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2013 DEC 24 AM 9:16

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SCENIC NEVADA, INC.

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF WASHOE

SCENIC NEVADA, INC.,

Case No. CV12-02863

Plaintiff,

Dept. 7

vs.

**SCENIC NEVADA'S OPPOSITION  
TO THE CITY OF RENO'S  
MOTION FOR SUMMARY  
JUDGMENT**

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

Defendant.

SAUNDERS OUTDOOR ADVERTISING,  
INC., a Utah corporation,

Case No. CV12-02917

Plaintiff,

Dept. 7

vs.

CITY OF RENO, a municipal corporation  
and political subdivision of the State of  
Nevada,

Defendant.

1 Summary judgment is appropriate only where the facts, viewed most favorably  
2 from the perspective of the non-moving party, are undisputed. *See NRCP 56(c); Wood v.*  
3 *Safeway, Inc.*, 121 Nev. 724, 732, 121 P.3d 1026, 1031 (2005). Here, the City's Answer  
4 denies or disputes 46 out of 75 paragraphs of Scenic Nevada's first amended complaint,  
5 and yet, the City has filed a motion for summary judgment. The contradiction between  
6 disputing the facts in the Answer while claiming in the current motion that the material  
7 facts are undisputed underscores the point that summary judgment is not right for this  
8 case. Scenic Nevada deserves to have all the facts and arguments fully presented at trial  
9 commencing February 19, 2014.

10 I

11 **THE ABSENCE OF THE MANDATORY CONCISE STATEMENT OF FACTS**  
12 **SHOULD DOOM THE CITY'S MOTION**

13 Rule 56(c) requires a moving party to include in its motion a concise statement of  
14 alleged undisputed facts with citations to the record. Besides being mandatory, the  
15 concise statement is practical. The moving party has the burden of establishing the non-  
16 existence of any genuine issue of fact. *City of Boulder v. State*, 106 Nev. 390, 392, 793  
17 P.2d 845 (1990). The rule forces the moving party to meet its burden of outlining the  
18 alleged undisputed facts and associated proof so that the opposing party knows what facts  
19 are claimed to be at issue in order to respond with contra evidence showing facts in  
20 controversy. Here, the City has ignored the rule and filed no concise statement. Instead,  
21 the City rehashes legal arguments from the City's prior 12(b)(5) motions, with scattered  
22 references to a large block of attached exhibits. Scenic Nevada therefore is responding in  
23 a vacuum. There is no statement of alleged facts to which Scenic Nevada can respond.  
24 The situation is fundamentally unfair, it requires much extra time to prepare an  
25 opposition, and it is just plain outside the rules. The absence of the mandatory statement  
26 from the moving papers should be grounds enough to deny the motion.

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II

**THE CITY'S MOTION VIOLATES THE STANDARDS THAT APPLY TO  
SUMMARY JUDGMENT MOTIONS**

At page 5 of its moving papers, the City concedes that all the pleadings and evidence must be viewed in the light most favorable to the non-moving party. The first and most important piece of evidence to be viewed in the light most favorable to Scenic Nevada is the voter initiative, which reads: **“The construction of new off-premises advertising displays/billboards is prohibited, and the City of Reno may not issue permits for their construction.”**

Scenic Nevada, author of the initiative, contends that the intent of the law is readily apparent on its face: the voters intended to ban construction of new billboards and issuance of permits for their construction.

On the other hand, at pages 5 to 11 of the moving papers, the City goes through a convoluted attempt to explain how the intent of the initiative was only to place a cap on the total number of billboards, and that new permits can be issued and new billboards can be erected, so long as the number of billboards stays below a “cap” pegged at the number of signs in existence at the time the initiative passed.<sup>1</sup>

By offering an interpretation of the facts least favorable to Scenic Nevada and most favorable to the City, the City fundamentally ignores the rules of engagement on summary judgment, even though the rules are cited in the City's own papers. It is axiomatic that for purposes of summary judgment, the pleadings and other proof must be construed in a light most favorable to the non-moving party. *Wood v. Safeway, Inc.*, *supra* at 732, 121 P.3d at 1031. Additionally, all favorable inferences that may reasonably be drawn from the evidence must be in favor of Scenic Nevada. *Anderson v.*

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<sup>1</sup> The City has *not* capped the number of billboards. Due to annexations, billboards increased from 278 in 2000 to 286 by March of 2009. See *City of Reno Billboard Inventory, Exhibit 1, attached*. And because of the banking and relocation ordinance, these additional billboards can be removed, banked, and then replaced with a new billboard at any location in Reno where billboards are allowed.

1 *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Wood v. Safeway, supra*, at 732, 121 P.3d  
2 at 1031 (2005). If Scenic Nevada would be entitled to prevail under any reasonable  
3 construction of the evidence and any acceptable theory of the law, summary judgment  
4 should be denied. *Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 970 (9<sup>th</sup> Cir. 2006).

5 Scenic Nevada has pleaded a reasonable construction of the evidence based on an  
6 acceptable legal theory, to wit: the voter initiative of 2000 was not intended merely to  
7 cap the number of billboards, it was intended to ban new construction altogether.

8 Construing the pleadings and proof in the light most favorable to Scenic Nevada, as the  
9 Court is obliged to do at this juncture, the City's alternative view of the evidence must  
10 give way to the reasonable interpretation that favors Scenic Nevada.

11 Applying these bedrock principles, the City has no business spending the first six  
12 pages of its argument trying to countervail Scenic Nevada's reasonable interpretation of  
13 the intent of the voter initiative. The City should concede that summary judgment cannot  
14 be granted, because obviously, the intent of the initiative genuinely is in dispute.

15 Furthermore, intent generally is a question of fact that precludes summary  
16 judgment. *Mullis v. Nev. Nat'l Bank*, 98 Nev. 510, 654 P.2d 533 (1982) (intention to  
17 create security interest); *Parmian v. Petricciani*, 70 Nev. 427, 272 P.2d 492 (1954)  
18 (intended rights of parties under a lease). If the issue boils down to a question of intent,  
19 as the City maintains in its motion, this case is not suitable for summary adjudication.

### 20 III

#### 21 CONCISE STATEMENT OF GENUINE ISSUES OF FACT

22 Without waiving its objection that the City failed to produce the required  
23 statement of facts supported by admissible evidence, Scenic Nevada proposes that at least  
24 the following are genuinely disputed material issues of fact:

25 1. Did the citizens of Reno pass an initiative with the intent of prohibiting new  
26 billboard construction and banning issuance of any building permits for billboard  
27 construction. *SN23-25; SN 416; COR 85; SN 19; SN 475-476*

1           2.     Did the citizens act using their initiative powers because their elected  
2 officials were hostile to what the citizens desired? *SN26-29; SN 491-492.*

3           3.     Notwithstanding the voter initiative, enacted January 22, 2002 as  
4 RMC§18.16.902 (a), did a majority of the City Council vote to skirt the language and  
5 intent of the initiative by amending the code to create a billboard banking and relocation  
6 system, which allows issuance of a permit to a billboard company to remove a billboard  
7 in one location, bank a receipt for that billboard up to 10 years (now 15 years), and then  
8 issue another permit for a new billboard at a new location. *SN 416; COR 494-495; COR*  
9 *523; COR 445-447; SN 20; COR 527; SN 35-36; SN 480-485; Ordinance 5461 adopted*  
10 *July 11, 2003, Exhibit 2, attached.*

11           4.     Did the City amend the sign ordinance in 2003 under RMC §18.16.908 to  
12 formally establish a billboard permit bank and provide city staff a mechanism for  
13 tracking permits of removed billboards so that they could be relocated later as new  
14 billboards, in violation of the voter initiative. *Exhibit 2, attached; SN 516*

15           5.     Did the Council actions in adopting RMC §18.16.908 violate Article 19, §4  
16 of the Nevada Constitution effectively repeal, suspend, amend, or revoke the ballot  
17 initiative barely 14 months after it was approved by the voters. *COR 81; COR 85; COR*  
18 *142; COR 27-41*

19           6.     Was the Council's adoption of the banking and relocation system  
20 "conforming" to the initiative, as the City argues, or was it the opposite; i.e., did the  
21 banking and relocation system subvert the initiative by allowing new billboards to replace  
22 the old. *COR 35; SN 480-487; SN 491-492; SN 496-497; SN 500; SN 503-504*

23           7.     Does anything either in the billboard initiative or in Scenic Nevada's  
24 interpretation of the initiative impinge upon legislative powers reserved by City Charter  
25 to the City Council. *See, SN 23-25 and First Amended Complaint; COR 494-495;*  
26 *recitation of facts and holding in Eller Media Co. v. City of Reno, 118 Nev. 767, 59 P.3d*  
27 *437 (2002)*

1           8.     Was the ordinance of 2012 legalizing digital billboards based upon or  
2 necessarily dependent upon the banking and relocation ordinances of 2002 and 2003. *See*  
3 *RMC §18.16.905 (1); COR 11-13; COR 691-692; COR 702-703; SN 643*

4           9.     Did a majority of the Reno City Council, led by Councilman Dwight  
5 Dortch, vote in February 13, 2008 to direct Reno City staff to initiate a text amendment  
6 that would eliminate RMC §18.16.905 (1) and allow the construction and permitting of  
7 new digital billboards. *SN 66; SN 85-86; SN 308-309*

8           10.    Are digital billboards by definition a new type of billboard, using new  
9 technology, and requiring mostly new construction and new building permits. *SN 87; SN*  
10 *418-422; SN 429; SN 443; SN 476; SN 500-501; SN 516; SN 520*

11           11.    Are digital billboards computer controlled variable message electronic  
12 signs whose informational content can be changed or altered by means of computer-  
13 driven electronic impulses (including “light emitting diodes” or “LED” light bulbs), thus  
14 making them intermittent. *Scenic Arizona v. City of Phoenix Board of Adjustment*, 268  
15 P.3d 370 (Ariz.App. 2011); *SN 476, SN 495*

16           12.    Is Scenic Nevada the author of the initiative and thus able authoritatively to  
17 testify to its meaning and intent. *SN 29; COR 63*

18           13.    Was the Council, led by Councilman Dortch, well aware that the proposed  
19 ordinance violated the voter’s initiative but nevertheless pushing the proposed ordinance  
20 to help the politicians’ friends in the billboard industry. *SN 87-88; SN 294-295; SN 308-*  
21 *309; SN 326-328; SN 627-630*

22           14.    Did the Council on May 13, 2009 direct staff to proceed with the digital  
23 ordinance regardless of federal studies on the safety impacts of digitals. *SN 286-287; SN*  
24 *319-325; SN 327- 330*

25           15.    Throughout 2008 through 2012 leading to adoption of the digital billboard  
26 ordinance, did Scenic Nevada constantly appear and voice objections that the 2000 ballot  
27 initiative prohibited the city from allowing new billboard construction, including new  
28 construction of digital billboards, as well as violating the federal Highway Beautification

1 Act, as implemented by Nevada statutes and regulations, as well as violating and the  
2 City's own sign code. *SN 93-102; SN 286-287; SN 319-320; SN 436-441; SN 503-504*

3 16. Did Scenic Nevada timely appeal adverse decisions by the Planning  
4 Commission on November 14, 2011 and January 9, 2012. *SN 558-559; SN 625-626*

5 17. Did the Council vote to approve the digital billboard ordinance, and each  
6 subsequent draft and revision, over Scenic Nevada's objections. *SN 826; SN 891-892;*  
7 *COR 847*

8 18. Has Scenic Nevada, the author and proponent of the billboard initiative  
9 adopted as RMC§18.16.902, spent more than four years exhausting its administrative  
10 remedies by opposing the new digital billboard ordinance in workshops, public hearings  
11 and appeals and is an aggrieved party. *COR 1-903*

12 19. Was the Council acting to "amend, annul, repeal, set aside or suspend" the  
13 voter initiative within three years following its adoption on Nov. 7, 2000 as it adopted the  
14 banking and relocation ordinance. *SN 23-25; COR 494; Exhibit 2, attached*

15 20. Does the digital billboard ordinance violate the federal Highway  
16 Beautification Act of 1965, the implementing law found in NRS Chapter 410 and the  
17 resulting federal-state agreement by allowing billboards illuminated by intermittent  
18 lights. *SN 529-531; SN 601-602; COR 651-652; COR 654-668; COR 675-677; SN 1-9;*  
19 *SN 599; facts contained in Sharpe, Susan C., "Between Beauty and Beer Signs: Why*  
20 *Digital Billboards Violate the Letter and Spirit of the Highway Beautification Act of*  
21 *1965," 64 Rutgers Law Review 515 (2012); Scenic Arizona v. City of Phoenix Board of*  
22 *Adjustment*, 268 P.3d 370 (Ariz.App. 2011)

23 21. Does the digital billboard ordinance violate the sections of the Reno sign  
24 code including RMC §18.16.901(a) in that digital billboards mar scenic mountain views,  
25 blight neighborhoods, lower property values, harm the environment by wasting energy,  
26 and cause safety issues for drivers on public streets and highways. *COR 5; COR 27; SN*  
27 *788-790; SN 416; SN 518; SN 520; SN 580; SN 599; billboard photographs, Ex. 3,*  
28 *attached; Young, Gregory: "Illuminating the Issues", Exhibit 4, attached; Snyder,*

1 Jonathan: "Beyond Aesthetics: How Billboards Affect Economic Prosperity", Dec. 2011,  
2 Exhibit 5, attached

3 22. Are digital billboards harmful to the citizens of Reno, including injurious to  
4 public safety, property values and esthetics. SN 93-102; SN 286-287; SN 520; billboard  
5 photos, Exhibit 3, attached; Young, Gregory: "Illuminating the Issues", Exhibit 4,  
6 attached

7 23. Do digital billboards violate the prohibition in the Reno sign code on  
8 intermittent lighting. SN 580-583, 599; COR 19-24

#### 9 IV

### 10 GENUINE ISSUES OF FACT EXIST AS TO THE CONSTITUTIONAL 11 GROUNDS FOR DECLARATORY RELIEF

#### 12 1. The Digital Ordinance, Incorporating Banking and Relocation, 13 Violates the Plain Language and the Purpose of the Billboard 14 Initiative

15 Ever since Dwight Dortch and the Council majority first launched their efforts to  
16 legalize digital billboards in Reno in 2008, the City has tried to project the false image  
17 that it is acting consistently with the voter initiative. The truth, however, is that the  
18 Council majority has never supported a ban on new billboards, which is why a citizens'  
19 initiative was needed in the first place. If City was being candid, it would concede these  
20 facts.

21 Instead, the City's motion opens with six pages of argument attempting to explain  
22 how issuing new permits for new digital billboards is consistent with the voter initiative.  
23 This is doublespeak: the deliberate use of words to disguise, distort, or reverse the truth.<sup>2</sup>  
24 The truth is that the initiative is simple, direct and clear. It prohibits new permits for, and  
25 new construction of, billboards.

26 As the Supreme Court pointed out in *City of Reno v. Citizens for Cold Springs*,  
27 236 P.2d 10, 17 (Nev. 2010), where the court rejected the City of Reno's unreasonable

28 <sup>2</sup> Wikipedia, the free encyclopedia, defining "doublespeak."



1 interpretation of its own ordinance, "courts should read each sentence, phrase, and word  
2 to render it meaningful within the context of the purpose of the legislation." *Id.* at 18.  
3 The initiative not only bans construction of new billboards, it also bans the issuance of  
4 permits for their construction. If only a "cap" were intended, the law would say permits  
5 are okay for replacement billboards up to the cap number. Instead, the law states  
6 explicitly that no permits can be issued, which refutes any argument that this law is  
7 merely a "cap" on billboard numbers.

8 Ironically, the moving papers state:

9 When a statute uses words which have a definite and plain meaning, the words  
10 will retain that meaning unless it clearly appears that such meaning was not so  
11 intended. *Balboa Ins. Co. v. Southern Distrib. Corp.*, 101 Nev. 774, 710 P.2d 725  
12 (1985); *City of Las Vegas, v. Macchiaverna*, 99 Nev. 256, 661 P.2d 879 (1983). ***If***  
13 ***language is plain and unambiguous, it must be given effect.*** *State v. State of*  
14 *Nevada Employees Ass'n, Inc.*, 102 Nev. 287, 289-290, 720 P.2d 697, 699 (1986).

14 Motion, p. 14, lines 7-12, emphasis added. *See also, Kay v. Nunez*, 122 Nev. 1100, 1104,  
15 146 P.3d 801, 804 (2006) (absent an ambiguity, the courts interpret a law according to its  
16 plain meaning).

17 In arguing against the plain words of an unambiguous law, the City contravenes  
18 the plain meaning rule.

19 Also ironically, the moving papers point out that "statutes are generally construed  
20 with a view to promoting, rather than defeating, legislative policy behind them." *Motion*,  
21 *p. 23, citing Dept. of Motor Vehicles v. Lovett*, 110 Nev. 473, 477, 874 P.2d 1247, 1249-  
22 1250 (1994). The policy behind this law is to ban new billboards, at least according to  
23 the law's author, Scenic Nevada. By issuing permits for new billboard construction, the  
24 City attempts to defeat the legislative policy behind the law, and as a corollary, by  
25 disagreeing with Scenic Nevada as to the intent of the law, the City introduces a factual  
26 issue not suitable for summary judgment.

27 The City justifies the banking and relocation ordinance of 2003 with the rationale  
28 that so long as the aggregate number of billboards does not increase, existing billboards  
can be "maintained, repaired, replaced or relocated." *See Motion, p. 9, line 1.* The City

1 similarly justifies the digital ordinance of 2012 with the rationale that as long as the  
2 aggregate number does not increase, the law allows “repair, relocation or *upgrading*” of  
3 existing billboards. *See Motion, p. 10, line 11-14, citing Staff Report, COR 192,*  
4 emphasis added. The scope of the “exceptions” is swallowing the rule. First,  
5 replacement and relocation, and now, “upgrades” (translated, “digitals”) supposedly are  
6 consistent with an ordinance that bans construction of new billboards. The City’s simply  
7 refuses to admit that repair, relocation and “upgrading” actually require new permits for  
8 new billboard construction, which directly conflicts with the billboard initiative.

9 For reasons that are unclear, the City chose not to include its banking and  
10 relocation ordinance of June 11, 2003 in the so-called “full administrative record”  
11 attached to the motion as COR 1-903. The City chastises Scenic Nevada for referring to  
12 the “banking ordinance” in a “misleading” manner, contending that the words “bank” and  
13 “banking” are not found in the law. *See Motion, p. 5, footnote 3.* The City errs. The  
14 banking and relocation ordinance that the City chose not to include in its “certified”  
15 record is attached to this Opposition as Exhibit 2. The ordinance was adopted June 11,  
16 2003 as Ordinance 5461. It expressly refers to “bank” and “banking.” Language was  
17 added to RMC 18.06.950 to describe the relocation process specifically using the words  
18 “bank” and “banking.” *Id.* Indeed, the banking and relocation ordinance was commonly  
19 referred to by that name during the proceedings leading up to passage of the digital  
20 billboard ordinance of 2012. Ordinance 5295, which the City refers to repeatedly as the  
21 “conforming” ordinance, is a different ordinance entirely.

22 Be that as it may, the City correctly states in its moving papers that the record  
23 proves Scenic Nevada objected to the digital billboard ordinance because it violated the  
24 initiative. *See Motion, p. 10, lines 9-10.* The City argues, however, that Scenic Nevada  
25 should be precluded from objecting, because Scenic Nevada failed to file a lawsuit  
26 challenging the “conforming” ordinance in 2002. *See Motion, pp. 7, 8 and 11.* The City  
27 does not support this argument with any authority, however.  
28

1 Scenic Nevada is challenging the 2012 ordinance, which legalized digital  
2 billboards, deriving its power from ordinances in 2002 and 2003 that effectively  
3 amended, annulled, repealed, set aside or suspended the voter initiative. The  
4 digital/banking and relocation ordinance constitutes an ongoing violation of  
5 constitutional rights guaranteed by Article 19 of the Nevada Constitution. The statute of  
6 limitations cannot insulate continued enforcement of an unconstitutional law merely  
7 because no one challenges it within so many years of its enactment. *Virginia Hosp. Ass'n*  
8 *v. Baliles*, 868 F.2d 653, 663 (4<sup>th</sup> Cir. 1989); *Kuhnle Bros. v. County of Geauga*, 103 F.3d  
9 516, 522 (6<sup>th</sup> Cir. 1997). If a statute of limitations immunized unconstitutional laws,  
10 decisions like *Brown v. Board of Education*, 347 U.S. 483, 98 L.Ed. 873, 74 S.Ct. 686  
11 (1954) would not have been possible and separate but equal would still be the law of the  
12 land.

13 In this declaratory relief action, Scenic Nevada is going after energy hogging,  
14 obnoxious, intrusive, electronic LED billboards. Should Scenic Nevada prevail, the only  
15 ordinance that would be invalidated is the 2012 digital ordinance, obviating the City's  
16 alleged concern over whether billboard companies would lose their "banked" receipts for  
17 static billboards granted under the 2002 and 2003 ordinances. *See p. 16, footnote 11.*  
18 This lawsuit does not ask for the 2002 or 2003 ordinances to be invalidated. The City's  
19 attempt to alarm the Court over the impact of this case on existing banked receipts is a  
20 red herring.

21 **2. Adoption of the Banking and Relocation Laws Was Unconstitutional**

22 The City argues in the next section of its moving papers that the Council could  
23 repeal, annual or set aside the billboard initiative "at any time for any reason." *Motion, p.*  
24 *13, line 26.* If this were true, the initiative powers of the citizens would be meaningless,  
25 because immediately upon the voters' approval of an initiative, the Council could veto it.

26 In response to the City's two prior motions to dismiss, Scenic Nevada has pointed  
27 out that under Article 19, § 3 of the Nevada Constitution, an initiative measure so  
28 approved by the voters "shall not be amended, annulled, repealed, set aside or suspended?"

1 within three years from the date it takes affect. As in prior motions, the City continues to  
2 argue this three-year rule only applies to statewide initiatives, under Article 19, § 2. Yet  
3 as Scenic Nevada has pointed out before, the initiative powers provided for in Article 19,  
4 § 2 are further reserved to the registered voters of each municipality as to all local,  
5 special and municipal legislation of every kind. See, Article 19, §4. Because Section 4  
6 states that initiative powers provided for in Article 19 apply to municipal initiatives, the  
7 three-year prohibition on amendment, annulment, or repeal that is found in Section 2 of  
8 Article 19 applies to municipal initiatives.

9 Scenic Nevada's straightforward interpretation of Article 19, § 4 makes sense, and  
10 additionally, the organization or structure of Article 19 makes clear that Scenic Nevada's  
11 interpretation is correct. Section 2 concerning statewide initiative deals with many  
12 aspects of initiative petitions that are not restated or rehashed in Section 4 dealing with  
13 municipal initiatives. Instead, Section 4 incorporates provisions of Section 2 by stating  
14 the other provisions of Article 19 apply to municipal initiatives. Section 4 only adds the  
15 percentage of signatures required for municipal initiative petitions.

16 The City argues nonetheless that a municipal initiative is subject to immediate  
17 repeal by the Council, because NRS 295.220 states a municipal initiative "shall be treated  
18 in all respects in the same manner as ordinances of the same kind adopted by the  
19 council," and a city council can amend any municipal ordinance at any time. The City  
20 has been known to assert unreasonable interpretations of its own ordinances. *City of*  
21 *Reno v. Citizens for Cold Springs*, 236 P.3d 10, 17 (Nev. 2010). This pattern and practice  
22 continues. The City is interpreting NRS 295.220 as overriding the Nevada Constitution,  
23 although NRS 295.220 simply reflects the fact that a ballot initiative passed by the voters  
24 must be treated as the law, the same as any other ordinance. The statute does not  
25 override the Constitution.

26 In another unreasonable interpretation of the law, the City argues that the citizen  
27 initiative "cannot impinge upon the Legislature's express grant of legislative authority to  
28 the City Council under the city charter." *Motion, p. 13, lines 22-24, citing Horne v. City*

1 of *Mesquite*, 120 Nev. 700, 100 P.3d 168 (2004).<sup>3</sup> The City apparently contends that the  
2 City Charter overrides the people's Constitutional initiative rights and the right of Scenic  
3 Nevada to bring this lawsuit.

4 The City's argument is meritless. The City Charter states that the Council can  
5 pass a law "not repugnant to the Constitution of the United States or the State of Nevada  
6 . . .," so on its face, the charter recognizes the right to challenge an unconstitutional  
7 ordinance. See *Reno City Charter*, §2.080(1).

8 Additionally, the City of Mesquite is a general law municipality, rather than a  
9 charter city, so *Horne* dealt with an initiative that conflicted with provisions of Chapter  
10 266 of Nevada Revised Statutes, governing general law jurisdictions. In the instant case,  
11 the billboard initiative does not conflict with any other law. In fact, the Supreme Court in  
12 *Eller Media Co. v. City of Reno*, 118 Nev. 767, 59 P.3d 437 (2002) held that the billboard  
13 initiative was the proper subject of legislation by the people. *Horne* is inapposite.

### 14 3. Scenic Nevada's Lawsuit Is Not "Moot"

15 The City cites *Personhood Nev. v. Bristol*, 245 P.3d 572, 574 (Nev. 2010) for the  
16 proposition that this Court cannot grant the relief sought by Scenic Nevada because "the  
17 alleged procedural constitutional violation at issue" is "moot." See *Motion*, p. 17.

18 In *Bristol*, the initiative proponent had been unable to acquire the necessary  
19 number of signatures to put the measure on the ballot, and the election already had  
20 occurred before the case was heard by the Supreme Court, so the challenge to the  
21 proposed initiative was moot. The court in *Bristol* held that despite the mootness, the  
22 district judge's injunction order would have no preclusive effect if the initiative qualified  
23 for the ballot at the next election.

24 In contrast, this case involves an initiative placed on the ballot and approved by  
25 the voters, following which the Council adopted a digital ordinance flouting the law. In  
26

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27 <sup>3</sup> The alleged holding that "an initiative ordinance cannot impinge upon state law or city  
28 charter," which the City supposedly pulled from page 705 of the *Horne* case, is  
inaccurate. *Horne* contains no such holding.

1 the instant case, the ballot initiative actually was codified in the Reno Municipal Code at  
2 the time the offending digital ordinance was adopted. *See RMC §18.16.902 (a)*.

3 Furthermore, in the face of challenges by *both* Scenic Nevada and Saunders Outdoor  
4 Advertising, the ordinance has been suspended with a moratorium on constructing digital  
5 billboards pending the outcome of these proceedings. Therefore, it is specious for the  
6 City to argue under *Bristol* that the instant case is “moot”.

7  
8 **V**

9 **GENUINE ISSUES OF FACT EXIST AS TO DECLARATORY RELIEF BASED**  
10 **ON THE HIGHWAY BEAUTIFICATION ACT**

11 The City argues that the Nevada Department of Transportation adopts and  
12 enforces regulations for signage along federal highways, and therefore, the City  
13 ordinance cannot override NDOT’s prerogative as to whether to issue a permit for a  
14 billboard that lies within NDOT’s jurisdiction. The City asks this Court to ignore any  
15 violation of federal law by the City, because NDOT has concurrent jurisdiction, and  
16 NDOT ultimately will determine whether a digital billboard can be constructed.

17 The simple response is that Scenic Nevada is seeking declaratory relief against the  
18 City of Reno on the basis that the digital billboard ordinance violates the federal Highway  
19 Beautification Act, 23 U.S.C. §131 et seq. Scenic Nevada is not presently seeking any  
20 relief against NDOT. The violation of federal law by the City cannot be condoned  
21 merely because the City claims that NDOT also may be violating it, or because the City  
22 asserts that NDOT can prevent a billboard from being constructed.

23 In *Scenic Arizona v. City of Phoenix Board of Adjustment*, 268 P.3d 370  
24 (Ariz.App. 2011) the court held all digital billboards are prohibited adjacent to federal aid  
25 highways because they use intermittent light to display rotating advertisements as  
26 frequently as every eight seconds, which violates Nevada’s and most states’ FSAs.  
27 Notably, Scenic Arizona filed the action against the City of Phoenix, but the decision also  
28 discusses the position of the Arizona version of NDOT before reaching its conclusion  
that digitals are barred by federal law.

1 Nevada law is the same in all material respects as Arizona's and most other states.  
2 Following passage of the HBA in 1965, Nevada wanted to maintain a certain level of  
3 federal funding for highways and entered into an agreement with the federal government.  
4 Indeed, our legislature adopted NRS 410.220 to 410.410 requiring Nevada to enter into a  
5 FSA with the federal government. In 1972 and 1999, Nevada entered into FSAs to  
6 ensure continued federal funding of highways, and Nevada promised that its regulations  
7 would be consistent with federal highway standards, on "spacing, size and lighting."

8 Nevada's FSA states that billboards: "shall not include or be illuminated by  
9 flashing, intermittent or moving lights (except that part necessary to give public service  
10 information such as time, date, temperature, weather or similar information) and shall not  
11 cause beams or rays of light to be directed at the traveled way if such light is of such  
12 intensity or brilliance or is likely to be mistaken for a warning or danger signal as to  
13 cause glare or impair vision of any driver, or to interfere with a driver's operation of a  
14 motor vehicle." *SN 1-9*. Nevada's agreement not to allow signs with intermittent lights  
15 remains the same today as when the first FSA was signed by Nevada 41 years ago.

16 Consistent with the FSA's and Nevada statutes, Scenic Nevada asserts a valid  
17 claim against the City for a judicial declaration that the digital ordinance violates federal  
18 law. Whether NDOT also is violating federal law is immaterial.

19 Finally, the City's reliance on the discredited 2007 "guidance memo" by the  
20 Federal Highway Administration is misplaced. *See, Sharpe, Susan C., "Between Beauty  
21 and Beer Signs: Why Digital Billboards Violate the Letter and Spirit of the Highway  
22 Beautification Act of 1965," 64 Rutgers Law Review 515 (2012)*. It is the same memo  
23 that was rejected in *Scenic Arizona*. The memo states on its face that it is intended to  
24 provide information to divisions within the federal agency evaluating proposals; that it is  
25 not intended to amend applicable legal requirements; that divisions should work with  
26 states to review existing FSAs; that if appropriate, the agency divisions should assist in  
27 pursuing amendments; and that the divisions should also confirm that the state provided  
28 for appropriate public input, consistent with applicable state law and requirements. *See*

1 *Rutgers Law Review* article, filed May 13, 2013 with *Scenic Nevada's Opposition to*  
2 *Motion to Dismiss*.<sup>4</sup> The memo does not justify the City's digital billboard ordinance.

3 VI

4 **GENUINE ISSUES OF FACT EXIST AS TO DECLARATORY RELIEF BASED**  
5 **ON VIOLATIONS OF THE CITY SIGN CODE**

6 The City's argument in regards to violations of the sign code is basically "we  
7 made the law, so we can break it." The City meanwhile concedes that Scenic Nevada is  
8 correct that the sign code does not allow intermittent lighting, but calls it a "hyper-  
9 technical legal interpretation" leading to the "unreasonable conclusion" that the sign code  
10 bans LED billboards "across the board." *See Motion, p. 25, lines 12-14.*

11 The City appears to forget what happened in 2012. In that year, the City legalized  
12 digital billboards for the first time. Prior to 2012, they were *illegal* under the Reno sign  
13 code. Therefore, Scenic Nevada's "hyper-technical legal interpretation" is in fact the  
14 accurate expression of the law that existed before 2012.

15 The Council can argue that it is entitled to break its own laws, but as long as the  
16 intermittent lighting prohibition is part of the sign code, the Council is violating the law  
17 with its digital billboard ordinance. And contrary to the City's argument, even the  
18 Council is obliged to comply with city ordinances. *City of Reno v. Citizens for Cold*  
19 *Springs*, 236 P.3d 10, 17 (Nev. 2010). Declaratory relief should be granted in favor of  
20 Scenic Nevada for violation of the sign code.

21 VII

22 **SCENIC NEVADA IS TRYING TO COMPLETE DISCOVERY WHILE THIS**  
23 **MOTION IS PENDING**

24 While Scenic Nevada is not moving to postpone the decision on this motion to  
25 finish discovery, there is outstanding discovery that could add measurably to Scenic  
26

27  
28 <sup>4</sup> Scenic America currently is suing the Federal Highway Administration in federal court  
in Washington, D.C. for violating agency rulemaking in issuing the memo. *Scenic*



1 Nevada's case. On November 25, 2013, one day before the City filed and served the  
2 current motion, Scenic Nevada served requests for production on the city with respect to  
3 59 categories of documents. A response is due December 30, 2013. On December 2,  
4 2013, Scenic Nevada served notices of taking deposition for Dwight Dortch and Bob  
5 Cashell. The deposition of Dwight Dortch is set for Jan. 16, 2014. The deposition of  
6 Bob Cashell is not yet arranged.

7 By way of explanation, due in large part to the lengthy motion practice before the  
8 City had to file its Answer, this case has been pending for a year but the joint case  
9 conference report between Scenic Nevada and the City was not filed until two months  
10 ago. Discovery could not commence until that joint case conference report was filed.  
11 The discovery period has been short. Scenic Nevada expects to have additional evidence  
12 shortly.

13 **VIII**  
14 **CONCLUSION**

15 The motion for summary judgment should be denied for the reasons stated and the  
16 parties should be allowed to present their cases on the merit at trial commencing  
17 February 19, 2014.

18 DATED: December 23, 2013

LAW OFFICES OF MARK WRAY

19  
20 By   
21 MARK WRAY  
22 Attorneys for Plaintiff SCENIC NEVADA  
23  
24  
25  
26  
27

1 **DECLARATION OF LORI WRAY IN SUPPORT OF OPPOSITION TO**  
2 **MOTION FOR SUMMARY JUDGMENT**

3 I, Lori Wray, declare:

4 1. My name is Lori Wray. I am a board member of Plaintiff Scenic Nevada,  
5 Inc. and a member of Scenic Nevada for the past 10 years. I know the following facts of  
6 my personal knowledge and could, if asked, competently testify to the truth of the same  
7 under oath.

8 2. I personally participated in the events that are set forth in Scenic Nevada's  
9 First Amended Complaint. I was present at the workshops and hearings from 2008  
10 through 2012 on behalf of Scenic Nevada. The minutes of the workshops and hearings  
11 that the City has disclosed as the official administrative record reflect Scenic Nevada's  
12 participation in the process and Scenic Nevada's objection that a digital billboard  
13 ordinance violates the voter's initiative, state and federal laws.

14 3. In addition to the official record that the City has disclosed as COR 1-903,  
15 Scenic Nevada has disclosed SN 1-1032. I personally prepared the Scenic Nevada  
16 disclosures from records I personally compiled while participating in the digital billboard  
17 ordinance process. Many of the records disclosed by Scenic Nevada overlap with those  
18 of the City, and many do not.

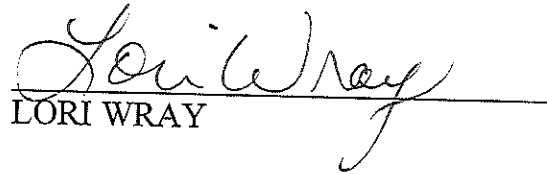
19 4. Attached as exhibits 1, 2, 3, 4 and 5 to Scenic Nevada's opposition are  
20 additional documents Scenic Nevada has not yet disclosed in 16.1 disclosures. These  
21 exhibits are documents that were actually exchanged with the City Council and/or  
22 Planning Commission or exchanged with Scenic Nevada by city staff. The exhibits are  
23 true and correct copies of the documents used during the workshops and hearings and yet  
24 not included by the City in its official version of the administrative record.

25 5. I personally participated in the preparation of this opposition and in  
26 particular, I personally compiled the supporting evidence for the concise statement of  
27 material issues of fact. Attached to this opposition as Exhibit 6 are true and correct  
28

1 copies of the records from the administrative process that were previously disclosed by  
2 Scenic Nevada in its 16.1 disclosures and which are designated by "SN" Bates numbers.  
3 I have not included any of the records disclosed by the City of Reno because those should  
4 already be filed with the court as part of the city's motion, labeled COR 1- 903.

5 6. I have read the opposition and the facts stated therein are true and correct to  
6 the best of my knowledge, information and belief.

7 I declare under penalty of perjury under the law of the State of Nevada that the  
8 foregoing is true and correct and that this declaration was executed on December 23,  
9 2013 at Reno, Nevada.

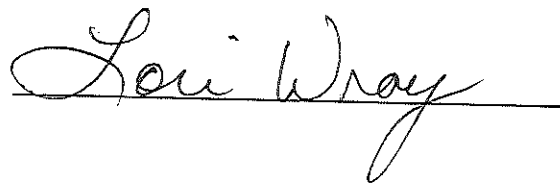
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CERTIFICATE OF SERVICE

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 23, 2013 addressed as follows:

Jonathan Shipman, Deputy City Attorney  
Reno City Hall  
One East First Street  
Reno, NV 89501

Frank C. Gilmore  
Robison Belaustegui Sharp & Low  
71 Washington Street  
Reno, Nevada 89503



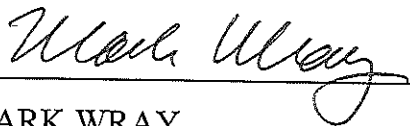
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AFFIRMATION

The undersigned certifies that the foregoing document does not contain the Social Security number of any person.

DATED: Dec. 23, 2013

  
MARK WRAY

INDEX OF EXHIBITS

- Exhibit 1 City of Reno Billboard Inventory
- Exhibit 2 Ordinance 5461 adopted July 11, 2003
- Exhibit 3 Billboard photographs
- Exhibit 4 Young, Gregory: "Illuminating the Issues"
- Exhibit 5 Snyder, Jonathan: "Beyond Aesthetics: How Billboards Affect Economic Prosperity", Dec. 2011
- Exhibit 6 Excerpts of Scenic Nevada 16.1 Disclosures

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