

Case No. 84345

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Electronically Filed
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Elizabeth A. Brown
Clerk of Supreme Court

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

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

**APPENDIX TO OPPOSITION TO APPELLANT'S MOTION TO STAY
VOLUME 2**

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing APPENDIX TO OPPOSITION TO APPELLANT'S MOTION TO STAY - **VOLUME 2** was filed electronically with the Nevada Supreme Court on the 18th day of March, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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09:50:55 1 are including in Title 19.

2 In other words telling the landowner as part
3 of his due diligence that your property is zoned R-PD7,
4 and that R-PD7 zoning designation will govern the use
09:51:07 5 of the property prior to any interference by the
6 government. Therefore, your Honor, clearly when
7 deciding this property interest issue that we brought
8 to you today that's required under Sisolak and ASAP
9 Storage, you need to focus on, number one, on the
09:51:22 10 zoning and, number two, rely upon the city code to make
11 the determination of the permitted uses under that
12 zoning.

13 And there's -- as we've laid out -- and, your
14 Honor, I'm not going to go through this in detail
09:51:33 15 because I think we laid it out sufficiently in our
16 motion and in our reply, but there's two specific
17 sections of the city code which address what the
18 permitted uses are on R-PD7 zoned property. I'll
19 address just one of them. It's Exhibit No. 5 to our
09:51:50 20 motion, and it's Section 19.10.050 of the city code.

21 That section is entitled R-PD residential
22 planned development district. And in the Section C of
23 that Las Vegas Municipal Code it specifically
24 identifies, expressly identifies "the permitted uses"
09:52:15 25 requested under that zoning. And it lists single

09:52:18 1 family and multifamily residential as those permitted
2 uses.

3 And the code itself defines what it means by
4 permitted use. What it means by permitted uses
09:52:27 5 according to the code is uses that may be made of a
6 property in a certain zoning distinction as a matter of
7 right.

8 Therefore, your Honor, according to the City
9 Code Section 19.16.050, subclass C, single family and
09:52:46 10 multifamily residential are uses that are permitted as
11 a matter of right under R-PD7 zoned property.

12 So, your Honor, that's our request to you.
13 And I will address just a couple arguments that the
14 City has made. But our request to you, your Honor, is
09:53:02 15 very straightforward and very narrow.

16 It is, number one, to make a finding that the
17 property is the hard zoned R-PD7. Number two, apply
18 that R-PD7 zoning as the Nevada Supreme Court did in
19 the March 5, 2020 order and as ordered and directed by
09:53:19 20 the Nevada Supreme Court in the Alper and Bustos
21 decisions.

22 And then find as a matter of -- that as -- or
23 that the landowners have as a matter of right the right
24 to use that R-PD7 zoned property prior to the
09:53:34 25 interference by the government for single family and

09:53:37 1 multifamily residential uses. That's the exact
2 verbiage right out of the city code that we're
3 requesting here, your Honor.

4 So, your Honor, before I finish, though, I
09:53:47 5 want to talk about just very briefly two of the City's
6 arguments. The first City argument I referenced
7 earlier just a little bit and I want to address a
8 little bit more. And it's that the City can engage in
9 actions to deny the landowners the use of their
09:54:01 10 property, and those actions that are referenced in the
11 PJR matter, and, therefore, the landowners have no
12 property interest to begin with.

13 Again, that violates the Nevada Supreme Court
14 rule that these taking actions that are set forth in
09:54:16 15 the PJR matter cannot be considered when deciding the
16 underlying property interest that a landowner has in an
17 inverse condemnation case for any interference by the
18 government.

19 Let me just explain this by way of a quick
09:54:30 20 example. If the City built a roadway through the
21 35 acre property, that would be -- clearly be a taking.
22 And if the City refused to pay compensation, the
23 landowner would bring an inverse condemnation case
24 against the -- against the City.

09:54:44 25 In deciding the underlying property interest

09:54:46 1 that the landowner had, it would be improper for the
2 City to argue that the City has discretion to build a
3 35 -- the roadway through the 35-acre property,
4 therefore, there was no property interest to begin
09:54:59 5 with. As stated, the underlying property interest must
6 be decided prior and independent of any taking actions.
7 Meaning all of the City actions to deny the use of the
8 property that are referenced in the PJR matter should
9 not be considered when deciding the underlying property
09:55:17 10 interest in this case.

11 And that's why, your Honor, you entered three
12 orders. We've argued this ad nauseam in three separate
13 hearings. You entered three orders stating that only
14 inverse condemnation law can be used to decide these
09:55:31 15 issues that we're presenting to you today. And that
16 the PJR, findings of fact and conclusions of law should
17 not be used to make these findings.

18 Now, your Honor, the City's final argument is
19 that the City -- this 35-acre property is the only
09:55:47 20 property in the City of Las Vegas that is not governed
21 by the zoning. And they go so far as to say "zoning is
22 irrelevant". And then they say instead of -- instead
23 of applying the zoning, what this Court should apply is
24 a concept draft plan that was put together by
09:56:04 25 Mr. Peccole 30 years for this area for his vision that

09:56:07 1 was abandoned, that Mr. Jerbic states was never applied
2 by the City of Las Vegas and never implemented by the
3 City of Las Vegas, and important to the inquiry today,
4 was never recorded at the Clark County Records Office
09:56:20 5 or that you should apply the City's general plan that
6 also wasn't recorded and exists somewhere in some city
7 archive.

8 Now, that argument is legally incorrect and
9 factually incorrect. It's factually incorrect, your
09:56:35 10 Honor, because the City's own client, I don't know how
11 to say this, but Mr. Ogilvie or Mr. Schwartz' own
12 client has submitted statements and documents through
13 Mr. Jerbic, through planning director Tom Perrigo, and
14 Rule 11 pleadings and in two city affidavits in another
09:56:51 15 inverse condemnation case where they've laid out in
16 detail that zoning governs the use of the 35 acre
17 property, as we are arguing, and that the Peccole Ranch
18 Concept Plan and the City's general plan do not apply
19 to determine the property interest use.

09:57:08 20 Those are statements by their own client, your
21 Honor, that our argument is correct. The zoning should
22 be used to determine this underlying property interest.

23 This argument by the City is also legally
24 baseless because the Nevada Supreme Court already
09:57:21 25 rejected them, your Honor, on March 5, 2020. The

09:57:25 1 Nevada Supreme Court said you should focus on the
2 zoning, not the Peccole Concept Plan, not the City's
3 general plan, not cluster zoning, and not some implied
4 dedication on the property.

09:57:38 5 In addition to that, the Court in the Alper
6 case and the Bustos case both held that is reversible
7 error to not consider the current zoning, or rather the
8 Court is required to apply the current zoning to
9 determine the underlying property interest.

09:57:53 10 Now, your Honor, just finally, consider the
11 public policy alternative if you rule in the City's
12 favor. First of all you have to disregard the entire
13 zoning code. That would render the City's entire
14 zoning code superfluous. The largest part of the
09:58:14 15 Las Vegas Municipal Court would be rendered superfluous
16 because according to the City, the City's argument to
17 you today, zoning is irrelevant. You'd have to
18 disregard Nevada's recording and property notice
19 statutes because instead of applying zoning, the City
09:58:26 20 is going to -- asking you to apply to determine the
21 property interest unrecorded plans that were abandoned.

22 You'll turn title policy upside -- title
23 policy law upside down in Nevada because every single
24 title policy that's been issued based on the zoning of
09:58:41 25 the property will now be defective. Because the use of

09:58:43 1 the property is not based on zoning, according to the
2 City. It's based on unrecorded plans that are archived
3 at City Hall. That's an unaccepted law. It's an
4 unacceptable policy.

09:58:55 5 Mr. Schwartz's own client has rejected that
6 argument, and the Nevada Supreme Court in two inverse
7 condemnation cases and most recently in the March 5,
8 2020, order on the 17-acre property right next day
9 rejected that argument, flatly, your Honor, when it was
09:59:13 10 directly presented to it.

11 So, your Honor, I want to conclude right here
12 with our request. Number one, the property is zoned
13 R-PD7. Everybody agrees to that. The name of the
14 zoning is residential planned development district up
09:59:27 15 to seven units per acre.

16 The second request that we have is that single
17 family residents and multifamily residents are
18 permitted as a matter of right under that zoning.

19 And, your Honor, that's our request to make
09:59:41 20 this initial determination, this first sub inquiry by
21 the Court on the property interest.

22 And if, your Honor, if you have any questions,
23 I can respond to them.

24 THE COURT: Sir, I have no questions at this
09:59:53 25 time. We'll hear from the City.

09:59:55 1 MR. LEAVITT: All right. Thank you, your
2 Honor.

3 MR. SCHWARTZ: Thank you, your Honor. This is
4 Andrew Schwartz for the City.

10:00:04 5 The developer -- the developer misrepresented
6 the issue before the Court, misrepresented the City's
7 argument. And it's in particular misrepresented the
8 decision of the Nevada Supreme Court in the Union case
9 and the 17-acre case. And I will get to that.

10:00:25 10 The developer is asking the Court to find that
11 R-PD7 zoning confers on developer a vested right to
12 approval of its application to develop housing in the
13 Badlands. It claims that this R-PD zoning constitutes
14 a property right. So if they can get the Court to hold
10:00:49 15 that they have a vested right to an approval, which is
16 a property, then they allege the City's taken that by
17 denying its development application. So that's what's
18 before the Court here.

19 The developer cites no authority whatever that
10:01:06 20 zoning confers a vested right.

21 The Nevada Supreme Court's defined a vested
22 right as a right to complete construction of a project
23 where construction's already begun based on a valid
24 approval. That's the vested rights doctrine in Nevada.

10:01:22 25 So the vested rights doctrine prevents the

10:01:26 1 regulatory agency from changing the law after the
2 developer started construction of the project.

3 Well, in this case there's no approval. In
4 fact, the City disapproved the application in question
10:01:41 5 on the 35 acre portion of the Badlands. So we can't
6 have a vested right. And the Court has already ruled
7 in this case that the R-PD7 zoning confers no vested
8 right. And that's in Exhibit A to our appendix.

9 Well, the developer claims that that ruling
10:02:02 10 was under this petition for judicial review, and they
11 claim a regulatory taking here where they say they
12 raised different facts and law. And so they argue that
13 they're not bound by the Court's -- well, they didn't
14 even refer to the Court's ruling in their -- they
10:02:20 15 didn't mention it in their opening brief.

16 The difficulty with that argument is there's
17 only one type of vested right in Nevada. And it's
18 an -- it requires reliance on an approved permit, and
19 whether zoning confers a vested right. That kind of
10:02:42 20 vested right is, therefore, a pure question of law.

21 So it's the same law that we're dealing with
22 here that the Court already addressed in denying the
23 petition for judicial review. It's only -- the
24 developer here is asking for damages instead for a
10:03:01 25 taking. Instead of an order that the Court require the

10:03:04 1 City to approve its application. So they're simply
2 asking for a different remedy for a vested right, but
3 under the same fact.

4 And the legal grounds that they're arguing
10:03:15 5 here are precisely the same grounds that the Court
6 addressed in its order denying the petition for
7 judicial review. It's the very same law. They're only
8 asking for a different remedy.

9 Therefore, the Court's earlier ruling that
10:03:29 10 zoning -- and the Court was quite clear about this --
11 zoning does not confer any vested right as a matter of
12 law. That ruling stands. It's binding here.

13 So this is -- What is this? This is, in
14 reality, a motion for reconsideration. Under the local
10:03:48 15 court Rule 2.24 they have to file a noticed motion for
16 reconsideration. It has to be filed 14 days after the
17 Court issued its ruling.

18 The state district court Rule 137 says that
19 you have to bring a noticed motion for reconsideration
10:04:08 20 if you want the Court to change its prior ruling. And
21 that's what they're -- exactly that's what they're
22 asking for here.

23 So this begs the question why is the developer
24 risking filing this improper motion for reconsideration
10:04:29 25 rather than something like a motion for summary

10:04:30 1 judgment on their takings claim? Well, the answer is
2 because they have no taking claim under the applicable
3 taking statute. There is no takings test that finds
4 that if you -- if you -- that the zoning confers a
10:04:48 5 vested right, and if you deny the application, an
6 application in exercise of discretion under that zoning
7 that it's a taking.

8 The Constitution says that you can't have a
9 taking without just compensation. So that was
10:05:04 10 originally intended to apply to just direct
11 condemnation, to eminent domain.

12 And then in 1922 the Court extended that
13 doctrine to regulation. But it made clear that a
14 regulatory taking has to be the functional equivalent
10:05:22 15 of an eminent domain.

16 So in 2005 in the Lingle case, the United
17 States Supreme Courts said a taking under any taking
18 test, either the categorical test or the Penn Central
19 test has to be a wipe out or a virtual wipe out of use
10:05:38 20 or value. It's not the taking of a vested right.

21 It applies to categorical as well as Penn
22 Central. And the Nevada Supreme Court in the Kelly
23 case said -- says that the developer can't carve up the
24 property, segment the property, the parcel as a whole
10:06:01 25 into smaller segments and then apply for development of

10:06:04 1 the segment. And if it's denied development of one of
2 the -- one segment, claim a taking, claim a wipeout.
3 The Courts look to the parcel as a whole to see if the
4 owner has been wiped out.

10:06:16 5 So I refer the Court to Exhibit X which is in
6 the City's appendix. It's Volume two of two, 2-2, at
7 page 390.

8 And this motion should be addressing what are
9 the true takings test, not whether the developer has a
10:06:43 10 vested right in its approval, but whether the City has
11 taken the property under an applicable takings test.
12 And Exhibit X you can see that with the Peccole Ranch
13 Master Plan Phase 2, which is in -- circled in red.
14 That of the 1569 acres of that parcel, which is the
10:07:04 15 parcel as a whole here, that's the parcel the Court
16 should consider. It's not just the 35 acres carved out
17 of this property. 84 percent of that property was
18 developed with thousands of housing units and retail
19 and a hotel and a casino. And the 250-acre Badlands
10:07:22 20 Golf Course is shown in yellow. And that was set aside
21 for open space.

22 So even if the City didn't permit any
23 development in the Badlands, it still allowed
24 substantial development of the parcel as a whole, and
10:07:37 25 there can't be a taking. And even if the Badlands is

10:07:40 1 considered a parcel as a whole, the City approved 435
2 luxury housing units for construction in Badlands on a
3 17-acre portion of the property that the developer
4 carved out of the parcel as a whole.

10:07:58 5 So in so doing, the City not only did not --
6 did not wipe out the developer use, but it increased
7 the value of the Badlands, increased the use. So that
8 is the test that applies here and not whether the
9 property owner has a vested right to approval under the
10:08:17 10 zoning.

11 So the developer can't prevail on its takings
12 claim. That the Nevada Supreme Court decision the
13 developer referenced, the March 5th decision, found
14 that the developer didn't need to file a major
10:08:35 15 modification application to apply to develop the
16 17-acres. And that effect of that decision was to
17 reinstate the City's approval of the development in the
18 Badlands of 435 units. So that's fatal to the takings
19 claim on Badlands, including this 35-acre property.

10:08:57 20 So that that explains why we --

21 THE COURT: You know what, I have a question
22 for you. And I'm sitting here thinking about it. And
23 isn't it a little bit more nuanced than how you're
24 setting it forth on the record?

10:09:08 25 And I just want to make sure I'm clear. I did

10:09:10 1 read the opposition here. In fact, I think it was on
2 page 9 of the opposition where you stated that the
3 Court found that the zoning does not grant the
4 developer a vested right to have the developer's
10:09:27 5 application approved.

6 Isn't that a slightly different scenario we
7 are dealing with right now? Because there we had a
8 petition for judicial review. Here we have an inverse
9 condemnation claim being asserted. And what -- and the
10:09:48 10 reason why I am asking this. And I was listening to
11 the example given by plaintiff's counsel, and I thought
12 about this. And say I own a vacant property on a
13 thoroughfare on, say, Sahara. And it's vacant. But
14 it's, as far as the zoning, is zoned commercial, and
10:10:09 15 it's going to have some value based upon that.

16 And then the Clark County decides, you know
17 what, we need -- we already have the 215, we've grown
18 so much, we need another expressway that goes north and
19 south, and they take that property. They condemn it.
10:10:32 20 Inverse condemnation. They do it. There's a public
21 interest and so on.

22 How do I value as a trial judge the taking?
23 Wouldn't it be based upon the zoning that was in place?

24 MR. SCHWARTZ: Of course. Yes, your Honor.
10:10:50 25 Your Honor, you're talking about a direct condemnation.

10:10:53 1 THE COURT: Right.

2 MR. SCHWARTZ: That's not -- that's completely

3 different in this case. That is inverse condemnation.

4 THE COURT: But why would that differ in this

10:10:58 5 regard? Because at some point I have to decide, and

6 that's why I made the distinction here because it seems

7 to me it's -- it's -- this is a different issue being

8 raised by the plaintiff. Because I'm not being asked

9 in this scenario to make a determination as it relates

10:11:18 10 to the issue you raised. And, I guess, I had to

11 decide. Let me see if I can find it on page 9 of your

12 opposition. Specifically dealing with the Court found

13 that zoning does not grant the developer a vested right

14 to have his development application approved.

10:11:40 15 That's a different issue.

16 MR. SCHWARTZ: Well, your Honor, it's -- this

17 is a regulatory taking case. It's an inverse

18 condemnation case where liability is the issue. If

19 liability is determined based on a takings test that

10:12:01 20 the Nevada Supreme Court or the US Supreme Court has

21 adopted, then you move to whether -- what the damages

22 are. And that turns on the value of the property.

23 Then, of course, you need to consider zoning.

24 What would -- what could the property be used for in a

10:12:19 25 determination of value? But that's not what we're

10:12:22 1 talking about here.

2 We're talking about whether the City is liable
3 for a taking by denying an application. The City
4 didn't condemn a road through the Badlands. The
10:12:33 5 example that counsel gave is completely off point.

6 That's a direct condemnation where liability
7 is conceded by condemning the property, taking --
8 physically taking it. You're conceding liability.
9 Then you have to determine what's the fair market value
10:12:52 10 of the property.

11 And that's based on an opinion of appraisers.
12 And the appraisers, of course, consider the zoning of
13 the property to what uses would be permitted. But they
14 also have to consider, you know, like in a case like
10:13:06 15 this, that the City might not approve a development on
16 the property. For example, if the general plan says
17 that the property is, can only be used for public
18 parks, recreation, and open space according to its
19 history use.

10:13:24 20 And so the developer here has completely
21 confused valuation with liability, with damages with
22 liability.

23 So --

24 THE COURT: Is that what they're requesting
10:13:40 25 right now? Because I look at -- I'm looking at page 21

10:13:45 1 of the reply starting at line 19. And it appears the
2 thrust and focus of the motion requests two
3 determinations. And one, that the Court enter an order
4 that the 35 acre property is hard zoned R-PD7 as of the
10:14:07 5 relevant date of September 14, 2017, date of valuation.

6 And two, that's permitted use by right under R-PD7
7 zoning are "single family and multifamily residential."

8 MR. SCHWARTZ: Well, there is no dispute about
9 either of those two, your Honor.

10:14:31 10 That's not what --

11 THE COURT: Okay.

12 MR. SCHWARTZ: -- they're requesting. No, no,
13 they're -- the, you know -- they're requesting that the
14 Court find exactly what it rejected in the -- in the
10:14:51 15 petition for judicial review. They're requesting, in
16 their opening brief you look at page 9, it says at the
17 bottom page, lines 19 and 20.

18 Because this use interest was part of their
19 title to begin with, the landowners have a
10:15:06 20 vested right to use the 35-acre property for
21 residential development.

22 They asked -- they're asking the Court to find
23 that as a matter of law that a developer has a right,
24 an automatic approval of a development application that
10:15:26 25 does not exceed the density allowed by zoning.

10:15:31 1 Zoning is a limitation on use. The City can't
2 approve more than seven units per acre on the Badlands
3 property because the zoning limits the seven. But the
4 City has complete discretion to determine what the use
10:15:53 5 of that property would be, including no use. It has
6 complete discretion.

7 So if -- the developer is asking the Court to
8 find that just because the property is zoned R-PD7,
9 which is not disputed and has never been disputed, and
10:16:10 10 that because residential uses are permitted uses, that
11 they have a vested right. That they have a property
12 interest in approval of their specific application.

13 And the Nevada Supreme Court in six cases that
14 we've cited has rejected that proposition, and the
10:16:30 15 Court rejects that proposition. And it's the same
16 issue of law that the Court dealt with in the petition
17 for judicial review. They were just asking -- in that
18 case they were -- based on the same facts and the same
19 law, they were asking the Court to order the City to
10:16:48 20 approve their application. In this case, same facts
21 and law, they're asking the Court to give them money
22 damages.

23 And so, let me if I could, if I could read
24 from the Court's decision. This is Exhibit A in Volume
10:17:03 25 1, page 785. This is page 17 of the Court's findings

10:17:13 1 of fact and conclusions of law on petition for judicial
2 review. Paragraph 34:

3 The Court rejects the developer's argument
4 that the R-PD7 zoning designation on the
10:17:24 5 Badlands property somehow required the counsel
6 to approve its application.

7 That's exactly what the developer is arguing
8 here, and the Court simply rejected it. The Court went
9 on to say --

10:17:40 10 THE COURT: Isn't that -- isn't that a
11 different issue --

12 MR. SCHWARTZ: It's --

13 THE COURT: -- from an administrative
14 perspective? Isn't that a different issue?

10:17:48 15 Because I'm looking here. Even when I go to
16 page 10 of the moving papers, and I look at -- and at
17 the end of the day I have to look at what relief is
18 being requested. And once again, it appears starting
19 at line 12 of the motion on page 10 that the requested
10:18:14 20 relief entered it's two things. One, that the 35-acre
21 property is hard zoned R-PD7 as of the relevant dates
22 September 14, 2017, date of valuation.

23 And two, that the permitted use by right under
24 R-PD7 zoning are single family and multifamily
10:18:36 25 residential. Period. Close quote.

10:18:42 1 MR. SCHWARTZ: Well, first, as you already
2 determined that the property is zoned R-PD7. As far as
3 September 14, that's not the date of value, but that's
4 not really an issue here.

10:18:53 5 The permitted use by right under R-PD7 zoning
6 are single and multifamily residential.

7 THE COURT: I remember that. Because
8 understand, this case has somewhat of a history. And I
9 remember --

10:19:04 10 MR. SCHWARTZ: Yes.

11 THE COURT: -- I remember the great education
12 that was given to me probably a year or two ago as we
13 were discussing a petition for judicial review
14 vis-à-vis what R-PD7 specifically is. And I remember
10:19:17 15 the lawyers did a great job in reviewing that issue.

16 But at the end of the day, I mean, Mr. Leavitt
17 will tell me if I'm -- if they're asking for more than
18 this, but I look for what specific relief is being
19 requested.

10:19:33 20 And lawyers do what they do and they have
21 reasons for making specific requests. But it just
22 appeared to me that that's what the thrust and focus of
23 the motion was about.

24 MR. SCHWARTZ: Well, the -- on page 9, they
10:19:59 25 made it clear that they want you to decide they have a

10:20:00 1 vested right to the City's approval of their
2 application. That's where they're -- that's the whole
3 point of this motion.

4 And then on page 10 they say that the
10:20:12 5 permitted use by right under R-PD7 zoning are single
6 family and multifamily residential. It's not disputed
7 that the permitted use, permitted uses in R-PD7 are
8 residential uses. It's not in dispute.

9 What's at issue in this case -- I mean,
10:20:32 10 that's, it's right in the code. The code section for
11 R-PD7 say that it's single and multifamily residences
12 are permitted uses. The question in this case is is
13 the City's denial of their application to develop the
14 property a taking?

10:20:52 15 Now, it can't be because the City has already
16 approved development in the parcel as a whole, which is
17 the Peccole Ranch Master Plan. Or even if it's not the
18 Peccole Ranch, it's the Badlands.

19 THE COURT: But isn't that an another day?

10:21:07 20 MR. SCHWARTZ: You can't prevail --

21 THE COURT: Isn't that another day?

22 MR. SCHWARTZ: No. Because that's the test
23 for a taking and not whether the City has denied a
24 vested -- denied a vested right. First, they don't
10:21:17 25 have a vested right. That's what this motion is about.

10:21:19 1 But even if the City did disapprove their
2 application they had a vested right, it doesn't mean
3 there is a taking because it -- that's not the takings
4 test. The takings test is whether you wipe out or
10:21:32 5 virtually wipe out use or value of the parcel as a
6 whole. And the City has already approved 435 units in
7 the parcel as a whole.
8 So they can't prevail on any takings claim.
9 But specifically for this motion, they are asking you
10:21:51 10 to decide that they had a property right to approval of
11 their specific application, and that the City in
12 denying it took a property right, and it's a taking.
13 And that's contrary to all law.
14 Could I -- could I explain to the Court --
10:22:12 15 THE COURT: Well, I never -- I'm listening,
16 sir. You can explain whatever you want to. I don't
17 want to rush you.
18 MR. SCHWARTZ: Well, the Court said, and the
19 legal issue, again, is precisely the same here, the
10:22:28 20 same argument they made in the petition for judicial
21 review. They just asked for a different relief.
22 The Court said in its order denying the
23 petition for review a zoning designation does not give
24 the developer a vested right to have its developed
10:22:41 25 applications approved.

10:22:43 1 In order for rights in a proposed development
2 project to vest, zoning or use approvals must not be
3 subject to further governmental discretionary action
4 affecting project commencement. And the developer must
10:22:57 5 prove considerable reliance on the approvals granted.

6 The Court said -- and the four applications
7 submitted to the counsel for a general plan amendment,
8 tentative map, site development review, and waiver were
9 all subject to the council's discretionary decision
10:23:18 10 making no matter the zonings designation.

11 Mr. Leavitt has argued this morning that the
12 City could not deny the developer's application without
13 affecting a taking. That is what he argued this
14 morning. That's their argument in this case.

10:23:37 15 They made -- they made the same argument that
16 the zoning designation alone prevents the City from
17 denying the developer's application for the petition
18 for judicial review.

19 The Court said -- in its order the Court
10:23:55 20 rejects the developer's attempt to distinguish the
21 Stratosphere case which concluded that the very same
22 decision-making process at issue here was squarely
23 within the council's discretion no matter that the
24 property was zoned for the proposed use.

10:24:13 25 The Court said statements from planning staff

10:24:15 1 or the city attorney that the Badlands property has a
2 R-PD zoning designation do not alter this conclusion.

3 The developer purchased its interest in the
4 Badlands Golf Course knowing that the City's general
10:24:34 5 plan showed the property as designated for parks,
6 recreation, and open space, and that the Peccole Ranch
7 Master Plan Development Plan identified the property
8 for being for open space and drainage.

9 The Court said in paragraph 41 of its order,
10:24:52 10 the general plan sets forth the City's policy to
11 maintain the golf course property for parks, open
12 space, and recreation.

13 The City, and I'm paraphrasing, chose to
14 maintain the historical use for this area that dates
10:25:05 15 back to the 1989 Peccole Ranch Master Plan, Master
16 Development Plan presented by the developer's
17 predecessor.

18 The golf course was part of a comprehensive
19 development scheme, and the entire Peccole Ranch Master
10:25:19 20 Plan area was built around the golf course.

21 Now, here's the key the Court said in
22 paragraph 14. It is up to the council through its
23 discretionary decision making to decide whether a
24 change in the area or conditions justify the
10:25:34 25 development sought by the developer and how any such

10:25:38 1 development might look.

2 So the -- what's the Court saying? The Court
3 is saying that just because the property is zoned R-PD7
4 doesn't mean that the City has to approve the
10:25:50 5 developer's application. The City has discretion. And
6 the general plan, which is different from the zoning,
7 and the general plan prevails over zoning if they were
8 inconsistent.

9 And we've explained why they're not
10:26:05 10 inconsistent. But the general plan designation for the
11 property which was true, the time the developer bought
12 the property which is -- and that's -- that was the
13 general plan designation is set forth in Exhibits I, N,
14 P, U, and O.

10:26:30 15 The general plan designates its property for
16 parks, recreation, and open space. That does not allow
17 residential development. So how could the developer
18 have a vested right to this approval of an application
19 for development in the area without an amendment to the
10:26:52 20 general plan? That's exactly what the Court said in
21 paragraph 46 of its order denying the petition for
22 judicial review. The applications included requests
23 for a general plan amendment and waiver.

24 In that, the developer asked for exceptions to
10:27:11 25 the rules. Its assertion that approval was somehow

10:27:15 1 mandated simply because there is R-PD7 zoning on the
2 property is plainly wrong.

3 It is well within the council's discretion to
4 determine that the developer did not meet the criteria
10:27:26 5 for a general plan amendment or waiver found in the
6 Unified Development Code and to reject the site
7 development plan and tentative map application.
8 Accordingly, no matter the zoning designation.

9 The Court said in submitting a general plan
10:27:48 10 amendment application the developer acknowledged that
11 one was needed to require -- to reconcile the
12 differences between the general plan designation act
13 and the zoning.

14 In paragraph 54 the Court said that all
10:28:09 15 regulatory decisions made pursuant to this title be
16 consistent with the general plan. For purposes of this
17 section consistency with the general plan means not
18 only consistency with the plan's land use and density
19 designations, and in this case properties designated
10:28:26 20 PROS, no residential allowed, but also consistency with
21 all policies and programs of the general plan.

22 Then in paragraph 55 the Court said,
23 Consistent with this law, the City properly required
24 that the developer obtain approval of the general plan
10:28:44 25 amendment in order to proceed with any development.

10:28:47 1 So the general plan did not allow residential
2 development of the property. The developer is arguing
3 here that because the property was zoned R-PD7 that the
4 City was required to approve its application. And that
10:29:02 5 would be directly contrary to all of the Court's
6 findings, conclusions of law in the order denying the
7 petition for judicial review.

8 And that's -- that law is no different whether
9 they're asking for -- asking for the Court to award
10:29:23 10 damages for a taking for denial of the application or
11 asking for the Court to order the City to approve the
12 application. It's the same facts. It's the same law.

13 You know, the contention that because a
14 residential use is a permitted use, as of right in the
10:29:50 15 general plan -- in the R-PD7 zoning section needs to be
16 understood for what it means. There are three types.
17 There are basically three types of uses, or four.

18 There's a permitted use. There's a use that's
19 only permitted with a conditional use permit or a
10:30:11 20 special use permit. And then there are prohibited
21 uses.

22 So if a use is permitted, that means -- and as
23 the ordinance says by right, that means that you don't
24 need a conditional use permit or a special use permit
10:30:32 25 in order to apply for the use. But you still need a

10:30:35 1 cite development permit. And they -- the City still
2 has discretion to approve up to the maximum densities
3 or to approve no development. And that's what the
4 Court held in denying the petition for judicial review
10:30:54 5 where the developer made precisely the same argument.
6 That's what the Court held in -- the Nevada Supreme
7 Court held in the Stratosphere case.

8 In that case, the Court said the
9 City of Las Vegas has discretion. It doesn't have to
10:31:12 10 approve the developer's application. It has discretion
11 as to what to approve on the property.

12 Even if the use is a permitted use -- what the
13 developer is arguing, in essence, is that if a use is
14 permitted in a zone, if it's listed as a permitted use,
10:31:32 15 that means that you have to -- that the City has no
16 further discretion.

17 In other words, once the City zones property
18 saying you can develop up to seven units of
19 residential, all discretion is transferred to the
10:31:50 20 developer, and the developer decides what it's going to
21 apply for, and the City has to approve it, which turns
22 Nevada law upside down.

23 That's not the law. And we've cited six cases
24 in our brief from the Nevada Supreme Court that hold
10:32:04 25 that. And the Court cited some of them in its -- in

10:32:07 1 its order denying the petition for judicial review.
2 And the Court relied on the Stratosphere case and said
3 that the developer's attempt to distinguish the
4 Stratosphere case, which the Court found was directly on
10:32:21 5 point, is unavailing. The developer didn't even try to
6 distinguish the Stratosphere case in this motion because
7 the Court's already ruled on that issue.

8 When you think about it, if the developer's
9 claim is that the City has to approve its project,
10:32:43 10 whatever it is, they say they have a vested right to
11 approval of a project, well, R-PD7 zoning says that
12 a -- that the maximum of seven units per gross acre can
13 be developed. It says that the purpose of R-PD7 zoning
14 is to -- is intended to provide flexibility. I'm
10:33:11 15 reading from the Uniform Development Code Section
16 19.10.050.

17 R-PD district is intended to provide for
18 flexibility and innovation in residential development
19 with emphasis on enhanced residential amenities,
10:33:26 20 efficient utilization of open space, the separation of
21 pedestrian and vehicle traffic and homogeny --
22 homogeneity of the land use patterns.

23 The density allowed in the R-PD district shall
24 be reflected by a numerical designation for that
10:33:43 25 district. Meaning that the planning commissioner of

10:33:47 1 the city council can't approve more than the numerical
2 designation of units per acre without amending the
3 zoning code.

4 Then in Uniform Development Code Section
10:33:58 5 19.10.050(E) under R-PD7 zoning, it says single family
6 and multifamily residential and supported uses are
7 permitted in the R-PD district to the extent they are
8 determined by the director to be consistent with the
9 density approved for the district and are compatible
10:34:20 10 with the surrounding uses.

11 So, yeah, R-PD7 says that residential is
12 permitted, but exactly what is going to be permitted is
13 at the complete discretion of the planning commission
14 and the City Council. The code goes on to say, For any
10:34:40 15 use which pursuant to the section is deemed to be
16 permitted within the R-PD district, the director may
17 apply the development standards and procedures which
18 would apply to that if it were located in the
19 equivalent standard residential district.

10:34:57 20 Section 19-06.050(G).4 says Open Space and
21 Common Recreational Facilities in an R-PD7 district
22 shall be configured so as to permit optimal utilization
23 and shall be more or less centrally located so as to be
24 reasonable and readily accessible from all residences
10:35:24 25 built or proposed for the development.

10:35:26 1 Nowhere do any of these sections say that any
2 development is by right in the sense that the developer
3 has a right to decide what's going to be developed and
4 the City doesn't.

10:35:44 5 These provisions provide abundant discretion
6 to the City to disapprove a condition development. So
7 it's impossible to square with the claim that all
8 discretion, once property is zoned all discretion lies
9 with the developer instead of the City. I mean, it's a
10:35:59 10 rather -- it's a very bizarre contention and would turn
11 the law on its head.

12 The developer even refers to the zoning for R2
13 property, not R-PD7 but R2. And says that the Court
14 should apply the standards in the R2 zoning which
10:36:27 15 allows residential use. But that even -- you know,
16 that doesn't apply to R-PD7. But even if it did, that
17 section said, Maximum dwelling units per acre is
18 determined by the underlying general plan designation
19 and may not exceed the density permitted under said
10:36:48 20 designation.

21 So it's clear the City has discretion. The
22 developer can't have vested rights to approval. The
23 City's disapproval of the 35-acre application was
24 within its discretion and can't be a taking.

10:37:08 25 But let's look at the developer's claim.

10:37:11 1 They're claiming that they have a right to approval of
2 whatever they apply for. Well, the R-PD7 zoning is
3 pretty vague about its standards. It's -- it allows
4 very broad discretion to decide, Well, here's where
10:37:26 5 we're going to put housing. Here's where we're going
6 to put open space.

7 So when you think about R-PD7 gives the
8 developer a vested right, a vested right to do what? I
9 mean, the City Council of the planning commission have
10:37:43 10 to decide, well, how much parking? Where is the
11 housing going to go? Where is the open space? Where
12 are the roads? How much parking is going to be
13 provided? What are the setbacks going to be? What are
14 the heights? What are the buildings going to look
10:37:54 15 like? These are all within the discretion of the
16 planning commission. So there's no way that it could
17 exercise that discretion if the developer had a vested
18 right to approval of whatever they proposed.

19 So the question is a vested right to do what?
10:38:13 20 The vested right concept doesn't make any sense in this
21 context because, you know, the vested right claim kind
22 of collapses under its own weight. You don't know what
23 you have a vested right to do except not exceed seven
24 units per acre. Well, that doesn't get you very far
10:38:31 25 when the -- even if that were true, when the planning

10:38:34 1 commission and the city council hold discretion to
2 determine all the other aspects of the development.
3 Vested rights only makes sense in the context in which
4 it's defined by the Nevada Supreme Court. Which is,
10:38:46 5 okay, if you have a valid permit approval and you start
6 construction in reliance on that approval, the City
7 can't change the law on you. You're -- you get to
8 build the project as approved. That's the vested
9 rights doctrine.

10:39:06 10 And it's absolutely clear here that the
11 developer's claiming that they have a vested right,
12 which they claim is a property right, to approval of a
13 specific application, and the Court has already
14 rejected that.

10:39:25 15 All of the eminent domain cases they cite
16 about consideration of the zoning, they're all, you
17 know, eminent domain liability conceded, what's the
18 value of the property. So, yes, the appraisers have to
19 consider the zoning of the property in their opinion,
10:39:42 20 which is a hypothetical of what would the property sell
21 for on the open market. That is a completely different
22 issue than whether a developer -- a property owner has
23 a vested right to develop something merely because of
24 the zoning.

10:40:00 25 And I want to draw the Court's attention to

10:40:04 1 the open space designation. You know, I said earlier
2 that the developer has really appallingly
3 misrepresented what the Nevada Supreme Court held in
4 that case on the 17-acre property. That, your Honor, I
10:40:34 5 think if you read that opinion, or that -- it's not an
6 opinion; it's an order; it's an order of reversal --
7 you'll see that the Court didn't say anything like what
8 the developer has represented that decision to have
9 said.

10:41:01 10 In that case there was one issue before the
11 Court. And that was whether to apply to develop the
12 17-acre property the developer needed to file a major
13 modification application. That is the only issue
14 before the Court.

10:41:26 15 The City said -- the City said, No, you don't
16 have to file a major modification application. The
17 developer went ahead and filed a site development
18 application, a rezoning application, and an application
19 to amend the general plan.

10:41:42 20 The neighborhood group sued and claimed that
21 the developer had to file a major modification
22 application. Judge Crockett agreed. Invalidated the
23 City's approval of the project, again, over the City's
24 objection. The City agreed no major modification
10:42:03 25 application was required. And the Nevada Supreme Court

10:42:08 1 then decided that very narrow issue.

2 It decided no major modification application
3 was required for the sole reason that in the Uniform
4 Development Code of the City, a major modification
10:42:27 5 application was required for a planned development and
6 it was not required for a residential planned
7 development. It's just what the code said. It was
8 a -- it was a pretty straightforward matter of
9 interpretation of the code.

10:42:47 10 And the Court did not -- the Court did not
11 find that the developer had a right or any right or
12 vested right or a property interest in the zoning. The
13 Court did not address that issue. It wasn't before the
14 Court. The Court didn't address that issue. And if
10:43:14 15 you read the order of reversal, you'll find that the
16 Court did not decide that.

17 The Court did not decide that the zoning
18 regulation was the only regulation that applied to the
19 property. The Court expressly recognized that this
10:43:36 20 developer was required to also file for an amendment of
21 the general plan designation of PROS.

22 On page, this is the exhibit -- that decision
23 is Exhibit FF to the City's Appendix in Volume III, at
24 page 516. The Supreme Court said on that page, The
10:44:05 25 governing ordinances require the City to make specific

10:44:08 1 findings to approve a general plan amendment, and cited
2 to the Las Vegas Municipal Code, a rezoning application
3 and a cite development plan amendment. The Court said
4 it does not, is not required to approve a major
10:44:25 5 modification application.

6 And I want to draw the Court's attention to
7 the contention that the developer made in its opening
8 brief where it grossly misrepresents what the Nevada
9 Supreme Court said. The developer said that the Nevada
10:44:49 10 Supreme Court found that the developer -- that the City
11 was required -- the developer was not required to -- I
12 got to find the exact language from the developer's
13 brief, from the reply brief where they said -- they
14 said, and I quote, they said that the Supreme Court
10:45:30 15 found that the developer could build residential
16 without applying for a major -- or could build
17 residential under the zone. And, in fact, the Court
18 found that the developer could apply to build under the
19 zone. There's all the Court found. So, you know,
10:45:54 20 that's a very serious misrepresentation of what the
21 Court held.

22 I want -- I refer the Court to our Exhibits I,
23 and N through P. Those are ordinances of the City that
24 the developer says don't exist, and if they do exist,
10:46:17 25 they don't apply because they're improperly enacted;

10:46:21 1 although, the developer cites no evidence or authority
2 that they weren't properly enacted.
3 Those exhibits are ordinances of the City that
4 provide that the entire 250-acre Badlands is PROS,
10:46:42 5 designated PROS in the City's general plan, parks,
6 recreation, and open space. That designation does not
7 allow for residential development.
8 That was a designation of 211 acres of the
9 250-acre Badlands since 1992, again, by ordinance of
10:47:04 10 the city council and of the entire 250-acre Badlands
11 including the 35-acre property here since 1998,
12 including in 2015 when the developer bought the
13 property. So it was clear that was the open space
14 designation. And that the law is also clear as the
10:47:32 15 Court found in its decision, in its order denying the
16 petition for judicial review that the general plan --
17 that the zoning has to be consistent with the general
18 plan. We've cited abundant authority that the zoning
19 must be consistent with the general plan.
10:47:52 20 R-PD7 zoning is not inconsistent with the
21 general plan designation of open space because in R-PD7
22 zoning, the original developer decided we're going to
23 put residential here, we're going to put open space
24 here.
10:48:11 25 The City then designated the residential for

10:48:14 1 residential use in its general plan and the open space
2 for open space use in the general plan. And that's the
3 law. It's binding. You can't change that. You can't
4 develop residential in the open space without amendment
10:48:27 5 to the general plan. And amendment is at the city's
6 discretion.

7 So those exhibits that I cited to you all show
8 that even up to today with exhibits, I think, R,
9 Exhibit R that the Badlands is still designated PROS in
10:48:46 10 the general plan except for the 17 acres where the City
11 approved an amendment to allow the developer to build
12 on the 35 units.

13 So the developer can't have a vested right to
14 approval of its application unless the City amended the
10:49:09 15 general plan, which is at its discretion. The City can
16 leave the property in its historic use, which is PROS,
17 parks, recreation, and open space.

18 So there is absolutely no legal basis to
19 require that the City approve the application. And
10:49:36 20 that's what this motion is all about. So for the Court
21 to just -- you know, the relief that the developer
22 seeks in that last page of its motion that the property
23 is zoned R-PD7 and that residential use is permitted,
24 that's right in the statute. The Court doesn't need to
10:50:02 25 say that. Right in the statute, it says those things.

10:50:07 1 Although they put certain words in quotes.
2 All this motion -- and they admitted on page 10 of
3 their motion that what they're seeking is a ruling that
4 they have a vested right, that they have a property
10:50:24 5 interest. You don't have any property rezoning,
6 absolutely clear.

7 I want to make a couple of other points in
8 response to the developer. You know, the developer
9 says that general plan designation of the Badlands
10:50:41 10 is -- doesn't apply because the maps that were attached
11 to the ordinances that we've submitted to the Court say
12 that they're for reference only. Well, the developer
13 has selectively quoted from the notation on the maps.
14 The maps -- the full reference says that -- the full
10:51:19 15 note says that GIS maps are normally produced only to
16 meet the needs of the City. Due to continuous
17 development activity, this map is for reference only.
18 So they only quoted from the last four words.

19 Well, what that says is that at the time that
10:51:41 20 the city council approves a version of the general
21 plan, that map, the city council's constantly amending
22 the general plan to allow development at the request of
23 developers. So the map changes. And the map is held
24 by the -- is maintained by the planning department and
10:52:02 25 updated. But the map that's approved by the city

10:52:06 1 council in one point in time does become outdated.

2 But that doesn't mean that at the time the
3 city council approves that map that wasn't the open
4 space -- that wasn't the general plan designation for
10:52:21 5 property shown in the map. And we've shown the Court
6 maps from 1992, 1998, 2001, 2005, 2009, 2018. The
7 Badlands is consistently PROS.

8 So you've got statute city ordinances staring
9 you right in the face. The developer contends, well,
10:52:52 10 these don't exist or don't apply. And that's absurd.
11 And, again, the Court found in denying the petition for
12 judicial review that the PROS designation is binding,
13 that it requires amendment to develop residential in
14 the Badlands, and, therefore, that it's impossible for
10:53:12 15 the developer to have a vested right.

16 So I -- the Court should deny the motion. The
17 Court, I don't think, should indulge the plaintiff's
18 kind of obfuscation where they're asking you to say the
19 property is zoned R-PD7 and, say residential is a
10:53:30 20 permitted use. When they're going to take that -- if
21 the Court said -- merely says that, which is what the
22 statute says and it's undisputed, the way they put
23 quotes around "by right" and they want the Court to
24 find that they had a vested right, which means they had
10:53:52 25 a right to automatic approval of their application

10:53:56 1 because it didn't provide for more than seven units for
2 gross acreage, and that's, therefore, a taking. That's
3 where we're going here. So I don't think the Court
4 should completely reverse itself from the petition for
10:54:13 5 judicial review and grant this motion.

6 Thank you.

7 THE COURT: Thank you, sir. And I have just
8 a -- and I do agree. I think the example I used before
9 was eminent domain example versus inverse condemnation.
10:54:35 10 I agree with that. But I was thinking about the
11 Sisolak case.

12 And I was thinking about it as you were
13 talking about it. I remember reading the Sisolak case.
14 I think that was in front of Judge Mark Denton. And
10:54:46 15 there you had a regulatory taking, it's my
16 recollection.

17 And so when they -- it seems -- didn't the
18 Supreme Court look at the Sisolak case, and I forget
19 the ordinance, but he, when he purchased the property
10:55:02 20 back in the 80s, it was subject to an ordinance
21 pertaining to height restrictions. And lo and behold
22 the -- I'm sorry, the county, and it might have been
23 McCarran Airport, I forget which one, but anyway, they
24 expanded the airport, and they implemented, more
10:55:20 25 restrictive height requirements. And, ultimately, and

10:55:24 1 I think his property was actually zoned commercial for
2 hotels, casinos, and those types of things. It's been
3 a while since I've read it. But at the end of the day
4 didn't the Supreme Court make a determination based
10:55:37 5 upon the status of the property and its zoning that
6 there was a taking?

7 And if I'm wrong you can tell me that.

8 MR. SCHWARTZ: Absolutely not.

9 THE COURT: I'm just --

10:55:47 10 MR. SCHWARTZ: Your Honor, the Sisolak case is
11 a physical takings case. The Court made it clear. It
12 said multiple times this is a physical takings case.
13 The authority is the Loretto case. This is not a
14 regulatory takings case.

10:56:08 15 In a physical takings case, while it's an
16 inverse condemnation case, the government deprives the
17 property owner of the right to exclude others. And
18 that's what --

19 THE COURT: Wait, wait, wait. Say that

10:56:23 20 again --

21 MR. SCHWARTZ: -- the airport --

22 THE COURT: I want to make sure I understood
23 what you're saying. I don't want to cut you off. I
24 want to make sure I understand. Repeat that again.

10:56:30 25 MR. SCHWARTZ: In a physical takings case, the

10:56:36 1 regulation deprives the property owner of the right to
2 exclude others in the public or the government.

3 That's what happened in the Sisolak case. It
4 is based on the Loretto case. The Loretto case is a US
10:56:59 5 Supreme Court case about 1982, '83. In that case, the
6 Court found that the New York City's requirement that
7 landlords of apartment houses allow cable companies to
8 put cable, cable facilities on their building, the
9 cables for cable TV. To require them to allow that is
10:57:25 10 a physical taking because you're deprived of a property
11 right. And it's one of the essential ticks in the
12 bundle of property rights, which is the right to
13 exclude others. That's a physical taking.

14 Now, in Sisolak, the Court found this is a
10:57:44 15 physical taking. The overflight law allows or requires
16 the owner to submit the plane flights in its airspace.
17 And the Court said that's a physical taking.

18 In one of the attributes of ownership is the
19 right to exclude others. That's a property interest.
10:58:13 20 A vested right. Again, zoning doesn't give you
21 property interest. Zoning limits your use of the
22 property. Doesn't grant a property interest. But when
23 you buy property, you have a property interest to
24 exclude others. And there in Sisolak, the Court said
10:58:31 25 that's a taking. That is not our case.

10:58:33 1 We have a -- this is a pure regulatory takings
2 case. The City hasn't taken a road from their
3 property. It hasn't deprived the property owner of the
4 right to exclude others. It has disapproved its
10:58:51 5 application for a particular use of the property.
6 That's a regulatory taking, a pure -- a pure regulatory
7 taking. So Sisolak doesn't apply.
8 And what the developer here is arguing is that
9 you have a property right in zoning that can be taken
10:59:15 10 away if you're not allowed to develop some big -- you
11 know, again, what's the property -- what's the right?
12 Their argument collapses because you don't know exactly
13 what rights they have.
14 That's why the vested right doctrine doesn't
10:59:31 15 apply here. The vested rights doctrine doesn't give
16 the property owner a property right to develop whatever
17 they choose on the property as long as it's within the
18 black letter maximums of the code.
19 Again, we cite six Nevada Supreme Court
10:59:50 20 opinions that confirm. And, again, the Court made
21 these very findings. Exactly what I'm saying. And I
22 read you the Court -- it's exactly what I'm saying.
23 And exactly what the developer is telling you is not
24 true. Is if they have a property right in zoning. And
11:00:13 25 that simply can't be the law. Otherwise, public

11:00:17 1 agencies in Nevada would not -- would have no more
2 discretion.

3 Where is the developer going with this case?
4 The City, you know, again, putting aside the fact that
11:00:28 5 they can't make out a takings claim because the City
6 has already approved substantial development in the
7 parcel overall.

8 But putting that aside, where is the developer
9 going? They're saying that the City has to approve
11:00:41 10 their development and their development application for
11 this property, and that the City's disapproval is a
12 taking, and they should get -- now they should get paid
13 for what -- what they would have -- you know, what the
14 value of the property would have been if the City
11:01:03 15 approved it.

16 Well, that's contrary to all law, all law from
17 the Nevada Supreme Court, the US Supreme Court.
18 They're -- that means that the public agency no longer
19 has discretion to deny development. That means
11:01:21 20 developers get to build whatever they want.

21 When you look --

22 THE COURT: But, but the government --

23 MR. SCHWARTZ: The developer -- it's
24 ridiculous.

11:01:26 25 THE COURT: But my -- the government doesn't

11:01:28 1 have absolute unfettered discretion regarding any
2 decision they make.

3 What about this? And I pulled Sisolak up on
4 my --

11:01:37 5 MR. SCHWARTZ: Can I respond to that, your
6 Honor?

7 THE COURT: Yes. Go ahead.

8 MR. SCHWARTZ: Can I respond to your last
9 point?

11:01:44 10 THE COURT: Yeah. Go ahead.

11 MR. SCHWARTZ: In the law of regulatory
12 taking, the government and/or restrict use of property.
13 The only limitation, the only limitation is that it
14 can't wipe out or virtually wipe out the use or value
11:02:03 15 of the property. That's, that's what this case is

16 about. It's about the just compensation clause.

17 THE COURT: But what about --

18 MR. SCHWARTZ: And --

19 THE COURT: -- a deprivation of economic
11:02:15 20 benefit? You can have a regulatory taking under those
21 circumstances, right?

22 MR. OGILVIE: Well, that's -- no, no. That is
23 not correct. You're not -- the government is not
24 required to allow the most profitable use of property.

11:02:39 25 So, again, putting aside the fact that the

11:02:42 1 government has already approved development in the
2 Badlands, and that's the parcel as a whole. You
3 can't -- you can't carve up the property, the 35 acres.
4 Putting that aside, if you want to focus on the 35-acre
11:02:54 5 property, the government is not required to allow the
6 most profitable use of that property under takings law.
7 It's only required to allow some use. Some economic
8 use. But that's under the Constitution.

9 It is not a taking if you -- it's not a taking
11:03:28 10 if you disapprove a development application unless you
11 can show you've been wiped out or virtually wiped out.

12 So this issue of whether the developer has
13 vested rights or not, that's why the developer is
14 arguing here that they had a vested right in the zoning
11:03:47 15 because it's a -- they're claiming it's a property
16 right, and that if they can't -- that they have a
17 property right to build the exact development they
18 applied for with all its -- all its detail. They're
19 claiming they have -- they have a property --

11:04:07 20 THE COURT: Isn't that --

21 MR. SCHWARTZ: -- right to build whatever they
22 apply for.

23 THE COURT: But in a general sense, my
24 recollection in Sisolak, he didn't have a permit or any
11:04:17 25 approvals by McCarran Airport and/or Clark County

11:04:22 1 specifically when he purchased the property, right,
2 back in the 80s. And so the ordinances were changed
3 that impacted potentially the economic value of his
4 property when it came time to sell. And so he said,
11:04:38 5 Look, Judge, this is a taking of my property, and
6 consequently, I should be compensated for that.

7 MR. SCHWARTZ: No, the developer --

8 THE COURT: I'm paraphrasing there, but, I
9 mean --

11:04:56 10 MR. SCHWARTZ: Yeah.

11 THE COURT: -- isn't that the essence of what
12 happened there?

13 MR. SCHWARTZ: Well, no. It's not, your
14 Honor. The developer didn't show that the -- that
11:05:04 15 his -- the loss of his right to exclude planes from
16 certain -- from flying over his property, he didn't
17 show that that was -- or that the case wasn't decided
18 on whether that had an economic impact on him, like it
19 is here. That case was decided purely on the absolute
11:05:25 20 right to exclude others from your property.

21 In Loretto, you know, the -- which, on which
22 Sisolak is squarely based. In Loretto vs. Manhattan
23 Teleprompter, the cable, the placement of the cable on
24 the apartment house had a de minimis effect on the
11:05:47 25 value of the property. In fact, it probably improved

11:05:50 1 the value of the property. Because the tenants in
2 Loretto, Ms. Loretto's tenants had access to cable
3 telecoverage.

4 But the Court found with physical takings your
11:06:03 5 rights are absolute. If someone deprives you of the
6 right to exclude others, which is one of the most
7 precious rights, then you're entitled to just
8 compensation.

9 Now, the lower court ordered Ms. Loretto a
11:06:17 10 dollar in damages. A dollar. Because the right to
11 exclude others is, in the US Supreme Court's eyes and
12 the Nevada Supreme Court's eyes, sacred. You can't
13 deprive the property owner the right to exclude others.

14 This is a completely different case. This a
11:06:36 15 pure regulatory taking where the developer has the
16 burden to show that because the City didn't approve a
17 specific application or development on one part of the
18 Badlands that they were wiped out, or virtually wiped
19 out. And they can't show that. Again, because the
11:07:00 20 City approved substantial development in the Badlands.

21 And they only filed one application, you know,
22 one or two applications for a very extensive
23 development of the 35-acre property. Which, you know,
24 the City could always approve a lesser development.

11:07:18 25 But putting that aside, that's why the

11:07:21 1 developer needs the Court to say, again, contrary to
2 the Court's order in denying the petition for judicial
3 review that they had -- they had a constitutional
4 right. They had a property right to the City's
11:07:34 5 approval of their application. And that is -- that
6 that would turn all law on its head.

7 THE COURT: I just have one last question for
8 you. So what did the Court rely upon in the Sisolak
9 case from a valuation perspective? And I realize it
11:07:57 10 was a physical taking. I do understand that. But what
11 did the Court rely upon to make that determination?
12 The ordinances that were in place?

13 MR. SCHWARTZ: It relied -- it relied on the
14 law that said the property owner could not exclude
11:08:13 15 others. He couldn't -- it couldn't --

16 THE COURT: No. I'm --

17 (Unreportable cross-talk)

18 MR. SCHWARTZ: -- planes to fly over.

19 THE COURT: From a valuation perspective what
11:08:21 20 did they rely on?

21 MR. SCHWARTZ: I don't think the Court -- I
22 don't recall that the Court decided that issue yet.
23 That may -- that would probably be decided by the trial
24 court on remand that the Court found this is a physical
11:08:31 25 taking. The question there was liability. And when

11:08:35 1 you're talking about value, you have to distinguish
2 between liability for a regulatory taking and then if
3 there's liability, what are the damages.

4 Yeah, that turns on, that's the value of the
11:08:48 5 property. The value is influenced by zoning. You
6 know, you couldn't say that they have an absolute right
7 to approval of the project under the zoning.

8 You know, that's -- appraisers can't do that
9 because that's just not the law. But in -- the same
11:09:06 10 thing with a physical takings case. In Sisolak, there
11 was a finding that the City wasn't liable. And so the
12 Supreme Court found, yes, the City is liable for a
13 physical taking. And so that determination would have
14 had to have been made by the trial court as to -- what
11:09:29 15 is the value of that loss of that right to exclude
16 others.

17 THE COURT: Okay. Sir, anything else?

18 MR. SCHWARTZ: No, your Honor. Thank you.

19 THE COURT: Thank you.

11:09:55 20 All right. We'll hear from the plaintiff.

21 MR. LEAVITT: Thank you, your Honor. James
22 Leavitt on behalf of 180 Land again.

23 Your Honor, you hit -- you hit Sisolak right
24 on the head. And the reason I know about Sisolak is
11:10:06 25 because our office litigated -- actually, we commenced

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11:10:08 1 and litigated those air space takings cases for
2 approximately 15 years.

3 Sisolak is an inverse condemnation case
4 exactly like this. Sisolak is a per se regulatory
11:10:20 5 taking case. That's the language the Nevada Supreme
6 Court uses in the case.

7 And the principle underlying number one issue
8 in the Sisolak case, your Honor, was whether the
9 landowner had a property interest. And the Nevada
11:10:35 10 Supreme Court had to decide the same exact issue you're
11 deciding right now, which was what kind of property
12 interest the landowner had in the Sisolak case. And
13 exactly, almost exactly as the City is arguing to you
14 here today, the County of Clark argued in the Sisolak
11:10:54 15 case that Sisolak had no property interest in his air
16 space because he didn't have an approval. Almost
17 verbatim the argument that the City is making to you
18 today was made to the Nevada Supreme Court by the
19 County of Clark, and the Nevada Supreme Court rejected
11:11:11 20 that argument.

21 The Nevada Supreme Court held that every
22 landowner -- exactly as you referenced in your example
23 to counsel. Every landowner in the State of Nevada has
24 a vested right to use, possess, and acquire their
11:11:27 25 property.

11:11:28 1 In fact, your Honor Article 1 Section 1 of the
2 Nevada State Constitution says that every landowner in
3 the state of Nevada has the inalienable right to use,
4 possess, and protect their property.

11:11:41 5 And the Nevada Supreme Court interpreted that
6 to mean that every landowner has the vested right to
7 use their property in the Sisolak case. And so that
8 underlying property interest issue was presented
9 directly to the Court.

11:11:55 10 And here's what the Court said. The Court
11 said an individual must have a property interest to
12 support a takings claim. And then went on to provide
13 the exact same analysis that I provided to you in my
14 opening argument. That you first have to decide that
11:12:10 15 underlying property interest.

16 You don't have to have an approval. You don't
17 have to have an entitlement. You have a property
18 interest. And the Nevada Supreme Court held in those
19 cases that I cited to you previously to determine the
11:12:26 20 property interest that the landowner has you have to
21 rely upon the zoning code. You have to rely upon the
22 zoning to make that determination.

23 And your question was spot on. Well, how did
24 they value the Sisolak property if he didn't have any
11:12:39 25 development applications? If he didn't have any

11:12:42 1 approval? Well, the way they value the property, your
2 Honor, again, because we were intimately involved in
3 all these air space takings cases, is we valued the
4 property based on zoning. Because that's how it's been
11:12:53 5 done in the state of Nevada for the past 100 years. Is
6 properties are negotiated. Properties are purchased.
7 And people close on properties based upon the zoning.
8 Title is issued based upon the zoning.

9 And simply because you don't have an
11:13:10 10 entitlement or an approval yet, doesn't mean the
11 property has zero value. That same exact issue was
12 brought up in a case called Schwartz vs. State of
13 Nevada. And the State of Nevada made the same argument
14 that the City is making you here today in the Schwartz
11:13:23 15 case. Mr. -- or Phyllis Schwartz in that case argued
16 that she had a property interest to access to her
17 property. And the state of Nevada said, No, you don't
18 have a property interest because you have not yet
19 obtained an encroachment permit.

11:13:36 20 And the Nevada Supreme Court, again, rejected
21 that argument and held that every landowner who abuts a
22 roadway has a right of easement to that roadway which
23 is a property interest.

24 In other words you have the right to use your
11:13:50 25 property. So these arguments that have been made by

11:13:53 1 counsel that nobody in the City of Las Vegas has any
2 vested right until they get a development application
3 from the City of Las Vegas is an argument that's been
4 made by the State of Nevada, it's an argument that's
11:14:05 5 been made by the County of Clark to the Nevada Supreme
6 Court, and it's been flatly rejected. And it's been
7 flatly rejected because Article 1 Section 1 to the
8 Nevada State Constitution says we have an inalienable
9 right to use, possess, and protect our property. And
11:14:20 10 the Nevada Supreme Court interpreted that to mean that
11 every landowner has the vested right to use their
12 property. Therefore, your Honor, we understand Sisolak
13 well. That's what the Sisolak court held.
14 Now counsel, this is like, I think, probably
11:14:32 15 the fifth time counsel has accused me of making -- or
16 California counsel has accused me of making
17 representations. Apparently they're appalling and
18 grossly at this point. Your Honor, I will assure you I
19 will never make an appalling, gross or any type of
11:14:47 20 misrepresentation to this Court.
21 I understand the eminent domain law very well,
22 your Honor. And all we're simply asking for from you
23 today is that first sub inquiry that the Nevada Supreme
24 Court requires the district court to make in every
11:15:03 25 single inverse condemnation case. That's a very narrow

11:15:07 1 request.

2 Ninety-nine percent of what Mr. Schwartz just
3 argued to you has absolutely no relevance whatsoever to
4 that underlying issue. And, in fact, when you read to
11:15:18 5 him our request, it appears that he was somewhat
6 confused because he said, Well, that's not in dispute.
7 I have no idea, frankly, your Honor, why the
8 City of Las Vegas filed a 27-page opposition to this
9 motion.

11:15:30 10 And the reason why I have no idea is because
11 we've been -- Kermitt has been doing this for 45 years,
12 me for 25 years. We've never had once where an
13 opposing counsel in an inverse condemnation case even
14 implied that zoning was irrelevant.

11:15:43 15 In every single inverse condemnation case,
16 including the Sisolak case, including the Alper case,
17 including the Bustos case, the Nevada Supreme Court has
18 held that you must rely upon zoning to determine the
19 underlying property interest.

11:15:59 20 So our request, your Honor, is very
21 straightforward. That you enter a finding that there
22 is R-PD7 zoning on the property. And that the
23 permitted uses by right under the R-PD7 zoning are
24 single family and multifamily residential. And those
11:16:14 25 words "by right", your Honor, appear directly in the

11:16:17 1 city code. The city code definition of permitted uses
2 is any use allowed in a zoning district as a matter of
3 right. So that's what permitted uses is defined as, as
4 a matter of right.

11:16:28 5 We've also cited to you the land use code, or
6 the land use table. And, your Honor, the City's land
7 use table does not, counsel correctly states, does not
8 include an R-PD7 zoning on the land use table.

9 However, to determine the uses of R-PD7 zoning
11:16:48 10 on the land use table, 19.10.050 clearly states that
11 the type of development permitted within the R-PD
12 district can be more consistently achieved using the
13 standard residential districts. So standard
14 residential districts are listed on the table. And the
11:17:05 15 code says what you're supposed to do for R-PD7 is
16 identify that standard residential district which is
17 most similar to R-PD7. And then -- and then those uses
18 that are permitted under that designation are permitted
19 under R-PD7.

11:17:20 20 We chose RPD2 -- or I'm sorry. We chose R2 on
21 that table because R2 allows 6 to 12 units per acre.
22 R-PD7 allows seven units per acre; therefore they're an
23 equivalent zoning district.

24 And if you look at that, we actually
11:17:36 25 superimposed it on page 13 of our reply. And under the

11:17:40 1 R2 zoning, there is a "P" for single family attached
2 and single family detached.

3 The P symbol is then defined in the table
4 itself. It says the uses permitted as a principle use
11:17:52 5 in that zoning district by right. Therefore, under
6 R-PD7 zoning, under the residential plans development
7 district zoning with a numerical No. 7 behind it, the
8 zoning allows -- or is -- or single family and
9 multifamily residential are uses permitted as a matter
11:18:16 10 of right, your Honor. So that's our request.

11 But I do have to address a couple of things.
12 You had a great question. You said what about property
13 that's not yet zoned? Doesn't it have value? You have
14 a 30-acre zoned commercial property, and the government
11:18:29 15 comes and takes that property, doesn't that -- isn't
16 there some value to that property? And then the
17 counsel's response to you, Well, that was a direct
18 case. This is an inverse case.

19 Well, California counsel perhaps doesn't know
11:18:40 20 that in the Alper decision, the Nevada Supreme Court
21 held that inverse condemnation rules are the same as
22 direct condemnation rules in the state of Nevada. What
23 the Nevada Supreme Court held is they said, We're not
24 going to apply one set of rules in a direct
11:18:56 25 condemnation case and an entirely different set of

11:18:59 1 rules in an inverse condemnation case.

2 The Nevada Supreme Court said the same exact
3 rules that apply to a direct case apply to an inverse
4 case. Meaning, in a direct case, you still have to
11:19:10 5 determine the property interest, your Honor. How are
6 you going to determine how to value it? Just the same
7 as you have to determine the property interest in an
8 inverse condemnation case.

9 New, I will say, your Honor, that when you
11:19:24 10 read the two requests that we made, counsel stated flat
11 out that's not in dispute. Your Honor, so that we
12 would ask that those two requests that we made to you
13 be put into an order because counsel said they're not
14 in dispute.

11:19:39 15 Counsel even said, your Honor, that's what the
16 statute says. He admitted to it. I'm not -- I'm,
17 frankly, somewhat confused why we have a 27-page
18 opposition from the City when all we're asking for is
19 this very narrow finding.

11:19:53 20 Again, 99 percent of what was just argued goes
21 to the taking issue which certainly, your Honor, we are
22 going to address at a later date. But I will -- I will
23 clarify one thing right now.

24 Our claim is not that the City denied one
11:20:07 25 application. Our claim is that the City engaged in

11:20:11 1 systematic and aggressive actions to prohibit all use
2 of the 35-acre property. You've heard those actions,
3 your Honor. It's not one. It's not two. It's not
4 three. It's eleven actions that the City engaged in to
11:20:25 5 stop and preclude all use of this property.

6 Now, of course, that's not being argued now.
7 We will argue that at a later date. But that's what
8 our claim is based upon. We've argued that to you in a
9 motion for summary judgment. You know that it's not
11:20:39 10 just one act by the City of Las Vegas but an aggregate
11 of numerous acts.

12 Now, last thing I'll address, your Honor, is
13 this issue about the petition for judicial review.
14 Okay. What counsel is saying is this. You don't have
11:20:54 15 a vested right in a petition for judicial review. That
16 means you don't have a vested right in an inverse
17 condemnation case.

18 Your Honor, you'll remember we argued this
19 issue three times before you. And in three different
11:21:07 20 orders you rejected that argument by the government.
21 Here's the March -- I believe it's the March -- yeah,
22 I'm sorry. The May 15th order. The May 15 order that
23 you entered, this is what was said. And this is why
24 you said that the petition for judicial review law
11:21:26 25 cannot be applied in an inverse case.

11:21:29 1 Because you said in that order:

2 In an inverse condemnation case every

3 landowner in the state of Nevada has the vested

4 right to possess, use, and enjoy their

11:21:38 5 property. And if this right is taken, just

6 compensation must be paid.

7 And then you continued:

8 On the other hand, in petitions for

9 judicial review, the City has discretion to

11:21:47 10 deny a land use application as long as valid

11 zoning laws are applied.

12 So the way the interaction occurs here, your

13 Honor, is in a petition for judicial review certainly

14 the City of Las Vegas has discretion to deny a land use

11:22:03 15 application. However, when we move over to the inverse

16 condemnation proceeding, the City is responsible for

17 that discretion and must pay just compensation if it

18 denies the use of the property, all use of the

19 property.

11:22:18 20 And, by the way, your Honor, you had a good

21 question there. It doesn't have to be a denial of all

22 use of the property. The Nevada Supreme Court in the

23 Ad America case adopted de facto taking law in the

24 state of Nevada and found and adopt -- and relied upon

11:22:31 25 a case out of the Ninth Circuit where the landowners

11:22:34 1 still had 1/3rd use of their property, and the Court
2 still found a taking because there was an economic
3 deprivation of property.

4 So when we get to that taking part, your
11:22:43 5 Honor, the Nevada Supreme Court has allowed just
6 compensation where there is an economic deprivation.
7 But that's a side note.

8 So, your Honor, in your orders in this inverse
9 condemnation case, which is why we don't need to go do
11:22:58 10 a motion for reconsideration in the petition for
11 judicial review, here's what you concluded in regards
12 to the property interest. You said in the May 15
13 order, Because we litigated this issue already any
14 determination of whether the landowner has a property
11:23:14 15 interest or the vested right to use the 35-acre
16 property must be based on eminent domain law rather
17 than the land use law that was relied upon in the
18 petition for judicial review.

19 That's why the petition for judicial review
11:23:28 20 findings cannot carry over to this side of the case.
21 Because even though there's discretion to deny land use
22 applications, when you move to an eminent domain case,
23 the Nevada Supreme Court has been very clear, every
24 landowner has a vested right to use their property.
11:23:43 25 Period.

11:23:44 1 And if the government prohibits that use, even
2 if it exercises its discretion, even if it has the
3 purest of intents, the government has to pay just
4 compensation for that loss.

11:23:56 5 Now, your Honor, there were several other
6 arguments, your Honor, that were absolutely irrelevant
7 to what we've talked about here. I'm going to save
8 those arguments for the day when we address the second
9 issue, which is whether the property has been taken.

11:24:10 10 But I just want to conclude by saying the zoning is
11 R-PD7. That's undisputed. The Nevada Supreme Court --
12 or the city code expressly states that single family
13 use and multifamily -- single family residential and
14 multifamily residential are uses permitted as a matter
11:24:32 15 of right. That's the words right out of the code.

16 So, your Honor, we respectfully request that
17 our motion be granted. Counsel himself said that it's
18 not in dispute. We can prepare the order consistent
19 with the motion and consistent with your findings here
11:24:46 20 today, your Honor.

21 Do you have any other questions for me, Judge?

22 THE COURT: No. I just have one just
23 overwhelming comment. And I think this can't be
24 overlooked because the denial of a land use application
11:25:01 25 by a governmental entity is a much different animal

11:25:07 1 than the bundle of rights held by a property owner as
2 it relates to real property ownership, which is very,
3 very unique and recognized under both the Nevada and
4 the United States Constitution. And it's a different

11:25:24 5 animal. And that's why I mentioned that a little
6 earlier. We're talking about a bundle of rights owned
7 by all property owners that own property.

8 And I think the Sisolak case was a pretty good
9 example as I thought about this issue. And he had a
11:25:39 10 certain bundle of rights that apparently based upon
11 government action and changes in ordinances as it
12 relates to his property that impacted the value.

13 MR. LEAVITT: Absolutely.

14 THE COURT: You know, and that's what we're
11:25:55 15 talking about here in a general sense.

16 And so what I'm going to do as far as the
17 motion is concerned, I'm going to grant the motion.

18 I see it's a different animal. And I do have
19 to have some baseline to work from. And that's to
11:26:08 20 determine what the bundle of rights the landowner has
21 in this case. I'm not -- whether -- and the land use
22 application is rejected or accepted, I'm not going
23 to -- that's not what's before me today. I'm just
24 determining what the bundle of rights will be.

11:26:24 25 And so anyway, Mr. Leavitt, prepare an order

11:26:26 1 for me and circulate it. If you can't agree on the
2 contents of the order, you can -- you can submit
3 competing orders.

4 MR. LEAVITT: I will do that, your Honor. And
11:26:37 5 thank you, your Honor --

6 MR. SCHWARTZ: Your Honor.

7 MR. LEAVITT: -- for your time.

8 THE COURT: Yes.

9 MR. SCHWARTZ: Your Honor, this is Andrew
11:26:41 10 Schwartz. Can I ask a question, please?

11 THE COURT: Yes.

12 MR. SCHWARTZ: I think we've had a long
13 hearing here. And we've -- we have -- in his final
14 comments, Mr. Leavitt made it clear that they want more
11:26:58 15 than what they asked for in the last page of their
16 motion. They want -- they want "by right" or
17 "permitted" to mean that they have a property interest.
18 So they're asking the Court to do more than just
19 verbatim grant what they asked for in the last section
11:27:20 20 of their brief. And --

21 MR. LEAVITT: Your Honor.

22 MR. SCHWARTZ: We've had this very long
23 hearing. And I don't think we understand. I don't
24 think there's any understanding of what by right or
11:27:29 25 permitted means.

11:27:31 1 MR. LEAVITT: Your Honor, I can prepare the
2 order.

3 MR. SCHWARTZ: We're just going to have
4 another -- it would seem to me, we're going to have to
11:27:38 5 have another proceeding to determine what that means
6 which is -- which is what counts.

7 MR. LEAVITT: Well, your Honor, I can prepare
8 the order consistent with the motion and consistent
9 with what counsel stated they do not dispute, which are
11:27:53 10 the two requests that we make in the order.

11 If they feel that there's something else that
12 needs to be litigated at that point in time, we can
13 litigate it. But it's not before the Court at this
14 time.

11:28:04 15 THE COURT: All right. Anything else?

16 MR. LEAVITT: That's it, your Honor. We'll
17 prepare the order.

18 THE COURT: Okay. And prepare the order. And
19 if you disagree on the contents, submit competing
11:28:14 20 orders, and I'll sign whichever one I feel is
21 appropriate or prepare my own order.

22 MR. LEAVITT: I appreciate that. Thank you,
23 your Honor. And thank you so much for your time. And
24 have a great day and be safe.

11:28:24 25 THE COURT: Everyone enjoy your day.

11:28:26 1

MS. HAM: Thank you, your Honor.

2

MR. LEAVITT: Thank you.

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(Proceedings were concluded.)

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Pursuant to NRS 239.053, illegal to copy without payment.

RA 00297

REPORTER'S CERTIFICATE

STATE OF NEVADA)

:SS

COUNTY OF CLARK)

I, PEGGY ISOM, CERTIFIED SHORTHAND REPORTER DO
HEREBY CERTIFY THAT I TOOK DOWN IN STENOGRAPHY ALL OF THE
TELEPHONIC PROCEEDINGS HAD IN THE BEFORE-ENTITLED
MATTER AT THE TIME AND PLACE INDICATED, AND THAT
THEREAFTER SAID STENOGRAPHY NOTES WERE TRANSCRIBED INTO
TYPEWRITING AT AND UNDER MY DIRECTION AND SUPERVISION
AND THE FOREGOING TRANSCRIPT CONSTITUTES A FULL, TRUE
AND ACCURATE RECORD TO THE BEST OF MY ABILITY OF THE
PROCEEDINGS HAD.

IN WITNESS WHEREOF, I HAVE HEREUNTO SUBSCRIBED
MY NAME IN MY OFFICE IN THE COUNTY OF CLARK, STATE OF
NEVADA.

PEGGY ISOM, RMR, CCR 541

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1 CASE NO. A-17-758528-J

2 DOCKET U

3 DEPT. XVI

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5

6 DISTRICT COURT

7 CLARK COUNTY, NEVADA

8 * * * * *

9 180 LAND COMPANY LLC,)

10 Plaintiff,)

11 vs.)

12 LAS VEGAS CITY OF,)

13 Defendant.)

14 -----)

15 REPORTER'S TRANSCRIPT

16 OF

17 HEARING

18 (TELEPHONIC HEARING)

19

20 BEFORE THE HONORABLE JUDGE TIMOTHY C. WILLIAMS

21 DISTRICT COURT JUDGE

22

23 DATED TUESDAY, November 17, 2020

24

25

REPORTED BY: PEGGY ISOM, RMR, NV CCR #541,

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Pursuant to NRS 239.053, illegal to copy without payment.

RA 00315

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3 DEPARTMENT 16 ARE BEING HEARD VIA TELEPHONIC
4 APPEARANCE)

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25 RA 00317

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RA 00318

1 LAS VEGAS, NEVADA, TUESDAY, NOVEMBER 11, 2020

2 1:31 P.M.

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

4 * * * * *

5

6 THE COURT: All right. Thank you, CJ.

7 Good afternoon to everyone. This is the time

8 set for the Tuesday, November 17th, 2020, 1:30 law and

9 motion calendar. We only have one matter on this

01:31:40 10 afternoon, and that's 180 Land Company LLC versus the

11 City of Las Vegas.

12 And let's go ahead and set forth our

13 appearances on the record.

14 MR. LEAVITT: Good morning, your Honor. For

01:31:52 15 the plaintiff, 180 Land LLC, the landowner, James J.

16 Leavitt.

17 MS. HAM: Good morning, your Honor. Elizabeth

18 Ghanem Ham, also on behalf of the plaintiff landowners.

19 MR. OGILVIE: Good afternoon, your Honor.

01:32:09 20 This is George Ogilvie on behalf of the City of

21 Las Vegas. Also with me today is Phil Byrnes from the

22 City attorney's office.

23 MR. SCHWARTZ: This is Andrew Schwartz

24 representing the City.

01:32:26 25 THE COURT: All right. Does that cover

01:32:28 1 everyone's appearance?

2 MR. LEAVITT: It does on behalf of the
3 plaintiff landowner, your Honor.

4 MR. OGILVIE: On behalf of the City as well,
01:32:40 5 your Honor. This is George Ogilvie again. And I'd ask
6 that this hearing be reported.

7 THE COURT: And that was my next question,
8 Mr. Ogilvie.

9 And, for the record, Madam Reporter, did you
01:32:55 10 get all the appearances?

11 THE COURT REPORTER: I did. Thank you.

12 THE COURT: All right. I guess in light of
13 that, we can go ahead and proceed.

14 MR. OGILVIE: Thank you, your Honor. This is
01:33:03 15 George Ogilvie.

16 The briefing was extensive, and I'm confident
17 the Court has reviewed it, so I'm not going to go into
18 reiterating the positions set forth in the briefing.
19 But I do think it's important to take a step back and
01:33:28 20 put this all in context.

21 And that is -- that is this, your Honor. This
22 is an inverse condemnation matter in which the
23 developer, 180 Land Fore Stars, are contending that the
24 City took actions that wiped out the -- virtually all
01:33:48 25 of the value or use of the Badlands Golf Course, the

01:33:53 1 250 acres that the developer purchased in 2015.

2 And, again, I know the Court understands this
3 and -- but I just want to take a moment to emphasize
4 that after purchasing the property -- and the purchase
01:34:12 5 of the property was achieved through the developer's
6 acquisition of a company, Fore Stars, which owned the
7 Badlands Golf Course and all of the assets that go
8 along with a golf course: The clubhouse, the equipment
9 barn, all of the equipment for maintaining the golf
01:34:39 10 course, and everything that goes along with that.

11 So in 2015, the developer purchased the
12 company Fore Stars. And the primary asset in that
13 acquisition was the 250 acres of the Badlands Golf
14 Course. The developer then split the golf course into
01:35:05 15 four parcels, one of which is this 35-acre parcel
16 that's before the Court in this lawsuit. As you know,
17 there are three other lawsuits relating to the other
18 three parcels that the developer subdivided the 250
19 acres into.

01:35:28 20 So the developer in -- as it relates to these
21 35 acres has to demonstrate that the City's actions
22 have virtually wiped out all of the use or value of the
23 35 acres. And actually that's for another day, your
24 Honor. But as has been briefed before this Court, the
01:35:55 25 City's position, which is supported by US Supreme

01:36:00 1 Court's opinions, is that it's not just 35 acres; the
2 Court has to view whether or not the City's actions
3 viewing the parcel as a whole, the entire 250 acres,
4 whether the City's actions wiped out virtually all of
01:36:25 5 the use or value of that 250 acres. Again, that's for
6 a different day, but I just don't want the record to be
7 unclear that the City -- that is the City's position
8 and supported by US Supreme Court precedent.

9 So as it relates to the 35 acres, if the --
01:36:48 10 the determination of a taking gets down to whether or
11 not the City's actions have wiped out -- virtually
12 wiped out all of the use or value of that property. So
13 in order to make that determination, the threshold
14 issue is: What did the developer pay for that parcel?
01:37:15 15 What did it pay for those 35 acres? So -- and then
16 once that's determined, there is a determination of
17 what the value of the -- what the value of that
18 property is after the City's actions.

19 So it's a comparison. And if -- if it's -- if
01:37:37 20 it's a wash, if the developer paid a million dollars
21 for these 35 acres and the property, those 35 acres are
22 worth \$1 million today after the City's actions, there
23 hasn't been a taking.

24 In fact, there hasn't been a taking even if
01:37:58 25 the value of the property has decreased as a result of

01:38:01 1 the City's actions by 50 percent because Supreme Court
2 precedent states that it has to be a wipeout. The
3 City's actions have to wipe out virtually all of the
4 use or value of the property.

01:38:20 5 So if the City's actions diminish the
6 property, it was 35 acres property -- if the 35-acre
7 property valued from a million to \$500,000, there's no
8 taking. But that's not before the Court today either.

9 What's before the Court today is the -- well,
01:38:38 10 I hope it's the culmination. I hope this -- we don't
11 have to continue going down these rabbit holes after
12 this hearing. But what's before the Court today
13 hopefully is the culmination of 16 months of effort by
14 the City to attempt to determine what the -- what
01:39:00 15 consideration the developer paid for the 250 acres as a
16 whole, but, you know, as it relates to this argument,
17 the 35 acres. And what we have -- what we've
18 determined after getting stonewalled at every turn,
19 including the City's attempts to obtain the purchase
01:39:27 20 price through -- the purchase and sale agreement from
21 the seller, which is Peccole-Nevada Corporation, which
22 owned the property from the 1970s -- the Peccole family
23 owned the property all that time -- and then sold these
24 250 acres to the developer in 2015 for a total of seven
01:39:52 25 and a half million dollars. That's reflected in the

01:39:55 1 purchase and sale agreement that the City finally
2 obtained from Peccole-Nevada. Even though the
3 developer attempted to prevent the seller,
4 Peccole-Nevada, from producing those documents, we
01:40:10 5 finally obtained those -- that single purchase and sale
6 agreement from the -- from the seller four months ago.
7 And it is clear that the purchase price for
8 the entire 250 acres and all of the assets that went
9 along with it was a total of seven and a half million
01:40:29 10 dollars. So that works out to \$30,000 an acre, which,
11 if you apply that to 35 acres, comes out to a million
12 dollars. And, in fact, it's \$1,050,000.
13 But that also includes all of the other assets
14 that went along with the purchase of the golf course,
01:40:52 15 all the equipment, the equipment barn, et cetera. So
16 that is the basis of the City's contention that the
17 developer actually paid less than a million dollars for
18 these 35 acres.
19 So that's the City's position. And the City
01:41:10 20 is then going to demonstrate that the City's actions
21 did not wipe out virtually all of the value or use of
22 that 35 acres or of the 250 acres, that the value of
23 these 35 acres exceeds the million-dollar purchase
24 price that the developer paid for the 35 acres. That
01:41:39 25 is the threshold issue that this Court is going to be

01:41:43 1 faced with is a comparison of the purchase price
2 against the appraised value after the City's actions.

3 So in response to the City's position, the
4 developer is now taking the position through an answer
01:42:03 5 to an interrogatory, no, no, no, City, you have it
6 wrong. We didn't pay seven and a half million dollars
7 for these 250 acres. We actually paid \$45 million
8 for -- for -- for the Badlands Golf Course and -- which
9 is essentially the 250 acres.

01:42:29 10 So the City, when faced with that, has gone
11 down that rabbit hole and attempted to determine what
12 documentation supports the developer's contention that
13 if it paid \$45 million, which is directly contrary to
14 the sole purchase and sale agreement that shows that it
01:42:58 15 was seven and a half million dollars.

16 And, again, the City has been stonewalled at
17 every turn attempting to obtain any documentation that
18 reflects that the developer actually paid \$45 million
19 or one dollar more than the seven and a half million
01:43:17 20 dollars that the purchase and sale agreement reflects.

21 So that brings us to today's hearing, your
22 Honor.

23 We have attempted now for 16 months to obtain
24 the documentation that will allow the City to
01:43:38 25 demonstrate the purchase price that the developer paid

01:43:43 1 for these 35 acres.

2 And so we filed the motion to compel to obtain
3 specific documentation that the developer has failed to
4 produce. And I'll go through them one by one.

01:44:04 5 They are seeking the Court to compel the
6 developer to produce all documents, all agreements
7 between the developer and the Peccole family and their
8 respective affiliates related to or in connection with
9 the acquisition of Badlands property. Again, that's
01:44:25 10 clearly within the ambit of this litigation because we
11 need to know -- and the Court will need to know for
12 making a determination on the threshold issue
13 between -- or before it whether or not there's been a
14 taking by comparing the acquisition price with the
01:44:40 15 value of the property subsequent to the City's actions.

16 So any agreement between the developer and the
17 Peccole family that's related to or connected to the
18 acquisition of the Badlands' property, it's clearly
19 relevant and needs to be produced.

01:45:00 20 Secondly, we've been seeking and are
21 requesting an order compelling the developer to produce
22 all documents pertinent to the consideration paid by
23 the developer in connection with its acquisition of the
24 Badlands property. We're seeking all documents related
01:45:16 25 to the BGC settlement agreement -- BGC meaning Badlands

01:45:24 1 Golf Course -- settlement agreement and attempted
2 takeover of the Badlands Golf Course by BGC Holdings
3 LLC because, again, that is relevant to the acquisition
4 price according to -- according to the developer. I
01:45:40 5 mean, according to the City, we had a document, a
6 purchase and sale agreement that says it was seven and
7 a half million dollars, but the developer is contending
8 that that is not the whole story.

9 So we need to get to the whole story.

01:45:54 10 We're also seeking an order compelling all
11 documents related to a restrictive covenant reported
12 against the Badlands property for the benefit of BGC
13 Holdings and Queensridge Towers LLC, Queensridge Towers
14 being on a parcel appurtenant to, adjacent to the
01:46:16 15 Badlands Golf Course. We're seeking all documents
16 related to the 2013 settlement agreement which
17 apparently is relevant because there was an election to
18 transfer 2.37 acres to Fore Stars which is, again,
19 the -- it's one of the plaintiffs, but it's the entity
01:46:42 20 that the developer purchased from the Peccoles in 2015.

21 We're also seeking all communications with the
22 developer's lenders which addressed the project
23 feasibility to make a determination as to the
24 reasonable investment-backed expectations of the
01:47:05 25 developer.

01:47:05 1 We're seeking all cost estimates for
2 developing the Badlands property to determine whether
3 or not, in fact, there has been a taking.

4 We're seeking -- and the next category -- the
01:47:18 5 next few categories, the developer has not even
6 contested in its opposition to the City's motion to
7 compel. So the City contends that all of these,
8 because they are not contested, should automatically
9 summarily be ordered to be produced: All
01:47:41 10 communications with the land expert, Greg Wardle; all
11 communications with their lenders; all cost estimates;
12 all communications with -- between the developer's
13 principals through email or text exchanges; all
14 non-privileged communications with its consultants,
01:47:59 15 Chris Kaempfer and Stephanie Allen; all communications
16 with the Peccole family relative to the acquisition of
17 the Badlands property; all documents related to the BGC
18 Holdings lawsuit or the restrictive covenant; and all
19 documents related to the 2013 settlement agreement.

01:48:24 20 All those documents that I just identified,
21 beginning with the communications with the land expert,
22 Greg Wardle, have not been opposed by the developer,
23 and so they should be, as a matter of course, ordered
24 to be produced.

01:48:40 25 Additionally, we're seeking an order

01:48:43 1 compelling the developer to produce all documents that
2 support its estimate of damages and its damage
3 calculation, which include all the documents related to
4 the 2015 offer to purchase and the August 2019 sale.

01:49:02 5 Also, we're seeking an order compelling the
6 developer to amend its response to interrogatory
7 number -- Interrogatory No. 20 in which the City has
8 requested that the developer identify all water rights
9 that are appurtenant to the Badlands property and
01:49:24 10 whether the developer has disposed of such water
11 rights.

12 That category also, your Honor, is not subject
13 to the developer's opposition. So, again, that
14 specific category identifying all water rights
01:49:46 15 appurtenant to Badlands property should be compelled as
16 a matter of course.

17 And, finally, your Honor, because we've been
18 chasing most of this documentation for 16 months, I
19 would submit to the Court that most of this
01:50:06 20 documentation, if the -- if the developer actually
21 intended to rely on the \$45 million contention --
22 contended purchase price of the property, all of this
23 documentation which would support that contention
24 should have been produced pursuant to NRCP 16.1 in the
01:50:34 25 developer's initial disclosures.

01:50:37 1 They weren't produced then. They should have
2 been produced in response to the City's first set of
3 requests for production of documents which was served
4 16 months ago on July 2nd, 2019, and they should have
01:50:54 5 been produced in subsequent requests that are
6 identified in our briefing.

7 So, again, we submit that because -- I mean,
8 I -- I have not gone through the City billings to
9 determine how much time has been spent trying to obtain
01:51:15 10 the documentation that should have been produced over a
11 year and a half ago, but I -- it's tens of thousands of
12 dollars, if not in excess of \$100,000, just trying to
13 get the developer to produce the documents and
14 information related to the consideration that was paid
01:51:38 15 for the acquisition of the Badlands Golf Course.

16 And for that reason, your Honor, we submit
17 that the Court should grant the City's motion in all
18 respects including the City's request for attorney's
19 fees.

01:51:54 20 THE COURT: Thank you, sir.

21 We'll go ahead, and we'll hear from the
22 plaintiff.

23 MR. LEAVITT: Thank you, your Honor. James
24 Leavitt on behalf of the plaintiff, 180 Land.

01:52:10 25 Just two preliminary issues that Mr. Ogilvie

01:52:13 1 addressed is he stated that in this case the landowner
2 must demonstrate an absolute total wipeout of the
3 property, and even 50 percent of the value loss to the
4 property is not a taking.

01:52:25 5 The Nevada Supreme Court has expressly
6 rejected that rule. The United States Supreme Court
7 has stated that states can provide greater protections
8 for their landowners than what is provided by the
9 federal government. And what Mr. Ogilvie has cited to
01:52:40 10 you as the total wipeout rule is a rule which was
11 adopted by the federal government but has been rejected
12 by the State of Nevada. In fact, to quote from a
13 Nevada Supreme Court case, in 2015 the Nevada Supreme
14 Court stated, and I quote:

01:52:54 15 "To constitute a taking under the Fifth
16 Amendment, it is not necessary that the
17 property be absolutely taken in the narrow
18 sense of that word to come within the
19 protection of this constitutional provision."

01:53:06 20 It is sufficient if the action by the
21 government involved -- again, a quote -- "a direct
22 interference with or disturbance of property rights."

23 The Nevada Supreme Court also stated in a
24 previous decision that some property right which is
01:53:20 25 directly connected to the ownership of the use of

01:53:22 1 property, if that property right is substantially
2 impaired or extinguished, then there's a taking.

3 So this rule that Mr. Ogilvie has cited to you
4 about a total wipeout has been expressly rejected by
01:53:34 5 the Nevada Supreme Court. I know it's going to be
6 addressed at a later date, but I wanted that noted for
7 the Court.

8 The second argument that Mr. Ogilvie makes is
9 that if the landowner paid a million dollars for the
01:53:46 10 property and in the after condition, after all of the
11 government's actions, the property is still worth a
12 million dollars, that rule has also been rejected by
13 the Nevada Supreme Court.

14 The Nevada Supreme Court, again, has been very
01:53:57 15 clear. If a property has value, it doesn't matter how
16 much the landowner paid for the property. If a
17 property has value and the Nevada -- and the government
18 engages in actions that substantially impair that
19 value, then there's a taking, and the government has to
01:54:12 20 pay just compensation for that taking.

21 So with that background, your Honor, I'll move
22 to the government's request here.

23 I agree with Mr. Ogilvie. And, in fact, I
24 called Mr. Ogilvie last night, and we had a
01:54:23 25 conversation -- he graciously returned my phone call.

01:54:26 1 We spoke at 5:00 o'clock. I said, I agree with you
2 that this is a very complicated case. It's not the
3 typical case where a landowner went out, and he
4 purchased a parcel of property and that purchase price
01:54:38 5 is very clear and that we have a deed and a declaration
6 of value setting out that value. That's not this case.
7 In fact, that's the opposite of this case.

8 Just by way of background, your Honor, this
9 acquisition of this 250-acre property which includes
01:54:56 10 the 35-acre property in this case involves a
11 complicated history. And Mr. Ogilvie and I discussed
12 this a little bit last night. But it involves an
13 extremely complicated history of approximately 20 years
14 of the principal, who's the principal of 180 Land in
01:55:16 15 this case -- his name is Yohan Lowie -- where he worked
16 with the Peccole family over a 20-year period to
17 acquire the rights to purchase this property.

18 So the right to acquire the 250-acre property,
19 the due diligence done to acquire that property, and
01:55:31 20 the consideration paid for the right to acquire the
21 property occurred over an approximately 20-year period.
22 It's over that approximately 20-year period that there
23 were several complicated transactions out of which was
24 born the right to acquire the 250-acre property.

01:55:49 25 And, your Honor, to complicate matters further

01:55:51 1 is at the end of that 20-year period, our client didn't
2 just purchase the 250-acre property; he purchased a
3 company that owned the 250-acre property, all of that
4 company's assets and accounts, and all of that
01:56:03 5 company's liabilities.

6 So I understand this issue. The City -- the
7 City wants two things. They want to fully understand
8 the complicated historical purchase of the property,
9 and they want to review the relevant documents
01:56:17 10 associated with that background.

11 Almost all of the discovery disputes arise out
12 of this complicated historical background.

13 Now, your Honor, we believe that it's not
14 relevant. And the reason we believe that it's not
01:56:32 15 relevant is because what happened 20 years ago, how
16 this transaction occurred over the past 20 years, the
17 consideration that was paid beginning in 2001 through
18 2005 and 2010, that consideration that was paid way
19 back then has absolutely nothing to do with the value
01:56:52 20 of this property in 2017. The statutory date of value
21 in this case is 2017.

22 What happened back in that time frame has
23 nothing to do with that -- with this value. What has
24 to do with this value today is to have an appraiser
01:57:05 25 identify the property, look at the comparable sales,

01:57:07 1 and determine the value today.

2 It doesn't matter, again, what happened during
3 the past. However, the City has made it an issue, and
4 so we've been trying to comply as best as we can and to
01:57:19 5 explain this issue to Mr. Ogilvie and to the City of
6 Las Vegas.

7 It hasn't worked. I'll just tell you right
8 now, your Honor, it hasn't worked. And the reason it
9 hasn't worked is because this historical transaction
01:57:32 10 that occurred that Mr. Ogilvie wants to find out about
11 that we believe is irrelevant occurred over a 20-year
12 period. And the only individual that can tell this
13 story is Mr. Lowie.

14 And I -- I'll share this with you. I shared
01:57:49 15 it with Mr. Ogilvie last night. It took me four and a
16 half straight hours of listening to Mr. Lowie and
17 having him explain this to fully understand that
18 transaction. And so I'm going to make a proposal. And
19 I talked to Mr. Ogilvie a little bit about this last
01:58:04 20 night, is that I propose that Mr. Lowie's deposition
21 occur on this one issue, the historical background
22 associated with the acquisition of the property, and
23 that we reserve for a later time all of the related
24 valuation issues that Mr. Lowie may testify to as of
01:58:25 25 2017. Now, we don't typically offer up our clients for

01:58:28 1 two depositions, but this is a unique circumstance that
2 warrants it.

3 Secondly, during that deposition there will be
4 several documents that are contracts that are
01:58:38 5 referenced. Your Honor, those contracts and those
6 documents do not include a purchase price for the
7 property. They do not include the consideration paid
8 for the property. Again, what happened is out of those
9 complicated land transaction deals was born the right

01:58:55 10 to purchase the property. Just one of those
11 complicated transactions that Mr. Lowie entered into
12 with the Peccole family involved the Queensridge
13 Towers, Tivoli Village, which is built now, Hualapai
14 Commons, which is on the corner of Hualapai and Sahara
01:59:12 15 here in Las Vegas; two other partners; the prior golf
16 course operator. Just one of them.

17 And so, your Honor, I believe that we can get
18 to the bottom of this. I believe we can resolve all of
19 Mr. Ogilvie's issues regarding this complicated
01:59:27 20 transaction, regarding these -- these contracts if
21 Mr. Lowie's deposition is taken.

22 And here's what I would recommend, your Honor,
23 is that within the next week, next two weeks -- I'll
24 double-check with our client. I believe it can happen.
01:59:40 25 Within the next two weeks we can schedule this

01:59:42 1 deposition. Again, limit it to this issue of this
2 complicated historical background.

3 At that time, some of these documents will be
4 referenced. I understand, from speaking with our
01:59:54 5 client, that there's some confidentiality issues that
6 involve individuals that were involved in those
7 transactions. We can work through those with
8 Mr. Ogilvie. If not with Mr. Ogilvie, then we can
9 submit them to this Court in camera, and we can work
02:00:06 10 those issues out with the Court in camera.

11 But here's my problem, your Honor, is that I
12 think in order to do this, and then to get this
13 information, the relevance of which Mr. Ogilvie thinks
14 is important, and also to provide it and for -- also
02:00:22 15 for our experts is we're going to need some time to cut
16 through this and then get it to the experts and -- and,
17 again, I spoke to Mr. Ogilvie about this last night. I
18 recommend that we continue everything for 45 days, we
19 allow this to occur, we work through these issues, we
02:00:39 20 give the parties time to get this information to their
21 experts, and then we defer these pending discovery
22 issues that are related to each one of these documents.

23 I wholeheartedly believe that if we do it this
24 way, your Honor, we're going to resolve this -- once
02:00:56 25 and for all these discovery issues, and at that point

02:00:59 1 in time I think Mr. Ogilvie will be satisfied.

2 And I'll tell you, your Honor, I -- and I was
3 going to save this for the status check tomorrow. I
4 mean, a second reason for this 45-day continuance is
02:01:10 5 we've -- I mean, we've faced significant difficulties
6 obtaining the information and data necessary to
7 exchange our expert reports. I brought -- I expressed
8 some of that frustration at our last status check
9 hearing. We identified an issue just very recently
02:01:26 10 that may even require additional expert work to
11 address.

12 And, your Honor, our office has been doing
13 this eminent domain for about 30 years, and we rarely,
14 if ever -- it's extraordinarily rare that we ever ask
02:01:38 15 for a continuance because we're the plaintiff seeking
16 compensation. But due to the unique circumstances of
17 this case, we can't meet that -- the pending discovery
18 dates any way.

19 And I don't do it lightly, your Honor. I
02:01:52 20 mean, I spoke to our client last night who's not been
21 entirely happy with continuances, but I explained we
22 need to make this request so that the pending discovery
23 issues can be resolved once and for all, that
24 information can be given to the experts, and so that we
02:02:06 25 can have the adequate time to produce the expert

02:02:09 1 reports.

2 So on that issue, your Honor, so there's
3 two -- I'd recommend we stay it -- or not stay but
4 continue everything for 45 days. I understand, your
02:02:20 5 Honor, that that would kick our trial date that we have
6 vehemently argued we need to keep, but I understand it
7 would kick that date.

8 First we'll -- and there's two reasons for
9 that. Number one, I think we can resolve most, if not
02:02:36 10 all, of the pending discovery issues.

11 And, second, it will allow us to prepare this
12 case adequately for trial. I mean, I went back and
13 read the COVID orders, the administrative order.

14 -- (telephonic audio glitch) -- So that's
02:02:58 15 where we're at. And so, your Honor, that's what we're
16 asking for here. And, your Honor --

17 THE COURT REPORTER: Mr. Leavitt, I'm sorry.
18 Mr. Leavitt, this is the court reporter. I didn't hear
19 for a while. Were you silent or did I miss something?

02:03:16 20 MR. LEAVITT: No, I'm speaking now.

21 THE COURT REPORTER: Okay.

22 MR. LEAVITT: Okay. And so, your Honor, and I
23 don't know if you heard my last part there, but there
24 is that COVID order 20-09 that states that judges are
02:03:27 25 encouraged to liberally grant continuances to allow

02:03:30 1 time for preparation. And that's what we're asking for
2 here, is it would be a twofold benefit.

3 Number one, it would allow us time to have
4 Mr. Lowie's deposition taken so that this complicated
02:03:41 5 transaction can be explained fully to Mr. Ogilvie,
6 because I will tell you a lot of the things that he's
7 asking for are entirely irrelevant.

8 And I'll go through a handful of them. He's
9 asking for all documents related to the 2013 settlement
02:03:55 10 agreement including Queensridge Towers LLC's election
11 to transfer 2.37 acres to Fore Stars. In 2013, the
12 landowners were neither Queensridge Towers LLC nor Fore
13 Stars. They weren't involved in that transaction at
14 all.

02:04:09 15 And, see, Mr. Lowie can explain this
16 historical path to Mr. Ogilvie so that he can
17 understand it. And at that point in time, all of these
18 documents that -- and I'm assuming that during the
19 deposition, Mr. Ogilvie will say, Hey, well, what
02:04:24 20 document shows that transaction that occurred? And we
21 can discuss the confidentiality provision of that
22 document at that time.

23 But, your Honor, I will briefly go through
24 some -- the documents that the government has asked for
02:04:35 25 here, all agreements between the landowners and Peccole

02:04:38 1 related to or connected to the acquisition. --
2 (telephonic audio glitch) --
3 THE COURT REPORTER: I can't hear again. Can
4 anyone else hear?
02:04:40 5 THE COURT: Yeah, I can't --
6 MS. HAM: Well, no.
7 THE COURT: He faded. We'll see if he comes
8 back online.
9 MR. LEAVITT: Judge, can you hear me now, your
02:05:00 10 Honor?
11 THE COURT: Yes, I can.
12 MS. HAM: Yeah.
13 THE COURT: Here's --
14 MR. LEAVITT: Okay.
02:05:04 15 THE COURT: -- my thoughts. And I'll let you
16 continue. But here's my thoughts. And I do understand
17 this case is nuanced. And on some level it might be
18 complex. But there's a couple issues I'm concerned
19 about. And I do understand the potential tension
02:05:19 20 between Rule 16.1, computation of damages are required
21 early on in the case. I mean, I get that.
22 I do understand also this is an inverse
23 condemnation case. As a result, the experts will
24 ultimately testify as to the value. Just as important
02:05:44 25 too -- and what I mean by "value" is value of potential

02:05:47 1 taking is whether there was one or not.

2 But just as important too, I think I have to
3 point this out: When it comes to issues regarding
4 relevancy or whether certain discovery is relevant,
02:05:57 5 there's a much broader brush as it relates to relevancy
6 for the purposes of discovery versus admissibility at
7 the time of trial. And so I have all these competing
8 tensions in this case, and I get that.

9 And so I'm looking at it from this
02:06:12 10 perspective: Whether or not the purchase price is
11 relevant or not or the amount of consideration paid is
12 relevant or not for the ultimate decision-making in
13 this case, I can't say.

14 But it seems to me, as a baseline, the
02:06:34 15 government probably has a right to find out, okay, how
16 did this transaction occur? Just as important too,
17 what was paid?

18 And last, but not least, and this is -- I just
19 look back at my time taking depositions of experts in
02:06:53 20 more complex cases, I would always like to have all
21 documents I need in front of me to prepare for that
22 deposition and documents that the witnesses potentially
23 will rely upon, because unless I have that complete
24 file history, I don't know what's important and
02:07:11 25 necessarily what's not important.

02:07:12 1 And when it comes to depositions, typically
2 you get one bite, and that's all you get. We all
3 understand that.

4 And so I'm looking at that, and I understand
02:07:21 5 what Mr. Ogilvie's request is. And I -- and I have a
6 checklist of all the things that he's looking -- that
7 he's requesting. And so that's my -- that's kind of
8 how I see this.

9 And we have to come to some sort of resolution
02:07:41 10 on this so this case can move forward. As far as time
11 is concerned, I'm not really concerned about that, to
12 be candid with everyone. I want to get this case
13 moving in this regard.

14 We got -- we have to have a baseline upon
02:07:55 15 which both parties can prepare their case.

16 And I'm not saying whether I'll accept
17 Mr. Ogilvie's position at the end of the day, but I do
18 feel he has a right, like any party to a complex
19 litigation, to develop their case.

02:08:12 20 You know, and maybe he's right. Maybe he's
21 wrong. I don't know. But -- and ultimately I would
22 anticipate there will be some law and motion practice
23 at the end of the day regarding admissibility of
24 certain opinions from the experts.

02:08:30 25 On some level maybe I might have to perform a

02:08:34 1 Hallmark analysis as it pertains to the admissibility
2 of the expert opinions. Maybe I'll have to look at
3 qualification, maybe the assistance requirement and/or
4 limited in scope. I don't know. But I do know this:

02:08:50 5 We have to get this case moving. We just do.

6 And, once again, I'm not concerned about
7 continuances and the like. I'm concerned about making
8 sure both parties have a full and fair opportunity to
9 develop their case.

02:09:04 10 And, ultimately, someone will win. Someone
11 will lose. Maybe the case settles. I don't know. But
12 that's my overwhelming concern at this point. I don't
13 mind telling everybody what my thoughts are on that
14 specific issue.

02:09:18 15 But with that in mind, I don't want to cut you
16 off, Mr. Leavitt. I don't. And, of course, I want to
17 hear from Mr. Ogilvie once you're done.

18 And whether there's an agreement or not in
19 place, I don't know. But I do know this: We have to
02:09:31 20 get the case moving. We just do.

21 MS. HAM: Your Honor, this is -- this is
22 Elizabeth Ghanem Ham. I'm sorry.

23 I'm sorry, Mr. Leavitt.

24 I just want to address one of your statements
02:09:45 25 and so we're very clear as it relates to the purchase

02:09:50 1 price. And I think it's important so that you
2 understand we answered the question both as an
3 interrogatory, what did you pay, 45 million; and both
4 of the requests for production. And we had a 2.34
02:10:04 5 conference about it and responded again. There are no
6 documents that state that the landowner paid the
7 45 million for the golf course. There are simply no
8 documents that state that.

9 Having -- does that mean that that's not what
02:10:17 10 we paid for it? It certainly does not. Our position
11 will remain that that is what was paid for the course.
12 So we always say -- and how these 2.34 conferences go,
13 which I've been involved in, is that the government
14 will say, Well, we don't understand. But it's not --
02:10:31 15 I'm not being deposed at the 2.34 conferences, and it's
16 not my job to explain it. There are other tools
17 available.

18 I understand that when you take a deposition
19 that you want every document in front of you, but there
02:10:42 20 are simply none. So I just want it so you understand.
21 It's not that we're not answering. We are answering
22 very truthfully.

23 Are there documents that support eventually
24 this position through other transactions? Yes.

02:10:57 25 Do they relate to this? Not necessarily.

02:10:58 1 Which is why we offered this deposition so he can get
2 an understanding and then maybe hone in. We're
3 certainly not hiding anything. We're not refusing to
4 produce anything.

02:11:09 5 And so I just want you to understand that it's
6 not that we say we're not giving this to you. We are
7 saying there are no documents that exist that say, as
8 the request was asked, the landowner paid 45 million
9 for the golf course. No document states that.

02:11:26 10 So it is an involved 20-year history with the
11 sellers that I think is important. So we've offered
12 that. And I just want to be clear so that you
13 understand. And I certainly understand you want every
14 document that may exist that is involved in this case.

02:11:41 15 But it's been so far reaching and so beyond.

16 But our answers are all truthful. So, you
17 know, to say that we've not produced documents, they
18 simply don't exist. It doesn't mean that our -- that
19 our testimony is going to be any different.

02:11:57 20 And so if you want to understand that, which
21 is why we offered this, this sort of first layer: Take
22 the deposition. And we've said it over and over again
23 during the 2.34 conferences. There are other discovery
24 tools available to you then.

02:12:09 25 And so I just wanted that to be clear with

02:12:12 1 your position as to how it relates to discovery and how
2 this matter should proceed. But certainly Mr. Leavitt
3 can address all the other items that I think are sort
4 of in line with what happened with that particular
02:12:25 5 question.

6 THE COURT: All right. And, ma'am, wait,
7 wait. And I appreciate that. And for the record, I
8 never have a position. I just want to make sure I'm
9 really clear on that, because I don't.

02:12:36 10 And I do understand from time to time -- and
11 this happens sometimes in complex cases, sometimes in
12 simple cases -- sometimes documents that are being
13 requested do not exist. And so under those
14 circumstances -- and I don't know what the discovery
02:12:54 15 request was -- I mean, the discovery answer or response
16 was, but maybe as it relates to, I guess, one of the
17 items would be a purchase agreement or something of
18 that ilk, maybe the response should be it doesn't
19 exist; there is no such documentation, or something
02:13:16 20 like that. I mean, but -- I get that. I understand
21 that.

22 MS. HAM: Yeah.

23 MR. LEAVITT: And, your Honor, that's -- and I
24 appreciate Ms. Ghanem Ham's explanation there. And
02:13:28 25 that's what's happened during some of these responses

02:13:31 1 and during these 2.34 conferences -- and Ms. Ghanem Ham
2 has been handling them; I haven't been in most of
3 them -- is that there has been an explanation these
4 documents don't exist, and there's been a retort that,
02:13:42 5 well, they have to exist. And they don't, your Honor.

6 And that's why I believe that -- and I got to
7 take a step back. I agree wholeheartedly with what you
8 said, your Honor; although, that we are contesting that
9 these issues are not relevant, I understand that the
02:13:59 10 government is entitled to get these documents. I
11 understand that the issue of the purchase price will be
12 fully briefed for you at a later date.

13 And the questions that are really being
14 presented, that you presented here, your Honor, is how
02:14:12 15 did this transaction occur? What was paid? What
16 happened?

17 And the problem here is is that there is a
18 massive disconnect. And the massive disconnect is that
19 the government has not taken -- deposed Mr. Lowie yet.
02:14:29 20 And if they depose him, I think that all of these
21 issues, every single one of these pending issues that
22 are before you right now, I believe every single one of
23 them will be resolved through that process.

24 And we can take it in layers. I understand
02:14:43 25 that in complex litigation, sometimes we take it in

02:14:46 1 layers.

2 And so, your Honor, that's why we made the
3 proposal. Let's -- I don't want to call it a stay, but
4 let's continue everything for 45 days. Mr. Ogilvie and
02:14:57 5 I have been very good on agreeing to what those dates
6 would be. Again, the trial date is going to have to be
7 slid to the next stack or maybe the stack after that.
8 And then this issue can be once and for all resolved.

9 There's been these accusations that we somehow
02:15:14 10 hid documents or that we're hiding things from the
11 government. That's -- nothing could be further from
12 the truth. It's just a very complex transaction that
13 has to be explained.

14 And so, your Honor, if we -- again, if I can
02:15:27 15 go back to some of these requests, one of -- the second
16 request was all communications with the Peccole family.
17 There is no time limit on that request. There is no
18 parameters at all.

19 Mr. Lowie began working with the Peccoles in
02:15:44 20 developing properties in Queensridge and in these
21 complicated transactions over 20 years ago. It would
22 be absolutely overly burdensome and impossible to get
23 every single communication there.

24 We have, however, provided everything from
02:15:58 25 2014 forward to the City. So they have those

02:16:01 1 documents.

2 All documents pertinent to the consideration
3 paid by developer in connection with the property.

4 Again, I believe that that will be resolved through a
02:16:11 5 deposition. The testimony will lay out what the
6 consideration was that was paid and if, during that
7 deposition, there are contracts that become relevant
8 that are discoverable, we can discuss that at that
9 time, your Honor.

02:16:26 10 The other request is all documents related to
11 BGC settlement agreement. BGC Holding is a defunct
12 LLC, and the landowners don't have the documents from
13 that company. We can't produce that.

14 All documents related to the restrictive
02:16:39 15 covenant reported against the 250-acre property. We
16 have produced that document. Now, there might be
17 another document, your Honor, that we discussed last
18 night that is a release of that restrictive covenant.

19 What happened is the Queensridge Towers which
02:16:56 20 was built adjacent to the 250-acre property knew that
21 the 250-acre property could be developed. And because
22 of that, they wanted a restrictive covenant during the
23 time they were selling their units. After they sold
24 their units, then they released the 250-acre property
02:17:12 25 for development. And I believe we have -- if that

02:17:15 1 release has not been produced, we will produce that.

2 Again, all documents related to the 2013
3 settlement agreement, we were not a party to that, so
4 we don't have that document.

02:17:24 5 And all the communications between the lender
6 and the landowner, I believe that that's been addressed
7 at a 2.34 conference. We've produced the agreement.
8 We don't believe there are any further communications,
9 but we'll double-check.

02:17:41 10 The government also asked for all cost
11 estimates for the -- to develop the 250-acre property.
12 First of all, there are none. The way the landowners
13 work, your Honor, is they have in-house preliminary
14 estimates for their properties, for their drainage
02:17:57 15 issues. They don't go out and hire people to do that.

16 And I think, again, that can be explained
17 through Mr. Lowie's deposition where he talks about the
18 historical purchase of the property.

19 Now, I'll tell you -- I'll tell the Court
02:18:11 20 these cost estimates are being done for the 35-acre
21 property. Those will be produced as part of an
22 exchange. But they were never done for this specific
23 35-acre property, because this 35-acre property doesn't
24 have drainage issues.

02:18:25 25 Your Honor, they asked for communications

02:18:27 1 between Yohan Lowie and Vickie DeHart. We've given
2 them. They believe there's more. We don't have any
3 more.

4 They've asked for all communications between
02:18:37 5 Chris Kaempfer and Stephanie Allen and the landowner.
6 Your Honor, that is an incredibly overburdensome
7 request because it involves, again, five years of
8 attempting to develop the property where the landowners
9 met with their attorney almost daily during that
02:18:52 10 period. We -- at least weekly.

11 And if -- and we've produced to them -- to the
12 government all of the nonprivileged documents. But the
13 government said they want a privilege log. If they
14 want that privilege log, the government will have to
02:19:06 15 pay to have that done under NRCP Rule 34(d) which
16 requires a party asking for these type of documents to
17 pay for that.

18 I think they've abandoned that. I'm not sure.
19 But if they want that privilege log, we're happy to do
02:19:19 20 it, but we're not going to pay for it because that's
21 going to take weeks of work and thousands of pages of
22 documents, and a third party will have to be retained
23 to identify those documents and identify the ones that
24 are privileged under the attorney-client privilege.

02:19:35 25 The other documents they ask for that support

02:19:38 1 the estimate of damage calculations related to the 2015
2 offer and the August 2019 sale. And you mentioned
3 that, your Honor. The computation of damages, the
4 estimate.

02:19:49 5 A 2.34 conference was held yesterday and, from
6 what I understand, Ms. Ghanem Ham agreed to produce the
7 LOI and certain other agreements to further supplement
8 that response.

9 And, your Honor, in regards to the -- finally,
02:20:05 10 in regards to Interrogatory No. 20, your Honor, there
11 has been what we've -- approximately 24 interrogatories
12 have been issued on the landowner, which with the
13 subparts we believe it exceeds 40. But we responded to
14 them all. And the government has identified one out of
02:20:20 15 those 40 that it believes is deficient, and it's in
16 regards to the water. We have responded adequately,
17 the best that we can to that response. We stated that
18 there are -- (telephonic audio glitch) --

19 THE COURT REPORTER: Mr. Leavitt, we can't
02:20:36 20 hear you.

21 MR. LEAVITT: Okay. Can you hear me now?

22 THE COURT REPORTER: Yes.

23 MR. LEAVITT: Okay. And so we responded to
24 that Interrogatory No. 20 based upon information we
02:20:47 25 received from the state engineer, the highest authority

02:20:50 1 on water rights in the state of Nevada. That's how we
2 responded to that request.

3 There are water documents that are public
4 documents that the government obtained -- (telephonic
02:20:58 5 audio glitch) --

6 THE COURT REPORTER: You're cutting out again.

7 MR. LEAVITT: I'm not sure what more we can
8 do, your Honor, with the Interrogatory No. 20 other
9 than respond to it the best that we can.

02:21:12 10 So, your Honor, again, if I can go back to my
11 original argument or my -- sorry -- my original
12 position was I think we can get this resolved through
13 layers, your Honor. And the first layer on the
14 historical background of the property would be to
02:21:30 15 conduct the deposition of Mr. Lowie. And then we can
16 move from there. Again, I believe that will resolve at
17 least ten of the pending issues that are before you
18 right now.

19 And just very briefly, on the issue of
02:21:43 20 attorney's fees, your Honor, we're in an unprecedented
21 time. It's been extraordinarily difficult to litigate
22 at this time. Everybody recognizes that. And --
23 (telephonic audio glitch) --

24 THE COURT REPORTER: You're cutting out again,
02:22:03 25 Mr. Leavitt.

02:22:03 1 MR. LEAVITT: Let me try and speak into the
2 phone a little bit better.

3 The Rule 37 that says that attorney's fees
4 must be granted where a motion to compel is granted,
02:22:12 5 that rule also has an exception that says the Court
6 must not order that payment if the opposing party's
7 nondisclosure, response, or objection was substantially
8 justified or other circumstances makes an award of
9 expenses unjust.

02:22:29 10 Again, this is that case which involves
11 complex issues. We're at a very unique time. We're
12 doing our very best to respond to what the government
13 is asking for, but they're assuming certain facts that
14 don't exist. And we can resolve all of that right now
02:22:46 15 with Mr. Lowie's deposition, your Honor.

16 So with that, I'll submit, your Honor.

17 THE COURT: Thank you, sir.

18 Mr. Ogilvie.

19 MR. OGILVIE: Yes. Thank you, your Honor.

02:23:00 20 My argument would have been very different at
21 the outset. I made a determination to limit my
22 argument to the merits of the motion and omit the
23 conversation that I had with Mr. Leavitt yesterday,
24 because, as you know, your Honor, frequently counsel
02:23:26 25 have off-the-record communications, and Jim and I --

02:23:32 1 Mr. Leavitt and I have, throughout this case, had
2 off-the-record communications. I believe that without
3 Mr. Leavitt expressly requesting that that conversation
4 be off the record, I believe that perhaps he intended
02:23:52 5 it to be off the record. So now that it's not, let me
6 address them. Let me address that conversation.

7 We very well may agree to the proposal, but I
8 thought the proposal was backwards. The proposal is
9 here if the developer will produce Mr. Lowie for a
02:24:26 10 deposition related to -- exclusively related to these
11 transactions, and then based on these transactions you
12 can make a request for documents that we may or may not
13 agree to.

14 As the Court recognized, when you take a
02:24:44 15 deposition, you want all of the documents in front of
16 you.

17 And the City's been wanting to take
18 Mr. Lowie's deposition now for over a year. But we
19 have continued to delay the taking of that deposition
02:25:02 20 for that very reason. And I think I probably said this
21 at a status conference: Before I take Mr. Lowie's
22 deposition, I want every document that the City is
23 entitled to relative to the transactions that the
24 developer believes support its position that it paid
02:25:25 25 \$45 million for this property.

02:25:28 1 And I want to address a point that Ms. Ghanem
2 Ham made a few moments ago. And that is they said that
3 the developer responded that there are no documents
4 that state that the property was approximately -- the
02:25:50 5 property was acquired for \$45 million.

6 That was not the request.

7 The request was not provide us documents,
8 every document that state that the purchase price was
9 \$45 million. This is how that -- that -- to put that
02:26:10 10 in context, this is how that went down: The -- in
11 answer to Interrogatory 19 that the City served on
12 180 Land, 180 Land stated the aggregate of
13 consideration given to the Peccole family for the
14 former Badlands Golf Course was approximately
02:26:34 15 \$45 million.

16 That was the first that the City had heard of
17 this \$45 million.

18 So the City, upon receiving that
19 interrogatory, made the following request for
02:26:48 20 production of documents. Produce all documents that
21 support your first supplemental answer to Interrogatory
22 No. 19 stating that the aggregate consideration given
23 to the Peccole family for the former Badlands Golf
24 Course property was approximately \$45 million.

02:27:06 25 It did not say -- again, it did not say

02:27:09 1 produce documents that state that you paid \$45 million.
2 It said produce all documents that support your
3 contention that you paid \$45 million.

4 And going to -- going to the universal
02:27:28 5 argument that I'm hearing from the developer today,
6 that, you know, these go back 20 years, very
7 sophisticated, complex transactions, going to take a
8 long time. That's fine. I mean, that's not -- that is
9 not the litmus test as to whether or not it should be
02:27:48 10 produced.

11 The litmus test is if it's requested, if it's
12 not overly burdensome, and if there's some relevance.
13 The relevance is that the developers claimed that it
14 did acquire the 250 acres for \$45 million, and the City
02:28:09 15 requested all documents that support that.

16 It doesn't have to -- it doesn't have to even
17 have a dollar figure in the document to be relevant and
18 responsive to that document request.

19 So my response is this, your Honor: Yes, I
02:28:28 20 would love to take Mr. Lowie's deposition, but I want
21 every document that relates to every one of these
22 transactions that support their contention of the
23 \$45 million purchase price. Which, from what I'm
24 listening to -- what I'm hearing from Mr. Leavitt is an
02:28:51 25 enormous number of contracts, and other documents

02:28:57 1 relating to this complex series of transactions. The
2 City is entitled to them, and the City makes a request
3 of the Court today that it compel the developer to
4 produce all of those documents.

02:29:19 5 THE COURT: All right. Is there anything else
6 as far as that issue is concerned, Mr. Leavitt?
7 Because I don't mind sharing this with you, sir. I was
8 sitting here. Although I said it slightly different
9 than Mr. Ogilvie, but one of my notes reflected that
02:29:34 10 all documents relied upon by plaintiff to support their
11 \$45 million evaluation.

12 It seems to me that's a reasonable request,
13 whether it's checks or land transfers or fine art
14 transfer. I mean, there has to be a basis. And we
02:29:59 15 can't overlook this one fact. Ultimately, when it
16 comes to computation of damages, that's going to be the
17 plaintiff's burden in this case.

18 And so you can't -- you can't not produce it.
19 And just as important too, and I think everyone agrees
02:30:16 20 with this -- if you're going to take someone's
21 deposition, you don't want to go in and they testify as
22 to documents that you haven't had a chance to review.

23 You have to have the document.

24 MR. LEAVITT: And I understand that, your
02:30:31 25 Honor. And I'm going to let Ms. Ghanem Ham address

02:30:34 1 that issue in just one moment.

2 But I did want to address one issue that
3 Mr. Ogilvie brought up regarding our communication last
4 night. I did not intend to disclose anything that
02:30:43 5 Mr. Ogilvie told me that was intended to be off the
6 record, and I was very careful to make sure that I just
7 advised him that I would be making this request today.
8 It wasn't intended in any way to disclose any
9 conversations we had off the record. And I apologize
02:30:58 10 if that -- if it came off that way. That was not what
11 was intended.

12 But with that said -- I'm sorry. Go ahead.

13 MR. OGILVIE: I --

14 THE COURT: No. No, I'm not even concerned
02:31:11 15 about that, gentlemen, to be really candid with you.

16 MR. OGILVIE: Judge, this is George Ogilvie.
17 And that was not -- that was not the point that I was
18 trying to make. I was just advising the Court of the
19 reason for me not addressing Mr. Leavitt's proposal in
02:31:25 20 my initial argument. I just felt that if he may have
21 intended for the communications to be confidential.
22 I'm not -- I'm not -- I'm not suggesting otherwise.

23 THE COURT: Okay. I understand.

24 MR. LEAVITT: And I appreciate that.

02:31:38 25 All right. And I don't know if Ms. Ghanem Ham

02:31:40 1 is still on the phone here with us.

2 MS. HAM: I'm still on the phone. I am still
3 on the phone.

4 And so you wanted me to respond to
02:31:47 5 specifically in regard to our response to
6 interrogatory -- I forget which number it was -- where
7 we stated that the consideration given for the former
8 Badlands Golf Course property was 45 million. And our
9 response to that request for production was that -- and
02:32:07 10 we revised it, but the request of the government, the
11 defendant, that said that there are no documents,
12 again, as I stated to you earlier, your Honor, that
13 within the plaintiff's custody and control that states
14 that the aggregate of consideration given to the
02:32:24 15 Peccole family for the former Badlands Golf Course
16 property was 45 million.

17 There is a multitude in binders and binders of
18 documents that memorialize this complicated transaction
19 to ultimately finalize the dealings with -- that they
02:32:39 20 were already in process with the Peccoles, some of
21 which Mr. Leavitt has already referenced previously in
22 the different properties and different ventures whether
23 they were joint ventures or partnerships or whatever
24 they were in multitude of properties, and none of them
02:32:56 25 will address that.

02:32:57 1 They have already requested the deposition of
2 Mr. Baines, who I believe is being put forward as
3 either the PMK or in some regard on the Peccole side
4 who can answer these questions as well.

02:33:14 5 There's already been deposition testimony
6 that's been provided that sort of confirms this sort of
7 out of this relationship and all other transactions
8 that was born in this right.

9 These are highly confidential documents that
02:33:28 10 involve several other parties. If the Court is going
11 to order that we -- that we produce them, they must be
12 produced under confidentiality provision. And I would
13 request that the Court review them first in camera
14 because we are in a position where the City has
02:33:45 15 continued and repeatedly continues to be in bed really
16 with the homeowners, for lack of a better term, who
17 started litigation with us before the year even
18 finished of owning this -- or this entity Fore Stars
19 that owned the land. And through the City's actions
02:34:01 20 which have been so egregious and outrageous, everything
21 stemming from intending to destroy the company beyond
22 even just the development of this property, but seeking
23 intel through a private investigator on some of our
24 principals. They have reached out to every
02:34:17 25 relationship that we have had one way or another,

02:34:19 1 whether it's been the City directly through their
2 counsel members or the homeowners that they have worked
3 with to destroy relationships, to change positions. So
4 we are highly guarded over here, more than usual,
02:34:32 5 because of what's gone on for the past five years.

6 And they -- the City doesn't want you to know
7 what they have done. They don't want you to know what
8 they have said. They don't want -- they don't want to
9 get to that issue. They keep trying to dismiss our
02:34:45 10 case because what they have done is outrageous, and
11 they continue their outrageous conduct through this
12 discovery.

13 I take very great issue with how Mr. Ogilvie
14 has raised what has gone on here and that it's taken
02:34:58 15 all these months to get it. When he agreed to
16 extensions of time, he can't now complain about it when
17 we're in the middle of a pandemic complaining that we
18 didn't produce these documents. The minute we got the
19 protective order from the discovery commissioner, the
02:35:13 20 next day we produced documents. We have produced
21 thousands of pages of documents.

22 So, again, if you are going to order that
23 these documents be produced, I ask that you first
24 review them. They are binders and binders of
02:35:25 25 complicated, involved transactions that will never

02:35:31 1 mention the transaction of the golf course. It was
2 honored for this price because of the family dealings
3 and because of these years -- years of dealings with
4 the Peccole family.

02:35:39 5 So this is why we thought it would be
6 important and we continue to offer up information and
7 go beyond what we think is -- is related to either the
8 claims for defenses of this case in order to appease
9 the City, but they keep digging deeper into other
02:35:57 10 things which have nothing to do with it.

11 I understand why they would want the documents
12 in front of them, but they are not going to be
13 relevant. They are not going to show this number. The
14 only thing that will show that is the explanation.

02:36:07 15 So, again, if you're inclined to order it, I
16 would ask that it be 100 percent protected. We may
17 have to alert some other parties. I don't know how
18 they'll feel about this being produced in any other
19 manner beyond an in-camera review, and then you can
02:36:22 20 make the determination if at all it's relevant to this
21 case and this action.

22 And that's -- and that's all I can offer in
23 regards to that. Our positions and our responses have
24 been 100 percent accurate and truthful.

02:36:37 25 And so, you know, I -- I -- we have continued

02:36:43 1 to offer up Mr. Lowie or anyone in the company should
2 they want that to ask that question. We are saying,
3 you know, we don't want it to be deposed twice, but if
4 this will help resolve these issues, we're willing to
02:36:56 5 do it.

6 And so, again, I would ask that if you're
7 going to order that these documents be released, that
8 it be done in the proper manner and in the way that we
9 requested.

02:37:06 10 THE COURT: Well, there's a lot there to
11 unwind. But, ultimately --

12 MS. HAM: Yes.

13 THE COURT: -- if the plaintiff is taking the
14 position that they paid \$45 million or they've paid \$45
02:37:20 15 million in consideration or that's the value of what
16 they paid for the 35 acres at issue, it's their burden
17 to produce reliable testimony and documentation to
18 support that claim. And, ultimately, that's what --
19 what -- what this aspect of the case, I would
02:37:39 20 anticipate, is about.

21 When it comes to confidentiality and the like,
22 I got to go back to -- I guess it's roman numeral
23 Rule VII or whatever it is from our Nevada Supreme
24 Court. They have specific rules as it relates to
02:37:55 25 confidentiality. Just as important too, when you use

02:38:00 1 the Court system, that's another avenue we have to look
2 at as to whether documents are confidential or not. I
3 just can't arbitrarily make that determination.

4 Any determination I make as to
02:38:14 5 confidentiality, I have to make specific findings of
6 fact as to why it's confidential pursuant to the rule.
7 That's another issue.

8 But at the end of the day -- and this is all I
9 can say is this: That if there's transactions and/or
02:38:33 10 documents out there that support the valuation property
11 by the plaintiff as to the purchase price, it seems to
12 me potentially those might be germane to the case.

13 MS. HAM: And, your Honor, this may be
14 splitting hairs. It's not that they support the
02:38:55 15 \$45 million answer that we provided in regard to this
16 request.

17 They support the 20-year history that from
18 those transactions was born this right to purchase it
19 for the -- for the 15 million, which included the water
02:39:16 20 rights. Then that was divided later.

21 So they're not going to reference at all the
22 golf course property.

23 It's -- it's, you know, again, I don't mean
24 to -- it is the testimony of Mr. Lowie what was given
02:39:35 25 over the years, but it is not -- these documents will

02:39:40 1 not state that. They will not support that. It will
2 only support what his testimony will ultimately be,
3 that, yes, all of these transactions took place; yes,
4 they have all developed these other properties and
02:39:54 5 parcels and the Towers and Tivoli and so on and so
6 forth. But they are not going to say anything about
7 the Badlands Golf Course property.

8 So that's the issue that we have. It's not
9 going to be relevant whatsoever beyond his testimony,
02:40:09 10 which was why we think -- I think that you're only
11 going to understand that once you see the testimony,
12 which he has testified to before.

13 So, you know, I -- I understand what -- it's
14 really difficult to understand without knowing the
02:40:26 15 story. And that's all I can say, which is why we
16 offered him up to tell the story.

17 THE COURT: Well, but, I mean, I kind of get
18 that. But I would anticipate that if it's a series of
19 transactions and relationships, as you go down the path
02:40:43 20 of each transaction, there has to be value and
21 consideration potentially that would couple with the
22 next transaction and the next transaction that would be
23 the basis for the valuation offered as to potentially
24 what the purchase price would be.

02:41:01 25 And that's kind of my point. Because at the

02:41:04 1 end of the day, it's going to be his burden to
2 establish that. And if he can't, then that's a
3 problem.

4 MS. HAM: Yeah, I understand what you're
02:41:14 5 saying.

6 THE COURT: Potentially.

7 MS. HAM: Yeah. Again, without knowing the
8 entire story, it's difficult to explain. The only
9 other thing that I can offer that may give them some
02:41:24 10 comfort -- I assume they have it already -- is
11 deposition testimony that was given in another case
12 that relates specifically to the consideration given.
13 Perhaps they want to review that and then determine if
14 the documents will be necessary or not.

02:41:42 15 But I don't -- I don't -- they're not going to
16 ever say this ultimately gives us the right of first
17 refusal on the property down the line for this amount
18 of money. It just doesn't exist. They only have to do
19 with all these other transactions that took place.

02:41:59 20 They never referenced the course in that manner. So I
21 don't know how to explain it without -- you know, I
22 can't speak for Mr. Lowie. I only know --

23 THE COURT: But ultimately --

24 (Unreportable cross-talk)

02:42:12 25 THE COURT: I would -- I would anticipate

02:42:14 1 ultimately in open court he's going to have to testify
2 to that and the basis of his evaluation, right?

3 MS. HAM: Yes.

4 THE COURT: And just as important too,
02:42:26 5 potentially he might have to produce documents that
6 support that and talk about transactions.

7 MR. LEAVITT: Sorry, your Honor. It's James
8 Leavitt again --

9 THE COURT: Yes.

02:42:36 10 MR. LEAVITT: -- on behalf of the landowner.

11 We don't anticipate producing that during
12 trial. His testimony will be what the value of the
13 property is as of 2017. As I stated previously, we
14 believe that the purchase price evidence is entirely
02:42:54 15 irrelevant, so we won't be producing that. He'll be
16 testifying based upon actual comparable sales, actual
17 transactions that occurred to compare to the property
18 in 2017 to arrive at his value. This whole purchase
19 price issue that the government is bringing up is
02:43:10 20 something that they are using as a basis to try and
21 show that there's no taking or to devalue the property.

22 So we will not --

23 THE COURT: And --

24 (Unreportable cross-talk).

02:43:19 25 MR. LEAVITT: -- this evidence.

02:43:20 1 THE COURT: And, Mr. Leavitt, I understand
2 that. I do.

3 MR. LEAVITT: Okay.

4 THE COURT: I mean, I get that. I understand
02:43:25 5 that.

6 But, see, remember at the very outset of this
7 academic discussion, there's a distinction between --
8 and we know this -- what's relevant for the purposes of
9 trial and what's relevant for the purposes of
02:43:37 10 discovery. Whether the consideration paid as it
11 relates to purchase price is relevant at this time, I
12 can't say. I mean, I just -- I don't know. But at
13 some point I'm going to have to make that decision
14 probably, you know, and I understand that.

02:43:55 15 But I don't know if I can just arbitrarily say
16 at this stage of the litigation that it's not relevant
17 for the purposes of discovery.

18 And that's ultimately what it comes down to.
19 I might accept that. I might -- it might be completely
02:44:11 20 rejected. That's why I talked about -- I mean, I made
21 somewhat of a reference to some sort of Hallmark
22 analysis as it relates to expert opinions in this case
23 as to valuation.

24 But I can't -- right now what's in front of
02:44:29 25 me, I can't make that decision. And that's kind of my

02:44:33 1 point. And as far as producing documents, or going
2 through all these past transactions in camera, I can
3 say this: That's a task I don't want to take on.
4 Heck, if I was going to do that, I'd go ahead and
02:44:53 5 appoint Floyd Hale to do that for me as special master
6 as it relates to the evaluation issue. And it probably
7 would save time and money, to be candid with everyone.
8 But that's another day.
9 Anything else you want to add, Mr. Ogilvie?
02:45:21 10 MR. OGILVIE: As you said, you know, I have a
11 lot to unpack there.
12 THE COURT: There is.
13 MR. OGILVIE: I'll just -- there's nothing
14 that I want to add. There is one short thing that I
02:45:32 15 want to reiterate, Judge.
16 Well, actually I'll say it a different way.
17 We have a document, purchase and sale
18 agreement between the developer, Mr. Lowie's entity and
19 the seller, Peccole-Nevada Corporation, that -- that
02:45:54 20 reflects a seven and a half million dollar purchase
21 price for the -- for Fore Stars, which includes the
22 golf course and the -- all the accouterments. So we
23 have -- we have a purchase price reflected in a
24 purchase and sale agreement of seven and a half million
02:46:17 25 dollars.

02:46:18 1 And the developer says, No, no. We paid
2 \$45 million.

3 Well, if they don't produce the documents, I
4 think the City is entitled to an order excluding any
02:46:33 5 testimony or any evidence that would refute the
6 purchase price set forth in the purchase and sale
7 agreement.

8 But that's for another day.

9 So in the interim, I will now reiterate if I'm
02:46:51 10 going to -- if -- if the developer is going to continue
11 to contend they paid \$45 million for that, for all this
12 series of complex transactions, the City is entitled to
13 every one of those documents.

14 THE COURT: Anything else? And so that's
02:47:15 15 going -- we have a somewhat complex -- I should say a
16 laundry list of discovery requests. Let me look here.

17 MR. OGILVIE: Your Honor, I'll remind the
18 Court that we have a status conference tomorrow if the
19 Court wants to sleep on this.

02:47:31 20 THE COURT: No, no. I'm trying to -- I want
21 to -- I don't want to sleep on it per se.

22 I do want to get the case moving.

23 MS. HAM: Then, your Honor, with Mr. Ogilvie's
24 last statement, I just want to have an opportunity to
02:47:49 25 speak to Mr. Leavitt. What he's saying is if you're

02:47:53 1 not going to produce these documents, which we hold in
2 highly -- as highly confidential, and you're not -- and
3 I understand. I -- I don't want to read them either.
4 I wouldn't want to read them either if I were you. I
02:48:10 5 certainly would not. There are binders and binders of
6 them, and they don't address the issues at hand.

7 I'd like an opportunity to speak to
8 Mr. Leavitt -- if what they're saying is then we don't
9 get to say that we paid \$45 million for it, I'd like to
02:48:24 10 have an opportunity to speak to Mr. Leavitt about that.

11 Perhaps, you know, I just want to know -- I
12 would like a conversation with Mr. Leavitt.

13 THE COURT: Okay.

14 MS. HAM: Maybe what we do is change our
02:48:39 15 answer. But I want to -- I want to have that
16 opportunity so I know exactly what I'm -- I'm -- may or
17 may not be agreeing to. And, yes, we do have a
18 conference tomorrow, if you would allow the time for me
19 to have that conversation. I think we probably have an
02:48:56 20 idea where you're going with the ruling, but I'd like
21 to have that opportunity to discuss with him, and maybe
22 that is the -- maybe that could resolve it.

23 THE COURT: I understand, ma'am. I do.

24 This is what we'll do then. There is a lot
02:49:13 25 being requested here. We will -- we will table this

02:49:16 1 discussion for the status check tomorrow. Without
2 going too deep into the weeds, in a general sense, I
3 would anticipate that if you have documents in your
4 possession that would potentially support the claimed
02:49:36 5 property valuation of 45 million on some level,
6 supporting documents should be produced.

7 I will say that.

8 That has nothing to do with whether it's
9 relevant for the purposes of this taking issue.

02:49:52 10 Understand what we're doing right now, this --
11 this is focusing solely on discovery issues.

12 Just as important too, I would think taking
13 the deposition of Mr. Lowie might be helpful. But,
14 remember, before you take the deposition, I would
02:50:15 15 anticipate you'd want all documents to support that
16 position.

17 And so that's all I can say. This is a
18 discovery issue. There is a lot here. I'm going to
19 give you a chance to talk the rest of this afternoon if
02:50:28 20 you want to talk. And if you want some sort of
21 agreement, you come to some sort of accord, I'm fine
22 with that.

23 But tomorrow we have a status check at what
24 time again? 9:00 o'clock.

02:50:39 25 MR. OGILVIE: 9:00 o'clock.

02:50:41 1 THE COURT: Okay. All right. And that's what
2 we'll do. We'll just go ahead and have the status
3 check tomorrow. Maybe we have some sort of resolution.
4 Give you a chance to talk. And I'll think about this.
02:50:55 5 All right.
6 MR. LEAVITT: Appreciate it, your Honor. Jim
7 Leavitt again.
8 And, your Honor, tomorrow when we discuss that
9 sliding the trial date 45 days, would that be --
02:51:04 10 (Unreportable cross-talk)
11 THE COURT: Yeah, we can do that.
12 You know what, when is this matter currently
13 set again? I don't have it right in front of me.
14 MR. LEAVITT: It's set for May 3rd trial.
02:51:13 15 THE COURT: Okay. Yeah. You know, we have a
16 lot of flexibility right now. And there's a lot going
17 on. We have the dealing with the second wave and
18 just -- I don't know anticipate much of a problem,
19 Mr. Leavitt, with that.
02:51:30 20 MR. LEAVITT: Thank you, your Honor.
21 THE COURT: All right. Okay. I will talk to
22 you tomorrow --
23 MS. HAM: Thank you.
24 THE COURT: -- morning.
02:51:36 25 MR. OGILVIE: Appreciate it. Thank you, your

02:51:36

1 Honor.

2 MS. HAM: Thank you, your Honor. Have a good
3 afternoon.

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7 (Proceedings were concluded.)

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REPORTER'S CERTIFICATE

STATE OF NEVADA)

:SS

COUNTY OF CLARK)

I, PEGGY ISOM, CERTIFIED SHORTHAND REPORTER DO
HEREBY CERTIFY THAT I TOOK DOWN IN STENOGRAPHY ALL OF THE
TELEPHONIC PROCEEDINGS HAD IN THE BEFORE-ENTITLED
MATTER AT THE TIME AND PLACE INDICATED, AND THAT
THEREAFTER SAID STENOGRAPHY NOTES WERE TRANSCRIBED INTO
TYPEWRITING AT AND UNDER MY DIRECTION AND SUPERVISION
AND THE FOREGOING TRANSCRIPT CONSTITUTES A FULL, TRUE
AND ACCURATE RECORD TO THE BEST OF MY ABILITY OF THE
PROCEEDINGS HAD.

IN WITNESS WHEREOF, I HAVE HEREUNTO SUBSCRIBED
MY NAME IN MY OFFICE IN THE COUNTY OF CLARK, STATE OF
NEVADA.

PEGGY ISOM, RMR, CCR 541

<p>MR. LEAVITT: [21] 5/14 6/2 16/23 25/20 25/22 27/9 27/14 33/23 39/21 39/23 40/7 41/1 45/24 46/24 55/7 55/10 55/25 56/3 61/6 61/14 61/20 MR. OGILVIE: [11] 5/19 6/4 6/14 41/19 46/13 46/16 57/10 57/13 58/17 60/25 61/25 MR. SCHWARTZ: [1] 5/23 MS. HAM: [15] 5/17 27/6 27/12 30/21 33/22 47/2 51/12 52/13 54/4 54/7 55/3 58/23 59/14 61/23 62/2 THE COURT REPORTER: [8] 6/11 25/17 25/21 27/3 39/19 39/22 40/6 40/24 THE COURT: [36] 5/6 5/25 6/7 6/12 16/20 27/5 27/7 27/11 27/13 27/15 33/6 41/17 45/5 46/14 46/23 51/10 51/13 53/17 54/6 54/23 54/25 55/4 55/9 55/23 56/1 56/4 57/12 58/14 58/20 59/13 59/23 61/1 61/11 61/15 61/21 61/24 \$ \$1 [1] 8/22 \$1 million [1] 8/22 \$1,050,000 [1] 10/12 \$100,000 [1] 16/12 \$30,000 [1] 10/10 \$45 [21] 11/7 11/13 11/18 15/21 42/25 43/5 43/9 43/15 43/17 43/24 44/1 44/3 44/14 44/23 45/11 51/14 51/14 52/15 58/2 58/11 59/9</p>	<p>\$45 million [17] 11/7 11/13 15/21 43/5 43/9 43/15 43/17 43/24 44/1 44/3 44/14 44/23 51/14 52/15 58/2 58/11 59/9 \$500,000 [1] 9/7 0 09 [1] 25/24 1 10 [1] 2/2 100 [1] 50/24 100 percent [1] 50/16 1000 [1] 3/7 11 [1] 5/1 120 [1] 2/19 1215 [1] 2/18 15 million [1] 52/19 16 [5] 2/2 9/13 11/23 15/18 16/4 16.1 [2] 15/24 27/20 17 [1] 1/22 1749 [1] 3/20 17th [1] 5/8 180 [1] 1/9 180 Land [7] 5/10 5/15 6/23 16/24 19/14 43/12 43/12 19 [2] 43/11 43/22 1964 [1] 2/11 1970s [1] 9/22 1:30 [1] 5/8 1:31 [1] 5/2 2 2.34 [7] 31/4 31/12 31/15 32/23 34/1 37/7 39/5 2.37 [1] 13/18 2.37 acres [1] 26/11 20 [9] 15/7 19/13 20/15 20/16 35/21 39/10 39/24 40/8 44/6 20-09 [1] 25/24 20-10 [1] 2/2 20-year [7] 19/16 19/21 19/22 20/1 21/11 32/10 52/17 2001 [1] 20/17 2005 [1] 20/18 2010 [1] 20/18</p>	<p>2013 [5] 13/16 14/19 26/9 26/11 37/2 2014 [1] 35/25 2015 [7] 7/1 7/11 9/24 13/20 15/4 17/13 39/1 2017 [5] 20/20 20/21 21/25 55/13 55/18 2019 [3] 15/4 16/4 39/2 2020 [3] 1/22 5/1 5/8 2269 [1] 3/19 229-2269 [1] 3/19 2300 [1] 3/6 24 [1] 39/11 250 [7] 7/1 7/13 7/18 8/3 9/24 10/22 11/9 250 acres [5] 8/5 9/15 10/8 11/7 44/14 250-acre [10] 19/9 19/18 19/24 20/2 20/3 36/15 36/20 36/21 36/24 37/11 2nd [1] 16/4 3 30 [1] 24/13 34 [1] 38/15 35 acres [16] 7/21 7/23 8/1 8/9 8/15 8/21 8/21 9/6 9/17 10/11 10/18 10/22 10/23 10/24 12/1 51/16 35-acre [6] 7/15 9/6 19/10 37/20 37/23 37/23 37 [1] 41/3 386-1749 [1] 3/20 396 [1] 4/5 3rd [1] 61/14 4 40 [2] 39/13 39/15 400 [1] 3/16 4100 [1] 3/9 415 [2] 4/7 4/8 45 [6] 23/18 25/4 35/4 47/8 60/5 61/9 45 million [4] 31/3 31/7 32/8 47/16 45-day [1] 24/4</p>	<p>5 50 percent [2] 9/1 17/3 541 [2] 1/25 63/17 552-5816 [1] 4/8 552-7272 [1] 4/7 5816 [1] 4/8 5:00 [1] 19/1 6 6930 [1] 2/21 6938 [1] 2/22 7 702 [8] 2/10 2/11 2/21 2/22 3/9 3/10 3/19 3/20 704 [1] 2/8 7272 [1] 4/7 731-1964 [1] 2/11 733-8877 [1] 2/10 8 873-4100 [1] 3/9 873-9966 [1] 3/10 8877 [1] 2/10 89101 [2] 2/9 3/18 89102 [1] 3/8 89117 [1] 2/20 9 940-6930 [1] 2/21 940-6938 [1] 2/22 94102 [1] 4/6 9966 [1] 3/10 9:00 [2] 60/24 60/25 : :SS [1] 63/2 A abandoned [1] 38/18 ABILITY [1] 63/11 about [20] 18/4 21/10 21/19 23/17 24/13 27/19 29/11 30/6 30/7 31/5 37/17 46/15 49/16 50/18 51/20 53/6 55/6 56/20 59/10 61/4 absolute [1] 17/2 absolutely [3] 17/17 20/19 35/22 academic [1] 56/7 accept [2] 29/16 56/19</p>	<p>accord [1] 60/21 according [3] 13/4 13/4 13/5 accounts [1] 20/4 accouterments [1] 57/22 accurate [2] 50/24 63/11 accusations [1] 35/9 achieved [1] 7/5 acquire [6] 19/17 19/18 19/19 19/20 19/24 44/14 acquired [1] 43/5 acquisition [12] 7/6 7/13 12/9 12/14 12/18 12/23 13/3 14/16 16/15 19/9 21/22 27/1 acre [17] 7/15 9/6 10/10 19/9 19/10 19/18 19/24 20/2 20/3 36/15 36/20 36/21 36/24 37/11 37/20 37/23 37/23 acres [30] 7/1 7/13 7/19 7/21 7/23 8/1 8/3 8/5 8/9 8/15 8/21 8/21 9/6 9/15 9/17 9/24 10/8 10/11 10/18 10/22 10/22 10/23 10/24 11/7 11/9 12/1 13/18 26/11 44/14 51/16 action [2] 17/20 50/21 actions [16] 6/24 7/21 8/2 8/4 8/11 8/18 8/22 9/1 9/3 9/5 10/20 11/2 12/15 18/11 18/18 48/19 actual [2] 55/16 55/16 actually [6] 7/23 10/17 11/7 11/18 15/20 57/16 add [2] 57/9 57/14 additional [1] 24/10 Additionally [1] 14/25 address [10] 24/11 30/24 33/3 42/6 42/6 43/1 45/25 46/2 47/25 59/6</p>
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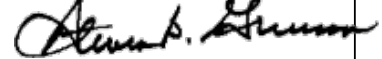
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DISTRICT COURT

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,

Plaintiff,

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' MOTION
TO DETERMINE TAKE
AND FOR
SUMMARY JUDGMENT ON THE
FIRST, THIRD AND FOURTH CLAIMS
FOR RELIEF**

Hearing Requested

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3	<i>Commonwealth v. Alger,</i>	
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7	<i>County of Clark v. Sun State Properties Ltd.,</i>	
8	119 Nev. 329, 72 P.3d 954 (2003)	37
9	<i>Ehrlander v. State,</i>	
10	797 P.2d 629 (Alaska 1990)	43
11	<i>First English Evangelical Lutheran Church v. County of Los Angeles,</i>	
12	482 U.S. 304 (1987)	15
13	<i>Hearts Bluff Game Ranch, Inc. v. State,</i>	
14	381 S.W.3d 468 (Tx. 2012)	43
15	<i>Herman Glick Realty Co. v. St. Louis County,</i>	
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17	<i>Huttig v. Richmond Heights,</i>	
18	372 S.W.2d 833 (Mo.1963)	43
19	<i>Indiana Toll Road Comm’n v. Jankovich,</i>	
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21	<i>Knick v. Township of Scott, Pennsylvania,</i>	
22	139 S.Ct. 2162 (2019)	31, 38
23	<i>Lange v. State,</i>	
24	86 Wash.2d 585 (1976)	43
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7	<i>Moldon v. County of Clark,</i>	
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9	<i>National Advertising Co. v. State, Dept. of Transp.,</i>	
10	116 Nev. 107, 993 P.2d 62 (2000)	37
11	<i>Pegasus v. Reno Newspapers, Inc.,</i>	
12	118 Nev. 706, 851 P.3d 82 (2002)	36
13	<i>Posadas v. City of Reno,</i>	
14	109 Nev. 448, 851 P.2d 438 (1993)	36
15	<i>Richmond Elks Hall Assoc. v. Richmond Red. Agency,</i>	
16	561 F.2d 1327 (9th Cir. 1977)	40
17	<i>Roark v. City of Caldwell,</i>	
18	87 Idaho 557, 394 P.2d 641 (1964)	39
19	<i>Robinson v. City of Ashdown,</i>	
20	783 S.W.2d 53 (Ark. 1990)	41
21	<i>Schwartz v. State,</i>	
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23	<i>Seventy Acres, LLC., v. Binion,</i>	
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1	<i>State Dept. of Transp. v. Cowan,</i>	
2	120 Nev. 851, 103 P.3d 1 (2004)	37
3	<i>Stratosphere Gaming Corp., v. City of Las Vegas,</i>	
4	120 Nev. 523, 96 P.3d 756 (2004)	5
5	<i>Tien Fu Hsu v. County of Clark,</i>	
6	123 Nev. 625, 173 P.3d 724 (2007)	5, 15, 36, 38, 39
7	<i>Trustees Under Will of Pomeroy v. Westlake,</i>	
8	357 So.2d 1299 (La.App.1978)	43
9	<i>Wheeler v. Pleasant Grove,</i>	
10	664 F.2d 99 (CA5 1981)	43
11	<i>Wood v. Safeway, Inc.,</i>	
12	121 Nev. 724, 121 P.3d 1026 (2005)	35
13	<i>Yara Eng'g Corp. v. City of Newark,</i>	
14	132 N.J.L. 370, 40 A.2d 559 (1945)	39
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21	NRS 361.227(1)	34
22	LVMC 19.12.010	37
23	LVMC 19.16.100	27
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3	Nichols on Eminent Domain, at § 22.1, 22-6	35
4	Nichols on Eminent Domain § 14B 01 (3 rd ed. 2016)	3
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1 **I. INTRODUCTION**

2 This is an inverse condemnation case brought by the Plaintiff landowners (“Landowners”)
3 against the City of Las Vegas (“City”). This is one of four cases which seeks to remedy the illegal
4 and unjust actions of the City to preserve the Landowners 250 acres of residentially zoned land
5 (hereinafter the “Land” or “250 Acre Residential Zoned Land” or “250 Acres”) for the use and
6 enjoyment of the surrounding neighbors.

7 In Nevada, if the Government preserves private property to be utilized for public use, it is
8 a taking mandating payment of just compensation. McCarran v. Sisolak, 122 Nev. 645 (2006) (a
9 County Ordinance that preserved portions of the airspace above private property to be utilized by
10 aircraft was a taking, whether the aircraft ever entered the space or not). However, the facts of this
11 case go far beyond simply preserving land for public use and refusing to pay just compensation.
12 As detailed below, the City engaged in aggressive, systematic and outrageous government actions
13 to take the Landowners’ 35 acre property located near the intersection of Hualapai Way and Alta
14 Drive in Las Vegas, Nevada (the “35 Acre Property” and/or “Landowners’ Property” and/or
15 “Subject Property”) to *preserve* the Landowners’ Property for the surrounding neighbors’ use and
16 enjoyment. Thus, the Landowners were forced to initiate this lawsuit.

17 Once litigation ensued the City created a justification for its outrageous conduct by arguing
18 for the first time that the Landowners’ Property was dedicated to the City many years ago.¹ Yet,
19 there is no document memorializing such a land dedication.² This Court has held that the
20
21

22 ¹ At no time during the development attempts did the City ever claim that the Land was dedicated
23 to the City. This “litigation defense” was created by counsel to try and avoid liability for a clear
24 taking.

24 ² In Nevada, when any interest in land is transferred it must be in writing and signed by the grantor.
NRS 111.210. Here, the City has no such writing reflecting any dedication of any portion of the
Landowners’ Property to the City.

1 Landowners had the “right” to develop the 35 Acre Property residentially. *Landowners’ Appendix*
2 (*“LO Appx.”*) *Ex. 1, October 12, 2020 FFCL Regarding Property Interest.*

3 The 35 Acre Property that is the subject of this case is one parcel of land adjoining other
4 parcels that make up the 250 Acres. This Land was acquired by the Landowners via a purchase of
5 the membership interest in Fore Stars Ltd which owned 5 parcels of land comprising the 250 Acres.
6 *LO Appx., Ex. 140, Deed.* The 250 Acres is prime real estate located within the boundaries of the
7 City of Las Vegas, adjacent to Summerlin, between Hualapai Way to the West, Alta Drive to the
8 North, Charleston to the South and Rampart to the East, and was utilized for golf course operations
9 formerly known as the Badlands Golf Course. *LO Appx., Ex. 2, Map 1 of 250 Acre Land, Ex. 3,*
10 *Map 2 of 250 Acre Land.*

11 Due to time limitations subscribed by NRS 278.3195,³ the Landowners were required to
12 file 4 separate inverse condemnation cases for the various parcels which are now pending in the
13 Eighth Judicial District Court. *Id.* Specifically:

- 14 • 17 Acre Case – pending before senior Judge Bixler;
- 15 • **35 Acre Case – pending before this Court;**
- 16 • 65 Acre Case – pending before Judge Trujillo (previously Judge Herndon); and
- 17 • 133 Acre Case – pending before Judge Sturman.

18 Although the City has asserted that these four cases involve “common plaintiffs, a common
19 defendant, a common property, common causes of action and common questions of law and fact,”
20 (*LO Appx., Ex. 4*) the land comprising the 35 Acre Property is one independent parcel, recognized
21 by the Clark County Tax Assessor as such.⁴ Thus, for purposes of this inverse condemnation
22 proceeding, the 35 Acre Property must be considered by the Court as one property separate from

23 ³ NRS 278.3195 4(b) provides in pertinent part “Any person who: Is aggrieved by a governing
24 body, may appeal that decision to the district court . . . by filing a petition for judicial review within
25 days after the date of filing of notice of the decision . . .”

⁴ The 35 Acre Property is legally identified by the Tax Assessor as APN 138-31-201-005.

1 the 17, 65, and 133 Acre properties:

2 “A question often arises as to how to determine what areas are portions of the parcel
3 being condemned, and what areas constitute separate and independent parcels?
4 Typically, the legal units into which land has been legally divided control the issue.
5 That is, each legal unit (typically a tax parcel) is treated as a separate parcel....” City
of North Las Vegas v. Eighth Judicial Dist. Court, 133 Nev. 995, *2, 401 P.3d 211
(table)(May 17, 2017) 2017 WL 2210130 (unpublished disposition), *citing* 4A
Julius L. Sackman, *Nichols on Eminent Domain* § 14B.01 (3d ed. 2016).

6 In this motion, the Landowners are requesting that the Court enter summary judgment in
7 this 35 Acre Case on three of their claims for relief – First (Categorical Taking), Third (Regulatory
8 Per Se Taking), and Fourth (Nonregulatory Taking) Claims for Relief.

9 **II. PROCEDURE AND RESOLVED ISSUES**

10 **A. The Required Two Sub-Inquiries in Nevada Inverse Condemnation 11 Proceedings**

12 The Nevada Supreme Court has held that in every inverse condemnation action like this,
13 the District Court Judge is required to make two distinct “sub inquiries” and that these sub inquiries
14 must be made in the proper order. In McCarran Int’l Airport v. Sisolak, 122 Nev. 645, 658, 137
15 P.3d 1110, 1119 (2006), the Nevada Supreme Court held “the court ***must first determine ‘whether
16 the plaintiff [landowner] possesses a valid interest in the property*** affected by the government
17 action, [that is] whether the plaintiff [landowner] possessed a ‘stick in the bundle of property
18 rights,’ ***before proceeding to determine whether the government action at issue constituted a
19 taking.***” Emphasis added. See also ASAP Storage, Inc., v. City of Sparks, 123 Nev. 639 (2008)
20 (“[i]n analyzing [the landowners] taking claim, we undertake **two distinct sub-inquiries**: (a)
21 whether appellants’ real and personal property constitutes ‘private property’ under the Nevada
22 Constitution, and (b) whether the City’s actions that denied appellants access to their business
23 constituted a taking under the terms of the Nevada Constitution.” ASAP Storage, at 736.
24 Emphasis added. Whether a taking has occurred is a question of law. See Moldon v. County of
Clark, 124 Nev. 507 (2008) *citing* Sisolak at 658, 1119).

1 **B. Resolution of the First Sub-Inquiry**

2 The first sub-inquiry was presented to this Court on September 17, 2020. This Court
3 reviewed significant briefing and heard extensive argument (over two hours) and entered findings
4 of fact and conclusions of law, holding that *before* the City engaged in actions to interfere with the
5 use of the 35 Acre Property:

- 6 1) the 35 Acre Property is hard zoned R-PD7 at all relevant times herein; and,
7 2) the permitted uses by right of the 35 Acre Property are single-family and multi-family
residential.

8 *LO Appx., Ex. 1, October 12, 2020 FFCL Granting Property Interest, p. 3:3.* By these findings,
9 this Court rejected the City’s argument, specifically the “PR-OS argument” (discussed below) and
10 determined that “Nevada eminent domain law provides that zoning must be relied upon to
11 determine a landowners’ property interest in an eminent domain case.” *Id., at p. 4:20-21.*⁵

12 **C. Other Resolved Issues**

13 This Court has also resolved two other important issues.

14 **1. Inverse Condemnation/Eminent Domain Law Applies, Not Law**
15 **Pertinent to Petitions for Judicial Review**

16 Without any citation to authority, the City has repeatedly argued that the law pertinent to
17 petitions for judicial review/land use should apply in this inverse condemnation case to give the
18 City “discretion” to deny land uses, thereby shielding it from takings liability. Such immunity
19 does not exist in an inverse condemnation case and thus, this Court must apply eminent
20 domain/inverse condemnation law. **“Inverse condemnation proceedings are the constitutional**
21 **equivalent to eminent domain actions** and are governed by the same rules and principles that are

22 _____
23 ⁵ City documents show the 250 Acre Residential Zoned Land had a residential zoning designation
24 on the City’s Zoning Atlas Maps and a residential land use designation on the City’s General Plan
as early as 1981. *LO Appx. Ex. 5, at CLV034089, CLV034414-415, CLV033780-781; LO Appx.*
Ex. 6, at CLV033295.

1 applied to formal condemnation proceedings.” Clark County v. Alper, 100 Nev. 382, 391 (1984).

2 Emphasis added. This Court has entertained extensive briefing and extensive oral argument on
3 this issue resolving the issue *three times* as follows:

4 “[T]he Court concludes that its conclusions of law regarding the *petition for*
5 *judicial review do not control its consideration of the Developer’s [Landowner’s]*
6 *inverse condemnation claims.*” *LO Appx., Ex 7, May 7, 2019 Order at 11:20-22.*
7 Emphasis added.

8 “[B]oth *the facts and the law are different* between the petition for judicial review
9 and the inverse condemnation claims.” *LO Appx., Ex. 8, May 15, 2019 Order at*
10 *21:15-20.* Emphasis added.

11 “*The evidence and burden of proof are significantly different* in a petition for
12 judicial review than in civil litigation. *Id., at 22:1-11.* Emphasis added.

13 “A petition for judicial review is *one of legislative grace* and limits a court’s review
14 to the record before the administrative body, *unlike an inverse condemnation*,
15 which is *of constitutional magnitude* and requires all government actions against
16 the property at issue to be considered.” *Id., at 8:25 – 9:2.* Emphasis added.

17 “Furthermore, the *law is also very different in an inverse condemnation case than*
18 *in a petition for judicial review.* Under inverse condemnation law, if the City
19 exercises discretion to render a property valueless or useless, there is a taking. Tien
20 Fu Hsu v. County of Clark, 173 P.3d 724 (Nev. 2007), McCarran Int’l Airport v.
21 Sisolak, 122 Nev. 645, 137 P.3d 1110 (Nev. 2006), City of Monterey v. Del Monte
22 Dunes, 526 U.S. 687, 119 S.Ct. 1624 (1999), Lucas v. South Carolina Coastal
23 Council, 505 U.S. 1003 (1992). *In an inverse condemnation case, every*
24 *landowner in the state of Nevada has the vested right to possess, use, and enjoy*
their property and if this right is taken, just compensation must be paid. Sisolak.
And, the Court must consider the “aggregate” of all government action and
the evidence considered is not limited to the record before the City Council.
Merkur v. City of Detroit, 680 N.W.2d 485 (Mich.Ct.App. 2004), State v. Eighth
Jud. Dist. Ct., 131 Nev. Adv. Op. 41, 351 P.3d 736 (2015), Arkansas Game & Fish
Comm’s v. United States, 568 U.S. 23, 133 S.Ct. 511 (2012). *On the other hand,*
in petitions for judicial review, the City has discretion to deny a land use
application as long as valid zoning laws are applied, there is no vested right to
have a land use application granted, and the record is limited to the record before
the City Council. Stratosphere Gaming Corp., v. City of Las Vegas, 120 Nev. 523,
96 P.3d 756 (2004). *Id., at 22:13-27.* Emphasis added.

Therefore, all City arguments based on petition for judicial review law must be rejected.

1 **2. Zoning Governs the Use of the Property and There is No PR-OS**

2 The City has argued in litigation that the R-PD7 residential zoning that has existed on the
3 property for over 30 years is *irrelevant* and, instead, the entire 250 Acre Land must remain park,
4 recreation, open space (PR-OS), because, according to the City, this is what the City's General
5 Plan and the Peccole Ranch (Concept) Master Plan (PRMP) designates the 35 Acre Property,
6 meaning any action the City has taken to preserve the Landowners' Property for the surrounding
7 neighbors' use, including precluding development, cannot result in a taking. The City has
8 repeatedly lost this PR-OS argument.

9 In opposition to the Landowners' Motion to Determine Property Interest *in this very case*,
10 the City specifically argued, "[t]he City adopted the PR-OS General Plan designation through duly
11 enacted legislation," the PR-OS "has the force of law," and "the PR-OS designation prevails" over
12 the "irrelevant" R-PD7 zoning ("the City's PR-OS argument"). *LO Appx, Ex. 9, August 18, 2020*
13 *City's Opp. to Mot. to Determin. Prop. Interest - see highlighted portions*. This Court expressly
14 rejected the City's PR-OS argument, holding: 1) "Nevada eminent domain law provides that
15 zoning must be relied upon to determine a landowners' property interest in an eminent domain
16 case;" 2) "the 35 Acre Property has been hard zoned R-PD7 since at least 1990;" and, 3) "the
17 permitted uses **by right** of the 35 Acre Property are single-family and multi-family residential."
18 *LO Appx., Ex. 1, October 12, 2020 FFCL Regarding Property Interest at 4-5*. Emphasis added.

19 At least **ten other orders** have been entered also rejecting or disregarding the City PR-OS
20 argument as entirely baseless:

- 21 • The City made the PR-OS argument early in this case as a basis for its motion for judgment
22 on the pleadings. *LO Appx., Ex 10, February 13, 2019 City Mot. for Judg. on the Pldgs.;*
23 *see highlighted portions*. In detailed findings, this Court rejected the City's PR-OS
24 argument and denied the City's motion. *LO Appx., Ex. 8, May 15, 2019 Order*.
- The City filed a Writ Petition with the Nevada Supreme Court on this Court's denial of its
motion for judgment on the pleadings, again presenting the PR-OS argument. *LO Appx.,*
Ex. 11, May 17, 2019 City Pet. For Writ - see highlighted portions. The Supreme Court

1 gave zero credence to the City's PR-OS argument and upheld this Court's denial of the
2 City's motion for judgment on the pleadings. *LO Appx., Ex. 12, Order Denying Pet. for*
3 *Writ of Mandamus or Prohibition, Case No. 78792 (May 24, 2019)*. The City filed a
4 petition for rehearing and a request for en banc reconsideration and the Court, again,
disregarded the PR-OS argument. *LO Appx., Ex. 13 Order Denying Rehearing (July 24,*
2019; Ex. 14, Order Denying En Banc Reconsideration (September 6, 2019).

- 5 • The City extensively argued the PR-OS issue before Senior Judge Bixler as grounds to
6 dismiss the 17 Acre Case. *LO Appx., Ex. 15, City Mot. to Dismiss (October 23, 2020)* – see
7 *highlighted portions; Ex. 16, City Sur-Reply to Mot. to Dismiss (December 4, 2020)* – see
8 *highlighted portions*. Following the hearing, the City proposed extensive findings stating,
9 in part, “Here, most of the Badlands [250 Acre Residential Zoned Land] has been
10 designated PR-OS since 1992 (including the 17 Acre Property), and all of it has been
11 designated PR-OS since at least 2002 long before the Developer purchased the Badlands
12 in 2015. Residential use is not permitted on property designated PR-OS.” *LO Appx., Ex.*
13 *17, City Proposed FFCL at p. 9, proposed finding #12*. Emphasis added. ***Senior Judge***
14 ***Bixler rejected the City's PR-OS argument*** and adopted the Landowners' proposed order.
15 *LO Appx., Ex. 18, Judge Bixler Order Denying City Mot. to Dismiss (December 9, 2020).*
- 16 • The City also presented the PR-OS argument to Judge Sturman as grounds to dismiss the
17 133 Acre Case. *LO Appx., Ex. 19, City Mot. to Dismiss (August 27, 20189); see highlighted*
18 *portions. Judge Sturman rejected the PR-OS argument* and denied the City's Motion to
19 Dismiss. *LO Appx., Ex. 20, Judge Sturman Minute Order⁶ Denying CLV Mot. to Dismiss*
20 *(February 15, 2019).*
- 21 • The PR-OS argument was also pointedly before the Nevada Supreme Court in a petition
22 for judicial review case related to the 17 Acre property, with the precise argument the City
23 repeatedly presents in these inverse condemnation cases. *LO Appx., Ex 21, Respondents'*
24 *Answering Brief – see pages 8-10, highlighted portions.*⁷ ***The Nevada Supreme Court***
rejected the PR-OS argument, reversed the “Crockett Order” and held “the parcel carries
a zoning designation of residential planned development district [R-PD7]” and that all that
was needed to develop was a “site development plan” and the process to develop “does not
require [the Landowners] to obtain a major modification of the Peccole Ranch Master Plan
[PRMP] [to change the PR-OS] prior to submitting the at-issue applications” *LO Appx.,*
Ex 23, Supreme Court Order of Reversal of Crockett Order, filed March 5, 2020, Case No.
*75481, unpublished disposition, p. 4.*⁸ The Court rejected the PR-OS argument twice more
in denying a petition for rehearing and a request for en banc reconsideration. *LO Appx.,*

⁶ Only a minute order is available as the City filed an untimely removal to federal court before a formal order could be entered.

⁷ This Court may recall that Judge Crockett accepted the PR-OS argument and held that the entire 250 Acres had been designated PR-OS and PR-OS does not allow residential development, resulting in the “Crockett Order.” *LO Appx., Ex. 22, Crockett Order (overturned) at p. 5, finding 13*. At this stage of the litigation, the City itself rejected the PR-OS argument representing to the Crockett Court that “the land use designation is subordinate to the zoning designation . . .” *LO Appx., Ex. 139, City brief page 2 lines 8-9.*

⁸ *Seventy Acres, LLC., v. Binion*, 458 P.3d 1071*2 (Table) 2020 WL 1076065 (March 05, 2020).

1 *Ex. 24 Order Denying Rehearing – 17 Acre PJR Matter; Ex. 25 Order Denying En Banc*
2 *Reconsideration – 17 Acre PJR Matter.*

- 3 • In a case involving the entire 250 Acre Residential Zoned Land, a homeowner in the
4 Queensridge Community argued the 250 Acre Land could not be developed because it was
5 “open space” and the District Court rejected the argument, entering two very extensive
6 findings of fact and conclusions of law, reading in part, as follows: 1) Peccole always
7 intended to keep the property available for “future development as residential;” 2) the 250
8 Acre Property is zoned R-PD7; 3) R-PD7 zoning “dictates” the use; 4) the R-PD7 zoning
9 gives the Landowners the “right to develop” the 250 Acre Property; and, 5) rejected the
10 argument that there is a requirement the property remain “open space” or “golf course.”
11 *LO Appx., Ex. 26, FFCL and Judgment, November 20, 2016 - 250 Acres, pp. 14, 16, 18;*
12 *LO Appx., Ex 27, FFCL, Final Order, and Judgment, January 31, 2017 – 250 Acres, p. 17*
13 *– see highlighted portions.* The Supreme Court affirmed and denied reconsideration. *LO*
14 *Appx., Ex. 28, Supreme Court Order of Affirmance, October 17, 2018 – 250 Acres; LO*
15 *Appx., Ex. 29, Supreme Court Order Denying Rehearing, November 27, 2018 – 250 Acres.*

16 Also, the **City** itself through the highest-ranking Planner and the City Attorney - rejected
17 the City’s newly concocted PR-OS argument, confirming on the record that the PR-OS argument
18 is baseless:

- 19 • “The Peccole Ranch Phase II plan (PRMP) was a very, very, very general plan. I have read
20 every bit of it. If you look at the original plan and look what’s out there today, it’s different.
21 . . . So the plan - - the master plan that we talk about, ***the Peccole Phase 2 master plan***
22 ***(PRMP) is not a 278A agreement, it never was, never has been, not a word of that***
23 ***language was in it. We never followed it.*** Statement by long time City Attorney Brad
24 Jerbic. *LO Appx., Ex. 30, Transcr. of Badlands Homeowners Meeting, November 1, 2016*
25 *at pp. 60 and 117.*
- 26 • “If I can jump in too and just say that everything Tom [Tom Perrigo – Director of City
27 Planning] said is absolutely accurate. The R-PD7 preceded the change in the General Plan
28 to PR-OS. ***There is absolutely no document that we could find that really explains why***
29 ***anybody thought it should be changed to PR-OS,*** except maybe somebody looked at a
30 map one day and said, hey look, it’s all golf course. It should be PR-OS. I don’t know.”
31 Statement by long time City Attorney Brad Jerbic confirming the research by City Planning
32 Director, Tom Perrigo. *LO Appx., Ex. 31, Transcr. Of Planning Commission Meeting, June*
33 *13, 2017 at 72 of 83.*

34 In all there have been ten orders entered between the Nevada Supreme Court and the District Court
35 that have rejected or lent no credence to the City’s PR-OS argument, there have been multiple
36 statements on the record at City Hall and in Court by the City itself rejecting the PR-OS argument.
37 Given that ***the Nevada Supreme Court*** has expressly rejected the PR-OS argument when it
38 ***overturned the Crockett Order that adopted the PR-OS argument*** and, that the City’s own

1 position through its Planning Department and City Attorney's Office has been that PR-OS was of
2 no effect, the argument is without merit.

3 Given the extensive precedent rejecting the City's PR-OS argument, this Court's holding
4 that: 1) zoning must be relied upon to determine the property interest; 2) the 35 Acre Property has
5 been zoned R-PD7 since at least 1990; and, 3) the permitted uses *by right* of the 35 Acre Property
6 are single-family and multi-family residential, the City should be precluded from once again re-
7 raising the argument here. *LO Appx., Ex. 1, October 12, 2020 FFCL Regarding Property Interest*
8 *entered October 12, 2020, pp. 4-5.*

9 **III. THE SECOND SUB-INQUIRY – HAS A TAKING OCCURRED**

10 As this Court has already resolved the first sub-inquiry – the property interest – this motion
11 addresses the second sub inquiry – whether that property interest has been taken. Further, this
12 motion is limited to the Landowners' First, Third and Fourth Claims for Relief. Accordingly, the
13 only issue before this Court is whether there is a taking of the 35 Acre Property when:

14 1) The City has denied all use of the Landowners' Property so that the Property is
15 preserved in an undeveloped state for the surrounding owners' use (viewshed, open space,
16 recreation) and the City adopted two Bills to implement the preservation of the Landowners'
17 Property for this public use.

18 2) The City adopted a Bill that forces the Landowners to acquiesce to a physical
19 occupation of their Property by forcing the Landowners to allow "*ongoing public access*" onto
20 their Property or be subjected to criminal charges.

21 **IV. STATEMENT OF UNCONTESTED FACTS RELEVANT TO THE** 22 **LANDOWNERS' ACQUISITION OF THE 35 ACRE PROPERTY**

23 The Landowners are accomplished and professional developers that have constructed more
24 homes and commercial development in the vicinity of the 35 Acre Property than any other person
or entity and, through this work, gained significant information about the 250 Acre Residential

1 Zoned Land (which includes the 35 Acre Property).⁹ *LO Appx., Ex. 34, Decl. Lowie (1); Ex. 35*
2 *Decl. Lowie (2)*. They have extensive experience developing luxurious and distinctive commercial
3 and residential projects in Las Vegas, including but not limited to: (1) One Queensridge Place,
4 which consists of two 20-story luxury residential high rises; (2) Tivoli Village at Queensridge, an
5 Old World styled mixed-used retail, restaurant, and office space shopping center; (3) over 300
6 custom homes, and (4) multiple commercial shopping centers. *LO Appx., Ex. 34, Decl. Lowie*
7 *(1), at p. 1, para. 2*. The Landowners' principles live in the Queensridge Common Interest
8 Community and One Queensridge Place (which is adjacent to the 250 Acre Residential Zoned
9 Land) and are the single largest owners within both developments having built over 40% of the
10 custom homes within Queensridge. *Id.* At all times Queensridge was and is governed by the
11 Master Declaration of Covenants, Conditions, Restrictions and Easements recorded in 1996
12 ("CC&Rs"). For years, the Land was leased to a third-party golf course operator for the operation
13 of a golf course. The homeowners in the Queensridge Community have never owned any interest
14 in the Land and have never paid for the maintenance, upkeep, taxes or any costs associated with
15 the Land.

16 The Peccole family was the original owner of the 250 Acre Residential Zoned Land and
17 the adjacent community commonly referred to as the "Queensridge Community." *See LO Appx.,*
18 *Exs. 2 and 3, Map 1 and Map 2 of 250 Acres of Land*. In 1996, the principals of the Landowners
19 began working with William Peccole and the Peccole family (referred to as "Peccole") to develop
20 lots adjacent to the 250 Acre Residential Zoned Land within the Queensridge Community and
21 consistently worked together with them in the area on property transactions thereafter. *LO Appx.,*
22 *Ex. 34, Decl. Lowie (1), p. 1, para. 3*.

23 In 2001, the principals of the Landowners learned from Peccole that the Badlands Golf
24 Course was zoned R-PD7 and intended for residential development. *LO Appx., Ex 34, Decl. Lowie*
25 *(1), p. 2, para. 4*. They further learned that Peccole had never imposed any restrictions on the use
26 of the Land and that the Land would eventually be developed. *Id.* Peccole further informed the
27 Landowners that the Land is "developable at any time." *Id.*

⁹ Yohan Lowie, one of the Landowners' principles, has been described as the best architect in the Las Vegas valley. *LO Appx., Ex. 33, June 21, 2017 Transcr. City Council at 64 of 128*.

1 In or about 2001, the principals of the Landowners retained legal counsel to confirm
2 Peccole's assertions and counsel advised that the 250 Acre Residential Zoned Land is "Not A Part"
3 of the Queensridge Community, the Land was residentially zoned, there existed rights to develop
4 the Land, the Land was intended for residential development and that as homeowners within the
5 Queensridge Community, according to the Queensridge CC&Rs they had no right to interfere with
6 the development of the 250 Acre Residential Zoned Land. *LO Appx., Ex. 34, Decl. Lowie (1), p.*
2, para. 5. See also LO Appx., Ex. 36 at 000762, 000875, 000879.

7 Peccole always maintained and disclosed the developability of the entire 250 Acre
8 Residential Zoned Land. **"The existing 18-hole golf course commonly known as the "Badlands
9 Golf Course" [250 Acre Property] is not a part of the Property** or the Annexable Property
10 [Queensridge Community] and the Queensridge Community **"is not required to[] include ... a
11 golf course, parks, recreational areas, open space."** *LO Appx., Ex. 36, p. 1-2, Queensridge
12 Community CC&Rs.* Emphasis added. The Custom Lot Design Guidelines also informed that the
13 interim golf course on the 250 Acre Land was available for "future development." *LO Appx., Ex.*
14 *37, QR Custom Lot Design.* The CC&Rs further disclosed to every purchaser of property within
15 the Queensridge Community that the 250 Acre Land was "not a part" of the Queensridge
16 Community, that purchasers in the community "shall not acquire any rights, privileges, interest, or
17 membership" in the 250 Acre Land, there are no representations or warranties "concerning the
18 preservation or permanence of any view," and lists the "Special Benefits Area Amenities" for the
19 surrounding Queensridge Community, **which does not include a golf course or open space or any
20 other reference to the 250 Acre Land.** *LO Appx., Ex. 38, LO 4471, Lot Purchase Agreement for
21 Queensridge; LO Appx., Ex. 39, LO 4453-4454, 4456, Public Offering Statement.* Emphasis
22 added.

23 The Landowners were also developing and selling land in the Queensridge Community
24 and likewise disclosed that the Land was available for development. *LO Appx., Ex. 40, Lowie
Depo., Binion v. Fore Star, p.47:16-19.*

In 2006, in furtherance of acquiring the 250 Acre Residential Zoned Land, Yohan Lowie,
a Landowner principal, met with the highest-ranking City planning official, Robert Ginzer, and

1 was advised that: 1) the entire 250 Acres is zoned R-PD7; and, 2) there is nothing that can stop
2 development of the property. *LO Appx., Ex. 34, Decl. Lowie, p. 2, para. 6.*

3 With this knowledge and understanding, the principals of the Landowners then obtained
4 the right to purchase all five parcels that made up the 250 Acre Residential Zoned Land. *LO*
Appx., Ex. 34, Decl. Lowie, p. 2, para. 6.

5 In November 2014, the Landowners were given six months to exercise their right to acquire
6 the 250 Acre Residential Zoned Land and conducted their final due diligence prior to closing on
7 the acquisition of the Land. *LO Appx., Ex. 34, Decl. Lowie, p. 2-3, para. 6.* The Landowners met
8 with the two highest-ranking City Planning officials at the time, Tom Perrigo and Peter
9 Lowenstein, and asked them to confirm that the entire 250 Acre Residential Zoned Land is
10 developable and if there was “anything” that would otherwise prevent development. The City
11 Planning Department agreed to do a study that took approximately three weeks. *Id.; LO Appx.,*
Ex. 40 pp. 66-67; 69:15-16; 70:13-16 (Lowie Depo, Binion v. Fore Star). The City Planning
12 Department reported that: 1) the 250 Acre Residential Zoned Land was hard zoned and had “vested
13 rights” to develop up to 7 units an acre; 2) “the zoning trumps everything;” and, 3) any owner of
14 the 250 Acre Residential Zoned Land can develop the property. *LO Appx., Ex. 34, Decl. Lowie,*
p. 3, para. 8; Ex. 40, pp. 74-75, specifically, 75:13; 74:22-23; 75:12 (Lowie Depo, Binion v. Fore
15 *Star).*

16 The City provided its official position through a “Zoning Verification Letter” issued by the
17 City Planning & Development Department on December 30, 2014, stating: 1) “The subject
18 properties are zoned R-PD7 (Residential Planned Development District – 7 units per acre;” 2) “The
19 density allowed in the R-PD District shall be reflected by a numerical designation for that district.
20 (Example, R-PD4 allows up to four units per gross acre.);” and, 3) “A detailed listing of the
21 permissible uses and all applicable requirements for the R-PD Zone are located in Title 19 (“Las
22 Vegas Zoning Code”) of the Las Vegas Municipal Code.” *LO Appx., 134, City Zoning Verification*
Letter; Ex. 40, pp. 77:24-25, 80:20-21.

23 With this due diligence complete, the Landowners closed on the acquisition of the entire
24 250 Acre Residential Zoned Land by acquiring the membership interest of Fore Stars Ltd. *LO*
Appx., Ex. 34, Decl. Lowie, p. 4, para. 12. The City will argue that the terms of the acquisition

1 and price paid are a relevant question of fact, however, that is only considered (if at all) in
2 analyzing the Landowners 2nd Claim for Relief (Penn Central claim), which is **not** the subject of
3 this motion.

4 At the time of acquisition, the entire 250 Acre Residential Zoned Land consisted of five
5 separate parcels. *LO Appx. Ex. 34, Decl. Lowie, p. 4, para. 12; Ex. 44, Deed.* After acquisition,
6 the Landowners moved forward with developing the Land and, at the direction of the City, re-drew
7 the boundaries of various parcels creating a total of ten parcels of residentially zoned land. *LO*
8 *Appx. Ex. 34, Decl. Lowie, p. 4, para. 12-13.* The 35 Acre Property is one Assessor Parcel, APN
138-31-201-005.

9 After the acquisition, the golf course operator terminated operations due to an inability to
10 be profitable (*LO Appx., Ex. 45, Golf Course Closure, September, 2015 & May, 2016, Par 4 Letter*
11 *to Fore Star; Ex. 46, Golf Course Closure, December 1, 2016, Elite Golf Letter to Yohan Lowie;*
Ex. 47, Golf Course Closure, Keith Flatt Depo, Fore Stars v. Nel).

12 The Landowners hired well known land use attorney, Christopher L. Kaempfer, to assist
13 with submitting the applications to the City of Las Vegas to develop the Land. *LO Appx. Ex. 48,*
14 *Decl. Kaempfer.* Attorney Kaempfer lives in the adjoining Queensridge Community and testified
15 “it was important for [him] to ascertain what development rights, if any, actually existed on the
16 Badlands [250 Acres].” *LO Appx. Ex. 48, para. 7, Decl. Kaempfer.* Attorney Kaempfer checked
17 the zoning website and was provided the Zoning Verification Letter, both of which proved the
18 residential zoning. *Id.* Attorney Kaempfer then checked with the City’s Planning Section
19 Manager, Peter Lowenstein, and was advised the Land could be developed in accordance with the
20 R-PD7 zoning. *Id.* Attorney Kaempfer also checked with then City Attorney, Brad Jerbic, who
21 said the City will “honor the zoning letter” provided to the Landowners during their due diligence.
Id. With this information, Attorney Kaempfer agreed to represent the Landowners in developing
the Land and moved forward accordingly. *Id.*

22 The extensive due diligence, the representations by the City’s highest-ranking officials,
23 and the City documents are all consistent with this Court’s findings of fact and conclusions of law
24 on the property interest sub-inquiry, that: 1) zoning must be relied upon to determine the property
interest; 2) the 35 Acre Property has been zoned R-PD7 since at least 1990; and, 3) the permitted

1 used **by right** of the 35 Acre Property are single-family and multi-family residential. *LO Appx.*,
2 *Ex. 1, October 12, 2020 FFCL Regarding Property Interest, pp. 4-5.*

3 **V. THE CITY’S TAKING ACTIONS RELEVANT TO THE LANDOWNERS’ FIRST,**
4 **THIRD AND FOURTH CLAIMS FOR RELIEF**

5 **A. This Court Held that “All” City Actions in the Aggregate Must Be Considered**
6 **When Deciding the Pending Taking Issue**

7 This Court previously held that when deciding the second sub-inquiry Nevada inverse
8 condemnation law requires the Court to consider all government action in the aggregate, regardless
9 of when these actions occurred:

10 In determining whether a taking has occurred, Courts must look at the
11 ***aggregate of all of the government actions*** because “the form, intensity, and
12 the deliberateness of the government actions toward the property must be
13 examined ... All actions by the [government], in the aggregate, must be
14 analyzed.” Merkur v. City of Detroit, 680 N.W.2d 485, 496 (Mich.Ct.App.
15 2004). *See also* State v. Eighth Jud. Dist. Ct., 351 P.3d 736 (Nev. 2015)
16 (*citing* Arkansas Game & Fish Comm’s v. United States, 568 U.S. --- (2012))
17 (there is no “magic formula” in every case for determining whether particular
18 government interference constitutes a taking under the U.S. Constitution;
19 there are “nearly infinite variety of ways in which government actions or
20 regulations can effect property interests.” *Id.*, at 741); City of Monterey v.
21 Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) (inverse
22 condemnation action is an “ad hoc” proceeding that requires “complex
23 factual assessments.” *Id.*, at 720.); Lehigh-Northampton Airport Auth. v.
24 WBF Assoc., L.P., 728 A.2d 981 (Comm. Ct. Penn. 1999) (“There is no
bright line test to determine when government action shall be deemed a de
facto taking; instead, each case must be examined and decided on its own
facts.” *Id.*, at 985-86).

25 The City has argued that the Court is limited to the record before the City
26 Council in considering the Landowners’ applications and cannot consider all
27 the other City action towards the Subject Property, however, the City cites
28 the standard for petitions for judicial review, not inverse condemnation
29 claims. A petition for judicial review is one of legislative grace and limits a
30 court’s review to the record before the administrative body, ***unlike an inverse***
31 ***condemnation, which is of constitutional magnitude and requires all***
32 ***government actions against the property at issue to be considered.***

33 *LO Appx., Ex. 8, May 15, 2019 Order Denying City’s Motion for Judgment on the Pleadings, pp.*
34 *8-9. Emphasis added.*

1 This Court further held, based on the Sisolak case, “[t]he City can apply ‘valid’ zoning
2 regulations to the property to regulate the use of the property, but *if those zoning regulations ‘rise*
3 *to a taking,’ Sisolak at fn 25, then the City is liable for the taking and must pay just*
4 *compensation.” LO Appx., Ex. 8, May 15, 2019 Order Denying City’s Motion for Judgment on*
5 *the Pleadings pp. 8:3-4. Emphasis added. This holding is based on hornbook inverse*
6 *condemnation law that the Takings Clause “is designed not to limit governmental interference with*
7 *property rights per se, but rather to secure compensation in the event of otherwise proper*
8 *interference amounting to a taking.”¹⁰ For example, the Clark County height restrictions imposed*
9 *in the Sisolak and Hsu cases, the State of Nevada regulation to change access in the Schwartz case,*
10 *the City of Monterey action to protect the habitat of an endangered butterfly and provide dune*
11 *viewshed in the Del Monte Dunes case,¹¹ and the South Carolina Coastal Commission’s*
12 *Beachfront Management Act to protect inland flooding in the Lucas case, were all “valid”*
13 *government actions, but not a defense to a taking.¹² Therefore, any argument that taking actions*
14 *are based on “valid” zoning laws or “valid” government action is not a defense to the taking.*

15 **B. The City Engages in Extreme Conduct to Take the Land for the Surrounding**
16 **Neighbors.**

17 As discussed above, all homeowners of the adjacent Queensridge Community have had
18 actual notice of the developability of the 250 Acre Residential Zoned Land as the CC&R’s, the
19 Custom Lot Design Guidelines, the Lot Purchase Agreements, and the Public Offering Statements
20

21 ¹⁰ First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315 (1987).

22 ¹¹ “As a result of the City’s action, the entire subject property was burdened by a public use for
23 beach dedication, dune viewshed, and habitat preservation.” *LO Appx., Ex. 138, Del Monte Dunes*
v. City of Monterey, 1995 WL 17070330 (C.A.9)(Appellate Brief 9th Cir.) Appellees’ Opposition
24 *Brief and Cross-Brief *14.*

¹² McCarran Int’l Airport v. Sisolak, 122 Nev. 645 (2006); Hsu v. County of Clark, 123 Nev. 625
(2007); Schwartz v. State, 111 Nev. 998 (1995); City of Monterey v. Del Monte Dunes at Monterey,
Ltd., 526 U.S. 687 (1999); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

1 specifically disclose that the Land is “not a part” of the Queensridge Community and does not
2 include a golf course or open space.

3 Yet, a small group of the surrounding neighbors objected to development and demanded
4 the Land for themselves. On or about December 29, 2015, a surrounding neighbor, met with the
5 Landowners, bragged that his Queensridge Community is “politically connected,” they could stop
6 all development, and that they wanted 180 acres of the 250 Acre Residential Zoned Land, including
7 water rights, handed over for free. *LO Appx. Ex. 94, Decl. DeHart, at 002836 ¶2*. The Landowners
8 refused to comply with this demand for the Land they worked over 20 years to acquire and reported
9 this extortion attempt to the F.B.I. *Id.* The surrounding neighbors vowed to continue to file
10 lawsuits until they got their way. *LO Appx. Ex. 149 LVRJ* article (“This is the first lawsuit to bring
11 an end to that process, I don’t know whether it will be the last one.”). In an email to a Queensridge
12 homeowner that supported development, one of the surrounding neighbors boasted [w]e have done
13 a pretty good job of prolonging the developer’s agony from Sept 2015 to now.” *LO Appx Ex. 143,*
14 *email regarding prolonging developer’s agony*. From 2015 forward, a small group of the
15 surrounding neighbors relentlessly opposed any and all development of the 250 Acres.

16 During this time, another surrounding neighbor enlisted his longtime friend Las Vegas City
17 Council Member Bob Coffin to stop the Landowners’ development of the Land. *LO Appx. Ex. 147*.
18 Coffin evidently agreed to take direction with the specific intention and plan to deny the
19 Landowners their vested property and constitutional rights. *LO Appx. Ex 122 at 004230*, (“do they
20 know I am voting against the whole thing?”); *LO Appx., Ex 126 at 004244* (“***a majority [of the***
21 ***City Council]*** ***is standing in his [Landowners] path [to development]***”). It did not take long for
22 Council Member Coffin to make clear he was working *NOT* for the public benefit, but for his
23 “longtime friend.” Within months of the Landowners' acquisition of the 250 Acres, Coffin told
24 Mr. Lowie that no development was to occur on 180 acres of the Land, but that Coffin would

1 "allow" Mr. Lowie to build "anything he wanted" on the remaining 70 acres if the Landowners
2 handed over the 180 acres to the neighbors along with the water rights. *LO Appx. Ex 35 Decl.*
3 *Lowie (2) at 000741 ¶5* This was again repeated several months later, in April 2016, when
4 Councilman Coffin told the Landowners that to allow any development at all on the 70 acres, the
5 Landowners would have to "hand over" the 180 acres, and associated water rights, in perpetuity.
6 *Id at ¶ 6.*

7 As time went on, and the Landowners refused to "hand over" the Land, Coffin intensified
8 his position calling the Landowners' representative a "sonofab[...]," "A[...]"hole," "scum,"
9 "motherf[...]"er," "greedy developer," "dirtball," "clown," and Narciss[ist]" with a "mental
10 disorder," and sought "intel" against the Landowners through a private investigator as "dirt may
11 be handy" in case he needs to "get rough" with the Landowners. *LO Appx. Exs. 121, 127, and 130.*

12 Likewise, one of the surrounding neighbors "suggested" to then Councilman Bob Beers,
13 who held the seat for Ward 2, which included Queensridge, it would do his political career well to
14 hold up development.

15 Q. You also indicated that the homeowners were suing to slow it down so that there
16 wouldn't be any development in their lifetime? A. Yes, sir.

17 Q. And where did you get that understanding? A. Mr. Binion told me that.

18 Q. He [Binion] was asking you to break the law? A. He was asking to have the City get
in the way of the of the landowner's rights, yes.

19 Q. And that's what he was asking you to do was to cause delay as you say?

20 A. Yes. . . . A. I attempted to kindly reject his offer. . . .

21 A. I think he was discussing the potential for –for a political campaign against me."

LO Appx., Ex. 142, Deposition of Councilman Bob Beers pages 31-36.

22 The surrounding neighbors then campaigned against Councilman Beers who was up for
23 reelection in July 2017 and successfully removed him from office replacing him with their
24 candidate Steve Seroka who had vowed to stop all development during his campaign and willingly

1 followed the direction of these individuals by working behind the scene and delaying hearings,
2 instructing staff to legislate against development and denying or striking applications for
3 development. *See LO Appx., Ex. 146, Schreck -Seroka email (directing Seroka on an upcoming*
4 *City Council hearing, and Seroka informing Schreck 133 Acre coming up for hearing and*
5 *suggesting “may be delayed . . .”); Ex. 148, Transcr. Sept. 6, 2016 City Council Meeting; Ex. 54,*
6 *Denial of MDA, Ex. 114, Transcr. of 5.16.18 City Council Meeting (Bill 2018-5).* As is more fully
7 discussed below, the City through its representatives conducted their duties - under the direction
8 of the surrounding neighbors - with the intention of denying the constitutional property rights of
9 the Landowners in order to take their Land and give it to the surrounding neighbors.

10 Seroka, as a Councilman, at a public meeting on June 21, 2018, even told all of the
11 Landowners’ neighbors that the Landowners’ Property belonged to the neighbors and the
12 neighbors had the right to use the Landowners’ Property as recreation and open space.

13 “So when they built over there off of Hualapai and Sierra –Sahara –this land [250
14 Acres] is the open space. Every time that was built along Hualapai and Sahara, this
15 [250 Acres] is the open space. Every community that was built around here, that
16 [250 Acres] is the open space. The development across the street, across Rampart,
17 that [250 Acres] is the open space....it is also documented as part recreation, open
18 space...That is part recreation and open space...” *LO Appx., Ex. 136, 17:23-18:15,*
19 *HOA meeting page*

17 “Now that we have the documentation clear, ***that is open space for this part of our***
18 ***community. It is the recreation space for this part of it.*** It is not me, it is what the
19 law says. ***It is what the contracts say between the city and the community, and***
that is what you all are living on right now.” *LO Appx., Ex. 136, 20:23-21:3, HOA*
meeting (emphasis added).

20 And, in accordance with Councilman Seroka’s direction, ***the neighbors are using the***
21 ***Landowners’ Property.*** *See LO Appx., Ex. 150, Affidavit of Donald Richards and pictures*
22 *attached thereto wherein Mr. Richards attests that the neighbors are using the Landowners*
23 *property and that they have told him “it is our open space.” Id. at §6 & 7.* The neighbors are
24 using the Landowners’ Property for a viewshed, for recreation, for open space and for access as

the legislation Seroka sponsored and passed provided. (*LO Appx., Ex. 136, 137, 48, 89, 92, 108, 150*).

C. In the Aggregate, the City Engaged in Aggressive and Systematic Actions to Prohibit *all* use of the 35 Acre Property to Preserve it for “Ongoing Public Access” and for the Surrounding Property Owners Use

Immediately after purchasing the 250 Acre Residential Zoned Land in early 2015, the Landowners and Attorney Kaempfer met with the City of Las Vegas Planning Department to begin development of the individual 17, 35, 65, and 133 Acre parcels as the residential real estate market was increasing in early 2015 and the carrying costs for this vacant property are significant.¹³ Accordingly, the Landowners wanted to quickly develop the properties and development of the parcels one at a time was the most financially feasible way to commence development. While the Landowners had a vision of how to develop the Land, the City directed the type of applications necessary for approval of development. *LO Appx., Ex. 34, Decl. Lowie (1), para. 11.*

The City adamantly insisted that **the *only* application it would accept to develop any part of the Land was a Master Development Agreement to develop the entire 250 Acre Residential Zoned Land under one development plan**; the City repeatedly refused to accept individual applications to develop each parcel. *LO Appx., Ex. 34, Decl. Lowie (1); Ex. 48 Decl. Kaempfer.* “Mayor Goodman informed [the Landowners during a December 16, 2015, meeting] that due to neighbors’ concerns the City would not allow ‘piecemeal development’ of the Land and that one application for the entirety of the 250 Acre Residential Zoned Land was necessary by way of a Master Development Agreement (“MDA”)” and that during the MDA process, “the City continued to make it clear to [the Landowners] that it would not allow development of individual

¹³ For example, the Clark County Tax Assessor valued the entire 250 Acre Residential Zoned Land at about \$88 million and, based on this residential land value, the Landowners were paying (and continue to pay) about \$1 million per year in real estate taxes alone without deriving any residential income from the property. *LO Appx., Exs. 49, 50, 51, 52, Tax Assessors’ valuations and taxes.*

1 parcels, but demanded that development only occur by way of the MDA.” *LO Appx. Ex. 34*, Decl.
2 Lowie, at 00538, para. 19, at 00539, para. 24:25-27. The Landowners’ land use attorney, Chris
3 Kaempfer, states: 1) that he had “no less than seventeen (17) meetings with the [City] Planning
4 Department” regarding the “creation of a Development Agreement” which were necessitated by
5 “public and private comments made to me by both elected and non-elected officials that they
6 wanted to see a plan – via a Development Agreement – for the development of the entire Badlands
7 and not just portions of it;” and, 2) the City advised him that “[the Landowners] either get an
8 approved Development Agreement for the entirety of the Badlands *or we get nothing.*” *LO Appx.*,
9 *Ex 48, Decl. Kaempfer, paras 11-13*. Emphasis Added.

10 The Landowners opposed the City mandated MDA, because it is not required by law or
11 code and more importantly, it would significantly increase the time and cost to develop. *LO Appx.*,
12 *Ex 34, Decl. Lowie (1), para. 20*. Nevertheless, the City left the Landowners no choice, so they
13 moved forward with the City’s proposed MDA concept, that included development of the 35 Acre
14 Property, along with the 17, 65, and 133 Acre properties. *Id.*

15 The MDA process started in or about Spring of 2015 and through this process the City
16 dictated to the Landowners exactly how the City wanted the Land developed, which included how
17 the 35 Acre Property would be developed, and the precise information and documents the City
18 wanted as part of the MDA application process. *LO Appx., Ex 34, Decl. Lowie (1), paras. 20-21*.
19 The City’s demands were oppressive, unreasonable, and overburdensome, with the City Planning
20 Department and City Attorney’s Office drafting the MDA almost entirely.¹⁴ The Mayor indicated
21 that City Staff had dedicated “an excess of hundreds of hours beyond the full day” working on the
22 MDA. *LO Appx., Ex. 54, lines 697-701*.

23 _____
24 ¹⁴ *LO Appx., Ex. 53, June 21, 2017 Transcr. City Council Meeting, LO 00000367 lines 333-335; 446 lines 2471-2472; 447 lines 2479-2480; 465 lines 2964-2965; Ex. 54, August 2, 2017 Transcr. City Council Meeting, p. 26 lines 691-692.*

1 The uncontested evidence shows that these City demands, which were part of the MDA,
2 *cost the Landowners more than \$1 million over and above the normal costs for a development*
3 *application* of this type, further demonstrating the City's oppressive demands. *LO Appx. Ex. 34,*
4 *Decl. Lowie (1), para. 21:4-6.* In an effort to comply, so that development could occur, the
5 Landowners agreed to every single City demand and paid over \$1 million in *extra* application
6 costs. *LO Appx. Ex. 34, Decl. Lowie (1), para. 20:26-27. See also e.g. LO Appx. Ex. 55, City*
7 *required MDA concessions signed by Landowners and Ex. 56, MDA memos and emails regarding*
8 *MDA changes.* The Mayor acknowledged as much, stating, "you did bend so much. And I know
9 you are a developer, and developers are not in it to donate property. And you have been donating
10 and putting back... And it's costing you money every single day it delays." *LO Appx., Ex. 53 lines*
11 *2462-2465.* Councilwoman Tarkanian commented that she had never seen anybody give as many
12 concessions as the Landowners as part of the MDA stating, "I've never seen that much given
13 before." *LO Appx., Ex. 53 lines 2785-2787; 2810-2811.*

14 The City demands, prior to the MDA being submitted for approval included, without
15 limitation, detailed architectural drawings including 3D digital models for topography, elevations,
16 etc., regional traffic studies, complete civil engineering packages, master detailed sewer studies,
17 drainage studies, school district studies. *LO Appx. Ex. 34, Decl. Lowie (1), p. 6, para. 21.* Mr.
18 Lowie's Declaration provides, "[i]n all my years of development and experience such costly and
19 timely requirements **are never required prior to the application approval** because no developer
20 would make such an extraordinary investment prior to entitlements, ie. approval of the application
21 by the City." *LO Appx. Ex. 34, Decl. Lowie (1), p. 6, para. 21:6-10.* Emphasis added.

22 The City also demanded onerous concessions as part of the MDA that ranged from simple
23 definitions, to the type of light poles, to the number of units and open space required for the overall
24

1 project.¹⁵ Additional, non-exhaustive City demands / concessions made of the Landowners, as
2 part of the MDA, included: 1) donation of approximately 100 acres as landscape, park equestrian
3 facility, and recreation areas; 2) building brand new driveways and security gates and gate houses
4 for Queensridge; 3) building two new parks, one with a vineyard; and, 4) reducing the number of
5 units, increasing the minimum acreage lot size, and reducing the number and height of the towers.¹⁶
6 During the process the City required at least 700 changes and 16 new and revised versions of the
7 MDA.¹⁷

8 After a year and half of the City's MDA demands, 16 re-drafts, and no end in sight, it
9 became clear the City was intent on engaging in a never-ending process that was imposing
10 unreasonable burdens on the Landowners over and above the normal application process. The
11 Landowners communicated their frustration, stating the unreasonable changes to the MDA were
12 always at the request of the City: "[w]e have done that through many iterations, and those changes
13 were not changes that were requested by the developer. They were changes requested by the City
14
15
16
17

18 ¹⁵ As just one example of this, *see LO Appx., Ex. 57, LO 00001838-1845*. Another example of the
19 significant changes requested and made over time can be seen in a redline comparison of just two
20 of the MDAs – the MDA dated July 12, 2016 and the MDA dated May 22, 2017. *LO Appx., Ex. 58*.
21 During just this eight-month period there were 544 total changes to the MDA. *Id.* These
22 changes can also be seen in a redline comparison of the "Design Guidelines" that were part of the
MDA. *LO Appx., Ex. 59*. Another 157 changes were made to these Design Guidelines in just over
one year from the April 20, 2016, to May 22, 2017, version. *Id.*

¹⁶ *LO Appx., Ex. 60, LO 00001836; Ex. 54, lines 599-601; Ex. 60, LO 00001837; LO Appx., Ex. 53, lines 2060-2070; Ex. 60 and Exhibit 55.*

¹⁷ *LO Appx., Exs. 58 and 59*, final page of exhibits show the over 700 changes. *LO Appx., Ex. 61*
consists of 16 versions of the MDA generated from January, 2016 to July, 2017. *LO Appx. Ex 61, LO 00001188 - LO 00001835*. Importantly, the Landowners expressed their concern that the time,
resources, and effort it was taking to negotiate the MDA may cause them to lose the property. *LO Appx. Ex. 53, LO 00000447-450.*

1 and/or through homeowners [surrounding neighbors] to the City.”¹⁸ The City Attorney also
2 recognized the “frustration” of the Landowners due to the length of time negotiating the MDA.¹⁹

3 Seeing no end whatsoever to the City-mandated MDA process, the Landowners
4 approached the City Planning Department to develop the 35 Acre Property as a stand-alone
5 development, rather than as part of the MDA, and asked the Planning Department to set forth all
6 requirements the City could possibly impose on the Landowners to develop the 35 Acre Property
7 by itself. *LO Appx. Ex. 34, Decl. Lowie, p. 6, para 23.* The City Planning Department worked
8 with the Landowners to prepare the residential development applications for the 35 Acre Property.
9 *LO Appx. Ex. 34, Decl. Lowie, p. 6, para. 24.* The applications were completed and properly
10 submitted to develop the 35 Acre Property as a stand-alone property. *Id.; LO Appx, Exs. 62-72,*
11 *35 Acre Applications.* The City Planning Department issued Staff Reports stating that the
12 applications the Planning Department and the Landowners jointly prepared were consistent with
13 the R-PD7 hard zoning, met all requirements in the Nevada Revised Statutes and the City’s Unified
14 Development Code (Title 19), and recommended approval to allow the Landowners to develop the
15 35 Acre Property. *LO Appx., Ex. 73, City Planning Department Staff Report to Planning*
16 *Commission; Ex. 74, City Planning Department Staff Report to City Council; Ex. 75, Transcript,*
17 *February 14, 2017, Planning Commission, 35 Acre Applications.*

18 The 35 Acre Property as a stand-alone development was presented to the City Council for
19 approval on June 21, 2017. Tom Perrigo, the City’s Planning Director stated at the hearing on the
20 Landowners’ applications that the proposed development met all City requirements and should be
21

22 ¹⁸ *LO Appx., Ex. 54, Transcr. August 2, 2017 City Council Meeting, lines 378-380.*

23 ¹⁹ “But I do not like the tactics that look like we’re working, we’re working, we’re working and,
24 by the way, here’s something you didn’t think of I could have been told about six months ago. I
understand Mr. Lowie’s frustration. There’s some of that going on. There really is. And that’s
unfortunate. I don’t consider that good faith, and I don’t consider it productive.” City Attorney
Brad Jerbic. *LO Appx., Ex. 53, Transcr. June 21, 2017 City Council Meeting, lines 2990-2993.*

1 approved. *LO Appx., Ex. 53, Transcr. June 21, 2017 City Council meeting, 35 Acre Applications,*
2 *pp. 22-23, lines 566-587.* One City Council members acknowledged at the hearing that the 35
3 Acre Property applications met all City requirements, stating the proposed development was “so
4 far inside the existing lines [the Las Vegas Code requirements].” *LO Appx., Ex. 53, Transcr. June*
5 *21, 2017 City Council meeting, 35 Acre Applications, p. 97, lines 2588-2590.* The City Council,
6 however, re-stated its firm position that it opposed individual development applications and
7 insisted on the MDA for the entire 250 Acre Residential Zoned Land: 1) “I have to oppose this,
8 because it’s piecemeal approach (Councilman Coffin);” 2) “I don’t like this piecemeal stuff. I
9 don’t think it works (Councilwoman Tarkanian); and, 3) “I made a commitment that I didn’t want
10 piecemeal,” there is a need to move forward, “but not on a piecemeal level. I said that from the
11 onset,” “Out of total respect, I did say that I did not want to move forward piecemeal.” (Mayor
12 Goodman). *LO Appx., Ex. 53, Transcr. June 21, 2017 City Council meeting, 35 Acre Applications,*
13 *p. 98:2618; 104:2781-2782; 118:3161; 49:1304-1305; 92:2460-2461.* This confirmed that the
14 City would not accept any application other than the MDA.

15 The City Council, contrary to the City’s own Planning Department, Planning
16 Commission, the City Code, and the Nevada Revised Statutes, denied the 35 Acre Property
17 applications altogether. *LO Appx. Ex. 93, 35 Acre Application Denial Letter; see also Ex. 53,*
18 *Transcr. June 21, 2017, City Council meeting, 35 Acre Applications, p. 109:2906-2911; Ex. 76,*
19 *35 Acre Applications City Council Minutes.* The City’s official position at the hearing was: 1) the
20 35 Acre Property applications were consistent with zoning and met all requirements in the Nevada
21 Revised Statutes and City Unified Development Code (Title 19); and, 2) the sole reason for
22 denying the applications was the City wanted one MDA for the entire 250 Acres, not “piecemeal”
23 development. “The City continued to make it clear to [the Landowners] that it would not allow
24

1 development of individual parcels but demanded that development only occur by way of the
2 MDA.” *LO Appx. Ex. 34, Decl. Lowie, p. 6, para. 24:25-27.*

3 Intent on developing the 35 Acre Property, the Landowners turned their attention back to
4 the unreasonable and oppressive MDA. In total, the Landowners worked with the City for 2 ½
5 years on the MDA (between Spring, 2015, and August 2, 2017) and accepted all 700 changes and
6 at least 16 different City re-drafts of the MDA. During this time, the entire property sat idle with
7 the Landowners paying all carrying costs (including over \$1 million per year in real property taxes)
8 while the City delayed development with its 700 changes and 16 do-overs.

9 On August 2, 2017, (approximately 40 days after the City denied the applications to
10 develop the 35 Acre Property as a stand-alone project on the sole basis it wanted the MDA) the
11 MDA application,²⁰ along with the MDA,²¹ was presented to the City Council for approval - a day
12 that will live in infamy forever for the Landowners. The City Planning Department issued a Staff
13 Report, stating the MDA met all requirements in the Nevada Revised Statutes and the City’s
14 Unified Development Code (Title 19), and that the MDA should be approved to allow the
15 Landowners to develop the entire 250 Acres. *LO Appx., Ex. 77, MDA City Staff Report to City*
16 *Council.* Despite offering the MDA as the only application the City would accept to develop any
17 part of the 250 Acres (including the 35 Acre Property); repeated assurances from the City that it
18 would approve the MDA after denying the 35 Acre Property stand-alone applications; the fact that
19 the City itself drafted the MDA; and the City’s own Planning Department recommending approval,
20 **the City denied the MDA** altogether on August 2, 2017. *LO Appx. Ex. 78, MDA- Denial Minutes;*
21 *Ex 54, Transcr. August 2, 2017, City Council meeting (MDA), pp. 149:4154-4156; 153:4273-4275.*

22
23 ²⁰ *LO Appx., Ex. 79, MDA Application; Ex. 80, MDA Application, Bill No. 2017-17.*

24 ²¹ *LO Appx., Ex., 81, Master Development Agreement; Ex. 82, MDA Addendum; Ex. 83, MDA*
Design Guidelines; Ex. 84, MDA Justification Letter; Ex. 85, MDA Location and Aerial Maps; Ex.
86, MDA Supporting Documents (1); Ex. 87, MDA Supporting Documents (2).

1 The City did not ask the Landowners to make more concessions, like increasing setbacks
2 or reducing units per acre, it simply denied the MDA which denied the development of the entire
3 250 Acre Property, including the 35 Acre Property. *LO Appx. Ex. 34, Decl. Lowie, p. 7, para. 26.*
4 *LO Appx. Ex. 78, MDA- Denial Minutes; Ex. 54, Transcript, August 2, 2017, City Council (MDA),*
5 *pp. 149:4154-4156; 153:4273-4275.*

6 The City denied the individual 35 Acre Property applications because it demanded an
7 MDA, then the City denied the MDA. This establishes that the City's assertion that it wanted to
8 see the entire 250 Acres developed under the MDA as one unit was nothing more than a farce.
9 Regardless of whether the Landowners submit individual applications (35 Acre Property
10 applications) or one omnibus plan for the entire 250 Acres (the MDA), the City denied any and all
11 uses of the 35 Acre Property.

12 **C. Further Takings Actions by the City**

13 As will be explained in the Legal Argument below, the City's above-described actions
14 alone meet Nevada's taking standard for the Landowners' First, Third and Fourth Claims for
15 Relief. However, the following shows additional actions the City engaged in to further preclude
16 all use of the 35 Acre Property.

17 **The City denied the Landowners routine over-the-counter request for access.** The
18 Landowners filed with the City a request for three access points to streets the 250 Acre Residential
19 Zoned Land abuts – one on Rampart Blvd. and two on Hualapai Way. *LO Appx., Ex. 88, Access*
20 *Application.* This was a routine over the counter request and is specifically excluded from City
21 Council review. *LO Appx., Ex. 90 at 002818, LVMC 19.16.100(f)(2)(a) and 19.16.100(f)(2)(a)(iii).*
22 Moreover, the Nevada Supreme Court has held that a landowner cannot be denied access to
23 abutting roadways, because all property that abuts the roadway has a special right of easement for
24 access purposes and this is a recognized property right in Nevada. Schwartz v. State, 111 Nev. 998

1 (1995). The Court held that this right exists “despite the fact that the Landowner had not yet
2 developed access.” *Id.*, at 1003. Contrary to this Nevada law and its own City Code, the City
3 denied the access application citing as the sole basis for the denial, the potential impact to
4 “*surrounding properties.*” *LO Appx., Ex 89, Access Denial Letter, LO 00002365.* Emphasis
5 added. In violation of its own City Code, the City required that the matter be presented to the City
6 Council through a “Major Review” process pursuant to LVMC 19.16.100(G)(1)(b), which is
7 substantial. *LO Appx., Ex. 90, LVMC 19.16.100.* It requires a pre-application conference, plan
8 submittal, circulation to interested City departments for comments, recommendation,
9 requirements, and publicly noticed Planning Commission and City Council hearings. The City
10 placed this extraordinary barrier to access, because the City is preserving the property for the use
11 of the owners of the “*surrounding properties.*”

12 **The City also denied the Landowners routine over-the-counter fence request.** In
13 August 2017, after the MDA denial, the Landowners filed a routine request to install chain link
14 fencing with the City to enclose two water features/ponds that are located on the 250 Acres. *LO*
15 *Appx., Ex. 91, Fence Application.* The City Code expressly states that this application is similar
16 to a building permit review that is granted over the counter and not subject to City Council review.
17 *LO Appx., Ex. 90, LVMC 19.16.100(f)(2)(a) and 19.16.100(f)(2)(a)(iii).* The City denied the
18 application, again stating its consideration for the “*surrounding properties.*” *LO Appx., Ex 92,*
19 *Fence Denial.* Emphasis added. The City improperly required that this routine fence matter also
20 go through the Major Review Process because the City is preserving the Landowners’ property for
21 the use of the owners of the “*surrounding properties.*”

22 **The City denied the Landowners’ request to develop the 133 Acre Property.** As part
23 of the numerous development applications filed by the Landowners between 2015 and 2018 to
24 develop all or portions of the 250 Acre Residential Zoned Land, in October and November 2017,

1 after the MDA denial, the Landowners filed detailed applications to develop the 133 Acre Property
2 with residential units, consistent with the R-PD7 hard zoning. *LO Appx., Ex. 97, 133 Acre*
3 *Applications, Combined; Ex. 98, 133 Acre Applications, Justification Letter.* The City Planning
4 Staff thoroughly reviewed the applications and provided a detailed analysis recommending
5 approval, because the proposed residential development was consistent with the R-PD7 hard
6 zoning and it met all requirements in the Nevada Revised Statutes and the Unified Development
7 Code (Title 19). *LO Appx., Ex. 99, Ex. 100, Ex. 101, Ex. 102 and Ex. 103, City Planning Staff*
8 *Reports for all 133 Acre Applications.* None of this mattered to the City Council. **It first**
9 **unnecessarily delayed the matter for three months**²² and then refused to grant or deny the
10 applications, and instead **struck the applications** at the hearing.²³ *LO Appx., Ex. 105, 133 Acre*
11 *Application, May 17, 2018, Notice Letters Striking Applications; LO Appx., Ex. 106, Transcr. May*
12 *5, 2018 City Council meeting (133 Acre Strike Applications), p. 74:2082-84.* This illustrates the
13 length to which the City was working to preserve the entire 250 Acres for the surrounding
14 properties.

15 After denial of the MDA, **the City raced to adopt two City Bills that solely target the**
16 **250 Acre Residential Zoned Land in order to prevent all use of the Land – Bill No. 2018-5**

18 ²² *LO Appx., Ex. 104, Transcr. February 21, 2018, City Council meeting (133 Acre App.*
19 *Abeyance), pp. 13-14.*

20 ²³ For these applications, the City forced the Landowner to file a GPA or else it would not “consider
21 the applications.” *LO Appx., Ex. 129, letter to City Planning Department.* The Landowners
22 complied but filed under protest. *LO Appx., Ex. 129.* Remarkably, the City struck the applications
23 on the basis that the GPA, the very application the City forced the Landowners to file, *was untimely*
24 *pursuant to the City Code.* The City thus, required the Landowner to file the application for a GPA
that it would later use as a reason for denial claiming it “violated the code we have in place for a
12-month cooling off period” [application for a general plan amendment [GPA]. 2018 – May 16,
227-232. Again, implementing a catch-22 barrier to development of this Land. The City Planning
Department objected and testified that this application was filed at their “request” and not required
when there is no change in zoning. City 1029-1035. Yet the City struck all of the applications
and refused to consider development of the 133 Acre Property. *See LO Appx., Ex. 135, Transcript*
at 40 lines 1114-1115.

1 **and Bill No. 2018-24.**²⁴ *LO Appx., Ex. 107, Bill No. 2018-5; LO Appx., Ex. 108, Bill No. 2018-24;*
2 *Ex. 109, Transcr. November 7, 2018 City Council meeting (Adopt Bill No. 2018-24), p. 146.* The
3 sole and undisputed analysis performed to determine the properties impacted by these two Bills
4 concluded the Bills targeted only the Landowners' 250 Acres.²⁵ The City's own councilperson
5 acknowledged as much, stating "**I call it the Yohan Lowie [a principle with the Landowners]**
6 **Bill.**"²⁶ And, the uncontested evidence verifies that these Bills authorize the public, including the
7 surrounding property owners, to physically enter the Landowners' Property – a text book per se
8 regulatory taking - by requiring the Landowners to provide for "**ongoing public access**[and to]
9 ensure that such access is maintained." *LO Appx., Ex. 108, Bill No. 2018-24, p. 11, section G.2.d.*

10 In addition, the uncontested evidence shows these two Bills impose impossible to
11 overcome barriers to develop the 250 Acre Residential Zoned Land. For example, on August 13,
12 2018, the City advised the Landowners' engineer company that "zoning/planning approval of the
13 entitlements on a property are required to be approved prior to conditional approval being given
14 on a TDS [technical drainage study]." *LO Appx., Ex. 117, GCW Meeting Minutes, highlighted.*
15 Yet, Bill No. 2018-24, that was signed by the City attorney on June 27, 2018, and adopted on
16 November 7, 2018, states as a requirement to submit an application to develop, approval of a
17 "conceptual master drainage study." *LO Appx., Ex. 108, Bill No. 2018-24, section (e)(1).* Thus, a

18 ²⁴ It is no coincidence that the 133 Acre Property applications were delayed until the day of the
19 hearing on the adoption of these Bills. Notably, the Bills were adopted and less than 2 hours later
20 133 Acre applications were stricken from the agenda forcing the Landowner to "start over". See
LO Appx., Ex. 135, Transcript 5/15/18 Agenda items 71 & 74-83, page 26 line 740.

21 ²⁵ *LO Appx., Ex. 10, Transcript, October 15, 2018, Recommending Committee (Bill No. 2018-24),*
p. 7:169-191; Ex. 111, Bill No. 2018-24, Kaempfer Opposition, October 15, 2018, Part 1; Ex. 112,
22 *Bill No. 2018-24, Kaempfer Opposition, October 15, 2018, Part 2. See also Ex. 113, Bill No.*
2018-24, Hutchison Opposition Letter, July 17, 2018.

23 ²⁶ *LO Appx., Ex. 114, Transcript, May 16, 2018, City Council (Bill No. 2018-5), p. 17:487 and p.*
1:57-58. See also LO Appx., Ex. 115, Bill No. 2018-5, Fiore Opening Statement, p. 1; LO Appx.,
24 *Ex. 116, Transcript, May 14, 2018 Recommending Committee (Bill No. 2018-5), p. 6:149-50.*

1 development application could not be submitted without a drainage study and a drainage study
2 could not be conducted without approval of a development application. This is the proverbial
3 catch-22.

4 Just some of the additional (impossible to meet) barriers included in the Bills which must
5 be satisfied **before** a development application can even be submitted are the following: a master
6 plan (showing areas proposed to remain open space, recreational amenities, wildlife habitat, areas
7 proposed for residential use, including acreage, density, unit numbers and type, areas proposed for
8 commercial, including acreage, density and type, a density or intensity), a full and complete
9 development agreement, an environmental assessment (showing the project's impact on wildlife,
10 water, drainage, and ecology), a phase I environmental assessment report, a master drainage study,
11 a master traffic study, a master sanitary sewer study with total land uses proposes, connecting
12 points, identification of all connection points, a 3D model of the project with accurate topography
13 to show visual impacts as well as an edge condition cross section with improvements callouts and
14 maintenance responsibility, analysis and report of alternatives for development, rationale for
15 development, a mitigation report, CC&Rs for the development area, *a closure maintenance plan*
16 *showing how the property will continue to be maintained as it has in the past* (providing security
17 and monitoring), development review to assure the development complies with "other" City
18 policies and standards, and **anything else** "the [City Planning] Department may determine are
19 necessary." *LO Appx., Ex. 107, Bill No. 2018-5 and Ex. 108, Bill No. 2018-24, ad passim.* No
20 developer would engage in these outrageous costs **before** submitting an application. The City
21 knew this, which is why it imposed the same solely on the Landowners' Property, as the City did
22 not want development on the Landowners' Property because the City is preserving the property
23 for the surrounding neighbors' use and enjoyment.

1 Bill 2018-24 also makes it a misdemeanor subject to a \$1,000 a day fine or “imprisonment
2 for a term of not more than six months” if the Landowners do not comply with the Bills outrageous
3 requirements, including maintaining the golf course, even if it is losing money and ongoing public
4 access. *LO Appx., Ex. 108, Bill No. 2018-24, p. 12.* At the September 4, and November 7, 2018,
5 meetings the City Staff confirmed that the Closure Maintenance Plan part of the Bill (which is
6 where the authorization for public access is found) **would be applied retroactively.** *LO Appx., Ex.*
7 *118, Transcr. November 7, 2018 at 03487-03488, 03607, 03616-03617, City Council minutes for*
8 *Bill 2018-24; LO Appx., Ex. 119, Transcr. September 4, 2018 at 3710 lines 255-261.* In other
9 words, the City adopted a Bill that forces the Landowners to acquiesce to a physical occupation of
10 their Property by forcing the Landowners to allow “**ongoing public access**” onto their Property or
11 be subjected to criminal charges.²⁷

12 **D. Further Evidence of the City’s Public Purpose in Taking the Landowners’**
13 **Property**

14 While the Landowners do not need to establish *why* the City has taken their property, it
15 does put into context to all of the City’s actions. Accordingly, the following is further evidence of
16 the “public purpose” for the City’s taking of the 250 Acre Residential Zoned Land:

- 17 • The City repeatedly stated the intent to prohibit any development on any part of the 250
18 Acre Residential Zoned Land was so it could purchase the entire property as follows: 1)
identifying \$15 million of potential City funds to purchase the 250 Acres (notwithstanding
the Land was not for sale)²⁸; 2) advancing a City “proposal regarding the **acquisition and**

19 ²⁷ The City’s counsel must have finally convinced the City that these Bills subjected the City to
20 inverse condemnation liability and to help in their defense against the Landowners’ inverse
21 condemnation claims the City should repeal these Bills. The City did so on January 15, 2020.
22 However, once government's actions have worked a taking of property, “no subsequent action by
the government can relieve it of the duty to provide compensation for the period during which the
23 taking was effective.” Arkansas Game & Fish Comm’n v. United States, 568 U.S. 23, 33 (2012).
“A bank robber might give the loot back, but he still robbed the bank.” Knick v. Township of Scott,
24 Pennsylvania, 139 S.Ct. 2162, 2170, 2172 (2019). Therefore, any repeal does not negate the
taking. Moreover, this repeal was only of the Yohan Lowie Bills; it was not a repeal of all other
City action against the Landowners’ Property.

²⁸ *LO Appx Ex. 144, Seroka email regarding December 15, 2017 Opioid Lawsuit allocation of funds.*

1 **re-zoning** of green space land [250 Acre Property];”²⁹ proposing a Bill to force the 250
2 Acres to remain “Open Space,” contrary to its legal zoning;³⁰ and, telling the surrounding
3 neighbors the solution is to “Sell off the balance to be a golf course with water rights (key).
4 Keep the bulk of Queensridge green.” *LO Appx., Ex. 122, at LO 00002344*. Engaging a
5 golf course architect to “repurpose” the Landowners’ Property. *LO Appx., Ex. 145, email*
6 *and proposal of Golf Course Architects*.

- 7 • One Councilman referred to the Landowners proposal to build large estate homes on his
8 residentially zoned land as the same as “Bibi Netanyahu’s insertion of the concreted
9 settlements in the West Bank neighborhoods.” *LO Appx., Ex. 123, March 27, 2017 Letter*
10 *from Coffin to Polikoff*.
- 11 • Then-Councilman Seroka testified at the Planning Commission (during his campaign) that
12 it would be “**over his dead body**” before the Landowners could use their private property,³¹
13 and issued a statement during his campaign entitled “The Seroka Badlands Solution” which
14 provides the intent to convert the Landowners’ private property into a “fitness park,” and
15 in an interview with KNPR stated that he would “turn [the Landowners’ private property]
16 over to the City.” *LO Appx., Ex. 125, Seroka Campaign Literature and KNPR Interview*.
- 17 • In reference to development on the Landowners’ Property, then-Councilman Coffin stated
18 firmly “I am voting against the whole thing,” and “a majority is standing in his
19 [Landowners] path [to development],”³² **before** the applications were even finalized and
20 presented to the City Council,³³ the councilman refers to the Landowners’ representative
21 as a “sonofab[...],” “A[...].hole,” “scum,” “motherf[...].er,” “greedy developer,” “dirtball,”
22 “clown,” and Narciss[ist]” with a “mental disorder,”³⁴ and seeks “intel” against the
23 Landowner through a PI in case he needs to “get rough” with the Landowners.³⁵
- 24 • Then-Councilmen Coffin and Seroka also exchanged emails wherein they stated they will
 not compromise one inch and that they “need an approach to accomplish the desired
 outcome,” - prevent all development on the Landowners’ Property. *LO Appx., Ex. 122,*
 Coffin Email at LO 00002340.

29 *LO Appx., Ex. 128, September 26, 2018 email to then-councilman Seroka*. Emphasis supplied.

30 *LO Appx., Ex. 121, August 29, 2018 email from then-councilman Bob Coffin*.

31 *LO Appx., 124, Transc. February 14, 2017 Planning Commission Meeting, with Still Image*

32 *LO Appx., Ex. 122, Coffin Email at 00002341; LO Appx., Ex. 126, Bob Coffin Facebook post*.

33 This statement was made by email on April 6, 2017, and the applications were not even presented to the City Council until June 21 and August 2 of 2017.

34 *LO Appx., Ex. 121, August 29, 2018 email by then-councilman Bob Coffin*.

35 In a text message to an unknown recipient, Councilman Coffin stated: “Any word on your PI enquiry about badlands [250 Acre Residential Zoned Land] guy? While you are waiting to hear **is there a fair amount of intel on the scum** behind [sic] the badlands [250 Acre Residential Zoned Land] takeover? **Dirt will be handy if I need to get rough**. *LO Appx., Ex. 127, Coffin Text messages, LO 00002969*. (emphasis supplied); *see also LO Appx., Ex. 126, Bob Coffin Facebook Post*.

- 1 • The City further singled out the Landowners' Property stating "If any one sees a permit
2 for a grading or clear and grub at the *Badlands* Golf Course [250 Acre Residential Zoned
3 Land], please see Kevin, Rod, or me. **Do Not Permit without approval from one of
4 these three.**" *LO Appx., Ex. 130, June 27, 2017, City email.* Italics in original.
- 5 • City Council members even sought to hide information related to actions toward the
6 Landowners' Property after being issued a documents subpoena,³⁶ with instruction given,
7 in violation of the Nevada Public Records Act,³⁷ on how to avoid the search terms being
8 used in the subpoenas: "Also, please pass the word for everyone to not use **B...l.nds in
9 title or text of comms. That is how search works.**" *Id. (emphasis supplied).*

10 The City acknowledged that it was denying the Landowners' use of the 35 Acre Property so
11 it could be preserved for the adjoining Queensridge Community. The City sent the Landowners
12 letters after the denial of the 35 Acre stand-alone applications, which stated that, in addition to not
13 wanting piecemeal development, the applications were denied due to "public opposition," and
14 "concerns over the impact to proposed development on *surrounding residents.*" *LO Appx., Ex 93,
15 35 Acre Application, Denial Letters.*

16 As the Queensridge residents are the only "surrounding residents" it is clear the denials
17 were to preserve the property for them. This was confirmed by Attorney Kaempfer wherein he
18 testifies that, "despite our best efforts, and despite the merits of our application(s)" no development
19 was going to be allowed unless the Queensridge Community agreed and the leader of that group
20 firmly stated they would not agree - "I would rather see the golf course [250 Acres] a desert than
21 a single home built on it." *LO Appx., Ex. 48, Declaration of Attorney Chris Kaempfer, p. 2, para.*

22 12. This was also confirmed by documents obtained as part of a FOIA request, which show the

23 ³⁶ *LO Appx., Ex. 122, Coffin Email at LO 00002343. (Emphasis added).* Email stating, "I am
24 considering only using the phone but awaiting clarity from court. **Please pass word to all your
25 neighbors. In any event tell them to NOT use the city email address but call or write to our
26 personal addresses. For now...PS. Same crap applies to Steve [Seroka]** as he is also being
27 individually sued i[n] Fed Court and also his personal stuff being sought. This is no secret so let
28 all your neighbors know."

³⁷ *See NRS 239.001(4)* (use of private entities in the provision of public services must not deprive
members of the public access to inspect and copy books and records relating to the provision of
those services)

1 City wanted the 35 Acre Property “turned over to the City” for a for \$15 Million to preserve the
2 Property for the surrounding neighbors use as a viewshed. *LO Appx., Ex 144, City Memorandum*
3 – *Thoughts on EP Opioid Lawsuit, p. 3.* And all the City Council meetings are replete with the
4 neighbors demanding the City preserve the Landowners’ Property for their own use.

5 **E. The Tax Assessor**

6 In their attempts to develop, the Landowners even presented to the City Council, the Notice
7 of Decision³⁸ by the City’s own tax assessor³⁹ that the lawful use of the 133 Acre Property is
8 “residential,”⁴⁰ that the tax assessor valued the 250 Acres at approximately \$88 million⁴¹ based on
9 this “residential” use, and that the City was collecting real estate taxes from the Landowners that
10 amounted to *over \$1 million per year* (\$205,227.22 on the 35 Acre Property, alone⁴²) based on
11 this lawful residential use and, accordingly, this lawful use should be permitted. As explained,
12 none of this mattered to the City as it was preserving the Property for the surrounding owners.
13 And, the City’s scheme to prevent development so that it could “Purchase Badlands and operate”
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19 ³⁸ *LO Appx., Ex. 120, Tax Assessor Notice of Decision, submitted with 133 Acre Applications.*

20 ³⁹ See City Charter, Sec. 3.120 (1) (“The County Assessor of the County is, ex officio, the City Assessor of the City.”)

21 ⁴⁰ NRS 361.227(1) mandates that the Tax Assessor determine the taxable value of real property
22 based on the “lawful” use to which property may be put and the Tax Assessor determined the
23 “lawful” use of all parts of the 250 Acres to be “residential.” *LO Appx., Ex. 120, Tax Assessor*
Notice of Decision, Submitted with the 133 Acre Applications; Ex. 49, Tax Assessor Values, \$88
Million; Ex. 51, Tax Assessor Valuation for 35 Acre Property.

24 ⁴¹ *LO Appx., Ex. 49, Tax Assessor Values, \$88 million (the \$88 million is the composite value by*
the Assessor of all parts of the 250 Acre Land).

⁴² *LO Appx., Ex. 50, Tax Assessor, Taxes as Assessed for 35 Acre Property.*

1 for “\$15 Million,” (which equates to less than 6% of the tax assessed value (\$88 million) and likely
2 less than 1% of the fair market value⁴³) **shocks the conscience.**⁴⁴

3 **VI. LEGAL ARGUMENT**

4 Summary judgment is warranted now under three of the Landowners’ taking claims - First
5 Claim for Relief (Categorical Taking), Third Claim for Relief (Regulatory Per Se Taking), Fourth
6 Claim for Relief (Nonregulatory Taking / De Facto taking).

7 **A. Standard of Review**

8 **1. Standard for Summary Judgment**

9 NRCP 56(c) provides that summary judgment “shall be rendered forthwith if the pleadings,
10 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,
11 show that there is no genuine issue as to any material fact and that the moving party is entitled to
12 a judgment as a matter of law.” Further, “summary judgment ... may be rendered on the issue of
13 liability alone although there is a genuine issue as to the amount of damages.” NRCP 56(c). In
14 Wood v. Safeway, Inc., 121 Nev. 724, 121 P.3d 1026 (2005), the Nevada Supreme Court
15 eliminated the “slightest doubt standard,” holding that “[w]hile the pleadings and other proof must
16 be construed in a light most favorable to the nonmoving party, that party bears the burden to do
17 more than simply show that there is some ‘metaphysical doubt’ as to the operative facts in order
18 to avoid summary judgment being entered in the moving party's favor” and that “[t]he nonmoving
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22 ⁴³ The Tax Assessor value of \$88 million is recognized as an extremely low value for the entire
23 250 Acre Land. **Error! Main Document Only.** “Although the assessor is required to appraise
24 the value of the property, it is an open secret that the assessment rarely approaches the true
market value.” Nichols on Eminent Domain, at § 22.1, 22-6

⁴⁴ This shows an incentive to deny all use of the property so the City can purchase the property for pennies on the dollar, which is an unconstitutional act in itself.

1 party “ ‘is not entitled to build a case on the gossamer threads of whimsy, speculation, and
2 conjecture.’”⁴⁵ Summary judgment is appropriately sought here.

3 **2. This Court Decides, as a Matter of Law, the Issue of Liability in**
4 **Inverse Condemnation Cases - Whether a Taking has Occurred**

5 This Court decides, as a matter of law, whether a taking has occurred. McCarran Int’l
6 Airport v. Sisolak, 137 P.3d 1110 (2006) (“whether the Government has inversely condemned
7 private property is a question of law that we review de novo.” Id., at 1119).⁴⁶ The Nevada Supreme
8 Court in the case of County of Clark v. Alper, 100 Nev. 382, 391 (1984), recognized that “[I]nverse
9 condemnation proceedings are the constitutional equivalent to eminent domain actions and are
10 governed by the same rules and principles that are applied to formal condemnation proceedings.”
11 Therefore, all “eminent domain” liability rules and principles cited herein apply equally to this
12 “inverse condemnation” action.

13 **B. The Landowners are Entitled to Summary Judgment on the First, Third,**
14 **And Fourth Claims for Relief**

15 It has been the City’s tactic in the 17, 35, 65, and 133 Acre Cases to string together non-
16 inverse condemnation law addressing separation of powers and land use law from petitions for
17 judicial review to argue for an impossible to meet taking standard. However, this Court must
18 ignore this tactic and, instead, focus on the four seminal Nevada Supreme Court inverse
19 condemnation cases that pointedly set forth Nevada’s inverse condemnation taking standards -
20 State v. Eighth Judicial District Court, 131 Nev. 411 (2015), Tien Fu Hsu v. County of Clark, 173

21 ⁴⁵ Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 713-14, 57 P.3d 82, 87 (2002) (quoting
22 Posadas v. City of Reno, 109 Nev. 448, 452, 851 P.2d 438, 442 (1993) (quoting Collins v. Union
Fed. Savings & Loan, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983))); Bulbman, Inc. v. NV Bell,
108 Nev. 105, 110, 825 P.2d 588, 591 (1992) (quoting Collins, 99 Nev. at 302, 662 P.2d at 621).

23 ⁴⁶ See also Moldon v. County of Clark, 124 Nev. 507, 511, 188 P.3d 76, 79 (2008) (“whether a
24 taking has occurred is a question of law...”); Tien Fu Hsu v. County of Clark, 173 P.3d 724 (Nev.
2007) (date of taking determined by court to be August 1, 1990); City of Sparks v. Armstrong, 103
Nev. 619 (1987) (date of taking determined by the court to be September 12, 1972).

1 P.3d 724 (Nev. 2007), McCarran Int'l Airport v. Sisolak, 122 Nev. 645, 137 P.3d 1110 (Nev.
2 2006), and Sloat v. Turner, 93 Nev. 263, 269 (1977). Nichols on Eminent Domain (Nichols)
3 should also be considered as the Nevada Supreme Court has relied upon Nichols in at least 12
4 eminent domain and inverse condemnation cases.⁴⁷

5 1. First Claim for Relief – Categorical Taking

6 The Landowners first claim for relief is a categorical taking. The Nevada Supreme Court
7 holds that a categorical taking occurs where government action “completely deprives an owner of
8 all economical beneficial use of her property,” and, in these circumstances, just compensation is
9 automatically warranted, meaning there is no defenses to the taking. Sisolak, supra, at 662. A
10 categorical taking does **not** require a physical invasion. This Court has previously held this claim
11 is a “valid claim in the State of Nevada” and has been properly pled. *LO Appx., Ex. 8, May 15,*
12 *2019 Order Denying the City’s Motion for Judgment on the Pleadings*, pp. 4-5.

13 Nevada’s categorical taking standard is met here. As detailed above, the City has **denied**
14 **100%** of the Landowners’ repeated attempts to use the 35 Acre Property - the City denied the 35
15 Acre stand-alone applications, denied the MDA application, denied the access application, and
16 denied the fence application. The City then adopted Bills to make it impossible to use the Property
17 for any purpose for the benefit of the surrounding neighbors. *LO Appx., Ex. 107, 108, 48, 136,*
18 *150*. As a result, the property lies vacant and useless,⁴⁸ all while the Landowners are paying

20 ⁴⁷ See e.g. Buzz Stew v. City of North Las Vegas, 181 P.3d 670, 671, 672 (2008); State Dept. of
21 Transp. v. Cowan, 120 Nev. 851, 854 (2004); County of Clark v. Sun State Properties Ltd., 119
22 Nev. 329, 336 (2003); City of Las Vegas v. Bustos, 119 Nev. 360, 362 (2003); City of Las Vegas
23 v. Pappas, 119 Nev. 429, 441 (2003); National Advertising Co. v. State, Dept. of Transp., 116 Nev.
107, 113 (2000); Argier v. Nevada Power Co., 114 Nev. 137, 139 (1998); Schwartz v. State, 111
Nev. 998, 1002 (1995); Stagecoach Utilities Inc. v. Stagecoach General Imp. Dist., 102 Nev. 363,
365 (1986); Manke v. Airport Authority of Washoe County, 101 Nev. 755, 759 (1985); Sloat v.
Turner, 93 Nev. 263, 268 (1977); State v. Olsen, 76 Nev. 176, 187 (1960).

24 ⁴⁸ In addition to the golf course operations being a financial loss, the golf course was not a legal
or economic use. A golf course use is one “that is not allowed,” in any residential zoned land,
such as the 250 Acre Residential Zoned Land. See *LVMC 19.12.010 (showing a golf course use*

1 \$205,227.22 per year in real estate taxes and significant other carrying costs. Not only has the
2 City actions “completely deprive[d] [the Landowners] of all economical beneficial use of [their]
3 property,” the actions have caused a negative value. Therefore, summary judgment should be
4 granted on the Landowners’ First Claim for Relief – Categorical Taking.

5 2. Third Claim for Relief - Per Se Regulatory Taking

6 The Landowners’ third claim for relief is a per se regulatory taking. The Nevada Supreme
7 Court holds that a per se regulatory taking occurs where government action “authorizes” the public
8 to use private property or “preserves” private property for public use. Sisolak, supra, at 1124-25
9 and Hsu, supra, at 634-635. When this occurs, just compensation is automatically warranted,
10 meaning there is no defenses to the taking. Sisolak, supra, at 662. For example, in the Sisolak and
11 Hsu cases there was a taking, because the County of Clark adopted Ordinance 1221 that preserved
12 Mr. Sisolak and Mr. Hsu’s airspace for aircrafts to use. In Knick v. Township of Scott,
13 Pennsylvania, 139 S.Ct. 2162 (2019), there was a taking, because the Township of Scott adopted
14 an ordinance requiring that “[a]ll cemeteries ... be kept open and accessible to the general public
15 during daylight hours.” Ms. Knick owned a property with several grave markers, meaning the
16 public was authorized to enter her property. This Court has previously held this claim is a “valid
17 claim in the State of Nevada” and has been properly pled. *LO Appx., Ex. 8, May 15, 2019 Order*
18 *Denying the City’s Motion for Judgment on the Pleadings, pp. 4-5.*

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20
21 *prohibited on any residential zoned land).* The City Assessor issued a “Notice of Decision” that
22 as of December 1, 2016, prior to the filing of this case, the golf course was not the “lawful” use of
23 the property. *LO Appx., Ex. 120, Tax Assessor Notice of Decision, submitted with 133 Acre*
24 *Applications.* While only an interim use, the golf course was shuttered over four years ago,
because it was a financial failure, even when the Landowners leased the land for *free* to the
operator. *LO Appx., Ex. 45, Golf Course Closure, September, 2015 & May, 2016, Par 4 Letter to*
Fore Star; Ex. 46, Golf Course Closure, December 1, 2016, Elite Golf Letter to Yohan Lowie; Ex.
47, Golf Course Closure, Keith Flatt Depo, Fore Stars v. Nel.

1 The City has incorrectly argued that a Nevada per se regulatory taking requires the public
2 to actually physically enter and use the property rather than just having authority to use the property
3 or preserving the property. However, this argument belies the law in Nevada. In a companion
4 airspace taking case, the Supreme Court held that whether the planes were actually using Mr.
5 Sisolak's and Mr. Hsu's airspace was "inconsequential" to the liability determination; rather the
6 Court focused on how Ordinance 1221 "preserved" the landowners' airspace for the public to use
7 it. *LO Appx., Ex. 95, Johnson v. McCarran Int'l Airport, Supreme Court Case No. 53677,*
8 *unpublished, pp. 5-6.* The Landowners understand that the Johnson case is unpublished, however,
9 the case is critical to rebut the City's consistent misrepresentation of the Sisolak and Hsu cases.
10 Moreover, the three main cases relied upon by the Sisolak Court for the per se regulatory taking
11 standard (at footnote 72 of the opinion) are all non-physical taking cases. *See Roark v. City of*
12 *Caldwell*, 87 Idaho 557, 394 P.2d 641, 646–47 (1964); *Indiana Toll Road Comm'n v. Jankovich*,
13 244 Ind. 574, 193 N.E.2d 237, 242 (1963); *Yara Eng'g Corp. v. City of Newark*, 132 N.J.L. 370,
14 40 A.2d 559 (1945). Therefore, even if the public is not physically using property, if the
15 government engages in action that "authorize" the public to use private property or "preserves"
16 private property for public use, this is a per se regulatory taking.

17 Nevada's per se regulatory taking standard is met here. As detailed above, as the City
18 openly admitted its actions authorized the public to use the 35 Acre Property. The City adopted
19 Bills 2018-5 and 2018-24 which target only the 250 Acres to prevent development and expressly
20 states the Landowners **must** allow "ongoing public access" and "plans to ensure that such [public]
21 access is maintained." *LO Appx., Ex. 108, Bill 2018-24- see Section G(2)(d).* The City openly
22 admitted that it was denying all use of the 35 Acre Property for the "surrounding properties" which
23 allowed the surrounding properties to use the 250 Acres for a viewshed and for recreation. (*LO*
24 *Appx., Ex. 89, 92, 136, 150*). This was confirmed by Attorney Kaempfer who testified that,

1 “despite our best efforts, and despite the merits of our application(s)” the surrounding property
2 owners wanted to use the property for their viewshed and the City would not allow development
3 unless “virtually all” of them agreed to allow the development and the leader of that group firmly
4 stated they would not agree - “I would rather see the golf course [250 Acre Land] a desert than a
5 single home built on it.” *LO Appx., Ex. 48, Declaration of Attorney Chris Kaempfer, p. 2, para.*
6 *12; see also LO Appx., Ex. 94, Declaration of Vickie DeHart.* The City even identified \$15 million
7 to purchase the 250 Acres for these surrounding property owners. *LO Appx., Ex. 144.* And, the
8 City demonstrated hostility to any development that would deny the surrounding property owners
9 use of the 35 Acre Property, with one councilman claiming the Landowners’ use of their 35 Acre
10 Property was the same as “Bibi Netanyahu’s insertion of the concreted settlements in the West
11 Bank neighborhoods.”⁴⁹ As a result of the City’s actions, the Landowners’ Property has been
12 preserved for public use and the public has been authorized to use the 35 Acre Property. Therefore,
13 summary judgment should be granted on the Landowners’ Third Claim for Relief – Per Se
14 Regulatory Taking.

15 3. Fourth Claim for Relief - Non-regulatory De Facto Taking

16 The Landowners’ fourth claim for relief is a non-regulatory / de facto taking. The Nevada
17 Supreme Court holds that a non-regulatory / de facto taking occurs where, there is ***no physical***
18 ***invasion***, but the government has “taken steps that directly and substantially interfere[] with [an]
19 owner’s property rights to the extent of rendering the property **unusable or valueless to the**
20 **owner.**” *State v. Eighth Judicial District Court*, 131 Nev. 411, 421 (2015). The Court relied on
21 *Richmond Elks Hall Assoc. v. Richmond Red. Agency*, 561 F.2d 1327, 1330 (9th Cir. 1977), where
22 the Ninth Circuit held that “[t]o constitute a taking under the Fifth Amendment it is not necessary
23 that property be absolutely ‘taken’ in the narrow sense of that word to come within the protection
24

⁴⁹ *LO Appx., Ex. 123, March 27, 2017 Letter from Coffin to Polikoff.*

1 of this constitutional provision; it is sufficient if the action by the government involves a **direct**
2 **interference with or disturbance of property rights.**” Emphasis added. And, in Sloat v. Turner,
3 supra, the Supreme Court held a taking occurs where there is “**some derogation** of a right
4 appurtenant to that property which is compensable” or “if some property right which is directly
5 connected to the ownership or use of the property is **substantially impaired or extinguished**” Id.,
6 at 269. This rule is further supported by Article 1, section 22(3) of Nevada’s Constitution
7 (amended to the Constitution in 2008), which provides “taken **or damaged** property shall be
8 valued at its highest and best use” and NRS 37.110(3), which provides that the court must assess
9 the “damages” to property even though no property has been taken. Nevada is not alone in
10 adopting this de facto taking law as the great majority of other jurisdictions have adopted a similar
11 rule.⁵⁰ Nichols on Eminent Domain summarily describes this non-regulatory / de facto taking
12 claim as follows: “[c]ontrary to prevalent earlier views, it is now clear that **a de facto taking does**
13 **not require a physical invasion or appropriation of property.** Rather, a **substantial**
14 **deprivation of a property owner’s use and enjoyment of his property** may, in appropriate
15 circumstances, be found to constitute a ‘taking’ of that property or of a compensable interest in the
16 property...” 3A Nichols on Eminent Domain §6.05[2], 6-65 (3rd rev. ed. 2002). Therefore, a
17

18 ⁵⁰ See e.g. McCracken v. City of Philadelphia, 451 A.2d 1046 (Pa.Cmwlt. 1982) (holding that a
19 court should focus on the “cumulative effect” of government action and “[a] de facto taking occurs
20 when an entity clothed with eminent domain power **substantially deprives** an owner of the use
21 and enjoyment of his property” or where there is an ‘adverse interim consequence’ which deprives
22 an owner of the use and enjoyment of the property.” Id., at 1050. Emphasis added.); Robinson v.
23 City of Ashdown, 783 S.W.2d 53 (Ark. 1990) (when government “**substantially diminishes** the
24 value of a landowner’s land” just compensation is required. Id., at 56. Emphasis added.). Mentzel
v. City of Oshkosh, 146 Wis.2d 804, 812-813, 432 N.W.2d 609, 613 (1988) (taking occurred when
the City of Oshkosh denied the landowner’s established liquor license because the City of Oshkosh
desired to acquire the landowner’s property and it sought to reduce the value of its acquisition.);
City of Houston v. Kolb, 982 S.W.2d 949 (1999) (taking found where the City of Houston denied
a subdivision plat submitted by the Kolbs for the sole purpose of keeping the right-of-way for a
planned highway clear to reduce the cost for the State in acquiring the properties for the highway.).
See also *LO Appx., Ex. 96, Summary of Other Jurisdiction’s De Facto Taking Law.*

1 Nevada non-regulatory / de facto taking occurs where government action renders property
2 unusable or valueless to the owner, substantially impairs or extinguishes some right directly
3 connected to the property, or damages the property. This Court has previously held this claim is a
4 “valid claim in the State of Nevada” and has been properly pled. *LO Appx., Ex. 8, May 15, 2019*
5 *Order Denying the City’s Motion for Judgment on the Pleadings, pp. 4-5.*

6 Nevada’s nonregulatory / de facto taking standard is met here. Although the Landowners
7 have the “right” to develop residential units, **the City has denied 100%** of the Landowners’
8 repeated attempts to use the 35 Acre Property for that purpose. The City has taken action to
9 preserve the 35 Acre Property for use by the surrounding property owners. And, the City has
10 mandated that the Landowners pay \$205,227.22 per year in real estate taxes based on the exact
11 same residential use the City will not allow. As a result of the City’s actions, the 35 Acre Property
12 has been rendered “useless and valueless” to the Landowners, there has been a “direct interference
13 with or disturbance of” the 35 Acre Property, there has been “some derogation of a right
14 appurtenant to [the 35 Acre Property] which is compensable,” there has been a “property right
15 which is directly connected to the ownership or use of the [35 Acre Property which has been]
16 substantially impaired or extinguished,” *and* there has been a “damage” to the 35 Acre Property.
17 Therefore, summary judgment should be granted on the Landowners’ Fourth Claim for Relief –
18 Non-regulatory / De Facto Taking.

19 **C. Because The City Singled Out The Landowners’ Property, And Treated The**
20 **Landowners Differently Than Any Other Owners, the Landowners’ Claims**
Are “Much More Formidable”

21 Three general inverse condemnation principles are instructive in this case – 1) government
22 action that singles out a landowner from similarly situated landowners raises the specter of a taking
23 and makes the taking claim “much more formidable;”⁵¹ 2) taking claims are much more formidable

24 ⁵¹ “In analyzing takings claims, courts have long recognized the difference between a regulation
that targets one or two parcels of land and a regulation that enforces a statewide policy.

1 when government action targets vacant property, because it causes the landowner to become an
2 involuntary trustee holding the vacant land for the government;⁵² and, 3) “[w]hether the
3 governmental entity acted in bad faith may also be a consideration in determining whether a
4 governmental action gives rise to a compensable taking.”⁵³

5 As explained above, the City, in a rare but clear display of government overreach, made
6 sure to hit every one of these escalating principles. The City clearly singled out the Landowners’
7 Property, even adopting the “Yohan Lowie Bills” that solely target the 250 Acre Residential Zoned
8 Land.⁵⁴ The City actions forced the Landowners to hold the 35 Acre Property in a vacant

9
10 See, e.g., *A.A. Profiles, Inc. v. Ft. Lauderdale*, 850 F.2d 1483, 1488 (CA11 1988); *Wheeler v.*
11 *Pleasant Grove*, 664 F.2d 99, 100 (CA5 1981); *Trustees Under Will of Pomeroy v. Westlake*, 357
12 So.2d 1299, 1304 (La.App.1978); see also *Burrows v. Keene*, 121 N.H. 590, 596, 432 A.2d 15, 21
13 (1981); *Herman Glick Realty Co. v. St. Louis County*, 545 S.W.2d 320, 324–325
14 (Mo.App.1976); *Huttig v. Richmond Heights*, 372 S.W.2d 833, 842–843 (Mo.1963). As one early
court stated with regard to a waterfront regulation, ‘If such restraint were in fact imposed upon the
estate of one proprietor only, out of several estates on the same line of shore, the objection would
be **much more formidable**.’ *Commonwealth v. Alger*, 61 Mass. 53, 102 (1851).” *Lucas v. South*
Carolina Coastal Council, 505 U.S. 1003, 1074, 112 S.Ct. 2886, 2924 (1992)(Stevens, j.,
dissenting).

15 ⁵² *Ehrlander v. State*, 797 P.2d 629, 634 (1990) (recognizing that “possession of unimproved and
16 untenanted property is a desirable economic asset only if: ‘1) the property may appreciate in value;
17 and, 2) the owner is afforded the opportunity to improve the property toward whatever end he
18 might desire.”); *Manke v. Airport Authority*, 101 Nev. 755, 757 (1985) (recognizing that when
19 vacant property is taken both the “investment value” and “development value” are “frozen” and
20 the value of vacant and unimproved land to the owner is “destroyed”); *Althaus v. U.S.*, 7 Cl.Ct.
21 688, 695 (1985) (where vacant land is targeted for a taking no prudent person would be interested
in purchasing it and it would be futile to begin the development process.); *Lange v. State*, 86
Wash.2d 585, 595 (1976) (acknowledging that the effect of condemnation activity targeting vacant
land “chains” landowners to the property.); *Community Redevelopment Agency of City of*
Hawthorne v. Force Electronics, 55 Cal.App.4th 622, 634 (Cal. App. 1997) (recognizing
government taking actions result in improperly making the landowner an “involuntary lender” who
is forced to finance public projects without the payment of just compensation.).

22 ⁵³ *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 487 (Tx. 2012). See also *City of*
Austin v. Teague, 570 S.W.2d 389 (Tx. 1978) (recovery of damages warranted where the
government’s action against an economic interest of an owner is for its own advantage.).

23 ⁵⁴ *LO Appx., Ex. 114 line 487*; see also *Ex. 132*; *Ex. 53, Transcr. June 21, 2017 City Council*
24 *meeting, line 1230*, wherein Tom Perrigo statement that six properties like the Landowners’ were
approved for development; *Ex. 133, map showing 1,067 approved developments contrary to the*
Peccole Plan.

1 condition. And, the City clearly acted in bad faith, stating no valid reason to preclude all use of
2 the 35 Acre Property other than the unconstitutional reason to freeze the use of the property for
3 the surrounding properties.

4 **VII. CONCLUSION**

5 As explained, for a proper taking analysis, the Court is required to make two distinct “sub
6 inquiries” in the correct order. First, what is the property interest the Landowners owned in the 35
7 Acre Property *before* the City engaged in its actions. Second, whether the government engaged in
8 actions to take that underlying property interest.

9 This Court has already decided the first sub-inquiry; that the 35 Acre Property included the
10 “right” to develop residentially. The Landowners now respectfully request that this Court enter an
11 order on the second sub-inquiry that there has been a taking; that the City action in this case meets
12 the standards for three of the Landowners’ claims for relief - First (categorical), Third (per se
13 regulatory), and Fourth (nonregulatory / de facto) because:

14 1) the City has denied all use of the Landowners’ Property so that the Property is preserved
15 in an undeveloped state for the surrounding owners’ use (viewshed, open space, recreation) and
16 the City adopted two Bills to implement the preservation of the Landowners’ Property for this
public use; and

17 2) the City adopted a Bill that forces the Landowners to acquiesce to a physical occupation of
18 their Property by forcing the Landowners to allow “*ongoing public access*” onto their Property or
be subjected to criminal charges.

19 Respectfully submitted this 26th day of March, 2021.

20 **LAW OFFICES OF KERRITT L. WATERS**

21 BY: /s/ Kerritt L. Waters
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Nevada Bar No. 8887
24 AUTUMN WATERS, ESQ.
Nevada Bar No. 8917

1 **CERTIFICATE OF SERVICE**

2 I HEREBY CERTIFY that I am an employee of the Law Offices of Kermitt L. Waters, and
3 that on the 26th day of March, 2021, pursuant to NRCP 5(b) and EDCR 8.05(f), a true and correct
4 copy of **PLAINTIFF LANDOWNERS' MOTION TO DETERMINE TAKE AND FOR**
5 **SUMMARY JUDGMENT ON THE FIRST, THIRD AND FOURTH CLAIMS FOR**
6 **RELIEF** was served on the below via the Court's electronic filing/service system and/or deposited
7 for mailing in the U.S. Mail, postage prepaid and addressed to, the following:

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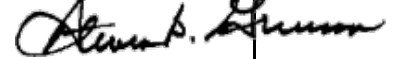
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CLARK COUNTY, NEVADA

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

Defendants.

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

**APPENDIX OF EXHIBITS IN
SUPPORT OF PLAINTIFF
LANDOWNERS' MOTION TO
DETERMINE TAKE AND FOR
SUMMARY JUDGMENT ON
THE FIRST, THIRD AND
FOURTH CLAIMS FOR RELIEF**

VOLUME 1

Plaintiff Landowners hereby submit this Appendix of Exhibits in Support of Their
Motion to Determine Take and for Summary Judgment on the First, Third and Fourth Claims for
Relief.

Exhibit No.	Description	Vol. No.	Bates No.
1	Findings of Fact and Conclusions of Law Regarding Plaintiff Landowners' Motion to Determine "Property Interest"	1	000001-000005
2	Map 1 of 250 Acre Land	1	000006

3	Map 2 of 250 Acre Land	1	000007
4	Notice of Related Cases	1	000008-000012
5	April 15, 1981 City Commission Minutes	1	000013-000050
6	December 20, 1984 City of Las Vegas Planning Commission hearing on General Plan Update	1	000051-000151
7	Findings of Fact and Conclusions of Law Regarding Plaintiffs' Motion for New Trial, Motion to Alter or Amend and/or Reconsider the Findings of Fact and Conclusions of Law, Motion to Stay Pending Nevada Supreme Court Directives	2	000152-000164
8	ORDER GRANTING the Landowners' Countermotion to Amend/Supplement the Pleadings; DENYING the Landowners' Countermotion for Judicial Determination of Liability on the Landowners' Inverse Condemnation Claims	2	000165-000188
9	City's Opposition to Motion to Determine "Property Interest"	2	000189-000216
10	City of Las Vegas' Motion for Judgment on the Pleadings on Developer's Inverse Condemnation Claims	2	000217-000230
11	Petition for Writ of Mandamus, or in the Alternative, Writ of Prohibition	2	000231-000282
12	Supreme Court Order Denying Petition for Writ of Mandamus or Prohibition	2	000283-000284
13	Supreme Court Order Denying Rehearing	2	000285-000286
14	Supreme Court Order Denying En Banc Reconsideration	2	000287-000288
15	Motion to Dismiss Complaint for Declaratory and Injunctive Relief and in Inverse Condemnation, <i>Fore Stars, Ltd. Seventy Acres, LLC v. City of Las Vegas, et al.</i> , Case No. A-18-773268-C	2	000289-000308
16	City's Sur Reply Memorandum of Points and Authorities in Support of Motion to Dismiss Complaint for Declaratory and Injunctive Relief and Inverse Condemnation, <i>Fore Stars, Ltd. Seventy Acres, LLC v. City of Las Vegas, et al.</i> , Case No. A-18-773268-C	2	000309-000319

1	17	City's Proposed Findings of Fact and Conclusion of Law Granting City's Motion to Dismiss Complaint, <i>Fore Stars, Ltd. Seventy Acres, LLC v. City of Las Vegas, et al.</i> , Case No. A-18-773268-C	2	000320-000340
2	18	Order Denying City of Las Vegas' Motion to Dismiss, <i>Fore Stars, Ltd. Seventy Acres, LLC v. City of Las Vegas, et al.</i> , Case No. A-18-773268-C	2	000341-000350
3	19	City of Las Vegas' Motion to Dismiss, <i>180 Land Co., LLC v. City of Las Vegas, et al.</i> , Case No. A-18-775804-J	2	000351-000378
4	20	2.15.19 Minute Order re City's Motion to Dismiss	2	000379
5	21	Respondents' Answer Brief, Supreme Court Case No. 75481	2	000380-000449
6	22	Order Granting Plaintiffs' Petition for Judicial Review, <i>Jack B. Binion, et al vs. The City of Las Vegas</i> , Case No. A-17-752344-J	2	000450-000463
7	23	Supreme Court Order of Reversal	2	000464-000470
8	24	Supreme Court Order Denying Rehearing	2	000471-000472
9	25	Supreme Court Order Denying En Banc Reconsideration	2	000473-000475
10	26	Findings of Fact, Conclusions of Law and Judgment Granting Defendants Fore Stars, Ltd., 180 Land Co LLC, Seventy Acres LLC, EHB Companies LLC, Yohan Lowie, Vickie Dehart and Frank Pankratz's NRCP 12(b)(5) Motion to Dismiss Plaintiffs' Amended Complaint	2	000476-000500
11	27	Notice of Entry of Findings of Fact, Conclusions of Law, Final Order of Judgment, <i>Robert Peccole, et al v. Peccole Nevada Corporation, et al.</i> , Case No. A-16-739654-C	2	000501-000545
12	28	Supreme Court Order of Affirmance	2	000546-000550
13	29	Supreme Court Order Denying Rehearing	2	000551-000553
14	30	November 1, 2016 Badlands Homeowners Meeting Transcript	2	000554-000562
15	31	June 13, 2017 Planning Commission Meeting Verbatim Transcript	2	000563-000566
16	32	Notice of Entry of Findings of Fact and Conclusions of Law Granting City of Las Vegas' Motion for Summary Judgment, <i>180 Land Co. LLC, et al v. City of Las Vegas</i> , Case No. A-18-780184-C	3	000567-000604

33	June 21, 2017 City Council Meeting Combined Verbatim Transcript	3	000605-000732
34	Declaration of Yohan Lowie	3	000733-000739
35	Declaration of Yohan Lowie in Support of Plaintiff Landowners' Motion for New Trial and Amend Related to: Judge Herndon's Findings of Fact and Conclusion of Law Granting City of Las Vegas' Motion for Summary Judgment, Entered on December 30, 2020	3	000740-000741
36	Master Declaration of Covenants, Conditions Restrictions and Easements for Queensridge	3	000742-000894
37	Queensridge Master Planned Community Standards - Section C (Custom Lot Design Guidelines)	3	000895-000896
38	Custom Lots at Queensridge Purchase Agreement, Earnest Money Receipt and Escrow Instructions	3	000897-000907
39	Public Offering Statement for Queensridge North (Custom Lots)	4	000908-000915
40	Deposition of Yohan Lowie, <i>In the Matter of Binion v. Fore Stars</i>	4	000916-000970
41	The City of Las Vegas' Response to Requests for Production of Documents, Set One	4	000971-000987
42	Respondent City of Las Vegas' Answering Brief, <i>Jack B. Binion, et al v. The City of Las Vegas, et al.</i> , Case No. 17-752344-J	4	000988-001018
43	Ordinance No. 5353	4	001019-001100
44	Original Grant, Bargain and Sale Deed	4	001101-001105
45	May 23, 2016 Par 4 Golf Management, Inc.'s letter to Fore Stars, Ltd. re Termination of Lease	4	001106-001107
46	December 1, 2016 Elite Golf Management letter to Mr. Yohan Lowie re: Badlands Golf Club	4	001108
47	October 30, 2018 Deposition of Keith Flatt, <i>Fore Stars, Ltd. v. Allen G. Nel</i> , Case No. A-16-748359-C	4	001109-001159
48	Declaration of Christopher L. Kaempfer	4	001160-001163
49	Clark County Real Property Tax Values	4	001164-001179
50	Clark County Tax Assessor's Property Account Inquiry - Summary Screen	4	001180-001181
51	Assessor's Summary of Taxable Values	5	001182-001183
52	State Board of Equalization Assessor Valuation	5	001184-001189

53	June 21, 2017 City Council Meeting Combined Verbatim Transcript	5	001190-001317
54	August 2, 2017 City Council Meeting Combined Verbatim Transcript	5	001318-001472
55	City Required Concessions signed by Yohan Lowie	5	001473
56	Badlands Development Agreement CLV Comments	5	001474-001521
57	Development Agreement for the Two Fifty, Section Four, Maintenance of the Community	5	001522-001529
58	Development Agreement for the Two Fifty	5	001530-001584
59	The Two Fifty Design Guidelines, Development Standards and Uses	5	001585-001597
60	The Two Fifty Development Agreement's Executive Summary	5	001598
61	Development Agreement for the Forest at Queensridge and Orchestra Village at Queensridge	5	001599-002246
62	Department of Planning Statement of Financial Interest	6	002247-002267
63	December 27, 2016 Justification Letter for General Plan Amendment of Parcel No. 138-31-702-002 from Yohan Lowie to Tom Perrigo	6	002268-002270
64	Department of Planning Statement of Financial Interest	6	002271-002273
65	January 1, 2017 Revised Justification letter for Waiver on 34.07 Acre Portion of Parcel No. 138-31-702-002 to Tom Perrigo from Yohan Lowie	6	002274-002275
66	Department of Planning Statement of Financial Interest	6	002276-002279
67	Department of Planning Statement of Financial Interest	6	002280-002290
68	Site Plan for Site Development Review, Parcel 1 @ the 180, a portion of APN 138-31-702-002	6	002291-002306
69	December 12, 2016 Revised Justification Letter for Tentative Map and Site Development Plan Review on 61 Lot Subdivision to Tom Perrigo from Yohan Lowie	6	002307-002308
70	Custom Lots at Queensridge North Purchase Agreement, Earnest Money Receipt and Escrow Instructions	7	002309-002501

1	71	Location and Aerial Maps	7	002502-002503
2	72	City Photos of Southeast Corner of Alta Drive and Hualapai Way	7	002504-002512
3	73	February 14, 2017 Planning Commission Staff Recommendations	7	002513-002538
4	74	June 21, 2017 Planning Commission Staff Recommendations	7	002539-002565
5	75	February 14, 2017 Planning Commission Meeting Verbatim Transcript	7	002566-002645
6	76	June 21, 2017 Minute re: City Council Meeting	7	002646-002651
7	77	June 21, 2017 City Council Staff Recommendations	7	002652-002677
8	78	August 2, 2017 City Council Agenda Summary Page	7	002678-002680
9	79	Department of Planning Statement of Financial Interest	7	002681-002703
10	80	Bill No. 2017-22	7	002704-002706
11	81	Development Agreement for the Two Fifty	7	002707-002755
12	82	Addendum to the Development Agreement for the Two Fifty	8	002756
13	83	The Two Fifty Design Guidelines, Development Standards and Permitted Uses	8	002757-002772
14	84	May 22, 2017 Justification letter for Development Agreement of The Two Fifty, from Yohan Lowie to Tom Perrigo	8	002773-002774
15	85	Aerial Map of Subject Property	8	002775-002776
16	86	June 21, 2017 emails between LuAnn D. Holmes and City Clerk Deputies	8	002777-002782
17	87	Flood Damage Control	8	002783-002809
18	88	June 28, 2016 Reasons for Access Points off Hualapai Way and Rampart Blvd. letter from Mark Colloton, Architect, to Victor Balanos	8	002810-002815
19	89	August 24, 2017 Access Denial letter from City of Las Vegas to Vickie Dehart	8	002816
20	90	19.16.100 Site Development Plan Review	8	002817-002821
21	91	8.10.17 Application for Walls, Fences, or Retaining Walls	8	002822-002829
22	92	August 24, 2017 City of Las Vegas Building Permit Fence Denial letter	8	002830

93	June 28, 2017 City of Las Vegas letter to Yohan Lowie Re Abeyance Item - TMP-68482 - Tentative Map - Public Hearing City Council Meeting of June 21, 2017	8	002831-002834
94	Declaration of Vickie Dehart, <i>Jack B. Binion, et al. v. Fore Stars, Ltd.</i> , Case No. A-15-729053-B	8	002835-002837
95	Supreme Court Order of Affirmance, <i>David Johnson, et al. v. McCarran International Airport, et al.</i> , Case No. 53677	8	002838-002845
96	De Facto Taking Case Law From State and Federal Jurisdictions	8	002846-002848
97	Department of Planning Application/Petition Form	8	002849-002986
98	11.30.17 letter to City of Las Vegas Re: 180 Land Co LLC ("Applicant"t - Justification Letter for General Plan Amendment [SUBMITTED UNDER PROTEST] to Assessor's Parcel ("APN(st") 138-31-601-008, 138-31- 702-003, 138-31-702-004 (consisting of 132.92 acres collectively "Property"t - from PR-OS (Park, Recreation and Open Space) to ML (Medium Low Density Residential) as part of applications under PRJ-11990, PRJ-11991, and PRJ-71992	8	002987-002989
99	January 9, 2018 City Council Staff Recommendations	8	002990-003001
100	Item #44 - Staff Report for SDR-72005 [PRJ-71990] - amended condition #6 (renumbered to #7 with added condition)	8	003002
101	January 9, 2018 WVR-72007 Staff Recommendations	8	003003-003027
102	January 9, 2018 WVR-72004, SDR-72005 Staff Recommendations	8	003028-003051
103	January 9, 2018 WVR-72010 Staff Recommendations	8	003052-003074
104	February 21, 2018 City Council Meeting Verbatim Transcript	8	003075-003108
105	May 17, 2018 City of Las Vegas Letter re Abeyance - TMP-72012 [PRJ-71992] - Tentative Map Related to WVR-72010 and SDR-72011	9	003109-003118
106	May 16, 2018 Council Meeting Verbatim Transcript	9	003119-003192
107	Bill No. 2018-5, Ordinance 6617	9	003193-003201

1	108	Bill No. 2018-24, Ordinance 6650	9	003202-003217
2	109	November 7, 2018 City Council Meeting Verbatim Transcript	9	003218-003363
3	110	October 15, 2018 Recommending Committee Meeting Verbatim Transcript	9	003364-003392
4	111	October 15, 2018 Kaempfer Crowell Letter re: Proposed Bill No. 2018-24 (part 1 of 2)	10	003393-003590
5	112	October 15, 2018 Kaempfer Crowell Letter re: Proposed Bill No. 2018-24 (part 2 of 2)	11	003591-003843
6	113	July 17, 2018 Hutchison & Steffen letter re Agenda Item Number 86 to Las Vegas City Attorney	11	003844-003846
7	114	5.16.18 City Council Meeting Verbatim Transcript	11	003847-003867
8	115	5.14.18 Bill No. 2018-5, Councilwoman Fiore Opening Statement	11	003868-003873
9	116	May 14, 2018 Recommending Committee Meeting Verbatim Transcript	11	003874-003913
10	117	August 13, 2018 Meeting Minutes	11	003914-003919
11	118	November 7, 2018 transcript In the Matter of Las Vegas City Council Meeting, Agenda Item 50, Bill No. 2018-24	12	003920-004153
12	119	September 4, 2018 Recommending Committee Meeting Verbatim Transcript	12	004154-004219
13	120	State of Nevada State Board of Equalization Notice of Decision, <i>In the Matter of Fore Star Ltd., et al.</i>	12	004220-004224
14	121	August 29, 2018 Bob Coffin email re Recommend and Vote for Ordinance Bill 2108-24	12	004225
15	122	April 6, 2017 Email between Terry Murphy and Bob Coffin	12	004226-004233
16	123	March 27, 2017 letter from City of Las Vegas to Todd S. Polikoff	12	004234-004235
17	124	February 14, 2017 Planning Commission Meeting Verbatim Transcript	12	004236-004237
18	125	Steve Seroka Campaign letter	12	004238-004243
19	126	Coffin Facebook Posts	12	004244-004245
20	127	September 17, 2018 Coffin text messages	12	004246-004257
21	128	September 26, 2018 email to Steve Seroka re: meeting with Craig Billings	12	004258

129	Letter to Mr. Peter Lowenstein re: City's Justification	12	004259-004261
130	August 30, 2018 email between City Employees	12	004262-004270
131	February 15, 2017 City Council Meeting Verbatim Transcript	12	004271-004398
132	May 14, 2018 Councilman Fiore Opening Statement	12	004399-004404
133	Map of Peccole Ranch Conceptual Master Plan (PRCMP)	12	004405
134	December 30, 2014 letter to Frank Pankratz re: zoning verification	12	004406
135	May 16, 2018 City Council Meeting Verbatim Transcript	13	004407-004480
136	June 21, 2018 Transcription of Recorded Homeowners Association Meeting	13	004481-004554
137	Pictures of recreational use by the public of the Subject Property	13	004555-004559
138	Appellees' Opposition Brief and Cross-Brief, <i>Del Monte Dunes at Monterey, Ltd., et al. v. City of Monterey</i>	13	004560-004575
139	Respondent City of Las Vegas' Answering Brief, <i>Binion, et al. v. City of Las Vegas, et al.</i>	13	004576-004578
140	Grant, Bargain and Sale Deed	13	004579-004583
141	City's Land Use Hierarchy Chart	13	004584
142	August 3, 2017 deposition of Bob Beers, pgs. 31-36 - <i>The Matter of Binion v. Fore Stars</i>	13	004585-004587
143	November 2, 2016 email between Frank A. Schreck and George West III	13	004588
144	January 9, 2018 email between Steven Seroka and Joseph Volmar re: Opioid suit	13	004589-004592
145	May 2, 2018 email between Forrest Richardson and Steven Seroka re Las Vegas Badlands Consulting/Proposal	13	004593-004594
146	November 16, 2017 email between Steven Seroka and Frank Schreck	13	004595-004597
147	June 20, 2017 representation letter to Councilman Bob Coffin from Jimmerson Law Firm	13	004598-004600

148	September 6, 2017, City Council Verbatim Transcript	13	004601-004663
149	December 17, 2015 LVRJ Article, Group that includes rich and famous files suit over condo plans	13	004664-04668
150	Affidavit of Donald Richards with referenced pictures attached	14, 15, 16	004669-004830

DATED this 26th day of March, 2021.

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1 **CERTIFICATE OF SERVICE**

2 I HEREBY CERTIFY that I am an employee of the Law Offices of Kermitt L. Waters, and
3 that on the 26th day of March, 2021, pursuant to NRCP 5(b) and EDCR 8.05(f), a true and correct
4 copy of the foregoing document(s): **APPENDIX OF EXHIBITS IN SUPPORT OF PLAINTIFF**
5 **LANDOWNERS' MOTION TO DETERMINE TAKE AND FOR SUMMARY JUDGMENT**
6 **ON THE FIRST, THIRD AND FOURTH CLAIMS FOR RELIEF - VOLUME 1** was made by
7 electronic means pursuant to EDCR 8.05(a) and 8.05(f), to be electronically served through the
8 Eighth Judicial District Court's electronic filing system, with the date and time of the electronic
9 service substituted for the date and place of deposit in the mail and addressed to each of the
10 following:

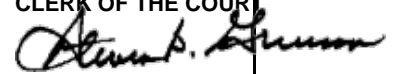
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24 Evelyn Washington, an employee of the
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26
27
28

Exhibit 1



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**DISTRICT COURT
CLARK COUNTY, NEVADA**

180 LAND COMPANY, LLC, a Nevada limited liability company, and FORE STARS, Ltd., DOE INDIVIDUALS I through X, DOE CORPORATIONS I through X, and DOE 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

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW REGARDING
PLAINTIFF LANDOWNERS' MOTION
TO DETERMINE "PROPERTY
INTEREST"**

Hearing Date: September 17, 2020
Hearing Time: 9:00 a.m.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs, 180 LAND COMPANY, LLC and FORE STARS, Ltd (hereinafter Landowners), brought Plaintiff Landowners' Motion to Determine Property Interest before the Court on September 17, 2020, with James Jack Leavitt, Esq of the Law Offices of Kermitt L. Waters, appearing for and on behalf of the Landowners along with the Landowners' corporate counsel, Elizabeth Ghanem Ham, Esq., and George F. Ogilve III Esq. and Andrew Schwartz, Esq. appearing for and on behalf

000001

1 of the Defendant, City of Las Vegas (hereinafter the City). Having reviewed all pleadings and
2 attached exhibits filed in this matter and having heard extensive oral arguments on September 17,
3 2020, in regards to Plaintiff Landowners' Motion to Determine Property Interest, the Court hereby
4 enters the following Findings of Fact and Conclusions of Law:

5 **FINDINGS OF FACT**

6 1. Plaintiff 180 Land Company, LLC is the owner of an approximately 35 acre parcel of
7 property generally located near the southeast corner of Hualapai Way and Alta Drive within the
8 geographic boundaries of the City of Las Vegas, more particularly described as Clark County
9 Assessor Parcel 138-31-201-005 (hereinafter 35 Acre Property).

10 2. The Landowners' Motion to Determine Property Interest requests this Court enter an order
11 that: 1) the 35 Acre Property is hard zoned R-PD7 as of the relevant September 14, 2017, date of
12 valuation; and, 2) that the permitted uses by right under the R-PD7 zoning are single-family and
13 multi-family residential.

14 3. In their submitted briefs, the Landowners and the City presented evidence that the 35 Acre
15 Property has been zoned R-PD7 since at least 1990, including: 1) Z-17-90, Resolution of Intent to
16 Rezone the 35 Acre Property to R-PD7, dated March 8, 1990 (Exhibit H to City's Opposition, Vol.
17 1:00193); and, Ordinance 5353, passed by the City of Las Vegas City Council in 2001, which hard
18 zoned the 35 Acre Property to R-PD7 and repealed anything in conflict (Exhibit 10 to Landowners'
19 Motion).

20 4. In response to the Landowners' inquiry regarding zoning prior to purchasing the 35 Acre
21 Property, on December 30, 2014, the City of Las Vegas Planning & Development Department
22 provided the Landowners a Zoning Verification Letter, stating, in part: 1) the 35 Acre Property is
23 "zoned R-PD7 (Residential Planned Development District - 7 unites per acre);" 2) "[t]he density
24 allowed in the R-PD District shall be reflected by a numerical designation for that district.
25 (Example, R-PD4 allows up to four units per gross acre.); and 3) "A detailed listing of the
26 permissible uses and all applicable requirements for the R-PD Zone are located in Title 19 ("Las
27 Vegas Zoning Code") of the Las Vegas Municipal Code." Exhibit 3 to Landowners' Motion.
28

1 5. The City stated in its opposition to the Landowners' motion that the R-PD7 zoning on the
2 35 Acre Property "is not disputed." City's Opposition to Motion to Determine Property Interest,
3 10:17-18.

4 6. As stated in the City Zoning Verification Letter provided to the Landowners on December
5 30, 2014, the legally permitted uses of property zoned R-PD7 are include in the Las Vegas Municipal
6 Code (hereinafter LVMC), Title 19.

7 7. LVMC 19.10.050 is entitled "R-PD Residential Planned Development District" and is the
8 applicable section of the LVMC used to determine those permitted uses on R-PD7 zoned properties
9 in the City of Las Vegas. Exhibit 5 to Landowners' Motion.

10 8. LVMC 19.10.050 (C) lists as "Permitted Land Uses" on R-PD zoned properties "[s]ingle-
11 family and multi-family residential." Id.

12 9. LVMC 19.10.050 (A) also provides that "the types of development permitted within the
13 R-PD District can be more consistently achieved using the standard residential districts." Id. The
14 standard residential districts are listed on the City Land Use Table, LVMC 19.12.010. Exhibit 6 to
15 Landowners' Motion. The R-2 residential district listed on the City Land Use Table is the standard
16 residential district most comparable to the R-PD7 zoning, because R-PD7 allows up to 7 units per
17 acre¹ and R-2 allows 6-12 units per acre.² The "permitted" uses under the R-2 zoning on the City
18 Land Use Table include "Single Family, Attached" and "Single-Family, Detached" residential uses.
19 LVMC 19.12.010, Exhibit 6 to Landowners' Motion.

20 10. Table 1 to the City Land Use Table provides that if a use is "permitted" in a certain
21 zoning district then "the use is permitted as a principle use in that zoning district by right." Id.

22 11. "Permitted Use" is also defined at LVMC 19.18.020 as "[a]ny use allowed in a zoning
23 district as a matter of right." Exhibit 8 to Landowners' Motion.

24 12. The Landowners have alleged that the City of Las Vegas has taken the 35 Acre Property
25 by inverse condemnation, asserting five (5) separate inverse condemnation claims for relief, a

26
27 ¹ See City Zoning Verification Letter, Exhibit 3 to Landowners' Motion and LVMC
28 19.10.050 (A), Exhibit 5 to Landowners' Motion.

² See LVMC 19.06.100, Exhibit 7 to Landowners' Motion.

1 Categorical Taking, a Penn Central Regulatory Taking, a Regulatory Per Se Taking, a Non-
2 regulatory Taking, and a Temporary Taking.

3 CONCLUSIONS OF LAW

4 13. The Nevada Supreme Court has held that in an inverse condemnation, such as this, the
5 District Court Judge is required to make two distinct sub inquiries, which are mixed questions of fact
6 and law. ASAP Storage, Inc., v. City of Sparks, 123 Nev. 639 (2008); McCarran Int'l Airport v.
7 Sisolak, 122 Nev. 645 (2006). First, the District Court Judge must determine the "property interest"
8 owned by the landowner or, stated another way, the bundle of sticks owned by the landowner prior
9 to any alleged taking actions by the government. *Id.* Second, the District Court Judge must
10 determine whether the government actions alleged by the landowner constitute a taking of the
11 landowners property. *Id.*

12 14. The Landowners' Motion to Determine Property Interest narrowly addresses this first
13 sub inquiry and, accordingly, this Court will only determine the first sub inquiry.

14 15. In addressing this first sub inquiry, this Court has previously held that: 1) "it would be
15 improper to apply the Court's ruling from the Landowners' petition for judicial review to the
16 Landowners' inverse condemnation claims;"³ and, 2) "[a]ny determination of whether the
17 Landowners have a 'property interest' or the vested right to use the 35 Acre Property must be based
18 on eminent domain law, rather than the land use law."⁴

19 16. Therefore, the Court bases its property interest decision on eminent domain law.

20 17. Nevada eminent domain law provides that zoning must be relied upon to determine a
21 landowners' property interest in an eminent domain case. City of Las Vegas v. C. Bustos, 119 Nev.
22 360 (2003); Clark County v. Alper, 100 Nev. 382 (1984).

23 18. The Court concludes that the 35 Acre Property has been hard zoned R-PD7 since at least
24 1990.

25
26
27
28 ³ Exhibit 18 to Landowners' Reply, App. at 0026 / 23:7-8

⁴ Exhibit 18 to Landowners' Reply, App. at 0010 / 7:26-27