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' OPPOSITION TO MOTION FOR LEAVE TO FILE LANDOWNERS' SUR-REPLY BRIEF TO CITY'S REPLY BRIEF ON APPEAL

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Attorneys for City of Las Vegas

The City of Las Vegas ("City") opposes the Motion for Leave to File Landowners' Sur-Reply Brief to City's Reply Brief on Appeal ("Motion for Leave") filed by 180 Land Co LLC and Fore Stars Ltd. (collectively, the "Developer"). This Opposition is supported by the Declaration of Debbie Leonard attached as Ex. 1 and such other matters as the Court may wish to consider.

I. INTRODUCTION

The Developer's Motion for Leave to file a sur-reply brief that is based on yet **more** extra-record documents further underscores that the Developer cannot prevail in this appeal on the record alone. In a last-ditch effort to shore up its case, the Developer seeks to jettison entirely the rule that an appellate court must limit its review to the record that existed in the district court at the time the Judgment was entered. If the Developer's position were accepted, there would be no end to the scope and extent of new, post-judgment material that a party can present on appeal. This transforms the Court into a factfinder in the first instance, which is contrary to the fundamental rule of appellate review.

The Motion for Leave also flies in the face of the Developer's stipulation, in which it agreed to a four-brief appeal and cross-appeal schedule in compliance with NRAP 28.1(c). The Developer cannot unilaterally extricate itself from this agreement on the false pretense that the City presented "new arguments" in its Reply Brief. The City merely presented its own extra-record evidence to show that

the Developer misrepresented facts to Judge Jones. Because the Developer reached outside the appellate record in the first instance, the City's rebuttal is of the Developer's own making. The Developer should not be allowed to benefit twice from failing to follow the rules by: (1) including extra-record material in its Answering Brief; and then (2) enjoying the benefit of a Sur-Reply Brief as a reward. The Developer invited the cascade of extra-record references, motion practice and briefing that the Developer's rule violations prompted.

Allowing the Sur-Reply Brief based on additional extra-record evidence would abandon completely the fundamental principle of appellate review that limits the scope of review to the record on appeal. The Court should enforce the Developer's stipulation, limit its consideration to the pre-Judgment record before the district court **in this case** and deny the Motion for Leave. The City has a constitutional right to this Court's independent review of the existing record, not some moving target of documents that the Developer seeks to present.

II. PROCEDURAL BACKGROUND

The City filed its notice of appeal on March 9, 2022. Pursuant to NRAP 30(a), the parties' counsel conferred and reached agreement as to the content of the joint appendix. Debbie Leonard Decl. ¶4, Ex. 1. Between August 21 and August 25, 2022, counsel for the Developer filed a 129-volume joint appendix. *Id.* ¶5. After counsel for the City identified image quality issues in the joint appendix

filing, the Developer's counsel filed amended volumes of the joint appendix between September 29, 2022 and September 30, 2022 and between October 27, 2022 and November 15, 2022. *Id.* ¶6. The parties filed a total of 131 joint appendix volumes. *Id.* On August 12, 2022, the parties filed a Stipulation to Modify Scheduling Order in which they agreed to a standard cross-appeal briefing schedule in accordance with NRAP 28.1(c).

The City filed its opening brief on October 17, 2022. After seeking and obtaining two extensions of time, the Developer's answering brief was due on January 17, 2023. *Id.* ¶7. On January 11, 2023, the Developer filed a document entitled "Landowners' Appendix." *Id.* ¶8. That new appendix contained orders from other cases that were not filed in the district court in this case and that post-date the notice of appeal. The "Landowners' Appendix" does not contain evidence on which those orders were based.

The Developer then filed its Answering Brief on January 17, 2023. The Developer's Answering Brief contains twenty-four citations to the "Landowners' Appendix," amounting to approximately 1,400 words. *Id.* ¶9. The Developer did not inform the Court that these documents are outside the record. *Id.* ¶10. Instead, it surreptitiously referenced them throughout its brief and only inserted a footnote that requested judicial notice without any explanation. RAB 9, n.4.

On February 1, 2023, the City moved to strike the "Landowners' Appendix" and Answering Brief on the basis that they contain matters outside the record on appeal that cannot be considered. The City further argued that the extra-record materials in the "Landowners' Appendix" are not proper subjects of judicial notice. In response, the Developer requested that the Court defer a ruling on the Motion to Strike until it decides the merits of the appeal. In reply, the City argued that deferring a decision would violate the City's due process rights and transform the appellate court into a factfinder. To comport with due process and prevent undue prejudice, the City argued, it would need to submit its own extra-record evidence in support of its reply brief to rebut the Developer's extra-record arguments.

On March 31, 2023, the Court provisionally denied the City's Motion to Strike and took provisional judicial notice of the public records in the "Landowners' Appendix." The City then filed its Reply Brief on Appeal and Answering Brief on Cross Appeal. To rebut the Developer's extra-record arguments, the City filed a Reply Appendix and requested that the Court take judicial notice of those documents. However, the City reiterated its position that the Court should not consider any matters outside the record and should strike the Developer's extra-record documents and arguments, which would obviate the need for the Court to consider the City's Reply Appendix and portions of its Reply Brief that reference them.

The Developer now moves to file a Sur-Reply Brief and asks the Court to consider further extra-record documents contained in a "Sur-Reply Appendix." Because the Court should limit its review to the appellate record, the Developer's Motion for Leave should be denied.

III. ARGUMENT

A. The Court Should Reject The Proposed Sur-Reply Brief Because Appellate Review Must Be Limited To The Record On Appeal

The Developer's proposed Sur-Reply Brief goes further afield of fundamental principles of appellate review by asking the Court to consider even more extra-record material than it included in its Answering Brief. An appellate court "cannot consider matters not properly appearing in the record on appeal." *Tabish v. State*, 119 Nev. 293, 312, 72 P.3d 584, 596 (2003). "The trial court record consists of the papers and exhibits filed in the district court, the transcript of the proceedings, if any, the district court minutes, and the docket entries made by the district court clerk." NRAP 10(a). "[D]ocuments or facts not presented to the district court are not part of the record on appeal." *Smith v. Cent. Ariz. Water Conserv. Dist.*, 418 F.3d 1028, 1034 (9th Cir. 2005). The reviewing court must "examine the district court's decision based on the state of affairs at the time of that decision." *R.R. St. & Co. Inc. v. Transp. Ins. Co.*, 656 F.3d 966, 974 (9th Cir. 2011).

Here, the Developer's Answering Brief violated this basic rule of appellate review, and its proposed Sur-Reply Brief exacerbates the error. As pretense for its Motion for Leave, the Developer contends that it must be given the opportunity to respond to "new arguments" in the City's Reply Brief. First, the City's Reply Brief only rebutted the Developer's Answering Brief; it did not make "new arguments." The supposedly "new arguments" – that (1) the City's approval of the 435-Unit Project increased the Badlands' value and prevented the district court from finding a taking; and (2) the Developer seeks to profit off of taxpayers by prosecuting inverse condemnation claims, rather than build the 435-Unit Project – are the **same arguments** the City made in the district court (at 55(9879-9883, 9950-9954); 92(16541-16542)) and in its Opening Brief (at 23-27, 36-37, 60). The Developer simply failed to include responding evidence in the district court record.

Second, the extra-record evidence the City submitted in its Reply Brief showed that the Developer misrepresented facts to Judge Jones regarding the drainage plan for the 435-Unit Project and the Developer's August 2022 settlement proposal. The City submitted this evidence to respond to the Developer's extra-record documents **only after** the Court denied the City's Motion to Strike. In its Reply Brief, the City informed the Court that it need only consider the City's Reply Appendix and the portions of the Reply Brief related thereto if it declined to strike the Developer's extra-record documents and arguments. In other words, the

entire basis for the Developer's proposed Sur-Reply Brief is the Developer's conduct, not anything done by the City.

Because the Court's review should be limited to the record before the district court at the time of the Judgment, the Court should deny the Developer's Motion for Leave and strike all references to extra-record materials in the Developer's Answering Brief. The Court then would not need to consider the portions of the City's Reply Brief that the Developer contends are grounds for a Sur-Reply Brief. Where the Developer invited any alleged due process problem through its own procedural violations, it should not be allowed the benefit of additional briefing.

B. The Developer Is Bound By Its Stipulation To Limit Briefing To The Standard NRAP 28.1(c) Briefing Schedule

The Court should enforce the parties' stipulation to limit themselves to the four-brief cross appeal schedule set forth in NRAP 28.1(c). Parties are generally bound by their stipulations. *See Cohen v. State*, 113 Nev. 180, 184, 930 P.2d 125, 127 (1997); *Conrad v. Sadur*, 83 Nev. 39, 41, 422 P.2d 236, 237 (1967). "Because stipulations serve both judicial economy and the convenience of the parties, courts will enforce them absent indications of involuntary or uninformed consent." *CDN Inc. v. Kapes*, 197 F.3d 1256, 1258 (9th Cir. 1999).

Here, the parties entered into a Stipulation to Modify Briefing Schedule "to streamline the briefing schedule from seven to four briefs since the current briefing schedule would necessarily entail redundancies and unnecessary work for the

Parties and the Court." Stip. ¶3. The agreed-upon briefing schedule gave the City the final merits brief, with the Developer's reply brief on cross appeal being limited to the issue of pre-judgment interest. *Id.* ¶4. The Developer now tries to circumvent that stipulation so it can have the last word on the City's appeal of the Judgment. The NRAP 28.1(c) schedule to which the Developer agreed prohibits that result. *See* NRAP 28.1(c)(5) ("Unless the court permits, no further briefs may be filed in a case involving a cross-appeal.").[1]

C. Judge Jones' Disputed Findings And Conclusions Cannot Usurp This Court's Proper Exercise Of Appellate Review

The Developer's proposed Sur-Reply Brief asks this Court simply to accept the disputed findings and conclusions of a district judge in a different case rather than sit as an appellate tribunal over the Judgment at issue here. The Nevada Constitution is clear that "[t]he Supreme Court and the court of appeals have appellate jurisdiction in all civil cases arising in district courts…." Art. 6, §4(1). "Implicit in the concept of jurisdiction is the power to make a binding determination of the case or controversy before the court." *Laxalt v. Cannon*, 80 Nev. 588, 591, 397 P.2d 466, 467 (1964). Only an appellate court – not another

[1] The Developer included argument on the merits of the City's appeal in its Reply Brief on Cross-Appeal (at 3-6), which is yet another violation of the appellate rules. NRAP 28.1(c)(4) (reply brief on cross-appeal "must be limited to the issues presented by the cross-appeal"). Concurrently with this filing, the City has moved to strike the offending portions of the Reply Brief on Cross-Appeal.

district court or district judge – has appellate jurisdiction to review a district court judgment. *See State v. Sustacha*, 108 Nev. 223, 226, 826 P.2d 959, 961 (1992).

Underscoring that the Judgment in this 35-Acre Case cannot stand on the record, the Developer clings desperately to the disputed findings of fact and conclusions of law made in the 17-Acre Case as if they should be binding here. Judge Jones' decisions will be subject to a future appeal and cannot be used by the Developer to backstop Judge Williams' faulty Judgment. They also cannot substitute for the independent appellate review to which the City is constitutionally entitled. *See* Const. Art. 6, §4(1).

The Developer chose to bring four separate takings actions for each of the 17-Acre Segment, 35-Acre Segment, 133-Acre Segment and 65-Acre Segment and must proceed through a separate appeal for each. It cannot mix and match each district judge's decision to make up for the deficiencies in the Judgment here. As a constitutional matter, therefore, the Developer's Motion for Leave must be denied.

CONCLUSION

The Developer's proposed Sur-Reply Brief violates basic principles of appellate review, breaches its stipulated briefing schedule, and seeks to deprive the City of its constitutional right to independent appellate review on the existing administrative record. As a result, the City respectfully requests that the Developer's Motion for Leave to File Sur-Reply Brief be denied.

AFFIRMATION

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person

DATED this 24th day of May, 2023 BY: /s/ *Debbie Leonard*

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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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Dated: May 24, 2023

/s/ Tricia Trevino
Tricia Trevino

EXHIBIT 1

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DECLARATION OF DEBBIE LEONARD IN SUPPORT OF OPPOSITION TO MOTION FOR LEAVE TO FILE SUR-REPLY BRIEF

I, Debbie Leonard, do hereby swear under penalty of perjury that the assertions in this declaration are true and correct.

1. I am over the age of eighteen (18) years. I have personal knowledge of the facts stated within this declaration. If called as a witness, I would be competent to testify to these facts.

2. I am the owner of Leonard Law, PC and counsel of record for Appellant City of Las Vegas ("the City").

3. This declaration is offered in support of the City's Opposition to Motion for Leave to File Sur-Reply Brief.

4. Pursuant to NRAP 30(a), I conferred with counsel for the Developer and reached agreement as to the content of the joint appendix. Counsel for the Developer volunteered to prepare and file the agreed-upon joint appendix.

5. Between August 21 and August 25, 2022, counsel for the Developer filed a 129-volume joint appendix.

6. After I identified image quality issues in the joint appendix filing, the Developer's counsel filed amended volumes of the joint appendix between September 29, 2022 and September 30, 2022 and between October 27, 2022 and November 15, 2022. The parties filed a total of 131 joint appendix volumes.

7. The City filed its opening brief on October 17, 2022. After seeking and obtaining two extensions of time, the Developer's answering brief was due on January 17, 2023.

8. On January 11, 2023, without first conferring with the City's counsel, the Developer filed a document entitled "Landowners' Appendix Volume 1." This new appendix contains documents that were not filed in the district court in this case and that post-date the notice of appeal.

9. The Developer then filed its Answering Brief on January 17, 2023. By my count, the Developer's Answering Brief contains twenty-four citations to the "Landowners' Appendix," amounting to approximately 1,400 words.

10. The Developer did not inform the Court that these documents are outside the record.

11. I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

DATED May 24, 2023

/s/ Debbie Leonard
Debbie Leonard