

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 22

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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 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 22** was filed electronically with the Nevada Supreme Court on the 18th day of March, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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1 MR. MOLINA: I will tell you this, because
2 I'm talking just about the facts; right, is that when
3 they submitted a request for fencing, they wanted to do
4 a chain link fence. And the city code very clearly
5 says that you have to actually comply with the site
6 development review standards for fencing for your
7 community.

8 You can't just put up a fence that's not the
9 same. So they asked them to submit an application for
10 fencing that's not just chain link fence, and they just
11 never followed through.

12 THE COURT: Okay.

13 MR. MOLINA: That's it. This is all in
14 Peter Lowenstein's declaration. It's attached to our
15 exhibits. He goes through all of the fencing and
16 access issues. He explains why they requested that
17 Mr. Lowie actually apply through this procedure for
18 fencing and access, and then he just never did.

19 And that's the theme of all of this, is that
20 the City has rules and procedures for how you're
21 supposed to apply for things. And Mr. Lowie and his
22 land use counsel, Chris Kaempfer and Stephanie Allen,
23 had a different feeling about it. They didn't think he
24 needed to do different things. There's specific issues
25 on each property.

1 With respect to the 35-acre property, you
2 actually had -- they had a general plan amendment
3 application, but it was on 166 acres, not just the
4 35 acres. And so they didn't have applications in the
5 pipeline for the remaining 130 acres of that. They had
6 just the stand-alone GPA.

7 And the density that was requested was up to
8 5.49 units per acre. And the City said, well, we're
9 not going to approve a general plan on 166 acres when
10 you're only applying for site development review and
11 tentative map applications on 35 acres, unless we see
12 what you're going to do with the other 133 acres.

13 And why are you applying for entitlements
14 that are in excess of the density that you said you
15 were going to build and that we were negotiating in the
16 development agreement?

17 And so that was the real issue there, was he
18 didn't want to submit a GPA just for that property.
19 And he wouldn't, you know, make the density consistent
20 with what they were negotiating in the development
21 agreement, as he said he was going to do.

22 So there's all of these little --

23 THE COURT: Was there any problem with the
24 R-PD7?

25 MR. MOLINA: Let's get back to that. Okay.

1 So if you notice here in the City's general plan, they
2 talk about density categories and they talk about three
3 types of RPDs. And we're dealing just with residential
4 planing development. And in an ARPD you can have
5 50 percent high-density housing. In a BRPD, you can
6 have 10 percent medium density.

7 And so these are the mix of land uses that
8 you can put into a residential planning district is
9 what they use RPD for. But it's pretty confusing
10 because it's very similar to residential planning
11 development.

12 So this is the table in the 1975 general
13 plan. And the reason why this is relevant is because
14 McCauley, William McCauley, ends up submitting an
15 application for rezoning the master plan in 1981. And
16 this is the general plan that's in effect when he does
17 that.

18 And this is a little bit more of the tables
19 that are in the 1975 general plan. All of this is
20 attached to our appendix. It's attached to the current
21 community development director's declaration. And this
22 is just really to give you an understanding of how the
23 City looked at things from a planning perspective.

24 Because there was no zoning tool for a master
25 planned community in the 1980s. They hadn't really

1 gotten that far. And so they had to use the toolbox
2 that they had to create a master planned community.
3 And this is, essentially, part of the tools that they
4 had, was looking at the different densities, how much
5 high-density housing can you have within a given square
6 mile, what's the population capacity that you can have
7 in that given square mile. And what are the other
8 supporting uses, like parks, recreation, facilities,
9 open space, neighborhood service centers that would
10 reduce the amount of land that you would need to have
11 or could have for a high density or low density
12 housing.

13 So this is sort of the framework that the
14 City used to make zoning decisions in the 1980s when
15 William McCauley came to the City.

16 And this is just the parks and recreation
17 element. This is really just a policy. It's not a
18 specific regulation. But there are aspects of the
19 City's general plan that are, you know, sort of
20 aspirational policies. And then there are aspects of
21 the City's general plan that are actually regulatory in
22 nature. And, specifically, what I'm referring to is
23 the land use plan.

24 And then the 1975 general plan ended with
25 this idea that they recognized it's very hard to plan

1 out an entire city all at once, but you could
2 potentially come up with a better plan if you focused
3 on special areas, smaller areas, geographically, and
4 just kind of identified what was in those areas, you
5 know, breaking things up into sort of logical kind of
6 units.

7 And so what they said here is that, you know,
8 in the next 10 years, before you got the next general
9 plan, we are going to come up with a more precise
10 planning process. And, in fact, they did in 1980.

11 And this is the letter that William McCauley
12 wrote. This is Exhibit A in our appendix. And
13 William McCauley asked the mayor, he says, we want to
14 annex our 2,200 acres into the City of Las Vegas and
15 with the cooperation of the City of Las Vegas we would
16 like to go forward with the master plan of the entire
17 parcel.

18 So he wants to master plan the entire parcel
19 and the question is how does he do it?

20 So now we'll actually pull the actual
21 exhibits up. I will let my paralegal take over the
22 screen here.

23 This is the 2,200 acres that McCauley annexed
24 into the City of Las Vegas. And this is the property
25 that was in the plat, all Section 5, all Section 6 --

1 he actually gave this to his brother -- and the south
2 three-quarters of Sections 31 and 32.

3 And if you look at this area over here, this
4 is the boundaries of the -- actually, this is 1989.
5 This is his land in 1981 right after he annexes it.
6 Those are the boundaries. That lines up.

7 Now, if you go to the next page in Exhibit A,
8 this is the discussion about the annexation. And in
9 the middle paragraph, you know, McCauley is talking
10 about annexing it and being a part of Las Vegas and
11 planning the property with the City.

12 And they're all excited about this because
13 this is the largest annexation in City history.
14 They've never done this before. And the only, you
15 know, largest annexation after that was the Suma
16 Corporation, which was the Hughes site, the Howard
17 Hughes property.

18 So let's go to Exhibit B.

19 And I want to kind of show the pattern here
20 of how the City applied these zoning tools that were
21 available to them at the time. The first thing that
22 they did, after McCauley annexed his property, was they
23 adopted the general plan. They amended the general
24 plan. You have to zone in accordance with the
25 comprehensive plan so they amended their general plan

1 and they extended the suburban development west and
2 that will be relevant later on because it will tell us
3 sort of what the density is.

4 Now, on the next page, Item 14.

5 Then they adopted a generalized land use
6 plan. So they extend what the City called suburban.
7 They moved it west because there was nothing out there
8 at the time. And then they adopted this plan. So
9 first you adopt the general plan. And then they did
10 this basically like a specific plan that they kind of
11 thought was possible during the 1975, when they came up
12 with the 1975 general plan.

13 And McCauley says, we want to zone the entire
14 property in accordance with this plan. So that tells
15 you right there that he's asking for planned unit
16 development zoning. I want to zone the entire parcel
17 of land. I want to get all of this property zoned all
18 at once.

19 How is the City going to do that unless you
20 tell them what your plans look like. This is the
21 difference between single-lot zoning and zoning of
22 large subdivisions.

23 And if we go to page 4. This is the city
24 council or the city commission. Still a couple years
25 before they came city council. And you'll see the way

1 they have these agenda items on there. The general
2 plan amendment first, and then the generalized land use
3 plan. So the planning commission approved the
4 generalized land use plan amendment and then the City
5 approved it.

6 Let's go to 6. These are, essentially, the
7 staff reports, very early version of this. And it,
8 basically, explains, you know, why do we do this.
9 Well, there was no land use plan when the property was
10 annexed into the city.

11 The next item says, "McCauley intends to
12 start development on this property as soon as possible
13 and wishes to have it rezoned from end use, non-urban,
14 to various residential densities and for commercial use
15 in the immediate future. A separate generalized land
16 use plan would provide a guide for the zone change that
17 will be requested on the entire parcel as soon as the
18 general plan is amended."

19 So you have to plan before you zone.
20 Otherwise, you're not zoning in accordance with the
21 comprehensive plan and you're exceeding the enabling
22 acts, delegation of the police power, from the state to
23 the city.

24 Let's go to page 7.

25 So this is the general plan amendment. And

1 if you can see, this is very rudimentary. It's not
2 really sophisticated at all. But these are the general
3 plan, sort of, categories, that existed in 1981. They
4 just said, we're going to do suburban here. We're
5 going to do urban here. We're going to do rural over
6 here. That's all they did with this is they moved the
7 suburban west.

8 This is the generalized land use plan that
9 the City approved. And you have to plan where the
10 streets are. You have to tell us what the densities
11 are going to be. You have to tell us where you're
12 going to put commercial, all these things. He's got
13 schools, neighborhood parks, things like that. There's
14 a reservoir. So this is a very early plan.

15 And then -- go ahead.

16 This is the area that was zoned. That's it.

17 So now he's gotten the general plan
18 amendment. He's gotten his generalized land use plan.
19 Now he has to actually come and have the property
20 zoned. And that's what happens. He files Z3481. The
21 way that the City used to do this is the last two
22 digits of this were the year when it was filed and the
23 first two digits were the number of the application
24 when it was filed.

25 And I want to address what zoning was for the

1 Badlands property in 1981 because it wasn't R-PD7.

2 But let's just go to the next.

3 This is Z3481. This is just the zoning
4 application. They approved it. This is minutes on,
5 you know, what the basis was for this. You've got
6 Larry Miller, who is William McCauley's son-in-law, who
7 is there explaining that they're going to reduce the
8 density, and in favor and on behalf of property owners.
9 The zoning is at its maximum density. But there is a
10 possibility that it will be lowered as the property is
11 being built. This will be called Venetian Foothills.

12 Put up Exhibit 165.

13 So the zoning map that was in that Z3481 case
14 law it's illegible; you can't read it. But one of the
15 conditions of approval that they put on McCauley is
16 they said, you have to tell everybody where everything
17 is going. You have to put up signs that are showing
18 what areas are actually being zoned.

19 And he came back to the City and he says, I
20 don't actually want to put up these signs because
21 people just keep vandalizing them.

22 So what he did was he proposed that instead
23 of putting up signs, he would have homeowners
24 acknowledge what the zoning was. And if you go to 85
25 of this exhibit, and you zoom in on the left side, you

1 can see it's actually R-PD8. It's not R-PD7. That
2 didn't come until much later. It was R-PD8.

3 So the City approves this under a resolution
4 of intent. Remember they don't actually rezone
5 everything until the development is actually done. And
6 this never really got built out. It never really even
7 got started on this. So there was no R-PD7 zoning at
8 this point in time.

9 Let's go to Exhibit QQQQ2.

10 This is again talking about residential
11 planning districts. They're thinking about the city in
12 square miles. They're not thinking about it in terms
13 of individual parcels. And they're talking about what
14 we were just saying, there's the urban, suburban, and
15 rural. They break it down. What's the purpose of
16 these different things?

17 Go to the next page.

18 And then they talk about, okay, well, what's
19 the mix of density that you can have in an urban
20 neighborhood. You can have 50 percent high density.
21 You can have 25 percent medium density. You can have
22 25 percent medium low. And so that was sort of the
23 idea here.

24 Let's zoom in on the top paragraph that's
25 highlighted.

1 If one of the density categories is exceeded
2 in any particular residential planning district, the
3 difference must be made up from other density
4 categories in order to maintain the same overall
5 character and density pattern within the residential
6 planning district.

7 So we're zoning for density. We're not
8 zoning for particular locations of structures. We're
9 zoning for density. And that's the idea. So if you
10 put -- if you want to put high-density housing on one
11 part of your property, you've got to reduce the density
12 somewhere else.

13 Go to the last paragraph on that page.

14 So the other thing here is they come up with
15 this community profile system. This is consistent with
16 what they wanted to do under the 1975 general plan.
17 They wanted to basically have specific plans for
18 different communities.

19 And later on, in 1992, when they adopt the
20 general plan that designates the Badlands Golf Course
21 PR-OS, all they do is they take these community profile
22 maps and they mush them together in one bigger map. So
23 that's sort of what this is.

24 Let's go to QQQQ4.

25 So there's supposed to be these community

1 profiles that were adopted at the same time as the 1985
2 general plan. The homeowners association or the
3 Homebuilders Association of Southern Nevada was kind of
4 against it so they wanted some more time. But these
5 are the community profile records that were in the
6 minutes when they were adopted. We don't know exactly
7 what got adopted. There's no records.

8 But if you go to page 116.

9 So this is community profile 13. This is
10 where McCauley's property is. It says it right here.
11 It says, most of the area between Sahara Avenue and
12 Angel Park has been master planned and is known as "The
13 McCauley Property."

14 And go to the next page.

15 And there it is. And this is exactly what
16 that McCauley land use plan that the City approved in
17 1981 looked like. So they just took that and they put
18 it into this community profile map, and they said, this
19 is our general plan now; okay.

20 So in 1986 -- go to Exhibit C -- McCauley
21 goes back to the City. And he says, I have a new plan.
22 And I want to do this different layout. Looks
23 completely different. I want two golf courses. And
24 I'm going to reduce the overall size of the master plan
25 because I had a falling out with Canyon Gate, the guy

1 who owns Canyon Gate. There was issues with that.

2 The key thing to note here, though, is when
3 you look at the land use tables, you have zoning by
4 density. And they talk about what are the land uses.
5 So custom, single family, single-family homes, patio
6 homes, single family.

7 Then you get all the way down to
8 open space/golf course. You see the zoning it's RPD.
9 It's RPD because it's part of that residential planning
10 district. You're zoning that entire parcel. And that
11 golf course is going to be part of the community. Open
12 space is going to be part of the community.

13 So it doesn't have a density on it. It
14 doesn't have any number of units. But we have acres
15 and we have RPD zoning for open space and golf course.
16 And it's the same thing down here. If you look at the
17 future phases, so this master plan came with the
18 rezoning application for phase one.

19 But if you look at the future phases, you've
20 got open space and golf course down here, 200 acres, no
21 density. There's no residential density next to that
22 piece.

23 So let's go into the -- this is the
24 narrative; right? And he explains it. He says -- this
25 is Wayne Smith, his planner, his company did planning

1 for most of McCauley Ranch. He says this master plan
2 approval includes circulation, land use, overall
3 density. The zoning approvals requested are RPD for
4 residential uses and densities ranging from 2.2 to 22
5 dwelling units per acre. C1 for the commercial sites,
6 PR for the office sites.

7 Then he says the zoning for a resort, tennis
8 club, casitas, and golf course is also desired under an
9 RPD designation. The RPD category is requested at the
10 direction of the planning staff, as it allows the
11 developer flexibility and the City design control.

12 So everybody knew that the golf course was
13 going to be zoned RPD. That was just -- that's how
14 everybody understood and interpreted and applied the
15 RPD zoning at this time.

16 Let's go on to page 6.

17 It says, "The focal point of Venetian
18 Foothills is the 18-hole golf course and clubhouse,
19 which is centrally located and easily viewed throughout
20 the development. The golf course open space system
21 provides open space buffers between differing land uses
22 and will create a pleasant and attractive environment.
23 On-site retention is maintained by the golf course
24 open-space system" -- he's talking about water --
25 "utilizing the existing washes throughout the golf

1 course directs the flow of water that historically
2 flows from the foothills to Angel Park."

3 And then -- let's go to the next page.

4 These are the land use tables. Again, you've
5 got types of land uses, types of zoning. So custom,
6 single-family, RPD. How many units per acre, 2.5.
7 You've got single-family, RPD, 7 dwelling units per
8 acre. Down below you've got open space/golf course,
9 198. And this one doesn't actually say it, but go to
10 the next page. Doesn't have the zoning.

11 Open space/golf course. We know that they
12 included this because it was on the master plan. They
13 included that within the RPD designation. It said it
14 on the beginning of the page. So you've got 200 acres
15 of open space and golf course that's zoned RPD with
16 zero residential density.

17 Go to the next page.

18 And this is just the summary of the whole
19 place. So he was originally contemplating doing two
20 golf courses. He wanted 400 acres of open space. They
21 didn't end up developing that much, but that was sort
22 of the intent.

23 Let's keep going.

24 He presents the master plan to the planning
25 commission. The planning commission approves the

1 master plan. And they put all these conditions in
2 there, things that you would expect a master developer
3 to do. Construction of flood controls, and, you know,
4 changing the streets, things like that.

5 And then after they approved the master plan,
6 then they file a zoning application. And this is the
7 same thing that they did in 1981. They filed a master
8 plan or a land use plan, and then they filed a zoning
9 application, because you have to zone in accordance
10 with a comprehensive plan.

11 And this just tells you what they are. And
12 if you note the conditions of approval, there's a
13 resolution of intent. And remember, in 1981, there was
14 a resolution of intent to rezone the property. This
15 changed the zoning and the resolution of intent and it
16 expunged all previous resolutions of intent.

17 And then the other condition of approval was
18 that you have to conform to the master development
19 plan.

20 THE COURT: Sir, I think this is a good time
21 to break, don't you?

22 MR. MOLINA: Yeah. Absolutely.

23 THE COURT: We're going to break right now.
24 It's 4:45. We'll break for the evening. Tomorrow
25 morning we'll reconvene at 9:30. How is that? And

1 we'll have all day tomorrow if necessary.

2 MR. SCHWARTZ: Thank you, Your Honor.

3 THE COURT: Everyone enjoy your evening.

4 (Proceedings adjourned at 4:46 p.m.)

5 -o0o-

6 ATTEST: FULL, TRUE, AND ACCURATE TRANSCRIPT OF
7 PROCEEDINGS.

8 
9 /S/ Kimberly A. Farkas, RPR, CRR

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\$			2
\$1 31:6 37:8,11 \$1,450,000 16:20 \$15 67:6 \$2 37:14 \$205,000 76:12 \$205,227.22 76:7 \$88 76:3	120 13:23 62:6 122 67:21 68:2,4,12 1221 10:18 11:2,11 12:2,17 123 67:14 124 67:17 126 68:2 127 68:13,15 128 67:8 12th 6:10 7:3 25:7 13 24:15,16 115:9 130 104:5 133 70:15 104:12 133-acre 65:10,11, 16,19 66:19 136 63:16 14 27:3 32:25 33:2 94:13 109:4 142 32:4 144 67:5 14th 67:17 15 12:6 42:2 88:8 15-minute 79:4 150 64:11,16 1599 11:11 16 2:3 11:9 35:15 42:24 165 112:12 166 104:3,9 17 58:24 69:19 73:3 17-acre 81:13,23	18 44:2,16,18 180 2:8,14 32:1,18 33:13 1800s 22:3 182 66:4 19 41:19 1938 91:5 195 69:7 1954 86:15 1960s 90:10 1962 86:22 1969 93:12 1972 93:19 97:24 1975 98:3 105:12, 19 106:24 109:11, 12 114:16 1977 17:22 18:3,11, 25 1980 107:10 1980s 105:25 106:14 1981 105:15 108:5 111:3 112:1 115:17 1983 82:13 1985 115:1 1986 115:20 1988 17:23 1989 108:4 1992 114:19 1:30 2:7 1st 67:21	2 30:9 96:5 2,200 107:14,23 2.24 94:10 2.5-acre 38:16 2008 23:13 2015 18:20,22 27:9 30:3 78:12 2017 43:1 46:16 48:8 56:23,24 57:6, 20,21 60:17 67:17, 21 70:16 2018 58:6 67:3,8 2018-24 57:25 58:5,11 59:5 60:16, 18 61:16 62:19 64:4,5,7,24 67:9 71:8 73:19 74:1,17 2018-5 73:19 2020 6:10 7:3 25:7 47:6 94:10 2021 13:5 20s 84:14 21 46:8,9 21st 43:1 57:6,20 24/7 62:8 24th 56:23,24 57:20 25 36:20 37:18 88:9 113:21,22 250 33:12 250-acre 30:6,11 31:4 38:8 51:6
1			
1 33:24 96:3 1.7 40:9,12 10 17:16 31:12,14 69:23 70:3 71:25 105:6 107:8 101 65:18 102 65:18 103 65:18 107 58:3 108 58:3 62:16,18 109 36:23 11 85:4 110 59:3 111 59:2 112 59:2 114 58:22 115 58:22 116 58:22 115:8 12 47:6 69:7 73:1,7 90:12 94:9			

59:18 63:23 67:12		70 38:16	accepted 66:13
26 50:19 67:8	4	700 35:15	83:3
278 47:9 80:21	4 75:13 109:23	74 41:7,19,23 42:24	access 38:16 50:2,
84:18	40-year 34:10 73:2	44:4	5,8,16,23 51:7,9,12
27th 67:13 70:15	41 18:4,5	77 47:1	52:1,10,22,25 53:2
2nd 48:8	42 36:23 67:3	78 48:7,19	56:24 57:5,14,17,
	435 81:23		21 61:21 63:5,11
3	44 30:14	8	64:6 71:5 72:18,20
	48 34:12 73:1		74:3 77:2 99:25
3.5 40:16	5	8 27:17	100:1,17,18 101:1,
30 96:4		85 112:24	7,11,14,16,20
3040 86:8		88 50:3,18	103:16,18
31 108:2	5 107:25	89 51:17,23 72:18	accordance 84:24
32 108:2	5.49 104:8		85:6,9,16 94:1,2
33 42:5	50 52:18,19 61:10	9	108:24 109:14
34 34:3 36:18 48:22	84:16 105:5 113:20		110:20
60:1	53 36:11	91 54:7,15	acknowledge
35 25:4 30:18 32:15	54 34:18 35:21	92 54:24 56:18	112:24
39:18 40:7 43:7	55 37:21	72:22	acquire 32:25 33:4
61:15 104:4,11	58 35:13	93 45:9	acquired 30:2,4,6,
35-acre 7:11 25:1,	59 35:13	94 31:20 70:9	14,24 86:8
2,15,18 26:4 30:23		9th 67:3	acquisition 29:23,
34:5,8,16 35:4 36:3	6	A	24 67:11 78:12
39:11,12,23 40:18,			acre 40:8,9,10,12,
20 42:2 43:16	6 107:25 110:6	absolute 25:8	17 49:1 90:11,13,
44:20 48:21 54:17	60s 88:4 90:25	absolutely 12:19	15,16,18 104:8
65:12 71:1,4 72:5,	61 40:8	17:3 19:22 21:20	acres 25:4 30:18
6,9,10 74:24 75:2,5	675 11:24	22:2,12,18 23:20	32:1,18 33:12,14
76:6,21 78:11	6th 46:16	30:21 43:24 47:16	38:16 39:18 40:7
104:1	7	abundantly 34:13	43:7 86:8 104:3,4,
36 61:14 86:8		73:12	5,9,11,12 107:14,
361.227 75:23	7 40:10 110:24	abuts 51:2	23
361.8 81:10,20		accept 34:4	act 22:10 84:18
365-page 59:3			85:15 86:10
37 64:15			action 10:9,23
			11:2,5,24 14:14
			23:25 27:16,23
			32:4 57:9,22 59:9,
			10 69:10 78:18

actions 7:10,19 10:2 11:3 12:23 14:22,23 15:12,16 16:24 17:5 19:7 21:17 25:2,17,23 26:2,9,25 27:4,11, 25 28:1,6 31:18 33:9,16,23 66:22 70:21 71:1,12,14 72:6 74:19 75:1 76:20 99:1 acts 84:17,22 110:22 actual 93:20 107:20 ad 99:21 adding 61:11 addition 74:18 additional 37:8 address 4:5 7:15 20:16 58:2 68:12 99:13 102:4,20 111:25 adds 93:7 adjacent 47:11 96:18 adjoining 32:6 33:13 56:16 70:10 adjudicated 94:7 Administration 89:19 administrative 98:22 100:6,10 admit 58:19 admitted 59:14 adopt 22:22 59:13	74:15 77:23 86:22 109:9 114:19 adopted 10:18 13:4,21 15:7,8,9 17:21 18:11 19:12 58:6 59:16 64:10, 25 67:9 76:25 78:9 82:13 84:14,17 87:11 91:6 108:23 109:5,8 115:1,6,7 adopting 59:20 74:17 adoption 11:1 71:6 adopts 10:9 22:19, 21 59:12 adverse 29:2 aesthetically 102:10 affect 27:11 affidavit 31:20,21 55:17 56:4 59:23 64:12 73:1 74:11 affidavits 35:4 afternoon 2:7,12, 15,17,22,25 3:2 agencies 41:1 68:21 69:12,24 agency 19:12 agenda 110:1 agents 47:20 aggregate 27:22 28:2,6 71:12 aggressive 66:21 77:22 agree 36:14 94:21	agreed 48:2 63:21 65:17 70:1 73:11 agreement 34:1,9, 15,20 35:10,24 37:24 39:7,13,16 43:6,14,18,19 45:23 46:2,6,16,17, 18,22,23 47:3,8 48:1 60:17,20,24, 25 69:25 70:1 71:3 73:4,8,16 104:16, 21 agreements 69:23 ahead 2:9 3:15 4:10 29:14 44:17 93:2,7 97:11 102:17 111:15 air 88:24 Airlines 22:5 airplanes 10:25 airport 9:25 12:4, 8,11 airspace 10:19,20, 22,25 12:5,19 99:15 100:13 akin 101:1 Ali 68:18 Allen 34:18 58:23 69:11 103:22 Allen's 69:6 allowed 13:22 41:9 69:15,18 Alta 51:7 ambiguous 61:8, 10 amend 87:6 98:8	amended 23:13 108:23,25 110:18 amendment 23:19 53:25 65:23 98:10 99:2 104:2 110:2,4, 25 111:18 amenities 92:5,25 America 84:14 amount 16:19 71:11 90:20 106:10 analysis 13:12,18 26:14,22,23 59:1,3 analyze 28:18 51:13 analyzed 28:2 and/or 21:18 99:3 Andrew 2:21 79:12 Angel 115:12 annex 107:14 annexation 108:8, 13,15 annexed 107:23 108:22 110:10 annexes 108:5 annexing 108:10 answers 26:11 anticipate 102:10 anymore 20:24 54:12 apartments 91:15 apparently 75:19 86:11 Appeals 19:14,16,
---	--	--	---

20,21 20:1 appearances 2:10 3:5 appeared 6:14 appears 3:5 44:12 appendix 93:20,21 105:20 107:12 applicable 8:17 11:9 13:11 application 34:4, 25 36:1,15 37:9 39:11 42:3 43:20, 21 44:6,20 46:2,5, 19 48:5,15,20,21 49:4,11,21,22 50:7 51:9,10,11 52:8 53:5,8 54:8,20 56:23,24 57:5 58:7 60:10,13 65:10,11, 12,20,22,23 66:4, 15,17 69:13 72:9, 10,15 92:14 103:9 104:3 105:15 111:23 112:4 applications 20:21 40:22 41:1 65:15 66:2,8,14,18 67:5, 18 69:12,20 75:4 76:24 77:20 80:13 81:13,14,22 87:11 104:4,11 applied 59:17 71:9, 19 83:25 92:8 93:10 108:20 applies 9:16 17:10 61:20 63:2,4 apply 22:25 23:1 26:19,21,23 49:12 50:2 59:14 60:7	72:1 77:14 78:23 92:11 103:17,21 applying 80:17 104:10,13 approach 4:15 99:19 approached 33:19, 20 37:13 42:4 appropriated 11:11 appropriation 24:10 approval 41:24,25 42:25 47:25 48:17 70:20 87:15 112:15 approve 39:6 104:9 approved 23:24 40:1,11 42:13 46:7, 20 47:22 48:16 63:21 65:17 66:20 73:9,10 81:13,15, 22 87:7,10 110:3,5 111:9 112:4 115:16 approves 113:3 approximately 69:23 architect 88:20 area 36:23,25 37:2 38:7 45:20 46:13 63:24 64:1 78:16 92:4 93:16 96:18 108:3 111:16 115:11 areas 90:7 107:3,4 112:18 argue 75:8 94:19	98:17 argued 19:20 82:22 83:4 94:8 99:5 100:25 arguing 47:18 94:15 argument 4:11 5:2 6:16,18 17:10 19:14,23 20:23 21:3 22:12,25 23:9 29:18 79:13 83:7 arguments 4:25 79:8 83:1,11 95:18 98:4 ARPD 105:4 article 22:20 89:17, 18 articles 90:9 aspects 106:18,20 aspirational 106:20 assessment 81:11 82:20 assessments 81:20 83:9 assessor 75:20,22 81:21,24 82:14,15 assessor's 82:11 83:3 assistance 40:23 association 115:2, 3 associations 89:6 attached 28:10 58:3 103:14 105:20	attention 46:5 attorney 34:10 46:12 47:18 58:24 73:2 attorney's 47:25 48:16 audit 82:19 August 48:8 56:23, 24 57:6,20 authority 18:24 20:6 22:21 23:18 24:17 authorize 10:3 14:15,23 25:3 73:20 authorized 10:21 11:16 14:8 65:8 authorizes 11:5 12:24 13:8 73:24 74:16 authorizing 10:10 74:17 automatically 9:9 10:7 17:2 Autumn 2:16 avenue 36:16 49:19 52:10 115:11 average 40:8 Aviation 99:18 awarded 11:25 16:19 aware 30:13 <hr/> B <hr/> back 38:20 43:19
---	--	--	---

46:1,6 49:23 51:14, 20 70:9 71:18 72:1 74:23 81:18 82:3 84:20 87:17 88:16 93:13 104:25 112:19 115:21	behalf 2:13,16,18 4:12 112:8 behind-the-scenes 57:1 Bellagio 52:6 53:1 beneficial 15:13,17 16:25 25:18 75:2,6, 8 benefit 89:23 90:3 91:17 bicycles 65:4 big 87:25 102:9 bigger 89:15 114:22 bikes 56:3 bill 56:17 57:25 58:3,5,11,20 59:1, 2,5,16 60:3,7,9,16, 18 61:4,16,20,23 62:1,9,19 63:1,2 64:4,7,24 67:9 71:6,7,8 73:19 74:1,17 77:23 85:22 bills 59:12 61:7 63:6 76:25 77:1 78:9 binder 53:9 bit 8:20 89:25 90:1 99:12 105:18 Board 82:21,25 91:3,5 Bob 32:5 42:3 body 67:19 boilerplate 51:11	book 8:1,2,3 11:8, 10 17:15 28:24 29:2,19 30:16 35:14 booklet 28:10 29:18 44:13 46:8 62:16 bottom 11:19 17:16 52:2 61:3 71:4,5 85:5 bought 101:15,19 boundaries 108:4, 6 bounds 21:21 bow 58:17 60:22 Brad 46:11,21 branch 21:22 brand 38:15 break 71:22 113:15 breaking 107:5 breezed 84:13 briefed 94:7 briefing 6:15,17 briefly 65:12 87:1 briefs 35:10 bring 102:13 brings 57:25 broadside 58:16 broken 30:11 brother 108:1 brought 67:25 98:18,24 100:3 BRPD 105:5	build 16:14 33:12 37:25 38:1,15 39:5, 7 42:18 45:18 46:24 50:13 52:6 60:19 61:2 62:20 63:9 65:16 69:1,2 73:22 80:10 88:11 89:14 104:15 building 17:24 18:13,15 19:2,18, 24,25 37:4 61:18 87:21 88:14,19 89:1 buildings 92:16 built 37:3 38:7 40:18 88:7 112:11 113:6 bullet 11:18 35:13 bunch 8:22 bundle 6:7 53:18 buy 78:1 93:15 Byrnes 2:23
<hr/>			
C			
<hr/>			
calendar 3:7,17 California 13:21 62:2,6 call 54:10 57:17 61:8 66:11 86:24 97:20 called 13:4 15:9 17:22,24,25 18:20 22:4,5 33:8 51:1 52:3 65:20,22 71:7 77:23 87:20 90:5 109:6 112:11			

campaign 32:11	22 78:22,23	citation 59:24	73:4,7 74:2,13,25
Canyon 115:25	chain 103:4,10	cite 18:17 24:6,14	75:4,18,20 76:12,
capacity 106:6	challenge 92:17	53:6,8 63:19	19,23,25 77:7,16,
car 53:24 80:17	challenged 82:21	cited 18:24 20:5	19 78:3,5 79:9,13,
carries 95:9	change 87:6	21:7 23:18 28:10	25 81:21 82:11,12,
carry 80:14 95:8	110:16	cites 18:14 24:15	15,17 84:17 85:23
carrying 31:6	changed 89:2,11	cities 84:13	87:6 91:4,5 92:19
62:23	chaos 102:2	citing 50:15 90:9	93:9,10 94:10 96:4
case 8:9,15 9:25	chapter 75:23	city 2:9,21,23 3:1,3	98:9 99:1 100:22
10:14,23 11:8 12:3,	81:10,20	6:5 7:9,19 13:16	101:8 102:7 103:4,
11,16 13:4,5,6,10,	character 96:15	14:13,21 15:9,22	20 104:8 105:23
19 14:7 15:9,21,24	114:5	16:9,13,16 20:16,	106:14,15 107:1,
16:3,7,9,18 17:22,	characterized	19,25 21:1,5,17	14,15,24 108:11,
24,25 18:14,16,18,	53:19	22:12,21,25 25:2,	13,20 109:6,19,23,
20,22,25 19:15	charge 97:18	16,23 26:2,8 31:5,	24,25 110:4,10,23
20:2,17 21:9 22:4,	charged 67:14	8,10,11,13 32:7	111:9,21 112:19
5,18 27:9,24 28:9,	charter 82:12	33:8,18,20,21 34:4,	113:3,11 115:16,21
22 29:15 31:19	cherry-pick 23:2	7,21,22 35:2,3,14,	city's 3:21 6:23
33:8 50:21 51:6	Chicago 96:1,3	19 36:2,8,16,19	20:17 22:13 28:6
53:10 59:7 74:15	chicken-or-egg	37:7,10,22 38:14,	33:23 35:22 40:24
80:2 83:11 98:13	92:20	20 39:9,14,16,21,	41:6,23 46:11
99:14 112:13	chief 89:18	22 40:1,11,13,25	47:17,19 51:16
cases 6:1,19 11:9	children 55:15	41:3,6 42:7,9 43:1,	66:19 68:12 69:17
12:6,7 18:1,3 23:3	Chris 3:1 34:10	21,23,25 44:22,23,	86:21 93:21 98:6
24:16 53:9	58:23 103:22	25 45:4,6,10,14,16	105:1 106:19,21
categorical 9:4	chronological	46:4,7,12,17,22	civic-minded 86:4
15:1,3 16:18,23	80:3	47:18,25 48:7,8,11,	claim 9:20 14:18
25:13 26:18 74:22	Circuit 18:25	12,14,16,17,18,19,	15:2 16:21 17:11,
76:14	19:14,16,20,21	20,23,24,25 49:5,6,	13,14 20:7,10
categories 105:2	20:1	8,9,12,18,21,24,25	25:13 26:21 45:8
111:3 114:1,4	circumstances	50:13 51:6,13,21	72:3 74:22 76:18
CC&RS 38:9	8:17,24 9:1,6 13:18	52:9,13 56:9,15	77:3
Cedar 13:4 53:6,8	24:12	57:4,14,16,22 58:4,	claims 3:10,23 4:1
62:1 74:15		7,10 59:22,25 60:3,	9:18 20:15 26:24
centers 106:9		4,7,18 61:5 63:17,	80:1 82:12 97:12
Central 13:11,12,		22,25 64:4,5,9,25	Clark 9:25 10:17
15,18 26:14,17,20,		65:5,8,13,18 66:22	classes 91:19
		67:4,6,19 68:21,25	CLB06391 57:3
		69:12,20,24 70:6,	clean 50:16
		12,16,22 71:14,16	
		72:6,10,14,19,23	

clear 15:5 24:9 34:13 60:22,25 64:7 65:11 70:18 72:14 73:8,12,15 83:22 client 42:8 55:6 close 63:13 71:17 77:25 78:21 88:16 closed 49:24 81:14, 24 82:1 closely 45:7 86:16 closer 37:14 closure 62:24 cluster 90:5 91:14 93:11 clustering 90:10 CLV_002074 46:10 CLV_054375 44:3 co-equal 21:22 code 6:23 41:4 42:7 50:14 68:6,8 103:4 coelum 99:21 cohesive 45:21 collecting 82:16 Colliers 22:4 combination 91:16 commence 12:15 Commerce 84:16 commercial 110:14 111:12 commission 21:17 40:2 41:24 42:16,	24,25 47:7 52:13 109:24 110:3 commissioner 97:24 Commissioners 91:4,5 commit 87:13 commitment 43:10 committee 64:8 common 89:4,7 90:3 commonly 53:19 communication 61:1 communities 89:15 114:18 community 38:2,5, 6,15 40:16,20 63:18 90:2,24 102:11 103:7 105:21,25 106:2 114:15,21,25 115:5,9,18 Company 2:8 14:3 Company's 14:2,6 comparable 41:17 compare 28:19 comparison 35:17 compatibility 47:11 compensation 11:13 16:19 17:2 23:4 complain 88:18	complete 35:12 completed 35:9 completely 15:12, 16 25:17 75:1 86:17 115:23 complied 35:9 98:7 comply 103:5 comprehensive 84:11,24 85:1,2,6, 10,17,24 86:22 108:25 110:21 computer 35:17 conceded 51:6,8 83:12 concerned 55:14 concerns 45:19 concessions 48:24 conclude 24:6 28:8 44:21 63:6 66:25 -74:8 concludes 59:3 conclusion 11:8,10 12:21 16:21 condemnation 5:20,21,24 6:1,19 conditions 87:14 112:15 condo 81:23 condominium 93:15 condominiums 91:15 configuration 90:14	configurations 90:24 confirmed 34:9 confirming 32:14 confirms 32:4 conformance 96:16 conforms 41:19, 20,21 47:8,9 confusing 105:9 Congress 21:18 connected 18:7 70:12 considered 27:4 85:11 99:16 consist 91:14 consistent 14:10 41:12 42:19,20 45:1 47:5,14,16,17, 22 59:4 64:3,24 98:11 104:19 114:15 constitute 23:18 Constitution 23:13,22 99:3,7,8 Constitutional 52:21,23 80:15,17 construct 92:8 contacted 32:6 51:21 55:6 contest 49:9 contests 59:25 context 80:8 97:16 102:5
--	---	---	---

continue 79:8	42:3,20 44:5 57:7, 17 63:17,21 64:22 68:11 74:10	11,13,14,21 22:6,7, 8,14,17,23 23:7,10, 18,24 24:4,15,17 25:6,19 26:11,13, 16,19,21 27:9,13, 15,16,20 28:10,11, 12,25 29:1,4,7,10, 11 30:8,10,18 33:7, 10,14 37:3 38:22, 25 44:7,10,17 50:20 51:4 52:24 53:11,12 54:4 55:3, 9,14,19,25 58:15 59:6 62:17 71:21, 23 74:7 77:9 78:19 79:3,7,14,17,21 80:6 81:3,7 82:8 83:14,20 84:4,6 94:5,15,18,22 95:6, 24 96:22 97:1,5,17 98:12,18 99:24 100:3,16,24 101:4, 10,16,20 102:6,17, 22 103:12 104:23	D
Continuing 32:13	Councilman's 57:9		damaging 23:14, 15
contrary 24:8	councilmen 63:17		date 11:23,25 12:1, 12 56:22 57:6
Controlled 38:16	councilwoman 36:10 49:14,16 58:5,9 59:4,15		dated 38:20
controls 94:23	counsel 3:11 29:2 44:12 95:17 103:22		day 3:17 13:23 38:19 62:7 98:25
controversy 58:10	counter 51:14		days 13:23 57:4,12, 13 62:6 94:13 96:4
conventional 84:2 86:24 87:18,19,20	countermotion 3:16		de 9:5 17:13,18,20 18:6,19,23 20:9 24:9 26:2,20 76:17 77:4
conversations 57:10,18,19	countermotions 3:24 97:19		dead 67:19
converted 81:17 82:3,24 83:2	country 88:5 96:4		deal 102:9
cooperation 107:15	county 9:25 10:17 12:1 21:17 81:21, 24 82:14,15		dealing 55:20 85:21 105:3
copy 5:6,11 95:2,3, 19,22	couple 35:11 109:24	Court's 30:13 62:15 78:4 79:10 102:21	debris 50:10
corner 17:16	courses 115:23	courts 21:16 22:9 27:22	decide 7:7 8:6,9 12:14 28:7,14
Corporation 108:16	court 2:6 3:4,13,15, 18,20 4:2,4,10,15, 19 5:10,14 6:2,10, 12,14,18,20 7:2,4, 6,7,25 8:6,8,10,12, 13,15,18,19,21 9:2, 7,9,11,23,24 10:11, 16,24 11:1,3,10,20, 22,24 12:11,14,16 13:3,6,11,14,17 14:7,11,12,17 15:4, 5,7,8,18,25 16:4,7 17:2,8,21,23 18:19, 21,22 19:14,16,20, 21 20:1,5,8 21:8,9,	cover 3:5 create 90:6 106:2 creates 92:20 creative 90:22 crisis 89:13 critical 19:13 50:20 61:13 87:2 current 105:20 cut 50:9	decided 7:2,4,16 25:20 26:6 53:10 95:14 deciding 28:3,5,13 decision 6:13 18:11,12,13,14,15 22:3 97:21 decisions 21:16 106:14 declaration 32:14 34:19 48:23 58:25 64:16 69:6,7 73:3, 16 103:14 105:21
correct 3:11,12,24 30:20 80:13			
cost 37:7 91:11 93:7			
costing 48:4			
costly 37:16			
costs 31:7 37:8 92:21			
council 21:17 33:18,20,21 36:9 42:9,13 43:1,2,7 48:8,18,19 52:14 64:9 66:8 67:19 71:7 77:22 85:23 91:4 109:24,25			
councilman 32:5			

deed 30:14 defeats 85:12 defense 9:10 29:13 defenses 15:19 17:3 define 6:3 12:12 97:11 99:19 defined 6:6,8 88:25 definitive 25:7 definitively 7:2 12:12 Dehart 31:21 70:9 Del 15:10,20,22 16:3,4,9,12,15 delegation 110:22 deliberateness 27:24 delineation 92:15 demand 48:3 demanded 32:17 65:19 demands 37:7 demonstrate 65:13 demonstrates 47:10 demonstrating 66:21 demonstrative 10:15 denial 16:12 45:10, 24 51:16,17 52:23 71:2,3,4 72:9,13, 18,22 76:8	denied 16:11 43:24 44:19,22,23,24 45:5,10 46:4 48:8, 20 49:6,17,21,24 52:1,17 56:23,24 57:6,13,14,15,22 58:7,8 60:18,21,23, 25 67:4 69:14,20, 21,25 70:5 73:17 75:4 76:23 78:8 99:25 100:1 denies 48:19 dense 40:18 41:10 45:2 densities 106:4 110:14 111:10 density 40:9,16 41:9 90:5,13 104:7, 14,19 105:2,6 106:11 109:3 112:8,9 113:19,20, 21 114:1,3,5,7,9,11 deny 20:21 43:13, 24 44:5 52:9,25 77:20 80:9 101:7 102:7 denying 72:10,15, 19,23 100:16,18,25 101:11 department 2:3 35:22 39:21,22 40:24 41:7,16 42:11,12 46:22 47:2,4 48:17 61:6 84:16 departments 41:2 deposition 31:11 32:16 37:6,13 59:24	depositions 35:5 deprivation 24:11 deprive 15:16 16:24 17:6 25:17 75:1 deprives 15:12 describing 58:5 design 88:19 91:9 92:18 93:2,25 designated 98:5 designates 114:20 designation 83:10, 16 95:9 98:5 designed 37:3 designs 89:1 Detailed 92:13 details 40:6 determination —83:1,3 97:8 98:25 determine 3:8,21 6:21 9:12 11:20,21, 23 12:20 61:6 75:23 determining 27:21 develop 16:10 30:25 31:3,7,23,25 32:17 33:22 34:4,6, 8,24 36:13,15 39:18,24 43:7,16 48:11 49:15 66:18 72:10 73:5 78:3,6 80:12 81:22 developed 36:23 37:2 38:11 39:14 67:20 88:23	developer 58:12 78:15,16 88:13 developer's 3:21 developers 78:1 90:21 91:17 developing 31:1 36:19 37:5,18 48:21 60:15 70:13 86:2 development 31:15 33:5,19,25 34:9,14,20 35:3,9, 23 36:25 37:24 38:8 39:6,13,16 42:4 43:6,14,18,19 45:11,15,20,23 46:1,6,15,18,21,23 47:2,8 48:1,15 49:24 58:20 60:9, 17,20,23,25 62:22, 24 67:10 69:14,23, 25 71:2 72:13 73:4, 8,14,16 77:2,24 80:14 84:3 86:1,19 87:8,18 89:20 91:1, 8,11,13,24 92:5,12, 13,18,22 93:5,7,15, 22,24 95:5,8 96:11 98:1 103:6 104:10, 16,20 105:4,11,21 109:1,16 110:12 113:5 dialed 85:25 die 54:21 Difederico 75:11 difference 62:4 84:2 87:17 92:3 100:12 109:21 114:3
---	--	---	---

differently 57:24	61:20	easy 80:8	enacted 97:25
digits 111:22,23	documented 63:22	economic 16:16,24 25:18,25 75:2,7,9, 12,17,18 76:9,24	end 6:17 19:10 70:24 98:25 110:13
diligence 33:1	Dolan 33:8	economical 15:13, 17	ended 106:24
direct 23:25	dollars 39:4 48:4 49:4 60:12 76:5	economically 17:6 75:6	ends 105:14
direction 31:13 74:12	domain 23:3 24:5, 16	EDCR 94:10	enforce 62:13
directly 18:7 24:3	Don 55:17 56:5 64:12,13 74:11 93:12 97:23	effect 56:17 88:6 96:16 105:16	enforcement 50:14
director 93:12	doors 49:24	effected 12:17	engage 7:10,19 11:3,4 14:21,23 25:2,16,23 26:2,8 53:25 72:6 74:25 76:19
director's 105:21	downside 92:17	effort 33:3	engaged 19:7 71:15
dirt 68:15,23 78:12	downtown 96:6	egregious 39:9	engagement 62:21
discovered 98:20	drafted 40:13,14 46:21	Eighth 8:14 18:20, 21 27:8	engages 10:2 12:23 15:12 16:23 17:5 26:24
discretion 20:20 21:2,6 23:9	drafting 49:6	elected 85:23	engaging 66:22
discuss 100:5	drafts 48:15	element 53:17 106:17	enjoyment 20:3 77:17
discussed 98:13	drive 54:18 80:17	elevations 92:16	ensure 61:21
discussion 99:6 108:8	driver's 80:18	Elite 75:10	enter 10:10,21 13:22,25 14:1,6,8 74:16,18 78:19
dispute 35:2,6 96:20,23	drowning 55:13	Elizabeth 2:18	entered 6:10,18,20 25:6 27:17,18 47:6 94:9
disrespect 22:17	due 33:1	Elko 86:12	entering 55:23 56:2 74:12
distinction 100:20	Dunes 15:10,20,22 16:3,5,9,13,15	Elks 18:16,18,25 19:1,3,4,6,9,10,17, 23 20:4 23:17	entire 30:6,11 34:15 46:13 91:21 92:1,4 107:1,16,18 109:13,16 110:17
district 8:15 18:21, 22 27:9 41:11 91:13 95:9 105:8 114:2,6	duplicative 66:12	email 46:9 57:1,4, 15 67:5,10 68:4,12 70:15,16 95:23	
districts 85:4 113:11	duty 21:10	embroided 58:10	
disturbance 24:1	dwelling 90:11,13, 15,16,18	eminent 23:3 24:5, 15	
disturbing 61:4	<hr/> E <hr/>	enabling 84:15,17, 21,22 85:15 110:21	
disturbs 24:3	earlier 24:8		
do-overs 35:19	early 110:7 111:14		
doctrine 99:21	easement 50:22 51:1,3		
documentation			

entirety 48:9	38:24	58:3,22 59:2 65:18 68:2 83:23 93:21 95:23 103:15 107:21	F
entitlements 80:14 104:13	exactions 39:3		FAA 99:18
entity 14:13 30:4 69:21	examined 28:1	existed 111:3	facilities 106:8
entry 10:24	exceeded 114:1	existing 41:11,18 42:8,14,15 47:9 69:15	facility 38:18 39:6
envelope 87:21 88:14,23,24	exceeding 110:21	expect 59:13	fact 18:13 21:11,23 30:3 35:1 39:2 44:21 56:20 86:1 94:14 96:2 107:10
Equalization 82:22,25	excess 104:14	experience 37:4	facto 9:5 17:13,18, 20 18:6,19,23 20:9 24:9 26:2,20 76:17 77:4
equally 59:14	excessive 36:7	expert 59:1,3,15 75:10,11	facts 8:22,23 9:8,11 10:13 13:19 15:20 16:8 18:16 27:7 28:17,19,22,23 29:15 30:2,22 44:13,15,22 47:19 63:14 66:24,25 67:1 70:24 71:11, 13,19 72:1,8 74:4 75:3 77:5 78:14 79:1,11 98:16 103:2
equestrian 38:18 39:5	excited 108:12	explain 8:20 84:2 96:20	factual 80:1
equipment 50:11	exclude 13:6 53:13,16,22 54:5, 22 56:9	explaining 45:7 88:22 89:19 100:9 112:7	fairly 7:14
equivalent 52:16, 23	excuse 17:8 51:24 53:3	explains 103:16 110:8	faith 70:2
era 20:25	exercise 53:2	expressly 21:9 22:24 23:8 63:4 72:9 74:10	fall 54:21
Eric 83:23	exercises 21:5	extend 109:6	falling 55:13 115:25
essential 53:18,21 85:7	exhaust 98:21 100:9	extended 109:1	familiar 18:1 29:14
essentially 43:22 44:23 82:16 99:20 106:3 110:6	exhaustion 100:6	extensive 70:4	families 65:3
establish 85:19	exhibit 27:17 30:9, 14,16 31:20 32:4, 15 34:3,12,18 35:21 36:11,18 37:21 41:7,19,23 42:5,24 44:4,11 45:9 47:1 48:7,19, 22 50:3,18 51:17, 23 54:7,15,24 56:18 62:16,18 63:16 64:11,16 66:4 67:5,8,14,17, 21 68:4,12,13 69:7 70:8,9,15 72:18,22 73:1 83:19 107:12 108:7,18 112:12,25 113:9 115:20	extent 20:4	farmers 62:2
established 66:12 85:4		extinguished 18:9	farms 13:22,25
et al 2:8 86:17		extinguishes 23:11	
evidence 32:23 35:1,6 36:7 43:5 69:8 79:24		extortion 33:9	
evil 80:9		extra 37:14 39:4 48:4 49:5	
evolution 86:20		extraordinarily 13:19	
ex-officio 82:14	exhibits 29:9,20 30:10 35:13,16		
exact 13:4 21:13			

62:6 74:16	finale 99:13	formidable 59:10 69:10	future 38:7 110:15
fault 52:20	finally 28:18 33:4	formula 8:9	<hr/>
favor 112:8	finance 89:4	forward 12:7 18:3 31:14 33:5,15 107:16	G
favorite 38:17	financing 89:3,8, 16 93:18	found 10:16,24 11:1 15:25 16:7,19 24:13 26:12 56:20 89:15 94:23	garden 91:15
February 67:17	find 8:25 9:2,9 14:17 20:16 22:14 24:4 57:9,17 68:7, 10 74:7	foundation 31:22 33:16	gate 54:10 115:25
federal 86:13,18 89:19 99:18	finding 11:20 25:11	fourth 3:10,23 17:14 53:24 76:18	gatehouses 38:2
fee 51:15 93:15 99:16,21	fine 30:8 50:15 71:24 79:14	Fowler 14:2,3,6	gates 38:15 39:5 55:21,25
feel 81:7	fit 28:17	fox 21:12 22:9	gathered 86:11
feeling 103:23	fits 45:7	framed 24:24 25:14	gave 5:19 33:22 49:11 52:10 108:1
fees 37:8 48:5 49:4, 5	flags 57:16	framework 88:11 106:13	general 51:7 65:22 94:1,2 98:4,8,10,11 104:2,9 105:1,12, 16,19 106:19,21,24 107:8 108:23,25 109:9,12 110:1,18, 25 111:2,17 114:16,20 115:2,19
feet 88:8,9	flat 48:19	free 32:2,19,21 45:14 75:15,16	generalized 109:5 110:2,4,15 111:8, 18
fence 53:4,5,7 54:9, 11,16,20,22,25 55:2,7 56:7,12,22 57:5,8,15,16,21 65:6 72:22 101:6,8 103:4,8,10	flexibility 91:9 93:24	freely 83:16	geographically 107:3
fences 100:23	flexible 87:19	front 14:18 36:21 48:18 52:21 62:17	get all 109:17
fencing 55:3 71:5 102:8 103:3,6,10, 15,18	flip 65:1	fronts 101:25	Ghanem 2:17,18
FHA 89:3,4,8 93:18	floor 79:18 84:6 92:15	Fu 9:25	give 5:7 28:25 32:1, 18 33:13 36:12,14 45:13 50:15 51:13, 14 58:4 83:16 94:11 95:2 105:22
figure 8:3 102:6	focused 100:5 107:2	full 85:2	giving 94:18
file 65:19,22 66:2, 15,17 94:12	folder 5:19	full-heartedly 46:6	glad 83:17
filed 7:15 54:8 66:16 111:22,24	folders 5:4	fully 94:7	goals 47:14
files 111:20	follow 6:3 97:20	fundamental 53:17	golf 62:20 70:18
fill 88:14 91:21	Follow-up 57:7	funds 67:6	
final 17:11 26:1 95:4	Foothills 112:11		
	Fore 30:4		
	form 27:24		
	format 5:2,3		

75:9,11,12,14 81:12,14,24 82:1, 23 83:5 93:1 114:20 115:23 good 2:7,12,15,17, 22,25 3:2 70:2 75:19 90:21 Goodman 35:20 government 10:2, 6,9 12:23 13:8 14:13 15:11,15 16:23 17:5,9 19:3, 7,15,19 20:2,11 21:10,23 23:11,25 24:2 25:10 26:24 27:3,11,14,16 28:1 30:1 51:24 54:2 55:8 59:8,12,13,20 61:24 69:9,21 73:23 75:8 78:17 86:13 government's 27:23,25 Governor 10:19 GPA 65:20,22 66:2,5,12,15 104:6, 18 grading 70:18 Gragson 86:3 93:13 grand 99:13 graph 70:25 Grazing 86:9,10 green 67:11 gross 90:11 grossly 39:3	grub 70:18 guard 21:12 22:9 guess 39:24 79:8 92:17 guide 110:16 guy 68:14,20 115:25 guys 64:23 <hr/> H <hr/> half 35:11,22 39:15 40:8 49:3 Hall 18:16,18,25 19:1,3,4,6,9,17,23 20:4 23:17 Hall's 19:10 hand 5:5,14 32:20 handed 38:20 handing 5:11 handled 69:14 handling 4:11,14 handy 68:15 happen 37:19 88:10 89:5 happened 12:5 13:10 32:15 40:24 49:9 51:15 54:24 55:6 59:21 70:14 80:24 81:9,12 82:18 88:4 89:2 90:25 happening 50:12 55:22 65:7 66:25 69:2	hard 106:25 harmed 83:11 Hassid 13:5 head 22:2 31:9 headed 27:3 hear 13:15 79:9 83:21 heard 32:23 59:19 66:9 94:3 hearing 28:4 36:20 42:6 43:7,12 66:7 97:7 hearings 42:2 heat 67:3 height 10:18 11:1 12:16 88:24 99:19, 20,23 100:11 held 6:2 9:25 11:24 12:16 13:6 14:7,11 26:13 27:20 41:13 53:16 hen 21:12 22:9 hey 10:6 12:8 30:24 37:23 61:11 64:23 hide 45:16 high 88:15 106:11 113:20 high-density 105:5 106:5 114:10 higher 81:17 82:3, 9,20,24 83:2 highest 23:16 39:22 42:9 highlight 35:11	highlighted 28:11 34:13 113:25 hike 52:18,19 hiring 68:22 historical 21:14 92:7 96:10 history 80:19,21,23 84:12 108:13 hit 22:1 HOA 63:18 64:22 74:9 holders 70:11 holding 13:4 home 53:23 Homebuilders 115:3 homeowners 89:6 112:23 115:2 homes 36:24 39:7 40:17 91:20 93:11 96:17 honestly 93:4 Honor 2:12,15,17, 22,24,25 3:2,12,14, 25 4:7,8,13,18,24 5:4,9,13,16 7:1,8, 14,21 8:20 11:7,18 12:3,5,21 13:2 14:21,25 15:24 17:10,16,20 19:10, 13 20:7,16 21:20 22:2,16,19 23:6 24:19 27:2 28:3,8, 13 29:3,16,24 30:7, 16,21 31:2,17,22 32:10,13 33:6,15 34:22 35:7,14 36:5,
--	---	---	---

18,22 37:1,21 39:11 40:3,7,15 41:12,22 43:12 44:1,2,9,14 47:24 48:6,10 49:8 50:1 51:9,25 53:3,5,24 54:7,17 55:11,16 56:1,18,21 58:1 60:1,3,6,8,16 61:13 63:7,12 64:13 65:1, 9 67:2,13,15 71:15 72:8,13,25 74:4 76:14,19 77:25 78:7,13,18,25 79:10,16,19 94:3,6, 21 95:11,19 96:24 97:2,14,22 102:16, 20,25 Honorable 2:4 hope 79:19 hours 13:23 35:23 62:7 house 21:12 22:9 88:17 89:8 101:4,6, 7,9 houses 88:12 housing 89:13,19 91:23 105:5 106:5, 12 114:10 Howard 86:19 108:16 Hsu 9:25 15:7 Hsu's 10:19 Hualapai 36:24 50:4,6,9 51:7 Hughes 86:18,19 108:16,17	hundred 93:4 hundreds 35:23 55:18 65:2 hypothetical 100:20 <hr/> I <hr/> idea 89:24 106:25 113:23 114:9 identified 8:19 67:10 107:4 identifies 50:3,5 67:6 identify 28:23 35:18 57:3 identifying 9:15 II 89:13 illegal 85:11 illegible 112:14 imaginative 93:25 immediately 30:25 31:3,7 immune 21:24 impact 45:11 51:19 54:25 56:10,13 72:11,20,23 impaired 18:8 impairs 23:11 impermissible 52:20 important 11:19 28:23 29:17 30:1,3 44:22 56:22 57:12 77:5 80:5,24 81:1 84:4	importantly 54:16 55:11 impose 39:23 42:17 48:13 imposed 87:14 imposes 48:12 impossibility 60:15 impossible 63:9 inappropriate 67:15 incidentally 85:23 includes 34:15 92:4 including 69:12,24 71:14 income 19:11 inconsequential 12:19,25 inconsistent 75:21 incorrect 20:17 22:22 increase 90:5 incur 37:7 indicating 92:14 individual 75:13 113:13 infinite 8:10 27:10, 14 informed 64:21 initial 81:22 93:10 innovation 91:9 innovative 93:25	inside 42:8,14,15 44:23 48:2 instructive 13:20 15:21 18:17 intended 91:10,12 98:2 intends 110:11 intensity 27:24 intent 87:12 113:4 interest 6:4,5,6,11, 14,21 7:20 11:21, 22,25 25:6,20 26:5 27:12 32:24 38:3, 13 41:13 42:21 47:5,23 94:7,9,16, 23 95:12,25 99:16, 21 interesting 56:20 86:7 interfere 19:8 26:3,9 76:20 interfered 20:3 77:7 interference 6:5 23:25 77:10,12,17 interferes 20:11 24:2 International 9:24 12:4,10 interoffice 70:16 interrogatories 51:5,8 intervene 21:10 intervening 21:5 invading 100:13
--	---	--	---

invariable 7:23 8:5,16,19 9:7,12, 15,16 14:12,16 17:1 20:8 24:16,21 28:16 74:6 76:16 78:20 invasion 24:10 100:19 inverse 5:20,21,24 6:1,19 investigator 68:13, 15 investigators 68:23 involves 23:25 issue 5:18 6:9,11, 14 7:2,3,5,14,16 8:7 24:24 25:20 26:5 27:17,19 28:5, 13 29:25 30:19 42:21 55:4,7 59:15 72:4 74:23 76:19 79:25 80:11 82:10 94:7,9,11,24 95:13, 14 97:3,6,21 98:12 102:19 104:17 issued 95:7 issues 9:11 24:21 26:12 80:6 88:2 98:20 102:5,15 103:16,24 issuing 21:16 item 109:4 110:11 items 110:1 <hr/> J <hr/> James 2:13 4:13	January 67:3 Jennifer 2:19 Jerbic 46:11,21 Johnson 12:4,7,10, 13,16 joint 89:7 93:16 jointly 89:10 Judge 2:4 8:12 10:5,13 20:22 21:7 25:5 27:6 28:20,24 32:23 34:2 35:10, 25 37:9 38:3,19 39:2,8,15 43:4 45:4 46:1,3,10,25 49:18 50:4 51:18 52:4 54:24 55:5 56:12, 25 57:19 58:6,13, 21 59:6,21 61:7,15, 23 62:12 63:19 64:5,7 65:10 66:24 68:17,18 69:3,5 70:4,10,13,24 71:17 73:22 74:8, 21 75:10,20 76:8, 25 77:3,13 78:10, 22 judgment 3:9,17, 22,24 4:1 9:19 15:3 16:22 17:12 97:19, 20 judicial 8:15 18:20,21 20:20 21:1 23:1 27:8 judiciary 21:23 jump 102:17 June 13:5 43:1 46:16 70:15	Jungle 68:20 jurisdiction 22:18 Justice 59:6,7 69:8 <hr/> K <hr/> Kaempfer 34:10 58:23 73:2,15 103:22 Kaempfer's 72:25 Kaufman 44:5 Kevin 70:19 key 84:22 92:3 kids 56:2,3 kind 10:9,15 63:13 80:9 82:19 83:14 85:19 89:11 92:20 96:8 98:23 99:9 102:8 107:4,5 108:19 109:10 115:3 kinds 88:2 knew 71:9 85:25 knock 101:25 <hr/> L <hr/> labeled 18:22 labor 13:22,24,25 14:5 62:3,5 74:16 laid 33:17 35:10 36:22 63:19 land 2:8,14 20:21 34:10 38:17 51:6 58:12,24 67:11 73:2 75:15 78:1	86:18 91:10 92:1 93:25 103:22 105:7 106:10,23 108:5 109:5,17 110:2,4,9, 15 111:8,18 115:16 landowner 2:13 10:10 16:24 17:6 20:10 23:4 30:4 32:22 33:11,13 34:23 36:12,14,17 38:23 39:10 45:6, 13 48:2,13 49:15 50:15 56:8 57:23 59:8,20 60:8,11,19, 23 61:1,11,18,19 62:14 63:2,10 64:5 65:6,14,15,19,21 66:9 67:25 69:9 70:7,22 71:9 73:22 75:1,4 76:10,12,23 77:22 78:7 94:24 landowner's 3:8 landowners 2:16, 19 6:4,8 7:11,17 9:19 15:2,24,25 16:22 17:11 24:23, 25 25:8,15,17,21 26:7 30:1,2,6,14,24 31:2,12,23 32:2,24 34:14,22 35:8 36:2, 7 37:10 39:17,20 40:14 42:16 43:22 44:1 46:5,9,17,24 49:11,20,23,25 50:2,8,21 54:8 56:15 60:16 62:10 68:6 69:5 70:11,23 71:10 72:3,4,11,17 73:18 74:2,24 77:4, 5,16,20 78:1 95:14 landowners' 7:11
--	---	---	---

<p>9:20 14:22,24 15:1 17:13 20:14 22:10 26:3 32:8 41:14 44:13,15 53:20 59:5 63:8,23 64:14 76:20</p> <p>landscape 89:12</p> <p>language 93:22</p> <p>large 109:22</p> <p>larger 87:25 89:14</p> <p>largest 108:13,15</p> <p>Larry 112:6</p> <p>Las 2:9 13:16 17:24 18:12,15 31:5,8,10, 13 35:2 36:19 37:7 40:2 42:10 43:25 47:15 57:23 63:25 65:8 69:13,24 70:6, 22 71:16 74:13 80:23 84:12 86:8 107:14,15,24 108:10</p> <p>latching 55:21</p> <p>late 22:3</p> <p>latest 58:11,19</p> <p>law 5:20,22 6:23 9:15,23 18:4,5 20:6,20 21:8 22:19 23:1,2 24:20 28:8,9 59:20 64:10 71:19 74:23 77:15 79:2 80:22 89:17,18 98:17 99:15 112:14</p> <p>lawful 75:24 76:1</p> <p>laws 55:9 59:12</p> <p>lawyer 102:14</p>	<p>lay 5:1 35:16 90:23</p> <p>layout 115:22</p> <p>lays 31:22 33:1 73:3 78:10,11</p> <p>learned 38:3,5,13 64:22</p> <p>leave 21:12 22:9 90:17</p> <p>Leavitt 2:12,13 3:12 4:6,13,17,23, 24 5:16 8:2 21:20 22:1 29:3,6,9,16 30:9,21 44:14,18 55:5,11,16,22 56:1 58:18 62:18 71:25 79:16 82:12 94:3,6, 21 96:24 97:2,14</p> <p>lecturn 4:16</p> <p>left 71:4 112:25</p> <p>left-hand 71:2</p> <p>legal 26:3,7,9 41:14 42:21 43:13,14,23, 24 44:24 51:12 69:1 77:5 79:12 94:24 102:19</p> <p>legally 6:23 25:21 42:12</p> <p>legislation 84:15</p> <p>legislative 80:20</p> <p>legislature 21:18 82:13</p> <p>length 34:20 87:23 88:24</p> <p>letter 37:22 45:6,10 51:16,17,25 56:9 57:14 66:4 72:9,18, 19,22 81:25 107:11</p>	<p>letters 75:13</p> <p>letting 97:17</p> <p>level 42:9 99:1,15</p> <p>liability 55:4,7 102:14,15</p> <p>license 80:18</p> <p>light 3:13 88:23</p> <p>limitation 62:8</p> <p>limitations 12:13, 15</p> <p>lines 42:8,14,15 44:23 48:2 108:6</p> <p>link 103:4,10</p> <p>list 74:8</p> <p>listen 8:8,13,21 11:3 13:24 23:10 31:25 37:6 45:17 46:20 50:8 52:17 55:6 64:17,19 65:21 69:7 77:10 95:25 101:5</p> <p>listening 29:14</p> <p>listing 61:10</p> <p>lists 30:14</p> <p>litigated 12:5,7 18:2 96:25</p> <p>litigation 30:12</p> <p>live 101:5</p> <p>LLC 2:8</p> <p>local 69:12</p> <p>locations 114:8</p> <p>lodge 94:22</p> <p>lodged 32:11</p>	<p>logical 107:5</p> <p>long 39:8 95:11</p> <p>longer 81:19 82:4</p> <p>longtime 46:12</p> <p>looked 28:21 42:6, 7 55:4 61:7 105:23 115:17</p> <p>lot 13:15 31:17 40:8 87:4,21 88:14, 22,25 91:21 93:1 102:12</p> <p>lot-by-lot 91:25</p> <p>lots 40:8</p> <p>Lou 22:4</p> <p>loud 83:21</p> <p>low 106:11 113:22</p> <p>Lowenstein 31:9</p> <p>Lowenstein's 103:14</p> <p>lowered 112:10</p> <p>Lowie 32:14 33:20 34:3 36:17,18 37:2, 22 71:6,8 80:10 81:25 82:19 83:3 103:17,21</p> <p>Lowie's 32:16 48:22 83:11</p> <p>Lucas 59:7</p> <p>luxury 81:23</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>Madam 71:21</p> <p>made 6:13 16:17 34:13 43:10 44:5</p>
---	---	--	---

45:12 48:3 52:18 66:15 72:14 73:7, 12,15 80:2 87:10 114:3 magazine 22:20 magic 8:9 mailed 95:22 maintain 114:4 maintained 61:22 maintenance 62:24 major 52:3,5,7,11 majority 68:1 make 3:20 4:22 29:7 39:25 40:11 42:18 44:10 45:14 48:23 60:24 61:12, 14 63:9 80:8 82:25 83:8 87:4 88:13 89:15 90:1 97:7 98:10,25 100:12 104:19 106:14 makes 10:5 22:12 59:8 69:10 making 38:14 46:15 95:17 manager 31:10 64:14 managing 2:20 Mandatory 5:23 Manila 68:19 manner 92:9 map 41:21 50:3 86:14 87:6 104:11 112:13 114:22 115:18	maps 114:22 March 30:3 67:13 78:12 marked 30:9 marshal 2:3 5:15 massive 54:19 master 33:25 34:8, 20 35:9,23 37:24 39:6,13,16 43:6,14, 18,19 45:20,23 46:1,6,15,18,21,23 47:2,8,15,17 48:1, 15 60:17,20 71:2 72:13 73:4,8,16 83:10 85:8 86:21 105:15,24 106:2 107:16,18 115:12, 24 Materials 17:24 18:13,15 matter 16:12 17:8, 9 27:18 30:19 42:23,25 48:7 61:2 67:24 69:15,18 101:6 matters 46:13 maximum 91:8 93:24 112:9 mayor 35:20 66:10 86:3 93:13 107:13 Mccarran 9:24 12:4,10 Mccauley 85:22 105:14 106:15 107:11,13,23 108:9,22 109:13 110:11 112:15 115:13,16,20	Mccauley's 112:6 115:10 MDA 33:24,25 34:25 36:6,11,15 37:9 48:9 49:1,19, 22,23 58:8 means 58:15 64:1 65:25 76:1 92:11 96:23,25 meant 58:14 87:12 medium 105:6 113:21,22 meet 9:8 74:4 meeting 63:18,20 64:22 74:9 meetings 35:21 52:12 73:3 member 33:21 42:13 71:7 77:22 members 33:18 43:2,8 66:8 mention 65:13 mess 45:24 met 9:13 37:23 41:3 43:22 44:24, 25 76:15 middle 89:10 90:2 108:9 mile 106:6,7 miles 52:18,19 113:12 Miller 112:6 million 31:6 37:8, 11,14 39:4 48:4 49:4 67:6 76:3,5	millions 60:11 mind 4:4 59:17 65:5 95:24 96:1 100:24 minute 9:14 17:19 minutes 71:25 84:1 93:9 112:4 115:6 missed 12:13 mix 91:23 105:7 113:19 Molina 2:25 3:1 79:11,19,23 81:5,9 82:10 83:17,21 84:7 94:17 95:22 96:19,23 97:15,22 98:14 99:11 100:1, 8,18 101:3,8,14,18, 22 103:1,13 104:25 moment 14:21 20:15 54:14 Monday 57:9 money 88:13 93:1 monitor 5:5 Monongahela 21:8 monotonous 87:24 Monte 15:10,20,22 16:3,4,9,13,15 Monterey 15:10, 22 16:9,13,16 months 13:3 53:10 motion 3:8,21,22, 25 7:15 29:21 32:24 33:1 38:4,13 motions 97:18
--	---	--	---

motorcycles 56:3	6:1,23 7:6 8:6,7,18	20:19 27:14 28:14	one-third 19:11
motorcyclists 65:3	9:7,23,24 10:11,15,	36:10 45:25 63:7,8,	ongoing 39:17
mountain 52:19	24,25 12:11,22	10 76:23 79:25	61:21 63:5,11 64:6
move 6:9 27:6,7	14:11,12 15:4 17:1,	96:3,5 111:23	74:3 77:2
33:5,15 63:12	7,17,21,23 18:4,18	nursery 13:5 38:17	open 5:19,20 29:12
79:20 84:9	20:5,8,9 21:18	53:6,8 62:1 74:15	44:15,18 63:24
moved 31:7 49:23	22:23 23:6,13,17,	<hr/>	64:19 81:12 83:10,
109:7 111:6	23 24:4,14,17	O	12 89:4,7,23 90:3,
movement 44:5	26:13,16,19,21	<hr/>	6,20 96:2 98:2
moving 7:4 9:19	27:9,13 34:11 37:3	oath 31:11 32:6	106:9
31:14	38:22,25 50:20,21	object 96:24	opening 101:23
Muhammad 68:18	51:2,3 77:8,9 82:13	objected 32:2	operating 75:14
multi-family 6:25	95:6 99:3,7,15	objection 5:10	opinion 59:7 95:7
7:13,18 16:6	115:3	29:8 44:8 79:15	opinions 22:6
mush 114:22	Nevada's 5:23	94:4,22 95:4,11	opportunity 41:3
<hr/>	24:21	objectives 47:14	oppose 43:2,8
N	nice 92:24	obtained 57:1 68:5	52:14
<hr/>	Nichols 24:5,7,14,	obtaining 80:13	opposed 31:24
named 96:3	15	obvious 17:4 59:10	33:18
narrow 5:18 7:14,	Ninth 18:25 19:13,	occupy 93:16	opposition 3:21
16 23:20 72:3	16,20,21 20:1	100:14	Oran 86:3 93:13
nature 96:15	non-regulatory	occur 8:11,14	order 6:11,12,18,
106:22	9:5 17:12,18,20	12:14 33:9	20 11:21 12:14
needed 32:20	18:6,19,23 20:9	occurred 10:14	19:18 27:18,21
34:22 89:14 103:24	26:1,20 76:17 77:4	27:22 28:7 46:4	34:24 36:15 41:13
negative 76:7,10	non-urban 110:13	occurs 12:22 15:11	47:5,23 80:3,6 81:6
negotiated 70:1	Nos 73:19	16:23 18:6 93:5	94:9 100:2 102:5
negotiating	note 102:22	October 6:10 7:3	114:4
104:15,20	notice 13:24 62:7	25:7 47:6 94:9	ordinance 10:21
neighborhood	82:18,19 94:11,12,	odd 90:24	11:2 12:2 84:12
89:9 90:7 92:19	13 97:3 105:1	offered 75:15	85:1,5,24 86:23,25
106:9 111:13	nowadays 93:5	office 2:20 47:25	88:6,25 91:2,3,6
113:20	NRS 41:20 47:9	48:16 82:11	93:11,19,20,23
neighbors 89:9	75:23 80:21 81:10	offices 18:2	97:24
Nevada 5:19,21	84:18	official 3:20	ordinances 11:11,
	nuisance 55:9		14,15 55:19 59:13
	number 6:20,22		61:8 84:10,14
	9:3,4 10:18 11:2		

organization 14:1	paraphrase 64:13	Peccole 38:7 86:17	Peter 31:9 103:14
originally 88:23	parcel 89:25 95:8 107:17,18 109:16 110:17	pending 30:12 32:25 97:18	petition 20:20 23:1
outline 5:1	parcels 30:5,15 31:12,14 113:13	Penn 13:11,12,15, 18 26:14,17,20,22 78:22,23	petitioned 21:1
outrageous 20:22 48:3,12 49:13	park 37:25 38:16 89:9 90:2 115:12	Pennsylvania 89:18	Phil 2:23
over-the-counter 52:7	parks 89:23 96:7 106:8,16 111:13	people 50:24 54:1, 12,13,21,23 55:12, 15,23 56:2,3 59:14 64:17 74:11 86:4 87:10 88:10,18 91:19 92:25 100:12,23 112:21	phonetic 86:17
overstep 21:21	part 21:6 22:13 36:14 37:24 38:4 44:4 48:15 61:4 63:25 82:10,11 87:2 99:16,17,20 106:3 108:10 114:11	percent 93:5 105:5,6 113:20,21, 22	photos 56:5 65:2
owed 81:19	participated 46:23	perfunctory 51:10	physical 5:6,11 10:24 24:10 98:15 99:14 100:4,11,19 101:2,12
owned 19:1 30:5 89:9 100:13	parties 70:2	permissible 6:24 25:21 42:12	physically 10:11 100:14
owner 15:13,17 59:17,18 102:7	partners 86:3,12	permission 62:15 79:11 92:8	picked 36:8
owner's 24:11	parts 30:12,13	permit 57:8,11,21 70:17,19 82:9	pictures 55:18
owners 31:16,24 32:7,17 33:17 45:25 51:21 55:1 56:13,16 72:21,24 73:11,12 74:20 112:8	passage 14:7	permits 57:13	piece 15:15 31:4 90:17
ownership 13:7 18:8 53:14	passed 12:1 85:25	permitted 75:7	piecemeal 43:3,8, 9,11 45:19
ownerships 92:15	past 58:9	person 37:1 77:14, 15	pipeline 104:5
<hr/>			
P			
<hr/>			
Packing 14:2,3,6	path 68:1	personnel 57:4	place 13:12 102:7
paid 23:4	pattern 108:19 114:5	perspective 21:15 29:13 88:1 96:10 105:23	plaintiff 2:11,13,18 3:8 4:6,12
pan 87:8	pause 17:19 20:14	persuasive 22:21	plaintiffs 80:1
Par 75:13	pay 39:4 51:15 76:6 81:18 82:3 92:25 93:1	pertaining 21:16 62:22	plaintiffs' 44:12
paragraph 73:1 108:9 113:24 114:13	payment 11:12		plan 19:12 40:2,25 45:21 47:15,17 62:24 65:22 83:10 84:24 85:6,8,10,13, 14,17 86:21 94:1,2 96:11,15 98:4,8,10, 11 104:2,9 105:1, 13,15,16,19 106:19,21,23,24,25 107:2,9,16,18 108:23,24,25 109:6,8,9,10,12,14
paralegal 107:21	PBS 68:18		
parallel 39:10			

110:2,3,4,9,16,18, 19,21,25 111:3,8,9, 14,17,18 114:16,20 115:2,16,19,21,24	39:15 40:6 48:10 49:18 53:6,8 60:14 62:1 74:15 98:3 99:9 113:8	PR-OS 83:12 114:21	preserving 10:6 60:4
planes 12:18	points 50:5	pre-constitutional 20:25	President 21:24
planing 105:4	police 110:22	preamble 63:1	presiding 2:5
planned 45:20 84:3 87:18 89:20 91:1,8,13 92:5,12, 18 95:5,8 97:25 98:1 105:25 106:2 109:15 115:12	policies 47:14 106:20	precise 107:9	pretty 86:7 105:9
planner 89:18	policy 106:17	preface 47:3	prevalent 24:8
planning 31:9 39:21,22 40:2,24 41:7,16,24 42:11, 12,16,23,24 43:21 46:22 47:2,4,7,24 48:17 52:12,13 61:6 65:17,24 66:19 69:17 80:22 84:17 86:1 88:1 90:23 93:12,22,23 97:23 105:8,10,23 107:10 108:11 110:3 113:11 114:2,6	political 32:11	prefer 98:16	previously 4:25 5:25 18:11,12 27:18 30:10
	politically 67:14 70:11	prejudgment 11:21,22,25	primarily 91:10
	pond 54:17,19,20 55:3,8,13 102:8	preliminarily 4:5	print 71:15
ponds 65:6	ponds 65:6	preliminary 7:1	prior 6:4
pools 55:20	population 106:6	premises 55:4 102:14	private 10:2,4 11:5,11,17 12:23 13:22 68:13,14,22 73:21
portion 90:6	pose 100:20	prepare 40:2	problem 7:25 79:22 87:25 92:20 93:17 102:18 104:23
position 32:22 82:2 98:6	possess 38:23	prepared 40:23 43:22	procedure 5:24 6:3 87:3 103:17
possibility 112:10	possibly 36:1 39:23 77:19	present 5:8 92:19 100:2	procedures 80:13 98:8 103:20
potential 51:18 54:25 56:10 102:15	potentially 107:2	presentation 5:12 44:13,15 95:20	proceed 4:9,17,23
power 110:22	Powerpoint 5:2,11 7:22 94:14 95:1,20	presented 35:2 42:23 48:7 64:9 69:11,22 95:5	process 52:3,5,7,11 53:1 62:23 72:15 86:5 101:22 102:3 107:10
powers 21:4,15 22:7,11 23:2,9		presenting 79:11, 12	processed 92:9
		preserve 10:2 11:4 12:23 14:14,22 25:2,10 51:22 63:9 72:6,16 73:17 74:19 88:23	produced 59:16
		preserved 10:19 11:15 72:12	produces 93:8
		preserves 61:17 73:23	product 91:18 92:23 93:8
			profile 114:15,21

115:5,9,18 profiles 115:1 profoundly 36:6 prohibit 25:24 77:23 prohibited 75:18 76:11 77:1 prohibits 21:4 61:17 promise 45:12 promised 46:7 proper 80:6,12 properties 39:7 51:19 56:11 85:20 87:22 88:7 property 6:4,5,6, 11,14,21,24 7:11, 17,20 10:3,4,6,11 11:4,6,11,16,17 12:8,24,25 13:1,9 14:2,4,6,9,14,22,24 15:14,16,17,23 16:1,2,6,10,17,25 17:7 18:7,8 19:3,5, 9 20:4,10,12,22,24 21:2,10 22:10,15 23:12,15,20 24:1,3, 11,12 25:1,3,6,9, 16,18,20,22,25 26:4,5,7 27:12,25 29:23,25 30:2,6,11, 23,24 31:4,5,11,23, 24,25 32:1,7,17,18, 24,25 33:4,17,22, 23 34:5,6,8,15,16, 24 35:4 36:4,13,19 37:2,5,18 38:3,4,8, 12,13,21,24 39:1, 11,12,24 40:18,21	41:13,14,15 42:21 43:16 45:13,25 47:5,23 48:22 49:16 50:11,15,22, 25 51:1,3,21,22 52:22 53:14,17,19, 21,23 54:2,6,11,17, 22 55:1,23,24 56:2, 4,6,8,13,14,16 59:5,17,18 60:4 61:17,25 62:3,9 63:3,5,8,23,24 64:2,6,14,18,23 65:4,7,16,20,25 66:19,23 67:7,12, 19 68:21 69:1 70:10 71:1 72:5,7, 12,14,16,20,24 73:6,11,12,17,21, 23,25 74:3,10,12, 18,19,20,24 75:2,5, 17,24,25 76:4,6,9, 21 77:1,6,11,18 78:10,11,16 80:10, 12 81:16,19,23 82:17,22 83:15 86:2,6,11,12,13 87:3,5,13 89:4 92:10,15 94:6,8,15, 23,25 95:7,12,15 96:17,20 100:14 101:1,15,18 102:7 103:25 104:1,18 107:24 108:11,17, 22 109:14,17 110:9,12 111:19 112:1,8,10 114:11 115:10,13 property's 87:7 proposal 41:10 62:19 67:10 69:14	proposed 40:12, 13,20 41:9 112:22 protect 55:12 65:6 98:2 protection 23:21 protectors 22:10 protest 66:3,6,16 provide 5:6 61:20 89:23 91:12 92:6 110:16 provided 5:2,3 public 10:3,10,20, 21 11:4,5,12,16,17 12:24 13:8 14:8,15, 23,24 25:3 46:9 50:23 56:21 57:2 61:21,25 62:21 63:5,11,15 64:6 68:5 70:17 72:7 73:21,24 74:3,17 77:2 101:23 published 95:7 PUD 93:10 pull 77:21 83:23 107:20 purchase 67:6 pure 23:9 purpose 76:11 85:12 91:7 93:23 97:7 113:15 purposes 16:11 25:1,9,16,22 26:5,8 41:15 50:23 66:1 72:5 74:25 76:22 pursuant 99:2 put 14:17 22:16	30:7 38:7,8 39:24 52:15,20 54:9,11, 15,20,21 56:7,12 60:3,7,9,18 70:25 71:13 72:19 74:2 76:3,10 79:21 90:1, 18 94:13 97:15 101:6,8 102:1 103:8 105:8 111:12 112:12,15,17,20 114:10 115:17 putting 112:23 <hr/> Q <hr/> QQQQ2 113:9 QQQQ4 114:24 qualify 81:19 82:4 83:9 Queensridge 36:24 38:2,5,6,12, 15 40:16,17,19 63:18 96:18 question 14:20 25:10,14,23 26:1 66:11 81:3 82:7 83:18 96:14 97:20 100:16 101:11,12 107:19 questions 78:25 79:4 102:21 quick 74:21 79:4 quickly 23:7 40:7 67:2 84:9 quit 75:14 quote 15:12 18:6, 10 23:7 27:21 34:17 38:24 41:10
---	--	--	---

59:9,10 64:15 70:19 quotes 63:20 quoting 27:23	59:11 89:20 Rebecca 3:3 recall 10:17 36:21 69:13,25 received 19:14 37:22 46:10 70:16 recently 68:17 recess 79:5,6 recited 22:4,5 reclassification 92:9 recognized 16:4 106:25 recommend 41:24 42:25 recommended 47:25 recommending 64:8 recommends 48:17 record 2:10 3:4 29:1 35:6,20 42:14 43:17 44:7 45:22 58:19 59:2,25 79:3, 24 records 46:9 56:21 57:2 68:5 70:17 115:5,7 recourse 21:22 recreate 64:2,23 recreation 63:24 64:1,3 106:8,16 red 57:15 redeveloped 19:5	redrafts 35:15 reduce 48:25 91:11 106:10 112:7 114:11 115:24 reduced 19:11 81:11,20 82:4 83:9 refer 10:13 71:18 72:25 reference 44:3 46:15 92:7 referring 44:11 56:19 70:9 106:22 refused 19:6 regular 49:4 regulation 106:18 regulations 27:11 80:23 85:3 99:18 regulatory 9:3,18, 20,23 10:16 12:17, 22 13:9,13 24:24 25:12 26:15 45:8 60:5 72:2 74:5,14 106:21 reheard 94:14 rehearing 94:12 rejected 19:22 21:9 22:7,25 23:8 49:1 relationship 85:8 relevant 29:19 31:19 44:11 73:20 105:13 109:2 relied 6:21 relief 3:10,23 9:20 15:2 17:14 72:3 74:22 76:18 97:12	relies 24:18 remaining 104:5 remedies 100:7,10 remember 25:5 42:3 43:4 45:12 46:11 49:14 60:16 69:8 73:21 100:5 113:4 remove 50:10 rent 19:2 rental 91:12 rented 20:1 repeatedly 50:14 report 59:1,15 75:10,11 reported 46:12 Reporter 71:21,23 reports 110:7 representative 36:17 71:8 representatives 35:22 47:20 repurpose 62:20 request 56:21 57:2 70:17 102:7 103:3 requested 103:16 104:7 110:17 require 24:9 43:14 49:13 63:10 98:10 required 9:9,11 27:15 35:15,19 37:17,20 63:22 75:23 77:2 requirement 43:23 44:25 48:12
---	---	--	---

requirements 36:6 37:17 41:4,20,21 47:9,10 49:13 52:5 60:2,7,9 62:21 87:22,24 requires 7:6,7 37:11 52:11 94:10 98:9 requiring 39:9 61:4 reservoir 111:14 residence 47:12 residential 6:25 7:13,18 16:1,2,5,6, 10 25:1,9,16,22 26:4,8 31:5 41:15 42:22 65:25 72:5 74:25 75:5,18 76:2, 3,5,11,13,21,24 77:6 91:9,11 93:25 95:1,16 96:11 105:3,8,10 110:14 113:10 114:2,5 residentially 15:23 residents 45:12,18 resolution 46:13 87:11 113:3 resources 33:2 respect 80:25 85:20 104:1 responsible 82:16 restriction 10:18 11:1 12:17 restrictions 32:21 39:23,25 42:17 resubmitted 6:12	result 78:17 resulted 11:14 resulting 25:11 review 20:20 21:1 23:1 52:3,5,7,11 62:22 89:17,18 103:6 104:10 revisiting 95:12 rezone 113:4 rezoned 110:13 rezoning 67:11 87:3,11,13 92:12 105:15 Richards 55:17 56:5 64:12,13 Richards' 64:12 74:11 Richmond 18:16, 18,25 19:1,3,4,6,9, 10,17,23 20:4 23:17 riding 56:2,3 65:4 right-hand 17:16 50:6 70:8 71:3,5 rights 13:7 20:22, 24 21:2 22:11 24:1, 3,4 32:2,8,9,19 38:12 53:2,13,18 54:5 98:22 99:6 ripeness 9:10 17:10 26:23 rise 99:1 road 25:6 34:23 50:23 51:2 102:1 roadmap 86:15	roads 51:12 Rod 70:19 rough 68:16,24 RPD 91:3 93:20 94:23,24 97:24 98:1 105:9 RPDS 105:3 rudimentary 111:1 rule 20:8 21:6 22:13,21 23:3 76:16 ruled 42:21 97:1,6 rules 7:23 8:6,16, 19 9:7,12,15,16 14:12,16 17:1 24:16,21 28:16 74:6 78:20 103:20 ruling 6:13 25:7 27:17 Rumble 68:19 rural 111:5 113:15 <hr/> S <hr/> safe 88:3 99:19 safety 71:4 Sahara 36:24 115:11 sailed 94:20 salvo 58:12,13 77:23 satisfaction 87:13 Saylor 93:12 97:23 scenario 96:12	scenes 67:1 68:4 69:3 scheme 82:5 schools 111:13 Schwartz 2:21 3:14,16,19,25 4:3,8 5:13 17:25 18:10, 13 23:10 44:9 50:20 51:4 62:11 79:10,12 98:16 102:16,19,25 screen 4:20 107:22 Seaboard 22:5 search 68:5,10 searches 54:1 seat 66:10 seated 2:6 79:7 section 5:22 8:5 31:9 39:12 61:16 62:13 63:3,4 107:25 Sections 108:2 secure 56:6 seeking 16:22 17:12 sees 70:17 seizures 54:1 self-latching 55:25 sell 88:12 91:18 sending 50:14 sense 10:5 23:21 85:2 87:4 sensitivity 47:10 separate 30:5,15
---	---	---	--

38:6,9 65:11 70:22 110:15 separation 21:4,15 22:7,11 23:2,9 September 67:8 Seroka 57:7 service 106:9 session 2:4,8 set 2:9 3:7 62:21,25 79:24 99:6 setback 87:21 setbacks 48:25 89:25 sheet 11:19 shield 77:21 ship 94:20 short 94:4 shot 58:11,16,19 60:22 shovel 78:11 show 16:8 52:14 77:11 108:19 showed 70:14 showing 55:18 57:15,22 70:5,21 84:20 86:20 112:17 shows 31:18 36:7 50:19 60:4,15 66:7 69:4 shut 83:6 side 50:7 70:8 71:2, 3 87:23 88:8 112:25 signed 38:20 39:3	significant 6:15 31:6 33:2 35:25 37:4 51:19 52:12 54:12 74:19 significantly 45:2 signs 112:17,20,23 similar 105:10 simple 93:15 99:16,21 simply 22:16 49:1 51:12 single 8:9 37:1 43:23 44:24,25 48:3,12,14 49:5,22 78:2,6,8 87:20 88:14,22 single-family 6:25 7:12,18 47:11 91:13,14,20 single-family/ multi-family 94:25 95:16 single-lot 109:21 singled 69:5 singular 44:20 46:4 49:20 sir 3:15 4:15,19,23 29:14 44:17 62:17 79:3,14,18,21 83:20 84:6 94:16 97:17 102:18,24 Sisolak 10:14,17, 19 11:8,20,22 15:7 26:16 38:22 98:13, 14,19,21 99:6,13, 14 100:5,9,15 sit 78:1	site 69:6 86:18 90:6,8,23 103:5 104:10 108:16 size 40:8 41:17 115:24 Skateboarders 65:3 skipped 84:19 slide 5:21 9:17 14:25 17:14 27:2,3 42:1 65:9 Slope 17:22 18:12, 14 small 71:15 90:19 smaller 90:1,17 107:3 socioeconomic 91:19 soil 50:10 solely 78:17 son-in-law 112:6 sophisticated 111:2 sort 84:1,12 86:24 87:2 106:13,19 107:5 109:3 111:3 113:22 114:23 sound 20:23 south 108:1 Southern 115:3 space 63:24 64:20 67:11 81:12 83:10, 13 89:4,7,23 90:3, 7,20 98:2 106:9 spaces 96:2	speak 68:6,8 speaking 47:18 special 50:22 51:1, 2 68:18 107:3 specific 8:17,24 9:1,8 28:22 33:16 57:22 76:6 83:15 103:24 106:18 109:10 114:17 specifically 36:8, 11 38:9 54:16 55:19 106:22 spend 9:14 31:17 60:11 92:21 spent 35:23 split 31:11,13 sponsored 84:15 spot 85:11 sprawl 88:1 spread 90:16 square 106:5,7 113:12 staff 43:22 47:24 65:17,24 66:19 69:17 110:7 stamp 44:3 stand 42:4 73:13 stand-alone 104:6 standard 15:5,9,10 17:17,21 18:20 20:18 25:19 26:6, 15,18 27:6 28:21 73:20 74:5 76:15 77:14 78:4,5 84:17 standards 9:9 26:15 28:15,18
--	---	---	--

62:24 71:20 103:6 standing 68:1 71:11 Stars 30:4 start 2:11 5:16,17 29:24 86:2 110:12 started 4:11 30:25 39:10 51:20 70:10 71:20 113:7 state 8:7,14 12:22 17:17,24,25 18:4, 20,21 20:9 23:10 27:8 34:11 50:21 51:4 62:1 81:11 99:3 110:22 stated 19:3 34:19 35:20 36:11 37:12 53:15 58:25 statement 22:7 42:19,20 67:14,15 statements 35:5 states 13:3,17 15:4, 8 16:4 21:8,24 22:6,8 31:21 33:7, 10 53:11,12 54:3 59:6,16 63:4 82:14 84:16 99:2,8 stating 25:7 statute 12:13,15 13:21,24 14:8 74:15 81:16 83:8 84:21 statutory 82:5 stays 90:13 step 6:3 28:16 48:4 Stephanie 34:18 58:23 69:6,11	103:22 Stevens 59:7 69:8 stick 53:21 98:16 sticks 6:7 53:18 stipulated 83:2 stop 25:10 45:14 67:9 70:12 95:17 stopping 64:17,18 straight 79:24 83:18,20 84:10 straightforward 7:8 street 87:23 88:16 101:23,25 streets 111:10 strict 39:25 strike 66:14,18 stronger 99:7 structures 114:8 stuff 43:9 sub-inquiry 7:5,8, 9 subdivided 92:2 subdivisions 100:22 109:22 subject 62:20 submit 60:13 103:9 104:18 submits 66:3 submitted 29:10 30:10 36:1 41:16 51:5 52:4 55:17 56:4 60:10,17 64:11 65:15 92:14	103:3 submitting 105:14 subsequent 12:3 substantial 24:11 77:12,16 substantially 18:8 19:8 20:2,11 23:11 26:3,9 76:20 77:7 substantive 47:19 suburban 109:1,6 111:4,7 113:14 succinctly 24:24 sudden 81:18 sue 12:9 sued 16:15 sufficient 23:24 sum 24:19 Suma 108:15 summarized 64:15 summary 3:9,17, 22,24 4:1 9:19 15:3 16:22 17:12 24:20 60:6 97:19 supporting 106:8 supposed 103:21 114:25 Supreme 6:2 7:6 8:6,18,20 9:7,23,24 10:11,16,24,25 12:11 13:3,17 14:11,12 15:4,8 16:4 17:1,8,21,23 18:18 20:5,8 21:8 22:6,8,23 23:6,17, 24 24:4,15,17 26:13,16,19,21	27:9,13 33:7,10 37:3 38:22,25 50:20 51:4 53:11, 12 54:3 59:6 77:9 95:6 surrounded 86:17 surrounding 31:16,24 32:16 33:17 45:11,18,25 51:19,21 55:1 56:10,13 72:11,16, 20,24 73:10,12,18 74:20 swap 86:10 swapped 86:12 swimming 55:20 sword 77:21 system 114:15 systematic 66:22 <hr/> T <hr/> tab 29:22 31:16 50:1,2 63:12,15 tabbed 28:11 table 105:12 tables 105:18 takes 14:13 15:16 21:10 79:25 taking 3:8,22 7:10 8:9,11,14,22,25 9:2,3,4,5,10,18,21, 23 10:1,8,12,16,23 11:2,6,15,23 12:1, 6,9,12,14,17,22 13:9,13,19 14:7,17, 19 15:1,3,10,11,18,
---	---	---	---

19,20 16:18,23 17:4,7,13,18,20 18:6,19,23,24 19:18 20:5,9,12,17 22:14 23:12,14,19 24:5,9,13,20,21,24 25:12,14 26:2,12, 15,18,20,25 27:21 28:15,18,21 33:16 39:8,14 44:13,15 45:8 51:20 59:9 60:5 69:10 71:1,12, 16 72:2 73:20,25 74:5,7,14,18,22 76:15,18 77:3,4,11 78:20 79:1 97:9,10, 11 98:7 99:1 100:4, 11 101:2,12 takings 10:15 22:24 26:25 28:7 71:20 98:15 99:14 talk 80:20,22 100:4 105:2 113:18 talked 5:25 27:5 talking 6:7 82:5 93:11,14,18 98:15, 23 103:2 108:9 113:10,13 target 57:23 59:20 63:8 66:23 67:1 78:9 targeted 36:8 69:9 77:1 targeting 70:6,21 targets 59:5,8 Tarkanian 36:10 49:14 tax 75:20,22 81:4, 20 82:11,14 83:9	taxed 31:4 76:5 taxes 81:18 82:4,16 taxing 76:12 Taylor 86:9,10 teasing 99:12 technology 2:20 television 79:20 telling 95:24 tells 65:24 68:11 109:14 tenancy 93:16 tenants 89:7 tentative 41:21 104:11 terms 89:12 113:12 testified 31:10 32:5,12 34:3,12 testimony 34:1,9 37:13 39:20 testing 50:10 theme 103:19 theory 91:22 thereof 91:16 these.' 70:20 thing 28:14 34:19 48:14 49:5 54:24 64:3 67:22 68:1 78:3,6 84:23 85:18 89:2,11 93:2 95:4 98:3 99:13 108:21 114:14 things 27:15 35:11 49:9 54:9 55:9 58:2 60:12 61:10 63:7	79:25 80:7,8 84:8 96:7 103:21,24 105:23 107:5 111:12,13 113:16 thinking 96:9 113:11,12 thoroughfare 101:23 thought 87:9 98:19 109:11 thoughts 96:8 thousands 69:11, 19 three-quarters 108:2 three-story 19:1, 24 Thrilla 68:19 Tien 9:25 Tigard 33:8 time 19:16 31:17 32:5 50:13 54:12 66:11 67:9 79:4 80:4 84:20 92:22 93:2,7 97:24 108:21 109:8 113:8 115:1,4 timeline 46:3 timely 37:16 times 23:8 24:15,17 61:7 Timothy 2:4 Tio 75:11 Title 41:19 Tivoli 36:23	today 2:19 3:7 5:18 7:15 13:16 24:22 28:4,14 72:4 78:10, 17 97:18 today's 97:7 told 31:25 33:21 52:25 64:23 70:11 tomorrow 28:4,5 tool 105:24 toolbox 106:1 tools 106:3 108:20 top 5:23 7:22 53:7 90:12 113:24 tort 102:13 total 19:19,22 22:15 23:8 Totally 94:21 touch 87:1 townhouses 91:14 tract 92:1 traditional 86:24 88:22 traffic 88:2 transcript 74:9 transpired 80:7 travel 80:16 treasured 13:7 53:13 54:5 treat 57:23 treating 70:22 trees 50:10 trial 21:16 trucks 50:9,16
--	---	--	--

turn 7:21 13:2 17:15 20:13 23:5 28:22 29:22 36:5 44:2 46:8 56:25 62:15 65:9 78:8 turned 46:5 78:12 Turner 17:22 turning 9:17,22 14:25 27:2 35:8 41:22 42:1 46:25 48:6 50:1,18 53:4 two-step 6:2 type 14:14,18 18:23 22:20 33:9 91:18 97:11 types 22:24 85:3,4 91:24 105:3 typically 37:10	understood 56:1 86:4 undeveloped 90:17 undisputed 34:2 35:1 uneconomical 75:16 unequivocal 61:1 unfounded 22:12 unheard 59:19 uniform 87:21,23 89:24 unions 13:22,25 14:5 62:3,5 74:16 unit 84:3 87:18 89:20 91:1,8,13 92:5,12,18 95:5 97:25 98:1 109:15 United 13:3,17 15:4,8 16:4 21:8,24 22:6,8 33:7,10 53:11,12 54:3 59:6 99:2,8 units 40:9,10,12, 16,19 41:18 48:25 81:23 90:11,12,13, 15,16,18 91:12,14, 15 104:8 107:6 universally 53:16 unreasonable 53:25 up-front 92:21 urban 88:1 111:5 113:14,19 Usely 86:16	utilities 90:23 utilization 91:10 94:1 <hr/> V <hr/> vacant 10:20 31:4 78:2,10,11,17 vague 61:8,9 valid 98:6 valued 23:15 vandalizing 112:21 variance 100:11,15 variety 8:11 27:10 Vegas 2:9 13:16 17:24 18:12,15 31:5,8,10,13 35:2 36:19 37:7 40:2 42:10 43:25 47:15 57:23 63:25 65:8 69:13,24 70:6,22 71:16 74:13 80:23 84:12 86:8 107:14, 15,24 108:10 vehemently 31:24 33:17 Venetian 112:11 verbatim 18:10 verbiage 33:14 version 110:7 viable 76:9 Vickie 31:21 70:9 views 24:8 Village 36:23	vineyards 38:1 vires 85:15 virtually 73:10 80:1 84:16 93:21 visible 4:21 vision 86:5 volume 44:11 vote 44:19 52:17, 18,19,22 votes 42:25 voting 67:21,25 <hr/> W <hr/> walk 34:23 52:18 79:23 80:5,19 83:24 84:8 walking 56:3 65:4 wall 102:1 wanted 31:11 40:11 44:10 50:17 56:5 68:20 85:18 101:21 103:3 114:16,17 115:4 War 89:13 warranted 17:3 watching 68:17 water 32:2,19 54:19 75:15 waterfront 96:7 Waters 2:15,16 18:2 ways 8:11,13 27:10 102:12
--	--	---	--

weekend 57:10,18	writing 74:2	zoning 6:21,22,24	
weekly 35:21	written 5:3 70:1	16:5 40:9 41:8,11	
weigh 41:3	wrong 81:11	42:7 45:1,3 47:10,	
well-known 78:16	wrote 39:16 57:14	16 65:23,24 69:16,	
well-seasoned	107:12	18 75:7 78:4 80:22,	
49:16		23,25 81:4 83:24	
Wesley 5:8	Y	84:2,3,10,11,14,23	
west 109:1,7 111:7	yard 87:24 88:8,9	85:1,3,4,8,9,11,12,	
whatsoever 22:19	year 13:23 31:6	14,24 86:23,24	
wide 88:15	62:6 85:24 111:22	87:6,7,18,19 88:6,	
width 88:24	years 12:6 18:4,5	19,22,25 89:3,12,	
William 105:14	19:8 32:25 33:2	21 90:5 91:25 92:1,	
106:15 107:11,13	34:21 35:12,22	4,5 94:23,24 95:9,	
112:6	36:20 37:18 39:15	10,13 96:2,10,12	
Williams 2:4	49:3 58:10,24	98:11 105:24	
wipeout 19:19,22	69:19 70:4 78:13	106:14 108:20	
22:15 23:8	86:8 91:2 107:8	109:16,21 110:20	
wishes 28:12	109:24	111:25 112:3,9,13,	
110:13	yellow 50:4	24 113:7 114:7,8,9	
Wolfson 3:2,3	Yohan 32:14	zoom 112:25	
wonderful 96:7	36:17,18 37:22	113:24	
word 23:21 52:1	71:6,8		
68:8,9,13	young 55:14,23		
words 14:17 23:23	56:1		
33:7,10 46:14 63:9	Z		
work 33:3 49:3	Z3481 111:20		
73:5	112:3,13		
worked 32:24	zone 85:13,16		
34:19 40:1 86:1,5	108:24 109:13,16		
working 7:24	110:16,19		
works 58:23 68:10	zoned 15:23 16:1		
world 89:13 96:5	30:19 75:25 83:15		
Write 102:22	87:5 109:17		
	111:16,20 112:18		

In the Matter Of:
180 LAND vs CITY OF LAS VEGAS

September 24, 2021



DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * *

180 LAND CO., LLC, ET AL.,

Plaintiffs,

vs.

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

CITY OF LAS VEGAS, ET AL.,

Defendants.

CONTINUED MOTIONS
BEFORE THE HONORABLE TIMOTHY C. WILLIAMS

On September 24, 2021

9:33 a.m. to 4:38 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

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P R O C E E D I N G S

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THE MARSHAL: All rise. Department 16 now in session. The Honorable Timothy Williams presiding.

THE COURT: All right. You may be seated. And let's go ahead and set forth our appearances on the record. We'll start first with plaintiff and move to the defense.

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

MS. WATERS: Good morning, Your Honor. Autumn Waters on behalf of the landowners as well. And Elizabeth Ghanem Ham and Jennifer Knight are just running a few minutes late, but we're ready to go.

THE COURT: I understand.

MR. MOLINA: Chris Molina on behalf of the City.

MR. SCHWARTZ: Andrew Schwartz on behalf of the City, Your Honor.

MR. BYRNES: Phil Byrnes on behalf of the City.

THE COURT: Okay. Once again, good morning. So, sir, do we have something we need to address before we get started?

1 MR. LEAVITT: One thing, Your Honor. I just
2 wanted to make sure that I was clear on this yesterday.
3 I'll just be very quickly with one matter.

4 We raised an objection yesterday. I just
5 wanted to make clear what our objection was. I heard a
6 little bit of conversation yesterday about the R-PD7
7 zoning on the property. In this very case, the
8 landowners requested all of the historical records for
9 the R-PD7 zoning from 1983 forward in requests for
10 production of documents, including applications,
11 minutes, drafts, memos, letters, correspondence,
12 everything the City had in regards to the R-PD7 zoning.
13 The City's response: "Such records are not
14 proportionate to the needs of this case as the City
15 does not dispute the R-PD7 zoning."

16 So we've had no discovery on the R-PD7 zoning
17 because the City did not dispute --

18 THE COURT: Sir, I mean, if that's the
19 response to the request --

20 MR. LEAVITT: It is, Your Honor.

21 THE COURT: -- that becomes part of the case.
22 And, ultimately -- I thought about this yesterday. I
23 thought about it this morning. And I have no -- I
24 think you've done a really good job of giving me a
25 historical oversight on land development in Las Vegas.

1 But at the end of the day, when this 35-acre parcel was
2 purchased, how was it zoned?

3 MR. MOLINA: R-PD7.

4 THE COURT: Okay then. None of this other
5 stuff matters, does it?

6 MR. MOLINA: Well, absolutely it does.

7 THE COURT: Tell me how. Here's another
8 question I have for you.

9 MR. MOLINA: Sure.

10 THE COURT: Why wouldn't R-PD7 zoning be part
11 of the bundle of rights that have been accessed or that
12 are owned by 180 Land Company in this case?

13 MR. MOLINA: Well, because it's not an actual
14 entitlement in this case. With respect to the specific
15 R-PD7 zoning on the Badlands golf course was not an
16 entitlement to build. In any event --

17 THE COURT: Well, but, I mean, isn't it --
18 here's the thing about it. I mean, if it's not an
19 entitlement to build, there's going to have to be a
20 pretty good reason as to why he couldn't have his
21 expectations met. And I'm talking about 180 Land. I
22 don't mind telling you that.

23 Because you've got to give me some reasons.
24 Because, at the end of the day, and I understand this,
25 well, we have to do the whole parcel, this or that,

1 but, you know what, this 35 acres was zoned; right?
2 It's uncontroverted. So we're going through this
3 history. How is that relevant? It's zoned R-PD7.

4 MR. MOLINA: Can I approach?

5 THE COURT: I mean, you can, but is it zoned
6 R-PD7?

7 MR. MOLINA: There's no doubt about that.

8 THE COURT: Okay. Well, move on. Tell me
9 why Mr. Leavitt is wrong. That's what I want to know.

10 Sir, you can step up and do it. He went
11 through a pretty comprehensive factual rendition as to
12 the basis for their motion for summary judgment; right.
13 He said, Judge, these are uncontroverted issues of
14 material fact in this case. I get that. And that's
15 what Rule 56 mandates. Show me why he's wrong.

16 MR. SCHWARTZ: Your Honor, could I address
17 that?

18 THE COURT: I never cut anybody off, but at
19 the end of the day, I want to know why this is
20 relevant.

21 MR. SCHWARTZ: Can I address that,
22 Your Honor?

23 THE COURT: Absolutely.

24 MR. SCHWARTZ: We haven't even gotten to the
25 facts.

1 THE COURT: We haven't what?

2 MR. SCHWARTZ: We haven't gotten to the facts
3 from 1990 forward.

4 THE COURT: Okay. But my question is this.
5 When 180 Land Company purchased the 35 acres at issue,
6 what was the zoning?

7 MR. MOLINA: The zoning was R-PD7. And
8 that's why I'm trying to walk you through this, to
9 explain what that means.

10 THE COURT: You can say what it means. We've
11 had -- this isn't the first rodeo as far as the
12 hearings are concerned in this case. It was explained
13 to me over a year ago what that means. So if you want
14 to go over that again, that's okay.

15 MR. MOLINA: Okay. And I need to make a
16 record.

17 THE COURT: I don't mind telling you this. I
18 sat down and I thought about this. We spent an hour
19 and a half yesterday, and none of the issues that are
20 important to this case have been addressed from the
21 defense perspective.

22 MR. MOLINA: I'm sorry, but I disagree.

23 THE COURT: Well, sir, I'm making the
24 decision. I was a trial lawyer. You've got to know
25 your audience. That's why I'm telling you what I'm

1 looking for.

2 MR. SCHWARTZ: Your Honor, that's a legal
3 issue, and I fully intend to address that issue.

4 THE COURT: So, sir, it's a legal issue.
5 When it comes to assessing the legal issues in this
6 case, if the property, the 35 acres at issue, has been
7 zoned R-PD7, yesterday, the facts that we went over
8 yesterday, how is that relevant to the issues at hand
9 right now?

10 MR. SCHWARTZ: It explains how R-PD7 zoning
11 works. It explains the legal --

12 THE COURT: We never talked about how R-PD7
13 worked yesterday.

14 MR. SCHWARTZ: I know. Because we're just
15 going through the facts --

16 THE COURT: I know how it works. If you want
17 to spend 30 seconds saying, Judge, this is what R-PD7
18 zoning is, I'll listen to that. But I'm talking about
19 the issues involved in this case involve a taking and
20 whether there was a taking or not; right. And I asked,
21 I think it was a pretty good question, and I understand
22 bundle of rights. I get that when it comes to real
23 property ownership. And is R-PD7 part of that.

24 MR. MOLINA: No.

25 THE COURT: Tell me why.

1 MR. LEAVITT: Your Honor, if I can --

2 THE COURT: I'm going to give you a chance,
3 Mr. Leavitt.

4 MR. SCHWARTZ: Your Honor, Mr. Molina is
5 going to explain what R-PD7 zoning is --

6 THE COURT: Tell me now. You know, I'm going
7 to tell you this. I did not -- I listened to it. I
8 thought it was enjoyable to listen to the lecture
9 yesterday on the history of Las Vega city planning and
10 zoning and what's happened west of Rainbow and the
11 Peccole Family and all the wonderful things they've
12 done. But that has no bearing on the decision I have
13 to make today. I just want to tell you that.

14 MR. SCHWARTZ: Your Honor, Mr. Molina is
15 ready to proceed to explain what R-PD7 zoning is all
16 about, what it means, how it was used in this case.
17 This is directly relevant to the issues and he's about
18 ready to do that.

19 THE COURT: Okay. We're going to back to
20 1800 or whatever.

21 MR. MOLINA: We're going to pick up right
22 where we left off yesterday, which is 1988.

23 MR. LEAVITT: Your Honor, if I could just say
24 one last thing because I just want to make my record
25 clear, with the Court's indulgence.

1 THE COURT: Yes.

2 MR. LEAVITT: The question is what does R-PD7
3 mean. We had extensive briefing on that.

4 THE COURT: Absolutely.

5 MR. LEAVITT: This Court entered an order and
6 said, you have defined what R-PD7 is in your 10/12/2020
7 order. That's the law of the case. Your Honor, I had
8 no idea this was going to happen today. I asked for
9 their PowerPoint yesterday. I still don't have it.

10 THE COURT: But you know what, that's not how
11 we do things. We just don't do things the morning of a
12 hearing; right. And my question is this. What was
13 that discovery response that you had, sir?

14 MR. LEAVITT: The discovery response was the
15 records that we asked for are not proportionate to the
16 needs of the case as the City does not dispute that the
17 subject property is zoned R-PD7. So what we did is at
18 the hearing we had, you defined R-PD7. We heard all
19 these arguments. And we now have an order that defines
20 that the R-PD7 says the landowners have the legal right
21 to develop residentially on their property. And the
22 Nevada Supreme Court in the Alcantara v. Walmart said,
23 once that order is entered, the party is not permitted
24 to ambush another party at a hearing where it's not an
25 issue and reargue it because that would be -- this is

1 the Court's statement -- harassment and oppressive.

2 So I have significant issues with being
3 handed documents that I should have gotten during
4 discovery --

5 THE COURT: Mr. Leavitt, I don't want to cut
6 you off, but we do have Rule 16.1; right. We have a
7 duty and responsibility to seasonably supplement all
8 discovery and all documents in our possession. Because
9 understand, this is a trial court. This isn't the
10 city council. I just want to tell you that. It's a
11 trial court.

12 So if there's -- and right now -- let me see,
13 when was the discovery cutoff in this case?

14 MR. LEAVITT: Discovery cutoff occurred in --

15 MR. MOLINA: Your Honor, everything has been
16 produced. Everything has been produced.

17 THE COURT: Wait. I just asked a question.
18 I asked a question, sir. When was the discovery
19 cutoff?

20 MR. LEAVITT: I believe, Your Honor, it was
21 July 22nd, 2021, discovery was cut off.

22 THE COURT: And my point is this. Remember
23 this, under Rule 56, you're dealing specifically with
24 admissible evidence at the time of trial. So my
25 question is this. Has all this stuff that's being

1 utilized been admitted -- I mean, been produced? If it
2 has, you can deal with it. If it hasn't, I'm not going
3 to consider it.

4 MR. MOLINA: Okay. That's fine.

5 THE COURT: It's not fine. That's the rule.

6 MR. MOLINA: Yeah. Can I ask a clarification
7 on that because --

8 THE COURT: Oh, I'll clarify it for you.

9 MR. MOLINA: -- ordinances are laws; right.

10 THE COURT: But I didn't ask ordinances;
11 right.

12 MR. MOLINA: I know. But that's --

13 THE COURT: No. I'm asking --

14 MR. MOLINA: I just want to make sure I can
15 present ordinances.

16 THE COURT: Sir, I'm not going to -- I don't
17 think there's any limitation under Rule 16.1 as it
18 deals with the law.

19 MR. MOLINA: Okay. That's all I want to make
20 clear.

21 THE COURT: Right. I mean, I thought that
22 was pretty basic. There's nothing in Rule 16 that
23 deals with the law; right. It deals with evidence.

24 MR. MOLINA: We're not using any other
25 evidence that hasn't been produced. We've produced

1 everything.

2 THE COURT: So go ahead and tell me why. I'm
3 listening.

4 MR. MOLINA: Okay. Thank you. And I just
5 want to -- since you want to understand why I'm going
6 through all of this. If you look at this, this is a
7 mathematical explanation of why the master plan matters
8 and the City's general plan matters with respect to
9 R-PD7 zoning.

10 THE COURT: When it comes to R-PD7 zoning,
11 the zoning in place, that wasn't in violation of the
12 master plan, was it?

13 MR. MOLINA: It was the master plan.

14 THE COURT: Okay. All right. I get that.

15 MR. MOLINA: Right. So but here's what I'm
16 saying. And this will make a lot of sense. And we'll
17 go just through the documents that actually zoned the
18 property R-PD7. And I want to explain why it matters
19 that the open space is defined in the initial master
20 plan. Because if you take 100 acres and you zone them
21 R-PD7, you can build 700 units on 10 acres of that and
22 you have 90 acres of open space; okay. It's 7 units
23 per acre.

24 Now, if the first developer who got the
25 entitlements for that went and he sold the rest of the

1 acres of open space to somebody else --

2 THE COURT: When you say, "the entitlements
3 for that," what do you mean?

4 MR. MOLINA: The entitlements for the R-PD7
5 on the initial 100 acres.

6 THE COURT: So here's my question when it
7 comes to that issue. What does that mean,
8 entitlements? Is that part of the bundle of rights?

9 MR. MOLINA: So there's this concept of
10 vested rights. And you don't have vested rights until
11 you've actually gotten your building permit and you've
12 started to build. That's just the -- the basic idea is
13 that -- it's like grandfathered rights. You can't stop
14 somebody once they've already started use of a
15 property. That doesn't necessarily mean that you have
16 to let them start a new use of property.

17 So here we have historic use of the property
18 is golf course. There's no grandfathered rights under
19 R-PD7 zoning to build houses.

20 THE COURT: Okay. But here's my point.
21 We're talking about the 35 acres. I want to be really
22 specific. Because it's my recollection the 35 acres
23 was zoned R-PD7.

24 MR. MOLINA: Yes. And I will walk you
25 through that. But what I'm trying to illustrate here

1 is why, when you're talking about plan development
2 zoning, that if you don't do it in accordance with the
3 plan, an overall plan, and you ignore that plan later
4 on, what could potentially be here is that you can
5 build -- let's say you build 700 units on the first
6 10 acres. You have 90 acres of open space. It's
7 7 units per acre. So if you sold those 90 acres of
8 open space to somebody else, they could build 630 units
9 on 10 acres. It would be 7 units per acre.

10 And then if that person sold the remaining
11 70 acres of open space to somebody else, they could
12 build 560 units on 10 acres --

13 THE COURT: I understand hypotheticals. What
14 are the facts of this case and what was proposed?
15 That's what I want to know.

16 MR. MOLINA: Let's go into the -- let's go
17 into the -- back into the evidence that's attached to
18 our motion that's been produced in discovery. And what
19 I'm going to put up here is the 1986 master plan. And
20 we'll actually just skip forward. Let's go to
21 Exhibit E.

22 THE COURT: Let me follow you, sir. And I
23 have it up here.

24 MR. MOLINA: It's in our appendix of
25 exhibits. And I apologize. We have 20 volumes of

1 exhibits. I didn't think it was practical to try to
2 bring all of that into the court.

3 THE COURT: Go ahead, sir.

4 MR. MOLINA: So this is the Peccole Ranch
5 master plan that was submitted to the City in 1988. It
6 was prepared by Wayne Smith. It's by the Peccole Ranch
7 Partnership, Triple 5 Corporation, and the Peccole
8 Trust. Triple 5 Corporation is the company that built
9 Mall of America. There's a lot of litigation and
10 history between these two parties. They had a big
11 falling out.

12 This is what they submitted to the City in
13 1988. If you go to page 6 of our Exhibit E, it
14 describes the Peccole Ranch master plan.

15 "The proposed overall 1716.3-acre Peccole
16 Ranch master plan is being submitted to Las Vegas" --

17 THE COURT REPORTER: I'm sorry, sir, could
18 you please read a little slower for me.

19 MR. MOLINA: -- "along with a rezoning
20 application on 448 acres on phase one."

21 And I have that right here. This is the
22 1716 acres. There's the boundary right there. Doesn't
23 include Canyon Gate. Doesn't include the parcels that
24 have been sold off and developed by other builders.

25 Now, we go to page 7 of Exhibit E. Shows you

1 the boundaries that I just outlined on this board. And
2 if you go to page 8 of Exhibit E, it will show you
3 that's the Peccole Ranch master plan submitted in 1988,
4 and there's no golf courses on this.

5 And where did the golf course come from;
6 right? And if you skip to page 18, just included this
7 to show that they've got the planned unit development
8 concept in mind. They're doing open space. They're
9 clustering houses.

10 And I'll show you on page 24 of Exhibit E, we
11 have the phase one land use data. Phase one was
12 actually just from south of Charleston Boulevard west
13 of Fort Apache, north of Sahara Avenue, and cuts off
14 right through here on this street that kind of curves
15 around. So that's phase one. It's just 400 acres.

16 So what you'll see here is this phase one
17 land use data. You've got R-PD7 zoning on the single
18 family, and you also have R-PD7 zoning on the open
19 space and drainage. Even the elementary school was
20 zoned RPD-7.

21 So you've got a lot of different uses that
22 you can put in an R-PD7 zone. Doesn't necessarily mean
23 that you have entitlements to build houses. It's a
24 planned development. How are they going to include all
25 of these uses? You've got to have a plan. And this is

1 the plan.

2 If you go onto page 25 --

3 THE COURT: So here's my question as far as
4 whatever plan was submitted by 180 Land Company as it
5 relates to the 35-acre parcel that is at issue in this
6 case. Would there have been a necessity for a variance
7 of any sort?

8 MR. MOLINA: Not a variance. And I'll walk
9 you through the specific entitlements that are
10 required.

11 But the process has changed, and that's why I
12 want to show, sort of, all this background so you
13 understand that people were acting in good faith here.
14 There's a legitimate debate. Reasonable people could
15 disagree.

16 THE COURT: But here's my question. And I
17 actually thought about this, too, good faith, intent
18 and the like. At the end of the day, if you take
19 somebody's property, you take somebody's property. You
20 can say, you know what, we want to make this for the
21 public good; right. And you can have good faith. And
22 if you do that, of course, the private property owner
23 has some rights, too.

24 MR. MOLINA: Right.

25 THE COURT: And so if you say, this is what

1 we want to do, we want to use it for this purpose, and
2 it could be a great reason, for the best parks and
3 recreation in Clark County, but you've got to pay the
4 property owner.

5 MR. MOLINA: Absolutely. You're totally
6 correct. But there's --

7 THE COURT: I'm going to tell everybody this.
8 I'm not necessarily focusing -- you can address this if
9 you want to. I'm not as concerned as much as the
10 intent. I'm concerned about paying back the property
11 owner. I understand there's a lot of arguments there.
12 I'm going to listen to the evidence. But at the end of
13 the day, what impact does this have on the rights, the
14 entitlements, the bundle of rights, that were owned by
15 the 180 Land Company vis-a-vis or is relating to the 35
16 acres. So they can have all the goodwill and want to
17 do the right thing, but the bottom line is, there's
18 property rights here.

19 MR. MOLINA: And you're so dead on. The
20 problem is, is that the developers argue that you have
21 to look at the aggregate of the City's actions. And
22 you have to look at all this different evidence. And
23 he's trying to vilify everybody that's involved in this
24 thing.

25 THE COURT: Well, I'm not looking at it from

1 vilified. I'm looking at the impact on his property
2 rights.

3 MR. MOLINA: Okay. And that's great. And
4 we'll talk about that. But what I really want to lay
5 the foundation for is the process of obtaining
6 entitlements. Because until you have an entitlement
7 and until you start to build in reliance on that
8 entitlement, you don't have vested rights. And the
9 case law is super clear on this.

10 Stratosphere says, zoning does not confer
11 vested rights. So that's the distinction here, is that
12 you have to have a vested right in order to base a
13 taking claim on that right. And you don't have a
14 vested right just in the mere fact that the property is
15 zoned. You have to go through the process --

16 THE COURT: They have a vested right based
17 upon the ownership of a property; right? They have a
18 vested right based upon real property ownership; right?

19 MR. MOLINA: They don't have a vested right
20 to build whatever they want.

21 THE COURT: But here's the thing. You say
22 they don't have a vested right to build whatever they
23 want. And that's why I asked the one question as it
24 pertained to whether a variance would be necessary as
25 it relates to their project.

1 MR. MOLINA: It's not a variance. There's
2 other entitlements that you would need to get, but it's
3 not a variance.

4 THE COURT: But you're not answering my
5 question. In essence, this was not a nonconforming
6 use.

7 MR. MOLINA: It wasn't a use. It didn't
8 exist.

9 THE COURT: Wait. Their application was not
10 a nonconforming use. They didn't need to get a
11 variance; right?

12 MR. MOLINA: A nonconforming use is a
13 specialized term that means that a use that has been
14 allowed, but then it's no longer allowed under a
15 subsequent version of the code.

16 THE COURT: No. No. No. Answer my
17 question.

18 Would they have to get any variance based
19 upon their application?

20 MR. MOLINA: So our position is that --

21 THE COURT: Wait. Wait. That's a yes or no.
22 That's a fact. It's not your position. Would they
23 have had to get a variance?

24 MR. MOLINA: I'm trying to explain it's
25 not --

1 THE COURT: Wait.

2 MR. MOLINA: No. The answer is no.

3 THE COURT: Okay. Here's the thing. You've
4 got to understand this. I'm going to make the
5 decision.

6 MR. MOLINA: Yeah.

7 THE COURT: So if you can't answer my
8 questions and you're going to beat around the bush,
9 that's going to impact my decision. I don't mind
10 telling you that.

11 MR. MOLINA: I want to answer all of your
12 questions, but what I'm trying to say -- I'm not trying
13 to beat around the bush. I'm trying to explain that
14 you have to have a general plan amendment at a minimum
15 because the general plan is parks, recreation, and open
16 space, which is consistent with the master plan that
17 the City approved. You have to have a site development
18 review application, which is, essentially, you're
19 showing the City the plans, you're showing them the
20 layout, you're showing them where you're going to put
21 the landscaping, you know, what kind of units you're
22 going to have. Then you have to have a tentative map.
23 You have to have a subdivision approval.

24 So in this case, they filed a general plan
25 amendment, but it wasn't specific to the 35-acre

1 property. It was on 166 acres. And that's the issue,
2 is that they were asking for density of up to 5 units
3 per acre, while at the same time, they were negotiating
4 their development agreement that was saying that we're
5 going to build 1 acre per lot. So if you're going to
6 ask for 5 units per acre under the general plan
7 designation, why are you telling us that you're going
8 to build one acre per lot? If you go through the
9 application history, what happened is they came in --

10 THE COURT: I want to make sure I'm clear.
11 If it was 1 acre per lot, would that have been in
12 conformance with R-PD7?

13 You know what, sir, I don't know if you
14 litigate a lot, but most litigators don't do that.
15 They answer the judge's questions; right. So my
16 question is this. And I don't want any benign or
17 whatever. Answer my question, please. Because that
18 doesn't happen very often. I don't mind telling you I
19 handle very complex cases.

20 MR. MOLINA: I know. I know you do. And
21 what I'm trying to explain here is that unless there's
22 a plan that contemplates housing in that area that's
23 been designated for it -- actually, let me back up.

24 No, it doesn't comply with R-PD7 zoning. And
25 the reason why is R-PD7 zoning only allows the amount

1 of housing that's allowed under the general plan
2 designation. And the City's code is clear on that.
3 The general plan controls the density limitations. The
4 ROS has zero residential density.

5 THE COURT: Continue on, sir.

6 MR. MOLINA: Okay. Just going back -- we're
7 going to get to all this. I promise you. I'm going to
8 get to all of your questions. My thought here is that
9 we put it all in order so it makes sense in a logical
10 fashion.

11 And this is the overall master plan land use
12 data. Like I was saying on the previous page, it
13 showed that there was open space, schools, other uses
14 that are zoned R-PD7. This also shows you've got open
15 space and drainage, but there's no residential density.

16 That's the golf course. It's zoned -- the
17 open space is zoned R-PD7, but it's no density. And
18 that's what I'm saying is that you have to look at the
19 plan. The plan says zero density on the golf course.
20 Of course you can't build houses on a golf course.

21 And I'll just --

22 THE COURT: But this wasn't part of the
23 golf course, the 35 acres; right?

24 MR. MOLINA: It's part of a 9-acre
25 golf course.

1 THE COURT: I thought the 35 acres was
2 separate from the rest of the golf course.

3 MR. MOLINA: This is the 35 acres right here.
4 It's a golf course.

5 THE COURT: Is that true?

6 MR. MOLINA: Yes.

7 MR. LEAVITT: Your Honor, the answer is this:
8 Under the Peccole Ranch concept plan, absolutely not
9 part of the golf course. Number two, the Peccole Ranch
10 concept plan that counsel is going through with you was
11 abandoned.

12 It's disturbing what's happening here, Judge.
13 This plan was abandoned. And he's taking you through
14 an abandoned plan.

15 We went through all this, Judge, at the
16 motion to determine property interest hearing. And
17 that's why the Court didn't follow this plan, because
18 it was abandoned. Disturbing what's happening. For
19 counsel to testify to this plan is not evidence.

20 MR. MOLINA: I'm not -- I'm showing you the
21 evidence. This is a golf course. This is an aerial
22 map showing a golf course. How can we deny this is a
23 golf course?

24 MR. LEAVITT: Your Honor, the 35-acre
25 property was part of the interim golf course that was

1 used in the past. But under this plan that counsel is
2 showing you, this property was not part of this
3 golf course in this plan, number one. Number two, this
4 plan was abandoned. We have the documentation showing
5 this plan was abandoned.

6 THE COURT: Was the plan abandoned or not?

7 MR. MOLINA: No.

8 MR. LEAVITT: We'll show that to you, Your
9 Honor.

10 MR. MOLINA: Can I just give my presentation?

11 MR. SCHWARTZ: Your Honor, we've ought to be
12 allowed --

13 THE COURT: Sir, you can go ahead and say
14 what you want to say. I'm listening.

15 MR. SCHWARTZ: I think we should be allowed
16 to present our case without --

17 THE COURT: Well, you know what, I'm going to
18 push back on that, sir, respectfully. I've never not
19 permitted someone to present their case. However, when
20 I ask questions, I don't expect rolling of the eyes
21 and/or facial expressions that I can see from the
22 lecturn, and putting the hands up in the air. I don't
23 expect that either. I've had some fantastic lawyers
24 appear in front of me, and I've asked them some really
25 tough questions. And you know what they would do, they

1 would answer the question.

2 MR. SCHWARTZ: Apologies, Your Honor. We
3 would just like to go through the facts of the general
4 plan and the zoning of this property. This factual
5 recitation is an answer to the Judge's question. We
6 just need to be allowed to go through it.

7 THE COURT: I mean, go through it. And I
8 will make a determination as to whether my question is
9 asked or not. At the end of the day, I keep coming
10 back to I wanted to know what the zoning was as it
11 relates to the 35 acres at issue. And I guess the
12 answer would be it was R-PD7; right?

13 MR. MOLINA: That's correct. Okay.
14 Thank you. So I'm going to go to page 31 on Exhibit E.
15 This is planning commission minutes for the master
16 development plan that we just went through. What I was
17 explaining yesterday is the City always followed the
18 same process. You approve a plan, and then you rezone
19 the property in accordance with the plan.

20 So on January 12th, 1989, the City planning
21 commission approved the master development plan. And
22 subject to a maximum of 3,150 dwelling units be allowed
23 for phase one. And the plan director says in that
24 first paragraph on the right-hand margin, he says, "The
25 application involves a large parcel that's had several

1 master plans in the past. There are some major
2 drainage channels going through the area. The exterior
3 treatment will be similar to Canyon Gate."

4 And so then you go onto page 33 of
5 Exhibit E., and there's a rezoning application. They
6 approved a plan. Then they approved a rezoning
7 application. And it says Z139-88. And it's subject to
8 a resolution of intent with 12-month time limit. And
9 this is just the phase one property.

10 If you go on to page 34 of Exhibit E,
11 paragraph 10 down at the bottom says, "The existing
12 resolution of intent is expunged under approval of this
13 application."

14 The reason why I keep pointing that out,
15 because the property is not officially zoned R-PD7
16 until the development is done in 2000. And we'll get
17 to that.

18 So that was the planning commission.

19 THE COURT: I get that. But, once again, I
20 think -- and I keep coming back to this. And correct
21 me if I'm wrong if I'm missing a point, but when the
22 applications were made in this case, the 35 acres at
23 issue was zoned R-PD7; right?

24 MR. MOLINA: Yes.

25 THE COURT: I'm trying to figure out why does

1 all this other stuff matter?

2 MR. MOLINA: Because you're in an existing
3 planned development.

4 THE COURT: I mean, I get that. I do. Tell
5 me that, hey, Judge, this is why that doesn't matter.
6 Go ahead.

7 MR. MOLINA: Thank you.

8 THE COURT: Tee that up for me.

9 MR. MOLINA: I'm going to show you some other
10 communities in town. There's five or six other
11 communities, big, large, master planned communities
12 with golf courses, man-made lakes, big open water
13 features that are zoned R-PD7. And they're designated
14 PR-OS in the City's general plan.

15 So what I'm trying to explain here is that in
16 the '90s, they used this R-PD7 as flexible zoning.
17 They're looking at the number of units. They're
18 looking at the density. They're giving the developer
19 flexibility to basically put things, you know,
20 different uses in different places, depending on how
21 they want to do it subject to the City's discretionary
22 control.

23 And every time they approve one of these
24 zoning applications, the developer still doesn't have
25 an entitlement to build. They have to come back to the

1 City later on and get an entitlement on each individual
2 parcel. And back then they called it a plot plan
3 review. I'm not going to go through a plot plan review
4 for every single one of these because it's voluminous.

5 But my point is that the zoning establishes
6 an R-PD7 district on the entire property. And then the
7 landowner has to come back and apply for plot plan
8 review. Goes through planning commission. Sometimes
9 it goes through city council on the individual parcels
10 for them to say, okay, we like the layout. We like the
11 way you put this together. We like the way that the
12 houses look. There's aesthetic review as part of this.

13 And that's the second step before you can
14 start applying for permits. That's how they did this,
15 you know, in the '90s. The application procedures
16 changed, you know, over time, but in the '90s, that's
17 how this worked. And that's how this development
18 specifically was built out.

19 So let's go to E36, page 36 of Exhibit E.
20 And this is the city council minutes for that master
21 development plan. And first paragraph explains what
22 this says. "This item was held in abeyance at the
23 request of the applicant --

24 THE COURT REPORTER: I'm sorry, sir. You
25 have to read a little slower for me.

1 MR. MOLINA: Sorry. I've got so much to get
2 through that I'm trying to --

3 THE COURT REPORTER: It doesn't help if I
4 can't keep up with you.

5 MR. MOLINA: "This item was held in abeyance
6 at the request of the applicant and as a revised master
7 development plan for the Peccole property that is to be
8 a planned community and named Peccole Ranch. There is
9 a related rezoning application involving 444 --
10 448.8 acres, gross acres, of the 1716 acres involved in
11 this development plan."

12 Then on the third paragraph, it says, "The
13 phase one portion of this property is located west of
14 Fort Apache between Charleston Boulevard and
15 Sahara Avenue. It's predominantly single-family use.
16 There's a mixed-use village in the center on the
17 settling portion of Sahara."

18 Which is what I showed you that nice, green,
19 open space area with clustered apartments and, you
20 know, other housing.

21 And then it says, "West of phase one similar
22 type of development."

23 Talking about compatibility.

24 "The entire development will be a walled-in
25 community with landscaping, a school site is proposed.

1 The overall density is 6.7 units per gross acre that is
2 compatible with the general plan, which recommends an
3 average density of 7 units per acre. Uses and the
4 amount of acreage are as follows."

5 And you remember that I showed you that plan
6 earlier. It didn't have a golf course. Well, it came
7 back because they asked him to reduce the density and
8 he brought the golf course back. So you've got
9 207.1 acres of golf course.

10 And then if we go to page 38 of Exhibit E,
11 this is the master plan that the City approved, the
12 phase one master plan that the City approved. Shows
13 the golf course has been added back to the north
14 portion, the phase two portion, of the master plan.

15 And then if we go to page 41 of Exhibit E,
16 they have a rezoning application. And the rezoning
17 application is in accordance with the master plan. And
18 you'll see here that there's conditions of approval on
19 the bottom. And no. 3 says, "Approval of plot plans
20 and elevation by the planning commission for each
21 parcel prior to development."

22 So just because you get the zoning doesn't
23 necessarily mean that they have to approve your
24 development on a particular parcel. You still have to
25 come back to the City and show them -- you have to

1 apply for approval on each parcel.

2 Now, I'm going to flip to page 43 of
3 Exhibit E. And the third paragraph on that page says,
4 "Initially, this phase had an overall density of 8.6
5 dwelling units per acre, which exceeds the 7 units per
6 gross acre density recommended in the general plan.
7 The applicant has agreed to limit the maximum number of
8 dwelling units to 3,150 that will reduce the density in
9 accordance with the general plan. There are no
10 development plans submitted at this time due to this
11 being a large-scale development. And these will be
12 required to be approved by the planning commission
13 prior to development."

14 Going to page 44 of Exhibit E. This just
15 shows the phase one area that was rezoned. Actually, I
16 want to zoom in on just the top portion of that bold
17 area. You see how the City has designated the parcels
18 north of Charleston Boulevard with ROI? It's a
19 resolution of intent. So those properties have
20 resolution of intent zoning.

21 And I'll just point out one other thing here.
22 Because we don't have GIS mapping at this point in
23 time. We're keeping track of all this stuff by hand;
24 right. So it's pretty burdensome for the City to try
25 to keep track of this kind of stuff.

1 Now we're going to get to the master plan
2 that actually led to the zoning of the phase two
3 property where the 35-acre property is located. And
4 that's in Exhibit F2. And this is a letter from
5 Wayne Smith, the planner that basically did all the
6 planning for the Peccole Ranch master plan for the
7 Peccole Family.

8 He says, "Enclosed per your requirements are
9 an application for rezoning and 8 blue lines of the
10 master plan for the overall 1716.3 acres."

11 And that is this one. And, actually, I
12 apologize. Go to page 3 of Exhibit F. This was the
13 application where they added some property to
14 phase one. It's basically overlooked, but it's, you
15 know, they added property to the phase one area. This
16 piece right here that goes down the middle was added to
17 this part of phase one.

18 Now, something important happened in 1989
19 that makes a big difference here.

20 Go to the next exhibit. Okay. This is
21 Ordinance 3455. And what this did is this established
22 a procedure for rezoning applications that deviate from
23 the general plan. And what happened in 1989? The
24 Nevada Supreme Court decided Nova Horizon v.
25 City of Reno. The Nevada Supreme Court basically

1 reversed a denial of an application because the City
2 didn't accord deferens to their master plan.

3 And so after that decision, the City amends
4 its laws and says, okay, we've got to actually start
5 making sure that we insist on this master plan being
6 followed. And that's what this does. So this
7 establishes a procedure. And all it said is if you're
8 going to submit an application for development that's
9 not consistent with the master plan, you've got to have
10 a good justification for it.

11 THE COURT: And I think, for the record,
12 that's why I asked the question as it relates to the
13 35 acres at issue in this matter. Because it's my
14 understanding, and we can make sure the record is clear
15 on this, but the 180 Land didn't seek some sort of
16 variance or deviation from the existing zoning as it
17 pertained to the 35-acre property; is that correct?

18 MR. MOLINA: It's a general plan amendment,
19 not a variance.

20 THE COURT: Okay. All right.

21 MR. MOLINA: So Exhibit G is another
22 ordinance, 1989 ordinance. And this established a
23 gaming enterprise district in the City of Las Vegas.
24 And right there in the summary it says, "Establishes a
25 gaming enterprise district as of 1990 for nonrestricted

1 gaming."

2 So if you want a casino, you have to be in
3 the gaming enterprise district.

4 And then if we go to page 10 of Exhibit G.
5 This is a memo from one of the planning staff to the
6 department of planning. The memo just explains what
7 the next documents are. Let's go to page 11.

8 This is the attachment A. And what they
9 determined -- and I'll show you some additional
10 evidence on this point. But what they determined was
11 if we're going to have a gaming enterprise district,
12 we're going to have nonrestricted gaming all the way
13 out on the west side of Las Vegas, we need to make sure
14 that it's not just a standalone casino. We're going to
15 make sure that you're a destination resort.

16 And this is what defines a destination
17 resort. A destination resort is designed as a hotel
18 with a minimum of 200 guest rooms and an 18-hole
19 golf course and the rest of these amenities. So if
20 Peccole wanted to get into this, he needed an 18-hole
21 golf course.

22 And then go to the next page, page 12 of
23 Exhibit G. This is the gaming enterprise district map.
24 And zoom in a little bit to the bottom left-hand corner
25 there. You can see that's the gaming enterprise

1 district, the star. "Each planned community is limited
2 to one destination resort as defined on attachment A."

3 You have to have a golf course.

4 Go up a little bit. There it is.

5 Peccole Ranch, limited to one destination resort.

6 Go to page 15 of Exhibit G. This is the
7 background behind the ordinance that established the
8 gaming enterprise district. Just tells you what the
9 law was, the state law, that says, "During its recently
10 enacted session, the Nevada legislature enacted Chapter
11 616 statutes in 1989. The legislation provides that
12 beginning January 1, 1990, no state license for
13 nonrestricted gaming may be issued in such county
14 unless the property being licensed is located in an
15 area that has been designated as a gaming enterprise
16 district."

17 So on page 17, you've got minutes of
18 city council regarding the Las Vegas gaming enterprise
19 district. This is actually a special meeting of the
20 city council. And it talks about areas recommended for
21 inclusion down in paragraph 4. Says, "Peccole Ranch in
22 Summerlin Village 3 as outlined in the respective maps
23 with the qualification that each of those two
24 developments be limited to one destination resort as
25 defined in the attachment."

1 And then we've got, on page 18 of Exhibit G,
2 we have the memo where they're talking about what's a
3 destination resort. They're saying, "Certain parties
4 that are developing large master planned communities in
5 the City of Las Vegas have requested Las Vegas Gaming
6 Enterprise District Committee recommend that a portion
7 of their master planned community be designated a
8 gaming enterprise district."

9 If you were to go back to that map, you'd see
10 it's just the phase two property north of Charleston
11 Boulevard that says it is part gaming and part
12 district.

13 So on page 23 of Exhibit G, we actually have
14 a transcript of this. They talk about the Summerlin
15 and Peccole properties were discussed next. Pointed
16 out the people were upset about this. The two
17 properties that are being discussed are open space that
18 has been master planned and there were previous
19 designations of what would be a resort hotel. And they
20 just make a motion for approval.

21 And page 24 of Exhibit B is just sort of
22 ironic that the person who seconded that person was
23 Chris Kaempfer, the developer's attorney in the land
24 use. So, you know, it's kind of a bait and switch.
25 You're telling the City that you're going to build an

1 18-hole golf course so you can be included in a gaming
2 enterprise district. And if they hadn't built that
3 golf course, there wouldn't be a Sun Coast Hotel.

4 So, you know, what happens if the golf course
5 closes. They're not going to close the Sun Coast now.
6 But it's a bait and switch.

7 So now I'm going to go to Exhibit H. And
8 this is what I thought the previous one was. But this
9 is the submittal for the 1990 Peccole Ranch master
10 plan. This is reduced acreage to 1569.6 acres. And
11 we're going to get into this a little bit, into the
12 nitty gritty on this one, if you'll indulge me.

13 On page 4 of Exhibit H, this is again just
14 the booklet that was submitted with this application.
15 It's prepared by Peccole Ranch Partnership. As I
16 mentioned before, there's a falling out with the Triple
17 5 group. They go their separate ways, but it is what
18 it is.

19 Page 7 of Exhibit H is the explanation. It
20 says, "The proposed 1569.6-acre Peccole Ranch master
21 plan is being submitted to the City of Las Vegas for
22 the approval of an amendment to the overall conceptual
23 master plan, along with the rezoning of the 996.4 acres
24 in phase two to R-PD7, R3 and C1 designations."

25 So you finally get to R-PD7 on the 35-acre

1 property. And I apologize for how long it took me to
2 get to this.

3 Going on to page 9. Explains the proposed
4 master plan incorporates office, neighborhood,
5 commercial, nursing home, a bunch of other uses. Then
6 it says, "An extensive 253-acre golf course and linear
7 open space system winding throughout the community
8 provides positive focal point while creating a
9 mechanism to handle drainage flows."

10 So this was really smart for Peccole to use
11 the golf course as the drainage. It's a win-win. You
12 can knock out two birds with one stone.

13 Going on to page 11. And down at the bottom,
14 the last paragraph talks about the differences between
15 these two master plans, the one that was approved in
16 1988 --

17 THE COURT: I have a question as far as
18 draining. There's no question Mr. Peccole, based upon
19 his actions in southern Nevada, was a forward-thinking
20 man. But as far as the golf course is concerned, if
21 the City wants that to remain drainage, wouldn't the
22 City have to pay for that?

23 MR. MOLINA: I believe what you're asking is
24 whether or not that would be an exaction. And I would
25 defer to Mr. Schwartz to answer that question. That's

1 just a little bit --

2 THE COURT: But you understand what I mean?
3 I mean, from a common good perspective, I get it, you
4 know. And I think that's one of the issues that the
5 county and the City and so on have been very proactive
6 from a historical perspective. Because I've been here
7 since the mid-'80s. And I remember when -- it was
8 actually before I got here, but I still remember when
9 Caesars Palace flooded. Everybody kind of knows that.

10 And Las Vegas, the community leaders and, I
11 guess, also the engineers and planning, I think they
12 were forward thinking. And I don't understand this
13 because I'm not an engineer, but they put in all the
14 different flood channels and all those things; right.

15 But my point is this. If there's a concern
16 as to the use of the golf course and they had a
17 secondary value as a flood channel, you know, for the
18 public good, and there was going to be a potential
19 change, and the City says, no, it should stay for this
20 purpose, shouldn't the City pay for that?

21 MR. SCHWARTZ: Your Honor, the answer is no.
22 And I can explain.

23 THE COURT: And make a note on it, sir.
24 Write it down and tell me why the City would not pay
25 for that.

1 MR. MOLINA: I mean, this is pretty common;
2 right. Any development they have to address drainage.
3 You just can't let properties get flooded. That's not
4 good for anybody.

5 So page 4 of Exhibit H -- I'm sorry. I lost
6 my place. I'm sorry. We are on page 11.

7 And I was saying it explains the difference
8 is that there's been a refinement of the golf course
9 and drainage-ways, shifting of parcels and parcel
10 boundaries, to better use open space areas.

11 Going on to page 15 of Exhibit H, it talks
12 about this drainage issue a little bit more where it
13 says, "The focal point of Peccole Ranch phase two is
14 the 199.8-acre golf course and open space drainage
15 waste system, which traverses the site along with the
16 national wash system."

17 It's a good thing to do drainage in a wash
18 for a lot of different reasons. But it says, "All
19 residential parcels within phase two except for one
20 have exposure to the golf course and open space areas.
21 The single-family parcel, which is not adjacent to the
22 open space system borders Angel Park Golf Course."

23 This was a big deal. Open space was a big
24 deal.

25 Page 17 of Exhibit H talks about the drainage

1 even more. The third paragraph from the top, it
2 explains the pathway of the drainage flows.

3 So south of Charleston Boulevard the drainage
4 flow through the washes initially enters the site in
5 two locations along the western boundary at a peak rate
6 of 800 cubic feet per second. Two wash flows are then
7 directed into the main drainage wash, which flows
8 northeasterly towards the large Angel Park.

9 And then the last paragraph on page 17 says,
10 "Phase two. Proposed Peccole Ranch master plan has
11 approximately 33.1 additional acres allotted for golf
12 course and drainage-ways. The additional acreage
13 accommodates a clubhouse, driving range, centrally
14 located within the golf course and surrounding
15 residential community. These features are also
16 accessible to visitors staying at the adjacent
17 destination resort casino."

18 So this was all part of a big plan. Page 23
19 of Exhibit H. We'll go to the land use data. And,
20 again, we've got 211.6 acres of golf course. It's
21 going to be zoned R-PD7, but there's zero residential
22 density. There's zero units.

23 Page 24. Same thing. This is the land use
24 data for the overall master plan. Got 253 acres of
25 golf course, open space, drainage, zero density.

1 All right. Page 27 is the legal description
2 for the parcel that included the 35-acre property. And
3 it's Lot 31 on the master plan map. And we'll show
4 that in a second.

5 But if you go to the next page, page 3 -- I'm
6 sorry -- page 29 shows the acreage. 519.87 acres for
7 R-PD7 zoning. This Lot 31 has R-PD7 zoning.

8 The City asked the developer to submit these
9 legal descriptions so they could say which part is
10 going to be R-PD7, which part is going to be C1. This
11 didn't subdivide the property. It just gave the City
12 the legal description to know where the proposed uses
13 were going to go.

14 And the thing that I'll point out about this
15 it that says 519.87 acres for R-PD7. But if you went
16 back to the phase two land data, there's only 401 acres
17 of single-family residential. So you've got
18 519.87 acres zoned R-PD7, but you only have 401 acres
19 planned for single-family residential. The difference
20 is the golf course is part of that R-PD7 zone.

21 So now I'm going to go on to page 47 of
22 Exhibit H. And this is when they present the master
23 plan to the planning commission; right. You've got to
24 go to planning commission and then you go to
25 city council. And they always do this in the same

1 order. They approve the master plan and then rezone
2 the property.

3 You've got item 24 on planning commission.
4 This is March 8th, 1990. And it says, "A maximum of
5 4,247 dwelling units be allowed for phase two."

6 And then the director of planning also
7 explains this request. Says, "Phase two contains
8 996.4 acres predominantly single-family dwellings;
9 however, there will be a multi-family resort,
10 golf course, commercial office, school, rights-of-way.
11 The significant change is the addition of the
12 golf course and a larger resort casino site and a
13 100-acre shopping center."

14 And then the second to the last sentence of
15 that paragraph says, "The gaming enterprise district
16 indicates this area could contain one destination
17 resort/casino, but the applicant would have to have a
18 major recreational facility and a minimum of 200 rooms,
19 which is the golf course."

20 Going onto page 49. So after they approve
21 the master plan, they go in and rezone the property.
22 It's the 17th zoning application submitted in 1990.
23 And the staff recommendation of approval. Mostly same
24 conditions, 4,247 dwelling units per acre; conformance
25 to the conditions of approval for the

1 Peccole Ranch Master Development Plan, phase two;
2 approval of plot lands for each parcel.

3 At the time it was developed you have to
4 dedicate the right-of-ways, streets, improvements,
5 drainage plan, drainage waste system extension, all
6 that stuff. And on the right side, you'll see there's
7 William Peccole. He's there. He's testifying in
8 support of this application.

9 And one of his, you know, people in the
10 neighborhood complained about the casino. He says,
11 it's going to be buffered by his golf course on the
12 south and Angel Park Golf Course on the north.

13 And then his planner below also explains. He
14 says, "We've reduced the density by about 2,200 units."

15 So where did number come from? We've reduced
16 the density by 2,200 units. And the way to come up
17 with that number is you look at the 4,247 units. Well,
18 what would be 2,200 plus that? That gets you to about
19 6,600.

20 And what he's doing, apparently, is he's
21 multiplying the 996.4 acres times 7 to come up with a
22 total allowable units of 7 units per acre on the entire
23 master planned area, including the commercial,
24 including, you know, all of these other uses,
25 including, you know, the R3 zoned areas, the high

1 density apartments. He's looking at the entire master
2 plan through the lens of the general plan, which is 7
3 units per acre at this point in time.

4 And so he's saying, we reduced this by
5 2200 acres [sic] because, theoretically, under the
6 general plan that existed at that time, we could do 7
7 units per acre on all 996.4 acres.

8 But they reduced it. They went down by 2,200
9 units because the traffic issues just didn't make
10 sense.

11 So going onto page 50 of Exhibit H, this is
12 the city council minutes. Planning commission approved
13 it. Now it goes to city council. City council
14 approves it subject to all the conditions recommended
15 by the planning commission, including --

16 THE COURT: Tell me this. Why didn't the
17 city council approve the recommendations of the
18 planning commission as it relates to the 35 acres in
19 this case?

20 MR. MOLINA: Why did or didn't they?

21 THE COURT: Didn't they?

22 MR. MOLINA: Well, like I was saying before,
23 the issue was that they were negotiating this
24 development agreement that was saying that they're
25 going to do 1 unit per acre or even less than that, I

1 think. And then they're coming in at the same time
2 applying for a general plan amendment that would allow
3 up to 5 units per acre on 166 acres, not just 35 acres.
4 It didn't have any applications in the pipeline at that
5 time for the other 130 acres.

6 And so -- and I'll walk you through that.
7 I've got exhibits. I've got another binder for that.
8 And we'll talk about that. Because I'll show you the
9 evidence on that that explains why.

10 On page 51 of Exhibit H, this is the staff
11 report that's included in that application. It just
12 notes the land uses. And then on page 53 of Exhibit H,
13 you've got a rezoning application. And they approve
14 the rezoning application.

15 And I'm just going to go -- page 55 of
16 Exhibit H, it's the last thing I'll say on this
17 exhibit, is that on this fourth paragraph from the top,
18 just says, "Phase two proposed development will contain
19 4,247 dwelling units per acre, overall gross density of
20 4.3 units."

21 Then at the bottom it says, "Conforms to
22 general plan, the density recommendations, the general
23 plan."

24 So they're below the 7 units per acre allowed
25 on the general plan on the entire property and all

1 996.4 acres. And they're now at 4.3 units, if you look
2 at the gross acreage of the entire development, of
3 phase two.

4 So now I want to go to Exhibit QQQQ page 7.
5 This is that master development plan that they approved
6 on April 4th of 1990. As I was saying before, you have
7 that Lot No. 31 is the one that is zoned R-PD7, that
8 big, 600-acre piece. And if we could just zoom in to
9 this top part that's up here north of Charleston
10 Boulevard. The boundary lines for that Lot 31 include
11 the golf course. And we can walk through the meets and
12 bounds on the legal description, but I'm pretty sure
13 you don't want to do that.

14 So what happened next? They approved the
15 master development plan. They approved the rezoning
16 application.

17 And then in 1992, they adopt a new general
18 plan. And this changes a lot. This changes the way
19 that the City handles, you know, general plan
20 applications, how they actually handle their rezoning
21 applications.

22 You remember that ordinance that I was saying
23 before where they have to submit a justification
24 statement? Now they actually have to apply. This
25 formal application for a general plan amendment to

1 obtain development that's inconsistent with the general
2 plan.

3 But I'm going to go through the process
4 really quickly because there's been an argument that
5 this general plan is somehow invalid. And that's just
6 false. They worked on this general plan for two years.
7 I won't go through all of that, but I'll just show you
8 the documents and what they are just so you know what
9 the evidence shows.

10 On Exhibit QQQQ8, this is attached to the
11 declaration of the community development director.
12 This is the general plan map that existed in 1992
13 before the City adopted their new comprehensive master
14 plan. And it's exactly what the City approved in 1990
15 when Peccole applied for an amended master plan. The
16 City just took that and they put it in their master
17 plan.

18 And if you zoom in on the top portion north
19 of Charleston Boulevard, you'll see the golf course.
20 It's "P" for parks.

21 Now I'm going to go to RRRR2, the
22 supplemental declaration of Seth Floyd, community
23 planning director. These are minutes of the citizen
24 advisory committee that put all this stuff together.

25 And there's a lot of big names on here.

1 You've got, all the way at the bottom, Brad Nelson,
2 American Nevada Corporation. He did the Green Valley
3 master plan. And then on page 15 -- I'm sorry --
4 page 5 of that exhibit, these are minutes of that
5 meeting. And it says, "Discussion ensued concerning
6 the time between the committee meetings due to the
7 desire of members to review land uses in the field, as
8 well as staff preparation time, it was determined that
9 there should be three weeks between meetings. The
10 staff also instructed to mail out copies of the
11 community profile maps being reviewed to aid in their
12 field work."

13 And this is February 13th, 1991. If you go
14 to page 7 of that exhibit, it's the same map. This is
15 what was mailed out to the citizens advisory committee
16 saying, hey, go look at what's existing out in the
17 field, but this is what we've already approved. This
18 is our approved general plan area.

19 And I talked about this yesterday. These
20 community profile maps were part of that 1986 -- or
21 1985 general plan, this whole community profile system.
22 And back in 1985, the general plan looked like the
23 Peccole land use plan that was approved in 1981. Well,
24 they just replaced it with what they approved in 1990.

25 And then I'm just going to go through this

1 very, very quickly so we make a record that the 1992
2 general plan was validly adopted. I'm going to go to
3 RRRR2. This is the planning commission minutes from
4 October 10th, 1991. And I'll just -- let me just
5 explain the procedure very quickly here. Under NRS
6 278.250, or maybe 210 or something like that, the
7 planning commission has to adopt the master plan first.

8 Then the planning commission sends that
9 master plan to the city council. And then if the
10 city council approves the master plan, it's done. But
11 if they make changes, it's got to go back to the
12 planning commission. So that's why I want to walk
13 through this a little bit, but I also just want to show
14 the extent of all of the public meetings that were held
15 on this general plan.

16 So the first one is October 10th, 1991. At
17 this point in time, the citizens advisory committee has
18 been working on this for over a year. And then we'll
19 go to page -- just that second paragraph says, "The
20 citizen advisory committee is 41 members. They met for
21 approximately a year and a half to put this document
22 together."

23 Going to the next exhibit, RRRR3. This is
24 the October 22nd, 1991 planning commission meeting
25 minutes. Remember, they only have to hold one meeting

1 on this plan before they adopt it and send it out to
2 the city council, but they hold a lot.

3 We'll go to RRRR4. November 14th, 1991.

4 Let's go to RRRR5. November 26th, 1991.

5 And this is where they actually adopt it. So
6 if we go to RRRR7, this is the resolution. And that's
7 what the statute requires to adopt the general plan by
8 resolution. And then you forward it to the
9 city council.

10 So then let's go to RRRR8. City proposes an
11 ordinance to adopt the general plan that was adopted by
12 the planning commission. And under the City's
13 procedural rules, you have to just read a bill before
14 you can adopt it. So that's all they did. There's no
15 discussion on it at this meeting.

16 And then what the City normally does is then
17 they send a proposed ordinance to a recommending
18 committee. And RRRR9 is the minutes of the
19 recommending committee. And in this instance, the
20 recommending committee was the entire city council.
21 The entire city council reviewed this general plan.

22 If you go to page 4 of RRRR9, they talk
23 about, it says, "Based on Nevada state case law, the
24 courts upheld the master plan as a standard that
25 demands deference and production-backed applicability.

1 The Nevada Supreme Court has held the master plans in
2 Nevada must be accorded substantial compliance, while
3 Nevada statutes require that zoning authority must
4 adopt zoning regulations that are in substantial
5 agreement with the master plan."

6 So that's the intent. That was the framework
7 they were working with.

8 If you go to page 5, they talk about
9 specifically they're making changes to the procedures
10 of how they're going to enforce their general plan
11 based on Nova Horizon. "No application for subdivision
12 or land or change in zoning district classification
13 which would have the effect of permitting use of land
14 or structures in a manner inconsistent with the land
15 use plan and/or the land use classification system may
16 be approved without a plot without filing a
17 simultaneous request to the city council to consider a
18 formal planned amendment. In order for such zoning
19 change to be approved the city council must hold a
20 public hearing to consider planning commission
21 recommendations and formally amend -- to formally amend
22 the land use map and/or land use classification."

23 Finally, "No land use variance which would
24 have the effect of permitting use density or intensity
25 of land or structures in a manner inconsistent with the

1 land use and/or land use classification system shall be
2 approved."

3 And that's the language that they're saying
4 you need to insert into our general plan. And I'll
5 show you where it is. And they -- on page 9 of RRRR,
6 you have Councilman Adamsen specifically talking about
7 the Peccole property.

8 And he's saying that, "There was also a
9 question of west Charleston at Fort Apache/Rampart
10 where they intersect. We currently have an ongoing
11 application there. With that application forthcoming
12 would we want to be proactive and take a look at that
13 corner as it relates to commercial and eliminating
14 residential, low residential, just immediately north."

15 And then down below that, the other council
16 members say, we don't know what they're actually going
17 to do at this point. We should probably go out and
18 contact them.

19 If you go onto the next page, page 10.
20 They're still talking about it. They say, well, what
21 I've seen from the developer is commercial and with the
22 first step we've taken reverting it to acreage. While
23 we're in the process of doing this master plan update,
24 thought it should be incorporated. And then down below
25 he says, well, let's see if we can get in contact with

1 them to incorporate their changes into our map.

2 City just incorporated what Peccole asked
3 for.

4 If you go to page 22. I'm sorry. Yeah,
5 page 22. Is this a different exhibit? There it is.
6 These are the land use categories that they are going
7 to incorporate into their general plan. Remember, now
8 they're going to insist that you formally amend the
9 general plan in order to change something. And this is
10 where the parks, recreation, open space comes from.
11 Down at the bottom it just says "P." That's all they
12 used at the time, just "P."

13 All right. Going on to RRRR10. Remember,
14 they want to make changes to this. And under the state
15 statute, if the city council is going to make changes,
16 they have to refer it back to the planning commission.
17 That's what they do on February 19th, 1992.

18 On RRRR11, is the planning commission meeting
19 where they consider the city council's revisions. And
20 on page 3 of that, they talk about the southwest sector
21 map. And that's where the golf course gets designated
22 P, PR-OS, in 1992.

23 And they say on paragraph 3, "Parcel in the
24 vicinity of Rampart/Durango and Charleston/Alta revised
25 to conform to revised Peccole Ranch master plan."

1 The City just adopted Peccole Ranch master
2 plan as its general plan in 1992.

3 And this is a recommending committee meeting.
4 Actually, RRRR12 this is minutes from a recommending
5 committee meeting where they sent -- the planning
6 commission adopted all the changes proposed by the
7 city council. They sent it back to the city council.
8 And the city council holds another meeting on this.

9 He says, "If someone applies for zoning
10 that's not consisted with the plan, it's automatically
11 taken in as a plan amendment and a hearing will be held
12 on a plan amendment at the same time."

13 And then he says again later on down in that
14 same minutes, he says, "In processing a plan amendment,
15 the council will get staff background and analysis of
16 what is going on so it would not be a spot plan
17 amendment. Staff would recommend changing whatever is
18 logical in the area, not just one piece at a time if
19 it's time to do that. That way the plan will not get
20 out of date."

21 So you've got an administrative benefit to
22 requiring a general plan amendment in addition to a
23 overall land use sort of principle here of making sure
24 that you're not doing spot zoning.

25 RRRR13 is the city council minutes where they

1 adopt the new general plan. So we've had, I think,
2 four or five different planning commission meetings
3 before the planning commission adopts the 1992 general
4 plan. Then it goes to the city council. The
5 city council makes changes. Then it goes back to the
6 planning commission, just like you're supposed to do
7 under the statute.

8 Planning commission approves all of the
9 changes recommended by the city council. And then the
10 city council sends it back -- then the city council
11 adopts an ordinance. And that's final. It's the law
12 now.

13 RRRR13 -- actually, the next page. This just
14 is a memo that is showing what changes were approved by
15 the planning commission. It says it right there in
16 that first paragraph. "The planning commission at
17 their March 12, 1992, reviewed the revisions proposed
18 by the city council recommending committee. They
19 concurred with our revisions and unanimously adopted
20 the general plan with these revisions."

21 So, in some of these other cases, the
22 developers argued that this was -- you know, because
23 the Peccole property wasn't listed on these changes or
24 because the golf course wasn't listed on these changes,
25 that somehow it wasn't part of the 1992 general plan.

1 And that's just false. What this is just showing is
2 what was changed by the city council, sent back to the
3 planning commission, and then approved by the
4 city council again on April 1st. That's all that this
5 is showing. And, in fact, they do show a change to
6 part of the Peccole Ranch master plan. They said,
7 we're going to revise this to conform to the Peccole
8 Ranch master plan.

9 So now I'm going to go to QQQQ9. And this is
10 what they adopted. That's the cover page. This
11 gigantic binder, 400 and something pages. Then if you
12 go to page 12 of QQQQ9. And we've given you all 400
13 pages, by the way, in QQQQ9.

14 But on page 12, in the middle, it explains
15 where did these maps come from? Where did the map that
16 made the golf course PR-OS come from? Well, the City
17 just combined all the smaller maps into one big map.

18 It's all this says. Aggregation of the 16
19 individual community profile area maps into a northwest
20 sector map, a southwest sector map, and a southeast
21 sector map.

22 Developers are going to get up, and they're
23 going to say, Brad Jerbic said the City studied this
24 and they couldn't find out where it came from. This is
25 where it came from. It was already in the master plan

1 before 1992.

2 Go to page 17 --

3 THE COURT: So, I mean, are we testifying or
4 is that -- I just want to make sure I understand that.
5 Because if Mr. Jerbic testified a specific way, I mean,
6 the evidence would be limited to his testimony unless
7 you were placed under oath and we took testimony from
8 you, sir. And that's my point.

9 But go ahead on, sir, because I am going to
10 have some questions. I'm going to think about this
11 case.

12 MR. MOLINA: I thought the documents speak
13 for themselves on that point.

14 THE COURT: There you go.

15 MR. LEAVITT: Your Honor, if I may lodge one
16 objection. Counsel is testifying.

17 THE COURT: Sir, your position is the
18 document speaks for itself.

19 MR. MOLINA: Yeah. I thought I walked
20 through that.

21 THE COURT: I understand. Continue on.

22 MR. MOLINA: Thank you. On page 17 of the
23 1992 master plan explains what is zoning. Zoning is
24 the major implementation tool of the general plan.

25 And then on the right column it explains,

1 based on case law, Nevada case law in Nova Horizon, the
2 courts upheld that master plan is the standard that
3 commands deference and a presumption of applicability.
4 Nevada Supreme Court has held that master plans in
5 Nevada must be accorded substantial compliance while
6 Nevada statutes require that zoning authority must
7 adopt zoning regulations that are in substantial
8 agreement with the master plan.

9 We have to follow the master plan.

10 And then on page 25 of Exhibit 9, they
11 explain what does PR-OS mean, parks, recreation, open
12 space. This category allows large open spaces and
13 recreation areas, such as public and private golf
14 courses, trails, and easements, drainage-ways, and
15 retention basins, and any other large areas of
16 permanent open land.

17 And further down on that page they're talking
18 about legal significance of general master plans.
19 People call it general plan, people call it master
20 plan. But it says, "With the adoption of this general
21 plan." And, actually, before that, they reference that
22 ordinance that I showed you that they adopted after
23 Nova Horizon in 1989, where they say that you have to
24 have a justification statement for a deviation from a
25 general plan. Now they're saying, with this general

1 plain in 1992, all future deviation requests shall be
2 supported by a formal request to amend the land use
3 map, classification schedule, or text as the case may
4 require.

5 Getting back to your question about a
6 variance. I wasn't trying to dodge the question. What
7 I was trying to explain is that it's not a variance.
8 Because a variance is -- involves actual development
9 standards. Whereas, the general plan is talking about
10 permitted land uses. So what I was saying is that you
11 have to apply for a general plan amendment, not a
12 variance.

13 THE COURT: Okay. In this case, as it
14 relates to the 35 acres, would there be a requirement
15 to obtain a variance as to the general plan amendment?
16 Because it was already -- I keep coming back to this,
17 but it was already zoned R-PD7.

18 MR. MOLINA: Those are two different types of
19 applications in the City code. And they designate this
20 by, when you look at the applications, they put a stamp
21 on it, like, with a number. And a variance has a "VAR"
22 and then there's a Bates or a Hansen number. And a
23 general plan amendment is a "GPA" and then there's a
24 different Hansen number. So they're two separate
25 applications.

1 But you're correct, yeah, they have to --
2 they have to apply for some kind of approval to deviate
3 or to make the development consistent with the general
4 plan. It's to bring it into conformance as opposed to
5 asking for permission to deviate.

6 THE COURT: So here there would be no
7 necessity to request conformance to the general plan as
8 it relates to the 35 acres at issue based upon the fact
9 that it had been already zoned at R-PD7.

10 MR. MOLINA: That's not the position that
11 we've taken. We've stated --

12 THE COURT: No, no, no. I just asked the
13 question, that's all. Is that true or not true?
14 That's more of a factual issue.

15 MR. MOLINA: And we claim yes.

16 THE COURT: And why? It's already -- it's
17 already zoned R-PD7. Why would they have to do that?

18 MR. MOLINA: Because the City designated it
19 PR-OS in the general plan, which is zero density. No
20 housing can be development in the general plan. Which
21 is what Peccole asked for; right, and that's the master
22 plan be approved zero density on the golf course. And
23 the City said, okay, we're adopting this as our --

24 THE COURT: So are you saying there's a
25 conflict? Because I'm trying to figure out if that is

1 the case, why would the 35 acres, and it appears to me
2 there's no issue of fact here, why was it zoned R-PD7?

3 MR. MOLINA: Because the zoning was the
4 entire parcel. And there's many uses that were allowed
5 in that zoning, the drainage, the golf course.

6 THE COURT: I understand all that. But I
7 keep coming back to the fact that it was zoned a
8 specific way. And it appears to me there's not a issue
9 of fact as it relates to how the 35 acres were zoned.

10 MR. SCHWARTZ: Your Honor, if I may, I will
11 be addressing that in my comments. You've got zoning
12 and master plan. They're two different things.

13 THE COURT: I understand the difference. I
14 do. I get it.

15 MR. SCHWARTZ: So I will be addressing all of
16 these questions in my remarks.

17 THE COURT: Okay.

18 MR. SCHWARTZ: Thank you.

19 MR. MOLINA: Let's just go through some maps
20 to kind of explain the distinction between the general
21 plan and zoning as it relates to --

22 THE COURT: We can all agree the general plan
23 comes first, and then later comes the zoning; is that
24 correct?

25 MR. MOLINA: That's our position. They don't

1 agree with that.

2 THE COURT: You know, I mean, and here's my
3 point. Regardless of when that occurred, the property
4 was zoned R-PD7.

5 MR. MOLINA: Right. We're just arguing about
6 what that means. So QQQQ10 is the southwest sector map
7 that was adopted with the 1992 general plan. And you
8 have there the golf course in green with the
9 surrounding area. So let's just kind of establish --
10 and this is what I was saying by the documents speak
11 for themselves. And we'll actually put them up and
12 compare them. But I want to show you -- compare the
13 1990 master plan with the community profile map the
14 City had, you know, put in place before the 1992
15 general plan.

16 You see the golf course is the same shape.
17 All of the land uses are the same. On the left side
18 you have the master plan is approved in 1990 by the
19 city council. And on the right you have the community
20 profile map, which was part of that general plan that
21 was in place before the 1992 general plan. So the City
22 just took what Peccole adopted and they put it into
23 their general plan.

24 And then if you go on, what they just did
25 with the existing general plan is then they just took

1 this smaller map and they merged them together and they
2 created a bigger map. So that's all this is. They
3 didn't change anything with the 1992 other than that
4 one piece of commercial at Fort Apache and Charleston.

5 But the golf course was there. It was
6 already planned to be part of that community.

7 Now, I'm going to show you some other
8 communities in Las Vegas that have basically the same
9 exact characteristics in terms of zoning and general
10 plan designations. And the first one is Canyon Gate,
11 which was originally property that Peccole owned as
12 well. And Canyon Gate is zoned R-PD4. On the left
13 side you have the zoning map. And you see how it's all
14 consistent? The entire development is R-PD4, including
15 the golf course.

16 And on the right side, you have the general
17 plan map, which is green on the golf course. And the
18 surrounding is low density residential.

19 So they're not in conflict because the open
20 space golf course was part of the R-PD7 zoning. The
21 general plan just called it out in detail. So we'll go
22 to another example.

23 Desert Shores. This is another planned
24 community. And you've got man made lakes that are
25 zoned RPD, I think it's 5, R-PD5. The lakes are zoned

1 R-PD5. And in the City's general plan they're
2 designated PR-OS. There's no inconsistency. The lakes
3 were part of the planned community. When the City
4 approved the rezoning application for that entire
5 parcel that's encompassed in that blue boundary, the
6 lakes were already part of the development. They
7 didn't require additional, you know, zoning or
8 entitlements. And they're designated PR-OS in the
9 general plan.

10 THE COURT: When you say entitlements, what
11 do you mean by that again? I just want to make sure
12 the record is clear.

13 MR. MOLINA: An approved application for
14 development.

15 This is The Lakes at Sahara, which is just
16 south of Canyon Gate. We've got actually phase one and
17 phase two of Lakes at Sahara. There's not so many
18 lakes on the western portion, but there is open space.
19 And if you look at it on the City's general plan map,
20 the lake is designated PR-OS. It's open space. And
21 there's also, you know, a nice little greenbelts on
22 what they call the section 7 side of the property that
23 are also designated PR-OS in the City's general plan.
24 You go and drive out there, there's nice, little water
25 features, big park areas. Sit down and have a picnic.

1 They're part of the community. They are all zoned RPD.

2 Next one is Los Prados. This is, I want to
3 say, R-PD6. It's RPD something. The entire community,
4 including the golf course, zoned residential planned
5 development. Golf course is designated parks,
6 recreation, open space in the City's general plan. No
7 inconsistency.

8 Just got one more example to drive the point
9 home. You got Painted Desert, another master planned
10 community. This one actually really shows, you know,
11 the concept of a planned development really well. You
12 can see the area more clearly.

13 There's all types of density to this.
14 There's condos, there's townhouses, there's
15 single-family residences, there's apartments. There's
16 all different types of housing. They're all zoned RPD,
17 I want to say, 4.

18 And in the general plan, the golf course is
19 designated PR-OS. There's no inconsistency. That's
20 just how it was planned. The City approved these plans
21 and the open space that was approved by the City was
22 designated PR-OS in the general plan.

23 So, now, remember that the phase two master
24 plan that the City approved in 1990 had 18 holes; okay.
25 And the 35 acres is not part of those original

1 18 holes. There was an additional 9-hole course that
2 was added subsequently. And if we go to Exhibit J,
3 we'll see some letters about this, Clyde Spitz to
4 Robert Genser, the planning director in 1996.

5 And he's asking for conversation that they
6 can expand the golf course in the R-PD7 zone. And he
7 says, "As you know, the Badlands Golf Course at Peccole
8 Ranch is proposing to develop an additional 9-hole
9 course between the existing golf course and Alta Drive.
10 The existing master plan zoning of this area is R-PD7,
11 and the golf course would be developed within this
12 zoned parcel. I would like a letter from the City
13 stating that a golf course would be compatible within
14 the zoning. I need the letter for the bank."

15 And we deposed Clyde Spitz, and he confirmed
16 that Peccole intended this golf course to be open
17 space.

18 MR. SCHWARTZ: I have to -- Your Honor.

19 THE COURT: Number one, why does what Peccole
20 intended matter? I mean, we're going back -- you know,
21 sir, I mean, I think I've been very patient, for the
22 record. I've been letting you go on now for an hour
23 and 35 minutes. I mean, I don't mind saying that. You
24 had about an hour plus yesterday. And we still haven't
25 even gotten to the legal issues in this case.

1 MR. MOLINA: We're getting very close.

2 THE COURT: I mean, we've had this whole
3 historical rendition. And a lot of my important, I
4 think are important, issues have yet to be addressed as
5 far as this case is concerned. Remember, at the end of
6 the day, there's three claims the plaintiff is moving
7 for summary judgment on. And that's what this case is
8 all about. It's not a historical rendition of the
9 planning by Clark County and the City of Las Vegas over
10 the last 20 years. It's not. You know, I think I
11 asked some pretty good questions.

12 For example, I remember reading the Sisolak
13 case. And I remember reading the dissent. And Justice
14 Maupin offered the dissent. He varied from the
15 majority because he thought a Penn Central analysis
16 should have been conducted. And the majority rejected
17 it; right. Just as important, too, I don't know if
18 this has been discussed, these are things I'm thinking
19 about. So why would I conduct a Penn Central analysis
20 right now when, of course, in Sisolak, the Nevada
21 majority on the Supreme Court rejected that? And they
22 didn't follow the lead of Justice Maupin. And I
23 understand this. I really liked Justice Maupin.

24 But the things I always liked about
25 Justice Maupin, he'd give good reasons when he did

1 dissents. Just as important, too, when he authored
2 opinions, I thought they were so well written, I used
3 to enjoy reading his decisions. I don't mind saying
4 this. He's one of my favorite Supreme Court justices
5 over the last 20 years here in the state of Nevada.
6 But my point is this. The Nevada Supreme Court has
7 ruled.

8 Just as important, too, I was wondering about
9 it, and, for example, he discussed the futility
10 analysis; right. He did. And he goes to exhaustion of
11 administrative remedies. And I thought about that.

12 For example, futility is not limited to this
13 area of the law. I'm a business court judge. I deal
14 with futility from time to time as it relates to
15 shareholder derivative litigation cases, and the demand
16 requirement under NRCP 23.1. And that's what I love
17 about the law because a lot of the concepts come into
18 play again. Even when it comes to a simple motion to
19 amend the complaint; right. I have to conduct a
20 futility analysis from time to time as to whether or
21 not to grant the motion.

22 So, for example, I was saying to myself, I
23 kind of get this, there's this whole big picture issue
24 as to what the developer should or shouldn't have done;
25 right. But maybe, based upon the entire way you can

1 look at it, no matter what he intended to do, maybe a
2 futility analysis is appropriate. I don't know. But
3 as a trial judge, I will always tell you what I'm
4 thinking.

5 MR. MOLINA: Thank you.

6 THE COURT: I think that's fair so you can
7 address it; right.

8 MR. MOLINA: Thank you.

9 THE COURT: And that's my point. And I
10 think, Kim, you need a break.

11 Madam reporter, you need a break?

12 THE COURT REPORTER: Sure.

13 THE COURT: Okay. We'll give you 15 right
14 now. We'll break and we'll continue on.

15 (Whereupon, a recess was taken.)

16 THE MARSHAL: Department 16 come to order.
17 Back on the record.

18 THE COURT: All right. We may continue on.
19 Everybody may be seated.

20 MR. MOLINA: Thank you, Your Honor. I'm
21 going to spend about 10 to 15 more minutes total before
22 I give the floor to Mr. Schwartz.

23 THE COURT: Okay.

24 MR. MOLINA: Just got a few more exhibits to
25 run through. I want to point out that Exhibit L is the

1 Ordinance 5250. This is adopting the 2020 master plan.
2 The 2020 master plan is what was in effect when the
3 developer was applying for development approvals.

4 And one thing to note is that the 2020 master
5 plan did not have a new land use element so the 1992
6 master plan, that first master plan where you see the
7 golf course designated in green, that one still applies
8 as of 2000.

9 Exhibit N is Ordinance 5787. This is adopted
10 in 2005. And this adopts a new land use element. And
11 this replaces of the land use element from 1992. The
12 reason why this is relevant is because there's been an
13 argument that the PR-OS designation on the Badlands is
14 somehow invalid even though we walked through all the
15 planning commission hearings and all of the, you know,
16 city council meetings, the citizen advisory committee
17 meetings, I showed you all of that showing that the
18 1992 general plan was valid. But if there is any real
19 question about the designation of the PR-OS on the
20 35-acre property at issue, this resolves all that.

21 This is 2005, Ordinance 5787. And if you go
22 to page 14 of that exhibit, it explains the PR-OS
23 designation. It says, parks, recreation, open space.
24 Allows large public parks and recreation areas, such as
25 public and private golf courses. Only thing that

1 changes it goes from being just a P designation to
2 being a PR-OS. That's the only thing that they change.

3 And then page 15 of Exhibit N is the
4 southwest sector map. And let's pull that up. That's
5 fine because it gets adopted again. Let's go to the
6 next ordinance.

7 Exhibit O is Ordinance 6056. And this was
8 adopted in 2009. And what this did is, you may recall,
9 rural neighborhood preservation is required in Nevada
10 or was required for some point in time under NRS. So
11 the City amended its land use element to include rural
12 preservation neighborhoods, but they left everything
13 else in the general plan the same.

14 And if we go to Exhibit page 11 of Exhibit O.
15 There we go. You'll see that Peccole Ranch or
16 Queensridge, the golf course, including all 27 holes.
17 We'll zoom in on the middle there. Zoom in even more.
18 There we go.

19 That's all 27 holes. That includes the
20 35-acre property. It's PR-OS. Doesn't allow housing.
21 It's the law.

22 Exhibit P is the 2011 update to the land use
23 element. It's page 17 of Exhibit 7, same map. No
24 changes to the Badlands. No change to the 35-acre
25 property. It's still designated PR-OS.

1 THE COURT: Why would they zone it R-PD7?

2 MR. MOLINA: Because the zoning included open
3 space use. Open space was a permissible use in R-PD7
4 zoning.

5 THE COURT: I understand that. So
6 residential construction of homes was a permissible use
7 too; right?

8 MR. MOLINA: Right. But -- and this is a
9 key, you know, fundamental part of our defense here, is
10 that the City has discretion to change the general
11 plan. And if you want to change the general plan, you
12 can. You just have to apply. And that's what that
13 1992 ordinance says, is that -- or the 1992 master plan
14 said, is that every application after that master plan
15 has to be in conformance with the master plan.

16 THE COURT: I want to understand this. I
17 thought about this. I'm glad you're talking about
18 this. I don't know. I never practiced in real
19 property law or anything like that. And so when a
20 specific piece of property is already zoned from a
21 procedural perspective, and someone comes in for an
22 application or for permits and the like specifically
23 related to the property, typically, what would the City
24 do? Would they check and confirm what the zoning is as
25 part of the process? Or did they always go back and

1 say, look, let's see if this is conflicting with the
2 master plan? Because that's what I want to know.

3 MR. MOLINA: So I'll walk you through this
4 because, as you probably picked up on, I'm not a
5 litigator.

6 THE COURT: That's okay, sir. You're doing a
7 good job.

8 MR. MOLINA: I want to explain how I would
9 approach this. Because I have handled these
10 applications before, and I can give you a detailed
11 overview of what that looks like.

12 So a client comes to me and they say, I want
13 to build a condominium on this property.

14 THE COURT: I didn't ask you when a client
15 comes to you. My question is this. What happens with
16 the process vis-a-vis City building department?

17 MR. SCHWARTZ: Your Honor, it has to comply
18 with both.

19 THE COURT: I mean, I understand we're making
20 that statement, but what do they do? Because it seems
21 to me that, you know, if I wanted to -- example. I
22 bought a lot and it's in MacDonald Highlands, and
23 that's already zoned. And I go in and I say, look, I
24 want to put a single-story residential 2500 square foot
25 home. I would anticipate the City of Henderson would

1 look at that and say, okay, this is in conformance with
2 the zoning; right.

3 MR. MOLINA: Yeah, they would look at all of
4 that. They would look at the zoning and the general
5 plan. And MacDonald Highland and the City of Henderson
6 is a little bit different in how they handle things.

7 In the City of Las Vegas, if you want to have
8 a new development, you would at a minimum have to have
9 a site development review application that's done. For
10 a single house, you know, it would be a little bit
11 different. But we're not talking about a single house.
12 We're talking about a subdivision. So you've got to
13 have at least a site plan for the subdivision. And you
14 would submit that to --

15 THE COURT: And I want to make sure I
16 understand the processes. So if you wanted to have a
17 site plan for the subdivision, in this case, the
18 subdivision, would that be the 35 acres?

19 MR. MOLINA: It's up to the developer, how
20 they want to define subdivision.

21 So this would get submitted to the planning
22 department. As a developer submitting it, they would
23 submit what they think is the right application. And
24 then there would be a conference with the planning
25 department, planning staff. And they would, basically,

1 you know, comment on whether or not that application
2 needed other applications, other requests.

3 So, for example, if I took plans down to the
4 City that showed a neighborhood with only 10 feet of
5 streets, the City would say, well, you need a waiver in
6 order to get approval to do only 10-foot-wide streets.
7 And that's actually what happened in the 35-acre case,
8 not 10 feet wide, but reduced-sized streets, no
9 sidewalk on one side, you've got to have a waiver
10 application.

11 So there's multiple applications that you
12 would file with one development request for each
13 project. And the City would assign a project number
14 for all those applications. Each of those applications
15 would have a separate designation. And, I mean, I can
16 show you what these actually look like.

17 THE COURT: And in following that, what did
18 the City do in this case initially from the building
19 department's perspective?

20 MR. MOLINA: So can I --

21 THE COURT: You can. Absolutely, sir. What
22 did the City do? That's what I want to know. What did
23 the City do prior to the involvement of the
24 city council? What did the City do?

25 MR. MOLINA: So there's only 10 things in

1 here so we can cycle through this pretty quickly. When
2 he acquired the property, it was -- you know, if you
3 look at tab 1, this is the parcels that were -- that
4 existed when he acquired the property, when the
5 developer acquired the property.

6 Tab 2 explains, sort of, the mapping history
7 here. There was a whole lawsuit over the mapping that
8 was done here, but that was, sort of, an initial thing
9 that they did when they -- when they got the property
10 is they subdivided it.

11 This is a declaration of Frank Pankratz.
12 That's one of the developer's principals. And he
13 explains that on, page 2 in paragraph 5, he says, "I
14 can further attest that the purpose of the parcel map
15 was to carve out an approximately 70-acre parcel that
16 was required by our bank to be pledged as collateral
17 for refinancing."

18 So that's one, sort of, step in this
19 development process is subdividing the property into
20 the parcels that would then be the subject of different
21 applications that were submitted to the City.

22 And I won't go through the rest of this,
23 but -- actually, on page 4 of that affidavit, at
24 paragraph 15, he explains what the 17-acre applications
25 were. And this was the first set of applications that

1 the developer filed with the City was for the
2 17.49-acre parcel over here. And the City approved 435
3 units over there.

4 And he explains what the applications are.
5 He says, there was a GPA 62387, a general plan
6 amendment. They applied to amend the PR-OS designation
7 from -- to a PR-OS -- to a general plan designation
8 that allowed housing.

9 They applied for a rezoning application that
10 was ZON 62392. And that was to change the zoning from
11 R-PD7 to, I believe it was initially R4, and then they
12 reduced the density to R3. Originally, they had
13 applied for 720 units, and then they reduced that
14 application down to 435, and the City approved it.

15 So there's three applications on that. There
16 was the general plan amendment, the zone, the rezoning
17 application, and the SDR, the site development review
18 application.

19 And I think I have those in here if you go to
20 tab 6, which is our Exhibit Z.

21 And when you submit any of these
22 applications, there's a checklist of things that you
23 submit. And one of those things is a justification
24 letter. And it kind of harkens back to that
25 requirement that they enacted in 1989 where they said,

1 you've got to submit a justification.

2 So this is kind of the practice here, is that
3 you submit a justification letter explaining the nature
4 of the request. And this explains that they want
5 approval for 720 units on the 17-acre property. And
6 then if you flip to page, I think, the fourth or fifth
7 page of that exhibit, then you have the actual
8 applications that get submitted.

9 And the first one there is a general plan.
10 And the property owner is 70 Acres, LLC. When they
11 subdivided that 70 acres off, they put it all under one
12 entity. And as Frank Pankratz explained in the
13 affidavit, they did that for financing purposes. This
14 is GPA 62387.

15 Then if you flip to the page after the
16 application, there's the map. Every time that these
17 applications get put up in a public meeting, the City
18 creates a little map, and that gets part of the agenda.
19 That's what this is, this map right here. It shows you
20 the area that's subject to the designation.

21 And, actually, this map shows it's PR-OS;
22 right. They changed it from PR-OS -- the initial
23 application was to high, high density residential.

24 And then if you flip the page again, you get
25 the zoning application. It's the same form, just

1 slightly -- you just have to submit a separate
2 application. That's what the City requires.

3 Then there's a zoning map. If you flip the
4 page again at 452, the zoning map. I don't know if
5 you're looking at the exhibits.

6 THE COURT: I have it right here.

7 MR. MOLINA: Okay. There's three
8 applications that get filed on that first piece. And
9 then, you know, the thing about this is that's sort of
10 interesting if you want to understand how the -- how
11 the homeowners kind of got sideways with the developer,
12 I put it in tab 4. This was a -- this is the agenda
13 for general plan amendment 60759. And what this was is
14 a staff-initiated amendment. And staff does this from
15 time to time where they will, you know, apply
16 themselves for a change to the general plan to change
17 the text. And that's what this did, is that it was a
18 proposed change to the text of the land use designation
19 table that would have given the City discretion to
20 increase density in certain instances.

21 And in tab 5, we've got the actual transcript
22 of this. And the thing about this is that this was on
23 September 8th, 2015, so that was after --

24 THE COURT: And, for the record, I want to
25 make sure I'm clear on this. Like, for example, when

1 you're looking at tab 4, we're talking about a agenda
2 summary page. And this is from the planning
3 commission; is that correct?

4 MR. MOLINA: Correct. Correct. And
5 generally all matters that affect planning or
6 development go to the planning commission first.
7 There's a few things that go to the city council
8 directly. But to amend the general plan, you obviously
9 have to go to planning commission first.

10 And the thing about this is that when the
11 City publishes its agenda for these meetings, they
12 usually publish them the week before. And the agenda
13 here got published on a Thursday before Labor Day. So
14 there was really no time for the public to contact the
15 City to ask questions about this because the City is
16 closed on Fridays. So it was published on Thursday.
17 The meeting is on Tuesday, following Labor Day. This
18 kind of got jammed through without a lot of notice.

19 And, honestly, this is really the source of
20 the distrust between the homeowners and the developer,
21 is the fact that, you know, there's a bunch of
22 people -- if you go to tab 5, this is the transcript of
23 that meeting. And all of this is on -- I thought about
24 just putting the video up, but I don't think it's going
25 to work out with the technical stuff that we have here.

1 But you can see the appearance list of people
2 that are there. You've got Doug Rankin, Frank Schreck,
3 Clyde Turner, Jack Binion, Greg Borgel,
4 Jennifer Lazovich. Those are attorneys and land use
5 planners for the developer.

6 And, you know, the first person who gets up
7 and talks is Frank Schreck on page 4. And he says,
8 "It's always been my understanding in this community
9 that the Las Vegas 2020 master plan provides homeowners
10 with their greatest security in terms of their values
11 in their homes against inappropriate zoning. The
12 proposed amendment to the master plan will possibly
13 cause a significant and very possibly an adverse impact
14 on planned community development throughout Las Vegas,
15 not just Queensridge, by eliminating the specific
16 density limitation that protects the communities over
17 400 -- or over 40 acres."

18 THE COURT: I mean, that might sound good, I
19 mean, but when it comes to golf courses, that's a
20 national problem right now.

21 MR. MOLINA: Well --

22 THE COURT: And I understand, I really do. I
23 understand that. That's a national problem. Because,
24 let's face it, there's been a change in demographics;
25 right. There has. Baby Boomers love golf.

1 Millennials, not quite as much. Gen-Xers, not as much;
2 right.

3 For example -- this is kind of how I see
4 this, I really do. Here we have a scenario where the,
5 quote, master planned community with a golf course is
6 not really a viable economic model anymore. I mean,
7 golf courses are closing down.

8 And at the end of the day, notwithstanding
9 any argument that's made by real property owners,
10 homeowners, I get that, I do. But at some point, in
11 the general sense, city government has to make tough
12 decisions; right.

13 MR. MOLINA: Yeah.

14 THE COURT: They just do. And my point is
15 this. You don't just kick the ball -- kick the can
16 down the road and hope that the trial judge makes the
17 decision; right. These are decisions that should be
18 made by the city council. There's no question about
19 that.

20 I mean, as a trial judge, I don't mind saying
21 this, I've made some really tough decisions, I have.
22 And I realize it's going to upset somebody. But at the
23 end of the day, I have to do what I think is right
24 under the law. That's all you can do.

25 I mean, I realize there's a political aspect,

1 and being a county commissioner or city council member
2 and they've got to deal with that. But sometimes
3 you've got to make decisions, you just do, and they're
4 not popular. And sometimes you'll make a decision and
5 you might not be there in four years, but you've got to
6 make decisions.

7 But go ahead, sir. I'm following you.
8 You're helping me out.

9 MR. MOLINA: So, I guess, what I'm just
10 trying to explain here is that the homeowners in
11 Queensridge felt like there was a conspiracy between
12 the developer and the City to jam this through because
13 staff sponsored the amendment. And then they got up
14 there and they started complaining about it. And then
15 on page 10 of this transcript, you have the developer's
16 attorney, and also his expert land use planner,
17 Greg Borgel, that get up and stand. And she says, on
18 line 263, the reason why that is important --

19 THE COURT: What page are you on, sir?

20 MR. MOLINA: I'm on page 10 of tab 5.

21 THE COURT: I'm following you. I just want
22 to make sure. Okay.

23 MR. MOLINA: It starts on line 262.
24 Jennifer Lazovich says, "We are representing the
25 developer that has, in fact, timed applications to

1 follow behind this application moving forward. The
2 reason why that is important is because you've heard
3 them slightly reference a project that deals with
4 Queensridge, that deals with Badlands. They have been
5 in initial neighborhood meetings talking about a
6 proposed project which will be before the planning
7 commission and then, of course, move on to the
8 city council."

9 So, you know, all these homeowners from
10 Queensridge show up to this public hearing and they
11 start complaining about this amendment that got put on
12 the agenda without really any notice to the public.
13 And then, all of a sudden, the developer's attorneys
14 stand up and say, hey, we need you to approve this
15 because we've got applications in the pipeline that are
16 dependent on this. So that's all I wanted to point out
17 about that.

18 THE COURT: And what happens at the meeting?

19 MR. MOLINA: So, actually, the planning
20 commissioners -- I mean, we have the transcript in here
21 so I'm not going to paraphrase it. But, you know, the
22 planning commissioners are looking at this kind of
23 sceptically. And let's go to page 17. And at the
24 bottom, Commissioner Trowbridge, and he's saying, "I'm
25 going to take a different swat at this. We're dealing

1 with a master plan land use designation change. And I
2 think that because the city and the county, the cities,
3 in plural, this is an incredibly important decision
4 that we're making. I say that because it ranges all
5 the way from the pieces of property that were sold and
6 with the understanding that they would be golf course
7 lots and people pay a lot premium. Are they going to
8 be reimbursed if their property value goes down?"

9 You know, and so there's mixed opinions.

10 THE COURT: I mean, I get the concern. I
11 don't mind saying that. I do. But what happens when
12 that golf course model is no longer viable?

13 MR. MOLINA: I think that we agree that it
14 would be very difficult to run a golf course profitably
15 here, but here's the solution. You just have to follow
16 the right procedures to change the land use.

17 MR. SCHWARTZ: Your Honor, I can address the
18 legal issues.

19 THE COURT: I know. He's doing a -- he's
20 pointing out what happened factually. And I'm
21 following up. And I have no problem with his response.

22 MR. MOLINA: And, you know, if you go to
23 page 20 of that transcript, you've got Peter
24 Lowenstein. He kind of talks about that process of how
25 you do it. And he says to the chairman of the planning

1 commission, "When the RPD was an existing zoning
2 district." In context, the RPD zoning district was
3 eliminated from the code in 2011.

4 But he says, "When the RPD was an existing
5 zoning district, it would be affected by the zoning
6 ordinance currently. It had the ability to develop
7 your own development standards as part of the
8 application process."

9 I think I was mentioning that before. After
10 you get the rezoning approval, then you have to get a
11 plot plan approval on the individual parcels. And
12 that's what he's talking about, is that process of
13 doing the plot plan application is how the development
14 standards were created.

15 I'm actually going to touch on that a little
16 bit because I want to address your questions from
17 yesterday about the access of fencing. But he's
18 explaining that.

19 And so, ultimately, this went nowhere. The
20 planning commissioners, I think -- let's go to the end
21 of that transcript. They held it in abeyance for
22 60 days. So then there was subsequent -- I think,
23 actually, the planning staff just took it off, out of
24 the cycle. So there may not have been any subsequent
25 hearings on this, but I'm not a hundred percent sure

1 about that.

2 So the 17-acre property was submitted on
3 first. And if you go to tab 3 of this binder, it will
4 show you why. They've already got a deal to sell that
5 property for \$25 million. And the City approved that
6 development. And, ultimately, this deal fell through
7 because of the litigation with the homeowners. And,
8 you know, that's unfortunate, but there was a deal
9 lined up with The Calida Group who is a pretty good
10 developer in town. They have all kinds of really nice
11 apartments. And they participated in the design of
12 this.

13 But that was part of the reason why they
14 wanted to get that 17-acre piece approved first. They
15 had a deal lined up to do this condo development. But
16 that entitlement still exists. And that's pretty
17 critical in this case because, you know, the homeowners
18 challenged this approval of the 17-acre property.
19 Judge Crockett said it was void because there was no
20 major modification. That was the whole legal issue
21 that went up to the Nevada Supreme Court.

22 The City said, well, this doesn't actually
23 technically have the zoning that's required for --
24 that, you know, requires major modification. It's an
25 RPD zoning. And the code, at least, doesn't say you

1 need a major modification.

2 And so the Nevada Supreme Court reversed
3 Judge Crockett, and reinstated the approvals of the
4 17-acre property. And, you know, after the Supreme
5 Court issued remittitur, the City sent the developer a
6 letter stating that, you can come in and apply for
7 permits. You know, you've got an existing entitlement,
8 and we'll extend it for two years from the date of
9 remittitur.

10 And that was late 2020. The reversal of
11 Crockett's order was March, I want to say, 5th, 2020.
12 The City waited until remittitur issued, and then sent
13 them a letter and said, we'll extend your approval for
14 two years after this.

15 And that approval, the two-year extension,
16 really actually only applies to the site development
17 review application. The zoning has been changed on
18 that 17-acre parcel. I skipped over some of this other
19 stuff about how resolution of intent zoning worked.
20 But they got rid of that, you know, process where
21 you're just tentatively zoning things. That 17-acre
22 property is currently zoned R3. And the general plan
23 has permanently changed. I want to say it's "M" for
24 medium.

25 So they've got an entitlement, what I would

1 call an entitlement. But they've got the general plan
2 is consistent with the zoning. And then they've got a
3 site development review application approved, which
4 spells out literally what they can do with the
5 property, 425 units, the actual layout of what that
6 looks like. And so, you know, they've got an approval.

7 And so it's not futile to, you know, suggest
8 that they should come back and continue to apply for
9 other developments. But things got a little bit
10 problematic because of Crockett's order. And then
11 there was this development agreement.

12 I'll just go to the last tab in this binder,
13 which is the general plan amendment application, the
14 agenda for the general plan amendment application that
15 included the 35-acre property. And I want to go to
16 Bates No. 675, which is the fourth page of that
17 exhibit. And you'll see on that page 675 --

18 THE COURT: Which tab is that again, sir?

19 MR. MOLINA: Tab 10.

20 So you see that area right there is
21 approximately 166 acres. Now, they filed individual
22 development applications for the 35-acre property, but
23 this GPA was intended to apply to this entire area, and
24 they submitted it before those other applications for
25 the rest of that property came through.

1 And it's changing the PR-OS. In fairness to
2 the developer, you know, they did not want to submit
3 this application. They protested submitting this.
4 They didn't feel like they needed to submit a general
5 plan amendment application.

6 The City code pretty clearly says that they
7 do. You know, when the initial applications came in,
8 the City planning department did what they basically
9 always do, and required a general plan amendment.

10 Later on they kind of got convinced that they didn't
11 need a general plan amendment. You know, there's --

12 THE COURT: When you say, they got convinced,
13 who are you talking about?

14 MR. MOLINA: So if you look at -- let's see.
15 So I don't have it in this binder here, but if you look
16 at the first page of that exhibit, tab 10, Exhibit II,
17 and you look, kind of, closely at the first paragraph
18 under the subject line, it explains what the request
19 is. And then it says, "Staff has no recommendation.
20 Planning commission failed to obtain a super majority
21 vote, which is tantamount to denial."

22 So, in this instance, staff didn't make a
23 recommendation on whether to approve this general plan
24 amendment because, you know, technically, you need to
25 have the planning commission approving changes to the

1 general plan.

2 So there was this big debate about whether
3 you need to actually apply for a general plan amendment
4 when you want to go in and apply for site development
5 that doesn't actually change the zoning. Because on
6 the 35-acre property, they -- you know, they kind of
7 shifted gears and decided that they were just going to
8 apply for, you know, applications that were based on
9 the R-PD7 zoning. And so they submitted a site
10 development review application, a tentative map
11 application, and a general plan amendment application.
12 And this is that general plan amendment application
13 that extended to a much broader area.

14 And at the same time, you know, they are
15 negotiating this development agreement. And if you
16 turn to the last page of this exhibit, last page of the
17 binder, this is the June 21, 2017, this is an excerpt
18 of the transcript from the June 21, 2017 city council
19 meeting where they denied the applications for the
20 35-acre property. And Brad Jerbic says, you know, "The
21 61 units in this application is a very limited corner.
22 It's much denser than what would be. In fact, it's as
23 dense as what would be on the entire golf course
24 virtually if we had a development agreement. So it is
25 inconsistent, absolutely inconsistent, with that

1 development agreement that's still not finished.

2 "And if that development agreement does get
3 finished and it gets up before the council, one of the
4 things that they will have to do, and they're telling
5 you now, they will have to agree is give up the 61 if
6 they win today; is that right?"

7 So the problem that the city council was
8 confronted with is that they've got this development
9 agreement that they've been negotiating with the
10 developer for a long time. And, you know, it's got a
11 lower density than what he's proposing with these
12 applications. And if they approve these applications,
13 then they're, essentially, you know, they're changing
14 the negotiation of the development agreement.

15 And so if you go down to that last paragraph,
16 and Brad Jerbic says, "Well, we believe, in my
17 negotiations with the neighbors that have participated
18 in negotiations, they have told me they requested
19 2-acre parcels, which would be one unit per two acres.
20 And that was a concession that we won during that
21 negotiation. So the entire golf course, the 183 acres
22 except for one small piece" --

23 THE COURT: Tell me this. Why would the
24 city council or Mr. Jerbic negotiate with the
25 neighbors?

1 MR. MOLINA: So, you know, this is a pretty
2 long, drawn-out conflict where he kind of got involved
3 personally.

4 THE COURT: I mean, I do understand that, but
5 I'm trying to figure out why they would go outside the
6 processes. Because this is not typical, is it?

7 MR. MOLINA: I can't say that. I don't know.
8 But I have --

9 THE COURT: But you see what I mean? It's
10 kind like, you know, you go in front of the county
11 planning department. Staff has a recommendation. They
12 do what they do, send it off maybe to the city council
13 or reject it. But my question is this. Why would
14 Mr. Jerbic be in negotiations with neighbors of the
15 adjoining properties? That doesn't seem normal to me,
16 you know. Because I would think if they had complaints
17 or any problems like that, they would come to the
18 meeting and lodge it publicly.

19 MR. MOLINA: And they did.

20 THE COURT: I know they did. I'm not
21 questioning that. I'm talking about the negotiation
22 part.

23 MR. MOLINA: So at this point in time, when
24 this is in front of the council, there's litigation
25 going on. And it's wildfire. And so, you know,

1 there's talks --

2 THE COURT: The reason why I say that, I
3 mean, hypothetically, if we had neighbors show up today
4 and want to voice their opinions, I would say, well,
5 you can listen, and that's about it; right. And that's
6 my whole point because we have processes in place.

7 MR. MOLINA: Well, this is a public process,
8 and you have to give somebody at least --

9 THE COURT: I'm not saying you don't have to.
10 I'm just wondering why it didn't happen under the
11 auspices of a city planning commission meeting and/or a
12 city council meeting. No question you have a public
13 comment --

14 MR. MOLINA: If I remember correctly, I
15 believe the city council asked the developer to meet
16 with the homeowners to address their concerns. And,
17 you're right, it is a little rare. But this is also a
18 unique situation where we're dealing with a golf course
19 inside a master planned community. And there's
20 litigation that's going on. It got very complicated.
21 And it's, you know, there was a hope, I think, amongst
22 certain city council members, at least, that there
23 would be some kind of global resolution through this
24 development agreement.

25 But there's a lot of different people that

1 are involved in all of this. And so, anyways, so
2 that's -- that's the background there. That,
3 ultimately, is why they denied those 35-acre
4 applications because there was a development agreement
5 in the pipeline that they thought was going to produce
6 a better development than what those applications were
7 going to provide.

8 And then after those were denied, he never
9 applied again for another type of development approval
10 on that. So that is, essentially, the last thing I'm
11 going to say about that. And I do want to just very
12 quickly address your questions yesterday about the
13 access and fencing.

14 THE COURT: Yes, sir.

15 MR. MOLINA: And what this is, this is part
16 of our exhibits to our opposition and our countermotion
17 for summary judgment. And this is the Exhibit DDDD.
18 And it's the declaration of Peter Lowenstein. And
19 there are sub-Exhibits DDDD1 through 10. And I think
20 the easiest way to do this, actually, because the
21 declaration --

22 THE COURT: I do have it right here. Tell
23 me --

24 MR. MOLINA: I'll read the declaration and
25 then it will go through these exhibits. But at

1 paragraph 28 of the declaration, Mr. Lowenstein
2 explains that, "In order for a developer to build
3 access or fencing on their property, either, A, the
4 City must approve a site development plan review, SDR
5 application for the development, and that must address
6 access or fencing. Or, B, the developer must apply for
7 an SDR specifically to build access and/or fencing."

8 So either you've got a site development plan
9 that applies to the entire project, and within that
10 project there's standards for fencing or access, then
11 you don't need to file a separate application for
12 access or fencing.

13 And, you know, in this case, what we're
14 showing on tab 2, that little map there, is the yellow
15 highlighted areas show the existing access to the
16 Badlands property. And the green highlighted areas
17 show the proposed access points. And then if you look
18 down at, sort of, the entrance to Queensridge off
19 Charleston Boulevard, it's highlighted blue. Those are
20 the ponds that the developer wanted to add a fencing
21 for.

22 So Mr. Lowenstein explains the process for,
23 you know, getting a building permit for access and
24 fencing. He explains both processes slightly
25 different, but the basic idea here is that either

1 you've got a site development plan approval that
2 already addresses it or you have to come in, you have
3 to apply for -- you have to specifically apply for site
4 development plan review for the access for the fencing.

5 And in this case, because this was part of an
6 old subdivision that got approved in 1990, there's no
7 site development review plan that, at least for these
8 proposed access points on Hualapai, there's no existing
9 site development that addresses the access to those
10 points so you have to go into the City and you have to
11 apply for a site development review.

12 Now, if you're still looking at the diagram
13 on tab 2, the 17-acre property, that's on the far right
14 of the diagram, the third proposed access point. There
15 was an entitlement for that development, and it did
16 address access; however, as these exhibits basically
17 explain, you had to do a traffic study before they were
18 going to let you put that in there.

19 So there's a process for all of this. But
20 getting back to Mr. Lowenstein's declaration. He
21 explains that there is a minor review application.
22 This gets a little technical, but, you know, since you
23 asked, we'll kind of walk through it. There's a minor
24 review process that can be administratively approved by
25 the director of planning. Administrative approval

1 means no public hearing.

2 THE COURT: Well, you know, to be candid with
3 you, I'm glad you're going through this because I was
4 saying to myself, we're not talking about a traditional
5 process where you're seeking to obtain building
6 permits. We're talking about access so you can put
7 fencing up to make the property owners' property safer.
8 That's all.

9 And I was just wondering, you know -- he has
10 this hyper-technical thing here, but the bottom line is
11 they just want to put some fencing up so kids and young
12 people don't fall into the lake and drown. That's kind
13 of what it's all about. That's how I see it.

14 Now you're telling me they do have an
15 administrative process that would potentially apply to
16 that. So I'm looking at Lowenstein. Is it Lowenstein?

17 MR. MOLINA: Peter Lowenstein.

18 THE COURT: I mean, the real issue is the
19 administrative process.

20 MR. MOLINA: Right. Right. Well, okay. So
21 you can have an administrative review without a public
22 hearing or there's -- and he explains this. And I
23 don't want to paraphrase this. But he says, "The
24 director of planning has the discretion to determine
25 whether an SDR, site development review, to build

1 access and fencing requires a major or minor review."

2 So there's two processes depending on the
3 nature of the request and potential impacts on the
4 surrounding areas.

5 So a site development plan requires a minor
6 review maybe administratively approved by the director
7 of planning. The minor review process is started by
8 submitting a pre-application conference request or
9 ability permit application. And a minor site
10 development plans for certain construction types,
11 including onsite walls and fences, are to be submitted
12 and reviewed as part of the building permit
13 application.

14 So what the developer explained yesterday is
15 that this is, you know, a, sort of, over-the-counter
16 type approval. And you should just be able to walk
17 into the building department, submit your plans, get a
18 building permit for this. And what Mr. Lowenstein is
19 explaining is that that's partially true, but you
20 actually have to -- you know, they have to look at the
21 nature of the request. It's just not that simple.

22 If you're putting an access into a major --
23 if I wanted to build a ramp up to the freeway,
24 obviously, that's not going to work. You've got to go
25 through the processes, and there's got to be engineers

1 that look at this kind of stuff.

2 So the planning director has, you know,
3 discretion to require a major review. And he explains
4 that in paragraph 7. The site development plan
5 requires a major review and a public hearing if it does
6 not qualify for a minor review or for what doesn't
7 qualify for a minor review.

8 And it says, you know, that "The improvements
9 shall be processed as a major review or if the director
10 of planning determines that it is necessary based on
11 the proposed development's impact on the land uses on
12 the site or on surrounding properties."

13 So it's in the City's code that you can --
14 that the plan director has discretion to look at the
15 impact on the surrounding properties. And, I mean,
16 that's really the fundamental principle of zoning is
17 compatibility with surrounding uses. You want
18 compatible land uses next to each other.

19 THE COURT: But isn't health and safety
20 another factor?

21 MR. MOLINA: That's the underlying power.

22 THE COURT: Health and safety.

23 MR. MOLINA: That's the police power that the
24 statute -- Nevada legislature delegates that police
25 power to local governments to carry out zoning for the

1 health, safety, and welfare of their citizens.

2 So then he says, "An SDR to build access and
3 fencing will require major review" --

4 THE COURT REPORTER: I'm sorry, sir, I can't
5 even understand what you're saying.

6 THE COURT: And which paragraph is that, sir?

7 MR. MOLINA: Paragraph 8 on page 3. "An SDR
8 to build access and fencing will require a major review
9 if the director of planning determines that the
10 construction of access or fencing would significantly
11 impact the land uses on the site or on surrounding
12 properties."

13 And then the citation to the unified
14 development code is right there.

15 And then he goes through the facts of what
16 was actually submitted and what the actions that were
17 taken. And he explains that on February 15th, 2017,
18 the City approved the construction of 435 units and
19 other contiguous property. And then he says, "The
20 City's 17-acre approval required a traffic impact
21 analysis prior to the issuance of any building or
22 grading permits, including permits to construct
23 additional access or fencing."

24 And then he says, on June 28th, 2017, which
25 is just three months, you know, three, four months

1 later, he says, "The developer applied to build three
2 additional access points to the Badlands, only one of
3 which was on the 17-acre property."

4 So what he's explaining here is that there's
5 a request for access to the 35-acre property that's at
6 issue in this case, but there's no existing site
7 development review application that addresses access or
8 fencing. And so he's got discretion to require an SDR,
9 a site development review application. And he's got
10 discretion to determine whether to put that through the
11 minor or the major review process.

12 THE COURT: But why would this be considered
13 a major review process?

14 MR. MOLINA: So he explains --

15 THE COURT: Especially -- I'm just talking
16 about the fencing itself. Because we're not talking
17 about -- I don't think that would involve any grading;
18 right?

19 MR. MOLINA: Oh, it would.

20 THE COURT: Would it?

21 MR. MOLINA: Yeah. Absolutely.

22 THE COURT: I don't know about that. So
23 you're telling me we're going to have -- to put a chain
24 link fence up there, they'd have to conduct grading?

25 MR. MOLINA: I was just talking about the

1 access.

2 THE COURT: I'm just talking about the
3 fencing. But go ahead.

4 MR. MOLINA: We'll get to the fencing. Just
5 a second.

6 So if you go to tab 3. This is a --

7 THE COURT: I don't know this. These are
8 factual questions I'm asking you. Was part of the
9 request to put in permanent access roadways and that
10 type of stuff?

11 MR. MOLINA: I'll show you the plans.

12 THE COURT: You can answer that. Was it
13 putting in asphalt or concrete?

14 MR. MOLINA: I'm not a hundred percent sure
15 what the nature of that road was going to look like,
16 but we can take a look at the plans if you want to go
17 to tab 5. It doesn't really say. I can tell you, at
18 least with respect to the 17-acre property, there was a
19 grade change there. On the 35-acre property, not so
20 much, but, you know, there's still -- there's still
21 some construction to do. And really it's not just
22 about the grading. It's also about the traffic impact,
23 too.

24 So what Peter Lowenstein is saying in his
25 declaration is that you've got to go through the

1 process. And originally their engineer, the
2 developer's engineer, submits the SDR, the site
3 development review application, the approval. This is
4 the approval letter for the 17-acre property. And he
5 says that this entitles them to develop access at three
6 different points, including on the 35-acre property,
7 which it just can't. It's only limited to the 17-acre
8 property.

9 And it specifically says, if you go to tab --
10 let's see, this is page 3 of tab 3 -- page 4 of tab 3,
11 item 19. One of the conditions of approval was a
12 traffic impact analysis must be submitted to and
13 approved by the department of public works prior to the
14 issuance of any building or grading permits, submittal
15 of construction drawings, all that good stuff.

16 MR. LEAVITT: I'm sorry, where was that at,
17 counsel?

18 MR. MOLINA: That's on, I believe it's page 3
19 of the approval letter for SDR 62393 in paragraph 19.

20 MR. LEAVITT: That's for the 17-acre parcel?

21 MR. MOLINA: That's correct. And if you go
22 back to the first page on tab 3, the developer's
23 engineer is submitting the approval for the 17-acre
24 parcel and requesting access on the 35-acre parcel.

25 So, clearly, the approval on the 17-acre

1 parcel doesn't necessarily mean you can just go and get
2 a building permit for access on the 35-acre parcel.
3 And even in this approval, it's got conditions that
4 says, you can't get a building permit until you do the
5 traffic study.

6 So that's what we're talking about here.
7 We're talking about technical processes that, you know,
8 you have detailed code requirements on this stuff. And
9 that's really where this stuff kind of breaks down.

10 So, you know, going back to Mr. Lowenstein's
11 declaration. There was request for an access that was
12 submitted on June 28th, 2017. And that was what --
13 Exhibit 3 was the email letter and exhibit -- or tab 4,
14 which is also Exhibit 4 to this declaration, is the
15 actual permit application.

16 And it's pretty basic. There's really not a
17 lot there. Mr. Lowenstein goes on to explain that on
18 August 24, 2017, the acting director of the department
19 of planning informed the developer that the proposed
20 construction of additional access could significantly
21 impact the land uses on the site or the surrounding
22 properties and a major development review would be
23 required. And that was Exhibit 5. It's actually
24 tab 6.

25 THE COURT: How does it impact land uses on

1 the site?

2 MR. MOLINA: He says it in his letter at
3 tab 6. He says, "I have determined that proximity to
4 adjacent properties has the potential to have
5 significant impact on surrounding properties. As
6 such" --

7 THE COURT: I asked a specific question.
8 Because I see here he says two things. He said, impact
9 land use on the site or surrounding areas. I didn't
10 ask about surrounding areas. I asked specifically as
11 it relates to the site.

12 MR. MOLINA: As it relates to the site?

13 THE COURT: Yes.

14 MR. MOLINA: So I think if we go back --

15 THE COURT: If he doesn't address it, that's
16 okay, but he has this. If you take a look at
17 Exhibit 3, I guess in Exhibit 1, his affidavit and/or
18 declaration, and I'm just looking at page 4 starting at
19 line 5, paragraph 16.

20 MR. MOLINA: So I think if you hold your
21 finger on that and flip to tab 5, it's the last page of
22 tab 5., there's a letter that explains a request for
23 it, and the nature of the request. And it says, "The
24 access points on Hualapai are necessary for the service
25 operations and ingress and egress, but not limited to

1 the trucks and equipment required for tree and plant
2 cutting, removal of related debris, and soil testing
3 equipment."

4 And that's, essentially, what he's saying.
5 He's saying we need to bring heavy equipment onto the
6 property. And then down in the last paragraph, he
7 explains that the bridge from the clubhouse to -- you
8 know, they could theoretically drive all the way across
9 the golf course. What he's saying is that there's a
10 little wash right next to the golf course that has a
11 little bridge. It's next to the clubhouse. And what
12 he's suggesting here is that to bring trucks across
13 that bridge would not support the weight of the trucks.

14 Now, there's actually a different way to get
15 across there. You don't have to cross the bridge. As
16 I showed on tab 2, there is another access point that's
17 over by the Las Vegas Valley Water District reservoir.
18 So you didn't technically need to go across the bridge
19 there.

20 THE COURT: But isn't he saying that they
21 can't use the bridge because of weight limits?

22 MR. MOLINA: Right. And what I was just
23 trying to say is there's another way.

24 So that's the story with the access points.
25 You know, that's the planning director's determination.

1 I don't know everything that went into that. And I'm
2 not going to testify on his behalf right here.

3 THE COURT: No, I understand. And the only
4 reason I thought about that because, in a general
5 sense, this property, for all practical purposes from a
6 maintenance perspective, had been abandoned for how
7 long?

8 MR. MOLINA: At this point, this is
9 February -- no, June or July of 2017. The golf course
10 closed in late 2016. So we're talking, like, six
11 months.

12 THE COURT: What do we know about the
13 maintenance of the golf course prior to closing?

14 MR. MOLINA: Well, there was a golf course
15 operator.

16 THE COURT: I mean, that can mean a lot of
17 things. Do we know when they pulled out? Did they
18 operate as a golf course up until the very last day?
19 Because I don't know this. I don't.

20 MR. MOLINA: They -- towards the end of 2016,
21 I think was December 1st, 2016, is when the golf course
22 closed. And there was a lot of back and forth between
23 the developer trying to renegotiate the management
24 agreement. They were basically trying to keep it
25 alive, it looks like, for a while. But the golf course

1 operator ultimately said, you know, we can't do this
2 anymore. And then that's when they closed the course.
3 And that was, I want to say, late 2016.

4 THE COURT: Because I'm sitting here, I'm
5 anticipating, I'm looking at, you said the access
6 point, Rampart Boulevard is necessary for service
7 operations and ingress/egress of, but not limited to,
8 the trucks and equipment required for tree and plant
9 cutting, removal of related debris, and soil testing.

10 So it appears to me there might be two things
11 going on there. That they needed to know, number one,
12 I would anticipate from a maintenance perspective
13 there's trees and debris, they wanted to remove that
14 from the property. And I see nothing wrong with that.
15 Then, secondly, this might be a future issue, I would
16 anticipate part of it he talks about -- let me see
17 here. Soils testing, I think that would go to
18 potential issues regarding future use of the property
19 because, you know, you have to go out and test for
20 expansive soils and the like; right? And that's kind
21 of what they did.

22 MR. MOLINA: So --

23 THE COURT: So there's two things going on.

24 MR. MOLINA: What's interesting is that the
25 access was not -- access request was not granted, but

1 the trees have been removed. And if you look at their
2 expert reports, there was soil testing done. So they
3 found a way to get it done without that access.

4 THE COURT: Do we know how they did that?

5 MR. MOLINA: Not sure.

6 So with respect to the fencing, on page 3 of
7 Mr. Lowenstein's declaration, he says that in June and
8 July of 2017, which is really around the same time,
9 "the developer discussed with the City planning
10 department its intent to build fencing around the
11 entire perimeter of the Badlands" -- around the entire
12 perimeter, not just the ponds -- "without filing a
13 request for an SDR."

14 What he's saying is that there was
15 discussions, but there hadn't been an application yet.
16 And he goes to what's tabbed 7. It's Exhibit 6 to his
17 declaration. And there's an email there from
18 Peter Lowenstein to Robert Summerfield. I believe at
19 this time, Robert Summerfield was still in the planning
20 department. And he explains, sort of, what happened
21 there. And he says, "EHB Companies has indicated that
22 they intend to submit a building permit request for use
23 of a chain link fence along the perimeter of the
24 golf course adjacent to the Queensridge north and south
25 subdivisions. On Monday of this week, EHB Companies

1 provided an update via email to the planning commission
2 stating, we are still working on the fence exhibits and
3 looking to submit to the planning development
4 department -- department of building and safety
5 sometime tomorrow. We will provide you an emailed copy
6 at the same time. You will note that the areas along
7 Regent Park Road and Palace Court in lieu of a chain
8 link fence we are requesting a masonry fence along the
9 property line."

10 So chain link fence for almost all of the
11 Badlands, and a masonry fence for these parts by Regent
12 Park Road and Palace Court.

13 THE COURT: Explain that. So they had
14 approved the utilization of a chain link fence for most
15 of it. What does that mean?

16 MR. MOLINA: That was the initial -- it
17 wasn't even a request. It was just a discussion. And
18 they said, submit the plans for this. And it was
19 mostly a chain link fence around the entire
20 golf course. We're not talking about the ponds yet.
21 And part of it was going to be a masonry fence. That's
22 at least what the discussion said.

23 Then he goes on to explain that, "Since that
24 communication, staff has had verbal communications with
25 EHB Companies to get further clarification pertaining

1 to the masonry fence. In that discussion EHB Companies
2 indicated that they intend to match the existing walls
3 within the Queensridge north and south communities.
4 Staff had requested an architectural exhibit of the
5 proposed wall to review." Which is very typical.

6 "It was known to EHB Companies that perimeter
7 walls are governed by a Title 19.06, and that they are
8 to be decorative walls with contrasting materials."

9 The code says that.

10 "An argument could be made that the zoning
11 district governing the perimeter walls is not called
12 out within Title 19.06, as the subject site district is
13 R-PD7, and, therefore, the standard is what they
14 proposed."

15 And, remember, with R-PD7 zoning, the process
16 was that the development standards it created through
17 the plot plan review process.

18 THE COURT: I mean, I clearly get that. But
19 my question is this. This wasn't meant to be permanent
20 fencing.

21 MR. MOLINA: Well, a masonry wall.

22 THE COURT: I mean, as far as a chain link.
23 You see that a lot in Las Vegas; right. You go by
24 any -- up and down Las Vegas Boulevard, they have a lot
25 of chain link fencing up, and it's there temporarily.

1 That's not part of the overall permanent plan. It's
2 there many times for safety reasons, and we all
3 understand that.

4 So I'm trying to figure out if you're asking
5 for chain link fencing and it's more temporary in
6 nature, until this issue can be resolved, why are they
7 treating it like permanent fencing?

8 MR. MOLINA: There's also a rule for
9 temporary fencing.

10 THE COURT: Okay. What's that rule?

11 MR. MOLINA: It has to be for construction
12 activities. And I think there's maybe one other
13 situation where it's allowed. But, for the most part,
14 it's allowed when you have construction activities,
15 which haven't been approved in this case yet, at least
16 not for the majority of the Badlands.

17 THE COURT: Is there a catchall for that? I
18 mean, I don't know. But it seems to me, and I guess
19 you can look at it this way, there's anticipating
20 construction activities. But I don't see how you can,
21 especially for a homeowner -- I mean, I'm sorry, for a
22 property owner. And there are some public safety and
23 welfare issues out there.

24 And I don't mind saying I was a tort lawyer.
25 And I understand doctrines like attractive nuisance and

1 those things. Just as important, too, you have
2 potential hazards on the property. And at the end of
3 the day, if the property is not made safe and this is a
4 non-delegable duty; right, you can't delegate that as a
5 property owner, why wouldn't the City say, look, yeah,
6 we get it, no permanent fencing or anything like that,
7 but if you want to make the property safer for the time
8 being until we work this out. There has to be a
9 mechanism in place like that, I would think.

10 MR. MOLINA: So what he says at the bottom of
11 that email is that there was a permit file. When they
12 came in and they originally submitted something, the
13 City assigns a permit file on June 29th, 2017, for a
14 chain link/concrete fence. And the applicant left with
15 the plans. There was no recent activity. And then
16 there was a --

17 THE COURT: I mean, really, I'm just going
18 through it in my mind. I mean, in a way, I understand
19 discretionary function of the City.

20 MR. MOLINA: This isn't even that. This is
21 they just didn't follow through --

22 THE COURT: Okay. Go ahead.

23 MR. MOLINA: -- is the problem.

24 THE COURT: Where are you at? I want to make
25 sure I'm following you.

1 MR. MOLINA: I'm at tab 7. It's at the
2 bottom of just right before the last sentence in there,
3 the permit numbers.

4 THE COURT: Is that permit no. C1700371?

5 MR. MOLINA: Right. So they created a permit
6 file when they came in and initially submitted the
7 application form, but they left with the plans and
8 there wasn't any subsequent activity as of July 26th,
9 which is basically a month later. And so there's these
10 two fencing requests, once for chain link and I think
11 ones for concrete. And if you go to tab 8, DDDD7,
12 there's that application form, but we don't have the
13 plans. I have never seen the plans for these fences.
14 I have no idea what they look like.

15 And then he explains that -- Peter Lowenstein
16 explains in, let's see, paragraph 16 on August 24th,
17 "The director of development informed the developer
18 that the proposed fencing around the ponds could
19 significantly impact the land use on the site."

20 So they just sent them the same letter about
21 the access at the same time, even though there weren't
22 any plans on file yet. They just said, if you're going
23 to do this, then bring it through the major review
24 process, apply for a site development review
25 application, and let us know what you're doing.

1 And then he goes on to explain in paragraph
2 18, "The developer never filed an application for major
3 review to construct access or fencing. The City has
4 not denied any developer request to construct
5 additional access to the Badlands or to install
6 fencing."

7 So, I mean, that's just the whole thing in a
8 nutshell, is that they didn't follow through with the
9 procedures that the City requested them to follow. And
10 that's kind of the story of the entire development here
11 is that the City said, you should follow the process.
12 Developer said, nope, I don't think I have to.

13 And that's where really everything breaks
14 down and, pretty much, the situation with almost all of
15 these parcels of land. There was a fight about what
16 the process was.

17 THE COURT: So I have a question for you. I
18 was looking at the exhibit you pointed out. And I
19 think this would be Exhibit 8, and that's part of the
20 DDDD-7, there's photographs -- do you have any idea --
21 this is maybe three or four pages in, that are circled.
22 Appears to be water. Do we know what that represents?

23 MR. MOLINA: Those are ponds. Those were
24 ponds that were on the golf course.

25 THE COURT: And as far as the red line that

1 surrounds the pond, what would that be?

2 MR. MOLINA: That's just the proposed fencing
3 line, I guess.

4 And we actually toured those ponds or toured
5 the Badlands. We did a site inspection. And, for the
6 most part, they're drained. So talk about attractive
7 nuisance issue. You can drain these ponds. They have
8 drainage. And they're going to say, yeah, okay, you
9 have to maintain the pipes. Sure. But you're right,
10 it's non-delegable duty.

11 THE COURT: But you can't do it if you can't
12 access it.

13 MR. MOLINA: You can access this.

14 THE COURT: Well, apparently, they weren't
15 given access for the fencing.

16 MR. MOLINA: The access and the fencing have
17 no relationship whatsoever, two separate requests.

18 THE COURT: I mean, I'm looking here. This
19 is the August 24th, 2017, letter by Robert Summerfield,
20 department of planning. And he says, "After reviewing
21 the permit submitted C17-01047, for chain link fencing
22 to enclose the two water features/ponds on the subject
23 site, I determined that the proximity to adjacent
24 properties has the potential to have a significant
25 impact on the surrounding properties."

1 So that's their decision; right?

2 MR. MOLINA: I'm not going to try to read his
3 mind, but what I would assume is that he's got a
4 tremendous amount of political pressure on him at this
5 point in time and he wants to punt this to the
6 city council.

7 THE COURT: That's kind of -- I mean, I get
8 that. I'm not throwing anybody under the bus for that.
9 But if you make decisions, sometimes they have an
10 impact.

11 MR. MOLINA: Right.

12 THE COURT: I'm sure there was a lot of
13 political pressure on him. I'm not denying that at
14 all. I would imagine there's a lot.

15 MR. MOLINA: And the way that I read this is
16 this is above my pay grade at this point.

17 THE COURT: I understand.

18 MR. MOLINA: So, you know, ultimately, all
19 these exhibits, when you just kind of -- he also talks
20 about the whole open space bill. There's additional
21 stuff. I don't need to get into that.

22 I think I've spent enough time up here. I'd
23 like to turn the floor over to Mr. Schwartz so he can
24 address the summary judgment arguments.

25 THE COURT: What we're going to do, and I'll

1 be candid with you, in the last hour, sir, you answered
2 a lot of questions I had and specifically focused on
3 what we needed to make a decision so thank you.

4 I think it's time for a break for lunch.
5 Does everyone agree to that?

6 MR. LEAVITT: Yes, Your Honor. I just wanted
7 to get timing issue because today --

8 THE COURT: I don't mind telling everybody my
9 concern. I set aside a day and a half for this; right.
10 I mean, I should have pulled a Judge Gonzalez and said,
11 you got 15 minutes per side and I'm done. A day and a
12 half is a lot of time.

13 MR. LEAVITT: Right, Your Honor.

14 THE COURT: We're going to take an hour. And
15 you've got to convince me why I shouldn't say we're
16 limited at this point on two hours per side, and we can
17 go home and make a decision. You've got to convince me
18 why that would be improper.

19 Anyway, right now it's 12:20. We'll be ready
20 to go at 1:45. That would be an hour and five minutes.

21 (Whereupon, a recess was taken.)

22 THE MARSHAL: Department 16 come to order.
23 We're back on the record.

24 THE COURT: Everyone may be seated. All
25 right. Before we get started, I just have a quick

1 question. How much more time do we need?

2 MR. SCHWARTZ: Your Honor, I'm going to need
3 at least three hours to address the legal issues that
4 are raised in this motion for a taking, this summary
5 judgment motion. We also have the City's counter-motion
6 for summary judgment, where we address three causes of
7 action that weren't addressed in the developer's
8 motion.

9 THE COURT: So how are we supposed to
10 accomplish all of this today?

11 MR. SCHWARTZ: Your Honor, I do not think we
12 can, and if I could explain. The developer has asked
13 for \$54 million in damages in this case alone.

14 THE COURT: But here's my point. And we
15 spent time on issues that I don't think were very
16 important to my decision-making process. So we have to
17 be efficient. Now, if you say you need three hours,
18 I'm not going to sit back and say, well, you can't have
19 it, but I need efficiency. I just want to say that.

20 I'll just tell you right now, I looked at
21 this as far as when we're coming back, and it has to be
22 Monday or Tuesday. If it's Monday, it will be for half
23 a day, that's it. 1:00 o'clock this courtroom goes
24 back to Judge Krall. This is her courtroom. If we
25 can't do it then, then there will be no live

1 appearances. It will be done by video, BlueJeans.

2 MR. SCHWARTZ: Your Honor, I am not available
3 on Monday.

4 THE COURT: Well, then it will be done by
5 video.

6 MR. SCHWARTZ: If necessary, Your Honor.

7 Your Honor, I think it's important not to
8 lose sight of how important this case is. The
9 developer is asking this Court to do nothing less than
10 turn the whole land use regulatory system in this state
11 upside down.

12 THE COURT: I understand the importance of
13 the case, but I do understand the importance of
14 efficiency. I don't need to know land use in the state
15 of Nevada going back to 1950; right. I don't need
16 that.

17 MR. SCHWARTZ: I think that's what the
18 developer is asking the Court to do.

19 THE COURT: I'm just telling you what I need.
20 And there are certain things I didn't need from a
21 factual perspective. I think your co-counsel did a
22 good job after he got beyond that answering my
23 questions, but a lot of it would have been, I don't
24 think, necessarily germane to my decision making.

25 So, anyway, whatever we do now is going to be

1 done by BlueJeans. I want everyone to understand that.

2 MR. SCHWARTZ: I promise to be efficient,
3 Your Honor, but there are many legal issues here that
4 are very important to this case.

5 MR. LEAVITT: If I could be heard,
6 Your Honor?

7 THE COURT: Yes.

8 MR. LEAVITT: We presented our entire case in
9 two hours. And it's two narrow issues, what's the
10 Nevada law for taking, and did the government engage in
11 taking actions. The government decided not to address
12 even one of those issues for five hours now. They've
13 been up here for five hours.

14 And so, Your Honor, my point is counsel can
15 take an hour and a half. That would give them six and
16 a half hours. We can take an hour and a half. That
17 would give us three and a half hours. And I will
18 respond to him, and we can be done. Or if we are going
19 to go Monday, Your Honor --

20 THE COURT: We're not going Monday.

21 MR. LEAVITT: I get it. So if we each do an
22 hour and a half, that would give them six and a half
23 hours and the landowner only three and a half hours,
24 and we would agree to that. If we could get that done
25 and we should be able to resolve this and get it done

1 today.

2 Counsel can be very pointed. Here's Nevada
3 law on the take. Here's the taking acts. He can try
4 and justify the City's taking acts. That's only why
5 we're here today.

6 THE COURT: I don't mind saying we're not
7 going to get done today.

8 MR. LEAVITT: Then if we go Monday,
9 Your Honor, it would be impossible for us to respond to
10 this by BlueJeans. We can be here live, and counsel
11 can appear by BlueJeans. We've done that, actually, in
12 some of these other cases. Because we have specific
13 documents that are necessary to rebut what the
14 government has stated here today, hard copies of those
15 documents.

16 THE COURT: We can handle it this way, too.
17 If we do it in my courtroom, which I'll only be there
18 for another month, they tell me, because I will happily
19 be moving to the 16th Floor again, if we do it live, it
20 will be one counsel per side.

21 MR. LEAVITT: Well, Your Honor, if we can do
22 it live here on Monday, that's one thing.

23 THE COURT: See, Monday I have limitations.
24 This is Judge Krall's courtroom.

25 MR. LEAVITT: If counsel needs three hours,

1 he'll be done today. I can tell you I'll be done in
2 one morning, on Monday.

3 MR. SCHWARTZ: I need at least three hours,
4 and I can explain why.

5 THE COURT: I don't need explanations. I've
6 going to give you three hours.

7 MR. LEAVITT: One last -- I'll put on the
8 record one last thing. And I've told you this numerous
9 times in the past, Your Honor, that we tried to get
10 this on in March, and we're finally here. And this
11 happens in every case, the City delays everything.

12 THE COURT: It will be done next week. I'm
13 going to tell you this right now. I can do this.
14 Either we're done Monday or Tuesday or everything is
15 going to be submitted on submission on the points and
16 authorities.

17 On an appellate review perspective, and I
18 think we probably have timers; is that correct, madam
19 court reporter, as to how much time each side has been
20 given for their argument? Do we have that?

21 THE COURT REPORTER: Do you mean can I tell
22 you how much time we've taken?

23 THE COURT: Yes.

24 THE COURT REPORTER: Yes.

25 THE COURT: Yeah. And so we'll have a

1 record. So if there's any question as to whether or
2 not, well, judge is being unfair as far as time
3 allocation -- like I indicated before, Judge Gonzalez,
4 what was it, 15 minutes per side, and that's it, you
5 know. I don't believe in that. I don't believe in
6 artificial limitations as far as arguments are
7 concerned, but I do have another thousand cases. I
8 have other cases I have to deal with so I thought I was
9 being very gracious in giving a day and a half for
10 this, which is a long time; right.

11 MR. LEAVITT: I agree it should have been
12 done in a day and a half.

13 MR. SCHWARTZ: Your Honor, I am not available
14 Monday afternoon, but if --

15 THE COURT: It would be Monday morning.

16 MR. SCHWARTZ: Okay.

17 THE COURT: It would be Monday morning
18 because this courtroom is not available Monday
19 afternoon.

20 MR. SCHWARTZ: Am I to understand that I have
21 three hours for my opposition to the motions filed by
22 the developer, and then I will get --

23 THE COURT: Actually, you've had more than
24 three hours. We've given you how much time already,
25 your side, sir?

1 MR. SCHWARTZ: That was just on the facts.

2 THE COURT: I'm being very gracious in that
3 regard, too. Because, normally, I don't permit sides
4 to split it up like that. Just one lawyer per side.
5 We don't do Ping-Ponging.

6 I know it's an important issue, but you say
7 you need another -- and here's another issue. I just
8 want to raise it. I want you to raise every issue,
9 both factually and also issues of law as to why I
10 shouldn't grant the summary judgment motion. I
11 understand you filed a countermotion or whatever. I
12 would anticipate that can be covered in that time
13 period, too. At the end of the day, we're talking
14 about issues of law; right. And I'm going to look
15 at -- it seems to me, the controlling case I have to
16 deal with as far as this case is concerned would be
17 Sisolak in many respects; right. And we can all agree
18 to that?

19 MR. SCHWARTZ: I agree with that, Your Honor.
20 And the developer has so tortured that case, I'm going
21 to need some time to take the Court through that to
22 explain why that case is a physical takings case and
23 doesn't apply to the first and second cause of action.
24 That is going to take time.

25 THE COURT: See, here's the thing. I'm not

1 going to have any -- okay. How do we handle this from
2 a procedural perspective. Normally, what happens when
3 I have a motion in front of me, I ultimately decide
4 that before I move on to the next motion; right.
5 That's how we do that. My question is this. We have a
6 countermotion for summary judgment. It's on the same
7 issues; right, basically?

8 MR. SCHWARTZ: Well, yes and no. We've got
9 this Penn Central claim that the developer didn't move
10 for summary judgment on. I'll explain why. I think
11 that's significant. We need to argue on that.

12 THE COURT: Why is that relevant? The reason
13 why I bring that up is this. If you look, I think it
14 was the first claim for relief, the third claim for
15 relief, and the fourth claim for relief. And these all
16 are issues that relate to taking. And if there's a
17 taking, does that other claim for relief even matter.

18 MR. SCHWARTZ: It's a Penn Central taking
19 claim, Your Honor. They pled it, and we are entitled
20 to summary judgment on it. And I'm going to explain
21 why.

22 THE COURT: Here's the difference. So what
23 you're saying is, Judge, you can decide their first,
24 third, and fourth claim for relief. We have a pending
25 motion for summary judgment as to the Penn Central

1 claim. You should decide that. We can do that.

2 MR. SCHWARTZ: And their temporary taking
3 claim. And on those issues, we should be able to argue
4 first and last.

5 THE COURT: Okay. I get that. So why do we
6 need three hours for the legal issues right now when
7 I've already given you more than that?

8 MR. SCHWARTZ: Well, we have some very
9 significant issues about what zoning means, about
10 whether zoning confers rights. There's a lot of law on
11 that issue. It all says, no. And what's the
12 relationship between zoning and the general plan
13 designation.

14 And there's been a big disconnect in this
15 case between this claim that all property owners have a
16 constitutional right to build whatever they want as
17 long as it's a permitted use under the zoning
18 ordinance. There's a big disconnect between that and
19 the tests for liability for a regulatory taking. I
20 need to explain to the Court what -- why they're making
21 that claim and how it has nothing to do with a
22 regulatory taking. So I need to explain the origins of
23 the regulatory taking doctrine and what the rules are.
24 Then I need to fit the facts of this case within those
25 rules.

1 THE COURT: But we've had facts.

2 MR. SCHWARTZ: I need to fit those facts
3 within the law.

4 THE COURT: Here's my question. Why did we
5 spend three hours on -- if you're going to do that, why
6 did we spend three hours this morning? You should have
7 stepped up -- going back to yesterday, we should have
8 just dove into this head first. I mean, I don't mind
9 saying this because I think counsel did his best and he
10 did an admirable job, but the first hour and a half or
11 two hours of this discussion was almost like watching
12 something on Channel 10 regarding the history of
13 planning and zoning in Clark County.

14 MR. SCHWARTZ: Well, I think the point was
15 that the history of land use planning in Nevada is that
16 the state has found the general plan to be more and
17 more important, and that zoning has to be consistent
18 with the plan. And in this case --

19 THE COURT: And you can make that argument,
20 sir, but my point is this. I mean, when I deal with a
21 products liability case, I don't have to go back to the
22 origin of products liability. I'm just saying that. I
23 don't. What is the law.

24 MR. SCHWARTZ: I will be very brief on those
25 facts and how they fit into the law. But I will

1 explain how those facts fit into the law, Your Honor.

2 THE COURT: All right. I think this is the
3 only fair way to do it today. I'm going to allocate,
4 and this is fair, I'm going to allocate one hour per
5 side. And you don't have to use it all today. As far
6 as Monday is concerned, is Monday going to be a go?

7 MR. LEAVITT: Are you talking to me?

8 THE COURT: I'm talking to everybody. I'm
9 talking to the plaintiff and the defense as far as
10 Monday is concerned.

11 MR. SCHWARTZ: I'm available Monday morning
12 by BlueJeans.

13 MR. LEAVITT: Your Honor, we will appear here
14 in person.

15 THE COURT: I have to be done by noon.

16 MR. LEAVITT: What time will we start,
17 Your Honor?

18 THE COURT: Start at 9:15.

19 MR. LEAVITT: And did you say you're going to
20 give each party an hour today?

21 THE COURT: I'm looking at the totality of
22 time because we do have the pending motions. But what
23 I'm thinking, maybe can the City be done today because
24 I plan on getting out of here by 4:50?

25 MR. SCHWARTZ: I will do my best.

1 THE COURT: This is Friday; right. We
2 started at 9:15 in the morning.

3 MR. SCHWARTZ: I will do my best, Your Honor.

4 THE COURT: Okay. And then on Monday, I'll
5 hand the floor back over to the plaintiff. And then
6 you can go for an hour, sir. And then he'll get the
7 last word, something like that, regarding his
8 counterclaim. This case has to come to an end.

9 MR. LEAVITT: I agree, Your Honor.

10 MR. SCHWARTZ: Thank you, Your Honor.

11 THE COURT: So, sir, you have the floor.

12 MR. SCHWARTZ: Thank you, Your Honor.

13 Your Honor, I have delivered to you two
14 binders of exhibits that I'll be referring to, Volumes
15 I and II.

16 THE COURT: Yes, sir. I've got them.

17 MR. SCHWARTZ: They each have tabbed numbers.
18 I want to refer the Court to the first three exhibits,
19 which, in a sense, tells the Court everything you need
20 to know to grant summary judgment for the City in this
21 case.

22 THE COURT: Okay.

23 MR. SCHWARTZ: Tab 1 are the approvals of 435
24 units on the 17-acre property. Now, takings, in
25 takings, Your Honor, the parcel as a whole is a very

1 important concept. The Court doesn't look at the
2 property and the effect of the regulation on a part of
3 the property. It looks at the whole property. And
4 there are rules to decide what is the whole property.

5 In this case, the PRMP, the 1500-acre Peccole
6 Ranch master plan, is the parcel as a whole. And in
7 taking jurisprudence, the Court should look at the
8 effect of the City's regulation on the parcel as a
9 whole. If the PRMP is not the parcel as a whole, at
10 minimum, the 250-acre Badlands is the parcel as a whole
11 for purposes of takings.

12 And that's why the first three tabs are so
13 important, Your Honor. If the parcel as a whole is the
14 PRMP, the City will have allowed 84 percent of it to be
15 developed so there can't be a taking if the City
16 doesn't allow the other 16 percent to be developed.
17 The developer has got substantial value.

18 If the parcel as a whole is the Badlands, the
19 City has approved 435 luxury units in the Badlands. So
20 it's allowed substantial development of the parcel as a
21 whole. So the developer can't carve up the property
22 into different segments and apply for development on
23 each segment. And if the City says no on a particular
24 segment, okay, now, you've wiped me out; you have to
25 pay me for a taking.

1 The courts are onto that. The U.S. Supreme
2 Court and the Nevada Supreme Court have said, you can't
3 do that.

4 THE COURT: Okay, but tell me this. And
5 these are my thoughts. What about this current case?
6 And the reason why I say that is this. There's no
7 question there was a development as a whole when the
8 entire parcel was developed, including the golf course,
9 single-family residential homes, condos, and the like.
10 But at some point, the golf course failed; right.
11 That's an important point to bring up. And the
12 golf course has failed.

13 And so it seems to me, you have, what is it,
14 approximately 150 acres, give or take, and this case
15 happens to be about 35 acres. And so once the
16 golf course fails, are you saying that there can never
17 be the right to develop the golf course because the
18 surrounding properties were developed? That's what
19 that bottom line would be under that scenario.

20 MR. SCHWARTZ: I am saying that only in part,
21 Your Honor. It's a bit more complicated than that.
22 Because you can't exclude the history of this property.

23 THE COURT: I get that, but you can't exclude
24 the fact that we had a failure of the golf course. How
25 many acres is it total, once again?

1 MR. SCHWARTZ: The R-PD7 zoned area was
2 614 acres. Then the golf course is 250 of those. So
3 the City designated the residential in the general
4 plan. The general plan is the highest law. It
5 designated the housing portion of that 614-acre R-PD7
6 zoned area housing or medium density housing. And it
7 designated the golf course PR-OS; okay. That means
8 that you can't use the golf course for residential.
9 That's the law. And the City has discretion as to
10 whether to change that.

11 Now, the developer came along, bought the
12 property in 2015 for \$4.5 million. The City -- the
13 developer claims that they're an experienced developer.
14 They did their due diligence. They claim they did
15 their due diligence as to the law. Although, they
16 failed to find all of the state statutes and the case
17 law that prevented development of the golf course area
18 because it was designated PR-OS, unless the City
19 exercises discretion to change it.

20 So the developer knew, Exhibit Y -- Exhibit Y
21 is tab 56, Your Honor, in the second binder. That
22 shows the developer knew that the Badlands, the
23 golf course, was designated PR-OS when they bought the
24 property. And if they didn't know, they should have
25 known because it's right there in the general plan and

1 all the ordinances that approved the PR-OS designation.

2 So if the developer did their due diligence,
3 they bought a golf course. They still have a
4 golf course today. And that's why there can't be a
5 taking.

6 Now, the Court asked a very good question.
7 What if the golf course is not an economic use. They
8 either should not have bought the golf course or they
9 should have paid a nominal amount for it if it wasn't
10 an economic use. They bought a golf course that, by
11 law, could not be developed with residential unless the
12 City exercised its discretion to change that. That's
13 state law, state statutory law and state case law.
14 They knew it. If they didn't know it, it's the law.
15 They bought a golf course, and the City didn't make
16 them buy the golf course. They didn't have to buy it.

17 So they can't buy something that they now say
18 they can't use, it's got no economic use. And say to
19 the City, oh, you have to change the law to allow me to
20 make money on this. That's not the City's job.

21 THE COURT: Now, when you say they have to
22 change the law, what does that mean? Because at the
23 end of the day, understand we're talking about the
24 35 acres at issue. And I know we know the answer to
25 that, but it was zoned; right?

1 MR. SCHWARTZ: Your Honor, there's zoning and
2 there's a general plan.

3 THE COURT: I understand that. But my
4 question was, it was zoned R-PD7; correct?

5 MR. SCHWARTZ: Yes, Your Honor. And that
6 zoning, that zoning requires -- that's for a planned
7 development area. That's for large acreage. I can
8 take that Court through that zoning statute and tell
9 you exactly what that does. That's tab 27.
10 Your Honor, let's go through the R-PD7 zoning
11 ordinance.

12 And, Your Honor we've highlighted the key
13 points of this zoning ordinance. This says in the
14 first part that, yeah, PD means planned development.
15 Your Honor, I think it's crucial to distinguish between
16 PD zoning and regular R, which stands for residential,
17 zoning. This is not an R1 district. R1 are
18 single-family lots.

19 And if the City were to say, you can't build
20 a house on that lot, regardless of what the general
21 plan said, that might be a taking because you wouldn't
22 have an economic use of the property.

23 But this is very different. This is a large
24 acreage, over 600 acres. And it's a planned
25 development district. So that means the City has to

1 use flexibility and innovation in residential
2 development. And in the first sentence, that says it
3 all, Your Honor. That's what this case is about.
4 "With emphasis on enhanced residential amenities,
5 efficient utilization of open space."

6 So open space is encouraged in an RPD
7 district, and it is a permissible use.

8 THE COURT: But if the City wants to maintain
9 open space, you're going to pay for it.

10 MR. SCHWARTZ: No. Of course, not.

11 THE COURT: Why shouldn't they?

12 MR. SCHWARTZ: Because the City has its
13 police power. And in a planned development district,
14 it has the power to tell developers how high the
15 buildings can go, where the buildings can go, how the
16 buildings should look, how the traffic circulation
17 should look, where the open space is supposed to look.
18 I'll refer you to Nevada Revised Statutes.

19 THE COURT: The reason why I'm bringing that
20 up, I mean, I've lived in Las Vegas a long time, and I
21 don't remember golf courses being in everybody's
22 neighborhood. I don't mind saying that because it's
23 true. So I get parks and open spaces, but it seems to
24 me when it comes to some of this property, I still
25 haven't been given an adequate explanation as to why

1 the 35 acres shouldn't have been allowed to be
2 developed for residential purposes. And, yeah, maybe
3 some of the others, but I haven't heard that.

4 MR. SCHWARTZ: Well, Your Honor, if you could
5 turn to tab 19, please. I want to take you through
6 Nevada law.

7 THE COURT: Make sure you explain to me
8 because I want to make sure I don't miss what your
9 point as far as tab 27. It appears to be --

10 MR. SCHWARTZ: I'm at tab 19.

11 THE COURT: So you've moved on from tab 27?

12 MR. SCHWARTZ: Yeah. I'm going to start from
13 the -- I'm going to answer the Court's question by
14 explaining to you why Nevada law absolutely allows
15 local agencies in a planned development to designate
16 certain parts for housing, certain parts for open
17 space, certain parts for roads, certain parts for
18 perhaps a fire station or a school or drainage or any
19 of those things. And it's not a taking to require that
20 the developer provide amenities for their development.
21 The powers of the City are so broad --

22 THE COURT: But is a golf course really -- in
23 essence, what a golf course was was a business that
24 failed; right? I mean, it was. It was a golf course.
25 It was there for economic purposes, to make money. And

1 the golf course failed and it went out of business. It
2 didn't go into bankruptcy.

3 MR. SCHWARTZ: It did not.

4 THE COURT: Why did it stop operating?

5 MR. SCHWARTZ: The developer shut it down.

6 THE COURT: Why?

7 MR. SCHWARTZ: Because, according to the
8 developer, it wasn't an economic use. But that's not
9 relevant.

10 THE COURT: Sir, you can just tell me what
11 happened. It's my understanding they weren't making
12 money; right. The golf course went -- you're saying --
13 I want to make sure you're going to say what I think
14 you're going to say. You're going to say that the
15 golf course wasn't experiencing economic problems that
16 impacted its ability to conduct its day-to-day business
17 as a golf course?

18 MR. SCHWARTZ: I'm not going to say that. I
19 am not. But it's not relevant, Your Honor.

20 THE COURT: Well, that's another issue. But
21 you were referring to it like it was a park that had
22 already been designed and it was in place. And you
23 can't buy public parks, we know that. But it wasn't a
24 park. It was a golf course. It was a money-making
25 venture; right? We can all agree to that.

1 MR. SCHWARTZ: No, Your Honor. Can I
2 explain?

3 THE COURT: Okay. Tell me why a golf course
4 was put there for other purposes other than making
5 money. Because a golf course has to be viable.

6 MR. SCHWARTZ: That may be true, but the
7 purpose -- the City's purpose was not for Peccole or
8 any developer to make money on the golf course. The
9 City's purpose in requiring a golf course, and, in
10 fact, Peccole's purpose in setting aside the
11 golf course, was to provide an open space, recreational
12 for the community.

13 THE COURT: Why wasn't it just made to be a
14 public park?

15 MR. SCHWARTZ: Well, there are all types of
16 open space, recreation. There's --

17 THE COURT: Answer my question. Why wasn't
18 this dedicated to the City then; right, as a park?

19 MR. SCHWARTZ: There's a big difference --

20 THE COURT: I know the difference. That's
21 why I'm asking the question.

22 MR. SCHWARTZ: They don't have to dedicate
23 it.

24 THE COURT: They don't have to, but I'm
25 asking you why? I understand your argument, but this

1 is not a park. It was a golf course. And the golf
2 courses are undergoing financial problems right now
3 because they can't meet the day-to-day operations.
4 People don't play as much golf as they used to. The
5 cost of water has gone up. I'm not a businessman, but
6 they're failing.

7 MR. SCHWARTZ: Your Honor --

8 THE COURT: Right?

9 MR. SCHWARTZ: Yes.

10 THE COURT: Okay.

11 MR. SCHWARTZ: They are. But that's not
12 relevant to the -- this case concerns land use
13 regulation and the law of takings.

14 So if the Court were to look at tab 19. This
15 is NRS 278.150. This states that there shall be --
16 that each city shall prepare a comprehensive, long-term
17 general plan for the physical development of the city.

18 So it's the state legislature telling cities,
19 we want you to plan. And then it says, "the plan will
20 be known as the master plan and be prepared as a basis
21 for development of the city."

22 In subsection 5, Your Honor, on the second
23 page, tab 19, it says that the city has to address the
24 elements of the physical development of the city, A
25 through H of section 160.

1 278.160 is tab 20. That says, "The master
2 plan with the accompanying charts, drawings, diagrams,
3 schedules, and reports, may include such of the
4 following elements."

5 Okay. So on the third page of this exhibit,
6 subsection D says, "The land use element must include
7 provisions concerning community design, including for
8 subdivision of land and suggestive patterns for
9 community design and development."

10 Then it says, "It shall include an inventory
11 of classification of types of natural land and
12 comprehensive plans for the most desirable utilization
13 of land."

14 Now --

15 THE COURT: And which one are you at, sir,
16 again?

17 MR. SCHWARTZ: Page 3, subsection D.

18 THE COURT: D, as in dog?

19 MR. SCHWARTZ: D, as in dog. It says, "The
20 land use plan has to address mixed-use development,
21 transit-oriented development, master planned
22 communities, and gaming enterprise districts."

23 So the open space, the PR-OS space, the
24 Badlands in this case, is there for two reasons. One,
25 because under -- well, let me back up.

1 Tab 21, Your Honor, is the zoning, state
2 zoning law. This is NRS 278.250.

3 This says, "Within the zoning district it may
4 regulate and restrict the erection, construction,
5 reconstruction, et cetera of building structures on
6 land."

7 Now, right there, Your Honor, that tells you
8 that the purpose of zoning is not to grant rights. It
9 restricts use. The whole premise of the --

10 THE COURT: Sir, I understand that. Go
11 ahead.

12 MR. SCHWARTZ: No. No. This says, zoning
13 restricts uses. Zoning doesn't grant rights. The
14 developer claims that just the zoning. And all
15 property is zoned. So they're saying that every
16 property owner in this state that owns property that's
17 zoned -- and, again, all property is zoned -- has a
18 constitutional right to build any use that's
19 permissible -- that's permitted in that zoning
20 district. And the city, and the local agency, has no
21 discretion.

22 That's what this case is about. That is
23 absolutely false. This Court found that it was wrong
24 in denying the PJR. The zoning law says --

25 THE COURT: Sir, I was very clear on this.

1 There's a difference as far as proof and standards are
2 concerned as it pertains to a petition for judicial
3 review. This is not a petition for judicial review.
4 This is a civil action with a preponderance of the
5 evidence standard in place.

6 There are claims for relief being made by the
7 landowner. There's affirmative defenses being asserted
8 by the City. And the City has its claims, too. That's
9 a totally different issue. It is. And I have a high
10 level of confidence as far as those issues are
11 concerned as a matter of law, i.e., the different
12 standards. As far as the petition for judicial review,
13 my charge under Nevada law was very limited; right.

14 MR. SCHWARTZ: Your Honor, may I address
15 that?

16 THE COURT: I can't substitute my judgment
17 for that of the council. I was pretty clear on that.

18 MR. SCHWARTZ: May I address that?

19 THE COURT: Yeah. Go ahead. It's
20 interesting. I got a decision from the Nevada Supreme
21 Court on a case where there was a petition for judicial
22 review filed in one of my cases, and they reminded me,
23 although I knew this, it was never an issue, there's
24 different standards involved. The only thing I felt
25 bad about, when I got the decision, they didn't give me

1 a chance to address that. I knew that.

2 MR. SCHWARTZ: Your Honor, I would like to
3 address that. I think this is an extremely important
4 issue, and I would appreciate the chance to --

5 THE COURT: You have the floor, sir.

6 MR. SCHWARTZ: Your Honor, there is no
7 question that the standard for judicial review of a PJR
8 is substantial evidence for failure to proceed by law,
9 which could lead to an abuse of discretion. There's no
10 dispute that the remedy for a PJR is an equitable
11 remedy. Court issues an order.

12 There's no dispute that the evidence in a PJR
13 is limited to the administrative record. There's no
14 dispute that in an inverse condemnation claim, a taking
15 claim, that the standard for liability for a taking is
16 there has to be a wipeout or near wipeout of economic
17 value of the property or interference with
18 investment-backed expectations.

19 Different standard for liability. There is
20 no dispute that the remedy for a regulatory taking is
21 damages, not equitable relief. And there is no dispute
22 that the Court can seek to review evidence outside an
23 administrative record in ruling on a taking claim.

24 THE COURT: I think everyone might agree to
25 that. But go ahead, sir. I'm listening to you.

1 MR. SCHWARTZ: That's not to say, Your Honor,
2 a PJR is an empty vessel. It's a process. It's a
3 procedure and a remedy. There is no substantive law of
4 PJR. There is no substantive law of PJR. PJRs are
5 based on underlying substantive law.

6 In the PJR, this Court found, it said, "The
7 Court rejects the developer's argument that R-PD7
8 zoning designation on the Badlands property somehow
9 required the council to approve its applications."

10 And then the Court cited the Stratosphere
11 case and other cases. Yes, they are PJR cases, but
12 there are other cases that say the same thing that are
13 not PJR cases that are constitutional challenges. And
14 the Ninth Circuit in a case between these same parties
15 on the very same issue, issued a decision and said,
16 Nevada law of property -- this is Nevada law of
17 property. There's no such PJR law of property. Again,
18 it's an empty vessel. The Nevada law of property is
19 that you do not have constitutional rights conferred by
20 zoning. That's absolutely clear.

21 Let me refer the Court to the Boulder v.
22 Cinnamon Hills case. That's tab 13. In Boulder City,
23 the Court said -- and I've highlighted the portion of
24 that case.

25 THE COURT: Hold on. I want to follow this

1 here. Go ahead, sir.

2 MR. SCHWARTZ: So on page 6 of the opinion,
3 upper left, I've highlighted the portion that says,
4 "Boulder City could not have violated Cinnamon Hills
5 substantive due process rights. The grant of a
6 building permit was discretionary. Therefore, under
7 the applicable land use laws, Cinnamon Hills did not
8 have a vested entitlement to a constitutionally
9 protected property interest."

10 That wasn't a PJR challenge. That was a due
11 process challenge. That was under the constitution.
12 And the Court there is referring to the underlying
13 Nevada law of property. There is no case anywhere, in
14 any jurisdiction in this country, and certainly not in
15 Nevada, that says that a property owner whose property
16 is zoned, and, again, that's all property, has a right
17 to do anything under zoning, no less a constitutional
18 right.

19 We have set forth the Ninth Circuit decision
20 in our papers. That's tab 37. We contend that this
21 Ninth Circuit memorandum decision has issue preclusive
22 effect. It is between the same parties. It is the
23 very same issue; the developer argued they had a
24 constitutional right to build residential under the
25 zoning. And the Court said, no.

1 We quoted from the decision in our papers.
2 There the Court said -- and I'm reading from page 4,
3 the memorandum decision, Your Honor, the fourth line
4 down. The court said, "To have a constitutionally
5 protected property interest in a government benefit,
6 such as a land use permit, an independent source, such
7 as state law, must give rise to a legitimate claim of
8 entitlement that imposes significant limitations on the
9 discretion of the decision maker."

10 So they're referring to Nevada law of
11 property and land use regulation. And they outright
12 reject the claim that the developer made to you.

13 And, again, I refer the Court to the
14 Stratosphere case, which involves the very same land
15 use regulations that are at issue here. A site
16 development permit was required to develop the property
17 and the uniform development code of the City of Las
18 Vegas.

19 This is tab 30. The Court there said in the
20 Stratosphere case, tab 30, page 3, that, "The context
21 of governmental immunity, we have to find a
22 discretionary act as an act that requires a decision
23 requiring personal deliberation and judgment."

24 And then on the next page, page 4 of the
25 Stratosphere decision, it says, under section

1 19.18.050, and that's the Las Vegas Municipal Code,
2 unified development code, "The city council must
3 approve the Stratosphere's proposed development of the
4 property through the city's site development plan
5 review process. That process requires the council to
6 consider a number of factors and to exercise its
7 discretion -- I emphasize the word discretion -- in
8 reaching a decision. There is no evidence that the
9 Stratosphere had a vested right to construct the
10 proposed rights."

11 We've attached the American West opinion at
12 tab 31. We've attached the Teague opinion, tab 32, the
13 City of Reno opinion at tab 33. The Nevada Contractors
14 case, tab 34, the City of Reno case, tab 35, the CMC of
15 Nevada, tab 36. And then that's followed by the Ninth
16 Circuit opinion.

17 They all say the same thing, that under the
18 underlying rights, underlying Nevada law of property,
19 there's no vested right to do anything if the agency
20 has discretion.

21 And I was taking the Court through the state
22 law that grants the City wide discretion in approving
23 or disapproving development permits. And that answers
24 the Court's question, well, can the City require a
25 developer in a planned development to set aside

1 property for roads? Absolutely. They have that police
2 power under NRS 278.250.

3 And I was going to take the Court through 250
4 to show you how broad the state legislature has granted
5 discretion to public agencies.

6 And I think, Your Honor, this goes to the
7 heart of the case. Tab 21. So tab 21 is NRS 278.250.
8 I apologize, Your Honor, for going so quickly through
9 this.

10 THE COURT: I'm following you at each step of
11 the way. You actually are very clear and to the point,
12 sir.

13 MR. SCHWARTZ: All right. Now, this tells
14 local agencies, you shall zone and your zoning shall do
15 the following things. So in subsection 2, Your Honor,
16 it says the zoning regulation must be adopted in
17 accordance with the master plan for land use.

18 Okay. Right there. Why did we go through
19 these facts this morning with the Court? To explain
20 that zoning is subordinate to the master plan. The
21 master plan is a higher authority. Zoning must be
22 consistent with the master plan. And in this case, the
23 Badlands Golf Course was PR-OS in the general plan.

24 The zoning is consistent -- and I'm jumping
25 around here --

1 THE COURT: When you say that with the master
2 plan, what do you mean by that, sir, as far as the
3 golf course is concerned?

4 MR. SCHWARTZ: Well, okay. Your Honor, I
5 will answer that question. Can I do that by taking you
6 through -- because to answer that, I need to show
7 you --

8 THE COURT: You have the floor, sir.

9 MR. SCHWARTZ: Tab 21.

10 THE COURT: Whatever you want to do, sir.

11 MR. SCHWARTZ: Tab 21 says what local agency
12 is supposed to do with zoning. So subsection 2. The
13 zoning regulations must be designed. I'm paraphrasing
14 here. So let's go through these, Your Honor.

15 A. Air quality and water source.

16 B. Promote the conservation of open space.

17 So they're telling cities, you have to
18 conserve open space. And protection of other natural
19 and scenic resources.

20 So they gave the City the tool to protect
21 open space. And that's exactly what it did in this
22 case. It designated one part of the property for
23 housing, another part for the open space. They're
24 doing what they're supposed to do.

25 2C. Consider existing views.

1 THE COURT: Now, I'm asking you this question
2 because I don't know the answer to it, sir. Do they
3 have specific zoning requirements as far as
4 golf courses are concerned and how they define --

5 MR. SCHWARTZ: Good question. In this case,
6 the City did two things in creating the golf course.
7 It approved the R-PD7PR-OS zoning for this 614-acre
8 part of the PRMP. And part of that approval was
9 contingent on the developer setting aside the
10 golf course, open space. They're following their
11 mandate from the state legislature, and they're also
12 following the mandate in the R-PD7 zoning ordinance of
13 the city.

14 And the second thing they did was the
15 developer was required by state law, to be included in
16 a gaming district to have recreation. And the
17 developer decided the recreation in this case would be
18 a golf course.

19 So the requirement that a gaming -- to
20 participate in a gaming enterprise district to have
21 recreation and open space, it's not so that the
22 developer of the casino will make money or that their
23 casino and hotel will make money. It's for the
24 surrounding community. That's what zoning is for.

25 THE COURT: Here's the thing, though. And I

1 think this is kind of getting lost. And understand
2 this was not my area of practice. But I'm looking at
3 it from this perspective when they have these master
4 plans. And, for example, if the plan is -- if the
5 development is big enough -- we can use maybe
6 Green Valley as an example. They might say, okay,
7 developer, when you come in, in order to do this, you
8 have to set aside maybe certain portions of your
9 development for schools; right. And then they'll do
10 the same thing for parks; right. And they'll do the
11 same thing for a fire station and all those things;
12 right. And they do that. And we all know that's
13 common.

14 But my point is this. When they do that,
15 does the developer still retain ownership of the land
16 upon which the school is located?

17 MR. SCHWARTZ: Depends.

18 THE COURT: You see where I'm going on that?

19 MR. SCHWARTZ: I'll address it, Your Honor.
20 I do. I do. In this case -- in this case, the
21 developer retained ownership.

22 THE COURT: Of the school?

23 MR. SCHWARTZ: And that's very common.

24 THE COURT: But, I mean, what happens if --

25 MR. SCHWARTZ: Okay. Let me address that.

1 THE COURT: Don't they dedicate the school.
2 And at the end of the day, the school becomes owned by
3 the Clark County School District? And I don't know
4 what the exact term of art would be, but it's set aside
5 for public ownership, library, and so on and so on.

6 So when it comes to open spaces, it seems to
7 me that would come under a park or a -- I mean, we have
8 parks all over Las Vegas and those are dedicated and
9 owned by the county or city. So I'm trying to -- this
10 is what I'm trying to do. Is the City saying, look,
11 open spaces and golf courses are the same?

12 MR. SCHWARTZ: It depends on the facts of
13 each case. But, Your Honor, you have all kinds of open
14 space requirements imposed on all types of projects.
15 Sometimes in a rare situation do they require public
16 dedication of a park. The parks that you see around
17 you are largely acquired by the city either by
18 voluntary purchase or eminent domain. They are not set
19 aside from buildings.

20 THE COURT: Does the county or city require
21 that as part of a large master plan like Green Valley?

22 MR. SCHWARTZ: It could. And let me address
23 that. If it requires a dedication to the public, in
24 other words, the public is going to take physical
25 possession of that property, then there is a regulatory

1 takings doctrine that addresses that. That's not at
2 issue in this case because the City did not take title
3 to the property.

4 But when it approves a development and
5 requires that the developer provide certain amenities
6 for the community, the developer often owns the land,
7 often owns that property, but it's required to provide
8 amenities to the community. In this case, the
9 golf course provided recreation, park, open space, not
10 only to the residents that lived on the golf course,
11 but to the surrounding community. That is the purpose
12 of zoning.

13 The developer's theory of zoning, Your Honor,
14 turns zoning upside down. Exclusionary zoning that we
15 have here, it excludes certain uses from certain areas
16 in order to protect the residents of that zone or the
17 occupants of that zone from uses that the legislature
18 doesn't want to see there. It doesn't confer rights.
19 It can't confer rights. That's contrary to the whole
20 concept of zoning.

21 But when it plans a planned development area,
22 it commonly asks the developer, requires the developer,
23 to plan for a quality, safe community. And more to the
24 Court's point, public agencies commonly require
25 dedication of property for road widening before you

1 develop the property.

2 The only thing they have to do there is show
3 that there's a connection between the need for that
4 dedication, again, if it's going to go to the public,
5 the public agency has to show a connection, and that
6 they're not exacting too much land from the property
7 owner.

8 That's a regulatory takings test for
9 exemptions that the U.S. Supreme Court has adopted.
10 That does not apply here because the City didn't exact
11 a physical interest in property. It replanned a
12 planned development.

13 So going back to NRS 278.250. It says
14 that --

15 THE COURT: Wait. I want to go back and
16 follow you, sir.

17 MR. SCHWARTZ: This is tab 21, 278.250.

18 THE COURT: I'm with you.

19 MR. SCHWARTZ: This says, in Subsection 2E,
20 "Cities have to plan to provide for recreational
21 needs."

22 THE COURT: I get that. I do. I understand
23 that. But at the very outset, you have the master
24 plan. And I think Green Valley is probably a great
25 example because that was the first master plan type

1 development in Clark County. I get it. You go in
2 front of the Henderson City Council, and you have this
3 plan for Green Valley. And there were certain areas
4 set aside for parks, set aside for greenbelts, set
5 aside for allotted schools, and so on.

6 And so once that master plan is approved,
7 under those circumstances, the parks, for example, once
8 construction is completed, they're no longer owned by,
9 quote, the developer. There's some sort of dedication.
10 And that's kind of what I'm focusing on. And
11 this is the reason why I think it's important to point
12 this out, and this is where I see a distinction when it
13 comes to open spaces.

14 Here we're talking about recreational.
15 That's fine. But the recreational needs are typically
16 parks, walkways. I get that. But, once again, coming
17 back to a failed business where there's private
18 property, what happens then? Are you saying that, you
19 know what, the developer has an obligation to keep that
20 golf course running even though it doesn't make money?

21 MR. SCHWARTZ: No. The City is not the
22 insurer for developers. Let's say the Peccoles still
23 owned the property and the golf course failed. Well,
24 the City has no responsibility to make sure that the
25 Peccoles make money on that golf course.

1 If the City says, we want that to remain the
2 open space amenity, because this golf course provided
3 open space for the community. It provided recreation
4 for the community. It provided a park for the
5 community. That's what cities are supposed to do.
6 That's what they did.

7 THE COURT: Don't they have to pay for that?
8 See, here's the thing about it. And I'm not throwing
9 anyone under the bus as far as the decision-maker is
10 concerned. I'm looking at it from a legal perspective.
11 But in your analogy, when the failed Peccole
12 golf course and the City says, yeah, we want that to
13 remain an open space, it seems to me, okay, if you want
14 to do that, City, that's all right, but you're going to
15 pay the Peccoles for that.

16 MR. SCHWARTZ: No, you don't. Because they
17 bought the golf course knowing it couldn't be used for
18 residential.

19 Now, I'll refer you to the Guggenheim case.

20 THE COURT: Remember, I mean, a golf course
21 is a really great example because that was never a,
22 quote -- that was private property. It's not a public
23 golf course.

24 MR. SCHWARTZ: That's right.

25 THE COURT: Yeah, it provides some open

1 space, no question about it, but there's limited
2 access; right. It's the best example, really and
3 truly, I think, that we could have. And all I'm saying
4 is this. Once the golf course fails, how can the City
5 say, look, it has to remain an open space; you can't do
6 anything else with this property? If the City does
7 that, it seems to me, that we start conducting
8 potentially, if the Peccoles wanted fair compensation
9 for the City's use of their property and the
10 restrictions, then I have to start conducting some sort
11 of analysis that's being raised right now.

12 Go ahead, sir.

13 MR. SCHWARTZ: Your Honor, for three reasons
14 that's not correct. First --

15 THE COURT: And we're making a good record
16 here. Just want to tell you that. We are.

17 MR. SCHWARTZ: They're not liable for a
18 taking if they don't wipe out the value of the parcel
19 as a whole. That's the rule. The parcel as a whole is
20 the PRMP. If the developer -- if part of the PRMP is
21 not making money, that doesn't mean that the City is
22 liable to compensate the developer for that part that's
23 not making money. Because they made money on the other
24 part.

25 It's the same if the Court says, well, I

1 don't think the PRMP is the parcel as a whole. We have
2 demonstrated in our papers that this meets the factors
3 of the Herrera case, the U.S. Supreme Court case.
4 There has been no, no opposition points and authorities
5 because they can't. Because there is no law supporting
6 the developer.

7 The PRMP is the parcel as a whole. You can't
8 carve it up and say, now, if you won't let me develop
9 something on a tiny part of it, or 16 percent of it,
10 where I've been able to develop 84 percent of it with a
11 casino and a hotel and retail and thousands of housing
12 units, now I'm going to carve out this one part and
13 because the golf course may not be making money,
14 according to the developer, I'm going to carve that
15 out, you must let me build housing on it. And, not
16 only that, I have a constitutional right to build
17 whatever housing I want. That's ludicrous and that's
18 not the law. And that's what's going on here.

19 But finally, finally, I've referred the Court
20 to tabs 1 through 3.

21 THE COURT: Which tabs, again? I want to
22 follow you.

23 MR. SCHWARTZ: Tabs 1 through 3. Tab 1. The
24 City approved 435 luxury housing units on the Badlands.
25 Tab 1. The Supreme Court, in its order of reversal,

1 reinstated those approvals after Judge Crockett voided
2 them.

3 Then the City sent a letter to the developer
4 saying -- and the City approved the development. And
5 it supported its decision in the Supreme Court with an
6 amicus brief saying, please reverse Judge Crockett.
7 Reinstate these approvals.

8 Tab 3 is the City's letter to the developer
9 saying, you're ready to go. You can now build your 435
10 luxury housing units, and we'll extend the period of
11 time in which you have to do that by two years because
12 this case was on appeal.

13 So we have a situation here where the City
14 approved substantial development of the parcel as a
15 whole. And that the developer here carved the property
16 into four different development sites, applied on the
17 individual sites, and now is suing -- I mean, not only
18 on the three -- it's also suing on all four for damages
19 for those parcels claiming, he wiped me out; I've got
20 no use of this segment.

21 They segmented the property. That is
22 forbidden in regulatory takings law. You can see why,
23 for precisely this situation.

24 That allows a developer to say, okay, I've
25 got this piece of property, and I want to build 1,000

1 units. The City has discretion. There's no way
2 they're going to let me build 1,000 units.

3 So what I'll do is I'll carve it up into
4 different pieces and see what I can get on some of the
5 pieces. And then if the City says, well, no, we don't
6 want you to develop these parts, we want it to be open
7 space, or we want it to be some other use, then the
8 developer, you know, we want you to leave it at open
9 space. It was originally open space. We want you to
10 leave it open space. We've let you develop significant
11 development over here on this other part of the
12 property.

13 So the developer says, no, these are now
14 discrete segments of property. You wiped me out.
15 That's a taking and pay me. That's a way to get more
16 density. That's a developer trick. The courts are
17 onto it. We briefed this.

18 The Penn Central case in 1978 started by
19 saying, you can't carve the property into Grand Central
20 Terminal and the airspace above the terminal, that's
21 not the parcel as a whole, and then say, because we
22 won't let you build in the airspace, that's a taking
23 because you have no use of the airspace. No, it's not.
24 If you look at the parcel as a whole of that property,
25 they've had substantial use of the property

1 historically for Grand Central Terminal.

2 Tahoe Sierra case. Sierra Tahoe v. Tahoe
3 Regional Planning Agency case says the same thing. You
4 can't carve up the property temporally, if there's a
5 moratorium on development, for 33 months and then
6 afterwards the government can lift the moratorium. So
7 you can't say that during that 33-month period, you
8 wiped me out because I couldn't do anything with my
9 property during that period. No, you don't carve up
10 the property interest in that fashion.

11 Then we cited a number of other cases, and
12 including the Murr case that is a recent case that sets
13 forth clear standards for how to determine the parcel
14 as a whole.

15 THE COURT: Hang on. Which tab is that, sir?

16 MR. SCHWARTZ: In our brief.

17 THE COURT: I just wondered if you have a
18 tab.

19 MR. SCHWARTZ: I don't have the Murr case in
20 a tab, Your Honor. It is in our brief. That's only
21 our third argument as to why the developer -- we should
22 get summary judgment. Because our first argument is
23 that the case is ripe. That's going to require some
24 time to explain. The second argument is that even if
25 it's ripe for development, because the developer bought

1 the property with the PR-OS designation that did not
2 permit housing, the developer can't now say, you have
3 to let me develop housing because I have no economic
4 use of these segments of the property.

5 And, of course, the City did approve the
6 435 units.

7 So we've got a situation here where a
8 developer buys property that legally can't be used for
9 housing. That's the law. It voluntarily shuts down
10 the golf course. Then it applies to develop the
11 golf course. It carves the property into four parts
12 and applies to develop one part.

13 In the first application, the City up-zones
14 the property. It changed the zoning from R-PD7, which
15 has a maximum of 7 units per acre, but, again, also
16 allows the open space. So they up-zone the property to
17 R3, which allows medium density housing. And they lift
18 the PR-OS designation that prohibited housing, and
19 designate the property for a general plan designation
20 that allows housing development.

21 According to the developer's own evidence,
22 the value of just the 17-acre property increased by
23 \$26 million. Now the developer is suing the City not
24 only on the 17-acre property where the City approved
25 its project, but for the entire Badlands \$386 million.

1 And it denies, it denies, that it has an approval of
2 the 435 units on the 17-acre property.

3 So you don't need to know much about takings
4 to know that something is very wrong here. They buy
5 property for \$4.5 million. They now want \$386 million
6 in damages, even though the City approved 435 units on
7 the property.

8 So really they've got no injury, only a
9 windfall project. And during the break, Your Honor, I
10 was out in the hall and I saw on the wall this saying
11 by Confucius. "Recompense injury with justice.
12 Recompense kindness with kindness."

13 So you recompense injury with justice. The
14 developer wasn't injured. They took a flyer on buying
15 a golf course that they either knew or should have
16 known might not be viable, that could not legally be
17 developed for residential. And now -- and they want
18 \$386 million in damages because the City simply did not
19 change the law.

20 Now, kindness with kindness. The City did
21 change the law. 435 units, Your Honor, is a lot of
22 units. And these are luxury units, too.

23 So what do they recompense the City for its
24 kindness with? They even sued the City on the 17-acre
25 property. So the only conclusion here is -- and,

1 again, this isn't -- I've just giving you an idea.

2 THE COURT: I'm listening, sir. I'm
3 listening.

4 MR. SCHWARTZ: This is a Court -- this Court
5 wants to do justice. And, you know, the law -- I find
6 the law -- it's very impressive, the law in this
7 country, Your Honor. The law is generally just and
8 it's reasonable. It makes a lot of sense. You know,
9 really sensible people are making these laws.

10 So how can we have a law in this country
11 where a developer, as I said, buys a golf course not
12 legally used for residential, \$4.5 million, \$18,000 an
13 acre. And the City approves substantial development.
14 And they now claim that they don't have a permit, which
15 is absolutely preposterous, ludicrous. It's hard to
16 find words at how ridiculous that is. And they want
17 \$386 million of damages.

18 This can't be the law, Your Honor, that they
19 would now be entitled to \$386 million in damages or any
20 damages. And, in fact, it is not the law.

21 If the Court were to apply the law here, the
22 law is quite reasonable. The law says, basically,
23 local public agencies have broad discretion to regulate
24 land use. It's a political issue. You've heard a lot
25 about the politics of this, Your Honor. And these land

1 use issues are very highly charged.

2 The community is involved because the
3 community is affected. And the land use regulatory
4 laws are to protect the community. They're not to
5 protect the property owner. They don't confer rights.
6 That's what these statutes that I've shown the Court
7 show.

8 And so the legislative and administrative
9 branches have broad discretion to regulate land use
10 delegated by the state legislature. And it exercises
11 the general police power for the general health, safety
12 and welfare.

13 I was going to read you the last section of
14 the zoning law .250.

15 THE COURT: And which tab is that, sir?

16 MR. SCHWARTZ: That's tab 21. Which says,
17 "In exercising the powers granted in this section" --
18 this the zoning, state zoning law, tab 4.

19 "In exercising the powers granted in this
20 section, the governing body may use any controls
21 relating to land use or principles of zoning the
22 governing body determines to be appropriate."

23 And if you go above that, Your Honor, and
24 look at Subsection K. They're supposed to zone to
25 promote health and the general welfare. There couldn't

1 be anything more broad, and there couldn't be anything
2 that makes it clearer that the agencies are entitled to
3 discretion.

4 So here's how the law of taking works in a
5 nutshell. Local agencies have broad power to regulate
6 use of land for the general health, safety, and welfare
7 for open space, recreation, all these other uses. Only
8 if they go too far is the property owner entitled to
9 compensation, only if they go too far.

10 And the courts have said -- and I want to get
11 into that in a moment. The courts have said a
12 regulation is a taking only if -- we're not going to
13 interfere with this, what is a local political process,
14 we're not going to interfere with that. These
15 decisions are best made by planners and by legislators
16 and city officials, in connection with the property
17 owners. They all work together. They work it out.
18 Only if there's a wipeout, because that's the
19 functional equivalent to eminent domain.

20 And this law, again, makes a lot of sense
21 when you think, well, all land is different, all
22 communities are different. They have different values.
23 We're going to leave it up to the local planners as to
24 how they want to decide as to each property what's best
25 for the community. Again, not what's best for the

1 landowner, what's best for the community.

2 So I want to take the Court through -- before
3 we do this, I want to refer the Court to the R-PD7
4 zoning because I want to finish with that. I didn't
5 finish my explanation of how that works.

6 THE COURT: Sir, take your time. Which tab
7 was that?

8 MR. SCHWARTZ: Tab 27. This is the zoning
9 ordinance at issue in this case. The entire Badlands
10 was under this section. The first section says, "The
11 purpose of a PD district is to provide for flexibility
12 and innovation in residential development and efficient
13 utilization of open space."

14 So what are they saying there? The City is
15 going to look at a big piece of acreage, not a
16 single-family lot, big piece of acreage. And we want
17 to have the best plan for the community. We want to
18 have the streets where they're going to make the most
19 sense and the open space where it's going to make the
20 most sense, and the housing where it's going to make
21 the most sense.

22 Then it says later in that paragraph, and
23 I've highlighted it for the Court, "flexible to
24 accommodate innovative residential development."

25 Then the ordinance lists the uses that are

1 permitted in the zone. Your Honor, I need time to
2 address what does permitted mean. Because the
3 developer has misled the Court into thinking if a use
4 is permitted, that means they have a constitutional
5 right to build. And that's actually false.

6 A permitted use is a use that is not
7 permitted -- it's a use that is not excluded from the
8 zone. That's the whole purpose of zoning. In *Euclid*
9 *v. Amway*, the first zoning case of 1926, U.S. Supreme
10 Court said, it is constitutional for a city to limit
11 uses in a zone by excluding other uses. It's
12 permissible to limit this zone to houses. You can't
13 put a pig farm in. That's exclusionary zoning. That's
14 what all of this is.

15 THE COURT: Way back in the day, I used to
16 represent Mr. Robert Combs, RC Farms. I know all about
17 RC Farms.

18 MR. SCHWARTZ: Did you try to put one in a
19 residential neighborhood?

20 THE COURT: Well, he was there before the
21 residential neighborhoods came. We can agree. If
22 you've been around in Las Vegas, I think everyone has
23 been here for a longer period of time. And that's my
24 limited involvement in this type of issue. Because
25 Mr. Robert Combs was a very close friend of Neil

1 Galatz, where I used to work. And I remember Mr. Combs
2 and his many issues that would come up from time to
3 time specifically involving, I think it was, North Las
4 Vegas City Council. That's my only --

5 MR. SCHWARTZ: I didn't mean to maline
6 agriculture, Your Honor. Agriculture is great. But
7 the City has a right to exclude it from a residential
8 zone. And that's how zoning works. Again, the theory,
9 the developer's theory here that the zoning provides is
10 contrary to all of the authorities.

11 So Subsection C says what uses are permitted
12 in the zone. Single-family and multi-family houses,
13 home occupation, childcare, family home and childcare
14 group home. And then it says -- and we know it also
15 includes open space. Because in Subsection A, the
16 section says, you want to put the houses in the open
17 space in the right places, you're encouraged to have
18 open space. You don't have to, but you can. It's
19 within your police power.

20 Now, in Subsection C2, it says, "The director
21 may apply the development standards and procedures."

22 And then in Subsection 3 it says, which in
23 the director's judgment.

24 And now Subsection D, that really puts an
25 exclamation point on this. "The approving body may

1 attach to the amendment to the site development plan
2 review whatever conditions are deemed necessary to
3 ensure the proper amenities and to ensure that the
4 proposed development will be compatible with
5 surrounding existing and proposed land uses."

6 THE COURT: All right. And I thought about
7 that. And we can kind of agree that that's not
8 necessarily what happened here. And here's my point.
9 And understand this is not my bailiwick. I'm not a --
10 I didn't practice in the area of application before the
11 building commission and the like as it relates to
12 developing parcels and land and plans, et cetera. But
13 say, hypothetically -- and I'm reading, for example,
14 this provision that you referred to that was in tab 27.
15 And it was the intent of the RPD district.

16 And so when I'm reading it, it says, quote,
17 "The RPD district has been provided for flexibility and
18 innovation in residential development with emphasis on
19 enhanced residential amenities, efficient utilization
20 of open spaces, the separation of pedestrian and
21 vehicular traffic and homogeneity of the land use
22 patents."

23 Here's my point. And I was thinking about
24 it. I understand it's a big parcel. There's a lot of
25 issues going on. Say, hypothetically, the City

1 rejected the initial plan of the developer, but they
2 said something like this. You know what, we realize
3 the golf course is no longer functioning, but maybe if
4 you had wider greenbelts between the separation between
5 the existing homes and the proposed homes. Just as
6 important, too, we want to make sure the lot sizes are,
7 quote -- let me see, what did they say here -- would be
8 homogeneous to the community; right, and everything
9 is -- so you would look in there with a new plan, you
10 would never know that this wasn't part of the original
11 plan. And that's kind of my point.

12 If they rejected it and said, this is what we
13 want or something like this, as an alternative to their
14 plan, I mean, that's a totally different animal versus
15 open space, nothing more, nothing less.

16 MR. SCHWARTZ: Not for purposes of taking,
17 Your Honor.

18 THE COURT: Well, that's my point. For the
19 purposes of a taking. Because, in essence, you're
20 saying, look, this land would have no value to the
21 owner because it can't be used for any purpose other
22 than providing open spaces for the public's use. And
23 if you're going to do that, maybe the public should pay
24 for that. That's kind of my point.

25 MR. SCHWARTZ: It was set aside for the

1 public's -- for public use, not physically, but it was
2 set aside as recreation, park, and open space in the
3 original plan. The City has discretion to keep that.
4 So they can say, well, the golf course is -- to avoid a
5 taking, again, assuming that there's no parcel as a
6 whole doctrine, assuming that the Court allows them to
7 segment the property and say, now the Court has to
8 focus on just one segment, again, that's not the law.
9 And we've established in our papers they can't do that.
10 They've already had substantial development of even the
11 Badlands. But assuming that the Court dispenses --

12 THE COURT: Answer this question. We talked
13 about Penn Central. We're talking about vertical air
14 spaces; right? Is that different? Because we're not
15 talking about vertical air spaces here. We're talking
16 about land, tracts of land. How is that different.

17 MR. SCHWARTZ: Because it's the parcel as a
18 whole doctrine. If it includes temporal segmentation,
19 like in Sierra Tahoe, it certainly includes vertical or
20 horizontal segmentation. It depends on the situation.
21 And that's why you have to analyze each case on its
22 facts.

23 THE COURT: That's kind of what I'm getting
24 to.

25 MR. SCHWARTZ: The PRMP was developed as a

1 single master plan by a single developer. It was
2 approved. Then they sold off parts to other
3 developers. Each part, each part, complemented the
4 other parts. So you can't later come along and take
5 out one part. That's the parcel as a whole doctrine.
6 You can't do that.

7 Let's say an analogy is to a machine. You've
8 got a machine that's running fine. It's got all its
9 parts. You take a part of the machine out. You expect
10 the machine to run. No. Each part complements the
11 other parts. That's kind of a good analogy for the
12 parcel as a whole doctrine.

13 And the courts are very clear on this,
14 Your Honor. While we're on -- you know, I keep
15 getting -- I think the Court had a good question that
16 leads me to my discussion of the ripeness doctrine.

17 THE COURT: At least I'm asking decent
18 questions. Go ahead.

19 MR. SCHWARTZ: I've got limited time here.

20 THE COURT: Take your time.

21 MR. SCHWARTZ: Tab 14 is the Kelly case.

22 THE COURT: I'm following you, sir.

23 MR. SCHWARTZ: This is the Nevada Supreme
24 Court saying this is a parcel as a whole case. This is
25 a segmentation case. Kelly develops, buys property,

1 subdivides it in 39 lots. Builds on 32. Says, hey,
2 you have to let me build on the other 7. Nevada
3 Supreme Court says, no way. You've segmented the
4 property. You've had substantial development on the
5 parcel as a whole. You don't have the right to build
6 on the 7 lots.

7 The Kelly case also says on page 6 of the
8 opinion I've cited to the Court on tab 14 top left --

9 THE COURT: This is in Kelly, for the record?

10 MR. SCHWARTZ: Yes, Kelly v. Tahoe Regional
11 Plan. 109, page 6. Kelly there says what the test for
12 a taking is. And I'm going to talk about three cases,
13 the State v. Eighth Judicial District case, the
14 Boulder City case, and the Kelly case. These are the
15 Nevada Supreme Court cases that said that a taking for
16 a use, a regulation of use type taking, not a Sisolak
17 taking. That's a physical taking. A regulation of use
18 taking, like the developer has alleged in its first two
19 causes of action, the test is you have to deny all
20 economically beneficial use of the land.

21 And the Court there found it did not deny all
22 beneficial or economically productive use of the 7 lots
23 because you got development of the 32 lots. And you'll
24 notice in the developer's presentation of what they say
25 is the law in the case, they scrupulously avoid these

1 three cases, which are directly on point. That's the
2 test for a taking for a regulation of use, excessive
3 regulation of use, in Nevada, as well as every other
4 court in the country.

5 They don't cite that. Instead they say that
6 they have this constitutional right conferred by zoning
7 to build whatever they want. That's not the takings
8 test. They have no such right. But even if they did,
9 it wouldn't be a taking because a taking has got to be
10 a wipeout or a near wipeout or interference with
11 investment-backed expectations.

12 Why aren't they moving for summary judgment
13 on their Penn Central case? Begs the question. One of
14 the factors in the Penn Central claim is the government
15 has to interfere with your investment-backed
16 expectations. In other words, the takings law is
17 really designed for the situation like you have in the
18 Lucas case. Where you buy property that's where a
19 certain use is permitted. Let's say it's residential
20 use. Not this case, of course, because residential use
21 was not permitted. But you buy property where
22 residential use is permitted by the general plan, by
23 zoning. And then the government changes the law.
24 Nope, you can't use it for residential. You can't use
25 it for anything. That's the Lucas case. Court there

1 said, that's a taking. That's a taking.

2 We don't have that case here. This isn't the
3 case where the City changed the law. The City declined
4 to change the law. They're under no obligation to
5 change the law. This was part of the Peccole Ranch
6 master plan, and they were under no obligation to do
7 it. And, in fact, they did change the law to allow
8 substantial development of the Badlands.

9 So the Kelly case is directly on point. And
10 the landowner has not even attempted to refute that
11 case.

12 Your Honor, I'd like to --

13 THE COURT: And tell me, what do I do with
14 this language from Kelly? And this would be on, I
15 guess, looking here at the cite, 648. This is where
16 the court said, "The court, however, did point out
17 these situations where regulatory actions are
18 compensable without case specific inquiry and to the
19 public interest advanced in support of their
20 restraints. One, regulations that compel the property
21 owner to suffer physical invasion of his property no
22 matter how minute the intrusion and no matter how
23 weighty the public purpose behind it. And, two, where
24 regulations denied all economically beneficial or
25 productive use of the land."

1 And so do I -- I'm just asking questions
2 here. Do I consider that second point that was raised
3 by the Nevada Supreme Court, where it says, "where
4 regulations denied all economically beneficial or
5 productive use of the land"?

6 MR. SCHWARTZ: You absolutely do. I think,
7 Your Honor, you hit on -- that's the test for a taking.

8 Now, what I want to do here is I want to
9 explain this takings test and how it fits in with this
10 case. I'm going to give the Court just advanced
11 notice. The Sisolak case the developer relies on --
12 they came Sisolak says everything and anything. The
13 Sisolak is a physical taking case. And the passage the
14 Court just read from Kelly citing the Lucas case, Kelly
15 and Lucas distinguish between physical takings and
16 regulations of use. Regulations of the owner's use has
17 to be a wipeout or interference with investment-backed
18 expectations. A physical takings case has to be a
19 government law that denies the owner the ability to
20 exclude others. In other words, it allows people, it
21 allows planes or people, to physically invade the land.
22 That's a physical takings case.

23 So Sisolak does not apply to the
24 developer's -- what the developer calls -- the
25 developer's regulation of use claims for denial of a

1 permit. Physical takings have nothing to do with
2 denial of a permit.

3 THE COURT: Here's a question I have on that.
4 What about the statement of the members of the
5 city council as it relates to this is public court.
6 We're making this public spaces. I'm just paraphrasing
7 it, but I think there's some of that in the record
8 right now. Is that a physical taking?

9 MR. SCHWARTZ: Absolutely not. There's a
10 claim that a member of the city council told people
11 they could trespass on the Badlands. That's not the
12 City. That doesn't bind the City. They can say
13 whatever they want. That's not the City's official
14 policy. And what we're dealing with here is -- it has
15 to --

16 THE COURT: Here's my question. Trust me, I
17 don't want to cut you off, but in many respects,
18 ultimately, doesn't the city council determine what the
19 ultimate policy will be of the City as it pertains to
20 land usage and the like?

21 MR. SCHWARTZ: Yes, it is.

22 THE COURT: Okay.

23 MR. SCHWARTZ: And so the Court should
24 concern this case, all of that evidence that
25 Mr. Leavitt spent hours on about the politics of this

1 situation, who said what and who did what and
2 disparaging remarks about his client and individual
3 city council members saying this or that, I think this
4 or that, and the City staff saying this to the
5 developer and saying that to the developer and the City
6 attorney, none of that is at all relevant in this case,
7 Your Honor. Because the only thing that counts is the
8 law. And the law is made by a majority vote of the
9 city council. And that's the only thing that can
10 affect the owner's use of the property or legally
11 authorize the public to go on. It's got to be a law.

12 THE COURT: I agree. But how did the
13 city council vote in this case?

14 MR. SCHWARTZ: It voted to deny a permit
15 application; okay. So that has to fit within a takings
16 test. And I want to explain that to the Court; okay.

17 1922. Pennsylvania Coal v. May, the first
18 regulatory takings case. So we have this takings
19 clause in the Fifth Amendment of the U.S. Constitution.
20 The U.S. Supreme Court said for the first time, if you
21 deny the coal company the right to use this coal in
22 order to require it to hold up the surface of the land,
23 that could be the functional equivalent of a direct
24 condemnation. Up to that point, the takings laws only
25 meant eminent domain, direct condemnation.