Code No. 2315
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

SCENIC NEVADA, INC.,

Plaintiff,

vs.

CITY OF RENO, a political subdivision of the State of Nevada, and the CITY COUNCIL thereof,

Defendant.

_____/

Case No. CV12-02863

Dept. No. 7

MOTION TO DISMISS COMPLAINT FOR JUDICIAL REVIEW TO INVALIDATE CITY OF RENO DIGITAL BILLBOARD ORDINANCE

COMES NOW, the City of Reno ("City"), by and through its attorneys, John J. Kadlic, Reno City Attorney, and Marilyn D. Craig, Deputy City Attorney, and files its Motion to Dismiss Complaint for Judicial Review to Invalidate City of Reno the Digital Billboard Ordinance. Boiled down, this lawsuit challenges the digital off-premises advertising displays ordinance adopted by the City on October 24, 2012 ("Ordinance"), on statutory and constitutional provisions under the Nevada Constitution to become effective on January 24, 2013, but thereafter subject to a moratorium. Plaintiff, Scenic Nevada, seeks a declaratory judgment that the Ordinance is "void and of no force or effect." Complaint, ¶ 5. *See also*, Scenic Nevada's Prayer, ¶ 1. The Ordinance allows static billboards to be converted to digital billboards under certain

circumstances. Because of defects in Scenic Nevada's Complaint, Scenic Nevada cannot state a claim on which relief may be granted pursuant to NCRP 12(b)(5) and is destined to fail.

I. Overview of City zoning with respect to billboards.

Billboards, whether static or digital, are regulated in Reno Municipal Code ("RMC"), Chapter 18.16. Among other things, RMC Chapter 18.16 addresses billboard with respect to:

(1) Design, such as size, height, and lighting, and,

(2) Location such as the permitted zoning districts, distance from other billboards and certain kinds of development, such as schools and residential units, or limited in certain areas because of the area's special aesthetic characteristics. Billboards, whether static or digital, may be located on parcels zoned Industrial, Industrial Business, Industrial Commercial, Arterial Commercial, Community Commercial, and Mixed Use, a type of zoning wherein both commercial and residential uses are allowed.

There are a limited number billboards allowed in the City. In 2000, the City's voters approved an Initiative which placed a cap on the number of billboards which can be erected in the City. RMC § 18.16.902(a). To allow billboards existing at the time of the Initiative to be moved from one location to another location in compliance with the zoning regulations, the City adopted a system allowing billboard to be "banked" ("Banking Ordinance"). RMC § 18.16.908. For example, billboards were removed from certain locations because of road construction and the ReTrac train project in downtown Reno. The Banking Ordinance allows the owners of such billboards to retain rights to erect those billboards at another location in the future if there is compliance with applicable codes.

II. The fatal defects in the Complaint.

With respect to motions to dismiss, the United States Supreme Court holds that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45, 78 S. Ct. 99 (1957). *See, also Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, n. 6, 181 P.3d 670 (2008) ("Dismissed only if it appears beyond a

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doubt that it could prove no set of facts, which, if true, would entitle it to relief). Beyond a doubt, Scenic Nevada can prove no set of facts in support of its claim which would entitle it to relief.

A. Petitions for Judicial Review are not available to challenge substantive legislative issues.

To understand why a petition for judicial review is not available in this case to present the challenge to the Ordinance, it is first important to understand the difference between legislative and administrative acts.

1. Administrative vs. legislative acts.

To invoke the jurisdiction of the Court, Scenic Nevada alleges it may file a petition for judicial review pursuant to NRS 278.3195. Complaint, p 1. In its reliance on NRS 278.3195, Scenic Nevada confuses administrative and legislative acts.

Amendments to the text of Title 18, "Annexation and Land Development," Reno Municipal Code ("RMC") are legislative acts. For over fifty years, the Nevada Supreme Court has held that zoning is a legislative act. *See, e.g., McKenzie v. Shelly*, 77 Nev. 237, 242, 362 P.2d 268 (1961) ("Under the police power, zoning is a matter within sound legislative action ..."). NRS 278.250(1) states:

> For the purposes of NRS 278.010 to 278.630, inclusive, the governing body may divide the city, county or region into zoning districts of such number, shape and area as are best suited to carry out the purposes of NRS 278.010 to 278.630, inclusive. Within the zoning district, it may regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land.

Consistent with the Ordinance constituting the adoption of a new policy, the Ordinance was adopted in accordance with RMC § 18.06.302. RMC § 18.06.302, "Amendments to Text of Title," states:

> (a) This section's procedures apply to all legislative amendment to the text of Title 18 of the Reno Municipal Code ...
>
> (b) Amendments to this title may be initiated by the planning commission or the city council. The administrator shall review the text amendment and provide a recommendation to the planning commission.

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> (c) The planning commission shall hold a public hearing on a proposed text amendment and shall forward a *recommendation* to the city council.
>
> (d) Following receipt of the planning commission's *recommendation*, the city council shall hold a public hearing and may adopt a text amendment by affirmative votes of a simple majority of the entire city council ...[1]

(Emphasis added.) Thus, the Planning Commission made only a recommendation with respect to the Ordinance. Scenic Nevada recognized that the Planning Commission made a recommendation: "On January 4, 2012 ... the Planning Commission recommended a draft digital billboard ordinance allowing new construction of digital billboards within the city limits." Complaint, ¶ 39.

Under RMC § 18.06.302, the City Council, not a subordinate body, makes the decision to approve or disapprove a legislative bill because such acts involve policy determinations. The Nevada Supreme Court explains:

> The [legislative act of an initiative limiting the number of billboards allowed in the City] did not merely apply previously declared policies or laws; rather, it articulated an entirely new policy – it prohibited construction of new off-premises billboards throughout the City. Although the City of Reno had regulated off-premises advertising, prohibiting such advertising was a complete change in policy. Additionally, unlike the situations in *Citizens for Train Trench Vote v. Reno* and *Glover v. Concerned Citizens for Fuji Park*, the billboard initiative does not concern a specific project, but enacts a city-wide change in policy towards off-premise advertising.

Eller Media Co. v. City of Reno, 118 Nev. 767, 772, 59 P.3d 437 (2002). In this case, the Ordinance adopted a citywide policy of allowing static billboards to be converted to digital billboards. Scenic Nevada recognizes that the Ordinance constitutes a new citywide policy. *See, e.g.* Complaint, ¶¶ 21 and 22. These paragraphs state:

> During the years 2000 through 2012, all billboard lighting was required to be directed toward the billboard, and not toward the

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[1] The adoption procedure requires two readings of the proposed ordinance and publication in a newspaper before the proposed ordinance becomes effective. Reno City Charter, Sec. 2.100

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> street. This requirement was codified in RMC § 18.16.905(l), which effectively presented digital billboards in the City of Reno. In contrast to a traditional billboard where lights shine onto the display, the lighting of a digital billboard shines toward the public roads. RMC § 18.16.905(l) effectively made digital billboards illegal in the City of Reno by prohibiting light shining toward the public roads.
>
> On February 13, 2008, a majority of the Reno City Council led by Councilman Dwight Dortch voted to direct Reno City staff to initiate a text amendment that would eliminate RMC § 18.16.905(l) and allow the construction and permitting of new digital billboards.

Adoption of a new policy by ordinance is also consistent with the Reno City Charter, Sec. 2.090(1), which states that "[n]o ordinance may be passed except by bill and by a majority vote of the City Council." Scenic Nevada recognized that the City conducted two hearings before adoption, the first reading on October, 12, 2012, and the second reading on October 24, 2012. Complaint, ¶¶ 47 and 49.[2]

Based on the above, the Ordinance is a legislative act.

2. Challenges based on substantive legislative issues cannot be presented by petitions for judicial review.

In 2006, the Supreme Court considered the proper mechanism for the presentation of a challenge to a zoning action – a petition for judicial review or a petition for mandamus, in light of NRS 278.3195 which had been adopted in 2001. The Supreme Court compared and contrasted the two types of petitions and concluded:

> A party who has *administratively* appealed to the Board [Clark County Board of County Commissioners], under the local ordinance, may challenge the Board's decision 'by filing a [timely] petition for judicial review. As a mandamus petition is only appropriate if no adequate and speedy legal remedy exists, and the

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[2] Scenic Nevada's Complaint follows the procedure for administrative appeals. NRS 278.3195 required local governments to provide for appeals of decisions, not recommendations by lower bodies, such as the Planning Commission. The City adopted RMC § 18.06.208 ("any person ... aggrieved by his/her/its inability to obtain a building permit or by any decision made by an administrative officer ... based upon or made in the course of the administration or enforcement of the provisions of any zoning regulation or an regulation relating to the location or soundness of structures in the administration and enforcement of this Title 18 may appeal such decision ...")

The confusion arises in legislative actions because the City allows a person to "appeal" a recommendation as a method of moving the hearing to the evening to allow more people to attend and give the "appellant" additional time to state his or her concerns. In this case Scenic Nevada correctly states it filed an appeal, but that appeal was to the Planning Commission's recommendation.

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> Legislature has created the right to petition for judicial review, which constitutes an adequate and speedy legal remedy, mandamus petitions are generally no longer appropriate to challenge the Board's final decision.

Kay v. Nunez, 122 Nev. 1100, 1104-05, 146 P. 3d 801, 805 (2006). Thus, in *Kay*, the Supreme Court concluded that petitions for judicial review could lie for administrative decisions which had been appealed to the governing body. The Supreme Court did not reach the question in *Kay* whether petitions for judicial review were available to challenge legislative decisions made by the City Council.

Approximately four years later, the Supreme Court considered whether a legislative act, an amendment to the City of Reno Master Plan, may also be presented by petitions for judicial review. The Supreme Court recalled that its holding in *Kay* was based upon "the express language in NRS 278.3194." *City of Reno v. Citizens for Cold Springs*, 126 Nev. ___, ___, 236 P.3d 10, 15 (2010). The Supreme Court concluded:

> The enactment of zoning ordinances and amendments by local municipal entities constitutes sound legislative action. Some courts do not extend judicial review to the legislative process of enacting zoning amendments. However, the procedural actions of municipal legislative entities may still be subject to judicial review. The Supreme Court concluded that [b]ecause these issues [such as compliance with statutory requirements] are procedural and do not require this court to consider the substance or content of the enactments, we conclude that a petition for judicial review was the proper vehicle for respondents' challenge.

Id. (internal citations and quotations omitted).

As will be shown below, the challenge to the Ordinance is grounded on substantive legislative issues and, thus, cannot be presented by a petition for judicial review. However, even if the Court were to allow Scenic Nevada to proceed under its Petition for Judicial Review, Scenic Nevada has not and cannot state a claim upon which relief can be granted.

3. Interpretation and applicability of Article 19 of the Nevada Constitution.

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To make its case that the Ordinance violates the Nevada Constitution, Scenic Nevada alleges that the Ordinance is:

(1) Dependent upon the "Banking Ordinance" (Complaint, ¶ 26), and

(2) The Banking Ordinance adopted in 2002 amends the Initiative approved in 2000 (Complaint ¶¶ 16 and 17). Because there was not three years between the Initiative and the Banking Ordinance, Scenic Nevada reasons and alleges that the Ordinance violates Art. 19, § 2(3). Subsection 2(3) states:

> If the initiative petition proposes a statute or an amendment to a statute, the person who intends to circulate it shall file a copy with the secretary of state ... If a majority of the voters voting on such question ... votes approval of such statute or amendment to the, it shall become law and take effect upon the completion of the canvass of votes by the supreme court. An initiative measure so approved by the voters shall not be amended ... by the legislature within 3 years ...

(Emphasis added.) As can be readily seen, this subsection refers to amendments to state statutes, not municipal ordinances. *See*, NRS 220.110(3)(the NRS contains "the laws of this state of general application"). *See, also*, NRS 266.105 et seq. (city council may pass ordinances). In other words, the word, "statute" refers to the enactments of the Legislature.

Consistently, Scenic Nevada has not and cannot demonstrate that it or its predecessor, Citizens for a Scenic Reno, caused the Initiative to be transmitted to the Nevada Legislature as required by Article 19, § 2(3) nor that the Nevada Supreme Court canvassed the Initiative's votes as required by Article 19, § 2(3). On the contrary, Scenic Nevada alleges that Citizens for a Scenic Reno filed the Initiative petition with the Reno City Clerk. Complaint, ¶ 8. Such action is consistent with NRS 295.205 wherein a municipal initiative is presented to a city council, not the Nevada Legislature: "Any five registered voters of the city may commerce initiative ... proceedings by filing with the city clerk ... [and] "[u]pon receipt of a petition for initiative ... placed on file pursuant to subsection 1, the City Clerk shall consult with the council ..."

Based upon all the above, Article 19, § 2(3), is not applicable to municipal initiatives. Moreover, Scenic Nevada also relies upon Article 19, § 4, to allege that the City may not amend its ordinances for three years. While Subsection 4 refers to initiative powers reserved to the

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voters of the cities, it is silent with respect to time limitations in which a municipality may amend an initiative. However, NRS 295.220(1) states that "[i]f a majority of the registered voters voting on a proposed initiative ordinance vote in its favor, it shall be considered adopted upon certification of the election results and shall be treated in all respects in the same manner as ordinances of the same kind adopted by the council." (Emphasis added.) Scenic Nevada alleges that the elections "results were certified by the Defendant City Council on November 14, 2000 and Ballot Question R-1 became Reno Municipal Code § 18.16.902(a)." The City Council certifying the elections results is consistent with a municipal initiative, not a state statute.

By reading together Section 4 of Article 19 of the Nevada Constitution and NRS 295.220(1), it is unmistakable that a municipal initiative can be amended consistent with amendments to ordinances of the same kind. A search of the Reno City Charter and the Reno Municipal Code reveals no prohibition on the amendment of land use ordinances, much less a prohibition for a period of 3 years.[3]

Based on the above, the City could properly adopt the Banking Ordinance and the Ordinance, even if the Ordinance were dependent upon the Banking Ordinance.

Scenic Nevada also alleges that digital billboards are "new off-premises advertising displays" and in combination with the banking and relocation system, creates a contradiction in which "the voter initiative is entitled to prevail." *See*, Complaint, ¶ 74. There is no "contradiction" between the Initiative and the Banking Ordinance. The word, "contradiction" suggests an irreconcilable conflict."

Scenic Nevada recites the language of the Initiative in its Complaint (Complaint, ¶ 10) and alleges that the word, "new," does not mean a cap on the number of billboards but a prohibition on the relocation of existing billboards. Complaint, ¶ 17. To the degree the word, "new," is ambiguous, the question becomes one of statutory interpretation. "[I]f the statutory language is ambiguous or does not address the issue before use, we must discern the Legislature's intent and construe the statute according to that which 'reason and public policy would indicate the

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[3] Reno City Charter, Sec. 2.100 sets forth the enactment procedure for ordinances. Reno Municipal Code ("RMC") Chapter 18.06, "Administration and Procedures," provides further direction on procedures for adoption of land use ordinances.

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legislature intended.'" *Sandoval v. Bd. of Regents*, 119 Nev. 148, 153, 67 P.3d. 902, 905 (2003)(internal citation omitted). In this case, it is the Reno voters who approved and passed the Initiative. Thus, the voters are the "legislature." The legislative history includes the language of the Ballot Initiative, the explanations, and the vote.

Even though it made reference to the Initiative, Scenic Nevada chose not to attach the Ballot Initiative to its Complaint. Complaint, ¶ 17. But, if Scenic Nevada fails to attach that document, the City may do so to show that the document does not support Scenic Nevada's claim. *Marder v. Lopez*, 450 F.3d 444, 448 (9th Cir. 2004). With respect to Fed. Rule Civ. Pro. 12(b)(5), the federal companion to NRCP 12(b)(6), the courts have held that they may consider a document without a motion to dismiss being converted to a motion for summary judgment if the complaint refers to a document, the document is central to plaintiff's case, and no party questions the authenticity of the document.[4] *Marder, supra.* In this case, Scenic Nevada quotes RMC § 18.16.902(a), including the notation that this section was "[a]pproved by the voters at the November 7, 2000, General Election, Question R-1. These results were certified by the city council on November 14, 2000" (Complaint, ¶ 16) and assert that allowing billboards to be "banked" is "contrary to the plain mandate of the voters in passing Ballot Question R-1." Complaint, ¶ 17. In other words, Scenic Nevada referred to the Initiative Ballot in its Complaint and the document is central to Scenic Nevada's assertion that the City violated the Initiative.

Moreover, the federal courts have held that courts may consider documents containing judicially-noticed facts if those facts contradict the alleged facts. NRS 47.130 provides that facts

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[4] Under a 12(b)(5) motion, facts set forth in the Complaint are assumed to be true. *Hynds Plumbing & Heating Co. v. Clark County Sch. Dist.*, 94 Nev. 776, 587 P.2d 1331 (1978). The companion federal rule, Fed. R. Civ. Pro. 12(b)(6), contains a similar standard, "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *De la Cruz v. Tormey*, 582 F.2d 45, 48 (9th Cir. 1978). The federal courts, when considering the federal rule, have had the opportunity to drill down and identify common-sense exceptions to the federal rule that are consistent with doing substantial justice between the parties. These exceptions include where the factual allegations are contradicted by judicially-noticed facts (*Mullis v. United States Bank. Ct.*, 828 F.2d 1385, 1388 (9th Cir. 1987) or by documents attached to the Complaint (*Hal Roach Studios v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 (9th Cir. 1990). Documents referred to in the complaint, but not physically attached, may be considered if the document is central to plaintiff's case and does not support plaintiff's claim. *Marder, supra,* 448 referred to in the Complaint. These exceptions are appropriate and warranted in this case.

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subject to judicial notice are those that are "[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." "[C]ourts shall take judicial notice if requested by a party and supplied with the necessary information." NRS 47.150. The Initiative Ballot is a matter of public record. The City requests the Court take judicial notice of a certified copy of the Initiative Ballot. Exhibit "1."

It was the Ballot Initiative proponents' pro arguments regarding Question R-1 which were available to all voters and, therefore, provides the best insight into what the voters intended. Consistent with pro arguments set forth by the proponents of the Initiative Ballot, the Initiative intends that a cap be placed on the number of billboards allowed in the City:

> (1) "This Initiative Petition, supported by over 7,000 Reno citizens, would prohibit any increase in the present number of billboards. This Initiative does not ban existing billboards, but it does place a cap on their numbers." Initiative Ballot, Argument for Passage, ¶ 1. (emphasis added.)
>
> (2) "Excessive numbers of billboards adversely impact aesthetics and traffic safety," (emphasis added.)
>
> (3) "Stopping the growth of new billboards in Reno will help to preserve the distinctive character and natural scenic beauty of the Truckee Meadows." *Id.* ¶ 2. (emphasis added.)

Moreover, a further reference to an increase in the number of billboards is set forth the Rebuttal by Proponents: "It is true that the Reno Municipal Code has not resulted in a proliferation of billboards. It is the *changes* to the existing Code being pushed by the billboard companies themselves that could result in the proliferation of billboards." (emphasis added to "proliferation." Otherwise, emphasis in the original.) Based on the legislative history, the proper interpretation of the Initiative is that no *additional* billboards are allowed.

The Banking Ordinance is consistent and harmonious with the Initiative. "Whenever possible, supreme court will interpret a rule or statute in harmony with other rules and statutes." *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990,993, 860 P.2d 720 (1993). The Banking Ordinance does not allow an increase in the number of billboards. Instead, it allows relocation of existing billboards. Thus, the Banking Ordinance does not amend the Initiative but instead is harmonious with it.

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But even if there were an irreconcilable conflict between the Initiative and the Banking Ordinance, "the [ordinance] which was recently enacted controls the provisions of the earlier enactment." *Marschall v. City of Carson*, 86 Nev. 107, 115, 464 P.2d 494 (1970). As the Complaint alleges, the Initiative was approved in 2000 and the Banking Ordinance in 2002. Thus, the Banking Ordinance prevails. Even if the Court determined that the Initiative initially prohibited relocation of billboards, the Banking Ordinance properly amended the Initiative because the City may amend the Initiative as any other like ordinance.

4. No violation of the NRS beautification law.

Scenic Nevada alleges that the Ordinance violates state laws. Complaint, ¶ 36. The federal Highway Beautification Act of 1965 ("HBA") requires the Secretary of Transportation to negotiate an agreement with each state based upon "customary practices" at the time. 23 U.S.C. § 131(d). *See also*, NRS 410.330 (The Board of Directors of the Nevada Department of Transportation ("NDOT") shall enter into an agreement with the Secretary of Transportation.)

Scenic Nevada in its Complaint refers to a 1972 federal-state agreement ("FSA"). Complaint, ¶ However, the 1972 FSA has been superseded by a later FSA. As discussed above, because the 1972 FSA is central to plaintiff's case, but does not support plaintiff's claim, the court may consider that it has been superseded.

Moreover, the Court may take judicial notice of the latter FSA as it is a matter of public record and its authenticity cannot reasonably be questioned. Accordingly, the City requests that the Court take judicial notice of the latter FSA for the sole purpose of demonstrating that the 1972 FSA does not support the allegations in the Complaint because it has been superseded. Exhibit "2," *See,* last page ("This Agreement shall have an effective date of MAR 5 1999 and supersedes the previous Agreement entered into on January 21, 1972.")

Even if the Complaint retained some viability with respect to the Nevada FSA, it is fatally flawed on other grounds because the "state law" (Complaint, ¶ 65) on which the Complaint is based is agency regulations inapplicable to the City. To carry out a Nevada FSA, NRS 410.400 states that "[t]he Board [of NDOT] shall prescribe:

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(a) Regulations governing the issuance of permits for advertising signs, displays or devices ... and

(b) Such other regulations as it deems necessary to implement the provisions of NRS 410.220 to 410.410, inclusive.

Accordingly, the Legislature required NDOT to adopt rules rather than enacting statutory provisions in the NRS, the laws of general application. Consistently, an inspection of NRS 410.222 through 410.410 immediately reveals that there are no statutory provisions regarding lighting of billboards. Instead, the regulations regarding lighting are located in the Nevada Administrative Code ("NAC") 410.350.

The NAC is provided for under the Administrative Procedure Act set forth in NRS Chapter 233B. NRS 233B.031 defines "agency" as meaning "an agency, bureau, board, commission, department, division, officer or employee of the Executive Department of the State Government authorized by law to make regulations ..." NRS 233B.020 further explains that Chapter 233B is applicable to the agency of the Executive Department of the State Government.

NDOT is an agency of the Executive Branch of the State of Nevada. NRS 408.106. NDOT is authorized to adopt regulations "to aid it in carrying out the functions assigned to it by law and shall adopt such regulations as are necessary to the proper execution of those functions." With respect to NDOT, "it is the express intent of the Legislature to make the Board of Directors of the Department of Transportation custodian of the state highways and roads and to provide sufficiently broad authority to enable the Board to function adequately and efficiently in all areas of appropriate jurisdiction, subject to the limitations of the Constitution and the legislative mandate proposed in this chapter [408].

Conversely, the City is not an agency of the Executive Department. The City is a political subdivision and a municipal corporation. *See also*, Nevada Constitution, art. 8 and Reno City Charter, Sec. 1.010. Thus, regulations regarding outdoor advertising set forth by NDOT govern whether NDOT, not the City, will grant a billboard permit.

NAC 410.230 states: "A sign permit cannot be issued unless the proposed site of the sign is located in either a zoned or unzoned commercial or industrial area and unless the proposed sign

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conforms to the size, spacing and lighting requirements ..." NAC 410.250 requires that a sign permit application "must be submitted to the district office of the Department in the area where the proposed sign is to be located [and] the Department will grant an application on the basis ..." NAC 410.690(1) also requires a permit issued by the Department: "In accordance with NRS 410.220 through 410.410, inclusive, no off-premises outdoor advertising structure may be erected within the controlled areas of the interstate or primary highway systems within this state without first obtaining a sign permit from the Department." NDOT's regulations require a NDOT permit irrespective of whether an applicant has obtained a permit from the City in those areas which are under the control of NDOT. Thus, NDOT's permitting system is separate from and in addition to the City's permitting system.

Moreover, Scenic Nevada refers to *Scenic Arizona v. City of Phoenix Board of Adjustment*, 268 P.3d 370 (Ariz. App. 2011). Complaint, e.g. ¶ 68. However, the *Scenic Arizona* case does not support Scenic Nevada's claim. The statutory schemes of the two states differ. In Arizona in 1998, intermittent lighting was prohibited by state law, ARS 28-7903 (1998). In Nevada, intermittent lighting is prohibited in NDOT's regulations, NAC 410.350, not state law. Thus, in Arizona, the prohibition is generally applicable to the state as a whole including political subdivisions; whereas, in Nevada, the prohibition is applicable to NDOT.

If the Nevada Legislature had desired to enact a state scheme like Arizona's, the Nevada Legislature could have done so. If the Nevada Legislature had intended to prohibit intermittent light to be set forth in the NRS, the Legislature "could have easily have inserted [the] language into the statutes but chose not to do so ..." *State, Dep't of Motor Vehicles & Public Safety v. Brown*, 104 Nev. 524, 526, 762 P.2d 882 (1982). One statutory scheme is not necessarily better than the other, the statutory schemes are simply different and those differences should be respected.

Based on all the above, the Ordinance does not violate NRS Chapter 410. NAC Chapter 410 applies to NDOT. An applicant for a digital billboard to be located in the areas under the control of NDOT would have to comply with NDOT's regulations. An applicant, even if

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successful in obtaining a City sign permit, would not necessarily be able to construct a billboard in the NDOT controlled areas unless NDOT also issued a state permit.

5. No violation of Federal beautification law.

Scenic Nevada also refers to the *Scenic Arizona* case to allege that the Ordinance violates federal law. Integral to the decision in the *Scenic Arizona* case is the 2007 Federal Highways Administration ("FHWA") Guidance Memorandum ("Memorandum"). *Scenic Arizona, supra*, at 380. The *Scenic Arizona* court explains:

> The memorandum ... stated that 'proposed laws, regulations, and procedures' that would allow digital billboard subject to 'acceptable criteria ... do not violate a prohibition against 'intermittent,' or 'flashing' or 'moving' lights as those terms are used in the various ... FSA's ... Recognizing that many technological advances had occurred since the FSA' were entered into with the states, the memorandum then explained that digital billboards are acceptable 'if found to be consistent with the FSA ...

Scenic Arizona, supra, at 380.

The Memorandum is a proper subject for judicial notice. The Memorandum is part of the official records before the Arizona Court of Appeals and its authenticity is set forth by the *Scenic Arizona* court:

> In its support of its argument that we should construe the Arizona statute to allow digital images that change no more frequently than every eight seconds because regulators elsewhere have allowed such billboards, American Outdoor relies on a 2007 guidance issued by an FHWA Associate Administrator for Planning, Environment, and Realty. *See* Guidance Memorandum from FHWA to Div. Adm'rs (Sept. 25, 2007). The memorandum was written to 'Division Administrators' ...

Scenic Arizona, supra, at 380. *See, also* NRS 47.130(2)(b) (facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"). The City requests this Court take judicial notice of the Memorandum. Exhibit "3." *See also*, 47.150 (court may take judicial notice whether requested or not). A matter that is properly the subject of judicial notice may be considered along with the complaint when deciding a motion to dismiss for failure to state a claim. *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986).

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The purpose of the 2007 Memorandum is "to provide guidance to Division Realty Professionals concerning off-premise changeable message signs adjacent to routes subject to requirements for effective control under the Highway Beautification Act ... It clarifies the application of the Federal Highway Administration (FHWA) July 17, 1996, memorandum on this subject." Memorandum, p. 1. Among other things the Memorandum states:

> On July 17, 1996, the Office of Real Estate Services issued a memorandum to Regional Administrators to provide guidance on off-premises changeable messages signs and confirmed that the FHWA has '*always applied the Federal law 23 U.S.C. 131 as it is interpreted and implemented under the Federal regulations and individual FSAs* [federal-state agreements].' *It was expressly noted that 'in the twenty-odd years since the agreements have been signed, there have been many technological changes in signs, including changes that were unforeseen at the time the agreements were executed. While most of the agreements have not changed, the changes in technology require the State and the FHWA to interpret the agreements with those changes in mind."* The July, 1996, memorandum primarily addressed tri-vision signs, which were the leading technology at the time, but it specifically noted that changeable message signs '*regardless of the type of technology used*' are permitted if the interpretation of the FSA allowed them. Further, advances in technology and affordability of LED and other complex electronic message signs, unanticipated at the time the FSAs were entered into, require the FHWA to conform and expand on the principles set forth in the July 17, 1996, memorandum.
>
> The policy espoused in the July 17, 1996, memorandum was premised upon the concept that changeable messages that were fixed for a reasonable time period do not constitute a moving sign. If the State set a reasonable time period, the agreed-upon prohibition against moving signs is not violated. Electronic signs that have stationary messages for a reasonably fixed time merit the same considerations.

(emphasis in the original)

Thereafter, under Discussion, the Memorandum states, "[c]hangeable message signs, including Digital/LED Display CEVMS [changeable electronic variable message signs] may be allowed on HBA controlled routes ..." Further, "[b]ased upon contacts with all Divisions, we have identified certain ranges of acceptability that have been adopted in those States that do allow CEVMS that will be useful in reviewing State proposals on this topic. Available information

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indicates that State regulations, policy and procedures that have been approved by the Divisions to date contain some or all of the following standards:

- Duration of Message - Duration of each display is generally between 4 and 10 seconds – 8 seconds is recommended.
- Transition Time - Transition between messages is generally between 1 and 4 seconds – 1-2 seconds is recommended.
- Brightness - Adjust brightness in response to changes in light levels so that the signs are not unreasonably bright for the safety of the motoring public.
- Spacing - Spacing between such signs not less than minimum spacing requirements for signs under the FSA, or greater if determined appropriate to ensure the safety of the motoring public.
- Locations - Locations where allowed for signs under the FSA except such locations where determined inappropriate to ensure safety of the motoring public.

Other standards that the States have found helpful to ensure driver safety include a default designed to freeze a display in one still position if a malfunction occurs ..." Memorandum, pp. 1-2.

A comparison of RMC § 18.16.905(n) with the guidelines set forth in the Memorandum, reveals that the Ordinance complies with these federal standards. For example, subsection (n) provides:

> (1) Each message shall remain fixed for a minimum of eight seconds.
>
> (2) Maximum time allowed for transition between message displays shall be one second.
>
> (4) Illumination shall not change during a display period.
>
> (5) Illumination shall not flash during a display period.
>
> (13) Illuminance. Displays shall have a light sensing device that will adjust the brightness of the display as ambient light conditions change. Each application for a digital off-premises advertising display shall include a photometric plan. The photometric plan shall demonstrate the digital display's maximum light intensity, I foot candles above ambient light. Displays shall not operate at brightness levels of more than 0.3 foot candles above ambient light, as measure using a foot candle meter at a pre-set distance. Pre-set distances to measure the foot candles impact vary with

the expected viewing distances of each size sign as follows [with respect to face size]:

12 feet x 25	(300square feet)	150 feet
10.5 feet x 36 feet	(378 square feet)	200 feet
14 feet x 48 feet	(672 square feet)	250 feet.

The Ordinance fits within the ranges of acceptability set by the federal government in its 2007 Memorandum. The *Scenic Arizona* court rejected this argument because Arizona had not amended its statutes:

> Although the FHWA memorandum may indicate the federal's agency's willingness to allow a state to permit some intermittent billboard lighting, the only standards, rules, or regulations that Arizona has adopted to address electronic billboards are the provisions of the AHBA [Arizona Highway Beautification Act of which ARS 28-7903, prohibiting intermittent lighting, is a section]. Nothing in our record indicates there has been any attempt by ADOT to obtain FHWA approval for any proposed law, regulation, or procedure that exempt digital billboards from the current state prohibition against intermittent lighting .... The memorandum did not eliminate the AHBA's prohibition of intermittent lighting.

Scenic Arizona, supra, at 381.[5]

Based on all of the above, the Ordinance does not violate federal law.

4. No violation of the RMC.

Scenic Nevada alleges that the Ordinance violates the RMC definition of a flashing sign – "a sign which uses blinking, flashing or intermittent illumination, either direct, or indirect or internal." Complaint, ¶ 75. A definition is not a prohibition. Scenic Nevada confuses the definition with the prohibition of intermittent lighting under Arizona law. As discussed above,

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[5] It is notable that Arizona in 2012 amended its statutes consistent with the 2007 Memorandum to allow changeable message billboards. A new section E in ARS 28-7902 states:

> Outdoor Advertising Authorized under this section may include billboards that are capable of changing messages mechanically or electronically by remote or automatic means, if they do not contain any form of animation and if each message displayed remains static or at least eight seconds with a transition of not greater than two seconds. Nothing in this subsection shall prevent a city or county from enforcing or enacting an ordinance regulating billboards including the lighting of billboards.

A copy of this law can be found at http://www.azleg.gov/legtext/50leg/2r/bills/hb2757h.pdf.

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Arizona law is not applicable to the City's regulations and federal guidelines allow illumination that does not flash or change during the display period. In section 18.16.905(n)(1)(2), digital billboards may not flash or change during a display period.

The Ordinance does not violate the RMC's definition of "flashing sign."

III. Conclusion:

Beyond a doubt, Scenic Nevada has failed to plead facts which support a claim for relief. "Dismissal is proper where the allegations are insufficient to establish the elements of a claim for relief." *Seput v. Lacayo*, 122 Nev. 499, 501, 134 P.2d 733, 735 (2006) (overruled on other grounds and internal citation omitted.) Accordingly, the City respectfully requests that the Court grant its Motion to Dismiss Complaint for Judicial Review to Invalidate City of Reno Digital Billboard Ordinance.

***

AFFIRMATION

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

Dated this 26th day of December, 2012.

JOHN J. KADLIC
Reno City Attorney

By: _____
MARILYN D. CRAIG
Deputy City Attorney
Nevada State Bar No. 3304
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Attorneys for Defendant, City of Reno

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the RENO CITY ATTORNEY'S OFFICE, and that on this date, I am serving the foregoing document(s) on the party(s) set forth below by:

_____ Placing an original or true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, at Reno, Nevada, postage prepaid, following ordinary business practices, addressed as follows:

__X__ ECF electronic notification system

MARK WRAY, ESQ.

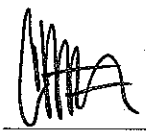
_____ Personal delivery.

_____ Facsimile (FAX).

_____ Federal Express or other overnight delivery.

_____ Reno/Carson Messenger Service.

Dated this 26th day of December, 2012.



Christine L. Felch
An Employee of the Reno City Attorney

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LIST OF EXHIBITS

November 7, 2000, Ballot Question No. R-1 regarding Billboards	Exhibit 1
FSA agreement, effective March 5, 1999	Exhibit 2
2007 Federal Highway Administration Guidance Memo	Exhibit 3

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