

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 21

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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 21** 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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/s/ Sandy Guerra

An Employee of the Law Offices of Kermitt L. Water

1 which is really a summary adjudication motion on one element of their
2 taking claim, but they called it to determine property interest. And then
3 they used the Williams order to say -- to try to get our motion in
4 the -- our motion for summary judgment in the 65 acre case knocked off
5 calendar so that they would -- the court would only hear their motion.

6 So they would frame the issue and not get into any of the
7 history of this or any of the law on takings, but frame the issue with their
8 crazy theory. That's their only way that they can prevail in this case.

9 THE COURT: Okay. But --

10 MR. SCHWARTZ: Judge Herndon heard them both at the
11 same time. The developer -- let me -- if I can, that's how we got to this
12 case.

13 THE COURT: Uh-huh. Right.

14 MR. SCHWARTZ: Then they misled Judge Jones in citing the
15 *Sisolak* and the *Alper* case, that you have to do a two-stage process and
16 you have to have a separate motion for a determination of property
17 interest. The City filed its counter-motion for summary judgment, which
18 adjudicated the same issue. Just like a breach of contract case. You go
19 into a breach of contract case, summary judgment. Is there a contract?
20 If there is, was it breached? Here, do they have a property interest? If
21 so, was it taken? So --

22 THE COURT: Okay. Well, you know, with all due respect for
23 my colleagues, I'm not sure they were misled by anything. These cases
24 are all different. Judge Williams has a case where the problem was
25 allegedly that there was some denial due to failure to file a general plan

1 amendment. So that's an action that's taken. Okay. So I get that. Judge
2 Jones very clearly says, look, I can't follow Herndon because Herndon's
3 case is so different. Herndon's case, no action was taken. No action was
4 taken. Clearly, the 65 acre case is in its own category.

5 So what Judge Herndon's -- what Judge Jones is saying,
6 well, look, maybe there's something going on here, because we have
7 this whole problem where when this whole thing gets interfered with by
8 the neighbors and Crockett's order gets in place, and then everything has
9 to stop because you've got, you know, an injunction pending and, you
10 know, what are you going to do? Are you going to violate that? So
11 obviously, you can't. So something happens on that 17 acres, which I
12 still can't understand. And so maybe they've got something here. So he
13 says we'll go forward, maybe you've got something here. It's different.

14 So with all due respect to my colleagues, I do not believe that
15 they are stupid. I believe that they all look at their cases individually.
16 And Judge Herndon's case decision is very good about this. It lays them
17 all out and how each of them is different. And Judge Jones says he's
18 right, they're all different. This case isn't the 65 acre case. So ripeness
19 isn't a problem here. We need to go forward because maybe there's
20 something here in this alleged taking. Let's see. Let's go forward.

21 I don't think he's stupid and being misled. I think what he is
22 saying is each of these four parcels has a different procedural history
23 which requires a different analysis. So let's focus on us.

24 MR. SCHWARTZ: Well, so here's what happened in this case.

25 THE COURT: Yeah.

1 MR. SCHWARTZ: The developer filed its motion to
2 determine property interest.

3 THE COURT: All right. I wasn't talking about the procedure.
4 I'm talking about the facts. Because with all due -- even though this is a
5 summary judgment, you got to look at the facts. And I believe that my
6 colleagues -- as I said, I think Judge Herndon and Judge Jones lay it out
7 pretty clearly. The facts are different in every one of these situations.
8 And so how do you analyze the facts? I don't want to talk about the
9 procedural motions. I'm talking about what's the merits of the case.

10 MR. SCHWARTZ: Well Your Honor, we filed a motion for
11 summary judgment. He filed a counter-motion for summary judgment.
12 And then the Court said I'm going to hear the developer's motion to
13 determine property interests, and I am not going to hear the City's
14 summary judgment motion. And you --

15 THE COURT: I don't remember saying that.

16 MR. SCHWARTZ: -- you removed it from the calendar. And
17 so we withdrew the motion because the Court removed it from the
18 calendar. We lay all this out in our motion for summary -- our counter-
19 motion for summary judgment. We lay it all out.

20 THE COURT: Because I read it, so I'm -- I said I wouldn't hear
21 it?

22 MR. SCHWARTZ: Yes.

23 THE COURT: I don't remember that.

24 MR. SCHWARTZ: Well, that's because when Mr. Leavitt
25 presented you with an order, the order said we're going to hear the

1 City's motion to remand and motion to dismiss first, and then we're
2 going to hear the developer's motion to determine property interest.
3 And the City's motion -- we're not going to hear the City's motion --

4 THE COURT: Okay.

5 MR. SCHWARTZ: -- for summary judgement. So the Court
6 took it off calendar, so we withdrew the motion, because it wasn't going
7 to be heard. So what we're here today for is this motion to determine
8 property interest.

9 THE COURT: Right. Okay.

10 MR. SCHWARTZ: And so we address this motion because
11 it's an element of the takings claim in our motion for summary
12 judgment. And the cases that Mr. Leavitt relied on for -- that he gets to
13 go first with his theory, *Sisolak* and *Alper*, they resolved this claim on
14 summary judgment or trial, not in a separate motion, so they knocked
15 the City's motion off calendar. So that's why we're here today.

16 So I can tell the Court why this case is different. It's identical
17 to the 65 acre case because it was not ripe, and it is identical to all the
18 other cases in the fact that you don't have a property interest in zoning,
19 so their theory of relief goes out the window. And I was going through
20 with the Court all the reasons why they don't have such a property
21 interest to --

22 THE COURT: Yeah. I don't know --

23 MR. SCHWARTZ: -- so that the Court would deny their
24 motion.

25 THE COURT: Thank you. So two things. We have the one

1 issue, which I'm sure they'll argue that this is ripe, because it's not the 65
2 acres. The 65 acres, nothing ever got filed. They just said, you know, it's
3 futile. The City is never going to do anything for us, so let's just sue
4 them. So fine. So here, there was -- and this is what is just -- like, I'm
5 trying to understand what the respective positions are with respect to the
6 facts. I like facts, so let's talk about the facts.

7 They submit something, which somehow makes it through
8 the process, somehow, and it gets on an agenda, but then it goes off the
9 agenda because there's something missing. So that's not action?

10 MR. SCHWARTZ: No. I --

11 THE COURT: I'm not sure I understand.

12 MR. SCHWARTZ: I think it's the opposite.

13 THE COURT: Okay.

14 MR. SCHWARTZ: They filed a set of applications, a site
15 development review application, another application, an application to
16 amend the general plan, as they were required to do because their
17 application was for housing. The general plan doesn't allow housing.
18 They filed these set of applications, and when the City Council ruled on
19 the applications, the City Council said two things. Number one, this
20 property was part of a larger property that the developer applied for a
21 general plan amendment previously. You can't apply for a general plan
22 amendment on the same property within one year. That's in the UDC.

23 But more important, the developer failed to file a major
24 modification application, which Judge Crockett said was required. So
25 there was a discussion about what you should do, and the city attorney

1 made his recommendations. But what the Council did was strike the
2 applications because there was no major modification application filed,
3 and it wasn't the City Council's responsibility to file one for the
4 developer. It was the developer's responsibility under Judge Crockett's
5 order. The developer didn't like Judge Crockett's order, so it didn't file.
6 The City Council may have also decided you can't file a general plan
7 application for the same property within one year. But the main reason
8 they did it was because it didn't have a major modification application
9 with it. Now the developer wants to -- is asking the Court to get into the
10 motivations of the City Council members.

11 THE COURT: Yeah.

12 MR. SCHWARTZ: They didn't like the developer
13 [indiscernible]. That's completely irrelevant. That's a red herring. The
14 takings doctrine provides that it's not a taking unless it wipes out or
15 nearly wipes out the economic value.

16 THE COURT: Okay. Thank you.

17 MR. SCHWARTZ: It doesn't matter why, why the City did
18 what it did. That's the *Lingle* case. The *Lingle* case says it doesn't
19 matter one bit what the motivations were, if they wanted to get this
20 developer, or if they didn't like the developer. It doesn't matter what
21 anyone said. It doesn't matter what anyone did. The only thing that
22 matters is the action of the decision-maker. In this case, it was the City
23 Council.

24 THE COURT: So -- and is this where we get into the
25 segmentation issue? Because like I said, I mean, what do you do? Do

1 you prorate the \$4 million over the whole 200-and-however-many acres?

2 I mean --

3 MR. SCHWARTZ: You mean the purchase price?

4 THE COURT: Yeah. Because I'm trying to figure out how do
5 you argue --

6 MR. SCHWARTZ: No. They bought --

7 THE COURT: -- wipeout or nearly wipeout?

8 MR. SCHWARTZ: They bought a 250 acre golf course and
9 [indiscernible] for four and a half million dollars.

10 THE COURT: Right. Right.

11 MR. SCHWARTZ: Now, they say that they paid, I don't know,
12 45 million or 100 million. There's not a --

13 THE COURT: It's varied.

14 MR. SCHWARTZ: -- single document to support that.

15 THE COURT: Understood.

16 MR. SCHWARTZ: So they paid four and a half million. Then
17 they got approval for the 435 acre property, which they shouldn't have
18 carved it up. Or if they did, they can't come into this Court and say, hey,
19 you won't let me develop the 133 acre property, because they already
20 got to develop all of the Peccole Ranch master plan. They already got
21 435 units on the 17 acre property. That increased their investment in the
22 entire property by five times, and they've still got 233 acres left to
23 develop or use for parks and recreation and open space.

24 THE COURT: So you would go all the way back to the
25 original Peccole.

1 MR. SCHWARTZ: You have to.

2 THE COURT: Which by the way, I used to live in Peccole
3 Ranch about 30 years ago.

4 MR. SCHWARTZ: One has to. And we briefed this -- we brief
5 this in our motion for summary judgment.

6 THE COURT: Right. So are you suggesting that we go all the
7 way back to the original Peccole Ranch development and the whole -- all
8 the way from Sahara to -- we're basically into the freeway.

9 MR. SCHWARTZ: The original --

10 THE COURT: The whole development --

11 MR. SCHWARTZ: -- Phase Two, 1500 --

12 THE COURT: -- and not just their four and a half million-
13 dollar golf course.

14 MR. SCHWARTZ: Yeah. That's what the U.S. Supreme Court
15 and the *Kelley* court require. You look at the factors, and you don't let
16 developers segment property and then claim, oh, you've deprived me of
17 any use or development of this property when it's not the whole
18 property. That's a developer trick so that they get greater density. You
19 see, this how they do it. They buy a 250 acre golf course, and they say,
20 okay, we want to build as many houses as we can. So what we do is we
21 carve it up into four parts, we apply for 435 units on one. I mean, how
22 much has the City -- the City has discretion. How much are they going to
23 give us on this? Well, you know, if we just have this one property,
24 maybe we'd get 500 units. Okay.

25 They carve it up into four parts. Then they apply for

1 development on one part. They get it approved, which is -- this case
2 should be over. The 17 acre case should have been thrown out. You
3 can't have a taking if the government approves your project. But they
4 get it approved, and then they say, okay, we want to develop the 133
5 acre property. And the City says no. You've got to develop the whole
6 Peccole Ranch master plan, and this was supposed to be the open space.
7 We have discretion. We want to keep it. Our general plan says this is
8 PROS. It said that when you bought the property. You knew that you
9 couldn't do this unless we exercised our discretion. You took a chance.
10 And the City says no, we don't -- and again, the City didn't do this.

11 But if the City said no, or as Mr. Leavitt argues, it would be
12 futile to apply to develop on the 133 acre property. You know, he fought
13 remand because they don't want to actually -- they don't want the City to
14 actually call their bluff. But he said it's futile. So even if it were futile,
15 they don't have a taking because they segmented the property. They got
16 substantial value from the Badlands. They got substantial value if you
17 expand your analysis of the parcel as a whole, from the PRNP. So they
18 weren't injured. In fact, their gamble paid off. They paid four-and-a-half
19 million for a 250 acre golf course. They shut it down, and they got 435
20 luxury units approved already. And the City --

21 THE COURT: Well, they say they don't.

22 MR. SCHWARTZ: Pardon me?

23 THE COURT: They say they don't anymore, but.

24 MR. SCHWARTZ: Well, that's nonsense, Your Honor.

25 THE COURT: I know. I know. I know.

1 MR. SCHWARTZ: And if you look at --

2 THE COURT: But anyway, so --

3 MR. SCHWARTZ: If you look at tab 3 --

4 THE COURT: So can we get to the -- like, the so what? So
5 you're saying deny the motion for summary judgment because --
6 because what?

7 MR. SCHWARTZ: This is a motion to determine property
8 interest. It's a disguised motion for summary adjudication of one issue.
9 We're saying deny the motion to determine property interest on the law.
10 When the Court gets to the merits of the -- you know, that claim goes
11 away that they have a constitutional right to build in a -- you know, just
12 because it's zoned for residential. That goes away, and they're stuck.
13 They're stuck with their categorical and Penn Central claims, what
14 they've actually alleged in those claims, which is that the City wiped
15 them out, or nearly wiped them out, or under *Penn Central*, it interfered
16 with their investment-backed expectations.

17 THE COURT: Okay. There we go. Now we're where I want
18 to be. So say you say I don't believe that you have a theoretical -- like, a
19 vested property interest in the fact that you may theoretically be able to
20 build and assuming that you can get the zoning change. And so when
21 you don't get the zoning change, you therefore have your damage.

22 However, here's my question. They've alleged all this, like,
23 you know, carrying costs and all this delay, and it's been years and years
24 and years. So that seems to me to be something different. And that
25 seems to me that that's where they're saying they fall under *Penn*

1 *Central* because hypothetically speaking, had this gone forward in
2 whatever year -- what year was this? I don't know, 2016. We would
3 have been done building this out and, you know, houses in Las Vegas
4 are selling for probably twice what they're really worth. So we would
5 have made all this money. So it seems like that's really what they're
6 saying, is that that's the value. That's where they have a damage claim.

7 MR. SCHWARTZ: No, you don't get there --

8 THE COURT: I don't think that is.

9 MR. SCHWARTZ: They didn't have a right to build, so you
10 don't get to --

11 THE COURT: Okay.

12 MR. SCHWARTZ: -- what expenses they had or their carrying
13 costs. That's the -- you know, developers -- you can make a lot of money
14 as a developer. You can also -- you know, you can make bad decisions.
15 They bought a golf course that they now claim is not economic. They
16 voluntarily shut it down. They paid a price. That's the *Guggenheim*
17 [phonetic] case that we've had put in your -- that is tab 50. The
18 *Guggenheim* case. *Guggenheim* says you get what you pay for. In that
19 case, a man bought a mobile home park that was subject to rent control.
20 He said rent control is a taking. And the court said, are you kidding?
21 And this is an en banc decision of the Ninth Circuit. En banc. They said
22 are you kidding? You bought the property subject to the rent control.
23 You pay the price that reflected it. You pay price that reflected the value
24 as restricted. Now you can't come to us and say that, you know, we
25 need to get rid of the rent control when you knew about it, and that it's

1 preventing you from making a profit.

2 THE COURT: Right.

3 MR. SCHWARTZ: It's exactly the same situation here. The
4 PROS designation was adopted by the City, by ordinance in 1992, and
5 reconfirmed over and over again, and it was in effect when the
6 developer bought the property. You cannot use property for
7 residential --

8 THE COURT: Now that's my next question.

9 MR. SCHWARTZ: -- and then take four and a half million
10 based on the fact --

11 THE COURT: They've changed a bunch of -- like, there's a
12 new plan here, lots of pretty pictures, 2020. New maps, all sorts of stuff.
13 So what's the significance of -- I mean --

14 MR. SCHWARTZ: They didn't change --

15 THE COURT: -- it's been how many years?

16 MR. SCHWARTZ: -- the PROS.

17 THE COURT: So have things -- have things changed?

18 MR. SCHWARTZ: No. I can take you through. And I --

19 THE COURT: Yeah, where are those things?

20 MR. SCHWARTZ: -- I can take you through Exhibits I through

21 Q.

22 THE COURT: Yeah, here they are.

23 MR. SCHWARTZ: Tab 41. Now -- and, Your Honor, the PROS
24 designation is fatal to their takings claim. And that's why they throw all
25 this mud against the wall about why they're invalid, including that the

1 City didn't follow the right procedures in adopting these ordinances. The
2 burden is on them to show that the City didn't, and they had 25 days to
3 bring a PJR to challenge that. They didn't do that, so they can't come
4 into this court and make that argument.

5 So Exhibit I is the 1992 general plan where the City -- and by
6 the way, all of these -- we've given the Court excerpts here. The
7 Exhibit -- the Exhibit QQQ is all of these exhibits, the entire thing,
8 because the developer has alleged in the past, oh, we only attach
9 excerpts. You know, we had some mercy on the Court, and we didn't
10 want to attach -- so Exhibit I. I think we're going to need to go to Exhibit
11 QQQ, Your Honor, to see the maps, or QQQQ, to see the maps. And I
12 have not given that to the Court.

13 THE COURT: No, it's -- it should be on here.

14 MR. SCHWARTZ: But -- oh, here it is. All right. So Exhibit I,
15 which is the first one in the tab. And I think it's Bates page -- or we've
16 numbered our exhibits. This is 0229, page 0229. And that shows the
17 Badlands as parks. This is the 1992 general plan. This was a major
18 change in the City's plans. They adopted this 1992 plan, and they
19 adopted these maps. The developer is going to tell you that the City
20 didn't follow the proper procedures, but that's false. And again, statute
21 of limitations has run. But even so, we filed with the Court, I think
22 Exhibit RRRR, that explains that these maps -- these general plan maps
23 were all adopted, particularly the 1992 general plan, was adopted in
24 accordance with all procedures. So I won't get into that, Your Honor.
25 That's a red herring.

1 So there you show these -- the Badlands in the configuration
2 that was originally proposed. Then, on page -- let's see. Oh, I think it's
3 at our page 248, Your Honor, deep in Exhibit R. It's --

4 THE COURT: Yeah, it's a map. I've got it.

5 MR. SCHWARTZ: Okay. That shows -- that's the
6 [indiscernible]. That shows the original golf course configuration in
7 green. And then in the key, you'll see it says parks, schools, recreation,
8 open space. Okay. So that's -- this was adopted by ordinance of the City
9 Council in 1992. And that imposed the PROS designation. And
10 remember, the general plan is the constitution. That's the highest
11 authority.

12 Then in Exhibit L, adopting the Las Vegas 2020 general plan,
13 which was in the year 2000, the map -- well it looks like the map for the
14 southwest section has been left off, Your Honor. The definition of parks,
15 recreation, and open space is at page 269, but I'll take you forward to
16 Exhibit N, as in Nancy, and that was the 2005, again, readopting the land
17 use element of the 2020 master plan. And there, you see at page 291 --

18 THE COURT: Yeah, I do.

19 MR. SCHWARTZ: There, you'll see -- and that is the
20 current -- that is -- that was the configuration of the Badlands, the 250
21 acre Badlands, after it was built out. It changed the contours. The
22 developer argues, oh, well, you know, the PROS designation doesn't
23 apply because the original PROS was on a different configuration. Well,
24 the City Council then adopted, by ordinance, these plans with a map that
25 showed it in its current configuration.

1 So then you get to Exhibit O, and that is the 2009 version --
2 2009 ordinance, excuse me. And at page 301, you see the very same
3 Badlands, same configuration. Then you get to Exhibit P, which is a 2011
4 ordinance. Again, same definition of parks, recreation, and open space
5 at 316 and at 317. That's it. This was the map in effect when the
6 developer bought the property. It knew. It knew that it couldn't develop
7 the property unless it got the City Council, in its discretion, to lift that
8 general plan designation of PROS to a designation that allowed
9 residential use. And finally, in Exhibit Q, which was the most recent
10 adoption of the plan, at page 322, same configuration. That's what's in
11 effect today.

12 So Your Honor, even if -- even if the Court were to find, and I
13 don't think the Court can under the law of takings, find that it would have
14 been futile for the developer -- you know, that the case is ripe. In other
15 words, that the developer complied with the ripeness prerequisite to a
16 taking claim, and even if the City -- the Court found that the City had
17 denied applications to develop housing on the 133 acre property, there
18 wouldn't be a taking for two reasons.

19 First, because when the developer bought the property, the
20 PROS designation did not allow residential use. The developer paid a
21 price for that property that reflected that fact. That's the *Guggenheim*
22 case. The second reason is because the developer segmented the
23 property. Even if there weren't the PROS designation, the City said you
24 cannot develop the 133 acre property with housing. We want it to stay
25 an open space for the community. They segmented the property. They

1 got substantial development of the Badlands. They got substantial
2 development of the PRNP. They can't come into this court, carve out a
3 piece of property, and say either you let me develop this or it's a taking.
4 That's the part that was a hold-up. So that's the case we make in our
5 motion for summary judgment.

6 THE COURT: Okay. But we're talking about theirs. So their
7 motion for summary judgment should be denied, because they -- first of
8 all, they're wrong on the law. So I understand your argument is they're
9 wrong in the law, that the mere fact that property is zoned something
10 doesn't mean you are absolutely 100 percent entitled to build what you
11 want to build.

12 MR. SCHWARTZ: Got no entitlement. None.

13 THE COURT: No entitlement from zoning alone. So instead,
14 you have to have some action taken by the governmental entity to deny
15 you whatever rights you do have. And here, we're missing action.

16 MR. SCHWARTZ: No.

17 THE COURT: Okay. Sorry.

18 MR. SCHWARTZ: We -- well, we argue in opposition to this
19 motion --

20 THE COURT: Right.

21 MR. SCHWARTZ: -- that it's moot because the case isn't ripe.
22 You can't have a taking if there is no action that meets one of the takings
23 tests, which is the wipeout or the categorical taking, a mere wipeout, or
24 interferes with their investment-backed expectations for *Penn Central*.
25 And their investment-backed expectations are the four and a half million

1 dollars they invested in this property that they have a right to expect the
2 City to allow them to develop the 133 acre property so they can make big
3 bucks. They don't have that right, because the law restricting use to
4 residential was in effect when the developer bought the property. They
5 knew about it.

6 THE COURT: Okay.

7 MR. SCHWARTZ: They don't have a Constitutional right --

8 THE COURT: Okay.

9 MR. SCHWARTZ: -- for the City to change it.

10 THE COURT: All right. So this motion should be denied and
11 what?

12 MR. SCHWARTZ: The Court should put our motion for
13 summary judgment back on calendar.

14 THE COURT: Yeah.

15 MR. SCHWARTZ: They can oppose it. Mr. Leavitt is going to
16 stand up, and he's going to wave Judge Jones' order at the Court that
17 Judge Jones handed down yesterday. And there's a lot in Judge Jones'
18 order.

19 THE COURT: Right. Like I said, I've got the most important
20 thing, which he said this is a different case.

21 MR. SCHWARTZ: But the law is the law.

22 THE COURT: Herndon's is right.

23 MR. SCHWARTZ: What I'm saying is the law is the law.

24 THE COURT: Ruled on ripeness. This isn't the same case,
25 so --

1 MR. SCHWARTZ: I'm saying the law --

2 THE COURT: -- even --

3 MR. SCHWARTZ: -- the law of property -- the law of property
4 in Nevada and land use regulation is the law. It applies to that case, to
5 this case. Judge Jones -- this order was prepared by the developer.

6 THE COURT: No, I understand.

7 MR. SCHWARTZ: Judge Jones signed it without any
8 modifications. There is a lot in this order that's going to contradict what
9 I've been saying. And I could go through this order one by one, as Mr.
10 Leavitt's going to do, and explain why this is wrong. This is wrong.

11 They cite the *Bustos* case, and the *Buckwalter* case, and the --
12 and the *Alper* case for -- they have a constitutional right for -- a
13 constitutional right to build housing in the 133 acre property.

14 THE COURT: Okay.

15 MR. SCHWARTZ: Those are eminent domain cases. They
16 have nothing to do with liability. They don't say that. They depend on --
17 you know, they depend on the courts taking their word for it, and they
18 misrepresent those cases gravely.

19 So Your Honor, I would -- I would like an opportunity to just
20 go through this order briefly just to point out where --

21 THE COURT: And then can we take a break?

22 MR. SCHWARTZ: Yes. In paragraph six --

23 THE COURT: The facts or --

24 MR. SCHWARTZ: -- excuse me, paragraph seven of Judge
25 Jones' order.

1 THE COURT: Which part? Paragraph six?

2 MR. SCHWARTZ: I'm sorry, the --

3 THE COURT: They're --

4 MR. SCHWARTZ: Oh, there. The paragraphs are numbered
5 numerically.

6 THE COURT: It's under findings of fact?

7 MR. SCHWARTZ: Yes, in the findings of fact.

8 THE COURT: Got it.

9 MR. SCHWARTZ: I'm sorry.

10 THE COURT: I got it.

11 MR. SCHWARTZ: They say -- their Exhibit 30 shows that the
12 17 acre property was zoned R-PD7 in May 1981. That's false. It was
13 temporarily zoned R-PD7 in 1991, I think. And then permanently zoned in
14 2001. That's an important fact because they say it's always been zoned
15 R-PD7, and we have a right -- we've always had a right to build anything
16 we want in the property as long as it's permitted use in that zone.

17 They say that -- in paragraph nine, that the R-PD7 zoning
18 ordinance in 2001, this time the right one -- by the way, Exhibit 30 in
19 paragraph seven has nothing to do with zoning. It's the first page of the
20 brief -- of one of the developer's briefs. It's not a zoning ordinance. In
21 paragraph nine, that when the City permanently zoned the 133 acre
22 property R-PD7 in 2001, the ordinance said all ordinances or part of
23 ordinances for sections in conflict with this are hereby repealed. The
24 R-PD7 zoning and the general plan designation of PROS are not in
25 conflict. R-PD7 zoning allows for ancillary open space. Therefore, the

1 PROS designation does not conflict.

2 Your Honor, I want to show you just a couple of maps here.

3 Okay. I can't get my PowerPoint.

4 [Counsel confer]

5 MR. SCHWARTZ: Here we go. Your Honor, I'm going to
6 show you 10 slides. The first five are other planned developments in the
7 City of Las Vegas. Painted Desert is the first one. And can we cycle
8 through these? You'll see residential around a golf course or around
9 open space. These properties are zoned -- the entire thing is zoned
10 residential, just like the Badlands. Entire thing. In fact, the Badlands is
11 part of a 614 acre zoning. So these are just like the Badlands. Painted
12 Desert is one. Next? Oh, I'm sorry. Is that the second one?

13 THE COURT: Los Prados, yeah.

14 MR. SCHWARTZ: Los Prados. Third, Canyon Gate. Fourth,
15 Lakes at Sahara, and then finally, Desert Shores. Okay. All of those are
16 just like the 614 acres in the PRNP. Then let's go through the next slide.
17 So you see the houses, and you see the golf course or the open space in
18 between, just like the -- this property.

19 Okay. So now, we're back. We've done -- the first one
20 is -- just a second. Okay. So Desert Shores, this shows the general plan
21 designation of the property. And it shows that the residential is
22 designated for a residential use and the open space, the golf course, is
23 designated PROS. There are five of these that we're bringing to the
24 Court's attention. Lakes at Sahara, Canyon Gate, Painted Desert, Los
25 Prados.

1 Okay. So the zoning is compatible with the general plan
2 because the City came along and zoned the entire thing. But the zoning
3 allows for open space. It in fact encourages open space. So then they
4 designate for, in the general plan, the housing under a residential
5 designation and the open space under the PROS designation. This is
6 common practice. That's what they did here.

7 So what they are saying is every owner of this area, these,
8 they have a constitutional right to build housing in this open space?
9 Again, every property owner's property is zoned. They have a
10 constitutional right to build in it? Okay. So --

11 THE COURT: Well, some of these have deed restrictions.
12 And that's the true significance.

13 MR. SCHWARTZ: Well, they may, but that's not relevant
14 because --

15 THE COURT: Okay.

16 MR. SCHWARTZ: -- this is regulation. This is land use
17 regulation.

18 THE COURT: Okay. Go on.

19 MR. SCHWARTZ: In fact, one of Mr. Leavitt's ten orders
20 where the court said that they have a constitutional right to build here is
21 a deed restriction case that has nothing to do with regulation. It's the
22 neighbors and the developer, they have a contract with CC&Rs. It has
23 nothing to do with regulation.

24 THE COURT: Okay.

25 MR. SCHWARTZ: So by saying that all -- anything in conflict

1 here is repealed. They're arguing that the master plan designation PROS
2 was repealed. The master plan is not part of the UDC. It's not an
3 ordinance. It's the master plan. It wasn't repealed. It's not in conflict
4 anyway. They are consistent.

5 And then they say in paragraph 10 -- and this is the note.
6 This residential zoning conferred the right to develop the 17 acre
7 property residentially. That's false. That is contrary to all authority. In
8 paragraph 14, they say the zoning and the likelihood of rezoning governs
9 the property interest determination in this inverse condemnation case.
10 False. If the City wipes them out, or near wipes them out, they may have
11 a takings claim, but it has nothing to do with the zoning and their rights
12 under zoning.

13 They cite *Sisolak*. They say *Sisolak* -- they say in *Sisolak*,
14 zoning was also used to determine the compensation due Mr. Sisolak.
15 This is the first time that they haven't misrepresented what Sisolak said.
16 That's correct. The zoning was used to determine the damages that
17 Sisolak incurred after the court found there was a taking. It had nothing
18 to do with whether the developer had rights to develop that property.

19 They cite -- then they cite *Alper*, *Bustos*, *Buckwalter*,
20 *Andrews*, all those cases, and they say that they're the same, that the
21 court relies on these eminent domain cases, they're governed by the
22 same rules and principles applied to formal condemnation proceedings.
23 Well, yeah, just value. They're really misrepresenting those cases. They
24 have nothing to do with liability nor could they possibly have anything to
25 do with liability because the City concedes liability in an eminent domain

1 case.

2 They then cite to NRS 278.349, a state statute that says that
3 on tentative map applications, that zoning prevails over the general plan.
4 This isn't relevant because the zoning and the general plan are not
5 inconsistent. But in 1991, the State Legislature amended NRS 278.250.
6 That's the state statute that says zoning must be consistent with the
7 master plan. It said in its previous versions, zoning shall be consistent
8 with the master plan. They amended it to say zoning must be consistent
9 with the master plan. And that was 14 years after this 278.349 was
10 adopted.

11 The amendment shows the legislative intent that, you know,
12 this -- unfortunately, they didn't amend this because this is inconsistent.
13 But the later amendment made it -- and they were emphatic -- zoning
14 must be consistent with the general plan. Again, not relevant because
15 there's no conflict. But if they were, the general plan would prevail. All
16 the other cases, authorities, you know, the *Stratosphere* case and the
17 other cases, they cite to 278.250, or the *AmWest* case cites to 278.250 as
18 controlling.

19 They talk about City departments that supported the
20 developer. The City attorney supported the developer. Completely
21 irrelevant. They don't make the law. They don't make the law. The City
22 Council makes the law. And the only thing that the Court can consider is
23 the effect of the law or a decision on a permit application, which is the
24 action that allegedly was -- well, it wasn't taken in this case, but they
25 allege that there would be an action. If they actually got consideration

1 on the merits, they allege that that action would be to deny. That's the
2 only action you could consider if it happened.

3 They cite to the tax assessor. The tax assessor has nothing
4 to do with any of these regulations. The tax assessor's opinion is
5 completely irrelevant insofar as they construe it. And the tax assessor is,
6 again, valuing property. It has nothing to do with the liability for a
7 regulatory taking. Insofar as they say the tax assessor thinks that they
8 have a constitutional right to develop housing on the property, of course
9 the tax assessor has no authority to make that determination.

10 They allege that their zoning verification letter from the City
11 gives them a constitutional right to develop the property. Well, let's look
12 at the zoning verification letter.

13 THE COURT: I thought we were going to go through this
14 quickly. Can we -- seriously, we need to take a break. So can we wrap
15 this up so that we can take a break?

16 MR. SCHWARTZ: Yes. All right. Tab 37 --

17 THE COURT: We'll appreciate that.

18 MR. SCHWARTZ: -- the zoning letter doesn't say any of that.
19 It says you got R-PD7 zoning. Here's what's permitted. It doesn't say
20 anything about rights or constitutional rights.

21 They claim that *City of Henderson*, the new case, they claim
22 that that case holds, that because the Court shouldn't mix petitions for
23 judicial review and civil complaints. But that means that *Stratosphere*
24 and the other cases, *Boulder City*, all those cases that were petition for
25 judicial review cases, that the underlying law that they rely on, the

1 underlying substantive law they rely on, goes out the window. That's
2 absurd. That's an absurd interpretation of *City of Henderson*.

3 They claim that the Nevada Supreme Court -- in paragraph
4 47, the Nevada Supreme Court precedent relies on zoning to determine
5 the property interest in inverse. Fine. They don't cite a case because
6 there is no case. It's the opposite. The law is the opposite.

7 Well, you know, it comes back down to they've got eminent
8 domain cases, and they have a statement of the city attorney. The city
9 attorney said there is absolutely no document that we could find that
10 really explains why anybody thought it should be changed to PROS.
11 That's really the best argument they got going, the former city attorney
12 statement. And just because the former city attorney was unaware of
13 Exhibits I through Q, you know, and the master plan, and how to find the
14 master plan on the website, because the city attorney was unaware of all
15 that doesn't mean that that's the law. Thank you, Your Honor.

16 THE COURT: All right. Thank you. So Mr. Leavitt, I would
17 just ask you, again, like, incredibly briefly, how long is it going to take
18 you to do a reply? Because it's 20 after, so can we just take a brief recess
19 and wrap this up in a relatively short period of time or do we take our
20 lunch break?

21 MR. LEAVITT: About an hour, Your Honor. Hour.

22 THE COURT: Okay.

23 MR. LEAVITT: There's a lot of things that I need to address.

24 THE COURT: All right. Okay. So then, we will return at 1:30.
25 Thank you. We'll be in recess until 1:30.

1 [Recess from 12:21 p.m. to 1:31 p.m.]

2 MR. LEAVITT: Your Honor, I've looked at this. I might go a
3 little bit over an hour. Just a head's up. Not much.

4 THE COURT: Okay.

5 MR. LEAVITT: Okay. So, Your Honor, as you'll recall, we
6 appeared before you at a status check hearing. And, you know, at that
7 status check hearing, we presented to you the case law on the state of
8 Nevada on how to -- and it's the specific procedure that every single
9 inverse condemnation case must go through in the state of Nevada.
10 And that procedure is step one -- well, first of all, and the Court said, just
11 like this, and I'm going to quote them, "We undertake two distinct sub
12 inquiries."

13 And so, the Nevada Supreme Court requires two distinct sub
14 inquiries of these inverse condemnation cases. And so, when we were
15 before you at the last status check, we presented that case law to you
16 and we explained, Judge, we have to do two distinct sub inquiries in this
17 case. We first have to decide the property interest issue, which is the
18 bundle of sticks --

19 THE COURT: But we first have to decide if you have a case.

20 MR. LEAVITT: Well, yeah.

21 THE COURT: Yeah.

22 MR. LEAVITT: No. Well, Your Honor, no, I agree with you on
23 that. Absolutely. We first have to decide the property interest issue and
24 then --

25 THE COURT: No. We have to decide if you have a case. If

1 your case isn't ripe, you don't have a case, and we're done, right?

2 MR. LEAVITT: And I'll talk about that, Your Honor, because --

3 THE COURT: I'd like to be done. I think we're done.

4 MR. LEAVITT: What's that?

5 THE COURT: I said I think we're done. I mean I -- seriously, I
6 reread all the decisions of all the other decisions.

7 MR. LEAVITT: Right.

8 THE COURT: All four of these cases are very different.

9 MR. LEAVITT: They are. And so, Your Honor --

10 THE COURT: So I'm not really persuaded by what anybody
11 else has done. Every case is different.

12 MR. LEAVITT: And I agree with you on that. But if the Court
13 will let me. Then you move to the second issue, which is whether there's
14 been a taking. Your Honor, the ripeness issue only comes up at that
15 second issue. It cannot up at the first issue. And, Your Honor, if -- we
16 have the status check order, and this is what happened, is we appeared
17 in front of you and we made this argument. And we said, Judge, we're
18 only going to talk about the property interest issue. And we'll talk about
19 the take issues at a later date. And the take issues do involve the
20 ripeness issue. That's the only time ripeness comes up.

21 And at that status check hearing and in the Court's order, the
22 Court said to us we're not required to brief those issues. And so, we
23 have not briefed those issues. We haven't briefed the ripeness issue.
24 We haven't briefed the case law in the state of Nevada that says that a
25 per se categorical taking, a per se regulatory taking, and a non-

1 regulatory taking are not subject to a ripeness standard. The Nevada
2 Supreme Court flatly stated that ripeness does not apply to three of our
3 claims. And so, Judge, that's why we didn't brief ripeness.

4 The sole issue that we briefed before you today is
5 extraordinarily narrow. It's just what property rights did the landowner
6 have prior to the city interfering with those property rights. And Judge
7 Williams and Judge Jones did the same exact thing. They said there's
8 two distinct sub inquiries. And I -- and in those cases, they said -- here's
9 what Judge Jones said. The landowner's request narrowly addresses
10 the first sub inquiry. This Court will only determine the first sub inquiry.
11 So that's all Judge Jones decided was the first sub inquiry, the property
12 interest issue. He did not decide ripeness or the take issues. Judge
13 Williams said --

14 THE COURT: But, you see, here's my problem.

15 MR. LEAVITT: Yeah.

16 THE COURT: There was action taken in the 17 acre case.
17 There was action taken in the 35 acre case. There's no action taken in
18 this case. So is there ripeness or that -- is that just like what are your
19 property interests, your property interest is -- I mean you have an
20 interest in your property, but what is their interest in zoning?

21 MR. LEAVITT: Absolutely. And I'll talk about it.

22 THE COURT: If there's no action taken.

23 MR. LEAVITT: And, Your Honor, there was action taken. And
24 we didn't brief that for you. We didn't brief that for you because we
25 were expressly told, in finding number six here, that the parties are not

1 required to brief the take issue at the hearing, that the Court will only
2 decide -- they'll only decide the property interest issue. And the Court
3 even cited in its order the *Sisolak* case that says that we're going to do it
4 this way, because this is the procedure the *Sisolak* case requires us to
5 follow.

6 So, Your Honor, if this court enters an order on the ripeness
7 issue, we will have been denied our due process, because we haven't
8 addressed the ripeness issue and we haven't addressed the take issue
9 yet. But -- and, Your Honor, when we do address those issues, I will lay
10 out to you, Your Honor, that we did file an application for the 133 acre
11 property.

12 THE COURT: Well, Your Honor.

13 MR. LEAVITT: Yeah.

14 THE COURT: I understand that.

15 MR. LEAVITT: Not only --

16 THE COURT: But it was taken off calendar.

17 MR. LEAVITT: No, Your Honor. And that's what I -- that's
18 what I'm saying. For the 100 -- for the whole property, when the
19 landowners wanted to develop the individual 133 acre property, they
20 were expressly told that the only application they could file to develop
21 the 133 acre property was a master development agreement. And this is
22 the evidence we'll present to you at the take side, and that's undisputed
23 evidence. We have undisputed evidence that that's the only application
24 the city would accept to develop the 133 acre property.

25 And the landowner, Your Honor, worked two-and-a-half

1 years on that application and paid an extra million dollars in fees. And
2 the City wrote that application, Your Honor, that master development
3 agreement application to allow the development of the 133 acre
4 property. The City wrote it. And the planning department said that --
5 this was important -- that the master development agreement which
6 would have allowed the development of the 133 acre property, the
7 planning department said it was consistent with zoning. They said it was
8 consistent with the Nevada Revised Statutes. And they said it was
9 consistent with the city's master plan. And the planning department
10 actually -- the planning commission approved that master development
11 agreement to allow the 133 acre property to be developed. It went to the
12 city council. And the City Council had a hearing and denied it.

13 So, Your Honor, yes, there has been an application, and yes,
14 it has been heard by the City Council, and yes, it has been denied. But,
15 Your Honor, that's only for the ripeness issue, which is part of the take.
16 So that -- I know, Your Honor. I'm going to go back. I'm going to go
17 back to this very narrow issue that we're here for today. And this is what
18 the Nevada Supreme Court said. They said, in an inverse condemnation
19 case, the Court has to first decide the bundle of sticks -- and this is what
20 they say -- prior to the government interfering with those bundle of
21 sticks.

22 So before the government takes any action against the
23 property, the district court judge is required for define the bundle of
24 sticks. And that makes sense. Here's why. Because once you define the
25 bundle of sticks prior to government action, you can say okay, this is

1 what the landowner had. Then and only then can you move to the next
2 phase and then say okay, here's the aggregate of government action.
3 How did that impact the bundle of sticks. How many sticks did the
4 government take out through its actions. We're not at that second
5 phase. We're not at the phase where we talk about ripeness on what the
6 government did. We're only at the phase of deciding an extraordinarily
7 narrow issue. What did the landowner have prior to the City interfering
8 with those rights? And that's what the Nevada Supreme Court said the
9 court must decide. That's what Judge Jones decided. That's what
10 Judge Williams decided. And they're both following this procedure, and
11 they both --

12 THE COURT: But their cases are different.

13 MR. LEAVITT: No, Your Honor, they're not.

14 THE COURT: They're -- they are.

15 MR. LEAVITT: No, no, no. Let me say this.

16 THE COURT: Every one of these cases turns on very different
17 facts.

18 MR. LEAVITT: I agree with you.

19 THE COURT: And I appreciate you guys are talking about all
20 these theoretical legal issues, but you're not -- you don't look at it the
21 way we do.

22 MR. LEAVITT: Okay.

23 THE COURT: We look at our case.

24 MR. LEAVITT: I agree.

25 THE COURT: My case is very different from their cases.

1 MR. LEAVITT: I agree when you get --

2 THE COURT: So --

3 MR. LEAVITT: -- to the take side.

4 THE COURT: Okay. All right.

5 MR. LEAVITT: When you get to the take side. But, Your
6 Honor, here's why they're the same exact when you're on the property
7 interest side, because every one of these properties had the same exact
8 zoning. Every -- so that's what we're -- that's why I say Judge, you're
9 right, I agree with you. When we're talking about ripeness and we're
10 talking about takings, law that we haven't briefed to you today, the cases
11 will be fact specific. And that's actually -- that's what the courts even
12 hold as you look at the aggregate of actions against this one specific
13 piece of property. But we're not there, Your Honor.

14 And so, when we're talking about the narrow property
15 interest issue, all of the facts are the same for all four cases. All of the
16 facts that the -- all of the properties have the same exact zoning. And so,
17 Your Honor, it -- we have a huge concern in representing the landowner
18 in this matter right now that we've now moved, and counsel has made
19 significant argument in regards to the take issue and the ripeness issue.
20 And we haven't briefed that. And that's a concern for -- we haven't
21 briefed it according to the Court's order, and we haven't briefed it
22 according to the Nevada Supreme Court procedure and due process for
23 deciding these cases.

24 The very narrow issue that we briefed is what was the
25 property interest prior to the government interference. And so, we have

1 a huge concern, Your Honor. If you're going to move over into the take
2 side and start deciding take issue and ripeness issues, that causes us
3 great concern, because we haven't been heard on that. We're only being
4 heard and we --

5 THE COURT: What are you proposing?

6 MR. LEAVITT: Yeah. We're only -- our -- in fact, it's our
7 motion, Your Honor. And we write very clearly in our motion that we're
8 very narrow in our request.

9 And remember, when the city filed their countermotion, they
10 properly removed it according to the order, the status check order.

11 THE COURT: Okay. Well, since then I've read all this stuff,
12 and I think I was wrong. I -- seriously, I just think this is the wrong
13 approach.

14 MR. LEAVITT: Well, Your Honor, you mean to decide -- to do
15 the two distinct sub inquiries?

16 THE COURT: No, that this is a whole wrong approach. Like I
17 said, I think that Judge Herndon had it right.

18 MR. LEAVITT: Oh, on the ripeness issues and things like
19 that?

20 THE COURT: I think he's right. As I look at this --

21 MR. LEAVITT: Uh-huh.

22 THE COURT: -- all these -- your 17 acre case and your 35 acre
23 case --

24 MR. LEAVITT: Right.

25 THE COURT: -- is very different. Very different --

1 MR. LEAVITT: Uh-huh. No.

2 THE COURT: -- from your 65 and 133.

3 MR. LEAVITT: And that goes to the ripeness issue. But,
4 Judge -- yeah, Your Honor. And the reason I'm bringing this up is
5 because Judge Herndon I understand -- Judge Herndon did not address
6 and resolve the property interest issues that we're here for today. He
7 expressly said he did not decide that.

8 THE COURT: Exactly.

9 MR. LEAVITT: Okay. Yeah. So he's only on the taking side.
10 He -- yes, that's what he said.

11 THE COURT: I think he said that this is all premature.

12 MR. LEAVITT: Absolutely, because he decided the taking
13 issue. See, Your Honor. And that's why Judge Trujillo, in that case, set
14 that order aside, as he said wait -- Judge Trujillo said wait a minute. He
15 didn't follow the mandatory two-step procedure. And because he didn't
16 follow --

17 MR. SCHWARTZ: Objection, Your Honor. That misstates the
18 evidence. I --

19 THE COURT: Sir, please have a seat. Have a seat. We didn't
20 let Mr. Leavitt interrupt you. So --

21 MR. LEAVITT: Okay. And since he didn't follow the
22 mandatory two-step procedure, I, Judge Trujillo, now have to do that.
23 Okay.

24 And then, Your Honor, the 17 acre case is different. You're
25 right, when you get to the facts. And when you start talking about

1 ripeness, this was another thing that she found -- Judge Trujillo found
2 with the Herndon order is that, wait a minute. There's three claims that
3 the landowners have that the Nevada Supreme Court expressly said are
4 not subject to a ripeness standard. And I'll explain that later, Judge,
5 exactly why. The Nevada Supreme Court says exactly why three of our
6 claims are not subject to the ripeness standard. And so, Judge Trujillo
7 said listen, I've read the case law and Judge Herndon was wrong. The
8 ripeness standard doesn't apply to three claims. You're -- just let me -- if
9 I can, Your Honor, just one --

10 MR. SCHWARTZ: Objection, Your Honor. No foundation,
11 Your Honor.

12 THE COURT: Please, sir. Please don't interrupt. We didn't
13 let him interrupt you. We aren't going to let --

14 MR. SCHWARTZ: Sorry.

15 THE COURT: -- you interrupt him. Thank you.

16 MR. LEAVITT: So here, let me explain. I'll just explain just
17 very briefly one of them. A per se regulatory taking. The Nevada
18 Supreme Court, that's one of our taking claims. The Nevada Supreme
19 Court, in the *Sisolak* case, this is what they said. They said *Sisolak* was
20 not required to exhaust his administrative remedies by applying for an
21 application before bringing his inverse condemnation claim for a per se
22 regulatory taking of his property.

23 In other words, the Nevada Supreme Court said it's a per se
24 regulatory taking claim. Ripeness standard doesn't even apply. And
25 then in the *Hsu* case, Your Honor, the Nevada Supreme Court addressed

1 that issue again and said where there's a per se taking, a per se
2 categorical taking or a per se regulatory taking. The Court said we
3 conclude that the landowners were not required to apply or otherwise
4 exhaust their administrative remedies prior to bringing the claim.

5 So that -- so, Your Honor, if we get to the ripeness side and
6 the take side, I'll cite you this case law and I'll say to you, Judge, you
7 don't do a ripeness analysis under a per se regulatory taking or per se
8 categorical taking, which are claims. We've also cited a non-regulatory
9 de facto taking claim. And in the case of *State v. Eighth Judicial District*
10 *Court*, the Nevada Supreme Court, again, did not apply a ripeness
11 standard. Here's why. Because when you're focusing on those claims,
12 the Nevada Supreme Court says you look at one thing. You look at the
13 government's actions towards the property.

14 And the Nevada Supreme Court said those actions can be
15 anything. You have to look at the aggregate of the government's
16 actions.

17 THE COURT: Okay.

18 MR. LEAVITT: And --

19 THE COURT: And what are they here?

20 MR. LEAVITT: What's that?

21 THE COURT: And what is it here? What happened here?

22 MR. LEAVITT: Well, Your Honor --

23 THE COURT: What do you think happened?

24 MR. LEAVITT: -- that's -- see, your question, it's a concern for
25 me, because we're not -- we didn't brief that issue for you --

1 THE COURT: Okay.

2 MR. LEAVITT: -- because we're not at the take side. But I can
3 tell --

4 THE COURT: Well, with all due respect, this is the way you
5 wanted it. And all you've done is create a whole bunch of questions for
6 me, because I'm just not seeing how we get there. This is the approach
7 you wanted to take.

8 MR. LEAVITT: Yes, Your Honor. And the approach I want to
9 take today was that you just define the property, you define the bundle
10 of sticks.

11 THE COURT: But I don't think you can do that until we get
12 past this question that I have, which is what are you talking about.

13 MR. LEAVITT: Okay. I'll do it. I'll do it, Your Honor. I'll do --
14 I'll absolutely go to the facts. This is what -- and you know what, Your
15 Honor? The history is important. So I'll go through the history. And you
16 asked this of counsel. Here's the facts, okay, Your Honor.

17 Because counsel said that the planning commission and the
18 city attorney, they don't adopt the law, but they do state the facts. And,
19 Your Honor. We've laid out the facts. Here's the facts. The landowner,
20 in 2001, approaches Mr. Peccole and says I want to buy this property.
21 And the Peccole family disclosed to him that there's no restrictions on
22 development. The landowners then go to the city of Las Vegas on three
23 different occasions, and the city of Las Vegas discloses to the landowner,
24 as part of his due diligence, that the property is zoned R-PD7, that R-PD7
25 trumps everything, and that the landowners have the right to develop.

1 So these are facts, Your Honor, that are critical to why we're here today.

2 And so, after the landowner gets that information from the
3 city of Las Vegas, he says to the city of Las Vegas I want you to do a
4 study to confirm what you just told me. Again, all part of his due
5 diligence. And the city of Las Vegas does a three-week study and comes
6 back to the landowner prior to his acquisition of the property. And the
7 city told him you have R-PD7 zoning. Your R-PD7 trumps everything.
8 And you have the right to develop your property.

9 And so, he asked the City of Las Vegas to put that in writing
10 as part of his due diligence. And the City of Las Vegas did that, which is
11 Exhibit number 134. That's the zoning verification letter. And, Your
12 Honor, the zoning verification letter in -- that was issued to the
13 landowner from the City of Las Vegas, prior to his acquiring the property,
14 says, unequivocally, the property is zoned R-PD7, which means seven
15 units to an acre. The zoning verification letter then discloses to the
16 landowner the R-PD7 is intended to provide flexibility and residential
17 development.

18 Then the letter says the density that you're allowed to build
19 on your R-PD7 is identified by a number. And then they say right in the
20 letter that they give to our client, for example, R-PD4 means you can
21 build four units to an acre. Again, this is the zoning verification letter
22 that he received prior to acquiring the property. And then the -- then that
23 letters says, and I'll quote, "A detailed listing of the permissible uses on
24 your property and the applicable requirements for R-PD7 are in our
25 code."

1 Your Honor, the landowner didn't just show up one day and
2 buy the property. He did 14 years of due diligence. And during that 14
3 years of due diligence, he confirmed with the city of Las Vegas on at
4 least four or five different occasions, including in writing, that the
5 property is zoned R-PD7. The R-PD7 trumps everything else. And R-PD7
6 gives the landowner the right to develop the property.

7 So here's -- so that right there, Your Honor, lays that first --
8 the foundation, the foundational facts for that first issue of the property
9 interest. So your question is okay, well, what happened after that? Your
10 Honor, after the -- oh, I need to point something out here, Your Honor.
11 When the landowners acquired the property, there were five different
12 parcels. The landowners didn't insidiously split this property up. And if I
13 may, I'm going to, I'm going to quote -- there's a deposition that was
14 taken by Peter Loinstein in this matter, Your Honor. And this says
15 volume one. It's part of the record. Peter Loinstein. He said -- the
16 question was, and he was referring to this property. "Okay. So you the
17 city wanted the developer here to subdivide the property; is that
18 correct?"

19 And then the answer is, "As part of the submittal, we were
20 looking for that to be accomplished prior to notification. Yes."

21 So the property -- the landowners purchased five parcels.
22 And then, Your Honor, Peter Loinstein, who's the head planner of the
23 City of Las Vegas, Your Honor, he's the one that the landowners were
24 working with. Peter Loinstein confirmed that the City asked the
25 landowners to divide the property up as part of the development. So

1 then what happened is the landowners went to submit their
2 development applications.

3 And you had a great question, Judge. Why are these cases
4 all separate? Here's why. Because when the landowners file a
5 development application, for example, for the 35 acre property, and a
6 city denies it, they have 25 days to bring the lawsuit. So they had to
7 bring the lawsuit immediately for the 25 acres. When they refused to
8 accept the applications for the 133, they then filed the lawsuit for that
9 one, because they had to file it within 25 days.

10 THE COURT: It's the petition for judicial review.

11 MR. LEAVITT: Petition for judicial review.

12 THE COURT: Yeah.

13 MR. LEAVITT: Under the old law, joining the claims together.
14 So, Your Honor, that's why there's four separate lawsuits is because the
15 landowners were following this process to try and develop the property,
16 and they had to bring them at the appropriate time. Thereafter, the
17 landowners sought to join them, and they received opposition from the
18 city of Las Vegas on the joinder. So, Your Honor, that's where we are
19 today, and that's why they're split up.

20 Now your question is -- okay. I'm going to move to the take
21 side for just a minute, so the Court can see the larger context. The
22 landowners then go to the city and say we want to build. We want to
23 build. And the city said you can only do one application, the master
24 development agreement. The landowners did it, as I explained to you,
25 and the city denied it. The landowners then said we want to at least

1 access our property to use it. And the City denied the access permit.
2 Wouldn't even let them access their property.

3 Why is that so important? Because the Nevada Supreme
4 Court, in two cases, held that landowners have the absolute right to
5 access their property. In a case called *State v Schwartz*, the Nevada
6 Supreme Court said when you abut property here, here, and here, you
7 have a legal right to access your property. And in discovery, the city
8 admitted that the landowners have the legal right to access their
9 property. And the city denied that access.

10 Then, Your Honor, one of the important parts of ownership is
11 being able to exclude other people. And so, the landowner said we want
12 to put a fence around our property. And they said we want to prohibit
13 other people from coming onto it. And we want to also fence our ponds.
14 And the City of Las Vegas denied those applications also, Your Honor.

15 So right now we have three denial of applications to use the
16 133 acre property. And then, Your Honor, here was the -- probably the
17 worst part of what happened at the City of Las Vegas is the City then
18 drafted a bill. It's called Bill 2018-5 and 2018-24. That bill did three
19 things. It targeted only the landowner's property. It made it impossible
20 to develop the property. And then this is what that bill said, Judge. It
21 said all of the public have, they said, ongoing public access to the
22 property. That bill right there, in and of itself, is a taking. And let me
23 explain why.

24 In the *Sisolak* case, the Nevada Supreme Court held that if
25 the government engages in actions that preserve property for use by the

1 public or authorize the public to enter onto property, if they adopt a bill
2 that authorizes the public to enter onto your property, that is a per se
3 taking. Makes sense. If there is a --

4 THE COURT: Well, that's what I talked to Mr. Schwartz
5 about. It's like -- as I said, there's, well, various different causes of action
6 in here. And there's a lot of these allegations about things that the city
7 did.

8 MR. LEAVITT: Absolutely.

9 THE COURT: They seem somewhat unrelated to like the
10 specific narrow question of was this denial of the -- well, actually, that
11 was my problem. I didn't see a denial. This -- when they took this 133
12 acre application off the agenda and didn't act on it --

13 MR. LEAVITT: Yes.

14 THE COURT: -- was that a taking? Well, that didn't really
15 seem to me to be -- like what right to that? That doesn't make any sense.
16 This other stuff, as I said, well, what's that, that's something else.

17 MR. LEAVITT: And I'm telling you the something else.

18 THE COURT: Okay.

19 MR. LEAVITT: So you have to look at the aggregate of
20 government actions. You just don't look at one action.

21 THE COURT: Okay.

22 MR. LEAVITT: And remember, the master development
23 agreement was to develop the 133 acre property. And here's -- Your
24 Honor, the City said you can only develop the 133 acre property with the
25 master development agreement. The landowners after that was denied

1 tried the single application and the City struck them. Your Honor, the
2 landowners also tried a singular application for the 35 acres. And the
3 City denied it, because it wasn't the master development agreement.
4 That's why when you say there wasn't a denial, there absolutely was.
5 The only application the landowner were permitted to file to develop the
6 133 acre property was worked on for two-and-a-half years and filed and
7 submitted to the City Council and denied.

8 THE COURT: Which one was denied? Because we've been
9 talking about this one that goes under the agenda. And they --

10 MR. LEAVITT: Uh-huh.

11 THE COURT: -- talk it off. They say well that's not -- it
12 doesn't have -- I forget what it was. It didn't -- it has something it didn't
13 need.

14 MR. LEAVITT: Yes.

15 THE COURT: And so, they take it off. And so, how is that a
16 denial?

17 MR. LEAVITT: That's different.

18 THE COURT: Okay.

19 MR. LEAVITT: That's totally different. The master
20 development agreement is totally different. That's what I'm saying.
21 There are numerous applications filed by the landowners to try and use
22 the property. The master development agreement was for the whole 250
23 acre property --

24 THE COURT: Right.

25 MR. LEAVITT: -- including the 133 acre property. And

1 remember, that's the only application the city would accept to develop
2 the property. It refused to accept any other application. And that
3 application was undeniably denied, Your Honor. That's not disputed in
4 this case, that that application was denied.

5 So we have an application, and we have a denial of that
6 application. In addition to that, we have the three other attempts to use
7 the property, which were applications to use the property. Your Honor,
8 the landowners asked for access, and the City wouldn't even let them
9 access onto their property. That's a denial of an application. The
10 landowners also wanted to fence it, and they wouldn't let them fence it.
11 That's another denial of an application.

12 But I think even more important than that -- that's important,
13 obviously, but you have these three denials where the City was putting
14 up a shield saying you can't use your property. But then they took out
15 their sword and went and jabbed it into the property and adopted a bill
16 that said you can't even use your property. Your Honor, that bill is
17 critical. And we'll present that evidence to you on the take side, where
18 the city said we're going to target one property here, your property.
19 We're going to make it impossible to develop. We -- you can't develop
20 the property, and you have to allow the public to use your property.

21 Now you're probably saying why would the city possibly do
22 that? Here's why. We will present to you the evidence at the take part of
23 this case, where the surrounding property owners went to the City of Las
24 Vegas and said to the City of Las Vegas we do not want you to allow
25 these people to use their property. We have that -- we have the affidavit

1 evidence. We have the emails. We have the written statements by the
2 city itself, where the city says we're preserving this property for use by
3 the surrounding landowners. So, Your Honor, that's the take evidence
4 that we will present to you, specific to this 133 acre property.

5 Your Honor, is there any more questions that you have?

6 THE COURT: Yeah, because I'm trying to understand then --
7 because, as I said, there were all these different causes of action in --

8 MR. LEAVITT: Yes.

9 THE COURT: -- your complaint. Are you saying that they all
10 have to go through this same process of determining, quote, your
11 bundle of sticks? Because with all due respect, with respect to, you
12 know, taking the application off the agenda, you know, I don't see that as
13 being a violation that rises to the level -- it seems premature.

14 MR. LEAVITT: Okay.

15 THE COURT: As I said, there are all these other allegations
16 about things that the city did. Didn't allow them access. Why are you
17 not allowed to fence your property? Does that cause you harm? It
18 seems like -- those like a tort. Those are more like the city didn't properly
19 allow you to make use of your property and to protect your property.
20 You don't want people dumping. I mean the place is going to turn into a
21 junkyard. I mean so you've got to be able to protect your property. I
22 understand that.

23 So that seems to be the -- different -- and it doesn't have to --
24 seem to have anything to do with this -- what you're talking about, which
25 is this overall they wouldn't let us, I guess, develop our property. And

1 they seem very different and distinct. And I'm trying to figure -- what are
2 you -- how do you define what you believe your bundle of sticks is,
3 because these are all different things, but to you they seem to be all one
4 big thing. And I don't get it. I don't see how they can be.

5 MR. LEAVITT: Two things. Under all of the claims, yes, the
6 Nevada Supreme Court says you have to do the two distinct sub
7 inquiries. Second thing, on a tort, Your Honor, you hit it on the head.
8 You can't sue the government for a tort --

9 THE COURT: Right. Right. That's what I said.

10 MR. LEAVITT: -- under these circumstances. You can only
11 sue them in imminent domain.

12 THE COURT: Right, because -- discretionary act. So they
13 have --

14 MR. LEAVITT: Absolutely.

15 THE COURT: They have immunity.

16 MR. LEAVITT: So we have to sue them in inverse
17 condemnation and say you took our property. But, Your Honor, the
18 other part is I understand the 133 acre application standing alone was
19 stricken from the agenda. But, Your Honor, we have another application,
20 a master development agreement application that was denied. Your
21 Honor, but here's the situation. The landowners have a piece of
22 property. They have zoning. They have the right to use it. They go to
23 the City. They say there's only one road you can go down to build.
24 That's the master development agreement. They do every single thing
25 the city says. They file the application to develop, and then the City says

1 no. That's your classic taking action.

2 The exact same thing happened in a case called *Del Monte*
3 *Dunes v City of Monterey*. It went to the United States Supreme Court.
4 The city of Monterey denied the application to develop. And then the Del
5 Monte Dunes sued, and the United States Supreme Court, and the
6 United States Supreme Court held that that was a taking.

7 But, Your Honor, here's my great concern, and my great
8 problem here, again, is I'm at a huge disadvantage. And I think you are
9 too, Your Honor, because you haven't heard our case. You haven't
10 heard our facts. You haven't heard our taking facts. And so, your last
11 question there is so how do you define the bundle of sticks? You have to
12 define them before the government action. They have to be defined at
13 that point in time. And that's what the -- that's what the Nevada
14 Supreme Court said. Here's what the Court said. They said in analyzing
15 a taking claim, we undertake two distinct sub inquiries, a) whether the
16 appellant's real and personal property constitutes private property under
17 the constitution. So they say we decide A first. Then they go on and
18 say, b) whether the city's actions denied -- in that case it was access --
19 whether the city's actions denied them access to constitute a taking.

20 The Nevada Supreme Court adopted this mandatory
21 procedure, and the mandatory procedure makes sense. And that's why,
22 at the last hearing that we had, said we're going to split these two issues
23 entirely up and separate them. And that's why --

24 THE COURT: Well, that was your recommendation, and I
25 agreed to go along with it. I now think it's wrong.

1 MR. LEAVITT: Okay.

2 THE COURT: This doesn't make any sense. It's out of
3 context. I think this is not a good approach.

4 MR. LEAVITT: Your Honor, I -- the only way I guess I could
5 respond to that is to say it's the approach the Nevada Supreme Court
6 has required us to take. And the Nevada Supreme Court, I mean it --
7 they -- I mean the -- to address it for a second time, the Nevada Supreme
8 Court did it again. And here's what the Court said in *Sisolak*.

9 Accordingly, the Court -- this is their language. Accordingly,
10 the Court must, first, determine whether there plaintiffs possess a valid
11 interest in the property affected by the government action before
12 proceeding to determine whether the government action at issue
13 constituted a taking. So that's what the United -- the Nevada Supreme
14 Court said you -- that's what the -- the language they used, the Court
15 must, first, determine the property interest before proceeding to
16 determine the take issue.

17 And, Your Honor, yes, I did invite you to do that. And yes,
18 that's -- and the only reason I did that, Your Honor, is because I want to
19 avoid error on appeal. I don't want the Court to -- I don't want to go
20 through a whole process here, and then we go to the Nevada Supreme
21 Court, and the Nevada Supreme Court remands it.

22 THE COURT: Okay. Well, here's my problem with *Sisolak*.
23 Okay. So Mr. Sisolak, not then governor, owns these -- like this raw land.

24 MR. LEAVITT: Yes.

25 THE COURT: And the City passes an ordinance --

1 MR. LEAVITT: Yes.

2 THE COURT: -- that says height restrictions.

3 MR. LEAVITT: Absolutely.

4 THE COURT: That's not what we're talking about here.

5 MR. LEAVITT: Excuse me, Your Honor.

6 THE COURT: We aren't talking about that here.

7 MR. LEAVITT: We're talking about the same thing.

8 THE COURT: It's totally -- no, it's not.

9 MR. LEAVITT: Let me explain. And, Your Honor, again,
10 you're at a disadvantage, because I haven't briefed that for you.

11 THE COURT: Okay.

12 MR. LEAVITT: And that's why it's a huge concern for me. In
13 Sisolak, we tried those cases. What happened is the city adopt -- the
14 county adopted height restriction ordinance number 1221.

15 THE COURT: Uh-huh.

16 MR. LEAVITT: It did one thing. It authorized the airplanes to
17 enter at a certain air space above the property in 1990. We then sued the
18 county, and we went through 14 years of litigation. And the Nevada
19 Supreme Court said the passage of the ordinance that authorized the
20 public to use the property was the taking.

21 THE COURT: Okay. So that was 10 years after he bought the
22 property.

23 MR. LEAVITT: Yes. Oh, absolutely. He bought the property,
24 and the Nevada Supreme Court said that, in 1990, when the ordinance
25 was adopted, that was the taking.

1 THE COURT: He had air space rights.

2 MR. LEAVITT: Yes.

3 THE COURT: What rights here -- you're saying zoning is a
4 right. How is zoning a right? Because it's not saying we can't use your
5 property because we're going to land planes over the top of Badlands.

6 MR. LEAVITT: Right.

7 THE COURT: That's not what they said.

8 MR. LEAVITT: No. No. What they said -- what the ordinance
9 said, Your Honor --

10 THE COURT: No, I'm not talking about *Sisolak*. I'm talking
11 about here.

12 MR. LEAVITT: I know.

13 THE COURT: Yeah.

14 MR. LEAVITT: The City adopted an ordinance here --

15 THE COURT: Right.

16 MR. LEAVITT: -- that expressly states -- it's written right in
17 the ordinance -- that the landowners -- it's up. Here it is right here. This
18 is ordinance -- this is the bill, 2018-25. It says the landowners must allow
19 ongoing public access to their problem.

20 THE COURT: Okay. So again, to me, that seems very
21 different from the 133 acres developing. That's why I said it seems to me
22 like it's -- it almost sounds -- like I said, it's not a tort, because you can't
23 sue for tort, but those -- that seems very different to me from the zoning
24 action. That's this, overall, the county takes punitive actions against us.
25 They don't want us developing our land.

1 MR. LEAVITT: Yeah.

2 THE COURT: They're going to not let us use it. That's a
3 different case than the 133 acre specific -- so that's why I didn't
4 understand why these things are all separated out, because these zoning
5 applications seem to be one thing. And all these other things that's like
6 pattern and practice that you allege, it seemed more global. And so, I'm
7 trying to figure out why did you separate that into -- I mean that just
8 didn't make any sense to me.

9 MR. LEAVITT: No, Your Honor --

10 THE COURT: The PJRs, with respect to specific denials of
11 specific zoning applications, are one thing.

12 MR. LEAVITT: Right.

13 THE COURT: This big, you know, you not letting us use this,
14 because you keep enacting all these crazy laws that keep --

15 MR. LEAVITT: Right.

16 THE COURT: -- Mr. Lloyd from using his land --

17 MR. LEAVITT: Right.

18 THE COURT: -- that seems like one thing. But yet, it's split
19 up into four different cases. And that's where I just -- it seems like an
20 odd choice.

21 MR. LEAVITT: Well, and some of the facts are different. You
22 were right, Your Honor. Some of the facts are different. But I want to go
23 back to the bill.

24 THE COURT: Okay.

25 MR. LEAVITT: The bill specifically authorized the public to go

1 onto the 133 acre property. It was specific to that property. It said you
2 have to allow ongoing public access to the 133 acre property. And if I
3 may, just two months ago, the United States Supreme Court had the
4 exact issue before it, in a case called *Cedar Point v Hassid*. In *Cedar*
5 *Point v Hassid*, two months ago, the United States Supreme Court had to
6 decide whether a statute adopted by California -- and this is what the
7 statute said. It said farmers had to allow the union to go onto their
8 property something like -- I can't remember how many days a year, like a
9 couple -- a few --

10 THE COURT: Yeah.

11 MR. LEAVITT: -- days a year. So you --

12 THE COURT: [Indiscernible]

13 MR. LEAVITT: You have to allow them to go onto the
14 property.

15 THE COURT: Right.

16 MR. LEAVITT: That's the *Cedar Point v Hassid* case. One of
17 the landowners in that case that sued the farmer, the unions hadn't even
18 come onto his property yet. The United States Supreme Court held that
19 is a per se taking. When you adopt a statute that authorizes the public to
20 go onto property, that's a per se taking. That means it's a taking in and
21 of itself. And when we move to the taking side of this case, we're going
22 to present to you this bill that the city adopted that said the landowners
23 must allow the public -- all the public, not just some but all of the public
24 to go onto their property.

25 THE COURT: This is what I'm trying to figure out. What are

1 you saying you want defined? Because as I told you, I think a lot of times
2 now, I have an issue with this -- like what's -- but, essentially, it's been
3 severed off. It's the PJR. The 133 acres denied. That to me is, one, it's a
4 very concrete thing. I just don't see it. I don't think it's right. I don't
5 think that's --

6 MR. LEAVITT: Okay.

7 THE COURT: And that's why I was asking. What about -- and
8 I asked Mr. Schwartz this. What's all this other stuff that they're alleging
9 in here about these -- what these city counselors were up to and all these
10 allegations that the City had this plot and this plan and this effort to try to
11 keep them from using this whole big --

12 MR. LEAVITT: Yeah.

13 THE COURT: -- you know, Badlands.

14 MR. LEAVITT: Those are --

15 THE COURT: That seems to me to be very different.

16 MR. LEAVITT: Those are specific to the 133. And, Your
17 Honor, we will -- again, at the take side of this, we will present that
18 evidence where the City specifically targeted the 133 acre property.

19 THE COURT: Okay. I'm -- maybe I'm not making myself
20 clear.

21 MR. LEAVITT: Okay. Go ahead.

22 THE COURT: Specifically the PJR.

23 MR. LEAVITT: Yeah.

24 THE COURT: We went in. We had this application.

25 MR. LEAVITT: Yeah.

1 THE COURT: They took it off the agenda. File a PJR. Fine.
2 MR. LEAVITT: Got it.
3 THE COURT: That's a very specific thing.
4 MR. LEAVITT: Right.
5 THE COURT: And that's where I -- so I felt like that's where I
6 thought Herndon was right.
7 MR. LEAVITT: Right.
8 THE COURT: That's not right. There's no actual final action
9 there. The rest of all this, which is what I'm trying to get you people to
10 explain to me, is this -- all this -- I often -- I don't know, it's not really
11 pattern and practice, but that's what it is. It's like the history --
12 MR. LEAVITT: Yes.
13 THE COURT: -- of how the City dealt with Badlands. They
14 had, you know, the big fancy people like Jack Bennion mad at them --
15 MR. LEAVITT: Right.
16 THE COURT: -- over taking away the golf course.
17 MR. LEAVITT: Right.
18 THE COURT: So they said oh, wait a minute, we're going
19 [indiscernible] detail work out. Although, as they point out, you know,
20 we went in and fought for the 17 acres at the Supreme Court. We were
21 on their side. So --
22 MR. LEAVITT: So --
23 THE COURT: -- to me, they're two different things. So are
24 you asking the Court to say -- this is what I think you have for your,
25 quote, take consideration. All this other stuff that they did, to me, that

1 seems like it's a whole different case.

2 MR. LEAVITT: Totally is, Your Honor. We're here today just
3 on the inverse condemnation case.

4 THE COURT: Uh-huh.

5 MR. LEAVITT: That's only why we're here today is on the
6 inverse condemnation case. Okay. Everything else that I've talked about
7 to you today about the government action towards the property is not
8 relevant to why we're here today. You asked me about those take
9 issues, and I addressed them.

10 THE COURT: Right. So there's -- and here's --

11 MR. LEAVITT: Yeah.

12 THE COURT: So then the next step is if we're talking about
13 the zoning action, which, you know, that's the PJR. I think that's a
14 different thing.

15 MR. LEAVITT: Totally.

16 THE COURT: Now we're going to just talk about this whole
17 rest of the allegations in the complaint.

18 MR. LEAVITT: Yes.

19 THE COURT: Their point is first you have to say do you have
20 a right.

21 MR. LEAVITT: Yes, absolutely.

22 THE COURT: What's the right?

23 MR. LEAVITT: Okay. So that's where I want to go to now.

24 THE COURT: Okay.

25 MR. LEAVITT: And so, Your Honor, that's the, that's the,

1 that's the question is what property rights --

2 THE COURT: Right.

3 MR. LEAVITT: -- does the landowner have. It's the, it's the,
4 it's --

5 Can we bring this one up?

6 And may I approach, Your Honor?

7 THE COURT: Sure.

8 MR. LEAVITT: I can just hand this to you. And that's what I
9 addressed on Monday.

10 THE COURT: Is it the same one? Because I still have them.

11 MR. LEAVITT: I can -- I'll give you another one, because it
12 summarizes it pretty well. It summarizes it pretty well. May I approach,
13 Your Honor?

14 THE COURT: If it's one of these, I've got them.

15 MR. LEAVITT: Okay. Let's do that. Three questions on the
16 property.

17 [Counsel confer]

18 MR. LEAVITT: So the three questions on the property, Your
19 Honor --

20 THE COURT: I've got it.

21 MR. LEAVITT: I know, but I can't find mine now.

22 THE COURT: Do you want mine?

23 MR. LEAVITT: No, no, no, no. Hold on, Your Honor.

24 [Counsel confer]

25 MR. LEAVITT: Yeah. Here it is, Your Honor. Yes.

1 THE COURT: Good work is gone.

2 MR. LEAVITT: So this is how the property interest issue and
3 we're -- the sole issue we're here today on the inverse condemnation
4 cases was all.

5 THE COURT: All right.

6 MR. LEAVITT: Is number one, is zoning used to determine
7 the property rights? Okay. That's the proverbial issue before you.
8 That's the number one issue is how do we decide that. We turn to the
9 next page, Your Honor. And the next page, the Nevada Supreme Court
10 addressed this issue in six cases. And remember, in the *Sisolak* case,
11 that's the case where the court said we have to do two distinct sub
12 inquiries, right? That's the one the court said that in. We must, first,
13 define the property.

14 And so, in that case, on page 4 of our outline here, I have the
15 page from the *Sisolak* case, where the court used zoning to determine
16 the property right. That's important, because Mr. Sisolak, exactly like
17 our client, had a vacant piece of property. And so, the court had to say
18 okay, what does Mr. Sisolak have. They had to, they had to define his
19 property interests for purposes of the take. And -- go ahead.

20 THE COURT: Sisolak owned raw desert.

21 MR. LEAVITT: Raw desert.

22 THE COURT: Your client bought a golf course.

23 MR. LEAVITT: No, Your Honor. Your Honor, he acquired raw
24 land. It's the same thing. It was being used as a golf course. And, Your
25 Honor, at the time of the take, the golf course was closed, and it was

1 converted to -- it was --

2 THE COURT: I thought he, I thought he closed it.

3 MR. LEAVITT: It was closed. He closed it. It was shuttered
4 because it was an absolute financial failure. What he --

5 THE COURT: It's also apparently a really difficult golf course
6 to play.

7 MR. LEAVITT: From what I understand. I don't golf, Your
8 Honor, but from what I understand.

9 THE COURT: Everybody I know who golfs says it's the
10 hardest one in town. So --

11 MR. LEAVITT: But what he had at the time of the taking --
12 remember, he had a vacant piece of property with R-PD7 zoning. What
13 did Mr. Sisolak have? A vacant unused piece of property with H-2
14 zoning. So the Nevada Supreme Court had to decide, okay, what are Mr.
15 Sisolak's property rights. And the Nevada Supreme Court decided Mr.
16 Sisolak's property right was a vacant piece of property with H-2 zoning
17 that gave him the right to build into the space. He didn't have
18 entitlements. All he had was zoning. And the Nevada Supreme --

19 THE COURT: Which they changed?

20 MR. LEAVITT: Huh?

21 THE COURT: Which they did -- after this ordinance, that
22 affected his right to build.

23 MR. LEAVITT: No. His zoning was not changed.

24 THE COURT: No. His zoning was. The ordinance changed --

25 MR. LEAVITT: The ordinance said now the public can enter

1 into your air space. But here's the point. If Mr. Sisolak didn't have the
2 right to use his air space under that zoning, there wouldn't have been a
3 taking. So that's what the Court said. I -- that's why the court said we
4 have to separate these out and the court first decided the H-2 zoning on
5 his vacant piece of property gave him the right to develop. And, Judge,
6 they used these words. Gave him the vested right to develop his
7 property. That's the words the Nevada Supreme Court uses. And I'm
8 going to, I'm going to address that in just a minute, Your Honor.

9 And then -- so, and then, we go to the next case, which is the
10 *Alper* case. And Your Honor, I'm going to go through these kind of
11 quickly. In the *Alper* case, it's an inverse condemnation case. Again, the
12 Nevada Supreme Court looked at the zoning to determine the property
13 rights that Mr. *Alper* had in the inverse condemnation case.

14 And then they did the same thing in the next case, which is
15 *Alper v. State*. Same thing. They looked at the H-2 zoning. They
16 actually took a copy of the zoning and put it into the case and said, we're
17 going to use the H-2 zoning to determine Mr. *Alper*'s property rights in
18 this inverse condemnation case.

19 And then we go the next case. This is an interesting case,
20 the *Buckwalter* case. Again, Mr. *Buckwalter* was actually using his
21 property for apartments. And how -- what property right did the Nevada
22 Supreme Court identify there? They said it's zone for casino. And so
23 that -- they said that gave him the right to use the property for a casino.
24 And therefore, that's how they identified the property right, based on
25 zoning and the rights you have under the zoning.

1 And I want to go to a couple more cases. *Andrews v.*
2 *Kinsburg* [phonetic]. The Court said, again, the property was zoned, and
3 they used that. But I want to end with City of Las Vegas v. Bustos
4 because counsel addressed City of Las Vegas v. Bustos. If we can bring
5 that up. In City of Las Vegas v. Bustos, the Nevada Supreme Court said,
6 the district court properly considered the current zoning of the property,
7 as well as the likelihood of a zoning change to determine the property
8 rights that Mr. Bustos had.

9 Now, what we brought to you, Judge, we brought to you
10 three inverse condemnation cases where the Court went through the
11 exact same thing we're asking you to do. And they used zoning to
12 determine the property rights. We also brought to you three eminent
13 domain cases where they use zoning to determine the value of the
14 property. And counsel says, well, you don't use -- that's irrelevant here
15 because in those cases, they just use zoning to value the property. Well,
16 Your Honor, you don't value something that you don't have. So whether
17 it's a direct eminent domain case or an inverse condemnation case, the
18 very first step is to identify the property interest. Then and only then can
19 you determine whether it was taken in an inverse condemnation case.
20 And in a direct condemnation case when the government admits liability,
21 then and only then can you value that property. So no matter what case
22 we're in, you always have to determine the property rights before the
23 government interferes with those property rights.

24 And if I may -- if I may -- if I may do one thing in the *Bustos*
25 case, Your Honor, again, because counsel addressed it. In the *Bustos*

1 case, you can see that there's a footnote. It's footnote 10 behind the
2 citation. And then -- I'll just reference it, Your Honor. In footnote 10,
3 there's ten cases cited. The Nevada Supreme Court cited ten cases to
4 say zoning is what's used. And they even said, if you have the
5 reasonable probability of a higher zoning, that's what's used to
6 determine the property rights.

7 So what the Court looks at is what was the property's
8 condition, what did it look like, what did the landowner have before the
9 government entered the picture. And so that's why they said in ten
10 cases in the *Bustos* case you always look at and focus on zoning. And
11 Judge, the Nevada legislature adopted the same type of rule.

12 Now, counsel -- you heard counsel. Counsel said what you
13 have to look at is the master plan. So really, that's where the fight is,
14 Judge. That's where the fight is in this case. The City says you should
15 use the master plan to determine the property rights. And the
16 landowner's saying you should use zoning to determine property rights.
17 That's really where the fight is. Sorry, Your Honor. I had to catch my
18 breath there.

19 The Nevada Legislature resolved that issue. And here's what
20 the Nevada Legislature said in 278.349. They said, i there is an existing
21 ordinance that is inconsistent with a master plan, the zoning ordinance
22 takes precedence. Zoning is of the highest order. The master plan is
23 down here. And then, Your Honor, we've also submitted to you an
24 Attorney General opinion from the executive branch where the Attorney
25 General's Office did an analysis, the same exact analysis, and concluded

1 that it's always been the intent in the State of Nevada under the
2 legislative provisions that zoning is of the highest order, and it
3 supersedes a master plan.

4 That the master plan is -- they wrote it right here. They said,
5 it's also intended that local ordinances control over general statements
6 or provisions of a master plan. Why? Because zoning, Your Honor, sinks
7 its teeth into the property. It runs with the land no matter what. A
8 master plan is exactly what the title says. It's a plan that the city has for
9 future possibilities on properties. That's all it is. That's why the Court's
10 focus for why we're here today -- that's why the courts always focused
11 on zoning.

12 And Your Honor, there is no case that -- and we stay within
13 the box of inverse condemnation case. There is six cases that use zoning
14 to determine property rights. There's not one inverse condemnation
15 case in the State of Nevada that uses a master plan to determine
16 property -- the property rights issue. Not one.

17 And so Your Honor, we also go to the next section here. You
18 have three City of Las Vegas departments. You'll recall that I went
19 through this where the City Attorney's office prior to trial has submitted
20 briefs to you, Your Honor. They've submitted affidavits to you. They've
21 submitted briefs to other eighth judicial district courts. And in those
22 briefs, they have confirmed what I'm telling you today. Uniformly, every
23 single one of those city attorneys represented to the Eighth Judicial
24 District Court and the Nevada Supreme Court that zoning is of the
25 highest order and the master plan is below zoning. That the courts must

1 use zoning to determine property rights in the State of Nevada.

2 We turn to the next page, Your Honor. That's also been the
3 practice of the city planning department. Can we turn that next page?
4 Your Honor, can you see what we're bringing up on the screen?

5 THE COURT: Yes.

6 MR. LEAVITT: Okay.

7 THE COURT: Yes.

8 MR. LEAVITT: Okay. So this is the city planning department.
9 The city planning department over the -- remember, the landowners did
10 all of this due diligence. And the city planning department confirmed
11 over the 14 years that the landowners did due diligence that zoning was
12 of the highest order and that the master plan was below the zoning, and
13 that the zoning trumped everything else, meaning that when
14 determining property rights in the City of Las Vegas, zoning applied.

15 And if we turn to the next one, which is the Tax Department
16 of the City of Las Vegas. And Judge, this is critical here. After the
17 landowners acquired the property, the City Tax Department came to the
18 landowners and said, we now under NRS 361.227 have to determine
19 what the taxes are on your property. And that statute requires the City
20 Tax Department to determine the lawful use of the property. And what
21 did the City Tax Department use to determine the lawful use? They used
22 the R-PD7 zoning and said R-PD7 zoning gives you, the landowner, the
23 legal right to use the property for residential uses. The City then put an
24 88 million dollar value on the landowner's residential property and then
25 taxed them a million dollars a year.

1 THE COURT: Now, those are all directed to Michelle
2 Schaeffer who is county assessor. So how did that work?
3 MR. LEAVITT: Yes, Your Honor, if I may.
4 THE COURT: Because it looked like it was county me, so.
5 MR. LEAVITT: The City of Las Vegas adopted a city charter.
6 THE COURT: Uh-huh.
7 MR. LEAVITT: And the City of Las Vegas City Charter in
8 Section 3.12, decided and elected to make that county tax assessor its
9 county assessor.
10 THE COURT: Okay.
11 MR. LEAVITT: This is what it says.
12 THE COURT: It's city tax assessor. Okay. Got it.
13 MR. LEAVITT: I'm sorry, you're right.
14 THE COURT: Uh-huh.
15 MR. LEAVITT: The county assessor of the county is exofacial
16 the city assessor of the city. So that's the City's charter. This is actually
17 in the City's constitution here.
18 THE COURT: Uh-huh.
19 MR. LEAVITT: That's their charter where they elected to be
20 bound by everything the county assessor does. And the city was well
21 aware of that. And the city was collecting taxes from the landowners
22 based on that residential use, which is based on zoning.
23 So Your Honor, we have -- and I've got to be clear here. The
24 landowners entered into a stipulation to that effect. So we have a
25 stipulation from -- between the landowner and a city department that the

1 lawful use of the landowner's property is based on R-PD7 zoning and
2 that that zoning is residential, and the lawful use of the property is
3 residential. We have that stipulation.

4 And so Your Honor, we have three city departments now that
5 have agreed because we talked about the facts. And I love what you said
6 here, I want to see the facts. Those are the facts. Those are the
7 historical facts. All three departments of the City of Las Vegas have
8 conceded, agreed, and stipulated that the zoning on the property is R-
9 PD7, that R-PD7 gives the right to use the property residential, and that
10 that should be used to determine the use of the property.

11 So then we go to question number 2, Your Honor. If we can
12 flip to the -- question number 2 is, okay, what is the zoning on the
13 property, right? So we have the -- we have the law -- the unequivocal
14 law that says zoning has to be used to determine the property rights,
15 right? So the next question is what's the zoning. We don't have a
16 dispute on that. If we go to this page right here, Your Honor, and we flip
17 a couple pages over, the 133 acres zoning is R-PD7. Residential --

18 MR. SCHWARTZ: What is it you're referring to?

19 MR. LEAVITT: Residential --

20 MR. SCHWARTZ: Thank you.

21 MR. LEAVITT: -- plan development, seven units per acre.
22 That's what the landowners acquire at the time they acquired this
23 property was an R-PD7 zoned property. Okay. Everybody agrees to that.
24 Here's -- here it is right here, Your Honor. This one right here. So then
25 the final question to determine the property rights issue is question

1 number 3 if we can go to that. Question number 3, what does this R-PD7
2 zoning give to the landowners?

3 And Judge, this was the exact question before Judge
4 Williams, and it was the exact question before Judge Jones. Both of
5 them addressed this very, very narrow issue is what does R-PD7 give to
6 the landowners. And this was what -- that was their question. That was
7 the number one question because remember, Your Honor, the 17 acre
8 property had R-PD7. The 35 acre property had R-PD7. The 133 acre
9 property had R-PD7. And this is what Judge Williams said. The Court
10 concludes that 19.10.050 lists single family and multi-family residential
11 as the legally permissible uses of R-PD7's own properties. That issue
12 has been fully litigated in the 35 acre case and resolved by Judge
13 Williams.

14 The issue was also fully litigated before Judge Jones. Judge
15 Jones agreed. He said the same thing, Your Honor, is that the R-PD7
16 zoning -- let me get there. The Court's indulgence. He said, the legally
17 permitted uses of properties owned R-PD7 are included in the city's code
18 and that code provides that the legally permissible uses are single-family
19 and multi-family residential. I understand, Your Honor, that the 17 acre
20 and the 35 acre property do have different take facts. But they don't
21 have different property interest facts. The facts are the exact same for
22 the Williams 35 acre case and the exact same for the Jones 17 acre case.
23 In both of those cases, the Court said I used zoning to determine the
24 property interest. The zoning is R-PD7. And the city's R-PD7 gives the
25 landowner the legal right to use the property for single-family multi-

1 family residential uses prior to any interaction with the government

2 THE COURT: But see they also have elements of this action
3 being taken on the zoning application that I have a problem with in this
4 case. You've got your, like, eight causes of action here.

5 MR. LEAVITT: Yes.

6 THE COURT: Petition for judicial -- again, we have to
7 separate this --

8 MR. LEAVITT: Yes.

9 THE COURT: -- pleading, I guess. So you've got your
10 petition for judicial review. And then you have -- I'm not really quite sure
11 if this is part of the condemnation or if this is -- I guess this is your
12 condemnation. So first alternative cause of action for a dec relief.
13 Second is preliminary injunction, which really seem more to go with this
14 zoning problem. Third, this is where we get into categorical taking,
15 consensual regulatory taking, per se regulatory taking, nonregulatory
16 taking, which is really kind of the one that it seemed like this was
17 headed. Seventh is temporary taking. Again, kind of seemed like that
18 was the problem when they wouldn't let you put up your fence.

19 MR. LEAVITT: Right.

20 THE COURT: So like I said, these sound almost like torts to
21 me. And you can't have torts as a discretionary meeting. So to me
22 that's -- it's different where you have the cases where there's a zoning
23 action.

24 MR. LEAVITT: Okay. And so Your Honor, yes. Okay. The
25 cases are the same in this narrow property interest issue. The cases

1 then become different because the city did take different action towards
2 each one of the properties.

3 THE COURT: Uh-huh.

4 MR. LEAVITT: Okay. And you're right. And maybe I should
5 explain it. We're teasing out the inverse condemnation claims. Your
6 Honor, this is extraordinarily -- I agree, this is extraordinarily confusing --
7 is that you have to tease out the petition for judicial review claims from
8 the inverse condemnation claims. Those have to be -- we argued that on
9 Monday and we said they have to be separated out.

10 THE COURT: Uh-huh. Yeah.

11 MR. LEAVITT: We're not here on the petition for judicial
12 review claims at all. We're here just on the inverse condemnation
13 claims. And when we decide the inverse condemnation claims, we
14 obviously have to -- we've talked about this --

15 THE COURT: But here's what I'm trying to understand. What
16 do you think is part of the inverse condemnation plan? As I said, the
17 zoning action I have a problem with.

18 MR. LEAVITT: Okay.

19 THE COURT: I think Herndon's right on that.

20 MR. LEAVITT: Uh-huh.

21 THE COURT: You don't have the multiple actions taken and
22 the denial and the equitable refusal. I get your point though that you've
23 got this problem with this Lowie bill and this, like, pattern of what
24 happened --

25 MR. LEAVITT: Right.

1 THE COURT: -- that appears kind of suspect at the
2 commission meetings.

3 MR. LEAVITT: Right.

4 THE COURT: Like I said, that sounds almost in tort to me.
5 And that tort is discretionary. So what are you actually saying that is?
6 And that's why I'm struggling with what kind of an interest is that?

7 MR. LEAVITT: So --

8 THE COURT: That's bizarre.

9 MR. LEAVITT: -- a government tort, Your Honor, another
10 name for it is inverse condemnation. The government torts are inverse
11 condemnation cases. This is what the courts say is all government
12 action in the aggregate must be considered when deciding an inverse
13 condemnation case. So what --

14 THE COURT: I tried an inverse condemnation case once
15 where he -- Paul Christenson said a mobile home park could expand --

16 MR. LEAVITT: Yeah.

17 THE COURT: -- if they made the rest of -- because it's right
18 by Ellis --

19 MR. LEAVITT: Uh-huh.

20 THE COURT: -- made the rest of their -- if they had impact
21 proof mobile homes. There was I guess a bunker.

22 MR. LEAVITT: Those were good times.

23 THE COURT: Yeah. So I mean, I've done this. I mean, I get
24 that. But that was like -- that was how that was tried. It wasn't about a
25 petition for judicial review, or you did a bad zoning thing. It was you

1 acted unreasonably --

2 MR. LEAVITT: Exactly.

3 THE COURT: -- and you made it impossible for us to --
4 because what are we going to build, bunkers? No, these are mobile
5 homes. So I understand what you're saying. I mean, I've been here, I've
6 done that.

7 MR. LEAVITT: Yeah.

8 THE COURT: Okay. But this is why -- because of how -- no
9 offense -- this was all smooshed into one big thing --

10 MR. LEAVITT: I know.

11 THE COURT: -- I have issues with the way this is pled. And it
12 just doesn't make any sense to me. What are you trying to say you think
13 this Court should do with this motion to define what you believe has
14 been taken because I'm not sure it has been?

15 MR. LEAVITT: Right.

16 THE COURT: But I get your point that you think something
17 nefarious happened.

18 MR. LEAVITT: Yeah, because we -- and we haven't briefed
19 the take issue.

20 THE COURT: Exactly.

21 MR. LEAVITT: So you don't have that before you. So I
22 understand, Your Honor, that we haven't briefed that. We haven't had
23 the opportunity to present that. So we're not asking you to say what's
24 been taken. We're absolutely not asking you that today. All we're asking
25 you for is what did the landowner have in his possession as his property

1 right before he went to the City of Las Vegas and asked to develop?

2 That's what the Court requires us to do.

3 THE COURT: Uh-huh.

4 MR. LEAVITT: So -- and the reason I say that is because the
5 Court requires us to say, okay, I've got to find out what Mr. Lowie had.
6 What did he have? Because if he didn't have a property right, they didn't
7 take anything, right? If you don't -- for example, if you -- I'm trying to
8 think of a -- the example the Court used. If you're not an owner of a
9 property, Judge, then of course, you don't have the right. If you have a
10 property and you don't have -- and it's -- let's say this.

11 You have a property, and it's landlocked, right, the Court has
12 to first define that property. The Court has to first say it's landlocked.
13 And then we go to the next phase which is, well, the government didn't
14 allow you access to your property. Was there anything taken? No,
15 because your property was landlocked. But you can't decide that second
16 step unless you first decide the property interest issue. So that's what
17 we're saying here.

18 Here's -- and let me put it in a real nutshell. We're saying,
19 Judge, here's what we want. We want an order from you which is
20 exactly like Judge Jones and Judge Williams. We want an order that
21 says on the 133 acre property, the landowners have R-PD7 zoned
22 property and that R-PD7 zoned property gave him the legal right to use
23 that property for single-family and multi-family residential uses. That's
24 it. And --

25 THE COURT: It gave him the right to apply for approval. It

1 didn't -- it didn't give him the right to do it. That's the problem I have.

2 MR. LEAVITT: Well, I get what you're saying.

3 THE COURT: You have the right to apply. And see, that's
4 why I said to me, I see this -- all this issue of did they do all these things
5 deliberately to keep him from doing that. That's a totally separate thing
6 from the zoning. He had the right to apply for approval.

7 MR. LEAVITT: Okay. But --

8 THE COURT: He didn't have the right to build. Otherwise, he
9 wouldn't have had to apply for the right to build.

10 MR. LEAVITT: Now, Your Honor, what that -- and
11 respectfully to the Court, that says that landowners don't have property
12 rights. That -- no, that's what it says.

13 THE COURT: It's just the opposite of what he says. It says --

14 MR. LEAVITT: Yeah.

15 THE COURT: -- okay. All right.

16 MR. LEAVITT: No, because if you don't -- if all you have is
17 the right to apply and the city has discretion to deny that, what does that
18 mean?

19 THE COURT: They have to act reasonably.

20 MR. LEAVITT: No. It means you have no property rights.

21 THE COURT: Okay.

22 MR. LEAVITT: That's what that means is you have no
23 property rights. Now, that's why -- Judge, that's why the Court says you
24 have to separate out what the government did --

25 THE COURT: Okay.

1 MR. LEAVITT: -- from the property right. And Your Honor,
2 that would mean that the Nevada Supreme Court was wrong in *Sisolak*
3 because in *Sisolak*, the Court said his property was zoned for hotel
4 casino. That gave him the right to use the property for hotel casino.

5 THE COURT: No. It gave him access to the air space. The
6 ordinance affected his air space. Same problem with my aircraft impact
7 proof mobile homes.

8 MR. LEAVITT: If I -- and Your Honor, I think I might be able to
9 answer it this way.

10 THE COURT: Sure. Go ahead.

11 MR. LEAVITT: May I approach? So this is the government's
12 arguments in this case.

13 THE COURT: Okay.

14 MR. LEAVITT: And I think this will resolve it. First, the city
15 made the argument the petition for judicial review law should apply.
16 Okay. They cited to you 16 of their 26 cases -- or 16 of their first 26
17 exhibits were petition for judicial review law. Petition for judicial review
18 law does give the city discretion. But remember, we were here on
19 Monday, and we argued ad nauseum for why these cases had to be
20 separated out and the petition for judicial review law could not apply
21 here. They're like water and oil. That's what counsel said. They even
22 wanted the case dismissed because they were so different. The body of
23 law is so very different.

24 So you can't bring petition for judicial review law into inverse
25 condemnation law. And I'm concerned that that's what's happening.

1 The city has cited to you the *America West* case, the *Stratosphere* case,
2 all of these cases that are petition for judicial review cases that say the
3 government has discretion to deny land use applications. And they're
4 bringing that over into inverse condemnation law. And let me explain
5 why that's so inappropriate. Your Honor, if we could turn to the next
6 page here. It says, the City's argument relies upon petition for judicial
7 review law. That's that one, Your Honor. Okay. Actually, we can go to
8 this one right here. You see this one?

9 THE COURT: Uh-huh.

10 MR. LEAVITT: Okay. So here's the City's argument. The City
11 has discretion under petition for judicial review law to decide the
12 property may not be used. Therefore, there are no rights in the City of
13 Las Vegas. And he said it. This is their argument. I wrote it down. He
14 said, if the city has discretion, there is no property right. And when
15 you're in a petition for judicial review case, which are all of the cases that
16 the City has cited to you, that's correct, the City does have discretion to
17 deny land use applications. But you can't carry that discretion over to
18 inverse condemnation cases. Otherwise, counsel will say, if the City has
19 discretion, there is no property right.

20 Let me tell you how the Nevada Supreme Court resolved that
21 in *Sisolak*. This is what they said. They said the City can't apply valid
22 zoning ordinances that don't amount to a taking. So Your Honor, they
23 don't have this absolute discretion. Otherwise, you and I don't have
24 property rights in the City of Las Vegas. That's what he said. I'll quote it.
25 "If the City has discretion, there is no property right."

1 That exact same argument was made in *McCarran*
2 *International Airport v. Sisolak*. And if I could refer the Court to the
3 quotes from *Sisolak*. They're right here. There are six of them that
4 reject that argument. They say the first inalienable right in the
5 constitution is a right to acquire, possess, and protect your property.
6 They say in Nevada, we've adopted expansive property rights in the
7 context of inverse condemnation cases. And then they go on to say this.
8 Governor Sisolak's property was zoned for development of a hotel.
9 Governor Sisolak's property had "the vested property interest" in the air
10 space above his property. Then they say this. Governor Sisolak's
11 property rights include the right to possess, use, and enjoy the property.

12 So when you come over into an inverse condemnation case,
13 you have to use the zoning. And that discretion stays in the PJR side of
14 the case. You cannot carry that discretion over, otherwise, there are no
15 property rights, exactly as counsel just argued.

16 THE COURT: All right. So here's the problem we've got here
17 though.

18 MR. LEAVITT: Yes.

19 THE COURT: So 30 years, Mr. Peccole builds Badlands.

20 MR. LEAVITT: I'm sorry, built what?

21 THE COURT: Built the golf course.

22 MR. LEAVITT: Got it.

23 THE COURT: He builds Badlands. Okay. Fine. Later, it's
24 purchased by Mr. Lowie.

25 MR. LEAVITT: Yes.

1 THE COURT: He says, this is an impossible golf course to
2 play, it's terrible, it doesn't make any sense, let's close it.

3 MR. LEAVITT: Right.

4 THE COURT: Nobody wants to play here. It's too hard.

5 MR. LEAVITT: Got it.

6 THE COURT: So we should build on it.

7 MR. LEAVITT: Right.

8 THE COURT: So we need to change the zoning of it --

9 MR. LEAVITT: Got it.

10 THE COURT: -- because it's approved for a golf course that
11 was built. Let's change that into houses. Right, that's what the
12 application was for?

13 MR. LEAVITT: No, Your Honor.

14 THE COURT: Okay.

15 MR. LEAVITT: And here, let me explain why. Mr. -- the
16 evidence -- the uncontested evidence shows that Mr. Peccole from the
17 very beginning never put a golf course zoning on the property.

18 THE COURT: He didn't put a deed restriction on it.

19 MR. LEAVITT: He didn't put a deed restriction. Neither did
20 he zone it for golf course. For golf course the zoning is C-V.

21 THE COURT: True.

22 MR. LEAVITT: And I didn't bring the exhibit with me but -- so
23 here's what happened is Mr. Peccole kept the property at R-PD7 zoned
24 property, which means up to seven units per acre. Then he said -- then,
25 listen to what he did.

1 THE COURT: They didn't -- he didn't change -- they weren't
2 trying to change the zoning. They were trying to change the use.

3 MR. LEAVITT: Okay. But this is what Mr. -- let me state it this
4 way. Mr. Peccole always intended to develop the 250 acre property.
5 That's the evidence that's in the case. We've cited --

6 THE COURT: Right. Yeah. He didn't put a zone -- a deed
7 restriction for that reason.

8 MR. LEAVITT: And he didn't put -- not only did he not put a
9 deed restriction on it, but when he drafted the Queensridge CC&Rs for all
10 the homeowners, he expressly said that the golf course can be
11 developed. And if I may, Your Honor, I'll show you one page from that.
12 I'll provide you one page.

13 THE COURT: Well, anybody who lives on a golf course in
14 this town knows this. Some of them have it. Some of them don't.

15 MR. LEAVITT: So here's -- this is a page from the CC&Rs.
16 Future development. This is the golf course property.

17 THE COURT: Uh-huh.

18 MR. LEAVITT: He kept the property for development. He
19 specifically put in the CC&Rs that the golf course property is not part of
20 the Queensridge community, that the golf -- that nobody has any rights
21 to the golf course community, and nobody can stop development of the
22 golf course community. And then he listed the amenities and he
23 expressly stated that the golf course community is not one of the
24 amenities. So the plan here for Mr. Peccole was to always develop the
25 property into homes. And he kept the zoning on the property to allow

1 that to happen. And Your Honor --

2 THE COURT: So it's developed though because it was not
3 developed with houses on it, right?

4 MR. LEAVITT: Correct.

5 THE COURT: I mean, there was a period of time it was --

6 MR. LEAVITT: It was a golf course.

7 THE COURT: -- a golf course.

8 MR. LEAVITT: Yes.

9 THE COURT: So in order to then take that golf course and
10 build homes on it, you need to get that changed.

11 MR. LEAVITT: No. No. And here's why.

12 THE COURT: Okay.

13 MR. LEAVITT: Because Mr. Peccole from the beginning
14 always intended to develop the property for residential. So he kept the
15 zoning R-PD7 on the property. He never went in and said, hey, I want
16 this to be zoned golf course. He never said I want to keep the deed
17 restriction on it. He specifically and expressly kept the residential zoning.

18 THE COURT: But it wasn't houses. It was a golf course.
19 That's the use to which it was for.

20 MR. LEAVITT: Exactly. And Your Honor, we've presented
21 the evidence that back in the days when he built the golf course, that was
22 actually contrary to the -- or he didn't actually even file the applications
23 necessary to build the golf course. It was always intended to be a
24 residential development.

25 THE COURT: Uh-huh.

1 MR. LEAVITT: It was never -- or I'm sorry, let me state it this
2 way. It was very clear that the golf course was an interim use until he
3 got ready to develop the property into homes.

4 THE COURT: Wasn't there also a wash?

5 MR. LEAVITT: There's a wash. Absolutely. Through part of
6 the property, there's a wash. And there's actually a development
7 agreement with the City to reconfigure that wash to allow development.
8 So that was the plan from the very beginning, Your Honor. The plan was
9 always to develop this property residential. And the residential zoning
10 carried all through the years. All the way from 1981 up to today, that
11 zoning has never changed.

12 THE COURT: So it's your position then that, you know, like I
13 said, for *Sisolak* -- *Sisolak* is different. He owned land, which was zoned
14 a certain way. And because of that land, he acquired certain rights.

15 MR. LEAVITT: Yes.

16 THE COURT: Which they changed when they enacted the
17 ordinance that said you couldn't build that high.

18 MR. LEAVITT: Okay.

19 THE COURT: That was the problem in *Sisolak*.

20 MR. LEAVITT: Yeah.

21 THE COURT: What did they do here? He had land. It was
22 being -- zoned a certain way. Being used --

23 MR. LEAVITT: Right.

24 THE COURT: -- for a certain purpose.

25 MR. LEAVITT: Right.

1 THE COURT: He wanted to change the use.

2 MR. LEAVITT: Well, no. And Your Honor, I guess the better
3 way to say this --

4 THE COURT: How do you -- if you're not changing the use
5 from golf course to houses, what do you call that?

6 MR. LEAVITT: Well, no, no, no.

7 THE COURT: That's change of use.

8 MR. LEAVITT: No, no, no. He -- you're right. He closed the
9 golf course and went to use the property for the purpose for which it was
10 always intended. Let me give you another example.

11 THE COURT: Okay. All right.

12 MR. LEAVITT: Okay. In the *Hsu* case -- the *Hsu* case is
13 another airspace taking case. In the *Hsu* case, that property was being
14 used as a mobile home. It was actually -- it was -- we litigated that case
15 for 14 years. It was a mobile home.

16 THE COURT: Right.

17 MR. LEAVITT: And the county argued our air space is not
18 changing that use, therefore there's not a taking. And then the United
19 States -- or the Nevada Supreme Court rejected that argument. They
20 said that the property, even though it was being used as a mobile home,
21 had H-2 zoning, which gave them the right to build into the airspace.
22 Our same exact facts here. We have a golf course, but we have R-PD7
23 zoning which gives us the right to build single-family and multi-family
24 residential units on it. And the government has stopped us from doing
25 that. So it's the same exact scenario.

1 Again, in *Hsu*, the property being used is a mobile home, but
2 it had zoning for hotel casino, H-2. And the Court found that that zoning
3 defined the property interest the landowners had. So that's all we're
4 asking for here is exactly as was done in the *Hsu* case is to say even
5 though the property was being used as a golf course, it had RPD 7
6 zoning, which gives the landowner the legal right to use it for single-
7 family and multi-family residential uses. It just doesn't give the legal
8 right to apply, otherwise you have no property rights. Again, that's the
9 rule in PJR law. But when you go to a domain law, the rule is very
10 different. Zoning must be used. And the rights that are permissible
11 under that zoning are how the property is defined. I hope I made that
12 straight, Your Honor. So that's the very, very narrow is.

13 And if I may refer back to this page right here because the
14 Department of Justice made that same exact argument that you have
15 discretion, so you really don't have property rights. Here's what the
16 United States Supreme Court said two months ago. Just two months
17 ago the Court said, under the Constitution, property rights cannot be so
18 easily manipulated. And then they said the protection of property rights
19 is necessary to preserve freedom. So in that *Hassid* case, the *Cedar*
20 *Point Nursery* case, the party in that case tried to make the exact same
21 argument that's being made here today. Since the government has
22 discretion to deny these land use applications, there is no property right.
23 And the court said, well, wait a minute, you're manipulating property
24 rights.

25 THE COURT: Okay. Well, the -- and here's a really good

1 point. The judgment that this court immediately entered an order
2 finding PROS designation on the 133 acre property is invalid.

3 MR. LEAVITT: Correct.

4 THE COURT: I thought you just told me it was R-PD7.

5 MR. LEAVITT: Yes. Now, that's -- and that's -- yes. The
6 property is zoned R-PD7.

7 THE COURT: Right.

8 MR. LEAVITT: But what all courts have found, and what the
9 city argues is that there is a master plan land use designation of PROS.

10 THE COURT: Right.

11 MR. LEAVITT: Zoning is different from a master plan. And
12 so yes, we asked for that. Judge Jones just entered an order stating that
13 it was not -- the PROS is not valid.

14 THE COURT: Okay.

15 MR. SCHWARTZ: He did not.

16 MR. MOLINA: He did. He did. It says that.

17 MR. LEAVITT: Yes, it says that in the order. I think Mr.
18 Molina just corrected Mr. Schwartz that it does say that in the order. So
19 Your Honor, would it be okay if -- I'd like to --

20 THE COURT: Okay. If you want --

21 MR. LEAVITT: What's that?

22 THE COURT: The CF --

23 MR. LEAVITT: Yeah. Can I approach? Because I have
24 another one that talks about what zoning rights are in the City of Las
25 Vegas. This is right here. So what are zoning rights? What does the City

1 Code say about zoning rights? This is the City Code. It says -- 19.18.020
2 says, zoning district is defined as certain uses that are permitted.
3 Permitted uses are then defined as uses that are permitted as a matter of
4 right. So when you have a zone designation of R-PD7, and it says the
5 permitted uses are single-family, multi-family residential uses, that's a
6 use permitted as a matter of right under the City's own code. Otherwise,
7 Your Honor, there'd be no property rights. You would go and buy a
8 piece of property that has H-2 zoning on it, and you'd have no property
9 rights. And this has been the law in the State of Nevada for 50 years is
10 that zoning determines the property rights.

11 And Your Honor, we -- I've also referred in our brief to -- this
12 is Las Vegas Municipal Code 19.12.010. This is the City's land use table.
13 And in the land use table it says the uses permitted as a principle use in
14 that zoning district, by right. So when you have a use that's
15 permitted -- and Your Honor, that's 19.12.010. The City's own code says
16 that when you have a use that's permitted, you can use that property as
17 a matter of right, by right, which is why Judge Jones and Judge Williams
18 in both of their decisions stated -- used those words. They said when
19 you have zoning, it gives you the legal right to use that property for that
20 use. And Your Honor, I got -- if I may have the Court's indulgence. I got
21 a little sideways here.

22 So I want -- I'd like to now, Your Honor, address the City's --
23 actually, let me go back for just a moment, Your Honor, because I really
24 want to focus for just one more minute. And then I'm going to go to
25 another argument that the city made to you. And what I like to focus on

1 is those four -- or those six cases that we've cited to you. Remember we
2 cited to you those six Nevada Supreme Court cases that all relied upon
3 zoning? There were -- the reason we did this, there was three inverse
4 condemnation cases and three eminent domain cases. We cited both of
5 those cases because the Nevada Supreme Court said that the cases are
6 the constitutional equivalent of one another and that the same rules and
7 procedures apply to both eminent domain and inverse condemnation
8 cases. And in all of those cases, the courts again use zoning to
9 determine the property rights.

10 [Pause]

11 MR. LEAVITT: Sorry, Your Honor.

12 [Pause]

13 MR. LEAVITT: Okay. Your Honor, if I can now go to -- we
14 were -- I was following along here on the City's arguments because I do
15 want to have the opportunity to respond to some of the City's other
16 arguments on this issue. And the main argument that the City made
17 Your Honor was this PROS argument. And if I may, Your Honor, I'd like
18 to approach. I've just got one more for you --

19 THE COURT: Okay.

20 MR. LEAVITT: -- on the PROS issue. It says rebuttal to the
21 City's masterplan PROS argument. So here, Your Honor, is the City's
22 argument. What they say is they say, Judge, you should not use the
23 zoning to determine the property rights. You should use the PROS to
24 determine the property rights. What I did right here, Your Honor, is I
25 summarized the ten times where this PROS issue was presented to the

1 courts and the ten times the courts did not accept the PROS argument.

2 Number one, Judge Williams in his 35 acre property interest
3 motion rejected the City's PROS argument. Judge Jones just two days
4 ago, again, rejected the City's PROS argument, laid it out in detail. The
5 City in number three made the PROS argument as part of the 35 acre
6 case to dismiss it. Judge Jones -- Judge Williams denied that. That
7 issue went to the Nevada Supreme Court. It was presented three times
8 to the Nevada Supreme Court. And the Nevada Supreme Court did not
9 accept that PROS argument that the City made.

10 There was one time when the City's PROS argument was
11 accepted. It's number four. It's the Crockett order. Judge Crockett
12 accepted the City's PROS argument. That issue went up to the Nevada
13 Supreme Court. And the Nevada Supreme Court reversed Judge
14 Crockett's order. And then the argument was made vehemently to the
15 Nevada Supreme Court that the PROS was on the property and the court
16 should apply the PROS and a petition for rehearing and reconsideration.
17 And the court rejected it again.

18 The City filed the PROS argument as a reason to dismiss the
19 17-acre case. And Judge Bixler denied the PROS argument. And then
20 the Queensridge homeowners, Your Honor, this is a -- this is another
21 important part right here. The Queensridge homeowners brought a
22 lawsuit to try and stop development on the whole 250 acre property.
23 And the district court judge in that case said two things critical to why
24 we're here today. They said the property had RPD 7 zoning and that RPD
25 7 zoning gives the landowner the right to develop. That's a quote from

1 that district court decision that was appealed to the Nevada Supreme
2 Court and affirmed.

3 So we have this issue that's been litigated heavily. It's a very
4 narrow issue that's before you, heavily litigated. Should you apply
5 zoning, or should you apply the masterplan PROS? And there's been ten
6 orders that have said you don't apply the master plan PROS, instead you
7 apply zoning. And we have a specific case saying that the R-PD7 zoning
8 gives the landowner, the right to develop. Those orders were affirmed
9 by the Nevada Supreme Court.

10 THE COURT: Okay. Here's what I'm thinking.

11 MR. LEAVITT: Okay.

12 THE COURT: As I said, we have to -- now that we know we
13 have to separate the PJR and the condemnation cases --

14 MR. LEAVITT: Yes.

15 THE COURT: -- trying to do that. As I said, the zoning issue
16 to me seems -- does not seem to be right, which is why all the
17 condemnation issues related to the zoning question to me, I just -- I'm
18 not seeing.

19 MR. LEAVITT: Uh-huh.

20 THE COURT: What I've always said seemed to me to be
21 something was this issue of what's with the Lowie bill --

22 MR. LEAVITT: Yeah.

23 THE COURT: -- what's with pulling the application off the
24 agenda? What were they doing there? Were they, you know, setting up
25 the landowner for failure?

1 MR. LEAVITT: Yes.

2 THE COURT: That to me is what the condemnation action is
3 about.

4 MR. LEAVITT: Yes.

5 THE COURT: Maybe I'm wrong about what you think it is.

6 MR. LEAVITT: You're correct.

7 THE COURT: So -- but my problem is it's things like, should
8 you have access to your property. If they're not going to let you develop
9 it, can't you at least fence it, so people don't dump on it?

10 MR. LEAVITT: Right.

11 THE COURT: I mean, I drive past that corner all the time.

12 MR. LEAVITT: Uh-huh.

13 THE COURT: So I'm just trying to figure out, what are you
14 trying -- when you say you want to determine what this bundle of sticks
15 is, that for me is what it is. It's this question of -- the zoning issue I don't
16 think we're at yet because I don't -- they never actually finally said for all
17 these oddball reasons that, you know, Crockett's order was up on appeal.
18 I said, well, I'm not going to decide it -- I mean, I'm going to dismiss it
19 unless Crockett gets overturned. That's all the zoning issues. They want
20 it remanded. And I said, okay, fine, makes sense, we should just decide
21 the PJR and not just give -- let's decide the PJR. So we'll rule on that at
22 another time.

23 But this condemnation case that you -- we've got to go
24 forward on this condemnation case now, decide what the bundle of
25 sticks are. That's where I'm troubled with this idea that somehow there

1 was some denial of a zoning right when I can't see that it's ever been
2 denied. I see this as a different problem, that they're interfering with his
3 ability to plan and develop.

4 MR. LEAVITT: Totally agree.

5 THE COURT: Totally different question.

6 MR. LEAVITT: I get it. You -- Judge, you're right. Okay. So
7 what you're saying is, I can't see the interference with the zoning, right?

8 THE COURT: Right.

9 MR. LEAVITT: But we do see clearly the interference with the
10 development. Clearly, they did that.

11 THE COURT: Right. There's some --

12 MR. LEAVITT: I mean, it's very clear.

13 THE COURT: -- that's --

14 MR. LEAVITT: Yeah. Very clear.

15 THE COURT: -- something else.

16 MR. LEAVITT: Yeah. So it's -- although it's something else,
17 it's all part of that taking action. Interference with zoning is part of the
18 taking because that's government action towards the property. Denying
19 applications, again, you know, interfering with the development
20 property, that's again government action to take the property. So -- but
21 before we get to that government action that takes the property, before
22 we get to the government action that interferes with that zoning, you
23 have to come over and define the bundle of sticks.

24 THE COURT: Okay. And so this is where, like, I keep get --
25 we keep getting. And I -- my problem is I can't really say -- I mean,

1 you're -- you want to say that they have this absolute right --

2 MR. LEAVITT: Uh-huh.

3 THE COURT: -- to build houses.

4 MR. LEAVITT: Correct, Your Honor.

5 THE COURT: And I'm saying, I don't see that that's been
6 interfered with yet because we got interrupted. Through third-party -- I
7 love Judge Crockett more than anybody else. The man's amazing. But it
8 interfered with this whole process.

9 MR. LEAVITT: Got it.

10 THE COURT: And then we got remanded to go to court.
11 Whatever. So I don't see that.

12 MR. LEAVITT: Right.

13 THE COURT: What I see is all this other stuff that was in
14 there from day one.

15 MR. LEAVITT: Right. Okay.

16 THE COURT: What are they up to?

17 MR. LEAVITT: So you're right. You don't see where they
18 interfere with that legal right to use the homes.

19 THE COURT: To build the homes.

20 MR. LEAVITT: To build the homes.

21 THE COURT: Uh-huh.

22 MR. LEAVITT: You don't see that because we haven't briefed
23 it for you.

24 THE COURT: Okay.

25 MR. LEAVITT: We have -- we don't have that issue before

1 you. All we have before you -- and that's why it's such a narrow issue.
2 It's so -- and that's what Judge Jones said, that's what Judge Williams
3 said is this is an extraordinarily narrow issue. They say before the City
4 interfered with the zoning, before the City interfered with development,
5 what did the landowner have. And all we're here today is to decide what
6 did the landowner have.

7 THE COURT: Right. So this is what I --

8 MR. LEAVITT: That's it.

9 THE COURT: -- this is what I'm trying to get at is since I don't
10 think in this retrospect of 133 acres --

11 MR. LEAVITT: Yeah.

12 THE COURT: -- that the right to build the houses has ever
13 been finally determined.

14 MR. LEAVITT: Okay.

15 THE COURT: It got sidetracked. But there was this whole
16 other -- and I keep calling it pattern of practice. I don't know what you'd
17 call it. Course of action, history, whatever. That something was going
18 on with respect to no money is going to allow this developer to change
19 the golf course into houses. It was some sort of a pressure from the
20 community. We don't want to give up this beautiful golf course. It was a
21 desert. We don't want to give up this beautiful golf course and have a
22 bunch of houses there. So what does the City do? They find all these
23 roadblocks.

24 But -- so this is where I'm trying to figure it out. Where I
25 struggle with this is if you're saying they had an absolute right to build,

1 you know -- seven houses is a lot of houses on an acre -- seven houses
2 per acre on 133 acres, you haven't been interfered with that. What's
3 been -- what's happened is you've had the hearing costs and all the
4 hassles and all the efforts of trying to develop it over these many, many
5 years. And they keep throwing up these artificial roadblocks. To me
6 that's -- like I said, it's not because you have a right to the zoning. You
7 have a right to have it considered. I agree with you there. You have a
8 right to have -- to apply for it, to change it. I understand that. But my
9 problem is are -- if you're trying to say my client has an absolute right to
10 seven houses -- how many is -- how many acres is it? Seven times 133,
11 whatever that is.

12 MR. LEAVITT: We're not saying that.

13 THE COURT: Okay.

14 MR. LEAVITT: Yeah. Your Honor, we're not saying that. All
15 we're asking you to do, Your Honor -- this is all we're asking you to do --

16 THE COURT: Okay.

17 MR. LEAVITT: -- is --

18 THE COURT: Are you on the same thing?

19 MR. LEAVITT: I'm sorry, Your Honor. It's the three questions
20 now.

21 THE COURT: The three questions.

22 MR. LEAVITT: Three questions. At the very last page there --

23 THE COURT: Yes.

24 MR. LEAVITT: -- that's R-PD7 zoning.

25 THE COURT: Okay.

1 MR. LEAVITT: Judge Jones didn't say, you have the right to
2 build 700 homes. Judge Williams didn't say you have the right to build
3 700 homes. Neither of them said that in their decision. What they did is
4 they went to this code, and they looked at permitted uses. And they said
5 that LVMC 19.10.050 lists single-family and multi-family residential uses
6 as the legally permissible uses on R-PD7 zoned properties.

7 THE COURT: Right.

8 MR. LEAVITT: So they said that's what you get to use your
9 property for. They didn't say you get 700 or 800 homes. That's not what
10 they said. Then they went on to say, therefore, the landowner's motion
11 to determine property interest is granted in its entirety and it's ordered
12 that the 35 acre property is zoned R-PD7 at all times and the permitted
13 uses by right of the 35 acre property are single-family and multi-family
14 residential. That's what this says.

15 THE COURT: Uh-huh.

16 MR. LEAVITT: It says, permitted uses, single-family and
17 multi-family residential. Well, how is permitted uses defined in the City's
18 code? It means you get to use it as a matter of right. So when you have
19 a residential zoned property, you have the right to use your property
20 residentially. When you have a commercial zoned property, you have
21 the right to use it for commercial purposes. Now, what you're talking
22 about is if you want to build a 7-11 on your commercial property, yeah,
23 you have to go and apply and get the application for that 7-11. If you
24 have an H2 property, you have the right to build a hotel casino on that
25 property.

1 Now, when you're going -- when you say, hey, I want to
2 build -- that doesn't mean you can build a 400 story hotel casino there.
3 There's certain things you have to do. You still have to comply. All
4 these orders do is they say zoning is R-PD7 and the permitted uses under
5 R-PD7 are legal single-family residential and multifamily residential,
6 which gives the landowner the right to use the property for that purpose.
7 You see, what counsel said to you is he said, Judge, they're asking to
8 build whatever they want, they're asking to build 900 units, they're
9 asking to build whatever. That's not what we're saying here today,
10 Judge. We're just saying apply the zoning to determine the property
11 rights, as was done in six cases, and find, as was done in the *Sisolak*
12 case, that the zoning gives the landowner the right -- it's a residential
13 zoning -- the right to use the property for residential uses. That's exactly
14 what *Sisolak* said.

15 THE COURT: See, here's my problem. I have a hard time
16 with *Sisolak* being applicable here because *Sisolak* had raw desert zoned
17 for a certain purpose. They didn't change the zoning on its property.
18 They changed an ordinance for the height restrictions. His right was to
19 the air space. They changed the ordinance saying he couldn't use his air
20 space.

21 MR. LEAVITT: Yeah.

22 THE COURT: That was the problem with *Sisolak*. Here you
23 have somebody who has a golf course. They don't use it as a golf
24 course. It's a terrible golf course. They wanted to build houses.

25 MR. LEAVITT: But Your Honor --

1 THE COURT: So they need to change these.

2 MR. LEAVITT: Yeah. But you don't need to change the
3 zoning.

4 THE COURT: Right. I get that. I get that.

5 MR. LEAVITT: Yeah.

6 THE COURT: So that's my point is I'm struggling with --

7 MR. LEAVITT: I get it.

8 THE COURT: -- how we merge --

9 MR. LEAVITT: I got it.

10 THE COURT: What it is exactly --

11 MR. LEAVITT: I got it.

12 THE COURT: -- you want to do in this alleged taking part of
13 the case because as I've said, I see the zoning PJR part of it very
14 different. I think --

15 MR. LEAVITT: Right.

16 THE COURT: -- it might even be dismissed because it seems
17 like that's premature. What you have over here in this other part of the
18 case though, that's what I've said -- that always seemed to me to be --
19 like I said, I know you can't say tort. But it -- that seemed to me to be
20 something because there seemed to be something going on --

21 MR. LEAVITT: Right.

22 THE COURT: -- where there was some interference in the
23 efforts that were being made to figure out how can we do something
24 with our land, even if it's just put a fence up so people stop dumping on
25 it.

1 MR. LEAVITT: Right. I got that. So it's akin -- and maybe I --
2 I keep saying *Sisolak*. So the better case is the *Hsu* case. That's the
3 better case to use.

4 THE COURT: Okay. Probably. Yeah.

5 MR. LEAVITT: Yeah. Because in the *Hsu* case, mobile homes
6 were being used on the property that had zoning for H-2. In this case,
7 there's a golf course that's on the property that has zoning for
8 residential.

9 THE COURT: Residential. Uh-huh.

10 MR. LEAVITT: And in the *Hsu* case the Court held, even
11 though the property was used as a golf course, it had the right to build a
12 hotel casino because it had an H-2. We're asking you for the exact same.
13 Even though the property's being used as a golf course, it has residential
14 zoning, which gives them the right to use it for single-family and multi-
15 family residential uses.

16 THE COURT: Right.

17 MR. LEAVITT: Now, obviously, at some point -- well, that's
18 the rule we're asking for. We're not asking for more, Judge. We're not
19 asking you to define the number of units that can be built. We're not
20 asking you for that. We're just saying, number one, that you say that
21 zoning applies, and number two, what that zoning says. That -- and that
22 again, Your Honor, is -- I understand on the take side the 35 and 17 acre
23 cases are different. But on the -- this property bundle of sticks side,
24 they're identical. Absolutely identical issues. There's no difference in
25 the cases between the 17 acre case and the 35 acre case. And maybe I

1 should have explained that better, Your Honor, on exactly what the issue
2 is, how we're teasing out. I probably should have explained that better.
3 And I probably should have explained a little bit better that we're not
4 asking to build whatever we want. We're asking for a very limited and
5 narrow order.

6 THE COURT: Well, I think the concern that the City has is that
7 your -- they view your argument as any landowner has an absolute
8 vested right to use their property within whatever its zoned, no matter
9 what the -- how -- no matter what. They have the absolute right to use it.
10 No matter what other zoning regulations, no matter what other master
11 plans, no matter what other uses are being used, no matter what it's
12 already being used for that you want to change it from, you have an
13 absolute right to do what you want to do. I don't think that's true.

14 MR. LEAVITT: Right. I agree.

15 THE COURT: And I don't think you would necessarily agree
16 with that. They're concerned about that. And that is the logical
17 extension of this argument. I see how -- why they're concerned. But --
18 so I'm trying to say, specifically, what do you want this to say --

19 MR. LEAVITT: I understand.

20 THE COURT: -- because as I've said, I don't see this as a case
21 where attorney action was taken. This whole other universe of things
22 that were going on including like -- what do you mean you can't even
23 build fence? All of those kinds of things to me are something.

24 MR. LEAVITT: Yes.

25 THE COURT: And I'm trying to figure out what it is you want

1 from this Court with respect to everything else that's in your complaint.

2 MR. LEAVITT: Yeah. First, let me explain what I don't want.

3 THE COURT: Okay.

4 MR. LEAVITT: Okay. I don't want to decide the take issue
5 today. I don't want to decide whether the City interfered with zoning. I
6 don't want to decide whether the City interfered with development
7 because I haven't briefed it, I haven't argued it, and the Court held that
8 we were not required to brief it, so we did not. So that's what I don't
9 want.

10 THE COURT: Okay.

11 MR. LEAVITT: All I want is for a definition of the property
12 rights. And here's what it would be is number one, the property has R-
13 PD7 zoning. Okay. Everybody stipulates to that, so that easily can be put
14 in the order. Okay. Then, a finding that Section A of 19.10.050, which is
15 this right here says the intent for the R-PD district is residential
16 development. So that's the second finding we would want is the intent
17 of R-PD7 is residential development. That's in Section A.

18 THE COURT: Uh-huh.

19 MR. LEAVITT: And then go down to section C, which says --
20 and I'm quoting from Judge Jones' order here -- that section C lists the
21 permitted land uses as single-family and multi-family residential uses.
22 That's what the permitted land uses are. And then what we do is we go
23 to say, okay, what does permitted land uses mean? Permitted land uses
24 is defined by Judge Jones, by Judge Williams, and by the City's own
25 code that you have the legal right to use the property for that general

1 use. Just that general use. Residential. That's all we're asking for,
2 Judge. We're not asking you to take the next step, which is -- which
3 means you can build 700 units and that you can build this many units.
4 That's not what we're asking for.

5 THE COURT: Okay. That last one is the one that's
6 problematic.

7 MR. LEAVITT: Okay.

8 THE COURT: I don't have a problem with your first two.

9 MR. LEAVITT: Got it.

10 THE COURT: The last one is the one that I think is where the
11 City is -- their hair's on fire --

12 MR. LEAVITT: Okay.

13 THE COURT: -- because if you take that to its logical
14 extension --

15 MR. LEAVITT: Uh-huh.

16 THE COURT: -- that is saying you have an absolute positive
17 right, the City cannot exercise its discretion, you must be allowed to
18 build. And this is where I think the problem is with what Judge Jones
19 did. And I think this is where we kind of got strayed from what Judge --
20 the importance of what Judge Herndon did because Judge Herndon was
21 right in what he said. In the 65 acre case, it wasn't right. No application
22 had ever been made.

23 MR. LEAVITT: Okay.

24 THE COURT: So he's right about that. There is no
25 application. So why is it -- he stopped there. And other people say you

1 shouldn't stop there, you should still keep going because -- and that's my
2 point here is with respect to the 133 acres on the issue that Judge
3 Herndon addresses, I agree with him 100 percent right down the line.

4 MR. LEAVITT: Okay.

5 THE COURT: So the problem is when you go to that last
6 step.

7 MR. LEAVITT: Okay.

8 THE COURT: That's the problem.

9 MR. LEAVITT: Okay. So let me --

10 THE COURT: You have the right to apply.

11 MR. LEAVITT: Okay. Okay. So here's -- let me tell you
12 where I think it's a little incorrect. And I'll tell you why, Judge.

13 THE COURT: Okay.

14 MR. LEAVITT: Okay. Is we all agree -- so we're past the R-
15 PD7. We all agree --

16 THE COURT: Right.

17 MR. LEAVITT: -- zoning applies.

18 THE COURT: I think so. Yeah. I think so.

19 MR. LEAVITT: We all agree that the zoning is R-PD7.

20 THE COURT: Right.

21 MR. LEAVITT: So we got those two findings. Okay. So the
22 third finding is -- okay -- and it's very specific. In an inverse
23 condemnation case what does R-PD7 give you. Okay. That's the precise
24 issue.

25 THE COURT: Right.

1 MR. LEAVITT: And here --

2 THE COURT: And this is where I think we diverge.

3 MR. LEAVITT: Exactly. So the question is in an inverse
4 condemnation case, does the City have discretion to deny that use? And
5 Your Honor, the answer is unequivocally no.

6 THE COURT: Okay.

7 MR. LEAVITT: And let me explain why. Okay. If we're in a
8 petition for judicial review case, of course they have discretion, right.
9 They have discretion to deny the use. Okay. But if they deny -- if they
10 exercise that discretion, that's a taking. But let me explain why that
11 discretion can't carry over to the eminent domain case because if you
12 have the residential zoning that gives you the legal right to use your
13 property for homes, right, it gives you the legal right.

14 THE COURT: Uh-huh.

15 MR. LEAVITT: And then if you take the next step and say, but
16 the City has discretion to deny those land use applications, then you
17 have no property right because all the City would have to do in an
18 inverse condemnation case -- all they've had to do is say we have
19 discretion to deny your zoning, therefore, you never had a property right,
20 therefore, we can never take anything. That's the problem.

21 THE COURT: I think that where we diverge is you have a
22 right to build residential --

23 MR. LEAVITT: Yes.

24 THE COURT: -- homes on the land --

25 MR. LEAVITT: Yes.

1 THE COURT: -- subject to -- subject to whatever other zoning
2 codes, building codes, whatever other codes this -- whatever interest the
3 city has, whatever they have to look at --

4 MR. LEAVITT: Absolutely.

5 THE COURT: -- in order to approve. And so to me --

6 MR. LEAVITT: Right.

7 THE COURT: -- what you're saying is we have this right,
8 that's our property right, you can't do anything about property right. We
9 have this absolute property right. It's not absolute.

10 MR. LEAVITT: And maybe I said it wrong. And let me be
11 clear. We're not saying that we can come in and do whatever we want.
12 Absolutely. All we're asking for is you have the legal right to build
13 single-family, multi-family residential, okay --

14 THE COURT: And see, this is where I --

15 MR. LEAVITT: -- but --

16 THE COURT: -- this is where I diverge from you.

17 MR. LEAVITT: But --

18 THE COURT: I think you have the legal right to apply for this.

19 MR. LEAVITT: Okay. But let me finish, Your Honor.

20 THE COURT: All right.

21 MR. LEAVITT: If I could finish.

22 THE COURT: All right.

23 MR. LEAVITT: I agree with you the City still has discretion.
24 For example, sewer, drainage, traffic, compatibility. There's those kind
25 of issues. But Your Honor, if all you have is a legal right to apply, that's

1 not a property right. That's no right at all.

2 THE COURT: Oh, see, I guess that's where we disagree.

3 MR. LEAVITT: Yeah.

4 THE COURT: That's where we disagree.

5 MR. LEAVITT: Because if you -- listen, if my -- if I go and I
6 buy a 40 acre property that's zoned hotel casino on the Las Vegas strip
7 and I paid 40 million dollars for it and all I have is the legal right to apply,
8 I have nothing.

9 THE COURT: No. But you -- absolutely. You have the legal
10 right to apply the hotel casino because it complies. And so you can -- as
11 long as you meet every other standard, whatever requirements there are
12 that the city or county have, then you can build. But it doesn't mean you
13 get the absolute right --

14 MR. LEAVITT: Well --

15 THE COURT: Hypothetically speaking, remember Red Rock
16 Casino?

17 MR. LEAVITT: I remember Red Rock. Yes. I've got you.

18 THE COURT: You remember Red Rock? They want -- they
19 had the right to build 300 feet. They had the right to build up to 300 feet.

20 MR. LEAVITT: Yes.

21 THE COURT: The neighbors -- I might know some people
22 who are involved in this. The neighbors said, wow, that's a lot, it's really
23 only supposed to be 10, you're asking to build 300.

24 MR. LEAVITT: Got it.

25 THE COURT: It's supposed to be ten. Stay at ten. You know,

1 they're not -- Aliante had to stay at ten. They were going to keep it to ten
2 there because they had these -- you know, they had the -- all around the
3 valley -- they had to build around the valley.

4 MR. LEAVITT: Uh-huh.

5 THE COURT: Stations have their --

6 MR. LEAVITT: I remember.

7 THE COURT: -- places all around the valley. They were all
8 zoned for ten stories. They wanted to build them all 300.

9 MR. LEAVITT: Right.

10 THE COURT: And the neighbors were able to keep it to 200.

11 MR. LEAVITT: Absolutely.

12 THE COURT: So you have the right to apply to build what
13 you want to build on your land subject to whatever else there may be
14 that might limit it. In that case it was a bunch of neighbors screaming.
15 And every time they have fireworks, they have to send us a letter.

16 MR. LEAVITT: I got that letter, by the way.

17 THE COURT: So -- like the other day, what was it? I forget.
18 Like their anniversary or something.

19 MR. LEAVITT: Yeah. But what --

20 THE COURT: It's also so startling when you get a letter from
21 them.

22 MR. LEAVITT: But Stations Casino bought a vacant piece of
23 land --

24 THE COURT: Right.

25 MR. LEAVITT: -- with hotel casino zoning.

1 THE COURT: Right.

2 MR. LEAVITT: That hotel casino zoning gave them the
3 right --

4 THE COURT: To build a hotel. Yeah.

5 MR. LEAVITT: There it is. But it didn't give them the right to
6 do whatever they want.

7 THE COURT: It didn't give them the right to build a 300 story.

8 MR. LEAVITT: And that's all we're asking for --

9 THE COURT: Uh-huh.

10 MR. LEAVITT: -- is that we have an R-PD7 zoned property,
11 which gives us the right to build homes. We're not saying that we can
12 build seven-story homes or that we can build a high-rise condo.

13 THE COURT: And see, I guess this is where I think that we're
14 diverging from that is you view we have the right to build homes.

15 MR. LEAVITT: Yes.

16 THE COURT: And my view is no, you own this property, and
17 you have the right to apply for all the permits to build on it in accordance
18 with what it was zoned for, a hotel. And you wanted to build it 300 feet.
19 We didn't let you build it 300 feet. We made you -- the neighbors only
20 wanted you to build it 100 feet. So we made you keep it at 200 feet.
21 That's how that process works.

22 MR. LEAVITT: I agree. But Your Honor, they had the
23 underlying right to build a hotel casino, right?

24 THE COURT: Uh-huh. Right. Yeah. Okay.

25 MR. LEAVITT: Okay. That's all we're asking for is that we

1 have the underlying right --

2 THE COURT: Okay.

3 MR. LEAVITT: -- to build single-family, multi-family. That's
4 it. We're not taking it the step further and saying, hey, that means we
5 can build 500 feet.

6 THE COURT: And I guess this is -- for me, I have a modifier
7 there where you don't, which is you have the right to apply to build on
8 that property in accordance with the zoning.

9 MR. LEAVITT: And --

10 THE COURT: You don't have the right to build, which is what
11 I think you're --

12 MR. LEAVITT: Well, Judge, if you don't have the right to
13 build, then we would have no right.

14 THE COURT: Yes, you do.

15 MR. LEAVITT: What is the right?

16 THE COURT: Because you have the right to apply. And that
17 to me is the right. It's not the right to do it. It's the right to seek approval
18 to do it because otherwise, there's no zoning code. What's the point of
19 having it.

20 MR. LEAVITT: Exactly. And that's where we're at is what
21 does --

22 THE COURT: See, that's the only thing we disagree on. I
23 think after, you know, two full days of this, we've narrowed it down to
24 where you and I have a disagreement. I agree with everything else here.
25 I don't have any problem with it. Like I said, I think you can -- you can

1 make all four of these orders in all four of these cases line up. They
2 make perfect sense --

3 MR. LEAVITT: Okay.

4 THE COURT: -- if you look at the facts.

5 MR. LEAVITT: Here is the --

6 THE COURT: It makes perfect sense what Judge Williams
7 does. It makes perfect sense what Judge Jones does. The only thing I
8 disagree with -- and I understand why Judge Herndon did what he did.

9 MR. LEAVITT: Okay.

10 THE COURT: I'm not so sure that it was -- he was wrong in
11 stopping. I think he was probably right in stopping.

12 MR. LEAVITT: Okay.

13 THE COURT: But here now that we know we have to split
14 these, the zoning, PJR issue, and the --

15 MR. LEAVITT: Yes.

16 THE COURT: -- condemnation case --

17 MR. LEAVITT: Uh-huh.

18 THE COURT: -- here's where it -- the one thing -- the only
19 thing I disagree with these other people on. And that is how you define
20 the right. And for me, you have the right within the zoning code to seek
21 approval to build what you want to build. You may not be given that
22 approval because there may be other things that prevent you from
23 building what you want to build. You may want to build the most ugliest
24 building in the world --

25 MR. LEAVITT: Yeah.

1 THE COURT: -- but it's within the zoning. And the City says,
2 absolutely not, that's a ridiculous looking building, we're not going to let
3 you build it. So it's not the right to do it. It's the right to apply to do it.
4 MR. LEAVITT: Okay. And if I may --
5 THE COURT: And that's where you and I differ.
6 MR. LEAVITT: And if I may, Your Honor.
7 THE COURT: Yeah.
8 MR. LEAVITT: I -- the same exact issue was present in the
9 *Hsu* case. It really was.
10 THE COURT: Uh-huh.
11 MR. LEAVITT: Okay. Because the Court didn't say in the *Hsu*
12 case that you only have the right --
13 THE COURT: I hope you know that I printed that.
14 MR. LEAVITT: Or --
15 THE COURT: Let me get it.
16 MR. LEAVITT: Yeah. And in the *Sisolak* case, the court didn't
17 say you just have the right to apply. They didn't say that. What they
18 said is that zoning gave them the right to develop --
19 THE COURT: Right.
20 MR. LEAVITT: -- hotel casino. Okay. And Judge, I want to be
21 really clear that what we're asking for is not a specific plan. We're not
22 asking you to say, hey, we can have a specific plan. We're just asking
23 you to, as the courts have done in the other cases, use the zoning to
24 determine the property rights and what property rights are permitted
25 under that zoning.

1 THE COURT: Exactly. And that's what I keep saying. My
2 view of what the property right is, you're right, is to seek to use your
3 land in accordance with the applicable zoning.

4 MR. LEAVITT: In accordance --

5 THE COURT: I know that Ms. Ghanem doesn't agree with
6 me, but that's what I believe.

7 MR. LEAVITT: Well, yeah.

8 THE COURT: And I appreciate that differs because your view
9 is you have the right to do it.

10 MR. LEAVITT: I think we're talking -- I think we might be
11 talking about the same thing. And here's why is because I think what
12 you're saying is you have the right to seek approval to use the property
13 for that zoning. Your Honor, the *Hsu* case is 123 Nev 625.

14 THE COURT: Yeah. I --

15 MR. LEAVITT: Okay.

16 THE COURT: We found it at the same time, I think.

17 MR. LEAVITT: And --

18 THE COURT: Our internet is just so fast.

19 MR. LEAVITT: I've got you. And Life is Beautiful is going on
20 down here right now. And so it's a big mess right now.

21 THE COURT: Yeah.

22 MR. LEAVITT: If I may, Your Honor. I think I might be able
23 to -- I know you're looking at that. So while you're looking at that I'm --

24 THE COURT: Right. So that's why I said, you know, if -- an
25 order to come out of this -- I understand an order to come out of this.

1 And I'm just trying to tell you where I think it is.

2 MR. LEAVITT: Okay.

3 THE COURT: Only talking about the condemnation --

4 MR. LEAVITT: Yes.

5 THE COURT: -- because we've had to sever off the PJR. I
6 don't -- and that's where I see Judge Herndon 100 percent on the
7 ripeness because this predated all that. So he was -- he got hung up on
8 the ripeness, and he's stuck. It's -- it makes total sense.

9 MR. LEAVITT: Okay.

10 THE COURT: And I agree with him that he was right when he
11 did that. We now have this new case that says sever these two issues.
12 So you know, all the zoning stuff, the PJR stuff, totally separate. He
13 never looked at this other part of the case.

14 MR. LEAVITT: Right.

15 THE COURT: I get the point that the judge truly is looking at
16 the other part of the case, just as Judge Jones and Judge Williams are.
17 They got there differently because their cases are factually different.
18 Now we're here in this 133 acre case. As I've said, I always thought this
19 other stuff -- I don't know what to call it -- all the other causes of action,
20 that that was something. And I understand your point that you have to
21 define what it is.

22 MR. LEAVITT: Yeah.

23 THE COURT: So if we're -- and to go to the next step, I
24 understand we need this order. So here's my -- I have no problem with
25 the first two things that you've said.

1 MR. LEAVITT: Okay.

2 THE COURT: I just don't define that last one the exact same
3 way you do. So maybe there's a way we can come to a common
4 understanding of what that last one is. I think your version's a little --

5 MR. LEAVITT: Okay. Can I have a 30 second sidebar with co-
6 counsel?

7 THE COURT: Yes, you can. And meanwhile, I'm looking at
8 *Hsu*. Which by the way, is H-S-U. It's spelled H-S-U.

9 [Pause]

10 THE COURT: Give us a minute here, the Clerk stepped out.

11 [Pause]

12 So we'll go back on the record and see if we can come up
13 with language for our third item.

14 MR. LEAVITT: I think we get there, Judge.

15 THE COURT: Okay.

16 MR. LEAVITT: You tell me when you're ready.

17 THE COURT: We're ready.

18 MR. LEAVITT: Okay, Your Honor. So, I mean, in the -- just
19 really quick. In the *Sisolak* and *Hsu* cases, I'm looking at it. They said
20 that the property was zoned for development of a hotel, a casino, or
21 apartments. And in the *Alper* case, what they did is they just printed the
22 zoning code in the decision itself. So maybe we could just do this, Your
23 Honor. Is zoning is used to determine the property rights issue. The
24 zoning is R-PD7, and just do like what they did in the *Alper* decision and
25 say, the property may be used for residential, or the permitted uses

1 under that code provision are single family, multi-family residential. Just
2 copy like what the Court did here in the *Alper* case. And the way we
3 could do that is going to the -- going to the --

4 [Counsel confer]

5 MR. LEAVITT: With the -- there it is. With the R-PD7 in the
6 back, Your Honor. So we say the R-PD7 zoning applies. The permitted
7 land uses in the R-PD7 are single family, multi-family residential. We're
8 just simply quoting from the zone. And then that way we don't add -- I
9 think what's causing concern here is we want the word legally permitted.
10 We want the words, as a matter of right.

11 THE COURT: Right.

12 MR. LEAVITT: And that's directly from the code, which is
13 exactly what the Court did in *Alper*.

14 THE COURT: I can go there.

15 MR. LEAVITT: Okay.

16 THE COURT: Yeah. Okay. So then to be clear about what
17 we're doing.

18 MR. LEAVITT: Okay.

19 THE COURT: I'm granting your motion, I believe, in part.

20 MR. LEAVITT: Okay.

21 THE COURT: Because I think the way it was originally
22 framed; it would have addressed both.

23 MR. LEAVITT: Got it.

24 THE COURT: And given our recent decision that we have to
25 sever the PJR and the condemnation case, I specific -- I believe that with

1 respect to the zoning issues that Herndon's analysis of ripeness is
2 correct. So that would mean that I wouldn't -- I'm not going to discuss
3 the zoning issue. However, all of the other causes of action in this, like,
4 multi-part complaint, I understand how they stated cause of action, even
5 in our really limited Nevada motion to dismiss, which is why I don't think
6 it's appropriate. I think there's something there.

7 So if we're going to define it, my belief is with your first two
8 items, which are -- you had land zoned R-PD7. I would add something to
9 that, which would be previously used as a golf course, and when he
10 acquired it, and that that zoning use includes residential homes.
11 Because the rest of what I'm concerned about is the -- all the stuff that
12 happened at the meeting. How it appeared like there was some sort of --
13 I don't know, you didn't use the word conspiracy, but it kind of almost
14 seemed like that's where it was headed.

15 MR. LEAVITT: I'll probably use it later.

16 THE COURT: Okay. You'll use it later. Yeah, the actions
17 taken at the zoning meetings, which you view as interfering in that right,
18 to me didn't actually deny the zoning, because we never got there, but
19 there were actions taken in that process that you believe interfered with
20 your client's right to use that property. So that, I believe, you can pursue
21 through inverse condemnation. Not because you were denied zoning,
22 but because of in this process other things happened, so you had
23 [indiscernible]. Did it amount to a taking?

24 MR. LEAVITT: And so what will --

25 THE COURT: That's part two.

1 MR. LEAVITT: And I just want to refine it. So what we'll do is
2 zoning is used to determine property rights issue. The zoning is our --

3 MR. OGILVIE: No, Your Honor.

4 MR. LEAVITT: Your Honor, can I speak without being
5 insulted. We've gone --

6 THE COURT: Yeah. Yeah. You can -- I'll allow you to object
7 later, but --

8 MR. LEAVITT: We've gone through this, Your Honor.

9 THE COURT: Yeah, just say what you want to say.

10 MR. LEAVITT: So zoning is used -- zoning is used in eminent
11 domain cases and inverse condemnation cases to determine the
12 property rights issue, which is consistent with the six cases. The zoning
13 on the property is R-PD7. And the -- we could just quote that the
14 property was previously used as golf course when acquired, and that the
15 permitted uses -- we'll just use the exact one we got out of the code, the
16 permitted land use is our single family, multi-family residential.

17 THE COURT: Now the challenge that we have here is this
18 idea that zoning defines the property rights.

19 MR. LEAVITT: Uh-huh.

20 THE COURT: The problem that I have with that is zoning
21 defines what you can apply to use your property as, not your absolute
22 right. Within that zoning, you could apply to use your property with
23 something that complies with that zoning.

24 MR. LEAVITT: Well, you --

25 THE COURT: And so the way I think you're putting it, it just --

1 it makes it seem that, you know, you've got -- and you've said, you never
2 said we've got the right to seven houses per acre. I appreciate your
3 clarifying that.

4 MR. LEAVITT: Yeah.

5 THE COURT: So that's my problem, is when you say -- the
6 way that sounds to me is that because zoning defines the property
7 rights, we have this absolute right to build seven per acre and the
8 absolute right to do it.

9 MR. LEAVITT: Yeah. And --

10 THE COURT: And that's why I'm saying it doesn't. What
11 zoning does is it defines what you can apply to do with your land.

12 MR. LEAVITT: And, Your Honor, I think --

13 THE COURT: And that's --

14 MR. LEAVITT: -- so now we're back to where we were
15 before. And I thought --

16 THE COURT: Yeah. And that's always what I've said.

17 MR. LEAVITT: -- and I thought we got beyond that. But
18 here's all I want.

19 THE COURT: I've never given up on that.

20 MR. LEAVITT: I know. I've got to tell you -- here's all I want,
21 Your Honor.

22 THE COURT: Okay.

23 MR. LEAVITT: Okay. Is that under the six Nevada Supreme
24 Court cases that are inverse condemnation cases -- and we can just say it
25 this way. In those six cases, the Nevada Supreme Court used zoning to

1 determine the property rights. They did. That's undisputed.

2 THE COURT: Okay.

3 MR. LEAVITT: You can read the cases, and you can see that
4 the Nevada Supreme Court used the zoning. In not one of those cases
5 did the Court use the master plan. It used zoning to determine property
6 rights. Otherwise, there would be no reason to --

7 THE COURT: Well, that's true.

8 MR. LEAVITT: That's true. Otherwise, there would be no
9 reason to quote the R-PD7 zoning in this case.

10 THE COURT: Right. Okay.

11 MR. LEAVITT: So then the next step would be that the
12 zoning in this case is R-PD7. And then all we do is we then say -- we can
13 just use the language from 19.10.050 on what that zoning is.

14 THE COURT: Okay. So, again, let's be very, very clear about
15 this. And I know this is the sticking point between the two of us. I just --
16 I'm very uncomfortable with this idea that zoning defines the property
17 interest. Your property interest is to use your property in the way that
18 conforms to the zoning.

19 MR. LEAVITT: Agreed.

20 THE COURT: You have the right to apply to use your
21 property in the way that it's complied with the zoning. I know that that's
22 the distinction between the two of us that you don't agree with. And so
23 that's my -- that's our hang up. And that is a hang up, because I cannot
24 agree that it's an absolute. Which you may not be intending it to be this,
25 but it seems to me that you're making it an absolute right, and I just

1 [indiscernible].

2 MR. LEAVITT: And I'm not, Your Honor.

3 THE COURT: Okay.

4 MR. LEAVITT: But here's what -- and I think maybe it's the
5 use of the verbage.

6 THE COURT: Okay. All right.

7 MR. LEAVITT: Okay. What the Court saying is you have the
8 right to -- they don't say you only have the right to apply, otherwise,
9 again, there's no [indiscernible]. What they say is you have the right to
10 use the property consistent with the zoning.

11 THE COURT: Correct. Okay. Right.

12 MR. LEAVITT: Okay. So maybe if we just change the word
13 apply to use, and then that would, I think, result --

14 THE COURT: A landowner's use of their property is defined
15 by the zoning.

16 MR. LEAVITT: Yeah, I know.

17 THE COURT: Yeah. I have no problem with that.

18 [Counsel confer]

19 MR. SCHWARTZ: Your Honor, am I going to get a chance to
20 respond to this?

21 THE COURT: In a minute, yeah.

22 MR. LEAVITT: Your Honor, this is my motion.

23 THE COURT: Yeah, in conclusion you can. Yeah. You can.

24 MR. LEAVITT: If you've got an opposition, I got a reply.

25 THE COURT: I'll let you have something to say in the end

1 because when it comes to drafting an order, I'm sure he'll have issues
2 with how the order is drafted.

3 MR. LEAVITT: Yeah. And, Judge, maybe we can just --
4 because I get the concern. Maybe we can just use the exact language
5 right --

6 THE COURT: Are we looking for our three-part thing?

7 MR. LEAVITT: -- right out of the *Sisolak* case.

8 THE COURT: Oh, *Sisolak*.

9 MR. LEAVITT: Yeah.

10 [Counsel confer]

11 MR. LEAVITT: And maybe there's another way to say it,
12 Judge. And, actually, maybe this is the best way to do it, which is from
13 the *Hsu* and *Sisolak* cases, and from the *Bustos* case, is that zoning is
14 used. The R-PD7 is zoning, and you can use the property consistent with
15 the zoning. I think that gets us there. You can use the property
16 consistent with the zoning. Instead -- and I see the concerns. You don't
17 want us to put in there legal, legal, legal this, and is right, is right, but
18 you can use the property consistent with the zoning. There should not
19 be a consternation about that.

20 THE COURT: Okay. All right. Great. Thank you. And if you
21 have something brief to say in conclusion, Mr. Schwartz. Briefly.

22 MR. SCHWARTZ: Yes.

23 THE COURT: Briefly in conclusion. Because we're to the
24 point where now we are discussing what counsel is going to put in the
25 order. I'm granting it in part. I'm only granting it in part as to the portion

1 of the complaint that deals with their --

2 MR. LEAVITT: Property.

3 THE COURT: -- inverse condemnation claim, other than the
4 zoning issue, which I believe has to be severed out and solely separate,
5 and I think is not ripe. So we're only looking at those other issues in the
6 complaint alleged. Okay. Great.

7 MR. LEAVITT: And, Your Honor, since we got to that issue
8 of, hey, we use zoning here, and we're going to use the R-PD7, I'm not
9 addressing any other arguments to rebut this whole master plan,
10 because we're already at zoning, according to the six Nevada Supreme
11 Court cases.

12 But what I'll say is that in the *Bustos* case, the Nevada
13 Supreme Court made it really clear that it would be reversible error to
14 not use the zone.

15 THE COURT: Okay.

16 MR. LEAVITT: And so if we say the zoning applies, it's R-
17 PD7, and the property would -- the property right was to use the property
18 consistent with the zoning, I think we could go that route; is that correct?
19 I think that would be --

20 THE COURT: So this may not be the part that Ms. Ghanem is
21 thinking of from *Sisolak*, but an individual must have a property interest
22 in order to support a takings claim. Accordingly, the Court must first
23 determine whether the plaintiff possesses a valid interest in the property
24 affected by the governmental action, that is, whether the plaintiff
25 possessed a, quote, "stick in the bundle of property rights," before

1 proceeding to determine whether the governmental action at issue
2 constituted a taking. The term, quote, "property," includes all rights
3 inherent in ownership, including the right to possess, use, and enjoy the
4 property.

5 That's your right.

6 MR. LEAVITT: Yes.

7 THE COURT: The county argues that the district court erred
8 in finding he had a vested property interest in the airspace. And so
9 they're beginning this whole discussion about how airspace is a
10 recognized right.

11 So I'm looking to see if there's another place here where
12 you're looking to see how they define it.

13 MR. LEAVITT: Yes. There is, Your Honor. Hold on, Your
14 Honor. I got it, Your Honor.

15 THE COURT: And acquiring, possessing --

16 MR. LEAVITT: I got it right here.

17 THE COURT: -- and protecting the property are inalienable
18 rights. The Nevadan's property rights are protected by our Constitution.
19 These property rights include at least usable airspace of the adjacent
20 land.

21 MR. LEAVITT: And then it goes on, Your Honor, to talk about
22 -- and, right. The County -- and this was the real rub of that case. It's on
23 footnote -- or it's at headnote 3. The county argues that the District Court
24 erred in finding that Sisolak had a vested property interest in the
25 airspace above his property. That vested property right was based upon

1 his zoning, which allowed him to build up to there. And so that's what
2 the county's big rub was in that case and that's what the City's rub is
3 here.

4 And the Nevada Supreme Court goes on to define that
5 property right and uses the word vested two or three more times in that
6 section. And if we go to where it says 1120, it talks about the inalienable
7 right and those rights including, at least the usable airspace, and then
8 got on to say that that airspace is vested in the lone owner, and that he
9 has the right to own that usable airspace -- or he owns that usable
10 airspace and may use it.

11 Now, obviously, it would have to be consistent with the
12 zoning, and that's what the Court said previously under the section
13 under property, under the facts section.

14 [Counsel confer]

15 MR. LEAVITT: And, Your Honor, I think footnote 26 also
16 addresses the very issue that we're talking about. Footnote 26. And that
17 was the county's argument at footnote -- because the county said, listen,
18 you didn't apply yet, so you don't have a property right. And this is what
19 the Court said.

20 THE COURT: Well, so I think that what we can say is that the
21 motion is granted in part. The Court determines that what the
22 landowner acquired was property zoned R-PD7, which had been
23 previously used as a golf course.

24 MR. LEAVITT: And there would just be one thing, which is,
25 and he can use the property consistent with the R-PD7 zone.

1 THE COURT: Well, which -- an R-PD7 zoning permits, blah,
2 blah, blah.

3 MR. LEAVITT: Yeah. Yes.

4 THE COURT: Yeah.

5 MR. LEAVITT: And, Judge, that's what --

6 THE COURT: And, again, I'm not saying he can use it for
7 that. I'm saying he has the right to seek approval to do blah, blah, blah.

8 MR. LEAVITT: Well, Your Honor, this is what --

9 THE COURT: So this is my challenges --

10 MR. LEAVITT: Yeah, and I --

11 THE COURT: -- this can't go as far as you want me to go.

12 MR. LEAVITT: And I see that where you want to add that you
13 only have the right to apply, but that's not, because here's what the
14 Court said in *Sisolak*.

15 THE COURT: Okay. Uh-huh.

16 MR. LEAVITT: They said, the property is zoned for
17 development of a hotel, casino, or apartments.

18 THE COURT: Right.

19 MR. LEAVITT: We can just use that exact language out of
20 *Sisolak*. We use that exact language. We can just say the property is
21 zoned R-PD7 and that R-PD7 is zoned for development of residential
22 units. That's all -- we can use the same --

23 THE COURT: Okay.

24 MR. LEAVITT: -- exact language that they have here.

25 THE COURT: All right. Thank you.

1 MR. LEAVITT: And --

2 THE COURT: Oh, I'm sorry.

3 MR. LEAVITT: No. And so, of course, obviously, the
4 language you put in there is what's in the code, which is it's zoned for --
5 or to be able to use the property consistent with that zoning, which is
6 single family, multi-family residential, Your Honor. And then we can take
7 out that legally permissible uses. We don't even have to add the second
8 section, because we can read the code itself, which says what you can
9 use it for. So you can say zoned for development of residential units.
10 Exactly as *Sisolak* says, Your Honor.

11 THE COURT: Okay. Thanks.

12 MR. LEAVITT: All right. Thank you, Your Honor.

13 THE COURT: In conclusion from the City. Just very briefly,
14 and then I'll tell Mr. Leavitt what I think his order [indiscernible]. And I
15 do mean brief.

16 MR. SCHWARTZ: I'm sorry, Your Honor.

17 THE COURT: And I do mean brief.

18 MR. SCHWARTZ: Yes. The Court is absolutely right. Zoning
19 does not confer rights period. There's no authority that zoning confers
20 any rights. And the Court is absolutely right. The zoning allows you to
21 apply for a use that's permitted by the zoning. In other words, you can't
22 apply for an industrial use in a zone that only permits residential. That's
23 it. That's this case. It doesn't give you a constitutional right to build
24 anything, whether it's consistent with the zoning or not.

25 THE COURT: And that's why I said we're not going to talk

1 about the zoning. My problem is with did you interfere with did you
2 interfere with his ability to use his property? Did not letting him put up a
3 fence, was that a problem? I don't know.

4 MR. SCHWARTZ: That's --

5 THE COURT: That's what needs to be explored.

6 MR. SCHWARTZ: That's what a taking case is.

7 THE COURT: Right. And that's --

8 MR. SCHWARTZ: This is a taking case and the test for a
9 taking is wipeout or near wipeout --

10 THE COURT: Right. And that's what we have to --

11 MR. SCHWARTZ: -- interference --

12 THE COURT: And that's what you have to see --

13 MR. SCHWARTZ: -- or --

14 THE COURT: -- if that's here.

15 MR. SCHWARTZ: Right. Or --

16 THE COURT: That's why [indiscernible].

17 MR. SCHWARTZ: -- or a physical taking. *Sisolak* is a physical
18 taking case.

19 THE COURT: Right. Yeah.

20 MR. SCHWARTZ: And this motion only concerns right to use
21 the property. You know, for them to apply and approve. *Sisolak* has
22 nothing to do with this case. *Hsu* has nothing to do with this case. We
23 would be fine with an order that says I don't -- that says, the property --
24 the 133 acre property has been zoned R-PD7 since 1991 or whenever it is.
25 The R-PD7 zoning ordinance, UDC 19.10.0 --

1 THE COURT: I have it here.

2 MR. SCHWARTZ: -- speaks for itself, and that the property
3 was used for a golf course at the time the developer bough it.

4 THE COURT: Well, again, that's probably --

5 MR. SCHWARTZ: And then the developer has the right to
6 apply to use the property for a use permitted by the R-PD7 zoning
7 ordinance.

8 THE COURT: Yeah. Again, way more than I was willing to
9 do. So, again, the 133 acres is part of the larger parcel, whatever. It was
10 previously used as a golf course and zoned R-PD7 or zoned R-PD7, uses
11 the golf course when he acquired it. Whichever way makes more sense,
12 like, grammatically. And that the zoning rights are what they are.
13 Because, as I said, I don't think this is a zoning case. This about all that
14 other stuff --

15 MR. SCHWARTZ: Okay.

16 THE COURT: -- that interferes with his quiet --

17 MR. SCHWARTZ: That's fine.

18 THE COURT: -- like *Sisolak* talks about, his quiet and
19 peaceful use and enjoyment of his land.

20 MR. SCHWARTZ: I think what the Court's saying is that the
21 property owner has a right to apply to use the property for a use that's
22 permitted by the R-PD7 zoning ordinance. I think that's what the Court is
23 saying. I think we can cut through this if we submit opposing orders,
24 and I think the Court could then see --

25 THE COURT: You know, we don't really do that anymore

1 because we don't -- the methodology that we use now to process orders
2 is very different, where we get digital orders, and we sign them. It's very
3 difficult to do competing orders. I would certainly allow you an
4 opportunity to review the order that Mr. Leavitt writes and to submit in
5 correspondence, but you can't take a second order, because these orders
6 -- when there's multiple orders on the same thing in our queue, it gets
7 very messy, because we can't process them. They're just digital, and
8 they're in there, and things get signed that shouldn't get signed, so it's a
9 mess. So I don't -- I wouldn't take a competing order.

10 I will tell you, you can certainly submit something
11 commenting on his order. I've got no problem with that.

12 MR. SCHWARTZ: Your Honor, Mr. Leavitt is going to submit
13 an order that says that the --

14 THE COURT: And I've already told him I'm not going to --

15 MR. SCHWARTZ: -- developer --

16 THE COURT: I've already told him I'm not going to sign an
17 order that looks like the one Judge Jones' signed.

18 MR. SCHWARTZ: Okay.

19 THE COURT: I won't do it.

20 MR. SCHWARTZ: He's going to submit an order that says the
21 developer has a right to use the property for a use permitted by the R-
22 PD7 zoning ordinance. That's -- that is -- they don't right. Zoning doesn't
23 confer rights. That's the whole thing.

24 THE COURT: Okay.

25 MR. SCHWARTZ: All those cases they're relying on --

1 THE COURT: As I said many, many, many, many times, I will
2 sign an order that says that in this particular -- the portion of this case
3 that deals with the inverse condemnation that Mr. Lowie -- well, the
4 Plaintiff acquired a parcel of land -- part of the larger parcel of land,
5 consisting of this 133 acres at issue here, zoned at all times R-PD7, which
6 had been used, for however many years, as a golf course.

7 MR. SCHWARTZ: Okay.

8 THE COURT: R-PD7 zoning is whatever it is period, end of
9 story.

10 MR. SCHWARTZ: Very good. Thank you, Your Honor.

11 THE COURT: He has rights on that land, absolutely. And
12 whatever that is, it is what it is. I'm just -- I'm not going to say what I
13 think either of you wants me to say. They want to make it more narrow;
14 you want it much more broad, and I think I've told you where I diverge
15 from both of you is that you get something when you acquire land by
16 virtue of the zoning, but you don't get the absolute right to the zoning.

17 MR. SCHWARTZ: Understood.

18 THE COURT: You get the right to seek approval of how you
19 want to use your land. Because in this case, it's not about the zoning, it's
20 about all the other stuff that was going on. That's what I think this part
21 of this condemnation case is about.

22 MR. LEAVITT: I think I know my marching orders, Your
23 Honor.

24 THE COURT: Thank you, Mr. Leavitt. I appreciate it. And, as
25 I said, send them an order so they can write a letter. Like I said, I don't

1 want a competing order. That's messy. But I would -- if you want to
2 submit an order saying why you think it's wrong, you can submit an
3 order saying why you think it's -- a letter saying why you think it's
4 wrong. I just can't take competing orders. There's just -- we don't have
5 any way to process them. It's a mess. We usually just throw them away.
6 It's hard to do.

7 MR. OGILVIE: Thanks. I'll remember that the next time I
8 spent an hour on a competing order.

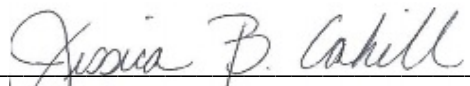
9 THE COURT: Yeah. It's gotten to be a real mess with this
10 virtual system. So it's granted in part. I believe, Mr. Leavitt is going to
11 prepare the order. Thank you very much.

12 MR. LEAVITT: Your Honor, thank you for all your time.

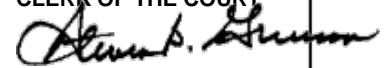
13 THE COURT: Thank you. It's been interesting and
14 educational. A walk down memory lane.

15 [Proceedings concluded at 3:54 p.m.]

16
17
18
19
20 ATTEST: I do hereby certify that I have truly and correctly transcribed the
21 audio-visual recording of the proceeding in the above entitled case to the
22 best of my ability.

23 

24 Maukele Transcribers, LLC
25 Jessica B. Cahill, Transcriber, CER/CET-708



In the Matter Of:

180 LAND vs CITY OF LAS VEGAS

September 23, 2021



DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * *

180 LAND CO., LLC, ET AL.,

Plaintiffs,

vs.

Case No. A-17-758528-J
Dept. No. 16

CITY OF LAS VEGAS, ET AL.,

Defendants.

MOTIONS

BEFORE THE HONORABLE TIMOTHY C. WILLIAMS

On September 23, 2021

1:37 p.m. to 4:46 p.m.

For the Plaintiff: James J. Leavitt, Esq.
Autumn Waters, Esq.
Elizabeth Ghanem Ham, Esq.

For the Defendant: Christopher Molina, Esq.
Andrew Schwartz, Esq.
Philip R. Byrnes, Esq.
Rebecca Wolfson, Esq.

Reported by: Kimberly A. Farkas, RPR, CCR #741

1 P R O C E E D I N G S

2 * * * * *

3 THE MARSHAL: Department 16 is now in
4 session. The Honorable Judge Timothy Williams
5 presiding. Thank you.

6 THE COURT: You may be seated. I want to say
7 good afternoon to everyone and welcome you to the 1:30
8 session. And this is 180 Land Company, LLC, et al. v.
9 the City of Las Vegas. And let's go ahead and set
10 forth our appearances for the record.

11 We'll start first with the plaintiff.

12 MR. LEAVITT: Good afternoon, Your Honor.
13 James J. Leavitt on behalf of the plaintiff landowner,
14 180 Land.

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

17 MS. GHANEM: Good afternoon, Your Honor.
18 Elizabeth Ghanem here on behalf of the plaintiff
19 landowners. And with me today is Jennifer from my
20 office. We'll be managing the technology.

21 MR. SCHWARTZ: Andrew Schwartz for the City,
22 Your Honor. Good afternoon.

23 MR. BYRNES: Phil Byrnes for the City,
24 Your Honor.

25 MR. MOLINA: Good afternoon, Your Honor.

1 Chris Molina for the City.

2 MS. WOLFSON: Good afternoon, Your Honor.

3 Rebecca Wolfson for the City.

4 THE COURT: Okay. And, for the record, does
5 that cover all appearances? It appears to be. Okay.

6 It's my understanding, based upon what was
7 currently set on the calendar today, we have the
8 plaintiff landowner's motion to determine a taking, and
9 also for summary judgment on the first, third, and
10 fourth claims for relief.

11 Is that correct, counsel?

12 MR. LEAVITT: That's correct, Your Honor.

13 THE COURT: Okay. In light of that --

14 MR. SCHWARTZ: Your Honor?

15 THE COURT: Yes. Go ahead, sir.

16 MR. SCHWARTZ: We have a countermotion for
17 summary judgment on the calendar for the same day.

18 THE COURT: And you sure do.

19 MR. SCHWARTZ: Thank you.

20 THE COURT: I'll make it official. And the
21 City's opposition to developer's motion to determine a
22 taking and also motion for summary judgment on the
23 first, third, and fourth claims for relief and
24 countermotions for summary judgment. Is that correct?

25 MR. SCHWARTZ: Yes, Your Honor. Our motion

1 is for summary judgment on all claims.

2 THE COURT: I understand.

3 MR. SCHWARTZ: Thank you.

4 THE COURT: With that in mind, is there
5 anything we need to address preliminarily?

6 MR. LEAVITT: Not from the plaintiff,
7 Your Honor.

8 MR. SCHWARTZ: No, Your Honor. Ready to
9 proceed.

10 THE COURT: Okay. We can go ahead and get
11 started. And so who will be handling the argument on
12 behalf of the plaintiff?

13 MR. LEAVITT: James J. Leavitt, Your Honor.
14 I'll be handling it.

15 THE COURT: Okay. Sir, you may approach.
16 The lecturn is available for you.

17 MR. LEAVITT: Thank you. May I proceed,
18 Your Honor?

19 THE COURT: Yes, sir.

20 You know what we can do. I have a screen
21 here. There's one there; right? Is that visible to
22 everybody? Okay. Just want to make sure.

23 Mr. Leavitt, you may proceed, sir.

24 MR. LEAVITT: Your Honor, through the
25 arguments that we've done with you previously, what

1 I've been able to do is lay out an outline of my
2 argument. I've provided it in PowerPoint format and
3 I've also provided it in written format. And I do have
4 that, Your Honor. And so I have various folders that I
5 could hand to you. So we can see it on the monitor,
6 but I can also provide you a physical copy. I'm not
7 sure how you would like me to do that. I can give it
8 to the bailiff, Wesley, and he can present it to you,
9 Your Honor.

10 THE COURT: Is there any objection to him
11 handing me a physical copy of the PowerPoint
12 presentation?

13 MR. SCHWARTZ: No, Your Honor.

14 THE COURT: Okay. You can hand that to the
15 marshal.

16 MR. LEAVITT: Your Honor, we'll start with --
17 what I want to do is I want to start with the very
18 narrow issue that we're here for today. And if we can
19 open up the folder I just gave you, has the Nevada
20 inverse condemnation law. And if we open it, up the
21 very first slide there is "Nevada Inverse Condemnation
22 Law." And behind that, the next section, the next
23 page, the top of that page says, "Nevada's Mandatory
24 Inverse Condemnation Procedure."

25 We've talked about this previously that in

1 all of these inverse condemnation cases, the Nevada
2 Supreme Court has held that there's a two-step
3 procedure that we follow. The first step is to define
4 the property interest that the landowners had prior to
5 any city interference with that property interest. And
6 once that property interest is defined -- and what
7 we're talking about here is once the bundle of sticks
8 is defined that the landowners have, then and only
9 then, do we move to the take issue.

10 On October 12th, 2020, this Court entered an
11 order on the property interest issue. And we've
12 resubmitted that order to the Court to see that that
13 ruling and that decision has already been made on the
14 property interest issue. We appeared before the Court.
15 We had significant briefing. We had significant
16 argument.

17 And then at the end of that briefing and that
18 argument, this Court entered that first order that's
19 necessary in these inverse condemnation cases. And the
20 order that this Court entered was that, number one,
21 zoning is relied upon to determine a property interest.
22 Number two, the zoning is R-PD7. And number three,
23 under Nevada law and under the city's code, the legally
24 permissible uses of the property with R-PD7 zoning is
25 single-family and multi-family residential.

1 So, Your Honor, that very first preliminary
2 issue has been decided by this Court definitively on
3 October 12th, 2020. Because that first issue has
4 already been decided by the Court, we're now moving to
5 the second issue, which is the second sub-inquiry that
6 the Court requires us -- or which the Nevada Supreme
7 Court requires us to decide. And that second
8 sub-inquiry is very straightforward, Your Honor.

9 The second sub-inquiry is, did the City
10 engage in taking actions, or in actions to take the
11 landowners' 35-acre property for which the landowners
12 have the right to use for single-family and
13 multi-family residential uses.

14 So, Your Honor, that fairly narrow issue is
15 why we're here today. We filed our motion to address
16 that very narrow issue of, now that we've decided that
17 the landowners have the right to use the property for
18 single-family and multi-family residential uses, did
19 the City engage in actions to take that underlying
20 property interest.

21 Your Honor, if we turn to the next page in
22 the PowerPoint here, at the top of that page, it says,
23 "Three Invariable Rules."

24 It's not working on that --

25 THE COURT: Are you having a problem? I do

1 have the book.

2 MR. LEAVITT: You've got the book. We'll go
3 through the book and, hopefully, they can figure it
4 out.

5 The next section here is the three invariable
6 rules that the Nevada Supreme Court has used to decide
7 the take issue in the state of Nevada.

8 First, the court said, listen, we have no
9 magic formula to decide a taking in every single case.
10 The court went on to say, there's nearly infinite
11 variety of ways in which a taking can occur.

12 But then the court said this, Judge. The
13 court said, listen, there's many, many ways that a
14 taking can occur. But then in the State v. Eighth
15 Judicial District Court case, the court said,
16 nevertheless, there are several invariable rules
17 applicable to specific circumstances.

18 And then the court -- and the Nevada Supreme
19 Court has identified three invariable rules. So to
20 explain that a little bit more, Your Honor, the Supreme
21 Court said, listen, we're going to look at a whole
22 bunch of facts. And we can have a taking under many,
23 many different facts, but there's going to be three
24 specific circumstances where we are always going to
25 find a taking.

1 And here's the three specific circumstances
2 the Court said we're always going to find a taking.
3 Number one, on a per se regulatory taking. Number two,
4 on a per se categorical taking. And, number three, on
5 a non-regulatory de facto taking.

6 So under these three circumstances, the
7 Nevada Supreme Court said, these rules are invariable.
8 If the specific facts meet any one of these three
9 standards, the court is required to automatically find
10 a taking. There's no defense, there's no ripeness
11 issues. The court is required to look at the facts and
12 determine whether any one of these invariable rules has
13 been met.

14 So then I want to spend just a minute
15 identifying those invariable rules and the law that
16 applies to those invariable rules.

17 Turning to the next slide is the per se
18 regulatory taking. This is one of the claims that the
19 landowners are moving for summary judgment on. It's
20 landowners' third claim for relief, a per se regulatory
21 taking.

22 And turning to the next page, this is the
23 Nevada Supreme Court law on a per se regulatory taking.
24 The Nevada Supreme Court in the McCarran International
25 Airport and County of Clark v. Tien Fu Hsu case held

1 there's always going to be a per se taking if the
2 government engages in actions that preserve private
3 property for use by the public or authorize the public
4 to use private property.

5 And, Judge, that makes sense. If the
6 government says, hey, we're preserving your property
7 for use by somebody else, that's going to automatically
8 be a per se taking in and of itself. Or if the
9 government adopts any kind of action and says to a
10 landowner, we're authorizing the public to enter
11 physically onto your property, the Nevada Supreme Court
12 said that's in and of itself going to be a taking.

13 And, Judge, I want to refer to those facts
14 that occurred in the Sisolak case because they're very
15 demonstrative of the kind of takings that the Nevada
16 Supreme Court found in that per se regulatory taking.
17 And Sisolak, as you'll recall, the County of Clark
18 adopted height restriction known as number 1221 that
19 preserved Governor Sisolak and Mr. Hsu's airspace as
20 vacant airspace for use by the public. And that
21 underlying ordinance authorized the public to enter
22 into that airspace.

23 The taking action in that case that the
24 Nevada Supreme Court found was not the physical entry
25 of airplanes into the airspace. The Nevada Supreme

1 Court found that the adoption of height restriction
2 ordinance number 1221 was the taking action. So the
3 Court said, listen, if you just engage in actions to
4 preserve property for use by the public or you engage
5 in action that authorizes the public to use private
6 property, that's a taking.

7 And, Your Honor, I'll read from the very
8 conclusion of the Sisolak case. You see in the book I
9 have the most applicable cases. It's at page 16 of the
10 book behind there. The conclusion is the Court says,
11 Ordinances 1221 and 1599 appropriated private property
12 for public use without the payment of just
13 compensation.

14 It was the ordinances that resulted in the
15 taking because the ordinances themselves preserved the
16 property for use by the public and authorized the
17 public to use that private property.

18 Your Honor, the second bullet point from the
19 bottom of that sheet there, that's an important
20 finding. Because the Sisolak court had to determine
21 prejudgment interest. And in order to determine
22 prejudgment interest, the Sisolak court had to
23 determine what was the taking date, what was the taking
24 action. And, again, at page 675, the court held that
25 prejudgment interest was awarded from the date of

1 taking, which was the date the county passed
2 Ordinance 1221.

3 And then in a subsequent case, Your Honor,
4 Johnson v. McCarran International Airport, what had
5 happened, Your Honor, is we litigated those airspace
6 taking cases for about 15 years. Then after those
7 cases had been litigated, Mr. Johnson came forward and
8 said, hey, my property is near the airport. I want to
9 sue for a taking also.

10 So in that Johnson v. McCarran International
11 Airport case, the Nevada Supreme Court had to
12 definitively define what the date of taking was because
13 Mr. Johnson missed the statute of limitations. So the
14 court had to decide when did the taking occur in order
15 to commence the statute of limitations. And in the
16 Johnson case, the court held that the height
17 restriction 1221 effected a per se regulatory taking.
18 And then they went on to say, when the planes began
19 using the airspace was absolutely inconsequential to
20 determine the take.

21 So, Your Honor, in conclusion, a per se
22 regulatory taking in the state of Nevada occurs when
23 the government engages in actions that preserve private
24 property use by the public or authorizes the public to
25 use the property. It's inconsequential whether they

1 actually use the property.

2 And if we turn to the next page, Your Honor.
3 The United States Supreme Court, just two months ago,
4 adopted this same exact holding in a case called Cedar
5 Point Nursery v. Hassid. That's a June 2021 case. In
6 that case, the Court held that the right to exclude is
7 one of the most treasured rights of ownership. And
8 where the government authorizes the public to use
9 property, it is a per se regulatory taking.

10 What happened in this case is very, very
11 applicable here. First, the court said, Penn Central
12 has no place here. We don't do a Penn Central analysis
13 when there's a per se regulatory taking. That's what
14 the court said.

15 You're going to hear a lot about Penn Central
16 from the City of Las Vegas here today. And the
17 United States Supreme Court said, we don't even do a
18 Penn Central analysis under these circumstances. And
19 the taking facts in that case are extraordinarily
20 instructive.

21 First, California adopted a statute that
22 allowed these labor unions to enter onto private farms
23 for up to three hours a day for 120 days a year for --
24 with notice. And so the statute said, listen, labor
25 unions have a right to enter onto farms. The labor

1 organization tried to enter onto
2 Fowler Packing Company's property, but
3 Fowler Packing Company went out there and said, you're
4 not coming onto my property.

5 So the labor unions actually didn't even
6 enter onto Fowler Packing Company's property. And the
7 court in that case held that the taking was the passage
8 of the statute that authorized the public to enter onto
9 the property.

10 So that's very consistent with what the
11 Nevada Supreme Court held. So that's one of those
12 invariable rules. The Nevada Supreme Court said, when
13 the city, or any other government entity, takes this
14 type of action to preserve property for use by the
15 public or authorize the public to use it, that's going
16 to be an invariable rules where we are always going to
17 find a taking. And that's why the court put the words
18 "per se" in front of that type of claim. There is a
19 taking in and of itself.

20 So the question will be, and I'll get to this
21 in a moment, Your Honor, is did the City engage in
22 actions to preserve the landowners' property for use by
23 the public or did they engage in actions to authorize
24 the public to use the landowners' property.

25 Turning now, Your Honor, to the next slide,

1 which says, "Per se Categorical Taking, Landowners'
2 first claim for relief." Landowners are also asking
3 for summary judgment on a per se categorical taking.
4 The Nevada Supreme Court and the United States Supreme
5 Court have been very clear on what the standard is
6 here.

7 The Sisolak court adopted it. The Hsu court
8 adopted it. And the United States Supreme Court
9 adopted this same standard in a case called City of
10 Monterey v. Del Monte Dunes. And the taking standard
11 here is a per se taking occurs whenever the government
12 engages in actions that, quote, "Completely deprives an
13 owner of all economical beneficial use of her
14 property."

15 So if the government comes to a piece of
16 property and takes actions that completely deprive that
17 owner of all economical beneficial use of the property,
18 then the court says that's a per se taking. That's a
19 taking in and of itself. There's no defenses to that
20 taking. And the taking facts in the Del Monte Dunes
21 case are very instructive.

22 Del Monte Dunes went to the City of Monterey,
23 and they said, we have residentially zoned property,
24 just like the landowners in this case, Your Honor. As
25 this Court already found, the landowners have

1 residential zoned property. They had the right to use
2 that property for residential uses.

3 In the Del Monte Dunes case, the
4 United States Supreme Court recognized that Del Monte
5 Dunes had residential zoning and the right to use the
6 property for a multi-family residential use exactly as
7 this Court found in this case.

8 Then, exactly as the facts will show in this
9 case, Del Monte Dunes went to the City of Monterey and
10 asked to develop their property for residential
11 purposes. And they were denied, denied, and denied.
12 There was denial after denial. No matter what Del
13 Monte Dunes did, the City of Monterey said, you can't
14 build.

15 And so Del Monte Dunes sued the
16 City of Monterey because there was no other economic
17 use that could be made of the property. And then,
18 ultimately, in that case, a categorical taking was
19 found, and just compensation was awarded in the amount
20 of \$1,450,000.

21 So, in conclusion on this claim that the
22 landowners are seeking summary judgment on, a per se
23 categorical taking occurs when the government engages
24 in actions that deprive a landowner of all economic
25 beneficial use of their property. And this is, again,

1 one of those invariable rules where the Nevada Supreme
2 Court says, just compensation is automatically
3 warranted and there are absolutely no defenses to this
4 taking for obvious reasons.

5 If the government engages in actions that
6 economically deprive a landowner of the use of their
7 property, that's clearly a taking. So the Nevada
8 Supreme Court said, no matter what excuse the
9 government may have for doing it, no matter this
10 ripeness argument, none of it applies, Your Honor.

11 So the final claim that the landowners are
12 seeking summary judgment on is a non-regulatory
13 de facto taking claim. And this is the landowners'
14 fourth claim for relief on the next slide. And if we
15 turn to the next page in our book here, it's actually
16 page 10 in the bottom right-hand corner, Your Honor.
17 This is the standard in the state of Nevada for a
18 non-regulatory de facto taking.

19 And if I may pause for a minute here,
20 Your Honor. This non-regulatory de facto taking
21 standard was first adopted by the Nevada Supreme Court
22 in a case called Slope v. Turner in 1977. It was
23 reaffirmed by the Nevada Supreme Court in 1988 in a
24 case called State v. Las Vegas Building Materials, and
25 reaffirmed in a case called State v. Schwartz.

1 We're very familiar with those cases.
2 Actually, Mr. Waters from our offices litigated every
3 one of those cases from 1977 forward. It's been the
4 law in the state of Nevada for over 41 years.

5 Over 41 years the law has been as follows: A
6 non-regulatory de facto taking occurs, quote, "Where a
7 property right that is directly connected to the use or
8 ownership of the property is substantially impaired or
9 extinguished."

10 That is a verbatim quote from the Schwartz
11 decision, which was adopted previously in 1977 in the
12 Slope decision, and previously in the Las Vegas
13 Building Materials decision. In fact, the Schwartz
14 case cites to the Slope decision and cites to the
15 Las Vegas Building Materials decision.

16 The facts of the Richmond Elks Hall case are
17 actually instructive here. The reason I cite to the
18 Richmond Elks Hall case is because the Nevada Supreme
19 Court reaffirmed this non-regulatory de facto taking
20 standard in a 2015 case called State v. Eighth Judicial
21 District Court. In that State v. Eighth judicial
22 District Court case in 2015, the Court actually labeled
23 this type of taking as a non-regulatory de facto
24 taking, and then cited with authority to the
25 Richmond Elks Hall case, a 1977 Ninth Circuit case.

1 And Richmond Elks Hall owned a three-story
2 building. They were using it for rent. And the
3 government stated the Richmond Elks Hall property was
4 going to be taken, but Richmond Elks Hall could keep
5 their property if it redeveloped it.

6 Richmond Elks Hall refused to do that. And then the
7 government engaged in certain other actions over the
8 years to substantially interfere with the use of the
9 Richmond Elks Hall property.

10 At the end, Your Honor, Richmond Elks Hall's
11 income was reduced to less than one-third of what it
12 was before the agency adopted its plan. That's
13 critical right there, Your Honor. Because the Ninth
14 Circuit Court of Appeals received argument from the
15 government in that case. And the government said to
16 the Ninth Circuit Court of Appeals, time out.
17 Richmond Elks Hall still can use a third of their
18 building. In order for there to be a taking, you have
19 to have a total wipeout. That's what the government
20 argued to the Ninth Circuit Court of Appeals.

21 The Ninth Circuit Court of Appeals said,
22 absolutely not, and rejected the total wipeout
23 argument, and said, Richmond Elks Hall had a
24 three-story building. They could still use a third of
25 the building, and a third of the building was still

1 being rented, but the Ninth Circuit Court of Appeals
2 said that the government in that case substantially
3 interfered with the use and enjoyment of the
4 Richmond Elks Hall property to such an extent that it
5 became a taking. And the Nevada Supreme Court cited to
6 that law as authority.

7 So, Your Honor, this next claim that the
8 Nevada Supreme Court said is an invariable rule in the
9 State of Nevada is this non-regulatory de facto taking
10 claim that says, if the landowner has a property right
11 and the government substantially interferes with that
12 property right, that's always going to be a taking.

13 Now, I want to turn to the next page.
14 Because now I want to pause with what the landowners'
15 claims are. And I want to take just a moment,
16 Your Honor, and address what the City wants you to find
17 in this case. And this is the City's incorrect taking
18 standard.

19 The City says, number one, that it has
20 discretion under petition for judicial review law to
21 deny land use applications, and, therefore, there are
22 no property rights. And, Judge, as outrageous as that
23 may sound, that's its argument, that we don't have
24 property rights anymore. We're at
25 pre-constitutional era, according to the City, that

1 because the City has petitioned for judicial review
2 discretion, there are no property rights. That's its
3 first argument.

4 Then it says, separation of powers prohibits
5 you from intervening when the City exercises its
6 discretion. That's its second part of this rule.
7 Judge, I can tell you right now, and we cited you this
8 law, the United States Supreme Court in the Monongahela
9 case expressly rejected that and said the Court has a
10 duty to intervene when the government takes property.
11 And, in fact, used this example: The court said you
12 can't leave the fox to guard the hen house. That's the
13 exact example the court used.

14 THE COURT: I mean, from a historical
15 perspective, separation of powers have never been in
16 trial courts when issuing decisions pertaining to
17 actions of the city council, county commission, the
18 Nevada legislature, and/or Congress; right? I mean,
19 really.

20 MR. LEAVITT: Absolutely, Your Honor.

21 THE COURT: They overstep their bounds, the
22 only recourse is to go to another co-equal branch of
23 government. And that would be the judiciary. In fact,
24 the President of the United States is not immune from
25 that.

1 MR. LEAVITT: And you hit it right on the
2 head, Your Honor, absolutely. And that's from the very
3 beginning. It's a late 1800s decision. And it was
4 recited in a case called Lou Colliers, which was
5 recited in another case called Seaboard Airlines, which
6 are three United States Supreme Court opinions where
7 the court rejected the separation of powers statement,
8 and the United States Supreme Court said, you can't
9 leave the fox to guard the hen house. The courts are
10 there to act as the protectors of landowners' property
11 rights. Therefore, this whole separation of powers
12 argument that the City makes is absolutely unfounded.

13 Then the third part of the City's rule is
14 that this court can only find a taking where there's a
15 total wipeout of all value of the property. I'm going
16 to put this as simply as I can, Your Honor, and no
17 disrespect to the Court, of course. There is
18 absolutely no case in any jurisdiction anywhere that
19 adopts this law. None, whatsoever. Your Honor, I
20 haven't even read a magazine article, any type of
21 persuasive authority, that adopts this rule the City
22 wants you to adopt. It's patently incorrect.

23 And the Nevada Supreme Court in these three
24 types of takings that I just went through expressly
25 rejected this argument by the City that you apply

1 petition for judicial review of law, then you apply
2 separation of powers law. Then you cherry-pick from
3 some eminent domain cases and come up with a rule where
4 no landowner would ever be paid just compensation.

5 And if I could turn to the next page,
6 Your Honor. The next page is where the Nevada Supreme
7 Court -- and I'll just quote these quickly -- four
8 times, actually, expressly rejected this total wipeout,
9 separation of powers, pure discretion argument. In
10 Schwartz v. State, the court said, listen, if the
11 government substantially impairs or extinguishes
12 property, there's a taking.

13 The Nevada Constitution was amended in 2008
14 to say that if there's a taking or damaging of
15 property -- or damaging a property, it shall be valued
16 at its highest and best use.

17 Richmond Elks Hall, which the Nevada Supreme
18 Court cited to for authority, said to constitute a
19 taking under the Fifth Amendment, it's not necessary
20 that the property be absolutely taken within the narrow
21 sense of that word to come within the protection of the
22 Constitution.

23 Here's the words. Here's what the Nevada
24 Supreme Court approved. "It is sufficient that the
25 action by the government involves a direct interference

1 with, or disturbance of, property rights."

2 So if the government interferes with your
3 property rights directly or disturbs those property
4 rights, the Nevada Supreme Court is going to find a
5 taking. And in Nichols on Eminent Domain, they
6 conclude it all. And I'll tell you even why I cite
7 Nichols.

8 So contrary to the prevalent earlier views,
9 it's now clear that a de facto taking does not require
10 a physical invasion or appropriation. Rather, a
11 substantial deprivation of a property owner's use of
12 its property may, in appropriate circumstances, be
13 found to be a taking.

14 Why do I cite Nichols? Because the Nevada
15 Supreme Court cites Nichols 13 times in their eminent
16 domain and invariable rules cases; no less than 13
17 times. That's the authority the Nevada Supreme Court
18 relies on.

19 So, Your Honor, I want to sum this up on the
20 taking law. On the next page, this is a summary of the
21 taking issues based on Nevada's three invariable rules.

22 So here's why we're here today. Here's why
23 the landowners have come here. Under the per se
24 regulatory taking, the issue is framed very succinctly
25 like this. Where the landowners had the right to use

1 their 35-acre property for residential purposes, did
2 the City engage in actions to preserve that 35-acre
3 property for use by the public or authorize the public
4 to use the 35 acres?

5 Because remember, Judge, we've already been
6 down the property interest road. This Court entered a
7 definitive ruling on October 12th, 2020, stating that
8 the landowners had the absolute right to use their
9 property for residential purposes. So the only
10 question is did the government stop that and preserve
11 it for some other use finding a -- resulting in a
12 per se regulatory taking.

13 The next claim is a per se categorical
14 taking. The question is framed just like this. Again,
15 where the landowners had the right to use their 35-acre
16 property for residential purposes, did the City engage
17 in actions to completely deprive the landowners of all
18 economic beneficial use of their 35-acre property.

19 Again, under that standard, the Court already
20 decided the property interest issue, that the
21 landowners have the legally permissible right to use
22 their property for residential purposes. So the
23 question here is did the City engage in actions to
24 prohibit them from doing that, which is the only
25 economic use of the property.

1 The final question under a non-regulatory
2 de facto taking is did the City engage in actions to
3 substantially interfere with the landowners' legal
4 right to use their 35-acre property for residential
5 purposes. Again, the property interest issue under
6 that standard has already been decided, that the
7 landowners had the legal right to use their property
8 for residential purposes. So did the City engage in
9 actions to substantially interfere with that legal
10 right?

11 If this Court answers yes to any one of these
12 issues, then a taking should be found. That's what the
13 Nevada Supreme Court held. We don't have to go into
14 this Penn Central analysis. And every one of these
15 standards, under a per se regulatory taking standard,
16 the Nevada Supreme Court said in Sisolak, we don't go
17 into Penn Central.

18 Under a per se categorical taking standard,
19 the Nevada Supreme Court said, we don't apply
20 Penn Central. And in a non-regulatory de facto taking
21 claim, the Nevada Supreme Court said, we don't apply a
22 Penn Central analysis.

23 We don't apply a ripeness analysis to any of
24 these claims because if the government engages in these
25 actions, the actions are per se takings, a taking in

1 and of themselves.

2 So, Your Honor, turning to the next slide,
3 which is slide no. 14. It's headed, "All government
4 Actions Must be Considered."

5 So I'm going to -- so I've talked about the
6 standard, Judge. And now I'm going to move to the
7 facts. But before I move to the facts, I just want to
8 point out that in the State v. Eighth Judicial
9 District Court case, 2015, the Nevada Supreme Court
10 said there's nearly infinite variety of ways in which
11 the government actions or regulations can affect a
12 property interest.

13 The Nevada Supreme Court said very, very
14 clearly that the government can do an infinite number
15 of things and that the court is required to look at all
16 of that government action. And this Court actually
17 already entered a ruling on that issue. Exhibit No. 8
18 is an order you entered in this matter previously.
19 This issue has already come up.

20 And this is what this Court held in its
21 order. Quote: "In determining whether a taking has
22 occurred, courts must look at the aggregate of all of
23 the government's action because" -- and you're quoting
24 a case here -- "the form, intensity, and deliberateness
25 of the government's actions toward the property must be

1 examined. All actions by the government in the
2 aggregate must be analyzed."

3 Therefore, Your Honor, when we're deciding in
4 this hearing today, and tomorrow if we go into
5 tomorrow, when we're deciding that issue, we have to
6 look at all of the City's actions in the aggregate to
7 decide whether any of these takings occurred.

8 And, Your Honor, I'll conclude on the law
9 here just by saying, all of that case law which we just
10 cited to is attached in this booklet for the Court.
11 It's all tabbed and highlighted for the Court if the
12 Court wishes to so look at it.

13 So, Your Honor, when we're deciding the issue
14 here today, the number one thing is to decide the
15 taking standards. We've done it. There's three
16 invariable rules. The next step is to look at the
17 facts and see if the facts fit into any one of those
18 taking standards. And then, finally, to analyze those
19 facts as they compare to the take.

20 And so, Judge, now what I want to do, now
21 that we've looked at the taking standard, I want to
22 turn to the specific facts in this case. And I want to
23 identify those facts which are most important.

24 And, Judge, if I may, I have another book
25 here that I'd like to give to the Court.

1 THE COURT: And, for the record, you want
2 adverse counsel to know what's in that book?

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

4 THE COURT: We should have them take a look
5 --

6 MR. LEAVITT: Oh, yeah.

7 THE COURT: -- and make sure there's no
8 objection.

9 MR. LEAVITT: These are the exhibits that
10 have already been submitted to the Court.

11 THE COURT: You can take a look. I won't
12 open them until you say everything is okay from a
13 defense perspective.

14 Go ahead, sir. I'm listening. I'm familiar
15 with the facts of the case.

16 MR. LEAVITT: I'm with you, Your Honor. I'm
17 going to point out the most important ones. So we have
18 this booklet right here. This is just my argument.

19 Then we have the book, which is the relevant
20 exhibits, which are the exhibits, the same exhibits, as
21 they appear on the motion. And so what I'll do is, I
22 want to first turn to the first tab, which is the
23 property acquisition.

24 Your Honor, I start with the acquisition of
25 the property because it becomes an issue, not by the

1 landowners, but by the government. There's important
2 facts that when the landowners acquired the property.
3 The first important fact is in March 2015, the
4 landowner acquired the entity known as Fore Stars,
5 Ltd., which owned five separate parcels. So when the
6 landowners acquired the entire 250-acre property --
7 and, Your Honor, I'll put this up, if that's okay.

8 THE COURT: That's fine.

9 MR. LEAVITT: This is marked as Exhibit No. 2
10 in the previously submitted exhibits to the Court.
11 It's an entire 250-acre property. And it's broken up
12 into four parts in this litigation that's pending. The
13 Court's aware of those four parts. But when the
14 landowners acquired the deed, Exhibit No. 44, lists
15 five separate parcels.

16 Then, Your Honor, in this exhibit book
17 would --

18 THE COURT: It's the 35 acres that are at
19 issue in this matter, and they were zoned R-PD7; is
20 that correct?

21 MR. LEAVITT: Absolutely, Your Honor.

22 The only facts that are before you is the
23 35-acre property. And during -- so after the
24 landowners acquired the property, they said, hey, we
25 want to go develop. They immediately started

1 developing.

2 And, Your Honor, why? Why did the landowners
3 immediately want to develop? Because they had a
4 250-acre vacant piece of property they were being taxed
5 by the City of Las Vegas as a residential property at
6 \$1 million a year, and they had significant carrying
7 costs. And so they immediately moved to develop.

8 They went to the City of Las Vegas and
9 Peter Lowenstein, who is the head planning section
10 manager at the City of Las Vegas, testified under
11 deposition oath that the City wanted the property split
12 up further into 10 parcels. And so the landowners did
13 that at the direction of the City of Las Vegas, split
14 it up into 10 parcels and began moving forward with
15 development.

16 The next tab is, "Surrounding Owners." And,
17 Your Honor, I'm not going to spend a lot of time on
18 this, but it shows why certain actions were taken in
19 this case, and so that's why it's relevant.

20 Exhibit No. 94 is the affidavit of
21 Vickie DeHart. She states in her affidavit,
22 Your Honor, lays out this foundation that when the
23 landowners went to develop the property, the
24 surrounding property owners vehemently opposed it and
25 told them, listen, you can't develop this property

1 unless you give to us 180 acres of your property plus
2 water rights for free. The landowners objected and
3 said, we're not going to do that.

4 And Exhibit No. 142 confirms that action.
5 Bob Beers, who was a councilman at the time, testified
6 under oath that he was contacted by the adjoining
7 property owners, and he was asked to have the City get
8 in the way of the landowners' rights. Get in the way
9 of their rights. He said, I'm not going to do that.
10 And because he wouldn't do that, Your Honor, "They
11 lodged a political campaign against me," is what he
12 testified to.

13 Continuing, Your Honor, to the next page.
14 The declaration of Yohan Lowie confirming what
15 happened, Exhibit No. 35. Exhibit No. 35 is
16 Mr. Lowie's deposition. He said that, "The surrounding
17 property owners demanded that I not develop my
18 property. They said I had to give them 180 acres for
19 free, plus water rights."

20 And then he said, "I needed to hand it over
21 to them for free without restrictions."

22 So look at the position the landowner is in.
23 And, Judge, you heard all of this evidence during the
24 property interest motion. The landowners worked
25 14 years to acquire the property. We have a pending

1 motion before you which lays out the due diligence that
2 was done for 14 years. The significant resources,
3 work, and effort that went into that.

4 And they finally acquire the property. They
5 move forward with development. And I don't know a
6 better way to say it, Your Honor, and these are the
7 words that the United States Supreme Court uses in a
8 case called Dolan v. City of Tigard. They said that
9 when those type of actions occur, it's like extortion.
10 That's the words the United States Supreme Court uses.

11 That you can't go to a landowner and say,
12 well, I'm only going to let you build on your 250 acres
13 if you give your adjoining landowner 180 of those
14 acres. That's the verbiage the Court used.

15 So, Your Honor, I want to move forward now
16 with the specific taking actions. With that foundation
17 laid, that the surrounding property owners vehemently
18 opposed it and that the city council members were
19 approached to get in the way of development, and that
20 Mr. Lowie himself was approached by the city council, a
21 city council member, and told him that he couldn't
22 develop unless he gave that property away, let's now
23 look at the City's actions towards the property.

24 The next one is the MDA. And I have a "1"
25 around that. The MDA is the Master Development

1 Agreement. And this testimony that I'm about to tell
2 you about, Judge, is undisputed.

3 In Exhibit 34, Mr. Lowie testified that the
4 City would only accept one application to develop the
5 35-acre property.

6 So he goes to develop his property. And the
7 City says, here's the only way you're going to be able
8 to develop the 35-acre property is through a Master
9 Development Agreement. That testimony is confirmed by
10 Chris Kaempfer, who is a 40-year land use attorney in
11 the state of Nevada.

12 Exhibit No. 48, he testified, and it's
13 highlighted here, that it was made abundantly clear to
14 him that the landowners would get a development
15 agreement for the entire property that includes the
16 35-acre property or they get nothing. That's his
17 quote.

18 Stephanie Allen, in Exhibit No. 54 in her
19 declaration stated the same thing. That they worked on
20 this, the Master Development Agreement, at length for
21 two years because that's what the City said the
22 landowners needed to do. So, Your Honor, the City
23 said, you, landowner, have one road to walk down in
24 order to develop the property, and that's through the
25 MDA application. That's the only way.

1 That's an undisputed fact. No evidence has
2 been presented by the City of Las Vegas to dispute that
3 that was the only way the City would allow development
4 of the 35-acre property. There's no affidavits.
5 There's no depositions. There's no statements on the
6 record. There's no evidence to dispute that,
7 Your Honor.

8 Turning to the next page. The landowners
9 complied and completed the Master Development
10 Agreement. Judge, that's all laid out in the briefs.
11 I'll highlight a couple things. It took two and a half
12 years to complete that.

13 The second bullet point in Exhibits 58 and 59
14 that are in this book here, Your Honor, the City
15 required at least 700 changes and 16 redrafts.

16 Those exhibits lay out all of the changes.
17 They do a comparison. And through computer they were
18 able to identify what the changes were and how many
19 they were and how many do-overs the City required.

20 Mayor Goodman even stated on the record in
21 Exhibit 54 that there were weekly meetings for two and
22 a half years with the City's department representatives
23 and hundreds of hours spent on this Master Development
24 Agreement.

25 Judge, this is the most significant

1 application that could possibly have been submitted.
2 And the City said to the landowners, that's the only
3 way you're going to be able to use your 35-acre
4 property.

5 We'll turn to the next page, Your Honor.

6 The MDA requirements were profoundly
7 excessive. This evidence shows that these landowners
8 were picked out and specifically targeted by the city
9 council.

10 Number one, Councilwoman Tarkanian, in
11 Exhibit 53, specifically stated in regards to the MDA,
12 "I've never seen a landowner have to give up that much
13 to develop their property. And I've never seen a
14 landowner agree to give up that much as part of this
15 MDA application in order to develop."

16 Again, the only avenue the City would allow.

17 Yohan Lowie is the landowner representative.
18 This is his Exhibit No. 34. Yohan Lowie, Your Honor,
19 has been developing property in the City of Las Vegas
20 for 25 years. At the last hearing that we were in
21 front of you, I don't know if you recall this,
22 Your Honor, but I laid out everything that he's
23 developed in this area, Tivoli Village, 42 of the 109
24 homes in Queensridge, Sahara and Hualapai, the
25 development at that area.

1 Your Honor, there's no single person who has
2 developed more property in this area than Mr. Lowie.
3 He actually designed and built the Nevada Supreme Court
4 building. So he has significant experience in
5 developing property.

6 Listen to what he says in his deposition.
7 "The demands by the City of Las Vegas cost us to incur
8 more than an additional \$1 million in fees and costs."

9 So, Judge, this MDA application, the
10 landowners had to do everything the City typically
11 requires, plus \$1 million.

12 He actually stated, and I believe this is in
13 his deposition testimony, that it actually approached
14 closer to \$2 million extra just because. And he did
15 it.

16 He went on to say, "Such costly and timely
17 requirements are never required."

18 25 years of developing property and he says
19 he's never had this happen before. They've never
20 required this.

21 Exhibit No. 55, Your Honor. This right here
22 is a letter that Mr. Yohan Lowie received. The City
23 met with him and said, hey, here's what you're going to
24 have to do as part of the Master Development Agreement.
25 They said, you're going to have to build a park with

1 vineyards. You're going to have to build new
2 gatehouses for the Queensridge community.

3 Judge, we learned in the property interest
4 motion that this property is not part of the
5 Queensridge community. We learned that it's entirely
6 separate from the Queensridge community. That
7 Mr. Peccole, when he built this whole area, put future
8 development on this 250-acre property and put
9 specifically in the CC&Rs that this is separate and
10 apart.

11 It can be developed. And nobody in
12 Queensridge has any rights to this property. That's
13 what we learned in our property interest motion. And
14 look at what the City is making them do. You have to
15 build brand new gates for the Queensridge community.
16 Controlled access, a park of 70 acres, 2.5-acre
17 nursery -- and this is probably my favorite -- land for
18 an equestrian facility.

19 You know what he did, Judge, that same day,
20 he signed it, dated it, and handed it back to the City,
21 said, I just want to use my property.

22 The Nevada Supreme Court in Sisolak says,
23 "Every landowner has a right to possess and use their
24 property." That's an exact quote. So he said, as the
25 Nevada Supreme Court said, I just want to use my

1 property.

2 And, Judge, despite the fact of these being
3 grossly unconstitutional exactions, he signed it and
4 said, I'll do it. I'll pay your extra million dollars.
5 I'll build the gates. I'll build the equestrian
6 facility just to approve the Master Development
7 Agreement so I can build homes on the properties.

8 But, Judge, it was taking so long and it was
9 so egregious what the City was requiring that the
10 landowner then went over and started a parallel
11 application for the 35-acre property. Your Honor,
12 that's the next section is the 35-acre property.

13 So while this Master Development Agreement
14 was being developed and the City was taking two and a
15 half years to do it. And, Judge, if I may just point
16 out, the City wrote the Master Development Agreement;
17 okay? While that was ongoing, the landowners said, we
18 want to develop the 35 acres. And that's this 35 acres
19 right here.

20 So the testimony is the landowners said,
21 let's go to the city planning department and let's ask
22 the city planning department what's the highest
23 restrictions you could possibly impose on the 35-acre
24 property to develop it. And then, guess what, put even
25 more strict restrictions on it because we want to make

1 sure this is approved. They worked with the City of
2 Las Vegas planning commission to prepare this plan
3 right here, Your Honor.

4 And if I could -- is it up? Doesn't look
5 like it's up.

6 I will point out the details just very
7 quickly on this, Your Honor. It was 35 acres. There
8 were 61 lots. The average lot size was a half acre.
9 The density was 1.7 units per acre. The R-PD7 zoning
10 allows up to 7 units per acre. But when they went to
11 the City, they wanted to make sure this gets approved
12 so they only proposed 1.7 units per acre. This is what
13 they proposed. They drafted it up. The City said, do
14 this. The landowners went and drafted it up.

15 To see how reasonable that is, Your Honor,
16 the Queensridge community has a density of 3.5 units
17 per acre. So all of the Queensridge homes that are
18 built around the 35-acre property are twice as dense.
19 There's twice as many units on the Queensridge
20 community as was being proposed on the 35-acre
21 property.

22 So those applications, all of them, are
23 prepared. They're prepared with the assistance of the
24 City's own planning department. And then what happened
25 is the City then sent this plan with all the

1 applications to all their agencies and all their
2 departments. And all their departments had an
3 opportunity to weigh in on whether this met the city
4 code requirements.

5 And let's go to the next page because this
6 gives us what the City said. This is the City's
7 planning department, Exhibit No. 74 on the next page.
8 They say just like this, the zoning is R-PD7. The
9 proposed density is allowed under R-PD7. And this is a
10 quote. "The proposal is, quote, less dense than the
11 existing R-PD7 zoning district allows."

12 Your Honor, that's entirely consistent with
13 your property interest order. You held that the
14 landowners' property is R-PD7, and they have a legal
15 right to use the property for residential purposes. So
16 did the planning department when this was submitted.

17 They went on to say, it's comparable in size
18 to the existing units. And then they said at
19 Exhibit No. 74, it conforms to all Title 19
20 requirements. It conforms to all NRS requirements.
21 And it conforms to the tentative map requirements.

22 And turning to the next page, Your Honor,
23 again at Exhibit No. 74. So what did the City's
24 planning commission recommend for this? Approval on
25 all bases, approval, approval, approval, approval.

1 Turning to the next page, which is slide
2 no. 15. This is at one of the hearings on the 35-acre
3 application. Remember Councilman Bob Beers who was
4 approached to try to stand in the way of development?
5 He said, just like this in Exhibit No. 33 at the
6 hearing, he said, I've looked at this. I've looked at
7 the city code. I've looked at the zoning. This is so
8 far inside the existing lines. That's their client.
9 The city council is the highest level at the City of
10 Las Vegas.

11 So their planning department said, this is
12 legally permissible. Their planning department said,
13 this should be approved. Their council member said on
14 the record, this is so far inside the existing lines.
15 Why was it so far inside the existing lines? Because
16 the landowners went to the planning commission and
17 said, impose as many restrictions as you can on us. We
18 just want to make sure we can build.

19 Again, Mr. Beers' statement is consistent --
20 or Councilman Beers' statement is consistent with what
21 you ruled on the property interest issue, the legal
22 right to use for residential.

23 The matter is then presented to the planning
24 commission, Exhibit No. 74, no. 16. The planning
25 commission votes to recommend approval. The matter

1 then goes to the city council on June 21st, 2017.
2 Here's what the council members say. I have to oppose
3 this because it's piecemeal.

4 Remember, Judge, what they said. Remember
5 what all the evidence, the uncontested evidence, is.
6 You can only do a Master Development Agreement to
7 develop the 35 acres. So at the hearing, three council
8 members say, I oppose it. It's piecemeal. I don't
9 like this piecemeal stuff. I don't want piecemeal. I
10 made a commitment that I wasn't going to allow
11 piecemeal.

12 Do you know, Your Honor, at that hearing,
13 there wasn't one legal basis given to deny this and
14 require the Master Development Agreement, not one legal
15 basis. They just said, we're not going to allow you to
16 develop the 35-acre property alone.

17 And then they said on the record, we're only
18 going to allow the Master Development Agreement.
19 Again, back to the Master Development Agreement
20 application.

21 So this application that the City planning
22 staff essentially prepared with the landowners that met
23 every single legal requirement, that the City had
24 absolutely no legal basis to deny, was denied by the
25 City of Las Vegas.

1 So what did the landowners do, Your Honor?
2 And, Your Honor, if you turn to page 18, I'll just
3 reference this. This is Bates stamp no. CLV_054375.
4 It's part of Exhibit No. 74. That's where
5 Councilman Kaufman made the movement to deny that
6 application.

7 THE COURT: For the record, was there an
8 objection?

9 MR. SCHWARTZ: No, Your Honor.

10 THE COURT: Just wanted to make sure. We're
11 referring to the relevant exhibit volume that was given
12 to me by plaintiffs' counsel, along with, it appears to
13 be a booklet, Landowners' Presentation of Taking Facts.

14 MR. LEAVITT: Yes. So, Your Honor, if you
15 open up Landowners' Presentation of Taking Facts to
16 page no. 18.

17 THE COURT: Go ahead, sir.

18 MR. LEAVITT: If you open up to page no. 18,
19 that's where the vote was taken, and this was denied,
20 the singular 35-acre application.

21 And let me conclude on that fact. Those are
22 important facts. The City denied what was so far
23 inside the lines. The City essentially denied what
24 could not be denied because it met every single legal
25 requirement. It met every single city requirement.

1 And it was entirely consistent with the R-PD7 zoning.
2 And it was significantly less dense than the R-PD7
3 zoning allows.

4 The best way to say it, Judge, the City
5 denied what could not be denied.

6 Then the City sent a letter to the landowner
7 explaining why. And this fits very closely into our
8 per se regulatory taking claim. It's the next page and
9 it's Exhibit No. 93.

10 The denial letter says the City denied this
11 because of the impact of the development on surrounding
12 residents. Remember the promise that was made to the
13 landowner? If you don't give us your property for
14 free, we're going to go to the City and make them stop
15 your development.

16 The City didn't even try and hide what it was
17 doing. They said, listen, we're not going to let you
18 build because the surrounding residents don't want you
19 to. And then they said, we have concerns on piecemeal
20 development of a master development planned area rather
21 than a cohesive plan.

22 So they said again on the record, we're only
23 going to allow a Master Development Agreement. Two
24 reasons for denial. We don't want to mess up the
25 surrounding property owners, and, number two, you've

1 got to go back to this, Judge, the Master Development
2 Agreement application.

3 So after -- this is a timeline, Judge. So
4 after that occurred, after the City denied the singular
5 application, the landowners then turned their attention
6 full-heartedly back to the Master Development Agreement
7 that the City promised would be approved.

8 And if you turn to page 21 of this booklet
9 here, page 21 is a public records email the landowners
10 received. It's Bates-stamped CLV_002074. Judge, you
11 and I all remember Brad Jerbic. He was the city's
12 attorney, longtime city attorney. He reported that
13 there is resolution on most matters in the entire area.

14 In other words, what he was saying there, he
15 was making reference to the Master Development
16 Agreement. This is on June 6th, 2017. We have
17 agreement, the City and the landowners. We have
18 agreement on the Master Development Agreement, on the
19 application.

20 They said, listen, it should be approved.
21 Brad Jerbic said, we've drafted the Master Development
22 Agreement. The City planning department said, we
23 participated in the Master Development Agreement. You
24 need to allow these landowners to build.

25 Turning to the next page. I mean, Judge, I

1 couldn't have said it better, Exhibit No. 77. This is
2 from the planning department on the Master Development
3 Agreement. Again, I'll preface this by saying what the
4 planning department is saying here is entirely
5 consistent with your property interest order you
6 entered on October 12, 2020.

7 The planning commission said about this
8 Master Development Agreement that it conforms to the
9 requirements of NRS 278. It conforms to the existing
10 zoning requirements. It demonstrates sensitivity and
11 compatibility with the adjacent single-family
12 residence.

13 Then goes on to say that it even is
14 consistent with the goals, objectives, and policies of
15 the Las Vegas Master Plan. So they said, this is
16 consistent not only with zoning, but it's absolutely
17 consistent with the city's master plan. This is the
18 City speaking. This isn't an attorney arguing. These
19 are substantive facts that were given by the City's own
20 agents and representatives.

21 And then they said, therefore, it should be
22 approved. Again, entirely consistent with your
23 property interest order.

24 And, Your Honor, the planning staff and the
25 city attorney's office recommended approval of this

1 Master Development Agreement because it was, again, so
2 far inside the lines, and the landowner agreed to every
3 single outrageous demand that was made at every single
4 step, costing him an extra million dollars in
5 application fees.

6 Turning to the next page, Your Honor, is
7 Exhibit No. 78. The matter is presented to the city
8 council on August 2nd, 2017. The city council denied
9 the MDA in its entirety.

10 So, Your Honor, I just got to point this out.
11 The City says, we'll only allow you to develop one way.
12 The City imposes every single outrageous requirement it
13 could impose on the landowner. The landowner does
14 every single thing the City says. The City, for the
15 most part, drafts the Master Development Application.
16 The city attorney's office says, it must be approved.
17 The city planning department recommends approval. And
18 it goes in front of the city council. In
19 Exhibit No. 78, the city council flat out denies it.

20 It is its own application. The City denied
21 its own application for developing the 35-acre
22 property. And then Exhibit No. 34 is Mr. Lowie's
23 declaration. He says, the City didn't ask us to make
24 more concessions. The City didn't ask us to do more
25 setbacks. The City didn't ask us to reduce the units

1 per acre. It just simply rejected the MDA all
2 together.

3 Two and a half years of work, all of the
4 regular application fees, over a million dollars in
5 extra fees, doing every single thing the City asked
6 them to do, the City drafting it, and then they denied
7 it.

8 Your Honor, that's uncontested. The City
9 doesn't contest that these things happened. The City
10 doesn't say anywhere in the pleadings that there was
11 another application that we gave the landowners to
12 apply for. The City doesn't say in the pleadings that
13 it didn't require these outrageous requirements.
14 Remember Councilwoman Tarkanian said, I've never seen
15 any landowner do this much to try to develop their
16 property, never. She's a well-seasoned councilwoman.

17 And it was denied.

18 So just up to this point, Judge, the City
19 said, you have one avenue to go down, the MDA. The
20 landowners went down it. They tried to do a singular
21 application. It was denied. When the City said, you
22 can't do a single application, you have to do an MDA,
23 the landowners moved back to the MDA, and it was
24 denied. The City closed the only doors to development
25 that the landowners had according to the City itself.

1 Turning to the next tab, Your Honor, the
2 landowners then apply for access. The next tab is
3 Exhibit No. 88. It's a map. And this map identifies
4 in yellow here, Judge, this is Hualapai Way right here.
5 It identifies three access points right here, two on
6 Hualapai way and one on Rampart. And on the right-hand
7 side is the application.

8 The landowners say, listen, we want access
9 from Hualapai Way to allow our trucks to go in and cut
10 the trees down, remove debris and soil and have testing
11 equipment on our property. You want to know why they
12 were doing that? Because you know what was happening
13 during the time the City wouldn't let them build? They
14 were sending out code enforcement repeatedly to the
15 property and citing the landowner. Fine. Give me
16 access so I can get my trucks on there to clean it up.
17 That's all he wanted to do.

18 Exhibit No. 88. Turning to the next page,
19 no. 26. This shows why, another reason why, this was
20 so critical. The Nevada Supreme Court in the Schwartz
21 v. State case, said that all Nevada landowners have
22 property right described as a special right of easement
23 in and a public road for access purposes.

24 You can't tell these people they can't use
25 this because they have a property right. And it's

1 called a special right of easement. When your property
2 abuts a road, you, in Nevada, have a special right of
3 easement to use that property according to the Nevada
4 Supreme Court in Schwartz v. State.

5 In interrogatories that were submitted in
6 this case, the City conceded that the 250-acre land had
7 general access along Hualapai Way, along Alta, and
8 along Rampart. They conceded that in interrogatories.

9 And, Your Honor, an access application is a
10 perfunctory application. I don't know if that's the
11 best way to say it, a boilerplate application. Since
12 you have a legal right to access roads, you simply go
13 give it to the City. The City gets it, they analyze
14 it, and they give it to you back over the counter. You
15 pay your fee. Not what happened here.

16 The next page is the City's denial letter,
17 Exhibit No. 89. And this denial letter says it all
18 again, Judge. It says, "This has the potential to have
19 significant impact on the surrounding properties,"
20 taking us, again, back to where we started. The
21 surrounding property owners contacted the City and
22 said, preserve that property for us. That's
23 Exhibit No. 89.

24 Now, the government has an excuse here that
25 they try and use. This letter itself, Your Honor, uses

1 the word, "Your access is denied." Then it goes to the
2 bottom and it says, but you can go through what's
3 called a major review process if you want.

4 Judge, we've submitted to you the
5 requirements of a major review process. That's what
6 you need to do when you build a Bellagio. That's the
7 major review process. This is an over-the-counter
8 application.

9 And what the City says, well, we didn't deny
10 you because we gave you an avenue to get your access,
11 which was the major review process, which requires
12 significant plans, planning meetings. You have to go
13 to the planning commission. You have to go to the city
14 council and everybody gets to show up and oppose it.

15 And they say, that's okay. And we put an
16 example in our brief. That's the equivalent of saying,
17 listen, we haven't denied you the right to vote. We
18 just made you walk or hike 50 miles to vote. And if
19 you don't want to hike 50 miles up a mountain to vote,
20 that's your fault. When you put impermissible barriers
21 in front of a Constitutional right, such as the right
22 to vote or the right to access your property, it is the
23 equivalent of a Constitutional denial.

24 And to come to this Court and say, we didn't
25 really deny them their access, we just told them they

1 had to go through the same process the Bellagio has to
2 go through to exercise their access rights, is not an
3 excuse, Your Honor.

4 Turning to the next page is a fence
5 application. The fence application, Your Honor, I
6 cite, to begin with, from Cedar Point Nursery. It's
7 this one right here. At the top it says, "Fence
8 Application." The reason I cite to Cedar Point Nursery
9 is that's one of the cases we have in our binder. This
10 case was just decided two months ago by the
11 United States Supreme Court.

12 The United States Supreme Court said, "The
13 right to exclude is one of the most treasured rights of
14 property ownership."

15 They went on to say, "We've stated that the
16 right to exclude is universally held to be a
17 fundamental element of a property right and is one of
18 the most essential sticks in the bundle of rights that
19 are commonly characterized as property."

20 So when we're looking at the landowners'
21 property right here, the most essential stick is the
22 right to exclude others and keep them off of your
23 property. Whether it's your home, whether it's your
24 car. And we see that, Your Honor, in the Fourth
25 Amendment, where you can't engage in unreasonable

1 searches and seizures because we don't want people --
2 we don't want the government going into our property.

3 And this is what the United States Supreme
4 Court was saying here. That is one of our most
5 treasured rights is the right to exclude others from
6 property.

7 And, Your Honor, Exhibit No. 91, is an
8 application the landowners filed. And they asked for
9 two things. They said, we want to put a fence or a
10 gate or barrier, whatever you want to call it, we want
11 to put a fence all around our property. We don't want
12 people using it anymore. At this time, significant
13 people were using it. And I'll get to that in a
14 moment.

15 So in Exhibit 91, this said, we want to put a
16 fence around this. And, importantly, specifically on
17 the 35-acre property, Your Honor, there was a pond
18 right here. You can see it if you drive by. There's a
19 massive pond. It had water in it. And they said in
20 the application, we want to put a fence around the pond
21 so people don't fall in it and die. And we want to put
22 a fence around the whole property so we can exclude
23 other people.

24 Same thing happened, Judge, Exhibit No. 92.
25 Well, your fence has the potential to have an impact

1 on, who, the surrounding property owners. How is the
2 only way this fence --

3 THE COURT: Fencing with a pond like that
4 could be looked upon as a premises liability issue.

5 MR. LEAVITT: Judge, that's exactly what
6 happened. Is our client contacted us and said, listen,
7 we've got a liability issue here. We want to fence
8 this pond. What did the government tell them?

9 THE COURT: We have nuisance laws and things
10 like that. I get that.

11 MR. LEAVITT: But, importantly, Your Honor,
12 not only did they want to protect other people from
13 falling in the pond and becoming -- well, drowning --

14 THE COURT: I'd be concerned about young
15 people, you know, children.

16 MR. LEAVITT: And, Your Honor, we've
17 submitted the affidavit of Don Richards where he has
18 hundreds of pictures showing --

19 THE COURT: They have ordinances specifically
20 dealing with that when it comes to swimming pools and
21 latching gates.

22 MR. LEAVITT: And that's what was happening
23 on the property. Young people were entering onto
24 property.

25 THE COURT: I should say self-latching gates.

1 MR. LEAVITT: Understood, Your Honor. Young
2 people were entering on the property, kids riding their
3 motorcycles, kids riding their bikes, people walking
4 through the whole property. We submitted the affidavit
5 of Don Richards which has those photos. So we wanted
6 the property to be secure.

7 But, again, to be able to put a fence around
8 the whole property gives the landowner the right to
9 exclude others. And the City sent a letter: It has
10 the potential to have impact to the surrounding
11 properties.

12 Judge, how could a fence being put up around
13 your property impact the surrounding property owners?
14 There's only one way. It keeps them off the property.
15 And the City didn't want the landowners to be able to
16 keep the adjoining owners off the property. We have a
17 bill to that effect.

18 Your Honor, that's Exhibit No. 92 that I was
19 just referring to.

20 Now, an interesting fact we found,
21 Your Honor, through a public records request. So this
22 fence -- it's an important date. That fence
23 application was denied on August 24th, 2017. The
24 access application was denied on August 24th, 2017.

25 Judge, let's turn to the next page. This is,

1 again, a behind-the-scenes email that we obtained
2 through a public records request.

3 I'll identify it as CLB06391. And this is an
4 email amongst the City personnel three days before the
5 fence application and the access application were
6 denied. The date is August 21st, 2017. Let me read
7 it. "Follow-up with Councilman Seroke regarding the
8 Badlands fence permit that we just went through. Want
9 to take action on Monday after to find out Councilman's
10 conversations went over the weekend regarding the
11 permit."

12 Why is that important? Because three days
13 before these permits were denied, three days before the
14 City wrote a letter saying, your access is denied, your
15 fence is denied, we have an email showing that red
16 flags were going up at the City. For a fence, for an
17 access, you've got to call a councilman, find out how
18 his conversations went over the weekend.

19 And, Judge, we know how the conversations
20 went on August 21st, 2017. Because on August 24th,
21 2017, the fence permit and the access permit were
22 denied. Again, showing specific action by the City of
23 Las Vegas to target this one landowner and treat them
24 differently than anybody else.

25 Which brings us to Bill No. 2018-24,

1 Your Honor.

2 I want to address three things about this
3 bill. It's attached as 107 and 108 to our exhibits.
4 But I want to give a little background first. A city
5 councilwoman, in describing this Bill No. 2018-24,
6 which was adopted in 2018. Judge, this is after the
7 City denied this application. It's after the City
8 denied the MDA.

9 That councilwoman says, "For the past
10 two years, the City has been embroiled in controversy
11 over Badlands. And this Bill 2018-24 is a latest shot
12 in a salvo against the land developer."

13 Judge, I had to look up "salvo." Didn't know
14 what it meant.

15 THE COURT: I know what it means. It's like
16 a broadside. I know what it is. It's a shot across
17 the bow. I know.

18 MR. LEAVITT: And she said, this is just the
19 latest shot. Then she goes on to admit on the record,
20 this bill is for one development, one development only,
21 it's only about the Badlands. Judge, that's
22 Exhibits 114, 115 and 116.

23 Stephanie Allen works for Chris Kaempfer.
24 She has been a land use attorney for over 17 years.
25 She stated this in her declaration. She did an

1 analysis of this bill. This is the only expert report
2 in the record on this bill. It's Exhibits 111, 112 and
3 110. It's a 365-page expert analysis that concludes,
4 consistent with what the councilwoman said, that this
5 Bill No. 2018-24 targets only the landowners' property.

6 Judge, a United States Supreme Court Justice,
7 Justice Stevens, in his opinion in the Lucas case said,
8 when the government targets one landowner, it makes,
9 quote, "The taking action" -- sorry -- the taking
10 action, quote, "much more formidable for obvious
11 reasons."

12 When the government adopts bills and laws and
13 ordinances, we expect the government to adopt those to
14 apply equally to all people, but it was admitted by the
15 councilwoman. And the only expert report on this issue
16 produced states, this bill was adopted with one
17 property owner in mind, and it applied to one property
18 owner, this 250-acre property.

19 That is unheard of. I have never heard of a
20 government adopting a law to target just one landowner,
21 but that's exactly what happened here, Judge. And it
22 is uncontested. We don't have anything from the City.
23 We don't have an affidavit. We don't have a
24 deposition. We don't have a citation to anything in
25 the record that even contests that the City did this.

1 The next page, Your Honor, is 34.

2 Then he goes to the requirements that the
3 City put in its bill. And, Your Honor, this clearly
4 shows that the City was preserving the property under a
5 per se regulatory taking. Why?

6 Your Honor, this is just a summary of some of
7 the requirements the City put in the bill that apply
8 only to this landowner. And, Your Honor, these
9 requirements are put in the bill before a development
10 application can even be submitted. Do you know any
11 landowner that's going to go through and spend millions
12 of dollars to do these things before they can even
13 submit an application?

14 Let me point out one of them because this
15 shows the impossibility of developing under
16 Bill No. 2018-24. Remember, Your Honor, the landowners
17 in 2017 submitted the Master Development Agreement and
18 it was denied. Well, the City put in Bill 2018-24 that
19 the only way the landowner could build was through a
20 Master Development Agreement. It had already been
21 denied.

22 That was a clear shot across the bow to the
23 landowner. We've already denied your development
24 agreement, and we're going to make you get a
25 development agreement that we already denied. Clear

1 and unequivocal communication to the landowner that no
2 matter what you do, you're not going to build.

3 Then look at the bottom. This is maybe the
4 most disturbing part of this bill. After requiring all
5 this, then it says, "and anything else the city
6 planning department may determine are necessary."

7 Judge, how many times have we looked at bills
8 and ordinances that are vague and ambiguous and we call
9 them unconstitutional. That could not be more vague
10 and ambiguous than after listing about 50 things the
11 landowner has to do, and then adding on there, hey,
12 anything else we may make you do.

13 The next page, Your Honor, is a critical
14 page. It's page no. 36, I believe. Let me make sure,
15 Judge. Page no. 35.

16 This is Section G of 2018-24. So this bill
17 not only preserves this property and prohibits the
18 landowner from building on it, then it goes so far to
19 say that the landowner, again, the only one that this
20 bill applies to, must provide documentation regarding
21 ongoing public access and to ensure that such access is
22 maintained.

23 I mean, Judge, have we ever seen a bill like
24 that, where the government says, you've got to let the
25 public go onto your property? You know where we saw

1 that bill? Was at Cedar Point Nursery, where the state
2 of California said to the farmers, you have to let the
3 labor unions go onto your property.

4 You want to know the difference between that
5 one and this one? Is the labor unions could only go
6 onto the farms in California 120 days out of the year
7 for a few hours a day and upon notice.

8 There's no such limitation here. 24/7,
9 anybody who wants to go onto the property, this bill
10 says the landowners have to allow it.

11 Now, I already know what Mr. Schwartz is
12 going to say. He's going to say, Judge, that's in
13 Section G and we did not enforce Section G against the
14 landowner.

15 With the Court's permission, I'd like to turn
16 to Exhibit 108 in the exhibit booklet.

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

18 MR. LEAVITT: Exhibit 108. The very first
19 page of Bill No. 2018-24 says, "Any proposal to
20 repurpose a golf course and build on it is subject to
21 the public engagement requirements set forth in C and
22 D, as well as pertaining to the development review
23 process" -- and carrying over to the next page -- "the
24 development standards and the closure maintenance plan
25 set forth in E and G."

1 That preamble to that bill says to this one
2 landowner, to whom this whole bill applies, that if
3 you're going to try to use your property, Section G
4 applies to you. And Section G expressly states, you
5 have to allow ongoing public access to your property.

6 So I'll conclude with these bills,
7 Your Honor. They do three things. Number one, they
8 target only the landowners' property. Number two, they
9 make it impossible to build, in other words, preserve
10 it. And then, number three, they require the landowner
11 to allow ongoing public access.

12 Your Honor, I want to move to the next tab.
13 I'm actually getting kind of close to being done with
14 the facts here.

15 The next tab is "Public Use." This is
16 Exhibit No. 136.

17 A councilman -- one of the city councilmen
18 goes to an HOA meeting for the Queensridge community.
19 And we've laid this out, Judge. I'll just cite one of
20 the quotes. We have several quotes from that meeting.
21 That councilman says, it's agreed upon, approved,
22 documented, required by the City. And then goes on to
23 say that this property here, the landowners' 250-acre
24 property, is open space and recreation area for this
25 part of the City of Las Vegas.

1 What does "recreation area" mean? It means
2 you can go onto the property and recreate. That's the
3 only thing recreation can mean. Which is consistent
4 with what the City did with Bill No. 2018-24. In
5 2018-24, Judge, the City said, you, the landowner, have
6 to allow ongoing public access to the property.

7 And, Judge, to be clear, that Bill 2018-24
8 went through a recommending committee, and it was
9 presented to the city council, and the city council
10 adopted it as its law.

11 Then we've submitted Exhibit No. 150, which
12 is Don Richards' affidavit. Don Richards -- I'll just
13 paraphrase here, Your Honor -- Don Richards is the
14 landowners' manager of the property.

15 Here on page 37, I've summarized or I quote
16 from his declaration, Exhibit No. 150. He says,
17 listen, I'm stopping these people. People are coming
18 on the property and I'm stopping them and asking,
19 listen, why are you here? They said, it's our open
20 space.

21 And some of them informed him that they
22 learned that from the councilman at the HOA meeting who
23 told them, hey, guys, this is your property to recreate
24 on, which was consistent, again, with Bill No. 2018-24
25 that the City had adopted.

1 And if you flip to the next page, Your Honor,
2 here it is. Hundreds of photos like this.
3 Skateboarders, motorcyclists, looks like families out
4 there walking, riding bicycles on the property.

5 And keep in mind, again, the City won't even
6 allow the landowner to fence it or protect the ponds
7 when this was happening on his property. All
8 authorized by the City of Las Vegas.

9 Your Honor, I want to turn to the next slide,
10 which is the 133-acre application. And, Judge, I want
11 to be clear here. The 133-acre application is separate
12 from the 35-acre application. I only want to briefly
13 mention this to further demonstrate what the City was
14 doing to the landowner.

15 The landowner submitted all applications
16 necessary to build on the 133-acre property and the
17 planning staff agreed that it should be approved.
18 That's Exhibits 101, 102, and 103. But the City
19 demanded that the landowner file, on this 133-acre
20 property, an application called a GPA application.

21 The landowner said, listen, I don't have to
22 file a GPA application, that's called a general plan
23 amendment application, because I have zoning. Your own
24 planning staff tells me I have zoning, which is R-PD7,
25 which means I can use the property for residential

1 purposes. But they say, you're not going to get any
2 applications done unless you file a GPA.

3 So he does it. And under protest, submits a
4 letter, Exhibit 182, with that application saying, I'm
5 going to do the GPA, but it's going to be under
6 protest.

7 Then he shows up at the hearing. And one of
8 the council members, before the applications were even
9 heard, before the landowner could even get up out of
10 his seat and go to the podium, says, Mayor, I'd like to
11 call a question at this time. I believe we've
12 established that the GPA is duplicative and the GPA
13 should not have been accepted, and then uses that as a
14 reason to strike all the applications.

15 So they made him file a GPA application that
16 he filed under protest, that he didn't think he should
17 have to file, and then they use that application as a
18 reason to strike all of the applications to develop the
19 133-acre property that the City's own planning staff
20 said should be approved.

21 Further just demonstrating the aggressive and
22 the systematic actions that the City was engaging in to
23 target this one property.

24 Judge, those are the facts. But I want to
25 conclude here on the facts with what was happening

1 behind the scenes. And that's the target facts. I'll
2 go through these quickly, Your Honor.

3 Page 42. On January 9th, 2018, in the heat
4 of all this, after the City denied all the
5 applications, Exhibit No. 144 is an email where the
6 City identifies \$15 million of City funds to purchase
7 the property. They then go on to say, in
8 Exhibit No. 128, again, September 26, 2018, at or about
9 the time Bill 2018-24 was adopted to stop all
10 development. Identified in that email a proposal
11 regarding acquisition and rezoning of green space land,
12 the 250-acre property.

13 On March 27th, Your Honor, the next one,
14 Exhibit No. 123, just a politically charged statement,
15 Your Honor, an entirely inappropriate statement. Won't
16 even go over it.

17 Exhibit No. 124, this is February 14th, 2017.
18 This is before the applications are even before the
19 city council. "Over my dead body will the property be
20 developed."

21 May 1st, 2017, Exhibit 122. "I'm voting
22 against the whole thing."

23 They don't even know what's before them yet.
24 They don't even have this. No matter what the
25 landowner brought, they said, I'm voting against the

1 whole thing. And the majority is standing in his path.
2 Those are Exhibits 122 and 126.

3 Going to the next page, again, behind the
4 scenes. Exhibit No. 122 is an email. Again, we
5 obtained these through a public records search where
6 they say, Speak in code because the landowners will try
7 and find out what we're doing. And we want you to
8 speak in code because if you don't use the word
9 "Badlands," you don't use the word, "take," that's how
10 the search works and they won't be able to find these.

11 Another councilman tells them not to use the
12 city's email address, Exhibit No. 122.
13 Exhibit No. 127, Any word on your private investigator
14 about the Badlands guy? They got a private
15 investigator. And they said in 127, Dirt will be handy
16 if I need to get rough.

17 Judge, I've been recently watching the
18 Muhammad Ali special, PBS. Judge, this wasn't the
19 "Thrilla in Manila." This wasn't the "Rumble in the
20 Jungle." This was a guy going out here who just wanted
21 to use his property that all city agencies said he
22 should be able to do. And they're hiring private
23 investigators to try to get dirt on him so they can get
24 rough with him?

25 When he went to the City and said, all I want

1 to do is build on a property that I have the legal
2 right to build, that's what was happening behind the
3 scenes, Judge.

4 And on the next page, it shows further how
5 the landowners were singled out. Judge, this is
6 Stephanie Allen's declaration on the site. It's
7 Exhibit No. 195. In no. 12 in her declaration. Listen
8 to this evidence. Remember what Justice Stevens said.
9 If a landowner is targeted by the government, that
10 makes the taking action much more formidable.

11 Stephanie Allen: "I've presented thousands
12 of applications to local agencies, including the City
13 of Las Vegas. I cannot recall an application that I've
14 handled being denied when the development proposal was
15 allowed as a matter of right under the existing
16 zoning."

17 The City's own planning staff said that was
18 allowed as a matter of right under their zoning. That
19 was the only one in 17 years of thousands of
20 applications that she's had that the City denied, that
21 any government entity denied.

22 She then goes on to say, "I've presented
23 approximately 10 development agreements before various
24 agencies, including the City of Las Vegas, and I can't
25 recall a development agreement being denied when the

1 written agreement had been agreed to and negotiated in
2 good faith between the parties."

3 She's only done 10 of them because they're so
4 extensive. They take two to three years to do. Judge,
5 never had one denied except this one. Clearly showing,
6 again, that the City of Las Vegas was targeting this
7 one landowner.

8 On the right-hand side of that exhibit is
9 Exhibit No. 94, again referring back to Vickie DeHart,
10 where we started, Judge, where the adjoining property
11 holders told the landowners, we're politically
12 connected and we're going to get the City to stop you
13 from developing. And, Judge, what we just went through
14 showed that happened.

15 Last email, Exhibit No. 133. June 27th,
16 2017, interoffice city email that we received through a
17 public records request. "If anyone sees a permit for
18 grading or clear grub at the Badlands Golf Course,
19 please see Kevin, Rod, or me. Quote: 'do not permit
20 without approval from one of these.'"

21 Again, showing the targeting actions of the
22 City of Las Vegas treating this landowner separate and
23 different from all other landowners.

24 Judge, we'll end on the facts with this.
25 Just a little graph we put together. These are the

1 taking actions on the 35-acre property. On the
2 left-hand side is the denial of the Master Development
3 Agreement. On the right-hand side is the denial of the
4 35-acre. On the left bottom is the denial of a safety
5 fencing and access. And on the right-hand bottom is
6 the adoption of the Yohan Lowie Bill.

7 You know a council member called Bill No.
8 2018-24 the "Yohan Lowie Bill", a representative of the
9 landowner, because they knew it only applied to these
10 landowners.

11 Those four facts, standing alone, amount to a
12 taking. But when you look at the aggregate of actions,
13 when you put all four of those facts together,
14 including all of the other actions that the City
15 engaged in, which are in small print there, Your Honor,
16 that's clearly a taking by the City of Las Vegas.

17 Judge, what I want to do is I want to close
18 down here. And I want to -- I want to just refer back
19 to the law and how these facts applied under each one
20 of these takings standards we started with.

21 THE COURT: Madam Court Reporter, are you
22 okay? Do you need a break?

23 THE COURT REPORTER: Whenever he's done.
24 It's fine.

25 MR. LEAVITT: I'll be 10 more minutes.

1 So now I want to apply the facts and go back
2 to the per se regulatory taking. This is the
3 landowners first claim for relief. The very narrow
4 issue here today is where the landowners had the right
5 to use the 35-acre property for residential purposes,
6 did the City engage in actions to preserve the 35-acre
7 property for use by the public?

8 Your Honor, the facts are as follows. The
9 35-acre application denial letter expressly said that
10 the City was denying the 35-acre application to develop
11 because of impact to surrounding landowners, that the
12 property was being preserved for them.

13 The master development denial, Your Honor,
14 for the whole property. The City made it very clear
15 during that process that it was denying the application
16 to preserve that property for the surrounding
17 landowners.

18 And the access denial letter, Exhibit No. 89.
19 The City put right in the letter that it's denying the
20 access because of impact to surrounding property
21 owners.

22 Exhibit 92, the fence denial letter. The
23 City said, we're denying this because of impact to
24 surrounding property owners.

25 Your Honor, if I may refer to Mr. Kaempfer's

1 affidavit, Exhibit No. 48, and paragraph 12. Again,
2 Mr. Kaempfer is a 40-year land use attorney. And in
3 his declaration he lays out the 17 meetings he had with
4 the City on the Master Development Agreement, all the
5 work he did, everything he did to develop this
6 property.

7 And in no. 12 he says that the City made it
8 clear that only a Master Development Agreement was
9 going to be approved. And then he said it would not be
10 approved unless all, virtually all, of the surrounding
11 property owners agreed. And then he said the
12 surrounding property owners made it abundantly clear
13 that they were going to stand in the way of
14 development.

15 And so Mr. Kaempfer made it very clear in his
16 declaration that the Master Development Agreement was
17 denied. Why? To preserve the property for the
18 surrounding landowners.

19 Bill Nos. 2018-5 and 2018-24 are also
20 relevant to this taking standard because they authorize
21 the public to use the private property. Remember,
22 Judge, if the landowner has the right to build on their
23 property and the government preserves that property for
24 use by the public, or authorizes the public to use the
25 property, that's a taking.

1 And we just read in Bill No. 2018-24 where
2 the City put it in writing that the landowners have to
3 allow ongoing public access to their property. Those
4 facts right there, Your Honor, meet this per se
5 regulatory taking standard. This is a taking in and of
6 itself. This is one of those invariable rules where
7 the Court is going to always find a taking.

8 And, Judge, to conclude on that list there,
9 we have the transcript from the HOA meeting where the
10 councilman expressly said, you can go on the property.
11 We have Don Richards' affidavit that people were
12 actually entering onto the property at the direction of
13 the City of Las Vegas.

14 Just like it was a per se regulatory taking
15 in the Cedar Point Nursery case to adopt a statute that
16 authorizes the labor unions to enter onto farms,
17 adopting Bill No. 2018-24 authorizing the public to
18 enter onto the property was also a taking, in addition
19 to the significant actions to preserve the property for
20 the surrounding property owners.

21 Judge, I'll be quick on this next one, the
22 per se categorical taking, the third claim for relief.
23 Again, going back to the law. The issue is where the
24 landowners have the right to use their 35-acre property
25 for residential purposes, did the City engage in

1 actions to completely deprive the landowner of all
2 economic beneficial use of their 35-acre property?

3 Here's the facts.

4 The City denied all landowner applications to
5 use the 35-acre property for a residential use, which
6 it is uncontested, is the only economically beneficial
7 use permitted under zoning. That's the only economic
8 beneficial use. The government tries to argue that a
9 golf course is its economic use.

10 Judge, we have an expert report from Elite
11 Golf. We have an expert report from Tio DiFederico.
12 Both saying the golf course was not an economic use.
13 And we have the letters from the individual at Par 4
14 who was operating the golf course before, who quit even
15 though they were offered water for free and the land
16 for free because it was uneconomical.

17 The only economic use of the property is
18 residential, and the City prohibited that economic use.

19 But that wasn't, apparently, good enough for
20 the City because the City, Judge, sent the tax assessor
21 out. This is such -- so inconsistent. They sent the
22 tax assessor out. The tax assessor, under
23 Chapter NRS 361.227, is required to determine the
24 lawful use of the property, and he does that.

25 He says, the property is zoned R-PD7. R-PD7

1 means you have the lawful right to use it for
2 residential. Therefore, I'm going to value it as a
3 residential use, and I'm going to put an \$88 million
4 value on the whole property. And you're going to get
5 taxed a million dollars for residential use. That's
6 specific to the 35-acre property, you have to pay
7 \$205,227.22. It has a negative value.

8 Judge, not only has there been a denial of
9 all economic viable use of the property, they're going
10 to put a negative value because the landowner has been
11 prohibited from using it for a residential purpose, all
12 the while the City is taxing the landowner \$205,000 as
13 if it was a residential use.

14 So, Your Honor, that per se categorical
15 taking standard is met. It is a taking in and of
16 itself. And it's that invariable rule.

17 The last one is a non-regulatory de facto
18 taking, the fourth claim for relief. This one,
19 Your Honor, the issue again: Did the City engage in
20 actions to substantially interfere with the landowners'
21 right to use the 35-acre property for residential
22 purposes?

23 Number one, the City denied all landowner
24 applications for residential use, its only economic
25 use. And then, Judge, the City adopted two bills, two

1 bills that targeted the property, prohibited its
2 development, and required ongoing public access.

3 So, Judge, on that last taking claim,
4 non-regulatory de facto taking, the landowners have
5 just two important facts: The landowners had the legal
6 right to use their property for residential, and the
7 City substantially interfered with that right.

8 And I want to say something about the Nevada
9 Supreme Court here. The Nevada Supreme Court didn't
10 say, listen, every interference with the use of your
11 property is a taking. They said, you have to show a
12 substantial interference.

13 Judge, I don't think -- I think under the
14 "reasonable person" standard that we apply in
15 everything in the law, any reasonable person would say
16 what the City did to these landowners was a substantial
17 interference with the use and enjoyment of the
18 property.

19 What more could the City have possibly done
20 to the landowners than deny all applications as a
21 shield and then pull out a sword and go on the
22 aggressive against the landowner, as one council member
23 called it, a salvo, and adopt a bill to prohibit the
24 development.

25 I'll close by this, Your Honor. These

1 landowners are developers. They don't buy land to sit
2 around and have it be vacant. They did every single
3 thing the City asked them to do to develop, under this
4 Court's standard that they had the right under zoning,
5 under City planning's standard that they had the right
6 to develop. They did every single thing they were
7 asked to do, more than any other landowner, Your Honor,
8 and they were denied at every single turn.

9 And there were bills adopted that only target
10 them. And, Judge, today this property lays vacant.
11 The 35-acre property lays vacant without a shovel of
12 dirt turned since their acquisition on March 2015, over
13 six years ago, Your Honor.

14 I don't know what better facts there can be
15 than a developer doing everything they can, a
16 well-known developer in this area, and the property
17 being vacant today solely as a result of the government
18 action, Your Honor.

19 Therefore, we ask that the Court enter a
20 taking on all three of these per se invariable rules.
21 And I'll close by this. We don't even get to
22 Penn Central, Judge. And the reason we don't is
23 because Penn Central doesn't apply in any one of these
24 three.

25 Your Honor, I can answer any questions you'd

1 like, if you want me to, on any of these taking facts
2 or the law.

3 THE COURT: Sir, for the record, I have no
4 questions at this time. We'll take a quick 15-minute
5 recess.

6 (Whereupon, a recess was taken.)

7 THE COURT: Everyone may be seated. All
8 right. I guess we can continue with arguments. And we
9 can hear from the City.

10 MR. SCHWARTZ: Your Honor, with the Court's
11 permission, Mr. Molina will be presenting the facts and
12 then I, Andrew Schwartz, will be presenting the legal
13 argument for the City.

14 THE COURT: And, sir, that's fine.

15 Any objection to that?

16 MR. LEAVITT: No, Your Honor.

17 THE COURT: All right.

18 Sir, you have the floor.

19 MR. MOLINA: Thank you, Your Honor. I hope
20 it's okay -- can I move this television?

21 THE COURT: Sir, wherever you want to put it,
22 I have no problem with that.

23 MR. MOLINA: So I'm going to walk you through
24 the evidence. And I want to set the record straight on
25 a number of things that the City takes issue with,

1 virtually all of the factual claims that the plaintiffs
2 made in this case. And the best way for me to do that
3 is to go in chronological order.

4 And this may take some time, but I think it's
5 important and necessary to actually walk through the
6 issues in the proper order so that the Court has the
7 right understanding of how things transpired. Because
8 it's very easy to take things out of context and make
9 it seem like there's some kind of evil plot to deny
10 Mr. Lowie the right to build this property.

11 The basic issue here is he has no right to
12 develop the property unless he follows the proper
13 applications and procedures for obtaining the correct
14 entitlements to carry out the development that he
15 wants. And it's just like you have a Constitutional
16 right to travel, doesn't mean that you have a
17 Constitutional right to drive a car without applying
18 for a driver's license.

19 So we're going to walk through some history
20 here. We're going to talk about the legislative
21 history between -- behind NRS 278, which is the
22 planning and zoning law. Then I'm going to talk about
23 the history of Las Vegas zoning regulations because I
24 think it's important to understand what happened here
25 with respect to R-PD7 zoning.

1 And the reason why that's important because
2 it's not --

3 THE COURT: I do have one question regarding
4 the R-PD7 zoning. Why did they tax it?

5 MR. MOLINA: So I can answer that in the
6 order or I can answer it now. But --

7 THE COURT: Whenever you feel it would be
8 appropriate.

9 MR. MOLINA: What happened is this. So under
10 NRS Chapter 361.8 -- I could be getting the chapter
11 wrong -- the state allows for a reduced assessment for
12 open space and golf course uses. And what happened is
13 that after the 17-acre applications were approved, the
14 golf course had been closed. There were applications
15 that were approved.

16 And the statute says that when the property
17 has been converted to a higher use, that, all of a
18 sudden, you have to actually pay the back taxes that
19 are owed on the property because you no longer qualify
20 for these reduced tax assessments under Chapter 361.8.

21 And the county assessor -- after the City
22 approved their initial applications to develop
23 435 luxury condo units on the 17-acre property, and
24 after the golf course had closed, the county assessor
25 sent Mr. Lowie a letter that said, you know, it's our

1 understanding that the Badlands Golf Course is closed
2 and, therefore, it's our position that it's been
3 converted to a higher use. Now you must pay back
4 taxes. You no longer qualify for these reduced taxes
5 under this statutory scheme that I've been talking
6 about.

7 Does that answer your question?

8 THE COURT: I mean, I do understand that, but
9 then they didn't permit the higher use.

10 MR. MOLINA: And here's part of the issue, is
11 that the City is not part of the tax assessor's office,
12 despite what Mr. Leavitt claims. The city charter,
13 which was adopted by the Nevada legislature in 1983,
14 states that the county assessor is the ex-officio tax
15 assessor for the city. And so the county assessor is
16 essentially responsible for collecting taxes on all
17 property in the city.

18 What happened is they sent this notice to
19 Mr. Lowie, a notice of audit or some kind of
20 assessment, higher assessment. And there was a -- he
21 challenged it. And he challenged it before the Board
22 of Equalization. And he argued that the property could
23 still be used as a golf course and, therefore, it has
24 not been converted to a higher use.

25 And the Board of Equalization did not make a

1 determination on the arguments. They actually
2 stipulated that it was converted to a higher use. And
3 so Mr. Lowie accepted the assessor's determination even
4 though he could have argued that it was still, you
5 know, could be used as a golf course even though they
6 had shut it down.

7 But there was another argument that he did
8 not make at all, which is, under the statute, you can
9 also qualify for reduced tax assessments based on an
10 open space master plan designation. And that would
11 have really harmed Mr. Lowie's arguments in this case
12 because if he had conceded that there was a PR-OS open
13 space --

14 THE COURT: I kind of get that, but his
15 property was actually zoned a specific way, R-PD7. So
16 why should he freely give up that designation?

17 MR. MOLINA: I'm really glad that you asked
18 that question. And maybe we should just go straight
19 into the exhibit.

20 THE COURT: Go straight into it, sir.

21 MR. MOLINA: I think I hear you loud and
22 clear. So I'm actually going to --

23 Eric, you want to pull up your exhibits.

24 So I want to walk through how this zoning got
25 applied and how it was -- how it was used. And,

1 actually, if I could just have five minutes to sort of
2 explain the difference between conventional zoning and
3 planned unit development zoning, I think it's really
4 important to actually go through that so the Court
5 understands that.

6 THE COURT: Yes, sir, you have the floor.

7 MR. MOLINA: All right. Thank you.

8 So I want to walk through some things. I'll
9 move through this very quickly, and I will actually go
10 just straight to the zoning ordinances.

11 So this is the first comprehensive zoning
12 ordinance in Las Vegas history. And what I just sort
13 of breezed through was the background on how cities in
14 America adopted zoning ordinances in the '20s through
15 enabling legislation that was sponsored by the
16 Department of Commerce. Virtually all 50 states have
17 adopted those enabling acts, the Standard City Planning
18 Act, and that's exactly what NRS 278 is based on.

19 So what I skipped over here, and I'll come
20 back to it later if we have time, was just showing how
21 the statute that we have is based on these two enabling
22 acts. And the key to these enabling acts is that they
23 all say the same thing, that zoning must be in
24 accord with the comprehensive plan.

25 And you'll see this is the first

1 comprehensive zoning ordinance. And I say
2 "comprehensive" in the sense that it's got full
3 regulations for all different types of zoning. There's
4 11 different types of zoning districts established by
5 this ordinance. It says it right here at the bottom,
6 "In accordance with a comprehensive plan."

7 So that is the essential, you know,
8 relationship between zoning and the master plan, is
9 that zoning must be in accordance with the
10 comprehensive plan. And if it's not, then it's
11 considered spot zoning, and that's illegal because that
12 defeats the purpose of zoning.

13 So you have to plan before you can zone. And
14 if you don't plan, then the zoning is actually
15 ultra vires the enabling act. Because the enabling act
16 says that you must zone in accordance with the
17 comprehensive plan.

18 So that's the first thing that I wanted to
19 kind of establish here. Because we'll see that over
20 and over, especially with respect to the properties
21 that we're dealing with.

22 Now, this is Bill McCauley. And,
23 incidentally, he was elected to the city council the
24 year after the first comprehensive zoning ordinance was
25 passed. He was very, very dialed in. He knew how

1 planning and development worked. And, in fact, when he
2 went to actually start developing his property,
3 Mayor Oran Gragson was one of his partners. And so
4 they both were very civic-minded people, understood how
5 the process worked, and they had a vision; okay.

6 And I'll tell you where he got this property
7 because it's actually pretty interesting. He was
8 36 years old when he acquired 3040 acres in Las Vegas.
9 And the way that he did it was under the Taylor Grazing
10 Act. And under the Taylor Grazing Act, you could swap
11 property. He apparently had gathered up all this
12 property with his partners in Elko and swapped it with
13 the federal government for property that's out here.

14 It's not even on the map. It's off the map.
15 This is a 1954 roadmap. If you were to look very
16 closely at this you'd see it actually says Usely
17 (phonetic), Peccole, et al. He's completely surrounded
18 by federal land except you've got the Hughes site down
19 here, which was the Howard Hughes development. This is
20 just background just showing the evolution of the
21 city's master plan.

22 In 1962, they adopt another comprehensive
23 ordinance, zoning ordinance. This is still what I
24 would call a traditional sort of conventional zoning
25 ordinance.

1 And I do want to touch on this briefly
2 because this is sort of critical. This was part of the
3 procedure that they used for rezoning property. And
4 this is going to make a lot of sense when we actually
5 get into how the property was zoned R-PD7. Is that the
6 city wouldn't just amend its zoning map and change a
7 property's zoning just when they approved it. They
8 actually had to see if the development was going to pan
9 out the way that they thought.

10 So they made people -- well, they approved
11 applications for rezoning. They adopted a resolution
12 of intent. And what that basically meant is that they
13 would commit to rezoning the property upon satisfaction
14 of, you know, all the conditions that were imposed on
15 the approval. And that's just what this says right
16 here.

17 So getting back to the difference between
18 conventional zoning and planned unit development zoning
19 or flexible zoning. This is conventional zoning. And
20 with conventional, you have what's called a single
21 building lot envelope. You have uniform setback
22 requirements. All of these properties are exactly the
23 same length from the street. They have uniform side
24 yard requirements, and it's very monotonous.

25 And it's actually a big problem from a larger

1 planning perspective because it causes urban sprawl and
2 there's all kinds of traffic issues and it's just not
3 actually safe.

4 So in the '60s, this happened all over the
5 country, is that they said -- that is actually the
6 zoning ordinance that was in effect when those
7 properties were built. And you can see that it's --
8 there shall be a side yard of no less than 15 feet, you
9 know, a rear yard of not less than 25 feet.

10 And what would happen is people would just
11 build as much as they could within this framework.
12 Because if you want to sell houses, if you're a
13 developer, you want to make as much money as possible.
14 So you fill up the single building lot envelope. You
15 go as high as you can, you go as wide as you can, and
16 as close to the street, and as far back.

17 And so every house looks exactly the same.
18 And what people would complain about is that it would
19 be the zoning that would design the building and not
20 the architect.

21 And, you know, this is what I was just
22 explaining here. Traditional single lot zoning
23 envelope was originally developed to preserve light and
24 air, the length, width, and height of an envelope
25 defined each lot. The reality is the zoning ordinance

1 designs the building.

2 Another thing that happened that changed the
3 way that zoning is used is FHA financing. Because the
4 FHA would not finance property with common open space.
5 Because what would happen is -- the only way to do this
6 before homeowners associations is that everybody would
7 be joint tenants in common of the common open space.
8 And so you couldn't get FHA financing for a house in a
9 neighborhood where all the neighbors owned the park in
10 the middle jointly.

11 So that's another thing that kind of changed
12 the landscape in terms of zoning, is that, you know,
13 after World War II, there was this housing crisis and
14 they needed to come up with this way to build larger,
15 bigger communities. And so they found a way to make
16 financing available for them.

17 And this is a Law Review article,
18 Pennsylvania Law Review article, by the chief planner
19 of the Federal Housing Administration explaining, you
20 know, the reasons why you have planned unit development
21 zoning.

22 And I won't go through this, but really the
23 benefit of this is to provide parks and open space.
24 Because the idea is that if you don't have uniform
25 setbacks, you can take a little bit of each parcel and

1 make it a little bit smaller and then you can put a
2 park in the middle of the community and it would
3 benefit everybody to have this common open space.

4 And this is an example right here of what's
5 called cluster zoning, where you increase the density
6 on one portion of the site so that you can create open
7 space for everybody in the neighborhood and other areas
8 of the site.

9 And these articles that I'm citing, this is
10 the 1960s. And this is another example of clustering
11 where you have two dwelling units per gross acre on the
12 top. You have 12 units in each of these. And the
13 density of dwelling units per acre always stays the
14 same regardless of the configuration; right.

15 So you can have two dwelling units per acre
16 spread out. You can have two dwelling units per acre
17 on a smaller piece and leave some of it undeveloped.
18 Or you can have two dwelling units per acre and put it
19 on this small little plot right here and this provides
20 the most amount of open space.

21 This is actually good for developers because
22 this allows them to be creative the way that they use
23 site planning. They don't have to lay out utilities in
24 odd configurations. And it's better for the community.

25 So this is just what happened in the '60s;

1 right. And this is the first planned unit development
2 ordinance. And this is just, I think, two years before
3 the RPD ordinance. But you can see that the Board of
4 City Commissioners -- they weren't a city council until
5 1938 -- but the Board of City Commissioners, they
6 adopted this ordinance.

7 And it says it right here, "The purpose of a
8 planned unit development is to allow maximum
9 flexibility and innovation of residential design and
10 land utilization. It is not intended primarily to be
11 used to reduce the cost of residential development nor
12 is it intended to provide rental units in a
13 single-family district. A planned unit development may
14 consist of single-family units, townhouses, cluster
15 units, condominiums, garden apartments, or any
16 combination thereof."

17 And so the benefit of this for developers was
18 actually they could sell a different type of product to
19 people of different socioeconomic classes. Where
20 before, you really just had single-family homes where
21 everybody was just trying to fill up the entire lot.

22 So, you know, that was the theory behind
23 this, is that you can have a mix of different housing
24 types in one development. And the way that this
25 changes zoning is that you're not zoning lot-by-lot.

1 You're zoning an entire tract of land before it gets
2 subdivided.

3 That's the key difference here, that you're
4 zoning an entire area, and that entire area includes
5 all the amenities that planned unit development zoning
6 can provide.

7 So, and just for historical reference here,
8 you have, "Permission to construct shall be applied for
9 and processed in the same manner as a reclassification
10 of property."

11 So that means you have to basically apply for
12 a rezoning to get a planned unit development.

13 And it says, "Detailed development plans must
14 be submitted with the application indicating uses of
15 property, delineation of property ownerships, floor
16 plans, and elevations of buildings."

17 So the downside or, I guess, the challenge of
18 planned unit development is that you have to design the
19 neighborhood before you present it to the city. Which
20 is, it kind of creates the chicken-or-egg problem,
21 where you don't want to spend all these up-front costs
22 on development, but at the same time, you want a better
23 product.

24 You want to, you know, have all these nice
25 amenities because people will pay for them. People

1 will pay more money for a lot on a golf course. And so
2 you have to actually design the thing ahead of time and
3 that's just the reality of this.

4 And that's -- honestly, it's almost a hundred
5 percent of all development occurs this way nowadays, is
6 that you actually have to come up with all your plans
7 ahead of time. It adds to the cost of development, but
8 it produces a much better product.

9 So this is some city minutes, just for, you
10 know, to see how the city applied that initial PUD
11 ordinance. He's talking about cluster homes. This
12 is -- Don Saylor is the director of planning in 1969,
13 and Oran Gragson is the mayor. And I keep coming back
14 to that. He's talking about everybody in the
15 development will buy a condominium for fee simple and
16 they'll occupy that area in joint tenancy and that's
17 the problem. But you see down here he's actually
18 talking about the FHA financing.

19 Now, this is the 1972 ordinance. And this is
20 the actual RPD ordinance. And this is Appendix R in
21 the City's appendix of exhibits. It's got virtually
22 the same language as the planning and development
23 ordinance. Says, "The purpose of planning and
24 development is to allow a maximum flexibility for
25 imaginative and innovative residential design and land

1 utilization in accordance with the general plan."

2 In accordance with the general plan.

3 MR. LEAVITT: Your Honor, may I be heard on
4 one short objection?

5 THE COURT: Yes.

6 MR. LEAVITT: Your Honor, the property
7 interest issue was fully briefed and fully adjudicated.
8 They argued that extensively, the underlying property
9 interest issue. An order was entered on October 12,
10 2020. EDCR 2.24 requires that if the City is going to
11 reargue this issue, they have to give me notice of it.
12 They have to file a notice of rehearing. They have
13 14 days to do that. I was not put on notice that this
14 was going to be reheard. In fact, this PowerPoint --

15 THE COURT: You're not arguing a property
16 interest, are you, sir?

17 MR. MOLINA: No.

18 THE COURT: He's giving me -- I'm not going
19 to tell anybody what to argue or not to argue. But
20 that ship has sailed.

21 MR. LEAVITT: Totally agree, Your Honor. I
22 only want to lodge my objection that the Court already
23 found that RPD zoning controls the property interest
24 issue. RPD zoning gives the landowner the legal right
25 to use the property for single-family/multi-family

1 residential uses. And I have not seen this PowerPoint.
2 I don't even have a copy of it. They didn't even give
3 me a copy over here.

4 And my final objection is this whole thing
5 about a planned unit development was presented to the
6 Nevada Supreme Court. And the Nevada Supreme Court, in
7 a published or issued opinion on this property, said
8 the parcel does not carry the planned development
9 zoning, district zoning designation. It carries the
10 R-PD7 zoning.

11 That's my objection, Your Honor. As long as
12 we're not revisiting the underlying property interest
13 issue and try to reargue the R-PD7 zoning or reargue an
14 issue that's already been decided, that the landowners
15 have a right to use the property for
16 single-family/multi-family residential uses, then of
17 course I wouldn't try to stop counsel from making those
18 arguments.

19 And, Your Honor, I'd like a copy of the
20 PowerPoint presentation so we can have it because I
21 have never seen any of this.

22 MR. MOLINA: We mailed them a copy.

23 We can email them. This is in our exhibits.

24 THE COURT: I don't mind telling everyone
25 this. I listen with some interest to this. I don't

1 mind saying this. I'm from Chicago. And Chicago is
2 known for their open spaces and zoning. In fact, I
3 think Chicago was just named number 1 most beautiful
4 city in the country within the last 30 days or so, I
5 think number 2 in the world.

6 If you go downtown and you look at all the
7 parks and waterfront and all those wonderful things, I
8 kind of get it. But my thoughts are, and I always tell
9 everyone what I'm thinking about, I mean, I get the
10 historical perspective as far as the zoning and the
11 residential plan development and the like, but here we
12 have a scenario where we had zoning of R-PD7; right,
13 and that's what it was.

14 And the question is this. It seems to me
15 that based upon the character and nature of the plan
16 that was in effect, that would be in conformance with
17 the real property and the homes and the like in the
18 adjacent area, right there at Queensridge; right?

19 MR. MOLINA: Right. And that's what I'm
20 trying to explain. We don't dispute that the property
21 is an R-PD7.

22 THE COURT: I get it.

23 MR. MOLINA: We dispute what that means.

24 MR. LEAVITT: Your Honor, if I may object,
25 we've litigated what R-PD7 means.

1 THE COURT: I've already ruled on that.

2 MR. LEAVITT: Your Honor, we have not been
3 given notice that they're rearguing an issue under
4 R-PD7.

5 THE COURT: We're not going to reargue any
6 issue unless I've ruled on an issue. I understand the
7 purpose of today's hearing. I'm going to make a
8 determination before we're done as to whether or not
9 there was a taking.

10 And if there was a taking, I'm going to go
11 ahead and define what type of taking it would be based
12 upon the different claims for relief. Nothing more,
13 nothing less.

14 MR. LEAVITT: Thank you, Your Honor.

15 MR. MOLINA: And, again, I'm trying to put
16 everything in context here.

17 THE COURT: I'm letting you do it, sir. I
18 know what my charge is today. I got pending motions
19 for summary judgment, countermotions for summary
20 judgment. I'm going to follow the call of the question
21 and issue a decision.

22 MR. MOLINA: Thank you, Your Honor. So we
23 have another just example of Don Saylor, the planning
24 commissioner at the time, that the 1972 RPD ordinance
25 was enacted, saying that this is a planned unit

1 development. RPD is a planned unit development. It's
2 intended to protect open space.

3 And I'll point out one thing about the 1975
4 general plan because there's been arguments about what
5 it was designated and whether that designation was
6 valid. And, ultimately, you know, the City's position
7 is there can't be a taking when you haven't complied
8 with the procedures to amend the general plan.

9 And that's what the City requires, is they
10 require a general plan amendment to make sure that the
11 zoning is consistent with the general plan.

12 THE COURT: Wasn't that issue like that
13 discussed in the Sisolak case?

14 MR. MOLINA: No, not quite. So in Sisolak,
15 we're talking about physical takings. And I would
16 prefer to just stick to the facts and let Mr. Schwartz
17 argue the law.

18 THE COURT: The only reason I brought that up
19 is I read Sisolak. And I thought that was one of the
20 issues that was discovered. And maybe it would be -- I
21 think in Sisolak they said you don't have to exhaust
22 your administrative rights.

23 That's kind of what you're talking about.
24 And that's the reason why I brought that up. Because
25 at the end of the day, I have to make a determination

1 if the actions of the City rise to the level of taking
2 pursuant to the Fifth Amendment of the United States
3 Constitution, and/or the Nevada State Constitution.

4 And I do understand that. And I even
5 understand it could be argued, based upon, I think it
6 was the discussion in Sisolak, that the rights set
7 forth in the Nevada Constitution are even stronger than
8 they are in the United States Constitution.

9 So my point is I kind of get it. I just want
10 to get to --

11 MR. MOLINA: We're going to get to -- I'm
12 teasing you a little bit. We're going to get to the
13 grand finale. Let me just address the Sisolak thing.

14 Sisolak is a physical takings case. And
15 under Nevada law, the airspace up to a certain level is
16 considered, you know, part of the fee simple interest.

17 And the part above that, whatever they -- you
18 know, it's the Federal Aviation, FAA regulations, that
19 define what a safe approach height is. And,
20 essentially, everything below that height is part of
21 your fee simple interest. It's the ad coelum doctrine.
22 You own everything below and everything above. But
23 actually you own it up to that certain height.

24 THE COURT: I get that. But what about
25 denied access?

1 MR. MOLINA: Well, denied access is -- I'd
2 like to present all of this in order.

3 THE COURT: But you brought it up when you
4 talk about a physical taking. That wasn't really what
5 I was focused on. I remember in Sisolak it did discuss
6 that he didn't have an exhaustion of administrative
7 remedies.

8 MR. MOLINA: Right. But what I was
9 explaining with Sisolak was he didn't have to exhaust
10 his administrative remedies because there was a
11 physical taking. So having a height variance wouldn't
12 actually make any difference because people would still
13 be invading his airspace that he owned. They would
14 physically occupy his property. So that's why you
15 didn't need a variance in Sisolak.

16 THE COURT: But my question is this. Denying
17 access, is that any different?

18 MR. MOLINA: Is denying access different than
19 having a physical invasion? I think there is a
20 distinction there, but let me just pose a hypothetical
21 for you.

22 You've got subdivisions all over the city
23 where there's people with fences --

24 THE COURT: I don't mind saying this. It
25 seems to me it could be argued if you're denying

1 someone access to their property, that's akin to a
2 physical taking.

3 MR. MOLINA: No. And --

4 THE COURT: If I go to your house -- no. No.
5 Listen to me. I don't know where you live. Doesn't
6 matter. If I go to your house and I put up a fence
7 around your house and I deny you access, what is that?

8 MR. MOLINA: The City did not put a fence
9 around his house.

10 THE COURT: No. No. I'm just asking you a
11 question. And my question was this. Denying access.
12 You said it was not a physical taking. My question is
13 this. Well, why not?

14 MR. MOLINA: Because he had the same access
15 that he had when he bought the property. So --

16 THE COURT: He didn't have the same access;
17 right?

18 MR. MOLINA: The property is the same,
19 exactly as it was when he bought it.

20 THE COURT: But he didn't have access to do
21 what he wanted to do; right?

22 MR. MOLINA: But there's a process for
23 opening up a street into a public thoroughfare. And
24 what I was saying is that if everybody who had a
25 backyard that fronts a street was just able to knock

1 down the wall and put a new road in, it would just be
2 chaos.

3 And that's why there's a process for doing
4 that. And I will address all of that, but I want to go
5 in order so we can understand the issues in context.

6 THE COURT: I'm trying to figure out why the
7 City would deny a property owner a request to place
8 fencing around a pond. To me, that's kind of a really
9 big deal. And it could be done in such a way where it
10 could be, I would anticipate, aesthetically pleasing to
11 the community.

12 There's a lot of ways that could be done.
13 And the only reason I bring that up, I was a tort
14 lawyer and I understand premises liability and
15 potential liability issues. I get that.

16 MR. SCHWARTZ: Your Honor --

17 THE COURT: Go ahead. If you want to jump
18 in, sir, I have no problem with that.

19 MR. SCHWARTZ: That is a legal issue,
20 Your Honor, and I was going to address that. And I
21 believe I can answer the Court's questions.

22 THE COURT: Take a note. Write that down.
23 You can answer that for me. I won't ask him that
24 again, sir.

25 MR. SCHWARTZ: Thank you, Your Honor.