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Mike Bell and Garley Amos
5

6 UNITED STATES DISTRICT COURT
7 FOR THE STATE OF NEVADA
8

9 JUNGO LAND & INVESTMENTS, INC., a
10 Nevada corporation,

CASE NO.: 3:10-CV-00257-RCJ-VPC

11 Plaintiff- Petitioner,

12 vs.

**DEFENDANTS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO PLAINTIFFS'
MOTION FOR ATTORNEY'S FEES
AND COSTS**

13 HUMBOLDT COUNTY BOARD OF
COUNTY COMMISSIONERS, and
14 HUMBOLDT COUNTY, a political
subdivision of the State of Nevada, CHUCK
15 GIORDANO, in his individual and official
capacity as Humboldt County Commissioner,
16 MIKE BELL, in his individual and official
capacity as Humboldt County Commissioner,
17 DAN CASSINELLI, in his individual and
official capacity as Humboldt County
18 Commissioner, GARLEY AMOS, in his
individual and official capacity as Humboldt
19 County Commissioner, TOM FRANSWAY,
in his individual and official capacity as
20 Humboldt County Commissioner,

21 Defendants-Respondents.

22 COME NOW Defendants, HUMBOLDT COUNTY BOARD OF COUNTY
23 COMMISSIONERS, HUMBOLDT COUNTY, CHUCK GIORDANO, MIKE BELL, DAN
24 CASSINELLI, GARLEY AMOS, by and through their attorneys, Thorndal, Armstrong, Delk,
25 Balkenbush & Eisinger, and TOM FRANSWAY by and through his attorneys, Lockie and
26 Macfarlan, Ltd., and hereby file their opposition to Plaintiff's Motion for Attorney's Fees and
27 Costs.

28 This opposition is based upon the memorandum of points and authorities, attached hereto,

1 and all pleadings and papers on file herein.

2 By way of filing the instant opposition, Defendants will attempt to address the major
3 issues of law and fact discussed in Plaintiff's motion, but it is respectfully submitted that the
4 failure to address any specific issue of law or fact raised by Plaintiff is not to be taken as an
5 admission of same by these Defendants.

6 Jungo has filed the instant motion under the provisions of Fed. R.Civ.P. 54(d). It has
7 long been held that Fed. R. Civ. P. 54(d)(2) "creates a procedure but not a right to recover
8 attorneys' fees." MRO Communications, Inc. V. Am. Tel & Tel. Co., 197 F.3d 1276, 1280 (9th
9 Cir.1999). Instead, it is incumbent upon Jungo to provide an independent statutory basis upon
10 which to recover attorneys' fees. In its motion, Jungo asserts two independent bases allegedly
11 entitling it to recover attorneys' fees, including NRS 34.270 and NRS 278.0237. For the reasons
12 set forth infra, neither NRS 34.270 nor NRS 278.0237 provides a basis for recovery of attorneys'
13 fees as prayed for by Jungo.

14 **ARGUMENT**

15 **I. Jungo Is Not Entitled to Recovery of Attorney's Fees From Humboldt County,**
16 **Nevada Under the Provisions of NRS 34.270 By Virtue of the Discretionary Nature**
of its Actions.

17 The Nevada Supreme Court has had occasion to address the issue of whether a party is
18 entitled to recover damages from a city, under the auspices of NRS 34.270, for its actions in
19 denying the issuance of a special use permit. See Travelers Hotel v. City of Reno, 103 Nev. 343,
20 345-46, 741 P.2d 1353, 1354-55 (1987). In Travelers Hotel, the Nevada Supreme Court
21 recognized that the grant or denial of a special use permit is a discretionary act which involves
22 personal deliberation, decision, and judgment. See also Parker v. Mineral County, 102 Nev. 593,
23 729 P.2d 491, 493 (1986).¹ Further, in Travelers Hotel *supra*, the Nevada Supreme Court
24 determined that the City of Reno was immune from a damage claim made pursuant to the

25 _____
26 ¹ The Nevada Supreme Court has consistently held that the grant or denial of a special use permit
27 is a discretionary act. See Travelers Hotel, supra; City of Las Vegas v. Laughlin, 111 Nev. 557, 558, 893
28 P.2d 383 (1995); Enterprise Citizens v. Clark County Commission, 112 Nev. 649, 653, 918 P.2d 305 (1996);
and Redrock Valley Ranch vs. Washoe County, 127 Nev. _____, 254, P.3d. 641, 644 (Adv. Op. No. 38, July
7, 2011).

1 provisions of NRS 34.270 by virtue of the discretionary nature of its actions in denying a special
 2 use permit. See also, NRS 41.032(2) and County of Esmeralda v. Grogan, 94 Nev. 723, 587 P.2d
 3 34 (1978)².

4 There is no room for argument that Humboldt County, Nevada acting through its Board
 5 of Commissioners exercised personal deliberation, decision, and judgment in acting on the
 6 appeal of Ms. Mayo and Mr. Dolan on April 5, 2010. This being so, Plaintiff is not entitled to
 7 recover attorneys' fees in the instant matter under the auspices of NRS 34.270.

8 Finally, the issue of whether Ms. Mayo and Mr. Dolan had standing to prosecute the
 9 instant appeal was a matter which engendered substantial personal deliberation, decision and
 10 judgment by the Board of Commissioners. Indeed, on March 1, 2010, at a public hearing the
 11 Board of Commissioners listened to a robust discussion concerning the standing issue made by
 12 both Ms. Mayo and Mr. Dolan both of whom are attorneys, that they had standing to prosecute
 13 the appeal. See Exhibit 1, Minutes of Humboldt County Board of Commissioners meeting on
 14 March 1, 2010. At this same meeting the Board heard from Deputy District Attorney Angie
 15 Elquist concerning her reservations about whether Ms. Mayo and Mr. Dolan had standing to
 16 prosecute the appeal. Id. Further complicating this issue is the undisputed fact that on
 17 November 2, 2009, just a few months earlier, the Humboldt County Board of Commissioners
 18 acted on another appeal filed by Ms. Mayo and Mr. Dolan concerning a decision of the Humboldt
 19 County Regional Planning Commission involving Jungo. With respect to this appeal, Deputy
 20 District Attorney Angie Elquist determined that both Ms. Mayo and Mr. Dolan had standing to
 21 prosecute the appeal under the provisions of Humboldt County Code, §17.68.120. See Exhibit 2,

22
 23 ² Plaintiff cites Gulbranson v. City of Sparks 89 Nev. 93, 95, 506 P. 2d. 1264, 1265 (1973), for the
 24 proposition that NRS 34.270 authorizes an award of attorney's fees by virtue of the language of the statute
 25 authorizing the recovery of damages. Respectfully, this issue was not even addressed by the Court in
 26 Gulbranson. Instead, what the Nevada Supreme Court did acknowledge in Gulbranson was that the
 27 provisions of NRS 41.032(2) may operate to foreclose a recovery of damages depending on the discretionary
 nature of the actions of the Chief License Officer. Id. at 94-95. In Traveler's Hotel, supra, the discretionary
 nature of actions involving a special use permit was directly addressed by the Nevada Supreme Court where
 it specifically held a municipality is immune from a damage claim under NRS 34.270 by virtue of the
 discretionary nature of the municipality's actions concerning same. Id. at 346.

1 Deposition of Deputy District Attorney Angie Elquist, pp. 119-124 and Exhibit 20 referred to
2 therein. This was exactly the opposite conclusion Ms. Elquist expressed on March 1, 2010.
3 Clearly, the Board of Commissioners struggled with the conflicting advice received and
4 conflicting views expressed on this issue.

5 Perhaps this set of uncontroverted facts best describes the complicated nature of the
6 standing issue with which the Board of Commissioners struggled in their deliberation.
7 Respectfully, under this set of facts, Jungo is not entitled to recover attorneys' fees under the
8 provisions of NRS 34.270 in that they are immune from a claim for damages by virtue of the
9 discretionary nature of their actions.

10 **II. The Provisions of NRS 278.0237(2) Do Not Provide a Basis for Recovery of**
11 **Attorneys' Fees in the Instant Matter.**

12 **A. Jungo is not entitled to recovery of attorneys' fees under NRS 278.0237(2)**
13 **because there has not been an adjudication of Jungo's claims under the**
14 **provisions of NRS 278.0233 and, therefore, Jungo has not been found to be a**
15 **prevailing party under said claim.**

16 NRS 278.0237 allows an award of reasonable attorney's fees and court costs to a
17 prevailing party in an action brought under NRS 278.0233. In the instant matter, Plaintiff's
18 claim asserted under the provisions of NRS 278.0233 has, as yet, not been adjudicated. This
19 being so, Plaintiff's claim for attorneys' fees and costs under NRS 278.0237 is premature in that
20 Jungo has not been found to be a prevailing party under the provisions of NRS 278.0233. Some
21 but not all of the issues which have yet to be resolved under NRS 278.0233 include the
22 following:

- 23 1) Whether the provisions of NRS 278.0233(1)(a) apply to the acts of a board of
24 commissioners acting as an appellate board in a quasi-judicial capacity.
- 25 2) Whether Jungo suffered actual damages as required by NRS 278.0233(1).
- 26 3) Whether the Board of Commissioners acting as an appellate board on April 5,
27 2010 acted arbitrarily or capriciously in reaching its decision.
- 28 4) Whether the Board of Commissioners acting as an appellate board on April 5,
2010 acted unlawfully in reaching its decision.

- 1 5) Whether the acts of the Board of Commissioners acting as an appellate board on
2 April 5, 2010 involved unintentional procedural or ministerial errors.
- 3 6) Whether the Board of Commissioners acting as an appellate board on April 5,
4 2010 are entitled to quasi-judicial immunity.

5 Until the aforementioned issues are litigated and decided in favor of Jungo, Jungo's
6 reliance on the provisions of NRS 278.0237(2) to support its claims for attorneys' fees and costs
7 is wholly misplaced.

8 **B. Jungo is not entitled to recover attorneys' fees or court costs from the**
9 **individually named County Commissioners under Chapter 278 of the Nevada**
10 **Revised Statutes.**

11 NRS 278.0233(2)(h) specifically prohibits the recovery of attorney's fees and costs from
12 the individual members of the Humboldt County Board of Commissioners who are sued in the
13 instant matter.

14 **III. Other Issues of Concern.**

15 For the reasons set forth in Arguments I and II, supra, Jungo is not entitled to an award of
16 attorneys' fees and costs. Nonetheless, should this Court decide Jungo is entitled to an award of
17 attorneys' fees and costs, the following is offered for this Court's consideration:

18 **A. By way of the instant motion, Jungo inappropriately seeks to recover all**
19 **attorneys' fees and costs it has incurred since April 6, 2010 in prosecuting the**
20 **instant action.**

21 In this matter, Jungo filed a Petition for Writ of Mandamus or Writ of Prohibition (#6).
22 In addition, Jungo filed an Amended Complaint for Declaratory Relief and Injunctive Relief and
23 Damages and Petition for Judicial Review (#92) (hereinafter Amended Complaint). Jungo's
24 Amended Complaint contains fourteen claims for relief including a Petition for Judicial Review.
25 This Court has only acted on Plaintiff's Petition for Writ of Mandamus/Prohibition, which was
26 granted and Plaintiff's Petition for Judicial Review which was denied as moot (#149). This
27 leaves thirteen (13) claims for relief which have not been decided and for which substantial
28 attorney time has been dedicated and yet Jungo claims the entirety of all attorneys' fees it has

1 incurred to date in its instant motion. Respectfully, this is neither fair nor reasonable.

2 Further, while Jungo has taken the depositions of no less than twelve individuals in this
 3 case, it has attributed the entire attorneys' fees and costs associated with same to its claim for
 4 Petition for Writ of Mandamus/Prohibition. In light of the sheer magnitude of the claims
 5 asserted in this matter it is respectfully asserted that such a position is untenable. Instead, only a
 6 percentage of the total fees and costs incurred by Jungo to date should be allocated to the Petition
 7 for Writ of Mandamus/Prohibition upon which Plaintiff prevailed. A fair and reasonable
 8 percentage would be twenty percent (20%).

9 **B. The amount of attorneys' fees claimed by Jungo is excessive.**

10 Even if this Court were to decide that Jungo is entitled to an award of attorneys' fees in
 11 this matter, it is submitted that the amount of attorneys' fees requested is excessive in light of the
 12 straightforward nature of the claim presented. Indeed, the central issue in this case was whether
 13 the Board of Commissioners' decision, while acting as an appellate board to overrule the
 14 decision of the Humboldt County Regional Planning Commission's grant of a five year extension
 15 to the conditional use permit was supported by substantial evidence. See Kay v. Nunez, 122
 16 Nev. 1100, 1105, 146 P.3d. 801 (2006). Respectfully, litigating this issue should not have
 17 required the depositions of twelve individuals and the expenditure of \$571,057.10 to determine
 18 whether substantial evidence existed to support the Board of Commissioners' decision. Either
 19 substantial evidence existed for the Board's decision, or it did not.

20 Further, respectfully, this case did not require the utilization of two attorneys to prepare
 21 for and attend each of the following depositions:

<u>Deponent:</u>	<u>Date of Deposition:</u>	<u>Citation to Record:</u>
1) Bob Dolan	8/30/10	#150-2, p. 27
2) Chuck Giordano	9/28/10	#150-2, p. 32
3) Tom Fransway	10/7/10	#150-2, p. 36
4) Dan Cassinelli	10/11/10	#150-2, p. 36
5) Garley Amos	10/13/10	#150-2, p. 36
6) Russell Smith	1/21/11	#150-2, p. 53

- 1 7) Bill Deist 1/27/11 #150-2, p. 54
- 2 8) Tami Rae Spero 1/29/11 #150-2, p. 54
- 3 9) George McGrath 2/11/11 #150-2, p. 59
- 4 10) Michael Sangiacomo 2/11/11 #150-2, p. 59

5 This staffing resulted in an effective billing rate of \$700.00-\$750.00 per hour depending upon
6 whether the work was done in 2010 or 2011. Such an hourly fee was neither customary nor
7 reasonable.

8 **C. Reference to settlement discussions in support of Jungo’s instant motion is
9 inappropriate.**

10 While it is undisputed that the parties made attempts to resolve this matter, it is
11 inappropriate to use these negotiations as evidence to support a claim for attorney’s fees. See
12 Fed. R. Evid. 408. Accordingly, Jungo’s discussion of settlement negotiations in this matter
13 should be disregarded by this Court and the documents concerning said settlement negotiations
14 should be stricken from Jungo’s motion.

15 **IV. JUNGO IS NOT ENTITLED TO THE COSTS SET FORTH IN ITS BILL OF**
16 **COSTS.**

17 **A. Plaintiff Is Not Entitled to Recover Any Taxable Costs under the Provisions
18 of NRS 34.270 or NRS 278.0237.**

19 Plaintiff asserts that it is entitled to recover costs in this matter under the statutory
20 provisions of NRS 34.270 and NRS 278.0237. See Affidavit of John Frankovich, ¶ 15 attached
21 to Plaintiff’s Motion for Attorneys’ Fees and Costs.

22 However, for the reasons set forth in arguments I and II, supra, neither of these provisions
23 provides a basis for recovery of costs under the facts of this case as it now stands. Indeed, no
24 damages or costs are recoverable under the provisions of NRS 34.270 in light of the fact that the
25 actions of the Board of Commissioners acting as an appellate board in the instant matter involved
26 discretion. See Travelers Hotels, supra and NRS 41.032(2). Also, as previously argued, Jungo is
27 entitled to no recovery of costs under the provisions of NRS 278.0237 in that this claim has not
28 yet been adjudicated and, accordingly, Jungo is not a prevailing party under said statute.

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Tab	Description	Amount Claimed as taxable	Amount Taxable
1.	Fees of the clerk	530.00	530.00
2.	Fees for service of summons and subpoena	425.00	425.00
3.	Fees for printed or electronically recorded transcripts necessarily obtained for use in the case	17,552.86	17,552.86
4.	Fees for witnesses	110.10	110.10
5.	Telephone	417.35	0
6.	Fax	9.75	0
7.	Fed Ex	152.78	0
8.	Travel	353.40	0
9.	Mileage	452.12	0
10.	Research	6,654.30	0
11.	Photocopies	13,625.50	0
12.	Outside Copies	263.76	0
13.	Transcripts	465.60	0
			TOTAL 18,617.96

With respect to claimed taxable costs for telephone, facsimile transmissions, Federal Express, travel, mileage for in house runners and computerized legal research, nothing in LR 54-1 through LR 54-14 provides for recovery of these costs. Further, there is no breakdown in Plaintiff's claim for computerized legal research concerning any research which was done.

Also, with respect to photocopies, LR 54-6 specifically disallows costs associated with reproducing copies of motions, pleadings, notices and other routine case papers. Accordingly, the costs for photocopies should not be allowed.

No explanation for outside copies claimed by Plaintiff is provided and, accordingly, should be rejected.

Finally, Plaintiff's claim for reimbursement of taxable costs concerning a transcript obtained from the District Court is not taxable in accordance with the provisions of LR54-3.

1 Accordingly, it is submitted that to the extent this Court determines that taxable costs are
2 allowable in this matter, Plaintiff should be limited to twenty per cent (20%) of the taxable costs
3 asserted by Defendants (\$18,617.96) resulting in an award of \$3,723.92.

4 **CONCLUSION**

5 Insofar as neither NRS 34.270 nor NRS 278.0237 provide a basis for Plaintiff's recovery
6 of attorneys' fees or costs in the instant matter at this stage of the proceedings, Plaintiff's motion
7 for attorneys' fees and costs should be denied.

8
9
10 DATED this 27th day of January, 2012.

11 THORNDAL, ARMSTRONG,
12 DELK, BALKENBUSH & EISINGER

13 By _____ /s/
14 STEPHEN C. BALKENBUSH, ESQ.
15 KATHERINE F. PARKS, ESQ.
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18 (775) 786-2882
19 Humboldt County, Humboldt County Board of
20 Commissioners, Chuck Giordano, Dan
21 Cassinelli, Mike Bell and Garley Amos

22 DATED this 27th day of January, 2012.

23 LOCKIE & MACFARLAN, LTD.

24 By _____ /s/
25 DAVID B. LOCKIE, ESQ.
26 919 Idaho St.
27 Elko, NV 89801
28 (775) 738-8084
Attorneys for Defendant Tom Fransway

CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I certify that I am an employee of Thorndal, Armstrong, Delk, Balkenbush & Eisinger, and that on this date I caused the foregoing **DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR ATTORNEY'S FEES** to be served on all parties to this action by the U.S. District Court's Electronic Filing System (CM/ECF) as follows:

**John Frankovich, Esq.
Debbie Leonard, Esq.
100 West Liberty Street, 10th Floor
Reno, Nevada 89505-2670
Attorneys for Plaintiff
Jungo Land & Investments, Inc.**

DATED this 27th day of January, 2012.

/s/ Susan Balkenbush
An employee of Thorndal, Armstrong,
Delk, Balkenbush & Eisinger