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 23

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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 23** 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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This is the first case that uses the regulatory takings concept. If you deny all economic value of the property, then it could be the functional equivalent of an eminent domain and will require compensation.

Not much happened until 1978 and the Penn Central case. And there the Supreme Court said that this regulation had prohibited development over Grand Central Terminal under the historic preservation laws was not a taking for a variety of reasons.

They established the three-factor test. What's the economic impact of the regulation on the property owner. Second, did the regulations interfere with investment-backed expectations. The third factor is not really relevant in this case.

And the Court said, no, you had historic use of the terminal. You can't segment the property and develop in the airspace. It doesn't meet the Penn Central test.

Fast forward to 1992 and the Lucas case. Before we get there, tab 10. Your Honor, tab 10 is the Loretto case. And Sisolak is based on Loretto. In Loretto, this is a 1982 case, the U.S. Supreme Court said it's a physical taking. It's different than a taking where an agency excessively regulates the use of

property by the owner.

This precludes the owner from excluding others from the property. It doesn't involve a permit application. The City's ordinance required Ms. Loretto to allow cable TV facilities on her rental apartment building. Court said it was a physical taking.

Now, let's fast forward to 1992. The Lucas case. There's a lot of litigation in between. But the Lucas case tried to impose some rules. Court in Lucas said, if a regulation does either of these two things, if it either requires the owner to allow other people to invade their properly physically, to go on their property, not just to look at it, the developer claims that a physical taking is if the City so-called preserves the Badlands as a view shed. That's a regulatory taking, a regulation of use, of the owner's use. It's not a physical taking unless the City statute authorizes the public to go on the property.

So the Lucas court said, there are two situations in which we are going to find a categorical taking. And we're not going to consider the Penn Central factors. And the two are as follows: A regulation that denies all economically viable use of the property, wipeout. Remember, the local public agencies have broad authority to regulate the use of

land. And if they go too far and they do something that's functionally equivalent to an eminent domain, the Supreme Court is saying, it's got to be pretty bad, got to be a wipeout, it's a categorical taking.

Or if the agency adopts a law that requires the owner to allow others on their property, that's a physical taking.

So the court said there, we're going to call these categorical takings. Don't need to go through the Penn Central factors. If you can prove a wipeout or a physical invasion, you need to be compensated without further proof. It said, if you can't show either of those categorical takings, then you're at Penn Central and you have to address the three Penn Central factors.

Then fast forward again to 2005 and the Lingle case. In the Lingle case, the court said some very important things. And it really brought into focus what are takings about. Prior to Lingle, prior to the 2005 Lingle case, the court had held that courts can get involved in whether the government is making a good or bad decision and call it a taking. And I think that's what the developer's evidence here is, hey, this was unfair, this was a bad decision. Particularly with the decision about requiring a certain type of

application for a fence or for access. They're saying, these are bad decisions.

And courts had indulged that. They had --

THE COURT: I didn't necessarily look at it that way. I think they were using that as an illustration as to whether there was a physical taking or not in this case. And understand this, remember this, I'm not here to judge the actions; right. That's why I was pretty clear at the very outset. And I even said this. I realize city council, they're not like courts. We don't make decisions based upon politics. That's their realm. That's what they do. I just wanted to be really clear that I understood that.

MR. SCHWARTZ: I know the Court was very concerned over this fence and the access. And I agree with the Court's analysis. The Court can't second guess those decisions. Those decisions are -- in fact, there's a process for challenging those decisions. And this is not the right proceeding to do that. Could be an administrative appeal. If not, there's a petition for judicial review. That's where you decide whether it's a good law or a bad law, whether the decision-maker made a right decision. We don't have a record of what was before the decision-maker here.

So the access and fence is a red herring. It

has nothing to do with whether there was a taking. A taking requires a wipeout or near wipeout or interference with investment-backed expectations.

Let me get back to Lingle.

THE COURT: Which one is that, sir?

MR. SCHWARTZ: The Lingle, I do not have -- I don't have the opinion of the Lingle.

THE COURT: Go ahead and read. I'll listen.

MR. SCHWARTZ: I can tell you what it says. First of all, we're not going to get involved in these decisions about whether land use regulation is good or bad. The takings doctrine assumes the regulation is valid. It assumes the regulation is valid, but it goes too far. It wipes out the value or it interferes with investment-backed expectations.

If the regulation is invalid, then you challenge it by a PJR or some equitable option and get it overturned. But if it's a valid regulation and it goes too far, it's too burdensome. There has to be a limit to what the government can do in regulating use of property.

So the court said, yeah, we've got these categorical takings. We've got -- and then we have categorical, a wipeout or a physical invasion, and then we have Penn Central. The court there said, you know,

we're dealing with the takings clause. It says take. And the history and the original intent of the takings clause was for eminent domain, direct condemnation. If we're going to say that a regulation of use is the functional equivalent of an eminent domain, then it's got to be really bad.

So in Lingle, the court said that a taking under any test, a regulation of use taking, has to be pretty much the functional equivalent of an eminent domain even in the Penn Central context. It was explicit. It said, whether it's Lucas, a wipeout, whether it's Penn Central, it's got to be a near wipeout or a wipeout for it to be really like a take, like an eminent domain.

THE COURT: Now, in following that, and it raises a question in the earlier session this morning. And I'm listening to you, and I was wondering whether -- and it's my recollection in reading Sisolak, and that's why I pointed that out earlier this morning where Justice Maupin in his dissent pointed out, yeah, I think you should have followed Penn Central. But one of the issues he raised was futility. And so my question is this. Do I consider that in any respect as far as the argument you're making or I just should ignore that? I don't know. I'm just thinking about

this whole concept because we did talk a little bit about Penn Central.

MR. SCHWARTZ: Well, futility. You're talking about rightness requirement, Your Honor. That is our first argument. I first need to break down -- I first need to break down the developer's claims. Because the developer has deliberately confused the record. And for the Court to understand how to apply the law, you first need to know what is the developer claiming. And they have obfuscated what they're claiming.

Tab 9 is their complaint, is the operative complaint. Now, by the way, Your Honor, before I go through this, we need to know what happened in Lucas. So Lucas, on the South Carolina coast, lots of houses, two vacant lots. It's zoned for residential development, single-family lots. These are single-family lots. Master plan says single-family development.

Lucas buys the lots under that scheme. Big hurricane hits the coast. Wipes out all these houses. The legislature says, hey, no more. We can't have any more development because then there will be more storms, they'll wreck these houses, loss of life, property.

Lucas, who is on the land side of the line or the sea side of the line, can't development his lots. That's the classic taking. That's what the taking clause was supposed to avoid. And, of course, we have the opposite situation here.

But in Lucas, the majority referred to those two types of takings where compensation is mandated, the categorical takings. They refer to them as categorical. In other words, this is a categorically compensated if you can prove this.

The dissent referred to the same two tests as a per se taking. So categorical and per se are synonymous. They mean the same thing. Now, that fact has given the developer an entree to really confuse the issues. Because, remember, you've got a wipeout claim is a categorical claim and a per se claim and a physical takings claim is a categorical claim and a per se claim.

That's allowed the developer to say, well, Sisolak, they don't admit it's a physical takings claim, but it's clear that it isn't. That allows them to say, because Sisolak is a per se claim and our wipeout claim for regulation of use is a per se claim, that the rules apply to physical takings claims apply to the regulation of use claim in their first cause of

action.

This is a deliberate effort to confuse the issues, again, because there's no law on their side. All the law is against them.

So let me go through the Sisolak case if I can, Your Honor.

THE COURT: You have the floor, sir.

MR. SCHWARTZ: And explain. And Sisolak is at tab 16.

THE COURT: I'm with you.

MR. SCHWARTZ: Let me start with tab 9, which is their operative pleading. And I will take you through their first three causes of action.

Their first claim for relief starts on page 28 of their complaint. That's tab 9, page 28. Their first claim is for a categorical taking. And they allege, essentially, that the City's denial of the 35-acre applications has denied them all use, wipeout. They don't say wipeout, but they do say, all economically. So this is a wipeout claim. It's a claim that you have denied the owner's use of the property and wiped out the value.

Okay. Now, and they say it's a categorical taking. They don't say it's a per se taking claim. They could say, but it is a per se because they mean

the same thing. But they haven't made it clear, by just saying categorical, whether it's a physical taking claim or a wipeout of use.

In paragraph 170, they do throw in a physical taking claim. "The City's actions required the landowner to suffer a permanent physical invasion of his property."

So that's a different type of categorical or per se claim, but it duplicates their third claim. And the reason it's in here on a regulation of use claim, and also in their third claim for relief, which is a physical takings claim, is so they can argue to the Court Sisolak, categorical claim, on our first cause of action, wipeout, also a categorical claim. So the rules for physical taking claim apply to our regulation use claim. And they do not. And I will explain that to the Court. This goes mainly to the ripeness issue.

The second claim is for a Penn Central taking. So that's, essentially, well, we don't have a categorical claim. If we don't have a categorical claim, then we apply the three Penn Central factors and it's a taking. A lesser showing, Your Honor, a lesser showing than a categorical wipeout claim. They don't have to show a wipeout. They only need to show a near wipeout. Or that there was interference with their

investment-backed expectation.

Why aren't they moving for summary judgment on their Penn Central claim? Because they only paid $4.5 million for a 250-acre golf course, $18,000 an acre, that's a golf course price. If they were right and they had a constitutional right to build whatever they wanted on the property, they would have paid $386 million, which they say the property is worth if they have a constitutional right to build on that property.

The third claim is their, they call it, a regulatory per se claim -- taking. Yes, they claim that the City's regulation is Bill 2018-24 required the owner to submit to physical occupation of his property. They're not specific here in this cause of action. They don't mention that. They just say the City's act, and they're very vague about that.

This is a physical takings claim. It's a per se claim. It's a categorical claim. Their first cause of action is a categorical and a per se claim. The reason they use this terminology and they use it so confusingly, is because they want the Court to apply physical taking rules to wipe out use claims.

And the developer goes so far as to say in his papers -- I'm not sure I can find it. The

developer goes so far as to call their claims categorical per se claims or per se categorical claims, which is like saying a wipeout wipeout claim or a physical physical taking claim. This is deliberately confusing, Your Honor, because of this issue of ripeness.

So let's get into the ripeness doctrine here. And Judge Herndon had the 60-acre case. He found 60-acre case, their taking claim was not ripe. Their motion to determine property interest was mute because they hadn't applied for two developments that had been denied by the City, which is required for ripeness for a denial of all use taking claim.

Okay. So the core allegation of the first two causes of action is excessive regulation of a use, denial of all use. And Justice Maupin in the Sisolak case said, well, yeah, the majority found this to be a physical takings case. I don't think so. I don't think it's a physical taking. Because, you know, I won't get into why. I happen to think Justice Maupin was correct.

I remember reading the Sisolak case when it came down. I didn't think this was a physical taking case. Be that as it may, the Nevada Supreme Court says that it is. Justice Maupin is saying, no, it's not a

physical taking. Therefore, I think this should be analyzed under Penn Central. And he refers to the ripeness doctrine. And he says that, under Penn Central, you have to file -- the developer -- the burden is on the developer to file two applications and have them both denied before a case can be ripe for consideration, before you can tell how far the government goes.

The taking claim is you have to wipe out or nearly wipe out their value. Okay. Well, how do you know if they've done that until you know how far the discretion goes.

And the court, I think, was making that point. Well, the City could have said maybe you can make the golf course work by putting some, you know, narrowing the fairways. Well, if the developer didn't like the decision to deny their applications for residential development, it was incumbent upon the developer to come back with an application. And if they want to sue for that segmented property, for the 35 acres, they have to come back with an application to develop just the 35 acres and have the second application denied.

The courts are very clear on this, that that's required before you can make a regulation of use

argument. Because you don't know -- because the City has discretion. It could approve something less than what you approve. If they ask for 100 units in their 35-acre applications, City said, denied. Well, the developer has to come back with a lower density or some other use that would be economic. That's the law. The Nevada Supreme Court said in the State case, which is -- that's the law. They rely on the Williamson County case, which I'm going to discuss now.

We're talking now about only the regulation of use cases. Again, this notion that zoning confers property rights, even though it's a preposterous notion, assume it's true. It only goes to the first two causes of action. Because there they claim that the City, through its regulation, denied their permit application for the owner's use of the property. Doesn't relate to the Sisolak case. That's a physical takings case. The final decision in this document doesn't apply.

Okay. So in the Williamson County case, 1985, the Supreme Court said, okay, we're faced with a similar situation. Planned development property. Developer comes in with a some unit subdivision proposal. And the agency says, no. Denied.

THE COURT: Kim, can you last until 4:15?

THE COURT REPORTER: Yeah.

THE COURT: Okay. Just want to make sure you're fine.

MR. SCHWARTZ: So the agency in the Williamson County case said, no. Denied.

The developer sued for a taking. The Supreme Court said, no. You don't know if they might approve some less development or some other development or a variance, as the court mentioned. They still have discretion to approve something. And just one application isn't enough. You need at least two applications, and they have to be denied before your claim is ripe and the court has jurisdiction over your taking claim.

And, again, in tab 12, the Nevada Supreme Court adopted this rule. Judge Herndon found in the 65-acre case, because they had not filed two applications to develop the 65-acre property standing alone, their claim wasn't ripe, and granted summary judgment for the City. Judge Herndon was absolutely right about that.

And this case is similar, in that the facts aren't identical, but they're close. In this case we only had one application, only one application to develop the property. It's incumbent upon the

developer to file an application to just the 35-acre property before their claim is ripe.

The Master Development Agreement that the developer cites as a second application doesn't count. Judge Herndon laid out why. That was for more than the 35-acre property. The State case says, you have to -- in applying the ripeness doctrine, you have to consider the property at issue. You can't rely on the City to do it for you. It's incumbent on a developer to test the City's discretion. You have to have two applications denied before you can raise a taking claim.

Judge Herndon in his ruling, in tab 4. And I refer the Court to that because I really don't have nearly enough time to explain why Judge Herndon was absolutely correct and why it applies in this case.

The developer argues, well, the ripeness doctrine doesn't apply to a categorical claim. It only applies to a Penn Central claim. That's absolute nonsense.

We have briefed in our papers that the authorities are unanimous that the final decision ripeness requirement applies to a categorical claim as well as a Penn Central claim. And by logic, it has to apply. It has to apply. Because how can you tell --

if you can't tell whether a near wipeout has occurred because you don't have two denied applications, then you certainly can't tell whether there's been a wipeout if you don't have two applications.

Your Honor, I'm running out of time here. I need to go through the Sisolak case and explain what that case is about because the developer is relying so heavily on it.

THE COURT: Sir, we're going to break at 4:15. It's four o'clock now, for the record. You can -- here's the problem we have. And it is a problem. I mean, we're now a day and a half in. And I do have Monday morning set aside for this matter. And then that will be two complete days. And I would anticipate -- I mean, you can try a case in two days; right? You can. I've seen it done before. I've actually seen -- I mean, actual jury trial in two days.

My point is this. I don't want to stop you from doing what you need to do. You can go ahead into Sisolak for the next 15 minutes. We'll break at 4:15. And, of course, Monday morning, you can continue your journey as to what you need to do.

MR. SCHWARTZ: Thank you, Your Honor. Sisolak case is tab 16.

THE COURT: Yes, sir. I have it right in

front of me.

MR. SCHWARTZ: That case says about 10 times that is a physical invasion, Loretto type case. They conclude, court concludes -- well, I want to refer you to this is again tab 16. This is a very important part of the Sisolak case.

By the way, Your Honor, the developer is completely misrepresenting what Sisolak says. They say that Sisolak says that they have -- that the zoning of property determines their property interest. Again, zoning doesn't confer rights. It doesn't determine property interest. They have a fee simple interest in the property.

The court in Sisolak said, You have a fee simple interest in the airspace above your property. You have, they said, a vested right. Vested means that you own the property. It's not in the context of a vested right the developer is talking about, where you have an approved application and a right to build. That's not the type of vested right.

The court is saying, the fee simple interest is vested in you. You own the airspace. You have a right to build in it not because of zoning. You have a right because you own the property. That's a crucial distinction. So they're misrepresenting what Sisolak

says.

THE COURT: I want you to explain to me why because the developer in this case had fee simple ownership, too.

MR. SCHWARTZ: That's right. And they have a right -- that's right. They have a right -- they have a right -- no. The Sisolak court said -- you know, it didn't say that the government has no discretion to limit your development of the airspace through regulation. They said, it took your airspace by a physical invasion. They say it 10 times it's not a regulation of use case.

That's why I want to refer the Court to this language in Sisolak on page 12, the right-hand column. I'd ask the Court to start reading in the middle of that paragraph where it says, "If the regulation forces," page 12 of Sisolak, right-hand column, the highlighted yellow.

THE COURT: Right. I see it.

MR. SCHWARTZ: "If the regulation forces the property owner to acquiesce to a permanent physical occupation, compensation is automatically warranted."

That's categorical or per se since this constitutes a per se taking. Remember, per se, categorical. Same thing.

"This element of required acquiescence is at the heart of the concept of occupation. The second type of per se taking, and they're using per se, instead of categorical; means the same thing. Complete deprivation of value is not at issue, it's not at issue, in this case. Because Sisolak never argued that the ordinance completely deprived him of all beneficial use of his property.

The first and second causes of action --

THE COURT: What do you do when the city council members say, this is going to be a park and this is open spaces and those types of things, and encourages members of the public to use the private property as a park?

MR. SCHWARTZ: Encouragement is not a law and it's not relevant. And if a city council member can get a majority vote to pass a law that affects the use of the property, that could be -- that could count in this case. But a statement of a city council member on or off the city council in a public hearing, outside the public hearing, a statement doesn't affect the owner's use of the property because it is not a law. You have to have the majority vote. And the only majority vote at issue in this case is the majority vote of the city council to rezone the property in 1990

R-PD7, to designate the Badlands PR-OS in the general plan in Exhibits I through Q, which are tab 18. Those are all the ordinances designating the property by legislation PR-OS. And then, third, to deny the application for the 35-acre -- deny the 35-acre application. Those are the only actions of the city council that are at issue here.

So if you look at the zoning designation, there's no dispute it was zoned R-PD7. That's not the problem here. The problem is, for the developer, is the PR-OS designation. That was adopted by legislation.

Again, I can show the Court the maps that were adopted by ordinance in the city legislation at tab 18 in 1992, in 2001, 2005, 2009, 2011. And that's Exhibit P. Exhibit P was the general plan map designating the Badlands PR-OS that's in effect -- that applied when the developer bought the property. And it clearly prohibited residential use.

So if the developer wanted to make a residential use, they have to get the City to exercise its discretion to change it. It can't force the City to do it by claiming that the zoning gave it rights. There's no law to support that.

Then Exhibit Q is the 2018. All throughout,

the 35-acre property, the whole Badlands, designated PR-OS.

THE COURT: How is requiring or saying, look, we need this property to be open space any different than having or placing prohibition on the airspace above the property?

MR. SCHWARTZ: It's not. They did the same thing in Penn Central. They said, well, you don't have a right to use your airspace.

THE COURT: I'm looking at it from the McCarran Airport/Sisolak case.

MR. SCHWARTZ: That's what I'm saying, Your Honor. It's a physical takings case. The developer is mixing --

THE COURT: They deprived Governor Sisolak of his airspace or certain portions of his airspace above --

MR. SCHWARTZ: No. They allowed airplanes to fly in it. They allowed the public to invade it. That's a physical taking.

The government can regulate the use of property. That's different from a physical invasion. That's what the court is saying here in the McCarran section I wrote. This is not at issue in this case, to wipe out the value of your property by regulating your

use of it.

THE COURT: So what's the value of the property in this case? It can only be used for open space; right?

MR. SCHWARTZ: No. It can be used for the permitted uses, all of the uses that we just read in the R-PD7 zoning ordinance.

THE COURT: Residential happens to be one of them; right?

MR. SCHWARTZ: Your Honor, that's not right. One and done is not the law. Look at the state case. Look at the Williamson County case. One and done is not the law.

THE COURT: I understand your position as far as one and done, but there was a request for residential use. We can all agree to that; right?

MR. SCHWARTZ: Yes.

THE COURT: Okay.

MR. SCHWARTZ: So Sisolak is a physical takings case. And the court in Sisolak said, the majority said, ripeness doctrine doesn't apply to physical takings cases. It applies to regulation use cases. And that makes sense. Because when you adopt a law, and counsel referred to the Nick case and the Cedar Point case.

Sisolak, the court said, the airport has exacted an easement, an interest in property, a physical interest in property, allowing people to go on their property. Same thing in Nick. Same thing in Cedar Point. The government exacted an easement.

The developer's first two causes of action are not for exaction of an easement; therefore, regulation of the owner's use. Exaction easement allows other people to use the owner's property. If you regulate the owner's use of the property, such that you wipe it out, that's a different type of taking, a different type of categorical taking. That's exactly what the Supreme Court is saying in Sisolak.

So the takings claim here is not ripe because there was no filing of a second application. And, again, the Court should be very clear on this. When the developer starts talking about Sisolak and mixing it up with its motion to determine property right, a right to development, they're talking about regulation of use. Sisolak has nothing whatever to do with that. That's an exaction of an easement.

They claim, the developer claims, they filed four applications to develop their property. And they compare themselves to the Del Monte Dunes case. Well, in that case, there were four development applications.

In each case the city council denied it, and said, well, we might approve a lesser development. There were four applications.

The developer says, oh, yeah, I've got four applications. I have the 35-acre applications. I have the Master Development Agreement. And I've got this access, my application for access, and my application for a fence.

There's only one application that counts for final decision ripeness. Again, I refer the Court to Judge Herndon's analysis of why the Master Development Agreement doesn't count for the 65-acre property, and it doesn't count here for the same reason. It included a much greater property, the entire Badlands, that the city council could have had any number of reasons for denying that that had nothing to do with the 35-acre property. So the developer has to file an application for the 35-acre property standing alone. That's what Judge Herndon held under the State case, and that was right.

Also, the MDA was vague. It didn't provide -- it didn't include site specific applications that you're supposed to file, with details that you're supposed to file under the uniform development code. You have to file those specific applications that Mr.

Hoehne had talked about to develop a property to have an application -- where you can say, the city council has denied my application to use the property for this.

The access and fence. Your Honor, in their regulation of use cases, they've got to show a wipeout. Denying a developer a property owner additional access -- they already had access, Your Honor. Denying them additional access isn't a wipeout of the value of the property. Denying them the right to build a fence is not. But, of course, the City didn't deny those -- didn't deny applications.

The public officials said you have to file this certain application. I have discretion to require it. The developer never filed them so those don't count. Again, even if they did go to the use of the entire and could be deemed a wipeout, they're not relevant. But even if they could, this isn't the forum to try whether that public official was right or wrong. That's a PJR. There's a 25-day statute of limitation. They had to challenge that a long time ago if they disagree with the decision. They can't come into this Court and try to flip the burden and have the City defend the reasons for a decision like that.

So tab 17 is the Hoehne case, H-O-E-H-N-E case. And that case says -- and Judge Herndon relied

heavily on the opinion in this case. It places the burden squarely on the developer to file and have denied these necessary applications for the property at issue. And Judge Herndon took that out of the State case. Applications to develop other property aren't -- you know, if the subject property is joined with other property, it doesn't count because there could be good reasons to deny the application involving the other property that don't apply to the property at issue.

Judge Herndon also said, hey, wait, the vote against the master development plan in addition was 4 to 3. Two of the members who voted against it are no longer on the city council. They had to file applications for site specific development. Four members of the city council are no longer on the council. There was lots of discussion at the hearings. There was plenty of room for discretion that Judge Herndon found.

You know, under the Hoehne case, the court has to say -- the court has to say that there is really no possibility that the city is going to allow any development on the property, and the burden is on the developer. And Judge Herndon said that's a pretty high standard. I'm not going to find that this case is ripe because I really don't know. I don't know what a

second application would look like in the case of the 65-acre. I don't know what a first and second application would look like. I don't know what considerations the city council would take into account. I can't say what they would do on that application.

And so that's where Justice Maupin is referring to the futility doctrine. Well, if you file the first two applications and they're both denied, further applications may be futile. It depends on the facts of the case. But you've got to file those first two applications and test the city council. They didn't do that in this case.

So the Court doesn't even get to the, let's call them, the merits of the taking claim on the first two causes of action because the claims aren't ripe.

THE COURT: Tell me this. As far as the golf course in general, how many applications were denied by the city council?

MR. SCHWARTZ: The 17-acre applications were approved. The 35-acre applications were disapproved. The MDA was disapproved. And that covered the entire Badlands. And the purpose of the MDA was to get the City to agree that it wouldn't change the rules midstream. That's the purpose of a development

agreement, also to provide for a provision of public amenities.

And then the 133-acre applications, and this is crucial, Your Honor, when the 133-acre applications came up before the city council, among other considerations, Judge Crockett's order was in effect. And that said, you have to file a major modification application to develop -- to apply to develop property in the Badlands.

The city council had two reasons for rejecting those applications. Because of lack of time, I'll only discuss the reason that there was no major modification application filed. The city council would be in contempt of Judge Crockett's order if it considered the applications without the filing of a major modification application. The developer filed a petition for judicial review.

And Judge Sturman denied the petition on the grounds -- and that's -- that is tab 47. Denied that application on the grounds that Judge Crockett's order -- under Judge Crockett's order, the city council could not, could not, consider the applications because the developer failed to file a major modification application.

THE COURT: You know, and I keep going back

to this open space issue. When it comes to open spaces, who or what does open spaces -- who benefits from that?

MR. SCHWARTZ: Well, the developer, the property owner, and the community. And let me explain. The property owner benefits because it's an amenity that makes development in the PR-OS more attractive.

THE COURT: So as far as the 35 acres at issue in this case and it's open space, how many does the property owner benefit from that as it relates to its 35-acre property?

MR. SCHWARTZ: Let me explain. The 1500-some-acre PRMP set aside open space as an amenity for that community. As you'll recall, it was required to be set aside for the R-PD7 or for the zoning for the PRMP. It was also required to be set aside for the developer to be included in the gaming enterprise district.

The reason the state legislature requires it to be set aside is to benefit not only the residents of the development, but the city, the community, at large. That's the purpose.

THE COURT: That's my point. It's going to benefit the public; right?

MR. SCHWARTZ: Let me finish.

THE COURT: But I'm going right here. There's a little language here from Sisolak in the conclusion. The court says, "Sisolak suffered a Loretto-type regulatory per se taking under both the United States and the Nevada Constitution because Ordinances 1221 and 1599 appropriated his private property for public use without payment of just compensation."

The reason I keep coming back to that, it appears to me, and I kind of get it, it's nuanced, but if you're saying, look, this is open space and this is what we want it to be, who's the beneficiary of that? It would be the public.

MR. SCHWARTZ: Not quite, Your Honor. The development -- you know, why did the Peccoles propose open space? Why do these planned developments set aside open space?

THE COURT: I have a question for you. Is there any case law that stands for the proposition that a golf course is equal to open space?

MR. SCHWARTZ: Any case?

THE COURT: The reason why I'm bringing that up because, you know, I think there's a difference between private property that's a golf course and a public park or open spaces like that; right? I mean,

there's a difference. You have property rights here. You have that bundle, that --

MR. SCHWARTZ: No, it's no different.

THE COURT: So you're saying there's no difference between a private golf course that's an actual business; right, that sets fees and have a golf shop and typically restaurants and all that type of stuff and all those amenities versus --

MR. SCHWARTZ: No, not for purposes of a taking, no. Not for purposes of the law of regulatory takings. The developer of the PRMP set aside the golf course and drainage as an amenity to that development. It's ironic that this developer built the Queensridge Towers, the 219-some luxury units, and the Tivoli retail. They benefited from the fact of this open space. They were able to sell those properties or those properties were more valuable because they had the amenity.

So, yes, if you carve up the property and segment it, which, Your Honor, you can't do. That's why we went through this history of the PRMP because you have to look at the parcel as a whole for takings purposes. Otherwise, you can always have a taking. You carve up the property into small parts, and then if the government doesn't allow you to develop each part

of the property, then they have to compensate you. That's segmentation. That's what's happened in this case.

So the open space benefited the PRMP, and it benefited the community. Whether it's a for-profit or a nonprofit venture, doesn't matter. It's open space. Open space, whether it's a golf course or a park, has community benefits.

THE COURT: But a park, typically, is public. And a golf course is private; right? And --

MR. SCHWARTZ: That's okay. Yes.

THE COURT: This is what it seems to me we're comparing a golf course with a park. They're different. Parks are public; right, typically. Golf courses are private property. Someone owns it. Fee simple, no.

MR. SCHWARTZ: Your Honor, it's open space and that has value. Whether it's a for-profit golf course or a private park, it still has benefits to the development itself and to the community.

It's open space. It's greenery. It's something nice to look at. It's aesthetic. It provides a buffer, a noise buffer, a visual buffer. There are all sorts of values in open space that are achieved by both golf courses and parks.

And in this case, the State said, you have to provide recreation as a condition of being in the gaming district. The developer chose to provide that recreation through a golf course. The developer could have made it a park. It could have made it a number of open space uses. But the point is it's up to the government agency how they're going to configure that open space, how it's going to be used. It's their decision that it's for the benefit of the community. And they have that police power.

THE COURT: You said, for the benefit of the community. Well, then buy it. That's my point.

MR. SCHWARTZ: No. This park was approved --

THE COURT: It's not a park. It's a golf course.

MR. SCHWARTZ: This golf course was approved as open space, at PR-OS, open space park, recreation for the community, both for the PRMP that was owned by the developer, and for the surrounding community.

So the owners who live on that golf course, Your Honor, they were part of the original PRMP. And the PRMP said we are going to set aside this land as a golf course and drainage. Then the City said, okay. The City doesn't have to require dedication. The City regulates the use. Then it designated the golf course

PR-OS, which means the future use of that is for PR-OS, something that's allowed by the PR-OS definition.

The developer knew it when they bought the property. So it doesn't matter whether the use of the golf course was a for-profit use or a not-for-profit use. It doesn't matter whether it was fairways or trees.

THE COURT: The developer of the whole area, that was Peccole. That wasn't 180 Land.

MR. SCHWARTZ: They stand in their shoes. Otherwise, you can always get around a taking claim, the developer. The developer gets approval for a 100-acre development. It has development in 90 acres and then it's required to set aside the other 10 acres. So the developer then sells off the 10 acres and the new owner comes in and says, hey, I know you've set this aside as a benefit for the community, but since I own it now, I get to develop it.

THE COURT: I don't mind saying this. Somebody is going to have to tell me otherwise. I see a distinct difference between a golf course -- and I understand the benefits and the amenities of a golf course. But the realities are, at the end of the day, a golf course is still a business. It has a clubhouse; right. It charges green fees. They sell

golf paraphernalia, those types of things. Typically, they have a restaurant and maybe a bar. And it's a business; right. Yeah, there's open spaces. It's a business.

But what happens when the property becomes economically unviable; right? Can't make money there. Then what?

And that's kind of my point. I don't think that's the same as a park.

MR. SCHWARTZ: The original developer made a lot of money, and this developer made a lot of money based on that open space. Now they can't come along and say, look, I bought a golf course where I can't make any money. Now you have to let me develop it. Your Honor, this is crucial. The City didn't tell the developer to buy the golf course. The developer bought the golf course, and it knew two things. One, that --

THE COURT: You would want somebody to buy the golf course and try to make it into some sort of viable project; right? Because, apparently, the golf course failed. And, I mean, I don't mind saying this. This is pure speculation on my part. But if the golf course is viable, there's a lot of businesses that are -- I mean, companies that are in the business of running golf courses. So there must be an issue

regarding the viability of golf courses. From a national perspective, I realize this is a problem. I mean, I get that, you know.

And so the golf course failed. Then what? Does it stay -- I mean, so if it's going to stay open spaces with public access, it should be on public lands.

MR. SCHWARTZ: It doesn't have public access, Your Honor. It's private property. It doesn't have public access. The City never required them to allow public access. That's false.

THE COURT: I get that. My point is this. And it's really a simple point. Some of the members of city council urged public access to the property. That's a problem.

MR. SCHWARTZ: It's not a problem, Your Honor. That's not an action of the City. The Court can only consider a law, an action of the majority of the city council. It either adopts an ordinance or resolution.

Statements of individual city council members aren't the law. They have no effect on the use or value of the property. They can't tell the public, you can go on the property, and then the City is liable for a physical taking. That's absolutely not the law.

But I want to get back to this notion --

THE COURT: I don't know if the city council has ever done something like that. I mean, I'm asking you, the expert on city council, I mean, this type of area, I don't know if that's ever been --

MR. SCHWARTZ: Have they authorized someone to go on someone else's property?

THE COURT: Have they ever publicly said, publicly made the statements that are being alleged in this case?

MR. SCHWARTZ: Your Honor, they're not. I'm only here to talk about the law. And whether an individual member of the city council made some statement is completely irrelevant to whether there's been a taking.

But I think what the Court is saying is that the City is going to be an insurer for this developer's business decision.

THE COURT: I'm not saying that at all. I'm not saying that at all.

MR. SCHWARTZ: Well, if the developer bought property that turned out to be not economically viable, if that was the case, that's the developer's business.

THE COURT: I think it didn't turn out to be not economically viable. It was not economically

viable when the property was purchased; is that correct?

MR. SCHWARTZ: The golf course was in operation. We don't know that. But it doesn't matter. If the developer didn't do its due diligence and learn that this golf course was not viable, it's not the City's role to bail them out. If the developer didn't know --

THE COURT: Nobody is saying it's the City's role to bail out the developer.

MR. SCHWARTZ: They want $54 million.

THE COURT: I think, didn't they want the property to be developed? Wasn't that the initial request going before the city council with plans for development and the like?

MR. SCHWARTZ: They don't have to let them develop the property. It was designated PR-OS. They knew it when they bought it. Why did they buy property that couldn't be developed for residential?

THE COURT: What you're saying is this. You're saying, look, Judge, when they made the purchase of the property, their bundle of rights was somewhat limited based upon the stature, nature, and character of the property being a golf course.

MR. SCHWARTZ: I'm saying -- no. The use of

the property was limited by the law. That's correct. They're responsible for knowing the law. So what this Court is saying, just because the golf course was a business, that the City has to pay them $54 million or let them -- or change the law?

THE COURT: I'll make the record really clear. I've never said that.

MR. SCHWARTZ: Or change the law. I think the Court is saying that the City needed to change the law to allow them to build residential use in that property.

THE COURT: I'm not saying that. I'm saying that the property was already zoned R-PD7; right?

MR. SCHWARTZ: Yes.

THE COURT: And one of the uses as it pertains to R-PD7 would be residential real property.

MR. SCHWARTZ: That is a permitted use. The City has discretion as to whether it's going to allow that. And the general plan designation is if they're inconsistent is the higher authority. In this case, the open space use of the Badlands is not inconsistent with the general plan. Under R-PD7 zoning, the City decides, here's where the housing goes. Here's where the open space goes.

And then the city council came along and said

we're designating the housing for medium density residential in the general plan. We're designating the open space, Badlands in the PR-OS in the general plan. They're consistent. But even if they weren't, even if the Court found there was some constitutional right under zoning to build, which, again, all the laws, this Court has found the opposite. If the Court were to find that, the PR-OS designation would prevail. NRS 278.150 says that. American West says that. The Nova Horizon case says that. The developer says that the general plan --

THE COURT: I'm sorry, sir. Sir, remember where you left off. It's 4:30 on a Friday. And we will reconvene Monday morning at 9:15.

MR. SCHWARTZ: Thank you, Your Honor.

THE COURT: We've got to wind this case up Monday morning.

MR. LEAVITT: So we're going to wind it up Monday morning?

THE COURT: We have to wind it up Monday morning.

MR. LEAVITT: We've had two hours. They've had seven and a half hours. Are we going to give Mr. Schwartz 15 minutes? I need some parameters so I know what to prepare for on Monday morning? Because

they've already had seven and a half hours. We've, obviously, only had two.

MR. SCHWARTZ: Your Honor, I really do think this case demands more time. Mr. Leavitt is going to tell you that there are multiple reasons why the PR-OS designation either doesn't exist, is invalid, or it doesn't apply.

THE COURT: Mr. Leavitt can get to it in one and a half hours. We're going to use three hours Monday morning.

MR. LEAVITT: So he gets an hour and a half and I get an hour and a half?

THE COURT: Can you live with an hour and a half, sir?

MR. LEAVITT: How about this, Judge. Give me -- how about if they get another hour, which will give them eight and a half hours, and then I get two hours, which gives us four hours?

THE COURT: Anything wrong with that? That seems pretty fair to me.

MR. LEAVITT: I get half as much time as they get under that scenario. I think that's fair, Judge.

MR. SCHWARTZ: Your Honor, the developer has thrown so much money against the wall on these issues. As I said, they're going to give you multiple, maybe

10, 11, reasons why the PR-OS designation doesn't apply. And that's key here. And I haven't even gotten to my second and third arguments about why, even if the Court finds the case is ripe because of the PR-OS designation, there's no taking. Under the Guggenheim case --

THE COURT: Here's my point. As a trial judge, I don't mind saying this, I don't have a reputation of being heavy handed; right. I don't. And I respect the time of the parties. I want to make sure we can make a clear record. But there has to be limits to how long you have when it comes to argument. I mean, right now, assuming I gave another hour, that would be eight hours for the City; right. Eight hours, you know, that's a fairly long time to argue summary judgment motions. We can all agree to that.

MR. SCHWARTZ: Well, Your Honor, Mr. Leavitt -- we've been to many of these hearings. Mr. Leavitt is going to be giving new arguments, new evidence, in his presentation that we won't be able to rebut. So I have to rebut everything that he's going to say. And I generally know what he's going to say. I have to rebut everything he's going to say in my argument. So I think I --

THE COURT: How about this then. I'm going

to tell everybody this. I don't mind taking appellate issues off the table; all right. I get it. We do this. This is the ultimate fairness. Sir, you have an hour. Mr. Leavitt, how much time do you say you need?

MR. LEAVITT: Two hours, Your Honor.

THE COURT: Then you have your countermotion. You get an hour to rebut him after that. How is that, sir?

MR. SCHWARTZ: Thank you.

THE COURT: And what will happen is this. I'm just sitting here. And I know, sir, you need to be in a courtroom to do this.

MR. LEAVITT: Yes.

THE COURT: This is what we'll do, which makes perfect sense. We'll break Monday at noon. You go back to your offices. You can do your last rebuttal remote on BlueJeans.

MR. SCHWARTZ: Yes, Your Honor.

THE COURT: That's what I'm going to do. I'm going to make sure everyone has had a full and fair opportunity. Regardless of what my decision is, this will be a nonissue.

MR. LEAVITT: Okay, Your Honor.

THE COURT: So this is what we're going to do. Sir, you get an hour. Then we go two hours with

Mr. Leavitt. Then we'll break. And after lunch we will continue the hearing. I should ask the court reporter, ma'am, are you available?

MR. SCHWARTZ: Your Honor, I am not available Monday afternoon. I'm sorry, but I'm not available.

THE COURT: Okay. I'm going to make sure this matter ends. So you're not available Monday afternoon. That's fine. What about Tuesday morning?

MR. SCHWARTZ: That's fine.

MR. LEAVITT: I'm available Tuesday morning. If I may say this. So our motion for summary judgment was my argument for two hours. Their opposition for eight and a half or nine hours. And then my reply for two hours. At that point --

THE COURT: To be fair to them, their opposition also included part of their motion for summary judgment.

MR. LEAVITT: Understood. When I close my reply, Judge, I will ask you to make a decision on our motion for summary judgment. In the event you make that decision at that time, it would nullify any countermotion. I'm just totally giving you the heads up, Your Honor.

THE COURT: I understand. I do. But, once again, at least for now, we have Monday morning, one

hour, two, we're done. Then we come back Tuesday and we finish up.

MR. SCHWARTZ: And it wouldn't nullify our motion. We're moving for summary judgment on three claims they don't address.

THE COURT: I understand. You need to come back on Tuesday morning.

MR. LEAVITT: Will we be back here Monday morning?

THE COURT: Understand this. This is not my courtroom. This is Judge Krall's courtroom. In another month, hopefully, I'll be in 16C. I need a bigger courtroom like I used to have traditionally. But that's another day.

But what I need to do is this. We can't go on and on and on. And I think when it comes to the time allocation, I just want to make sure the reviewing court says, yeah, Judge, you gave everyone enough time as they needed.

MR. SCHWARTZ: Thank you, Your Honor.

MR. LEAVITT: Thank you, Your Honor.

(Proceedings adjourned at 4:38 p.m.)

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ATTEST: FULL, TRUE, AND ACCURATE TRANSCRIPT OF

PROCEEDINGS.

/S/ Kimberly A. Farkas, RPR, CRR

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IN THE DISTRICT COURT

CLARK COUNTY, NEVADA

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180 LAND COMPANY, Plaintiff, vs. CITY OF LAS VEGAS, Defendant.	Case Number A-17-758528-J

Reporter's Transcript of Telephonic Proceedings

Monday, September 27, 2021

BEFORE THE HONORABLE JUDGE TIMOTHY C. WILLIAMS

DISTRICT COURT JUDGE

Reported By: Rhonda Aquilina, Nevada Certified #979, RMR, CRR
Court Reporter

APPEARANCES:

(PURSUANT TO ADMINISTRATIVE ORDER 20-24, SOME MATTERS IN DEPARTMENT 16 ARE BEING HEARD VIA TELEPHONIC APPEARANCE)

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P R O C E E D I N G S

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THE COURT: All right. Good morning to everyone.

ALL COUNSEL: Good morning.

THE COURT: I apologize for the brief delay. I had another matter I had to handle with another case, but I got to that done.

All right. And madam court reporter, are you ready to go?

THE COURT REPORTER: Yes, Judge. Thank you.

THE COURT: All right. Let's go ahead and set forth our appearances for the record.

MR. LEAVITT: Good morning, Your Honor. James J. Leavitt on behalf of the Plaintiff 180 Land landowners.

MS. WATERS: Good morning, Your Honor. Autumn Waters on behalf of the landowners as well.

MS. GHANEM: Good morning, Your Honor. Elizabeth Ghanem.

MR. WATERS: Kermitt Waters on behalf of 180 Land.

MR. LEAVITT: And also our legal assistant Jennifer is with us to assist with the presentation, Your Honor.

THE COURT: Okay.

MR. MOLINA: Good morning, Your Honor. Chris Molina on behalf of the city.

MR. BYRNES: Phil Byrnes on behalf of the city.

MS. WOLFSON: And good morning, Your Honor. Rebecca Wolfson on behalf of the city.

THE COURT: All right. And once again good morning to everyone.

And it's my recollection this will be a continuation of our argument from last week; is that correct?

MR. LEAVITT: Correct, Your Honor.

MR. MOLINA: Your Honor, Andrew Schwartz is supposed to be appearing via Bluejeans. Looks like they're waiting for the moderator to start the meeting. I just got a text message from him. He may be in the wrong session.

(Off-the-record discussion.)

MS. WOLFSON: That's the information I received this morning. It was forwarded to you.

(Off-the-record discussion.)

(Pause in proceedings.)

MS. WOLFSON: I apologize for the delay, Your Honor. Anyway, I can confirm the information I received this morning is the correct information.

THE COURT: Yes.

(Off-the-record discussion.)

MS. WOLFSON: I passed that information along. I hope they are able to join us shortly.

(pause in proceedings.)

THE COURT: All right. Do we have Mr. Schwartz on the line? Can you hear us, sir?

You might have to hit star 4 to unmute.

MR. SCHWARTZ: I'm sorry. Good morning, Your Honor. I apologize for being late. I didn't have the right information.

THE COURT: That's okay. Sir.

Let's go ahead and note your appearance for the record.

MR. SCHWARTZ: Andrew Schwartz for the City of Las Vegas.

THE COURT: Okay. And it's my understanding everyone has placed their appearances on the record; is that correct?

MR. LEAVITT: Correct, Your Honor.

THE COURT: All right. Okay. And so we're going to continue on, Mr. Schwartz. You have the floor, sir.

MR. SCHWARTZ: Thank you, Your Honor.

Your Honor, a taking is a highly deferential test, and there's no taking here. Judge Herndon's decision is at tab 4, and Judge Herndon explained the takings test and why it is so narrow.

I want to first explain that Judge Herndon's decision was not set aside by Judge Trujillo as the developers represented. The issue --

THE COURT: Whether it did or didn't, it doesn't

really matter to me. I don't care what other trial judges do. I just want to be candid with everyone. Never have, never will.

MR. SCHWARTZ: Well, fine.

THE COURT: Now, if you want to explain -- if you want to argue maybe some of the points, that's fine, but I really don't care what other trial judges do, I mean, I don't. I don't mind saying that.

MR. SCHWARTZ: I understand.

THE COURT: I care about what the Nevada Court of Appeals and the Supreme Court does, I will say that.

MR. SCHWARTZ: All right. Well, I do want to point out that Judge Herndon, in paragraph three of his conclusions of law, found that because the right to use land for a particular purpose is not a fundamental constitutional right, courts generally defer to the decisions of legislators and administrative agencies with regard to regulating land use.

And the citation there was to the *Berman versus Parker* case, which is a United States Supreme Court case, which laid out the principles behind the local regulation of land and why there's such broad latitude allowed in land use regulation, and that the takings clause really is a very narrow remedy for property owners, and it only applies in cases of extreme, extreme government regulation, and we don't have that here. And certainly there is no constitutional right to develop --

THE COURT: I don't want to cut you off, sir. I was thinking about this over the weekend, and I don't know if it's been brought up, maybe it has and I overlooked it, but as far as the golf course is concerned, were there any restrictive covenants?

MR. SCHWARTZ: No.

THE COURT: The reason why I thought about that, I don't mind saying it, I thought about the Legacy example, and it's my recollection that there was like a 50-year restrictive covenant that limited the use of that specific parcel of property to a golf course, something like that.

Go ahead.

MR. SCHWARTZ: That's not relevant, Your Honor. Restricted covenant is a contract between two private parties, and that's not -- governments don't typically regulate the use of land by restrictive covenants except in certain subdivisions where they may require that the subdivider establish a homeowners' association and adopt CC&Rs to restrict the use of the property. This is not that case. This is a typical --

THE COURT: Let me finish. Let me finish. You're kind of going down the track that I was thinking about in this one respect. You said the government may require, depending on the circumstances for certain subdivisions, to have CC&Rs. And the reason why I thought about that is this, because when it comes to the golf course, if there was some concern that this

property would be used as open property designation, couldn't that have been a request or mandate by the Council or the Planning Commission or someone that, you know what, we really like this project, but we're concerned about the potential long-term viability of the golf course, why couldn't you put in a restrictive covenant that would limit the use of the golf course to a golf course so we reserve open spaces for like maybe, you know, a period of 20, 30, 40, 50 years, something like that.

MR. SCHWARTZ: Well, that would be -- that would be one way to regulate the use of property by requiring the developer to adopt CC&Rs, but that's not the way that -- that's not the way this is typically done outside of a subdivision, and there were subdivisions as part of the Peccole Ranch Master Plan. But the government doesn't have to do that, and it's not always the best idea because that limits the flexibility of the government in regulating the land use.

So, again, this -- the interest of the -- of the city in the -- in the Peccole Ranch Master Plan was that there be open space. As the Court may recall, the RPD-7 zoning ordinance says that the plan development shall be innovative and flexible in allocating the different uses on the property, including open space. It doesn't say golf course, and it doesn't even say recreation, it says open space. So the city's interest here was in open space and not a golf course. The developer decided that

it would -- that it would develop a golf course. That wasn't the city's requirement. The requirement was for open space.

So here, we have, you know, the city could have required a park or property left in its natural state. There is intrinsic value to open space. The choice was made by the developers.

THE COURT: And for the record, I'm not necessarily disagreeing with you, but is there a difference between open space as it relates to public property and private property?

And the reason why I'm bringing that up is this, if the city wanted open space -- and I don't know if we're speculating or not because, I mean, when it came to the plan approval, I don't think anybody has come in and testified as to specifically what the building department was doing when they approved Queensridge. But my point is this, if they wanted open space, they could have very easily required that as part of the CC&Rs, and that's my point.

MR. SCHWARTZ: There were no -- the city didn't require CC&Rs, and they could have. But that's not at all what interest we're looking at here.

The City was faced with a 1500-acre property. The City's task is to make sure that that property is designed -- that that development is designed in such a way to serve not only the interests of the people who were going to live and work and play on that property, but also the surrounding community.

That's their job. So when they tell the developer, Okay, we want housing over here, we want the retail here, we want the streets here, we want open space here - it's all part of the city's job to design -- to make sure that that property is -- they engage in sound planning for a quality community that's going to have amenities for the property owners. The City could have required retail. That's all to serve the property and --

THE COURT: I get that, but here's my question. I would anticipate, and correct me if I'm wrong on this, when it came to the Queensridge and Badlands Golf Course, it would have been Peccole that went to the city with the plan, and it was up to the city as to whether or not they wanted to approve the plan or not. I mean, that's kind of how that process occurs.

And so I'm saying hypothetically, if there was -- and this is more from an evidentiary perspective. Peccoles could have came in and made the request without a golf course, right? And it just depends, because, I mean, we don't have golf courses every three or four miles in Las Vegas, they're kind of rare. I mean, I get that. But my point is this, what -- we have argument, but what evidence do we have?

MR. SCHWARTZ: Well, the Court used the example of Chicago as a well-planned city. Okay, you've got a number of high rises in Chicago, and Chicago, you know, they're very deliberate about this planning. Their buildings are more iconic and there's greater separation between the buildings.

Why? So that you can see the buildings. So if they don't allow the developer to build an entire envelope out to the property line, it's because they want to preserve light and air for other buildings, they want to limit -- to enhance privacy, they want to limit noise, they want the public to be able to view the building in a certain way, so they regulate the size, the shape, the color of that building. That's all within their police power.

They're doing the same thing here in Peccole Ranch Master Plan. They're regulating all of the elements of the project for the best interest of the community. And so the issue is the city wants open space. Open space. Open space has intrinsic value, whether it's a golf course or a park or it's just land in its natural state, there's intrinsic value in open space to benefit the residents, the people who work in the PRMP, and the developer, because it adds value to the property.

And this developer in this case, the plaintiff here developed property in the PRMP and got more money for their luxury condos in Queensridge Towers and their retail in Tivoli Gardens because of that amenity. So the city did require this open space amenity for the project, and whether that open space is a golf course is not the city's -- and whether it's profitable or not is not the city's concern. The developer makes a choice. The developer makes a choice to set aside open space to get an approval and to enhance the value of the entire

project. That's why you can't segment the golf course out. The golf course is an integral part of this mission.

You know, I use the analogy of a machine. You've got a machine that has retail, it has housing of different types, it's got streets, it's got drainage, it has open space. You take out one part and you disrupt the plan.

So this was the open space with part of a plan. It doesn't have to be CC&Rs. That's hardly ever done in a large plan development like this. And the purpose of that open space, even if the golf course closes, it provides an amenity, a benefit to the PRMP and to the surrounding community because, as open space, it's a buffer against noise, it's a view shed, it provides light and air, it provides privacy to people, it's aesthetically pleasing. So there's all those values that, again, the state legislature requires the city to do certain things like this. And it's -- by requiring the developer to set aside retail on the property, the city is not taking that property for the city, it's imposing standards on a master planned community in the best interest of the people who are going to live and work in that community.

The same thing with open space. By requiring the developer to set aside open space, the developer can own the fee, fee simple interest in that open space, but that's a requirement that the city has a right, has a right to require to continue. It doesn't have to buy it just because the developer

decides, Well, I want to put a golf course on there, and I can no longer make any money on the golf course, therefore, I'm going to eliminate the open space for this community. That's taking a part of the machine out, and the courts do not require that. That's why we have the segmentation doctrine. That's why this is a classic segmentation case. The parcel as a whole was the PRMP and each part of it is, according to city, was important. The city -- if the city decides, Well, we're going to impose a PROS general plan designation on the property instead of CC&Rs, well, that could make sense because the city may say CC&Rs are perpetual, they're forever, they're not flexible, it's not a flexible tool.

In this case, and it's the city's prerogative, in this case we're going to use a regulation, the general plan designation of PROS, which is the highest law in the city, to say the future use of this property is open space. It doesn't matter what kind of open space it is that provides that benefit, but the city can amend the general plan, as it did with the 17-acre property, and allow residential development or some other development to the property. So it's a much more flexible tool than CC&Rs.

And then, I think the concept here is, Your Honor, the city didn't take that open space for the city, it required the developer to set it aside for the benefit of the PRMP.

So if the -- and, Your Honor, I think you had a

concern that you expressed Friday that, Well, this may not be the most economically efficient use of the space if it was used for a golf course and if a golf course is no longer viable, and I don't think that's been established. But assume that that's true, that if the city doesn't allow some commercial development of that property, then the city is somehow taking the property. Well, again, open space has intrinsic value for the PRMP, and so the city doesn't have to do that. It's not a taking if it requires it to continue in its historic use as open space.

But it's even harder for the developer to make that argument because the city did approve 435 luxury housing units in the Badlands. The city said, okay, you know, you operate this golf course, now you want to build residential, you're telling us the golf course isn't economically viable, okay, we'll approve 435 luxury units. Your Honor, that is a lot of housing. That's huge. And according to Judge Herndon, and according to the developer's own evidence, by approving 435 units in the Badlands, the Court -- the city increased just the value of that 17-acre part of the Badlands by $26 million, and that is now five times what the developer paid for the entire Badlands, and the developer still has 233 acres of the Badlands left to either propose some development or use as open space, which again which is an amenity.

You know, for the 435 units, is the developer going to

be able to sell those for more if they put housing on the rest of the Badlands or if they leave it open so that these residents have some open space to look at, you know, as a buffer for noise for privacy. That's a decision that the city has the discretion to make. But the developer can't complain, Well, you've taken the Badlands because I can't make a go at running the golf course. The city has already approved that.

And, Your Honor, you know, the irony is that this developer took advantage of that amenity of that open space. I mean, not everybody in the PRMP who works and lives in the PRMP is going to play golf. That open space is valuable to them for these other reasons that I've listed.

And so --

THE COURT: And I want to focus on the 35 acres. And you do set forth in your opposition and countermotion on page 32, it says, both categorical and *Penn Central* claims require a showing that the city's regulations wiped out or nearly wiped out the economic use of the property.

So my question is this, what's the economic use of the 35 acres?

MR. SCHWARTZ: The economic use is as open space for the PRMP. That's the value of the open space. The developer of the PRMP made the decision -- and this developer stands in that developer's shoes, and that developer decided that a 250-acre open space is going to be valuable for the community,

it's going to compliment the community, and so I'm going to increase the total value of the PRMP if I have open space. If I've got -- if I build out a hundred percent of this property and there's no open space, I'm, you know, it's not going to be as attractive for people to live and work in this community. It's got open space and that adds value. That decision was made in 1989 and 1990, and that can't be taken back. The developer made that decision.

And so it's not a taking for the city to say, Oh, now you can't -- you can't convert that open space that you set aside to enhance the overall value of your development. It's not a taking for the city to say, No, it shall continue in that use.

You know, that's really what --

THE COURT: And I don't know if the law does this, maybe we'll develop this doctrine in this case, I don't know, but is there a distinction between private property, open space, and city-owned, county-owned open space?

The reason why I keep coming back to that, at the end of the day this is private property, and that's so important to point out, it really and truly is. And so, I mean, I remember continuing discovery in this case, and one of the issues that I think Mr. Ogilvie really wanted to vet was the economics or the economic value of the property at issue, right? I don't forget anything. And the plaintiffs objected and said, Judge, no, we

have to go now, my client is paying out a lot of money per month. And I respected all of that, but I was more concerned with making sure everyone had a full and fair opportunity to develop their case. That's all, right? And we can all agree the wheels of justice are slow, they just are. They just grind very slowly, they just do.

So, I mean, don't I have to look at that issue regarding -- because you do say it here, "requires a showing that city's regulation wiped out or nearly wiped out the economic use of the property." And so my question is this, what economic use would the 35 acres have at this point, if any?

MR. SCHWARTZ: Well, the economic use is as part of the Peccole Ranch Master Plan; that it had an economic use in 1989 and 1990, and under the segmentation doctrine you can't carve that out after you've developed the PRMP and say now I set aside this open space, the city required to set aside as good sound planning, now I want to build in the open space.

It's ironic that this developer built in the PRMP, got the benefit of the open space. This developer already got the economic value out of the 35 acres because it enhanced the developer's Queensridge Towers project and the Tivoli Gardens project. That's the economic value.

And so the segmentation doctrine tells us that that was the economic value of the Badlands, that that value has

already been -- that value has already been obtained because it was an amenity for the other uses in the PRMP. It enhanced those values.

But, Your Honor, can I refer you to the *Guggenheim* case, please?

THE COURT: Yes, you can, sir.

MR. SCHWARTZ: Tab 56. Your Honor, maybe 57, yes, sorry, Your Honor, tab 57.

THE COURT: And I have it, sir, right in front of me.

MR. SCHWARTZ: So in this case, Your Honor, and I've highlighted some of the important language in the *Guggenheim* case on pages 6, 7 and 8., what this says is that -- and this is going to whether the city has wiped out the economic value of the 35-acre property.

Again, Your Honor, let's assume -- let's assume that this case is ripe, and it's not, because the city hasn't denied two applications to develop the 35-acre property, but let's assume that this is ripe. There's still no taking, because the property was designated PROS in the general claim when the developer bought the property.

Now, let me explain why that's significant. In the *Guggenheim* case, the Court said, the Court said -- we had a -- the plaintiff bought a mobile home trailer park that was subject to rent control. The developer then sued the city that imposed the rent control claiming, I can't make money on the

mobile home park because of this rent control. And the *Guggenheim* court -- and this is a Ninth Circuit, this was an *en banc* decision of the Ninth Circuit -- said, look, you bought the mobile home park when it was subject to the regulation in question; you paid a price for that property that reflected the fact that its use was legally limited, and so you can't say that you were wiped out or you can't say that there was even any economic impact of the city regulation on your property, if the city just declines to change the law so that you can make more money. The Court said that is not a taking. You're assumed to pay a price for the property that reflects its legal use.

And we have the same situation here. And, again, this assumes that this case is ripe and it's not. Judge Herndon was absolutely right when he found that the 65-acre case was not ripe because the city had not denied two specific applications for just a 65-acre property to be developed, and here we only have one, so it's not ripe. But assuming it's ripe, the developer went into this with its eyes open, and it can't now claim you have to let me make some use of the property that wasn't legal when I bought the property.

Now, in tab 38, Your Honor, is your decision on the PJR, and at pages 18 and 20, and 20 of that decision here's what the Court said: The four applications submitted to the Council for a General Plan Amendment were all subject to the

Council's discretionary decision-making no matter the zoning designation.

So there goes the developer's theory that they have some constitutional right under zoning. There's absolutely no authority for that, and this Court has found that they don't. There goes their case.

But let's move on. Did the city wipe out the value of the 35-acre property if you assume it's ripe and you allow that to be segmented, which again both assumptions are not correct but let's assume they are. Here's what this Court said: The developer purchased its interest in the Badlands Golf Course knowing that the city's General Plan showed the property as designated for parks, recreation, and open space, PROS, and that the Peccole Ranch Master Development Plan identified the property as being for open space and drainage, as sought and obtained by the developer's predecessor. The golf course was part of a comprehensive development scheme, and the entire Peccole Ranch master planned area was built out and around the golf course.

The Court went on: It is up to the Council through its discretionary decision making to decide whether a change in the area or conditions justify the development sought by the developer and how any such development might look. And the Court cited to the *Nova Horizon* case.

The applications included requests for a general plan

amendment and waiver, in that the developer asked for exceptions to the rules -- this is just like the plaintiff in *Guggenheim* -- in that the developer asked for exceptions to the rules, its assertion that approval was somehow mandated simply because there is RPD-7 zoning on the property is plainly wrong. It was 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 the zoning designation.

So the Court has said twice in these paragraphs of its decision that the developer's crazy theory that zoning confers rights and that zoning confers a constitutional right to build anything the developer wants as long as it's a permitted use in the zoning is wrong, and it's rejected by all authority.

THE COURT: Well, can't we all agree -- and I think it's important to point out -- there's a completely different standard here. The claims for relief are different. We're not talking about a petition for judicial review.

And I think I was pretty clear, we had a significant discussion in some of the prior motions. In fact, it's my recollection Mr. Ogilvie was quite strident in his position, and I rejected it completely in this case.

And so my question is this, why are we going down this road? Because I see the *Guggenheim* case distinctly different

because, at the end of the day, there were rent controls in place and they were getting paid so much per, I guess, for the mobile homes, whatever the sum might have been, and they were still making money.

In this case, here, it's my understanding that the golf course was no longer viable, and it's public property, and that's a totally different issue, right? And I keep coming back to my question, because you raised it and it hasn't been really addressed. I understand you're saying, Well, Judge, you know, the value is -- well, the Peccoles, I guess, reaped the value.

But I'm talking about the 35 acres, because it's my understanding right now, in its current condition, it has no value economically for the property owner. Because if the city says this has to remain open space, he can't put anything on that property. Consequently, what's the value of the 35 acres? We all know what it is, it would be zero, it just would. It would have no value whatsoever. And I guess that's my point.

And I just want to be very clear on this issue, there's a completely different standard when it comes to a standard for petition for judicial review. I'm looking to see whether or not the City Council abused its discretion, right? And that's the standard for the most part, and whether there's substantial evidence in the record to support the findings.

And that's a low threshold, I don't mind saying that,

it just is. This is a totally different scenario here. Right now you're in open court. This isn't a petition for judicial review. All the evidentiary requirements have to be met, right? Rule 56, I have to make a decision based upon admissible evidence, we all understand that. So I'm looking at it from that perspective, and whether the court of appeals and/or Supreme Court agrees or disagrees with my evaluation of this issue is another day.

But I understand your argument. You said, Well, Judge, the value is to the Peccoles. That's kind of how I see that, right? But as far as 180 Land Company, who is the current owners of the property, it seems to me that if this parcel of the property is going to remain open space, then it could be argued that the city has wiped out or nearly wiped out all economic use of the property, and that's really and truly what I want you to address.

Because maybe your argument is that I guess value can only transfer one time, I guess, when the property is originally developed? I mean, I don't know. Is there case law that says that? What about the current property owner? What about the bundled rights?

MR. SCHWARTZ: Yes, Your Honor, we addressed that in the -- that's the segmentation doctrine that the Court is talking about, and you can't segment property, the parcel as a whole, and then say that one part of it, the regulated part,

has no value, so now pay me. You have to look at the parcel as a whole.

But I would like to back up, Your Honor. I think that this is an extremely important issue, that there is no substantive law of PJRs; it is an empty vessel; it is a procedure. Inverse condemnation is a procedure with a different remedy and different evidentiary standards. However, what we're talking about here is --

THE COURT: We can all agree on that, I think.

MR. SCHWARTZ: What we're talking about here is the underlying substantive law of property and land use regulation in Nevada, and that law is the same. It's the same for whether you're bringing a PJR or you're bringing a takings claim or a due process claim, the law is that zoning does not confer a right of any kind, it limits use, it doesn't confer rights, and it doesn't confer a constitutional right to build anything you want. That's the underlying law that applies to both a PJR and an inverse claim.

Again, PJR, it's an empty vessel, it's just a procedure. So you can have -- and we're not talking about facts here. The Court made the facts clear. There's a PROS designation on the property, there's RPD-7 zoning on the property; what does that mean legally?

First, those are the facts. The Court said here's the legal import of that, these are questions of law not of remedy.

The standard is the same in a PJR or a regulatory taking case. There is no constitutional right to build under zoning, and so it's the same law, it's the underlying substantive law, and so the Court's conclusions about what that underlying substantive property law and land use regulatory law in Nevada, it's the same for both causes of action.

Your Honor, what that would be saying is if none of the Court's conclusions of law in the PJR about the city's discretion -- and, again, discretion cannot coexist with a constitutional right to build what you want. If that's true, then if --

THE COURT: I got a question for you. Hypothetically, a decision of a city council or a planning commission and/or county commission and the like, they can make a decision, the trial court can make a determination that their decision is not an abuse of discretion, right? But that doesn't stand for the proposition that notwithstanding the fact that they didn't abuse their discretion, that when exercising their discretion it resulted in a taking of property. That's the difference, and that's the way I see it. And that's a totally different animal, subtle but huge, right? You could exercise your discretion without abusing your discretion, but that doesn't mean that's a get-out-of-jail free card. That's probably the best way to say that.

I mean, I don't mind saying it, and I'm saying it

because that's the issue I want the Nevada Supreme Court and/or Court of Appeals to really hone in on, because that's part of my decision-making process. I think they're different. Yeah, you could exercise your discretion and not abuse it.

But if you, for example, going back to one of the issues you brought up, both categorical and *Penn Central* claims requiring a showing that the city's regulation wiped out or nearly wiped out the total economic use of the property. That's not a charge I'm required to look at when it comes to a petition for judicial review.

MR. SCHWARTZ: Absolutely right, Your Honor. But the plaintiff's theory, Your Honor, can I address that? The plaintiff's theory --

THE COURT: Yeah, but you said, "absolutely, right," that's good to hear.

MR. SCHWARTZ: The plaintiff's theory in this case is that they had a constitutional right, quote, right to build whatever they want on the 35-acre property as long as it's a permitted use by zoning. That's their theory. That's not a takings theory, Your Honor, that's PJR theory. That's absolutely right. And they lost the PJR, and the judge -- and this Court decided against them because it said zoning doesn't confer any rights. But their entire case, Your Honor, is a redo of the PJR.

Now, I think where we're going with this is --

THE COURT: You can make your record on that, but I'm not buying that one. Once again, I don't mind telling you my charge is much different, and I recognize that -- I forget how long it's been, but it's been quite a while, and I recognize that aspect of it, that this is a totally different animal as far as inverse condemnation law is concerned, and I thought I was pretty clear on that.

So all I'm saying, sir, I'm going to let you go ahead and make your record. But as far as my decision as it pertains to the petition for judicial review, I had a different charge. And I even think there's -- I don't mind saying this, and interestingly enough, I was never even called upon to even deal with that specific issue, but in a decision sent down to me from I think it was the Supreme Court, they even talked about the different standards, right? I didn't even get a chance in that case, it was so early on, it was a motion to amend, I granted it, and that was it, and then a writ was run up. I clearly understood that, I think I did, going back to a year, year and a half or so ago, the differences between a petition for judicial review and a claim for inverse condemnation before a trial judge. Totally different, different issues of law, different factual issues.

MR. SCHWARTZ: Your Honor, can I explain?

THE COURT: Yeah, you can, sir, but I'm just saying, and I think the law will -- I have a fairly high degree of

confidence that the law will agree -- I mean the courts will agree with me on that issue.

MR. SCHWARTZ: Your Honor, when I recite to the Court this passage from the decision on the PJR, I'm reacting to the plaintiff's claim. The plaintiff's claim in this case in the taking -- this is a takings case -- is really a do-over of the PJR, because they're claiming that they've got this constitutional right.

I am -- we have, and I am fully prepared now to summarize our case on what the real takings tests are, because everything the plaintiffs are arguing in this case is a redo of the PJR.

So I think I'm on the same page as the Court in that to show a regulatory taking, you have to show a wipeout or a near wipeout or interference with investment-backed expectations. The plaintiffs don't address that in their takings claim, they just want to redo the PJR.

So if now I could address the Court's concern about why the city has not taken the 35-acre property. We have three arguments --

THE COURT: Please go forward. I'm listening, taking notes.

MR. SCHWARTZ: One is that the case isn't ripe. The case isn't ripe because the Court doesn't know how far -- if a regulation goes too far and wipes out value unless it knows and

it has a final decision of the public agency and knows how far it goes.

So in the 65-acre case, Judge Herndon found they didn't even get to first base. They didn't have a ripe claim because they had denied two applications. So that's what the Court -- that's what the courts have required, including the Nevada Supreme Court in the *Kelly* case.

The *Kelly* -- you know, we have the categorical and *Penn Central* claims allege excessive regulation of use. And as I indicated on Friday, the developer is trying to confuse the Court with the *Sisolak* case, which is a physical takings case, not a regulation of use case, and so the ripeness doctrine does not apply in a physical takings case, the *Sisolak* case recognizes that. The developers misrepresented that case.

In a regulation of use case, you need to show that the regulation of the owner's use was the taking. It has to wipe out the economic value or a near wipeout of the value.

And again, this developer, Your Honor, the city didn't change the value of the property because the developer either knew that the property had -- was not viable as a golf course, in which case the city didn't make the developer buy the property, or it didn't know and it didn't do its due diligence, either way the city didn't make the developer buy the property. The developer, like *Guggenheim*, should have paid a price for that property that reflected its worth, and it was subject to

the PROS designation, so it couldn't be used for residential. So the developer can't come in and say, Hey, I paid a price for property that that would be $1.5 million per acre, which is the developer's evidence, assuming I could use it for residential when the law is clear that they couldn't.

THE COURT: Why is the law clear that they couldn't? Because it's my recollection, I keep going back to this, the property at issue I'm talking about the 35 acres, was owned as RPD-7.

MR. SCHWARTZ: Well, Yes, Your Honor, but the PROS designation is the general plan designation and that's consistent with the RPD-7 zoning.

As the Court may recall in U.D.C. 19.10.050A, RPD-7 zoning is for plan developments, and the city is encouraged -- it is encouraged to require the set-aside of open space. It did that. It said you're going to be able to develop, if it's a 614-acre part of the 1500-acre Master Plan, you can develop 84 percent of the PRMP and 16 percent is going to be the 250-acre set-aside for open space.

So that's -- that use of part of the property that's zoned RPD-7 for open space --

THE COURT: I don't want to cut you off, but was the golf course private or public? Do we know?

MR. SCHWARTZ: Private. And so would the property be if it were open space, if it were park, if it were an amusement

park, if it were any use, it would be private, but that doesn't mean that the city has to allow a change in the use if it's segmented from the whole.

So the developer bought property --

THE COURT: That's the issue. And I don't want to cut you off, sir, you're saying the golf course was private, meaning no public access, it was part of the Queensridge, I guess, community, is the best way to say that, and so the public had no access for ingress or egress; is that correct?

Sir, you can answer that.

MR. SCHWARTZ: Oh, by permission --

MR. MOLINA: The golf course was privately owned, but it was publicly --

MR. SCHWARTZ: It is a public golf course. It was open to the public.

THE COURT: And I don't want to cut you off. I was just wondering if it was like DragonRidge where it's a private golf course.

So it was a public golf course, and I do understand it was private ownership, I do get that.

But go ahead, that's all I wanted to know, whether it was a --

MR. SCHWARTZ: So the developer, Your Honor, is telling you, I bought a golf course, I paid 4 and a half million dollars for a golf course, and it turned out, you know,

I made a bad business decision and the golf course isn't worth anything, so now pay me, and not only that, pay me $386 million if you don't let me build residential. Although, of course, the city did allow them to build residential.

So, you know, the developer can't have it both ways. It can't, just like *Guggenheim*, you can't buy property and say, oh, you've wiped out my value, you've taken away my economic value. In *Guggenheim*, the developer said, or the owner said, Well, I can't make much or any money with this rent control in place.

It's the same facts, the same situation. The Court said, Wait a minute, you bought this property and now you're telling us we have to change the use; even though it's not in the best interest of the community we have to change the use so that you could make a profit? That was your business decision to buy that property. The city didn't make you do it, and you pay a price that reflects its value.

And as the Court said, the developer bought the property knowing that it was PROS in the General Plan. That doesn't allow residential development, so that can't be a taking.

But getting back to my ripeness point. In the *Kelly* case -- excuse me, in the *State* case, and State is at tab 12, the Court said, In Nevada, we apply the Williamson County ripeness doctrine. That doctrine is -- we don't know if

regulation has wiped out property. If the developer applies for some plan of development and the city says, No, well, we might approve something else; we might approve a less dense development; we might approve a different type of development, the city has broad discretion. It can approve lots of things that may not be the first project.

So before a takings claim can be ripe, the government agency has to deny two separate applications for development of the property and just that property, and then the claim might be ripe. Then the developer can say, All right, it's now clear what they're going to allow on the property and what they're not. Now you can tell me whether this meets one of the takings tests, which is a wipeout or a near wipeout.

And in the *Hoehne* case, Your Honor, which is at tab 17, the Court said the claim is not ripe unless there's a clear, complete and unambiguous, it's unambiguous that the agency has drawn the line clearly and emphatically as to the sole use which the property may be put. And that's exactly what Judge Herndon found: No, I can't speculate about what the city might allow on the property. They've only denied one set of applications for this property. The developer hasn't filed another set of applications.

The City sent a letter to the developer, which is at tab 7, after the court -- the Supreme Court reversed the Crockett order, and said, You don't need to file a major

modification application. Come in and file another application for the 35-acre property, and invited the developer to do that. The developer didn't want to develop the property, so it didn't file another application, it didn't ripen its claim, and that law is absolutely clear.

And the developer claims that the ripeness doctrine does not apply to its categorical takings claims. The developer concedes it applies to its *Penn Central* takings claims. That's illogical and against all law. We've cited to the Court the *Palazzolo* case, tab 15, and many other U.S. Supreme Court cases, lower court cases in our brief that the ripeness doctrine applies with full force to the categorical -- their wipeout claim, their categorical taking claim, and it has to. You can't have a -- you can't have a ripeness doctrine that applies if there's a near wipeout, but you don't have a ripeness doctrine that applies to a wipeout. It just makes no sense.

So the developer then argues, Well, I can't apply for another project because it's futile. Your Honor, we have a very odd situation here. This case is not only a first in which a developer has argued they have a constitutional right to build anything they want as long as it's a permitted use in zoning or it's a taking, that's a pretty bizarre claim.

But here we have a situation where the city approved 435 luxury units for construction in the Badlands and the city

said now you're ready to go, the Supreme Court has reversed the Crockett order, and your applications are reinstated. The Nevada Supreme Court said the applications, the approvals are valid, that's what the language the Court used, and that's in tab 2.

And the Court -- and after the Court reinstated those approvals, the city sent a letter to the developer, tab 3, that's Exhibit GGG, saying you're ready to go, you've got your permits, you're ready to develop for the 17-acre property, 435 units. The developer claims, Oh, no, I don't have a permit. It's the craziest thing, Your Honor. No, I don't have a permit, you nullified it, and the city said, No, no, really, you've got a permit, go build. That was more than a year ago that the city said this. The developer has done nothing.

Here's what happened in the 133-acre case. In 133-acre case, after Judge Crockett's decision, the City Council said, Among other things we -- your applications are incomplete because you haven't filed a major modification application. Judge Crockett ordered it, that's a final decision. We would be in contempt of Judge Crockett's order if we approved these applications without you filing this major modification application.

The developer goes to -- takes that up on a PJR, and Judge Sturman finds, yes, denies the PJR on the grounds that the City Council could not approve those applications because

there was no MMA filed, and that would be in violation of Judge Crockett's order.

So the city -- so after the Supreme Court reversed Judge Crockett's order, we are now back in Judge Sturman's court in the 133-acre case. The city moved to remand the 133-acre applications to the City Council because they never, never decided them on the merits. They found them incomplete under Judge Crockett's order. The developer has strenuously opposed a remand to give the City Council a chance to review those 133-acre applications for the first time on the merits.

This is the most bizarre situation I've ever seen where a developer has got one set of permits, the city is telling him to go back to the City Council because they couldn't review your applications on the merits, and the developer says, No, no.

So what we've got here is a clear situation where a developer bought property that the developer now claims had no value, so it had no value when the developer bought it, and now it wants this -- and it has segmented off that property and it wants the Court to just focus on that property and say, Oh, the city is taking my property, and I want $54 million even though the developer paid 4 and a half million for the entire 250-acre Badlands. And the developer has got permits for, you know, a huge number of units, and it declined to even pursue development on the 133-acre property.

So it's just a bizarre situation here where there's no taking, there's no injury, there's no damage to the developer because the city, by declining to change the law, did not change the value of that property, and you got a developer who instead just wants money. That's what this case is about, Your Honor. It's a shakedown. It's an attempt to use the courts to get the developer what, you know, $386 million for a 4 and a half million dollars investment. I mean, it's just unconscionable. So the case is ripe for the --

THE COURT: I don't look at businessmen as shakedown artists. And I don't mind saying this, I thought about this, too, it was known that there were problems with this golf course, right? And I'm certain if the city really early on, if they wanted, they could have bought out the property owner, right? Or they could have bidded for this golf course like everyone else when it went up for sale, right? If they were so concerned about open spaces, they could have done that. There's nothing to preclude the city from saying, Look, you know what, we're concerned about this golf course and it's a problem, it's happened before, let's go ahead and turn this into public spaces, you know.

Only problem with that is this, though, they probably would have to have public access, they probably couldn't segment it all, but they could have done something, I would think, and they didn't.

MR. SCHWARTZ: That's not the city's responsibility, Your Honor. The city's responsibility is to make sure that the community is well planned for the community. Its job -- the city's job isn't to help property owners make profits.

THE COURT: Well, then who's making profits?

MR. SCHWARTZ: That's not -- I mean, there's no case that says that, Your Honor. What the Court is talking about, there's no authority --

THE COURT: Does the city get a free pass? They can't force someone to do something with their bundle of rights that results in no value to the property and not pay for it. That's a big issue.

MR. SCHWARTZ: The property had -- Your Honor, the property had whatever value --

THE COURT: I'll tell you what, this is a question I have, and I want to make sure I understand it.

Judge Crockett's order wasn't published; is that correct? Is it a published decision?

MR. SCHWARTZ: It was a trial court decision. I don't know if it was published.

THE COURT: Okay. Is that --

MR. LEAVITT: Your Honor, Judge Crockett's decision was a final decision of the lower court. It was appealed to the Nevada Supreme Court, and then the Nevada Supreme Court reversed Judge Crockett's decision.

THE COURT: Right. But they didn't publish it, right?

MR. LEAVITT: No. No.

THE COURT: Okay. I was just curious because I didn't think so one hundred percent.

MR. LEAVITT: It was not, published, Your Honor.

MR. SCHWARTZ: It was an order of reversal, Your Honor, and they reinstated the permits, and the city hasn't --

THE COURT: The question I have, though, and understand I haven't looked at Judge Crockett's order in a long time, I haven't, but what was his decision based upon?

MR. SCHWARTZ: Oh, it was a number of factors.

THE COURT: And I'm sorry, I'm --

MR. SCHWARTZ: The history of the PRMP --

THE COURT: Sir, I don't want to cut you off. I'm sorry, that was a bad question.

What did Judge Crockett decide? That was my question.

MR. SCHWARTZ: Judge Crockett decided that to develop housing in the Badlands, the owner needed to file a major modification application under the U.D.C. The U.D.C. says major modification application required for a PD development. It does not say it's required for an RPD development. When it went up to the Supreme Court, they made a very narrow decision. Again, the developer has misrepresented that decision as supporting their bizarre claims in this case. The Court made a very narrow decision; it sided with the city, which argued

major modification application by the plain language of our U.D.C. not required for RPD. It is required for a PD. This is not PD, it's RPD. That was the sole basis of the Supreme Court's decision. They didn't say that zoning prevails over general plans. They didn't say that there's no PROS designation. They didn't say anything what the developer says, except that the city was required to obtain an amendment to -- the city was properly required an application to amend the General Plan, to amend the PROS designation before a development of residential in the Badlands.

So the Court there was saying the opposite, the opposite of what the plaintiff is arguing here, which is that the Supreme Court somehow found that the PROS designation either didn't exist or did not prevail over zoning. Again, there's no -- there's consistency between the zoning and the General Plan designation here, so there's no question about which prevails. But if there were an inconsistency, the law is absolutely clear in NRS 278.250 and in the *AmWest* case and the *Nova Horizon* case that the PROS designation prevails, and that was the case when the developer bought the property, as the Court observed.

THE COURT: Here's my question, though, and I might be wrong on this, but didn't Judge Crockett require plaintiff or the property owner -- or require that there would have to be some sort of amendment to the General Plan; is that what

happened?

MR. SCHWARTZ: Yes, that's right, and that is correct. That was --

THE COURT: Isn't that what you're requiring in this case right now?

MR. SCHWARTZ: Yes, yes, that is the requirement, but his decision was based on a number of factors.

THE COURT: And I don't want to cut you off, sir, your co-counsel wants to address that issue. But my question is this, I'm looking at it, and Judge Crockett required an amendment to the General Plan, and the Nevada Supreme Court said, No, that's not required. Okay, I get it, but --

MR. SCHWARTZ: No, no, no, they said the opposite.

THE COURT: Okay. What did they say? What did I say?

MR. SCHWARTZ: They said an amendment to the General Plan is required. They said an amendment -- the Supreme Court said amendment to the General Plan is required. They said a major modification application was not required in addition to the site review application, the rezoning application, other applications. They absolutely did, Your Honor.

In tab 2, you can see here the Court said in the order --

THE COURT: Your co-counsel wants to say something for the record. Is there anything that you want to add, sir? Go ahead. I don't want cut you off.

MR. MOLINA: So just to clarify. Judge Crockett's decision was based on an appeal that -- PJR that was filed by the homeowners.

THE COURT: Right.

MR. MOLINA: The City's approval of the 17-acre applications, and those applications included a General Plan Amendment. They did not include a major modification. The homeowners challenged the city's decision not to require major modification, and so there was no general -- the failure to file a general plan amendment was not at issue in that case as it is in this case. However, the Nevada Supreme Court, in reversing Judge Crockett's order, made clear that the developer had to file all applications required by the city's development code, which the General Plan Amendment is required here.

MR. SCHWARTZ: Your Honor, I'm in tab 2 on page 5 of the Supreme Court's decision. The Supreme Court said: "The governing ordinances require the city to make specific findings to approve a general plan amendment," and they cite to the Code as well as a rezoning application.

So the Nevada Supreme Court said the opposite of what the developer claims it said. It's saying that property was designated PROS to build residential in the property. The City properly required an amendment to its General Plan.

So Your Honor, in my limited time left, I want to address this segmentation doctrine if I could.

THE COURT: Go ahead.

MR. SCHWARTZ: What the developer is doing here is called segmentation. It's a developer trick to get greater density. The courts, including the *Kelly* court, the Nevada Supreme Court in *Kelly* said no, you cannot segment the property for purposes of takings analysis; that would allow you to require compensation in almost every case. It's a circular argument.

So in *Kelly*, which is tab 14, in *Kelly*, the developer subdivided property into 39 lots and built on 32 and then said to the agency, Now you have to let me build on the seven remaining lots. And the Court said, No, you've got substantial development, parts and the whole. You can't, you know, carve off lots whether you develop them yourself or sell them to another person. Now you can't claim, Hey, you're wiping me out because now these are all discrete lots with assessor's parcels.

In this case, we've got four development sites that the developer has identified that they put, in classic form, they put each property under a different owner. There are some entities that fall into the properties, but all four have different owners. It's classic segmentation where the developer, the developer stands in the shoes of the original developer for use as a whole. They got to build. They got the city's approval to agree to a comprehensive master planned area, 1500-some acres where there was an agreement as to what was

going to go where, and, again, it's a machine. You take one part out and the machine doesn't work.

So they come along later and they sell off the open space after they've got -- after the developer has gotten the benefit and it has sold all the units to people, to property owners who live on that open space or benefit from that open space, it enhances their value. The developer then sells off the open space and someone comes in and says, Oh, now you have to develop the open space or else I won't make enough money.

Again, the argument that you have to let me develop this or I will lose money, that's false, Your Honor, that's not the facts. The developer knew they couldn't build a residential when they bought the property. By the city saying, Well, we're not going to change the law doesn't change the property's value one bit. It doesn't wipe it out, it doesn't deprive them of anything that they bought. It leaves them in the status quo.

Just like in the *Penn Central* case, the Court said, Well, you've got -- you've got historic use of this property. You're not entitled to make the most profit from this property. You got what you've bought. In *Guggenheim*, you got what your bought. You paid a price.

They paid $18,000 an acre, that's a golf course price. They claimed that if they could build housing, it's worth 1.5 million per acre. That's a residential development price.

They knew, and the price they paid reflected that the property was limited in its use.

But, again, you can't -- you can't allow the developer to segment off property. The United States Supreme Court in the *Murr* case said, Well, there are three factors that tell us what the parcel of whole is. And the developer, by the way, has made no argument, they've cited no authority that they didn't -- that allows them to segment off the property in this fashion.

You look at the *Murr* case and the three factors. You look at, among other things, what's the relationship between the property that you're segmenting off and the rest of the property? You know, is there some interdependence of the property such that it should be treated as the parcel as a whole? And that's exactly what we have here. We have a property that was part of a master planned development community and enhanced the value of the rest of the property as an amenity, whether it's a golf course or open space it enhances the value.

And so under the *Murr* -- and by the way, the master plan was one owner, one master plan, all the different parts were approved at the same time, and so, you know, that is the classic parcel as a whole.

Now, if the PRMP is not the parcel as a whole and lets say the Court disagrees and says the PRMP is not the parcel as

a whole, the Badlands at a minimum is a parcel of the whole. It was in one use for 23, 25 years, one owner. It was sold from one owner to another owner as a golf course, as a functioning golf course. It was in one use. That's got to be the parcel as a whole.

So the developer can't then carve up the Badlands and say, Okay, you've allowed me to build 435 residential units on one part of the Badlands. Well, I'm going to sell off 35 acres for that property, and then the new buyer comes in and says, If you don't allow me to build housing on this property even though I bought it when housing wasn't legal, if you don't allow me to build housing on this property, then it's a taking and you have to pay me $54 million? Your Honor, this is classic segmentation.

The city -- you know, if you carve up the property in the way the developer did, you're always going to be liable for a wipeout, because as you get smaller and smaller, the city says, Well, you know, 435 units on 250 acres, that's a lot of units, that's pretty dense. Now you want more? They don't have to allow each part of the property to be developed. Again, they don't have to allow any of it to be developed, because the developer bought it when it was subject to these regulations, and so the developer has the same value of property that it had when it bought the property, the exact same value. So there can't be a taking here.

THE COURT: I have another question. I don't know if there's an answer to this or if this has even been pointed out as an issue, but I do understand your segmentation argument. My question is this, though -- and you brought up a very important point from a time factor -- this golf course functioned for about 22, 23 years. What is the impact of time on a segmentation, I guess where you could call this some sort of affirmative defense maybe? What impact does that have?

You know, because there's no question, and we see this all the time in all the major metropolitan areas, and 23 years is a long time. The character and nature of property could change in 23 years. And there's no question maybe early on there were benefits, but over time those benefits can dissipate, right? And so does this segmentation argument, does that -- can you make that same argument 20 years, 50 years, a hundred years down the road?

MR. SCHWARTZ: Your Honor, that's a very good point. I think it's -- I don't think it's relevant because the takings test requires a wipeout and, as I've explained, the city did not change the value of the property one bit.

But to answer your question about time, you know, that's the city's discretion, that's where the city's discretion comes into play, and this Court -- what the developer arguing here --

THE COURT: It's a general question, I mean, I'm just

thinking --

MR. SCHWARTZ: I think it's a great question. Great question.

What the developer is arguing here is, hey, the city was unfair and they were biased against us. And so whether the best use, the most efficient economic use, whether the best use of that property for the community is open space or golf course or housing or office or whatever the use, that is subject to the city's broad discretion. They exercised that discretion. They can exercise that discretion, but if they wipe out the value, then they have to pay compensation, but short of that or a near wipeout, they don't have to pay compensation. That's within their police power.

So when the Court -- when the Court was faced with a PJR in this case, the Court found that there was substantial evidence to support the Government's decision. That's the deferential test that the Court applied for PJR.

So when we're talking about fairness or efficiency or what's the -- you know, what is the optimal use of this property, that's a political decision, it's up to the city's discretion.

For the taking claim, the only concern, the only issue for this Court, the only legal issue is whether the city has wiped out the value or nearly wiped out the value. And as I indicated, the city did not change the value at all, because the

developer still has exactly what it paid for when it bought the property. Whether the city should change that, that's a good question, but that's what the Court said in the PJR, Well, you know, it's not my -- I can read from your findings of fact and conclusions of law on the PJR, Your Honor, tab 38. You said many times, you know, it's not my decision, it's not my decision to say what is the best use for this property. I'm going to leave that up to the -- you know, leave that up to the political system, to the Government, the city government. They have the expertise. They have the power. They have -- they're the entity that makes the decision. I don't make the decision. You said in paragraph 19 on --

THE COURT: I agree with that, but that's a different call to the question, right? It really and truly is. And that's my point, because right now we can look at it from this perspective. You could have a situation where hypothetically a city council or a county commission didn't abuse their discretion, but, notwithstanding that, their decision making results in a taking of private property.

MR. SCHWARTZ: Well, that's true, I agree.

THE COURT: We can all agree that's true.

MR. SCHWARTZ: But your question was about the timing of the parcel as a whole, and it says the parcel of a whole applies over time, and it absolutely does, but I was addressing the Court's concern that after --

THE COURT: Has that ever been addressed? Does anyone know?

MR. LEAVITT: It has, Your Honor.

THE COURT: Okay. I want to hear about that then.

MR. SCHWARTZ: What was that, Your Honor? I'm sorry, I missed that.

THE COURT: I asked a question whether or not that issue regarding the segmentation argument and the impact of time, has that ever been addressed by a court, and that was my question, and counsel on behalf of plaintiffs said, yes, it has been addressed.

MR. SCHWARTZ: Well, yes, it has, Your Honor, in the *Sierra-Tahoe* case. In the *Sierra-Tahoe* case, the court said not only can you not segment property geographically, you know, horizontally or vertically, in *Penn Central* you couldn't sever off the air space.

In the *Murr* case, you couldn't sever off one of the assessor's parcels from the other assessor's parcels because given the history of that property, they're really the parcel as a whole, and the court doesn't look at assessor's parcel boundaries exclusively to make that determination.

In the *Sierra-Tahoe* case, the Tahoe Regional Planning Agency imposed a 33-month moratorium on any development of single-family lots in the Basin while it studied permanent controls for the Basin. And there the Court -- the owner sued

and said, Hey, you've wiped out my value because during that 33-month period I could have no use of the property, and the Court said, No, we even apply the segmentation doctrine to time, to the segmenting the property over time.

So let's look at the issue of time in this case.

The Badlands is still functioning as the open space for that PRMP. People are still enjoying the views, the buffer, the buffer, the protection from noise, the privacy, seeing a natural area. They are still enjoying that. It's still adding value to all of that community.

And so it's not a question of there is -- you know, that that Badlands has become completely disconnected from the community such that it might be in the city's judgment, in the city's exercise of discretion, you know, it might be a good idea to change the use. Well, again, it's still functioning as the open space for the PRMP, so it's still -- so there are no facts to indicate, well, now you can segment off this property from the parcel as a whole given that the City Council has designated the property PROS in the General Plan, saying we want this property, at least for now; until we amend the General Plan, we want this property to continue functioning as the open space for this community, and so to sever it off would violate the segmentation doctrine.

And, again, it's a rule of fairness. You know, how can you plan -- how can you plan, a master planned community,

how can you plan a master planned community if the developer can buy a hundred acres, say I want to impose a master plan here, and the city says, okay, because of the topography, because of the surrounding development --

THE COURT: I'm sorry. I was just asking my law clerk --

MR. SCHWARTZ: Because of the surrounding development we're going to want the different uses to be in these different locations, including the amenities, I don't know, school or healthcare, police and fire, open space, transportation, roads. So, yes, the public agency says, Okay, here's where we want all the different parts to go. Well, if someone comes along and severs off part of it, part of the whole so that the machine might not work, they can't say, Well, unless you let me make a different use of this property, then the property that was -- that was programmed for this project when the master plan was approved, if you don't let me make a different use of this property, then you have to compensate me.

Well, it would be very difficult to use master planning in development, Your Honor, if that were the case, because the developer would build out the project and then sell off the parts of the project that it didn't want, and the new developer would come in and claim, Oh, I get to do whatever I want with this property because it no longer has the use that the original developer said it was supposed to be used for.

Well, the city says, Wait a minute. This is part of the master plan. This provides valuable benefits, enhancement of use and value of all this other property. We're not going to allow you to change that because that will disrupt our master plan.

And so that open space is as valuable and as useful today as it was in 1990, 1989 when the city imposed the PROS designation on the property.

So Your Honor, we extensively briefed this segmentation issue, and we've cited many authorities that are all consistent that segmentation is not permitted, otherwise it's so easy to show a taking, a wipeout taking, and this is just a classic segmentation.

Now, the developer is going to argue that the city made them segment the property, and that's false. The city didn't make them segment the property. The developer came to the city with a development plan, and the city said, Well, we want you to make sure that the lot lines are consistent. We don't want development sites straddling lot lines. And the city only required them to impose a rational set of assessor's parcels underneath the four development sites.

The decision to develop the property with four development sites was the developer's and the developer's own. But more important to the segmentation point, the decision to apply for development on each separate property and then sue, sue the city for a taking on each separate property, that's the

segmentation, that's where the segmentation really comes into play, because they're claiming now you wiped out one of my segments, even though the city let them build in the parcel as a whole, the Badlands or the PRMP, you know, 84 percent buildout, even though the city let them build, Okay, I've carved out this one part, you have to let me build on every part.

So that's how you get greater density. Let's say you approach an acreage and you say, okay, if I do a master plan with the city, maybe they'll allow me 500 units. So if I then carve it up into four parts, then apply for development on the first part, and let's say they give me 400 units on that part, then if they say, No, we don't want you to develop the other parts, we've already given you 400 units, you know, you carve the property up into four parts, but it's the parcel as a whole. We gave you 400 units, that's substantial development, you really did well.

In this case the developer paid 4 and a half million dollars for property that it now claims is worth 54, or that only 35 acres of the 250 acres is worth 54 million. Wow! That's a great deal for property.

MR. LEAVITT: I have an objection --

THE COURT: Sir, we have an objection. Wait. Sir, we have an objection.

Yes, sir, Mr. Leavitt.

MR. LEAVITT: Yes. As far as the purchase price is concerned, that's the subject of a motion *in limine* which includes the actual evidence, so we would object on that basis; and, secondly, Your Honor, I guarantee you we will not hear the words from counsel "I am done." It will not happen. He's repeated himself four times on this segmentation argument. He went through it four times. He's supposed to go for an hour today. We're not going to get any time to respond, Your Honor, if he doesn't -- I guarantee you we're not going to hear the words "I'm done," so we're going to have to at least put some limitation on how far he can go, Your Honor.

MR. SCHWARTZ: I'm done, Your Honor.

(Laughter)

THE COURT: Okay.

MR. LEAVITT: I stand corrected, Your Honor. I was wrong, but he just said he's done.

THE COURT: Sir, thank you.

MR. SCHWARTZ: Your Honor, I was responding to the Court's questions. I apologize for going over my hour.

THE COURT: That's okay, sir. And I just want to make sure we have a clear record here. Nothing more, nothing less.

All right. You want to take five minutes?

MR. LEAVITT: I have to use the restroom, Your Honor.

THE COURT: That's what I was thinking, I think everybody probably has to.

We'll take a restroom break and then come back and get started.

MR. LEAVITT: Thank you, Your Honor.

(Recess taken at 11:02 a.m.)

(Proceedings resumed at 11:12 a.m.)

THE COURT: Okay. We can go back on the record.

And Mr. Leavitt, you have the floor, sir.

MR. LEAVITT: Thank you, Your Honor.

Your Honor, I'm going to just very generally, I'm going to make a couple statements, then I'm going to respond to a couple of your questions, and then I'm going to go into my presentation.

To follow the city's argument here, there would be two things that are necessary: Number one, you have to reverse your property interest order of October 12, 2021 -- or 2020, that's the city's first request, is to reverse your property interest order.

Then their second request is to apply the *Penn Central* standard to all three of the landowners' claims. The reason I say that is because the *Penn Central* standard does say that you weigh three various factors, and you apply the segmentation. The Nevada Supreme Court was unequivocally clear in *Sisolak*, *Sue* and *State versus Hoehne* that *Penn Central* analysis shall not be applied to a *per se* categorical taking, a *per se* regulatory statement, and a non-regulatory *de facto* taking

claim which are the landowners' three claims, that you're not to apply a *Penn Central* analysis, and I'll give you one example.

For Mr. Sisolak, he had a piece of property and he had air space. The Nevada Supreme Court held that the County of Clark height restriction ordinance number 1221 reserved 66 feet and above for use by the public, and that was a taking. If we apply *Penn Central* to those facts and segmentation to those facts, Mr. Sisolak loses, because his property was segmented. He still kept below 66 feet, and he still can build on his land. So that's why the Nevada Supreme Court said, in the three claims that we're moving for summary judgment on, you shall not apply *Penn Central*, and you shall not apply segmentation. You look at the property as an individual property, and I'll address that a little bit more.

So those are our three claims, Your Honor. We're not talking about *Penn Central*, and the reason we're not talking about any *Penn Central* analysis is because our three claims are very limited. And the Court has said we will not apply *Penn Central* under these circumstances, because they say a *per se* categorical taking is a categorical -- is a taking in and of itself. They say a *per se* regulatory taking is a taking in and of itself. They say that a non-regulatory *de facto* taking is a taking where the Government substantially interferes with the use and enjoyment of property. There's no defenses. You don't

get to come in and say, Well, there's segmentation. You don't get to come in and say, Well, there's no ripeness. You don't get to come in and say, Well, there's no *Penn Central* factors. So the Court found that when we meet that threshold, if this Court says, Listen, I've got this standard and you've met the threshold, then that's a taking. So that's the first thing.

Then the second thing, Your Honor, is in *Sisolak*, this is the question I thought you had, was if the Government exercises its discretion and that results in a taking, is that a taking?

So you have this whole petition for judicial review and taking law, and the Government is over here saying, We have discretion to do whatever we want, and even if it results in a taking, there's no compensation. We have discretion under PJR to do whatever we want to a property, therefore, you have no property rights, and if you have no property rights, there's not a taking.

Here's what the Court said, they said the Government -- this is almost a verbatim quote: The Government has the right to apply valid zoning ordinances that don't rise to a taking. See, they leave that second part off. So the Government can exercise its discretion as long as it doesn't amount to a taking. But just because the Government doesn't have discretion doesn't mean there's no property rights.

Your Honor, now I want to talk about -- I want to

address two of your very poignant questions today. This is actually a little bit out of order of what I was going to do today. The question you asked is, is there a restrictive covenant or a condition that the property remain open space? From the very beginning, counsel said absolutely, and here's their argument, here's their argument. They say there was -- and I'll give you this, Your Honor. They say there was a Peccole Ranch Master Plan that was adopted, and that Peccole Ranch Master Plan is a planned development, a PD. And then they say as part of that PD, the landowners' property must remain open space. Must remain open space. That's their argument, Your Honor.

I'm going to tell you -- and you hit it right on the head. You said, well, that's your argument, where's the evidence? Okay. Now I'm going to show you the evidence that is the exact opposite of what counsel just told you.

And I want to start here, Your Honor. May I approach, Your Honor, with -- I have an outline here on the property rights issue.

THE COURT: Yeah, and make sure, do you have an extra copy for the --

MR. LEAVITT: Absolutely, Your Honor, I have a section that's called Rejection of the Peccole Ranch Concept Plan, okay, and this is the facts and the law.

But let me just state one thing really quick --

MR. SCHWARTZ: Your Honor, if I could interrupt. I don't have copies of these exhibits. Is there some way I could get copies?

MR. LEAVITT: I have one for counsel right here and, yes, we can email him. We will email that.

MR. SCHWARTZ: Could you email it now?

MR. LEAVITT: Yes, we will email it now.

MR. SCHWARTZ: Thank you.

MR. LEAVITT: But the argument that's being made, Your Honor, on this condition issue is what they say is they say there's this condition which is pending. The law is very clear that if the Government is going to claim there's a condition on a piece of property, it has to be abundantly clear in the ordinances, you can't imply a condition, you can't spend seven hours trying to tie documents together to say now there's a condition that the property remain open space.

And here's all the Government had to do, Your Honor. For seven hours through this hearing all they had to do was walk in with a big board where the condition was imposed on the property that it remain open space. You want to know why they didn't do that? Because it doesn't exist.

And so here's where I want to go -- do you mind if I hand this to you for the Court?

So, Your Honor, here's where I want to go through the city's Peccole Ranch Master Plan argument, and I want to go

through and explain that the exact opposite is true.

So if you go to the -- on the bottom right-hand corner, it's number 38, this is a statement made by 30-year veteran attorney Brad Jerbic about this exact Peccole Ranch Concept Plan argument that they're making to you. Your Honor, this is the city's agent. He said that the Peccole Ranch Phase II Plan was a very, very, very general plan. I've read every bit of it. If you look at the original plan and what's out there today, it's different. Then he went on to say, the Master Plan that we talk about, this Peccole Phase II Plan is not a 278(a) agreement, it never was, never has been, not a word of that language was in it.

Mr. Jerbic said that the Peccole Ranch Master Plan that counsel argued to you extensively here in this case was entirely abandoned. And you remember, Judge, that's when I jumped up and I said this is very disturbing, because counsel knows that this plan has been abandoned.

And then you go to the next page, Your Honor, this is the Nevada Supreme Court opinion in the 17-acre case. The Nevada Supreme Court said right there in yellow: "The parcel does not carry the planned development district zoning designation."

That's what they argued, that it was a planned development and you had to stick to that planned development. Instead, it's interesting what the Court said: The parcel

carries a zoning designation of residential plan development district. Residential, meaning it has a residential use.

So this whole argument about planned development being on the property, this whole argument about PRMP, Peccole Ranch Master Plan being on the property is entirely false.

We go to the next page, Your Honor, page 40, this proves it even further. This page 40 says that Peccole -- this is the original owner. You remember they said the landowner stepped in the shoes of the developer. Peccole and the City of Las Vegas worked together to assure that there was no restriction on the use of the 250-acre property, and, Your Honor, they took express action to make sure there was never an open space on the property. Remember, I stated from the beginning the intent was always to develop the property residentially.

In 1990 --

THE COURT: That's why I asked the simple question regarding -- and I don't know what the City of Henderson did when it came to the Legacy Golf Course, but they clearly had a 50-year -- I think it was 50-year restrictive covenant on the property.

MR. LEAVITT: Yes. And, Your Honor, not only am I going to show you there's no restrictive covenant on the property, I'm going to show you that everybody in the area signed disclosures recognizing that the 250-acre property was

not a golf course, not open space, and here it is right here: Available for future development. The exact opposite of what counsel has represented to you.

But let me go back to 1990, why everybody got these disclosures. The next tab is page number 41. This is what's been referred to as Z-1790, and it's Exhibit No. 154. The city and Peccole got together. And it's a little bit difficult to see in this, it says, "Gentlemen" -- this is the corrective letter. This is a letter of what happened, and if it's blown up on the right-hand side, and it's --

MR. SCHWARTZ: Your Honor, I haven't seen any of these exhibits. I don't have any of these exhibits. I'm at a real disadvantage out here.

MR. LEAVITT: It's Exhibit No. 154.

THE COURT: All right. Has that been emailed to him. Ma'am?

MS. WOLFSON: We're having trouble --

MR. LEAVITT: Can we have Sandy email it to him from our office?

MS. WOLFSON: The city used this exhibit.

MR. LEAVITT: The city used this exhibit as well, Your Honor. It's in their documents.

THE COURT: And, ma'am, for the record, which exhibit of the city was that, do you know?

MR. LEAVITT: 154.

THE COURT: Sir, it's 154 of the city.

MR. LEAVITT: It's 154 of the landowners, and it's Z-1790. And, Your Honor, this has been discussed extensively. They know what exhibit this is.

THE COURT: But I just want to make sure he knows what you're looking at, that's all.

MR. LEAVITT: Okay, good.

So we're looking at Z-1790.

THE COURT: Okay.

MR. LEAVITT: Okay. So at Z-1790, on page 41, it says the City Council held a meeting on April 4, 1990. They approved the request for reclassification of property, and then they describe the location of the property, which is the landowners' property in this case. And here's what it went from, Your Honor, we got to follow this: Non-urban, and then resolutions of intent, and then, Your Honor, right before the highlighted "2" it says "C-V." That's critical. It went from all these designations and C-V. You want to know why that's critical? Because C-V is the only zoning that allows open space or golf course. And what did the zoning go to? It went to R-3, RPD-7 and C-1. The City of Las Vegas and Peccole worked to take off any potential open space, any potential golf course use. And then, Your Honor, look what they put as the proposed use: Single-family dwellings, multi-family dwellings, commercial, office, and resort casino. This is in 1990. This

is the City of Las Vegas and Mr. Peccole, in 1990, saying we're not going to put any C-V zoning on this property, we're not going to put any golf course use --

THE COURT: And for the record, the C-V zoning, that is the open spaces designation?

MR. LEAVITT: That's the only zoning that allows open space or golf course. It was expressly and specifically removed from the property in 1990.

Then, importantly, Your Honor, we turn to the next page, page number 42, and we have the conditions that are listed. Remember counsel said one of the conditions is the property has to remain open space and golf course. You know what's not listed as a condition? Open space or golf course.

So we have an action by the City of Las Vegas and the landowners working together in 1990 to make positively sure that this 250-acre property remains available for residential use.

If Mr. Peccole and the City of Las Vegas wanted this property to remain open space, they could have very easily put on a condition "open space." They could have very easily put on there "golf course." They could have very easily kept on the C-V zoning, and the city could have very easily said you have to leave this property as open space or golf course. They did the exact opposite, and they put the zoning on the property which allow-- and, Your Honor, they even say what the proposed uses are: Single-family, multi-family, commercial, office, and

resort casino. They put it right there. Yet counsel spent seven hours, seven hours trying to convince the Court that this didn't happen. Argument of counsel, as you well know, Your Honor, as we all know is not evidence. This is evidence (indicating) of what actually occurred on the property.

Now, Your Honor, let's move to the next page, which is our Exhibit No. 130. This is on page 43. This is an inner-office memo at the City of Las Vegas that we had to obtain through public records, and the City of Las Vegas made their own search to see if there's a golf course open space condition, and they said, "There are no conditions mentioned that pertain to the maintenance of the open space/golf course area." The City did it own research and found that there was no condition, found that there was no restriction that the property remain open space or a golf course. That's why Brad Jerbic said -- Your Honor, this is contemporaneous with the facts of this case, contemporaneous with the facts of this case, Mr. Jerbic stated there was never a Peccole Ranch Master Plan.

Now, Your Honor, I want to turn to the next page 44. This is Exhibit No. 133 of our exhibits. We did an analysis, Exhibit No. 133. Here's the large board of this analysis that we did, and this is all supported by affidavit. This analysis shows an overlay on this area here. You can see -- maybe I'll orient ourselves here, Your Honor. This is Charleston

Boulevard (indicating), this is Haulapai (indicating), this is and Alta (indicating), and the landowners' property is between that area, and you can see the golf course kind of laid out there. Okay. This shows an overlay of what the Peccole Ranch Concept Plan was going to look like, and then it shows what was actually built. There are 1,014 units built, contrary to that original Peccole Ranch Concept Plan.

Now, let's think about that for just a minute, Judge. The City of Las Vegas said the Peccole Ranch Master Plan is the governing document here; the Peccole Ranch Master Plan is what everybody had to comply with; the Peccole Ranch Concept Plan was a PD plan that was binding, and that Peccole Ranch Master Plan bound this property to be open space and golf course. Number one, you just saw that the exact opposite happened in Z-1790; and number two, we see that the Peccole Ranch Master Plan was never followed, and the reason it was never followed, Judge, is because there was litigation between Triple 5 and Peccole who started the original Peccole Ranch Master Plan, and because of that litigation, they abandoned the plan all together. That's why Brad Jerbic said that plan has never been followed.

Now, Judge the next 1, 2, 3, 4 pages of the landowners' book of exhibits here, page 45, 46, 47 and 48, those are all the disclosures in the area. I'm not going to go through them, Judge. But you asked, Hey, what did people think was going to happen in this area? Let's just go through them.

Seller makes no representation about zoning or future development. Look at number 4 there: No golf course or membership privileges. Look at number 7: Views or location advantages. They're not there.

Now, let me turn to page 46, because counsel said something this morning that was a little disturbing to me. He said that the golf course was an amenity for the Queensridge community. Again, the exact opposite is the truth. If you look at page 46 here, these are the CC&Rs for Queensridge community. The existing golf course commonly known as Badlands is not a part of the Queensridge community or inexorable property. The existing 27 golf course, commonly known as "Badlands" is not a part of the property.

So you had a good question: Well, in Legacy, it was part of the property, the golf course. It had a 15-year restriction on it. Here --

THE COURT: I thought it was 50. Was it 15?

MR. LEAVITT: 50, sorry.

THE COURT: Yeah, I thought it was 50.

MR. LEAVITT: Here, they're expressly stating the exact opposite. It's not a part of the Queensridge community, it's not an amenity. We're disclosing to you that this property may be developed. This is written right in the Queensridge CC&Rs.

And, Judge, who wrote the Queensridge CC&Rs?

THE COURT: Peccole.

MR. LEAVITT: That's right.

THE COURT: I mean, that's --

MR. LEAVITT: I don't mean to ask the Court questions.

THE COURT: I know it's rhetorical. I get it, I do.

MR. LEAVITT: And why did he say it's not part of it? Because in 1990, he met with the city and they rezoned everything for that area and took out the C-V zoning specifically to make sure that this property here (indicating) was available for residential zoning. That's why he did it.

And, Judge, you go to the next page, we have more disclosures. I'll just refer to the one on the right. This is a disclosure for the properties in the area. Look at the current zoning on the contiguous parcels is, look at what the south is, and to the south, RPD-7 residential up to seven units per acre. Right there.

If this property here (indicating), the landowners' property was reserved as open space, why was everybody in this area being disclosed that the property to the south is RPD-7? Zoning classifications describe the land uses. You go on with the views, and they say, Listen, we're not giving you any rights to views here because it's available for development.

Then we go to the next page, page 48, this is the disclosures, a map put right inside of the city's -- or, I'm sorry, inside of the Queensridge CC&Rs. You can see where it's

highlighted as "not parked." I want to reference the Court to this little triangle at the top here (indicating). Do you see that little triangle at the top right below Alta Drive?

THE COURT: Yes.

MR. LEAVITT: That's the location of the 35-acre property right here (indicating).

Going out to the key at the bottom there it says, "subject to development rights." That doesn't sound like the Queensridge community was told this was going to be open space or golf course.

And then here is the kicker --

THE COURT: I mean, I don't mind saying this, I wasn't a land and planning use lawyer, but it just seems to me that if that were the case, there would be documents and evidence to support that.

MR. LEAVITT: And there are none. Instead, Judge, the documents and evidence that we submitted to you state the exact opposite.

I want to show you this document right here, Judge.

MR. SCHWARTZ: Your Honor, I hate to interrupt, but I have got one exhibit by email. I don't have -- I'm not getting these exhibits. I can't follow along.

MR. LEAVITT: This is the Queensridge CC&Rs that counsel has in his possession, Your Honor. Queensridge CC&Rs are attached as an exhibit, and I believe it's Exhibit No. 33;

is that correct?

MR. SCHWARTZ: Your Honor, these exhibits are in about 20 different volumes. They don't say -- the exhibit doesn't tell me which volume it's in. By the time I find these exhibits, counsel has moved on to another exhibit. Can't they send me an email copy of whatever he's showing to the Court?

MS. WATERS: Sir, it's taking a minute.

MR. LEAVITT: It's large, so it's taking a minute, which, Your Honor, this actually might be a good time for me to put on the record that when Mr. Molina was up here and I asked him for his email or his presentation, we never got it, it was never sent to us. So I haven't said that --

MR. MOLINA: I handed it to you.

MR. LEAVITT: No, that's not true. It was -- we asked for the presentation that night by email. They said it was too large and they couldn't send it to us, and they didn't give it to us the next day. He handed to me the old maps. He didn't hand to me their presentation.

MR. MOLINA: What?

MR. LEAVITT: So here's what we're doing. It's going to them. Their present counsel who is sitting here in the courtroom has a physical copy of the document, and it's being sent to them, Your Honor.

What's that?

MS. WATERS: And it's on the screen.

MR. LEAVITT: And it's on the screen, and we have on the screen the exhibit so he's able to see them.

THE COURT: Sir, can you see the screen? For example, there's a document up, it's Bates stamped 02685, Exhibit C. It appears to me to be a map, final map for the Peccole West. That's what's at the top. Underneath it in parentheticals is "Queensridge."

MR. SCHWARTZ: Your Honor, I can only see the Court, the bench. I don't see anything on my screen other than that, and an inset box with me.

MS. WATERS: It's still sending.

MR. LEAVITT: It's sending, Your Honor. They have it present, counsel has it.

THE COURT: You can see it now, sir. You should be able to see it now. Can you see it?

MR. SCHWARTZ: No, I can't, Your Honor. I just see the bench, I just see the judge and the man standing besides you, and now I see Mr. Leavitt standing behind the podium, but there's nothing on my screen other than that.

MS. WATERS: I'm sending it. It's saying "sending." I don't know how to rush that along. I mean, he has a copy of it.

THE COURT: Sir, do you have all the documents that are Bates stamped?

MR. SCHWARTZ: Your Honor, is that a question for me,

Andrew Schwartz?

THE COURT: Yes.

MR. SCHWARTZ: I don't have any documents other than the, I don't know, 20-or so volume of exhibits. And, again, the exhibits are not -- they don't tell you which volume they're in, so it's -- searching for them takes considerable amount of time.

THE COURT: Do you know which volume this is in?

MR. LEAVITT: Yes, Your Honor. We actually have -- let me just say it this way. We've produced all the volumes. On the front of the volume it has a list of all the exhibits plus the page number for every single exhibit. They're all in page number order.

THE COURT: This would be 2685, for the record.

MR. LEAVITT: Just for the Court's reference, these aren't unknown documents. These are documents which have been heavily litigated in both of these cases. Counsel is extremely aware of the Queensridge CC&Rs.

MR. SCHWARTZ: Your Honor, let's proceed. I'll just do the best I can. If Mr. Leavitt could give me the exhibit number and the volume it's in, that would allow me maybe to keep up. Thank you.

MR. LEAVITT: So for the record, this is the Queensridge CC&Rs, and I'll just go to the last page of the Queensridge CC&Rs, Your Honor, and this is where it says a map

with future development right over the landowners 35-acre property.

And also, I'll pause right here for just a moment. And this is all in the record. The adjoining property owners actually sued the landowners and said you shouldn't be able to build, because we think the property should remain open space; we think the property should remain as a golf course - the exact issue that's before you today that the city is arguing. The city was a party to that lawsuit that was later dismissed. You know what the outcome of that argument was, Judge? There's a decision by the district court in that case, and it's extensive findings of facts and conclusions of law. Here's what the Court said. The property is RPD-7 zoned. The landowners have the right to close the golf course, and here's what the quote was: The landowners have the, quote, right to develop, end quote.

This whole very issue of this is open space, that this is the Peccole Ranch Concept Plan, and that this has to remain a golf course was actually fully and fairly adjudicated, and the lawsuit against the property -- or lawsuit brought by the adjoining property owners, and the district court held they had the right to develop. That was appealed to the Nevada Supreme Court, and the Nevada Supreme Court affirmed it not once but three times, because the adjoining property owners kept filing petitions for rehearing.

So this whole underlying argument that the city is making, their whole argument rests on the property was supposed to be open space or golf course forever.

THE COURT: And for the record, the city was part of that lawsuit?

MR. LEAVITT: The city was part of that lawsuit to very begin with, and they asked to be dismissed from it. So they had full and fair notice of that issue, and they had full and fair opportunity to participate, and the city did not. You want to know why, Judge? This is what's been such disturbing in this case, is while the landowners were filing their applications, the city was on our side. The city agreed with us this entire time. The city said to the adjoining owners, this property is not a golf course property. The city said to the adjoining owners, this property is not open space.

Brad Jerbic, we just read his statement, that's a homeowners' association meeting where Brad Jerbic appeared, and Brad Jerbic says to these homeowners, he says: That was a very general plan. I've read every bit of it. If you look at the plan, what's out there today is different. He said, "We never followed the Peccole plan."

My point in bringing that up is we have always been on the same page with the city. When this litigation started, their private counsel took the exact opposite position and started arguing that the Peccole Ranch Concept Plan is now

binding on everybody, when they said the exact opposite for years.

Remember, Your Honor, when it -- I'll go through this. When we submitted, when the landowners submitted their applications to develop the 35-acre property, you remember what the Planning Department said? They have zoning, they can go forward and build. Remember when the landowner submitted their Master Development Agreement Application, what did the City Planning Department say? They have the zoning, they should be able to go ahead and build.

Never once during the application process did the city come forward and say, Hey, you have to leave this property open space; Hey, this property is golf course.

This whole open space/golf course argument is an invented argument for litigation, which is based only on argument by counsel, and is the exact opposite of the city's position for the past five years, and it's the exact opposite of the documentary evidence.

If we turn to -- this is ordinance number 5353, page 49 of our booklet, Exhibit No. 43, a well-known document in this case. This further confirms what I'm telling you, Your Honor. Again, evidence. Ordinance number 5353, it's undisputed that this occurred in 2001, and the Court can see the highlighted part there on 5353. It says, "The document shows for each parcel the zoning designation on the current

zoning atlas and the new zoning designation for the property." What happened here with ordinance number 5353, as the city explains, is it wanted to conform all of the zoning in the city, and it's undisputed in this case that in 2001 the city reconfirmed the RPD-7 zoning. And what's critical is what the city says in section 4 on the next page: "All ordinances or parts of ordinances or sections, subsections, phrases, sentences, clauses, paragraphs contained in the City Municipal Code, 1983 Edition in conflict herewith are hereby repealed."

So the city says unequivocally --

THE COURT: I mean, that language is typically -- and I've dealt with ordinances before, and that's general language that's in the -- I mean to the city's benefit, they always put that language in there just to make sure it's clear, clarity as you proceed forwards.

MR. LEAVITT: Absolutely. So what was the clarity they wanted to know? Zoning applied, that the RPD -- that the property was RPD-7 zoned.

And so they said we don't care what may or could or should have happened in the past, this property is now RPD-7 zoned property, which is consistent, Your Honor, with what happened on this property, which was to assure that there are only three zoning designations and to assure that the C-V designation was taken off.

Now, I want to turn to page 51.

THE COURT: What's the impact of, I mean, from a legal perspective, of the -- and, I mean, I don't know the exact term for it, but I'll call it the special ordinance that was approved by the City Council within the last few years specifically related to this property. What impact does that have legally?

MR. LEAVITT: Which ordinance are you referring to, Your Honor?

THE COURT: I'm talking about the one that you indicated that was prepared -- I mean, I'm sorry, approved by the City Council specifically addressing the golf course. You know what I'm talking -- you said, Judge this shouldn't happen, this is bargaining this defendant.

MR. LEAVITT: Oh, yes, okay, so that's ordinance number 2018-24, okay. This is after the city denied the 35-acre application, after the city denied the magic realm agreement after the city denied the fence, and after the city denied access, the city then took action specific towards the landowners' property. Here's the action they took. They said, number one, this bill targets only your property, 2018-24, they said that. There's no evidence to contradict that. Counsel has it, that it targeted only the landowners. Number two, it imposes requirements making it impossible to develop. So the city recognized the property was able to be developed because then they imposed impossible-to-meet requirements to develop;

and then, thirdly, here's the quicker. They said you have to allow the public to access the property. That was the operative language. They put --

THE COURT: By itself that takes it out of *Penn Central*.

MR. LEAVITT: Of course. And that's exactly what happened in the *Sisolak* case. That's exactly what happened in the *Sierra Point versus Hassid* case, and in both of those cases --

THE COURT: Do they -- do they --I mean --

MR. MOLINA: Absolutely not, Your Honor. In the Declaration of Peter Lowenstein that we went through last week, if you go through -- there's a section that specifically talks about this ordinance. It was not specific to their property, it was never applied to them, and this is absolutely false, and I just need to make an objection for the record. That's completely misstating what the evidence shows.

THE COURT: Now, when you say that it was never applied to them, wasn't the ordinance approved, though?

MR. MOLINA: The ordinance was approved, but it didn't automatically apply to them. The city had to either ask them to submit an open space plan or it would apply to a future golf course that closed. In this case the golf course was already closed at the time the ordinance was passed.

THE COURT: But it didn't -- there were no other golf

courses at issue, right?

MR. MOLINA: I mean, there are golf courses throughout the county?

THE COURT: No, no, no, there were no other golf course at issue, i.e., there were none that were failing, there were no other golf courses that were having --

MR. MOLINA: Well, there's Silverstone, that's another golf course in Las Vegas that failed.

THE COURT: And where is that ordinance again?

MR. LEAVITT: I will pull it up, Your Honor. It's Exhibit 108, Your Honor.

And as we're pulling this up, we can read the ordinance. We don't need Mr. Lowenstein to tell us what doesn't apply. It's an exhibit in our exhibit book, Your Honor.

THE COURT: Yes.

MR. LEAVITT: Landowners' exhibit. We could turn to Exhibit No. 108. That's -- it should have a red cover, and I have another book, Your Honor.

THE COURT: No, I have it here. Yes, I have it.

MR. LEAVITT: Okay. Exhibit No. 108. And once you get there, Your Honor, I can reference you.

THE COURT: I have it.

MR. LEAVITT: Okay. Now, the front page there at 003202, it says, A, General, so this is the ordinance that was passed by the City of Las Vegas. It says: "Any proposal by or

on behalf of a property owner to re-purpose a golf course or open space, whether or not currently in use as such," in other words it applies no matter what you've done so far, "is subject to the public engagement requirements in subsection (c) and (d) as well as the requirements pertaining to the development review and approval process, development standards and the Closure Maintenance Plan set forth in E(2)(G) exclusive." So it expressly states if you're going to change your property from an open space to a golf course, you are subject to (g), that's the operative one. And just so we're clear here, the only evidence we have is that this applies only to the landowners.

So let's flip over to section (g), which is 003211, bottom right-hand corner. See at the top there it says (g) Closure Maintenance Plan?

THE COURT: Yes.

MR. LEAVITT: Then we turn to the next page, and one of the requirements under that Closure Maintenance Plan is little (d) on page 003212. I don't know if you're there, Your Honor.

THE COURT: I'm there. "Provide documentation regarding ongoing public access."

MR. LEAVITT: There it is.

THE COURT: "Access to utility easements and plans to ensure that such access is maintained."

MR. LEAVITT: Why? Here is where it all fits in, Judge. Why did the city adopt this language that applies only to this landowners' property? Because it already denied the fence. It denied the landowners' fence to keep the public out.

And the city -- and do you remember why that fence was denied? Counsel told us on Friday. He said the fence was denied because of political pressure. What was that political pressure? The surrounding property owners wanted to be able to access the property, and so they put right in an ordinance that you have to allow ongoing public access. That act alone is a *per se* taking under *Sisolak*.

Now, it doesn't matter whether the public actually used it, but, Judge, we know they did. There's no, Hey, we're going to adopt this but it might or might not apply to you; Hey, we're going to adopt this but we're just kidding. That didn't happen as counsel is representing.

The very beginning of this ordinance says that section (g) shall apply to you, and it shall apply only to the landowners.

But let me back up for just a minute and put this bill in context. This is -- remember, the council member, who was the highest level member at the city, went to these homeowners and in their homeowners meetings said to them "This property is your recreation," that's what he said. He went to their meeting --

THE COURT: Is that Mr. -- for the record is that Mr. Seroka --

MR. LEAVITT: That's Mr. Seroka.

THE COURT: -- who sponsored the bill?

MR. LEAVITT: Who sponsored the bill. He went to the homeowners and said, "This property is your recreation, you get to use it." Then he followed up by sponsoring the 2018-24, and then he required that that language be put in there that the landowners must allow ongoing public access to the property. So remember, counsel said, Listen, statements of council members are irrelevant, I'll get to that in a minute. But in addition to saying that, he then sponsored the bill and the City Council adopted the bill, so there wasn't just a statement by a council member, there was a follow-up and an adoption of a bill.

THE COURT: Well, for all practical purposes, the City Council has spoken once this bill has been introduced and approved.

MR. LEAVITT: Absolutely. And, Judge, can I just give an example here? This was in the *Knick versus City* of -- *Township of Scott Pennsylvania*, exact same thing happened. In that case, the city adopted an ordinance saying that private landowners had to allow public to enter into their cemeteries around the property. Taking.

THE COURT: So, I mean, we can look at it factually.

The property owner was denied access, yet they're required, pursuant to the ordinance, to permit public access.

MR. LEAVITT: That's exactly what happened.

MR. MOLINA: Your Honor, that's not what the ordinance requires. This is a closure -- this provision addresses Closure Maintenance Plan, and if the landowner were going to provide access, then the Closure Maintenance Plan would need to address that. Completely misconstrues --

THE COURT: I'm just looking at the language, it says, "Provide documentation regarding ongoing public access."

MR. MOLINA: That's if the landowner allows ongoing public access. It's not saying that the landowner *must* provide ongoing public access.

MR. LEAVITT: I appreciate counsel's attempt to interpret the law, Your Honor, but the language is plain. It says you have to provide documentation showing that the public is coming onto the property. If counsel has objection to this evidence, he can enter it, or if he has an argument, he can wait until I'm done and then make that argument.

But, Your Honor, not only that, but we've presented as Exhibit 119 the council minutes which state the exact opposite of what counsel just told you. This is Exhibit 119, Bates stamped 004163. This is Robert Summerfield who is the head planner of the City of Las Vegas: "I want to be clear that the Closure Maintenance Plan, because the language does say

something along the lines of what we've been aware of, may close. But, again, where there's a golf course" -- he then goes on to explain that that provision applies retroactively.

That same language, Your Honor, appears several times in the minutes. Here we go right here. This is Exhibit No. 118: The retroactive provision. This is 003957. This is November 7, 2018 when this issue is being discussed. The retroactive provision. The only way this becomes retroactive -- and everybody has their own definition -- there's a potential for property that's golf course or open space that either has been or will be withdrawn, and they *have* to propose the Closure Maintenance Plan.

Then right here, page 004086, referring to 2018-24:

Our lawyer: I just want to ask you, is this retroactive? Does this go back to -- I mean, I haven't mentioned Badlands. I don't want to get into that much, but does this go back to any developer that is already in the process?

In other words he's saying is it retroactive?

Their attorney at that time, not during trial, but unbiased by the parts of litigation here, he says: To that extent all laws are retroactive. The one part of this ordinance that could be considered retroactive --

THE COURT: That's not necessarily true. If it's substantive in nature versus procedural. Procedural, they're

retroactive; substantive, no, prospective, unless it's specifically carved out.

But go ahead, I get it.

MR. LEAVITT: Well, he goes on to say right here: Insofar as the retroactively of this part, he says it needs to propose a Closure Maintenance Plan. He goes on to say that the city's intent on drafting 2018.24 was to mandate section (g) Closure Maintenance Plan on the landowners. He said it was intended to apply retroactively specific to these landowners.

And, Judge, we don't have to even go there. All we have to do is look at the general section right up front that says section (g) applies to the landowners when they try and change their property.

And the City Council spoke, they didn't say you have to provide ongoing public access only if we ask you to. They could have put that in there. The city could have put right in there behind that clause: You have to do this only if we ask you to. They didn't do that. They said you have to provide ongoing public access, which is consistent with Mr. Seroka's statement to the homeowners' association.

THE COURT: I mean, legally that's not much different, if any, from *Sisolak*.

MR. LEAVITT: That's the same exact thing, Your Honor, and that's what we've argued.

In Mr. Sisolak's case, the county adopted ordinance

number 1221 that said you have to allow the airplanes to use your air space. It's the same exact thing.

In *Cedar Point Nursery versus Hassid*, the State of California adopted a statute that said that the farm owners had to allow the labor unions to come onto their property 120 days of the year for 2 hours a day. Extremely less restrictive than this one. The United States Supreme Court said the adoption of that statute was a taking - a definitive statement by the United States Supreme Court in *Cedar Point Nursery*.

So, Your Honor, that -- and to keep in mind, in *Cedar Point Nursery*, Your Honor, the labor unions didn't even go onto the property, they were stopped, and the United States Supreme Court said it's irrelevant, whether they went on or not, you adopted the statute inviting them onto the property.

And then in this case it's even worse, Your Honor, because Mr. Seroka announced the public can use the property; they adopted a statute 2018-5 saying you can use the property; and then we have the affidavit of Don Richards, which has been submitted to the Court, and in the affidavit of Don Richards, Mr. Richards states unequivocally that he interviewed people coming onto the property, and they said, We're here because the city told us this is our recreation - even more egregious than the *Knick* case, even more egregious than the *Cedar Point Nursery* case.

So, Your Honor, I want to go on and I want to finish

off on this Peccole Ranch concept argument.

THE COURT: How much time do you anticipate that will take, Mr. Leavitt?

MR. LEAVITT: Just this last part right here?

THE BAILIFF: Just a reminder, we have to get out of here by noon.

MR. LEAVITT: Wow.

THE COURT: We have this afternoon, Mr. Leavitt.

MR. LEAVITT: We do have this afternoon?

THE COURT: Didn't we say this afternoon?

(Discussion off the record between the Judge and Clerk.)

THE COURT: No, I'm talking about our court. Didn't we say telephonically at my court?

MR. LEAVITT: Yeah, I think we can go telephonically, we could show up there.

THE COURT: Right, didn't I say that? I don't remember for sure.

MR. SCHWARTZ: I thought we were going tomorrow.

THE COURT: It is tomorrow? Okay. All right. Well, I'm not going to change anything.

MR. LEAVITT: Oh, okay. I misunderstood.

THE COURT: But tomorrow at 9:15 -- and, I mean, I'm very thankful that Judge Krall permitted me to use her courtroom. I just don't want to overstep my bounds because she has, I know, a lot of stuff this afternoon; is that correct?

And they've got to get prepared.

So what we'll do then -- and, you know what, I don't mind saying this, we're going to finish this up tomorrow, and that's just how I look at it. We have to have some sort of closure on these issues. We'll finish it up.

We start at what, 9:15 tomorrow?

(Off-the-record discussion.)

It will be 9:15.

MR. LEAVITT: Your Honor, so we could come live to your courtroom, your regular courtroom?

THE COURT: I mean, do we have any courtrooms available on this floor? My courtroom is about --

THE BAILIFF: Significantly smaller, Your Honor.

THE COURT: Significantly smaller.

MR. LEAVITT: Your Honor, I could stay back or I could even go back and sit at a table, but I just need --

THE COURT: See, this is how we would handle that if we do have -- if I permit you to come live, there would be two representatives per side and that's it.

MR. LEAVITT: That's fine, Your Honor.

THE COURT: Is there any objection to that? Because I want to be candid with everyone, I've never done more than that, first of all; secondly, it's a smaller courtroom, and notwithstanding, I want to make sure everyone has a full and fair opportunity to place their positions on the record, but

just as important, too, I do have to be concerned about safety --

MR. LEAVITT: Agree, Your Honor.

THE COURT: -- you know, for counsel, for everyone involved in this case, I don't mind saying that. Because for the record I take COVID-19 very seriously. In fact, I went out yesterday and got my booster (indicating).

MR. LEAVITT: I've been shot, too, Your Honor.

THE COURT: Yeah. But it's very, very important.

So this is --

UNIDENTIFIED SPEAKER: Your Honor, can I ask a question?

THE COURT: Yes, you may, ma'am.

(Question inaudible.)

THE COURT: Yeah, just two per side.

UNIDENTIFIED SPEAKER: Including the assistants?

THE COURT: Yes. But everyone can also listen. I mean, it will be video fed. And I'm going to make that for both sides, because that's about what we can do; is that correct, Mr. Marshal?

THE BAILIFF: If that's what you want, yes, Your Honor. I mean, I could see where we could probably have some people in the galley, if you'd like.

THE COURT: No, we haven't done that.

THE BAILIFF: Then we're not going to do that, Your

Honor, like you said.

THE COURT: We haven't done that at all.

So I don't want to -- especially right now because from a healthcare perspective -- and health, we have a lot of issues going on right now, and I think everyone is well aware of that. And, yes, I thought we would have been in a much different place four or five months ago, but unfortunately that's not the case.

So Mr. Leavitt, and for the city, too, we're going to finish this up tomorrow morning, we have to. We have one matter in the morning. I have one status check at 9:00 o'clock. 9:15 we can roll and we'll finish this up.

MR. LEAVITT: That sounds perfect, Your Honor. We look forward to that.

THE COURT: Just remember where you're at. And two representatives per side, it could be lawyer and legal assistant or two lawyers. It doesn't matter.

Bottom line, too, I don't mind saying this, everyone has done a wonderful job of getting me everything I need, from all the booklets and the evidence and charts and all those things. It greatly assisted me. I don't mind saying that.

And so we'll go ahead and recess. I have to respect Judge Krall. She's been so gracious to permit us to come in here. This is her courtroom. I wish my courtroom was set up like this.

Anyway, that's what we're going to do. And what we need to do is bring the banker's -- I'm sorry, library cart, Mr. Marshal, so we can take all this stuff back with us.

THE BAILIFF: Yes, Your Honor.

THE COURT: Anyway, let's recess until 9:15 tomorrow morning.

ALL COUNSEL: Thank you, Your Honor.

(Proceedings adjourned at 12:04 p.m.)

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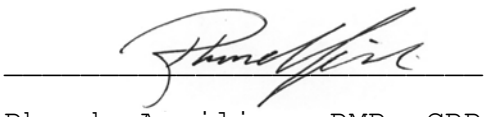
Reporter's Certificate

State of Nevada)
)
County of Clark)

I, Rhonda Aquilina, Certified Shorthand Reporter, do hereby certify that I took down in stenotype all of the proceedings had in the before-entitled matter at the time and place indicated, and that thereafter said stenotype notes were transcribed into typewriting at and under my direction and supervision and the foregoing transcript constitutes a full, true and accurate record to the best of my ability of the proceedings had.

In witness whereof, I have hereunto subscribed my name in my office in the County of Clark, State of Nevada.

Dated: October 6, 2021



Rhonda Aquilina, RMR, CRR, Cert. #979

IN THE DISTRICT COURT

CLARK COUNTY, NEVADA

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180 LAND COMPANY, Plaintiff, vs. CITY OF LAS VEGAS, Defendant.	Case Number A-17-758528-J

Reporter's Transcript of Telephonic Proceedings

Tuesday, September 28, 2021

BEFORE THE HONORABLE JUDGE TIMOTHY C. WILLIAMS

DISTRICT COURT JUDGE

Reported By: Rhonda Aquilina, Nevada Certified #979, RMR, CRR
Court Reporter

APPEARANCES:

(PURSUANT TO ADMINISTRATIVE ORDER 20-24, SOME MATTERS IN DEPARTMENT 16 ARE BEING HEARD VIA TELEPHONIC APPEARANCE)

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Tuesday, September 28, 2021 **9:17 a.m.**

P R O C E E D I N G S

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THE COURT: Calling the next matter, that happens to be page 3 of the calendar, 180 Land Company versus the City of Las Vegas.

Let's go ahead and set forth our appearances for the record.

MR. LEAVITT: Good morning, Your Honor. James J. Leavitt on behalf of the plaintiff landowner, 180 Land, and our legal assistant from in-house counsel is Jennifer, and she'll be assisting with the presentation.

THE COURT: All right.

MR. MOLINA: Chris Molina on behalf of the city.

MR. BYRNES: Phil Byrnes on behalf of the city.

THE COURT: All right, counsel. I just want to say good morning to everyone. And you can see now why I took a cautious approach as far as live appearances in the courtroom.

Unfortunately, and I think we can all agree to a person, this courtroom is not large enough for general civil litigation/business court, it's not. So fortunately I'm being moved, and I guess the powers that be listened to me on that. And so Judge Ahlf and I and Judge Denton will all be going to the 16th floor, and I guess that's going to be the business court floor. But I still handle general civil litigation too,

but I think that will be a benefit for everyone.

So at this point have you had a chance to set up and all those wonderful things?

MR. LEAVITT: The plaintiffs are ready to proceed, Your Honor.

MR. MOLINA: I believe we have Andrew Schwartz on the line. I just wanted to confirm.

THE COURT: What we're going to do is we're going to formally set forth our appearances for the record. I don't think we've done that yet, have we?

MR. MOLINA: We just did, except I don't think Mr. Schwartz --

THE COURT: Mr. Schwartz, are you there, sir?

MR. SCHWARTZ: Yes, I am, Your Honor. Good morning. Andrew Schwartz for the city.

THE COURT: And actually, I think we have a better connection, you know, than we had yesterday. I think it's pretty clear.

For the record, Mr. Schwartz, we can't see you on the video.

All right. And so is there anything preliminarily we need to do before we get started?

MR. LEAVITT: On behalf of the plaintiffs, no, Your Honor.

THE COURT: All right. And for the defense?

ALL DEFENSE COUNSEL: No, Your Honor.

THE COURT: All right. And madam court reporter, are you ready to proceed, ma'am?

THE COURT REPORTER: Yes, Judge. Thank you.

THE COURT: And I guess we might as well continue on.

And it's my recollection, Mr. Leavitt, you weren't completed yet; is that correct, sir?

MR. LEAVITT: What's that?

THE COURT: You weren't finished yet.

MR. LEAVITT: Oh, no, I've got a bit more, Your Honor.

THE COURT: Okay. So we'll go ahead and hand the floor to you, sir.

MR. LEAVITT: Thank you, Your Honor.

THE COURT: You may approach the lecturn.

MR. LEAVITT: Thank you.

And, Your Honor, I apologize for yesterday with the whole Power Point mixup. I was actually very upset at myself because I had it ready that morning and I wanted to make sure we emailed it to Mr. Schwartz. So immediately upon returning to the office, we regrouped and made sure that he got a copy of it. I apologize, Your Honor.

Your Honor, where we left off yesterday is we were talking about the Peccole Ranch Master Plan and the Government's argument that the property is an open space for the Peccole Ranch Master Plan. We completed that discussion.

We concluded that there are no restrictive covenants on the property. We concluded that there's no open space designation on the property. We concluded that the surrounding property owners all find disclosures, recognizing that the 250-acre property is available for a future development, and that it is not an open space or golf course property.

Now, to wrap up that Peccole Ranch Master Plan argument, I want to address the city's five examples that they showed you, Your Honor. As you'll recall, the city showed you some examples of golf courses across the valley, there were five of them. Each one of those golf courses has a deed restriction requiring it to remain a golf course. Each one of those golf course is owned by an HOA, and they're not privately owned properties. Unlike this case where there's no deed restriction on the 250-acre property, the 250-acre property is privately owned, and it is expressly recognized in the area based upon the disclosure documents that we presented to the Court that the 250-acre property would never be an amenity for the surrounding property owners.

And if I may, Your Honor, this Court can take judicial notice of those properties that are actually an amenity in the Peccole area. I'll just give one, Piggott School, P-I-G-G-O-T-T. It's a school. Remember, Mr. Peccole owned this entire area, and there's a school which is identified in that area, that's Piggott School. Piggott School is owned by the

School Board of Trustees. It is zoned C-V. And if you'll recall, Your Honor, Mr. Peccole and the city of Las Vegas worked together in 1990 to remove any C-V designation from this 250-acre property, but the property that was going to be reserved for the public, Piggott School, retained or has that C-V zoning designation.

And so you can see where the difference between how property in this area was handled that was preserved for an amenity, it's zoned C-V, and it's owned by the public. You can see the difference between that and the 250-acre property in this case that where the C-V zoning was specifically removed, and it is a privately-owned property.

And that's similar to this Court's example that this Court gave about Green Valley, where you see the public uses and they're specifically reserved for the public, unlike the property here.

Now, Your Honor, what I'm going to do now is I'm going to answer a couple questions that I thought were pertinent that obviously you wanted an answer to that you asked. Then I'm going to go to the property interest issue, and I'm going to address that property interest issue that the Government addressed during about seven hours of their presentation, and then I'm going to close out on the take issue, which was the original reason why we came here.

But yesterday you asked what economic value is left on

the property? And as this Court will recall, we continued this hearing so that the city could actually do specific discovery on economic value. That was a big fight we had.

THE COURT: And I do remember that. And as a trial judge I don't mind saying this, and I know litigants sometimes overlook this issue, but there's a reason why I do certain things, I don't mind saying this. I wanted to take that off the table as an appellate issue, right? Because that is one of the -- they do talk about economic impact on a lot of cases, and I just wanted to make sure that everyone had a full and fair opportunity to investigate and develop that issue.

MR. LEAVITT: Absolutely. And we respect that decision, Your Honor, and so we did all have that opportunity to complete that discovery. The city did the depositions it needed to do. And when that question was presented to you, the only answer that the city gave was, Well, it's an amenity for the area. That's what the city said. We know that's not true, because the disclosures of all the individuals in the area, they were told it's not an amenity for the area.

But, Your Honor, we did, the landowner did complete the discovery on the economic impact, and that is Exhibit No. 183 to the landowners' documents in this case. That is an appraisal report by an appraiser; he's an MAI appraiser, which means --

THE COURT: And which exhibit is that again, sir?

MR. LEAVITT: It's Exhibit No. 183, Your Honor. Let me make sure it's part of this. If not, I have it.

THE COURT: I have it.

MR. LEAVITT: In our exhibit book. You have the large one with the red cover.

THE COURT: Yes, I do.

MR. LEAVITT: Okay.

THE COURT: And that's 183?

MR. LEAVITT: Yes.

THE COURT: I have it, sir.

MR. LEAVITT: Okay. And if we turn to Exhibit No. 183, this is an appraiser by the DiFederico Group. Mr. DiFederico carries the highest designation that an appraiser can have, which is a member of the Appraisal Institute, MAI Appraiser. He's been appraising property in the Las Vegas valley for approximately 30 years.

You can see there that he appraised the property on the first page there.

We turn to the second page, Your Honor, this is just the summary of his report. He completed this report on April 23, 2021, which is Bates stamped 005213. This appraiser report, because it was timely completed, was produced to the city of Las Vegas in discovery. And the very relevant part, this is just a summary, we turn to the very last page of his appraiser report, and -- or this summary sheet here. It's Bates

stamp 005216. I can point out to the Court what Mr. DiFederico determined. He said that the value of the landowners' property before any government interference was $34,135,000. And then he considered all of the taking facts that we've been discussing in this case, and he concluded that after the Government interfered with this property it has a zero value. And you can read that at the last sentence, he says, I analyzed the property as if it could be developed under the RPD-7 zone, and then I considered all of the actions that the Government engaged in towards this property, and, frankly -- and he said in the after value, the value would be zero.

I believe that once Mr. DiFederico is testifying, he'll say I actually think it's a negative value, because the landowner not only cannot use the property for residential purposes because of the city's actions, but the city is taxing him $205,000 a year on this property as if it could be used for a residential purpose.

So your question was very poignant, because we have -- and, Your Honor, I know that this Court decides whether there's a denial of all economic viable use of the property, but this is extremely persuasive evidence of a denial of all economic viable use of the property. It's an opinion by a certified appraiser who went through this entire case and determined there's zero value left after the Government interfered with the use and enjoyment of the landowners' property.

It's an important point because the Nevada Supreme Court has analyzed these inverse condemnation cases and they said, quote, It's a battle of the experts, end quote.

The city did not do an appraiser report, Your Honor, and the city did not produce a rebuttal to this appraisal report. In fact, the city did no expert reports, so the only expert analysis that we have in this case, which is a battle of the experts, is Mr. DiFederico.

Despite the continuance and despite the time we gave for the city to determine the economic impact, it did not hire an expert -- well, it did not produce a report by an expert to do that. It did hire an expert, and we know that because that expert went and visited the landowners' property. But the city chose to not have that expert complete a report or even rebut the appraiser report that's been submitted.

The next question that the Court presented was, does the city have to pay for open space? And you remember Mr. Schwartz emphatically on Friday said absolutely not. That was a stunning statement. Because if you take private property and you force it to be open space, that's preserving that property for use by the public, and just the general provision of the United States Constitution and Nevada Constitution say "Nor shall private property be taken for a public use without payment and just compensation." Clearly compensation is required.

Secondly, Nevada has legislated that very issue.

Your Honor, NRS 37.039 -- and I just must assume that counsel was not aware of this. NRS 37.039.

THE COURT: 37.039. Hold for one second.

MR. LEAVITT: While you're looking for that, Your Honor, Chapter 37 are the eminent domain provisions, and this is 37.039.

And so the Court knows this, an 03 -- 030, there's a list of all the public uses, and then it says, "And any other public use." And then the legislature chose to create a very specific statute for open space because they wanted to make sure -- I'll just say it just like this, Your Honor, they wanted to make sure that what the city is trying to do in this case doesn't happen in Nevada where they force a landowner to have their property as open space but don't pay. It's conditions precedent to acquiring properties for purposes of open space.

They say, "Notwithstanding any other provision," and this is an important part of the bill, Your Honor, is the city is trying to say that this entire 250 acres is open space. It has to remain open space. And they even say, Your Honor, this -- and this becomes important on this part, too. The Government says, Well, if we approve 17 acres here, we can make the remaining 233 acres remain open space. Nevada has legislated this out so that the Government can't make these type of arguments. And the legislature says, Listen, if you're going

to identify property as open space, you can look at the bottom of subsection 1A, it lays out you have to offer compensation. You have to try and reach an agreement on the compensation. You go down to 2A, and they list all these requirements. And Judge, why, why did the legislature list all of these requirements that the Government has to go through before it can force a landowner to make their property open space? Because they didn't want what's happening here today to happen. They didn't want the Government to come in and say, We're going to force your property to be open space.

And then, Judge, if you go down to section 2A4, 2A4 says that you have to provide the owner of the property the value of the property plus damages, if any, as appraised by the agency. That has to automatically be given to the landowner, automatic. So the agency required, the city is required to appraise this property, determine its value, determine any damages, and pay that immediately to the landowner. And the way eminent domain statutes work is then if the landowner is not satisfied with that, we could have a litigation on the amount of compensation.

Your Honor, my real point in bringing that 37.039 to the Court's attention is clearly the Government can't just force somebody's property to remain open space, and clearly, the legislature took it very serious when a governmental entity is trying to force a landowner to designate their property as

open space.

Okay. All right. Your Honor, I don't know if you have any further questions on me on 37.039.

THE COURT: You know, I don't know how -- let me see. When was the statute enacted?

MR. LEAVITT: 2005, Your Honor.

THE COURT: Interestingly, I noticed they just put in that 50-year provision. That's very similar to the covenants running with the land, and to me it kind of makes sense, I mean, you can't have that designation forever.

MR. LEAVITT: Right.

THE COURT: Neighborhoods change, properties change, and so on. We've seen that many, many times how properties can change over 50 years.

MR. LEAVITT: Absolutely.

THE COURT: I get it, I do.

MR. LEAVITT: So if the city wanted this property to remain open space, this is what it had to have done, and it had to have paid for the property. And now what the city is doing is it's trying to force the property to remain open space without paying for it, in violation of that statute. And there's a provision, there's a paragraph in the *Sisolak* case, a very clear paragraph; it says if the Government tries to force a property owner in the state of Nevada to have their property remain in a -- or to convert their property to a public use but

not pay for it, in violation of a statute, the Nevada Supreme Court in the *Sisolak* case says that is a taking immediately. That's an inverse condemnation case. There's a whole paragraph on that in the *Sisolak* case.

So, Your Honor, now I want to go back to the property interest issue. Again, unless this Court has anymore questions for me on NRS 37.039.

THE COURT: Not at this time, sir.

MR. LEAVITT: Okay. So I want to -- now I've answered those few questions. I want to go back to the property interest issue, and I want to specifically address this question of PROS that the city has brought up.

And so what the city is arguing is they're saying, Judge, there is a master plan and the master plan says that the landowners' property is PROS.

And I'm sorry, Your Honor, do you have this book, the Landowners' Rebuttal to City Arguments 35-acre, the yellow one?

THE COURT: Yes, sir.

MR. LEAVITT: There we go. I'm on page 52 on the bottom right-hand corner.

THE COURT: All right. I'm there.

MR. LEAVITT: Page 52, Your Honor. So this is the city's argument. We turn to page -- the argument that there's a challenge.

We turn to page 53, the next page, Your Honor, the

landowners' position and the evidence shows there never was a legal PROS on the property to even begin with.

And if we turn to the next page, which is page 54, also up on the slide, you'll remember that Mr. Molina -- I can't remember what day it was, Thursday or so -- showed you this document; it's a 1981 city council meeting, and you can see on C it says, "Consideration of a document - generalized land use plan," and he quickly went through these maps for you. I'm going to slow it down a little.

If we flip to the next page, 55, the next page 55 is the original master plan designation for this 250-acre property. And, Judge, you can see we circled it in yellow, that's the general location of the 35-acre property, it's MED. And you look at the side, MED, what does it stand for? It stands for 6 to 12 residential units per acre.

So in 1981, Your Honor, the city's master plan had the 35-acre property identified as MED residential 6 to 12 units. That was consistent with the RPD-7 zoning that was on the property in 1981 also. So in 1981, you had RPD-7 zoning, which means 7 residential units, you have the city's own master plan that shows MED, which is 6 to 12 residential units, so you have the zoning that was consistent with the master plan - all the way back in 1981.

So now, the next question becomes did the city change this (indicating)? Did the city change the MED to PROS on the

landowners' property?

And we turn to the next tab, number 56, Your Honor, I'll just read one of these. Next tab, 56, is Exhibit 18 of planning commission meeting where this very issue came up in a planning commission meeting.

But on tab 56, the planning commission and the city Attorneys' Office did a full-blown study. And I want to refer to what Brad Jerbic says here at the bottom. He says, The planning commission or the Planning Department and the City Attorneys' Office researched the alleged change from MED to PROS. And this is what he said, There's absolutely no document that we could find that really explains why anybody thought it should be changed to PROS, except maybe somebody looked at a map one day and said, Hey, look, it's all golf course, it should be PROS, I don't know.

What he was saying there, which is confirmed by other testimony, is we couldn't find anything of how this property was changed from MED to PROS on the city's master plan.

Remember Mr. Molina showed you several maps that showed the property highlighted in green and said, Judge, because this map shows the property highlighted in green, it has to be PROS. Well, at the bottom right-hand corner of those maps, Your Honor, it says the maps are for reference only. They're not legally binding documents.

What would be legally binding is that the city showed

how the master plan was changed from the 1981 MED designation to PROS. And Your Honor, they couldn't have done it. They couldn't have changed it to PROS because the original zoning was RPD-7. The original master plan was MED. If they changed it to PROS, it would have been an illegal change because the zoning of RPD-7 was already in place.

Then we turn to the next tab, which is tab number 57. This is just a summary of the law. At the top it says the law to change the MED to PROS on a master plan. NRS chapter 278 has several requirements. The City's code says that if you're going to make a parcel specific amendment, you have to do certain things.

And this is the citation of the law, Judge, I could go through this in detail and spend an hour of all the requirements. But there's one specific requirement, and I don't know if it actually is listed in 278. The city, if it was going to change the MED to PROS, it had to go to Mr. Peccole here and say, Mr. Peccole, your property is designated MED; we're going to make a parcel specific change from MED to PROS, and they had to give him that notice.

During seven hours, the city not once gave you the document which said, Mr. Peccole, here is our parcel specific change from MED to PROS and now your parcel is going to be PROS. They didn't do that. And Mr. Peccole would have went through the roof had they tried to do that, because he met with

the city in 1990, as we went through those documents, and he and the city adopted Z-1790 to remove any C-V zoning and to assure that the proposed use of this 250-acre property was always residential. Your Honor, we didn't need seven and a half hours. What we needed was five minutes of an exhibit showing that the city gave notice that this was done to Mr. Peccole on this specific property, and it didn't happen.

Your Honor, I'd like to move to tab number 58. Let's indulge the city for just a moment, and let's assume that the city did adopt a PROS -- I'm sorry, Your Honor, not tab 58, I meant page 58 on my Power Point. I apologize to the Court.

Okay. So page 58 on my Power Point. Even if there is a PROS on the master plan, the zoning of RPD-7 would take precedence. So there never was a PROS, but let's assume there was. The Nevada Revised Statute, on page 59, is 278.349. It says that if any existing zoning ordinance is inconsistent with the master plan, the zoning ordinance takes precedence. So even if we have a PROS on the city's master plan, the RPD-7 zoning would take precedence.

Remember, counsel argued vehemently to you that the master plan is the Constitution, the master plan is of the highest order, that's the exact opposite of the statute.

And Your Honor, what counsel is going to say is this only applies to the tentative map process. Your Honor, this is the tentative map. This whole property would have had to have

gone through the tentative map process. That's -- when you go through the application process, you have to submit a tentative map. So clearly this applies to the landowners' property. Zoning takes precedence.

Now, if I could turn to the next tab. Sorry, next page, page 60, this is the city's own master plan that the city is arguing applies here over zoning. We've blown out on the right-hand side there, Your Honor, Exhibit No. 161. You can see the top left-hand side there it says, "master plan," and then it says, "provide general policies, a guiding framework." And then if you go to the right-hand corner where it says, "zoning ordinances,' it says, "provide specific regulations, the law." So the master plan that the city wants to apply itself recognizes that zoning is the law and a master plan is nothing more than policies. It's just that, Your Honor, it's a plan.

If I could turn to the next page, Your Honor, I'm going to go through this a little bit more in detail on another part. On page number 61, these are statements not by counsel here today, these aren't my arguments, these aren't the city's private attorney arguments, this is the City Attorneys' Office and the City Planning Department. Brad Jerbic: "I just want to break it down so that what happened over time. Somehow, PROS became the General Plan designation only after hard zoning was in place."

So he's saying somehow somebody wrote this PROS on this map, but hard zoning was already in place.

And then he said, "And the rule is hard zoning in my opinion does trump the General Plan designation."

Tom Perrigo, the next one, Exhibit No. 159.

"Q. If the land use and zoning are not in conformance then zoning would --

I'm sorry, actually it says, Answer.

"A. -- zoning would be the higher order entitlement, I guess.

"Q. So it's your position that zoning supercedes the General Plan?

"A. Yes."

Tom Perrigo, again, Your Honor, I've got over about ten of these statements from the City Attorneys' Office and the Planning Department. They're consistent always that zoning takes precedence over any general plan designation.

Your Honor, I'll turn to the next page, and I'll close out here on the PROS issue. On page 62 -- hold on a minute, Your Honor, let me make sure I got the right page. Actually, you know what, Your Honor, I want to reference Tom Perrigo's statement right there at the bottom, because I think it's critical to what the city had previously told you, that a general plan amendment was necessary on this property. Mr. Perrigo said, Even if that general plan action, his bold at

the bottom, didn't come forward, it doesn't take away the rights that the applicant had to the zoning.

So what happened during this process is the city said, Hey, Mr. Landowner, we want you to file a general plan amendment so that you remove this mistaken PROS off the property and it's consistent with your zoning. And we said, Listen we're not doing that, because if we don't need it, we already have zoning. And the Planning Department agreed that we didn't need to do that in order to develop. There was no variance required. There was no general plan amendment required.

THE COURT: I mean, it really makes sense just from a policy perspective, because when you look at zoning and zoning that's in place as far as property is concerned, if there's a conflict -- and I'm quite sure there's probably a lot of conflicts with the General Plan or the Master Plan -- my point is this, it would cause chaos.

MR. LEAVITT: Well, absolutely, Your Honor, that's why the courts and the City Attorneys' Office and the City Planning Department, and the City Tax Department have always relied upon zoning to determine property rights in Nevada.

Do you know, Your Honor -- go ahead.

THE COURT: From this perspective, I mean, it's my understanding that there was a tax bill issue that was based upon RPD-7 zoning, right?

MR. LEAVITT: Yes.

THE COURT: The taxes weren't submitted, and based upon an open space designation.

MR. LEAVITT: They were not, that's correct.

THE COURT: And my point is this, once again it would chaos.

MR. LEAVITT: Correct, Your Honor.

THE COURT: I mean, typically when a person goes in to the building department or any department and they want to develop, first thing they're going to look at, even when you buy the property, what's the zoning?

MR. LEAVITT: And, Your Honor, that's a perfect dovetail into the next section right here. Because what counsel said is they said, in one of the hearings, they said, Listen, this landowner messed up, he bought -- and this is the words he used -- he bought a pig in a poke.

But now I want to turn to this right here, Your Honor, the next tab, which is due diligence, and this is rebuttal of the city's argument that the landowner did not perform a proper due diligence, okay. And I want to turn to page number 11. This is a brief summary of the landowner's due diligence. And in 2001, he had been working with the Peccole family for six years in this area. He learned that the 250-acre property was RPD-7 zoned. He learned that it had, quote, the rights to develop, and he learned that, quote, it was intended for

residential development, and Peccole confirmed in 2001 that they would, quote, never, end quote, put a deed restriction on the property, Exhibit 34.

In 2001, the landowner goes and investigates the Queens Ridge CC&Rs and all of the disclosures for the surrounding area, and he finds out that the property is available for, quote, future development. That's what we have here, Your Honor, in the Queens Ridge CC&Rs, future development on the golf course property, and all land disclosures to the surrounding owners confirm this.

Then in 2005, I forgot to put it here, Your Honor, the landowner obtains the option to purchase the property. And in 2006, he then goes and meets with the head planner. The head planner says the 250-acre is RPD-7 and there's nothing that can stop development. That's the city's head planning official.

In 2014, he then meets with two more head planning officials, Peter Lowenstein and Tom Perrigo, and they conduct a three-week study at the city's planning department and they confirm, quote, the 250 acres is hard zoned for residential use and had vested rights to develop up to 7 units per acre, that zoning trumps everything, and any owner of the 250 acres can develop the property.

Your Honor, the landowner had not yet closed on the property when they got that three-week study. So they went to the city and said, We want you to put that in writing.

Now, before I go to what the city put in writing, Tom Perrigo, the head planner, his deposition was taken. He said if the land use and zoning are not in conformance, the zoning is the higher order entitlement. Peter Lowenstein had his deposition taken also. He said a zoned district gives a property owner property rights.

So you have a pointed question during these hearings. You said, Well, how did the city treat this zoning in the past. This is it, Your Honor.

And then the landowner says, Received all of this. And he says, Listen, before I close on this property, before I -- he allocated $45 million in cash to the property, and he entered into various complicated and very -- I guess the best way to say it is a lot of transactions that had a lot of hair on them over a ten-year period. And then he comes to the time to close and he attributes a hundred million dollars towards this 250-acre property. And before he's going to do that, he goes to the city and says, Listen, over the past 14 years, you've confirmed the due diligence for me, now I want you to put it in writing, and that's the next page, Your Honor, page number 12.

MR. MOLINA: Your Honor, I would just like to place an objection for the record that references to the documents and what was just said there lacks foundation.

THE COURT: What do you mean lacks foundation?

MR. MOLINA: There's no evidentiary support to support what Mr. Leavitt is saying about this hundred million dollars, this option in 2005, so we would just object to those statements.

THE COURT: Okay. I understand. But you're not objecting to Exhibit H -- I mean Exhibit 134, are you?

MR. MOLINA: I'm not objecting to Exhibit 134, no.

THE COURT: Objection noted, sir.

MR. LEAVITT: And, Your Honor, so what's interesting here is this is the city's letter. What we've been talking about is what was the city's position. And do you know, I think it was eight and a half hours the city didn't pull this letter out. That's a stunning thing. This is the city's position on zoning that they gave to the landowner prior to his purchasing the property and the city didn't even reference it in their argument. They say it's zoned RPD-7. And I will guarantee you, Your Honor, I've read this letter about 50 times and the words "open space," the words "PROS" and the words "master plan" don't appear in this letter. You can read the highlighted portion, Your Honor, where the city says, "RPD-7 is for residential development."

The city then goes on to say, the second sentence in the second paragraph, critical sentence, the density, the residential density allowed in RPD district shall be referenced by a numerical designation for that district. Then they even

give an example: RPD-4 allows up to 4 residential units per gross acre. Then they go on to say a detailed listing of the permissible uses and all applicable requirements of the RPD zone are in Title 19 of the City Code.

Judge, I'm going to go to the permissible uses in just a minute. This is what the city's representation was to the landowner. And why did they do that, Your Honor? If you turn to the next page, we can see why they did it.

The City Attorneys' Office confirmed that the landowners' due diligence wasn't accurate. Brad Jerbic, he stated on the record, counsel gave hard zoning to this golf course, RPD-7 which allows somebody to come in and develop. He then goes on to say that, quote, hard zoning trumps everyone else. Brad Jerbic and Phil Byrnes, we've attached all these documents, in a motion, in a 2011 condemnation case, said, "A master plan is a planning activity that has no legal effect."

Go down to number 3, Your Honor, these are affidavits now from the current City Attorney Bryan Scott and Jim Lewis in a 2011 inverse condemnation case where they say, "The Office of the City Attorney has consistently advised the City Council that the City's Master Plan is a planning document only."

Phil Byrnes, last one, number 4, this is specific to the 250-acre property: "In the hierarchy, the land use master plan designation is subordinate to zoning."

This is everything the City Attorney, all the way up

until this litigation confirmed this, agreed with everything I'm telling you, agreed with the landowners' due diligence, agreed that zoning controls.

Your Honor, if I could turn to the next page, number 14, you've already referenced this, I'm not going to go through it again, but this is the city's tax department also confirming the due diligence and confirming Exhibits 49 and 120.

THE COURT: I have a question from a legal perspective. How am I to treat these statements by Mr. Jerbic, Mr. Byrnes, Mr. Scott, Mr. Lewis, and so on.

MR. LEAVITT: They are -- here's -- there's a couple cases on that, but here's how. It's persuasive authority on the city's position, because the Planning Department and the City Attorneys' Office wrote Title 19 of the Code, they interpret Title 19 of the Code, and they sit in the council chambers and tell the City Council what Title 19 of the Code means, and the Nevada Supreme Court in a case said that the City Attorneys were -- the City Attorneys' interpretation and the Planning Department's interpretation of the Code is, quote, cloaked with the presumption of validity. So we have the individuals at the city who drafted these provisions and are interpreting them.

Now, there's case law saying that that is cloaked -- sorry, Your Honor.

THE COURT: I was just thinking about it from an evidentiary perspective, would they be admissions against interest?

MR. LEAVITT: We have a whole section, Your Honor, on admissions against interest. Your Honor, we absolutely have briefed that. But here's the problem with how the city presented this, is that was briefed in our motion to determine property interests that this Court already decided, and we laid out all the case law that that's an admission against interest. That's clearly one of the reasons you ruled the way you did, is you said this, I'm going to following the zoning, because that's what you've done for the past 50 years.

So yes, Your Honor, it is an admission against interest. We've cited that law and provided it to the Court previously.

And then if I may turn to page 15, Your Honor, I'll summarize this in one second. The landowners, on March 15, acquired Fore Stars which owned five parcels comprising the 250-acre property.

And so talking about admissions against interest, Your Honor, the landowners would have never allocated a hundred million dollars to this property and purchased it had the city sent them a letter that said the property is open space, the property is PROS. They would have never done that.

And, Your Honor, turning now to the next page,

page 16, here's some more admissions against interest. The city planners confirmed the landowners' due diligence and the use of the 35-acre property when the applications were filed

And, Your Honor, may I approach over to the easel?

THE COURT: Yes, you may, sir.

MR. LEAVITT: Okay. So as you'll recall, the City of Las Vegas required the Master Development Agreement. And as you'll recall, the thought here, they say -- and then what happened is the Planning Department gave a recommendation on the Master Development Agreement which would have allowed residential development, and we went through that. This is Exhibit 77, the City's Planning Department said, Listen, this conforms to everything; it conforms to the zoning; it conforms to the master plan; it conforms to NRS 278; it shows sensitivity to the surrounding area. So the city's own planning department, when the landowner submitted this Master Development Agreement, which the city denied, but prior to denying it, the city's planning department said, these landowner have zoning, and they have the right to do this.

I want to turn to the next page, Your Honor, page 18. And on page 18, remember the landowners filed another application to use the 35-acre property, with 61 lots. This is the City's Planning Department again confirming that the landowners have the right to do this.

We'll just look at the bottom. We've already gone

through this, Judge. I'll look at the bottom. The submitted tentative map is in conformance with all Title 19 and NRS requirements for this tentative map. Title 19 is the zoning code. So we have the city's own planning department, when the applications are filed, confirming the due diligence on the property.

Turn to the next page, Your Honor, page 19. This is Councilman Bob Beers when this was submitted. Remember what he said? He said, Listen, this is so far inside the lines - again confirming the landowners' due diligence that the property was zoned RPD-7 with the right to build.

Now, this next section, Judge, I think nails it right on the head. What does the Nevada Supreme Court -- so in this exact type of case, what does the Nevada Supreme Court rely upon when determining property rights? And that's the tab the Court relies on, zoning. Because of that tab, Your Honor, I'm going to go through six cases here. I'm not going to spend a lot of time on it, Your Honor, because it might take a while.

But tab 21, you go to tab 21 -- I'm sorry, page 21. This is the *Sisolak* case. Remember, Sisolak said you have to first determine the property interest. The facts, you can see on the left-hand side there is the facts, and then right below the facts is the property. And what did the Nevada Supreme Court rely upon to determine Mr. Sisolak's property interest? The zoning. The Court held that the properties were zoned for

development of a hotel, a casino or apartments. At no place in the *Sisolak* case does the Court say, Hey, is there a master plan in this area? Hey, is there some Peccole Ranch concept plan in this area similar to that? The Court relies upon zoning.

We go to the next case, Your Honor, it's another inverse condemnation case, *Clark County versus Alper*. I won't spend a lot of time on this one. It's page 22. It says, the Court said, "Due consideration should be given to the zoning ordinances."

Page 23 is another inverse condemnation case. This one is interesting. This is *Alper versus State*, page 23. The Nevada Supreme Court recognized the property on H2 zoning and they cut and pasted the H2 zoning into the decision and said, These are the legally permissible uses of the property. You can look at the top there, it says, under Clark County ordinances "uses permitted" in H2 zoning, and then they go through what they all are.

The point is the Nevada Supreme Court uses zoning to determine property rights in inverse condemnation cases.

Page 24 is an interesting case. It's one that you can see at the top there, Kermitt Waters did. It was one of the first cases I ever did with Mr. Waters. It's *County of Clark versus Buckwalter*. Look at this: "Although the property housed apartment buildings, it was zoned for commercial use, retail, food, beverage, gaming." That property was actually

being used as apartments, and the Nevada Supreme Court said it doesn't matter, it had zoning for gaming. And, Judge, you know how we valued that property in that case? Gaming. We didn't value it based upon apartments, even though it had been used for that use I think it was for like 20 years prior to that, they used the zoning.

Another case, the next page is 25, *Andrews versus Kingsbury*, another case where the Court used zoning.

And then page 26, I'll spend just a minute on this one because this is the case that this Court relied upon in its order, property interest order. This is what the Nevada Supreme Court said, this is an inverse -- this is a direct eminent domain case, *City of Las Vegas versus Bustos* -- the Court said, "We conclude that the district court properly considered the current zoning of the property as well as the likelihood of a zone change."

And then there's an interesting footnote in that case. It's footnote 1, it lists 10 cases, Your Honor, 10, where zoning was used to determine the property interest. In fact, in that *City of Las Vegas v. Bustos* case, the Nevada Supreme Court strongly indicates that if you use anything other than zoning, it's reversible error.

Now, Mr. Bustos, his property -- well, Your Honor, the point is that zoning was used to determine the property interest, okay, in the *Bustos* case.

And, Your Honor, I actually have all of those cases if you want a reprint of all those cases. I actually have them for the Court if it would like.

Okay. So page 27, the Nevada legislature confirms the zoning. We've already read this statute. Zoning trumps.

Go to page 29, the next page. The next page, 29, is an attorney general opinion. Even the Attorney General has weighed in on this issue, Your Honor. And the Attorney General issued an opinion where he says, (Reading) The enactment of that statute, the Nevada legislature in 1977 declared its intention that zoning ordinances take precedence over provisions contained in the master plan. They went on to read that that enactment buttresses our conclusion that Nevada legislature has always intended local zoning ordinances to control over a master plan.

I got two more, just a couple, two more on this, Your Honor, on zoning, and then I'm going to get to where the rubber meets the road.

Page 30, I just found this statute, it's NRS 40.005, it says, In any proceeding involving the disposition of land, in other words when you're dealing with land, the Court *shall* consider lot size and other applicable zoning requirements before ordering a physical division of the land.

Now, I know that 40 --

THE COURT: That's a partition case, right?

MR. LEAVITT: Exactly. That's not right on point.

THE COURT: I understand, but you're telling the Court this is what you do when you make that determination as to potential use, I guess.

MR. LEAVITT: Absolutely. It's not right on point. But, Judge, the point is the legislature has always intended zoning ordinances to apply. And this is just another example that when you're dealing with land, the Court is instructed, the legislature said you *shall* consider the zoning requirements. What I don't see in here is open space, PROS, master plan.

Next page is the real world. Lenders, bankers, brokers, investors, title companies, insurance companies, and even the government have always relied upon zoning, not a master plan.

And, Your Honor, do you see my statement there: No government entity has argued otherwise in these type of cases. This is the first time a government entity in the state of Nevada has argued that zoning doesn't apply and instead a master plan would apply.

And you know what good evidence I have for that - is the next page 32. This is the Declaration of Stephanie Allen. Stephanie Allen is a land use attorney in the state of Nevada. She works for Chris Kaempfer who has been doing land use for 40 years. She's been doing land use for 17 years. That means if

she billed 2,000 hours a year, 34,000 hours worth.

Paragraph 16: "During my 17 years of work in the area of land use, it has always been the practice that zoning governs the determination of how land may be used. The master plan designation has always been considered a general planning document." And listen to this sentence, "I do not recall any government agency or employee ever even making the argument that a master plan trumps zoning." 17 years. She hasn't even heard the argument that master plan trumps zoning - the argument being made here by the city today. This is the first time ever, Judge.

Now, so zoning should be used. Let's go to the next page, page 33. And page 34 is just the zoning verification letter.

And now, Judge, I want to go to where the rubber --

THE COURT: This is a general question, this is something I've always seen when it comes to ordinances enacted by the city. They always have some defining language and I think that this is one of them. We went over this in one of the other ordinances that was discussed at the very end. It will say that this ordinance trumps whatever happened in the past, so on and so on, right?

MR. LEAVITT: Yes, um-hm, and that's exactly what's happened here.

And do you know, I'll point this out, Judge, I won't

pull it out now, but the document that the city says adopts the PROS is ordinance number 3636. There's a section 3 in there, and you know what it says, it *shall* not affect zoning.

THE COURT: That's mandatory.

MR. LEAVITT: Absolutely. Because once -- zoning is claws into the land, it stays in the land. The master plan is in the government's archive. They're just back there planning the activities.

So now I want to turn to page 35, which is the RPD-7 zoning rights. And this is what this Court referenced before. We've already gone through this, I'm not going to spend a lot of time on it. But this is Las Vegas Municipal Code 19.10.050. Remember, the city zoning verification letter says you go to this to see your permitted uses. First the intent: The RPD has been to provide flexibility and innovation in residential development, and then as you well recognized, Your Honor, section C is permitted land uses. The number one permitted land use is single-family and multi-family residential. You have other land uses that are permitted: Home occupations and childcare and other child cares, right? Those are the only permitted uses in RPD-7.

Do you know this argument that the Government is making that this property has to be forced to remain open space or this property has to be forced to remain golf course. Those aren't even permitted uses. Those would be illegal uses under

an RPD-7 zoned property.

So the point here, Your Honor, is when you decided the property interest issue, you said, I'm going to follow zoning because that's what the Nevada Supreme Court requires, and the zoning here is RPD-7 and the legally permitted uses in RPD-7 zoning are single-family and multi-family residential, and, Judge, you were right, based upon this right here (indicating).

Now, can you pull this up? Do you have this? If not I can approach.

THE COURT: Which one is it?

MR. LEAVITT: You know what, I'll approach. I'll hand this to you, Your Honor. You don't have it in there. I just thought about it last night. What's the best way to give it to you.

THE COURT: Just approach.

MR. LEAVITT: Okay. I'm fully vaccinated and I've already had it, so I think I should be safe.

So this is what the city's own code says about zoning, okay, and what "permitted" means. So first, section 19.18.020 says, "Words and terms defined. What does zoning mean? An area designated on the zoning map in which certain uses are permitted and certain others are not permitted, according to this code." So when you have zoning, it means this is the uses that are permitted: Single-family, multi-family. Then it defines what it means by permitted uses: "Any use allowed in a zoning

district as a matter of right. As long as it's conducted in accordance with the restrictions, permitted uses are designated in the land use title by a letter P." I don't know if I have it in here, it doesn't look like. So a letter P means you have the right to use the property.

Let's turn to the next section of the Code here, Your Honor, the city's code 19.16.090. And this is the part right here that says what do you get when you get zoning, and section O is authorization to proceed. "Such approval of zoning authorizes the applicant to proceed with the process to develop and/or use the property in accordance with the standards, procedures of the city departments, and in accordance with the requirements of the Code."

Counsel said the other day that what "permitted" really means, Judge, is it's not not permitted. If that's what the city wanted to say, then on the definition of "permitted" right here, it would have said permitted means not not permitted. That's not what the Code said. It says, "Permitted means any use allowed in the zoning district as a matter of right."

Your Honor, I think I've hit that property interest issue enough. I mean, the city brought this up out of the clear blue. It wasn't supposed to be heard. I understand why the Court wanted to allow it to be heard, to make sure that they could be fully heard. But they brought it up out of the

clear blue. It had been fully decided and fully litigated before this Court entered a decision on the property rights issue previously, and there's absolutely no reason that that decision should be changed, and this Court didn't -- or the city didn't provide any reason why the Court should change its property interest order.

THE COURT: Well, I mean, there was no motion for reconsideration done on that issue, right?

MR. LEAVITT: Absolutely, Your Honor, there was not.

So now what I want to do, Your Honor -- and I think we've sent this. If not, I know -- okay, it's already been sent, okay, to Mr. Schwartz.

Now we want to turn -- and Your Honor, this looks a little thick and it looks daunting. It's not going to take much time to go through.

May I approach again, Your Honor?

THE COURT: Yes, you may.

MR. LEAVITT: Okay. So, Your Honor, we've established that the landowners had a residential zoned property which included the right to develop that property for single-family and multi-family residential uses. So now the question is did they take that?

And I'm just going to briefly go back where we were about 10 hours ago in arguments. If we go to the first tab there, Your Honor, I'm going to skip the front portion. Go to

the first tab there that's Taking Facts: "Taking facts, the aggregate of the city's actions," that's page 69.

If we go to page 70, we know we're supposed to look at the aggregate of the city's actions. This was one of those acts, just one of the acts that we looked at on page 70. Just remember -- and I talked about this yesterday, so I'm not going to spend a lot of time on it -- that councilman publicly announced, Hey, this property, the landowners' property is for your recreation use to the public. He then sponsored that Bill 2018-24 to force the landowners to allow that access, and the city did it. The city passed the bill, and the public is following that discretion, Your Honor, or that direction. The public is following exactly, exactly what they said they were going to do.

And Your Honor, what the city said -- they objected yesterday, and I want to address this just very briefly, the city said, Hey, we didn't enforce that provision, we didn't enforce 2018-24 against the landowner. It doesn't matter. The city adopted a statute which authorized the public to enter onto this landowner's property. And I can give you an example in the *Sisolak* case.

Clark County ordinance 1221 was adopted in 1990. The planes didn't start using the property until 1997. The Nevada Supreme Court said the taking was 1990 when the ordinance was adopted because it preserved the property for use by the public