IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF LAS VEGAS, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA, Appellant, vs. 180 LAND CO., LLC, A NEVADA LIMITED-LIABILITY COMPANY; AND FORE STARS, LTD., A NEVADA LIMITED-LIABILITY COMPANY, Respondents.	No. 84345
180 LAND CO., LLC, A NEVADA LIMITED-LIABILITY COMPANY; AND FORE STARS, LTD., A NEVADA LIMITED-LIABILITY COMPANY, Appellants/Cross-Respondents, vs. CITY OF LAS VEGAS, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA, Respondent/Cross-Appellant.	No. 84640

LANDOWNERS' COMBINED ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL

Kermitt L. Waters, Esq.
Nevada Bar No. 2571
kermitt@kermittwaters.com
James J. Leavitt, Esq.
Nevada Bar No. 6032
jim@kermittwaters.com
Michael A. Schneider, Esq.
Nevada Bar No. 8887
michael@kermittwaters.com
Autumn L. Waters, Esq.
Nevada Bar No. 8917
autumn@kermittwaters.com
LAW OFFICES OF KERMITT L. WATERS
704 South Ninth Street
Las Vegas, Nevada 89101
Telephone: (702) 733-8877

Micah S. Echols, Esq.
Nevada Bar No. 8437
micah@claggettlaw.com
CLAGGETT & SYKES LAW FIRM
4101 Meadows Lane, Ste. 100
Las Vegas, Nevada 89107
(702) 655-2346 – Telephone

Attorneys for 180 Land Co., LLC and Fore Stars, Ltd.

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. 180 Land Co., LLC, a Nevada limited liability company, is not a publicly traded company, nor is more than 10% of its stock owned by a publicly traded company.

2. Fore Stars, Ltd., a Nevada limited liability company, is not a publicly traded company, nor is more than 10% of its stock owned by a publicly traded company.

3. Law Offices of Kermitt L. Waters represented both 180 Land Co., LLC and Fore Stars, Ltd., before the District Court and this Court.

4. Claggett & Sykes Law Firm represents both 180 Land Co., LLC and Fore Stars, Ltd., before this Court.

Dated this 17th day of January 2023.

CLAGGETT & SYKES LAW FIRM

/s/ Micah S. Echols

_____

Micah S. Echols, Esq.
Nevada Bar No. 8437

LAW OFFICES OF KERMITT L. WATERS
Kermitt L. Waters, Esq.
Nevada Bar No. 2571
James J. Leavitt, Esq.
Nevada Bar No. 6032
Michael A. Schneider, Esq.
Nevada Bar No. 8887
Autumn L. Waters, Esq.
Nevada Bar No. 8917

Attorneys for Landowners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

RESPONDENTS' ANSWERING BRIEF (CASE NO. 84345)

I. JURISDICTIONAL STATEMENT

The Landowners timely appealed on April 25, 2022 from the district court's final Judgment in Inverse Condemnation entered on April 18, 2022. 127 JA 23183-233188. NRAP 3A(b)(1) allows for an appeal from a final judgment in the district court. Therefore, appellate jurisdiction is properly before this Court.

II. ROUTING STATEMENT

This case is subject to presumptive retention by the Supreme Court pursuant to NRAP 17(a)(11).

III. STATEMENT OF ISSUES ON APPEAL

1. The district court properly followed this Court's two-step procedure for deciding inverse condemnation cases set forth in the seminal *Sisolak* case by first deciding the property interest the Landowners had in their 35 Acre Property and then deciding whether the City's actions constituted a taking of the 35 Acre Property.
2. On the property interest, there is substantial evidence to support the district court's comprehensive findings of fact and conclusions of law that the Landowners had the legal right to use the 35 Acre Property for residential purposes where the property has been zoned for residential use **and** designated for a residential use on the City's master plan since 1981 and all relevant City departments, including the City Planning Department, City Attorney's Office, and Tax Assessor, confirmed the residential use both prior to and after the Landowners' acquisition.

3. On the City's actions that constituted a taking, there is substantial evidence to support the district court's comprehensive findings of fact and conclusions of law that the City took by inverse condemnation the 35 Acre Property where the City preserved the property for use by the surrounding neighbors by: 1) adopting a City Ordinance that targets only the Landowners' property, making it impossible to develop, and specifically authorizing the public to physically enter onto the property; 2) denying **four** applications to use the property, even though all four applications met all City standards; and 3) demonstrating hostility toward any development, including publicly announcing development will be prohibited.
4. The district court properly awarded $34,135,000 as the fair market value of the taken 35 Acre Property where this value was based on the uncontested appraisal report submitted by the Landowners; the City did not present a competing valuation by way of an initial or rebuttal appraisal report.
5. The district court properly awarded attorney fees, costs, and reimbursement of taxes where each of these awards was based on settled Nevada inverse condemnation law.

IV. STATEMENT OF THE CASE

A. Nature of the Case

This case involves important questions related to the Nevada Constitution's Just Compensation Clause which states, private property shall not be taken for public use "without just compensation having been first made." Nev. Const. art. 1, sec. 8. More specifically, can the City of Las Vegas force Nevada landowners to preserve and utilize their private property as a public park without the payment of just compensation?

Nearly eight years ago, the Landowners acquired 250 acres of land in Las Vegas, Nevada ("250 Acres") – including the 35-acre property at issue here ("35 Acre Property") – which had been zoned for residential development (R-PD7) and designated with a residential land use ("MED" / "ML") on the City's Master Plan since 1981. This R-PD7 residential zoning legally permits up to 7.49 residential units per acre. Prior to acquiring the 250 Acres, the Landowners conducted significant due diligence, including confirmation from the City through several meetings and an official Zoning Verification Letter, that: 1) the 250 Acres has always been zoned R-PD7; 2) R-PD7 zoning grants the vested right to develop residential units; and 3) there were no restrictions that could preclude the residential development. The Landowners relied on that confirmation in acquiring the 250 Acres.

After acquisition, the Landowners immediately moved to develop residential homes on the 35 Acre Property and the City Planning Department and City Attorney's Office recommended approval as the development was consistent with the R-PD7 residential zoning and met every City Code and Nevada statutory requirements. Even the Tax Assessor was taxing the Landowners over $1 million per year based on the "lawful" residential use of the 250 Acres. The City Council, however, engaged in indefensible government predation by taking aggressive and systematic actions to preserve the 35 Acre Property for use by the surrounding neighbors (and the public) and to specifically authorize the public to physically enter onto the property with one City Council member in his official capacity directly instructing the surrounding neighbors that the Landowners' 250 Acre property was theirs to use for recreation. Following this unconstitutional scheme, the City Council denied *four* applications to use the 35 Acre Property and then adopted two City Ordinances that: 1) target only the Landowners' 250 Acres; 2) impose impossible development requirements; and 3) specifically authorize the surrounding neighbors (and the public) to enter onto and use the 35 Acre Property. The undisputed evidence demonstrated the City Council engaged in these egregious actions at the behest of the surrounding neighbors who wanted the 250 Acres adjacent to their residences but were unsuccessful in their attempts to extort it from the Landowners.

After protracted litigation, the district court held the Landowners had the legal right to use the 35 Acre Property for residential development and thereafter concluded "I think under the facts and circumstances **it's pretty clear that we had a taking**" and based on uncontested appraisal testimony, awarded the Landowners the fair market value of $34 million along with fees, costs, interest, and reimbursement of taxes in accord with longstanding Nevada law. 98 JA 17411:7-9 (emphasis added).

B. Course of the Proceedings and Disposition Below

This 35 Acre Property case is one of four inverse condemnation cases brought by the Landowners in the Eighth Judicial District Court: (1) the 35 Acre Property case pending before this Court ("35 Acre Case"); (2) the 17 Acre Property case pending before Hon. David Jones ("17 Acre Case"); (3) the 65 Acre Property case pending before Hon. Monica Trujillo ("65 Acre Case"), and; (4) the 133 Acre Property case pending before Hon. Gloria Sturman ("133 Acre Case").

In this 35 Acre Case, the Landowners first sought relief by filing a petition for judicial review ("PJR") within the time constraints prescribed by NRS 278.0235 (25 days). 1 JA 39-65. The Landowners' complaints alternatively alleged inverse condemnation claims, including a *per se* regulatory taking, a *per se* categorical taking, a non-regulatory taking, and a regulatory taking under *Penn Central Transportation Co. v. New York City,* 438 U.S. 104 (1978). 1 JA 47-63.

The district court severed the PJR from the inverse condemnation claims and affirmed the City's denial of the Landowners' development applications[1] under the standard applied in such administrative reviews. 1 pt. 5 JA 71, 202-229. The district court then addressed the Landowners' inverse condemnation claims pursuant to Nevada's two-step procedure for resolving liability in such cases. 22 JA 4022:4-11; 109 JA 19643:21-19644:8. The district court first properly determined the Landowners' interest in the 35 Acre Property based on the property's R-PD7 residential zoning and found the Landowners had the legal right to use their property for single family and multi-family residential development consistent with its R-PD7 zoning. 18 JA 3429-3436; 109 JA 19645:18-19652:6. The district court properly

[1] The district court did so primarily based on the doctrine of issue preclusion, applying the Hon. James Crockett's judicial review decision involving the 17 Acre Property that vacated the City's approval of development applications for the Land. *See* 1 pt. 5 JA 225-228. This Court subsequently overturned that decision, holding amongst other things that the property is zoned R-PD7. *See Seventy Acres v. Binion,* 2020 WL 1076065, at *4 (Nev. Mar. 5, 2020) (unpublished disposition).

Notably, the City prepared and submitted the PJR findings of fact and conclusions of law which were signed by the district court. That order, however, was so overreaching that it erroneously dismissed the Landowners' inverse condemnation claims as well. Thus, the district court granted reconsideration and entered an order *nunc pro tunc* that removed from the judicial review decision all references to the Landowners' inverse condemnation action, stating that it **"had no intention of making any findings of fact, conclusions of law or orders regarding the Landowner's severed inverse claims . . . .**" in the PJR proceeding. 4 JA 804-809.

rejected the City's arguments that: the general plan is superior to zoning;[2] the Landowners' property is designated for use as parks, recreation and open space ("PR-OS"); and that it is subject to the conceptual Peccole Ranch Master Plan Phase II (PRMP II).

Following a subsequent four-day evidentiary hearing wherein the district court took evidence on the numerous improper actions by the City, the court concluded the City's actions were so egregious that they met the individual standard for three[3] of the Landowners' inverse condemnation claims. 109 JA 19652:7-19687:21. Thereafter, the district court determined the fair market value of the 35 Acre Property is $34,135,000 based on the Landowners' uncontested appraisal report. 110 JA 19852-19874. The district court also properly awarded the Landowners costs, attorney fees, and reimbursement of taxes. 126 pt. 5 JA 23026-23062.

---

[2] Zoning determines the specific legal use of the property while a land use designation on a master plan is merely a general policy used for planning. 86 JA 15052. Indeed, developers, lenders, title companies, real estate agents and brokers, etc. all rely on zoning. 103 JA 18216; 41 JA 7587.

[3] Upon the City's insistence that a *Penn Central* regulatory taking claim is a lessor standard and, therefore, necessarily met if the other inverse claims are met, the district court also found a taking under the Landowners' fourth claim for relief. 109 JA 19686-19687; 98 JA 17412:22-24.

Finally, the district court properly concluded the Landowners were entitled to an award of prejudgment interest as part of their just compensation. 127 JA 23172:9-10. However, the district court erroneously applied a rate of prime plus two percent (5.25%-7.00%) to calculate interest rather than a higher rate of twenty three percent (23%) which was supported by the only competent and empirical evidence presented. 127 JA 23176:21-23177:4. The parties' appeals followed.

C. Course of Proceedings in the 17- and 65-Acre Cases

To bolster its arguments, the City mischaracterizes the facts in the 17 Acre Property and 65 Acre Property cases. In doing so, the City touts its approval of a development application in the 17 Acre Property Case and claims the Landowners "refused to build the 435-unit project" approved on the 17 Acre Property and "never filed an application to redevelop the 65-Acre segment." *See* Appellant's Opening Brief ("AOB") pp. 35-36. After extensive evidentiary hearings in both the 17 and 65 Acre Cases, both district court judges, as the finders of fact, rejected these City arguments as entirely baseless.

In the 17 Acre Case, the district court held extensive evidentiary hearings to fully vet the interest the Landowners possessed in their 17 Acre Property and whether the City's actions constituted a taking of the 17 Acre Property. Following the evidentiary hearing on the property interest, the district court entered detailed findings of fact and conclusions of law that the Landowners had the legal right to

exclude others from their property, to use the 17 Acre Property for residential development, and the original approval to build the 435 units was properly granted on February 15, 2017. See Landowners Appendix ("LA")[4] 1 LA 5-20. The district court then considered evidence on all of the City actions that occurred *after the initial approvals on February 15, 2017,* finding the City engaged in a series of *six* specific systematic and aggressive actions to stop all development of the 17 Acre Property, one of which was to "preclude the drainage infrastructure necessary to develop the 17 Acre Property." 1 LA 50-80, 77:4-5. These facts are conspicuously absent from the City's and Amici's briefs. After analyzing all City actions, the district court held, "[t]he City engaged in actions to authorize the public to enter on the 17 Acre Property and preserve the property for use by the public and surrounding neighbors meeting Nevada's standard for a per se regulatory taking thereby resulting in the taking of the **entire** 17 Acre Property by inverse condemnation." 1 LA 79:16-19 (emphasis added). The district court similarly rejected the City's claim that correspondence inviting the Landowners to re-submit applications showed it would

[4] The Landowners request the Court take judicial notice of the publicly available documents contained in the Landowners Appendix. NRS 47.130, 47.150(2) ("A judge or court shall take judicial notice if requested by a party and supplied with the necessary information."); *see also Caballero v. Seventh Judicial Dist. Ct*., 123 Nev. 316, 167 P.3d 415 (2007).

allow development, concluding the letters did not prove as much nor did they "erase the extensive actions toward the 17 Acre Property." *See* 1 LA 71:3-13.

In the 65 Acre Case, the district court held three days of evidentiary hearings and concluded the Landowners had the legal right to use the 65 Acre Property for residential development, exclude others from their property, and that the City's actions took the 65 Acre Property by inverse condemnation. 1 LA 88-98, 106-123. The district court specifically rejected the notion the Landowners never filed an application to develop the 65 Acre Property, holding "[t]he evidence presented showed that the City would accept only one application to develop the 65 Acre Property – a Master Development Agreement ("MDA")," the Landowners worked with the City for nearly three years to complete the MDA application that would have allowed development of the 65 Acre Property, and the City "denied" the MDA. 1 LA 110-114. The district court in the 65 Acre Case considered significant other actions by the City in addition to this denial and concluded, "the Landowners were singled out and targeted by the City" and "based on the evidence presented, the Court concludes as a matter of law, that the City has taken the 65 Acre Property under Nevada's per se regulatory taking standard." 1 LA 118:25; 15:5-7.

Importantly, both district court judges also entered detailed findings of fact and conclusions of law rejecting the City's arguments that the general plan is superior to zoning and rejecting the City's PR-OS and PRMP II arguments (found

extensively throughout the City's Opening Brief) similar to the findings by the district court in this 35 Acre Case. 1 LA 94-97; 16-18; 62-63.

In all, there have been *ten days* of evidentiary hearings on the property interest, take, PR-OS, and PRMP II issues. Three district courts engaged as finders of fact fully vetted the relevant issues, facts, and law and all three entered detailed and comprehensive findings of fact and conclusions of law supporting the Landowners' property rights and finding a taking of the Landowners' property based on the City's aggressive, systematic, and predatory actions towards the 250 Acres. Importantly, as the finders of fact, these district court judges were in the best position to consider and weigh the evidence of the City's actions. They were also in the best position to fully consider and review the City's representations and citation to documents, finding many of them to be unsubstantiated. For example, the district court in the 65 Acre Case found:

> The Court also declines the City's request to find that City Exhibits E, G, and H impose a condition that the 65 Acre Property remain a golf course and open space into perpetuity. Although Exhibits E, G, and H include certain historical actions taken by the City and do reference numerous "conditions," **none of these** conditions identify the 65 Acre Property and **none of them** impose a condition that any property remain a golf course or open space into perpetuity.

1 LA 96:5-12 (emphasis added).

Here, substantial evidence supports all of the courts' findings and the City provides no valid reason to reverse the holdings.

V. STATEMENT OF FACTS

This Court's seminal *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 137 P.3d 1110 (2006) case holds that when deciding an inverse condemnation case, the Court must first decide the property interest the landowner had prior to any government interference and then, and only then, decide whether the government actions at issue constituted a taking. *Id.* at 658, 137 P.3d at 1119. Accordingly, the Landowners' statement of facts will first address the facts relevant to the 35 Acre Property interest and then address the facts relevant to the City's actions that constituted a taking of the Landowners' property.

A. Facts Confirming the Property Interest and the Landowners' Acquisition of the 35 Acre Property

1. The 35 Acre Property is a Stand-Alone Property with its Own Assessor Parcel Number

The Landowners collectively own approximately 250 acres ("250 Acres") of prime residential real estate that weaves around the Queensridge Common Interest Community ("Queensridge") located in Las Vegas, Nevada, between Alta Drive to the north, Charleston Blvd. to the south, Hualapai Way to the west and Rampart to the east. 22 JA 4025, 4027. For years, the 250 Acres was leased to a golf course operator that operated it - as the Badlands Golf Course, which was ultimately closed

as it was a financial failure.[5] 28 JA 5198-5199, 5201, 5215. The 250 Acres, however, *was always intended for future residential development* having been zoned and master planned for residential use since 1981.

At the time of acquisition, the 250 Acres consisted of five parcels. 28 JA 5192-5196. When the Landowners sought to develop, the City insisted the 250 Acres be further divided through parcel maps which created a total of 10 parcels. 85 pt. 5 JA 14992, 14993. The 35 Acre Property is one of these divisions, consisting of a single parcel with individual Assessor's Parcel Number ("APN") 138-31-201-005. 1 JA 74; 53 JA 9504. For this reason, the district court ultimately rejected the City's unsubstantiated (yet repeated) claim that the Landowners intentionally parceled the 250 Acres as a "transparent ploy" to "fabricate a takings claim." 109 JA 19682. *See also* AOB 55.

2. The 35 Acre Property Has Always Been Zoned for Residential Development

At all relevant times, the 250 Acres, including the 35 Acre Property, has been zoned for residential development (R-PD7). In 1981, the City adopted the first zoning action on the 35 Acre Property - City Zoning Ordinance Z-34-81 – which designated the property "R-PD7." 22 JA 4043, 4041- 4072. This 1981 action firmly

[5] The City's counsel conceded during an evidentiary hearing the golf course was not financially feasible. 95 JA 17012:13-15.

set the R-PD7 residential zoning as a "Resolution of Intent **with no time limit**." 22 JA 4041 (emphasis added). Then in 2001, the City adopted City Zoning Ordinance 5353 to further "reduce to writing" the City's past zoning actions, including the R-PD7 zoning on the 35 Acre Property,[6] confirming "All actions and proceedings by the City concerning the rezoning of those parcels are hereby ratified, approved and confirmed as if the resolutions of intent had been reduced to writing." 27 JA 5108-28 JA 5190. Significantly, Ordinance 5353 further provides: "**All ordinances or parts of ordinance or sections, subsections, phrases, sentences, clauses or paragraphs contained in the Municipal Code of the City of Las Vegas, Nevada 1982 Edition, *in conflict herewith are hereby repealed***." *Id. section 4* (emphasis added). Ordinance 5353 was unanimously "PASSED, ADOPTED and APPROVED" by the Las Vegas City Council ("City Council").

Based on these undisputed facts, the City repeatedly confirmed this R-PD7 residential zoning and does not dispute it even now. *See, e.g.,* AOB 22. Indeed, during discovery in this case, the City refused to produce the official Zoning Atlas Maps from 1983 to present stating instead in its responses that the "*City does not dispute that the Subject Property is Zoned R-PD7.*" 11 JA 2003-2004, 2004:15-16.

[6] The 35 Acre Property was derived from APN 138-31-212-002 & 138-31-610-002 and after the City's direction to further parcel the 250 acres, the 35 Acre Property is now APN 138-31-201-005.

Thus, the 35 Acre Property has indisputably been zoned for residential development since 1981 and was confirmed in 2001 with direction to "repeal" anything in "conflict" with that zoning. *See id.* Because Ordinance 5353 was the last legislative action taken on the 250 Acres, and it expressly repealed anything that conflicted with the 250 Acres' residential zoning, all ordinances, master plans, land use designations, etc. that the City relies on here to justify its prohibition of any development of the Landowners' property are irrelevant.

3. The Landowners Completed Due Diligence and Acquired the 35 Acre Property after the City Formally Confirmed the R-PD7 Zoning Grants the Legal Right to use the 35 Acre Property for Residential Development

Prior to acquiring the 250 Acres, the Landowners took extensive steps to confirm with the City the R-PD7 zoning and that this zoning confers a legal right to develop residential. At that time (without the biases of litigation) the City firmly confirmed: 1) the 250 Acres was zoned R-PD7; 2) R-PD7 zoning grants the vested right to develop residential units; and 3) there were no other restrictions that could preclude residential development. City Planning Official Robert Ginzer confirmed the 250 Acres has always been zoned R-PD7 for residential development and there were no restrictions that could prevent that residential development. 26 JA 4804, para. 6. Prior to the Landowners' acquisition, two other high ranking City planning officials, Tom Perrigo and Peter Lowenstein, conducted a three-week study at the

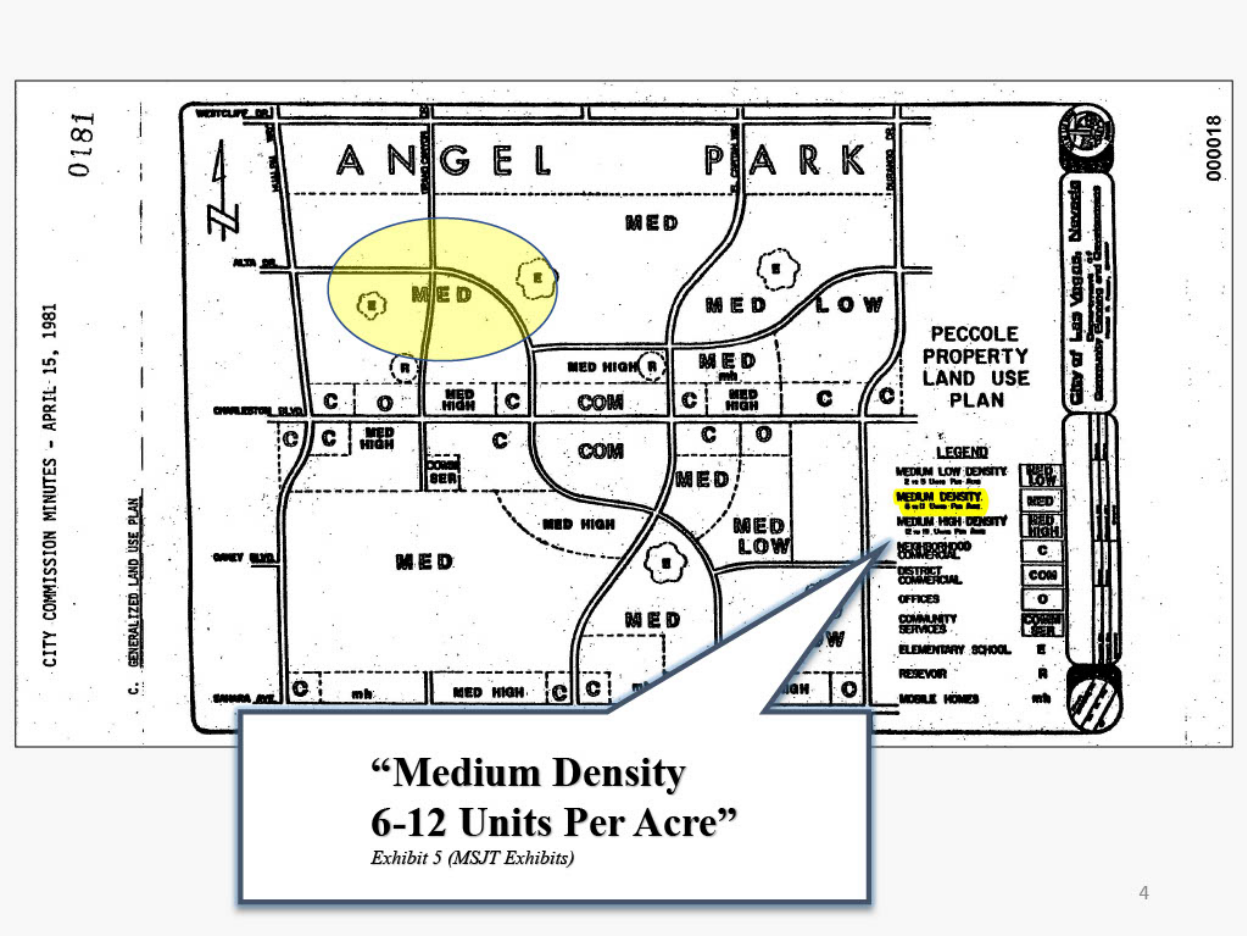
Landowners' request and confirmed: 1) the 250 Acres is zoned for a residential use, R-PD7, and has vested rights to develop up to 7.49 residential units per acre; 2) the zoning trumps all other land use designations; and 3) the owner of the 250 Acres can develop the property residentially. 26 JA 4805, para. 8. The City confirmed its three-week study in a "Zoning Verification Letter" to the Landowners dated December 30, 2014, which states, in part: 1) the 35 Acre Property is "zoned R-PD7 (Residential Planned Development District – 7 units per acre;" 2) the "R-PD District is intended to provide for flexibility and innovation in residential development;" 3) the residential density allowed in the R-PD District shall be reflected by a "numerical designation for that district, (Example, R-PD4 allows up to four units per gross acre);" and, 4) a "detailed listing of the permissible uses and all applicable requirements for the R-PD Zone are located in Title 19 ("Las Vegas Zoning Code") of the Las Vegas Municipal Code." 47 JA 8674. The Landowners relied on this in acquiring the 250 Acres.

4. The 250 Acres Has Always Been Designated "MED / ML" (Residential) on the City's Master Plan, and the City's "PR-OS" Master Plan Argument is Contradicted by Its Own Actions, Admissions, and Ordinances

Permeating the City's entire Opening Brief is the argument that the City adopted Ordinance 3636 in 1992 that adopted a "PR-OS" land use designation on the City's master plan for the 35 Acre Property, this PR-OS designation supersedes

zoning, and this precluded any use of the 35 Acre Property for residential use. *See, e.g.,* AOB 18-20. This argument was repeatedly presented to the district court in this 35 Acre Case (and the two district courts in the 17 and 65 Acre Cases) and all three district courts, after extensive evidentiary hearings on this one issue, concluded this City PR-OS argument is both factually and legally baseless. These findings were based on substantial evidence and should not be disturbed on appeal. The following facts show why this PR-OS argument was repeatedly rejected and legally invalid.

First, in 1981, at the same time the first R-PD7 residential zoning was adopted on the 250 Acres, the City also adopted a master plan for the area where the 250 Acres is located and specifically identified the majority of the 250 Acres, including the 35 Acre Property as "MED," which is the residential land use designation for 6-12 residential units per acre. 22 JA 4038-4041.



This "MED" master plan land use designation in 1981 is consistent with the R-PD7 zoning also adopted in 1981 which allows up to 7.49 residential units per acre. 22 JA 4040.

Second, the district court found the 1981 residential master plan land use designation was never legally changed to PR-OS and at no time during any of the extensive evidentiary hearings did the City provide evidence (even upon direct request) that it followed the mandatory requirements in the applicable NRS Chapter 278 to change the 1981 master plan "MED" designation to a parks and recreation

"PR-OS" designation. *See* 87 JA 15254 (NRS chapter 278 applicable as of the date the City claims the PR-OS was changed, requiring specific "notice" of a master plan land use change); 98 JA 17315:13-17316:7. Indeed, prior to this litigation, the City attorney testified that the City had no idea how the designation of PR-OS came to be:

> The R-PD7 preceded the change in the General Plan to PR-OS. There is absolutely no document that we could find that really explains why anybody thought it should be changed to PR-OS, except maybe somebody looked at a map one day and said, hey look, it's all golf course. It should be PR-OS. I don't know.

24 JA 4621:1944-1948.

Third, any change from MED to PR-OS would have been improper, as a PR-OS land use designation is entirely inconsistent with the R-PD7 residential zoning because it is contrary to the City zoning code. 87 JA 15270-15272. Therefore, not only did the City fail to present evidence of the change to PR-OS, the change would have created a conflict with the City's own code.

Fourth, the City's assertion that City Ordinance 3636 changed the MED land use designation to PR-OS in 1992 is baseless. AOB 18-19 citing 58 JA 10221. Ordinance 3636 was adopted in 1992 and expressly states it "shall not" affect already zoned properties, like the 35 Acre Property that was zoned R-PD7 in 1981. 86 JA 15054-15062. That is, the City expressly stated in 1992 there was no intent to change

the use on properties, like the 250 Acres, that were already hard zoned for residential use.

Fifth, City Ordinance 5353 was adopted in 2001 and "reduce[d] to writing" zoning actions the City had taken in the past, including the R-PD7 zoning on the 35 Acre Property, and specifically states, "**All ordinances or parts of ordinance or sections, subsections, phrases, sentences, clauses or paragraphs contained in the Municipal Code of the City of Las Vegas, Nevada 1982 Edition, *in conflict herewith are hereby repealed.***" 27 JA 5109-28 JA 5190. Thus, any conflicting land use designations on the 35 Acre Property, including the City's purported PR-OS designation, were nullified by the City itself with Ordinance 5353 in 2001.

Sixth, the City Planning Department and City Attorney's Office both conducted detailed studies to verify the underlying residential zoning and then conducted further studies to determine whether the City ever properly adopted a PR-OS master plan land use designation on the 250 Acres and concluded: "There is absolutely no document that we could find that really explains why anybody thought it should be changed to PR-OS...." 24 JA 4621. Thus, the evidence that was before the district court, at the evidentiary hearing showed, without question, that the City never properly adopted a PR-OS on the City's Master Plan for the 250 Acres.

Finally, the City's repeated contention that the Landowners acquired the 35 Acre Property with knowledge of the PR-OS and included it on their development

applications is misleading at best. AOB 63-64. When this PR-OS argument was first presented *after the Landowners acquired the 250 Acres*, the Landowners' counsel met with the City Attorney and, consistent with its research and conclusion on the issue, the ***City Attorney's Office expressly acknowledged there was never a proper PR-OS on the 250 Acres***. 87 JA 15274-15282. And, the only reason the Landowners filed applications to remove the improper PR-OS from the 250 Acres is because the City forced them to, asserting it would not accept any development applications without it. 87 JA 15286-15288. Facing financial hardship, the Landowners acquiesced and filed "under protest." *See id.*; 87 JA 15287

5. There Was Never a Peccole Ranch Master Plan Phase II (PRMP II) that Governed the 250 Acres

The City's Opening Brief is also replete with references to the Peccole Ranch Master Plan Phase II "PRMP II," which the City incorrectly claims has always applied to the 35 Acre Property and imposes a "condition" that the 250 Acres be "set aside" as a golf course or open space into perpetuity. AOB 5, 8, 13, 18, 19, 21.

None of the City's citations supports its allegation that there is a PRMP II "condition" that the 250 Acres remain a golf course/open space. For example, the City cites several parts of the record to claim the approval of the PRMP required the 250 Acres remain open space/golf course, but not one of these cites includes this so-called condition or reservation. AOB 18. *See also* 1 LA 96-97, *rejecting City*

citations to an alleged "condition" in the PRMP, referenced above. This is the same allegation the City made during extensive evidentiary hearings in the three adjudicated cases. Three district court judges reviewed each of the City's citations and found they were not only incorrect, they were misleading. 1 LA 96:4-97:28; 1 LA 18:4-20; 109 JA 19652:1-6. The district court in the 65 Acre Case specifically held that she reviewed the City's citations for the "condition" and concluded, "none of them impose a condition that any property remain a golf course or open space into perpetuity." 1 LA 96:10-12. Indeed, City Attorney Brad Jerbic confirmed the City Attorney's Office, "looked for a very long time, and we can find no restrictions that require that this [250 Acres] stay a golf course." 87 JA 15437. And, City planning along with code enforcement also reviewed the PRMP and concluded, "there are no conditions mentioned that pertain to the maintenance of the open space/golf course area [for the 250 Acres]." 47 JA 8528

Additionally, prior to commencement of this litigation it was adjudicated in a final order that, although the 250 Acres was originally contemplated to be a part of PRMP II, it was never annexed into it, a necessary requirement to be governed by the PRMP II. 86 JA 15165:3-11. Therefore, it is undisputed the 250 Acres, including the 35 Acre Property, is not part of the Peccole Ranch Master Association. *Id.*

Moreover, the undisputed evidence before the district court showed the PRMP II was nothing more than a defunct "concept" planning tool that was neither

implemented nor followed and simply put, does not exist.[7] Since the drafting of this PRMP II conceptual plan thirty years ago, there have been well over 1,000 units developed contrary to this plan. 47 JA 8672.[8] In fact, the Landowners' principals developed multiple properties within the boundaries of the PRMP II plan, including Tivoli Village and One Queensridge Place, and the PRMP II was never mentioned let alone required to be followed. 26 JA 4811, para. 4. The City Attorney confirmed this, stating:

> The Peccole Ranch Phase II plan (PRMP II) was a very, very, very general plan. I have read every bit of it. If you look at the original plan and look what's out there today, it's different. . . . 24 JA 4614:16-21.
>
> So the plan - - the master plan that we talk about, the Peccole Phase 2 master plan (PRMP II) is not a 278A agreement, it never was, never has been, not a word of that language was in it. ***We never followed it***.

24 JA 4616:20-25 (emphasis added).

---

[7] The City bootstraps the conceptual PRMP II with Peccole Ranch which is a separate established community located south of the 250 Acres and governed through its recorded CC&Rs. Whereas, the PRMP II conceptual plan was merely a planning tool that was never implemented. Indeed, the PRMP II was ultimately abandoned and the common interest community of Queensridge was developed in that area with the CC&R's for Queensridge clearly stating the Badlands golf course is "not a part" of that community. 26 JA 4834.

[8] The City asserts the area was developed consistent with the conceptual PRMP II's land use designations, but merely cites to an aerial photo that makes no comparison to the land uses in the concept plan and what was actually built. AOB 56.

Further, evidence the PRMP II was nothing more than a concept plan that was "never followed" is the fact that there is no recording of this alleged plan on the 250 Acres.[9] And, City Attorney, Brad Jerbic, confirmed the PRMP II was not one of the enumerated development plans that would require modification for development. 47 JA 8571:1009-1017.

Finally, in a 2020 appeal, this Court likewise affirmed the 250 Acres' residential zoning as well as the Landowners' development rights. *See Seventy Acres v. Binion,* 2020 WL 1076065, at *4.[10] In that case, surrounding neighbors specifically argued – as the City does here – that the 250 Acres can never be developed because the PRMP II encumbers and preserves it as open space forever, and an erroneous PR-OS designation on a single map supersedes its R-PD7 zoning. *See id.* This Court rejected both arguments, recognizing the 250 Acres carries residential zoning, so only a site development plan – a routine submittal – is necessary to ensure that development is consistent with its residential zoning. *See id.* Also, clearly absent from the Court's decision was any reference to the notion

[9] *Diaz v. Ferne*, 120 Nev. 70, 75, 84 P.3d 664, 667 (2004) (landowners cannot be bound by "secret intentions" and documents not noticed).

[10] This is the 17 Acre Petition for Judicial Review filed by a few surrounding neighbors in an attempt to stop development that generated the Crockett Order as referred to by the City. AOB at 24-25.

that the 250 Acres was bound by the PRMP II or encumbered with a PR-OS designation. This further undermines the City's claims that the there is a condition found in the PRMP II that requires the privately owned 250 acres be used as a public park. *See id.*

6. The City Planning Department, City Attorney's Office, and Tax Assessor Further Confirmed the Residential Zoning and Use and Rejected the PR-OS and PRMP II During the Application Process

Significantly, during the attempted development of the 35 Acre Property, discussed below, all three relevant City departments – Planning, City Attorney, and Tax Assessor – uniformly confirmed the R-PD7 residential zoning, the residential development rights, and rejected the alleged PR-OS and PRMP II arguments.

First, when the Landowners filed applications to develop, there was a uniform agreement that R-PD7 zoning confers the legal right to develop residential units. The City Attorney's Office confirmed the City would "honor" the Zoning Verification Letter stating "Council gave hard zoning to this golf course, R-PD7, which allows somebody to come in and develop." 28 JA 5255, para. 7; 86 JA 15066:3444-3445. The City Planning Department confirmed "a zone district [R-PD7] gives a property owner property rights." 85 pt. 6 JA 15032:242:5-6. Regarding

the 35 Acre development applications,[11] the City's planning staff found that the residential development "conforms to the existing zoning district requirements," and is "in conformance with all Title 19 [City Zoning Code] and NRS requirements for tentative maps" and recommended approval for residential development. 37 JA 6828; 37 JA 6707. The City Planning Department likewise recommended approval of the use of the entire 250 Acres for residential development because it conformed with zoning district requirements and Nevada law. 37 JA 6810, 6828. The City Tax Assessor[12] imposed real estate taxes in excess of $1 million annually– $205,227.22 of which is attributed to the 35 Acre Property – based solely on its determination that the lawful use of the 250 Acres is a residential use due to its R-PD7 zoning.[13] 30 JA 5372-5380; 28 JA 5277-5278. The Landowners have dutifully paid these taxes over the years while paying all carrying costs and continue to maintain the 250 Acres since the golf course operator terminated operations several years ago because they were not profitable. 30 JA 5372-5373.

[11] The 35 Acre development applications included a site development review (SDR) and a tentative map. 38 JA 7015-7016.

[12] Pursuant to Las Vegas City Charter § 3.120(1), the Clark County Tax Assessor is "ex officio, the Assessor of the City."

[13] NRS 361.227(1) requires that the tax assessor, when determining the taxable value of real property, shall appraise the full cash value of vacant land "by considering the uses to which it may lawfully be put" and "any legal restrictions upon those uses."

Furthermore, prior to the biases of litigation, *the City uniformly agreed that, zoning supersedes any conflicting master plan or land use designation* regardless of its origin. Indeed, the Zoning Verification Letter presented to the Landowners by the City provides the formal City opinion on the uses of the 250 Acres and does not mention an alleged PR-OS in the City's master plan nor the alleged PRMP II, undoubtedly because both are subordinate to zoning. 47 JA 8674.

> **The City Planning Department:**
> "if the land use [Master Plan] and the zoning aren't in conformance, then the zoning would be the higher order entitlement." 85 pt 4 JA 14965:53:4-6.
> **The City Attorney's Office:**
> "the rule is the hard zoning, in my opinion, does trump the General Plan designation" **37 JA 6784:1787-1789.**
> [the City Master Plan] "was a routine planning activity that had no legal effect on the use and development" of properties and "in the hierarchy, the land use designation is subordinate to the zoning designation"
> **Two City Attorneys signed under rule 11 and provided sworn testimony** (in a different case):
> "the Office of the City Attorney has consistently advised the City Council and the City staff that the City's Master Plan *is a planning document only*."
> 85 pt. 3 JA 14936-14937, 14941-14945, see also 27 JA 5081:8-12.

Moreover, the City's Master Plan itself states the plan is only a "policy" and zoning is "the law." 86 JA 15052. Finally, the City Tax Assessor imposes taxes on the 35 Acre Property based on its residential zoning of R-PD7 not plans such as the general plan or any conceptual documents like the PRMP II. 30 JA 5372-5380; 28 JA 5277-5278.

Unable to rebut this evidence, the City relied instead on arguments of counsel which is neither evidence nor accurate. *See Nev. Ass'n Servs., Inc. v. Eighth Judicial*

Dist. Court, 130 Nev. 949, 957, 338 P.3d 1250, 1255-56 (2014) ("[a]rguments of counsel [however,] are not evidence and do not establish the facts of the case") citing *Jain v. McFarland,* 109 Nev. 465, 475-76, 851 P.2d 450, 457 (1993).

7. The Market Recognizes Zoning Controls Over Planning Instruments

It was also uncontested in the district court that the real estate world relies on zoning for property rights, not "concepts" or "plans." Lenders, bankers, real estate agents, title companies, and appraisers rely on zoning to determine land rights. 103 JA 18216. Indeed, the Appraisal of Real Estate, issued by the largest appraisal organization in the country – the Appraisal Institute, provides "[m]ost zoning ordinances identify and define the uses to which a property may be put without reservation or recourse to legal intervention. This is referred to as a *use by right.*" The Appraisal of Real Estate, p. 170 (15th Ed. 2020) (italics in original).

8. The Queensridge Residents Had No Rights to the 250 Acres and It is NOT A PART of that Community

The Queensridge CIC is a master planned community governed by NRS 116 and established in 1996 by the recordation of the Queensridge Master Declaration of its Covenants, Conditions and Restrictions ("CC&Rs") which indisputably did not extend to or include the 250 Acres. 86 JA 15162:1-8; 26 JA 4834. In fact, the CC&Rs expressly *excluded* the 250 Acres and the golf course occupying that land stating:

> The existing 27-hole golf course commonly known as the "Badlands Golf Course" is not part of the [Queensridge CIC] Property or the Annexable Property.

86 JA 15165; *see also* 26 JA 4834.

Moreover, the CC&Rs provide a map with the words "future development" written directly over the 35 Acre Property publicly confirming the development potential of the 250 Acres. 26 JA 4969.

Additionally, when Queensridge homebuyers purchased in the community they expressly acknowledged that: (1) the 250 Acres was not a part of Queensridge; (2) they would not pay for any upkeep for the 250 Acres; (3) zoning and future development in Queensridge, the surrounding area, and nearby property may change; and (4) present and future views may include "adjacent or nearby single-family homes, multiple family residential structures, commercial structures, utility facilities, landscaping and other items" 26 JA 4804, 4833-4834, 4947, 4969, 4974, 4981; 27 JA 4994, 4995, 4997.

A 2016 lawsuit confirmed this when the court definitively ruled the Queensridge CC&Rs did not grant, and the Queensridge homeowners did not have, any rights in the 250 Acres. 24 JA 4567:3-4; 4575:11-13; 86 JA 15162-15166. That court also held: (1) the 250 Acres is zoned R-PD7; (2) R-PD7 zoning dictates the 250 Acres use; and (3) R-PD7 zoning gives the Landowners the "right" to develop the 250 Acres. 86 JA 15167; 24 JA 4575, paras. 61, 64. The court flatly rejected the

notion that the 250 Acres must remain open space or a golf course. *Id.* In other words, Queensridge homebuyers had actual notice at the time they purchased their homes and lots that they had no rights in the 250 Acres or the defunct golf course operations, and that the 250 Acres was intended for future residential development which they had no legal right to stop.

9. The Landowners Acquired the 250 Acres with the Knowledge it is Zoned for Residential Development, Free of any Deed Restrictions, and Not Encumbered by Any Other PR-OS or PMRP II "Plans"

The Landowners' principals are accomplished real estate developers well-acquainted with Queensridge and the surrounding area.[14] Their commercial and residential projects near Queensridge include: (1) One Queensridge Place, which consists of two 20-floor luxury residential high rises; (2) Tivoli Village, a mixed use development; (3) Sahara Center, a 220,000 sq. ft. retail and commercial center (located at Sahara and Hualapai); and (4) over 300 custom and semi-custom homes (including approximately 40% of the custom homes in Queensridge). 26 JA 4803.

Beginning in 1996, the Landowners' principals embarked on several real estate development projects near the 250 Acres with the Peccole family ("Peccole")

[14] The individual Landowners' principals through their various entities are Yohan Lowie, Vickie DeHart, and Paul DeHart (collectively "Principals"). At all relevant times, the Principals lived in Queensridge and/or One Queensridge Place and were the single largest owners of property within both developments. 26 JA 4803.

and successfully worked together for nearly 20 years. 26 JA 4803. Peccole was the original owner of the 250 Acres, along with a couple thousand surrounding acres. Around 2001, the Principals learned from Peccole that the 250 Acres was residentially zoned and intended for development consistent with its zoning. 26 JA 4804. For this reason, no restrictions, deeds or otherwise, were placed on the 250 Acres. Peccole confirmed the property is "developable at any time," as the golf course was just an interim use. *Id.* The Landowners eventually became interested in acquiring the 250 Acres. 26 JA 4804-4806.

Before purchasing the 250 Acres, the Principals obtained a legal opinion from counsel in 2001 that confirmed the residential zoning and residential use. 26 JA 4804. They also confirmed the Queensridge homeowners never owned any interest in the 250 Acres or the golf course operation based on the facts set forth above. 26 JA 4804, 4833-4834, 4947, 4969, 4974, 4981; 27 JA 4994, 4995, 4997. By 2005, the Principals met with City Planning official Genzer, who gave the opinion on the residential zoning and use of the 250 Acres, referenced above. 26 JA 4804.

Also, around 2005, the Principals and Peccole began development of One Queensridge Place Towers that was planned to be constructed on a portion of the 250 Acres when it was utilized as a golf course. After construction of the Towers commenced, Peccole disclosed that they could not meet their debt obligations and had not obtained necessary releases to construct the Towers on a portion of the 250

Acres from the then golf course operator, who was leasing the 250 Acres. 81 JA 14148:219:5-15; 27 JA 5008-5010, 81 JA 14235. The golf course operator demanded $30 million from Peccole for this breach and release. 81 JA 14148:219:12-15, 14235. As a resolution, the Principals and Peccole agreed to a series of complex transactions that: 1) provided the Principals the option to purchase the 250 Acres, including the 35 Acre Property; 2) transferred three partnership properties solely to the Landowners – One Queensridge Place, Tivoli Village, and Hualapai Commons (a large commercial shopping center nearby); 3) resolved the Peccole funding issue; and 4) resolved the golf course operator's $30 million demand. 81 JA 14148-14151; 26 JA 4811-4812; 91 JA 16181:23-16187:10; 81 JA 14148-14149; 81 JA 14235.

Both the Landowners' person most knowledgeable ("PMK") and the Peccole PMK testified that this acquisition involved a series of "complex" and "complicated" agreements with "a lot of hair" on them, including: 1) transferring the multiple properties listed above; 2) Peccole retaining $10 million worth of condos in the Towers; 3) Peccole receiving an additional $90 million; and 4) payment of $30 million (from the $90 million) to the golf course operator. 81 JA 14087, 227:22-228:10, 14148-14149; 81 JA 14104-14105, 14111, 14116, 14148-14149. The Principals conferred over $100 million in valuable consideration to Peccole for an option to purchase the 250 Acres, and they agreed to pay an additional $15 million

if the option was exercised. 81 JA 14149-14151; 14086 222:14-19. Although the City challenged the 2005 option (claiming it did not exist), both the Landowners and the Peccole PMK agreed, with the Peccole PMK testifying the option existed prior to 2006. 81 JA 14086 222:14-19.

Due to changing market conditions the acquisition of the 250 Acres did not materialize for nearly a decade – in 2015. 81 JA 14110. Before exercising their option, the Landowners took precautions of again confirming the residential zoning with the City. The highest-ranking City Planning officials, Tom Perrigo and Peter Lowenstein, performed the three-week study confirming the residential use and the City then issued its Zoning Verification Letter confirming the residential zoning and residential use of the 250 Acres: "the subject properties are zoned R-PD7 (Residential Planned Development District – 7 Units per Acre)," adding the R-PD district is "intended to provide for flexibility and innovation in residential development." 47 JA 8674.

Relying on the City's verification, the Principals then entered into a series of additional transactions to exercise the option, resulting in the acquisition of the entity Fore Stars LLC in 2015 that held title to the 250 Acres. 27 JA 5013 34:5-25; 36:9-37:5; 28 JA 5192-5196. This added another layer of complexity to the acquisition of the 250 Acres as it involved the transfer between the Landowners and Peccole of: 1) fixtures, fittings, and equipment; 2) use of the name "Badlands Golf Course;"

3) vendors lists; 4) stock of goods in the pro shop, club house, office and kitchen; 5) water rights leases; 6) leases with respect to machinery, equipment, vehicles, and "other tangible property;" and 7) the post-closing obligation to subdivide out that portion of the 250 Acres where the Towers were constructed. 81 JA 14237-82 JA 14253; 82 JA 14255-14262. *See also* 81 JA 14087: 227:22-228:10.

Notably, when this case proceeded to trial, the only expert appraiser retained to value the 35 Acre Property reviewed the facts regarding the circumstances and events of the Principals' purchase and opined the purchase price "had no relationship to the subject site's September 14, 2017 [date of valuation] market value." 87 JA 15299. As there were numerous other arms-length sales of other similar properties, those sales were utilized to determine the value of the 35 Acre Property. 87 JA 15358.

10. Summary of Property Interest Facts

Since 1981, the 35 Acre Property has, at all times, been zoned R-PD7 for residential use *and* has been designated for a residential use on the City's Master Plan; there was never a legal change on the City's master plan to PR-OS; and the alleged PRMP II was a concept that was never implemented. The City's own representatives repeatedly confirmed this residential zoning, that zoning supersedes any other alleged land use designations, that zoning grants the vested right to develop, and rejected the PR-OS and PRMP II arguments. With this assurance of

residential use, confirmed by the City itself, the Landowners acquired the 250 Acres through a series of complex transactions that began in 2005.

B. Facts Confirming the Landowners' Attempts to Develop and the City's Taking Actions

Immediately after acquiring the 250 Acres through the "complicated transactions," the Landowners began the formal process of developing consistent with the R-PD7 residential zoning. Shortly thereafter, the City took aggressive and systematic actions to preserve the entire 250 Acres for use by the surrounding neighbors and the public, to authorize the public to use the 250 Acres, and to entirely prevent the Landowners from developing the 250 Acres.

1. The Queensridge Opponents Enlist the City to do Their Bidding after Their Attempt to Obtain the 250 Acres from the Landowners for Free was Unsuccessful

The Landowners began the development process by submitting their applications consistent with their residential zoning. However, a small but powerful group of Queensridge residents ("Queensridge Opponents") adamantly opposed any development even though they had no legal rights to the 250 Acres giving the Landowners an ultimatum: the Landowners had to hand over 180 of the 250 Acres immediately adjacent to the Queensridge Opponents, along with valuable water rights for free, and then the Queensridge Opponents would "allow" development of the remaining seventy acres, or they would use their wealth, power, and political

influence to shut down all development of the entire 250 Acres.[15] 38 JA 7021. When the Landowners refused to give away their property for free, the Queensridge Opponents continued their threat and enlisted the City to wrongfully stop all development of the 250 Acres.[16] The City did so by, amongst other actions, adopting ordinances to preserve the 250 Acres for the Queensridge Opponents' use specifically authorizing them to enter onto the property. *Id.*

2. The City Openly Admitted to Succumbing to Political Pressure to Preserve the 250 Acres for Use by the Surrounding Neighbors

The Las Vegas Unified Development Code ("Title 19") promised Las Vegas landowners that the City would establish "a system of fair, comprehensive, consistent and equitable regulations, standards and procedures for the review and approval of all proposed development," and "promote fair procedures that are efficient and effective" in handling land development applications. LVMC 19.00.030. The City openly admitted to violating this pledge of equity and fairness.

Within months of the Landowners' acquisition, one City Councilman

---

[15] It is noteworthy that the Queensridge Opponents were not asking that 180 acres be provided to the Queensridge Community (as an offer to lease the land to the Queensridge CIC was rejected), but to the individuals that made the demand, a fact that was uncontested by the City. 41 JA 7515-7516; 26 JA 4812.

[16] In an email to another resident one Queensridge Opponent bragged "we have been successful in prolonging the agony of the developer." 49 JA 8876.

demanded that no development occur on 180 of the 250 Acres, consistent with the Queensridge Opponents' demand. 26 JA 4812. Several months later, this same Councilman again told the Landowners that the City would only allow development on seventy acres after the Landowners handed over 180 acres, and associated water rights, to the Queensridge Opponents in perpetuity. 26 JA 4812. When the Landowners refused to give up their property for free, this Councilman openly displayed bias against Principal Lowie based on his Israeli heritage and Jewish faith, comparing the purchase of the 250 Acres to Bibi Netanyahu's establishment of Israeli settlements in the West Bank and accused the Landowners of treating Queensridge residents as "a band of unruly Palestinians." 26 JA 4812; 46 JA 8492. As time went on, the animus amplified, with the Councilman calling Mr. Lowie a "crazy Israeli," "motherfucker," and "scum:"

> I just called to congratulate and realized it might be too late. Therd [sic] is a lot to ask you about starting with your oppo on that *crazy Israeli*. Next few days gonna be crucial on Badlands.
>
> *No tolerance on this one*. Pls ask Tim to post me later when more is known. Yeah, I am looking elsewbere [sic] next few hours. Badlands rides on this! 46 JA 8481; 47 JA 8510 (emphasis added).

Unbelievably, this same Councilman also sent the following text message in his *official capacity*:

> Any word on your PI enquiry about badlands guy?

> While you are waiting to hear ***is there a fair amount of intel*** **on the** ***scum*** bebind [sic] the badlands takeover? ***Dirt will be handy if I need to get rough.*** 47 JA 8511(emphasis added).

The Queensridge Opponents also attempted, but failed, to persuade then Ward 2 (council seat for the jurisdiction of 250 Acres) Councilmember Bob Beers ("Beers") to stop development of the 250 Acres.[17] So, they endorsed candidate Steve Seroka ("Seroka") to oppose Beers and were successful in this endeavor. This was important because this was the council seat for the jurisdiction where the 250 Acres was located, and Seroka publicly proclaimed that he would require the Landowners

---

[17] Beers testified that a Queensridge Opponent suggested his political career would suffer if he didn't stop development of the 250 Acres:

> Q. You also indicated that the homeowners were suing to slow it down so that there wouldn't be any development in their lifetime?
> A. Yes, sir.
> Q. And where did you get that understanding?
> A. Mr. Binion told me that.
> …
> Q. **He [Binion] was asking you to break the law?**
> A. **He was asking to have the City get in the way of the landowner's rights, yes.**
> …
> Q. And that's what he was asking you to do was to cause delay?
> A. Yes. . . .
> A. **I attempted to kindly reject his offer. . . .**
> A. . . . **he was discussing the potential for –for a political campaign against me.** 49 JA 8873-8874.

to participate in a land swap with the City, and he promised the City would take the 250 Acres and turn it into a fitness park for the surrounding neighbors. 46 JA 8498-8499. As the election approached, Seroka committed to voting against any development of the 250 Acres if elected. 46 JA 8495, 8496. Prior to taking office, in February 2017, Seroka stated at a City Planning Commission meeting that development on the 250 Acres would only be allowed "over my dead body," followed by a City Council meeting statement that he is "against this development." 46 JA 8495:882-888. Upon taking office, the councilmembers went to great lengths to stop all development, including clawing back entitlements already granted on the 17 Acres as the Hon. Judge Jones recently ruled. 1 LA 48:18-49:10.

3. The City Council Denied <u>All</u> Applications to Develop or Use the 35 Acre Property

The Landowners refused to capitulate to the City's hardball tactics. Instead, the Landowners expected a fair process and development approvals from the City upon presenting a plan consistent with Title 19, because the City had repeatedly confirmed the 250 Acres' R-PD7 zoning and allowable density for residential development and cited nothing that prohibited this development. The Landowners retained veteran land use attorney, Christopher Kaempfer ("Kaempfer"), to assist them in obtaining entitlements to develop the 250 Acres, including the 35 Acre Property, consistent with the R-PD7 zoning. 28 JA 5255. Kaempfer lives in

Queensridge and agreed to represent the Landowners only after confirming their development rights. 28 JA 5255. Kaempfer met with City planning staff who again confirmed that the 250 Acres could be developed in accordance with the R-PD7 zoning. 28 JA 5255, para. 7. Long-time City attorney, Brad Jerbic, similarly confirmed that the City would "'honor the zoning letter' provided to the Landowner by the City of Las Vegas." 28 JA 5255, para. 7. Despite this, *the City denied all four applications* to develop and use the 35 Acre Property.

a. The City Insisted on Only One Type of Application to Develop – A Master Development Agreement (MDA) and Then Delayed the MDA with Excessive Demands

Even though there is no such requirement in Title 19, the City Councilmembers demanded that the Landowners submit only one application to develop any part of the 250 Acres – a Master Development Agreement ("MDA") covering the entire 250 Acres – emphatically stating any other application would be summarily rejected. 26 JA 4807, para. 19; 28 JA 5256-5257, paras. 11-13. Although the City touts the 17 Acre Property approvals (e.g., AOB 23-28), notably, at the hearing approving the 17 Acre Property applications, the City emphatically stated development would not proceed until the 17 Acre Property was incorporated into a "global" development plan – an MDA. 47 JA 8559:656-657; 8560:687-688; 8561:716-717; 8626:2625-2626; 8627:2629, 2640-2641, 2650-2651; 8638:2959-

2962, 2969-2971; 8564:803-808; 8565:816; 8635:2861-2864; 8631:2744-2746; 47 JA 8625:2584-8626:2609; 47 JA 8639:2985-2987.

Mr. Kaempfer testified he had no less than 17 meetings with the City Planning Department in regard to the MDA and the City advised him that "[the Landowners] either get an approved [MDA] for the entirety of the Badlands or we get nothing." 28 JA 5256-5257, paras. 11-13. Stephanie Allen, an attorney with Mr. Kaempfer's office, testified she attended more than 25 meetings and "it was made clear by the City of Las Vegas employees, councilpersons, and the Mayor that the City would accept only one type of application to develop the 250 acre property – an MDA" and that the City "did not want and would not approve individual applications for the 35 [Acre Property]." 91 JA 16191, paras. 8-9.

Mr. Lowie testified, "Mayor Goodman informed [the Landowners during a December 16, 2015, meeting] that due to neighbors' concerns the City would not allow 'piecemeal development' of the Land and that one application for the entirety of the 250 Acre Residential Zoned Land was necessary by way of a Master Development Agreement ("MDA")" and that during the MDA process, "the City continued to make it clear to [the Landowners] that it would not allow development of individual parcels, but demanded that development only occur by way of the MDA." 26 JA 4807, para. 19, 4808-4809, para. 24:25-27. The City has never disputed these facts. 109 JA 19653:18-19654:15.

Having no other choice, the Landowners complied and began the MDA process.[18] The City dictated and drafted the vast majority of the MDA imposing a profoundly excessive and burdensome process on the Landowners, far beyond what is normally required to develop property. 26 JA 4807-4808, paras. 20-21; 32 JA 5726-5781; 32 JA 5782-5795; 32 JA 5797. These requirements included approximately 700 changes and 16 revised versions of the MDA. *Id.* Prior to submittal for approval, the City required, without limitation, detailed architectural drawings including 3D digital models for topography, elevations, etc., regional traffic studies, complete civil engineering packages, master detailed sewer studies, drainage studies, school district studies. 26 JA 4808, para. 21. Principal Lowie testified: "[i]n all my years of development and experience such costly and timely requirements are never required prior to the application approval because no developer would make such an extraordinary investment prior to entitlements, i.e., approval of the application by the City." *Id.* Lowie further stated, "every single time we agreed to the MDA … the City would change the requirements demanding more

[18] The Landowners had also applied for 720 luxury apartments on the 17 Acre Property. Entitlements for 435 condominiums (rather than 720 apartments) were granted in February of 2017 and were to be subsumed into the MDA as the drainage remediation for the 17 Acres necessitated infrastructure on the 65 Acre Property and the 133 Acre Property. 1 LA 63-68. After Seroka's election, those entitlements were likewise taken as a recent district court has determined the City precluded development consistent with those approvals. 1 LA 50-80.

from us." 26 JA 4807, para. 20. Additional, non-exhaustive City demands in the MDA included: (1) donation of approximately 100 acres as landscape, park, equestrian facility, and recreation areas; (2) building brand new driveways and security gates and gate houses for Queensridge; (3) building two new parks, one with a vineyard, for use by Queensridge; and (4) reducing the number of units, increasing the minimum acreage lot size, and reducing the number and height of the towers. 32 JA 5797; 30 JA 5532:599-601; 30 JA 5458:2060-2070; 31 JA 5667.

The City acknowledged the MDA demands were excessive. For example, Mayor Goodman stated: "you did bend so much. And I know you are a developer, and developers are not in it to donate property. And you have been donating and putting back . . . And it's costing you money every single day it delays." 30 JA 5473:2462-2465. Another City councilmember admitted: "I've never seen that much given before." 30 JA 5485:2785-2787; 5486:2810-2811.

Despite the City's efforts to sabotage them, the Landowners met every demand, spending millions over and above the normal costs for this type of development application. 26 JA 4808:4-6; 31 JA 5667; 31 JA 5669-5716.

b. After Excessive City Delay During the MDA Process, the City Planning Department Worked with the Landowners on a Stand-Alone Application for the 35 Acre Property that Met Every City Requirement, But the City Denied this Application

The Landowners communicated their frustration with the City's unreasonable MDA process, stating the time, resources, and effort put into the MDA may cause them to lose the 250 Acres. 30 JA 5502:3234-3236; 30 JA 5524:378-380. The carrying costs for the 250 Acres (including loan costs as well as the City's newly imposed costly application requirements and $1 million/year real estate taxes) were causing the Landowners damaging financial stress (and continue to do so). *Id.*

While the City was delaying the MDA process, the City's Planning Department endorsed residential development of the 35 Acre Property as a stand-alone application. 26 JA 4808, para 24. This would allow the Landowners to realize some income on the 35 Acre Property while the MDA for the entire 250 Acres was pending. 25 JA 4690. The Landowners asked the City's Planning Department to provide any and all requirements the City would impose on the application process to develop the 35 Acre Property consistent with the R-PD7 zoning. 26 JA 4808, para 23.

The City Planning Department issued a Staff Report confirming the applications met every City requirement and should be approved. 26 JA 4808, para 24; 37 JA 6704-6707. Likewise, the City Planning Commission recommended

approval. 37 JA 6800. The City Planning Staff Report noted the density allowed under the R-PD7 residential zoning is up to 7.49 units per acre and the Landowners proposed development on the 35 Acre Property was less than 0.5 units per acre (only 61 lots), meaning "[t]he proposed residential lots throughout the subject site [35 Acre Property] are comparable in size to the existing residential lots directly adjacent to the proposed lots" and "[t]he development standards proposed are compatible with those imposed on the adjacent lots."[19] 37 JA 6706. The City staff report also confirmed "[s]ite access from Hualapai Way through a gate [to the 35 Acre Property] meets Uniform Standard Drawing specifications" and "[t]he submitted Tentative Map is in conformance with all Title 19 and NRS requirements for tentative maps." 37 JA 6706-6707, 6711.

During the City Council hearing on June 21, 2017, a councilmember observed that the proposed development was "so far inside the existing lines [the Las Vegas Code requirements]." 30 JA 5478:2588-2590. At the hearing, the City Planning Director also agreed that the 35 Acre applications met all City requirements and should be approved. 30 JA 5403:566-5404:587.

[19] The City incorrectly claims the Landowners were seeking to build "whatever it desired" on the 35 Acre Property. AOB 29. This is far from true as the development applications confirm the proposed development was well within the allowed zoning density of 7.49 units per acre and conformed to the surrounding development.

Disregarding these recommendations for approval, the City Council *denied* the 35 Acre Property stand-alone applications, stating that it would only accept the MDA: (1) "I have to oppose this, because it's piecemeal approach (Councilman Coffin);" (2) "I don't like this piecemeal stuff. I don't think it works (Councilwoman Tarkanian); and (3) "I made a commitment that I didn't want piecemeal," there is a need to move forward, "but not on a piecemeal level. I said that from the onset," "Out of total respect, I did say that I did not want to move forward piecemeal (Mayor Goodman)." 38 JA 7015-7018; 30 JA 5490:2906-2911; 30 JA 5479:2618; 5485:2781-2782; 5499:3161; 5430:1304-1305; 5473:2460-2461. The City made it clear that it would not allow any development of individual parcels and once again demanded that development only occur by way of the MDA. 26 JA 4808, para 24:25-27. The City's subsequent denial letter on the 35 Acre stand-alone applications similarly cited piecemeal development and surrounding residents' opposition as the sole reasons for denial.[20] This was the *first* application the City denied for use of the 35 Acre Property.

[20] Importantly, the City denied the Landowners' applications because of political pressure from the Queensridge Opponents and not because the conceptual PRMP II or alleged PR-OS designation in the City master plan preclude development of the 250 Acres as is now the City's litigation position. *See* 95 JA 17045:2-6; 109 JA 19662:8-9. In fact, City officials rejected both arguments during public hearings for the very same reasons the Landowners' point to here, including that the 250 Acres' R-PD7 zoning takes precedence over general or master plans. NRS 278.349(3)(e). 37 JA 6784; 85 Pt. 4 JA 14965 53:4-6. The City's about-face occurred after litigation

c. The Landowners Turned Back to the MDA, but the City Also Denied the MDA Even Though the Landowners Met All City Demands

Upon denial of the 35 Acre stand-alone applications on June 21, 2017, the Landowners turned back to the MDA – the only application the City stated it would accept to develop any of the 250 Acres. The Landowners worked tirelessly to incorporate more City demands and presented the MDA to the City Council for approval within 40 days after the City Council's denial of the 35 Acres – August 2, 2017. 30 JA 5518-31 JA 5533, 5645-5651, 5665; 37 JA 6843-6916; 38 JA 6929-6987. In all, it took nearly three years for the City to formally bring the MDA before the City Council for consideration. The City Planning Department issued the following recommendation of approval:

> The proposed Development Agreement *conforms* to the requirements of NRS 278 regarding the content of development agreements. The proposed density and intensity of development *conforms* to the existing zoning district requirements for each specified development area. Through additional development and design controls, the proposed development demonstrates sensitivity to and *compatibility with* the existing single-family uses on the adjacent parcels. Furthermore, the development as proposed would be ***consistent with*** **goals, objectives and policies** ***of the Las Vegas 2020 Master Plan*** that call for walkable communities, access to transit options, access to recreational opportunities and dense urban hubs at the intersection of primary roads. Staff therefore *recommends approval of the proposed Development Agreement.*

---

ensued, and, thus, its PRMP and PR-OS arguments are just litigation tactics rather than legitimate obstacles to development of the 250 Acres.

37 JA 6828 (emphasis added).

This detailed recommendation by the City Planning Department for the MDA further demonstrates the property interest the Landowners had in the 35 Acre Property prior to the City's actions to take the property. Indeed, the MDA, as drafted by the City, states: "[t]he Parties acknowledge and agree that the Property [250 Acres] is zoned R-PD7 which allows for the development of the [residential] densities provided for herein and that no subsequent zone change is needed." 37 JA 6889.

Despite the MDA being *the only application* the City claimed it would accept, despite the City's drafting of the majority of the MDA, despite the City's Planning Department and Planning Commission approval recommendation, and despite the City Council's acknowledgement of its excess demands, the City Council *denied* the MDA on August 2, 2017 without equivocation or alternative. 37 JA 6836-6838. The City Council did so with Seroka, now on the City Council, making good on his promise to prevent all development of the 250 Acres and to turn the 250 Acres over to the surrounding neighbors. *Id.* As the 17 Acre Property was included in this global MDA, the denial of the MDA on August 2, 2017, resulted in a denial of the 17 Acre Property development, despite the City touting the initial 17 Acre approvals on February 15, 2017. 1 LA 70, 77:19-20. The City did not ask the Landowners to make any more concessions; rather, the City

summarily denied the MDA which sought development of the entire 250 Acres, including the 35 Acre Property. 26 JA 4809, para. 26; 37 JA 6836-6838. This was the *second* application the City denied for use of the 35 Acre Property.

d. The City Denied the Landowners' Application to Secure the 35 Acre Property and Right to Exclude Others with Fencing

After the City denied the Landowners' two applications to develop the 35 Acres, the City denied the Landowners' pending applications to fence the entire 250 Acres and the unused and drained golf course ponds that remained on the property including the 35 Acres. 38 JA 7004-7011. Fence permits follow a routine, ministerial application process - Las Vegas Unified Development Code 19.16.100(F)(2)(a) provides that a "fence" application is subject to a "Minor Review Process" and section 19.16.100(F)(3) specifically exempts fences from a "Major Review Process." Contrary to its own City Code, the City denied the fence application on August 24, 2017, stating that the Landowners would have to submit to a major review, a significant and burdensome process which included public meetings and public comments, because putting up a fence would negatively impact surrounding residents (as a fence would prevent the surrounding neighbors from entering and using the Landowners' property). *See* LVMC 19.16.100(G); *see also* 38 JA 7013; 109 JA 19662, para. 91. When later asked by the district court why the fence application was denied, the City's only justification was it succumbed to the

"political pressure" of the surrounding neighbors. 95 JA 17045:2-6; 109 JA 19662:8-9. Thus, the City denied a *third* application for use of the 35 Acre Property based on political pressure and prevented the Landowners from excluding others from their property. *Id.*

e. The City Denied the Landowners' Application to Access the 35 Acre Property

Concurrently with the fence application, the Landowners also submitted for access, requesting that the City approve three access points to the 250 Acres, including one specific access to the 35 Acre Property from Hualapai Way, for "tree and plant cutting, removal of related debris and soil testing equipment." 38 JA 6989-6994; 109 JA 19663:3-5. The City had already determined "[s]ite access from Hualapai Way through a gate meets Uniform Standard Drawing specifications" and later admitted in discovery "[t]he Badlands [250 Acres] had general legal access to public roadways along Hualapai Way, Alta Drive, and Rampart Blvd." 37 JA 6706; 20 JA 3812:12-13. On August 24, 2017, the City nevertheless denied the access application and has never been able to provide any reasonable basis for doing so. 38 JA 6996; 109 JA 19663, para. 102. Incredibly, the City's denial letter again cites "significant impact" on surrounding residents' properties as the reason for denying

the Landowners' access to their own property. 38 JA 6996. This was the *fourth* application the City denied for the use of the 35 Acre Property.[21]

The City's claim that it did not deny the fence and access applications, but instead, it merely required a "major review" is unfounded. AOB 81-82. First, the City letters expressly state the applications are "denied."[22] 38 JA 6996; 38 JA 7013. Second, as stated above, the City Code exempts these types of applications from a major review. Third, LVMC 19.16.100(3)(b) specifically states a "major review" requires *a finding* that a "proposed development could significantly impact the land uses on the site or surrounding properties." There was no "proposed development" with the access and fence applications, and the City provided no explanation of how a curb cut for access or perimeter fence could "significantly impact" the surrounding properties – save its preservation for public use.

[21] Around this time, the City began harassing the Landowners sending violation notices such as the weeds on the 250 Acres were too tall or the pine needles were too numerous all the while frustrating the ability to maintain the property. 38 JA 6989-6994.

[22] The denial letters also confirm the City's intent to deny any development specifically stating "*any development* on this site has the potential to have a significant impact on the surrounding properties. . . ."

4. The City Passed Two Ordinances that Targeted Only the Landowners' Property, Made It Impossible to Develop, and Preserved the Property for Use by the Public, Specifically Authorizing the Public to Enter Onto the 250 Acres

Within weeks of denying all use of the 35 Acre Property, including the only application the City said it would approve (the MDA), the City took the extreme action to move forward with City Ordinances that: 1) targeted only the Landowners' 250 Acres; 2) made it impossible to develop the 250 Acres; and 3) preserved the 250 Acres for use by the surrounding neighbors (i.e., the public) and specifically authorized the surrounding neighbors/public to use the 250 Acres. 40 JA 7402-7427. These City Ordinances 6617 and 6650, were referred to as City Bills 2018-5 and 2018-24 at the district court level, but hereinafter are referred to as "City Ordinances 6617 and 6650."

On September 6, 2017, after attempting to place a moratorium on filing applications, Seroka publicly instructed City staff to draft City Ordinances that authorize the public to enter onto the 250 Acres and prevent any development of the 250 Acres. 49 JA 8949:1657-8950:1668; 49 JA 8954:1797-1806. Because, the Landowners were reassured that it was "business as usual" at the City, they submitted stand-alone applications to develop the 133 Acre Property consistent with its R-PD7 residential zoning and Title 19. 49 JA 8955:1820-1835; 38 JA 7037-39 JA 7174. Here, too, the City Planning Department and Planning Commission

confirmed the R-PD7 zoning, that the zoning permitted the development, and recommended approval of the applications. 37 JA 6800; 39 JA 7246.

At Seroka's direction, however, the City Council purposefully abeyed the 133 Acre Property applications twice until May 16, 2018. 49 JA 8886. At the May 16, 2018, City Council meeting, the City set City Ordinance 6617 for the morning agenda and the 133 Acre Property applications for the afternoon agenda. 44 JA 8085-8105; 40 JA 7327-7330. The City approved Ordinance 6617 in the morning and struck the 133 Acre Applications from the City afternoon agenda, refusing to hear them on the merits. 40 JA 7317-7325, 7332, 7334, 7400. By doing so, the City ensured that any future consideration of these applications (and any others for the 250 Acres) would be pursuant to the onerous development and public access requirements set forth in the new Ordinances (explained below) which meant certain denial.

a. Ordinances 6617 and 6650 Target Only the 250 Acres

One of the City's own councilmembers admitted Ordinances 6617 and 6650 were drafted to target only the Landowners' 250 Acres: "[f]or the past two years, the Las Vegas Council has been broiled in controversy over Badlands [250 Acres], and this [Ordinances] is *the latest shot in a salvo against one developer*"; "[t]his bill is for one development and one development only. This bill is only about the Badlands Golf Course [250 Acres]" . . .I call it the Yohan Lowie Bill." 44 JA 8086-8087; 44

JA 8107; 44 JA 8119,8150. An extensive uncontested report similarly concluded the Ordinances target only the 250 Acres. 41 JA 7582; 42 JA 7617-44 JA 8079. The City presented no evidence to contest that it adopted these Ordinances to target only the 250 Acres. 109 JA 19664, para. 108.

b. City Ordinances 6617 and 6650 Made It Impossible to Develop the 250 Acres

Some of the requirements the Ordinances imposed on the Landowners include: master plans, development agreements, environmental assessment reports, 3D models, master drainage, traffic and sewer studies, mitigation reports, CC&Rs, closure maintenance plan providing security and monitoring, etc. 109 JA 19664, para. 110 - 19665, paras. 111-113; 40 JA 7412-7424. The Ordinances imposed compliance with these requirements *before the Landowners could even submit an application for development*. *Id.* The Ordinances also included additional vague, impossible-to-meet criteria such as a development review to assure the development complies with "other" City policies and standards, and a catchall requirement for anything else "the [City Planning] Department may determine are necessary." 40 JA 7422:12-13.

Incredibly, the Ordinances mandated development only by way of an MDA which the City had already denied after the Landowners jumped through nearly three years of costly hoops seeking approval and acquiesced to every unreasonable demand by the City. 37 JA 6836-6838; 40 JA 7416:26-7417:4. Amongst other

things, complying with these requirements would cause the Landowners to spend millions *before* even filing an application. A cost that no developer would undertake before approval. 26 JA 4808. Thus, these Ordinances made development of the 250 Acres impossible, a point which was not contested by the City. 109 JA 19665, para. 113.

c. City Ordinances 6617 and 6650 Expressly Preserve the Landowners' 250 Acres for Use by the Public and Authorize the Public to Use the 250 Acres

City Councilmember Seroka repeatedly and publicly announced the City's intent to preclude the Landowners from using the 250 Acres while preserving it for use by the public and indeed encouraged the public to use the 250 Acres by informing the surrounding neighbors in his official capacity that the 250 Acres was theirs to use for their own recreation. 48 JA 8782:23-8783:3, 8779:23-8780:15. Consistent with this, Councilman Seroka then "sponsored" Ordinance 6650, which includes a provision to authorize the public's use of the 250 Acres, and it was adopted by the City. 40 JA 7412, 7421. Section "A. General" in City Ordinance 6650 states that any proposal to repurpose the 250 Acres from a golf course "is subject to … the requirements pertaining to … the Closure Maintenance Plan set forth in Subsections (E) and (G), inclusive." 40 JA 7412-7413. Section "G. 2. Maintenance Plan Requirements," then provides that "the maintenance plan must, at a minimum and with respect to the property . . . provide documentation regarding

ongoing public access . . . and plans to ensure that such access is maintained." 40 JA 7421-7422 (emphasis added).[23] Based on this plain language, and consistent with the United States Supreme Court case of *Cedar Point Nursery v. Hassid*, 594 U.S. ___, 141 S.Ct. 2063 (2021), the district court properly held the Ordinances authorize the public to use the Landowners' 35 Acre Property.[24] 109 JA 19665, para. 114.

5. The City Rejected Two Additional Entitlement Packages Submitted by the Landowners as Recently as 2022

As the City was drafting and submitting its Opening Brief to this Court alleging it denied only one application, the City rejected two additional entitlement packages submitted by the Landowners that would have allowed development of the entire 250 Acres, including the 35 Acre Property. In July / August, 2022, the Landowners and City Staff worked together to draft an entitlement package (with a

[23] Recognizing the unconstitutionality of the 250 Acres Ordinances, the City repealed them on January 15, 2020. It is well established, however, that once government action has worked a taking of property, "no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 33, 133 S. Ct. 511 (2012). "A bank robber might give the loot back, but he still robbed the bank." *Knick v. Twp. of Scott, Pa.*, 588 U.S. ___, 139 S.Ct. 2162, 2170, 2172 (2019).

[24] Consistent with Seroka's public announcement, his encouragement and the City's adoption of the Ordinances, the Landowners presented uncontested evidence, including a sworn declaration and hundreds of pictures, proving the surrounding neighbors are using the 250 Acres as a public park for recreation and open space. 50 JA 8976-51 JA 9159; 109 JA 19666, para 120-19667, para 121.

monetary payment to the Landowners) that would have allowed development of the entire 250 Acres, this was placed on the City Council's August 3, 2022, Agenda for approval, and the City, at the midnight hour, struck the entitlement package from the City Agenda. 1 LA 21-22, 30. Thereafter, as part of the 17 Acre Case, the Landowners re-submitted the same entitlement package to the Court (without any monetary payment) and requested that the Court order the City to put the matter back on the City's Agenda for consideration, and the City opposed the request, arguing the district court could not force the City to consider the Landowners' entitlement package. 1 LA 21-22, 30, 131-132. The Court in the 17 Acre Case agreed it could not force the City to consider the entitlement package, but also held the City liable for a taking, as set forth above. 1 LA 131-132. Therefore, in total, there have been ***six*** City denials of the Landowners' attempts to develop the 35 Acre Property as recently as 2022.

6. City Communications Demonstrate the City Targeted the 250 Acres to Preserve It for Use by the Public

City communications obtained during discovery and through public records requests further evidence the City's intent to take the 250 Acres for the surrounding neighbors: (1) the City identified $15 million of potential City funds to acquire the 250 Acres; (2) the City identified a "proposal regarding the acquisition and re-zoning of green space land [250 Acres];" (3) the City proposed/discussed a Bill to force

"Open Space" on the 250 Acres, contrary to its legal R-PD7 residential zoning;[25] (4) the City proposed a solution to "Sell off the balance [of the 250 Acres] to be a golf course with water rights (key). Keep the bulk of Queensridge green," and; (5) the City engaged a golf course architect to "repurpose" the 250 Acres. 49 JA 8878-8881; 47 JA 8520; 46 JA 8480-8481; 46 JA 8486-8490; 49 JA 8883-8884; 48 JA 8771:4-12.

The City also demonstrated relentless hostility towards the Landowners and any development and openly discussed preserving the entire 250 Acres for use by the surrounding neighbors. Again, one Councilmember referred to the Landowners proposed development as "Bibi Netanyahu's insertion of the concreted settlements in the West Bank neighborhoods," stating: "I am voting against the whole thing [development on the 250 Acres]." 46 JA 8492-8493, 46 JA 8487; 47 JA 8504-8505. Before the Landowners' applications to develop were finalized and presented to City Council, this Councilmember boasted that "a majority [of City Council] is standing in [the Landowners] path [to development].[26] 47 JA 8504. Two Councilmembers

[25] That the City planned to make the 250 Acres Open Space as part of its scheme to preserve the property for public use demonstrates there was no valid pre-existing PR-OS designation as a second Open Space designation would be unnecessary if the PR-OS was validly in place since 1992 as the City represents. AOB 18.

[26] This statement was made by email on April 6, 2017, and the Landowners' applications were not presented to City Council until June 21 and August 2 of 2017.

also exchanged emails wherein they stated they will not compromise one inch and that they "need an approach to accomplish the desired outcome," namely, prevent development on the 250 Acres. 46 JA 8486. An interoffice City memo further confirms the 250 Acres was targeted: "If anyone sees a permit for a grading or clear and grub at the *Badlands* Golf Course [250 Acres], please see Kevin, Rod, or me. Do Not Permit without approval from one of these three." 47 JA 8531 (emphasis in original). Finally, the email stating "we have done a pretty good job of prolonging the [Landowners'] agony from Sept. 2015 to now" likewise confirms the City improper actions. 49 JA 8876.

7. The City's Actions Indisputably had a "Catastrophic" Impact on the 35 Acre Property

The Landowners timely disclosed an expert MAI appraiser who opined: 1) with the residential zoning in place and prior to any City interference with the 35 Acre Property, it had a value of $34,135,000 as of September 14, 2017 (the statutory date of valuation under NRS 37.120), and; 2) the City's actions had a "catastrophic" impact on the 35 Acre Property rendering it entirely valueless. 87 JA 15294, 15390. The City neither contested this expert report nor did it produce an initial or rebuttal expert report countering it. Thus, the only expert that appraised the 35 Acre Property

37 JA 6802-6807, 6836-3838. When considered together, this evidence further demonstrates the City targeted the 250 Acres to preserve it for use by the public.

and considered how the City's actions impacted its market value determined that the City's actions rendered it valueless.

8. The District Court Awarded the Landowners $34 Million for the Taking along with Costs, Attorney Fees, Reimbursement of Taxes, and Interest

Following extensive briefing, argument, and evidentiary hearings, the district court entered comprehensive findings of fact and conclusions of law, holding the Landowners had the legal right to use the 35 Acre Property for residential development consistent with the R-PD7 zoning. 18 JA 3429-3436. Following extensive re-arguing by the City, the district court re-affirmed its property interest findings. 109 JA 19645-19652. Thereafter, the district court entered detailed findings of fact and conclusions of law holding the City's actions were so extensive, systematic, and egregious that it met all four of Nevada's taking standards. 109 JA 19652-19691. The district court subsequently awarded the Landowners $34,135,000 for the fair market value of the 35 Acre Property based on their uncontested expert appraisal report. 110 JA 19852-19874.

Post-trial motions followed, and the district court awarded the Landowners costs, attorney fees, reimbursement of taxes, and interest. 126 pt. 5- JA 23026-23036, 126 pt. 5 – JA 23037-23048, 126 pt. 5 JA 23049-23062, 127 JA 23167-23182 All were properly ordered pursuant to Nevada law except for the prejudgment interest award.

VI. SUMMARY OF ARGUMENT

The district court entered detailed findings of fact and conclusions of law after this nearly five years of litigation during which time the district court allowed substantial briefing, oral argument, and evidence, granting every request to file pleadings in excess of the page limit and even adding extra days for evidentiary hearings to allow a full and complete presentation of the evidence. NRCP 52(a)(6) provides these district court findings must not be set aside unless clearly erroneous, and this Court has held the findings should be affirmed if supported by substantial evidence.

The district court's findings on the property interest are supported by substantial evidence and not clearly erroneous as the 35 Acre Property has been zoned for a residential use since 1981, this zoning has not changed, and zoning must be used to determine the property rights in the 35 Acre Property prior to any City interference. The district court's findings rejecting the City's PR-OS and PRMP II arguments are also supported by substantial evidence including the fact that all three relevant City departments (Planning, City Attorney, and Tax Assessor) uniformly opined there was never a PR-OS or PRMP II that applied to the 35 Acre Property.

The district court's findings on the take issue are also supported by substantial evidence and are not clearly erroneous, including the uncontested City actions set forth above that clearly meet all four of Nevada's taking standards. The City did not

contest that it "targeted" the Landowners' property, adopted City Ordinances to make it impossible to use the property and authorize the public to physically enter onto the property, and denied *four* applications to use the 35 Acre Property in order to preserve it for use by the public. The City even admitted in open court that at least one denial was due to "political pressure" and *not* based on the City Code.

The district court award of $34,135,000 should also not be disturbed as it was based on the uncontested appraisal report by MAI appraiser Tio DiFederico. Finally, the district court did not abuse its discretion during trial and post-trial proceedings relating to the award of just compensation, attorney fees, costs, reimbursement of taxes, and interest except for the rate of prejudgment interest.

Accordingly, the district court findings should be affirmed.

VII. LEGAL ARGUMENT

A. Standard of Review

"Whether the government has inversely condemned private property is a question of law that we review de novo." *Sisolak*, 122 Nev. at 661, 137 P.3d at 1121. Importantly, however, "the district court's findings of fact will not be disturbed on appeal if they are supported by substantial evidence." *City of Las Vegas v. Bustos*, 119 Nev. 360, 365, 75 P.3d 351, 354 (2003); *see also* NRCP 52(a)(6) (findings of facts must not be set aside unless clearly erroneous as reviewing court gives due regard to trial court's opportunity to judge witness credibility). The public policy

for this rule is clear; the district court is in the best position to take argument and review evidence.

The district court has wide discretion in calculating an award of damages, and this Court will not disturb an award absent an abuse of discretion. *See Diamond Enters., Inc. v. Lau*, 113 Nev. 1376, 1379, 951 P.2d 73, 74 (1997). Likewise, awards of attorney fees and costs are reviewed for an abuse of discretion. *See Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 82, 319 P.3d 606, 616 (2014) (attorney fees reviewed for abuse of discretion); *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006) (requires "manifest" abuse of discretion); *Kahn v. Morse & Mowbray*, 121 Nev. 464, 479, 117 P.3d 227, 238 (2005) ("manifest" abuse of discretion); *see also Logan v. Abe*, 131 Nev. 260, 267, 350 P.3d 1139, 1144 (2015) (An award of costs is reviewed for an abuse of discretion).

B. The District Court's Judicial Review Decision is Inapposite Here

The City devotes numerous pages of its opening brief to the erroneous contention that the district court was compelled to reject the Landowners' takings claims because it denied their PJR.[27] In doing so, the City disregards that civil actions (including inverse condemnation cases) and judicial review actions are

[27] The City's argument is based largely on the doctrine of issue preclusion, applying the Hon. James Crockett's judicial review decision which this Court subsequently overturned. *See* 1 pt. 5 JA 225-228; *see Seventy Acres v. Binion,* 2020 WL 1076065, at *4 (Nev. Mar. 5, 2020) (unpublished disposition).

distinct types of legal proceedings, with different standards of review, which often have different outcomes. *See City of Henderson v. Eighth Jud. Dist. Ct.*, 137 Nev., Adv. Op. 26, 489 P.3d 908, 912 (2021) (petitions for judicial review and other civil cases should not be mixed; they are "[l]ike water and oil, the two will not mix."). This is because the district court has a quasi-appellate role in hearing a petition for judicial review versus its usual role as a trial court in civil actions. *See id.* Moreover, the district court is limited to a review of the agency record on judicial review, so it does not examine evidence produced in discovery or through witnesses as it does throughout the proceedings in a civil case. *See id.* Indeed, the district court mentioned numerous times that its review of evidence was extremely limited in the PJR case, whereas there was significantly more evidence of the Landowners' property rights and the City's egregious actions presented in the inverse condemnation case. 98 JA 17406:6-17407:13, 17411:18-17412:1.

Also, the standards of review on appeal for civil actions and dispositions of petitions for judicial review likewise differ. *See id.* For these reasons, the district court was not compelled to apply its findings from the PJR decision to the Landowners' inverse condemnation claims and necessarily reached different decisions given the significant additional evidence presented in this inverse condemnation case and the different burdens of proof and standards of review. The district court detailed this reasoning in several hearings and orders. *See* 98 JA

17376-17378; 98 JA 17406-17407; 98 JA 17411-17412; 9 JA 1615-1616; 109 JA 19683-19685.

Moreover, if accepted, the City's "discretion" argument based in PJR law would entirely erase the Just Compensation Clause in the Constitution. The government does have discretion to deny land use applications in a PJR case, but that exercise of discretion can still result in a taking if it renders property valueless or useless.[28] Otherwise, the government could engage in any type of action, take property, and then avoid the constitutional mandate of just compensation by simply stating it was exercising its PJR law "discretion." As stated by this Court, "like most property rights, the use of airspace and subadjacent land may be the subject of valid zoning and related regulations ***which do <u>not</u> give rise to a taking claim."*** *Sisolak*, 122 Nev. at 600 & n. 25, 137 P.3d at 1120 & n. 25 (finding an ordinance adopted by the County resulted in a taking)*; see also City of Monterey v. Del Monte Dunes,* 526 U.S. 687, 707, 119 S. Ct. 1624 (1999) (discretionary land use decision resulted in a taking); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1012 (1992) (discretionary land use decision resulted in a taking). Meaning, the City's discretion to act does not absolve it from liability for a taking. For this additional reason, courts may reach different decisions when considering petitions for judicial review (that

[28] Notably, the City was advised of this by its long time City Attorney, Brad Jerbic, at the time of its actions. 87 JA 15438:20-25.

allows discretion in denying land use applications) versus inverse condemnation claims (which finds a taking where the government denies land use applications or takes action to preserve property for use by the public).

Additionally, the concept of "vested rights" differs in the context of judicial review proceedings versus inverse condemnation actions. *See Sisolak,* 122 Nev. at 658, 137 P.3d at 1119 (Nevadans have a vested right in useable airspace above their land, and county ordinances effected a taking); *ASAP Storage, Inc. v. City of Sparks,* 123 Nev. 647, 173 P.3d 734, 742 (2008) (inverse condemnation case holding Nevada landowners have the "inalienable right to possess, use, and enjoy property."); *cf. Stratosphere Gaming Corp. v. City of Las Vegas,* 120 Nev. 523, 527, 96 P.3d 756,759-60 (2004) (no vested right to construct in context of judicial review decision). This Court should reject the City's PJR arguments accordingly.

Most importantly, this is not a case where the City simply exercised its discretion to deny one application to develop as represented by the City and argued by Amici Curiae. Rather, the City engaged in a series of egregious conduct to preserve the Landowners' property for the surrounding neighbors including denying *four* applications to use the 35 Acre Property, adopted Ordinances that targeted only the 250 Acres, made it impossible for the Landowners to use their own property, authorized the public to enter onto the Landowners' property, and further demonstrated open hostility toward any action that would allow the Landowners to

use the 35 Acre Property or interfere with the surrounding neighbors' use of the property. Therefore, discretion in a PJR setting has no place in this inverse condemnation case.

C. The District Court Properly Followed Nevada's Mandatory Two-Step Procedure for Determining Liability in Inverse Condemnation Cases

In inverse condemnation cases, the district court must make two distinct sub-inquiries to determine liability. *See Sisolak,* 122 Nev. at 658, 137 P.3d at 1119. The district court must first determine whether the landowner possesses a valid interest in the property affected by the government action, i.e., whether the landowner possessed "a stick in the bundle of property rights," thus, having a compensable property right before proceeding to determine whether the government action at issue constituted a taking. *Id.*; *see also, ASAP Storage,* 123 Nev. at 647, 173 P.3d at 742 (courts must undertake two distinct sub-inquiries: (a) whether a valid property interest exists; and (b) whether the government action at issue constitutes a taking). Here, the district court properly followed Nevada's two-step procedure to determine liability.

1. The District Court Properly Concluded the Landowners Have a Valid Property Interest to Use Their Property Consistent with Its R-PD7 Zoning

In Nevada, the term "property" includes all rights inherent in ownership, including the vested and "inalienable" right to possess, use, and enjoy the property.

See Sisolak, 122 Nev. at 658, 137 P.3d at 1119; *see also ASAP Storage*, 123 Nev. at 647, 173 P.3d at 742 (holding property rights under Nevada Constitution include inherent and inalienable right to possess, use, and enjoy the property); *Schwartz v. State,* 111 Nev. 998, 900 P.2d 939 (1985) (inverse condemnation case holding the owner had a "property right" to access an abutting roadway, even where the land was vacant, there was no permit to use the access, and access had not yet been developed as of the time of trial). Whether the Landowners possessed a valid property right or interest was a question of law, based on a review of the evidence, appropriately decided by the district court. *See Sisolak* 122 Nev. at 661, 137 P.3d at 1121.

To determine the underlying property interest in direct and inverse condemnation cases, this Court has always looked to the property's current zoning, unless there is a reasonable probability that a re-zoning for a higher use could be achieved. *See Bustos*, 119 Nev. at 365, 75 P.3d at 354 (district court properly considered current zoning and potential for higher zoning); *Sisolak*, 122 Nev. at 645, 137 P.3d at 1119-21 (inverse condemnation case where this Court cited to *Bustos* and used zoning to determine Mr. Sisolak's property interest); *Clark Cnty. v. Alper*, 100 Nev. 382, 391, 685 P.2d 943, 941 (the existing zoning ordinance is a proper matter to consider in condemnation actions) (citing *U.S. v. Eden Memorial Park Ass'n*, 350 F.2d 933 (9th Cir. 1965) (taken land must be valued based on existing

zoning ordinance)); *County of Clark v. Buckwalter*, 115 Nev. 58, 974 P.2d 1162 (1999) (direct condemnation case where this Court used zoning to determine Mr. Buckwalter's property interest); *Alper v. State, Dept. of Highways*, 95 Nev. 876, 603 P.2d 1085 (1979), on reh'g sub nom. *Alper v. State*, 96 Nev. 925, 621 P.2d 813 (1980) (inverse condemnation where this Court used zoning to determine Mr. Alper's property interest); *Andrews v. Kingsbury Gen. Imp. Dist. No. 2*, 84 Nev. 88 (1968) (direct condemnation case relying on zoning to determine the Andrews property interest).[29]

This rule is so universally accepted that it is included in pattern jury instructions for condemnation cases. *See e.g.,* 6A Wash. Pattern JI 151.15 ("You are to value the property in view of the uses permitted under present zoning."); Mich. M. Civ. JI 90.10 ("One of the things that must be considered in deciding what the

[29] *See also Vacation Village, Inc. v. Clark County*, 497 F.3d 902 (9th Cir. 2007) (citing *Bustos* for proposition that district court should consider zoning ordinance existing at time of taking); *Twp. of Manalapan v. Gentile*, 231 A.3d 631 (N.J. 2020) (highest and best use ordinarily evaluated in accordance with current zoning); *Berry & Co., Inc. v. Cnty. of Hennepin*, No. 27-CV-13-07304, 2017 Minn. Tax LEXIS 3 (Minn. T.C. Jan. 24, 2017) (In an eminent domain case, "[g]enerally, legally permissible uses would conform to the land's current zoning classification."); *accord* S. Bernstein, *Zoning as a Factor in Determination of Damages in Eminent Domain*, 9 A.L.R.3d 291 (2005) (citing *Bustos* for proposition that an existing zoning ordinance is a proper matter for consideration in a condemnation action); *Rathkopf's The Law of Zoning and Planning* § 75:6, Evidence of Probability of Zoning Change (4th Ed.) (Where property taken by eminent domain is subject to zoning, the permitted use is that use ordinarily authorized by the zoning regulations at the time of the taking.).

highest and best use of the property was at the time of taking is the zoning classification of the property at that time."). The preeminent handbook on appraising property follows this rule: "[m]ost zoning ordinances identify and define the uses to which a property may be put without reservation or recourse to legal intervention. This is referred to as a *use by right.*" *The Appraisal of Real Estate*, p. 170 (italics in original). This is because identifying the "permitted" uses of property in designated zoning areas "proscribes uses of land in an orderly manner." Donald T. Morrison, *J.D.*, *Highest and Best Use of Property Taken Under Eminent Domain*, 19 Am. Jur. Proof of Facts 3d 613 (June 2020 update). Therefore, zoning ordinances covering real property establish the minimum use for which it may be used. *See* 19 Am. Jur. Proof of Facts 3d 613 (1993), *Highest and Best Use of Property Taken Under Eminent Domain* § 14, Rezoning. Here, the district court properly concluded that the Landowners had a valid property interest to use their property consistent with its R-PD7 residential zoning. 18 JA 3432-3436; 109 JA 19645-19652.

As explained in detail above, the facts establish the 35 Acre Property has been hard zoned R-PD7 since 1981 and the City concedes this zoning at least as early as 1990. 11 JA 2004:15-16; 37 JA 6784:1784-1789; 24 JA 4621:1944-1945; 47 JA 8674. *See also* Section V(A)(2-4), *supra*. Accordingly, the R-PD7 zoning dictates the 35 Acre Property use.

a. The District Court Properly Held the Landowners Have a Right to Use the 250 Acres Consistent with its R-PD7 Zoning

The City argues to this Court zoning is meaningless and that its general plan controls land use in its jurisdiction. AOB 67-73. The City's argument renders its zoning code meaningless, is contradicted by state law, its own City attorney, and simply defies logic. Accordingly, the district court correctly rejected this position and found, in accord with Nevada inverse condemnation law, that zoning takes precedence in analyzing the Landowners' property interest.

It is undisputed that at all relevant times here and since 1981, the 35 Acre Property has been zoned R-PD7, which is residential zoning. 11 JA 2004:15-16; 37 JA 6784:1784-1789; 24 JA 4621:1944-1945; 47 JA 8674. The permissible uses for land with R-PD zoning are set forth in the City's Unified Development Code - Title 19. Indeed, the City's official Zoning Verification Letter referred the Landowners to Title 19 to determine the permissible uses of the 250 Acres, stating: "[a] detailed listing of the permissible uses and all requirements for the R-PD Zone are located in Title 19 ("Las Vegas Zoning Code") of the Las Vegas Municipal Code." 47 JA 8674. Specifically, Title 19 authorizes "single-family and multi-family residential" uses for R-PD7 zoned properties. *See* LVMC 19.10.050(C) (establishing "permitted land use" on R-PD7 zoned property as "[s]ingle-family and multi-family residential"). Title 19 further provides that single-family attached and single-family detached

residential uses are "permitted as a principal use in that zoning district [R-PD7] *by right*." *See* LVMC 19.12.010 (emphasis added). Given its R-PD7[30] zoning, the permissible uses for the 35 Acre Property *by right* are single-family and multi-family residential uses. *See id.*; *see also* LVMC 19.10.050.

Additionally, LVMC 19.18.020 defines a zoning district as an area "in which certain uses are permitted and certain other uses are not permitted" in accordance with the City Code and LVMC 19.16.090(O) provides that once zoning is granted this "authorizes the applicant to proceed with the process to develop and or use the property in accordance with the development and design standards" of the City Code. Accordingly, the City Code further confirms the district court finding the R-PD7 zoning governs the use by right of the 35 Acre Property.

Moreover, the Landowners acquired the right to use the 35 Acre Property for residential development because the 250 Acres carried the R-PD7 zoning when they

[30] The City's statement that R-PD zoning was replaced by PD zoning (AOB 22) is blatantly false as these are two separate zoning districts. LVMC 19.10.040 (G) governs Planned Development Districts and LVMC 19.10.050 governs R-PD districts as this Court already determined. *See Order of Reversal* 24 JA 4515-4521 *and City's Amicus* 62 JA 11099-11100. Although the R-PD zoning district is no longer available to be granted via rezoning, it does not take away that existing zoning. Transitional Rules: Property which, on the effective date of this Title, was classified under a zoning classification which no longer exists under this Title will be reclassified by the City to an existing classification by subsequent Rezoning action. *Until that action occurs, such property shall be governed by the requirements and limitations applicable to the zoning classification in effect just before the adoption of this Title.* LVMC 19.00.100 (emphasis added).

obtained title. Because this use interest was part of their title to begin with, the Landowners have a vested right to use the 35 Acre Property for single-family and multi-family residential, as a matter of law. *See id.; see also* LVMC 19.10.050; LVMC 19.12.010. The district court's decision on the property interest issue should therefore be affirmed.

b. The District Court Properly Rejected the City's Argument that Land Use Designations (Such As PR-OS) Prohibit Development

The main thrust of the City's argument is that its invalid PR-OS general plan designation governs the use of the 250 Acres above all else. AOB 65-73. In fact, the City claims, "the PR-OS designation should be the beginning and end of this case." AOB 37. However, there is substantial evidence to support the district court findings rejecting the City's PR-OS argument. Indeed, the City's PR-OS argument fails for at least eight important reasons. *See also* Section V(A)(6), *supra*.

First, it is well established that zoning takes precedence over any land use designation. *See* NRS 278.349(3)(e) ("[I]f any existing zoning ordinance is inconsistent with the master plan, the zoning ordinance takes precedence."); Nevada Atty Gen. Op. 84-6, at *3 (Apr. 11, 1984) ("[The] Nevada legislature has always intended local zoning ordinances to control over general statements or provisions of a master plan."). Indeed, when deciding the property interest in inverse condemnation cases, this Court relies entirely on zoning. *See e.g., Bustos,* 119 Nev.

at 362, 95 P.3d at 352 (2003) (direct condemnation case using zoning instead of the master plan land use designation to decide the property interest issue); *Sisolak*, 122 Nev. at 659-61, 137 P.3d at 1119-21(inverse condemnation case where this Court cited to *Bustos* and used zoning to determine property rights); *Alper*, 100 Nev. at 391, 685 P.2d at 941 (inverse condemnation case using zoning to determine property rights).

Second, despite the City's about-face for litigation purposes, the City has repeatedly confirmed the PR-OS designation was inconsequential because zoning takes precedence over the City's master plan and any land use designations thereon, and that the 35 Acre Property's R-PD7 zoning existed before any general plan's PR-OS designation was allegedly adopted.[31] For example, City Attorney Jerbic advised his client, the City, that:

[31] The City now erroneously asserts the opposite as a litigation tactic – that general or master plans take precedence over zoning. In doing so, the City relies on *SGIC v. Jumpers, LLC,* 122 Nev. 53, 128 P.3d 452 (2006), for the proposition that zoning ordinances that conflict with a master plan are void *ab initio*. That reliance is misplaced for several important reasons. *First*, *SGIC* holds no such thing – this Court merely cited to a California case stating as much but then distinguished it because Nevada law differs from that of other jurisdictions requiring strict conformity between master plans and zoning ordinances. *See id.,* 122 Nev. at 64, 128 P.3d at 460. In Nevada, zoning ordinances need not be in perfect conformity with every master plan policy. *See id.* *Second*, *SGIC* involved prospective rather than existing zoning ordinances, holding only that the former must be generally compatible with a master plan's goals and policies. *See id.* (master plan is a tool for prospective land uses rather than legislative straightjacket). This is because NRS 278.250(2) requires that new zoning regulations be consistent with any existing

> [t]he zoning for this property happens to be hard zoned RPD-7. . . somehow PR-OS became the General Plan designation only after the hard zoning was in place. And the rule is the hard zoning, in my opinion, does trump the General Plan designation. . . If you do not grant the general plan amendment tonight, you will merely leave in place a general plan that's inconsistent with the zoning, and the zoning trumps it, in my opinion. 37 JA 6784.

Similarly, City Planning Director, Tom Perrigo, testified that "[i]f the land use and the zoning aren't in conformance, then the zoning would be a higher order entitlement." 85 pt 4 JA 14965. As judicial admissions, the City is bound by these statements regarding the 250 Acres' R-PD7 zoning, the PR-OS designation, and that the former takes precedence over the latter.[32]

---

master plan for land use. As to the latter, however, NRS 278.349(3)(e) applies and expressly states that existing zoning ordinances take precedence over any conflicting master plan. Despite its argument otherwise on appeal, the City has repeatedly admitted that the 250 Acres' R-PD7 zoning preceded the purported change in the general plan to PR-OS. *See* n.11 *infra.* *Finally*, the Court reiterated that zoning ordinances have a presumption of validity, ultimately concluding that the new zoning ordinance was consistent with the master plan. *See id.,* 122 Nev. at 71, 128 P.3d at 465.

[32] Judicial admissions are deliberate, clear, unequivocal statements by parties about concrete facts within their knowledge. *See, e.g., Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co.,* 127 Nev. 331, 343, 255 P.3d 268, 276 (2011) (comparing judicial admissions to evidentiary admissions which may be controverted or explained by a party); *cf.* Fed. R. Evid. 801(d)(2)(B),(C), and (D) (providing that any relevant statement made by a party or his agent acting in the scope of his employment, which is offered against that party, is generally admissible into evidence as an evidentiary admission). Parties are generally bound by their judicial admissions, including those made by their attorneys. *See Fassberg Const. Co. v. Housing Authority of City of Los Angeles,* 60 Cal.Rptr.3d 375, 403 (Cal. App. 2007) (An oral statement by counsel in the same action is a binding judicial

Third, the City published the land use hierarchy in its Land Use & Neighborhood Preservation Element of the Las Vegas 2020 Master Plan, which is designed to provide a framework for the orderly planning of *future land uses* (as opposed to *present uses*) within the City. *See* 79 pt. 1 JA 13788. Not surprisingly, by the City's own published admission, *land use designations are subordinate to zoning*. *Id.* Thus, existing zoning – not a master/general plan land use designation – dictates permitted uses. *Id.*

Fourth, the City admitted zoning take precedence over its general plan designations in the 17 Acre PJR case, expressly stating: "[i]n the hierarchy, the land use designation is subordinate to the zoning designation, for example, because land use designations indicate the intended use and development density for a particular area, while zoning designations specifically define allowable uses and contain the design and development guidelines. . . ."[33] 27 JA 5081. Further, the City's newly

admission if the statement was an unambiguous concession of a matter then at issue and was not made improvidently or unguardedly.).

[33] The City should be judicially estopped from taking a contrary position here. *See Brock v. Premier Trust, Inc. (In re Frei Irrevocable Trust),* 133 Nev. 50, 390 P.3d 646 (2017) (judicial estoppel prevents parties from deliberately shifting their positions to suit the requirements of another case concerning the same subject matter). Judicial estoppel applies where: (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial proceedings; (3) the party was successful in asserting the first position; (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake. *See id.* In the 17 Acre PJR case, the City asserted that the property's R-

adopted 2050 general plan likewise states that zoning is "the law" and the master plan land use designation merely provides "general policies" or "framework." 86 JA 15052.

Fifth, as explained, despite 10 days of evidentiary hearings, the City never traced the PR-OS designation to any lawful action or otherwise demonstrated that it

---

PD7 zoning governs the property's use and takes precedence over all else. *See Seventy Acres v. Binion,* 2020 WL 1076065, at *4. This Court overturned the district court's decision vacating the City's approval of the Landowners' development applications, concluding the City correctly interpreted its zoning ordinances. *Id.,* at *6. Thus, the City was successful in asserting its first position which was not taken as a result of ignorance, fraud, or mistake, particularly given this Court's conclusion that substantial evidence supported the City's decision in that case.

was properly placed on the 250 Acres.[34] At best, it was a ministerial error.[35] In fact, the City admits it has no idea how the PR-OS designation came to be:

> The R-PD7 preceded the change in the General Plan to PR-OS. There is absolutely no document that we could find that really explains why anybody thought it should be changed to PR-OS, except maybe somebody looked at a map one day and say, hey look, it's all golf course. It should be PR-OS. I don't know.

24 JA 4621:1945-1948.

---

[34] Under Nevada law, there are specific requirements for changing a master plan's land use designation for a property, including: 1) notice to the landowner; 2) published notice to the public; 3) at least one public hearing; 4) a community design, conservation plan, economic plan, historic property plan, housing plan, land use plan, comprehensive plan for the use of each property, and several other plans must be prepared; 5) passage by not less than two-thirds of the commission; 6) a passed resolution that expressly refers to the maps, descriptive matter and other matter intended by the commission to constitute the plan or amendment to the plan; 7) the passed action must be described on the land use map and signed by the secretary and chairman of the commission; and 8) the action must be "certified" to the City. *See, e.g.*, NRS 278.150 (master plan preparation and adoption); NRS 278.170 (coordination of master plan); NRS 278.210 (procedure for adoption and amendment of master plan); *see also* LVMC 19.16.030 (general plan amendments). *See also,* 87 JA 15251-15262 setting forth the procedure to amend the master plan in 1992, the date the City alleged the master plan was changed. There is no evidence that any of this was ever done to change the general plan designation on the 35 Acre Property.

[35] The City's reliance on a green shaded area on a map as evidence that the 35 Acre Property has been designated PR-OS since 1992 is misplaced. Not only is the depiction not evidentiary proof that the land use designation was lawfully placed on the property pursuant to NRS Chapter 278 and LVMC 19.16.030, but the map itself expressly disclaims as much, stating in small text at the bottom right-hand corner: "GIS maps are normally produced only to meet the needs of the City" and "this map is for reference only." E.g., 58 pt. 3 JA 10283-10286. Thus, a color depiction on a single map (of which no one knows the origins) certainly cannot override 41 years of hard residential zoning on the 35 Acre Property.

The City speculated that it may have been staff-initiated:

> The zoning for this property, R-PD7 was in existence prior to the change in the General Plan [PR-OS]. The General Plan was a staff-initiated change. . . [I]t doesn't take away the rights that the applicant has to zoning.

24 JA 4621:1926-1930.

That the statutory requirements for changing land use designations are extensive further indicates that they were never met and thus, the PR-OS designation was never lawfully placed on the 35 Acre Property. *See* n.34, *supra.* Thus, the City's own research ultimately confirmed as much.[36]

Sixth, regardless of how the PR-OS designation appeared, the City was always indifferent about it before litigation ensued, repeatedly reiterating that the 250 Acres' R-PD7 zoning takes precedence over the PR-OS designation. Some examples of City indifference include:

> If you do not grant the general plan amendment tonight, you will merely leave in place a general plan that's inconsistent with the zoning, and the zoning trumps it, in my opinion.

37 JA 6784:1795-1797.

* * *

[36] Landowners' counsel also advised City Council that "[w]e've done a lot of research and haven't been able to find any indication of how PR-OS was placed on this property." 25 JA 4693:519-522.

> . . . you will be able to consider a general plan amendment. If you vote for it, great, they're synchronized. If you don't vote for it, it doesn't change a darn thing. The zoning is still hard and in place.

24 JA 4624:1951-1952.

* * *

> The zoning [R-PD7] had been in place here for 27 years. . . . if you didn't even have a general plan amendment that synchronized the General Plan with the zoning, the zoning is in place, and it doesn't change a thing.

31 JA 5605:2648-2654.

Seventh, the City's PR-OS argument does not even apply to the 35 Acre Property. Contrary to the City's representation, the 1992 Las Vegas General Plan Land Use Element (Map 6) Southwest Sector contradicts any PR-OS designation on the 35 Acres by identifying the 35 Acre Property as Medium-Low Density (up to nine single family units per acre) for residential development. 78 pt. 1 JA 13525.

Finally, the City's 1992 General Plan Amendment (which the City claims placed the PR-OS designation on the 250 Acres) was adopted through Ordinance 3636, which expressly states that the amendment does not impact properties with existing zoning:

> Section 3: The adoption of the General Plan referred to in this Ordinance shall not be deemed to modify or invalidate any proceeding, zoning designation, or development approval that occurred before the adoption of the Plan nor shall it be deemed to affect the Zoning Map adopted by and referred to in LVMC 19.02.040.

86 JA 15056:18-22.

The evidence clearly shows the 35 Acre Property was hard zoned R-PD7 in 1981. 22 JA 4034-4072; 11 JA 2003-2004. And, the City concedes that the property was zoned R-PD7 at least as early as 1990. 11 JA 2004:15-16. Thus, even if the PR-OS designation was properly placed on the 35 Acre Property in 1992 as the City claims (which it was not), the designation does not impact the 250 Acres' use because it had already been hard zoned R-PD7 prior to the alleged 1992 action and regardless *zoning takes precedence*. Moreover, critically, in 2001 Ordinance 5353 hard zoned thousands of properties in the City, including the 35 Acres, and expressly *repealed* anything in conflict. 27 JA 5109-28 JA 5190. The City asserts the "PR-OS designation should be the beginning and end of this case." AOB 37, 65. As demonstrated above, since the district court had substantial evidence to support the clear finding that there was no valid PR-OS designation on the 35 Acre Property, the City's appeal fails by its own admission.

For all these reasons, the district court properly rejected the City's PR-OS argument.[37] This Court should do so as well.

[37] The City's assertion that the Landowners' acknowledged the legitimacy of the PR-OS designation by filing a general plan amendment is likewise meritless. AOB 10. The record demonstrates that the Landowners protested the PR-OS designation on the 250 Acres and demanded the City remove it. Rather than do so, the City required the Landowners to submit the general plan amendment (GPA) to change the PR-OS designation to match the zoning, and refused to process their development

c. The City's Argument that the *CONCEPTUAL* PRMP II is a Permanent Encumbrance on the 250 Acres is Contrary to Well-Established Property Law, what is Actually Developed in the Area, as well as the City's Own Code

As the premise for its invalid PR-OS argument, the City latches onto the abandoned and never followed conceptual PRMP II to claim the 250 Acres is open space. AOB 17. However, there is substantial evidence to support the district court findings rejecting the City's PRMP II argument. The City argues that the *conceptual* PRMP II not only imposes a "condition" that the 35 Acre Property remain open space into perpetuity notwithstanding its existing residential (R-PD7) zoning and lack of any deed restriction whatsoever, but also invalidates the underlying R-PD7 zoning that has been in place since 1981. AOB 18, 21. There are at least four reasons the district court properly rejected this PRMP II arguments.

First, by its own terms the PRMP is "conceptual" only. 57 JA 10136. The conceptual PRMP II is not a recorded encumbrance on the 250 Acres, and, as provided *supra*, it was never followed and defunct long ago. 24 JA 4616:20-25. *See Wilson v. Wilson,* 23 Nev. 267, 45 P. 1009, 1010 (1896) (unrecorded documents do not impart notice). Since the PRMP II was drafted, there have been over 1,000 units

---

applications without it and the Landowners repeatedly put in writing their objection to the PR-OS and that the GPA with the PR-OS reference was filed "under protest." 87 JA 15274-15282; 87 JA 15285-15288.

developed contrary to the "concept" land use designations. 47 JA 8672. Indeed, City Attorney Jerbic confirmed the PRMP II is a defunct planning tool, stating:

> The Peccole Ranch Phase II plan was a very, very, very general plan. I have read every bit of it. If you look at the original plan and look what's out there today, it's different. 24 JA 4614:16-21.
> . . .
> So the plan - - the master plan that we talk about, the Peccole Phase 2 master plan is not a 278A agreement, it never was, never has been, not a word of that language was in it. We never followed it.

24 JA 4616:20-25.

Second, despite 10 days of evidentiary hearings, the City failed to present any evidence of its alleged condition tying the 35 Acre Property to the PRMP II as not a single citation by the City provides this condition. The City Attorney stated his office "looked for a very long time, and we can find no restrictions that require that this [250 Acres] stay a golf course" and City Planning reviewed the PRMP II and concluded, "there are no conditions mentioned that pertain to the maintenance of the open space/golf course area [for the 250 Acres]." 87 JA 15437:11-13; 47 JA 8528. Indeed, the district court in the 65 Acre Case reviewed the City's citations to the record for this alleged "condition" and concluded "none" of the conditions identified in the City-cited documents even reference the 250 Acres and "none" of them impose a condition on the 250 Acres that it remain a golf course or open space. 1 LA 96:5-12.

Third, the development proposed in the PRMP II was never built. Queensridge was ultimately developed in the area and the Queensridge CC&R's expressly *excluded* the 250 Acres and the golf course occupying that land stating:

> The existing 27-hole golf course commonly known as the "Badlands Golf Course" **is not part** of the [Queensridge CIC] Property or the Annexable Property.

86 JA 15165 (emphasis added); *see also*, 26 JA 4834.

Moreover, the CC&Rs even include a map with the words "future development" written directly over the 35 Acre Property publicly confirming the development potential of the 250 Acres. 26 JA 4969.

Fourth, the 35 Acre Property was hard zoned R-PD7 in 1981 and re-confirmed through City adopted Ordinance 5353 in 2001 which unconditionally zoned the 250 Acres R-PD7. 27 JA 5109-28 JA 5190. In doing so, the City repealed all conflicting ordinances and master plans, including the alleged concept PRMP Phase II. *See id.* And, as explained above, this R-PD7 zoning supersedes any alleged defunct PRMP Phase II planning tool. Thus, only the R-PD7 zoning governs the development of the 35 Acre Property, and there is substantial evidence to support the district court's detailed findings rejecting the City's argument otherwise.

d. Amici Curiae Mischaracterize the Facts and Misstate the Law to Support Their "Sky Is Falling" Perspective

As expected, the Amici Curiae City of Reno, City of North Las Vegas, City of Henderson, and International Municipal Lawyer's Association (collectively "Amici") argument is no different than the City of Las Vegas ("City") and likewise, it is flawed in several aspects because it is based on the false premises advanced by the City such as the false representation the Landowners filed only a single application. Those false premises are belied by the record and discussed in detail throughout the Landowner's Answering Brief.

Second, the Amici's argument does not distinguish between the relationship of the general plan to a *rezoning* application versus the relationship of the general plan to *existing* zoning. Here, the Landowners never sought rezoning of the 35 Acre Property, submitting a tentative map application to improve the property under its *existing* R-PD7 residential zoning that complied with all requirements of Title 19 and NRS 278.349. 29 JA 5329-5339. Thus, the 35 Acre Property's *existing* R-PD7 zoning takes precedence over the PR-OS land use designation under Nevada law – not the other way around as Amici suggest – and the district court's decision in this case is entirely consistent with the legislative process and Nevada law. NRS 278.349(3)(e).

Furthermore, Amici's argument that zoning does not confer vested development rights is similarly flawed and belies their own codes. In addition to well-established Nevada law holding otherwise, the City of Reno's own code expressly provides: "*Development Right - The right granted to a landowner or other authorized party to improve a property.* ***Such right is usually expressed in terms of a use and intensity allowed under existing zoning regulations***." Reno Nevada – Annexation and Land Development Code (RDC or "Title 18") 18.09.401 (2021) (emphasis added).[38] This Reno Code is similar to City of Las Vegas Code LVMC 19.16.090(O), *supra*, which provides once zoning is granted this "authorizes the applicant to proceed with the process to develop and or use the property in accordance with the development and design standards" of the City Code.

[38] Like the City, Amici rely on *Stratosphere Gaming* for the erroneous contention that zoning does not confer development rights. Again, the concept of "vested rights" differs in the context of judicial review proceedings versus inverse condemnation actions. *See id.*, 120 Nev. at 527, 96 P.3d at 759-60*; cf. Sisolak,* 122 Nev. at 658, 137 P.3d at 1120-21 (Nevadans have vested right in development and use of land). *Stratosphere Gaming* addressed vested rights (as well as the City's exercise of discretion) in the former context whereas this case involves the latter. Thus, it is inapposite here. *See* Section VII(B), *supra.* Furthermore, *Stratosphere Gaming* involved commercial zoning rather than residential zoning, and the City's denial of an application to build a specific amusement in a commercial district is hardly akin to the City's denial of all conforming residential use on the Landowners' residentially-zoned property to ensure that the surrounding neighbors can use the same as a park. *See id.*; *see also* Section V(B)(3), *supra.*

Finally, what should be "flatly terrifying to municipalities" (BOA 5) such as Amici is if courts were to allow municipalities to implement general plans that effectively strip landowners' existing zoning rights if they are inconsistent with newly implemented land use designations because doing so would result in mass takings claims every time new general plans are approved. This is the "existential threat" that would expose municipalities to the "incalculable liability" Amici fear. BOA 2.

All other arguments provided by the Amici are identical to the City's and should be rejected.

e. The Court Should Affirm the District Court's Decision on the Property Interest

The standard of review is whether there is substantial evidence to support the district court's property interest findings and the findings must be upheld if not clearly erroneous. There is substantial evidence to support the district court findings on R-PD7 residential zoning, that this zoning permits residential uses "by right," and the City's PR-OS and PRMP II arguments are meritless. Therefore, prior to the City engaging in actions to preserve the 35 Acre Property for public use, the Landowners had the legal right to use the 35 Acre Property for residential uses consistent with the R-PD7 zoning.

2. The District Court Properly Found the City Liable for a Taking Under All Four Invariable Takings Standards

Whether a taking has occurred is a mixed question of fact and law that is likewise appropriately decided by the district court. *See Sisolak*, 122 Nev. at 661, 137 P.3d at 1121. In doing so, the district court may consider evidence beyond that in the agency record. *See State v. Eighth Jud. Dist. Ct.*, 131 Nev. 411, 419, 351 P.3d 736, 741 (2015).[39] In determining whether a taking has occurred, all actions by the government, in the aggregate, must be analyzed. *See id.* (citing *Arkansas Game,* 568 U.S. at 31 (no "magic formula" exists in every case for determining whether particular government interference constitutes a taking under the U.S. Constitution; there are "nearly infinite variety of ways in which government actions or regulations

[39] Despite the City's assertion otherwise (AOB 5, 48, 50), statements and/or actions of its councilmembers, officials and staff were relevant to the district court's evaluation of the City's actions and whether the evidence demonstrated a taking of the 35 Acre Property by the City. *See Sisolak*, 12 Nev. at 653-54, 137 P.3d at 1116 (relying on statements by a principal planner to support a taking); *see also, Del Monte Dunes,* 526 U.S. at 699-706 (landowners' evidence, including inconsistent positions taken by City of Monterey, its officials and staff, undermined asserted factual premises for denial of development applications, suggested ulterior motive that the city wanted the property for public use, and ultimately proved that city effected a taking of landowners' property); *City of N. Las Vegas v. 5th & Centennial, LLC*, No. 58530, No. 59162, 2014 Nev. Unpub. LEXIS 482 (Mar. 21, 2014), *clarified on denial of reargument sub nom*. *City of N. Las Vegas v. 5th & Centennial*, 130 Nev. 619, 331 P.3d 896 (2014) (Court considered statements by city officials finding liability for precondemnation damages); *Althaus v. United States*, 7 Cl. Ct. 688, 691 (1985) (Court considered statement by government officials in finding takings liability for vacant land).

can effect property interests"). Indeed, "the form, intensity, and the deliberateness of the government actions toward the property must be examined." *Merkur v. City of Detroit*, 680 N.W.2d 485, 496 (Mich. Ct. App. 2004); *see also Del Monte Dunes*, 526 U.S. at 720 (inverse condemnation action is an "ad hoc" proceeding that requires "complex factual assessments."); *Lehigh-Northampton Airport Auth. v. WBF Assoc., L.P.,* 728 A.2d 981, 985-86 (Comm. Ct. Penn. 1999) ("There is no bright line test to determine when government action shall be deemed a de facto taking; instead, each case must be examined and decided on its own facts.").

Although "no magic formula" exists for determining whether particular government action constitutes a taking, there are several invariable rules applicable to specific circumstances. *See State v. Eighth Jud. Dist. Ct.*, 131 Nev. at 419, 351 P.3d at 741. Aside from the government constructing a project on private property, which is of course a taking, there are also three invariable rules where the Court will also always find a taking: (1) a per se regulatory taking where the government engages in actions that preserves private property for use by the public, or authorizes the public to use private property; (2) a per se categorical taking where the government action completely deprives an owner of all economically beneficial use of her property; and (3) where the government actions substantially impair or extinguish a property right which is directly connected to the use or ownership of

the property. *See id.*; *Sisolak,* 122 Nev. at 662, 137 P.3d at 1121; *Schwartz*, 111 Nev. at 1003, 900 P.2d at 943.

A taking also occurs when a government entity requires an unlawful exaction in exchange for approval of a land-use permit. *See State v. Eighth Jud. Dist. Ct.*, 131 Nev. at 419, 351 P.3d at 741; *see also Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309 (1994). For example, the government cannot condition issuance of a building permit on the landowner giving the government five feet of land for a bike path. *See Dolan,* 512 U.S. at 396. One has nothing to do with the other and "[a] strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Id.* Nearly all other takings claims "turn on situation-specific factual inquiries." *See State v. Eighth Jud. Dist. Ct.*, 131 Nev. at 419, 351 P.3d at 741 (citing *Arkansas Game,* 568 U.S. at 31).

Importantly, the Nevada Constitution also provides more expansive property rights than its federal counterpart, guaranteeing every individual's "inalienable right to possess, use, and enjoy property." *ASAP Storage,* 123 Nev. at 647, 173 P.3d at 740*; see also State v. Eighth Jud. Dist. Ct.*, 131 Nev. at 418, 351 P.3d at 741. "Our State enjoys a rich history of protecting private property owners against government takings," and "the Nevada Constitution contemplates expansive property rights in

the context of takings claims." *State v. Eight Jud. Dist. Ct.*, 131 Nev. at 418, 351 P.3d 741 (*quoting Sisolak,* 122 Nev. at 670, 137 P.3d at 1127).

After extensive evidentiary hearings and the mountain of evidence presented against the City, the district court ruled "I think under the facts and circumstances **it's pretty clear that we had a taking**" and thereafter entered comprehensive findings of facts and conclusions of law detailing how the City's actions meet the various takings standards. 98 JA 17411:7-9. Substantial evidence supports each of the district court's findings on the take issue.

a. The District Court Properly Found the City's Actions Resulted in a *Per Se* Regulatory Taking of the 35 Acre Property

i. The District Court Properly Rejected the City's Ripeness (Exhaustion) Argument as it Does Not Apply to the Landowners' *Per Se* Regulatory Taking Claim

The City erroneously claims the Landowners' *per se* regulatory claim is subject to a ripeness analysis and is not ripe for review because the Landowners did not file enough development applications. AOB 51. Not only does the record belie this contention as the Landowners made repeated attempts to develop and use the 35 Acre Property, but no landowner is required to exhaust administrative remedies before bringing inverse condemnation claims based on a *per se* regulatory taking. This Court held that a per se regulatory taking claim is not subject to a ripeness

(exhaustion) analysis. *See Sisolak*, 122 Nev. at 664, 137 P.3d at 1123 (holding Mr. Sisolak was not required to exhaust administrative remedies based on a per se regulatory taking claim). This is because government action that authorizes the public to enter onto property or preserves that property for use by the public is always a taking ripe for the Court's review. While *Sisolak* discussed permanence as an element for a taking, as argued by the City, this was nullified in 2021, when the United States Supreme Court made it clear that the law is even more expansive than stated in *Sisolak* and finds an appropriation is a taking whether it is permanent or temporary. *See Cedar Point*, 141 S.Ct. at 2074. Simply, in cases involving a physical occupation of private property, or where government action "preserves" private property for public use or "authorizes" the public to use private property, the government "has a categorical duty to compensate the former owner" and exhaustion of administrative remedies/ripeness is not a consideration. *Sisolak*, 122 Nev. at 664, 137 P.3d at 1123 (citations omitted). The Landowners' *per se* regulatory claim was therefore ripe for review.

ii. The City's Actions Effected a *Per Se* Regulatory Taking of the 35 Acre Property

Under Nevada law, a *per se* regulatory taking occurs where government action "preserves" private property for public use or future use by the government, or where government action authorizes the public to use private property or requires an owner

to acquiesce to a physical invasion.[40] *See Hsu v. County of Clark*, 123 Nev. 625, 173 P.3d 724 (2007); *Sisolak*, 122 Nev. at 663, 137 P.3d at 1122; *see also Cedar Point,* 141 S.Ct. at 2074. Such a taking may occur regardless of whether the government (or someone authorized by the government) occupies the property, or whether the government action advances any public interest. *See Sisolak*, 122 Nev. at 666-67, 137 P.3d at 1124-25 (citing *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 427-32 and n. 9 (1982)). Even where the government action does not directly authorize the physical invasion of private property, and the public invasion is not constantly occupying the property, the invasion is nevertheless permanent because the right to occupy the private property is preserved by the government. *See Hsu*, 123 Nev. at 634-635, 173 P.3d at 732; *Sisolak,* 122 Nev. at 668, 137 P.3d at 1125; *Cedar Point*, 141 S.Ct. at 2074 (ordinance requiring growers to allow union representatives onto their property for short periods of time upon written notice was a taking even when notice was not provided); *see also Knick*, 139 S.Ct. at 2166 (ordinance requiring that "[a]ll cemeteries … be kept open and

[40] Other states have adopted the same rule. *See, e.g., Mentzel v. City of Oshkosh*, 432 N.W.2d 609 (Wisc. 1988) (taking occurred when city denied landowner's established liquor license because it desired to acquire the property and thus sought to reduce the value of its acquisition); *City of Houston v. Kolb*, 982 S.W.2d 949 (Tex. 1999) (taking found where city denied a subdivision plat submitted by landowners for the sole purpose of keeping the right- of-way for a planned highway clear to reduce the cost for the State in acquiring properties for the highway).

accessible to the general public during daylight hours" appropriated private property because it authorized public entry); *Loretto*, 458 U.S. at 428 and n.5 (the one incontestable case for compensation (short of formal expropriation) occurs when the government deliberately brings it about that its agents, or the public at large, regularly use, or permanently occupy, space or a thing which theretofore was understood to be under private ownership); *ASAP Storage,* 123 Nev. at 647, 173 P.3d at 742 (a taking can arise when the government regulates or physically appropriates an individual's private property and a physical appropriation exists when the government seizes or occupies private property or allows occupancy of that property by the public or ousts the owners from their private property).

Significantly, the cases relied upon by this Court in *Sisolak* for the *per se* regulatory taking standard are non-physical taking cases. *See Sisolak*, 122 Nev. at 668 & n.72, 137 P.3d at 1125 & n.72 (citing *Roark v. City of Caldwell*, 394 P.2d 641, 646-47 (Idaho 1964); *Indiana Toll Road Comm'n v. Jankovich*, 193 N.E.2d 237, 242 (Ind. 1963); *Yara Eng'g Corp. v. City of Newark,* 40 A.2d 559 (N.J. 1945)). In other words, a *per se* regulatory taking may occur where government action "authorizes" public use of private property or "preserves" private property for public use even if the public is not actually using it. The Court should reject the City's assertion otherwise. AOB 75.

Here, the City openly admitted its actions authorized public use of the 35 Acre Property. Moreover, the City's ordinances targeted the 250 Acres, prevented any development whatsoever, and expressly authorized the public to use it, stating: the Landowners *must* allow "ongoing public access" and "ensure that such [public] access is maintained." 40 JA 7422:8-9; *see also* Section V(B)(4), *supra.* The City argues it would need to provide written notice to the Landowners before "ongoing public access" was forced on the Landowners. (AOB 79: "the City never notified the Developer that it should submit a plan…"). This precise defense was rejected by the United States Supreme Court. *See Cedar Point*, 141 S.Ct. 2063. In *Cedar Point*, the Court held a California statute amounted to a per se regulatory taking where the statute authorized labor unions to occasionally enter onto growers' property *upon written notice*. *See id.* at 2069. In *Cedar Point*, one of the growers was never given written notice, yet the United States Supreme Court still held the California statute was a per se regulatory taking of his property, because "the regulation appropriates **a right to physically invade** the growers' property" **whether that right was exercised or not**. *Id.* at 2074 (emphasis added).

The City further admitted in writing that it denied all use of the 35 Acre Property to preserve the viewshed for the "surrounding properties." 38 JA 7015-7018. This was confirmed by the Landowners' land use counsel who testified: "despite our best efforts, and despite the merits of our application(s)" the

surrounding property owners wanted to use the property for their viewshed and the City would not allow development unless "virtually all" of them agreed to allow the development and the leader of that group firmly stated they would not agree - "I would rather see the golf course [250 Acre Land] a desert than a single home built on it." 28 JA 5256, para. 12; *see also* 38 JA 7021. Additionally, evidence showed that while the City was demanding the Landowner jump through more hoops, the City identified $15 million to acquire the 250 Acres for these surrounding property owners. 49 JA 8881. Numerous communications of its officials likewise evidenced the extent of the City's efforts to preserve the 35 Acre Property for the public's use thereby preventing any development of the 35 Acre Property, as well as the animus and bias of its councilmembers towards the Landowners. 46 JA 8481; 47 JA 8510; 46 JA 8492; 46 JA 8486; 46 JA 8487-8490; 47 JA 8520; 47 JA 8531; *see also* Section V(B)(6), *supra.*

Therefore, overwhelming evidence in the record demonstrates the City's actions preserved the 35 Acre Property for public use as well as authorized the public to use it. Thus, there is substantial evidence to support the district court findings and conclusion the City effectuated a *per se* regulatory taking of the 35 Acre Property. *See Bustos*, 119 Nev. at 365, 75 P.3d at 354 (district court's findings of fact will not be disturbed on appeal if supported by substantial evidence); *see also* NRCP 52(a)(6)

(findings of facts must not be set aside unless clearly erroneous). Accordingly, this Court should affirm the finding of a *per se* regulatory taking of the 35 Acres.

b. The District Court Properly Found the City's Actions Resulted in a *Per Se* Categorical Taking of the 35 Acre Property

i. The District Court Properly Rejected the City's Ripeness (Exhaustion) Argument as it Does Not Apply to the Landowners' *Per Se* Categorical Taking Claim

A *per se* categorical taking occurs where government action "completely deprives an owner of all economical beneficial use of her property." *Sisolak,* 122 Nev. at 662, 137 P.3d at 1122. In such circumstances, just compensation is automatically warranted regardless of the public interest advanced by the government action and the claim is exempt from a ripeness (exhaustion) analysis. *See id.* at 664, 1123 (citing *Lucas,* 505 U.S. at 1012 (reasoning that the landowner did not have to pursue any subsequently created permit procedures before his takings claims would be considered ripe); *id.* at 684, 1136 (Maupin, J., dissenting "While I disagree with the majority that a regulatory per se taking has occurred in this instance, I do agree that *Loretto* and *Lucas* takings, like per se physical takings, do not require exhaustion of administrative remedies."); *see also Kelly v. Tahoe Reg'l Planning Agency*, 109 Nev. 638, 648, 855 P.2d 1027, 1033 (1993) (government

action that denies all economically beneficial or productive use of land is compensable as a matter of law without case-specific inquiry into the public interest advanced).

ii. The City's Actions Effected a *Per Se* Categorical Taking of the 35 Acre Property

Here, substantial evidence demonstrates the City denied all of the Landowners' repeated attempts to use the 35 Acre Property and, thus, it is vacant and useless. The City denied the Landowners' stand-alone application for entitlements on the 35 Acre Property, denied the MDA application on the 250 Acres which included the 35 Acres, denied the Landowners access to their property and the right to exclude others via denial of routine fence and access applications. 38 JA 7015-7018; 37 JA 6836; 38 JA 6996, 7008; *see also* Section V(B)(3), *supra.* The City then adopted Ordinances 6617 and 6650 that targeted only the Landowners' property, made it impossible to use the 35 Acre Property for any purpose, and preserved it for public use, specifically authorizing the public to enter onto the property. 109 JA 19663-19667; *see also* Section V(B)(4), *supra.* The City does not dispute these actions.

As a result, the 35 Acre Property is vacant and without economically beneficial or productive use.[41] Indeed, the Landowners' expert opined that the City's actions rendered the 35 Acre Property valueless. 87 JA 15294, 15390. The City never objected to this appraisal analysis and, indeed, agreed to this amount at the Bench Trial. 110 JA 19801:1-3. Meanwhile, the Landowners are paying $205,227.22 per year in real estate taxes for the 35 Acre property along with substantial other carrying costs. 112 pt.1 JA 20107. Not only have the City's actions

[41] Contrary to the City's contention on appeal (AOB 62), the 35 Acre Property's interim use as a golf course was not economically beneficial or productive as the golf course operations were a financial failure even when the Landowners leased the land to the operator for *free*. 28 JA 5198-5199, 5201, 5215. The City's counsel conceded that a golf course use was uneconomic when directly presented with the question by the district court stating: "I think that we agree that it would be very difficult to run a golf course profitably here…" 95 JA 17012:13-15. And, the only uncontested expert to analyze this issue (the Landowners' appraiser) concluded the same. 87 JA 15292, 15349-15355. Because the golf course was a financial failure, the Landowners provided free rent to the operators, but they were still unprofitable. 28 JA 5198-5199, 5201, 5215. Additionally, the City's delays caused extreme financial stress forcing the Landowners to mitigate damages by discontinuing costly watering of the abandoned course. 25 JA 4690.

Additionally, the 250 Acres was not entitled for use as a golf course which is not a legally permissible use on the 35 Acre Property since it is zoned R-PD7, and a golf course open to the public is not allowed on residentially zoned land. *See* LVMC 19.12.010 (prohibiting a golf course use on any residentially zoned land). Additionally, the City is prohibited by its own code from encouraging nonconforming uses. *See* LVMC 19.14.010. Moreover, the City Assessor issued a "Notice of Decision" that, as of December 1, 2016 (prior to the filing of this case), the golf course was not the "lawful" use of the property. 46 JA 8475-8479.

deprived the Landowners of all economically beneficial use of the 35 Acre Property, but the City's actions have caused a negative value to the property. Therefore, there is substantial evidence in the record to support the district court's decision that the City's actions resulted in a categorical taking of the 35 Acre Property. *See Bustos*, 119 Nev. at 365, 75 P.3d at 354 (district court's findings of fact will not be disturbed on appeal if supported by substantial evidence); *see also* NRCP 52(a)(6) (findings of facts must not be set aside unless clearly erroneous). Accordingly, this Court should affirm the finding of a categorical taking of the 35 Acre Property.

c. The District Court Properly Held the City's Actions Effected a Non-regulatory / *De Facto* Taking of the 35 Acre Property

A non-regulatory / *de facto* taking occurs where there is no physical invasion, but the government has taken steps that directly and substantially interfere with an owner's property rights to the extent of rendering the property unusable or valueless to the owner. *See State v. Eighth Jud. Dist. Ct.*, 131 Nev. at 421, 351 P.3d at 742 (citing *Richmond Elks Hall Assoc. v. Richmond Red. Agency*, 561 F.2d 1327, 1330 (9th Cir. 1977)). In *Richmond*, the Ninth Circuit held that "[t]o constitute a taking under the Fifth Amendment it is not necessary that property be absolutely 'taken' in the narrow sense of that word to come within the protection of this constitutional provision; *it is sufficient if the action by the government involves a direct interference with or disturbance of property rights.*" *Id.,* 561 F.2d at 1330 (emphasis

added). Likewise, this Court in *Sloat* and *Schwartz* held a taking occurs where there is "*some derogation* of a right appurtenant to that property which is compensable" or "if some property right which is directly connected to the ownership or use of the property is *substantially impaired or extinguished.*" *Sloat*, 93 Nev. at 269, 563 P.2d at 89-90; *Schwartz,* 111 Nev. at 1003, 900 P.2d at 943. (emphasis added).

This "substantially impaired" rule is further supported by Article 1, section 22(3) of Nevada's Constitution which provides: **"**taken *or damaged* property shall be valued at its highest and best use." Similarly, NRS 37.110(3) provides that the court must assess "damages" to property even though no property has been taken.

Nevada is not alone in adopting this *de facto* taking standard as the great majority of other jurisdictions have adopted a similar rule.[42] Nichols on Eminent Domain, the foremost authority on eminent domain, describes this non-regulatory / *de facto* taking claim as follows:

> Contrary to prevalent earlier views, it is now clear that a *de facto* taking does not require a physical invasion or

[42] *See, e.g., McCracken v. City of Philadelphia*, 451 A.2d 1046, 1050 (Pa. 1982) (holding that a court should focus on the "cumulative effect" of government action and "[a] *de facto* taking occurs when an entity clothed with eminent domain power substantially deprives an owner of the use and enjoyment of his property" or where there is an 'adverse interim consequence' which deprives an owner of the use and enjoyment of the property"); *Robinson*, 783 S.W.2d at 56 (when government "substantially diminishes the value of a landowner's land" just compensation is required); *see also* 38 JA 7033-7035.

> appropriation of property. Rather, a substantial deprivation of a property owner's use and enjoyment of his property may, in appropriate circumstances, be found to constitute a 'taking' of that property or of a compensable interest in the property....

3A Julius L. Sackman, *Nichols on Eminent Domain* §6.05[2], 6-65 (3d rev. ed. 2002).

Thus, a non-regulatory / *de facto* taking occurs where government action renders property unusable or valueless to the owner, substantially impairs or extinguishes some right directly connected to the property, or otherwise damages the property.

Here, substantial evidence in the record supports the district court's conclusion that the City's action effectuated a nonregulatory / *de facto* taking of the 35 Acre Property. Again, although the Landowners have the "right" to use their property for residential development based on its R-PD7 zoning, the City has prevented them from doing so, repeatedly denying the Landowners' attempts to use the 35 Acre Property for that purpose. 37 JA 6836; 38 JA 7013-7018; 38 JA 6996; *see also,* Section V(B)(3), *supra.* In particular, the City council denied all four of the Landowners' applications to develop and use the 35 Acre Property even though City staff and officials confirmed the R-PD7 zoning and allowable density for residential development, and recommended approval of the MDA and stand-alone applications. *See id.* City councilmembers worked behind the scenes to sabotage

any use or development of the 35 Acre Property instructing City staff to draft City Ordinances targeting only the Landowners' property and to deny the Landowners' applications for access and fencing of the 35 Acre Property. 47 JA 8504-8520; *see also* Section V(B)(3)(d-e), *supra.* They also delayed votes on the Landowners' development applications until City Council could enact the Ordinances which further ensured that any development or use of the 250 Acres was impossible. *See id.* These City actions took place to preserve the 35 Acre Property for use by the surrounding neighbors who were expressly told by the same councilmembers that they could access and use the entire 250 Acres as their own for recreation and open space (viewshed). 48 JA 8782:23-8783:3, 8779:23-8780:15; *see also* Section V(B)(4), supra. As a result, the 35 Acre Property sits vacant and useless. *Althaus v. U.S.*, 7 Cl. Ct. 688, 695 (1985) (Court recognized the government "retained an arsenal of weapons to deter any attempt to use the property other than as if it were parkland" in finding a taking of vacant land). 87 JA 15293. Meanwhile, the City imposed exorbitant real estate taxes on the 250 Acres based on the R-PD7 zoning and residential use it won't allow. 112 pt. 1 JA 20107-20109. Despite not being able to use the 250 Acres, the Landowners have paid all real estate taxes, including $205,227.22 annually for the 35 Acre Property. *See id.* All of this is undisputed as the City's entire defense rests on the meritless PRMP II and PR-OS designation to

justify preserving the 250 Acres for the public's use thereby preventing the Landowners from developing or using the 35 Acre Property.

According to the Landowners' unchallenged expert, these City's actions had a "catastrophic" impact on the 35 Acre Property, rendering the property useless and valueless. 87 JA 15294, 15390; *see also,* Section V(B)(7), *supra.* This evidence was unrefuted as the City presented no expert testimony or report, or other rebuttal evidence. 110 JA 19802:13-19. In sum, the evidence showed that City actions rendered the 35 Acre Property unusable and valueless, substantially impaired or extinguished the Landowners' right to use their property, and otherwise "damaged" the 35 Acre Property. Therefore, substantial evidence supports the district court finding the City effected a nonregulatory / *de facto* taking of the 35 Acre Property. *See Bustos*, 119 Nev. at 365, 75 P.3d at 354 (district court's findings of fact will not be disturbed on appeal if supported by substantial evidence); *see also* NRCP 52(a)(6) (findings of facts must not be set aside unless clearly erroneous). Accordingly, this Court should affirm the finding of a non-regulatory/*de facto* taking of the 35 Acre Property.

d. The District Court Was Reasoned in Finding the City liable for a *Penn Central* Regulatory Taking

As an initial matter, when government action physically appropriates private property, as it has here, then a per se taking has occurred (whether under a per se

regulatory or a per se categorical standard). The U.S. Supreme Court recently held that "[w]henever a regulation results in a physical appropriation of property, a *per se* taking has occurred, and *Penn Central* has no place." *Cedar Point*, 141 S.Ct. at 2072. Accordingly, the Landowners did not move for summary judgment on their *Penn Central* claim, instead, it was the City that insisted the *Penn Central* standard was met upon liability for the Landowners' other takings claims being determined against the City.[43] 98 JA 17412:19-24. Accordingly, the district court was reasoned in finding the City liable under *Penn Central*.

i. The Landowners' *Penn Central* Regulatory Taking Claim was Ripe for Review

The Landowners' *Penn Central* regulatory taking claim is subject to a ripeness analysis and there is substantial evidence to support the district court's finding the claim was ripe.

A *Penn Central* taking claim is ripe once the government entity charged with implementing the regulations reaches a final decision regarding the application of the regulations to the property at issue. *See State v. Eighth Jud. Dist. Ct.*, 131 Nev. at 419-20, 351 P.3d at 742 (citing *Williamson Ctny. Reg'l Planning Comm'n v.*

[43] The City argued a regulatory taking under *Penn Central* is a lesser standard, requiring a "near wipeout" so when the district court found a categorical taking, which the City argued required a "total wipeout" the City conceded the lesser standard under *Penn Central* was met.

Hamilton Bank of Johnson City, 473 U.S. 172, 186 (1985)). But when exhausting available remedies, including the filing of a land-use permit application, is futile, a matter is deemed ripe for review. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 625-26 (2001); *see also State, Dep't of Taxation v. Scotsman Mfg. Co.*, 109 Nev. 252, 255, 849 P.2d 317, 319 (1993) (acknowledging that exhaustion of a taxpayer's administrative remedies is not required when doing so would be futile).

Del Monte Dunes provides further guidance on how these regulatory takings claims are ripened. In *Del Monte Dunes*, the landowner submitted applications to the City of Monterey to develop his property. *See id.,* 526 U.S. at 696. The City of Monterey was opposed to the development and sent the landowner back to revise his plans five different times. *See id.* at 696-98. When it became clear to the landowner that the City of Monterey was not going to allow development, the landowner brought inverse condemnation claims. *See id.* at 698. Like this case, the landowner in *Del Monte Dunes* presented evidence that the City of Monterey's denials were potentially motivated by the City of Monterey's desire to purchase the property. *See id.* at 700. The City of Monterey asserted that the landowner was not entitled to a liability finding, because he had not exhausted his administrative remedies and needed to work with the city more to find an agreeable development plan for the property. *Id.* The United States Supreme Court disagreed, holding the taking claims were ripe and the landowner obtained a $1,450,000.00 judgment. *See id.* at 701.

The very recent United States Supreme Court case of *Pakdel v. City and County of San Francisco, California,* 141 S.Ct. 2226 (2021) cited by the City fully supports ripeness in this case. AOB 46. There, the Court held "the finality requirement is relatively modest" and all a landowner need show to meet the *Penn Central* ripeness requirement is "there is no question … about how the regulations at issue apply to the particular land in question." *Id*. at 2231. The Court reasoned, whatever policy reasons support the ripeness doctrine, ripeness "is not a prerequisite for a takings claim when the government has reached a conclusive decision." *Id.*

Here, the Landowners put in significantly more effort than the *Del Monte Dunes* landowner and it is beyond doubt the City reached a conclusive decision regarding the 35 Acre Property. The Landowners worked for nearly three years with the City, gave more concessions than any other developer, revised the MDA approximately 16 times (11 more than the *Del Monte Dunes* landowner), and met the legal requirements under Title 19. 32 JA 5798 - 35 JA 6446 (16 versions of the MDA); 31 JA 5667; 37 JA 6809-6834, specifically, 6828; 26 JA 4807-4809; *see also,* Section V(B)(3)(a-c), *supra.* Still, the City denied the MDA (the only application the City would accept) and denied the stand-alone applications altogether. *Id.* The City even denied the Landowners simple uses of the 35 Acre Property, such as fencing and access, solely to preserve the use of the 250 Acres for the surrounding neighbors. 38 JA 6996, 7013. And, as recently as 2022, the City

again, twice, refused to consider entitlement packages that would have allowed development of the 35 Acre Property. 1 LA 21-22, 30, 131-132. The City clearly reached a conclusive decision that no use of the 35 Acre Property would be allowed, meeting the ripeness standard.

As the landowner's claims were ripe for a liability finding in *Del Monte Dunes*, so are the Landowners' claims in this case. At minimum, any further exhaustion of remedies by the Landowners would have been futile as the City's actions in the aggregate made it clear that development never be allowed. 103 JA 18255-18289.

ii. The City's Actions Effected a *Penn Central* Regulatory Taking of the 35 Acre Property

Even if there is no appropriation or physical invasion, or deprivation of all economically beneficial use, of private property, a regulatory taking may still be established under *Penn Central*, where three factors guide a complex factual inquiry to determine whether government action went "too far:" (1) the economic impact of the government action on the landowner; (2) the extent to which the government action interfered with investment-backed expectations; and (3) the character of the government action. *See Sisolak*, 122 Nev. at 663-64, 137 P.3d at 1122 (citing *Penn Central,* 438 U.S. at 124). Here, the record supports the district court's conclusion

that the City's actions resulted in a *Penn Central* taking of the 35 Acre Property as well.

First, the City's actions have had a devastating economic impact on the Landowners.[44] They are accomplished developers who invested significant time, money, and resources to develop the 35 Acre Property for which they have the "right to develop" based on the R-PD7 zoning. 86 JA 15167:3-4; *see also,* Section V(A), *supra.* The carrying costs and expenses for the 35 Acre Property over the last eight years, including over $1 million per year in real estate taxes alone, have caused substantial financial harm to the Landowners because the City has prevented them from using or developing the 250 Acres. 112 pt. 1 JA 20100-20144, specifically, 20104, 20107-20144; *see also,* Section V(B)(7), *supra*. City officials, including the mayor and councilmembers, acknowledged the significant economic impact of the City's actions on the Landowners. *See* Section IV (B)(3)(a), *supra*. And, the

[44] *Penn Central* applies to government actions as well as regulations. This is because courts consider government action tantamount to a "regulation" where, as here, the City's actions were specifically directed towards the 35 Acre Property. *See, e.g., Mekuria v. Washington Metro. Area Transit Auth.,* 975 F. Supp. 1, 6 (D.C. 1997) (finding that *Penn Central* takings are not narrowly limited to government regulations because *Penn Central* explicitly refers to the possibility of compensable takings occurring as a result of a government's action or program, neither of which necessarily require regulatory or legislative action). Indeed, "the regulatory taking principles of *Penn Central* and its progeny have been applied in a number of non-zoning contexts by both federal and state courts." *Id.* If there is a taking under the three elements set forth in *Penn Central* because of "government action," then a court should enter a finding of a taking. *Id.*

Landowners' expert concluded that the City's actions had a "catastrophic" impact on the 35 Acre Property rendering it entirely valueless. 87 JA 15294, 15390. The City never disputed this, offering no rebuttal expert or other evidence to refute the Landowners' expert opinion.

Second, the City's actions have substantially interfered with the Landowners' reasonable investment-backed expectations. The Landowners had investment backed expectations as the 250 Acres carried R-PD7 zoning when the Landowners acquired it. 47 JA 8674. The City confirmed the 250 Acres' zoning and allowable density for residential development on numerous occasions beforehand. *See* Section IV(A), *supra.* Indeed, the City's official Zoning Verification Letter identified the 35 Acre Property as a hard-zoned R-PD7 parcel with residential building rights. 47 JA 8674. Based on the zoning and these City's assurances, the Landowners invested time, money, and resources to develop the 35 Acre Property with single-family residences. 26 JA 4804-4806; *see also,* Section V(B)(3), *supra.* The Landowners met every City demand. For example, they spent an *additional* $1 million over and above the normal costs for the MDA application alone. 26 JA 4808, para. 21. Given the 250 Acre Property's R-PD7 zoning and the Landowners' extensive due diligence, which included the City's repeated confirmation of that zoning and allowable density for residential development, the Landowners' clearly meet the investment-back expectations guidepost.

The City interfered with the Landowners' investment backed expectations. The City Council unequivocally denied all four of the Landowners' applications to use and develop the 35 Acre Property, despite repeated opinions from its own Planning Department and City Attorney's Office that the Landowners had the right to use their property for residential development. *See* Section V(B)(3), *supra.* In doing so, City officials blamed its about-face on "political pressure" and opposition from surrounding neighbors. 95 JA 17045:2-6. Indeed, the City's denial letters state as much, citing the impact on "surrounding" residents and properties as reason for the denials and not once claiming the PRMP or the general plan's PR-OS designation prohibited development until after the underlying litigation ensued. 37 JA 6836; 38 JA 7013-7018; 38 JA 6996; *see also* Section V(B), *supra.* City councilmembers further sabotaged any use or development of the 250 Acres by instructing City staff to deny future access and fencing applications as well as draft ordinances targeting the 35 Acre Property and making any use or development of the 35 Acre Property impossible. 100 JA 17611; 38 JA 7013-7018; 38 JA 6996; 40 JA 7402-7427; *see also,* Section V(B)(4), *supra.* These councilmembers then delayed votes on the Landowners' development applications until the City Council could enact those ordinances and subsequently deny the Landowners' applications because they didn't meet the Ordinances' impossible to meet new requirements. *See id.* As a result, the 35 Acre Property sits vacant, useless and utilized by the public. 87 JA 15293. Quite

simply, the City's actions did far more than "interfere" with the Landowners' investment-backed expectations, they ruined them entirely.

Third, the character of the City's actions is nothing short of predation. The record reveals no legitimate public interest motive or anything akin to "adjusting the benefits and burdens of economic life to promote the common good." *State v. Eighth Jud. Dist. Ct.*, 131 Nev. at 420, 351 P.3d at 742. Instead, the record shows the City succumbed to political pressure from the surrounding neighbors, targeted the Landowners and referred to their Principals with racial and religious epithets, and then sabotaged any use or development of the 250 Acres, including the 35 Acre Property, after the Landowners refused to "hand over" 180 acres of the 250 Acres for free to the Queensridge Opponents. *See* Section V(B), *supra.* All of this demonstrates that the City unfairly singled out the Landowners to "bear a burden that should be borne by the public as a whole." *Sisolak*, 122 Nev. at 664, 137 P.3d at 1123 (a taking occurs if the purpose of government action suggests it unfairly singled out the landowner to bear a burden that should be borne by the public as a whole).

There is substantial evidence in the record to support the district court's findings on all three of the *Penn Central* guideposts and, as such, the district court was correct in finding the City's actions constitute a *Penn Central* taking. *See Bustos*, 119 Nev. at 365, 75 P.3d at 354 (district court's findings of fact will not be

disturbed on appeal if supported by substantial evidence); NRCP 52(a)(6) (findings of facts must not be set aside unless clearly erroneous). Further, the City capitulated that its actions met the lesser *Penn Central* regulatory taking standard.

D. The Nature of the City's Actions Make the Landowners' Claims "Much More Formidable"

Three general inverse condemnation principles are also particularly relevant and applicable here. *First*, government action that singles out a landowner from similarly situated landowners raises the specter of a taking and makes the taking claim "much more formidable." *Lucas*, 505 U.S. at 1074 (Stevens, J., dissenting).[45] *Second*, takings claims are "much more formidable" when government action targets vacant property, because it causes the landowner to become an involuntary trustee holding the vacant land for the government. *See, e.g., Ehrlander v. State*, 797 P.2d 629, 634 (Alaska 1990) (recognizing that "possession of unimproved and untenanted

[45] "In analyzing takings claims, courts have long recognized the difference between a regulation that targets one or two parcels of land and a regulation that enforces a statewide policy." *See, e.g., A.A. Profiles, Inc. v. Ft. Lauderdale,* 850 F.2d 1483, 1488 (11th Cir. 1988); *Wheeler v. Pleasant Grove,* 664 F.2d 99, 100 (5th Cir. 1981); *Trustees Under Will of Pomeroy v. Westlake,* 357 So.2d 1299, 1304 (L.A. App. 1978); *see also Burrows v. Keene,* 432 A.2d 15, 21 (N.H. 1981); *Herman Glick Realty Co. v. St. Louis Cnty.,* 545 S.W.2d 320, 324-325 (Mo. Ct. App. 1976); *Huttig v. Richmond Heights,* 372 S.W.2d 833, 842-843 (Mo. 1963). As one early court stated regarding a waterfront regulation: "If such restraint were in fact imposed upon the estate of one proprietor only, out of several estates on the same line of shore, the objection would be *much more formidable*." *Lucas*, 505 U.S. at 1074 (*quoting Commonwealth v. Alger,* 61 Mass. 53, 102 (1851)).

property is a desirable economic asset only if: (1) the property may appreciate in value; and (2) the owner is afforded the opportunity to improve the property toward whatever end he might desire").[46] *Third*, "[w]hether the governmental entity acted in bad faith may also be a consideration in determining whether a governmental action gives rise to a compensable taking." *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 487 (Tex. 2012); *see also City of Austin v. Teague*, 570 S.W.2d 389 (Tex. 1978) (recovery of damages warranted where the government's action against an economic interest of an owner is for its own advantage).

The City's actions in this case hit every one of these escalating principles proving the predatory nature of the City's taking actions. The City clearly singled out the Landowners, denying all their development applications and adopting Ordinances which solely targeted the 250 Acres. This is uncontested by the City.

[46] *See also Manke v. Airport Authority,* 101 Nev. 755, 757, 710 P.2d 80, 82 (1985) (recognizing that when vacant property is taken both the "investment value" and "development value" are "frozen" and the value of vacant and unimproved land to the owner is "destroyed"); *Althaus v. U.S.,* 7 Cl. Ct. 688, 695 (1985) (where vacant land is targeted for a taking no prudent person would be interested in purchasing it and it would be futile to begin the development process); *Lange v. State*, 547 P.2d 282, 293 (Wash. 1976) (acknowledging that the effect of condemnation activity targeting vacant land "chains" landowners to the property); *Community Redevelopment Agency of City of Hawthorne v. Force Electronics,* 64 Cal. Rptr. 2d 209, 220 (Cal. App. 1997) (recognizing government taking actions result in improperly making the landowner an "involuntary lender" who is forced to finance public projects without the payment of just compensation).

The City admitted that it did so due to political pressure, having otherwise approved at least six other nearby development projects like the Landowners. 95 JA 17045:2-6; 109 JA 19662:8-9; 44 JA 8101:487; 47 JA 8664-8672; 30 JA 5427:1229-1231. Having sabotaged all of their efforts to use and develop the 35 Acre Property, the City's actions have forced the Landowners to hold it in a vacant condition for the benefit of the public whereby financing a public park on the backs of these Landowners. *See* Section V(B), *supra.* Likewise, the City's political motivation, delay tactics, repeated denial of the Landowners' development applications that met all City requirements, extortion attempts, and use of racial and religious epithets towards the Landowners, among other actions, all evidence bad faith, making the Landowners' takings claims that much more formidable. This Court should affirm the district court's decision accordingly.

E. The District Court Properly Rejected the City's Segmentation Argument and Considered the 35 Acre Property Independently

The City's segmentation argument is meritless and the district court properly rejected it. As a defense to its egregious and predatory actions in this case, the City argues this should be excused because at one time it approved 435 units on a completely separate portion of the 250 Acres – i.e., the 17 Acre Property. AOB 53. This argument fails for several distinct reasons, not least of which, is the finding that the City ultimately voided any approvals on the 17 acres.

First, the driving force behind the City's "segmentation" argument is the claim the entire 250 Acres must be considered the "whole" property and since the City approved 435 units on the 17 Acre Property on February 15, 2017, the City can force the remaining 233 acres to remain open space. As an initial matter, the 17 Acre approvals, given on February 15, 2017, did not require the other 233 acres remain open space as a condition. Clearly, this "segmentation" argument is a mere afterthought for litigation. Additionally, as explained *supra*, the district court in the 17 Acre Case, after extensive hearings, determined that after the City initially granted the 435 units on February 15, 2017, it ***engaged in a series of egregious actions to take the entire 17 Acre Property, rendering the initial approvals entirely meaningless***. 1 LA 50-80. Accordingly, the City's segmentation defense is without merit.

Second, a segmentation defense is only appropriate in a *Penn Central* takings. It has "no place" in a per ser taking analysis. *Cedar Point,* 141 S.Ct. at 2072. Furthermore, contrary to the City's contention, the Landowners did not intentionally segment the 250 Acres to fabricate takings claims. *See* Section V(A)(1), *supra*. Not only does that scenario defy common sense given the financial hardship this litigation has caused the Landowners, but the record refutes it as well. Again, the 250 Acres consisted of five parcels when the Landowners acquired it. 49 JA 8864-8868. When they began the entitlements process to develop the 250 Acres, the City

insisted that the Landowners further subdivide it via the City's parcel map process. 26 JA 4806. Indeed, Peter Lowenstein, the City's top planning official, admitted this. 85 Pt. 5 JA 14992:84:12-25. Moreover, the 35 Acre Property is an independent parcel recognized by the Clark County Tax Assessor as APN 138-31-201-005. Under Nevada law, condemned property is typically determined by individual parcels:

> A question often arises as to how to determine what areas are portions of the parcel being condemned, and what areas constitute separate and independent parcels? Typically, the legal units into which land has been divided control the issue. That is, each legal unit (typically a tax parcel) is treated as a separate parcel. . . .

City of North Las Vegas v. Dist. Ct., 2017 WL 2210130, at *2 (May 17, 2017) (unpublished disposition) (citing 4A Julius L. Sackman, *Nichols on Eminent Domain* § 14B.01 (3d ed. 2016)).[47]

As such, the 35 Acre Property alone – not the 250 Acres or the PRMP's original 1500 acres – constitutes the parcel at issue here. The City's segmentation argument fails for this additional reason.

Likewise, the City's reliance on *Kelly*, to support its segmentation argument is misplaced for several reasons. First, *Kelly* was decided prior to *Sisolak* and thus

[47] *See* NRAP 36(c)(3) (unpublished dispositions issued by the Supreme Court of Nevada after January 1, 2016 may be cited for their persuasive value).

does not have the same precedential value. *See id.,* 109 Nev. 638, 855 P.2d 1027*; cf. Sisolak,* 122 Nev. at 661, 137 P.3d at 1121. Second, *Kelly* is distinguishable here because it involved a temporary moratorium on building in Lake Tahoe that merely delayed, rather than denied, a landowner's development of four of forty-four lots. The *Kelly* court concluded that the moratorium did not constitute a regulatory taking, in part, because the landowner's own appraiser testified that the lots effected by the regulation maintained substantial value during the period of the moratorium since they could eventually be developed. *See id.* at 649-50, 855 P.2d at 1034-35. Delayed development of four lots for a finite period is hardly analogous to the City's denial of any use or development whatsoever of the *entire* 35 Acre Property so that the public can use the same. Indeed, the only expert retained in this matter opined the City's actions rendered the entire 35 Acre Property valueless. 87 JA 15389-15390. No such evidence was present in the *Kelly* case. And, the City has taken this action toward the *entire* 250 Acres despite its assertion otherwise. *See* Section V(B). As such, the Landowners have certainly been deprived of all economic use of the 35 Acre Property whereas the landowner in *Kelly* was not since his lots remained valuable assets and could ultimately be developed. *See id.* at 650, 855 P.2d at 1035.[48]

[48] It is noteworthy that the City refused to consolidate all four inverse condemnation cases involving the 250 Acres when the Landowners sought to do so, perhaps because consolidation would have dispelled the City's segmentation argument.

Finally, *Kelly* does not stand for the proposition that it is improper to consider a single parcel such as the 35 Acre Property separately when evaluating a takings claim. To the contrary, *Kelly* merely recognized further dividing a single parcel into subdivision lots to carve out the specific property impacted by a government regulation as improper segmentation. *See id.* (citing *Penn Central,* 438 U.S. at 130) ("Takings jurisprudence does not divide a *single parcel* into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.")) (emphasis added). Thus, the district court's consideration of the 35 Acre Property apart from the 250 Acres was proper under *Kelly*.

The Nevada Legislature has also expressly rejected the City's segmentation argument. Under NRS 37.039, the government can only compel Nevada landowners to preserve land for "open space" by purchasing it according to the specific and detailed purchase process therein. Specifically, the statute requires: (1) an "open space" plan;[49] (2) the land designated for "open space" must conform to the zoning; (3) an appraisal of the property; (4) a written offer to purchase the land for open space based on the appraisal; (5) "good faith" negotiations for 24 months; (6) a

[49] NRS 376A.010 defines "open space use" to include "preservation of land to conserve and enhance natural or scenic resources," the protection of "viewsheds," and maintenance of natural features to "control floods." NRS 376A.010 then states that an "open space plan" is a plan developed by the county to provide for the "acquisition, development, and use of open-space land."

"detailed description" of the intended use of "each acre;" and (7) "specific reasons for the necessity of acquiring" each acre for open space. The City's segmentation argument purports to allow it to preserve 233 of the 250 Acres for open space in circumvention of the statute. In *Sisolak,* the Court held that such government action constitutes a *per se* regulatory taking namely, a taking occurs when a public agency seeking to acquire property for a public use fails to follow the statutory procedures for doing so and appropriates or permanently invades private property for a public use without first paying just compensation. *See id.,* 122 Nev. at 670, 137 P.3d at 1127. Thus, the City's argument that it has discretion to force the Landowners to keep the 35 Acre Property as "open space" confirms a taking in this case.

Murr v. Wisconsin, 137 S. Ct. 1933 (2017) is also distinguishable here and does not support the City's segmentation argument. *Murr* involved two small parcels of land adjacent to a federally protected river that had less than an acre of buildable area when combined. *See id.* at 1940. The State of Wisconsin was required by federal law to develop a management and development program for that river area. *See id.* In doing so, Wisconsin adopted an ordinance which merged small parcels (less than one acre each) coming into common ownership. *See id.* Upon merger, the single parcel could not be "sold or developed as separate lots." *See id.* The *Murr* parcels subsequently came into common ownership and merged. *See id.* at 1941. They sought a variance from the merger ordinance to move their existing

cabin from one lot to the other so they could sell the cabin lot. *See id.* The variance was denied and the Murrs brought a regulatory taking claim. *See id.* Applying a multifactor standard, the United States Supreme Court concluded the merger regulations did not constitute a taking. *See id.* at 1949. In doing so, the United States Supreme Court looked to state law to first determine the property interest at issue, ultimately holding the takings analysis properly focused on the regulations effect on the Murrs' property as a whole because the Murrs were charged with knowledge of the existing zoning laws, i.e., the merger regulations, when they acquired the property. *See id.* at 1944-45. Moreover, the physical characteristics of the Murrs' land, including steep terrain and riverfront location, presented unique concerns for a fragile land system needing special protection. *See id.* at 1949. Finally, the combined value of the two lots with their existing cabin was far greater than the summed value of the individual lots. *See id.* at 1949.

By contrast, the 35 Acre Property carries a single APN and has always been zoned R-PD7 for residential development, which zoning takes precedence over any land use designation (PR-OS) in the general plan or the PRMP. 37 JA 6784; 85 pt. 4 JA 14965. Here, there is no overarching state law compelling the 35 Acres be merged with other land. And, the 35 Acre Property's residential zoning existed long before the PR-OS designation somehow appeared on the City's master plan. 37 JA 6784:1784-1789; 24 JA 4621:1944-1945. Likewise, the physical characteristics of

the 35 Acre Property do not present any unique concerns for a fragile land system which compel consideration of the 250 Acres as a unified parcel. Quite the opposite, the 35 Acre Property consists of a single parcel and abuts a major roadway, and does not require drainage remediation. Thus, the *Murr* multifactor standard compels a different result here, and the district court correctly analyzed the 35 Acre Property individually as the proper unit of property against which to assess the effect of the City's actions in this case.

Therefore, since the underlying premise for the City's segmentation defense is invalid and it is legally inapplicable to the 35 Acre Property as a single tax parcel, the City's segmentation defense is without merit.

F. Substantial Evidence Supports the District Court's Valuation of the 35 Acre Property at $34 Million

Landowners are entitled to just compensation for the government's taking of private property. Nev. Const. Art. 1, sec. 8(3). Just compensation is determined by the property's market value "by reference to the highest and best use for which the land is available and for which it is plainly adaptable." *Bustos,* 119 Nev. at 362, 75 P.3d at 352. Market value must be determined disregarding the government action or public use taking the property. NRS 37.112.

Here, the Landowners' valuation expert opined: (1) with the residential zoning in place and prior to any City interference with the 35 Acre Property, it had a value

of $34,135,000 as of September 14, 2017 (the statutory date of valuation under NRS 37.120); and (2) the City's actions had a "catastrophic" impact on the 35 Acre Property rendering it entirely valueless. 87 JA 15390. The City never contested this evidence and did not produce an initial or rebuttal expert report as it is legally required to do.[50] Thus, the evidence of the 35 Acre Property's value before the City's actions effected a taking was undisputed. *See id.* Likewise, the only expert that considered how the City's actions impacted the value of the 35 Acre Property determined that they rendered it valueless. Therefore, the district court properly relied on this appraisal.

Finally, the district court properly valued the 35 Acre Property as of the date of service of summons, September 14, 2017, because it is the statutory date of valuation under NRS 37.120 which applies to inverse condemnation proceedings such as these. See *Clark County v. Alper*, 100 Nev. at 391, 685 P.2d at 951 ("[i]nverse condemnation proceedings are the constitutional equivalent to eminent domain actions and are governed by the same rules and principles that are applied to

[50] NRS 37.039(2)(a)(1) provides where the government takes property for public open space, it "must, at a minimum," provide a "copy of the appraisal report" to the landowners. The Nevada Constitution provides "in all eminent domain actions, prior to the government's occupancy, a property owner shall be given copies of all appraisals by the government." Nev. Const. Art. 1, sec. 22(2).

formal condemnation proceedings.").[51] Substantial evidence therefore supports the district court's valuation of the 35 Acre Property at $34 million. *See Bustos*, 119 Nev. at 365, 75 P.3d at 354 (district court's findings of fact will not be disturbed on appeal if supported by substantial evidence); *see also* NRCP 52(a)(6) (findings of facts must not be set aside unless clearly erroneous).

Moreover, the district court's *in limine* decisions regarding the PR-OS designation and the PRMP II were not an abuse of discretion. Again, the residential zoning – not the PR-OS designation or the PRMP II – governs the use of the 35 Acre Property and thus dictated its highest and best use. *See Bustos,* 119 Nev. at 362, 75 P.3d at 352 (just compensation is determined by highest and best use for which land is available and plainly adaptable, and trier of fact should consider zoning permitting viable economic use of property to determine its value). Moreover, the district court did not "exclude" anything from evidence at trial since it had already considered and rejected the same City arguments when determining the property interest issue. *See* 18 JA 3429-3436; *see also* Section VII(C)(1)(b-c), *supra.*

Accordingly, substantial and unchallenged evidence supports the valuation of the 35 Acre Property and it should be affirmed.

---

[51] The City's argument that the date of value is date of taking rather than date of service of summons under NRS 37.120 was the same argument advanced by the county and rejected by this Court in *Alper* and therefore must be rejected here. See *Alper*, 100 Nev. at 391, 685 P.2d at 951.

G. The District Court Did Not Abuse Its Discretion Excluding the 2005 Purchase Price

The district court entered detailed findings of fact and conclusions of law excluding the remote 2005 purchase price of the entity owning the 250 Acres along with other assets and considerations and this was not an abuse of discretion. 110 JA 19826-19842.

First, the district court determined the 2005 purchase price was too remote in time and did not cover substantially the same property or reflect the highest and best use of the 35 Acre Property on the date of valuation. *See Bustos*, 119 Nev. at 365, 75 P.3d 354 (district court properly considered current zoning and potential for higher zoning to determine highest and best use of land); *see also* 5 Julius L. Sackman, *Nichols on Eminent Domain* 21,01(2)(a), 21-10 (2001) (admissible sale must be bona-fide, voluntary, relevant in time, and cover substantially the same property). 110 JA 19826-19842. Importantly, the "complex" and "complicated" transactions that resulted in the acquisition of the 35 Acre Property involved three other properties, and countless other items of consideration, meaning it would be impossible to determine what parts of the consideration applied only to the 250 Acres and then which part of that applied only to the 35 Acre Property. *See* Section V(A)(9), *supra.*

Furthermore, the City did not produce an expert to adjust that 2005-dollar figure to the valuation date or rebut the Landowners' expert opinion that it was irrelevant to the value of the 35 Acre Property on that date. 110 JA 19830-19833. That the City's strategic decision not to hire an expert left it unable to challenge the Landowners' evidence does not make the district court's decision erroneous.

Moreover, there were sales of other similar properties in the area of the 35 Acre Property that sold near the September 14, 2017, date of valuation supporting the valuation of $34,135,000, which the City never contested. 110 JA 19831:16-19. And, with these sales, the complexity of the transaction, and the fact that it was very remote, the only expert retained in this case determined the 2005 purchase price was irrelevant to a valuation analysis as of September 14, 2017. 87 JA 15299.

Finally, the City's rendition of the purchase price as $18,000.00 per acre is not supported by any admissible or even credible evidence and is woefully inaccurate. AOB 89. Rather, PMKs for the Landowners and its predecessor testified that: 1) the option to purchase the entire 250 Acres occurred in 2005; 2) the 2005 option arose due to the inability of the predecessor to fund joint projects and provide a release for construction on the 250 Acres, 3) the option was derived through a series of complex transactions that included exchange of real estate and millions of dollars, and 4) that option was honored in 2015. 81 JA 14148-14151; 26 JA 4803-4809; 26 JA 4811-4812; 91 JA 16181:23-16186:10; 81 JA 14235; *see also*, Section

V(A)(9), *supra*. This uncontested evidence from the parties involved in the transaction rendered the purchase price too remote to the date of value with changes in market conditions, confirmed that it was not a bona-fide purchase as it had elements of compulsion and that any probative value was outweighed by the danger of unfair prejudice, confusion of the issues and misleading the jury. NRS 48.035. 110 JA 1931:20-25.

Finally, the City fails to show how the remote and irrelevant 2005 purchase price could possibly change the district court's September 14, 2017, value conclusion. The district court continued the bench trial to fully consider and review the Landowners' appraiser's report. 110 JA 19804:24-25. Following that review, and fully aware of the 2005 purchase price, the district court entered detailed findings on value. 110 JA 19852-19874. The district court held the City did not contest the report and that the report complies with all appraisal guidelines, provides a proper highest and best use analysis, properly values the 35 Acre Property as of the relevant September 14, 2017 date of value, provides five comparable sales that sold near that date of value, adjusts those five sales to arrive at a value, and then checks that value with three different income approaches to properly arrive at $34,135,000 as of September 14, 2017. 110 JA 19859-19864. The district court concluded the report "is based on reliable data, including reliable comparable sales, and is well-reasoned" and the "conclusions therein are well-supported." 110 JA

19867:16-18. The City fails to show how the 2005 purchase price could change this analysis.

Therefore, the district court did not abuse its discretion excluding the remote 2005 purchase price, and this Court should affirm this holding.

H. The District Court's Post-Trial Awards of Attorney Fees, Costs, and Real Estate Taxes Were Not an Abuse of Discretion

The City's cursory argument that the district court's post-judgment awards must be set aside because they are legally unsupported and confer a windfall on the Landowners is without merit. Generally, any financial burden the City must bear as a result of having to pay just compensation is irrelevant. *See Sisolak*, 122 Nev. at 671, 137 P.3d at 1128 (rejecting contention that government cannot afford to regulate by purchase and awarding landowner millions of dollars in just compensation for government's taking of airspace regardless of financial burden it must bear); *see also Knick*, 139 S.Ct. at 2169 (just compensation clause shares same constitutional status as other protections in the Bill of Rights); *Arkansas Game,* 568 U.S. at 33 (right to full and complete just compensation is self-executing regardless of the impact on government's budget). Specifically, each post-trial award was supported by well-settled Nevada law.

1. The Tax Award was not an Abuse of Discretion

In regard to reimbursement of property taxes, the district court properly cited to this Court's decision that "[a]n owner who is dispossessed from his or her land when it is taken for public use is no longer obligated to pay [property] taxes" and is entitled to reimbursement of property taxes actually paid. *Alper,* 100 Nev. at 395, 685 P.2d at 951. The district court held the taking occurred on August 2, 2017, and the Landowners presented uncontested evidence of property taxes paid from August 2, 2017, forward. 126 pt. 5 JA 23026-23036. The district court properly awarded the Landowners' payment for these taxes under *Alper*. *Id.*

The City's tactic to blame the Landowners' development efforts for the increased property tax assessment (AOB 95) is absurd and in no way vitiates the City's responsibility to reimburse them for property taxes paid after the City took the 35 Acre property. *See Alper*, 100 Nev. at 391, 685 P.2d at 951.

Reimbursement of taxes as part of just compensation is proper as a matter of law, and the district court did not abuse its discretion in awarding the Landowners what the record demonstrates they paid in taxes. *See id.*; *see also* 126 Pt. 5 JA 23030-23031.

2. The Award of Costs was not an Abuse of Discretion

The district court carefully considered all of the Landowners' litigation costs and granted in part and denied in part the City's motion to retax. 126 pt. 5 JA 23037-

23048. The award of costs is constitutionally guaranteed in these proceedings. Nev. Const. Art 1, Sec. 22(4) (just compensation includes compounded interest, as well as all reasonable costs and expenses actually incurred).[52] All of the costs set forth

[52] Based on this authority and over 40 years of Nevada precedent, the district court properly rejected the City's argument that landowners in inverse condemnation cases deserve less constitutional and statutory protection than those in direct condemnation cases. *See Argier v. Nevada Power Co.,* 114 Nev. 137, 140 & n. 2, 952 P.2d 1390, 1392 & n.2 (1998) (rejecting government's argument that eminent domain case was inapplicable in inverse condemnation action because the same rules that govern direct condemnation actions apply in inverse condemnation actions as well); *see also Nevadans for the Protection of Property Rights v. Heller*, 122 Nev. 894, 908 & n.36, 141 P.3d 1235, 1245 & n.36 (2006) (inverse condemnation proceedings are constitutional equivalent of eminent domain); *City of Sparks v. Armstrong,* 103 Nev. 619, 621, 748 P.2d 7, 8 (1987), *superseded by statute as stated in City of N. Las Vegas v. 5th & Centennial, LLC*, 130 Nev. 619, 331 P.3d 896 (2014) (consideration by the district court of the valuation factors relied upon in an inverse condemnation proceeding does not work to convert a condemnation case into an inverse condemnation case because inverse condemnation proceedings are the constitutional equivalent to eminent domain actions and are governed by the same rules and principles that are applied to formal condemnation proceedings).

This Court's 40-year precedent is based on sound public policy: landowners in inverse condemnation cases deserve the same constitutional and statutory protections as landowners in direct condemnation actions. In a direct condemnation the government admits to the taking and agrees to follow the constitutional standard to pay just compensation. In an inverse condemnation action, the government wrongfully takes property without offering just compensation, forcing the landowner to bring an inverse condemnation action. This means the government has violated the United States and Nevada Constitutions as well as Nevada statutes and case law by attempting to take property without payment of just compensation and forcing protracted litigation. Under such circumstances, the government should not be rewarded for violating landowners' constitutional rights. Rather, the government must be compelled to pay full, just compensation to vindicate them. *See Alper v. Clark County,* 93 Nev. 569, 574, 571 P.2d 810, 815 (1977) (inverse condemnation awards vindicate landowners' constitutional rights). Otherwise, the government has

in the district court order were determined by the court to be "reasonable and actually incurred in this matter as they were undisputed." 126 Pt. 5 JA 23041:16-17. The district court did not abuse its discretion awarding costs, as it was "undisputed" the Landowners incurred these costs, and this Court should affirm.

3. The Award of Attorney Fees Was not an Abuse of Discretion

The district court did not abuse its discretion in the award of attorney fees as Nevada has adopted the Federal Relocation Act in its entirety (NRS 342.105) and 42 USC § 4654(C) and 49 CFR § 24.107(c)(2020) of that Act both provide a court "shall" award reasonable attorney fees to a prevailing landowner in an inverse condemnation case. Indeed, this Court held in *Sisolak*, "[b]ecause Sisolak is a property owner who was successful in his inverse condemnation action, the plain terms of the Relocation Act allowed the district court to award reasonable attorney fees and costs" and in *Hsu* this Court held "[a]s indicated in Sisolak, as successful property owners in an inverse condemnation action, the landowners are also entitled to recover … reasonable attorney fees actually incurred." *Hsu*, 123 Nev. at 636, 173 P.3d at 734; *Sisolak*, 122 Nev. at 675, 137 P.3d. 1130.

---

no incentive to bring direct condemnation actions for its public projects and will take private property with impunity as the City has done in this case. Constitutional rights should not be so easily circumvented.

It is likewise irrelevant whether the taking itself involved federal funding because, despite the City's mistaken contention otherwise, there need not be a specific nexus between federal funding and the taking at issue. *See Sisolak*, 122 Nev. at 674, 137 P.3d at 1129. And, even if the nexus for federal funds was required, the district court considered significant evidence and concluded, "[t]he City receives federal funds generally and the city receives federal funds for its parks, recreation and open space program, the program for which the City took the Landowners' Property." 126 Pt. 5 JA 23054. At no time before the district court did the City even contest this nexus to federal funds.

The district court properly awarded attorney fees for the additional reason the Nevada Constitution provides "just compensation" includes "all reasonable costs and expenses actually incurred" in an eminent domain action. Nev. Const. art. 1, sec. 22(4). Here, it is undisputed the attorney fees were an expense actually incurred in this action.

The district court also considered the totality of the circumstances of this case, including the protracted litigation tactics employed by the City, and awarded attorney fees for the additional reasons set forth in NRS 18.010(2)(b) and the City has provided no argument to contest this holding. 126 Pt. 5 JA 23055-223056.

The amount of attorney fees was not challenged as it was awarded based on the actual hourly rate charged in this matter and the district court determined the fees were "reasonable and actually incurred" in this matter. 126 pt. 5 JA 23056:15-19.

The district court's post-trial awards of taxes, costs, and attorney fees were not an abuse of discretion and should be affirmed in their entirety.

Finally, the City's claim that the district court erred by failing to compel the Landowners to convey their fee simple interest to the City is particularly disingenuous given the City's refusal to timely pay the judgment, having even sought a stay from this Court to avoid doing so. Once full compensation is paid a final order of condemnation will be issued transferring title to the City, subject to the Landowners' reversionary rights set forth in the Nevada Constitution. Nev. Const. Art. 1, sec. 22. 126 Pt. 5 JA 23066-23073.

VIII. CONCLUSION

The Nevada Constitution provides that private property shall not be taken "without just compensation having been first made." Nev. Const. art. 1, sec. 8(3). Here, the City engaged in systematic and aggressive actions to preserve the 35 Acre Property for use by the surrounding neighbors and prevented any and all use of the 250 Acres including the 35 Acres. Indeed, the government predation in this case is shocking and forced the Landowners to initiate the underlying inverse condemnation action for taking their 35 Acres without just compensation. After protracted

litigation and extensive evidentiary hearings, the district court properly held the Landowner's had the legal right to use the 35 Acre Property for residential development in accord with its longstanding residential zoning and that the City's actions *clearly effected a taking* by inverse condemnation. Likewise, the district court properly awarded just compensation, including $34 million for the taking based on well supported and uncontested evidence as well as attorney fees, costs, interest (with the exception of the rate), and reimbursement of taxes. All of these district court findings are supported by substantial evidence. Accordingly, this Court should affirm the district court's decision in its entirety except for the interest award which should be amended as set forth below.

APPELLANTS' OPENING BRIEF (CASE NO. 84640)

I. STATEMENT OF ISSUE ON APPEAL

Whether the district court erred in applying a rate of prime plus two percent (5.25%-7.00%) to calculate interest rather than a higher rate of at least twenty three percent (23%) which was supported by competent evidence as well as controlling Nevada inverse condemnation law?

II. STATEMENT OF THE CASE

This case involves the important constitutional question of what rate must be used to calculate interest in protracted inverse condemnation cases to meet the constitutional standard of "just compensation." The Landowners submitted three

sources of competent evidence to support a rate of 23% during the relevant period. The City alleged, without any supporting evidence, the rate must be prime plus two percent, the lowest possible rate. The district court disregarded the only competent evidence presented and ordered a rate of prime plus two percent, which unconstitutionally reduced the Landowners' award more than $40 million. This was legal error and an abuse of discretion, and this Court should reverse and order interest calculated based on a rate of 23%.

III. STATEMENT OF FACTS

A. The Landowners Presented the Only Competent Evidence on the Proper Rate to Calculate Interest

After the district court properly awarded $34 million based on the market value of the taken land, the Landowners filed a post-trial motion to determine the three issues necessary to calculate interest: (1) the date of commencement of interest; (2) the rate of return to apply; and (3) how interest should be compounded. *See* NRS 37.175(4); *see also* 112 pt. 2 JA 20145-20156, 120 JA 22086-22102. The parties agreed that prejudgment interest commenced on August 2, 2017[53] and must be

[53] *See Hsu*, 123 Nev. at 637, 173 P.3d at 733; (prejudgment interest in an inverse condemnation proceeding from the date of taking); *County of Clark v. Sun State Properties, Ltd.*, 119 Nev. 329, 72 P.3d 954 (2003) (prejudgment interest accrues from the date of take).

compounded annually.[54] *See id.* This left only the rate of return to be determined, and the district court set an evidentiary hearing to resolve this narrow issue.

The Landowners presented two experts who focused on the rate of return for land like the 35 Acre Property for the relevant period (since land is what was taken on August 2, 2017). 112 pt. 3 JA 20161-112 pt. 6 JA 20297. Bill Lenhart ("Lenhart"), the managing member of a large real estate brokerage with over 30 years of experience, analyzed seven similar, nearby properties that were vacant and zoned for residential use like the 35 Acre Property, and were purchased and then resold during the relevant 2017-2021 period. 112 pt. 4 JA 20246-112 pt. 6 JA 20297. These seven sales and resales showed an annual rate of return on residential properties in the vicinity of the 35 Acre Property at 30.34%, 21.40%, 26.97%, 27.04%, 26.12%, 26.12%, and 15.01% during the relevant period. 112 pt. 4 JA 20247. Lenhart concluded that if the City had paid the $34,135,000 fair market value of the property on August 2, 2017, the Landowners could have invested in land similar to the 35 Acre Property and earned an annual compounded rate of return of 25-27% from 2017-2021. *Id.*

Expert MAI appraiser, Tio DiFederico ("DiFederico"), who also has over 30 years of experience appraising property in Las Vegas, considered Colliers

[54] *See* Nev. Const. art. 1, Sec. 22(4) (prejudgment interest must be compounded annually).

International Research & Forecast Reports for the relevant period (from the third quarter 2017 through third quarter 2021), which reported an increase of 190.2% for vacant residential land in the area of the 35 Acre Property (which equated to 30.5% per year, to be compounded annually). 112 pt. 3 JA 20161-20164. He also considered data compiled by CoStar, a source relied upon by expert appraisers that compiles property sales in Las Vegas, which showed an increase of 128.6% for vacant residential land in Las Vegas from 2017-2021 (which equated to 23% per year). *Id.* He likewise considered the rate increase for vacant residential finished lots sold in the Summit, a residential area near the 35 Acre Property in Summerlin, which showed an increase of 18.9% per year. *Id.* DiFederico further considered the sale and resale of five vacant residential properties in Las Vegas during the relevant 2017-2021 period (which showed an increase of 23% per year), ultimately concluding that, had the City paid the $34,135,000 fair market value of the property on August 2, 2017, the Landowners could have invested in land similar to the 35 Acre Property and earned an annual compounded rate of return of 23% from 2017-2021. 112 pt. 3 JA 20165. Even though Lenhart determined an interest rate of 25%-27% was appropriate, the Landowners ultimately requested 23% consistent with DiFederico's more conservative analysis, asking the district court to award the latter. 112 pt. 2 JA 20153-20154.

In addition to expert opinions, the Landowners also presented evidence how they would have invested the proceeds. 120 JA 22102. Specifically, the Landowners' Principal confirmed that had they been paid for their property contemporaneously with it being taken in 2017, they would have invested in real estate since this has always been their common practice as developers. *Id.*

By contrast, the City presented nothing at the evidentiary hearing. Instead, the City made two conclusory arguments: (1) 23% is too high; and (2) the Court should use the prime plus two percent rate (5.25%-7.00% for the relevant period). 119 pt. 1 JA 21742-21762. Perplexed by the City's lack of evidence, the district court asked:

> What does a trial court like me do under the facts of this case where I have to decide what the rate should be; right, in light of the current state of the evidence, because this is a question of fact.
>
> * * *
>
> And then we have a scenario where there's interest rates being offered by the plaintiff from an expert perspective. I understand there's been argument, but as it pertains to the methodology and those things, they [the Landowners' expert reports] really haven't been challenged with another report.

126 pt. 1 JA 22888:19-23, 126 pt. 2 JA 22917:12-16.

B. The District Court Disregarded the Expert and Market Evidence and Improperly Adopted Prime Plus Two Percent to Calculate Prejudgment Interest

Despite the City's failure to present any evidence, the district court ordered prime plus two percent to calculate the prejudgment interest and then ordered the City to prepare findings based "on the record on file herein." 126 pt. 5 JA 23074. The district court offered no other explanation or reasoning for its conclusion. *Id.* Based on the parties' agreement, the findings of fact and conclusions of law properly conclude that interest must commence on August 2, 2017, continues to run until satisfied, and must be compounded annually. 127 JA 23176-23177. Conspicuously absent from the findings, however, is any evidentiary support or explanation for the district court's adoption of the prime plus two percent interest. 127 JA 23170-23177. Regardless, the district court's decision to reduce the Landowners' just compensation award does not meet the constitutional mandate of full and real just compensation.[55]

IV. SUMMARY OF ARGUMENT

This Court has held interest in an inverse condemnation award is part of the landowner's constitutionally mandated just compensation, it must compensate the landowner for the delay in payment, and it may be the most important part of the just compensation award in protracted condemnation proceedings like this and in

[55] Applying the appropriate 23% rate of return provides an interest award of $52,515,866.90 and applying prime plus two percent rate (5.25% - 7.00%) provides an interest award of $10,258,953.30, with daily interest running until the judgment is paid. 112 pt. 2 JA 20154; 127 JA 23176:25-27-23177.

fact exceed the value of the land. The rate used to calculate the interest award is a question of fact that must be based on competent evidence and must achieve the constitutional mandate of just compensation. This Court has consistently held prime plus two percent is an arbitrary "floor rate" that must only be used if unchallenged and if competent evidence is provided to support a higher rate necessary to meet the standard of just compensation that higher rate must be used. Moreover, this Court has upheld a rate that was based on the rate of return in land investments similar to the land taken during the relevant period.

Here, the Landowners presented competent expert testimony supporting an interest rate of 23% necessary to meet the just compensation standard. The City did not contest this testimony, but merely made a conclusory argument that the "floor" rate of prime plus two percent (5.25%-7%) should apply. As the Landowners presented the only competent evidence of a rate that meets the constitutional standard of just compensation it was error and an abuse of discretion for the district court to order interest based on the City requested prime plus two percent. This Court should amend the judgment accordingly.

V. ARGUMENT

A. Standard of Review

This Court reviews the district court decision on prejudgment interest for an abuse of discretion. *See Sisolak,* 122 Nev. at 675, 137 P.3d at 1130 (award of

prejudgment interest reviewed by this Court under the abuse of discretion standard). Here, the district court abused its discretion by using a rate of prime plus two percent to calculate interest because the evidence adduced on interest substantially supports a rate of 23%, and there is nothing in the record to support the prime rate. *See State ex rel. DOT v. Barsy,* 113 Nev. 709, 719, 941 P.2d 969, 977 (1997) (citing *State Emp. Sec. v. Hilton Hotels,* 102 Nev. 606, 608, 729 P.2d 497, 498 (1986) (substantial evidence is evidence which a reasonable mind might accept as adequate to support a conclusion)).

B. The Standard to Determine the Rate of Interest is "Just Compensation" and this Rate Must Be Based on Competent Evidence

The Nevada Constitution makes clear that interest is part of the constitutionally mandated "just compensation" and this Court has held the word "just" is used to intensify the meaning of the word "compensation" and conveys the idea that the equivalent to be rendered for the property taken shall be "real, substantial, full, and ample." Nev. Const. art. I §22(4) (just compensation shall include, but is not limited to, compounded interest); *Alper,* 100 Nev. at 392, 685 P.2d at 951 (*quoting Tacchino*, 89 Nev. at 152, 508 P.2d at 1214). The "purpose of awarding interest is to compensate the landowner for the delay in the monetary payment that occurred after the property had been taken" and must put the landowner "in as good position pecuniarily as [they] would have been if [their] property had

not been taken." *Barsy,* 113 Nev. at 718, 941 P.2d at 977; *Sisolak,* 122 Nev. at 675, 137 P.3d at 1130. Critical to this case, prejudgment interest is often the most important part of a just compensation award because it may be very substantial in protracted condemnation proceedings and may in fact exceed the value of the land. *Alper,* 100 Nev. at 392, 685 P.2d at 951.

The rate used to calculate interest must meet this constitutional standard and is a "question of fact" decided by the district court in a post-trial hearing. NRS 37.175(4)(b). This Court has provided three important guiding principles for that hearing. First, this Court has held that statutory interest of prime plus two percent is "not prima facie proof of a fair rate," but rather a "floor rate" and should only be used when unchallenged. *Alper*, 100 Nev. at 394, 685 P.2d at 952. *See also Barsy*, 113 Nev. at 718, 941 P.2d at 977; NRS 37.175(4)(b). Second, the rate must be based on "competent evidence" that meets the constitutional standard of just compensation. *Id.* Third, this Court approved a rate based on what a landowner could have earned during the delay period had he "invested his money in land similar to that condemned." *Barsy,* 113 Nev. at 718, 941 P.2d at 976.

C. The Only Competent Evidence for a Rate of Return Based on Empirical Data was Presented by the Landowners; the District Court Abused Its Discretion in Disregarding this Evidence and Adopting Prime Plus Two Percent

The district court expressly acknowledged the only evidence presented to

support a rate of return was the Landowners' experts. 126 pt. 1 JA 22888:19-23, 126 pt. 2 JA 22917:12-16. Both Landowners' experts relied on empirical data (the sale and resale of residential land similar to the 35 Acre Property) to arrive at an opinion of the rate of return (23%-25%) the Landowners could have earned on $34,135,000 during the relevant period (2017-2021) had the City actually paid the Landowners this money on August 2, 2017. 112 pt. 3 JA 20161-112 pt. 6 JA 20297. The competency and accuracy of this evidence was never challenged by the City. And, the City elected not to present any evidence whatsoever to rebut or support a lower rate, thereby conceding that, had the City paid the $34,135,000 on August 2, 2017, the Landowners could have earned 23%-25% per year by investing the funds in land similar to the 35 Acre Property. 119 pt. 1 JA 21742-21762.

This interest rate is particularly important in this case, because the Landowners are real estate developers who have, for over 25 years, primarily invested in land especially during a period of strong economic growth. 120 JA 22102. Indeed, the rate of return on land appears to be the only relevant and competent measure of interest rates in a case like this rather than an instrument that achieves a rate of prime plus two percent. And, this Court expressly approved a rate based on this exact type of evidence, namely, the rate that could be earned had the landowner "invested his money in land similar to that condemned." *Barsy*, 113 Nev. at 718, 941 P.2d at 976.

Because the City did not present evidence to contest the 23% rate, the district court's decision lacks evidentiary support for prime plus two percent (5.25%-7.00%) accomplishing the constitutional standard for just compensation and instead provides unsupported conclusory statements. For example, the order states: "[t]hrough the payment of prime plus two percent, Plaintiffs will be made whole." 127 JA 23174:1. However, there is no evidence in the record supporting this statement. The order also relies exclusively on dictionary definitions to distinguish between "interest" and "profit," reaching the erroneous conclusion that the Landowners' interest rate was based on the latter even though the dictionary is not evidence of a proper rate of return and the Landowners' experts opined otherwise based on market evidence. 127 JA 23174:15-23175:15. Because the Landowners presented the only evidence of an appropriate interest rate, the district court abused its discretion by disregarding it and instead applying prime plus two percent to calculate interest.

D. A Rate of 23% is Necessary to Meet this Court's Just Compensation Standard

Here, a rate of 23% is necessary to meet the constitutional requirement of just compensation, because it was the actual market rate of interest during the years in question. Specifically, the 35 Acre Property was taken on August 2, 2017, and the uncontested value of the 35 Acre Property as of the date of value (September 14,

2017) was $34,135,000, which is the finding of the district court in this case. 127 JA 23183-23192. The City, however, did not pay $34,135,000 on August 2, 2017, meaning the City has had the use of both the 35 Acre Property and the money it should have paid the Landowners on that date. The uncontested facts are that from August 2, 2017, forward land values for properties like the 35 Acre Property increased twenty three percent (23%) a year (compounded annually) up through 2021. This means that if the City had not taken the 35 Acre Property and the Landowners had sold the property on the open market for $34,135,000, they could have (and the evidence showed they would have) *reinvested that money* in similar property and earned 23% per year, compounded annually. Again, the City never contested that the value of those similar properties increased 23% annually from August 2, 2017 through 2021. Thus, it is undisputed that the market rate of interest during the years in question was 23%. A rate of 23% is therefore necessary to put the Landowners back in the same position monetarily as they would have been had the property not been taken. Simply put, without providing the market rate of 23% just compensation cannot be achieved as the Landowners will be unable to reinvest the money in similar property having instead been compensated with less than half of todays market value.

Moreover, the evidence indisputably demonstrates that a rate of 23% is fair and reasonable given the egregiousness of the City's action, the protracted

condemnation proceedings in this case, and the escalating market during this time, the benefit of which the Landowners were denied by the City. Specifically, after repeatedly confirming the Landowners' R-PD7 zoning and initially supporting residential development of the Landowners' property, the City succumbed to political pressure and demanded the Landowners give their property to the Queensridge Opponents. 95 JA 17045:2-6; 109 JA 19662:8-9. The City did so because the Queensridge Opponents wanted it for open space (a viewshed) adjacent to their residences but were unwilling to buy the property on the open market. 38 JA 7021. When the Landowners likewise refused the City's demands to give their property to the Queensridge Opponents for free, the City delayed and stalled their development applications with outrageous demands and conditions. 32 JA 5797; 30 JA 5532:599-601; 30 JA 5458:2060-2070; 31 JA 5667. For several years, the Landowners spent millions and jumped through every one of the dozens of hoops the City demanded for their development applications. 26 JA 4808:4-6; 31 JA 5667; 31 JA 5669-5716. Despite City Planning staff and commission approvals, the City did the bidding of the Queensridge Opponents and ultimately denied the Landowners' applications when they reached the City Council. 37 JA 6836; 38 JA 7015-7018; 30 JA 5510-31 JA 5665, specifically 5511, 5660, 5663. Through these systematic, egregious actions, the City prevented any development whatsoever of the 35 Acre Property, authorized public use of the 35 Acres, caused extreme financial

hardship to the Landowners, and eventually forced them to initiate the underlying inverse condemnation action for taking their property without just compensation. Since then, the City has only further delayed the matter, making a rate of prime plus two percent even more unreasonable and judicially unacceptable. *See Alper*, 100 Nev. at 394, 685 P.2d at 951 (the statutory rate of interest can only be applied to a claim for just compensation if it is reasonable and judicially acceptable). The district court's rate of interest should be recomputed accordingly.

E. Prime Plus Two Percent is an Arbitrary Rate Not Tied to Any Standard of Just Compensation

The prime rate the district court utilized is the lowest short-term rate set by the Federal Reserve on financial depositories' borrowing and lending funds overnight which is not geared toward any "just compensation" standard. It has nothing to do with the purpose of interest in an inverse condemnation case, which is "to compensate the landowner for the delay in the monetary payment that occurred after the property had been taken." *Sisolak*, 122 Nev. at 675, 137 P.3d at 1130. It has nothing to do with putting the Landowners "in as good position pecuniarily as [they] would have been if [their] property had not been taken." *Barsy*, 113 Nev. at 718, 941 P.2d at 977. It has nothing to do with this Court's test to determine a rate an owner can earn had he "invested his money in land similar to that condemned." *Id*. And, it bears no relation to the standard for determining just compensation which

is "what has the owner lost, not what has the taker gained." *Del Monte Dunes*, 526 U.S. at 710.

In fact, it is universally recognized that the prime rate does not reflect a true market based rate determined from the perspective of an owner who has waited years for compensation. The economic reality here is that if the full fair market value had been paid on the August 2, 2017 date of taking, the Landowners would have been able to earn 23%, based on the real estate market during the relevant delay period. For this reason, this Court has determined the statutory prime plus two percent is "not prima facie proof of a fair rate," but rather the "floor" and should only be used where no competent evidence of another rate is presented. *Barsy*, 113 Nev. at 718, 941 P.2d at 977.

By choosing the "floor" prime plus two percent rate without any supporting data or evidence whatsoever, the district court ignored economic realities and lowered the experts' interest rate by over 17% per year (23% - 5.25% to 7.00%), thereby reducing the Landowners' interest from $52,515,866.90 to $10,528,953.30. Consequently, not only did the Landowners lose the use of their property since August 2, 2017, but they also lost the use of their money from August 2, 2017 to the present. This certainly does not reflect Nevada's standard that just compensation be "real, substantial, full, and ample." *Alper*, 100 Nev. at 392, 685 P.2d at 951.

Finally, public policy does not support an interest rate of prime plus two percent in this case. When government takes private property and delays payment of just compensation through protracted litigation (as the City did here), landowners become unwilling creditors making a loan they did not want to make, lending to a borrower they would prefer not to have as a debtor. It adds insult to injury to allow the government to pay only prime plus two percent, which is much less than the market interest rate for the delay period. The City has financed its public project on the backs of these Landowners. Accordingly, it was an abuse of discretion for the district court to use prime plus two percent to calculate interest.

F. The District Court's Interest Award Misinterprets This Court's Precedent

Citing *Barsy*, *Alper*, and, *Armstrong*, the district court erroneously concluded that this Court has never affirmed an interest rate above prime plus two percent. 127 JA 23175-23176. In doing so, the district court overlooked a critical distinction here, namely, there was undisputed evidence in this case, including empirical market data and expert opinions, proving the rate of return for land investment during the relevant period far exceeded the prime plus two percent rate. By contrast, the *Barsy* court concluded prime plus two percent met the constitutional standard of just compensation because prime plus two percent was consistent with the rate of return for land investments during the relevant period in that case. *See id.*, 113 Nev. at 718,

941 P.2d at 977. Likewise, the *Alper* court recognized that a rate of prime plus two percent is merely a "floor" and remanded the case back to the lower court to decide the proper rate. *See Alper*, 100 Nev. at 394, 685 P.2d at 952. Similarly, the *Armstrong* court remanded the pre-judgment interest issue to the district court to determine the proper rate, because just compensation includes interest from the date of taking and is not limited by the rate set forth in NRS 37.175. *See Armstrong*, 103 Nev. at 623, 748 P.2d at 10.

Thus, the district court misinterpreted this Court's decisions on interest in *Barsy*, *Alper*, and, *Armstrong*, all of which recognized that prime plus two percent is the minimum rate for computing interest and courts may use a higher rate if supported by the evidence. Because the evidence in this case indisputably supported a rate of 23%, the district court erred by using prime plus two percent to calculate the Landowners' interest award.

G. It is an Abuse of Discretion to Decide Just Compensation Based on the Fiscal Impact to the Government

Again, any financial burden the City must bear as a result of having to pay just compensation is irrelevant. *See Sisolak*, 122 Nev. at 671 137 P.3d at 1128 (rejecting contention that government cannot afford to regulate by purchase and awarding landowner millions of dollars in just compensation for government's taking of airspace regardless of financial burden it must bear); *see also Arkansas*

Game, 568 U.S. at 33 (right to full and complete just compensation is self-executing regardless of the impact on government's budget). And, in the specific context of deciding the rate of return in an inverse condemnation case, this Court recognized that "prejudgment interest may be very substantial in protracted condemnation proceedings and *may in fact exceed the value of the land.*" *Alper*, 100 Nev. at 393, 685 P.2d at 949 (emphasis added). Thus, the Landowners are entitled to just compensation, including interest, regardless of the fiscal impact on the City.

VI. CONCLUSION

Based on the foregoing, the Landowners' interest award does not meet the constitutional requirement of just compensation and should be recomputed. Indeed, there is no evidentiary support whatsoever for the district court's prime plus two percent rate (5.25%-7.00%). The City presented nothing, and all the evidence presented by the Landowners indisputably showed a rate of 23% was proper based on the return on investment in land similar to the 35 Acre Property during the relevant time period. In other words, the evidence adduced substantially supports the latter rate, so it was an abuse of discretion for the district court to use the prime plus two percent rate. The Landowners, therefore, respectfully request that this Court reverse the district court's decision regarding the interest rate and order that interest – which commences on August 2, 2017 and compounds annually – be computed at a rate of 23%. Based on the calculations attached to the Landowners'

motion to determine interest, the accuracy of which was not challenged by the City, the Landowners should be awarded interest as follows:

1. From August 2, 2017 (date of take) – February 2, 2022
   $52,515,866.90 ($34,135,000 x 23% for 4.5 years, compounded annually)

2. At a daily rate thereafter as follows:
   From February 2, 2022 – August 2, 2023
   $54,601.92 per day ($19,929,699.57 interest / 365)
   From August 2, 2023 – August 2, 2024
   $67,160.36 per day ($24,513,530.51 interest / 365).
   112 pt. 2 JA 20154.

The judgment should be amended accordingly.

Dated this 17th day of January 2023.

CLAGGETT & SYKES LAW FIRM

/s/ Micah S. Echols

_____

Micah S. Echols, Esq.
Nevada Bar No. 8437

LAW OFFICES OF KERMITT L. WATERS
Kermitt L. Waters, Esq.
Nevada Bar No. 2571
James J. Leavitt, Esq.
Nevada Bar No. 6032
Michael A. Schneider, Esq.
Nevada Bar No. 8887
Autumn L. Waters, Esq.
Nevada Bar No. 8917

Attorneys for Landowners

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point Times New Roman font.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☒ proportionally spaced, has a typeface of 14 points or more and contains **37,702** words and a motion to exceed has been filed with the Court; or

☐ does not exceed _____ pages.

Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 17th day of January 2023.

CLAGGETT & SYKES LAW FIRM

/s/ Micah S. Echols

_____

Micah S. Echols, Esq.
Nevada Bar No. 8437

LAW OFFICES OF KERMITT L. WATERS
Kermitt L. Waters, Esq.
Nevada Bar No. 2571
James J. Leavitt, Esq.
Nevada Bar No. 6032
Michael A. Schneider, Esq.
Nevada Bar No. 8887
Autumn L. Waters, Esq.
Nevada Bar No. 8917

Attorneys for Landowners

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **LANDOWNERS' COMBINED ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL** with the Supreme Court of Nevada on the 17th day of January 2023. I will electronically serve the foregoing document in accordance with the Master Service List as follows:

George F. Ogilvie III, Esq.
gogilvie@mcdonaldcarano.com
John Christopher Molina, Esq.
cmolina@mcdonaldcarano.com
Amanda C. Yen, Esq.
ayen@mcdonaldcarano.com
McDONALD CARANO LLP
2300 West Sahara Avenue, Ste., 1200 Las Vegas, Nevada 89102
(702) 873-4100 – Telephone
Attorneys for City of Las Vegas

Bryan K. Scott, Esq.
bscott@lasvegasnevada.gov
Philip R. Byrnes, Esq.
pbyrnes@lasvegasnevada.gov
Rebecca L. Wolfson, Esq.
rwolfson@lasvegasnevada.gov
LAS VEGAS CITY ATTORNEY'S OFFICE
495 South Main Street, 6th Floor, Las Vegas, Nevada 89101
(702) 229-6629 – Telephone
Attorneys for City of Las Vegas

Andrew W. Schwartz (pro hac vice)
schwartz@smwlaw.com
Lauren M. Tarpey (pro hac vice)
ltarpey@smwlaw.com

396 Hayes Street San Francisco, California 94102
SHUTE, MIHALY & WEINBERGER, LLP
(415) 552-7272 – Telephone
Attorneys for City of Las Vegas

Debbie A. Leonard, Esq.
debbie@leonardlawpc.com
LEONARD LAW, PC
955 South Virginia Street, Ste. 220, Reno, Nevada 89502
(775) 964-4656 – Telephone
Attorneys for City of Las Vegas

Kermitt L. Waters, Esq.
kermitt@kermittwaters.com
James J. Leavitt, Esq.,
jim@kermittwaters.com
Michael Schneider, Esq.
michael@kermittwaters.com
Autumn L. Waters, Esq.
autumn@kermittwaters.com
LAW OFFICES OF KERMITT L. WATERS
704 South 9th Street, Las Vegas, Nevada 89101
(702) 733-8877 – Telephone
Attorneys for Landowners

Elizabeth Ghanem Ham, Esq.
eham@ehbcompanies.com
EHB COMPANIES, LLC
1215 South Fort Apache Road, Ste. 120, Las Vegas, Nevada 89117
(702) 940-6930 – Telephone
Attorneys for Landowners

Karl Hall, Esq.
Reno City Attorney
Jonathan Shipman, Esq.
CITY OF RENO
1 E. First Street

P.O. Box 1900, Reno, Nevada 89505
Attorneys for Proposed Amicus Curiae

Steven M. Silva, Esq.
NOSSAMAN, LLP
895 Pinebrook Road. Reno, Nevada 89509
(775) 895-3036 – Telephone
Attorneys for Proposed Amicus Curiae

/s/ Anna Gresl

_____

Anna Gresl, an employee of
CLAGGETT & SYKES LAW FIRM