

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.

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Elizabeth A. Brown
Clerk of Supreme Court

Eighth Judicial District Court, Clark County, Nevada
Case No. A-17-758528-J
Honorable Timothy C. Williams, Department 16

**NOTICE OF JUSTICE PARTICIPATION IN LOWER TRIBUNAL AND
MOTION FOR DISQUALIFICATION**

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I. INTRODUCTION

This is an inverse condemnation case brought by the Respondents 180 LAND CO, LLC, a Nevada limited-liability company, and FORE STARS LTD., a Nevada limited-liability company (collectively “Landowners”), against the City of Las Vegas (“City”). This is one of four cases¹ which seeks to remedy the illegal and unjust actions of the City to preserve the Landowners’ 250 acres of residentially zoned land for the use and enjoyment of the surrounding neighbors without paying for the taking of their property. The 250 acres consist of 10 parcels that are contiguous and owned by three entities, 180 Land Co, LLC, Fore Stars Ltd., and Seventy Acres LLC. Significantly, the City’s actions that constitute a taking of the 250 acres exist in every case and include, but are not limited to, the City’s denial of a master development agreement for the entire 250 acres, the City denial of fence applications for the perimeter of the entire 250 acres, the City’s denial of access applications for various portions of the 250 acres, and the City’s adoption of an ordinance that that: (a) targets only the 250 acres; (b) makes it impossible to develop any part of the 250 acres; and (c) allows the public to access the Landowners entire

¹ There are three additional inverse condemnation cases currently pending in the Eighth Judicial district Court, Clark County, Nevada: case nos. A-18-773268-C (“17-Acre Case”), A-18-775804-J (“133-Acre Case”), and A-18-780184-C (“65-Acre Case”).

privately-owned 250 acres so the public can use it for their recreation and open space.

On February 11, 2022, the City filed an Emergency Petition for Writ of Mandamus, Or in the Alternative, Writ of Certiorari (“the City’s Petition”) seeking a stay of execution of the Judgment rendered against the City. The Honorable Douglas W. Herndon (“Justice Herndon”) is an Associate Justice assigned to the City’s Petition². *See* Order Directing Answer at p. 2 (February 22, 2022). Justice Herndon was also the district court judge in the 65 Acre case footnoted *supra*, having made a substantive decision in that matter which the City utilizes moving forward in every motion in every case and references in every single hearing before every judge. *See Declaration of Elizabeth Ghanem Ham* ¶ 7.

On March 9, 2022, the City filed a motion to stay the execution of the judgment pursuant to NRAP 8 arguing that the City is likely to prevail on appeal based on, amongst other things, the Judge Herndon Order from the district court matter³. Accordingly, the Landowners respectfully request Justice Herndon’s disqualification on the following grounds:

² It was not readily apparent from the City’s Writ Petition, however, that Justice Herndon was the judge that presided over the 65-Acre Case because the City never identified him as the district judge in that case.

³ Because the Landowners moved for disqualification of Justice Herndon in the Writ Petition based primarily on the fact that the City utilizes Justice Herndon’s decision as the basis for its likelihood of success on appeal, the City shifts its tactics in this

Nev. Code of Jud. Conduct, Rule 2.11(A), and (6)(d). Specifically, Justice Herndon was presiding judge over the 65-Acre [C]ase (case no. A-18-780184) referred to by the City in its Writ Petition. *See, e.g.*, City’s Writ Petition (“WP”) at 22-24 and n. 6-7. The City references Justice Herndon’s district court decision, relying on it as reasoning why it will likely prevail on appeal. *See id.* Importantly, the City has also made that decision part of the record by including it in the writ petition’s appendix and it will assuredly utilize it in the appeal itself. *See* Petition Appendix (“PA”) IV-PA0699-0733.⁴ Accordingly, the Landowners hereby inform the Court of these facts and respectfully request Judge Herndon’s disqualification on the grounds that he previously presided over a related matter in another court, namely, the 65-Acre Case.

II. LEGAL AUTHORITY

Pursuant to NRAP 35(a)(1) a motion for disqualification shall be timely made and must be filed within 60 days after docketing of the appeal. Because the decision on the instant motion provides the reasoning for the City’s request of reversal of

motion by removing reference to Justice Herndon and his lower court Order. Removal of Justice Herndon’s name however, does not remove the principle that an appellate judge cannot review his own decision or the findings and conclusions from his own decision on appeal.

⁴ Here, the City removes Justice Herndon’s Order as an exhibit noting it was “intentionally omitted”. *see* APPELLANT’S APPENDIX Volumes 4 part 6 “AA0695-AA0733 Intentionally Omitted” also identified as “Intentionally Omitted” in each Index at p. 9.

Judge Williams, the Landowners now timely request disqualification of Justice Herndon prior to the Court's consideration of the merits of the instant motion.

It is axiomatic that an appellate judge cannot review a matter which he or she previously presided over as a district court judge. *See Nev. Code of Jud. Conduct*, Rule 2.11(A)(6)(d). This is to “uphold and promote the independence, integrity, and impartiality of the judiciary.” *Id.*, Canon 1. Indeed, “[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety.” *Id.*, Rule 1.2. It would be impossible for a Justice (or anyone for that matter) to be impartial in reviewing their own decision. As such, a judge must disqualify himself or herself in such circumstances as well as any others in which the judge's impartiality might reasonably be questioned. *See id.*, Rule 2.11(A).

III. ARGUMENT

Although Justice Herndon did not previously preside over this matter in another court, he did so in related proceedings, namely, the 65-Acre Case. *See PA IV-PA0699-0733*. In fact, the City cites his district court decision at least three times in its Writ Petition, relying on it to demonstrate why it will likely prevail on appeal. *See WP at 22-24 and n. 6-7*. And, the City included that decision in the appendix thereby making it a part of the record on appeal. *See PA IV-PA0699-0733*. Moreover, the City has repeatedly argued that Justice Herndon's district court

decision in the 65-Acre Case should apply to the Landowners' other inverse condemnation actions, including this one. *See Declaration of Elizabeth Ghanem Ham* ¶ 6. Because the City continues to refer to Justice Herndon's district court decision in this matter, the Court must necessarily consider it to determine whether a stay is warranted and ultimately to resolve the City's pending appeal. Absent disqualification, Justice Herndon will be compelled to consider his previous district court decision, a circumstance in which his impartiality might reasonably be questioned. *See Nev. Code of Jud. Conduct, Rule 2.11(A); see also Rule 1.2* ("A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety.").

Significantly, Justice Herndon himself recognized that disqualification/recusal might eventually be necessary to avoid the appearance of impropriety:

I began kind of getting the sense of **this is a case that's probably going back to the Supreme Court in one or more of these four different cases in some fashion at some time . . . [s]o** I kind of feel like I have some sense of propriety and responsibility to say **should I move forward with this and therefore not be available to involve myself in the case** and be another Justice that has to recuse if and when any of this litigation goes back to the Supreme Court, or should I move it now and not make any decisions on anything so that I could be involved in it?

See Exhibit A, Transcript, Before The Honorable Douglas W. Herndon, December 16, 2020 (partial), p. 4:24-25, p. 5:7-13, pp. 7-9; *see also Declaration of Elizabeth Ghanem Ham* ¶ 7. The parties acknowledged Judge Herndon's position regarding the necessity to recuse at the appellate level but nevertheless requested that the matter proceed. *See id.* As Justice Herndon astutely predicted, the case is now before this Court and his recusal is necessary to avoid the appearance of impropriety. Accordingly, the Landowners respectfully request that Justice Herndon be disqualified from sitting in this matter.

IV. CONCLUSION

Based on the foregoing, the Landowners' Motion for Disqualification should be granted in its entirety.

DATED this 18th day of March, 2022.

ELIZABETH GHANEM HAM

/s/ Elizabeth Ghanem Ham

Elizabeth Ghanem Ham, Esq. Bar No. 6987

Attorney for 180 Land Co, LLC and Fore Stars Ltd.

**DECLARATION OF ELIZABETH GHANEM HAM, ESQ. IN SUPPORT
OF THE LANDOWNERS’ MOTION FOR DISQUALIFICATION**

STATE OF NEVADA)
COUNTY OF CLARK) ss.

Elizabeth Ghanem Ham, ESQ., being duly sworn, deposes and says as follows:

1. I am in-house counsel of record for Respondents 180 LAND CO, LLC, a Nevada limited liability company, and FORE STARS, LTD., a Nevada limited liability company, (collectively “Landowners”), in the above-captioned matter. I am over eighteen years of age, an attorney duly-licensed to practice law in the State of Nevada.

2. I make this Declaration in support of the Landowners’ MOTION FOR DISQUALIFICATION. I am competent to testify to the following facts known personally to me, except as to those facts stated on information and belief, and as to those facts, I believe them to be true.

3. On February 11, 2022, Petitioner City of Las Vegas (“City”) filed an Emergency Petition for Writ of Mandamus, Or in the Alternative, Writ of Certiorari (“the City’s Petition”), referencing a district judge and citing his decision several times to demonstrate why extraordinary relief is warranted and the City is likely to prevail on appeal. *See, e.g.*, City’s Writ Petition (“WP”) at 22-24 and n. 6-7. That

district court decision is also included in the City's appendix. *See* Petition Appendix ("PA") IV-PA0699-0733.

4. The Honorable Douglas W. Herndon ("Justice Herndon") is an Associate Justice of this Court. He is also the district court judge referred to in the City's Petition as the "judge presiding over the 65-Acre [C]ase" (case no. A-18-780184). It is not readily apparent, however, that Justice Herndon previously presided over the 65-Acre Case because the City never identifies him as the district judge in that case.

5. On February 22, 2022, the Court directed the Landowners to file an answer. *See* Order Directing Answer at p. 2. Justice Herndon signed that order. *See id.* Accordingly, the Landowners became aware of the facts set forth herein on February 22, 2022 when they received the Court's order signed by Justice Herndon.

6. On March 9, 2022, the City filed a motion to stay the execution of the judgment pursuant to NRAP 8 arguing that the City is likely to prevail on appeal based on, amongst other things, the Judge Herndon Order from the district court matter albeit avoiding using Judge Herndon's name or reference to the Order while utilizing the same reasoning as is provided in that Order.

7. The City has repeatedly argued that Justice Herndon's district court decision in the 65-Acre Case should apply to the Landowners' other inverse

condemnation actions, including this one. Once the City received the Judge Herndon Order, the City utilized the Order in every case and in nearly every motion.

8. Justice Herndon himself previously recognized that disqualification/recusal would eventually be necessary to avoid the appearance of impropriety. See Exhibit A, Transcript, Before The Honorable Douglas W. Herndon, December 16, 2020 (partial), p. 4:24-25, p. 5:7-13, pp. 7-9. The parties acknowledged Judge Herndon's position regarding recusal and requested that the matter proceed. *See id.*

9. I declare under the penalties of perjury and the laws of the State of Nevada that the foregoing is true and correct to the best of my knowledge.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

/s/ Elizabeth Ghanem Ham

ELIZABETH GHANEM HAM

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read the foregoing motion and all supporting documents and they comply with all applicable Nevada Rules of Appellate Procedure and, in particular, are in the form required by NRAP 35.

I further certify that, based on personal investigation, I believe all grounds asserted to be legally valid and all supporting factual allegations to be true, and the foregoing motion is made in good faith and not for purposes of delay or for other improper motive.

I understand that I may be subject to sanctions in the event that the accompanying motion is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 18th day of March, 2022.

ELIZABETH GHANEM HAM

/s/ Elizabeth Ghanem Ham

Elizabeth Ghanem Ham, Esq. Bar No. 6987

Attorney for 180 Land Co, LLC and Fore Stars Ltd.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing NOTICE OF JUSTICE PARTICIPATION IN LOWER TRIBUNAL AND MOTION FOR DISQUALIFICATION 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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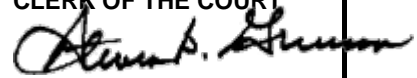
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*/s/ Sandy Guerra*_____

An Employee of the Law Offices of Kermit L. Waters

Exhibit A



TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

180 LAND COMPANY, LLC,

Plaintiff,

vs.

LAS VEGAS CITY OF,

Defendant.

AND RELATED PARTIES

CASE NO. A-18-780184-C
DEPT NO. III

**TRANSCRIPT OF
PROCEEDINGS**

BEFORE THE HONORABLE DOUGLAS W. HERNDON, DISTRICT COURT JUDGE

WEDNESDAY, DECEMBER 16, 2020

**CITY OF LAS VEGAS'S MOTION FOR SUMMARY JUDGMENT;
MEMORANDUM OF POINTS AND AUTHORITIES**

**PLAINTIFF LANDOWNERS' OPPOSITION TO THE CITY'S MOTION
FOR SUMMARY JUDGMENT AND COUNTERMOTIONS TO
DETERMINE THE TWO INVERSE CONDEMNATION
SUB-INQUIRIES IN THE PROPER ORDER**

APPEARANCES (VIA BLUEJEANS AND TELEPHONE):

FOR THE PLAINTIFFS:

JAMES J. LEAVITT, ESQ.
ELIZABETH M. GHANEM HAM, ESQ.
AUTUMN L. WATERS, ESQ.

FOR THE DEFENDANT:

GEORGE F. OGILVIE, III, ESQ.
PHILIP R. BYRNES, ESQ.
ANDREW W. SCHWARTZ, ESQ.

ALSO PRESENT:

LISA RASMUSSEN, ESQ.

RECORDED BY: STACEY RAY, COURT RECORDER

TRANSCRIBED BY: JD REPORTING, INC.

1 **LAS VEGAS, CLARK COUNTY, NEVADA, DECEMBER 16, 2020, 1:04 P.M.**

2 * * * * *

3 THE COURT: Okay. And if you guys could just put
4 your appearances on the record for the respective parties.

5 MR. LEAVITT: Your Honor, on behalf of the plaintiff
6 180 Land LLC it's James J. Leavitt and Autumn Waters is also
7 participating on behalf of the landowners. Her bar number is
8 8917, and my bar number is 6032.

9 THE COURT: Thank you.

10 MS. GHANEM HAM: Good morning, Your Honor. Elizabeth
11 Ghanem Ham, in-house counsel, also associated into this case on
12 behalf of the plaintiff landowners.

13 THE COURT: Thank you.

14 MS. GHANEM HAM: Bar Number 6987.

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

17 THE COURT: Thank you.

18 MR. SCHWARTZ: Andrew Schwartz appearing pro hac vice
19 for the City of Las Vegas, Your Honor.

20 THE COURT: Thank you.

21 I can see all of you on the screen that just spoke.
22 Is there anybody else that's just by phone?

23 MR. BYRNES: Yes, Your Honor. My name is Phil
24 Byrnes. I'm with the City Attorney's office, also on behalf of
25 the City.

1 THE COURT: Thank you.

2 Anybody else?

3 MS. RASMUSSEN: Your Honor, Lisa Rasmussen, Bar
4 Number 7491. I am not speaking in part of this litigation, but
5 I represent 180 in other litigations. So I'm just here to
6 observe.

7 THE COURT: I thought maybe you got lost and thought
8 this was a homicide calendar.

9 MS. RASMUSSEN: Thanks, Your Honor.

10 THE COURT: Just kidding.

11 Anybody else?

12 (No audible response.)

13 THE COURT: Okay. That sounds like it's it.

14 Okay. So, hey, listen, before we get started, I want
15 to engage you all in a discussion of something, and now that I
16 know kind of fully what the case is about, and I'll explain
17 what I mean by that in just a moment, but it's not a
18 disclosure. It's not that I feel like I have any conflict.
19 More it's about something that I think would be prudent and
20 responsible for me to bring up to you all to let you have a
21 chat about it as well before we potentially move forward today.

22 Here's what I mean when I say now that I know what
23 the case is about, when you all, and I think it was just Jim
24 and George that were --

25 Or, Elizabeth, you may have been there as well.

1 -- when we had the Rule 16 conference. All I had at
2 that time was understanding of dates that were being proposed
3 for setting a trial. You guys will recall we had the video,
4 and I said is there any kind of issue that we need to talk
5 about. I'm going to give you your dates. There was some brief
6 discussion about preferential trial settings. We set the dates
7 for the trial.

8 The only time it was on calendar thereafter I think
9 Justice -- or Judge Becker presided over something because I
10 was up in Carson City at the time.

11 At that time I had, quite frankly, and I apologize
12 for my ignorance, I didn't really have any understanding of
13 what the case was about other than it was a land case, and we
14 were talking about preferential trial settings. I am familiar
15 with the case over the years now that I know what it's about,
16 but only in the sense that I was kind of aware there was
17 something going on, but it wasn't anything that I ever really
18 paid much attention to. I don't know if I ever even read any
19 articles about it. So it's not anything that I have any kind
20 of issue with, any type of conflict.

21 But as I kind of plowed through reading things over
22 the last day and a half, and particularly last night very late
23 when I was reading some of the Supreme Court's decisions, most
24 particularly the one reversing Judge Crockett's order, and I
25 began kind of getting the sense of this is a case that's

1 probably going back to the Supreme Court in one or more of
2 these four different cases in some fashion at some time, and
3 when I read the thing -- or the decision reversing Judge
4 Crockett's order, that's the first time I became aware that
5 five Justices recused off of this case, leaving only two of
6 them to hear that original appeal.

7 So I kind of feel like I have some sense of propriety
8 and responsibility to say should I move forward with this and
9 therefore not be available to involve myself in the case and be
10 another Justice that has to recuse if and when any of this
11 litigation goes back to the Supreme Court, or should I move it
12 now and not make any decisions on anything so that I could be
13 involved in it? And then you would at least have three
14 Justices for a panel if and when any of this goes back to the
15 Supreme Court.

16 Obviously I don't really view having given you dates
17 on your Rule 16 conference as anything that causes me any kind
18 of concern about conflict, being able to be involved in the
19 case later on, but I just kind of wanted to throw all of that
20 out there to you because I'm in kind of a unique situation here
21 that in three weeks I leave to go do this different job, and
22 you all may be asking that Court to intervene at some point on
23 any number of types of appeals in any of the litigations, and
24 right now the vast majority of the Court is recused off of the
25 case.

1 MS. GHANEM HAM: Your Honor, if I may just add
2 something to the recusals -- and we've had the same recusals in
3 our state court as well. Many, many Judges have recused. I
4 think it went through at least five Judges before it got to
5 you.

6 THE COURT: Yeah, I tracked that between peremptory
7 challenges, recusals, striking peremptory challenges, Trevor
8 getting off when he got appointed. I know it's been a tortured
9 history.

10 MS. GHANEM HAM: So I just want to add for the matter
11 that was in front of the Nevada Supreme Court in regard to the
12 order that you referenced, as far as we know, for the Judges
13 that would give a reason for recusal, and some of them did, had
14 to do with the -- that was a different case in that it was
15 the -- some of the homeowners had brought that petition for
16 judicial review. So a lot of those recusals were due to those
17 particular individuals.

18 And then some of those Judges that recused because of
19 the particular individuals did not recuse because of ourselves
20 or because of the City and sat on other matters that have gone
21 up before the Supreme Court, such as the City has filed a
22 motion -- on a motion to dismiss a writ.

23 So I just wanted to sort of -- I don't know that
24 we'll have the same. There's been a turnover of Judges as
25 well.

1 THE COURT: Right.

2 MS. GHANEM HAM: So some of those initially recused
3 sat on our other matters as it relates to the inverse cases
4 because it didn't involve some of those (video interference)
5 individuals. So I just wanted to add that information so you
6 are aware.

7 Thank you.

8 THE COURT: So when you say, Elizabeth, turnover,
9 meaning -- what do you mean by there's been some turnover of
10 some of those Judges? Are you going back several years now,
11 before Addie [phonetic] and Alyssa [phonetic] got elected?

12 MS. GHANEM HAM: Correct.

13 THE COURT: Okay. Got it. All right.

14 Anybody else?

15 MR. SCHWARTZ: Well, Your Honor, on the City's
16 behalf, we would prefer to proceed today with you in this
17 motion.

18 THE COURT: Okay. Jim, anything you wanted to add,
19 or George?

20 MR. LEAVITT: George, I'll let you go first.

21 THE COURT: Well, I guess -- I guess even -- you
22 know, let me jump in here before any of the rest of you speak.
23 And I apologize. Maybe I should have said this before
24 Elizabeth even got started.

25 I guess part of it would be do you all think that I

1 would be conflicted at the Supreme Court level having sat and
2 heard the Rule 16 conference when we set the dates for your
3 trial?

4 If anybody feels like that caused enough of a
5 conflict that you would seek my recusal on any issue before the
6 Supreme Court, then that probably, you know, is a game changer
7 right there, and I wouldn't try and move it in any fashion.

8 MR. OGILVIE: On behalf of the City, no, Your Honor.

9 MR. LEAVITT: Your Honor, I would agree with your
10 analysis that (video interference), but it is a (video
11 interference).

12 THE COURT: I lost you for a moment there. I'm
13 sorry.

14 MR. LEAVITT: Okay. On behalf of the landowner, we
15 would not consider the 16.1 to be a matter for recusal.

16 THE COURT: Okay. All right.

17 And then you and George were both going to speak to
18 the other issue. Go ahead. I think you deferred to George.
19 So George was about to talk.

20 I'm sorry, George. Go ahead.

21 MR. OGILVIE: Your Honor, I have nothing further to
22 add from what Mr. Schwartz said.

23 THE COURT: Okay.

24 MR. LEAVITT: And, Your Honor, on behalf of the
25 landowner, I don't have anything more to add other than what

1 Ms. Elizabeth Ghanem Ham has presented on moving forward.

2 THE COURT: Okay.

3 MS. GHANEM HAM: And so if we want to be clear, we
4 would prefer to move forward with you as well. I don't know
5 that I stated that more than just kind of giving you a
6 background on the recusals.

7 THE COURT: Okay. All right. Okay. Then let's just
8 go ahead and move forward then. We'll deal with it at the
9 appellate court level if and when we need to in whatever
10 fashion. Okay.

11 All right. So we have the motion for summary
12 judgment that's on today on behalf of the City. There was the
13 countermotion to create an order and which issues are decided.
14 I know the City filed a motion to strike the countermotion as
15 well. And my understanding was there was an opposition to the
16 motion to strike that was filed.

17 Unfortunately, I didn't get a chance to look at that
18 yet because I guess it got filed later yesterday, and we
19 didn't -- and, look, I know this is all happening really
20 quickly, and that didn't come in through the queue in time for
21 me to get a copy of it before I left there.

22 But is that correct that you all filed an opposition
23 to the motion to strike?

24 MR. LEAVITT: Yes, Your Honor. And if you'd like,
25 there's three points. I could point them out for you if you'd