IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 84345
and
Case No. 84640

CITY OF LAS VEGAS, a political subdivision of the State of Nevada,

Appellant

v.

180 LAND CO, LLC, a Nevada limited-liability company, FORE STARS LTD., a Nevada limited liability company,

Respondents

District Court Case No.: A-17-758528-J
Eighth Judicial District Court of Nevada

CITY OF LAS VEGAS' REPLY BRIEF ON APPEAL AND ANSWERING BRIEF ON CROSS-APPEAL

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INTRODUCTION

The Developer's answering brief is deficient in rebutting the dispositive arguments made by the City:

1. For decades, the PR-OS designation and PRMP sought and obtained by the Developer's predecessor have prohibited housing in the Badlands, the City Council needs to approve a General Plan amendment to allow anything other than open space and recreation, and the Developer knew this at the time it purchased the Badlands. The City's denial of the 35-Acre Application simply maintained the status quo, did not alter the property's value, and was not a taking.
2. The City's approval of residential, commercial, gaming, recreation and open space uses in the PRMP and the 435-Unit Project in the Badlands negates any regulatory taking claim.
3. A landowner has no right, constitutional or otherwise, to have its proposed project approved simply because the project does not exceed the allowable zoning density.
4. There is no evidence to show a physical taking because the City Council did not invade, exact an easement, or authorize trespass on the Badlands.

5. The Judgment fails to point to any non-regulatory actions by the City that could establish liability for a non-regulatory taking.
6. The Judgment amount is unsupportable because it incorrectly presumes that the Developer could develop housing, notwithstanding the PR-OS designation.

Under the Developer's theory of the case, a developer has a constitutional right to have any project approved that does not violate the applicable zoning ordinance. This would render superfluous city council review and regulatory takings because courts would be compelled to order the agency to approve the project without conditions. It would also lead to the absurd result that an agency could only amend a zoning ordinance if it paid compensation to all affected property owners. If property owners have a constitutional right to build free of any local agency discretion, as the Developer contends, Nevada's carefully crafted framework of land use regulation in NRS Chapter 278, which mandates that local agencies exercise discretionary review over development projects to promote sound land use planning, would be unconstitutional.

These outcomes are contrary to law. When denying the City's PJR, the district court agreed, ruling that: (1) the PR-OS designation was valid and in effect when the Developer bought the Badlands; (2) the Developer was aware that the PR-OS

designation did not permit housing; (3) the PR-OS designation is not preempted by zoning even if the two laws were in conflict (they are not); (4) the City Council had discretion to retain the PR-OS designation to preserve the open space as an amenity; and (5) the City Council had discretion to deny the Developer's project even if it complied with zoning. Because the Developer failed to appeal the PJR Order to challenge any of these findings and conclusions, they continue to govern the case.

Nevertheless, in contravention of the PJR Order and defiance of unanimous authority, the district court accepted the Developer's argument that the City effected categorical and *Penn Central* takings of the 35-Acre Segment on the erroneous basis that the Developer had a constitutionally protected property right to have its housing project approved. This Court's precedents make clear that the City has discretion to deny or condition development applications and no such right exists. The Developer cannot escape these authorities by contending they apply only if the Developer challenges the decision in a petition for judicial review. Because the City Council has the same discretion to deny a development application whether the Developer then petitions for judicial review or brings a regulatory taking action, the Developer's incongruous position must be rejected.

Recognizing that the 435-Unit Project approval obviated its regulatory takings claims, the Developer led the district court to the erroneous conclusion that the City

had "clawed back" the approval. The record lacks evidence to support this unfounded conclusion. Admitting as much, with its Answering Brief, the Developer resorted to submitting extra-record orders from other cases to backfill the deficiencies in the Judgment. Not only are these outside the appellate record, but they are not "evidence," and their disputed findings are not proper subjects of judicial review. Although the Court provisionally denied the City's motion to strike these prohibited documents pending its review of the merits, nothing presented by the Developer supports the district court's "claw back" theory. In sum, the Answering Brief confirms that reversal of the legally and factually flawed Judgment is required and, instead, judgment should be entered for the City.

ARGUMENT

A. Because Only The City Council Can Take Action To Effect A Regulatory Taking, The Statements And Actions Of Individuals On Which The Answering Brief Heavily Relies Are Irrelevant

1. The Developer Misleadingly Attributes Actions To "The City" That Were Merely Statements By Individual Council Members Or Staff

The Legislature has charged city councils with planning and zoning, delegating to cities broad powers "to address matters of local concern." NRS 268.001(6)(a); NRS 268.003(2)(b). To accord with separation-of-powers principles, courts must defer to local land use regulation, except where extreme

regulatory restrictions on the owner's use wipe out or nearly wipe out the property's value. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937) (courts should refrain from replacing the policy judgments of lawmakers and regulators with their own regarding non-fundamental constitutional rights); *State v. Eighth Jud. Dist. Ct.*, 131 Nev. 411, 419, 351 P.3d 736, 741 (2015) (to effect a regulatory taking, the regulation must "'completely deprive an owner of all economically beneficial use of her property'") (quoting *Lingle v. Chevron, U.S.A.*, 544 U.S. 525, 538 (2005)); *Kelly v. Tahoe Reg'l Planning Agency*, 109 Nev. 638, 649-50, 855 P.2d 1027, 1034 (1993) (regulation must deny "all economically viable use of [] property" to constitute a taking under either categorical or *Penn Central* tests), *citing Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978); *Boulder City v. Cinnamon Hills Assocs.*, 110 Nev. 238, 245-46, 871 P.2d 320, 324-35 (1994) (same). In other words, only *regulations* – i.e., binding law – can constitute a regulatory taking.

As the City's governing body, the City Council has the final say regarding land use regulation. NRS 278.3195(4). Under Nevada's Open Meeting Law, the City Council can adopt regulations only at a properly noticed public meeting that meets all statutory requirements. *See* NRS 241.015; NRS 241.020; NRS 241.035; NRS 241.036; *see also Comm'n on Ethics of the State of Nevada v. Hansen*, 134 Nev.

304, 307, 419 P.3d 140, 142 (2018) (discussing when action by legislative body is required). A public body composed of elected officials, such as the City Council, may not act except by majority vote. NRS 241.0355(1). Any City Council action other than by majority vote is void. NRS 241.036. In rejecting the Developer's PJR, the district court agreed:

> The statements of individual council members are not indicative of any arbitrary or capricious decision making. The action that the Court is tasked with reviewing is the decision of the governing body, not statements made by individual council members leading up to that decision. . . . Statements from planning staff or the City Attorney that the Badlands Property has an RPD-7 zoning designation do not alter [the district court's] conclusion [that the City Council has discretion to deny or condition a project "no matter that the property was zoned for the proposed use."].

1(221).

Rather than point to the City Council's regulatory actions, the Developer relies on statements and actions of individual Councilmembers, the former City Attorney, Planning staff, and the Developer's attorneys, which do not have the force of law and are irrelevant to a regulatory taking analysis. *See State*, 131 Nev. at 420, 351 P.3d at 742 (statement of individual member of Las Vegas City Council that the City will not allow development of property is not a legally binding City regulation); *Nevada Contractors v. Washoe Cty.*, 106 Nev. 310, 313, 792 P.2d 31, 33 (1990) ("By themselves, '... the opinions of council members ...' do not constitute

substantial evidence.") (internal citation omitted); *see also City of Pharr v. Pena*, 853 S.W.2d 56, 62 (Tex.App. 1993) ("statements or assurances regarding zoning made by individual members of the city council, board or commission are not binding and do not give private property owners a vested right to the use or disposal of their property so as to deny the city the exercise of its police power").

The statements of individuals the Developer cites to demonstrate alleged improper motives (AB 35, 52, 96, 114) make no difference because the Court's precedents are clear that the City Council's motives are irrelevant. *State*, 131 Nev. at 420, 351 P.3d at 742, *Kelly* 109 Nev. at 649-50, 855 P.2d 1027, 1034; *Boulder City* 110 Nev. at 248-49, 871 P.2d at 326-27. The City's liability for a categorical or *Penn Central* taking turns solely on the economic impact of regulation or interference with investment-backed expectations. *Boulder City*, 110 Nev. at 248-49, 871 P.2d at 326. The Taking Clause does not bar arbitrary or irrational regulations and is not concerned with whether regulations are imposed in good or bad faith. *Lingle*, 544 U.S. at 543-44. A claim for a regulatory taking "presupposes that the government has acted in pursuit of a valid public purpose." *Id*. at 543. For that reason, a takings analysis does not probe the underlying validity of the

government action, but rather considers "the actual burden imposed on property rights." *Id*.[1]

Accordingly, the following are irrelevant to the City's liability for a taking:

- The Developer's and its counsel's opinions and statements to others, experience in developing real estate, "due diligence" regarding its purchase of the Badlands, and expenditures attempting to develop housing in the Badlands (AB 3, 15, 30, 31, 40-42, 54-55, 79, 95-96);

- Recommendations, opinions, and statements of the City Planning Department, the City Attorney's Office, and other City staff (AB 4, 15-16, 19-21, 23-27, 31, 33-34, 40, 42-45, 47-48, 54, 59, 61, 74-80, 83, 99, 109-11);

- The Tax Assessor's opinion of the legal uses of property (AB 4, 26-27, 61, 99);

- Statements and actions of individual City Council members, including proposals to acquire the Badlands and statements that surrounding neighbors owned and had the right to occupy the Badlands (AB 4, 36-39, 41, 43, 45-46, 48, 52-55, 57-58, 96, 102-03, 109, 111-12);

- Surrounding neighbors' lobbying and alleged attempt to extort land from the Developer (AB 36-39);

- Opinions of developers, appraisers, lenders, title companies, real estate agents, and brokers as to the Developer's legal rights or the legal effect of zoning or the General Plan (AB 5, 7, 34, 59-61, 99, 104, 110);

- The Developer's work with City staff or individual Councilmembers on a Master Development Agreement ("MDA") application (AB 10, 107);

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[1] Even in the limited contexts in which the basis of an official government decision might be relevant, evidence of the subjective considerations and motivations of individual decision makers is not. *See*, *e.g.*, *City of Las Vegas v. Foley*, 747 F.2d 1294, 1297 (9th Cir. 1984) (describing evaluating decisions on the basis of motivations as a "hazardous task").

- The Queensridge CC&Rs, statements and opinions of Queensridge homebuyers, and court rulings regarding the property interests of the Queensridge homeowners' association (AB 23, 28-30, 46, 84, 95-96); and

- Opinions of the "real estate world" and treatises as to the legal effect of zoning ordinances and General Plans (AB 28, 70).

2. The Developer's "Authorities" Do Not Authorize The Court To Look Beyond Majority-Vote City Council Actions To Determine The City's Liability For A Categorical Or *Penn Central* Taking

To support its argument that the Court should consider factors other than a regulation's economic impact, the Developer relies on inapplicable cases. *See* AB 88-89 & n. 39. For example, *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 37 (2012), was a physical taking case where a public project flooded the plaintiff's property, which has no bearing on the standard of government liability for categorical and *Penn Central* takings. Similarly, *Markur v. City of Detroit*, 680 N.W.2d 485, 496 (Mich. Ct. App. 2004) and *Lehigh-Northhampton Airport Auth. v. WBF Assoc*., L.P., 728 A.2d 981, 985-86 (Comm. Ct. Penn. 1999) hold that regulatory taking cases are decided on the individual facts of each case. Neither case holds that statements and actions other than a majority vote of the governing body can effect a taking.

In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 720 (1999), a jury determined that because the City denied four different development applications, the City would not allow any development of the property and found a

taking. *Id.* at 695-96. Although the Supreme Court permitted the jury to consider the motives of the City Council and statements of City officials or staff, *id*. at 705-707, that holding was overruled in *Lingle*, where the Court held that an agency's purpose in adopting a regulation, or whether a regulation achieves a legitimate state interest, are not proper inquiries in a regulatory taking case. 544 U.S. at 541-45. *Lingle* teaches that the only issue relevant to the agency's liability for a regulatory taking is the economic impact of the regulation. *Id*. at 539.

City of North 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), is an unpublished decision issued before 2016 that cannot be cited. *See* NRAP 36(c)(3). Regardless, it is not a regulatory taking case, but involved a claim for precondemnation damages where the Court held that statements or actions other than of the governing body were relevant only to that claim. *See id.* at 4.

In *Althaus v. United States*, 7 Cl. Ct. 688, 691 (1985), the court found that the agency intended to acquire title to the property but failed to file an eminent domain action. Meanwhile, the agency issued statements over an extended period indicating its interest in acquiring the property, which rendered the property unmarketable. *Id.* at 694-95. *Althaus* is inapplicable here because the City did not acquire and had no

intention of acquiring the 35-Acre Segment, but simply exercised its discretion to retain a long-standing restriction on the owner's use. *Cf. id.*

In *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 666-68, 37 P.3d 1110, 1124-26 (2006), this Court determined that certain ordinances effected a physical taking. In the *Facts* section of the opinion, the Court noted the statement of an agency staff member merely as background. *Id.* at 653-54, 37 P.3d at 1116. It did not rely on the staff member's statement in its analysis of the taking claim. *See id.* at 658-673, 37 P.3d at 1119-1128.

3. Even If The Former City Attorney And Planning Staff At One Time Believed The PR-OS Designation Was Invalid Or Zoning Granted A Right To Build, They Subsequently Learned That The PR-OS Designation Was Controlling And That Zoning Did Not Confer A Right To Build

To bolster its takings arguments, the Developer refers repeatedly to the former City Attorney's statements that the Badlands were not set aside as open space in the PRMP and the PR-OS designation is invalid or inapplicable to the Badlands. AB 4, 19-21, 23-27, 40, 61, 74-80, 83, 111. The Developer also contends that the former City Attorney and employees of the City's Planning Department repeatedly informed the Developer that it had a vested right to build housing in the Badlands. AB 4, 19-21, 23-27, 31, 33, 40, 44-45, 47-48, 74-80, 83, 110-11. Because only the City Council by majority vote – not the former City Attorney and City planners –

can adopt legally binding regulations that could limit the Developer's use of its property, these statements are irrelevant. *See State*, 131 Nev. at 420, 351 P.3d at 742.

Even if relevant, *before* the Developer filed its applications to build on the 17-Acre and 35-Acre Segments, the former City Attorney and Planning Department discovered the correct facts and law because they required the Developer to apply to the City Council to amend the PR-OS designation to allow housing. 59(10479-10499); 64(11414-11419); 60(10634, 10635-10637, 10639-10645, 10696-10723, 10726-10731); 29(5313); 39(7176-7178). The Developer admits as much:

> 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 applications without it* . . . .

AB 81-82, n. 37 (emphases added).

Additionally, the former City Planning Director's opinion that the PR-OS designation is subordinate to zoning is not a "judicial admission" that binds the City. AB 75. Setting aside that the statement of an individual City employee is not "law" (*see State*, 131 Nev. at 420, 351 P.3d at 742; *Nevada Contractors*, 106 Nev. at 313, 792 P.2d at 33), the authorities cited by the Developer, including *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co*., 127 Nev. 331, 343, 255 P.3d 268, 276 (2011), hold only that an agent's statements of *fact*, not legal opinions, can bind

the principal. AB 75. Here, the alleged statement of the City's Planning Director was a legal opinion, not a statement of fact. 8(14965).

Likewise, a statement by the former City Attorney in *Seventy Acres v. Binion*, that the General Plan designation is subordinate to zoning does not estop the City from applying its General Plan to the 35-Acre Segment in this case. AB 76 & n. 33. The Developer's reliance on *Brock v. Premier Trust, Inc. (In re Frei Irrevocable Trust)*, 133 Nev. 50, 390 P.3d 646 (2017) for the contention that the City cannot "shift its position" from one case to another (AB 76, n. 33) fails because judicial estoppel requires that the former City Attorney's first position was successful and not the result of ignorance or mistake. *Brock*, 133 Nev. at 56, 390 P.3d at 652. The former City Attorney's prior statement meets neither criterion.

On appeal, this Court held that Judge Crockett was wrong to require the Developer to file a Major Modification Application ("MMA") as part of its application to build the 435-Unit Project because the R-PD7 zoning ordinance did not require an MMA. 62(11109). The Court further held that the City was required to amend the PR-OS designation to allow the construction of the 435-Unit Project. 62(11110). Accordingly, the R-PD zoning, which allows open space, and PR-OS General Plan designation of the 17-Acre Segment were consistent. 62(11109-11110). Because the Court did not need to reach the issue of the interplay between

zoning and the General Plan, the City was not successful in its initial position to give rise to judicial estoppel. Moreover, the former City Attorney's statement that zoning prevails over the General Plan was incorrect and resulted from ignorance or mistake. *See Am. W. Dev.*, 111 Nev. at 807, 898 P.2d at 112.

4. The Tax Collector's Opinion That The Badlands Could Legally Be Used For Housing Is Irrelevant

After the Developer voluntarily closed the golf course in December 2016, the Clark County Tax Assessor reassessed the Badlands, ignoring the PR-OS designation and concluding that the highest and best use is residential, resulting in a tax increase. 70(12363). The Developer appealed the reassessment and could have argued that the Badlands should be assessed at a lower value because PR-OS does not permit residential use. Instead, the Developer stipulated to the Assessor's opinion of the allowable uses, resulting in a higher assessment. 71(12439). This was a transparent strategy to avoid undercutting the Developer's position in its four takings cases that the PR-OS designation does not exist. 71(12401-12410); 70(12361-12363).

Consistent with that strategy, the Developer now contends, without authority, that the City is bound by the Assessor's opinion as to the legally permitted use of the Badlands. AB 25-27, 61, 99. As the district court correctly found in the PJR Order

> The Clark County Assessor's assessment determinations regarding the Badlands Property did not usurp the Council's exclusive authority over land use decisions. . . . The Council alone and not the County Assessor, has the sole discretion to amend the open space designation for the Badlands Property.

1(223). By failing to appeal the PJR Order, the Developer has not challenged this finding and cannot rely on the Assessor's opinions to nullify the PR-OS designation.

B. Zoning Does Not Confer Any Rights To Build

By asserting a right to build a housing development based on a zoning designation, the Developer turns the purpose of zoning on its head. Zoning does not confer "rights" on property owners, but rather *restricts* an owner's use of property to protect community interests. *See* NRS 278.250(1) (purpose of zoning is to "regulate and restrict" the use of land); *County of Clark v. Alper*, 100 Nev. 382, 389, 685 P.2d 943, 948 (1984) (zoning is "a restriction on use"); *Nova Horizon, Inc. v. City of Reno*, 105 Nev. 92, 93, 769 P.2d 721, 721 (1989) (referring to the restrictions that accompany various zoning districts); *Gypsum Res., LLC v. Masto*, 672 F.Supp.2d 1127, 1141 (D. Nev. 2009) ("purpose of zoning is to closely control local development according to particularized local needs"); *see also Save the Hill Group v. City of Livermore*, 76 Cal.App.5th 1092, 1112, n. 5 (Cal.Ct.App. 2022) ("purpose of zoning and planning is to regulate the use of land to promote the public welfare"); *Fabiano v. Hopkins*, 352 F.3d 447, 454 (1st Cir. 2003) (same). The district court

ignored these authorities to transform a land use *restriction* into a constitutional *right* to build housing.

1. The Developer's Contention That Zoning Confers A "Vested" or "Property" Right To Build Contravenes This Court's Precedents

The Answering Brief fails to address the holdings of dispositive authorities in which this Court has held – without exception – that local agencies have discretion to deny or condition development projects, even if they comply with zoning. *Stratosphere Gaming Corp. v. City of Las Vegas*, 120 Nev. 523, 528, 96 P.3d 756, 760 (2004); *Am. W. Dev., Inc. v. City of Henderson*, 111 Nev. 804, 807, 898 P.2d 110, 112 (1995); *Tighe v. Von Goerken*, 108 Nev. 440, 443, 833 P.2d 1135, 1137 (1992); *Nevada Contractors*, 106 Nev. at 311, 792 P.2d at 31-32; *Bd. of Cty. Comm'rs v. CMC of Nev., Inc.*, 99 Nev. 739, 747, 670 P.2d 102, 107 (1983); *City of Reno v. Harris*, 111 Nev. 672, 679, 895 P.2d 663, 667 (1995); *Boulder City*, 110 Nev. at 246, 871 P.2d at 325; *see also 180 Land Co. LLC v. City of Las Vegas*, 833 F. App'x 48, 51 (9th Cir. 2020)). Accordingly, the premise of the Developer's regulatory takings claims – that it had a property right conferred by zoning to build housing in the Badlands – is wrong.

In the PJR Order, the district court followed these authorities:

> The decision of the City Council to grant or deny applications for a general plan amendment, rezoning, and site development plan review is a discretionary act. . . .

> A zoning designation does not give the developer a vested right to have its development applications approved . . . *Stratosphere Gaming*, 120 Nev. at 527, 96 P.3d at 759-60. . . .

1(215, 221-223).

In contending that these authorities are inapplicable to its taking claims because they are PJR cases, the Developer relies on a single authority, *City of Henderson v. Eighth Jud. Dist. Ct.*, 137 Nev. 282, 489 P.3d 908 (2021), which according to the Developer, makes a distinction between "PJR law" and "inverse condemnation law." AB 63-67. That case holds only that petitions for judicial review and inverse condemnation claims should not be combined in the same action because the admissibility of evidence and the standard of review differ between the two actions. *Id*. at 911-12. *City of Henderson* does *not* hold that there exists a substantive law of PJRs or that facts and legal rules vary depending on the type of suit brought. *See id*.[2] The contention that the City Council has discretion to deny a development application if the developer then sues for a PJR, but the City Council had no

[2] The Developer misrepresents the City's argument as stating that the district court should have rejected the taking claims because it rejected the PJR. AB 63. The City instead argues that the district court's conclusions of law in the PJR Order that zoning does not grant a right to build and that the PR-OS designation is valid and controlling are *also dispositive* of the City's liability for a regulatory taking. These findings of fact and law do not magically disappear if the Developer sues for a regulatory taking. When analyzing the regulatory takings claims, the district court never identified any error in the PJR Order's findings of facts and conclusions.

discretion to deny the same application if the developer sues for a regulatory taking, stretches *City of Henderson* and logic to the breaking point.

The Developer notably fails to address this Court's decision in *Boulder City*, where the developer brought a constitutional challenge to the denial of its development application, not a PJR. 110 Nev. at 245, 871 P.2d at 324-25. This Court rejected the claim, holding that "[t]he grant of a building permit was discretionary. Therefore, under the applicable land use laws, Cinnamon Hills did not have a vested entitlement to a constitutionally protected property interest." *Id.* at 246, 871 P.2d at 325. Given the holding in *Boulder City*, the Judgment simply cannot be reconciled with the correct conclusions in the PJR Order. *See id.*

The Developer also ignores the lawsuit it filed in federal court that raised constitutional challenges to the City's alleged frustration of the Developer's attempts to redevelop the Badlands, which also was not a PJR. The Ninth Circuit rejected the Developer's position:

> To have a constitutionally protected property interest in a government benefit, such as a land use permit, an independent source, such as state law, must give rise to a "legitimate claim of entitlement," that imposes significant limitations on the discretion of the decision maker. . . . We reject as without merit plaintiffs' contentions that certain rulings in Nevada state court litigation establish that plaintiffs were deprived of a constitutionally protected property interest. . . .

180 Land, 833 F. App'x at 51. These non-PJR decisions show that no matter the type of case, zoning confers no rights.

Faced with this obstacle, the Developer attempts to distinguish *Stratosphere* on the ground that it involved an application for commercial, rather than residential, development. AB 86, n. 38. An agency's considerations are the same no matter the type of development proposed: the best interests of the community. *See* LVMC 12.16.100(A) ("the Site Development Plan Review Process ... ensure[s] that each development ... (3) Contributes to the economic vitality of the community ... and (4) … to the public safety, health and general welfare"). Moreover, several of this Court's decisions upholding a local agencies' discretion to deny or condition approval of development applications involved applications for housing, making this a distinction without a difference. *See, e.g.*, *Am. W. Dev.*, 111 Nev. at 805, 898 P.2d at 111; *Boulder City*, 110 Nev. at 239, 871 P.2d at 321.

2. The Cases Cited By The Developer Do Not Hold That Zoning Grants A Constitutional Right To Build

The inapplicable physical taking and eminent domain cases on which the Developer relies do not state that the Developer has a "vested" or "property" right to build merely by virtue of owning property. AB 66-68, 86, n. 38, *citing Sisolak*, 122 Nev. at 658, 137 P.3d at 1119; *ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 647, 173 P.3d 734 (2008); *Schwartz v. State*, 111 Nev. 998, 900 P.2d 939 (1985). In

Sisolak, this Court noted: "The term 'property' includes all rights inherent in ownership, including the right to possess, use, and enjoy the property." 122 Nev. at 658, 137 P.3d at 1119. The Court went on to find that an owner of land has a "vested property interest" in the airspace above his property. *Id.* at 659-60, 137 P.3d at 1119-20. An ordinance requiring the owner to allow commercial airlines to fly through the airspace, the Court held, was a physical taking of that property interest. *Id.* at 666-67, 137 P.3d at 1124-25.

Because *Sisolak* was a physical takings case, the Court did not consider whether, much less hold that, the right to "possess, use, and enjoy property" included a right to approval of a development project free of any government discretionary review. *See id.* at 662, 137 P.3d 1122. The Court considered the property's zoning and the likelihood of a change in zoning only as a basis for determining the value of the property physically taken. *Id.* at 672, 137 P.3d at 1128.[3]

[3] The City does not deny that the Developer has the right to possess, use, and enjoy its property. Local governments in Nevada, however, are authorized to exercise broad police powers to limit an owner's use and enjoyment of property to protect the general health, safety, and welfare. *See* LVMC 12.16.100(A). The regulatory takings doctrine requires compensation for such exercise only where limits on use and enjoyment of property impose an extreme economic burden on the owner, equivalent to an eminent domain taking. *See State*, 131 Nev. at 419, 351 P.3d at 741; *Kelly*, 109 Nev. at 649-50, 855 P.2d at 1034; *Boulder City*, 110 Nev. at 245-46, 871 P.2d at 324-35.

In *Sisolak*, whether the plaintiff had a vested property right in the airspace above the land was disputed. *Id.* at 658-59, 137 P.3d at 1119-1120. In the instant case, there is no dispute that title is "vested" in the Developer by virtue of its fee simple interest, but neither *Sisolak* nor any other authority grants the Developer a right to redevelop the property based merely on ownership. *See id.*

Similarly, *ASAP Storage* did "not involve an alleged taking based on government regulations." 123 Nev. at 647, 173 P.3d at 740. Rather, this Court held that cutting off access to the plaintiff's property during a flood did not effect a physical taking because the interference was temporary. 123 Nev. at 657, 173 P.3d at 746. Similarly in *Schwartz*, a property owner claimed that an agency's denial of access to its property from a public street was a taking. 111 Nev. at 1000, 1003-04, 900 P.2d at 940, 942-43. None of these cases holds that a property owner has a property right to build.

The Developer's citations to eminent domain cases and treatises likewise fail to support the untenable proposition that zoning confers constitutional rights to build anything an owner desires if the proposed use is permitted in the zoning district. AB 68-69 and n. 29. Eminent domain cases have no bearing on the City's *liability* for a regulatory taking because an agency concedes liability by filing the action; the only

issue is the *value* of the condemned property. *See* NRS 37.110; NRS 37.120. As the Ninth Circuit recently noted,

> eminent domain and regulatory takings suits compensate property owners for different injuries. Eminent domain compensates property owners for the forced sale of their properties to the government; the property is transferred to the government, and the owner is paid the property's fair market value as of the date the government made a deposit on the property… A regulatory taking action, on the other hand, compensates a property owner for "[t]he economic impact of [a] regulation ... and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations."

Gearing v. Half Moon Bay, 54 F.4th 1144, 1149 (9th Cir. 2022) (quoting *Lingle*, 544 U.S. at 538-39 (citation omitted)).

City of Las Vegas v. C. Bustos, 119 Nev. 360, 75 P.3d 351 (2003) and the other eminent domain cases the Developer cites merely recognize that zoning is a limitation on the use of property and that in *valuing* property in eminent domain, an appraiser may not assume a use that is not permitted by the zoning unless there is a reasonable probability of a zoning change. *See id.* at 362, 75 P.3d at 352. To argue that zoning's limitation on the use, and hence the value, of property also means that the owner has a constitutional right to build any development of their choosing so long as it is permitted by the zoning ordinance, distorts these eminent domain cases beyond recognition.[4]

[4] In this Court's order staying the Judgment in this case, the Court appropriately

Indeed, if zoning granted a constitutional right to build, the Court's only three cases that adjudicated claims for a regulatory taking involving a limitation on the owner's use would have to be overruled. *See State*, 131 Nev. at 419, 351 P.3d at 741; *Kelly*, 109 Nev. at 649-50, 855 P.2d at 1034; *Boulder City*, 110 Nev. at 245-46, 871 P.2d at 324-35. In each case, this Court found that agency action denying an application to build did not effect a taking. *Id*. Because it is long-settled law that zoning does not confer rights to build, these opinions do not even mention the issue of the owner's "rights" under the applicable zoning. *See id.*

The Developer also misrepresents a court ruling in a case involving claims by homeowners adjacent to the Badlands that the CC&Rs for their Queensridge subdivision granted a property interest in the Badlands. AB 29-30. The Developer falsely contends that the court there ruled that "R-PD7 zoning gives the Landowners the 'right' to develop the 250 Acres," free of any discretionary review. AB 29, *citing* 86(15167); 24(4575, ¶¶ 61, 64). The court held only that the Queensridge homeowners have no property interest in the Badlands. The City was not a party to

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found that eminent domain rules do not apply across the board to regulatory taking cases: "[W]hile we generally apply eminent domain 'rules and principles' to inverse condemnation cases, *Clark County v. Alper,* NRS 37.170 is inapposite to the circumstances here." Order Granting Stay at 3-4. Similarly, eminent domain rules for the valuation of property cannot govern the City's liability for a regulatory taking.

that decision, and the court did not address the City's regulatory authority over the Badlands. *Id*. The Queensridge CC&Rs are a private contract between property owners and have no bearing on government regulation of land.

3. Zoning Ordinances Do Not Exempt The Developer From The City's Discretionary Review

In reliance on LVMC 19.12.010 and 19.10.050, the Developer erroneously contends that because single and multi-family housing is a *permitted* use in an R-PD district, an owner has a constitutional *right* to build whatever housing project they desire within the numerical limits of the zoning ordinance, free of any discretionary review by the City Council. AB 71-72. Although residential use is a "permitted use as a matter of right" in an R-PD district under LVMC 19.12.010, the "as a matter of right" language does not eliminate the City's discretion to deny or condition construction of housing in the district. In the context of these ordinances, "permitted as a matter of right" means only that a conditional or special use permit or zoning amendment are not required for the City to approve the use. *See* LVMC 19.12.10. The ordinances do not create a "property right" that deprives the City of the discretion otherwise afforded under NRS Chapter 278.

The definition of "Permitted Land Use" applicable to R-PD7 zoning is found in LVMC 19.18.020, entitled "Words and Terms Defined," which provides: "**Permitted Use**. Any use allowed in a zoning district as a matter of right *if it is*

conducted in accordance with the restrictions applicable to that district." (Emphasis added). The R-PD zoning ordinance, entitled "R-PD Residential Planned Development District," provides that the approval of uses permitted in the district are subject to the City's discretion:

> A. The R-PD District has been to provide for *flexibility and innovation* in residential development, with emphasis on enhanced residential amenities, efficient utilization of open space. . . .
>
> * * *
>
> C. Permitted Land Uses
>
> 1. Single-family and multi-family residential and supporting uses are permitted in the R-PD District *to the extent they are determined by the Director to be consistent with the density approved for the District and are compatible with surrounding uses.* In addition, the following uses are permitted as indicated:
>
> a. Home Occupations . . .
> b. Child Care-Family Home and Child Care-Group Home, *to the extent the Director determines that such uses would be permitted in the equivalent standard residential district*.

LVMC 19.10.050C (emphases added).

Accordingly, the R-PD zoning ordinance and other provisions of the LVMC grant the City a high level of discretion, consistent with the Court's precedents. *See*, *e.g.*, *Stratosphere Gaming*, 120 Nev. at 527-28, 96 P.3d at 759-60; *Tighe*, 108 Nev. at 443, 833 P.2d at 1137.

Even though the Badlands has been used for open space and recreation for decades, the Developer also asserts that single- and multi-family housing are the only permitted uses in an R-PD zone. AB 71-72. Based on that faulty premise, the Developer asserts that unless the City approves the housing project, the Developer will be unable to make any legal use of the 35-Acre Segment. AB 71-72. The district court accepted this flawed position, finding a taking based on its conclusion that "single family and multi family residential [are] *the* legally permissible uses on R-PD7 zoned properties." 18(3436) (emphasis added).

The R-PD ordinance is clear, however, that open space is a permissible use in R-PD7 zones along with housing. LVMC 19.10.050A. Consistent with this emphasis on open space in an R-PD district, the Staff Report for the Developer's 35-Acre Applications explained that:

> [a]s a Residential Planned Development, density may be concentrated in some areas while other areas remain less dense, as long as the overall density for this site does not exceed 7.49 dwelling units per acre. Therefore, portions of the subject area can be restricted in density by various General Plan designations.

65(11553-54). Thus, the R-PD zoning of the 35-Acre Segment does not mandate that the City Council allow housing in designated open space.[5]

[5] According to the Developer, the City's statement in its Opening Brief that PD zoning replaced R-PD zoning is incorrect because "these are two separate zoning districts." AB 72, n. 30. The City's brief made clear that PD and R-PD are separate

LVMC 19.16.090(O) likewise does not grant the Developer a constitutional right to build any project that complies with zoning (AB 86, n. 38) but rather provides that the City's approval of a rezoning application

> authorizes the applicant to *proceed with the process* to develop and/or use the property in accordance with the development and design standards and procedures of all City departments and in conformance with all requirements and provisions of the City of Las Vegas Municipal Code.

LVMC 19.16.090(O) (emphasis added). In other words, the ordinance allows a property owner to *apply* for development consistent with the new zoning. It does not strip the City Council of its discretion to deny or condition a development application. *See id.*

The Developer also misrepresents the Planning Department's "Zoning Verification Letter" as purportedly confirming that the Developer "has vested rights to develop up to 7.49 residential units per acre" in the Badlands. AB 16, *citing* 47(8674(2)). To the contrary, the letter states that the Badlands was zoned R-PD7 and explained the purpose of R-PD zoning, the density allowed in an R-PD7 zone,

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zoning districts subject to different sections of the LVMC and correctly stated that, in 2011, the City discontinued the R-PD zoning category and replaced it with the PD category but continued to recognize pre-existing R-PD designations. OB 22, citing 58(10380).

and the uses allowed in an R-PD7 zone. *Id*. It did not state that the Developer had a right to build. 47(8674).

C. The Developer Has No Right To Build Housing Because The 35-Acre Segment Is Designated PR-OS In The General Plan, Which Does Not Allow Housing

It is well-established that the General Plan designation not only imposes legal limits on the use of property, but if the zoning conflicts with the General Plan, the General Plan takes precedence. NRS 278.250(2) ("zoning regulations must be adopted in accordance with the master plan for land use"); *Am. W. Dev.*, 111 Nev. at 807, 898 P.2d at 112 ("municipal entities must adopt zoning regulations that are in substantial agreement with the master plan"); *Nova Horizon*, 105 Nev. at 98, 769 P.2d at 724 (same); *City of Reno v. Citizens for Cold Springs*, 126 Nev. 263, 266, 236 P.3d 10, 12 (2010) (same); LVMC 19.00.040 ("It is the intent of the City Council that all regulatory decisions made pursuant to this Title be consistent with the General Plan."). The Developer's brief fails to address these authorities. Because the PR-OS designation does not allow housing, even if the zoning were inconsistent (it was not – *see* §C.3 *infra*), it could not have granted the Developer a right to build housing.

Nevertheless, without any support, and directly contradicting the PJR Order, the district court dispatched with the PR-OS designation in a single sentence: "[T]he

Court rejects the City's defenses that there is a Peccole Ranch Master Plan that governs the 35 Acre Property and a City of Las Vegas Master Plan/land use designation of PR-OS that affects this Court's property interest determination." 109(19652). The Developer devotes a substantial part of its Answering Brief attempting to backstop the district court's disregard of the General Plan, variously contending that the PR-OS designation of the Badlands does not exist, is invalid, or is inapplicable. These arguments fail.

1. This Court's Prior Ruling That The City Properly Required The Developer To Obtain The City Council's Approval Of A General Plan Amendment To Build The 435-Unit Project Confirms The Pertinence Of The PR-OS Designation

Having already determined that the PR-OS designation controls redevelopment of the Badlands, the Court need not tread new ground here. In reversing Judge Crockett's Order, this Court concluded that because the Badlands was designated PR-OS in the General Plan, the 17-Acre Segment could not be developed with housing unless the City changed that designation: "The governing ordinances require the City to make specific findings to approve a general plan amendment…." 62(11110), *citing* LVMC 19.16.030(I). The Developer fails to address this language, much less overcome it.

2. The PR-OS Designation And Open Space Set Aside In The PRMP Afforded The City Discretion To Deny A Housing Development

The record also undercuts the Developer's attempt to evade the well-established history of the PRMP and PR-OS designation. AB 13-25. In 1989, the City approved a Gaming Enterprise District expressly conditioned on Peccole providing a recreational amenity in the PRMP. 57(10106-10116, 10122, 10127-10129). To satisfy this condition, Peccole reserved the Badlands as a golf course. 57(10086, 10088, 10115-10116). The City maintains its discretion to approve, modify or deny a request to lift the conditions of approval imposed on the Developer's predecessor. *Stratosphere Gaming*, 120 Nev. at 527-28, 96 P.3d at 759-60; *Tighe*, 108 Nev. at 443, 833 P.2d at 1137.

In 1990, Peccole applied to amend the PRMP in connection with a rezoning application. 57(10131-10154). The revised PRMP highlighted an "extensive 253-acre golf course and linear open space system winding throughout the community [that] provides a positive focal point while creating a mechanism to handle drainage flows." 57(10138). As the district court correctly found in denying the PJR:

> [T]he Peccole Ranch Master Development Plan identified the property as being for open space and drainage, as sought and obtained by the Developer's predecessor.
>
> The golf course was part of a comprehensive development scheme, and the entire Peccole Ranch master planned area was built out around the golf course.

1(222-223, 225). The City approved Peccole's rezoning application under a resolution of intent subject to all conditions of approval for the revised PRMP. 57(10176-10187). On April 1, 1992, in Ordinance 3636, the City Council designated the Badlands PR-OS in the City's new 2000 General Plan. 58(10253).

Notwithstanding this history, the Developer contends that the Badlands was never intended to be open space long term, misrepresenting that the portion of the PRMP encompassing the Badlands was designated MED (Medium Density Residential) in the City's General Plan from 1981 through the present. AB 17-18, citing 22(4038-4041). However, in 1981, when the Developer claims the Badlands was designated "MED," there was no "MED" designation in the City's General Plan. 72(12590). Indeed, throughout the 1980s, the City's General Plan used only three residential land use designations: "suburban," "urban," and "rural." 72(12671-12672, 12704-12706). The letters "MED" on the Peccole Property Land Use Plan cited by the Developer (AB 17-18) referred to a density category and not a general plan designation. 22(4038, 4040). From 1985 to 1990, the Badlands was categorized in the General Plan as "L" for low density residential and "ML" for medium density residential. 73(12905). Regardless, in 1990, the City approved a master plan amendment designating an 18-hole golf course in the same general location as the Badlands Property as "P" for Parks/Recreation/Open Space. 74(13020, 13035).

Even had the General Plan designation of the Badlands portion of the PRMP been MED prior to 1992, Ordinance 3636 adopting the 2000 General Plan in 1992 superseded any prior General Plan designation. 58(10219-10223, 100229-10253). Further, after 1992, the City adopted at least five ordinances reaffirming the PR-OS designation. 58(10200-10253, 10287-10301, 10302-10312, 10313-10329, 10330-10345); 72(12591-12592); 78(13526-13752); 79(13763-13987). Accordingly, since at least 1992, the Badlands was designated open space, not housing.

Contrary to the Developer's assertion (AB 82), the City does not contend that in approving the PRMP, it required the Badlands to remain open space in perpetuity. The City Council has discretion to lift the PR-OS designation if it finds that doing so would be in the community's best interests and did so when approving the 435-Unit Project. 64(11414-11419); *see Nova Horizon*, 105 Nev. at 96, 769 P.2d at 723. Nothing required it to do so for the 35-Acre Segment as well. *See Stratosphere Gaming*, 120 Nev. at 527, 96 P.3d at 759-60.

The Developer's challenge to the PRMP and the PR-OS designation because they were not recorded as a deed restriction is irrelevant because, as laws, land use regulations need not be recorded against private property to be legally binding. *See*, *e.g.*, LVMC 19.12.040(D) (restrictions of conditional use permit enforceable "against the person or entity that owns the property"). The Legislature has specified

certain land use documents that must be recorded, and master plans are not one of them. *See* NRS 278.150; *cf.* NRS 278.0207 (development agreements); NRS 278.374 (final maps); NRS 278.468 (parcel maps). In contrast, restrictive covenants are the result of private contracts, not government regulation of land use, and must be recorded. *See Horizons at Seven Hills v. Ikon Holdings*, 132 Nev. 362, 371, 373 P.3d 66, 73 (2016).

3. The Zoning And General Plan Designation Are Not In Conflict, But Even If They Were, The General Plan Would Control

The City's adherence to the General Plan does not "render[] its zoning code meaningless." AB 71. Zoning and the General Plan both limit an owner's use of land. The General Plan designates the permissible uses of land, and the zoning ordinance implements that directive, similar to a constitution whose more general policies are implemented by statutes. 58(10224, 10229). In the case of an inconsistency between zoning and the General Plan, the General Plan controls. NRS 278.250(2); *Nova Horizon*, 105 Nev. at 96, 769 P.2d at 723.

Here, the 35-Acre Segment's zoning is consistent with the General Plan. In 1990, the City rezoned 614 acres of the 1,539-acre PRMP as R-PD7. 57(10131-10185). R-PD zoning allows a developer to comprehensively plan a new residential community by clustering the housing on one portion of the property and placing

open space on other portions as an amenity for the residential use. LVMC 19.10.050A.

The R-PD7 zoning and PR-OS General Plan designation have long coexisted. Prior to rezoning the 614-acre area as R-PD7, Peccole had set aside 211 acres of that area as open space for the future residents and business owners of the PRMP. 57(10152, 10156-10158, 10160-10161, 10164-10165). In Ordinance 3636 passed in 1992, the City Council designated the housing portions of the R-PD zone medium-density residential and the Badlands portion PR-OS in the General Plan. 58(10221-10223). Accordingly, the Developer's claim that Ordinance 3636 designating the Badlands PR-OS in 1992 must be invalid because it conflicted with the pre-existing provisional R-PD7 zoning of the Badlands (AB 19-20, 80-81) is incorrect. 58(10221-10223). Likewise, in 2001, when the City made the R-PD7 zoning of a 614-acre area of the PRMP permanent in Ordinance 5353, the zoning and the General Plan designation of the Badlands were consistent. 58(10358-10377).

Despite the absence of a conflict between the zoning and General Plan designation of the 35-Acre Segment, the Developer argues that NRS 278.349(3)(e) and *Sisolak*, *Bustos*, and *Alper* provide that "zoning takes precedence over any land use designation." AB 73, 74-75, n. 31. *Sisolak*, *Bustos*, and *Alper* do not hold that zoning confers development rights on property owners that can be elevated over the

General Plan. *See supra* §B.2. Moreover, NRS 278.349(3)(e) provides that in considering a tentative subdivision map for approval, the agency shall consider "[c]onformity with the zoning ordinances and master plan, except that if any existing zoning ordinance is inconsistent with the master plan, the zoning ordinance takes precedence." Because the R-PD7 zoning of the Badlands is consistent with the General Plan designations, NRS 278.349(3)(e) is irrelevant.

Even if the zoning and General Plan designation were inconsistent, in the PJR Order, the district court correctly dispensed with the argument that NRS 278.349(3)(e) would require the City to approve the 35-Acre Applications:

> The Court rejects the Developer's contention that NRS 278.349(3)(e) abolishes the Council's discretion to deny land use applications.
>
> First, NRS 278.349(3) merely provides that the governing body "shall consider" a list of factors when deciding whether to approve a tentative map. Subsection (e) upon which the Developer relies, however, is only one factor.
>
> In addition, NRS 278.349(3)(e) relates only to tentative map applications, and the Applications at issue here also sought a waiver of the City's development standards, a General Plan Amendment to change the PR-OS designation and a Site Development Plan review. A tentative map is a mechanism by which a landowner may divide a parcel of land into five or more parcels for transfer or development; approval of a map alone does not grant development rights. NRS 278.019; NRS 278.320.
>
> Finally, NRS 278.349(e) does not confer any vested rights.

> [M]unicipal entities must adopt zoning regulations that are in substantial agreement with the master plan." *See Am. W. Dev.*, 111 Nev. at 807, 898 P.2d at 112, quoting *Nova Horizon*, 105 Nev. at 96, 769 P.2d at 723; NRS 278.250(2).
>
> The City's Unified Development Code states as follows:
>
> > Compliance with General Plan
> > Except as otherwise authorized by this Title, approval of all [land use entitlements] shall be consistent with the spirit and intent of the General Plan. UDC 19.16.010(A).
> >
> > It is the intent of the City Council that all regulatory decisions made pursuant to this Title be consistent with the General Plan. For purposes of this Section, "consistency with the General Plan" means not only consistency with the Plan's land use and density designations, but also consistency with all policies and programs of the General Plan, including those that promote compatibility of uses and densities, and orderly development consistent with available resources. UDC 19.00.040.
>
> Consistent with this law, the City properly required that the Developer obtain approval of a General Plan Amendment in order to proceed with any development.

1(224-25).

The "land use hierarchy" in the General Plan does not subordinate the General Plan to zoning. AB 76. The General Plan states the polar opposite:

> Zoning is the major implementation tool of the Master Plan. The use of land as well as the intensity, height, setbacks, and associated parking needs of a development are regulated by zoning district requirements. Each Master Plan designation has specific zoning categories that are compatible, and *any zoning or rezoning request must be in substantial agreement with the Master Plan as required by Nevada Revised Statutes 278.250 and Title 19.00 of the Las Vegas Municipal Code.*

79(13789) (emphasis added). The pyramid to which the Developer refers shows the General Plan at the base, and zoning at the tip, meaning that zoning is inferior to and implements the General Plan. 79(13788).

4. The Developer's Claim That The City Failed To Comply With Required Procedures In Adopting Ordinances Designating The Badlands PR-OS Is Time-Barred And Without Evidentiary Support

The Developer's collateral attack on the PR-OS designation on the basis that purportedly "[t]here is no evidence" that the City complied with the proper procedures for adopting it must be rejected on multiple grounds. AB 77-80, n.34; *see also* AB 18-19. The City designated the Badlands PR-OS in at least five ordinances between 1992 and 2018. 58(10200-10253, 10287-10301, 10302-10312, 10313-10329, 10330-10345). The statute of limitations to challenge the validity of those ordinances was 25 days. NRS 278.0235; *League to Save Lake Tahoe v. Tahoe Reg'l Planning Agency*, 93 Nev. 270, 275, 563 P.2d 582, 585 (1977), *overruled on other grounds by Cty. of Clark v. Doumani*, 114 Nev. 46, 952 P.2d 113 (1998). Because neither Peccole nor the Developer timely filed any such challenge, the issue is waived. *See* NRS 278.0235.

Even if deemed timely, the Developer's attempt to flip the burden to the City to show that these ordinances were validly adopted is contrary to law. "Statutes are

presumed valid, and the challenger bears the burden of showing that a statute is unconstitutional." *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 509, 217 P.3d 546, 551 (2009). As the party challenging their validity, the Developer has the burden to submit evidence showing that the ordinances are invalid, which it failed to satisfy. In lieu of such evidence, the Developer relied on irrelevant statements of City staff that they could not find documents to show that the Badlands was designated PR-OS in the General Plan (AB 78), which statement they later corrected. 59(10479-10499); 64(11414-11419); 60(10634, 10635-10637, 10639-10645, 10696-10723, 10726-10731); 29(5313); 39(7176-7178); *see also* AB 81-82, n. 37. Even if City had the burden, it submitted extensive, uncontradicted evidence showing that the ordinances designating the Badlands PR-OS were adopted in compliance with the law. 58(10200-10253, 10287-10301, 10302-10312, 10313-10329, 10330-10345); 72(12591-12592).

5. The General Plan Maps Support The City's Position, Not That Of The Developer

The Developer cannot will away the duly adopted PR-OS designation by pointing to the General Plan maps. AB 78, n. 35. The City's ordinances adopting General Plans identify the General Plan by date, with each General Plan the City entered in evidence correlated to the ordinance adopting that General Plan. 58(10200-10253, 10287-10301, 10302-10312, 10313-10329, 10330-10345). NRS

278.150 requires a General Plan to include maps showing areas of the City designated for certain land uses identified in the key of each map. The City's Director of Planning authenticated each ordinance that adopted the text and maps of each General Plan submitted into evidence. 72(12591-12592); 75(13051-13170); 76(13172-13300); 77(13312-13512); 78(13524-13752); 79(13763-13987).

The five excerpts submitted by the City show the Badlands in green on the Southwest Sector map of the Land Use Element of the General Plan. 58(10234, 10301, 10312, 10329, 10345). The key to each map indicates that areas shaded in green are designated PR-OS. *Id.* Accordingly, there is no genuine dispute as to the authenticity of the General Plan maps or the fact that the Badlands was validly designated PR-OS.

The notation that the maps are "for reference only" does not call into question the maps' authenticity or the fact that they are the official General Plan maps. AB 78, n. 35. The notation is necessary to give notice to the public that General Plan maps may change after passage of the ordinance adopting a General Plan update as the City Council approves individual applications for development. If the Council's approval of a development application in the future requires amendment of the General Plan designation to allow the development, the version of the map on the date of the ordinance updating the General Plan would not be current. *See*, *e.g.*,

60(10634-10640); 64(11414-11419) (City Council approval General Plan Amendment of 17-Acre Segment). Every General Plan map of the Southwest Sector since 1992 consistently shows the Badlands as PR-OS. 58(10234, 10301, 10312, 10329, 10345).

The 1992 General Plan Map of the Land Use Element (Map 6) Southwest Sector, which designates the 35-Acre Segment Medium-Low Density rather than PR-OS, does not alter the PR-OS designation that existed when the Developer bought the property and sought to redevelop it. AB 80. In 1989, Peccole set aside only 211 acres for the Badlands golf course, which did not include the 35-Acre Segment. 57(10152, 10185). The 1992 Ordinance designating the Badlands PR-OS also did not include the 35-Acre Segment. 58(10221-10223, 10253). Between 1992 and 1998, however, Peccole added the 35-Acre Segment to create an additional nine holes for the golf course, which then totaled 250 acres. *Compare* 58(10253) *with* 61(11033); *see also* 58(10255-10260, 10301), 61(11035). Every General Plan map of the Southwest Sector since 1992, including the map in effect when the Developer bought the Badlands (58(10329)), clearly designates the 35-Acre Segment PR-OS. 58(10262-10264), 58(10273), 58(10283-10286), 58(10301), 58(10303, 10311-10312); 58(10314-10316, 10328-10329); 58(10331, 10344-10345).

The Developer paid a bargain-basement price for the Badlands, $18,000 per acre, because the Developer knew that to build housing, it must persuade the City Council to exercise its discretion to lift the PR-OS designation. 59(10578). The Developer's marketing materials show that it was aware of the legal limits on redevelopment. 59(10452). The district court's findings in the PJR Order that "[t]he Developer purchased its interest in the Badlands Golf Course knowing that the City's General Plan showed the property as designated for Parks Recreation and Open Space (PR-OS)" and that "the City properly required that the Developer obtain approval of a General Plan Amendment in order to proceed with any development" were accurate, and nothing in the Answering Brief demonstrates otherwise. 1(222-223, 225).

D. The City Did Not Single Out The Developer Or "Conspire" With Nearby Homeowners To Deprive The Developer Of Its "Rights"

1. City Council And Community Opposition To The Developer's Request To Redevelop Long-Established Open Space Into Housing Was Ordinary And Legitimate Political Activity

The fact that the Developer's redevelopment proposal prompted opposition from the community and certain Councilmembers does not support the Developer's accusations of "conspiracy." The state legislature deems open space an important element of a high-quality living environment and requires local agencies to create

and protect this community resource through General Plans and zoning. *See*, *e.g.*, NRS 278.160(f); NRS 278.250(2)(b) & (f).[6]

Peccole proposed that the Badlands be reserved as an open space amenity for the PRMP to obtain higher density housing, and the City conditioned the inclusion of the PRMP in a Gaming Enterprise District on Peccole setting aside the Badlands as a recreational amenity. 57(10106-10116, 10122, 10127-10129, 10086, 10088, 10115-10116). As the district court correctly found in the PJR Order, the City Council could reasonably have declined to lift the PR-OS designation because it deemed the preservation of existing open space to be in the community's best interest. 1(222-223, 225). Rather than conspiring with homeowners to deprive the Developer of supposed "rights" (AB at 35-40), the Council simply did its job of responding to the legitimate concerns of its constituents that the community's existing open space be preserved.

[6] The wisdom of the legislature's mandate is amply supported by studies showing that open space is essential for human health and well-being. *See, e.g.*, Mychal Cohen, Kimberly Burrowes, & Peace Gwam, *The Health Benefits of Parks and their Economic Impacts*, Urban Institute (Feb. 2022). Las Vegas, in particular, is underserved with open space relative to other large cities. *See* Dak Kopec, *A Case Study of Urban Design and Mental Health in Las Vegas*, 5 Journal of Urban Design and Mental Health (2018); Trust For Public Land, ParkScoreIndex 2022 (https://www.tpl.org/parkserve/downloads).

The City Council properly exercised its discretion to hold Peccole and its successors, including the Developer, to Peccole's commitment to establish that amenity, and there was nothing improper, or unusual, in community members urging the Council to do so. *Stratosphere Gaming*, 120 Nev. at 529, 96 P.3d at 760; *Bd. of Cty. Comm'rs of Clark Cty. v. C.A.G., Inc.*, 98 Nev. 497, 501, 654 P.2d 531, 533 (1982). The Council's decision required balancing the competing interests among constituents, which is exactly why decision-makers are afforded discretion in determining appropriate land uses. *See Liquor & Gaming Licensing Bd. v. Simon & Tucker, Inc.*, 106 Nev. 96, 98-99, 787 P.2d 782, 783-84 (1990). It did not raise a constitutional issue.

2. The City Treated The Developer Like Any Other

Nothing in the record supports the Developer's narrative (AB 114) that the City singled out the Developer. The City Council routinely approves R-PD zoning for comprehensively planned housing developments that set aside open space for the benefit of the surrounding community. 93(16684-16697). In each of these planned developments, the Council zoned the entire planned development R-PD. *Id.* The Council then designated the housing portion medium-density residential in the General Plan and the open space portion PR-OS in the General Plan, just as it did

for the 614 acres of the PRMP zoned R-PD7 that contain the Badlands. 93(16684-16685, 16693-16697).

The developers of these similar planned developments could have no reasonable expectation that after they built out the housing portion of their projects (achieving higher profits from housing sales due to the open space amenity), they could then build housing in the open space. In building hundreds of housing units and retail in the PRMP (AB 30-31), the Developer benefitted from the open space amenity. *See* John Crompton & Sarah Nicholls, *The impact on property prices of the proportion of park-like space in the proximate area*, World Leisure Journal (Oct. 2020) (paper reviewing 22 empirical studies finding that increasing greenery and open space increases property values).

The City's Bills 2018-5 and 2018-24, to which the Developer now refers as Ordinances 6617 and 6650, were not enacted "within weeks of" the City's denial of the MDA and did not apply only to the Developer. AB 52-56. The Council denied the MDA on August 2, 2017. 128(25605-25714). It adopted Bills 2018-5 and 2018-24 in March and November 2018, respectively, eight and thirteen months later, and repealed them in January 2020. 40(7402-7407); 63(11252-11265); 66(11717-11730. The Bills required all owners who proposed to redevelop golf courses to provide certain impact studies, engage the community in discussion of their proposals, and

report to the City. 40(7402-7407); 66(11717-11728); 109(19675). The Developer's only evidence that the Bills purportedly "targeted" the Developer are statements of a single Councilmember who supported the Developer and "reports" and other statements of the Developer's own attorneys, neither of which is evidence of legislative intent. 109(19663-19664); 41(7582); 42 (7617); 44(8079).

Moreover, the Developer's contention that the Bills imposed "impossible-to-meet criteria" and would require the Developer to "spend millions" (AB at 54-56) are conclusory statements of the Developer and its counsel unsupported by any evidence. The Developer fails to acknowledge that the Bills did not impose substantive requirements, but only procedures designed to provide more information to the City Council and the public concerning proposals to build structures on land previously set aside as open space. 40(7402-7407); 62(11114-11120); 66(11718-11729); 109(19664); 119(21756). Although the Bills imposed certain procedural requirements, they did not prevent the Developer from submitting a second application for the 35-Acre Segment or indicate how the Council would act on that application had it been submitted. 40(7402-7407); 66(11718-11729).[7] Even if the

[7] Assuming that the Bills would have applied to a second application to redevelop the 35-Acre Segment if the Developer had filed such an application before the Bills were repealed in January 2020, they would not have applied to the 435-Unit Project because the City approved it prior to the enactment of the Bills, and the Court reinstated the City's approval in March 2020 after the Bills were repealed.

Bills made it more difficult to develop, such temporary restriction on use does not work a taking. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 332 (2002) (33-month moratorium on development not a regulatory taking).

The Developer misleads the Court in asserting that "the City" identified funds to acquire the Badlands, planned to rezone the Badlands to open space "contrary to its legal R-PD7 residential zoning," and planned to acquire the Badlands and restore its golf course use. AB 57-58. The evidence cited for the "City's identification of $15 million" to acquire the Badlands is a Word document of unknown authorship. 49(8878-8881). Setting aside that it is not reliable or relevant evidence, the document is not an official statement or action of a majority of the City Council. *Id.*

Moreover, if a majority of the Council desired to prevent construction of housing in the 35-Acre Segment, rezoning would not be required; the property is already designated open space, and the Council could simply maintain the status quo. The other actions the Developer attributes to the City are communications among individual Councilmembers expressing their opposition to converting the Badlands to housing (AB 57-58), not statements or actions of "the City," and are therefore irrelevant.[8] *See* NRS 241.0355(1).

[8] Particularly misleading is the Developer's representation that the City stated that it

E. The City Did Not "Take" Anything Because Its Approval Of The 435-Unit Project Multiplied The Developer's Investment In The Badlands

No matter the City Council's action to deny the 35-Acre Application, its approval of the 435-Unit Project increased the Badlands' value, rather than took property without compensation. The Developer's purchase and sale agreement, along with Peccole's records and testimony, show that the Developer bought the Badlands in March 2015 for $4.5 million after an eight-month, arms-length negotiation with Peccole. 66(11758-11762); 66(11774)-68(12035). The Developer does not dispute that it failed to produce a single document to contradict the $4.5 million purchase price or support its assertion that it supposedly purchased the Badlands in 2005 for $45 million. 64(11434); 66(11762-64); 69(12150). NRS 111.205(1) requires conveyances of title in real estate to be in writing. The 2015 PSA, the only writing regarding the purchase, contained the following integration clause:

> Integration Clause; Modifications; Waivers. This Agreement (along with the documents herein) constitutes the entire agreement among the Parties pertaining to the subject matter contained herein and supersedes all prior agreements, representations and understandings of the Parties.

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had "prolong[ed] the [Landowners'] agony." AB 36, n.16. That email was authored by a homeowner opposed to the Developer's plan to eliminate the open space, not "the City." 49(8876).

62(11066). The district court disregarded these facts and law, accepting at face value the Developer's conclusory statement that it purchased the Badlands in 2005 for an unknown purchase price. 110(19831). The Answering Brief makes no effort to rectify this legal defect. AB 30-34, 126-27.

Because the Developer's own evidence shows that if the Badlands could be developed with housing, it would be worth $1,542,857 per acre (64(11454)), the Developer's purchase for only $18,000 per acre ($4.5 million/250 acres) confirms it bought the Badlands on speculation, hoping that if it could persuade the City Council to change the law to allow housing, it could multiply its investment. *See* 62(11059; 66(11774-11849); 67(11862-11987); 68(11988-12081); 93(16660-16665). According to that evidence, when the City approved the 435-Unit Project, the Developer multiplied its investment in the Badlands by a factor of six, and the Developer still had 233 acres left for potential development. *Id*. ([$1,542,857 - $18,000] x 17 = $27 million = 6 x $4.5 million). Rather than cause any damage, therefore, the City increased the Badlands' value by $27 million. 64(11454).

F. The City Council Did Not Revoke, Or Have The Authority To Revoke, Its Approval Of The 435-Unit Project

1. There Is No Evidence To Support The Developer's "Revocation" Argument

Because the Council's approval of the 435-Unit Project negated its takings claims, the Developer made the strategic decision to jettison the approved project and, instead, press its litigation. In furtherance of this effort, the Developer embarked on a campaign of misrepresentations that the City purportedly "revoked" the 435-Unit Project approval. AB 115. No evidence supports this assertion. To the contrary, the record is clear that once this Court affirmed the City's approval of the 435-Unit Project, the City repeatedly informed the Developer that not only was its entitlement valid but it would remain valid for an additional two years. 62(11117-11125).

The district court nevertheless concluded the City "clawed back" the approval because

> the City denied the MDA (which expressly included the 17 Acre Property), denied the 35 Acre applications, denied the fence application (that would have allowed the Landowners to fence the 17 Acre Property) and denied the access application (that would have allowed access to the 17 Acre Property). The City also sent the Landowners an email that explained the 17 Acre approvals were "vacated, set aside and shall be void." Exhibit 189.

62(1117-11125). None of these had any effect on the 435-Unit Project, and the Developer notably did not petition for judicial review from any of these purported "revocations."

The proposed MDA incorporated the existing approval of the 435-Unit Project without modification, so the Council's denial of the MDA application left the 435-Unit Project approval intact. 61(10868-10869, 10877-10887). The City's purported "denial" of additional access and fencing did not affect the 435-Unit Project approval because when the Developer bought the Badlands, the 17-Acre Segment already had vehicular access from public streets at multiple locations. 66(11678, 11712-11714). In approving the 435-Unit Project, the City granted the Developer's request for an additional vehicle access point from South Rampart Blvd. 66(11678, 11693-11694). The application for additional access was for maintenance, not development. 66(11694). The fencing application sought to exclude trespassers from the Badlands and ponds that are not on the 17-Acre Segment. AB 98; 66(11696-11704); 38(7004-7013). The Developer admits that the "[t]here was no 'proposed development' with the access and fence applications." AB 51.

The email on which the district court relied for the finding "the 17 Acre approvals were 'vacated, set aside and shall be void'" was from a City employee to the Developer's attorney in January 2019 noting that *Judge Crockett* had voided the 435-Unit Project approval, not the City. 87(15475). The Developer then successfully argued to this Court in its appeal of Judge Crockett's Order – *after* the City's denial of the MDA and alleged denial of additional access and fencing – that the City's

approval was valid and should be reinstated. 62(11106-12); ReplyApp 2(266, 339). By limiting its appeal to Judge Crockett's Order, the Developer conceded the City's earlier MDA denial and alleged denial of additional access and fencing did not "revoke" the 435-Unit Project approval, as it thereafter asserted. The Developer only raised its "revocation" argument to salvage its regulatory taking claims after this Court reinstated the City's approval of the 435-Unit Project.

2. No "Revocation" Occurred As A Matter Of Law

Setting aside this evidence, the notion that the City "revoked" the 435-Unit Project approval is flawed on other grounds. First, had the City done so, it would have been in contempt of this Court's Order reinstating the approval. *See* NRS 22.010(3). At no time did the Developer ask the Court to hold the City in contempt for a purported violation of its order (because no such violation occurred). Second, action to revoke the 435-Unit Project approval would require a majority vote of the Council, which did not occur. *See* NRS 241.0355(1); 62(11110). The Developer's brief fails to address these points, thereby conceding them. *See Polk v. State*, 126 Nev. 180, 185, 233 P.3d 357, 360 (2010).

3. The Extra-Record District Court Order The Developer Cites Is Not Evidence That The City Revoked The 435-Unit Project Approval

Because the record evidence defeats the Developer's regulatory takings claims, the Developer has resorted to extra-record documents to backfill its faulty revocation argument. The City reasserts the arguments from its motion to strike that the Court's consideration of these documents is improper.[9] *See* NRAP 30(g)(1); *Tabish v. State*, 119 Nev. 293, 312, 72 P.3d 584, 596 (2003). Among the unauthorized documents in the "Landowner's Appendix" is an interlocutory order in the 17-Acre Case that post-dates the Judgment, which found that the City "Prohibited the Drainage Infrastructure Necessary to Develop the 17 Acre Property" ("17-Acre Order"). AB 9, 39, 42, 116, *citing* 1 LA at 63-68, 77:4-5.

The 17-Acre Order is not evidence but rather a judge's determination based on alleged evidence that the Developer has failed to present to this Court. The Court cannot, through judicial notice, simply accept as true Judge Jones' disputed findings. *See Wyatt v. Terhune*, 315 F.3d 1108, 1114 (9th Cir. 2003); *see also Lasar v. Ford Motor Co.*, 399 F.3d 1101, 1117 n.14 (9th Cir. 2005) (denying request for judicial

[9] Because this section F.3 rebuts the Developer's extra-record documents, the Court need not consider it should the Court strike those documents. The City has submitted a Reply Appendix that contains extra-record documents referenced in this section. To the extent the Court considers any extra-record materials, the City requests that the Court take judicial notice of the documents in its Reply Appendix.

notice of an order in another case because party was "offering the factual findings contained in the order for the purpose of proving the truth of the factual findings contained therein"). This is particularly important here because the findings arose from the Developer's misrepresentations.

a. The Extra-Record 17-Acre Order Derives From The Developer's Misleading Tactics To Overcome Its Inability To Prove A Regulatory Taking In The 17-Acre Case

The context of the 17-Acre Order is critical to understanding why it is unreliable to prove any "facts" as to the City's alleged regulatory actions at issue here. Of the Developer's nine causes of action, Judge Jones found the City liable only for a physical taking based on alleged trespass. 1 LA 74-80.

In support of its categorical and *Penn Central* taking claims, the Developer submitted an appraisal report by Tio DiFederico, which concluded that the 17-Acre Segment's value before the City's alleged actions that the Developer contended effected a taking would be $44,185,000 because the property could be developed with multi-family housing. ReplyApp 8(1558, 1582, 1591). Although acknowledging that the 17-Acre Segment was entitled for the 435-Unit Project as of the October 10, 2022 date of value in his report, without explanation, Mr. DiFederico ignored the 435-Unit Project approval and opined that after the date of value, the City would not allow any development of the 17-Acre Segment, rendering the

property valueless. ReplyApp 8(1553, 1544, 1584, 1585, 1588). The report made no mention of trespassing as interfering with the owner's ability to develop the property, and the valuation was not based on any alleged trespass. *See id.*

In response to the DiFederico report, the City submitted an appraisal report from Charles Jack, which demonstrated that even had the City caused trespassing on the 17-Acre Segment (as the Developer alleged in its physical taking claim), trespassing would not preclude development of the 435-Unit Project. ReplyApp 1(174-176, 199). Mr. Jack pointed out that if the Developer obtained a building permit, it could simply erect a temporary construction fence to exclude trespassers during construction. ReplyApp 1(174-176, 199). Indeed, once a building permit is obtained, no City permission is required to erect a temporary construction fence. Las Vegas Admin. Code § 301.4.1(32). By this simple showing, the City dismantled the Developer's physical taking claim.

Because the only damages the Developer alleged for a physical taking were for trespass (ReplyApp 1(14-17, 26)), yet the Developer's appraisal found damages only for the City's alleged interference with the Developer's ability to develop the property with housing, i.e., a categorical taking (ReplyApp 8(1582, 1588, 1656)), a claim on which it did not prevail, the Developer contrived a new strategy that asserted the City "made it impossible to install the necessary drainage infrastructure"

for the 435-Unit Project, which was tantamount to a revocation. ReplyApp 1(20); 2(380-385). According to the Developer's newly manufactured scheme: (a) the 435-Unit Project approval conditioned the City's grant of a building permit on the Developer obtaining the City's approval of a drainage study for the 435-Unit Project; (b) the City purportedly required the Developer to build drainage improvements on the 65- and 133-Acre Segments as a condition of approval of a drainage study for the 17-Acre Segment; (c) the City required that as a condition of approval of drainage improvements on the 65- and 133-Acre Segments, the Developer would have to obtain the City's approval of housing development projects on those segments; and (d) the City denied the Developer's applications to build housing on the 65- and 133-Acre Segments. ReplyApp 1(20); 2(380-385). Even though this convoluted argument would only support a categorical claim for denial of use, Judge Jones accepted it as grounds to find a physical taking. 1 LA 63-68. 77:4-5.

b. The Developer Misrepresented The Facts Surrounding A Drainage Study

Judge Jones' finding that the City purportedly prohibited drainage improvements was based on the Developer's misrepresentations. In early 2016, before segmenting the Badlands, the Developer submitted a March 3, 2016 *Technical Drainage Study for the Seventy* to the City's Department of Public Works ("DPW"), which proposed drainage improvements on the entire 250-acre Badlands

("250-Acre Drainage Study"). ReplyApp 3(460)-4(864); 3(493, 497, 499); 9(1686, 1700-01, 1718, 1720, 1724, 1734). The 250-Acre Drainage Study stated that the Developer intended to construct 3,020 housing units in the Badlands in three phases, which project the Developer entitled "The Two Fifty." ReplyApp 3(475). The first and second phases of The Two Fifty would be grading and installation of drainage improvements and construction of multi-family housing on a 70-acre portion of the Badlands, which the Developer entitled "The Seventy." *Id.* The third phase would be construction of estate homes on a 180-acre portion of the Badlands, which the Developer entitled "The One Eighty." *Id.*

After submitting the 250-Acre Drainage Study to DPW, rather than file applications to build The Seventy or The Two Fifty, for which the 250-Acre Drainage Study was prepared, the Developer filed an application for a housing development on only the 17-Acre Segment (59(10479-10499)), which the City Council approved for the 435-Unit Project. In approving a Site Development Review for the 435-Unit Project, the City Council imposed Condition 21, its standard condition regarding drainage for new construction, which states: "A Drainage Plan and Technical Drainage Study must be submitted to and approved by the Department of Public Works prior to the issuance of any building or grading permits or submittal of any construction drawings, whichever may occur first." 64(11419). Condition 21,

therefore, required the Developer to submit and obtain DPW's approval of a drainage plan and technical drainage study *specifically for the 435-Unit Project*. *Id.* It likewise reflects that: (a) at the time of the City's 435-Unit Project approval, the Developer had not submitted a drainage study for the 17-Acre Segment; and (b) the 250-Acre Drainage Study did not satisfy Condition 21. *See id.*

Nevertheless, the Developer misrepresented to Judge Jones that it submitted the 250-Acre Drainage Study to comply with Condition 21 (even though it predated the 435-Unit Project approval) and that DPW purportedly approved the 250-Acre Drainage Study for the 435-Unit Project. ReplyApp 2(380-381). This was false. There is no evidence that DPW approved the 250-Acre Drainage Study. Moreover, after the City approved the 435-Unit Project with Condition 21, the Developer submitted a different drainage study to DPW entitled *Technical Drainage Study for The 435 (Formerly "The Seventy")* ("TDS for The 435"). ReplyApp 3(454), 5(932-1096); 6(1115-1132). Between November 9, 2017, and July 26, 2018, the Developer submitted to DPW three drafts of the TDS for The 435, and DPW commented on each draft, requiring the Developer to respond to each set of comments with a modified TDS. ReplyApp 6(1134-37); 7(1275-79, 1449-54). As these comments show, **DPW never required the Developer to build drainage improvements on the 65- and 133-Acre Segments or obtain building permits for housing on the**

65- and 133-Acre Segments as a condition of approval of a drainage study and building permit for the 435-Unit Project. *Id*.; ReplyApp 3(457-58). The Developer's drainage consultant admitted that DPW agreed to allow the Developer to build drainage improvements for the 435-Unit Project on the 65-Acre Segment at the Developer's option without requiring approval of a housing project on the 65-Acre Segment. ReplyApp 5(934). The Developer failed to submit the TDS for The 435 to Judge Jones, instead misrepresenting that the 250-Acre Drainage Study, which showed drainage improvements on the entire 250-Acre Badlands (9(1684-1742)), was the drainage study for the 435-Unit Project on the 17-Acre Segment. ReplyApp 2(381-385).

In addition to misrepresenting to Judge Jones that the 250-Acre Drainage Study was the drainage study the City required for the 435-Unit Project, the Developer misrepresented statements made in an August 13, 2018 meeting between DPW and the Developer's engineers regarding "The 435 TDS" by submitting meeting minutes drafted by the Developer's engineer ("August 13, 2018 Minutes"), which state:

> Rules state when processing a Technical Drainage Study (TDS) through the CLV, that zoning/planning approval of the entitlements on a property are required to be approved prior to conditional approval can be given on a TDS. CLV staff discussed that due to the ongoing litigation standing on the entitlements for the property, that direction from the City Manager's office was that City staff is not authorized to

> provide conditional approval on this TDS. CLV also discussed that review of any addendums or responses to comments can proceed; however, until litigation on the entitlements is resolved, conditional approval can't be issued on this TDS.

ReplyApp 7(1456). The Developer misleadingly contended that these statements meant that DPW would not approve a drainage study for the 17-Acre Segment unless the Developer obtained building permits for the 65- and 133-Acre Segments, which was not accurate. *Compare* ReplyApp 1(20); 2(384) *to* ReplyApp 3(457-458). There is no evidence that DPW mentioned the 65- or 133-Acre Segments at the meeting, and DPW never required the Developer to obtain a building permit for housing on the 65- or 133-Acre Segments as a condition to approval of a drainage study for the 17-Acre Segment. ReplyApp 3(457-458).

To clear up any possible confusion, in an email dated August 21, 2018, DPW requested that the Developer's engineer more accurately report DPW's statement:

> Flood Control has reviewed the notes and has some concerns. Please revise the notes to reflect our understanding.
>
> **First bullet point**
>
> **Revise the bullet point**
> Conditional Approval of a Technical Drainage Study (TDS) requires zoning/planning approval of the entitlements before CLV Flood Control can issue Conditional Approval of the TDS. Flood Control advised that the 435 site entitlements are not currently approved based upon ongoing litigation, therefore Flood Control cannot grant conditional approval until the entitlements are approved. Flood Control will continue to review TDS submittals based upon the

> engineer's submitted addendum, however we will not conditionally approve the study until we have approved entitlements.

ReplyApp 7(1464). The Developer declined to correct the August 13, 2018 Minutes but did agree to attach DPW's requested corrections. ReplyApp 7(1463). Although DPW's position was clear that it could not approve a drainage study for the 435-Unit Project while the approval had been invalidated by Judge Crockett, and that DPW would not require any building permits for the 65- and 133-Acre Segments as a condition of a drainage study for the 435-Unit Project, the Developer **failed to bring DPW's clarifying email to Judge Jones' attention**. ReplyApp 7(1456-1461).

Events occurring after the August 13, 2018 meeting confirm that the City did not prevent the Developer from building the 435-Unit Project but, rather, the Developer abandoned it. On March 5, 2020, this Court reversed Judge Crockett and reinstated the 435-Unit Project approval. 62(11110-11111). On March 26, 2020, the City notified the Developer that, once this Court's remittitur issued, "the discretionary entitlements the City approved for [the Developer's] 435-unit project on February 15, 2017 ... will be reinstated" and valid for two years after the date of the remittitur. 62(11117). On September 1, 2020, the City notified the Developer that this Court issued its remittitur, the City's approval of the 435-Unit Project was reinstated, the Developer was free to proceed, and the approval was extended for two years. 62(11120). On December 23, 2021, the City notified the Developer a third

time that the 435-Unit Project approval was valid and the Developer could apply for ministerial building permits and start construction. 119(21756). The Developer never responded to any of these notices.

Significantly, after the Developer's September 13, 2018 email refusing to correct the August 13, 2018 Minutes, including after the Supreme Court reinstated the 435-Unit Project approval in August 2020, the Developer failed to (1) respond to DPW's comments on the Third Draft TDS for The 435; (2) resubmit a drainage study for the 435-Unit Project; (3) take any other action to obtain a building permit for the 435-Unit Project; or (4) communicate with DPW. ReplyApp 3(457-458).

c. The Developer Led Judge Jones Into Other Erroneous Findings Regarding The Developer's Failure To Apply For A Building Permit

Judge Jones further erred in finding that the MDA required the Developer to build drainage improvements on the 65-Acre and 133-Acre Segments as a condition of developing the 435-Unit Project. 1 LA 66. Regardless of its proposed terms, the MDA did not impose any conditions on the Developer because the City disapproved it. 61(10948).

Judge Jones also erroneously determined that Bill 2018-24 required the Developer to prepare a major drainage study and build drainage improvements on the 65- and 133-Acre Segments as a condition of building the 435-Unit Project. 1

LA 66-67. Bill 2018-24 applied only to "proposals" to redevelop golf courses. 40(7402-7407); 66(11717-11729). Because the City approved the 435-Unit Project in February 2017, more than a year before the City Council adopted Bill 2018-24, the 435-Unit Project was no longer a "proposal" and Bill 2018-24 did not apply. *See id.*

Regardless, Judge Crockett's Order rendered the approval void during the entire period Bill 2018-24 was in effect, from November 2018 to January 2020. 63(11252-11265). DPW could not have approved a drainage study for the 435-Unit Project unless and until the Developer had valid approvals. ReplyApp 3(456-457). By the time this Court reinstated the 435-Unit Project approval in March 2020, Bill 2018-24 had been repealed. 63(11252-11265). Yet, thereafter, the Developer never communicated with DPW or sought approval of a drainage study. ReplyApp 3(457-458).

d. The Developer Also Abandoned Any Attempt To Develop The 133-Acre, 35-Acre, And 65-Acre Segments To Avoid The Possibility That The City May Have Approved Development, Thereby Undermining The Developer's Effort To Raid The Public Treasury

In addition to abandoning the 435-Unit Project, the Developer failed to pursue redevelopment of the other Badlands segments in an apparent effort to avoid the possibility that the City would *approve* such applications and undercut the

Developer's takings claims. For example, when the City moved to remand the 133-Acre Case to allow the Council to consider the 133-Acre Application for the first time on the merits, the Developer opposed it to prevent the City Council from approving any redevelopment of that segment. 63(11270-11271); 106(18941-18971). The Developer never filed a second application to redevelop the 35-Acre Segment, despite the City's invitation (63(11274)), and never filed any application to redevelop the 65-Acre Segment. 65(11636-11637). The Developer's brief does not dispute these facts, demonstrating that it would prefer to extort hundreds of millions from the public treasury rather than develop housing.

G. The Developer Fails To Provide Any Factual Or Legal Support For Its Categorical And *Penn Central* Claims

1. Nothing In The Developer's Brief Demonstrates That Its Categorical and *Penn Central* Claims Were Ripe

a. The Developer's Contention That Final Decision Ripeness Does Not Apply To Its Categorical Taking Claim Is Contrary To All Authority And Logic

The Developer admits (AB 105-06) that in *State*, 131 Nev. at 419-20, 351 P.3d at 742, this Court adopted the final decision ripeness requirement of *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985). *Williamson County* places the burden on the developer to file and have denied at least two applications to develop the "property at issue" before the agency's decision can be deemed final as to what the agency will allow. *Id.* at 191.

The Developer contends, however, that final decision ripeness applies only to its *Penn Central*, not categorical, claim (AB 91), ignoring unanimous contrary authority. *See*, *e.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606, 618-19 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 731, 734 (1997); *Barlow & Haun, Inc. v. United States*, 805 F.3d 1049, 1057-59 (Fed. Cir. 2015); *see also State*, 131 Nev. at 419-20, 351 P.3d at 742 (applying ripeness requirement to regulatory takings claims without distinguishing between amount of economic impact alleged).

If a final decision is necessary for a near wipeout claim (*Penn Central*), it must also be required for a total wipeout claim (categorical). The question for both claims is whether the agency might allow some lesser—but still economically beneficial—use of the property. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986) ("It follows from *the nature of a regulatory takings claim* that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property.") (emphasis added).

The Developer's reliance on *Sisolak* and *Kelly* (AB 97-98, 105-06) does not alter this conclusion. *Sisolak* does not hold, as the Developer contends, that a claim that regulation "'completely deprives an owner of all economic beneficial use of her property'" "is exempt from a ripeness (exhaustion) analysis." AB 97. *Sisolak* was a

physical taking case that did not involve a development application to which final decision ripeness applies. *See* 122 Nev. at 663, 137 P.3d at 1122 (noting, "The second type of per se taking, complete deprivation of value, is not at issue in this case because Sisolak never argued that the Ordinances completely deprived him of all beneficial use of his property."). Nonetheless, the Court indicated that final decision ripeness *would apply* to a claim that government regulation denied the owner all economic use of its property (i.e., a wipeout). *See id.* at 664, 137 P.3d at 1123. Also, contrary to the Developer's representation, Justice Maupin's dissent agreed with the majority holding that final decision ripeness applies to wipeout claims. *Id.* at 684, 137 P.3d at 1136 (Maupin, J., dissenting); *see also id*. at 685, 1136 ("I do not believe it necessary to deviate from federal takings jurisprudence to justly evaluate . . . whether the matter is ripe for such a determination."). Ripeness was not an issue in *Kelly*. *See generally* 109 Nev. at 647-53, 855 P.2d at 1032-37.

b. Neither the Master Development Agreement Application Covering The Entire Badlands Nor Applications For Additional Access And Fencing Constituted A Second Application to Redevelop The Individual 35-Acre Segment, Which Is The "Property At Issue"

Contrary to the Developer's assertion (AB 107), because the MDA proposed phased development of the entire 250-Acre Badlands, it was not a second application to develop the "property at issue" for ripeness purposes. *State*, 131 Nev. at 419, 351

P.3d at 742, *quoting Williamson County*, 473 U.S. at 186. Even had the City approved the MDA, the Developer still would have needed to file new applications for a Site Development Review, General Plan Amendment, Tentative Map, and Waiver for the 35-Acre Segment. *See* LVMC 19.16.100 (requiring Site Development Review application for specific project); 60(10630, 10696-10723). The Council's denial of the MDA, therefore, was not a "clear, complete, and unambiguous" statement that the agency has "drawn the line, clearly and emphatically, as to the sole use to which [the property] may ever be put." *See Hoehne v. County of San Benito*, 870 F.2d 529, 533 (9th Cir. 1989).

Nor could denial of the MDA mean that there was a "conclusive decision" or that "there is no question . . . about how the regulations at issue apply to *the particular land in question.*" *Pakdel v. City and County of San Francisco*, 141 S.Ct 2226, 2231 (2021) (emphasis added). There could be any number of reasons the Council denied the MDA that did not involve the 35-Acre Segment, such as objection to the housing density or type the MDA proposed for the 133-Acre or 65-Acre Segments. 61(10861-10946). The Developer's brief does not address this point, thereby conceding it. *See Polk*, 126 Nev. at 185, 233 P.3d at 360.

The Developer contends the MDA qualifies as a second application to develop the 35-Acre Segment because "the City" allegedly informed the Developer it would

not accept further applications for development of individual segments, but only an MDA that included the entire 250-Acre property. AB 41, 47-48, 107. This assertion derives from alleged statements by two individual Council members and City staff in a private meeting with the Developer, rather than a majority vote of the City Council. 109(19653-19655) (referencing 26(4807-4809)). In relying on these alleged statements, the Developer improperly attempts to flip its burden to the City to state a ripe taking claim. *See Hoehne*, 870 F.2d at 533.

The Developer's alleged application for additional access was to maintain the Badlands, not redevelop the 35-Acre Segment. 66(11694). The Developer's alleged application for fencing was to exclude trespassers from other segments of the Badlands and ponds located in those segments, not redevelop the 35-Acre Segment. AB 98; 66(11696-11704); 38(7004-7013). The Developer admits that the "[t]here was no 'proposed development' with the access and fence applications." AB 51. Accordingly, even had the Developer filed proper applications for additional access and fencing (it did not), neither counts as a second application for final decision ripeness. *Williamson County*, 473 U.S. at 191.

This case bears no resemblance to *City of Monterey*, in which a city council denied four applications. 526 U.S. at 696-98. AB 106. The Ninth Circuit concluded that the developer's taking claim met the *Williamson County* final decision

requirement, and the City's petition for certiorari did not contest ripeness. *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1506-1507 (9th Cir. 1990). Here, by contrast, the Developer filed and the City Council denied only one application to develop the "property at issue," rendering the Developer's categorical and *Penn Central* claims unripe. *Williamson County*, 473 U.S. at 191.

c. The Developer Misrepresents Its August 2022 Settlement Proposal As A Redevelopment Application For The 35-Acre Segment

In the Landowners' Appendix, the Developer seeks the Court's consideration of an extra-record agenda summary and minutes of an August 3, 2022 City Council action striking from the agenda the Developer's proposal to settle the four Badlands lawsuits. 1 LA 21-22, 30. This post-dated the Judgment, is outside the appellate record, and should be stricken. *See Tabish*, 119 Nev. at 312, 72 P.3d at 596.

Moreover, the Developer misrepresents the item as an "entitlement package[] that would have allowed development of the 35 Acre Property" that "the City … twice, refused to consider." AB 107-08. Placed on the agenda by Councilmember Seaman (who later voted with the other councilmembers to unanimously strike it from the agenda), the item was the Developer's proposal to settle all four Badlands lawsuits on condition that the City pay the Developer $64 million in cash and in-kind drainage improvements and allow the Developer to build more than 3,000

housing units in the Badlands. 1 LA 22; ReplyApp 2(414-432). The proposal did not contain any of the necessary elements of a real estate development application or comply with any of the procedures required by law. *See*, *e.g.*, NRS 278.260 (procedure for amendment of zoning ordinance); LVMC 19.16.100 (requirements for a Site Development Review). Moreover, because the proposal was not limited to the 35-Acre Segment, the Council could have rejected it for a variety of other reasons, including the $64 million price tag or the proposed density for areas outside the 35-Acre Segment. ReplyApp 2(419-432).

The post-Judgment settlement proposal also could not ripen the Developer's categorical and *Penn Central* claims because ripeness is determined at the time the Developer filed suit. *See Williamson County*, 473 U.S. at 186; *State*, 131 Nev. at 419, 351 P.3d at 742. These same infirmities, plus that ripeness is established through agency (not court) action, mean the City's opposition to the Developer's motion in the 17-Acre Case asking the district court to order the City to approve the development proposed in the settlement proposal did not ripen the Developer's regulatory takings claims. AB 56-57, 107-08.

2. The Categorical And *Penn Central* Claims Fail Because The City Did Not Diminish The Value Of The 35-Acre Segment

a. The Developer Fails To Overcome That The PR-OS Designation Governs The Allowable Uses Of The 35-Acre Segment

The Developer has not satisfied its burden to show that the City's denial of the 35-Acre Application wiped out or nearly wiped out the property's economic value or interfered with the Developer's objective and reasonable investment-backed expectations. *State*, 131 Nev. at 419, 351 P.3d at 741; *Kelly*, 109 Nev. at 649-50, 855 P.2d at 1034; *Boulder City*, 110 Nev. at 245-46, 871 P.2d at 324-35; *Penn Central*, 438 U.S. at 124; *Lingle*, 544 U.S. at 538. The Badlands was designated PR-OS when the Developer acquired the property, the Developer knew that PR-OS prohibited housing, and the Developer paid a purchase price that reflected this legal constraint on redevelopment. 59(10452); 66(11174-11849); 67(11862-11987); 68(11988-12081); 93(16660-16665). Under these facts, the Developer cannot show that the City's regulation had any effect on the 35-Acre Segment's value.

"[E]conomic impact is determined by comparing the total value of the affected property before and after the government action." *Colony Cove Props. v. City of Carson*, 888 F.3d 445, 451 (9th Cir. 2018). In denying the Developer's application to redevelop the 35-Acre Segment with housing, the City Council voted to retain the existing PR-OS designation. 128(25605-25714). No change in the applicable

regulation before and after the City's action means there was no decrease in the property's value due to the City's regulation and no taking. *See Colony Cove*, 888 F.3d at 451.

Even if the MDA counted as an application to redevelop the 35-Acre Segment, the City Council's denial of the MDA likewise did not affect the 35-Acre Segment value's; it simply maintained the status quo. 61(10948). Similarly, even had the Developer filed, and the City denied, the correct applications for additional access and fencing, because they were for maintenance, not development (AB 51), their denial did not wipe out or nearly wipe out the property's value. Finally, because Bills 2018-5 and 2018-24 only temporarily required expanded public engagement in the process to redevelop golf courses and did not apply to the 35-Acre Application, they are not evidence of a complete economic wipe-out.

Like the district court, the Developer ignores that a takings claimant who buys property subject to regulations that limit its use has no objectively reasonable investment-backed expectation that the agency will change the law to expand the allowable uses. *Kelly*, 109 Nev. at 651, 855 P.2d at 1035 (developer "had adequate notice that his development plans might be frustrated" by existing land use regulations); *Penn Central*, 438 U.S. at 136 (New York City law that did not interfere with "present uses" of the property could not interfere with property owner's

"primary expectation concerning the use of the parcel"); *Bridge Aina Le'a, LLC v. Land Use Comm'n*, 950 F.3d 610, 634-35 (9th Cir. 2020) (developer could not have reasonably expected the Commission to not enforce conditions in place when it purchased the property); *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1120-21 (9th Cir. 2010) (takings claimants "bought a trailer park burdened by rent control, and had no concrete reason to believe they would get something much more valuable, because of hoped-for legal changes, than what they had").

The Developer's contention that the City took the 35-Acre Segment because it "is vacant and without economically beneficial or productive use" (AB 99) ignores Peccole's reservation of the Badlands as an open space and recreational amenity to benefit the remainder of the PRMP and as a condition of approval of the Gaming Enterprise District. 57(10115-10116, 10144, 10146, 10152-10153, 10176). The City did not prevent the historic use of the Badlands. *See Penn Central*, 438 U.S. at 136 (denying taking claim where regulation did not interfere with long-standing use of the property). As sought and effectuated by Peccole, the Badlands served an economically beneficial and productive use. No authority requires the City to change its regulations so that a private property use that is no longer profitable can be used

profitably.[10] *See id.* The Developer has no constitutional right to be rescued from its market choices.

b. The Developer's Division Of The Badlands Into Four Development Sites And Suits For Four Separate Takings Is Classic Segmentation

The Developer cannot prop up its deficient categorical and *Penn Central* taking claims by contending, contrary to all facts, that the 35-Acre Segment has no historical or geographical connection to the PRMP or the Badlands. Because the City approved development of 84 percent of the PRMP, the claim that the City has taken the Badlands fails. *See Kelly*, 109 Nev. at 651, 855 P.2d at 1035. Even if the Badlands is the whole parcel instead of the PRMP, the Developer improperly segmented it. Although the Developer intended to develop the entire Badlands with housing (59(10458-10459, 10518-10617)), it carved out four development sites, transferred title to four separate subsidiaries controlled by the Developer (59(10479-10499); 60(10696-10723); 61(10861-10946); 62(11076-11092)), obtained approval for one site, and then filed suit when the City denied development on another.

In the district court, the Developer failed to cite the two controlling parcel-as-a-whole cases: *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017), which sets forth the

[10] Although the Developer now contends that housing is the only profitable use of the Badlands, in its assessment appeal the Developer claimed that the Badlands could be used for "golfing or golf practice." 71(12407).

necessary analysis, and *Kelly*, which is the *only* decision of this Court to address the parcel-as-a-whole issue. 109 Nev. at 651, 855 P.2d at 1035. Instead, the Developer and district court relied on *City of North Las Vegas v. Eighth Jud. Dist. Ct.*, 133 Nev. 995, 401 P.3d 211 (table) (May 17, 2017), 2017 WL 2210130 *2, Case No. 68263 (unpublished disposition), which holds that for purposes of valuation in eminent domain, the parcel as a whole is typically, but not always, a discrete assessor's parcel. 109(19680-19682); 84(14801-14802). Although the Developer continues to lean on *City of North Las Vegas* (AB 117), that unpublished decision has no relevance to this regulatory taking case. *See* 2017 WL 2210130 *2. *Murr* and *Kelly* expressly hold that assessor's parcel boundaries do not determine the parcel as a whole for purposes of regulatory takings. *Murr*, 137 S.Ct. at 1947; *Kelly*, 109 Nev. At 651, 855 P.2d at 1035.

Rather than apply *Murr's* three factors, the Developer attempts to "distinguish" the case based on irrelevant grounds. AB 120-22. The facts that: (a) the physical characteristics of the property in *Murr* are different from the PRMP and the Badlands; (b) the 35-Acre Segment is a separate assessor's parcel; (c) and this case does not involve parcel merger are not relevant to the parcel-as-a-whole analysis. The City demonstrated that application of the *Murr* factors compels the conclusion that the parcel as a whole is either the PRMP or the Badlands. OB 55-60.

The development of 84% of the PRMP and the City's approval of the 435-Unit Project in the Badlands negates a regulatory taking of the parcel as a whole.

The Developer argues that *Kelly* was decided before *Sisolak* and "thus does not have the same precedential value." AB 117-18, citing 122 Nev. At 667, 137 P.3d at 1125. However, *Sisolak* was a physical taking case, in which the existence of taking does not depend on whether a government limitation on the owner's use affects all or a part of the property. *See Loretto v. Manhattan Teleprompter CATV Corp*., 458 U.S. 419, 436 (1982). *Kelly* is still binding precedent here. 109 Nev. at 651, 855 P.2d at 1035.

The agency's temporary denial of an application to build in *Kelly*, as opposed to the City's allegedly permanent denial of development of the 35-Acre Segment (AB 118), is both factually inaccurate and irrelevant to the parcel-as-a-whole analysis. Whether the agency's denial of a development application rises to the level of a permanent taking is a separate question from the parcel as a whole. *See Kelly*, 109 Nev. at 651, 855 P.2d at 1035. This Court rejected the taking claim in *Kelly* because the agency approved a subdivision of the original acreage into 39 assessor's parcels and approved development on 32 of those parcels. *Id.* at 651, 855 P.2d at 1035. *Kelly* is directly on point.

The Developer's citation to NRS 37.039 (AB 119-20) does not help because that statute requires an agency acquiring title to property for open space by eminent domain to comply with certain procedures prior to filing the action. It has no application to regulatory takings. *See id.*; *Gearing*, 54 F.4th at 1149.

The Developer's contention that "the 17 Acre approvals . . . did not require the other 233 acres remain open space as a condition" and the "City's segmentation argument purports to allow it to preserve 233 of the 250 acres for open space in circumvention of [NRS 37.039]" (AB 116, 120) has no bearing on the parcel-as-a whole analysis. The fact that 233 acres in which the City has not yet approved redevelopment is limited to park, recreation, and open space is based on the longstanding PR-OS designation, not because the City approved the 435-Unit Project.

The Developer also cannot sidestep the parcel as a whole by contending that the PRMP does not exist, or that the Badlands was not part of the PRMP. AB 82-84. The record shows otherwise. *See, e.g.*, 59(10532) (referring to the 1989 and 1990 "Peccole Ranch Master Plan"). The developer of the master planned community set aside the Badlands as an amenity for that master planned community. 58(10253); 57(10106-10116, 10122, 10127-10129); 57(10086, 10088, 10115-10116). The City and Peccole have consistently referred to the PRMP as a master planned community

since 1990. 59(10504, 10532); 57(10086-10088, 10106-10116, 10122, 10127-10129, 10131-10158, 10176-10187); 58(10236, 10297).

The Developer misrepresents that a City planner required the Developer to segment the Badlands. AB 116-17. In response to the Developer's decision to create the four segments, the planner required the Developer to subdivide the Badlands so that no segment straddled assessor's parcel boundaries. 86(15604-15605). Subdivision into separate assessor's parcels is not improper segmentation for purposes of regulatory takings. *See Kelly*, 109 Nev. at 651, 855 P.2d at 1035. Rather, improper segmentation is the division of the parcel as a whole into segments, applying for development of each segment separately, and filing suit for a taking of a segment of the whole. *See id.*; *Murr*, 137 S.Ct. at 1944. There is no evidence that the City Council instructed the Developer to do any of these things.

Finally, the Developer's argument that it can engage in segmentation and then sue for a "per se" taking is not supported by law. AB 116, *citing Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021). Because *Cedar Point* is a physical taking case, the parcel as a whole was not at issue. *Id.* at 2072. If by its reference to a "per se" taking the Developer means a categorical (wipeout) taking,[11] the argument that

[11] The Developer engendered confusion by entitling its wipeout claim "categorical" and its physical taking claim "per se." The *Lucas* majority used the term "categorical" to refer to wipeouts and physical takings, while the dissent preferred

segmentation is a defense to a *Penn Central* claim but not a categorical claim is without merit. Allowing economic use of one part of the parcel as a whole is a defense to both *Penn Central* and categorical taking claims. *See*, *e.g.*, *Murr*, 137 S.Ct. 1949 (rejecting categorical (wipeout) and *Penn Central* claims because owners allowed substantial use of parcel as a whole).

H. Nothing In The Developer's Brief Supports The District Court's Conclusion That A Physical Taking Occurred

1. The City's Short-Lived Ordinances Regarding Golf Course Repurposing Did Not Authorize The Public To Trespass On The 35-Acre Segment

In contending that the City effected a physical taking of the 35-Acre Segment, the Developer relies on *Hsu v. v. County of Clark*, 123 Nev. 625, 173 P.3d 724 (2007), *Sisolak*, 122 Nev. at 668, 137 P.3d at 1125; *Knick v. Township of Scott, Pa.*, 139 S.Ct. 2162 (2019), *Loretto*, 458 U.S. at 427-32, and *Cedar Point*, 141 S.Ct. at 2074. AB 92-95. In each of these cases, the agency enacted legislation that exacted a permanent easement that required the owner to allow others to physically occupy their property. Here, the only legislation cited by the Developer for its physical

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"per se." 505 U.S. at 1015; *id*. at 1052 (Blackmun, J., dissenting). The Developer has doubled down on the confusion by repeatedly referring to its categorical claim as a "per se categorical taking" (AB 97-100), which is the equivalent of a "wipeout taking."

taking claim are Bills 2018-5 and 2018-24 (AB 95), which do not exact an easement. 40(7402-7407); 66(11718-11724).

The Developer did not respond to the City's argument showing that the Bills did not apply to the 35-Acre Segment (OB 77-79) or dispute that during the short period in which the Bills were in effect, the Developer filed no "proposals" to repurpose the 35-Acre Segment. 60(10696-10723). The Council denied the 35-Acre Application in June 2017, long before the Bills were enacted. 60(10725-10732).

The Developer also fails to refute that Bill 2018-24's reference to "ongoing public access" did not apply to the Developer. The requirement that a golf course redeveloper "document" "ongoing public access" applied only if the City notified the owner that it was required to submit a maintenance plan, and the Developer does not dispute that the City never issued such a notice. 66(11673-11674). The Developer also does not dispute that it voluntarily shut down the golf course in 2016 before Bill 2018-24 was enacted, so there was no "ongoing public access" to maintain. 66(11674).

Moreover, the Developer fails to demonstrate that any trespassing occurred because of the Bills. The Developer's own evidence shows that trespassing began well before the Bills were enacted and continued after the City Council repealed them. 50(8975-9027); 51(9039-9092, 9104-9159). The Developer points to no

evidence that the trespassing interfered with the Developer's proposed use of the property for housing, which is the only category of damages the Developer claims. *See* AB 95-96, 122-23. Even if Bill 2018-24 caused trespassing, it was in effect for only 15 months and was repealed in January 2020, yet thereafter, the Developer failed to file another application to redevelop the 35-Acre Segment. If the Developer had secured discretionary entitlements to develop the 35-Acre Segment, before, during, or after Bill 2018-24 was in effect, it could have obtained a building permit that would have entitled the Developer to erect a construction fence without a permit and excluded trespassers. Las Vegas Admin. Code § 301.4.1(32). The fact that the district court awarded no damages for trespassing undercuts the Developer's claim that it suffered a physical taking, and the Developer does not contend otherwise. 87(15290-15392); 110(19855-19869).

2. The City's Requirement That The Developer File Different Applications For Additional Access And New Fencing Was Not A Physical Occupation Or An Exercise Of Possession

The Developer continues to point to the City's alleged denial of applications for additional access and new fencing to show a physical taking. AB 49-50. Yet those alleged denials did not exact easements from the Developer requiring it to allow others to take "possession" of its property, as required for a physical taking. *See Sisolak*, 122 Nev. at 667, 137 P.3d at 1125. Moreover, the City did not deny the

Developer's applications. When the Developer filed applications to construct a new perimeter fence, part of which would be a masonry wall, and fences around two ponds (66(11670-11673, 11678, 11700-11707) and for additional vehicular access, the Acting Planning Director simply informed the Developer that it needed to file different applications (66(11704, 11672, 11704, 11696)), which the Developer failed to do. 66(11672-3, 11704). Because it was within the Director's discretion to determine that improvements could "have significant impact on surrounding properties" (66(11696, 11704)) and require more than cursory review, LVMC 19.16.100(G)(1)(b) authorizes the Director to require a Major Review application.

Although the Developer cites *ASAP Storage* (AB 94), there, the Court rejected a taking claim after the City temporarily cut off all access to property from a public street, preventing the owner from removing personal property before it was destroyed by flooding. 123 Nev. at 649, 173 P.3d at 741. Here, there is no evidence that the City interfered with existing access to the Badlands. 66(11678, 11712-11714, 11696).[12]

[12] The Developer also proffers the straw-man argument that the City contends that physical taking claims are subject to final decision ripeness. AB 91-92. The City never made that argument.

I. The City Cannot Be Liable For A Nonregulatory Taking Based On Alleged Regulatory Actions

A nonregulatory taking claim is designed to provide compensation where a public improvement or agency action that does not involve regulation of the owner's use physically damages the property. *See*, *e.g.*, *Richmond Elks Hall Assoc. v. Richmond Redevelopment Agency*, 561 F.2d 1327, 1332 (9th Cir. 1977) (agency repeatedly flooded property before a planned condemnation). The only evidence the Developer cites to support its nonregulatory taking claim is the City's alleged adoption of ordinances and denial of applications, which were regulatory actions that are irrelevant to a nonregulatory taking claim. AB 102-04. .

J. Even If The City Effected A Regulatory Taking Of The 35-Acre Segment, The Amount Of The Judgment Is Excessive

Even if the Court concludes the City effected a taking of the 35-Acre Segment, the City respectfully requests that the Court reverse and remand for a new trial on the amount of the Judgment. It is not plausible that property purchased for $18,000 per-acre in an arms-length sale from an experienced real estate developer could be worth nearly $1,000,000 per acre only two years later, where there was no intervening physical alteration of the property or change in its legally permissible uses.

For any remand for a new trial on the amount of damages, the Court should instruct the district court that the Badlands was part of the PRMP, the PR-OS designation is valid and prohibits housing, and zoning does not confer any right to build housing. The Court should further instruct the district court that the Developer purchased the Badlands for $4.5 million, and the 35-Acre Segment should be valued as of the date the alleged restrictive regulation was imposed, rather than the date the Developer filed its complaint. *See Colony Cove*, 888 F.3d at 451; *Alper*, 100 Nev. at 391, 685 P.3d at 949.

K. The Developer's Arguments Confirm That The Reimbursement Of Property Taxes And Attorneys' Fees Award Conferred A Windfall

If the Court reverses the Judgment, the propriety and amount of the post-judgment awards of Additional Sums would be rendered moot. If the Court affirms the Judgment, however, the Court should instruct the district court that the Developer is not entitled to reimbursement for property taxes or attorneys' fees.

The Developer's defense of the property tax award is based on the fiction that the Developer should not be required to pay taxes for property it does not possess. AB 129. Because there is no evidence that the City physically occupied or prevented the Developer from possessing or using the 35-Acre Segment, there is no basis to exempt the Developer from property taxes. Additionally, the Developer stipulated with the Assessor to pay a tax rate based on residential use, which ignored the PR-

OS designation. 71(12401-12410); 70(12361-12363). Having made the strategic decision to pay higher property taxes to preserve its argument that the PR-OS designation is invalid or inapplicable, the Developer must pay the resulting taxes.

The Developer also fails to justify the attorneys' fee award. The Federal Uniform Relocation Act, 42 U.S.C. §§ 4601-4655, and NRS 342.105 on which the Developer relies (AB 131) apply only to projects receiving federal funding or undertaken by the federal government. The alleged taking here did not involve federal funds or actions. The Developer's contention that attorneys' fees were properly awarded under Nevada Constitution art. 1, §22(4) must be rejected because that provision concerns "eminent domain actions." There is no language in §22(4) that suggests it applies to regulatory takings actions.

The Developer's contention that the district court properly awarded fees under NRS 18.010(2)(b) should also be rejected. The City's defense is based on the public interest in retaining open space set aside as a condition of development of a master planned community; the district court's prior decision denying the Developer's PJR; NRS 278.150, NRS 278.160, and NRS 278.250; this Court's well-established precedents; and decisions of the Ninth Circuit and the United States Supreme Court. The City is defending the State's carefully crafted system of land use regulation against a claim that the entire system is unconstitutional. Under no view of the facts

or law could the City's defense be deemed to have been brought without reasonable ground or to harass the Developer to justify a fee award under NRS 18.010(2).

ANSWERING BRIEF ON CROSS APPEAL

STATEMENT OF THE ISSUES

Did the district court correctly choose the prejudgment interest rate of prime plus 2%?

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.

B. The Profit The Developer Alleges It Would Have Made By Investing Its Damages Award In Speculative Real Estate Ventures Would Not Constitute Prejudgment "Interest" And Is Not Necessary To Make The Developer Whole

To the extent the Judgment can stand, the district court did not abuse its discretion in awarding prejudgment interest at prime plus 2% and properly rejected the Developer's demand for $52,515,866.90 in prejudgment interest instead of $10,258,953.30. If the Court reverses the Judgment, the issue of prejudgment interest would be moot. However, if the Court does not reverse the Judgment, the Court should deny the cross-appeal and affirm the prejudgment interest award.

A higher interest rate is unnecessary to make the Developer whole because the $34,135,000 Judgment for property the Developer bought for only $630,000 already conferred a windfall. Moreover, the Developer's proposed rate of 23% was based on speculative *profit* from investing in a hypothetical real estate venture rather than *interest* on funds loaned.

1. A Prejudgment Interest Rate Higher Than The Statutory Rate Is Not Necessary To Make The Developer "Whole"

The Developer contends that Nevada Constitution Article 1, §22(4) and NRS 37.175(4) govern the determination of prejudgment interest. Those laws apply to eminent domain, not regulatory takings. However, even if applicable, the prejudgment interest rate under those authorities should be prime plus 2%.

"In all eminent domain actions, just compensation shall be . . . that sum of money, necessary to place the property owner back in the same position, monetarily . . . as if the property had never been taken." Nev. Const. Art. 1, §22(4); NRS 37.175(4). The Developer claims that prejudgment interest at 23% per year is required to place the Developer in the same position monetarily as before the alleged taking, relying on *State ex rel. Dept. of Transp. v. Barsy*, 113 Nev. 712, 718, 941 P.2d 971, 974 (1997).

In *Barsy*, the defendant in an eminent domain action owned a building occupied by two tenants. In 1988, the Nevada Department of Transportation

("NDOT") identified Barsy's property for acquisition by eminent domain for a highway construction project. In late 1988 or early 1989, an NDOT representative informed Barsy's tenants "of the imminent project and of the relocation costs and benefits which NDOT would pay them. Due to NDOT's inability to indicate an accurate time frame for the acquisition of the property, the tenants refused to renew their leases upon expiration." *Id.* at 715-16, 941 P.2d at 974. "Barsy was unable to attract new tenants because of the uncertainty surrounding the acquisition by NDOT." *Id*. NDOT delayed filing an eminent domain action until 1992, after Barsy's tenants had vacated the premises. *Id.* at 716, 941 P.2d at 974. During the eminent domain action, Barsy was unable to attract new tenants and suffered lost income. *Id*.

The district court awarded Barsy prejudgment interest of 8%, 2% above prime, rather than the rate specified in the eminent domain law at the time, to account for Barsy's lost rental income during the eminent domain litigation.[13] *Id.* at 178-19, 941 P.2d at 975-76. The Court affirmed, noting the substantial evidence from Barsy's expert that prime plus 2% "comes reasonably close to anticipating what property owners would have done with the money." *Id.*

[13] At the time *Barsy* was decided, NRS 37.175 set prejudgment interest at the rate of interest paid on one year's United States Treasury bills. NRS 37.175 was later amended to require prejudgment interest at prime plus 2%a.

This case presents the opposite facts to *Barsy* because the Developer has already been made more than whole monetarily by the $34,135,000 just compensation award, a sum that is 54 times the $630,000 the Developer paid for the 35-Acre Segment (35 x $18,000/acre = $630,000; $34,135,000/$630,000 = 54). *Barsy*, therefore, provides no support.

2. The District Court Properly Rejected The Developer's Claim To Speculative Profit From A Hypothetical Investment Under The Guise Of "Interest"

The Developer cannot use pre-judgment interest as a proxy for purported potential profit it could have made investing the Judgment in a speculative real estate venture. The Developer cites no authority to support this distorted interpretation of "interest." "Interest" is defined as "money that is charged by a bank or other financial organization for borrowing money." https://dictionary.cambridge.org/us/dictionary/english/interest. "Interest" in this case, therefore, is the return the Developer would have earned had it received the Judgment in 2017 and loaned it to others at a rate competitive with other lenders, which would be close to prime. *See id.*

Profit, by contrast, would be what the Developer might earn if it invested the money in a business venture such as real estate. "Profit" is defined as "a financial gain, especially the difference between the amount earned and the amount spent in

buying, operating, or producing something" and "to obtain a financial advantage or benefit, especially from an investment." https://www.google.com/search?client=safari&rls=en&q=cambridge+Dictionary+definition+of+profit&ie=UTF-8&oe=UTF-8. In that case, the investment would "produce" something of value (i.e., "profit") that the Developer could then sell or rent. Interest, by definition, is a known amount that must be paid by contract; profit, in contrast, is speculative and depends on a myriad of factors.

Here, the Developer relies on portions of market data obtained by its consultants to concoct a hypothetical real estate investment project that, if started in 2017, allegedly would have made a 23% profit every year between 2017 and the present day. AB 136-37, 144-45. Not only is this assertion pure speculation, it constitutes "profit," not "interest" and has no place in the determination of prejudgment interest.

If the Court were to conflate "interest" with "profit" in the manner the Developer proposes, in every case that results in a money judgment, the plaintiff could: (a) contend that had it been paid the money at the time of the damage, it could have invested the money in real estate, the stock market, or any other unidentified business venture; (b) solicit "expert" testimony to predict that the investment in the hypothetical and unidentified venture would yield a certain

amount of profit; and (c) call the profit prejudgment "interest." "Prospective profits of a new business venture … are too uncertain and speculative to form a basis for recovery." *Hughes v. Hobson*, 92 Nev. 683, 684, 558 P.2d 543, 544 (1976)). Because profit from a business investment lacks the certainty of the prime interest rate, which is publicized by the federal government, the district court did not abuse its discretion when awarding prejudgment interest at prime plus 2%.

CONCLUSION

The Court should reverse the Judgment and enter judgment for the City. If the Court reverses on ripeness grounds for the categorical and *Penn Central* takings claims, it should instruct the district court that: (a) the PR-OS designation is controlling and prohibited housing on the Badlands, as a matter of law, absent a General Plan Amendment, which the City Council had discretion to deny; (b) due to the City Council's discretionary powers over land use decisions, the Developer had no right to have its proposed housing project approved, even though the proposed density was within the limit of the zoning ordinance; (c) the PRMP, or at a minimum, the Badlands was the parcel as a whole, and since the City approved substantial development in both, there can be no taking as a matter of law; and (d) the City did not revoke its approval of the 435-Unit Project; rather, the Developer abandoned it. If the Court affirms the Judgment, it should nevertheless determine that the amount

of "just compensation" and post-Judgment awards of fees, costs, and property taxes were unsupported and cannot stand. If the Court affirms the Judgment amount, it should also affirm the district court's calculation of prejudgment interest.

AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 1st day of May, 2023.

BY: /s/ Debbie Leonard

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NRAP 28.2 ATTORNEY'S CERTIFICATE

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 2007 in 14-point font, Times New Roman style. I further certify that this brief exceeds the type-volume limitation of NRAP 28.1(e)(2) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 20,858 words. A motion to exceed the word limit is filed concurrently with this brief.

Pursuant to NRAP 28.2, 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), which requires every assertion regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

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

DATED this 1st day of May, 2023

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Leonard Law, PC, and that on this date a copy of the foregoing document was electronically filed with the Clerk of the Court for the Nevada Supreme Court on today's date by using the Nevada Supreme Court's E-Filing system (E-Flex). Participants in the case who are registered with E-Flex as users will be served by the E-Flex system. All others will be served by U.S. mail.

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