

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.

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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 20**

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing APPENDIX TO OPPOSITION TO APPELLANT'S MOTION TO STAY - **VOLUME 20** 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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1 The dismissal here was without prejudice. Now we -- in the
2 *Valley Bank v. Ginsburg* case, the Court said that finality of an order for
3 judgment is determined, and I'm quoting here, "by looking to what the
4 order of judgment actually does, not what it's called. More precisely, a
5 final appeal of a judgment is one that disposes of the issues presented in
6 the case and leaves nothing for the future consideration of the Court. "

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

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

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

1 but that's the ripeness doctrine to a tee.

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

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

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

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

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

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

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

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

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

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

14 THE COURT: Okay.

15 MR. SCHWARTZ: We think that the Court should remand the
16 133 applications -- acre applications to the City Council. We think that
17 the Court should dismiss and retain jurisdiction over the PJR. If the City
18 denies the applications, and the developer thinks it has a ripe claim, or
19 the City didn't proceed by law, then it -- they can come back to the Court,
20 or the Court could dismiss the PJR without prejudice, and if the
21 developer, you know, pursues its applications and doesn't like the result,
22 they can file another PJR.

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

1 for dismissal without prejudice.

2 THE COURT: Anything else?

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

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

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

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

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

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

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

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

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

9 THE COURT: Are we still talking about remanding?

10 MR. SCHWARTZ: Pardon me?

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

13 MR. SCHWARTZ: Because --

14 THE COURT: Are we talking about remanding?

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

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

18 MR. SCHWARTZ: Pardon me?

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

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

24 THE COURT: Let's talk about remand.

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

1 THE COURT: Let's talk about remand.

2 So is what you're saying that you believe -- the City's

3 argument is that based on what happened with *Crockett* decision, and

4 the fact that this Court had said this is without prejudice to be renewed if

5 the Supreme Court overturns *Crockett*, that that doesn't mean we

6 proceed here with the PJR, instead it means that the PJR needs to go

7 back to the City Council for a final decision, because it had no such final

8 decision, initially, so just remand the PJR portion of this action, period,

9 end of story, we're talking about that.

10 MR. SCHWARTZ: Remand the --

11 THE COURT: Okay. All right.

12 MR. SCHWARTZ: -- application.

13 THE COURT: Okay.

14 MR. SCHWARTZ: Yes.

15 THE COURT: Thanks. Anything else on remand?

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

17 THE COURT: Why are we talking about ripeness --

18 MR. SCHWARTZ: Because --

19 THE COURT: -- in the context --

20 MR. SCHWARTZ: Okay --

21 THE COURT: -- of remand?

22 MR. SCHWARTZ: Can I explain?

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

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

25 THE COURT: -- connection of ripeness --

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

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

5 MR. SCHWARTZ: Pardon me?

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

7 MR. SCHWARTZ: Because the application --

8 THE COURT: You're asking this Court --

9 MR. SCHWARTZ: -- should be remanded --

10 THE COURT: -- to remand the PJR.

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

13 THE COURT: Okay.

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

17 THE COURT: Okay.

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

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

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

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

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

25 THE COURT: Okay.

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

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

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

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

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

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

12 MR. SCHWARTZ: Yes, Your Honor.

13 THE COURT: -- is that it on remand?

14 MR. SCHWARTZ: That is.

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

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

20 THE COURT: Let's talk about remand.

21 MR. SCHWARTZ: -- about ripeness.

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

23 MR. SCHWARTZ: Yeah. And the --

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

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

1 Honor.

2 THE COURT: Okay. Alrighty.

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

8 THE COURT: Uh-huh.

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

13 THE COURT: Okay.

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

15 THE COURT: Okay.

16 MR. SCHWARTZ: -- thousands of --

17 THE COURT: So your position is --

18 MR. SCHWARTZ: -- pages of paper.

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

21 MR. SCHWARTZ: Okay.

22 THE COURT: And so we go no further. Okay. All right.

23 Thanks, I'm ---

24 MR. SCHWARTZ: So --

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

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

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

11 MR. SCHWARTZ: So it --

12 THE COURT: -- the petition of judicial review?

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

15 THE COURT: Uh-huh.

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

19 THE COURT: Okay.

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

22 THE COURT: Okay.

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

24 THE COURT: Got it. Okay.

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

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

3 THE COURT: Uh-huh. Okay.

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

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

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

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

24 THE COURT: Okay.

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

1 THE COURT: Thank you.

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

4 THE COURT: Yes.

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

7 THE COURT: Yes.

8 MR. SCHWARTZ: Thank you.

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

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

14 THE COURT: Uh-huh. Uh-huh.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 MR. LEAVITT: A motion to dismiss.

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

24 MR. LEAVITT: It has been 39 months.

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

1 circumstances.

2 MR. LEAVITT: Uh-huh.

3 THE COURT: So --

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

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

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

17 THE COURT: Sure.

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

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

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

2 THE COURT: Uh-huh.

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

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

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

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

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

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

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

10 MR. LEAVITT: Yes.

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

12 MR. LEAVITT: Yes.

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

15 MR. LEAVITT: Absolutely.

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

19 MR. LEAVITT: Remain dismissed,

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

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

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

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

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

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

20 MR. LEAVITT: Correct.

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

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

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

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

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

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

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

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

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

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

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

21 THE COURT: Sure.

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

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

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

10 THE COURT: Sure.

11 MR. LEAVITT: This is another transcript from May 16th,
12 2018, okay. If we turn to the -- page 22 of this transcript, here's Brad
13 Jerbic advising the City Council again. "I'll try and get this as straight
14 down the line as I can, tell it. Judge Crockett agreed with that argument,
15 and he issued a written opinion," okay. So again, we're at the City
16 Council. Brad Jerbic is advising the City Council. The Council was asked
17 to make a policy call. To end the argument completely you could make a
18 decision to change your code or just make a policy call as to whether or
19 not you wanted a major modification to accompany these applications.

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

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

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

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

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

16 THE COURT: How to approve or how to consider?

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

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

23 THE COURT: Trujillo?

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

1 133 acre property. What the City is asking you to do here today, Judge,
2 is here's the denial of the 130 acre application. I'm sorry, Your Honor.

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

5 MR. LEAVITT: Absolutely.

6 THE COURT: Yeah, I read that.

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

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

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

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

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

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

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

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

1 THE COURT: Uh-huh.

2 MR. LEAVITT: He met them. But do you know what the City
3 did, they said, well, we got more for you, landowner, \$2 million,
4 \$2 million extra to be paid as part of this master development
5 agreement, to develop the 133-acre property. The City wrote it, and it
6 went to the planning department. And you know what happened at the
7 planning department, Judge, the City's planning department said, you
8 should approve it. You need to approve this master development
9 agreement, which will allow development of the entire property,
10 including the 133 acre property. And you know what the planning
11 department even said, they said it's all the code requirements. It meets
12 every requirement you could possibly think of.

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

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

16 MR. LEAVITT: I got it.

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

20 MR. LEAVITT: Got it.

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

23 MR. LEAVITT: Yes.

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

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

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

5 THE COURT: Number one.

6 MR. LEAVITT: That's number one.

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

8 MR. LEAVITT: Number two it's futile.

9 THE COURT: Uh-huh.

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

17 THE COURT: Uh-huh. Okay.

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

1 even going to let you have access to your property.

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

7 Now here comes the important part, is after the City denied
8 all of these applications, four applications, Judge, because it struck the
9 133 acre applications here, then what the City did, and this is why, what
10 the City is asking for is totally futile; the City adopts a bill. So now the
11 City is not just denying it -

12 THE COURT: What you could the Yohan Lowie bills.

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

19 THE COURT: Uh-huh.

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

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

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

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

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

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

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

8 Even after -- and, Judge I want to point one thing out,
9 because counsel keeps making this argument that we approved the
10 17 acres, right? We approved the 17 acres. The 17 acre approval
11 occurred here. Do you know what happened after the approval? The
12 Council changed and then all of this occurred, ten actions.

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

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

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

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

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

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

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

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

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

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

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

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

21 THE COURT: Uh-huh.

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

24 THE COURT: Uh-huh.

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

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

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

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

20 THE COURT: Okay. Thanks.

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

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

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

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

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

17 THE COURT: Thank you.

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

20 THE COURT: No.

21 MR. LEAVITT: Okay. Thank you.

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

1 Your argument on the status of the pleadings?

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

4 THE COURT: Yes.

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

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

19 Your Honor, every one of the arguments that counsel made,
20 they made before Judge Herndon. And in his decision, pages 24 through
21 35, that's tab 11, Judge Herndon carefully refute -- rejected every one of
22 those arguments. Let's talk about the -- well, first, I want to address -- I
23 know the Court is concerned about the procedural issue. Counsel didn't
24 have to refile their PJR with the civil complaint for taking. And they
25 blame the delay in filing -- or they blame the delay in their ability to

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

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

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

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

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

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

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

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

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

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

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

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

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

11 These bills that they call the Lowie bills. These bills go to
12 their physical taking claim. They claim that the second of the bill, the
13 201824, effected a physical taking by requiring the developer to allow the
14 public on the property. Well, that's false. And we can -- we would show
15 that if we get to that point on the merits. But those were physical taking
16 skills. They had nothing to do with an application to develop the
17 property, which is required by the ripeness doctrine.

18 It seems like this exhibit -- this demonstrative exhibit on the
19 easel, it seems like they may be left out a couple of crucial of facts like
20 the Nevada Supreme Court reversed the Crockett order, reinstated the
21 17-acre approval, the City sent a letter that you can -- your approvals are
22 valid. They're arguing this shows futility when they leave out the most
23 crucial facts. It's obviously not futile.

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

1 entire Badlands are no longer on the city council. And it would only take
2 one vote to flip that from four to three. And Judge Herndon said, there is
3 no way I can tell what the city council -- this current city council would do
4 on this application. And it's not the City's fault that all this time passed.
5 The City supported its approvals in the Crockett appeal. And the Nevada
6 Supreme Court finally reversed. And as soon as the Supreme Court
7 reversed, the City went to the developer and said it didn't have to.
8 Because again, the burden is on the developer. The developer got notice
9 that the 17 acre approvals had been reversed. But the City sent levels on
10 all three -- the 17 acre, 133 acre, 65, and 35 acre properties and said if the
11 requirements have changed, file your applications, or in the case of the
12 17 acres, go ahead and build.

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

22 So it comes back here. And finally we have the hearing in
23 like, June, July, whatever it was, say we need to get everything on file so
24 that we have a clear record. What was filed on the same day is first at
25 2:30 p.m., the petition for judicial review with its takings case. That

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

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

5 MR. SCHWARTZ: Well, Your Honor --

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

9 MR. SCHWARTZ: Your Honor --

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

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

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

21 MR. SCHWARTZ: Well, you have --

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

25 MR. SCHWARTZ: Exactly.

1 THE COURT: The Crockett order does not reverse it.
2 MR. SCHWARTZ: Exactly. But --
3 THE COURT: So --
4 MR. SCHWARTZ: -- under the cases I've --
5 THE COURT: So technically, it's been dismissed.
6 MR. SCHWARTZ: Yes. But under the *AMOS* case, under the
7 cases I cited, *Valley Bank v. Ginsburg*, *Five Star Cattle*, and *Royco*
8 [phonetic], and particularly *America West*, the Court had continuing
9 jurisdiction. You retained jurisdiction because --
10 THE COURT: So I can just sua sponte say because of the
11 Crockett order, my -- the fact that you filed a motion to -- the proposed
12 complaint is filed, and then subsequently the order is filed that says the
13 PJR's dismissed, I'm going to sua sponte say it doesn't matter that this
14 was filed technically after the fact, dismissing the PJR. I'm going to
15 revive the PJR, and I'm going to remand it. Is that what you're asking
16 me to do?
17 MR. SCHWARTZ: Well, no. I think the issue is was there a
18 final judgment? The Court's action was not a final judgment under these
19 authorities.
20 THE COURT: Okay.
21 MR. SCHWARTZ: Developer has cited no contrary authority.
22 Under *Valley Bank v. Ginsburg*, it says the finality of an order, whether
23 there's a final judgment, you have to look at what the order actually
24 does. And then in *AmWest*, we had the same situation. The -- what the
25 Court's order actually did was to retain jurisdiction. If the Court didn't

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

6 THE COURT: Right. But what --

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

8 THE COURT: But here's my -- here is my question that I
9 asked early on. What is the status of the pleadings? Because I can't sua
10 sponte say, oh, I'm reviving that motion -- the PJR because I said I would
11 take another look at it if Crockett was dismissed -- was overturned. I
12 don't know what I would have done. Nobody ever asked me. I was
13 never asked that. Instead, these two pleadings were filed, the last of
14 which is the order that says the PJR is dismissed. I asked early on, what
15 is the status of our pleadings? Do we need something here saying, yes,
16 we were serious when we filed this complaint -- amended complaint?
17 Twenty minutes before you filed the order saying the PJR is dismissed --
18 20 minutes before that, we intended to revive our PJR.

19 MR. SCHWARTZ: Your Honor, you filed --

20 THE COURT: Nobody's ever asked me that.

21 MR. SCHWARTZ: -- you filed --

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

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

25 THE COURT: February of 2019.

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

8 THE COURT: Okay.

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

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

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

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

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

2 MR. SCHWARTZ: You have discretion.

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

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

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

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

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

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

2 THE COURT: Uh-huh.

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

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

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

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

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

20 MR. SCHWARTZ: No. No. The --

21 THE COURT: Seriously, I just sort of --

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

23 THE COURT: Sir, with all due respect --

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

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

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

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

18 So I thought our pleadings stood as they stood in February
19 2015, prior to the removal. Instead, we get all these arguments renewing
20 the motion to dismiss, the motion to remand. And I'm just, like,
21 remanding what? I don't have anything in front of me to be remanded.
22 Nobody ever said, Judge, you need to take another look at your
23 dismissal of this petition for judicial review, that's wrong, Crockett got
24 overturned, can we please refile our petition for judicial review. Does
25 the fact that Crockett's order overturned -- was overturned, does that

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

3 MR. SCHWARTZ: Well --

4 THE COURT: That's --

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

6 THE COURT: -- critical, I think.

7 MR. SCHWARTZ: Can I address that?

8 THE COURT: Yeah.

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

11 THE COURT: Right.

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

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

19 MR. SCHWARTZ: Right.

20 THE COURT: You got entirely new people.

21 MR. SCHWARTZ: And --

22 THE COURT: Market conditions have changed --

23 MR. SCHWARTZ: -- the developer --

24 THE COURT: -- substantially.

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

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

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

11 MR. SCHWARTZ: No. You --

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

14 MR. SCHWARTZ: Okay.

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

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

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

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

2 THE COURT: Okay. All right.

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

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

9 MR. SCHWARTZ: No.

10 THE COURT: Okay. Thanks. All right. So I'm going to deny
11 this motion to remand because there's nothing before me that I can
12 remand. The last order in this case, the effective order is filed on July
13 29th. Yeah. And in my minute order I specifically said, "somebody come
14 back and tell me if Crockett's order gets overturned and ask me to take
15 another look at this." Nobody ever has. There's no petition for judicial
16 review to be remanded. I can't remand something that doesn't exist. It's
17 been dismissed.

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

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

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

7 MR. SCHWARTZ: I thought that --

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

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

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

14 MR. SCHWARTZ: Well, okay. Okay.

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

17 MR. SCHWARTZ: Sure.

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

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

22 THE COURT: Okay.

23 MR. SCHWARTZ: -- you retained jurisdiction.

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

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

2 THE COURT: Okay.

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

5 THE COURT: Uh-huh.

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

8 THE COURT: October 2nd, 2019.

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

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

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

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

1 case was --

2 THE COURT: Because it was remanded.

3 MR. OGILVIE: -- in -- yes.

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

8 MR. OGILVIE: Well --

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

11 MR. OGILVIE: Correct.

12 THE COURT: So --

13 MR. OGILVIE: Correct.

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

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

19 THE COURT: Technically.

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

21 THE COURT: Okay.

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

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

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

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

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

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

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

5 MR. OGILVIE: Exactly.

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

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

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

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

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

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

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

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

6 MR. SCHWARTZ: Well, that --

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

9 MR. SCHWARTZ: Yes. Right. Right.

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

11 MR. SCHWARTZ: Right.

12 THE COURT: We never did step two.

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

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

15 MR. SCHWARTZ: Correct.

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

20 MR. SCHWARTZ: But a motion for --

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

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

8 MR. OGILVIE: Correct. So --

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

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

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

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

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

1 THE COURT: Okay.

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

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

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

7 THE COURT: Uh-huh.

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

11 THE COURT: Okay.

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

13 THE COURT: Okay.

14 MR. OGILVIE: -- that was filed.

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

20 MR. OGILVIE: Well, but --

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

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

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

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

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

13 THE COURT: Right.

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

15 THE COURT: Right.

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

20 THE COURT: Right.

21 MR. OGILVIE: -- by evaluating and approving.

22 THE COURT: Right.

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

25 THE COURT: Right. Yeah, yes, yes.

1 MR. OGILVIE: -- with the Crockett order.

2 THE COURT: Right.

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

5 THE COURT: Uh-huh.

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

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

14 THE COURT: Okay.

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

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

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

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

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

23 We're going to refile this as you let us do back in August of
24 2019. You said we could file our proposed amended complaint. You
25 didn't -- we didn't talk about the merits of it . You don't talk about -- and

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

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

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

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

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

1 Honor. I --

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

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

6 MR. OGILVIE: And it was.

7 THE COURT: Nobody ever did.

8 MR. OGILVIE: And it was.

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

13 MR. OGILVIE: That --

14 THE COURT: Nobody ever asked for that order.

15 MR. OGILVIE: I think --

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

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

20 THE COURT: Uh-huh.

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

23 THE COURT: Okay.

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

25 THE COURT: Okay.

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

2 THE COURT: Uh-huh.

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

5 THE COURT: Okay.

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

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

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

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

7 MR. OGILVIE: Refiled.

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

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

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

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

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

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

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

20 MR. OGILVIE: Correct.

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

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

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

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

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

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

20 MR. OGILVIE: Okay.

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

1 action for petition, for petition for judicial review.

2 That was dismissed earlier. But you said that was without
3 prejudice, should Crockett be overturned. Crockett's been overturned.

4 Your Honor, are you reinstating the petition for judicial review, because
5 when you granted leave to file the proposed amended complaint, that
6 was under different circumstances? The circumstances have changed.

7 Because the circumstances have changed, is the petition for judicial
8 review valid and active with the filing of this document, or is it invalid?

9 And see that's my question, is I don't know that just -- by just filing a
10 proposed amended complaint in order to catch up with where we were
11 in August and October of 2019, when this thing got removed -- where are
12 we?

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

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

17 MR. OGILVIE: So -- and

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

24 MR. OGILVIE: Right.

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

1 MR. OGILVIE: Absolutely. And --

2 THE COURT: So Judge you need to -- you need to revisit

3 your order --

4 MR. OGILVIE: And --

5 THE COURT: -- reconsider it. Say the petition for judicial

6 review stand, and then we address the questioned agreement. Nobody

7 ever asked me to do that.

8 MR. OGILVIE: Right. So if --

9 THE COURT: That's basically [indiscernible].

10 MR. OGILVIE: -- if all this case was about, was a petition for

11 judicial review, then we -- there wouldn't be -- we wouldn't be here right

12 now. Okay.

13 THE COURT: Right.

14 MR. OGILVIE: But because this case is about inverse

15 condemnation --

16 THE COURT: Right.

17 MR. OGILVIE: -- as well --

18 THE COURT: Right. Yes. Yes.

19 MR. OGILVIE: -- then if the inverse condemnation claims

20 can't go forward without the city --

21 THE COURT: Okay.

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

23 THE COURT: Okay.

24 MR. OGILVIE: -- substantive action.

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

1 here, but --

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

4 THE COURT: Okay.

5 MR. OGILVIE: Is --

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

10 MR. OGILVIE: Without prejudice.

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

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

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

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

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

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

5 THE COURT: Okay.

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

8 THE COURT: Okay.

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

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

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

20 The merits do not need to be addressed. We need an order
21 that says, this Court has reconsidered its decision dated October 19th,
22 2019, not filed until July 29th, 2021, that should be reconsidered because
23 Judge Crockett's decision, which was the basis for finding, there was
24 issue for preclusion, has been overturned. Therefore that -- we need --
25 we missed an order. You need an order that says this is reconsidered.

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

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

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

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

14 MR. OGILVIE: If I could finish.

15 MR. LEAVITT: -- denied three times --

16 THE COURT: Yes.

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

19 THE COURT: I know.

20 MR. OGILVIE: If I could finish.

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

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

23 MR. OGILVIE: If I could finish.

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

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

3 THE COURT: Yeah.

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

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

8 MR. OGILVIE: Submitted, Your Honor.

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

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

13 MR. OGILVIE: So moved, Your Honor.

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

19 MR. LEAVITT: Okay.

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

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

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

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

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

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

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

4 MR. OGILVIE: Yes, Your Honor.

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

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

10 THE COURT: Yeah.

11 [Counsel confer]

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

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

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

17 THE COURT: Yeah.

18 MR. LEAVITT: Okay. I appreciate it.

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

24 MR. LEAVITT: Understood. Understood.

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

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

3 MR. LEAVITT: Understood, Your Honor. Okay.

4 THE COURT: Very good. I'll see you guys all back here at
5 1:45. We're going to take just an hour and five minutes recess.

6 MR. OGILVIE: Okay.

7 THE COURT: Thank you so much.

8 MR. OGILVIE: To protect the record --

9 THE COURT: Yes.

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

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

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

14 THE COURT: No.

15 MR. OGILVIE: Okay. Fine.

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

23 MR. OGILVIE: Okay.

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

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

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

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

7 MR. LEAVITT: Thank you.

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

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

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

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

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

21 THE COURT: Right.

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

1 THE COURT: Uh-huh.

2 MR. LEAVITT: Then to the extent -- and I agree with Mr.
3 Ogilvie on this position. To the extent the City wants to file a motion to
4 reconsider, he said he felt it would probably be brief, the City would file a
5 motion to reconsider that underlying order. Obviously, there would be
6 some concerns that we have with it, which is, you know, I mean EDCR
7 2.25B has a 14 day period where you can reconsider an order.

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

14 THE COURT: Right.

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

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

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

7 However --

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

12 MR. LEAVITT: Uh-huh.

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

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

18 THE COURT: Okay.

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

21 THE COURT: Yeah.

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

1 THE COURT: Yeah.

2 MR. LEAVITT: For those reconsiderations.

3 THE COURT: That's my question.

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

11 THE COURT: Okay.

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

17 THE COURT: Not right now.

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

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

25 MR. LEAVITT: Yeah, and since --

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

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

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

5 MR. LEAVITT: I'm sorry.

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

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

10 THE COURT: Okay. All right. Thank you.

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

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

18 MR. OGILVIE: I --

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

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

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

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

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

2 THE COURT: Okay.

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

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

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

8 THE COURT: Exactly.

9 MR. OGILVIE: -- what --

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

21 MR. OGILVIE: Okay.

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

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

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

1 procedural route.

2 MR. OGILVIE: Okay.

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

5 MR. OGILVIE: Okay.

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

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

14 THE COURT: Right.

15 MR. OGILVIE: Yes, yes. I understand.

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

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

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

22 MR. OGILVIE: I --

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

24 MR. OGILVIE: Understood.

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

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

2 MR. OGILVIE: Okay.

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

5 MR. OGILVIE: Okay.

6 THE COURT: -- and how this affects us.

7 MR. OGILVIE: Okay.

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

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

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

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

20 THE COURT: Okay.

21 MR. OGILVIE: -- briefing.

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

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

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

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

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

21 MR. OGILVIE: I'll prepare that.

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

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

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

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

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

19 I also want to point out --

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

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

24 THE COURT: Uh-huh. Okay.

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

1 mandatory. Although dismissal without prejudice, of course.

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

7 MR. SCHWARTZ: Yes.

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

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

15 THE COURT: Okay.

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

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

19 MR. SCHWARTZ: That's right.

20 THE COURT: So how do we relate it back?

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

24 THE COURT: Uh-huh.

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

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

2 THE COURT: Uh-huh.

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

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

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

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

1 existing civil suit.

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

5 MR. SCHWARTZ: Yes.

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

11 MR. SCHWARTZ: I understand --

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

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

17 THE COURT: Uh-huh.

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

1 THE COURT: Okay.

2 MR. SCHWARTZ: Thank you.

3 THE COURT: Thank you.

4 MR. LEAVITT: May I approach, Your Honor?

5 THE COURT: Yes, go ahead.

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

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

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

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

10 Under the EDCR, we have two choices. Number one, a Rule
11 21 severance. You sever the claim, and you put a brick wall up. That's
12 exactly what Judge Williams has done in the 35 acre case. Number two,
13 you do a Rule 42 separate trial, and you put a brick wall up between the
14 two. Or number three --

15 THE COURT: Which would bifurcate.

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

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

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

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

6 THE COURT: Yes.

7 MR. LEAVITT: This is his order --

8 THE COURT: Okay.

9 MR. LEAVITT: -- of what he did.

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

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

13 THE COURT: Okay. Thank you.

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

20 THE COURT: Uh-huh.

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

1 THE COURT: Sure.

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

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

14 THE COURT: Okay.

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

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

21 THE COURT: Okay. Noted.

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

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

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

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

3 MR. LEAVITT: I know, but he does.

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

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

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

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

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

25 MR. LEAVITT: Right.

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

4 MR. LEAVITT: Right.

5 THE COURT: We didn't.

6 MR. LEAVITT: Correct.

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

8 MR. LEAVITT: Together.

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

11 MR. LEAVITT: Right.

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

15 MR. LEAVITT: That's right.

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

19 MR. LEAVITT: Correct.

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

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

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

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

2 MR. LEAVITT: Right.

3 THE COURT: -- because I'm like, well, how does that work?

4 So it's interesting to me to see that he's directing the clerk's office to say,
5 give it a new case number but, enter it -- I don't know how this works. I
6 guess it's programming. I guess there's a way you can override the
7 program. But enter it with a relation back.

8 MR. LEAVITT: Correct.

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

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

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

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

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

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

6 THE COURT: Appreciate that, thank you.

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

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

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

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

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

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

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

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

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

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

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

4 MR. SCHWARTZ: *City of Henderson*?

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

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

18 MR. SCHWARTZ: Well --

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

1 together.

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

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

5 THE COURT: Nobody does.

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

7 THE COURT: They made it up.

8 MR. SCHWARTZ: That's not what Judge Williams said.

9 Judge Williams said the new civil action will be randomly reassigned.

10 THE COURT: Yeah, it's a --

11 MR. SCHWARTZ: The whole point --

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

15 MR. SCHWARTZ: Yeah. I think --

16 THE COURT: And reassigning it.

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

18 THE COURT: I think that's --

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

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

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

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

11 MR. SCHWARTZ: Right.

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

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

20 THE COURT: They said nothing about that.

21 MR. SCHWARTZ: Can I address that?

22 THE COURT: Yeah.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 THE COURT: Correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

19 MR. SCHWARTZ: So --

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

22 MR. SCHWARTZ: Okay. And that is --

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

1 MR. SCHWARTZ: Okay. So they --

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

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

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

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

21 MR. SCHWARTZ: Thank you, Your Honor.

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

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

9 MR. SCHWARTZ: Thank you, Your Honor.

10 THE COURT: So again --

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

12 THE COURT: You're preparing that order?

13 MR. OGILVIE: Yes.

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

15 MS. GHANEM: Can I just ask a question?

16 THE COURT: Yeah.

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

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

23 MS. GHANEM: Right.

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

1 MS. GHANEM: Right.

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

5 MS. GHANEM: Will it need something --

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

10 MS. GHANEM: Right.

11 MR. OGILVIE: And then Your Honor --

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

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

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

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

1 numbers.

2 THE COURT: Right.

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

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

7 MR. LEAVITT: I agree.

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

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

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

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

15 THE COURT: Nope. Nope.

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

20 THE COURT: Yeah?

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

22 THE COURT: Sure.

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

25 THE COURT: Right.

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

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

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

11 THE COURT: Yeah.

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

19 THE COURT: Yeah.

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

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

24 MR. LEAVITT: And --

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

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

3 THE COURT: Exactly.

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

7 THE COURT: Right.

8 MR. LEAVITT: Judge, it's --

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

15 MR. LEAVITT: I understand that.

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

19 MR. LEAVITT: Well, I think --

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

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

25 THE COURT: Right.

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

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

7 MR. LEAVITT: Yeah.

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

10 MR. LEAVITT: Yeah. And --

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

13 MR. LEAVITT: Right.

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

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

18 THE COURT: Okay.

19 MR. LEAVITT: The Court did make that that very clear on the
20 35 acre case.

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

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

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

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

7 MR. LEAVITT: Right.

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

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

15 THE COURT: Yeah.

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

20 THE COURT: Right.

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

1 you're just given a different case number.

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

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

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

18 MR. LEAVITT: Exactly.

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

24 MR. LEAVITT: Right.

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

1 Procedure.

2 MR. LEAVITT: There is not, Your Honor.

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

4 MR. LEAVITT: Right.

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

14 MR. LEAVITT: Yeah.

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

16 MR. LEAVITT: We could -- right.

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

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

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

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

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

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

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

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

6 MR. LEAVITT: Here's --

7 THE COURT: Co-counsel will cover for him.

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

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

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

12 THE COURT: Yeah.

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

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

23 THE COURT: Right.

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

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

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

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

13 And our client -- you want to say it?

14 MS. GANHEM: No.

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

20 THE COURT: Right.

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

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

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

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

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

6 MR. LEAVITT: Okay.

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

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

10 THE COURT: -- the most recent. *Valdez v. Cox*, 130 Nev. 905,
11 2014. And they talked about the similarity with the federal and the state
12 court Rule 21. Federal courts, recognizing that claims severed under
13 FRCP 21, may proceed with -- separately, treat severed claims as a
14 separate suit. And when a judgment has been entered resolving claims
15 properly severed, it's final and appealable. This is what the court of
16 appeals was telling you. If they had just been severed, it would be
17 treated as a separate suit.

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

1 So they're trying to avoid doing that. They're trying to say
2 have a clear record on the condemnation issues, have a clear record on
3 the PJR. Got it. So what they're trying to say, I think, is that an order
4 finally resolving severed claims does not need to be certified under Rule
5 54(b). So they're talking here -- they didn't tell us to sever it. That's
6 what's so bizarre in *City of Henderson* --

7 MR. LEAVITT: Well, I --

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

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

10 THE COURT: Why?

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

15 THE COURT: Where appropriate, yeah.

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

20 THE COURT: Right.

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

24 THE COURT: Right. Yes.

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

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

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

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

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

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

15 THE COURT: Correct.

16 MR. LEAVITT: So once you sever --

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

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

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

25 THE COURT: I know.

1 MR. LEAVITT: I don't think --

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

4 MR. LEAVITT: Mr. Schwartz.

5 MR. OGILVIE: That's four times today.

6 MR. LEAVITT: Mr. Schwartz.

7 THE COURT: Yeah, I noticed it.

8 MR. OGILVIE: And it's --

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

10 MR. LEAVITT: I'll accept his objection.

11 THE COURT: I get the point.

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

13 THE COURT: Yes.

14 MR. LEAVITT: Okay? I also --

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

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

21 THE COURT: Thank you.

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

23 THE COURT: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 THE COURT: Yeah. Let's do that.

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

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

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

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

1 Crockett's order.

2 THE COURT: Okay.

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

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

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

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

4 So they can apparently make this happen. So it is simply a
5 question of how do -- and they gave it the proper extension. It's
6 838775-J. So that's the new City of Henderson case. So it is possible for
7 them to deal with this as a, quote, "supreme court-ordered transfer". So
8 we can make that happen. So it is possible to do that.

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

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

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

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

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

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

17 THE COURT: Okay.

18 MR. LEAVITT: -- with our inverse side.

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

1 MS. GANHEM: True.

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

3 THE COURT: We need houses.

4 MS. GANHEM: Yes.

5 MR. LEAVITT: We agree with that.

6 MS. GANHEM: We would have had them already.

7 THE COURT: So you know, can we work something out?

8 Not a problem. I don't do that. That's not my job. My job is to move on

9 to the next thing. So with respect, denying the motion to remand, I just

10 -- I don't think that's an appropriate remedy. I'm granting alternative

11 relief on the motion to strike because we have to address this *City of*

12 *Henderson* issue, and I think we can. It appears the Clerk's Office can do

13 that. They can just give you a new case number, and they just enter that

14 old filing date. They did it for Judge Williams' case, so apparently they

15 can do it for us.

16 MR. LEAVITT: All right.

17 THE COURT: I think we need to separate them. I get the

18 point. This whole reassignment thing is what's so odd to me, and I just

19 didn't understand why he chose to do that. That's up to Tim Williams.

20 We're going to move on.

21 MR. OGILVIE: Your Honor --

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

23 to keep you.

24 MR. OGILVIE: I do, and I apologize. One matter, you

25 said -- reiterated, you're going to deny the motion for remand. But

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

2 THE COURT: Correct.

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

7 THE COURT: Right.

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

10 THE COURT: Okay.

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

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

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

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

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

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

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

15 MR. OGILVIE: Okay.

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

18 THE COURT: Yes.

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

22 THE COURT: Correct.

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

24 MR. OGILVIE: Thank you, Judge.

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

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

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

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

22 THE COURT: Yes. Certainly, yeah.

23 MR. LEAVITT: Okay.

24 THE COURT: Thank you.

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

1 case. And if I may just pause for just one moment. In the 35 acre case,
2 Judge, that was the first filed case, and we've completed discovery in the
3 35 acre case. The City hasn't even filed an answer in this case. But in
4 the 35 acre case, we've totally completed discovery and this exact issue
5 was presented to Judge Williams.

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

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

8 MR. LEAVITT: Understood.

9 THE COURT: Here we go. Here we go.

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

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

20 Well, Judge Williams addressed those exact same issues and
21 he heard, Judge, the exact same arguments you're going to hear today
22 in the 35 acre case. And so Your Honor, I'd like to move to his order. On
23 that first -- on the first page right here where it says, question number 1.
24 Is zoning used to determine the property interest in an inverse
25 condemnation case? He decided that exact issue that's before you here

1 today.

2 In conclusion of law 15 and conclusion of law 17 in his
3 finding of facts and conclusions of law, he said two things. He said, first,
4 it would be improper for me to decide the property interest issue in an
5 inverse condemnation case based on petition for judicial review law. We
6 just heard counsel agree with us on that. The petition for judicial review
7 cases are different than inverse condemnation cases.

8 And so on this first issue, he said, you must base the
9 property interest issue on eminent domain law rather than land use law,
10 which is petition for judicial review law. And in conclusion of law
11 number 17, he says, eminent domain law states that zoning must be
12 used to determine the landowner's property interests in an eminent
13 domain case. Okay, so there it is. What do we use to determine the
14 property interest issue in an eminent domain case? Judge Williams
15 answered that, zoning.

16 Then question number two, if you turn to the next slide, says,
17 well, what zoning must be used to determine the property rights issue?
18 Judge Williams also addressed that. Conclusion of law 18. The Court
19 concludes that the 35 acre property has been hard zoned R-PD7 since at
20 least 1990. Your Honor, this is the 35 acre case right here. This is the
21 133 acre case right here. They have had the same zoning since 1981.

22 This is why the 35 acre case is so critical to this case. It's
23 right next door. It had the same exact zoning as the 133 acre property.
24 R-PD7 on this property and R-PD7 on that property since 1981. And
25 Judge Williams said for our purposes here today, critical. That 1990 date

1 is going to become critical in a moment because the City is going to say
2 something happened in 1992, which is going to be totally irrelevant.
3 Why? Because zoning was already in place when the City did what it did
4 in 1992. So I'll just -- I'll lay that nugget out there, right there, Your
5 Honor.

6 So Judge Williams said the zoning is R-PD7. That's the same
7 zoning on the 133 acre property. So then he had to turn to the third
8 question. What rights does R-PD7 zoning confer on the 35 acre
9 property? And his conclusion of law 19 addressed that. He said, the
10 Court concludes that the Las Vegas Municipal Code 19.10.050 lists single
11 family and multi-family residential as the legally permissible uses on
12 R-PD7-zoned properties. So what did Judge Williams do? He went right
13 to the City's Code, and he said, okay, what does R-PD7 zoning allow? He
14 says the legally permissible uses are R-PD7 zoned properties.

15 Then we go to his final holding on the exact issue we're here
16 today on, number 20. He then says the landowner's motion to determine
17 property interests is granted in its entirety. The same exact motion we
18 have pending before you today. Judge Williams granted it in its entirety.
19 Then he said, the 35 acre property is zoned R-PD7 at all relevant times
20 and the permitted uses by right of the 35 acre property are single family
21 and multi-family residential.

22 So Your Honor, we have a decision. And you'll recall all of
23 the issue preclusion arguments that the City has made in these cases.
24 We have a decision from a judge on the property right next door on the
25 exact same issue that's before you today granting the landowner's

1 motion to determine property interests in its entirety. And Your Honor, I
2 have that Exhibit 1. I mean, you have it in the pleadings. If you want,
3 Your Honor, I can approach, and I can give you a copy of Judge
4 Williams' order.

5 THE COURT: Okay.

6 MR. LEAVITT: If I may approach, Your Honor?

7 THE COURT: So how do we square that order of Judge --
8 because I don't understand why these things are all consolidated --

9 MR. LEAVITT: I got you.

10 THE COURT: -- but that's water under the bridge. So Judge
11 Herndon's order, it appears to me that she did not entirely reconsider it.

12 MR. LEAVITT: Okay.

13 THE COURT: She said only that he had only considered the
14 consensual claims. The other claims there should be a hearing on. So
15 what are you saying in this case? Because again, it's an entirely separate
16 section of land, entirely separate, like, historical time frame that we're
17 talking about here. Because we have this issue in this one where,
18 technically, there was no consideration of the application, because they
19 said, oh, there's a problem with it, we're going to take it off calendar.

20 So your procedural history at the city level, a little different.
21 So what's the significance with the -- do we have -- are those procedural
22 facts -- when I say procedural, I mean below. The process below.

23 MR. LEAVITT: Yeah.

24 THE COURT: The process below, are there similar facts in 35
25 acres versus -- I don't know. Which one was Herndon?

1 MR. LEAVITT: Judge Williams was the 35 acre case.
2 THE COURT: He's the 35 and Herndon was the?
3 MR. LEAVITT: Sixty-five acre case.
4 THE COURT: Sixty-five, okay.
5 MR. LEAVITT: Yes. Okay --
6 THE COURT: So is that process at all relevant?
7 MR. LEAVITT: It's not.
8 THE COURT: Okay.
9 MR. LEAVITT: And here's why, Your Honor. For purposes of
10 this case, the 65 acre case, and the 133 acre case, because as I just read,
11 and I'm going to show you this in just a moment, zoning determines the
12 property interest issue. Nothing that the City of Las Vegas did below as
13 far as the petitions for judicial review, as far as the applications are
14 concerned, change that zoning. The zoning has been in place since 1981.
15 And since the zoning has been in place since 1981, you as a judge,
16 according to the Nevada Supreme Court, and I'm going to get to that in
17 just a moment, the Nevada Supreme Court requires you to look at the
18 zoning and then use that zoning to determine the property interest issue.
19 So whatever may or may not have happened below is
20 entirely irrelevant in these three cases to make that determination. So
21 now, let me turn to Judge Herndon, because that's a great question,
22 Judge. Judge Herndon, what he did in his order -- I have it right here
23 before me -- is he went through, and he has a section that's called
24 procedure history. And he has some findings that he does, right? What
25 he does, Your Honor, is he cut and pastes some of the government's

1 findings on the background history of the property. Then he cut and
2 pastes some of the landowner's findings on the background and history.
3 And so, Judge, if you go through here, he says, listen, the landowner
4 confirmed that the property had vested rights. The landowner confirmed
5 that the property had zoning. The landowner confirmed that he had the
6 right to develop the property.

7 So all he does is he lists the facts, Judge. And then he
8 expressly says, I'm not deciding the property interest issue. He
9 expressly states that. Your Honor, you go to the very, very end of his
10 decision, findings number 48 and 49 of his decision, he says straight out,
11 he says, I'm only deciding the right in this issue. And then he goes on to
12 say, the Court believes that addressing the merits of any of the
13 remaining issues would be unwise as there are three companion cases.

14 So he says, I'm only deciding -- I've listened to some of the
15 landowner's facts, I've listened to some of the government's facts. I'm
16 not deciding the property interest issue. And then says expressly, it
17 would be unwise to discuss those issues. And this is what he says why.
18 He says, there's three companion cases still pending with similar issues
19 and any ruling by this Court could be construed as having an issue
20 preclusive effect. He says it right here. He says he doesn't want Mr.
21 Schwartz to do what Mr. Schwartz is doing to you today.

22 THE COURT: Well, why aren't these consolidated? I don't
23 understand that.

24 MR. LEAVITT: Your Honor, I have to tell you, we tried. And
25 I'm sorry. I apologize. We tried. And you know where we got

1 opposition from?

2 THE COURT: Okay.

3 MR. LEAVITT: We tried. Okay? And so Your Honor, it's a
4 good question. So I apologize for that because it's frustrating because
5 now it's four cases we have to try instead of putting them in one. And
6 Judge Williams has the lower case number. So he would have already
7 decided this. In fact, he already decided this issue which would have
8 applied to all four of the cases.

9 So --

10 THE COURT: So where we got with Judge Williams, he was
11 a little ahead of the rest of us. Like you said, lowest case number. He
12 decided the motion to determine property interests.

13 MR. LEAVITT: He did.

14 THE COURT: Then you did discovery.

15 MR. LEAVITT: Well, no --

16 THE COURT: And now, you're doing the take?

17 MR. LEAVITT: Oh, yeah. So -- well, actually, we did a lot of
18 discovery, and he decided the motion to determine property interests on
19 October --

20 THE COURT: '20.

21 MR. LEAVITT: October 2020, I think it was.

22 THE COURT: Yeah.

23 MR. LEAVITT: October 20th, 2020, he decided the property
24 interest. Then we finished discovery. And now, we have scheduled with
25 Judge Williams, for September 23rd and 24th, the take issue.

1 THE COURT: Right. This is what I'm trying to figure out,
2 because again, we've got this problem with preclusive effect and what's
3 the significance. So it seems like a step was skipped in this Herndon
4 case.

5 MR. LEAVITT: Exactly.

6 THE COURT: Like, where's discovery?

7 MR. LEAVITT: He never decided the property interest issue.
8 And Judge, that was -- so --

9 THE COURT: So I --

10 MR. SCHWARTZ: Objection, Your Honor. He found it was
11 moot.

12 THE COURT: Right.

13 MR. SCHWARTZ: Counsel is misrepresenting his order.

14 MR. LEAVITT: Okay --

15 THE COURT: I'm trying to understand here, because we
16 have -- and that case bounced around because it kept getting moved
17 from judges who had --

18 MR. LEAVITT: Yeah.

19 THE COURT: Because it got caught up in that whole mess of
20 reassigning cases for people on the murder trial. And so you bounced
21 around a lot because judges kept getting -- in that docket, you do nothing
22 but murder. So the judges kept having to turn it over. So it got turned
23 over a couple of times. By the time it finally lands, and that's a big part
24 of Judge Herndon's decision is, look, it's been bounced around. So what
25 he says, if -- what I'm understanding that he did and what -- because it

1 didn't seem that Judge Trujillo entirely overturned his decision. She just
2 said he only addressed one issue.

3 MR. LEAVITT: Right.

4 THE COURT: And there were multiple causes of action in the
5 complaint, and he really only addressed one of them.

6 MR. LEAVITT: Yes.

7 THE COURT: So then you had an evidentiary hearing on
8 what? Based on what?

9 MR. LEAVITT: So here's what happened. And counsel is
10 right, Judge Herndon decided that the property interest issue was moot,
11 so he didn't decide it. He didn't decide the property interest issue.

12 MR. SCHWARTZ: He denied it. It's right there in the order.

13 MR. LEAVITT: Okay. All right, Counsel. Your Honor, can I
14 ask counsel not to interrupt?

15 THE COURT: Yes. Yeah, sure. Yes. Okay.

16 MR. LEAVITT: I've agreed not to call him California counsel,
17 so I'll call him Mr. Schwartz if he can not interrupt.

18 THE COURT: Yes. Okay. Yes.

19 MR. LEAVITT: All right.

20 THE COURT: So counsel is correct. According to page 35, "it
21 is hereby ordered City's motion for summary judgment is granted;
22 developer's counter-motion is denied as moot." That's been
23 reconsidered.

24 MR. LEAVITT: Yeah, denied as moot. So they weren't -- so
25 Judge, he didn't decide the property interest issue. So here's what

1 happened, is we went in front of Judge Trujillo, and we had a long
2 hearing. And I said, Judge, there's a mandatory two-step process. You
3 have to decide the property interests first, and then and only then can
4 you move to the take issues. And I said, Judge Trujillo, Judge Herndon
5 didn't do that.

6 And so Judge Trujillo paused the hearing, looked at Mr.
7 Schwartz and said, show me where Judge Herndon adopted that
8 mandatory two-step process and followed the mandatory two-step
9 process. And he spoke for about 20 minutes and never showed anybody
10 it. And so Judge Trujillo said under Rule 52, Rule 59, and Rule 60, I am
11 setting aside Judge Herndon's order. We're going to have an
12 evidentiary hearing, number one, on the property interest issue, and
13 then we're going to have an evidentiary hearing on the take issue. And
14 she had three days of evidentiary hearings, Judge, and we're still waiting
15 for her decision on the property interest issue and on the take issue.

16 THE COURT: Okay. But --

17 MR. LEAVITT: So she's deciding --

18 THE COURT: -- so she's not discussed the -- so she's not
19 actually decided the --

20 MR. LEAVITT: No.

21 THE COURT: Okay, got it.

22 MR. LEAVITT: So that's the point is she -- that she absolutely
23 set aside Judge Herndon's decision, because he didn't make those -- that
24 two-step inquiry. And so she is deciding them now. So yes, Judge
25 Herndon's order is not final. Judge Herndon's order has been set aside

1 pursuant to Rule 52, 59, and 60, and Judge Trujillo is now deciding those
2 issues in the 65 acre case.

3 If Judge Herndon had decided the property interest issue, we
4 would be able to see a line that says, the property interests that the
5 landowners had prior to the take was based upon X. That is -- and the
6 zoning is Y, and therefore, I hereby find that the property interests the
7 landowner had is Z. That's not in the decision, Your Honor.

8 So the only judge so far that has actually entered an order on
9 the property interest issue is Judge Williams. That's the only one that
10 we have so far. And that's why we attach it as Exhibit number 1. It's not
11 in conflict with Judge Herndon's decision because Judge Herndon said
12 all those other issues were moot. Here's what Judge Herndon did
13 decide, Judge -- Your Honor. He said the claim was not ripe. And since
14 the claim was not ripe, he dismissed it.

15 But the problem was he applied that ripeness standard to
16 four claims and the Nevada Supreme Court has expressly held the
17 ripeness standard doesn't apply to three claims. And Judge Trujillo went
18 and read the cases and she said, listen, I read the cases. I remember
19 this, her saying it very clearly. I read the cases and the cases expressly
20 state that the ripeness standard doesn't apply to three of these claims.
21 And, therefore, she said, that's why I have to reconsider -- or I have to
22 have a three day hearing on these issues.

23 Judge, if Judge Herndon --

24 THE COURT: As to the three claims. Because as to one, she
25 did not over turn it. But there is still one of the claims that --

1 MR. LEAVITT: Absolutely.

2 THE COURT: -- that Herndon said is not ripe, and she said,
3 I'm not disturbing it.

4 MR. LEAVITT: There you go, Your Honor.

5 THE COURT: But these other three, I believe that's incorrect
6 as to those three claims, so we'll proceed on those three. Okay, got it.

7 MR. LEAVITT: Exactly.

8 THE COURT: That's what I thought.

9 MR. LEAVITT: You're totally right. And Judge, in order to
10 decide those three claims, she had to do the two-step process.

11 THE COURT: And why did she do them together? That's
12 what seems so bizarre to me. Oh, I beg your pardon.

13 MR. LEAVITT: We asked her.

14 THE COURT: I shouldn't say that. I'm not critical of it.

15 MR. LEAVITT: That's okay.

16 THE COURT: I'm not critical.

17 MR. LEAVITT: We asked her --

18 THE COURT: I'm just trying to decide, procedurally --

19 MR. LEAVITT: Yeah. We asked her to have two separate
20 days.

21 THE COURT: Right.

22 MR. LEAVITT: So what she did is she had about a day and a
23 half on the property interest issue. And then she says, okay, we're done
24 with the property interest issue. I'm putting that to the side. Then she
25 moved to the take issue, and she heard it. She didn't hear them at the

1 same time. She separated them out, and she's going to issue an opinion
2 on the property interest issue and then an opinion on the take issue. I
3 believe that's extraordinarily difficult to do because you first have to
4 decide the property interest issue, which is what Judge Jones is doing.
5 He just had a hearing on the property interest issue. He's saving the take
6 issue for later. Judge Williams decided the property interest issue.

7 THE COURT: So are you here today to ask to have that
8 hearing?

9 MR. LEAVITT: On the property interest issue.

10 THE COURT: Because we're not here for that hearing. I want
11 to make that perfectly clear.

12 MR. LEAVITT: Yeah, we're here -- our motion is the motion
13 to determine property interest.

14 THE COURT: Okay.

15 MR. LEAVITT: That's why we're here today. Yeah, that's our
16 motion that we filed in this case. It's the same exact motions that we
17 filed in front of Judge Williams. And we filed a 30 -- actually, it's a 22
18 page motion.

19 THE COURT: Uh-huh.

20 MR. LEAVITT: We want you to determine the property
21 interest issue. The City filed an 88 page opposition, and we filed a
22 30 page reply. So that's what's pending before you today. The
23 underlying issue is what's the property issue the landowners have prior
24 to the Government interference.

25 THE COURT: Okay.

1 MR. LEAVITT: So that's why it's so critical, Your Honor, and
2 that's our very first document that we provided to you is what Judge
3 Williams has done. Because he's the only one who's decided that issue
4 yet. And so, we're asking you to enter an order just like Judge Williams
5 did. We're asking you to follow Judge Williams order in the 35 acre case
6 and find -- and define the landowner's property interest that they had in
7 this property.

8 Now Judge, I want to, with the Court's permission, I want to
9 now go to why Judge Williams did that, and these are the arguments
10 that we put in our brief.

11 THE COURT: I'm going to ask you one more question.

12 MR. LEAVITT: Yes. Go ahead, Your Honor.

13 THE COURT: About this -- like my problem with issue
14 preclusion and the inconsistent verdicts. If what Judge Trujillo is dealing
15 with, and again, I'm not critical of her doing them back-to-back. I'm
16 saying, you know, just why did she do it? I'm trying to understand how
17 other people would approach this. My question is, Judge Williams
18 appears to have made decision one, which is here's what's the interest
19 is. You do a bunch of discovery and then he'll address the taking.

20 MR. LEAVITT: Yes.

21 THE COURT: Judge Herndon said, all of this is not right.
22 Judge Trujillo says he's wrong. One of these isn't right. Three of them
23 are. Let's hear evidence on the three.

24 MR. LEAVITT: Yes.

25 THE COURT: So what's your position on this ripeness

1 question? Because it seems like Judge Williams didn't have a concern
2 about it, he just wouldn't follow them. But we do have at least one
3 department saying that Penn Central isn't ripe and you should be
4 considering all these consensual issues.

5 MR. LEAVITT: Okay. So the ripeness issue, Your Honor,
6 comes up on the take part of the case. It's not relevant to the motion to
7 determine the property interest sign. Here's why. Because once you
8 define the property interest, then you can decide, okay, what type of
9 application should have been filed to develop that property.

10 So the ripeness, Your Honor, is not a defense to what
11 property issue you have. Ripeness is a defense to the take. So we don't
12 talk about ripeness yet until such time as we decide the property interest
13 issue. And it's important to also identify what Judge Jones is doing in
14 the 17-acre case. He's following this two-step process, and he had a
15 separate hearing on the property interest issue. And that was on August
16 13th, 2021.

17 So Judge Jones had a full-blown hearing. I believe it went
18 for about three or four hours and then he heard all the evidence on the
19 property interest issue and now we're waiting for him to enter an order,
20 which will address one issue. What is the property interest the
21 landowners have on the property prior to the government interference?

22 So to this same exact issue is pending in front of Judge
23 Williams. He's following this same exact process that we're following
24 here today.

25 THE COURT: Williams or Jones?

1 MR. LEAVITT: Jones, sorry. I apologize. Judge Jones in the
2 17 acre case, doing the same thing Judge Williams did in the 35 acre
3 case and the same thing we're asking you to do here today is determine
4 that first underlying issue.

5 So Judge, may I approach?

6 THE COURT: Sure.

7 MR. LEAVITT: Do you have another question about the
8 procedures?

9 THE COURT: No. I was just trying to get straight --

10 MR. LEAVITT: I know. I know, Your Honor. There's a lot of
11 cases to follow here, and it's a -- I mean, we're keeping track. May I
12 approach, Your Honor?

13 THE COURT: Yeah.

14 MR. LEAVITT: Okay. So this now, Your Honor, will follow,
15 will track my argument with the three questions.

16 THE COURT: Okay.

17 MR. LEAVITT: So now, why did Judge Williams do what he
18 did? Why did he grant our motion to determine property interest in its
19 entirety, and we have this up on the board also.

20 So question number one. The first question, is zoning used
21 to determine the property interest in an inverse condonation case?
22 That's the very first question. You can go to the next one on the slide.
23 And this issue, Your Honor, has been addressed by the Nevada Supreme
24 Court, the Nevada Legislature, and the Executive Branch. It's stunning.
25 We've never had, in my -- that I'm aware of, all three branches agreeing

1 on this one issue.

2 So let's talk about the Nevada Supreme Court first. Is zoning
3 used to determine the property interest issue like Judge Williams held in
4 his order. Judge Williams held that zoning must be used. Here's six
5 Nevada Supreme Court cases, Your Honor, over the past 50 years where
6 the Nevada Supreme Court has decided this property interest issue. So
7 this isn't something where we don't have a body of law. We're not out
8 where the buses don't run like we were earlier today. We have case law
9 here. So the first one is the *Sisolak* case, seminal inverse condemnation
10 case. Remember, this is the case where the Court said you had to follow
11 the two-step process.

12 THE COURT: Right.

13 MR. LEAVITT: Right here on the left hand side it says facts.
14 The next thing is the property. And so, what did the Nevada Supreme
15 Court use to determine the property interest issue? They said the
16 property is zoned for development of a hotel, casino, and apartments.

17 So the Nevada Supreme Court in the inverse condemnation
18 *Sisolak* case said use zoning to determine what the property rights were
19 that Mr. Sisolak had. That's the seminal case, Judge. And then they
20 went -- and I want to pause for a minute. The *Sisolak* case was -- you
21 remember those air space taking cases, Your Honor?

22 THE COURT: Yeah.

23 MR. LEAVITT: Okay. So you were -- you may have been
24 on -- there were so many of them. So there was those air space taking
25 cases where the argument was hey, you put a height restriction on our

1 property so we can only build up to a certain height on the property now.
2 In other words, you took above 100 feet. In the *Sisolak* case it was above
3 62 feet.

4 And so, the Nevada Supreme Court had to decide, okay,
5 what property interest did Mr. Sisolak have? And they said the zoning
6 allows him to build a casino. And because the zoning allowed him to
7 build a casino, when the government took his height restriction, they took
8 his ability to build into that height restriction. So it was the zoning that
9 was used to determine that underlying property interest.

10 If Mr. Sisolak didn't have the zone to build the hotel casino, it
11 wouldn't have mattered if they took his air space. But he had that
12 zoning.

13 Let's turn to the next case, Your Honor. It's *Clark County v.*
14 *Alper*. I'll go through these pretty quick. The *Nevada Supreme Court in*
15 *Clark County v. Alper* is an inverse condemnation case again. And the
16 Nevada Supreme Court said that due consideration should be given to
17 the zoning ordinances when determining the property interest issue,
18 exactly as Judge Williams held.

19 So that's another inverse condemnation case. If we turn the
20 page now to the next inverse condemnation case it's *Alper v. State*. This
21 is another inverse condemnation case where the Nevada Supreme Court
22 again had to determine the property interest issue. Judge, what did they
23 do? They cut and pasted the zoning. And what the permissible uses
24 under the H2 zoning were and said that's what Mr. Alper's property
25 interest is based on again zoning.

1 Turning to the next case, these are direct eminent domain
2 cases. The next one is -- and I'll be quick on these. *County of Clark v.*
3 *Buckwalter*. Judge, this is actually one of the first cases I did as a very
4 young attorney. And Mr. Buckwalter was using his property for
5 apartments. This is what the Nevada Supreme Court said. Although the
6 property had apartments, it was zoned for commercial use, retail, food,
7 beverage and gaming. And so, the Court said, that's his property
8 interest. I don't care what he was using it for. He had zoning for
9 gaming. And then Judge, we went and valued that property based on
10 the zoning or based on that gaming zoning even though it was used as
11 apartments.

12 Same thing happened in the *Andrews v. Kingsbury* case, the
13 next case. Zoning -- the Court found that the property was zoned for
14 single family residences and the zoning -- and what those zoning
15 regulations required.

16 And then the final case -- this is probably the early seminal
17 case on this zoning. This is the 2003. *City of Las Vegas v. Bustos*. The
18 property was being used as a residence and it actually had zoning as
19 residence. But look what the Nevada Supreme Court here did. They
20 said the district court properly considered the current zoning on the
21 property as well as the likelihood of a higher zoning change.

22 So the Nevada Supreme Court said listen, you're not even
23 limited to the zoning you have. If there's a likelihood that you could get
24 a higher zoning, that would be your property interest issue.

25 And so, what's the public policy for that? What's the public

1 policy for the Nevada Supreme Court? And Judge, six cases over 50
2 years relying upon zoning. Here's why. It's because when we step into
3 an inverse condemnation case, we have litigation against the landowner
4 and the government. And who has control of all the documents over at
5 the government? The government. They have all kinds of planned
6 documents over there. They have master plans. They have
7 neighborhood plans.

8 And so, what the Court says is hold on a minute. If we're in
9 an inverse condemnation case, we have to have something that's
10 reliable to determine the property interest issue. And we know what that
11 is. We know what can be reliable is zoning. And so, the Court relies
12 upon that zoning to determine the property interest. It's not going to
13 allow any other extraneous documents to come in to try and influence
14 the proceedings. And so, that's why there's six cases over 50 years
15 where the Nevada Supreme Court relied upon zoning.

16 So let's turn now to the Legislature. What does the
17 Legislature say about this issue? The Nevada State Legislature. There's
18 a statute right on point. It's NRS 278.349. It says if there's ever a conflict
19 between the zoning and any other plans that the government has, the
20 Nevada Supreme Court says that the zoning ordinance takes precedence.
21 So the Nevada -- or I'm sorry, the Nevada legislature. So now we have
22 the Nevada Supreme Court saying we're using zoning to determine
23 property interest and we have the Legislature saying even if there's a
24 conflict with any other plans that the government might have, zoning is
25 going to take precedence over those other plans, okay.

1 Now let's turn to the Executive Branch. The Executive
2 Branch had an opportunity to weigh in on this issue also. Because what
3 happened in 1984 is someone wrote them a letter to the Attorney
4 General's Office, and we've seen these before, and said hey, what
5 happens if there's a conflict between zoning and some other plan that
6 the city has? And the Attorney General responded, said that in 1977, the
7 Legislature declared its intention that zoning takes precedence over any
8 other provisions and any other master plans that the government might
9 have. They went on to say that buttresses are a conclusion that the
10 Nevada Legislature has always intended that local zoning ordinances
11 apply to determine the property interest issues.

12 So, Your Honor, we have -- and that's attached as Exhibit
13 number 155. We have a -- six Nevada Supreme Court cases. We have a
14 statute, and we have an Attorney General opinion all agreeing that in
15 Nevada, when you determine a property interest issue, you need to rely
16 on zoning.

17 Now, Your Honor, I would think that that would be enough
18 authority and we could probably end right there and answer question
19 number one, should zoning be used to determine the property interest
20 and answer it, yes. But we also have the three City of Las Vegas
21 departments who've also answered this question. So and there's -- it's
22 going to be very relevant why I bring this up. If you turn to the next page
23 here. Let's go to the City Attorney's Office. So this is the City Attorney's
24 Office prior to trial.

25 And, Your Honor, may I approach here for just a moment?

1 THE COURT: Of course.

2 MR. LEAVITT: Okay. I'm going to hand you what's been
3 marked as Exhibit 156. You can see the first heading there is Brad
4 Jerbic and Phil Burns. They submitted a motion to you, Your Honor, in
5 2011 in an inverse condemnation case, okay, submitted under Rule 11.
6 And if you open up Exhibit Number 156, you can see this. You can see
7 what the inverse condemnation case is, and you can see it's department
8 number 26. And Exhibit 156, you turn to page 8 in Exhibit number 156,
9 and this is the representation made to you, Your Honor, in an inverse
10 condemnation case just like this.

11 They've said that the City's master plans of streets and
12 highways is a planning document. And then you go down to the bottom
13 of 8, the placement of the north alignment on the City's master plans of
14 streets and highways was a routine planning activity that had no legal
15 effect on the use and development of the property. So what the City is
16 saying here, Your Honor, is that these plans that we have with the City of
17 Las Vegas are planning documents only that have no legal effect on
18 property. That's why zoning is used to determine the property interest in
19 these cases.

20 Now I want to point out a footnote that was presented to
21 you. In that footnote, it's footnote 2 on page 11 of Exhibit number 156.
22 The representation that was made to you is that the Supreme Court
23 noted that a City's interpretation of its land use laws is cloaked with the
24 presumption of validity and won't be disturbed absent the manifest,
25 abuse and discretion. And so, what Mr. Burns and Mr. Jerbic told you in

1 that 2011 case was that listen, our master plans are planning documents
2 only.

3 In that same case, two affidavits were submitted to you
4 where they said -- and that's number two on our list. The office of the
5 City Attorney has constant -- consistently advised the city council, and
6 City staff that the master plan is a planning document only and that it
7 can't be used to restrict or imperil developmental property.

8 So again, we have zoning over here and the master plan,
9 which is just the plan. Continuing on that list, Brad Jerbic. Now Brad
10 Jerbic is talking specifically about the 133 acre property. He says, hard
11 zoning, in my opinion, trumps the general plan. He goes on to say about
12 this property, counsel gave the landowners R-PD7 zoning, and he said I
13 don't see anything that changed that, Brad Jerbic.

14 Phil Burns, again under Rule 11, submitted a brief to the
15 Court specific to this property here. Specific to the 250 acre property and
16 said, in the hierarchy, land use designations are subordinate to zoning
17 and then he said quote, "zoning designations specifically define
18 allowable uses." Why is that important? Because that's the City
19 Attorney's department who adopts the zoning code, writes it and
20 interprets it. And the Nevada Supreme Court said that what they say
21 here is cloaked with the presumption of validity. That's the
22 representation that was made to you prior to trial in 2011. That's the
23 representation that was made on the record by Brad Jerbic and Phil
24 Burns prior to this trial.

25 And Judge, I'll turn to the next page. We can go to the City's

1 planning department, okay. This is specific to this entire 250 acre
2 property and the 133 acre property. What did the City's Planning
3 Department represent, again cloaked with the presumption of validity,
4 about the 250 acre property? Number one, their head planner, Robert
5 Ganzer [phonetic], said the entire 250 acres of property as zoned as R-
6 PD7 and there's nothing that can stop development.

7 Number two, Tom Perrego and Peter Loinstein, they said the
8 250-acre property is zoned residential and has the vested right to
9 develop. Zoning trumps everything and the owner of the 250-acre
10 property can develop. Number three is deposition under oath by the
11 City's head planner, Tom Perrego. If the land use master plan and the
12 zoning aren't in conformance, then zoning is the higher order
13 entitlement. Number four is Peter Loinstein. Again, deposition under
14 oath, a zone district gives a property owner property rights.

15 And then, Your Honor, on number 5, this is the City's zoning
16 verification letter. Your Honor, all this was before Judge Williams. In the
17 City zoning verify -- what happened is the landowners researched the
18 property for 14 years. And they got significant information from the City
19 and just before purchasing the property or acquiring the property or
20 closing on it, the landowners went to the City and said, we want you to
21 put in writing what our rights are, and the City did. Exhibit number 134.
22 They said the property is RPD zoned and that's intended for residential
23 development.

24 Number two, the property that are zoned R-PD7, which
25 means up to seven residential units per acre. And number three, they

1 define the density allowed on the property. Again, this is all prior to trial
2 unaffected by these biases of trial. This is what the landowners got.
3 This is what they did, Your Honor. They didn't just show up one day and
4 acquire this property. They researched it for 14 years, and for 14 years,
5 the City Attorney's Office and the City Planning Department told them
6 unequivocally, the property is zoned R-PD7. That gives you the right to
7 develop the property and there's nothing that can stop you from
8 developing the property. That's the representations that were made to
9 them.

10 And Judge, those representations were true. I'm here to tell
11 you everything they said was true. Their deposition testimony. Their
12 zoning verification letter. The briefs that Mr. Jerbic, Brad Jerbic, and
13 Brad Burns who's sitting in the courtroom, the briefs they submitted to
14 you in the *Moxon* [phonetic] case were true. They were right. All of this
15 information prior to trial that they gave was absolutely correct.

16 And so, Your Honor, I want to now turn to the final City
17 department, and this is the City's Tax Department, okay. Prior to trial,
18 what happened as far as the taxes are concerned? So we know what the
19 City's Attorney's Department said. We know what the City's Planning
20 Department said. Let's see what the City Tax Department said.

21 And Judge, this was a stipulation between the Tax
22 Department and the landowners. A stipulation on the property interest
23 issue. What happened is, shortly after acquiring the property, the City
24 came to the landowner and said well, wait a minute. We have a law that
25 says that we need to determine what the lawful use of your property is.

1 May I approach?

2 THE COURT: Thank you.

3 MR. LEAVITT: Okay. This is NRS 361.227. This statute says
4 that any person who is determining the taxable value of the property
5 shall appraise it based on the lawful use that may be put of the property.
6 So they have to look at okay, what are the lawful uses of the property
7 and what are the legal, what are the legal limitations on the property,
8 okay. So the tax assessor did just that, Your Honor. And may I approach
9 again?

10 THE COURT: You may.

11 MR. LEAVITT: This is Exhibit Number 52. Exhibit Number 52
12 is the tax assessor at the City complying with NRS 361.227. And, Your
13 Honor, if you turn to the first page you can see assessor valuation. You
14 turn to the next page, and it's bated stamped from Exhibit number 52. At
15 the bottom the bated stamp is 001185. And if you come up here at the
16 top, Judge, it says zoning designation R-PD7. Then it says, probable use,
17 residential. Why is that so important? Because after all of that occurred,
18 after the tax assessor went out and did that -- may I approach again?

19 THE COURT: Sure.

20 MR. LEAVITT: Exhibit Number 120.

21 THE COURT: What if I said no?

22 MR. LEAVITT: I know. Then I guess I'm going to have to
23 show it to you from a distance, okay. Exhibit Number 120, Your Honor.
24 You go over one page and two pages and the bated stamp at the bottom
25 is 0042222. And you see at the top there, Your Honor, at the very top

1 right after Michelle W. Schafe, you see the word stipulation. The
2 landowners signed this document with the Government stipulating to
3 the taxes. Stipulating number 1, the lawful use of the property is
4 residential. Or I'm sorry, the zoning is residential, and the lawful use is
5 residential.

6 What happened was the property was used as a golf course,
7 but it always had R-PD7 zoning. And so, after -- and, Your Honor, this is
8 in 2016. This is way back in 2016. Two years before this case was filed.
9 So the government came to the landowners and said listen, your
10 property lawful use is residential. It's zoned R-PD7. We're going to
11 determine the lawful use as R-PD7. And Judge, the City of Las Vegas
12 Tax Assessor put a value of \$88 million dollars on the property, the
13 whole 250 acre property. And then sent to our client, the landowners, a
14 bill for \$1 million dollars a year. And Judge, he stipulated to that, and he
15 paid that tax bill based upon that lawful use.

16 So, Your Honor --

17 THE COURT: What is the density for R-PD7?

18 MR. LEAVITT: I'm sorry, what was that?

19 THE COURT: The density.

20 MR. LEAVITT: The density, it depends. So there's R-PD2, R-
21 PD4, R-PD7. The number decides the density. So it's residential plan
22 development, seven units per acre. So the zoning here was R-PD7. And
23 the way that we know that is because it's in the zoning code. But also, if
24 we go back to the City's zonification letter that was provided to the
25 landowners prior to acquiring the property, the City wrote that in the

1 letter that your density is residential up to seven units per acre.

2 So Judge, why are we here? It's really an odd question
3 because we have the Nevada Supreme Court saying zoning must be
4 used. The Legislature and the Executive Branch saying zoning must be
5 used. We have the City's three departments planning, attorney's office,
6 and the Tax Department that are responsible for interpreting, applying,
7 drafting the City Zoning Code, all uniformly agreeing, they all uniformly
8 agreed. All six of those authorities, that this property is zoned R-PD7
9 and that you have the right to use the property, legal right to use the
10 property for up to seven units per acre.

11 That's why Judge Williams concluded in his order, Judge,
12 that's why he said zoning must be used to determine the property rights.
13 And, Judge, what's going to happen here, I just want to point out very
14 quickly and then I'll go to question number two. What's going to happen
15 is Mr. Schwartz is going to say all six of them are wrong. He's going to
16 say my City Tax Department is irrelevant. He's going to say my Planning
17 Department was misinformed. He's going to say my City Attorney's
18 Office was misinformed. They put that in their brief. The City Attorney's
19 Office don't know what they're talking about. Brad Jerbic whose been
20 here for 30 years doesn't know what he's talking about.

21 He's going to say that the legislature really didn't write that
22 in the statute. He's going to try and ignore the six Nevada Supreme
23 Court cases right on point saying zoning applies and here's what he's
24 going to say to you, Judge. He's going to say zoning shouldn't apply.
25 You should apply a plan that the City had called a master plan. He's

1 going to say that's what you should apply, not zoning, despite six
2 Nevada Supreme Court cases right on point.

3 So, Judge, I want to turn to the City's master plan that Mr.
4 Schwartz is going to tell you should apply rather than zoning, Exhibit
5 number 161. The top left-hand corner of that says here's what a master
6 plan is. It provides general policies. Then it talks about what a general
7 plan is. Then it says what a zoning ordinance is. It says provides
8 specific regulations. The law.

9 So this master plan document that Mr. Schwartz is going to
10 try and convince you should trump zoning, the document itself says that
11 the master plan is just a policy guideline, and the zoning is the law. Just
12 exactly as the Nevada Supreme Court stated six times in their opinion.
13 Just exactly as the planning and the Planning Department and the City
14 Attorney's Office determined also.

15 So, Your Honor, I want to turn now -- I'm going to close out
16 this question number one. Question number one is, what should you
17 use to decide the property interest issue in this case? Zoning or
18 something else? So let's look at what other district court judges have
19 said on this issue. This is Judge Bixler in the 17 acre case. Judge Bixler
20 even had some say in this case, Judge. Here's what he said. He said,
21 how can anybody dispute what that means? The zoning laws designate
22 each one of these zones to permit a certain number of residential homes
23 per acre, which is what you asked. What is it that the City has to argue
24 about that? So he said, what are you even arguing about? Zoning lays
25 out the use of property in the City of Las Vegas." And then Judge

1 Williams, the 35-acre case that we just went through, he said, "Nevada
2 eminent domain law provides that zoning must be relied upon to
3 determine a landowner's property interest in an eminent domain case."

4 So on question number one, three questions to resolve all
5 the issues before you today. The first question is the most important
6 one and that's why I spent quite a bit of time on it. The next two
7 questions I'm not going to spend that much time on.

8 First question is, what should you use to determine that
9 property rights issue? According to Judge Williams and all the authority,
10 it's zoning. And I'll close out with this summary. This is the summary.
11 On the left-hand side, Your Honor, is all the authority I just provided to
12 you. From the Nevada Supreme Court, the three Nevada departments or
13 branches of Government, the three relevant City departments and Judge
14 Bixler -- or I'm sorry, Judge Williams' order. And what you're going to
15 hear is you're going to hear argument by counsel that the master plan
16 should apply instead. There's no one Nevada case that says the master
17 plan should be used instead of zoning. Not one Nevada inverse
18 condemnation case, and we've cited to you six, Your Honor, that applies
19 zoning.

20 So now the question number two would be okay, what
21 zoning must be used to determine the property rights on the 133-acre
22 property? That's been stipulated to in this case. The City agrees
23 that -- well actually, if we can go to the next slide. You'll recall that in the
24 *City of Bustos v. -- The City of Las Vegas v. Bustos* case, the Nevada
25 Supreme Court said you look at the current zoning plus any potential for

1 up zoning.

2 So the question is, what's the current zoning. Turn to the
3 next page. As of the filing of the complaint and the date of valuation in
4 this case, the zoning has always been R-PD7 undisputed facts. So
5 question number one, zoning is used. Question number two, the zoning
6 is R-PD7. So now the final question, Your Honor, question number three.
7 What rights does R-PD7 zoning confer on the 133-acre property? And it's
8 quite simple. Remember what Judge Williams did? He went to the
9 City's Code.

10 If we can turn to the next slide. This is the R-PD7 zoning
11 rights. It's 19.10.050. It says, R-PD, residential plan development district.
12 And the section (a), the first section is intent of the R-PD's own district,
13 which is our zoning on our property says, "the intent is for residential
14 development."

15 You know where else we saw that, Your Honor? In Exhibit
16 134, which was the City's zoning verification letter that they gave to the
17 landowners prior to his acquiring the property. The City quoted that to
18 him and said the intent of your zoning is residential development. And
19 then it lists, okay, what do you get to do with residential develop or with
20 R-PD7 zoned properties? It's section (c), Your Honor. It says, permitted
21 land uses are single family and multifamily residential.

22 So now if we flip back to how Judge Williams answered
23 question number three, which was what rights does R-PD7 zoning confer
24 upon the property? He said, conclusion of law number 19. He said, Las
25 Vegas Municipal Code 19.10.050 lists single family/multiple family

1 residential as the legally permissible uses on R-PD7 zoned properties.
2 All he did was copy right from the City's code, which says R-PD7.

3 And, Your Honor, for the -- this case was filed in 2018. From
4 2014 to 2018, you want to know who agrees with Judge Williams? Every
5 single person at the City of Las Vegas. The very, very first time anybody
6 ever said that you don't have the right to build, or you don't have -- or
7 you shouldn't use zoning, was when this case started. There is --

8 THE COURT: By this case, you mean the four?

9 MR. LEAVITT: Yes, the four cases. Prior to these four cases
10 being started -- Judge, we have the zoning verification letter in writing.
11 We have the deposition testimony from their own Planning Department.
12 I mean, those arguments, those facts, and that law was very compelling
13 to Judge Williams. I mean, he said how can -- Judge Bixler actually said,
14 how can you possibly dispute the zoning? What are we going to rely on?
15 We're going to rely on plans that the government has in their archives.
16 No, you rely on zoning.

17 So, Your Honor, we would ask that you follow the Williams'
18 order in similar fashion and answer question number one that zoning is
19 used to determine the property rights issue in an inverse condemnation
20 case exactly has the Nevada Supreme Court has applied in in six cases.

21 Number two, find that the zoning is R-PD7 on the property at
22 all relevant times, the same as Judge Williams did. That's not disputed.
23 And then turn to the City code, which is R-PD7. It says R-PD zoning at
24 the top of this section 10, which is Las Vegas Municipal Code 19.10.050,
25 and enter an order that the legally permissible uses are single family and

1 multiple family residential uses.

2 And, Your Honor, it is actually that straight forward to
3 resolve it in those three -- in that manner through those three questions.
4 And I'll tell you, Your Honor, what's going to happen is counsel's going to
5 to ask you to apply everything but zoning. He's going to ask you to
6 apply a master plan that no court has ever applied in an inverse
7 condemnation case. And, Your Honor, after he does that, then I'll reply
8 to those arguments which he makes, so I'll save that for my reply, Your
9 Honor. And Judge, if you have any questions, I'll resolve any questions
10 you might have right now.

11 THE COURT: Thank you, no.

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

13 MR. SCHWARTZ: Your Honor, we have some PowerPoint
14 slides. We're just trying to get it up on the system.

15 MR. LEAVITT: While they're doing that, Your Honor, I
16 apologize. I referred to Mr. Burns back here, and I guess he's not here
17 anymore.

18 THE COURT: He was. I think he may have left after you said
19 that.

20 MR. LEAVITT: Okay.

21 THE COURT: But he was here until just a couple of minutes
22 ago.

23 MR. LEAVITT: Okay.

24 MR. SCHWARTZ: Your Honor, I think that this motion should
25 be put in context, and I briefly reviewed the context earlier that we have

1 a 200 -- we initially had a -- before we ran into master plan of 1,500 39
2 acres that was then developed. And what the issue now is the 250 acre
3 badlands undertakings jurisprudence all the authority created the *Kelly*
4 case, the Nevada Supreme Court *Kelly* case. You can't carve up the
5 property and allow the owner, the original owner of the parcel of the
6 development park, and then carve off another part and let somebody --
7 and carve up another part and say well, if you deny me the right to
8 develop this part then it's a taking.

9 You can't do that. We don't -- we had that in this case. Even
10 if you said that the Badlands, as a whole, the City allowed substantial
11 development of the Badlands, so there can't be a taking from the 133
12 acre property. It just makes eminent sense. We can't. And in no one
13 can the rule be here in Nevada or anywhere else that the City actions
14 approving the development application, multiplying the property
15 owner's investment in the entire property by five times or six times,
16 could be a taking. It just can't be.

17 And it's not. And the law is absolutely clear that it's not as
18 well as absolutely clear that there's no property right in zoning as the
19 developer alleges here, that it could be taken.

20 So I'm going to explain a regulatory taking, a regulation of
21 use, which is at issue here. In this motion to determine property interest,
22 the claim is that zoning gives the property owner the right to use the
23 property for what he claims if it has a right to do, which of course is to do
24 anything. Do anything on the property and the City has no discretion as
25 long as they build something that is a permitted use in that zoning

1 district. And that's an absurd proposition. It has -- it's contrary to all law
2 and I will address that later.

3 So regulatory taking requires a wipeout. Well, I've already
4 explained to the Court that there can't be a regulatory taking because the
5 parcel as a whole is the PRNP or at minimum, the Badlands and the City
6 allowed development of the property increased the value substantially,
7 including to this developer, that developed property in the Gully Ranch
8 [phonetic] master plan and benefited from that open space.

9 So it can't be a taking on that basis. Well the developer also
10 bought the property subject to the PROS designation in the general plan,
11 that's Park Recreation and Open Space, that did not allow housing. So
12 the developer knew that when he bought the property. The City -- even if
13 the City had declined to lift that PROS designation in the 133 updates,
14 and it didn't because it never reached the merits. It didn't. But even if it
15 had, it wouldn't be a taking because the developer bought a golf course
16 and drainage for four and a half million, and after, and the -- and with
17 respect to the 133 acre property the City just didn't change the law.

18 So the developer paid a price for the property that reflected
19 restriction of the PROS designations in time. All the takings cases say
20 this. But, you know, despite that the City actually approved the
21 development of the 17 acre property, increasing the value. You can't
22 have a taking unless the action challenge increases the value.

23 All right. Your Honor, the developer has distorted eminent
24 domain law, regulatory takings law, zoning law, general plan law, to
25 such a great of extent I really need to ask for the Court's patience while I

1 untangle all of the misrepresentations of the law that the developer has
2 made. We first need to start with, what has the developer alleged? In
3 their third and fourth cause of action the developer alleged a, what they
4 call a categorical takings claim, and a *Penn Central* takings claim.

5

6 Now the motion to determine property interest is actually a complete
7 disconnect with those causes of action, because there's no takings test
8 that you take a right, a right that the property owner had, even if they
9 had the right. That's not the test for a taking.

10 The test for a taking is, what is the economic impact of the
11 action on the economic value of the property? For a categorical taking,
12 as alleged by developer, it's got to be a wipeout under the *Lucas* case.
13 It's got to be a destruction of all economic value. You can't use it for
14 anything, it's worthless. If it's the *Penn Central* claim, it's based on the
15 three factors, the economic impact of the regulation on the property, and
16 the extent to which the alleged action interferes with distinct investment
17 expectations, these are all about economic impact on the property.

18 So again, this motion, and this motion to determine a
19 property interest is a huge disconnect with these two causes of action,
20 because they allege that the City action had detrimental economic
21 impact on the property. Whereas their motion to determine property
22 interest is -- well, we had a right to build housing. They don't say how
23 much, or what kind, or how high, they don't say anything about that,
24 which just tells you right there; a right to do what? I mean, it's because
25 it's a complete disconnect with zoning, that's not how zoning works.

1 But even so, if they had a right to building housing, okay,
2 let's assume that they had that right and the City denied it, and of course
3 their remedy would be a PJR, not damages, but assume all of those
4 things, that doesn't tell you whether it's been a comparison taking,
5 because the taking requires a wipeout, or a near wipeout of the parcel as
6 a whole.

7 So this motion is way off base in terms of what the law
8 provides, and I want to explain further that the complaint raises
9 essentially -- well, five taking causes of action, and it's very important to
10 distinguish among these five causes of action. The third and fourth
11 causes of action are the categorical and *Penn Central* claim. The fifth
12 cause of action is for what the developer styles a per se regulatory
13 taking; that's a physical taking, completely different animal. The sixth
14 claim is for a non-regulatory taking; that's not really before the Court,
15 except the fact that the title, non-regulatory.

16 We're not talking about regulation we're talking about
17 something else. And there are, I believe they stated a temporary taking
18 cause of action, and temporary taking is if there's a finding of a
19 permanent taking due to regulation of use, and the government then
20 rescinds the regulation that was found to be a taking, then the
21 government is liable during that period, in between imposing the
22 regulation and rescinding it for a temporary taking. Otherwise, it's a
23 permanent taking. So if you don't have a permanent taking under their
24 categorical or *Penn Central* claim, temporary taking is out the window.

25 Now in order to get around a ripeness doctrine, which is just

1 fatal to their claim. Have you got the fifth there? Identical to, Judge, to
2 the 65 acre property, because there was never any application denied
3 upon the merits in this case, so they are identical.

4 Judge Herndon found that both the categorical and the *Penn*
5 *Central* claim were unripe, and he went deep into the facts of those
6 claims, to explain why they were unripe. He rejected every one of the
7 arguments that counsel made today as to why their claims are ripe.

8 Anyway, how does the developer get around the ripeness
9 doctrine, which is the state of their claim? What they do is, they tell the
10 Court that *Sisolak* and other physical takings cases, where ripeness is not
11 at issue, because there's no permit applications, it's all about a physical
12 taking. They tell the Court, that because these are also called categorical
13 takings, as I explained this morning, that therefore the ripeness must not
14 apply, because the Court said, the ripeness doctrine doesn't apply to a
15 physical taking, which is a categorical taking.

16 So it's word play, what they're doing. They're deliberately
17 confusing the Court, and if you look at their briefs, if you look at their
18 briefs they really try hard to confuse this issue, more than just that word
19 play. You know, by calling their third cause of action a categorical
20 taking, instead of a regulatory taking, where the regulation of use,
21 they're trying to import physical taking rules into that claim, to get
22 around the ripeness doctrine, which again is a taking.

23 So if you look at their briefs in this case, where the developer
24 tries to persuade the Court to apply these physical taking rules to
25 ripeness, they say in -- they say -- actually they called their claims per se

1 categorical claims. That's like saying physical/physical taking, or
2 wipeout/wipeout taking. I mean it's deliberately confusing, so that the
3 Court will apply these rules where they shouldn't.

4 So I want to explain here why *Sisolak* is a physical takings
5 case. The developer has represented that case as controlling in this
6 motion to determine property interest and has nothing to do with their
7 motion to determine property interest, because their motion to
8 determine property interest alleges that the City cannot limit their use of
9 the property by regulations.

10 A physical taking case affects the property owner's right to
11 exclude others, a completely different animal. So in the *Sisolak* case,
12 and I need to -- Your Honor, I hope you'll indulge me, that sometimes I'm
13 going to quote some new cases, because I'll tell, I'll give you an
14 example, question number 1 of the developer's Exhibit 1. Now at the
15 bottom it says conclusion of law, number 17, and it starts out with a
16 quotation. Nevada eminent domain law provides that zoning must be
17 relied upon to determine a landowner's property interest in an eminent
18 domain case, knowing that, quote -- that's a quote made up by counsel.
19 That case doesn't say that.

20 MR. LEAVITT: Your Honor, I need to object.

21 MR. SCHWARTZ: It doesn't -- it's not even close to it.

22 THE COURT: Thank you, Mr. Leavitt.

23 MR. SCHWARTZ: Not even close.

24 MR. LEAVITT: If I can make an objection?

25 MR. SCHWARTZ: No, Your Honor --

1 MR. LEAVITT: I can lodge an objection, counsel logged
2 objections.

3 THE COURT: Thank you. Thank you, Mr. Leavitt.

4 MR. LEAVITT: That's directly out Exhibit 1, Judge Williams'
5 order.

6 THE COURT: So we're referring to Judge Williams' order.
7 Thank you.

8 MR. SCHWARTZ: Now, Your Honor. This says a sentence
9 and they cite a case, that as -- you know, you make a statement, and you
10 cite a case, that means that case says that. That case doesn't say
11 anything like that. So -- and I'll explain why counsel is referencing those
12 cases, but my point is, I'm going to have to quote from some cases here,
13 so that the Court knows that we're telling the truth about what those
14 cases say.

15 In *Sisolak*, the Court said, in determining whether a property
16 owner has suffered a per se taking by physical invasion. So here the
17 Court's saying, yeah, we recognize that a physical taking is a type of
18 per se taking; they don't use the word categorical, but they could have.
19 A court must determine whether the regulation has granted the
20 government physical possession of the property, or whether it merely
21 forbids certain private uses in the States.

22 So here we have the Nevada Supreme Court making a
23 distinction between a wipeout case, wipeout *Penn Central*, where the
24 wipeout, or near wipeout, *Penn Central* has got to be very close to a
25 wipeout, according to the *Lingle* decision.

1 And they're saying, this is a physical possession case, a
2 physical takings case. They use the distinction, or whether it merely
3 forbid certain private uses of the space. So *Sisolak* and the other
4 physical takings cases that counsel cited, have nothing whatever to do
5 with zoning ordinances and the general plan designations, here that limit
6 the use of the property by the owner, nothing to do with that.

7 Then, Your Honor, this morning I briefly recounted the facts
8 of the *Loretto* case, where New York City required Ms. Loretto to allow
9 cable TV facilities on her rental building. The Court said that's a physical
10 taking, you have the right to exclude others from occupying your
11 building, that wasn't a regulation of Ms. Sisolak's use of the property, it
12 allowed someone to physically occupy her property. And it said because
13 the ordinance denied the owner of the fee simple interest, the right to
14 exclude others from their property. In that case *Loretto* owned the
15 building. She was the owner. That it affected this regulatory physical
16 taking.

17 So you can have a regulatory physical taking where a
18 regulation requires the owner to allow other people to occupy their
19 property, but that's completely different from a regulatory taking case
20 where you limit the use, the owner's use of the property.
21 Then the *Sisolak* Court went on to say, categorical rules apply when a
22 government regulation either; 1) requires an owner to suffer a
23 permanent physical invasion of her property; or 2) completely deprives
24 an owner of all economical beneficial use of her property.

25 So here we have the Nevada Supreme Court saying, the

1 categorical taking, that categorical from the same thing as per se
2 requires an owner to allow a physical invasion or regulates the use to
3 wipeout economic value. Two different things.

4 Then the Court said, the second type of per se taking,
5 complete deprivation of value is not at issue in this case. I want to
6 repeat that. The second type of per se taking, complete deprivation of
7 value is not at issue in this case, because *Sisolak* never argued that the
8 ordinances completely deprived him of all beneficial use of estoppel.
9 So they're making a clear distinction here, between regulation of use and
10 depriving the property owner of the right to exclude others.

11 Then the Court went on to say, because the height restriction
12 ordinances authorize airplanes to make a permanent, physical invasion
13 of a landowner's airspace, we conclude that a *Loretto* type regulatory per
14 se taking occurred. That's the title that the developer gave to its fifth
15 cause of action for a physical taking, a regulatory per se taking. It's a
16 physical taking.

17 *Sisolak* claimed that the effect of the ordinances was a
18 physical invasion of his airspace, again a direct quote. Quote, "*Sisolak* is
19 due just compensation for the government's physical invasion of his
20 property. The District Court found that the presence of air traffic over
21 *Sisolak*'s property, at altitudes below 500 feet, as permitted by the
22 ordinances, constituted a permanent physical invasion of a property and
23 was sufficient to establish a taking."

24 We agree, quote, "the ordinance authorized a physical
25 invasion of *Sisolak* property and required *Sisolak* to acquiesce to a

1 permanent physical invasion." Quote, "we conclude that under Federal
2 law the ordinances effectuated a *Loretto* type regulator per se taking of
3 *Sisolak* property."

4 So it's false, the developer's representation to this Court that
5 *Sisolak* was about zoning, and zoning prohibiting a use that the agency
6 there used zoning to prohibit a use is wrong; that case didn't do that. It
7 said where the regulation required the owner to submit to physical
8 occupation by others, was a physical taking. That was not a wipeout
9 case, it wasn't a regulation of use case. So it's improper for the
10 developer to rely on *Sisolak* for ripeness. It has nothing to do with
11 ripeness, because ripeness only has to do with regulation of use, just as
12 a matter of law and a matter of logic.

13 And in the case of the 65 acre property, after Judge Herndon
14 ruled that the categorical and *Penn Central* claims were not ripe, because
15 the developer hadn't complied with the State case, and filing, and having
16 denied two applications for development of the property on the merits
17 for that property standing alone, finding the case was unripe and granted
18 the City summary judgment.

19 In the motion for rehearing, counsel argued to Judge Trujillo,
20 who then took the bench that *Sisolak* provides, they conceded that the
21 *Penn Central* claim wasn't ripe, so they're conceding that the ripeness
22 doctrine applies in Nevada, and they're conceding that the ripeness
23 doctrine required what Judge Herndon said, two applications and denial.
24 But they argue that the language in *Sisolak* meant that the ripeness
25 doctrine doesn't apply to a categorical taking claim, it does in

1 *Penn Central*, and that's categorical, that's absolute nonsense,
2 *Penn Central* carries a lesser showing, a lesser showing of interference
3 with use.

4 So how could greater, you know, a greater burden of
5 showing interference, the ripe, how could the Court know more that it's
6 going to wipe it out, than if it's going to only nearly wipe out the
7 property, it makes absolutely no logical sense.

8 And then as we've cited in our briefs -- and Judge Trujillo
9 didn't fine that the ripeness doctrine doesn't apply to categorical taking.
10 She asked the question, she's never ruled one way or the other, she
11 asked the question based on being misled in this motion for a new trial
12 by counsel.

13 Here's what the law says. For example, *Palazzolo v. Rhode*
14 *Island*, it's a U.S. Supreme Court case, 533 U.S. 606, from 2001. Where
15 there the Supreme Court applied that the *Williamson County* ripeness
16 doctrine to a categorical wipeout claim. "The landowner alleged that the
17 Government's denial of its development proposal, deprives him of
18 economically beneficial use of the property." This is the developer's
19 third cause of action.

20 This is -- it goes directly to the ripeness of that cause of
21 action. The *Palazzolo* Court's explanation of the rule left no question that
22 ripeness doctrine applied to categorical takings claim. The Court said, a
23 final decision by the responsible State agency informs the constitutional
24 determination of whether a regulation has deprived the landowner of all
25 economically beneficial use. These matters cannot be resolved in

1 definite terms until a Court know the extent of permitted development on
2 the land.

3 And in the *Suitum*, S-U-I-T-U-M, v. *Tower Regional Planning*
4 *Agency*, 520 U.S. 725, at pages 731 and 734, the U.S. Supreme Court
5 said it again. By the way, the cite from *Palazzolo* case was at page 618.
6 The Supreme Court said it again the *MacDonald, Sommer and Frates*
7 case. And the lower courts had said, the Courts are unanimous,
8 categorical takings claims are subject to the final decision ripeness
9 requirement. Clearly, there's no logic to saying only a *Penn Central*
10 claim again, which requires less regulation, less burdensome regulation,
11 should be subject to ripeness, but not a categorical claim.

12 THE COURT: Well, unless we can wrap this up in the next
13 five minutes, we're going to have to continue this hearing, because
14 under pandemic rules we must be out of the building at 5:00. So
15 unfortunately I'm scheduled every afternoon this week, already, except
16 for Friday. So I appreciate the fact that you travelled in for this, so if you
17 want to appear remotely, that's fine with me for resumption.

18 MR. SCHWARTZ: All right, Your Honor.

19 THE COURT: Okay. Are you folks available on Friday, it's
20 open?

21 MR. LEAVITT: We'll be here Friday, Your Honor.

22 THE COURT: So what time would you be available --

23 MR. LEAVITT: The earliest you can make it, Your Honor,
24 we'll be here. We could do 10:00 a.m. again, on Friday. Okay. All right.
25 And certainly, I'm sure if Mr. Schwartz cannot travel again, because he

1 came in for this hearing, we understand he's to participate remotely.

2 MR. SCHWARTZ: And, Your Honor, when would that hearing
3 conclude on Friday?

4 THE COURT: Pardon?

5 MR. SCHWARTZ: Would it go like the end of the day?

6 THE COURT: No --

7 MR. LEAVITT: I hope not.

8 THE COURT: I would certainly hope not, because, I mean,
9 this is -- we're just on this last motion --

10 MR. LEAVITT: It's up to him.

11 THE COURT: -- so whatever your opposition, the rest of your
12 opposition, and then the response from Mr. Leavitt, and hopefully a
13 ruling on this motion then. Have you got a decision one way or the other
14 ready? I don't -- I don't know -- I mean, is there --

15 MR. SCHWARTZ: It requires -- when this much mud has
16 thrown against the wall here, it requires a lot of time to untangle it.

17 THE COURT: Right.

18 MR. SCHWARTZ: They have so tangled and tortured the law,
19 it requires a lot of time to explain it. And so, you know, I have at least
20 two or three hours more. This is -- you know, we've got to painstakingly
21 show that everything they said is wrong. Everything?

22 THE COURT: Yeah. Okay.

23 MR. LEAVITT: Could I just say one thing, Your Honor?

24 THE COURT: Yes, Mr. Leavitt.

25 MR. LEAVITT: I don't know how everything I said was

1 wrong. I mean when I quoted from the cases and quoted from Judge
2 Williams, but having said that, Your Honor, we're here on a very narrow
3 issue, and that is what property rights did the landowner have prior to
4 the government interfering with that property right. And remember,
5 Your Honor, we argued this issue, prior in a status check, and this Court
6 entered an order, we're not going to talk about the take issues --

7 THE COURT: Correct.

8 MR. LEAVITT: -- we're not going to talk about ripeness
9 issues, we're just going to talk about what property rights the
10 landowners have. So maybe we can -- and that's all our motion
11 addresses, that's all our motion addresses.

12 THE COURT: And so that looks like it's certainly going to be
13 a question I had, which is it was not my understanding that we were
14 talking about, and that's why the motion was, I thought, the
15 counter-motion was withdrawn is -- we're not talking about whether this
16 was in fact taking, or -- but simply this question of defining what it is,
17 that we're going to be discussing.

18 MR. SCHWARTZ: Can I be heard on that, Your Honor?

19 THE COURT: Okay. Five minutes, that's all we've got.

20 MR. SCHWARTZ: The motion to determine property interest
21 is moot. The case isn't ripe --

22 THE COURT: That's -- I appreciate that's the --

23 MR. SCHWARTZ: They can't have been denied a right --

24 THE COURT: That's Judge Herndon.

25 MR. SCHWARTZ: Yes, but it's moot. And by the way, Judge

1 Herndon heard these motions at the same time. There's no processing
2 in Nevada requiring this motion to be heard first; that doesn't exist. And
3 those *Sisolak* and *A.S.A.P.*, the Court's heard them on summary
4 judgment, it's just different elements of the claim. That the ripeness is
5 crucial because if the City hasn't been given a chance to deny the alleged
6 ripe, of course this ripe doesn't exist, but even if it did, the Court doesn't
7 reach constitutional questions in either judicial -- you conservatism. The
8 Court is supposed to avoid constitutional questions where it can.

9 In this case you don't need to reach the constitutional
10 question, because the City might, if they file the proper application they
11 might actually grant them, in which case it would grant that the alleged
12 ripe and there wouldn't be a constitutional issue. But I just want to say
13 one more thing, what they're asking you to do is to throw out almost the
14 entire land use regulatory system in the State, to say zoning, all property
15 zoned, Your Honor. What they want you to decide is, property owners
16 get to do whatever they want, as long as they build a use that is
17 permitted in the zone, so they can build anything they want. They're
18 asking you to throw out the whole system, and all authority from the
19 Nevada Supreme Court, all authority from the legislature --

20 THE COURT: Well, maybe I misunderstood what they were
21 asking, because I thought the process here is to determine, what are we
22 going to be talking about? Are we talking about, is there property
23 interest in the fact that you have zoning, and that when you apply for
24 something that you believe would be appropriate under that zoning, and
25 you don't -- you're not approved for that, has there been a taking? I

1 thought the second part was, was there a taking? I thought all we were
2 doing with this part was saying, what are we going to talk about here,
3 are we going to talk about just their -- that's why I asked, you know, what
4 is R-PD7?

5 MR. SCHWARTZ: All right. Well, that's --

6 THE COURT: So is that --

7 MR. SCHWARTZ: -- I'm going to get to that.

8 THE COURT: -- what we're trying to figure out? Is that all
9 we're talking about here is what is their interest, they have existing
10 zoning, has that in fact been taken by the action that the City did?

11 MR. SCHWARTZ: They don't have an interest, they don't
12 have a property, it's just a zone --

13 THE COURT: No, but that's why I thought that their question
14 was, was if we have interest in zoning, has that zoning -- has that interest
15 been taken, I thought that was the part of the two-part question.

16 MR. SCHWARTZ: No

17 THE COURT: Was do we have an interest, if we have an
18 interest has it been taken, that was my understanding of what their two
19 parts were.

20 MR. SCHWARTZ: No, they're claiming a right they're
21 claiming a right to build --

22 THE COURT: Right --

23 MR. SCHWARTZ: -- to build whatever they want under
24 zoning, and that's not a property interest.

25 THE COURT: Okay. All right.

1 MR. SCHWARTZ: That's why you got to go through this.

2 THE COURT: I just wanted to say I think that maybe I view
3 this a little more narrow, perhaps than you see what they're doing.

4 MR. SCHWARTZ: They're asking you to find that the
5 constitutional right to build whatever they want in any zone, anywhere in
6 the State of Nevada, as long as your properly zoned. If you zoned
7 industrial you can build whatever you want, height, length, there's no
8 discretion.

9 MR. LEAVITT: It's not what we're asking for, Judge.

10 MR. SCHWARTZ: That is completely -- that would
11 completely --

12 THE COURT: And perhaps I'm just interested in what they
13 were asking --

14 MR. SCHWARTZ: -- the turn the system upside down.

15 THE COURT: -- so we can clarify with Mr. Leavitt on Friday.
16 That was not my understanding of what they were arguing, so --

17 MR. SCHWARTZ: I think I --

18 THE COURT: I appreciate your point that you believe--

19 MR. SCHWARTZ: I would like the opportunity to explain --

20 THE COURT: -- that that's the net effect of what they're
21 saying.

22 MR. SCHWARTZ: I would like the opportunity to explain that
23 that is exactly what they're saying --

24 THE COURT: Okay. Okay. Alrighty.

25 MR. SCHWARTZ: -- and the implications of what they're

1 asking.

2 THE COURT: So that's why I said I think we're going to need
3 more time. So Friday?

4 MR. MOLINA: Your Honor, just a point of clarification.

5 THE COURT: Yes.

6 MR. MOLINA: Do you want two separate orders for the
7 motion to dismiss and motion to remand, or can we combine them?

8 THE COURT: You can combine them, I mean, if that's easiest
9 for you. Just like review them with counsel and make sure we got them.

10 MR. MOLINA: Thank you.

11 MS. GHANEM: Thank you, Your Honor.

12 THE COURT: And we'll see you guys then on Friday. Two of
13 you are going to be here. If you can't be here, Mr. Schwartz, we certainly
14 understand --

15 MR. SCHWARTZ: Thank you, Your Honor.


16 THE COURT: -- and thank you for being here today.

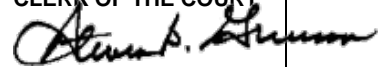
17 MR. LEAVITT: Thank you, Your Honor. And thank you for
18 everything today, for time. Glad to be out of her by 5:00.

19 [Proceedings adjourned at 5:00 p.m.]

20

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

23 
24 _____
Maukele Transcribers, LLC
25 Jessica B. Cahill, Transcriber, CER/CET-708



1 RTRAN

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3
4
5 DISTRICT COURT

6 CLARK COUNTY, NEVADA

7)
8 180 LAND COMPANY LLC, ET AL.,)

CASE#: A-18-775804-J

9 Petitioners,)

DEPT. XXVI

10 vs.)

11 CITY OF LAS VEGAS,)

12 Respondent.)
_____)

13 BEFORE THE HONORABLE GLORIA STURMAN
14 DISTRICT COURT JUDGE

15 FRIDAY, SEPTEMBER 17, 2021

16 **RECORDER'S TRANSCRIPT OF PENDING MOTIONS**

17 APPEARANCES:

18 For the Petitioners:

19 JAMES J. LEAVITT, ESQ.
20 KERMITT L. WATERS, ESQ.
21 ELIZABETH M. GHANEM, ES.
22 AUTUMN L. WATERS, ESQ.
23 MICHAL A. SCHNEIDER, ESQ.

24 For the Respondent:

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

RECORDED BY: KERRY ESPARZA, COURT RECORDER

1 Las Vegas, Nevada, Friday, September 17, 2021

2

3 [Case called at 10:04 a.m.]

4 THE COURT: We'll get the appearances of counsel and then
5 we'll begin.

6 MR. LEAVITT: Would you like us to go first, Your Honor,
7 Plaintiffs?

8 THE COURT: Sure.

9 MR. LEAVITT: Good morning, Your Honor. James. J. Leavitt
10 on behalf of 180 Land and Fore Stars land owners.

11 MS. WATERS: Good morning, Your Honor. Autumn Waters
12 on behalf of the land owners, as well.

13 MS. GHANEM: Good morning, Your Honor. Elizabeth
14 Ghanem on behalf Plaintiffs.

15 MR. WATERS: Kermitt Waters, Your Honor, on behalf of the
16 landowners.

17 MR. LEAVITT: And also our two legal assistants, Jennifer
18 Knighton and Sandy Guerra, in the courtroom with us also, Your Honor.

19 THE COURT: All right, with you?

20 MR. SCHWARTZ: Good morning, Your Honor. Andrew
21 Schwartz for the City.

22 MR. MOLINA: Good morning, Your Honor. Chris Molina for
23 the City.

24 MR. OGILVIE: Good morning, Your Honor. George Ogilvie
25 on behalf of the City.

1 MR. BYRNES: Good morning, Your Honor. Phil Byrnes for
2 the City.

3 THE COURT: All right, counsel. So Mr. Schwartz, you want
4 to pick up where you left off on whatever day it was?

5 MR. SCHWARTZ: Yes, Your Honor. Thank you.

6 I want to thank the court for giving me more time to address
7 the claim that the property owners have constitutional rights to building
8 permits just by virtue of zoning. This is -- it's an extremely important
9 principle. What the developer is proposing here is a radical change in
10 land use law and property law in Nevada. And that's not an
11 exaggeration. In the 1970s and '80s, the State Legislature for Nevada
12 gradually changed the land use regulatory system in Nevada. Whereas
13 the former system was marked by very little regulation and property
14 owners had great freedom to use their property and build on their
15 property as they saw fit with very little oversight from the government.

16 In the 1980s and 1990s, the Nevada Legislature made a C
17 change in the way land use is regulated in the State of Nevada. It
18 determined that there should be much more -- much more regulation to
19 make sure that development served the community, that it was safe, that
20 it was aesthetically pleasing, that it provided proper infrastructure, that
21 communities were planned for the best interests of the community. And
22 there was a de-emphasis on the rights of property owners to build on
23 property. And I wanna take the Court through that change because that
24 affects -- that directly affects what the alleged constitutional right that's
25 at issue here, whether it's valid or not, and I think the Court will see it is

1 not a valid point.

2 So it's clear from all authority, including the *Oliver* case that
3 the developer likes to rely on, that zoning does not confer rights. The
4 purpose of zoning is to exclude certain uses and to limit an owner's use
5 of the property. So the theory that a property owner has constitutional
6 rights granted by zoning doesn't fit with the entire concept of zoning.
7 The first zoning case was *Euclid v. Ambler Realty*, and in that case --
8 prior to 1926 and prior to that case, developers in the community, or
9 owners, could do virtually anything they wanted with their property. The
10 only limit on their use was of a public nuisance. In that case, the U.S.
11 Supreme Court upheld a zoning ordinance which said that the
12 community could exclude certain uses from a zone to -- it was to allow a
13 zone to be solely residential. So it excluded industrial uses and noxious
14 uses that might interfere with the residential use.

15 That's the purpose of zoning. And unanimous Nevada
16 authority holds that zoning does not confer property rights. It's not for
17 the interests of property owners, as the developer claims here. And a
18 denial of a property right is not a taking. That's not the test for a taking.
19 If you're denied a property right, your remedy is a petition for judicial
20 review requiring the government to allow you to do what you say you
21 have a right to do. But the test has nothing to do with takings. The test
22 for takings is the economic impact of the regulation on the property.

23 Now, the developer relies on the *Sisolak* case for the
24 proposition that zoning confers constitutional rights on the property.
25 They can do whatever they want as long as it's permitted by -- it's a

1 permitted use in the zone. In other words, if it's -- if residential use is a
2 permitted use in the zone, the developer claims -- and this is -- this would
3 completely up-end all land use regulation in the State of Nevada. The
4 landlord contends they have a constitutional right to build anything they
5 want without this -- the exercise by the government of discretion to limit
6 that right, and they claim that *Sisolak* supports that theory. It does not.
7 *Sisolak* is a takings case -- a physical takings case where the Court held it
8 had nothing to do with zoning. It had everything to do with the owner's
9 rights to exclude other people.

10 And the Court said if you -- if property is vested in an owner,
11 which means you own it, you own the fee simple, that's the use of
12 vesting in the *Sisolak* case. To get a preliminary title for it, it tells you
13 who owns the property. It's called vesting. The property is vested in
14 such. In this case, the property was vested in the developer. It owned
15 the fee simple interest. The *Sisolak* court did not say that the property
16 owner has a vested right to build whatever they want as long as it's a
17 permitted use by zoning. The *Sisolak* court refers to zoning in the
18 context of damages of the value of the property. The zoning permitted
19 certain uses.

20 So in valuing the property, the court said, yeah, you consider
21 the zoning, what's allowed. If zoning allows only residential, and open
22 space, and recreation, well, you can't value the property based on a --
23 you know, a high-rise office building. That's the context in which the
24 court in *Sisolak* discussed the zoning. It had nothing to do with the right
25 to exclude others. It doesn't matter what the zoning is if you're denied

1 the right to exclude others of physical taking. It doesn't matter what the
2 zone is. You're entitled to compensation for a physical taking.

3 That's not this case. This motion goes to the categorical
4 under *Penn Central* claims, which only concern regulation of owner's use
5 of the property. And the court said, in *Sisolak*, not that the property
6 owner had a right to build in the air space, but it had a vested right in the
7 air space, which means it owned the air space. That's all it said. That's
8 all that that decision meant.

9 In this case, as I'll explain, the R-PD7 zoning grants the City
10 broad discretion to restrict the owner's use of the property. The
11 developer's theory is completely inconsistent with that ordinance. And
12 as I indicated -- as I argued at some length on Tuesday, *Sisolak* is a
13 physical takings case and has nothing to do with the categorical and
14 incentive claims, which concern regulation of use.

15 I want to take the Court through two state statutes and the
16 Las Vegas zoning ordinance, which I think will make it abundantly clear
17 that property owners do not have constitutional rights to build whatever
18 they want as long as it's a permitted use. But I do want to refer the Court
19 to Judge Herndon's decision. And by the way, Judge Herndon's
20 decision was a final decision on the merits. It was not set aside by Judge
21 Trujillo. She has not issued any orders in the case.

22 Judge Herndon's decision was well-reasoned. He took the
23 proposed findings of fact and conclusions of law of both parties, and he
24 took some from each, and he modified the decision. He really dug deep
25 into these issues. And everything he said in his decision is

1 well-supported by Nevada and federal case law and statute, and the
2 developer can't refute any of it because it's all right.

3 But at page 16 of his -- which is 10 of 11, Your Honor, in our
4 exhibits.

5 THE COURT: No, I've got it.

6 MR. SCHWARTZ: Page 16, Judge Herndon said, "because
7 the right to use land for a particular purpose is not a fundamental
8 constitutional right, courts generally defer to the decisions of legislatures
9 and administrative agencies charged with regulating land use." And
10 Judge Herndon goes on at some length to explain how the land use
11 regulatory system in Nevada works. There are separation of powers.
12 Local agencies have broad discretion to regulate land for the community
13 good. And the only situation in which a property owner is entitled to
14 compensation for a taking is where the regulation either wipes out or
15 virtually wipes out the property's value or interferes with objective
16 investment-backed expectations.

17 And on page 20 of Judge Herndon's decision, he cites the
18 authority for that proposition. It's the *State v. 8th Judicial District* case,
19 *Kelly v. Tahoe Regional Planning Agency*, and the *Boulder City* case.
20 And they all say the same thing. This is the test for a taking. Whether
21 the property owner was denied some right is not the test for a taking,
22 even if it had the right. And of course, it didn't have the right.

23 Now, I'd like to refer the Court to tab 39, please. And that is
24 the Nevada Revised Statutes 278.150. And that's the -- this is the statute
25 that orders local agencies to prepare a master plan. A master plan and

1 general plan are synonymous. And in subsection 2, it says that these
2 master plans will be a basis for development of the city. And then in
3 section 5 -- subsection 5, it says that the governing body shall adopt each
4 of the elements in its master plan set forth in NRS 278.160.

5 278.160 is tab 40. And that says that the master plan, with
6 the accompanying charts, drawings, diagrams, schedules, and reports,
7 may include the following elements. And one of those -- and you can
8 see a number of elements. And one of those, in subsection D, is the land
9 use element. And it sets forth in subsection D that they concern
10 community design and standards and principles governing subdivision
11 and suggested patterns for community design and development. And a
12 land use plan inventorying the types of land use and comprehensive
13 plans for the most desirable utilization of the land.

14 So then the legislature adopted later, in a later section, in
15 NRS 278.250, which is back to tab 16, Your Honor. NRS 278.250. And
16 this is the zoning ordinance, the statute that requires local agencies to
17 adopt zoning ordinances. And it says, within the zoning district, it, that
18 means governing body, can regulate and restrict. So zoning regulation
19 restricts. It doesn't confer rights. There is no law in the State of Nevada
20 or anywhere else that holds that zoning confers rights. It's a radical
21 proposition that would take the State back before all of these statutes to
22 a place where property owners had virtual freedom to do what they
23 wanted with their property. That's in the past. That's not this case.

24 It says it can regulate and restrict the -- basically, use of
25 property. And it says in 2, and this is significant, the zoning regulation

1 must be adopted in accordance with the master plan or land use and the
2 design. And then what follows is A through O. And this tells cities what
3 they should do to regulate and restrict use of property to protect
4 community interests to make for a well-planned community.

5 And then in subsection 4, the legislature said, in exercising
6 the powers granted in this section, the governing body may use any
7 controls relating to land use or principles of zoning that the governing
8 body determines to be appropriate.

9 So this is significant in that you have a master plan, and the
10 master plan is the equivalent of a constitution. And the statutes
11 implement the constitution. They have to be consistent with the
12 constitution. Same thing with a master plan and zoning ordinances. The
13 master plan is like the constitution. It sets all the policies for what land
14 can be used for and the zoning has to be consistent with it. It has to
15 implement that.

16 But, moreover, these statutes -- and if you look through A
17 through O, it kind of covers the universe of what you want to do to
18 point -- to have a sound planning apparatus. It grants the government
19 wide discretion -- wide discretion, to restrict the use of land for the
20 community. And that discretion is completely inconsistent with the
21 theory that zoning ordinances grant constitutional rights to do what you
22 want without discretion. You cannot have discretion and at the same
23 time have a constitutional right to a building permit. They can't coexist.

24 Okay. Now, I'd like to refer the Court to the R-PD7 zoning
25 ordinance. Well, let me back up. Tabs 28 through 33, I won't take the

1 Court through those in detail, but those are all the -- this is the Unified
2 Development Code, which is part of the Las Vegas Municipal Code. And
3 these set the general principles for zoning and planning in the City of Las
4 Vegas. And you will see that these -- and I've highlighted portions of
5 these ordinances that show that the City has wide discretion. It exercises
6 discretion at all levels in approving building permits.

7 So now, looking at -- oh, here it is. Tab 27, Your Honor. This
8 is the R-PD7. The R-PD zoning ordinance. And I will spend a little time
9 with this because this is what's at issue here. Tab 27 says, the RPD
10 district has been to provide for flexibility and innovation in residential
11 development with emphasis on enhanced residential amenities, efficient
12 utilization of open space, the separation of pedestrian and vehicle traffic.
13 Emphasize efficient utilization of open space. Further on in that section,
14 it says that, the regulation has to remain sufficiently flexible to
15 accommodate innovative residential development.

16 Then, in Subsection C, it sets forth the uses that are
17 permitted -- permitted in an RPD zone. In this case, the property is zoned
18 R-PD7, which means no more than seven residential units per acre, or
19 other -- whatever uses, group care homes, childcare, family homes. No
20 more than seven per acre. Then section C(3) says that the director,
21 that's the Director of Planning, gets to use his or her judgment in
22 applying this ordinance. And then in subsection D, it says, the approving
23 body, and this is the Planning Commission and the City Council. The
24 City Council has the final word on building permits. The approving body
25 may attach to the amendment to an approved site development plan

1 review whatever conditions are deemed necessary to ensure the proper
2 amenities and to assure that the proposed development will be
3 compatible with surrounding existing and proposed land use.

4 So what we see is in state law, a wide degree of discretion.
5 And in state statute. Judge Herndon went through in detail the wide
6 discretion granted to local public agencies in Nevada under Nevada case
7 law. And now the statute that applies here shows a wide degree of
8 discretion. This says that the City can approve a development project
9 that proposes a permitted use. Approve it with conditions or disapprove
10 it. It has that discretion. The only constitutional limitation on that power
11 is the takings clause. And the only -- and the takings test is, does the
12 regulation wipe out or nearly wipe out the economic value of the
13 property or interfere with objective reasonable investment-backed
14 expectations. That's the test.

15 Okay. So the Nevada Supreme Court has said, the Nevada
16 Supreme Court is unanimous -- unanimous, that where there is
17 discretion, there is no property or vested right to a building permit. It's
18 just that simple. And there's clearly discretion in this case. And so those
19 cases are directly applicable. I want to refer the Court to tab 18, the
20 *Stratosphere* case. They all say the same thing, but *Stratosphere* is a
21 good case because it involves the City of Las Vegas, and it involves the
22 same developments scheme here, a site development permit that's
23 required for every development in the City of Las Vegas. And in the
24 *Stratosphere* case, tab 18, at 120 Nev 527, the Court said that in the
25 context of governmental immunity, we have defined a discretionary act

1 as an act that requires a decision requiring personal deliberation and
2 judgment.

3 The language used in Section 19.18.050 clearly indicates a
4 discretionary act on the part of the City Council. And that's -- 19.18.050
5 is the requirement that the City approve a tentative map, and that is
6 discretionary. All of the other permits required, you got a site
7 development permit, a rezoning permit, a general plan amendment, all
8 involved discretion.

9 And then, I'm at 120 Nev 528. The court said -- and this just
10 demolishes the developer's claim in this case. Under section 19.18.050,
11 the City Council must approve the Stratosphere's proposed development
12 of the property through the City's site development plan review process.
13 And the site development plan review process which is required here is
14 UDC 19.16.100, and that's tab 33. And that says every application for
15 development in the City of Las Vegas has to have a site development
16 permit. And this is saying that the City must approve the Stratosphere's
17 proposed development of the property through the City's -- the site
18 development plan review process. That process requires the Council to
19 consider a number of factors and to exercise its discretion in reaching a
20 decision. There is no evidence that Stratosphere had a vested right to
21 construct the proposed ride.

22 We have -- we've cited *Boulder City*, tab 19, the *T* case, tab
23 20, *City of Reno*, tab 21, *Havana Contractors*, tab 22, *City of Reno*, tab 23,
24 *Board of County Commissioners*, tab 24. They all say the same thing.

25 Now, the developer claims that these cases are not relevant

1 because they were supposed -- they were petition for judicial review
2 cases, but that's -- that is dead wrong. A petition for judicial review is a
3 procedure. It is a remedy. It is not a -- there's no substantive law of
4 petitions for judicial review. No substantive law. And the developer
5 hasn't cited any authority that there's a substantive law of petitions for
6 judicial review. In a petition for judicial review, the standard is
7 substantial evidence, limited to the administrative record. The remedy is
8 equitable. That's a procedure and a remedy. There is no substantive
9 PJR.

10 So those cases that rely on the discretion granted to public
11 agencies -- and the law in Nevada is there is no property right conferred
12 by zoning. That's what those cases say. That is the Nevada law of
13 property and land use regulations. That applies in a PJR case, or a
14 regulatory taking case, or any case. That's the law. That's the
15 substantive law of property and land regulation in the state of Nevada.

16 And to establish with finality that this argument that these
17 cases are petition for judicial review cases and therefore don't apply to
18 any other case, I mean, it defies logic, and it defies all of the case law.
19 But if the Court would please look at the *Boulder* case -- *Boulder City*
20 case, tab 19, at page -- at 110 Nev 246. So that's on page -- well, page 6
21 of this opinion, at the top left. It says Boulder City -- Boulder City
22 challenged the denial of its permit as a Constitutional due process
23 violation, not a PJR. Boulder City could not have violated Cinnamon
24 Hill's substantive due process rights. The grant of a building permit was
25 discretionary. Therefore, under the applicable land use laws, Cinnamon

1 Hills did not have a vested entitlement to a Constitutionally protected
2 property interest.

3 That's this case. This is the Nevada Supreme Court saying
4 they've got nothing. Their claim is wrong. This is not a PJR case, or at
5 least that claim wasn't subject to a PJR. It was a constitutional
6 challenge, just like this case. This is a challenge under the takings clause
7 in Nevada and the federal constitutions. It's a constitutional challenge. I
8 mean, *Boulder City* proves the point that this is not -- that there's no
9 substantive law of PJR. If that were the case with the Boulder City, the
10 Supreme Court in the *Boulder City* would have said, well, we've got two
11 parallel systems of land use law in this state. One if you sue for a PJR,
12 one if you sue for a constitutional violation. That's kind of a ridiculous
13 proposition.

14 So what the developer is saying here is that if you are
15 this -- that we have two parallel systems of property law and land use
16 law in this state. So if you're a City Council, and you're presented with a
17 building permit application, if you deny it or condition it in a way that the
18 developer doesn't like, in other words exercise -- if you exercise your
19 discretion, if the developer later after this happened sues for a PJR, the
20 court is going to apply an abuse of discretion standard, a substantial
21 evidence standard, and a failure to comply with the law.

22 But if the developer later sues for a regulatory taking, you
23 have no discretion. That's a paradox. That can't be. That can't be the
24 law, and it isn't. And there's no -- if you look at the developers briefs and
25 their proposed findings, there is no authority to support what they're

1 saying. None whatsoever. All the authority is on the other side.

2 In addition to this, Your Honor, we have the 9th Circuit in the
3 180 Land case. The developer sued the City and two members of
4 the -- former members of the City Council in federal court. And they
5 made the identical claim that they're making here, that they had a
6 constitutional right to a building permit for the 103rd Street
7 property -- for the Badlands property. And the 9th Circuit held -- and
8 again, they made it the identical argument, and the 9th Circuit held no.
9 And our reading of Nevada law is you do not have a property or vested
10 right in zoning. And that was a final decision between the same parties,
11 on the merits, on the identical issue. And under general principles of
12 issue for preclusion, that decision ought to be binding. You don't get a
13 re-do. Once that decision has been made, it binds.

14 By the way, on the previous page of the *Boulder City* case, at
15 the bottom right, that's page 5, I just want to refer the Court to the part
16 I've highlighted there where the court said no taking. No taking because
17 the denial of the permit didn't destroy all viable economic value. And so
18 that's the test for a taking, not whether you've been denied some right,
19 whether you have that right or not.

20 And Your Honor, the 9th Circuit decision that I referred to is
21 tab 25. And there, the Court said, to have a Constitutionally protected
22 property interest in a government benefit such as a land use permit, an
23 independent source such as state law must give rise to a legitimate claim
24 of entitlement that imposes significant limitations under discretion of the
25 decision-maker. So what's the court saying there? It's saying that

1 property -- what property interests an owner has, is determined by state
2 law. They're referring to the Nevada law of property. We reject as
3 without merit Plaintiffs' contentions that certain rulings in Nevada state
4 court litigation established that Plaintiffs were deprived of a
5 constitutionally protected property interest.

6 Now, Judge Williams' order -- Judge Jones ordered that
7 findings of fact and conclusions of law in the 17 acre case that the Court
8 received yesterday from the developer's counsel. Those are
9 interlocutory orders. But I understand that they are -- they can be
10 persuasive, but they also have to be correct.

11 Well, in denying the petition for judicial review in the 35 acre
12 case, Judge Williams was correct. He said -- and that's at tab 26, the
13 decision of the City Council to grant or deny applications for a general
14 plan amendment, rezoning, and site development plan review is a
15 discretionary act. A zoning designation does not give the developer a
16 vested right to have its development applications approved.

17 Also, in that same decision, Judge Williams said, compatible
18 zoning does not ipso facto divest a municipal government of the right to
19 deny certain uses based upon considerations of public interest. In that
20 the developer asked for exceptions to the rules, its assertion that
21 approval was somehow mandated simply because there is R-PD7 zoning
22 on the property is plainly wrong.

23 Then Judge Williams said, it is well within the Council's
24 discretion to determine that the developer did not meet the criteria for a
25 general plan amendment or waiver found in the Unified Development

1 Code and to reject the site development plan and tentative map
2 application accordingly, no matter of the zoning designation. Then
3 Judge Williams said, the Court rejects the developer's argument that the
4 R-PD7 zoning designations on the Badlands property somehow required
5 the Council to approve its applications. Statements from planning staff
6 or the city attorney that the Badlands property has an R-PD7 zoning
7 designation do not alter this conclusion.

8 Now, the developer argues that those statements from Judge
9 Williams were made in the context of a petition for judicial review and
10 that they have no application to their regulatory takings claim. And I
11 submit that that is dead wrong. There is no substantive law of PJR.
12 Judge Williams cited authority, extensive authority to Nevada property
13 laws and land use regulatory laws. The fact that it was a PJR has
14 nothing to do with the facts and the underlying legal basis for Judge
15 Williams' decision to deny the petition for judicial review. It wasn't PJR
16 law.

17 The developer also argues that Judge Williams' decision was
18 based on Judge Crockett's finding that the Badlands was subject to a
19 PROS designation in the City's general plan, which does not allow
20 residential use. And that when Judge Crockett was reversed by the
21 Nevada Supreme Court, that his conclusion that the property was --
22 Judge Crockett's conclusion that the property, the Badlands, was subject
23 to the PROS designation, goes out the window. Well, that's a fact. The
24 PROS designation was imposed by ordinance, by the City, and
25 repeatedly reconfirmed by ordinance of the City, and it was in effect

1 when the developer bought the property. It's a fact. Judge Herndon
2 found that that was a fact.

3 You can't just get rid of facts just because you sue under a
4 different cause of action. That's a fact. And the effect of the PROS
5 designation is the law. Nevada Revised Statutes 278.150, the R-PD7
6 zoning, and the City's general plan all provide that the PROS designation
7 applies to this property and does not permit residential development.
8 The City has discretion. Judge Williams said the city has discretion to
9 change the PROS designation. If it has discretion, the property owner
10 cannot have a constitutional right to a building permit. I cited to Judge
11 Herndon's findings of facts and conclusions of law, where Judge
12 Herndon said a landowner does not have a fundamental constitutional
13 right to use the land for a particular purpose. It's directly on point.

14 And now, this a -- and the next point, Your Honor, is an
15 absolutely crucial point. The developer claims that eminent domain
16 cases hold that a property owner has a constitutional right to build
17 whatever they want as long as it's a permitted use by the zoning. And
18 they cite for that proposition several cases, including -- and this is their
19 Exhibit 1. They cite *City of Las Vegas v. Bustos* and *Clark County v. Alper*
20 [phonetic]. Okay. So this case, the instant case, is about whether the
21 City can restrict the use of property as long as it doesn't wipe out the
22 value. That's what this case is about.

23 So the Court is asked to determine whether the City is liable
24 for a regulatory taking. That's an inverse condemnation, where the
25 property owner is the Plaintiff, claims what you've done is wiping out or

1 nearly wiping out. And the issue here is liability, first. And if the City is
2 liable, then the Court or a jury determines what the just compensation is,
3 and that's based on the value of the property. In sharp contrast, in an
4 eminent domain case, the City initiates the action, and it concedes
5 liability. It concedes liability and the only issue is the value of the
6 properties.

7 Yeah. Inverse condemnation, the liability is the issue. If
8 liability is determined based on the tests for liability, which are wipeout,
9 or near wipeout, or investment-backed expectations. If there's a
10 determination taken, then the Court looks at damages. The cases that
11 the developer cites are either eminent domain cases where liability is not
12 an issue, so they couldn't possibly -- they couldn't possibly state the
13 standard for liability for a regulatory taking, and they don't. And there
14 are a couple of cases in there that are inverse cases, but the developer
15 cites to a discussion of value.

16 In the *Alper* case that the developer relies on saying eminent
17 domain, regulatory takings, same thing. Apply all the same rules. Well,
18 of course, that's ridiculous because liability is not an issue. Liability is at
19 issue here. Liability is not an issue in eminent domain cases.

20 In the inverse cases the developer cites, the discussion was
21 about value, that there had been a finding of a taking. And the
22 discussion was value, and in that case, the *Alper* court said we determine
23 value the same way we do in eminent domain cases. It makes a lot of
24 sense. Those cases say that in determination of value, an appraiser, the
25 expert witness for each side, has to go through the following analysis.

1 The appraiser determines what the property can be used for physically,
2 economically, and legally. So in the determination of what the property
3 can be used for legally, the appraiser must consider the restrictions on
4 use of the property from zoning. The appraiser doesn't consider what
5 rights zoning grants because zoning doesn't grant rights. It restricts the
6 use.

7 These cases say that the appraiser cannot assume a use of
8 property that's not allowed by the zoning in valuing the property unless
9 there's a reasonable probability that the City will change the zoning.
10 That's the analysis that an appraiser goes through in giving an opinion of
11 value of the property.

12 So the part of these cases that the developer relies on
13 actually say the opposite of what the developers say. They say you
14 can't -- you have to consider the zoning limits on the use of properties
15 and value. You can't go wild and say, well, the property could be used
16 for a 40 story office building if that's not allowed by zoning. Those cases
17 don't remotely say what the developer says here. Nevada eminent
18 domain law provides that zoning must be relied upon to determine a
19 landowner's property interest. That's false. To determine the property
20 value.

21 Your Honor, those eminent domain cases and a couple of
22 inverse cases that discuss value, in addition to statements by the former
23 city attorney and a planner, are the developer's case. They say that's the
24 law. And of course, what Judge Williams said, "statements from
25 planning staff for the city attorney that the Badlands has an R-PD7 zoning

1 designation, do not alter this conclusion. It's just that -- it's pretty
2 simple. If the former city attorney wasn't familiar with the law, the state
3 law, local law, or constitutional law, that doesn't bind this Court or a
4 member of the planning staff. None of those statements are relevant.

5 What binds this Court are cases from the Nevada Supreme
6 Court and statutes from the Nevada Legislature. And there is no
7 [indiscernible]. As I said, the Court is being asked to say that discretion
8 is out the window in Nevada for land use planning. And that's not an
9 exaggeration. And you would think to make such a radical change in the
10 law, that the Court would want to rely on at least one case, at least one
11 statute. But there's absolutely nothing. If you read the developer's
12 cases, there is no case that says what they are claiming here, and all the
13 authority is the opposite.

14 Again, their theory is -- it just isn't -- there's a disconnect
15 between their theory and zoning law. Zoning doesn't grant rights. So,
16 you know, the developer never says, well, you have a right -- you have a
17 right to build. They're relying on -- the developer is relying on Judge
18 Williams' order, and that's tab 26. And at the end of Judge Williams'
19 order -- I'm sorry it's not tab 26. Your Honor, I'm having trouble putting
20 my finger on that order.

21 But the order says, in their -- in the -- in granting this motion
22 to determine property interest, it says two things. One, the property is
23 zoned R-PD7. That's never been at issue. Of course, it zoned R-PD7. The
24 City has never disputed it. The developer acts like that's some sort of a
25 victory for the developer that the City has denied that. And the

1 developer says the City denies that there is R-PD7 zoning or that zoning
2 has any effect on the use of the property, the developer's right. And
3 that's a straw man argument. We don't argue that. We argue that both
4 zoning and the general plan apply. And they apply in very -- in very clear
5 ways under local and state law.

6 But they submitted an order to Judge Williams, and they led
7 him into error. The order says that single family and multi-family
8 residential uses are the, T-H-E, the legally permitted uses in the plan.
9 Now, if you look at permitted uses by right in the property, if you look at
10 tab 27, and the R-PD residential zoning district, it says that the R-PD
11 district provides for flexibility and innovation in residential development
12 with emphasis on enhanced residential amenities, efficient utilization of
13 open space, now that's key. So single family and multi-family are not
14 the only legally permitted uses, but also open space. And then, if you go
15 down to subsection C, we see that there are home occupations, childcare
16 family homes, childcare group homes, all permitted.

17 So they led Judge Williams into error when they submitted
18 an order that said -- that made it sound like that residential use, single
19 family and multi-family use, the use they want to make, are the only
20 legally permitted uses in the district. That's false. Other uses are
21 permitted, including open space.

22 So here's what happened in this case. The developer
23 ignores -- avoids the history of this case. In 1991 -- in 1990, '91, '90, the
24 City approved the Peccole Ranch master plan, 1539 acres. It re-zoned a
25 614 acre part of that property R-PD7 in a tentative zoning. That's how the

1 City worked back then. It tentatively zoned property, and then when the
2 property was built out, it would make the zoning permanent. So in 1991,
3 the City re-zoned a 614 acre portion of the property R-PD7.

4 Then, in 1992, the City Council adopted a new general plan.
5 This was the City really changing the way it did things. It became much
6 more active, had a much more rigorous land use regulatory program
7 with the 1992 general plan. And in that plan, it designated 250 acres of
8 that 614 acre property PROS, parks, recreation, and open space, that did
9 not permit residential use. And the rest of the property was designated
10 residential in the general plan, a residential use, a low-density or a
11 medium-density residential use in that [indiscernible]. That's exactly
12 what R-PD7 -- R-PD zoning [indiscernible].

13 Okay. So the developer is treating this case like *Lucas* case,
14 where you've got a lot, one lot, surrounded by other residential lots, all
15 developed. And the State of South Carolina says you can't build on this
16 lot. Well, a house on that lot is the only use for that lot. And you know, I
17 think that it makes sense. Well, if the only use you've got is to build one
18 house on your property, and the government says no, you can't, well,
19 that could be a taking. That very well could be.

20 But that is not this case. We had a 1500 acre master planned
21 community, and the whole point of the master plan is to decide where
22 the houses are going to go, where's the recreation and open space going
23 to go, where the roads going to go, the fire station, the hotel and casino,
24 the retail, to plan a sound community. A community that's safe and
25 provides quality -- a high quality of life. That's the whole point of these

1 regulations.

2 And so when the City re-zoned a portion of the property, of
3 the PRNP, the 614 acres, to R-PD7, it did exactly what it's supposed to do.
4 In that area, that large area, it decided, well, here are the houses and
5 here is the open space. And in fact, in approving the Peccole Ranch
6 master plan, the City conditioned the approval on the set aside of
7 recreation and open space. The zoning -- under the zoning. The zoning
8 requires it.

9 Again, the City has discretion as to where the open space is
10 going to go. But this zoning requires it, and it was part of the approval.
11 They approved a project that had recreation and open space in it, a golf
12 course. It was also a condition of the developers of the PRNP to
13 participate in a gaming district, that they set aside a golf course. That
14 was a condition.

15 Now, the developer argues -- and this is false. The developer
16 argues that -- it's a straw man argument -- that the City contends that
17 those conditions of development -- that the City argues that those
18 conditions required that the property stay in open space or recreation
19 permanently. That is not our argument. The conditions -- and the
20 developer also argues there were no such conditions because the
21 approvals of the Peccole Ranch master plan don't say, as a condition of
22 zoning approval, you will set aside open space. That's not how this
23 works. That's not how these approvals work. They approved a project
24 that had in it, streets and houses, retail, a number of things, and open
25 space. So their approval -- everything in the approval, is a condition. It

1 doesn't have to say this is a condition. However, the gaming district
2 approval was specifically conditioned on the set aside the golf course.

3 So the Peccole is then built out. The Peccole Ranch master
4 plan, with thousands of housing units, hotel, casino, retail, and the golf
5 course. And this developer participated in that. Built the Queen Church
6 Towers, Tivoli retail facility, and benefited from the amenity of the open
7 space.

8 Now, the developer bought the open space and claims I have
9 around the build in this area because I have a -- you know, I have --
10 because the property is zoned R-PD7. Again, Your Honor, their theory is
11 absurd. That means that -- every property is zoned for some uses, some
12 for residential, some for industrial, some for agricultural. Every property
13 in this state, practically, is zoned, except maybe federal property. So that
14 means that any owner of property has a constitutional right to build
15 whatever they want as long as it's a permitted use in the zone.

16 It's just such a fantastic notion. It also means that anytime a
17 government agency denies the development permit or conditions it, it's
18 a taking, because they have a constitutional right to develop. Again, it's
19 just -- it's stretching the law to the point of breaking. That can't be the
20 law. But that's what they're asking to do. And they say that they have
21 Constitutional rights to build in the property. Well, they say they have a
22 right to build single or multi-family residential. Well, does the City -- you
23 know, apparently the City doesn't have any discretion. Can the City limit
24 them to one house? If they have a right to build residential, what does
25 that mean? One house? In this case, 133 acres times 7, the density, the

1 931 houses? What rights do they have?

2 What they're saying, again, amounts to the City has no
3 discretion. They've never said, well, exactly what right they have, and
4 that's because their theory just doesn't fit. It doesn't fit within the law of
5 zoning or taking. It gets even more absurd. This means that -- their
6 theory would mean that every time a city or county re-zones property to
7 impose any new restrictions, it's a taking because they have a
8 constitutional right under zoning. So that means the City can't change
9 the zoning without paying compensation. The whole thing just is -- just
10 collapses, Your Honor. And again, the R-PD district says the City is to
11 provide enhanced residential amenities and sufficient utilization of open
12 space that it approves.

13 UDC Section 19.10.050 says that in an RPD zone, single
14 family and multi-family and supporting uses are allowed. The open
15 space, the golf course, and the drainage for the 133 acre property was a
16 supporting use. That's allowed. Residential is not the only use alone.
17 And in fact, R-PD zoning encourages open space. It says single family
18 and multi-family residential or supporting uses, to the extent they are
19 determined by the director to be consistent with the density approved for
20 the district and are compatible with surrounding uses. The whole
21 section is just infused with discretion. It's pervasive. And under the
22 *Stratosphere* and other cases, it's pretty simple. If the agency has
23 discretion, there's no property value.

24 Now, the developer relies on a play on words of the concept
25 of a permitted use, and a permitted use by right. The developer argues

1 that if a use is a permitted use in a zone, that means they have a
2 Constitutional right to build it. That's not the case. And that obviously
3 isn't the case because the *Stratosphere* case was deciding Las Vegas
4 law. And all zones have a permitted use. That's what the zones are for.
5 Again, *Euclid v. Ambler*. Housing is permitted; other uses are not
6 permitted.

7 So permitted means that the government can allow that use
8 in the zone. It cannot allow a use in the zone that's not permitted. That's
9 what permitted means. It's not -- it's the opposite of what the developer
10 claims. That limits saying what uses are permitted in the zone and limits
11 the uses in that zone. It doesn't confer rights on owners to make those
12 rights. So their theory is just, again, a big disconnect with zoning law.

13 The definition of a permitted use in Las Vegas is a -- a
14 permitted use is permitted as a matter of right. Not by right. They
15 misquoted in their order they presented to Judge Williams. It's
16 permitted as a matter of right. Single family and multi-family residential
17 uses are permitted uses. So that means they are permitted as an added
18 right in an R-PD7 zone.

19 In tab 28 is the definition of permitted use, Your Honor. So
20 the developer ignores all the authority that says that just because a use
21 is permitted in the zone doesn't mean that you have a constitutional
22 right, a property right or a vested right, to make that use. The City has
23 discretion. And the definition of permitted has been the same for a long
24 time. So the Court couldn't have decided that the City has discretion,
25 and the owner has no property rights if permitted as a matter of right

1 meant that the owner has a Constitutional right. That would blow up --
2 again, that would blow up all land use law and return to an age where
3 owners had virtual freedom to do what they wanted.

4 The definition of permitted use is a use of land in a zoning
5 district as a matter of right if it is conducted in accordance with the
6 restrictions applicable to that district. That says discretion. In the RPD
7 district, what are the restrictions to that district? Well, you have
8 the -- you have a number of uses that are permitted uses, and then you
9 have all this discretion to require supporting uses such as open space,
10 ancillary uses. Again, the R-DP ordinance is infused with discretion. So
11 permitted as a matter of right doesn't mean at the developer has a
12 constitutional right. Permitted means it's not -- not permitted. The only
13 way that the City Council could allow a use in a zone that's not permitted
14 is to amend the zoning ordinance.

15 Okay. Now, Your Honor, it gets even more difficult for the
16 developer. They don't have a constitutional right under zoning, but they
17 fail -- the general plan is also an insurmountable obstacle to their claim.
18 How can the developer have a constitutional right under the zoning to
19 build wherever it pleases as long as it's a permitted use where the
20 general plan of the City has designated the Badlands PROS, which does
21 not allow housing. The two aren't compatible. They can't have such a
22 constitutional right because the general plan doesn't allow it.

23 I cited to the Court Nevada Revised Statute 278.25.02, that's
24 tab 16. It says, all zoning must be consistent with the general plan. I
25 refer the Court to tab 43. This is UDC 19.00.040. It says the adoption of

1 this title is consistent and compatible with and furthers the goals,
2 policies, objectives, and programs of the general plan. It is the intent of
3 the City Council that all regulatory decisions made pursuant to this title
4 be consistent with the general plan, and then it goes on. And then, it
5 even makes a stronger statement. For purposes of this section,
6 consistency with the general plan means not only consistency with the
7 plan's land use and density designations, that's the PROS, that's a land
8 use and density designation, but also consistency with all policies and
9 programs of the general plan, including those that promote compatibility
10 of uses and densities and orderly development consistent with available
11 resources.

12 So this says two major -- three major things. One, zoning
13 must be consistent with the general plan. Zoning implements the
14 general plan. The general is the Constitution. It's a higher authority.
15 And it says that in implementing the general plan, the City has -- in
16 implementing zoning ordinances, they have to be consistent with the
17 letter of the general plan. You know the land use designations in the
18 general plan are controlling. They're also kind of the spirit of the plan
19 and all of the plan's provisions.

20 In the *AmWest* case versus *City of Henderson*, the Court
21 said -- the Nevada Supreme Court said, at the bottom of the first page in
22 yellow, we agree with the District Court that AWD does not have vested
23 rights in its 1989 master plan. In order for rights in the proposed
24 development project to vest, zoning or use approvals must not be
25 subject to further governmental discretionary action affecting the project.

1 And then on the next page, Your Honor, in the paragraph that starts with
2 without overruling, the Court said, "This Court held, pursuant to NRS
3 278.250, that municipal entities must adopt zoning regulations that are in
4 substantial agreement with the master plan." The *Nova Horizon* case, at
5 105 Nevada 92, a 1989 case, says the same thing. So if the developer has
6 to obtain an amendment of the general plan to allow residential
7 development in the Badlands, it can't have a constitutionally protected
8 property or vested right on their zoning to build houses.

9 Nevada -- excuse me. Las Vegas UDC 19.16.010(a) is tab 29.
10 It says in subsection A, "as otherwise provided by this title, approval of
11 all maps, vacations, re-zoning, site development plan reviews,"
12 remember, a site development plan review is required for every
13 development project in the state with a few exceptions." Special use
14 permits, very -- the law shall be consistent with the spirit and intent of
15 the general plan. I cited in the subsequent tabs are a number of other
16 ordinances -- I won't take you through those in detail -- that require
17 zoning to be consistent with the general plan, all development to be
18 consistent with the general plan.

19 I will refer the Court, though, to the UDC 19.16 .100, which is
20 tab 33. I think this is significant. I've highlighted in yellow the important
21 parts of that ordinance, Your Honor. And that says that -- in subsection
22 A, the purpose of the site development plan review process is to ensure
23 that each development, number one, is consistent with the general plan,
24 this title, and other regulations. And then in the subsequent sections, it
25 just goes to show how much discretion the City exercises. You know, it

1 contributes to the long-term attractiveness of the city. Well, that requires
2 discretion. It contributes to the economic vitality of the community.

3 Your Honor, every property is unique, and you can't have
4 one size fits all in zoning and planning regulations. What the legislature
5 is telling cities is you shall use your discretion to plan your communities
6 to achieve these objectives. There has to be discretion.

7 THE COURT: It this, like, a good time we could discuss -- we
8 have these four different cases pending and each of these four parcels
9 that -- the developer chose to do it this way. Each of these four parcels
10 were submitted separately. The cases are all separate. And they're all at
11 a different point in the process. I'm not going to say procedure because
12 procedure is for court. I would say zoning process. So can we talk about
13 that and how --

14 MR. SCHWARTZ: Yeah.

15 THE COURT: I mean, thank you very much for the historical
16 perspective, but how does this apply to this situation we're in specifically
17 here? We have the 17 acre case with Judge Jones. I appreciated seeing
18 the order yesterday. I thought it was interesting that he said he felt that
19 Herndon's order was very specific to Herndon's -- the situation in
20 Herndon's case, which is the 65 acres, which apparently never had
21 anything submitted. So clearly not ripe. I mean, Herndon's right on that.
22 I don't think anybody can question it. He's right. That case is not ripe.
23 Nothing was ever done.

24 The 30 -- the 17 acre, that seems to be this whole mess
25 where that was approved, and then the property -- the neighbors sued,

1 so we had Crockett's order. It goes up to the Supreme Court. Somehow,
2 in the midst of all this, something happens. I've never really been clear
3 on what happened to the 17acre case. It's not mine. I don't care. But it
4 is it relevant, because what Judge Jones says is look, this is a different
5 case. Seventeen acres, we have this whole problem of, you know, did
6 they or didn't they revoke it or, you know. And, you know, Herndon
7 says, well, it doesn't matter, it was void because while Crockett's order
8 was in place, that voids it. But then, the Supreme Court reinstates it.

9 So there we have the problem of Judge Williams' case,
10 which is the 35 acres. Again, a different situation. The petition for
11 judicial review is denied, and then they proceed on this other, you know,
12 what we now understand to be -- it should be a separate case, which is
13 this constitutional part of the case. And there, we have this whole
14 problem where there was some action taken that had to do with
15 amending the general plan. And so that's -- he sees that as significant
16 and that's different in that case.

17 And so then we get to this case. So can we just talk about, I
18 mean, because seriously, we've had enough of this.

19 MR. SCHWARTZ: Sure.

20 THE COURT: Can we just talk about some specifics of the
21 case, please?

22 MR. SCHWARTZ: Well, that's what I've been doing. And this
23 is a motion to determine property interest.

24 THE COURT: No, I haven't heard anything about the facts.
25 So I would like to get into the specifics, because I see each of these four

1 cases is very different. They're all at a very different stage. I don't see
2 how you could say well, Judge Trujillo did this, or Judge Jones did that,
3 or Judge Herndon did this. They're all different.

4 MR. SCHWARTZ: I agree, and I'm not saying that that's
5 what --

6 THE COURT: So let's talk.

7 MR. SCHWARTZ: I'm talking about the *Stratosphere*, and
8 the other cases, and the statutes.

9 THE COURT: Let's move on, please.

10 MR. SCHWARTZ: That applies directly to --

11 THE COURT: Let's talk very specifically the history of this
12 case, of these facts, because again, each of these cases have unique
13 facts. Very different. So we're talking about 133 acres. Let's go. Let's
14 go.

15 MR. SCHWARTZ: Okay. So if the Court thinks that Judge
16 Herndon was right about the --

17 THE COURT: A hundred percent.

18 MR. SCHWARTZ: -- the ripeness --

19 THE COURT: Yes.

20 MR. SCHWARTZ: -- this is the exact same situation
21 because --

22 THE COURT: And is that because what happened here is the
23 City Council didn't, technically, act.

24 MR. SCHWARTZ: Correct.

25 THE COURT: They took it off calendar.

1 MR. SCHWARTZ: Correct. The burden is on the developer,
2 and that's the *Haney* [phonetic] case, and we cited at tab 13. And there
3 are other cases. The burden is on the developer. If they want to sue for
4 a taking, they've got to file at least two applications and have them
5 denied on the merits, and they have to be for just the property at issue.
6 They can't be for that and the other property. Because if you combine it
7 with other property, well, the decision maker could have other
8 considerations that involve that other property. It's got to be two
9 applications for the property at issue, and they have to be denied. And
10 then you may have a ripe claim if there's no more discretion in the City.

11 That never occurred here. They say they filed four
12 applications, but one of them was the 133 applications, which was never
13 decided on the merits, so that doesn't count for taking purposes, for
14 ripeness purposes. And the NDA --

15 THE COURT: And again, this is the developer chose to do it
16 this way.

17 MR. SCHWARTZ: Yes.

18 THE COURT: They wanted to submit one massive plan for all
19 200-and-whatever acres, they could have. They chose not to. They did it
20 in these little -- these segments. They broke it up.

21 MR. SCHWARTZ: Okay, yes. So why --

22 MR. LEAVITT: If I might interrupt?

23 THE COURT: No.

24 MR. SCHWARTZ: Your Honor, I object to Mr. Leavitt.

25 THE COURT: I told him to sit down.

1 MR. SCHWARTZ: He's constantly interrupting my
2 arguments.

3 THE COURT: I told him to sit down. Thanks.

4 MR. SCHWARTZ: I'm sorry?

5 THE COURT: I said I told him to sit down. Thank you.

6 MR. SCHWARTZ: Okay. Your Honor, the other three
7 applications that Mr. Leavitt said were for the 133 acre properties were
8 one major development agreement, but that wasn't a site specific
9 application for the 133 acre property. A development agreement
10 basically does two things. It says if you approve it, then the government
11 won't change the law, but you still have to provide -- file the site
12 development permit, a zoning permit, a general plan amendment, other
13 permits under the UDC to have an application that the City could have
14 acted on that only concerned the 133 acre property.

15 So that doesn't count. And Judge Herndon went into great
16 detail to explain why it didn't count, because they made the same
17 argument. Then they say they filed applications for a fence and for
18 access. Those applications were not to develop the property such that
19 they could be denied any development and habitation. They were just
20 for certain things on the property. They never -- and this is in -- the
21 assistant city planner filed a declaration, and I can get that declaration
22 for the Court. They never filed the right application. They weren't
23 denied. That's false that they were denied.

24 They were required to file a certain type of application, as to
25 which, the planner has discretion. Now they say, oh, that planner

1 abused their discretion. Well, they can't come in here in a takings case
2 and argue that. If there was an abuse of discretion, they had a remedy of
3 a petition for judicial review if they wanted a fence or if they wanted
4 access. They didn't do that. The statute of limitations is past. They can't
5 come in here and ask this court to conduct what is essentially a petition
6 for judicial review and review the decision of that planner about what
7 type of application was required.

8 Again, access and a fence. This is about denial of any use,
9 their third cause of action and, therefore --

10 THE COURT: And so then how did it get on calendar?
11 Because there's a lot in their complaint about all these things that
12 counselor said. Counselor Cerroda [phonetic], he said this. And then
13 there's all -- there's just all these factual allegations of all these, like,
14 things that people were saying and how this is all some big plot.

15 MR. SCHWARTZ: Your Honor, that is all a complete red
16 herring. A taking, the test is quite simple, *Boulder City*, appellate, state.
17 The takings test is quite simple.

18 THE COURT: Okay.

19 MR. SCHWARTZ: You have to have an action of the
20 governing body alone that restricts your use.

21 THE COURT: And so -- again, so -- and actions is what I'm
22 looking for.

23 MR. SCHWARTZ: Yes.

24 THE COURT: So is there an action?

25 MR. SCHWARTZ: No.

1 THE COURT: It somehow gets on the agenda, and then
2 somehow, it gets off the agenda.

3 MR. SCHWARTZ: What? I'm sorry, the --

4 THE COURT: The 133 acres.

5 MR. SCHWARTZ: -- 133 [indiscernible] decision?

6 THE COURT: The 133 acres.

7 MR. SCHWARTZ: So --

8 THE COURT: Somehow it's on the agenda, and then it's just,
9 their version, magically off. Your version, it wasn't final and couldn't be
10 submitted.

11 MR. SCHWARTZ: It wasn't magically off. It was all
12 conducted out in the open.

13 THE COURT: Okay.

14 MR. SCHWARTZ: There was -- the City Council struck the
15 applications because the developer failed to file a major modification
16 application as required by Judge Crockett's order.

17 THE COURT: Okay.

18 MR. SCHWARTZ: This Court, now --

19 THE COURT: So here we go. Now, so we got this major
20 modification order. So that was what was required by Judge Crockett.
21 That was the law as it stood at the time until it's voided by the Supreme
22 Court. So because there's not this major modification, does the mere
23 fact that later Judge Crockett is overturned by the Nevada Supreme
24 Court, does that somehow make this whole thing wrongful retroactively?
25 Because that seems to be what the argument is.

1 MR. SCHWARTZ: Of course not. The City -- I think this Court
2 here in your findings of fact and conclusions of law in October -- was it
3 29th of 2019?

4 THE COURT: Right.

5 MR. SCHWARTZ: Of course, they couldn't, or they would be
6 in contempt. And Judge Herndon recognized this in his order. They
7 made the same argument. They said that the 133 acre applications were
8 an application to develop the property that related to the 65 acre
9 property and showed that it was futile. Judge Herndon correctly said no,
10 they couldn't approve that application because it didn't contain a major
11 modification application, or they would have been in contempt of Judge
12 Crockett's order.

13 And that's what this Court found. I think this is already
14 argued and determined by this Court. And so yes, it is the height. It
15 would be the height of injustice to require the City to pay compensation
16 to this developer for not letting it develop anything in the 133 acre
17 property where the City was never even given a chance to consider an
18 application on the merits. That -- yeah, that's this case.

19 THE COURT: Okay. So what does that mean? What is your
20 position with respect to their motion for summary judgment?

21 MR. SCHWARTZ: Well --

22 THE COURT: I know you said their whole theory is wrong,
23 that this two-part process is wrong, that that's not the law. Fine. But
24 what does it mean here?

25 MR. SCHWARTZ: Here, we're talking about their motion to

1 determine property interest.

2 THE COURT: Right.

3 MR. SCHWARTZ: Here's what happened --

4 THE COURT: And that's why I asked why wasn't the
5 counter-motion taken off? It seems to me that it's either they're right and
6 the Court should, what, grant their motion or deny their motion. What is
7 the effect of granting versus denying? And so that's why I said, why was
8 the counter-motion taken out? I kind of liked that counter-motion.

9 MR. SCHWARTZ: I'd like to address that, Your Honor. Okay.
10 So the developer is dead in the water on the takings -- on the takings
11 doctrine, for a variety of reasons. The PRNP, is the parcel as a whole,
12 they got 85 percent of it developed. You can't carve out the Badlands
13 and say, oh, now you have to let me develop that. You can't do that
14 under takings. That's a developer trick. All the courts are on it. The U.S.
15 Supreme Court and the Nevada Supreme Court in the *Kelley* case. So
16 they can't do that.

17 Well, what if the PRNP is not the parcel as a whole? What if
18 it's just the Badlands? Well, the City approved 435 luxury housing use
19 the Badlands. So they can't show a wipeout or interference with their
20 investment expectations. It increased their value by five or six times.

21 THE COURT: Well so, and here's my question --

22 MR. SCHWARTZ: And so --

23 THE COURT: Yeah. Again, like I said, it was their choice to
24 chop this all up into these individual little parcels. But -- so on the one
25 hand, are we looking at this as a whole or are we looking at this as four

1 separate parcels? Because the mere fact that the 17 acres now -- well,
2 you know, whatever is going on with Judge Jones is, you know,
3 whatever. But -- so they had the zoning on the 17 acres at one point. So
4 that's now got some more increased value, but they've chopped this up
5 into these other three parcels. Does that somehow give them -- provide
6 a different evaluation as to each individual sub-parcel as to whether or
7 not there's value to that sub-parcel?

8 MR. SCHWARTZ: Yes. Good question. This is classic
9 segmentation. And Judge Herndon said when they bought the property
10 in 2015, they then shut down the golf course, segmented the property,
11 put each property under a different owner -- owner's name, but they're
12 all the developer, and then they proceeded to apply to develop individual
13 properties. And then, when they got approval on one, they didn't get
14 approval on the others, they didn't file on others. Then they sued the
15 City on all four, but only individually. That was their choice. And they
16 asked for damages for each property.

17 Why did they carve the property up? Why did they segment
18 it? It's the classic developer trick. You know, if you -- let's take the
19 PRNP, 1500-some acres. The City allows them -- it says you got to set
20 aside 250 acres for the golf course. So we allow you to develop 85
21 percent, and it was thousands of housing units in the development.
22 Then the developer sells off the 250 acres. Well, this developer comes
23 in. He says, okay, you now have to let me build something on the golf
24 course. You have to let me build some houses on the golf course or it's
25 a taking because it's a wipeout.

1 The courts say, huh-huh, no, you can't do that. We look at
2 the parcel as a whole. The golf course was an ancillary use. It was part
3 of this part of this 1500 acre development. And so you can't carve it out,
4 just like they can't buy the Badlands, the 250 acre Badlands, and then
5 divide it into four parts. The City approves development on one, and
6 they say, so you have -- but you have to let me build housing on the 133
7 acre property or it's a wipeout. Well, and I think the court says, no, wait
8 a minute. The Badlands was under one ownership, one use. You
9 bought the property all at the same time.

10 That's classic segmentation, and we cited these cases to
11 show they have no claim. And that's why they've got this nutty theory
12 that zoning confers property rights. Now, can I address your question,
13 Your Honor?

14 THE COURT: Yes.

15 MR. SCHWARTZ: Okay. So the developer can't win this case
16 because they've got nothing under the takings doctrine. So they made
17 up this theory of zoning rights. And then, they filed a motion to
18 determine property interest with Judge Williams. And Judge Williams
19 granted the motion and just signed that order. And in their order, they
20 said, well in a regulatory takings case, there are these two sub-inquiries.
21 And you have to determine the property interest before you can
22 determine whether that property interest was taken. That's obviously
23 true.

24 But they contended that it has to be a two stage process. So
25 what they did is they filed this motion to determine property interest,