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Filed October 26, 2022

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EVANS CREEK, LLC, Plaintiff-Appellant, v. CITY OF RENO, Defendant-Appellee.	No. 21-16620 D.C. No. 3:20-cv-00724-MMD-WGC MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Miranda M. Du, Chief District Judge, Presiding

Argued and Submitted October 20, 2022
San Francisco, California

Before: S.R. THOMAS and M. SMITH, Circuit Judges, and McSHANE,** District Judge.

Evans Creek, LLC ("Evans Creek") appeals from the district court's dismissal of its claim brought under 42 U.S.C. § 1983 alleging violations of the Takings Clause and the Equal Protection Clause against the City of Reno ("the City"). We have jurisdiction pursuant to 28 U.S.C. § 1291. We review

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Michael J. McShane, United States District Judge for the District of Oregon, sitting by designation.

a district court's decision to grant or deny a motion to dismiss under Rule 12(b)(6) for failure to state a claim de novo. *See Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885, 889 (9th Cir. 2021). We affirm.

Because the parties are familiar with the factual and procedural history of the case, we need not recount it here.

I

The district court properly dismissed Evan Creek's Takings claim. To survive a motion to dismiss, a complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Conclusory statements that are unsupported by factual allegations are "not entitled to the assumption of truth." *Id.* at 679.

Assuming, without deciding, that Evans Creek has plausibly pleaded that denying its 2020 application for annexation ("2020 Application") effectively forecloses any feasible development on the property, Evans Creek has failed to plausibly plead a regulatory taking. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), set forth three factors for determining whether government action constitutes a regulatory taking: (1) "[t]he economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with

distinct investment-backed expectations," and (3) "the character of the governmental action." *Id.* at 124. The first and second *Penn Central* factors are the primary factors. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538–39 (2005).

Evans Creek's complaint fails to sufficiently plead the first *Penn Central* factor. "In considering the economic impact of an alleged taking, we 'compare the value that has been taken from the property with the value that remains in the property.'" *Colony Cove Props., LLC v. City of Carson*, 888 F.3d 445, 450 (9th Cir. 2018) (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987)). As pleaded, the complaint lacks any information about the value of the property when the 2020 Application was submitted or its value after the 2020 Application was denied. Accordingly, it is not possible for this Court to determine what the economic impact to the property is, even taking the allegations in the complaint as true.

Evans Creek's takings claim also fails prong two of the *Penn Central* analysis. As the Court in *Penn Central* noted, an appellant cannot "establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development." 438 U.S. at 130. Instead, "a purported distinct investment-backed expectation must be objectively reasonable." *Colony Cove*, 888 F.3d at 452.

Here, the principals' expectations that Evans Creek would be able to develop the property into a master planned community may well have been "hardly unconventional." But Evans Creek's "[u]nilateral expectations" about the mere possibility

for future development were no more than speculative desires that cannot form the basis of a takings claim. *Bridge Aina Le'a*, 950 F.3d at 633–34. Additionally, the City's decision to annex property is subject to the City's discretion based on multiple statutorily prescribed factors. *See* Reno Mun. Code § 18.04.301(d).[1] Nevada law grants cities discretion to annex property when a property owner requests it. *See* Nev. Rev. Stat. § 268.670. Therefore, Evans Creek knew or should have known—especially after several failed requests for annexation—that the 2020 Application might be denied.

Thus, the district court properly granted the motion to dismiss the regulatory-taking claim.

II

Evans Creek has also failed to plausibly plead an Equal Protection class-of-one claim. The Supreme Court has held that "an equal protection claim can in some circumstances be sustained even if the plaintiff has not alleged class-based discrimination, but instead claims that she has been irrationally singled out as a so-called 'class of one.'" *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 601 (2008). For Evans Creek to succeed on its class-of-one claim, it must demonstrate that the City "(1) intentionally (2) treated [Evans Creek] differently than other similarly situated property owners, (3) without a rational basis." *Gerhart v. Lake Cnty.*, 367 F.3d 1013, 1022 (9th Cir. 2011).

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[1] In the current version of the Reno Municipal Code, this provision was moved to section 18.04.401(c)(4) of the Code, but is otherwise identical.

To determine whether a plaintiff is "similarly situated" to others in the class-of-one context, this Court has held that "a class-of-one plaintiff must be similarly situated to the proposed comparator in *all material respects*." *SmileDirectClub, LLC v. Tippins*, 31 F.4th 1110, 1123 (9th Cir. 2022) (emphasis added). Because Evans Creek's complaint provides virtually none of the material facts on which this determination must be made, it falls far short of plausibly pleading the demanding "similarly situated" requirement articulated in *SmileDirectClub*. The complaint alleges no facts about the other annexation applications or the land at issue in those applications. Nor does it offer support regarding how the City's decision to approve the other annexation applications differed from its decision to deny the 2020 Application. Evans Creek also makes the conclusory allegation that the City routinely grants annexation applications "irrespective of the characteristics of the subject properties," but the complaint is devoid of any facts supporting this assertion. Accordingly, because Evans Creek has not plausibly pleaded the "similarly situated" element of its class-of-one claim, its equal-protection claim as a whole fails, *see SmileDirectClub*, 31 F.4th at 1123, and we need not reach the question of whether the distinction made by the City was rationally related to legitimate government interests. The district court correctly dismissed the "class of one" Equal Protection claim.

AFFIRMED.[2]

[2] Appellants' motion to take judicial notice (**Dkt. 25**) is granted.

Filed September 20, 2021

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

EVANS CREEK, LLC, Plaintiff, v. CITY OF RENO, Defendant.	Case No. 3:20-cv-00724-MMD-WGC ORDER

This is a regulatory takings action. Plaintiff Evans Creek, LLC, alleges Defendant City of Reno violated the Takings Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment by refusing to annex a parcel of land in west Reno. (ECF No. 1.) The City moved to dismiss the Complaint under Rule 12(b)(6), arguing in part that the Complaint lacked requisite factual information to proceed. (ECF No. 8.) In its opposition, Plaintiff expressly requested leave to amend the Complaint "to provide additional factual detail." (ECF No. 10 at 18.) The Court granted the City's motion to dismiss on September 14, 2021, but also granted Plaintiff leave to amend to support its claims. (ECF No. 25 ("Order").) The Court instructed Plaintiff to file an amended complaint within 30 days. (*Id.*)

On September 17, 2021, Plaintiff filed a notice of intent not to file an amended complaint. (ECF No. 26.) As part of its notice, Plaintiff requested the court enter an order dismissing the action in its entirety and

recognizing the order dismissing the Complaint as a final, appealable decision.[1] (*Id.*)

"The touchstone for finality is that the particular action filed is fully disposed of, without the possibility of being resurrected through amendment." *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1106 (9th Cir. 2018). However, "[a]n order dismissing a complaint without prejudice may be final and appealable 'if the plaintiff cannot cure the defect that led to dismissal or elects to stand on the dismissed complaint.'" *Lopez v. City of Needles, Cal.*, 95 F.3d 20, 22 (9th Cir. 1996) (citation omitted); *see also McCalden v. Cal. Library Ass'n*, 955 F.2d 1214, 1224 (9th Cir. 1990) ("[A]ppellant is not required to amend in order to preserve his right to appeal. When one is granted leave to amend a pleading, she may elect to stand on her pleading and appeal, if the other requirements for a final appealable judgment are satisfied.").

Although the Court did not anticipate that its Order would finally decide this action, the Court acknowledges Plaintiff's written intent to stand on its dismissed complaint. In the Order, the Court noted specific factual issues in both the class-of-one equal protection claim and regulatory takings claim that could be cured by amendment. For example: whether Plaintiff is similarly situated to other property owners (ECF No. 25 at 8–9), how Plaintiff's treatment was unique from other property owners (*id.* 10–11), how motivations from 15–20 years ago could be attributed

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[1] The City has filed a motion to compel production of documents. (ECF No. 24.) Because the Court will close the case so that Plaintiff may appeal the Complaint's dismissal, the Court will deny the motion to compel. If the case is reopened, the City will be given leave to refile its motion to compel.

to the City's present decisions (*id.* at 11), what degree of economic impact the City's decision had on the property (*id.* at 14), and why Plaintiff's expectation that the City would grant annexation was reasonable at this juncture (*id.* at 15). Still, the Court permitted Plaintiff to file an amended complaint, but did not mandate that it do so. *Cf. Applied Underwriters, Inc. v. Lichtenegger*, 913 F.3d 884, 889–892 (9th Cir. 2019) (distinguishing between failing to amend in violation of a district court order and electing to appeal dismissal under Rule 12(b)(6)). Accordingly, the Court will grant Plaintiff's request to dismiss this action.

It is therefore ordered that this action is dismissed as explained in the Order.

The Clerk of Court is therefore directed to enter judgment in favor of Defendant and close this case.

DATED THIS 20th Day of September 2021.

/s/ Miranda M. Du
MIRANDA M. DU
CHIEF UNITED STATES
DISTRICT JUDGE

Filed September 14, 2021

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

EVANS CREEK, LLC, Plaintiff, v. CITY OF RENO, Defendant.	Case No. 3:20-cv-00724-MMD-WGC ORDER

I. SUMMARY

This is a dispute about land use and development. Plaintiff Evans Creek, LLC, alleges that Defendant City of Reno has violated the Fifth Amendment's Takings Clause and the Fourteenth Amendment's Equal Protection Clause by preventing it from developing land formerly known as the Ballardini Ranch in southwest Reno. (ECF No. 1.) Before the Court is the City's motion to dismiss.[1] (ECF No. 8 ("Motion").) The City argues the Complaint lacks factual support sufficient to plausibly allege Plaintiff's claims, and that the claims would necessarily fail on the merits. The City also moves to dismiss or strike references to any conduct prior to 2019.

As further explained below, the Court finds both of Plaintiff's claims fail to adequately state a claim upon which relief could be granted and will therefore

[1] Plaintiff responded (ECF No. 10) and the City replied (ECF No. 11).

grant the City's Motion in part. But the Court will also grant Plaintiff leave to amend to state sufficient relevant factual allegations. Finally, the Court will deny the City's motion to exclude references to pre-2019 conduct, as that material is not properly brought in a motion to dismiss.

II. BACKGROUND

The following facts are adapted from the Complaint. (ECF No. 1.)

A. The Property

The Ballardini Ranch is a parcel of land originally comprising approximately 1,500 acres in unincorporated Washoe County. (*Id.* at 5.) Although there have been past attempts to incorporate part or all of the Ballardini Ranch, the Ballardini family resisted these efforts. (*Id.*) In 1997, Everest Development Company, LLC ("Everest") entered into an agreement with the Ballardini family to purchase a portion of the Ballardini Ranch. (*Id.*) Everest is a Minnesota company owned by the same principals as Plaintiff. (*Id.*) In 1998, the Ballardini family transferred title to 1,019 acres of the Ballardini Ranch ("the Property") to Evans Creek,[2] an entity formed by Everest. (*Id.* at 6.) Everest/Evans Creek's principals intended to move to Nevada, build a home on the Property, and develop a master planned community. (*Id.*)

At the time of purchase, the Property was located in the unincorporated territory of Washoe County.

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[2] In the Complaint, Plaintiff refers to itself as Evans Creek Limited Partnership, but in the caption, it is Evans Creek LLC. The parties appear to treat both Evans Creek LP and Evans Creek LLC as the same entity.

(*Id.*) The northern 419 acres of the property were located within the City of Reno's sphere of influence[3] ("SOI") and were therefore subject to the City's land use planning and zoning regulations. (*Id.*) The remaining southern 600 acres were not. (*Id.*)

B. Sphere of Influence and the Regional Plan

The Truckee Meadows Regional Plan ("Regional Plan")—a comprehensive plan that controls development and manages growth in Washoe County—is updated and implemented every 20 years. (*Id.* at 3.) Under Nevada law, local governments that participate in the Regional Plan are required to amend their own master plans to conform with the provisions of the Regional Plan. (*Id.* at 4.) The City's current master plan was implemented in 2017. (*Id.*) Within the master plan is a land use plan which guides the City's development with the City and its SOI. (*Id.*)

In November 1997, shortly before title to the Property was transferred, Plaintiff requested an amendment to the City's master plan that would include the southern 600 acres of the Property in the City's SOI for future annexation. (*Id.* at 6.) The original planning concept for the Property called for up to 2,226 residential units. (*Id.* at 7.) However, Plaintiff withdrew its initial applications to develop the property due to "the overt hostility and threats from community members and government officials from the City and Washoe County." (*Id.*)

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[3] Under Nevada law, "'sphere of influence' means an area into which a political subdivision may expand in the foreseeable future." NRS § 278.0274(6).

Plaintiff submitted a renewed development plan and application for a master plan amendment in 2000, which was denied. (*Id.*) That same year, Washoe County adopted a resolution to acquire the Property as part of its Open Space Plan. (*Id.*) Plaintiff asserts the purpose of Washoe County's resolution was "to prevent all attempts to develop the Property as well as to prevent the value of the property from increasing." (*Id.*)

In 2002, the Truckee Meadows Regional Planning Commission circulated a draft of the revised Regional Plan. (*Id.* at 8.) The draft showed the entirety of the Property as located within the City's SOI. (*Id.*) Around the same time, Plaintiff filed its first annexation application ("2002 Application"). (*Id.*)

But Washoe County opposed the Regional Plan draft that included the southern 600 acres of the Property within the City's SOI. (*Id.*) The Truckee Meadows Regional Planning Governing Board ultimately adopted an updated draft that excluded the southern 600 acres of the Property from the City's SOI and service area. (*Id.*) Plaintiff withdrew the 2002 Application. (*Id.*)

The next year, Plaintiff filed its second annexation application ("2003 Application"). (*Id.*) Again, Washoe County opposed. (*Id.*) The City denied the 2003 Application. (*Id.*)

In 2004, Washoe County initiated eminent domain proceedings to acquire the Property. (*Id.*) Plaintiff filed suit in response, and the parties reached an agreement in 2006. (*Id.*) As part of the settlement agreement, Washoe County agreed not to oppose

Plaintiff's attempt to include the Property in the Truckee Meadows Service Area. (*Id.*)

The City then "encouraged" Plaintiff to apply for acceptance of the 600 southern acres into the City's section of the Truckee Meadows Service Area ("Service Area"), as the northern portion of the Property was already included. (*Id.* at 10.) The City represented to Plaintiff that the Property's inclusion in the Service Area would be the first step towards development, with annexation and other approvals to follow. (*Id.*) Accordingly, Plaintiff applied to include the southern 600 acres in the Service Area in 2007. (*Id.*) The City approved the application, and the Property was included in the City's section of the Service Area. (*Id.*)

After the entirety of the Property was placed within the City's Service Area, the City then passed a resolution to change the zoning designation for the Property's southern 600 acres. (*Id.* at 11.) Although the northern 419 acres were zoned for single-family residential use, the southern 600 acres suffered from significant hurdles to development. (*Id.*)

Plaintiff again applied for annexation in 2014 ("2014 Application"). (*Id.*) Along with the 2014 Application, Plaintiff submitted a proposed amendment to the master plan that would rezone the northern and southern part of the Property for mixed-residential and single-family residential use, respectively. (*Id.*) Plaintiff also supplemented the 2014 Application with traffic and fiscal analyses, at the City's request. (*Id.* at 12) City staff then recommended the 2014 Application be denied. (*Id.*) Upon learning of the recommendation, Plaintiff terminated the 2014 Application. (*Id.*)

C. The 2020 Annexation Application and City Council Hearing

On January 27, 2020, Plaintiff again submitted an annexation application ("2020 Application") for the Property. (*Id.* at 13.) City staff recommended approving the 2020 Application. (*Id.* at 14.) The 2020 Application was publicly noticed for a two-part public hearing on May 13 and May 27, 2020, for the City to receive public comment. (*Id.* at 16.)

At the second meeting, the City denied the 2020 Application, "primarily based on the following reasons: (i) Evans Creek did not submit a master plan amendment request; (ii) there is no demand for the mixture of land use types proposed on the Property; (iii) there are alleged private party water rights disputes on the Property; and (iv) fire danger." (*Id.*)

Plaintiff asserts that these reasons are pretextual. (*Id.* at 17.) The City expressed different concerns in response to Plaintiff's previous annexation applications, including the City's "desire to maintain open space," the risk of exacerbating "the shortage of neighborhood parks," "deficiencies in emergency access to nearby subdivisions," that development "may cause harm to unidentified and unknown archaeological sites on the Property," that development "would create an annexation island of non-contiguous City property," and that development would "overburden Washoe County School District." (*Id.*)

Plaintiff alleges that the City's refusal to grant annexation has wholly deprived the Property of any viable commercial use. (*Id.* at 18.) Plaintiff further alleges that it was treated differently from other

developers because it is not aware of any other instance in which the City has similarly denied an annexation request. (*Id.*)

III. LEGAL STANDARD

A court may dismiss a plaintiff's complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pleaded complaint must provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed factual allegations, it demands more than "labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555). "Factual allegations must be enough to rise above the speculative level." *Twombly*, 550 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).

In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply when considering motions to dismiss. First, a district court must accept as true all well-pleaded factual allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth. *See id.* at 678. Mere recitals of the elements of a cause of action, supported only by conclusory statements, do not suffice. *See id.* Second, a district court must consider whether the factual allegations in the complaint allege a plausible claim for relief. *See id.* at 679. A claim is facially plausible when the plaintiff's complaint alleges facts

that allow a court to draw a reasonable inference that the defendant is liable for the alleged misconduct. *See id.* at 678. Where the complaint does not permit the Court to infer more than the mere possibility of misconduct, the complaint has "alleged—but it has not show[n]—that the pleader is entitled to relief." *Id.* at 679 (alteration in original) (internal quotation marks and citation omitted). That is insufficient. When the claims in a complaint have not crossed the line from conceivable to plausible, the complaint must be dismissed. *See Twombly*, 550 U.S. at 570.

IV. DISCUSSION

Plaintiff asserts two claims in the Complaint. First, Plaintiff alleges the City singled it out impermissibly, denying it equal protection under the law. By denying the 2020 Application but granting every other annexation application from developers under NRS § 268.670, Plaintiff claims the City violated the Equal Protection Clause of the Fourteenth Amendment. Second, Plaintiff asserts that denying the 2020 Application constituted a regulatory taking in violation of the Fifth Amendment because refusing to annex the Property deprived it of its development potential and, consequently, the majority of its value, without just compensation.

The City argues both claims should be dismissed. As a preliminary matter, the City asserts that Plaintiff has failed to show it is similarly situated to the property owners whose applications were granted, which is a requisite element of pleading a class-of-one equal protection claim. (ECF No. 8 at 4.) But even if Plaintiff had so demonstrated, the City further argues that Plaintiff's equal protection claim could not succeed because the decision to deny the 2020

Application was rationally related to a legitimate government interest. The City next argues that Plaintiff's regulatory takings claim is not ripe because denying the 2020 Application was not a "final decision" about the use of the Property. Moreover, the City argues Plaintiff cannot show an economic impact to the Property or that Plaintiff's expectations about its ultimate use were objectively reasonable.

The Court will address each claim in turn.

A. Equal Protection – Class of One

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall deny to any person within its jurisdiction the equal protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (internal quotation omitted). "The Supreme Court has recognized that 'an equal protection claim can in some circumstances be sustained even if the plaintiff has not alleged class-based discrimination, but instead claims that she has been irrationally singled out as a so-called 'class of one.'" *Gerhart v. Lake Cnty., Mont.*, 367 F.3d 1013, 1021 (9th Cir. 2011) (quoting *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)). For a plaintiff to succeed on a class-of-one claim, they must demonstrate the government: "(1) intentionally (2) treated [the plaintiff] differently than other similarly situated property owners, (3) without a rational basis." *Id.* at 1022.

1. Similarly Situated

Plaintiff alleges it was intentionally discriminated against because the 2020 Application

was the only annexation application submitted pursuant to NRS § 268.670 the City ever denied. (ECF No. 1 at 18.) The City argues the Complaint fails because Plaintiff fails to factually support its assertion that Plaintiff and other applicants for annexation are similarly situated. (ECF No. 8 at 4.) Plaintiff responds that it does not need to establish that the City granted annexation application to property owners who own similar parcels of land. (ECF No. 10 at 4–5.) Instead, Plaintiff contends, its claim is that the City has granted every annexation application "irrespective of the characteristics of the subject properties because decisions related to land use and development projects are reserved for future proceedings." (*Id.* at 5.)

But "[a]n equal protection claim will not lie by conflating all persons not injured into a preferred class receiving better treatment than the plaintiff." *Thornton v. City of St. Helens*, 425 F.3d 1158, 1167 (9th Cir. 2005); *see also Hunters Capital LLC v. City of Seattle*, 499 F. Supp. 3d 888 (W.D. Wash. 2020) (dismissing a class-of-one claim for failure to state a claim when plaintiff did not allege "any facts suggesting that they are *similarly situated* to the control group"). "To be considered similarly situated, the plaintiff and [its] comparators must be *prima facie* identical in all relevant respects or directly comparable in all material respects." *Smith v. Cnty. of Santa Cruz*, Case No. 20-cv-00647-BLF, 2020 WL 6318705 at* (N.D. Cal. Oct. 28, 2020). Indeed, courts in this circuit have held that the similarly situated requirement should be enforced "with particularly strictness when the plaintiff invokes the class-of-one theory" to minimize the risk that "almost every executive and administrative decision" becomes

federally reviewable. *Warkentine v. Soria*, 152 F. Supp. 3d 1269, 1294 (E.D. Cal. 2016).

The Complaint alleges no facts about the other annexation applications or land, or how the City's decision to approve the other annexations differed from its decision to deny the 2020 Application. As pleaded, Plaintiff provides the Court with no information about the control group apart from the fact that it consists of property owners in Washoe County who applied for annexation. Plaintiff does not assert that approved annexation applications concerned property that are similarly located, of a similar size, at risk to similar financial risks, or considered around the same point in time. Moreover, Plaintiff does not indicate whether the applications that the City approved were brought under the current Regional Plan or under a prior plan, which may have had different stated development objectives.

The City's discretionary annexation procedure would make pleading any class-of-one claim difficult, but it is essentially impossible if the Complaint lacks such facts. The Reno Municipal Code states ten factors which govern the City's discretion when determining whether annexation is appropriate. *See* RMC § 18.04.301(d).[4] These factors include the property's location, its proximity to extant services, the need for expansion to accommodate planned growth, and "[a]ny other factors concerning the proposed annexation deemed appropriate for consideration by the city council." *Id.* The decision of whether to annex a piece of property is therefore highly context specific

[4] In the current version of the Reno Municipal Code, this provision was moved to RMC § 18.08.401(c)(4), but is otherwise identical.

and creates a potentially unique inquiry for each parcel of land the City considers for annexation. Plaintiff makes conclusory allegation the City routinely grants annexation applications "irrespective of the characteristics of the subject properties" when the Complaint lacks any facts to support such an assertion. As pleaded, the Complaint lacks factual support to plausibly allege that Plaintiff is similarly situated to all other property owners in Washoe County who applied for annexation.

2. Rational-Basis Review

Even if the Court assumed Plaintiff's class-of-one claim were plausibly pleaded, the City contends the claim would still be facially deficient on the merits. (ECF No. 8 at 5.) The City attaches a copy of the minutes from the May 27, 2020 City Council meeting (ECF No. 8-1 ("Meeting Minutes")) to show that the City's decision was undisputedly rationally related to legitimate government interests.

At the public hearing, council members expressed concerns about whether the City needs the type of housing supply for which the Property would potentially be zoned (*id.* at 11), conflicts about water rights on the Property (*id.*), the Property's location in a "high hazard area prone to fire danger" (*id.* at 12). The City Council noted that the 2020 Application did not include a master plan amendment, which, though not required for consideration, is highly encouraged by the City's master plan. (*Id.*) Councilmember Brekhus further explained that the 2020 Application did not meet the ten factors for annexation set forth in

the Reno Municipal Code. (*Id.*) Because the grounds[5] for the City's decision were rationally related to legitimate government interests, the City argues there is no possibility for relief. (ECF No. 8 at 5–6.)

But Plaintiff argues the City improperly articulates the standard. (ECF No. 10 at 6–8.) While the City argues that its decision to deny the Application was rationally related to legitimate government interests, Plaintiff argues the proper question is whether the City's decision to treat it differently from other similarly situated property owners was rationally related to a legitimate government interest. (*Id.*) Instead of challenging the City's proffered interests as illegitimate, Plaintiff argues that they are pretextual. (*Id.* at 7.)

The Court agrees that the appropriate inquiry is "whether there is a rational basis for the *distinction*, rather than the underlying government *action*." *Gerhart*, 637 F.3d 1013. But as the Complaint is currently pleaded, this is a distinction without a difference. Plaintiff does not provide any factual

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[5] The City requests the Court take judicial notice of their contents. (ECF No. 8 at 6 n.2), which Plaintiff does not oppose (ECF No. 10 at 6 n.1). Although courts typically may not consider materially outside the pleadings when assessing the sufficiency of a complaint under Rul 12(b)(6), taking judicial notice under Federal Rule of Evidence 201 is an exception to this rule. *See Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 988 (9th Cir. 2018). Because "[a] court may take judicial notice of matters of public record without converting a motion to dismiss into a motion for summary judgment," the Court will consider the City's Motion under Rule 12(b)(6), not Rule 12(d) as a summary judgment motion. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). But the Court may only consider facts not reasonably subject to dispute within the Meeting Minutes at the motion to dismiss stage. *See Khoja*, 899 F.3d at 999.

support for how the City subjected Plaintiff to unique treatment that it did not require of other property owners whose applications were granted. Instead, Plaintiff only alleges that its application was denied when no other property owner's was. To plausibly assert a class-of-one equal protection claim, Plaintiff must show that its treatment—not just the outcome—was "unique." *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 592 (9th 2008). It is not clear from the Complaint that the City—intentionally or otherwise—subjected Plaintiff to any treatment that similarly situated property owners were not.

Plaintiff's pretext argument does not in and of itself cure this deficiency. "[A] plaintiff can show that a defendant's alleged rational basis for his acts is a pretext for an impermissible motive." *Engquist v. Or. Dep't of Agric.*, 478 F.3d 985, 993 (9th Cir. 2007), *aff'd sum nom. Engquist v. Or. Dep't of Agric.*, 553 U.S. 591 (2008). To assert a pretextual motivation, the plaintiff must plausibly allege "(1) the proffered rational basis was objectively false; or (2) the defendant actually acted based on an improper motive." *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 946 (9th Cir. 2004), *overruled on other grounds by Lingle v. Chevron U.S.C. Inc.*, 544 U.S. 528 (2005).

As currently pleaded, Plaintiff's allegations that the City's reasoning was "objectively false" is conclusory and lacks factual support. *Id.* Plaintiff does not assert that the area is not in a high hazard area, that the annexation request did not provide a master plan amendment, or that there are unresolved water rights issues, as the City indicated in the Meeting Minutes. (ECF No. 8-1 at 11–12.) Instead, Plaintiff argues that these facts carried an outsized weight and

were used to justify an otherwise arbitrary decision. (ECF No. 1 at 17.)

Plaintiff's assertion that the City used otherwise true rationales to disguise an improper motive is stronger, but still conclusory. Plaintiff cites to shifting rationales over the years (*id.* at 17–18) and prior attempts by Washoe County to acquire the land for less than its alleged market value (*id.* at 7, 9). But Plaintiff does not clarify how the alleged improper motivations ranging from 15–20 years ago carry over to the actions the City took in 2020. Arguing that the City's reasons for denying annexation in 2004 differ from its reasons for denying annexation in 2020—more than 15 years later, under a new City of Reno master plan, a new Truckee Meadows Regional Plan, and changing climate and population needs—is insufficient to demonstrate pretext without more contemporary information.

However, these deficiencies are not necessarily fatal to the claim, as the City suggests, and may potentially be cured by amendment. Accordingly, the Court will dismiss Plaintiff's equal protection claim, with leave to amend.

B. Takings Clause

Plaintiff also argues that denying the 2020 Application constituted a regulatory taking. (ECF No. 12.) The City counters that Plaintiff's claim is not ripe because the denial was not a "final decision" about the use of the Property. (ECF No. 8 at 10.) But even if the denial were considered a final decision, the City argues that Plaintiff fails to allege sufficient information to support the three regulatory takings

factors articulated in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). (*Id.* at 12.)

1. Final Decision

As a preliminary matter, the Court must determine whether denying an annexation application constitutes a "final decision" on land use. "When a plaintiff alleges a regulatory taking in violation of the Fifth Amendment, a federal court should not consider the claim before the government has reached a 'final' decision." *Pakdel v. City and Cnty. of S.F., Cal.*, 141 S. Ct. 2226, 2228 (2021). This "modest" requirement is met when a plaintiff shows "that 'there [is] no question . . . about how the 'regulations at issue apply to the particular land in question.'" *Id.* (quoting *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 737 (1997)) (substitutions in original). Requiring finality "ensures that a plaintiff has actually been injured by the Government's action and is not prematurely suing over a hypothetical harm." *Id.* at 2230 (internal quotation and citation omitted).

In terms of ripeness, the City argues that denying the 2020 Application was not a final decision because whether an annexation application is approved or denied "does not constitute a determination about *how* the property may be used." (ECF No. 11 at 9.) The Court disagrees.

Plaintiff has plausibly pleaded that denying the 2020 Application effectively forecloses any feasible development on the Property. Despite the fact that the decision to annex or not annex property is not a conclusive determination on how the property may be used, the City does not contest that by denying the

2020 Application, it has determined that Plaintiff cannot, in practice, develop the Property. As a councilmember noted at the May 27 hearing, "We are only addressing an annexation request but annexation is the first step in a development." (ECF No. 8-1 at 11.) The decision not to annex the Property is, in effect, a final decision about what may or may not be developed on the Property.

The Court is unpersuaded that Plaintiff is required to take some additional step before the City's decision to deny the 2020 Application is final. The City argues Plaintiff could apply to the Regional Planning Commission or the City to be excluded from the City's SOI and Service Area. (ECF No. 8 at 10.) But contrary to the City's argument, Plaintiff need not seek exclusion from the City's SOI for its claim to be ripe. The Supreme Court has rejected that takings claims brought under § 1983 have an implicit administrative exhaustion requirement. *See Pakdel*, 141 S. Ct. at 2230 (reasoning that requiring a plaintiff to seek an exemption from state enforcement "plainly requires exhaustion"). Requiring Plaintiff here to take further action to exclude the Property from the SOI would create an exhaustion requirement analogous to what the Supreme Court rejected in *Pakdel*.

Because the decision to deny the 2020 Application is a final decision, the Court considers Plaintiff's regulatory takings claim ripe and turns to its merits.

2. Regulatory Taking[6]

"The Takings Clause of the Fifth Amendment states that 'private property [shall not] be taken for

[6] The Court accepts Plaintiff's argument that it is alleging a regulatory taking, not a categorial *Lucas* taking. (ECF No. 10 at

public use, without just compensation.'" *Knick v. T'ship of Scott, Pa.*, 139 S. Ct. 2162, 2167 (2019) (substitution in original). "A classic taking occurs when the 'government directly appropriates private property or ousts the owner from his domain.'" *Bridge Aina Le'a, LLC v. Land Use Comm'n*, 950 F.3d 610, 625 (9th Cir. 2020) (quoting *Lingle*, 544 U.S. at 539). "[C]ourts determine whether a regulatory action is functionally equivalent to the classic taking using 'essentially ad hoc, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances.'" *Id.* (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002)). "These inquiries are set forth in the three *Penn Central* factors: (1) '[t]he economic impact of the regulation on the claimant,' (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations,' and (3) 'the character of the governmental action.'" *Id.* (quoting *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)). "The first and second *Penn Central* factors are the primary factors." *Id.* (citing *Lingle*, 544 U.S. at 538–39).

In its Motion, the City argues that Plaintiff has not properly pleaded information to support any of the *Penn Central* factors. (ECF No. 8 at 11–14.) Because the Court agrees that the "primary factors" are

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12 n.4.) However, the Court notes that the language in the Complaint may be interpreted to the contrary. (ECF No. 1 at 20 ("The City's denial of the 2020 Annexation Application has so restricted the permissible uses of the Property that Evans Creek has been deprived of all or substantially all of the economic value or use of the land.") If Plaintiff amends its complaint, it must clarify whether it is alleging the City's actions did in fact deprive the Property of "all" value.

insufficiently pleaded, the Court will grant the City's Motion.

a. Economic Impact

The City claims that because Plaintiff is in the same position it was prior to applying for annexation, denial of the 2020 Application has not deprived the Property of economic value. (ECF No. 8 at 12.) The Court agrees.

"In considering the economic impact of an alleged taking, we 'compare the value that has been taken from the property with the value that remains in the property.'" *Colony Cove Props., LLC v. City of Carson*, 888 F.3d 445, 450 (9th Cir. 2018) (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987)). As pleaded, the Complaint lacks any information about the value of the Property when the 2020 Application was submitted or its value after the 2020 Application was denied. Accordingly, it is not possible for the Court to determine what the economic impact to the Property is, even taking the allegations in the Complaint as true.

Even taking Plaintiff's argument that undeveloped land has "significant economic value" which is lost when development potential is restricted (ECF No. 10 at 14.), "[u]nder the *Penn Central* test, a property owner is not entitled to the most beneficial use of the property." *Comm. For Reasonable Regul. of Lake Tahoe v. Tahoe Reg'l Planning Agency*, 365 F. Supp. 2d 1146, 1161 (D. Nev. 2005). To demonstrate economic impact, Plaintiff must clearly state what effect the denial of the 2020 Application, specifically, had on the Property.

b. Investment-Backed Expectations

Plaintiff's takings claim also fails prong two of the *Penn Central* analysis. "To form the basis for a taking claim, a purported distinct investment-backed expectation must be objectively reasonable." *Colony Cove*, 888 F.3d at 452. "'Distinct investment-backed expectations implies reasonable probability, like expected-rent to be paid, not starry eyed hope of winning the jackpot if the law changes." *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1120 (9th Cir. 2010). "Speculative possibilities of windfalls do not amount to 'distinct investment-backed expectations,' unless they are shown to be probable enough materially to affect the price." *Id.* at 1120–21. "Thus, 'unilateral expectation[s]' or 'abstract need[s]' cannot form the basis of a claim that the government has interfered with property rights." *Bridge Aina Le'a*, 950 F.3d at 633–34.

The Complaint does not plausibly allege that Plaintiff had objectively reasonable expectations that the 2020 Application would be approved. In its opposition to the City's Motion, Plaintiff points to its allegations about its principals' expectations to develop the Property into a master planned community, and that these expectations "were hardly unconventional" due to the number of successful, similar developments surrounding the Property. (ECF No. 10 at 15–16.) While this is useful background information, those expectations were from 1997. At issue here is whether Plaintiff's expectation that the City would grant the 2020 Application was objectively reasonable. As presently pleaded, that is not apparent—for example, the City had already denied the 2003 Application, and circumstances surrounding

the 2002 Application and 2014 Application made Plaintiff to believe they would be unsuccessful. As pleaded, the Complaint does not adequately allege that Plaintiff reasonably believed the 2020 Application's approval was reasonably probable.

Because the "primary factors" are insufficiently pleaded, the Court need not reach the third *Penn Central* factor. The Court will grant the City's Motion, and will grant Plaintiff leave to amend their regulatory takings claim.

C. Leave to Amend

Plaintiff requests leave to amend if the Court dismisses any of Plaintiff's claims. (ECF No. 10 at 18.) The Court has discretion to grant leave to amend and should freely do so "when justice so requires." Fed. R. Civ. P. 15(a); *see also Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990). Nonetheless, the Court may deny leave to amend if it will cause: (1) undue delay; (2) undue prejudice to the opposing party; (3) the request is made in bad faith; (4) the party has repeatedly failed to cure deficiencies; or (5) the amendment would be futile. *See Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 532 (9th Cir. 2008). Facts raised for the first time in a plaintiff's opposition papers should be considered by the Court in determining whether to grant leave to amend or to dismiss the complaint with or without prejudice. *See Orion Tire Corp. v. Goodyear Tire & Rubber Co.*, 268 F.3d 1133, 1137–38 (9th Cir. 2001).

As it is relatively early in the litigation and prejudice or delay is unlikely to result, and the City did not oppose Plaintiff's request, the Court will grant leave to amend. As outlined above, amendment may

cure several factual deficiencies in Plaintiff's original Complaint.

D. Statute of Limitations & Motion to Strike

The City also moves to dismiss "allegations regarding the City's conduct prior to 2019" because they are barred by the statute of limitations. (ECF No. 8 at 15.) The Court agrees with Plaintiff that this request is improper under Rule 12(b)(6), as references to the history of the relationship between Plaintiff and the City with respect to the Property are not claims, but background information. To support its two claims, Plaintiff must limit its allegations to the 2020 Application; however, that does not make all prior information relating to the treatment of the Property irrelevant. The Court will therefore deny the City's motion on this ground, as it is not a proper use of Rule 12(b)(6).

The City argues in its reply that the Court may consider its request alternatively as a motion to strike under Rule 12(f). (ECF No. 11 at 14.) The Court declines to do so. Per the Court's Local Rules, "[f]or each type of relief requested or purpose of the document, a separate document must be filed and a separate event must be selected for that document." LR IC 2-2(b). Moreover, "[a] Rule 12(f) motion to strike is an extreme and drastic remedy—it is generally disfavored." *Kennedy v. Las Vegas Sands Corp.*, Case No. 2:17-cv-00880-JCM-VCF, 2017 WL 4227941, at *2 (D. Nev. Sept. 22, 2017). If the City truly believes that references to conduct prior to 2019 is immaterial, it must bring its motion to strike separately.

V. CONCLUSION

The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant discussion as they do not affect the outcome of the motion before the Court.

It is therefore ordered that the City's motion to dismiss (ECF No. 8) is granted in part and denied in part, as specified herein.

It is further ordered that Plaintiff is granted leave to file an amended complaint. Plaintiff must file its amended complaint within 30 days.

DATED THIS 14th Day of September 2021.

/s/ Miranda M. Du
MIRANDA M. DU
CHIEF UNITED STATES
DISTRICT JUDGE

Filed December 20, 2020

* * * * *

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

EVANS CREEK, LLC, a Minnesota limited liability company; Plaintiff, vs. CITY OF RENO, a political subdivision of the State of Nevada Defendant,	CASE NO.: 3:20-cv-00724-MMD-WGC **COMPLAINT** **[JURY DEMAND]**

Plaintiff Evans Creek, LLC, ("Plaintiff" or "Evans Creek"), by and through its undersigned counsel, hereby brings this Complaint against Defendant City of Reno ("Defendant" or "City") and alleges as follows:

I. NATURE OF THE ACTION

1. Evans Creek is the owner of a large parcel of undeveloped land in the hills above Southwest Reno commonly known as Ballardini Ranch. For more than two decades, Evans Creek has endeavored to develop this land into a master planned community, which is the highest and best use of the property and would achieve a projected economic value exceeding $100 million. And for that entire two-plus decade time period, Evans Creek has faced a brazen pattern of obstruction by local government, including the City, that has sought at every turn to maintain Evans

Creek's private property as public, open space for the illegal and uncompensated use by neighboring landowners and local residents. To accomplish that un-American purpose, the City has repeatedly undermined and blocked Evans Creek's efforts to develop the property without any legitimate basis and in direct contravention of applicable laws, regulations, and, most recently, the recommendations of the City's own staff. The end result is that Evans Creek and its principals have been treated differently than all other similarly situated property owners simply because they are residents of another state who own what should otherwise be an exceedingly valuable parcel of land that has long been coveted by an amalgam of wannabe stakeholders.

2. The City's pattern of obstruction recently culminated in May 2020 with the Reno City Council's unanimous denial of Evans Creek's application for annexation of the property notwithstanding that City staff had recommended unconditional approval of the application after analyzing the applicable factors required by law. Annexation, a well-established procedure by which municipalities incorporate new territory into their domain, is the critical first-step a landowner must undertake to start the process for future development and commercial use of its property. By refusing to annex the subject property based on a handful of pretextual reasons—an extraordinary event which rarely, if ever, occurs—the City eviscerated any chance Evans Creek had to develop its land for commercial use and drove its economic value—literally—into the ground. Evans Creek now brings this action to vindicate its rights as a property owner under the Fifth and Fourteenth Amendments of the United States Constitution and to

obtain monetary damages from the City that reflect the property's true value.

II. JURISDICTION AND VENUE

3. The Court has jurisdiction over this matter and the parties thereto pursuant to 28 U.S.C. § 1343(a) and 48 U.S.C. § 1983. Plaintiff brings this action against Defendant, which is acting under color of state law, for damages to redress past deprivation and to prevent further deprivation of rights secured by the United States Constitution, namely the Equal Protection Clause of the Fourteenth Amendment and the Takings Clause of the Fifth Amendment.

4. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(1) and (2) because Defendant is the City of Reno, Plaintiff's subject real property is located in unincorporated Washoe County, Nevada, and the events related to the City's denial of Evans Creek's annexation application occurred in Reno, Nevada.

III. IDENTIFICATION OF PARTIES

5. Evans Creek is a Minnesota limited liability company and the owner of a 1,019-acre parcel of land in unincorporated Washoe County, Nevada (the "Property"). Evans Creek is owned and operated by a Minnesota resident who is highly experienced in land development and construction.

6. The Property comprises ±1,019 acres of property located on the south side of South McCarran Boulevard with frontage spanning ±1,840 feet west and ±1,870 feet east of the intersection at South McCarran Boulevard and Manzanita Lane.

7. Defendant is the City of Reno, Nevada, which is a municipal corporation organized and existing under the laws of the State of Nevada.

IV. GENERAL ALLEGATIONS

A. Applicable Land Use Laws, Regulations and Public Bodies.

8. The Truckee Meadows Regional Plan ("TMRP") is a comprehensive regional plan that controls the physical development and orderly management of growth in Washoe County for the next 20 years. Pursuant to Chapter 278 of the Nevada Revised Statutes, the TMRP is revised and updated every 20 years.

9. The TMRP is developed by the Truckee Meadows Regional Planning Commission ("TMRPC") and adopted by the Truckee Meadows Regional Planning Governing Board ("TMRPGB") in accordance with Nev. Rev. Stat. 278.02528.

10. Pursuant to Nev. Rev. Stat. 278.0282, the local governments participating in the TMRP are required to amend their master plans, facilities plans, and other similar plans to conform to the provisions of the TMRP.

11. In 2017, the City performed a comprehensive review and overhaul of its Master Plan ("Master Plan"), which is a living document intended to function as a tool for City officials to use in evaluating and making decisions regarding the spatial development of the city, the distribution of different land uses, and the provision of infrastructure and services necessary to support new growth over the next 20 years.

12. The City's Master Plan includes a Land Use Plan intended to provide guidance for future development within the City of Reno and its Sphere of Influence ("SOI"). The SOI is the "area into which a city plans to expand as designated in a comprehensive regional plan [ ] within the time designated in the comprehensive regional plan." Nev. Rev. Stat. 268.623.

13. Nev. Rev. Stat. 268.670 authorizes a city to annex territory following receipt and acceptance of a petition signed by all owners of record of the property to be annexed. Section 18.04.301 of the City of Reno Municipal Code ("RMC") establishes the framework for the annexation application and review process. Section 2.1D of the Master Plan similarly lists factors for the City to consider when determining whether to annex property.

14. The purpose of annexation is to extend the municipal boundaries of the City to provide the government services essential for sound urban development and protection of the health, safety and welfare in the annexed area. For property owners outside of the City, annexation is the first step towards development and commercial use.

B. The History Of The Property And Community Efforts To Block Development.

Evans Creek Acquires the Property from the Ballardini Family

15. In 1937, Antonio Ballardini acquired 1,500 acres of the 25,000-acre Wheeler Ranch in unincorporated Washoe County which became known as Ballardini Ranch. The Ballardini family owned the property until 1998 and, for the most part, raised hay

and cattle, operating the property as a typical Northern Nevada cattle ranch.

16. For decades, neighboring landowners—who were aided and abetted by local municipalities including the City and Washoe County—endeavored to prevent development and maintain Ballardini Ranch as open space for their own enjoyment. For example, in 1988, neighboring landowners went so far as to attempt to create a new city through annexation known as Sierra Meadows, which would have encompassed large swaths of Ballardini Ranch and prevented future development. The Ballardini family filed suit to stop the annexation and incorporation of the proposed city of Sierra Meadows and, in October 1988, the Honorable James Guinan of the Second Judicial District Court permanently enjoined the Board of County Commissioners and would-be city incorporators from carrying out their scheme. Specifically, Judge Guinan ruled that private citizens did not have the legal right to seize their neighbors' property as that right is reserved for the government if it can establish a valid public purpose and compensate the owner for its property's highest and best value.

17. In 1989, the Ballardini family decided to sell a portion of Ballardini Ranch to resolve an estate tax lien on the property. They were also afraid the unlawful behavior of the neighboring landowners who wanted to maintain the land as open space would destroy the value of Ballardini Ranch.

18. In 1997, the Ballardini family entered into a purchase agreement to sell the Property to Everest Development Company, LLC ("Everest"), a company owned by the same principals as Evans Creek.

19. In 1998, the Ballardini family transferred title to 1,019 acres of Ballardini Ranch to Evans Creek Limited Partnership, an entity Everest formed to take ownership of the Property. Evans Creek's principals planned to move their real estate business to Nevada, build a home on the Property, and develop a master planned community—which is the highest and best use of the Property.

20. The Property was located in the unincorporated territory of Washoe County and classified as suitable for residential development under the TMRP and the County Comprehensive Plan. The northern 419 acres of the property were located within the City's SOI, as designated by both the TMRP and the Master Plan, and were subject to the City's land use planning and zoning regulations. The southern 600 acres, however, were not located within the City's SOI and were subject to the land use and zoning regulations of Washoe County.

Evans Creek's Initial Plans for Development of the Property

21. In 1997, Evans Creek began efforts to develop the Property and, on November 1, 1997, requested an amendment to the City's SOI to include the southern 600 acres for future annexation. Evans Creek also sought an amendment to the Regional Plan Land Use Diagram that would reclassify areas of rural and rural reserve to allow a mix of urban, suburban, rural, and rural reserve.

22. Evans Creek's intention to develop a master planned community was hardly unconventional given that the Property was surrounded by the other master planned communities that had been approved by the

City, including but not limited to Arrow Creek, Lakeridge, and Caughlin Ranch. Evans Creek, however, was immediately viewed as an unwelcome interloper into the region and its development plans were met at every juncture with vociferous hostility from community members and local government officials from the City and Washoe County. Certain of those community members and government officials even went so far as to threaten Evans Creek with entitlement obstruction and demand the immediate re-sale of the Property to Washoe County.

23. Evans Creek's original planning concept for the Property called for up to 2,226 dwelling units with 2,150 dwelling units located in the City and 76 dwelling units in unincorporated Washoe County. Evans Creek's planning concept also proposed to transfer approximately 500 acres of open space to Washoe County at no cost.

24. Based on the overt hostility and threats from community members and government officials from the City and Washoe County, Evans Creek withdrew its initial applications to develop the Property.

Washoe County Conspires to Force a Sale of the Property by Blocking All Attempts to Develop the Property

25. From 2000 to 2004, the Washoe County Commission, along with the City and a coalition of conservation groups, engaged in a series of malicious acts to sabotage Evans Creek's attempts to develop the Property so that Washoe County could acquire the Property at its lowest possible value and maintain it as open space.

26. In early 2000, Evans Creek submitted its next development plan and application for an amendment to the TMRP, which was denied.

27. In February 2000, the Washoe County Commission adopted a resolution, without notice to Evans Creek, to acquire the Property for the alleged implementation of the Washoe County Regional Open Space Plan that was adopted by the Regional Planning Commission in 1994. The purpose of the resolution was to prevent all attempts to develop the Property as well as to prevent the value of the property from increasing, as an increase in value would translate to an increase in acquisition price. Additionally, Washoe County planned to apply for and receive federal funding through the Southern Nevada Public Land Management Act ("SNPLMA") to acquire the Property.

28. Next, in September 2001, the Reno City Council (the "City Council") adopted a resolution pledging to assist the County in its acquisition of the Property and further thwart Evans Creek's attempts to develop the Property.

29. Notwithstanding the City Council's resolution, a draft of the 2002 TMRP was subsequently introduced showing the entire Property as being located within the City's SOI as well as the City's section of the Truckee Meadows Service Area. Washoe County opposed this draft of the 2002 TMRP due to the fact that the inclusion of the entire Property within the City's SOI, as well as the inclusion of the Property in the TMSA, would drive up the appraised value of the Property and make Washoe County's potential acquisition of the Property impossible.

30. In April 2002, Evans Creek filed its first application with the City for annexation of the Property ("2002 Annexation Application") and, in May 2002, submitted its first PUD application to the City.

31. The TMRPGB adopted the updated 2002 TMRP in May 2002 and excluded the southern 600 acres of the Property from the Reno SOI and TMSA. This exclusion was the result of concerted lobbying by the City and Washoe County designed to ensure that the appraisal value of the Property would not increase.

32. Shortly thereafter, as a result of Washoe County's and the City's efforts to suppress the value of the Property, Evans Creek terminated sale negotiations with Washoe County and withdrew the 2002 Annexation Application.

33. In 2003, the City of Reno adopted an Annexation Program, which identified the northern 419 acres of the Property as within the City's SOI and the City's "7-year Annexation Area."

34. In light of the adoption of the Annexation Program, Evans Creek filed its second application with the City to annex the entire Property ("2003 Annexation Application"). Washoe County opposed this annexation request as it would increase the value of the property and result in higher acquisition costs.

35. In September 2003, the City denied the 2003 Annexation Application so that the price of the property would not increase beyond Washoe County's financial means.

Evans Creek's Lawsuit Against Washoe County and Ultimate Settlement

36. In July 2004, Washoe County adopted a resolution to condemn the Property for open space unless Evans Creek agreed to sell the Property at a price unilaterally set by Washoe County. As a result of this draconian action, Evans Creek offered to sell the Property—without condemnation being necessary—as long as a customary and fair three-neutral-appraiser process was utilized to determine the fair market value of the Property. Realizing this customary process would thwart its plan to acquire the Property for pennies on the dollar, Washoe County refused to utilize the three appraiser process, and no agreement to purchase the Property was reached.

37. In August 2004, Washoe County illegally initiated eminent domain proceedings in an attempt to acquire the Property, ostensibly using SNPLMA funds even though Washoe County's access to such funds had been forcibly revoked by the United States government when Evans Creek terminated sale negotiations years earlier. In response, Evans Creek filed suit against Washoe County to prevent the unlawful seizure of the Property ("Washoe County Litigation").

38. Ultimately in 2006, following years of litigation and on the eve of trial, Evans Creek and Washoe County reached a settlement once Washoe County realized its potential exposure in the case would exceed $100,000,000—the true value of the Property.

39. Under the parties' settlement agreement (the "Settlement Agreement"), Washoe County agreed to pay $13,500,000 to Evans Creek and its affiliates. The Settlement Agreement further provided, *inter alia*, that (1) Washoe County will administer any development applications or requests by Evans Creek in a good faith and fair manner; (2) Washoe County agrees not to oppose Evans Creek's application to any governmental agency for inclusion in the TMSA the southern 600 acres of the Property; (3) Washoe County would not oppose Evans Creek's applications for the amendment of the TMRP, the County's Comprehensive Plan and/or the City's Master Plan or zoning matters related to density; and (4) Washoe County would not oppose Evans Creek's application for transfers of density and clustered development.

40. Additionally, Evans Creek agreed, *inter alia*, to: (1) forego a right-of-first refusal of significant value and facilitate the purchase and sale of over 100 acres of the Ballardini family's land by the County; and (2) dedicate as privately owned and deed-restricted open space of at least 289 acres of the Property upon approval of its development applications. Under the Settlement Agreement, these concessions were intended to satisfy any requirements under any laws and ordinances for the provision of open space, parks, public road access, public trails access and wildlife habitat on the Property.

41. Evans Creek was led to believe that the Settlement Agreement would finally pave the way for development of the Property.

The City Induces Evans Creek to Enter the City's Service Area

42. In fall 2006, City staff encouraged Evans Creek to apply for the acceptance of the southern 600 acres of the Property into the City's section of the TMSA as the northern 419 acres were already included. By transferring the southern 600 acres into the City's section of the TMSA, City staff led Evans Creek to believe it could secure zoning designations consistent with the City's translation table and the then-existing Single Family Residential designation for the northern 419 acres together with the property rights secured by the Settlement Agreement with Washoe County. To that end, the City represented to Evans Creek that inclusion in the City's section of the TMSA would be the first step towards development with annexation and other approvals to follow thereafter. In reality, by inducing Evans Creek to transfer the southern 600 acres into the City's section of the TMSA, the City intended to downzone, impair and obstruct future development of the Property without fair compensation.

43. Based on the City's representations, Evans Creek submitted its TMSA application in 2007, which was approved, thereby placing the entire Property within the City's section of the TMSA. The City, in turn, began to exercise extra-jurisdictional authority over land use and permitting on the Property such that no development could proceed without annexation into the City.

44. After approving Evans Creek's TMSA application, the City Council passed a resolution to change the zoning designation for the southern 600 acres of the Property. Rather than amend the zoning

designation for the southern 600 acres of the Property to match the existing Single Family Residential zoning designation for the northern 419 acres, however, the City unilaterally designated the southern 600 acres with a newly created Special Planning Area Master Plan land use designation. The City's conduct in this respect conflicted with its staff's prior representations that Evans Creek would obtain zoning designations consistent with the City's translation table and the then-existing Single Family Residential designation for the northern 419 acres together with the property rights secured by the Settlement Agreement with Washoe County. This Special Planning Area Master Plan land use designation imposed onerous burdens on Evans Creek, presented significant hurdles to development of the Property, and rendered the effort and expense to secure appropriate densities and services for the Property futile.

The City Undermines and Constructively Denies Evans Creek's Annexation Application and Master Plan Amendment Request in 2014

45. In early 2014, former Reno Mayor Bob Cashell strongly encouraged Evans Creek to submit another application for annexation and advance the Property towards development. As a result, Evans Creek agreed to apply for annexation and sought guidance from City staff to ensure that this latest application was not futile. The City staff feigned support and even reviewed Evans Creek's proposed application prior to submission for compliance with the required guidelines.

46. In May 2014, Evans Creek submitted its application for annexation ("2014 Annexation Application") in reliance on representations by City staff that they would support annexation and the appropriate density intensification of the Property. Additionally, Evans Creek submitted a Master Plan Amendment application seeking a Mixed Residential designation for the northern 419 acres and a Single-Family Residential designation for the southern 600 acres.

47. In response to this submission, City staff for the first time demanded that Evans Creek provide supplemental information and analyses including traffic and fiscal studies that City staff had previously informed Evans Creek would not be necessary. Notwithstanding the contradictory representations from City staff, Evans Creek complied with the request for supplemental information and analyses.

48. In direct contradiction to their prior representations and notwithstanding Evans Creek's submission of the above-referenced materials upon request, City staff sent a memorandum to Evans Creek recommending blanket denial of the 2014 Annexation Application and request for a Master Plan amendment, primarily using open space and parks issues as a pretense.

49. In light of the inconsistent and misleading conduct of City staff, Evans Creek notified the City it intended to terminate the 2014 Annexation Application and Master Plan amendment application. In response, City staff stated they "strongly encourage [Evans Creek] to annex into the City and have expressed [their] intentions through Regional Planning amendments by including [the Property] in

[the City's] sphere of influence." City staff further reiterated that the "the City has exercised extraterritorial authority over these lands which means land use and building permit authority. [Evans Creek] has existing entitlements (land use). No permits can be issued for this site if [Evans Creek] has not applied for annexation."

50. Based on City staff's assurances, Evans Creek decided to proceed with the annexation application for the northern 419 acres but terminated the 2014 Annexation Application for the southern 600 acres as well as the request for a Master Plan amendment.

51. But even after Evans Creek narrowed its request, the City indicated its intention to downzone the northern 419 acres and force Evans Creek to develop the Property at an exceedingly reduced density in the interest of maintaining the Property as open space. In short, the City planned to render development and commercial use of the Property economically impossible.

52. Based on the continued misrepresentations by City staff and the City's stated intent to downzone and devalue the Property, Evans Creek terminated the 2014 Annexation Application as it related to the northern 419 acres. Evans Creek filed a formal complaint due to the City's conduct in connection with the 2014 Annexation Application and received a refund of its application fees.

D. The City Rejects Evans Creek's Application For Annexation Again In 2020.

53. On January 27, 2020, Evans Creek once again applied for annexation of the Property into the City

("2020 Annexation Application") pursuant to Nev. Rev. Stat. 268.670 and RMC 18.04.301.

54. RMC 18.04.301 sets forth the following review process for voluntary annexation: (i) the annexation process is initiated by the City Council upon petition signed by 100 percent of the record owners of the real property within the subject area, (ii) the application is then reviewed by the City of Reno Community Development Department and recommendation regarding approval is made to the City Council, and (iii) the City Council then holds a public hearing and issues a decision on the application.

55. RMC 18.04.301(d) sets forth the following factors the City Council should consider when reviewing an annexation application:

a. Location of the property to be considered for annexation;

b. The logical extension or boundaries of city limits;

c. The need for expansion to accommodate planned regional growth;

d. The location of existing and planned water and sewer service;

e. Community goals that would be met by the proposed annexation;

f. The efficient and cost-effective provision of service areas and capital facilities;

g. Fiscal analysis regarding the proposed annexation;

h. Whether Washoe County has adopted a community management plan for the proposed annexation area;

i. Whether the annexation creates any islands; and

j. Any other factors concerning the proposed annexation deemed appropriate for consideration by the city council.

56. RMC 18.04.301 does not require that an applicant for annexation simultaneously submit a request for a Master Plan amendment and, as such, Evans Creek did not seek to amend the Master Plan.

57. Following a review of the 2020 Annexation Application, the City Community Development department and staff recommended unconditional approval thereof based on general compliance with the annexation review factors set forth in RMC 18.04.301.

58. Specifically, the City Community Development Department found the following:

a. The location of the Property is contiguous to the City on the north, west, and east sides, and the entire Property is located within the City's SOI. Extension of the boundaries of the city limits is logical as the Property is located within the SOI, which is the area the City has identified for expansion over a 20-year time period.

b. The Property is located within the City's TMSA and has a Tier 2 Regional Land Designation. A Tier 2 Land Use designation denotes an area within the TMSA where there is generally less dense development occurring at

suburban levels, with some higher density nodes, and is third in the priority hierarchy for development. These designations indicate the Property is located in an area planned to accommodate population and employment growth and receive municipal services over the 20-year planning horizon.

c. The 2020 Annexation Application assumed the land use zoning designations assigned by the City would correspond to existing Washoe County zoning, which would allow for 203 single family residences. In reality, RMC 18.08.105 would apply and assign the closest conforming zoning district, which would result in higher density zoning than that of the County. Because Evans Creek is constrained by slopes, and Evans Creek did not provide a slope analysis to evaluate the reduction of potential dwelling units based on RMC hillside development standards, City Staff estimated approximately 580 dwelling units on the northern parcel and 30 dwelling units on the southern parcel. Thus, the subject annexation would assist in accommodating a greater amount of projected population growth than stated in the 2020 Annexation Application.

d. The zoning assigned upon annexation would support single-family residential development. Based on the Housing Demand Forecast and Needs Assessment, while the subject annexation would assist in accommodating overall population growth, the assigned zoning would not support the increased demand for higher density multi-family housing.

e. The Property is located outside the Truckee Meadows Water Authority (TMWA) and future development of the Property will be required to annex into the TMWA service area.

f. The Property will be required to connect to the City's sanitary sewer system and sewer infrastructure is available on the south side of S. McCarran. The final location of water and sewer connection would be determined at the development stage.

g. While policy 2.1D of the Master Plan strongly encourage applicants to submit a concurrent Master Plan Amendment request, this is not a requirement. Any future Master Plan Amendments or land use intensifications would be reviewed at the time of the application submittal. Approval of the annexation request does not guarantee that future land use development applications would be approved.

h. The Property is located within a designated Foothill Neighborhood. Within designated Foothill Neighborhoods, the Master Plan promotes a mix of housing types to support documented housing needs as well as the preservation and integration of natural features into the overall design of a site. The northern portion of the Property is designated Single-Family (SF) Neighborhood and SF15 zoning would be assigned upon annexation. The southern portion of the Property is designated Unincorporated Transition (UT) and a mix of UT5, UT10, and UT40 zoning districts would be assigned upon annexation.

i. Evans Creek submitted two fiscal impact analyses. The initial analysis based on 203 dwelling units represents a lower amount of development than would be allowed under the zoning assigned upon annexation. The second analysis based on 1,256 dwelling units represents a higher level of development than would occur under the zoning assigned upon annexation. Both analyses show a net positive fiscal impact to the City. Further, the Finance Department's review of the analyses confirmed a net positive fiscal impact would result for a lower range of development based on gross density reductions.

j. City of Reno Police and Fire currently provide services to properties adjacent to the Property and this would be a logical extension of their services. Roadway and recreation facilities needed to meet level of service standards would be further evaluated when a project is proposed.

k. The Reno Fire Department's closest fire station to the Property is Station 7, which has a current estimated response time of two minutes. The second closest station is Station 3 with an estimated response time of seven minutes. These response times are measured from the fire station to the closest point on South McCarran Boulevard and response times to actual buildings may be longer.

l. The Property is located in a HIGH (hazard) Fire Wildland-Urban Interface Area where compliance with the States adoption of the Wildland-Urban Interface Code under NRS 477 and NAC 477.281 is required.

m. The Property is currently served by the Truckee Meadows Fire Protection District, with supplemental assistance from the Reno Fire Department of up to 12 hours of service. Upon annexation the City would be responsible for all fire service costs associated with fire events. The Reno Fire Department currently provides service to properties adjacent to the Property and this would be a logical extension of their services.

n. The City's Public Works Design Manual (PWDM) requires two means of ingress/egress with all developments. The Property has a recorded legal access on the south side of South McCarren Boulevard and a 50-foot roadway easement granted to APNs 222-080-11-13 along Lone Tree Lane. Any future street network would be constructed by the developer and comply with City of Reno, Nevada Department of Transportation, and/or Washoe County access management standards.

o. Parks and recreation facilities proposed to meet the City's level of service standards would be further evaluated at the time of development.

p. Due to the Property's location in the City's SOI and the City's exertion of extraterritorial jurisdiction over the Property, all discretionary and ministerial land use approvals fall under the City's jurisdiction. The Master Plan will provide the applicable policy framework and municipal code standards will govern further development of the Property.

59. The 2020 Annexation Application was then publicly noticed as a two-part meeting for public comment prior to City Council action. The first portion of this meeting was held on May 13, 2020. The second portion of the meeting was held on May 27, 2020.

60. Prior to the May 13, 2020 and May 27, 2020 meetings, the City knew that City staff had recommended unconditional approval of the requested annexation of the Property based on general compliance with the annexation review factors set forth in RMC 18.04.301. City staff's recommendation was critical as Section 8.2C of the Master Plan states that the City Council shall "utilize City Staff's assessment of conformity and alignment with the Master Plan as a key consideration in decision making to enhance transparency."

61. Despite the City Community Development Department's recommendation of unconditional approval, the City Council denied the 2020 Annexation Application on May 27, 2020 primarily based on the following reasons: (i) Evans Creek did not submit a Master Plan Amendment request; (ii) there is no demand for the mixture of land use types proposed on the Property; (iii) there are alleged private party water rights disputes on the Property; and (iv) fire danger. While the City Council referenced other concerns—which were, in part and parcel, meritless—it did not develop a record or otherwise explain in detail as to why such concerns warranted denial under the applicable factors.

62. The City's bases for denying Evans Creek's 2020 Annexation Application are pretextual and clearly lacked a legitimate rational basis. First, the law is clear that Evans Creek was not required to

submit a Master Plan Amendment request in conjunction with the 2020 Annexation Request, particularly when Evans Creek did not seek to alter the existing Master Plan. Second, the City is experiencing a well-documented housing shortage, and annexation of the Property would plainly support sustainable growth in the City. Third, the purported "water rights dispute"—which was not even mentioned by City staff and appears to have been fed to the City Council by community members—is, in reality, a minor easement issue with a neighbor that consisted of a single exchange of letters more than a year ago and never materialized into an actual legal dispute. Lastly, fire is a danger to suburban areas throughout Northern Nevada, and the evidence introduced at the City Council hearing demonstrated that the City's existing facilities are sufficient to meet the fire protection needs of the Property when developed. Moreover, the City Council was only tasked with considering whether to annex the Property and should not have addressed hypothetical concerns better suited for Master Plan amendments, zoning changes or development project requests that may or may not occur in the future.

63. The pretextual nature of the City Council's bases for denying annexation is further demonstrated by the conspicuous absence of the prior explanations given by the City for undermining Evans Creek's annexation applications. For example, the City previously cited the following concerns as grounds for its opposition to annexation: (i) the City's desire to maintain open space; (ii) Evans Creek's development would exacerbate the shortage of neighborhood parks and deficiencies in emergency access to nearby subdivisions; (iii) Evans Creek's development may

cause harm to unidentified and unknown archeological sites on the Property; (iv) Evans Creek's development would create an annexation island of non-contiguous City property; and (v) Evans Creek's development of the Property would overburden the Washoe County School District. None of these reasons were mentioned let alone relied on by the City Council in denying the 2020 Annexation Application.

64. Because of the City's ongoing refusal to grant annexation, Evans Creek cannot develop the Property and has been wholly deprived of any viable commercial use. Moreover, Evans Creek faces daily trespass and vandalism of the property as local residents illegally trespass on the Property, fences and posts are routinely cut and damaged, metal gates are chained and torn down, firearms are illegally discharged at the risk of harming livestock and personnel, and "No Trespass" signs are ignored and damaged. Evans Creek personnel are routinely abused by local residents when they attempt to prevent unlawful entry onto the Property or protect Evans Creek's livestock from harm. Despite Evans Creek's repeated pleas for protection, no government authority has ever taken steps to address the near-constant trespass and property damage suffered by Evans Creek.

E. The City Intentionally Treated Evans Creek Differently Than All Other Similarly Situated Property Owners in the Area.

65. Prior to submitting the 2020 Annexation Application, Evans Creek reviewed available public records reflecting the City's treatment of other annexation applications submitted by landowners in Northern Nevada. These records stand in stark

contrast to the manner in which the City considered and ultimately denied Evans Creek's 2020 Annexation Application.

66. Based on Evans Creek's review of the limited public records maintained by the City, Evans Creek is not aware of any other instance in which the City has denied an annexation request submitted pursuant to Nev. Rev. Stat. 268.670. This is, of course, logical as any concerns about development should be reserved for future proceedings related to Master Plan amendments, zoning changes or development project requests.

67. The City's denial of Evans Creek's 2020 Annexation Application was discriminatory, arbitrary, and capricious. Additionally, the City intentionally treated Evans Creek differently than all other property owners who have applied for annexation pursuant to Nev. Rev. Stat. 268.670.

FIRST CAUSE OF ACTION

(Violation Of The Equal Protection Clause – Class of One)

68. Evans Creek incorporates all previous paragraphs as though fully set forth herein.

69. The Fourteenth Amendment of the United States Constitution provides in pertinent part "…nor shall any State deprive any person of life, liberty, or property, without due process of the law, nor deny to any person within its jurisdiction the equal protection of the laws."

70. 42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

71. Evans Creek has a constitutionally protected interest in the use of its Property.

72. Evans Creek has suffered actual injury to its property interests through the denial of its 2020 Annexation Application and, therefore, has standing to bring this claim.

73. The City denied Evans Creek the equal protection of the law guaranteed under the Fourteenth Amendment of the United States Constitution by arbitrarily and discriminatorily denying its 2020 Annexation Application without any legitimate rational basis.

74. Based on Evans Creek's review of the limited public records maintained by the City, the City has not denied any other similar annexation request made pursuant to Nev. Rev. Stat. 268.670. Thus, the City intentionally treated Evans Creek differently than all other similarly situated property owners in the area.

75. The City acted with animus and ill-will toward Evans Creek as its denial of the 2020 Annexation Application was merely a continuation of

the City's ongoing effort to maintain the Property as open space and prevent development.

76. The City, acting under color of State law, has subjected Evans Creek to the deprivation of its respective rights, privileges, or immunities secured by the Constitution and laws and is therefore liable to Evans Creek for the resulting damage and harm.

77. As a result of the City's conduct, Evans Creek has been harmed in excess of Seventy-Five Thousand Dollars ($75,000.00).

78. As a result of the City's conduct, Evans Creek has been forced to hire an attorney to prosecute this action and, therefore, seeks recovery of its attorney's fees and court costs.

SECOND CAUSE OF ACTION

(Violation Of The Fifth Amendment Taking Clause)

79. Evans Creek incorporates all previous paragraphs as though fully set forth herein.

80. The Fifth Amendment of the United States Constitution states in pertinent part "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." The Fifth Amendment of the United States Constitution is applicable to the States through the Fourteenth Amendment of the United States Constitution.

81. Article 1, Section 8(3) of the Nevada Constitution provides "[p]rivate property shall not be taken for public use without just compensation having

been first made, or secured," except in circumstances not applicable here.

82. Evans Creek had a vested property interest in the Property and distinct investment-backed expectations in the commercial use and development of the Property.

83. The City's denial of the 2020 Annexation Application has so restricted the permissible uses of the Property that Evans Creek has been deprived of all or substantially all of the economic value or use of the land.

84. The City's conduct has restricted the use to which the Property may be put in order to obtain a public benefit (i.e. open-space preservation) without just compensation. Indeed, by abusing its police powers to regulate land use, the City has effectively accomplished the result that the County's attempted condemnation proceeding failed to achieve years ago by forcing Evans Creek to maintain its Property as open space and de facto parkland for the public.

85. The City's conduct constitutes a taking of Evans Creek's Property without just compensation.

86. The City's denial of the 2020 Annexation Application constitutes a final decision regarding the Property such that the permissible uses of the Property are known to a reasonable degree of certainty.

87. The City, acting under color of State law, has subjected Evans Creek to the deprivation of its respective rights, privileges, or immunities secured by the Constitution and laws and is therefore liable to Evans Creek for the resulting damage and harm.

88. As a result of the City's conduct, Evans Creek has been harmed in excess of Seventy-Five Thousand Dollars ($75,000.00).

89. As a result of the City's conduct, Evans Creek has been forced to hire an attorney to prosecute this action and, therefore, seeks recovery of its attorney's fees and court costs.

DEMAND FOR JURY TRIAL

Evans Creek demands a trial by jury on all issues so triable.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment as follows:

1. For a judicial declaration that the City's denial of the 2020 Annexation Application was discriminatory, arbitrary, lacked any legitimate rational basis, and thereby unconstitutionally deprived Evans Creek of equal protection of the law.

2. For a judicial declaration that the City's denial of the 2020 Annexation Application so restricted the permissible uses to which the Property can be put such that it deprived Evans Creek of all or substantially all of the economic value or use of the land without just compensation.

3. For compensatory damages in excess of Seventy-Five Thousand Dollars ($75,000.00), in an amount to be proven at trial;

4. For an award of attorney's fees and costs; and

5. For such other and further relief as the Court deems just and proper.

Dated: December 30, 2020

CAMPBELL & WILLIAMS

By /s/ ***Philip R. Erwin***
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Evans Creek, LLC

JURY DEMAND

Plaintiff demands a trial by jury pursuant to Fed. R. Civ. P. 38(b).

Dated: December 30, 2020

CAMPBELL & WILLIAMS

By /s/ ***Philip R. Erwin***
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