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' PETITION FOR REHEARING

LAS VEGAS CITY ATTORNEY'S OFFICE Jeff Dorocak (#13109) Rebecca Wolfson (#14132) 495 S. Main Street, 6th Floor Las Vegas, NV 89101 Phone: 702.229.6629 Fax: 702.386.1749 jdorocak@lasvegasnevada.gov rwolfson@lasvegasnevada.gov	McDONALD CARANO LLP George F. Ogilvie III (#3552) Amanda C. Yen (#9726) Christopher Molina (#14092) 2300 W. Sahara Ave, Suite 1200 Las Vegas, NV 89102 Phone: 702.873.4100 Fax: 702.873.9966 gogilvie@mcdonaldcarano.com ayen@mcdonaldcarano.com cmolina@mcdonaldcarano.com

LEONARD LAW, PC Debbie Leonard (#8260) 955 S. Virginia St., Suite #220 Reno, NV 89502 775-964-4656 debbie@leonardlawpc.com	SHUTE, MIHALY & WEINBERGER, LLP Andrew W. Schwartz (CA Bar No. 87699) (Admitted pro hac vice) Lauren M. Tarpey (CA Bar No. 321775) (Admitted pro hac vice) 396 Hayes Street San Francisco, California 94102

Attorneys for City of Las Vegas

NRAP 26.1 DISCLOSURE STATEMENT

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

1. The City of Las Vegas is a political subdivision of the State of Nevada and has no corporate affiliation.
2. The City of Las Vegas is represented by the following:
    a. Las Vegas City Attorney's Office
    b. McDonald Carano LLP
    c. Shute, Mihaly & Weinberger, LLP
    d. Leonard Law, PC

DATED this 20th day of May, 2024

LEONARD LAW, PC

BY: /s/ Debbie Leonard
Debbie Leonard (#8260)
955 S. Virginia St., Suite #220
Reno, NV 89502
775-964-4656
debbie@leonardlawpc.com

(additional counsel listed below)

Attorneys for City of Las Vegas

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

INTRODUCTION

The Court's Opinion disregards the constraints on redevelopment imposed by the City's approvals of the Peccole Ranch master planned community. These constraints determined the "before" value of the 35-acre carved-out fraction at issue in this case and are binding on the Developer. The Developer purchased the golf course subject to a condition that it remain the recreational amenity associated with the Suncoast Casino Resort and serve open space, recreational and drainage purposes for the master planned community in lieu of a public park. The purchase price reflected these restrictions and the fact that market conditions made a golf course a risky financial prospect. Any financial losses the Developer incurred were the result of its speculative real estate investment, not the City's actions.

The Court failed to properly apply *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003 (1992), which requires that the Court analyze the effect of a change in the law on a property's economic value. Because the City's denial of the 35-Acre Application did not change the approved use or the value of the 35-Acre Segment, but rather left the existing restrictions in place, no *Lucas* wipeout taking occurred.

In concluding R-PD zoning (Residential-Planned Development) gave the Developer the right to build houses, the Court fundamentally misunderstands planned development zoning, pursuant to which a large tract under unified control

is developed as a whole according to a development plan (here, the Peccole Ranch Master Plan ("PRMP")). The PRMP establishes the permitted land uses and residential densities for the entire tract. R-PD zoning gives developers flexibility to build a project that would have been prohibited under traditional, single-use zoning regulations, referred to as "Euclidean" zoning. To avail itself of the benefits of R-PD zoning and obtain approval for the Suncoast Casino Resort, Peccole had to provide open space and recreational amenities to benefit the community. The Court ignored the legal framework for planned development, instead treating R-PD zoning as Euclidean zoning to conclude that the Developer had a right to build housing in violation of the PRMP and rezoning approvals.

While the City disagrees with the Court's analysis of the PR-OS designation (and notes the Court's conclusion conflicts with *Seventy Acres, LLC v. Binion*, No. 75481, 2020 WL 1076065 (Nev. March 5, 2020)), that issue was not determinative. Overlooking the material facts, the Court conflated (at 10) the PRMP the City approved for the master planned community, of which the golf course was an integral part (57(10133-10187); 58(10254-10260)), with the City's master plan under NRS 278.150, called its "General Plan," which contains the PR-OS designation. 58(10221-10253). The Court misapprehended the material fact that the PRMP and its related rezoning approvals constrain the golf course's redevelopment, wholly independent from the PR-OS designation. 57(10081-10096,

10133-10187). Moreover, the Court ignored its precedents that zoning confers no right to build that can be "taken" by denial of discretionary land use applications.

The Court also failed to address the controlling authority in *Kelly v. Tahoe Reg'l Planning Agency*, 109 Nev. 638, 855 P.2d 1027 (1993), which required the denominator to be the Peccole Ranch master planned community, from which Peccole and the Developer already derived considerable value through the City's significant development approvals. The Court misapplied *Murr v. Wisconsin*, 582 U.S. 383 (2017), by concluding the 35-acre assessor parcel created by the Developer constituted the denominator and by disregarding the physical, aesthetic, environmental, and functional characteristics of the golf course that tied it to the master planned community as a whole.

To conclude that further development applications would be futile, the Court overlooked the evidence that the City had already approved the Developer's application to build 435 housing units in the Badlands and that a majority of Councilmembers expressed a willingness – and in some cases a desire – to approve development on the remaining acreage. Councilmembers voiced concerns regarding density, traffic and neighboring property values because the Developer proposed to transform the master planned community from one characterized by primarily single-family homes clustered around open space to one characterized by multi-family housing with virtually no common open space. They sought to

continue negotiations to find an amenable solution and to give new Councilmembers time to review all materials the Developer submitted. Nothing in the record supports the Court's conclusion that the City categorically denied all development or that an additional application was futile.

Had the Court correctly understood and applied the law and facts, it could reach no other conclusion than that the City is entitled to judgment, as a matter of law. The City requests that the Court grant rehearing, vacate its Opinion, and enter judgment for the City.

ARGUMENT

A. Standard for Rehearing

A petition for rehearing may be granted when the Court has overlooked or misapprehended a material fact in the record or a material question of law in the case or overlooked, misapplied or failed to consider controlling authority. NRAP 40(c)(2).

B. The Court Overlooked Constraints On The Golf Course's Redevelopment That Negated A Per Se Taking, Separate And Apart From The General Plan's PR-OS Designation

1. The Existing R-PD7 Zoning Did Not, As A Matter Of Law, Grant The Developer Any Development Rights Other Than As A Golf Course

The Opinion overlooks that the R-PD7 zoning on the golf course has built-in density and use restrictions, irrespective of the City's General Plan. In 1990, the

City approved Peccole's master plan amendment, concurrently with a resolution of intent to rezone 996.6 acres for the second phase of development in accordance with the plan. 57(10152-10153, 10176-10187). The amended PRMP permitted the following land uses, acreage and densities within the community:

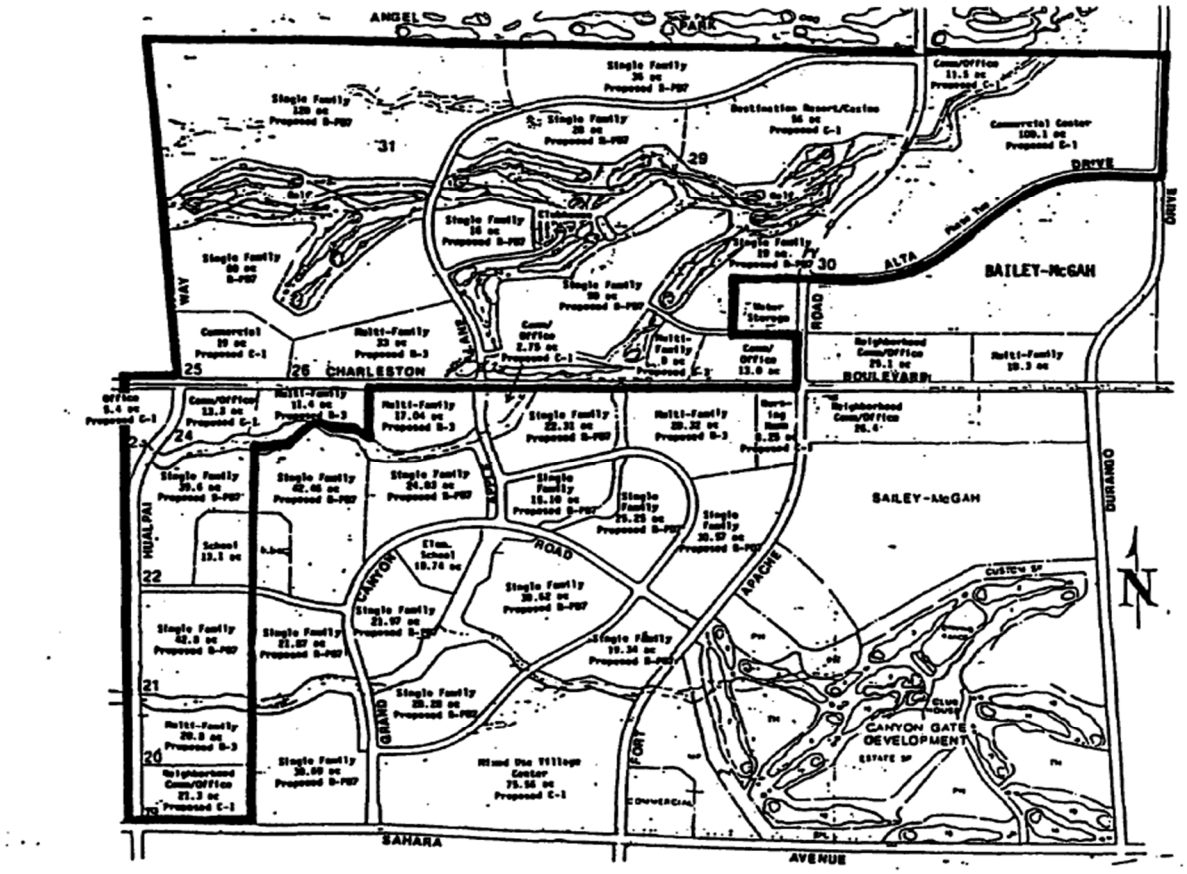
PECCOLE RANCH

LAND USE DATA

OVERALL MASTER PLAN

LAND USE	NET ACRES	DENSITY RANGES
Single Family	729.49	4.0 - 8.0 du/ac
Multi-Family	105.36	8.0 - 24.0 du/ac
Mixed Use Village Center (Commercial, Office, Multi-Family)	75.56	20.0 - 35.0 du/ac
Neighborhood Commercial/Office	197.05	
Resort-Casino	56 0	
Nursing Home	8 25	
Golf Course/Open Space/Drainage	253.07	
Right-of-Way	114.37	
Schools	30.44	
TOTAL	1,569 6	

57(10153).



MASTER DEVELOPMENT PLAN AMENDMENT

57(10181). The amended PRMP capped the total residential density for Phase II at 4,247 units, allowing a total net density of up to 4.5 units/acre, but did not authorize any of that density to be built in the golf course acreage:

PECCOLE RANCH

LAND USE DATA

PHASE TWO

LAND USE	ACRES	NET DENSITY	NET UNITS
Single-Family	401.0	7.0 du/ac	2,807
Multi-Family	60.0	24.0 du/ac	1,440
Commercial/Office	194.3	-	-
Resort-Casino	56.0	-	-
Golf Course Drainage	211 6	-	-
Right-of-Way	60.4	-	-
Elementary School	13.1	-	-
TOTAL	996 4	4.5 du/ac	4,247

Note Overall density based upon all areas except R.O.W

57(10152, 10176). Approval of the Z-17-90 rezoning application for Phase II that established the R-PD7 zone likewise had the following conditions: "A maximum of 4,247 dwelling units… allowed for Phase II" and "Conformance to the conditions of approval for the Peccole Ranch Master Development Plan Phase II." 57(10182). In other words, the R-PD7 zoning was inextricably tied to the PRMP and had associated density and use restrictions. As staff explained, the purpose of the rezoning application was to "approve the zoning indicated on the Master Development Plan." 57(10178).

After receiving the City's approval, Peccole built out Phase II. 59(10560). In 2001, the City adopted an ordinance to "hard zone" the Phase II property, finding the conditions of approval for rezoning had been fulfilled. 58(10358-10377).

Without further discretionary approvals from the City, Peccole could not change the approved land uses and densities: "No substantial change may be made to a development or to the rezoning approval which authorized that development without the approval of the City Council." UDC 19.16.090(P)(3). As a result, the Developer had no "right" to alter the master planned community by building houses on the golf course in violation of the PRMP. *See id.* By concluding otherwise, the Court incorrectly disaggregated the zoning from the restrictions of the approved PRMP.

2. R-PD Zoning Is Entirely Consistent With Open Space, And The Badlands Was Zoned For Open Space

By concluding that "the zoning ordinance trumps the designation on the master plan," the Opinion sets up a false dichotomy that incorrectly presumes open space is not allowed in the R-PD zoning district and that housing is the only allowable use. The "PD" in R-PD zoning means "planned development," which allows for "a modification in lot size and frontage requirements under the condition that other land in the development be set aside for parks, schools, or other public needs." Zoning, Black's Law Dictionary (11th ed. 2019).

The City established R-PD zoning "to promote an enhancement of residential amenities by means of an efficient consolidation and utilization of open space, separation of pedestrian and vehicular traffic and a homogeneity of use patterns." 58(10347). By City ordinance, common open space was required "if

compact lot developments are proposed in the R-PD district." 61(11025). R-PD zoning allows:

> … for flexibility and innovation in residential development, with emphasis on enhanced residential amenities, ***efficient utilization of open space***, ... 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***....

UDC 19.10.050 (emphases added).

Peccole demonstrated in its initial master plan submission (Phase I) that it chose R-PD7 zoning precisely because it could be used for, and was entirely consistent with, open space:

PECCOLE RANCH
LAND USE DATA
PHASE ONE

LAND USE	NET ACRES	ZONING	NET DENSITY	UNITS
Single Family	228.2	R-PD7	7.0 du/ac	1,597
Multi-Family	48.0	R-3	24.0 du/ac	1,152
Mixed Use Village Center		C-1	-	-
Multi-Family	32.4	-	34.2 du/ac	1,108
Commercial/Office	43.0	-	-	-
Commercial/Office	2.0	C-1	-	-
Nursing Home	6.3	C-1	-	-
Open Space/Drainage	30.8	R-PD7	-	-
Right-of-Way	48.0	R-PD7	-	-
Elementary School	10.1	R-PD7	-	-
TOTAL	448.8		8.6 du/ac	3,857

57(10074). At the Planning Commission meeting at which the amended PRMP and Z-17-90 rezoning applications were considered, Peccole stated that "[a]ll the[]

property shows the zoning," including the R-PD7 for the golf course. 57(10177). R-PD7 zoning over large portions of the master planned area allowed Peccole to develop a variety of housing types in response to market demands in exchange for common open space that Peccole specifically represented would have **no** density. 57(10152-10153).

Precisely because of this flexibility, Peccole could and did use R-PD7 zoning for **both** the areas designated as single-family houses **and** the areas designated as golf course, open space and drainage. 57(10074). At least five master planned communities in Las Vegas have R-PD zoning for the residential **and** open space areas. 93(16684-16697). The Court's belief that it had to choose between the General Plan's PR-OS designation and R-PD zoning overlooks material facts and law.

3. By Disregarding The Golf Course's Role In The Approved Master-Planned Community, The Court Overlooked The Fundamental Distinction Between Euclidean And Master Planned Zoning And Rendered Master Planning Meaningless

The Court's treatment of the 35-Acre Segment as a discrete development unit disregards the legal framework that governs the master planned community and, instead, treats it as a traditional "Euclidean" parcel. *See Story Bed & Breakfast, LLP v. Brown Cnty. Area Plan Comm'n*, 819 N.E.2d 55, 60 (Ind. 2004), *citing Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

> The planned unit development, in contrast to Euclidean zoning which divides a community into districts and explicitly mandates certain uses, ... is a district in which a planned mix of residential, commercial, and even industrial uses is sanctioned subject to restrictions calculated to achieve compatible and efficient use of the land.
>
> * * *
>
> In addition to facilitating flexibility in zoning, the planned unit development also seeks to grant diversification in the location of structures and other site qualities. Thus, the goal of planned unit development is achieved when an entire self-contained little community is permitted to be built within a zoning district, with the rules of density controlling not only the relation of private dwellings to open space, but also the relation of homes to commercial establishments such as theaters, hotels, restaurants, and quasi-commercial uses such as schools and churches.

Sinkler v. Cnty. of Charleston, 690 S.E.2d 777, 781–82 (S.C. 2010), *quoting* 83 Am. Jur. 2d Zoning and Planning §§ 396, 398 (2003). Unlike rigid, single-purpose Euclidean zoning, planned development zoning provides flexibility, variety and diversity of development types within a community, allowing a developer to concentrate residential densities in certain areas "in return for dedicated common, open space elsewhere in the project." Mandelker, Daniel R., NEW PERSPECTIVES ON PLANNED UNIT DEVELOPMENTS, 52 Real Property, Trust and Estate Law J. 229, 231-32 (2017); *see* UDC 19.10.050. Planned development has been used throughout Las Vegas to create functionally and visually diverse communities that meet the City's housing and commercial needs. 93(16684-16697).

The Court's conclusion that the same R-PD7 zoning that allowed Peccole to develop roughly 2,000 acres of land by setting aside common open space later authorized the Developer – "by right" – to convert that open space into housing disregards the PRMP's restrictions and undermines the concept of planned development zoning embodied in UDC 19.10.050. *See also Frankland v. City of Lake Oswego*, 517 P.2d 1042, 1048-1052 (Or. 1973) (holding that apartment building that bore no resemblance to the approved development plan violated the planned development ordinance). Although the Opinion deems the R-PD7 zoning determinative, it ignores the express language in UDC 19.10.050 and overlooks the PRMP entirely.

To argue that single-family and multi-family residential uses were permitted "by right," the Developer cited the Permitted Use Table in UDC 19.12.010. RAB 72. However, the Permitted Use Table only applies to standard residential, commercial and industrial zoning districts, not any of the special zoning districts that employ planned development zoning. *Id.*; 86(15141).[1] The City's R-PD zoning regulation does not have any "by right" language. UDC 19.10.050. Instead, it provides: "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

[1] The City's Development Code provides three special zoning districts that follow the planned unit development zoning process: P-C Planned Community District (UDC 19.10.030); PD Planned Development District (UDC 19.10.040); and R-PD Residential Planned Development District (UDC 19.10.050).

be **consistent with the density approved for the District** and are compatible with surrounding uses." UDC 19.10.050(C)(1) (emphasis added). By disregarding UDC 19.10.050 and treating the 35-Acre Segment as a traditionally zoned parcel, the Court has effectively removed planned development from a municipality's planning toolbox, depriving communities throughout the State of the associated benefits. *See generally* NRS Chapter 278; NRS Chapter 278A; 83 Am. Jur. 2d Zoning and Planning §§ 396, 398 (2003).

4. The Golf Course Was A Condition Of The City's Approval Of The Suncoast Resort Casino

The Court also overlooked that Peccole's set-aside of the golf course was a condition of the City's approval of the Suncoast resort casino. To develop a casino, Peccole had to obtain a Gaming Enterprise District overlay and build a "destination resort." 57(10115-10116, 10176). As explained in the record:

CITY COUNCIL MINUTES
SPECIAL MEETING OF
DEC 08 1989
000018

MEMORANDUM

TO: *City of Las Vegas Gaming Enterprise District Committee*

FROM: *Scott M. Nielson, Esq.* SMN

DATE: *November 15, 1989*

RE: *Nonrestricted Gaming at a "Destination Resort"*

Certain parties that are developing large master-planned communities in the City of Las Vegas have requested that the City of Las Vegas Gaming Enterprise District Committee (the "Committee") recommend that a portion of their master-planned community be designated a gaming enterprise district. Rather than simply designating a portion of such master-planned communities as a gaming enterprise district, it has been suggested that nonrestricted gaming be permitted only in conjunction with a "Destination Resort." A Destination Resort would be defined as a hotel within the boundaries of a master-planned community of at least 500 acres that includes at least the following amenities:

1. 200 guest rooms for sleeping accommodations.
2. An 18-hole golf course.

CITY COUNCIL MINUTES
LAS VEGAS GAMING ENTERPRISE SPECIAL MEETING OF
DISTRICT COMMITTEE
DEC 08 1989
000017

AREAS RECOMMENDED FOR INCLUSION IN THE GAMING ENTERPRISE DISTRICT

(Meetings of November 14 and 20, 1989)

4. Peccole Ranch and Summerlin Village 3, as outlined on their respective maps **

** with the qualification that each of those two developments be limited to one "destination resort" as defined in the attachment.

57(10121-10122).

ATTACHMENT A

GAMING ENTERPRISE DISTRICT

A "Destination Resort" is defined as a hotel with a minimum of 200 guest rooms within the boundaries of a master planned community of at least 500 acres in size and includes amenities such as:

1. An 18-hole golf course.

57(10115). The City incorporated this definition into its approval. 57(10127-10128).

In the PRMP, Peccole described how the golf course would integrate the destination resort into the master planned community:

> A 56.0 acre destination resort-casino site is located at the intersection of an internal collector and Rampart Boulevard. The boundary of this parcel was altered from the previously approved overall Master Plan to accommodate the boundary changes of the refined golf course and road system The golf course along the southern border of the parcel provides an aesthetic quality to the destination resort-casino The resort-casino is planned as a destination golf resort and casino, and will provide the transition from a commercial center to single family residential. The resort will be comprised of approximately 300 to 500 guest rooms, and other elements which may include meeting, conference and ballroom facilities, restaurants, bars, and a casino including its own specialty restaurant and bar areas. Guest amenities may include use of the adjacent golf course, tennis facilities, fitness center, beauty salon, game rooms, a nursery and swimming pool. Exhibit D on page 11 illustrates the anticipated site layout and character for the resort-casino. The Peccole Ranch Resort will be designed to maximize the beauty of the desert surroundings, maintaining sensitivity to scale, character, landscape, and topography, and represents the true centerpiece of the Peccole Ranch Community.

57(10144) (emphasis added). When he appeared before the Planning Commission, William Peccole reiterated: "The casino will be buffered on the north by the Angel Park Golf Course **and on the south by his golf course**." 57(10178) (emphasis added). The PRMP approval stated, "The Gaming Enterprise District indicates this area could contain one destination resort/casino, **but the applicant would have to**

have a major recreational facility….” 57(10176) (emphasis added). Peccole chose a golf course as that “major recreational facility.” 57(10144).

Given the constraints of the casino approval and PRMP, the Developer could not have purchased the golf course with the expectation that the City would allow any part of it to be converted to houses. *See Murr*, 582 U.S. at 397-98; *see Gray v. Trustees, Monclova Twp.*, 313 N.E.2d 366, 369 (Ohio 1974). If an existing condition burdens property, the landowner has no property right to be free of that condition. *See City of Las Vegas v. Cliff Shadows Prof'l Plaza*, 129 Nev. 1, 12, 293 P.3d 860, 867 (2013); *see also 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”); *Atlas Enters. Ltd. P'ship v. United States*, 32 Fed.Cl. 704, 708 (Fed.Cl.1995) (“when an owner buys property with knowledge of restrictions upon the development of that property, he assumes the risk of any economic loss.”). Because the constraints on redevelopment burdened the 35-Acre Segment before the City acted on the 35-Acre Application or the Master Development Agreement (“MDA”), declining to lift the conditions of the casino and PRMP approvals did not constitute a per se taking, as a matter of law, because the “before” and “after” values were the same. *See Colony Cove Props. v. City of Carson*, 888 F.3d 445, 451 (9th Cir. 2018).

C. The Court Misapplied *Lucas* Because A Developer Does Not Have A Constitutional Right To Squeeze Out Additional Value From A Previously Built Master Planned Development From Which It Already Profited

The Court overlooked that Peccole and the Developer already profited from the significant value added by the golf course to the surrounding residential development, thereby obviating any taking claim. 57(10133-10136, 10144-10146). Peccole marketed the golf course as an open space amenity to build denser housing elsewhere in the master planned community and increase the value of adjacent parcels, including the Queensridge Tower project built by the Developer. 57(10144, 10146, 10152-10153); 66(11805-11808).

> **Single Family Residential**
>
> The demand for housing remains strong in the Peccole Ranch vicinity, reflecting the continued growth of immigration to the area. The delineation of residential uses (single family and multi-family totalling 461 0 acres) proposed for Peccole Ranch Phase Two is based upon market study documentation of historical and projected single family housing subdivision and multi-family absorption patterns. Approximately 401 0 acres or 40 2 percent of Phase Two is devoted to quality golf course oriented single-family and custom lot developments, reflecting the fact that there is a demand for higher priced single family housing in the strong northwest/southwest markets. This fact is evident particularly at the Project location which is positioned as a natural northerly growth extension to the successful Lakes community, and which will benefit greatly from the surrounding golf environment and the Summerlin Parkway. Recent market data obtained evidences that there is now a growing preference for detached single family homes over apartment and condominiums, reflecting a stabilization of the Las Vegas Metropolitan economy The significance of this growth is the expanding opportunity to provide single family housing alternatives to an increasingly diverse income base - particularly in association with a golf course community.
>
> There is potential for gated entries to several of the single family parcels Gated entries into Phase Two residential parcels will not only provide residents with a sense of security, but will promote the construction of quality housing products, and form an enclave within Peccole Ranch. A 50 acre single-family parcel central to Phase Two offers extensive golf course frontage to future residents in an exclusive environment bounded on all sides by the golf course. Depending upon market demand, additional gated neighborhoods can be provided in proximity to the clubhouse and adjacent to the golf course.

57(10142-10143).

The golf course allowed Peccole to develop and profit from the Suncoast Casino and saved Peccole from constructing parks (allowing for more housing) and drainage facilities (because the golf course naturally handled flows). 57(10144, 10146, 10152-10153). Peccole planned and built the master planned community to achieve its desired level of profitability. *See id.* The Developer's own promotional materials touted how it profited from construction in the PRMP as the builder of more than "40% of all custom homes in Queensridge" and "the acclaimed One Queensridge Place, Tivoli Village and Sahara Center." 59(10444-10446).

The open space provided by the golf course enhanced the market appeal of the Developer's projects in the PRMP and increased the Developer's profits. *See id.* Now that the Developer has extracted those profits, the Developer seeks to profit yet again by redeveloping the PRMP's open space, at the expense of the community the Developer helped build. The PRMP's residents would lose the open space amenity that was reflected in the purchase and rental prices of PRMP property.

The Court overlooked these material facts and misapplied *Lucas* when it held the City denied the Developer "economically viable use of his land." Op. 24, *quoting* 505 U.S. at 1016. *Lucas* involved two single-family lots in a development where every other lot had been improved with a single-family house and could only be used for that purpose. *Id.* at 1009. At the time Lucas acquired the lots, the

law permitted construction of a house on each lot. *Id.* After a destructive hurricane, the Coastal Council adopted a law preventing any further development in the area. *Id.* at 1008-09, 1075. The Supreme Court found that the statute wiped out the lots' value and was a per se taking. *Id.* at 1019.

Lucas' lots were not set aside by the developer of a master planned community as an open space amenity or express condition of a casino approval. *See id.* at 1009. Moreover, unlike *Lucas*, the City did not change the law to disallow development after the plaintiff purchased the property; the Developer purchased the Badlands subject to the use restrictions sought and obtained by its predecessor. *See id.* Because Peccole and the Developer profited from the land built as a golf course, there was no economic wipeout when the City denied the 35-Acre Application and MDA. *See Lucas*, 505 U.S. at 1027.

D. The Court Overlooked The Facts And Misapplied Its Precedents To Conclude That The Developer Had A Right To Build That Was Taken

1. Land Ownership Alone Does Not Confer A Constitutional Right To Build Free Of Existing Restrictions

Disregarding its precedent, the Court erroneously concluded that the Developer's land ownership alone created a property interest to build its desired development. Based on that incorrect premise, the Court found that the City categorically "took" the 35-Acre Segment by denying the 35-Acre Application. Op. 16. The Court must look at whether the City wiped out the value of a

compensable interest in the property; zoning does not confer a constitutional right to build. *Boulder City v. Cinnamon Hills Assocs.*, 110 Nev. 238, 245, 871 P.2d 320, 324 (1994). A compensable constitutional right does not exist simply because a developer owns land and wants to develop in contravention of existing restrictions. *See id.*; *Lucas*, 505 U.S. at 1030. Here, because existing use restrictions were part of the "bundle of sticks" purchased by the Developer, a per se taking did not occur.

The Court's citation to *Sisolak* does not alter this conclusion. *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 137 P.3d 1110 (2006). In *Sisolak*, the question was whether the property owner had a property interest in airspace, which was the right taken by a regulation that allowed a direct physical invasion. *Id.* at 658, 137 P.3d at 1119. *Karuk Tribe* cited in *Sisolak* makes clear that there must be "a compensable property right" "affected by the governmental action." *Karuk Tribe of California v. Ammon*, 209 F.3d 1366, 1374 (Fed. Cir. 2000) (noting that takings analysis looks at "whether the governmental action at issue constituted a taking of **that** 'stick'"; i.e., the compensable property right) (emphasis added). The existence of a compensable property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'" *Phillips v. Washington Legal Found.*, 524 U.S. 156, 164 (1998), *quoting Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Because the existing restrictions

on redevelopment meant the Developer never acquired a property interest in a "right" to build housing, the Developer's fee ownership of the restricted land is not determinative.

2. The Court's Conclusion That R-PD7 Zoning Gave The Developer The Right To Build Houses In The Golf Course Disregards The Controlling Authority In *Stratosphere*, *Tighe*, And *Boulder City*

The Court failed to consider its long line of jurisprudence that confirms zoning confers no right to build. In *Stratosphere*, the Court held that even when a proposed use is "permitted within existing zoning," a landowner has no right to build it. *Stratosphere Gaming Corp. v. City of Las Vegas*, 120 Nev. 523, 527, 96 P.3d 756, 759 (2004). In *Tighe v. Von Goerken*, the Court held that "compatible zoning does not, ipso facto, divest a municipal government of the right to deny certain uses based upon considerations of public interest." 108 Nev. 440, 443, 833 P.2d 1135, 1137 (1992). In *Boulder City*, the Court held that zoning confers no constitutionally protected property interest.[2] 110 Nev. at 245-46, 871 P.2d at 524-25; *see also Nevada Contractors v. Washoe Cty.*, 106 Nev. 310, 311, 792 P.2d 31, 31-32 (1990) (affirming county commission's denial of a special use permit even though property was zoned for the use). By holding that zoning alone confers a

[2] *Boulder City* cannot be distinguished on the ground that the Court addressed the absence of a property interest in the context of a due process claim. A property right is a prerequisite for both due process and takings claims. *See Sisolak*, 122 Nev. at 658, 137 P.3d at 1119.

constitutionally compensable right, the Opinion cannot be squared with the *Stratosphere* line of cases.[3]

3. The Court Overlooked That The Developer's "Before" Value Erroneously Presumed A Constitutional Right To Build

The Court's dispositive error in presuming a right to build extended to its affirmance of the just compensation award. As the Court recognized, the value for just compensation must be based on a use "for which the land is available." Op. 28, *quoting City of Las Vegas v. Bustos*, 119 Nev. 360, 362, 75 P.3d 351, 352 (2003). In opining on value, the Developer's appraiser erroneously presumed that single-family and multi-family residential were "permitted uses by right," disregarding the existing restrictions on the golf course's use that predated the City's denial of the 35-Acre Application, notably that no housing density was allowed in the golf course acreage, and the land was set aside as a condition of the casino and PRMP approvals. 87(15343-15355). Notwithstanding these limitations, the appraiser deemed residential use a "legally permissible" use in the "before" condition. 87(15343-15355). The district court granted the Developer's motions in limine to

[3] The Opinion also elevates staff recommendations above other matters that a land use authority can consider, disregarding the substantial evidence standard for land use cases and that a municipality's decision makers need not follow staff recommendations when determining whether a proposed development is harmonious, compatible and desirable. *See Stratosphere*, 120 Nev. at 524, 528-29, 96 P.3d at 758, 760-61. Substantial evidence can consist of public opposition alone. *Id.* at 528-29, 96 P.3d at 760-61. It is the job of elected officials to consider compatibility, weigh competing uses and determine how orderly growth will occur.

prohibit the City from cross-examining the Developer's appraiser about his assumption that the zoning gave the Developer a "right" to build houses. 110(19829-19893).

The Court also overlooked material facts when it incorrectly concluded that "the City neither challenged the valuation nor provided alternative valuations." Op. 3. The City argued that the appraised value was based on the flawed legal assumption that the Developer had a "right" to build houses. 108(19388-90). Because the existing restrictions on the golf course property meant houses were not "legally permissible," under the appraiser's own analysis, the "before" and "after" values were both zero. 87(15355-15384).

Additionally, the City argued that the $4.5 million the Developer paid for the golf course in 2015 – as evidenced by a purchase and sale agreement containing an integration clause – confirmed that the buyer and seller were fully aware of the existing restrictions to redevelopment.[4] 62(11059). In contravention of controlling authority, the Court disregarded the integrated contract, which is highly probative of the "before" value and indicates the sale price derived from use restrictions. *Kaldi v. Farmers Ins. Exch.*, 117 Nev. 273, 281, 21 P.3d 16, 21 (2001); *see State, Dep't of Transp. v. Cowan*, 120 Nev. 851, 858, 103 P.3d 1, 5 (2004).

[4] The purchase and sale agreement stated the purchase price for Fore Stars was $7.5 million, but uncontroverted evidence demonstrated that $3 million of that was for real estate interests other than the Badlands. 66(11774-11849); 67(11862-11987); 68(11988-12081); 92(16323); 93(16660-16665).

E. The Court Misapplied And Failed To Consider Controlling Law And Overlooked Material Facts In Its Parcel-As-A-Whole Analysis

1. Although *Kelly* Is Directly-On-Point And Controlling Authority, The Court Did Not Consider It

In *Kelly*, the Court rejected a developer's taking claim that was based on the developer's segmentation of seven lots affected by regulation from the remainder of the developer's 39-lot planned unit development. *Id.* at 641 & n.1, 651, 855 P.2d at 1029 & n.1, 1035. Because the agency approved development on 32 of those parcels, thereby bestowing a "substantial profit" on the developer, no taking occurred. *Id.* at 651, 855 P.2d at 1035. *Kelly* is the only decision of this Court to address the parcel-as-a-whole issue, has directly analogous facts, and is entirely consistent with *Murr*, yet the Court did not consider it.

Here, the 35-Acre Segment is just a small piece of the master planned area that Peccole developed with thousands of housing units, a hotel/casino, retail shopping mall, and golf course. 61(11037-11043). The City thus approved development in **the entirety** of the master planned area. 61(11037). Yet, in contravention of *Kelly*, which like here, involved a planned development, the Court failed to even address the golf course's role in the master planned community.

Even if the Court ignores that the golf course was an integral part of a planned development long before the Developer bought it, *Kelly* requires that, at a minimum, the City's approval of the 435-Unit Project on the 17-Acre Segment

obviates any regulatory taking claim. According to the Developer's own evidence, that approval added $27 million in value to the master planned community. 62(11238). Under *Kelly*, that approval defeated any claim that the City "took" another segment in the parcel as a whole. 109 Nev. at 651, 855 P.2d at 1035.

Rather than credit the City for the significant value it conferred on the Developer, the Court used the 435-Unit Project approval *against* the City by incongruously concluding that it "demonstrates the 35 acres' separate nature." Op. 18. To the contrary, the Developer, not the City, segmented the Badlands. The City's approval of the 435-Unit Project showed it was willing to lift the historical restrictions on at least some of the golf course acreage to allow redevelopment, negating a taking claim under *Kelly*.[5] 109 Nev. at 651, 855 P.2d at 1035. Approval of the 435-Unit Project was not an endorsement of the Developer's improper segmentation in pursuit of its takings claims.

2. The Court Misapplied *Murr* By Deeming Assessor Parcel Lines Decisive And Disregarding The Peccole Ranch Master Plan

The fact that the golf course consists of more than one parcel does not render the 35-Acre Segment the denominator because lot lines created under state law do not define the relevant parcel. *Murr*, 582 U.S. at 400. Under *Murr*, when analyzing

[5] Moreover, unlike the 35-Acre Application, the Developer's application for the 435-Unit Project was consistent with (and the City's approval of the 435-Unit Project was incorporated without modification in) the development agreement the Developer was negotiating with the City. 61(10869).

the "treatment of the land under state and local law," the Court must look at any "reasonable restriction that predates a landowner's acquisition … as one of the objective factors that most landowners would reasonably consider in forming fair expectations about their property." *Id.* at 397-98. The Supreme Court expressly rejected the landowners' lot-line argument, concluding instead that two adjoining assessor's parcels were the whole parcel. *Id.* at 400-01. The Court did the same in *Kelly*:

> [The subdivision] must be viewed as a whole, not as thirty-nine individual lots, when determining whether Kelly has been deprived of *all* economic use.... When viewed as a whole, we conclude that Kelly has not been deprived of all economic use; only the seven Hilltop lots have been affected by TRPA's regulations, not the entire Uppaway subdivision.

Id. at 651, 855 P.2d at 1035 (*citing Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 130 (1978)) (emphasis in original). In other words, *Murr* and *Kelly* expressly hold that assessor's parcel boundaries **do not** determine the denominator when restrictions under state and local law warrant otherwise.

3. The Court Misapprehended Material Facts In Its *Murr* Analysis

At the time of the Developer's purchase, the golf course acreage consisted of two legal parcels that had existed since the City approved the PRMP, not nine parcels as presumed by the Court. 61(11004-11012). The 35-Acre Segment did not become its own parcel until the Developer recorded a parcel map on January 2017, **after** filing the 35-Acre Application. *Compare* 59(10413-10441) *with* 60(10708).

"Courts must … define the parcel in a manner that reflects reasonable expectations about the property." *Murr*, 582 U.S. at 405–06. "Reasonable expectations" derive from the existing land use restrictions, not what a landowner subsequently seeks to do after its purchase. *Id.* at 397-98. With planned developments, the entire master planned area is treated as a development unit. *See Kelly*, 109 Nev. at 651, 855 P.2d at 1035.

In contravention of *Murr*, rather than look at the property's historical treatment under state and local law, the Court looked only at the Developer's post-purchase conduct, deeming germane the fact that the 35-Acre Segment was "a single parcel with an individual parcel number and was treated as an individual parcel throughout the entirety of 180 Land's attempts to obtain the City's approval to develop it…." Op. 18. The conclusion that the Developer could create a new 35-acre parcel **after** acquiring the golf course portion of a master planned development and then have that new parcel define the denominator for the purpose of the regulatory takings analysis flies in the face of *Murr* and *Kelly*.

Moreover, the Court's conclusion that the 35-Acre Segment was treated as an individual parcel "even when 180 Land submitted applications regarding the entire 250 acres" is wrong. Op. 18. The Developer's proposed MDA included the 35-Acre Segment as part of a 181-acre "Development Area 4." 61(10916, 11043-11045); *see also* 59(10458-10460). Because the 35-Acre Segment is not called out

anywhere in the MDA, even if assessor's parcel lines were legally relevant, the Court's analysis rests on dispositive factual errors.

Finally, the Court's conclusion that "there are no ecological or other physical aspects of the land that warrant us treating the 250 acres as the whole parcel in this case" either misapprehends or disregards the evidence. Peccole designed and built the golf course as an "open space system winding throughout the [master planned] community [that] provides a positive focal point while creating a mechanism to handle drainage flows." 57(10056, 10138). When presenting the PRMP, Peccole highlighted the physical and ecological contribution of the golf course to the master planned area:

> **Open Space and Drainage**
>
> A focal point of Peccole Ranch Phase Two is the 199 8 acre golf course and open space drainageway system which traverses the site along the natural wash system. All residential parcels within Phase Two, except one, have exposure to the golf course and open space areas. The single family parcel which is not adjacent to the open space system borders Angel Park Golf Course on its northern boundary Passive and active recreational areas will be provided, and residents will have an opportunity to utilize alternative modes of transportation throughout with the bike paths and pedestrian walkways (see Exhibits E and F on pages 13 and 14). The surrounding community as well as project residents may use the open space system to travel to neighboring areas including Angel Park. In addition, recreational improvements such as picnic tables, ramadas and pleasing water features will be located in passive gathering areas located throughout the open space.
>
> The close proximity to Angel Park along with the extensive golf course and open space network were determining factors in the decision not to integrate a public park in the proposed Plan According to the Parks, Recreation and Senior Citizen Activities Division a need for a dedicated public facility within Peccole Ranch is not indicated nor anticipated in the future

South of Charleston Boulevard, drainage flows through the washes initially enter the site in two locations along the western boundary at a peak rate of 800 cubic feet per second (cfs), and move in a east/northeast direction. Two wash flows are then directed into the main drainage wash which flows northeasterly towards the large Angel Park reservoir at a rate of approximately 1,600 cfs North of Charleston Boulevard an off-site flow of 2,000 cfs enters the Project. This storm water will be contained within the golf course until it reaches Rampart Boulevard, and will then flow through a channel adjacent to the commercial center to the Angel Park Basin. Based on the golf course routing plan by Mr. Ted Robinson, renowned golf course architect, the golf course has been designed in conjunction with existing drainage features on the site. The design of the golf course has been instrumental in preserving the natural character of the land and controlling drainage on and through the property.

Phase Two of the proposed Peccole Ranch Master Plan has approximately 33.1 additional acres allotted for golf course and drainageways. The additional acreage accommodates a clubhouse and driving range centrally located within the golf course and surrounding residential community. These features are also accessible to visitors staying at the adjacent destination resort-casino.

57(10144-10146). Due to the Court's misapprehension of these facts, its *Murr* analysis cannot stand.

F. The Court's Per Se Taking And Futility Analyses Overlooked Material Facts Regarding The Council's Willingness To Approve Housing In The Golf Course

The transcript of the hearing at which the City denied the MDA application indicates that a majority of Councilmembers were willing – and wanted – to approve a project that had less density and better addressed traffic issues. 31(5542, 5597-5598). The Court overlooked material facts when it "consider[ed] the totality of the City's actions" to "conclude that any further attempts to apply for development by 180 Land would be futile…." Op. 21.

By the time of the August 2, 2017 meeting at which the Council heard the MDA application, the City was embroiled in litigation with the neighbors over the City's approval of the 435-Unit Project. 30(5535-5538); 31(5542). The Developer had shut off water on the golf course, creating concerns for wildlife and impacts to

the value of adjacent properties. 30(5514, 5536); 31(5544, 5562-5563, 5627-5630). The City Attorney and planners had been involved in efforts to broker a deal between the Developer and the neighbors over a master development agreement that would allow the Developer to redevelop the golf course with residential and commercial uses. 30(5519, 5534-5535, 5537-5538).

Two new members had just joined the Council and one member expressed that she had just the prior day received "new research and work from both sides" and "need[ed] additional time" to review the materials, in particular those related to traffic and access. 30(5534, 5539); 31(5608). Additionally, the version of the MDA that the Developer presented for approval at the meeting differed from the one in the agenda packet, creating confusion among Councilmembers as to what they would actually be approving. 31(5550).

Many Councilmembers expressed a desire for redevelopment of the Badlands and a proposal that addressed concerns regarding, among other things, density, impacts on surrounding property values, and traffic. 31(5542, 5544, 5597-5598). Multiple times, Councilmembers said they wished to continue the matter for 30 days to allow for further negotiations with the Developer. 30(5537-5539); 31(5544-5545, 5561-5662, 5576, 5579, 5581-5582, 5585, 5608, 5610, 5661-5662, 5664).

The obstacle was that the Developer sought densities that far exceeded the PRMP's 4,247-unit cap and would nearly double the area's density. 57(10152). Even after the City approved the 435-Unit Project, the MDA that the Developer presented on August 2, 2017 still proposed an **additional** 1,734 units (mostly multi-family) for a total of 5,073 units, **plus** the right to build an unspecified number of assisted living apartments and up to 15,000 square feet of ancillary commercial, leaving only 12.7 acres of common open space. 37(6815-6816); 59(10560); 60(10634-10640); 64(11414-11419). In addition to exceeding the Phase II cap, this proposal gutted the positive aesthetic, physical, and ecological open space conditions that Peccole established, and transformed the amenities that Peccole built pursuant to the approved PRMP into a mostly multi-family neighborhood. 37(6815-6816).

There are numerous statements in the record showing that Councilmembers were willing to approve additional residential uses on the golf course and that the proposed MDA showed progress but still presented unresolved issues:

> MAYOR GOODMAN:
>
> [T]here are pieces of the agreement that I still have issues with. But to talk about a holistic approach, we're moving in that direction. 30(5537).
>
> Well, and I do think a lot of that has to do with the fact we're trying to get the two sides together.… [I]f, in fact, we could get the sides together, then hopefully with the give and take, the residents will get behind we want to move this forward, where are the areas that we can

help on easements, on different things, so it becomes one unified vision for the entire property, [while also] maintaining the property value of the owners of the properties that live out there in Queensridge. 31(5594).

COUNCILWOMAN FIORE:

[W]e're asking for 30 days so our Planning folks and our staff can work on a better agreement and come up with a better development plan to make everyone happy. What I am concerned with is keeping those value[s] in property up and making sure that the [Developer] doesn't walk away so we just have dead grass and dead animals. 31(5581-5582).

COUNCILWOMAN TARKANIAN:

I would prefer – waiting the 30 days. I'm just one of those people that feels you never give up. 31(5662).

COUNCILMAN COFFIN:

I do support some sort of development agreement. I do. But not this one, though. And I gave them what I thought was a reasonable way to go, from my standpoint, to get my vote, which would have been a combination building, and actually pretty high density, but because of an appearance sake, they didn't want to venture into any kind of drawings even to explore my idea. 31(5545-5546).

I still have an open mind on development agreements. 31(5652).

By a vote of 4-3, the Council denied the MDA, meaning the Developer needed **only one additional vote** for approval. 31(5663); 61(10948). Of those who voted to deny, at least two Councilmembers indicated they either needed additional time to become familiar with the issues, wanted to work with the Developer, or were willing to consider a lower density development. 31(5545, 5662). Although

the City disputes the Court's statement that under *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, it must provide guidance as to what level of development it would find acceptable (Op. 21, *citing id.*, 920 F.2d 1496, 1501 (9th Cir. 1990)), the record is clear that Councilmembers wanted the Developer to further address density and traffic and present a revised development agreement for consideration. 31(5542, 5544, 5597-5598).

In sum, there is nothing in the record that can be remotely construed as a "clear, complete, and unambiguous" statement that the City has "drawn the line, clearly and emphatically" that no redevelopment of the golf course would be allowed. *Hoehne v. County of San Benito*, 870 F.2d 529, 533 (9th Cir. 1989).

G. The Court Relied On Extra-Record Materials And The Developer's Misrepresentations To Find That The City "Denied" The Developer's "Application For A Technical Drainage Study"

The Court's Opinion contains internal inconsistencies regarding a technical drainage study. In footnote 10, the Court correctly followed its precedents to disregard the Developer's false argument that the City acted in a manner to prohibit the Developer from building the 435-Unit Project. Op. 18, *citing FDIC v. Rhodes*, 130 Nev. 893, 897, 336 P.3d 961, 964 (2014). Yet at the bottom of page 7, the Court disregards footnote 10 and relies on extra-record disputed findings from an interlocutory order in another case (that has no factual support and contravenes the evidence) to contend that "the City denied 180 Land's application for a

technical drainage study." The Court's finding gifts the Developer a win in the 17-acre case because, in contravention of footnote 18, it expands the Opinion to encompass the entire golf course acreage.

It also is wrong. 62(11110-11111, 11117, 11120); 64(11419); 119(21756); ReplyApp 3(457-58); 6(1134-37); 7(1275-79, 1449-64). After the City increased the Badlands' value by $27 million when it approved the 435-Unit Project, and this Court affirmed the approval, the Developer abandoned the project, choosing to instead pursue takings claims. 62(11117-11125). Realizing the increased value from the City's approval obviated any taking claim, the Developer manufactured a new and demonstrably false story in the 17-acre case that the City purportedly denied a drainage study prerequisite to building the 435-Unit Project. The City never denied a drainage study for any part of the Badlands. To the contrary, in September 2018 while the validity of the City's approval of the 435-Unit Project was before this Court, the Developer failed to respond to the City's Department of Public Works' comments on the required technical drainage study specific to the 435-Unit Project. 64(11419); ReplyApp 3(457-58); 6(1134-37); 7(1275-79, 1449-64). After this Court reinstated the City's approval of the 435-Unit Project, the City sent multiple letters informing the Developer that its permit had been reinstated and would be valid for another two years. 62(11117). After September 2018, the

Developer failed to communicate with the City regarding the 435-Unit Project, clearly indicating that it had abandoned the Project. ReplyApp 3(457-458).

The Developer did not cite any evidence to support its false assertions regarding the City's purported denial of a drainage study, and the Court cited none. Instead, the Court effectively took judicial notice of the district judge's unsupported and erroneous findings in the 17-acre case. The Court's reliance on the City's alleged denial of technical drainage study to conclude that further applications would be futile misapprehends the facts, overlooks the law, and expands the Opinion's reach well beyond this case. Even if the Court declines to modify the judgment, the Court's unsupported finding regarding the technical drainage study should be deleted from the Opinion.

H. The Court Failed To Follow Controlling Law That The Date Of Value Is The Date Of The City's Alleged Action That Wiped Out All Value

Should the Court ultimately conclude that the City categorically took the 35-Acre Segment, the City submits that the date of value for calculating just compensation and prejudgment interest is the date on which the regulation in question wiped out the property's value, which the Court held is August 2, 2017, when the City's denied the MDA Application. Op. 25-26. In regulatory takings actions, the taking occurs when the regulation that effects the taking is imposed on the property. *See Knick v. T'ship of Scott, Pa.*, 588 U.S. 180, 190 (2019) ("The Fifth Amendment right to full compensation arises at the time of the taking");

Colony Cove, 888 F.3d at 451 ("[E]conomic impact is determined by comparing the total value of the affected property before and after the government action."); *Guggenheim*, 638 F.3d at 1119 (regulatory taking "is a single harm, measurable and compensable when the statute is passed"); *State v. Eighth Judicial. Dist. Ct.*, 131 Nev. 411, 419, 351 P.3d 736, 741 (2015) (taking occurs if regulation "completely deprive[s] an owner of all economically beneficial use of her property"); *see also Kirby Forest Indus., Inc. v. U.S.*, 467 U.S. 1, 10 (1984) ("'Just compensation' ... means in most cases the fair market value of the property **on the date it is appropriated**.") (emphasis added); *Norman v. U.S.*, 63 Fed.Cl. 231, 280 (2004) ("the determination involves a calculation of the fair market value before and after the date of the alleged taking").

Notwithstanding these authorities, the Court affirmed the district court's use of September 14, 2017, for calculating just compensation, even though no action by the City occurred on that date. Op. 28, *citing* NRS 37.120; *County of Clark v. Alper*, 100 Nev. 382, 391, 685 P.2d 943, 949 (1984). As the Court held earlier in this case, although it "generally appl[ies] eminent domain 'rules and principles' to inverse condemnation cases," it will not do so where the eminent domain rule is "inapposite to the circumstances." May 9, 2022 Order Granting Stay, Case No. 84345, at 3. While the date of service may be the correct date of value in an eminent domain case, because the City imposed no limits on the Developer's use

and did not cause an economic loss on that date, it was not a proper date of value in this regulatory taking case. *See id.*; *Colony Cove*, 888 F.3d at 451.

Unlike here, *Alper* is not a regulatory takings case. There, the county held a limited-term easement over private property pursuant to which the county widened a public road. *Id.* at 386, n.1, 685 P.2d at 945, n.1. The county's easement was extinguished on May 31, 1972, but the encroaching public road remained. *See id.* at 391, 685 P.2d at 949. After the county failed to bring an eminent domain action to acquire the property that it had physically taken, the landowners filed an inverse condemnation action, in which the county stipulated that the former easement area was "taken for public use" on June 1, 1972. *Id.* Treating the case as an eminent domain action, the trial court applied NRS 37.120 to hold that the property should be valued as of the trial date because more than two years had passed since the county took the property. *See id.*

On appeal, the county argued that NRS 37.120 did not apply because the case was technically brought as an inverse condemnation claim. *See id.* The Court disagreed, finding that because the county had taken physical possession and conceded liability, it "should have initiated formal eminent domain proceedings" and could not "delay formal eminent domain proceedings on the expectation that the landowner will file an action for inverse condemnation and thereby avoid its obligation to bring the matter to trial within two years." *Id.* Because *Alper* was not

a regulatory taking case, and the policy behind NRS 37.120 — to encourage the government to bring eminent domain actions to trial within two years – is inapplicable here, the blanket application of eminent domain law is inappropriate. *See* May 9, 2022 Order Granting Stay, Case No. 84345, at 3; *see also Gearing v. Half Moon Bay*, 54 F.4th 1144, 1149 (9th Cir. 2022) (explaining distinction between eminent domain and regulatory takings).

The Developer had the burden to demonstrate the value of the 35-Acre Segment on August 2, 2017, the date of the City's purported per se wipeout, which it failed to do. Op. 28. To the extent the Court does not revisit its conclusion that a per se taking occurred, it should nevertheless remand for a determination of value as of that date.

I. The Court Misapplied *Alper* When Affirming The Property Tax Award Because The City Never Dispossessed The Developer Of Any Property

The Court noted that "[a]n owner who is dispossessed from [their] land when it is taken for public use is no longer obligated to pay taxes." Op. 30, *quoting Alper*, 100 Nev. at 395, 685 P.2d at 949. However, the Court did not hold the City liable for a physical taking or cite any evidence that the City physically dispossessed the Developer, of which there is none. Rather, the Court found the City liable only for a per se regulatory taking based on the denial of a proposed change in use. Op. 24-26.

In *Sisolak*, this Court noted the distinction between physical versus use-based regulatory takings: "In determining whether a property owner has suffered a per se taking by physical invasion, a court must determine whether the regulation has granted the government physical possession of the property or whether it merely forbids certain private uses of the space." 122 Nev. at 662, 137 P.3d at 1122. There is no evidence the City physically dispossessed the Developer. *See* AOB 75-83; ARB 78-81. Because the Developer has been in full possession at all times, the Court misapplied *Alper* to affirm the property tax award.

CONCLUSION

Because the Court overlooked, misapprehended, and disregarded controlling authority and material facts, the City requests rehearing and judgment in its favor.

DATED this 20th day of May, 2024 BY: /s/ *Debbie Leonard*

LAS VEGAS CITY ATTORNEY'S OFFICE Jeff Dorocak (#13109) Rebecca Wolfson (#14132) 495 S. Main Street, 6th Floor Las Vegas, NV 89101 Phone: 702.229.6629 Fax: 702.386.1749 jdorocak@lasvegasnevada.gov rwolfson@lasvegasnevada.gov	McDONALD CARANO LLP George F. Ogilvie III (#3552) Amanda C. Yen (#9726) Christopher Molina (#14092) 2300 W. Sahara Ave, Suite 1200 Las Vegas, NV 89102 Phone: 702.873.4100 Fax: 702.873.9966 gogilvie@mcdonaldcarano.com ayen@mcdonaldcarano.com cmolina@mcdonaldcarano.com

LEONARD LAW, PC Debbie Leonard (#8260) 955 S. Virginia St., Suite #220 Reno, NV 89502 775-964-4656 debbie@leonardlawpc.com	SHUTE, MIHALY & WEINBERGER, LLP Andrew W. Schwartz (CA Bar No. 87699) (Admitted pro hac vice) Lauren M. Tarpey (CA Bar No. 321775) (Admitted pro hac vice) 396 Hayes Street San Francisco, California 94102

Attorneys for City of Las Vegas

CERTIFICATE OF COMPLIANCE

I hereby certify that this petition 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 it 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 petition exceeds the type-volume limitation of NRAP 40(b)(3), computed in compliance with Rule 32(a)(7)(C), because it contains **7,870** words. I have separately filed a motion to exceed the word limit.

Pursuant to NRAP 28.2, I hereby certify that I have read this petition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that it 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. 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 May 20, 2024

LEONARD LAW, PC

By: /s/ Debbie Leonard

Debbie Leonard (NV Bar No. 8260)
955 S. Virginia Street, Suite 220
Reno, Nevada 89502
Phone: (775) 964-4656
debbie@leonardlawpc.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Leonard Law, PC, and that on May 20, 2024, a copy of the foregoing document was electronically filed with the Clerk of the Court for the Nevada Supreme Court by eFlex. Participants below who are registered as eFlex users will be served by the eFlex system upon filing. All others will be served by first-class mail.

Kermitt L. Waters
James J. Leavitt
Michael A. Schneider
Autumn L. Waters
Law Offices of Kermitt L. Waters
704 South Ninth Street
Las Vegas, Nevada 89101
Attorneys for Landowners

Micah S. Echols
Claggett & Sykes Law Firm
4101 Meadows Lane, Suite 100
Las Vegas, Nevada 89107
Attorneys for Landowners

Elizabeth Ham
EHB Companies
1215 S. Fort Apache Road, Suite 120
Las Vegas, NV 89117
Attorneys for Landowners

Karl Hall
Jonathan Shipman
City of Reno
1 E. First Street
P. O. Box 1900
Reno, NV 89505
Attorneys for Amicus Curiae

Steven M. Silva
Nossaman, LP
895 Pinebrook Road
Reno, NV 89509
Attorneys for Amicus Curiae

Brandon P. Kemble
Amanda B. Kern
Nicholas G. Vaskov
Henderson City Attorney's Office
P.O. Box 95050, MSC 144
Henderson, NV 89009
Attorneys for Amicus Curiae

Micaela Moore
North Las Vegas City Attorney's Office
2250 Las Vegas Blvd. North, #810
North Las Vegas, NV 89030
Attorneys for Amicus Curiae

Robert D. Sweetin
Davison Van Cleve
300 South 4th Street, Suite 1400
Las Vegas, NV 89101
Attorneys for Amicus Curiae

Nancy Porter
Lauren A. Landa
Goicoechea, Di Grazia, Coyle & Stanton, Ltd.
530 Idaho Street
Elko, NV 89801
Attorneys for Amicus Curiae

Leo Cahoon
501 Mill Street
Ely, NV 89301
Attorneys for Amicus Curiae

/s/ Tricia Trevino
An employee of Leonard Law, PC