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.

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 21

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INDEX

Index No.	File Date	Document	Volume	RA Bates
1	2019-01-17	Reporter's Transcript of Plaintiff's Request for Rehearing, re issuance of Nunc Pro Tunc Order	1	00001 - 00014
2	2020 02 19	Order of Remand	1	00015 - 00031
3	2020-08-04	Plaintiff Landowners' Motion to Determine "Property Interest"	1	00032 – 00188
4	2020-09-09	Exhibit 18 to Reply in Support of Plaintiff Landowners' Motion to Determine "Property Interest - May 15, 2019, Order	1	00189 – 00217
5	2020-09-17	Reporter's Transcript of Hearing re Plaintiff Landowners' Motion to Determine "Property Interest"	1, 2	00218 - 00314
6	2020-11-17	Reporter's Transcript of Hearing re The City Of Las Vegas Motion to Compel Discovery Responses, Documents and Damages Calculation and Related Documents on Order Shortening Time, provided in full as the City provided partial	2	00315 – 00391
7	2021-03-26	Plaintiff Landowners' Motion to Determine Take and for Summary Judgment on the First, Third and Fourth Claims for Relief	2	00392 - 00444
8	2021-03-26	Exhibits to Plaintiff Landowners' Motion and Reply to Determine Take and for Summary Judgment on the First, Third and Fourth Claims for Relief and Opposition to the City's Counter-Motion for Summary Judgment	2	00445 - 00455
9		Exhibit 1 - Findings of Fact and Conclusions of Law Regarding Plaintiff Landowners' Motion to Determine "Property Interest"	2, 3	00456 – 00461
10		Exhibit 7 - Findings of Fact and Conclusions of Law Regarding Plaintiffs' Motion for New Trial, Motion to Alter or Amend and/or Reconsider the Findings of Fact and Conclusions of Law, Motion to Stay Pending Nevada Supreme Court Directives	3	00462 – 00475
11		Exhibit 8 - Order Granting the Landowners' Countermotion to Amend/Supplement the Pleadings; Denying the Landowners' Countermotion for Judicial Determination of Liability on the Landowners' Inverse Condemnation Claims	3	00476 – 00500
12		Exhibit 26 - Findings of Fact, Conclusions of Law and Judgment Granting Defendants Fore Stars, Ltd., 180 Land Co LLC, Seventy Acres LLC, EHB Companies LLC, Yohan Lowie, Vickie Dehart and Frank Pankratz's	3	00501 – 00526

Index No.	File Date	Document	Volume	RA Bates
		NRCP 12(b)(5) Motion to Dismiss Plaintiffs' Amended Complaint		
13		Exhibit 27 - Notice of Entry of Findings of Fact, Conclusions of Law, Final Order of Judgment, Robert Peccole, et al v. Peccole Nevada Corporation, et al., Case No. A-16-739654-C	3	00527 – 00572
14		Exhibit 28 - Supreme Court Order of Affirmance	3	00573 – 00578
15		Exhibit 31 – June 13, 2017 Planning Commission Meeting Transcript – Agenda Item 82, provided in full as the City provided partial	3	00579 - 00583
16		Exhibit 33 – June 21, 2017 City Council Meeting Transcript – Agenda Items 82, 130-134, provided in full as the City provided partial	3, 4	00584 - 00712
17		Exhibit 34 - Declaration of Yohan Lowie	4	00713 – 00720
18		Exhibit 35 - Declaration of Yohan Lowie in Support of Plaintiff Landowners' Motion for New Trial and Amend Related to: Judge Herndon's Findings of Fact and Conclusion of Law Granting City of Las Vegas' Motion for Summary Judgment, Entered on December 30, 2020	4	00721 - 00723
19		Exhibit 36 - Master Declaration of Covenants, Conditions Restrictions and Easements for Queensridge	4	00724 – 00877
20		Exhibit 37 - Queensridge Master Planned Community Standards - Section C (Custom Lot Design Guidelines	4	00878 – 00880
21		Exhibit 40- 08.04.17 Deposition of Yohan Lowie, Eighth Judicial District Court Case No. A-15-729053-B (Binion v. Fore Stars)	4, 5	00881 – 00936
22		Exhibit 42 - Respondent City of Las Vegas' Answering Brief, Jack B. Binion, et al v. The City of Las Vegas, et al., Eighth Judicial District Court Case No. A-17-752344-J	5	00937 – 00968
23		Exhibit 44 - Original Grant, Bargain and Sale Deed	5	00969 – 00974
24		Exhibit 46 - December 1, 2016 Elite Golf Management letter to Mr. Yohan Lowie re: Badlands Golf Club	5	00975 - 00976
25		Exhibit 48 - Declaration of Christopher L. Kaempfer	5	00977 – 00981
26		Exhibit 50 - Clark County Tax Assessor's Property Account Inquiry - Summary Screen	5	00982 – 00984
27		Exhibit 51 - Assessor's Summary of Taxable Values	5	00985 – 00987

Index No.	File Date	Document	Volume	RA Bates
28		Exhibit 52 - State Board of Equalization Assessor Valuation	5	00988 - 00994
29		Exhibit 53 - June 21, 2017 City Council Meeting Combined Verbatim Transcript	5	00995 – 01123
30		Exhibit 54 - August 2, 2017 City Council Meeting Combined Verbatim Transcript	5, 6	01124 – 01279
31		Exhibit 55 - City Required Concessions signed by Yohan Lowie	6	01280 – 01281
32		Exhibit 56 - Badlands Development Agreement CLV Comments	6	01282 – 01330
33		Exhibit 58 - Development Agreement for the Two Fifty	6, 7	01331 – 01386
34		Exhibit 59 - The Two Fifty Design Guidelines, Development Standards and Uses	7	01387 - 01400
35		Exhibit 60 - The Two Fifty Development Agreement's Executive Summary	7	01401 – 01402
36		Exhibit 61 - Development Agreement for the Forest at Queensridge and Orchestra Village at Queensridge	7, 8, 9	01403 – 02051
37		Exhibit 62 - Department of Planning Statement of Financial Interest	9, 10	02052 – 02073
38		Exhibit 63 - December 27, 2016 Justification Letter for General Plan Amendment of Parcel No. 138-31-702-002 from Yohan Lowie to Tom Perrigo	10	02074 – 02077
39		Exhibit 64 - Department of Planning Statement of Financial Interest	10	02078 – 02081
40		Exhibit 65 - January 1, 2017 Revised Justification letter for Waiver on 34.07 Acre Portion of Parcel No. 138-31-702-002 to Tom Perrigo from Yohan Lowie	10	02082 – 02084
41		Exhibit 66 - Department of Planning Statement of Financial Interest	10	02085 – 02089
42		Exhibit 67 - Department of Planning Statement of Financial Interest	10	02090 – 02101
43		Exhibit 68 - Site Plan for Site Development Review, Parcel 1 @ the 180, a portion of APN 138-31-702-002	10	02102 – 02118
44		Exhibit 69 - December 12, 2016 Revised Justification Letter for Tentative Map and Site Development Plan Review on 61 Lot Subdivision to Tom Perrigo from Yohan Lowie	10	02119 – 02121
45		Exhibit 70 - Custom Lots at Queensridge North Purchase Agreement, Earnest Money Receipt and Escrow Instructions	10, 11	02122 – 02315
46		Exhibit 71 - Location and Aerial Maps	11	02316 – 02318

Index No.	File Date	Document	Volume	RA Bates
47		Exhibit 72 - City Photos of Southeast Corner of Alta Drive and Hualapai Way	11	02319 – 02328
48		Exhibit 74 - June 21, 2017 Planning Commission Staff Recommendations	11	02329 – 02356
49		Exhibit 75 - February 14, 2017 Planning Commission Meeting Verbatim Transcript	11	02357 – 02437
50		Exhibit 77 - June 21, 2017 City Council Staff Recommendations	11	02438 – 02464
51		Exhibit 78 - August 2, 2017 City Council Agenda Summary Page	12	02465 – 02468
52		Exhibit 79 - Department of Planning Statement of Financial Interest	12	02469 – 02492
53		Exhibit 80 - Bill No. 2017-22	12	02493 – 02496
54		Exhibit 81 - Development Agreement for the Two Fifty	12	02497 – 02546
55		Exhibit 82 - Addendum to the Development Agreement for the Two Fifty	12	02547 – 02548
56		Exhibit 83 - The Two Fifty Design Guidelines, Development Standards and Permitted Uses	12	02549 – 02565
57		Exhibit 84 - May 22, 2017 Justification letter for Development Agreement of The Two Fifty, from Yohan Lowie to Tom Perrigo	12	02566 – 02568
58		Exhibit 85 - Aerial Map of Subject Property	12	02569 – 02571
59		Exhibit 86 - June 21, 2017 emails between LuAnn D. Holmes and City Clerk Deputies	12	02572 – 02578
60		Exhibit 87 - Flood Damage Control	12	02579 – 02606
61		Exhibit 88 - June 28, 2016 Reasons for Access Points off Hualapai Way and Rampart Blvd. letter from Mark Colloton, Architect, to Victor Balanos	12	02607 – 02613
62		Exhibit 89 - August 24, 2017 Access Denial letter from City of Las Vegas to Vickie Dehart	12	02614 – 02615
63		Exhibit 91 - 8.10.17 Application for Walls, Fences, or Retaining Walls	12	02616 – 02624
64		Exhibit 92 - August 24, 2017 City of Las Vegas Building Permit Fence Denial letter	12	02625 – 02626
65		Exhibit 93 - June 28, 2017 City of Las Vegas letter to Yohan Lowie Re Abeyance Item - TMP-68482 - Tentative Map - Public Hearing City Council Meeting of June 21, 2017	12	02627 - 02631
66		Exhibit 94 - Declaration of Vickie Dehart, Jack B. Binion, et al. v. Fore Stars, Ltd., Case No. A-15-729053-B	12	02632 – 02635

Index No.	File Date	Document	Volume	RA Bates
67		Exhibit 106 – City Council Meeting Transcript May 16, 2018, Agenda Items 71 and 74-83, provided in full as the City provided partial	12, 13	02636 – 02710
68		Exhibit 107 - Bill No. 2018-5, Ordinance 6617	13	02711 – 02720
69		Exhibit 108 - Bill No. 2018-24, Ordinance 6650	13	02721 – 02737
70		Exhibit 110 - October 15, 2018 Recommending Committee Meeting Verbatim Transcript	13	02738 – 02767
71		Exhibit 111 - October 15, 2018 Kaempfer Crowell Letter re: Proposed Bill No. 2018-24 (part 1 of 2)	13, 14	02768 – 02966
72		Exhibit 112 - October 15, 2018 Kaempfer Crowell Letter re: Proposed Bill No. 2018-24 (part 2 of 2)	14, 15	02967 – 03220
73		Exhibit 114 - 5.16.18 City Council Meeting Verbatim Transcript	15	03221 – 03242
74		Exhibit 115 - 5.14.18 Bill No. 2018-5, Councilwoman Fiore Opening Statement	15	03243 – 03249
75		Exhibit 116 - May 14, 2018 Recommending Committee Meeting Verbatim Transcript	15	03250 – 03260
76		Exhibit 120 - State of Nevada State Board of Equalization Notice of Decision, In the Matter of Fore Star Ltd., et al.	15	03261 – 03266
77		Exhibit 121 - August 29, 2018 Bob Coffin email re Recommend and Vote for Ordinance Bill 2108-24	15	03267 – 03268
78		Exhibit 122 - April 6, 2017 Email between Terry Murphy and Bob Coffin	15	03269 – 03277
79		Exhibit 123 - March 27, 2017 Letter from City of Las Vegas to Todd S. Polikoff	15	03278 – 03280
80		Exhibit 124 - February 14, 2017 Planning Commission Meeting Verbatim Transcript	15	03281 – 03283
81		Exhibit 125 - Steve Seroka Campaign Letter	15	03284 – 03289
82		Exhibit 126 - Coffin Facebook Posts	15	03290 – 03292
83		Exhibit 127 - September 17, 2018 Coffin text messages	15	03293 – 03305
84		Exhibit 128 - September 26, 2018 Email to Steve Seroka re: meeting with Craig Billings	15	03306 – 03307
85		Exhibit 130 - August 30, 2018 Email between City Employees	15	03308 – 03317
86		Exhibit 134 - December 30, 2014 Letter to Frank Pankratz re: zoning verification	15	03318 – 03319
87		Exhibit 136 - 06.21.18 HOA Meeting Transcript	15, 16	03320 – 03394
88		Exhibit 141 – City's Land Use Hierarchy Chart	16	03395 – 03396

Index No.	File Date	Document	Volume	RA Bates
		The Pyramid on left is from the Land Use & Neighborhoods Preservation Element of the Las Vegas 2020 Master Plan, The pyramid on right is demonstrative, created by Landowners' prior cancel counsel		
89		Exhibit 142 - August 3, 2017 deposition of Bob Beers, pgs. 31-36 - The Matter of Binion v. Fore Stars	16	03397 - 03400
90		Exhibit 143 - November 2, 2016 email between Frank A. Schreck and George West III	16	03401 – 03402
91		Exhibit 144 -January 9, 2018 email between Steven Seroka and Joseph Volmar re: Opioid suit	16	03403 – 03407
92		Exhibit 145 - May 2, 2018 email between Forrest Richardson and Steven Seroka re Las Vegas Badlands Consulting/Proposal	16	03408 – 03410
93		Exhibit 150 - Affidavit of Donald Richards with referenced pictures attached, which the City of Las Vegas omitted from their record	16	03411 – 03573
94		Exhibit 155 - 04.11.84 Attorney General Opinion No. 84-6	16	03574 – 03581
95		Exhibit 156 - Moccasin & 95, LLC v. City of Las Vegas, Eighth Judicial Dist. Crt. Case no. A-10-627506, 12.13.11 City of Las Vegas' Opposition to Plaintiff Landowner's Motion for Partial Summary Judgment on Liability for a Taking (partial)	16	03582 – 03587
96		Exhibit 157 - Affidavit of Bryan K. Scott	16	03588 – 03590
97		Exhibit 158 - Affidavit of James B. Lewis	16	03591 – 03593
98		Exhibit 159 - 12.05.16 Deposition Transcript of Tom Perrigo in case Binion v. Fore Stars	16	03594 – 03603
99		Exhibit 160 - December 2016 Deposition Transcript of Peter Lowenstein in case Binion v. Fore Stars	16, 17	03604 – 03666
100		Exhibit 161 - 2050 City of Las Vegas Master Plan (Excerpts)	17	03667 – 03670
101		Exhibit 163 - 10.18.16 Special Planning Commission Meeting Transcript (partial)	17	03671 – 03677
102		Exhibit 183 and Trial Exhibit 5 - The DiFederico Group Expert Report	17	03678 – 03814
103		Exhibit 189 - January 7, 2019 Email from Robert Summerfield to Frank Pankratz	17	03815 – 03816
104		Exhibit 195 - Declaration of Stephanie Allen, Esq., which Supports Plaintiff Landowners' Reply in Support of: Plaintiff Landowners' Evidentiary Hearing Brief #1:	17	03817 – 03823

Index No.	File Date	Document	Volume	RA Bates
		Memorandum of Points and Authorities Regarding the Landowners' Property Interest; and (2) Evidentiary Hearing Brief #2: Memorandum of Points and Authorities Regarding the City's Actions Which Have Resulted in a Taking of the Landowners' Property		
105		Exhibit 198 - May 13, 2021 Transcript of Hearing re City's Motion for Reconsideration of Order Granting in Part and Denying in Part the Landowners' Motion to Compel the City to Answer Interrogatories	17, 18	03824 – 03920
106	2021-04-21	Reporter's Transcript of Motion re City of Las Vegas' Rule 56(d) Motion on OST and Motion for Reconsideration of Order Granting in Part and Denying in Part the City's Motion to Compel Discovery Responses, Documents and Damages Calculation and Related Documents	19	03921 – 04066
107	2021-07-16	Deposition Transcript of William Bayne, Exhibit 1 to Plaintiff Landowners' Motion in Limine No. 1: to Exclude 2005 Purchase Price, provided in full as the City provided partial	19	04067 – 04128
108	2021-09-13	Reporter's Transcript of Hearing re Plaintiff Landowners' Motion to Determine Property Interest in Eighth Judicial District Court Case No. A-18-775804-J, Judge Sturman, provided in full as the City provided partial	19, 20	04129 – 04339
109	2021-09-17	Reporter's Transcript of Hearing re Plaintiff Landowners' Motion to Determine Property Interest in Eighth Judicial District Court Case No. A-18-775804-J, Judge Sturman, provided in full as the City provided partial	20, 21	04340 – 04507
110	2021-09-23	Reporter's Transcript of Hearing re Plaintiff Landowners' Motion to Determine Take and For Summary Judgment on the First, Third and Fourth Claim for Relief	21, 22	04508 – 04656
111	2021-09-24	Reporter's Transcript of Hearing re Plaintiff Landowners' Motion to Determine Take and For Summary Judgment on the First, Third and Fourth Claim for Relief	22, 23	04657 – 04936
112	2021-09-27	Reporter's Transcript of Hearing re Plaintiff Landowners' Motion to Determine Take and For Summary Judgment on the First, Third and Fourth Claim for Relief	23	04937 – 05029
113	2021-09-28	Reporter's Transcript of Hearing re Plaintiff Landowners' Motion to Determine Take and For Summary Judgment on the First, Third and Fourth Claim for Relief	23, 24	05030 – 05147
114	2021-10-26	Reporter's Transcript of Hearing re Plaintiff Landowners' Motion for Summary Judgment on Just Compensation on Order Shortening Time	24	05148 – 05252

Index No.	File Date	Document	Volume	RA Bates
115	2021-10-27	Reporter's Transcript of Hearing re Bench Trial	24	05253 – 05261
116	2022-01-19	Reporter's Transcript of Hearing re City's Motion for Immediate Stay of Judgment on OST	24, 25	05262 – 05374
117	2022-01-27	Plaintiff Landowners' Reply in Support of Motion for Attorney's Fees	25	05375 – 05384
118	2022-02-03	Reporter's Transcript of Hearing re Plaintiff Landowners' Motion to Determine Prejudgment Interest and Motion for Attorney Fees	25	05385 – 05511
119	2022-02-11	Reporter's Transcript of Hearing re City of Las Vegas' Motion to Amend Judgment (Rules 59(e) and 60(b) and Stay of Execution	25, 26	05512 – 05541
120	2022-02-16	Order Granting in Part and Denying in Part the City of Las Vegas' Motion to Retax Memorandum of Costs	26	05542 - 05550
121	2022-02-16	Order Granting Plaintiffs Landowners' Motion for Reimbursement of Property Taxes	26	05551 -05558
122	2022-02-17	Notice of Entry of Order Granting Plaintiffs Landowners' Motion for Reimbursement of Property Taxes	26	05559 – 05569
123	2022-02-17	Notice of Entry of: Order Granting in Part and Denying in Part the City of Las Vegas' Motion to Retax Memorandum of Costs	26	05570 - 05581
124	2022-02-18	Order Granting Plaintiff Landowners' Motion for Attorney Fees in Part and Denying in Part	26	05582 – 05592
125	2022-02-22	Notice of Entry of: Order Granting Plaintiff Landowners' Motion for Attorney Fees in Part and Denying in Part	26	05593 – 05606
126	2022-02-25	Order Denying City of Las Vegas' Motion to Amend Judgment (Rules 59(e) and 60(b)) and Stay of Execution	26	05607 – 05614
127	2022-02-28	Notice of Entry of: Order Denying City of Las Vegas' Motion to Amend Judgment (Rules 59(e) and 60(b)) and Stay of Execution	26	05615 – 05625

CERTIFICATE OF SERVICE

I hereby certify that the foregoing APPENDIX TO OPPOSITION TO APPELLANT'S MOTION TO STAY - **VOLUME 21** 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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which is really a summary adjudication motion on one element of their taking claim, but they called it to determine property interest. And then they used the Williams order to say -- to try to get our motion in the -- our motion for summary judgment in the 65 acre case knocked off calendar so that they would -- the court would only hear their motion.

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

THE COURT: Okay. But --

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

THE COURT: Uh-huh. Right.

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

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

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

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

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

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

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

THE COURT: Yeah.

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

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

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

THE COURT: I don't remember saying that.

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

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

MR. SCHWARTZ: Yes.

THE COURT: I don't remember that.

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

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

THE COURT: Okay.

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

THE COURT: Right. Okay.

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

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

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

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

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

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

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

MR. SCHWARTZ: No. I --

THE COURT: I'm not sure I understand.

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

THE COURT: Okay.

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

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

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

THE COURT: Yeah.

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

THE COURT: Okay. Thank you.

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

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

you prorate the $4 million over the whole 200-and-however-many acres? I mean --

MR. SCHWARTZ: You mean the purchase price?

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

MR. SCHWARTZ: No. They bought --

THE COURT: -- wipeout or nearly wipeout?

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

THE COURT: Right. Right.

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

THE COURT: It's varied.

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

THE COURT: Understood.

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

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

MR. SCHWARTZ: You have to.

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

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

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

MR. SCHWARTZ: The original --

THE COURT: The whole development --

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

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

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

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

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

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

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

MR. SCHWARTZ: Pardon me?

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

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

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

MR. SCHWARTZ: And if you look at --

THE COURT: But anyway, so --

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

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

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

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

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

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

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

THE COURT: I don't think that is.

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

THE COURT: Okay.

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

preventing you from making a profit.

THE COURT: Right.

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

THE COURT: Now that's my next question.

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

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

MR. SCHWARTZ: They didn't change --

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

MR. SCHWARTZ: -- the PROS.

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

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

THE COURT: Yeah, where are those things?

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

THE COURT: Yeah, here they are.

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

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

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

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

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

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

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

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

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

THE COURT: Yeah, I do.

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

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

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

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

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

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

MR. SCHWARTZ: Got no entitlement. None.

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

MR. SCHWARTZ: No.

THE COURT: Okay. Sorry.

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

THE COURT: Right.

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

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

THE COURT: Okay.

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

THE COURT: Okay.

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

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

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

THE COURT: Yeah.

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

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

MR. SCHWARTZ: But the law is the law.

THE COURT: Herndon's is right.

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

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

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

THE COURT: -- even --

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

THE COURT: No, I understand.

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

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

THE COURT: Okay.

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

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

THE COURT: And then can we take a break?

MR. SCHWARTZ: Yes. In paragraph six --

THE COURT: The facts or --

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

THE COURT: Which part? Paragraph six?

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

THE COURT: They're --

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

THE COURT: It's under findings of fact?

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

THE COURT: Got it.

MR. SCHWARTZ: I'm sorry.

THE COURT: I got it.

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

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

PROS designation does not conflict.

Your Honor, I want to show you just a couple of maps here. Okay. I can't get my PowerPoint.

[Counsel confer]

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

THE COURT: Los Prados, yeah.

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

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

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

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

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

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

THE COURT: Okay.

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

THE COURT: Okay. Go on.

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

THE COURT: Okay.

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

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

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

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

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

case.

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

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

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

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

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

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

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

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

THE COURT: We'll appreciate that.

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

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

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

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

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

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

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

THE COURT: Okay.

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

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

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

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

THE COURT: Okay.

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

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

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

MR. LEAVITT: Well, yeah.

THE COURT: Yeah.

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

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

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

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

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

MR. LEAVITT: What's that?

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

MR. LEAVITT: Right.

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

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

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

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

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

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

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

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

MR. LEAVITT: Yeah.

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

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

THE COURT: If there's no action taken.

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

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

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

THE COURT: Well, Your Honor.

MR. LEAVITT: Yeah.

THE COURT: I understand that.

MR. LEAVITT: Not only --

THE COURT: But it was taken off calendar.

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

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

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

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

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

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

THE COURT: But their cases are different.

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

THE COURT: They're -- they are.

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

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

MR. LEAVITT: I agree with you.

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

MR. LEAVITT: Okay.

THE COURT: We look at our case.

MR. LEAVITT: I agree.

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

MR. LEAVITT: I agree when you get --

THE COURT: So --

MR. LEAVITT: -- to the take side.

THE COURT: Okay. All right.

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

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

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

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

THE COURT: What are you proposing?

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

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

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

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

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

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

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

MR. LEAVITT: Uh-huh.

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

MR. LEAVITT: Right.

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

MR. LEAVITT: Uh-huh. No.

THE COURT: -- from your 65 and 133.

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

THE COURT: Exactly.

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

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

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

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

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

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

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

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

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

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

MR. SCHWARTZ: Sorry.

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

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

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

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

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

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

THE COURT: Okay.

MR. LEAVITT: And --

THE COURT: And what are they here?

MR. LEAVITT: What's that?

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

MR. LEAVITT: Well, Your Honor --

THE COURT: What do you think happened?

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

THE COURT: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. LEAVITT: Petition for judicial review.

THE COURT: Yeah.

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

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

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

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

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

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

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

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

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

MR. LEAVITT: Absolutely.

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

MR. LEAVITT: Yes.

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

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

THE COURT: Okay.

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

THE COURT: Okay.

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

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

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

MR. LEAVITT: Uh-huh.

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

MR. LEAVITT: Yes.

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

MR. LEAVITT: That's different.

THE COURT: Okay.

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

THE COURT: Right.

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

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

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

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

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

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

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

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

MR. LEAVITT: Yes.

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

MR. LEAVITT: Okay.

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

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

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

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

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

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

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

MR. LEAVITT: Absolutely.

THE COURT: They have immunity.

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

no. That's your classic taking action.

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

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

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

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

MR. LEAVITT: Okay.

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

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

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

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

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

MR. LEAVITT: Yes.

THE COURT: And the City passes an ordinance --

MR. LEAVITT: Yes.

THE COURT: -- that says height restrictions.

MR. LEAVITT: Absolutely.

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

MR. LEAVITT: Excuse me, Your Honor.

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

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

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

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

THE COURT: Okay.

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

THE COURT: Uh-huh.

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

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

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

THE COURT: He had air space rights.

MR. LEAVITT: Yes.

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

MR. LEAVITT: Right.

THE COURT: That's not what they said.

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

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

MR. LEAVITT: I know.

THE COURT: Yeah.

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

THE COURT: Right.

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

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

MR. LEAVITT: Yeah.

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

MR. LEAVITT: No, Your Honor --

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

MR. LEAVITT: Right.

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

MR. LEAVITT: Right.

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

MR. LEAVITT: Right.

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

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

THE COURT: Okay.

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

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

THE COURT: Yeah.

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

THE COURT: [Indiscernible]

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

THE COURT: Right.

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

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

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

MR. LEAVITT: Okay.

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

MR. LEAVITT: Yeah.

THE COURT: -- you know, Badlands.

MR. LEAVITT: Those are --

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

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

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

MR. LEAVITT: Okay. Go ahead.

THE COURT: Specifically the PJR.

MR. LEAVITT: Yeah.

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

MR. LEAVITT: Yeah.

THE COURT: They took it off the agenda. File a PJR. Fine.

MR. LEAVITT: Got it.

THE COURT: That's a very specific thing.

MR. LEAVITT: Right.

THE COURT: And that's where I -- so I felt like that's where I thought Herndon was right.

MR. LEAVITT: Right.

THE COURT: That's not right. There's no actual final action there. The rest of all this, which is what I'm trying to get you people to explain to me, is this -- all this -- I often -- I don't know, it's not really pattern and practice, but that's what it is. It's like the history --

MR. LEAVITT: Yes.

THE COURT: -- of how the City dealt with Badlands. They had, you know, the big fancy people like Jack Bennion mad at them --

MR. LEAVITT: Right.

THE COURT: -- over taking away the golf course.

MR. LEAVITT: Right.

THE COURT: So they said oh, wait a minute, we're going [indiscernible] detail work out. Although, as they point out, you know, we went in and fought for the 17 acres at the Supreme Court. We were on their side. So --

MR. LEAVITT: So --

THE COURT: -- to me, they're two different things. So are you asking the Court to say -- this is what I think you have for your, quote, take consideration. All this other stuff that they did, to me, that

seems like it's a whole different case.

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

THE COURT: Uh-huh.

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

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

MR. LEAVITT: Yeah.

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

MR. LEAVITT: Totally.

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

MR. LEAVITT: Yes.

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

MR. LEAVITT: Yes, absolutely.

THE COURT: What's the right?

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

THE COURT: Okay.

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

that's the question is what property rights --

THE COURT: Right.

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

Can we bring this one up?

And may I approach, Your Honor?

THE COURT: Sure.

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

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

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

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

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

[Counsel confer]

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

THE COURT: I've got it.

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

THE COURT: Do you want mine?

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

[Counsel confer]

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

THE COURT: Good work is gone.

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

THE COURT: All right.

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

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

THE COURT: Sisolak owned raw desert.

MR. LEAVITT: Raw desert.

THE COURT: Your client bought a golf course.

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

converted to -- it was --

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

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

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

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

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

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

THE COURT: Which they changed?

MR. LEAVITT: Huh?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Yes.

MR. LEAVITT: Okay.

THE COURT: Yes.

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

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

THE COURT: Now, those are all directed to Michelle Schaeffer who is county assessor. So how did that work?

MR. LEAVITT: Yes, Your Honor, if I may.

THE COURT: Because it looked like it was county me, so.

MR. LEAVITT: The City of Las Vegas adopted a city charter.

THE COURT: Uh-huh.

MR. LEAVITT: And the City of Las Vegas City Charter in Section 3.12, decided and elected to make that county tax assessor its county assessor.

THE COURT: Okay.

MR. LEAVITT: This is what it says.

THE COURT: It's city tax assessor. Okay. Got it.

MR. LEAVITT: I'm sorry, you're right.

THE COURT: Uh-huh.

MR. LEAVITT: The county assessor of the county is exofacial the city assessor of the city. So that's the City's charter. This is actually in the City's constitution here.

THE COURT: Uh-huh.

MR. LEAVITT: That's their charter where they elected to be bound by everything the county assessor does. And the city was well aware of that. And the city was collecting taxes from the landowners based on that residential use, which is based on zoning.

So Your Honor, we have -- and I've got to be clear here. The landowners entered into a stipulation to that effect. So we have a stipulation from -- between the landowner and a city department that the

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

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

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

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

MR. LEAVITT: Residential --

MR. SCHWARTZ: Thank you.

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

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

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

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

family residential uses prior to any interaction with the government

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

MR. LEAVITT: Yes.

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

MR. LEAVITT: Yes.

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

MR. LEAVITT: Right.

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

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

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

THE COURT: Uh-huh.

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

THE COURT: Uh-huh. Yeah.

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

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

MR. LEAVITT: Okay.

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

MR. LEAVITT: Uh-huh.

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

MR. LEAVITT: Right.

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

MR. LEAVITT: Right.

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

MR. LEAVITT: So --

THE COURT: That's bizarre.

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

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

MR. LEAVITT: Yeah.

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

MR. LEAVITT: Uh-huh.

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

MR. LEAVITT: Those were good times.

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

acted unreasonably --

MR. LEAVITT: Exactly.

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

MR. LEAVITT: Yeah.

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

MR. LEAVITT: I know.

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

MR. LEAVITT: Right.

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

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

THE COURT: Exactly.

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

right before he went to the City of Las Vegas and asked to develop? That's what the Court requires us to do.

THE COURT: Uh-huh.

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

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

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

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

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

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

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

MR. LEAVITT: Okay. But --

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

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

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

MR. LEAVITT: Yeah.

THE COURT: -- okay. All right.

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

THE COURT: They have to act reasonably.

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

THE COURT: Okay.

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

THE COURT: Okay.

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

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

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

THE COURT: Sure. Go ahead.

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

THE COURT: Okay.

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

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

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

THE COURT: Uh-huh.

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

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

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

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

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

MR. LEAVITT: Yes.

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

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

THE COURT: Built the golf course.

MR. LEAVITT: Got it.

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

MR. LEAVITT: Yes.

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

MR. LEAVITT: Right.

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

MR. LEAVITT: Got it.

THE COURT: So we should build on it.

MR. LEAVITT: Right.

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

MR. LEAVITT: Got it.

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

MR. LEAVITT: No, Your Honor.

THE COURT: Okay.

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

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

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

THE COURT: True.

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

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

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

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

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

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

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

THE COURT: Uh-huh.

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

that to happen. And Your Honor --

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

MR. LEAVITT: Correct.

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

MR. LEAVITT: It was a golf course.

THE COURT: -- a golf course.

MR. LEAVITT: Yes.

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

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

THE COURT: Okay.

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

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

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

THE COURT: Uh-huh.

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

THE COURT: Wasn't there also a wash?

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

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

MR. LEAVITT: Yes.

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

MR. LEAVITT: Okay.

THE COURT: That was the problem in Sisolak.

MR. LEAVITT: Yeah.

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

MR. LEAVITT: Right.

THE COURT: -- for a certain purpose.

MR. LEAVITT: Right.

THE COURT: He wanted to change the use.

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

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

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

THE COURT: That's change of use.

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

THE COURT: Okay. All right.

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

THE COURT: Right.

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

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

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

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

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

MR. LEAVITT: Correct.

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

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

THE COURT: Right.

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

THE COURT: Right.

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

THE COURT: Okay.

MR. SCHWARTZ: He did not.

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

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

THE COURT: Okay. If you want --

MR. LEAVITT: What's that?

THE COURT: The CF --

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

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

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

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

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

[Pause]

MR. LEAVITT: Sorry, Your Honor.

[Pause]

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

THE COURT: Okay.

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

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

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

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

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

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

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

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

MR. LEAVITT: Okay.

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

MR. LEAVITT: Yes.

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

MR. LEAVITT: Uh-huh.

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

MR. LEAVITT: Yeah.

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

MR. LEAVITT: Yes.

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

MR. LEAVITT: Yes.

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

MR. LEAVITT: You're correct.

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

MR. LEAVITT: Right.

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

MR. LEAVITT: Uh-huh.

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

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

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

MR. LEAVITT: Totally agree.

THE COURT: Totally different question.

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

THE COURT: Right.

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

THE COURT: Right. There's some --

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

THE COURT: -- that's --

MR. LEAVITT: Yeah. Very clear.

THE COURT: -- something else.

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

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

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

MR. LEAVITT: Uh-huh.

THE COURT: -- to build houses.

MR. LEAVITT: Correct, Your Honor.

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

MR. LEAVITT: Got it.

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

MR. LEAVITT: Right.

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

MR. LEAVITT: Right. Okay.

THE COURT: What are they up to?

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

THE COURT: To build the homes.

MR. LEAVITT: To build the homes.

THE COURT: Uh-huh.

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

THE COURT: Okay.

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

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

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

MR. LEAVITT: That's it.

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

MR. LEAVITT: Yeah.

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

MR. LEAVITT: Okay.

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

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

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

MR. LEAVITT: We're not saying that.

THE COURT: Okay.

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

THE COURT: Okay.

MR. LEAVITT: -- is --

THE COURT: Are you on the same thing?

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

THE COURT: The three questions.

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

THE COURT: Yes.

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

THE COURT: Okay.

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

THE COURT: Right.

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

THE COURT: Uh-huh.

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

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

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

MR. LEAVITT: Yeah.

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

MR. LEAVITT: But Your Honor --

THE COURT: So they need to change these.

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

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

MR. LEAVITT: Yeah.

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

MR. LEAVITT: I get it.

THE COURT: -- how we merge --

MR. LEAVITT: I got it.

THE COURT: What it is exactly --

MR. LEAVITT: I got it.

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

MR. LEAVITT: Right.

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

MR. LEAVITT: Right.

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

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

THE COURT: Okay. Probably. Yeah.

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

THE COURT: Residential. Uh-huh.

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

THE COURT: Right.

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

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

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

MR. LEAVITT: Right. I agree.

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

MR. LEAVITT: I understand.

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

MR. LEAVITT: Yes.

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

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

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

THE COURT: Okay.

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

THE COURT: Okay.

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

THE COURT: Uh-huh.

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

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

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

MR. LEAVITT: Okay.

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

MR. LEAVITT: Got it.

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

MR. LEAVITT: Okay.

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

MR. LEAVITT: Uh-huh.

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

MR. LEAVITT: Okay.

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

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

MR. LEAVITT: Okay.

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

MR. LEAVITT: Okay.

THE COURT: That's the problem.

MR. LEAVITT: Okay. So let me --

THE COURT: You have the right to apply.

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

THE COURT: Okay.

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

THE COURT: Right.

MR. LEAVITT: -- zoning applies.

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

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

THE COURT: Right.

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

THE COURT: Right.

MR. LEAVITT: And here --

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

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

THE COURT: Okay.

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

THE COURT: Uh-huh.

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

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

MR. LEAVITT: Yes.

THE COURT: -- homes on the land --

MR. LEAVITT: Yes.

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

MR. LEAVITT: Absolutely.

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

MR. LEAVITT: Right.

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

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

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

MR. LEAVITT: -- but --

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

MR. LEAVITT: But --

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

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

THE COURT: All right.

MR. LEAVITT: If I could finish.

THE COURT: All right.

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

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

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

MR. LEAVITT: Yeah.

THE COURT: That's where we disagree.

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

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

MR. LEAVITT: Well --

THE COURT: Hypothetically speaking, remember Red Rock Casino?

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

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

MR. LEAVITT: Yes.

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

MR. LEAVITT: Got it.

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

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

MR. LEAVITT: Uh-huh.

THE COURT: Stations have their --

MR. LEAVITT: I remember.

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

MR. LEAVITT: Right.

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

MR. LEAVITT: Absolutely.

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

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

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

MR. LEAVITT: Yeah. But what --

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

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

THE COURT: Right.

MR. LEAVITT: -- with hotel casino zoning.

THE COURT: Right.

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

THE COURT: To build a hotel. Yeah.

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

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

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

THE COURT: Uh-huh.

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

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

MR. LEAVITT: Yes.

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

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

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

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

have the underlying right --

THE COURT: Okay.

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

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

MR. LEAVITT: And --

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

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

THE COURT: Yes, you do.

MR. LEAVITT: What is the right?

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

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

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

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

MR. LEAVITT: Okay.

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

MR. LEAVITT: Here is the --

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

MR. LEAVITT: Okay.

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

MR. LEAVITT: Okay.

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

MR. LEAVITT: Yes.

THE COURT: -- condemnation case --

MR. LEAVITT: Uh-huh.

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

MR. LEAVITT: Yeah.

THE COURT: -- but it's within the zoning. And the City says, absolutely not, that's a ridiculous looking building, we're not going to let you build it. So it's not the right to do it. It's the right to apply to do it.

MR. LEAVITT: Okay. And if I may --

THE COURT: And that's where you and I differ.

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

THE COURT: Yeah.

MR. LEAVITT: I -- the same exact issue was present in the *Hsu* case. It really was.

THE COURT: Uh-huh.

MR. LEAVITT: Okay. Because the Court didn't say in the *Hsu* case that you only have the right --

THE COURT: I hope you know that I printed that.

MR. LEAVITT: Or --

THE COURT: Let me get it.

MR. LEAVITT: Yeah. And in the *Sisolak* case, the court didn't say you just have the right to apply. They didn't say that. What they said is that zoning gave them the right to develop --

THE COURT: Right.

MR. LEAVITT: -- hotel casino. Okay. And Judge, I want to be really clear that what we're asking for is not a specific plan. We're not asking you to say, hey, we can have a specific plan. We're just asking you to, as the courts have done in the other cases, use the zoning to determine the property rights and what property rights are permitted under that zoning.

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

MR. LEAVITT: In accordance --

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

MR. LEAVITT: Well, yeah.

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

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

THE COURT: Yeah. I --

MR. LEAVITT: Okay.

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

MR. LEAVITT: And --

THE COURT: Our internet is just so fast.

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

THE COURT: Yeah.

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

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

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

MR. LEAVITT: Okay.

THE COURT: Only talking about the condemnation --

MR. LEAVITT: Yes.

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

MR. LEAVITT: Okay.

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

MR. LEAVITT: Right.

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

MR. LEAVITT: Yeah.

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

MR. LEAVITT: Okay.

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

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

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

[Pause]

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

[Pause]

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

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

THE COURT: Okay.

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

THE COURT: We're ready.

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

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

[Counsel confer]

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

THE COURT: Right.

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

THE COURT: I can go there.

MR. LEAVITT: Okay.

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

MR. LEAVITT: Okay.

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

MR. LEAVITT: Okay.

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

MR. LEAVITT: Got it.

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

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

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

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

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

MR. LEAVITT: And so what will --

THE COURT: That's part two.

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

MR. OGILVIE: No, Your Honor.

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

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

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

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

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

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

MR. LEAVITT: Uh-huh.

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

MR. LEAVITT: Well, you --

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

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

MR. LEAVITT: Yeah.

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

MR. LEAVITT: Yeah. And --

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

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

THE COURT: And that's --

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

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

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

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

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

THE COURT: Okay.

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

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

THE COURT: Okay.

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

THE COURT: Well, that's true.

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

THE COURT: Right. Okay.

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

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

MR. LEAVITT: Agreed.

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

[indiscernible].

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

THE COURT: Okay.

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

THE COURT: Okay. All right.

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

THE COURT: Correct. Okay. Right.

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

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

MR. LEAVITT: Yeah, I know.

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

[Counsel confer]

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

THE COURT: In a minute, yeah.

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

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

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

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

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

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

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

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

THE COURT: Oh, *Sisolak*.

MR. LEAVITT: Yeah.

[Counsel confer]

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

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

MR. SCHWARTZ: Yes.

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

of the complaint that deals with their --

MR. LEAVITT: Property.

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

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

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

THE COURT: Okay.

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

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

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

That's your right.

MR. LEAVITT: Yes.

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

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

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

THE COURT: And acquiring, possessing --

MR. LEAVITT: I got it right here.

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

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

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

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

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

[Counsel confer]

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

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

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

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

MR. LEAVITT: Yeah. Yes.

THE COURT: Yeah.

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

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

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

THE COURT: So this is my challenges --

MR. LEAVITT: Yeah, and I --

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

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

THE COURT: Okay. Uh-huh.

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

THE COURT: Right.

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

THE COURT: Okay.

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

THE COURT: All right. Thank you.

MR. LEAVITT: And --

THE COURT: Oh, I'm sorry.

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

THE COURT: Okay. Thanks.

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

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

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

THE COURT: And I do mean brief.

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

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

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

MR. SCHWARTZ: That's --

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

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

THE COURT: Right. And that's --

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

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

MR. SCHWARTZ: -- interference --

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

MR. SCHWARTZ: -- or --

THE COURT: -- if that's here.

MR. SCHWARTZ: Right. Or --

THE COURT: That's why [indiscernible].

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

THE COURT: Right. Yeah.

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

THE COURT: I have it here.

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

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

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

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

MR. SCHWARTZ: Okay.

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

MR. SCHWARTZ: That's fine.

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

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

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

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

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

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

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

MR. SCHWARTZ: -- developer --

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

MR. SCHWARTZ: Okay.

THE COURT: I won't do it.

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

THE COURT: Okay.

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

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

MR. SCHWARTZ: Okay.

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

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

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

MR. SCHWARTZ: Understood.

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

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

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

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

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

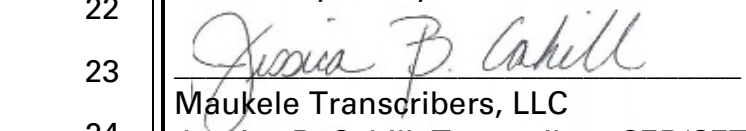
THE COURT: Yeah. It's gotten to be a real mess with this virtual system. So it's granted in part. I believe, Mr. Leavitt is going to prepare the order. Thank you very much.

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

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

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

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



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

In the Matter Of:

180 LAND vs CITY OF LAS VEGAS

September 23, 2021

REALTIME TRIALS REPORTING
EXPERIENCE MATTERS

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * * *

180 LAND CO., LLC, ET AL.,

Plaintiffs,

vs.

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

CITY OF LAS VEGAS, ET AL.,

Defendants.

MOTIONS

BEFORE THE HONORABLE TIMOTHY C. WILLIAMS

On September 23, 2021

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

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

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

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

P R O C E E D I N G S

* * * * * *

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

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

We'll start first with the plaintiff.

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

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

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

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

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

MR. MOLINA: Good afternoon, Your Honor.

Chris Molina for the City.

MS. WOLFSON: Good afternoon, Your Honor. Rebecca Wolfson for the City.

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

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

Is that correct, counsel?

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

THE COURT: Okay. In light of that --

MR. SCHWARTZ: Your Honor?

THE COURT: Yes. Go ahead, sir.

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

THE COURT: And you sure do.

MR. SCHWARTZ: Thank you.

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

MR. SCHWARTZ: Yes, Your Honor. Our motion

is for summary judgment on all claims.

THE COURT: I understand.

MR. SCHWARTZ: Thank you.

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

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

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

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

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

THE COURT: Okay. Sir, you may approach. The lecturn is available for you.

MR. LEAVITT: Thank you. May I proceed, Your Honor?

THE COURT: Yes, sir.

You know what we can do. I have a screen here. There's one there; right? Is that visible to everybody? Okay. Just want to make sure.

Mr. Leavitt, you may proceed, sir.

MR. LEAVITT: Your Honor, through the arguments that we've done with you previously, what

I've been able to do is lay out an outline of my argument. I've provided it in PowerPoint format and I've also provided it in written format. And I do have that, Your Honor. And so I have various folders that I could hand to you. So we can see it on the monitor, but I can also provide you a physical copy. I'm not sure how you would like me to do that. I can give it to the bailiff, Wesley, and he can present it to you, Your Honor.

THE COURT: Is there any objection to him handing me a physical copy of the PowerPoint presentation?

MR. SCHWARTZ: No, Your Honor.

THE COURT: Okay. You can hand that to the marshal.

MR. LEAVITT: Your Honor, we'll start with -- what I want to do is I want to start with the very narrow issue that we're here for today. And if we can open up the folder I just gave you, has the Nevada inverse condemnation law. And if we open it, up the very first slide there is "Nevada Inverse Condemnation Law." And behind that, the next section, the next page, the top of that page says, "Nevada's Mandatory Inverse Condemnation Procedure."

We've talked about this previously that in

all of these inverse condemnation cases, the Nevada Supreme Court has held that there's a two-step procedure that we follow. The first step is to define the property interest that the landowners had prior to any city interference with that property interest. And once that property interest is defined -- and what we're talking about here is once the bundle of sticks is defined that the landowners have, then and only then, do we move to the take issue.

On October 12th, 2020, this Court entered an order on the property interest issue. And we've resubmitted that order to the Court to see that that ruling and that decision has already been made on the property interest issue. We appeared before the Court. We had significant briefing. We had significant argument.

And then at the end of that briefing and that argument, this Court entered that first order that's necessary in these inverse condemnation cases. And the order that this Court entered was that, number one, zoning is relied upon to determine a property interest. Number two, the zoning is R-PD7. And number three, under Nevada law and under the city's code, the legally permissible uses of the property with R-PD7 zoning is single-family and multi-family residential.

So, Your Honor, that very first preliminary issue has been decided by this Court definitively on October 12th, 2020. Because that first issue has already been decided by the Court, we're now moving to the second issue, which is the second sub-inquiry that the Court requires us -- or which the Nevada Supreme Court requires us to decide. And that second sub-inquiry is very straightforward, Your Honor.

The second sub-inquiry is, did the City engage in taking actions, or in actions to take the landowners' 35-acre property for which the landowners have the right to use for single-family and multi-family residential uses.

So, Your Honor, that fairly narrow issue is why we're here today. We filed our motion to address that very narrow issue of, now that we've decided that the landowners have the right to use the property for single-family and multi-family residential uses, did the City engage in actions to take that underlying property interest.

Your Honor, if we turn to the next page in the PowerPoint here, at the top of that page, it says, "Three Invariable Rules."

It's not working on that --

THE COURT: Are you having a problem? I do

have the book.

MR. LEAVITT: You've got the book. We'll go through the book and, hopefully, they can figure it out.

The next section here is the three invariable rules that the Nevada Supreme Court has used to decide the take issue in the state of Nevada.

First, the court said, listen, we have no magic formula to decide a taking in every single case. The court went on to say, there's nearly infinite variety of ways in which a taking can occur.

But then the court said this, Judge. The court said, listen, there's many, many ways that a taking can occur. But then in the State v. Eighth Judicial District Court case, the court said, nevertheless, there are several invariable rules applicable to specific circumstances.

And then the court -- and the Nevada Supreme Court has identified three invariable rules. So to explain that a little bit more, Your Honor, the Supreme Court said, listen, we're going to look at a whole bunch of facts. And we can have a taking under many, many different facts, but there's going to be three specific circumstances where we are always going to find a taking.

And here's the three specific circumstances the Court said we're always going to find a taking. Number one, on a per se regulatory taking. Number two, on a per se categorical taking. And, number three, on a non-regulatory de facto taking.

So under these three circumstances, the Nevada Supreme Court said, these rules are invariable. If the specific facts meet any one of these three standards, the court is required to automatically find a taking. There's no defense, there's no ripeness issues. The court is required to look at the facts and determine whether any one of these invariable rules has been met.

So then I want to spend just a minute identifying those invariable rules and the law that applies to those invariable rules.

Turning to the next slide is the per se regulatory taking. This is one of the claims that the landowners are moving for summary judgment on. It's landowners' third claim for relief, a per se regulatory taking.

And turning to the next page, this is the Nevada Supreme Court law on a per se regulatory taking. The Nevada Supreme Court in the McCarran International Airport and County of Clark v. Tien Fu Hsu case held

there's always going to be a per se taking if the government engages in actions that preserve private property for use by the public or authorize the public to use private property.

And, Judge, that makes sense. If the government says, hey, we're preserving your property for use by somebody else, that's going to automatically be a per se taking in and of itself. Or if the government adopts any kind of action and says to a landowner, we're authorizing the public to enter physically onto your property, the Nevada Supreme Court said that's in and of itself going to be a taking.

And, Judge, I want to refer to those facts that occurred in the Sisolak case because they're very demonstrative of the kind of takings that the Nevada Supreme Court found in that per se regulatory taking. And Sisolak, as you'll recall, the County of Clark adopted height restriction known as number 1221 that preserved Governor Sisolak and Mr. Hsu's airspace as vacant airspace for use by the public. And that underlying ordinance authorized the public to enter into that airspace.

The taking action in that case that the Nevada Supreme Court found was not the physical entry of airplanes into the airspace. The Nevada Supreme

Court found that the adoption of height restriction ordinance number 1221 was the taking action. So the Court said, listen, if you just engage in actions to preserve property for use by the public or you engage in action that authorizes the public to use private property, that's a taking.

And, Your Honor, I'll read from the very conclusion of the Sisolak case. You see in the book I have the most applicable cases. It's at page 16 of the book behind there. The conclusion is the Court says, Ordinances 1221 and 1599 appropriated private property for public use without the payment of just compensation.

It was the ordinances that resulted in the taking because the ordinances themselves preserved the property for use by the public and authorized the public to use that private property.

Your Honor, the second bullet point from the bottom of that sheet there, that's an important finding. Because the Sisolak court had to determine prejudgment interest. And in order to determine prejudgment interest, the Sisolak court had to determine what was the taking date, what was the taking action. And, again, at page 675, the court held that prejudgment interest was awarded from the date of

taking, which was the date the county passed Ordinance 1221.

And then in a subsequent case, Your Honor, Johnson v. McCarran International Airport, what had happened, Your Honor, is we litigated those airspace taking cases for about 15 years. Then after those cases had been litigated, Mr. Johnson came forward and said, hey, my property is near the airport. I want to sue for a taking also.

So in that Johnson v. McCarran International Airport case, the Nevada Supreme Court had to definitively define what the date of taking was because Mr. Johnson missed the statute of limitations. So the court had to decide when did the taking occur in order to commence the statute of limitations. And in the Johnson case, the court held that the height restriction 1221 effected a per se regulatory taking. And then they went on to say, when the planes began using the airspace was absolutely inconsequential to determine the take.

So, Your Honor, in conclusion, a per se regulatory taking in the state of Nevada occurs when the government engages in actions that preserve private property use by the public or authorizes the public to use the property. It's inconsequential whether they

actually use the property.

And if we turn to the next page, Your Honor. The United States Supreme Court, just two months ago, adopted this same exact holding in a case called Cedar Point Nursery v. Hassid. That's a June 2021 case. In that case, the Court held that the right to exclude is one of the most treasured rights of ownership. And where the government authorizes the public to use property, it is a per se regulatory taking.

What happened in this case is very, very applicable here. First, the court said, Penn Central has no place here. We don't do a Penn Central analysis when there's a per se regulatory taking. That's what the court said.

You're going to hear a lot about Penn Central from the City of Las Vegas here today. And the United States Supreme Court said, we don't even do a Penn Central analysis under these circumstances. And the taking facts in that case are extraordinarily instructive.

First, California adopted a statute that allowed these labor unions to enter onto private farms for up to three hours a day for 120 days a year for -- with notice. And so the statute said, listen, labor unions have a right to enter onto farms. The labor

organization tried to enter onto Fowler Packing Company's property, but Fowler Packing Company went out there and said, you're not coming onto my property.

So the labor unions actually didn't even enter onto Fowler Packing Company's property. And the court in that case held that the taking was the passage of the statute that authorized the public to enter onto the property.

So that's very consistent with what the Nevada Supreme Court held. So that's one of those invariable rules. The Nevada Supreme Court said, when the city, or any other government entity, takes this type of action to preserve property for use by the public or authorize the public to use it, that's going to be an invariable rules where we are always going to find a taking. And that's why the court put the words "per se" in front of that type of claim. There is a taking in and of itself.

So the question will be, and I'll get to this in a moment, Your Honor, is did the City engage in actions to preserve the landowners' property for use by the public or did they engage in actions to authorize the public to use the landowners' property.

Turning now, Your Honor, to the next slide,

which says, "Per se Categorical Taking, Landowners' first claim for relief." Landowners are also asking for summary judgment on a per se categorical taking. The Nevada Supreme Court and the United States Supreme Court have been very clear on what the standard is here.

The Sisolak court adopted it. The Hsu court adopted it. And the United States Supreme Court adopted this same standard in a case called City of Monterey v. Del Monte Dunes. And the taking standard here is a per se taking occurs whenever the government engages in actions that, quote, "Completely deprives an owner of all economical beneficial use of her property."

So if the government comes to a piece of property and takes actions that completely deprive that owner of all economical beneficial use of the property, then the court says that's a per se taking. That's a taking in and of itself. There's no defenses to that taking. And the taking facts in the Del Monte Dunes case are very instructive.

Del Monte Dunes went to the City of Monterey, and they said, we have residentially zoned property, just like the landowners in this case, Your Honor. As this Court already found, the landowners have

residential zoned property. They had the right to use that property for residential uses.

In the Del Monte Dunes case, the United States Supreme Court recognized that Del Monte Dunes had residential zoning and the right to use the property for a multi-family residential use exactly as this Court found in this case.

Then, exactly as the facts will show in this case, Del Monte Dunes went to the City of Monterey and asked to develop their property for residential purposes. And they were denied, denied, and denied. There was denial after denial. No matter what Del Monte Dunes did, the City of Monterey said, you can't build.

And so Del Monte Dunes sued the City of Monterey because there was no other economic use that could be made of the property. And then, ultimately, in that case, a categorical taking was found, and just compensation was awarded in the amount of $1,450,000.

So, in conclusion on this claim that the landowners are seeking summary judgment on, a per se categorical taking occurs when the government engages in actions that deprive a landowner of all economic beneficial use of their property. And this is, again,

one of those invariable rules where the Nevada Supreme Court says, just compensation is automatically warranted and there are absolutely no defenses to this taking for obvious reasons.

If the government engages in actions that economically deprive a landowner of the use of their property, that's clearly a taking. So the Nevada Supreme Court said, no matter what excuse the government may have for doing it, no matter this ripeness argument, none of it applies, Your Honor.

So the final claim that the landowners are seeking summary judgment on is a non-regulatory de facto taking claim. And this is the landowners' fourth claim for relief on the next slide. And if we turn to the next page in our book here, it's actually page 10 in the bottom right-hand corner, Your Honor. This is the standard in the state of Nevada for a non-regulatory de facto taking.

And if I may pause for a minute here, Your Honor. This non-regulatory de facto taking standard was first adopted by the Nevada Supreme Court in a case called Slope v. Turner in 1977. It was reaffirmed by the Nevada Supreme Court in 1988 in a case called State v. Las Vegas Building Materials, and reaffirmed in a case called State v. Schwartz.

We're very familiar with those cases. Actually, Mr. Waters from our offices litigated every one of those cases from 1977 forward. It's been the law in the state of Nevada for over 41 years.

Over 41 years the law has been as follows: A non-regulatory de facto taking occurs, quote, "Where a property right that is directly connected to the use or ownership of the property is substantially impaired or extinguished."

That is a verbatim quote from the Schwartz decision, which was adopted previously in 1977 in the Slope decision, and previously in the Las Vegas Building Materials decision. In fact, the Schwartz case cites to the Slope decision and cites to the Las Vegas Building Materials decision.

The facts of the Richmond Elks Hall case are actually instructive here. The reason I cite to the Richmond Elks Hall case is because the Nevada Supreme Court reaffirmed this non-regulatory de facto taking standard in a 2015 case called State v. Eighth Judicial District Court. In that State v. Eighth judicial District Court case in 2015, the Court actually labeled this type of taking as a non-regulatory de facto taking, and then cited with authority to the Richmond Elks Hall case, a 1977 Ninth Circuit case.

And Richmond Elks Hall owned a three-story building. They were using it for rent. And the government stated the Richmond Elks Hall property was going to be taken, but Richmond Elks Hall could keep their property if it redeveloped it.
Richmond Elks Hall refused to do that. And then the government engaged in certain other actions over the years to substantially interfere with the use of the Richmond Elks Hall property.

At the end, Your Honor, Richmond Elks Hall's income was reduced to less than one-third of what it was before the agency adopted its plan. That's critical right there, Your Honor. Because the Ninth Circuit Court of Appeals received argument from the government in that case. And the government said to the Ninth Circuit Court of Appeals, time out. Richmond Elks Hall still can use a third of their building. In order for there to be a taking, you have to have a total wipeout. That's what the government argued to the Ninth Circuit Court of Appeals.

The Ninth Circuit Court of Appeals said, absolutely not, and rejected the total wipeout argument, and said, Richmond Elks Hall had a three-story building. They could still use a third of the building, and a third of the building was still

being rented, but the Ninth Circuit Court of Appeals said that the government in that case substantially interfered with the use and enjoyment of the Richmond Elks Hall property to such as extent that it became a taking. And the Nevada Supreme Court cited to that law as authority.

So, Your Honor, this next claim that the Nevada Supreme Court said is an invariable rule in the State of Nevada is this non-regulatory de facto taking claim that says, if the landowner has a property right and the government substantially interferes with that property right, that's always going to be a taking.

Now, I want to turn to the next page. Because now I want to pause with what the landowners' claims are. And I want to take just a moment, Your Honor, and address what the City wants you to find in this case. And this is the City's incorrect taking standard.

The City says, number one, that it has discretion under petition for judicial review law to deny land use applications, and, therefore, there are no property rights. And, Judge, as outrageous as that may sound, that's its argument, that we don't have property rights anymore. We're at pre-constitutional era, according to the City, that

because the City has petitioned for judicial review discretion, there are no property rights. That's its first argument.

Then it says, separation of powers prohibits you from intervening when the City exercises its discretion. That's its second part of this rule. Judge, I can tell you right now, and we cited you this law, the United States Supreme Court in the Monongahela case expressly rejected that and said the Court has a duty to intervene when the government takes property. And, in fact, used this example: The court said you can't leave the fox to guard the hen house. That's the exact example the court used.

THE COURT: I mean, from a historical perspective, separation of powers have never been in trial courts when issuing decisions pertaining to actions of the city council, county commission, the Nevada legislature, and/or Congress; right? I mean, really.

MR. LEAVITT: Absolutely, Your Honor.

THE COURT: They overstep their bounds, the only recourse is to go to another co-equal branch of government. And that would be the judiciary. In fact, the President of the United States is not immune from that.

MR. LEAVITT: And you hit it right on the head, Your Honor, absolutely. And that's from the very beginning. It's a late 1800s decision. And it was recited in a case called Lou Colliers, which was recited in another case called Seaboard Airlines, which are three United States Supreme Court opinions where the court rejected the separation of powers statement, and the United States Supreme Court said, you can't leave the fox to guard the hen house. The courts are there to act as the protectors of landowners' property rights. Therefore, this whole separation of powers argument that the City makes is absolutely unfounded.

Then the third part of the City's rule is that this court can only find a taking where there's a total wipeout of all value of the property. I'm going to put this as simply as I can, Your Honor, and no disrespect to the Court, of course. There is absolutely no case in any jurisdiction anywhere that adopts this law. None, whatsoever. Your Honor, I haven't even read a magazine article, any type of persuasive authority, that adopts this rule the City wants you to adopt. It's patently incorrect.

And the Nevada Supreme Court in these three types of takings that I just went through expressly rejected this argument by the City that you apply

petition for judicial review of law, then you apply separation of powers law. Then you cherry-pick from some eminent domain cases and come up with a rule where no landowner would ever be paid just compensation.

And if I could turn to the next page, Your Honor. The next page is where the Nevada Supreme Court -- and I'll just quote these quickly -- four times, actually, expressly rejected this total wipeout, separation of powers, pure discretion argument. In Schwartz v. State, the court said, listen, if the government substantially impairs or extinguishes property, there's a taking.

The Nevada Constitution was amended in 2008 to say that if there's a taking or damaging of property -- or damaging a property, it shall be valued at its highest and best use.

Richmond Elks Hall, which the Nevada Supreme Court cited to for authority, said to constitute a taking under the Fifth Amendment, it's not necessary that the property be absolutely taken within the narrow sense of that word to come within the protection of the Constitution.

Here's the words. Here's what the Nevada Supreme Court approved. "It is sufficient that the action by the government involves a direct interference

with, or disturbance of, property rights."

So if the government interferes with your property rights directly or disturbs those property rights, the Nevada Supreme Court is going to find a taking. And in Nichols on Eminent Domain, they conclude it all. And I'll tell you even why I cite Nichols.

So contrary to the prevalent earlier views, it's now clear that a de facto taking does not require a physical invasion or appropriation. Rather, a substantial deprivation of a property owner's use of its property may, in appropriate circumstances, be found to be a taking.

Why do I cite Nichols? Because the Nevada Supreme Court cites Nichols 13 times in their eminent domain and invariable rules cases; no less than 13 times. That's the authority the Nevada Supreme Court relies on.

So, Your Honor, I want to sum this up on the taking law. On the next page, this is a summary of the taking issues based on Nevada's three invariable rules.

So here's why we're here today. Here's why the landowners have come here. Under the per se regulatory taking, the issue is framed very succinctly like this. Where the landowners had the right to use

their 35-acre property for residential purposes, did the City engage in actions to preserve that 35-acre property for use by the public or authorize the public to use the 35 acres?

Because remember, Judge, we've already been down the property interest road. This Court entered a definitive ruling on October 12th, 2020, stating that the landowners had the absolute right to use their property for residential purposes. So the only question is did the government stop that and preserve it for some other use finding a -- resulting in a per se regulatory taking.

The next claim is a per se categorical taking. The question is framed just like this. Again, where the landowners had the right to use their 35-acre property for residential purposes, did the City engage in actions to completely deprive the landowners of all economic beneficial use of their 35-acre property.

Again, under that standard, the Court already decided the property interest issue, that the landowners have the legally permissible right to use their property for residential purposes. So the question here is did the City engage in actions to prohibit them from doing that, which is the only economic use of the property.

The final question under a non-regulatory de facto taking is did the City engage in actions to substantially interfere with the landowners' legal right to use their 35-acre property for residential purposes. Again, the property interest issue under that standard has already been decided, that the landowners had the legal right to use their property for residential purposes. So did the City engage in actions to substantially interfere with that legal right?

If this Court answers yes to any one of these issues, then a taking should be found. That's what the Nevada Supreme Court held. We don't have to go into this Penn Central analysis. And every one of these standards, under a per se regulatory taking standard, the Nevada Supreme Court said in Sisolak, we don't go into Penn Central.

Under a per se categorical taking standard, the Nevada Supreme Court said, we don't apply Penn Central. And in a non-regulatory de facto taking claim, the Nevada Supreme Court said, we don't apply a Penn Central analysis.

We don't apply a ripeness analysis to any of these claims because if the government engages in these actions, the actions are per se takings, a taking in

and of themselves.

So, Your Honor, turning to the next slide, which is slide no. 14. It's headed, "All government Actions Must be Considered."

So I'm going to -- so I've talked about the standard, Judge. And now I'm going to move to the facts. But before I move to the facts, I just want to point out that in the State v. Eighth Judicial District Court case, 2015, the Nevada Supreme Court said there's nearly infinite variety of ways in which the government actions or regulations can affect a property interest.

The Nevada Supreme Court said very, very clearly that the government can do an infinite number of things and that the court is required to look at all of that government action. And this Court actually already entered a ruling on that issue. Exhibit No. 8 is an order you entered in this matter previously. This issue has already come up.

And this is what this Court held in its order. Quote: "In determining whether a taking has occurred, courts must look at the aggregate of all of the government's action because" -- and you're quoting a case here -- "the form, intensity, and deliberateness of the government's actions toward the property must be

examined. All actions by the government in the aggregate must be analyzed."

Therefore, Your Honor, when we're deciding in this hearing today, and tomorrow if we go into tomorrow, when we're deciding that issue, we have to look at all of the City's actions in the aggregate to decide whether any of these takings occurred.

And, Your Honor, I'll conclude on the law here just by saying, all of that case law which we just cited to is attached in this booklet for the Court. It's all tabbed and highlighted for the Court if the Court wishes to so look at it.

So, Your Honor, when we're deciding the issue here today, the number one thing is to decide the taking standards. We've done it. There's three invariable rules. The next step is to look at the facts and see if the facts fit into any one of those taking standards. And then, finally, to analyze those facts as they compare to the take.

And so, Judge, now what I want to do, now that we've looked at the taking standard, I want to turn to the specific facts in this case. And I want to identify those facts which are most important.

And, Judge, if I may, I have another book here that I'd like to give to the Court.

THE COURT: And, for the record, you want adverse counsel to know what's in that book?

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

THE COURT: We should have them take a look --

MR. LEAVITT: Oh, yeah.

THE COURT: -- and make sure there's no objection.

MR. LEAVITT: These are the exhibits that have already been submitted to the Court.

THE COURT: You can take a look. I won't open them until you say everything is okay from a defense perspective.

Go ahead, sir. I'm listening. I'm familiar with the facts of the case.

MR. LEAVITT: I'm with you, Your Honor. I'm going to point out the most important ones. So we have this booklet right here. This is just my argument.

Then we have the book, which is the relevant exhibits, which are the exhibits, the same exhibits, as they appear on the motion. And so what I'll do is, I want to first turn to the first tab, which is the property acquisition.

Your Honor, I start with the acquisition of the property because it becomes an issue, not by the

landowners, but by the government. There's important facts that when the landowners acquired the property. The first important fact is in March 2015, the landowner acquired the entity known as Fore Stars, Ltd., which owned five separate parcels. So when the landowners acquired the entire 250-acre property -- and, Your Honor, I'll put this up, if that's okay.

THE COURT: That's fine.

MR. LEAVITT: This is marked as Exhibit No. 2 in the previously submitted exhibits to the Court. It's an entire 250-acre property. And it's broken up into four parts in this litigation that's pending. The Court's aware of those four parts. But when the landowners acquired the deed, Exhibit No. 44, lists five separate parcels.

Then, Your Honor, in this exhibit book would --

THE COURT: It's the 35 acres that are at issue in this matter, and they were zoned R-PD7; is that correct?

MR. LEAVITT: Absolutely, Your Honor.

The only facts that are before you is the 35-acre property. And during -- so after the landowners acquired the property, they said, hey, we want to go develop. They immediately started

developing.

And, Your Honor, why? Why did the landowners immediately want to develop? Because they had a 250-acre vacant piece of property they were being taxed by the City of Las Vegas as a residential property at $1 million a year, and they had significant carrying costs. And so they immediately moved to develop.

They went to the City of Las Vegas and Peter Lowenstein, who is the head planning section manager at the City of Las Vegas, testified under deposition oath that the City wanted the property split up further into 10 parcels. And so the landowners did that at the direction of the City of Las Vegas, split it up into 10 parcels and began moving forward with development.

The next tab is, "Surrounding Owners." And, Your Honor, I'm not going to spend a lot of time on this, but it shows why certain actions were taken in this case, and so that's why it's relevant.

Exhibit No. 94 is the affidavit of Vickie DeHart. She states in her affidavit, Your Honor, lays out this foundation that when the landowners went to develop the property, the surrounding property owners vehemently opposed it and told them, listen, you can't develop this property

unless you give to us 180 acres of your property plus water rights for free. The landowners objected and said, we're not going to do that.

And Exhibit No. 142 confirms that action. Bob Beers, who was a councilman at the time, testified under oath that he was contacted by the adjoining property owners, and he was asked to have the City get in the way of the landowners' rights. Get in the way of their rights. He said, I'm not going to do that. And because he wouldn't do that, Your Honor, "They lodged a political campaign against me," is what he testified to.

Continuing, Your Honor, to the next page. The declaration of Yohan Lowie confirming what happened, Exhibit No. 35. Exhibit No. 35 is Mr. Lowie's deposition. He said that, "The surrounding property owners demanded that I not develop my property. They said I had to give them 180 acres for free, plus water rights."

And then he said, "I needed to hand it over to them for free without restrictions."

So look at the position the landowner is in. And, Judge, you heard all of this evidence during the property interest motion. The landowners worked 14 years to acquire the property. We have a pending

motion before you which lays out the due diligence that was done for 14 years. The significant resources, work, and effort that went into that.

And they finally acquire the property. They move forward with development. And I don't know a better way to say it, Your Honor, and these are the words that the United States Supreme Court uses in a case called Dolan v. City of Tigard. They said that when those type of actions occur, it's like extortion. That's the words the United States Supreme Court uses.

That you can't go to a landowner and say, well, I'm only going to let you build on your 250 acres if you give your adjoining landowner 180 of those acres. That's the verbiage the Court used.

So, Your Honor, I want to move forward now with the specific taking actions. With that foundation laid, that the surrounding property owners vehemently opposed it and that the city council members were approached to get in the way of development, and that Mr. Lowie himself was approached by the city council, a city council member, and told him that he couldn't develop unless he gave that property away, let's now look at the City's actions towards the property.

The next one is the MDA. And I have a "1" around that. The MDA is the Master Development

Agreement. And this testimony that I'm about to tell you about, Judge, is undisputed.

In Exhibit 34, Mr. Lowie testified that the City would only accept one application to develop the 35-acre property.

So he goes to develop his property. And the City says, here's the only way you're going to be able to develop the 35-acre property is through a Master Development Agreement. That testimony is confirmed by Chris Kaempfer, who is a 40-year land use attorney in the state of Nevada.

Exhibit No. 48, he testified, and it's highlighted here, that it was made abundantly clear to him that the landowners would get a development agreement for the entire property that includes the 35-acre property or they get nothing. That's his quote.

Stephanie Allen, in Exhibit No. 54 in her declaration stated the same thing. That they worked on this, the Master Development Agreement, at length for two years because that's what the City said the landowners needed to do. So, Your Honor, the City said, you, landowner, have one road to walk down in order to develop the property, and that's through the MDA application. That's the only way.

That's an undisputed fact. No evidence has been presented by the City of Las Vegas to dispute that that was the only way the City would allow development of the 35-acre property. There's no affidavits. There's no depositions. There's no statements on the record. There's no evidence to dispute that, Your Honor.

Turning to the next page. The landowners complied and completed the Master Development Agreement. Judge, that's all laid out in the briefs. I'll highlight a couple things. It took two and a half years to complete that.

The second bullet point in Exhibits 58 and 59 that are in this book here, Your Honor, the City required at least 700 changes and 16 redrafts.

Those exhibits lay out all of the changes. They do a comparison. And through computer they were able to identify what the changes were and how many they were and how many do-overs the City required.

Mayor Goodman even stated on the record in Exhibit 54 that there were weekly meetings for two and a half years with the City's department representatives and hundreds of hours spent on this Master Development Agreement.

Judge, this is the most significant

application that could possibly have been submitted. And the City said to the landowners, that's the only way you're going to be able to use your 35-acre property.

We'll turn to the next page, Your Honor.

The MDA requirements were profoundly excessive. This evidence shows that these landowners were picked out and specifically targeted by the city council.

Number one, Councilwoman Tarkanian, in Exhibit 53, specifically stated in regards to the MDA, "I've never seen a landowner have to give up that much to develop their property. And I've never seen a landowner agree to give up that much as part of this MDA application in order to develop."

Again, the only avenue the City would allow.

Yohan Lowie is the landowner representative. This is his Exhibit No. 34. Yohan Lowie, Your Honor, has been developing property in the City of Las Vegas for 25 years. At the last hearing that we were in front of you, I don't know if you recall this, Your Honor, but I laid out everything that he's developed in this area, Tivoli Village, 42 of the 109 homes in Queensridge, Sahara and Hualapai, the development at that area.

Your Honor, there's no single person who has developed more property in this area than Mr. Lowie. He actually designed and built the Nevada Supreme Court building. So he has significant experience in developing property.

Listen to what he says in his deposition. "The demands by the City of Las Vegas cost us to incur more than an additional $1 million in fees and costs."

So, Judge, this MDA application, the landowners had to do everything the City typically requires, plus $1 million.

He actually stated, and I believe this is in his deposition testimony, that it actually approached closer to $2 million extra just because. And he did it.

He went on to say, "Such costly and timely requirements are never required."

25 years of developing property and he says he's never had this happen before. They've never required this.

Exhibit No. 55, Your Honor. This right here is a letter that Mr. Yohan Lowie received. The City met with him and said, hey, here's what you're going to have to do as part of the Master Development Agreement. They said, you're going to have to build a park with

vineyards. You're going to have to build new gatehouses for the Queensridge community.

Judge, we learned in the property interest motion that this property is not part of the Queensridge community. We learned that it's entirely separate from the Queensridge community. That Mr. Peccole, when he built this whole area, put future development on this 250-acre property and put specifically in the CC&Rs that this is separate and apart.

It can be developed. And nobody in Queensridge has any rights to this property. That's what we learned in our property interest motion. And look at what the City is making them do. You have to build brand new gates for the Queensridge community. Controlled access, a park of 70 acres, 2.5-acre nursery -- and this is probably my favorite -- land for an equestrian facility.

You know what he did, Judge, that same day, he signed it, dated it, and handed it back to the City, said, I just want to use my property.

The Nevada Supreme Court in Sisolak says, "Every landowner has a right to possess and use their property." That's an exact quote. So he said, as the Nevada Supreme Court said, I just want to use my

property.

And, Judge, despite the fact of these being grossly unconstitutional exactions, he signed it and said, I'll do it. I'll pay your extra million dollars. I'll build the gates. I'll build the equestrian facility just to approve the Master Development Agreement so I can build homes on the properties.

But, Judge, it was taking so long and it was so egregious what the City was requiring that the landowner then went over and started a parallel application for the 35-acre property. Your Honor, that's the next section is the 35-acre property.

So while this Master Development Agreement was being developed and the City was taking two and a half years to do it. And, Judge, if I may just point out, the City wrote the Master Development Agreement; okay? While that was ongoing, the landowners said, we want to develop the 35 acres. And that's this 35 acres right here.

So the testimony is the landowners said, let's go to the city planning department and let's ask the city planning department what's the highest restrictions you could possibly impose on the 35-acre property to develop it. And then, guess what, put even more strict restrictions on it because we want to make

sure this is approved. They worked with the City of Las Vegas planning commission to prepare this plan right here, Your Honor.

And if I could -- is it up? Doesn't look like it's up.

I will point out the details just very quickly on this, Your Honor. It was 35 acres. There were 61 lots. The average lot size was a half acre. The density was 1.7 units per acre. The R-PD7 zoning allows up to 7 units per acre. But when they went to the City, they wanted to make sure this gets approved so they only proposed 1.7 units per acre. This is what they proposed. They drafted it up. The City said, do this. The landowners went and drafted it up.

To see how reasonable that is, Your Honor, the Queensridge community has a density of 3.5 units per acre. So all of the Queensridge homes that are built around the 35-acre property are twice as dense. There's twice as many units on the Queensridge community as was being proposed on the 35-acre property.

So those applications, all of them, are prepared. They're prepared with the assistance of the City's own planning department. And then what happened is the City then sent this plan with all the

applications to all their agencies and all their departments. And all their departments had an opportunity to weigh in on whether this met the city code requirements.

And let's go to the next page because this gives us what the City said. This is the City's planning department, Exhibit No. 74 on the next page. They say just like this, the zoning is R-PD7. The proposed density is allowed under R-PD7. And this is a quote. "The proposal is, quote, less dense than the existing R-PD7 zoning district allows."

Your Honor, that's entirely consistent with your property interest order. You held that the landowners' property is R-PD7, and they have a legal right to use the property for residential purposes. So did the planning department when this was submitted.

They went on to say, it's comparable in size to the existing units. And then they said at Exhibit No. 74, it conforms to all Title 19 requirements. It conforms to all NRS requirements. And it conforms to the tentative map requirements.

And turning to the next page, Your Honor, again at Exhibit No. 74. So what did the City's planning commission recommend for this? Approval on all bases, approval, approval, approval, approval.

Turning to the next page, which is slide no. 15. This is at one of the hearings on the 35-acre application. Remember Councilman Bob Beers who was approached to try to stand in the way of development? He said, just like this in Exhibit No. 33 at the hearing, he said, I've looked at this. I've looked at the city code. I've looked at the zoning. This is so far inside the existing lines. That's their client. The city council is the highest level at the City of Las Vegas.

So their planning department said, this is legally permissible. Their planning department said, this should be approved. Their council member said on the record, this is so far inside the existing lines. Why was it so far inside the existing lines? Because the landowners went to the planning commission and said, impose as many restrictions as you can on us. We just want to make sure we can build.

Again, Mr. Beers' statement is consistent -- or Councilman Beers' statement is consistent with what you ruled on the property interest issue, the legal right to use for residential.

The matter is then presented to the planning commission, Exhibit No. 74, no. 16. The planning commission votes to recommend approval. The matter

then goes to the city council on June 21st, 2017. Here's what the council members say. I have to oppose this because it's piecemeal.

Remember, Judge, what they said. Remember what all the evidence, the uncontested evidence, is. You can only do a Master Development Agreement to develop the 35 acres. So at the hearing, three council members say, I oppose it. It's piecemeal. I don't like this piecemeal stuff. I don't want piecemeal. I made a commitment that I wasn't going to allow piecemeal.

Do you know, Your Honor, at that hearing, there wasn't one legal basis given to deny this and require the Master Development Agreement, not one legal basis. They just said, we're not going to allow you to develop the 35-acre property alone.

And then they said on the record, we're only going to allow the Master Development Agreement. Again, back to the Master Development Agreement application.

So this application that the City planning staff essentially prepared with the landowners that met every single legal requirement, that the City had absolutely no legal basis to deny, was denied by the City of Las Vegas.

So what did the landowners do, Your Honor? And, Your Honor, if you turn to page 18, I'll just reference this. This is Bates stamp no. CLV_054375. It's part of Exhibit No. 74. That's where Councilman Kaufman made the movement to deny that application.

THE COURT: For the record, was there an objection?

MR. SCHWARTZ: No, Your Honor.

THE COURT: Just wanted to make sure. We're referring to the relevant exhibit volume that was given to me by plaintiffs' counsel, along with, it appears to be a booklet, Landowners' Presentation of Taking Facts.

MR. LEAVITT: Yes. So, Your Honor, if you open up Landowners' Presentation of Taking Facts to page no. 18.

THE COURT: Go ahead, sir.

MR. LEAVITT: If you open up to page no. 18, that's where the vote was taken, and this was denied, the singular 35-acre application.

And let me conclude on that fact. Those are important facts. The City denied what was so far inside the lines. The City essentially denied what could not be denied because it met every single legal requirement. It met every single city requirement.

And it was entirely consistent with the R-PD7 zoning. And it was significantly less dense than the R-PD7 zoning allows.

The best way to say it, Judge, the City denied what could not be denied.

Then the City sent a letter to the landowner explaining why. And this fits very closely into our per se regulatory taking claim. It's the next page and it's Exhibit No. 93.

The denial letter says the City denied this because of the impact of the development on surrounding residents. Remember the promise that was made to the landowner? If you don't give us your property for free, we're going to go to the City and make them stop your development.

The City didn't even try and hide what it was doing. They said, listen, we're not going to let you build because the surrounding residents don't want you to. And then they said, we have concerns on piecemeal development of a master development planned area rather than a cohesive plan.

So they said again on the record, we're only going to allow a Master Development Agreement. Two reasons for denial. We don't want to mess up the surrounding property owners, and, number two, you've

got to go back to this, Judge, the Master Development Agreement application.

So after -- this is a timeline, Judge. So after that occurred, after the City denied the singular application, the landowners then turned their attention full-heartedly back to the Master Development Agreement that the City promised would be approved.

And if you turn to page 21 of this booklet here, page 21 is a public records email the landowners received. It's Bates-stamped CLV_002074. Judge, you and I all remember Brad Jerbic. He was the city's attorney, longtime city attorney. He reported that there is resolution on most matters in the entire area.

In other words, what he was saying there, he was making reference to the Master Development Agreement. This is on June 6th, 2017. We have agreement, the City and the landowners. We have agreement on the Master Development Agreement, on the application.

They said, listen, it should be approved. Brad Jerbic said, we've drafted the Master Development Agreement. The City planning department said, we participated in the Master Development Agreement. You need to allow these landowners to build.

Turning to the next page. I mean, Judge, I

couldn't have said it better, Exhibit No. 77. This is from the planning department on the Master Development Agreement. Again, I'll preface this by saying what the planning department is saying here is entirely consistent with your property interest order you entered on October 12, 2020.

The planning commission said about this Master Development Agreement that it conforms to the requirements of NRS 278. It conforms to the existing zoning requirements. It demonstrates sensitivity and compatibility with the adjacent single-family residence.

Then goes on to say that it even is consistent with the goals, objectives, and policies of the Las Vegas Master Plan. So they said, this is consistent not only with zoning, but it's absolutely consistent with the city's master plan. This is the City speaking. This isn't an attorney arguing. These are substantive facts that were given by the City's own agents and representatives.

And then they said, therefore, it should be approved. Again, entirely consistent with your property interest order.

And, Your Honor, the planning staff and the city attorney's office recommended approval of this

Master Development Agreement because it was, again, so far inside the lines, and the landowner agreed to every single outrageous demand that was made at every single step, costing him an extra million dollars in application fees.

Turning to the next page, Your Honor, is Exhibit No. 78. The matter is presented to the city council on August 2nd, 2017. The city council denied the MDA in its entirety.

So, Your Honor, I just got to point this out. The City says, we'll only allow you to develop one way. The City imposes every single outrageous requirement it could impose on the landowner. The landowner does every single thing the City says. The City, for the most part, drafts the Master Development Application. The city attorney's office says, it must be approved. The city planning department recommends approval. And it goes in front of the city council. In Exhibit No. 78, the city council flat out denies it.

It is its own application. The City denied its own application for developing the 35-acre property. And then Exhibit No. 34 is Mr. Lowie's declaration. He says, the City didn't ask us to make more concessions. The City didn't ask us to do more setbacks. The City didn't ask us to reduce the units

per acre. It just simply rejected the MDA all together.

Two and a half years of work, all of the regular application fees, over a million dollars in extra fees, doing every single thing the City asked them to do, the City drafting it, and then they denied it.

Your Honor, that's uncontested. The City doesn't contest that these things happened. The City doesn't say anywhere in the pleadings that there was another application that we gave the landowners to apply for. The City doesn't say in the pleadings that it didn't require these outrageous requirements. Remember Councilwoman Tarkanian said, I've never seen any landowner do this much to try to develop their property, never. She's a well-seasoned councilwoman.

And it was denied.

So just up to this point, Judge, the City said, you have one avenue to go down, the MDA. The landowners went down it. They tried to do a singular application. It was denied. When the City said, you can't do a single application, you have to do an MDA, the landowners moved back to the MDA, and it was denied. The City closed the only doors to development that the landowners had according to the City itself.

Turning to the next tab, Your Honor, the landowners then apply for access. The next tab is Exhibit No. 88. It's a map. And this map identifies in yellow here, Judge, this is Hualapai Way right here. It identifies three access points right here, two on Hualapai way and one on Rampart. And on the right-hand side is the application.

The landowners say, listen, we want access from Hualapai Way to allow our trucks to go in and cut the trees down, remove debris and soil and have testing equipment on our property. You want to know why they were doing that? Because you know what was happening during the time the City wouldn't let them build? They were sending out code enforcement repeatedly to the property and citing the landowner. Fine. Give me access so I can get my trucks on there to clean it up. That's all he wanted to do.

Exhibit No. 88. Turning to the next page, no. 26. This shows why, another reason why, this was so critical. The Nevada Supreme Court in the Schwartz v. State case, said that all Nevada landowners have property right described as a special right of easement in and a public road for access purposes.

You can't tell these people they can't use this because they have a property right. And it's

called a special right of easement. When your property abuts a road, you, in Nevada, have a special right of easement to use that property according to the Nevada Supreme Court in Schwartz v. State.

In interrogatories that were submitted in this case, the City conceded that the 250-acre land had general access along Hualapai Way, along Alta, and along Rampart. They conceded that in interrogatories.

And, Your Honor, an access application is a perfunctory application. I don't know if that's the best way to say it, a boilerplate application. Since you have a legal right to access roads, you simply go give it to the City. The City gets it, they analyze it, and they give it to you back over the counter. You pay your fee. Not what happened here.

The next page is the City's denial letter, Exhibit No. 89. And this denial letter says it all again, Judge. It says, "This has the potential to have significant impact on the surrounding properties," taking us, again, back to where we started. The surrounding property owners contacted the City and said, preserve that property for us. That's Exhibit No. 89.

Now, the government has an excuse here that they try and use. This letter itself, Your Honor, uses

the word, "Your access is denied." Then it goes to the bottom and it says, but you can go through what's called a major review process if you want.

Judge, we've submitted to you the requirements of a major review process. That's what you need to do when you build a Bellagio. That's the major review process. This is an over-the-counter application.

And what the City says, well, we didn't deny you because we gave you an avenue to get your access, which was the major review process, which requires significant plans, planning meetings. You have to go to the planning commission. You have to go to the city council and everybody gets to show up and oppose it.

And they say, that's okay. And we put an example in our brief. That's the equivalent of saying, listen, we haven't denied you the right to vote. We just made you walk or hike 50 miles to vote. And if you don't want to hike 50 miles up a mountain to vote, that's your fault. When you put impermissible barriers in front of a Constitutional right, such as the right to vote or the right to access your property, it is the equivalent of a Constitutional denial.

And to come to this Court and say, we didn't really deny them their access, we just told them they

had to go through the same process the Bellagio has to go through to exercise their access rights, is not an excuse, Your Honor.

Turning to the next page is a fence application. The fence application, Your Honor, I cite, to begin with, from Cedar Point Nursery. It's this one right here. At the top it says, "Fence Application." The reason I cite to Cedar Point Nursery is that's one of the cases we have in our binder. This case was just decided two months ago by the United States Supreme Court.

The United States Supreme Court said, "The right to exclude is one of the most treasured rights of property ownership."

They went on to say, "We've stated that the right to exclude is universally held to be a fundamental element of a property right and is one of the most essential sticks in the bundle of rights that are commonly characterized as property."

So when we're looking at the landowners' property right here, the most essential stick is the right to exclude others and keep them off of your property. Whether it's your home, whether it's your car. And we see that, Your Honor, in the Fourth Amendment, where you can't engage in unreasonable

searches and seizures because we don't want people -- we don't want the government going into our property.

And this is what the United States Supreme Court was saying here. That is one of our most treasured rights is the right to exclude others from property.

And, Your Honor, Exhibit No. 91, is an application the landowners filed. And they asked for two things. They said, we want to put a fence or a gate or barrier, whatever you want to call it, we want to put a fence all around our property. We don't want people using it anymore. At this time, significant people were using it. And I'll get to that in a moment.

So in Exhibit 91, this said, we want to put a fence around this. And, importantly, specifically on the 35-acre property, Your Honor, there was a pond right here. You can see it if you drive by. There's a massive pond. It had water in it. And they said in the application, we want to put a fence around the pond so people don't fall in it and die. And we want to put a fence around the whole property so we can exclude other people.

Same thing happened, Judge, Exhibit No. 92. Well, your fence has the potential to have an impact

on, who, the surrounding property owners. How is the only way this fence --

THE COURT: Fencing with a pond like that could be looked upon as a premises liability issue.

MR. LEAVITT: Judge, that's exactly what happened. Is our client contacted us and said, listen, we've got a liability issue here. We want to fence this pond. What did the government tell them?

THE COURT: We have nuisance laws and things like that. I get that.

MR. LEAVITT: But, importantly, Your Honor, not only did they want to protect other people from falling in the pond and becoming -- well, drowning --

THE COURT: I'd be concerned about young people, you know, children.

MR. LEAVITT: And, Your Honor, we've submitted the affidavit of Don Richards where he has hundreds of pictures showing --

THE COURT: They have ordinances specifically dealing with that when it comes to swimming pools and latching gates.

MR. LEAVITT: And that's what was happening on the property. Young people were entering onto property.

THE COURT: I should say self-latching gates.

MR. LEAVITT: Understood, Your Honor. Young people were entering on the property, kids riding their motorcycles, kids riding their bikes, people walking through the whole property. We submitted the affidavit of Don Richards which has those photos. So we wanted the property to be secure.

But, again, to be able to put a fence around the whole property gives the landowner the right to exclude others. And the City sent a letter: It has the potential to have impact to the surrounding properties.

Judge, how could a fence being put up around your property impact the surrounding property owners? There's only one way. It keeps them off the property. And the City didn't want the landowners to be able to keep the adjoining owners off the property. We have a bill to that effect.

Your Honor, that's Exhibit No. 92 that I was just referring to.

Now, an interesting fact we found, Your Honor, through a public records request. So this fence -- it's an important date. That fence application was denied on August 24th, 2017. The access application was denied on August 24th, 2017.

Judge, let's turn to the next page. This is,

again, a behind-the-scenes email that we obtained through a public records request.

I'll identify it as CLB06391. And this is an email amongst the City personnel three days before the fence application and the access application were denied. The date is August 21st, 2017. Let me read it. "Follow-up with Councilman Seroka regarding the Badlands fence permit that we just went through. Want to take action on Monday after to find out Councilman's conversations went over the weekend regarding the permit."

Why is that important? Because three days before these permits were denied, three days before the City wrote a letter saying, your access is denied, your fence is denied, we have an email showing that red flags were going up at the City. For a fence, for an access, you've got to call a councilman, find out how his conversations went over the weekend.

And, Judge, we know how the conversations went on August 21st, 2017. Because on August 24th, 2017, the fence permit and the access permit were denied. Again, showing specific action by the City of Las Vegas to target this one landowner and treat them differently than anybody else.

Which brings us to Bill No. 2018-24,

Your Honor.

I want to address three things about this bill. It's attached as 107 and 108 to our exhibits. But I want to give a little background first. A city councilwoman, in describing this Bill No. 2018-24, which was adopted in 2018. Judge, this is after the City denied this application. It's after the City denied the MDA.

That councilwoman says, "For the past two years, the City has been embroiled in controversy over Badlands. And this Bill 2018-24 is a latest shot in a salvo against the land developer."

Judge, I had to look up "salvo." Didn't know what it meant.

THE COURT: I know what it means. It's like a broadside. I know what it is. It's a shot across the bow. I know.

MR. LEAVITT: And she said, this is just the latest shot. Then she goes on to admit on the record, this bill is for one development, one development only, it's only about the Badlands. Judge, that's Exhibits 114, 115 and 116.

Stephanie Allen works for Chris Kaempfer. She has been a land use attorney for over 17 years. She stated this in her declaration. She did an

analysis of this bill. This is the only expert report in the record on this bill. It's Exhibits 111, 112 and 110. It's a 365-page expert analysis that concludes, consistent with what the councilwoman said, that this Bill No. 2018-24 targets only the landowners' property.

Judge, a United States Supreme Court Justice, Justice Stevens, in his opinion in the Lucas case said, when the government targets one landowner, it makes, quote, "The taking action" -- sorry -- the taking action, quote, "much more formidable for obvious reasons."

When the government adopts bills and laws and ordinances, we expect the government to adopt those to apply equally to all people, but it was admitted by the councilwoman. And the only expert report on this issue produced states, this bill was adopted with one property owner in mind, and it applied to one property owner, this 250-acre property.

That is unheard of. I have never heard of a government adopting a law to target just one landowner, but that's exactly what happened here, Judge. And it is uncontested. We don't have anything from the City. We don't have an affidavit. We don't have a deposition. We don't have a citation to anything in the record that even contests that the City did this.

The next page, Your Honor, is 34.

Then he goes to the requirements that the City put in its bill. And, Your Honor, this clearly shows that the City was preserving the property under a per se regulatory taking. Why?

Your Honor, this is just a summary of some of the requirements the City put in the bill that apply only to this landowner. And, Your Honor, these requirements are put in the bill before a development application can even be submitted. Do you know any landowner that's going to go through and spend millions of dollars to do these things before they can even submit an application?

Let me point out one of them because this shows the impossibility of developing under Bill No. 2018-24. Remember, Your Honor, the landowners in 2017 submitted the Master Development Agreement and it was denied. Well, the City put in Bill 2018-24 that the only way the landowner could build was through a Master Development Agreement. It had already been denied.

That was a clear shot across the bow to the landowner. We've already denied your development agreement, and we're going to make you get a development agreement that we already denied. Clear

and unequivocal communication to the landowner that no matter what you do, you're not going to build.

Then look at the bottom. This is maybe the most disturbing part of this bill. After requiring all this, then it says, "and anything else the city planning department may determine are necessary."

Judge, how many times have we looked at bills and ordinances that are vague and ambiguous and we call them unconstitutional. That could not be more vague and ambiguous than after listing about 50 things the landowner has to do, and then adding on there, hey, anything else we may make you do.

The next page, Your Honor, is a critical page. It's page no. 36, I believe. Let me make sure, Judge. Page no. 35.

This is Section G of 2018-24. So this bill not only preserves this property and prohibits the landowner from building on it, then it goes so far to say that the landowner, again, the only one that this bill applies to, must provide documentation regarding ongoing public access and to ensure that such access is maintained.

I mean, Judge, have we ever seen a bill like that, where the government says, you've got to let the public go onto your property? You know where we saw

that bill? Was at Cedar Point Nursery, where the state of California said to the farmers, you have to let the labor unions go onto your property.

You want to know the difference between that one and this one? Is the labor unions could only go onto the farms in California 120 days out of the year for a few hours a day and upon notice.

There's no such limitation here. 24/7, anybody who wants to go onto the property, this bill says the landowners have to allow it.

Now, I already know what Mr. Schwartz is going to say. He's going to say, Judge, that's in Section G and we did not enforce Section G against the landowner.

With the Court's permission, I'd like to turn to Exhibit 108 in the exhibit booklet.

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

MR. LEAVITT: Exhibit 108. The very first page of Bill No. 2018-24 says, "Any proposal to repurpose a golf course and build on it is subject to the public engagement requirements set forth in C and D, as well as pertaining to the development review process" -- and carrying over to the next page -- "the development standards and the closure maintenance plan set forth in E and G."

That preamble to that bill says to this one landowner, to whom this whole bill applies, that if you're going to try to use your property, Section G applies to you. And Section G expressly states, you have to allow ongoing public access to your property.

So I'll conclude with these bills, Your Honor. They do three things. Number one, they target only the landowners' property. Number two, they make it impossible to build, in other words, preserve it. And then, number three, they require the landowner to allow ongoing public access.

Your Honor, I want to move to the next tab. I'm actually getting kind of close to being done with the facts here.

The next tab is "Public Use." This is Exhibit No. 136.

A councilman -- one of the city councilmen goes to an HOA meeting for the Queensridge community. And we've laid this out, Judge. I'll just cite one of the quotes. We have several quotes from that meeting. That councilman says, it's agreed upon, approved, documented, required by the City. And then goes on to say that this property here, the landowners' 250-acre property, is open space and recreation area for this part of the City of Las Vegas.

What does "recreation area" mean? It means you can go onto the property and recreate. That's the only thing recreation can mean. Which is consistent with what the City did with Bill No. 2018-24. In 2018-24, Judge, the City said, you, the landowner, have to allow ongoing public access to the property.

And, Judge, to be clear, that Bill 2018-24 went through a recommending committee, and it was presented to the city council, and the city council adopted it as its law.

Then we've submitted Exhibit No. 150, which is Don Richards' affidavit. Don Richards -- I'll just paraphrase here, Your Honor -- Don Richards is the landowners' manager of the property.

Here on page 37, I've summarized or I quote from his declaration, Exhibit No. 150. He says, listen, I'm stopping these people. People are coming on the property and I'm stopping them and asking, listen, why are you here? They said, it's our open space.

And some of them informed him that they learned that from the councilman at the HOA meeting who told them, hey, guys, this is your property to recreate on, which was consistent, again, with Bill No. 2018-24 that the City had adopted.

And if you flip to the next page, Your Honor, here it is. Hundreds of photos like this. Skateboarders, motorcyclists, looks like families out there walking, riding bicycles on the property.

And keep in mind, again, the City won't even allow the landowner to fence it or protect the ponds when this was happening on his property. All authorized by the City of Las Vegas.

Your Honor, I want to turn to the next slide, which is the 133-acre application. And, Judge, I want to be clear here. The 133-acre application is separate from the 35-acre application. I only want to briefly mention this to further demonstrate what the City was doing to the landowner.

The landowner submitted all applications necessary to build on the 133-acre property and the planning staff agreed that it should be approved. That's Exhibits 101, 102, and 103. But the City demanded that the landowner file, on this 133-acre property, an application called a GPA application.

The landowner said, listen, I don't have to file a GPA application, that's called a general plan amendment application, because I have zoning. Your own planning staff tells me I have zoning, which is R-PD7, which means I can use the property for residential

purposes. But they say, you're not going to get any applications done unless you file a GPA.

So he does it. And under protest, submits a letter, Exhibit 182, with that application saying, I'm going to do the GPA, but it's going to be under protest.

Then he shows up at the hearing. And one of the council members, before the applications were even heard, before the landowner could even get up out of his seat and go to the podium, says, Mayor, I'd like to call a question at this time. I believe we've established that the GPA is duplicative and the GPA should not have been accepted, and then uses that as a reason to strike all the applications.

So they made him file a GPA application that he filed under protest, that he didn't think he should have to file, and then they use that application as a reason to strike all of the applications to develop the 133-acre property that the City's own planning staff said should be approved.

Further just demonstrating the aggressive and the systematic actions that the City was engaging in to target this one property.

Judge, those are the facts. But I want to conclude here on the facts with what was happening

behind the scenes. And that's the target facts. I'll go through these quickly, Your Honor.

Page 42. On January 9th, 2018, in the heat of all this, after the City denied all the applications, Exhibit No. 144 is an email where the City identifies $15 million of City funds to purchase the property. They then go on to say, in Exhibit No. 128, again, September 26, 2018, at or about the time Bill 2018-24 was adopted to stop all development. Identified in that email a proposal regarding acquisition and rezoning of green space land, the 250-acre property.

On March 27th, Your Honor, the next one, Exhibit No. 123, just a politically charged statement, Your Honor, an entirely inappropriate statement. Won't even go over it.

Exhibit No. 124, this is February 14th, 2017. This is before the applications are even before the city council. "Over my dead body will the property be developed."

May 1st, 2017, Exhibit 122. "I'm voting against the whole thing."

They don't even know what's before them yet. They don't even have this. No matter what the landowner brought, they said, I'm voting against the

whole thing. And the majority is standing in his path. Those are Exhibits 122 and 126.

Going to the next page, again, behind the scenes. Exhibit No. 122 is an email. Again, we obtained these through a public records search where they say, Speak in code because the landowners will try and find out what we're doing. And we want you to speak in code because if you don't use the word "Badlands," you don't use the word, "take," that's how the search works and they won't be able to find these.

Another councilman tells them not to use the city's email address, Exhibit No. 122.

Exhibit No. 127, Any word on your private investigator about the Badlands guy? They got a private investigator. And they said in 127, Dirt will be handy if I need to get rough.

Judge, I've been recently watching the Muhammad Ali special, PBS. Judge, this wasn't the "Thrilla in Manila." This wasn't the "Rumble in the Jungle." This was a guy going out here who just wanted to use his property that all city agencies said he should be able to do. And they're hiring private investigators to try to get dirt on him so they can get rough with him?

When he went to the City and said, all I want

to do is build on a property that I have the legal right to build, that's what was happening behind the scenes, Judge.

And on the next page, it shows further how the landowners were singled out. Judge, this is Stephanie Allen's declaration on the site. It's Exhibit No. 195. In no. 12 in her declaration. Listen to this evidence. Remember what Justice Stevens said. If a landowner is targeted by the government, that makes the taking action much more formidable.

Stephanie Allen: "I've presented thousands of applications to local agencies, including the City of Las Vegas. I cannot recall an application that I've handled being denied when the development proposal was allowed as a matter of right under the existing zoning."

The City's own planning staff said that was allowed as a matter of right under their zoning. That was the only one in 17 years of thousands of applications that she's had that the City denied, that any government entity denied.

She then goes on to say, "I've presented approximately 10 development agreements before various agencies, including the City of Las Vegas, and I can't recall a development agreement being denied when the

written agreement had been agreed to and negotiated in good faith between the parties."

She's only done 10 of them because they're so extensive. They take two to three years to do. Judge, never had one denied except this one. Clearly showing, again, that the City of Las Vegas was targeting this one landowner.

On the right-hand side of that exhibit is Exhibit No. 94, again referring back to Vickie DeHart, where we started, Judge, where the adjoining property holders told the landowners, we're politically connected and we're going to get the City to stop you from developing. And, Judge, what we just went through showed that happened.

Last email, Exhibit No. 133. June 27th, 2017, interoffice city email that we received through a public records request. "If anyone sees a permit for grading or clear grub at the Badlands Golf Course, please see Kevin, Rod, or me. Quote: 'do not permit without approval from one of these.'"

Again, showing the targeting actions of the City of Las Vegas treating this landowner separate and different from all other landowners.

Judge, we'll end on the facts with this. Just a little graph we put together. These are the

taking actions on the 35-acre property. On the left-hand side is the denial of the Master Development Agreement. On the right-hand side is the denial of the 35-acre. On the left bottom is the denial of a safety fencing and access. And on the right-hand bottom is the adoption of the Yohan Lowie Bill.

You know a council member called Bill No. 2018-24 the "Yohan Lowie Bill", a representative of the landowner, because they knew it only applied to these landowners.

Those four facts, standing alone, amount to a taking. But when you look at the aggregate of actions, when you put all four of those facts together, including all of the other actions that the City engaged in, which are in small print there, Your Honor, that's clearly a taking by the City of Las Vegas.

Judge, what I want to do is I want to close down here. And I want to -- I want to just refer back to the law and how these facts applied under each one of these takings standards we started with.

THE COURT: Madam Court Reporter, are you okay? Do you need a break?

THE COURT REPORTER: Whenever he's done. It's fine.

MR. LEAVITT: I'll be 10 more minutes.

So now I want to apply the facts and go back to the per se regulatory taking. This is the landowners first claim for relief. The very narrow issue here today is where the landowners had the right to use the 35-acre property for residential purposes, did the City engage in actions to preserve the 35-acre property for use by the public?

Your Honor, the facts are as follows. The 35-acre application denial letter expressly said that the City was denying the 35-acre application to develop because of impact to surrounding landowners, that the property was being preserved for them.

The master development denial, Your Honor, for the whole property. The City made it very clear during that process that it was denying the application to preserve that property for the surrounding landowners.

And the access denial letter, Exhibit No. 89. The City put right in the letter that it's denying the access because of impact to surrounding property owners.

Exhibit 92, the fence denial letter. The City said, we're denying this because of impact to surrounding property owners.

Your Honor, if I may refer to Mr. Kaempfer's

affidavit, Exhibit No. 48, and paragraph 12. Again, Mr. Kaempfer is a 40-year land use attorney. And in his declaration he lays out the 17 meetings he had with the City on the Master Development Agreement, all the work he did, everything he did to develop this property.

And in no. 12 he says that the City made it clear that only a Master Development Agreement was going to be approved. And then he said it would not be approved unless all, virtually all, of the surrounding property owners agreed. And then he said the surrounding property owners made it abundantly clear that they were going to stand in the way of development.

And so Mr. Kaempfer made it very clear in his declaration that the Master Development Agreement was denied. Why? To preserve the property for the surrounding landowners.

Bill Nos. 2018-5 and 2018-24 are also relevant to this taking standard because they authorize the public to use the private property. Remember, Judge, if the landowner has the right to build on their property and the government preserves that property for use by the public, or authorizes the public to use the property, that's a taking.

And we just read in Bill No. 2018-24 where the City put it in writing that the landowners have to allow ongoing public access to their property. Those facts right there, Your Honor, meet this per se regulatory taking standard. This is a taking in and of itself. This is one of those invariable rules where the Court is going to always find a taking.

And, Judge, to conclude on that list there, we have the transcript from the HOA meeting where the councilman expressly said, you can go on the property. We have Don Richards' affidavit that people were actually entering onto the property at the direction of the City of Las Vegas.

Just like it was a per se regulatory taking in the Cedar Point Nursery case to adopt a statute that authorizes the labor unions to enter onto farms, adopting Bill No. 2018-24 authorizing the public to enter onto the property was also a taking, in addition to the significant actions to preserve the property for the surrounding property owners.

Judge, I'll be quick on this next one, the per se categorical taking, the third claim for relief. Again, going back to the law. The issue is where the landowners have the right to use their 35-acre property for residential purposes, did the City engage in

actions to completely deprive the landowner of all economic beneficial use of their 35-acre property?

Here's the facts.

The City denied all landowner applications to use the 35-acre property for a residential use, which it is uncontested, is the only economically beneficial use permitted under zoning. That's the only economic beneficial use. The government tries to argue that a golf course is its economic use.

Judge, we have an expert report from Elite Golf. We have an expert report from Tio DiFederico. Both saying the golf course was not an economic use. And we have the letters from the individual at Par 4 who was operating the golf course before, who quit even though they were offered water for free and the land for free because it was uneconomical.

The only economic use of the property is residential, and the City prohibited that economic use.

But that wasn't, apparently, good enough for the City because the City, Judge, sent the tax assessor out. This is such -- so inconsistent. They sent the tax assessor out. The tax assessor, under Chapter NRS 361.227, is required to determine the lawful use of the property, and he does that.

He says, the property is zoned R-PD7. R-PD7

means you have the lawful right to use it for residential. Therefore, I'm going to value it as a residential use, and I'm going to put an $88 million value on the whole property. And you're going to get taxed a million dollars for residential use. That's specific to the 35-acre property, you have to pay $205,227.22. It has a negative value.

Judge, not only has there been a denial of all economic viable use of the property, they're going to put a negative value because the landowner has been prohibited from using it for a residential purpose, all the while the City is taxing the landowner $205,000 as if it was a residential use.

So, Your Honor, that per se categorical taking standard is met. It is a taking in and of itself. And it's that invariable rule.

The last one is a non-regulatory de facto taking, the fourth claim for relief. This one, Your Honor, the issue again: Did the City engage in actions to substantially interfere with the landowners' right to use the 35-acre property for residential purposes?

Number one, the City denied all landowner applications for residential use, its only economic use. And then, Judge, the City adopted two bills, two

bills that targeted the property, prohibited its development, and required ongoing public access.

So, Judge, on that last taking claim, non-regulatory de facto taking, the landowners have just two important facts: The landowners had the legal right to use their property for residential, and the City substantially interfered with that right.

And I want to say something about the Nevada Supreme Court here. The Nevada Supreme Court didn't say, listen, every interference with the use of your property is a taking. They said, you have to show a substantial interference.

Judge, I don't think -- I think under the "reasonable person" standard that we apply in everything in the law, any reasonable person would say what the City did to these landowners was a substantial interference with the use and enjoyment of the property.

What more could the City have possibly done to the landowners than deny all applications as a shield and then pull out a sword and go on the aggressive against the landowner, as one council member called it, a salvo, and adopt a bill to prohibit the development.

I'll close by this, Your Honor. These

landowners are developers. They don't buy land to sit around and have it be vacant. They did every single thing the City asked them to do to develop, under this Court's standard that they had the right under zoning, under City planning's standard that they had the right to develop. They did every single thing they were asked to do, more than any other landowner, Your Honor, and they were denied at every single turn.

And there were bills adopted that only target them. And, Judge, today this property lays vacant. The 35-acre property lays vacant without a shovel of dirt turned since their acquisition on March 2015, over six years ago, Your Honor.

I don't know what better facts there can be than a developer doing everything they can, a well-known developer in this area, and the property being vacant today solely as a result of the government action, Your Honor.

Therefore, we ask that the Court enter a taking on all three of these per se invariable rules. And I'll close by this. We don't even get to Penn Central, Judge. And the reason we don't is because Penn Central doesn't apply in any one of these three.

Your Honor, I can answer any questions you'd

like, if you want me to, on any of these taking facts or the law.

THE COURT: Sir, for the record, I have no questions at this time. We'll take a quick 15-minute recess.

(Whereupon, a recess was taken.)

THE COURT: Everyone may be seated. All right. I guess we can continue with arguments. And we can hear from the City.

MR. SCHWARTZ: Your Honor, with the Court's permission, Mr. Molina will be presenting the facts and then I, Andrew Schwartz, will be presenting the legal argument for the City.

THE COURT: And, sir, that's fine.

Any objection to that?

MR. LEAVITT: No, Your Honor.

THE COURT: All right.

Sir, you have the floor.

MR. MOLINA: Thank you, Your Honor. I hope it's okay -- can I move this television?

THE COURT: Sir, wherever you want to put it, I have no problem with that.

MR. MOLINA: So I'm going to walk you through the evidence. And I want to set the record straight on a number of things that the City takes issue with,

virtually all of the factual claims that the plaintiffs made in this case. And the best way for me to do that is to go in chronological order.

And this may take some time, but I think it's important and necessary to actually walk through the issues in the proper order so that the Court has the right understanding of how things transpired. Because it's very easy to take things out of context and make it seem like there's some kind of evil plot to deny Mr. Lowie the right to build this property.

The basic issue here is he has no right to develop the property unless he follows the proper applications and procedures for obtaining the correct entitlements to carry out the development that he wants. And it's just like you have a Constitutional right to travel, doesn't mean that you have a Constitutional right to drive a car without applying for a driver's license.

So we're going to walk through some history here. We're going to talk about the legislative history between -- behind NRS 278, which is the planning and zoning law. Then I'm going to talk about the history of Las Vegas zoning regulations because I think it's important to understand what happened here with respect to R-PD7 zoning.

And the reason why that's important because it's not --

THE COURT: I do have one question regarding the R-PD7 zoning. Why did they tax it?

MR. MOLINA: So I can answer that in the order or I can answer it now. But --

THE COURT: Whenever you feel it would be appropriate.

MR. MOLINA: What happened is this. So under NRS Chapter 361.8 -- I could be getting the chapter wrong -- the state allows for a reduced assessment for open space and golf course uses. And what happened is that after the 17-acre applications were approved, the golf course had been closed. There were applications that were approved.

And the statute says that when the property has been converted to a higher use, that, all of a sudden, you have to actually pay the back taxes that are owed on the property because you no longer qualify for these reduced tax assessments under Chapter 361.8.

And the county assessor -- after the City approved their initial applications to develop 435 luxury condo units on the 17-acre property, and after the golf course had closed, the county assessor sent Mr. Lowie a letter that said, you know, it's our

understanding that the Badlands Golf Course is closed and, therefore, it's our position that it's been converted to a higher use. Now you must pay back taxes. You no longer qualify for these reduced taxes under this statutory scheme that I've been talking about.

Does that answer your question?

THE COURT: I mean, I do understand that, but then they didn't permit the higher use.

MR. MOLINA: And here's part of the issue, is that the City is not part of the tax assessor's office, despite what Mr. Leavitt claims. The city charter, which was adopted by the Nevada legislature in 1983, states that the county assessor is the ex-officio tax assessor for the city. And so the county assessor is essentially responsible for collecting taxes on all property in the city.

What happened is they sent this notice to Mr. Lowie, a notice of audit or some kind of assessment, higher assessment. And there was a -- he challenged it. And he challenged it before the Board of Equalization. And he argued that the property could still be used as a golf course and, therefore, it has not been converted to a higher use.

And the Board of Equalization did not make a

determination on the arguments. They actually stipulated that it was converted to a higher use. And so Mr. Lowie accepted the assessor's determination even though he could have argued that it was still, you know, could be used as a golf course even though they had shut it down.

But there was another argument that he did not make at all, which is, under the statute, you can also qualify for reduced tax assessments based on an open space master plan designation. And that would have really harmed Mr. Lowie's arguments in this case because if he had conceded that there was a PR-OS open space --

THE COURT: I kind of get that, but his property was actually zoned a specific way, R-PD7. So why should he freely give up that designation?

MR. MOLINA: I'm really glad that you asked that question. And maybe we should just go straight into the exhibit.

THE COURT: Go straight into it, sir.

MR. MOLINA: I think I hear you loud and clear. So I'm actually going to --

Eric, you want to pull up your exhibits.

So I want to walk through how this zoning got applied and how it was -- how it was used. And,

actually, if I could just have five minutes to sort of explain the difference between conventional zoning and planned unit development zoning, I think it's really important to actually go through that so the Court understands that.

THE COURT: Yes, sir, you have the floor.

MR. MOLINA: All right. Thank you.

So I want to walk through some things. I'll move through this very quickly, and I will actually go just straight to the zoning ordinances.

So this is the first comprehensive zoning ordinance in Las Vegas history. And what I just sort of breezed through was the background on how cities in America adopted zoning ordinances in the '20s through enabling legislation that was sponsored by the Department of Commerce. Virtually all 50 states have adopted those enabling acts, the Standard City Planning Act, and that's exactly what NRS 278 is based on.

So what I skipped over here, and I'll come back to it later if we have time, was just showing how the statute that we have is based on these two enabling acts. And the key to these enabling acts is that they all say the same thing, that zoning must be in accordance with the comprehensive plan.

And you'll see this is the first

comprehensive zoning ordinance. And I say "comprehensive" in the sense that it's got full regulations for all different types of zoning. There's 11 different types of zoning districts established by this ordinance. It says it right here at the bottom, "In accordance with a comprehensive plan."

So that is the essential, you know, relationship between zoning and the master plan, is that zoning must be in accordance with the comprehensive plan. And if it's not, then it's considered spot zoning, and that's illegal because that defeats the purpose of zoning.

So you have to plan before you can zone. And if you don't plan, then the zoning is actually ultra vires the enabling act. Because the enabling act says that you must zone in accordance with the comprehensive plan.

So that's the first thing that I wanted to kind of establish here. Because we'll see that over and over, especially with respect to the properties that we're dealing with.

Now, this is Bill McCauley. And, incidentally, he was elected to the city council the year after the first comprehensive zoning ordinance was passed. He was very, very dialed in. He knew how

planning and development worked. And, in fact, when he went to actually start developing his property, Mayor Oran Gragson was one of his partners. And so they both were very civic-minded people, understood how the process worked, and they had a vision; okay.

And I'll tell you where he got this property because it's actually pretty interesting. He was 36 years old when he acquired 3040 acres in Las Vegas. And the way that he did it was under the Taylor Grazing Act. And under the Taylor Grazing Act, you could swap property. He apparently had gathered up all this property with his partners in Elko and swapped it with the federal government for property that's out here.

It's not even on the map. It's off the map. This is a 1954 roadmap. If you were to look very closely at this you'd see it actually says Usely (phonetic), Peccole, et al. He's completely surrounded by federal land except you've got the Hughes site down here, which was the Howard Hughes development. This is just background just showing the evolution of the city's master plan.

In 1962, they adopt another comprehensive ordinance, zoning ordinance. This is still what I would call a traditional sort of conventional zoning ordinance.

And I do want to touch on this briefly because this is sort of critical. This was part of the procedure that they used for rezoning property. And this is going to make a lot of sense when we actually get into how the property was zoned R-PD7. Is that the city wouldn't just amend its zoning map and change a property's zoning just when they approved it. They actually had to see if the development was going to pan out the way that they thought.

So they made people -- well, they approved applications for rezoning. They adopted a resolution of intent. And what that basically meant is that they would commit to rezoning the property upon satisfaction of, you know, all the conditions that were imposed on the approval. And that's just what this says right here.

So getting back to the difference between conventional zoning and planned unit development zoning or flexible zoning. This is conventional zoning. And with conventional, you have what's called a single building lot envelope. You have uniform setback requirements. All of these properties are exactly the same length from the street. They have uniform side yard requirements, and it's very monotonous.

And it's actually a big problem from a larger

planning perspective because it causes urban sprawl and there's all kinds of traffic issues and it's just not actually safe.

So in the '60s, this happened all over the country, is that they said -- that is actually the zoning ordinance that was in effect when those properties were built. And you can see that it's -- there shall be a side yard of no less than 15 feet, you know, a rear yard of not less than 25 feet.

And what would happen is people would just build as much as they could within this framework. Because if you want to sell houses, if you're a developer, you want to make as much money as possible. So you fill up the single building lot envelope. You go as high as you can, you go as wide as you can, and as close to the street, and as far back.

And so every house looks exactly the same. And what people would complain about is that it would be the zoning that would design the building and not the architect.

And, you know, this is what I was just explaining here. Traditional single lot zoning envelope was originally developed to preserve light and air, the length, width, and height of an envelope defined each lot. The reality is the zoning ordinance

designs the building.

Another thing that happened that changed the way that zoning is used is FHA financing. Because the FHA would not finance property with common open space. Because what would happen is -- the only way to do this before homeowners associations is that everybody would be joint tenants in common of the common open space. And so you couldn't get FHA financing for a house in a neighborhood where all the neighbors owned the park in the middle jointly.

So that's another thing that kind of changed the landscape in terms of zoning, is that, you know, after World War II, there was this housing crisis and they needed to come up with this way to build larger, bigger communities. And so they found a way to make financing available for them.

And this is a Law Review article, Pennsylvania Law Review article, by the chief planner of the Federal Housing Administration explaining, you know, the reasons why you have planned unit development zoning.

And I won't go through this, but really the benefit of this is to provide parks and open space. Because the idea is that if you don't have uniform setbacks, you can take a little bit of each parcel and

make it a little bit smaller and then you can put a park in the middle of the community and it would benefit everybody to have this common open space.

And this is an example right here of what's called cluster zoning, where you increase the density on one portion of the site so that you can create open space for everybody in the neighborhood and other areas of the site.

And these articles that I'm citing, this is the 1960s. And this is another example of clustering where you have two dwelling units per gross acre on the top. You have 12 units in each of these. And the density of dwelling units per acre always stays the same regardless of the configuration; right.

So you can have two dwelling units per acre spread out. You can have two dwelling units per acre on a smaller piece and leave some of it undeveloped. Or you can have two dwelling units per acre and put it on this small little plot right here and this provides the most amount of open space.

This is actually good for developers because this allows them to be creative the way that they use site planning. They don't have to lay out utilities in odd configurations. And it's better for the community.

So this is just what happened in the '60s;

right. And this is the first planned unit development ordinance. And this is just, I think, two years before the RPD ordinance. But you can see that the Board of City Commissioners -- they weren't a city council until 1938 -- but the Board of City Commissioners, they adopted this ordinance.

And it says it right here, "The purpose of a planned unit development is to allow maximum flexibility and innovation of residential design and land utilization. It is not intended primarily to be used to reduce the cost of residential development nor is it intended to provide rental units in a single-family district. A planned unit development may consist of single-family units, townhouses, cluster units, condominiums, garden apartments, or any combination thereof."

And so the benefit of this for developers was actually they could sell a different type of product to people of different socioeconomic classes. Where before, you really just had single-family homes where everybody was just trying to fill up the entire lot.

So, you know, that was the theory behind this, is that you can have a mix of different housing types in one development. And the way that this changes zoning is that you're not zoning lot-by-lot.

You're zoning an entire tract of land before it gets subdivided.

That's the key difference here, that you're zoning an entire area, and that entire area includes all the amenities that planned unit development zoning can provide.

So, and just for historical reference here, you have, "Permission to construct shall be applied for and processed in the same manner as a reclassification of property."

So that means you have to basically apply for a rezoning to get a planned unit development.

And it says, "Detailed development plans must be submitted with the application indicating uses of property, delineation of property ownerships, floor plans, and elevations of buildings."

So the downside or, I guess, the challenge of planned unit development is that you have to design the neighborhood before you present it to the city. Which is, it kind of creates the chicken-or-egg problem, where you don't want to spend all these up-front costs on development, but at the same time, you want a better product.

You want to, you know, have all these nice amenities because people will pay for them. People

will pay more money for a lot on a golf course. And so you have to actually design the thing ahead of time and that's just the reality of this.

And that's -- honestly, it's almost a hundred percent of all development occurs this way nowadays, is that you actually have to come up with all your plans ahead of time. It adds to the cost of development, but it produces a much better product.

So this is some city minutes, just for, you know, to see how the city applied that initial PUD ordinance. He's talking about cluster homes. This is -- Don Saylor is the director of planning in 1969, and Oran Gragson is the mayor. And I keep coming back to that. He's talking about everybody in the development will buy a condominium for fee simple and they'll occupy that area in joint tenancy and that's the problem. But you see down here he's actually talking about the FHA financing.

Now, this is the 1972 ordinance. And this is the actual RPD ordinance. And this is Appendix R in the City's appendix of exhibits. It's got virtually the same language as the planning and development ordinance. Says, "The purpose of planning and development is to allow a maximum flexibility for imaginative and innovative residential design and land

utilization in accordance with the general plan."

In accordance with the general plan.

MR. LEAVITT: Your Honor, may I be heard on one short objection?

THE COURT: Yes.

MR. LEAVITT: Your Honor, the property interest issue was fully briefed and fully adjudicated. They argued that extensively, the underlying property interest issue. An order was entered on October 12, 2020. EDCR 2.24 requires that if the City is going to reargue this issue, they have to give me notice of it. They have to file a notice of rehearing. They have 14 days to do that. I was not put on notice that this was going to be reheard. In fact, this PowerPoint --

THE COURT: You're not arguing a property interest, are you, sir?

MR. MOLINA: No.

THE COURT: He's giving me -- I'm not going to tell anybody what to argue or not to argue. But that ship has sailed.

MR. LEAVITT: Totally agree, Your Honor. I only want to lodge my objection that the Court already found that RPD zoning controls the property interest issue. RPD zoning gives the landowner the legal right to use the property for single-family/multi-family

residential uses. And I have not seen this PowerPoint. I don't even have a copy of it. They didn't even give me a copy over here.

And my final objection is this whole thing about a planned unit development was presented to the Nevada Supreme Court. And the Nevada Supreme Court, in a published or issued opinion on this property, said the parcel does not carry the planned development zoning, district zoning designation. It carries the R-PD7 zoning.

That's my objection, Your Honor. As long as we're not revisiting the underlying property interest issue and try to reargue the R-PD7 zoning or reargue an issue that's already been decided, that the landowners have a right to use the property for single-family/multi-family residential uses, then of course I wouldn't try to stop counsel from making those arguments.

And, Your Honor, I'd like a copy of the PowerPoint presentation so we can have it because I have never seen any of this.

MR. MOLINA: We mailed them a copy.

We can email them. This is in our exhibits.

THE COURT: I don't mind telling everyone this. I listen with some interest to this. I don't

mind saying this. I'm from Chicago. And Chicago is known for their open spaces and zoning. In fact, I think Chicago was just named number 1 most beautiful city in the country within the last 30 days or so, I think number 2 in the world.

If you go downtown and you look at all the parks and waterfront and all those wonderful things, I kind of get it. But my thoughts are, and I always tell everyone what I'm thinking about, I mean, I get the historical perspective as far as the zoning and the residential plan development and the like, but here we have a scenario where we had zoning of R-PD7; right, and that's what it was.

And the question is this. It seems to me that based upon the character and nature of the plan that was in effect, that would be in conformance with the real property and the homes and the like in the adjacent area, right there at Queensridge; right?

MR. MOLINA: Right. And that's what I'm trying to explain. We don't dispute that the property is an R-PD7.

THE COURT: I get it.

MR. MOLINA: We dispute what that means.

MR. LEAVITT: Your Honor, if I may object, we've litigated what R-PD7 means.

THE COURT: I've already ruled on that.

MR. LEAVITT: Your Honor, we have not been given notice that they're rearguing an issue under R-PD7.

THE COURT: We're not going to reargue any issue unless I've ruled on an issue. I understand the purpose of today's hearing. I'm going to make a determination before we're done as to whether or not there was a taking.

And if there was a taking, I'm going to go ahead and define what type of taking it would be based upon the different claims for relief. Nothing more, nothing less.

MR. LEAVITT: Thank you, Your Honor.

MR. MOLINA: And, again, I'm trying to put everything in context here.

THE COURT: I'm letting you do it, sir. I know what my charge is today. I got pending motions for summary judgment, countermotions for summary judgment. I'm going to follow the call of the question and issue a decision.

MR. MOLINA: Thank you, Your Honor. So we have another just example of Don Saylor, the planning commissioner at the time, that the 1972 RPD ordinance was enacted, saying that this is a planned unit

development. RPD is a planned unit development. It's intended to protect open space.

And I'll point out one thing about the 1975 general plan because there's been arguments about what it was designated and whether that designation was valid. And, ultimately, you know, the City's position is there can't be a taking when you haven't complied with the procedures to amend the general plan.

And that's what the City requires, is they require a general plan amendment to make sure that the zoning is consistent with the general plan.

THE COURT: Wasn't that issue like that discussed in the Sisolak case?

MR. MOLINA: No, not quite. So in Sisolak, we're talking about physical takings. And I would prefer to just stick to the facts and let Mr. Schwartz argue the law.

THE COURT: The only reason I brought that up is I read Sisolak. And I thought that was one of the issues that was discovered. And maybe it would be -- I think in Sisolak they said you don't have to exhaust your administrative rights.

That's kind of what you're talking about. And that's the reason why I brought that up. Because at the end of the day, I have to make a determination

if the actions of the City rise to the level of taking pursuant to the Fifth Amendment of the United States Constitution, and/or the Nevada State Constitution.

And I do understand that. And I even understand it could be argued, based upon, I think it was the discussion in Sisolak, that the rights set forth in the Nevada Constitution are even stronger than they are in the United States Constitution.

So my point is I kind of get it. I just want to get to --

MR. MOLINA: We're going to get to -- I'm teasing you a little bit. We're going to get to the grand finale. Let me just address the Sisolak thing.

Sisolak is a physical takings case. And under Nevada law, the airspace up to a certain level is considered, you know, part of the fee simple interest.

And the part above that, whatever they -- you know, it's the Federal Aviation, FAA regulations, that define what a safe approach height is. And, essentially, everything below that height is part of your fee simple interest. It's the ad coelum doctrine. You own everything below and everything above. But actually you own it up to that certain height.

THE COURT: I get that. But what about denied access?

MR. MOLINA: Well, denied access is -- I'd like to present all of this in order.

THE COURT: But you brought it up when you talk about a physical taking. That wasn't really what I was focused on. I remember in Sisolak it did discuss that he didn't have an exhaustion of administrative remedies.

MR. MOLINA: Right. But what I was explaining with Sisolak was he didn't have to exhaust his administrative remedies because there was a physical taking. So having a height variance wouldn't actually make any difference because people would still be invading his airspace that he owned. They would physically occupy his property. So that's why you didn't need a variance in Sisolak.

THE COURT: But my question is this. Denying access, is that any different?

MR. MOLINA: Is denying access different than having a physical invasion? I think there is a distinction there, but let me just pose a hypothetical for you.

You've got subdivisions all over the city where there's people with fences --

THE COURT: I don't mind saying this. It seems to me it could be argued if you're denying

someone access to their property, that's akin to a physical taking.

MR. MOLINA: No. And --

THE COURT: If I go to your house -- no. No. Listen to me. I don't know where you live. Doesn't matter. If I go to your house and I put up a fence around your house and I deny you access, what is that?

MR. MOLINA: The City did not put a fence around his house.

THE COURT: No. No. I'm just asking you a question. And my question was this. Denying access. You said it was not a physical taking. My question is this. Well, why not?

MR. MOLINA: Because he had the same access that he had when he bought the property. So --

THE COURT: He didn't have the same access; right?

MR. MOLINA: The property is the same, exactly as it was when he bought it.

THE COURT: But he didn't have access to do what he wanted to do; right?

MR. MOLINA: But there's a process for opening up a street into a public thoroughfare. And what I was saying is that if everybody who had a backyard that fronts a street was just able to knock

down the wall and put a new road in, it would just be chaos.

And that's why there's a process for doing that. And I will address all of that, but I want to go in order so we can understand the issues in context.

THE COURT: I'm trying to figure out why the City would deny a property owner a request to place fencing around a pond. To me, that's kind of a really big deal. And it could be done in such a way where it could be, I would anticipate, aesthetically pleasing to the community.

There's a lot of ways that could be done. And the only reason I bring that up, I was a tort lawyer and I understand premises liability and potential liability issues. I get that.

MR. SCHWARTZ: Your Honor --

THE COURT: Go ahead. If you want to jump in, sir, I have no problem with that.

MR. SCHWARTZ: That is a legal issue, Your Honor, and I was going to address that. And I believe I can answer the Court's questions.

THE COURT: Take a note. Write that down. You can answer that for me. I won't ask him that again, sir.

MR. SCHWARTZ: Thank you, Your Honor.