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Dec 22 2014 01:14 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

IN THE SUPREME COURT OF THE STATE OF NEVADA

SCENIC NEVADA, INC.

Appellant,

Case No. 65364

v.

CITY OF RENO, a Political Subdivision
of the State of Nevada,

Respondent.

_____ /

APPELLANT'S OPENING BRIEF

Mark Wray, #4425
Law Offices of Mark Wray
608 Lander Street
Reno, Nevada 89509
(775) 348-8877
(775) 348-8351 fax
mwray@markwraylaw.com
Attorney for Appellant
SCENIC NEVADA, INC.

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NRAP 26.1 DISCLOSURE STATEMENT


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

All parent corporations and publicly-held companies owning 10% or more of the party's stock: None.

Names of all firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court: Mark Wray.

If litigant is using a pseudonym, the litigant's true name: None.

Dated this 22nd day of December, 2014.



MARK WRAY
Bar No. 4425
LAW OFFICES OF MARK WRAY
608 Lander Street
Reno, Nevada 89509
(775) 348-8877
(775) 348-8351 fax
Attorney for Appellant
SCENIC NEVADA, INC.

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25
26
27
28

TABLE OF CONTENTS

	<u>Page</u>
I Jurisdictional Statement	1
II Issues for Review	1
III Statement of the Case	1
A. Nature of the Case	1
B. Course of the Proceedings	1
C. Disposition Below	2
IV Statement of Facts	2
V Summary of Argument	9
VI Argument	10
A. Standard of Review	10
B. The District Judge’s Favorable Perception of Billboards Is Not Supported by the Record and <i>De Novo</i> Review Is Appropriate	10
C. The Language of the Ballot Initiative Has A Definite and Plain Meaning	12
D. The Billboard Industry Understands the Plain Meaning of “New” Billboard	14
E. The City’s Artifice that “New Billboard Construction” Was Not Taking Place	14
F. The Billboard Initiative Did Not Merely “Cap” the Number of Billboards at the Number in Existence on November 14, 2000	17
G. Scenic Nevada’s Interpretation of the Billboard Initiative Does Not Constitute a “Taking” in Violation of the Fifth Amendment	20
H. The Digital Billboard Ordinance Violates	22

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

Art. 19, §§ 2.3 and 4 of the Nevada
Constitution

I. The District Court Erred in Holding that
a City Council Can Immediately Repeal
a Municipal Initiative 25

VII Conclusion 27

Certification of Counsel 28

1 **TABLE OF AUTHORITIES**

2

3 Page

4 **CASES**

5 *Balboa Ins. Co. v. Southern Distrib. Corp.*, 101 Nev. 774, 12

6 710 P.2d 725 (1985)

7 *Bd. of County Comm'rs v. CMC of Nevada*, 99 Nev. 739, 13, 22

8 670 P.2d 102 (1983)

9 *City of Las Vegas v. Macchiaverna*, 99 Nev. 256, 12

10 661 P.2d 879 (1983)

11 *City of Reno v. Citizens for Cold Springs*, 236 P.3d 10 (Nev. 2010) 10, 12, 22

12 *Davis v. Beling*, 278 P.3d 501, 508 (2012) 12

13 *Dept. of Motor Vehicles v. Lovett*, 110 Nev. 473, 22

14 874 P.2d 1247 (1994)

15 *Eller Media Co. v. City of Reno*, 118 Nev. 767, 59 P.3d, 437 (2002) 3, 24

16 *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 10

17 217 P.3d 546 (2009)

18 *Hernandez v. Bennett-Haron*, 287 P.3d 305 (Nev. 2012) 10

19 *McGrath v. State, Dep't of Pub. Safety*, 123 Nev. 120, 12

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22 *State v. State of Nevada Employees Ass'n, Inc.*, 102 Nev. 287, 12

23 720 P.2d 697 (1986)

24

25

26

27

28

	<u>Page</u>
1	
2	
3	
	NEVADA CONSTITUTION
4	Nevada Constitution Art. 19, § 2 25
5	Nevada Constitution Art. 19, § 2(1) 23
6	
7	Nevada Constitution Art. 19, § 2.3 10, 24, 25, 26
8	
9	Nevada Constitution Art. 19, § 3 23
10	Nevada Constitution Art. 19, § 4 10, 24, 25, 26, 27
11	
12	
	STATUTES
13	
14	NRS 295.220 26
15	NRS 405.020 11
16	
17	NRS 410.360(1) 11
18	
	RENO MUNICIPAL CODE
19	
20	RMC § 18.06.920(A) 3, 5
21	RMC § 18.06.920(B) 5
22	RMC § 18.16.902(a) 3, 4, 24
23	
24	RMC § 18.16.905(1) 8, 20
25	RMC § 18.16.908 6
26	
27	RMC § 18.24.203.570(23) 13
28	

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RULES

NRAP 3A(b)(1)

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SECONDARY SOURCES

Merriam-Webster Dictionary

12, 13

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I

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment under NRAP 3A(b)(1). Judgment was entered March 27, 2014. *JA 476*. Notice of Entry of Judgment was filed March 28, 2014. *JA 503*. Notice of Appeal was filed March 28, 2014. *JA 507*.

II

ISSUES FOR REVIEW

This appeal raises two issues:

1. Does the initiative enacted by the voters of Reno that bans construction of billboards and prohibits issuance of permits for their construction merely amount to a cap on the number of billboards?
2. If the voters enact a municipal initiative banning construction of billboards and prohibiting the issuance of permits for their construction, does it violate the Nevada Constitution for the city council to amend, annul, repeal, set aside or suspend that initiative within the first three years of its passage?

III

STATEMENT OF THE CASE

A. Nature of the Case

This is an action to invalidate the City of Reno digital billboard ordinance, which unconstitutionally violates the voters' initiative banning the construction of billboards and prohibiting the issuance of permits for their construction.

B. Course of the Proceedings

On October 24, 2012 the Reno City Council adopted Ordinance No. 6258, entitled "Digital Off-Premises Advertising Displays, including Light-Emitting Diode (LED)", authorizing the issuance of permits for construction of digital billboards in Reno (hereafter, the "digital billboard ordinance"). *JA 520*. The ordinance was to take effect January 24, 2013.

1 On November 16, 2012, Scenic Nevada filed a “Complaint for Judicial
2 Review to Invalidate City of Reno Digital Billboard Ordinance.” *JA 001*.

3 On December 12, 2012, the City adopted a moratorium on accepting
4 applications for permits to construct digital billboards until this litigation is
5 resolved. *JA 1412*.

6 On March 29, 2013, District Judge Patrick Flanagan granted the City’s
7 motion to dismiss Scenic Nevada’s complaint, with leave to amend. Judge
8 Flanagan held that Scenic Nevada’s challenge to the digital billboard ordinance
9 could not proceed by petition for judicial review and had to go by complaint for
10 declaratory relief. *JA 028*.

11 On April 15, 2013, Scenic Nevada filed its “First Amended Complaint to
12 Invalidate City of Reno Digital Billboard Ordinance.” *JA 032*. On July 23, 2013,
13 the district court denied the city’s second motion to dismiss. *JA 057*.

14 After initially filing an answer on July 30, 2013, the City filed an amended
15 answer to Scenic Nevada’s first amended complaint on August 6, 2013. *JA 068*.

16 On February 18, 2014, Judge Flanagan denied the City’s motion for
17 summary judgment. *JA 142*.

18 On February 24, 2014, the district court held a one-day bench trial. *JA 145*.

19 **C. Disposition Below**

20 On March 27, 2014, the district court issued a written decision and order
21 granting judgment in favor of the City and against Scenic Nevada. *JA 476*.

22 **IV**

23 **STATEMENT OF FACTS**

24 Following repeated attempts by Reno citizens to persuade the Reno
25 Planning Commission and Reno City Council to enact stronger billboard controls,
26 a grassroots, volunteer organization called "Citizens for a Scenic Reno"
27 (“CFASR”) formed on January 20, 2000. *JA 187-191, 1853*. CFASR changed its
28

1 name to “Citizens For A Scenic Northern Nevada” and in September 2002,
2 adopted its current name, “Scenic Nevada”. *JA 215*.

3 On March 29, 2000, CFASR filed with the City Clerk an Initiative Petition
4 to qualify a measure for the ballot that would ban the construction of billboards.
5 *JA 587*. By July 25, 2000, CFASR had collected 7,381 valid signatures, above the
6 required minimum of 6,790 signatures, which represented 15% of the votes cast in
7 the previous citywide election, in order to qualify its initiative for the 2000 general
8 election ballot. *JA 1841 (Trial Exhibit 223)*.

9 Ballot Question R-1 read:

10 The construction of new off-premises advertising
11 displays/billboards is prohibited, and the City of Reno may not issue
12 permits for their construction.

13 *JA 587*.

14 On August 24, 2000, Eller Media Co. sued the City to remove the initiative
15 from the ballot. On October 14, 2000, the Hon. Jerome Polaha, District Judge,
16 found in favor of the City and against Eller Media. The initiative remained on the
17 ballot. *JA 193*. Eller Media appealed. On Dec. 17, 2002, this Court affirmed, in
18 *Eller Media Co. v. City of Reno*, 118 Nev. 767, 59 P.3d 437 (2002), holding that
19 the billboard petition was legislative in character, a proper subject for an initiative
20 petition, and reflected a citywide change in policy towards off-premise
21 advertising. A petition for rehearing was denied Feb. 6, 2003. *JA 1814 (Trial*
22 *Exhibit 221)*.

23 At the polls on November 7, 2000, of the 57,782 votes cast, 32,765, or 57%,
24 voted in favor of Ballot Question R-1. *JA 193; JA 1843 (Trial Exhibit 223)*.

25 The results were certified by the Reno City Council on November 14, 2000, and
26 Ballot Question R-1 became Reno Municipal Code (“RMC”) §18.06.920(A) (later
27 the numbering was changed to §18.16.902(a)), entitled “Restrictions on
28 Permanent Off-Premises Advertising Displays”. *JA 193, JA 519 (Trial Exhibit 2)*.

1 RMC §18.16.902(a) states:

2 The construction of new off-premises advertising
3 displays/billboards is prohibited, and the City of Reno may not issue
4 permits for their construction.

5 *JA 060, 519 (Trial Exhibit 2).*

6 The ink was barely dry on the law before the City issued permits for
7 construction of new billboards. *JA 194-202; JA 1800-1824 (Trial Exhibit 219).*
8 In 1999, Outdoor Media Dimensions, a billboard company, had sued the City in
9 federal court. *JA 196, 1802.* In the beginning of December, 2000, less than a
10 month after the citizens of Reno enacted the initiative, the City and Outdoor
11 Media entered into a settlement for the City to pay \$50,000 and for Outdoor
12 Media to be issued permits for the construction of 12 billboards. *JA 1810-1811.*
13 In exchange, Outdoor Media dismissed the lawsuit on December 13, 2000. *JA*
14 *1808, 1814.*

15 Thereafter, the City also settled lawsuits with other billboard companies.
16 *JA 199.*

17 The settlement with Clear Channel Outdoor related to a municipal project
18 called ReTRAC. *JA 200.* ReTRAC was a trench built with municipal bond
19 money through downtown Reno so that the freight and passenger trains would
20 pass the downtown casinos below ground. *JA 199-200; JA 1553 (Trial Exhibit*
21 *202).* Clear Channel billboards were removed for ReTRAC, and instead of
22 compensating Clear Channel for them, the City issued permits, or receipts, for
23 future billboards. *JA 201.*

24 The settlement with YESCO in Second Judicial District Court CV02-03571
25 gave YESCO permits for future billboards as well. *JA 201-202.*

26 The City thus put itself into the position of needing to enact ordinances to
27 allow future billboard construction, as part of settlements the City made with
28

1 billboard companies, despite the citizens' initiative banning construction and
2 permits for new billboards.

3 Q Okay. So do you have a handle, you think, on the why
4 question, why the city did not want to literally stop the construction
5 of new billboards?

6 A Yes. They had a different agenda. They could not pay
7 for all the billboards that they wanted to have come down. So they
8 could not allow the ballot initiative to stand. They could not allow no
9 new construction and they could not allow – they could not stop
10 handing out permits, because they didn't want to pay for the
11 billboards that they wanted to have come down.

12 *JA 202:11-20.*

13 The first of these ordinances was adopted January 22, 2002, as Ordinance
14 No. 5295. The ordinance codified the ballot initiative as RMC §18.06.920(A), *see*
15 *JA 542 (Trial Exhibit 4)*, but also added a new subsection, RMC §18.06.920(B), to
16 carry out the agenda with the billboard companies. Subsection (B) stated, in
17 relevant part:

18 In no event shall the number of off-premises advertising displays
19 exceed the number of existing off-premises advertising displays
20 located within the city on November 14, 2000. This number shall
21 include all applications for off-premises advertising displays approved
22 in final action by the City on or before November 14, 2000, but
23 unbuilt as well as those applications approved by a court of competent
24 jurisdiction.

25 The City and the district court came to refer to subsection (B) as the
26 “conforming ordinance”, *see JA 478*, as if to signify “conforming” of the ballot
27 initiative with the City's perceived need to appease the billboard companies. The
28 addition of subsection (B), immediately following the subsection codifying the
citizens' initiative, introduced the key concept that the City would come to rely
upon later as the City's interpretation of the ballot initiative; to wit, that “no new
billboards” meant a cap on the number but did not prohibit new billboards from

1 being constructed to replace ones that were removed. *JA 478:4-6*. As the district
2 court said about subsection (B), “this interpreted the ‘no new billboards’ language
3 in the Initiative to mean that no *additional* billboards could be built in the City of
4 Reno, thus capping the number of billboards in the City.” *Id.*

5 The second of the ordinances adopted in the wake of the citizens’ initiative
6 was Ordinance No. 5461, adopted June 11, 2003, which became known as the
7 “banking and relocation ordinance.” *JA 1569 (Trial Exhibit 203)*. This ordinance,
8 subsequently codified in RMC §18.16.908, formally enacted a system allowing a
9 billboard company to remove a billboard in one location and “bank” a receipt for
10 up to 10 years until a new permitted location could be found. *JA 1572*. Using
11 these “banked” receipts, a billboard company could construct a new billboard,
12 often in a new location, where no billboard stood before, by obtaining a new
13 building permit for the new billboard. *JA 204, 1572; JA 1607 (Trial Exhibit 207)*.

14 The City Council’s adoption of the banking and relocation system
15 effectively repealed the ballot initiative by allowing City staff to issue permits for
16 new billboard construction when existing billboards are removed. *JA 35*.
17 Specifically, the ordinance allowed for construction of new billboards and for
18 permits to be issued for their construction. It provided that a billboard “may be
19 relocated to a permitted location” as long as two permits are obtained; one to
20 remove the old billboard and one to relocate the new billboard to a new location.
21 *JA 1572*. The billboard permit “bank” was to provide city staff a mechanism for
22 tracking permits of removed billboards. *Id.*

23 Scenic Nevada objected, but those objections fell on deaf ears. On May 8,
24 2003, the City Attorney’s Office prepared a memo to the Mayor and City Council
25 on “Constitutionality of Billboard Regulations and Legality of Ordinance
26 Allowing Relocation of Billboards.” *JA 1825-1830 (Trial Exhibit 220)*. The
27 memo states:
28

1 There exists substantial debate regarding the meaning of
2 Question R-1 and whether its language can be read to allow the
3 relocation of an existing billboard. Doug Smith, Chairman of Scenic
4 Nevada, has adamantly insisted that relocation of existing billboards
5 is prohibited under the initiative, and that it was never the intent of
6 the drafters of the initiative to merely place a cap on the number of
7 billboards. *See* letter from Doug Smith, dated January 8, 2003
8 (Exhibit A).

9
10 *JA 1827.* At trial, the judge asked Scenic Nevada director Lori Wray about the
11 position of Scenic Nevada on the banking and relocation ordinance.

12 Q The next phrase says, more increase the number of
13 allowable signs, what did you mean by that?

14 A Kind of the same thing, that they wanted – the City
15 Council called it a deal. The 2002 ordinance was a deal with the
16 industry. So that we'll cap place a cap on it and you can bank and
17 relocate and they're going to be allowed in all of these locations, and
18 that's the deal, which is what they all agreed to.

19 And then in this meeting, they said to us, you know, this is the
20 deal that everybody agreed to. And we said we didn't agree to it, but
21 the City did and they passed the ordinance over our objections.

22 *JA 271:24-272:11.*

23 After undermining the ballot initiative with the conforming, banking and
24 relocation ordinances, the City took a further step in 2008, with the introduction of
25 the digital billboard ordinance. *JA 217-218; JA 1053 (Trial Exhibit 29).* Digital
26 billboards are computer controlled variable message electronic signs whose
27 informational content can be changed or altered by means of computer-driven
28 electronic impulses (including "light emitting diodes" or "LED" light bulbs).
LED bulbs turn off and on every eight seconds to display a different
advertisement in a sequence of eight rotating advertisements, day and night. *JA*

1 220, *JA 520 (Trial Exhibit 3)*. Digital billboard displays are by definition a new
2 type of billboard, using new technology. *JA 223; JA 1453 (Trial Exhibit 200)*. In 2

3 Up to that time, all billboard lighting in Reno was required to be directed
4 toward the billboard, and not toward the street. This requirement was codified in
5 RMC§18.16.905(l), which effectively made digital billboards illegal in Reno. In
6 contrast to a traditional, or static, billboard where light shines onto the display, the
7 lighting of a digital billboard shines toward the public roads. *JA 215-216, JA 542*
8 *(Trial Exhibit 4)*.

9 On February 13, 2008, Councilman Dwight Dortch, at the behest of the
10 billboard industry, introduced an agenda item to direct City staff to initiate a text
11 amendment that would eliminate RMC §18.16.905(l) and allow the construction
12 and permitting of new digital billboards. *JA 217-218; JA 1053 (Trial Exhibit 29)*.

13 Over the next four years, Scenic Nevada fought against the proposed digital
14 billboard ordinance by participating with city staff and representatives of the
15 billboard industry in at least 16 workshops and hearings on the proposed
16 ordinance. *JA 177, 185, 226, 235; JA 1062 (Trial Exhibit 31); JA 1877*. Dortch
17 pushed the interests of the billboard industry by seeking to lessen or even
18 eliminate new restrictions on digital billboard construction. *JA 228; JA 1596*
19 *(Trial Exhibit 206)*. Scenic Nevada objected that the 2000 ballot initiative
20 prohibited the city from allowing new billboard construction, including new
21 construction of digital billboards. *JA 37, 62, 176, 239, 242, 243; JA 1198 (Trial*
22 *Exhibit 48); JA 1207 (Trial Exhibit 50); JA 1889 (Trial Exhibit 229); JA 1964*
23 *(Trial Exhibit 235)*.

24 Beginning with the initial draft in 2008 and at all times, the text amendment
25 for the proposed digital billboard ordinance was based upon, and dependent upon,
26 the City Council's adoption of the 2002 and 2003 "conforming" and banking and
27 relocation ordinances. *JA 227; JA 283:6-8* (testimony of City planner Claudia
28

1 Hanson confirming that to build a digital billboard requires banked receipts, or,
2 billboard removals and relocations - *JA 326:12-23*).

3 In November 2011, during the administrative battles, Scenic Nevada
4 pressed the Reno Planning Commission to vote on halting proceedings toward the
5 digital billboard ordinance due to the citizens' 2000 ballot initiative. The motion
6 failed by a 2-3 vote. A divided Planning Commission then recommended a digital
7 billboard ordinance to the City Council. Scenic Nevada appealed. *JA 39, 62,*
8 *240; JA 1132 (Trial Exhibit 38), JA 1146 (Trial Exhibit 39), JA 1151 (Trial*
9 *Exhibit 40); JA 39, 62, 1163 (Trial Exhibit 41).*

10 After more workshops, members of the City Council and representatives of
11 the billboard industry came to an understanding on how they wished to proceed
12 and the City Council held a public hearing on the draft ordinance on July 18,
13 2012, where Scenic Nevada's appeal finally would be heard. Consistent with its
14 opposition at hearings for the past four years, Scenic Nevada opposed the draft
15 and presented arguments against its passage. The City Council approved the first
16 reading of the draft ordinance over Scenic Nevada's objections. *JA 246; JA 1952*
17 *(Trial Exhibit 231)*. More continuances followed, for more rewrites, as Scenic
18 Nevada objected. *JA 41, 63, 251, 252; JA 1959 (Trial Exhibit 232); JA 1962*
19 *(Trial Exhibit 233)*. Despite those objections, on October 24, 2012, the City
20 Council approved the second and final reading of the digital billboard ordinance.
21 *JA 49, 63*. Scenic Nevada filed the lawsuit November 16, 2012. *JA 1*.

22 V

23 SUMMARY OF ARGUMENT

24 The ballot initiative banning construction of billboards and prohibiting
25 issuance of permits for their construction is an unambiguous expression of
26 legislative intent by the voters of Reno, which the City of Reno will not
27 acknowledge because the City is pursuing a different agenda with the billboard
28 industry. The district court erred in interpreting the citizens' initiative to be

1 merely a “cap” which allows the City to continue issuing permits for construction
2 of new billboards up to the “cap” amount. The City’s digital billboard ordinance
3 incorporates and is dependent upon unconstitutional “conforming” and banking
4 and relocation ordinances adopted by the City in violation of the initiative powers
5 of the people under Nevada Constitution Art. 19, §§ 2.3 and 4. The digital
6 billboard ordinance violates the ballot initiative and the Nevada Constitution.

7
8 **VI**
ARGUMENT

9 **A. Standard of Review**

10 “In the absence of any factual dispute, this court reviews a district court's
11 decision to grant or deny declaratory and injunctive relief *de novo*.” *Hernandez v.*
12 *Bennett-Haron*, 287 P.3d 305, 310 (Nev. 2012), citing *Nevadans for Nevada v.*
13 *Beers*, 122 Nev. 930, 942, 142 P.3d 339, 347 (2006). The facts of this case are
14 undisputed.

15 Scenic Nevada also seeks to invalidate a municipal ordinance on grounds
16 that it conflicts with the voter’s initiative. “Courts also apply a *de novo* standard
17 of review when interpreting municipal code provisions.” *City of Reno v. Citizens*
18 *for Cold Springs*, 236 P.3d 10, 16 (Nev. 2010).

19 Scenic Nevada contends the digital billboard ordinance violates the Nevada
20 Constitution. This Court reviews *de novo* determinations of whether a statute is
21 constitutional. *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 509,
22 217 P.3d 546, 551 (2009).

23 **B. The District Judge’s Favorable Perception of Billboards Is Not**
24 **Supported by the Record and *De Novo* Review Is Appropriate**

25 It could be fairly concluded from his written decision that the Hon. Patrick
26 Flanagan, District Judge, did not cast his ballot in the election of 2000 in favor of
27 the ballot initiative to ban construction of new billboards. *JA 476-501*. An
28 inkling of his viewpoint on the subject emerges from the opening paragraph of his

1 decision, in which he equates economic development with billboards, and offers
2 the results of his independent research at www.visitrenotahoe.com: “The City of
3 Reno drew over 4.6 million visitors in 2013, many of whom are guided to their
4 destination by billboards on the public highways.”

5 The website does not refer to billboards, however, so the statement that
6 visitors use billboards to find their way to Reno is the judge’s opinion rather than
7 a finding of fact. Certainly, no evidence to support the judge’s opinion was
8 introduced at trial. The evidence was that 57% of Reno voters in 2000 favored a
9 ban on billboard construction. To the extent the ballot box is evidence of a
10 preference, most Reno voters -- people who actually live in Reno -- prefer that
11 construction of billboards ceases.

12 Nor was there any evidence at trial that visitors, once they are *in* Reno,
13 want to see billboards, and after all, it is billboards *in* Reno that the 2000 ballot
14 initiative actually addresses.

15 While the district judge wrote that the City’s digital billboard ordinance
16 balances “the commercial needs of its business community and the scenic
17 preservation aspirations of its citizens, enhancing both the economy and the
18 community” (*JA 500:22-24*), there is no evidence that billboards enhance the
19 economy of Reno or any other place. Indeed, the City’s excuse for the digital
20 ordinance was that trades would help clear the city of billboard “clutter”. *JA*
21 *265:24-266:6*. Scenic Nevada’s description was that “billboards are litter on a
22 stick”. *JA 128-141*. Billboards are not inherently beneficial, even according to
23 the Nevada Legislature, which adopted laws declaring billboards to be public
24 nuisances unless erected in certain areas and in compliance with statutory
25 requirements. *See* NRS 405.020; NRS 410.360(1).

26 Pronouncements as to the alleged benefits of billboards are set forth at the
27 beginning and end of the district court’s decision. *JA 476-501*. These are
28 opinions of the district court rather than findings from facts in evidence. It is

1 appropriate to apply a *de novo* standard of review to the district court’s decision.
2 *Nevadans for Nevada v. Beers, supra; City of Reno v. Citizens for Cold Springs,*
3 *supra.*

4 **C. The Language of the Ballot Initiative Has a Definite and Plain**
5 **Meaning**

6 The ballot initiative states:

7 “The construction of new off-premises advertising
8 displays/billboards is prohibited, and the City of Reno may not issue
9 permits for their construction.”

10 If language is plain and unambiguous, it must be given effect. *State v. State*
11 *of Nevada Employees Ass’n, Inc.*, 102 Nev. 287, 289-290, 720 P.2d 697, 699
12 (1986). When a statute uses words which have a definite and plain meaning, the
13 words will retain that meaning unless it clearly appears that such meaning was not
14 so intended. *Balboa Ins. Co. v. Southern Distrib. Corp.*, 101 Nev. 774, 710 P.2d
15 725 (1985); *City of Las Vegas, v. Macchiaverna*, 99 Nev. 256, 661 P.2d 879
16 (1983). When examining the plain meaning of a statute, “we presume that the
17 Legislature intended to use words in their usual and natural meaning.” *McGrath*
18 *v. State, Dep’t of Pub. Safety*, 123 Nev. 120, 123, 159 P.3d 239, 241 (2007). “We
19 interpret a clear and unambiguous statute pursuant to its plain meaning by reading
20 it as a whole and giving effect to each word and phrase.” *Davis v. Beling*, 278
21 P.3d 501, 508 (2012).

22 The first independent clause prohibits the construction of new billboards.
23 The second independent clause prohibits the issuance of permits for their
24 construction. Both independent clauses address prohibition of construction.

25 Construction has a usual and natural meaning. Construction is a noun that
26 means “the act or process of building something.” Merriam-Webster Dictionary,
27 www.m-w.com.

1 The something that is prohibited from being built is a new billboard.
2 “New” has a usual and natural meaning. “New” means “not old: recently born,
3 built or created.” Merriam-Webster Dictionary, www.m-w.com.

4 A billboard is defined in RMC §18.24.203.570(23) as follows:

5 Off premises advertising display. Any arrangement of material,
6 words, symbols or any other display erected, constructed, carved,
7 painted, shaped or otherwise created for the purpose of advertising or
8 promoting the commercial interests of any person, persons, firm,
9 corporation or other entity, located in view of the general public
10 which is not principally sold, available or otherwise provided on the
11 premises on which the display is located. Any display which is
12 composed of at least 80% of on-premises display is an on-premises
13 sign. An off-premises advertising display includes its structure. Off-
14 premises advertising displays are commonly called billboards. (Ord.
15 NO. 5295, § 1, 1-22-02).

16 *JA 536-537.*

17 “Courts must construe ordinances in a manner that gives meaning to all of
18 the terms and language.” *Bd. of County Comm'rs v. CMC of Nevada*, 99 Nev.
19 739, 744, 670 P.2d 102, 105 (1983). Using the ordinary meanings of all of the
20 terms and language of the initiative, the first independent clause prohibits the act
21 or process of building a recently built or created billboard, and the second
22 independent clause prohibits the issuance of a permit for the act or process of
23 building a recently built or created billboard.

24 Noting that the initiative contains two independent clauses, the district court
25 wrote: “This implies equal attention for both ideas in each independent clause.
26 This provides little assistance to the court.” *JA 490:22-23*. On the contrary, the
27 two independent clauses, both aimed at preventing the building of something new,
28 should have assisted the district court. Not only is the act of construction banned;
the separate act of issuing a permit for construction also is prohibited. The
initiative was designed to prohibit both acts.

1 **D. The Billboard Industry Understands the Plain Meaning of**
2 **“New” Billboard**

3 Trial Exhibit 211 consisted of copies of building permits for new billboards
4 applied for by YESCO Outdoor Media on May 24, 2011 and Clear Channel
5 Outdoor on July 3, 2012. *JA 1613-1622.*

6 In the YESCO application, the description of work states: “Erect new
7 billboard.” *JA 206-207; JA 1613.* The City planning staff notations that
8 accompany the application state the billboard is being erected pursuant to “New
9 Billboard Construction Bank Receipt Y-10”. *JA 1614* (emphasis added). The
10 trail report states: “New billboard meets all spacing requirements.” *JA 1614.*

11 On the Clear Channel application, the description of work states: “New
12 billboard structure to replace 2 units removed by Moana Lane widening.” *JA 208;*
13 *JA 1615.*

14 Despite the efforts of the City to muddy the issue (see below), the people
15 who build billboards knew full well in 2011 and 2012 that they were building new
16 billboards. To the people who build them, the construction of a new billboard is
17 not an elusive concept. By stating what they were doing, matter-of-factly and
18 without artifice, the billboard companies confirmed that construction of a new
19 billboard has a plain and ordinary meaning. The City’s own trail report confirmed
20 that what was going on was “new billboard construction.” *JA 1614.*

21 **E. The City’s Artifice that “New Billboard Construction” Was Not**
22 **Taking Place**

23 After Clear Channel Outdoor applied for a permit to construct a new
24 billboard, the City staff emailed the representative of Clear Channel on July 10,
25 2012 stating that its permit had been reviewed and was on hold for six reasons.
26 *JA 1619.* Reason No. 6 was as follows:

27 Please revise application to remove reference of “new” billboard as no
28 new billboards are allowed in the City.

1 *JA 208-210; JA 1619.*

2 The City staff's email overlooked the fact that the City itself was unable to
3 keep up the pretense of calling a new billboard anything other than a new
4 billboard. The City's own internal records for the YESCO application refer to
5 "New Billboard Construction Bank Receipt Y-10". *JA 1614.*

6 Be that as it may, the position of the City was disingenuous to the extreme.
7 The truth was that a new billboard was under construction on Moana Lane, and
8 any motorist, resident or local business could see it going on. But the city could
9 not admit the truth. During July 2012, the City was embroiled with Scenic
10 Nevada in a battle over the new digital ordinance, and the City was highly
11 sensitive to the "new billboard" language. Rather than following the law that bans
12 construction of new billboards, the City's solution was to take the position that no
13 new billboard was there, because the piece of paper on file with the planning
14 department would omit the word "new".

15 Interestingly, the word "new" was not redacted; the application still
16 contains the word "new", there is no evidence the application was ever revised,
17 and thus, even on paper, the billboard is a new billboard. *See JA 1615.*

18 The district court found the City's logic persuasive, however.

19 Thus, while a billboard created pursuant to the banking or
20 removal Ordinance may appear for the first time in a different area, it
21 isn't genuinely appearing for the first time: the location is new, but the
22 billboard is not.

23 *JA 494:20-22.* While a metaphysical debate could be had as to whether a
24 billboard appearing for the first time is "genuinely" appearing for the first time, it
25 is at least true that *in reality* it is appearing for the first time. At the very least,
26 this Court is not bound by the district court's reasoning on *de novo* review.

1 The absurdity of the situation¹ was highlighted at trial by two pieces of
2 evidence.

3 The first was Trial Exhibit 217, a copy of documentation submitted for the
4 construction of the new Clear Channel billboard on Moana Lane. *JA 210-211; JA*
5 *1207-1336*. The exhibit is 129 pages. It includes a geotechnical investigation, the
6 building permit (*JA 1692*), engineering drawings, engineering calculations,
7 construction specifications and inspection reports. If there were any doubt that
8 new construction was taking place, Exhibit 217 would dispel it.

9 The second was Trial Exhibit 207, which includes a photograph of the new
10 YESCO billboard under construction along U.S. 395 in Reno. *JA 206; JA 1608*.
11 The photograph depicts a crane erecting a new steel monopole and signboard,
12 obviously with all new materials and at a site where no billboard stood before.
13 Shown this photograph, City Planner Claudia Hanson testified as follows:

14 Q And the question I have for you, is this photograph in
15 2011, according to the testimony earlier, a photograph of a new
16 billboard under construction?

17 [Objections and rulings]

18 A The way the system works, if somebody takes down a
19 billboard elsewhere in the City, they can bank it, as we call it. So you
20 maintain the rights or the rights to that board to relocate or reconstruct
21 elsewhere. So this is the rights to a board that was elsewhere in the
22 City, new materials and new construction, but for an old entitlement
or to rights to an old board.

23 *JA 277:16-278:11.*
24

25 _____
26 ¹ The district court was okay with removing the word “new” to avoid conflict with
27 the ballot initiative, commenting, “the City of Reno has refused billboard
28 applications seeking approval of ‘new’ billboards.” *JA 493:12-13*, citing Trial Ex.
211. The City denied nothing, however; it only suggested an amendment to delete
the word “new”.

1 Q Is this picture showing a new billboard?

2 A It is new construction of an old board.

3 *JA 278:19-20.*

4 The photograph showed only one new billboard under construction.
5 According to the testimony of a Clear Channel representative at a September 20,
6 2011 workshop, in the 10 years since the citizens had voted to ban the
7 construction of new billboards, Clear Channel had removed and relocated 36
8 billboards, with new permits, new sites, and new structures. *JA 205; JA 1607.*

9 **F. The Billboard Initiative Did Not Merely “Cap” the Number of**
10 **Billboards at the Number in Existence on November 14, 2000**

11 The district court employed tortured reasoning to conclude that the
12 initiative should be interpreted as merely a “cap” on the billboards in existence at
13 the time the initiative was enacted on November 14, 2000, thus allowing the City
14 to approve construction of new billboards so long as the “cap” was not exceeded.
15 *JA 491-495.*

16 The district court reasoned that the word “new” was ambiguous because
17 three dictionaries defined “new” differently. *JA 491:13-19.* Each publisher had
18 editorial license to offer a variation on the meaning of the word “new”, but taking
19 that into consideration, the definitions of “new” in the three dictionaries were
20 essentially the same, which is not surprising, considering “new” is a household
21 word. *Id.*

22 Because the definitions varied slightly, however, the Court held that it was
23 “permitted to consider the history of the regulation in determining the intent of the
24 legislating body.” *JA 491:20-21.* The district court turned to the “pro” and “con”
25 arguments that accompanied the initiative on the ballot in 2000, *JA 588*, holding
26 that “[e]ven after the passage of the 2000 initiative, Scenic Nevada continued to
27 maintain that the initiative merely placed a “cap” of 289 billboards permitted in
28 the City of Reno and prohibited the construction of any *additional* billboards.” *JA*

1 492:6-9 (*emphasis in original*). In footnote 22, the district court then purported to
2 quote from Scenic Nevada’s “pro” argument, stating:

3 This Initiative Petition, supported by over 7,000 Reno citizens, would
4 prohibit any increase in the present number of billboards, but it does
5 place a cap on their numbers.

6 *JA 492, fn. 22*. The district court misquoted that section of the “pro” argument.
7 The actual quotation reads as follows:

8 This Initiative Petition, supported by over 7,000 Reno citizens, would
9 prohibit any increase in the present number of billboards. *This*
10 *Initiative does not ban existing billboards*, but it does place a cap on
11 their numbers.

12 *JA 588 (omitted section highlighted)*. In addition to leaving words out of Scenic
13 Nevada’s “pro” argument, the district court inserted two key words that Scenic
14 Nevada never said. The added key words were “merely” and “additional”, and by
15 adding these words, and omitting the phrase “[t]his initiative does not ban existing
16 billboards,” the district court fundamentally altered the entire substance of the
17 ballot initiative and Scenic Nevada’s position in support of the initiative.

18 Even though the district court italicized the word “additional” for emphasis,
19 the “pro” arguments did not use that word in any context, and the “pro” arguments
20 especially did not use the word to maintain that the initiative prohibited only
21 “additional” billboards beyond the “cap”.

22 The phrase that the district court attributed to Scenic Nevada – “the
23 Initiative merely placed a cap” – would dramatically affect the meaning of the
24 initiative, meaning that the initiative was only a “cap”, and as long as the number
25 of billboards stayed within the “cap”, the City could continue to issue permits for
26 the construction of new billboards.

27 The notion that the initiative merely placed a “cap” did not come from
28 Scenic Nevada. The “pro” argument pointed out that the initiative would ban

1 issuance of permits for construction of new billboards, the number of billboards
2 would be capped, and the initiative would not ban existing billboards. *JA 588.*

3 The district court nevertheless took Scenic Nevada to task for allegedly
4 changing its position, asserting that “Scenic Nevada now argues that the intent of
5 the 2000 Initiative and Ballot Question was to eliminate billboards and that
6 regardless where the billboard originated or how long it existed, if it is relocated
7 to another location it is a “new” billboard whose construction is prohibited by the
8 Initiative and the Ballot Question.” *JA 492:14-18.*

9 Aside from the fact that there is no evidence that a billboard ever was
10 “relocated”, in the sense of a physical structure being moved to another location,
11 Scenic Nevada has never taken the position in any forum that the intent of the
12 initiative was, as the court states, “to eliminate billboards.” *Id.* The portion of the
13 “pro” argument that the district court omitted specifically states the initiative does
14 not ban existing billboards. Over the course of time, as billboards fall into
15 disrepair or are taken down due to loss of the lease, the number of billboards
16 should decline until eventually there are none, but the initiative expressly concerns
17 a prohibition on construction of new billboards, not a ban on those already
18 existing.

19 The implication that Scenic Nevada somehow changed its position in any
20 respect is baseless. The “pro” arguments in 2000 are exactly the same as Scenic
21 Nevada’s position today. The contemporaneous journals written by Scenic
22 Nevada shortly after the 2000 election – while Scenic Nevada was still known as
23 “Citizens For A Scenic Reno” – state the same position that Scenic Nevada takes
24 today. *JA 1864-1865.* The City Attorney’s memo of May 8, 2003 even quotes
25 Scenic Nevada founder Doug Smith taking the same position that Scenic Nevada
26 takes today. *JA 1827.* Scenic Nevada declared at trial that its lawsuit does not
27 affect vested rights in any way; the only declaratory relief sought by this lawsuit is
28

1 a judgment invalidating a 2012 ordinance that would allow the construction of
2 new digital billboards. *JA 420-421.*

3 **G. Scenic Nevada’s Interpretation of the Billboard Initiative Does**
4 **Not Constitute a “Taking” in Violation of the Fifth Amendment**

5 Most disconcerting to Scenic Nevada was the district court’s statement that
6 “Scenic Nevada’s interpretation of the Initiative and Ballot Question would
7 clearly lead to the permanent loss of a billboard to its owner.” *JA 495:18-20.*

8 The district court’s conclusion that Scenic Nevada’s position amounts to a
9 “taking” of private property in violation of the Fifth Amendment is unsupported
10 by any tenable reading of the initiative and the record in this case. No vested
11 rights of any billboard company would be affected by giving force and effect to
12 the ballot initiative. Up to this time, the construction of a digital billboard in the
13 City of Reno has been illegal, and a moratorium is in place preventing even the
14 application for a digital billboard until this litigation ends, which makes it
15 impossible for the invalidation of the ordinance to affect any existing rights.
16 *RMC §18.16.905(l); JA 215-216; JA 542 (Trial Exhibit 4).*

17 Furthermore, although the district court does not mention it anywhere in its
18 analysis, the billboard industry has been aware since the beginning that the
19 initiative prohibited the construction of new billboards. In their “con” arguments
20 in rebuttal, the industry wrote:

21 The proponents of this Initiative are incorrect when they state that the
22 Initiative will merely place a cap on the number of billboards allowed
23 in Reno. The wording on this Initiative specifically prohibits building
24 permits for any new billboards. This will have a significant effect on
25 the billboard industry in Reno and will result in the loss of jobs.

1 JA 588.² Knowing that the initiative “specifically prohibits building permits for
2 new billboards”, Eller Media filed a lawsuit seeking to keep the initiative off the
3 ballot, arguing that it was improper to address the issue by initiative petition.
4 Judge Polaha ruled against Eller Media, as did this Court. Eller Media did not
5 complain, however, that the initiative amounted to a “taking” under the Fifth
6 Amendment, which Eller Media surely would have done if the initiative truly
7 posed a takings issue.

8 At trial, Ryan Saunders of Saunders Outdoor, a billboard company, testified
9 that there was no takings issue as far as he was concerned.

10 Q I understand your concern about the competitive
11 disadvantage you were talking about. I just had to ask you about that,
12 because you do know, the city could say, Saunders cannot put up any
13 new billboards? It could say that?

14 A It could. In fact, cities do it all the time. They put caps
15 on the numbers, but they have to continue to allow the existing
16 billboards to go under grandfather status. So they can continue to
17 operate under the current levels of business that they have and that’s
18 what the citizens initiative says.

19 JA 392:6-15.

20 It defies logic that banning construction of new billboards could be
21 construed as a “taking”. The district court’s own decision acknowledges that four
22 states have entirely banned billboards: Hawaii, Maine, Alaska and Vermont. JA
23 493, *fn. 24*.

24 Assuming *arguendo* that the initiative was ambiguous and that a resort to
25 the “legislative history” was appropriate, the district court manifestly erred in
26 determining that the initiative was merely a “cap” on the number of billboards.

27 ² If anyone is changing positions, it is the billboard industry, which admitted in its
28 “con” argument that the initiative would ban issuance of new permits. The
industry now assumes the contrary position.

1 Courts 'should read each sentence, phrase, and word to render it meaningful
2 within the context of the purpose of the legislation.'" *Bd. of County Comm'rs v.*
3 *CMC of Nevada*, 99 Nev. 739, 744, 670 P.2d 102, 105 (1983); *City of Reno v.*
4 *Citizens for Cold Springs*, 236 P.3d 10, 16 (Nev. 2010). The initiative not only
5 bans construction of new billboards, it also bans the issuance of permits for their
6 construction. If only a "cap" were intended, the initiative would have stated that
7 permits are okay for replacement billboards up to the cap number. Instead, the
8 initiative states explicitly that no permits can be issued, which refutes any
9 argument that this law is merely a "cap" on billboard numbers.

10 "Statutes are generally construed with a view to promoting, rather than
11 defeating, legislative policy behind them." *Dept. of Motor Vehicles v. Lovett*, 110
12 Nev. 473, 477, 874 P.2d 1247, 1249-1250 (1994). The policy behind this law is to
13 ban new billboards, at least according to the author, Scenic Nevada. By issuing
14 permits for new billboard construction, the City attempts to defeat the legislative
15 policy behind the law.

16 **H. The Digital Billboard Ordinance Violates Art. 19, §§ 2.3 and 4 of**
17 **the Nevada Constitution**

18 Speaking of the citizens who voted for the 2000 ballot initiative, the district
19 court said:

20 Through the exercise of the democratic process, their efforts lead to
21 the enactment of municipal ordinances that cap and will reduce the
22 number of billboards in the City of Reno.

23 *JA 500:16-18*. After paying respects to the democratic process, the district court
24 held that a municipal ballot initiative can be repealed immediately by a city
25 council. If this holding is affirmed, then the constitutional right to the initiative
26 process at the local level, arguably at the very heart of the democratic process, is
27 not worth the paper it is printed on.

1 In the instant case, the Reno citizens acted to ban the proliferation of a
2 public nuisance, using the initiative process, because their elected representatives
3 refused to act. Most initiatives probably arise under similar circumstances.
4 Almost by necessity, the initiative process is the electorate's remedy of last resort.
5 If this ultimate exercise of the right of the people to govern themselves can be
6 nullified, by the very government that refused to act in the first place, the core of a
7 democracy is denied to the people.

8 The Nevada Constitution guarantees the right of the citizens to resort to the
9 initiative process where their elected officials have failed to act. Nevada
10 Constitution Article 19, §2(1) states:

11 Notwithstanding the provisions of Section 1 of Article 4 of this
12 Constitution, but subject to the limitations of Section 6 of this Article,
13 the people reserve to themselves the power to propose, by initiative
14 petition, statutes and amendments to statutes and amendments to this
15 Constitution, and to enact or reject them at the polls.

16 Once the citizens have passed a law by an initiative, the governing body of
17 the local government is prohibited from amending, annulling or repealing that law
18 for a period of not less than three (3) years. Nevada Constitution Article 19, §3,
19 states, in pertinent part:

20 If a majority of the voters voting on such question at such election
21 votes approval of such statute or amendment to a statute, it shall
22 become law and take effect upon completion of the canvass of votes
23 by the Supreme Court. An initiative measure so approved by the
24 voters shall not be amended, annulled, repealed, set aside or
25 suspended by the Legislature within 3 years from the date it takes
26 effect. If a majority of such voters votes disapproval of such statute or
27 amendment to a statute, no further action shall be taken on such
28 petition.

1 The same initiative powers that the citizens possess with respect to statutes
2 and constitutional provisions apply to municipal ordinances. Nevada Constitution
3 Article 19, §4 states:

4 The initiative and referendum powers provided for in this article are
5 further reserved to the registered voters of each county and each
6 municipality as to all local, special and municipal legislation of every
7 kind in or for such county or municipality. In counties and
8 municipalities initiative petitions may be instituted by a number of
9 registered voters equal to 15 percent or more of the voters who voted
10 at the last preceding general county or municipal election.
11 Referendum petitions may be instituted by 10 percent or more of
12 such voters.

13 The voter initiative of 2000, codified as RMC §18.16.902(a), prohibits
14 construction of new billboards and the issuance of building permits for their
15 construction. The district court held that the 2000 ballot initiative met the
16 statutory and constitutional requirements for a municipal initiative. *JA 488:4-6*.
17 Judge Polaha and this Court also held that the ballot initiative was the proper
18 subject of an initiative petition and reflected a city-wide change in policy
19 concerning billboards. *Eller Media Co. v. City of Reno*, 118 Nev. 767, 59 P.3d
20 437 (2002).

21 Since RMC §18.16.902(a) resulted from an initiative petition, the City
22 Council had no authority to “amend, annul, repeal, set aside or suspend” the voter
23 initiative for a period of three years following its enactment on November 14,
24 2000. By adopting the “conforming” ordinance in January, 2002, and the banking
25 and relocation ordinance in June, 2003, the City Council permitted the
26 construction of new billboards and the issuance of permits for their construction,
27 thereby amending, annulling, repealing and setting aside the mandate of the
28 voters, in violation of Art. 19, §§ 2.3 and 4 of the Nevada Constitution.

 It is undisputed that the digital billboard ordinance of 2012 is dependent
upon the unconstitutional underpinning of the “conforming” ordinance and the

1 banking and relocation ordinance. Without this unconstitutional foundation, there
2 can be no digital billboard ordinance. The digital billboard ordinance therefore is
3 invalid under the Nevada Constitution.

4 **I. The District Court Erred in Holding that a City Council Can**
5 **Immediately Repeal a Municipal Initiative**

6 The district court's interpretation of Article 19 of the Nevada Constitution
7 was that while Art. 19, § 2.3 prohibits the Legislature from amending a state
8 initiative within three years of its enactment, there is no similar provision for
9 municipal initiatives. *JA 488:7-9.*

10 The district court erred, however, in failing to consider the effect of Art. 19,
11 § 4 of the Constitution, which states that the initiative powers provided for in
12 Article 19, § 2 are further reserved to the registered voters of each municipality as
13 to all local, special and municipal legislation of every kind. If this language has
14 any meaning, it is that the powers reserved to the people that are enumerated in
15 Section 2 likewise are reserved to the people in Section 4. This would include the
16 power to enact an initiative that cannot be repealed for a period of at least three
17 years.

18 Scenic Nevada's straightforward interpretation of Article 19, § 4 makes
19 sense, in that it stands to reason that the right to enact law by initiative petition
20 should not be illusory. Allowing the governing body to repeal the law
21 immediately after its passage would be nonsensical, and Section 4 forbids it.

22 Scenic Nevada's position also makes sense within the structure of Article
23 19. Section 2 concerning statewide initiative deals with many aspects of initiative
24 petitions that are not rehashed in Section 4 dealing with municipal initiatives.
25 Instead, Section 4 incorporates provisions of Section 2 by stating the other
26 provisions of Article 19 apply to municipal initiatives.

27 The district court quoted Section 4, *JA 487:17-20*, but never applied or even
28 discussed the significance of Section 4 in its analysis of the constitutional

1 question. Indirectly, the district court reasoned that “[f]oundational differences in
2 the structure of the Legislature and the city governments of the state caution
3 against a liberal reading of the Nevada Constitution conflating acts by the
4 Legislature to acts by those city governments.” *JA 488:16-18*. The district court
5 did not amplify upon the expression “foundational differences”, or indeed, upon
6 why the court considered Scenic Nevada’s interpretation to be a “liberal reading”
7 that was “conflating acts by the Legislature to acts by those city governments.”

8 Notably, however, Section 4 plainly states that statewide initiative powers
9 reserved to the voters under Section 2 are further reserved to the registered voters
10 of each municipality as to all local, special and municipal legislation of every
11 kind, and thus, it does not require a “liberal reading” to conclude that whatever
12 “foundational differences” there may be, the Constitution nonetheless affords the
13 same initiative powers to the voters as to both statewide and municipal measures.

14 The district court speculated that “the Nevada Constitution could have been
15 amended to provide a corollary to the ban on amendments found in Article 19 §
16 2.3, instead the Legislature enacted Nevada Revised Statute 295.220.” *JA 488:9-
17 12*. Perhaps the language of Section 4 *could* have been differently worded, but its
18 present language provides a “corollary” to the ban on amendments in Section 2 by
19 expressly stating that the powers reserved in Section 2 are reserved to the voters in
20 all local, special and municipal legislation of every kind.

21 The district court correctly observed that NRS 295.220 provides that a
22 municipal initiative “shall be treated in all respects as other ordinances of the
23 same kind adopted by the council,” *JA 488:12-14*, but the district court
24 unreasonably interpreted NRS 295.220 as permitting a city council to repeal,
25 annul or amend a law passed by initiative, contrary to the Constitution. The
26 district court cited no authority or reasoning for the proposition that NRS 295.220
27 is intended to override Section 4 of the Constitution. The statute simply ensures
28 that the city council will give force and effect to a law enacted by initiative as it

1 would to any law enacted by the council. The statute does not express any intent
2 by the Legislature to replace provisions of the Constitution pertaining to
3 initiatives, specifically Art. 19, § 4. The district court's ruling should be reviewed
4 *de novo* and reversed.

5 **VII**
6 **CONCLUSION**

7 Scenic Nevada respectfully requests that the judgment of the district court
8 be reversed, and that this Court direct the entry of a judgment by the district court
9 declaring that the October 24, 2012 vote of the Reno City Council adopting
10 Ordinance No. 6258 entitled "Digital Off-Premises Advertising Displays,
11 including Light-Emitting Diode (LED)" is unlawful, void, and of no force and
12 effect, and that the ordinance purportedly adopted thereunder is unlawful, void,
13 and of no force and effect.

14
15 DATED: December 22, 2014 LAW OFFICES OF MARK WRAY

16
17 By 
18 MARK WRAY
19 Attorneys for Appellant
20 SCENIC NEVADA, INC.
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1 I understand that I may be subject to sanctions in the event that the
2 accompanying brief is not in conformity with the requirements of the Nevada
3 Rules of Appellate Procedure.

4 Dated this 22nd day of December, 2014.

5
6 

7 MARK WRAY
8 Bar No. 4425
9 LAW OFFICES OF MARK WRAY
10 608 Lander Street
11 Reno, Nevada 89509
12 (775) 348-8877
13 (775) 348-8351 fax
14 Attorney for Appellant
15 SCENIC NEVADA, INC.
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CERTIFICATE OF SERVICE

The undersigned employee of the Law Offices of Mark Wray certifies that a true copy of the foregoing document was sealed in an envelope with first class postage prepaid thereon and deposited in the U.S. Mail at Reno, Nevada on December 22, 2014 addressed as follows:

Jonathan Shipman
Reno City Attorney's Office
One E. First St., 3rd Floor
P.O. Box 1900
Reno, NV 89505



THERESA MOORE