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 FIRST AMENDED COMPLAINT 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 First Amended Complaint to Invalidate City of Reno Digital Billboard Ordinance ("First Amended Complaint").

**I. Introduction.**

Boiled down, this lawsuit challenges the digital off-premises advertising displays ordinance adopted by the City on October 24, 2012 ("Digital Billboard Ordinance"), on statutory and constitutional provisions under the Nevada Constitution to become effective on January 24, 2013, but thereafter became subject to a moratorium. Exhibit "1." The Digital Billboard

Ordinance allows static billboards to be converted to digital billboards under certain circumstances.

Prior to the filing of the First Amended Complaint, Scenic Nevada had filed a complaint seeking a petition for judicial review. The City moved to dismiss the complaint on the basis that substantive, not procedural, issues were raised and that Scenic Nevada had not and could not state a claim on which relief could be granted. The Court granted the City's motion on the nature of the issues raised but also gave Scenic Nevada an opportunity to file an amended complaint based upon declaratory relief.

Scenic Nevada, now seeks a declaratory judgment that the Ordinance is "unlawful, void and of no force or effect." Scenic Nevada's Prayer, ¶ 1. Because of defects in Scenic Nevada's First Amendment Complaint, Scenic Nevada cannot state a claim on which relief may be granted pursuant to NCRP 12(b)(5) and is destined to fail. Without a claim on which relief may be granted, Scenic Nevada's complaint for declaratory relief must be dismissed.

**II. Nature of declaratory relief actions.**

Scenic Nevada correctly styles its request for declaratory relief as a prayer. First Amended Complaint, p. 16. A claim for declaratory relief is "technically [a] prayer for relief, not independent causes of action." *Huggins v. Quality Load Servicing*, 2011 U.S. Dist. LEXIS 12639, p. *21 referring to *Anderson v. Deutsche Bank National Trust*, 2010 U.S. Dist. LEXIS 120865, 2010 WL 4386958 at *5.[1]

Declaratory relief actions must meet conditions precedent. The Nevada Supreme Court explains:

> This court has a 'long history of requiring an actual justiciable controversy as a predicate to judicial relief.' In cases for declaratory relief and where constitutional matters arise, this court has required plaintiffs to meet increased jurisdictional standing requirements.

*Stockmeier v. Nevada Department of Corrections Psychological Review Panel*, 122 Nev. 385, 393 (2006) citing to *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986).

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[1] NRS 30.010 to 30.160, inclusive, shall be so interpreted and construed as to effectuate their general purpose to make uniform the law of those states which enact them, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees.

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The definition of a justiciable controversy is:

> (1) there must exist a justiciable controversy; that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy, that is to say, a legally protectable interest; and (4) the issue involved in the controversy must be ripe for judicial determination.

*Kress v. Corey*, 65 Nev. 1, 189 P.2d 352 (1948).

However, even if these conditions precedent were met, they would not protect a complaint for declaratory action from a motion to dismiss. Here, the First Amended Complaint does not contain any causes of action. Instead, the First Amended Complaint merely contains a statement of alleged facts, request for a declaration that the Digital Billboard Ordinance is unlawful, void, and of no force and effect, and an order directing the City to prepare a complete administrative record. Where Scenic Nevada fails to state a claim upon which relief may be granted, as in this First Amended Complaint, the declaratory relief action must be dismissed. "[T]he request for declaratory relief must also fail because Plaintiff has not stated any claims upon which relief may be granted." *Lai L Chiu v. BAC Home Loans Servicing*, 2012 U.S. Dist. LEXIS 72964 at *12.

**III. 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 billboards 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 of 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 ("2000 Initiative"). Exhibit "2." RMC § 18.16.902(a). To allow billboards existing at the

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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 billboards 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.

## IV. The fatal defects in the First Amended 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 a 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 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. The Ordinance is consistent with the (A) Nevada Constitution, (B) 2000 Initiative, (C) Beautification law, and (D) Reno Municipal Code.

### A. Article 19, sec. 2.3 of the Nevada Constitution is applicable to state initiatives, not municipal initiatives.

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

(1) Art. 19, Sec. 2.3 states, in part:

> If a majority of the voters voting on such question at such election votes approval of such *statute* or amendment to a *statute*, it shall become law and take effect upon completion of the canvass of votes by the *Supreme Court*. An initiative measure so approved by the voters shall not be amended, annulled, repealed, set aside or suspended by the Legislature within 3 years from the date it takes effect.
>
> (Complaint, ¶53.) (emphasis added).

2) The Digital Billboard Ordinance is "dependent upon" a "'banking' and relocation system, which purported to allow billboard companies to 'bank' receipts for billboards and move them to new locations within the City ("Banking

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Ordinance") (Complaint, ¶ 26). The Banking Ordinance was adopted in 2002.

(3) The Banking Ordinance amends the 2000 Initiative (Complaint, ¶ 17).

(4) Because there was not three years between the adoption of the 2000 Initiative and the Banking Ordinance, the Banking Ordinance violates Art. 19, sec. 2.3 of the Nevada Constitution and thus the Digital Billboard Ordinance, being dependent upon the Banking Ordinance also violates Art. 19, sec. 2.3 (Complaint, ¶ 18).[2]

As will be shown below, Scenic Nevada misapprehends Art. 19, sec. 2.3, and consequently misapplies Art. 19, sec. 2.3, to municipal initiatives. Art. 19, sec. 2.3, pertains to state initiatives. Accordingly, there is no prohibition on the amendment, annulment, repeal, set aside or suspension of municipal initiatives. Art. 19, "Initiative and Referendum," pertains to initiatives generally. For purposes of this discussion, Art. 19, sec. 2, addresses state initiatives; whereas Art. 19, sec. 4, addresses municipal initiatives. The requirements for state and municipal initiatives greatly differ.

1. 2000 Initiative is not a state initiative.

With respect to state initiatives, Sec. 2.1 states: "[T]he people reserve to themselves the power to propose, by initiative petition, statutes and amendment to statutes ... and to enact or reject them at the polls." Sec. 2.2 states in part with respect to statutory amendments that they shall be:

> [P]roposed by a number of registered voters equal to 10 percent or more of the number of voters who voted at the last preceding general election in not less than 75 percent of the counties in the state, but total number of registered voters signing the initiative petition shall be equal to 10 percent or more of the voters who voted in the entire state at the last preceding general election."

Art. 19, sec. 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

[2] Notably, the First Amended Complaint does not seek a declaration that the Banking Ordinance is unconstitutional.

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> 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. The word, "statute" refers to the enactments of the Legislature. *See*, Chapter 220 of the NRS regarding "General Provisions" and more specifically, NRS 220.110(3)(NRS contains "the laws of this state of general application"). *See, also*, NRS 266.105, et seq. (city council may pass ordinances), and Reno City Charter Sec. 2.080 ("The City Council may make and pass all ordinances ... not repugnant to the Constitution of the United States or the State or Nevada, or to the provisions of Nevada Revised Statutes or of this Charter ...").

Finally, Art. 19, sec. 2.3, provides that the initiative shall become law upon completion of the canvass of voters by the Nevada Supreme Court. If approved by the voters, the initiative shall "not be amended annulled, repealed, set aside or suspended by the legislature within 3 years from the date it takes effect."

A review of the First Amended Complaint reveals the 2000 Initiative does not meet the requirements for a state initiative. Instead of filing a copy of the initiative with the Secretary of State, Scenic Nevada's predecessor, Citizens for Scenic Reno, filed the 2000 Initiative with the Reno City Clerk. First Amended Complaint, ¶8. Instead of the total number of registered voters signing the initiative petition, being 10 percent or more of the voters who voted in the entire state at the last preceding general election, Scenic Nevada alleges the 2000 Initiative was signed by 7,381 "which represented 15% of the votes cast in the previous citywide election." First Amended Complaint, ¶10. Instead of the results being canvassed by the Nevada Supreme Court, the results were canvassed and certified "by the Defendant City Council." First Amended Complaint, ¶ 16. Scenic Nevada has not and cannot demonstrate that it or its predecessor, Citizens for a Scenic Reno, caused the 2000 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). The 2000 Initiative does not qualify as a state initiative.

2. 2000 Initiative is a municipal initiative.

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On the other hand, Art. 19, sec. 4, addresses municipal initiatives and provides that the initiative power is reserved to the registered voters of each municipality. "This power consists of the power to propose laws which thereafter must be enacted or rejected at the polls ..." *Rea v. City of Reno*, 76 Nev. 483, 486 (1960). *Rea* concerned whether NRS 268.010 violated Art. 19, sec. 3 [now sec. 4], of the Nevada Constitution. The Supreme Court determined that NRS 268.010 did not violate the Nevada Constitution because the "provisions of sec. 3 [now sec. 4] are self-executing with reference to state matters, they are not self-executing with reference to ... municipal matters." *Id.* at 485 citing to *Beebe v. Koontz*, 72 Nev. 247, 302 P.2d 486. In other words, NRS 268.010 was a proper exercise of constitutional power given to the Nevada Legislature by the Nevada Constitution to enact ancillary legislation with respect to municipal initiatives. "Self-executing constitutional provisions" are defined as

> [P]rovisions which are immediately effective without the ancillary legislation. Constitutional provision is 'self-executing if it supplies sufficient rule by which right given may enjoyed or duty imposed enforced; constitutional provision is not 'self-executing' when it merely indicates principles without laying down rules giving them force of law.

Black's Law Dictionary, Fifth Edition, p. 1220. In 1962, after the *Rea* case, the voters approved a constitutional amendment that now constitutes Art. 19, sec. 5, which states that "[t]he provision of this article are self-executing but the legislature may provide by law for procedures to facilitate the operations thereof." Thus, the Legislature could historically facilitate the operation of municipal initiatives provided for under Art. 19, sec. 4. However, after the constitutional amendment, the Legislature was authorized to facilitate the operation of all initiatives. Accordingly, NRS Chapter 295, "Initiative and Referendum," contains laws pertaining to state, county, and municipal initiatives.

Art. 19, Sec. 4, provides that municipal initiatives may be instituted "by a number of registered voters equal to 15 percent or more of the voters who voted in the last preceding general ... municipal election." As Scenic Nevada alleges in its First Amended Complaint, "7,381 valid signatures, above the required minimum of 6,790 signatures, which represented 15% of the votes

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cast in the previous citywide election ..." Accordingly, for purposes of this discussion, the 2000 Initiative meets the constitutional requirements for municipal initiatives.

NRS 295.205 provides that municipal initiatives petitions are filed with the City Clerk. As noted above, the 2000 Initiative was filed with the Reno City Clerk. First Amended 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 ..." Consistently, the "results were certified by the Defendant City Council on November 14, 2000 and Ballot Question R-1 became Reno Municipal Code ('RMC') §18.16.902(a)." First Amended Complaint, ¶ 16. Accordingly, for purposes of this discussion, the 2000 Initiative is consistent with the statutory and constitutional requirements for municipal initiatives.

Based upon all the above, Art. 19, sec. 2.3, contains the prohibition on the amendment, annulment, repeal, set aside, or suspension by the legislature within 3 years from the date the [state initiative] takes effect. There is no similar provision for municipal initiatives. Instead, NRS 295.220 provides that a municipal initiative "shall be treated in all respects in the same manner as ordinances of the same kind adopted by the council." (emphasis added). Moreover, 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] As a consequence, there is no prohibition on the amendment, annulment, repeal, set aside, or suspension by the City Council of a municipal initiative. The City could properly adopt the Banking Ordinance and Digital Billboard Ordinance, even if the Digital

[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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Billboard Ordinance were dependent upon the Banking Ordinance and even if the Banking Ordinance amended the 2000 Initiative.

Finally, Scenic Nevada has benefitted from the Banking Ordinance because the billboards that are banked are not adversely affecting traffic safety or the esthetics of the City, the twin bases on which the City may regulate billboards. *Central Hudson v. PSC*, 447 U.S. 557, 100 S. Ct. 23 43 (1980). For good reason, Scenic Nevada has not previously sued the City in the past 10 years since the Banking Ordinance was adopted. If Scenic Nevada had perceived it had been harmed, it had remedies. However, the statute of limitations is three years for a liability created by statute. NRS 11.190(3)(a). Scenic Nevada is guilty of laches.

**B. The Banking Ordinance, and thus the Digital Billboard Ordinance, is in harmony with the 2000 Initiative.**

Scenic Nevada's position is that it is the Banking Ordinance unconstitutionally amends the 2000 Initiative. Since, based on the above, there is no prohibition against amendments of municipal initiatives, the Court need not reach the question of whether the Banking Ordinance is in harmony with the 2000 Initiative. But if the Court reaches this question, Scenic Nevada cannot show that the Banking Ordinance is irreconcilably in conflict with the 2000 Initiative.

Scenic Nevada 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." First Amended Complaint, ¶ 73. There is no "contradiction" between the 2000 Initiative and the Banking Ordinance. The word, "contradiction" suggests an irreconcilable conflict."

Scenic Nevada recites the language of the Initiative in its First Amended 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. First Amended 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 legislature intended.'" *Sandoval v. Bd. of Regents*, 119 Nev. 148, 153, 67 P.3d.

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902, 905 (2003)(internal citation omitted). In this case, it is the Reno voters who approved and passed the Initiative. Thus, the City voters are the "legislature" and the related legislative history includes the language of the Ballot Initiative, the explanations, and the vote.

Even though Scenic Nevada made reference to the Initiative, Scenic Nevada chose not to attach the Ballot Initiative to its Complaint. First Amended 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)(6), the federal companion to NRCP 12(b)(5), 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" (First Amended Complaint, ¶ 16), and Scenic Nevada asserts that allowing billboards to be "banked" is "contrary to the plain mandate of the voters in passing Ballot Question R-1." First Amended Complaint, ¶ 17. In other words, Scenic Nevada referred to the Initiative Ballot in its First Amended Complaint and the document is central to Scenic Nevada's assertion that the City violated the 2000 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.

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 2000 Initiative but instead is harmonious with it as no additional billboards are allowed under the Banking Ordinance. By the

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same token, the Digital Billboard Ordinance is harmonious with the 2000 Initiative in that the Ordinance does not allow for additional billboards.

But even if there were an irreconcilable conflict between the 2000 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 First Amended Complaint, ¶¶ 16 and 17, 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 2000 Initiative initially prohibited relocation of billboards, the Banking Ordinance properly amended the 2000 Initiative because the City may amend the 2000 Initiative as any other like ordinance as discussed above.

**C. No violation of the beautification law.**

1. No violation of State law.

Scenic Nevada alleges that the Ordinance violates state law. First Amended 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 First Amended Complaint, as it did in its original complaint, refers to a 1972 federal-state agreement ("FSA"). First Amended Complaint, ¶ 61. 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

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"3," *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 First Amended Complaint retained some viability with respect to the Nevada FSA, it is fatally flawed on other grounds. The "state law" (First Amended Complaint, ¶ 65) on which the First Amended Complaint is based is NDOT's regulations inapplicable to the City. To carry out a Nevada FSA, NRS 410.400 states that "[t]he Board [of NDOT] shall prescribe:

> (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 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].

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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 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, the Nevada Legislature is considering Assembly Bill ("AB") 305, as amended, and attached hereto as Exhibit "4." AB 305 amends NRS 410.400 allowing the NDOT Board to specify "the operational requirements for commercial electronic variable message signs which conform to any national standards promulgated by the Secretary of Transportation pursuant to 23 U.S.C. §131," among other things. "'Commercial electronic variable message sign' means a self-luminous or externally illuminated advertising sign which contains only static messages copy which may be changed electronically." On April 16, 2013, the Assembly Committee on Transportation recommended "do pass" as amended. AB 305 confirms that the national standards promulgated by the Secretary of Transportation apply to NDOT, not the City. Specifically, AB 305 sets forth that it does not have a fiscal effect on local government, but does have a fiscal effect on state government. The point is Chapter 410 of the NRS pertains to state, not local governments. On April 19, 2013, the bill was referred to the Senate Committee on

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Transportation. The City requests the Court take judicial notice of AB 305 as it is capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.

Notwithstanding the above, Scenic Nevada refers to *Scenic Arizona v. City of Phoenix Board of Adjustment*, 268 P.3d 370 (Ariz. App. 2011). First Amended Complaint, e.g. ¶ 36. 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 would have done so. If the Nevada Legislature had intended to prohibit intermittent lighting to be applicable to local governments, 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 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.

2. 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:

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> 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 "5." *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).

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*

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> *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 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.

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- 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, in 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

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> prohibition against intermittent lighting .... The memorandum did not eliminate the AHBA's prohibition of intermittent lighting.

*Scenic Arizona, supra*, at 381.

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

3. 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." First Amended 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, 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. Moreover, as the Ninth Circuit explains: "We have explained that deference is due to a city's legislative decision addressing the spread of billboard advertising, as these decisions require the balancing of interests such as traffic safety, revenue, and aesthetics." *Charles v. City of L.A.*, 697 F.3d 1146, 1156 (9th Circ. 2012).

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

**V. An administrative record of the hearings sheds no light on the substantive issues.**

In addition to the declaratory relief, Scenic Nevada seeks an order that the City produce the complete administrative record relating to the digital sign ordinance from 2008 to present. First Amended Complaint, 16: 25-28; 17: 1-2. This Court has ruled that substantive issues were raised improperly in the original complaint for a petition for judicial review and allowed Scenic Nevada the opportunity to file an amended complaint for declaratory relief to address the substantive issues. Order, 1: 23-24. More specifically, this Court ruled that "Plaintiff's challenge is not procedural in nature. Thus, the production of an administrative record will not assist the Court in ruling on the substantive issues. To the degree that Scenic Nevada is pursuing any administrative procedural issues, such a request for an order is untimely. The Supreme Court of New Mexico explains:

> We perceive no sound judicial policy for allowing a party aggrieved by an administrative decision to forego an available avenue of

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> judicial review only to allow that same party to initiate judicial review in another form at some future date that no one can predict or rely upon with any certainty. Indeed, the efficient administrative of justice requires just opposite. Once invoking the administrative review process offered by the City, the Smiths were obligated to either pursue a timely appeal ... or, at a minimum, initiate a declaratory judgment action with the same time frame. Having failed to do so, we conclude that the district court lacked jurisdiction to rule on the Smith's claim for declaratory relief.

*Smith, et al., v. City of Santa Fe*, 171 P.3d 300, 307 (N.M. 2007). The 25-day period for filing administrative review has passed. NRS 278.3195. The New Mexico Supreme Court further explained a declaratory relief action may be used to challenge a municipality's authority "provided that the declaratory judgment action is not used to circumvent established procedures for seeking judicial review of a municipality's administrative decisions."

**VI. Failure to serve the Nevada Attorney General.**

A review of Scenic Nevada's Certificate of Service regarding the First Amended Complaint indicates that the Attorney General was not served. When an ordinance is challenged as unconstitutional, the Attorney General is to be served. NRS 30.130.

**VII. 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.) Scenic Nevada has not and cannot cure the deficiencies that were present in the original complaint and are present in the First Amended Complaint. Without a claim for which relief may be granted, the declaratory action must dismissed.

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Accordingly, the City respectfully requests that the Court grant its Motion to Dismiss First Amended Complaint to Invalidate City of Reno Digital Billboard Ordinance with prejudice.

***

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 24th day of April, 2013.

JOHN J. KADLIC
Reno City Attorney

By: _____
MARILYN D. CRAIG
Deputy City Attorney
Nevada State Bar No. 3304
P. O. Box 1900
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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.

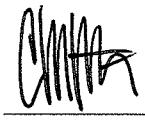
_____ Personal delivery.

_____ Facsimile (FAX).

_____ Federal Express or other overnight delivery.

_____ Reno/Carson Messenger Service.

Dated this 24th day of April, 2013.



Christine L. Felch
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## LIST OF EXHIBITS

| | |
|---|---|
| Digital Billboard Ordinance | Exhibit 1 |
| November 7, 2000, Ballot Question No. R-1 regarding Billboards | Exhibit 2 |
| FSA agreement, effective March 5, 1999 | Exhibit 3 |
| AB 305 | Exhibit 4 |
| 2007 Federal Highway Administration Guidance Memo | Exhibit 5 |

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