THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA POWER COMPANY, dba NV ENERGY, a Nevada corporation,

Appellant,

vs.

CITY OF HENDERSON, a political subdivision of the State of Nevada,

Respondent.

Case No.: 56374
District Court Case No.: A598063

RESPONDENT'S ANSWERING BRIEF

JAMES MARTINES
Assistant City Attorney
Nevada Bar #9386
HENDERSON CITY ATTORNEY'S OFFICE
240 Water Street, MSC 144
Henderson, Nevada 89015

Attorney for Respondent
CITY OF HENDERSON

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I. INTRODUCTION

Appellant (hereinafter "NV Energy") failed to set forth any background on the City's Development Code generally or the standards applicable to conditional use permits in its Opening Brief. As such, this Introduction is necessary to appropriately frame the relevant issues.

A. Conditional Use Permit

Pursuant to Henderson Municipal Code (HMC) 19.2.8.A[1], "[t]he conditional use permit review and approval procedure provides a **discretionary** approval process for uses with unique or widely varying operating characteristics or unusual site development features. The procedure **encourages public review and evaluation** of a use's operating characteristics and site development features and is intended to ensure that proposed conditional uses will **not have a significant adverse impact on surrounding uses or on the community-at-large**." HMC 19.2.8.A[2] (Emphasis added).

B. Conditional Use Permit Approval Criteria

Pursuant to HMC 19.2.8.F[3], "[c]onditional use permits **may** be approved by the planning commission **only** if they find that **all** of the following criteria have been met:

a. The proposed use complies with all applicable provisions of this Development Code unless otherwise expressly stated;
b. The proposed use is compatible with adjacent uses in terms of scale, site design and operating characteristics (hours of operation, traffic generation, lighting, noise, odor, dust and other external impacts);
c. Any significant adverse impacts resulting from the use will be mitigated or offset to the maximum practical extent;
d. The proposed use will not cause substantial diminution in value of other property in the neighborhood in which it is to be located;
e. Public safety, transportation and utility facilities and services will be available to serve the subject property while maintaining sufficient levels of service for existing development;
f. Adequate assurances of continuing maintenance have been provided;
g. Any significant adverse impacts on the natural environment will be mitigated to the maximum practical extent.

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[1] See, Exhibit 1.
[2] See, Exhibit 1.
[3] See, Exhibit 2.

HMC 19.2.8.F[4] (Emphasis added).

It is important to note that the City Council must deny a conditional use permit if any one of the above criterion is not met. Moreover, "even if an applicant meets his burden of proving [the necessary criteria], this merely permits the legislative body to grant the requested use permit but does not require it to do so." Messenger v. Board of County Commissioners for Prince George's County, 271 A.2d 166, 172 (Md. 1970); See also HMC 19.2.8.F.1 (stating that "Conditional use permits **may** be approved...[if] all the following criteria have been met" [Emphasis added]).

C. Burden of Proof Before City Council Generally

Pursuant to HMC 19.2.1.I[5], NV Energy had the burden of proving to City Council that it had satisfied all approval criteria:

> I. Burden of Proof or Persuasion. The burden of demonstrating that an application complies with applicable review and approval criteria is on the applicant. The burden is not on the city or other parties to show that the criteria have not been met.

Before City Council, it was also NV Energy's burden to show, in addition to satisfaction of all approval criteria, that approval of its use permit would better promote the general welfare than leaving the property in its current state. Harmon City, Inc. v. Draper City, 997 P.2d 321, 329 (Utah App. 2000). The City Council alone has the ability to weigh the evidence presented and determine whether or not NV Energy met this burden. Stratosphere Gaming Corp. v City of Las Vegas, 120 Nev. 523, 530 (Nev. 2004); Enterprise Citizens Action Committee v. Clark County Board of Commissioners, 918 P.2d 305 (Nev. 1996).

NV Energy's burden before this Court is not to show that it satisfied the conditional use permit approval criteria or that the City Council had no reason to deny its application. Rather, it

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[4] See, Exhibit 2.
[5] See, Exhibit 3.

is NV Energy's burden to now prove that the City Council acted arbitrarily and capriciously when it denied NV Energy's use permit.

II. STATEMENT OF THE CASE

NV Energy submitted an application for a conditional use permit to construct a major utility (electrical) transmission line and upgrade a portion of an existing transmission line. The applicant's intent was to upgrade 3.3 miles of existing 69kV transmission lines within the City to quad-circuit 230/138kV transmission lines through the Weston Hill, Tuscany, and Section 4 neighborhoods. In short, NV Energy's application proposed to remove the existing thirty-five (35) foot tall wood poles bearing three (3) transmission lines on each and replace them with much wider, 145 foot tall metal poles bearing up to twenty (20) lines on each. This would all take place within an existing 100-foot wide utility right-of-way that crosses private property within residential neighborhoods. (See clarification noted on H00003).

On June 25, 2009, the Planning Commission denied NV Energy's aforementioned application for a conditional use permit. Thereafter, consistent with the requirements of HMC 19.2.8.G[6], the Planning Commission's findings of fact were reduced to writing and kept on record at the City of Henderson, Community Development Department. NV Energy was then sent a Notice of Denial on June 29, 2009, consistent with HMC 19.2.8.I[7]. (H00568-00569).

On July 6, 2009, NV Energy appealed Planning Commission's decision to City Council. (H00005). On the Appeal Application Form, NV Energy stated the reason for the appeal of Planning Commission's decision was "because we disagree with their findings." (H00006). Planning Commission's written findings of fact were included in the official record before City Council. (H00004).

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[6] See, Exhibit 4.
[7] See, Exhibit 5.

At its August 9, 2009 meeting, City Council affirmed Planning Commission's denial of NV Energy's use permit and adopted the written findings of fact before them. (H00004). The denial was based on substantial and specific concerns by members of City Council, based on their own knowledge of existing conditions, as well as concerns expressed by 700 homeowners represented by the Tuscany Master Association (H00252), 80 residents who returned comment cards (H00273 – H00387; Transcript at 58), 62 residents who wrote letters in opposition (H00388 – H00548), 24 residents who testified at the meeting (Transcript at 58 – 98), 19 residents who signed a petition (H00549), and The Desert Wetlands Conservancy[8] (H00253, H00547), which both wrote a letter and testified in opposition to this project.

On August 27, 2009, NV Energy filed, in the Eighth Judicial District Court of the State of Nevada, a Petition for Judicial Review of City Council's decision to affirm Planning Commission's denial.

On May 27, 2010, the parties presented oral arguments before the Honorable Susan H. Johnson who ultimately denied NV Energy's Petition for Judicial Review and found that the Henderson City Council's denial was supported by substantial evidence and, therefore, said denial did not amount to a manifest abuse of discretion.

On July 6, 2010, NV Energy appealed the denial of its Petition for Judicial Review to this Court.

III. STATEMENT OF ISSUES

1. Did City Council act arbitrarily and capriciously, committing a manifest abuse of discretion, when it denied NV Energy's application for a conditional use permit?

2. Did City Council fail to make "any findings," as alleged in NV Energy's Opening Brief, when it denied NV Energy's application for a conditional use permit?

[8] The Desert Wetlands Conservancy was created in 1995 to influence public policy, create partnerships, and initiate activities in advocacy for the Las Vegas Valley Watershed and Clark County wetlands ecosystem that enhances the quality of life and sustains the community.

IV. SUMMARY OF THE ARGUMENT

"[T]he action taken by the city council...upon the matter properly before it, would not warrant interference by the trial court except where there was a manifest abuse of discretion." City of Henderson v. Henderson Auto Wrecking, Inc., 77 Nev. 118 (Nev. 1961).

The City Council did not abuse its discretion by denying NV Energy's use permit because the denial was based upon substantial evidence presented by 885 members of the public, the Desert Wetlands Conservancy, and members of City Council, based on their own knowledge of existing conditions.

Moreover, NV Energy's allegation that City Council failed to make "any findings" to support its decision is entirely unfounded and contradicted by the facts in the official record.

Accordingly, the relief sought by NV Energy must be denied.

V. ARGUMENT

There is ample evidence in the record to show that City Council's decision to deny NV Energy's conditional use permit was firmly based on substantial and specific evidence and, as such, the relief sought by NV Energy must be denied.

A. STANDARD GOVERNING JUDICIAL REVIEW

The scope of this Court's review is "limited to a determination of whether the agency or municipality...committed an abuse of discretion." Stratosphere, 120 Nev. at 528. In making such determination, "this court is limited to the record made before the City in reviewing the City's decision." City of Las Vegas v. Laughlin, 111 Nev. 557, 559 (Nev. 1995) (citation omitted). An existing land use classification, such as denial of a use permit, is strictly a legislative matter and is presumed to be valid. McKenzie v. Shelly, 362 P.2d 268, 269-270 (Nev. 1961). "The grant or denial of a request for a special use permit is a discretionary act." Laughlin, 111 Nev. at 559 (citation omitted). If this discretionary act is supported by substantial evidence,

there is no abuse of discretion. Id. Substantial evidence is that which "'a reasonable mind might accept as adequate to support a conclusion.'" Id. **Substantial evidence exists where "concerns [are] expressed by the public ... over ... preserving the residential nature of the neighborhood.**" Id. at 559-560 (Emphasis added).

When the official record plainly establishes that such concerns were expressed, there is no manifest abuse of discretion, and where there is no manifest abuse of discretion, the court cannot interfere with City Council's decision. McKenzie v. Shelly, 77 Nev. 237, 242 (Nev. 1961). See also County of Clark v. Doumani, 114 Nev. 46, 53 (Nev. 1998); Board of Com'rs of City of Las Vegas v. Dayton Development Co., 91 Nev. 71, 75 (Nev. 1975).

B. CITY COUNCIL'S DENIAL OF NV ENERGY'S USE PERMIT WAS A DISCRETIONARY ACT SUPPORTED BY SUBSTANTIAL EVIDENCE

The certified record in this mater plainly establishes that the City Council's decision was supported by substantial evidence. City Council denied NV Energy's application for a conditional use permit based on substantial and specific concerns expressed by 885 members of the public, the Desert Wetlands Conservancy, and members of City Council based upon their own knowledge of existing conditions. As more fully explained below, these concerns all relate to the use permit approval criteria cited above in section I.B. Said denial was a discretionary act supported by substantial evidence. Laughlin, 111 Nev. at 559. Consequently, there was no abuse of discretion and City Council's denial must stand.

1. The Substantial And Specific Concerns Expressed By 885 Members Of The Public And The Desert Wetlands Conservancy Constitute Substantial Evidence Supporting City Council's Decision.

City Council appropriately considered the public's opposition to NV Energy's application, and said opposition amounted to substantial evidence supporting denial of NV Energy's use permit.

In Laughlin, the Nevada Supreme Court held that the City of Las Vegas' denial of a special use permit was supported by substantial evidence when public testimony in opposition to the use permit was expressed by over 200 individuals who raised substantial concerns. 111 Nev. at 559. In Laughlin, the Nevada Supreme Court also took the time to distinguish this case from those of Tighe v. Von Goerken, 108 Nev. 440 (Nev. 1992) and City Council of Reno v. Travelers Hotel, 100 Nev. 436 (Nev. 1984).

In Tighe, the Nevada Supreme Court found that testimony from a few individuals in an affected area may not be enough to deny a special use permit. 108 Nev. at 444. In Travelers, the Nevada Supreme Court found that one (1) lay opinion was an insufficient ground for denial of a special use permit. 100 Nev. at 439. However, the Nevada Supreme Court in Laughlin clarified that **when you have "the opinion of over 200 individuals ... the lay objections [are] substantial.**" 111 Nev. at 559 (Emphasis added). As such, the Court found "that the concerns expressed by the public, **specifically those over...preserving the residential nature of the neighborhood, establish a valid basis for the denial of Laughlin's request for a special use permit.**" Id at 559-560 (Emphasis added).

In McKenzie v. Shelly, supra, the Nevada Supreme Court reviewed a challenge to a zone change and found that the following constituted substantial evidence: (1) the fact that 8 people testified against and 11 testified in favor of the application, (2) 1000 written communications to the Board, and (3) a map and the zoning authorities' own knowledge of existing conditions (i.e., high traffic and noise made area more suitable for commercial activity and there was a need for closer shopping).

In Stratosphere, the Court emphatically emphasized the relevance and importance of public opinion. 120 Nev. 523 (Nev. 2004). The appellant in Stratosphere applied for a site development plan review. Both at the planning commission and city council levels, substantial numbers of people expressed opposition both orally and in writing. The council voted against

appellant's project. Before voting the Mayor said, "[I]f those folks in the neighborhood feel that this particular project is such that it will destroy their quality of life as they perceive it, then I feel that I must support the neighbors." Stratosphere, 120 Nev. at 525. The appellant argued, as does NV Energy, that the city council improperly based its decision solely on public opposition and that public opposition alone is not substantial evidence. The court rejected that argument, explaining as follows:

> "[W]e have recognized that a local government may weigh public opinion in making a land-use decision. Moreover, in City of Las Vegas v. Laughlin, we explained that "substantial and specific" public opposition could constitute substantial evidence to support a local government's decision to deny a request for a special use permit. In Laughlin, "over 200 individuals" opposed the respondent's application for a special use permit for a convenience store to be built on land properly zoned for commercial use but near a residential neighborhood. We concluded that the public's "substantial and specific" concerns, "specifically those over increased traffic where children walk to school and **preserving the residential nature of the neighborhood**, establish a valid basis for the denial of [the respondent's] request for a special use permit." 96 P.3d at 760-61. (footnotes omitted) (Emphasis added).

Applying this law to the facts of the case in Stratosphere, the Nevada Supreme Court held that the public opposition did constitute substantial evidence:

> "In this case, the City Council received 175 written protests before the City Council's public hearing, and approximately 20 individuals testified against the proposed ride during the City Council's public hearing. The opposition primarily consisted of nearby neighborhood residents and business owners. The opposition's main concerns included: (1) **the compatibility of the proposed ride located near the residential neighborhood**, (2) the increased neighborhood traffic and resulting safety concerns, and (3) the possibility of increased noise and ground vibration caused by the proposed ride. Although the Stratosphere presented evidence to rebut the opposition's concerns and testimony from individuals who supported the proposed ride, we cannot substitute our judgment for that of the City council as to the weight of the evidence. We conclude that the kind of concerns expressed by the individuals and businesses opposed to the proposed ride are substantial and specific." 96 P.3d at 761 (footnotes omitted) (Emphasis added).

Similarly, the opposition in the case sub judice consisted of multitudinous concerns relevant to the applicable criteria. And just as in Stratosphere, while NV Energy claims that it rebutted these concerns, this Court cannot substitute its judgment for that of the City Council.[9]

Here, the City Council properly denied NV Energy's application based on the overwhelming public opposition by:

1. 700 homeowners represented by the Tuscany Master Association (H00252),
2. 80 individuals' comment cards (H00273 – H00387, (Transcript at 58),
3. 62 written letters in opposition (H00388 – H00548),
4. 24 individuals' testimony (Transcript at 58 – 98).
5. 19 individuals' signed petition (H00549), and
6. The Desert Wetlands Conservancy (H00253, H00547),

Thus, according to the Nevada Supreme Court in Laughlin, McKenzie, and Stratosphere, "the City's decision was based on substantial evidence and the City did not manifestly abuse its discretion by denying [NV Energy's] request for a special use permit." Laughlin at 560.

2. The Substantial And Specific Concerns Expressed By City Council, Based On Their Own Knowledge Of Existing Conditions, Constitute Substantial Evidence Supporting City Council's Decision.

Members of City Council expressed concerns, based on their own knowledge of existing conditions, with NV Energy's application and said concerns amount to substantial evidence supporting denial of NV Energy's use permit.

In considering land use decisions, councilmembers' concerns, based on their own knowledge of existing conditions, alone constitute substantial evidence supporting council action. McKenzie, 77 Nev. at 237, 240. Here, councilmembers Kirk and March both expressed concerns that NV Energy's application is not compatible with the adjacent residential uses, as

[9] Other Nevada cases have addressed public opinion as well. In Board of Com'rs of City of Las Vegas v. Dayton Development Co., 91 Nev. 77 (Nev. 1975), the Supreme Court recognized that public opinion was an important factor "possess[ing] substance and force" in support of the rezoning decision. In County of Clark v. Doumani, 952 P.2d 13, 17 (Nev. 1998), the Court found substantial evidence to exist where "[t]he primary evidence presented at the hearing in opposition to the project consisted of fifteen letters of protest, a petition containing 106 signatures, testimony of five area homeowners, and Commissioner Woodbury's statement that the land was more suitable for single family homes."

quoted in sections 3(a)-(e) below. (Transcript at 101-103). Thus, according to the Nevada Supreme Court in McKenzie, "the City's decision was based on substantial evidence and the City did not manifestly abuse its discretion by denying [NV Energy's] request for a special use permit." Laughlin at 560.

3. City Council Properly Denied NV Energy's Application When The Substantial And Specific Concerns Expressed Were Based On The "Approval Criteria" Outlined In The Governing Ordinance.

City Council properly denied NV Energy's application for a use permit when the aforementioned substantial and specific concerns expressed were based on the "approval criteria" outlined in Henderson Municipal Code (HMC) 19.2.8.F[10].

HMC 19.2.8.F[11] states that conditional use permits may be approved only if NV Energy is able to prove that all seven approval criteria have been met. If NV Energy failed to prove any one of these criterion, the City Council was required to deny the application.

As noted below, NV Energy was unable to prove to City Council that it satisfied the following four (4) criteria:

a. The proposed use complies with all applicable provisions of this Development Code unless otherwise expressly stated;
b. The proposed use is compatible with adjacent uses in terms of scale, site design and operating characteristics (hours of operation, traffic generation, lighting, noise, odor, dust and other external impacts);
c. Any significant adverse impacts resulting from the use will be mitigated or offset to the maximum practical extent;
d. The proposed use will not cause substantial diminution in value of other property in the neighborhood in which it is to be located;

NV Energy's failure to satisfy said criteria required denial of its application on four (4) separate counts. At the close of the public hearing, City Council voted to affirm the written findings of Planning Commission. (See H00004; Transcript pg. 104). These written findings expressly stated:

[10] See, Exhibit 2.
[11] See, Exhibit 2.

- Structure is too large and obtrusive to the residents.
- Quality of life of residents would be affected.
- Not in compliance with the following findings of fact:
  - **B.** The proposed use is compatible with adjacent uses in terms of scale, site design, operating characteristics (hours of operation, traffic generation, lighting, noise, odor, dust, and other external impacts).
  - **C.** Any significant adverse impacts resulting from this use will be mitigated or offset to the maximum practical extent.
  - **D.** The proposed use will not cause substantial diminution on the value of other property in the neighborhood in which it is located.

(H00004). City Council properly affirmed these written findings based on the substantial and specific concerns set forth in subsections (a) through (d) below. In evaluating this evidence, it is important to remember that this Court "cannot substitute [its] judgment for that of the City Council as to the weight of the evidence." Stratosphere, 120 Nev. at 530.

a. The substantial and specific concerns expressed regarding noncompliance with HMC 19.2.8.F.1.b[12] constitute substantial evidence to support City Council's decision.

City Council's finding that the proposed 145 foot tall metal poles with up to twenty (20) transmission wires on each are not compatible with the adjacent residential land use was sufficient ground on which to deny NV Energy's use permit. Many residents of the adjacent residential communities expressed their substantial and specific concerns to this effect on the record. Examples of such comments include:

- Bill Wilson: "We feel like it's an inconsistent land use." (Transcript at 62).
- Joyce Hulsey: "We have been before the Council numerous times to maintain out rural community lifestyle...The wood power poles are not obtrusive...We want to maintain our rural lifestyle. You voted to maintain that as a rural residential area. Let's keep it that way." (Transcript at 70-71).
- Nancy Myers: "[T]he transmission lines are inappropriate [and] not compatible." (Transcript at 78).
- Patty McPherson-Luker: "these lines don't belong on this right-of-way or on any other that runs amongst the homes of human life, playgrounds and recreation areas." (Transcript at 83).

[12] See, Exhibit 2.

(See also Written Statements of Opposition at H00388 – H00548). Council members Kirk and March also expressed, based on their own knowledge of conditions in the area, opinions as to this incompatibility[13]:

- COUNCILMAN KIRK: "You keep saying that in January 1999, we approved the use permit. How many people were living out there in 1999?" RIGDEN: "I don't believe any." KIRK: "So while I appreciate the fact that in 1999 you got your approvals, things have changed significantly since 1999." (Transcript at 22).
- COUNCILMEMBER MARCH: "I think for me...[the problem] is the whole idea of a 140-foot pole in a residential neighborhood." (Transcript at 32).
- COUNCILMAN KIRK: "[O]ne of the measuring rods I use when I consider a land use vote is does it fit? Does it fit the neighborhood?" "To me, it doesn't fit." (Transcript at 103).
- COUNCILMEMBER MARCH: "I don't believe that this defined line is compatible with the residential nature of the adjacent uses in terms of the scale, site design, and operating characteristics." (Transcript at 104).

These concerns were appropriate for Council to consider in that they indicate a sentiment that the poles are not compatible with the adjacent residential uses. HMC 19.2.8.F.1.b[14]. City Council properly considered the above substantial and specific concerns related to HMC 19.2.8.F.1.b[15] and said concerns on this point alone constitute substantial evidence to support denial of NV Energy's use permit. As such, City Council did not abuse its discretion and the denial must stand.

Residents and City Council also expressed substantial and specific concerns indicating that the proposed 145 foot tall metal poles with up to twenty (20) transmission wires on each are too large and obtrusive for the neighborhood and would negatively affect the quality of life of the residents. The Council found that issues also rendered the project incompatible with the adjacent residential use.

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[13] In considering land use decisions, councilmembers' own knowledge of existing conditions alone can constitute substantial evidence supporting council action. McKenzie, 77 Nev. 237 at 237, 240.

[14] See, Exhibit 2.

[15] See, Exhibit 2.

i. <u>The substantial and specific concerns expressed regarding the structure being "too large and obtrusive" also constitute substantial evidence related to HMC 19.2.8.F.1.b.</u>

The substantial and specific concerns indicating that the proposed 145 foot tall metal poles with up to twenty (20) transmission wires on each are "too large and obtrusive" for the neighborhood amount to substantial evidence to support City Council's decision.

There was an overwhelming amount of public opposition that expressed substantial and specific concerns related to the size of the proposed transmission lines:

- <u>Tom Sims</u>: The proposed "poles are about 135 foot [sic] high…I've heard figures of 140, even higher…[M]y home would be heavily impacted just from the aesthetics." (Transcript at 60).
- <u>John Blevins</u>: "[R]ight now we have a 35-foot power line made out of wood…now we're looking at 135 to 165-foot line…That's not a residential community corridor…Please oppose this. (Transcript at 69).
- <u>Nancy Myers</u>: "[T]he transmission lines are…too big." (Transcript at 78).
- <u>Bill Kerstiens</u>: "How can 135-foot tower be considered acceptable in a residential neighborhood when 45-foot cell towers are not?" (Transcript at 82).
- <u>Evelyn Daumeyer</u>: "[T]he power line they want to put in…[is] way too high." (Transcript at 88).

(See also Written Statements of Opposition at H00388 – H00548). Councilman Kirk also expressed, based on his own knowledge of the conditions, his opinion as to this incompatibility[16]:

- <u>COUNCILMAN KIRK</u>: [I]f these poles were there in 1999 when you got your approval, we wouldn't be having this discussion tonight because everyone would have bought into an existing configuration with tall poles. The problem is that **these poles are too big, they're too obtrusive,** and that is not what the neighbors bought into." (Transcript at 102).
- <u>COUNCILMAN KIRK</u>: "I cannot imagine the negative impact that these higher poles…would have on the neighborhoods." (Transcript at 103).
- <u>COUNCILMAN KIRK</u>: "[M]y message to you tonight is the **same as many of what the neighbors have said** and it takes more than a calculator and a straight edge to figure out where these lines ought to go.…We're not saying you don't deserve it. We're not saying

[16] In considering land use decisions, councilmembers' own knowledge of existing conditions alone can constitute substantial evidence supporting council action. <u>McKenzie</u>, 77 Nev. 237 at 237, 240.

we don't need it. What we're saying is we don't want it here and we don't want it that high." (Transcript at 103).

The above concerns were appropriate for Council to consider in that they indicate a sentiment that the poles are not compatible with the adjacent residential uses due to their size and structure characteristics. HMC 19.2.8.F.1.b[17]. City Council properly considered the above substantial and specific concerns related to the structures being "too large and obtrusive" and said concerns on this point alone constitute substantial evidence to support City Council's decision.

ii. The substantial and specific concerns expressed regarding the "quality of life of the residents" constitute substantial evidence related to HMC 19.2.8.F.1.b.

The substantial and specific concerns that the proposed 145 foot tall metal poles with up to twenty (20) transmission wires on each would negatively affect the quality of life of the residents constitute substantial evidence to support City Council's decision.

In Stratosphere, the Nevada Supreme Court confirmed that the consideration of the "quality of life" of the residents is an appropriate consideration. In that case, the Mayor stated, "[I]f these folks in the neighborhood feel that this particular project is such that it will destroy their **quality of life** as they perceive it, then I feel I must support the neighbors." Stratosphere, 120 Nev. at 525 (Emphasis added). In affirming that such "quality of life" concerns were appropriately considered by the City Council, the Nevada Supreme Court held that such "concerns expressed by the individuals...are substantial and specific." Id. at 530.

Here, there was an overwhelming amount of public opposition that expressed substantial and specific concerns related to the negative affect the 145 foot poles would have on the quality of life of the residents in the neighborhood:

- Art Wolf: "Our concerns...are with...questioning the need to only use a straight edge and a calculator in figuring quality of life issues." (Transcript at 65-66).

[17] See, Exhibit 2.

- Danny Winegar: "I purchased my home about 18 months ago...Had I known those power lines were proposed, I would not have purchased my home." (Transcript at 68).
- Gregorio Gomez: "Reject Nevada Energy's proposal as presented. I urge you all to do what's best for the health, quality of life, and safety of your neighbors and constituents." (Transcript at 75).
- Joel Kaplan: "[A]t Planning Commission,...quality of life was [Commissioner Burr's] major issue...and it really struck home with me." (Transcript at 75-76).
- Bill DiBenedetto: "The quality of life here has been something that kept me here since '93." (Transcript at 81).
- Evelyn Daumeyer: "We know the best way of ensuring maintaining quality of life is by working together...[W]e show you the examples of our homes and their relationship to the power lines and we show you where our kids play. We show you that the fluorescent light tubes light up if you stand underneath these things. We...ask you, our City Council, to stand by our sides." (Transcript at 89-90).
- Brook Bohlke: "I oppose the Nevada Energy plan to destroy the aesthetics of our neighborhood...Nevada Energy's proposal is going to provide out community with at least 18 months of construction...[P]lease...deny this proposal." (Transcript at 90).
- Matthew Paulowski: "I purchased a home in Tuscany because it was a golf community...Nevada Power...will have to create construction access directly across the[] golf [course]...[U]ntil the day they finish 18 months down the road, that golf course cannot be opened." (Transcript at 94).
- Tuscany Master Association: "We oppose this project because...it would negatively affect the quality of life in our community." (H000252).

(See also Written Statements of Opposition at H00388 – H00548). Councilman Kirk also expressed, based on his own knowledge of existing conditions, his opinion as to this incompatibility[18]:

- COUNCILMAN KIRK: "[M]y message to you tonight is, come up with an alternate plan that doesn't go through ...neighborhoods, because in Henderson, this is a quality of life issue." (Transcript at 101).
- COUNCILMAN KIRK: "The reason people move to Henderson, they buy into a quality of life. That is hard to put a value on." (Transcript at 101-102).

These concerns were appropriate for Council to consider in that they indicate a sentiment that the poles are not compatible with the adjacent residential uses due to their external impacts.

[18] In considering land use decisions, councilmembers' own knowledge of existing conditions alone can constitute substantial evidence supporting council action. McKenzie, 77 Nev. 237 at 237, 240.

HMC 19.2.8.F.1.b[19]. Council properly considered the above substantial and specific concerns related to negative effects on the quality of life of the residents and said concerns on this point alone constitute substantial evidence to support denial of NV Energy's use permit.

Based on the foregoing, there was substantial evidence to support City Council's finding that NV Energy's proposed transmission lines are not compatible with the adjacent residential use. Thus, City Council did not abuse its discretion when it denied NV Energy's use permit and, as such, this Court should not interfere with said denial.

b. The substantial and specific concerns expressed regarding noncompliance with HMC 19.2.8.F.1.c[20] constitute substantial evidence to support City Council's decision.

The residents' and City Council's concerns that the adverse impacts of the proposed 145 foot tall metal poles with up to twenty (20) transmission wires on each would not be "mitigated or offset to the maximum practical extent" constitute substantial evidence to support City Council's decision.

There was an overwhelming amount of public opposition that expressed substantial and specific concerns related to the significant adverse impacts that would result from installation of the proposed poles:

- Art Wolf: "I haven't heard anyone mention tonight burying [the transmission] lines. Ninety percent of this would go away if you talked about that." (Transcript at 66).
- Nancy Myers: "We're sure the impact cannot be offset." (Transcript at 78).
- Drina Fried: "We would like the power lines to be buried so as not to negatively affect people, protect already diminishing property values...and to keep the landscape beautiful." (H00388).

(See also Written Statements of Opposition at H00388 – H00548). Councilman Kirk also expressed, based on his own knowledge of the conditions, his opinion as to these adverse

[19] See, Exhibit 2.
[20] See, Exhibit 2.

impacts and ultimately decided that NV Energy's proposal did not mitigated or offset them to the maximum practical extent[21]:

- DAVID RIGDEN (on behalf of Nevada energy): "There's two…options…One was to go along Lake Mead, and the other to go along Athens Avenue. The **cheaper way of doing it** is to go along Athens…that's this proposal." (Transcript at 98) (Emphasis added).
- COUNCILMAN KIRK (in response to David Rigden): "I don't think anyone would be opposed to this if you would move the alignment…[I]t takes more than a calculator …to figure out where these lines ought to go." (Transcript at 101, 103).

These concerns were appropriate for Council to consider in that it was NV Energy's burden to proof that these adverse impacts would be mitigated to the maximum extent before a use permit could be approved. HMC 19.2.8.F.1.c[22]. The above stated concerns show that this burden was not met.

Based on the foregoing, there was substantial evidence to support City Council's finding that the adverse impacts of NV Energy's proposed transmission lines were not "mitigated or offset to the maximum practical extent." Thus, City Council did not abuse its discretion and, as such, this Court should not interfere with said denial.

c. The substantial and specific concerns expressed regarding noncompliance with HMC 19.2.8.F.1.d[23] constitute substantial evidence to support City Council's decision.

When City Council found, based on substantial and specific concerns expressed by the public and members of City Council, that that the proposed 145 foot tall metal poles with up to twenty (20) transmission wires on each may "cause substantial diminution in value of other property in the neighborhood," this finding alone constituted substantial evidence to support City Council's decision.

[21] In considering land use decisions, councilmembers' own knowledge of existing conditions alone can constitute substantial evidence supporting council action. McKenzie, 77 Nev. 237 at 237, 240.
[22] See, Exhibit 2.
[23] See, Exhibit 2.

There was an overwhelming amount of public opposition that expressed substantial and specific concerns related to the possible diminution of property values that would result from installation of the proposed poles:

- Tom Sims: [M]y home would be heavily impacted just from…the fall zone." (Transcript at 60).
- Bill Wilson: "My house if 85 feet past the fall zone. I can't get [FHA] financing." (Transcript at 64).
- Andrew Simmons: "It's about 20 feet to the power lines to the side of our house…And we couldn't have even gotten the financing to get the house because of the fall safety issues." (Transcript at 73).
- Joel Kaplan: "[When purchasing my home] I knew…I was buying a 35-foot pole with power lines…I bought a $600,000 home…Yeah, I'm concerned about my property values.' (Transcript at 76).
- Lance McDade: "I'm against this power line…[because if] they bring those [poles] to…135 foot [sic], my lot is not buildable anymore because the fall zone will cover the whole lot." (Transcript at 92).
- Tuscany Master Association: "We oppose this project because…[it would] be a detriment to future sales efforts,…pose a disruption to the construction of new homes…negatively affect property values…[and] negatively affect golf course operations and revenues." (H000252).

(See also Written Statements of Opposition at H00388 – H00548). Councilman Kirk also expressed, based on his own knowledge of the conditions, his opinion as to the possible diminution of property values[24]:

- COUNCILMAN KIRK: "The problem I'm having with this is…we're going to double or triple the [pole] size and go from four or five wires to 20…And I would imagine also that if you had two pieces of property identical, that the one with the transmission line would be…worth less than the one without." (Transcript at 34)

Even NV Energy's own experts expressed opinions as to the possible diminution of property values:

- MR. KIEHLBAUCH (on behalf of Nevada energy): "All things being equal, if [a buyer is] given the choice between two properties, he would take the one without the [power] lines" (Transcript at 31)

[24] In considering land use decisions, councilmembers' own knowledge of existing conditions alone can constitute substantial evidence supporting council action. McKenzie, 77 Nev. 237 at 237, 240.

- MR. KIEHLBAUC (on behalf of Nevada energy): "sales slower due to the lack of FHA/VA financing in 'fall zone areas'" (Transcript at 31)
- TIMOTHY MORSE (on behalf of Nevada energy): "I think that we can all agree…overhead power transmission lines are unsightly." (Transcript at 37)

These concerns were appropriate for Council to consider in that it was NV Energy's burden to prove that the proposed use would not cause diminution in neighborhood property values before a use permit could be approved. HMC 19.2.8.F.1.d[25].

Based on the foregoing, there was substantial evidence to support City Council's finding that NV Energy's proposed transmission lines may "cause substantial diminution in value of other property in the neighborhood." Thus, City Council did not abuse its discretion and, as such, this Court should not attempt to reweigh the evidence or interfere with said denial.

d. The substantial and specific concerns expressed regarding NV Energy's failure to prove compliance with all applicable provisions of the Development Code constitute substantial evidence to support City Council's decision.

Before granting a conditional use permit, City Council must find that the "proposed use complies with all applicable provisions of [the] Development Code." HMC 19.2.8.F.1.a[26]. The Development Code is designed "to protect the public health, safety and general welfare and to implement to the policies of the Henderson comprehensive plan." More specifically, the purposes and intent of the Code are to, among other things, "**preserve the character and quality of residential neighborhoods,**" "promote the **economic stability of existing land uses … and protect them from intrusions by incompatible land uses,**" and "protect natural and scenic resources." HMC 19.1.4.A[27] (Emphasis added). As the above cited concerns reveal, there was an overwhelming amount of public opposition that expressed substantial and specific

[25] See, Exhibit 2.
[26] See, Exhibit 2.
[27] See, Exhibit 6.

concerns related to NV Energy's proposal not complying with the intent and purpose of the Development Code. Some additional related concerns expressed by residents were as follows:

- Bill Wilson: "the provisions of the Development Code are to protect the public health, safety, and general welfare...preserve the character and quality of residential neighborhoods...this project does anything but that. (transcript at 61).
- Art Wolf: "I'm a trustee of the Desert Wetlands Conservancy ... Our concerns...are with the view shed [and] with the environmental damage." "[T]here's been millions of dollars spent in the Wetlands on restoring and replenishing what used to be there...and the view from there would be of these 135-foot poles." (Transcript at 65-67).

These concerns were appropriate for Council to consider in that it was NV Energy's burden to prove that the proposed use would comply with all provisions of the Development Code before a use permit could be approved. HMC 19.2.8.F.1.a[28]. As such, City Council properly considered the above substantial and specific concerns related to HMC 19.2.8.F.1.a[29] and said concerns on this point alone constitute substantial evidence.

As this Court has found, "[a]lthough [NV Energy] presented evidence to rebut the opposition's concerns ... [the Court] cannot substitute [its] judgment for that of the City Council as to the weight of the evidence." Stratosphere, 120 Nev. at 530. Based on the foregoing substantial and specified concerns expressed in subsections (a) – (d) above, there was substantial evidence to support City Council's decision. As such, there was no manifest abuse of discretion, and where there was no manifest abuse of discretion, the court cannot interfere with City Council's decision. McKenzie v. Shelly, 77 Nev. 237, 242 (Nev. 1961).

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[28] See, Exhibit 2.
[29] See, Exhibit 2.

4. Even If NV Energy Had Satisfied All Approval Criteria, Council Still Had Authority To Deny The Application Because Maintaining The Current Use Better Promotes The General Welfare Of The Community.

Even if NV Energy had satisfied all approval criteria under HMC 19.2.8.F[30], City Council was still under no duty to approve the use permit if, based on substantial evidence, it found that the general welfare of the community was better served by leaving the property in its current state and preserving the status quo.

NV Energy had the burden to not only show that it had satisfied the approval criteria, but also that granting its use permit, rather than leaving the property in its current state, would better promote the general welfare. Harmon City, Inc. v. Draper City, 997 P.2d 321, 329 (Utah App. 2000). When "an applicant meets his burden of proving [the necessary criteria], this merely permits the legislative body to grant the requested rezoning but does not require it to do so." Messenger v. Board of County Commissioners for Prince George's County, 271 A.2d 166, 172 (Md. 1970). This is reinforced by the language of HMC 19.2.8.F.1[31], which states, "Conditional use permits **may** be approved...only if they find that all of the following criteria have been met." Based on the foregoing arguments, Council's conclusion that the general welfare of the community was better served by leaving the property in its current state was singularly sufficient to support City Council's denial of NV Energy's use permit.

This Court's review is limited to "a determination of whether the agency or municipality ... committed an abuse of discretion." Stratosphere Gaming Corp., 120 Nev. 523 at 528 (Emphasis added). There is no abuse of discretion if City Council's denial was supported by substantial evidence. Laughlin, 111 Nev. at 559. Here, the foregoing arguments show that City Council's denial of NV Energy's use permit was, at the very least, supported by substantial

[30] See, Exhibit 2.
[31] See, Exhibit 2.

evidence. Laughlin, 111 Nev. at 559. As such, City Council did not commit an abuse of discretion.

C. NV ENERGY INCORRECTLY ARGUES THAT THIS COURT SHOULD DIRECT CITY COUNCIL TO ISSUE NV ENERGY'S USE PERMIT BECAUSE ALL EVIDENCE PRESENTED IN OPPOSITION TO THE PERMIT IS WITHOUT MERIT AND WAS COMPLETELY REFUTED.

NV Energy misstates the law when it argues that this Court should direct Council to issue its use permit because all evidence presented at the Council meeting was without merit and was completely refuted by NV Energy at that meeting. By making this argument, NV Energy not only mischaracterizes the evidence, but misapprehends the burden of proof. The neighbors raised numerous concerns, which were directly relevant to the approval criteria for a conditional use permit. Rather than address these concerns, as it was NV Energy's burden to do, NV Energy essentially ignores them, restates the evidence presented to City Council, and asks this Court to "re-weigh" that evidence and substitute the Court's judgment for that of City Council. This is improper at best.

In McKenzie, Respondents argued that the only evidence supporting the board's action was completely refuted at the public meeting. The Court held that "[t]his argument in our opinion is without merit." 77 Nev. at 240. The Court reiterated "the general rule that a court is not empowered to substitute its judgment for that of a zoning board" and went on to explain that"[b]ecause the Board's action is clothed with the presumption of validity, and is supported by substantial evidence, in the absence of a showing of an abuse of discretion, the lower court was without power to nullify the same." Id. at 240, 242.

Similarly here, this Court is not empowered to "re-weigh" the evidence that was presented at the public meeting and "substitute its judgment for that of" City Council. City Council's action is "clothed with the presumption of validity" and short of NV Energy's showing

a manifest abuse of discretion, this Court is "without power to nullify the same." NV Energy, indeed, has not made that showing and, as such, City Council's decision must stand.

D. NV ENERGY'S ARGUMENT THAT CITY COUNCIL'S DENIAL IS A QUASI-JUDICIAL ACTION IS A MISSTATEMENT OF THE LAW.

NV Energy's entire argument under section VII of its Opening Brief is based on a misstatement of Nevada law.

In its Opening Brief at page 8, lines 4-7, NV Energy cites footnote 63 in Garvin v. Ninth Judicial District Court claiming that in this case "the Nevada Supreme Court specifically acknowledged that an administrative decision granting or denying a conditional use permit is quasi-judicial in nature" 118 Nev. 749 at n.63. The Nevada Supreme Court, however, made no such finding. The Garvin case did not involve the issuance of a use permit at all. Garvin was a **due process** case dealing specifically with whether the adoption of a sustainable growth measure that instituted a construction cap could be enjoined from placement on the general election ballot. Id. at 752. The cited footnote that NV Energy is attributing to this Nevada case is actually a California court citing an Oregon Court of Appeals case, which "distinguish[ed] between legislative and quasi-judicial matters" in an entirely different context. Id. at 763. Thus, at best NV Energy can argue that the Nevada Supreme Court once cited a California court that referenced an Oregon Court of Appeals case that attributed certain quasi-judicial traits to due process issues. What is more telling is the fact that in making this stretch, NV Energy simply ignores the insurmountable, on-point Nevada case law that states the denial of a conditional use permit is strictly a legislative matter. See McKenzie, 77 Nev. at 242 (holding that "[u]nder the police power, zoning is a matter within sound legislative action"); Nova Horizon, Inc. v. City Council of the City of Reno, 105 Nev. 92, 94 (Nev. 1989) (stating "zoning is a matter within sound legislative action); Board of Com'rs of City of Las Vegas v. Dayton Development Co., 91 Nev. 71, 75 (Nev. 1975) (stating "Zoning is a legislative matter); Forman v. Eagle Thrifty Drugs

& Markets, Inc., 89 Nev. 533, 537 (Nev. 1973) (stating "zoning...is a legislative matter"); Eagle Thrifty Drugs & Markets, Inc. v. Hunter Lake Parent Teachers Ass'n, 85 Nev. 162 (Nev. 1969) (stating "Zoning is a legislative matter"). See also N.R.S. 278.250, 278.260.

Moreover, even if NV Energy's "quasi-judicial" argument had an actual basis in Nevada law, the issue itself is moot. The only reason for such an argument is to allege a requirement to issue written findings. However, because City Council did make sufficient findings, as explained below, NV Energy's "quasi-judicial" argument is moot.

E. NV ENERGY'S ARGUMENT THAT CITY COUNCIL FAILED TO MAKE ANY FINDINGS TO SUPPORT ITS POSITION IS ENTIRELY CONTRARY TO THE FACTS AND THE RECORD.

NV Energy's argument that City Council failed to make specific findings to support its decision is entirely unfounded and contradicted by the facts contained in the official record.

"[T]his court is limited to the record made before the City in reviewing the City's decision." Laughlin, 111 Nev. at 559. Planning Commission's written findings are in the record at H00004. NV Energy acknowledged receipt of these written findings when it stated on its Appeal Application Form that the reason for the appeal was "because we disagree with their findings." (H00006). City Council voted to affirm said findings, thereby adopting them as their own, in the Transcript at 104.

The evidence in the record confirms that City Council did make the required findings when it denied NV Energy's use permit. This argument by NV Energy attempts to distract this Court from the real issue of substantial evidence. The record plainly establishes that City Council's denial was supported by substantial evidence. Therefore, City Council did not abuse its discretion and the relief sought by NV Energy must be denied. McKenzie v. Shelly, 77 Nev. 237, 242 (Nev. 1961).

VI. CONCLUSION

This Court's review is limited to "a determination of whether the agency or municipality ... committed an abuse of discretion." Stratosphere Gaming Corp., 120 Nev. 523 at 528. There is no abuse of discretion if City Council's denial was supported by substantial evidence. Laughlin, 111 Nev. at 559. Substantial evidence is subject to a "reasonableness" standard, and this Court has specifically found that substantial evidence exists where "concerns [are] expressed by the public ... over ... preserving the residential nature of the neighborhood." Id at 559-560.

The City Council properly denied NV Energy's application based upon these very concerns expressed by 885 members of the public, the Desert Wetlands Conservancy, and members of City Council based in their own knowledge of existing conditions. Thus, according to the Nevada Supreme Court in Laughlin, McKenzie, and Stratosphere, "the City's decision was based on substantial evidence and the City did not manifestly abuse its discretion by denying [NV Energy's] request for a special use permit." Laughlin at 560.

Accordingly, the City Council did not abuse its discretion and where there is no manifest abuse of discretion, the Court must not interfere with City Council's decision. McKenzie, 77 Nev. at 242 (Nev. 1961); City of Henderson, 77 Nev. at 118 (Nev. 1961). Based on the foregoing, the relief sought by NV Energy must be denied.

Dated this 17th day of March, 2011.

HENDERSON CITY ATTORNEY'S OFFICE

JAMES MARTINES
Nevada Bar #9386
Assistant City Attorney
240 Water Street, MSC 144
Henderson, Nevada 89015
Attorney for Respondent
CITY OF HENDERSON

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this answering brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to a page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 17th day of March, 2011.

HENDERSON CITY ATTORNEY'S OFFICE

JAMES MARTINES
Nevada Bar #9386
Assistant City Attorney
240 Water Street, MSC 144
Henderson, Nevada 89015
Attorney for Respondent
CITY OF HENDERSON

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of March, 2011, I served the foregoing Respondent's Answering Brief and Appendix by causing a true and correct copy to be placed in the United States mail, first class postage prepaid, on the date and to the addressee(s) shown below.

William E. Peterson, Esq.
MORRIS PETERSON
6100 Neil Road, Suite 555
Reno, NV 89511

By Laura Kopanski