

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 23

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Electronically Filed
Mar 18 2022 03:54 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing APPENDIX TO OPPOSITION TO APPELLANT'S MOTION TO STAY - **VOLUME 23** 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 This is the first case that uses the
2 regulatory takings concept. If you deny all economic
3 value of the property, then it could be the functional
4 equivalent of an eminent domain and will require
5 compensation.

6 Not much happened until 1978 and the Penn
7 Central case. And there the Supreme Court said that
8 this regulation had prohibited development over Grand
9 Central Terminal under the historic preservation laws
10 was not a taking for a variety of reasons.

11 They established the three-factor test.
12 What's the economic impact of the regulation on the
13 property owner. Second, did the regulations interfere
14 with investment-backed expectations. The third factor
15 is not really relevant in this case.

16 And the Court said, no, you had historic use
17 of the terminal. You can't segment the property and
18 develop in the airspace. It doesn't meet the Penn
19 Central test.

20 Fast forward to 1992 and the Lucas case.
21 Before we get there, tab 10. Your Honor, tab 10 is the
22 Loretto case. And Sisolak is based on Loretto. In
23 Loretto, this is a 1982 case, the U.S. Supreme Court
24 said it's a physical taking. It's different than a
25 taking where an agency excessively regulates the use of

1 property by the owner.

2 This precludes the owner from excluding
3 others from the property. It doesn't involve a permit
4 application. The City's ordinance required Ms. Loretto
5 to allow cable TV facilities on her rental apartment
6 building. Court said it was a physical taking.

7 Now, let's fast forward to 1992. The Lucas
8 case. There's a lot of litigation in between. But the
9 Lucas case tried to impose some rules. Court in Lucas
10 said, if a regulation does either of these two things,
11 if it either requires the owner to allow other people
12 to invade their property physically, to go on their
13 property, not just to look at it, the developer claims
14 that a physical taking is if the City so-called
15 preserves the Badlands as a view shed. That's a
16 regulatory taking, a regulation of use, of the owner's
17 use. It's not a physical taking unless the City
18 statute authorizes the public to go on the property.

19 So the Lucas court said, there are two
20 situations in which we are going to find a categorical
21 taking. And we're not going to consider the Penn
22 Central factors. And the two are as follows: A
23 regulation that denies all economically viable use of
24 the property, wipeout. Remember, the local public
25 agencies have broad authority to regulate the use of

1 land. And if they go too far and they do something
2 that's functionally equivalent to an eminent domain,
3 the Supreme Court is saying, it's got to be pretty bad,
4 got to be a wipeout, it's a categorical taking.

5 Or if the agency adopts a law that requires
6 the owner to allow others on their property, that's a
7 physical taking.

8 So the court said there, we're going to call
9 these categorical takings. Don't need to go through
10 the Penn Central factors. If you can prove a wipeout
11 or a physical invasion, you need to be compensated
12 without further proof. It said, if you can't show
13 either of those categorical takings, then you're at
14 Penn Central and you have to address the three Penn
15 Central factors.

16 Then fast forward again to 2005 and the
17 Lingle case. In the Lingle case, the court said some
18 very important things. And it really brought into
19 focus what are takings about. Prior to Lingle, prior
20 to the 2005 Lingle case, the court had held that courts
21 can get involved in whether the government is making a
22 good or bad decision and call it a taking. And I think
23 that's what the developer's evidence here is, hey, this
24 was unfair, this was a bad decision. Particularly with
25 the decision about requiring a certain type of

1 application for a fence or for access. They're saying,
2 these are bad decisions.

3 And courts had indulged that. They had --

4 THE COURT: I didn't necessarily look at it
5 that way. I think they were using that as an
6 illustration as to whether there was a physical taking
7 or not in this case. And understand this, remember
8 this, I'm not here to judge the actions; right. That's
9 why I was pretty clear at the very outset. And I even
10 said this. I realize city council, they're not like
11 courts. We don't make decisions based upon politics.
12 That's their realm. That's what they do. I just
13 wanted to be really clear that I understood that.

14 MR. SCHWARTZ: I know the Court was very
15 concerned over this fence and the access. And I agree
16 with the Court's analysis. The Court can't second
17 guess those decisions. Those decisions are -- in fact,
18 there's a process for challenging those decisions. And
19 this is not the right proceeding to do that. Could be
20 an administrative appeal. If not, there's a petition
21 for judicial review. That's where you decide whether
22 it's a good law or a bad law, whether the
23 decision-maker made a right decision. We don't have a
24 record of what was before the decision-maker here.

25 So the access and fence is a red herring. It

1 has nothing to do with whether there was a taking. A
2 taking requires a wipeout or near wipeout or
3 interference with investment-backed expectations.

4 Let me get back to Lingle.

5 THE COURT: Which one is that, sir?

6 MR. SCHWARTZ: The Lingle, I do not have -- I
7 don't have the opinion of the Lingle.

8 THE COURT: Go ahead and read. I'll listen.

9 MR. SCHWARTZ: I can tell you what it says.
10 First of all, we're not going to get involved in these
11 decisions about whether land use regulation is good or
12 bad. The takings doctrine assumes the regulation is
13 valid. It assumes the regulation is valid, but it goes
14 too far. It wipes out the value or it interferes with
15 investment-backed expectations.

16 If the regulation is invalid, then you
17 challenge it by a PJR or some equitable option and get
18 it overturned. But if it's a valid regulation and it
19 goes too far, it's too burdensome. There has to be a
20 limit to what the government can do in regulating use
21 of property.

22 So the court said, yeah, we've got these
23 categorical takings. We've got -- and then we have
24 categorical, a wipeout or a physical invasion, and then
25 we have Penn Central. The court there said, you know,

1 we're dealing with the takings clause. It says take.
2 And the history and the original intent of the takings
3 clause was for eminent domain, direct condemnation. If
4 we're going to say that a regulation of use is the
5 functional equivalent of an eminent domain, then it's
6 got to be really bad.

7 So in Lingle, the court said that a taking
8 under any test, a regulation of use taking, has to be
9 pretty much the functional equivalent of an eminent
10 domain even in the Penn Central context. It was
11 explicit. It said, whether it's Lucas, a wipeout,
12 whether it's Penn Central, it's got to be a near
13 wipeout or a wipeout for it to be really like a take,
14 like an eminent domain.

15 THE COURT: Now, in following that, and it
16 raises a question in the earlier session this morning.
17 And I'm listening to you, and I was wondering
18 whether -- and it's my recollection in reading Sisolak,
19 and that's why I pointed that out earlier this morning
20 where Justice Maupin in his dissent pointed out, yeah,
21 I think you should have followed Penn Central. But one
22 of the issues he raised was futility. And so my
23 question is this. Do I consider that in any respect as
24 far as the argument you're making or I just should
25 ignore that? I don't know. I'm just thinking about

1 this whole concept because we did talk a little bit
2 about Penn Central.

3 MR. SCHWARTZ: Well, futility. You're
4 talking about rightness requirement, Your Honor. That
5 is our first argument. I first need to break down -- I
6 first need to break down the developer's claims.
7 Because the developer has deliberately confused the
8 record. And for the Court to understand how to apply
9 the law, you first need to know what is the developer
10 claiming. And they have obfuscated what they're
11 claiming.

12 Tab 9 is their complaint, is the operative
13 complaint. Now, by the way, Your Honor, before I go
14 through this, we need to know what happened in Lucas.
15 So Lucas, on the South Carolina coast, lots of houses,
16 two vacant lots. It's zoned for residential
17 development, single-family lots. These are
18 single-family lots. Master plan says single-family
19 development.

20 Lucas buys the lots under that scheme. Big
21 hurricane hits the coast. Wipes out all these houses.
22 The legislature says, hey, no more. We can't have any
23 more development because then there will be more
24 storms, they'll wreck these houses, loss of life,
25 property.

1 Lucas, who is on the land side of the line or
2 the sea side of the line, can't development his lots.
3 That's the classic taking. That's what the taking
4 clause was supposed to avoid. And, of course, we have
5 the opposite situation here.

6 But in Lucas, the majority referred to those
7 two types of takings where compensation is mandated,
8 the categorical takings. They refer to them as
9 categorical. In other words, this is a categorically
10 compensated if you can prove this.

11 The dissent referred to the same two tests as
12 a per se taking. So categorical and per se are
13 synonymous. They mean the same thing. Now, that fact
14 has given the developer an entree to really confuse the
15 issues. Because, remember, you've got a wipeout claim
16 is a categorical claim and a per se claim and a
17 physical takings claim is a categorical claim and a per
18 se claim.

19 That's allowed the developer to say, well,
20 Sisolak, they don't admit it's a physical takings
21 claim, but it's clear that it isn't. That allows them
22 to say, because Sisolak is a per se claim and our
23 wipeout claim for regulation of use is a per se claim,
24 that the rules apply to physical takings claims apply
25 to the regulation of use claim in their first cause of

1 action.

2 This is a deliberate effort to confuse the
3 issues, again, because there's no law on their side.
4 All the law is against them.

5 So let me go through the Sisolak case if I
6 can, Your Honor.

7 THE COURT: You have the floor, sir.

8 MR. SCHWARTZ: And explain. And Sisolak is
9 at tab 16.

10 THE COURT: I'm with you.

11 MR. SCHWARTZ: Let me start with tab 9, which
12 is their operative pleading. And I will take you
13 through their first three causes of action.

14 Their first claim for relief starts on page
15 28 of their complaint. That's tab 9, page 28. Their
16 first claim is for a categorical taking. And they
17 allege, essentially, that the City's denial of the
18 35-acre applications has denied them all use, wipeout.
19 They don't say wipeout, but they do say, all
20 economically. So this is a wipeout claim. It's a
21 claim that you have denied the owner's use of the
22 property and wiped out the value.

23 Okay. Now, and they say it's a categorical
24 taking. They don't say it's a per se taking claim.
25 They could say, but it is a per se because they mean

1 the same thing. But they haven't made it clear, by
2 just saying categorical, whether it's a physical taking
3 claim or a wipeout of use.

4 In paragraph 170, they do throw in a physical
5 taking claim. "The City's actions required the
6 landowner to suffer a permanent physical invasion of
7 his property."

8 So that's a different type of categorical or
9 per se claim, but it duplicates their third claim. And
10 the reason it's in here on a regulation of use claim,
11 and also in their third claim for relief, which is a
12 physical takings claim, is so they can argue to the
13 Court Sisolak, categorical claim, on our first cause of
14 action, wipeout, also a categorical claim. So the
15 rules for physical taking claim apply to our regulation
16 use claim. And they do not. And I will explain that
17 to the Court. This goes mainly to the ripeness issue.

18 The second claim is for a Penn Central
19 taking. So that's, essentially, well, we don't have a
20 categorical claim. If we don't have a categorical
21 claim, then we apply the three Penn Central factors and
22 it's a taking. A lesser showing, Your Honor, a lesser
23 showing than a categorical wipeout claim. They don't
24 have to show a wipeout. They only need to show a near
25 wipeout. Or that there was interference with their

1 investment-backed expectation.

2 Why aren't they moving for summary judgment
3 on their Penn Central claim? Because they only paid
4 \$4.5 million for a 250-acre golf course, \$18,000 an
5 acre, that's a golf course price. If they were right
6 and they had a constitutional right to build whatever
7 they wanted on the property, they would have paid
8 \$386 million, which they say the property is worth if
9 they have a constitutional right to build on that
10 property.

11 The third claim is their, they call it, a
12 regulatory per se claim -- taking. Yes, they claim
13 that the City's regulation is Bill 2018-24 required the
14 owner to submit to physical occupation of his property.
15 They're not specific here in this cause of action.
16 They don't mention that. They just say the City's act,
17 and they're very vague about that.

18 This is a physical takings claim. It's a
19 per se claim. It's a categorical claim. Their first
20 cause of action is a categorical and a per se claim.
21 The reason they use this terminology and they use it so
22 confusingly, is because they want the Court to apply
23 physical taking rules to wipe out use claims.

24 And the developer goes so far as to say in
25 his papers -- I'm not sure I can find it. The

1 developer goes so far as to call their claims
2 categorical per se claims or per se categorical claims,
3 which is like saying a wipeout wipeout claim or a
4 physical physical taking claim. This is deliberately
5 confusing, Your Honor, because of this issue of
6 ripeness.

7 So let's get into the ripeness doctrine here.
8 And Judge Herndon had the 60-acre case. He found
9 60-acre case, their taking claim was not ripe. Their
10 motion to determine property interest was mute because
11 they hadn't applied for two developments that had been
12 denied by the City, which is required for ripeness for
13 a denial of all use taking claim.

14 Okay. So the core allegation of the first
15 two causes of action is excessive regulation of a use,
16 denial of all use. And Justice Maupin in the Sisolak
17 case said, well, yeah, the majority found this to be a
18 physical takings case. I don't think so. I don't
19 think it's a physical taking. Because, you know, I
20 won't get into why. I happen to think Justice Maupin
21 was correct.

22 I remember reading the Sisolak case when it
23 came down. I didn't think this was a physical taking
24 case. Be that as it may, the Nevada Supreme Court says
25 that it is. Justice Maupin is saying, no, it's not a

1 physical taking. Therefore, I think this should be
2 analyzed under Penn Central. And he refers to the
3 ripeness doctrine. And he says that, under Penn
4 Central, you have to file -- the developer -- the
5 burden is on the developer to file two applications and
6 have them both denied before a case can be ripe for
7 consideration, before you can tell how far the
8 government goes.

9 The taking claim is you have to wipe out or
10 nearly wipe out their value. Okay. Well, how do you
11 know if they've done that until you know how far the
12 discretion goes.

13 And the court, I think, was making that
14 point. Well, the City could have said maybe you can
15 make the golf course work by putting some, you know,
16 narrowing the fairways. Well, if the developer didn't
17 like the decision to deny their applications for
18 residential development, it was incumbent upon the
19 developer to come back with an application. And if
20 they want to sue for that segmented property, for the
21 35 acres, they have to come back with an application to
22 develop just the 35 acres and have the second
23 application denied.

24 The courts are very clear on this, that
25 that's required before you can make a regulation of use

1 argument. Because you don't know -- because the City
2 has discretion. It could approve something less than
3 what you approve. If they ask for 100 units in their
4 35-acre applications, City said, denied. Well, the
5 developer has to come back with a lower density or some
6 other use that would be economic. That's the law. The
7 Nevada Supreme Court said in the State case, which
8 is -- that's the law. They rely on the Williamson
9 County case, which I'm going to discuss now.

10 We're talking now about only the regulation
11 of use cases. Again, this notion that zoning confers
12 property rights, even though it's a preposterous
13 notion, assume it's true. It only goes to the first
14 two causes of action. Because there they claim that
15 the City, through its regulation, denied their permit
16 application for the owner's use of the property.
17 Doesn't relate to the Sisolak case. That's a physical
18 takings case. The final decision in this document
19 doesn't apply.

20 Okay. So in the Williamson County case,
21 1985, the Supreme Court said, okay, we're faced with a
22 similar situation. Planned development property.
23 Developer comes in with a some unit subdivision
24 proposal. And the agency says, no. Denied.

25 THE COURT: Kim, can you last until 4:15?

1 THE COURT REPORTER: Yeah.

2 THE COURT: Okay. Just want to make sure
3 you're fine.

4 MR. SCHWARTZ: So the agency in the
5 Williamson County case said, no. Denied.

6 The developer sued for a taking. The Supreme
7 Court said, no. You don't know if they might approve
8 some less development or some other development or a
9 variance, as the court mentioned. They still have
10 discretion to approve something. And just one
11 application isn't enough. You need at least two
12 applications, and they have to be denied before your
13 claim is ripe and the court has jurisdiction over your
14 taking claim.

15 And, again, in tab 12, the Nevada Supreme
16 Court adopted this rule. Judge Herndon found in the
17 65-acre case, because they had not filed two
18 applications to develop the 65-acre property standing
19 alone, their claim wasn't ripe, and granted summary
20 judgment for the City. Judge Herndon was absolutely
21 right about that.

22 And this case is similar, in that the facts
23 aren't identical, but they're close. In this case we
24 only had one application, only one application to
25 develop the property. It's incumbent upon the

1 developer to file an application to just the 35-acre
2 property before their claim is ripe.

3 The Master Development Agreement that the
4 developer cites as a second application doesn't count.
5 Judge Herndon laid out why. That was for more than the
6 35-acre property. The State case says, you have to --
7 in applying the ripeness doctrine, you have to consider
8 the property at issue. You can't rely on the City to
9 do it for you. It's incumbent on a developer to test
10 the City's discretion. You have to have two
11 applications denied before you can raise a taking
12 claim.

13 Judge Herndon in his ruling, in tab 4. And I
14 refer the Court to that because I really don't have
15 nearly enough time to explain why Judge Herndon was
16 absolutely correct and why it applies in this case.

17 The developer argues, well, the ripeness
18 doctrine doesn't apply to a categorical claim. It only
19 applies to a Penn Central claim. That's absolute
20 nonsense.

21 We have briefed in our papers that the
22 authorities are unanimous that the final decision
23 ripeness requirement applies to a categorical claim as
24 well as a Penn Central claim. And by logic, it has to
25 apply. It has to apply. Because how can you tell --

1 if you can't tell whether a near wipeout has occurred
2 because you don't have two denied applications, then
3 you certainly can't tell whether there's been a wipeout
4 if you don't have two applications.

5 Your Honor, I'm running out of time here. I
6 need to go through the Sisolak case and explain what
7 that case is about because the developer is relying so
8 heavily on it.

9 THE COURT: Sir, we're going to break at
10 4:15. It's four o'clock now, for the record. You
11 can -- here's the problem we have. And it is a
12 problem. I mean, we're now a day and a half in. And I
13 do have Monday morning set aside for this matter. And
14 then that will be two complete days. And I would
15 anticipate -- I mean, you can try a case in two days;
16 right? You can. I've seen it done before. I've
17 actually seen -- I mean, actual jury trial in two days.

18 My point is this. I don't want to stop you
19 from doing what you need to do. You can go ahead into
20 Sisolak for the next 15 minutes. We'll break at 4:15.
21 And, of course, Monday morning, you can continue your
22 journey as to what you need to do.

23 MR. SCHWARTZ: Thank you, Your Honor.
24 Sisolak case is tab 16.

25 THE COURT: Yes, sir. I have it right in

1 front of me.

2 MR. SCHWARTZ: That case says about 10 times
3 that is a physical invasion, Loretto type case. They
4 conclude, court concludes -- well, I want to refer you
5 to this is again tab 16. This is a very important part
6 of the Sisolak case.

7 By the way, Your Honor, the developer is
8 completely misrepresenting what Sisolak says. They say
9 that Sisolak says that they have -- that the zoning of
10 property determines their property interest. Again,
11 zoning doesn't confer rights. It doesn't determine
12 property interest. They have a fee simple interest in
13 the property.

14 The court in Sisolak said, You have a fee
15 simple interest in the airspace above your property.
16 You have, they said, a vested right. Vested means that
17 you own the property. It's not in the context of a
18 vested right the developer is talking about, where you
19 have an approved application and a right to build.
20 That's not the type of vested right.

21 The court is saying, the fee simple interest
22 is vested in you. You own the airspace. You have a
23 right to build in it not because of zoning. You have a
24 right because you own the property. That's a crucial
25 distinction. So they're misrepresenting what Sisolak

1 says.

2 THE COURT: I want you to explain to me why
3 because the developer in this case had fee simple
4 ownership, too.

5 MR. SCHWARTZ: That's right. And they have a
6 right -- that's right. They have a right -- they have
7 a right -- no. The Sisolak court said -- you know, it
8 didn't say that the government has no discretion to
9 limit your development of the airspace through
10 regulation. They said, it took your airspace by a
11 physical invasion. They say it 10 times it's not a
12 regulation of use case.

13 That's why I want to refer the Court to this
14 language in Sisolak on page 12, the right-hand column.
15 I'd ask the Court to start reading in the middle of
16 that paragraph where it says, "If the regulation
17 forces," page 12 of Sisolak, right-hand column, the
18 highlighted yellow.

19 THE COURT: Right. I see it.

20 MR. SCHWARTZ: "If the regulation forces the
21 property owner to acquiesce to a permanent physical
22 occupation, compensation is automatically warranted."

23 That's categorical or per se since this
24 constitutes a per se taking. Remember, per se,
25 categorical. Same thing.

1 "This element of required acquiescence is at
2 the heart of the concept of occupation. The second
3 type of per se taking, and they're using per se,
4 instead of categorical; means the same thing. Complete
5 deprivation of value is not at issue, it's not at
6 issue, in this case. Because Sisolak never argued that
7 the ordinance completely deprived him of all beneficial
8 use of his property.

9 The first and second causes of action --

10 THE COURT: What do you do when the
11 city council members say, this is going to be a park
12 and this is open spaces and those types of things, and
13 encourages members of the public to use the private
14 property as a park?

15 MR. SCHWARTZ: Encouragement is not a law and
16 it's not relevant. And if a city council member can
17 get a majority vote to pass a law that affects the use
18 of the property, that could be -- that could count in
19 this case. But a statement of a city council member on
20 or off the city council in a public hearing, outside
21 the public hearing, a statement doesn't affect the
22 owner's use of the property because it is not a law.
23 You have to have the majority vote. And the only
24 majority vote at issue in this case is the majority
25 vote of the city council to rezone the property in 1990

1 R-PD7, to designate the Badlands PR-OS in the general
2 plan in Exhibits I through Q, which are tab 18. Those
3 are all the ordinances designating the property by
4 legislation PR-OS. And then, third, to deny the
5 application for the 35-acre -- deny the 35-acre
6 application. Those are the only actions of the
7 city council that are at issue here.

8 So if you look at the zoning designation,
9 there's no dispute it was zoned R-PD7. That's not the
10 problem here. The problem is, for the developer, is
11 the PR-OS designation. That was adopted by
12 legislation.

13 Again, I can show the Court the maps that
14 were adopted by ordinance in the city legislation at
15 tab 18 in 1992, in 2001, 2005, 2009, 2011. And that's
16 Exhibit P. Exhibit P was the general plan map
17 designating the Badlands PR-OS that's in effect -- that
18 applied when the developer bought the property. And it
19 clearly prohibited residential use.

20 So if the developer wanted to make a
21 residential use, they have to get the City to exercise
22 its discretion to change it. It can't force the City
23 to do it by claiming that the zoning gave it rights.
24 There's no law to support that.

25 Then Exhibit Q is the 2018. All throughout,

1 the 35-acre property, the whole Badlands, designated
2 PR-OS.

3 THE COURT: How is requiring or saying, look,
4 we need this property to be open space any different
5 than having or placing prohibition on the airspace
6 above the property?

7 MR. SCHWARTZ: It's not. They did the same
8 thing in Penn Central. They said, well, you don't have
9 a right to use your airspace.

10 THE COURT: I'm looking at it from the
11 McCarran Airport/Sisolak case.

12 MR. SCHWARTZ: That's what I'm saying,
13 Your Honor. It's a physical takings case. The
14 developer is mixing --

15 THE COURT: They deprived Governor Sisolak of
16 his airspace or certain portions of his airspace above
17 --

18 MR. SCHWARTZ: No. They allowed airplanes to
19 fly in it. They allowed the public to invade it.
20 That's a physical taking.

21 The government can regulate the use of
22 property. That's different from a physical invasion.
23 That's what the court is saying here in the McCarran
24 section I wrote. This is not at issue in this case, to
25 wipe out the value of your property by regulating your

1 use of it.

2 THE COURT: So what's the value of the
3 property in this case? It can only be used for open
4 space; right?

5 MR. SCHWARTZ: No. It can be used for the
6 permitted uses, all of the uses that we just read in
7 the R-PD7 zoning ordinance.

8 THE COURT: Residential happens to be one of
9 them; right?

10 MR. SCHWARTZ: Your Honor, that's not right.
11 One and done is not the law. Look at the state case.
12 Look at the Williamson County case. One and done is
13 not the law.

14 THE COURT: I understand your position as far
15 as one and done, but there was a request for
16 residential use. We can all agree to that; right?

17 MR. SCHWARTZ: Yes.

18 THE COURT: Okay.

19 MR. SCHWARTZ: So Sisolak is a physical
20 takings case. And the court in Sisolak said, the
21 majority said, ripeness doctrine doesn't apply to
22 physical takings cases. It applies to regulation use
23 cases. And that makes sense. Because when you adopt a
24 law, and counsel referred to the Nick case and the
25 Cedar Point case.

1 Sisolak, the court said, the airport has
2 exacted an easement, an interest in property, a
3 physical interest in property, allowing people to go on
4 their property. Same thing in Nick. Same thing in
5 Cedar Point. The government exacted an easement.

6 The developer's first two causes of action
7 are not for exaction of an easement; therefore,
8 regulation of the owner's use. Exaction easement
9 allows other people to use the owner's property. If
10 you regulate the owner's use of the property, such that
11 you wipe it out, that's a different type of taking, a
12 different type of categorical taking. That's exactly
13 what the Supreme Court is saying in Sisolak.

14 So the takings claim here is not ripe because
15 there was no filing of a second application. And,
16 again, the Court should be very clear on this. When
17 the developer starts talking about Sisolak and mixing
18 it up with its motion to determine property right, a
19 right to development, they're talking about regulation
20 of use. Sisolak has nothing whatever to do with that.
21 That's an exaction of an easement.

22 They claim, the developer claims, they filed
23 four applications to develop their property. And they
24 compare themselves to the Del Monte Dunes case. Well,
25 in that case, there were four development applications.

1 In each case the city council denied it, and said,
2 well, we might approve a lesser development. There
3 were four applications.

4 The developer says, oh, yeah, I've got four
5 applications. I have the 35-acre applications. I have
6 the Master Development Agreement. And I've got this
7 access, my application for access, and my application
8 for a fence.

9 There's only one application that counts for
10 final decision ripeness. Again, I refer the Court to
11 Judge Herndon's analysis of why the Master Development
12 Agreement doesn't count for the 65-acre property, and
13 it doesn't count here for the same reason. It included
14 a much greater property, the entire Badlands, that the
15 city council could have had any number of reasons for
16 denying that that had nothing to do with the 35-acre
17 property. So the developer has to file an application
18 for the 35-acre property standing alone. That's what
19 Judge Herndon held under the State case, and that was
20 right.

21 Also, the MDA was vague. It didn't
22 provide -- it didn't include site specific applications
23 that you're supposed to file, with details that you're
24 supposed to file under the uniform development code.
25 You have to file those specific applications that Mr.

1 Hoehne had talked about to develop a property to have
2 an application -- where you can say, the city council
3 has denied my application to use the property for this.

4 The access and fence. Your Honor, in their
5 regulation of use cases, they've got to show a wipeout.
6 Denying a developer a property owner additional
7 access -- they already had access, Your Honor. Denying
8 them additional access isn't a wipeout of the value of
9 the property. Denying them the right to build a fence
10 is not. But, of course, the City didn't deny those --
11 didn't deny applications.

12 The public officials said you have to file
13 this certain application. I have discretion to require
14 it. The developer never filed them so those don't
15 count. Again, even if they did go to the use of the
16 entire and could be deemed a wipeout, they're not
17 relevant. But even if they could, this isn't the forum
18 to try whether that public official was right or wrong.
19 That's a PJR. There's a 25-day statute of limitation.
20 They had to challenge that a long time ago if they
21 disagree with the decision. They can't come into this
22 Court and try to flip the burden and have the City
23 defend the reasons for a decision like that.

24 So tab 17 is the Hoehne case, H-O-E-H-N-E
25 case. And that case says -- and Judge Herndon relied

1 heavily on the opinion in this case. It places the
2 burden squarely on the developer to file and have
3 denied these necessary applications for the property at
4 issue. And Judge Herndon took that out of the State
5 case. Applications to develop other property aren't --
6 you know, if the subject property is joined with other
7 property, it doesn't count because there could be good
8 reasons to deny the application involving the other
9 property that don't apply to the property at issue.

10 Judge Herndon also said, hey, wait, the vote
11 against the master development plan in addition was 4
12 to 3. Two of the members who voted against it are no
13 longer on the city council. They had to file
14 applications for site specific development. Four
15 members of the city council are no longer on the
16 council. There was lots of discussion at the hearings.
17 There was plenty of room for discretion that
18 Judge Herndon found.

19 You know, under the Hoehne case, the court
20 has to say -- the court has to say that there is really
21 no possibility that the city is going to allow any
22 development on the property, and the burden is on the
23 developer. And Judge Herndon said that's a pretty high
24 standard. I'm not going to find that this case is ripe
25 because I really don't know. I don't know what a

1 second application would look like in the case of the
2 65-acre. I don't know what a first and second
3 application would look like. I don't know what
4 considerations the city council would take into
5 account. I can't say what they would do on that
6 application.

7 And so that's where Justice Maupin is
8 referring to the futility doctrine. Well, if you file
9 the first two applications and they're both denied,
10 further applications may be futile. It depends on the
11 facts of the case. But you've got to file those first
12 two applications and test the city council. They
13 didn't do that in this case.

14 So the Court doesn't even get to the, let's
15 call them, the merits of the taking claim on the first
16 two causes of action because the claims aren't ripe.

17 THE COURT: Tell me this. As far as the
18 golf course in general, how many applications were
19 denied by the city council?

20 MR. SCHWARTZ: The 17-acre applications were
21 approved. The 35-acre applications were disapproved.
22 The MDA was disapproved. And that covered the entire
23 Badlands. And the purpose of the MDA was to get the
24 City to agree that it wouldn't change the rules
25 midstream. That's the purpose of a development

1 agreement, also to provide for a provision of public
2 amenities.

3 And then the 133-acre applications, and this
4 is crucial, Your Honor, when the 133-acre applications
5 came up before the city council, among other
6 considerations, Judge Crockett's order was in effect.
7 And that said, you have to file a major modification
8 application to develop -- to apply to develop property
9 in the Badlands.

10 The city council had two reasons for
11 rejecting those applications. Because of lack of time,
12 I'll only discuss the reason that there was no major
13 modification application filed. The city council would
14 be in contempt of Judge Crockett's order if it
15 considered the applications without the filing of a
16 major modification application. The developer filed a
17 petition for judicial review.

18 And Judge Sturman denied the petition on the
19 grounds -- and that's -- that is tab 47. Denied that
20 application on the grounds that Judge Crockett's
21 order -- under Judge Crockett's order, the city council
22 could not, could not, consider the applications because
23 the developer failed to file a major modification
24 application.

25 THE COURT: You know, and I keep going back

1 to this open space issue. When it comes to open
2 spaces, who or what does open spaces -- who benefits
3 from that?

4 MR. SCHWARTZ: Well, the developer, the
5 property owner, and the community. And let me explain.
6 The property owner benefits because it's an amenity
7 that makes development in the PR-OS more attractive.

8 THE COURT: So as far as the 35 acres at
9 issue in this case and it's open space, how many does
10 the property owner benefit from that as it relates to
11 its 35-acre property?

12 MR. SCHWARTZ: Let me explain. The
13 1500-some-acre PRMP set aside open space as an amenity
14 for that community. As you'll recall, it was required
15 to be set aside for the R-PD7 or for the zoning for the
16 PRMP. It was also required to be set aside for the
17 developer to be included in the gaming enterprise
18 district.

19 The reason the state legislature requires it
20 to be set aside is to benefit not only the residents of
21 the development, but the city, the community, at large.
22 That's the purpose.

23 THE COURT: That's my point. It's going to
24 benefit the public; right?

25 MR. SCHWARTZ: Let me finish.

1 THE COURT: But I'm going right here.
2 There's a little language here from Sisolak in the
3 conclusion. The court says, "Sisolak suffered a
4 Loretto-type regulatory per se taking under both the
5 United States and the Nevada Constitution because
6 Ordinances 1221 and 1599 appropriated his private
7 property for public use without payment of just
8 compensation."

9 The reason I keep coming back to that, it
10 appears to me, and I kind of get it, it's nuanced, but
11 if you're saying, look, this is open space and this is
12 what we want it to be, who's the beneficiary of that?
13 It would be the public.

14 MR. SCHWARTZ: Not quite, Your Honor. The
15 development -- you know, why did the Peccoles propose
16 open space? Why do these planned developments set
17 aside open space?

18 THE COURT: I have a question for you. Is
19 there any case law that stands for the proposition that
20 a golf course is equal to open space?

21 MR. SCHWARTZ: Any case?

22 THE COURT: The reason why I'm bringing that
23 up because, you know, I think there's a difference
24 between private property that's a golf course and a
25 public park or open spaces like that; right? I mean,

1 there's a difference. You have property rights here.
2 You have that bundle, that --

3 MR. SCHWARTZ: No, it's no different.

4 THE COURT: So you're saying there's no
5 difference between a private golf course that's an
6 actual business; right, that sets fees and have a golf
7 shop and typically restaurants and all that type of
8 stuff and all those amenities versus --

9 MR. SCHWARTZ: No, not for purposes of a
10 taking, no. Not for purposes of the law of regulatory
11 takings. The developer of the PRMP set aside the
12 golf course and drainage as an amenity to that
13 development. It's ironic that this developer built the
14 Queensridge Towers, the 219-some luxury units, and the
15 Tivoli retail. They benefited from the fact of this
16 open space. They were able to sell those properties or
17 those properties were more valuable because they had
18 the amenity.

19 So, yes, if you carve up the property and
20 segment it, which, Your Honor, you can't do. That's
21 why we went through this history of the PRMP because
22 you have to look at the parcel as a whole for takings
23 purposes. Otherwise, you can always have a taking.
24 You carve up the property into small parts, and then if
25 the government doesn't allow you to develop each part

1 of the property, then they have to compensate you.
2 That's segmentation. That's what's happened in this
3 case.

4 So the open space benefited the PRMP, and it
5 benefited the community. Whether it's a for-profit or
6 a nonprofit venture, doesn't matter. It's open space.
7 Open space, whether it's a golf course or a park, has
8 community benefits.

9 THE COURT: But a park, typically, is public.
10 And a golf course is private; right? And --

11 MR. SCHWARTZ: That's okay. Yes.

12 THE COURT: This is what it seems to me we're
13 comparing a golf course with a park. They're
14 different. Parks are public; right, typically.
15 Golf courses are private property. Someone owns it.
16 Fee simple, no.

17 MR. SCHWARTZ: Your Honor, it's open space
18 and that has value. Whether it's a for-profit
19 golf course or a private park, it still has benefits to
20 the development itself and to the community.

21 It's open space. It's greenery. It's
22 something nice to look at. It's aesthetic. It
23 provides a buffer, a noise buffer, a visual buffer.
24 There are all sorts of values in open space that are
25 achieved by both golf courses and parks.

1 And in this case, the State said, you have to
2 provide recreation as a condition of being in the
3 gaming district. The developer chose to provide that
4 recreation through a golf course. The developer could
5 have made it a park. It could have made it a number of
6 open space uses. But the point is it's up to the
7 government agency how they're going to configure that
8 open space, how it's going to be used. It's their
9 decision that it's for the benefit of the community.
10 And they have that police power.

11 THE COURT: You said, for the benefit of the
12 community. Well, then buy it. That's my point.

13 MR. SCHWARTZ: No. This park was approved --

14 THE COURT: It's not a park. It's a
15 golf course.

16 MR. SCHWARTZ: This golf course was approved
17 as open space, at PR-OS, open space park, recreation
18 for the community, both for the PRMP that was owned by
19 the developer, and for the surrounding community.

20 So the owners who live on that golf course,
21 Your Honor, they were part of the original PRMP. And
22 the PRMP said we are going to set aside this land as a
23 golf course and drainage. Then the City said, okay.
24 The City doesn't have to require dedication. The City
25 regulates the use. Then it designated the golf course

1 PR-OS, which means the future use of that is for PR-OS,
2 something that's allowed by the PR-OS definition.

3 The developer knew it when they bought the
4 property. So it doesn't matter whether the use of the
5 golf course was a for-profit use or a not-for-profit
6 use. It doesn't matter whether it was fairways or
7 trees.

8 THE COURT: The developer of the whole area,
9 that was Peccole. That wasn't 180 Land.

10 MR. SCHWARTZ: They stand in their shoes.
11 Otherwise, you can always get around a taking claim,
12 the developer. The developer gets approval for a
13 100-acre development. It has development in 90 acres
14 and then it's required to set aside the other 10 acres.
15 So the developer then sells off the 10 acres and the
16 new owner comes in and says, hey, I know you've set
17 this aside as a benefit for the community, but since I
18 own it now, I get to develop it.

19 THE COURT: I don't mind saying this.
20 Somebody is going to have to tell me otherwise. I see
21 a distinct difference between a golf course -- and I
22 understand the benefits and the amenities of a
23 golf course. But the realities are, at the end of the
24 day, a golf course is still a business. It has a
25 clubhouse; right. It charges green fees. They sell

1 golf paraphernalia, those types of things. Typically,
2 they have a restaurant and maybe a bar. And it's a
3 business; right. Yeah, there's open spaces. It's a
4 business.

5 But what happens when the property becomes
6 economically unviable; right? Can't make money there.
7 Then what?

8 And that's kind of my point. I don't think
9 that's the same as a park.

10 MR. SCHWARTZ: The original developer made a
11 lot of money, and this developer made a lot of money
12 based on that open space. Now they can't come along
13 and say, look, I bought a golf course where I can't
14 make any money. Now you have to let me develop it.
15 Your Honor, this is crucial. The City didn't tell the
16 developer to buy the golf course. The developer bought
17 the golf course, and it knew two things. One, that --

18 THE COURT: You would want somebody to buy
19 the golf course and try to make it into some sort of
20 viable project; right? Because, apparently, the
21 golf course failed. And, I mean, I don't mind saying
22 this. This is pure speculation on my part. But if the
23 golf course is viable, there's a lot of businesses that
24 are -- I mean, companies that are in the business of
25 running golf courses. So there must be an issue

1 regarding the viability of golf courses. From a
2 national perspective, I realize this is a problem. I
3 mean, I get that, you know.

4 And so the golf course failed. Then what?
5 Does it stay -- I mean, so if it's going to stay open
6 spaces with public access, it should be on public
7 lands.

8 MR. SCHWARTZ: It doesn't have public access,
9 Your Honor. It's private property. It doesn't have
10 public access. The City never required them to allow
11 public access. That's false.

12 THE COURT: I get that. My point is this.
13 And it's really a simple point. Some of the members of
14 city council urged public access to the property.
15 That's a problem.

16 MR. SCHWARTZ: It's not a problem, Your
17 Honor. That's not an action of the City. The Court
18 can only consider a law, an action of the majority of
19 the city council. It either adopts an ordinance or
20 resolution.

21 Statements of individual city council members
22 aren't the law. They have no effect on the use or
23 value of the property. They can't tell the public, you
24 can go on the property, and then the City is liable for
25 a physical taking. That's absolutely not the law.

1 But I want to get back to this notion --

2 THE COURT: I don't know if the city council
3 has ever done something like that. I mean, I'm asking
4 you, the expert on city council, I mean, this type of
5 area, I don't know if that's ever been --

6 MR. SCHWARTZ: Have they authorized someone
7 to go on someone else's property?

8 THE COURT: Have they ever publicly said,
9 publicly made the statements that are being alleged in
10 this case?

11 MR. SCHWARTZ: Your Honor, they're not. I'm
12 only here to talk about the law. And whether an
13 individual member of the city council made some
14 statement is completely irrelevant to whether there's
15 been a taking.

16 But I think what the Court is saying is that
17 the City is going to be an insurer for this developer's
18 business decision.

19 THE COURT: I'm not saying that at all. I'm
20 not saying that at all.

21 MR. SCHWARTZ: Well, if the developer bought
22 property that turned out to be not economically viable,
23 if that was the case, that's the developer's business.

24 THE COURT: I think it didn't turn out to be
25 not economically viable. It was not economically

1 viable when the property was purchased; is that
2 correct?

3 MR. SCHWARTZ: The golf course was in
4 operation. We don't know that. But it doesn't matter.
5 If the developer didn't do its due diligence and learn
6 that this golf course was not viable, it's not the
7 City's role to bail them out. If the developer didn't
8 know --

9 THE COURT: Nobody is saying it's the City's
10 role to bail out the developer.

11 MR. SCHWARTZ: They want \$54 million.

12 THE COURT: I think, didn't they want the
13 property to be developed? Wasn't that the initial
14 request going before the city council with plans for
15 development and the like?

16 MR. SCHWARTZ: They don't have to let them
17 develop the property. It was designated PR-OS. They
18 knew it when they bought it. Why did they buy property
19 that couldn't be developed for residential?

20 THE COURT: What you're saying is this.
21 You're saying, look, Judge, when they made the purchase
22 of the property, their bundle of rights was somewhat
23 limited based upon the stature, nature, and character
24 of the property being a golf course.

25 MR. SCHWARTZ: I'm saying -- no. The use of

1 the property was limited by the law. That's correct.
2 They're responsible for knowing the law. So what this
3 Court is saying, just because the golf course was a
4 business, that the City has to pay them \$54 million or
5 let them -- or change the law?

6 THE COURT: I'll make the record really
7 clear. I've never said that.

8 MR. SCHWARTZ: Or change the law. I think
9 the Court is saying that the City needed to change the
10 law to allow them to build residential use in that
11 property.

12 THE COURT: I'm not saying that. I'm saying
13 that the property was already zoned R-PD7; right?

14 MR. SCHWARTZ: Yes.

15 THE COURT: And one of the uses as it
16 pertains to R-PD7 would be residential real property.

17 MR. SCHWARTZ: That is a permitted use. The
18 City has discretion as to whether it's going to allow
19 that. And the general plan designation is if they're
20 inconsistent is the higher authority. In this case,
21 the open space use of the Badlands is not inconsistent
22 with the general plan. Under R-PD7 zoning, the City
23 decides, here's where the housing goes. Here's where
24 the open space goes.

25 And then the city council came along and said

1 we're designating the housing for medium density
2 residential in the general plan. We're designating the
3 open space, Badlands in the PR-OS in the general plan.
4 They're consistent. But even if they weren't, even if
5 the Court found there was some constitutional right
6 under zoning to build, which, again, all the laws, this
7 Court has found the opposite. If the Court were to
8 find that, the PR-OS designation would prevail. NRS
9 278.150 says that. American West says that. The Nova
10 Horizon case says that. The developer says that the
11 general plan --

12 THE COURT: I'm sorry, sir. Sir, remember
13 where you left off. It's 4:30 on a Friday. And we
14 will reconvene Monday morning at 9:15.

15 MR. SCHWARTZ: Thank you, Your Honor.

16 THE COURT: We've got to wind this case up
17 Monday morning.

18 MR. LEAVITT: So we're going to wind it up
19 Monday morning?

20 THE COURT: We have to wind it up Monday
21 morning.

22 MR. LEAVITT: We've had two hours. They've
23 had seven and a half hours. Are we going to give
24 Mr. Schwartz 15 minutes? I need some parameters so I
25 know what to prepare for on Monday morning? Because

1 they've already had seven and a half hours. We've,
2 obviously, only had two.

3 MR. SCHWARTZ: Your Honor, I really do think
4 this case demands more time. Mr. Leavitt is going to
5 tell you that there are multiple reasons why the PR-OS
6 designation either doesn't exist, is invalid, or it
7 doesn't apply.

8 THE COURT: Mr. Leavitt can get to it in one
9 and a half hours. We're going to use three hours
10 Monday morning.

11 MR. LEAVITT: So he gets an hour and a half
12 and I get an hour and a half?

13 THE COURT: Can you live with an hour and a
14 half, sir?

15 MR. LEAVITT: How about this, Judge. Give
16 me -- how about if they get another hour, which will
17 give them eight and a half hours, and then I get two
18 hours, which gives us four hours?

19 THE COURT: Anything wrong with that? That
20 seems pretty fair to me.

21 MR. LEAVITT: I get half as much time as they
22 get under that scenario. I think that's fair, Judge.

23 MR. SCHWARTZ: Your Honor, the developer has
24 thrown so much money against the wall on these issues.
25 As I said, they're going to give you multiple, maybe

1 10, 11, reasons why the PR-OS designation doesn't
2 apply. And that's key here. And I haven't even gotten
3 to my second and third arguments about why, even if the
4 Court finds the case is ripe because of the PR-OS
5 designation, there's no taking. Under the Guggenheim
6 case --

7 THE COURT: Here's my point. As a trial
8 judge, I don't mind saying this, I don't have a
9 reputation of being heavy handed; right. I don't. And
10 I respect the time of the parties. I want to make sure
11 we can make a clear record. But there has to be limits
12 to how long you have when it comes to argument. I
13 mean, right now, assuming I gave another hour, that
14 would be eight hours for the City; right. Eight hours,
15 you know, that's a fairly long time to argue summary
16 judgment motions. We can all agree to that.

17 MR. SCHWARTZ: Well, Your Honor,
18 Mr. Leavitt -- we've been to many of these hearings.
19 Mr. Leavitt is going to be giving new arguments, new
20 evidence, in his presentation that we won't be able to
21 rebut. So I have to rebut everything that he's going
22 to say. And I generally know what he's going to say.
23 I have to rebut everything he's going to say in my
24 argument. So I think I --

25 THE COURT: How about this then. I'm going

1 to tell everybody this. I don't mind taking appellate
2 issues off the table; all right. I get it. We do
3 this. This is the ultimate fairness. Sir, you have an
4 hour. Mr. Leavitt, how much time do you say you need?

5 MR. LEAVITT: Two hours, Your Honor.

6 THE COURT: Then you have your countermotion.
7 You get an hour to rebut him after that. How is that,
8 sir?

9 MR. SCHWARTZ: Thank you.

10 THE COURT: And what will happen is this.
11 I'm just sitting here. And I know, sir, you need to be
12 in a courtroom to do this.

13 MR. LEAVITT: Yes.

14 THE COURT: This is what we'll do, which
15 makes perfect sense. We'll break Monday at noon. You
16 go back to your offices. You can do your last rebuttal
17 remote on BlueJeans.

18 MR. SCHWARTZ: Yes, Your Honor.

19 THE COURT: That's what I'm going to do. I'm
20 going to make sure everyone has had a full and fair
21 opportunity. Regardless of what my decision is, this
22 will be a nonissue.

23 MR. LEAVITT: Okay, Your Honor.

24 THE COURT: So this is what we're going to
25 do. Sir, you get an hour. Then we go two hours with

1 Mr. Leavitt. Then we'll break. And after lunch we
2 will continue the hearing. I should ask the court
3 reporter, ma'am, are you available?

4 MR. SCHWARTZ: Your Honor, I am not available
5 Monday afternoon. I'm sorry, but I'm not available.

6 THE COURT: Okay. I'm going to make sure
7 this matter ends. So you're not available Monday
8 afternoon. That's fine. What about Tuesday morning?

9 MR. SCHWARTZ: That's fine.

10 MR. LEAVITT: I'm available Tuesday morning.
11 If I may say this. So our motion for summary judgment
12 was my argument for two hours. Their opposition for
13 eight and a half or nine hours. And then my reply for
14 two hours. At that point --

15 THE COURT: To be fair to them, their
16 opposition also included part of their motion for
17 summary judgment.

18 MR. LEAVITT: Understood. When I close my
19 reply, Judge, I will ask you to make a decision on our
20 motion for summary judgment. In the event you make
21 that decision at that time, it would nullify any
22 countermotion. I'm just totally giving you the heads
23 up, Your Honor.

24 THE COURT: I understand. I do. But, once
25 again, at least for now, we have Monday morning, one

1 hour, two, we're done. Then we come back Tuesday and
2 we finish up.

3 MR. SCHWARTZ: And it wouldn't nullify our
4 motion. We're moving for summary judgment on three
5 claims they don't address.

6 THE COURT: I understand. You need to come
7 back on Tuesday morning.

8 MR. LEAVITT: Will we be back here Monday
9 morning?

10 THE COURT: Understand this. This is not my
11 courtroom. This is Judge Krall's courtroom. In
12 another month, hopefully, I'll be in 16C. I need a
13 bigger courtroom like I used to have traditionally.
14 But that's another day.

15 But what I need to do is this. We can't go
16 on and on and on. And I think when it comes to the
17 time allocation, I just want to make sure the reviewing
18 court says, yeah, Judge, you gave everyone enough time
19 as they needed.

20 MR. SCHWARTZ: Thank you, Your Honor.

21 MR. LEAVITT: Thank you, Your Honor.

22

23 (Proceedings adjourned at 4:38 p.m.)

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25 ATTEST: FULL, TRUE, AND ACCURATE TRANSCRIPT OF

1 PROCEEDINGS.

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4 /S/ Kimberly A. Farkas, RPR, CRR
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CLARK COUNTY, NEVADA

180 LAND COMPANY,

Case Number
A-17-758528-J

CITY OF LAS VEGAS,

Defendant.

Monday, September 27, 2021

DISTRICT COURT JUDGE

Rhonda Aguilina, Nevada Certified #979

1 APPEARANCES:

2 (PURSUANT TO ADMINISTRATIVE ORDER 20-24, SOME MATTERS IN
3 DEPARTMENT 16 ARE BEING HEARD VIA TELEPHONIC APPEARANCE)

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Monday, September 27, 2021

9:28 a.m.

P R O C E E D I N G S

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THE COURT: All right. Good morning to everyone.

ALL COUNSEL: Good morning.

THE COURT: I apologize for the brief delay. I had another matter I had to handle with another case, but I got to that done.

All right. And madam court reporter, are you ready to go?

THE COURT REPORTER: Yes, Judge. Thank you.

THE COURT: All right. Let's go ahead and set forth our appearances for the record.

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

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

MS. GHANEM: Good morning, Your Honor. Elizabeth Ghanem.

MR. WATERS: Kermitt Waters on behalf of 180 Land.

MR. LEAVITT: And also our legal assistant Jennifer is with us to assist with the presentation, Your Honor.

THE COURT: Okay.

MR. MOLINA: Good morning, Your Honor. Chris Molina on behalf of the city.

1 **MR. BYRNES:** Phil Byrnes on behalf of the city.

2 **MS. WOLFSON:** And good morning, Your Honor. Rebecca
3 Wolfson on behalf of the city.

4 **THE COURT:** All right. And once again good morning to
5 everyone.

6 And it's my recollection this will be a continuation
7 of our argument from last week; is that correct?

8 **MR. LEAVITT:** Correct, Your Honor.

9 **MR. MOLINA:** Your Honor, Andrew Schwartz is supposed
10 to be appearing via Bluejeans. Looks like they're waiting for
11 the moderator to start the meeting. I just got a text message
12 from him. He may be in the wrong session.

13 (Off-the-record discussion.)

14 **MS. WOLFSON:** That's the information I received this
15 morning. It was forwarded to you.

16 (Off-the-record discussion.)

17 (Pause in proceedings.)

18 **MS. WOLFSON:** I apologize for the delay, Your Honor.
19 Anyway, I can confirm the information I received this morning
20 is the correct information.

21 **THE COURT:** Yes.

22 (Off-the-record discussion.)

23 **MS. WOLFSON:** I passed that information along. I hope
24 they are able to join us shortly.

25 (pause in proceedings.)

1 **THE COURT:** All right. Do we have Mr. Schwartz on the
2 line? Can you hear us, sir?

3 You might have to hit star 4 to unmute.

4 **MR. SCHWARTZ:** I'm sorry. Good morning, Your Honor.
5 I apologize for being late. I didn't have the right
6 information.

7 **THE COURT:** That's okay. Sir.

8 Let's go ahead and note your appearance for the
9 record.

10 **MR. SCHWARTZ:** Andrew Schwartz for the City of Las
11 Vegas.

12 **THE COURT:** Okay. And it's my understanding everyone
13 has placed their appearances on the record; is that correct?

14 **MR. LEAVITT:** Correct, Your Honor.

15 **THE COURT:** All right. Okay. And so we're going to
16 continue on, Mr. Schwartz. You have the floor, sir.

17 **MR. SCHWARTZ:** Thank you, Your Honor.

18 Your Honor, a taking is a highly deferential test, and
19 there's no taking here. Judge Herndon's decision is at tab 4,
20 and Judge Herndon explained the takings test and why it is so
21 narrow.

22 I want to first explain that Judge Herndon's decision
23 was not set aside by Judge Trujillo as the developers
24 represented. The issue --

25 **THE COURT:** Whether it did or didn't, it doesn't

1 really matter to me. I don't care what other trial judges do.
2 I just want to be candid with everyone. Never have, never
3 will.

4 **MR. SCHWARTZ:** Well, fine.

5 **THE COURT:** Now, if you want to explain -- if you want
6 to argue maybe some of the points, that's fine, but I really
7 don't care what other trial judges do, I mean, I don't. I
8 don't mind saying that.

9 **MR. SCHWARTZ:** I understand.

10 **THE COURT:** I care about what the Nevada Court of
11 Appeals and the Supreme Court does, I will say that.

12 **MR. SCHWARTZ:** All right. Well, I do want to point
13 out that Judge Herndon, in paragraph three of his conclusions
14 of law, found that because the right to use land for a
15 particular purpose is not a fundamental constitutional right,
16 courts generally defer to the decisions of legislators and
17 administrative agencies with regard to regulating land use.

18 And the citation there was to the *Berman versus Parker*
19 case, which is a United States Supreme Court case, which laid
20 out the principles behind the local regulation of land and why
21 there's such broad latitude allowed in land use regulation, and
22 that the takings clause really is a very narrow remedy for
23 property owners, and it only applies in cases of extreme,
24 extreme government regulation, and we don't have that here.
25 And certainly there is no constitutional right to develop --

1 **THE COURT:** I don't want to cut you off, sir. I was
2 thinking about this over the weekend, and I don't know if it's
3 been brought up, maybe it has and I overlooked it, but as far
4 as the golf course is concerned, were there any restrictive
5 covenants?

6 **MR. SCHWARTZ:** No.

7 **THE COURT:** The reason why I thought about that, I
8 don't mind saying it, I thought about the Legacy example, and
9 it's my recollection that there was like a 50-year restrictive
10 covenant that limited the use of that specific parcel of
11 property to a golf course, something like that.

12 Go ahead.

13 **MR. SCHWARTZ:** That's not relevant, Your Honor.
14 Restricted covenant is a contract between two private parties,
15 and that's not -- governments don't typically regulate the use
16 of land by restrictive covenants except in certain subdivisions
17 where they may require that the subdivider establish a
18 homeowners' association and adopt CC&Rs to restrict the use of
19 the property. This is not that case. This is a typical --

20 **THE COURT:** Let me finish. Let me finish. You're
21 kind of going down the track that I was thinking about in this
22 one respect. You said the government may require, depending on
23 the circumstances for certain subdivisions, to have CC&Rs. And
24 the reason why I thought about that is this, because when it
25 comes to the golf course, if there was some concern that this

1 property would be used as open property designation, couldn't
2 that have been a request or mandate by the Council or the
3 Planning Commission or someone that, you know what, we really
4 like this project, but we're concerned about the potential
5 long-term viability of the golf course, why couldn't you put in
6 a restrictive covenant that would limit the use of the golf
7 course to a golf course so we reserve open spaces for like
8 maybe, you know, a period of 20, 30, 40, 50 years, something
9 like that.

10 **MR. SCHWARTZ:** Well, that would be -- that would be
11 one way to regulate the use of property by requiring the
12 developer to adopt CC&Rs, but that's not the way that -- that's
13 not the way this is typically done outside of a subdivision,
14 and there were subdivisions as part of the Peccole Ranch Master
15 Plan. But the government doesn't have to do that, and it's not
16 always the best idea because that limits the flexibility of the
17 government in regulating the land use.

18 So, again, this -- the interest of the -- of the city
19 in the -- in the Peccole Ranch Master Plan was that there be
20 open space. As the Court may recall, the RPD-7 zoning ordinance
21 says that the plan development shall be innovative and flexible
22 in allocating the different uses on the property, including open
23 space. It doesn't say golf course, and it doesn't even say
24 recreation, it says open space. So the city's interest here was
25 in open space and not a golf course. The developer decided that

1 it would -- that it would develop a golf course. That wasn't
2 the city's requirement. The requirement was for open space.

3 So here, we have, you know, the city could have
4 required a park or property left in its natural state. There
5 is intrinsic value to open space. The choice was made by the
6 developers.

7 **THE COURT:** And for the record, I'm not necessarily
8 disagreeing with you, but is there a difference between open
9 space as it relates to public property and private property?

10 And the reason why I'm bringing that up is this, if
11 the city wanted open space -- and I don't know if we're
12 speculating or not because, I mean, when it came to the plan
13 approval, I don't think anybody has come in and testified as to
14 specifically what the building department was doing when they
15 approved Queensridge. But my point is this, if they wanted open
16 space, they could have very easily required that as part of the
17 CC&Rs, and that's my point.

18 **MR. SCHWARTZ:** There were no -- the city didn't
19 require CC&Rs, and they could have. But that's not at all what
20 interest we're looking at here.

21 The City was faced with a 1500-acre property. The
22 City's task is to make sure that that property is designed --
23 that that development is designed in such a way to serve not
24 only the interests of the people who were going to live and work
25 and play on that property, but also the surrounding community.

1 That's their job. So when they tell the developer, Okay, we
2 want housing over here, we want the retail here, we want the
3 streets here, we want open space here - it's all part of the
4 city's job to design -- to make sure that that property is --
5 they engage in sound planning for a quality community that's
6 going to have amenities for the property owners. The City could
7 have required retail. That's all to serve the property and --

8 **THE COURT:** I get that, but here's my question. I
9 would anticipate, and correct me if I'm wrong on this, when it
10 came to the Queensridge and Badlands Golf Course, it would have
11 been Peccole that went to the city with the plan, and it was up
12 to the city as to whether or not they wanted to approve the
13 plan or not. I mean, that's kind of how that process occurs.

14 And so I'm saying hypothetically, if there was -- and
15 this is more from an evidentiary perspective. Peccoles could
16 have come in and made the request without a golf course, right?
17 And it just depends, because, I mean, we don't have golf courses
18 every three or four miles in Las Vegas, they're kind of rare. I
19 mean, I get that. But my point is this, what -- we have
20 argument, but what evidence do we have?

21 **MR. SCHWARTZ:** Well, the Court used the example of
22 Chicago as a well-planned city. Okay, you've got a number of
23 high rises in Chicago, and Chicago, you know, they're very
24 deliberate about this planning. Their buildings are more
25 iconic and there's greater separation between the buildings.

1 Why? So that you can see the buildings. So if they don't
2 allow the developer to build an entire envelope out to the
3 property line, it's because they want to preserve light and air
4 for other buildings, they want to limit -- to enhance privacy,
5 they want to limit noise, they want the public to be able to
6 view the building in a certain way, so they regulate the size,
7 the shape, the color of that building. That's all within their
8 police power.

9 They're doing the same thing here in Peccole Ranch
10 Master Plan. They're regulating all of the elements of the
11 project for the best interest of the community. And so the
12 issue is the city wants open space. Open space. Open space has
13 intrinsic value, whether it's a golf course or a park or it's
14 just land in its natural state, there's intrinsic value in open
15 space to benefit the residents, the people who work in the PRMP,
16 and the developer, because it adds value to the property.

17 And this developer in this case, the plaintiff here
18 developed property in the PRMP and got more money for their
19 luxury condos in Queensridge Towers and their retail in Tivoli
20 Gardens because of that amenity. So the city did require this
21 open space amenity for the project, and whether that open space
22 is a golf course is not the city's -- and whether it's
23 profitable or not is not the city's concern. The developer
24 makes a choice. The developer makes a choice to set aside open
25 space to get an approval and to enhance the value of the entire

1 project. That's why you can't segment the golf course out.
2 The golf course is an integral part of this mission.

3 You know, I use the analogy of a machine. You've got
4 a machine that has retail, it has housing of different types,
5 it's got streets, it's got drainage, it has open space. You
6 take out one part and you disrupt the plan.

7 So this was the open space with part of a plan. It
8 doesn't have to be CC&Rs. That's hardly ever done in a large
9 plan development like this. And the purpose of that open
10 space, even if the golf course closes, it provides an amenity,
11 a benefit to the PRMP and to the surrounding community because,
12 as open space, it's a buffer against noise, it's a view shed,
13 it provides light and air, it provides privacy to people, it's
14 aesthetically pleasing. So there's all those values that,
15 again, the state legislature requires the city to do certain
16 things like this. And it's -- by requiring the developer to
17 set aside retail on the property, the city is not taking that
18 property for the city, it's imposing standards on a master
19 planned community in the best interest of the people who are
20 going to live and work in that community.

21 The same thing with open space. By requiring the
22 developer to set aside open space, the developer can own the
23 fee, fee simple interest in that open space, but that's a
24 requirement that the city has a right, has a right to require to
25 continue. It doesn't have to buy it just because the developer

1 decides, Well, I want to put a golf course on there, and I can
2 no longer make any money on the golf course, therefore, I'm
3 going to eliminate the open space for this community. That's
4 taking a part of the machine out, and the courts do not require
5 that. That's why we have the segmentation doctrine. That's why
6 this is a classic segmentation case. The parcel as a whole was
7 the PRMP and each part of it is, according to city, was
8 important. The city -- if the city decides, Well, we're going
9 to impose a PROS general plan designation on the property
10 instead of CC&Rs, well, that could make sense because the city
11 may say CC&Rs are perpetual, they're forever, they're not
12 flexible, it's not a flexible tool.

13 In this case, and it's the city's prerogative, in this
14 case we're going to use a regulation, the general plan
15 designation of PROS, which is the highest law in the city, to
16 say the future use of this property is open space. It doesn't
17 matter what kind of open space it is that provides that
18 benefit, but the city can amend the general plan, as it did
19 with the 17-acre property, and allow residential development or
20 some other development to the property. So it's a much more
21 flexible tool than CC&Rs.

22 And then, I think the concept here is, Your Honor, the
23 city didn't take that open space for the city, it required the
24 developer to set it aside for the benefit of the PRMP.

25 So if the -- and, Your Honor, I think you had a

1 concern that you expressed Friday that, Well, this may not be
2 the most economically efficient use of the space if it was used
3 for a golf course and if a golf course is no longer viable, and
4 I don't think that's been established. But assume that that's
5 true, that if the city doesn't allow some commercial
6 development of that property, then the city is somehow taking
7 the property. Well, again, open space has intrinsic value for
8 the PRMP, and so the city doesn't have to do that. It's not a
9 taking if it requires it to continue in its historic use as
10 open space.

11 But it's even harder for the developer to make that
12 argument because the city did approve 435 luxury housing units
13 in the Badlands. The city said, okay, you know, you operate
14 this golf course, now you want to build residential, you're
15 telling us the golf course isn't economically viable, okay,
16 we'll approve 435 luxury units. Your Honor, that is a lot of
17 housing. That's huge. And according to Judge Herndon, and
18 according to the developer's own evidence, by approving 435
19 units in the Badlands, the Court -- the city increased just the
20 value of that 17-acre part of the Badlands by \$26 million, and
21 that is now five times what the developer paid for the entire
22 Badlands, and the developer still has 233 acres of the Badlands
23 left to either propose some development or use as open space,
24 which again which is an amenity.

25 You know, for the 435 units, is the developer going to

1 be able to sell those for more if they put housing on the rest
2 of the Badlands or if they leave it open so that these residents
3 have some open space to look at, you know, as a buffer for noise
4 for privacy. That's a decision that the city has the discretion
5 to make. But the developer can't complain, Well, you've taken
6 the Badlands because I can't make a go at running the golf
7 course. The city has already approved that.

8 And, Your Honor, you know, the irony is that this
9 developer took advantage of that amenity of that open space. I
10 mean, not everybody in the PRMP who works and lives in the PRMP
11 is going to play golf. That open space is valuable to them for
12 these other reasons that I've listed.

13 And so --

14 **THE COURT:** And I want to focus on the 35 acres. And
15 you do set forth in your opposition and counter-motion on
16 page 32, it says, both categorical and *Penn Central* claims
17 require a showing that the city's regulations wiped out or
18 nearly wiped out the economic use of the property.

19 So my question is this, what's the economic use of the
20 35 acres?

21 **MR. SCHWARTZ:** The economic use is as open space for
22 the PRMP. That's the value of the open space. The developer
23 of the PRMP made the decision -- and this developer stands in
24 that developer's shoes, and that developer decided that a
25 250-acre open space is going to be valuable for the community,

1 it's going to compliment the community, and so I'm going to
2 increase the total value of the PRMP if I have open space. If
3 I've got -- if I build out a hundred percent of this property
4 and there's no open space, I'm, you know, it's not going to be
5 as attractive for people to live and work in this community.
6 It's got open space and that adds value. That decision was
7 made in 1989 and 1990, and that can't be taken back. The
8 developer made that decision.

9 And so it's not a taking for the city to say, Oh, now
10 you can't -- you can't convert that open space that you set
11 aside to enhance the overall value of your development. It's
12 not a taking for the city to say, No, it shall continue in that
13 use.

14 You know, that's really what --

15 **THE COURT:** And I don't know if the law does this,
16 maybe we'll develop this doctrine in this case, I don't know,
17 but is there a distinction between private property, open
18 space, and city-owned, county-owned open space?

19 The reason why I keep coming back to that, at the end
20 of the day this is private property, and that's so important to
21 point out, it really and truly is. And so, I mean, I remember
22 continuing discovery in this case, and one of the issues that I
23 think Mr. Ogilvie really wanted to vet was the economics or the
24 economic value of the property at issue, right? I don't forget
25 anything. And the plaintiffs objected and said, Judge, no, we

1 have to go now, my client is paying out a lot of money per
2 month. And I respected all of that, but I was more concerned
3 with making sure everyone had a full and fair opportunity to
4 develop their case. That's all, right? And we can all agree
5 the wheels of justice are slow, they just are. They just grind
6 very slowly, they just do.

7 So, I mean, don't I have to look at that issue
8 regarding -- because you do say it here, "requires a showing
9 that city's regulation wiped out or nearly wiped out the
10 economic use of the property." And so my question is this,
11 what economic use would the 35 acres have at this point, if
12 any?

13 **MR. SCHWARTZ:** Well, the economic use is as part of
14 the Peccole Ranch Master Plan; that it had an economic use in
15 1989 and 1990, and under the segmentation doctrine you can't
16 carve that out after you've developed the PRMP and say now I
17 set aside this open space, the city required to set aside as
18 good sound planning, now I want to build in the open space.

19 It's ironic that this developer built in the PRMP, got
20 the benefit of the open space. This developer already got the
21 economic value out of the 35 acres because it enhanced the
22 developer's Queensridge Towers project and the Tivoli Gardens
23 project. That's the economic value.

24 And so the segmentation doctrine tells us that that
25 was the economic value of the Badlands, that that value has

1 already been -- that value has already been obtained because it
2 was an amenity for the other uses in the PRMP. It enhanced
3 those values.

4 But, Your Honor, can I refer you to the *Guggenheim*
5 case, please?

6 **THE COURT:** Yes, you can, sir.

7 **MR. SCHWARTZ:** Tab 56. Your Honor, maybe 57, yes,
8 sorry, Your Honor, tab 57.

9 **THE COURT:** And I have it, sir, right in front of me.

10 **MR. SCHWARTZ:** So in this case, Your Honor, and I've
11 highlighted some of the important language in the *Guggenheim*
12 case on pages 6, 7 and 8., what this says is that -- and this
13 is going to whether the city has wiped out the economic value
14 of the 35-acre property.

15 Again, Your Honor, let's assume -- let's assume that
16 this case is ripe, and it's not, because the city hasn't denied
17 two applications to develop the 35-acre property, but let's
18 assume that this is ripe. There's still no taking, because the
19 property was designated PROS in the general claim when the
20 developer bought the property.

21 Now, let me explain why that's significant. In the
22 *Guggenheim* case, the Court said, the Court said -- we had a --
23 the plaintiff bought a mobile home trailer park that was
24 subject to rent control. The developer then sued the city that
25 imposed the rent control claiming, I can't make money on the

1 mobile home park because of this rent control. And the
2 *Guggenheim* court -- and this is a Ninth Circuit, this was an *en*
3 *banc* decision of the Ninth Circuit -- said, look, you bought
4 the mobile home park when it was subject to the regulation in
5 question; you paid a price for that property that reflected the
6 fact that its use was legally limited, and so you can't say
7 that you were wiped out or you can't say that there was even
8 any economic impact of the city regulation on your property, if
9 the city just declines to change the law so that you can make
10 more money. The Court said that is not a taking. You're
11 assumed to pay a price for the property that reflects its legal
12 use.

13 And we have the same situation here. And, again, this
14 assumes that this case is ripe and it's not. Judge Herndon was
15 absolutely right when he found that the 65-acre case was not
16 ripe because the city had not denied two specific applications
17 for just a 65-acre property to be developed, and here we only
18 have one, so it's not ripe. But assuming it's ripe, the
19 developer went into this with its eyes open, and it can't now
20 claim you have to let me make some use of the property that
21 wasn't legal when I bought the property.

22 Now, in tab 38, Your Honor, is your decision on the
23 PJR, and at pages 18 and 20, and 20 of that decision here's
24 what the Court said: The four applications submitted to the
25 Council for a General Plan Amendment were all subject to the

1 Council's discretionary decision-making no matter the zoning
2 designation.

3 So there goes the developer's theory that they have
4 some constitutional right under zoning. There's absolutely no
5 authority for that, and this Court has found that they don't.
6 There goes their case.

7 But let's move on. Did the city wipe out the value of
8 the 35-acre property if you assume it's ripe and you allow that
9 to be segmented, which again both assumptions are not correct
10 but let's assume they are. Here's what this Court said: The
11 developer purchased its interest in the Badlands Golf Course
12 knowing that the city's General Plan showed the property as
13 designated for parks, recreation, and open space, PROS, and
14 that the Peccole Ranch Master Development Plan identified the
15 property as being for open space and drainage, as sought and
16 obtained by the developer's predecessor. The golf course was
17 part of a comprehensive development scheme, and the entire
18 Peccole Ranch master planned area was built out and around the
19 golf course.

20 The Court went on: It is up to the Council through
21 its discretionary decision making to decide whether a change in
22 the area or conditions justify the development sought by the
23 developer and how any such development might look. And the
24 Court cited to the *Nova Horizon* case.

25 The applications included requests for a general plan

1 amendment and waiver, in that the developer asked for
2 exceptions to the rules -- this is just like the plaintiff in
3 *Guggenheim* -- in that the developer asked for exceptions to the
4 rules, its assertion that approval was somehow mandated simply
5 because there is RPD-7 zoning on the property is plainly wrong.
6 It was well within the Council's discretion to determine that
7 the developer did not meet the criteria for a general plan
8 amendment or waiver found in the Unified Development Code and
9 to reject the site development plan and tentative map
10 application. Accordingly, no matter the zoning designation.

11 So the Court has said twice in these paragraphs of its
12 decision that the developer's crazy theory that zoning confers
13 rights and that zoning confers a constitutional right to build
14 anything the developer wants as long as it's a permitted use in
15 the zoning is wrong, and it's rejected by all authority.

16 **THE COURT:** Well, can't we all agree -- and I think
17 it's important to point out -- there's a completely different
18 standard here. The claims for relief are different. We're not
19 talking about a petition for judicial review.

20 And I think I was pretty clear, we had a significant
21 discussion in some of the prior motions. In fact, it's my
22 recollection Mr. Ogilvie was quite strident in his position, and
23 I rejected it completely in this case.

24 And so my question is this, why are we going down this
25 road? Because I see the *Guggenheim* case distinctly different

1 because, at the end of the day, there were rent controls in
2 place and they were getting paid so much per, I guess, for the
3 mobile homes, whatever the sum might have been, and they were
4 still making money.

5 In this case, here, it's my understanding that the
6 golf course was no longer viable, and it's public property, and
7 that's a totally different issue, right? And I keep coming
8 back to my question, because you raised it and it hasn't been
9 really addressed. I understand you're saying, Well, Judge, you
10 know, the value is -- well, the Peccoles, I guess, reaped the
11 value.

12 But I'm talking about the 35 acres, because it's my
13 understanding right now, in its current condition, it has no
14 value economically for the property owner. Because if the city
15 says this has to remain open space, he can't put anything on
16 that property. Consequently, what's the value of the 35 acres?
17 We all know what it is, it would be zero, it just would. It
18 would have no value whatsoever. And I guess that's my point.

19 And I just want to be very clear on this issue,
20 there's a completely different standard when it comes to a
21 standard for petition for judicial review. I'm looking to see
22 whether or not the City Council abused its discretion, right?
23 And that's the standard for the most part, and whether there's
24 substantial evidence in the record to support the findings.

25 And that's a low threshold, I don't mind saying that,

1 it just is. This is a totally different scenario here. Right
2 now you're in open court. This isn't a petition for judicial
3 review. All the evidentiary requirements have to be met,
4 right? Rule 56, I have to make a decision based upon
5 admissible evidence, we all understand that. So I'm looking at
6 it from that perspective, and whether the court of appeals
7 and/or Supreme Court agrees or disagrees with my evaluation of
8 this issue is another day.

9 But I understand your argument. You said, Well,
10 Judge, the value is to the Peccoles. That's kind of how I see
11 that, right? But as far as 180 Land Company, who is the
12 current owners of the property, it seems to me that if this
13 parcel of the property is going to remain open space, then it
14 could be argued that the city has wiped out or nearly wiped out
15 all economic use of the property, and that's really and truly
16 what I want you to address.

17 Because maybe your argument is that I guess value can
18 only transfer one time, I guess, when the property is
19 originally developed? I mean, I don't know. Is there case law
20 that says that? What about the current property owner? What
21 about the bundled rights?

22 **MR. SCHWARTZ:** Yes, Your Honor, we addressed that in
23 the -- that's the segmentation doctrine that the Court is
24 talking about, and you can't segment property, the parcel as a
25 whole, and then say that one part of it, the regulated part,

1 has no value, so now pay me. You have to look at the parcel as
2 a whole.

3 But I would like to back up, Your Honor. I think that
4 this is an extremely important issue, that there is no
5 substantive law of PJRs; it is an empty vessel; it is a
6 procedure. Inverse condemnation is a procedure with a
7 different remedy and different evidentiary standards. However,
8 what we're talking about here is --

9 **THE COURT:** We can all agree on that, I think.

10 **MR. SCHWARTZ:** What we're talking about here is the
11 underlying substantive law of property and land use regulation
12 in Nevada, and that law is the same. It's the same for whether
13 you're bringing a PJR or you're bringing a takings claim or a
14 due process claim, the law is that zoning does not confer a
15 right of any kind, it limits use, it doesn't confer rights, and
16 it doesn't confer a constitutional right to build anything you
17 want. That's the underlying law that applies to both a PJR and
18 an inverse claim.

19 Again, PJR, it's an empty vessel, it's just a
20 procedure. So you can have -- and we're not talking about
21 facts here. The Court made the facts clear. There's a PROS
22 designation on the property, there's RPD-7 zoning on the
23 property; what does that mean legally?

24 First, those are the facts. The Court said here's the
25 legal import of that, these are questions of law not of remedy.

1 The standard is the same in a PJR or a regulatory taking case.
2 There is no constitutional right to build under zoning, and so
3 it's the same law, it's the underlying substantive law, and so
4 the Court's conclusions about what that underlying substantive
5 property law and land use regulatory law in Nevada, it's the
6 same for both causes of action.

7 Your Honor, what that would be saying is if none of
8 the Court's conclusions of law in the PJR about the city's
9 discretion -- and, again, discretion cannot coexist with a
10 constitutional right to build what you want. If that's true,
11 then if --

12 **THE COURT:** I got a question for you. Hypothetically,
13 a decision of a city council or a planning commission and/or
14 county commission and the like, they can make a decision, the
15 trial court can make a determination that their decision is not
16 an abuse of discretion, right? But that doesn't stand for the
17 proposition that notwithstanding the fact that they didn't
18 abuse their discretion, that when exercising their discretion
19 it resulted in a taking of property. That's the difference,
20 and that's the way I see it. And that's a totally different
21 animal, subtle but huge, right? You could exercise your
22 discretion without abusing your discretion, but that doesn't
23 mean that's a get-out-of-jail free card. That's probably the
24 best way to say that.

25 I mean, I don't mind saying it, and I'm saying it

1 because that's the issue I want the Nevada Supreme Court and/or
2 Court of Appeals to really hone in on, because that's part of
3 my decision-making process. I think they're different. Yeah,
4 you could exercise your discretion and not abuse it.

5 But if you, for example, going back to one of the
6 issues you brought up, both categorical and *Penn Central* claims
7 requiring a showing that the city's regulation wiped out or
8 nearly wiped out the total economic use of the property. That's
9 not a charge I'm required to look at when it comes to a petition
10 for judicial review.

11 **MR. SCHWARTZ:** Absolutely right, Your Honor. But the
12 plaintiff's theory, Your Honor, can I address that? The
13 plaintiff's theory --

14 **THE COURT:** Yeah, but you said, "absolutely, right,"
15 that's good to hear.

16 **MR. SCHWARTZ:** The plaintiff's theory in this case is
17 that they had a constitutional right, quote, right to build
18 whatever they want on the 35-acre property as long as it's a
19 permitted use by zoning. That's their theory. That's not a
20 takings theory, Your Honor, that's PJR theory. That's
21 absolutely right. And they lost the PJR, and the judge -- and
22 this Court decided against them because it said zoning doesn't
23 confer any rights. But their entire case, Your Honor, is a
24 redo of the PJR.

25 Now, I think where we're going with this is --

1 **THE COURT:** You can make your record on that, but I'm
2 not buying that one. Once again, I don't mind telling you my
3 charge is much different, and I recognize that -- I forget how
4 long it's been, but it's been quite a while, and I recognize
5 that aspect of it, that this is a totally different animal as
6 far as inverse condemnation law is concerned, and I thought I
7 was pretty clear on that.

8 So all I'm saying, sir, I'm going to let you go ahead
9 and make your record. But as far as my decision as it pertains
10 to the petition for judicial review, I had a different charge.
11 And I even think there's -- I don't mind saying this, and
12 interestingly enough, I was never even called upon to even deal
13 with that specific issue, but in a decision sent down to me
14 from I think it was the Supreme Court, they even talked about
15 the different standards, right? I didn't even get a chance in
16 that case, it was so early on, it was a motion to amend, I
17 granted it, and that was it, and then a writ was run up. I
18 clearly understood that, I think I did, going back to a year,
19 year and a half or so ago, the differences between a petition
20 for judicial review and a claim for inverse condemnation before
21 a trial judge. Totally different, different issues of law,
22 different factual issues.

23 **MR. SCHWARTZ:** Your Honor, can I explain?

24 **THE COURT:** Yeah, you can, sir, but I'm just saying,
25 and I think the law will -- I have a fairly high degree of

1 confidence that the law will agree -- I mean the courts will
2 agree with me on that issue.

3 **MR. SCHWARTZ:** Your Honor, when I recite to the Court
4 this passage from the decision on the PJR, I'm reacting to the
5 plaintiff's claim. The plaintiff's claim in this case in the
6 taking -- this is a takings case -- is really a do-over of the
7 PJR, because they're claiming that they've got this
8 constitutional right.

9 I am -- we have, and I am fully prepared now to
10 summarize our case on what the real takings tests are, because
11 everything the plaintiffs are arguing in this case is a redo of
12 the PJR.

13 So I think I'm on the same page as the Court in that
14 to show a regulatory taking, you have to show a wipeout or a
15 near wipeout or interference with investment-backed
16 expectations. The plaintiffs don't address that in their
17 takings claim, they just want to redo the PJR.

18 So if now I could address the Court's concern about
19 why the city has not taken the 35-acre property. We have three
20 arguments --

21 **THE COURT:** Please go forward. I'm listening, taking
22 notes.

23 **MR. SCHWARTZ:** One is that the case isn't ripe. The
24 case isn't ripe because the Court doesn't know how far -- if a
25 regulation goes too far and wipes out value unless it knows and

1 it has a final decision of the public agency and knows how far
2 it goes.

3 So in the 65-acre case, Judge Herndon found they
4 didn't even get to first base. They didn't have a ripe claim
5 because they had denied two applications. So that's what the
6 Court -- that's what the courts have required, including the
7 Nevada Supreme Court in the *Kelly* case.

8 The *Kelly* -- you know, we have the categorical and
9 *Penn Central* claims allege excessive regulation of use. And as
10 I indicated on Friday, the developer is trying to confuse the
11 Court with the *Sisolak* case, which is a physical takings case,
12 not a regulation of use case, and so the ripeness doctrine does
13 not apply in a physical takings case, the *Sisolak* case
14 recognizes that. The developers misrepresented that case.

15 In a regulation of use case, you need to show that the
16 regulation of the owner's use was the taking. It has to wipe
17 out the economic value or a near wipeout of the value.

18 And again, this developer, Your Honor, the city didn't
19 change the value of the property because the developer either
20 knew that the property had -- was not viable as a golf course,
21 in which case the city didn't make the developer buy the
22 property, or it didn't know and it didn't do its due diligence,
23 either way the city didn't make the developer buy the property.
24 The developer, like *Guggenheim*, should have paid a price for
25 that property that reflected its worth, and it was subject to

1 the PROS designation, so it couldn't be used for residential.
2 So the developer can't come in and say, Hey, I paid a price for
3 property that that would be \$1.5 million per acre, which is the
4 developer's evidence, assuming I could use it for residential
5 when the law is clear that they couldn't.

6 **THE COURT:** Why is the law clear that they couldn't?
7 Because it's my recollection, I keep going back to this, the
8 property at issue I'm talking about the 35 acres, was owned as
9 RPD-7.

10 **MR. SCHWARTZ:** Well, Yes, Your Honor, but the PROS
11 designation is the general plan designation and that's
12 consistent with the RPD-7 zoning.

13 As the Court may recall in U.D.C. 19.10.050A, RPD-7
14 zoning is for plan developments, and the city is encouraged --
15 it is encouraged to require the set-aside of open space. It
16 did that. It said you're going to be able to develop, if it's
17 a 614-acre part of the 1500-acre Master Plan, you can develop
18 84 percent of the PRMP and 16 percent is going to be the
19 250-acre set-aside for open space.

20 So that's -- that use of part of the property that's
21 zoned RPD-7 for open space --

22 **THE COURT:** I don't want to cut you off, but was the
23 golf course private or public? Do we know?

24 **MR. SCHWARTZ:** Private. And so would the property be
25 if it were open space, if it were park, if it were an amusement

1 park, if it were any use, it would be private, but that doesn't
2 mean that the city has to allow a change in the use if it's
3 segmented from the whole.

4 So the developer bought property --

5 **THE COURT:** That's the issue. And I don't want to cut
6 you off, sir, you're saying the golf course was private,
7 meaning no public access, it was part of the Queensridge, I
8 guess, community, is the best way to say that, and so the
9 public had no access for ingress or egress; is that correct?

10 Sir, you can answer that.

11 **MR. SCHWARTZ:** Oh, by permission --

12 **MR. MOLINA:** The golf course was privately owned, but
13 it was publicly --

14 **MR. SCHWARTZ:** It is a public golf course. It was
15 open to the public.

16 **THE COURT:** And I don't want to cut you off. I was
17 just wondering if it was like DragonRidge where it's a private
18 golf course.

19 So it was a public golf course, and I do understand it
20 was private ownership, I do get that.

21 But go ahead, that's all I wanted to know, whether it
22 was a --

23 **MR. SCHWARTZ:** So the developer, Your Honor, is
24 telling you, I bought a golf course, I paid 4 and a half
25 million dollars for a golf course, and it turned out, you know,

1 I made a bad business decision and the golf course isn't worth
2 anything, so now pay me, and not only that, pay me \$386 million
3 if you don't let me build residential. Although, of course,
4 the city did allow them to build residential.

5 So, you know, the developer can't have it both ways.
6 It can't, just like *Guggenheim*, you can't buy property and say,
7 oh, you've wiped out my value, you've taken away my economic
8 value. In *Guggenheim*, the developer said, or the owner said,
9 Well, I can't make much or any money with this rent control in
10 place.

11 It's the same facts, the same situation. The Court
12 said, Wait a minute, you bought this property and now you're
13 telling us we have to change the use; even though it's not in
14 the best interest of the community we have to change the use so
15 that you could make a profit? That was your business decision
16 to buy that property. The city didn't make you do it, and you
17 pay a price that reflects its value.

18 And as the Court said, the developer bought the
19 property knowing that it was PROS in the General Plan. That
20 doesn't allow residential development, so that can't be a
21 taking.

22 But getting back to my ripeness point. In the *Kelly*
23 case -- excuse me, in the *State* case, and *State* is at tab 12,
24 the Court said, In Nevada, we apply the Williamson County
25 ripeness doctrine. That doctrine is -- we don't know if

1 regulation has wiped out property. If the developer applies
2 for some plan of development and the city says, No, well, we
3 might approve something else; we might approve a less dense
4 development; we might approve a different type of development,
5 the city has broad discretion. It can approve lots of things
6 that may not be the first project.

7 So before a takings claim can be ripe, the government
8 agency has to deny two separate applications for development of
9 the property and just that property, and then the claim might be
10 ripe. Then the developer can say, All right, it's now clear
11 what they're going to allow on the property and what they're
12 not. Now you can tell me whether this meets one of the takings
13 tests, which is a wipeout or a near wipeout.

14 And in the *Hoehne* case, Your Honor, which is at
15 tab 17, the Court said the claim is not ripe unless there's a
16 clear, complete and unambiguous, it's unambiguous that the
17 agency has drawn the line clearly and emphatically as to the
18 sole use which the property may be put. And that's exactly what
19 Judge Herndon found: No, I can't speculate about what the city
20 might allow on the property. They've only denied one set of
21 applications for this property. The developer hasn't filed
22 another set of applications.

23 The City sent a letter to the developer, which is at
24 tab 7, after the court -- the Supreme Court reversed the
25 Crockett order, and said, You don't need to file a major

1 modification application. Come in and file another application
2 for the 35-acre property, and invited the developer to do that.
3 The developer didn't want to develop the property, so it didn't
4 file another application, it didn't ripen its claim, and that
5 law is absolutely clear.

6 And the developer claims that the ripeness doctrine
7 does not apply to its categorical takings claims. The
8 developer concedes it applies to its *Penn Central* takings
9 claims. That's illogical and against all law. We've cited to
10 the Court the *Palazzolo* case, tab 15, and many other U.S.
11 Supreme Court cases, lower court cases in our brief that the
12 ripeness doctrine applies with full force to the categorical --
13 their wipeout claim, their categorical taking claim, and it has
14 to. You can't have a -- you can't have a ripeness doctrine
15 that applies if there's a near wipeout, but you don't have a
16 ripeness doctrine that applies to a wipeout. It just makes no
17 sense.

18 So the developer then argues, Well, I can't apply for
19 another project because it's futile. Your Honor, we have a
20 very odd situation here. This case is not only a first in
21 which a developer has argued they have a constitutional right
22 to build anything they want as long as it's a permitted use in
23 zoning or it's a taking, that's a pretty bizarre claim.

24 But here we have a situation where the city approved
25 435 luxury units for construction in the Badlands and the city

1 said now you're ready to go, the Supreme Court has reversed the
2 Crockett order, and your applications are reinstated. The
3 Nevada Supreme Court said the applications, the approvals are
4 valid, that's what the language the Court used, and that's in
5 tab 2.

6 And the Court -- and after the Court reinstated those
7 approvals, the city sent a letter to the developer, tab 3,
8 that's Exhibit GGG, saying you're ready to go, you've got your
9 permits, you're ready to develop for the 17-acre property, 435
10 units. The developer claims, Oh, no, I don't have a permit.
11 It's the craziest thing, Your Honor. No, I don't have a permit,
12 you nullified it, and the city said, No, no, really, you've got
13 a permit, go build. That was more than a year ago that the city
14 said this. The developer has done nothing.

15 Here's what happened in the 133-acre case. In
16 133-acre case, after Judge Crockett's decision, the City
17 Council said, Among other things we -- your applications are
18 incomplete because you haven't filed a major modification
19 application. Judge Crockett ordered it, that's a final
20 decision. We would be in contempt of Judge Crockett's order if
21 we approved these applications without you filing this major
22 modification application.

23 The developer goes to -- takes that up on a PJR, and
24 Judge Sturman finds, yes, denies the PJR on the grounds that
25 the City Council could not approve those applications because

1 there was no MMA filed, and that would be in violation of Judge
2 Crockett's order.

3 So the city -- so after the Supreme Court reversed
4 Judge Crockett's order, we are now back in Judge Sturman's
5 court in the 133-acre case. The city moved to remand the
6 133-acre applications to the City Council because they never,
7 never decided them on the merits. They found them incomplete
8 under Judge Crockett's order. The developer has strenuously
9 opposed a remand to give the City Council a chance to review
10 those 133-acre applications for the first time on the merits.

11 This is the most bizarre situation I've ever seen
12 where a developer has got one set of permits, the city is
13 telling him to go back to the City Council because they couldn't
14 review your applications on the merits, and the developer says,
15 No, no.

16 So what we've got here is a clear situation where a
17 developer bought property that the developer now claims had no
18 value, so it had no value when the developer bought it, and now
19 it wants this -- and it has segmented off that property and it
20 wants the Court to just focus on that property and say, Oh, the
21 city is taking my property, and I want \$54 million even though
22 the developer paid 4 and a half million for the entire 250-acre
23 Badlands. And the developer has got permits for, you know, a
24 huge number of units, and it declined to even pursue development
25 on the 133-acre property.

1 So it's just a bizarre situation here where there's no
2 taking, there's no injury, there's no damage to the developer
3 because the city, by declining to change the law, did not change
4 the value of that property, and you got a developer who instead
5 just wants money. That's what this case is about, Your Honor.
6 It's a shakedown. It's an attempt to use the courts to get the
7 developer what, you know, \$386 million for a 4 and a half
8 million dollars investment. I mean, it's just unconscionable.
9 So the case is ripe for the --

10 **THE COURT:** I don't look at businessmen as shakedown
11 artists. And I don't mind saying this, I thought about this,
12 too, it was known that there were problems with this golf
13 course, right? And I'm certain if the city really early on, if
14 they wanted, they could have bought out the property owner,
15 right? Or they could have bidden for this golf course like
16 everyone else when it went up for sale, right? If they were so
17 concerned about open spaces, they could have done that.
18 There's nothing to preclude the city from saying, Look, you
19 know what, we're concerned about this golf course and it's a
20 problem, it's happened before, let's go ahead and turn this
21 into public spaces, you know.

22 Only problem with that is this, though, they probably
23 would have to have public access, they probably couldn't
24 segment it all, but they could have done something, I would
25 think, and they didn't.

1 **MR. SCHWARTZ:** That's not the city's responsibility,
2 Your Honor. The city's responsibility is to make sure that the
3 community is well planned for the community. Its job -- the
4 city's job isn't to help property owners make profits.

5 **THE COURT:** Well, then who's making profits?

6 **MR. SCHWARTZ:** That's not -- I mean, there's no case
7 that says that, Your Honor. What the Court is talking about,
8 there's no authority --

9 **THE COURT:** Does the city get a free pass? They can't
10 force someone to do something with their bundle of rights that
11 results in no value to the property and not pay for it. That's
12 a big issue.

13 **MR. SCHWARTZ:** The property had -- Your Honor, the
14 property had whatever value --

15 **THE COURT:** I'll tell you what, this is a question I
16 have, and I want to make sure I understand it.

17 Judge Crockett's order wasn't published; is that
18 correct? Is it a published decision?

19 **MR. SCHWARTZ:** It was a trial court decision. I don't
20 know if it was published.

21 **THE COURT:** Okay. Is that --

22 **MR. LEAVITT:** Your Honor, Judge Crockett's decision
23 was a final decision of the lower court. It was appealed to
24 the Nevada Supreme Court, and then the Nevada Supreme Court
25 reversed Judge Crockett's decision.

1 **THE COURT:** Right. But they didn't publish it, right?

2 **MR. LEAVITT:** No. No.

3 **THE COURT:** Okay. I was just curious because I didn't
4 think so one hundred percent.

5 **MR. LEAVITT:** It was not, published, Your Honor.

6 **MR. SCHWARTZ:** It was an order of reversal, Your
7 Honor, and they reinstated the permits, and the city hasn't --

8 **THE COURT:** The question I have, though, and
9 understand I haven't looked at Judge Crockett's order in a long
10 time, I haven't, but what was his decision based upon?

11 **MR. SCHWARTZ:** Oh, it was a number of factors.

12 **THE COURT:** And I'm sorry, I'm --

13 **MR. SCHWARTZ:** The history of the PRMP --

14 **THE COURT:** Sir, I don't want to cut you off. I'm
15 sorry, that was a bad question.

16 What did Judge Crockett decide? That was my question.

17 **MR. SCHWARTZ:** Judge Crockett decided that to develop
18 housing in the Badlands, the owner needed to file a major
19 modification application under the U.D.C. The U.D.C. says
20 major modification application required for a PD development.
21 It does not say it's required for an RPD development. When it
22 went up to the Supreme Court, they made a very narrow decision.
23 Again, the developer has misrepresented that decision as
24 supporting their bizarre claims in this case. The Court made a
25 very narrow decision; it sided with the city, which argued

1 major modification application by the plain language of our
2 U.D.C. not required for RPD. It is required for a PD. This is
3 not PD, it's RPD. That was the sole basis of the Supreme
4 Court's decision. They didn't say that zoning prevails over
5 general plans. They didn't say that there's no PROS
6 designation. They didn't say anything what the developer says,
7 except that the city was required to obtain an amendment to --
8 the city was properly required an application to amend the
9 General Plan, to amend the PROS designation before a
10 development of residential in the Badlands.

11 So the Court there was saying the opposite, the
12 opposite of what the plaintiff is arguing here, which is that
13 the Supreme Court somehow found that the PROS designation
14 either didn't exist or did not prevail over zoning. Again,
15 there's no -- there's consistency between the zoning and the
16 General Plan designation here, so there's no question about
17 which prevails. But if there were an inconsistency, the law is
18 absolutely clear in NRS 278.250 and in the *AmWest* case and the
19 *Nova Horizon* case that the PROS designation prevails, and that
20 was the case when the developer bought the property, as the
21 Court observed.

22 **THE COURT:** Here's my question, though, and I might be
23 wrong on this, but didn't Judge Crockett require plaintiff or
24 the property owner -- or require that there would have to be
25 some sort of amendment to the General Plan; is that what

1 happened?

2 **MR. SCHWARTZ:** Yes, that's right, and that is correct.
3 That was --

4 **THE COURT:** Isn't that what you're requiring in this
5 case right now?

6 **MR. SCHWARTZ:** Yes, yes, that is the requirement, but
7 his decision was based on a number of factors.

8 **THE COURT:** And I don't want to cut you off, sir, your
9 co-counsel wants to address that issue. But my question is
10 this, I'm looking at it, and Judge Crockett required an
11 amendment to the General Plan, and the Nevada Supreme Court
12 said, No, that's not required. Okay, I get it, but --

13 **MR. SCHWARTZ:** No, no, no, they said the opposite.

14 **THE COURT:** Okay. What did they say? What did I say?

15 **MR. SCHWARTZ:** They said an amendment to the General
16 Plan is required. They said an amendment -- the Supreme Court
17 said amendment to the General Plan is required. They said a
18 major modification application was not required in addition to
19 the site review application, the rezoning application, other
20 applications. They absolutely did, Your Honor.

21 In tab 2, you can see here the Court said in the
22 order --

23 **THE COURT:** Your co-counsel wants to say something for
24 the record. Is there anything that you want to add, sir? Go
25 ahead. I don't want cut you off.

1 **MR. MOLINA:** So just to clarify. Judge Crockett's
2 decision was based on an appeal that -- PJR that was filed by
3 the homeowners.

4 **THE COURT:** Right.

5 **MR. MOLINA:** The City's approval of the 17-acre
6 applications, and those applications included a General Plan
7 Amendment. They did not include a major modification. The
8 homeowners challenged the city's decision not to require major
9 modification, and so there was no general -- the failure to
10 file a general plan amendment was not at issue in that case as
11 it is in this case. However, the Nevada Supreme Court, in
12 reversing Judge Crockett's order, made clear that the developer
13 had to file all applications required by the city's development
14 code, which the General Plan Amendment is required here.

15 **MR. SCHWARTZ:** Your Honor, I'm in tab 2 on page 5 of
16 the Supreme Court's decision. The Supreme Court said: "The
17 governing ordinances require the city to make specific findings
18 to approve a general plan amendment," and they cite to the Code
19 as well as a rezoning application.

20 So the Nevada Supreme Court said the opposite of what
21 the developer claims it said. It's saying that property was
22 designated PROS to build residential in the property. The City
23 properly required an amendment to its General Plan.

24 So Your Honor, in my limited time left, I want to
25 address this segmentation doctrine if I could.

1 **THE COURT:** Go ahead.

2 **MR. SCHWARTZ:** What the developer is doing here is
3 called segmentation. It's a developer trick to get greater
4 density. The courts, including the *Kelly* court, the Nevada
5 Supreme Court in *Kelly* said no, you cannot segment the property
6 for purposes of takings analysis; that would allow you to
7 require compensation in almost every case. It's a circular
8 argument.

9 So in *Kelly*, which is tab 14, in *Kelly*, the developer
10 subdivided property into 39 lots and built on 32 and then said
11 to the agency, Now you have to let me build on the seven
12 remaining lots. And the Court said, No, you've got substantial
13 development, parts and the whole. You can't, you know, carve
14 off lots whether you develop them yourself or sell them to
15 another person. Now you can't claim, Hey, you're wiping me out
16 because now these are all discrete lots with assessor's parcels.

17 In this case, we've got four development sites that
18 the developer has identified that they put, in classic form,
19 they put each property under a different owner. There are some
20 entities that fall into the properties, but all four have
21 different owners. It's classic segmentation where the
22 developer, the developer stands in the shoes of the original
23 developer for use as a whole. They got to build. They got the
24 city's approval to agree to a comprehensive master planned area,
25 1500-some acres where there was an agreement as to what was

1 going to go where, and, again, it's a machine. You take one
2 part out and the machine doesn't work.

3 So they come along later and they sell off the open
4 space after they've got -- after the developer has gotten the
5 benefit and it has sold all the units to people, to property
6 owners who live on that open space or benefit from that open
7 space, it enhances their value. The developer then sells off
8 the open space and someone comes in and says, Oh, now you have
9 to develop the open space or else I won't make enough money.

10 Again, the argument that you have to let me develop
11 this or I will lose money, that's false, Your Honor, that's not
12 the facts. The developer knew they couldn't build a
13 residential when they bought the property. By the city saying,
14 Well, we're not going to change the law doesn't change the
15 property's value one bit. It doesn't wipe it out, it doesn't
16 deprive them of anything that they bought. It leaves them in
17 the status quo.

18 Just like in the *Penn Central* case, the Court said,
19 Well, you've got -- you've got historic use of this property.
20 You're not entitled to make the most profit from this property.
21 You got what you've bought. In *Guggenheim*, you got what your
22 bought. You paid a price.

23 They paid \$18,000 an acre, that's a golf course price.
24 They claimed that if they could build housing, it's worth
25 1.5 million per acre. That's a residential development price.

1 They knew, and the price they paid reflected that the property
2 was limited in its use.

3 But, again, you can't -- you can't allow the developer
4 to segment off property. The United States Supreme Court in
5 the *Murr* case said, Well, there are three factors that tell us
6 what the parcel of whole is. And the developer, by the way,
7 has made no argument, they've cited no authority that they
8 didn't -- that allows them to segment off the property in this
9 fashion.

10 You look at the *Murr* case and the three factors. You
11 look at, among other things, what's the relationship between the
12 property that you're segmenting off and the rest of the
13 property? You know, is there some interdependence of the
14 property such that it should be treated as the parcel as a
15 whole? And that's exactly what we have here. We have a
16 property that was part of a master planned development community
17 and enhanced the value of the rest of the property as an
18 amenity, whether it's a golf course or open space it enhances
19 the value.

20 And so under the *Murr* -- and by the way, the master
21 plan was one owner, one master plan, all the different parts
22 were approved at the same time, and so, you know, that is the
23 classic parcel as a whole.

24 Now, if the PRMP is not the parcel as a whole and lets
25 say the Court disagrees and says the PRMP is not the parcel as

1 a whole, the Badlands at a minimum is a parcel of the whole.
2 It was in one use for 23, 25 years, one owner. It was sold
3 from one owner to another owner as a golf course, as a
4 functioning golf course. It was in one use. That's got to be
5 the parcel as a whole.

6 So the developer can't then carve up the Badlands and
7 say, Okay, you've allowed me to build 435 residential units on
8 one part of the Badlands. Well, I'm going to sell off 35 acres
9 for that property, and then the new buyer comes in and says, If
10 you don't allow me to build housing on this property even
11 though I bought it when housing wasn't legal, if you don't
12 allow me to build housing on this property, then it's a taking
13 and you have to pay me \$54 million? Your Honor, this is
14 classic segmentation.

15 The city -- you know, if you carve up the property in
16 the way the developer did, you're always going to be liable for
17 a wipeout, because as you get smaller and smaller, the city
18 says, Well, you know, 435 units on 250 acres, that's a lot of
19 units, that's pretty dense. Now you want more? They don't have
20 to allow each part of the property to be developed. Again, they
21 don't have to allow any of it to be developed, because the
22 developer bought it when it was subject to these regulations,
23 and so the developer has the same value of property that it had
24 when it bought the property, the exact same value. So there
25 can't be a taking here.

1 **THE COURT:** I have another question. I don't know if
2 there's an answer to this or if this has even been pointed out
3 as an issue, but I do understand your segmentation argument.
4 My question is this, though -- and you brought up a very
5 important point from a time factor -- this golf course
6 functioned for about 22, 23 years. What is the impact of time
7 on a segmentation, I guess where you could call this some sort
8 of affirmative defense maybe? What impact does that have?

9 You know, because there's no question, and we see this
10 all the time in all the major metropolitan areas, and 23 years
11 is a long time. The character and nature of property could
12 change in 23 years. And there's no question maybe early on
13 there were benefits, but over time those benefits can dissipate,
14 right? And so does this segmentation argument, does that -- can
15 you make that same argument 20 years, 50 years, a hundred years
16 down the road?

17 **MR. SCHWARTZ:** Your Honor, that's a very good point.
18 I think it's -- I don't think it's relevant because the takings
19 test requires a wipeout and, as I've explained, the city did
20 not change the value of the property one bit.

21 But to answer your question about time, you know,
22 that's the city's discretion, that's where the city's discretion
23 comes into play, and this Court -- what the developer arguing
24 here --

25 **THE COURT:** It's a general question, I mean, I'm just

1 thinking --

2 **MR. SCHWARTZ:** I think it's a great question. Great
3 question.

4 What the developer is arguing here is, hey, the city
5 was unfair and they were biased against us. And so whether the
6 best use, the most efficient economic use, whether the best use
7 of that property for the community is open space or golf course
8 or housing or office or whatever the use, that is subject to the
9 city's broad discretion. They exercised that discretion. They
10 can exercise that discretion, but if they wipe out the value,
11 then they have to pay compensation, but short of that or a near
12 wipeout, they don't have to pay compensation. That's within
13 their police power.

14 So when the Court -- when the Court was faced with a
15 PJR in this case, the Court found that there was substantial
16 evidence to support the Government's decision. That's the
17 deferential test that the Court applied for PJR.

18 So when we're talking about fairness or efficiency or
19 what's the -- you know, what is the optimal use of this
20 property, that's a political decision, it's up to the city's
21 discretion.

22 For the taking claim, the only concern, the only issue
23 for this Court, the only legal issue is whether the city has
24 wiped out the value or nearly wiped out the value. And as I
25 indicated, the city did not change the value at all, because the

1 developer still has exactly what it paid for when it bought the
2 property. Whether the city should change that, that's a good
3 question, but that's what the Court said in the PJR, Well, you
4 know, it's not my -- I can read from your findings of fact and
5 conclusions of law on the PJR, Your Honor, tab 38. You said
6 many times, you know, it's not my decision, it's not my decision
7 to say what is the best use for this property. I'm going to
8 leave that up to the -- you know, leave that up to the political
9 system, to the Government, the city government. They have the
10 expertise. They have the power. They have -- they're the
11 entity that makes the decision. I don't make the decision. You
12 said in paragraph 19 on --

13 **THE COURT:** I agree with that, but that's a different
14 call to the question, right? It really and truly is. And
15 that's my point, because right now we can look at it from this
16 perspective. You could have a situation where hypothetically a
17 city council or a county commission didn't abuse their
18 discretion, but, notwithstanding that, their decision making
19 results in a taking of private property.

20 **MR. SCHWARTZ:** Well, that's true, I agree.

21 **THE COURT:** We can all agree that's true.

22 **MR. SCHWARTZ:** But your question was about the timing
23 of the parcel as a whole, and it says the parcel of a whole
24 applies over time, and it absolutely does, but I was addressing
25 the Court's concern that after --

1 **THE COURT:** Has that ever been addressed? Does anyone
2 know?

3 **MR. LEAVITT:** It has, Your Honor.

4 **THE COURT:** Okay. I want to hear about that then.

5 **MR. SCHWARTZ:** What was that, Your Honor? I'm sorry,
6 I missed that.

7 **THE COURT:** I asked a question whether or not that
8 issue regarding the segmentation argument and the impact of
9 time, has that ever been addressed by a court, and that was my
10 question, and counsel on behalf of plaintiffs said, yes, it has
11 been addressed.

12 **MR. SCHWARTZ:** Well, yes, it has, Your Honor, in the
13 *Sierra-Tahoe* case. In the *Sierra-Tahoe* case, the court said
14 not only can you not segment property geographically, you know,
15 horizontally or vertically, in *Penn Central* you couldn't sever
16 off the air space.

17 In the *Murr* case, you couldn't sever off one of the
18 assessor's parcels from the other assessor's parcels because
19 given the history of that property, they're really the parcel as
20 a whole, and the court doesn't look at assessor's parcel
21 boundaries exclusively to make that determination.

22 In the *Sierra-Tahoe* case, the Tahoe Regional Planning
23 Agency imposed a 33-month moratorium on any development of
24 single-family lots in the Basin while it studied permanent
25 controls for the Basin. And there the Court -- the owner sued

1 and said, Hey, you've wiped out my value because during that
2 33-month period I could have no use of the property, and the
3 Court said, No, we even apply the segmentation doctrine to time,
4 to the segmenting the property over time.

5 So let's look at the issue of time in this case.

6 The Badlands is still functioning as the open space
7 for that PRMP. People are still enjoying the views, the
8 buffer, the buffer, the protection from noise, the privacy,
9 seeing a natural area. They are still enjoying that. It's
10 still adding value to all of that community.

11 And so it's not a question of there is -- you know,
12 that that Badlands has become completely disconnected from the
13 community such that it might be in the city's judgment, in the
14 city's exercise of discretion, you know, it might be a good idea
15 to change the use. Well, again, it's still functioning as the
16 open space for the PRMP, so it's still -- so there are no facts
17 to indicate, well, now you can segment off this property from
18 the parcel as a whole given that the City Council has designated
19 the property PROS in the General Plan, saying we want this
20 property, at least for now; until we amend the General Plan, we
21 want this property to continue functioning as the open space for
22 this community, and so to sever it off would violate the
23 segmentation doctrine.

24 And, again, it's a rule of fairness. You know, how
25 can you plan -- how can you plan, a master planned community,

1 how can you plan a master planned community if the developer can
2 buy a hundred acres, say I want to impose a master plan here,
3 and the city says, okay, because of the topography, because of
4 the surrounding development --

5 **THE COURT:** I'm sorry. I was just asking my law
6 clerk --

7 **MR. SCHWARTZ:** Because of the surrounding development
8 we're going to want the different uses to be in these different
9 locations, including the amenities, I don't know, school or
10 healthcare, police and fire, open space, transportation, roads.
11 So, yes, the public agency says, Okay, here's where we want all
12 the different parts to go. Well, if someone comes along and
13 severs off part of it, part of the whole so that the machine
14 might not work, they can't say, Well, unless you let me make a
15 different use of this property, then the property that was --
16 that was programmed for this project when the master plan was
17 approved, if you don't let me make a different use of this
18 property, then you have to compensate me.

19 Well, it would be very difficult to use master
20 planning in development, Your Honor, if that were the case,
21 because the developer would build out the project and then sell
22 off the parts of the project that it didn't want, and the new
23 developer would come in and claim, Oh, I get to do whatever I
24 want with this property because it no longer has the use that
25 the original developer said it was supposed to be used for.

1 Well, the city says, Wait a minute. This is part of the master
2 plan. This provides valuable benefits, enhancement of use and
3 value of all this other property. We're not going to allow you
4 to change that because that will disrupt our master plan.

5 And so that open space is as valuable and as useful
6 today as it was in 1990, 1989 when the city imposed the PROS
7 designation on the property.

8 So Your Honor, we extensively briefed this
9 segmentation issue, and we've cited many authorities that are
10 all consistent that segmentation is not permitted, otherwise
11 it's so easy to show a taking, a wipeout taking, and this is
12 just a classic segmentation.

13 Now, the developer is going to argue that the city
14 made them segment the property, and that's false. The city
15 didn't make them segment the property. The developer came to
16 the city with a development plan, and the city said, Well, we
17 want you to make sure that the lot lines are consistent. We
18 don't want development sites straddling lot lines. And the
19 city only required them to impose a rational set of assessor's
20 parcels underneath the four development sites.

21 The decision to develop the property with four
22 development sites was the developer's and the developer's own.
23 But more important to the segmentation point, the decision to
24 apply for development on each separate property and then sue,
25 sue the city for a taking on each separate property, that's the

1 segmentation, that's where the segmentation really comes into
2 play, because they're claiming now you wiped out one of my
3 segments, even though the city let them build in the parcel as
4 a whole, the Badlands or the PRMP, you know, 84 percent
5 buildout, even though the city let them build, Okay, I've
6 carved out this one part, you have to let me build on every
7 part.

8 So that's how you get greater density. Let's say you
9 approach an acreage and you say, okay, if I do a master plan
10 with the city, maybe they'll allow me 500 units. So if I then
11 carve it up into four parts, then apply for development on the
12 first part, and let's say they give me 400 units on that part,
13 then if they say, No, we don't want you to develop the other
14 parts, we've already given you 400 units, you know, you carve
15 the property up into four parts, but it's the parcel as a whole.
16 We gave you 400 units, that's substantial development, you
17 really did well.

18 In this case the developer paid 4 and a half million
19 dollars for property that it now claims is worth 54, or that
20 only 35 acres of the 250 acres is worth 54 million. Wow!
21 That's a great deal for property.

22 **MR. LEAVITT:** I have an objection --

23 **THE COURT:** Sir, we have an objection. Wait. Sir, we
24 have an objection.

25 Yes, sir, Mr. Leavitt.

1 **MR. LEAVITT:** Yes. As far as the purchase price is
2 concerned, that's the subject of a motion *in limine* which
3 includes the actual evidence, so we would object on that basis;
4 and, secondly, Your Honor, I guarantee you we will not hear the
5 words from counsel "I am done." It will not happen. He's
6 repeated himself four times on this segmentation argument. He
7 went through it four times. He's supposed to go for an hour
8 today. We're not going to get any time to respond, Your Honor,
9 if he doesn't -- I guarantee you we're not going to hear the
10 words "I'm done," so we're going to have to at least put some
11 limitation on how far he can go, Your Honor.

12 **MR. SCHWARTZ:** I'm done, Your Honor.

13 (Laughter)

14 **THE COURT:** Okay.

15 **MR. LEAVITT:** I stand corrected, Your Honor. I was
16 wrong, but he just said he's done.

17 **THE COURT:** Sir, thank you.

18 **MR. SCHWARTZ:** Your Honor, I was responding to the
19 Court's questions. I apologize for going over my hour.

20 **THE COURT:** That's okay, sir. And I just want to make
21 sure we have a clear record here. Nothing more, nothing less.

22 All right. You want to take five minutes?

23 **MR. LEAVITT:** I have to use the restroom, Your Honor.

24 **THE COURT:** That's what I was thinking, I think
25 everybody probably has to.

1 We'll take a restroom break and then come back and get
2 started.

3 **MR. LEAVITT:** Thank you, Your Honor.

4 (Recess taken at 11:02 a.m.)

5 (Proceedings resumed at 11:12 a.m.)

6 **THE COURT:** Okay. We can go back on the record.

7 And Mr. Leavitt, you have the floor, sir.

8 **MR. LEAVITT:** Thank you, Your Honor.

9 Your Honor, I'm going to just very generally, I'm
10 going to make a couple statements, then I'm going to respond to
11 a couple of your questions, and then I'm going to go into my
12 presentation.

13 To follow the city's argument here, there would be two
14 things that are necessary: Number one, you have to reverse
15 your property interest order of October 12, 2021 -- or 2020,
16 that's the city's first request, is to reverse your property
17 interest order.

18 Then their second request is to apply the *Penn Central*
19 standard to all three of the landowners' claims. The reason I
20 say that is because the *Penn Central* standard does say that you
21 weigh three various factors, and you apply the segmentation.
22 The Nevada Supreme Court was unequivocally clear in *Sisolak*,
23 *Sue* and *State versus Hoehne* that *Penn Central* analysis shall
24 not be applied to a *per se* categorical taking, a *per se*
25 regulatory statement, and a non-regulatory *de facto* taking

1 claim which are the landowners' three claims, that you're not
2 to apply a *Penn Central* analysis, and I'll give you one
3 example.

4 For Mr. Sisolak, he had a piece of property and he had
5 air space. The Nevada Supreme Court held that the County of
6 Clark height restriction ordinance number 1221 reserved 66 feet
7 and above for use by the public, and that was a taking. If we
8 apply *Penn Central* to those facts and segmentation to those
9 facts, Mr. Sisolak loses, because his property was segmented.
10 He still kept below 66 feet, and he still can build on his land.
11 So that's why the Nevada Supreme Court said, in the three claims
12 that we're moving for summary judgment on, you shall not apply
13 *Penn Central*, and you shall not apply segmentation. You look at
14 the property as an individual property, and I'll address that a
15 little bit more.

16 So those are our three claims, Your Honor. We're not
17 talking about *Penn Central*, and the reason we're not talking
18 about any *Penn Central* analysis is because our three claims are
19 very limited. And the Court has said we will not apply *Penn*
20 *Central* under these circumstances, because they say a *per se*
21 categorical taking is a categorical -- is a taking in and of
22 itself. They say a *per se* regulatory taking is a taking in and
23 of itself. They say that a non-regulatory *de facto* taking is a
24 taking where the Government substantially interferes with the
25 use and enjoyment of property. There's no defenses. You don't

1 get to come in and say, Well, there's segmentation. You don't
2 get to come in and say, Well, there's no ripeness. You don't
3 get to come in and say, Well, there's no *Penn Central* factors.
4 So the Court found that when we meet that threshold, if this
5 Court says, Listen, I've got this standard and you've met the
6 threshold, then that's a taking. So that's the first thing.

7 Then the second thing, Your Honor, is in *Sisolak*, this
8 is the question I thought you had, was if the Government
9 exercises its discretion and that results in a taking, is that
10 a taking?

11 So you have this whole petition for judicial review
12 and taking law, and the Government is over here saying, We have
13 discretion to do whatever we want, and even if it results in a
14 taking, there's no compensation. We have discretion under PJR
15 to do whatever we want to a property, therefore, you have no
16 property rights, and if you have no property rights, there's not
17 a taking.

18 Here's what the Court said, they said the
19 Government -- this is almost a verbatim quote: The Government
20 has the right to apply valid zoning ordinances that don't rise
21 to a taking. See, they leave that second part off. So the
22 Government can exercise its discretion as long as it doesn't
23 amount to a taking. But just because the Government doesn't
24 have discretion doesn't mean there's no property rights.

25 Your Honor, now I want to talk about -- I want to

1 address two of your very poignant questions today. This is
2 actually a little bit out of order of what I was going to do
3 today. The question you asked is, is there a restrictive
4 covenant or a condition that the property remain open space?
5 From the very beginning, counsel said absolutely, and here's
6 their argument, here's their argument. They say there was --
7 and I'll give you this, Your Honor. They say there was a
8 Peccole Ranch Master Plan that was adopted, and that Peccole
9 Ranch Master Plan is a planned development, a PD. And then
10 they say as part of that PD, the landowners' property must
11 remain open space. Must remain open space. That's their
12 argument, Your Honor.

13 I'm going to tell you -- and you hit it right on the
14 head. You said, well, that's your argument, where's the
15 evidence? Okay. Now I'm going to show you the evidence that is
16 the exact opposite of what counsel just told you.

17 And I want to start here, Your Honor. May I approach,
18 Your Honor, with -- I have an outline here on the property
19 rights issue.

20 **THE COURT:** Yeah, and make sure, do you have an extra
21 copy for the --

22 **MR. LEAVITT:** Absolutely, Your Honor, I have a section
23 that's called Rejection of the Peccole Ranch Concept Plan,
24 okay, and this is the facts and the law.

25 But let me just state one thing really quick --

1 **MR. SCHWARTZ:** Your Honor, if I could interrupt. I
2 don't have copies of these exhibits. Is there some way I could
3 get copies?

4 **MR. LEAVITT:** I have one for counsel right here and,
5 yes, we can email him. We will email that.

6 **MR. SCHWARTZ:** Could you email it now?

7 **MR. LEAVITT:** Yes, we will email it now.

8 **MR. SCHWARTZ:** Thank you.

9 **MR. LEAVITT:** But the argument that's being made, Your
10 Honor, on this condition issue is what they say is they say
11 there's this condition which is pending. The law is very clear
12 that if the Government is going to claim there's a condition on
13 a piece of property, it has to be abundantly clear in the
14 ordinances, you can't imply a condition, you can't spend seven
15 hours trying to tie documents together to say now there's a
16 condition that the property remain open space.

17 And here's all the Government had to do, Your Honor.
18 For seven hours through this hearing all they had to do was
19 walk in with a big board where the condition was imposed on the
20 property that it remain open space. You want to know why they
21 didn't do that? Because it doesn't exist.

22 And so here's where I want to go -- do you mind if I
23 hand this to you for the Court?

24 So, Your Honor, here's where I want to go through the
25 city's Peccole Ranch Master Plan argument, and I want to go

1 through and explain that the exact opposite is true.

2 So if you go to the -- on the bottom right-hand
3 corner, it's number 38, this is a statement made by 30-year
4 veteran attorney Brad Jerbic about this exact Peccole Ranch
5 Concept Plan argument that they're making to you. Your Honor,
6 this is the city's agent. He said that the Peccole Ranch Phase
7 II Plan was a very, very, very general plan. I've read every
8 bit of it. If you look at the original plan and what's out
9 there today, it's different. Then he went on to say, the Master
10 Plan that we talk about, this Peccole Phase II Plan is not a
11 278(a) agreement, it never was, never has been, not a word of
12 that language was in it.

13 Mr. Jerbic said that the Peccole Ranch Master Plan
14 that counsel argued to you extensively here in this case was
15 entirely abandoned. And you remember, Judge, that's when I
16 jumped up and I said this is very disturbing, because counsel
17 knows that this plan has been abandoned.

18 And then you go to the next page, Your Honor, this is
19 the Nevada Supreme Court opinion in the 17-acre case. The
20 Nevada Supreme Court said right there in yellow: "The parcel
21 does not carry the planned development district zoning
22 designation."

23 That's what they argued, that it was a planned
24 development and you had to stick to that planned development.
25 Instead, it's interesting what the Court said: The parcel

1 carries a zoning designation of residential plan development
2 district. Residential, meaning it has a residential use.

3 So this whole argument about planned development being
4 on the property, this whole argument about PRMP, Peccole Ranch
5 Master Plan being on the property is entirely false.

6 We go to the next page, Your Honor, page 40, this
7 proves it even further. This page 40 says that Peccole -- this
8 is the original owner. You remember they said the landowner
9 stepped in the shoes of the developer. Peccole and the City of
10 Las Vegas worked together to assure that there was no
11 restriction on the use of the 250-acre property, and, Your
12 Honor, they took express action to make sure there was never an
13 open space on the property. Remember, I stated from the
14 beginning the intent was always to develop the property
15 residentially.

16 In 1990 --

17 **THE COURT:** That's why I asked the simple question
18 regarding -- and I don't know what the City of Henderson did
19 when it came to the Legacy Golf Course, but they clearly had a
20 50-year -- I think it was 50-year restrictive covenant on the
21 property.

22 **MR. LEAVITT:** Yes. And, Your Honor, not only am I
23 going to show you there's no restrictive covenant on the
24 property, I'm going to show you that everybody in the area
25 signed disclosures recognizing that the 250-acre property was

1 not a golf course, not open space, and here it is right here:
2 Available for future development. The exact opposite of what
3 counsel has represented to you.

4 But let me go back to 1990, why everybody got these
5 disclosures. The next tab is page number 41. This is what's
6 been referred to as Z-1790, and it's Exhibit No. 154. The city
7 and Peccole got together. And it's a little bit difficult to
8 see in this, it says, "Gentlemen" -- this is the corrective
9 letter. This is a letter of what happened, and if it's blown
10 up on the right-hand side, and it's --

11 **MR. SCHWARTZ:** Your Honor, I haven't seen any of these
12 exhibits. I don't have any of these exhibits. I'm at a real
13 disadvantage out here.

14 **MR. LEAVITT:** It's Exhibit No. 154.

15 **THE COURT:** All right. Has that been emailed to him.
16 Ma'am?

17 **MS. WOLFSON:** We're having trouble --

18 **MR. LEAVITT:** Can we have Sandy email it to him from
19 our office?

20 **MS. WOLFSON:** The city used this exhibit.

21 **MR. LEAVITT:** The city used this exhibit as well, Your
22 Honor. It's in their documents.

23 **THE COURT:** And, ma'am, for the record, which exhibit
24 of the city was that, do you know?

25 **MR. LEAVITT:** 154.

1 **THE COURT:** Sir, it's 154 of the city.

2 **MR. LEAVITT:** It's 154 of the landowners, and it's
3 Z-1790. And, Your Honor, this has been discussed extensively.
4 They know what exhibit this is.

5 **THE COURT:** But I just want to make sure he knows what
6 you're looking at, that's all.

7 **MR. LEAVITT:** Okay, good.

8 So we're looking at Z-1790.

9 **THE COURT:** Okay.

10 **MR. LEAVITT:** Okay. So at Z-1790, on page 41, it says
11 the City Council held a meeting on April 4, 1990. They
12 approved the request for reclassification of property, and then
13 they describe the location of the property, which is the
14 landowners' property in this case. And here's what it went
15 from, Your Honor, we got to follow this: Non-urban, and then
16 resolutions of intent, and then, Your Honor, right before the
17 highlighted "2" it says "C-V." That's critical. It went from
18 all these designations and C-V. You want to know why that's
19 critical? Because C-V is the only zoning that allows open
20 space or golf course. And what did the zoning go to? It went
21 to R-3, RPD-7 and C-1. The City of Las Vegas and Peccole
22 worked to take off any potential open space, any potential golf
23 course use. And then, Your Honor, look what they put as the
24 proposed use: Single-family dwellings, multi-family dwellings,
25 commercial, office, and resort casino. This is in 1990. This

1 is the City of Las Vegas and Mr. Peccole, in 1990, saying we're
2 not going to put any C-V zoning on this property, we're not
3 going to put any golf course use --

4 **THE COURT:** And for the record, the C-V zoning, that
5 is the open spaces designation?

6 **MR. LEAVITT:** That's the only zoning that allows open
7 space or golf course. It was expressly and specifically
8 removed from the property in 1990.

9 Then, importantly, Your Honor, we turn to the next
10 page, page number 42, and we have the conditions that are
11 listed. Remember counsel said one of the conditions is the
12 property has to remain open space and golf course. You know
13 what's not listed as a condition? Open space or golf course.

14 So we have an action by the City of Las Vegas and the
15 landowners working together in 1990 to make positively sure that
16 this 250-acre property remains available for residential use.

17 If Mr. Peccole and the City of Las Vegas wanted this
18 property to remain open space, they could have very easily put
19 on a condition "open space." They could have very easily put
20 on there "golf course." They could have very easily kept on
21 the C-V zoning, and the city could have very easily said you
22 have to leave this property as open space or golf course. They
23 did the exact opposite, and they put the zoning on the property
24 which allow-- and, Your Honor, they even say what the proposed
25 uses are: Single-family, multi-family, commercial, office, and

1 resort casino. They put it right there. Yet counsel spent
2 seven hours, seven hours trying to convince the Court that this
3 didn't happen. Argument of counsel, as you well know, Your
4 Honor, as we all know is not evidence. This is evidence
5 (indicating) of what actually occurred on the property.

6 Now, Your Honor, let's move to the next page, which is
7 our Exhibit No. 130. This is on page 43. This is an
8 inner-office memo at the City of Las Vegas that we had to
9 obtain through public records, and the City of Las Vegas made
10 their own search to see if there's a golf course open space
11 condition, and they said, "There are no conditions mentioned
12 that pertain to the maintenance of the open space/golf course
13 area." The City did it own research and found that there was
14 no condition, found that there was no restriction that the
15 property remain open space or a golf course. That's why Brad
16 Jerbic said -- Your Honor, this is contemporaneous with the
17 facts of this case, contemporaneous with the facts of this
18 case, Mr. Jerbic stated there was never a Peccole Ranch Master
19 Plan.

20 Now, Your Honor, I want to turn to the next page 44.
21 This is Exhibit No. 133 of our exhibits. We did an analysis,
22 Exhibit No. 133. Here's the large board of this analysis that
23 we did, and this is all supported by affidavit. This analysis
24 shows an overlay on this area here. You can see -- maybe I'll
25 orient ourselves here, Your Honor. This is Charleston

1 Boulevard (indicating), this is Haulapai (indicating), this is
2 and Alta (indicating), and the landowners' property is between
3 that area, and you can see the golf course kind of laid out
4 there. Okay. This shows an overlay of what the Peccole Ranch
5 Concept Plan was going to look like, and then it shows what was
6 actually built. There are 1,014 units built, contrary to that
7 original Peccole Ranch Concept Plan.

8 Now, let's think about that for just a minute, Judge.
9 The City of Las Vegas said the Peccole Ranch Master Plan is the
10 governing document here; the Peccole Ranch Master Plan is what
11 everybody had to comply with; the Peccole Ranch Concept Plan was
12 a PD plan that was binding, and that Peccole Ranch Master Plan
13 bound this property to be open space and golf course. Number
14 one, you just saw that the exact opposite happened in Z-1790;
15 and number two, we see that the Peccole Ranch Master Plan was
16 never followed, and the reason it was never followed, Judge, is
17 because there was litigation between Triple 5 and Peccole who
18 started the original Peccole Ranch Master Plan, and because of
19 that litigation, they abandoned the plan all together. That's
20 why Brad Jerbic said that plan has never been followed.

21 Now, Judge the next 1, 2, 3, 4 pages of the
22 landowners' book of exhibits here, page 45, 46, 47 and 48,
23 those are all the disclosures in the area. I'm not going to go
24 through them, Judge. But you asked, Hey, what did people think
25 was going to happen in this area? Let's just go through them.

1 Seller makes no representation about zoning or future
2 development. Look at number 4 there: No golf course or
3 membership privileges. Look at number 7: Views or location
4 advantages. They're not there.

5 Now, let me turn to page 46, because counsel said
6 something this morning that was a little disturbing to me. He
7 said that the golf course was an amenity for the Queensridge
8 community. Again, the exact opposite is the truth. If you
9 look at page 46 here, these are the CC&Rs for Queensridge
10 community. The existing golf course commonly known as Badlands
11 is not a part of the Queensridge community or inexorable
12 property. The existing 27 golf course, commonly known as
13 "Badlands" is not a part of the property.

14 So you had a good question: Well, in Legacy, it was
15 part of the property, the golf course. It had a 15-year
16 restriction on it. Here --

17 **THE COURT:** I thought it was 50. Was it 15?

18 **MR. LEAVITT:** 50, sorry.

19 **THE COURT:** Yeah, I thought it was 50.

20 **MR. LEAVITT:** Here, they're expressly stating the
21 exact opposite. It's not a part of the Queensridge community,
22 it's not an amenity. We're disclosing to you that this
23 property may be developed. This is written right in the
24 Queensridge CC&Rs.

25 And, Judge, who wrote the Queensridge CC&Rs?

1 **THE COURT:** Peccole.

2 **MR. LEAVITT:** That's right.

3 **THE COURT:** I mean, that's --

4 **MR. LEAVITT:** I don't mean to ask the Court questions.

5 **THE COURT:** I know it's rhetorical. I get it, I do.

6 **MR. LEAVITT:** And why did he say it's not part of it?

7 Because in 1990, he met with the city and they rezoned
8 everything for that area and took out the C-V zoning
9 specifically to make sure that this property here (indicating)
10 was available for residential zoning. That's why he did it.

11 And, Judge, you go to the next page, we have more
12 disclosures. I'll just refer to the one on the right. This is
13 a disclosure for the properties in the area. Look at the
14 current zoning on the contiguous parcels is, look at what the
15 south is, and to the south, RPD-7 residential up to seven units
16 per acre. Right there.

17 If this property here (indicating), the landowners'
18 property was reserved as open space, why was everybody in this
19 area being disclosed that the property to the south is RPD-7?
20 Zoning classifications describe the land uses. You go on with
21 the views, and they say, Listen, we're not giving you any rights
22 to views here because it's available for development.

23 Then we go to the next page, page 48, this is the
24 disclosures, a map put right inside of the city's -- or, I'm
25 sorry, inside of the Queensridge CC&Rs. You can see where it's

1 highlighted as "not parked." I want to reference the Court to
2 this little triangle at the top here (indicating). Do you see
3 that little triangle at the top right below Alta Drive?

4 **THE COURT:** Yes.

5 **MR. LEAVITT:** That's the location of the 35-acre
6 property right here (indicating).

7 Going out to the key at the bottom there it says,
8 "subject to development rights." That doesn't sound like the
9 Queensridge community was told this was going to be open space
10 or golf course.

11 And then here is the kicker --

12 **THE COURT:** I mean, I don't mind saying this, I wasn't
13 a land and planning use lawyer, but it just seems to me that if
14 that were the case, there would be documents and evidence to
15 support that.

16 **MR. LEAVITT:** And there are none. Instead, Judge, the
17 documents and evidence that we submitted to you state the exact
18 opposite.

19 I want to show you this document right here, Judge.

20 **MR. SCHWARTZ:** Your Honor, I hate to interrupt, but I
21 have got one exhibit by email. I don't have -- I'm not getting
22 these exhibits. I can't follow along.

23 **MR. LEAVITT:** This is the Queensridge CC&Rs that
24 counsel has in his possession, Your Honor. Queensridge CC&Rs
25 are attached as an exhibit, and I believe it's Exhibit No. 33;

1 is that correct?

2 **MR. SCHWARTZ:** Your Honor, these exhibits are in about
3 20 different volumes. They don't say -- the exhibit doesn't
4 tell me which volume it's in. By the time I find these
5 exhibits, counsel has moved on to another exhibit. Can't they
6 send me an email copy of whatever he's showing to the Court?

7 **MS. WATERS:** Sir, it's taking a minute.

8 **MR. LEAVITT:** It's large, so it's taking a minute,
9 which, Your Honor, this actually might be a good time for me to
10 put on the record that when Mr. Molina was up here and I asked
11 him for his email or his presentation, we never got it, it was
12 never sent to us. So I haven't said that --

13 **MR. MOLINA:** I handed it to you.

14 **MR. LEAVITT:** No, that's not true. It was -- we asked
15 for the presentation that night by email. They said it was too
16 large and they couldn't send it to us, and they didn't give it
17 to us the next day. He handed to me the old maps. He didn't
18 hand to me their presentation.

19 **MR. MOLINA:** What?

20 **MR. LEAVITT:** So here's what we're doing. It's going
21 to them. Their present counsel who is sitting here in the
22 courtroom has a physical copy of the document, and it's being
23 sent to them, Your Honor.

24 What's that?

25 **MS. WATERS:** And it's on the screen.

1 **MR. LEAVITT:** And it's on the screen, and we have on
2 the screen the exhibit so he's able to see them.

3 **THE COURT:** Sir, can you see the screen? For example,
4 there's a document up, it's Bates stamped 02685, Exhibit C. It
5 appears to me to be a map, final map for the Peccole West.
6 That's what's at the top. Underneath it in parentheses is
7 "Queensridge."

8 **MR. SCHWARTZ:** Your Honor, I can only see the Court,
9 the bench. I don't see anything on my screen other than that,
10 and an inset box with me.

11 **MS. WATERS:** It's still sending.

12 **MR. LEAVITT:** It's sending, Your Honor. They have it
13 present, counsel has it.

14 **THE COURT:** You can see it now, sir. You should be
15 able to see it now. Can you see it?

16 **MR. SCHWARTZ:** No, I can't, Your Honor. I just see
17 the bench, I just see the judge and the man standing besides
18 you, and now I see Mr. Leavitt standing behind the podium, but
19 there's nothing on my screen other than that.

20 **MS. WATERS:** I'm sending it. It's saying "sending."
21 I don't know how to rush that along. I mean, he has a copy of
22 it.

23 **THE COURT:** Sir, do you have all the documents that
24 are Bates stamped?

25 **MR. SCHWARTZ:** Your Honor, is that a question for me,

1 Andrew Schwartz?

2 **THE COURT:** Yes.

3 **MR. SCHWARTZ:** I don't have any documents other than
4 the, I don't know, 20-or so volume of exhibits. And, again,
5 the exhibits are not -- they don't tell you which volume
6 they're in, so it's -- searching for them takes considerable
7 amount of time.

8 **THE COURT:** Do you know which volume this is in?

9 **MR. LEAVITT:** Yes, Your Honor. We actually have --
10 let me just say it this way. We've produced all the volumes.
11 On the front of the volume it has a list of all the exhibits
12 plus the page number for every single exhibit. They're all in
13 page number order.

14 **THE COURT:** This would be 2685, for the record.

15 **MR. LEAVITT:** Just for the Court's reference, these
16 aren't unknown documents. These are documents which have been
17 heavily litigated in both of these cases. Counsel is extremely
18 aware of the Queensridge CC&Rs.

19 **MR. SCHWARTZ:** Your Honor, let's proceed. I'll just
20 do the best I can. If Mr. Leavitt could give me the exhibit
21 number and the volume it's in, that would allow me maybe to
22 keep up. Thank you.

23 **MR. LEAVITT:** So for the record, this is the
24 Queensridge CC&Rs, and I'll just go to the last page of the
25 Queensridge CC&Rs, Your Honor, and this is where it says a map

1 with future development right over the landowners 35-acre
2 property.

3 And also, I'll pause right here for just a moment.
4 And this is all in the record. The adjoining property owners
5 actually sued the landowners and said you shouldn't be able to
6 build, because we think the property should remain open space;
7 we think the property should remain as a golf course - the
8 exact issue that's before you today that the city is arguing.
9 The city was a party to that lawsuit that was later dismissed.
10 You know what the outcome of that argument was, Judge? There's
11 a decision by the district court in that case, and it's
12 extensive findings of facts and conclusions of law. Here's
13 what the Court said. The property is RPD-7 zoned. The
14 landowners have the right to close the golf course, and here's
15 what the quote was: The landowners have the, quote, right to
16 develop, end quote.

17 This whole very issue of this is open space, that this
18 is the Peccole Ranch Concept Plan, and that this has to remain
19 a golf course was actually fully and fairly adjudicated, and
20 the lawsuit against the property -- or lawsuit brought by the
21 adjoining property owners, and the district court held they had
22 the right to develop. That was appealed to the Nevada Supreme
23 Court, and the Nevada Supreme Court affirmed it not once but
24 three times, because the adjoining property owners kept filing
25 petitions for rehearing.

1 So this whole underlying argument that the city is
2 making, their whole argument rests on the property was supposed
3 to be open space or golf course forever.

4 **THE COURT:** And for the record, the city was part of
5 that lawsuit?

6 **MR. LEAVITT:** The city was part of that lawsuit to
7 very begin with, and they asked to be dismissed from it. So
8 they had full and fair notice of that issue, and they had full
9 and fair opportunity to participate, and the city did not. You
10 want to know why, Judge? This is what's been such disturbing
11 in this case, is while the landowners were filing their
12 applications, the city was on our side. The city agreed with
13 us this entire time. The city said to the adjoining owners,
14 this property is not a golf course property. The city said to
15 the adjoining owners, this property is not open space.

16 Brad Jerbic, we just read his statement, that's a
17 homeowners' association meeting where Brad Jerbic appeared, and
18 Brad Jerbic says to these homeowners, he says: That was a very
19 general plan. I've read every bit of it. If you look at the
20 plan, what's out there today is different. He said, "We never
21 followed the Peccole plan."

22 My point in bringing that up is we have always been on
23 the same page with the city. When this litigation started,
24 their private counsel took the exact opposite position and
25 started arguing that the Peccole Ranch Concept Plan is now

1 binding on everybody, when they said the exact opposite for
2 years.

3 Remember, Your Honor, when it -- I'll go through this.
4 When we submitted, when the landowners submitted their
5 applications to develop the 35-acre property, you remember what
6 the Planning Department said? They have zoning, they can go
7 forward and build. Remember when the landowner submitted their
8 Master Development Agreement Application, what did the City
9 Planning Department say? They have the zoning, they should be
10 able to go ahead and build.

11 Never once during the application process did the city
12 come forward and say, Hey, you have to leave this property open
13 space; Hey, this property is golf course.

14 This whole open space/golf course argument is an
15 invented argument for litigation, which is based only on
16 argument by counsel, and is the exact opposite of the city's
17 position for the past five years, and it's the exact opposite
18 of the documentary evidence.

19 If we turn to -- this is ordinance number 5353,
20 page 49 of our booklet, Exhibit No. 43, a well-known document
21 in this case. This further confirms what I'm telling you, Your
22 Honor. Again, evidence. Ordinance number 5353, it's
23 undisputed that this occurred in 2001, and the Court can see
24 the highlighted part there on 5353. It says, "The document
25 shows for each parcel the zoning designation on the current

1 zoning atlas and the new zoning designation for the property."
2 What happened here with ordinance number 5353, as the city
3 explains, is it wanted to conform all of the zoning in the
4 city, and it's undisputed in this case that in 2001 the city
5 reconfirmed the RPD-7 zoning. And what's critical is what the
6 city says in section 4 on the next page: "All ordinances or
7 parts of ordinances or sections, subsections, phrases,
8 sentences, clauses, paragraphs contained in the City Municipal
9 Code, 1983 Edition in conflict herewith are hereby repealed."

10 So the city says unequivocally --

11 **THE COURT:** I mean, that language is typically -- and
12 I've dealt with ordinances before, and that's general language
13 that's in the -- I mean to the city's benefit, they always put
14 that language in there just to make sure it's clear, clarity as
15 you proceed forwards.

16 **MR. LEAVITT:** Absolutely. So what was the clarity
17 they wanted to know? Zoning applied, that the RPD -- that the
18 property was RPD-7 zoned.

19 And so they said we don't care what may or could or
20 should have happened in the past, this property is now RPD-7
21 zoned property, which is consistent, Your Honor, with what
22 happened on this property, which was to assure that there are
23 only three zoning designations and to assure that the C-V
24 designation was taken off.

25 Now, I want to turn to page 51.

1 **THE COURT:** What's the impact of, I mean, from a legal
2 perspective, of the -- and, I mean, I don't know the exact term
3 for it, but I'll call it the special ordinance that was
4 approved by the City Council within the last few years
5 specifically related to this property. What impact does that
6 have legally?

7 **MR. LEAVITT:** Which ordinance are you referring to,
8 Your Honor?

9 **THE COURT:** I'm talking about the one that you
10 indicated that was prepared -- I mean, I'm sorry, approved by
11 the City Council specifically addressing the golf course. You
12 know what I'm talking -- you said, Judge this shouldn't happen,
13 this is bargaining this defendant.

14 **MR. LEAVITT:** Oh, yes, okay, so that's ordinance
15 number 2018-24, okay. This is after the city denied the
16 35-acre application, after the city denied the magic realm
17 agreement after the city denied the fence, and after the city
18 denied access, the city then took action specific towards the
19 landowners' property. Here's the action they took. They said,
20 number one, this bill targets only your property, 2018-24, they
21 said that. There's no evidence to contradict that. Counsel
22 has it, that it targeted only the landowners. Number two, it
23 imposes requirements making it impossible to develop. So the
24 city recognized the property was able to be developed because
25 then they imposed impossible-to-meet requirements to develop;

1 and then, thirdly, here's the quicker. They said you have to
2 allow the public to access the property. That was the
3 operative language. They put --

4 **THE COURT:** By itself that takes it out of *Penn*
5 *Central*.

6 **MR. LEAVITT:** Of course. And that's exactly what
7 happened in the *Sisolak* case. That's exactly what happened in
8 the *Sierra Point versus Hassid* case, and in both of those
9 cases --

10 **THE COURT:** Do they -- do they --I mean --

11 **MR. MOLINA:** Absolutely not, Your Honor. In the
12 Declaration of Peter Lowenstein that we went through last week,
13 if you go through -- there's a section that specifically talks
14 about this ordinance. It was not specific to their property,
15 it was never applied to them, and this is absolutely false, and
16 I just need to make an objection for the record. That's
17 completely misstating what the evidence shows.

18 **THE COURT:** Now, when you say that it was never
19 applied to them, wasn't the ordinance approved, though?

20 **MR. MOLINA:** The ordinance was approved, but it didn't
21 automatically apply to them. The city had to either ask them
22 to submit an open space plan or it would apply to a future golf
23 course that closed. In this case the golf course was already
24 closed at the time the ordinance was passed.

25 **THE COURT:** But it didn't -- there were no other golf

1 courses at issue, right?

2 **MR. MOLINA:** I mean, there are golf courses throughout
3 the county?

4 **THE COURT:** No, no, no, there were no other golf
5 course at issue, i.e., there were none that were failing, there
6 were no other golf courses that were having --

7 **MR. MOLINA:** Well, there's Silverstone, that's another
8 golf course in Las Vegas that failed.

9 **THE COURT:** And where is that ordinance again?

10 **MR. LEAVITT:** I will pull it up, Your Honor. It's
11 Exhibit 108, Your Honor.

12 And as we're pulling this up, we can read the
13 ordinance. We don't need Mr. Lowenstein to tell us what doesn't
14 apply. It's an exhibit in our exhibit book, Your Honor.

15 **THE COURT:** Yes.

16 **MR. LEAVITT:** Landowners' exhibit. We could turn to
17 Exhibit No. 108. That's -- it should have a red cover, and I
18 have another book, Your Honor.

19 **THE COURT:** No, I have it here. Yes, I have it.

20 **MR. LEAVITT:** Okay. Exhibit No. 108. And once you
21 get there, Your Honor, I can reference you.

22 **THE COURT:** I have it.

23 **MR. LEAVITT:** Okay. Now, the front page there at
24 003202, it says, A, General, so this is the ordinance that was
25 passed by the City of Las Vegas. It says: "Any proposal by or

1 on behalf of a property owner to re-purpose a golf course or
2 open space, whether or not currently in use as such," in other
3 words it applies no matter what you've done so far, "is subject
4 to the public engagement requirements in subsection (c) and (d)
5 as well as the requirements pertaining to the development
6 review and approval process, development standards and the
7 Closure Maintenance Plan set forth in E(2)(G) exclusive." So
8 it expressly states if you're going to change your property
9 from an open space to a golf course, you are subject to (g),
10 that's the operative one. And just so we're clear here, the
11 only evidence we have is that this applies only to the
12 landowners.

13 So let's flip over to section (g), which is 003211,
14 bottom right-hand corner. See at the top there it says (g)
15 Closure Maintenance Plan?

16 **THE COURT:** Yes.

17 **MR. LEAVITT:** Then we turn to the next page, and one
18 of the requirements under that Closure Maintenance Plan is
19 little (d) on page 003212. I don't know if you're there, Your
20 Honor.

21 **THE COURT:** I'm there. "Provide documentation
22 regarding ongoing public access."

23 **MR. LEAVITT:** There it is.

24 **THE COURT:** "Access to utility easements and plans to
25 ensure that such access is maintained."

1 **MR. LEAVITT:** Why? Here is where it all fits in,
2 Judge. Why did the city adopt this language that applies only
3 to this landowners' property? Because it already denied the
4 fence. It denied the landowners' fence to keep the public out.

5 And the city -- and do you remember why that fence was
6 denied? Counsel told us on Friday. He said the fence was
7 denied because of political pressure. What was that political
8 pressure? The surrounding property owners wanted to be able to
9 access the property, and so they put right in an ordinance that
10 you have to allow ongoing public access. That act alone is a
11 *per se* taking under *Sisolak*.

12 Now, it doesn't matter whether the public actually
13 used it, but, Judge, we know they did. There's no, Hey, we're
14 going to adopt this but it might or might not apply to you;
15 Hey, we're going to adopt this but we're just kidding. That
16 didn't happen as counsel is representing.

17 The very beginning of this ordinance says that section
18 (g) shall apply to you, and it shall apply only to the
19 landowners.

20 But let me back up for just a minute and put this bill
21 in context. This is -- remember, the council member, who was
22 the highest level member at the city, went to these homeowners
23 and in their homeowners meetings said to them "This property is
24 your recreation," that's what he said. He went to their
25 meeting --

1 **THE COURT:** Is that Mr. -- for the record is that
2 Mr. Seroka --

3 **MR. LEAVITT:** That's Mr. Seroka.

4 **THE COURT:** -- who sponsored the bill?

5 **MR. LEAVITT:** Who sponsored the bill. He went to the
6 homeowners and said, "This property is your recreation, you get
7 to use it." Then he followed up by sponsoring the 2018-24, and
8 then he required that that language be put in there that the
9 landowners must allow ongoing public access to the property.
10 So remember, counsel said, Listen, statements of council
11 members are irrelevant, I'll get to that in a minute. But in
12 addition to saying that, he then sponsored the bill and the
13 City Council adopted the bill, so there wasn't just a statement
14 by a council member, there was a follow-up and an adoption of a
15 bill.

16 **THE COURT:** Well, for all practical purposes, the City
17 Council has spoken once this bill has been introduced and
18 approved.

19 **MR. LEAVITT:** Absolutely. And, Judge, can I just give
20 an example here? This was in the *Knick versus City of --*
21 *Township of Scott Pennsylvania*, exact same thing happened. In
22 that case, the city adopted an ordinance saying that private
23 landowners had to allow public to enter into their cemeteries
24 around the property. Taking.

25 **THE COURT:** So, I mean, we can look at it factually.

1 The property owner was denied access, yet they're required,
2 pursuant to the ordinance, to permit public access.

3 **MR. LEAVITT:** That's exactly what happened.

4 **MR. MOLINA:** Your Honor, that's not what the ordinance
5 requires. This is a closure -- this provision addresses
6 Closure Maintenance Plan, and if the landowner were going to
7 provide access, then the Closure Maintenance Plan would need to
8 address that. Completely misconstrues --

9 **THE COURT:** I'm just looking at the language, it says,
10 "Provide documentation regarding ongoing public access."

11 **MR. MOLINA:** That's if the landowner allows ongoing
12 public access. It's not saying that the landowner *must* provide
13 ongoing public access.

14 **MR. LEAVITT:** I appreciate counsel's attempt to
15 interpret the law, Your Honor, but the language is plain. It
16 says you have to provide documentation showing that the public
17 is coming onto the property. If counsel has objection to this
18 evidence, he can enter it, or if he has an argument, he can
19 wait until I'm done and then make that argument.

20 But, Your Honor, not only that, but we've presented as
21 Exhibit 119 the council minutes which state the exact opposite
22 of what counsel just told you. This is Exhibit 119, Bates
23 stamped 004163. This is Robert Summerfield who is the head
24 planner of the City of Las Vegas: "I want to be clear that the
25 Closure Maintenance Plan, because the language does say

1 something along the lines of what we've been aware of, may
2 close. But, again, where there's a golf course" -- he then
3 goes on to explain that that provision applies retroactively.

4 That same language, Your Honor, appears several times
5 in the minutes. Here we go right here. This is Exhibit No.
6 118: The retroactive provision. This is 003957. This is
7 November 7, 2018 when this issue is being discussed. The
8 retroactive provision. The only way this becomes retroactive --
9 and everybody has their own definition -- there's a potential
10 for property that's golf course or open space that either has
11 been or will be withdrawn, and they have to propose the Closure
12 Maintenance Plan.

13 Then right here, page 004086, referring to 2018-24:

14 Our lawyer: I just want to ask you, is this
15 retroactive? Does this go back to -- I mean, I haven't
16 mentioned Badlands. I don't want to get into that much, but
17 does this go back to any developer that is already in the
18 process?

19 In other words he's saying is it retroactive?

20 Their attorney at that time, not during trial, but
21 unbiased by the parts of litigation here, he says: To that
22 extent all laws are retroactive. The one part of this
23 ordinance that could be considered retroactive --

24 **THE COURT:** That's not necessarily true. If it's
25 substantive in nature versus procedural. Procedural, they're

1 retroactive; substantive, no, prospective, unless it's
2 specifically carved out.

3 But go ahead, I get it.

4 **MR. LEAVITT:** Well, he goes on to say right here:

5 Insofar as the retroactively of this part, he says it needs to
6 propose a Closure Maintenance Plan. He goes on to say that the
7 city's intent on drafting 2018.24 was to mandate section (g)
8 Closure Maintenance Plan on the landowners. He said it was
9 intended to apply retroactively specific to these landowners.

10 And, Judge, we don't have to even go there. All we
11 have to do is look at the general section right up front that
12 says section (g) applies to the landowners when they try and
13 change their property.

14 And the City Council spoke, they didn't say you have
15 to provide ongoing public access only if we ask you to. They
16 could have put that in there. The city could have put right in
17 there behind that clause: You have to do this only if we ask
18 you to. They didn't do that. They said you have to provide
19 ongoing public access, which is consistent with Mr. Seroka's
20 statement to the homeowners' association.

21 **THE COURT:** I mean, legally that's not much different,
22 if any, from *Sisolak*.

23 **MR. LEAVITT:** That's the same exact thing, Your Honor,
24 and that's what we've argued.

25 In Mr. Sisolak's case, the county adopted ordinance

1 number 1221 that said you have to allow the airplanes to use
2 your air space. It's the same exact thing.

3 In *Cedar Point Nursery versus Hassid*, the State of
4 California adopted a statute that said that the farm owners had
5 to allow the labor unions to come onto their property 120 days
6 of the year for 2 hours a day. Extremely less restrictive than
7 this one. The United States Supreme Court said the adoption of
8 that statute was a taking - a definitive statement by the
9 United States Supreme Court in *Cedar Point Nursery*.

10 So, Your Honor, that -- and to keep in mind, in *Cedar*
11 *Point Nursery*, Your Honor, the labor unions didn't even go onto
12 the property, they were stopped, and the United States Supreme
13 Court said it's irrelevant, whether they went on or not, you
14 adopted the statute inviting them onto the property.

15 And then in this case it's even worse, Your Honor,
16 because Mr. Seroaka announced the public can use the property;
17 they adopted a statute 2018-5 saying you can use the property;
18 and then we have the affidavit of Don Richards, which has been
19 submitted to the Court, and in the affidavit of Don Richards,
20 Mr. Richards states unequivocally that he interviewed people
21 coming onto the property, and they said, We're here because the
22 city told us this is our recreation - even more egregious than
23 the *Knick* case, even more egregious than the *Cedar Point*
24 *Nursery* case.

25 So, Your Honor, I want to go on and I want to finish

1 off on this Peccole Ranch concept argument.

2 **THE COURT:** How much time do you anticipate that will
3 take, Mr. Leavitt?

4 **MR. LEAVITT:** Just this last part right here?

5 **THE BAILIFF:** Just a reminder, we have to get out of
6 here by noon.

7 **MR. LEAVITT:** Wow.

8 **THE COURT:** We have this afternoon, Mr. Leavitt.

9 **MR. LEAVITT:** We do have this afternoon?

10 **THE COURT:** Didn't we say this afternoon?

11 (Discussion off the record between the Judge and Clerk.)

12 **THE COURT:** No, I'm talking about our court. Didn't
13 we say telephonically at my court?

14 **MR. LEAVITT:** Yeah, I think we can go telephonically,
15 we could show up there.

16 **THE COURT:** Right, didn't I say that? I don't
17 remember for sure.

18 **MR. SCHWARTZ:** I thought we were going tomorrow.

19 **THE COURT:** It is tomorrow? Okay. All right. Well,
20 I'm not going to change anything.

21 **MR. LEAVITT:** Oh, okay. I misunderstood.

22 **THE COURT:** But tomorrow at 9:15 -- and, I mean, I'm
23 very thankful that Judge Krall permitted me to use her
24 courtroom. I just don't want to overstep my bounds because she
25 has, I know, a lot of stuff this afternoon; is that correct?

1 And they've got to get prepared.

2 So what we'll do then -- and, you know what, I don't
3 mind saying this, we're going to finish this up tomorrow, and
4 that's just how I look at it. We have to have some sort of
5 closure on these issues. We'll finish it up.

6 We start at what, 9:15 tomorrow?

7 (Off-the-record discussion.)

8 It will be 9:15.

9 **MR. LEAVITT:** Your Honor, so we could come live to
10 your courtroom, your regular courtroom?

11 **THE COURT:** I mean, do we have any courtrooms
12 available on this floor? My courtroom is about --

13 **THE BAILIFF:** Significantly smaller, Your Honor.

14 **THE COURT:** Significantly smaller.

15 **MR. LEAVITT:** Your Honor, I could stay back or I could
16 even go back and sit at a table, but I just need --

17 **THE COURT:** See, this is how we would handle that if
18 we do have -- if I permit you to come live, there would be two
19 representatives per side and that's it.

20 **MR. LEAVITT:** That's fine, Your Honor.

21 **THE COURT:** Is there any objection to that? Because I
22 want to be candid with everyone, I've never done more than
23 that, first of all; secondly, it's a smaller courtroom, and
24 notwithstanding, I want to make sure everyone has a full and
25 fair opportunity to place their positions on the record, but

1 just as important, too, I do have to be concerned about
2 safety --

3 **MR. LEAVITT:** Agree, Your Honor.

4 **THE COURT:** -- you know, for counsel, for everyone
5 involved in this case, I don't mind saying that. Because for
6 the record I take COVID-19 very seriously. In fact, I went out
7 yesterday and got my booster (indicating).

8 **MR. LEAVITT:** I've been shot, too, Your Honor.

9 **THE COURT:** Yeah. But it's very, very important.

10 So this is --

11 **UNIDENTIFIED SPEAKER:** Your Honor, can I ask a
12 question?

13 **THE COURT:** Yes, you may, ma'am.

14 (Question inaudible.)

15 **THE COURT:** Yeah, just two per side.

16 **UNIDENTIFIED SPEAKER:** Including the assistants?

17 **THE COURT:** Yes. But everyone can also listen. I
18 mean, it will be video fed. And I'm going to make that for
19 both sides, because that's about what we can do; is that
20 correct, Mr. Marshal?

21 **THE BAILIFF:** If that's what you want, yes, Your
22 Honor. I mean, I could see where we could probably have some
23 people in the galley, if you'd like.

24 **THE COURT:** No, we haven't done that.

25 **THE BAILIFF:** Then we're not going to do that, Your

1 Honor, like you said.

2 **THE COURT:** We haven't done that at all.

3 So I don't want to -- especially right now because
4 from a healthcare perspective -- and health, we have a lot of
5 issues going on right now, and I think everyone is well aware of
6 that. And, yes, I thought we would have been in a much
7 different place four or five months ago, but unfortunately
8 that's not the case.

9 So Mr. Leavitt, and for the city, too, we're going to
10 finish this up tomorrow morning, we have to. We have one matter
11 in the morning. I have one status check at 9:00 o'clock. 9:15
12 we can roll and we'll finish this up.

13 **MR. LEAVITT:** That sounds perfect, Your Honor. We
14 look forward to that.

15 **THE COURT:** Just remember where you're at. And two
16 representatives per side, it could be lawyer and legal
17 assistant or two lawyers. It doesn't matter.

18 Bottom line, too, I don't mind saying this, everyone
19 has done a wonderful job of getting me everything I need, from
20 all the booklets and the evidence and charts and all those
21 things. It greatly assisted me. I don't mind saying that.

22 And so we'll go ahead and recess. I have to respect
23 Judge Krall. She's been so gracious to permit us to come in
24 here. This is her courtroom. I wish my courtroom was set up
25 like this.

1 Anyway, that's what we're going to do. And what we
2 need to do is bring the banker's -- I'm sorry, library cart,
3 Mr. Marshal, so we can take all this stuff back with us.

4 **THE BAILIFF:** Yes, Your Honor.

5 **THE COURT:** Anyway, let's recess until 9:15 tomorrow
6 morning.

7 **ALL COUNSEL:** Thank you, Your Honor.

8 (Proceedings adjourned at 12:04 p.m.)

9 ---o0o---

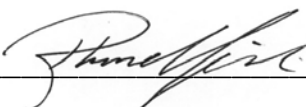
Reporter's Certificate

State of Nevada)
)
County of Clark)

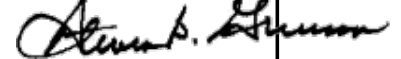
I, Rhonda Aquilina, Certified Shorthand Reporter, do hereby certify that I took down in stenotype all of the proceedings had in the before-entitled matter at the time and place indicated, and that thereafter said stenotype notes were transcribed into typewriting at and under my direction and supervision and the foregoing transcript constitutes a full, true and accurate record to the best of my ability of the proceedings had.

In witness whereof, I have hereunto subscribed my name in my office in the County of Clark, State of Nevada.

Dated: October 6, 2021



Rhonda Aquilina, RMR, CRR, Cert. #979



IN THE DISTRICT COURT
CLARK COUNTY, NEVADA

---o0o---

180 LAND COMPANY,)	
)	
Plaintiff,)	Case Number
)	A-17-758528-J
)	
vs.)	
)	
CITY OF LAS VEGAS,)	
)	
Defendant.)	

Reporter's Transcript of Telephonic Proceedings
Tuesday, September 28, 2021

BEFORE THE HONORABLE JUDGE TIMOTHY C. WILLIAMS
DISTRICT COURT JUDGE

Reported By: Rhonda Aquilina, Nevada Certified #979, RMR, CRR
Court Reporter

Rhonda Aquilina, Nevada Certified #979

1 APPEARANCES:

2 (PURSUANT TO ADMINISTRATIVE ORDER 20-24, SOME MATTERS IN
3 DEPARTMENT 16 ARE BEING HEARD VIA TELEPHONIC APPEARANCE)

4 For Plaintiffs:

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AUTUMN L. WATERS
8 ATTORNEYS AT LAW

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11 BY: BRYAN K. SCOTT
12 PHILIP R. BYRNES
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13 DEPUTY CITY ATTORNEYS

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16 ATTORNEY AT LAW

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18 San Francisco, CA 94102
19 BY: ANDREW W. SCHWARTZ
ATTORNEY AT LAW

Tuesday, September 28, 2021

9:17 a.m.

P R O C E E D I N G S

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THE COURT: Calling the next matter, that happens to be page 3 of the calendar, 180 Land Company versus the City of Las Vegas.

Let's go ahead and set forth our appearances for the record.

MR. LEAVITT: Good morning, Your Honor. James J. Leavitt on behalf of the plaintiff landowner, 180 Land, and our legal assistant from in-house counsel is Jennifer, and she'll be assisting with the presentation.

THE COURT: All right.

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

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

THE COURT: All right, counsel. I just want to say good morning to everyone. And you can see now why I took a cautious approach as far as live appearances in the courtroom.

Unfortunately, and I think we can all agree to a person, this courtroom is not large enough for general civil litigation/business court, it's not. So fortunately I'm being moved, and I guess the powers that be listened to me on that. And so Judge Ahlf and I and Judge Denton will all be going to the 16th floor, and I guess that's going to be the business court floor. But I still handle general civil litigation too,

Rhonda Aquilina, Nevada Certified #979

RA 05032

1 but I think that will be a benefit for everyone.

2 So at this point have you had a chance to set up and
3 all those wonderful things?

4 **MR. LEAVITT:** The plaintiffs are ready to proceed,
5 Your Honor.

6 **MR. MOLINA:** I believe we have Andrew Schwartz on the
7 line. I just wanted to confirm.

8 **THE COURT:** What we're going to do is we're going to
9 formally set forth our appearances for the record. I don't
10 think we've done that yet, have we?

11 **MR. MOLINA:** We just did, except I don't think
12 Mr. Schwartz --

13 **THE COURT:** Mr. Schwartz, are you there, sir?

14 **MR. SCHWARTZ:** Yes, I am, Your Honor. Good morning.
15 Andrew Schwartz for the city.

16 **THE COURT:** And actually, I think we have a better
17 connection, you know, than we had yesterday. I think it's
18 pretty clear.

19 For the record, Mr. Schwartz, we can't see you on the
20 video.

21 All right. And so is there anything preliminarily we
22 need to do before we get started?

23 **MR. LEAVITT:** On behalf of the plaintiffs, no, Your
24 Honor.

25 **THE COURT:** All right. And for the defense?

1 **ALL DEFENSE COUNSEL:** No, Your Honor.

2 **THE COURT:** All right. And madam court reporter, are
3 you ready to proceed, ma'am?

4 **THE COURT REPORTER:** Yes, Judge. Thank you.

5 **THE COURT:** And I guess we might as well continue on.
6 And it's my recollection, Mr. Leavitt, you weren't
7 completed yet; is that correct, sir?

8 **MR. LEAVITT:** What's that?

9 **THE COURT:** You weren't finished yet.

10 **MR. LEAVITT:** Oh, no, I've got a bit more, Your Honor.

11 **THE COURT:** Okay. So we'll go ahead and hand the
12 floor to you, sir.

13 **MR. LEAVITT:** Thank you, Your Honor.

14 **THE COURT:** You may approach the lecturn.

15 **MR. LEAVITT:** Thank you.

16 And, Your Honor, I apologize for yesterday with the
17 whole Power Point mixup. I was actually very upset at myself
18 because I had it ready that morning and I wanted to make sure we
19 emailed it to Mr. Schwartz. So immediately upon returning to
20 the office, we regrouped and made sure that he got a copy of it.
21 I apologize, Your Honor.

22 Your Honor, where we left off yesterday is we were
23 talking about the Peccole Ranch Master Plan and the
24 Government's argument that the property is an open space for
25 the Peccole Ranch Master Plan. We completed that discussion.

1 We concluded that there are no restrictive covenants on the
2 property. We concluded that there's no open space designation
3 on the property. We concluded that the surrounding property
4 owners all find disclosures, recognizing that the 250-acre
5 property is available for a future development, and that it is
6 not an open space or golf course property.

7 Now, to wrap up that Peccole Ranch Master Plan
8 argument, I want to address the city's five examples that they
9 showed you, Your Honor. As you'll recall, the city showed you
10 some examples of golf courses across the valley, there were
11 five of them. Each one of those golf courses has a deed
12 restriction requiring it to remain a golf course. Each one of
13 those golf course is owned by an HOA, and they're not privately
14 owned properties. Unlike this case where there's no deed
15 restriction on the 250-acre property, the 250-acre property is
16 privately owned, and it is expressly recognized in the area
17 based upon the disclosure documents that we presented to the
18 Court that the 250-acre property would never be an amenity for
19 the surrounding property owners.

20 And if I may, Your Honor, this Court can take judicial
21 notice of those properties that are actually an amenity in the
22 Peccole area. I'll just give one, Piggott School,
23 P-I-G-G-O-T-T. It's a school. Remember, Mr. Peccole owned this
24 entire area, and there's a school which is identified in that
25 area, that's Piggott School. Piggott School is owned by the

1 School Board of Trustees. It is zoned C-V. And if you'll
2 recall, Your Honor, Mr. Peccole and the city of Las Vegas worked
3 together in 1990 to remove any C-V designation from this
4 250-acre property, but the property that was going to be
5 reserved for the public, Piggott School, retained or has that
6 C-V zoning designation.

7 And so you can see where the difference between how
8 property in this area was handled that was preserved for an
9 amenity, it's zoned C-V, and it's owned by the public. You can
10 see the difference between that and the 250-acre property in
11 this case that where the C-V zoning was specifically removed,
12 and it is a privately-owned property.

13 And that's similar to this Court's example that this
14 Court gave about Green Valley, where you see the public uses
15 and they're specifically reserved for the public, unlike the
16 property here.

17 Now, Your Honor, what I'm going to do now is I'm going
18 to answer a couple questions that I thought were pertinent that
19 obviously you wanted an answer to that you asked. Then I'm
20 going to go to the property interest issue, and I'm going to
21 address that property interest issue that the Government
22 addressed during about seven hours of their presentation, and
23 then I'm going to close out on the take issue, which was the
24 original reason why we came here.

25 But yesterday you asked what economic value is left on

1 the property? And as this Court will recall, we continued this
2 hearing so that the city could actually do specific discovery
3 on economic value. That was a big fight we had.

4 **THE COURT:** And I do remember that. And as a trial
5 judge I don't mind saying this, and I know litigants sometimes
6 overlook this issue, but there's a reason why I do certain
7 things, I don't mind saying this. I wanted to take that off
8 the table as an appellate issue, right? Because that is one of
9 the -- they do talk about economic impact on a lot of cases,
10 and I just wanted to make sure that everyone had a full and
11 fair opportunity to investigate and develop that issue.

12 **MR. LEAVITT:** Absolutely. And we respect that
13 decision, Your Honor, and so we did all have that opportunity
14 to complete that discovery. The city did the depositions it
15 needed to do. And when that question was presented to you, the
16 only answer that the city gave was, Well, it's an amenity for
17 the area. That's what the city said. We know that's not true,
18 because the disclosures of all the individuals in the area,
19 they were told it's not an amenity for the area.

20 But, Your Honor, we did, the landowner did complete
21 the discovery on the economic impact, and that is Exhibit No.
22 183 to the landowners' documents in this case. That is an
23 appraisal report by an appraiser; he's an MAI appraiser, which
24 means --

25 **THE COURT:** And which exhibit is that again, sir?

1 **MR. LEAVITT:** It's Exhibit No. 183, Your Honor. Let
2 me make sure it's part of this. If not, I have it.

3 **THE COURT:** I have it.

4 **MR. LEAVITT:** In our exhibit book. You have the large
5 one with the red cover.

6 **THE COURT:** Yes, I do.

7 **MR. LEAVITT:** Okay.

8 **THE COURT:** And that's 183?

9 **MR. LEAVITT:** Yes.

10 **THE COURT:** I have it, sir.

11 **MR. LEAVITT:** Okay. And if we turn to Exhibit No.
12 183, this is an appraiser by the DiFederico Group.
13 Mr. DiFederico carries the highest designation that an
14 appraiser can have, which is a member of the Appraisal
15 Institute, MAI Appraiser. He's been appraising property in the
16 Las Vegas valley for approximately 30 years.

17 You can see there that he appraised the property on
18 the first page there.

19 We turn to the second page, Your Honor, this is just
20 the summary of his report. He completed this report on
21 April 23, 2021, which is Bates stamped 005213. This appraiser
22 report, because it was timely completed, was produced to the
23 city of Las Vegas in discovery. And the very relevant part,
24 this is just a summary, we turn to the very last page of his
25 appraiser report, and -- or this summary sheet here. It's Bates

1 stamp 005216. I can point out to the Court what Mr. DiFederico
2 determined. He said that the value of the landowners' property
3 before any government interference was \$34,135,000. And then he
4 considered all of the taking facts that we've been discussing in
5 this case, and he concluded that after the Government interfered
6 with this property it has a zero value. And you can read that
7 at the last sentence, he says, I analyzed the property as if it
8 could be developed under the RPD-7 zone, and then I considered
9 all of the actions that the Government engaged in towards this
10 property, and, frankly -- and he said in the after value, the
11 value would be zero.

12 I believe that once Mr. DiFederico is testifying,
13 he'll say I actually think it's a negative value, because the
14 landowner not only cannot use the property for residential
15 purposes because of the city's actions, but the city is taxing
16 him \$205,000 a year on this property as if it could be used for
17 a residential purpose.

18 So your question was very poignant, because we have --
19 and, Your Honor, I know that this Court decides whether there's
20 a denial of all economic viable use of the property, but this
21 is extremely persuasive evidence of a denial of all economic
22 viable use of the property. It's an opinion by a certified
23 appraiser who went through this entire case and determined
24 there's zero value left after the Government interfered with
25 the use and enjoyment of the landowners' property.

1 It's an important point because the Nevada Supreme
2 Court has analyzed these inverse condemnation cases and they
3 said, quote, It's a battle of the experts, end quote.

4 The city did not do an appraiser report, Your Honor,
5 and the city did not produce a rebuttal to this appraisal
6 report. In fact, the city did no expert reports, so the only
7 expert analysis that we have in this case, which is a battle of
8 the experts, is Mr. DiFederico.

9 Despite the continuance and despite the time we gave
10 for the city to determine the economic impact, it did not hire
11 an expert -- well, it did not produce a report by an expert to
12 do that. It did hire an expert, and we know that because that
13 expert went and visited the landowners' property. But the city
14 chose to not have that expert complete a report or even rebut
15 the appraiser report that's been submitted.

16 The next question that the Court presented was, does
17 the city have to pay for open space? And you remember
18 Mr. Schwartz emphatically on Friday said absolutely not. That
19 was a stunning statement. Because if you take private property
20 and you force it to be open space, that's preserving that
21 property for use by the public, and just the general provision
22 of the United States Constitution and Nevada Constitution say
23 "Nor shall private property be taken for a public use without
24 payment and just compensation." Clearly compensation is
25 required.

1 Secondly, Nevada has legislated that very issue.

2 Your Honor, NRS 37.039 -- and I just must assume that
3 counsel was not aware of this. NRS 37.039.

4 **THE COURT:** 37.039. Hold for one second.

5 **MR. LEAVITT:** While you're looking for that, Your
6 Honor, Chapter 37 are the eminent domain provisions, and this
7 is 37.039.

8 And so the Court knows this, an 03 -- 030, there's a
9 list of all the public uses, and then it says, "And any other
10 public use." And then the legislature chose to create a very
11 specific statute for open space because they wanted to make
12 sure -- I'll just say it just like this, Your Honor, they wanted
13 to make sure that what the city is trying to do in this case
14 doesn't happen in Nevada where they force a landowner to have
15 their property as open space but don't pay. It's conditions
16 precedent to acquiring properties for purposes of open space.

17 They say, "Notwithstanding any other provision," and
18 this is an important part of the bill, Your Honor, is the city
19 is trying to say that this entire 250 acres is open space. It
20 has to remain open space. And they even say, Your Honor,
21 this -- and this becomes important on this part, too. The
22 Government says, Well, if we approve 17 acres here, we can make
23 the remaining 233 acres remain open space. Nevada has
24 legislated this out so that the Government can't make these type
25 of arguments. And the legislature says, Listen, if you're going

1 to identify property as open space, you can look at the bottom
2 of subsection 1A, it lays out you have to offer compensation.
3 You have to try and reach an agreement on the compensation. You
4 go down to 2A, and they list all these requirements. And Judge,
5 why, why did the legislature list all of these requirements that
6 the Government has to go through before it can force a landowner
7 to make their property open space? Because they didn't want
8 what's happening here today to happen. They didn't want the
9 Government to come in and say, We're going to force your
10 property to be open space.

11 And then, Judge, if you go down to section 2A4, 2A4
12 says that you have to provide the owner of the property the
13 value of the property plus damages, if any, as appraised by the
14 agency. That has to automatically be given to the landowner,
15 automatic. So the agency required, the city is required to
16 appraise this property, determine its value, determine any
17 damages, and pay that immediately to the landowner. And the
18 way eminent domain statutes work is then if the landowner is
19 not satisfied with that, we could have a litigation on the
20 amount of compensation.

21 Your Honor, my real point in bringing that 37.039 to
22 the Court's attention is clearly the Government can't just
23 force somebody's property to remain open space, and clearly,
24 the legislature took it very serious when a governmental entity
25 is trying to force a landowner to designate their property as

1 open space.

2 Okay. All right. Your Honor, I don't know if you
3 have any further questions on me on 37.039.

4 **THE COURT:** You know, I don't know how -- let me see.
5 When was the statute enacted?

6 **MR. LEAVITT:** 2005, Your Honor.

7 **THE COURT:** Interestingly, I noticed they just put in
8 that 50-year provision. That's very similar to the covenants
9 running with the land, and to me it kind of makes sense, I
10 mean, you can't have that designation forever.

11 **MR. LEAVITT:** Right.

12 **THE COURT:** Neighborhoods change, properties change,
13 and so on. We've seen that many, many times how properties can
14 change over 50 years.

15 **MR. LEAVITT:** Absolutely.

16 **THE COURT:** I get it, I do.

17 **MR. LEAVITT:** So if the city wanted this property to
18 remain open space, this is what it had to have done, and it had
19 to have paid for the property. And now what the city is doing
20 is it's trying to force the property to remain open space
21 without paying for it, in violation of that statute. And
22 there's a provision, there's a paragraph in the *Sisolak* case, a
23 very clear paragraph; it says if the Government tries to force
24 a property owner in the state of Nevada to have their property
25 remain in a -- or to convert their property to a public use but

1 not pay for it, in violation of a statute, the Nevada Supreme
2 Court in the *Sisolak* case says that is a taking immediately.
3 That's an inverse condemnation case. There's a whole paragraph
4 on that in the *Sisolak* case.

5 So, Your Honor, now I want to go back to the property
6 interest issue. Again, unless this Court has anymore questions
7 for me on NRS 37.039.

8 **THE COURT:** Not at this time, sir.

9 **MR. LEAVITT:** Okay. So I want to -- now I've answered
10 those few questions. I want to go back to the property
11 interest issue, and I want to specifically address this
12 question of PROS that the city has brought up.

13 And so what the city is arguing is they're saying,
14 Judge, there is a master plan and the master plan says that the
15 landowners' property is PROS.

16 And I'm sorry, Your Honor, do you have this book, the
17 Landowners' Rebuttal to City Arguments 35-acre, the yellow one?

18 **THE COURT:** Yes, sir.

19 **MR. LEAVITT:** There we go. I'm on page 52 on the
20 bottom right-hand corner.

21 **THE COURT:** All right. I'm there.

22 **MR. LEAVITT:** Page 52, Your Honor. So this is the
23 city's argument. We turn to page -- the argument that there's
24 a challenge.

25 We turn to page 53, the next page, Your Honor, the

1 landowners' position and the evidence shows there never was a
2 legal PROS on the property to even begin with.

3 And if we turn to the next page, which is page 54,
4 also up on the slide, you'll remember that Mr. Molina -- I can't
5 remember what day it was, Thursday or so -- showed you this
6 document; it's a 1981 city council meeting, and you can see on C
7 it says, "Consideration of a document - generalized land use
8 plan," and he quickly went through these maps for you. I'm
9 going to slow it down a little.

10 If we flip to the next page, 55, the next page 55 is
11 the original master plan designation for this 250-acre property.
12 And, Judge, you can see we circled it in yellow, that's the
13 general location of the 35-acre property, it's MED. And you
14 look at the side, MED, what does it stand for? It stands for 6
15 to 12 residential units per acre.

16 So in 1981, Your Honor, the city's master plan had the
17 35-acre property identified as MED residential 6 to 12 units.
18 That was consistent with the RPD-7 zoning that was on the
19 property in 1981 also. So in 1981, you had RPD-7 zoning, which
20 means 7 residential units, you have the city's own master plan
21 that shows MED, which is 6 to 12 residential units, so you have
22 the zoning that was consistent with the master plan - all the
23 way back in 1981.

24 So now, the next question becomes did the city change
25 this (indicating)? Did the city change the MED to PROS on the

landowners' property?

And we turn to the next tab, number 56, Your Honor, I'll just read one of these. Next tab, 56, is Exhibit 18 of planning commission meeting where this very issue came up in a planning commission meeting.

But on tab 56, the planning commission and the city Attorneys' Office did a full-blown study. And I want to refer to what Brad Jerbic says here at the bottom. He says, The planning commission or the Planning Department and the City Attorneys' Office researched the alleged change from MED to PROS. And this is what he said, There's absolutely no document that we could find that really explains why anybody thought it should be changed to PROS, except maybe somebody looked at a map one day and said, Hey, look, it's all golf course, it should be PROS, I don't know.

What he was saying there, which is confirmed by other testimony, is we couldn't find anything of how this property was changed from MED to PROS on the city's master plan.

Remember Mr. Molina showed you several maps that showed the property highlighted in green and said, Judge, because this map shows the property highlighted in green, it has to be PROS. Well, at the bottom right-hand corner of those maps, Your Honor, it says the maps are for reference only. They're not legally binding documents.

What would be legally binding is that the city showed

1 how the master plan was changed from the 1981 MED designation to
2 PROS. And Your Honor, they couldn't have done it. They
3 couldn't have changed it to PROS because the original zoning was
4 RPD-7. The original master plan was MED. If they changed it to
5 PROS, it would have been an illegal change because the zoning of
6 RPD-7 was already in place.

7 Then we turn to the next tab, which is tab number 57.
8 This is just a summary of the law. At the top it says the law
9 to change the MED to PROS on a master plan. NRS chapter 278
10 has several requirements. The City's code says that if you're
11 going to make a parcel specific amendment, you have to do
12 certain things.

13 And this is the citation of the law, Judge, I could go
14 through this in detail and spend an hour of all the
15 requirements. But there's one specific requirement, and I don't
16 know if it actually is listed in 278. The city, if it was going
17 to change the MED to PROS, it had to go to Mr. Peccole here and
18 say, Mr. Peccole, your property is designated MED; we're going
19 to make a parcel specific change from MED to PROS, and they had
20 to give him that notice.

21 During seven hours, the city not once gave you the
22 document which said, Mr. Peccole, here is our parcel specific
23 change from MED to PROS and now your parcel is going to be
24 PROS. They didn't do that. And Mr. Peccole would have went
25 through the roof had they tried to do that, because he met with

1 the city in 1990, as we went through those documents, and he
2 and the city adopted Z-1790 to remove any C-V zoning and to
3 assure that the proposed use of this 250-acre property was
4 always residential. Your Honor, we didn't need seven and a
5 half hours. What we needed was five minutes of an exhibit
6 showing that the city gave notice that this was done to
7 Mr. Peccole on this specific property, and it didn't happen.

8 Your Honor, I'd like to move to tab number 58. Let's
9 indulge the city for just a moment, and let's assume that the
10 city did adopt a PROS -- I'm sorry, Your Honor, not tab 58, I
11 meant page 58 on my Power Point. I apologize to the Court.

12 Okay. So page 58 on my Power Point. Even if there is
13 a PROS on the master plan, the zoning of RPD-7 would take
14 precedence. So there never was a PROS, but let's assume there
15 was. The Nevada Revised Statute, on page 59, is 278.349. It
16 says that if any existing zoning ordinance is inconsistent with
17 the master plan, the zoning ordinance takes precedence. So even
18 if we have a PROS on the city's master plan, the RPD-7 zoning
19 would take precedence.

20 Remember, counsel argued vehemently to you that the
21 master plan is the Constitution, the master plan is of the
22 highest order, that's the exact opposite of the statute.

23 And Your Honor, what counsel is going to say is this
24 only applies to the tentative map process. Your Honor, this is
25 the tentative map. This whole property would have had to have

1 gone through the tentative map process. That's -- when you go
2 through the application process, you have to submit a tentative
3 map. So clearly this applies to the landowners' property.
4 Zoning takes precedence.

5 Now, if I could turn to the next tab. Sorry, next
6 page, page 60, this is the city's own master plan that the city
7 is arguing applies here over zoning. We've blown out on the
8 right-hand side there, Your Honor, Exhibit No. 161. You can
9 see the top left-hand side there it says, "master plan," and
10 then it says, "provide general policies, a guiding framework."
11 And then if you go to the right-hand corner where it says,
12 "zoning ordinances," it says, "provide specific regulations,
13 the law." So the master plan that the city wants to apply
14 itself recognizes that zoning is the law and a master plan is
15 nothing more than policies. It's just that, Your Honor, it's a
16 plan.

17 If I could turn to the next page, Your Honor, I'm
18 going to go through this a little bit more in detail on another
19 part. On page number 61, these are statements not by counsel
20 here today, these aren't my arguments, these aren't the city's
21 private attorney arguments, this is the City Attorneys' Office
22 and the City Planning Department. Brad Jerbic: "I just want
23 to break it down so that what happened over time. Somehow,
24 PROS became the General Plan designation only after hard zoning
25 was in place."

1 So he's saying somehow somebody wrote this PROS on
2 this map, but hard zoning was already in place.

3 And then he said, "And the rule is hard zoning in my
4 opinion does trump the General Plan designation."

5 Tom Perrigo, the next one, Exhibit No. 159.

6 "Q. If the land use and zoning are not in
7 conformance then zoning would --

8 I'm sorry, actually it says, Answer.

9 "A. -- zoning would be the higher order
10 entitlement, I guess.

11 "Q. So it's your position that zoning
12 supercedes the General Plan?

13 "A. Yes."

14 Tom Perrigo, again, Your Honor, I've got over about
15 ten of these statements from the City Attorneys' Office and the
16 Planning Department. They're consistent always that zoning
17 takes precedence over any general plan designation.

18 Your Honor, I'll turn to the next page, and I'll close
19 out here on the PROS issue. On page 62 -- hold on a minute,
20 Your Honor, let me make sure I got the right page. Actually,
21 you know what, Your Honor, I want to reference Tom Perrigo's
22 statement right there at the bottom, because I think it's
23 critical to what the city had previously told you, that a
24 general plan amendment was necessary on this property.
25 Mr. Perrigo said, Even if that general plan action, his bold at

1 the bottom, didn't come forward, it doesn't take away the
2 rights that the applicant had to the zoning.

3 So what happened during this process is the city said,
4 Hey, Mr. Landowner, we want you to file a general plan
5 amendment so that you remove this mistaken PROS off the
6 property and it's consistent with your zoning. And we said,
7 Listen we're not doing that, because if we don't need it, we
8 already have zoning. And the Planning Department agreed that
9 we didn't need to do that in order to develop. There was no
10 variance required. There was no general plan amendment
11 required.

12 **THE COURT:** I mean, it really makes sense just from a
13 policy perspective, because when you look at zoning and zoning
14 that's in place as far as property is concerned, if there's a
15 conflict -- and I'm quite sure there's probably a lot of
16 conflicts with the General Plan or the Master Plan -- my point
17 is this, it would cause chaos.

18 **MR. LEAVITT:** Well, absolutely, Your Honor, that's why
19 the courts and the City Attorneys' Office and the City Planning
20 Department, and the City Tax Department have always relied upon
21 zoning to determine property rights in Nevada.

22 Do you know, Your Honor -- go ahead.

23 **THE COURT:** From this perspective, I mean, it's my
24 understanding that there was a tax bill issue that was based
25 upon RPD-7 zoning, right?

1 **MR. LEAVITT:** Yes.

2 **THE COURT:** The taxes weren't submitted, and based
3 upon an open space designation.

4 **MR. LEAVITT:** They were not, that's correct.

5 **THE COURT:** And my point is this, once again it would
6 chaos.

7 **MR. LEAVITT:** Correct, Your Honor.

8 **THE COURT:** I mean, typically when a person goes in to
9 the building department or any department and they want to
10 develop, first thing they're going to look at, even when you
11 buy the property, what's the zoning?

12 **MR. LEAVITT:** And, Your Honor, that's a perfect
13 dovetail into the next section right here. Because what
14 counsel said is they said, in one of the hearings, they said,
15 Listen, this landowner messed up, he bought -- and this is the
16 words he used -- he bought a pig in a poke.

17 But now I want to turn to this right here, Your Honor,
18 the next tab, which is due diligence, and this is rebuttal of
19 the city's argument that the landowner did not perform a proper
20 due diligence, okay. And I want to turn to page number 11.
21 This is a brief summary of the landowner's due diligence. And
22 in 2001, he had been working with the Peccole family for six
23 years in this area. He learned that the 250-acre property was
24 RPD-7 zoned. He learned that it had, quote, the rights to
25 develop, and he learned that, quote, it was intended for

1 residential development, and Peccole confirmed in 2001 that they
2 would, quote, never, end quote, put a deed restriction on the
3 property, Exhibit 34.

4 In 2001, the landowner goes and investigates the
5 Queens Ridge CC&Rs and all of the disclosures for the
6 surrounding area, and he finds out that the property is
7 available for, quote, future development. That's what we have
8 here, Your Honor, in the Queens Ridge CC&Rs, future development
9 on the golf course property, and all land disclosures to the
10 surrounding owners confirm this.

11 Then in 2005, I forgot to put it here, Your Honor, the
12 landowner obtains the option to purchase the property. And in
13 2006, he then goes and meets with the head planner. The head
14 planner says the 250-acre is RPD-7 and there's nothing that can
15 stop development. That's the city's head planning official.

16 In 2014, he then meets with two more head planning
17 officials, Peter Lowenstein and Tom Perrigo, and they conduct a
18 three-week study at the city's planning department and they
19 confirm, quote, the 250 acres is hard zoned for residential use
20 and had vested rights to develop up to 7 units per acre, that
21 zoning trumps everything, and any owner of the 250 acres can
22 develop the property.

23 Your Honor, the landowner had not yet closed on the
24 property when they got that three-week study. So they went to
25 the city and said, We want you to put that in writing.

1 Now, before I go to what the city put in writing, Tom
2 Perrigo, the head planner, his deposition was taken. He said if
3 the land use and zoning are not in conformance, the zoning is
4 the higher order entitlement. Peter Lowenstein had his
5 deposition taken also. He said a zoned district gives a
6 property owner property rights.

7 So you have a pointed question during these hearings.
8 You said, Well, how did the city treat this zoning in the past.
9 This is it, Your Honor.

10 And then the landowner says, Received all of this.
11 And he says, Listen, before I close on this property, before
12 I -- he allocated \$45 million in cash to the property, and he
13 entered into various complicated and very -- I guess the best
14 way to say it is a lot of transactions that had a lot of hair
15 on them over a ten-year period. And then he comes to the time
16 to close and he attributes a hundred million dollars towards
17 this 250-acre property. And before he's going to do that, he
18 goes to the city and says, Listen, over the past 14 years,
19 you've confirmed the due diligence for me, now I want you to
20 put it in writing, and that's the next page, Your Honor, page
21 number 12.

22 **MR. MOLINA:** Your Honor, I would just like to place an
23 objection for the record that references to the documents and
24 what was just said there lacks foundation.

25 **THE COURT:** What do you mean lacks foundation?

1 **MR. MOLINA:** There's no evidentiary support to support
2 what Mr. Leavitt is saying about this hundred million dollars,
3 this option in 2005, so we would just object to those
4 statements.

5 **THE COURT:** Okay. I understand. But you're not
6 objecting to Exhibit H -- I mean Exhibit 134, are you?

7 **MR. MOLINA:** I'm not objecting to Exhibit 134, no.

8 **THE COURT:** Objection noted, sir.

9 **MR. LEAVITT:** And, Your Honor, so what's interesting
10 here is this is the city's letter. What we've been talking
11 about is what was the city's position. And do you know, I
12 think it was eight and a half hours the city didn't pull this
13 letter out. That's a stunning thing. This is the city's
14 position on zoning that they gave to the landowner prior to his
15 purchasing the property and the city didn't even reference it
16 in their argument. They say it's zoned RPD-7. And I will
17 guarantee you, Your Honor, I've read this letter about 50 times
18 and the words "open space," the words "PROS" and the words
19 "master plan" don't appear in this letter. You can read the
20 highlighted portion, Your Honor, where the city says, "RPD-7 is
21 for residential development."

22 The city then goes on to say, the second sentence in
23 the second paragraph, critical sentence, the density, the
24 residential density allowed in RPD district shall be referenced
25 by a numerical designation for that district. Then they even

1 give an example: RPD-4 allows up to 4 residential units per
2 gross acre. Then they go on to say a detailed listing of the
3 permissible uses and all applicable requirements of the RPD
4 zone are in Title 19 of the City Code.

5 Judge, I'm going to go to the permissible uses in just
6 a minute. This is what the city's representation was to the
7 landowner. And why did they do that, Your Honor? If you turn
8 to the next page, we can see why they did it.

9 The City Attorneys' Office confirmed that the
10 landowners' due diligence wasn't accurate. Brad Jerbic, he
11 stated on the record, counsel gave hard zoning to this golf
12 course, RPD-7 which allows somebody to come in and develop. He
13 then goes on to say that, quote, hard zoning trumps everyone
14 else. Brad Jerbic and Phil Byrnes, we've attached all these
15 documents, in a motion, in a 2011 condemnation case, said, "A
16 master plan is a planning activity that has no legal effect."

17 Go down to number 3, Your Honor, these are affidavits
18 now from the current City Attorney Bryan Scott and Jim Lewis in
19 a 2011 inverse condemnation case where they say, "The Office of
20 the City Attorney has consistently advised the City Council that
21 the City's Master Plan is a planning document only."

22 Phil Byrnes, last one, number 4, this is specific to
23 the 250-acre property: "In the hierarchy, the land use master
24 plan designation is subordinate to zoning."

25 This is everything the City Attorney, all the way up

1 until this litigation confirmed this, agreed with everything
2 I'm telling you, agreed with the landowners' due diligence,
3 agreed that zoning controls.

4 Your Honor, if I could turn to the next page,
5 number 14, you've already referenced this, I'm not going to go
6 through it again, but this is the city's tax department also
7 confirming the due diligence and confirming Exhibits 49 and
8 120.

9 **THE COURT:** I have a question from a legal
10 perspective. How am I to treat these statements by Mr. Jerbic,
11 Mr. Byrnes, Mr. Scott, Mr. Lewis, and so on.

12 **MR. LEAVITT:** They are -- here's -- there's a couple
13 cases on that, but here's how. It's persuasive authority on
14 the city's position, because the Planning Department and the
15 City Attorneys' Office wrote Title 19 of the Code, they
16 interpret Title 19 of the Code, and they sit in the council
17 chambers and tell the City Council what Title 19 of the Code
18 means, and the Nevada Supreme Court in a case said that the
19 City Attorneys were -- the City Attorneys' interpretation and
20 the Planning Department's interpretation of the Code is, quote,
21 cloaked with the presumption of validity. So we have the
22 individuals at the city who drafted these provisions and are
23 interpreting them.

24 Now, there's case law saying that that is cloaked --
25 sorry, Your Honor.

1 **THE COURT:** I was just thinking about it from an
2 evidentiary perspective, would they be admissions against
3 interest?

4 **MR. LEAVITT:** We have a whole section, Your Honor, on
5 admissions against interest. Your Honor, we absolutely have
6 briefed that. But here's the problem with how the city
7 presented this, is that was briefed in our motion to determine
8 property interests that this Court already decided, and we laid
9 out all the case law that that's an admission against interest.
10 That's clearly one of the reasons you ruled the way you did, is
11 you said this, I'm going to following the zoning, because
12 that's what you've done for the past 50 years.

13 So yes, Your Honor, it is an admission against
14 interest. We've cited that law and provided it to the Court
15 previously.

16 And then if I may turn to page 15, Your Honor, I'll
17 summarize this in one second. The landowners, on March 15,
18 acquired Fore Stars which owned five parcels comprising the
19 250-acre property.

20 And so talking about admissions against interest, Your
21 Honor, the landowners would have never allocated a hundred
22 million dollars to this property and purchased it had the city
23 sent them a letter that said the property is open space, the
24 property is PROS. They would have never done that.

25 And, Your Honor, turning now to the next page,

1 page 16, here's some more admissions against interest. The city
2 planners confirmed the landowners' due diligence and the use of
3 the 35-acre property when the applications were filed

4 And, Your Honor, may I approach over to the easel?

5 **THE COURT:** Yes, you may, sir.

6 **MR. LEAVITT:** Okay. So as you'll recall, the City of
7 Las Vegas required the Master Development Agreement. And as
8 you'll recall, the thought here, they say -- and then what
9 happened is the Planning Department gave a recommendation on
10 the Master Development Agreement which would have allowed
11 residential development, and we went through that. This is
12 Exhibit 77, the City's Planning Department said, Listen, this
13 conforms to everything; it conforms to the zoning; it conforms
14 to the master plan; it conforms to NRS 278; it shows
15 sensitivity to the surrounding area. So the city's own
16 planning department, when the landowner submitted this Master
17 Development Agreement, which the city denied, but prior to
18 denying it, the city's planning department said, these
19 landowner have zoning, and they have the right to do this.

20 I want to turn to the next page, Your Honor, page 18.
21 And on page 18, remember the landowners filed another
22 application to use the 35-acre property, with 61 lots. This is
23 the City's Planning Department again confirming that the
24 landowners have the right to do this.

25 We'll just look at the bottom. We've already gone

1 through this, Judge. I'll look at the bottom. The submitted
2 tentative map is in conformance with all Title 19 and NRS
3 requirements for this tentative map. Title 19 is the zoning
4 code. So we have the city's own planning department, when the
5 applications are filed, confirming the due diligence on the
6 property.

7 Turn to the next page, Your Honor, page 19. This is
8 Councilman Bob Beers when this was submitted. Remember what he
9 said? He said, Listen, this is so far inside the lines - again
10 confirming the landowners' due diligence that the property was
11 zoned RPD-7 with the right to build.

12 Now, this next section, Judge, I think nails it right
13 on the head. What does the Nevada Supreme Court -- so in this
14 exact type of case, what does the Nevada Supreme Court rely
15 upon when determining property rights? And that's the tab the
16 Court relies on, zoning. Because of that tab, Your Honor, I'm
17 going to go through six cases here. I'm not going to spend a
18 lot of time on it, Your Honor, because it might take a while.

19 But tab 21, you go to tab 21 -- I'm sorry, page 21.
20 This is the *Sisolak* case. Remember, Sisolak said you have to
21 first determine the property interest. The facts, you can see
22 on the left-hand side there is the facts, and then right below
23 the facts is the property. And what did the Nevada Supreme
24 Court rely upon to determine Mr. Sisolak's property interest?
25 The zoning. The Court held that the properties were zoned for

1 development of a hotel, a casino or apartments. At no place in
2 the *Sisolak* case does the Court say, Hey, is there a master plan
3 in this area? Hey, is there some Peccole Ranch concept plan in
4 this area similar to that? The Court relies upon zoning.

5 We go to the next case, Your Honor, it's another
6 inverse condemnation case, *Clark County versus Alper*. I won't
7 spend a lot of time on this one. It's page 22. It says, the
8 Court said, "Due consideration should be given to the zoning
9 ordinances."

10 Page 23 is another inverse condemnation case. This
11 one is interesting. This is *Alper versus State*, page 23. The
12 Nevada Supreme Court recognized the property on H2 zoning and
13 they cut and pasted the H2 zoning into the decision and said,
14 These are the legally permissible uses of the property. You
15 can look at the top there, it says, under Clark County
16 ordinances "uses permitted" in H2 zoning, and then they go
17 through what they all are.

18 The point is the Nevada Supreme Court uses zoning to
19 determine property rights in inverse condemnation cases.

20 Page 24 is an interesting case. It's one that you can
21 see at the top there, Kermitt Waters did. It was one of the
22 first cases I ever did with Mr. Waters. It's *County of Clark*
23 *versus Buckwalter*. Look at this: "Although the property
24 housed apartment buildings, it was zoned for commercial use,
25 retail, food, beverage, gaming." That property was actually

1 being used as apartments, and the Nevada Supreme Court said it
2 doesn't matter, it had zoning for gaming. And, Judge, you know
3 how we valued that property in that case? Gaming. We didn't
4 value it based upon apartments, even though it had been used
5 for that use I think it was for like 20 years prior to that,
6 they used the zoning.

7 Another case, the next page is 25, *Andrews versus*
8 *Kingsbury*, another case where the Court used zoning.

9 And then page 26, I'll spend just a minute on this one
10 because this is the case that this Court relied upon in its
11 order, property interest order. This is what the Nevada Supreme
12 Court said, this is an inverse -- this is a direct eminent
13 domain case, *City of Las Vegas versus Bustos* -- the Court said,
14 "We conclude that the district court properly considered the
15 current zoning of the property as well as the likelihood of a
16 zone change."

17 And then there's an interesting footnote in that case.
18 It's footnote 1, it lists 10 cases, Your Honor, 10, where zoning
19 was used to determine the property interest. In fact, in that
20 *City of Las Vegas v. Bustos* case, the Nevada Supreme Court
21 strongly indicates that if you use anything other than zoning,
22 it's reversible error.

23 Now, Mr. Bustos, his property -- well, Your Honor, the
24 point is that zoning was used to determine the property
25 interest, okay, in the *Bustos* case.

1 And, Your Honor, I actually have all of those cases if
2 you want a reprint of all those cases. I actually have them
3 for the Court if it would like.

4 Okay. So page 27, the Nevada legislature confirms the
5 zoning. We've already read this statute. Zoning trumps.

6 Go to page 29, the next page. The next page, 29, is
7 an attorney general opinion. Even the Attorney General has
8 weighed in on this issue, Your Honor. And the Attorney General
9 issued an opinion where he says, (Reading) The enactment of
10 that statute, the Nevada legislature in 1977 declared its
11 intention that zoning ordinances take precedence over
12 provisions contained in the master plan. They went on to read
13 that that enactment buttresses our conclusion that Nevada
14 legislature has always intended local zoning ordinances to
15 control over a master plan.

16 I got two more, just a couple, two more on this, Your
17 Honor, on zoning, and then I'm going to get to where the rubber
18 meets the road.

19 Page 30, I just found this statute, it's NRS 40.005,
20 it says, In any proceeding involving the disposition of land,
21 in other words when you're dealing with land, the Court *shall*
22 consider lot size and other applicable zoning requirements
23 before ordering a physical division of the land.

24 Now, I know that 40 --

25 **THE COURT:** That's a partition case, right?

1 **MR. LEAVITT:** Exactly. That's not right on point.

2 **THE COURT:** I understand, but you're telling the Court
3 this is what you do when you make that determination as to
4 potential use, I guess.

5 **MR. LEAVITT:** Absolutely. It's not right on point.
6 But, Judge, the point is the legislature has always intended
7 zoning ordinances to apply. And this is just another example
8 that when you're dealing with land, the Court is instructed,
9 the legislature said you *shall* consider the zoning
10 requirements. What I don't see in here is open space, PROS,
11 master plan.

12 Next page is the real world. Lenders, bankers,
13 brokers, investors, title companies, insurance companies, and
14 even the government have always relied upon zoning, not a
15 master plan.

16 And, Your Honor, do you see my statement there: No
17 government entity has argued otherwise in these type of cases.
18 This is the first time a government entity in the state of
19 Nevada has argued that zoning doesn't apply and instead a
20 master plan would apply.

21 And you know what good evidence I have for that - is
22 the next page 32. This is the Declaration of Stephanie Allen.
23 Stephanie Allen is a land use attorney in the state of Nevada.
24 She works for Chris Kaempfer who has been doing land use for 40
25 years. She's been doing land use for 17 years. That means if

1 she billed 2,000 hours a year, 34,000 hours worth.

2 Paragraph 16: "During my 17 years of work in the area
3 of land use, it has always been the practice that zoning
4 governs the determination of how land may be used. The master
5 plan designation has always been considered a general planning
6 document." And listen to this sentence, "I do not recall any
7 government agency or employee ever even making the argument
8 that a master plan trumps zoning." 17 years. She hasn't even
9 heard the argument that master plan trumps zoning - the
10 argument being made here by the city today. This is the first
11 time ever, Judge.

12 Now, so zoning should be used. Let's go to the next
13 page, page 33. And page 34 is just the zoning verification
14 letter.

15 And now, Judge, I want to go to where the rubber --

16 **THE COURT:** This is a general question, this is
17 something I've always seen when it comes to ordinances enacted
18 by the city. They always have some defining language and I
19 think that this is one of them. We went over this in one of
20 the other ordinances that was discussed at the very end. It
21 will say that this ordinance trumps whatever happened in the
22 past, so on and so on, right?

23 **MR. LEAVITT:** Yes, um-hm, and that's exactly what's
24 happened here.

25 And do you know, I'll point this out, Judge, I won't

1 pull it out now, but the document that the city says adopts the
2 PROS is ordinance number 3636. There's a section 3 in there,
3 and you know what it says, it *shall* not affect zoning.

4 **THE COURT:** That's mandatory.

5 **MR. LEAVITT:** Absolutely. Because once -- zoning is
6 claws into the land, it stays in the land. The master plan is
7 in the government's archive. They're just back there planning
8 the activities.

9 So now I want to turn to page 35, which is the RPD-7
10 zoning rights. And this is what this Court referenced before.
11 We've already gone through this, I'm not going to spend a lot
12 of time on it. But this is Las Vegas Municipal Code 19.10.050.
13 Remember, the city zoning verification letter says you go to
14 this to see your permitted uses. First the intent: The RPD
15 has been to provide flexibility and innovation in residential
16 development, and then as you well recognized, Your Honor,
17 section C is permitted land uses. The number one permitted
18 land use is single-family and multi-family residential. You
19 have other land uses that are permitted: Home occupations and
20 childcare and other child cares, right? Those are the only
21 permitted uses in RPD-7.

22 Do you know this argument that the Government is
23 making that this property has to be forced to remain open space
24 or this property has to be forced to remain golf course. Those
25 aren't even permitted uses. Those would be illegal uses under

1 an RPD-7 zoned property.

2 So the point here, Your Honor, is when you decided the
3 property interest issue, you said, I'm going to follow zoning
4 because that's what the Nevada Supreme Court requires, and the
5 zoning here is RPD-7 and the legally permitted uses in RPD-7
6 zoning are single-family and multi-family residential, and,
7 Judge, you were right, based upon this right here (indicating).

8 Now, can you pull this up? Do you have this? If not
9 I can approach.

10 **THE COURT:** Which one is it?

11 **MR. LEAVITT:** You know what, I'll approach. I'll hand
12 this to you, Your Honor. You don't have it in there. I just
13 thought about it last night. What's the best way to give it to
14 you.

15 **THE COURT:** Just approach.

16 **MR. LEAVITT:** Okay. I'm fully vaccinated and I've
17 already had it, so I think I should be safe.

18 So this is what the city's own code says about zoning,
19 okay, and what "permitted" means. So first, section 19.18.020
20 says, "Words and terms defined. What does zoning mean? An area
21 designated on the zoning map in which certain uses are permitted
22 and certain others are not permitted, according to this code."
23 So when you have zoning, it means this is the uses that are
24 permitted: Single-family, multi-family. Then it defines what
25 it means by permitted uses: "Any use allowed in a zoning

1 district as a matter of right. As long as it's conducted in
2 accordance with the restrictions, permitted uses are designated
3 in the land use title by a letter P." I don't know if I have it
4 in here, it doesn't look like. So a letter P means you have the
5 right to use the property.

6 Let's turn to the next section of the Code here, Your
7 Honor, the city's code 19.16.090. And this is the part right
8 here that says what do you get when you get zoning, and
9 section O is authorization to proceed. "Such approval of
10 zoning authorizes the applicant to proceed with the process to
11 develop and/or use the property in accordance with the
12 standards, procedures of the city departments, and in
13 accordance with the requirements of the Code."

14 Counsel said the other day that what "permitted"
15 really means, Judge, is it's not not permitted. If that's what
16 the city wanted to say, then on the definition of "permitted"
17 right here, it would have said permitted means not not
18 permitted. That's not what the Code said. It says, "Permitted
19 means any use allowed in the zoning district as a matter of
20 right."

21 Your Honor, I think I've hit that property interest
22 issue enough. I mean, the city brought this up out of the
23 clear blue. It wasn't supposed to be heard. I understand why
24 the Court wanted to allow it to be heard, to make sure that
25 they could be fully heard. But they brought it up out of the

1 clear blue. It had been fully decided and fully litigated
2 before this Court entered a decision on the property rights
3 issue previously, and there's absolutely no reason that that
4 decision should be changed, and this Court didn't -- or the
5 city didn't provide any reason why the Court should change its
6 property interest order.

7 **THE COURT:** Well, I mean, there was no motion for
8 reconsideration done on that issue, right?

9 **MR. LEAVITT:** Absolutely, Your Honor, there was not.
10 So now what I want to do, Your Honor -- and I think
11 we've sent this. If not, I know -- okay, it's already been
12 sent, okay, to Mr. Schwartz.

13 Now we want to turn -- and Your Honor, this looks a
14 little thick and it looks daunting. It's not going to take much
15 time to go through.

16 May I approach again, Your Honor?

17 **THE COURT:** Yes, you may.

18 **MR. LEAVITT:** Okay. So, Your Honor, we've established
19 that the landowners had a residential zoned property which
20 included the right to develop that property for single-family
21 and multi-family residential uses. So now the question is did
22 they take that?

23 And I'm just going to briefly go back where we were
24 about 10 hours ago in arguments. If we go to the first tab
25 there, Your Honor, I'm going to skip the front portion. Go to

1 the first tab there that's Taking Facts: "Taking facts, the
2 aggregate of the city's actions," that's page 69.

3 If we go to page 70, we know we're supposed to look at
4 the aggregate of the city's actions. This was one of those
5 acts, just one of the acts that we looked at on page 70. Just
6 remember -- and I talked about this yesterday, so I'm not going
7 to spend a lot of time on it -- that councilman publicly
8 announced, Hey, this property, the landowners' property is for
9 your recreation use to the public. He then sponsored that Bill
10 2018-24 to force the landowners to allow that access, and the
11 city did it. The city passed the bill, and the public is
12 following that discretion, Your Honor, or that direction. The
13 public is following exactly, exactly what they said they were
14 going to do.

15 And Your Honor, what the city said -- they objected
16 yesterday, and I want to address this just very briefly, the
17 city said, Hey, we didn't enforce that provision, we didn't
18 enforce 2018-24 against the landowner. It doesn't matter. The
19 city adopted a statute which authorized the public to enter onto
20 this landowner's property. And I can give you an example in the
21 *Sisolak* case.

22 Clark County ordinance 1221 was adopted in 1990. The
23 planes didn't start using the property until 1997. The Nevada
24 Supreme Court said the taking was 1990 when the ordinance was
25 adopted because it preserved the property for use by the public