IN THE SUPREME COURT OF THE STATE OF NEVADA

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

LANDOWNERS' OPPOSITION TO CITY OF LAS VEGAS' MOTION TO STRIKE PORTIONS OF REPLY BRIEF ON CROSS-APPEAL

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This Court should deny the City's pending motion to strike, the same as it denied the City's first motion to strike. *See* March 31, 2023 Order Regarding Motions.

I. LANDOWNERS' DISCUSSION OF THE DIFFERENT STANDARDS OF REVIEW IS APPROPRIATE.

The impetus of the City's pending "motion to strike" is the Landowners discuss, again, the "substantial evidence" standard of review in their Reply Brief on Cross-Appeal and, according to the City, "this has nothing to do with the cross-appeal." Mot. Strike at 1-2.

The Landowners' presentation on the standard of review in their Reply Brief is two-fold. First, it argues the standard of review for the interest issue is the "abuse of discretion" standard. Landowners' Reply Brief ("RRB") at 1-3. The City does not dispute this is appropriate. Second, the Landowners Reply Brief explains that this "abuse of discretion" standard of review for the interest issues is a different and lower standard than the "substantial evidence" standard that is used to review the district court decisions on the property interest and take issues. *Id*., at 3-5. Necessarily, to explain the difference between the "abuse of discretion" and "substantial evidence" standards, there needs to be a discussion of the "substantial evidence" standard. Third, the Landowners then argue the City fails to recognize these different standards, entirely fails to apply any of its arguments to either of these relevant and applicable standards, and merely presents a re-trial of all issues before

this Court, which is improper. *Id*., at 5-6. Therefore, it was proper to discuss the "substantial evidence" standard in this context.

Importantly, the City does not dispute it ignores the two standards of review and fails to address how these standards apply in this case. For example, the City never denies there is "substantial evidence" to support the district court's property interest and take findings of fact and conclusions of law ("FFCLs").

A. Landowners Did Not Waive The Standard of Review Argument.

The City also makes the baseless assertion the Landowners "waived" arguments related to the Standard of review on appeal, because the Landowners did not "expand on" the standard of review in their Answering Brief on Appeal. Mot. Strike at 4. First, contrary to this City argument, the Landowners cited extensively to the "substantial evidence" standard of review for the property interest and take issues and the "abuse of discretion" standard of review for the interest issue. *See* Answering Brief on Appeal ("RAB") at 62-63, 87, 96-97, 100, 104, 112, 124; Opening Brief on Cross-Appeal ("AOB") 140-14. Second, the Landowners clearly demonstrated the difference between these two standards as they apply to the different issues before the Court. *Id.* Third, the argument related to the different standards and how the City entirely fails to address the difference or even apply the appropriate standard to <u>any</u> of its arguments was not fully ripe to address until after the City completed its briefing. That is why the argument appears, again, in the

Landowners' final Reply Brief on Cross-Appeal at 3-6. Therefore, there was no waiver of the Landowners' arguments related to the different standards of review on appeal and how the City disregards these standards of review. Instead, the argument is best addressed in the Reply Brief.

Moreover, this Court's standard of review does not change based upon whether a party "expands on" the standard, nor is the Court's proper standard of review waivable. For the property interest and take issues, the FFCLs must be sustained if there is "substantial evidence" to support the FFCLs. *City of Las Vegas v. Bustos*, 119 Nev. 360, 365, 75 P.3d 351, 354 (2003); *see also* NRCP 52(a)(6) (findings of facts must not be set aside unless clearly erroneous as reviewing court gives due regard to trial court's opportunity to judge witness credibility). For the interest issue, the FFCL should be reversed if the Court abused its discretion by adopting an interest rate that is not based on competent evidence. *McCarran Int'l Airport v. Sisolak,* 122 Nev. 645, 675 2006) (award of prejudgment interest reviewed by this Court under the abuse of discretion standard). Therefore, the City's motion to strike is meaningless as it cannot change the standard of review this Court applies.

II. THE CITY'S MOTION TO STRIKE IS ANOTHER ATTEMPT TO IMPROPERLY LIMIT THE FACTS, LAW, AND ARGUMENTS BEFORE THIS COURT.

The City's two motions to strike and opposition to the Landowners' motion to file a Sur-Reply before this Court is emblematic of the City's strategy in all of the related cases, having filed with the district courts several motions to dismiss, for

judgment on the pleadings and to strike facts and arguments – losing every single motion at the district court level. *See, e.g.,* 9 JA 1595-1618; 23 JA 4255-4268; 2 JA 380-384; 3 JA 532-540. The City knows the Landowners had the legal right to develop residential units on the 35 Acre Property – the City's **own** Planning Department, City Attorney's Office, and City Tax Assessor confirmed this. *See* RAB at 25-28. The City also knows it engaged in egregious and systematic actions to take the 35 Acre Property – it does not dispute even one of these City actions. *See Id*., at 35-57. The proper remedy under these circumstances is "just compensation." Instead of complying with this constitutionally mandated remedy, the City seeks to strike relevant facts, law, and arguments in an attempt to preclude this Court from a full and complete review. Clearly this City tactic should not be authorized. Instead, all relevant facts, law, and arguments should be before this Court so that a just and equitable decision is made consistent with the Just Compensation Clause and this Court's long line of precedent to protect landowners in inverse condemnation cases. *Yaist v. United States,* 17 Cl. Ct. 246, 257 (Cl. Ct. 1989) (just compensation must be based on "fairness and equity" and "all relevant facts."); *State v. Eighth Jud. Dist. Ct.*, 131 Nev. 411, 418, 351 P.3d 739, 741 (2015), *quoting Sisolak, supra,* 122 Nev. at 670 ("our State enjoys a rich history of protecting private property owners against government takings," and "the Nevada Constitution contemplates expansive property rights in the context of takings claims."). Therefore, the City's attempts to

improperly erase the facts and the law in this case through repeated motions to strike should be rejected.

A. The City Fails to Demonstrate Any Harm or Prejudice.

The City's Motion to Strike does not claim any new argument, facts, or law presented in the Landowners Reply or that the City is prejudiced or harmed by the Landowners, again, discussing the "substantial evidence" standard. Indeed, the City concedes the "substantial evidence" standard is addressed in the Landowners' Combined Answering Brief on Appeal and Opening Brief on Cross-Appeal. *See* Mot. Strike at 3. Instead, the City simply complains the Landowners are "revisiting the standard of review in the appeal." *Id*., at 2. This is not grounds to strike arguments in an important constitutional proceeding, like this. As explained above, "revisiting" the substantial evidence standard of review was necessary to demonstrate the difference between the abuse of discretion standard and how the City entirely disregards all standards of review.

B. New United States Supreme Court Supports Rejecting the City's Motion to Strike.

New United States Supreme Court precedent supports the Landowners' briefing to consider all relevant facts, law, and arguments and rejects the City's continual motions to "strike."

On May 25, 2023, in *Tyler v. Hennepin County*, 598 U.S. ___, ___, 143 S. Ct. 644, ___, (2023) the United States Supreme Court unanimously rejected Hennepin

County's attempt to re-define property rights by claiming a landowner did not have a property right in the excess funds remaining after a tax sale of her residence. *Id.,* at 12; *citing Cedar Point Nursery v. Hassid*, 594 U.S. ___, 141 S. Ct. 2063 (2021). The Court held, "property rights cannot be so easily manipulated." *Id.* This is in line with recent United States Supreme Court opinions that uniformly affirm landowner property rights and mandate payment of just compensation for government takings. *See, e.g., Cedar Point Nursery, supra* (2021); *Knick v. Twp. of Scott,* 588 U.S.___, 139 S. Ct. 2162 (2019); *Horne v. Dept. of Agric.,* 576 U.S. 350 (2015); *Arkansas Game & Fish Comm'n v. United States,* 568 U.S. 23 (2012).

These recent United States Supreme Court cases, culminating with the *Tyler* case, provide guidance on the pending property rights issue, namely, the City's attempt to disregard the Landowners' property rights. In *Tyler,* the United States Supreme Court rejected the County of Hennepin's attempt to re-define property rights to avoid its constitutional duty to pay just compensation. The Court held that it will look to state law as "one important source" to define property rights and also "look to 'traditional property law principles,' plus **historical practice and this Court's precedents**." *Tyler*, at 5. Emphasis added.

Here, similar to Hennepin County in the *Tyler* case, the City attempts to limit the record with continual motions to strike. It then claims that, with a limited record, the Landowners never had the right to use their property for residential purposes.

When all of the facts and law are considered (not just the limited record the City seeks), "historical practice" and "this Court's precedents" – the two standards the *Tyler* case cites – prove otherwise.

The City's own "historical practice" shows the R-PD7 zoning is a residential zoning and that this R-PD7 zoning has always been used to determine property use and rights: 1) the City, itself, designated this R-PD7 "residential" zoning in 1981; 2) the City has "historically" used zoning to determine land uses; 3) the City used this R-PD7 residential zoning to decide the "legal" use of the 35 Acre Property is "residential" as a basis to determine **and collect** the real estate taxes on the 35 Acre Property "historically"; and, 4) all three relevant City departments have "historically" agreed the R-PD7 zoning is a residential zoning that provides the right to use the property for residential uses – City Planning Department, City Attorney's Office, City Tax Assessor. *See* RAB 13-30, specifically, at 25-28.

This Court's "precedent" also shows this R-PD7 residential zoning has always been used to determine property use and rights in the context of eminent domain and inverse condemnation cases. *City of Las Vegas v. Bustos*, 119 Nev. 360 (2003) (district court properly considered current zoning and potential for higher zoning); *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645 (2006) (inverse condemnation case where this Court cited to *Bustos* and used zoning to determine Mr. Sisolak's property interest); *Clark Cnty. v. Alper*, 100 Nev. 382 (10984) (the existing zoning ordinance

is a proper matter to consider in condemnation actions) (*citing U.S. v. Eden Mem'l Park Ass'n*, 350 F.2d 933 (9th Cir. 1965) (taken land must be valued based on existing zoning ordinance)); *Cnty. of Clark v. Buckwalter*, 115 Nev. 58 (1999) (direct condemnation case where this Court used zoning to determine Mr. Buckwalter's property interest); *Alper v. State, Dept. of Highways*, 95 Nev. 876 (1979), on reh'g sub nom. *Alper v. State*, 96 Nev. 925 (1980) (inverse condemnation where this Court used zoning to determine Mr. Alper's property interest); *Andrews v. Kingsbury Gen. Imp. Dist. No. 2*, 84 Nev. 88 (1968) (direct condemnation case relying on zoning to determine the Andrews property interest).

Therefore, the *Tyler* decision confirms this Court should look to all facts and law, including historical practices and precedent, when deciding the property rights in inverse condemnation cases. When all facts and law are considered (rejecting the City's attempts to limit the facts and law), the City's own historical practices and this Court's precedent support the Landowners' residential property rights in the 35 Acre Property prior to the City taking the 35 Acre Property, regardless of how many motions to strike the City files.

III. CONCLUSION

Based on the foregoing, the City's motion to strike the Landowners' argument regarding the proper standard of review should be denied.

Dated this 31st day of May 2023.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **LANDOWNERS' OPPOSITION TO CITY OF LAS VEGAS' MOTION TO STRIKE PORTIONS OF REPLY BRIEF ON CROSS-APPEAL** with the Supreme Court of Nevada on the 31st day of May 2023. I will electronically serve the foregoing document in accordance with the Master Service List as follows:

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