

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 25

LAW OFFICES OF KERMITT L. WATERS

KERMITT L. WATERS, ESQ., NBN 2571

kermitt@kermittwaters.com

JAMES J. LEAVITT, ESQ., NBN 6032

jim@kermittwaters.com

MICHAEL SCHNEIDER, ESQ., NBN 8887

michael@kermittwaters.com

AUTUMN L. WATERS, ESQ., NBN 8917

autumn@kermittwaters.com

704 S. 9th Street, Las Vegas, Nevada 89101

Telephone: (702) 733-8877/ Facsimile: (702) 731-1964

Attorneys for 180 Land Co, LLC and Fore Stars Ltd.

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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 25** 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:

McDONALD CARANO LLP

George F. Ogilvie III, Esq.
Christopher Molina, Esq.
2300 W. Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
gogilvie@mcdonaldcarano.com
cmolina@mcdonaldcarano.com

**SHUTE, MIHALY &
WEINBERGER, LLP**

Andrew W. Schwartz, Esq.
Lauren M. Tarpey, Esq.
396 Hayes Street
San Francisco, California 94102
schwartz@smwlaw.com
ltarpey@smwlaw.com

**LAS VEGAS CITY ATTORNEY'S
OFFICE**

Bryan Scott, Esq., City Attorney
Philip R. Byrnes, Esq.
Rebecca Wolfson, Esq.
495 S. Main Street, 6th Floor
Las Vegas, Nevada 89101
bscott@lasvegasnevada.gov
pbyrnes@lasvegasnevada.gov
rwolfson@lasvegasnevada.gov

/s/ Sandy Guerra

An Employee of the Law Offices of Kermitt L. Water

1 conflict, but it's potentially a rule versus a statute.

2 Do you see the difference?

3 MR. LEAVITT: Absolutely, Your Honor, and its
4 something that I thought about, and that was my next argument
5 is when you have a rule of procedure which conflicts with a
6 substantive right that's been -- that has gone through
7 committee, that has been passed by the Nevada Legislature or
8 who has been elected by the voters in the State of Nevada and
9 signed by the Governor who has also been elected by the voters
10 of the State of Nevada, and it involves a substantive right,
11 clearly that would take precedence over a procedural rule.

12 And there's actually a great case in the Nevada
13 Supreme Court. I think it's called Teachers Building Materials
14 (phonetic), where the Nevada Supreme Court specifically says
15 that substantive rights in an eminent domain case always trump
16 procedural issues.

17 This clearly is a substantive right. It's a
18 substantive right to be paid. There couldn't be a more
19 substantive right than the right to be paid.

20 Everything that we've done up to -- in this case up
21 to this point involves the landowner's substantive right to be
22 paid just compensation timely. So I would agree with the Court
23 that that substantive right trumps that, and I -- I will cite
24 to you one more case.

25 I've cited to you two cases where the Nevada Supreme

1 Court has held, couldn't be clearer, inverse condemnation
2 proceedings are the constitutional equivalent to eminent domain
3 actions. That's a quote, and yet the City continually argues
4 inverse condemnation cases are different than eminent domain
5 cases. The Nevada Supreme Court went on to say they're
6 governed by the same rules and principles.

7 Another case I'll cite to this Court is *5th and*
8 *Centennial* (phonetic). In *5th and Centennial*, the lower
9 District Court Judge went -- it was a precondemnation damage
10 case. So a type of eminent domain case. The District Court
11 Judge in that case applied the general rule -- NRS Chapter 17
12 prejudgment interest rule. And the landowner said, well, wait
13 a minute. This is an eminent domain case. You should apply
14 NRS Chapter 37, and the lower District Court Judge ruled
15 against the landowner and applied the general prejudgment
16 interest statute of Chapter 17 and was reversed, and here's the
17 quote. Here's what the Court says:

18 Nevada treats precondemnation damage
19 actions as a type of eminent domain case.
20 Therefore, we conclude that the District Court
21 erred in using the general interest rule from
22 NRS Chapter 17 instead of the more specific
23 eminent domain rule from NRS Chapter 37.

24 Your Honor, that rule has been cited at least five
25 times by the Nevada Supreme Court that inverse condemnation

1 cases are the constitutional equivalent of eminent domain, and
2 therefore Chapter 37 applies to inverse condemnation cases.

3 Alper has been cited 28 times since it's been decided
4 in 1984. Therefore, Your Honor, we would have to deviate from
5 that rule in order to rule in favor of the City. We have to
6 apply a general rule and instead as a more specific, which is
7 the exact opposite of the rule.

8 We'd have to find that inverse condemnation actions
9 are different from eminent domain cases, contrary to Nevada's
10 rule. And if we did that, Your Honor, what rule would apply?
11 What body of law would apply? We don't -- in Nevada, we
12 don't -- the Nevada Supreme Court has never said here's an
13 inverse condemnation case, and here's the specific law that
14 applies to an inverse condemnation case. They never did that.
15 Instead the Court said they're the same, and therefore the same
16 rules and principles apply. Therefore, Your Honor, 37.140 and
17 the closed loophole set forth in 37.170 should be applied to
18 this specific case, Your Honor.

19 THE COURT: All right. Thank you, sir.

20 And, Mr. Ogilvie, sir, you get the last word of
21 course.

22 MR. OGILVIE: Your Honor, Mr. Leavitt cited the *Knick*
23 case. So I just wanted to point out that the *Knick* case was a
24 physical takings case, not a regulatory taking, such as the
25 matter before the Court.

1 Addressing Mr. Leavitt's argument that Chapter 37
2 does not require a final judgment, I would refer the Court to
3 NRS 37.140 where it states very clearly the plaintiff must
4 within 30 days after final judgment pay the sum of money
5 assessed. Therefore, I submit to the Court, again, I refer the
6 Court back to what the definition of final judgment is. It is
7 a judgment that has been affirmed if an appeal has been taken
8 because only then can it not be challenged by appeal, motion
9 for new trial or motion to vacate, as the definition of final
10 judgment requires.

11 So even if we apply Chapter 37, and again, that is
12 eminent domain, this is not an eminent domain matter, but even
13 if we apply Chapter 37, NRS 37.140 references final judgment
14 before the sum of money is assessed, and we do not have a final
15 judgment at this time.

16 THE COURT: Mr. Ogilvie, what's the impact of
17 Chapter 37.170 for this matter?

18 MR. OGILVIE: Chapter -- NRS 37.170 does not address
19 this very issue, which is when the -- when payment must be
20 made. First of all, again, let me, we submit that --

21 THE COURT: No. No. I understand your position
22 there. I'm not overlooking your position. You're saying,
23 look, Judge, there's a difference here between an eminent
24 domain matter and inverse condemnation and as a result, it
25 impacts the application of the statute. I get that.

1 I just want to know what your position would be as
2 far as hypothetically, without waiving any position you take
3 and what impact would 170 have, if any.

4 MR. OGILVIE: I think .170 needs to be read in
5 conjunction with .140, and a, I mean, .170, Sub 3 talks about
6 final judgment. It's not disregarded in .170, and reading .170
7 in conjunction with .140, I submit, requires a final judgment
8 to be entered, even in an eminent domain case, which this
9 isn't.

10 THE COURT: All right. Okay. Anything else from
11 anyone? I just want to -- we've vetted this issue. There's no
12 need to ping-pong, but I just want to make sure that there's
13 anything anyone might have to say that has not been set forth
14 on the record? I just want to make sure the record is clear in
15 that regard.

16 MR. OGILVIE: Again --

17 MR. LEAVITT: Your Honor, I --

18 MR. OGILVIE: Go ahead.

19 MR. LEAVITT: I was just, for 30 seconds, Your Honor.

20 Your Honor, the argument that Mr. Ogilvie just made
21 was made to the Nevada Supreme Court in *State versus Second*
22 *Judicial District*, and the Court said such is not our view of
23 the law. The deposit provided by NRS 37.170 is a condition to
24 condemnor's right to maintain an appeal. Your Honor, it's a
25 condition to appeal. That's why 37.170 was adopted was so that

1 it would be made. The deposit would be made as a condition to
2 appeal, Your Honor.

3 THE COURT: All right. And, Mr. Ogilvie, you get the
4 last word, sir.

5 MR. OGILVIE: Again, eminent domain is very
6 different. It only applies when the City has actually
7 appropriated the property for public use. That is not what is
8 before the Court. Therefore, NRS-- or Chapter 37 does not
9 apply. Even if it does apply, a final judgment is required.

10 What we have is a Developer (video interference)
11 250 acres of a golf course. The City took no action whatsoever
12 to disturb its use as a golf course. The City simply denied --
13 affected its discretion to deny the only application that was
14 ever submitted.

15 And again, it's not even a final decision by the City
16 Council, but that's -- again, that's for the appellate court to
17 review and decide whether or not there was a -- whether or not
18 this action was even right because there was no second
19 application submitted. So the Developer doesn't even know what
20 the City may have approved even though it denied the initial
21 applications.

22 Again though, the Developer purchased 250 acres for
23 three and a half million dollars. The purported oppressive --
24 oppressiveness that Mr. Leavitt refers to doesn't exist. The
25 irreparable harm to the taxpayers is evident because it's the

1 taxpayers will never recover whatever amount the final judgment
2 is in this case.

3 If the City -- or if the Developer is allowed to
4 execute judgment at this time, the City is entitled to a stay
5 of the judgment as a matter of right under Rule 62. NRS 37
6 does not conflict with Rule 62, and therefore we submit that
7 the Court should grant the requested stay.

8 Even if the Court found that a stay is not required
9 in this event in the matter in the issues before the Court, the
10 City would, if the Court denies the request in the City's
11 motion, the City would request that this Court impose a stay to
12 allow the City to seek an emergency stay from the Nevada
13 Supreme Court.

14 THE COURT: And I understand that, sir. I do. I get
15 it.

16 This is what I want to do, and, I mean, I've read all
17 the points and authorities. I looked at the statutes, and I do
18 really appreciate the argument, and this is a really, really
19 important decision for everyone involved. I get it. I
20 understand what's at stake.

21 And all I want to do is this, take a few days and
22 just deliberate, more so than anything and think about it and
23 go back and read the statute again, look at the cases. I mean,
24 I -- it's a unique issue, and there's a lot at stake for
25 everyone involved. So I just want to deliberate and maybe read

1 a little more. That's all I want to do. All right. So I'm
2 going to just tell you that.

3 MR. LEAVITT: I appreciate that.

4 THE COURT: So I just want to -- it's like a jury
5 making a decision. And this is a tough decision for me to
6 make, but at the end of the day, I have to make that decision,
7 and that's why I'm here. I get that. I do think it's
8 important to sit back and reflect. I appreciate the arguments.

9 And so let's go ahead and move on to the next matter
10 as far as reimbursement of property taxes and a motion to retax
11 and so on.

12 What should we do next? Because I'm going to line
13 these up.

14 MR. LEAVITT: The taxes may be the easiest one, Your
15 Honor.

16 THE COURT: Which one is that.

17 MR. LEAVITT: Whichever one you'd like to do, Your
18 Honor. We have taxes and costs.

19 THE COURT: Whichever one. It's up to you, sir. It
20 doesn't matter to me.

21 MR. OGILVIE: Your Honor, I'd ask that we argue the
22 motion to retax.

23 THE COURT: Okay. We'll do that one first.

24 MR. MOLINA: Good morning, Your Honor. This is Chris
25 Molina on behalf of the City. I'll be arguing the motion to

1 retax, and I don't want to go line by line and review each item
2 of costs that was disputed. I don't want to repeat anything
3 that was in the briefs. I think that both the developer's
4 opposition and the City's original motion have a pretty good
5 line by line breakdown, at least the developer's motion does.
6 The developer's opposition has a spreadsheet or a chart that
7 was attached as Exhibit 11. That might be a useful guide for
8 the Court to follow as we discuss this motion.

9 And I want to reiterate that, you know, the City is
10 not trying to nickel and dime the Developer with this motion.
11 The City did not dispute any costs that the City was able to
12 verify based upon the documentation that the Developer
13 submitted with its memorandum of costs. For example, with
14 respect to the developer's claim for parking costs and lunch,
15 the City was able to verify that the dates on the receipts
16 match dates of hearings in front of this Court. And so the
17 City did not move to retax those costs, and that is clearly
18 reflected in this chart that I was just referring to, which is
19 Exhibit 11 to the developer's opposition.

20 This contains at least a high-level summary of which
21 costs are disputed, which ones are not disputed. There's also
22 one cost that was amended, which I will get to in a second
23 here.

24 But I want to sort of go through the main issues that
25 we have here and then look at some of the evidence that was

1 submitted to the Court to, you know, explain why the City
2 disputed certain costs and why that documentation and evidence
3 does not necessarily substantiate or demonstrate that the costs
4 claimed were actually necessarily and reasonably incurred.

5 So just kind of going to the big issues here. The
6 main issue that we have really is that, as the Court is aware,
7 there are four different inverse condemnation cases involving
8 the Badlands property. They're in front of four different
9 Judges in four different departments. And based on the
10 documentation that was submitted, it is pretty clear that the
11 Developer did not keep track of costs incurred in each case
12 separately, and I will turn to Exhibit 5 to the Developer's
13 Memorandum of Costs to sort of point this out.

14 Exhibit 5 contains a FedEx invoice and also a check
15 from the office of Kermit Waters that corresponds to the amount
16 that's on that invoice, and both the invoice and the check stub
17 lack any indication that this cost was incurred in this case,
18 which is why we disputed this, both on that ground as well as
19 the fact that there was no explanation for why this cost was
20 necessary.

21 And in opposition to the motion to retax costs, the
22 Developer conceded that this was a cost that was actually
23 incurred in a different case, the 65-acre case, which is in
24 front of Judge Trujillo. So, you know, off the bat, we already
25 know that there's some issues here in the way that the

1 Developer kept track of costs and failed to basically keep
2 records or have some kind of methodology for separating those
3 costs amongst the different cases.

4 And this raises issues with respect to several other
5 categories of costs where it's just not apparent based on the
6 documentation that was submitted that the costs actually relate
7 to this particular case.

8 Another example, and this is the one that we focused
9 on in our motion, was the developer's Westlaw bills, is that
10 there's no record of which case the Westlaw bill corresponds
11 to. And we're unable to sort that out based on the
12 documentation that's submitted. It's just simply too many
13 costs in there to really drill down and figure out when, you
14 know, when those costs were incurred compared to the status of
15 each of the four different cases.

16 But the point is that we just don't have any
17 documentation submitted showing that the costs were incurred in
18 one case or another or that the costs were divided according to
19 some method that, you know, is sensible. We just don't have
20 any evidence to demonstrate that in front of us.

21 And, you know, the same thing with respect to the
22 developer's in-house copy fees. If you look at Exhibit 9 to
23 the memorandum of costs, you know, it just says 180 Land, LLC,
24 and it just has a, you know, a calculation sort of back of the
25 tablecloth type calculation as to the cost for this. But

1 there's no breakdown on the dates on this particular one, and
2 without the dates we certainly cannot determine whether any of
3 these costs were actually or necessarily incurred in this
4 particular case and not one of the other Badlands cases.

5 So failure to provide documentation demonstrating
6 that the costs were incurred in this case was really the
7 biggest issue with respect to the majority of the costs
8 claimed.

9 We also have a dispute over whether or not it was
10 necessary or reasonable for the Developer to retain two experts
11 that were never disclosed and, you know, from the City's
12 perspective, were never used or relied upon in this case. One
13 of those experts is Global Golf Advisors, which is also
14 apparently the same entity as GGA Partners.

15 The other expert that was not disclosed was Jones
16 Roach & Caringella. There's a number of issues, you know, with
17 respect to these particular costs, namely the fact that they
18 were not disclosed. They were not used. That in and of itself
19 demonstrates that their work was not necessary.

20 In the opposition to the memorandum of costs, the
21 Developer argues that it was necessary to, you know, prepare
22 them in advance of the expert disclosure deadline so that they
23 could be prepared to rebut any arguments that the City made,
24 but the fact of the matter is, is that the City did not retain
25 or disclose -- or disclose any retained experts in this case,

1 and the Developer did not need to hire these experts to review
2 arguments and experts that the City did not make or hire.

3 So right off the bat we would submit that the
4 approximately \$77,000 paid to Global Golf Advisors was not a
5 necessary cost; and if it was necessary, we have no evidence in
6 front of us to judge whether or not it was reasonable. We're
7 not disputing that the cost was actually paid, but we just
8 don't have evidence to establish its reasonableness, but the
9 fact of the matter is it wasn't necessary to pay \$77,000 to
10 Global Golf Advisors.

11 Likewise, the Developer took a risk in retaining
12 Jones Roach & Caringella prior to the expert disclosure
13 deadline and paid them \$30,000 to prepare for a rebuttal report
14 that they never had to prepare, and so we would submit that
15 these costs are also unrecoverable.

16 With respect to the only expert that was disclosed,
17 Mr. Tio DiFederico, again, the City is not disputing that the
18 Developer actually incurred the amount of costs claimed,
19 \$114,250. With respect to Mr. Tio DiFederico's fees, we would
20 argue that there was certainly fees that were not necessary and
21 not reasonable, particularly in light of the fact that
22 Mr. DiFederico did not testify at trial and did not sit for a
23 deposition.

24 And we would also argue that the developer's expert
25 Mr. DiFederico employed this very complicated, complex

1 valuation method, the subdivision method analysis, which is,
2 you know, questionably not admissible under certain
3 circumstances, in Nevada and certainly in other jurisdictions.
4 It's per se inadmissible.

5 But really what we're taking issue there, taking
6 issue with there is that Mr. DiFederico did this subdivision
7 analysis and applied it to three different hypothetical
8 scenarios, two of which have really no bearing or similarity in
9 reality.

10 And if you look at page 89 of Mr. DiFederico's
11 report -- and we attached that as Exhibit A to the City's
12 motion to retax costs, at page 89 of the report, it states that
13 Mr. DiFederico relied on the following extraordinary
14 assumption, and I'll just quote from this. It says, The values
15 for the 16-lot and 7-lot scenarios are based on hypothetical
16 condition that a waiver SDR and TMP approval -- that means a
17 waiver Site Development Review and Tentative Map Approval --
18 similar to those approved for the 61-lot scenario were given to
19 the development plans of 16 lots and 7 lots.

20 And so right there he says it in his own report at
21 page 89 that these were just hypothetical scenarios that were
22 based on this extraordinary assumption that these 16-lot and
23 7-lot subdivisions would be approved. And, in fact, this
24 statement that I just quoted from actually assumes that the,
25 quote, 61-lot scenario was approved, which is not correct, and

1 that's, you know, part of the reason why this case was started
2 was because that 61 lot tentative map and site development
3 review application were denied.

4 So again, you know, our arguments with respect to
5 Mr. DiFederico's report, which is by far the most significant
6 costs claimed here is that, you know, it wasn't necessary to
7 incur this extent of a bill when Mr. DiFederico didn't testify,
8 never sat for a deposition, didn't do a rebuttal report, didn't
9 review any expert reports prepared by the City, and the fact
10 that he unnecessarily spent a lot of time doing this
11 subdivision method analysis and applying it to two hypothetical
12 scenarios that have basically no basis in reality.

13 And on that basis we would submit that
14 Mr. DiFederico's fees were unreasonable, and it's ultimately
15 the developer's burden to establish that the \$1500 cap is not
16 appropriate and that the circumstances of Mr. DiFederico's
17 testimony justify the excessive cost.

18 And the last sort of major issue that I wanted to
19 sort of bring up here is that the City was the prevailing party
20 in the petition for judicial review phase of this proceeding.
21 The Developer did not respond to that argument in its
22 opposition; however, you know, it would be our position that
23 the Developer should not be entitled to recover costs for the
24 petition for judicial review phase of this proceeding,
25 particularly since, in light of the Nevada Supreme Court's

1 decision in the *City of Henderson* case, the petition for
2 judicial review should not have been combined with original
3 civil claims for inverse condemnation. The City did file a
4 motion to dismiss at the beginning of this case on that ground,
5 and it was denied, but --

6 THE COURT: You know what's interesting about that
7 case, and I don't mind saying that, they weren't combined. But
8 go ahead. They weren't. Yeah, but go ahead.

9 MR. MOLINA: Sure. And I know that Your Honor knows
10 that case very well.

11 THE COURT: Yeah.

12 MR. MOLINA: So I won't go into the particular --

13 THE COURT: No, but I understand your point. I do.
14 I get it. I do. I get it. I do.

15 MR. MOLINA: Right. And just to give the Court some
16 kind of idea, a sense of, you know, what --

17 THE COURT: How do I make a determination in that
18 regard, and I don't mind saying this. Many times when I'm
19 looking at retaxing costs and award of fees and things like
20 that, I kind of feel like I'm a forensic accountant, right, and
21 it's tough. It really is. I mean, I'm familiar with the *Bobby*
22 *Berosini* case, and, I mean, I get that, but for example, and
23 the only reason I bring it up when you talk about DiFederico,
24 the expert, what would be appropriate, if any, from an expert
25 fee standpoint? Because we're talking about I guess the

1 claimed amount was \$114,250.

2 MR. MOLINA: Well, if you're asking that question of
3 me, Your Honor, my response is that there should be an
4 appropriate reduction based on, you know, what we would to be
5 an unnecessary parts of the report. We also have argued in our
6 briefing that the -- Mr. DiFederico's analysis relied heavily
7 on the Court's own opinion, especially with respect to the
8 legally permissible use of the property, and therefore, you
9 know, it was not necessary for him to conduct an independent
10 investigation into that.

11 And, frankly, we don't know exactly what
12 Mr. DiFederico spent all of his time on. His bills are very
13 vague, and so it's very difficult for me to argue that it
14 should be reduced by a specific amount because I can't link the
15 documentation to any particular task, you know, just looking at
16 the exhibits that were attached to the memorandum of costs.

17 And Exhibit 3 contains the invoices from
18 Mr. DiFederico's bills, and it just says, you know, it has a
19 breakdown of the number of hours and the dates, and then a
20 description of what all of that included without necessarily,
21 you know, identifying what, you know, what line item for each
22 time entry corresponded to which task that was performed.

23 So, you know, I'm sort of at a loss because if there
24 was that sort of detail, then we would've been able to go
25 through and parse that out and come up with a more specific

1 figure as to what a reasonable cost would be, but we're just
2 not in a position to be able to do that based on the
3 documentation that was submitted.

4 And I'll just round out one other point that I was
5 making about the City being the prevailing party on the
6 judicial review, petition for judicial review proceeding. Just
7 to give the Court an idea of what this, you know, included,
8 there were roughly \$15,000 of the Developer's Westlaw bills,
9 which are not broken down by a case number, but about 15,000 of
10 those costs were incurred prior to February 29th, which is --
11 I'm sorry, February 2019, which is the month in which the Court
12 entered a nunc pro tunc order. That's what I would consider to
13 be the final order in the PJR phase of the proceeding, and so,
14 you know, that's another issue that we have here.

15 So there's \$15,000 of Westlaw bills that were
16 incurred prior to the resolution of the PJR, and then also, you
17 know, you've got the developer's filing fees that are going to
18 just be estimates based on what the docket was showing as
19 having been filed. I haven't done an analysis of the docket to
20 determine how many documents were filed prior to February 2019,
21 but it's -- it's not insignificant.

22 So just to briefly recap, you know, the four main
23 issues, from my perspective at least, is that we have multiple
24 cases involving similar set of facts, same parties, same
25 counsel, and none of the documentation submitted really breaks

1 any of that down by case.

2 Some of it can certainly be attributed directly to
3 this case, such as, you know, court reporter's fees, and we
4 didn't dispute the court recorders that were actually providing
5 in court transcription services.

6 But at any rate, we don't have documentation
7 separating the costs between the other four cases that we're
8 not able to allocate specifically to this case.

9 And the second major issue that we have here is we've
10 got undisclosed experts that were never used, never produced a
11 report, and we think that those are just, per se, unrecoverable
12 under the statute.

13 The third major issue that we have here is Mr. Tio
14 Federico's report. We believe that costs were excessive based
15 on the level of work that was performed, the number of hours
16 that were required and the amount of time that was apparently
17 spent on this very complex subdivision method analysis, which
18 was applied to hypothetical situations that have no bearing in
19 reality.

20 And then finally, you know, the fourth issue that
21 we -- major issue that we have here is that a substantial
22 number of these costs were incurred prior to the final
23 resolution of the petition for judicial review, which the City
24 was the prevailing party on.

25 And with that, I'll turn it over to Mr. Leavitt.

1 THE COURT: All right. Thank you, sir.

2 Mr. Leavitt.

3 MR. LEAVITT: Your Honor, again. James J. Leavitt on
4 behalf of 180 Land, the landowners.

5 Your Honor, the rule for recovering costs in an
6 eminent domain, an inverse condemnation case is set forth in
7 the Constitution, the Nevada Constitution, Article I,
8 Section 22.4, and it says that a landowner -- a landowner
9 should be awarded all of their reasonable costs and expenses
10 actually incurred. And then it goes on to say that that is
11 part of the just compensation award. So we're talking here now
12 about a constitutional recovery here, which is part of the just
13 compensation. Therefore, if the landowners get shorted on
14 their costs that they had to pay in this case, then they're
15 going to get shorted on their constitutional right to be paid
16 just compensation.

17 And so the rule that's laid out by the Nevada Supreme
18 Court -- or by the Nevada Constitution is, Number 1, the cost
19 must be reasonable, and they must be actually incurred. That's
20 the test.

21 And then the Nevada Supreme Court refined that test a
22 little bit in the *5th & Centennial* case, and here's what they
23 said in *5th & Centennial*.

24 Determining reasonableness may necessitate detailed
25 documents such as itemizations, and then they go on to say

1 though, which are only required where the District Court cannot
2 determine the necessity and reasonableness without such
3 documents.

4 Judge, in this case it's met. For every -- and I'll
5 address some of the concerns that Mr. Molina had, but for every
6 cost that's been incurred, we provided the document or the
7 Document (video interference) showing that that work was done.
8 We provided the invoice showing that we were billed, that the
9 landowner was billed, and we provided the check showing that
10 the landowner wrote the check. Therefore, all of these costs
11 were actually incurred. They were actually paid. So the only
12 question is are they reasonable. The Nevada Supreme Court
13 addressed that also in *the 5th & Centennial* case.

14 Judge Denton in that case increased significantly the
15 costs that were granted above the statutory limits that
16 Mr. Molina cited to you, and the Court found three reasons why
17 Judge Denton was proper in doing that:

18 Number one, because of the complex nature of the
19 case. The Court said, listen, that was a complex case. I
20 would have to say we certainly meet that standard here, Judge.
21 It's been going on for four years. We've been up to the
22 Supreme Court and back. We've been to federal court and back.
23 There's been three phases, the property phase, the take phase
24 and the just compensation phase. This is a complex case, and
25 it's been -- and it's been adjudicated over this four-year

1 period.

2 The second factor that the Court looked at to
3 determine whether to increase the costs in that eminent domain
4 case was the extensive history of the project. That factor is
5 met here. There's been thousands of pages to go over the
6 extensive history of what occurred here. You'll recall at the
7 summary judgment hearing Mr. Molina spent probably about a day,
8 an entire day at a hearing with thousands of pages of documents
9 going over the extensive history. So that factor is met.

10 The third factor the Court looked at to increase the
11 costs above this 1500 standard was the specialized experts that
12 were needed. The Nevada Supreme Court has repeatedly held that
13 an eminent domain case is a battle of the experts, and experts
14 are absolutely needed in these cases.

15 Therefore, Your Honor, the test is was it reasonable
16 and was it actually incurred. So with that test in mind, I'll
17 turn to first the large one, which is Mr. DiFederico's report.
18 Early on in this case, when this case was removed to federal
19 court, the landowners submitted as part of their discovery in
20 federal court right in the record, Your Honor, back in -- this
21 is back in 2019, it is very likely that the expert appraisers
22 in this case will each charge well in excess of \$100,000. The
23 City was put on notice of this back in 2019.

24 In addition to that, we've submitted the affidavit of
25 Autumn Waters, who's been practicing exclusively in the area of

1 eminent domain for 18 years. In that affidavit she stated that
2 it is common in these eminent domain and inverse condemnation
3 cases, especially a complex one like this where the expert will
4 charge in excess of a hundred thousand dollars and cited to a
5 case we recently did where the expert appraiser charged
6 \$250,000 and didn't even testify at trial.

7 Therefore, Your Honor, the fee that Mr. Tio
8 DiFederico charged in this case is not outside the realm of
9 reasonableness. It's absolutely reasonable, and it's been
10 proven by not only the discovery disclosure, but by the
11 affidavit of Ms. Waters.

12 Now, Mr. Molina said, well, you can't really tell
13 what work Mr. DiFederico did. Well, we can. We can look to
14 his 136-page report where he lays out in detail the work that
15 he did. We can also look to his work file, which is 7,048
16 pages. Therefore, Your Honor, his work is very detailed. It
17 lays out exactly what he did.

18 The next question or the next challenge to
19 Mr. DiFederico's report is Mr. Molina says, well,
20 Mr. DiFederico used a subdivision method that is questionable.
21 I've got three responses to that, Your Honor. First, the City
22 stipulated to that report in as evidence. Therefore it cannot
23 complain now about the subdivision approach that was used.

24 Number two, the findings of facts and conclusions of
25 law regarding just compensation cite that a subdivision

1 approach with approval. The findings of fact and conclusions
2 of law on just compensation lay out exactly what that
3 subdivision approach is and why it was appropriate here. The
4 Nevada Supreme Court in *Tacchino versus State Department of*
5 *Transportation* held the subdivision approach is appropriate.

6 And, Your Honor, it is very common and, in fact,
7 appropriate for an expert to use many methods to value
8 property. I'll quote to you from a 9th Circuit Court of
9 Appeals opinion *Eden versus -- or Eden Memorial Park*
10 (phonetic) -- or *U.S. versus Eden Memorial Park*. In the
11 majority of assignments, the appraiser utilizes all three
12 methodologies. On occasion he may believe the value indication
13 from one would be more significant. Yes, he -- yet he will use
14 all three as a check against each other to test his own
15 judgment. That's Ninth Circuit precedent. It's good for an
16 appraiser to go through and use various methodologies.

17 I guess what the suggestion that's being made is that
18 Mr. DiFederico should have just done one methodology. Then
19 what we would hear from the City is well, his report is not
20 reliable because he didn't do all three methodologies that the
21 Courts say he should do, and he should check it. That's way
22 various methodologies were used, and that's why he went through
23 the 7-, 16- and 61-lot scenarios, was to do this as a check.

24 And, Your Honor, if the City really thought that
25 there was something inappropriate about Mr. DiFederico's

1 report, they could have challenged it in a deposition and never
2 did that. It's too late to challenge it, and they've
3 stipulated to its admissibility.

4 Your Honor, I mean, at various times the City says in
5 its motion that the work that Mr. DiFederico did was not
6 necessary in this case, and his highest and best use just
7 relied upon your order, and his take analysis just relied upon
8 what was written in the findings of facts and conclusions of
9 law regarding take. That's not true.

10 Mr. DiFederico went and did his -- he certainly
11 looked at this Court's orders, but he states specifically in
12 his report that he went and read the documentation to confirm
13 them so that he could determine from an appraiser's viewpoint
14 the impact of the City's actions. Therefore, Your Honor, it's
15 simply not true to just say that he read your orders and then
16 just rubber stamped them. That's not what happened. He did
17 his own independent research, and it's set forth in his report.
18 And the City could have deposed him and fleshed that issue out
19 if it did not believe it to be true. They did not.

20 The second cost -- well, then therefore, Your Honor,
21 this cost of \$114,000, in a case like this, according to the
22 affidavit of Autumn Waters, according to the work that was done
23 by Mr. DiFederico, the invoices he submitted and the checks
24 that were paid by the landowners to Mr. DiFederico are
25 reasonable and were actually incurred in this case. The

1 landowners actually paid this expert that sum of money.

2 And I will note one last thing is the City makes the
3 argument that, well, Mr. DiFederico shouldn't be able to charge
4 for his trial preparation work. Your Honor, we prepared him
5 for trial. We spent a lot of time comp assuming we were going
6 to go to trial. And then, of course, the City stipulated to
7 the admissibility of the report, which made it so he did not
8 need to testify at the bench trial.

9 Your Honor, I'll turn to this. The GGA report, the
10 golf course report, the government argues, well, this wasn't
11 disclosed. And it never was a part of this case.

12 Your Honor, the GGA report was absolutely necessary
13 in this case because the City early on repeatedly -- and the
14 GGA report is the golf course report where the golf course
15 expert makes a determination that a golf course use is not
16 financially feasible.

17 As you'll recall early on in this case, the City
18 repeatedly said that nothing -- there had been no action or no
19 taking of the property because the landlord could still use the
20 property for a golf course. But we had, in order to prepare
21 for trial and properly present our case, hire a golf course
22 expert who's a financial feasibility expert to rebut that City
23 argument.

24 You'll recall that during the take phase of summary
25 judgment, the City's Las Vegas Council admitted that the golf

1 course was not feasible, but their California Counsel, all the
2 way up to the date of determining the take said, well, this may
3 not -- a golf course may not be most economically efficient if
4 it was used for a golf course, and if a golf course is no
5 longer viable, and then he said, and I don't think that's been
6 established. So he was even arguing that the golf course was
7 feasible all the way up to the findings of -- or all the way up
8 to the date that we were arguing the take issue. Therefore,
9 this was an absolutely necessary document to prepare.

10 This expert had to interview past owners. He had to
11 interview -- or the past owners. He had to analyze the past
12 operations. He analyzed the national golf industry, and he
13 analyzed the Las Vegas golf industry, and he concluded that a
14 golf course use on the property was not financially feasible.

15 And here's where the report was used. Number one, it
16 was given to Mr. DiFederico so that he could analyze it as part
17 of his expert report. Expert appraisers are entitled to rely
18 upon other experts. Secondly, it was produced to the City of
19 Las Vegas. The City of Las Vegas had, again, every opportunity
20 to depose this individual.

21 And thirdly, Your Honor, the golf course report is
22 again referenced in the findings of facts and conclusions of
23 law on just compensation. Therefore, this is a cost, Your
24 Honor, this golf course report is a cost that was absolutely
25 not only reasonable, but absolutely critical in this case, and

1 it was actually -- it was actually incurred.

2 And, Judge, you can determine that based upon the
3 documents. The report was part of the case, Number 1, and
4 number two, invoices were submitted, and number three, checks
5 were used to pay for that.

6 Now, the third item that counsel brings up is this
7 report and the fee by Jones Roach & Caringella for \$29,625.
8 Your Honor, we had a short period to do rebuttal reports, or
9 surrebuttal reports. We exchanged expert reports, and I can't
10 remember whether it was 30 or 60 days. We anticipated that the
11 City would produce an appraisal report. So we hired a rebuttal
12 expert. We, because of the enormous record in this case,
13 because of the enormous history and facts, we started that
14 rebuttal expert early on so that that expert could become
15 acquainted with the facts.

16 Once the City produced no reports, that rebuttal
17 expert became unnecessary. So we immediately told that expert
18 to stop working, but those fees were actually -- or those costs
19 were actually incurred in this case. And again it's
20 reasonable, Your Honor, to retain a rebuttal expert. It's
21 reasonable to get that rebuttal expert working early on prior
22 to the reports being exchanged so that they can be prepared to
23 rebut the other expert. Therefore, that Jones Roach &
24 Caringella fee of 29,625 was appropriate.

25 The final issue that Mr. Molina brought up at this

1 hearing is the Westlaw billing. Your Honor, admittedly, the
2 Westlaw billing was used for all four cases; however, this was
3 the lead case. And, Your Honor, I -- and we put it in our
4 brief. It is very reasonable to assume that all of those bills
5 from Westlaw were used to assist with the 35-acre case because
6 it was indeed the leading case. If this Court finds it
7 reasonable to split them up, we understand that.

8 But, Your Honor, I tell the Court that the \$50,000 in
9 Westlaw, we had to research the take, the property interest.
10 We had to go into separation of powers law that the government
11 argued. We had to dive in to petition for judicial review law
12 that the government argued. We had to dive into significant
13 federal law that was totally irrelevant in Nevada that the
14 government argued.

15 So those Westlaw bills were reasonable and necessary
16 in this case. I would say it would be very difficult to say
17 that, you know, none of it was used or part of it was used in
18 this 35-acre case because, Your Honor, it was used. And it was
19 used -- after used in this case, it was used in the other
20 cases. And if it was used in the other case, it was used in
21 this case, Your Honor. They do have very similar facts. So,
22 Your Honor, that Westlaw bill also is appropriate.

23 I'll address just finally Mr. Molina's argument that,
24 well, none of these costs should have been expended until after
25 the PJR was dismissed in 2019. Again, not true, Your Honor.

1 As you'll recall, these cases were severed in 2017. That means
2 that work was being done in the inverse condemnation case from
3 2017 all the way up to today. The work, again, at the same
4 time the petition for judicial review case was going on, this
5 35-acre inverse condemnation case was going on, and, Your
6 Honor, we have submitted no costs from the petition for
7 judicial review case.

8 But, Your Honor, we have the documents. We've proven
9 that the costs have been incurred. They've been actually paid.
10 We've provided all of the checks. We've submitted to this
11 Court Exhibit Number 11 which lays out each of those costs,
12 some of which we've modified and withdrawn. We would ask that
13 the Court enter a finding that those costs are reasonable,
14 appropriate and should be reimbursed in this case as part of
15 the landowner's just compensation award.

16 This is where I'll close. If we accept Mr. Molina's
17 argument and you say, Judge, well, just give them 50,000 for
18 the appraisal report, that means the landowner will have paid
19 an extra 64,000 for the appraisal report, and that \$64,000 will
20 reduce his just compensation award below the constitutional
21 threshold, and that constitutional right would be violated,
22 Your Honor, because these costs are recoverable and part of the
23 just compensation award.

24 Thank you, Your Honor. Any questions, I'd be happy
25 to answer them.

1 THE COURT: None at this time.

2 Mr. Molina, sir.

3 MR. MOLINA: Thank you, Your Honor. I'll just pick
4 up where Mr. Leavitt left off, and that is this argument that
5 just compensation is somehow reduced if you don't award the
6 landowner his costs, and that argument is itself incorrect.
7 And just compensation is intended to compensate the landowner
8 for the taking of property. The compensation must be based on
9 the value of the property. It's not based on this, you know,
10 overall economic situation of the Developer, as he likes the
11 claim, and it's the same exact reason why attorneys' fees are
12 not typically included in just compensation is that the just
13 compensation is not intended to compensate the landowner for
14 every economic burden that it has suffered due to a taking.
15 It's to compensate the landowner for the taking of the property
16 itself. So that is just one thing I wanted to hit up front.

17 With respect to this argument about the City's
18 stipulation to the admissibility of Mr. DiFederico's report, I
19 would submit that a stipulation to admissibility is a pretty
20 low threshold. You know, we did not stipulate that
21 Mr. DiFederico's fees were reasonable and, you know, I believe
22 that this admissibility argument that the Developer is making
23 mischaracterizes the arguments that the City is making, which
24 is that, you know, none of the -- none of the report, you know,
25 has any value and should not -- you know, the Developer should

1 not be permitted to recover any costs with respect to
2 Mr. DiFederico's report, and that's simply not what we are
3 arguing here.

4 You know, we basically argue that there were certain
5 things that did not require the Developer -- Mr. DiFederico to
6 do an independent analysis, and we've also argued that all of
7 this time that was spent on this complex subdivision amount
8 method was inappropriate, you know, given the fact that these
9 were two totally hypothetical issues, and the Developer did
10 mention, or Mr. Leavitt mentioned the *Tacchino* case, which, as
11 we put in our briefs, you know, that did not necessarily state
12 that the subdivision method is, you know, the preferred method
13 of valuation.

14 It basically said that this is an acceptable method
15 of valuation in cases where it's not purely based on
16 hypothetical conjecture and speculation, which with respect to
17 these two hypothetical scenarios that Mr. DiFederico included
18 in his report, that's exactly what they are. They're
19 hypothetical. They're, you know, based on conjecture. They're
20 not necessary to the report.

21 As Mr. Leavitt argued, you know, an appraiser can
22 apply multiple methods of valuation, you know, both the cost
23 method, the comparable sales method, the income approach and to
24 do all of those things would not be unreasonable, but to take
25 the subdivision method analysis, which is really just one

1 subtype of one of those broader types of valuation, and to
2 apply it to scenarios where he now has to, you know, make
3 assumptions about costs for a hypothetical subdivision that
4 nobody has ever proposed and was never approved by the City, I
5 mean, that's just a waste of time, plain and simple, and it,
6 you know, didn't require however much time Mr. DiFederico spent
7 on it, which I'm not able to say, because I can't determine
8 that based on the invoices.

9 So again, we're not saying that the Developer
10 shouldn't be permitted to recover anything based on
11 Mr. DiFederico's report. What we're arguing is that the cost
12 should be reasonable based on, you know, what he did and, you
13 know, comparing that to what he was actually -- what he
14 actually needed to do, which was simply to value the property.

15 With respect to the Global Golf Advisors' report,
16 Mr. Leavitt was very careful to argue that the City made this
17 argument about being able to run a golf course early on in the
18 case, and that's just something that the City never really
19 continued to argue in the inverse condemnation phase of this
20 case. The Developer cited to one instance where Mr. Schwartz
21 argued on behalf of the City that the, you know, feasibility of
22 a golf course had not necessarily been established but then
23 assumed that it was not a feasible use of the property.

24 And so the City certainly didn't place that at issue,
25 you know, to any great extent that necessitated 70,000 --

1 \$77,000 paid to Global Golf Advisors for this report that, you
2 know, it really wasn't required to generate.

3 And ultimately, you know, if the Developer wanted to
4 use that report, it could have disclosed GGA as an expert
5 witness, which it didn't do. It only disclosed the report as
6 part of Mr. Tio Federico's expert witness file, his work file.
7 So how was the City supposed to know that the Developer
8 intended to claim costs for this when it never disclosed him as
9 an expert?

10 And, you know, getting to Jones Roach & Caringella,
11 probably pronouncing that incorrectly, but I'll call it the
12 JRC, you know, the Developer said, well, it was absolutely
13 necessary to retain them in advance of the expert disclosure
14 deadline because it was such a short period of time between the
15 initial expert disclosure deadline and the rebuttal expert
16 disclosure deadline.

17 So the City stipulated to multiple extensions of the
18 expert disclosure deadline at the developer's request, and it
19 would have done the same for the rebuttal experts if that's
20 what they wanted to do, but those were the times that they had
21 proposed, was 30 days to prepare rebuttal reports.

22 And so they took a calculated risk to retain this
23 expert without knowing whether the City was going to disclose
24 an expert that they would need to use JRC to rebut. That's on
25 them. The City should not be forced to bear the cost of the

1 developer's litigation strategy.

2 With respect to the Westlaw billing, Mr. Leavitt
3 argued that this was the lead case, and so, you know, all of
4 these bills, Westlaw bills reflect work that somehow benefited
5 this case, and it's just not really the analysis that, you
6 know, typically applies to these types of issues. You know,
7 can we establish that the Westlaw bill was actually incurred
8 and the cost was paid in connection with this case? We can't
9 establish this based on the bills Mr. Leavitt acknowledged that
10 he's making some sort of qualitative argument that, you know,
11 because in his opinion this is the lead case that everything
12 benefited this case, and I don't think that that's an
13 appropriate argument to make.

14 Finally, the Developer claimed that -- Mr. Leavitt
15 actually argued that, you know, about the prevailing party
16 issue and costs that were incurred prior to the final
17 resolution of the PJR. I would just note that we had
18 previously mentioned to the Court that approximately \$15,000 of
19 that \$50,000 of Westlaw bills was attributable to time before
20 the final order on the PJR, and there were also several costs
21 that were, you know, copying costs that appear to have been
22 related to before that filing fees. The Developer in fact
23 actually claimed the filing fee for the petition for judicial
24 review as a cost, and so to say that they didn't claim any
25 costs for the petition for judicial review is not accurate.

1 And I think that's all, Your Honor.

2 THE COURT: And for me, as far as the Westlaw is
3 concerned, I think from just a reasonable perspective, I'd
4 reduce that by -- because there's another three companion
5 cases; right?

6 MR. MOLINA: Correct.

7 MR. LEAVITT: Yes, Your Honor.

8 THE COURT: Okay. We're going to reduce that by
9 75 percent and you get 25 percent of that for the Westlaw bill.

10 Now, it becomes much more problematic for me when it
11 comes to the expert fees and costs because what's necessary, I
12 don't think you look at what's necessary from an expert report
13 perspective when it comes to civil litigation and for
14 preparation for trial based upon the ultimate trial itself.
15 And what I mean by that is this. Here we had a scenario where
16 ultimately there was an agreement and/or stipulation and/or
17 waiver or however you want to categorize it.

18 And so my point is this. That makes my job much more
19 difficult because, for example, say hypothetically, if there
20 had been motions in limine filed regarding DiFederico Group's
21 opinions and hypothetically I narrowed his opinions and
22 portions of his report. Then going back and extrapolating, for
23 example, and I realize this wouldn't be exact, but
24 hypothetically, if I made a determination that half of the work
25 he performed would not be admissible because it, for example,

1 might not be the assistance requirement under *Hallmark*, that
2 makes my decision a lot easier, but now I have the scenario
3 where, for all practical purposes I don't think his opinion was
4 really challenged; right?

5 And so -- and the reason why I bring that up, at the
6 end of the day I do realize that whatever decisions I make, and
7 this is important to point out, that when it comes to our
8 Nevada Constitution, and more specifically Article I,
9 Section 22, paragraph 4, just the just compensation award shall
10 include all reasonable costs and expenses actually incurred;
11 right? And it doesn't have language that deals specifically
12 with based upon expert witnesses who testified at trial and/or
13 no other qualifiers. It just appears to be all reasonable
14 costs and expenses actually incurred.

15 I do understand the reasonableness, but my point
16 coming back to that is this. It's easier for me to determine
17 what potentially could be reasonable if the expert opinion was
18 attacked, stricken and the like. And last, but not least, I
19 think it's important to point out too that not all experts are
20 trial experts, right, and we understand that.

21 And so, anyway, as far as the motion attacks the
22 memorandum of costs, I'm going to go ahead and reduce the
23 Westlaw fee by 75 percent and one fourth.

24 Let me look here. And as far as the claimed expert
25 fees, and I guess this would be GGA Partners, Global Golf

1 Advisors, DiFederico and also Jones Roach, and it's my
2 understanding that was being utilized for the purposes of
3 rebuttal. And once again, I never got a chance to really --
4 there was no rebuttal testimony, the necessity for it. That
5 doesn't mean he wasn't necessarily retained.

6 And so all I'm saying is this. Regarding the GGA
7 Partners amount in the sum of \$11,162.41, Global Golf Advisors
8 in the amount of \$67,094.00, DiFederico Group, I think the
9 claimed amount is \$114,250, and Jones Roach Caringella, \$29,625
10 and zero cents, I'm going to let those stand.

11 And I think -- I know all the other claims, as far as
12 expenses and costs, I'll let those stand too.

13 All right.

14 I guess the last issue is payment of property taxes;
15 is that right -- reimbursement. I'm sorry.

16 MR. LEAVITT: Yes, Your Honor.

17 THE COURT: All right. Let's just dig into this
18 quickly.

19 Mr. Leavitt.

20 MR. LEAVITT: Yes, Your Honor.

21 Just very quickly, there's two sources of law that
22 we've referred to, the *County of Clark versus Alper* case. In
23 *County of Clark versus Alper*, there's a one paragraph in the
24 case where the Court specifically addresses reimbursement of
25 taxes at headnote 19 and 20 and says that the District Court

1 was reversed with instructions to reimburse the Alpers for
2 their property taxes actually paid after the land was taken by
3 the County.

4 We also -- section -- Article I, Section 22 -- I'm
5 sorry. Article I, Section 22 for the Nevada Constitution
6 states that the landowner must be put back in the same position
7 monetarily as if the property had not been taken, and
8 therefore, Your Honor, the landowners are requesting
9 reimbursement of taxes exactly as the award was granted in the
10 inverse condemnation case of *Alper*.

11 The Court has entered a finding of a take in this
12 case. It's findings of facts and conclusions of law on the
13 take are very clear that the City of Las Vegas has taken the
14 property, meeting all four standards of Nevada's taking law and
15 therefore, Your Honor, the landowners ask for a reimbursement
16 of their taxes in the amount of \$976,889.38.

17 We -- we used August 2nd, 2017, as the date upon
18 which the taxes should have no longer been paid, and we've
19 calculated those taxes from August 2nd, 2017, and as set
20 forth in our motion, we used that date because that was the
21 first date of compensable injury, as stated in *5th & Centennial*
22 case, and the reason we used that, Your Honor, is because as of
23 on that date the City had already denied the singular
24 application to develop the 35-acre property, and on August
25 2nd had denied the Master Development Agreement, which is the

1 only application the City stated it would approve to develop
2 the property. All the while the City was taxing the landowners
3 on a lawful use of residential. The City prohibited that
4 residential use through two denials.

5 Therefore, Your Honor, we ask that those taxes be
6 reimbursed pursuant to the inverse condemnation case of *County*
7 *of Clark versus Alper*.

8 THE COURT: Okay. Thank you, sir.

9 And we'll hear from the opposition.

10 MR. SCHWARTZ: Yes, Your Honor. This is Andrew
11 Schwartz representing the City.

12 Your Honor, can you hear me?

13 THE COURT: Oh, yes, sir, I can hear you very clear.
14 I'm sorry.

15 MR. SCHWARTZ: Okay. Thank you. All right.

16 Your Honor, the *Alper* case doesn't apply here. The
17 *Alper* case, in the *Alper* case, the City took physical
18 possession of the owner's property to build a road. It did not
19 file an eminent domain action. The Court said to the county,
20 you should have filed an eminent domain action because you took
21 physical possession of the property.

22 So the Court then -- the -- so it was an inverse
23 condemnation case, but nothing like this case where the
24 allegation is that the City's regulation abuse of the owners
25 use of the property is a taking of the property. The City does

1 not -- has not taken physical possession of the property. The
2 City does not want physical possession of the property for any
3 public project, and will not take physical possession of the
4 property.

5 This case is based on a regulatory taking, a denial
6 of use. That's the allegation. There are three cases in
7 Nevada where the Nevada Supreme Court considered this type of
8 taking (indiscernible), and those are the State, the *State*
9 *versus the Eighth Judicial District* case, the *Kelly* case, and
10 the *Boulder City* case. In each of those cases, the Court found
11 that the government agency had not denied all use of the
12 property and therefore had not taken the property.

13 And those are the only cases -- so we don't have a
14 Nevada Supreme Court case that's like this case where there's
15 the allegation is denial of the owners use preregulation.

16 Now, it makes sense that if the government has
17 actually taken possession of the property, like the *Alper* case,
18 and in eminent domain cases where to build the public project,
19 the government needs private property, it files an eminent
20 domain case conceding liability, and then deposits the probable
21 compensation, which the owner can then access, and then the
22 government takes early possession of the property, builds the
23 project, and, of course, of course, at the time of judgment,
24 the money should be paid to the property owner, and all taxes,
25 if the property owner pays taxes after the government has

1 physically taken possession, well, then, yes, those should be
2 reimbursed, as in the *Alper* case and typically in an eminent
3 domain case. And all the other cases that the Developer relies
4 on are eminent domain cases where the government has or will
5 take physical possession of the property for a public project.

6 And this is an issue in common that we had with the
7 motion for the stay, Your Honor, where there's a critical
8 distinction between the *Alper* case and this case where the City
9 has not dispossessed the owner. It has not taken physical
10 possession of property for a public project. And in that case,
11 the City shouldn't have to pay the money, the judgment because
12 it -- then, if appealed successfully, the Court is going to
13 have to unwind the entire transaction.

14 But anyway, I don't want to get into the motion to
15 stay. The Court has already taken that under submission.

16 But here so we have a situation where the property
17 owner still had possession and title of the property during
18 this entire period, and I want to point out that the property
19 owner in its appeal of the assessment attaches, the assessor
20 said well, your property is now a residential property. I'm
21 going to assess you for residential use at the higher rate than
22 the golf course. And the Developer initially appealed that
23 determination, and in their brief, and we cited this in our
24 papers in our briefs, Exhibits quadruple L. LLLL, at page 2709
25 of the defendants' exhibits. That's let me see. I think

1 that's Appendix 12. It's page 2209 and 22010.

2 The Nevada court argued to the assessor, the heading
3 on page 8 of that brief to the assessor is the property may
4 still be used for golf. And then it goes into some detail
5 about why the property can still be used for golfing.

6 Now, the date of this brief is significant in that it
7 was August 2nd. Excuse me. The date of the brief was
8 August 29, 2017. Why is that date significant? Well, in this
9 case, Your Honor, the Court had found that property owners have
10 a constitutional -- constitutionally protected property right
11 to use their and develop their property for any use that's
12 permitted by zoning and that the government has no discretion.

13 And that, if that's the case, then on August -- on
14 June 21, 2017, when the City disapproved the 35-acre
15 application, the application that the Developer filed to build
16 61 units, housing units, on the 35-acre portion of the
17 Badlands, that's the day the City denied those applications.
18 If the Court is correct that the Developer had a constitutional
19 right to approval of anything that they proposed, no discretion
20 on the part of the City.

21 Then the taking occurred on that date, June 21, 2017.
22 So this brief was filed after that occurred, more than
23 two months after that occurred, and the Developer is saying,
24 again, I quote from page 8, the heading, the property may still
25 be used for golfing. That was the Developer's argument to try

1 to get the assessor to reduce the assessment for the property.

2 So it would be -- it would be unjust if the City were
3 required to reimburse the Developer for property taxes that the
4 Developer paid, which is the cost of owning property only if
5 the Developer who remained in possession of the property, had
6 title for the property, and the City would be required to
7 reimburse the property owners for the taxes they paid, that
8 would be unjust.

9 I also want to point out, Your Honor, that in -- in
10 arguing that the appeal was too high, the Developer initially
11 argued, well, we can still use the property for golf.
12 Therefore, the property should be assessed at the lower rate.
13 Then the Developer did some -- a very curious thing. It
14 stipulated with the assessor to the higher amount. In other
15 words, it abandoned its appeal.

16 Now, why did it do that? Because the property was
17 designated PR-OS, park recreation open space in the City
18 general plan, which under NRS 278.250 -- .150, and NRS 278.250
19 is the controlling law with regard to the use of that property.

20 The Developer could not succeed on its taking claims
21 if -- if the Court found that the PR-OS designation prevented
22 residential development of the property. The Developer bought
23 property they could not use for residential in 2015, and the
24 City merely declined to change the law for that use. So the
25 Developer paid a price for that property that was -- that

1 should have taken into account the fact that it couldn't
2 legally be used for golf course -- or excuse me, for housing.

3 Well, what does that say? Well, if, according to
4 Mr. DiFederico, if the property could not be used for housing,
5 the property was worth zero. So the Developer paid zero for
6 the property -- or paid for property that couldn't be used for
7 residential. So according to the Developer's own evidence, the
8 property was worth zero when the Developer bought the property,
9 and it was worth zero after the City denied the 35-acre
10 applications in June of 2017, and it was worth zero on
11 August 29, 2017, when the Developer filed this brief with the
12 assessor arguing that the property could still be used for
13 golfing.

14 So if the Developer is right, if the (video
15 interference) is correct, that the property was worth zero
16 because the Developer couldn't develop the property for
17 housing, then that means that the property was worth zero at
18 the time of this appeal. The Developer, however, did not argue
19 to the assessor that the PR-OS designation prevented any
20 housing use of the property unless the City in its discretion
21 changed that.

22 Why didn't the Developer argue, well, you should
23 assess my property at zero because of the PR-OS designation?
24 Well, because that's where all the -- that was the big payoff
25 that the City -- that the Developer wanted in the inverse

1 condemnation litigation was it had to disappear the PR-OS
2 designation so that it could go for the large dollars, and that
3 gamble certainly paid off where the Developer here was awarded
4 \$34 million, and is seeking another 55 million in interest,
5 taxes and costs and attorneys' fees.

6 So it's very telling here that the Developer ceded
7 in its brief to the assessor that it still had use of the
8 property for golf course, and therefore, taxes, you know, are
9 necessary to maintain the ownership of property. That's the
10 cost of maintaining a property. You have to pay your property
11 taxes.

12 Moreover, the Developer is arguing that well, they
13 need to be reimbursed for their property taxes because they
14 need to be made whole in this proceeding.

15 Well, there is no question, there can be no question
16 here that the Developer has been made more than whole. The
17 facts are these that the Peccole Ranch Master Plan was
18 developed in the early 1990s, 1500-acre property, and that is
19 a condition of approval of that development where the original
20 Developer set aside the Badlands for golf course use.

21 The City then designated the golf course PR-OS in the
22 City's general plan. This was the open space. This was the
23 amenity to serve the Peccole Ranch Master Plan. That was the
24 purpose of this. The project wouldn't have been approved if
25 there hadn't been this amenity set aside.

1 The Peccole Ranch Master Plan was then developed.
2 84 percent of the property was developed. The Badlands
3 remained a golf course. Again, as an amenity to serve the golf
4 course and the surrounding community. That's the purpose of
5 setting it aside.

6 So the undertakings law, you can't -- it makes sense.
7 You can't then carve off the amenity that the Developer --
8 original Developer was required to set aside to serve the rest
9 of the development and then say, well, now I don't have an
10 economic use of that. Now, the government, you know, has to
11 let me do whatever I want with the property or pay me. That's
12 not the law.

13 But the issue here is whether the Developer is made
14 whole. The whole parcel was Peccole Ranch Master Plan.

15 And by the way, this Developer benefited from that
16 amenity by developing the Queensridge Towers, the Tivoli
17 retail, the retail shopping center and other houses in the
18 area. They benefited. They had greater value because of the
19 amenity, and all of the property in the area still retains
20 greater value if that amenity was continued.

21 So when you look at the parcel as a whole, by
22 preventing housing use of the 35 acres, you're not taking
23 anything from the Developer that the Developer owned. They
24 didn't have a right to do that.

25 Then if you consider just the Badlands as the parcel

1 as a whole instead of the entire Peccole Ranch Master Plan, the
2 City approved construction of 435 luxury units in the Badlands.
3 You can't carve up the Badlands into four different parts. The
4 Badlands was always a single economic unit. It was bought as a
5 single economic unit. The City approved 435 luxury housing
6 units.

7 According to the Developer's own evidence, that
8 property, just that part of the Badlands had increased in value
9 to about \$26 million, and the Developer -- the Developer paid
10 less than four and a half million dollars for the property. I
11 think Mr. Ogilvie said less than three and a half, but I think
12 that the purchase price was less than four and half million
13 dollars, and that's been thoroughly documented, and there is no
14 evidence to support the Developer's claim that the Developer
15 paid more, that the purchase and sale agreement was for seven
16 and a half million, and then the parties -- they -- the City
17 has established through documents produced by the Developer and
18 the deposition of the seller of the Badlands to the Developer,
19 that the Developer really paid less than four and a half
20 million dollars for the entire Badlands.

21 So one part is worth \$26 million based on the City's
22 approval. So it can't be the case that the Developer needs to
23 be reimbursed for his property taxes to be made whole. If you
24 look at the four a half million dollars purchase price, that's
25 \$18,000 an acre or \$630,000 for just for the 35 acres.

1 The Developer has claimed without any evidence that
2 the Developer purchased the Badlands for \$45 million, and in
3 other documents it claims it purchased it for a hundred million
4 dollars. Again, no evidence whatsoever to support that. The
5 Developer's admitted they have -- they don't have a document to
6 support that. All the other documents are the other way.

7 But even if they did, Your Honor, that 45 million,
8 that's \$180,000 an acre, and a hundred million, is \$400,000 an
9 acre. This Court awarded the Developer almost a million
10 dollars an acre in damages. So reimbursement of the million
11 dollars --

12 THE COURT: Well, I mean, the damage calculation,
13 it's my recollection -- wait a second. It's my recollection
14 the damage calculation was essentially uncontroverted; right?
15 And so my point is this. I mean, there's no reason to
16 relitigate this as far as the valuation is concerned.

17 MR. SCHWARTZ: No, that's not -- I'm not
18 controverting the damage calculation, Your Honor. In this
19 motion we controverted the damage calculation because the
20 appraiser assumed that the highest and best use of the
21 property --

22 THE COURT: My point is this: That ship has sailed
23 basically.

24 MR. SCHWARTZ: Basically was --

25 THE COURT: No. No. I mean, I don't want to sit

1 here and spend another hour. That ship has sailed, right, as
2 far as that is concerned. There was no valuation expert
3 offered. At the end of the day, it was uncontroverted, and my
4 ruling as far as the evaluation is what it is.

5 And so here we have a really simple issue that's
6 focusing on one claim, and that's reimbursement of the property
7 taxes based upon the taking date in this case offered by the
8 plaintiff.

9 MR. SCHWARTZ: Yes, and --

10 THE COURT: And ultimately, there's no dispute as to
11 how much was being paid in property taxes; right? And then you
12 have --

13 MR. SCHWARTZ: Oh, I don't dispute that, Your Honor.

14 THE COURT: Okay. Then I'm trying to figure out --

15 MR. SCHWARTZ: I am disputing that their entitlement
16 to reimbursement.

17 THE COURT: -- and then we have a provision under the
18 Nevada Constitution that deals specifically with making a
19 potential individual landowner, property owner that's involved
20 in a eminent domain and/or an inverse condemnation matter
21 whole, and so how do you make them whole if they paid taxes on
22 real property that they can't use, and there was a taking
23 determination? It's a simple calculation.

24 MR. SCHWARTZ: Your Honor, I just -- I've cited to
25 the Court their own brief where they contradicted that

1 statement. They said, and I quote, the property may still be
2 used for golfing. That's the Developer's statement, but that
3 doesn't matter in this case because --

4 THE COURT: But it doesn't matter because I made a
5 determination --

6 MR. SCHWARTZ: -- because the City didn't take
7 possession of the property.

8 THE COURT: Wait a second. Wait a second. It
9 doesn't matter because I've already ruled on the value of the
10 property. It was uncontroverted.

11 MR. SCHWARTZ: That's not --

12 THE COURT: All that other stuff doesn't matter.

13 MR. SCHWARTZ: That's not -- yes, Your Honor, but
14 that's not the issue here.

15 THE COURT: Well, no, the issue is this. This
16 property was owned R-PD7. It was taxed R-PD7, right, and the
17 plaintiff has alleged that they couldn't use the property
18 because of the actions of the City based upon a specific date.
19 And as a result, they're paying property taxes for property
20 they can't use. Heck, they couldn't even go out and put a
21 fence up; right?

22 MR. SCHWARTZ: Oh, no. Can I address that, Your
23 Honor?

24 THE COURT: I mean, I'm just saying it's a fact that
25 they couldn't put a fence up; right?

1 MR. SCHWARTZ: Well, it's not a fact that they
2 couldn't use --

3 THE COURT: I mean, the issue is -- I'm not --

4 MR. SCHWARTZ: -- of the property --

5 THE COURT: Sir, I'm going to tell you this.

6 MR. SCHWARTZ: -- they just admitted --

7 THE COURT: I mean, this is how I see it. I don't
8 mind saying it. I'm going to give the argument made by
9 Mr. Ogilvie at the very outset of this matter because I really
10 want to think about it, and it's a big issue. I get that. But
11 we're -- and that's an issue I have to give considerable
12 consideration and looking at the statute, trying to make a
13 determination as to whether I'm handcuffed as to what I really
14 can do, whether I have any discretion at all. These are all
15 things I think about, right. I don't mind saying that. I'll
16 tell you what I'm thinking about on the record.

17 For example, when I look at the statute, the
18 statutory scheme under Chapter 37, it could be argued, Judge,
19 you had no discretion. You have to do this. I kinda get it.
20 I understand what's going on. I understand Mr. Ogilvie's
21 position as it relates to the specific rules, the appellate
22 rules and Rules of Civil Procedure. I guess it was Rule 62.
23 And so I get it. I mean, I understand what's going on here and
24 what's at risk.

25 But this one here, we're not -- I'm not relitigating

1 anything. I've made a determination there was a taking on a
2 specific date. There's no question the plaintiff was cutting
3 checks for what, \$50,000 per -- what was the time period? I
4 saw it right in front of me.

5 But my point -- and that's it.

6 MR. SCHWARTZ: Your Honor, it's not -- we -- I don't
7 think it's correct that the Developer couldn't use the
8 property. I just quoted the Developer's admission that they
9 could use the property, and they could use the property for any
10 use allowed by the PR-OS --

11 THE COURT: I've already made a decision that there's
12 a taking, sir.

13 MR. SCHWARTZ: -- designation.

14 THE COURT: I've made a decision that there's a
15 taking. I respect the City's right to appeal the decision. I
16 do. I just -- I mean, I get it, but based upon my
17 determination, I'm looking at the calculation here. The ticker
18 started running on August 21st, 2017, and as far as the
19 amounts are concerned, it doesn't appear to be any issue
20 regarding that. I mean, it's a different variations of \$51,000
21 that were paid in certain installments, and we have the check.

22 And then I look at the Nevada Constitution and
23 specifically what it mandates, and it focuses on in all eminent
24 domain cases, actions, just compensation shall be defined as a
25 sum of money necessary to place the property owner back in the

1 same position monetarily without governmental offsets. It's
2 pretty -- I mean, we're making this so much more difficult than
3 it has to be. We are.

4 MR. SCHWARTZ: Your Honor, there is no authority in
5 Nevada that property taxes are reimbursed if the government
6 hasn't taken physical possession of the property or is not
7 going to take physical possession of the property for a public
8 project.

9 THE COURT: Well, this will be -- this will be the
10 case of first impression on that specific issue if that's the
11 case.

12 MR. SCHWARTZ: Well, then I guess I'm arguing --

13 THE COURT: I get a lot of -- I don't mind saying
14 this. I've got a lot of cases of first impression. Sometimes
15 I'm right. Sometimes I'm wrong. I mean, I don't -- that's
16 what I'm supposed to do, make decisions, and the Court of
17 Appeals and/or Supreme Court, with their infinite wisdom and
18 collective decision-making can say, look, Judge, you're wrong,
19 and this is why, or, Judge, you're right, and this is why. I
20 get it. That's the processes.

21 MR. SCHWARTZ: Well, my point, Your Honor, is that
22 there is no case for a good reason, and that is because the
23 only cases that allow property tax reimbursement, and *Alper*
24 seems to be the only one, is where the government took
25 possession of the property. The property owner was

1 dispossessed from the property, couldn't use it. That is --

2 THE COURT: But on the flip side --

3 MR. SCHWARTZ: -- not this case. This case the
4 property owner kept possession --

5 THE COURT: Wait. Wait. Wait. Wait. Wait.

6 On the flip side, there's no cases that says, look,
7 you can't do this; right?

8 MR. SCHWARTZ: I'm talking about reason, a reason
9 there aren't any cases is because there is no -- it would be
10 unjust to reimburse the property owner for property taxes when
11 they still have possession and title of the property. That is
12 why there are no cases --

13 THE COURT: And they have possession and title of
14 property --

15 MR. SCHWARTZ: -- because that would be unjust.

16 THE COURT: -- that's zoned R-PD7, and they can't do
17 anything with it. It's economically not viable to continue
18 running this business, and everyone forgets this. They talk
19 about open spaces and the like. I think I was pretty clear on
20 this at one of the prior hearings. At the end of the day, what
21 is a golf course? It's not a park. It's a business; right,
22 green fees, pro shops, restaurants. At the end of the day,
23 it's a business, and this was no longer a viable business.
24 That's what it's all about.

25 MR. SCHWARTZ: Well, they're not entitled to make

1 their profit on that property. That was set aside as the Open
2 Space Parks and Recreation for the development.

3 THE COURT: Well, then if that's the case --

4 MR. SCHWARTZ: There is no -- there is no
5 entitlement.

6 THE COURT: You know what, I understand this, and
7 then we'll be done.

8 If that's the case, the City should have bought the
9 property at the very outset, and we wouldn't be here. And so
10 we're going to burden the property order to sit on property
11 that's economically not feasible, right, to run as a golf
12 course, and we're going to let it remain open spaces forever as
13 an amenity, and the City is not willing to pay for it. Well,
14 that's why they have inverse condemnation law, I'll be candid
15 with you.

16 MR. SCHWARTZ: Thank you, Your Honor. I don't have
17 anything further.

18 THE COURT: All right. Thank you, sir.

19 Anything else, Mr. Leavitt?

20 MR. LEAVITT: No, Your Honor. I just -- I'd be very
21 brief that the findings of facts and conclusion of law
22 regarding the takes lay out in detail the taking actions,
23 including a physical possession of the property.

24 And, Your Honor, based upon the *Alper* decision and
25 even based upon Mr. Schwartz's argument that when the

1 government takes physical possession it must pay the taxes,
2 even under his argument taxes must be paid pursuant to the
3 findings of facts and conclusions of law.

4 Thank you, Your Honor.

5 THE COURT: All right. And that's going to be my
6 decision. I'm going to grant plaintiff's motion for
7 reimbursement of property taxes.

8 Last, but not least, I have a one matter under
9 advisement, and I'm going to look at it as far as -- and
10 consider it and contemplate it. I'm not going to make a
11 decision right now. I'm going to maybe sometime next week.

12 I'm going to get it done relatively quick, but I want
13 to -- I'll be candid with everyone. I want to think about it,
14 because I understand the total impact. I understand the
15 competing factors. I've looked at the statute over and over
16 and so on. I understand the rules. There's tension there, and
17 I'll issue a decision. All right.

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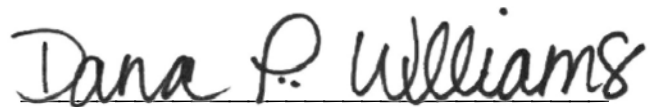
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THE COURT RECORDER: And in light of that, everyone
enjoy your day.

(Proceedings concluded at 12:49 p.m.)

-oOo-

ATTEST: I do hereby certify that I have truly and correctly
transcribed the audio/video proceedings in the above-entitled
case to the best of my ability.

A handwritten signature in cursive script that reads "Dana L. Williams". The signature is written in dark ink and is positioned above a horizontal line.

Dana L. Williams
Transcriber

<p>MR. LEAVITT: [19] 3/7 14/25 28/13 28/20 28/24 36/16 39/14 39/17 40/3 44/17 44/19 47/3 47/14 47/17 59/3 75/7 77/16 77/20 95/20</p> <p>MR. MOLINA: [8] 3/21 47/24 55/9 55/12 55/15 56/2 70/3 75/6</p> <p>MR. OGILVIE: [16] 3/10 4/20 4/24 5/5 6/11 29/2 33/13 34/22 36/14 42/22 43/18 44/4 44/16 44/18 45/5 47/21</p> <p>MR. SCHWARTZ: [28] 3/13 3/17 79/10 79/15 88/17 88/24 89/9 89/13 89/15 89/24 90/6 90/11 90/13 90/22 91/1 91/4 91/6 92/6 92/13 93/4 93/12 93/21 94/3 94/8 94/15 94/25 95/4 95/16</p> <p>MS. GHANEM HAM: [2] 3/12 3/15</p> <p>THE CLERK: [1] 4/4</p> <p>THE COURT</p> <p>RECORDER: [4] 4/10 4/14 28/25 97/2</p> <p>THE COURT: [71] 3/3 3/9 3/19 3/23 3/25 4/5 4/12 4/15 4/22 5/4 5/21 14/23 28/11 28/14 28/21 28/23 29/1 33/11 33/14 36/12 36/15 39/7 39/15 39/18 42/19 43/16 43/21 44/10 45/3 46/14 47/4 47/16 47/19 47/23 55/6 55/11 55/13 55/17 59/1 70/1 75/2 75/8 77/17 79/8 79/13 88/12 88/22 88/25 89/10 89/14 89/17 90/4 90/8 90/12 90/15 90/24 91/3 91/5 91/7 92/11 92/14 93/9 93/13 94/2 94/5 94/13 94/16 95/3 95/6 95/18 96/5</p> <p>UNIDENTIFIED</p> <p>SPEAKER: [1] 4/3</p> <p>\$</p> <p>\$1 [1] 26/24</p> <p>\$1 million [1] 26/24</p> <p>\$100,000 [1] 61/22</p> <p>\$11,162.41 [1] 77/7</p> <p>\$114,000 [1] 64/21</p> <p>\$114,250 [3] 52/19 56/1 77/9</p> <p>\$15,000 [3] 57/8 57/15 74/18</p> <p>\$1500 [1] 54/15</p> <p>\$18,000 [1] 87/25</p> <p>\$180,000 [1] 88/8</p> <p>\$250,000 [1] 62/6</p> <p>\$26 [2] 87/9 87/21</p> <p>\$26 million [2] 87/9 87/21</p>	<p>\$29,625 [2] 67/7 77/9 3/5 [1] 29/10</p> <p>\$3.5 million [1] 29/10</p> <p>\$30,000 [1] 52/13</p> <p>\$34 [4] 12/18 13/8 13/25 85/4</p> <p>\$34 million [4] 12/18 13/8 13/25 85/4</p> <p>\$400,000 [1] 88/8</p> <p>\$45 [1] 88/2</p> <p>\$45 million [1] 88/2</p> <p>\$50 [1] 13/8</p> <p>\$50 million [1] 13/8</p> <p>\$50,000 [3] 68/8 74/19 92/3</p> <p>\$51,000 [1] 92/20</p> <p>\$630,000 [1] 87/25</p> <p>\$64,000 [1] 69/19</p> <p>\$67,094.00 [1] 77/8</p> <p>\$77,000 [3] 52/4 52/9 73/1</p> <p>\$80 [3] 14/15 31/5 31/5</p> <p>\$80 million [3] 14/15 31/5 31/5</p> <p>\$80,000 [1] 31/4</p> <p>\$976,889.38 [1] 78/16</p> <p>-</p> <p>-oOo [1] 97/5</p> <p>.</p> <p>.140 [2] 44/5 44/7</p> <p>.150 [1] 83/18</p> <p>.170 [6] 15/12 34/18 44/4 44/5 44/6 44/6</p> <p>1</p> <p>10:06 [1] 3/1</p> <p>10:08 a.m [1] 4/11</p> <p>10:12 a.m [1] 4/11</p> <p>11 [3] 48/7 48/19 69/11</p> <p>12 [2] 9/24 82/1</p> <p>12:49 p.m [1] 97/4</p> <p>12th [2] 30/14 32/18</p> <p>136-page [1] 62/14</p> <p>14 [1] 26/8</p> <p>143 [2] 20/1 20/14</p> <p>15,000 [1] 57/9</p> <p>1500 [1] 61/11</p> <p>1500-acre [1] 85/18</p> <p>16 [2] 53/19 63/23</p> <p>16-lot [2] 53/15 53/22</p> <p>17 [3] 41/11 41/16 41/22</p> <p>170 [1] 44/3</p> <p>18 [1] 62/1</p> <p>180 [15] 1/4 3/8 13/24 30/20 31/8 31/22 32/3 32/12 32/14 32/23 33/23 34/1 35/9 50/23 59/4</p> <p>180 Land [21] 3/16 4/7 7/1 7/16 10/10 10/14 10/16 10/22 10/24 11/2 11/8 12/17 12/19 13/2 13/7 13/12 13/12 13/15 14/11 15/1 30/17</p> <p>180 Land Company [1] 3/4</p>	<p>180 Land's [4] 5/1 29/5 29/17 35/1</p> <p>19 [3] 1/12 3/1 77/25</p> <p>1959 [2] 15/6 36/20</p> <p>1984 [2] 24/23 42/4</p> <p>1990s [1] 85/18</p> <p>1998 [2] 25/18 25/19</p> <p>2</p> <p>2 defines [1] 36/6</p> <p>20 [1] 77/25</p> <p>200 [1] 38/3</p> <p>2015 [2] 20/16 83/23</p> <p>2017 [11] 19/15 69/1 69/3 78/17 78/19 82/8 82/14 82/21 84/10 84/11 92/18</p> <p>2019 [6] 29/20 57/11 57/20 61/21 61/23 68/25</p> <p>2020 [2] 9/24 29/19</p> <p>2021 [2] 10/2 10/7</p> <p>2022 [2] 1/12 3/1</p> <p>21 [2] 82/14 82/21</p> <p>21st [1] 92/18</p> <p>22 [3] 76/9 78/4 78/5</p> <p>22.4 [1] 59/8</p> <p>22010 [1] 82/1</p> <p>2209 [1] 82/1</p> <p>25 percent [1] 75/9</p> <p>250 acres [4] 29/10 30/22 45/11 45/22</p> <p>250-acre [1] 21/3</p> <p>25th [2] 10/2 32/19</p> <p>2709 [1] 81/24</p> <p>278.250 [2] 83/18 83/18</p> <p>28 [2] 10/7 42/3</p> <p>28th [1] 32/20</p> <p>29 [2] 82/8 84/11</p> <p>29,625 [1] 67/24</p> <p>29th [1] 57/10</p> <p>2nd [4] 78/17 78/19 78/25 82/7</p> <p>3</p> <p>30 [7] 15/24 24/11 28/6 43/4 44/19 67/10 73/21</p> <p>34 million [3] 13/13 13/14 13/15</p> <p>35 acres [3] 30/22 86/22 87/25</p> <p>35-acre [7] 68/5 68/18 69/5 78/24 82/14 82/16 84/9</p> <p>37 [16] 15/19 15/21 25/1 34/23 34/24 35/20 39/4 41/14 41/23 42/2 43/1 43/11 43/13 45/8 46/5 91/18</p> <p>37-point [1] 36/9</p> <p>37,009 [5] 35/23 36/5 36/9 37/4 37/5</p> <p>37.120 [1] 25/1</p> <p>37.140 [13] 15/10 15/12 15/23 24/2 28/7 31/16 34/17 36/2 36/4 36/10 42/16 43/3 43/13</p> <p>37.170 [18] 15/10 16/1</p>	<p>16/3 16/6 24/3 28/7 31/16 36/21 36/24 37/4 37/13 37/16 37/18 42/17 43/17 43/18 44/23 44/25</p> <p>4</p> <p>40 [1] 38/3</p> <p>435 [2] 87/2 87/5</p> <p>45 million [1] 88/7</p> <p>5</p> <p>50 million [1] 13/16</p> <p>50,000 [1] 69/17</p> <p>55 million [1] 85/4</p> <p>59 [3] 5/7 5/16 6/16</p> <p>5th [6] 41/7 41/8 59/22 59/23 60/13 78/21</p> <p>6</p> <p>60 [7] 5/8 5/17 6/16 26/14 26/17 39/4 67/10</p> <p>61 [2] 54/2 82/16</p> <p>61-lot [3] 53/18 53/25 63/23</p> <p>62 [25] 5/11 5/11 7/21 7/23 8/1 8/8 8/11 8/16 8/17 8/18 8/25 9/5 11/14 14/4 15/7 21/15 21/21 26/14 31/13 32/25 33/16 34/18 46/5 46/6 91/22</p> <p>64,000 [1] 69/19</p> <p>65-acre [1] 49/23</p> <p>7</p> <p>7,048 [1] 62/15</p> <p>7-lot [2] 53/15 53/23</p> <p>70,000 [1] 72/25</p> <p>75 percent [2] 75/9 76/23</p> <p>8</p> <p>8 and [1] 39/3</p> <p>80 million [2] 13/17 13/18</p> <p>84 percent [1] 86/2</p> <p>88 [1] 22/13</p> <p>89 [3] 53/10 53/12 53/21</p> <p>8C [1] 33/18</p> <p>8th [2] 5/18 6/18</p> <p>9</p> <p>9th [1] 63/8</p> <p>A</p> <p>a.m [3] 3/1 4/11 4/11</p> <p>abandoned [1] 83/15</p> <p>ability [2] 23/5 97/8</p> <p>able [8] 48/11 48/15 56/24 57/2 58/8 65/3 72/7 72/17</p> <p>about [41] 4/8 5/19 6/12 18/25 20/6 20/18 22/24 26/13 26/14 29/7 29/8 29/15 31/11 33/4 35/12 37/24 40/4 44/5 46/22 55/6 55/23 55/25</p>	<p>57/5 57/9 59/12 61/7 62/23 63/25 70/17 72/3 72/17 74/15 82/5 87/9 91/10 91/15 91/16 94/8 94/19 94/24 96/13</p> <p>above [3] 60/15 61/11 97/7</p> <p>above-entitled [1] 97/7</p> <p>absence [1] 18/5</p> <p>absolutely [11] 20/10 28/3 38/17 40/3 61/14 62/9 65/12 66/9 66/24 66/25 73/12</p> <p>abuse [1] 79/24</p> <p>accept [1] 69/16</p> <p>acceptable [1] 71/14</p> <p>acceptance [1] 27/13</p> <p>accepted [1] 38/25</p> <p>access [2] 20/9 80/21</p> <p>accordance [1] 9/5</p> <p>according [7] 34/1 50/18 64/21 64/22 84/3 84/7 87/7</p> <p>account [1] 84/1</p> <p>accountant, [1] 55/20</p> <p>accountant, right [1] 55/20</p> <p>accrue [3] 13/25 14/3 14/10</p> <p>accurate [1] 74/25</p> <p>acknowledged [1] 74/9</p> <p>acknowledgment [1] 31/24</p> <p>acquainted [1] 67/15</p> <p>acre [14] 21/3 49/23 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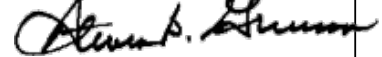
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91/14</p> <p>which [65] 5/9 6/13 7/7 7/10 12/18 12/18 15/19 17/10 17/15 18/4 18/14 18/20 23/11 25/22 29/20 30/11 30/14 32/14 35/24 36/1 38/16 38/25 40/5 42/6 43/19 44/8 47/16 48/18 48/20 48/21 48/22 49/18 49/23 50/10 51/13 53/1 53/8 53/25 54/5 56/22 57/9 57/10 57/11 57/11 58/17 58/23 59/12 60/1</p>
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<p>W</p> <p>which... [17] 61/17 62/15 65/7 69/11 69/12 70/23 71/10 71/16 71/25 72/7 72/14 73/5 78/18 78/25 80/21 83/4 83/18</p> <p>Whichever [2] 47/17 47/19</p> <p>while [4] 12/23 13/3 13/19 79/2</p> <p>who [7] 16/7 18/4 39/15 40/8 40/9 76/12 83/5</p> <p>who's [2] 61/25 65/22</p> <p>whole [9] 85/14 85/16 86/14 86/14 86/21 87/1 87/23 89/21 89/21</p> <p>why [24] 6/6 6/6 14/3 22/3 44/25 47/7 49/1 49/2 49/18 49/19 54/1 60/16 63/3 63/22 70/11 76/5 82/5 82/8 83/16 84/22 93/19 93/19 94/12 95/14</p> <p>will [39] 5/1 5/2 5/9 6/25 7/6 7/12 10/9 10/22 11/17 11/18 11/20 12/16 13/5 13/21 16/25 17/1 19/6 19/8 19/24 21/19 23/13 31/21 35/13 38/22 39/1 40/23 46/1 48/22 49/12 61/22 62/3 63/13 65/2 69/18 69/19 80/3 81/4 93/9 93/9</p> <p>WILLIAMS [2] 1/11 97/11</p> <p>willing [1] 95/13</p> <p>wisdom [1] 93/17</p> <p>withdrawn [1] 69/12</p> <p>within [5] 15/20 15/24 24/11 28/6 43/4</p> <p>without [14] 5/12 8/25 9/11 10/21 31/15 32/8 33/14 44/2 51/2 56/20 60/2 73/23 88/1 93/1</p> <p>witness [2] 73/5 73/6</p> <p>witnesses [1] 76/12</p> <p>won't [2] 18/21 55/12</p> <p>word [5] 8/14 36/25 37/3 42/20 45/4</p> <p>words [8] 11/2 16/10 19/5 22/6 22/7 23/7 27/10 83/15</p> <p>work [15] 51/19 58/15 60/7 62/13 62/14 62/15 62/16 64/5 64/22 65/4 69/2 69/3 73/6 74/4 75/24</p> <p>working [3] 20/6 67/18 67/21</p> <p>worth [7] 84/5 84/8 84/9 84/10 84/15 84/17 87/21</p> <p>would [72] 9/10 9/15 9/16 9/16 9/19 9/20 12/3 12/11 13/1 13/7</p>	<p>13/17 13/24 14/2 17/11 23/4 24/10 26/21 27/4 27/7 27/9 27/18 28/5 28/9 29/3 34/2 35/22 39/22 40/11 40/22 42/4 42/10 42/11 43/2 44/1 44/3 45/1 45/1 46/10 46/11 52/3 52/14 52/19 52/24 53/23 54/13 54/22 55/24 56/4 57/1 57/12 60/20 63/13 63/19 67/11 68/16 68/16 69/12 69/21 70/19 71/24 73/19 73/24 74/17 75/25 76/25 79/1 83/2 83/2 83/6 83/8 94/9 94/15</p> <p>would've [1] 56/24</p> <p>wouldn't [3] 75/23 85/24 95/9</p> <p>written [2] 22/23 64/8</p> <p>wrong [2] 93/15 93/18</p> <p>wrote [1] 60/10</p> <hr/> <p>X</p> <hr/> <p>XVI [1] 1/6</p> <hr/> <p>Y</p> <hr/> <p>yeah [5] 25/19 26/2 29/1 55/8 55/11</p> <p>year [2] 26/24 60/25</p> <p>years [12] 15/7 19/14 19/16 19/17 20/16 21/15 26/8 26/21 27/1 28/1 60/21 62/1</p> <p>yes [12] 4/3 36/16 39/18 63/13 75/7 77/16 77/20 79/10 79/13 81/1 89/9 90/13</p> <p>yesterday [1] 9/9</p> <p>yet [3] 13/4 41/3 63/13</p> <p>you [167]</p> <p>you'd [2] 28/9 47/17</p> <p>you'll [7] 20/5 21/1 24/19 61/6 65/17 65/24 69/1</p> <p>you're [6] 38/17 43/22 56/2 86/22 93/18 93/19</p> <p>you've [1] 57/17</p> <p>your [145]</p> <p>yours [1] 21/3</p> <p>yourself [1] 17/2</p> <hr/> <p>Z</p> <hr/> <p>zero [9] 77/10 84/5 84/5 84/8 84/9 84/10 84/15 84/17 84/23</p> <p>zoned [1] 94/16</p> <p>zoning [3] 10/21 12/23 82/12</p>			
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RPLY
LAW OFFICES OF KERMITT L. WATERS

Kermitt L. Waters, Esq., Bar No. 2571
kermitt@kermittwaters.com

James J. Leavitt, Esq., Bar No. 6032
jim@kermittwaters.com

Michael A. Schneider, Esq., Bar No. 8887
michael@kermittwaters.com

Autumn L. Waters, Esq., Bar No. 8917
autumn@kermittwaters.com

704 South Ninth Street
Las Vegas, Nevada 89101

Telephone: (702) 733-8877

Facsimile: (702) 731-1964

Attorneys for Plaintiff Landowners

DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND CO., LLC, a Nevada limited liability
company, FORE STARS Ltd., DOE
INDIVIDUALS I through X, ROE
CORPORATIONS I through X, and ROE
LIMITED LIABILITY COMPANIES I through
X,

Plaintiffs,

vs.

CITY OF LAS VEGAS, political subdivision of
the State of Nevada, ROE government entities I
through X, ROE CORPORATIONS I through X,
ROE INDIVIDUALS I through X, ROE
LIMITED LIABILITY COMPANIES I through
X, ROE quasi-governmental entities I through X,

Defendant.

Case No.: A-17-758528-J
Dept. No.: XVI

**PLAINTIFF LANDOWNERS' REPLY IN
SUPPORT OF MOTION FOR
ATTORNEY'S FEES**

Hearing Date: February 3, 2022

Hearing Time: 9:05 AM

The Plaintiffs, 180 Land Co LLC and Fore Stars, Ltd. (hereinafter referred to as
"Landowners") hereby Reply in Support of their Motion for Attorney's Fees as follows:

The City spends the first nine (9) pages of its Opposition arguing contrary to Nevada law.
The City is not entitled to come to the Court and misrepresent that state of the law in Nevada.

1 NRPC 3.3¹. The City knows that in Nevada a landowner who is successful in an inverse
2 condemnation claim is entitled to his or her attorney fees. The City does not argue that the law
3 should be changed, that would be permissible under NRPC 3.3, instead, the City argues that it is
4 not the law, which is impermissible under NRPC 3.3. It is simply shocking that the City has spent
5 9 pages arguing contrary to the well established and known law that a successful inverse
6 condemnation plaintiff is entitled to their attorney fees in Nevada.

7 **A. *Buzz Stew* was Not an Inverse Condemnation Case, Instead, it was an**
8 **Unsuccessful Precondemnation Damages Case**

9 The City starts its opposition with reference to *Buzz Stew v. City of North Las Vegas*,¹³¹
10 Nev. 1, 341 Pl3d 646 (2015). City Opp. at 2:3-14. And, consistent with its prior arguments to the
11 Court, the City lacks an understanding of this area of Nevada law. As the City points out, the
12 undersigned counsel's office was counsel for *Buzz Stew*, and is, therefore, very aware of the facts
13 and holding in *Buzz Stew*.

14 First, *Buzz Stew* was not an inverse condemnation case, instead, *Buzz Stew* was the first
15 case in Nevada to establish that a landowner could bring a precondemnation damages claim absent
16 a taking. *Buzz Stew v. City of North Las Vegas*, 124 Nev. 224, 230, 181 P. 3d 670, 674 (2008)
17 ("Finally, to the extent that *Barsy* indicated that a taking must occur to recover damages related to

18 ¹ Rule 3.3 Candor Toward the Tribunal.

- 19 (a) A lawyer shall not knowingly: (1) Make a false statement of fact or law to a tribunal or fail
20 to correct a false statement of material fact or law previously made to the tribunal by the
21 lawyer; (2) Fail to disclose to the tribunal legal authority in the controlling jurisdiction
22 known to the lawyer to be directly adverse to the position of the client and not disclosed
23 by opposing counsel; or (3) Offer evidence that the lawyer knows to be false. If a lawyer,
24 the lawyer's client, or a witness called by the lawyer, has offered material evidence and the
lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures,
including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence,
other than the testimony of a defendant in a criminal matter, that the lawyer reasonable
believes is false.

...

1 a municipality's announcement of intent to condemn and its improper action with respect to that
2 announcement, that requirement has been eliminated as to precondemnation damages.
3 Accordingly, *Buzz Stew* is not required to show that a taking and the damages resulting from such
4 a taking have occurred.”)

5 Second, Buzz Stew was ultimately unsuccessful with his stand alone precondemnation
6 damages claim, meaning the jury did not believe that the City of North Las Vegas had
7 unreasonably delayed filing a condemnation action causing *Buzz Stew* damages. As background,
8 in *Buzz Stew*, the City of North Las Vegas never filed a condemnation action, instead, the
9 landowner sold his property and the new owner dedicated the land the City of North Las Vegas
10 had originally sought. Accordingly, the holdings in *Buzz Stew* address an unsuccessful plaintiff in
11 a precondemnation damages case, not a successful plaintiff in an inverse condemnation case. The
12 case now before this Court is about a successful plaintiff / landowner in an inverse condemnation
13 case. And, the law in Nevada is clear, **a successful plaintiff / landowner in an inverse**
14 **condemnation case is entitled to their attorney fees.** *McCarran Int'l Airport v. Sisolak*, 122 Nev.
15 645, 673 (2006); *Tien Fu Hsu v. County of Clark*, 123 Nev. 625, 637 (2007); 49 CFR § 24.107(c);
16 Nev. Const., art. 1 § 22(4); NRS 37.185.(emphasis added). Therefore, the City's reliance on *Buzz*
17 *Stew* is extremely misplaced.

18 **B. Sisolak and the Relocation Act**

19 The *Sisolak* opinion is clear, a successful plaintiff / landowner in an inverse condemnation
20 case does not need to establish a nexus between the taking project and federal funds to recover
21 attorney fees. *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 673-675 (2006). However, to be
22 clear, the Landowners have unquestionably demonstrated that not only does the City receive
23 federal funds but, the City also receives federal funds for its parks and open space programs which
24 is what the City has taken the Landowners' property for here. *Exhibit 12-16*.

1 “The city of Las Vegas is a sub-recipient of financial assistance from federal aid
2 programs.” Vol 1, Exhibit 12 at ATTY FEE MOT – 0104.

3 “Adopted in 1998, SNPLMA allows the BLM to sell public land within a specific
4 boundary around Las Vegas. The revenue from auctioned land sales, totaling \$4.1
5 billion as of 2019, is split between the State Education Fund (5%), the Southern
6 Nevada Waters Authority (10%), and an account for specific purposes, including:
7 Development of parks, trails, natural areas, and other recreational public purposes
8 in cooperation with local governments and regional entities...***The City has
9 previously been able to leverage SNPLMA for a wide range of parks and trails
10 projects and renovations.***” Vol. 1, Exhibit 13, part 1 at ATTY FEE MOT – 0226
(emphasis added)

11 “The Southern Nevada Public Lands Management Act (SNPLMA) allows the
12 Bureau of Land Management (BLM) to dispose of public land, with a portion of
13 land sales proceeds that may be used for conservation and the development of
14 parks, trails and natural areas by local and federal agencies. ***The City accesses these
15 funds*** through a competitive application process.” Vol 2, Exhibit 13, part 2 at
16 ATTY FEE MOT – 0235 (emphasis added).

17 “The City receives revenue in other forms from the Federal [] government...to buoy
18 City revenues, the City must also work to increase the overall share of
19 competitively awarded grant funding, especially from Federal funding sources...of
20 the biennial budget, the state general fund and Federal fund represent roughly two
21 thirds of the budget...” Vol 2, Exhibit 13, part 2 at ATTY FEE MOT – 0272.

22 City has sought between “\$50-69 million” in Federal Funds for Parks, Trails and
23 Natural Areas. Vol 2, Exhibit 14 at ATTY FEE MOT – 0386.

24 Therefore, even if a nexus was required, which it is not, the Landowners have met that requirement
for both the City, itself, and also for the City’s parks and open space programs, as they both receive
federal funds. It must also be noted, that in the 17 Acre Case, the Landowners just received the
City’s responses to interrogatories seeking information about federal funding and the City in its
responses claims that federal funds are not relevant and are not likely to lead to the discovery of
evidence relevant to any issue in the case. *See Exhibit 19, City of Las Vegas’ Response to Plaintiff
Landowner Fore Stars, LTD.’s First Set of Interrogatories, Interrogatory No 4, page 7:27-8:1.*
The City cannot maintain such contradictory positions - here claiming the Landowners have not
established a nexus between federal funding and the City, and then in the 17 Acre Case, claim
federal funding is irrelevant.

1 Nevertheless, Nevada has adopted the Relocation Act in its entirety. NRS 342.105. And,
2 the Relocation Act unquestionably provides that an owner of real property *shall* be entitled to his
3 or her attorney fees when, “[t]he court having jurisdiction renders a judgment in favor of the owner
4 in an inverse condemnation proceeding” (*Exhibit 7*, 49 CFR 24) (emphasis added). This law could
5 not be clearer and includes no qualifiers. Therefore, under both *Sisolak* and NRS 342.105 (which
6 adopts the Relocation Act) the Landowners are entitled to their attorney fees.

7 **C. Article 1 § 22 (“the PISTOL Amendments” According to the City) Absolutely**
8 **Applies to Inverse Condemnation**

9 As argued in the Landowners’ opening motion, Article 1 § 22 of the Nevada Constitution
10 clearly provides for the recovery of attorney fees. Nev. Const., art. 1 § 22(4) (just compensation
11 includes “all reasonable costs and expenses actually incurred.”). To avoid this clear law, the City
12 argues in its opposition that Article 1 § 22, “the Pistol Amendments do not apply to inverse
13 condemnation actions...” City Opp. at 8:8-9. This is not true. In *Nevadans for the Prot. Of Prop.*
14 *Rights v. Heller*, 122 Nev. 894, 908, 141 P.3d 1235, 1244-1245 (2006), the Supreme Court
15 acknowledged that Article 1 § 22 would apply to inverse condemnation actions. Specifically,
16 when deciding whether a proposed section of the original initiative petition violated the single
17 subject requirements for initiative petitions, the Court found that “[a]lthough this section *would*,
18 as the proponents contend, *apply to many inverse condemnation cases*, which this court has held
19 to be the ‘constitutional equivalent to eminent domain,’ it would also apply to myriad other
20 government actions that do not fall even within the most broad definition of eminent domain.” *Id.*
21 Emphasis added. Therefore, without a doubt, the Nevada Supreme Court has recognized that
22 Article 1 §22 (“the Pistol Amendments”) would apply to inverse condemnation actions.
23 Accordingly, Article 1 §22 applies to inverse condemnation actions and supports awarding the
24 Landowners their requested attorney fees.

1 **D. The City’s Own Counsel Charges More Than \$450 An Hour and He Does Not**
2 **Limit His Practice to Condemnation Matters**

3 The City advances that the Landowners’ counsel should be limited to \$450 an hour based
4 on some report the City found online called the 2020 Real Rate Report. City Opp. at 11. What is
5 tellingly absent from the City’s Opposition is any reference to how much it pays its own private
6 counsel. Mr. Ogilvie currently charges the City \$550 an hour. *See Exhibit 17, McDonald Carano*
7 *General Terms and Conditions of Engagement with the City.* This is important as this is Mr.
8 Ogilvie’s **government rate which is widely known to be lower than what is charged for private**
9 **clients.** Moreover, Mr. Ogilvie does not limit his practice to condemnation matters, and, in fact,
10 the City had to contract with yet another attorney for such background. In Nevada, experienced
11 eminent domain and inverse condemnation counsel are compensated upwards of \$1,392 per hour.
12 (*Exhibit 8*). This was approved by the Nevada Supreme Court 15 years ago in Sisolak. Therefore,
13 the Landowners’ request for attorney fees ranging from \$800 – \$1,500 per hour is reasonable and
14 customary in the field of inverse condemnation in Nevada.

15 **E. The Landowners are Not Required to Show Billing Records, Affidavits are**
16 **Sufficient**

17 The City makes several incorrect statements in its attempt to obtain the Landowners’
18 Counsel’s billing records. City Opp. at 10:28-11:9. Billing records are not required and that is for
19 a good reason. Attorney fees are awarded prior to an appeal, if the prevailing party had to disclose
20 its billing records (which include attorney client privileged information and attorney work product
21 information) that would force a party to forgo attorney fees in order to protect those privileges.
22 Accordingly, an affidavit is sufficient to establish the hours an attorney worked, and not only in
23 cases where an attorney was on a contingency agreement, as the City wrongfully argues. (City
24 Opp. at 11:2). Instead, Rule 54 (d)(2)(B)(v)(a) only requires, “counsel’s affidavit swearing that
the fees were actually and necessarily incurred and were reasonable” which the Landowners’

1 Counsel's affidavits provide. Accordingly, the Landowners are entitled to their attorney fees, as
2 requested.

3 **1) The Landowners' Counsel Bill at 1/10 Hour Increments, Just Like**
4 **the City's Counsel**

5 The City makes the strange argument that Landowners' Counsel bill in increments that are
6 rounded to the nearest hundredth and this somehow is a disqualifying fact. City Opp. at 11:7-8.
7 There is no need to address the City's disqualifying argument, as it cites no authority, but more
8 importantly, it is not true. The Landowners' Counsel does not round to the nearest hundredth. The
9 Landowners' Counsel bills in 1/10 hour increments just like the City's Counsel. *Exhibit 17*.
10 However, due to the fact that some hours had to be split between cases for this, and future motions
11 for attorney fees, that is what accounts for the appearance of hundredth increments. *See Exhibit*
12 *18 ¶ ¶ 3-4, Declaration of Sandy Guerra*. Accordingly, the Landowners are entitled to their
13 attorney fees, as requested.

14 The City also claims that "this is the first and only case" the Landowners' Counsel "have
15 billed their time on an hourly basis." (City Opp. at 11:3-4). This is a wild misstatement of the
16 Landowners' Counsel's declaration. What Landowners' Counsel state in their declarations is that
17 they have not previously handled an inverse condemnation case on solely an hourly basis. Because
18 the City has no basis for opposing the Landowners' request for attorney fees, it instead throws
19 irrelevant and inaccurate accusations. The Landowners are entitled to their attorney fees, as
20 requested.

21 **2) The City's Own Counsel Has Billed More Hours than the Landowners'**
22 **Counsel**

23 The City alleges that it is difficult to determine the work that was done by Landowners'
24 Counsel, an apparent attack on the number of hours Landowners' Counsel billed in this matter.
City Opp. at 10-11. Tellingly absent, however, from the City's Opposition is any reference to how

1 many hours the City's counsel has billed. Had the City's counsel billed less than the Landowners'
2 Counsel, that surely would have been a featured argument in the City's attack on the number of
3 hours billed. That argument appears nowhere in the City's Opposition, and that is because the
4 City's counsel has billed more hours than the Landowners' Counsel.

5 The Landowners have obtained the City's counsel's invoices through September 2021 by
6 way of a Freedom of Information Act Request. Those invoices are attached hereto as *Exhibits 18a*
7 and *18b*, however, they are voluminous and require a time-consuming effort to total all private
8 attorney hours. Accordingly, the Landowners' Counsel's paralegal has added the time and
9 provided an affidavit detailing how this process was undertaken. As shown from *Exhibit 18*, as of
10 September 2021, the City has spent **7,274.10** attorney hours on the four inverse condemnation
11 actions while, as discussed in the Landowners' moving papers, as of October 2021, the
12 Landowners' Counsel has only spent **6,866.93** total attorney hours on all four cases. Landowners'
13 Mot at 9:14-15. Therefore, it is known that the City's counsel has billed more attorney hours than
14 the Landowners' Counsel demonstrating the reasonableness of the Landowners' Motion for
15 Attorney Fees and the unreasonableness of the City's opposition. The Landowners are entitled to
16 their attorney fees, as requested.

17 **F. Hours Since October 31, 2021**

18 The Landowners' moving papers calculated the hours worked up until October 31, 2021.
19 As stated, a supplemental calculation of the additional hours worked since October 31, 2021 would
20 be provided, as attorney and staff hours are still accumulating. Landowners' Mot. at fn 3. From
21 November 1, 2021 to January 25, 2022 there have been an additional 313.06 attorney hours and
22 140.47 additional staff hours worked on this 35 Acre Case. *See Exhibit 20, Supplemental*
23 *Declarations.*

24 ///

Attorney Hours since October 31, 2021

K. Waters	0.5 x \$675 = \$337.50	0.5 x \$1,500 = \$750
J. Leavitt	124.78 x \$675 = \$86,251.50	124.78 x \$1,300 = \$162,214.00
A. Waters	171.97 x \$675 = \$116,079.75	171.97 x \$800 = \$137,576.00
M. Schneider	15.8 x \$675 = \$10,665.00	15.8 x \$800 = \$12,640.00
Total additional hours 313.06 at \$675 = \$211,315.50		
Total additional hours 313.06 at enhanced rate = \$313,180.00		

Legal Assistants since October 31, 2021

Total additional hours worked = 140.47 x hourly rate of \$50.00 = \$7,023.5

G. Conclusion

Nevada law supports an award of attorney fees, including the enhancement provided in the *Hsu* case. Accordingly, the Landowners request an attorney fee award, as set forth in the opening motion, in the amount of **\$3,410,755.00 + \$313,180.00** (hours since October 31, 2021) **= \$3,723,935.00** and reimbursement of fees paid for the Law Offices of Kermitt L. Waters legal assistants in the amount of **\$44,912.50 + 7,023.50** (hours since October 31, 2021) **= \$51,936.00**.

DATED this 27th day of January, 2022.

LAW OFFICES OF KERMITT L. WATERS

/s/ Autumn Waters
Kermitt L. Waters, Esq. (NSB 2571)
James J. Leavitt, Esq. (NSB 6032)
Michael A. Schneider, Esq. (NSB 8887)
Autumn L. Waters, Esq. (NSB 8917)
704 South Ninth Street
Las Vegas, Nevada 89101
Telephone: (702) 733-8877
Facsimile: (702) 731-1964
Attorneys for Plaintiff Landowners

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McDONALD CARANO LLP
George F. Ogilvie III, Esq.
Christopher Molina, Esq.
2300 W. Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
gogilvie@mcdonaldcarano.com
cmolina@mcdonaldcarano.com

Bryan Scott, Esq., City Attorney
Philip R. Byrnes, Esq.
Rebecca Wolfson, Esq.
495 S. Main Street, 6th Floor
Las Vegas, Nevada 89101
bscott@lasvegasnevada.gov
pbyrnes@lasvegasnevada.gov
rwolfson@lasvegasnevada.gov

Andrew W. Schwartz, Esq.
Lauren M. Tarpey, Esq.
396 Hayes Street
San Francisco, California 94102
schwartz@smwlaw.com
ltarpey@smwlaw.com

/s/ Sandy Guerra
an employee of the Law Offices of Kermitt L. Waters

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * *

180 LAND COMPANY, LLC,

Petitioner,

vs.

CITY OF LAS VEGAS,

Respondent.

AND RELATED PARTIES

CASE NO. A-17-758528-J
DEPT NO. XVI

**TRANSCRIPT OF
PROCEEDINGS**

BEFORE THE HONORABLE TIMOTHY C. WILLIAMS, DISTRICT COURT JUDGE

THURSDAY, FEBRUARY 03, 2022

**PLAINTIFF LANDOWNERS' MOTION TO DETERMINE PREJUDGMENT
INTEREST**

[645] PLAINTIFF LANDOWNERS' MOTION FOR ATTORNEY FEES

APPEARANCES (VIA BLUEJEANS):

FOR THE PETITIONERS:

JAMES J. LEAVITT, ESQ.
ELIZABETH GHANEM HAM, ESQ.

FOR THE RESPONDENT:

GEORGE F. OGILVIE, III, ESQ.
PHILIP R. BYRNES, ESQ.
J. CHRISTOPHER MOLINA, ESQ.
ANDREW W. SCHWARTZ, ESQ.
REBECCA L. WOLFSON, ESQ.

RECORDED BY: MARIA GARIBAY, COURT RECORDER
TRANSCRIBED BY: JD REPORTING, INC.

1 **LAS VEGAS, CLARK COUNTY, NEVADA, FEBRUARY 3, 2022, 1:40 P.M.**

2 * * * * *

3 THE COURT: All right. I just want to say good
4 afternoon to everyone and welcome you to our afternoon February
5 3rd, 2022 calendar.

6 And let's go ahead and set forth our appearances.
7 We'll start first with the plaintiff and then we'll move to the
8 defense.

9 MR. LEAVITT: Good afternoon, Your Honor. James J.
10 Leavitt here on behalf of the plaintiff, 180 Land, LLC,
11 landowners.

12 Elizabeth, we can't hear you.

13 THE COURT: Yeah, you'll have to hit star 4, ma'am.

14 MS. GHANEM HAM: Sorry about that. Sorry about that.
15 Good afternoon, everyone. Good afternoon, Your Honor.
16 Elizabeth Ghanem Ham on behalf of 180 Land and Fore Stars
17 Landowners.

18 THE COURT: Okay.

19 MR. OGILVIE: Good afternoon, Your Honor. George
20 Ogilvie on behalf of the City of Las Vegas.

21 MR. SCHWARTZ: Good afternoon, Your Honor. This is
22 Andrew Schwartz for the City of Las Vegas.

23 MR. MOLINA: Good afternoon, Your Honor. This is
24 Chris Molina on behalf of the City.

25 MS. WOLFSON: And good afternoon, Your Honor.

1 Rebecca Wolfson also on behalf of the City of Las Vegas.

2 MR. BYRNES: And good afternoon, Your Honor. Phil
3 Byrnes on behalf of the City of Las Vegas.

4 THE COURT: And I think that covers all appearances;
5 is that correct?

6 MR. LEAVITT: Yes, on behalf of the plaintiff, Your
7 Honor.

8 THE COURT: All right. And I --

9 MR. OGILVIE: Yes, Your Honor.

10 THE COURT: All right. Okay. So once again, good
11 afternoon.

12 And I see we have, from what I can gather in looking
13 at the calendar, we have two pending motions. One would be
14 plaintiff landowners' motion for determination of prejudgment
15 interest, and the second would be plaintiff landowners' motion
16 for attorneys' fees.

17 Which one should we handle first?

18 MR. LEAVITT: Well, Your Honor, I think perhaps the
19 prejudgment interest one would be best to handle first.

20 THE COURT: All right. Okay. And, Mr. Ogilvie, is
21 that fine? No objection there?

22 MR. OGILVIE: Yes, Your Honor. No objection.

23 THE COURT: All right. Then that's what we'll do.

24 All right. Sir, you have the floor.

25 MR. LEAVITT: Thank you, Your Honor. Again, James J.

1 Leavitt on behalf of the plaintiff landowners.

2 Your Honor, this motion for prejudgment interest is a
3 standard motion that's filed in every eminent domain case, and
4 especially in every inverse condemnation case where the amount
5 recovered is higher than what the government offered; or, as
6 the case is in an inverse condemnation case, is the award. And
7 the prejudgment interest is statutory, or at least the
8 procedure for prejudgment interest is statutory. There's three
9 issues that need to be resolved posttrial by the Court
10 according to the statute 37.18175.

11 Two issues appear to be undisputed. In fact, there
12 was no opposition drafted by the City of Las Vegas regarding
13 two issues, which is the date of commencement of interest,
14 which is August 2nd, 2017. And there was no opposition to
15 the interest being compounded annually. Those are two of the
16 issues that the statutes require us to address and that the
17 Court is to resolve as part of the determination of prejudgment
18 interest.

19 The only disputed issue before you now, in order to
20 calculate the prejudgment interest is what is the rate of
21 return that should be used.

22 So that's the issue that I'll address right now is
23 what rate should be used to determine the prejudgment interest
24 on behalf of the landowners in this case on the \$34 million
25 verdict.

1 First, the rule. The Nevada Supreme Court has held
2 that prejudgment interest is part of the just compensation
3 award. The Nevada Constitution also states very clearly that
4 the determination of the rate of return for prejudgment
5 interest is also part of the just compensation award meaning
6 that it's part of the constitutionally mandated rights that the
7 landowners have in this case.

8 The test that the Nevada Supreme Court has used to
9 determine the rate of return is that rate which will put the
10 landowner back in the same position monetarily as he would have
11 been in had his property not been taken.

12 Now, that's a pretty general rule, but the Nevada
13 Supreme Court goes on to explain the purpose of that rule which
14 more fully explains how that rule should be applied when
15 determining the rate of return. The Supreme Court said that
16 interest is to compensate for the period that the landowners
17 were, and this is a quote, "deprived of the use of the proceeds
18 that should have been paid at the time of the taking."

19 So what the Court is saying here is we're going to go
20 back to August 2nd, 2017. We're going to assume that the
21 landowner had, for purposes of this case, \$34,135,000. What
22 rate of return could this landowner have achieved on that
23 \$34 million had that money been paid on August 2nd, 2017?
24 And there's a strong public policy for this rule that the Court
25 has adopted, especially in an inverse condemnation case.

1 First, the government has had use of the property.
2 It's been taken from the landowner. And secondly, the
3 landowner has not been paid for that taking. And so what
4 interest does is it compensates the landowner for that lost use
5 of those proceeds during that period.

6 Now, before I discuss the specific rule, I want to
7 address one of the concerns or one of the issues that the City
8 raised in its brief. The City doesn't make an argument that
9 the rate of return is improper. The City doesn't make an
10 argument that the landowners have improperly calculated the
11 rate of return. 90 percent of the City's brief is the amount
12 of money that the landowners are asking for in prejudgment
13 interest is too high. The Nevada Supreme Court has addressed
14 that issue twice.

15 First, in the *Sisolak* case, the Nevada Supreme Court
16 awarded interest to Mr. *Sisolak* that more than doubled his
17 award. Mr. *Sisolak* received approximately \$6 million in that
18 inverse condemnation case for the taking of his airspace. The
19 prejudgment interest was significantly higher than \$6 million.

20 In the *Alper* case, the Nevada Supreme Court, and I'll
21 quote what they say here, "As indicated by the award in the
22 present case, prejudgment interest may be very substantial in
23 protracted condemnation proceedings." And here's what they
24 say, "and may, in fact, exceed the inflated value of the land."

25 That's especially true in an inverse condemnation

1 case because they tend to be very protracted, as you've seen in
2 this case. The landowners -- the landowners have to prove the
3 property interest. The landowners have to prove the take. The
4 landowners have to prove the just compensation phase all
5 through discovery. In a direct eminent domain case, you go to
6 trial, and the only issue is how much does the government have
7 to pay? So that's why prejudgment interest is very high in
8 these inverse condemnation cases.

9 So now how do we calculate the rate of return here?
10 The Nevada Legislature has adopted a statute, and in that
11 statute, the Nevada Legislature says that the Court shall
12 determine the rate, and then it says that rate shall not be
13 below prime plus 2 percent.

14 So, Your Honor, prime plus 2 percent as the City has
15 argued, is not the rate of return that should be applied in
16 this case. Instead, the rate of return that should be applied
17 in this case is that rate which would put the landowner back in
18 the same position monetarily as he would have been in had his
19 property not been taken.

20 Now, Your Honor, we've done this for a long time, as
21 you're well aware, and there's only one case in Nevada where
22 the District Court Judge granted prejudgment interest based
23 upon a certain rate of return, and then that issue was taken up
24 to the Nevada Supreme Court, and the Nevada Supreme Court
25 affirmed. And here's what the Nevada Supreme Court said. It's

1 in the *State versus Barsy* case.

2 First, the Nevada Supreme Court said the rate of
3 return is a question of fact. Secondly, the rate of return
4 must be based upon evidence taken posttrial by the District
5 Court Judge, and thirdly, here's the only piece, Your Honor,
6 out of all the cases that we have in Nevada on inverse
7 condemnation and on prejudgment interest. This is the only
8 place where the Nevada Supreme Court indicates the type of
9 evidence that it will accept to determine the rate of return.
10 And this is what the Court said in *Barsy*, that the rate that
11 could be achieved -- the test is the rate that could have been
12 achieved had the landowners, and here's the quote, "invested
13 his money in land similar to that condemned."

14 So what the Nevada Supreme Court relied upon in the
15 *Barsy* case was what was the land increase like during the
16 relevant period? In other words, if the landowner had been
17 paid their money as of 2017 and invested that money in land
18 similar to that condemned, to quote *Barsy*, what would he have
19 achieved? And we've provided to you two reports which include
20 empirical evidence. One is by Mr. DiFederico, who was the
21 appraiser in this case, and the other is by Mr. Lenhart, who's
22 a broker. This is the precise evidence that the Nevada Supreme
23 Court held should be considered when determining the rate of
24 return on the prejudgment issue in the *Barsy* case.

25 And, Your Honor, I can go through the DiFederico

1 report with you if you'd like. I can go through the Lenhart
2 report, but both of those reports -- well, first of all, the
3 DiFederico report arrives at a rate of return of 23 percent for
4 the relevant period in this case, and the Lenhart report
5 arrives at a rate of return of 25 to 27 percent of the relevant
6 period.

7 I'll reference just the DiFederico report for just a
8 moment, Your Honor. Mr. DiFederico investigated Colliers
9 International Survey, a well-respected survey, to determine
10 what the rate of return was on land similar to the 35 acre
11 property from 2017 to 2022.

12 He also referenced CoStar in his report, and CoStar,
13 Your Honor, is a compilation of sales and resales of property,
14 and they have data which shows wherein you can identify
15 properties that are similar to the 35-acre property and
16 determine what those properties sold and resold for and
17 determine what the rate of increase was for those properties
18 during the relevant period.

19 He also referred to, in his report, to lot sales that
20 have occurred in the area that are similar to the landowner's
21 property.

22 And then he didn't end there. He went and found five
23 individual properties that had sold and resold during the
24 relevant period to support his number, and then he concluded,
25 Your Honor, based upon those four sources of empirical

1 evidence, that the proper rate of return to apply in this case,
2 following the *Barsy* standard, is 23 percent each year,
3 compounded annually.

4 Mr. Lenhart, Your Honor, followed the same process.
5 Except for he used seven sales and resales of properties during
6 the relevant period, and he came in with even a higher rate of
7 return of 25 to 27 percent.

8 Because that is the only evidence before the Court
9 right now on what the proper rate of return is, the landowners
10 chose the lowest number there, 23 percent, so there would be no
11 dispute as to what the rate of return should be for the
12 prejudgment interest in this case, Your Honor.

13 So, Your Honor, unless you have any questions, the
14 request is straightforward. Prejudgment interest should
15 commence from August 2nd, 2017. That's not a disputed issue.

16 That prejudgment interest should be compounded
17 annually. That's not a disputed issue.

18 And the rate of return should be 23 percent, as
19 that's the only evidence that's before this Court on this
20 question of fact that's pending, Your Honor.

21 Do you have any questions for me, Judge?

22 THE COURT: Not at this time, sir.

23 MR. LEAVITT: Okay.

24 THE COURT: Okay. And from the defense, we'll hear
25 from whoever's arguing this motion.

1 MR. SCHWARTZ: Yes, Your Honor. This is Andrew
2 Schwartz, and I'll be -- I'll be representing the City on this
3 motion.

4 There is no dispute that the minimum interest rate
5 for prejudgment interest in this case is prime plus 2 percent.
6 The only test, the only standard that the Court has to apply to
7 allow the Court to award prejudgment interest above that rate
8 is this constitutional standard that the -- the Constitution
9 and the case law is essentially saying the Court should award
10 the prime plus 2 percent rate from the statute unless a higher
11 rate would be necessary to make the property owner whole. And
12 we do not have those facts in this case. In fact, we have just
13 the opposite. We have just the opposite, Your Honor. There is
14 absolutely no reason to award the property owner more than the
15 statutory rate to make it whole because it's already been made
16 whole 54 times by the judgment.

17 Now, the Developer paid, and this is -- the Developer
18 paid four and a half million dollars for the 250-acre Badlands.
19 That's \$18,000 an acre. This is the 35-acre case. So the
20 Developer paid \$630,000 for the 35-acre segment of the property
21 that he carved out of the Badlands.

22 The Court has awarded the Developer \$34,135,000 in
23 takings damages in this case.

24 So that's 54 times the Developer's investment in the
25 property, and so it -- it cannot be, it cannot be the case here

1 that more money in interest above prime plus 2 percent is
2 necessary to make the Developer whole here, and the case is
3 even stronger that the Developer doesn't need extraordinarily
4 high rate of interest to be made whole.

5 Not only has the Developer already made 54 times its
6 investment in the 35-acre property, but the City approved 435
7 luxury housing units for construction on the 17-acre segment of
8 the Badlands. And by the Developer's own evidence, that
9 increased the value of just the 17-acre portion by 26 million.

10 So now you have a four and a half million dollar
11 investment with one judgment for 34 million. The City's
12 approval of development in one part that's increased the value
13 by 26 million. So you've got -- that's \$60 million. So you've
14 got an investment of four and a half million dollars.

15 Now, the Developer has received in damages and in
16 enhanced value of the property due to the City's approval, you
17 know, the City lifted the PR-OS designation and rezoned the
18 property to allow 435 units. Now, you've got \$60 million plus
19 the Developer still has 200 acres left, 200 acres left of the
20 Badlands in which to develop.

21 The Developer applied to develop the 133 acres
22 portion of the property under Judge Crockett's order. The City
23 couldn't consider that application because the Developer didn't
24 file a major modification application.

25 Well, so the City never examined the 133-acre

1 applications on the merits.

2 Then the Nevada Supreme Court reversed that and said
3 you don't need a major modification application. The City --
4 the City then wrote to the Developer and said now that the
5 Judge Crockett order has been reversed, refile your
6 applications for the 133-acre case. They haven't refiled the
7 application. In fact, the City asked Judge Sturman to remand
8 those applications to the City Council so the City Council
9 could decide them on the merits, and the Developer opposed it.
10 In fact, the Developer dismissed its petition for judicial
11 review on the 133-acre case. So then in the 65-acre case, the
12 Developer never even filed one application.

13 So the Developer can't seriously argue this
14 extraordinary interest rate to make it whole. If you include
15 the -- what the -- the \$52 million that they're seeking in
16 prejudgment interest, you add that to the 34 million in this
17 case, that would be, by my calculations, a 13,800 percent
18 profit, 13,800 percent profit on an investment in the property.
19 So they don't meet the test, and that's the only test for an
20 extraordinarily high interest rate.

21 And I'll address the *Barsy* case. The *Barsy* case
22 doesn't apply. First of all, *Barsy* was an eminent domain case.
23 The Court there said the government took -- delayed in filing
24 the eminent domain action. The government wanted the property
25 for a public project, delayed filing the eminent domain action

1 and during that period, *Barsy* lost tenants and lost money. So
2 when the Court awarded *Barsy* the fair market value of the
3 property on the date of value, the Court included, well, this
4 isn't enough to make *Barsy* whole because he lost some tenants.
5 So they said -- the Court accepted evidence that what would --
6 what would the interest rate be if *Barsy* had invested that in a
7 building that had tenants so that he could make the return and
8 that what he lost when the City delayed in the condemnation
9 action.

10 Number one, the *Barsy* was -- needed a higher interest
11 rate to be made whole, and that finding cannot be made in this
12 case. We're as far from that determination as you can get.

13 And the second thing is, the Court there didn't say
14 that you get the profit from an investment, the profit from an
15 investment of that -- of the amount of the award. It said what
16 would be the equivalent if you invested that property in
17 property that had tenants, which was the value of the property
18 that *Barsy* would have had had his tenants not moved out due to
19 the condemnation blight.

20 And so therefore, the Court was just adjusting the
21 interest rate, which is what the return on money that *Barsy*
22 would get in order to compensate him for something that he
23 lost. And in this case, the Developer lost nothing like that.
24 The Developer has been rewarded with a windfall, at least with
25 the judgment, 54 times its investment.

1 The *Alper* case -- and by the way, the interest rate
2 the Court found in *Barsy* was what, prime plus 2 percent.
3 That's the -- that's ultimately what the Court concluded was a
4 fair rate of interest, prime plus 2 percent.

5 The *Alper* case, there was a case where the City
6 physically took possession of the property. The county
7 physically took possession of the property for a public
8 project, for a road project, and the property owner brought an
9 inverse case because the City didn't file an eminent domain
10 case. So that was really an eminent domain case where the
11 government agency took possession of the property and
12 dispossessed the property owner.

13 Similar to *Barsy* where the Court was -- it was an
14 eminent domain case that took the Court -- the agency
15 ultimately took possession of the property. And in there, the
16 Court said that -- that *Alper* was entitled to what rate of
17 interest? Prime plus 2 percent. Prime plus 2 percent.

18 He didn't say that *Alper* could take the condemnation
19 award and invest it in some speculative investment and that the
20 Court would speculate, well, how much money would you have made
21 on this speculative investment. What if you put it in the
22 stock market or, you know, well, then you have to assume, well,
23 what if you put it in NASDAQ and NASDAQ went down during the
24 period that you put it in the Fortune 500 stocks, and that went
25 up during the period.

1 The Court didn't say that you could invest the money.
2 It said they're entitled to a higher rate of interest.
3 Interest is the return on money. It's not profit from a
4 speculative development.

5 So neither *Alper* -- and moreover, *Alper* in *Barsy*
6 don't apply to this case because this was a regulatory taking
7 case concerning the agency's regulation of the owners use of
8 the property. This was not an eminent domain case like *Barsy*
9 and *Alper* where the government actually took physical
10 possession of the property.

11 All the City did here, according to the Court in its
12 judgment, was regulate the owners use of the property. The
13 City never dispossessed the owner from the property. During
14 this entire time the property owner had the full possession and
15 use of the property where use is allowed by law.

16 So there's no reason to determine here that because
17 the property owner was dispossessed from the property that the
18 property owner needed the money to -- that -- in the judgment
19 to replace that property.

20 Now, the Developer argues here that -- oh, and let me
21 back up.

22 So there are three cases, Your Honor, that are like
23 this in Nevada where the claim, the taking claim was that the
24 regulation of the owners use of the property affected a taking.

25 The Court here awarded the \$34 million for the

1 categorical and Penn Central claims, where the property owner
2 alleged that the City's regulation of the owners use of the
3 property was a taking.

4 *Alper* and *Barsy* are completely different cases.
5 Those are eminent domain cases where the government took
6 physical possession of the property. The property owner didn't
7 have possession and use of the property during the -- during
8 most of the lawsuit in *Barsy* and in any part of the lawsuit in
9 the *Alper* case.

10 In Nevada, there are three cases like this. They are
11 the State case, the Kelly case and the Boulder City case. In
12 all of those cases, the Supreme Court found that the taking had
13 to wipe out all use and value of the property. That wasn't the
14 case there either because the cases weren't ripe or because the
15 owner still had some use of the property or that the agency
16 didn't change the law applicable to the property.

17 And in each of those cases, the Nevada Supreme Court
18 found no taking. So we don't have the case like this where the
19 claim is excessive regulation of the owners use of the property
20 resulted in the taking. Where the Court then found a taking
21 and awarded prejudgment interest, not of some interest rate,
22 but of the amount of the award, if the amount of the award had
23 been invested and what would the -- the property owner have
24 earned on that investment. We don't have a case that says that
25 that applies here. Even if *Barsy* held that you can set the

1 interest rate by what the owner would have earned had the owner
2 invested the award at the time of the taking in some
3 speculative investment.

4 So that means that the only guidance for the Court
5 here in this case is from the Constitution, which is the
6 standard. Make the property owner whole.

7 And I've explained the property owner has already
8 been made more whole 54 times by just the judgment alone.

9 Now, the Developer, assuming, assuming that it wasn't
10 clear that the Developer here has already been made whole by
11 the judgment, the Developer says, well, we would have invested
12 this money in some -- in real estate. We would have invested
13 this money in some speculative real estate venture.

14 Well, that's not really true here because this is a
15 real estate developer. They build. That's their business.
16 They don't buy land and hold the land and hope that it
17 appreciates.

18 And in this case, what would the Developer have done
19 with the money? Well, it certainly wouldn't have built
20 anything. It didn't need the money to build anything. So it
21 wasn't harmed because it didn't have \$34 million.

22 When he went into this project, he paid four and a
23 half million for the 250 acres. The Developer must have had
24 the money to develop the property at that time if that was the
25 Developer's intent. It didn't need an extra 34 million to make

1 this profitable, particularly when it paid so little for the
2 land, four and a half million.

3 So this is a real estate developer. What they're
4 saying is that they would've taken the money and, at the time,
5 they would have been prescient enough to know that the
6 investing that money in the real estate market would have
7 earned them a greater return than prime plus 2 percent, that
8 they would -- if they would have had a crystal ball, and they
9 would've earned that money.

10 Or, you know, who's to say whether they or any other
11 property owner, if this is going to be the rule in takings
12 cases, any time you have a condemnation award, you can
13 always -- the owner could always argue, well, I would've
14 invested it. I would've invested it in Zoom, or I would have
15 invested it in SpaceX, and, you know, quadrupled my money.
16 What if they thought, well, I think the stock market is the
17 best place to invest the money. Would they have made what is a
18 hundred percent on the judgment over four years? Well, who's
19 to say.

20 The whole thing is completely speculative, and that's
21 why all the cases and the statutes in the Constitution talk in
22 terms of interest. Interest is return on money. It's the time
23 value of money.

24 What the Developer is seeking here is profit. It's a
25 completely different thing, and profit that's speculative. We

1 know what the interest rates are. We know what the prime rate
2 is, and we can add 2 percent to that, but -- and but we don't
3 know what the Developer would have invested this money in a
4 profitable venture.

5 Or even if you -- even if you were to allow the
6 Developer to gamble on the judgment and pay the interest rate
7 equivalent to what the Developer would have earned in profit on
8 a speculative venture, what they now in hindsight say they
9 would've done, you know, you've got 2020 hindsight. Oh, yeah,
10 we would have invested in the real estate market because that
11 seems to have increased substantially. Well, that can't be the
12 measure of the prejudgment interest.

13 But assuming none of that is true, the Developer
14 doesn't have an appraisal of what this property or what any
15 property would've been worth had the Developer bought it back
16 in 2017. Their valuation evidence is just average values for a
17 certain type of real estate. They just take an average. That
18 wouldn't be admissible in court.

19 So to appraise property, you need to compare the
20 property to sales of comparable property, actual market data.
21 You can't just average the change in average prices for an
22 entire class of properties and say, well, that's my damage
23 because real estate development is speculative, and who's to
24 say whether one property would have appreciated at the same
25 rate as another property. The whole thing kind of collapses

1 under speculation.

2 So just thinking in terms of an interest rate, just
3 stepping back and looking at the big picture, 23 percent annual
4 interest rate, I mean, that's like double the usury rate.

5 Who's ever heard of an interest rate so high? No Nevada cases
6 ever, ever found that prejudgment interest to be so high, and,
7 as I've said, in no takings case either inverse or eminent
8 domain takings case where prejudgment interest has been
9 addressed, it's never been higher than prime plus 2 percent in
10 my research.

11 So all we have here, Your Honor, is the
12 constitutional requirement to make the Developer whole and for
13 the Developer to claim that they need another \$52 million to be
14 made whole after they've already earned 54 times their
15 investment in this property is -- that would be -- that would
16 be an unjust result to put it mildly.

17 Now, the Developer has claimed that they actually
18 spent \$45 million to buy the Badlands and a hundred million
19 dollars seems to change over time.

20 There is absolutely no evidence, no evidence that the
21 Developer paid more than four and a half million dollars for
22 the Badlands.

23 The contract, the contract of sale between the
24 Developer here and the Peccoles, who developed the Peccole
25 Ranch Master Plan, was for seven and a half million for the

1 entire Badlands. And the City has established by the documents
2 that went back and forth between the Developer and the Peccoles
3 in negotiations for that purchase that 3 million of that
4 purchase price was for other real estate --

5 THE COURT: Sir, I think we lost you. You faded out.
6 The last word that you set forth on the record was -- what was
7 it? Are you there?

8 Didn't he say real estate? Was that the last word
9 before you?

10 THE COURT RECORDER: He is not --

11 THE COURT: Because I thought he said real estate. I
12 was listening.

13 (Pause in the proceedings.)

14 THE COURT: Did we lose everybody over --

15 THE COURT RECORDER: No, just him.

16 THE COURT: You'll have to call him.

17 MR. LEAVITT: Your Honor.

18 THE COURT: Yes.

19 MR. LEAVITT: James J. Leavitt. I'm still here on
20 the line.

21 THE COURT: Okay. Thank you, sir.

22 THE COURT RECORDER: I'm going to put something on
23 chat, Your Honor.

24 THE COURT: And e-mail him so he knows we lost him.

25 (Pause in the proceedings.)

1 THE COURT: Mr. Ogilvie, can you hear me, sir?

2 MR. OGILVIE: Yes, Your Honor. I'm here.

3 THE COURT: Is there anyway you can contact
4 Mr. Schwartz for us.

5 MR. OGILVIE: I was going to ask Sarah Lucy to
6 contact him. I'm sure she's already attempted.

7 THE COURT: You know what we'll do, I think it makes
8 sense, and I think if my memory is correct, I think the last
9 word he set forth on the record was "real estate." Maybe that
10 can cue him, but anyway let's take a 10-minute recess to give
11 him an opportunity to reconnect, and you can, you know, take
12 that time to maybe call him personally or whatever has to be
13 done, but we're going to take 10 minutes to accommodate him.
14 Okay.

15 MR. OGILVIE: Thank you, Your Honor.

16 THE COURT: We'll be in recess for 10 minutes.

17 (Proceedings recessed at 2:16 p.m., until 2:32 p.m.)

18 THE COURT: All right. We're back on the record.

19 Is that correct, ma'am?

20 THE COURT RECORDER: Yes, Your Honor.

21 THE COURT: All right. And, Mr. Schwartz, I think
22 the last word you set forth on the record was real estate. I
23 might be wrong on that, but I was following your argument, sir.

24 Do we have him?

25 THE COURT RECORDER: Mr. Schwartz, are you there?

1 THE COURT: Did we lose him?

2 THE COURT RECORDER: Judge, we must have lost him
3 again. He was there.

4 Mr. Schwartz, can you hear us?

5 MR. SCHWARTZ: Yes. I'm sorry.

6 Your Honor, I think I was addressing the four and a
7 half million dollar purchase price, which is important here
8 because it goes directly to the issue of whether the Developer
9 here needs to be made whole by getting an award of \$52 million
10 in prejudgment interest.

11 The four and a half million dollar purchase price is
12 established by overwhelming evidence. The contract between the
13 Developer and the Peccoles who sold the Badlands to the
14 Developer in March of 2015, provided that the purchase price
15 was seven and a half million dollars.

16 This was a negotiated purchase between two
17 sophisticated real estate developers, an arm's-length
18 transaction. It was a -- there's no indication it was not a
19 fair market transaction. And the -- it was a heavily
20 negotiated price. In discovery the Developer didn't want to
21 release, but we finally got an order from the Court to (video
22 interference) the Developer to release the documents concerning
23 this negotiation, and they established that \$3 million of the
24 seven and a half million dollar purchase price was for other
25 real estate, and this is confirmed by the seller, by the

1 Peccoles in a deposition.

2 So the purchase price of the Badlands was four and a
3 half million dollars, and the Developers claim that the
4 purchase price is actually \$45 million, and I think at trial
5 they said a hundred million dollars was the purchase price. In
6 discovery, the City requested documents from the Developer to
7 support that contention. \$7.5 million in the contract signed
8 by both parties, and that documents indicate 3 million that was
9 for other real estate.

10 What documents do you have to establish end dollar
11 purchase price or any purchase price other than what it states
12 in the documents that we have. None. The Developer has
13 produced not a shred of evidence. Only the Developer's claim
14 that the purchase price was \$45 million, not a single document.
15 Who purchases property for \$45 million and doesn't have a
16 single document to show that that's the case, you know,
17 that's -- it's preposterous for the Developer to allege that.

18 Then so we are left with a \$34,135,000 that's 54
19 times what the Developer paid for the 35-acre property. They
20 paid 18,000 an acre, \$630,000 for 35 acres compared to
21 \$54 million -- excuse me \$34 million, which is 54 times what
22 they invested in the property.

23 So it -- the Developer can't seriously contend here
24 that the Developer needs an extraordinary interest rate of
25 something above prime plus 2 percent to be made whole when the

1 Developer's already been made whole many times over and still
2 has (video interference), made the 26 million on the 17-acre
3 property and still developed the 133-acre, 65-acre property.
4 The City sent them a letter saying go ahead and apply. You
5 haven't really applied. The City hasn't reviewed an
6 application on the merits. They still have that property that
7 might be developed or that they can use for uses permitted by
8 the PR-OS designation.

9 So they've really got -- they really received a huge
10 windfall in this case, and awarding them \$52 million in the
11 interest in addition to that would be -- would not be in the
12 interest of justice.

13 I did want to say one more thing about the *Sisolak*
14 case. In that case, that was a physical taking case where the
15 Court awarded prejudgment interest. The opinion, the Supreme
16 Court opinion doesn't say what the interest rate was. It just
17 says prejudgment interest was awarded. There is no discussion
18 in that case that the interest rate would be whatever the
19 Developer claims it could have made in profit had the Developer
20 invested that money in some speculative investment.

21 So apparently the interest rate there in the *Sisolak*
22 case was just the statutory rate.

23 So there is no case that supports the Developer's
24 position that instead of interest they're entitled to profit in
25 this speculative investment.

1 The only authority that really applies here is the
2 constitutional authority for an interest rate that's higher
3 than prime plus 2 percent only if the property owner can show
4 that they need that to be made whole to be put in the same
5 monetary position as they were without the -- without the
6 award, and that's impossible in this case. Thank you.

7 THE COURT: All right. Thank you, sir.

8 We'll hear from Mr. Leavitt.

9 MR. LEAVITT: Thank you, Your Honor. James J.
10 Leavitt on behalf of the plaintiff landowner 180 Land.

11 Judge, this is a hearing on a very narrow issue:
12 What is the rate of return to apply for the prejudgment
13 interest issue in an inverse condemnation case. That's it.
14 And the Nevada Supreme Court has been very clear that that's a
15 question of fact to be decided by the Judge in a posttrial
16 hearing based upon evidence.

17 Counsel, didn't provide you one shred of evidence of
18 what the proper rate of return would be. He made again about
19 95 percent of his argument was based upon irrelevant issues. I
20 do want to address just a couple of those.

21 First he attempts to rewrite the decision that this
22 Court made. He keeps saying that this case is a regulatory
23 taking. This Court found that there was a per se taking of the
24 landowner's property where the landowner has been dispossessed
25 of that property. We are now here to determine the remedy that

1 the landowner should receive after getting a just compensation
2 award, a remedy that's set forth in the Constitution and a
3 remedy that's set forth in the statutes, and that remedy is
4 prejudgment interest. The purpose for prejudgment interest is
5 to, Number 1, remedy what the government has done in this case
6 by taking the property and not paying the landowner for that
7 property. It's been five years now, five years now that the
8 government has had possession of the property, and the
9 landowners haven't been paid.

10 So the Nevada Supreme Court said that under those
11 circumstances, in an inverse condemnation case, prejudgment
12 interest must be paid for that period that the landowner was
13 dispossessed and lost use of the property. Now, the entire
14 premise for Mr. Schwartz's argument that he just made was the
15 2005 purchase price.

16 Your Honor, there is not a case in this country that
17 relies upon a 17-year-old purchase price to determine
18 prejudgment interest. There's not a case in this country that
19 considers a 17-year-old purchase price when determining the
20 proper rate of return, firstly. So it's entirely irrelevant.
21 The entire premise for the argument that was just made is
22 entirely irrelevant.

23 In addition to being irrelevant, it's not even true.
24 Your Honor, we had pretrial hearings. We had motions in limine
25 on the purchase price, and the 2005 purchase price was excluded

1 because it was so irrelevant to determine the value of the
2 property as of the 2017 date of value.

3 Now, counsel repeated probably 15 times his belief
4 that \$4.5 million was paid for the property. There's no basis
5 for that, Your Honor. The government took the deposition of
6 the PMK of the seller of the property and the deposition of the
7 PMK of a buyer of the property, Mr. Johan Lowy. Both of them
8 confirmed that the purchase occurred in 2005. It was a
9 complicated transaction. There was a lot of hair on it, and
10 the buyer, the PMK buyer stated that when you take all of the
11 consideration into -- or you consider all of the consideration
12 for in that 2005 purchase price that it amounted to over a
13 hundred million dollars.

14 Those are the PMKs, Your Honor, not argument of
15 counsel, but those were the PMKs. And, Your Honor, that's why
16 that evidence was excluded. It was excluded to determine just
17 compensation for the same reasons it should be excluded to
18 determine prejudgment interest.

19 Now, let me address the *Barsy* decision. As I laid
20 out, Your Honor --

21 THE COURT: And I'm going to jump in for a second.

22 MR. LEAVITT: -- *Barsy* is a decision -- sure.

23 THE COURT: And I just want to make sure the record
24 is clear in this regard because from a historical perspective,
25 I do remember a lot of the law and motion in this case. Now,

1 understand, when it comes to discovery, and I know everyone
2 understands it is relevancy for the purposes of discovery is
3 much broader than admissibility at the time of trial; right?
4 We all understand that.

5 MR. LEAVITT: Right.

6 THE COURT: And that's one of the reasons why I
7 permitted discovery on the purchase price issue; however,
8 ultimately, at the end of the day, when it comes to the value
9 and just compensation at the time of taking, that's not
10 relevant, really and truly. It comes down to what was the
11 valuation back in 2017 when I made a determination there was a
12 taking in this case.

13 Just -- and this is important to point out as far as
14 that value is concerned. I mean, two things. First and
15 foremost, that was a question of fact; right. Secondly, we had
16 an evaluation from the plaintiff at approximately 34 million or
17 so, and then I had nothing else to consider. So in many
18 respects, when it comes to that evaluation, that's what was
19 admitted at the hearing, and so that's what I went with; right?
20 And that's kind of important to point out.

21 For the record, I do -- and this is a question I have
22 for everyone. I did read the *Barsy* case, and I think that's
23 what you're going to. I have a copy of it. The text right in
24 front of me, and I'll just read into the record what the trial
25 court -- I'm sorry, the Supreme Court set forth in that

1 specific case.

2 And this is the, to me, some of the really important
3 and pertinent language, and this is off of page 718 of the
4 decision, and that would be 113 Nevada Reporter 718, and I'm
5 looking right here, and it starts out as follows: NDOT
6 contends that the statutory rate operates as a prima facie
7 evidence of a fair rate, period. In Clark County versus *Alper*,
8 and they cite the case. This Court referred to the statutory
9 rate as a floor on permissible rates and allowed the
10 legislature -- it allowed that legislative amendments
11 increasing the statutory rate where prima facie proof of an
12 interest -- of an increase in interest rates, not prima facie
13 proof of a fair rate, and that's really important to point out.

14 And they go further. They said this Court further
15 held that the determination of a proper interest rate is a
16 question of fact, and the District Court was not bound by the
17 statutory rate, period. And so that's kind of where we're at
18 right now. I understand it's a question of fact. I get that.

19 And so here we have evidence from two experts offered
20 by the plaintiff at this stage of the proceedings, and it's
21 pretty clear what the opinions are. And so anyway, when it
22 comes to determining what would be just compensation as it
23 pertains to -- and I want to make it really clear. I'll go
24 ahead and set it forth as it's stated in the case because I
25 don't want to misquote it.

1 The Court further went on and said, quote, This Court
2 further held that the determination of a proper interest rate
3 is a question of fact, and the District Court was not bound by
4 the statutory interest rate. We stated that just compensation
5 requires that the landowner be put in as good position
6 pecuniarily as he would have been if his property had not been
7 taken.

8 The purpose of awarding interest is to compensate the
9 landowner for the delay in the monetary payment that occurred
10 after the property had been taken, and that appears to be
11 fairly clear to me, and so at the end of the day, that's what
12 we're really looking at. We're looking at, okay, what is the
13 appropriate, fair rate under the facts of this case based upon
14 the current evidence as set forth in the record?

15 Is that a little distortion?

16 THE COURT RECORDER: I'm going to mute somebody.

17 THE COURT: Okay. And that's where we're at
18 primarily.

19 And so my question, my first question is this. What
20 does a trial court like me do under the facts of this case
21 where I have to decide what the rate should be; right, in light
22 of the current state of the evidence, because this is a
23 question of fact. And I'll just throw that out because I have
24 a lot of other thoughts in that regard too.

25 Mr. Leavitt, and then we'll hear from Mr. Schwartz.

1 MR. LEAVITT: Thank you, Your Honor. Again, James J.
2 Leavitt on behalf of 180 Land, the plaintiff landowners.

3 And continuing in the decision, Your Honor, and
4 you're absolutely correct as going forward in reading the case,
5 it's a question of fact based upon the evidence that's
6 presented. And as we continue down the case, on page 718, that
7 note 6 is where the Court specifically identifies the evidence
8 that was considered by the lower District Court Judge and
9 affirmed by the Nevada Supreme Court.

10 Again, this is the only case that I'm aware of where
11 the Nevada Supreme Court identifies the type of evidence that
12 it would consider when determining the fair rate, and it's
13 right here. It says Barsity's expert, at Headnote 6 testified
14 that a prudent landowner would have paid off the mortgage on
15 the land or invested his money in land similar to that
16 condemned rather than hold the land at such a low rate of
17 return.

18 So what we did, Your Honor, is we presented our -- we
19 presented these two experts with that precise language and said
20 we want you to determine for us the rate of return that the
21 landowners could have achieved on the \$34,135,000 had they
22 invested in land similar to that condemned, and that's the
23 evidence that we brought to you, which is the specific evidence
24 that the Nevada Supreme Court relied upon in *Barsity*.

25 Now, Your Honor, counsel stated that what happened in

1 *Barsy* is that the Court granted interest to make up for lost
2 tenants and lost money that was -- that Mr. Barsy had incurred
3 as a result of tenants leaving his property. Your Honor, we
4 litigated that case. That appears nowhere in that case. The
5 lost tenant compensation was compensated through what was
6 called precondemnation damages in that case.

7 Then after that precondemnation damages was paid and
8 compensation was paid for the land on top of that, the Nevada
9 Supreme Court awarded prejudgment interest. There's not a
10 citation in any part of that record. I don't recall that ever
11 even being an issue that interest was awarded to make up for
12 lost tenants. It's an entirely made up rendition of the case,
13 Your Honor.

14 The case is very clear that the interest that was
15 awarded in *Barsy* was because Mr. Barsy was not timely paid. It
16 was for the lost use of the proceeds and that interest rate was
17 based upon what he could have earned had he invested that money
18 in land similar to what was taken, and that's again, Your
19 Honor, the evidence that we presented to you.

20 The *Alper* case. Counsel stated that in *Alper* the
21 Nevada Supreme Court awarded prime plus two. Again, that's not
22 true. In *Alper*, the Nevada Supreme Court remanded the case
23 back to the lower District Court Judge and gave a very clear
24 signal to the lower District Court Judge.

25 In *Alper*, the Nevada Supreme Court wanted to make

1 sure that the type of arguments that we're hearing today don't
2 influence the determination of interest. Again, the Court said
3 that -- in *Alper* it sent the case back to the District Court
4 and then told the District Court, listen, interest may be very
5 substantial in this case and may, in fact, exceed the inflated
6 value of the land.

7 The Court wanted to be very clear to the District
8 Court Judge that it was sending that *Alper* case back to is that
9 listen, your interest calculation must be based on the
10 Constitution. It must be based upon the proper rate and in
11 times it's going to far exceed the value of the land taken,
12 just like it far exceeded the value of the land taken in the
13 *Sisolak* case.

14 The other argument that counsel makes is that we're
15 asking for profit. Your Honor, we're not asking for any
16 profit. We didn't bring to you a project. We didn't go out
17 and build an apartment complex and say here's the money we
18 would have earned. That's not what we did.

19 Again, we gave to two different experts, who by the
20 way prepared their reports entirely independent of one another
21 and gave the instruction from *Barsy*: What is the rate of
22 return the landowners could have achieved by investing in land
23 similar to that condemned, and they both provided empirical
24 evidence of exactly what that rate of return would have been
25 during the relevant period.

1 And, Your Honor, I'll just say this briefly. All of
2 this argument and statements about building and not building
3 again, entirely irrelevant to why we're here today.

4 I'll address one last final argument, Your Honor.
5 His counsel said these landowners would not have developed or
6 reinvested in land. These landowners wouldn't have done this.
7 I have no idea how Mr. Schwartz knows that. It's argument of
8 counsel, but we do have evidence, which is why we're here
9 today, is to review evidence and arrive at a fair rate based
10 upon the question of fact presented to you, and that evidence
11 was attached to our reply as Exhibit Number 8, and it's the
12 declaration of Vicki DeHart (phonetic). She is one of the
13 principals in this case. I'll just read a very small portion
14 of it:

15 That the common practice of the partnership
16 is to invest in real estate proceeds -- invest
17 in real estate property. That they never would
18 have invested in any type of instrument or land
19 that only yields prime plus two, and then they
20 say the proceeds would have been reinvested in
21 vacant land or improved real property by means
22 of a 1033 exchange.

23 Which is the eminent domain version of a 1031
24 exchange.

25 So the evidence that's before us here today is that

1 the proceeds would have been invested in land. That's the
2 exact evidence. We didn't even need the declaration because
3 that's the exact direction that the Nevada Supreme Court has
4 given in the *Barsy* case is to determine the rate of return that
5 would have been achieved if they had invested the money in land
6 similar to that condemned.

7 So, Your Honor, we ask that you enter an order.
8 Again, the other two issues are not in dispute. The only issue
9 is what's that fair rate of return? And in particular, for
10 this landowner who does land investments, in fact, we've
11 referred to the landowner repeatedly through this proceeding as
12 the landowner, and the City has repeatedly referred to them as
13 the Developer, and now the City wants to pretend like he's not
14 a land investor; he's not a Developer.

15 We have the perfect situation here, Your Honor, for
16 this question of fact where we have the perfect plaintiff who
17 only invests in land. Their business has never invested in
18 stocks or any other type of investment instrument that would
19 bring a rate of return of prime plus 2 percent as set forth in
20 Ms. DeHart's declaration. She lays it out very clearly what
21 they invest in. Not only do we have the perfect plaintiff, but
22 we have the perfect facts which line up identical to the *Barsy*
23 case, which is exactly what the *Barsy* court decided.

24 So, Your Honor, we would respectfully request,
25 pursuant to the *Barsy* decision, that the rate of return of

1 23 percent be applied. That's the only empirical evidence
2 before the Court which establishes a fair rate of return, Your
3 Honor.

4 THE COURT: All right. And I did ask some questions.
5 Mr. Schwartz, out of fairness, I'm going to give you a chance
6 to address those, sir.

7 MR. SCHWARTZ: Thank you, Your Honor.

8 In the *Barsy* case and the *Alper* case, these are
9 physical takings cases. The Court did not -- there's no
10 evidence, no evidence whatsoever that the City dispossessed the
11 property owner from the property, that the City took possession
12 of the property. There's no evidence of that whatsoever.

13 Those cases don't really apply. The cases that apply here are
14 Kelly, Boulder City and State, and those cases hold that to
15 show a taking through regulation of the owners use of the
16 property there has to be a complete wipeout in value. And
17 there clearly wasn't a complete wipeout of value for all of the
18 reasons that we have presented in evidence in this entire case,
19 including their argument to the tax assessor that the property
20 still had golf course use of the property after the City
21 allegedly -- after the City denied the 35-acre application.
22 That statement was made by the Developer's attorney two months
23 after the City denied the Developer's applications.

24 But be that as it may, the City has not, has not
25 dispossessed the Developer. There's no evidence of that, and

1 so I don't think the Court's decision could be based on the
2 *Barsy* and *Alper* case because those are cases involving eminent
3 domain with a physical possession of the property.

4 By I think that the argument -- the Developer's
5 argument here loses sight of the standard here. Yeah, if the
6 Developer had invested the money in the real estate market, in
7 2020 hindsight, they would have made -- they could've made some
8 big profits. It would depend on what property they invested in
9 because some appreciated, and some didn't appreciate, and
10 they're just dealing with averages here.

11 So this requires the Court to speculate as to what
12 this 23 percent, pure speculation.

13 But anyway --

14 THE COURT: And so --

15 MR. SCHWARTZ: -- maybe they would have made more
16 money if they had invested the award.

17 THE COURT: No. No. I don't want to cut you off, I
18 don't. Why would it be speculation? That's what I need to
19 know.

20 MR. SCHWARTZ: Well, the evidence before the Court as
21 to the rate of appreciation of real estate, not the interest
22 rate -- we're getting far afield here from interest, which is a
23 problem, but the rate of appreciation of real estate is an
24 average rate. It's an average rate. So the Court does have
25 evidence of a proper interest rate, which is the statutory

1 rate. The legislature is saying here's the rate. Unless you
2 can show, unless you can show that the owner needs a higher
3 rate to be made whole.

4 But what the evidence before this Court is not an
5 interest rate. It's the average rate of return of certain
6 types of real estate in the City of Las Vegas in the last four
7 years. So it's entirely speculative to say, if I'm a judgment
8 creditor in a takings case, I would have invested the money. I
9 would've invested the money in real estate, and the property I
10 would have invested in would have appreciated at the average
11 rate of all these properties. I would've been wise enough to
12 invest it in property where I wouldn't have lost money or maybe
13 not lucky enough to invest it in property that -- where its
14 value multiplied many times in that period, but it's the
15 average rate. So it's just -- it's 2020 hindsight about a
16 speculative investment. And you could say the same thing.

17 What if the stock market had gone up 30 percent per
18 year since 2017. The Developer could then say, well, I
19 would've taken that 34 million and invested it in the stock
20 market, and I would have made an average the increase in the
21 market, in the Fortune 500 or the NASDAQ. I would've made that
22 money. Purely speculative, and I don't think that the
23 Constitution or the legislature intended that this Court would
24 be engaging in that kind of speculation in setting an interest
25 rate.

1 The Court would set an interest rate needs to look at
2 what's the return on the value -- the time value of money.
3 What's the return on that money had they invested it and got
4 interest, not profit. And then the Court the Constitution
5 says, well, the Court can't set an interest rate that's higher
6 than the statutory rate in order to make the property owner
7 whole.

8 So, yeah, there's evidence before the Court of how
9 the real estate market appreciated overall in Las Vegas, but
10 there is no evidence before the Court that an interest rate
11 higher than the statutory rate is necessary to make this
12 property owner whole, like in *Barsy*.

13 That's -- counsel's rendition of the facts in *Barsy*
14 is not correct. In *Barsy*, the Court said you lost tenants. So
15 in awarding the -- in awarding the awards for the value of your
16 property -- remember, this is the condemnation action. The
17 agency took possession, took title of the property for a public
18 project. Condemnation action. The award of fair market value
19 as of the date of value was not enough to compensate for your
20 lost tenants, nor was the precondemnation interest. That's why
21 the Court said we're going to set an interest rate that's
22 higher -- higher than we otherwise would because to make up --
23 to make up for your lost value of your real estate during the
24 time when the City hadn't condemned your property.

25 If the precondemnation damages in *Barsy* were enough

1 to compensate the property owner for the lost tenants, then why
2 would the Court engage in this inquiry about an interest rate
3 necessary to make the property owner whole. So the facts as
4 the Developer has described them are wrong.

5 So we focus now on the standard, which is you need to
6 make the property owner whole.

7 Now, this Developer says, well, you need to make me
8 whole because I needed this money to build. I'm a developer.
9 I build -- I build things.

10 Well, the City has established, has clearly
11 established that this Developer has no interest in building on
12 the Badlands property. It had a permit to build 435 units on
13 the 17-acre property, and it's done nothing, nothing to build,
14 and, of course, the reason? Well, because that doesn't fit
15 with its narrative here, which is that it's victimized by the
16 City.

17 The Developer could've filed another application to
18 develop the 35-acre property at the City's invitation. It
19 didn't do so. It could have tried to develop the 133-acre and
20 65-acre property. It had no interest. So the Developer didn't
21 need this money.

22 My point is, Your Honor, the Developer didn't need
23 this money to make it whole so that it could engage in some
24 real estate development. It didn't have any interest in that.
25 It's just using the Courts here to get, you know, a windfall

1 from the taxpayers. So it didn't need a higher interest rate
2 to be made whole.

3 And my final point is this, okay. And there is
4 absolutely no evidence that the purchase price, and the Court I
5 think needs to focus on the amount the Developer paid for the
6 property in order to determine whether the interest rate on the
7 judgment needs to be extraordinarily high to make the Developer
8 whole. So then purchase price is directly relevant.

9 Now --

10 THE COURT: And I have a question for that, and this
11 is just more of a hypothetical than anything else. I mean, I
12 look at my house I currently live in, and I don't mind saying
13 it, I mean, I'm fortunate I live in a great neighborhood, and
14 I've been in the house for about 9, 10 years, and the value has
15 doubled; right? And we all know what the real estate market
16 has done over the last three or four years, more than doubled.

17 But my question would be this. Hypothetically, if
18 there was a taking done by a governmental entity today, why
19 would the purchase price be relevant on any level? Because
20 it's worth what it's worth at the time of the taking. So why
21 am I --

22 MR. SCHWARTZ: Well, that's right.

23 THE COURT: Yeah. And so why am I focused on that
24 issue? Because now we're looking at the time period post
25 taking during the litigation where the landowner was deprived

1 of usage in looking at what the appropriate interest rate
2 should be for that.

3 And I kind of get that, but -- and here's -- and I
4 don't mind -- this -- and I get it. That's why I'm spending a
5 lot of time on this because I understand it's a lot of money.
6 There's a lot of risk. I get it. I understand all of that.

7 Here is my question, and this is straight from the
8 *Barsy* case. It provides the following: Quote, While the
9 statutory rate should be used if unchallenged, once competent
10 evidence is presented supporting another rate of interest as
11 being more appropriate, and this is where the language gets
12 really interesting, quote, The District Court must determine
13 which rate would permit the most reasonable interest rate;
14 right. What would be reasonable, and that's specifically what
15 the language from the case provides, and so that's what I'm
16 required to do.

17 And I realize there's a lot here. There's a lot at
18 risk, I do, and I want to make sure -- because I want to really
19 take my time as far as this specific issue is concerned.

20 And so, Mr. Schwartz, in light of that, what do I do?
21 I mean, I want to make sure I understand what your position is
22 because right now, I mean, I have to determine ultimately a
23 question of fact. I do have two evaluations from the landowner
24 in this case, and that I have to grapple with as the fact
25 finder, and we can all agree to that, and that's what I'm

1 required to do.

2 And just as important, when it comes to review, it's
3 my understanding that at the end of the day, what the reviewing
4 court would look at, and they would make a determination as to
5 whether or not whatever decision I make is supported by
6 substantial evidence in the record; right, more likely to than
7 not, preponderance of the evidence standard.

8 But go ahead, sir. I don't want to cut you off. I'm
9 going to open it up for you. I have made a lot of comments
10 there.

11 You have the floor.

12 Of course, we're going to hear from Mr. Leavitt after
13 you're done.

14 MR. SCHWARTZ: The legislature has determined that a
15 proper rate of interest for a judgment is -- prejudgment
16 interest is prime plus 2 percent, and the law provides that you
17 can -- that the Court can find that the rate is higher than
18 that if it's necessary to make the property owner whole.

19 This Court has been asked to determine an interest
20 rate that will make the property owner whole, and that's in
21 addition to the award; right? Because the Court's already made
22 an award of 34 million plus.

23 So the Court's task is to find an interest rate that
24 is necessary to make the property owner whole. So in this
25 case, the property owner bought the property for four and half

1 million. Now, why is that significant? Well, because the
2 award is 54 times what the property owner paid for the 35-acre
3 property, 54 times. And the property owner's appraiser, the
4 property owner's appraiser said that the property is worth
5 \$34 million and change if the property owner -- if the property
6 can be developed with housing, and it's worth zero if it's not,
7 if it can't be developed for housing.

8 In his appraiser -- in his appraisal, Mr. DiFederico
9 used comparable sales to value the property. One of his sales
10 was from February of 2015. That's a month before the close on
11 the sale of the Badlands property. And this notion that there
12 was some 2005 purchase price, there's no evidence of that, and
13 it's not relevant because we've got a purchase and sale
14 contract from 2015 between --

15 THE COURT: So tell me this, sir --

16 MR. SCHWARTZ: -- it's been authenticated --

17 THE COURT: -- and I don't want to cut you off. I
18 don't want to cut you off on this issue. I don't, but you keep
19 going back to the purchase price, and why would that be
20 relevant as it pertains to the ultimate determination I made in
21 this case regarding the value of the property at the time of
22 taking? Because we can all agree --

23 MR. SCHWARTZ: Because it's relevant --

24 THE COURT: -- assets -- you know, you can buy
25 something if you hold it, and sometimes you buy in the right

1 area, and the property can make -- increase dramatically over
2 17 years, and consequently, why would the purchase price matter
3 when the fair market value at the time of taking could be 50
4 times or a hundred times what the purchase price will be?

5 And that happens a lot with real property, especially
6 in a growing community like Las Vegas. Because I've been here
7 since 1985, and I would anticipate some parts of the Valley
8 back in 1985, I remember this where St. Rose Parkway is located
9 was raw desert. Today I don't know what that property is
10 worth, and that's kind of my point. I'm trying to figure out
11 on any level why the purchase price would be germane. I just
12 don't see it.

13 MR. SCHWARTZ: Because the Court's already awarded
14 what the Court says is just compensation of \$34 million. And
15 in setting the interest rate, the Court looks to whether the
16 property owner needs to be made whole, not what they would have
17 made had they invested that money in some investment. The
18 Court is here trying to determine an interest rate (video
19 interference).

20 THE COURT: And that interest rate -- and the
21 interest rate from the time the taking occurred up until I make
22 the decision, like we would in any case involving prejudgment
23 interest; right?

24 MR. SCHWARTZ: But what -- that's not interest. What
25 happened after the judgment, after the -- excuse me, after the

1 alleged taking, what happened after the alleged taking, that's
2 subject to prejudgment interest. The legislature didn't say,
3 you know, what -- that you can get what's called profit for
4 investing the money that you should have received on that date.
5 That would leave these taking cases over to a complete
6 free-for-all of grossly speculative evidence, like we have in
7 this case, about what the property owner would have made.

8 That's not typically admissible in evidence. It's
9 too speculative, but that's not the test, and that's why the
10 test is interest, and the interest has to be, if it's going to
11 be higher than the statutory amount, it has to be to make the
12 property owner whole for something that happened before the
13 taking in this case.

14 Now if I could finish my point about this purchase
15 price.

16 So the Developer's appraiser said that one of the
17 sales that and which he relied for his \$34 million value for
18 just the 35-acre property was from February of 2015. Well, the
19 sale of the 35-acre property occurred in March of 2015. So you
20 can't say that the very same property is not relevant to the
21 value of the property --

22 THE COURT: No. No. Say that --

23 MR. SCHWARTZ: -- when their own appraiser is
24 admitting --

25 THE COURT: And, Mr. Schwartz --

1 MR. SCHWARTZ: -- that these sales are relevant --

2 THE COURT: Mr. Schwartz, I don't want to cut you

3 off. Say that again so I can make sure I -- so I can make sure

4 I can follow you. I think you were talking -- I just want to

5 make sure I understand what your position is. You said -- did

6 you say 1985?

7 MR. SCHWARTZ: No. I said 2015.

8 THE COURT: Okay, no. No. I want to follow you.

9 The 2015 transaction. Go ahead and tell me what you said. I

10 want to listen. Go ahead.

11 MR. SCHWARTZ: So an appraiser values property by

12 comparing the subject property with sales of similar property.

13 The more similar the property, the more accurate the appraisal,

14 the less subject to the appraisal. The sale of the very same

15 property, the very same property that's at issue is -- can be a

16 perfect comparable. It's the same property. It's got the same

17 location, the same topography, the same features. Everything

18 is the same. So there's not much guesswork.

19 So when this appraiser considered sales of property

20 from before the date of value, the date that the Badlands

21 transaction, so you can't say that this appraiser -- that the

22 sale of the Badlands being about two years -- two years and

23 five months before the alleged date of value, you can't say

24 that it's too old, that there's -- that it's too old. So it's

25 almost a perfect comparable, and that property sold for 18,000

1 an acre.

2 Mr. DiFederico said that that same property, that
3 same property is now worth almost a million dollars an acre.
4 So when you compare the Developer's investment in the property
5 with the judgment, the Developer made 54 times their
6 investment. You don't need to give them a high interest rate
7 to make them whole.

8 Let's take the Developer's allegation that they spent
9 45 million for the property. Heck, why not a million, a
10 hundred million, a hundred million dollars. There's no
11 evidence of that, but let's say a hundred million. That's
12 400,000 and acre. This Court has awarded the Developer almost
13 a million dollars per acre for this property. So that's more
14 than twice what the Developer paid, even with the Developer's
15 false claim that they paid a hundred million dollars for the
16 Badlands.

17 So the Developer doesn't need this extraordinarily
18 high interest rate to be made whole for something that the
19 government did.

20 The Developer also had the right to change the date
21 of value to the date of trial. The Developer didn't do that.

22 If -- you know, if the -- if the property had
23 appreciated like they say, well, the Developer could have done
24 that. They didn't do that.

25 But the evidence to the Court, that's before the

1 Court is completely speculative. In any takings case where
2 there's a damage award, is the Court going to say well, you
3 know, I am going to, you know, in looking back in the two or
4 three years from the time of award of prejudgment interest to
5 the alleged taking, the Court's going to look back and say,
6 well, the Developer is going to -- the property owner is going
7 to say, well, I would have invested it in my uncle's -- my
8 uncle's shoe business, and I would have -- and, look, my
9 uncle's business made, you know, these exorbitant profits, and
10 so that's my -- that's what I lost.

11 I just think that the Court going down this road,
12 even if the Court can consider this, because again, there's no
13 evidence the Developer hasn't been made whole, if the Court
14 goes down that road, it's requiring the Court to engage in rank
15 speculation.

16 And it also will end up in a completely unjust
17 result. I mean, the Developer has already made 54 times its
18 investment in the property. And to award the Developer another
19 \$52 million just it kind of shocks the conscience.

20 So there's no grounds for it. The Developer has
21 already made a windfall. It doesn't need to double down on the
22 windfall.

23 THE COURT: So I guess the bottom line, sir, what
24 you're saying, look, Judge, you should stick to the statutory
25 rate?

1 MR. SCHWARTZ: That's right. We calculated what the
2 statutory rate would yield based on the judgment. Again, we're
3 not conceding anything about liability in this case or, you
4 know, that the compensation awarded was just, but based on the
5 Court's judgment and the facts of this case, the unrefuted
6 facts, an interest rate higher than the statutory rate would be
7 unconscionable, would -- it would pile an enormous windfall on
8 top of what is already an enormous windfall, giving the
9 Developer, as I calculated, 13,800 percent profit on its
10 investment.

11 THE COURT: I understand, sir. I just wanted to make
12 sure I wasn't overlooking anything.

13 All right. And have you said everything you need to
14 say right now, sir? Then I'll go ahead and give Mr. Leavitt
15 the last word on this issue.

16 MR. SCHWARTZ: Yeah. One more thing. In the *Sisolak*
17 case, the prejudgment interest was greater than the award
18 because it was assessed over a very long period of time, a very
19 long period of time. But it's my understanding that the
20 interest rate awarded in *Sisolak* was the statutory rate. It
21 wasn't -- it wasn't -- it wasn't what the Developer could have
22 invested in the property. I mean, if that were the case,
23 certainly the Developer in that case could have made the
24 argument, well, I could've taken the money and invested it in
25 this and invested it in that and made higher than the statutory

1 rate.

2 I don't think that occurred in the *Sisolak* case
3 because there was no showing that the Developer needed a higher
4 interest rate to be made whole, and that's really the point
5 here.

6 The Court doesn't get to all of this other evidence
7 unless the Court finds that the Developer -- that something
8 about that award was not enough to compensate the Developer,
9 just not enough to give them 54 times their investment in the
10 property. They need more. That's the --

11 THE COURT: But is --

12 MR. SCHWARTZ: That's the decision the Court needs to
13 make.

14 THE COURT: But here's my question though. Is that
15 really the standard? And the reason why I asked that question,
16 and this come straight from the *Barsy* case, and this is what
17 the Nevada Supreme Court sets fourth, and I think I've read
18 this in the record before, but quote,

19 "While the statutory rate should be used if
20 unchallenged, once competent evidence is
21 presented supporting another rate of interest
22 being more appropriate, the trial judge must" --

23 Meaning I have no alternative here.

24 -- "then determine which rate would permit
25 the most reasonable interest rate."

1 And so that's where we're at right now.

2 MR. SCHWARTZ: But the reasonable rate, Your Honor,
3 is the rate that's necessary to make the property owner whole.
4 The Court in that case said that the owner lost tenants while
5 the agency delayed the -- filing the eminent domain action.

6 Again, the Court already -- if the Court had already
7 made the owner whole with the award of the fair market value of
8 the property and the prejudgment -- the precondemnation damages
9 award, if it had already made the owner whole, then under the
10 Constitution, there would be no reason to award higher than the
11 statutory rate. That's only, you know, a reasonable rate is
12 only the rate that's necessary to make the owner whole, the
13 owner whole.

14 And in this case, in *Barsy*, I think it's pretty clear
15 the Court was giving a rate higher than the statutory rate
16 because they wanted to make the property owner whole, and they
17 said well, you can invest another real estate where you get a
18 higher return. That's because the assumption is you'd have
19 tenants, and you'd be getting a higher return than the return
20 that you got during this period, which was because you didn't
21 have tenants.

22 So that's why the Court there found, well, we need to
23 give a higher rate, and so we'll use, you know, we'll
24 compensate this owner who wasn't made whole by the awards with
25 this higher rate, and it just happens to be that the evidence

1 was, well, what -- what he would have invested in this other
2 real estate to where if they had tenants he would've made up
3 that money had he lost, that he lost because the agency caused
4 him to lose his tenants.

5 We don't have that situation here. We have the
6 opposite situation where the Developer invested a certain
7 amount of money, and the Courts awarded the investor 54 times
8 what the Developer invested in the property. So the Developer
9 didn't lose anything. They got a huge windfall. So there's no
10 reason to award prejudgment interest in addition to that huge
11 windfall, to give them double or triple, yes, 52 million, would
12 have been having tripling their windfall.

13 You know, under the Constitution to test this, you
14 got to make the property owner whole. I think that's what the
15 Court needs to focus on, and there's no evidence that this
16 Developer needs yet more money to be made whole.

17 THE COURT: All right, sir. And thank you.

18 And we'll hear from Mr. Leavitt now.

19 MR. LEAVITT: Thank you, Your Honor. James J.
20 Leavitt on behalf of 180 Land, the plaintiff landowner again.

21 Your Honor, counsel said that the legislature
22 determined prime plus 2 percent to be the appropriate rate.
23 That's not what the legislature determined. The legislature
24 that the state says -- that the statute states the rate of
25 interest to be used to compute the award of interest must be

1 determined by the Court which, quote, must not be less than
2 prime plus 2 percent. The legislature never once determined
3 the prime plus 2 percent is the appropriate rate. They simply
4 said it cannot be below that.

5 And as you read from *Barsy*, the Nevada Supreme Court
6 said that once you receive competent evidence, you must
7 determine the rate which would be the most reasonable interest
8 rate. So the operative words there are reasonable interest
9 rate.

10 I will quote from the report by Bill Lenhart. This
11 is interest motion Bates stamp 0085. He concludes that he's
12 done his entire research here and that he says that the rate
13 which a landowner, and I'm going to quote, would reasonably
14 expect is a compound rate of 25 to 27 percent a year.

15 Your Honor used the exact standard that the Nevada
16 Supreme Court asked this Court to follow and asked *Barsy* to
17 follow, which what is the reasonable interest rate based upon
18 the rate of return for land during the relevant period.

19 Mr. DiFederico in his report, interest motion, dash,
20 0005, arrived at the same conclusion of a reasonable interest
21 rate except for he arrived at 23 percent, again pursuant to the
22 *Barsy* decision.

23 So, Your Honor, the question was to Mr. Schwartz, why
24 is this speculative? It's not, Your Honor. There's three
25 reasons this rate of return is not speculative. Number one,

1 the rate of return based upon land is what the landowners do.
2 They've done it in the past, and they're doing it now. They
3 invest in land.

4 Number two, it's what *Barsy* relies upon. *Barsy*
5 relies upon evidence of what the rate of return is of land
6 during the relevant period to determine the rate of interest.

7 And third, it's what the experts have confirmed in
8 this case.

9 So we have the landowners doing it. We have the
10 *Barsy* court relying it on it, and we have the experts
11 confirming it. That's the evidence before the Court right now
12 on this question of fact.

13 What we don't have from the City is any evidence of
14 why prime plus two should apply. They provided no evidence
15 from anybody, from an expert other than argument of counsel.
16 And what is that argument of counsel based on? He reargues the
17 purchase price that this Court has already ruled on, and he
18 tries to claim that that purchase price occurred in 2015. Both
19 the person most knowledgeable on the sale and the person most
20 knowledgeable on the purchase stated that the purchase price
21 was in 2005.

22 I'm going to quote just very briefly, Your Honor,
23 from this Court's order on the purchase price. Number one, the
24 purchase price transaction does not reflect the highest and
25 best use of the 35-acre property on the date of value.

1 Number two, the City has not identified an expert
2 that can testify to it.

3 Number five finding, jumping ahead, the purchase
4 price transaction beginning in 2005 is too remote to the date
5 of value with changes in the market fluctuations.

6 And then, Your Honor, I'm not going to continue to
7 read. That's the Court's motion -- that's the Court's order on
8 the motion in limine. We've been down this road. We've argued
9 this issue ad nauseam. The purchase price has been excluded
10 because it's so remote.

11 I will end with one example. You buy a parcel of
12 property in Las Vegas in 2005, your home. Say you got it for
13 \$50,000. Since 2005, which would not be unheard of, the
14 property is now worth \$700,000.

15 Under Mr. Schwartz's analysis here, all the City
16 would have to pay is \$50,000 because that made you whole, no
17 interest, not the increase in the value of your land, but let's
18 go back 17 years. Let's look at what you paid for the
19 property, and we'll give you 50 grand. Now, you've been made
20 whole. That's not the standard.

21 The standard is determining the value of the property
22 on the date of value. Once that property valuation is
23 determined, then the interest rate is -- then interest is based
24 on that value, and the rate is based on the time period in
25 which the landowners lost the use of those proceeds, and the

1 Nevada Supreme Court in Barsity said, look to land increases.

2 We've done that, Your Honor, and that's the only
3 evidence before the Court.

4 We respectfully request that you apply that -- or
5 that you rule that that 23 percent rate of return should be
6 applied because there's no evidence to contest it, just like
7 there was no evidence to contest the \$34 million value.

8 Thank you, Your Honor.

9 THE COURT: All right. And I don't mind saying this.
10 I mean, I thought about this case. I thought about my prior
11 decision as it pertained to the 34 million. And at the end of
12 the day there was no other alternative as far as value is
13 concerned.

14 And then, I mean, this -- I don't mind saying this to
15 everyone. The amounts being requested are significant sums of
16 money. I've made a lot of decisions in the past regarding
17 sums. I mean, I've had judgments in excess of \$500,000,000 in
18 this department that I had to reduce. That was for punitive
19 damages. It's my recollection I reduced it by -- I think it
20 was a State Farm Insurance Company case in front of the supreme
21 court where punitive damages had to have some sort of
22 relationship to compensatory damages, no more than 10 to 1.
23 And I had to reduce that. I forget what the exact sum was.
24 But I'm just saying we've had a lot of cases like that.

25 But here -- and this is the real -- I guess where the

1 rubber meets the road. We have argument about potentially what
2 would be the most reasonable interest rate, but I have no
3 evidence. And that's kind of what I'm grappling with right
4 now. We have no challenge under Hallmark as to --

5 MR. SCHWARTZ: Your Honor.

6 THE COURT: Yeah, go ahead.

7 MR. SCHWARTZ: Counsel freely intermixes rate of
8 return with interest rate. The expert testimony that was
9 presented to this Court are the rates of appreciation of real
10 estate. They are not reasonable interest rates. There's no
11 evidence from the developer of a reasonable interest rate in
12 this case.

13 THE COURT: All right.

14 MR. SCHWARTZ: He said the expert said a reasonable
15 interest rate is such and such, 23 percent per year. No,
16 that's not what the evidence shows. The evidence shows that
17 real estate, that the average of a class of real estate in Las
18 Vegas appreciated at a certain rate. Interest rate is the time
19 value of money. There's no case in Nevada where the Court has
20 awarded prejudgment interest at greater than prime plus
21 2 percent. Thank you.

22 THE COURT: All right. And I'm going to tell
23 everyone this. Am I going to make a decision right now? No.
24 I'm going to go back and read everything because there's a lot
25 of money involved. But at the end of the day, I'm going to

1 give the best decision I can give. It's going to be relatively
2 quick. It's my recollection I didn't sit on the last decision;
3 maybe, what, four or five days, a week at most, and that's what
4 I'm going to do.

5 But why does it matter -- I see the case -- what it
6 says here was -- and we can focus on that. It says, "While the
7 statutory rate should be used if unchallenged, once competent
8 evidence is presented supporting another rate of interest" --
9 right, that's what the case says -- "as being more appropriate,
10 the district court must determine which rate would permit the
11 most reasonable interest rate." And that's what the case says.

12 And then we have a scenario where there's interest
13 rates being offered by the plaintiff from an expert
14 perspective. I understand there's been argument, but as it
15 pertains to the methodology and those things, they really
16 haven't been challenged with another report. Right?

17 Anything you want to add to that, Mr. Leavitt? I
18 think you're frozen right now.

19 MR. LEAVITT: I'm on, Your Honor.

20 THE COURT: Okay.

21 MR. LEAVITT: No, Your Honor. And it's absolutely
22 correct that the evidence is unchallenged at this point in
23 time. So, again, we submit based upon the pleadings and based
24 upon the argument.

25 THE COURT: I understand. And I won't -- I think the

1 last time I got it done -- in fact, I think all the important
2 decisions I've gotten done pretty quick historically, like
3 within a week or so. I'm going to do the same thing. I just
4 want to go through it. It's a lot of money, but at the end of
5 the day I have to make a decision and I won't sit on it. It
6 will be done quickly.

7 MR. LEAVITT: Thank you.

8 THE COURT: All right. So we have one other matter
9 regarding attorney's fees.

10 And, Mr. Leavitt, you've got the floor, sir.

11 MR. LEAVITT: Yes, Your Honor. Thank you. Your
12 Honor, in our opening motion we listed three different sources
13 for recovery of attorney's fees in an inverse condemnation
14 case. I will address just two of those sources during my
15 argument today.

16 The first source is the Nevada Constitution. The
17 Nevada Constitution was amended in 2008 and it added a
18 provision, Article 1, Section 22, subclause 4, which states
19 what just compensation includes. And it says, "Just
20 compensation shall include but is not limited to interest and
21 all reasonable costs and expenses actually incurred in the
22 action."

23 So, Your Honor, the Nevada Constitution is abundantly
24 clear that a landowner recovers costs, and we've already done
25 that part of this case, and all expenses that that landowner

1 must incur in an eminent domain action or has incurred in an
2 eminent domain case. Those expenses clearly include attorney's
3 fees. The City has not even challenged the language that the
4 Constitution -- the provision of expenses includes attorney's
5 fees. Therefore, Your Honor, we would respectfully request
6 that attorney's fees be granted under that provision of the
7 Constitution.

8 But I do want to note one thing because when this
9 constitutional provision was placed on the ballot in 2006 and
10 2008, it was made very clear to the voters by the opponents of
11 the ballot question that this provision would require the
12 government to pay attorney's fees. We've laid that out in our
13 brief. And the voters of the State of Nevada passed this
14 constitutional provision in 2006 with almost 70 percent of the
15 voters. And, Your Honor, I don't know of many ballot questions
16 or elected officials that get 70 percent of the vote. Not only
17 in 2006 but in 2008, once again 70 percent of the electorate
18 voted to pass this section of the Nevada Constitution so that
19 landowners in these eminent domain cases would be reimbursed
20 for their attorney's fees. So, Your Honor, that's the first
21 section that allows for reimbursement of attorney's fees.

22 The second provision that allows for attorney's fees
23 arises out of the Sisolak and Hsu cases. Again, you're very
24 familiar with the Sisolak case. You're very familiar with the
25 Hsu case. Both of those cases cite to the Federal Relocation

1 Act and both of them say that once a landowner prevails in an
2 inverse condemnation case, that landowner is entitled to their
3 attorney's fees.

4 There's two provisions that the Nevada Supreme Court
5 cites to. 42 U.S.C. 4654, that's cited in the *Sisolak* case.
6 It's right on point. It says if a landowner prevails in an
7 inverse case, the government shall pay those attorney's fees.
8 49 CFR, Section 24.107 says the owner of real property shall be
9 reimbursed their attorney's fees if a judgment in inverse
10 condemnation is rendered in their favor. So these are
11 provisions that are cited by the Nevada Supreme Court in both
12 the *Sisolak* case and the *Hsu* case that where a landowner
13 prevails in an inverse condemnation case they're entitled to
14 their attorney's fees. And that's without exception, Your
15 Honor. The *Hsu* case, or the *Sisolak* case said very
16 succinctly -- here's what it said. "Because *Sisolak* is a
17 property owner who was successful in his inverse condemnation
18 case, the plain terms of the Act allowed the district court to
19 award reasonable attorney's fees." In the *Hsu* case the same
20 exact language is repeated. So we have two different avenues
21 to award attorney's fees.

22 Number one, the Constitution says just compensation
23 shall include reimbursement of all costs and expenses. All
24 costs and expenses clearly contemplates attorney's fees. And
25 then the *Hsu* and *Sisolak* rule, which state that in the State of

1 Nevada if a landowner prevails in an inverse condemnation
2 action they're entitled to reimbursement of their attorney's
3 fees.

4 Now, the argument that the City is going to make
5 about the *Sisolak* and *Hsu* case is they're going to say that,
6 Judge, the landowners in *Sisolak* and *Hsu* were only entitled to
7 attorney's fees because they showed that there were federal
8 funds involved in the taking. And they're going to say that
9 you have to show some type of connection or nexus between the
10 taking and the federal funds.

11 There's two reasons that's not true. Number one,
12 Your Honor, in an inverse condemnation case there are no funds.
13 The government doesn't allocate funds to acquire the property.
14 The government is denying the taking. Therefore, you can't
15 have a direct nexus between the federal funds that the
16 government receives and the taking of the property. All there
17 has to be is some kind of general nexus between the
18 government's program or the government itself and receiving
19 federal funds. So we see this all the time, Your Honor.

20 What the Federal Government will do is they'll say
21 we'll give you federal funds if you do certain things. And in
22 this case the Federal Government says we will give you federal
23 funds as long as you, the City, follow our Act, and if you take
24 property by inverse condemnation you have to reimburse a
25 landowner all of their attorney's fees. This is an absolute

1 requirement to the City of Las Vegas receiving federal funds.
2 In fact, if the City contests the attorney's fees here, it
3 would be jeopardizing receiving federal funds because it would
4 be contrary to the Federal Relocation Act.

5 Having said that, Your Honor, we have presented to
6 the Court -- they're all before the Court, Exhibit Number 12,
7 Exhibit Number 13 and Exhibit Number 14, which show the City
8 receives federal funds. The City receives federal funds
9 generally for all of its operations, and then Exhibits Number
10 13 and 14 show that the City receives federal funds
11 specifically for parks and open space under what's called
12 Southern Nevada Public Lands Management Act. It's known as
13 SNPLMA. Under SNPLMA, the City of Las Vegas receives federal
14 funds from the federal government to acquire properties and to
15 build properties for parks and open space.

16 That's the purpose for which the property has been
17 taken here, Your Honor. So insofar as there is some type of
18 nexus required to show federal funds between the property
19 that's being taken and -- or, I'm sorry, a nexus between the
20 property being taken and the federal funds that the City of Las
21 Vegas receives, that's set forth in Exhibits Number 12, 13 and
22 14. So, Your Honor, according to those two provisions, the
23 landowners are clearly entitled to reimbursement of their
24 attorney's fees.

25 So the final question, Your Honor, if they're

1 entitled to reimbursement of attorney's fees, would be how much
2 should that be? The Nevada Supreme Court provided a specific
3 formula for calculating attorney's fees in inverse condemnation
4 cases, and it's unique to inverse condemnation cases in the
5 *County of Clark v. Tien Fu Hsu* case. In that case we litigated
6 on behalf of Mr. Hsu for 14 years, and at the end of that case
7 the Nevada Supreme Court said you're going to get your
8 attorney's fees and here's how they have to be calculated in
9 two steps.

10 Number one, the Lodestar. This Court knows the
11 Lodestar. I'm not going to go through it. You look at the
12 hours and you multiply it by a reasonable rate. The hours we
13 provided to this Court are based upon the affidavits of all of
14 the counsel. Pursuant to NRCP 54, we've laid out those hours.
15 We've stated in our affidavits for every attorney that copious
16 records were given or kept.

17 On the hourly rate, those hourly rates were done down
18 to the tenth degree, so that, for example, if an individual
19 worked one hour and seven minutes that's 1.1 hours that was
20 recorded. Those were all added up solely and specifically for
21 this 35-acre case, meaning that none of the hours that we are
22 seeking to recover for attorney's fees in this case were spent
23 in the 65, 133 or 17-acre case. That's set forth clearly in
24 our affidavit. And, Your Honor, the rate that we have provided
25 to you was \$450 up to June 1, 2019, and after that it was \$675.

1 So pursuant to that first step, Your Honor, we've
2 given the Court the total hours worked. It's set forth in the
3 documents. I can provide that to the Court. But the total
4 hours that are worked we've given to the Court and the rate
5 that has been provided of \$450 and \$675 for attorneys and then
6 \$50 for legal assistance, Your Honor, is absolutely reasonable.
7 That was the actual rate that was charged to the client. And
8 so it's the actual rate multiplied by the hours worked that the
9 client has incurred in this case.

10 So the next step, Your Honor, after the actual rate
11 has been determined and the amount is given, is a twelve factor
12 analysis. And, Judge, I'm not going to go through all twelve
13 factors. But the twelve factors are set forth in the Hsu case.
14 We've laid them out in detail in our brief. And I believe --
15 and they're factors that this Court weighs. I believe eleven
16 of the twelve factors were clearly met in this case.

17 I'll address just a few of them, Your Honor.
18 Factors 3 and 9 to consider for whether the rate should be
19 enhanced looks at the skill and experience of the attorneys.
20 Your Honor, eminent domain is a very, very specialized area.
21 The Law Office of Kermitt L. Waters is the only firm that
22 specializes solely in eminent domain in the entire state of
23 Nevada. There's 110 years of combined experience which focuses
24 solely -- or wherein the attorneys for those 110 years have
25 focused exclusively on eminent domain work. The Owners'

1 Council of America chooses one firm out of every state to be a
2 part of that council. They chose the Law Office of Kermitt
3 Waters.

4 So, Your Honor -- and I'll just address this. The
5 constitutional provisions that we've been discussing in this
6 case, Article 1, Section 8, were drafted by the Law Office of
7 Kermitt L. Waters. The actual case that we're discussing to
8 determine attorney's fees, *County of Clark v. Tien Fu Hsu*, was
9 taken up to the Nevada -- litigated for 14 years and taken up
10 to the Nevada Supreme Court twice by the Law Office of Kermitt
11 L. Waters. So, Your Honor, the skill and experience of the
12 attorneys are clearly met to justify an enhanced fee.

13 Factor Number 5, Your Honor, is what's the customary
14 fee for specialized eminent domain cases. And, Your Honor, we
15 have that here. This is one of the cases where we don't have
16 to go look at what other attorneys charge. We don't have to
17 look at what other people in other specialties get because the
18 Nevada Supreme Court decided the fee for an eminent domain
19 attorney in an inverse condemnation case in *Sisolak*. The
20 Nevada Supreme Court awarded a fee of \$1,392 per hour times
21 1,400 hours. And, Your Honor, that was fifteen years ago.

22 So the one specific issue that really is before you
23 here today that the City really contests is the rate. Again,
24 the last issue was the rate of return on interest; here it's
25 the attorney rate. We ask that the Court follow that *Sisolak*

1 decision and provide a rate, an attorney hourly rate similar to
2 what was awarded in *Sisolak*. What was awarded in *Sisolak* was
3 \$1,392 per hour. That's the same attorney fee that should be
4 awarded in this case.

5 So, and then the final factor, Your Honor, Factor 12
6 was awards in similar cases. So in the *Sisolak* case,
7 Mr. Sisolak got almost \$500,000 less than his appraisal. In
8 this case the landowners, 180 Land, obtained the exact amount
9 of their appraisal report. And in *Sisolak* the Court awarded
10 \$1,392 as the hourly rate. So the award in *Sisolak*, Your
11 Honor, or the comparison of the award in *Sisolak* with the award
12 here, in addition to the actual hourly rate that was awarded in
13 *Sisolak*, we request that the Court multiply the hours worked in
14 this case by a rate similar to what was given in the *Sisolak*
15 case.

16 And, Your Honor, we've set that forth in our reply.
17 And just briefly, with the Court's indulgence, just very
18 quickly I'll get that for the Court. We set it forth in the
19 reply and we also set it forth in our opening motion. For
20 Mr. Waters, a rate of \$1,500 per hour. For James Leavitt, a
21 rate of \$1,300 per hour, which is \$92 less than what the
22 specialized eminent domain counsel received in *Sisolak*
23 fifteen years ago.

24 And for Ms. Waters and Mr. Schneider, \$800 an hour,
25 which is \$500 an hour less than what the specialized eminent

1 domain counsel was awarded in Sisolak.

2 So, Your Honor, with that said, number one, we
3 respectfully request that the Court award attorney's fees and
4 that the attorney's fees be calculated based upon those rates
5 that I just set forth based upon the Hsu factors.

6 THE COURT: Okay. Thank you, sir.

7 And we'll hear the opposition.

8 MR. MOLINA: Thank you, Your Honor. Personally and
9 for the City I'll be handling this opposition. So I think that
10 we agree with the developer on probably one thing, and that's
11 that there are two steps in this analysis. First, you have a
12 basis for awarding attorney's fees; and second, if there is a
13 basis, what is a reasonable fee. And as Mr. Leavitt stated,
14 there are three bases that the developer is attempting to
15 recover attorney's fees under. The first one is the Uniform
16 Relocation Assistance and Real Property Acquisition Policies
17 Act of 1970. That's -- we'll refer to that as the Uniform
18 Relocation Act. The second basis is Article 1, Section 22,
19 subsection 4 of the Nevada Constitution. And then also in
20 their motion they've also argued that they should be entitled
21 to attorney's fees under NRS 18.010, subsection 2(b).

22 I'll start with the Uniform Relocation Act because I
23 think that that's probably the most complicated one to get
24 through. Now, the developer has cited Title 49 of the Code of
25 Federal Regulations, Section 24.107, for the proposition that

1 the Court must award attorney's fees in inverse condemnation
2 actions, and we have directed the Court in our briefing to the
3 applicability section of that regulation. That's
4 Section 24.101. And what this says is that the Uniform
5 Relocation Act applies to two different types of programs or
6 projects.

7 The first one is a direct federal program or project,
8 and that means that there's a direct federal program and it's
9 an acquisition of real property for a direct federal program or
10 project.

11 The second type is a program or project receiving
12 federal financial assistance, and this is under subsection (b)
13 of that regulation. And it says, "The requirements of this
14 subpart apply to any acquisition of real property for programs
15 and projects where there is federal financial assistance in any
16 part of the project costs."

17 And where I'm going with this is that the City has no
18 project planned for the 35-acre property. The City has no
19 federal funding that they are going to receive for this
20 hypothetical project that does not exist. And so this section
21 plainly on its face does not apply.

22 Well, why did it apply in *Sisolak*? Well, it's pretty
23 clear why it applied in *Sisolak*, and the court made it quite
24 clear and I'll just quote from it. It says,

25 "Here, the Relocation Act entitles Sisolak

1 to an award of attorney's fees because the
2 County received federal funding for numerous
3 improvements at McCarran Airport, including
4 runway construction and land acquisition. The
5 County was eligible to receive the federal
6 funding specifically because it made assurances
7 that it took steps by enacting ordinances to
8 protect the airspace needed for aerial
9 approaches to the airport and to prevent future
10 construction in that airspace."

11 So what you have in *Sisolak* and what you also have in
12 the Hsu case is a federal project, a federal -- a program or
13 project that receives federal funding, and we don't have that
14 here. What Mr. Leavitt has argued is that, well, the City
15 receives federal funds generally and they receive federal funds
16 through the Southern Nevada Lands Public Management Act, and
17 therefore, you know, this is enough to make the Uniform
18 Relocation Act apply, and that's -- it's simply false.

19 What he does is he focuses on this language in
20 *Sisolak* where the *Sisolak* court rejected the County's argument
21 that there must be a specific nexus. The *Sisolak* court never
22 held that there can be no nexus; as long as you receive federal
23 funds the Uniform Relocation Act applies. That's not what they
24 said. What they said was there doesn't need to be a specific
25 nexus. And so there has to be a nexus and that's just sort of

1 the bottom line here is that there's no program or project
2 that's going to receive any federal funding here. The City is
3 certainly not going to get any money from the federal
4 government to pay the just compensation award or any other sums
5 that are awarded against the City. And there's simply no
6 project and there's no nexus.

7 And what's telling here is that you have two other
8 Nevada Supreme Court cases, one that predates *Sisolak* and the
9 other one is post *Sisolak*. The one that predates *Sisolak* is
10 *Alper* and *Alper* was not overruled by *Sisolak*. In *Alper*, the
11 Court made it quite clear that -- and I'll just go ahead and
12 read from it. It says,

13 "Since the Alpers did not produce any
14 evidence that federal funds had been received by
15 the County to acquire or widen that portion of
16 Flamingo Road which is subject to the present
17 inverse condemnation proceeding, NRS 342.320(2)
18 does not apply."

19 And that statute that the court cited there was the
20 State equivalent of the Uniform Properties Act -- Uniform
21 Relocation Act, and it simply just says that when it applies to
22 an agency the policies must be followed. That's all that that
23 says, so it's essentially the same rule. And as I've already
24 explained, it just simply doesn't apply.

25 So before *Sisolak* you have the Nevada Supreme Court

1 saying if you don't show that there's any evidence that there
2 was federal funds received for this project -- there was
3 actually a project there, a street widening project -- then
4 this doesn't apply. And after *Sisolak* we have another case.
5 We have *Buzz Stew*. And in *Buzz Stew v. City of North Las Vegas*
6 the court kind of tangentially rejected expert evidence of the
7 Uniform Relocation Act. And what they said there was,

8 "Any additional testimony regarding the
9 Relocation Act, the district court did not err
10 in excluding this evidence, as Buzz Stew failed
11 to show that federal funds were used for the
12 project."

13 The project. No evidence showing that federal funds
14 were used for the project. And again, you have a project there
15 and here we do not. There's no project. What is the project?
16 It does not exist. So you have case law before and after
17 *Sisolak* that explains that there has to be a nexus.

18 There doesn't have to be a specific nexus, but it's
19 got to be a nexus. You can't just say that, oh, every city in
20 the country, basically, receives federal funding. And if that
21 were enough to trigger the statute, then we wouldn't have this
22 conversation right now. It would be completely clear based on
23 the case law and the Nevada Supreme Court certainly wouldn't
24 have rejected that argument in *Buzz Stew*.

25 So, and I'll also say one more thing about *Buzz Stew*

1 because the Nevada Supreme Court cited two cases, one from the
2 Seventh Circuit and one from Colorado. In the Seventh Circuit
3 decision, *Rhodes v. City of Chicago for Use of Schools*, the
4 Seventh Circuit held Section 4655, which is the statute that
5 gives rise to the regulations that I was discussing before,

6 "Section 4655 is applicable only when
7 federal financial assistance is used in or
8 directly supports the property acquisition."

9 And then the Seventh Circuit went on to say,

10 "While substantial sums of federal money
11 are channeled into the Chicago public school
12 system, there is no evidence that federal funds
13 are used for the acquisition of property by the
14 Chicago Board of Education."

15 So again, there's got to be some kind of a nexus and
16 there's got to be a project. The other case that the Nevada
17 Supreme Court cited to in *Buzz Stew is Regional Transportation*
18 *District v. Outdoor Systems, Inc.* That was a Colorado
19 decision. And there -- that is an en banc Colorado decision.
20 And there the court stated that the regulations under the
21 Uniform Relocation Act,

22 "make clear that not every acquisition made
23 by a state agency that ultimately wins federal
24 funding falls within the Act's ambit. The
25 phrasing of the regulation implies that it

1 covers situations where an agency identifies a
2 parcel of land needed for a particular project
3 and then sets out to obtain it."

4 So we've got, you know, very recent or fairly recent
5 Nevada Supreme Court authority in *Buzz Stew* citing to both of
6 these cases and they reached the same conclusion that the City
7 is arguing here that unless you have a project and unless you
8 can show that there's funding that's at least related to that
9 project, then the Uniform Relocation Act doesn't apply. So we
10 would submit that that's pretty -- that should be a pretty
11 simple issue, Your Honor. We don't think that there's really
12 any legitimate basis to claim that the Uniform Relocation Act
13 applies.

14 The next basis that the developer is relying on to
15 claim attorney's fees is Article 1, Section 22, subsection 4 of
16 the Nevada Constitution. And as Mr. Leavitt noted, this is
17 something that Mr. Waters had participated in. And nowhere in
18 this section is the word inverse condemnation mentioned at all.
19 And that is pretty telling.

20 And for the same reason that -- I'll get back to this
21 in a second, but in *Buzz Stew* what happened is that the City of
22 North Las Vegas actually prevailed in that action, and what
23 they said was -- the developer, the property owner there had
24 argued that the Nevada Constitution protected against an award
25 of costs. And the court said, well, in eminent domain

1 actions -- this is the *Buzz Stew* court -- they said in eminent
2 domain actions such costs are curtailed. And they cited to
3 Nevada Constitution Article 1, Section 22, subsection 7. And
4 then they went on to say,

5 "The present case was an unsuccessful
6 action for pre-condemnation damages wherein the
7 City prevailed on its defense. Therefore, we
8 cannot say that under the facts of this case the
9 district court clearly erred."

10 And what the court just did there is they
11 distinguished an action for pre-condemnation damages from an
12 action based in eminent domain. And they held that it doesn't
13 apply to an action for pre-condemnation damages because the
14 constitutional provision at issue here on its face only refers
15 to eminent domain proceedings. It's qualified and limited to
16 eminent domain proceedings.

17 And the other key thing here is that in reaching that
18 conclusion the Nevada Supreme Court cited to a California case,
19 *Locklin v. City of LaFayette*, that held that an inverse
20 condemnation plaintiff who did not prevail in a takings claim
21 was not entitled to be shielded by the law against awarding
22 costs in eminent domain actions. So not only did the Nevada
23 Supreme Court distinguish the *Buzz Stew* case from the
24 constitutional provision that allows for -- that shields
25 landowners from having to pay the government their costs, it

1 also distinguished inverse condemnation from eminent domain in
2 citing to this *Locklin v. City of Lafayette* case. And this is
3 very recent, Your Honor. This is a 2015 decision basically
4 distinguishing that.

5 And so it's clear, then, that this is -- there is a
6 distinction that's important here for purposes of construing
7 the Nevada Constitution, and that distinction is that these
8 provisions, these protective provisions that were adopted by
9 the voters in 2008, they only apply to eminent domain actions,
10 and that's pretty clear.

11 I'll respond to one thing that Mr. Leavitt pointed
12 out about the ballot initiative. They made this argument in
13 their motion that because the Nevada voters, you know, were
14 given the information about the Act that said that, you know,
15 the government would have to pay attorney's fees in every
16 eminent domain case, therefore the Nevada voters knew that
17 attorney's were going to have to be paid in inverse
18 condemnation cases. Well, I mean, there's very clear law in
19 Nevada that those ballot explanations are not proper for
20 purposes of ascertaining legislative intent. That's now how
21 you construe a ballot proposition.

22 So for those reasons, we would argue that Article 1,
23 Section 22 of the Nevada Constitution does not apply to an
24 inverse condemnation action and it does not apply to this case.

25 And, Your Honor, I'll just briefly address the last

1 basis. I don't think that Mr. Leavitt spent much time on this
2 but, you know, they also claimed attorney's fees in their
3 motion under NRS. 18.010 2(b). And, you know, that provision,
4 as I know the Court is aware, it applies when, you know,
5 somebody makes a claim or a counterclaim or interposes some
6 kind of a defense for the purpose of harassing the other side,
7 being vexatious, frivolous arguments, things of that nature.
8 And we would submit that all of the arguments that we've made
9 in this case have been based on well-established law.

10 Everything that we've argued here has been supported
11 by ample law. And certainly there has been no effort on the
12 City's part to try to harass the developer in making any
13 arguments. That's just simply not true.

14 So, really we should not even get into the second
15 step of the analysis, which is what is a reasonable fee,
16 because we don't have a basis for awarding attorney's fees
17 here. The Uniform Relocation Act doesn't apply. The Nevada
18 Constitution provisions, the PISTOL amendments do not apply to
19 inverse condemnation cases. And we just don't have a grounds
20 here for applying NRS 18.010 2(b). But obviously I have to
21 respond to those and of course we can get -- these fees are
22 just outrageous.

23 The interesting thing here is that the developer
24 incurred 2.1 million dollars in attorney's fees, according to
25 their motion, and they're requesting 3.4 million dollars in

1 attorney's fees based on this argument that they should be
2 entitled to an enhanced fee under *Hsu*. Now, *Hsu* doesn't say
3 that the court can award an enhanced fee. What it says is that
4 you can make an appropriate adjustment.

5 And I'll just -- actually, to be careful here, I'll
6 read the language verbatim. What *Hsu* said was, "Following
7 determination of the lodestar amount, we leave it to the sound
8 discretion of the district court to adjust this fee based
9 upon" -- twelve factors. It doesn't say enhanced fee. That is
10 something that the developer completely made up. If you search
11 that decision for the word enhanced or enhance or increase or
12 upward adjustment, none of those things come up. It's an
13 adjustment based on these factors and it's basically to make
14 the fee reasonable.

15 And so all that *Hsu* said was that you multiply the
16 number of hours spent by a reasonable rate and then you adjust
17 it based on these factors. It doesn't say that they get an
18 enhanced fee. And an enhanced fee of 1.3 million dollars, Your
19 Honor, is pretty steep.

20 What the developer doesn't talk about in his motion
21 is all of the law that we have in Nevada about what's a
22 reasonable fee. It's pretty clear that when a court determines
23 what a reasonable fee is, it looks at the relevant
24 jurisdiction, and the relevant jurisdiction here is the Las
25 Vegas market.

1 So what we did is we went out and we got this Real
2 Rate Report from Wolters Kluwer and they published that report
3 specifically for these types of motions so that the court can
4 see what -- you know, what is the market charging, you know,
5 from year to year and that can be used as a basis to determine
6 reasonableness of a fee. So what we showed in the rate report
7 was that in 2017 the average rate charged was \$410 for partners
8 and \$264 for associates in the Las Vegas market. And that was
9 pretty steady. In 2018 it was \$444 for partners and \$279 for
10 associates. In 2019 it actually went down a little bit. For
11 partners it went down to \$438 for partners and \$281 for
12 associates.

13 So that just puts a little bit of context here on
14 what the developer is requesting, which is \$1,500 an hour for
15 Kermitt Waters; \$1,300 per hour for Mr. Leavitt; \$800 per hour
16 for Autumn Waters; and \$800 per hour for Mr. Schneider. All of
17 those rates are at least twice the amount of the average rates
18 that are charged in the Las Vegas submarket.

19 And with respect to the rates that Mr. Waters and Mr.
20 Leavitt are requesting, it's almost three times or almost four
21 times the amount of the average rate, which was around \$438 for
22 partners in 2019.

23 So, Your Honor, we think that these are grossly, you
24 know, disproportionate to what's reasonable in the Las Vegas
25 market. But once again, we don't think that we even get to

1 this step in the analysis because there's just no basis for
2 awarding attorney's fees in this case.

3 THE COURT: And, sir, I just have one question. What
4 about the references made to the *Sisolak* case and the hourly
5 rate that was awarded in that matter?

6 MR. MOLINA: Sure. So in the *Sisolak* case the
7 counsel for Sisolak, Laura Rehfeldt, she took that case on a
8 contingency fee. And I believe that we actually attached to
9 our opposition the lower court's analysis of, you know, how he
10 arrived at that amount. And essentially, you know, what he did
11 was he looked at this as a contingency case and compensated her
12 for taking on the risk of, you know, litigating that case all
13 the way up to the Nevada Supreme Court and back and not having
14 been paid at all during that time. And so a higher amount for
15 that case was appropriate, given the fact that she had taken on
16 that risk and, you know, she deserved to be compensated for it.

17 In this case the developer actually got paid. They
18 got paid, according to their motion, 2.1 million dollars in
19 fees already. So it wasn't a contingency fee, and so it's not
20 appropriate to use what was awarded in *Sisolak* as a benchmark
21 for what's appropriate and reasonable in this case.

22 THE COURT: All right, sir. Thank you.

23 MR. MOLINA: Thank you.

24 THE COURT: And, Mr. Leavitt?

25 MR. LEAVITT: Yes, Your Honor. Again, James J.

1 Leavitt on behalf of the plaintiff, 180 Land, landowner. Your
2 Honor, I'll start where we ended there on the Sisolak hourly
3 rate. It's true that Ms. Fitzsimmons handled the Sisolak case
4 on a contingency fee basis; however, the court never once
5 stated that it was awarding that attorney fee of \$1,392 based
6 on a contingency fee. That's nowhere in the decision. Nowhere
7 in the decision does the court say, hey, because you had such
8 great risk that you might not get paid, we're going to pay --
9 we're going to affirm a \$1,392 award. The court expressly
10 stated that she was awarded the amount of the fee, which was
11 \$1,392 times 1,400 hours, Your Honor. There was no caveat.
12 Therefore, that's the only case that we have in Nevada that
13 provides a reasonable rate for an attorney who specializes in
14 an eminent domain case.

15 The government has tried to attach this Real Rate
16 Report, which is a general rate report, which are general fees
17 for general attorneys. There's nothing in there about the rate
18 that attorneys charge in a specialized area or a rate that
19 attorneys are entitled to in a specialized area.

20 Secondly, the rate that's in that Real Rate Report
21 that counsel brought to you is less than the attorney fee rate
22 that Mr. Ogilvie's office is charging, Your Honor. And that's
23 a government rate. We laid out in our report that government
24 rates are typically lower. So, Your Honor, that Real Rate
25 Report is -- it has no basis in Nevada law, number one. It's

1 not cited in any Nevada case, number two. And number three,
2 it's contrary to the *Sisolak* decision.

3 Again, we have a case right on point which is
4 fifteen years old. Your Honor, we didn't go into the *Sisolak*
5 case and say, listen, \$1,392 was awarded in *Sisolak* and we want
6 you to adjust that up for fifteen years. We didn't do that.
7 My rate that I'm asking for is \$92 an hour less than *Sisolak*'s
8 rate or the attorney in *Sisolak*'s rate fifteen years ago. It's
9 a little bit higher for Mr. Waters for obvious reasons.
10 Mr. Waters has been described as the preeminent eminent domain
11 attorney on the entire west coast. He's known as that for the
12 west coast. There's another attorney for the east coast. So
13 an hourly rate in this specialized area that we've requested is
14 consistent not only with *Sisolak* but consistent with the
15 experience and the reputation of 110 years of specializing in
16 the area of eminent domain.

17 Now, counsel also brought up the *Hsu* decision. If
18 the *Hsu* case -- if in the *Hsu* case the Nevada Supreme Court did
19 not want the court to consider the twelve factors for an
20 enhanced rate, all the court would have had to have done is say
21 determine -- under the Lodestar analysis determine a reasonable
22 rate and then multiply it by the hours, and the analysis would
23 end there. It would entirely end there.

24 But the Nevada Supreme Court understood the nature of
25 an inverse condemnation case and said that after the court

1 determines the reasonable hourly rate, after the court -- or
2 times that by the number of hours worked, the court must then
3 consider these twelve factors. And every one of those twelve
4 factors are targeted towards enhancing a fee. Why would the
5 court want you to consider the reputation and skill of the
6 attorney if it was going to reduce the fee? Why would the
7 court want you to consider the outcome if it was going to
8 reduce the fee? So, Your Honor, it's clear that those factors
9 were provided to ask the court to look at the rate that was
10 charged, actually charged in the case and then enhance it
11 upward, exactly as was done in the *Sisolak* case, other than the
12 contingency fee was the starting point.

13 And, Your Honor, I will add one thing here.
14 Typically in an inverse condemnation case the contingency fee
15 is 30 percent. That fee would be more than 10 million dollars
16 in this case. So the fee which we're asking for here, which is
17 based upon \$1,392, that counsel says is outrageous based on
18 3.4 million dollars, is less than one-third of the typical
19 contingency fee that we would have charged in an inverse
20 condemnation case such as this.

21 I'll turn to the Constitution. The City of Las Vegas
22 concedes that attorney's fees under the Constitution are part
23 of a just compensation award. But what the City says is they
24 say, well, that's just part of the just compensation award in
25 an eminent domain case, you don't get attorney's fees in an

1 inverse condemnation case. Your Honor, this Court has entered
2 findings of fact and conclusions of law. The Nevada Supreme
3 Court has entered a holding in *Alper*. The Nevada Supreme Court
4 has entered a holding in *Argier* and about five other cases that
5 stated that eminent domain cases are the constitutional
6 equivalent of inverse condemnation cases and are governed by
7 the same rules and principles. So therefore, if a landowner is
8 entitled to recover their attorney's fees in an eminent domain
9 case, they're entitled to recover their fees in an inverse
10 condemnation case.

11 That not only is long-standing precedent in the state
12 of Nevada that the two cases are the constitutional equivalent,
13 but it's the law of this case now. So to argue that -- or to
14 try and split hairs between an inverse condemnation case and an
15 eminent domain case at this point in the case is simply
16 unreasonable, Your Honor, since it's already been adjudicated
17 fully in this case and by the Nevada Supreme Court.

18 Secondly, it makes no sense whatsoever to grant
19 attorney's fees under the Constitution in a direct eminent
20 domain case but not an inverse condemnation case. Let me read
21 to you the policy that comes out of the *Sisolak* case. So in
22 the *Sisolak* case the Nevada Supreme Court awarded attorney's
23 fees in an inverse condemnation case and here's what the court
24 held. It is inevitable that a landowner in an inverse
25 condemnation case will be forced to pay greater litigation

1 expenses than would have been necessary than if the City had
2 properly performed its function and condemned the property.

3 What the Nevada Supreme Court is saying there is that
4 when a landowner brings an inverse condemnation case they have
5 to incur greater fees and costs and expenses. Therefore,
6 they're entitled to their attorney's fees. Counsel is trying
7 to wear that policy exactly backwards and say, well, if the
8 government acts properly, as it should have done in this case,
9 but if the government acts properly and files an eminent domain
10 case and you go through the eminent domain process, the
11 landowner is entitled to attorney's fees under the
12 Constitution. But if the government doesn't act properly and
13 it tries to take that property without paying for it and the
14 landowners have to sue the government in inverse condemnation,
15 the landowner doesn't get attorney's fees. It makes absolutely
16 no sense whatsoever. It's contrary to the public policy that's
17 set forth in the *Sisolak* decision and it's contrary to the law
18 of this case and Nevada Supreme Court precedent that inverse
19 condemnation cases deserve the same protection as eminent
20 domain cases.

21 Actually, Your Honor, the Nevada Supreme Court has
22 been very clear that landowners in inverse condemnation cases
23 get greater protections than landowners in direct eminent
24 domain cases because in an inverse condemnation case the
25 government has acted improperly and tried to take the property

1 without paying for it, which is a violation of the landowner's
2 constitutional right. And because the government violates that
3 constitutional right, the government has to pay the landowner's
4 attorney's fees.

5 Your Honor, I'll address the last -- a couple last
6 issues on the Relocation Act. Your Honor, counsel is making
7 the same argument that the County of Clark made in *Hsu* and in
8 *Sisolak* because there has to be a direct nexus between the
9 federal funds received and the project for which the property
10 is being taken. Your Honor, in an inverse condemnation case
11 there is no project for which the property is being taken.
12 That's the issue. The government tries to take the property
13 without paying for it without a project, and that was the case
14 in the *Sisolak* case, or that was the situation in the *Sisolak*
15 case.

16 In the *Sisolak* case, the airport received federal
17 funds, but Mr. Sisolak's property was one mile away from the
18 airport. It wasn't part of some project at the airport, as
19 counsel stated. There was no project and no funds for that
20 project. The reason Mr. Sisolak was able to recover attorney's
21 fees is because he presented evidence to the district court
22 that the airport receives federal funds and is therefore bound
23 by the Federal Relocation Act.

24 Here, we've provided that same evidence; not only
25 that the City of Las Vegas generally receives federal funds,

1 but the City of Las Vegas receives federal funds for the
2 specific taking that happened in this case. Under the Southern
3 Nevada Public Lands Management Act, the City gets federal funds
4 for parks and open space. They apply for it. They get it.
5 Not only is that a general nexus, Your Honor, that's a specific
6 nexus directly tied to the purpose for which this property was
7 taken. And you remember well, Your Honor, and I'm not going to
8 go back through the facts of how this property was taken for a
9 public park and open space. Therefore, Your Honor, the
10 landowners are entitled to reimbursement of attorney's fees
11 under the Constitution, the constitutional provision which
12 applies to eminent domain and inverse condemnation cases, and
13 they're entitled to reimbursement of their attorney's fees
14 under the plain language of the *Sisolak* case. And we'd ask
15 this Court that it apply that enhanced fee, very similar to
16 what was given to the specialized eminent domain counsel in
17 *Sisolak* fifteen years ago.

18 I'll address one last issue, the *Buzz Stew* case.
19 Counsel cites the *Buzz Stew* case as apparently some type of
20 grounds to deny attorney's fees. In *Buzz Stew*, number one, it
21 was a pre-condemnation damage case, and number two, the
22 landowner lost. He didn't win. This is an inverse
23 condemnation case and the landowners won. Therefore, *Buzz Stew*
24 has absolutely no application here. When a landowner prevails
25 in an inverse condemnation case in the state of Nevada, they

1 are entitled to their attorney's fees, not only under the
2 constitutional provision, but also under *Sisolak* and *Hsu*.

3 And I'll just say one last thing, Your Honor. The
4 Constitution was not unclear. The Constitution says just
5 compensation shall include. What was this case about? This
6 case was about just compensation. So just compensation shall
7 include those costs and those expenses actually incurred. That
8 means what we're talking about (video interference) that they
9 be awarded.

10 THE COURT: We lost you at the very end there, sir.

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

12 THE COURT: We lost you at the very end there, the
13 last 10 seconds or so. And then when you're done, I have a
14 question for you.

15 MR. LEAVITT: Sure. Your Honor, my only statement is
16 that Article 1, Section 22 of the Nevada Constitution states
17 that just compensation shall include -- and then it goes on to
18 describe what's included. And, Your Honor, clearly attorney's
19 fees were part of that. Therefore, just compensation includes
20 payment of attorney's fees in this case.

21 And then I'll entertain your question, Your Honor.

22 THE COURT: And here's my question. I'm looking at,
23 I think it's page 10 of the motion, and it itemizes the actual
24 amount of fees that were paid, I think. And this would start
25 at line 1. It says, "The following shows the total attorney's

1 fees using these rates." And would that have been -- and I
2 guess it totals up, \$2,165,359.50. And plus it has a certain
3 number for legal assistants at a \$50 rate and that total was
4 \$44,912.50. Would that be the actual fees incurred in this
5 case?

6 MR. LEAVITT: Yes, Your Honor. Those are the actual
7 fees incurred. However, subsequent to the filing of the motion
8 additional attorney's fees were incurred, and those additional
9 attorney's fees are on page 9 of the reply.

10 THE COURT: Okay.

11 MR. LEAVITT: And I can give you those numbers if
12 you'd like, but you can see them on page 9.

13 THE COURT: Yeah. I have everything right in front
14 of me.

15 MR. LEAVITT: Yeah. On page 9, line 6. And the
16 additional legal assistant hours worked are page 9, line 9. So
17 adding -- so on line 6, adding the \$211,000 to the -- rounding
18 out the -- sorry, the two hundred -- or, I'm sorry, the
19 2.1 million and change, that's the actual fees incurred up to
20 January 25th.

21 THE COURT: Okay. And here's my question, Mr.
22 Leavitt. And I do agree that -- with your argument regarding
23 the award of fees pursuant to the Uniform Relocation Act,
24 pursuant to the Nevada Constitution, and also I understand your
25 position as it relates to the application of NRS 18.010. But

1 if I'm going to award fees under the facts of this case, why
2 wouldn't I award them as they were actually incurred?

3 MR. LEAVITT: Your Honor, the Constitution does say
4 actually incurred.

5 THE COURT: Yes.

6 MR. LEAVITT: And as does the -- as does the cases.
7 They do say actually incurred. The only authority that we have
8 for enhancement of fee is the *Hsu* case. The *Hsu* case does say
9 that there is a 2-step process in these specific inverse
10 condemnation cases, and it starts at Headnote 8 and it goes
11 through and says that in an inverse condemnation you're
12 entitled to recover attorney's fees. And first there has to be
13 a Lodestar analysis where you multiply -- and it says "multiply
14 the number of hours reasonably spent on the case by a
15 reasonable hourly rate." So you find out what the hourly rate
16 is and you multiply it. And we know what that is here.

17 Then the court goes on to say -- it does say,
18 "Following determination of the lodestar amount, we leave it to
19 the sound discretion of the district court to adjust this fee
20 award based upon" -- and then there's twelve factors.

21 So, frankly, Your Honor, it's within this Court's
22 sound discretion on whether to award a higher fee than those
23 actually incurred. And the authority that we have for that is
24 the *Sisolak* case where \$1,392 per hour was awarded. And, Your
25 Honor, I would submit to the Court that if the Court simply

1 followed the *Sisolak* case and awarded \$1,392 an hour, it would
2 be consistent with that. We took the *Sisolak* award and the
3 \$1,392 amount and we adjusted it amongst the various attorneys
4 in the office. But again, the basis is that Headnote 8, which
5 is page 637 of the *Hsu* decision.

6 THE COURT: All right. And I just want to make sure
7 I understand the distinction between the calculations that are
8 set forth on page 11 of the motion and page 9 of the reply
9 because it appears to me that, for example, since October 31st
10 of 2021 the hourly rate has gone up. Is that correct or no?

11 MR. LEAVITT: Well, the hourly rate went up on
12 June 1st. Your Honor, I have that right here. The hourly rate
13 went up on June 1st in I think the year of 2019. So prior to
14 June 1st, 2019, the rate was \$450, and after June 1st, 2019,
15 the rate was \$675. So the attorney hours since October 31st,
16 2021, are based upon that \$675 rate which had been in place
17 since June 1st, 2019.

18 THE COURT: All right.

19 MR. LEAVITT: And you can see, Your Honor, on page 9
20 on the left-hand column there along the attorneys is the
21 actually incurred, and then on the right-hand side is the rate
22 that has been requested pursuant to *Sisolak*.

23 THE COURT: And so I just want to make sure I get
24 this correctly, that since October 31st of 2021, for example,
25 based upon the \$675,000 (as said) rate the amount of fees

1 incurred have been \$211,350.50?

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

3 THE COURT: Okay. And the legal assistant rate
4 hasn't changed, has it?

5 MR. LEAVITT: That's correct, Your Honor. It's been
6 \$50 the entire time.

7 THE COURT: Okay. All right. Is there anything else
8 I need to know?

9 MR. LEAVITT: No, Your Honor. I think that -- I
10 think we have done quite a bit today and I think I have nothing
11 more to add, Your Honor.

12 THE COURT: Okay. And as far as fees are concerned,
13 and I do understand the *Hsu* case, but what I am going to do is
14 this. And this is a big case, there's no question about that.
15 I'm going to award the attorney's fees under the three areas
16 that we discussed pursuant to the Uniform Relocation Act, the
17 Nevada Constitution an NRS 18.010. And I'm going to go with
18 the language in the Constitution as far as fees actually
19 incurred. And so I just want to make sure I get this correct.

20 It appears to me, at least based upon what I
21 currently have in front of me based upon the actual incurred
22 fees, I'm looking at the chart set forth on page 11 of the
23 motion. That would be \$2,165,359.50. And everything is
24 itemized there because there has been a change.

25 But then moving on, there's additional fees that have

1 been incurred since October 31st of 2021, and that's, from what
2 I can tell -- and I'm looking here to make sure I get this
3 figure correct, it is the total additional hours based upon the
4 actual incurred post October 31st of 2021. That would be --
5 and tell me if I'm wrong or not, but that appears to me to be
6 \$211,350.50, plus the additional -- and I don't want to
7 overlook this, the legal assistant work. We had one,
8 \$44,912.50 plus additional post October 31st of 2021, of
9 \$7,023.50. Is that correct?

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

11 THE COURT: All right. Okay. And included would be
12 the time spent arguing today and preparation for today, and you
13 can prepare a memorandum on that. So I'm going to award the
14 attorney's fees as set forth on the record.

15 The only matter I have to look at and just think
16 about, I don't mind saying this, is the prejudgment interest
17 issue. And I just want to think -- just like the other one, I
18 just want to deliberate and think about that. And I think
19 it's -- and I'll make -- if I have some thoughts, I'll point
20 them out in my decision. But I do understand the current
21 status of the evidence. And, as the trial court under these
22 circumstances, I'm the finder of fact and I have to weigh and
23 balance the evidence. I get that. Everyone understand?

24 Do we have a question, Mr. Leavitt?

25 MR. LEAVITT: Yeah, Your Honor, I have one question.

1 We have -- I have a conflict in our hearing next week, which is
2 February 8th. I was wondering if we could have -- I'm out
3 February 8th and February 9th. If we could do that on
4 February 10th or anytime thereafter, I'm available.

5 THE COURT: All right. Time is flying, isn't it?
6 It's February. It's already February. I have no problem. So
7 as far as the City is concerned, and I've always accommodated
8 everyone in this matter, what dates are available again, Mr.
9 Leavitt?

10 MR. LEAVITT: I can do the afternoon of February 9th
11 or I can do February 10th. Frankly, any day thereafter I'm
12 open.

13 THE COURT: Okay. What do we have? And then we can
14 see if the City is also available at the same time.

15 (The Court confers with the clerk)

16 THE COURT: But what dates are we talking about?

17 THE CLERK: Oh. Next week, moving it from next
18 Tuesday; right?

19 THE COURT: Yes, the 8th. Whenever it's currently
20 set. It's set for the 8th at 9:00 o'clock a.m. -- 9:05 a.m.

21 THE CLERK: Correct. I would recommend, Judge, the
22 9th, Wednesday, 9:30.

23 MR. LEAVITT: That -- I can't do the 9th.

24 THE COURT: He can't do the 9th.

25 THE CLERK: Oh, I'm sorry.

1 MR. LEAVITT: I could do the 9th in the afternoon.

2 THE CLERK: Oh, I see. Unfortunately, we have a
3 special setting both the afternoon of Wednesday and Thursday.

4 (Colloquy regarding other matters on calendar)

5 MR. LEAVITT: I could do Monday, the 14th.

6 THE CLERK: That's a jury trial. That's a one-week
7 jury trial.

8 THE COURT: Oh, we're going into jury trials, believe
9 it or not.

10 MR. LEAVITT: Oh, boy.

11 THE COURT: It's only one week. We can't do
12 two weeks. Is that case definitely going? It looks like it,
13 huh?

14 (Colloquy regarding other matters on calendar)

15 THE COURT: Let's set them during that time, that
16 first week. And I think probably what we need to do, I'm glad
17 you brought that up. We need to bring -- do a status check as
18 far as trial readiness is concerned for that 2-week trial.
19 Let's try to get them in soon.

20 THE CLERK: Okay.

21 MR. LEAVITT: And, Your Honor, I could do the morning
22 of the 10th or the afternoon of the 10th or the morning of the
23 11th or afternoon of the 11th if those other times don't work.

24 (The Court confers with the clerk)

25 THE COURT: This is what we're going to do. And I

1 can't promise you this, but we're going to try to make this
2 work. I do have a two-week jury trial currently set that week,
3 but based upon the current Administrative Order we're not
4 conducting two-week jury trials. So it sounds to me that
5 Tuesday of that week might be available.

6 Is that correct, in the afternoon?

7 THE CLERK: Correct, the afternoon.

8 THE COURT: All right. And what we're going to do,
9 if we have -- if it's available for everyone right now, we'll
10 use that date. If something happens, I'll let you know and
11 we'll move it.

12 MR. LEAVITT: Your Honor, are we talking about
13 Tuesday, February 22nd?

14 THE COURT: Correct. Afternoon.

15 MR. SCHWARTZ: Your Honor, this is Andrew Schwartz.
16 I'm going to be arguing that motion and I am on vacation that
17 week.

18 THE COURT: Well, your vacation is very important,
19 sir. We'll have to go to another week. That will make it easy
20 for us. What about the following week?

21 (The Court confers with the clerk)

22 THE COURT: So I'm looking here. Today is currently
23 the 2nd of February; right? And that matter is currently set
24 for the 8th of February. We don't have anything the week of
25 the --

1 And, Mr. Schwartz, you're on vacation which week,
2 sir?

3 MR. SCHWARTZ: The week of February 21st, Your Honor.
4 Returning --

5 THE COURT: Okay. So I'm taking that completely out
6 of the discussion. I always, without reservation -- I can't
7 remember in 16 years ever not giving consideration to holidays,
8 vacations and the like to any lawyer. So that's out, we can't
9 use that. Why can't we use --

10 MR. SCHWARTZ: Thank you.

11 THE COURT: You don't have to worry about that, sir.
12 Isn't there a date we can use on the week of the 7th or the
13 week of the 14th for -- all we need is a couple hours.

14 (The Court confers with the clerk)

15 MR. LEAVITT: And, Your Honor, I think Mr. Ogilvie
16 will probably agree that this one is -- it's the motion to
17 amend. It should not -- I would think maximum an hour.

18 THE COURT: Right.

19 MR. LEAVITT: It's just -- it's one narrow issue on
20 the amendment.

21 MR. OGILVIE: Your Honor, there's plenty of hearings
22 that I thought were going to be a half hour or an hour and
23 turned out to be three or four. So I'm not saying that it will
24 be, I'm just basing it on the history of arguments in this
25 case.

1 THE COURT: All I can say is, Mr. Ogilvie, that's why
2 I always give you an afternoon by yourself if I can.

3 MR. OGILVIE: Appreciate it.

4 (The Court confers with the clerk)

5 THE COURT: And the 11th wasn't good; is that
6 correct? That was a problem?

7 MR. SCHWARTZ: The 11th is good for me, Your Honor.
8 Andrew Schwartz. Sorry. Yeah, the 11th is fine.

9 MR. LEAVITT: The 11th is good for counsel for the
10 plaintiff.

11 (The Court confers with the clerk)

12 THE COURT: You know what I'm going to do? This is
13 what I'm going to do. And the 11th is good for everybody;
14 right?

15 MR. OGILVIE: Yes.

16 MR. SCHWARTZ: Yes.

17 MR. LEAVITT: Yes.

18 THE COURT: All right. This is what I'm going to do.
19 We're going to set this matter for the afternoon of
20 February 11th at 1:15. You will have the entire afternoon,
21 Mr. Ogilvie, if you need it.

22 MR. OGILVIE: Thank you, Your Honor.

23 THE COURT: That's what I'm going to do because I
24 understand the importance of vacation. Everyone deserves one.
25 Lawyers work very hard, a lot of stress, so I always honor

1 those. But it seems to me that's probably the best time we can
2 do it. We don't want to kick the can down the road and kick
3 the can down the road. And what I'm going to do with the bench
4 trial, they've been going on for awhile, I'm just going to tell
5 them they can't come back that day and they'll have to find
6 another day. That's what we're going to do. And they should
7 be finished, anyway. That's how I look at it. They've had
8 enough time.

9 So, for the record, we're going to come back -- I'm
10 sorry. For the record, we're going to vacate the hearing
11 that's currently set for February 8th, 2022, at 9:05 a.m. And
12 that will be moved to February 11th at 1:15 p.m.

13 Is that correct, sir?

14 THE CLERK: Correct.

15 THE COURT: All right. That's what we're going to
16 do.

17 MR. OGILVIE: Your Honor.

18 THE COURT: Sir?

19 MR. OGILVIE: This is George Ogilvie.

20 THE COURT: Is that George Ogilvie? Yeah.

21 MR. OGILVIE: Yes. An issue has arisen -- well, it
22 hasn't arisen. An issue exists relative to the Court's order
23 regarding the stay. And so plaintiff's counsel --

24 THE COURT: And I don't mind telling you, I grappled
25 with that, Mr. Ogilvie, I really did. But go ahead.

1 MR. OGILVIE: I understand, Your Honor. And I'm not
2 arguing or rearguing the motion. I'm not arguing the
3 legitimacy or the merit of the findings of fact and conclusions
4 of law that plaintiff's counsel submitted. They submitted it,
5 I believe, yesterday or maybe the day before. I need
6 clarification for purposes of seeking relief from the supreme
7 court and that's the reason that I'm asking the question that
8 I'm asking. So in the Court's minute order the Court said,
9 "Additionally, based upon a 30-day delay in payment, the City
10 would have time to seek a stay, if appropriate, from the Nevada
11 Supreme Court."

12 And so my question is -- and I understand that the
13 Court hasn't signed an order yet. The Court has its order or
14 the proposed order from the plaintiff. It has the City's
15 objections to that proposed order. But for purposes of the
16 City seeking a stay, I need to have an understanding of what
17 that 30-day delay in payment means because in order for the
18 City to -- the City cannot seek a stay at this point unless it
19 does one of two things. Either it awaits the filing of a
20 notice of appeal, which would open a supreme court case in
21 which we could seek a stay. That's not tenable in the current
22 (video interference).

23 THE COURT: No, no. And I don't want to cut you off.
24 You broke up. You said that's not tenable, and then it got
25 muffled. Go ahead.

1 MR. OGILVIE: I'm sorry. It's not tenable in this
2 case because I don't know if the relief that the plaintiff is
3 being granted would allow the plaintiff to seek execution on
4 sums assessed prior to the filing of a notice of appeal. So
5 the only path that the City has that's viable for seeking
6 relief from the Court's order regarding -- just regarding the
7 stay.

8 THE COURT: I understand.

9 MR. OGILVIE: That's all I'm limiting my argument to
10 or my --

11 THE COURT: Question.

12 MR. OGILVIE: -- comments to. We can only seek a
13 stay through an emergency petition for a writ, and in order to
14 do that there has to be a pending harm within 14 days. And I
15 can't aver to the supreme court that there is this 14-day event
16 that could occur because I'm not clear on what the Court's
17 minute order says. So I'm just -- I'm trying to get some
18 clarification so I have a path forward relative to a stay --
19 seeking a stay before the supreme court.

20 THE COURT: I mean, I looked at it through this lens,
21 Mr. Ogilvie. I was looking at the time -- pursuant to the
22 statute, it's my recollection payment from the City doesn't
23 have to be tendered until -- I guess there's a 30-day time
24 period before the payment would be required to be tendered to
25 the landowner under the statute.

1 MR. OGILVIE: Right.

2 THE COURT: And so I was looking at it through that
3 lens that hypothetically if the judgment is entered you could
4 take it and say, look -- run to the supreme court within the
5 appropriate stay time period and say, look, we've been denied a
6 stay below and this is a really unique issue regarding a
7 potential statutory conflict with the Rules of Appellate
8 Procedure and specifically as it relates to the fact that
9 normally a municipality government authority has certain rights
10 given pursuant to the rule and so on. And so I was looking at
11 it through that lens.

12 MR. OGILVIE: I understand and I believe the Court is
13 referring to NRS 37.140 when it refers to the 30-day time
14 frame.

15 THE COURT: Right.

16 MR. OGILVIE: But 37.140 says 30 days from final
17 judgment. And as we argued to the Court last week or maybe
18 two weeks ago, I can't remember, final judgment is defined in
19 37.009 as being a judgment from which no appeal can be taken
20 and there is no further relief that can be sought from the
21 Court. So if I -- from the City's perspective, Your Honor,
22 37.140 wouldn't become effective, that 30-day time period under
23 37.140 would not become effective until all appeals in this
24 matter have been exhausted, and that's not where we're at.

25 And I'm not here to argue that point. I want to make

1 clear to the Court I'm just seeking some -- something -- some
2 clarification by which I can go to the supreme court and say if
3 I'm not granted this relief this is what's going to happen in
4 14 days. Or, you know, if I was -- the easiest thing from the
5 City's perspective is if this Court -- and here I am arguing
6 and I apologize to opposing counsel. They're not prepared for
7 this. But the easiest thing for me would be a reconsideration
8 of the Court's order that granted a stay through -- 30 days
9 from the Court's entering a findings of fact and conclusions of
10 law regarding the Rule 59 and 60 motion to alter or amend the
11 judgment, which the Court just set for a hearing now on
12 February 11th. So I apologize for arguing that.

13 And the only reason I am is I'm kind of cornered here
14 and I'm in a position that there isn't any vehicle through
15 which I can -- if the Court signs the proposed order that was
16 submitted by the plaintiff within the last two days, I'm in a
17 bind and I don't have any way to seek relief from the supreme
18 court.

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

20 THE COURT: Yes.

21 MR. LEAVITT: James J. Leavitt again on behalf of
22 plaintiff landowner, 180 Land. The procedure is very clear.
23 Every eminent domain goes through this. So does every inverse
24 condemnation case. Under 37.140, the City is required to pay
25 the sum of money within 30 days of final judgment. Now, if the

1 City takes appeal and just as Mr. Ogilvie argued, that final
2 judgment wouldn't occur until the end of the appeal, it just
3 erased 37.140's mandate that the money be paid within 30 days.
4 That's why the Nevada Legislature adopted 37.170, which says as
5 a precondition to appeal the City must pay the judgment.
6 That's why your order was very clear. It wasn't difficult to
7 understand.

8 It was very clear that the judgment will be entered
9 and the City has 30 days to pay that judgment. And there's a
10 30-day window within which the City can seek a stay, which was
11 the exact procedure in *State v. Second Judicial District Court*.
12 In *State v. Second Judicial District Court* is where the Nevada
13 Supreme Court said that 37.170 requires payment as a
14 precondition to appeal, and here's what the State did. The
15 State of Nevada brought prohibition proceedings against the
16 Second Judicial Court for the County of Washoe to restrain the
17 court from enforcing the order requiring them to pay. So
18 that's the procedure.

19 And the City of Las Vegas can go directly to the
20 Nevada Supreme Court and ask for that -- a prohibition or a
21 mandamus, however they want to do it, for a stay. Again,
22 that's the way it's done in every one of these cases. But
23 there's not just one prong, there's two prongs to the
24 requirement to pay.

25 Number one, under 37.140 within 30 days, and number

1 two, under 37.170 and the Second Judicial District Court case
2 decision as a precondition to appeal. That's what we argued in
3 our briefs. That's what was granted. And that's what's
4 clearly stated in the Court's decision, that there is that
5 30-day window within which it can go to the supreme court.

6 MR. OGILVIE: Okay. Well, I apologize again for
7 arguing this, Your Honor. I can't --

8 THE COURT: Yeah. And, Mr. Ogilvie, there's no need
9 to apologize. I mean, I looked at it from this perspective
10 when I -- and I don't have the statutes right in front of me,
11 Chapter 37. But I came to the conclusion that I can't rewrite,
12 you know, the Nevada Legislature's statutes, and I went with
13 the statutes as to how I interpreted my decision.

14 And I respect the City's right to appeal. And I do
15 understand there was a potential conflict between substantive
16 rights granted pursuant to the statute versus rules of
17 procedure and so on. And so I just felt that let the supreme
18 court decide that issue. And I would hope that they would
19 understand the urgency of your request and make the appropriate
20 decision.

21 And that's what I wanted to truly just point out when
22 I thought about it and I grappled with it because I do
23 understand. I mean, I didn't issue that decision lightly. I
24 didn't, you know. And I understand that and I felt in many
25 respects -- and it's okay to disagree with my decision, but the

1 way I interpreted the statutory scheme, that's the ultimate
2 result I came up with.

3 And I was saying to myself, well, let the Nevada
4 Supreme Court and the Court of Appeals decide that issue as far
5 as a stay is concerned. And of course it wouldn't be the Court
6 of Appeals, this would go straight to the Nevada Supreme Court.
7 We know that. This wouldn't get pushed down. They would
8 decide that. And I would hope their docket is such that they
9 could recognize the urgency of your request and make a decision
10 very quickly on this issue.

11 Now, whether or not -- and I'm not an appellate
12 lawyer. Maybe somebody should call Dan Polsenberg or Joel
13 Henriod, and maybe there's some sort of emergency writ that can
14 be ran up. I don't know. I just don't because my appellate
15 work is limited to probably about five or six decisions over
16 the years, and that's about it. It's something I didn't do
17 routinely.

18 MR. OGILVIE: Okay.

19 THE COURT: But all I can say, Mr. Ogilvie, if
20 there's -- whatever you file, you file. And of course we
21 entertain orders shortening times. I can't think of any time
22 I've rejected one in 16 years, close to 16 years, and I always
23 entertain them. I understand the importance of them to get in
24 front of the Court very quickly. If you have to do what you
25 have to do, that's fine. I have no problem with that. But

1 that was my thought process, and I don't mind sharing that with
2 everyone.

3 MR. OGILVIE: I appreciate that, Your Honor.

4 THE COURT: All right.

5 MR. OGILVIE: I have nothing further.

6 THE COURT: Okay. Thank you, sir. Okay. So we do
7 have a date; right? I'm giving priority to this matter. That
8 will be February 11th at 1:15.

9 THE CLERK: That's what I have, Judge.

10 THE COURT: All right. And that's where we're moving
11 the motion from the 8th. Everyone enjoy your day.

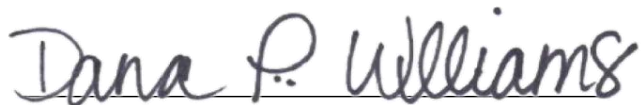
12 MR. OGILVIE: Thank you, Your Honor.

13 MR. LEAVITT: Thank you. Have a great evening.

14 (Proceedings concluded at 4:57 p.m.)

15 -oOo-

16 ATTEST: I do hereby certify that I have truly and correctly
17 transcribed the audio/video proceedings in the above-entitled
18 case to the best of my ability.

19 
20

21 Dana L. Williams
22 Transcriber

23 ADDITIONAL TRANSCRIBER: Liz Garcia
24
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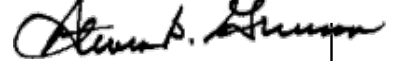
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DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

180 LAND COMPANY, LCC,)	
)	
Plaintiff,)	CASE NO. A-17-758528-J
)	
vs.)	DEPT. NO. XVI
)	
LAS VEGAS, CITY OF,)	
)	
Defendant.)	Transcript of
)	Proceedings

BEFORE THE HONORABLE TIMOTHY C. WILLIAMS, DISTRICT COURT JUDGE

FRIDAY, FEBRUARY 11, 2022

**CITY OF LAS VEGAS' MOTION TO AMEND JUDGMENT
(Rules 59(e) and 60(b) AND STAY OF EXECUTION)**

APPEARANCES: (Via BlueJeans Videoconference)

FOR 180 LAND COMPANY, LLC:	JAMES J. LEAVITT, ESQ. ELIZABETH M. GHANEM, ESQ.
FOR CITY OF LAS VEGAS:	ANDREW W. SCHWARTZ, ESQ.
(Appearing in person)	GEORGE F. OGILVIE, III, ESQ.

RECORDED BY: MARIA GARABAY, COURT RECORDER
TRANSCRIPTION BY: LGM TRANSCRIPTION SERVICE

1 **LAS VEGAS, NEVADA, FRIDAY, FEBRUARY 11, 2022, 1:18 P.M.**

2 * * * *

3 COURT RECORDER: We're on the record, Your Honor.

4 THE COURT: All right. And I want to say good
5 afternoon to everyone.

6 MR. OGILVIE: Good afternoon, Your Honor.

7 THE COURT: All right.

8 MR. SCHWARTZ: Good afternoon, Your Honor.

9 MR. LEAVITT: Good afternoon, Your Honor.

10 THE COURT: Okay. And let's go ahead and set forth
11 our appearances for the record.

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

14 MS. GHANEM: Good afternoon, Your Honor. Elizabeth
15 Ghanem Ham also on behalf of plaintiff landowners.

16 MR. OGILVIE: Good afternoon, Your Honor. George
17 Ogilvie.

18 MR. SCHWARTZ: Andrew Schwartz.

19 MR. OGILVIE: Go ahead, Andrew.

20 MR. SCHWARTZ: I'm sorry, George. It's Andrew
21 Schwartz representing the City, Your Honor.

22 MR. OGILVIE: George Ogilvie on behalf of the City
23 as well, Your Honor.

24 THE COURT: All right. Does that cover all
25 appearances?

1 MR. LEAVITT: That does on behalf of plaintiff,
2 Your Honor.

3 THE COURT: All right. And let's go ahead and get
4 started. Mr. Ogilvie, good afternoon to you, sir.

5 And anyway, it's my understanding we have one matter
6 on this afternoon. Is that correct?

7 THE CLERK: That's correct.

8 THE COURT: And that's the City of Las Vegas' motion
9 to amend judgment and to stay execution.

10 MR. SCHWARTZ: That's correct, Your Honor. This is
11 Andrew Schwartz. I'll be arguing for the City.

12 THE COURT: All right. And, sir, you have the floor.

13 MR. SCHWARTZ: Thank you. Your Honor, this motion
14 is simple and straightforward. In the November 24, 2021
15 judgment, the Court required the City to pay the landowners
16 \$34,135,000, but did not provide that if the City pays that
17 money to the developer that the City would take title to the
18 property in question. And whereas, of course, the City
19 objects to the judgment and objects to payment of the money
20 and has contended that the City's appeal would stay the
21 obligation to pay that money, the City is -- and we are aware
22 that the Court disagrees with that position and has ordered
23 the City to pay the money within 30 days, specifically in its
24 motion to deny the City's motion for a stay -- in its order
25 denying the City's motion for a stay filed on February 9, the

1 Court said that the City has to pay the money, the judgment in
2 30 days and as a condition of appeal. That order denying the
3 City's motion to stay also did not require that if the City
4 pays the money that title to the property would be transferred
5 to the City.

6 So what we're asking is that that order and that the
7 judgment, the November 24, 2021 judgment be amended to state
8 that if the City pays the money to the developer that the
9 City -- that title to the property would be transferred to
10 the City.

11 Now, the developer takes the position that the
12 judgment doesn't have to say that because this is an eminent
13 domain case and the eminent domain law requires that the
14 City pay the money into the court within 30 days and that the
15 Court would then order -- issue a final order of condemnation
16 transferring title. That procedure doesn't apply, so that's
17 not satisfactory to make sure that the City is transferred
18 title to the property if the City pays the money.

19 And I would like to address why that eminent domain
20 statute is not appropriate here. That statute, it's NRS
21 37.160, applies to eminent domain actions, and those are
22 actions where a public agency files an eminent domain action
23 because it needs the property for a public project. The
24 agency often takes early possession of the property while
25 the issue of valuation is being litigated. And then it's

1 appropriate when judgment is entered that the agency has to
2 pay for the property because the agency needs the property and
3 is going to take possession and title of the property, if the
4 possession isn't already obtained. So it makes sense that
5 the public agency would have to pay the money as a condition
6 of receiving title to the property.

7 That's not our case here. This is a case where
8 the Court ordered damages of 34 million plus for the City's
9 regulation of the use -- of the owner's use of the property.
10 The Court did not order any damages for the City's alleged
11 physical possession of the property. The City has never taken
12 physical possession of the property. It has not dispossessed
13 the property. There is no evidence to that effect. And even
14 if this Bill 2018-24 law that the developer claims authorized
15 the public to enter the property, even that -- well, it
16 didn't apply and we established that it didn't apply. The
17 Court disagrees with that. But even if it did apply, that
18 legislation was repealed in January of 2020.

19 So to have -- so this case is not at all equivalent
20 to an eminent domain case where the government has taken or
21 will take physical possession of the property because it needs
22 the property. This is a case where the Court awarded damages
23 for the City's regulation of the owner's use. And there are
24 only three cases in Nevada where that claim has been made, a
25 taking for excessive regulation of the owner's use. That's

1 the State case and the Kelly case and the Boulder City case.
2 In all three of those cases the court found that the action of
3 the agency did not affect a taking. So the court never faced
4 the issue of what you do if the court awards a judgment or a
5 regulatory taking of the property or regulation of the owner's
6 use. That's a case where the owner still has possession and
7 title of the property but the claim is that the regulation of
8 the owner's use has effectively taken the property. So in
9 that case the agency doesn't want the property, doesn't need
10 it for a public project.

11 And so therefore, as we have argued, and I admit
12 the Court rejected it, we think erroneously that the Court
13 rejected the fact that this is a regulatory taking case where
14 the City doesn't want or need the property. And so if the
15 City pays the money to the developer and takes title and
16 possession of the property and the judgment is reversed on
17 appeal, it's going to be extremely difficult to unwind that
18 transaction, to retrieve that money. And the City in the
19 meantime can't do anything with the property because it may
20 have to give the property back.

21 So we don't think that it's at all appropriate in
22 this case for the City to have to pay the money within 30 days
23 and then apply the eminent domain procedure that transfers
24 title to the City. We recognize that the Court has heard this
25 argument and rejected it, but I did want to make a record here

1 that this is not a case where the Court has awarded damages
2 for a permanent, physical occupation of the property. This is
3 not a case where the City had dispossessed the property owner.
4 In the case of Tahoe-Sierra v. Tahoe Regional Planning Agency
5 in the U.S. Supreme Court, that's at 535 U.S. 302, it's a
6 2002 case, in that case the court said that there's this
7 long-standing distinction between acquisitions of property
8 for public use on the one hand and regulations prohibiting
9 private use.

10 So it drew a sharp distinction between these
11 physical takings cases where the government takes physical
12 possession or the public takes permanent physical possession.
13 It says that -- and that holding is echoed in the McCarran
14 International Airport v. Sisolak case from the State of
15 Nevada. And that's at 122 Nev. 645, a 2006 case, at pages
16 662 and 663. The court there said that categorical rules --
17 categorical means the same things as per se -- these rules
18 apply either when the owner has to suffer a permanent physical
19 invasion of her property. I'm quoting there, "a permanent
20 physical invasion" or deprives the owner of beneficial use
21 of the property.

22 So the first case is the physical taking case where
23 either the government physically takes possession of the
24 property or authorizes someone to physically occupy the
25 property. The court in Sisolak said, "In determining whether

1 a property owner has suffered a per se taking by physical
2 invasion, a court has to determine whether the regulation has
3 granted the government physical possession of the property or
4 whether it merely forbids certain private uses of the space.
5 If the regulation forces the property owner to acquiesce to
6 a permanent physical invasion, compensation is automatically
7 warranted since this constitutes a per se taking. This element
8 of required acquiescence is at the heart of the concept of
9 occupation."

10 The second type of per se taking, complete
11 deprivation of value, is not at issue in this case. So the
12 courts there are distinguishing between the present case, this
13 Badlands case where the Court found that the City's limitation
14 of the owner's use was a taking. There's no evidence and the
15 Court cited to no evidence that the City has physically
16 occupied the property or that the City's ordinance, 2018-24,
17 has authorized the public to permanently occupy the property.

18 Now, at best -- and again, that ordinance doesn't
19 apply in this case, but even if it did it could only be found
20 to have authorized public occupation for the 15 months that
21 that ordinance was in effect. Now, we contend that, of
22 course, that didn't happen. It didn't apply. The public
23 didn't occupy the property as a result of the ordinance. But
24 even if it did, it doesn't qualify as a permanent physical
25 invasion. So therefore these procedures for payment of the

1 judgment into court in exchange for the public taking the
2 property for a public project don't apply.

3 What we're asking for, and we're not -- we're not
4 expecting the Court to change its decision that it's going to
5 apply the eminent domain laws. We want to make a record that
6 they don't apply. All we want -- we're asking for is that
7 that judgement from November 24 stay; that if the City pays
8 the money into court that title has to transfer because the
9 way the judgment reads now the City has to pay the money into
10 court but the Court doesn't say in exchange you get title
11 to the property. So, of course we'll let the Nevada Supreme
12 Court decide whether the City has to pay the money now or
13 later, but regardless of the outcome of the appeal, if the
14 City pays that money to the developer, it should at least
15 get title to the property.

16 So that's the limited relief we're asking for is
17 that the Court amend the judgment to state that if the City
18 pays the money then title will be transferred to the City.

19 Thank you.

20 THE COURT: Thank you, sir.

21 Mr. Leavitt, sir.

22 MR. LEAVITT: Yes. Good afternoon, Your Honor.
23 Hearing Mr. Schwartz' argument today, we don't have a
24 disagreement over what the impact is when the government
25 pays the money. We have a disagreement over the procedure.

1 And so counsel is arguing for a procedure that is
2 nowhere in Nevada law. It's not in any of the statutes nor
3 any of the case law. They've cited no support for their
4 procedure. What the City wants is they want to pay the funds
5 and then get a quit claim deed. That's not the procedure in
6 Nevada. Nevada has a very, very specific procedure for what
7 occurs when the government pays the funds in an eminent domain
8 case and an inverse condemnation case, and it's set forth in
9 37.260 -- or, I'm sorry, 37.160.

10 And that procedure is very clear. It says after
11 the government pays the money a final order of condemnation
12 is prepared and it states -- it first describes the property.
13 And we've done hundreds of these final orders of condemnation.
14 They describe the property, number one. That's easily done.
15 Number two, they describe the purpose of such condemnation,
16 and the purpose of such condemnation is very well set forth
17 in the findings of fact and conclusions of law on the take
18 issue. We will simply quote those verbatim in the final order
19 of condemnation. And then title to the property described
20 therein will vest in plaintiffs for the purposes stated
21 therein.

22 Now, that's the final order of condemnation statute,
23 37.160. That was adopted in 1965. There has been two
24 limitations subsequent to that statute that were adopted in
25 2005 and another one in 2008. First, in 2005 the Nevada State

1 Legislature decided to adopt -- right here, they decided to
2 pass 37.270. And what 37.270 states is that notwithstanding
3 any other provision of law. In other words, notwithstanding
4 NRS 37.160, that if the government tries to sell that property
5 it will automatically revert back to the original owner of
6 the property for the price that was paid. That's the statute.

7 The Constitution was amended in 2008 to specifically
8 reference a final order of condemnation. In Article 1,
9 Section 22, subsection 6, it specifically references final
10 orders of condemnation and says that if property is not used
11 within five years for the purpose for which it was taken, then
12 the property will automatically revert back to the property
13 owner by repaying the original purchase price. And then they
14 say the five years begins to run from the date of entry of
15 the final order of condemnation.

16 So the process here is the same that should be
17 followed in every eminent domain case in the state of Nevada.
18 Every inverse condemnation case that's ever been done in
19 the state of Nevada is there will be a final order of
20 condemnation, it will describe the property, describe the
21 purpose for the taking. It will say title will vest once the
22 City pays the property, and then there must be a provision
23 that complies with 37.270 and the Constitution that states
24 that if the government tries to sell that property to a
25 private individual other than the landowner, the landowner

1 will have the -- the original landowner -- the original
2 landowner will have the opportunity to repurchase that
3 property for the price that was paid originally by the
4 government.

5 That's the only thing we're asking for here is
6 that the statutes be followed and that the Constitution be
7 followed. Counsel made a whole bunch of arguments about what
8 happened in this case about the taking. He said this isn't
9 a per se categorical taking where the government has denied
10 all economic viable use of the property. Judge, there's a
11 finding. The first finding in the conclusion of law section
12 of the findings of fact and conclusions of law states that
13 there's been a per se categorical taking, which means a denial
14 -- and then it goes on to state there's been a denial of all
15 economic viable use of the property.

16 The next finding in the conclusions of law is that
17 there's been a per se regulatory taking of the property. And
18 a per se regulatory taking of the property is based upon the
19 physical use of the property. As you'll recall, Councilman
20 Seroka announced to the public that the landowner's property
21 was a park and it was for a park for their recreation. The
22 City then passed a bill stating that the landowners couldn't
23 use their property and that they had to allow ongoing public
24 access to their property. In other words, it was taken for a
25 park. And then the next finding in the findings of fact and

1 conclusions of law, I believe it's Number 117, is that the
2 landowners produced unequivocal evidence that the public was
3 actually using the property.

4 So, yes, this is a physical appropriation. This
5 is a per se taking. And those findings have already been
6 made, have already been set forth in the findings of fact and
7 conclusions of law and we're well past that. The sole reason
8 we're here for today is to decide how does title pass once
9 the government pays the money. And as I stated previously,
10 Your Honor, title should pass according to the statutes
11 pursuant to a final order of condemnation.

12 And I'll say just one last thing. It appears that
13 the government doesn't want that reversionary language in
14 there in the final order of condemnation. It appears that
15 the government is saying once we, the government, pay for
16 this property, we ought to be able to do whatever we want
17 with it. That's not the way the eminent domain statutes read;
18 number one.

19 Number two, it further shows what the predatory
20 actions of the government were here. As you'll recall, Your
21 Honor, from the very beginning, at the very beginning of this
22 case, the very first fact is that the surrounding property
23 owners contacted the landowners and told them that they had
24 to give the property to the surrounding property owners; that
25 the landowners had to give their property to the surrounding

1 property owners. That's what started this whole lawsuit. And
2 then there's evidence that those surrounding property owners
3 went to the City of Las Vegas officials and had them prohibit
4 the landowner from using their property in an attempt to
5 preserve this property -- well, not an attempt -- to preserve
6 this property for the surrounding property owners.

7 So our concern here, Your Honor, is that that
8 predatory action is continuing. In other words, the City
9 is trying to get title without the constitutional and the
10 statutory restrictions, which state that you don't get to --
11 once the government takes property by inverse condemnation,
12 it doesn't just get to willy-nilly do with it what it wants.
13 It has a purpose for which it was taken and that it cannot
14 retransfer that property to a private entity or a private
15 person without first offering it to the original owner from
16 whom it was taken for the original price. The Constitution
17 is clear. The statutes are clear, Your Honor.

18 So, again, we don't oppose that title will pass to
19 the City once the money is paid, but we have to follow the
20 statutes, which are 37.160 and 37.270, Your Honor. And that's
21 all I have, Your Honor, unless you have a question for me.

22 THE COURT: I don't.

23 All right. And we'll hear from the reply.

24 MR. SCHWARTZ: Your Honor, this is not an eminent
25 domain case. This is a case of first impression. This is an

1 inverse condemnation case of first impression. There are
2 only three cases where the Nevada Supreme Court has analyzed
3 a claim that regulation of the use -- the owner's use of
4 property is a taking. That's what this Court found, that the
5 City's regulation of the owner's use, a limitation of the
6 owner's use is a taking.

7 And the appraisal that was offered in evidence by
8 the developer is based on a determination that -- or the
9 judgment in this case is based on a determination that the
10 appraiser's conclusion that the City's regulation of the
11 use of the property, the private property of all value, the
12 owner's use, that's the basis of the judgment. That's the
13 basis of the \$34 million payment, not any physical invasion,
14 because there wasn't a physical invasion. But even if there
15 was, there wasn't any damages. There was no evidence of
16 damage and the Court didn't assess any damage.

17 So there are three cases in Nevada where this claim
18 was analyzed, and in those cases the court found no taking.
19 We think those cases should have been controlling in this case
20 and there shouldn't have been a finding of a taking. But the
21 Court has found a taking for an excessive regulation of the
22 owner's use. There is no case, there's no authority as to
23 how you handle the payment in that case, the payment of the
24 judgment, because all the cases are either eminent domain
25 cases or inverse condemnation cases where the government took

1 physical possession of the property and didn't file an eminent
2 domain case. They're all cases in which the government wanted
3 the property, it was an involuntary sale of the property by
4 the property owner, so the government could take the property
5 for a public project. There is no public project here; not
6 public project. The City doesn't want the property. It has
7 no use for the property.

8 THE COURT: I mean, well, it occurs to me -- it
9 could be argued, based upon the facts, that the public project
10 was open spaces and a park for the adjoining property owners.
11 And I think that's the problem we have here. But go ahead.

12 MR. SCHWARTZ: No. That's a regulation of the
13 owner's use. The claim here is that by regulating --
14 restricting the owner's use to what is allowed in the PROS
15 designation, Parks, Recreation and Open Space, the claim is
16 that that is a physical taking. And I just quoted from the
17 Sisolak case, from the Sierra-Tahoe case, that is not a
18 physical taking. That is not a per se physical taking.
19 A regulation of use is different from a physical occupation.
20 There has to be a physical occupation by the government. So
21 by requiring that the owner continue using that property for
22 PROS, it's not a physical taking. Eminent domain only applies
23 in physical takings where the agency is taking the property
24 for a public project. So those cases don't apply.

25 I don't think the Court needs to decide this issue,

1 however, if it says in the judgment that if the City pays
2 the money that the title will be transferred to the City.
3 That's all we're asking for here. I think this is water
4 under the bridge. You know, we disagree with the Court about
5 the difference between a physical and a regulatory taking.
6 We don't think there's any law on this.

7 You can't apply the eminent -- a good example is
8 what counsel is saying about the right to repurchase the
9 property. What's the purpose of that policy in state eminent
10 domain law? Well, it's where a property owner's property is
11 involuntarily taken from them, physically taken from them for
12 a public project. If the government doesn't use the property
13 for the public project and the property owner wants the
14 property back, they didn't want to give it to the government
15 in the first place, that's not our case. So that doctrine
16 makes no sense. The City doesn't want the property. It's
17 not an involuntary sale to the City.

18 THE COURT: But, really, isn't that more of --

19 MR. SCHWARTZ: It's an involuntary purchase.

20 THE COURT: Isn't that more of an argument versus
21 the conduct of the City Council in this case? Right? They
22 made statements regarding the use of the property for the
23 public.

24 MR. SCHWARTZ: Well, okay.

25 THE COURT: I mean, didn't -- but I mean --

1 MR. SCHWARTZ: So you're talking about the alleged
2 statement of one council member.

3 THE COURT: I mean, it's a City Council member.
4 I mean --

5 MR. SCHWARTZ: That can't bind -- even if that
6 statement was made, that doesn't bind the City. The defendant
7 here is the City. The City acts through the City Council, a
8 majority vote of the City Council. An individual City Council
9 member can't bind the City to something like this. There's
10 no -- there's absolutely no authority and that wouldn't make
11 any sense. City Council members make statements in their
12 individual --

13 THE COURT: Well, it does make sense in this regard
14 because the entire City Council, their actions ultimately
15 were no different than that one City Councilman. Right?

16 MR. SCHWARTZ: Oh, there's no evidence of that.
17 There's absolutely no evidence of that.

18 THE COURT: Well, but I mean, there is evidence of
19 it because of their actions. Ultimately, what did the City
20 Council do in this case?

21 MR. SCHWARTZ: The City Council denied applications,
22 one application to build housing on the 35-acre property.

23 THE COURT: And I have a question for you. What do
24 I do with this language --

25 MR. SCHWARTZ: That's all it did.

1 THE COURT: Wait. I have a question for you. This
2 is straight out of the Alper case. And please understand
3 this. I do understand what my limitations are and I do
4 understand and respect some of your arguments. But the bottom
5 line is this. What do I do when the Nevada Supreme Court in
6 the Alper case back in 1984 -- that's a long time ago -- said
7 the following. This is their quote: "Inverse condemnation
8 proceedings are the constitutional equivalent to an eminent
9 domain action and are governed by the same rules and
10 principles that are applied to formal condemnation
11 proceedings."

12 Now, and the reason why I think that's important
13 to point out, I'm not going to say I don't necessarily respect
14 and understand some of the arguments the City has made, but
15 the Nevada Supreme Court has ruled and set forth in the Alper
16 decision that it is a constitutional equivalency, right there,
17 to eminent domain actions and are governed -- and they went
18 further. When you really think about it, they went further
19 and they said the following, "and are governed by the same
20 rules and principles that are applied to a formal condemnation
21 proceeding." Okay. What does that mean? Well, that tells me
22 that I'm going to follow the rules as set forth in Chapter 37.
23 They haven't made a distinction for me to follow.

24 MR. SCHWARTZ: Well, Your Honor, can I address that?
25 Can I address that, Your Honor?