

1 Code: 3370
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5 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
6 IN AND FOR THE COUNTY OF WASHOE

7
8 SCENIC NEVADA, INC.

9 Petitioner,

10 v.

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

13 Respondent.

Case No.: CV17-00361

Dept. No.: 9

14 **ORDER GRANTING PETITION FOR WRIT OF MANDATE**

15 This case came on for oral argument July 24, 2017. At the time of the hearing, the Court
16 was in receipt of Petitioner SCENIC NEVADA, INC.'s ("Scenic Nevada") *Petition for Writ of*
17 *Mandate* filed February 21, 2017. Respondent, the CITY OF RENO a political subdivision of the
18 State of Nevada, and the CITY COUNCIL thereof (collectively "COR"), filed an *Opposition to*
19 *Petition for Writ of Mandate* March 31, 2017. Petitioner filed a *Reply in Support of Petition for Writ*
20 *of Mandate* April 13, 2017.

21 The Court granted Lamar Central Outdoor, LLC's ("Lamar") *Motion to Intervene* filed
22 March 31, 2017. The Court then thereafter considered Lamar's *Opposition to Petition for Writ of*
23 *Mandate* and permitted Lamar's oral argument to supplement their brief.

24 Upon careful review of the moving papers and oral arguments, the Court finds good cause
25 appears to GRANT Scenic Nevada's petition.

26 **FACTUAL BACKGROUND**

27 This case arises out of a voter initiated ballot in 2000, which prohibited the construction of
28 new billboards and banned the issuance of new billboard permits for construction. Under Article 19
§§ 2 and 4 of the Nevada Constitution, ballot initiatives that pass may not be amended for three
years. Despite this prohibition, the City of Reno passed two ordinances modifying the billboard

1 ordinance: the first permitted billboard companies to replace billboards that were removed, and the
2 second established a “banking” system, wherein billboard companies could “bank” their permits for
3 removed billboards for later use or to construct new billboards in new locations.

4 The Supreme Court of Nevada declared the modifications by the City of Reno
5 unconstitutional. However, the Supreme Court of Nevada also held that a new banking and
6 relocation ordinance, which was passed in 2012, was constitutional because it fell outside the three
7 year time limit for amending voter passed ordinances. *Scenic Nevada, Inc. v. City of Reno, A*
8 *Political Subdivision of the State of Nevada*, 132 Nev. Adv.Op. 48, 373 P.3d 873, 877 (2016).

9 The issue before this Court is whether banked receipts, which were issued in the 12-year
10 period between November 14, 2000 (the date the ordinance passed) and the date of the Council’s
11 adoption of the 2012 ordinance are null and void therein prohibiting the construction of new
12 billboards (both static and digital).

13 The language of the Supreme Court of Nevada at issue before this Court is as follows:

14 Here, it is undisputed that the Reno City Council enacted the Conforming and
15 Banking Ordinances within the three-year legislative moratorium, rendering the
16 ordinances void *ab initio*. However, when the City Council enacted the 2012 Digital
17 Ordinance – nine years after the three-year legislative moratorium expired – it
18 reenacted as amended both the Conforming and Banking Ordinances. *See* RMC §§
19 18.16.902, 18.16.908. As the City Council had the statutory authority to treat the
20 voters’ Initiative Ordinance “in the same manner as ordinances of the same kind
21 adopted by the council,” NRS 295.220, and the Nevada Constitution did not prohibit
22 any such action as the three-year legislative moratorium had expired, the 2012 Digital
23 Ordinance was enacted with full constitutional and statutory authority. Thus, upon
24 reenactment, the constitutional defects in the Conforming and Banking Ordinances
25 were cured. **Since Scenic Nevada limits the relief it seeks to the prospective
26 invalidation of the 2012 Digital Ordinance based on antecedent infirmities in the
27 2002 and 2003 Conforming and Banking Ordinances, which infirmities were
28 cured when the 2012 Digital Ordinance reenacted them outside the moratorium
period, no question arises in this case as to the impact the interim invalidity of
the 2002 and 2003 Conforming and Banking Ordinances may have on persons
who relied on those Ordinances.**

25 *Id.* at 876-77 (emphasis added).

26 Scenic Nevada’s contention is that any acceptance of banked permits during the period
27 between 2000 and the date of the Council’s adoption of the 2012 ordinance are void based on the
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1 decision in *Scenic Nevada*. COR, on the other hand, contends that no interim period existed, thus
2 rendering the banked permits issued from 2000 to 2012 valid.^{1,2}

3 DISCUSSION

4 **I. Writ Relief**

5 A district court may issue a writ of mandamus to “compel the performance of an act” by an
6 “inferior tribunal, corporation, board or person.” NRS 34.160. Mandamus is an extraordinary
7 remedy wherein the decision to issue lies within the sound discretion of the court. *Id.* A writ of
8 mandamus may only issue where there is no plain, speedy, or adequate remedy at law. *Sims v.*
9 *Eighth Jud. Dist. Ct. ex rel. Cnty of Clark*, 125 Nev. 126, 129, 206 P.3d 980, 982 (2009); *Harvey L.*
10 *Lerer, Inc. v. Eighth Judicial Dist. Court In & For Cty. of Clark*, 111 Nev. 1165, 1168, 901 P.2d
11 643, 645 (1995). A petition will be granted only when the petitioner has a clear right to the relief
12 requested and has met the burden of establishing that writ relief is appropriate. *Halverson v. Miller*,
13 124 Nev. 484, 488, 186 P.3d 893, 896 (2008).

14 Here, the Court finds writ relief is appropriate. No plain, speedy, or adequate remedy at law
15 exists for Scenic Nevada to obtain the relief it seeks.³ Upon careful review of whether banked
16 permits issued between 2000 and 2012 are invalid, the Court finds the Supreme Court of Nevada’s
17 order unambiguously found the 2002 and 2003 modifications of the voter initiated ordinance
18 unconstitutional. As such, this Court finds any banked receipts issued under the unconstitutional
19 modifications invalid. Moreover, the 2012 ordinance does not apply retroactively to cure the
20 constitutional defect of the 2000 to 2012 banked receipts. These findings are based on well-
21 established Nevada law.

22 Where a statute is found unconstitutional, “it is null and void *ab initio*; it is of no effect,
23 affords no protection, and confers no rights.” *Nev. Power Co. v. Metro. Dev. Co.*, 104 Nev. 684,
24 686, 765 P.2d 1162, 1164 (1988).⁴ While reenacting a statute, which had been found void *ab initio*,
25 may “cure the constitutional defect”, the reenacted bill must nevertheless be free of constitutional

26 ¹ A majority of the banked permits were issued to Clear Channel Outdoor, who sold the banked permits to Intervening
27 Party, Lamar Central Outdoor, LLC.

28 ² COR held this position on February 8, 2017, which gave rise to the subject matter of this action.

³ COR conceded during oral argument that a Petition for Writ of Mandamus was the proper vehicle to bring this issue
before the Court. As such, COR withdrew its objection that Scenic Nevada should have brought a petition for judicial
review.

⁴ “*Ab initio* (ab i-nish-ee-oh) *adv.* [Latin] (16c) From the beginning <the injunction was valid *ab initio*>. Cf. *in initio*.”
AB INITIO, Black’s Law Dictionary (10th ed. 2014).

1 infirmities. *Scenic Nevada*, 132 Nev. Adv. Op. at 48, 373 P.3d at 877. Moreover, to retroactively
2 cure a constitutional defect, the statute must unambiguously provide that it applies retroactively; if
3 it does not so provide, the statute is presumed to apply only prospectively. *Sandpointe Apts. v.*
4 *Eighth Jud. Dist. Ct.*, 129 Nev. Adv. Op. 87, 313 P.3d 849, 853 (2013) (citing *Landgraf v. USI Film*
5 *Prods.*, 511 U.S. 244, 273, 114 S.Ct. 1483 (1994)).

6 Here, the 2012 ordinance does not retroactively apply, nor does it cure the constitutional
7 defect of the 2002 and 2003 modifications of the 2000 ordinance. Pursuant to the Supreme Court of
8 Nevada,

9 deciding when a statute operates “retroactively” is not always a simple or mechanical
10 task. Any test of retroactivity will leave room for a disagreement in hard cases, and is
11 unlikely to classify the enormous variety of changes with perfect philosophical
12 clarity. . . . a statute has retroactive effect when it takes away or impairs vested rights
13 acquired under existing laws, or creates a new obligation, imposes a new duty, or
14 attaches a new disability, in respect to transactions or considerations already past.

15 *Sandpointe*, 129 Nev. Adv. Op. at 87, 313 P.3d at 854 (internal citations omitted).

16 First, upon careful review of the 2012 ordinance at issue, the statute does not expressly
17 state it has a retroactive application. *See* Ordinance No. 6258 (*Opposition to Petition for Writ of*
18 *Mandate*, Ex. 5). The ordinance does not take away or impair previously vested rights. Moreover,
19 the Court is not persuaded that the ordinance’s prospective application would take away vested
20 rights held by Intervening Party, Lamar Central Outdoor, LLC. Based on the Supreme Court’s order
21 holding the 2002 and 2003 modifications unconstitutional, this Court finds Lamar could not have
22 acquired vested rights in the banked billboard permits. The modifications were found to be null and
23 void *ab initio*. In other words, the modifications could not afford any protection, nor could the
24 modifications confer any rights. *Nev. Power Co.*, 104 Nev. at 686, 765 P.2d at 1164; *See also, We*
25 *People Nevada ex rel. Angle v. Miller*, 124 Nev. 874, 889-90, 192 P.3d 1166, 1176 (2008)
26 (recognizing well-established law that an “unconstitutional act is not law, and thus, can neither
27 ‘confer a right or immunity nor operate to supersede any existing law.’” (citing *Chicago, Ind. & L.*
28 *Ry. Co. v. Hackett*, 228 U.S. 559, 566, 33 S.Ct. 581, 57 L.Ed. 966 (1913))). As such, any banked
permits issued before the 2012 ordinance are also void *ab initio*. Rights cannot vest when they
initially do not exist.

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1 **II. COR's Procedural Objections**

2 Next, the Court addresses COR's procedural objections, which include (1) whether Scenic
3 Nevada failed to join necessary and indispensable parties to this action; (2) whether the statute of
4 limitations applies; (3) whether laches bars the petition; and (4) whether claim preclusion applies.

5 **A. Necessary and Indispensable Parties**

6 First, the Court finds Scenic Nevada did not fail to join necessary and indispensable parties
7 to this action. Under NRCP 19(a), a party is necessary to an action if "(1) in his absence, the court
8 cannot accord complete relief among the existing parties; or (2) he has an interest in the action and
9 his absence will impair his ability to protect his interest or subject one of the existing parties to
10 inconsistent obligations." *Humphries v. Eighth Jud. Dist. Ct.*, 129 Adv. Op. 85, 312 P.3d 484, 487
11 (2013). Once a court determines whether a party is necessary, it must then determine whether the
12 party is indispensable under NRCP 19(b): "[a]n indispensable party is one who is necessary to an
13 action but who, for some reason cannot be made a party to that action." *Potts v. Vokits*, 101 Nev.
14 90, 92, 692 P.2d 1304, 1304 (1985). The court must then decide whether the action can proceed
15 without the necessary, but unavailable, party. *Id.* "If in equity and good conscience the action
16 cannot proceed without the necessary party, that party is 'indispensable' and the case must be
17 dismissed." *Id.*

18 The Court finds COR did not provide sufficient justification to determine whether certain
19 holders of banked receipts are either necessary or indispensable parties. Apart from Lamar, to
20 whom the Court granted permissive intervention, COR has not identified any other holders of
21 banked receipts who would be necessary parties and the reasons for their joinder. Moreover, even
22 had COR identified necessary parties to this action, COR has failed to indicate how the party or
23 parties are indispensable to warrant dismissal of the case. COR has not indicated which parties
24 "cannot be made a party" to this case. NRCP 19(b).

25 Therefore, the Court will not dismiss the action based on an alleged failure to join
26 necessary and indispensable parties.

27 **B. Statute of Limitations**

28 Second, the Court does not find the statute of limitations applies. COR asserts the cause of
action for challenging the validity of the banked receipts occurred on October 24, 2012, the date the
last banked receipt was issued. (Opp., 11). According to COR, the petition for writ of mandamus

1 should have been filed, at the most, four years after October 24, 2012 pursuant to NRS 11.220.⁵ *Id.*
2 This Court disagrees.

3 The government action being challenged by Scenic Nevada arose on February 8, 2017
4 when the COR represented that the 2012 ordinance applied retroactively. *See* Petition for Writ of
5 Mandate, 17 ¶ 72-73. Scenic Nevada filed its *Petition* on February 21, 2017 well within any statute
6 of limitations period that could apply to this action.⁶ As such, the Court does not find any statute of
7 limitations apply to bar this action.

8 **C. Laches**

9 Third, the Court is not persuaded the equitable doctrine of laches applies.

10 The doctrine of laches is an “equitable doctrine which may be invoked when delay by one
11 party works to the disadvantage of the other, causing a change of circumstances which would make
12 the grant of relief to the delaying party inequitable.” *Carson City v. Price*, 113 Nev. 409, 412, 934
13 P.2d 1042, 1043 (1997). While “writ relief is subject to laches”, a court must nevertheless
14 determine “(1) whether there was an inexcusable delay in seeking the petition, (2) whether an
15 implied waiver arose from the petitioner’s knowing acquiescence in existing conditions, and (3)
16 whether there were circumstances causing prejudice to the respondent.” *State v. Eighth Judicial*
Dist. Court ex rel. Cty. of Clark, 118 Nev. 140, 148, 42 P.3d 233, 238 (2002).

17 Upon careful review of the record and oral argument, the Court is persuaded that Scenic
18 Nevada has not delayed in bringing this action. Scenic Nevada properly acted when the COR stated
19 on February 8, 2017 that the 2012 ordinance acted retroactively. Scenic Nevada did not delay in
20 seeking the petition nor was there an implied waiver. Moreover, Scenic Nevada has been actively
21 involved in litigating this case since the 2002 and 2003 modifications. *Scenic Nevada, Inc. v. City of*
Reno, A Political Subdivision of the State of Nevada, 132 Nev. Adv.Op. 48, 373 P.3d 873, 877
22 (2016). Granting relief to Scenic Nevada will not cause an inequitable result nor has COR been
23 prejudiced by any alleged delay.

24 As such, the doctrine of laches does not apply to bar the *Petition for Writ of Mandate*.

25 **D. Claim Preclusion**

26 Fourth, the Court does not find claim preclusion bars the writ petition.

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28 ⁵ “An action for relief, not hereinbefore provided for, must be commenced within 4 years after the cause of action shall have accrued.” NRS 11.220.

⁶ NRS 278.0235 (must commence an action against an agency within 25 days); NRS 11.190(3)(a) (must commence an action predicated on a statute within 3 years); and NRS 11.220 (all other actions not provided for, within 4 years).

1 “Claim preclusion applies to preclude an entire second suit that is based on the same set of
2 facts and circumstances as the first suit.” *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1055,
3 194 P.3d 709, 710 (2008). “Claim preclusion ‘treats a judgment, once rendered, as the full measure
4 of relief to be accorded between the same parties on the same “claim” or “cause of action.”’ *Robi v.*
5 *Five Platters, Inc.*, 838 F.2d 318, 322 (1988). Therefore, claim preclusion applies when “(1) the
6 parties and their privies are the same; (2) the final judgment is valid; and (3) the subsequent action
7 is based on the same claims or any part of them that were or could have been brought in the first
8 case.” *Five Star Capital Corp.* at 1054, 713.

9 The Court is not persuaded that this current action is “based on the same claims” as the
10 prior action, nor “could [it] have been brought in the first case.” The issue in *Scenic Nevada* was
11 whether the 2002 and 2003 modifications to the 2000 voter initiated ordinance were constitutional.
12 132 Nev. Adv. Op. at 48, 373 P.3d at 877. Here, the issues are (1) whether banked receipts, which
13 were issued based on the modifications, but prior to the Supreme Court of Nevada’s ruling, are
14 valid, and (2) whether the 2012 modification of the 2000 ordinance applies retroactively to cure the
15 constitutional defect of the 2002 and 2003 modifications. The current issues before this Court did
16 not arise until after the Supreme Court of Nevada made its decision in *Scenic Nevada*. The Supreme
17 Court of Nevada expressly reserved this issue for future consideration:

18 Since *Scenic Nevada* limits the relief it seeks to the prospective invalidation of the
19 2012 Digital Ordinance based on antecedent infirmities in the 2002 and 2003
20 Conforming and Banking Ordinances, which infirmities were cured when the 2012
21 Digital Ordinance reenacted them outside the moratorium period, ***no question arises
22 in this case as to the impact the interim invalidity of the 2002 and 2003 Conforming
23 and Banking Ordinances may have on persons who relied on those Ordinances.***

24 *Id.* (emphasis added). The issue presently before the Court is not the same claim, nor part of the
25 same claim from *Scenic Nevada*.

26 Therefore, claim preclusion does not bar the *Petition for Writ of Mandate*.

27 **III. Conclusion**

28 THEREFORE, and good cause appearing, the Court having read and considered the
verified *Petition for Writ of Mandate* and oral arguments on the matter, HEREBY GRANTS the
Petition for Writ of Mandate.

 IT IS HEREBY ORDERED that a Writ of Mandate shall issue herein. Respondents THE
CITY OF RENO and CITY COUNCIL shall, immediately after service of the writ herein, cease

1 and desist from allowing the construction of billboards in the City of Reno based on permits
2 obtained from any and all banked receipts issued prior to October 24, 2012.

3 DATED: this 2 day of August, 2017.

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6 DISTRICT JUDGE
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1 CERTIFICATE OF SERVICE

2 Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District
3 Court of the State of Nevada, County of Washoe; that on this _____ day
4 of _____, 2017, I deposited in the County mailing system for postage and
5 mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached
6 document addressed to:

7 [NONE]

8
9 Further, I certify that on the 2nd day of August, 2017, I
10 electronically filed the foregoing with the Clerk of the Court electronic filing system, which
11 will send notice of electronic filing to the following:

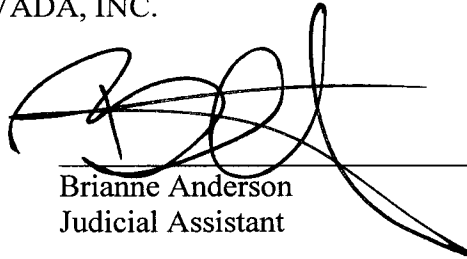
12 TARA ZIMMERMAN, ESQ. for LAMAR CENTRAL OUTDOOR, LLC, A DELAWARE
13 LIMITED LIABILITY CO.

14 CHANDENI SENDALL, ESQ.

15 SEVERIN CARLSON, ESQ. for LAMAR CENTRAL OUTDOOR, LLC, A DELAWARE
16 LIMITED LIABILITY CO.

17 KARL HALL, ESQ. for CITY OF RENO

18 MARK WRAY, ESQ. for SCENIC NEVADA, INC.

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Brianne Anderson
Judicial Assistant