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 25

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing APPENDIX TO OPPOSITION TO APPELLANT'S MOTION TO STAY - **VOLUME 25** 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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conflict, but it's potentially a rule versus a statute.

Do you see the difference?

MR. LEAVITT: Absolutely, Your Honor, and its something that I thought about, and that was my next argument is when you have a rule of procedure which conflicts with a substantive right that's been -- that has gone through committee, that has been passed by the Nevada Legislature or who has been elected by the voters in the State of Nevada and signed by the Governor who has also been elected by the voters of the State of Nevada, and it involves a substantive right, clearly that would take precedence over a procedural rule.

And there's actually a great case in the Nevada Supreme Court. I think it's called Teachers Building Materials (phonetic), where the Nevada Supreme Court specifically says that substantive rights in an eminent domain case always trump procedural issues.

This clearly is a substantive right. It's a substantive right to be paid. There couldn't be a more substantive right than the right to be paid.

Everything that we've done up to -- in this case up to this point involves the landowner's substantive right to be paid just compensation timely. So I would agree with the Court that that substantive right trumps that, and I -- I will cite to you one more case.

I've cited to you two cases where the Nevada Supreme

Court has held, couldn't be clearer, inverse condemnation proceedings are the constitutional equivalent to eminent domain actions. That's a quote, and yet the City continually argues inverse condemnation cases are different than eminent domain cases. The Nevada Supreme Court went on to say they're governed by the same rules and principles.

Another case I'll cite to this Court is *5th and Centennial* (phonetic). In *5th and Centennial*, the lower District Court Judge went -- it was a precondemnation damage case. So a type of eminent domain case. The District Court Judge in that case applied the general rule -- NRS Chapter 17 prejudgment interest rule. And the landowner said, well, wait a minute. This is an eminent domain case. You should apply NRS Chapter 37, and the lower District Court Judge ruled against the landowner and applied the general prejudgment interest statute of Chapter 17 and was reversed, and here's the quote. Here's what the Court says:

> Nevada treats precondemnation damage actions as a type of eminent domain case. Therefore, we conclude that the District Court erred in using the general interest rule from NRS Chapter 17 instead of the more specific eminent domain rule from NRS Chapter 37.

Your Honor, that rule has been cited at least five times by the Nevada Supreme Court that inverse condemnation

cases are the constitutional equivalent of eminent domain, and therefore Chapter 37 applies to inverse condemnation cases.

Alper has been cited 28 times since it's been decided in 1984. Therefore, Your Honor, we would have to deviate from that rule in order to rule in favor of the City. We have to apply a general rule and instead as a more specific, which is the exact opposite of the rule.

We'd have to find that inverse condemnation actions are different from eminent domain cases, contrary to Nevada's rule. And if we did that, Your Honor, what rule would apply? What body of law would apply? We don't -- in Nevada, we don't -- the Nevada Supreme Court has never said here's an inverse condemnation case, and here's the specific law that applies to an inverse condemnation case. They never did that. Instead the Court said they're the same, and therefore the same rules and principles apply. Therefore, Your Honor, 37.140 and the closed loophole set forth in 37.170 should be applied to this specific case, Your Honor.

THE COURT: All right. Thank you, sir.

And, Mr. Ogilvie, sir, you get the last word of course.

MR. OGILVIE: Your Honor, Mr. Leavitt cited the *Knick* case. So I just wanted to point out that the *Knick* case was a physical takings case, not a regulatory taking, such as the matter before the Court.

Addressing Mr. Leavitt's argument that Chapter 37 does not require a final judgment, I would refer the Court to NRS 37.140 where it states very clearly the plaintiff must within 30 days after final judgment pay the sum of money assessed. Therefore, I submit to the Court, again, I refer the Court back to what the definition of final judgment is. It is a judgment that has been affirmed if an appeal has been taken because only then can it not be challenged by appeal, motion for new trial or motion to vacate, as the definition of final judgment requires.

So even if we apply Chapter 37, and again, that is eminent domain, this is not an eminent domain matter, but even if we apply Chapter 37, NRS 37.140 references final judgment before the sum of money is assessed, and we do not have a final judgment at this time.

THE COURT: Mr. Ogilvie, what's the impact of Chapter 37.170 for this matter?

MR. OGILVIE: Chapter -- NRS 37.170 does not address this very issue, which is when the -- when payment must be made. First of all, again, let me, we submit that --

THE COURT: No. No. I understand your position there. I'm not overlooking your position. You're saying, look, Judge, there's a difference here between an eminent domain matter and inverse condemnation and as a result, it impacts the application of the statute. I get that.

I just want to know what your position would be as far as hypothetically, without waiving any position you take and what impact would 170 have, if any.

MR. OGILVIE: I think .170 needs to be read in conjunction with .140, and a, I mean, .170, Sub 3 talks about final judgment. It's not disregarded in .170, and reading .170 in conjunction with .140, I submit, requires a final judgment to be entered, even in an eminent domain case, which this isn't.

THE COURT: All right. Okay. Anything else from anyone? I just want to -- we've vetted this issue. There's no need to ping-pong, but I just want to make sure that there's anything anyone might have to say that has not been set forth on the record? I just want to make sure the record is clear in that regard.

MR. OGILVIE: Again --

MR. LEAVITT: Your Honor, I --

MR. OGILVIE: Go ahead.

MR. LEAVITT: I was just, for 30 seconds, Your Honor.

Your Honor, the argument that Mr. Ogilvie just made was made to the Nevada Supreme Court in *State versus Second Judicial District*, and the Court said such is not our view of the law. The deposit provided by NRS 37.170 is a condition to condemnor's right to maintain an appeal. Your Honor, it's a condition to appeal. That's why 37.170 was adopted was so that

it would be made. The deposit would be made as a condition to appeal, Your Honor.

THE COURT: All right. And, Mr. Ogilvie, you get the last word, sir.

MR. OGILVIE: Again, eminent domain is very different. It only applies when the City has actually appropriated the property for public use. That is not what is before the Court. Therefore, NRS-- or Chapter 37 does not apply. Even if it does apply, a final judgment is required.

What we have is a Developer (video interference) 250 acres of a golf course. The City took no action whatsoever to disturb its use as a golf course. The City simply denied -- affected its discretion to deny the only application that was ever submitted.

And again, it's not even a final decision by the City Council, but that's -- again, that's for the appellate court to review and decide whether or not there was a -- whether or not this action was even right because there was no second application submitted. So the Developer doesn't even know what the City may have approved even though it denied the initial applications.

Again though, the Developer purchased 250 acres for three and a half million dollars. The purported oppressive -- oppressiveness that Mr. Leavitt refers to doesn't exist. The irreparable harm to the taxpayers is evident because it's the

taxpayers will never recover whatever amount the final judgment is in this case.

If the City -- or if the Developer is allowed to execute judgment at this time, the City is entitled to a stay of the judgment as a matter of right under Rule 62. NRS 37 does not conflict with Rule 62, and therefore we submit that the Court should grant the requested stay.

Even if the Court found that a stay is not required in this event in the matter in the issues before the Court, the City would, if the Court denies the request in the City's motion, the City would request that this Court impose a stay to allow the City to seek an emergency stay from the Nevada Supreme Court.

THE COURT: And I understand that, sir. I do. I get it.

This is what I want to do, and, I mean, I've read all the points and authorities. I looked at the statutes, and I do really appreciate the argument, and this is a really, really important decision for everyone involved. I get it. I understand what's at stake.

And all I want to do is this, take a few days and just deliberate, more so than anything and think about it and go back and read the statute again, look at the cases. I mean, I -- it's a unique issue, and there's a lot at stake for everyone involved. So I just want to deliberate and maybe read

a little more. That's all I want to do. All right. So I'm going to just tell you that.

MR. LEAVITT: I appreciate that.

THE COURT: So I just want to -- it's like a jury making a decision. And this is a tough decision for me to make, but at the end of the day, I have to make that decision, and that's why I'm here. I get that. I do think it's important to sit back and reflect. I appreciate the arguments.

And so let's go ahead and move on to the next matter as far as reimbursement of property taxes and a motion to retax and so on.

What should we do next? Because I'm going to line these up.

MR. LEAVITT: The taxes may be the easiest one, Your Honor.

THE COURT: Which one is that.

MR. LEAVITT: Whichever one you'd like to do, Your Honor. We have taxes and costs.

THE COURT: Whichever one. It's up to you, sir. It doesn't matter to me.

MR. OGILVIE: Your Honor, I'd ask that we argue the motion to retax.

THE COURT: Okay. We'll do that one first.

MR. MOLINA: Good morning, Your Honor. This is Chris Molina on behalf of the City. I'll be arguing the motion to

retax, and I don't want to go line by line and review each item of costs that was disputed. I don't want to repeat anything that was in the briefs. I think that both the developer's opposition and the City's original motion have a pretty good line by line breakdown, at least the developer's motion does. The developer's opposition has a spreadsheet or a chart that was attached as Exhibit 11. That might be a useful guide for the Court to follow as we discuss this motion.

And I want to reiterate that, you know, the City is not trying to nickel and dime the Developer with this motion. The City did not dispute any costs that the City was able to verify based upon the documentation that the Developer submitted with its memorandum of costs. For example, with respect to the developer's claim for parking costs and lunch, the City was able to verify that the dates on the receipts match dates of hearings in front of this Court. And so the City did not move to retax those costs, and that is clearly reflected in this chart that I was just referring to, which is Exhibit 11 to the developer's opposition.

This contains at least a high-level summary of which costs are disputed, which ones are not disputed. There's also one cost that was amended, which I will get to in a second here.

But I want to sort of go through the main issues that we have here and then look at some of the evidence that was

submitted to the Court to, you know, explain why the City disputed certain costs and why that documentation and evidence does not necessarily substantiate or demonstrate that the costs claimed were actually necessarily and reasonably incurred.

So just kind of going to the big issues here. The main issue that we have really is that, as the Court is aware, there are four different inverse condemnation cases involving the Badlands property. They're in front of four different Judges in four different departments. And based on the documentation that was submitted, it is pretty clear that the Developer did not keep track of costs incurred in each case separately, and I will turn to Exhibit 5 to the Developer's Memorandum of Costs to sort of point this out.

Exhibit 5 contains a FedEx invoice and also a check from the office of Kermit Waters that corresponds to the amount that's on that invoice, and both the invoice and the check stub lack any indication that this cost was incurred in this case, which is why we disputed this, both on that ground as well as the fact that there was no explanation for why this cost was necessary.

And in opposition to the motion to retax costs, the Developer conceded that this was a cost that was actually incurred in a different case, the 65-acre case, which is in front of Judge Trujillo. So, you know, off the bat, we already know that there's some issues here in the way that the

Developer kept track of costs and failed to basically keep records or have some kind of methodology for separating those costs amongst the different cases.

And this raises issues with respect to several other categories of costs where it's just not apparent based on the documentation that was submitted that the costs actually relate to this particular case.

Another example, and this is the one that we focused on in our motion, was the developer's Westlaw bills, is that there's no record of which case the Westlaw bill corresponds to. And we're unable to sort that out based on the documentation that's submitted. It's just simply too many costs in there to really drill down and figure out when, you know, when those costs were incurred compared to the status of each of the four different cases.

But the point is that we just don't have any documentation submitted showing that the costs were incurred in one case or another or that the costs were divided according to some method that, you know, is sensible. We just don't have any evidence to demonstrate that in front of us.

And, you know, the same thing with respect to the developer's in-house copy fees. If you look at Exhibit 9 to the memorandum of costs, you know, it just says 180 Land, LLC, and it just has a, you know, a calculation sort of back of the tablecloth type calculation as to the cost for this. But

there's no breakdown on the dates on this particular one, and without the dates we certainly cannot determine whether any of these costs were actually or necessarily incurred in this particular case and not one of the other Badlands cases.

So failure to provide documentation demonstrating that the costs were incurred in this case was really the biggest issue with respect to the majority of the costs claimed.

We also have a dispute over whether or not it was necessary or reasonable for the Developer to retain two experts that were never disclosed and, you know, from the City's perspective, were never used or relied upon in this case. One of those experts is Global Golf Advisors, which is also apparently the same entity as GGA Partners.

The other expert that was not disclosed was Jones Roach & Caringella. There's a number of issues, you know, with respect to these particular costs, namely the fact that they were not disclosed. They were not used. That in and of itself demonstrates that their work was not necessary.

In the opposition to the memorandum of costs, the Developer argues that it was necessary to, you know, prepare them in advance of the expert disclosure deadline so that they could be prepared to rebut any arguments that the City made, but the fact of the matter is, is that the City did not retain or disclose -- or disclose any retained experts in this case,

and the Developer did not need to hire these experts to review arguments and experts that the City did not make or hire.

So right off the bat we would submit that the approximately $77,000 paid to Global Golf Advisors was not a necessary cost; and if it was necessary, we have no evidence in front of us to judge whether or not it was reasonable. We're not disputing that the cost was actually paid, but we just don't have evidence to establish its reasonableness, but the fact of the matter is it wasn't necessary to pay $77,000 to Global Golf Advisors.

Likewise, the Developer took a risk in retaining Jones Roach & Caringella prior to the expert disclosure deadline and paid them $30,000 to prepare for a rebuttal report that they never had to prepare, and so we would submit that these costs are also unrecoverable.

With respect to the only expert that was disclosed, Mr. Tio DiFederico, again, the City is not disputing that the Developer actually incurred the amount of costs claimed, $114,250. With respect to Mr. Tio DiFederico's fees, we would argue that there was certainly fees that were not necessary and not reasonable, particularly in light of the fact that Mr. DiFederico did not testify at trial and did not sit for a deposition.

And we would also argue that the developer's expert Mr. DiFederico employed this very complicated, complex

valuation method, the subdivision method analysis, which is, you know, questionably not admissible under certain circumstances, in Nevada and certainly in other jurisdictions. It's per se inadmissible.

But really what we're taking issue there, taking issue with there is that Mr. DiFederico did this subdivision analysis and applied it to three different hypothetical scenarios, two of which have really no bearing or similarity in reality.

And if you look at page 89 of Mr. DiFederico's report -- and we attached that as Exhibit A to the City's motion to retax costs, at page 89 of the report, it states that Mr. DiFederico relied on the following extraordinary assumption, and I'll just quote from this. It says, The values for the 16-lot and 7-lot scenarios are based on hypothetical condition that a waiver SDR and TMP approval -- that means a waiver Site Development Review and Tentative Map Approval -- similar to those approved for the 61-lot scenario were given to the development plans of 16 lots and 7 lots.

And so right there he says it in his own report at page 89 that these were just hypothetical scenarios that were based on this extraordinary assumption that these 16-lot and 7-lot subdivisions would be approved. And, in fact, this statement that I just quoted from actually assumes that the, quote, 61-lot scenario was approved, which is not correct, and

that's, you know, part of the reason why this case was started was because that 61 lot tentative map and site development review application were denied.

So again, you know, our arguments with respect to Mr. DiFederico's report, which is by far the most significant costs claimed here is that, you know, it wasn't necessary to incur this extent of a bill when Mr. DiFederico didn't testify, never sat for a deposition, didn't do a rebuttal report, didn't review any expert reports prepared by the City, and the fact that he unnecessarily spent a lot of time doing this subdivision method analysis and applying it to two hypothetical scenarios that have basically no basis in reality.

And on that basis we would submit that Mr. DiFederico's fees were unreasonable, and it's ultimately the developer's burden to establish that the $1500 cap is not appropriate and that the circumstances of Mr. DiFederico's testimony justify the excessive cost.

And the last sort of major issue that I wanted to sort of bring up here is that the City was the prevailing party in the petition for judicial review phase of this proceeding. The Developer did not respond to that argument in its opposition; however, you know, it would be our position that the Developer should not be entitled to recover costs for the petition for judicial review phase of this proceeding, particularly since, in light of the Nevada Supreme Court's

decision in the *City of Henderson* case, the petition for judicial review should not have been combined with original civil claims for inverse condemnation. The City did file a motion to dismiss at the beginning of this case on that ground, and it was denied, but --

THE COURT: You know what's interesting about that case, and I don't mind saying that, they weren't combined. But go ahead. They weren't. Yeah, but go ahead.

MR. MOLINA: Sure. And I know that Your Honor knows that case very well.

THE COURT: Yeah.

MR. MOLINA: So I won't go into the particular --

THE COURT: No, but I understand your point. I do. I get it. I do. I get it. I do.

MR. MOLINA: Right. And just to give the Court some kind of idea, a sense of, you know, what --

THE COURT: How do I make a determination in that regard, and I don't mind saying this. Many times when I'm looking at retaxing costs and award of fees and things like that, I kind of feel like I'm a forensic accountant, right, and it's tough. It really is. I mean, I'm familiar with the *Bobby Berosini* case, and, I mean, I get that, but for example, and the only reason I bring it up when you talk about DiFederico, the expert, what would be appropriate, if any, from an expert fee standpoint? Because we're talking about I guess the

claimed amount was $114,250.

MR. MOLINA: Well, if you're asking that question of me, Your Honor, my response is that there should be an appropriate reduction based on, you know, what we would to be an unnecessary parts of the report. We also have argued in our briefing that the -- Mr. DiFederico's analysis relied heavily on the Court's own opinion, especially with respect to the legally permissible use of the property, and therefore, you know, it was not necessary for him to conduct an independent investigation into that.

And, frankly, we don't know exactly what Mr. DiFederico spent all of his time on. His bills are very vague, and so it's very difficult for me to argue that it should be reduced by a specific amount because I can't link the documentation to any particular task, you know, just looking at the exhibits that were attached to the memorandum of costs.

And Exhibit 3 contains the invoices from Mr. DiFederico's bills, and it just says, you know, it has a breakdown of the number of hours and the dates, and then a description of what all of that included without necessarily, you know, identifying what, you know, what line item for each time entry corresponded to which task that was performed.

So, you know, I'm sort of at a loss because if there was that sort of detail, then we would've been able to go through and parse that out and come up with a more specific

figure as to what a reasonable cost would be, but we're just not in a position to be able to do that based on the documentation that was submitted.

And I'll just round out one other point that I was making about the City being the prevailing party on the judicial review, petition for judicial review proceeding. Just to give the Court an idea of what this, you know, included, there were roughly $15,000 of the Developer's Westlaw bills, which are not broken down by a case number, but about 15,000 of those costs were incurred prior to February 29th, which is -- I'm sorry, February 2019, which is the month in which the Court entered a nunc pro tunc order. That's what I would consider to be the final order in the PJR phase of the proceeding, and so, you know, that's another issue that we have here.

So there's $15,000 of Westlaw bills that were incurred prior to the resolution of the PJR, and then also, you know, you've got the developer's filing fees that are going to just be estimates based on what the docket was showing as having been filed. I haven't done an analysis of the docket to determine how many documents were filed prior to February 2019, but it's -- it's not insignificant.

So just to briefly recap, you know, the four main issues, from my perspective at least, is that we have multiple cases involving similar set of facts, same parties, same counsel, and none of the documentation submitted really breaks

any of that down by case.

Some of it can certainly be attributed directly to this case, such as, you know, court reporter's fees, and we didn't dispute the court recorders that were actually providing in court transcription services.

But at any rate, we don't have documentation separating the costs between the other four cases that we're not able to allocate specifically to this case.

And the second major issue that we have here is we've got undisclosed experts that were never used, never produced a report, and we think that those are just, per se, unrecoverable under the statute.

The third major issue that we have here is Mr. Tio Federico's report. We believe that costs were excessive based on the level of work that was performed, the number of hours that were required and the amount of time that was apparently spent on this very complex subdivision method analysis, which was applied to hypothetical situations that have no bearing in reality.

And then finally, you know, the fourth issue that we -- major issue that we have here is that a substantial number of these costs were incurred prior to the final resolution of the petition for judicial review, which the City was the prevailing party on.

And with that, I'll turn it over to Mr. Leavitt.

THE COURT: All right. Thank you, sir.

Mr. Leavitt.

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

Your Honor, the rule for recovering costs in an eminent domain, an inverse condemnation case is set forth in the Constitution, the Nevada Constitution, Article I, Section 22.4, and it says that a landowner -- a landowner should be awarded all of their reasonable costs and expenses actually incurred. And then it goes on to say that that is part of the just compensation award. So we're talking here now about a constitutional recovery here, which is part of the just compensation. Therefore, if the landowners get shorted on their costs that they had to pay in this case, then they're going to get shorted on their constitutional right to be paid just compensation.

And so the rule that's laid out by the Nevada Supreme Court -- or by the Nevada Constitution is, Number 1, the cost must be reasonable, and they must be actually incurred. That's the test.

And then the Nevada Supreme Court refined that test a little bit in the *5th & Centennial* case, and here's what they said in *5th & Centennial*.

Determining reasonableness may necessitate detailed documents such as itemizations, and then they go on to say

though, which are only required where the District Court cannot determine the necessity and reasonableness without such documents.

Judge, in this case it's met. For every -- and I'll address some of the concerns that Mr. Molina had, but for every cost that's been incurred, we provided the document or the Document (video interference) showing that that work was done. We provided the invoice showing that we were billed, that the landowner was billed, and we provided the check showing that the landowner wrote the check. Therefore, all of these costs were actually incurred. They were actually paid. So the only question is are they reasonable. The Nevada Supreme Court addressed that also in *the 5th & Centennial* case.

Judge Denton in that case increased significantly the costs that were granted above the statutory limits that Mr. Molina cited to you, and the Court found three reasons why Judge Denton was proper in doing that:

Number one, because of the complex nature of the case. The Court said, listen, that was a complex case. I would have to say we certainly meet that standard here, Judge. It's been going on for four years. We've been up to the Supreme Court and back. We've been to federal court and back. There's been three phases, the property phase, the take phase and the just compensation phase. This is a complex case, and it's been -- and it's been adjudicated over this four-year

period.

The second factor that the Court looked at to determine whether to increase the costs in that eminent domain case was the extensive history of the project. That factor is met here. There's been thousands of pages to go over the extensive history of what occurred here. You'll recall at the summary judgment hearing Mr. Molina spent probably about a day, an entire day at a hearing with thousands of pages of documents going over the extensive history. So that factor is met.

The third factor the Court looked at to increase the costs above this 1500 standard was the specialized experts that were needed. The Nevada Supreme Court has repeatedly held that an eminent domain case is a battle of the experts, and experts are absolutely needed in these cases.

Therefore, Your Honor, the test is was it reasonable and was it actually incurred. So with that test in mind, I'll turn to first the large one, which is Mr. DiFederico's report. Early on in this case, when this case was removed to federal court, the landowners submitted as part of their discovery in federal court right in the record, Your Honor, back in -- this is back in 2019, it is very likely that the expert appraisers in this case will each charge well in excess of $100,000. The City was put on notice of this back in 2019.

In addition to that, we've submitted the affidavit of Autumn Waters, who's been practicing exclusively in the area of

eminent domain for 18 years. In that affidavit she stated that it is common in these eminent domain and inverse condemnation cases, especially a complex one like this where the expert will charge in excess of a hundred thousand dollars and cited to a case we recently did where the expert appraiser charged $250,000 and didn't even testify at trial.

Therefore, Your Honor, the fee that Mr. Tio DiFederico charged in this case is not outside the realm of reasonableness. It's absolutely reasonable, and it's been proven by not only the discovery disclosure, but by the affidavit of Ms. Waters.

Now, Mr. Molina said, well, you can't really tell what work Mr. DiFederico did. Well, we can. We can look to his 136-page report where he lays out in detail the work that he did. We can also look to his work file, which is 7,048 pages. Therefore, Your Honor, his work is very detailed. It lays out exactly what he did.

The next question or the next challenge to Mr. DiFederico's report is Mr. Molina says, well, Mr. DiFederico used a subdivision method that is questionable. I've got three responses to that, Your Honor. First, the City stipulated to that report in as evidence. Therefore it cannot complain now about the subdivision approach that was used.

Number two, the findings of facts and conclusions of law regarding just compensation cite that a subdivision

approach with approval. The findings of fact and conclusions of law on just compensation lay out exactly what that subdivision approach is and why it was appropriate here. The Nevada Supreme Court in *Tacchino versus State Department of Transportation* held the subdivision approach is appropriate.

And, Your Honor, it is very common and, in fact, appropriate for an expert to use many methods to value property. I'll quote to you from a 9th Circuit Court of Appeals opinion Eden versus -- or Eden Memorial Park (phonetic) -- or U.S. versus Eden Memorial Park. In the majority of assignments, the appraiser utilizes all three methodologies. On occasion he may believe the value indication from one would be more significant. Yes, he -- yet he will use all three as a check against each other to test his own judgment. That's Ninth Circuit precedent. It's good for an appraiser to go through and use various methodologies.

I guess what the suggestion that's being made is that Mr. DiFederico should have just done one methodology. Then what we would hear from the City is well, his report is not reliable because he didn't do all three methodologies that the Courts say he should do, and he should check it. That's way various methodologies were used, and that's why he went through the 7-, 16- and 61-lot scenarios, was to do this as a check.

And, Your Honor, if the City really thought that there was something inappropriate about Mr. DiFederico's

report, they could have challenged it in a deposition and never did that. It's too late to challenge it, and they've stipulated to its admissibility.

Your Honor, I mean, at various times the City says in its motion that the work that Mr. DiFederico did was not necessary in this case, and his highest and best use just relied upon your order, and his take analysis just relied upon what was written in the findings of facts and conclusions of law regarding take. That's not true.

Mr. DiFederico went and did his -- he certainly looked at this Court's orders, but he states specifically in his report that he went and read the documentation to confirm them so that he could determine from an appraiser's viewpoint the impact of the City's actions. Therefore, Your Honor, it's simply not true to just say that he read your orders and then just rubber stamped them. That's not what happened. He did his own independent research, and it's set forth in his report. And the City could have deposed him and fleshed that issue out if it did not believe it to be true. They did not.

The second cost -- well, then therefore, Your Honor, this cost of $114,000, in a case like this, according to the affidavit of Autumn Waters, according to the work that was done by Mr. DiFederico, the invoices he submitted and the checks that were paid by the landowners to Mr. DiFederico are reasonable and were actually incurred in this case. The

landowners actually paid this expert that sum of money.

And I will note one last thing is the City makes the argument that, well, Mr. DiFederico shouldn't be able to charge for his trial preparation work. Your Honor, we prepared him for trial. We spent a lot of time comp assuming we were going to go to trial. And then, of course, the City stipulated to the admissibility of the report, which made it so he did not need to testify at the bench trial.

Your Honor, I'll turn to this. The GGA report, the golf course report, the government argues, well, this wasn't disclosed. And it never was a part of this case.

Your Honor, the GGA report was absolutely necessary in this case because the City early on repeatedly -- and the GGA report is the golf course report where the golf course expert makes a determination that a golf course use is not financially feasible.

As you'll recall early on in this case, the City repeatedly said that nothing -- there had been no action or no taking of the property because the landlord could still use the property for a golf course. But we had, in order to prepare for trial and properly present our case, hire a golf course expert who's a financial feasibility expert to rebut that City argument.

You'll recall that during the take phase of summary judgment, the City's Las Vegas Council admitted that the golf

course was not feasible, but their California Counsel, all the way up to the date of determining the take said, well, this may not -- a golf course may not be most economically efficient if it was used for a golf course, and if a golf course is no longer viable, and then he said, and I don't think that's been established. So he was even arguing that the golf course was feasible all the way up to the findings of -- or all the way up to the date that we were arguing the take issue. Therefore, this was an absolutely necessary document to prepare.

This expert had to interview past owners. He had to interview -- or the past owners. He had to analyze the past operations. He analyzed the national golf industry, and he analyzed the Las Vegas golf industry, and he concluded that a golf course use on the property was not financially feasible.

And here's where the report was used. Number one, it was given to Mr. DiFederico so that he could analyze it as part of his expert report. Expert appraisers are entitled to rely upon other experts. Secondly, it was produced to the City of Las Vegas. The City of Las Vegas had, again, every opportunity to depose this individual.

And thirdly, Your Honor, the golf course report is again referenced in the findings of facts and conclusions of law on just compensation. Therefore, this is a cost, Your Honor, this golf course report is a cost that was absolutely not only reasonable, but absolutely critical in this case, and

it was actually -- it was actually incurred.

And, Judge, you can determine that based upon the documents. The report was part of the case, Number 1, and number two, invoices were submitted, and number three, checks were used to pay for that.

Now, the third item that counsel brings up is this report and the fee by Jones Roach & Caringella for $29,625. Your Honor, we had a short period to do rebuttal reports, or surrebuttal reports. We exchanged expert reports, and I can't remember whether it was 30 or 60 days. We anticipated that the City would produce an appraisal report. So we hired a rebuttal expert. We, because of the enormous record in this case, because of the enormous history and facts, we started that rebuttal expert early on so that that expert could become acquainted with the facts.

Once the City produced no reports, that rebuttal expert became unnecessary. So we immediately told that expert to stop working, but those fees were actually -- or those costs were actually incurred in this case. And again it's reasonable, Your Honor, to retain a rebuttal expert. It's reasonable to get that rebuttal expert working early on prior to the reports being exchanged so that they can be prepared to rebut the other expert. Therefore, that Jones Roach & Caringella fee of 29,625 was appropriate.

The final issue that Mr. Molina brought up at this

hearing is the Westlaw billing. Your Honor, admittedly, the Westlaw billing was used for all four cases; however, this was the lead case. And, Your Honor, I -- and we put it in our brief. It is very reasonable to assume that all of those bills from Westlaw were used to assist with the 35-acre case because it was indeed the leading case. If this Court finds it reasonable to split them up, we understand that.

But, Your Honor, I tell the Court that the $50,000 in Westlaw, we had to research the take, the property interest. We had to go into separation of powers law that the government argued. We had to dive in to petition for judicial review law that the government argued. We had to dive into significant federal law that was totally irrelevant in Nevada that the government argued.

So those Westlaw bills were reasonable and necessary in this case. I would say it would be very difficult to say that, you know, none of it was used or part of it was used in this 35-acre case because, Your Honor, it was used. And it was used -- after used in this case, it was used in the other cases. And if it was used in the other case, it was used in this case, Your Honor. They do have very similar facts. So, Your Honor, that Westlaw bill also is appropriate.

I'll address just finally Mr. Molina's argument that, well, none of these costs should have been expended until after the PJR was dismissed in 2019. Again, not true, Your Honor.

As you'll recall, these cases were severed in 2017. That means that work was being done in the inverse condemnation case from 2017 all the way up to today. The work, again, at the same time the petition for judicial review case was going on, this 35-acre inverse condemnation case was going on, and, Your Honor, we have submitted no costs from the petition for judicial review case.

But, Your Honor, we have the documents. We've proven that the costs have been incurred. They've been actually paid. We've provided all of the checks. We've submitted to this Court Exhibit Number 11 which lays out each of those costs, some of which we've modified and withdrawn. We would ask that the Court enter a finding that those costs are reasonable, appropriate and should be reimbursed in this case as part of the landowner's just compensation award.

This is where I'll close. If we accept Mr. Molina's argument and you say, Judge, well, just give them 50,000 for the appraisal report, that means the landowner will have paid an extra 64,000 for the appraisal report, and that $64,000 will reduce his just compensation award below the constitutional threshold, and that constitutional right would be violated, Your Honor, because these costs are recoverable and part of the just compensation award.

Thank you, Your Honor. Any questions, I'd be happy to answer them.

THE COURT: None at this time.

Mr. Molina, sir.

MR. MOLINA: Thank you, Your Honor. I'll just pick up where Mr. Leavitt left off, and that is this argument that just compensation is somehow reduced if you don't award the landowner his costs, and that argument is itself incorrect. And just compensation is intended to compensate the landowner for the taking of property. The compensation must be based on the value of the property. It's not based on this, you know, overall economic situation of the Developer, as he likes the claim, and it's the same exact reason why attorneys' fees are not typically included in just compensation is that the just compensation is not intended to compensate the landowner for every economic burden that it has suffered due to a taking. It's to compensate the landowner for the taking of the property itself. So that is just one thing I wanted to hit up front.

With respect to this argument about the City's stipulation to the admissibility of Mr. DiFederico's report, I would submit that a stipulation to admissibility is a pretty low threshold. You know, we did not stipulate that Mr. DiFederico's fees were reasonable and, you know, I believe that this admissibility argument that the Developer is making mischaracterizes the arguments that the City is making, which is that, you know, none of the -- none of the report, you know, has any value and should not -- you know, the Developer should

not be permitted to recover any costs with respect to Mr. DiFederico's report, and that's simply not what we are arguing here.

You know, we basically argue that there were certain things that did not require the Developer -- Mr. DiFederico to do an independent analysis, and we've also argued that all of this time that was spent on this complex subdivision amount method was inappropriate, you know, given the fact that these were two totally hypothetical issues, and the Developer did mention, or Mr. Leavitt mentioned the *Tacchino* case, which, as we put in our briefs, you know, that did not necessarily state that the subdivision method is, you know, the preferred method of valuation.

It basically said that this is an acceptable method of valuation in cases where it's not purely based on hypothetical conjecture and speculation, which with respect to these two hypothetical scenarios that Mr. DiFederico included in his report, that's exactly what they are. They're hypothetical. They're, you know, based on conjecture. They're not necessary to the report.

As Mr. Leavitt argued, you know, an appraiser can apply multiple methods of valuation, you know, both the cost method, the comparable sales method, the income approach and to do all of those things would not be unreasonable, but to take the subdivision method analysis, which is really just one

subtype of one of those broader types of valuation, and to apply it to scenarios where he now has to, you know, make assumptions about costs for a hypothetical subdivision that nobody has ever proposed and was never approved by the City, I mean, that's just a waste of time, plain and simple, and it, you know, didn't require however much time Mr. DiFederico spent on it, which I'm not able to say, because I can't determine that based on the invoices.

So again, we're not saying that the Developer shouldn't be permitted to recover anything based on Mr. DiFederico's report. What we're arguing is that the cost should be reasonable based on, you know, what he did and, you know, comparing that to what he was actually -- what he actually needed to do, which was simply to value the property.

With respect to the Global Golf Advisors' report, Mr. Leavitt was very careful to argue that the City made this argument about being able to run a golf course early on in the case, and that's just something that the City never really continued to argue in the inverse condemnation phase of this case. The Developer cited to one instance where Mr. Schwartz argued on behalf of the City that the, you know, feasibility of a golf course had not necessarily been established but then assumed that it was not a feasible use of the property.

And so the City certainly didn't place that at issue, you know, to any great extent that necessitated 70,000 --

$77,000 paid to Global Golf Advisors for this report that, you know, it really wasn't required to generate.

And ultimately, you know, if the Developer wanted to use that report, it could have disclosed GGA as an expert witness, which it didn't do. It only disclosed the report as part of Mr. Tio Federico's expert witness file, his work file. So how was the City supposed to know that the Developer intended to claim costs for this when it never disclosed him as an expert?

And, you know, getting to Jones Roach & Caringella, probably pronouncing that incorrectly, but I'll call it the JRC, you know, the Developer said, well, it was absolutely necessary to retain them in advance of the expert disclosure deadline because it was such a short period of time between the initial expert disclosure deadline and the rebuttal expert disclosure deadline.

So the City stipulated to multiple extensions of the expert disclosure deadline at the developer's request, and it would have done the same for the rebuttal experts if that's what they wanted to do, but those were the times that they had proposed, was 30 days to prepare rebuttal reports.

And so they took a calculated risk to retain this expert without knowing whether the City was going to disclose an expert that they would need to use JRC to rebut. That's on them. The City should not be forced to bear the cost of the

developer's litigation strategy.

With respect to the Westlaw billing, Mr. Leavitt argued that this was the lead case, and so, you know, all of these bills, Westlaw bills reflect work that somehow benefited this case, and it's just not really the analysis that, you know, typically applies to these types of issues. You know, can we establish that the Westlaw bill was actually incurred and the cost was paid in connection with this case? We can't establish this based on the bills Mr. Leavitt acknowledged that he's making some sort of qualitative argument that, you know, because in his opinion this is the lead case that everything benefited this case, and I don't think that that's an appropriate argument to make.

Finally, the Developer claimed that -- Mr. Leavitt actually argued that, you know, about the prevailing party issue and costs that were incurred prior to the final resolution of the PJR. I would just note that we had previously mentioned to the Court that approximately $15,000 of that $50,000 of Westlaw bills was attributable to time before the final order on the PJR, and there were also several costs that were, you know, copying costs that appear to have been related to before that filing fees. The Developer in fact actually claimed the filing fee for the petition for judicial review as a cost, and so to say that they didn't claim any costs for the petition for judicial review is not accurate.

And I think that's all, Your Honor.

THE COURT: And for me, as far as the Westlaw is concerned, I think from just a reasonable perspective, I'd reduce that by -- because there's another three companion cases; right?

MR. MOLINA: Correct.

MR. LEAVITT: Yes, Your Honor.

THE COURT: Okay. We're going to reduce that by 75 percent and you get 25 percent of that for the Westlaw bill.

Now, it becomes much more problematic for me when it comes to the expert fees and costs because what's necessary, I don't think you look at what's necessary from an expert report perspective when it comes to civil litigation and for preparation for trial based upon the ultimate trial itself. And what I mean by that is this. Here we had a scenario where ultimately there was an agreement and/or stipulation and/or waiver or however you want to categorize it.

And so my point is this. That makes my job much more difficult because, for example, say hypothetically, if there had been motions in limine filed regarding DiFederico Group's opinions and hypothetically I narrowed his opinions and portions of his report. Then going back and extrapolating, for example, and I realize this wouldn't be exact, but hypothetically, if I made a determination that half of the work he performed would not be admissible because it, for example,

might not be the assistance requirement under *Hallmark*, that makes my decision a lot easier, but now I have the scenario where, for all practical purposes I don't think his opinion was really challenged; right?

And so -- and the reason why I bring that up, at the end of the day I do realize that whatever decisions I make, and this is important to point out, that when it comes to our Nevada Constitution, and more specifically Article I, Section 22, paragraph 4, just the just compensation award shall include all reasonable costs and expenses actually incurred; right? And it doesn't have language that deals specifically with based upon expert witnesses who testified at trial and/or no other qualifiers. It just appears to be all reasonable costs and expenses actually incurred.

I do understand the reasonableness, but my point coming back to that is this. It's easier for me to determine what potentially could be reasonable if the expert opinion was attacked, stricken and the like. And last, but not least, I think it's important to point out too that not all experts are trial experts, right, and we understand that.

And so, anyway, as far as the motion attacks the memorandum of costs, I'm going to go ahead and reduce the Westlaw fee by 75 percent and one fourth.

Let me look here. And as far as the claimed expert fees, and I guess this would be GGA Partners, Global Golf

Advisors, DiFederico and also Jones Roach, and it's my understanding that was being utilized for the purposes of rebuttal. And once again, I never got a chance to really -- there was no rebuttal testimony, the necessity for it. That doesn't mean he wasn't necessarily retained.

And so all I'm saying is this. Regarding the GGA Partners amount in the sum of $11,162.41, Global Golf Advisors in the amount of $67,094.00, DiFederico Group, I think the claimed amount is $114,250, and Jones Roach Caringella, $29,625 and zero cents, I'm going to let those stand.

And I think -- I know all the other claims, as far as expenses and costs, I'll let those stand too.

All right.

I guess the last issue is payment of property taxes; is that right -- reimbursement. I'm sorry.

MR. LEAVITT: Yes, Your Honor.

THE COURT: All right. Let's just dig into this quickly.

Mr. Leavitt.

MR. LEAVITT: Yes, Your Honor.

Just very quickly, there's two sources of law that we've referred to, the *County of Clark versus Alper* case. In *County of Clark versus Alper*, there's a one paragraph in the case where the Court specifically addresses reimbursement of taxes at headnote 19 and 20 and says that the District Court

was reversed with instructions to reimburse the Alpers for their property taxes actually paid after the land was taken by the County.

We also -- section -- Article I, Section 22 -- I'm sorry. Article I, Section 22 for the Nevada Constitution states that the landowner must be put back in the same position monetarily as if the property had not been taken, and therefore, Your Honor, the landowners are requesting reimbursement of taxes exactly as the award was granted in the inverse condemnation case of *Alper*.

The Court has entered a finding of a take in this case. It's findings of facts and conclusions of law on the take are very clear that the City of Las Vegas has taken the property, meeting all four standards of Nevada's taking law and therefore, Your Honor, the landowners ask for a reimbursement of their taxes in the amount of $976,889.38.

We -- we used August 2nd, 2017, as the date upon which the taxes should have no longer been paid, and we've calculated those taxes from August 2nd, 2017, and as set forth in our motion, we used that date because that was the first date of compensable injury, as stated in *5th & Centennial* case, and the reason we used that, Your Honor, is because as of on that date the City had already denied the singular application to develop the 35-acre property, and on August 2nd had denied the Master Development Agreement, which is the

only application the City stated it would approve to develop the property. All the while the City was taxing the landowners on a lawful use of residential. The City prohibited that residential use through two denials.

Therefore, Your Honor, we ask that those taxes be reimbursed pursuant to the inverse condemnation case of *County of Clark versus Alper*.

THE COURT: Okay. Thank you, sir.

And we'll hear from the opposition.

MR. SCHWARTZ: Yes, Your Honor. This is Andrew Schwartz representing the City.

Your Honor, can you hear me?

THE COURT: Oh, yes, sir, I can hear you very clear. I'm sorry.

MR. SCHWARTZ: Okay. Thank you. All right.

Your Honor, the *Alper* case doesn't apply here. The *Alper* case, in the *Alper* case, the City took physical possession of the owner's property to build a road. It did not file an eminent domain action. The Court said to the county, you should have filed an eminent domain action because you took physical possession of the property.

So the Court then -- the -- so it was an inverse condemnation case, but nothing like this case where the allegation is that the City's regulation abuse of the owners use of the property is a taking of the property. The City does

not -- has not taken physical possession of the property. The City does not want physical possession of the property for any public project, and will not take physical possession of the property.

This case is based on a regulatory taking, a denial of use. That's the allegation. There are three cases in Nevada where the Nevada Supreme Court considered this type of taking (indiscernible), and those are the State, the *State versus the Eighth Judicial District* case, the *Kelly* case, and the *Boulder City* case. In each of those cases, the Court found that the government agency had not denied all use of the property and therefore had not taken the property.

And those are the only cases -- so we don't have a Nevada Supreme Court case that's like this case where there's the allegation is denial of the owners use preregulation.

Now, it makes sense that if the government has actually taken possession of the property, like the *Alper* case, and in eminent domain cases where to build the public project, the government needs private property, it files an eminent domain case conceding liability, and then deposits the probable compensation, which the owner can then access, and then the government takes early possession of the property, builds the project, and, of course, of course, at the time of judgment, the money should be paid to the property owner, and all taxes, if the property owner pays taxes after the government has

physically taken possession, well, then, yes, those should be reimbursed, as in the *Alper* case and typically in an eminent domain case. And all the other cases that the Developer relies on are eminent domain cases where the government has or will take physical possession of the property for a public project.

And this is an issue in common that we had with the motion for the stay, Your Honor, where there's a critical distinction between the *Alper* case and this case where the City has not dispossessed the owner. It has not taken physical possession of property for a public project. And in that case, the City shouldn't have to pay the money, the judgment because it -- then, if appealed successfully, the Court is going to have to unwind the entire transaction.

But anyway, I don't want to get into the motion to stay. The Court has already taken that under submission.

But here so we have a situation where the property owner still had possession and title of the property during this entire period, and I want to point out that the property owner in its appeal of the assessment attaches, the assessor said well, your property is now a residential property. I'm going to assess you for residential use at the higher rate than the golf course. And the Developer initially appealed that determination, and in their brief, and we cited this in our papers in our briefs, Exhibits quadruple L. LLLL, at page 2709 of the defendants' exhibits. That's let me see. I think

that's Appendix 12. It's page 2209 and 22010.

The Nevada court argued to the assessor, the heading on page 8 of that brief to the assessor is the property may still be used for golf. And then it goes into some detail about why the property can still be used for golfing.

Now, the date of this brief is significant in that it was August 2nd. Excuse me. The date of the brief was August 29, 2017. Why is that date significant? Well, in this case, Your Honor, the Court had found that property owners have a constitutional -- constitutionally protected property right to use their and develop their property for any use that's permitted by zoning and that the government has no discretion.

And that, if that's the case, then on August -- on June 21, 2017, when the City disapproved the 35-acre application, the application that the Developer filed to build 61 units, housing units, on the 35-acre portion of the Badlands, that's the day the City denied those applications. If the Court is correct that the Developer had a constitutional right to approval of anything that they proposed, no discretion on the part of the City.

Then the taking occurred on that date, June 21, 2017. So this brief was filed after that occurred, more than two months after that occurred, and the Developer is saying, again, I quote from page 8, the heading, the property may still be used for golfing. That was the Developer's argument to try

to get the assessor to reduce the assessment for the property.

So it would be -- it would be unjust if the City were required to reimburse the Developer for property taxes that the Developer paid, which is the cost of owning property only if the Developer who remained in possession of the property, had title for the property, and the City would be required to reimburse the property owners for the taxes they paid, that would be unjust.

I also want to point out, Your Honor, that in -- in arguing that the appeal was too high, the Developer initially argued, well, we can still use the property for golf. Therefore, the property should be assessed at the lower rate. Then the Developer did some -- a very curious thing. It stipulated with the assessor to the higher amount. In other words, it abandoned its appeal.

Now, why did it do that? Because the property was designated PR-OS, park recreation open space in the City general plan, which under NRS 278.250 -- .150, and NRS 278.250 is the controlling law with regard to the use of that property.

The Developer could not succeed on its taking claims if -- if the Court found that the PR-OS designation prevented residential development of the property. The Developer bought property they could not use for residential in 2015, and the City merely declined to change the law for that use. So the Developer paid a price for that property that was -- that

should have taken into account the fact that it couldn't legally be used for golf course -- or excuse me, for housing.

Well, what does that say? Well, if, according to Mr. DiFederico, if the property could not be used for housing, the property was worth zero. So the Developer paid zero for the property -- or paid for property that couldn't be used for residential. So according to the Developer's own evidence, the property was worth zero when the Developer bought the property, and it was worth zero after the City denied the 35-acre applications in June of 2017, and it was worth zero on August 29, 2017, when the Developer filed this brief with the assessor arguing that the property could still be used for golfing.

So if the Developer is right, if the (video interference) is correct, that the property was worth zero because the Developer couldn't develop the property for housing, then that means that the property was worth zero at the time of this appeal. The Developer, however, did not argue to the assessor that the PR-OS designation prevented any housing use of the property unless the City in its discretion changed that.

Why didn't the Developer argue, well, you should assess my property at zero because of the PR-OS designation? Well, because that's where all the -- that was the big payoff that the City -- that the Developer wanted in the inverse

condemnation litigation was it had to disappear the PR-OS designation so that it could go for the large dollars, and that gamble certainly paid off where the Developer here was awarded $34 million, and is seeking another 55 million in interest, taxes and costs and attorneys' fees.

So it's very telling here that the Developer ceded in its brief to the assessor that it still had use of the property for golf course, and therefore, taxes, you know, are necessary to maintain the ownership of property. That's the cost of maintaining a property. You have to pay your property taxes.

Moreover, the Developer is arguing that well, they need to be reimbursed for their property taxes because they need to be made whole in this proceeding.

Well, there is no question, there can be no question here that the Developer has been made more than whole. The facts are these that the Peccole Ranch Master Plan was developed in the early 1990s, 1500-acre property, and that is a condition of approval of that development where the original Developer set aside the Badlands for golf course use.

The City then designated the golf course PR-OS in the City's general plan. This was the open space. This was the amenity to serve the Peccole Ranch Master Plan. That was the purpose of this. The project wouldn't have been approved if there hadn't been this amenity set aside.

The Peccole Ranch Master Plan was then developed. 84 percent of the property was developed. The Badlands remained a golf course. Again, as an amenity to serve the golf course and the surrounding community. That's the purpose of setting it aside.

So the undertakings law, you can't -- it makes sense. You can't then carve off the amenity that the Developer -- original Developer was required to set aside to serve the rest of the development and then say, well, now I don't have an economic use of that. Now, the government, you know, has to let me do whatever I want with the property or pay me. That's not the law.

But the issue here is whether the Developer is made whole. The whole parcel was Peccole Ranch Master Plan.

And by the way, this Developer benefited from that amenity by developing the Queensridge Towers, the Tivoli retail, the retail shopping center and other houses in the area. They benefited. They had greater value because of the amenity, and all of the property in the area still retains greater value if that amenity was continued.

So when you look at the parcel as a whole, by preventing housing use of the 35 acres, you're not taking anything from the Developer that the Developer owned. They didn't have a right to do that.

Then if you consider just the Badlands as the parcel

as a whole instead of the entire Peccole Ranch Master Plan, the City approved construction of 435 luxury units in the Badlands. You can't carve up the Badlands into four different parts. The Badlands was always a single economic unit. It was bought as a single economic unit. The City approved 435 luxury housing units.

According to the Developer's own evidence, that property, just that part of the Badlands had increased in value to about $26 million, and the Developer -- the Developer paid less than four and a half million dollars for the property. I think Mr. Ogilvie said less than three and a half, but I think that the purchase price was less than four and half million dollars, and that's been thoroughly documented, and there is no evidence to support the Developer's claim that the Developer paid more, that the purchase and sale agreement was for seven and a half million, and then the parties -- they -- the City has established through documents produced by the Developer and the deposition of the seller of the Badlands to the Developer, that the Developer really paid less than four and a half million dollars for the entire Badlands.

So one part is worth $26 million based on the City's approval. So it can't be the case that the Developer needs to be reimbursed for his property taxes to be made whole. If you look at the four a half million dollars purchase price, that's $18,000 an acre or $630,000 for just for the 35 acres.

The Developer has claimed without any evidence that the Developer purchased the Badlands for $45 million, and in other documents it claims it purchased it for a hundred million dollars. Again, no evidence whatsoever to support that. The Developer's admitted they have -- they don't have a document to support that. All the other documents are the other way.

But even if they did, Your Honor, that 45 million, that's $180,000 an acre, and a hundred million, is $400,000 an acre. This Court awarded the Developer almost a million dollars an acre in damages. So reimbursement of the million dollars --

THE COURT: Well, I mean, the damage calculation, it's my recollection -- wait a second. It's my recollection the damage calculation was essentially uncontroverted; right? And so my point is this. I mean, there's no reason to relitigate this as far as the valuation is concerned.

MR. SCHWARTZ: No, that's not -- I'm not controverting the damage calculation, Your Honor. In this motion we controverted the damage calculation because the appraiser assumed that the highest and best use of the property --

THE COURT: My point is this: That ship has sailed basically.

MR. SCHWARTZ: Basically was --

THE COURT: No. No. I mean, I don't want to sit

here and spend another hour. That ship has sailed, right, as far as that is concerned. There was no valuation expert offered. At the end of the day, it was uncontroverted, and my ruling as far as the evaluation is what it is.

And so here we have a really simple issue that's focusing on one claim, and that's reimbursement of the property taxes based upon the taking date in this case offered by the plaintiff.

MR. SCHWARTZ: Yes, and --

THE COURT: And ultimately, there's no dispute as to how much was being paid in property taxes; right? And then you have --

MR. SCHWARTZ: Oh, I don't dispute that, Your Honor.

THE COURT: Okay. Then I'm trying to figure out --

MR. SCHWARTZ: I am disputing that their entitlement to reimbursement.

THE COURT: -- and then we have a provision under the Nevada Constitution that deals specifically with making a potential individual landowner, property owner that's involved in a eminent domain and/or an inverse condemnation matter whole, and so how do you make them whole if they paid taxes on real property that they can't use, and there was a taking determination? It's a simple calculation.

MR. SCHWARTZ: Your Honor, I just -- I've cited to the Court their own brief where they contradicted that

statement. They said, and I quote, the property may still be used for golfing. That's the Developer's statement, but that doesn't matter in this case because --

THE COURT: But it doesn't matter because I made a determination --

MR. SCHWARTZ: -- because the City didn't take possession of the property.

THE COURT: Wait a second. Wait a second. It doesn't matter because I've already ruled on the value of the property. It was uncontroverted.

MR. SCHWARTZ: That's not --

THE COURT: All that other stuff doesn't matter.

MR. SCHWARTZ: That's not -- yes, Your Honor, but that's not the issue here.

THE COURT: Well, no, the issue is this. This property was owned R-PD7. It was taxed R-PD7, right, and the plaintiff has alleged that they couldn't use the property because of the actions of the City based upon a specific date. And as a result, they're paying property taxes for property they can't use. Heck, they couldn't even go out and put a fence up; right?

MR. SCHWARTZ: Oh, no. Can I address that, Your Honor?

THE COURT: I mean, I'm just saying it's a fact that they couldn't put a fence up; right?

MR. SCHWARTZ: Well, it's not a fact that they couldn't use --

THE COURT: I mean, the issue is -- I'm not --

MR. SCHWARTZ: -- of the property --

THE COURT: Sir, I'm going to tell you this.

MR. SCHWARTZ: -- they just admitted --

THE COURT: I mean, this is how I see it. I don't mind saying it. I'm going to give the argument made by Mr. Ogilvie at the very outset of this matter because I really want to think about it, and it's a big issue. I get that. But we're -- and that's an issue I have to give considerable consideration and looking at the statute, trying to make a determination as to whether I'm handcuffed as to what I really can do, whether I have any discretion at all. These are all things I think about, right. I don't mind saying that. I'll tell you what I'm thinking about on the record.

For example, when I look at the statute, the statutory scheme under Chapter 37, it could be argued, Judge, you had no discretion. You have to do this. I kinda get it. I understand what's going on. I understand Mr. Ogilvie's position as it relates to the specific rules, the appellate rules and Rules of Civil Procedure. I guess it was Rule 62. And so I get it. I mean, I understand what's going on here and what's at risk.

But this one here, we're not -- I'm not relitigating

anything. I've made a determination there was a taking on a specific date. There's no question the plaintiff was cutting checks for what, $50,000 per -- what was the time period? I saw it right in front of me.

But my point -- and that's it.

MR. SCHWARTZ: Your Honor, it's not -- we -- I don't think it's correct that the Developer couldn't use the property. I just quoted the Developer's admission that they could use the property, and they could use the property for any use allowed by the PR-OS --

THE COURT: I've already made a decision that there's a taking, sir.

MR. SCHWARTZ: -- designation.

THE COURT: I've made a decision that there's a taking. I respect the City's right to appeal the decision. I do. I just -- I mean, I get it, but based upon my determination, I'm looking at the calculation here. The ticker started running on August 21st, 2017, and as far as the amounts are concerned, it doesn't appear to be any issue regarding that. I mean, it's a different variations of $51,000 that were paid in certain installments, and we have the check.

And then I look at the Nevada Constitution and specifically what it mandates, and it focuses on in all eminent domain cases, actions, just compensation shall be defined as a sum of money necessary to place the property owner back in the

same position monetarily without governmental offsets. It's pretty -- I mean, we're making this so much more difficult than it has to be. We are.

MR. SCHWARTZ: Your Honor, there is no authority in Nevada that property taxes are reimbursed if the government hasn't taken physical possession of the property or is not going to take physical possession of the property for a public project.

THE COURT: Well, this will be -- this will be the case of first impression on that specific issue if that's the case.

MR. SCHWARTZ: Well, then I guess I'm arguing --

THE COURT: I get a lot of -- I don't mind saying this. I've got a lot of cases of first impression. Sometimes I'm right. Sometimes I'm wrong. I mean, I don't -- that's what I'm supposed to do, make decisions, and the Court of Appeals and/or Supreme Court, with their infinite wisdom and collective decision-making can say, look, Judge, you're wrong, and this is why, or, Judge, you're right, and this is why. I get it. That's the processes.

MR. SCHWARTZ: Well, my point, Your Honor, is that there is no case for a good reason, and that is because the only cases that allow property tax reimbursement, and *Alper* seems to be the only one, is where the government took possession of the property. The property owner was

dispossessed from the property, couldn't use it. That is --

THE COURT: But on the flip side --

MR. SCHWARTZ: -- not this case. This case the property owner kept possession --

THE COURT: Wait. Wait. Wait. Wait. Wait.

On the flip side, there's no cases that says, look, you can't do this; right?

MR. SCHWARTZ: I'm talking about reason, a reason there aren't any cases is because there is no -- it would be unjust to reimburse the property owner for property taxes when they still have possession and title of the property. That is why there are no cases --

THE COURT: And they have possession and title of property --

MR. SCHWARTZ: -- because that would be unjust.

THE COURT: -- that's zoned R-PD7, and they can't do anything with it. It's economically not viable to continue running this business, and everyone forgets this. They talk about open spaces and the like. I think I was pretty clear on this at one of the prior hearings. At the end of the day, what is a golf course? It's not a park. It's a business; right, green fees, pro shops, restaurants. At the end of the day, it's a business, and this was no longer a viable business. That's what it's all about.

MR. SCHWARTZ: Well, they're not entitled to make

their profit on that property. That was set aside as the Open Space Parks and Recreation for the development.

THE COURT: Well, then if that's the case --

MR. SCHWARTZ: There is no -- there is no entitlement.

THE COURT: You know what, I understand this, and then we'll be done.

If that's the case, the City should have bought the property at the very outset, and we wouldn't be here. And so we're going to burden the property order to sit on property that's economically not feasible, right, to run as a golf course, and we're going to let it remain open spaces forever as an amenity, and the City is not willing to pay for it. Well, that's why they have inverse condemnation law, I'll be candid with you.

MR. SCHWARTZ: Thank you, Your Honor. I don't have anything further.

THE COURT: All right. Thank you, sir.

Anything else, Mr. Leavitt?

MR. LEAVITT: No, Your Honor. I just -- I'd be very brief that the findings of facts and conclusion of law regarding the takes lay out in detail the taking actions, including a physical possession of the property.

And, Your Honor, based upon the *Alper* decision and even based upon Mr. Schwartz's argument that when the

government takes physical possession it must pay the taxes, even under his argument taxes must be paid pursuant to the findings of facts and conclusions of law.

Thank you, Your Honor.

THE COURT: All right. And that's going to be my decision. I'm going to grant plaintiff's motion for reimbursement of property taxes.

Last, but not least, I have a one matter under advisement, and I'm going to look at it as far as -- and consider it and contemplate it. I'm not going to make a decision right now. I'm going to maybe sometime next week.

I'm going to get it done relatively quick, but I want to -- I'll be candid with everyone. I want to think about it, because I understand the total impact. I understand the competing factors. I've looked at the statute over and over and so on. I understand the rules. There's tension there, and I'll issue a decision. All right.

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THE COURT RECORDER: And in light of that, everyone enjoy your day.

(Proceedings concluded at 12:49 p.m.)

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

Dana L. Williams
Transcriber

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DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND CO., LLC, a Nevada limited liability company, FORE STARS Ltd., DOE INDIVIDUALS I through X, ROE CORPORATIONS I through X, and ROE LIMITED LIABILITY COMPANIES I through X, Plaintiffs, *vs.* CITY OF LAS VEGAS, political subdivision of the State of Nevada, ROE government entities I through X, ROE CORPORATIONS I through X, ROE INDIVIDUALS I through X, ROE LIMITED LIABILITY COMPANIES I through X, ROE quasi-governmental entities I through X, Defendant.	Case No.: A-17-758528-J Dept. No.: XVI **PLAINTIFF LANDOWNERS' REPLY IN SUPPORT OF MOTION FOR ATTORNEY'S FEES** **Hearing Date: February 3, 2022** **Hearing Time: 9:05 AM**

The Plaintiffs, 180 Land Co LLC and Fore Stars, Ltd. (hereinafter referred to as "Landowners") hereby Reply in Support of their Motion for Attorney's Fees as follows:

The City spends the first nine (9) pages of its Opposition arguing contrary to Nevada law. The City is not entitled to come to the Court and misrepresent that state of the law in Nevada.

Case Number: A-17-758528-J

NRPC 3.3[1]. The City knows that in Nevada a landowner who is successful in an inverse condemnation claim is entitled to his or her attorney fees. The City does not argue that the law should be changed, that would be permissible under NRPC 3.3, instead, the City argues that it is not the law, which is impermissible under NRPC 3.3. It is simply shocking that the City has spent 9 pages arguing contrary to the well established and known law that a successful inverse condemnation plaintiff is entitled to their attorney fees in Nevada.

A. *Buzz Stew* was Not an Inverse Condemnation Case, Instead, it was an Unsuccessful Precondemnation Damages Case

The City starts its opposition with reference to *Buzz Stew v. City of North Las Vegas*,131 Nev. 1, 341 Pl3d 646 (2015). City Opp. at 2:3-14. And, consistent with its prior arguments to the Court, the City lacks an understanding of this area of Nevada law. As the City points out, the undersigned counsel's office was counsel for *Buzz Stew*, and is, therefore, very aware of the facts and holding in *Buzz Stew*.

First, *Buzz Stew* was not an inverse condemnation case, instead, *Buzz Stew* was the first case in Nevada to establish that a landowner could bring a precondemnation damages claim absent a taking. *Buzz Stew v. City of North Las Vegas*, 124 Nev. 224, 230, 181 P. 3d 670, 674 (2008) ("Finally, to the extent that *Barsy* indicated that a taking must occur to recover damages related to

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[1] Rule 3.3 Candor Toward the Tribunal.

(a) A lawyer shall not knowingly: (1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; (2) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or (3) Offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonable believes is false.

. . .

a municipality's announcement of intent to condemn and its improper action with respect to that announcement, that requirement has been eliminated as to precondemnation damages. Accordingly, *Buzz Stew* is not required to show that a taking and the damages resulting from such a taking have occurred.")

Second, Buzz Stew was ultimately unsuccessful with his stand alone precondemnation damages claim, meaning the jury did not believe that the City of North Las Vegas had unreasonably delayed filing a condemnation action causing *Buzz Stew* damages. As background, in *Buzz Stew*, the City of North Las Vegas never filed a condemnation action, instead, the landowner sold his property and the new owner dedicated the land the City of North Las Vegas had originally sought. Accordingly, the holdings in *Buzz Stew* address an unsuccessful plaintiff in a precondemnation damages case, not a successful plaintiff in an inverse condemnation case. The case now before this Court is about a successful plaintiff / landowner in an inverse condemnation case. And, the law in Nevada is clear, **a successful plaintiff / landowner in an inverse condemnation case is entitled to their attorney fees**. *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 673 (2006); *Tien Fu Hsu v. County of Clark*, 123 Nev. 625, 637 (2007); 49 CFR § 24.107(c); Nev. Const., art. 1 § 22(4); NRS 37.185.(emphasis added). Therefore, the City's reliance on *Buzz Stew* is extremely misplaced.

B. *Sisolak* and the Relocation Act

The *Sisolak* opinion is clear, a successful plaintiff / landowner in an inverse condemnation case does not need to establish a nexus between the taking project and federal funds to recover attorney fees. *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 673-675 (2006). However, to be clear, the Landowners have unquestionably demonstrated that not only does the City receive federal funds but, the City also receives federal funds for its parks and open space programs which is what the City has taken the Landowners' property for here. *Exhibit 12-16*.

> "The city of Las Vegas is a sub-recipient of financial assistance from federal aid programs." Vol 1, Exhibit 12 at ATTY FEE MOT – 0104.
>
> "Adopted in 1998, SNPLMA allows the BLM to sell public land within a specific boundary around Las Vegas. The revenue from auctioned land sales, totaling $4.1 billion as of 2019, is split between the State Education Fund (5%), the Southern Nevada Waters Authority (10%), and an account for specific purposes, including: Development of parks, trails, natural areas, and other recreational public purposes in cooperation with local governments and reginal entities…***The City has previously been able to leverage SNPLMA for a wide range of parks and trails*** projects and renovations." Vol. 1, Exhibit 13, part 1 at ATTY FEE MOT – 0226 (emphasis added)
>
> "The Southern Nevada Public Lands Management Act (SNPLMA) allows the Bureau of Land Management (BLM) to dispose of public land, with a portion of land sales proceeds that may be used for conservation and the development of parks, trails and natural areas by local and federal agencies. ***The City accesses these funds*** through a competitive application process." Vol 2, Exhibit 13, part 2 at ATTY FEE MOT – 0235 (emphasis added).
>
> "The City receives revenue in other forms from the Federal [] government…to buoy City revenues, the City must also work to increase the overall share of competitively awarded grant funding, especially from Federal funding sources…of the biennial budget, the state general fund and Federal fund represent roughly two thirds of the budget…" Vol 2, Exhibit 13, part 2 at ATTY FEE MOT – 0272.
>
> City has sought between "$50-69 million" in Federal Funds for Parks, Trails and Natural Areas. Vol 2, Exhibit 14 at ATTY FEE MOT – 0386.

Therefore, even if a nexus was required, which it is not, the Landowners have met that requirement for both the City, itself, and also for the City's parks and open space programs, as they both receive federal funds. It must also be noted, that in the 17 Acre Case, the Landowners just received the City's responses to interrogatories seeking information about federal funding and the City in its responses claims that federal funds are not relevant and are not likely to lead to the discovery of evidence relevant to any issue in the case. *See Exhibit 19, City of Las Vegas' Response to Plaintiff Landowner Fore Stars, LTD.'s First Set of Interrogatories, Interrogatory No 4, page 7:27-8:1.* The City cannot maintain such contradictory positions - here claiming the Landowners have not established a nexus between federal funding and the City, and then in the 17 Acre Case, claim federal funding is irrelevant.

Nevertheless, Nevada has adopted the Relocation Act in its entirety. NRS 342.105. And, the Relocation Act unquestionably provides that an owner of real property ***shall*** be entitled to his or her attorney fees when, "[t]he court having jurisdiction renders a judgment in favor of the owner in an inverse condemnation proceeding" (*Exhibit 7*, 49 CFR 24) (emphasis added). This law could not be clearer and includes no qualifiers. Therefore, under both *Sisolak* and NRS 342.105 (which adopts the Relocation Act) the Landowners are entitled to their attorney fees.

C. Article 1 § 22 ("the PISTOL Amendments" According to the City) Absolutely Applies to Inverse Condemnation

As argued in the Landowners' opening motion, Article 1 § 22 of the Nevada Constitution clearly provides for the recovery of attorney fees. Nev. Const., art. 1 § 22(4) (just compensation includes "all reasonable costs and expenses actually incurred."). To avoid this clear law, the City argues in its opposition that Article 1 § 22, "the Pistol Amendments do not apply to inverse condemnation actions…" City Opp. at 8:8-9. This is not true. In *Nevadans for the Prot. Of Prop. Rights v. Heller*, 122 Nev. 894, 908, 141 P.3d 1235, 1244-1245 (2006), the Supreme Court acknowledged that Article 1 § 22 would apply to inverse condemnation actions. Specifically, when deciding whether a proposed section of the original initiative petition violated the single subject requirements for initiative petitions, the Court found that "[a]lthough this section ***would***, as the proponents contend, ***apply to many inverse condemnation cases***, which this court has held to be the 'constitutional equivalent to eminent domain,' it would also apply to myriad other government actions that do not fall even within the most broad definition of eminent domain." *Id*. Emphasis added. Therefore, without a doubt, the Nevada Supreme Court has recognized that Article 1 §22 ("the Pistol Amendments") would apply to inverse condemnation actions. Accordingly, Article 1 §22 applies to inverse condemnation actions and supports awarding the Landowners their requested attorney fees.

D. The City's Own Counsel Charges More Than $450 An Hour and He Does Not Limit His Practice to Condemnation Matters

The City advances that the Landowners' counsel should be limited to $450 an hour based on some report the City found online called the 2020 Real Rate Report. City Opp. at 11. What is tellingly absent from the City's Opposition is any reference to how much it pays its own private counsel. Mr. Ogilvie currently charges the City $550 an hour. *See Exhibit 17, McDonald Carano General Terms and Conditions of Engagement with the City*. This is important as this is Mr. Ogilvie's ***government rate*** **which is widely known to be lower than what is charged for private clients**. Moreover, Mr. Ogilvie does not limit his practice to condemnation matters, and, in fact, the City had to contract with yet another attorney for such background. In Nevada, experienced eminent domain and inverse condemnation counsel are compensated upwards of $1,392 per hour. (*Exhibit 8*). This was approved by the Nevada Supreme Court 15 years ago in Sisolak. Therefore, the Landowners' request for attorney fees ranging from $800 – $1,500 per hour is reasonable and customary in the field of inverse condemnation in Nevada.

E. The Landowners are Not Required to Show Billing Records, Affidavits are Sufficient

The City makes several incorrect statements in its attempt to obtain the Landowners' Counsel's billing records. City Opp. at 10:28-11:9. Billing records are not required and that is for a good reason. Attorney fees are awarded prior to an appeal, if the prevailing party had to disclose its billing records (which include attorney client privileged information and attorney work product information) that would force a party to forgo attorney fees in order to protect those privileges. Accordingly, an affidavit is sufficient to establish the hours an attorney worked, and not only in cases where an attorney was on a contingency agreement, as the City wrongfully argues. (City Opp. at 11:2). Instead, Rule 54 (d)(2)(B)(v)(a) only requires, "counsel's affidavit swearing that the fees were actually and necessarily incurred and were reasonable" which the Landowners'

Counsel's affidavits provide. Accordingly, the Landowners are entitled to their attorney fees, as requested.

1) The Landowners' Counsel Bill at 1/10 Hour Increments, Just Like the City's Counsel

The City makes the strange argument that Landowners' Counsel bill in increments that are rounded to the nearest hundredth and this somehow is a disqualifying fact. City Opp. at 11:7-8. There is no need to address the City's disqualifying argument, as it cites no authority, but more importantly, it is not true. The Landowners' Counsel does not round to the nearest hundredth. The Landowners' Counsel bills in 1/10 hour increments just like the City's Counsel. *Exhibit 17*. However, due to the fact that some hours had to be split between cases for this, and future motions for attorney fees, that is what accounts for the appearance of hundredth increments. *See Exhibit 18 ¶ ¶ 3-4, Declaration of Sandy Guerra*. Accordingly, the Landowners are entitled to their attorney fees, as requested.

The City also claims that "this is the first and only case" the Landowners' Counsel "have billed their time on an hourly basis." (City Opp. at 11:3-4). This is a wild misstatement of the Landowners' Counsel's declaration. What Landowners' Counsel state in their declarations is that they have not previously handled an inverse condemnation case on solely an hourly basis. Because the City has no basis for opposing the Landowners' request for attorney fees, it instead throws irrelevant and inaccurate accusations. The Landowners are entitled to their attorney fees, as requested.

2) The City's Own Counsel Has Billed More Hours than the Landowners' Counsel

The City alleges that it is difficult to determine the work that was done by Landowners' Counsel, an apparent attack on the number of hours Landowners' Counsel billed in this matter. City Opp. at 10-11. Tellingly absent, however, from the City's Opposition is any reference to how

many hours the City's counsel has billed. Had the City's counsel billed less than the Landowners' Counsel, that surely would have been a featured argument in the City's attack on the number of hours billed. That argument appears nowhere in the City's Opposition, and that is because the City's counsel has billed more hours than the Landowners' Counsel.

The Landowners have obtained the City's counsel's invoices through September 2021 by way of a Freedom of Information Act Request. Those invoices are attached hereto as *Exhibits 18a* and *18b*, however, they are voluminous and require a time-consuming effort to total all private attorney hours. Accordingly, the Landowners' Counsel's paralegal has added the time and provided an affidavit detailing how this process was undertaken. As shown from *Exhibit 18*, as of September 2021, the City has spent **7,274.10** attorney hours on the four inverse condemnation actions while, as discussed in the Landowners' moving papers, as of October 2021, the Landowners' Counsel has only spent **6,866.93** total attorney hours on all four cases. Landowners' Mot at 9:14-15. Therefore, it is known that the City's counsel has billed more attorney hours than the Landowners' Counsel demonstrating the reasonableness of the Landowners' Motion for Attorney Fees and the unreasonableness of the City's opposition. The Landowners are entitled to their attorney fees, as requested.

F. Hours Since October 31, 2021

The Landowners' moving papers calculated the hours worked up until October 31, 2021. As stated, a supplemental calculation of the additional hours worked since October 31, 2021 would be provided, as attorney and staff hours are still accumulating. Landowners' Mot. at fn 3. From November 1, 2021 to January 25, 2022 there have been an additional 313.06 attorney hours and 140.47 additional staff hours worked on this 35 Acre Case. *See Exhibit 20, Supplemental Declarations*.

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Attorney Hours since October 31, 2021

K. Waters	0.5 x $675 = $337.50	0.5 x $1,500 = $750
J. Leavitt	124.78 x $675 = $86,251.50	124.78 x $1,300 = $162,214.00
A. Waters	171.97 x $675 = $116,079.75	171.97 x $800 = $137,576.00
M. Schneider	15.8 x $675 = $10,665.00	15.8 x $800 = $12,640.00

Total additional hours 313.06 at $675 = $211,315.50

Total additional hours 313.06 at enhanced rate = $313,180.00

Legal Assistants since October 31, 2021

Total additional hours worked = 140.47 x hourly rate of $50.00 = $7,023.5

G. Conclusion

Nevada law supports an award of attorney fees, including the enhancement provided in the *Hsu* case. Accordingly, the Landowners request an attorney fee award, as set forth in the opening motion, in the amount of **$3,410,755.00 + $313,180.00** (hours since October 31, 2021) **=$3,723,935.00** and reimbursement of fees paid for the Law Offices of Kermitt L. Waters legal assistants in the amount of **$44,912.50 + 7,023.50** (hours since October 31, 2021) = $**51,936.00**.

DATED this 27th day of January, 2022.

LAW OFFICES OF KERMITT L. WATERS

/s/ Autumn Waters

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the Law Offices of Kermitt L. Waters, and that on the 27th day of January, 2022, pursuant to NRCP 5(b), a true and correct copy of the foregoing: PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR ATTORNEY'S FEES was served on the below via the Court's electronic filing/service system and/or deposited for mailing in the U.S. Mail, postage prepaid and addressed to, the following:

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/s/ Sandy Guerra
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TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

180 LAND COMPANY, LLC, Petitioner, vs. CITY OF LAS VEGAS, Respondent. AND RELATED PARTIES	)	CASE NO. A-17-758528-J DEPT NO. XVI **TRANSCRIPT OF PROCEEDINGS**

BEFORE THE HONORABLE TIMOTHY C. WILLIAMS, DISTRICT COURT JUDGE

THURSDAY, FEBRUARY 03, 2022

PLAINTIFF LANDOWNERS' MOTION TO DETERMINE PREJUDGMENT INTEREST

[645] PLAINTIFF LANDOWNERS' MOTION FOR ATTORNEY FEES

APPEARANCES (VIA BLUEJEANS):

FOR THE PETITIONERS:	JAMES J. LEAVITT, ESQ. ELIZABETH GHANEM HAM, ESQ.
FOR THE RESPONDENT:	GEORGE F. OGILVIE, III, ESQ. PHILIP R. BYRNES, ESQ. J. CHRISTOPHER MOLINA, ESQ. ANDREW W. SCHWARTZ, ESQ. REBECCA L. WOLFSON, ESQ.

RECORDED BY: MARIA GARIBAY, COURT RECORDER
TRANSCRIBED BY: JD REPORTING, INC.

LAS VEGAS, CLARK COUNTY, NEVADA, FEBRUARY 3, 2022, 1:40 P.M.

* * * * *

THE COURT: All right. I just want to say good afternoon to everyone and welcome you to our afternoon February 3rd, 2022 calendar.

And let's go ahead and set forth our appearances. We'll start first with the plaintiff and then we'll move to the defense.

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

Elizabeth, we can't hear you.

THE COURT: Yeah, you'll have to hit star 4, ma'am.

MS. GHANEM HAM: Sorry about that. Sorry about that. Good afternoon, everyone. Good afternoon, Your Honor. Elizabeth Ghanem Ham on behalf of 180 Land and Fore Stars Landowners.

THE COURT: Okay.

MR. OGILVIE: Good afternoon, Your Honor. George Ogilvie on behalf of the City of Las Vegas.

MR. SCHWARTZ: Good afternoon, Your Honor. This is Andrew Schwartz for the City of Las Vegas.

MR. MOLINA: Good afternoon, Your Honor. This is Chris Molina on behalf of the City.

MS. WOLFSON: And good afternoon, Your Honor.

Rebecca Wolfson also on behalf of the City of Las Vegas.

MR. BYRNES: And good afternoon, Your Honor. Phil Byrnes on behalf of the City of Las Vegas.

THE COURT: And I think that covers all appearances; is that correct?

MR. LEAVITT: Yes, on behalf of the plaintiff, Your Honor.

THE COURT: All right. And I --

MR. OGILVIE: Yes, Your Honor.

THE COURT: All right. Okay. So once again, good afternoon.

And I see we have, from what I can gather in looking at the calendar, we have two pending motions. One would be plaintiff landowners' motion for determination of prejudgment interest, and the second would be plaintiff landowners' motion for attorneys' fees.

Which one should we handle first?

MR. LEAVITT: Well, Your Honor, I think perhaps the prejudgment interest one would be best to handle first.

THE COURT: All right. Okay. And, Mr. Ogilvie, is that fine? No objection there?

MR. OGILVIE: Yes, Your Honor. No objection.

THE COURT: All right. Then that's what we'll do.

All right. Sir, you have the floor.

MR. LEAVITT: Thank you, Your Honor. Again, James J.

Leavitt on behalf of the plaintiff landowners.

Your Honor, this motion for prejudgment interest is a standard motion that's filed in every eminent domain case, and especially in every inverse condemnation case where the amount recovered is higher than what the government offered; or, as the case is in an inverse condemnation case, is the award. And the prejudgment interest is statutory, or at least the procedure for prejudgment interest is statutory. There's three issues that need to be resolved posttrial by the Court according to the statute 37.18175.

Two issues appear to be undisputed. In fact, there was no opposition drafted by the City of Las Vegas regarding two issues, which is the date of commencement of interest, which is August 2nd, 2017. And there was no opposition to the interest being compounded annually. Those are two of the issues that the statutes require us to address and that the Court is to resolve as part of the determination of prejudgment interest.

The only disputed issue before you now, in order to calculate the prejudgment interest is what is the rate of return that should be used.

So that's the issue that I'll address right now is what rate should be used to determine the prejudgment interest on behalf of the landowners in this case on the $34 million verdict.

First, the rule. The Nevada Supreme Court has held that prejudgment interest is part of the just compensation award. The Nevada Constitution also states very clearly that the determination of the rate of return for prejudgment interest is also part of the just compensation award meaning that it's part of the constitutionally mandated rights that the landowners have in this case.

The test that the Nevada Supreme Court has used to determine the rate of return is that rate which will put the landowner back in the same position monetarily as he would have been in had his property not been taken.

Now, that's a pretty general rule, but the Nevada Supreme Court goes on to explain the purpose of that rule which more fully explains how that rule should be applied when determining the rate of return. The Supreme Court said that interest is to compensate for the period that the landowners were, and this is a quote, "deprived of the use of the proceeds that should have been paid at the time of the taking."

So what the Court is saying here is we're going to go back to August 2nd, 2017. We're going to assume that the landowner had, for purposes of this case, $34,135,000. What rate of return could this landowner have achieved on that $34 million had that money been paid on August 2nd, 2017? And there's a strong public policy for this rule that the Court has adopted, especially in an inverse condemnation case.

First, the government has had use of the property. It's been taken from the landowner. And secondly, the landowner has not been paid for that taking. And so what interest does is it compensates the landowner for that lost use of those proceeds during that period.

Now, before I discuss the specific rule, I want to address one of the concerns or one of the issues that the City raised in its brief. The City doesn't make an argument that the rate of return is improper. The City doesn't make an argument that the landowners have improperly calculated the rate of return. 90 percent of the City's brief is the amount of money that the landowners are asking for in prejudgment interest is too high. The Nevada Supreme Court has addressed that issue twice.

First, in the *Sisolak* case, the Nevada Supreme Court awarded interest to Mr. *Sisolak* that more than doubled his award. Mr. *Sisolak* received approximately $6 million in that inverse condemnation case for the taking of his airspace. The prejudgment interest was significantly higher than $6 million.

In the *Alper* case, the Nevada Supreme Court, and I'll quote what they say here, "As indicated by the award in the present case, prejudgment interest may be very substantial in protracted condemnation proceedings." And here's what they say, "and may, in fact, exceed the inflated value of the land."

That's especially true in an inverse condemnation

case because they tend to be very protracted, as you've seen in this case. The landowners -- the landowners have to prove the property interest. The landowners have to prove the take. The landowners have to prove the just compensation phase all through discovery. In a direct eminent domain case, you go to trial, and the only issue is how much does the government have to pay? So that's why prejudgment interest is very high in these inverse condemnation cases.

So now how do we calculate the rate of return here? The Nevada Legislature has adopted a statute, and in that statute, the Nevada Legislature says that the Court shall determine the rate, and then it says that rate shall not be below prime plus 2 percent.

So, Your Honor, prime plus 2 percent as the City has argued, is not the rate of return that should be applied in this case. Instead, the rate of return that should be applied in this case is that rate which would put the landowner back in the same position monetarily as he would have been in had his property not been taken.

Now, Your Honor, we've done this for a long time, as you're well aware, and there's only one case in Nevada where the District Court Judge granted prejudgment interest based upon a certain rate of return, and then that issue was taken up to the Nevada Supreme Court, and the Nevada Supreme Court affirmed. And here's what the Nevada Supreme Court said. It's

in the *State versus Barsy* case.

First, the Nevada Supreme Court said the rate of return is a question of fact. Secondly, the rate of return must be based upon evidence taken posttrial by the District Court Judge, and thirdly, here's the only piece, Your Honor, out of all the cases that we have in Nevada on inverse condemnation and on prejudgment interest. This is the only place where the Nevada Supreme Court indicates the type of evidence that it will accept to determine the rate of return. And this is what the Court said in *Barsy,* that the rate that could be achieved -- the test is the rate that could have been achieved had the landowners, and here's the quote, "invested his money in land similar to that condemned."

So what the Nevada Supreme Court relied upon in the *Barsy* case was what was the land increase like during the relevant period? In other words, if the landowner had been paid their money as of 2017 and invested that money in land similar to that condemned, to quote *Barsy*, what would he have achieved? And we've provided to you two reports which include empirical evidence. One is by Mr. DiFederico, who was the appraiser in this case, and the other is by Mr. Lenhart, who's a broker. This is the precise evidence that the Nevada Supreme Court held should be considered when determining the rate of return on the prejudgment issue in the *Barsy* case.

And, Your Honor, I can go through the DiFederico

report with you if you'd like. I can go through the Lenhart report, but both of those reports -- well, first of all, the DiFederico report arrives at a rate of return of 23 percent for the relevant period in this case, and the Lenhart report arrives at a rate of return of 25 to 27 percent of the relevant period.

I'll reference just the DiFederico report for just a moment, Your Honor. Mr. DiFederico investigated Colliers International Survey, a well-respected survey, to determine what the rate of return was on land similar to the 35 acre property from 2017 to 2022.

He also referenced CoStar in his report, and CoStar, Your Honor, is a compilation of sales and resales of property, and they have data which shows wherein you can identify properties that are similar to the 35-acre property and determine what those properties sold and resold for and determine what the rate of increase was for those properties during the relevant period.

He also referred to, in his report, to lot sales that have occurred in the area that are similar to the landowner's property.

And then he didn't end there. He went and found five individual properties that had sold and resold during the relevant period to support his number, and then he concluded, Your Honor, based upon those four sources of empirical

evidence, that the proper rate of return to apply in this case, following the *Barsy* standard, is 23 percent each year, compounded annually.

Mr. Lenhart, Your Honor, followed the same process. Except for he used seven sales and resales of properties during the relevant period, and he came in with even a higher rate of return of 25 to 27 percent.

Because that is the only evidence before the Court right now on what the proper rate of return is, the landowners chose the lowest number there, 23 percent, so there would be no dispute as to what the rate of return should be for the prejudgment interest in this case, Your Honor.

So, Your Honor, unless you have any questions, the request is straightforward. Prejudgment interest should commence from August 2nd, 2017. That's not a disputed issue.

That prejudgment interest should be compounded annually. That's not a disputed issue.

And the rate of return should be 23 percent, as that's the only evidence that's before this Court on this question of fact that's pending, Your Honor.

Do you have any questions for me, Judge?

THE COURT: Not at this time, sir.

MR. LEAVITT: Okay.

THE COURT: Okay. And from the defense, we'll hear from whoever's arguing this motion.

MR. SCHWARTZ: Yes, Your Honor. This is Andrew Schwartz, and I'll be -- I'll be representing the City on this motion.

There is no dispute that the minimum interest rate for prejudgment interest in this case is prime plus 2 percent. The only test, the only standard that the Court has to apply to allow the Court to award prejudgment interest above that rate is this constitutional standard that the -- the Constitution and the case law is essentially saying the Court should award the prime plus 2 percent rate from the statute unless a higher rate would be necessary to make the property owner whole. And we do not have those facts in this case. In fact, we have just the opposite. We have just the opposite, Your Honor. There is absolutely no reason to award the property owner more than the statutory rate to make it whole because it's already been made whole 54 times by the judgment.

Now, the Developer paid, and this is -- the Developer paid four and a half million dollars for the 250-acre Badlands. That's $18,000 an acre. This is the 35-acre case. So the Developer paid $630,000 for the 35-acre segment of the property that he carved out of the Badlands.

The Court has awarded the Developer $34,135,000 in takings damages in this case.

So that's 54 times the Developer's investment in the property, and so it -- it cannot be, it cannot be the case here

that more money in interest above prime plus 2 percent is necessary to make the Developer whole here, and the case is even stronger that the Developer doesn't need extraordinarily high rate of interest to be made whole.

Not only has the Developer already made 54 times its investment in the 35-acre property, but the City approved 435 luxury housing units for construction on the 17-acre segment of the Badlands. And by the Developer's own evidence, that increased the value of just the 17-acre portion by 26 million.

So now you have a four and a half million dollar investment with one judgment for 34 million. The City's approval of development in one part that's increased the value by 26 million. So you've got -- that's $60 million. So you've got an investment of four and a half million dollars.

Now, the Developer has received in damages and in enhanced value of the property due to the City's approval, you know, the City lifted the PR-OS designation and rezoned the property to allow 435 units. Now, you've got $60 million plus the Developer still has 200 acres left, 200 acres left of the Badlands in which to develop.

The Developer applied to develop the 133 acres portion of the property under Judge Crockett's order. The City couldn't consider that application because the Developer didn't file a major modification application.

Well, so the City never examined the 133-acre

applications on the merits.

Then the Nevada Supreme Court reversed that and said you don't need a major modification application. The City -- the City then wrote to the Developer and said now that the Judge Crockett order has been reversed, refile your applications for the 133-acre case. They haven't refiled the application. In fact, the City asked Judge Sturman to remand those applications to the City Council so the City Council could decide them on the merits, and the Developer opposed it. In fact, the Developer dismissed its petition for judicial review on the 133-acre case. So then in the 65-acre case, the Developer never even filed one application.

So the Developer can't seriously argue this extraordinary interest rate to make it whole. If you include the -- what the -- the $52 million that they're seeking in prejudgment interest, you add that to the 34 million in this case, that would be, by my calculations, a 13,800 percent profit, 13,800 percent profit on an investment in the property. So they don't meet the test, and that's the only test for an extraordinarily high interest rate.

And I'll address the *Barsy* case. The *Barsy* case doesn't apply. First of all, *Barsy* was an eminent domain case. The Court there said the government took -- delayed in filing the eminent domain action. The government wanted the property for a public project, delayed filing the eminent domain action

and during that period, *Barsy* lost tenants and lost money. So when the Court awarded *Barsy* the fair market value of the property on the date of value, the Court included, well, this isn't enough to make *Barsy* whole because he lost some tenants. So they said -- the Court accepted evidence that what would -- what would the interest rate be if *Barsy* had invested that in a building that had tenants so that he could make the return and that what he lost when the City delayed in the condemnation action.

Number one, the *Barsy* was -- needed a higher interest rate to be made whole, and that finding cannot be made in this case. We're as far from that determination as you can get.

And the second thing is, the Court there didn't say that you get the profit from an investment, the profit from an investment of that -- of the amount of the award. It said what would be the equivalent if you invested that property in property that had tenants, which was the value of the property that *Barsy* would have had had his tenants not moved out due to the condemnation blight.

And so therefore, the Court was just adjusting the interest rate, which is what the return on money that *Barsy* would get in order to compensate him for something that he lost. And in this case, the Developer lost nothing like that. The Developer has been rewarded with a windfall, at least with the judgment, 54 times its investment.

The *Alper* case -- and by the way, the interest rate the Court found in *Barsy* was what, prime plus 2 percent. That's the -- that's ultimately what the Court concluded was a fair rate of interest, prime plus 2 percent.

The *Alper* case, there was a case where the City physically took possession of the property. The county physically took possession of the property for a public project, for a road project, and the property owner brought an inverse case because the City didn't file an eminent domain case. So that was really an eminent domain case where the government agency took possession of the property and dispossessed the property owner.

Similar to *Barsy* where the Court was -- it was an eminent domain case that took the Court -- the agency ultimately took possession of the property. And in there, the Court said that -- that *Alper* was entitled to what rate of interest? Prime plus 2 percent. Prime plus 2 percent.

He didn't say that *Alper* could take the condemnation award and invest it in some speculative investment and that the Court would speculate, well, how much money would you have made on this speculative investment. What if you put it in the stock market or, you know, well, then you have to assume, well, what if you put it in NASDAQ and NASDAQ went down during the period that you put it in the Fortune 500 stocks, and that went up during the period.

The Court didn't say that you could invest the money. It said they're entitled to a higher rate of interest. Interest is the return on money. It's not profit from a speculative development.

So neither *Alper* -- and moreover, *Alper* in *Barsy* don't apply to this case because this was a regulatory taking case concerning the agency's regulation of the owners use of the property. This was not an eminent domain case like *Barsy* and *Alper* where the government actually took physical possession of the property.

All the City did here, according to the Court in its judgment, was regulate the owners use of the property. The City never dispossessed the owner from the property. During this entire time the property owner had the full possession and use of the property where use is allowed by law.

So there's no reason to determine here that because the property owner was dispossessed from the property that the property owner needed the money to -- that -- in the judgment to replace that property.

Now, the Developer argues here that -- oh, and let me back up.

So there are three cases, Your Honor, that are like this in Nevada where the claim, the taking claim was that the regulation of the owners use of the property affected a taking.

The Court here awarded the $34 million for the

categorical and Penn Central claims, where the property owner alleged that the City's regulation of the owners use of the property was a taking.

Alper and *Barsy* are completely different cases. Those are eminent domain cases where the government took physical possession of the property. The property owner didn't have possession and use of the property during the -- during most of the lawsuit in *Barsy* and in any part of the lawsuit in the *Alper* case.

In Nevada, there are three cases like this. They are the State case, the Kelly case and the Boulder City case. In all of those cases, the Supreme Court found that the taking had to wipe out all use and value of the property. That wasn't the case there either because the cases weren't ripe or because the owner still had some use of the property or that the agency didn't change the law applicable to the property.

And in each of those cases, the Nevada Supreme Court found no taking. So we don't have the case like this where the claim is excessive regulation of the owners use of the property resulted in the taking. Where the Court then found a taking and awarded prejudgment interest, not of some interest rate, but of the amount of the award, if the amount of the award had been invested and what would the -- the property owner have earned on that investment. We don't have a case that says that that applies here. Even if *Barsy* held that you can set the

interest rate by what the owner would have earned had the owner invested the award at the time of the taking in some speculative investment.

So that means that the only guidance for the Court here in this case is from the Constitution, which is the standard. Make the property owner whole.

And I've explained the property owner has already been made more whole 54 times by just the judgment alone.

Now, the Developer, assuming, assuming that it wasn't clear that the Developer here has already been made whole by the judgment, the Developer says, well, we would have invested this money in some -- in real estate. We would have invested this money in some speculative real estate venture.

Well, that's not really true here because this is a real estate developer. They build. That's their business. They don't buy land and hold the land and hope that it appreciates.

And in this case, what would the Developer have done with the money? Well, it certainly wouldn't have built anything. It didn't need the money to build anything. So it wasn't harmed because it didn't have $34 million.

When he went into this project, he paid four and a half million for the 250 acres. The Developer must have had the money to develop the property at that time if that was the Developer's intent. It didn't need an extra 34 million to make

this profitable, particularly when it paid so little for the land, four and a half million.

So this is a real estate developer. What they're saying is that they would've taken the money and, at the time, they would have been prescient enough to know that the investing that money in the real estate market would have earned them a greater return than prime plus 2 percent, that they would -- if they would have had a crystal ball, and they would've earned that money.

Or, you know, who's to say whether they or any other property owner, if this is going to be the rule in takings cases, any time you have a condemnation award, you can always -- the owner could always argue, well, I would've invested it. I would've invested it in Zoom, or I would have invested it in SpaceX, and, you know, quadrupled my money. What if they thought, well, I think the stock market is the best place to invest the money. Would they have made what is a hundred percent on the judgment over four years? Well, who's to say.

The whole thing is completely speculative, and that's why all the cases and the statutes in the Constitution talk in terms of interest. Interest is return on money. It's the time value of money.

What the Developer is seeking here is profit. It's a completely different thing, and profit that's speculative. We

know what the interest rates are. We know what the prime rate is, and we can add 2 percent to that, but -- and but we don't know what the Developer would have invested this money in a profitable venture.

Or even if you -- even if you were to allow the Developer to gamble on the judgment and pay the interest rate equivalent to what the Developer would have earned in profit on a speculative venture, what they now in hindsight say they would've done, you know, you've got 2020 hindsight. Oh, yeah, we would have invested in the real estate market because that seems to have increased substantially. Well, that can't be the measure of the prejudgment interest.

But assuming none of that is true, the Developer doesn't have an appraisal of what this property or what any property would've been worth had the Developer bought it back in 2017. Their valuation evidence is just average values for a certain type of real estate. They just take an average. That wouldn't be admissible in court.

So to appraise property, you need to compare the property to sales of comparable property, actual market data. You can't just average the change in average prices for an entire class of properties and say, well, that's my damage because real estate development is speculative, and who's to say whether one property would have appreciated at the same rate as another property. The whole thing kind of collapses

under speculation.

So just thinking in terms of an interest rate, just stepping back and looking at the big picture, 23 percent annual interest rate, I mean, that's like double the usury rate. Who's ever heard of an interest rate so high? No Nevada cases ever, ever found that prejudgment interest to be so high, and, as I've said, in no takings case either inverse or eminent domain takings case where prejudgment interest has been addressed, it's never been higher than prime plus 2 percent in my research.

So all we have here, Your Honor, is the constitutional requirement to make the Developer whole and for the Developer to claim that they need another $52 million to be made whole after they've already earned 54 times their investment in this property is -- that would be -- that would be an unjust result to put it mildly.

Now, the Developer has claimed that they actually spent $45 million to buy the Badlands and a hundred million dollars seems to change over time.

There is absolutely no evidence, no evidence that the Developer paid more than four and a half million dollars for the Badlands.

The contract, the contract of sale between the Developer here and the Peccoles, who developed the Peccole Ranch Master Plan, was for seven and a half million for the

entire Badlands. And the City has established by the documents that went back and forth between the Developer and the Peccoles in negotiations for that purchase that 3 million of that purchase price was for other real estate --

THE COURT: Sir, I think we lost you. You faded out. The last word that you set forth on the record was -- what was it? Are you there?

Didn't he say real estate? Was that the last word before you?

THE COURT RECORDER: He is not --

THE COURT: Because I thought he said real estate. I was listening.

(Pause in the proceedings.)

THE COURT: Did we lose everybody over --

THE COURT RECORDER: No, just him.

THE COURT: You'll have to call him.

MR. LEAVITT: Your Honor.

THE COURT: Yes.

MR. LEAVITT: James J. Leavitt. I'm still here on the line.

THE COURT: Okay. Thank you, sir.

THE COURT RECORDER: I'm going to put something on chat, Your Honor.

THE COURT: And e-mail him so he knows we lost him.

(Pause in the proceedings.)

THE COURT: Mr. Ogilvie, can you hear me, sir?

MR. OGILVIE: Yes, Your Honor. I'm here.

THE COURT: Is there anyway you can contact Mr. Schwartz for us.

MR. OGILVIE: I was going to ask Sarah Lucy to contact him. I'm sure she's already attempted.

THE COURT: You know what we'll do, I think it makes sense, and I think if my memory is correct, I think the last word he set forth on the record was "real estate." Maybe that can cue him, but anyway let's take a 10-minute recess to give him an opportunity to reconnect, and you can, you know, take that time to maybe call him personally or whatever has to be done, but we're going to take 10 minutes to accommodate him. Okay.

MR. OGILVIE: Thank you, Your Honor.

THE COURT: We'll be in recess for 10 minutes.

(Proceedings recessed at 2:16 p.m., until 2:32 p.m.)

THE COURT: All right. We're back on the record.

Is that correct, ma'am?

THE COURT RECORDER: Yes, Your Honor.

THE COURT: All right. And, Mr. Schwartz, I think the last word you set forth on the record was real estate. I might be wrong on that, but I was following your argument, sir.

Do we have him?

THE COURT RECORDER: Mr. Schwartz, are you there?

THE COURT: Did we lose him?

THE COURT RECORDER: Judge, we must have lost him again. He was there.

Mr. Schwartz, can you hear us?

MR. SCHWARTZ: Yes. I'm sorry.

Your Honor, I think I was addressing the four and a half million dollar purchase price, which is important here because it goes directly to the issue of whether the Developer here needs to be made whole by getting an award of $52 million in prejudgment interest.

The four and a half million dollar purchase price is established by overwhelming evidence. The contract between the Developer and the Peccoles who sold the Badlands to the Developer in March of 2015, provided that the purchase price was seven and a half million dollars.

This was a negotiated purchase between two sophisticated real estate developers, an arm's-length transaction. It was a -- there's no indication it was not a fair market transaction. And the -- it was a heavily negotiated price. In discovery the Developer didn't want to release, but we finally got an order from the Court to (video interference) the Developer to release the documents concerning this negotiation, and they established that $3 million of the seven and a half million dollar purchase price was for other real estate, and this is confirmed by the seller, by the

Peccoles in a deposition.

So the purchase price of the Badlands was four and a half million dollars, and the Developers claim that the purchase price is actually $45 million, and I think at trial they said a hundred million dollars was the purchase price. In discovery, the City requested documents from the Developer to support that contention. $7.5 million in the contract signed by both parties, and that documents indicate 3 million that was for other real estate.

What documents do you have to establish end dollar purchase price or any purchase price other than what it states in the documents that we have. None. The Developer has produced not a shred of evidence. Only the Developer's claim that the purchase price was $45 million, not a single document. Who purchases property for $45 million and doesn't have a single document to show that that's the case, you know, that's -- it's preposterous for the Developer to allege that.

Then so we are left with a $34,135,000 that's 54 times what the Developer paid for the 35-acre property. They paid 18,000 an acre, $630,000 for 35 acres compared to $54 million -- excuse me $34 million, which is 54 times what they invested in the property.

So it -- the Developer can't seriously contend here that the Developer needs an extraordinary interest rate of something above prime plus 2 percent to be made whole when the

Developer's already been made whole many times over and still has (video interference), made the 26 million on the 17-acre property and still developed the 133-acre, 65-acre property. The City sent them a letter saying go ahead and apply. You haven't really applied. The City hasn't reviewed an application on the merits. They still have that property that might be developed or that they can use for uses permitted by the PR-OS designation.

So they've really got -- they really received a huge windfall in this case, and awarding them $52 million in the interest in addition to that would be -- would not be in the interest of justice.

I did want to say one more thing about the *Sisolak* case. In that case, that was a physical taking case where the Court awarded prejudgment interest. The opinion, the Supreme Court opinion doesn't say what the interest rate was. It just says prejudgment interest was awarded. There is no discussion in that case that the interest rate would be whatever the Developer claims it could have made in profit had the Developer invested that money in some speculative investment.

So apparently the interest rate there in the *Sisolak* case was just the statutory rate.

So there is no case that supports the Developer's position that instead of interest they're entitled to profit in this speculative investment.

The only authority that really applies here is the constitutional authority for an interest rate that's higher than prime plus 2 percent only if the property owner can show that they need that to be made whole to be put in the same monetary position as they were without the -- without the award, and that's impossible in this case. Thank you.

THE COURT: All right. Thank you, sir.

We'll hear from Mr. Leavitt.

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

Judge, this is a hearing on a very narrow issue: What is the rate of return to apply for the prejudgment interest issue in an inverse condemnation case. That's it. And the Nevada Supreme Court has been very clear that that's a question of fact to be decided by the Judge in a posttrial hearing based upon evidence.

Counsel, didn't provide you one shred of evidence of what the proper rate of return would be. He made again about 95 percent of his argument was based upon irrelevant issues. I do want to address just a couple of those.

First he attempts to rewrite the decision that this Court made. He keeps saying that this case is a regulatory taking. This Court found that there was a per se taking of the landowner's property where the landowner has been dispossessed of that property. We are now here to determine the remedy that

the landowner should receive after getting a just compensation award, a remedy that's set forth in the Constitution and a remedy that's set forth in the statutes, and that remedy is prejudgment interest. The purpose for prejudgment interest is to, Number 1, remedy what the government has done in this case by taking the property and not paying the landowner for that property. It's been five years now, five years now that the government has had possession of the property, and the landowners haven't been paid.

So the Nevada Supreme Court said that under those circumstances, in an inverse condemnation case, prejudgment interest must be paid for that period that the landowner was dispossessed and lost use of the property. Now, the entire premise for Mr. Schwartz's argument that he just made was the 2005 purchase price.

Your Honor, there is not a case in this country that relies upon a 17-year-old purchase price to determine prejudgment interest. There's not a case in this country that considers a 17-year-old purchase price when determining the proper rate of return, firstly. So it's entirely irrelevant. The entire premise for the argument that was just made is entirely irrelevant.

In addition to being irrelevant, it's not even true. Your Honor, we had pretrial hearings. We had motions in limine on the purchase price, and the 2005 purchase price was excluded

because it was so irrelevant to determine the value of the property as of the 2017 date of value.

Now, counsel repeated probably 15 times his belief that $4.5 million was paid for the property. There's no basis for that, Your Honor. The government took the deposition of the PMK of the seller of the property and the deposition of the PMK of a buyer of the property, Mr. Johan Lowy. Both of them confirmed that the purchase occurred in 2005. It was a complicated transaction. There was a lot of hair on it, and the buyer, the PMK buyer stated that when you take all of the consideration into -- or you consider all of the consideration for in that 2005 purchase price that it amounted to over a hundred million dollars.

Those are the PMKs, Your Honor, not argument of counsel, but those were the PMKs. And, Your Honor, that's why that evidence was excluded. It was excluded to determine just compensation for the same reasons it should be excluded to determine prejudgment interest.

Now, let me address the *Barsy* decision. As I laid out, Your Honor --

THE COURT: And I'm going to jump in for a second.

MR. LEAVITT: -- *Barsy* is a decision -- sure.

THE COURT: And I just want to make sure the record is clear in this regard because from a historical perspective, I do remember a lot of the law and motion in this case. Now,

understand, when it comes to discovery, and I know everyone understands it is relevancy for the purposes of discovery is much broader than admissibility at the time of trial; right? We all understand that.

MR. LEAVITT: Right.

THE COURT: And that's one of the reasons why I permitted discovery on the purchase price issue; however, ultimately, at the end of the day, when it comes to the value and just compensation at the time of taking, that's not relevant, really and truly. It comes down to what was the valuation back in 2017 when I made a determination there was a taking in this case.

Just -- and this is important to point out as far as that value is concerned. I mean, two things. First and foremost, that was a question of fact; right. Secondly, we had an evaluation from the plaintiff at approximately 34 million or so, and then I had nothing else to consider. So in many respects, when it comes to that evaluation, that's what was admitted at the hearing, and so that's what I went with; right? And that's kind of important to point out.

For the record, I do -- and this is a question I have for everyone. I did read the *Barsy* case, and I think that's what you're going to. I have a copy of it. The text right in front of me, and I'll just read into the record what the trial court -- I'm sorry, the Supreme Court set forth in that

specific case.

And this is the, to me, some of the really important and pertinent language, and this is off of page 718 of the decision, and that would be 113 Nevada Reporter 718, and I'm looking right here, and it starts out as follows: NDOT contends that the statutory rate operates as a prima facie evidence of a fair rate, period. In Clark County versus *Alper*, and they cite the case. This Court referred to the statutory rate as a floor on permissible rates and allowed the legislature -- it allowed that legislative amendments increasing the statutory rate where prima facie proof of an interest -- of an increase in interest rates, not prima facie proof of a fair rate, and that's really important to point out.

And they go further. They said this Court further held that the determination of a proper interest rate is a question of fact, and the District Court was not bound by the statutory rate, period. And so that's kind of where we're at right now. I understand it's a question of fact. I get that.

And so here we have evidence from two experts offered by the plaintiff at this stage of the proceedings, and it's pretty clear what the opinions are. And so anyway, when it comes to determining what would be just compensation as it pertains to -- and I want to make it really clear. I'll go ahead and set it forth as it's stated in the case because I don't want to misquote it.

The Court further went on and said, quote, This Court further held that the determination of a proper interest rate is a question of fact, and the District Court was not bound by the statutory interest rate. We stated that just compensation requires that the landowner be put in as good position pecuniarily as he would have been if his property had not been taken.

The purpose of awarding interest is to compensate the landowner for the delay in the monetary payment that occurred after the property had been taken, and that appears to be fairly clear to me, and so at the end of the day, that's what we're really looking at. We're looking at, okay, what is the appropriate, fair rate under the facts of this case based upon the current evidence as set forth in the record?

Is that a little distortion?

THE COURT RECORDER: I'm going to mute somebody.

THE COURT: Okay. And that's where we're at primarily.

And so my question, my first question is this. What does a trial court like me do under the facts of this case where I have to decide what the rate should be; right, in light of the current state of the evidence, because this is a question of fact. And I'll just throw that out because I have a lot of other thoughts in that regard too.

Mr. Leavitt, and then we'll hear from Mr. Schwartz.

MR. LEAVITT: Thank you, Your Honor. Again, James J. Leavitt on behalf of 180 Land, the plaintiff landowners.

And continuing in the decision, Your Honor, and you're absolutely correct as going forward in reading the case, it's a question of fact based upon the evidence that's presented. And as we continue down the case, on page 718, that note 6 is where the Court specifically identifies the evidence that was considered by the lower District Court Judge and affirmed by the Nevada Supreme Court.

Again, this is the only case that I'm aware of where the Nevada Supreme Court identifies the type of evidence that it would consider when determining the fair rate, and it's right here. It says Barsy's expert, at Headnote 6 testified that a prudent landowner would have paid off the mortgage on the land or invested his money in land similar to that condemned rather then hold the land at such a low rate of return.

So what we did, Your Honor, is we presented our -- we presented these two experts with that precise language and said we want you to determine for us the rate of return that the landowners could have achieved on the $34,135,000 had they invested in land similar to that condemned, and that's the evidence that we brought to you, which is the specific evidence that the Nevada Supreme Court relied upon in *Barsy*.

Now, Your Honor, counsel stated that what happened in

Barsy is that the Court granted interest to make up for lost tenants and lost money that was -- that Mr. Barsy had incurred as a result of tenants leaving his property. Your Honor, we litigated that case. That appears nowhere in that case. The lost tenant compensation was compensated through what was called precondemnation damages in that case.

Then after that precondemnation damages was paid and compensation was paid for the land on top of that, the Nevada Supreme Court awarded prejudgment interest. There's not a citation in any part of that record. I don't recall that ever even being an issue that interest was awarded to make up for lost tenants. It's an entirely made up rendition of the case, Your Honor.

The case is very clear that the interest that was awarded in *Barsy* was because Mr. Barsy was not timely paid. It was for the lost use of the proceeds and that interest rate was based upon what he could have earned had he invested that money in land similar to what was taken, and that's again, Your Honor, the evidence that we presented to you.

The *Alper* case. Counsel stated that in *Alper* the Nevada Supreme Court awarded prime plus two. Again, that's not true. In *Alper*, the Nevada Supreme Court remanded the case back to the lower District Court Judge and gave a very clear signal to the lower District Court Judge.

In *Alper*, the Nevada Supreme Court wanted to make

sure that the type of arguments that we're hearing today don't influence the determination of interest. Again, the Court said that -- in *Alper* it sent the case back to the District Court and then told the District Court, listen, interest may be very substantial in this case and may, in fact, exceed the inflated value of the land.

The Court wanted to be very clear to the District Court Judge that it was sending that *Alper* case back to is that listen, your interest calculation must be based on the Constitution. It must be based upon the proper rate and in times it's going to far exceed the value of the land taken, just like it far exceeded the value of the land taken in the *Sisolak* case.

The other argument that counsel makes is that we're asking for profit. Your Honor, we're not asking for any profit. We didn't bring to you a project. We didn't go out and build an apartment complex and say here's the money we would have earned. That's not what we did.

Again, we gave to two different experts, who by the way prepared their reports entirely independent of one another and gave the instruction from *Barsy*: What is the rate of return the landowners could have achieved by investing in land similar to that condemned, and they both provided empirical evidence of exactly what that rate of return would have been during the relevant period.

And, Your Honor, I'll just say this briefly. All of this argument and statements about building and not building again, entirely irrelevant to why we're here today.

I'll address one last final argument, Your Honor. His counsel said these landowners would not have developed or reinvested in land. These landowners wouldn't have done this. I have no idea how Mr. Schwartz knows that. It's argument of counsel, but we do have evidence, which is why we're here today, is to review evidence and arrive at a fair rate based upon the question of fact presented to you, and that evidence was attached to our reply as Exhibit Number 8, and it's the declaration of Vicki DeHart (phonetic). She is one of the principals in this case. I'll just read a very small portion of it:

> That the common practice of the partnership is to invest in real estate proceeds -- invest in real estate property. That they never would have invested in any type of instrument or land that only yields prime plus two, and then they say the proceeds would have been reinvested in vacant land or improved real property by means of a 1033 exchange.

Which is the eminent domain version of a 1031 exchange.

So the evidence that's before us here today is that

the proceeds would have been invested in land. That's the exact evidence. We didn't even need the declaration because that's the exact direction that the Nevada Supreme Court has given in the *Barsy* case is to determine the rate of return that would have been achieved if they had invested the money in land similar to that condemned.

So, Your Honor, we ask that you enter an order. Again, the other two issues are not in dispute. The only issue is what's that fair rate of return? And in particular, for this landowner who does land investments, in fact, we've referred to the landowner repeatedly through this proceeding as the landowner, and the City has repeatedly referred to them as the Developer, and now the City wants to pretend like he's not a land investor; he's not a Developer.

We have the perfect situation here, Your Honor, for this question of fact where we have the perfect plaintiff who only invests in land. Their business has never invested in stocks or any other type of investment instrument that would bring a rate of return of prime plus 2 percent as set forth in Ms. DeHart's declaration. She lays it out very clearly what they invest in. Not only do we have the perfect plaintiff, but we have the perfect facts which line up identical to the *Barsy* case, which is exactly what the *Barsy* court decided.

So, Your Honor, we would respectfully request, pursuant to the *Barsy* decision, that the rate of return of

23 percent be applied. That's the only empirical evidence before the Court which establishes a fair rate of return, Your Honor.

THE COURT: All right. And I did ask some questions. Mr. Schwartz, out of fairness, I'm going to give you a chance to address those, sir.

MR. SCHWARTZ: Thank you, Your Honor.

In the *Barsy* case and the *Alper* case, these are physical takings cases. The Court did not -- there's no evidence, no evidence whatsoever that the City dispossessed the property owner from the property, that the City took possession of the property. There's no evidence of that whatsoever. Those cases don't really apply. The cases that apply here are Kelly, Boulder City and State, and those cases hold that to show a taking through regulation of the owners use of the property there has to be a complete wipeout in value. And there clearly wasn't a complete wipeout of value for all of the reasons that we have presented in evidence in this entire case, including their argument to the tax assessor that the property still had golf course use of the property after the City allegedly -- after the City denied the 35-acre application. That statement was made by the Developer's attorney two months after the City denied the Developer's applications.

But be that as it may, the City has not, has not dispossessed the Developer. There's no evidence of that, and

so I don't think the Court's decision could be based on the *Barsy* and Alper case because those are cases involving eminent domain with a physical possession of the property.

By I think that the argument -- the Developer's argument here loses sight of the standard here. Yeah, if the Developer had invested the money in the real estate market, in 2020 hindsight, they would have made -- they could've made some big profits. It would depend on what property they invested in because some appreciated, and some didn't appreciate, and they're just dealing with averages here.

So this requires the Court to speculate as to what this 23 percent, pure speculation.

But anyway --

THE COURT: And so --

MR. SCHWARTZ: -- maybe they would have made more money if they had invested the award.

THE COURT: No. No. I don't want to cut you off, I don't. Why would it be speculation? That's what I need to know.

MR. SCHWARTZ: Well, the evidence before the Court as to the rate of appreciation of real estate, not the interest rate -- we're getting far afield here from interest, which is a problem, but the rate of appreciation of real estate is an average rate. It's an average rate. So the Court does have evidence of a proper interest rate, which is the statutory

rate. The legislature is saying here's the rate. Unless you can show, unless you can show that the owner needs a higher rate to be made whole.

But what the evidence before this Court is not an interest rate. It's the average rate of return of certain types of real estate in the City of Las Vegas in the last four years. So it's entirely speculative to say, if I'm a judgment creditor in a takings case, I would have invested the money. I would've invested the money in real estate, and the property I would have invested in would have appreciated at the average rate of all these properties. I would've been wise enough to invest it in property where I wouldn't have lost money or maybe not lucky enough to invest it in property that -- where its value multiplied many times in that period, but it's the average rate. So it's just -- it's 2020 hindsight about a speculative investment. And you could say the same thing.

What if the stock market had gone up 30 percent per year since 2017. The Developer could then say, well, I would've taken that 34 million and invested it in the stock market, and I would have made an average the increase in the market, in the Fortune 500 or the NASDAQ. I would've made that money. Purely speculative, and I don't think that the Constitution or the legislature intended that this Court would be engaging in that kind of speculation in setting an interest rate.

The Court would set an interest rate needs to look at what's the return on the value -- the time value of money. What's the return on that money had they invested it and got interest, not profit. And then the Court the Constitution says, well, the Court can't set an interest rate that's higher than the statutory rate in order to make the property owner whole.

So, yeah, there's evidence before the Court of how the real estate market appreciated overall in Las Vegas, but there is no evidence before the Court that an interest rate higher than the statutory rate is necessary to make this property owner whole, like in Barsy.

That's -- counsel's rendition of the facts in *Barsy* is not correct. In *Barsy*, the Court said you lost tenants. So in awarding the -- in awarding the awards for the value of your property -- remember, this is the condemnation action. The agency took possession, took title of the property for a public project. Condemnation action. The award of fair market value as of the date of value was not enough to compensate for your lost tenants, nor was the precondemnation interest. That's why the Court said we're going to set an interest rate that's higher -- higher than we otherwise would because to make up -- to make up for your lost value of your real estate during the time when the City hadn't condemned your property.

If the precondemnation damages in Barsy were enough

to compensate the property owner for the lost tenants, then why would the Court engage in this inquiry about an interest rate necessary to make the property owner whole. So the facts as the Developer has described them are wrong.

So we focus now on the standard, which is you need to make the property owner whole.

Now, this Developer says, well, you need to make me whole because I needed this money to build. I'm a developer. I build -- I build things.

Well, the City has established, has clearly established that this Developer has no interest in building on the Badlands property. It had a permit to build 435 units on the 17-acre property, and it's done nothing, nothing to build, and, of course, the reason? Well, because that doesn't fit with its narrative here, which is that it's victimized by the City.

The Developer could've filed another application to develop the 35-acre property at the City's invitation. It didn't do so. It could have tried to develop the 133-acre and 65-acre property. It had no interest. So the Developer didn't need this money.

My point is, Your Honor, the Developer didn't need this money to make it whole so that it could engage in some real estate development. It didn't have any interest in that. It's just using the Courts here to get, you know, a windfall

from the taxpayers. So it didn't need a higher interest rate to be made whole.

And my final point is this, okay. And there is absolutely no evidence that the purchase price, and the Court I think needs to focus on the amount the Developer paid for the property in order to determine whether the interest rate on the judgment needs to be extraordinarily high to make the Developer whole. So then purchase price is directly relevant.

Now --

THE COURT: And I have a question for that, and this is just more of a hypothetical than anything else. I mean, I look at my house I currently live in, and I don't mind saying it, I mean, I'm fortunate I live in a great neighborhood, and I've been in the house for about 9, 10 years, and the value has doubled; right? And we all know what the real estate market has done over the last three or four years, more than doubled.

But my question would be this. Hypothetically, if there was a taking done by a governmental entity today, why would the purchase price be relevant on any level? Because it's worth what it's worth at the time of the taking. So why am I --

MR. SCHWARTZ: Well, that's right.

THE COURT: Yeah. And so why am I focused on that issue? Because now we're looking at the time period post taking during the litigation where the landowner was deprived

of usage in looking at what the appropriate interest rate should be for that.

And I kind of get that, but -- and here's -- and I don't mind -- this -- and I get it. That's why I'm spending a lot of time on this because I understand it's a lot of money. There's a lot of risk. I get it. I understand all of that.

Here is my question, and this is straight from the *Barsy* case. It provides the following: Quote, While the statutory rate should be used if unchallenged, once competent evidence is presented supporting another rate of interest as being more appropriate, and this is where the language gets really interesting, quote, The District Court must determine which rate would permit the most reasonable interest rate; right. What would be reasonable, and that's specifically what the language from the case provides, and so that's what I'm required to do.

And I realize there's a lot here. There's a lot at risk, I do, and I want to make sure -- because I want to really take my time as far as this specific issue is concerned.

And so, Mr. Schwartz, in light of that, what do I do? I mean, I want to make sure I understand what your position is because right now, I mean, I have to determine ultimately a question of fact. I do have two evaluations from the landowner in this case, and that I have to grapple with as the fact finder, and we can all agree to that, and that's what I'm

required to do.

And just as important, when it comes to review, it's my understanding that at the end of the day, what the reviewing court would look at, and they would make a determination as to whether or not whatever decision I make is supported by substantial evidence in the record; right, more likely to than not, preponderance of the evidence standard.

But go ahead, sir. I don't want to cut you off. I'm going to open it up for you. I have made a lot of comments there.

You have the floor.

Of course, we're going to hear from Mr. Leavitt after you're done.

MR. SCHWARTZ: The legislature has determined that a proper rate of interest for a judgment is -- prejudgment interest is prime plus 2 percent, and the law provides that you can -- that the Court can find that the rate is higher than that if it's necessary to make the property owner whole.

This Court has been asked to determine an interest rate that will make the property owner whole, and that's in addition to the award; right? Because the Court's already made an award of 34 million plus.

So the Court's task is to find an interest rate that is necessary to make the property owner whole. So in this case, the property owner bought the property for four and half

million. Now, why is that significant? Well, because the award is 54 times what the property owner paid for the 35-acre property, 54 times. And the property owner's appraiser, the property owner's appraiser said that the property is worth $34 million and change if the property owner -- if the property can be developed with housing, and it's worth zero if it's not, if it can't be developed for housing.

In his appraiser -- in his appraisal, Mr. DiFederico used comparable sales to value the property. One of his sales was from February of 2015. That's a month before the close on the sale of the Badlands property. And this notion that there was some 2005 purchase price, there's no evidence of that, and it's not relevant because we've got a purchase and sale contract from 2015 between --

THE COURT: So tell me this, sir --

MR. SCHWARTZ: -- it's been authenticated --

THE COURT: -- and I don't want to cut you off. I don't want to cut you off on this issue. I don't, but you keep going back to the purchase price, and why would that be relevant as it pertains to the ultimate determination I made in this case regarding the value of the property at the time of taking? Because we can all agree --

MR. SCHWARTZ: Because it's relevant --

THE COURT: -- assets -- you know, you can buy something if you hold it, and sometimes you buy in the right

area, and the property can make -- increase dramatically over 17 years, and consequently, why would the purchase price matter when the fair market value at the time of taking could be 50 times or a hundred times what the purchase price will be?

And that happens a lot with real property, especially in a growing community like Las Vegas. Because I've been here since 1985, and I would anticipate some parts of the Valley back in 1985, I remember this where St. Rose Parkway is located was raw desert. Today I don't know what that property is worth, and that's kind of my point. I'm trying to figure out on any level why the purchase price would be germane. I just don't see it.

MR. SCHWARTZ: Because the Court's already awarded what the Court says is just compensation of $34 million. And in setting the interest rate, the Court looks to whether the property owner needs to be made whole, not what they would have made had they invested that money in some investment. The Court is here trying to determine an interest rate (video interference).

THE COURT: And that interest rate -- and the interest rate from the time the taking occurred up until I make the decision, like we would in any case involving prejudgment interest; right?

MR. SCHWARTZ: But what -- that's not interest. What happened after the judgment, after the -- excuse me, after the

alleged taking, what happened after the alleged taking, that's subject to prejudgment interest. The legislature didn't say, you know, what -- that you can get what's called profit for investing the money that you should have received on that date. That would leave these taking cases over to a complete free-for-all of grossly speculative evidence, like we have in this case, about what the property owner would have made.

That's not typically admissible in evidence. It's too speculative, but that's not the test, and that's why the test is interest, and the interest has to be, if it's going to be higher than the statutory amount, it has to be to make the property owner whole for something that happened before the taking in this case.

Now if I could finish my point about this purchase price.

So the Developer's appraiser said that one of the sales that and which he relied for his $34 million value for just the 35-acre property was from February of 2015. Well, the sale of the 35-acre property occurred in March of 2015. So you can't say that the very same property is not relevant to the value of the property --

THE COURT: No. No. Say that --

MR. SCHWARTZ: -- when their own appraiser is admitting --

THE COURT: And, Mr. Schwartz --

MR. SCHWARTZ: -- that these sales are relevant --

THE COURT: Mr. Schwartz, I don't want to cut you off. Say that again so I can make sure I -- so I can make sure I can follow you. I think you were talking -- I just want to make sure I understand what your position is. You said -- did you say 1985?

MR. SCHWARTZ: No. I said 2015.

THE COURT: Okay, no. No. I want to follow you. The 2015 transaction. Go ahead and tell me what you said. I want to listen. Go ahead.

MR. SCHWARTZ: So an appraiser values property by comparing the subject property with sales of similar property. The more similar the property, the more accurate the appraisal, the less subject to the appraisal. The sale of the very same property, the very same property that's at issue is -- can be a perfect comparable. It's the same property. It's got the same location, the same topography, the same features. Everything is the same. So there's not much guesswork.

So when this appraiser considered sales of property from before the date of value, the date that the Badlands transaction, so you can't say that this appraiser -- that the sale of the Badlands being about two years -- two years and five months before the alleged date of value, you can't say that it's too old, that there's -- that it's too old. So it's almost a perfect comparable, and that property sold for 18,000

an acre.

Mr. DiFederico said that that same property, that same property is now worth almost a million dollars an acre. So when you compare the Developer's investment in the property with the judgment, the Developer made 54 times their investment. You don't need to give them a high interest rate to make them whole.

Let's take the Developer's allegation that they spent 45 million for the property. Heck, why not a million, a hundred million, a hundred million dollars. There's no evidence of that, but let's say a hundred million. That's 400,000 and acre. This Court has awarded the Developer almost a million dollars per acre for this property. So that's more than twice what the Developer paid, even with the Developer's false claim that they paid a hundred million dollars for the Badlands.

So the Developer doesn't need this extraordinarily high interest rate to be made whole for something that the government did.

The Developer also had the right to change the date of value to the date of trial. The Developer didn't do that.

If -- you know, if the -- if the property had appreciated like they say, well, the Developer could have done that. They didn't do that.

But the evidence to the Court, that's before the

Court is completely speculative. In any takings case where there's a damage award, is the Court going to say well, you know, I am going to, you know, in looking back in the two or three years from the time of award of prejudgment interest to the alleged taking, the Court's going to look back and say, well, the Developer is going to -- the property owner is going to say, well, I would have invested it in my uncle's -- my uncle's shoe business, and I would have -- and, look, my uncle's business made, you know, these exorbitant profits, and so that's my -- that's what I lost.

I just think that the Court going down this road, even if the Court can consider this, because again, there's no evidence the Developer hasn't been made whole, if the Court goes down that road, it's requiring the Court to engage in rank speculation.

And it also will end up in a completely unjust result. I mean, the Developer has already made 54 times its investment in the property. And to award the Developer another $52 million just it kind of shocks the conscience.

So there's no grounds for it. The Developer has already made a windfall. It doesn't need to double down on the windfall.

THE COURT: So I guess the bottom line, sir, what you're saying, look, Judge, you should stick to the statutory rate?

MR. SCHWARTZ: That's right. We calculated what the statutory rate would yield based on the judgment. Again, we're not conceding anything about liability in this case or, you know, that the compensation awarded was just, but based on the Court's judgment and the facts of this case, the unrefuted facts, an interest rate higher than the statutory rate would be unconscionable, would -- it would pile an enormous windfall on top of what is already an enormous windfall, giving the Developer, as I calculated, 13,800 percent profit on its investment.

THE COURT: I understand, sir. I just wanted to make sure I wasn't overlooking anything.

All right. And have you said everything you need to say right now, sir? Then I'll go ahead and give Mr. Leavitt the last word on this issue.

MR. SCHWARTZ: Yeah. One more thing. In the *Sisolak* case, the prejudgment interest was greater than the award because it was assessed over a very long period of time, a very long period of time. But it's my understanding that the interest rate awarded in *Sisolak* was the statutory rate. It wasn't -- it wasn't -- it wasn't what the Developer could have invested in the property. I mean, if that were the case, certainly the Developer in that case could have made the argument, well, I could've taken the money and invested it in this and invested it in that and made higher than the statutory

rate.

I don't think that occurred in the *Sisolak* case because there was no showing that the Developer needed a higher interest rate to be made whole, and that's really the point here.

The Court doesn't get to all of this other evidence unless the Court finds that the Developer -- that something about that award was not enough to compensate the Developer, just not enough to give them 54 times their investment in the property. They need more. That's the --

THE COURT: But is --

MR. SCHWARTZ: That's the decision the Court needs to make.

THE COURT: But here's my question though. Is that really the standard? And the reason why I asked that question, and this come straight from the *Barsy* case, and this is what the Nevada Supreme Court sets fourth, and I think I've read this in the record before, but quote,

> "While the statutory rate should be used if unchallenged, once competent evidence is presented supporting another rate of interest being more appropriate, the trial judge must" --

Meaning I have no alternative here.

> -- "then determine which rate would permit the most reasonable interest rate."

And so that's where we're at right now.

MR. SCHWARTZ: But the reasonable rate, Your Honor, is the rate that's necessary to make the property owner whole. The Court in that case said that the owner lost tenants while the agency delayed the -- filing the eminent domain action.

Again, the Court already -- if the Court had already made the owner whole with the award of the fair market value of the property and the prejudgment -- the precondemnation damages award, if it had already made the owner whole, then under the Constitution, there would be no reason to award higher than the statutory rate. That's only, you know, a reasonable rate is only the rate that's necessary to make the owner whole, the owner whole.

And in this case, in *Barsy*, I think it's pretty clear the Court was giving a rate higher than the statutory rate because they wanted to make the property owner whole, and they said well, you can invest another real estate where you get a higher return. That's because the assumption is you'd have tenants, and you'd be getting a higher return than the return that you got during this period, which was because you didn't have tenants.

So that's why the Court there found, well, we need to give a higher rate, and so we'll use, you know, we'll compensate this owner who wasn't made whole by the awards with this higher rate, and it just happens to be that the evidence

was, well, what -- what he would have invested in this other real estate to where if they had tenants he would've made up that money had he lost, that he lost because the agency caused him to lose his tenants.

We don't have that situation here. We have the opposite situation where the Developer invested a certain amount of money, and the Courts awarded the investor 54 times what the Developer invested in the property. So the Developer didn't lose anything. They got a huge windfall. So there's no reason to award prejudgment interest in addition to that huge windfall, to give them double or triple, yes, 52 million, would have been having tripling their windfall.

You know, under the Constitution to test this, you got to make the property owner whole. I think that's what the Court needs to focus on, and there's no evidence that this Developer needs yet more money to be made whole.

THE COURT: All right, sir. And thank you.

And we'll hear from Mr. Leavitt now.

MR. LEAVITT: Thank you, Your Honor. James J. Leavitt on behalf of 180 Land, the plaintiff landowner again.

Your Honor, counsel said that the legislature determined prime plus 2 percent to be the appropriate rate. That's not what the legislature determined. The legislature that the state says -- that the statute states the rate of interest to be used to compute the award of interest must be

determined by the Court which, quote, must not be less than prime plus 2 percent. The legislature never once determined the prime plus 2 percent is the appropriate rate. They simply said it cannot be below that.

And as you read from *Barsy*, the Nevada Supreme Court said that once you receive competent evidence, you must determine the rate which would be the most reasonable interest rate. So the operative words there are reasonable interest rate.

I will quote from the report by Bill Lenhart. This is interest motion Bates stamp 0085. He concludes that he's done his entire research here and that he says that the rate which a landowner, and I'm going to quote, would reasonably expect is a compound rate of 25 to 27 percent a year.

Your Honor used the exact standard that the Nevada Supreme Court asked this Court to follow and asked *Barsy* to follow, which what is the reasonable interest rate based upon the rate of return for land during the relevant period.

Mr. DiFederico in his report, interest motion, dash, 0005, arrived at the same conclusion of a reasonable interest rate except for he arrived at 23 percent, again pursuant to the *Barsy* decision.

So, Your Honor, the question was to Mr. Schwartz, why is this speculative? It's not, Your Honor. There's three reasons this rate of return is not speculative. Number one,

the rate of return based upon land is what the landowners do. They've done it in the past, and they're doing it now. They invest in land.

Number two, it's what *Barsy* relies upon. *Barsy* relies upon evidence of what the rate of return is of land during the relevant period to determine the rate of interest.

And third, it's what the experts have confirmed in this case.

So we have the landowners doing it. We have the *Barsy* court relying it on it, and we have the experts confirming it. That's the evidence before the Court right now on this question of fact.

What we don't have from the City is any evidence of why prime plus two should apply. They provided no evidence from anybody, from an expert other than argument of counsel. And what is that argument of counsel based on? He reargues the purchase price that this Court has already ruled on, and he tries to claim that that purchase price occurred in 2015. Both the person most knowledgeable on the sale and the person most knowledgeable on the purchase stated that the purchase price was in 2005.

I'm going to quote just very briefly, Your Honor, from this Court's order on the purchase price. Number one, the purchase price transaction does not reflect the highest and best use of the 35-acre property on the date of value.

Number two, the City has not identified an expert that can testify to it.

Number five finding, jumping ahead, the purchase price transaction beginning in 2005 is too remote to the date of value with changes in the market fluctuations.

And then, Your Honor, I'm not going to continue to read. That's the Court's motion -- that's the Court's order on the motion in limine. We've been down this road. We've argued this issue ad nauseam. The purchase price has been excluded because it's so remote.

I will end with one example. You buy a parcel of property in Las Vegas in 2005, your home. Say you got it for $50,000. Since 2005, which would not be unheard of, the property is now worth $700,000.

Under Mr. Schwartz's analysis here, all the City would have to pay is $50,000 because that made you whole, no interest, not the increase in the value of your land, but let's go back 17 years. Let's look at what you paid for the property, and we'll give you 50 grand. Now, you've been made whole. That's not the standard.

The standard is determining the value of the property on the date of value. Once that property valuation is determined, then the interest rate is -- then interest is based on that value, and the rate is based on the time period in which the landowners lost the use of those proceeds, and the

Nevada Supreme Court in Barsy said, look to land increases.

We've done that, Your Honor, and that's the only evidence before the Court.

We respectfully request that you apply that -- or that you rule that that 23 percent rate of return should be applied because there's no evidence to contest it, just like there was no evidence to contest the $34 million value.

Thank you, Your Honor.

THE COURT: All right. And I don't mind saying this. I mean, I thought about this case. I thought about my prior decision as it pertained to the 34 million. And at the end of the day there was no other alternative as far as value is concerned.

And then, I mean, this -- I don't mind saying this to everyone. The amounts being requested are significant sums of money. I've made a lot of decisions in the past regarding sums. I mean, I've had judgments in excess of $500,000,000 in this department that I had to reduce. That was for punitive damages. It's my recollection I reduced it by -- I think it was a State Farm Insurance Company case in front of the supreme court where punitive damages had to have some sort of relationship to compensatory damages, no more than 10 to 1. And I had to reduce that. I forget what the exact sum was. But I'm just saying we've had a lot of cases like that.

But here -- and this is the real -- I guess where the

rubber meets the road. We have argument about potentially what would be the most reasonable interest rate, but I have no evidence. And that's kind of what I'm grappling with right now. We have no challenge under Hallmark as to --

MR. SCHWARTZ: Your Honor.

THE COURT: Yeah, go ahead.

MR. SCHWARTZ: Counsel freely intermixes rate of return with interest rate. The expert testimony that was presented to this Court are the rates of appreciation of real estate. They are not reasonable interest rates. There's no evidence from the developer of a reasonable interest rate in this case.

THE COURT: All right.

MR. SCHWARTZ: He said the expert said a reasonable interest rate is such and such, 23 percent per year. No, that's not what the evidence shows. The evidence shows that real estate, that the average of a class of real estate in Las Vegas appreciated at a certain rate. Interest rate is the time value of money. There's no case in Nevada where the Court has awarded prejudgment interest at greater than prime plus 2 percent. Thank you.

THE COURT: All right. And I'm going to tell everyone this. Am I going to make a decision right now? No. I'm going to go back and read everything because there's a lot of money involved. But at the end of the day, I'm going to

give the best decision I can give. It's going to be relatively quick. It's my recollection I didn't sit on the last decision; maybe, what, four or five days, a week at most, and that's what I'm going to do.

But why does it matter -- I see the case -- what it says here was -- and we can focus on that. It says, "While the statutory rate should be used if unchallenged, once competent evidence is presented supporting another rate of interest" -- right, that's what the case says -- "as being more appropriate, the district court must determine which rate would permit the most reasonable interest rate." And that's what the case says.

And then we have a scenario where there's interest rates being offered by the plaintiff from an expert perspective. I understand there's been argument, but as it pertains to the methodology and those things, they really haven't been challenged with another report. Right?

Anything you want to add to that, Mr. Leavitt? I think you're frozen right now.

MR. LEAVITT: I'm on, Your Honor.

THE COURT: Okay.

MR. LEAVITT: No, Your Honor. And it's absolutely correct that the evidence is unchallenged at this point in time. So, again, we submit based upon the pleadings and based upon the argument.

THE COURT: I understand. And I won't -- I think the

last time I got it done -- in fact, I think all the important decisions I've gotten done pretty quick historically, like within a week or so. I'm going to do the same thing. I just want to go through it. It's a lot of money, but at the end of the day I have to make a decision and I won't sit on it. It will be done quickly.

MR. LEAVITT: Thank you.

THE COURT: All right. So we have one other matter regarding attorney's fees.

And, Mr. Leavitt, you've got the floor, sir.

MR. LEAVITT: Yes, Your Honor. Thank you. Your Honor, in our opening motion we listed three different sources for recovery of attorney's fees in an inverse condemnation case. I will address just two of those sources during my argument today.

The first source is the Nevada Constitution. The Nevada Constitution was amended in 2008 and it added a provision, Article 1, Section 22, subclause 4, which states what just compensation includes. And it says, "Just compensation shall include but is not limited to interest and all reasonable costs and expenses actually incurred in the action."

So, Your Honor, the Nevada Constitution is abundantly clear that a landowner recovers costs, and we've already done that part of this case, and all expenses that that landowner

must incur in an eminent domain action or has incurred in an eminent domain case. Those expenses clearly include attorney's fees. The City has not even challenged the language that the Constitution -- the provision of expenses includes attorney's fees. Therefore, Your Honor, we would respectfully request that attorney's fees be granted under that provision of the Constitution.

But I do want to note one thing because when this constitutional provision was placed on the ballot in 2006 and 2008, it was made very clear to the voters by the opponents of the ballot question that this provision would require the government to pay attorney's fees. We've laid that out in our brief. And the voters of the State of Nevada passed this constitutional provision in 2006 with almost 70 percent of the voters. And, Your Honor, I don't know of many ballot questions or elected officials that get 70 percent of the vote. Not only in 2006 but in 2008, once again 70 percent of the electorate voted to pass this section of the Nevada Constitution so that landowners in these eminent domain cases would be reimbursed for their attorney's fees. So, Your Honor, that's the first section that allows for reimbursement of attorney's fees.

The second provision that allows for attorney's fees arises out of the Sisolak and Hsu cases. Again, you're very familiar with the Sisolak case. You're very familiar with the Hsu case. Both of those cases cite to the Federal Relocation

Act and both of them say that once a landowner prevails in an inverse condemnation case, that landowner is entitled to their attorney's fees.

There's two provisions that the Nevada Supreme Court cites to. 42 U.S.C. 4654, that's cited in the Sisolak case. It's right on point. It says if a landowner prevails in an inverse case, the government shall pay those attorney's fees. 49 CFR, Section 24.107 says the owner of real property shall be reimbursed their attorney's fees if a judgment in inverse condemnation is rendered in their favor. So these are provisions that are cited by the Nevada Supreme Court in both the *Sisolak* case and the *Hsu* case that where a landowner prevails in an inverse condemnation case they're entitled to their attorney's fees. And that's without exception, Your Honor. The *Hsu* case, or the *Sisolak* case said very succinctly -- here's what it said. "Because Sisolak is a property owner who was successful in his inverse condemnation case, the plain terms of the Act allowed the district court to award reasonable attorney's fees." In the *Hsu* case the same exact language is repeated. So we have two different avenues to award attorney's fees.

Number one, the Constitution says just compensation shall include reimbursement of all costs and expenses. All costs and expenses clearly contemplates attorney's fees. And then the *Hsu* and *Sisolak* rule, which state that in the State of

Nevada if a landowner prevails in an inverse condemnation action they're entitled to reimbursement of their attorney's fees.

Now, the argument that the City is going to make about the *Sisolak* and *Hsu* case is they're going to say that, Judge, the landowners in *Sisolak* and *Hsu* were only entitled to attorney's fees because they showed that there were federal funds involved in the taking. And they're going to say that you have to show some type of connection or nexus between the taking and the federal funds.

There's two reasons that's not true. Number one, Your Honor, in an inverse condemnation case there are no funds. The government doesn't allocate funds to acquire the property. The government is denying the taking. Therefore, you can't have a direct nexus between the federal funds that the government receives and the taking of the property. All there has to be is some kind of general nexus between the government's program or the government itself and receiving federal funds. So we see this all the time, Your Honor.

What the Federal Government will do is they'll say we'll give you federal funds if you do certain things. And in this case the Federal Government says we will give you federal funds as long as you, the City, follow our Act, and if you take property by inverse condemnation you have to reimburse a landowner all of their attorney's fees. This is an absolute

requirement to the City of Las Vegas receiving federal funds. In fact, if the City contests the attorney's fees here, it would be jeopardizing receiving federal funds because it would be contrary to the Federal Relocation Act.

Having said that, Your Honor, we have presented to the Court -- they're all before the Court, Exhibit Number 12, Exhibit Number 13 and Exhibit Number 14, which show the City receives federal funds. The City receives federal funds generally for all of its operations, and then Exhibits Number 13 and 14 show that the City receives federal funds specifically for parks and open space under what's called Southern Nevada Public Lands Management Act. It's known as SNPLMA. Under SNPLMA, the City of Las Vegas receives federal funds from the federal government to acquire properties and to build properties for parks and open space.

That's the purpose for which the property has been taken here, Your Honor. So insofar as there is some type of nexus required to show federal funds between the property that's being taken and -- or, I'm sorry, a nexus between the property being taken and the federal funds that the City of Las Vegas receives, that's set forth in Exhibits Number 12, 13 and 14. So, Your Honor, according to those two provisions, the landowners are clearly entitled to reimbursement of their attorney's fees.

So the final question, Your Honor, if they're

entitled to reimbursement of attorney's fees, would be how much should that be? The Nevada Supreme Court provided a specific formula for calculating attorney's fees in inverse condemnation cases, and it's unique to inverse condemnation cases in the *County of Clark v. Tien Fu Hsu* case. In that case we litigated on behalf of Mr. Hsu for 14 years, and at the end of that case the Nevada Supreme Court said you're going to get your attorney's fees and here's how they have to be calculated in two steps.

Number one, the Lodestar. This Court knows the Lodestar. I'm not going to go through it. You look at the hours and you multiply it by a reasonable rate. The hours we provided to this Court are based upon the affidavits of all of the counsel. Pursuant to NRCP 54, we've laid out those hours. We've stated in our affidavits for every attorney that copious records were given or kept.

On the hourly rate, those hourly rates were done down to the tenth degree, so that, for example, if an individual worked one hour and seven minutes that's 1.1 hours that was recorded. Those were all added up solely and specifically for this 35-acre case, meaning that none of the hours that we are seeking to recover for attorney's fees in this case were spent in the 65, 133 or 17-acre case. That's set forth clearly in our affidavit. And, Your Honor, the rate that we have provided to you was $450 up to June 1, 2019, and after that it was $675.

So pursuant to that first step, Your Honor, we've given the Court the total hours worked. It's set forth in the documents. I can provide that to the Court. But the total hours that are worked we've given to the Court and the rate that has been provided of $450 and $675 for attorneys and then $50 for legal assistance, Your Honor, is absolutely reasonable. That was the actual rate that was charged to the client. And so it's the actual rate multiplied by the hours worked that the client has incurred in this case.

So the next step, Your Honor, after the actual rate has been determined and the amount is given, is a twelve factor analysis. And, Judge, I'm not going to go through all twelve factors. But the twelve factors are set forth in the Hsu case. We've laid them out in detail in our brief. And I believe -- and they're factors that this Court weighs. I believe eleven of the twelve factors were clearly met in this case.

I'll address just a few of them, Your Honor. Factors 3 and 9 to consider for whether the rate should be enhanced looks at the skill and experience of the attorneys. Your Honor, eminent domain is a very, very specialized area. The Law Office of Kermitt L. Waters is the only firm that specializes solely in eminent domain in the entire state of Nevada. There's 110 years of combined experience which focuses solely -- or wherein the attorneys for those 110 years have focused exclusively on eminent domain work. The Owners'

Council of America chooses one firm out of every state to be a part of that council. They chose the Law Office of Kermitt Waters.

So, Your Honor -- and I'll just address this. The constitutional provisions that we've been discussing in this case, Article 1, Section 8, were drafted by the Law Office of Kermitt L. Waters. The actual case that we're discussing to determine attorney's fees, *County of Clark v. Tien Fu Hsu*, was taken up to the Nevada -- litigated for 14 years and taken up to the Nevada Supreme Court twice by the Law Office of Kermitt L. Waters. So, Your Honor, the skill and experience of the attorneys are clearly met to justify an enhanced fee.

Factor Number 5, Your Honor, is what's the customary fee for specialized eminent domain cases. And, Your Honor, we have that here. This is one of the cases where we don't have to go look at what other attorneys charge. We don't have to look at what other people in other specialties get because the Nevada Supreme Court decided the fee for an eminent domain attorney in an inverse condemnation case in *Sisolak*. The Nevada Supreme Court awarded a fee of $1,392 per hour times 1,400 hours. And, Your Honor, that was fifteen years ago.

So the one specific issue that really is before you here today that the City really contests is the rate. Again, the last issue was the rate of return on interest; here it's the attorney rate. We ask that the Court follow that *Sisolak*

decision and provide a rate, an attorney hourly rate similar to what was awarded in *Sisolak*. What was awarded in *Sisolak* was $1,392 per hour. That's the same attorney fee that should be awarded in this case.

So, and then the final factor, Your Honor, Factor 12 was awards in similar cases. So in the *Sisolak* case, Mr. Sisolak got almost $500,000 less than his appraisal. In this case the landowners, 180 Land, obtained the exact amount of their appraisal report. And in *Sisolak* the Court awarded $1,392 as the hourly rate. So the award in *Sisolak*, Your Honor, or the comparison of the award in *Sisolak* with the award here, in addition to the actual hourly rate that was awarded in *Sisolak*, we request that the Court multiply the hours worked in this case by a rate similar to what was given in the *Sisolak* case.

And, Your Honor, we've set that forth in our reply. And just briefly, with the Court's indulgence, just very quickly I'll get that for the Court. We set it forth in the reply and we also set it forth in our opening motion. For Mr. Waters, a rate of $1,500 per hour. For James Leavitt, a rate of $1,300 per hour, which is $92 less than what the specialized eminent domain counsel received in *Sisolak* fifteen years ago.

And for Ms. Waters and Mr. Schneider, $800 an hour, which is $500 an hour less than what the specialized eminent

domain counsel was awarded in Sisolak.

So, Your Honor, with that said, number one, we respectfully request that the Court award attorney's fees and that the attorney's fees be calculated based upon those rates that I just set forth based upon the Hsu factors.

THE COURT: Okay. Thank you, sir.

And we'll hear the opposition.

MR. MOLINA: Thank you, Your Honor. Personally and for the City I'll be handling this opposition. So I think that we agree with the developer on probably one thing, and that's that there are two steps in this analysis. First, you have a basis for awarding attorney's fees; and second, if there is a basis, what is a reasonable fee. And as Mr. Leavitt stated, there are three bases that the developer is attempting to recover attorney's fees under. The first one is the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. That's -- we'll refer to that as the Uniform Relocation Act. The second basis is Article 1, Section 22, subsection 4 of the Nevada Constitution. And then also in their motion they've also argued that they should be entitled to attorney's fees under NRS 18.010, subsection 2(b).

I'll start with the Uniform Relocation Act because I think that that's probably the most complicated one to get through. Now, the developer has cited Title 49 of the Code of Federal Regulations, Section 24.107, for the proposition that

the Court must award attorney's fees in inverse condemnation actions, and we have directed the Court in our briefing to the applicability section of that regulation. That's Section 24.101. And what this says is that the Uniform Relocation Act applies to two different types of programs or projects.

The first one is a direct federal program or project, and that means that there's a direct federal program and it's an acquisition of real property for a direct federal program or project.

The second type is a program or project receiving federal financial assistance, and this is under subsection (b) of that regulation. And it says, "The requirements of this subpart apply to any acquisition of real property for programs and projects where there is federal financial assistance in any part of the project costs."

And where I'm going with this is that the City has no project planned for the 35-acre property. The City has no federal funding that they are going to receive for this hypothetical project that does not exist. And so this section plainly on its face does not apply.

Well, why did it apply in *Sisolak*? Well, it's pretty clear why it applied in *Sisolak*, and the court made it quite clear and I'll just quote from it. It says,

"Here, the Relocation Act entitles Sisolak

> to an award of attorney's fees because the County received federal funding for numerous improvements at McCarran Airport, including runway construction and land acquisition. The County was eligible to receive the federal funding specifically because it made assurances that it took steps by enacting ordinances to protect the airspace needed for aerial approaches to the airport and to prevent future construction in that airspace."

So what you have in *Sisolak* and what you also have in the Hsu case is a federal project, a federal -- a program or project that receives federal funding, and we don't have that here. What Mr. Leavitt has argued is that, well, the City receives federal funds generally and they receive federal funds through the Southern Nevada Lands Public Management Act, and therefore, you know, this is enough to make the Uniform Relocation Act apply, and that's -- it's simply false.

What he does is he focuses on this language in *Sisolak* where the *Sisolak* court rejected the County's argument that there must be a specific nexus. The *Sisolak* court never held that there can be no nexus; as long as you receive federal funds the Uniform Relocation Act applies. That's not what they said. What they said was there doesn't need to be a specific nexus. And so there has to be a nexus and that's just sort of

the bottom line here is that there's no program or project that's going to receive any federal funding here. The City is certainly not going to get any money from the federal government to pay the just compensation award or any other sums that are awarded against the City. And there's simply no project and there's no nexus.

And what's telling here is that you have two other Nevada Supreme Court cases, one that predates *Sisolak* and the other one is post *Sisolak*. The one that predates *Sisolak* is *Alper* and *Alper* was not overruled by *Sisolak*. In *Alper*, the Court made it quite clear that -- and I'll just go ahead and read from it. It says,

> "Since the Alpers did not produce any evidence that federal funds had been received by the County to acquire or widen that portion of Flamingo Road which is subject to the present inverse condemnation proceeding, NRS 342.320(2) does not apply."

And that statute that the court cited there was the State equivalent of the Uniform Properties Act -- Uniform Relocation Act, and it simply just says that when it applies to an agency the policies must be followed. That's all that that says, so it's essentially the same rule. And as I've already explained, it just simply doesn't apply.

So before *Sisolak* you have the Nevada Supreme Court

saying if you don't show that there's any evidence that there was federal funds received for this project -- there was actually a project there, a street widening project -- then this doesn't apply. And after *Sisolak* we have another case. We have *Buzz Stew*. And in *Buzz Stew v. City of North Las Vegas* the court kind of tangentially rejected expert evidence of the Uniform Relocation Act. And what they said there was,

> "Any additional testimony regarding the Relocation Act, the district court did not err in excluding this evidence, as Buzz Stew failed to show that federal funds were used for the project."

The project. No evidence showing that federal funds were used for the project. And again, you have a project there and here we do not. There's no project. What is the project? It does not exist. So you have case law before and after *Sisolak* that explains that there has to be a nexus.

There doesn't have to be a specific nexus, but it's got to be a nexus. You can't just say that, oh, every city in the country, basically, receives federal funding. And if that were enough to trigger the statute, then we wouldn't have this conversation right now. It would be completely clear based on the case law and the Nevada Supreme Court certainly wouldn't have rejected that argument in *Buzz Stew*.

So, and I'll also say one more thing about *Buzz Stew*

because the Nevada Supreme Court cited two cases, one from the Seventh Circuit and one from Colorado. In the Seventh Circuit decision, *Rhodes v. City of Chicago for Use of Schools*, the Seventh Circuit held Section 4655, which is the statute that gives rise to the regulations that I was discussing before,

> "Section 4655 is applicable only when federal financial assistance is used in or directly supports the property acquisition."

And then the Seventh Circuit went on to say,

> "While substantial sums of federal money are channeled into the Chicago public school system, there is no evidence that federal funds are used for the acquisition of property by the Chicago Board of Education."

So again, there's got to be some kind of a nexus and there's got to be a project. The other case that the Nevada Supreme Court cited to in *Buzz Stew* is *Regional Transportation District v. Outdoor Systems, Inc.* That was a Colorado decision. And there -- that is an en banc Colorado decision. And there the court stated that the regulations under the Uniform Relocation Act,

> "make clear that not every acquisition made by a state agency that ultimately wins federal funding falls within the Act's ambit. The phrasing of the regulation implies that it

covers situations where an agency identifies a parcel of land needed for a particular project and then sets out to obtain it."

So we've got, you know, very recent or fairly recent Nevada Supreme Court authority in *Buzz Stew* citing to both of these cases and they reached the same conclusion that the City is arguing here that unless you have a project and unless you can show that there's funding that's at least related to that project, then the Uniform Relocation Act doesn't apply. So we would submit that that's pretty -- that should be a pretty simple issue, Your Honor. We don't think that there's really any legitimate basis to claim that the Uniform Relocation Act applies.

The next basis that the developer is relying on to claim attorney's fees is Article 1, Section 22, subsection 4 of the Nevada Constitution. And as Mr. Leavitt noted, this is something that Mr. Waters had participated in. And nowhere in this section is the word inverse condemnation mentioned at all. And that is pretty telling.

And for the same reason that -- I'll get back to this in a second, but in *Buzz Stew* what happened is that the City of North Las Vegas actually prevailed in that action, and what they said was -- the developer, the property owner there had argued that the Nevada Constitution protected against an award of costs. And the court said, well, in eminent domain

actions -- this is the *Buzz Stew* court -- they said in eminent domain actions such costs are curtailed. And they cited to Nevada Constitution Article 1, Section 22, subsection 7. And then they went on to say,

> "The present case was an unsuccessful action for pre-condemnation damages wherein the City prevailed on its defense. Therefore, we cannot say that under the facts of this case the district court clearly erred."

And what the court just did there is they distinguished an action for pre-condemnation damages from an action based in eminent domain. And they held that it doesn't apply to an action for pre-condemnation damages because the constitutional provision at issue here on its face only refers to eminent domain proceedings. It's qualified and limited to eminent domain proceedings.

And the other key thing here is that in reaching that conclusion the Nevada Supreme Court cited to a California case, *Locklin v. City of LaFayette*, that held that an inverse condemnation plaintiff who did not prevail in a takings claim was not entitled to be shielded by the law against awarding costs in eminent domain actions. So not only did the Nevada Supreme Court distinguish the *Buzz Stew* case from the constitutional provision that allows for -- that shields landowners from having to pay the government their costs, it

also distinguished inverse condemnation from eminent domain in citing to this *Locklin v. City of Lafayette* case. And this is very recent, Your Honor. This is a 2015 decision basically distinguishing that.

And so it's clear, then, that this is -- there is a distinction that's important here for purposes of construing the Nevada Constitution, and that distinction is that these provisions, these protective provisions that were adopted by the voters in 2008, they only apply to eminent domain actions, and that's pretty clear.

I'll respond to one thing that Mr. Leavitt pointed out about the ballot initiative. They made this argument in their motion that because the Nevada voters, you know, were given the information about the Act that said that, you know, the government would have to pay attorney's fees in every eminent domain case, therefore the Nevada voters knew that attorney's were going to have to be paid in inverse condemnation cases. Well, I mean, there's very clear law in Nevada that those ballot explanations are not proper for purposes of ascertaining legislative intent. That's now how you construe a ballot proposition.

So for those reasons, we would argue that Article 1, Section 22 of the Nevada Constitution does not apply to an inverse condemnation action and it does not apply to this case.

And, Your Honor, I'll just briefly address the last

basis. I don't think that Mr. Leavitt spent much time on this but, you know, they also claimed attorney's fees in their motion under NRS. 18.010 2(b). And, you know, that provision, as I know the Court is aware, it applies when, you know, somebody makes a claim or a counterclaim or interposes some kind of a defense for the purpose of harassing the other side, being vexatious, frivolous arguments, things of that nature. And we would submit that all of the arguments that we've made in this case have been based on well-established law.

Everything that we've argued here has been supported by ample law. And certainly there has been no effort on the City's part to try to harass the developer in making any arguments. That's just simply not true.

So, really we should not even get into the second step of the analysis, which is what is a reasonable fee, because we don't have a basis for awarding attorney's fees here. The Uniform Relocation Act doesn't apply. The Nevada Constitution provisions, the PISTOL amendments do not apply to inverse condemnation cases. And we just don't have a grounds here for applying NRS 18.010 2(b). But obviously I have to respond to those and of course we can get -- these fees are just outrageous.

The interesting thing here is that the developer incurred 2.1 million dollars in attorney's fees, according to their motion, and they're requesting 3.4 million dollars in

attorney's fees based on this argument that they should be entitled to an enhanced fee under *Hsu*. Now, *Hsu* doesn't say that the court can award an enhanced fee. What it says is that you can make an appropriate adjustment.

And I'll just -- actually, to be careful here, I'll read the language verbatim. What Hsu said was, "Following determination of the lodestar amount, we leave it to the sound discretion of the district court to adjust this fee based upon" -- twelve factors. It doesn't say enhanced fee. That is something that the developer completely made up. If you search that decision for the word enhanced or enhance or increase or upward adjustment, none of those things come up. It's an adjustment based on these factors and it's basically to make the fee reasonable.

And so all that *Hsu* said was that you multiply the number of hours spent by a reasonable rate and then you adjust it based on these factors. It doesn't say that they get an enhanced fee. And an enhanced fee of 1.3 million dollars, Your Honor, is pretty steep.

What the developer doesn't talk about in his motion is all of the law that we have in Nevada about what's a reasonable fee. It's pretty clear that when a court determines what a reasonable fee is, it looks at the relevant jurisdiction, and the relevant jurisdiction here is the Las Vegas market.

So what we did is we went out and we got this Real Rate Report from Wolters Kluwer and they published that report specifically for these types of motions so that the court can see what -- you know, what is the market charging, you know, from year to year and that can be used as a basis to determine reasonableness of a fee. So what we showed in the rate report was that in 2017 the average rate charged was $410 for partners and $264 for associates in the Las Vegas market. And that was pretty steady. In 2018 it was $444 for partners and $279 for associates. In 2019 it actually went down a little bit. For partners it went down to $438 for partners and $281 for associates.

So that just puts a little bit of context here on what the developer is requesting, which is $1,500 an hour for Kermitt Waters; $1,300 per hour for Mr. Leavitt; $800 per hour for Autumn Waters; and $800 per hour for Mr. Schneider. All of those rates are at least twice the amount of the average rates that are charged in the Las Vegas submarket.

And with respect to the rates that Mr. Waters and Mr. Leavitt are requesting, it's almost three times or almost four times the amount of the average rate, which was around $438 for partners in 2019.

So, Your Honor, we think that these are grossly, you know, disproportionate to what's reasonable in the Las Vegas market. But once again, we don't think that we even get to

this step in the analysis because there's just no basis for awarding attorney's fees in this case.

THE COURT: And, sir, I just have one question. What about the references made to the *Sisolak* case and the hourly rate that was awarded in that matter?

MR. MOLINA: Sure. So in the *Sisolak* case the counsel for Sisolak, Laura Rehfeldt, she took that case on a contingency fee. And I believe that we actually attached to our opposition the lower court's analysis of, you know, how he arrived at that amount. And essentially, you know, what he did was he looked at this as a contingency case and compensated her for taking on the risk of, you know, litigating that case all the way up to the Nevada Supreme Court and back and not having been paid at all during that time. And so a higher amount for that case was appropriate, given the fact that she had taken on that risk and, you know, she deserved to be compensated for it.

In this case the developer actually got paid. They got paid, according to their motion, 2.1 million dollars in fees already. So it wasn't a contingency fee, and so it's not appropriate to use what was awarded in Sisolak as a benchmark for what's appropriate and reasonable in this case.

THE COURT: All right, sir. Thank you.

MR. MOLINA: Thank you.

THE COURT: And, Mr. Leavitt?

MR. LEAVITT: Yes, Your Honor. Again, James J.

Leavitt on behalf of the plaintiff, 180 Land, landowner. Your Honor, I'll start where we ended there on the Sisolak hourly rate. It's true that Ms. Fitzsimmons handled the Sisolak case on a contingency fee basis; however, the court never once stated that it was awarding that attorney fee of $1,392 based on a contingency fee. That's nowhere in the decision. Nowhere in the decision does the court say, hey, because you had such great risk that you might not get paid, we're going to pay -- we're going to affirm a $1,392 award. The court expressly stated that she was awarded the amount of the fee, which was $1,392 times 1,400 hours, Your Honor. There was no caveat. Therefore, that's the only case that we have in Nevada that provides a reasonable rate for an attorney who specializes in an eminent domain case.

The government has tried to attach this Real Rate Report, which is a general rate report, which are general fees for general attorneys. There's nothing in there about the rate that attorneys charge in a specialized area or a rate that attorneys are entitled to in a specialized area.

Secondly, the rate that's in that Real Rate Report that counsel brought to you is less than the attorney fee rate that Mr. Ogilvie's office is charging, Your Honor. And that's a government rate. We laid out in our report that government rates are typically lower. So, Your Honor, that Real Rate Report is -- it has no basis in Nevada law, number one. It's

not cited in any Nevada case, number two. And number three, it's contrary to the *Sisolak* decision.

Again, we have a case right on point which is fifteen years old. Your Honor, we didn't go into the *Sisolak* case and say, listen, $1,392 was awarded in *Sisolak* and we want you to adjust that up for fifteen years. We didn't do that. My rate that I'm asking for is $92 an hour less than Sisolak's rate or the attorney in Sisolak's rate fifteen years ago. It's a little bit higher for Mr. Waters for obvious reasons. Mr. Waters has been described as the preeminent eminent domain attorney on the entire west coast. He's known as that for the west coast. There's another attorney for the east coast. So an hourly rate in this specialized area that we've requested is consistent not only with *Sisolak* but consistent with the experience and the reputation of 110 years of specializing in the area of eminent domain.

Now, counsel also brought up the *Hsu* decision. If the *Hsu* case -- if in the *Hsu* case the Nevada Supreme Court did not want the court to consider the twelve factors for an enhanced rate, all the court would have had to have done is say determine -- under the Lodestar analysis determine a reasonable rate and then multiply it by the hours, and the analysis would end there. It would entirely end there.

But the Nevada Supreme Court understood the nature of an inverse condemnation case and said that after the court

determines the reasonable hourly rate, after the court -- or times that by the number of hours worked, the court must then consider these twelve factors. And every one of those twelve factors are targeted towards enhancing a fee. Why would the court want you to consider the reputation and skill of the attorney if it was going to reduce the fee? Why would the court want you to consider the outcome if it was going to reduce the fee? So, Your Honor, it's clear that those factors were provided to ask the court to look at the rate that was charged, actually charged in the case and then enhance it upward, exactly as was done in the *Sisolak* case, other than the contingency fee was the starting point.

And, Your Honor, I will add one thing here. Typically in an inverse condemnation case the contingency fee is 30 percent. That fee would be more than 10 million dollars in this case. So the fee which we're asking for here, which is based upon $1,392, that counsel says is outrageous based on 3.4 million dollars, is less than one-third of the typical contingency fee that we would have charged in an inverse condemnation case such as this.

I'll turn to the Constitution. The City of Las Vegas concedes that attorney's fees under the Constitution are part of a just compensation award. But what the City says is they say, well, that's just part of the just compensation award in an eminent domain case, you don't get attorney's fees in an

inverse condemnation case. Your Honor, this Court has entered findings of fact and conclusions of law. The Nevada Supreme Court has entered a holding in *Alper*. The Nevada Supreme Court has entered a holding in *Argier* and about five other cases that stated that eminent domain cases are the constitutional equivalent of inverse condemnation cases and are governed by the same rules and principles. So therefore, if a landowner is entitled to recover their attorney's fees in an eminent domain case, they're entitled to recover their fees in an inverse condemnation case.

That not only is long-standing precedent in the state of Nevada that the two cases are the constitutional equivalent, but it's the law of this case now. So to argue that -- or to try and split hairs between an inverse condemnation case and an eminent domain case at this point in the case is simply unreasonable, Your Honor, since it's already been adjudicated fully in this case and by the Nevada Supreme Court.

Secondly, it makes no sense whatsoever to grant attorney's fees under the Constitution in a direct eminent domain case but not an inverse condemnation case. Let me read to you the policy that comes out of the Sisolak case. So in the *Sisolak* case the Nevada Supreme Court awarded attorney's fees in an inverse condemnation case and here's what the court held. It is inevitable that a landowner in an inverse condemnation case will be forced to pay greater litigation

expenses than would have been necessary than if the City had properly performed its function and condemned the property.

What the Nevada Supreme Court is saying there is that when a landowner brings an inverse condemnation case they have to incur greater fees and costs and expenses. Therefore, they're entitled to their attorney's fees. Counsel is trying to wear that policy exactly backwards and say, well, if the government acts properly, as it should have done in this case, but if the government acts properly and files an eminent domain case and you go through the eminent domain process, the landowner is entitled to attorney's fees under the Constitution. But if the government doesn't act properly and it tries to take that property without paying for it and the landowners have to sue the government in inverse condemnation, the landowner doesn't get attorney's fees. It makes absolutely no sense whatsoever. It's contrary to the public policy that's set forth in the *Sisolak* decision and it's contrary to the law of this case and Nevada Supreme Court precedent that inverse condemnation cases deserve the same protection as eminent domain cases.

Actually, Your Honor, the Nevada Supreme Court has been very clear that landowners in inverse condemnation cases get greater protections than landowners in direct eminent domain cases because in an inverse condemnation case the government has acted improperly and tried to take the property

without paying for it, which is a violation of the landowner's constitutional right. And because the government violates that constitutional right, the government has to pay the landowner's attorney's fees.

Your Honor, I'll address the last -- a couple last issues on the Relocation Act. Your Honor, counsel is making the same argument that the County of Clark made in *Hsu* and in *Sisolak* because there has to be a direct nexus between the federal funds received and the project for which the property is being taken. Your Honor, in an inverse condemnation case there is no project for which the property is being taken. That's the issue. The government tries to take the property without paying for it without a project, and that was the case in the *Sisolak* case, or that was the situation in the *Sisolak* case.

In the *Sisolak* case, the airport received federal funds, but Mr. Sisolak's property was one mile away from the airport. It wasn't part of some project at the airport, as counsel stated. There was no project and no funds for that project. The reason Mr. Sisolak was able to recover attorney's fees is because he presented evidence to the district court that the airport receives federal funds and is therefore bound by the Federal Relocation Act.

Here, we've provided that same evidence; not only that the City of Las Vegas generally receives federal funds,

but the City of Las Vegas receives federal funds for the specific taking that happened in this case. Under the Southern Nevada Public Lands Management Act, the City gets federal funds for parks and open space. They apply for it. They get it. Not only is that a general nexus, Your Honor, that's a specific nexus directly tied to the purpose for which this property was taken. And you remember well, Your Honor, and I'm not going to go back through the facts of how this property was taken for a public park and open space. Therefore, Your Honor, the landowners are entitled to reimbursement of attorney's fees under the Constitution, the constitutional provision which applies to eminent domain and inverse condemnation cases, and they're entitled to reimbursement of their attorney's fees under the plain language of the *Sisolak* case. And we'd ask this Court that it apply that enhanced fee, very similar to what was given to the specialized eminent domain counsel in *Sisolak* fifteen years ago.

I'll address one last issue, the *Buzz Stew* case. Counsel cites the *Buzz Stew* case as apparently some type of grounds to deny attorney's fees. In *Buzz Stew*, number one, it was a pre-condemnation damage case, and number two, the landowner lost. He didn't win. This is an inverse condemnation case and the landowners won. Therefore, Buzz Stew has absolutely no application here. When a landowner prevails in an inverse condemnation case in the state of Nevada, they

are entitled to their attorney's fees, not only under the constitutional provision, but also under *Sisolak* and *Hsu*.

And I'll just say one last thing, Your Honor. The Constitution was not unclear. The Constitution says just compensation shall include. What was this case about? This case was about just compensation. So just compensation shall include those costs and those expenses actually incurred. That means what we're talking about (video interference) that they be awarded.

THE COURT: We lost you at the very end there, sir.

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

THE COURT: We lost you at the very end there, the last 10 seconds or so. And then when you're done, I have a question for you.

MR. LEAVITT: Sure. Your Honor, my only statement is that Article 1, Section 22 of the Nevada Constitution states that just compensation shall include -- and then it goes on to describe what's included. And, Your Honor, clearly attorney's fees were part of that. Therefore, just compensation includes payment of attorney's fees in this case.

And then I'll entertain your question, Your Honor.

THE COURT: And here's my question. I'm looking at, I think it's page 10 of the motion, and it itemizes the actual amount of fees that were paid, I think. And this would start at line 1. It says, "The following shows the total attorney's

fees using these rates." And would that have been -- and I guess it totals up, $2,165,359.50. And plus it has a certain number for legal assistants at a $50 rate and that total was $44,912.50. Would that be the actual fees incurred in this case?

MR. LEAVITT: Yes, Your Honor. Those are the actual fees incurred. However, subsequent to the filing of the motion additional attorney's fees were incurred, and those additional attorney's fees are on page 9 of the reply.

THE COURT: Okay.

MR. LEAVITT: And I can give you those numbers if you'd like, but you can see them on page 9.

THE COURT: Yeah. I have everything right in front of me.

MR. LEAVITT: Yeah. On page 9, line 6. And the additional legal assistant hours worked are page 9, line 9. So adding -- so on line 6, adding the $211,000 to the -- rounding out the -- sorry, the two hundred -- or, I'm sorry, the 2.1 million and change, that's the actual fees incurred up to January 25th.

THE COURT: Okay. And here's my question, Mr. Leavitt. And I do agree that -- with your argument regarding the award of fees pursuant to the Uniform Relocation Act, pursuant to the Nevada Constitution, and also I understand your position as it relates to the application of NRS 18.010. But

if I'm going to award fees under the facts of this case, why wouldn't I award them as they were actually incurred?

MR. LEAVITT: Your Honor, the Constitution does say actually incurred.

THE COURT: Yes.

MR. LEAVITT: And as does the -- as does the cases. They do say actually incurred. The only authority that we have for enhancement of fee is the *Hsu* case. The *Hsu* case does say that there is a 2-step process in these specific inverse condemnation cases, and it starts at Headnote 8 and it goes through and says that in an inverse condemnation you're entitled to recover attorney's fees. And first there has to be a Lodestar analysis where you multiply -- and it says "multiply the number of hours reasonably spent on the case by a reasonable hourly rate." So you find out what the hourly rate is and you multiply it. And we know what that is here.

Then the court goes on to say -- it does say, "Following determination of the lodestar amount, we leave it to the sound discretion of the district court to adjust this fee award based upon" -- and then there's twelve factors.

So, frankly, Your Honor, it's within this Court's sound discretion on whether to award a higher fee than those actually incurred. And the authority that we have for that is the *Sisolak* case where $1,392 per hour was awarded. And, Your Honor, I would submit to the Court that if the Court simply

followed the *Sisolak* case and awarded $1,392 an hour, it would be consistent with that. We took the *Sisolak* award and the $1,392 amount and we adjusted it amongst the various attorneys in the office. But again, the basis is that Headnote 8, which is page 637 of the *Hsu* decision.

THE COURT: All right. And I just want to make sure I understand the distinction between the calculations that are set forth on page 11 of the motion and page 9 of the reply because it appears to me that, for example, since October 31st of 2021 the hourly rate has gone up. Is that correct or no?

MR. LEAVITT: Well, the hourly rate went up on June 1st. Your Honor, I have that right here. The hourly rate went up on June 1st in I think the year of 2019. So prior to June 1st, 2019, the rate was $450, and after June 1st, 2019, the rate was $675. So the attorney hours since October 31st, 2021, are based upon that $675 rate which had been in place since June 1st, 2019.

THE COURT: All right.

MR. LEAVITT: And you can see, Your Honor, on page 9 on the left-hand column there along the attorneys is the actually incurred, and then on the right-hand side is the rate that has been requested pursuant to Sisolak.

THE COURT: And so I just want to make sure I get this correctly, that since October 31st of 2021, for example, based upon the $675,000 (as said) rate the amount of fees

incurred have been $211,350.50?

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

THE COURT: Okay. And the legal assistant rate hasn't changed, has it?

MR. LEAVITT: That's correct, Your Honor. It's been $50 the entire time.

THE COURT: Okay. All right. Is there anything else I need to know?

MR. LEAVITT: No, Your Honor. I think that -- I think we have done quite a bit today and I think I have nothing more to add, Your Honor.

THE COURT: Okay. And as far as fees are concerned, and I do understand the *Hsu* case, but what I am going to do is this. And this is a big case, there's no question about that. I'm going to award the attorney's fees under the three areas that we discussed pursuant to the Uniform Relocation Act, the Nevada Constitution an NRS 18.010. And I'm going to go with the language in the Constitution as far as fees actually incurred. And so I just want to make sure I get this correct.

It appears to me, at least based upon what I currently have in front of me based upon the actual incurred fees, I'm looking at the chart set forth on page 11 of the motion. That would be $2,165,359.50. And everything is itemized there because there has been a change.

But then moving on, there's additional fees that have

been incurred since October 31st of 2021, and that's, from what I can tell -- and I'm looking here to make sure I get this figure correct, it is the total additional hours based upon the actual incurred post October 31st of 2021. That would be -- and tell me if I'm wrong or not, but that appears to me to be $211,350.50, plus the additional -- and I don't want to overlook this, the legal assistant work. We had one, $44,912.50 plus additional post October 31st of 2021, of $7,023.50. Is that correct?

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

THE COURT: All right. Okay. And included would be the time spent arguing today and preparation for today, and you can prepare a memorandum on that. So I'm going to award the attorney's fees as set forth on the record.

The only matter I have to look at and just think about, I don't mind saying this, is the prejudgment interest issue. And I just want to think -- just like the other one, I just want to deliberate and think about that. And I think it's -- and I'll make -- if I have some thoughts, I'll point them out in my decision. But I do understand the current status of the evidence. And, as the trial court under these circumstances, I'm the finder of fact and I have to weigh and balance the evidence. I get that. Everyone understand?

Do we have a question, Mr. Leavitt?

MR. LEAVITT: Yeah, Your Honor, I have one question.

We have -- I have a conflict in our hearing next week, which is February 8th. I was wondering if we could have -- I'm out February 8th and February 9th. If we could do that on February 10th or anytime thereafter, I'm available.

THE COURT: All right. Time is flying, isn't it? It's February. It's already February. I have no problem. So as far as the City is concerned, and I've always accommodated everyone in this matter, what dates are available again, Mr. Leavitt?

MR. LEAVITT: I can do the afternoon of February 9th or I can do February 10th. Frankly, any day thereafter I'm open.

THE COURT: Okay. What do we have? And then we can see if the City is also available at the same time.

(The Court confers with the clerk)

THE COURT: But what dates are we talking about?

THE CLERK: Oh. Next week, moving it from next Tuesday; right?

THE COURT: Yes, the 8th. Whenever it's currently set. It's set for the 8th at 9:00 o'clock a.m. -- 9:05 a.m.

THE CLERK: Correct. I would recommend, Judge, the 9th, Wednesday, 9:30.

MR. LEAVITT: That -- I can't do the 9th.

THE COURT: He can't do the 9th.

THE CLERK: Oh, I'm sorry.

MR. LEAVITT: I could do the 9th in the afternoon.

THE CLERK: Oh, I see. Unfortunately, we have a special setting both the afternoon of Wednesday and Thursday.

(Colloquy regarding other matters on calendar)

MR. LEAVITT: I could do Monday, the 14th.

THE CLERK: That's a jury trial. That's a one-week jury trial.

THE COURT: Oh, we're going into jury trials, believe it or not.

MR. LEAVITT: Oh, boy.

THE COURT: It's only one week. We can't do two weeks. Is that case definitely going? It looks like it, huh?

(Colloquy regarding other matters on calendar)

THE COURT: Let's set them during that time, that first week. And I think probably what we need to do, I'm glad you brought that up. We need to bring -- do a status check as far as trial readiness is concerned for that 2-week trial. Let's try to get them in soon.

THE CLERK: Okay.

MR. LEAVITT: And, Your Honor, I could do the morning of the 10th or the afternoon of the 10th or the morning of the 11th or afternoon of the 11th if those other times don't work.

(The Court confers with the clerk)

THE COURT: This is what we're going to do. And I

can't promise you this, but we're going to try to make this work. I do have a two-week jury trial currently set that week, but based upon the current Administrative Order we're not conducting two-week jury trials. So it sounds to me that Tuesday of that week might be available.

Is that correct, in the afternoon?

THE CLERK: Correct, the afternoon.

THE COURT: All right. And what we're going to do, if we have -- if it's available for everyone right now, we'll use that date. If something happens, I'll let you know and we'll move it.

MR. LEAVITT: Your Honor, are we talking about Tuesday, February 22nd?

THE COURT: Correct. Afternoon.

MR. SCHWARTZ: Your Honor, this is Andrew Schwartz. I'm going to be arguing that motion and I am on vacation that week.

THE COURT: Well, your vacation is very important, sir. We'll have to go to another week. That will make it easy for us. What about the following week?

(The Court confers with the clerk)

THE COURT: So I'm looking here. Today is currently the 2nd of February; right? And that matter is currently set for the 8th of February. We don't have anything the week of the --

And, Mr. Schwartz, you're on vacation which week, sir?

MR. SCHWARTZ: The week of February 21st, Your Honor. Returning --

THE COURT: Okay. So I'm taking that completely out of the discussion. I always, without reservation -- I can't remember in 16 years ever not giving consideration to holidays, vacations and the like to any lawyer. So that's out, we can't use that. Why can't we use --

MR. SCHWARTZ: Thank you.

THE COURT: You don't have to worry about that, sir. Isn't there a date we can use on the week of the 7th or the week of the 14th for -- all we need is a couple hours.

(The Court confers with the clerk)

MR. LEAVITT: And, Your Honor, I think Mr. Ogilvie will probably agree that this one is -- it's the motion to amend. It should not -- I would think maximum an hour.

THE COURT: Right.

MR. LEAVITT: It's just -- it's one narrow issue on the amendment.

MR. OGILVIE: Your Honor, there's plenty of hearings that I thought were going to be a half hour or an hour and turned out to be three or four. So I'm not saying that it will be, I'm just basing it on the history of arguments in this case.

THE COURT: All I can say is, Mr. Ogilvie, that's why I always give you an afternoon by yourself if I can.

MR. OGILVIE: Appreciate it.

(The Court confers with the clerk)

THE COURT: And the 11th wasn't good; is that correct? That was a problem?

MR. SCHWARTZ: The 11th is good for me, Your Honor. Andrew Schwartz. Sorry. Yeah, the 11th is fine.

MR. LEAVITT: The 11th is good for counsel for the plaintiff.

(The Court confers with the clerk)

THE COURT: You know what I'm going to do? This is what I'm going to do. And the 11th is good for everybody; right?

MR. OGILVIE: Yes.

MR. SCHWARTZ: Yes.

MR. LEAVITT: Yes.

THE COURT: All right. This is what I'm going to do. We're going to set this matter for the afternoon of February 11th at 1:15. You will have the entire afternoon, Mr. Ogilvie, if you need it.

MR. OGILVIE: Thank you, Your Honor.

THE COURT: That's what I'm going to do because I understand the importance of vacation. Everyone deserves one. Lawyers work very hard, a lot of stress, so I always honor

those. But it seems to me that's probably the best time we can do it. We don't want to kick the can down the road and kick the can down the road. And what I'm going to do with the bench trial, they've been going on for awhile, I'm just going to tell them they can't come back that day and they'll have to find another day. That's what we're going to do. And they should be finished, anyway. That's how I look at it. They've had enough time.

So, for the record, we're going to come back -- I'm sorry. For the record, we're going to vacate the hearing that's currently set for February 8th, 2022, at 9:05 a.m. And that will be moved to February 11th at 1:15 p.m.

Is that correct, sir?

THE CLERK: Correct.

THE COURT: All right. That's what we're going to do.

MR. OGILVIE: Your Honor.

THE COURT: Sir?

MR. OGILVIE: This is George Ogilvie.

THE COURT: Is that George Ogilvie? Yeah.

MR. OGILVIE: Yes. An issue has arisen -- well, it hasn't arisen. An issue exists relative to the Court's order regarding the stay. And so plaintiff's counsel --

THE COURT: And I don't mind telling you, I grappled with that, Mr. Ogilvie, I really did. But go ahead.

MR. OGILVIE: I understand, Your Honor. And I'm not arguing or rearguing the motion. I'm not arguing the legitimacy or the merit of the findings of fact and conclusions of law that plaintiff's counsel submitted. They submitted it, I believe, yesterday or maybe the day before. I need clarification for purposes of seeking relief from the supreme court and that's the reason that I'm asking the question that I'm asking. So in the Court's minute order the Court said, "Additionally, based upon a 30-day delay in payment, the City would have time to seek a stay, if appropriate, from the Nevada Supreme Court."

And so my question is -- and I understand that the Court hasn't signed an order yet. The Court has its order or the proposed order from the plaintiff. It has the City's objections to that proposed order. But for purposes of the City seeking a stay, I need to have an understanding of what that 30-day delay in payment means because in order for the City to -- the City cannot seek a stay at this point unless it does one of two things. Either it awaits the filing of a notice of appeal, which would open a supreme court case in which we could seek a stay. That's not tenable in the current (video interference).

THE COURT: No, no. And I don't want to cut you off. You broke up. You said that's not tenable, and then it got muffled. Go ahead.

MR. OGILVIE: I'm sorry. It's not tenable in this case because I don't know if the relief that the plaintiff is being granted would allow the plaintiff to seek execution on sums assessed prior to the filing of a notice of appeal. So the only path that the City has that's viable for seeking relief from the Court's order regarding -- just regarding the stay.

THE COURT: I understand.

MR. OGILVIE: That's all I'm limiting my argument to or my --

THE COURT: Question.

MR. OGILVIE: -- comments to. We can only seek a stay through an emergency petition for a writ, and in order to do that there has to be a pending harm within 14 days. And I can't aver to the supreme court that there is this 14-day event that could occur because I'm not clear on what the Court's minute order says. So I'm just -- I'm trying to get some clarification so I have a path forward relative to a stay -- seeking a stay before the supreme court.

THE COURT: I mean, I looked at it through this lens, Mr. Ogilvie. I was looking at the time -- pursuant to the statute, it's my recollection payment from the City doesn't have to be tendered until -- I guess there's a 30-day time period before the payment would be required to be tendered to the landowner under the statute.

MR. OGILVIE: Right.

THE COURT: And so I was looking at it through that lens that hypothetically if the judgment is entered you could take it and say, look -- run to the supreme court within the appropriate stay time period and say, look, we've been denied a stay below and this is a really unique issue regarding a potential statutory conflict with the Rules of Appellate Procedure and specifically as it relates to the fact that normally a municipality government authority has certain rights given pursuant to the rule and so on. And so I was looking at it through that lens.

MR. OGILVIE: I understand and I believe the Court is referring to NRS 37.140 when it refers to the 30-day time frame.

THE COURT: Right.

MR. OGILVIE: But 37.140 says 30 days from final judgment. And as we argued to the Court last week or maybe two weeks ago, I can't remember, final judgment is defined in 37.009 as being a judgment from which no appeal can be taken and there is no further relief that can be sought from the Court. So if I -- from the City's perspective, Your Honor, 37.140 wouldn't become effective, that 30-day time period under 37.140 would not become effective until all appeals in this matter have been exhausted, and that's not where we're at.

And I'm not here to argue that point. I want to make

clear to the Court I'm just seeking some -- something -- some clarification by which I can go to the supreme court and say if I'm not granted this relief this is what's going to happen in 14 days. Or, you know, if I was -- the easiest thing from the City's perspective is if this Court -- and here I am arguing and I apologize to opposing counsel. They're not prepared for this. But the easiest thing for me would be a reconsideration of the Court's order that granted a stay through -- 30 days from the Court's entering a findings of fact and conclusions of law regarding the Rule 59 and 60 motion to alter or amend the judgment, which the Court just set for a hearing now on February 11th. So I apologize for arguing that.

And the only reason I am is I'm kind of cornered here and I'm in a position that there isn't any vehicle through which I can -- if the Court signs the proposed order that was submitted by the plaintiff within the last two days, I'm in a bind and I don't have any way to seek relief from the supreme court.

MR. LEAVITT: Your Honor, if I may?

THE COURT: Yes.

MR. LEAVITT: James J. Leavitt again on behalf of plaintiff landowner, 180 Land. The procedure is very clear. Every eminent domain goes through this. So does every inverse condemnation case. Under 37.140, the City is required to pay the sum of money within 30 days of final judgment. Now, if the

City takes appeal and just as Mr. Ogilvie argued, that final judgment wouldn't occur until the end of the appeal, it just erased 37.140's mandate that the money be paid within 30 days. That's why the Nevada Legislature adopted 37.170, which says as a precondition to appeal the City must pay the judgment. That's why your order was very clear. It wasn't difficult to understand.

It was very clear that the judgment will be entered and the City has 30 days to pay that judgment. And there's a 30-day window within which the City can seek a stay, which was the exact procedure in *State v. Second Judicial District Court*. In *State v. Second Judicial District Court* is where the Nevada Supreme Court said that 37.170 requires payment as a precondition to appeal, and here's what the State did. The State of Nevada brought prohibition proceedings against the Second Judicial Court for the County of Washoe to restrain the court from enforcing the order requiring them to pay. So that's the procedure.

And the City of Las Vegas can go directly to the Nevada Supreme Court and ask for that -- a prohibition or a mandamus, however they want to do it, for a stay. Again, that's the way it's done in every one of these cases. But there's not just one prong, there's two prongs to the requirement to pay.

Number one, under 37.140 within 30 days, and number

two, under 37.170 and the Second Judicial District Court case decision as a precondition to appeal. That's what we argued in our briefs. That's what was granted. And that's what's clearly stated in the Court's decision, that there is that 30-day window within which it can go to the supreme court.

MR. OGILVIE: Okay. Well, I apologize again for arguing this, Your Honor. I can't --

THE COURT: Yeah. And, Mr. Ogilvie, there's no need to apologize. I mean, I looked at it from this perspective when I -- and I don't have the statutes right in front of me, Chapter 37. But I came to the conclusion that I can't rewrite, you know, the Nevada Legislature's statutes, and I went with the statutes as to how I interpreted my decision.

And I respect the City's right to appeal. And I do understand there was a potential conflict between substantive rights granted pursuant to the statute versus rules of procedure and so on. And so I just felt that let the supreme court decide that issue. And I would hope that they would understand the urgency of your request and make the appropriate decision.

And that's what I wanted to truly just point out when I thought about it and I grappled with it because I do understand. I mean, I didn't issue that decision lightly. I didn't, you know. And I understand that and I felt in many respects -- and it's okay to disagree with my decision, but the

way I interpreted the statutory scheme, that's the ultimate result I came up with.

And I was saying to myself, well, let the Nevada Supreme Court and the Court of Appeals decide that issue as far as a stay is concerned. And of course it wouldn't be the Court of Appeals, this would go straight to the Nevada Supreme Court. We know that. This wouldn't get pushed down. They would decide that. And I would hope their docket is such that they could recognize the urgency of your request and make a decision very quickly on this issue.

Now, whether or not -- and I'm not an appellate lawyer. Maybe somebody should call Dan Polsenberg or Joel Henriod, and maybe there's some sort of emergency writ that can be ran up. I don't know. I just don't because my appellate work is limited to probably about five or six decisions over the years, and that's about it. It's something I didn't do routinely.

MR. OGILVIE: Okay.

THE COURT: But all I can say, Mr. Ogilvie, if there's -- whatever you file, you file. And of course we entertain orders shortening times. I can't think of any time I've rejected one in 16 years, close to 16 years, and I always entertain them. I understand the importance of them to get in front of the Court very quickly. If you have to do what you have to do, that's fine. I have no problem with that. But

that was my thought process, and I don't mind sharing that with everyone.

MR. OGILVIE: I appreciate that, Your Honor.

THE COURT: All right.

MR. OGILVIE: I have nothing further.

THE COURT: Okay. Thank you, sir. Okay. So we do have a date; right? I'm giving priority to this matter. That will be February 11th at 1:15.

THE CLERK: That's what I have, Judge.

THE COURT: All right. And that's where we're moving the motion from the 8th. Everyone enjoy your day.

MR. OGILVIE: Thank you, Your Honor.

MR. LEAVITT: Thank you. Have a great evening.

(Proceedings concluded at 4:57 p.m.)

-oOo-

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

Dana L. Williams
Transcriber

ADDITIONAL TRANSCRIBER: Liz Garcia

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2/14/2022 4:42 PM
Steven D. Grierson
CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

180 LAND COMPANY, LCC,	)	
	)	
Plaintiff,	)	CASE NO. A-17-758528-J
	)	
vs.	)	DEPT. NO. XVI
	)	
LAS VEGAS, CITY OF,	)	
	)	**Transcript of**
Defendant.	)	**Proceedings**
_____	)	

BEFORE THE HONORABLE TIMOTHY C. WILLIAMS, DISTRICT COURT JUDGE

FRIDAY, FEBRUARY 11, 2022

CITY OF LAS VEGAS' MOTION TO AMEND JUDGMENT
(Rules 59(e) and 60(b) AND STAY OF EXECUTION

APPEARANCES: (Via BlueJeans Videoconference)

FOR 180 LAND COMPANY, LLC:	JAMES J. LEAVITT, ESQ. ELIZABETH M. GHANEM, ESQ.
FOR CITY OF LAS VEGAS: (Appearing in person)	ANDREW W. SCHWARTZ, ESQ. GEORGE F. OGILVIE, III, ESQ.

RECORDED BY: MARIA GARABAY, COURT RECORDER
TRANSCRIPTION BY: LGM TRANSCRIPTION SERVICE

LAS VEGAS, NEVADA, FRIDAY, FEBRUARY 11, 2022, 1:18 P.M.

* * * *

COURT RECORDER: We're on the record, Your Honor.

THE COURT: All right. And I want to say good afternoon to everyone.

MR. OGILVIE: Good afternoon, Your Honor.

THE COURT: All right.

MR. SCHWARTZ: Good afternoon, Your Honor.

MR. LEAVITT: Good afternoon, Your Honor.

THE COURT: Okay. And let's go ahead and set forth our appearances for the record.

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

MS. GHANEM: Good afternoon, Your Honor. Elizabeth Ghanem Ham also on behalf of plaintiff landowners.

MR. OGILVIE: Good afternoon, Your Honor. George Ogilvie.

MR. SCHWARTZ: Andrew Schwartz.

MR. OGILVIE: Go ahead, Andrew.

MR. SCHWARTZ: I'm sorry, George. It's Andrew Schwartz representing the City, Your Honor.

MR. OGILVIE: George Ogilvie on behalf of the City as well, Your Honor.

THE COURT: All right. Does that cover all appearances?

MR. LEAVITT: That does on behalf of plaintiff, Your Honor.

THE COURT: All right. And let's go ahead and get started. Mr. Ogilvie, good afternoon to you, sir.

And anyway, it's my understanding we have one matter on this afternoon. Is that correct?

THE CLERK: That's correct.

THE COURT: And that's the City of Las Vegas' motion to amend judgment and to stay execution.

MR. SCHWARTZ: That's correct, Your Honor. This is Andrew Schwartz. I'll be arguing for the City.

THE COURT: All right. And, sir, you have the floor.

MR. SCHWARTZ: Thank you. Your Honor, this motion is simple and straightforward. In the November 24, 2021 judgment, the Court required the City to pay the landowners $34,135,000, but did not provide that if the City pays that money to the developer that the City would take title to the property in question. And whereas, of course, the City objects to the judgment and objects to payment of the money and has contended that the City's appeal would stay the obligation to pay that money, the City is -- and we are aware that the Court disagrees with that position and has ordered the City to pay the money within 30 days, specifically in its motion to deny the City's motion for a stay -- in its order denying the City's motion for a stay filed on February 9, the

Court said that the City has to pay the money, the judgment in 30 days and as a condition of appeal. That order denying the City's motion to stay also did not require that if the City pays the money that title to the property would be transferred to the City.

So what we're asking is that that order and that the judgment, the November 24, 2021 judgment be amended to state that if the City pays the money to the developer that the City -- that title to the property would be transferred to the City.

Now, the developer takes the position that the judgment doesn't have to say that because this is an eminent domain case and the eminent domain law requires that the City pay the money into the court within 30 days and that the Court would then order -- issue a final order of condemnation transferring title. That procedure doesn't apply, so that's not satisfactory to make sure that the City is transferred title to the property if the City pays the money.

And I would like to address why that eminent domain statute is not appropriate here. That statute, it's NRS 37.160, applies to eminent domain actions, and those are actions where a public agency files an eminent domain action because it needs the property for a public project. The agency often takes early possession of the property while the issue of valuation is being litigated. And then it's

appropriate when judgment is entered that the agency has to pay for the property because the agency needs the property and is going to take possession and title of the property, if the possession isn't already obtained. So it makes sense that the public agency would have to pay the money as a condition of receiving title to the property.

That's not our case here. This is a case where the Court ordered damages of 34 million plus for the City's regulation of the use -- of the owner's use of the property. The Court did not order any damages for the City's alleged physical possession of the property. The City has never taken physical possession of the property. It has not dispossessed the property. There is no evidence to that effect. And even if this Bill 2018-24 law that the developer claims authorized the public to enter the property, even that -- well, it didn't apply and we established that it didn't apply. The Court disagrees with that. But even if it did apply, that legislation was repealed in January of 2020.

So to have -- so this case is not at all equivalent to an eminent domain case where the government has taken or will take physical possession of the property because it needs the property. This is a case where the Court awarded damages for the City's regulation of the owner's use. And there are only three cases in Nevada where that claim has been made, a taking for excessive regulation of the owner's use. That's

the State case and the Kelly case and the Boulder City case. In all three of those cases the court found that the action of the agency did not affect a taking. So the court never faced the issue of what you do if the court awards a judgment or a regulatory taking of the property or regulation of the owner's use. That's a case where the owner still has possession and title of the property but the claim is that the regulation of the owner's use has effectively taken the property. So in that case the agency doesn't want the property, doesn't need it for a public project.

And so therefore, as we have argued, and I admit the Court rejected it, we think erroneously that the Court rejected the fact that this is a regulatory taking case where the City doesn't want or need the property. And so if the City pays the money to the developer and takes title and possession of the property and the judgment is reversed on appeal, it's going to be extremely difficult to unwind that transaction, to retrieve that money. And the City in the meantime can't do anything with the property because it may have to give the property back.

So we don't think that it's at all appropriate in this case for the City to have to pay the money within 30 days and then apply the eminent domain procedure that transfers title to the City. We recognize that the Court has heard this argument and rejected it, but I did want to make a record here

that this is not a case where the Court has awarded damages for a permanent, physical occupation of the property. This is not a case where the City had dispossessed the property owner. In the case of Tahoe-Sierra v. Tahoe Regional Planning Agency in the U.S. Supreme Court, that's at 535 U.S. 302, it's a 2002 case, in that case the court said that there's this long-standing distinction between acquisitions of property for public use on the one hand and regulations prohibiting private use.

So it drew a sharp distinction between these physical takings cases where the government takes physical possession or the public takes permanent physical possession. It says that -- and that holding is echoed in the McCarran International Airport v. Sisolak case from the State of Nevada. And that's at 122 Nev. 645, a 2006 case, at pages 662 and 663. The court there said that categorical rules -- categorical means the same things as per se -- these rules apply either when the owner has to suffer a permanent physical invasion of her property. I'm quoting there, "a permanent physical invasion" or deprives the owner of beneficial use of the property.

So the first case is the physical taking case where either the government physically takes possession of the property or authorizes someone to physically occupy the property. The court in Sisolak said, "In determining whether

a property owner has suffered a per se taking by physical invasion, a court has to determine whether the regulation has granted the government physical possession of the property or whether it merely forbids certain private uses of the space. If the regulation forces the property owner to acquiesce to a permanent physical invasion, compensation is automatically warranted since this constitutes a per se taking. This element of required acquiescence is at the heart of the concept of occupation."

The second type of per se taking, complete deprivation of value, is not at issue in this case. So the courts there are distinguishing between the present case, this Badlands case where the Court found that the City's limitation of the owner's use was a taking. There's no evidence and the Court cited to no evidence that the City has physically occupied the property or that the City's ordinance, 2018-24, has authorized the public to permanently occupy the property.

Now, at best -- and again, that ordinance doesn't apply in this case, but even if it did it could only be found to have authorized public occupation for the 15 months that that ordinance was in effect. Now, we contend that, of course, that didn't happen. It didn't apply. The public didn't occupy the property as a result of the ordinance. But even if it did, it doesn't qualify as a permanent physical invasion. So therefore these procedures for payment of the

judgment into court in exchange for the public taking the property for a public project don't apply.

What we're asking for, and we're not -- we're not expecting the Court to change its decision that it's going to apply the eminent domain laws. We want to make a record that they don't apply. All we want -- we're asking for is that that judgement from November 24 stay; that if the City pays the money into court that title has to transfer because the way the judgment reads now the City has to pay the money into court but the Court doesn't say in exchange you get title to the property. So, of course we'll let the Nevada Supreme Court decide whether the City has to pay the money now or later, but regardless of the outcome of the appeal, if the City pays that money to the developer, it should at least get title to the property.

So that's the limited relief we're asking for is that the Court amend the judgment to state that if the City pays the money then title will be transferred to the City.

Thank you.

THE COURT: Thank you, sir.

Mr. Leavitt, sir.

MR. LEAVITT: Yes. Good afternoon, Your Honor. Hearing Mr. Schwartz' argument today, we don't have a disagreement over what the impact is when the government pays the money. We have a disagreement over the procedure.

And so counsel is arguing for a procedure that is nowhere in Nevada law. It's not in any of the statutes nor any of the case law. They've cited no support for their procedure. What the City wants is they want to pay the funds and then get a quit claim deed. That's not the procedure in Nevada. Nevada has a very, very specific procedure for what occurs when the government pays the funds in an eminent domain case and an inverse condemnation case, and it's set forth in 37.260 -- or, I'm sorry, 37.160.

And that procedure is very clear. It says after the government pays the money a final order of condemnation is prepared and it states -- it first describes the property. And we've done hundreds of these final orders of condemnation. They describe the property, number one. That's easily done. Number two, they describe the purpose of such condemnation, and the purpose of such condemnation is very well set forth in the findings of fact and conclusions of law on the take issue. We will simply quote those verbatim in the final order of condemnation. And then title to the property described therein will vest in plaintiffs for the purposes stated therein.

Now, that's the final order of condemnation statute, 37.160. That was adopted in 1965. There has been two limitations subsequent to that statute that were adopted in 2005 and another one in 2008. First, in 2005 the Nevada State

Legislature decided to adopt -- right here, they decided to pass 37.270. And what 37.270 states is that notwithstanding any other provision of law. In other words, notwithstanding NRS 37.160, that if the government tries to sell that property it will automatically revert back to the original owner of the property for the price that was paid. That's the statute.

The Constitution was amended in 2008 to specifically reference a final order of condemnation. In Article 1, Section 22, subsection 6, it specifically references final orders of condemnation and says that if property is not used within five years for the purpose for which it was taken, then the property will automatically revert back to the property owner by repaying the original purchase price. And then they say the five years begins to run from the date of entry of the final order of condemnation.

So the process here is the same that should be followed in every eminent domain case in the state of Nevada. Every inverse condemnation case that's ever been done in the state of Nevada is there will be a final order of condemnation, it will describe the property, describe the purpose for the taking. It will say title will vest once the City pays the property, and then there must be a provision that complies with 37.270 and the Constitution that states that if the government tries to sell that property to a private individual other than the landowner, the landowner

will have the -- the original landowner -- the original landowner will have the opportunity to repurchase that property for the price that was paid originally by the government.

That's the only thing we're asking for here is that the statutes be followed and that the Constitution be followed. Counsel made a whole bunch of arguments about what happened in this case about the taking. He said this isn't a per se categorical taking where the government has denied all economic viable use of the property. Judge, there's a finding. The first finding in the conclusion of law section of the findings of fact and conclusions of law states that there's been a per se categorical taking, which means a denial -- and then it goes on to state there's been a denial of all economic viable use of the property.

The next finding in the conclusions of law is that there's been a per se regulatory taking of the property. And a per se regulatory taking of the property is based upon the physical use of the property. As you'll recall, Councilman Seroka announced to the public that the landowner's property was a park and it was for a park for their recreation. The City then passed a bill stating that the landowners couldn't use their property and that they had to allow ongoing public access to their property. In other words, it was taken for a park. And then the next finding in the findings of fact and

conclusions of law, I believe it's Number 117, is that the landowners produced unequivocal evidence that the public was actually using the property.

So, yes, this is a physical appropriation. This is a per se taking. And those findings have already been made, have already been set forth in the findings of fact and conclusions of law and we're well past that. The sole reason we're here for today is to decide how does title pass once the government pays the money. And as I stated previously, Your Honor, title should pass according to the statutes pursuant to a final order of condemnation.

And I'll say just one last thing. It appears that the government doesn't want that reversionary language in there in the final order of condemnation. It appears that the government is saying once we, the government, pay for this property, we ought to be able to do whatever we want with it. That's not the way the eminent domain statutes read; number one.

Number two, it further shows what the predatory actions of the government were here. As you'll recall, Your Honor, from the very beginning, at the very beginning of this case, the very first fact is that the surrounding property owners contacted the landowners and told them that they had to give the property to the surrounding property owners; that the landowners had to give their property to the surrounding

property owners. That's what started this whole lawsuit. And then there's evidence that those surrounding property owners went to the City of Las Vegas officials and had them prohibit the landowner from using their property in an attempt to preserve this property -- well, not an attempt -- to preserve this property for the surrounding property owners.

So our concern here, Your Honor, is that that predatory action is continuing. In other words, the City is trying to get title without the constitutional and the statutory restrictions, which state that you don't get to -- once the government takes property by inverse condemnation, it doesn't just get to willy-nilly do with it what it wants. It has a purpose for which it was taken and that it cannot retransfer that property to a private entity or a private person without first offering it to the original owner from whom it was taken for the original price. The Constitution is clear. The statutes are clear, Your Honor.

So, again, we don't oppose that title will pass to the City once the money is paid, but we have to follow the statutes, which are 37.160 and 37.270, Your Honor. And that's all I have, Your Honor, unless you have a question for me.

THE COURT: I don't.

All right. And we'll hear from the reply.

MR. SCHWARTZ: Your Honor, this is not an eminent domain case. This is a case of first impression. This is an

inverse condemnation case of first impression. There are only three cases where the Nevada Supreme Court has analyzed a claim that regulation of the use -- the owner's use of property is a taking. That's what this Court found, that the City's regulation of the owner's use, a limitation of the owner's use is a taking.

And the appraisal that was offered in evidence by the developer is based on a determination that -- or the judgment in this case is based on a determination that the appraiser's conclusion that the City's regulation of the use of the property, the private property of all value, the owner's use, that's the basis of the judgment. That's the basis of the $34 million payment, not any physical invasion, because there wasn't a physical invasion. But even if there was, there wasn't any damages. There was no evidence of damage and the Court didn't assess any damage.

So there are three cases in Nevada where this claim was analyzed, and in those cases the court found no taking. We think those cases should have been controlling in this case and there shouldn't have been a finding of a taking. But the Court has found a taking for an excessive regulation of the owner's use. There is no case, there's no authority as to how you handle the payment in that case, the payment of the judgment, because all the cases are either eminent domain cases or inverse condemnation cases where the government took

physical possession of the property and didn't file an eminent domain case. They're all cases in which the government wanted the property, it was an involuntary sale of the property by the property owner, so the government could take the property for a public project. There is no public project here; not public project. The City doesn't want the property. It has no use for the property.

THE COURT: I mean, well, it occurs to me -- it could be argued, based upon the facts, that the public project was open spaces and a park for the adjoining property owners. And I think that's the problem we have here. But go ahead.

MR. SCHWARTZ: No. That's a regulation of the owner's use. The claim here is that by regulating -- restricting the owner's use to what is allowed in the PROS designation, Parks, Recreation and Open Space, the claim is that that is a physical taking. And I just quoted from the Sisolak case, from the Sierra-Tahoe case, that is not a physical taking. That is not a per se physical taking. A regulation of use is different from a physical occupation. There has to be a physical occupation by the government. So by requiring that the owner continue using that property for PROS, it's not a physical taking. Eminent domain only applies in physical takings where the agency is taking the property for a public project. So those cases don't apply.

I don't think the Court needs to decide this issue,

however, if it says in the judgment that if the City pays the money that the title will be transferred to the City. That's all we're asking for here. I think this is water under the bridge. You know, we disagree with the Court about the difference between a physical and a regulatory taking. We don't think there's any law on this.

You can't apply the eminent -- a good example is what counsel is saying about the right to repurchase the property. What's the purpose of that policy in state eminent domain law? Well, it's where a property owner's property is involuntarily taken from them, physically taken from them for a public project. If the government doesn't use the property for the public project and the property owner wants the property back, they didn't want to give it to the government in the first place, that's not our case. So that doctrine makes no sense. The City doesn't want the property. It's not an involuntary sale to the City.

THE COURT: But, really, isn't that more of --

MR. SCHWARTZ: It's an involuntary purchase.

THE COURT: Isn't that more of an argument versus the conduct of the City Council in this case? Right? They made statements regarding the use of the property for the public.

MR. SCHWARTZ: Well, okay.

THE COURT: I mean, didn't -- but I mean --

MR. SCHWARTZ: So you're talking about the alleged statement of one council member.

THE COURT: I mean, it's a City Council member. I mean --

MR. SCHWARTZ: That can't bind -- even if that statement was made, that doesn't bind the City. The defendant here is the City. The City acts through the City Council, a majority vote of the City Council. An individual City Council member can't bind the City to something like this. There's no -- there's absolutely no authority and that wouldn't make any sense. City Council members make statements in their individual --

THE COURT: Well, it does make sense in this regard because the entire City Council, their actions ultimately were no different than that one City Councilman. Right?

MR. SCHWARTZ: Oh, there's no evidence of that. There's absolutely no evidence of that.

THE COURT: Well, but I mean, there is evidence of it because of their actions. Ultimately, what did the City Council do in this case?

MR. SCHWARTZ: The City Council denied applications, one application to build housing on the 35-acre property.

THE COURT: And I have a question for you. What do I do with this language --

MR. SCHWARTZ: That's all it did.

THE COURT: Wait. I have a question for you. This is straight out of the Alper case. And please understand this. I do understand what my limitations are and I do understand and respect some of your arguments. But the bottom line is this. What do I do when the Nevada Supreme Court in the Alper case back in 1984 -- that's a long time ago -- said the following. This is their quote: "Inverse condemnation proceedings are the constitutional equivalent to an eminent domain action and are governed by the same rules and principles that are applied to formal condemnation proceedings."

Now, and the reason why I think that's important to point out, I'm not going to say I don't necessarily respect and understand some of the arguments the City has made, but the Nevada Supreme Court has ruled and set forth in the Alper decision that it is a constitutional equivalency, right there, to eminent domain actions and are governed -- and they went further. When you really think about it, they went further and they said the following, "and are governed by the same rules and principles that are applied to a formal condemnation proceeding." Okay. What does that mean? Well, that tells me that I'm going to follow the rules as set forth in Chapter 37. They haven't made a distinction for me to follow.

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