

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

CLARK COUNTY, A POLITICAL  
SUBDIVISION OF THE STATE OF  
NEVADA,

Appellant,

vs.

HQ METRO, LLC, AN ARIZONA  
LIMITED LIABILITY COMPANY;  
PROJECT ALTA, LLC, A NEVADA  
LIMITED LIABILITY COMPANY;  
PROJECT ALTA II, LLC, A NEVADA  
LIMITED LIABILITY COMPANY,  
PROJECT ALTA III, LLC, A  
NEVADA LIMITED LIABILITY  
COMPANY; AND PROJECT ALTA  
LIQUIDATING TRUST U/A/D/  
12/31/09, BY AND THROUGH MARK  
L. FINE & ASSOCIATES, A  
NEVADA CORPORATION  
INDIVIDUALLY AND AS TRUSTEE,

Respondents.

Supreme Court Case No. 71877  
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**APPEAL**

From the Eighth Judicial District Court, Clark County  
The Honorable Ronald J. Israel, District Judge  
District Court Case No. A-13-681632-C

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**RESPONDENTS' ANSWERING BRIEF**

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## **I. STATEMENT OF THE FACTS**

This is an eminent domain action initiated by Nevada Power Company (“NV Energy”) on May 10, 2013, to acquire certain easements for a transmission line project (“Project”) to be built on property located at 400 S. Martin Luther King Boulevard, Las Vegas, Nevada and owned at that time by HQ Metro, LLC (“Property” or “Subject Property”). 1 App. 0011; 0003-05. NV Energy moved for immediate possession of the Subject Property on May 20, 2013. 1 App. 0030-250; 2 App. 0251-0500; 3 App. 0501-0625. The parties thereafter negotiated the terms of NV Energy’s possession of the Property by entering into a Stipulation and Order for Immediate Occupancy (“Stipulation”) which was presented contemporaneously with an Order Granting Immediate Occupancy Pending Entry of Judgment to the district which was entered on October 15, 2013 (“Order for Immediate Occupancy”). 3 App. 0683, 0689, 0680-81. The Order for Immediate Occupancy granted NV Energy the instantaneous right to possess and occupy both the permanent and temporary easements, and was conditioned on NV Energy depositing \$281,000.00 into the district court, representing the value of the permanent and temporary construction easements as appraised by NV Energy. 3 App. 0684. Both the Stipulation and Order for Immediate Occupancy were immediately thereafter recorded against the Property. 5 App. 1067.

More than a year later, on October 28, 2014, Clark County acquired the Subject Property for \$205,000,000.00, approximately \$20,000,000.00 less than HQ Metro's appraised value of the Property. 5 App. 0867. In late 2015 and early 2016, Clark County and HQ Metro filed cross motions to establish, among other things, which of them was entitled to the just compensation due from NV Energy for the permanent easement acquired on the Subject Property. 4 App. 0720-0854, 5 App. 0855-1104, 6 App. 1105-1296. The district court entered its order granting partial summary judgment in favor of HQ Metro on February 25, 2016 ("Partial Summary Judgment Order"). 7 App. 1465-69. The Partial Summary Judgment Order ruled HQ Metro was entitled to the just compensation for the permanent easement because HQ Metro was the owner of the Subject Property "at the time of the initiation of the permanent construction easement in October 2013, not Clark County . . .". 7 App. 1466.

Thereafter, NV Energy and all defendants asserting an interest in the Subject Property, entered into a global settlement as to the amount of just compensation due for the easements NV Energy acquired, thereby permitting the district court to enter a Judgment and Final Order of Condemnation on September 20, 2016 ("Stipulated Order"). 8 App. 1570-1603. The Stipulated Order finalized condemnation of the easements in favor of NV Energy and required NV Energy to deposit into the District Court an additional \$569,000.00 over and above the \$281,000.00 previously

deposited, representing total just compensation due of \$850,000.00. 8 App. 1570-1603. The Stipulated Order required the district court Clerk to pay \$75,000.00 of the \$850,000.00 deposited to Las Vegas Metropolitan Police Department (“LVMPD”) as the tenant/occupant of the Property, as compensation due for the temporary construction easement. 8 App. 1573. Despite the district court’s prior ruling on Partial Motion for Summary Judgment, ruling that HQ Metro, and not Clark County, were entitled to the proceeds for the permanent easement, Clark County refused to agree to the disbursement of the remaining funds in favor of the HQ Metro. 8 App. 1573-4. Therefore, the Stipulated Order deferred decision under NRS 37.115 as to the apportionment of the remaining proceeds, representing compensation due for the permanent easement, as between Clark County and HQ Metro. 8 App. 1573-74.

The district court thereafter apportioned the \$775,000.00 to HQ Metro in an order entered on February 25, 2016 (“Apportionment Order”) from which Clark County appeals. 8 App. 1710-12.

## **II. SUMMARY OF ARGUMENT**

HQ Metro and Clark County agree that both the United State and Nevada Constitutions provide for payment of just compensation when there is a taking of private property. *See* U.S. CONST. amend V; NEV. CONST. art. 1 §§ 8(6) & 22. And both HQ Metro and Clark County agree that pursuant to this Court’s holding in

*Argier v. Nevada Power Company*, it is the owner of the property at the time of the taking who is entitled to the compensation. 114 Nev. 137, 139, 952 P.2d 1390, 1391 (1998). The parties disagree, however, as to when the “taking” occurs. HQ Metro submits that the time of the taking is when the condemnor obtains possession of the condemned property through obtaining an order for possession and occupancy pursuant to NRS 37.100. Clark County submits that the taking does not actually occur however until the condemnor physically sets foot on the property. App. Brf. 11.

As will be shown below, Nevada law provides that when a condemnor interferes with a person’s possession of his/her property, the owner loses an interest in that property and it is the award of just compensation that vests as a substitute for that lost interest. *Argier v. Nevada Power Company*; 114 Nev. at 139, 952 P.2d at 1392. NV Energy clearly interfered with possession of HQ Metro’s Property when it obtained its Order for Immediate Occupancy on October 15, 2013, pursuant to NRS 37.100. From that point forward in time, physical possession of the Subject Property is vested in NV Energy in exchange for the deposit of the appraised value that NV Energy had obtained. It is irrelevant whether or not NV Energy actually set foot on the Subject Property on the day the Order for Immediate was entered or two years later, as the right to enter and possess the easements on the Property was effective as of October 15, 2013. From that date onward, the Subject Property was



interfered with and compensation vested in HQ Metro who maintained title to the Property at that time. Following Clark County's theory that compensation does not vest until when construction in the temporary construction easement occurred, not only contravenes the entire framework of NRS Chapter 37, governing how and when possession is obtained pending entry of final judgment and order of condemnation, but would lead to an imprecise and complicated exercise of determining definitively when physical possession occurs.

### **III. ARGUMENT**

#### **A. Under Nevada Law The Right to Compensation Vests When The Condemnor Obtains Physical Possession Through A Right To Immediate Occupancy Of The Subject Property.**

In *Argier v. Nevada Power Company*, the Supreme Court dealt with the issue of “whether the Argiers’ conveyance of their land to Clark County extinguished their right to just compensation.” 114 Nev. at 139, 952 P.2d at 1391. The Nevada Supreme Court referred to multiple treaties discussing the subject and concluded “just compensation should be paid to the person who owns the property at the time of the taking.” *Id.* Then specifically it cited to Nichols on Eminent Domain, the premier treatise on eminent domain case law, for the following:

It is well settled that when there is a taking of property by eminent domain in compliance with law, it is the owner of the property at the time of the taking who is entitled to compensation. Consequently, if the parcel of land from which the taking is made changes hands after the taking has occurred but before the compensation has been paid, the right to receive the compensation does not run with the

land, but remains a personal claim of the person who was the owner at the time of the taking, or his representative.

*Id.* (quoting *See* 3 Julius Sackman, Nichols on Eminent Domain, Section 5.01[d] (1997)).

The Nevada Supreme Court examined a number of cases on point that shared this same conclusion and explained the rationale for this rule:

When the government interferes with a person's possession of his/her property, the owners loses an interest in that property. The award of just compensation is a substitute for that lost interest in the property. When the owner sells what remains of her property, she does not also sell the right to compensation. If she did, the original owner would suffer a loss and the purchaser would receive a windfall.

*Id.* at 1392. Only if the parties contract otherwise will the right to the condemnation proceeds then run with the land instead of remaining a personal claim. *Id.* The Nevada Supreme Court then declared, “**We hold that equity mandates vesting occurs when the condemning agency enters into possession of the landowner's property.**” *Id.* at 142, P.2d at 1393 (emphasis added).

Here, NV Energy interfered with HQ Metro's possession of its Property when NV Energy obtained the legal right to immediately possess and occupy the Property pursuant to the Order for Immediate Occupancy entered on October 15, 2013. As it was HQ Metro who owned the Property at the time NV Energy's possession was obtained, the right to just compensation vested in HQ Metro.

This legal construct of determining how and when “possession” occurs is reiterated throughout the entirety of NRS Chapter 37. Beginning, with NRS 37.100, which states in pertinent part as follows:

**NRS 37.100 Plaintiff shall give property owner a copy of all appraisals before obtaining possession; motion by plaintiff for order permitting occupancy pending entry of judgment; notice; determination of public use at hearing; proof; bond or deposit in court; defendant may be restrained.**

1. Before the plaintiff obtains **possession** of the property, the plaintiff shall give to the owner of the property a copy of all appraisals of the property obtained by the plaintiff.

2. The plaintiff may move the court or a judge thereof at any time after the commencement of suit, on notice for such time as the court or judge may direct to the defendant if the defendant is a resident of the county or has appeared in the action, otherwise by serving a notice directed to the defendant on the clerk of the court, **for an order permitting the plaintiff to occupy the premises sought to be condemned**, pending the entry of judgment, and to do such work thereon as may be required for the easement, fee or property rights sought, according to its nature.

NRS 37.100 (emphasis added). NV Energy submitted its Motion for Immediate Occupancy pursuant to NRS 37.100 to acquire possession of the easements on the Subject Property on May 20, 2013. 1 App. 0030-0250l; 2 App. 0251-0500; 3 App. 0501-0625. NV Energy, as required by NRS 37.100(1), provided HQ Metro a copy of all appraisals that NV Energy had obtained for the Subject Property. *Id.* Thereafter, NV Energy obtained the Order for Immediate Occupancy to possess the Subject Property. 3 App. 0680-0681. When that Order for Immediate Occupancy

was entered, NV Energy had successfully obtained “possession” of the Subject Property in compliance with Nevada law. It is this possession that constitutes interference with the Subject Property, vesting the right to proceeds in HQ Metro.

Furthermore, NRS 37.170 echoes that NV Energy obtained possession of the Subject Property pursuant to the Court’s Order for Immediate Occupancy on October 15, 2013, as it states in relevant part:

**NRS 37.170 Plaintiff may continue in or be placed in possession pending conclusion of litigation; effect of defendant’s receipt of money on deposit; judgments.**

1. At any time after the entry of judgment, or pending an appeal by either party from the judgment to the appellate court of competent jurisdiction pursuant to the rules fixed by the Supreme Court pursuant to Section 4 of Article 6 of the Nevada Constitution, whenever the plaintiff has paid into court for the defendant the full amount of the judgment, and such further sum as may be required by the court as a fund to pay any further damages and costs that may be recovered in the proceedings, as well as all damages that may be sustained by the defendant, if for any cause the property is not finally taken for public use, **the plaintiff, if already in possession, may continue therein, and if not, the court shall, upon motion of the plaintiff, authorize the plaintiff to take possession of and use the property during the pendency of and until the final conclusion of the litigation**, and shall, if necessary, stay all actions and proceedings against the plaintiff on account thereof. The plaintiff must not be held to have abandoned or waived the right to appeal from the judgment by paying into court the amount of the judgment and such further sum as may be required by the court and taking possession of the property pursuant to this subsection.

NRS 37.170(1) (emphasis added).

Again, the protocol is clearly set forth, that a plaintiff condemnor, such as NV Energy, obtains **possession** though moving the Court for such an order to secure

possession of and use the property during the pendency of litigation. It is this form of possession that constitutes an interference with HQ Metro's ownership of the Subject Property, vesting the rights to just compensation at that time. *Argier*, 114 Nev. at 142; 952 P.2d at 1393.

Finally, NRS 37.180(2) provides that, "If the plaintiff has been placed in **possession** of the premises under the provisions of NRS 37.100 or 37.170, the defendant is entitled to all damages arising from that occupancy of the abandoned property", making it clear that a condemnor obtains possession of the condemned area through acquiring an order for occupancy, as NV Energy did in October 2013, when HQ Metro owned the Subject Property. NRS 37.180(2) (emphasis added). It is this possession of the Subject Property on behalf of the condemnor that vests the rights to just compensation proceeds to HQ Metro.

As Clark County points out, this Court in *Argier* stated, "[I]f the land is sold after condemnation proceedings have been instituted but before the punctum temporis of the taking, the purchaser, not the vendor is entitled to the compensation." *Argier*, 114 Nev. at 139, 952 P.2d at 1391 (footnote omitted) (quoting 3 Julius Sackman, Nichols on Eminent Domain, Section 5.04[4]). As Clark County also points out, Nichols on Eminent Domain defines the "punctum temporis" as "the time at which the right of the public to the land and the right of the owner to the compensation becomes vested." 3 Julius Sackman, Nichols on Eminent Domain at

Section 5.04[4]. When NV Energy obtained the legal right to possess and occupy the Subject Property, the right to compensation became vested.

Also, as Clark County points out, this Court in *Argier* relied on *United States v. Dow*, 357 U.S. 17, 27, 78 S.Ct. 1039, 1047 (1958) in support of its holding that “vesting occurs when the condemning agency enters into possession of the landowner’s property.” *Argier*, 114 Nev. at 142, 952 P.2d at 1393. In *Dow*, the U.S. Supreme Court stated, “We hold, contrary to the Court of Appeals, that the ‘taking’ did not occur in 1946 when the Government filed its declaration of taking, but rather when the United States entered into **possession** of the land in 1943.” *Dow*, 357 U.S. at 21, 78 S.Ct. at 1047 (emphasis added). The *Dow* Court explained that:

[B]roadly speaking, the United States may take property pursuant to its power of eminent domain in one of two ways: it can enter into physical possession of property without authority of a court order, or it can institute condemnation proceedings under various Acts of Congress providing authority for such takings.

*Id.* Focusing on the second procedure, (as that is what akin to what occurred herein),

Government may either employ statutes which require it to pay over the judicially determine compensation before it can enter upon the land, (internal citations omitted) or proceed under other statutes which enable it to take **immediate possession** upon order of court before the amount of just compensation has been ascertained.

*Id.* (internal citations omitted)(emphasis added) The U.S. Supreme Court further explained that:

The usual rule is that if the United States has entered into possession of the property prior to the acquisition of title, it is the former event which constitutes the act of taking. It is that event which gives rise to the claim for compensation and fixes the date as of which the land is to be valued and the Government's obligation to pay interest accrues. *See United States v. Lynah*, 188 U. S. 445, 470-471; *United States v. Rogers*, 255 U. S. 163; *Seaboard Air Line R. Co. v. United States*, 261 U. S. 299. **The owner at the time the Government takes possession** “rather than the owner at an earlier or later date, **is the one who has the claim and is to receive payment.**” *23 Tracts of Land v. United States*, *supra*, at 970.

*Id.* at 22 (emphasis added). Thus, again, the term “possession” is the ultimate lynchpin to vesting of condemnation rights – not literal physical entry as Clark County submits. In an attempt to obfuscate the reliance on the word “possession” to only and solely mean physical entry onto the condemned property, Clark County asks this Court to ignore the entire construct of NRS Chapter 37, which is predicated in large part on a condemnor’s ability to legally “possess” property rights prior to title vesting in its name. Despite Clark County’s arguments, whether or not the condemnor actually physically enters the condemned land is irrelevant to the vesting of a landowner’s right to condemnation proceeds; the possession occurs, as forth by NRS 37.100(1)-(2), when the condemnor obtains an order for occupancy.

The other two U.S. Supreme Court cases that Clark County cites to in support of its premise that actual “physical occupation” is necessary, are that of *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987)

and *Yee v. Escondido*, 503 U.S. 519, 112 S.Ct. 1522, (1992). While these cases were cited to in support of this Court’s holding in *Argier*, they are taken out of context by Clark County. In *Nollan*, the U.S. Supreme Court considered whether or not a taking occurred as a result of the California Coastal Commission’s imposition of a condition to provide a public easement across the Nollan’s beachfront property in order to grant their permit application to rebuild their house. *Nollan*, 483 U.S. at 831, 107 S.Ct. at 3145. The U.S. Supreme Court reversed the Commission’s condition for the public easement stating that:

The Commission may well be right that it is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization. Rather, California is free to advance its ‘comprehensive program’ if it wishes, by using its power of eminent domain for this ‘public purpose’, *see* U.S. Const., Amdt. 5; but if it wants an easement across the Nollans’ property, it must pay for it.

*Id.* 483 U.S. at 842. And in *Yee*, the landowners, who owned mobile home parks, contended that a local rent control ordinance amounted to a physical occupation of their property, entitling them to just compensation. *Yee*, 503 U.S. at 523. The U.S. Supreme Court held that “[b]ecause the Escondido rent control ordinance did not compel a landowner to suffer the physical occupation of his property, it does not effect a *per se* taking under *Lorretto*.” *Id.* 503 U.S. at 539. Thus, while these cases discuss what constitutes a taking, the analysis is still on when the landowner is required to submit to the occupation of her land, which occurs when the landowner



becomes subject to an order for occupancy or possession of its property by a condemnor. And as this Court concluded in *Argier* after reviewing *Nollan* and *Yee*: “where there is an entry into possession by the condemning authority prior to the formal commendation [sic] proceedings, the taking which occurs at the entry must be considered the taking for all purposes.” 114 Nev. at 141, 952 P.2d at 1392 (citing to *Brooks Investment Co. v. City of Bloomington*, 305 Minn. 305, 232 N.W.3d 911 (1975)). This aligns with HQ Metro’s argument that as of October 15, 2013, when NV Energy entered into possession of the Subject Property pursuant to its Occupancy Order, the taking occurred and vested the right to just compensation in HQ Metro at that time.

The same can be said of Clark County’s reliance on *Buzz Stew v. City of N. Las Vegas*, 131 Nev. Adv. Op. 1, 341 P.3d 646 (2015). Clark County points to the reference made in *Buzz Stew* to the *Argier* decision, which reaffirmed the agreed upon proposition that the right to just compensation does not run with the land and remains a personal claim of the person who was the “owner at the time of the taking”. App Brf. 11. As discussed herein, the taking occurs when the condemnor obtains possession of the property, thereafter causing the owner to correspondingly lose that same right. Here, the taking occurred when possession was obtained by NV Energy in October 2013, and the subsequent conveyance to Clark County in October 2014

included that possession obtained by NV Energy, which constituted a lost property right.

Clark County's arguments focus upon NV Energy "physically" entering the Property, but its arguments are puzzlingly limited to when NV Energy physically entered the temporary construction area ("TCE") for construction of its facilities; however, Clark County does not claim a right to just compensation from the TCE. App. Brf. 5. Rather, Clark County asserts its entitlement to compensation from the permanent easement ("PE"). App. Brf. 7. The Thom Declaration, for which Clark County solely relies to illustrate when physical construction began by NV Energy, declares that "[w]ith respect to the **TCE Area specifically**, NV Energy actually and physical occupied and use the TCE Area between January 12, 2015, and April 10, 2015." 7 App. 1366 (emphasis added). Relying upon this same information, NV Energy's appraiser, Glenn Anderson, MAI, updated his opinion of value as to the just compensation to be awarded for the TCE. 6 App. 1280. However, NV Energy's appraiser then immediately also noted that "**Prior to**, and after these dates, any occupancy was within the **permanent easement** acquired . . . ." *Id.* (emphasis added). Thus, not only does Clark County focus on physical entry for a property to which they assert no right to, the record below also does not conclusively prove Clark County's contention that physical occupancy of the Subject Property occurred in January 2015.

**B. HQ Metro Was The Owner Of The Subject Property When NV Energy Tendered Just Compensation To The District Court And Thereby Vested HQ Metro's Right To Said Just Compensation.**

Clark County reaches to jurisdictions beyond the State of Nevada to support its argument that NV Energy's purported right to abandon its condemnation of the Subject Property, and its alleged extinguishment from physical occupancy, is dispositive of when the right compensation vested, yet the cases cited by Clark County are readily distinguishable from Nevada law. Nevada contrasts Clark County's cited case law via the terms of the Nevada Revised Statutes, specifically NRS 37.180:

(1) The plaintiff may abandon the proceedings at any time after filing the complaint and before the expiration of 30 days after final judgment by serving on defendants and filing in court a written notice of abandonment. Upon that abandonment, on motion of any party, a judgment must be entered dismissing the proceedings and awarding the defendants their costs and disbursements, which must include all necessary expenses incurred in preparing for trial and reasonable attorney fees. Those costs and disbursements may be claimed in and by a cost bill, to be prepared, served, filed and taxed as in civil actions, except that, upon a judgment of dismissal on motion of the plaintiff, any defendant may file a cost bill within 30 days after notice of entry of that judgment.

(2) If the plaintiff has been placed in possession of the premises under the provisions of NRS 37.100 or 37.170, the defendant is entitled to all damages arising from that occupancy of the abandoned property.

NRS 37.180. Subsection 2 delineates that a landowner dispossessed of all or part of its property under a court order for immediate occupancy pending judgment is nonetheless entitled to damages for the condemnor's occupancy; therefore, the condemnor may still abandon its condemnation action despite physical occupancy

of the landowner's property. *Id.* This is unique compared to the laws of California, Washington, Iowa, and Maryland as cited by Clark County. More importantly, those jurisdictions uniformly concur that the condemnor's tender of just compensation proceeds for withdrawal by the landowner is key to vesting that landowner's right to such just compensation.

Clark County relies upon the dated case of *Bank of America v. City of Glendale*, 4 Ca. 2d 477, 50 P.2d 1035 (Cal. 1935), a California Supreme Court case with distinctly different facts and laws than those before this Court. The condemnor in *Bank of America*, the City of Glendale, never physically entered the landowner's property prior to the final judgment of condemnation, therefore, physical occupancy was not dispositive of when the right to a just compensation award vested. *Id.* at 480. In the present matter, NV Energy entered the easement area of Subject Property, but only pursuant to an Order for Immediate Occupancy where it gained legal right to oust HQ Metro from the easement. 3 App. 0683-0715. The California Supreme Court, in its *Bank of America* decision in favor of the landowner who held title when just compensation was paid, relied upon the Street Improvement Act of 1903, which permitted the city council to "at any time prior to the payment of the compensation awarded the defendants, abandon the proceedings[;]"<sup>1</sup> by comparison,

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<sup>1</sup> *Bank of America*, 4 Ca. 2d. at 481.

the court pointed out the California Code of Civil Procedure's Section 1268.510<sup>2</sup> (renumbered from Section 1255a) regarding abandonment of condemnation proceedings was inapplicable. *Bank of America*, 4 Ca. 2d. at 481.

NRS Chapter 37 is applicable to the case before this Court and NRS 37.180, although similar to the abandonment statute of California, is distinguishable. Section 1268.510 of the California Code of Civil Procedure allows courts to prevent a condemnor from abandoning its condemnation proceeding, and does not contain a provision mandating a landowner's recovery of damages from a condemnor's occupancy of the landowner's property pending judgment. CCP § 1268.510. NRS 37.180, conversely, does not statutorily authorize courts to prevent NV Energy's abandonment of condemnation proceedings, and mandates recovery of damages upon abandonment when NV Energy is placed in possession of the Subject Property under an Order for Immediate Occupancy via NRS 37.100. NRS 37.180. Applying

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<sup>2</sup> California Code of Civil Procedure § 1268.510 provides:

(a) At any time after the filing of the complaint and before the expiration of 30 days after final judgment the plaintiff may wholly or partially abandon the proceeding by serving on the defendant and filing in court a written notice of such abandonment.

(b) The court may upon motion made within 30 days after the filing of such notice set the abandonment aside if it determines that the position of the moving party has been substantially changed to his detriment in justifiable reliance upon the proceeding and such party cannot be restored to substantially the same position as if the proceeding had not been commenced.

Clark County's allegation that the Order for Immediate Occupancy in this case is akin to an "interlocutory decree" in *Bank of America*, and assuming CCP § 1268.510 actually applied in *Bank of America* (i.e. the City of Glendale could have abandoned condemnation proceedings at any time until thirty (30) days after entry of the "interlocutory decree"), then Clark County argues in favor of HQ Metro. Thirty (30) days after the Order for Immediate Occupancy was granted on October 15, 2013, where NV Energy was granted a legal right to enter upon the Subject Property and exclude others from the easement area contingent upon its deposit of estimated just compensation, HQ Metro was still the owner of the Subject Property. 5 App. 0867. Title to the Subject Property did not pass to Clark County via deed until October 28, 2014, as such, HQ Metro held a vested right to the just compensation award at issue. 5 App. 0867.

The *Bank of America* court further bolsters HQ Metro's position when it stated: "The rule as stated in Corpus Juris . . . is as follows: 'Where land is sold subsequent to the award **but before payment is made or security given by the condemnor**, and the conveyance is silent as to the right to damages, such right passes to the purchaser.'" *Bank of America*, 4 Ca. 2d at 482 (emphasis added) (citing 20 Corpus Juris 862). Security was given by NV Energy when it deposited estimated just compensation funds into the district court to acquire immediate occupancy of the Subject Property; therefore, the right to such funds remained with HQ Metro and

was not passed to Clark County. The outcome does not change even when applying the Street Improvement Act of 1903 relied upon by the *Bank of America* court (i.e. the date of the city council's tender of just compensation vested a right to condemnation proceeds) as just compensation was paid into the district court by NV Energy when HQ Metro was the owner of the Subject Property.

Clark County further cites to the 1913 case of *In Re Twelfth Ave. South*, 74 Wash. 132, 132 P. 868 (1913), a Washington Supreme Court case factually and legally distinguishable from the case before this Court. In that case, “prior to the entry of the judgment upon the verdict, and prior to the payment of the compensation award into the registry of the court, and prior to the date of doing the damage to the property for which compensation was paid in to the court,” the original landowner conveyed its property. *Id.* at 132-133. In the present case, and prior to passage of title to the Subject Property from HQ Metro to Clark County, NV Energy had paid just compensation into the district court to acquire an Order for Immediate Occupancy transferring legal dominion over the easement area. 3 App. 0684. The *Twelfth Ave. South* court focused upon the condemnor's ongoing right to abandon condemnation proceedings based upon an amalgamation of several Washington statutes, only one of which discussed abandonment<sup>3</sup>. *Twelfth Ave. South*, 74 Wash.

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<sup>3</sup> The court cites to “Rem. & Bal. Code, SS 7816 (P.C. 177 SS 127),” which tracks RCW 8.12.530:

at 134-135. RCW 8.12.530 is apparently the only Washington statute regarding abandonment of condemnation proceedings and, furthermore, lacks a mandate whereby landowners recover damages from a condemnor's occupancy of property pending judgment. RCW 8.12.530. NRS 37.180's abandonment requirements diverge from those cited in *Twelfth Ave. South* and statutorily mandates damages when condemnors like NV Energy are placed in legal occupancy of the Subject Property. NRS 37.180. In its opinion, the *Twelfth Ave. South* court concluded: "The owner is not divested of his title, nor can his property be lawfully damaged **until compensation is made or paid into the court.**" *In Re Twelfth Ave. South*, 74 Wash. at 135 (emphasis added). NV Energy divested HQ Metro of its right to the easement area when the Order for Immediate Occupancy was filed and estimated just compensation funds were paid into the district court, consequently, HQ Metro right to just compensation proceeds vested simultaneously. 3 App. 0683-0715.

Clark County continues its trend of citing antiquated cases from external jurisdictions with *Griffeth v. Drainage Dist. No. 41*, 182 Iowa 1291, 166 N.W. 570

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At any time within six months from the date of rendition of the last judgment awarding compensation for any such improvement in the superior court or if appellate review is sought then within two months after the final determination of the proceeding in the supreme court or the court of appeals any such city may discontinue the proceedings by ordinance passed for that purpose **before making payment or proceeding with the improvement** by paying or depositing in court all taxable costs incurred by any parties to the proceedings up to the time of such discontinuance. (emphasis added)



(Iowa 1918). Iowa's statutory scheme contains minimal references to abandonment of condemnation proceedings.<sup>4</sup> NRS 37.180, on the other hand, codifies more precise terms governing abandonment of condemnation proceeds and recoverable damages from a condemnor's immediate occupancy. NRS 37.180. In *Griffeth*, although the award and amount of damages were fixed with the vendor of the condemned property by the court, the dispositive issue for vesting the right to condemnation proceeds was whether security for the taking was provided or payment actually made to the landowner, not physical occupation by the condemnor. *Griffeth*, 166 N.W. at 571. In the present matter, NV Energy provided security for its condemnation of the Subject Property when it deposited the estimated just compensation owed for its taking pursuant to the Order for Immediate Occupancy. 3 App. 0684. HQ Metro was the owner at that time and its right to just compensation was contemporaneously vested. 1 App. 0003-05; 5 App. 0867.

Last in the line of cases cited by Clark County from beyond Nevada's borders is the Maryland case of *Lafontaine's Heirs v. Lafontaine's Heirs*, 205 Md. 311, 107 A.2d 653 (1953). The statutory scheme in Maryland specifically prevents

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<sup>4</sup> Iowa Code 2015, Chapter 6B.34 states:

Should the applicant decline, at any time after an appeal is taken as provided in section 6B.18, to take the property and pay the damages awarded, the applicant shall pay, in addition to the costs and damages actually suffered by the landowner, reasonable attorney fees to be taxed by the court.

abandonment of condemnation proceedings when either a taking has occurred or when 120 days have elapsed after final judgment.<sup>5</sup> NRS 37.180 does not contain the same limitations on abandonment and, furthermore, statutorily authorizes recovery of damages when condemnors like NV Energy are permitted immediate possession of the property under court order. NRS 37.180. In *Lafontaine's Heirs*, the court consistently points out the importance of payment or tender of just compensation funds as the trigger for vesting a right to condemnation proceeds. *Lafontaine's Heirs*, 205 Md. 311. “In States where payment is required before the landowner can be divested of ownership or possession, the condemnation is accomplished by prior judicial proceedings and the taking does not occur **until the compensation awarded has been paid or tendered.**” *Id.* at 318 (emphasis added). “The right to abandon ceases, the cases hold, **when compensation has been paid or tendered**, or the authorized appropriation of land for public use actually has taken place. *Id.* at 319

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<sup>5</sup> Md. Real Prop. Code § 12-109(d) states:

Limitation on abandonment. -- No condemnation proceeding may be abandoned:

- (1) After taking has occurred;
- (2) More than 120 days after the entry of final judgment, unless an appeal is taken; or
- (3) If an appeal is taken from a final judgment, more than 120 days after the receipt by the clerk of the lower court of a mandate of the Court of Appeals or the Court of Special Appeals evidencing the dismissal of the appeal, the affirmance of the judgment, the entry of judgment pursuant to the Maryland Rules, or the modification of the judgment without the award of a new trial. . . .

(emphasis added) (citing Nichols on Eminent Domain, 2nd Ed., Sec. 417, p. 1097).

To the extent the Maryland Court Appeals relied upon physical occupancy in its decision, Maryland law, in contrast to Nevada law, codifies the taking of property as a barrier to abandonment of condemnation proceedings. Md. Real Prop. Code § 12-109(d)(1). The *Lafontaine's Heirs* court also noted:

Constitutional rights rest on substance not on form and the liability to pay compensation for property taken cannot be evaded by leaving the title in the owner while depriving him of the beneficial use of the property when an interference with the use and enjoyment of land [is] an injury of such a character as to substantially oust the owner from the possession of the land and to deprive him of all beneficial use thereof there is a taking of property in the constitutional sense whether there has been any formal condemnation or not.

*Lafontaine's Heirs*, 205 Md. at 322 (citing Nichols on Eminent Domain, 2nd Ed., Sec. 107). In the case before this Court, NV Energy tendered its appraisal estimate of just compensation proceeds into the district court pursuant to the Order for Immediate Occupancy when HQ Metro still owned the Subject Property. 3 App. 0683-0715. Title to the Subject Property may have remained with HQ Metro at that time, but HQ Metro was substantially ousted from possession, use, and enjoyment of the easement area by the terms of the Order for Immediate Occupancy. *Id.* A constitutional right to just compensation was vested in HQ Metro at this point in time, not Clark County.

Through the line of cases cited by Clark County, physical occupancy by the condemnor is not determinative of vesting the right to just compensation proceeds.

Instead, the payment or tender of estimated just compensation or security (which occurred when the Order for Immediate Occupancy was entered in October 2013) for the taking of a landowner's property controls which party owns the condemnation proceeds at issue. This conclusion comports with the terms of NRS 37.180. Physical occupancy is inconsequential to extinguishing the condemnor's right to abandon condemnation proceedings as the statute still mandates the landowner be paid for damages sustained from occupancy of the property by the condemnor pursuant to NRS 37.100. NRS 37.180(2). Estimated just compensation was paid and/or tendered into the district court by NV Energy as security for immediate occupancy of the Subject Property to the exclusion of HQ Metro. 3 App. 0684. HQ Metro was the owner of the Subject Property at the occurrence of this event, therefore, the right to just compensation for NV Energy's partial taking of the Subject Property vested in HQ Metro. 1 App. 0003-05.

**C. Whether Clark County Received A Discount When Purchasing the Subject Property Is Not Determinative Of The Right To Just Compensation Proceeds And, In Any Case, Equity Demands HQ Metro Receive Just Compensation Proceeds.**

Clark County directs this Court to facts antithetical to its argument that the Subject Property purchase price it paid was not discounted for NV Energy's condemnation; in particular, Clark County complains that the Subject Property was appraised in 2013 by Mr. DiFederico for purposes of the sale to Clark County for \$225,000,000.00, but did not specify a particular discount to the Subject Property as

a result of NV Energy's condemnation. 5 App. 0892-1041. However, Clark County later purchased the Subject Property for a discounted price of \$20,000,000.00 less than Mr. DiFederico's appraised value. 5 App. 0866-67; 0892-1041. Clark County submits that this somehow equates to HQ Metro's receipt of a windfall by being allowed to keep the condemnation proceeds. But as referenced above, in the *Argier* decision, this Court explained:

When the government interferes with a person's possession of his/her property, the owner loses an interest in that property. The award of just compensation is a substitute for that lost interest in the property. When the owner sells what remains of her property, she does not also sell the right to compensation. If she did, the original owner would suffer a loss and the purchaser would receive a windfall.

*Argier*, 952 P.2d at 1392 (citing *Brooks*, 232 N.W.2d at 918). The *Brooks* court explained application of this rule as follows:

But we are here dealing with a right rather than the actual property. An owner of property may be entitled to damages for a taking for a public use, even though he has parted with his title and ownership before the award is paid. Thus, one who sells while condemnation proceedings are pending is entitled to the damages finally awarded as against his vendee, if his possession was taken from him while he still owned the property.

*Brooks*, 232 N.W.2d at 918-919 (citing *Crawford v. City of Des Moines*, 255 Iowa 861, 866, 124 N.W.2d 868, 871 (1963)). Under the facts before this Court, HQ Metro owned the Subject Property when the Order for Immediate Occupancy was filed, granting possession of the Subject Property to NV Energy. 1 App. 0003-05; 3 App. 0683-0715. The just compensation deposited into the district court was a

substitute for HQ Metro's lost interest in the Subject Property. *Argier*, 952 P.2d at 1392 (citing *Brooks*, 232 N.W.2d at 918). When HQ Metro sold its remaining interest in the Subject Property to Clark County, it did not also sell its right to just compensation. 5 App. 0867. The court in *Brooks* addresses the purchase price of the condemned property in two sentences at the end of its decision:

The original purchase price contemplated by the parties was significantly higher than the price in the contract actually performed. **While there is nothing in the record to indicate that this reduction was attributable to the taking of the street by the city, it is reasonable to assume that it may have been a factor.**

*Brooks*, 232 N.W.2d at 920 (emphasis added). The minimal importance of a purchase price reduction in assessing ownership of condemnation proceeds is plain through this quotation. In the present case, the record does not indicate the \$20,000,000.00 reduction in purchase price paid by Clark County for the Subject Property was attributable to the taking by NV Energy, but the Court can reasonably assume it was a factor and that HQ Metro retained its right to just compensation proceeds as was done in *Brooks*.

Clark County's citation again to *Twelfth Ave. South* is unwittingly in HQ Metro's favor. The court therein, when discussing various factors used to determine ownership of just compensation funds, considered "facts showing estoppel or other contravening equity, such as payment of a less price by reason of the pending condemnation proceedings." *In Re Twelfth Ave. South*, 74 Wash. at 133. Similar to the decision in *Brooks*, reductions to a purchase price are not dispositive of the right

to just compensation and are instead a minor consideration made in equity. In this case, Clark County paid a \$20,000,000.00 reduced purchase price for the Subject Property in comparison to the appraised value; an equitable consideration that weighs in favor of HQ Metro. 5 App. 0866-67; 0892-1041.

Finally, Clark County reaches back to the state of Iowa in 1918 to cite *Griffeth*, where the court determined the right to payment of just compensation proceeds remained with the vendor when land was sold amidst condemnation proceedings and the purchase price was reduced due to such a just compensation award. *Griffeth*, 166 N.W. at 570. The court in *Griffeth* was not persuaded that a reduction in purchase price was dispositive of whether the vendor or vendee had a right to condemnation proceeds. *Id.* As has been stated herein, Clark County paid \$20,000,000.00 less than the appraised value of the Subject Property in the midst of condemnation proceedings, therefore, the pendulum of equity swings to HQ Metro's favor. 5 App. 0866-67; 0892-1041. Notably, the Subject Property's title was conveyed to Clark County with the Stipulation and Order for Immediate Occupancy recorded against the Property. 5 App. 1043; 1047; 1067.

The U.S. Supreme Court case of *United States v. Dow*, cited by Clark County for a different purpose, contains a discussion on equity applicable to the present matter. In that case, Dow was the purchaser who acquired the condemned property at issue amid condemnation proceedings. *Dow*, 357 U.S. at 19. Regarding Dow's

argument that equity mandated it receive the just compensation proceeds, the Supreme Court stated:

Finally we see no merit in the suggestion that it is inequitable to deny Dow recovery in this action. Dow took his deed with full notice of the condemnation proceeding brought by the United States. There were readily available contractual means by which he could have protected himself *vis-a-vis* his grantors against the contingency that his claim against the United States would be subsequently invalidated by the Anti-Assignment Act.

*Id.* at 27. Likewise, Clark County purchased the Subject Property with full knowledge of the condemnation proceedings initiated by NV Energy and did not utilize readily available contractual means to acquire HQ Metro's right to just compensation proceeds. 5 App. 0867. Denial of Clark County's appeal yields no inequitable results.

Clark County's receipt of just compensation proceeds, conversely, herein would create an inequitable outcome. Clark County waited for an opportunity at the conclusion of the present litigation to pilfer the just compensation proceeds owed to HQ Metro through a Countermotion for Partial Summary Judgment and Application for Withdrawal of Funds Deposited for the Permanent Easement. 5 App. 0855-0864. Conversely, HQ Metro expended substantial funds to complete an eminent domain appraisal of the Subject Property and prosecuted its constitutional right to just compensation for NV Energy's taking; Clark County sat in wait and moved the District Court on the eve of finality to summarily rule condemnation proceeds were owed to it. (4 App. 0720-0854; 5 App. 0855-1104; 6 App. 1105-1296). Equity



mandates that HQ Metro retain its constitutional right to just compensation proceeds.

#### IV. CONCLUSION

The right to obtain just compensation proceeds vests when the condemnor obtains possession to the property at issue. Possession is obtained upon receiving the legal right, pursuant to NRS 37.100, to occupy the property, conditioned upon depositing the condemnor's appraised value for the same. *Argier*, 114 Nev. at 139. The exact date thereafter, upon which the condemnor physically sets foot on the condemned property is irrelevant for determining whom is entitled to the condemnation proceeds, as Clark County so argues and as the district court rejected.

The Honorable Judge Ronald Israel properly applied the law and determined that HQ Metro's right to the just compensation proceeds occurred in October 2013, when the Order for Occupancy was obtained by NV Energy. Based on the foregoing, Clark County's Appeal should be denied and the District Court's decision affirmed.

DATED this 30th day of August, 2017.

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## **CERTIFICATE OF COMPLIANCE**

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac Version 15.33 in 14-point Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and does not exceed 29 pages.

3. Finally, I hereby certify that I have read this appellate 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, 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 30th day of August, 2017.

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**CERTIFICATE OF SERVICE**

The undersigned, an employee of LAW OFFICES OF BRIAN C. PADGETT, hereby certified that on the 30<sup>th</sup> day of August, 2017, she served a true and correct copy of the foregoing, **RESPONDENTS' ANSWERING BRIEF**, via the Court's E-Flex Electronic Filing System to the following:

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