Case No. 84221

IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF LAS VEGAS, a political subdivision of the State of Nevada,

Petitioner,

v.

EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of Clark, and the Honorable Timothy C. Williams, District Judge,

Respondents,

and

180 LAND CO, LLC, a Nevada limited-liability company, FORE STARS LTD., a Nevada limited-liability company,

Real Parties in Interest.

Eighth Judicial District Court, Clark County, Nevada
Case No. A-17-758528-J
Honorable Timothy C. Williams, Department 16

APPENDIX TO ANSWER TO PETITIONER'S EMERGENCY PETITION FOR WRIT OF MANDAMUS, OR IN THE ALTERNATIVE, WRIT OF CERTIORARI

VOLUME 20

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing APPENDIX TO ANSWER TO PETITIONER'S EMERGENCY PETITION FOR WRIT OF MANDAMUS, OR IN THE ALTERNATIVE, WRIT OF CERTIORARI - **VOLUME 20** was filed electronically with the Nevada Supreme Court on the 8th day of March, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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The dismissal here was without prejudice. Now we -- in the *Valley Bank v. Ginsburg* case, the Court said that finality of an order for judgment is determined, and I'm quoting here, "by looking to what the order of judgment actually does, not what it's called. More precisely, a final appeal of a judgment is one that disposes of the issues presented in the case and leaves nothing for the future consideration of the Court. "

So in dismissing the petition without prejudice, recognizing that Judge Crockett's order might be reversed by the Nevada Supreme Court, that I think fits like a glove to what the Court was doing in its minute order, and its finding of fact and conclusion of law. Then we have the *Five Star Capital v. Ruby* case. By the way, the *Ginsburg* case is tab 8, the *Five Star Capital* case is tab 9.

"A valid final judgment does not include a case that was dismissed without prejudice, or for some reason, like jurisdiction, venue, failure to join a party, that is not meant to have preclusive effect." So again, I think that decision fits this case perfectly. The Court could have dismissed the petition with prejudice. It could have dismissed the petition and been silent about the future, about what might happen in the future, but the Court didn't do that.

I think the pure recognition was, hey -- and what the Court did I think makes eminent sense. The City never had an opportunity to review these applications on the merits. We don't want to have a long, drawn-out litigation as to whether the City has taken the property, and it never had the chance to consider the applications on the merits. That's the ripeness doctrine. You know, the Court didn't expressly refer to it,

but that's the ripeness doctrine to a tee.

I mean, I think the Court anticipated what -- the law is supposed to make sense, and so in takings -- obviously, the Court can't decide whether property value -- economic value has been wiped out, unless there's been a final decision about what the government is going to allow on the property, it's just logical. And that's what the U.S. Supreme Court and the Nevada Supreme Court has said. We're not going to ask judges to speculate about what would be allowed on the property. You've got a burden on the developer to make it happen. File applications and get them denied. Then you can go to court. Again, the Court just anticipated the ripeness doctrine. Okay.

Trustee v. Ryko [phonetic], we don't have that in our tabs. But there it was an order dismissing a complaint without prejudice, based solely on the parties' representation they reached a settlement, which was clearly not a final adjudication of the merits.

And finally, in the *Amwest* [phonetic] case, and that's tab 10. And this case is just like this case, Your Honor. The City in that case contended that developer was required to submit a new master plan as part of its development project, and the developer disagreed. It said, no, we don't have to submit a new master plan.

So the City didn't officially deny the application, but it was clear that it was going to, and it went up on to appeal. The developer filed a PJR, and they Nevada Supreme Court granted the PJR, and what it is it did, it ordered the City make a final decision about whether a new master plan was required or not, because the City, again, didn't officially

deny it, it just kind of, you know, made noises that it was going to. So it order for the City to make a final official decision, and if it denied it, then -- because there was no new master plan filed, then the Court retained jurisdiction to decide whether one was required. So this is exactly like this case. So *Amwest* holds there that courts retain jurisdiction while an issue germane to the case is resolved. And the Crockett order of appeal was absolutely germane to this case, so *Amwest* is clearly on point.

So there's clearly no final judgment in this case. Again, if there was a final judgment there's no point in dismissing without prejudice, there's no point in say, well, should Judge Crockett's order be reversed by the Supreme Court, the City --the Court, I think, clearly contemplated this situation. But even if the Court didn't retain jurisdiction, the developer -- after the Nevada Supreme Court reversed the Crockett order, the developer refiled the petition for judicial review. And if that case -- if that was gone, if the petition was -- and it was a final judgment, the Court had no jurisdiction over it. They refiled it. They can see that the Court has jurisdiction over the PJR.

And, again, the developer fails to cite in its opposition, fails to cite a single case, a single statute to support its position, except *Black Law's Dictionary*. Again, it's only fair to give the City another chance to review these applications before -- you know, Your Honor, the developers asked for $201 million in this case. I think before any money, the taxpayers paying money to this developer, the Court ought to give the City a chance to rule on those applications, and that would only be --

THE COURT: Okay. So now, again, looking at the pleading that has been filed, as you point out the most recent one is July 29th, it is -- and we'll get to this second question of whether it can be combined, they have a petition for judicial review, and in the alternative, complaint for declaratory relief and a preliminary injunction, so that's the first part of the pleadings. The second part of pleading is their inverse condemnation cause of action, and your second motion is whether these can be combined.

So what are you -- I'm trying to understand the effect of -- when you say, remand the whole thing, are you -- it seems to me that what you're saying is that the petition for judicial review should be severed and those issues remanded?

MR. SCHWARTZ: Yes. That -- let me explain, Your Honor.

THE COURT: Okay.

MR. SCHWARTZ: We think that the Court should remand the 133 applications -- acre applications to the City Council. We think that the Court should dismiss and retain jurisdiction over the PJR. If the City denies the applications, and the developer thinks it has a ripe claim, or the City didn't proceed by law, then it -- they can come back to the Court, or the Court could dismiss the PJR without prejudice, and if the developer, you know, pursues its applications and doesn't like the result, they can file another PJR.

But we think that under any circumstances the civil complaint for a regulatory taking was improperly combined, so we think the Court should dismiss that complaint, and either retain jurisdiction over the PJR

for dismissal without prejudice.

THE COURT: Anything else?

MR. SCHWARTZ: Yes. I'd like to explain -- I mean, the ripeness doctrine deserves some attention here, because, you know, it's a very significant argument. The takings clause of the 5th Amendment, and the takings clause in Nevada Constitution, originally intended to apply only to eminent domain, direct condemnation. In 1922, U.S. Supreme Court says, if a regulation does the functional equivalent thing to an eminent domain, it wipes out their use or value, an inverse condemnation, that could be a regulatory taking where it does the same thing as an eminent domain, but it's got to be a wipeout, because if it's not a wipeout it's not a taking.

Because public agencies have broad discretion to regulate the use of land in the public interest, and the Courts have said, you don't interfere with that unless it's really bad, unless it's the equivalent of a taking by eminent domain. If it's not equivalent to a taking it doesn't have a constitutional dimension, you don't apply the takings clause. That's the only situation in which the Courts interfere.

Okay. So man, 1922. Then *Penn Central*, 1978, there's a three-factor test. What's the economic impact of the regulation? Did the regulation interfere with the developer's objective investment-backed expectations? In other words, did they invest the money in property and then City pulls the rug out from under them, and their investment are wiped out? Of course we have the opposite situation here, where the City increased the properties' value significantly.

Then you have the *Loretto* case in 1982. That's a physical takings' case, and this is extremely important, Your Honor, because the developer is trying to confuse the Court, and arguing that a physical taking -- and the rules applicable to physical takings apply to a regulation of use taking, where the regulation of use taking, the government limits the owner's use of the property to be the functional equivalent of eminent domain. Physical taking, the government requires the owner to allow others to use the property. Completely different animals.

So *Loretto* was a physical takings case. There the City of New York said, you, landlord have to allow cable TV facilities on your building. *Loretto* said, this is a physical taking and the Court said, yes, it's strict liability, even if it's small. You're denied the right to exclude others, if it's a physical taking.

Then *Lucas*, 1992. *Lucas* tried to put some -- bring some rationality to all of the takings litigation that that had been occurring. And *Lucas* said, okay, we got the situation here. If you wipe out the value, or you engage in a physical taking, either the government physically occupies property, or it adopts a law that requires the owner to allow other people on your property, that's a physical taking.

If it's a wipeout or a physical taking, we're going to call that categorical taking, which means, we don't need to go through the *Penn Central* factors, it's a taking, compensation is required, if you can show you've been wiped out, if you can show that there's been a physical invasion. The dissent in *Lucas* called the same thing a categorical taking, and they use the term per se, taking per se, categorical per se, they mean

the same thing. Now the developer in this case capitalizes on that to really confuse the issues, and I'll -- I've got to straighten it out for the Court, for the Court to see why this case isn't ripe.

Okay. So Lucas was in 1992, and it said, if it's not a categorical taking, a per se taking, again they mean the same thing, then you're in *Penn Central* land. Fast forward to 2005, in the *Lingle* case. *Lingle* brought even more structure and certainty to the takings doctrine. *Lingle* said, okay, we've got *Lucas*, that says --

THE COURT: Are we still talking about remanding?

MR. SCHWARTZ: Pardon me?

THE COURT: This seems like we're not talking about remanding anymore. Where did get astray of remanding?

MR. SCHWARTZ: Because --

THE COURT: Are we talking about remanding?

MR. SCHWARTZ: I'm trying to explain the ripeness doctrine and why this case isn't ripe.

THE COURT: What does that have to do with remanding?

MR. SCHWARTZ: Pardon me?

THE COURT: What does it have to do with remanding the PJR?

MR. SCHWARTZ: Because if the Court doesn't remand we're going to go forward with an unripe claim, we're just going to reach the result.

THE COURT: Let's talk about remand.

MR. SCHWARTZ: It's a waste of the judicial --

THE COURT: Let's talk about remand.

So is what you're saying that you believe -- the City's argument is that based on what happened with *Crockett* decision, and the fact that this Court had said this is without prejudice to be renewed if the Supreme Court overturns *Crockett*, that that doesn't mean we proceed here with the PJR, instead it means that the PJR needs to go back to the City Council for a final decision, because it had no such final decision, initially, so just remand the PJR portion of this action, period, end of story, we're talking about that.

MR. SCHWARTZ: Remand the --

THE COURT: Okay. All right.

MR. SCHWARTZ: -- application.

THE COURT: Okay.

MR. SCHWARTZ: Yes.

THE COURT: Thanks. Anything else on remand?

MR. SCHWARTZ: Yes. The ripeness doctrine, Your Honor.

THE COURT: Why are we talking about ripeness --

MR. SCHWARTZ: Because --

THE COURT: -- in the context --

MR. SCHWARTZ: Okay --

THE COURT: -- of remand?

MR. SCHWARTZ: Can I explain?

THE COURT: No. I'm not understanding, what is the --

MR. SCHWARTZ: Well, counsel is going to argue --

THE COURT: -- connection of ripeness --

MR. SCHWARTZ: Counsel is going to tell you that the ripeness doctrine does not apply to its categorical takings' plan, and so they're going to rely on the *Sisolak* case, the *Sisolak* --

THE COURT: But what does that have to do with the PJR?

MR. SCHWARTZ: Pardon me?

THE COURT: What does that have to do with the PJR?

MR. SCHWARTZ: Because the application --

THE COURT: You're asking this Court --

MR. SCHWARTZ: -- should be remanded --

THE COURT: -- to remand the PJR.

MR. SCHWARTZ: -- because it's not ripe. The application should be remanded because they are not ripe.

THE COURT: Okay.

MR. SCHWARTZ: If the Court believes opposing counsel that the *Sisolak* case, which is a physical takings case applies ripeness rules, then the Court -- you know, I think that would be error, because --

THE COURT: Okay.

MR. SCHWARTZ: -- the case isn't ripe, so I feel like I need to explain this ripeness doctrine, so that the Court isn't misled.

The ripeness doctrine comes from a case called *Williamson County v. Hamilton Bank*, in 1985. And the Court there said, look, we've got this takings doctrine, it's got to be like an eminent domain, it's got to be a wipeout of economic value, or a *Penn Central*, it's got to be close to a wipeout of economic value. *Lingle* said, *Penn Central*, categorical wipeout, basically the same thing. They've got to be a functional

equivalent to an eminent domain. They've got to be really bad. And so *Williamson County* said, in cases where the allegation is that, through regulation, through denial of a permit application you're preventing use of the property, we don't know -- we can't tell whether there's been a wipeout, or a near wipeout, which is required for *Penn Central*, unless there's a final decision about what the government will allow.

And so *Williamson County* said, so before takings claim is ripe, you have to file an application for the property that you're seeking to develop. You can't file a -- you can't consider an application for that property, combined with other properties, or just a portion of that property. It's got to be for that property. That's what the *State* case said in 2013, in the Nevada Supreme Court. So you have to file an application, it has to be denied, and then you have to file a second application for let's say a lesser density. If your first application was for a 100 units, you got to try maybe 50 units, or a variance, or some way to test the agency's discretion. And only then, if there are two denials would the claim be ripe.

It might not even be ripe then, because there may be -- there may be an indication that there could be further exercise of discretion that would allow -- prevent an economic wipeout, but only then is the case ripe, because the Court can't know, it can't tell what the City would allow, unless the developer goes through the process, and the burden is on the developer, it's not the City. So that's what *Williamson County* holds.

THE COURT: Okay.

MR. SCHWARTZ: And all authority supports that, including -- and that's the law in the *State* -- in the *State* case. And so the developer contends that it's not the law in the state, because the developer has stated two claims, its third and fourth claims, regarding limitations on use. It's third claim is what they call a categorical claim. It's fourth claim is a *Penn Central* claim. It's fifth claim is for what they call a per se regulatory taking. That's really a physical taking claim.

So the developer argues that the ripeness doctrine does not apply to its categorical wipeout claim, because the Court in *Sisolak*, *McCarran International Airport v. Sisolak*, the Court found the ripeness doctrine does not apply to a physical taking claim. A physical taking claim is a categorical taking claim, it's a per se taking claim.

So the developer wants this Court to find that the ripeness doctrine does not apply to its so-called categorical claim, which is a wipeout of use, because *Sisolak*, also a categorical claim, the Court said ripeness doesn't apply.

Now of course in a physical takings claim there's no permit application, there's no decision on a permit application. The government passes a law that says you shall allow the public to come onto your property. You're going to allow the government to come on your property. And so, yeah, there's no dispute that the ripeness doctrine does not apply. The final decision of the ripeness doctrine does not apply to a physical takings case. And the Court in *Sisolak* made that clear. It said -- and I can refer Your Honor to the *Sisolak* case where the Court said --

THE COURT: Okay. Counsel, I agreed with you that I thought we should discuss remanding first, and it was Mr. Leavitt who said we should talk about the ripeness and the joinder of these actions. So I guess maybe I didn't understand what you were going to be talking about.

Specifically with respect to the question of the petition for judicial review, not the other seven causes of action that they have alleged for why they say they were -- there's this improper action taken by the City, strictly on this question of if they resubmit this might they get a different result, because the first time they didn't even get a hearing, so is that it on the remand? For the ninth time --

MR. SCHWARTZ: Yes, Your Honor.

THE COURT: -- is that it on remand?

MR. SCHWARTZ: That is.

THE COURT: Okay. Okay. Good. Thanks. All right. Thank you.

MR. SCHWARTZ: And I'm really responding -- counsel is going to get up here, and he's going to misrepresent these cases and tell you, you don't need to worry --

THE COURT: Let's talk about remand.

MR. SCHWARTZ: -- about ripeness.

THE COURT: But that's fine. Thank you. I appreciate that --

MR. SCHWARTZ: Yeah. And the --

THE COURT: -- I will certainly try to keep Mr. Leavitt on track.

MR. SCHWARTZ: -- ripeness goes to judicial economy, Your

Honor.

THE COURT: Okay. Alrighty.

MR. SCHWARTZ: And I think that is a factor in your decision to whether to remand, is if we -- if you remand we've got this motion to determine property interest. It's all a bunch of nonsense, but we're going spend today, and we may not even finish today on that motion, because the developer has thrown so much mud against the wall --

THE COURT: Uh-huh.

MR. SCHWARTZ: -- and then the City's motion for summary judgment. And we took that up -- we took it up, because we thought the Judge took the case -- the hearing off calendar. We didn't just withdraw it.

THE COURT: Okay.

MR. SCHWARTZ: And so we can avoid all that's --

THE COURT: Okay.

MR. SCHWARTZ: -- thousands of --

THE COURT: So your position is --

MR. SCHWARTZ: -- pages of paper.

THE COURT: -- that if we remand the petition for judicial review the rest of it all fails.

MR. SCHWARTZ: Okay.

THE COURT: And so we go no further. Okay. All right. Thanks, I'm ---

MR. SCHWARTZ: So --

THE COURT: We'll get to that other part later.

MR. SCHWARTZ: Okay. So, Your Honor, if counsel gets up here and says that their third and fourth causes of action -- well, they've conceded that their fourth cause of action, the *Penn Central* case is subject to the ripeness doctrine. They say that their third cause of action is not, that's absurd, because they're both regulations of use, and the ripeness doctrine applies whether it's a mere wipeout, or a wipeout. It's an absurd argument. All authority is to the contrary. You know, we've cited our --

THE COURT: Okay. Well, what does that have to do with remanding --

MR. SCHWARTZ: So it --

THE COURT: -- the petition of judicial review?

MR. SCHWARTZ: Because counsel is going to tell you, don't remand --

THE COURT: Uh-huh.

MR. SCHWARTZ: -- because it would be futile. It would be futile to go before the City Council, and it's ripe, that their third claim is ripe, that's what they're going to tell you.

THE COURT: Okay.

MR. SCHWARTZ: And so if they tell you that I would like the chance to refute --

THE COURT: Okay.

MR. SCHWARTZ: -- what they're saying.

THE COURT: Got it. Okay.

MR. SCHWARTZ: Now I want to make one more point on

this -- on this motion. Judge Herndon had exactly the same situation in the 65 acre case.

THE COURT: Uh-huh. Okay.

MR. SCHWARTZ: They filed no applications. Here we've got no applications on the merits, so it's precisely the same thing. Judge Herndon when through a very careful lengthy analysis on this issue of ripeness, and he found that the 65 acre claims were not ripe. He found that the physical takings case, like *Sisolak*, do not apply to ripeness. They're physical takings cases. The ripeness doctrine doesn't apply. He refuted all of these arguments, and he was right. He was backed by solid authority. The developers got no authority --

THE COURT: And I know they're going to stand up, and they're going to say well, he's been overturned, and Judge Trujillo is handling it differently --

MR. SCHWARTZ: It wasn't, Your Honor. That is -- his decision was not overturned. It wasn't set aside. Judge Trujillo questioned whether the ripeness doctrine applied to categorical takings, because she'd been misled by the developer that they don't apply.

We've since straightened Judge Trujillo out, with all the authority that is categoric, that the ripeness document does apply to these wipeouts. It does apply by logic, by law, and she said Judge Herndon didn't rule on some of the other claims that the developer filed. Like he ruled on the categorial claim and the *Penn Central* claim --

THE COURT: Okay.

MR. SCHWARTZ: -- and that decision should stand.

THE COURT: Thank you.

MR. SCHWARTZ: All right. Your Honor, do you want a different counsel on the motion to remand --

THE COURT: Yes.

MR. SCHWARTZ: -- now and then we can take up the motion to dismiss?

THE COURT: Yes.

MR. SCHWARTZ: Thank you.

THE COURT: I thought that was the plan. Maybe I was wrong. Mr. Leavitt, remand?

MR. LEAVITT: I will talk about remand, Your Honor. Now, apparently I've misled everybody, and I don't want to mislead you. I promise you I won't, Your Honor.

THE COURT: Uh-huh. Uh-huh.

MR. LEAVITT: Okay. The issue is very concise. When you have a case that's been pending for 39 months, three years and three months, right, it's been ongoing for 39 months, can the City suddenly ask for a remand on the PJR side of this case, and then dismiss the inverse condemnation side of the case at the same time? That's what the City is asking you for here.

So there's two issues before you. Number one, should we remand; and then, number two, what impact does that have? So think about what the City has done here. They first filed a motion to dismiss because the PJR should be separate from the inverse condemnation case, and we should have a brick wall between them two.

Then they come to you in the second motion, and they say, Judge, we want you to remand in the PJR, and the remand in the PJR will now affect the inverse condemnation case. They're making two totally inconsistent arguments. But what I want to do, is I want to do is, is I want to address, should there be a remand?.

Judge, this argument is named by the government in every inverse condemnation case. When the government gets close to being found liable for a taking it always comes to the courts and said, okay, our heart is white now, we give up, we want you to remind, we'll let them build now. And do you know there's four United States Supreme Court cases right on point, that say, Judge, you shouldn't do that, and I'm going to explain why in just a moment, and I'll talk about whether it should occur or not . But I want to generally address just the whole issue here of whether there should be a remand.

This is the *Del Monte Dunes* case, where the government -- the landowner filed a condemnation -- an inverse condemnation action almost exactly about what happened here. There have been five denials. Judge, there's been five denials of attempts to use the 133 acre property in this case, five. and I'll explain that in a moment, okay.

Counsel wants you to just focus on the 133 acre application, there's been five. Here's what happened in *Del Monte Dunes*. There were five denials, the landowner sues, and the City of Monterey says just like this, Judge, exactly what the City is saying to you, remand now, we will approve. Here's a quote that was accepted by the United States Supreme Court. "Requiring the appellants to persist with this protracted

application process implicates the concerns about disjointed, repetitive, and unfair procedures."

Do you see why that's unfair, Judge? Because the landowners already gave the City five opportunities to approve the use of this property here. If we remand all that's going to happen, is we're going to have this repetitive process ongoing, on and on again. Judge, I'll cite you another case from the United Supreme Court, this is the *Nick* case. This is a 2019 case. Look what happened there. This is critical here. The landowner sued the government for an offending ordinance. The day after the lawsuit was filed, the government withdrew the ordinance, and then said, okay, no harm, no foul. The government did what the City's saying they may do. The government did it in *Nick*. Let me quote you what the United State Supreme Court said. They said, "A property owner acquires an irrevocable right to just compensation immediately upon a taking." So if a taking already occurred there's absolutely nothing the government can do to revoke that taking. They have an irrevocable right.

Then number two, they said once there's a taking the landowner already has suffered a constitutional violation, and here's the kicker in the case, they say, "post taking actions by the government cannot nullify the property owner's existing Fifth Amendment right to payment and just compensation. And here's the example that United States Supreme Court used. They said, a bank burglar might give the loot back, but he still robbed the bank.

So, Judge -- and there's two other cases right on point.

There's *Arkansas Game and Fish*, and we cited that to you in *Cedar Point v. Hassid*, where the United States Supreme Court rejected this exact action by the City of Las Vegas. And, Judge, how do we know that's what happening here? How do we know? Because what the City is saying to you is, listen, the reversal of the Judge Crockett order has now given us the right to approve the 133 acre applications.

THE COURT: Yeah. Let's talk about that.

MR. LEAVITT: I'm going to talk about that, When did that occur? March 20th, 2020, 18 months ago. So if the City really wanted to do this, and the City really felt like this was the appropriate process it would have done it on March 21st, 2020?

THE COURT: Then what? Because you were in Federal Court at the time.

MR. LEAVITT: Well, they still could have remanded it.

THE COURT: Okay. So I guess -- so here's my question, because the order -- my minute order reads -- and it says, if this changes because of what happened with Judge Crockett at the Supreme Court, you need to come back. That was a motion to dismiss.

MR. LEAVITT: A motion to dismiss.

THE COURT: It wasn't this -- we weren't discussing this remand concept. So how does any of this affect remand, because there have been some changes at the City, as you point out, it's been 39 months.

MR. LEAVITT: It has been 39 months.

THE COURT: There have been -- we have some changes of

circumstances.

MR. LEAVITT: Uh-huh.

THE COURT: So --

MR. LEAVITT: So the question is, Judge, should we give the City a do over? That's really the question, okay. Because --

THE COURT: No. Isn't it more a question, for your client, of maybe now I have a chance to do what I wanted to do with my plan all along?

MR. LEAVITT: Judge, absolutely, the landowners want to develop, but we have to see what the City really did in this case, to see whether should be a remand or not. Okay, Judge, and I'll address that right now, because it's a very good question, okay. First of all, okay, you're right, the PJR claims were dismissed. Now the City makes the argument, and I just want to address this, the City makes the argument that we somehow revived those PJR claims. Judge, nothing could be further from the truth. May I approach Your Honor?

THE COURT: Sure.

MR. LEAVITT: Okay. This is the timeline of events in the case, okay. The complaint was filed, Your Honor, on June 7th, 2018, okay. That was filed 39 months ago. That included the PJR and the inverse condemnation claims. Counsel makes it sound like we just now brought the inverse condemnation claims back. That's not what happened. They were already joined together 39 months ago.

We then made a motion to amend on June 2019, and you crafted that motion to amend, but remember the City improperly

removed the case to federal court, which delayed it for two years.

THE COURT: Uh-huh.

MR. LEAVITT: Then it came back on July 19th, 2021, and you'll remember, you granted our leave to amend, two years -- or two years prior to that. It comes back in July 2021, and then once it comes back in July 2021, then we file our amended complaint in District Court, that had been granted two years previous. In the meantime you had dismissed the PJR claims.

And so, Judge, my point there is, we didn't revive anything, we merely filed the proposed amended complaint that was granted two years earlier that had the PJR and the inverse in the claims together. It wasn't a revival. The PJR claims were dismissed without prejudice, and I get that, Your Honor, they're dismissed without prejudice in the event the Judge Crockett order is reversed, okay.

Well, it has been reversed, we understand it, but Judge, the Plaintiff in this case, the landowner has the only ability to revive those claims. They weren't revived by the filing of that old amended complaint, because that was just what was filed. It was the only document we had authority to file two years previously.

So as the case stands right now there has been a dismissal without prejudice, and without prejudice means that the Plaintiff can bring that claim back. He hasn't done it yet. We've not made the procedural step to say, Judge, we now want those PJR claims to go forward. We haven't done that. Now it's something that obviously we'll have to talk -- we'll have to discuss later, but as the case exists right now,

the only thing in this case is an inverse condemnation claim, because they have been dismissed without prejudice.

And now, Your Honor, so now I want to talk about whether remand of that 133 acre application is appropriate right now. Obviously, it wouldn't, because there is nothing to remand. It's been dismissed without prejudice until the landowner says, I want those claims to move forward.

THE COURT: Okay. So when you refiled your complaint, then --

MR. LEAVITT: Yes.

THE COURT: -- on July 28, 2021 --

MR. LEAVITT: Yes.

THE COURT: -- which does allege the petition for judicial review in its -- I guess, technically, that's the first cause of action.

MR. LEAVITT: Absolutely.

THE COURT: So -- and the alternative being declaratory relief or an injunction. So are you -- is it your position that those claims, because they had previously been dismissed --

MR. LEAVITT: Remain dismissed,

THE COURT: -- remain dismissed, even though they're in the pleading?

MR. LEAVITT: Yes. Because, Your Honor, here's why. That's why the timeline of events was so critical when I laid this out, is the landowners were given leave to amend there, in June of 2019, okay. So the leave to amend was given to -- and attached to that leave to amend

was the proposed amended complaint. All right. And that proposed amended complaint just repeated the PJR claims, and then it amended the inverse condemnation claims.

So when the case was remanded back down, and after your order dismissing those claims was already granted, we couldn't file a different complaint, we were only given leave to file the proposed amended complaint that was attached to our motion to amend in 2019, two years previous, so that's why it was filed. Otherwise, Judge, if that weren't the rule, then all the landowner would have to do, if you dismissed a complaint on one day, just refile the next one the next day and revived it. That's not the proper procedure, okay.

So there wasn't a revival. We didn't intend to revive it at that time. For obvious reasons, it had been dismissed. We simply filed the proposed amended complaint that we have been given leave to file two years prior to that, Your Honor. So as the case sits right now, again, the PJR claim has been dismissed without prejudice. So now --

THE COURT: So then the City's findings -- they were filed on the same day. The City's order on the motion to dismiss was filed on the same day as the amended complaint.

MR. LEAVITT: Correct.

THE COURT: So your position is that in refiling the amended complaint with the PJR in there, you are not reasserting the PJR. That cause of action was dismissed, pending who doing what?

MR. LEAVITT: Well, pending the procedure would be the landowner -- according to the case law the landowner would be required

to take that action to revive that claim, and the procedure to do that, Your Honor, is we'd have to bring a motion. We'd have say, Judge, Judge Crockett's order has not been reversed, number one. Number two, we want you to take notice that this claim has been revived now, and we want you to now proceed on the PJR plan.

But as we all know the Plaintiff is the commander of their pleadings. The Plaintiff gets to decide what claims to go forward on. And at this point in time the Plaintiff has not brought that motion to revive that claim. All that the landowners have done is filed a proposed amended complaint that they had been given leave two years prior to file. But if we had changed that proposed amended complaint we would have been violating your court order that you had entered two years previously, because we didn't have the right to do it, to file anything other than that. So procedurally, that's just procedurally, is there a procedural way to now remand the PJR claims?

Now I want to address what the City has said here, because what the City has represented to you, is the City said, Judge, we never had an opportunity to address the 133 acre applications, right. And that's the whole reason they now want to remand this, 18 months after the Crockett order has already been reversed. And I would submit to the Court they waived that. Your Honor, the City sits on its hands for 18 months and does absolutely nothing, then it certainly waived the argument that it can now remand this PJR. And, Judge, here's -- we know why they did it. When did the City all of a sudden file this motion to remand? When the landowners filed their motion to determine

property interest, within 14 days of the City filing a motion to remand. They had 18 months to do it.

Judge, here's what's happened in this case. This is our big concern about what's happening in this case, and what the City is trying in the other cases. They filed seven motions to dismiss -- actually nine now, because there have been two. Then when they lost seven motions to dismiss they improperly removed the case to federal court. Four federal judges said that was improper. Written opinions from four Federal judges, improper to do that. It took two years to get this one back down.

We're now 39 months into this case and all we want is a finding on the property interest issue. We want to move forward with that, but what the City is trying to do, is they're trying to say, listen, we didn't have an opportunity to consider these issues before, so now we want you to give us this PJR remand and stay everything else. Judge, let me tell you what they did. This is what happened on the 133 acre application. The landowners appeared in front of the Planning Commission, and the Planning Commission approved the applications, to build on the 133 acre property. Judge, this is in 2017. We received approval to move forward from the planning commission. The City's own planning department said, the landowners should be permitted to move forward, the landowners should be permitted to build on their 133 acre property, okay.

So these 133 acre applications are pending before the City Council. Then this is what happens. The City says to the landowner, you

have to file a GPA, with your 133 acre applications, and the landowners vehemently object. A GPA is a certain kind of application. We vehemently objected, and we filed a letter under protest, but we did it, and then we appeared in front of the City Council, and you know what the City Council said, Judge? They didn't just say we're following Crockett. That is patently untrue. What the City said, number one is, you filed a GPA application, and because you thought that that was an improper application, and we're striking your applications. Think about that for a moment. That's just one of the taking actions in this case. The City says, as part of the 133 acre applications, you need to file a GPA application, and then strikes the applications because it includes a GPA application that the City required. The City had every opportunity to consider those applications.

So now what the City says to you, is they say, well, Judge, we couldn't consider the applications, because of the Crockett order. Again, we can believe what California counsel is telling us, or we can go back to the record and see what 30 year veteran attorney Brad Jerbic said to the City Council. Thirty year attorney Brad Jerbic said to the City Council, you should consider the applications; and may I approach, Your Honor?

THE COURT: Sure.

MR. LEAVITT: This is a transcript from March 21st, 2018, a City Council meeting, and, Your Honor, if you turn to page 2, the highlighted portion, this is what Brad Jerbic told the City Council. "There are several things that could happened here as a result of that," referring

to the Crockett order. One, counsel could simply require a major modification of the developer. That would resolve it. Number two, you could just change the plan yourself and take the zero out, put another number in it. That could change it. Number 3, you could change your own code that could moot the entire lawsuit.

Judge, Brad Jerbic gave them every opportunity to consider the applications, said you can legally consider the applications, despite the *Crockett* order, and the City Council struck them. May I approach again, Your Honor?

THE COURT: Sure.

MR. LEAVITT: This is another transcript from May 16th, 2018, okay. If we turn to the -- page 22 of this transcript, here's Brad Jerbic advising the City Council again. "I'll try and get this as straight down the line as I can, tell it. Judge Crockett agreed with that argument, and he issued a written opinion," okay. So again, we're at the City Council. Brad Jerbic is advising the City Council. The Council was asked to make a policy call. To end the argument completely you could make a decision to change your code or just make a policy call as to whether or not you wanted a major modification to accompany these applications.

Brad Jerbic, again, told the City Council, you do not need to strictly follow the Crockett order, you have an avenue to approve the 133 acre applications, exactly as the planning commission approved them, exactly as the planning department told the City Council they could approve them.

THE COURT: But if you go on in this transcript he talks about

how this was before Crockett's decision, and Crockett's decision is that you need a major modification. So they had another chance?

MR. LEAVITT: No, no. That's what Mr. Jerbic is saying. What he's saying is you, at the City Council, get to interpret your code the way you want, despite the Crockett order. You could interpret your code, and it's given deference to say you don't need a major modification, or the second process is, you could change the code today, right now. You could vote that the provision of the code doesn't apply, or you can remove that major modification request in the code, right now, today, and you don't have to comply with the Crockett order, because the facts would be different.

Remember, the Crockett order applied to the 17 acre property, and this is the 133 acre applications that are pending, and Brad Jerbic, a 30 year veteran attorney, I mean, is explaining to the City Council, how to approve the 133 acre applications. So the City Council --

THE COURT: How to approve or how to consider?

MR. LEAVITT: How to -- you're right, Your Honor, how to consider the 133 acre applications.

Now, Judge, I think it's absolutely critical to identify what was happening at that time, so you can see how the City Council was moving forward with the landowner's applications. Your Honor, and I presented this to Judge Willet, Judge Williams, Judge Jones, Judge --

THE COURT: Trujillo?

MR. LEAVITT: -- Trujillo, okay. This is the timeline of events. There are ten actions that we've cited that are City actions that took this

133 acre property. What the City is asking you to do here today, Judge, is here's the denial of the 130 acre application. I'm sorry, Your Honor.

THE COURT: Now these are the City actions that are explained in your complaint?

MR. LEAVITT: Absolutely.

THE COURT: Yeah, I read that.

MR. LEAVITT: Absolutely. And this shows why a remand is entirely futile, number one; and, number two, it shows that a taking already happened. And when a taking has already happened, no subsequent action by the government can remedy that taking. As stated by United States Supreme Court, the bank robber might give the loot back, but he still robbed the bank." That's their quote, not mine.

So, Judge, if we can just take two minutes here, I want to write a word right here, it's called salvo, and that's not my word, do you know whose word that is? That's Councilwoman Fiore's word. When she looked at everything that City was doing to these landowners, she said, wait a minute, there is a salvo that's being targeted towards this land. Salvo means a barrage of actions towards this landowner to prohibit the landowner from using their property.

So let me go through just some of them. Right here, the Master Development Agreement, Judge. That was an application to develop the 133 acre property. Remember Council said, Judge, we haven't had an opportunity to decide whether we can approve the 133 acres, patently incorrect. The master development agreement, I'll be very brief, and we laid this out in our brief, what the master development

agreement was, was the landowner wanted to develop each one of his parcels individually.

These are the four cases that are pending. He wanted to do the 35 acres, the 133, the 65 and the 17 separate. He wanted to do that. But he goes to the City of Las Vegas, the City of Las Vegas says, absolutely not. You can file one application, and one application only. The master development agreement -- and that master development agreement will have the 133, the 35, the 65, and the 17 acre.

Remember, Judge, the 17 acre approvals had been reversed. So the City says, listen we want to develop the 17 acres. And so the City says, the only we're going to let you do that now, is if you do this master development agreement. And, Judge, it's undisputed that the City required this one application. It's undisputed that the landowner did everything the City asked him to do in the master development agreement.

And if I can just point two things out about that master development agreement. There were 700 changes demanded by the City, there were 16 entire do overs. It was a master -- a thick document, the master development agreement to develop the entire 250 acres. The City wrote it, and the City went on for two and a half years. Two and a half years, Judge. Think about that, 2.5 years.

What's going to happen if you remand this? For two and a half years, Judge, the landowners worked with the City on the master development agreement. Do you know, Judge, that there are certain requirements that every applicant in the City of Las Vegas must meet?

THE COURT: Uh-huh.

MR. LEAVITT: He met them. But do you know what the City did, they said, well, we got more for you, landowner, $2 million, $2 million extra to be paid as part of this master development agreement, to develop the 133-acre property. The City wrote it, and it went to the planning department. And you know what happened at the planning department, Judge, the City's planning department said, you should approve it. You need to approve this master development agreement, which will allow development of the entire property, including the 133 acre property. And you know what the planning department even said, they said it's all the code requirements. It meets every requirement you could possibly think of.

And, Judge, I won't get -- so that master development agreement was presented to the City Council on August 2nd, 2017 --

THE COURT: So again, if we can refocus on remand.

MR. LEAVITT: I got it.

THE COURT: You've got two issues on remand. One is technically procedurally --that's why I asked early on, what is the state of the pleadings --

MR. LEAVITT: Got it.

THE COURT: -- that technically -- and that petition for judicial review still stands as dismissed?

MR. LEAVITT: Yes.

THE COURT: So asking to have it remanded, you're asking me to -- it's a fugitive motion, because there is nothing to be remanded,

because there is no petition for general review. What we have before us right now is just the takings case.

MR. LEAVITT: That's absolutely correct, Your Honor. So proceed --

THE COURT: Number one.

MR. LEAVITT: That's number one.

THE COURT: And number two is, it's futile.

MR. LEAVITT: Number two it's futile.

THE COURT: Uh-huh.

MR. LEAVITT: And then number three would be -- so here's the futile part, Judge, is what I read to you today. I read the United States Supreme Court opinions for you. I read to you where these actions have been attempted by the governments in the past, and the United Supreme Court in four cases, Judge, rejected this exact attempt by the City of Las Vegas, because, Judge, as we have here -- I'll brief -- I'll brief this up, okay.

THE COURT: Uh-huh. Okay.

MR. LEAVITT: The master development agreement that the City wrote was submitted to the City Council. Then here's what the landowners say after that, they say, well, can we at least access our property? They go to the City, Judge, and they say to the City, we have legal access here, here, here and here. And so they file an application with the City. The City admitted in pleadings that we have that legal access. The Nevada Supreme Court says they have to provide that legal access, it's an over-the-counter application, and the City said, we're not

even going to let you have access to your property.

Then the landowner said, can we have a fence? We want to protect for safety reasons. We want to keep people off our property, and we want to surround our ponds. We want to keep people from entering onto our ponds. Guess what the City did, Judge? They denied it. They wouldn't even let the landowner put a fence around his property.

Now here comes the important part, is after the City denied all of these applications, four applications, Judge, because it struck the 133 acre applications here, then what the City did, and this is why, what the City is asking for is totally futile; the City adopts a bill. So now the City is not just denying it -

THE COURT: What you could the Yohan Lowie bills.

The Yohan Lowie bills. And, Judge, they call him that. They state those three things. It targets just his property -- think about that. The City adopts the bill that only targets his property, undisputed evidence. Number two, it makes it impossible to develop the property. And then, remember, they said you can't have fences around your property?

THE COURT: Uh-huh.

MR. LEAVITT: Here's why. Because they put a provision in the bill that says you have to allow the public to access your property. And we presented to you evidence, Your Honor, that the public is actually using the property, and when questioned why they're using it they say, because the City told us we can use it.

So we have four denials of using the 133 acre property, four

applications already, to try and use it, and then we have the City adopting a bill saying, we're going to target your property, we're going to make it impossible to build, and we're going to make -- we're going to make you allow the public to use your property. After doing all of that to the landowner, and plus the other -- Judge, I'm going to put this right here, plus five. I'm not going to go into them right now, because the take, we're going to argue the take issue later. There were five additional actions in addition to that, that are takings, also.

And so after doing all of that to the landowner the City now tells you, Judge, we really didn't have a chance to consider this, despite Brad Jerbic saying you could, despite the planning commission approving it, we really couldn't. That's their first argument. And then they say, remand this PJR down, give us a chance to do this, and here is what -- here's the kicker, Judge. This is where they really give the landowner the kicker. They say, Judge, if you remand the PJR, then we want you to decide the property interest issue and the take issue without hearing them.

That is outrageous, Your Honor. They want you to pretend these taking actions didn't occur. They want you to pretend that the landlords don't have a property interest, and that's the impact of the order that they want you to enter.

So, Judge, I've got a couple of more issues I want to address, but -- so the first question is, is there a procedural way to remand? We obviously say, no, because we haven't provided that claim. And, secondly, if you remand would it be futile that all the courts say you

shouldn't do it? I mean, they say it right there, because this would implicate the improper process of never ending applications. They already have the opportunity to approve the property right here. They already had the opportunity to give us access and a fence, and they refused to do that, Judge, because -- we know why they did it, we put it in our pleadings, because they said, over my dead body are you going to ever be able to use this property.

Even after -- and, Judge I want to point one thing out, because counsel keeps making this argument that we approved the 17 acres, right? We approved the 17 acres. The 17 acre approval occurred here. Do you know what happened after the approval? The Council changed and then all of this occurred, ten actions.

And, Judge some of those actions claw back the 17 acre approvals. The MDA would have allowed the 17-acre to build, they said no, after the approvals. So my point is, Judge, it's entirely futile. Here's why. Because once a taking occurs the landowner receives an irrevocable right to receive payment and just compensation. Irrevocable.

There's absolutely nothing the City can do at this time to erase the taking. That's why in the four cases we cited to you -- the four United States Supreme Court cases we cited in our briefs, in all four of those the Court did not require the landowner to go back again. I'll tell you exactly what's going to happen. You remand this, we're going to go back there, they're going to mess around with us for two and half more years, then if they deny it -- they won't guarantee an approval today. If they deny they'll say, well, it's not really ripe, you've got to do another

application, and then they'll say, well, that's not ripe, you've got to do another one. It's exactly what happened in *Del Monte Dunes*. The Court said we're not going to make them do it anymore. Once you get to this point you're not required to go forward anymore.

And so, Judge, here's what we want, here's our request. Number one, obviously sever out the PJR from the inverse condemnation claim.

THE COURT: But it's already dismissed, according to you?

MR. LEAVITT: I got that. Well, no you could put a brick wall. Let me put it this way. It is. It is. And we made that argument. We made that argument in that other pleading. It's already been dismissed. Just put a brick wall up and stay over here in the inverse condemnation side. If we stay in the inverse condemnation world, there's nothing to remand, number one.

Number two, the United States Supreme Court said very clearly, we're not going to require you to go back. And what we want the courts to do is -- and counsel says this isn't the process. I don't know what more I can do than quote the Nevada Supreme Court. There's a mandatory two-step process. Number one, determine the property rights. Number two, determine the take. That's what we filed today was to determine the property right. And then you have a subsequent hearing where you determine the take.

Do you know that's the exact procedure that all three other judges are following and that he says is incorrect? So all three of the judges are wrong, but they're all three doing -- according to California

counsel, they're all three doing this. And you know what they didn't do? They didn't remand anything. Nobody has said, hey, go back and give them another chance. You want to know why? Because four United States Supreme Court opinions say you don't do that.

THE COURT: So what is the effect -- and as mentioned, my earlier question was what is the effect of the Crockett opinion because the minute order specifically was the dismissal is without prejudice subject to what happens with Judge Crockett. Judge Crockett has been reversed. And so when the -- and this is what I'm trying to figure out. If -- when you refiled your complaint, I understand that your position was that was what we originally were supposed to file before it got improperly removed to Federal Court.

Now we're back, we have to file that. But my question is then, are you refiling it? I just -- that's the kind of -- the thing that kind of -- I'm kind of missing here. And if so, what is the intervening change of the two and a half years? Why not go back and give it another shot? It's a whole bunch of different people.

MR. LEAVITT: I understand that. First, we have to obviously follow procedural rules. Okay. So the procedural rule would require the landowner to revive that claim.

THE COURT: Uh-huh.

MR. LEAVITT: Okay. So he does that. It has been revived. And Judge, the intent was not to revive that claim, obviously.

THE COURT: Uh-huh.

MR. LEAVITT: It was just to refile the proposed complaint

that we had leave to grant. And Judge, you bring up a good question. Okay. So what is the -- what's the problem with letting them go back and do it? Judge, okay, if that does occur, okay, if we say, hey, there's some procedure -- if we figure out some procedural way to get this PJR claim revived and then remand back to the city council, which by the way, they can do it. They could've done it on March 21st, 2020. Okay. So that's the first thing, can they -- can we do that. We say no.

The second question is, okay, what impact does that have on the inverse condemnation side. I hope I've made it clear enough that it has zero impact. We have to still move forward with the inverse condemnation claims. You have to still decide whether there's a property interest. You have to still decide whether there's been a taking in the inverse condemnation side in a case.

So that's my -- I mean, my analysis of this is number one, can it happen, number two, what's the impact. But I certainly -- Judge, I certainly can't see an avenue where we remand the PJR claim, and then all of a sudden, the inverse condemnation claims are sua sponte dismissed without even having a hearing on them because counsel says they're dismissed without even hearing the evidence.

THE COURT: Okay. Thanks.

MR. LEAVITT: So if I may have one moment, Your Honor. I just -- I want to make sure I presented this.

Your Honor, I do want to bring something up, and I forgot to say this, and my client has actually made this very clear to me in the past is when you -- when the landowners filed these applications -- let me see

here -- the date that they were filed was in 2017. Judge, that was four years ago. What's happened to the Nevada and Las Vegas real estate market in the last four years? It has profoundly and significantly changed in the last four years. The cost of construction has skyrocketed.

So now -- and that's why, Judge -- and really quick, that's why the Nevada Revised Statutes state that when a landowner submits an application, the government must consider it quickly. The PJR process is rapid. If you remember, you've got 25 days to appeal. You've got to get the record up, and you've got to get a decision, and then you go to the Supreme Court. And that's why that process is so fast because markets change so fast. It's been four years.

So what the City wants to do is send back four-year-old applications when the market has profoundly and significantly changed. I just wanted to put that on the record. In addition to the reasons that we don't have a process for it, it would be futile because the market has significantly changed.

THE COURT: Thank you.

MR. LEAVITT: Thank you, Your Honor. And Your Honor, do you want me to address this ripeness issue?

THE COURT: No.

MR. LEAVITT: Okay. Thank you.

THE COURT: So I just -- because counsel gets the final word on their motion to remand. And that was, like, my earliest question was what is the status of the pleadings? And we didn't really talk about it. So I'll talk to him about this.

Your argument on the status of the pleadings?

MR. LEAVITT: Okay. And you got my argument on the status of pleadings, right?

THE COURT: Yes.

MR. LEAVITT: Okay, Your Honor. Thank you.

MR. SCHWARTZ: Your Honor, there haven't been five denials. The cases that counsel's talking about, about the taking -- you can't take back the taking, are physical takings cases and don't apply. Plus, there are -- that argument is circular. That's why we're here. They sued for a taking. There hasn't been a finding that there has been a taking there. Yeah, if there's a finding there's a taking, then damages are owed as of the date of the taking. But those cases that counsel cited, the *Nick* case, the *Cedar Point* case, the *Arkansas* case, those are all physical taking cases where yeah, the taking occurs at the time of the physical invasion. And you can't take back a physical invasion, of course. They have nothing whatever -- nothing whatever to do to this case. This is just a deliberate attempt to confuse the limitations of use, wipeout takings with physical takings.

Your Honor, every one of the arguments that counsel made, they made before Judge Herndon. And in his decision, pages 24 through 35, that's tab 11, Judge Herndon carefully refute -- rejected every one of those arguments. Let's talk about the -- well, first, I want to address -- I know the Court is concerned about the procedural issue. Counsel didn't have to refile their PJR with the civil complaint for taking. And they blame the delay in filing -- or they blame the delay in their ability to

develop this property -- of course, they don't want to develop it but they're claiming that they do. They're blaming the delay on the city. In fact, counsel got the date wrong. The case was remanded by the Federal Court November 11th, 2020. November 11th, 2020.

What have they done since then? In March of 2020, the City wrote to them. And if the Court wants to see that exhibit, it's Exhibit OOO in our appendices. March -- I think the date is March 26th, 2020. The city wrote them a letter inviting them to resubmit their 133 applications in the form that they were submitted initially because now no MMA is required after the Supreme Court reversed Judge Crockett. That was March of 2020. They did nothing -- they did absolutely nothing since then to develop the property, even though the city said go ahead, you don't need an MMA. The Federal Court remanded November 11th. They've done nothing in the eight months since then.

But you know, this futility argument, it just seems to be absolute nonsense when you consider that the city approved the 17-acre application for 435 units and told them here's your permit, take it, go build. And there -- and now the developers are arguing it's futile to ask the city council to make a decision on the merits for the first time. It just is, you know, quite ridiculous.

Judge Sturman -- Judge Herndon dealt with each one of these arguments about their so-called five denials. That's a fiction. That's not true. There were no denials on the merits. They -- counsel referred to some general plan amendment. That concerned a 133 acre property and other property. That doesn't count for purposes of takings.

In the Haynie case, which we cited, and all the other ripeness cases -- the Haynie decision is tab 13 -- the burden is on the developer to ripen the claim. Not the regulatory agency. The regulatory agency is supposed to decide -- apply the law to an application. And it has -- supposed to protect the general health, safety, and welfare of the community. That's its job. So it's -- the burden is squarely on the developer to ripen its claim before it can come to the Court and say that it would be futile to file further applications.

So the first application they're talking about wasn't an application for this property under the *State* case. That doesn't count. The second set of applications were the 133 acre applications, not denied on the merits. And it's not up to the City to tell the Developer how to comply with the law. It's not up to the City to tell the Developer, well, here's Judge Sturman's order, you need to file a -- you need to file a major modification application to make your applications complete. It's up to the Developer to do that. The City attorney doesn't make the law. The planning staff doesn't make the law. They don't decide permit applications. What they tell the developer, what they say is irrelevant. The only thing that counts is the city council's action. And the question is what did the city council do by official action, a vote or the majority of the city council? So that's the two applications.

Then the third application, the major development application. Now, what is a development agreement? A development agreement is not a site-specific application for application. Not under the City's code or any code. It's an application for a large, complicated

project and asking that if the development agreement is preserved, the City won't change the law in between the time it's approved and the time the Developer starts construction. That's what an MDA does.

Yes, the 17-acre property was part of this major development agreement application. But the denial of the MDA had nothing to do with the validity of the approvals of the 17acre property. When the Supreme Court reinstated those approvals in March of 2020, and the City then said, they're valid. So you know, it's a paradox. For the Developer to say -- to come in and say, I don't have permits when the City is saying, oh yes, but here it is, here's your permit.

The -- that's -- and Judge Herndon went into quite some detail about the MDA, and why that was not an application to develop the 65 acre property, which was also included in the MDA. He said it's not a site-specific application, which is required for ripeness. There's a site development permit requirement, a general plan, rezoning, maybe a tentative map. All of those are required for a site-specific development. The MDA was not that. It was this general thing. It was very general. It wasn't a denial of development of the 65 acre property on the merits.

He also said that during the hearing on the development agreement, members of the city council, even those who voted against it, said, well, we might consider a less dense application. Judge Herndon went into great detail about why the MDA didn't count as an application.

Then this application for access and a fence. That's a -- that's just nonsense. In Exhibit DDDD, you'll see a declaration from the City's

assistant planning director. The Developer -- first of all, these were not applications to develop the 133 acre property. They were to get access. I'm not sure if it was to the 133 acre property or a different part or a fence. But they were to build a fence and get access to the property. The denial of those would not be a wipeout. It's not a taking. You've got to wipe out the value. But they never filed the right application. If you look at that exhibit, DDDD, you'll see that they were required to file a certain type of application by the planning director, which is the planning director's discretion. And they never filed one. So those applications were not denied. That's false.

These bills that they call the Lowie bills. These bills go to their physical taking claim. They claim that the second of the bill, the 201824, effected a physical taking by requiring the developer to allow the public on the property. Well, that's false. And we can -- we would show that if we get to that point on the merits. But those were physical taking skills. They had nothing to do with an application to develop the property, which is required by the ripeness doctrine.

It seems like this exhibit -- this demonstrative exhibit on the easel, it seems like they may be left out a couple of crucial of facts like the Nevada Supreme Court reversed the Crockett order, reinstated the 17-acre approval, the City sent a letter that you can -- your approvals are valid. They're arguing this shows futility when they leave out the most crucial facts. It's obviously not futile.

Judge Herndon also observed that two of the four members of the city council that voted against the development agreement for the

entire Badlands are no longer on the city council. And it would only take one vote to flip that from four to three. And Judge Herndon said, there is no way I can tell what the city council -- this current city council would do on this application. And it's not the City's fault that all this time passed. The City supported its approvals in the Crockett appeal. And the Nevada Supreme Court finally reversed. And as soon as the Supreme Court reversed, the City went to the developer and said it didn't have to. Because again, the burden is on the developer. The developer got notice that the 17 acre approvals had been reversed. But the City sent levels on all three -- the 17 acre, 133 acre, 65, and 35 acre properties and said if the requirements have changed, file your applications, or in the case of the 17 acres, go ahead and build.

THE COURT: Well, the problem we've got here is all these cases seem to be on a different track and a different schedule. As pointed out, this one didn't come back from Federal Court until November. Judge Herndon's case had already apparently been back. And he issued a ruling in December before leaving us for the Supreme Court. The oddity of this case is that we never had any orders filed when this case was first before this Court back in 2019. And instead, it had been removed to Federal Court, where apparently just the motion to dismiss was pending. Nothing ever got filed.

So it comes back here. And finally we have the hearing in like, June, July, whatever it was, say we need to get everything on file so that we have a clear record. What was filed on the same day is first at 2:30 p.m., the petition for judicial review with its takings case. That

whole complaint is refiled. And then 20 minutes later at 2:54, the City's motion to dismiss is filed, which says the PJR portion of it is dismissed.

So technically, I think Mr. Leavitt's correct in that technically the petition for judicial review is dismissed.

MR. SCHWARTZ: Well, Your Honor --

THE COURT: So what I'm trying to understand here is what are we talking about for the last two hours just because this -- none of this makes any sense to me.

MR. SCHWARTZ: Your Honor --

THE COURT: I ask first thing, what's the status of the pleadings. Nobody picked me up on it. I gave you the chance.

MR. SCHWARTZ: Your Honor, I think I argued at length. You kept jurisdiction.

THE COURT: But jurisdiction over what? Because very specifically, the motion to dismiss said this motion to dismiss is granted subject to what happens with the Crockett order. So the Crockett order is decided in March. This case doesn't come back over here until November. Then we finally get it on schedule in about June. These pleadings finally get filed. And technically, the last thing filed was the motion to dismiss. So what's the status of the pleadings?

MR. SCHWARTZ: Well, you have --

THE COURT: Does prior -- I mean, the Crockett order, with all due respect, did not reverse this decision. I said it was without prejudice to be revisited within the other Crockett order.

MR. SCHWARTZ: Exactly.

THE COURT: The Crockett order does not reverse it.

MR. SCHWARTZ: Exactly. But --

THE COURT: So --

MR. SCHWARTZ: -- under the cases I've --

THE COURT: So technically, it's been dismissed.

MR. SCHWARTZ: Yes. But under the *AMOS* case, under the cases I cited, *Valley Bank v. Ginsburg*, *Five Star Cattle*, and *Royco* [phonetic], and particularly *America West*, the Court had continuing jurisdiction. You retained jurisdiction because --

THE COURT: So I can just sua sponte say because of the Crockett order, my -- the fact that you filed a motion to -- the proposed complaint is filed, and then subsequently the order is filed that says the PJR's dismissed, I'm going to sua sponte say it doesn't matter that this was filed technically after the fact, dismissing the PJR. I'm going to revive the PJR, and I'm going to remand it. Is that what you're asking me to do?

MR. SCHWARTZ: Well, no. I think the issue is was there a final judgment? The Court's action was not a final judgment under these authorities.

THE COURT: Okay.

MR. SCHWARTZ: Developer has cited no contrary authority. Under *Valley Bank v. Ginsburg*, it says the finality of an order, whether there's a final judgment, you have to look at what the order actually does. And then in *AmWest*, we had the same situation. The -- what the Court's order actually did was to retain jurisdiction. If the Court didn't

intend to retain jurisdiction, it would have said dismissed with prejudice or dismissed without prejudice. But not -- what's the point of should, you know? What's the point of saying, you know, dismissed without prejudice should Judge Crockett's order be overturned on appeal? That can only mean one thing. That the Court retained jurisdiction --

THE COURT: Right. But what --

MR. SCHWARTZ: -- and it wasn't a final judgment.

THE COURT: But here's my -- here is my question that I asked early on. What is the status of the pleadings? Because I can't sua sponte say, oh, I'm reviving that motion -- the PJR because I said I would take another look at it if Crockett was dismissed -- was overturned. I don't know what I would have done. Nobody ever asked me. I was never asked that. Instead, these two pleadings were filed, the last of which is the order that says the PJR is dismissed. I asked early on, what is the status of our pleadings? Do we need something here saying, yes, we were serious when we filed this complaint -- amended complaint? Twenty minutes before you filed the order saying the PJR is dismissed -- 20 minutes before that, we intended to revive our PJR.

MR. SCHWARTZ: Your Honor, you filed --

THE COURT: Nobody's ever asked me that.

MR. SCHWARTZ: -- you filed --

THE COURT: Nobody's ever said, Judge, please reconsider your motion to dismiss the PJR.

MR. SCHWARTZ: Judge, you filed your minute order --

THE COURT: February of 2019.

MR. SCHWARTZ: Yes. February of -- and so the fact that this FFCL, which just memorialized the minute order, that's not the date -- the important date. The date is the minute order when this Court retained jurisdiction. Now that the PJR is refiled, it only strengthens the case that the Court has retained jurisdiction and that there was not a final judgment. There was not a final judgement. If the Court said, dismissed with prejudice --

THE COURT: Okay.

MR. SCHWARTZ: -- that would have been a final judgment.

THE COURT: It's not a final judgment. So but as -- I think we're all in agreement that whatever happened in Crockett's case affects Crockett's case only. It's only relevant to this case to the extent somebody says, take another look at, because Crockett's case has been overturned. So you need to take another look at what you did. We need to have a consideration of what this means in our case. Nobody ever -- that's a step that nobody ever asked this Court to take.

Instead, what was filed was just to bring our record up to date with what we had before it was removed. Everybody jumped ahead. Nobody ever said, Judge, please let us file -- refile our PJR, and then you can file your motion to remand. I mean, nobody ever asked me for that. And I'm just puzzling over the fact that I retain jurisdiction. Yes, I do, if somebody asks me to exercise it. But you haven't asked me to exercise it. Instead, you've asked me to remand something that was dismissed.

MR. SCHWARTZ: You have discretion to change your order.

THE COURT: Okay. I can sua sponte say --

MR. SCHWARTZ: You have discretion.

THE COURT: -- I've decided that PJR has been revived because you -- when you filed your proposed amended complaint that you had gotten approval for some time earlier, that revived your PJR.

MR. SCHWARTZ: I don't -- I disagree, Your Honor. I don't think it revived PJR. You had juris -- continuing juris -- you retained jurisdiction over that PJR because of what you said in order, that it dismissed without prejudice should Judge Crockett's order be reversed. Why did you say that if it just concerned the 17-acre case? You said it because it's crucial for this case because -- and that's why you retain jurisdiction. Under the authority we've cited, the Court has retained jurisdiction. There's no final judgment. You have discretion.

This is an equitable proceeding. You can remand those applications for reconsideration by the city council. You can do that. You have the authority to do that. And that would be in the interest of judicial economy because we're going to spend a lot of time in this court. You know, we're going to be involved in proceedings that -- we can avoid all of that by just giving the city council a chance to review these applications.

THE COURT: So what's the effect of the dismissed -- the fact that the petition for judicial review is dismissed? There's nothing for this Court to review, right?

MR. SCHWARTZ: Well, that's not correct under *Valley Bank v. Ginsburg*, under *Five Start Capital*, the court said, a valid final

judgment does not include a case that was dismissed without prejudice.

THE COURT: Uh-huh.

MR. SCHWARTZ: No. The law is very clear that you have the authority to do this. The refiling of the PJR isn't essential for our argument. Our argument is no final judgment, you retain jurisdiction, remand would be in the interest of justice and judicial economy.

THE COURT: Well, I'm going to deny this motion, because I still can't get past the fact that at no point in time was I ever asked to reconsider my decision. What I thought we were doing was bringing the pleadings up to date so they would be consistent with what our record was before it was removed. The way the record stands as I read it, the petition for judicial review is dismissed.

So I don't even see why you talk about the second motion, which is you shouldn't join these two pleadings because I can't remand something that isn't on the record. I can't sever something that has already been dismissed. I'm not understanding why we're here.

MR. SCHWARTZ: You can under *AmWest* and *Ginsburg*.

THE COURT: Okay. I can make these pleadings be what I want my pleadings to be. Not what the parties --

MR. SCHWARTZ: No. No. The --

THE COURT: Seriously, I just sort of --

MR. SCHWARTZ: You still have jurisdiction over that PJL --

THE COURT: Sir, with all due respect --

MR. SCHWARTZ: -- even though you dismissed it.

THE COURT: -- with all due respect, I asked -- the very first

thing I asked was what is the status of the pleadings, please address the status of the pleadings. Nobody chose to do that. So I'm finally just going to say what I -- I've been puzzling over what you people are doing. All we did when this came back from the Supreme Court -- because remember -- I mean, from the Court of Appeals. Herndon's case came back sooner than this case came back. He went all the way through his whole decision. Now you're doing whatever you're doing. It doesn't matter to me.

All I said in 2019, was I'm going to do this without prejudice should Crockett's order be overturned. It was overturned. And what happened? Nobody came back in and said, you need to reconsider this, Judge, because Crockett's order has been overturned, and you need to take another look at your petition -- at our petition for judicial review being dismissed. Nobody asked me that. Instead, all I was told when it came back is we need to bring our pleadings up to date consistent with the record that was before this Court when it was removed. That's all I thought you folks were doing when you filed these two pleadings.

So I thought our pleadings stood as they stood in February 2015, prior to the removal. Instead, we get all these arguments renewing the motion to dismiss, the motion to remand. And I'm just, like, remanding what? I don't have anything in front of me to be remanded. Nobody ever said, Judge, you need to take another look at your dismissal of this petition for judicial review, that's wrong, Crockett got overturned, can we please refile our petition for judicial review. Does the fact that Crockett's order overturned -- was overturned, does that

make a difference to you on your order? Respectfully, nobody ever asked me.

MR. SCHWARTZ: Well --

THE COURT: That's --

MR. SCHWARTZ: -- that's a good point, Your Honor.

THE COURT: -- critical, I think.

MR. SCHWARTZ: Can I address that?

THE COURT: Yeah.

MR. SCHWARTZ: The City did what we thought was the expedient thing.

THE COURT: Right.

MR. SCHWARTZ: We wrote a letter to the developer, said, let's cut out all this nonsense with this lawsuit. You have no taking because there's no ruling on the merits. The city council didn't rule on the merits. You can't sue them for a taking for that. Here, go refile your applications. Let's avoid all for this expense and this litigation.

THE COURT: And there's been a big change of circumstances.

MR. SCHWARTZ: Right.

THE COURT: You got entirely new people.

MR. SCHWARTZ: And --

THE COURT: Market conditions have changed --

MR. SCHWARTZ: -- the developer --

THE COURT: -- substantially.

MR. SCHWARTZ: -- did nothing. And so again, it wasn't

incumbent on the City. So then, when the developer refiled its petition for judicial review and start -- and filed his nonsensical motion to determine property interest. So the developer doesn't want to develop the 133-acre property but wants to litigate. So we file this motion. And in the -- I think the motion has merit in that yeah, you dismissed. But these cases say, well, it depends on the circumstances.

THE COURT: So I should just order them to go back to the city council even though, technically, their petition for judicial review is dismissed? And it wasn't technically dismissed until this order is entered finally because a minute order doesn't mean anything.

MR. SCHWARTZ: No. You --

THE COURT: In our jurisdiction, a minute order means nothing --

MR. SCHWARTZ: Okay.

THE COURT: -- until a written order is entered.

MR. SCHWARTZ: We're asking for an order that you order the city council -- you're remanding these to the city council for consideration.

THE COURT: Okay. I think you're asking me to do something I can't do. I do not believe that I have the authority to tell the city council to consider this issue when the petition for judicial review itself, they asked me to dismiss it two-plus years ago. We finally get the order, and it's not final until it's entered on July 29th, which the time has passed. There's no appeal. So that's -- I'm just -- I just find this bizarre. The petition for judicial review does not exist. It has been dismissed.

MR. SCHWARTZ: That's what happened in *America West.*

THE COURT: Okay. All right.

MR. SCHWARTZ: This is what happened. The Nevada Supreme Court told the city council, reconsider, make -- they didn't make an official decision. They said, make a decision. So they remanded it to the city council.

THE COURT: Well, had the petition for judicial review been dismissed?

MR. SCHWARTZ: No.

THE COURT: Okay. Thanks. All right. So I'm going to deny this motion to remand because there's nothing before me that I can remand. The last order in this case, the effective order is filed on July 29th. Yeah. And in my minute order I specifically said, "somebody come back and tell me if Crockett's order gets overturned and ask me to take another look at this." Nobody ever has. There's no petition for judicial review to be remanded. I can't remand something that doesn't exist. It's been dismissed.

So that, with all due respect, I believe moots this question of the severance because, technically, the petition for judicial review doesn't exist. So it's just this takings question, right? Right. Okay.

So with respect to the motion to remand, I believe that I -- that it is moot because the petition for judicial review was dismissed even though when they refiled on the 29th, the pleading includes the petition for judicial review. Subsequently, the order memorializing what was done on February 15th, 2019, was entered. And that order is the last

thing in the file. And technically, it tells me my petition for judicial review is dismissed. Nobody's come back in and said, you need to take another look at that, Crockett was overturned, it should matter on -- it doesn't overturn this decision, but you should take another look at it because what Crockett did was overturned, you now need to look at your decision. Nobody's ever asked me to do that.

MR. SCHWARTZ: I thought that --

THE COURT: They haven't asked me to do that.

MR. SCHWARTZ: I thought that was this motion. This was this motion to remand.

THE COURT: So my question to you is you didn't ask -- well, you asked me to remand something that's been dismissed. You didn't ask me to reconsider my dismissal.

MR. SCHWARTZ: Well, okay. Okay.

THE COURT: I was never asked to reconsider my dismissal. Your -- it was your motion to dismiss.

MR. SCHWARTZ: Sure.

THE COURT: And you entered an order saying it was granted?

MR. SCHWARTZ: Yeah. We -- because we contend to have -- you had --

THE COURT: Okay.

MR. SCHWARTZ: -- you retained jurisdiction.

THE COURT: Before my head explodes, Mr. Ogilvie, did you wish to be heard on this?

MR. OGILVIE: Yes, Your Honor. Very briefly.

THE COURT: Okay.

MR. OGILVIE: If the Court looks at the findings of fact and conclusions of law granting the dismissal --

THE COURT: Uh-huh.

MR. OGILVIE: -- it was signed by this Court when? I don't have --

THE COURT: October 2nd, 2019.

MR. OGILVIE: When this case was before the federal court, before it was remanded, that was a dismissal of the original petition for judicial review. Even though it was entered the same day as the filing of this amended petition for judicial review, it related to the original petition for judicial review and the inverse condemnation complaint that was field back in 2018. Didn't relate to the amended pleading that was filed on that same day.

So I'm a little bit lost on the Court's statement that it doesn't have anything to consider. What it has to consider is the amended petition for judicial review and amended complaint that was filed that same day, which there hasn't been any motion work other than the motions that are currently before the Court today.

THE COURT: Right. Okay. So here's what I think about that. Again, so I'm winding this all the back. As you pointed out, this order was originally signed by this Court relating to the February decision in October 2019. It never got filed.

MR. OGILVIE: It couldn't be filed because the Court -- the

case was --

THE COURT: Because it was remanded.

MR. OGILVIE: -- in -- yes.

THE COURT: So we finally come back, and we finally say, look, we need to get this record straightened out, what's actually happening here. They had a subsequent motion to amend that was filed. So they refiled.

MR. OGILVIE: Well --

THE COURT: And it included that petition for judicial review that had been dismissed.

MR. OGILVIE: Correct.

THE COURT: So --

MR. OGILVIE: Correct.

THE COURT: -- nobody did anything to that because it gets remanded -- I mean removed. So when it comes back over here, the first thing, this is my -- it's -- to me, this is significant. We've got this weird timing problem.

MR. OGILVIE: I don't think that's a weird --

THE COURT: Technically.

MR. OGILVIE: I don't think there is, Your Honor --

THE COURT: Okay.

MR. OGILVIE: -- because the order that was filed related to the original petition for review. And the original complainant for inverse condemnation.

THE COURT: Okay. All right. So then with all due respect,

that original complaint is dismissed. The proposed -- and this is why I keep going back to the motion to amend, which was -- let's see. Here we are, motion to amend. Motion to amend is granted. Oral motion to stay is not -- is denied. So we've got -- so we have no opposition to admit them. And so they were allowed to file their amended -- their proposed amended complaint. It only applied to the 180 acres, improper to bring any claims before these other judges. Okay. Great.

Mr. Ogilvie argued one entity conceded some of the same arguments here that were being made -- litigated through the departments. All claims splitting. Blah, blah, blah. The amendment would be futile and should be rejected. The matter should be stayed until a decision is made for Judge Williams, Department 16. Depending on how that was adjudicated, then this matter could be adjudicated because -- via claims preclusion. And the amendment at that time would be -- was in -- at this time was inappropriate. So that's August of 2019.

So that motion -- and this is why I'm trying to figure out what's the status of the pleadings. And with all due respect, I didn't really hear really addressed. My problem is that, technically, we have an order that -- and it's bizarre. It's this, like, 20-minute timing issue, which -- well, it's not even 20 minutes. It's more like 18 minutes. Yeah. It's 18 minutes. 236 petition for judicial review gets filed. And it's got the proposed amended complaint that was originally approved back in August of 2019. So that gets filed and it has everything in it. Just -- I'll add it up.

Then, like 18 minutes later, there's a motion -- there's an

order filed that says, we're dismissing the petition for a judicial review part of this case. And so is it your position that the petition for judicial review was not revived by the filing because -- I mean, it was revived by the filing because the amended complaint had it in there.

MR. OGILVIE: Exactly.

THE COURT: So even though the -- we'd already dismissed it and we didn't have a decision from Judge Crockett yet -- I mean, all you're doing when you move to admit a complaint is filing the proposed amended complaint. You aren't addressing the merits. And specifically, the February 15th order was this is dismissed, let me know when profits case is decided. Crockett's case wasn't decided until six months later.

So when they filed this proposed initial complaint and asked to have it file, we didn't address the merits of waiting in that Crockett's case was still pending on appeal. I don't know if that motion to dismiss is still going to be filed, if the City is going to file that same motion to dismiss. That's why your motion to dismiss actually technically might still be relevant because the motion to dismiss part of this thing was never discussed as on its merits because when this was amended, we didn't get to the fact of Crockett's has not been decided, are those same issues pending. You should still dismiss the PJR, Judge, because the Crockett's case is still pending.

We never got to that point because it gets removed. So that was never discussed on the merits. So when you file a proposed amended complaint, you're just filing something that's proposed. There's been no ruling on the merits of whether it's an appropriate

complaint or not. And what was still on the record, and what you just filed, was something saying, this is dismissed pending Judge Crockett -- a decision of Judge Crockett, and under Judge Crockett's ruling. Let's -- that's without prejudice. So bring it back.

We never had that intermediate step of was this City, prior to Judge Crockett's case being decided, if this had been filed and never renewed, would the City have renewed its motion to dismiss the PJR portion of this complaint? Probably because it was still pending with Judge Crockett in the Supreme Court.

So that's my -- I just -- these pleadings to me are -- have remained messed up. And they -- we didn't really get it straightened out when we filed these two orders because they -- neither -- the motion to remand it seems to me is premature because the motion that possibly has some relevance -- although I think it was really just not really so much the merits of the motion to dismiss that was pending with Judge Crockett. And this Court said, well, pending that, we're going to dismiss this -- this PJR.

We never really got to the merits of what was happening because we never came back and discussed what it meant that Judge Crockett's case was overturned. So the motion to remand it just seems to me is premature because we -- do we really have a PJR on the record or not? Nobody's there. And like I said, it's apparently because nobody ever appeal -- there's no appeal of the motion to dismiss. So I'm assuming they aren't -- they're not going to appeal this late motion to dismiss order coming in.

So where does that leave us with our pleadings? It leaves us with technically this amended complaint that came in and nobody ever addressed the merits. So is it your position that these motions address the merits of is this an appropriate amended pleading because we never talked about that?

MR. SCHWARTZ: Well, that --

THE COURT: A proposed amended complaint is just yeah, you can file.

MR. SCHWARTZ: Yes. Right. Right.

THE COURT: We'll discuss whether it's valid or not later.

MR. SCHWARTZ: Right.

THE COURT: We never did step two.

MR. SCHWARTZ: And now we're at step two.

THE COURT: And so now we're at step two.

MR. SCHWARTZ: Correct.

THE COURT: I don't see how we can do -- give the remand before we would address step two. And nobody ever asked this Court, are you even considering it, are you going to let that PJR claim stand. I've never been asked to do that.

MR. SCHWARTZ: But a motion for --

THE COURT: Because they filed that petition for judicial review, the client -- the proposed amended complaint, while Crockett's was still -- appeal was still pending. We never got to the merits of whether that's an appropriate cause of action or not. We never got to the merits of -- so are -- is -- am I to assume that because after they filed

this there was no -- the motions that were filed were on these other issues. They were on these issues related to remanding this whole thing, which was a new issue. I mean, are we assuming that that petition for judicial review is valid? Nobody's ever sought to have it -- to really approach the merits of it because the motion to dismiss is this other question which is can it be joined. And that's based on new case law that came down after that.

MR. OGILVIE: Correct. So --

THE COURT: So we're not going to address the question of -- I just want to make clear then, if your -- if it is your position that the -- because the proposed amended complaint -- leave was granted in August of 2019. It never gets filed because it's removed. It comes back over here, but we aren't going to readdress the whole question, that the Court said, I'm reserving this depending what happens with Judge Crockett. We're just to ignore what happened with Judge Crockett. That doesn't matter. That doesn't affect us anymore.

The newly filed complaint is the complaint that stands. It's got a PJR in it. Now we need to look at that, on this other issue, which is can they be joined. That's a whole different question.

MR. OGILVIE: It is a whole different question, yes.

THE COURT: So -- but my question is, I just don't think the remand is timely. I mean it seems like we skipped a step, because we never actually discussed do we really have a petition for judicial review.

MR. OGILVIE: Well, I don't think -- I don't think we have skipped a step.

THE COURT: Okay.

MR. OGILVIE: I think the City may or may not bring a motion to dismiss on the substance.

THE COURT: You just answered it. In fact that's an answer -- it said there's an answer.

MR. OGILVIE: Correct. So but these procedural motions --

THE COURT: Uh-huh.

MR. OGILVIE: -- the motion to remand and the motion to dismiss, based on the improper filing of -- the jointly filing of the petition and the inverse condemnation actions, those are perfectly legitimate --

THE COURT: Okay.

MR. OGILVIE: -- responses to a new amended pleading --

THE COURT: Okay.

MR. OGILVIE: -- that was filed.

THE COURT: Okay. So I understand that in part. But here's my problem. Is we never discussed whether the Crockett case has any impact on this. We've been talking a lot about it, but we've never said should this be reconsidered based on the fact that Crockett was overturned.

MR. OGILVIE: Well, but --

THE COURT: That's the thing that's missing. We have no ruling on that. So what we have is just this petition for judicial review and complaint filed, but we've never addressed is that an appropriate pleading because the other PJR was dismissed. We skipped that step. And that was my problem, is I don't understand how we skipped that

step and just went right into, okay, this is a valid PJR, I guess, and we're just not -- we're going to note the fact that it was previously dismissed and what happened with Crockett, and we're just going to take this other route.

MR. OGILVIE: So it's always dangerous, as you know, to assume or put yourself in the situation -- or the position of the Court and say what the Court intended. My understanding --

THE COURT: Okay. Thank you. I appreciate it.

MR. OGILVIE: -- this is the way I'll phrase it. My understanding of the dismissal that the Court granted two years ago was based upon the fact of the City was precluded from entertaining the substance of these applications --

THE COURT: Right.

MR. OGILVIE: -- based on the Crockett order.

THE COURT: Right.

MR. OGILVIE: And that the Court -- and this was my understanding, dismissed the PJR because of the Crockett order, saying that the City didn't have the opportunity to evaluate, because it couldn't. It would have been in contempt of Court --

THE COURT: Right.

MR. OGILVIE: -- by evaluating and approving.

THE COURT: Right.

MR. OGILVIE: So my understanding was that the Court said we'll see what the Supreme Court does --

THE COURT: Right. Yeah, yes, yes.

MR. OGILVIE: -- with the Crockett order.

THE COURT: Right.

MR. OGILVIE: And if the Crockett order comes back in reverse, well the Court -- the Crockett order stands.

THE COURT: Uh-huh.

MR. OGILVIE: If it's affirmed, then we'll just move forward and my dismissal without prejudice will become with prejudice. But if the Supreme Court reverses and now the City could review these applications, then the City should review the applications. Because the City was precluded from doing it by the Crockett order which has now been reversed.

So let me -- let me -- let me just throw out a different situation.

THE COURT: Okay.

MR. OGILVIE: If the Crockett order had not been in place, and the developer had brought its PJR and inverse condemnation, and the City had not -- had not considered the merits of those applications. A proper resolution of the claims at that time would be for this Court to remand and --

THE COURT: Well that's your argument. I understand that. So for purposes -- so looking at the order the way it's entered under conclusion of law 8. For purposes of preclusion, because it was a claims preclusion issue that we were dealing with earlier, and that's never been revisited. For purposes of preclusion doctrine, a party directly involved. So then we go down to 9. Based on a developer's representations for

purposes of paternity, issue preclusion, we've got these other cases, the issue of whether a major modification is required for redevelopment of the Badlands property was actually necessarily litigated in Crockett. So we've got this issue, so plus the -- so then given the substantial identity of interest among these parties, because Judge Crockett's order has preclusive effect, here the developer must submit a major modification application for the City of Las Vegas consideration and approval, before the City Council may consider any redevelopment applications for Badlands Golf Course. Because the order requires the developer to get approval of the major modification and no such approval was obtained, the petition for judicial review must be denied.

However, the developer's alternative claims for inverse condemnation may proceed in the ordinary course. And then you say the counter-motion to allow more definite -- so granted in part on the grounds of issue preclusion. It's denied without prejudice -- the petition for judicial review is denied. Denied. I didn't -- I mean I dismissed -- I didn't deny without prejudice should Judge Crockett's order be overturned on appeal.

Nobody ever came back at the time we discussed filing these pleadings and said, okay, Judge, how does Judge Crockett's case being overturned the preclusive effect, all the issues that were being litigated, how does that affect you here?

We're going to refile this as you let us do back in August of 2019. You said we could file our proposed amended complaint. You didn't -- we didn't talk about the merits of it . You don't talk about -- and

people always think you talk about the merits of a proposed pleading when you argue -- or when you file it. You don't necessarily do. And we didn't.

It was simply file it. File your proposed amended pleading, we'll fight about it later. Instead it gets removed. So we have never discussed -- okay, we're back. The concern about preclusive effect with Judge Crockett's decision about this major development agreement, mooted. That's been reversed. So we're back.

So in refiling, which you said you were going to do in August of 2019, before there was a decision on that. You refile your petition for judicial review. We can now assume that you're going forward on that as if it was originally filed. And that was -- that question I was never asked -- we never had an order on that. We don't -- we didn't ever address is this then the final pleading.

Instead, we got the order filed, technically, subsequently, saying that the petition for judicial review was denied. And we never addressed this was subject to Judge Crockett's decision being reviewed by the Supreme Court. It has in fact been reviewed by the Supreme Court. It was reversed. Therefore, we need to revisit that question and the preclusive effect is mooted. And so, therefore, we need to look at the other merits. The petition for judicial review is revived. And nobody ever said is there an order saying the petition for judicial review is back in place because Crockett's decision was reversed? Therefore, your order should be revisited. Nobody ever asked that.

MR. OGILVIE: I think it was done by operation of law, Your

Honor. I --

THE COURT: Crockett -- you can't do it that way.

MR. OGILVIE: No. No. Crockett's order technically has nothing to do with this case. It's without prejudice to be renewed, revised, whatever, with Crockett's decision.

MR. OGILVIE: And it was.

THE COURT: Nobody ever did.

MR. OGILVIE: And it was.

THE COURT: Nobody ever came in and said, Judge, please reconsider this because there has been a decision. You based it on the preclusive effect of Judge Crockett's decision. That's been overturned. You need to revisit it.

MR. OGILVIE: That --

THE COURT: Nobody ever asked for that order.

MR. OGILVIE: I think --

THE COURT: We need that order. Don't we need that order? I think we need that order. Because this record is such a mess.

MR. OGILVIE: I agree with 99 percent of what the Court just said. The part that I --

THE COURT: Uh-huh.

MR. OGILVIE: -- derail is -- to me the status of the pleadings is very clear.

THE COURT: Okay.

MR. OGILVIE: There was an order relating to the original.

THE COURT: Okay.

MR. OGILVIE: And now there's been a refiling --

THE COURT: Uh-huh.

MR. OGILVIE: -- and we have now brought motions relative to that particular amended pleading.

THE COURT: Okay.

MR. OGILVIE: Which hasn't been addressed yet.

THE COURT: All right. Okay. So again I believe that this remand motion is -- okay, is not consistent with the status of the pleadings as they stand now. Because I still believe that if you try to unwind this record, which I'm assuming somebody's going to have to do some day, they're going to say, wait a minute, where's the order. Crockett was reversed. Nobody ever came back in and said, okay, Judge, you have to revisit that whole issue of the motion to dismiss that we filed based on claim preclusion. That's now mooted because Crockett was reversed. You need to withdraw that order.

Instead, we file it because we needed a record saying, you know, this is what we've done here. So we file this order and now nobody came in and said, okay, thank you for filing the order. You did that back in October of 2019. Case was removed, it never got filed. We now need to address, because subsequent to this order being signed by me, not filed, but signed by me in October of 2019, Crockett was reversed. We should have -- we need to ask you, Judge, to withdraw your order over -- whatever, reconsider it, because Crockett's been reversed. Plaintiff's preclusions are no longer an issue. You need to take another look at this whole thing.

Instead we just launched into all this. And I'm like, but we still technically have an order. So I bet -- I bet you that it -- that it dealt with the original pleading, but all they did when they refiled their proposed amended complaint is they realleged that PJR, which had already been -- had already been denied on claims preclusion. So they just refiled it, and you never addressed --

MR. OGILVIE: Refiled.

THE COURT: -- technically that's in violation of your order. But --

MR. OGILVIE: I don't think it is.

THE COURT: -- Crockett's been overturned so there's no claim preclusion. Can we go forward on our PJR? Nobody ever asked that question?

MR. OGILVIE: I take it by operation of --

THE COURT: And so I think this reference is not clear.

MR. OGILVIE: -- -- law that's what transpired when they filed their amended pleading.

THE COURT: Okay. Okay, but even when it had been approved back in August of 2019, when Crockett had not been decided --

MR. OGILVIE: Correct.

THE COURT: -- and when I said, you know, that PJR is denied pending a decision by -- on Judge Crockett, and then nobody -- we didn't ever get to step two of the amended pleading process, which is Judge you've already decided. This PJR is subject to claims preclusion, and we're waiting for Judge Crockett. So you know, stay that or

whatever. Instead we just said, no, we're not going to stay it.

So that's kind of my confusion here. Is because of this interruption where there was this activity happening in federal court such that no pleadings ever got -- the order didn't get filed, the complaint didn't get filed. So now we're back over here post Crockett being reversed, and nobody's addressed the fact that Crockett was reversed.

Instead you just file the pleadings that were pending that should have been filed if it had been removed. So if we're going to get it back on the status as if it had never been removed, and we are just trying to do things in the right order.

Getting the findings of fact saying your Plaintiff's preclusion, we're going to -- we're going to dismiss this without prejudice should Crockett be overturned. Here's our proposed amended complaint. Oh, here, it looks like it's 57 pages.

So here's our amended -- proposed amended complaint. We're going to file this now, but, technically, this was -- this was proposed and to be -- I mean if this -- if this has no effect because Crockett was overturned, then this has no effect because I was never asked to reconsider what happens when Crockett's overturned.

MR. OGILVIE: Okay.

THE COURT: And so to me we've missed a step. And I just don't see how I can remand something that technically was dismissed. I was never asked to say, okay, Crockett's been reversed. We now have made a good record, a clear record, we've got our pleadings on file here. Let's take a look at this proposed amended complaint. It has a cause of

action for petition, for petition for judicial review.

That was dismissed earlier. But you said that was without prejudice, should Crockett be overturned. Crockett's been overturned. Your Honor, are you reinstating the petition for judicial review, because when you granted leave to file the proposed amended complaint, that was under different circumstances? The circumstances have changed. Because the circumstances have changed, is the petition for judicial review valid and active with the filing of this document, or is it invalid? And see that's my question, is I don't know that just -- by just filing a proposed amended complaint in order to catch up with where we were in August and October of 2019, when this thing got removed -- where are we?

MR. OGILVIE: If Judge Crockett's decision had been reversed at that time, we would have brought the motion to remand. Just as -- just as we did.

THE COURT: Right. But see the -- you've --

MR. OGILVIE: So -- and

THE COURT: -- so even though it had been dismissed. Even though -- even though this Court had dismissed the petition for judicial reviews, if this had never gone to federal court, Crockett's decided, you would have just brought the motion to remand. You wouldn't have come in and said Judge, we ask you to dismiss this petition for judicial review on Plaintiff's preclusion. That's moot --

MR. OGILVIE: Right.

THE COURT: -- because Crockett's been overturned.

MR. OGILVIE: Absolutely. And --

THE COURT: So Judge you need to -- you need to revisit your order --

MR. OGILVIE: And --

THE COURT: -- reconsider it. Say the petition for judicial review stand, and then we address the questioned agreement. Nobody ever asked me to do that.

MR. OGILVIE: Right. So if --

THE COURT: That's basically [indiscernible].

MR. OGILVIE: -- if all this case was about, was a petition for judicial review, then we -- there wouldn't be -- we wouldn't be here right now. Okay.

THE COURT: Right.

MR. OGILVIE: But because this case is about inverse condemnation --

THE COURT: Right.

MR. OGILVIE: -- as well --

THE COURT: Right. Yes. Yes.

MR. OGILVIE: -- then if the inverse condemnation claims can't go forward without the city --

THE COURT: Okay.

MR. OGILVIE: -- having taken some action --

THE COURT: Okay.

MR. OGILVIE: -- substantive action.

THE COURT: So we will -- we will get to that in a minute

here, but --

MR. OGILVIE: Well, no, that's what -- that's what this motion is all about.

THE COURT: Okay.

MR. OGILVIE: Is --

THE COURT: But, you know, I'm going to apologize if I get hung up on procedure, but I'm hung up on procedure. And, technically, we still have an order saying the petition for judicial review is denied. It was denied.

MR. OGILVIE: Without prejudice.

THE COURT: Without prejudice. This Court has never been asked to say, Judge, you have to revisit this order. You have to reconsider it. The denial of the petition for judicial review is now moot because Crockett has been overturned. So all they did when they filed this proposed amended complaint was file something that other procedural steps would have been taken if it had been still here. It wasn't. So the problem is that these pleadings didn't get filed in the ordinary course. It got filed after a two year delay for federal court.

And so I have to make my record, and I think this record is unclear. And this order has never been reconsidered. It should have been reconsidered after Crockett's case was decided.

MR. OGILVIE: So either their amended pleading is the operative pleading, or it isn't. And if it isn't, then -- then we're back to --

THE COURT: Well, see and this was Mr. Leavitt's point. Was that, Judge, all we did when we filed that was filed what you told us we

could file in August of 2019, when we were all still subject to the order that said you're dismissed without prejudice, depending on what happens with Judge Crockett.

MR. OGILVIE: Then they shouldn't have included a PJR.

THE COURT: Okay.

MR. OGILVIE: They did. It's the operative pleading. And the City has the obligation -- I was going to say the right --

THE COURT: Okay.

MR. OGILVIE: -- the obligation to respond to it. We have responded to it with these two motions.

THE COURT: Okay. Thanks. So with respect to the motion to remand, I'm going to deny that, because, technically, I've never been asked to reconsider my order denying the petition for judicial review.

The record still technically stands with a petition for judicial review having been denied. And nobody ever said now that Judge Crockett's been overturned, they're filing a pleading that you have heard before Judge Crockett was overturned, and we never addressed the fact that there was a PJR in there, because we never got to the merits, because it got removed.

The merits do not need to be addressed. We need an order that says, this Court has reconsidered its decision dated October 19th, 2019, not filed until July 29th, 2021, that should be reconsidered because Judge Crockett's decision, which was the basis for finding, there was issue for preclusion, has been overturned. Therefore that -- we need -- we missed an order. You need an order that says this is reconsidered.

And in fact, the dismissal of the petition for judicial review is no longer operative. The petition for judicial review now stands.

And they filed it 18 minutes earlier. So that's what the Court's going to consider the operative pleading. We don't have that anywhere in this record. There's nowhere in this record that says, where did that petition for judicial review come from. Why is it there? You have an order filed 18 minutes later that says it's dismissed. Was that when it -- nobody can look -- nobody could look at this record and figure out what's happening. I can't even look at this record and figure out what's happened.

MR. OGILVIE: So let me -- let me take --

MR. LEAVITT: Your Honor, can we move on? Because we have another motion. It's been --

MR. OGILVIE: If I could finish.

MR. LEAVITT: -- denied three times --

THE COURT: Yes.

MR. LEAVITT: -- and counsel just keeps arguing back and forth.

THE COURT: I know.

MR. OGILVIE: If I could finish.

THE COURT: I know. I know. Thank you.

MR. LEAVITT: We need to move on to the next motion.

MR. OGILVIE: If I could finish.

THE COURT: Thank you. Thank you. Okay. Thank you very much, Mr. Leavitt, have a seat.

MR. OGILVIE: Your Honor, so it begs the question where do we go from now --

THE COURT: Yeah.

MR. OGILVIE: -- from here. And I --

THE COURT: Does somebody want to make an oral motion that I reconsider my decision dated October 19th, not filed until July -- October 2019, not filed until July of 2021, I would grant that.

MR. OGILVIE: Submitted, Your Honor.

MR. LEAVITT: Your Honor, the landowners would be the only ones that would have the right to do that.

THE COURT: Well, actually, I believe that the City would have the obligation to.

MR. OGILVIE: So moved, Your Honor.

THE COURT: When you -- when you -- when you come up with new law, you have the obligation to bring it to the Court's attention, I believe. Their motion to dismiss was based on the preclusive effect of Judge Crockett's decision. They have the obligation to advise me Judge Crockett was overturned.

MR. LEAVITT: Okay.

THE COURT: This decision dated -- it was dated, I signed it October 19th of 2019. Six months later, Judge Crockett gets overturned. They have an obligation to tell me that, but they weren't here. They were in federal court. So nobody ever came in and said, Judge, you've got to reconsider this.

I now have an oral motion to reconsider this decision. So to

the extent that it was -- it's based on page 10, the City's motion to dismiss is granted in part as to the petition for judicial review on the grounds of issue preclusion.

That decision is incorrect. Judge Crockett has been overturned by the Supreme Court. Therefore, the preclusive effect of that issue that was pending on appeal is mooted and the petition for judicial review should not be denied. It should -- so now we have to get to the merits of the petition for judicial review. That was the grounds upon which it was originally filed.

So to the extent that this order signed on October 2nd, 2019, but not filed until July 29th, 2019 -- under this section that says order, number one, the City's motion to dismiss is granted in part as to the petition for judicial review on the grounds of issue preclusion. And that it's -- paragraph 2, the petition for judicial review is denied without prejudice, should Judge Crockett's order be overturned. Those two issues -- those two orders have to be over -- have to be reconsidered because Judge Crockett has been overturned by -- reversed by the Nevada Supreme Court.

I'm going to grant the oral motion of the City to amend its order, which I signed on October 2nd, 2019, but because of the removal to federal court, never got filed until July 29th of 2021. So the first and second orders of this decision have to be reconsidered. And so the granting of the motion to dismiss as to the petition for judicial review, which was based solely on issue preclusion and the denial of the petition for judicial review without prejudice have to be reconsidered and are

therefore -- the denial -- the City's motion to dismiss is denied. And the petition for judicial review is reinstated. Is that what you're looking for an order that would say --

MR. OGILVIE: Yes, Your Honor.

THE COURT: Okay. so we've got an oral motion for that. So Mr. Leavitt, I think we need that motion in the record, and we need an order on it, Because right now this record doesn't make any sense.

MR. LEAVITT: Okay. Your Honor, may I just have one moment?

THE COURT: Yeah.

[Counsel confer]

MR. LEAVITT: Okay. Your Honor, one thing. I'll just mention one thing, and then I'll talk to my in-house counsel, because, obviously --

THE COURT: Right. Because we'll take a break for lunch, and we'll come back, and we can discuss it.

MR. LEAVITT: Yeah, can we do that, Your Honor?

THE COURT: Yeah.

MR. LEAVITT: Okay. I appreciate it.

THE COURT: So I think we need to take a break for lunch until 1:45. But I will tell you I am inclined to grant the oral motion, because I believe that's the thing that we missed when we talked about getting these orders on file when we first came back. We never talked about, and then what.

MR. LEAVITT: Understood. Understood.

THE COURT: And we need -- I think you need that in the

record. I think you have to have that in the record. None of this makes any sense, otherwise.

MR. LEAVITT: Understood, Your Honor. Okay.

THE COURT: Very good. I'll see you guys all back here at 1:45. We're going to take just an hour and five minutes recess.

MR. OGILVIE: Okay.

THE COURT: Thank you so much.

MR. OGILVIE: To protect the record --

THE COURT: Yes.

MR. OGILVIE: -- perhaps we should brief this issue.

MR. LEAVITT: Wait, I'm sorry, what did you say?

MR. OGILVIE: To protect the record perhaps we should brief these issue.

THE COURT: No.

MR. OGILVIE: Okay. Fine.

THE COURT: As I said, I believe -- I believe, Mr. Ogilvie, it is your ethical obligation to advise the Court when a decision has come down that changes the basis of your original motion. I believe as an ethical attorney who have brought that to my attention that that -- that your order is based on a case that has since been overturned. We need it in the record because it wasn't there. But we now need to address the fact that it is there.

MR. OGILVIE: Okay.

THE COURT: It should be -- it should be reconsidered. And the Court would grant reconsideration. That's my -- I will tell you that is

my view that what we definitely missed. I'm sorry we missed it when we talked about it in July. Thanks.

MR. LEAVITT: And, Your Honor, is it okay if we leave our things here?

THE COURT: Leave it. Yeah, it will be locked up, no problem.

MR. LEAVITT: Thank you.

THE COURT: Thank you. See you guys in an hour.

[Recess taken from 12:41 p.m. to 1:50 p.m.]

THE COURT: We are concluding the issue back on the motion to remand. As indicated I believe that we first need an order reconsidering the motion to dismiss on the grounds that the Crockett appeal was pending in order to have the new PJR stand.

Did you want to be heard on that at all, Mr. Leavitt, before we move on?

MR. LEAVITT: Yes, Your Honor. So just here's my take on it. And this is speaking strictly procedurally, Your Honor. And to make sure we do this in an orderly process is there's two pending City motions, the motion to remand and the motion to dismiss based upon the PJR and the inverse being in the same cause of action.

THE COURT: Right.

MR. LEAVITT: So our recommendation to the Court is number one, those are denied right now because the claims have not been -- the PJR claim has not been revived. So for today's purpose, just denied.

THE COURT: Uh-huh.

MR. LEAVITT: Then to the extent -- and I agree with Mr. Ogilvie on this position. To the extent the City wants to file a motion to reconsider, he said he felt it would probably be brief, the City would file a motion to reconsider that underlying order. Obviously, there would be some concerns that we have with it, which is, you know, I mean EDCR 2.25B has a 14 day period where you can reconsider an order.

Those are annoying concerns we can address in the motions, but there would be a two-step process. There would be a reconsideration of the order, and there would be a revival of the PJR, and then the PJR would have to be considered. So the record on the PJR would have to come up, and then the City would have to file an answer. The City hasn't filed an answer to the PJR. And then --

THE COURT: Right.

MR. LEAVITT: -- obviously, the question would be, okay, what do we do now? Do we go back and ask the City to consider a four year old application? Obviously, I would have to talk to our client about that. I haven't had the opportunity. As you stated and as we all recognized, there have been profound changes over the last four years in the real estate market. I mean is the product still the same. The cost to construct? What's the best product? There's been a significant change in the market at that location, a significant change in cost, a significant change in lending issues, and it may be futile. And I'm not saying this yet, Your Honor. We have to look at it, obviously. And that's why we say briefing might be the appropriate way to handle it, because we're

going to be looking at now four year old applications in a significantly different market.

Having said that, Your Honor, so that's the procedural manner. You deny the motion. The City brings its motion to reconsider as it requested. It briefs that issue. We look at those issues. We consider them. We brief them.

However --

THE COURT: Well, technically, the procedure under the Local Rules is you first have to grant leave to request consideration, and then you reconsider. So my preference would be just to say, I've reconsidered it. I clearly have to withdraw that prior order.

MR. LEAVITT: Uh-huh.

THE COURT: I don't know why you guys need any more briefing, but, okay.

MR. LEAVITT: Well, the briefing would just be, hey, okay, so what's -- number one, what's the implications of that. Where do we go from there.

THE COURT: Okay.

MR. LEAVITT: You know, because I mean it's a two-step process.

THE COURT: Yeah.

MR. LEAVITT: You come -- like you said then you reconsider it, and then, okay, where do we go? What's the next step? We have -- there's some significant time limitations under the NRS 278 PJR rules to get everything before you.

THE COURT: Yeah.

MR. LEAVITT: For those reconsiderations.

THE COURT: That's my question.

MR. LEAVITT: So that's all -- that's why I tend to agree with Mr. Ogilvie, is we probably better brief this and just look out at it. I can't imagine it would be significant briefing from Mr. Ogilvie. The Crockett order came down, we want you to reconsider order. Here's what the Crockett order says. And then we would -- we would brief how to move forward. So that's procedurally on the City's pending motions on the PJR side of this case.

THE COURT: Okay.

MR. LEAVITT: Now there's just one last thing -- matter, Your Honor. Is on the inverse condemnation side of this case, where we know there should be a brick wall between the two based upon the *Henderson* decision, that shouldn't impact how we move forward. I don't know if you want to hear me argue on that right now --

THE COURT: Not right now.

MR. LEAVITT: -- but we clearly -- we clearly should move forward procedurally.

THE COURT: Because we have to deal on this remand issue and my question about -- I just think -- because my thing is what does the record look like on appeal. And right now this record on appeal is confused. And I think that you need that you need that order in place, whatever it's going to be --

MR. LEAVITT: Yeah, and since --

THE COURT: - in order to have a clear record.

MR. LEAVITT: So I guess I agree with Mr. Ogilvie -- at least there's one thing we agree on today.

THE COURT: Okay. Mr. Ogilvie make a note of this.

MR. LEAVITT: I'm sorry.

THE COURT: Make a note of this. It may be the last time. Mr. Leavitt agrees with you.

MR. LEAVITT: Okay. So that's the proper procedure we think that we should follow today, Your Honor.

THE COURT: Okay. All right. Thank you.

MR. LEAVITT: And we also have that other motion that's pending right now, the motion to determine property interest.

THE COURT: Right. We still have two more motions. So Mr. Ogilvie, as I said, technically Mr. Leavitt is correct. Under the Local Rules the proper procedure is would I reconsider my order. Obviously, I would. But if you wish to have it briefed after further reconsideration, then that may be --

MR. OGILVIE: I --

THE COURT: -- you know, I get his point it may make sense to discuss what does that mean.

MR. OGILVIE: I'm sorry, I didn't follow you. I followed you right up to what does that mean.

THE COURT: Yeah. I thought it was pretty clear, but --

MR. OGILVIE: So, Your Honor, I was just suggesting briefing for the Court's consideration. I don't -- I would renew my oral motion,

but if the Court wants briefing I'm fine with that.

THE COURT: Okay.

MR. LEAVITT: I thought we were going to agree on something, Your Honor, I guess. I guess not.

THE COURT: Never mind if we don't agree.

MR. OGILVIE: Could you articulate for me, when you say what does that mean --

THE COURT: Exactly.

MR. OGILVIE: -- what --

THE COURT: That was my point. Mr. Leavitt's concern is what does it mean if the Court reconsiders. He would like to be able to say this is untimely and that we have to get the record on appeal up here because we never did. All those kinds of things. The logistics of it. And you know, my point was simply that, you know, we -- this whole procedure got so interrupted just because of how this whole thing broke down, and then we had this two year interruption. My point is simply that if somebody were to look at it -- I mean if you just took this one issue, file the writ -- she wouldn't remand. Then you file a writ. The Supreme Court is going to look at this and say well, what was there for her to remand --

MR. OGILVIE: Okay.

THE COURT: -- because there was no petition for judicial review.

MR. OGILVIE: I understand. I understand what you're --

THE COURT: So I'm just saying we need to have a clear

procedural route.

MR. OGILVIE: Okay.

THE COURT: And as I said, to me it seemed like the logical thing was just to make the oral argument --

MR. OGILVIE: Okay.

THE COURT: -- you have to reconsider your order. Very clearly, Crockett was overruled. The only grounds was issue preclusion. That's gone. So what happens to your earlier granting of our motion to dismiss? I think it should be clear in the record that obviously that has to be reconsidered, and that motion would have to be denied. That motion.

MR. OGILVIE: The motion to dismiss would have to be denied.

THE COURT: Right.

MR. OGILVIE: Yes, yes. I understand.

THE COURT: And so then we have the petition for judicial review that they have -- now they've filed the amended complaint. Now we address that on its merits.

MR. OGILVIE: I think we ought to just get to that step, Your Honor. And that was --

THE COURT: I don't think we need any briefing on that. I --

MR. OGILVIE: I --

THE COURT: -- mean I appreciate Mr. Leavitt's point.

MR. OGILVIE: Understood.

THE COURT: And I certainly would allow him, if he wishes to

argue that this all untimely, he could certainly do so --

MR. OGILVIE: Okay.

THE COURT: -- because it does impact, he certainly does have some valid points about the Administrative Procedures Act --

MR. OGILVIE: Okay.

THE COURT: -- and how this affects us.

MR. OGILVIE: Okay.

THE COURT: Because this -- an orderly process got interrupted. It's nobody's fault. I mean this is just how it happened. It just -- what would ordinarily have just been a routine process, has been interrupted. And so at this point I would just deny the motion to remand at this point, without prejudice, because we have to get this new order in file. Personally, I don't see grounds to remand, but at this point I'm ready to move on.

MR. OGILVIE: Okay. And so again, I suggested briefing on it if that what the Court desires. But --

THE COURT: I don't desire it, but if the parties to do it, you can certainly do it.

MR. OGILVIE: I don't have any need for --

THE COURT: Okay.

MR. OGILVIE: -- briefing.

THE COURT: Okay. At this point in order to have a clear record, I'll make it very clear that the Court is aware that the amended order of -- which is not a final order until a written order is filed. Unfortunately, a written order signed in October of 2019 did not get filed

until July of 2021, because of the two year removable process. So now that we're back, we got the orders that were pending and had never been filed, on file, but it left us with an unanswered question. What happens because Judge Crockett was overturned. We never addressed that question. I believe that an attorney has an obligation to bring it to the Court's attention when the law has changed, and you have. All of you have.

So I think that that means we have to do something about that earlier order. And so I would grant the reconsideration of the order that is dated -- I should probably say entered, that is entered. That was entered on July 29th, 2021. I will reconsider that order. And based on the fact that Judge Crockett's order was overturned -- was reversed, thus the issue preclusion question has been mooted, that this order has to be -- for reconsideration has to be reconsidered, and it must be rescinded.

To the extent that the City's motion to dismiss was granted, on the issue of issue preclusion, there is no issue preclusion now. And similarly that the petition for judicial review was -- stood denied without prejudice if Crocket was overturned. He was. Therefore ,the petition for judicial review must be reinstated.

Who's going to do that? Can somebody write me an order?

MR. OGILVIE: I'll prepare that.

THE COURT: Mr. Ogilvie, you are a pal. Thank you so much.

With all due respect though, at this point I'm denying without prejudice this motion to remand because my only problem was not the issue with we never took care of the earlier order, but also I just -- I'm not

convinced that remand is appropriate. It does certainly seem to me a request for a do over.

Okay. So at this point then we have the next question, because this is the one -- one of the biggest changes in the landscape, since we were all last together, is this issue with the problem of joinder of a complaint and a petition for judicial review. That's new law. Again, thank you, very much, counsel, for bringing it to the Court's attention. There's new law on this. So this is -- this was never considered earlier. It's a totally new issue, and we have to discuss this issue. So we're ready to go.

MR. SCHWARTZ: Your Honor, our argument is very simple. The Court has now reinstated the PJR. The PJR has been joined with a civil complaint. The *City of Henderson* says that that can't be done. So that was improper on the part of the developer. So that seems to leave just one question, which is should the Court now dismiss the civil complaint. And because the Judge has ordered the PJR is reinstated, I think there's only one answer to that is under the *City of Henderson*, it must be dismissed without prejudice, of course.

I also want to point out --

THE COURT: So my -- so my question is, is dismissal the remedy or is it possible to sever?

MR. SCHWARTZ: I think in the *City of Henderson*, the -- I think the remedy was dismissal.

THE COURT: Uh-huh. Okay.

MR. SCHWARTZ: And it was dismissal, and I think that is

mandatory. Although dismissal without prejudice, of course.

THE COURT: Because here -- again here's my question. And it's this messed up procedural history that we have in this thing, where when they did their initial petition for judicial review combined with the complaint, that's perfectly okay. At least we didn't have any law saying it wasn't.

MR. SCHWARTZ: Yes.

THE COURT: So is the fact that the Court has since then said you shouldn't do this, how do you address the prejudice to a party that in reliance on that had this litigation pending, and now you're going to tell them -- pull the rug out from under them. That just doesn't seem fair.

MR. SCHWARTZ: Well, that's what happened in *City of Henderson*.

THE COURT: Okay.

MR. SCHWARTZ: And there's no prejudice, because we --

THE COURT: But this case was filed before *City of Henderson*.

MR. SCHWARTZ: That's right.

THE COURT: So how do we relate it back?

MR. SCHWARTZ: But the case that the *City of Henderson* adjudicated was the same thing. That the -- that before the law was you couldn't join them, the owner joined them.

THE COURT: Uh-huh.

MR. SCHWARTZ: And then later the Court said that was

improper and ordered the PJR dismissed. Not the civil complaint.

THE COURT: Uh-huh.

MR. SCHWARTZ: And I want to address that. So that's exactly what happened in the *City of Henderson* and prejudice to the property owner is not an issue, just like it wasn't a factor in that case. We -- I want to make clear we are saying that the Court should dismiss this civil complaint for regulatory taking without prejudice.

Now this case is different from *City of Henderson*. In *City of Henderson*, the owner filed the civil complaint first. And so that -- the action was really about the civil complaint. And later, filed what they called an amended petition for judicial review, and the Court said well, what's amended? This is the first petition for judicial review you're filing. And the Court said this was a civil action filed for damages. You've now filed this equitable proceeding. You can't do that. You can't join them. And so they required dismissal of the equitable proceeding.

In this case we have the opposite situation. This case was originally filed -- the PJR was first and was litigated first, and the civil complaint was attached to that. And now that the Court has reinstated the PJR that would be kind of an idle act if the Court were to then dismiss the PJR under *City of Henderson*. That's why the Court should dismiss the civil complaint.

THE COURT: Okay. Yeah, because this is -- that's why I said we had to have a clear record. We had to have an order on file, because *City of Henderson* is -- in this opinion we consider whether a petition for judicial review of an administrative zoning decision may be filed with an

existing civil suit.

So that was -- that was kind of my question. Was -- again I get hung up on all this procedure. Is your view of what the Court is saying that once you've filed the civil suit you can't add to it? But --

MR. SCHWARTZ: Yes.

THE COURT: -- what's the effect of the fact that this case was filed -- we weren't adding to an existing case. It was already there, and we just have this weird procedural hiccup where we -- it was unclear in our record that the previous dismissal of the PJR had to be reconsidered because of what happened with Judge Crockett. That's what I'm saying.

MR. SCHWARTZ: I understand --

THE COURT: I'm just trying to figure out procedurally who does it relate back.

MR. SCHWARTZ: -- the Court's question. I think the difference in this case is that this was a PJR. That's the title of the first pleading.

THE COURT: Uh-huh.

MR. SCHWARTZ: And they said -- and they attached to that the civil complaint, rather than the other way around, which is what happened in the *City of Henderson*. Then we litigated the PJR, and we've arrived today where the Court has reinstated the PJR, which was, you know, the first and leading claim with the civil complaint attached to it. And so that's why, for all those reasons, the Court should dismiss the civil complaint for regulatory taking, because this is a different case. This is the opposite case from the *City of Henderson*.

THE COURT: Okay.

MR. SCHWARTZ: Thank you.

THE COURT: Thank you.

MR. LEAVITT: May I approach, Your Honor?

THE COURT: Yes, go ahead.

MR. LEAVITT: Your Honor, you're absolutely correct and Judge Williams actually entered an order to what you just said. Is that we did the same exact thing in the 35 acre case. We brought a petition for judicial review. Here's the initial complaint filed in June 2018. And it has a petition for judicial review and alternative claims and inverse condemnation. They were brought together. Under the Nevada Constitution, Article VI, Sect. 14, under NRCP Rule 2 and under NRCP Rule 8, those were entirely appropriate at that time. And Judge Williams actually entered an order to that effect in the 35 acre case, that it was proper to bring them together at that time.

Now the Henderson rule -- the Henderson law changed that. The *Henderson* case itself says this is an issue of first impression. We're changing the law. And so what counsel -- and Judge, after they changed the law, they said, hey, you can't have a petition for judicial review with a civil claim. It's improper. Well, what they said is it's improper to join them. It's improper to combine them like this.

And so let's first see what the -- what the *City of Henderson* did not hold. The *City of Henderson* case nowhere states you have to automatically dismiss one of the claims. That's entirely incorrect. It actually -- it never says that in the decision. Otherwise, Judge, what you

would have to do is you'd have to go back in your docket, over the past five years, find where petition for judicial reviews were brought with other civil claims and just start dismissing them sua sponte. The Court doesn't require that, because that would be a draconian approach. It would prohibit cases from being heard on the merits when the Nevada Supreme Court says cases must be heard on the merits whenever possible. So here's what the court said, you got three choices, okay. The court actually didn't provide just two choices, the court provided a third choice.

Under the EDCR, we have two choices. Number one, a Rule 21 severance. You sever the claim, and you put a brick wall up. That's exactly what Judge Williams has done in the 35 acre case. Number two, you do a Rule 42 separate trial, and you put a brick wall up between the two. Or number three --

THE COURT: Which would bifurcate.

MR. LEAVITT: Which would bifurcate. Yeah, you would bifurcate. You would have different cases, which is what Judge Williams did in the 35 acre case. He did this two years -- actually, I think, it was 3 years ago, in the 35 acre case. Or just to make sure these claims aren't dismissed, the Nevada Supreme Court provided a third way to make sure that your case can move forward on the merits, and I'll call that the footnote five way.

THE COURT: Okay. [Indiscernible]. Okay, got it.

MR. LEAVITT: You remember. And there's an operative word there, transfer. They said instead of starting to dismiss these

claims, you can transfer the amended petition into a new docket if deemed warranted, okay. And Judge, let me show you where this actually occurred. In the *City of Henderson* case, the matter was remanded, right? So it was up at the Supreme Court. It came back down to Judge Williams. May I approach?

THE COURT: Yes.

MR. LEAVITT: This is his order --

THE COURT: Okay.

MR. LEAVITT: -- of what he did.

THE COURT: And this is the *City of Henderson*, not in the 35 acres?

MR. LEAVITT: This is the *City of Henderson*.

THE COURT: Okay. Thank you.

MR. LEAVITT: Not -- sorry, Judge. I'm sorry. Not the 35 acres. Right here, let's read in yellow. "The Clerk of the Court is hereby requested to transfer the amended petition for judicial review as the initial filing document to create a new civil action," and this is the important part, "and retaining the September filing date. The new civil action will be randomly reassigned."

THE COURT: Uh-huh.

MR. LEAVITT: So that's a third way. So what Judge Williams did is he followed the *City of Henderson*, footnote five in that particular case. But Judge, now -- so that's an example of how this can be done. Now, let me go to the 35 acre case. What he did in that case is he first said -- and Your Honor, if I may approach?

THE COURT: Sure.

MR. LEAVITT: Okay. This is his order in the 35-acre case. He says right there at page 3 of the decision, in finding number 6, he says, listen, given the one form action rule in Nevada, the Constitution, Rule 2, Rule 8, 180 Land could bring both the petition for judicial review and the civil complaint together. So he recognized that we could do this.

But then, his finding number 7, he says, "nevertheless, they're very different." So I'm going to bifurcate them. I'm going to order separate trials. I'm going to try the PJR over here. I'm going to put a brick wall up under Rule 42, and I'm going to try the inverse condemnation case over here. And Judge, something critical -- this is critical to what's going to happen in this case. Judge Williams entered four orders --

THE COURT: Okay.

MR. LEAVITT: -- where he said anything I decide in the PJR side shall not carry over to the inverse condemnation side, because it's totally -- it's a totally separate type of proceeding.

MR. SCHWARTZ: Your Honor, objection, not in evidence. We didn't receive any of this information, and I don't -- I can't tell whether it's true or false.

THE COURT: Okay. Noted.

MR. LEAVITT: Noted, except for he's received the four orders.

THE COURT: Well, I mean, he received the orders, he didn't really even argue, so.

MR. LEAVITT: I got it. He's got the four orders.

THE COURT: Yeah. I didn't. I didn't, so --

MR. LEAVITT: I know, but he does.

THE COURT: -- I appreciate the fact that you're getting them.

MR. LEAVITT: So he put a brick wall up between the two and he said you cannot consider it the same. So that's what he's done, is he just separated them out under Rule 42.

Now, this is important here, is then when the PJR claim was complete, right, in Judge Williams' department, we appealed that issue to the Nevada Supreme Court. It was Gibbons, Stiglich, and Silver. Stiglich and Silver entered the City of Henderson decision. We took that up, and we said, hey, we want to appeal this separate claim. They said, well, wait a minute, Judge Williams separated them out and ordered separate trials under Rule 42, impliedly approving that process in that specific case. And then said, we're not going to hear your appeal on the PJR until you complete your inverse condemnation claim.

So they impliedly already reviewed Judge Williams' act of separating them out under Rule 42, impliedly approved that, and said, go finish everything first, then bring it up on appeal. So Judge, you don't just start dismissing claims. It would be draconian to do that when we followed the law that was in existence at the time.

THE COURT: This is my concern is that was -- my question was while I understand their concern that these -- you should not be combining --

MR. LEAVITT: Right.

THE COURT: -- these two types of relief. I get their concern about that. But, as I said, I thought it was significant that they joined the PJR to an existing civil complaint.

MR. LEAVITT: Right.

THE COURT: We didn't.

MR. LEAVITT: Correct.

THE COURT: We had an existing. They were filed together --

MR. LEAVITT: Together.

THE COURT: -- because at the time, nobody knew it was not a good idea.

MR. LEAVITT: Right.

THE COURT: Fine. But trying to address the concern the court had, because theirs was this transfer idea that Judge Williams has since applied --

MR. LEAVITT: That's right.

THE COURT: -- in the *City of Henderson*, because that's kind of where they told them to do it. Is -- because this very problem that you've just mentioned, but then you don't have a final decision.

MR. LEAVITT: Correct.

THE COURT: Because that's their concern, where you bifurcate or sever, whatever you want to call it, that you don't then have a final decision. So the concept that they mentioned, which is interesting to me, like, I've never heard of that.

MR. LEAVITT: I've never heard of it either, Your Honor.

THE COURT: And so that's why I'm interested to see if, you

know, this is the direction that Judge Williams gave --

MR. LEAVITT: Right.

THE COURT: -- because I'm like, well, how does that work? So it's interesting to me to see that he's directing the clerk's office to say, give it a new case number but, enter it -- I don't know how this works. I guess it's programming. I guess there's a way you can override the program. But enter it with a relation back.

MR. LEAVITT: Correct.

THE COURT: A date -- you would relate it back to the date it was originally filed. Because then you have final decisions in separate cases.

MR. LEAVITT: I got it. Now, what the Supreme Court did say in the 35 acre case is under Rule 21 -- because what Judge Williams said, he says, I'm severing them, but I'm going to order separate trials under Rule 42. So he just ordered separate trials.

What would probably be the proper thing to do, according to the Nevada Supreme Court opinion in the 35 acre case, is sever them under Rule 21 and put a brick wall up. Therefore, they're severed. It's the equivalent of having a separate docket number. You have your PJR on one side that's being tried, and you have your inverse condemnation case that's being tried on the other side.

And here's what could be done. I don't -- I'm not sure it's entirely necessary, but what Judge Williams required is he said, I want you to tease out the PJR claims and file a complaint where the PJR claims are and file a separate complaint for the inverse condemnation. I

don't know if that's entirely necessary. We did that in his department.

So Judge, our recommendation would be to sever these claims. Clearly dismissal is not appropriate. Finding some other way to keep the original filing date and keep the claims together as they were properly filed originally would be the proper action here.

THE COURT: Appreciate that, thank you.

MR. LEAVITT: What's that, Your Honor?

THE COURT: I said I appreciate it. Thank you.

MR. LEAVITT: Okay. Yes, thank you, Your Honor.

THE COURT: Mr. Schwartz, see, that's my concern is that this appears to me to be -- where there's no indication this would -- should relate back. This decision should relate back. Because they talk first impression, so it appears it's something that would be going forward. So cases filed after the fact should know this and no more excuses. In the future, you can't do it.

But this is an existing case where -- and they weren't joined improperly -- it wasn't a question of improper joinder. It was these two cases were already joined. So how do we address the concern from doing that in a way that isn't prejudicial? That's kind of my problem.

MR. SCHWARTZ: That's exactly what happened in *City of Henderson*, it relates back. The Court said the writ and the civil complaint were improperly joined, and it ordered the writ struck. So what counsel has represented to the Court is wrong. The *City of Henderson* case was absolutely clear. The equitable writ -- the petition for judicial review action is an equitable action. The complaint for

damages is a civil action. The court said, they're like oil and water. Like water and oil, the two will not mix.

And then if you look at the conclusion of what the court said, it said, this Court is to issue a writ of mandamus instructing the District Court to strike -- to strike the amended petition from this docket. They are not allowing bifurcation in front of the same judge. They are not allowing severance. They are ordering that the pleading be struck from the docket. And in all of these orders that Judge Williams supposedly issued -- some of them he did; some of them he didn't -- were all before *City of Henderson*. So now, the 35 acre case is subject to the same requirements as any other case, and those orders that Judge Williams issued, now, are not proper.

In the appeal in the 35acre case, I don't think the Court -- the Nevada Supreme Court severed the claims, but if they did, that was before *City of Henderson*, so it doesn't matter. They now have announced a new rule. There are no exceptions to this rule. It's a hard and fast rule. In this *Solid State Properties* case, the order here is the new civil action will be randomly reassigned. That means it's struck from the docket, and it's assigned to a new judge, and that's what has to happen here.

THE COURT: So -- because here's my question. As I said, this is new law, and what do you do to all the people who would stand to be prejudiced by the application of this decision? I don't believe the Court would prejudice people in this fashion if they had timely filed their petition for judicial review originally. So that's why I thought that -- I

take your point that Judge Williams entered his order June 2nd. The case decision was June 24th. The decision came down from the Supreme Court --

MR. SCHWARTZ: *City of Henderson*?

THE COURT: June 24th. Yeah. The *City of Henderson* decision from the Supreme Court was June 24th. And his earlier order saying I'm directing the court to do blah, blah, blah, that was three weeks earlier. So what the Supreme Court says is in light of the previously unsettled law on the issue, nothing in this opinion prevents the Court from also transferring.

They don't say you have to dismiss it. They say also, here's another -- you can protect people because this was unsettled law. From transferring the amended petition into a new docket if deemed warranted." Fine. So that's what it seems to me they're asking the Court to do. And so my question here is, I'm like, how interesting. This is entirely -- to me, an entirely new procedural concept of transfer into a new docket. Who knew that was a thing?

MR. SCHWARTZ: Well --

THE COURT: They've made it up, because they have to protect people from being prejudiced because their decision is otherwise very prejudicial to a lot of people. And they don't want to do that. They don't want to harm people who, through no fault of their own, four years earlier had filed a petition for judicial review with a civil complaint, which they're now telling us, oops, you know, you really shouldn't do that because they're totally inconsistent remedies. They shouldn't be done

together.

So they've come up with this concept of transfer. So what's transferring? I'm kind of like, what the heck is that?

MR. SCHWARTZ: I don't know, Your Honor, but --

THE COURT: Nobody does.

MR. SCHWARTZ: -- Judge Williams order says --

THE COURT: They made it up.

MR. SCHWARTZ: That's not what Judge Williams said. Judge Williams said the new civil action will be randomly reassigned.

THE COURT: Yeah, it's a --

MR. SCHWARTZ: The whole point --

THE COURT: The Clerk of Court is requested to transfer the amended petition for judicial review as the initial filing document to a new civil action, retaining the original filing date.

MR. SCHWARTZ: Yeah. I think --

THE COURT: And reassigning it.

MR. SCHWARTZ: That's what it means, that --

THE COURT: I think that's --

MR. SCHWARTZ: -- reassigned to a new judge.

THE COURT: I think that's what they want us to do. I don't think they are requiring that it be dismissed because the -- what they -- they didn't say you have to dismiss it. They said, the writ is to instruct the District Court to strike the amended petition from its docket, footnote, but you could transfer it. Strike it but transfer it. Wacky. Oh, is that a new record? Did I say that out loud? Wow. Sorry about that.

I want to say inventive. That is an inventive procedural tool. But I get the point. I think that's what Judge Williams -- either he foresaw that as likely to be what would happen or, I don't know, read their minds. So I didn't know it was a thing you could do, but I'm going to assume that the Clerk's office can make it so because that's, it seems to me, is the appropriate remedy.

So here's my question. Where they're filed together, because see, the -- and that one -- in the other case, the PJR was new. And so he said transfer the PJR part, give it to a new judge, but keep the filing date.

MR. SCHWARTZ: Right.

THE COURT: Do you transfer to a new judge, or do you just give it a new case number so it's clear when it goes up on appeal that it's a different matter you're -- and that's the problem in the other case where they won't consider it because you don't have a final decision. So that's seems to me that severs the case. Essentially, it severs the cases. It makes it a new case, gives it a new case number. I'm not sure you have to direct the clerk to reassign.

MR. SCHWARTZ: Your Honor, can I address that?

THE COURT: They said nothing about that.

MR. SCHWARTZ: Can I address that?

THE COURT: Yeah.

MR. SCHWARTZ: I think that the nub of this *City of Henderson* opinion is that if you have two heard by the same judge, it's going to be very confusing because with a PJR, you're confined to the

administrative record; with the civil complaint, you're not. There's a different remedy for a PJR from a civil complaint. There's a different standard, substantial evidence or failure to proceed by law. And with a -- in this case, an inverse condemnation claim, you have to show a wipeout or some extreme regulation or liability for damages. And the Court said one judge should not hear the two causes of action because, they say, they're like oil and water.

And the judge -- the Court went on at some length about why. He says, you know, to conclude otherwise, to allow the two matters to be heard by the same judge, he says to conclude otherwise, I'm reading from the *City of Henderson*. "To conclude otherwise would allow confusingly hybrid proceedings in the district courts, where in the limited appellate review of an administrative decision would be combined with fraud, original civil trial matters. Thus, *Solid State* could not initiate judicial review proceedings within the existing civil action."

So the Courts -- their concern is that there's going to be some confusion when you look at -- when the Court is considering the record. If it can look at the administrative record in one proceeding, but it's also got the civil complaint in front of it where it's not confined to the record, it will seize on facts that aren't in the record because, you know, it's hard to exclude some fact from the judge's mind once you've heard it. And facts that might be relevant to the substantial evidence to a civil liability for damages might not be -- have been before the decision-maker. Only the administrative record is before the decision-maker.

And so it's like oil and water. A judge might have difficulty separating facts and law, because they're dealing with two very different claims. And that's what the *City of Henderson* --

THE COURT: Well, I don't think they're saying that judges are too stupid to know which one to they're doing with it at any given time.

MR. SCHWARTZ: Well, I'm not saying that at all, Your Honor.

THE COURT: Well, it kind of sounded like it. It seemed to me that their concern was the record. I mean, you know, that's all they care about is having a good record. And that's what they need. They need a good, clear record. So I've had my concerns.

Are you just deciding the petition for judicial review issues and nothing else comes in. The other -- and which is why Judge Williams had to write these orders saying we're not going to consider anything from one part of the severed matter and the other part of the severed matter. That seems logistically complicated. It's going to -- when that appeal goes up, it's going to be a mess to sever -- to figure it out, which one is which. So this concept of transferring it to a new case number makes perfect sense to me.

I was interested in why Judge Williams chose to say that it should be reassigned. Technically, any new action, you know, when it's assigned, it gets randomly assigned to somebody. But why does it have to be reassigned? And for one thing -- here's another one of my problems -- is only the chief judge can reassign cases. So in telling the clerk's office, you've got to reassign this, seems to me that he's invading

the province of the chief judge. Only the chief judge can reassign a case.

So that's kind of my question, is it seems to me that the purpose behind this is to make sure you have a separate, clean record. Here's everything related to the petition for judicial review. This is all that's relevant to it. It's a totally different concept. You're doing a totally different thing over here. Here we are over here in our condemnation action. Let's keep everything clean and separate. That makes perfect sense to me. Yes, I agree a hundred percent. I think it's a good idea.

I think that this transfer concept makes more sense to me that you put it into a new case number than this bifurcation or severing. But I'm just puzzled about why he said it should be randomly reassigned. I think that's kind of up to the Chief.

MR. SCHWARTZ: Your Honor, I did not mean any disrespect in my analysis. I think that -- I do think that the Supreme Court was genuinely concerned about, as you say, the record is going to be very confused if you've got the two types of actions at once. And so -- and the law will be very confused. So I think the Court was saying -- it didn't say transfer, it didn't say bifurcate, it didn't say sever, it said strike.

THE COURT: Correct.

MR. SCHWARTZ: And I think that that's significant. I think that the Court needs to strike the civil complaint. If the Court had meant that the Court would just transfer it to a new number and that Court would keep jurisdiction over the civil complaint or the pleading that's being dismissed, that would be a problem for exactly the reasons the Supreme Court said.

THE COURT: Okay. So here's the all-important footnote 5. I'm kind of like, what's in footnote 5? Footnote 5 is very critical to me, because in light of the previously unsettled law, this case was filed and the court *City of Henderson* was decided a long, long, long, long, long time ago. And it was an unsettled issue at the time. "Nothing in this opinion prevents the court from also," otherwise, in the alternative, "transferring the amended petition," again, that was a new petition, "the amended petition into a new docket if deemed warranted."

In other words, if you're not going to prejudice the folks who filed that case by dismissing it when they didn't know any better. And that's the same thing here. So striking it, it seems to me, is not appropriate. I like what Judge Williams has done here, however -- so I'm going to deny the motion to strike and grant alternative relief.

And pursuant to the *City of Henderson* case, I would direct the Clerk to transfer -- and here's the problem. We're going to need a pleading that is just the petition for judicial review portion of this joint complaint/petition for review. And that's the problem in the other case. They had that. They had, like, an original, existing complaint. And then you have a petition for judicial review that they tried to tack onto it. So you could say, on, no, no, no, that petition for judicial review needs to go over here into a new case.

So how do we achieve the same goal, because I understand the Court's concern that you don't want a muddled-up record. You want it to be very clear when they're considering one or the other. And the problem that you've got in the 35 acres is you don't have a final decision,

so it's not appealable. So if you go that route of just severing it or bifurcating it, you're just delaying things. So it makes more sense for them to just go their separate ways. I get that.

But how do we achieve that in this case where they were filed together? All of it was filed together. So do we tell the Court -- the Clerk that you are directed to what, excerpt from your -- and which one do you take? Which one do you give the new case number to? Does the petition for judicial review keep the original case number and the amended complaint gets the new case number? And which of them gets reassigned? I mean, it's -- they've really created a mess for us here, because I really do not believe they want us to prejudice people who, not knowing that they were going to take this route, filed these things together originally. That's prejudicial.

I don't believe they would ask us to prejudice people who have relied on their filings without knowing any -- that there was -- this was possibly coming down the pike. But you're right, we've got to figure out, then, how do we address their concern, which is muddling the record by blending PJR and the condemnation action into one proceeding when they're so different. That's their concern.

So here we get back to my -- this is what I'm so hung up on when we say that we've got this PJR filed, because I think ultimately, if you parse this all down, what makes sense is that because the petition for judicial review at one point was dismissed -- this is so complicated. I'm trying to unravel these threads. Because at one point we had our petition for judicial review dismissed, and we're now saying I have to

reconsider that, and we have to put that back into place, I think it should be put back into place under a separate case number. It should have its own case number with a date that relates back.

It's at the chief's discretion, and her sole authority, as to whether that needs to be reassigned. That's the chief's job. So that would be my direction for the order, would be I would grant alternative relief. And since we are reinstating the petition for judicial review based on what happened with Judge Crockett, and so the issue -- preclusion is over. Now we have a petition for judicial review that we need to consider. That that should receive a new case number. And the question remains as to -- under the *City of Henderson* case, the question remains for the chief judge as to whether, in her discretion, it is appropriate under these circumstances to assign that petition for judicial review to another department. So that's the order.

MR. SCHWARTZ: Your Honor, one comment? This case has got a J for judicial review.

THE COURT: Correct. Good point, counsel. That's a good catch. Good catch.

MR. SCHWARTZ: So --

THE COURT: So the C case would need to be the one that would be severed out.

MR. SCHWARTZ: Okay. And that is --

THE COURT: Good point. That is a -- that's -- you know, I always forget about that trailing -- that is how they organize their cases in Odyssey.

MR. SCHWARTZ: Okay. So they --

THE COURT: Good catch. So the order needs to be changed --

MR. SCHWARTZ: Well, I have to thank my colleague.

THE COURT: Okay. We need to change the order -- good catch. That this A case was filed with a J extension, meaning it's filed as a petition for judicial review under our system. It's not filed in the C case, meaning civil. So we need to sever -- essentially sever these two. But instead of just severing them and keeping them together, we need the new case number. That's what the Court indicated, transferring it to a new docket. So I think that what Judge Williams did in his decision in the *City of Henderson*, by getting it a new case number is the right thing to do. That's a really good point.

Oh, and the problem they had in the *City of Henderson* is it was a B case, and it was filed in business court, where, as I say, it should never have been, but that does make a difference. Good catch. I think that we'd probably have to do it that way. And that the chief then has to tell us who's assigned to which part of the case. And she may just send it down there to have them both randomly done, who knows. That's why she's got the title.

MR. SCHWARTZ: Thank you, Your Honor.

THE COURT: So again, so this order would be that I am granting alternative relief. And the alternative relief would be instead of striking the petition for judicial review from the complaint, that the petition for judicial review should be separated from the condemnation

action and the condemnation action should be assigned a new case number with the same date of filing, origination date, whatever they called it. Whatever you call it. He said retaining the date of filing. So retaining the date of filing. With a new case number, retaining the date of filing as a C case. And this matter should be referred to the chief judge for her review under the *City of Henderson* to determine whether this is necessary and/or appropriate to reassign one or the other of these matters, and that's up to her.

MR. SCHWARTZ: Thank you, Your Honor.

THE COURT: So again --

MR. OGILVIE: Yes, Your Honor. I'll prepare the order.

THE COURT: You're preparing that order?

MR. OGILVIE: Yes.

THE COURT: Thank you. I'm going to get to [indiscernible].

MS. GHANEM: Can I just ask a question?

THE COURT: Yeah.

MS. GHANEM: How do we effectuate that? Do we need to file something in front of the judge -- the chief judge?

THE COURT: No. We're going to get an order from Mr. Ogilvie, and once I've got the order, then I can advise the chief what I have done. I'm assuming that this works. I'm assuming you've got a new case number.

MS. GHANEM: Right.

THE COURT: So I'm assuming they know how to do this. I had never heard of it before. Ever.

MS. GHANEM: Right.

THE COURT: So I don't know how they do it. But my only concern about his order is they always tell us that we have no authority to reassign cases, and so that's my concern.

MS. GHANEM: Will it need something --

THE COURT: And I can see the point of there may be a need to reassign it. I don't think it's necessary, because I think they're more concerned about keeping the dockets clear, so when the issues go up on appeal they have a clear docket.

MS. GHANEM: Right.

MR. OGILVIE: And then Your Honor --

THE COURT: They're all hung up on the docket. I got to tell you this.

MS. GHANEM: Yeah, I just didn't know if we needed to file something in front of the chief judge or it will be handled internally. Okay.

THE COURT: Nope. We will do it. We will -- we are going to do it. As soon as we get the order from Mr. Ogilvie. He will show it to you. We'll file it, and it goes to the Clerk's Office. We'll give them a heads up, be on the lookout for this, and take it to the chief. Yes, Mr. Leavitt?

MR. LEAVITT: Your Honor, the only concern I would have is -- and clearly, I mean, I think what Judge Williams did was appropriate. And the only additional step in the 35 acre case was appropriate. The only additional step we'd need to here is to give them two separate case

numbers.

THE COURT: Right.

MR. LEAVITT: And then we can move forward. I think --

THE COURT: And that's my question when I said I'm not sure reassignment -- nowhere in here do they say you have to reassign it.

MR. LEAVITT: I agree.

THE COURT: And that's what I said, I don't understand why Judge Williams thought you did.

MR. LEAVITT: Well, and that's the point --

THE COURT: And that's why I think it has to go to the chief. She has to say it should or shouldn't.

MR. LEAVITT: Well, and that's the point is the Nevada Supreme Court didn't require that last step.

THE COURT: Nope. Nope.

MR. LEAVITT: So we don't need to follow-up. What we can do is what he did in the 35 acre case, is just a separate case number here, a separate case number here, and move forward. Here's our concern.

THE COURT: Yeah?

MR. LEAVITT: We want to go forward with our motions --

THE COURT: Sure.

MR. LEAVITT: -- as the Nevada Supreme Court has required us to go through on the motion to determine property interests.

THE COURT: Right.

MR. LEAVITT: Once that's decided, to go to the motion to determine take. And so that's why we think we can move forward today on those issues if we decide, hey, we're just going to put a case number here, a case number here, they're going to be separate.

THE COURT: They have anticipated my next question, which is if we're going to do this, do we have to wait and get the answer to that question? Is it necessary to reassign the cases? I'm not sure I understand why Judge Williams went that route.

MR. LEAVITT: Well, and so that's my point is the Nevada Supreme Court does not require it.

THE COURT: Yeah.

MR. LEAVITT: And the 8th Judicial District Court Rules don't require it and the Nevada Rules of Civil Procedure don't require it. All the court said is they shouldn't be combined. And they said you can actually transfer it to a separate docket number. That's all the court said. I understand Judge Williams added that, and randomly reassigned. I don't know, maybe there was something on it he didn't want to hear. I don't know.

THE COURT: Yeah.

MR. LEAVITT: But I give the Nevada judiciary much more credit than California counsel. I think you can handle them both.

THE COURT: He must have assumed that when you have a new case number, the new case number has to be randomly assigned.

MR. LEAVITT: And --

THE COURT: And if that's what he meant --

MR. LEAVITT: Well, and that was a little bit different because they weren't together yet.

THE COURT: Exactly.

MR. LEAVITT: They weren't together. This one is together, and so we have a different procedure where we can just assign different docket numbers and keep them together.

THE COURT: Right.

MR. LEAVITT: Judge, it's --

THE COURT: And that's the thing, I don't know the answer to. That's the thing I don't know the answer to. When you get a new case number, is it necessary that that be randomly assigned in the system. I don't know if it's going to automatically do that. If it's possible for me to say I keep it. That's what I don't know. The chief is the only one who can tell the Clerk's Office who gets assigned to a case.

MR. LEAVITT: I understand that.

THE COURT: And that's my problem is when we -- when I tell them I need a new case number for this part of the case, I don't know that I have the authority to say, and I get to keep it.

MR. LEAVITT: Well, I think --

THE COURT: Just like I don't know that I have the authority to say it needs to be reassigned.

MR. LEAVITT: I apologize, Your Honor. Under Rule 21, you absolutely have that, because under Rule 21, you can sever claims. You can sever cases --

THE COURT: Right.

MR. LEAVITT: -- and you can provide them two separate docket numbers.

THE COURT: Right. And but see, here's my problem with that, and this is why I think -- why I'm a little nervous about saying it should be considered a severance is that you want to make really sure you don't end up with the situation that you guys have now --

MR. LEAVITT: Yeah.

THE COURT: -- in the 35 acres where the Court said you don't have a final decision.

MR. LEAVITT: Yeah. And --

THE COURT: Or they consider that one bifurcated, in which case, it's not final.

MR. LEAVITT: Right.

THE COURT: Or are they saying no, they're severed, and severed means two different case numbers.

MR. LEAVITT: The Court made it clear that if they had been severed, they could have been taken up independent of one another.

THE COURT: Okay.

MR. LEAVITT: The Court did make that that very clear on the 35 acre case.

THE COURT: Okay. Let me find 21. Because I just don't want you to end up in the situation --

MR. LEAVITT: I agree with you, Your Honor. And I --

THE COURT: -- where you don't have a proper decision, and you can't -- and you're stymied again, and you're delayed. So it seems

to me that this transfer concept, I understand what they're trying to do with it. I don't think they're saying it has to be the same judge, and I'm puzzled by Judge Williams saying that unless it's an issue with the system, with Odyssey and how it has to automatically assign. If you get a new case number, it automatically gets a new judge, and only the chief can effect that.

MR. LEAVITT: Right.

THE COURT: And so that's my question. That's why I think it needs to go to the chief to say I need a new case number. Does this mean I have to have a new judge, or does this mean it's considered essentially a severance, and it's staying here. It's just a new case number, no new judge? She's the only one who can make that order. I don't have the authority to do it.

MR. LEAVITT: And, Your Honor, if I may?

THE COURT: Yeah.

MR. LEAVITT: And, Your Honor, if I may, if I may just briefly. In the appellate issue before the Nevada Supreme Court in the 35 acre case, they did say -- they indicated very clearly if it had been severed, there wouldn't be an issue with this ripeness issue on appeal.

THE COURT: Right.

MR. LEAVITT: That's the first issue. The second issue, I believe the Court has the inherent authority to assign a case number, a separate case number, to a severance once the claims are severed. I think the Court clearly has that authority to do that, and then move forward as if they were severed. The only difference is, under Rule 21,

you're just given a different case number.

And so, Your Honor, obviously -- and you mentioned it here . Our concern is with the delay issues. Our concern is that we don't want, you know, a case that's been pending for 39 months further delayed. And that's clearly what the City wants, Judge. Is we filed this motion to determine property interests, and we're ready to go forward now, so the City is looking for ways to delay this matter even further beyond 39 months.

And so that's what our concern is, is we don't want the further delay on this matter. We'd like to go forward today, actually, with our motion to determine property interests, and move forward and have those issues decided by the Court. That's our main concern, Judge. We don't want this to cause further delay.

THE COURT: Yeah. It's an interesting procedural question. Misjoinder of party -- Rule 21. Misjoinder of parties is not a ground for dismissing an action. I think it's the same concept of misjoinder of claims.

MR. LEAVITT: Exactly.

THE COURT: It's not grounds to dismiss. So on a motion or on its own, the Court may at any time add or drop a party. The Court may also sever any claims. So my question is under our rules, that's essentially what we're doing, we're severing the case in accordance with *City of Henderson*, and we're assigning it -- they call it transfer, which --

MR. LEAVITT: Right.

THE COURT: -- I don't see anywhere in the Rules of Civil

Procedure.

MR. LEAVITT: There is not, Your Honor.

THE COURT: It's not a thing. It's a not a thing.

MR. LEAVITT: Right.

THE COURT: But there's obviously a way to do this that the Clerk's Office can do. And I just -- you know, I can't call up Judge Williams and say, hey, Tim, why did you do that? So my question is, I think it has to go to the chief. I'm doing this. Please tell me if I get a new case number assigned to this case, we're going to keep the J part because it was opened as a J case, so the petition for judicial review stays here. The takings questions need to be in a separate pleading in a separate case. I mean, I guess you'd file the same pleading, and you just say only causes of action 1 through -- I think it's 2 --

MR. LEAVITT: Yeah.

THE COURT: -- and the alternative are kept here --

MR. LEAVITT: We could -- right.

THE COURT: -- and the remaining causes of action go to the new case. And so that should probably be in there, to be perfectly clear. You'll make sure they get that in there?

MR. LEAVITT: Oh, yeah. Of course, Your Honor.

THE COURT: Okay. Because here's my question -- I'll let you guys talk. Do you guys want to go off the record and just discuss this a little bit?

MR. LEAVITT: Could you give us five minutes, Your Honor?

THE COURT: Yeah. Let's just go off the record and discuss

the logistics of this. I mean, I don't -- I guess I could --

[Off the record at 2:48 p.m./On the record at 2:49 p.m.]

THE COURT: Okay. And it'll be noted that Mr. Ogilvie is free to leave as he needs due to his scheduling issues, so he's excused whenever he needs to leave. Yeah.

MR. LEAVITT: Here's --

THE COURT: Co-counsel will cover for him.

MR. LEAVITT: All right. I apologize, Your Honor. I don't know if we're on the record.

THE COURT: Yeah, we are. We're ready to go.

MR. LEAVITT: If I may proceed, Your Honor?

THE COURT: Yeah.

MR. LEAVITT: Okay. So I spoke to in-house counsel, Elizabeth Ganhem here, and she reminded me of a concern we have, is first of all, these cases have been shuffled significantly amongst the various judges. We've had significant recusals. And so we've had trouble getting to where we are right now. That's the first issue.

The second issue, this property was purchased six years ago, Judge. For six years, the landowners have tried to develop, and it sits idle. And here's the other big concern, is during that period, the City changed the taxes on the property and the landowners were paying $1 million a year in taxes in addition to other carrying costs.

THE COURT: Right.

MR. LEAVITT: So this isn't just the concern, hey, it's been 39 months and what's six more months or whatever to shuffle this. This is

having profound monetary consequences on our client. Six years of carrying a 250-acre property with a tax bill from the City of a million dollars a year based on a residential use.

THE COURT: It's not my desire to delay you.

MR. LEAVITT: I got it. And so Your Honor, that's our big concern. I think this Court has the inherent authority to monitor and to adjust its own calendar. It clearly has it. I don't know if you even have to give it a separate docket number. I think you can just sever this exactly as -- and now, the problem with Judge Williams is he ordered separate trials. You could put up even a stronger brick wall by just severing the claims so that we don't have this profound and significant more delay upon our client.

And our client -- you want to say it?

MS. GANHEM: No.

MR. LEAVITT: Our client is getting to the point, Judge, where the City is using this PJR so rabidly against him to delay that he's close to withdrawing it and just going forward with the inverse condemnation claims. That's where we're getting, Judge, is it's pushing him so hard into a corner where he can't wait anymore.

THE COURT: Right.

MR. LEAVITT: And he's running out of time. He's running out of funds. He's running out of the ability to carry this to where he's willing to almost give up claims now to go forward.

THE COURT: Right. And that's why I said he shouldn't be prejudiced by this. There should not be any further prejudice to a party

who in filing this way years ago would have no way of knowing.

MR. LEAVITT: I guess my point is, Judge, is if we're going to delay it further --

THE COURT: Right. So I'm looking here -- I'm trying to see cases that we have on severing and --

MR. LEAVITT: Okay.

THE COURT: -- because they talk about how in federal court -- here's, like --

MR. LEAVITT: I'll give the Court time.

THE COURT: -- the most recent. *Valdez v. Cox*, 130 Nev. 905, 2014. And they talked about the similarity with the federal and the state court Rule 21. Federal courts, recognizing that claims severed under FRCP 21, may proceed with -- separately, treat severed claims as a separate suit. And when a judgment has been entered resolving claims properly severed, it's final and appealable. This is what the court of appeals was telling you. If they had just been severed, it would be treated as a separate suit.

So my problem is how do you do that? And it makes sense to me that what they were trying to say in *City of Henderson* is transfer it to a new docket, meaning transfer those issues that are -- that need to be separated out to a new docket number, because you want to make sure the records are kept separate. We do this all the time in court. I have problems with this in probate where we have civil and criminal -- civil and probate cases are decided at one time, because you can do that in probate, and it gets real -- people get real confused.

So they're trying to avoid doing that. They're trying to say have a clear record on the condemnation issues, have a clear record on the PJR. Got it. So what they're trying to say, I think, is that an order finally resolving severed claims does not need to be certified under Rule 54(b). So they're talking here -- they didn't tell us to sever it. That's what's so bizarre in *City of Henderson* --

MR. LEAVITT: Well, I --

THE COURT: -- that they didn't say just sever it.

MR. LEAVITT: And it's interesting because --

THE COURT: Why?

MR. LEAVITT: -- I think the reason they're not saying that is they're saying what you -- they didn't say you have to do this. They said nothing in this opinion prevents the Court from transferring it to a separate docket. Remember --

THE COURT: Where appropriate, yeah.

MR. LEAVITT: Remember there was a civil claim here, and they were trying to bring one in, and they said, hey, don't bring it in. That's the difference, Judge. They said, don't bring the PJR in, transfer it to a different docket number.

THE COURT: Right.

MR. LEAVITT: We already had them together from the beginning under the old rule, so our case is a little bit different than the *City of Henderson*.

THE COURT: Right. Yes.

MR. LEAVITT: And what the *City of Henderson* made clear is

you don't dismiss. But since we already have them in one case, they're already in one case, you can still sever them. There's nothing in *City of Henderson* that says you can't sever them.

THE COURT: Right. But then how do you keep the -- your record clear? And this is what I think they were worried about, was are they going to get a clear record on appeal?

MR. LEAVITT: No, I agree that's a concern. And that's why -- I'm sorry.

THE COURT: And how do you make that happen? And so that's why I think they came up with this amendment to the Rules Of Civil Procedures, as far as I can tell, of transferring.

MR. LEAVITT: Well, Your Honor, they still did not eliminate the -- and in the case you just read, they made it very clear it would be treated as two separate lawsuits.

THE COURT: Correct.

MR. LEAVITT: So once you sever --

THE COURT: In federal court, it is. Yeah.

MR. LEAVITT: Yeah. And that's essentially what Judge Williams has done. Once you sever them, you can have them in two separate lawsuits. I don't foresee this large problem. It's a huge hyperbole by California counsel that everything is going to be all mixed up --

MR. OGILVIE: Your Honor, I have to address the Court. No, I have to.

THE COURT: I know.

MR. LEAVITT: I don't think --

MR. OGILVIE: I'm tired of the unprofessional reference to California counsel.

MR. LEAVITT: Mr. Schwartz.

MR. OGILVIE: That's four times today.

MR. LEAVITT: Mr. Schwartz.

THE COURT: Yeah, I noticed it.

MR. OGILVIE: And it's --

THE COURT: I noticed it, Mr. Ogilvie. I noticed it.

MR. LEAVITT: I'll accept his objection.

THE COURT: I get the point.

MR. LEAVITT: I'll accept his objection. Mr. Schwartz.

THE COURT: Yes.

MR. LEAVITT: Okay? I also --

THE COURT: I mean, isn't there a case where, like, the issue on appeal was they -- it was Pat Fitzgibbons in Reno, and they kept talking about Las Vegas counsel, and that was an issue for, like, a mistrial. Yeah. So yes. But you know, that's in front of a jury. I can ignore it. And I do. Thanks.

MR. LEAVITT: I'll call him Mr. Schwartz, Your Honor.

THE COURT: Thank you.

MR. LEAVITT: Okay, For Mr. Ogilvie. I apologize, Mr. Ogilvie.

THE COURT: Thank you.

MR. LEAVITT: So Mr. Schwartz' argument, I don't share the same opinion of him of our judges. I think that you can keep them

separate. I think you can have separate lawsuits. I think it's very easy to do. You sever them, and you try them separately as Judge Williams is currently doing in the 35 acre case. And what that will do, Your Honor, is it'll allow this 39 month old case to move forward. There is no reason that the City would oppose that. None, except to delay.

THE COURT: Right. I understand that. And -- but I don't think that it does delay it. I think that as soon as we get the order, we get the case number assigned. their point being we have to file this -- the condemnation portion as a C case. I do think it needs a separate case number because they're -- I'm not understanding how you're going to get a clear record on the appeal as how do you separate out which pleadings go up? I guess you can say what goes up in your record on appeal, only these things go up in the record on appeal.

This concept of -- that they've come up with of transferring it to a new docket number, I see how that would address their concern. But you need to make sure these are very clearly separated. I don't understand why when Judge Williams sort of anticipated that, he said to reassign it. That's my only part.

So if the issue is tell the Court, tell the Clerk's Office, give us a new case number. We need a new case number for our civil action.

MR. LEAVITT: Okay. Your Honor, if I may have one moment because we may have just been pushed into just abandoning the PJR. Hold on, I'll talk to him.

THE COURT: And we'll keep the file date.

MR. LEAVITT: Okay. I'm going to leave it up to in-house

counsel, Your Honor, to address. Do you want to address that? Do you want me to address it?

MS. GANHEM: Yeah. Either way, Your Honor. Then we would submit that we withdraw the petition for judicial review at this time so the inverse condemnation case can go forward with you -- this Court, and that our time to be heard will no longer be delayed.

THE COURT: Okay. All right. So with respect to the petition for judicial review, the Court declines to strike it and would instead follow the procedure of footnote 5 in *City of Henderson* and, quote, "transfer it" to a new case number. In order to avoid delay, the City -- the landowner has agreed to withdraw the petition for judicial review and proceed with the complaint only as a civil action on their equitable claims. Okay.

So the petition for judicial review is withdrawn without prejudice. I'm assuming without prejudice as to any issues. So for your order, I granted the alternative relief. I would follow the transfer procedure. However, the party has -- the landowner has chosen to abandon the petition for judicial review and proceed only on the remaining causes of action of the complaint.

MR. BYRNES: Your Honor, can we go off the record and talk amongst ourselves?

THE COURT: Sure. Let's take a break.

MR. BYRNES: We have -- we're working into some mine field too.

THE COURT: Yeah. Let's do that.

[Recess taken from 2:59 p.m. to 3:16 p.m.]

MR. OGILVIE: Understanding of what the City's intention was in bringing the motions that are being heard today, and that is to bring this matter back to where it was in May of 2018 when these applications came up before the City Council. And the City Council took no action, struck the applications because it would have been in violation of Judge Crockett's order at the time if it had considered and granted them.

The City's intention was to put itself back in that same position now that Judge Crockett's order has been reversed. So with that said, let me talk about two things. One, delay. There hasn't been an attempt to delay. And in fact, a year-and-a-half ago, the City invited the developer to move forward with those applications after Judge -- immediately after the Supreme Court reversed Judge Crockett's order. So there hasn't been this million dollars in taxes paid just because the City is taking some action. No. It's because the developer has sought not to pursue those applications. The developer, as we argued in the motion for remand, should be required to pursue those applications.

Now, with respect to the purported withdrawal of the PJR, Rule 41 does not allow that. The City has answered the PJR and amended pleading. Rule 41 only says the plaintiff can only withdraw a complaint as a matter of right one time; otherwise, it needs consent, or it needs to file a motion and have leave of court. So the City objects to that. It's not for purposes of delay. It's, again, for purposes of placing the parties where they should have been in May of 2018, but for Judge

Crockett's order.

THE COURT: Okay.

MR. OGILVIE: And finally, I just wanted to clarify, because the Court said on a number of occasions that the new case number will be related to the C actions, the civil actions. But I heard -- I thought I heard, and maybe I misheard, but I thought I heard near the end, the Court saying that the PJR would get the new case number. But I just wanted to confirm that in fact, the PJR case number would remain. That's the case that was filed here. And it would be the civil actions, the inverse condemnation actions, that would be subject to the new case number.

THE COURT: Okay. All right. So what I was trying to figure out was what happened in the other case, the *Solid State vs. City of Henderson*, what happened? How did they deal with Judge Williams' order to assign a new docket number. And it looks like -- it looks like they didn't. It looks like it was dismissed. And for the record, Judge Williams entered his order after -- I was mistaken. That order came after the Supreme Court's decision, so he was trying to effectuate what the Supreme Court told him to do.

So in trying to figure out how the Clerk's Office would deal with such an order, I thought we could look at how they dealt with it and did they open this new case. And it looks like that they did on the 3rd -- so that was on August 2nd that they did that. So then on August 3rd, the Clerk's Office filed a notice of change of case number and department reassignment. So pursuant to that order, the amended petition for

judicial review was filed -- has been given that case number and assigned to Judge Denton. They don't address the filing date, but we do have a new case number.

So they can apparently make this happen. So it is simply a question of how do -- and they gave it the proper extension. It's 838775-J. So that's the new City of Henderson case. So it is possible for them to deal with this as a, quote, "supreme court-ordered transfer". So we can make that happen. So it is possible to do that.

My problem with this order has been I don't understand why they are reassigning it to a new judge. That part makes no sense to me, you know, since it's ordered by the chief. So that's the part I still don't understand. Because I did -- they reassigned that one to -- the new one, the new part of it, to Judge Denton. And then it looks like the whole thing got dismissed. So there you are.

MR. OGILVIE: And I think the Court had it right at the outset when deferring to Judge Bell as the Chief Judge to make the determination.

THE COURT: Okay. Thank you, sir. All right. And so it does look like that one is proceeding. Yep. And they opened it. They did apparently open it. Even under that new case number, it does have the original filing date. So that is something they can do. They can accommodate by using the original. They're able to program it, apparently, to reflect that old filing date under the new case number. It's entirely possible to do this. I'm just not getting reassignment, and that's the thing that makes no sense to me.

So as I said, I would deny the motion to strike because I think that is not what the Supreme Court intended to have happen to pending cases. It's prejudicial to them, and I don't think the Supreme Court intended that; and in fact, addressed it in footnote 5, there is an alternative. Give it a new case number and proceed. So that's what I think we should do is enter an order that is -- the Clerk is requested to transfer the complaint, first amended verified claims in inverse condemnation to a new case number with the filing date relating back to the original filing in this case.

I don't think it has to be reassigned. So unless -- you know, unless the chief tells me that you can't open the new case number without reassigning it, or the Clerk's Office does, I'm not going to order it. So I'm good to go.

MR. LEAVITT: We would appreciate -- we e appreciate that, Your Honor, and the research you've done, and we can move forward, then --

THE COURT: Okay.

MR. LEAVITT: -- with our inverse side.

THE COURT: All right. So one more order, then, for counsel to prepare. I'm granting the alternative relief. I do not believe it's appropriate to strike, and I'm not assessing any evil or ill motive, but I am still not -- and forgive me for my use of vernacular -- granting a do-over. I mean, if the City and the landowner come to some sort of an agreement where they want to do that and just reapply -- I mean, because, seriously, the market's crazy, and you can't find a house, so.

MS. GANHEM: True.

MR. LEAVITT: Very true, Your Honor. It has changed.

THE COURT: We need houses.

MS. GANHEM: Yes.

MR. LEAVITT: We agree with that.

MS. GANHEM: We would have had them already.

THE COURT: So you know, can we work something out? Not a problem. I don't do that. That's not my job. My job is to move on to the next thing. So with respect, denying the motion to remand, I just -- I don't think that's an appropriate remedy. I'm granting alternative relief on the motion to strike because we have to address this *City of Henderson* issue, and I think we can. It appears the Clerk's Office can do that. They can just give you a new case number, and they just enter that old filing date. They did it for Judge Williams' case, so apparently they can do it for us.

MR. LEAVITT: All right.

THE COURT: I think we need to separate them. I get the point. This whole reassignment thing is what's so odd to me, and I just didn't understand why he chose to do that. That's up to Tim Williams. We're going to move on.

MR. OGILVIE: Your Honor --

THE COURT: Do you need to leave us, Mr. Ogilvie? I'm sorry to keep you.

MR. OGILVIE: I do, and I apologize. One matter, you said -- reiterated, you're going to deny the motion for remand. But

again, you stated earlier that was without prejudice; is that correct?

THE COURT: Correct.

MR. OGILVIE: Okay. Now, with respect to when you say move on, I understand Plaintiffs' counsel wants to move forward with the motion to determine property interests. The City believes that's wholly inappropriate --

THE COURT: Right.

MR. OGILVIE: -- until the chief judge makes a determination on who that case is assigned to.

THE COURT: Okay.

MR. LEAVITT: Wait, Your Honor. I thought we just resolved that, Your Honor, that you checked with the Clerk that that can be done, and we have two separate case numbers, and you can keep the matter?

THE COURT: Well, no. My point is I don't know why you need a new judge. That part -- Judge Williams ordered that in his order. I don't know why he ordered that. Only the chief judge can reassign cases. So I was wondering, is it automatic that you get a new judge when you open the case number. Is that what he was trying to say? It's a new case number; therefore, it's a new judge? I don't know what he means. I -- you know, not appropriate for me to ask him? What did you mean there, Tim?

So I do not believe that you need a new case number, that they apparently -- I mean, a new judge. They apparently can just -- they can do whatever we tell them to do about this. And so I -- unless the chief were to say, oh, new case number, I'm sorry, you can't keep it and

it is going to be reassigned. If the Clerk's Office does that when I send them this order, you may end up with a different judge. But for right now, I know of no reason why you would need it. Tim Williams directed them to give them a new judge. I don't know why.

MR. LEAVITT: Okay. And Your Honor, we feel, in light of that, with the Court's order, we can move forward with the motion to determine property interests.

MR. OGILVIE: That's baffling, Your Honor, because if the case is assigned to a new judge, that would be premature. We don't know. So we object to moving forward on that motion.

THE COURT: Okay. Well, and here's the problem. Whatever is determined is whatever is determined, and it's the law of the case. Whoever takes it over, takes it over. So we're just going to go -- we're going to just keep moving.

MR. OGILVIE: Okay.

MR. LEAVITT: And so may I move forward, Your Honor, with that motion?

THE COURT: Yes.

MR. LEAVITT: Okay. Your Honor, as we've argued numerous times before, in moving now to the inverse condemnation side of the case --

THE COURT: Correct.

MR. LEAVITT: -- which has the -- excuse me --

MR. OGILVIE: Thank you, Judge.

MR. LEAVITT: -- which as we've argued several times before

is the separate part, right? And in that case, what we've argued is we've argued that the Nevada Supreme Court laid out a precise procedure for deciding these cases in the *ASAP Storage vs. City of Sparks* and also in *Sisolak vs. McCarran International Airport*. And what the Court said is you, district court judges, here's what you're required to do. And this is almost a verbatim quote from Justice Gibbons and Justice Hardy. You have a duty to make two sub-inquiries, and they must -- this is the words used by the Nevada Supreme Court -- they must be made in the proper order.

The first sub-inquiry is what was the property interest the landowner had prior to the government interfering with that property interest? And then, of course, once you decide the property interest issue -- like we all remember in law school, the bundle of sticks, once you define those bundle of sticks -- then and only then can you move to the second sub-inquiry of whether those bundle of sticks have been taken.

And so all we're here today for -- and I've got to repeat this; it's an extraordinarily narrow issue -- what was the property interest the landowners had prior to the City interfering with that property interest? And, Your Honor, I have two exhibit books here I'd like to follow, if -- and the first one, if I may approach, Your Honor?

THE COURT: Yes. Certainly, yeah.

MR. LEAVITT: Okay.

THE COURT: Thank you.

MR. ROGERS: Your Honor, this is Judge Williams' 35 acre

case. And if I may just pause for just one moment. In the 35 acre case, Judge, that was the first filed case, and we've completed discovery in the 35 acre case. The City hasn't even filed an answer in this case. But in the 35 acre case, we've totally completed discovery and this exact issue was presented to Judge Williams.

And so Judge Williams -- I'll let you get that, Your Honor.

THE COURT: I'm not allowed to be in here without it, so.

MR. LEAVITT: Understood.

THE COURT: Here we go. Here we go.

MR. LEAVITT: So Judge Williams, what happened in that case, is we went so far along, on the cover there, you can see that we went before him. It's called the finding of facts and conclusions of law regarding plaintiff landowner's motion to determine property interest. This is Exhibit Number 1 of all of our exhibits.

And you'll remember, Your Honor, when we laid out our motion, we said, Judge, you're going to have to answer three questions on this property interest issue. Number one, does zoning apply to determine the property interest? Number two, what's that zoning? And number three, what does that zoning give us a right to do?

Well, Judge Williams addressed those exact same issues and he heard, Judge, the exact same arguments you're going to hear today in the 35 acre case. And so Your Honor, I'd like to move to his order. On that first -- on the first page right here where it says, question number 1. Is zoning used to determine the property interest in an inverse condemnation case? He decided that exact issue that's before you here

today.

In conclusion of law 15 and conclusion of law 17 in his finding of facts and conclusions of law, he said two things. He said, first, it would be improper for me to decide the property interest issue in an inverse condemnation case based on petition for judicial review law. We just heard counsel agree with us on that. The petition for judicial review cases are different than inverse condemnation cases.

And so on this first issue, he said, you must base the property interest issue on eminent domain law rather than land use law, which is petition for judicial review law. And in conclusion of law number 17, he says, eminent domain law states that zoning must be used to determine the landowner's property interests in an eminent domain case. Okay, so there it is. What do we use to determine the property interest issue in an eminent domain case? Judge Williams answered that, zoning.

Then question number two, if you turn to the next slide, says, well, what zoning must be used to determine the property rights issue? Judge Williams also addressed that. Conclusion of law 18. The Court concludes that the 35 acre property has been hard zoned R-PD7 since at least 1990. Your Honor, this is the 35 acre case right here. This is the 133 acre case right here. They have had the same zoning since 1981.

This is why the 35 acre case is so critical to this case. It's right next door. It had the same exact zoning as the 133 acre property. R-PD7 on this property and R-PD7 on that property since 1981. And Judge Williams said for our purposes here today, critical. That 1990 date

is going to become critical in a moment because the City is going to say something happened in 1992, which is going to be totally irrelevant. Why? Because zoning was already in place when the City did what it did in 1992. So I'll just -- I'll lay that nugget out there, right there, Your Honor.

So Judge Williams said the zoning is R-PD7. That's the same zoning on the 133 acre property. So then he had to turn to the third question. What rights does R-PD7 zoning confer on the 35 acre property? And his conclusion of law 19 addressed that. He said, the Court concludes that the Las Vegas Municipal Code 19.10.050 lists single family and multi-family residential as the legally permissible uses on R-PD7-zoned properties. So what did Judge Williams do? He went right to the City's Code, and he said, okay, what does R-PD7 zoning allow? He says the legally permissible uses are R-PD7 zoned properties.

Then we go to his final holding on the exact issue we're here today on, number 20. He then says the landowner's motion to determine property interests is granted in its entirety. The same exact motion we have pending before you today. Judge Williams granted it in its entirety. Then he said, the 35 acre property is zoned R-PD7 at all relevant times and the permitted uses by right of the 35 acre property are single family and multi-family residential.

So Your Honor, we have a decision. And you'll recall all of the issue preclusion arguments that the City has made in these cases. We have a decision from a judge on the property right next door on the exact same issue that's before you today granting the landowner's

motion to determine property interests in its entirety. And Your Honor, I have that Exhibit 1. I mean, you have it in the pleadings. If you want, Your Honor, I can approach, and I can give you a copy of Judge Williams' order.

THE COURT: Okay.

MR. LEAVITT: If I may approach, Your Honor?

THE COURT: So how do we square that order of Judge -- because I don't understand why these things are all consolidated --

MR. LEAVITT: I got you.

THE COURT: -- but that's water under the bridge. So Judge Herndon's order, it appears to me that she did not entirely reconsider it.

MR. LEAVITT: Okay.

THE COURT: She said only that he had only considered the consensual claims. The other claims there should be a hearing on. So what are you saying in this case? Because again, it's an entirely separate section of land, entirely separate, like, historical time frame that we're talking about here. Because we have this issue in this one where, technically, there was no consideration of the application, because they said, oh, there's a problem with it, we're going to take it off calendar.

So your procedural history at the city level, a little different. So what's the significance with the -- do we have -- are those procedural facts -- when I say procedural, I mean below. The process below.

MR. LEAVITT: Yeah.

THE COURT: The process below, are there similar facts in 35 acres versus -- I don't know. Which one was Herndon?

MR. LEAVITT: Judge Williams was the 35 acre case.

THE COURT: He's the 35 and Herndon was the?

MR. LEAVITT: Sixty-five acre case.

THE COURT: Sixty-five, okay.

MR. LEAVITT: Yes. Okay --

THE COURT: So is that process at all relevant?

MR. LEAVITT: It's not.

THE COURT: Okay.

MR. LEAVITT: And here's why, Your Honor. For purposes of this case, the 65 acre case, and the 133 acre case, because as I just read, and I'm going to show you this in just a moment, zoning determines the property interest issue. Nothing that the City of Las Vegas did below as far as the petitions for judicial review, as far as the applications are concerned, change that zoning. The zoning has been in place since 1981. And since the zoning has been in place since 1981, you as a judge, according to the Nevada Supreme Court, and I'm going to get to that in just a moment, the Nevada Supreme Court requires you to look at the zoning and then use that zoning to determine the property interest issue.

So whatever may or may not have happened below is entirely irrelevant in these three cases to make that determination. So now, let me turn to Judge Herndon, because that's a great question, Judge. Judge Herndon, what he did in his order -- I have it right here before me -- is he went through, and he has a section that's called procedure history. And he has some findings that he does, right? What he does, Your Honor, is he cut and pastes some of the government's

findings on the background history of the property. Then he cut and pastes some of the landowner's findings on the background and history. And so, Judge, if you go through here, he says, listen, the landowner confirmed that the property had vested rights. The landowner confirmed that the property had zoning. The landowner confirmed that he had the right to develop the property.

So all he does is he lists the facts, Judge. And then he expressly says, I'm not deciding the property interest issue. He expressly states that. Your Honor, you go to the very, very end of his decision, findings number 48 and 49 of his decision, he says straight out, he says, I'm only deciding the right in this issue. And then he goes on to say, the Court believes that addressing the merits of any of the remaining issues would be unwise as there are three companion cases.

So he says, I'm only deciding -- I've listened to some of the landowner's facts, I've listened to some of the government's facts. I'm not deciding the property interest issue. And then says expressly, it would be unwise to discuss those issues. And this is what he says why. He says, there's three companion cases still pending with similar issues and any ruling by this Court could be construed as having an issue preclusive effect. He says it right here. He says he doesn't want Mr. Schwartz to do what Mr. Schwartz is doing to you today.

THE COURT: Well, why aren't these consolidated? I don't understand that.

MR. LEAVITT: Your Honor, I have to tell you, we tried. And I'm sorry. I apologize. We tried. And you know where we got

opposition from?

THE COURT: Okay.

MR. LEAVITT: We tried. Okay? And so Your Honor, it's a good question. So I apologize for that because it's frustrating because now it's four cases we have to try instead of putting them in one. And Judge Williams has the lower case number. So he would have already decided this. In fact, he already decided this issue which would have applied to all four of the cases.

So --

THE COURT: So where we got with Judge Williams, he was a little ahead of the rest of us. Like you said, lowest case number. He decided the motion to determine property interests.

MR. LEAVITT: He did.

THE COURT: Then you did discovery.

MR. LEAVITT: Well, no --

THE COURT: And now, you're doing the take?

MR. LEAVITT: Oh, yeah. So -- well, actually, we did a lot of discovery, and he decided the motion to determine property interests on October --

THE COURT: '20.

MR. LEAVITT: October 2020, I think it was.

THE COURT: Yeah.

MR. LEAVITT: October 20th, 2020, he decided the property interest. Then we finished discovery. And now, we have scheduled with Judge Williams, for September 23rd and 24th, the take issue.

THE COURT: Right. This is what I'm trying to figure out, because again, we've got this problem with preclusive effect and what's the significance. So it seems like a step was skipped in this Herndon case.

MR. LEAVITT: Exactly.

THE COURT: Like, where's discovery?

MR. LEAVITT: He never decided the property interest issue. And Judge, that was -- so --

THE COURT: So I --

MR. SCHWARTZ: Objection, Your Honor. He found it was moot.

THE COURT: Right.

MR. SCHWARTZ: Counsel is misrepresenting his order.

MR. LEAVITT: Okay --

THE COURT: I'm trying to understand here, because we have -- and that case bounced around because it kept getting moved from judges who had --

MR. LEAVITT: Yeah.

THE COURT: Because it got caught up in that whole mess of reassigning cases for people on the murder trial. And so you bounced around a lot because judges kept getting -- in that docket, you do nothing but murder. So the judges kept having to turn it over. So it got turned over a couple of times. By the time it finally lands, and that's a big part of Judge Herndon's decision is, look, it's been bounced around. So what he says, if -- what I'm understanding that he did and what -- because it

didn't seem that Judge Trujillo entirely overturned his decision. She just said he only addressed one issue.

MR. LEAVITT: Right.

THE COURT: And there were multiple causes of action in the complaint, and he really only addressed one of them.

MR. LEAVITT: Yes.

THE COURT: So then you had an evidentiary hearing on what? Based on what?

MR. LEAVITT: So here's what happened. And counsel is right, Judge Herndon decided that the property interest issue was moot, so he didn't decide it. He didn't decide the property interest issue.

MR. SCHWARTZ: He denied it. It's right there in the order.

MR. LEAVITT: Okay. All right, Counsel. Your Honor, can I ask counsel not to interrupt?

THE COURT: Yes. Yeah, sure. Yes. Okay.

MR. LEAVITT: I've agreed not to call him California counsel, so I'll call him Mr. Schwartz if he can not interrupt.

THE COURT: Yes. Okay. Yes.

MR. LEAVITT: All right.

THE COURT: So counsel is correct. According to page 35, "it is hereby ordered City's motion for summary judgment is granted; developer's counter-motion is denied as moot." That's been reconsidered.

MR. LEAVITT: Yeah, denied as moot. So they weren't -- so Judge, he didn't decide the property interest issue. So here's what

happened, is we went in front of Judge Trujillo, and we had a long hearing. And I said, Judge, there's a mandatory two-step process. You have to decide the property interests first, and then and only then can you move to the take issues. And I said, Judge Trujillo, Judge Herndon didn't do that.

And so Judge Trujillo paused the hearing, looked at Mr. Schwartz and said, show me where Judge Herndon adopted that mandatory two-step process and followed the mandatory two-step process. And he spoke for about 20 minutes and never showed anybody it. And so Judge Trujillo said under Rule 52, Rule 59, and Rule 60, I am setting aside Judge Herndon's order. We're going to have an evidentiary hearing, number one, on the property interest issue, and then we're going to have an evidentiary hearing on the take issue. And she had three days of evidentiary hearings, Judge, and we're still waiting for her decision on the property interest issue and on the take issue.

THE COURT: Okay. But --

MR. LEAVITT: So she's deciding --

THE COURT: -- so she's not discussed the -- so she's not actually decided the --

MR. LEAVITT: No.

THE COURT: Okay, got it.

MR. LEAVITT: So that's the point is she -- that she absolutely set aside Judge Herndon's decision, because he didn't make those -- that two-step inquiry. And so she is deciding them now. So yes, Judge Herndon's order is not final. Judge Herndon's order has been set aside

pursuant to Rule 52, 59, and 60, and Judge Trujillo is now deciding those issues in the 65 acre case.

If Judge Herndon had decided the property interest issue, we would be able to see a line that says, the property interests that the landowners had prior to the take was based upon X. That is -- and the zoning is Y, and therefore, I hereby find that the property interests the landowner had is Z. That's not in the decision, Your Honor.

So the only judge so far that has actually entered an order on the property interest issue is Judge Williams. That's the only one that we have so far. And that's why we attach it as Exhibit number 1. It's not in conflict with Judge Herndon's decision because Judge Herndon said all those other issues were moot. Here's what Judge Herndon did decide, Judge -- Your Honor. He said the claim was not ripe. And since the claim was not ripe, he dismissed it.

But the problem was he applied that ripeness standard to four claims and the Nevada Supreme Court has expressly held the ripeness standard doesn't apply to three claims. And Judge Trujillo went and read the cases and she said, listen, I read the cases. I remember this, her saying it very clearly. I read the cases and the cases expressly state that the ripeness standard doesn't apply to three of these claims. And, therefore, she said, that's why I have to reconsider -- or I have to have a three day hearing on these issues.

Judge, if Judge Herndon --

THE COURT: As to the three claims. Because as to one, she did not over turn it. But there is still one of the claims that --

MR. LEAVITT: Absolutely.

THE COURT: -- that Herndon said is not ripe, and she said, I'm not disturbing it.

MR. LEAVITT: There you go, Your Honor.

THE COURT: But these other three, I believe that's incorrect as to those three claims, so we'll proceed on those three. Okay, got it.

MR. LEAVITT: Exactly.

THE COURT: That's what I thought.

MR. LEAVITT: You're totally right. And Judge, in order to decide those three claims, she had to do the two-step process.

THE COURT: And why did she do them together? That's what seems so bizarre to me. Oh, I beg your pardon.

MR. LEAVITT: We asked her.

THE COURT: I shouldn't say that. I'm not critical of it.

MR. LEAVITT: That's okay.

THE COURT: I'm not critical.

MR. LEAVITT: We asked her --

THE COURT: I'm just trying to decide, procedurally --

MR. LEAVITT: Yeah. We asked her to have two separate days.

THE COURT: Right.

MR. LEAVITT: So what she did is she had about a day and a half on the property interest issue. And then she says, okay, we're done with the property interest issue. I'm putting that to the side. Then she moved to the take issue, and she heard it. She didn't hear them at the

same time. She separated them out, and she's going to issue an opinion on the property interest issue and then an opinion on the take issue. I believe that's extraordinarily difficult to do because you first have to decide the property interest issue, which is what Judge Jones is doing. He just had a hearing on the property interest issue. He's saving the take issue for later. Judge Williams decided the property interest issue.

THE COURT: So are you here today to ask to have that hearing?

MR. LEAVITT: On the property interest issue.

THE COURT: Because we're not here for that hearing. I want to make that perfectly clear.

MR. LEAVITT: Yeah, we're here -- our motion is the motion to determine property interest.

THE COURT: Okay.

MR. LEAVITT: That's why we're here today. Yeah, that's our motion that we filed in this case. It's the same exact motions that we filed in front of Judge Williams. And we filed a 30 -- actually, it's a 22 page motion.

THE COURT: Uh-huh.

MR. LEAVITT: We want you to determine the property interest issue. The City filed an 88 page opposition, and we filed a 30 page reply. So that's what's pending before you today. The underlying issue is what's the property issue the landowners have prior to the Government interference.

THE COURT: Okay.

MR. LEAVITT: So that's why it's so critical, Your Honor, and that's our very first document that we provided to you is what Judge Williams has done. Because he's the only one who's decided that issue yet. And so, we're asking you to enter an order just like Judge Williams did. We're asking you to follow Judge Williams order in the 35 acre case and find -- and define the landowner's property interest that they had in this property.

Now Judge, I want to, with the Court's permission, I want to now go to why Judge Williams did that, and these are the arguments that we put in our brief.

THE COURT: I'm going to ask you one more question.

MR. LEAVITT: Yes. Go ahead, Your Honor.

THE COURT: About this -- like my problem with issue preclusion and the inconsistent verdicts. If what Judge Trujillo is dealing with, and again, I'm not critical of her doing them back-to-back. I'm saying, you know, just why did she do it? I'm trying to understand how other people would approach this. My question is, Judge Williams appears to have made decision one, which is here's what's the interest is. You do a bunch of discovery and then he'll address the taking.

MR. LEAVITT: Yes.

THE COURT: Judge Herndon said, all of this is not right. Judge Trujillo says he's wrong. One of these isn't right. Three of them are. Let's hear evidence on the three.

MR. LEAVITT: Yes.

THE COURT: So what's your position on this ripeness

question? Because it seems like Judge Williams didn't have a concern about it, he just wouldn't follow them. But we do have at least one department saying that Penn Central isn't ripe and you should be considering all these consensual issues.

MR. LEAVITT: Okay. So the ripeness issue, Your Honor, comes up on the take part of the case. It's not relevant to the motion to determine the property interest sign. Here's why. Because once you define the property interest, then you can decide, okay, what type of application should have been filed to develop that property.

So the ripeness, Your Honor, is not a defense to what property issue you have. Ripeness is a defense to the take. So we don't talk about ripeness yet until such time as we decide the property interest issue. And it's important to also identify what Judge Jones is doing in the 17-acre case. He's following this two-step process, and he had a separate hearing on the property interest issue. And that was on August 13th, 2021.

So Judge Jones had a full-blown hearing. I believe it went for about three or four hours and then he heard all the evidence on the property interest issue and now we're waiting for him to enter an order, which will address one issue. What is the property interest the landowners have on the property prior to the government interference?

So to this same exact issue is pending in front of Judge Williams. He's following this same exact process that we're following here today.

THE COURT: Williams or Jones?

MR. LEAVITT: Jones, sorry. I apologize. Judge Jones in the 17 acre case, doing the same thing Judge Williams did in the 35 acre case and the same thing we're asking you to do here today is determine that first underlying issue.

So Judge, may I approach?

THE COURT: Sure.

MR. LEAVITT: Do you have another question about the procedures?

THE COURT: No. I was just trying to get straight --

MR. LEAVITT: I know. I know, Your Honor. There's a lot of cases to follow here, and it's a -- I mean, we're keeping track. May I approach, Your Honor?

THE COURT: Yeah.

MR. LEAVITT: Okay. So this now, Your Honor, will follow, will track my argument with the three questions.

THE COURT: Okay.

MR. LEAVITT: So now, why did Judge Williams do what he did? Why did he grant our motion to determine property interest in its entirety, and we have this up on the board also.

So question number one. The first question, is zoning used to determine the property interest in an inverse condonation case? That's the very first question. You can go to the next one on the slide. And this issue, Your Honor, has been addressed by the Nevada Supreme Court, the Nevada Legislature, and the Executive Branch. It's stunning. We've never had, in my -- that I'm aware of, all three branches agreeing

on this one issue.

So let's talk about the Nevada Supreme Court first. Is zoning used to determine the property interest issue like Judge Williams held in his order. Judge Williams held that zoning must be used. Here's six Nevada Supreme Court cases, Your Honor, over the past 50 years where the Nevada Supreme Court has decided this property interest issue. So this isn't something where we don't have a body of law. We're not out where the buses don't run like we were earlier today. We have case law here. So the first one is the *Sisolak* case, seminal inverse condemnation case. Remember, this is the case where the Court said you had to follow the two-step process.

THE COURT: Right.

MR. LEAVITT: Right here on the left hand side it says facts. The next thing is the property. And so, what did the Nevada Supreme Court use to determine the property interest issue? They said the property is zoned for development of a hotel, casino, and apartments.

So the Nevada Supreme Court in the inverse condemnation *Sisolak* case said use zoning to determine what the property rights were that Mr. Sisolak had. That's the seminal case, Judge. And then they went -- and I want to pause for a minute. The *Sisolak* case was -- you remember those air space taking cases, Your Honor?

THE COURT: Yeah.

MR. LEAVITT: Okay. So you were -- you may have been on -- there were so many of them. So there was those air space taking cases where the argument was hey, you put a height restriction on our

property so we can only build up to a certain height on the property now. In other words, you took above 100 feet. In the *Sisolak* case it was above 62 feet.

And so, the Nevada Supreme Court had to decide, okay, what property interest did Mr. Sisolak have? And they said the zoning allows him to build a casino. And because the zoning allowed him to build a casino, when the government took his heigh restriction, they took his ability to build into that height restriction. So it was the zoning that was used to determine that underlying property interest.

If Mr. Sisolak didn't have the zone to build the hotel casino, it wouldn't have mattered if they took his air space. But he had that zoning.

Let's turn to the next case, Your Honor. It's *Clark County v. Alper*. I'll go through these pretty quick. The *Nevada Supreme Court in Clark County v. Alper* is an inverse condemnation case again. And the Nevada Supreme Court said that due consideration should be given to the zoning ordinances when determining the property interest issue, exactly as Judge Williams held.

So that's another inverse condemnation case. If we turn the page now to the next inverse condemnation case it's *Alper v. State*. This is another inverse condemnation case where the Nevada Supreme Court again had to determine the property interest issue. Judge, what did they do? They cut and pasted the zoning. And what the permissible uses under the H2 zoning were and said that's what Mr. Alper's property interest is based on again zoning.

Turning to the next case, these are direct eminent domain cases. The next one is -- and I'll be quick on these. *County of Clark v. Buckwalter*. Judge, this is actually one of the first cases I did as a very young attorney. And Mr. Buckwalter was using his property for apartments. This is what the Nevada Supreme Court said. Although the property had apartments, it was zoned for commercial use, retain, food, beverage and gaming. And so, the Court said, that's his property interest. I don't care what he was using it for. He had zoning for gaming. And then Judge, we went and valued that property based on the zoning or based on that gaming zoning even though it was used as apartments.

Same thing happened in the *Andrews v. Kingsbury* case, the next case. Zoning -- the Court found that the property was zoned for single family residences and the zoning -- and what those zoning regulations required.

And then the final case -- this is probably the early seminal case on this zoning. This is the 2003. *City of Las Vegas v. Bustos*. The property was being used as a residence and it actually had zoning as residence. But look what the Nevada Supreme Court here did. They said the district court properly considered the current zoning on the property as well as the likelihood of a higher zoning change.

So the Nevada Supreme Court said listen, you're not even limited to the zoning you have. If there's a likelihood that you could get a higher zoning, that would be your property interest issue.

And so, what's the public policy for that? What's the public

policy for the Nevada Supreme Court? And Judge, six cases over 50 years relying upon zoning. Here's why. It's because when we step into an inverse condemnation case, we have litigation against the landowner and the government. And who has control of all the documents over at the government? The government. They have all kinds of planned documents over there. They have master plans. They have neighborhood plans.

And so, what the Court says is hold on a minute. If we're in an inverse condemnation case, we have to have something that's reliable to determine the property interest issue. And we know what that is. We know what can be reliable is zoning. And so, the Court relies upon that zoning to determine the property interest. It's not going to allow any other extraneous documents to come in to try and influence the proceedings. And so, that's why there's six cases over 50 years where the Nevada Supreme Court relied upon zoning.

So let's turn now to the Legislature. What does the Legislature say about this issue? The Nevada State Legislature. There's a statute right on point. It's NRS 278.349. It says if there's ever a conflict between the zoning and any other plans that the government has, the Nevada Supreme Court says that the zoning ordinance takes precedence. So the Nevada -- or I'm sorry, the Nevada legislature. So now we have the Nevada Supreme Court saying we're using zoning to determine property interest and we have the Legislature saying even if there's a conflict with any other plans that the government might have, zoning is going to take precedence over those other plans, okay.

Now let's turn to the Executive Branch. The Executive Branch had an opportunity to weigh in on this issue also. Because what happened in 1984 is someone wrote them a letter to the Attorney General's Office, and we've seen these before, and said hey, what happens if there's a conflict between zoning and some other plan that the city has? And the Attorney General responded, said that in 1977, the Legislature declared its intention that zoning takes precedence over any other provisions and any other master plans that the government might have. They went on to say that buttresses are a conclusion that the Nevada Legislature has always intended that local zoning ordinances apply to determine the property interest issues.

So, Your Honor, we have -- and that's attached as Exhibit number 155. We have a -- six Nevada Supreme Court cases. We have a statute, and we have an Attorney General opinion all agreeing that in Nevada, when you determine a property interest issue, you need to rely on zoning.

Now, Your Honor, I would think that that would be enough authority and we could probably end right there and answer question number one, should zoning be used to determine the property interest and answer it, yes. But we also have the three City of Las Vegas departments who've also answered this question. So and there's -- it's going to be very relevant why I bring this up. If you turn to the next page here. Let's go to the City Attorney's Office. So this is the City Attorney's Office prior to trial.

And, Your Honor, may I approach here for just a moment?

THE COURT: Of course.

MR. LEAVITT: Okay. I'm going to hand you what's been marked as Exhibit 156. You can see the first heading there is Brad Jerbic and Phil Burns. They submitted a motion to you, Your Honor, in 2011 in an inverse condemnation case, okay, submitted under Rule 11. And if you open up Exhibit Number 156, you can see this. You can see what the inverse condemnation case is, and you can see it's department number 26. And Exhibit 156, you turn to page 8 in Exhibit number 156, and this is the representation made to you, Your Honor, in an inverse condemnation case just like this.

They've said that the City's master plans of streets and highways is a planning document. And then you go down to the bottom of 8, the placement of the north alignment on the City's master plans of streets and highways was a routine planning activity that had no legal effect on the use and development of the property. So what the City is saying here, Your Honor, is that these plans that we have with the City of Las Vegas are planning documents only that have no legal effect on property. That's why zoning is used to determine the property interest in these cases.

Now I want to point out a footnote that was presented to you. In that footnote, it's footnote 2 on page 11 of Exhibit number 156. The representation that was made to you is that the Supreme Court noted that a City's interpretation of its land use laws is cloaked with the presumption of validity and won't be disturbed absent the manifest, abuse and discretion. And so, what Mr. Burns and Mr. Jerbic told you in

that 2011 case was that listen, our master plans are planning documents only.

In that same case, two affidavits were submitted to you where they said -- and that's number two on our list. The office of the City Attorney has constant -- consistently advised the city council, and City staff that the master plan is a planning document only and that it can't be used to restrict or imperil developmental property.

So again, we have zoning over here and the master plan, which is just the plan. Continuing on that list, Brad Jerbic. Now Brad Jerbic is talking specifically about the 133 acre property. He says, hard zoning, in my opinion, trumps the general plan. He goes on to say about this property, counsel gave the landowners R-PD7 zoning, and he said I don't see anything that changed that, Brad Jerbic.

Phil Burns, again under Rule 11, submitted a brief to the Court specific to this property here. Specific to the 250 acre property and said, in the hierarchy, land use designations are subordinate to zoning and then he said quote, "zoning designations specifically define allowable uses." Why is that important? Because that's the City Attorney's department who adopts the zoning code, writes it and interprets it. And the Nevada Supreme Court said that what they say here is cloaked with the presumption of validity. That's the representation that was made to you prior to trial in 2011. That's the representation that was made on the record by Brad Jerbic and Phil Burns prior to this trial.

And Judge, I'll turn to the next page. We can go to the City's

planning department, okay. This is specific to this entire 250 acre property and the 133 acre property. What did the City's Planning Department represent, again cloaked with the presumption of validity, about the 250 acre property? Number one, their head planner, Robert Ganzer [phonetic], said the entire 250 acres of property as zoned as R-PD7 and there's nothing that can stop development.

Number two, Tom Perrego and Peter Loinstein, they said the 250-acre property is zoned residential and has the vested right to develop. Zoning trumps everything and the owner of the 250-acre property can develop. Number three is deposition under oath by the City's head planner, Tom Perrego. If the land use master plan and the zoning aren't in conformance, then zoning is the higher order entitlement. Number four is Peter Loinstein. Again, deposition under oath, a zone district gives a property owner property rights.

And then, Your Honor, on number 5, this is the City's zoning verification letter. Your Honor, all this was before Judge Williams. In the City zoning verify -- what happened is the landowners researched the property for 14 years. And they got significant information from the City and just before purchasing the property or acquiring the property or closing on it, the landowners went to the City and said, we want you to put in writing what our rights are, and the City did. Exhibit number 134. They said the property is RPD zoned and that's intended for residential development.

Number two, the property that are zoned R-PD7, which means up to seven residential units per acre. And number three, they

define the density allowed on the property. Again, this is all prior to trial unaffected by these biases of trial. This is what the landowners got. This is what they did, Your Honor. They didn't just show up one day and acquire this property. They researched it for 14 years, and for 14 years, the City Attorney's Office and the City Planning Department told them unequivocally, the property is zoned R-PD7. That gives you the right to develop the property and there's nothing that can stop you from developing the property. That's the representations that were made to them.

And Judge, those representations were true. I'm here to tell you everything they said was true. Their deposition testimony. Their zoning verification letter. The briefs that Mr. Jerbic, Brad Jerbic, and Brad Burns who's sitting in the courtroom, the briefs they submitted to you in the *Moxon* [phonetic] case were true. They were right. All of this information prior to trial that they gave was absolutely correct.

And so, Your Honor, I want to now turn to the final City department, and this is the City's Tax Department, okay. Prior to trial, what happened as far as the taxes are concerned? So we know what the City's Attorney's Department said. We know what the City's Planning Department said. Let's see what the City Tax Department said.

And Judge, this was a stipulation between the Tax Department and the landowners. A stipulation on the property interest issue. What happened is, shortly after acquiring the property, the City came to the landowner and said well, wait a minute. We have a law that says that we need to determine what the lawful use of your property is.

May I approach?

THE COURT: Thank you.

MR. LEAVITT: Okay. This is NRS 361.227. This statute says that any person who is determining the taxable value of the property shall appraise it based on the lawful use that may be put of the property. So they have to look at okay, what are the lawful uses of the property and what are the legal, what are the legal limitations on the property, okay. So the tax assessor did just that, Your Honor. And may I approach again?

THE COURT: You may.

MR. LEAVITT: This is Exhibit Number 52. Exhibit Number 52 is the tax assessor at the City complying with NRS 361.227. And, Your Honor, if you turn to the first page you can see assessor valuation. You turn to the next page, and it's bate stamped from Exhibit number 52. At the bottom the bate stamp is 001185. And if you come up here at the top, Judge, it says zoning designation R-PD7. Then it says, probable use, residential. Why is that so important? Because after all of that occurred, after the tax assessor went out and did that -- may I approach again?

THE COURT: Sure.

MR. LEAVITT: Exhibit Number 120.

THE COURT: What if I said no?

MR. LEAVITT: I know. Then I guess I'm going to have to show it to you from a distance, okay. Exhibit Number 120, Your Honor. You go over one page and two pages and the bate stamp at the bottom is 0042222. And you see at the top there, Your Honor, at the very top

right after Michelle W. Schafe, you see the word stipulation. The landowners signed this document with the Government stipulating to the taxes. Stipulating number 1, the lawful use of the property is residential. Or I'm sorry, the zoning is residential, and the lawful use is residential.

What happened was the property was used as a golf course, but it always had R-PD7 zoning. And so, after -- and, Your Honor, this is in 2016. This is way back in 2016. Two years before this case was filed. So the government came to the landowners and said listen, your property lawful use is residential. It's zoned R-PD7. We're going to determine the lawful use as R-PD7. And Judge, the City of Las Vegas Tax Assessor put a value of $88 million dollars on the property, the whole 250 acre property. And then sent to our client, the landowners, a bill for $1 million dollars a year. And Judge, he stipulated to that, and he paid that tax bill based upon that lawful use.

So, Your Honor --

THE COURT: What is the density for R-PD7?

MR. LEAVITT: I'm sorry, what was that?

THE COURT: The density.

MR. LEAVITT: The density, it depends. So there's R-PD2, R-PD4, R-PD7. The number decides the density. So it's residential plan development, seven units per acre. So the zoning here was R-PD7. And the way that we know that is because it's in the zoning code. But also, if we go back to the City's zonification letter that was provided to the landowners prior to acquiring the property, the City wrote that in the

letter that your density is residential up to seven units per acre.

So Judge, why are we here? It's really an odd question because we have the Nevada Supreme Court saying zoning must be used. The Legislature and the Executive Branch saying zoning must be used. We have the City's three departments planning, attorney's office, and the Tax Department that are responsible for interpreting, applying, drafting the City Zoning Code, all uniformly agreeing, they all uniformly agreed. All six of those authorities, that this property is zoned R-PD7 and that you have the right to use the property, legal right to use the property for up to seven units per acre.

That's why Judge Williams concluded in his order, Judge, that's why he said zoning must be used to determine the property rights. And, Judge, what's going to happen here, I just want to point out very quickly and then I'll go to question number two. What's going to happen is Mr. Schwartz is going to say all six of them are wrong. He's going to say my City Tax Department is irrelevant. He's going to say my Planning Department was misinformed. He's going to say my City Attorney's Office was misinformed. They put that in their brief. The City Attorney's Office don't know what they're talking about. Brad Jerbic whose been here for 30 years doesn't know what he's talking about.

He's going to say that the legislature really didn't write that in the statute. He's going to try and ignore the six Nevada Supreme Court cases right on point saying zoning applies and here's what he's going to say to you, Judge. He's going to say zoning shouldn't apply. You should apply a plan that the City had called a master plan. He's

going to say that's what you should apply, not zoning, despite six Nevada Supreme Court cases right on point.

So, Judge, I want to turn to the City's master plan that Mr. Schwartz is going to tell you should apply rather than zoning, Exhibit number 161. The top left-hand corner of that says here's what a master plan is. It provides general policies. Then it talks about what a general plan is. Then it says what a zoning ordinance is. It says provides specific regulations. The law.

So this master plan document that Mr. Schwartz is going to try and convince you should trump zoning, the document itself says that the master plan is just a policy guideline, and the zoning is the law. Just exactly as the Nevada Supreme Court stated six times in their opinion. Just exactly as the planning and the Planning Department and the City Attorney's Office determined also.

So, Your Honor, I want to turn now -- I'm going to close out this question number one. Question number one is, what should you use to decide the property interest issue in this case? Zoning or something else? So let's look at what other district court judges have said on this issue. This is Judge Bixler in the 17 acre case. Judge Bixler even had some say in this case, Judge. Here's what he said. He said, how can anybody dispute what that means? The zoning laws designate each one of these zones to permit a certain number of residential homes per acre, which is what you asked. What is it that the City has to argue about that? So he said, what are you even arguing about? Zoning lays out the use of property in the City of Las Vegas." And then Judge

Williams, the 35-acre case that we just went through, he said, "Nevada eminent domain law provides that zoning must be relied upon to determine a landowner's property interest in an eminent domain case."

So on question number one, three questions to resolve all the issues before you today. The first question is the most important one and that's why I spent quite a bit of time on it. The next two questions I'm not going to spend that much time on.

First question is, what should you use to determine that property rights issue? According to Judge Williams and all the authority, it's zoning. And I'll close out with this summary. This is the summary. On the left-hand side, Your Honor, is all the authority I just provided to you. From the Nevada Supreme Court, the three Nevada departments or branches of Government, the three relevant City departments and Judge Bixler -- or I'm sorry, Judge Williams' order. And what you're going to hear is you're going to hear argument by counsel that the master plan should apply instead. There's no one Nevada case that says the master plan should be used instead of zoning. Not one Nevada inverse condemnation case, and we've cited to you six, Your Honor, that applies zoning.

So now the question number two would be okay, what zoning must be used to determine the property rights on the 133-acre property? That's been stipulated to in this case. The City agrees that -- well actually, if we can go to the next slide. You'll recall that in the *City of Bustos v.* -- The *City of Las Vegas v. Bustos* case, the Nevada Supreme Court said you look at the current zoning plus any potential for

up zoning.

So the question is, what's the current zoning. Turn to the next page. As of the filing of the complaint and the date of valuation in this case, the zoning has always been R-PD7 undisputed facts. So question number one, zoning is used. Question number two, the zoning is R-PD7. So now the final question, Your Honor, question number three. What rights does R-PD7 zoning confer on the 133-acre property? And it's quite simple. Remember what Judge Williams did? He went to the City's Code.

If we can turn to the next slide. This is the R-PD7 zoning rights. It's 19.10.050. It says, R-PD, residential plan development district. And the section (a), the first section is intent of the R-PD's own district, which is our zoning on our property says, "the intent is for residential development."

You know where else we saw that, Your Honor? In Exhibit 134, which was the City's zoning verification letter that they gave to the landowners prior to his acquiring the property. The City quoted that to him and said the intent of your zoning is residential development. And then it lists, okay, what do you get to do with residential develop or with R-PD7 zoned properties? It's section (c), Your Honor. It says, permitted land uses are single family and multifamily residential.

So now if we flip back to how Judge Williams answered question number three, which was what rights does R-PD7 zoning confer upon the property? He said, conclusion of law number 19. He said, Las Vegas Municipal Code 19.10.050 lists single family/multiple family

residential as the legally permissible uses on R-PD7 zoned properties. All he did was copy right from the City's code, which says R-PD7.

And, Your Honor, for the -- this case was filed in 2018. From 2014 to 2018, you want to know who agrees with Judge Williams? Every single person at the City of Las Vegas. The very, very first time anybody ever said that you don't have the right to build, or you don't have -- or you shouldn't use zoning, was when this case started. There is --

THE COURT: By this case, you mean the four?

MR. LEAVITT: Yes, the four cases. Prior to these four cases being started -- Judge, we have the zoning verification letter in writing. We have the deposition testimony from their own Planning Department. I mean, those arguments, those facts, and that law was very compelling to Judge Williams. I mean, he said how can -- Judge Bixler actually said, how can you possibly dispute the zoning? What are we going to rely on? We're going to rely on plans that the government has in their archives. No, you rely on zoning.

So, Your Honor, we would ask that you follow the Williams' order in similar fashion and answer question number one that zoning is used to determine the property rights issue in an inverse condemnation case exactly has the Nevada Supreme Court has applied in in six cases.

Number two, find that the zoning is R-PD7 on the property at all relevant times, the same as Judge Williams did. That's not disputed. And then turn to the City code, which is R-PD7. It says R-PD zoning at the top of this section 10, which is Las Vegas Municipal Code 19.10.050, and enter an order that the legally permissible uses are single family and

multiple family residential uses.

And, Your Honor, it is actually that straight forward to resolve it in those three -- in that manner through those three questions. And I'll tell you, Your Honor, what's going to happen is counsel's going t to ask you to apply everything but zoning. He's going to ask you to apply a master plan that no court has ever applied in an inverse condemnation case. And, Your Honor, after he does that, then I'll reply to those arguments which me makes, so I'll save that for my reply, Your Honor. And Judge, if you have any questions, I'll resolve any questions you might have right now.

THE COURT: Thank you, no.

MR. LEAVITT: All right. Thank you, Your Honor.

MR. SCHWARTZ: Your Honor, we have some PowerPoint slides. We're just trying to get it up on the system.

MR. LEAVITT: While they're doing that, Your Honor, I apologize. I referred to Mr. Burns back here, and I guess he's not here anymore.

THE COURT: He was. I think he may have left after you said that.

MR. LEAVITT: Okay.

THE COURT: But he was here until just a couple of minutes ago.

MR. LEAVITT: Okay.

MR. SCHWARTZ: Your Honor, I think that this motion should be put in context, and I briefly reviewed the context earlier that we have

a 200 -- we initially had a -- before we ran into master plan of 1,500 39 acres that was then developed. And what the issue now is the 250 acre badlands undertakings jurisprudence all the authority created the *Kelly* case, the Nevada Supreme Court *Kelly* case. You can't carve up the property and allow the owner, the original owner of the parcel of the development park, and then carve off another part and let somebody -- and carve up another part and say well, if you deny me the right to develop this part then it's a taking.

You can't do that. We don't -- we had that in this case. Even if you said that the Badlands, as a whole, the City allowed substantial development of the Badlands, so there can't be a taking from the 133 acre property. It just makes eminent sense. We can't. And in no one can the rule be here in Nevada or anywhere else that the City actions approving the development application, multiplying the property owner's investment in the entire property by five times or six times, could be a taking. It just can't be.

And it's not. And the law is absolutely clear that it's not as well as absolutely clear that there's no property right in zoning as the developer alleges here, that it could be taken.

So I'm going to explain a regulatory taking, a regulation of use, which is at issue here. In this motion to determine property interest, the claim is that zoning gives the property owner the right to use the property for what he clams if it has a right to do, which of course is to do anything. Do anything on the property and the City has no discretion as long as they build something that is a permitted use in that zoning

district. And that's an absurd proposition. It has -- it's contrary to all law and I will address that later.

So regulatory taking requires a wipeout. Well, I've already explained to the Court that there can't be a regulatory taking because the parcel as a whole is the PRNP or at minimum, the Badlands and the City allowed development of the property increased the value substantially, including to this developer, that developed property in the Gully Ranch [phonetic] master plan and benefited from that open space.

So it can't be a taking on that basis. Well the developer also bought the property subject to the PROS designation in the general plan, that's Park Recreation and Open Space, that did not allow housing. So the developer knew that when he bought the property. The City -- even if the City had declined to lift that PROS designation in the 133 updates, and it didn't because it never reached the merits. It didn't. But even if it had, it wouldn't be a taking because the developer bought a golf course and drainage for four and a half million, and after, and the -- and with respect to the 133 acre property the City just didn't change the law.

So the developer paid a price for the property that reflected restriction of the PROS designations in time. All the takings cases say this. But, you know, despite that the City actually approved the development of the 17 acre property, increasing the value. You can't have a taking unless the action challenge increases the value.

All right. Your Honor, the developer has distorted eminent domain law, regulatory takings law, zoning law, general plan law, to such a great of extent I really need to ask for the Court's patience while I

untangle all of the misrepresentations of the law that the developer has made. We first need to start with, what has the developer alleged? In their third and fourth cause of action the developer alleged a, what they call a categorical takings claim, and a *Penn Central* takings claim.

Now the motion to determine property interest is actually a complete disconnect with those causes of action, because there's no takings test that you take a right, a right that the property owner had, even if they had the right. That's not the test for a taking.

The test for a taking is, what is the economic impact of the action on the economic value of the property? For a categorical taking, as alleged by developer, it's got to be a wipeout under the *Lucas* case. It's got to be a destruction of all economic value. You can't use it for anything, it's worthless. If it's the *Penn Central* claim, it's based on the three factors, the economic impact of the regulation on the property, and the extent to which the alleged action interferes with distinct investment expectations, these are all about economic impact on the property.

So again, this motion, and this motion to determine a property interest is a huge disconnect with these two causes of action, because they allege that the City action had detrimental economic impact on the property. Whereas their motion to determine property interest is -- well, we had a right to build housing. They don't say how much, or what kind, or how high, they don't say anything about that, which just tells you right there; a right to do what? I mean, it's because it's a complete disconnect with zoning, that's not how zoning works.

But even so, if they had a right to building housing, okay, let's assume that they had that right and the City denied it, and of course their remedy would be a PJR, not damages, but assume all of those things, that doesn't tell you whether it's been a comparison taking, because the taking requires a wipeout, or a near wipeout of the parcel as a whole.

So this motion is way off base in terms of what the law provides, and I want to explain further that the complaint raises essentially -- well, five taking causes of action, and it's very important to distinguish among these five causes of action. The third and fourth causes of action are the categorical and *Penn Central* claim. The fifth cause of action is for what the developer styles a per se regulatory taking; that's a physical taking, completely different animal. The sixth claim is for a non-regulatory taking; that's not really before the Court, except the fact that the title, non-regulatory.

We're not talking about regulation we're talking about something else. And there are, I believe they stated a temporary taking cause of action, and temporary taking is if there's a finding of a permanent taking due to regulation of use, and the government then rescinds the regulation that was found to be a taking, then the government is liable during that period, in between imposing the regulation and rescinding it for a temporary taking. Otherwise, it's a permanent taking. So if you don't have a permanent taking under their categorical or *Penn Central* claim, temporary taking is out the window.

Now in order to get around a ripeness doctrine, which is just

fatal to their claim. Have you got the fifth there? Identical to, Judge, to the 65 acre property, because there was never any application denied upon the merits in this case, so they are identical.

Judge Herndon found that both the categorical and the *Penn Central* claim were unripe, and he went deep into the facts of those claims, to explain why they were unripe. He rejected every one of the arguments that counsel made today as to why their claims are ripe.

Anyway, how does the developer get around the ripeness doctrine, which is the state of their claim? What they do is, they tell the Court that *Sisolak* and other physical takings cases, where ripeness is not at issue, because there's no permit applications, it's all about a physical taking. They tell the Court, that because these are also called categorical takings, as I explained this morning, that therefore the ripeness must not apply, because the Court said, the ripeness doctrine doesn't apply to a physical taking, which is a categorical taking.

So it's word play, what they're doing. They're deliberately confusing the Court, and if you look at their briefs, if you look at their briefs they really try hard to confuse this issue, more than just that word play. You know, by calling their third cause of action a categorical taking, instead of a regulatory taking, where the regulation of use, they're trying to import physical taking rules into that claim, to get around the ripeness doctrine, which again is a taking.

So if you look at their briefs in this case, where the developer tries to persuade the Court to apply these physical taking rules to ripeness, they say in -- they say -- actually they called their claims per se

categorical claims. That's like saying physical/physical taking, or wipeout/wipeout taking. I mean it's deliberately confusing, so that the Court will apply these rules where they shouldn't.

So I want to explain here why *Sisolak* is a physical takings case. The developer has represented that case as controlling in this motion to determine property interest and has nothing to do with their motion to determine property interest, because their motion to determine property interest alleges that the City cannot limit their use of the property by regulations.

A physical taking case affects the property owner's right to exclude others, a completely different animal. So in the *Sisolak* case, and I need to -- Your Honor, I hope you'll indulge me, that sometimes I'm going to quote some new cases, because I'll tell, I'll give you an example, question number 1 of the developer's Exhibit 1. Now at the bottom it says conclusion of law, number 17, and it starts out with a quotation. Nevada eminent domain law provides that zoning must be relied upon to determine a landowner's property interest in an eminent domain case, knowing that, quote -- that's a quote made up by counsel. That case doesn't say that.

MR. LEAVITT: Your Honor, I need to object.

MR. SCHWARTZ: It doesn't -- it's not even close to it.

THE COURT: Thank you, Mr. Leavitt.

MR. SCHWARTZ: Not even close.

MR. LEAVITT: If I can make an objection?

MR. SCHWARTZ: No, Your Honor --

MR. LEAVITT: I can lodge an objection, counsel logged objections.

THE COURT: Thank you. Thank you, Mr. Leavitt.

MR. LEAVITT: That's directly out Exhibit 1, Judge Williams' order.

THE COURT: So we're referring to Judge Williams' order. Thank you.

MR. SCHWARTZ: Now, Your Honor. This says a sentence and they cite a case, that as -- you know, you make a statement, and you cite a case, that means that case says that. That case doesn't say anything like that. So -- and I'll explain why counsel is referencing those cases, but my point is, I'm going to have to quote from some cases here, so that the Court knows that we're telling the truth about what those cases say.

In *Sisolak*, the Court said, in determining whether a property owner has suffered a per se taking by physical invasion. So here the Court's saying, yeah, we recognize that a physical taking is a type of per se taking; they don't use the word categorical, but they could have. A court must determine whether the regulation has granted the government physical possession of the property, or whether it merely forbids certain private uses in the States.

So here we have the Nevada Supreme Court making a distinction between a wipeout case, wipeout *Penn Central*, where the wipeout, or near wipeout, *Penn Central* has got to be very close to a wipeout, according to the *Lingle* decision.

And they're saying, this is a physical possession case, a physical takings case. They use the distinction, or whether it merely forbid certain private uses of the space. So *Sisolak* and the other physical takings cases that counsel cited, have nothing whatever to do with zoning ordinances and the general plan designations, here that limit the use of the property by the owner, nothing to do with that.

Then, Your Honor, this morning I briefly recounted the facts of the *Loretto* case, where New York City required Ms. Loretto to allow cable TV facilities on her rental building. The Court said that's a physical taking, you have the right to exclude others from occupying your building, that wasn't a regulation of Ms. Sisolak's use of the property, it allowed someone to physically occupy her property. And it said because the ordinance denied the owner of the fee simple interest, the right to exclude others from their property. In that case *Loretto* owned the building. She was the owner. That it affected this regulatory physical taking.

So you can have a regulatory physical taking where a regulation requires the owner to allow other people to occupy their property, but that's completely different from a regulatory taking case where you limit the use, the owner's use of the property.

Then the *Sisolak* Court went on to say, categorical rules apply when a government regulation either; 1) requires an owner to suffer a permanent physical invasion of her property; or 2) completely deprives an owner of all economical beneficial use of her property.

So here we have the Nevada Supreme Court saying, the

categorical taking, that categorical from the same thing as per se requires an owner to allow a physical invasion or regulates the use to wipeout economic value. Two different things.

Then the Court said, the second type of per se taking, complete deprivation of value is not at issue in this case. I want to repeat that. The second type of per se taking, complete deprivation of value is not at issue in this case, because *Sisolak* never argued that the ordinances completely deprived him of all beneficial use of estoppel. So they're making a clear distinction here, between regulation of use and depriving the property owner of the right to exclude others.

Then the Court went on to say, because the height restriction ordinances authorize airplanes to make a permanent, physical invasion of a landowner's airspace, we conclude that a *Loretto* type regulatory per se taking occurred. That's the title that the developer gave to its fifth cause of action for a physical taking, a regulatory per se taking. It's a physical taking.

Sisolak claimed that the effect of the ordinances was a physical invasion of his airspace, again a direct quote. Quote, "*Sisolak* is due just compensation for the government's physical invasion of his property. The District Court found that the presence of air traffic over Sisolak's property, at altitudes below 500 feet, as permitted by the ordinances, constituted a permanent physical invasion of a property and was sufficient to establish a taking."

We agree, quote, "the ordinance authorized a physical invasion of *Sisolak* property and required *Sisolak* to acquiesce to a

permanent physical invasion." Quote, "we conclude that under Federal law the ordinances effectuated a *Loretto* type regulator per se taking of *Sisolak* property."

So it's false, the developer's representation to this Court that *Sisolak* was about zoning, and zoning prohibiting a use that the agency there used zoning to prohibit a use is wrong; that case didn't do that. It said where the regulation required the owner to submit to physical occupation by others, was a physical taking. That was not a wipeout case, it wasn't a regulation of use case. So it's improper for the developer to rely on *Sisolak* for ripeness. It has nothing to do with ripeness, because ripeness only has to do with regulation of use, just as a matter of law and a matter of logic.

And in the case of the 65 acre property, after Judge Herndon ruled that the categorical and *Penn Central* claims were not ripe, because the developer hadn't complied with the State case, and filing, and having denied two applications for development of the property on the merits for that property standing alone, finding the case was unripe and granted the City summary judgment.

In the motion for rehearing, counsel argued to Judge Trujillo, who then took the bench that *Sisolak* provides, they conceded that the *Penn Central* claim wasn't ripe, so they're conceding that the ripeness doctrine applies in Nevada, and they're conceding that the ripeness doctrine required what Judge Herndon said, two applications and denial. But they argue that the language in *Sisolak* meant that the ripeness doctrine doesn't apply to a categorical taking claim, it does in

Penn Central, and that's categorical, that's absolute nonsense, *Penn Central* carries a lesser showing, a lesser showing of interference with use.

So how could greater, you know, a greater burden of showing interference, the ripe, how could the Court know more that it's going to wipe it out, than if it's going to only nearly wipe out the property, it makes absolutely no logical sense.

And then as we've cited in our briefs -- and Judge Trujillo didn't fine that the ripeness doctrine doesn't apply to categorical taking. She asked the question, she's never ruled one way or the other, she asked the question based on being misled in this motion for a new trial by counsel.

Here's what the law says. For example, *Palazzolo v. Rhode Island*, it's a U.S. Supreme Court case, 533 U.S. 606, from 2001. Where there the Supreme Court applied that the *Williamson County* ripeness doctrine to a categorical wipeout claim. "The landowner alleged that the Government's denial of its development proposal, deprives him of economically beneficial use of the property." This is the developer's third cause of action.

This is -- it goes directly to the ripeness of that cause of action. The *Palazzolo* Court's explanation of the rule left no question that ripeness doctrine applied to categorical takings claim. The Court said, a final decision by the responsible State agency informs the constitutional determination of whether a regulation has deprived the landowner of all economically beneficial use. These matters cannot be resolved in

definite terms until a Court know the extent of permitted development on the land.

And in the *Suitum*, S-U-I-T-U-M, *v. Tower Regional Planning Agency*, 520 U.S. 725, at pages 731 and 734, the U.S. Supreme Court said it again. By the way, the cite from *Palazzolo* case was at page 618. The Supreme Court said it again the *MacDonald, Sommer and Frates* case. And the lower courts had said, the Courts are unanimous, categorical takings claims are subject to the final decision ripeness requirement. Clearly, there's no logic to saying only a *Penn Central* claim again, which requires less regulation, less burdensome regulation, should be subject to ripeness, but not a categorical claim.

THE COURT: Well, unless we can wrap this up in the next five minutes, we're going to have to continue this hearing, because under pandemic rules we must be out of the building at 5:00. So unfortunately I'm scheduled every afternoon this week, already, except for Friday. So I appreciate the fact that you travelled in for this, so if you want to appear remotely, that's fine with me for resumption.

MR. SCHWARTZ: All right, Your Honor.

THE COURT: Okay. Are you folks available on Friday, it's open?

MR. LEAVITT: We'll be here Friday, Your Honor.

THE COURT: So what time would you be available --

MR. LEAVITT: The earliest you can make it, Your Honor, we'll be here. We could do 10:00 a.m. again, on Friday. Okay. All right. And certainly, I'm sure if Mr. Schwartz cannot travel again, because he

came in for this hearing, we understand he's to participate remotely.

MR. SCHWARTZ: And, Your Honor, when would that hearing conclude on Friday?

THE COURT: Pardon?

MR. SCHWARTZ: Would it go like the end of the day?

THE COURT: No --

MR. LEAVITT: I hope not.

THE COURT: I would certainly hope not, because, I mean, this is -- we're just on this last motion --

MR. LEAVITT: It's up to him.

THE COURT: -- so whatever your opposition, the rest of your opposition, and then the response from Mr. Leavitt, and hopefully a ruling on this motion then. Have you got a decision one way or the other ready? I don't -- I don't know -- I mean, is there --

MR. SCHWARTZ: It requires -- when this much mud has thrown against the wall here, it requires a lot of time to untangle it.

THE COURT: Right.

MR. SCHWARTZ: They have so tangled and tortured the law, it requires a lot of time to explain it. And so, you know, I have at least two or three hours more. This is -- you know, we've got to painstakingly show that everything they said is wrong. Everything?

THE COURT: Yeah. Okay.

MR. LEAVITT: Could I just say one thing, Your Honor?

THE COURT: Yes, Mr. Leavitt.

MR. LEAVITT: I don't know how everything I said was

wrong. I mean when I quoted from the cases and quoted from Judge Williams, but having said that, Your Honor, we're here on a very narrow issue, and that is what property rights did the landowner have prior to the government interfering with that property right. And remember, Your Honor, we argued this issue, prior in a status check, and this Court entered an order, we're not going to talk about the take issues --

THE COURT: Correct.

MR. LEAVITT: -- we're not going to talk about ripeness issues, we're just going to talk about what property rights the landowners have. So maybe we can -- and that's all our motion addresses, that's all our motion addresses.

THE COURT: And so that looks like it's certainly going to be a question I had, which is it was not my understanding that we were talking about, and that's why the motion was, I thought, the counter-motion was withdrawn is -- we're not talking about whether this was in fact taking, or -- but simply this question of defining what it is, that we're going to be discussing.

MR. SCHWARTZ: Can I be heard on that, Your Honor?

THE COURT: Okay. Five minutes, that's all we've got.

MR. SCHWARTZ: The motion to determine property interest is moot. The case isn't ripe --

THE COURT: That's -- I appreciate that's the --

MR. SCHWARTZ: They can't have been denied a right --

THE COURT: That's Judge Herndon.

MR. SCHWARTZ: Yes, but it's moot. And by the way, Judge

Herndon heard these motions at the same time. There's no processing in Nevada requiring this motion to be heard first; that doesn't exist. And those *Sisolak* and *A.S.A.P*, the Court's heard them on summary judgment, it's just different elements of the claim. That the ripeness is crucial because if the City hasn't been given a chance to deny the alleged ripe, of course this ripe doesn't exist, but even if it did, the Court doesn't reach constitutional questions in either judicial -- you conservatism. The Court is supposed to avoid constitutional questions where it can.

In this case you don't need to reach the constitutional question, because the City might, if they file the proper application they might actually grant them, in which case it would grant that the alleged ripe and there wouldn't be a constitutional issue. But I just want to say one more thing, what they're asking you to do is to throw out almost the entire land use regulatory system in the State, to say zoning, all property zoned, Your Honor. What they want you to decide is, property owners get to do whatever they want, as long as they build a use that is permitted in the zone, so they can build anything they want. They're asking you to throw out the whole system, and all authority from the Nevada Supreme Court, all authority from the legislature --

THE COURT: Well, maybe I misunderstood what they were asking, because I thought the process here is to determine, what are we going to be talking about? Are we talking about, is there property interest in the fact that you have zoning, and that when you apply for something that you believe would be appropriate under that zoning, and you don't -- you're not approved for that, has there been a taking? I

thought the second part was, was there a taking? I thought all we were doing with this part was saying, what are we going to talk about here, are we going to talk about just their -- that's why I asked, you know, what is R-PD7?

MR. SCHWARTZ: All right. Well, that's --

THE COURT: So is that --

MR. SCHWARTZ: -- I'm going to get to that.

THE COURT: -- what we're trying to figure out? Is that all we're talking about here is what is their interest, they have existing zoning, has that in fact been taken by the action that the City did?

MR. SCHWARTZ: They don't have an interest, they don't have a property, it's just a zone --

THE COURT: No, but that's why I thought that their question was, was if we have interest in zoning, has that zoning -- has that interest been taken, I thought that was the part of the two-part question.

MR. SCHWARTZ: No

THE COURT: Was do we have an interest, if we have an interest has it been taken, that was my understanding of what their two parts were.

MR. SCHWARTZ: No, they're claiming a right they're claiming a right to build --

THE COURT: Right --

MR. SCHWARTZ: -- to build whatever they want under zoning, and that's not a property interest.

THE COURT: Okay. All right.

MR. SCHWARTZ: That's why you got to go through this.

THE COURT: I just wanted to say I think that maybe I view this a little more narrow, perhaps than you see what they're doing.

MR. SCHWARTZ: They're asking you to find that the constitutional right to build whatever they want in any zone, anywhere in the State of Nevada, as long as your properly zoned. If you zoned industrial you can build whatever you want, height, length, there's no discretion.

MR. LEAVITT: It's not what we're asking for, Judge.

MR. SCHWARTZ: That is completely -- that would completely --

THE COURT: And perhaps I'm just interested in what they were asking --

MR. SCHWARTZ: -- the turn the system upside down.

THE COURT: -- so we can clarify with Mr. Leavitt on Friday. That was not my understanding of what they were arguing, so --

MR. SCHWARTZ: I think I --

THE COURT: I appreciate your point that you believe--

MR. SCHWARTZ: I would like the opportunity to explain --

THE COURT: -- that that's the net effect of what they're saying.

MR. SCHWARTZ: I would like the opportunity to explain that that is exactly what they're saying --

THE COURT: Okay. Okay. Alrighty.

MR. SCHWARTZ: -- and the implications of what they're

asking.

THE COURT: So that's why I said I think we're going to need more time. So Friday?

MR. MOLINA: Your Honor, just a point of clarification.

THE COURT: Yes.

MR. MOLINA: Do you want two separate orders for the motion to dismiss and motion to remand, or can we combine them?

THE COURT: You can combine them, I mean, if that's easiest for you. Just like review them with counsel and make sure we got them.

MR. MOLINA: Thank you.

MS. GHANEM: Thank you, Your Honor.

THE COURT: And we'll see you guys then on Friday. Two of you are going to be here. If you can't be here, Mr. Schwartz, we certainly understand --

MR. SCHWARTZ: Thank you, Your Honor.

THE COURT: -- and thank you for being here today.

MR. LEAVITT: Thank you, Your Honor. And thank you for everything today, for time. Glad to be out of her by 5:00.

[Proceedings adjourned at 5:00 p.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-visual recording of the proceeding in the above entitled case to the best of my ability.

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DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND COMPANY LLC, ET AL., Petitioners, vs. CITY OF LAS VEGAS, Respondent.	CASE#: A-18-775804-J DEPT. XXVI

BEFORE THE HONORABLE GLORIA STURMAN
DISTRICT COURT JUDGE

FRIDAY, SEPTEMBER 17, 2021

RECORDER'S TRANSCRIPT OF PENDING MOTIONS

APPEARANCES:

For the Petitioners:	JAMES J. LEAVITT, ESQ. KERMITT L. WATERS, ESQ. ELIZABETH M. GHANEM, ES. AUTUMN L. WATERS, ESQ. MICHAL A. SCHNEIDER, ESQ
For the Respondent:	GEORGE F. OGILVIE, III, ESQ. PHILIP R. BYRNES, ESQ. REBECCA L. WOLFSON, ESQ. J. CHRISTOPHER MOLINA, ESQ.

RECORDED BY: KERRY ESPARZA, COURT RECORDER

Case Number: A-18-775804-J

Las Vegas, Nevada, Friday, September 17, 2021

[Case called at 10:04 a.m.]

THE COURT: We'll get the appearances of counsel and then we'll begin.

MR. LEAVITT: Would you like us to go first, Your Honor, Plaintiffs?

THE COURT: Sure.

MR. LEAVITT: Good morning, Your Honor. James. J. Leavitt on behalf of 180 Land and Fore Stars land owners.

MS. WATERS: Good morning, Your Honor. Autumn Waters on behalf of the land owners, as well.

MS. GHANEM: Good morning, Your Honor. Elizabeth Ghanem on behalf Plaintiffs.

MR. WATERS: Kermitt Waters, Your Honor, on behalf of the landowners.

MR. LEAVITT: And also our two legal assistants, Jennifer Knighton and Sandy Guerra, in the courtroom with us also, Your Honor.

THE COURT: All right, with you?

MR. SCHWARTZ: Good morning, Your Honor. Andrew Schwartz for the City.

MR. MOLINA: Good morning, Your Honor. Chris Molina for the City.

MR. OGILVIE: Good morning, Your Honor. George Ogilvie on behalf of the City.

MR. BYRNES: Good morning, Your Honor. Phil Byrnes for the City.

THE COURT: All right, counsel. So Mr. Schwartz, you want to pick up where you left off on whatever day it was?

MR. SCHWARTZ: Yes, Your Honor. Thank you.

I want to thank the court for giving me more time to address the claim that the property owners have constitutional rights to building permits just by virtue of zoning. This is -- it's an extremely important principle. What the developer is proposing here is a radical change in land use law and property law in Nevada. And that's not an exaggeration. In the 1970s and '80s, the State Legislature for Nevada gradually changed the land use regulatory system in Nevada. Whereas the former system was marked by very little regulation and property owners had great freedom to use their property and build on their property as they saw fit with very little oversight from the government.

In the 1980s and 1990s, the Nevada Legislature made a C change in the way land use is regulated in the State of Nevada. It determined that there should be much more -- much more regulation to make sure that development served the community, that it was safe, that it was aesthetically pleasing, that it provided proper infrastructure, that communities were planned for the best interests of the community. And there was a de-emphasis on the rights of property owners to build on property. And I wanna take the Court through that change because that affects -- that directly affects what the alleged constitutional right that's at issue here, whether it's valid or not, and I think the Court will see it is

not a valid point.

So it's clear from all authority, including the *Oliver* case that the developer likes to rely on, that zoning does not confer rights. The purpose of zoning is to exclude certain uses and to limit an owner's use of the property. So the theory that a property owner has constitutional rights granted by zoning doesn't fit with the entire concept of zoning. The first zoning case was *Euclid v. Ambler Realty,* and in that case -- prior to 1926 and prior to that case, developers in the community, or owners, could do virtually anything they wanted with their property. The only limit on their use was of a public nuisance. In that case, the U.S. Supreme Court upheld a zoning ordinance which said that the community could exclude certain uses from a zone to -- it was to allow a zone to be solely residential. So it excluded industrial uses and noxious uses that might interfere with the residential use.

That's the purpose of zoning. And unanimous Nevada authority holds that zoning does not confer property rights. It's not for the interests of property owners, as the developer claims here. And a denial of a property right is not a taking. That's not the test for a taking. If you're denied a property right, your remedy is a petition for judicial review requiring the government to allow you to do what you say you have a right to do. But the test has nothing to do with takings. The test for takings is the economic impact of the regulation on the property.

Now, the developer relies on the *Sisolak* case for the proposition that zoning confers constitutional rights on the property. They can do whatever they want as long as it's permitted by -- it's a

permitted use in the zone. In other words, if it's -- if residential use is a permitted use in the zone, the developer claims -- and this is -- this would completely up-end all land use regulation in the State of Nevada. The landlord contends they have a constitutional right to build anything they want without this -- the exercise by the government of discretion to limit that right, and they claim that *Sisolak* supports that theory. It does not. *Sisolak* is a takings case -- a physical takings case where the Court held it had nothing to do with zoning. It had everything to do with the owner's rights to exclude other people.

And the Court said if you -- if property is vested in an owner, which means you own it, you own the fee simple, that's the use of vesting in the *Sisolak* case. To get a preliminary title for it, it tells you who owns the property. It's called vesting. The property is vested in such. In this case, the property was vested in the developer. It owned the fee simple interest. The *Sisolak* court did not say that the property owner has a vested right to build whatever they want as long as it's a permitted use by zoning. The *Sisolak* court refers to zoning in the context of damages of the value of the property. The zoning permitted certain uses.

So in valuing the property, the court said, yeah, you consider the zoning, what's allowed. If zoning allows only residential, and open space, and recreation, well, you can't value the property based on a -- you know, a high-rise office building. That's the context in which the court in *Sisolak* discussed the zoning. It had nothing to do with the right to exclude others. It doesn't matter what the zoning is if you're denied

the right to exclude others of physical taking. It doesn't matter what the zone is. You're entitled to compensation for a physical taking.

That's not this case. This motion goes to the categorical under *Penn Central* claims, which only concern regulation of owner's use of the property. And the court said, in *Sisolak*, not that the property owner had a right to build in the air space, but it had a vested right in the air space, which means it owned the air space. That's all it said. That's all that that decision meant.

In this case, as I'll explain, the R-PD7 zoning grants the City broad discretion to restrict the owner's use of the property. The developer's theory is completely inconsistent with that ordinance. And as I indicated -- as I argued at some length on Tuesday, *Sisolak* is a physical takings case and has nothing to do with the categorical and incentive claims, which concern regulation of use.

I want to take the Court through two state statutes and the Las Vegas zoning ordinance, which I think will make it abundantly clear that property owners do not have constitutional rights to build whatever they want as long as it's a permitted use. But I do want to refer the Court to Judge Herndon's decision. And by the way, Judge Herndon's decision was a final decision on the merits. It was not set aside by Judge Trujillo. She has not issued any orders in the case.

Judge Herndon's decision was well-reasoned. He took the proposed findings of fact and conclusions of law of both parties, and he took some from each, and he modified the decision. He really dug deep into these issues. And everything he said in his decision is

well-supported by Nevada and federal case law and statute, and the developer can't refute any of it because it's all right.

But at page 16 of his -- which is 10 of 11, Your Honor, in our exhibits.

THE COURT: No, I've got it.

MR. SCHWARTZ: Page 16, Judge Herndon said, "because the right to use land for a particular purpose is not a fundamental constitutional right, courts generally defer to the decisions of legislatures and administrative agencies charged with regulating land use." And Judge Herndon goes on at some length to explain how the land use regulatory system in Nevada works. There are separation of powers. Local agencies have broad discretion to regulate land for the community good. And the only situation in which a property owner is entitled to compensation for a taking is where the regulation either wipes out or virtually wipes out the property's value or interferes with objective investment-backed expectations.

And on page 20 of Judge Herndon's decision, he cites the authority for that proposition. It's the *State v. 8th Judicial District* case, *Kelly v. Tahoe Regional Planning Agency,* and the *Boulder City* case. And they all say the same thing. This is the test for a taking. Whether the property owner was denied some right is not the test for a taking, even if it had the right. And of course, it didn't have the right.

Now, I'd like to refer the Court to tab 39, please. And that is the Nevada Revised Statutes 278.150. And that's the -- this is the statue that orders local agencies to prepare a master plan. A master plan and

general plan are synonymous. And in subsection 2, it says that these master plans will be a basis for development of the city. And then in section 5 -- subsection 5, it says that the governing body shall adopt each of the elements in its master plan set forth in NRS 278.160.

278.160 is tab 40. And that says that the master plan, with the accompanying charts, drawings, diagrams, schedules, and reports, may include the following elements. And one of those -- and you can see a number of elements. And one of those, in subsection D, is the land use element. And it sets forth in subsection D that they concern community design and standards and principles governing subdivision and suggested patterns for community design and development. And a land use plan inventorying the types of land use and comprehensive plans for the most desirable utilization of the land.

So then the legislature adopted later, in a later section, in NRS 278.250, which is back to tab 16, Your Honor. NRS 278.250. And this is the zoning ordinance, the statute that requires local agencies to adopt zoning ordinances. And it says, within the zoning district, it, that means governing body, can regulate and restrict. So zoning regulation restricts. It doesn't confer rights. There is no law in the State of Nevada or anywhere else that holds that zoning confers rights. It's a radical proposition that would take the State back before all of these statutes to a place where property owners had virtual freedom to do what they wanted with their property. That's in the past. That's not this case.

It says it can regulate and restrict the -- basically, use of property. And it says in 2, and this is significant, the zoning regulation

must be adopted in accordance with the master plan or land use and the design. And then what follows is A through O. And this tells cities what they should do to regulate and restrict use of property to protect community interests to make for a well-planned community.

And then in subsection 4, the legislature said, in exercising the powers granted in this section, the governing body may use any controls relating to land use or principles of zoning that the governing body determines to be appropriate.

So this is significant in that you have a master plan, and the master plan is the equivalent of a constitution. And the statutes implement the constitution. They have to be consistent with the constitution. Same thing with a master plan and zoning ordinances. The master plan is like the constitution. It sets all the policies for what land can be used for and the zoning has to be consistent with it. It has to implement that.

But, moreover, these statues -- and if you look through A through O, it kind of covers the universe of what you want to do to point -- to have a sound planning apparatus. It grants the government wide discretion -- wide discretion, to restrict the use of land for the community. And that discretion is completely inconsistent with the theory that zoning ordinances grant constitutional rights to do what you want without discretion. You cannot have discretion and at the same time have a constitutional right to a building permit. They can't coexist.

Okay. Now, I'd like to refer the Court to the R-PD7 zoning ordinance. Well, let me back up. Tabs 28 through 33, I won't take the

Court through those in detail, but those are all the -- this is the Unified Development Code, which is part of the Las Vegas Municipal Code. And these set the general principles for zoning and planning in the City of Las Vegas. And you will see that these -- and I've highlighted portions of these ordinances that show that the City has wide discretion. It exercises discretion at all levels in approving building permits.

So now, looking at -- oh, here it is. Tab 27, Your Honor. This is the R-PD7. The R-PD zoning ordinance. And I will spend a little time with this because this is what's at issue here. Tab 27 says, the RPD district has been to provide for flexibility and innovation in residential development with emphasis on enhanced residential amenities, efficient utilization of open space, the separation of pedestrian and vehicle traffic. Emphasize efficient utilization of open space. Further on in that section, it says that, the regulation has to remain sufficiently flexible to accommodate innovative residential development.

Then, in Subsection C, it sets forth the uses that are permitted -- permitted in an RPD zone. In this case, the property is zoned R-PD7, which means no more than seven residential units per acre, or other -- whatever uses, group care homes, childcare, family homes. No more than seven per acre. Then section C(3) says that the director, that's the Director of Planning, gets to use his or her judgment in applying this ordinance. And then in subsection D, it says, the approving body, and this is the Planning Commission and the City Council. The City Council has the final word on building permits. The approving body may attach to the amendment to an approved site development plan

review whatever conditions are deemed necessary to ensure the proper amenities and to assure that the proposed development will be compatible with surrounding existing and proposed land use.

So what we see is in state law, a wide degree of discretion. And in state statute. Judge Herndon went through in detail the wide discretion granted to local public agencies in Nevada under Nevada case law. And now the statute that applies here shows a wide degree of discretion. This says that the City can approve a development project that proposes a permitted use. Approve it with conditions or disapprove it. It has that discretion. The only constitutional limitation on that power is the takings clause. And the only -- and the takings test is, does the regulation wipe out or nearly wipe out the economic value of the property or interfere with objective reasonable investment-backed expectations. That's the test.

Okay. So the Nevada Supreme Court has said, the Nevada Supreme Court is unanimous -- unanimous, that where there is discretion, there is no property or vested right to a building permit. It's just that simple. And there's clearly discretion in this case. And so those cases are directly applicable. I want to refer the Court to tab 18, the *Stratosphere* case. They all say the same thing, but *Stratosphere* is a good case because it involves the City of Las Vegas, and it involves the same developments scheme here, a site development permit that's required for every development in the City of Las Vegas. And in the *Stratosphere* case, tab 18, at 120 Nev 527, the Court said that in the context of governmental immunity, we have defined a discretionary act

as an act that requires a decision requiring personal deliberation and judgment.

The language used in Section 19.18.050 clearly indicates a discretionary act on the part of the City Council. And that's -- 19.18.050 is the requirement that the City approve a tentative map, and that is discretionary. All of the other permits required, you got a site development permit, a rezoning permit, a general plan amendment, all involved discretion.

And then, I'm at 120 Nev 528. The court said -- and this just demolishes the developer's claim in this case. Under section 19.18.050, the City Council must approve the Stratosphere's proposed development of the property through the City's site development plan review process. And the site development plan review process which is required here is UDC 19.16.100, and that's tab 33. And that says every application for development in the City of Las Vegas has to have a site development permit. And this is saying that the City must approve the Stratosphere's proposed development of the property through the City's -- the site development plan review process. That process requires the Council to consider a number of factors and to exercise its discretion in reaching a decision. There is no evidence that Stratosphere had a vested right to construct the proposed ride.

We have -- we've cited *Boulder City*, tab 19, the *T* case, tab 20, *City of Reno*, tab 21, *Havana Contractors*, tab 22, *City of Reno*, tab 23, *Board of County Commissioners*, tab 24. They all say the same thing.

Now, the developer claims that these cases are not relevant

because they were supposed -- they were petition for judicial review cases, but that's -- that is dead wrong. A petition for judicial review is a procedure. It is a remedy. It is not a -- there's no substantive law of petitions for judicial review. No substantive law. And the developer hasn't cited any authority that there's a substantive law of petitions for judicial review. In a petition for judicial review, the standard is substantial evidence, limited to the administrative record. The remedy is equitable. That's a procedure and a remedy. There is no substantive PJR.

So those cases that rely on the discretion granted to public agencies -- and the law in Nevada is there is no property right conferred by zoning. That's what those cases say. That is the Nevada law of property and land use regulations. That applies in a PJR case, or a regulatory taking case, or any case. That's the law. That's the substantive law of property and land regulation in the state of Nevada.

And to establish with finality that this argument that these cases are petition for judicial review cases and therefore don't apply to any other case, I mean, it defies logic, and it defies all of the case law. But if the Court would please look at the *Boulder* case -- *Boulder City* case, tab 19, at page -- at 110 Nev 246. So that's on page -- well, page 6 of this opinion, at the top left. It says Boulder City -- Boulder City challenged the denial of its permit as a Constitutional due process violation, not a PJR. Boulder City could not have violated Cinnamon Hill's substantive due process rights. The grant of a building permit was discretionary. Therefore, under the applicable land use laws, Cinnamon

Hills did not have a vested entitlement to a Constitutionally protected property interest.

That's this case. This is the Nevada Supreme Court saying they've got nothing. Their claim is wrong. This is not a PJR case, or at least that claim wasn't subject to a PJR. It was a constitutional challenge, just like this case. This is a challenge under the takings clause in Nevada and the federal constitutions. It's a constitutional challenge. I mean, *Boulder City* proves the point that this is not -- that there's no substantive law of PJR. If that were the case with the Boulder City, the Supreme Court in the *Boulder City* would have said, well, we've got two parallel systems of land use law in this state. One if you sue for a PJR, one if you sue for a constitutional violation. That's kind of a ridiculous proposition.

So what the developer is saying here is that if you are this -- that we have two parallel systems of property law and land use law in this state. So if you're a City Council, and you're presented with a building permit application, if you deny it or condition it in a way that the developer doesn't like, in other words exercise -- if you exercise your discretion, if the developer later after this happened sues for a PJR, the court is going to apply an abuse of discretion standard, a substantial evidence standard, and a failure to comply with the law.

But if the developer later sues for a regulatory taking, you have no discretion. That's a paradox. That can't be. That can't be the law, and it isn't. And there's no -- if you look at the developers briefs and their proposed findings, there is no authority to support what they're

saying. None whatsoever. All the authority is on the other side.

In addition to this, Your Honor, we have the 9th Circuit in the 180 Land case. The developer sued the City and two members of the -- former members of the City Council in federal court. And they made the identical claim that they're making here, that they had a constitutional right to a building permit for the 103rd Street property -- for the Badlands property. And the 9th Circuit held -- and again, they made it the identical argument, and the 9th Circuit held no. And our reading of Nevada law is you do not have a property or vested right in zoning. And that was a final decision between the same parties, on the merits, on the identical issue. And under general principles of issue for preclusion, that decision ought to be binding. You don't get a re-do. Once that decision has been made, it binds.

By the way, on the previous page of the *Boulder City* case, at the bottom right, that's page 5, I just want to refer the Court to the part I've highlighted there where the court said no taking. No taking because the denial of the permit didn't destroy all viable economic value. And so that's the test for a taking, not whether you've been denied some right, whether you have that right or not.

And Your Honor, the 9th Circuit decision that I referred to is tab 25. And there, the Court said, to have a Constitutionally protected property interest in a government benefit such as a land use permit, an independent source such as state law must give rise to a legitimate claim of entitlement that imposes significant limitations under discretion of the decision-maker. So what's the court saying there? It's saying that

property -- what property interests an owner has, is determined by state law. They're referring to the Nevada law of property. We reject as without merit Plaintiffs' contentions that certain rulings in Nevada state court litigation established that Plaintiffs were deprived of a constitutionally protected property interest.

Now, Judge Williams' order -- Judge Jones ordered that findings of fact and conclusions of law in the 17 acre case that the Court received yesterday from the developer's counsel. Those are interlocutory orders. But I understand that they are -- they can be persuasive, but they also have to be correct.

Well, in denying the petition for judicial review in the 35 acre case, Judge Williams was correct. He said -- and that's at tab 26, the decision of the City Council to grant or deny applications for a general plan amendment, rezoning, and site development plan review is a discretionary act. A zoning designation does not give the developer a vested right to have its development applications approved.

Also, in that same decision, Judge Williams said, compatible zoning does not ipso facto divest a municipal government of the right to deny certain uses based upon considerations of public interest. In that the developer asked for exceptions to the rules, its assertion that approval was somehow mandated simply because there is R-PD7 zoning on the property is plainly wrong.

Then Judge Williams said, it is well within the Council's discretion to determine that the developer did not meet the criteria for a general plan amendment or waiver found in the Unified Development

Code and to reject the site development plan and tentative map application accordingly, no matter of the zoning designation. Then Judge Williams said, the Court rejects the developer's argument that the R-PD7 zoning designations on the Badlands property somehow required the Council to approve its applications. Statements from planning staff or the city attorney that the Badlands property has an R-PD7 zoning designation do not alter this conclusion.

Now, the developer argues that those statements from Judge Williams were made in the context of a petition for judicial review and that they have no application to their regulatory takings claim. And I submit that that is dead wrong. There is no substantive law of PJR. Judge Williams cited authority, extensive authority to Nevada property laws and land use regulatory laws. The fact that it was a PJR has nothing to do with the facts and the underlying legal basis for Judge Williams' decision to deny the petition for judicial review. It wasn't PJR law.

The developer also argues that Judge Williams' decision was based on Judge Crockett's finding that the Badlands was subject to a PROS designation in the City's general plan, which does not allow residential use. And that when Judge Crockett was reversed by the Nevada Supreme Court, that his conclusion that the property was -- Judge Crockett's conclusion that the property, the Badlands, was subject to the PROS designation, goes out the window. Well, that's a fact. The PROS designation was imposed by ordinance, by the City, and repeatedly reconfirmed by ordinance of the City, and it was in effect

when the developer bought the property. It's a fact. Judge Herndon found that that was a fact.

You can't just get rid of facts just because you sue under a different cause of action. That's a fact. And the effect of the PROS designation is the law. Nevada Revised Statutes 278.150, the R-PD7 zoning, and the City's general plan all provide that the PROS designation applies to this property and does not permit residential development. The City has discretion. Judge Williams said the city has discretion to change the PROS designation. If it has discretion, the property owner cannot have a constitutional right to a building permit. I cited to Judge Herndon's findings of facts and conclusions of law, where Judge Herndon said a landowner does not have a fundamental constitutional right to use the land for a particular purpose. It's directly on point.

And now, this a -- and the next point, Your Honor, is an absolutely crucial point. The developer claims that eminent domain cases hold that a property owner has a constitutional right to build whatever they want as long as it's a permitted use by the zoning. And they cite for that proposition several cases, including -- and this is their Exhibit 1. They cite *City of Las Vegas v. Bustos* and *Clark County v. Alper* [phonetic]. Okay. So this case, the instant case, is about whether the City can restrict the use of property as long as it doesn't wipe out the value. That's what this case is about.

So the Court is asked to determine whether the City is liable for a regulatory taking. That's an inverse condemnation, where the property owner is the Plaintiff, claims what you've done is wiping out or

nearly wiping out. And the issue here is liability, first. And if the City is liable, then the Court or a jury determines what the just compensation is, and that's based on the value of the property. In sharp contrast, in an eminent domain case, the City initiates the action, and it concedes liability. It concedes liability and the only issue is the value of the properties.

Yeah. Inverse condemnation, the liability is the issue. If liability is determined based on the tests for liability, which are wipeout, or near wipeout, or investment-backed expectations. If there's a determination taken, then the Court looks at damages. The cases that the developer sites are either eminent domain cases where liability is not an issue, so they couldn't possibly -- they couldn't possibly state the standard for liability for a regulatory taking, and they don't. And there are a couple of cases in there that are inverse cases, but the developer cites to a discussion of value.

In the *Alper* case that the developer relies on saying eminent domain, regulatory takings, same thing. Apply all the same rules. Well, of course, that's ridiculous because liability is not an issue. Liability is at issue here. Liability is not an issue in eminent domain cases.

In the inverse cases the developer cites, the discussion was about value, that there had been a finding of a taking. And the discussion was value, and in that case, the *Alper* court said we determine value the same way we do in eminent domain cases. It makes a lot of sense. Those cases say that in determination of value, an appraiser, the expert witness for each side, has to go through the following analysis.

The appraiser determines what the property can be used for physically, economically, and legally. So in the determination of what the property can be used for legally, the appraiser must consider the restrictions on use of the property from zoning. The appraiser doesn't consider what rights zoning grants because zoning doesn't grant rights. It restricts the use.

These cases say that the appraiser cannot assume a use of property that's not allowed by the zoning in valuing the property unless there's a reasonable probability that the City will change the zoning. That's the analysis that an appraiser goes through in giving an opinion of value of the property.

So the part of these cases that the developer relies on actually say the opposite of what the developers say. They say you can't -- you have to consider the zoning limits on the use of properties and value. You can't go wild and say, well, the property could be used for a 40 story office building if that's not allowed by zoning. Those cases don't remotely say what the developer says here. Nevada eminent domain law provides that zoning must be relied upon to determine a landowner's property interest. That's false. To determine the property value.

Your Honor, those eminent domain cases and a couple of inverse cases that discuss value, in addition to statements by the former city attorney and a planner, are the developer's case. They say that's the law. And of course, what Judge Williams said, "statements from planning staff for the city attorney that the Badlands has an R-PD7 zoning

designation, do not alter this conclusion. It's just that -- it's pretty simple. If the former city attorney wasn't familiar with the law, the state law, local law, or constitutional law, that doesn't bind this Court or a member of the planning staff. None of those statements are relevant.

What binds this Court are cases from the Nevada Supreme Court and statutes from the Nevada Legislature. And there is no [indiscernible]. As I said, the Court is being asked to say that discretion is out the window in Nevada for land use planning. And that's not an exaggeration. And you would think to make such a radical change in the law, that the Court would want to rely on at least one case, at least one statute. But there's absolutely nothing. If you read the developer's cases, there is no case that says what they are claiming here, and all the authority is the opposite.

Again, their theory is -- it just isn't -- there's a disconnect between their theory and zoning law. Zoning doesn't grant rights. So, you know, the developer never says, well, you have a right -- you have a right to build. They're relying on -- the developer is relying on Judge Williams' order, and that's tab 26. And at the end of Judge Williams' order -- I'm sorry it's not tab 26. Your Honor, I'm having trouble putting my finger on that order.

But the order says, in their -- in the -- in granting this motion to determine property interest, it says two things. One, the property is zoned R-PD7. That's never been at issue. Of course, it zoned R-PD7. The City has never disputed it. The developer acts like that's some sort of a victory for the developer that the City has denied that. And the

developer says the City denies that there is R-PD7 zoning or that zoning has any effect on the use of the property, the developer's right. And that's a straw man argument. We don't argue that. We argue that both zoning and the general plan apply. And they apply in very -- in very clear ways under local and state law.

But they submitted an order to Judge Williams, and they led him into error. The order says that single family and multi-family residential uses are the, T-H-E, the legally permitted uses in the plan. Now, if you look at permitted uses by right in the property, if you look at tab 27, and the R-PD residential zoning district, it says that the R-PD district provides for flexibility and innovation in residential development with emphasis on enhanced residential amenities, efficient utilization of open space, now that's key. So single family and multi-family are not the only legally permitted uses, but also open space. And then, if you go down to subsection C, we see that there are home occupations, childcare family homes, childcare group homes, all permitted.

So they led Judge Williams into error when they submitted an order that said -- that made it sound like that residential use, single family and multi-family use, the use they want to make, are the only legally permitted uses in the district. That's false. Other uses are permitted, including open space.

So here's what happened in this case. The developer ignores -- avoids the history of this case. In 1991 -- in 1990, '91, '90, the City approved the Peccole Ranch master plan, 1539 acres. It re-zoned a 614 acre part of that property R-PD7 in a tentative zoning. That's how the

City worked back then. It tentatively zoned property, and then when the property was built out, it would make the zoning permanent. So in 1991, the City re-zoned a 614 acre portion of the property R-PD7.

Then, in 1992, the City Council adopted a new general plan. This was the City really changing the way it did things. It became much more active, had a much more rigorous land use regulatory program with the 1992 general plan. And in that plan, it designated 250 acres of that 614 acre property PROS, parks, recreation, and open space, that did not permit residential use. And the rest of the property was designated residential in the general plan, a residential use, a low-density or a medium-density residential use in that [indiscernible]. That's exactly what R-PD7 -- R-PD zoning [indiscernible].

Okay. So the developer is treating this case like *Lucas* case, where you've got a lot, one lot, surrounded by other residential lots, all developed. And the State of South Carolina says you can't build on this lot. Well, a house on that lot is the only use for that lot. And you know, I think that it makes sense. Well, if the only use you've got is to build one house on your property, and the government says no, you can't, well, that could be a taking. That very well could be.

But that is not this case. We had a 1500 acre master planned community, and the whole point of the master plan is to decide where the houses are going to go, where's the recreation and open space going to go, where the roads going to go, the fire station, the hotel and casino, the retail, to plan a sound community. A community that's safe and provides quality -- a high quality of life. That's the whole point of these

regulations.

And so when the City re-zoned a portion of the property, of the PRNP, the 614 acres, to R-PD7, it did exactly what it's supposed to do. In that area, that large area, it decided, well, here are the houses and here is the open space. And in fact, in approving the Peccole Ranch master plan, the City conditioned the approval on the set aside of recreation and open space. The zoning -- under the zoning. The zoning requires it.

Again, the City has discretion as to where the open space is going to go. But this zoning requires it, and it was part of the approval. They approved a project that had recreation and open space in it, a golf course. It was also a condition of the developers of the PRNP to participate in a gaming district, that they set aside a golf course. That was a condition.

Now, the developer argues -- and this is false. The developer argues that -- it's a straw man argument -- that the City contends that those conditions of development -- that the City argues that those conditions required that the property stay in open space or recreation permanently. That is not our argument. The conditions -- and the developer also argues there were no such conditions because the approvals of the Peccole Ranch master plan don't say, as a condition of zoning approval, you will set aside open space. That's not how this works. That's not how these approvals work. They approved a project that had in it, streets and houses, retail, a number of things, and open space. So their approval -- everything in the approval, is a condition. It

doesn't have to say this is a condition. However, the gaming district approval was specifically conditioned on the set aside the golf course.

So the Peccole is then built out. The Peccole Ranch master plan, with thousands of housing units, hotel, casino, retail, and the golf course. And this developer participated in that. Built the Queen Church Towers, Tivoli retail facility, and benefited from the amenity of the open space.

Now, the developer bought the open space and claims I have around the build in this area because I have a -- you know, I have -- because the property is zoned R-PD7. Again, Your Honor, their theory is absurd. That means that -- every property is zoned for some uses, some for residential, some for industrial, some for agricultural. Every property in this state, practically, is zoned, except maybe federal property. So that means that any owner of property has a constitutional right to build whatever they want as long as it's a permitted use in the zone.

It's just such a fantastic notion. It also means that anytime a government agency denies the development permit or conditions it, it's a taking, because they have a constitutional right to develop. Again, it's just -- it's stretching the law to the point of breaking. That can't be the law. But that's what they're asking to do. And they say that they have Constitutional rights to build in the property. Well, they say they have a right to build single or multi-family residential. Well, does the City -- you know, apparently the City doesn't have any discretion. Can the City limit them to one house? If they have a right to build residential, what does that mean? One house? In this case, 133 acres times 7, the density, the

931 houses? What rights do they have?

What they're saying, again, amounts to the City has no discretion. They've never said, well, exactly what right they have, and that's because their theory just doesn't fit. It doesn't fit within the law of zoning or taking. It gets even more absurd. This means that -- their theory would mean that every time a city or county re-zones property to impose any new restrictions, it's a taking because they have a constitutional right under zoning. So that means the City can't change the zoning without paying compensation. The whole thing just is -- just collapses, Your Honor. And again, the R-PD district says the City is to provide enhanced residential amenities and sufficient utilization of open space that it approves.

UDC Section 19.10.050 says that in an RPD zone, single family and multi-family and supporting uses are allowed. The open space, the golf course, and the drainage for the 133 acre property was a supporting use. That's allowed. Residential is not the only use alone. And in fact, R-PD zoning encourages open space. It says single family and multi-family residential or supporting uses, to the extent they are determined by the director to be consistent with the density approved for the district and are compatible with surrounding uses. The whole section is just infused with discretion. It's pervasive. And under the *Stratosphere* and other cases, it's pretty simple. If the agency has discretion, there's no property value.

Now, the developer relies on a play on words of the concept of a permitted use, and a permitted use by right. The developer argues

that if a use is a permitted use in a zone, that means they have a Constitutional right to build it. That's not the case. And that obviously isn't the case because the *Stratosphere* case was deciding Las Vegas law. And all zones have a permitted use. That's what the zones are for. Again, *Euclid v. Ambler*. Housing is permitted; other uses are not permitted.

So permitted means that the government can allow that use in the zone. It cannot allow a use in the zone that's not permitted. That's what permitted means. It's not -- it's the opposite of what the developer claims. That limits saying what uses are permitted in the zone and limits the uses in that zone. It doesn't confer rights on owners to make those rights. So their theory is just, again, a big disconnect with zoning law.

The definition of a permitted use in Las Vegas is a -- a permitted use is permitted as a matter of right. Not by right. They misquoted in their order they presented to Judge Williams. It's permitted as a matter of right. Single family and multi-family residential uses are permitted uses. So that means they are permitted as an added right in an R-PD7 zone.

In tab 28 is the definition of permitted use, Your Honor. So the developer ignores all the authority that says that just because a use is permitted in the zone doesn't mean that you have a constitutional right, a property right or a vested right, to make that use. The City has discretion. And the definition of permitted has been the same for a long time. So the Court couldn't have decided that the City has discretion, and the owner has no property rights if permitted as a matter of right

meant that the owner has a Constitutional right. That would blow up -- again, that would blow up all land use law and return to an age where owners had virtual freedom to do what they wanted.

The definition of permitted use is a use of land in a zoning district as a matter of right if it is conducted in accordance with the restrictions applicable to that district. That says discretion. In the RPD district, what are the restrictions to that district? Well, you have the -- you have a number of uses that are permitted uses, and then you have all this discretion to require supporting uses such as open space, ancillary uses. Again, the R-DP ordinance is infused with discretion. So permitted as a matter of right doesn't mean at the developer has a constitutional right. Permitted means it's not -- not permitted. The only way that the City Council could allow a use in a zone that's not permitted is to amend the zoning ordinance.

Okay. Now, Your Honor, it gets even more difficult for the developer. They don't have a constitutional right under zoning, but they fail -- the general plan is also an insurmountable obstacle to their claim. How can the developer have a constitutional right under the zoning to build wherever it pleases as long as it's a permitted use where the general plan of the City has designated the Badlands PROS, which does not allow housing. The two aren't compatible. They can't have such a constitutional right because the general plan doesn't allow it.

I cited to the Court Nevada Revised Statute 278.25.02, that's tab 16. It says, all zoning must be consistent with the general plan. I refer the Court to tab 43. This is UDC 19.00.040. It says the adoption of

this title is consistent and compatible with and furthers the goals, policies, objectives, and programs of the general plan. It is the intent of the City Council that all regulatory decisions made pursuant to this title be consistent with the general plan, and then it goes on. And then, it even makes a stronger statement. For purposes of this section, consistency with the general plan means not only consistency with the plan's land use and density designations, that's the PROS, that's a land use and density designation, but also consistency with all policies and programs of the general plan, including those that promote compatibility of uses and densities and orderly development consistent with available resources.

So this says two major -- three major things. One, zoning must be consistent with the general plan. Zoning implements the general plan. The general is the Constitution. It's a higher authority. And it says that in implementing the general plan, the City has -- in implementing zoning ordinances, they have to be consistent with the letter of the general plan. You know the land use designations in the general plan are controlling. They're also kind of the spirit of the plan and all of the plan's provisions.

In the *AmWest* case versus *City of Henderson*, the Court said -- the Nevada Supreme Court said, at the bottom of the first page in yellow, we agree with the District Court that AWD does not have vested rights in its 1989 master plan. In order for rights in the proposed development project to vest, zoning or use approvals must not be subject to further governmental discretionary action affecting the project.

And then on the next page, Your Honor, in the paragraph that starts with without overruling, the Court said, "This Court held, pursuant to NRS 278.250, that municipal entities must adopt zoning regulations that are in substantial agreement with the master plan." The *Nova Horizon* case, at 105 Nevada 92, a 1989 case, says the same thing. So if the developer has to obtain an amendment of the general plan to allow residential development in the Badlands, it can't have a constitutionally protected property or vested right on their zoning to build houses.

Nevada -- excuse me. Las Vegas UDC 19.16.010(a) is tab 29. It says in subsection A, "as otherwise provided by this title, approval of all maps, vacations, re-zoning, site development plan reviews," remember, a site development plan review is required for every development project in the state with a few exceptions." Special use permits, very -- the law shall be consistent with the spirit and intent of the general plan. I cited in the subsequent tabs are a number of other ordinances -- I won't take you through those in detail -- that require zoning to be consistent with the general plan, all development to be consistent with the general plan.

I will refer the Court, though, to the UDC 19.16 .100, which is tab 33. I think this is significant. I've highlighted in yellow the important parts of that ordinance, Your Honor. And that says that -- in subsection A, the purpose of the site development plan review process is to ensure that each development, number one, is consistent with the general plan, this title, and other regulations. And then in the subsequent sections, it just goes to show how much discretion the City exercises. You know, it

contributes to the long-term attractiveness of the city. Well, that requires discretion. It contributes to the economic vitality of the community.

Your Honor, every property is unique, and you can't have one size fits all in zoning and planning regulations. What the legislature is telling cities is you shall use your discretion to plan your communities to achieve these objectives. There has to be discretion.

THE COURT: It this, like, a good time we could discuss -- we have these four different cases pending and each of these four parcels that -- the developer chose to do it this way. Each of these four parcels were submitted separately. The cases are all separate. And they're all at a different point in the process. I'm not going to say procedure because procedure is for court. I would say zoning process. So can we talk about that and how --

MR. SCHWARTZ: Yeah.

THE COURT: I mean, thank you very much for the historical perspective, but how does this apply to this situation we're in specifically here? We have the 17 acre case with Judge Jones. I appreciated seeing the order yesterday. I thought it was interesting that he said he felt that Herndon's order was very specific to Herndon's -- the situation in Herndon's case, which is the 65 acres, which apparently never had anything submitted. So clearly not ripe. I mean, Herndon's right on that. I don't think anybody can question it. He's right. That case is not ripe. Nothing was ever done.

The 30 -- the 17 acre, that seems to be this whole mess where that was approved, and then the property -- the neighbors sued,

so we had Crockett's order. It goes up to the Supreme Court. Somehow, in the midst of all this, something happens. I've never really been clear on what happened to the 17acre case. It's not mine. I don't care. But it is it relevant, because what Judge Jones says is look, this is a different case. Seventeen acres, we have this whole problem of, you know, did they or didn't they revoke it or, you know. And, you know, Herndon says, well, it doesn't matter, it was void because while Crockett's order was in place, that voids it. But then, the Supreme Court reinstates it.

So there we have the problem of Judge Williams' case, which is the 35 acres. Again, a different situation. The petition for judicial review is denied, and then they proceed on this other, you know, what we now understand to be -- it should be a separate case, which is this constitutional part of the case. And there, we have this whole problem where there was some action taken that had to do with amending the general plan. And so that's -- he sees that as significant and that's different in that case.

And so then we get to this case. So can we just talk about, I mean, because seriously, we've had enough of this.

MR. SCHWARTZ: Sure.

THE COURT: Can we just talk about some specifics of the case, please?

MR. SCHWARTZ: Well, that's what I've been doing. And this is a motion to determine property interest.

THE COURT: No, I haven't heard anything about the facts. So I would like to get into the specifics, because I see each of these four

cases is very different. They're all at a very different stage. I don't see how you could say well, Judge Trujillo did this, or Judge Jones did that, or Judge Herndon did this. They're all different.

MR. SCHWARTZ: I agree, and I'm not saying that that's what --

THE COURT: So let's talk.

MR. SCHWARTZ: I'm talking about the *Stratosphere,* and the other cases, and the statutes.

THE COURT: Let's move on, please.

MR. SCHWARTZ: That applies directly to --

THE COURT: Let's talk very specifically the history of this case, of these facts, because again, each of these cases have unique facts. Very different. So we're talking about 133 acres. Let's go. Let's go.

MR. SCHWARTZ: Okay. So if the Court thinks that Judge Herndon was right about the --

THE COURT: A hundred percent.

MR. SCHWARTZ: -- the ripeness --

THE COURT: Yes.

MR. SCHWARTZ: -- this is the exact same situation because --

THE COURT: And is that because what happened here is the City Council didn't, technically, act.

MR. SCHWARTZ: Correct.

THE COURT: They took if off calendar.

MR. SCHWARTZ: Correct. The burden is on the developer, and that's the *Haney* [phonetic] case, and we cited at tab 13. And there are other cases. The burden is on the developer. If they want to sue for a taking, they've got to file at least two applications and have them denied on the merits, and they have to be for just the property at issue. They can't be for that and the other property. Because if you combine it with other property, well, the decision maker could have other considerations that involve that other property. It's got to be two applications for the property at issue, and they have to be denied. And then you may have a ripe claim if there's no more discretion in the City.

That never occurred here. They say they filed four applications, but one of them was the 133 applications, which was never decided on the merits, so that doesn't count for taking purposes, for ripeness purposes. And the NDA --

THE COURT: And again, this is the developer chose to do it this way.

MR. SCHWARTZ: Yes.

THE COURT: They wanted to submit one massive plan for all 200-and-whatever acres, they could have. They chose not to. They did it in these little -- these segments. They broke it up.

MR. SCHWARTZ: Okay, yes. So why --

MR. LEAVITT: If I might interrupt?

THE COURT: No.

MR. SCHWARTZ: Your Honor, I object to Mr. Leavitt.

THE COURT: I told him to sit down.

MR. SCHWARTZ: He's constantly interrupting my arguments.

THE COURT: I told him to sit down. Thanks.

MR. SCHWARTZ: I'm sorry?

THE COURT: I said I told him to sit down. Thank you.

MR. SCHWARTZ: Okay. Your Honor, the other three applications that Mr. Leavitt said were for the 133 acre properties were one major development agreement, but that wasn't a site specific application for the 133 acre property. A development agreement basically does two things. It says if you approve it, then the government won't change the law, but you still have to provide -- file the site development permit, a zoning permit, a general plan amendment, other permits under the UDC to have an application that the City could have acted on that only concerned the 133 acre property.

So that doesn't count. And Judge Herndon went into great detail to explain why it didn't count, because they made the same argument. Then they say they filed applications for a fence and for access. Those applications were not to develop the property such that they could be denied any development and habitation. They were just for certain things on the property. They never -- and this is in -- the assistant city planner filed a declaration, and I can get that declaration for the Court. They never filed the right application. They weren't denied. That's false that they were denied.

They were required to file a certain type of application, as to which, the planner has discretion. Now they say, oh, that planner

abused their discretion. Well, they can't come in here in a takings case and argue that. If there was an abuse of discretion, they had a remedy of a petition for judicial review if they wanted a fence or if they wanted access. They didn't do that. The statute of limitations is past. They can't come in here and ask this court to conduct what is essentially a petition for judicial review and review the decision of that planner about what type of application was required.

Again, access and a fence. This is about denial of any use, their third cause of action and, therefore --

THE COURT: And so then how did it get on calendar? Because there's a lot in their complaint about all these things that counselor said. Counselor Cerroda [phonetic], he said this. And then there's all -- there's just all these factual allegations of all these, like, things that people were saying and how this is all some big plot.

MR. SCHWARTZ: Your Honor, that is all a complete red herring. A taking, the test is quite simple, *Boulder City*, appellate, state. The takings test is quite simple.

THE COURT: Okay.

MR. SCHWARTZ: You have to have an action of the governing body alone that restricts your use.

THE COURT: And so -- again, so -- and actions is what I'm looking for.

MR. SCHWARTZ: Yes.

THE COURT: So is there an action?

MR. SCHWARTZ: No.

THE COURT: It somehow gets on the agenda, and then somehow, it gets off the agenda.

MR. SCHWARTZ: What? I'm sorry, the --

THE COURT: The 133 acres.

MR. SCHWARTZ: -- 133 [indiscernible] decision?

THE COURT: The 133 acres.

MR. SCHWARTZ: So --

THE COURT: Somehow it's on the agenda, and then it's just, their version, magically off. Your version, it wasn't final and couldn't be submitted.

MR. SCHWARTZ: It wasn't magically off. It was all conducted out in the open.

THE COURT: Okay.

MR. SCHWARTZ: There was -- the City Council struck the applications because the developer failed to file a major modification application as required by Judge Crockett's order.

THE COURT: Okay.

MR. SCHWARTZ: This Court, now --

THE COURT: So here we go. Now, so we got this major modification order. So that was what was required by Judge Crockett. That was the law as it stood at the time until it's voided by the Supreme Court. So because there's not this major modification, does the mere fact that later Judge Crockett is overturned by the Nevada Supreme Court, does that somehow make this whole thing wrongful retroactively? Because that seems to be what the argument is.

MR. SCHWARTZ: Of course not. The City -- I think this Court here in your findings of fact and conclusions of law in October -- was it 29th of 2019?

THE COURT: Right.

MR. SCHWARTZ: Of course, they couldn't, or they would be in contempt. And Judge Herndon recognized this in his order. They made the same argument. They said that the 133 acre applications were an application to develop the property that related to the 65 acre property and showed that it was futile. Judge Herndon correctly said no, they couldn't approve that application because it didn't contain a major modification application, or they would have been in contempt of Judge Crockett's order.

And that's what this Court found. I think this is already argued and determined by this Court. And so yes, it is the height. It would be the height of injustice to require the City to pay compensation to this developer for not letting it develop anything in the 133 acre property where the City was never even given a chance to consider an application on the merits. That -- yeah, that's this case.

THE COURT: Okay. So what does that mean? What is your position with respect to their motion for summary judgment?

MR. SCHWARTZ: Well --

THE COURT: I know you said their whole theory is wrong, that this two-part process is wrong, that that's not the law. Fine. But what does it mean here?

MR. SCHWARTZ: Here, we're talking about their motion to

determine property interest.

THE COURT: Right.

MR. SCHWARTZ: Here's what happened --

THE COURT: And that's why I asked why wasn't the counter-motion taken off? It seems to me that it's either they're right and the Court should, what, grant their motion or deny their motion. What is the effect of granting versus denying? And so that's why I said, why was the counter-motion taken out? I kind of liked that counter-motion.

MR. SCHWARTZ: I'd like to address that, Your Honor. Okay. So the developer is dead in the water on the takings -- on the takings doctrine, for a variety of reasons. The PRNP, is the parcel as a whole, they got 85 percent of it developed. You can't carve out the Badlands and say, oh, now you have to let me develop that. You can't do that under takings. That's a developer trick. All the courts are on it. The U.S. Supreme Court and the Nevada Supreme Court in the *Kelley* case. So they can't do that.

Well, what if the PRNP is not the parcel as a whole? What if it's just the Badlands? Well, the City approved 435 luxury housing use the Badlands. So they can't show a wipeout or interference with their investment expectations. It increased their value by five or six times.

THE COURT: Well so, and here's my question --

MR. SCHWARTZ: And so --

THE COURT: Yeah. Again, like I said, it was their choice to chop this all up into these individual little parcels. But -- so on the one hand, are we looking at this as a whole or are we looking at this as four

separate parcels? Because the mere fact that the 17 acres now -- well, you know, whatever is going on with Judge Jones is, you know, whatever. But -- so they had the zoning on the 17 acres at one point. So that's now got some more increased value, but they've chopped this up into these other three parcels. Does that somehow give them -- provide a different evaluation as to each individual sub-parcel as to whether or not there's value to that sub-parcel?

MR. SCHWARTZ: Yes. Good question. This is classic segmentation. And Judge Herndon said when they bought the property in 2015, they then shut down the golf course, segmented the property, put each property under a different owner -- owner's name, but they're all the developer, and then they proceeded to apply to develop individual properties. And then, when they got approval on one, they didn't get approval on the others, they didn't file on others. Then they sued the City on all four, but only individually. That was their choice. And they asked for damages for each property.

Why did they carve the property up? Why did they segment it? It's the classic developer trick. You know, if you -- let's take the PRNP, 1500-some acres. The City allows them -- it says you got to set aside 250 acres for the golf course. So we allow you to develop 85 percent, and it was thousands of housing units in the development. Then the developer sells off the 250 acres. Well, this developer comes in. He says, okay, you now have to let me build something on the golf course. You have to let me build some houses on the golf course or it's a taking because it's a wipeout.

The courts say, huh-huh, no, you can't do that. We look at the parcel as a whole. The golf course was an ancillary use. It was part of this part of this 1500 acre development. And so you can't carve it out, just like they can't buy the Badlands, the 250 acre Badlands, and then divide it into four parts. The City approves development on one, and they say, so you have -- but you have to let me build housing on the 133 acre property or it's a wipeout. Well, and I think the court says, no, wait a minute. The Badlands was under one ownership, one use. You bought the property all at the same time.

That's classic segmentation, and we cited these cases to show they have no claim. And that's why they've got this nutty theory that zoning confers property rights. Now, can I address your question, Your Honor?

THE COURT: Yes.

MR. SCHWARTZ: Okay. So the developer can't win this case because they've got nothing under the takings doctrine. So they made up this theory of zoning rights. And then, they filed a motion to determine property interest with Judge Williams. And Judge Williams granted the motion and just signed that order. And in their order, they said, well in a regulatory takings case, there are these two sub-inquiries. And you have to determine the property interest before you can determine whether that property interest was taken. That's obviously true.

But they contended that it has to be a two stage process. So what they did is they filed this motion to determine property interest,