

IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF LAS VEGAS, A POLITICAL
SUBDIVISION OF THE STATE OF
NEVADA,

Appellant,

vs.

180 LAND CO., LLC, A NEVADA LIMITED-
LIABILITY COMPANY; AND FORE STARS,
LTD., A NEVADA LIMITED-LIABILITY
COMPANY,

Respondents.

180 LAND CO., LLC, A NEVADA LIMITED-
LIABILITY COMPANY; AND FORE STARS,
LTD., A NEVADA LIMITED-LIABILITY
COMPANY,

Appellants/Cross-Respondents,

vs.

CITY OF LAS VEGAS, A POLITICAL
SUBDIVISION OF THE STATE OF
NEVADA,

Respondent/Cross-Appellant.

No. 84345

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**JOINT APPENDIX,
VOLUME NO. 18**

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1 CASE NO. A-17-758528-J

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DISTRICT COURT

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CLARK COUNTY, NEVADA

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180 LAND COMPANY LLC,)

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Plaintiff,)

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vs.)

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LAS VEGAS CITY OF,)

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Defendant.)

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REPORTER'S TRANSCRIPT

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OF

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HEARING

(TELEPHONIC HEARING)

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19

BEFORE THE HONORABLE JUDGE TIMOTHY C. WILLIAMS

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DISTRICT COURT JUDGE

21

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DATED THURSDAY, SEPTEMBER 17, 2020

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REPORTED BY: PEGGY ISOM, RMR, NV CCR #541,

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Pursuant to NRS 239.053, illegal to copy without payment.

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2 (PURSUANT TO ADMINISTRATIVE ORDER 20-10, ALL MATTERS IN
3 DEPARTMENT 16 ARE BEING HEARD VIA TELEPHONIC
4 APPEARANCE)

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1 LAS VEGAS, NEVADA; THURSDAY, SEPTEMBER 17, 2020

2 9:39 A.M.

3 P R O C E E D I N G S

4 * * * * *

5
6 THE COURT: Now, we're going to move on to
7 page 10 of the calendar. That's 180 Land Company LLC
8 vs. City of Las Vegas. Let's go ahead and place our
9 appearances on the record. Start first with the
10 plaintiff then we'll move to the defense.

11 MR. LEAVITT: Good morning, your Honor, James
12 J. Leavitt on behalf of 180 Land, the plaintiff
13 landowner.

14 MS. HAM: Good morning, your Honor. Elizabeth
15 Ghanem Ham, in-house counsel on behalf of the plaintiff
16 as well.

17 MR. OGILVIE: Good morning, your Honor.
18 George Ogilvie --

19 Go ahead, Andrew.

20 MR. SCHWARTZ: Good morning, your Honor. This
21 is Andrew Schwartz appearing for the City of Las Vegas
22 pro hac vice.

23 MR. OGILVIE: Good morning, your Honor.
24 George Olgilvie also on behalf of the City of
25 Las Vegas.

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1 THE COURT: All right. Does that cover
2 everyone's appearance. I just want to make sure I
3 didn't overlook anyone.

4 MR. OGILVIE: Your Honor --

5 THE COURT: Again --

6 MR. OGILVIE: -- the City would request that
7 the matter be reported.

8 THE COURT: That's exactly where I was going
9 to next.

10 And, Ms. Isom, did you get the appearances?

11 THE COURT REPORTER: I did. Thank you.

12 THE COURT: All right. And for the record
13 it's my understanding, let me get here, this is
14 plaintiff landowners's motion to determine a property
15 interest; is that correct?

16 MR. LEAVITT: That is correct, your Honor.
17 James Leavitt on behalf of 180 Land.

18 THE COURT: Okay. Sir, you have the floor.

19 MR. LEAVITT: Thank you very much, your Honor.
20 Again, it's James Leavitt on behalf of the landowner
21 180 Land.

22 Your Honor, to begin my argument I want to
23 reiterate and identify that the landowner's pending
24 request is a very narrow request that's based on a very
25 narrow set of facts.

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1 And the request is that this Court apply
2 inverse condemnation law to find that under the
3 currently stipulated-to zoning, which is the
4 residential plan district development, which is up to
5 seven residential units per acre on the 35-acre
6 property is the right -- or under that zoning that
7 residential use is a use permitted by right under the
8 city code.

9 Now, to be clear, we're not asking you to make
10 any determinations of a taking in this case. And the
11 reason that we brought this motion at this time is
12 because the Nevada Supreme Court in two decisions, two
13 recent decisions, the Sisolak case and the ASAP Storage
14 case, held that in every one of these inverse
15 condemnation cases in Nevada the district court judge
16 must make two distinct sub inquiries. And that's the
17 words that Justice Gibbons uses in the ASAP Storage
18 case. That they're two distinct sub inquiries that are
19 entirely independent from one another and they must be
20 made in the proper order.

21 The district court judge must -- the district
22 court judge's first sub inquiry according to Sisolak
23 and ASAP is to decide what is the property interest
24 that the landowners owned before the government engaged
25 in any actions to interfere with that property. Then

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1 and only then, after the judge makes that decision,
2 then and only then can the Court move to the second
3 inquiry which is an entirely separate inquiry to decide
4 whether the government engaged in actions to take that
5 underlying property interest that the Court determined.

6 So just to be clear, your Honor, the
7 landowner's motion solely addresses that first sub
8 inquiry, which is what is the property interest that
9 the landowner had in the 35-acre property prior to any
10 interference from the City of Las Vegas to that
11 property.

12 Now before I discuss my argument, your Honor,
13 the problem that's occurring in this case is that the
14 City has filed an opposition that conflates these two
15 issues. It's filed a 27-page brief where it's trying to
16 analyze both of these issues at one time. The City is
17 essentially arguing that the City has discretion to
18 engage in taking actions to preclude the landowners
19 from using their 35-acre property as was set forth in
20 the PJR matter. And then it's arguing that since it
21 had the discretion to enter into -- or engage in those
22 taking actions, the landowners never had any underlying
23 property interest to begin with.

24 Or stated another way what the City is doing
25 is it's referencing its actions that it engaged in to

1 take the property, and then asserting that since it had
2 discretion to engage in those actions, the landowners
3 had no property interest at all. That's a grossly
4 improper analysis, your Honor, because the Nevada
5 Supreme Court said you have to separate out the sub
6 inquiries. That you have to make a determination first
7 of what the underlying property interest is without
8 those interfering acts.

9 So without with that background, your Honor,
10 the Nevada Supreme Court has been very, very clear on
11 how the district court judge decides this property
12 interest issue in an inverse condemnation case. And
13 this has been the law in the state of Nevada in inverse
14 condemnation cases for at least the past 40 years.

15 The Nevada Supreme Court has said that when
16 you determine this underlying property interest in the
17 35-acre property, you must rely upon the zoning.

18 In the 1984 inverse condemnation case, County
19 of Clark vs. Alper, the Nevada Supreme Court said due
20 consideration should be given to the zoning ordinances
21 because those zoning ordinances carry "a presumption of
22 validity". So according to the Alper case, you have to
23 focus or you have to rely upon the zoning to determine
24 the underlying property interest.

25 That same ruling was entered by the Nevada

1 Supreme Court in City of Las Vegas vs. Bustos. And
2 what happened in that case, your Honor, is the lower
3 district court judge focused entirely on the zoning to
4 determine the underlying property interest in that
5 inverse condemnation case. And that issue was appealed
6 to the Nevada Supreme Court.

7 And the Nevada Supreme Court upheld the lower
8 district court judge and said that the lower district
9 court judge properly considered the zoning of the
10 property, to quote the Court, when determining the
11 underlying property interest.

12 And then the Court even went a step further.
13 That uses that are precluded by the zoning code aren't
14 even admissible. So the Nevada Supreme Court very
15 clearly indicated in that City of Las Vegas vs. Bustos
16 decision -- or very clearly held that the district
17 court judge in these inverse condemnation cases must
18 rely upon the zoning. And if the Court doesn't rely
19 upon the zoning, it's reversible error when determining
20 the property interest.

21 Now, your Honor, a very similar issue that's
22 pending right before you today was brought up in the
23 17-acre property -- or in the 17-acre case involving
24 the 17-acre property right next door to this one.

25 As you're aware, there are four inverse

1 condemnation cases. 17-, 35-, 65-, and 133-acre case
2 that are pending before you, Judge Tierra Jones, Judge
3 Jim Bixler and Judge Gloria Sturman. And the 17-acre
4 case, in the 17-acre case, the issue made its way up to
5 the Nevada Supreme Court, and we were co-counsel for
6 the landowners in that case. And we made the same
7 exact argument that we're making to you here today,
8 your Honor. That to determine what uses can be made of
9 the 17-acre property absent any interfering with the
10 government, the Court has to focus on the existing
11 residential planned development district zoning.

12 That was the argument we made squarely to the
13 Nevada Supreme Court. The opposing party in that case,
14 your Honor, made the exact same arguments that the City
15 is going to make to you today. That there's some type
16 of cluster zoning in the area. That there is some type
17 of implied dedication on the property. Or that there
18 is a PROS designation. Or that there is this Peccole
19 Concept Plan or the City's general plan that applies to
20 the property.

21 Those same exact arguments that the City is
22 making to you today were made to the Nevada Supreme
23 Court in that 17-acre case. The issue was argued --
24 the issue was briefed. The issue was presented to the
25 Nevada Supreme Court. And the Nevada Supreme Court

1 issued an opinion and agreed with us.

2 The Nevada Supreme Court held that when you
3 have a residential planned development district zoned
4 property that you may develop that property
5 residentially under the City of Las Vegas zoning code.
6 That the only thing that you have to file in order to
7 develop that property is a site development review plan
8 to confirm that you're developing the property
9 residentially.

10 Every single one of the City's arguments, the
11 Peccole Concept Plan, the City's general plan, the PROS
12 argument, the cluster zoning argument, every single one
13 of them was flatly rejected by the Nevada Supreme
14 Court.

15 The Nevada Supreme Court, in fact, knowing
16 that we were going to be citing to this case, knowing
17 that these four other inverse condemnation cases were
18 pending in front of these other lower district court
19 judges, including yourself, even went so far as to say
20 that a major modification of the Peccole Concept Plan
21 was absolutely not required to use the property.

22 And the Nevada Supreme Court did that to make
23 it abundantly clear that these arguments that the City
24 is making to you that are based on the Peccole plan, or
25 the City's general plan, or this PROS have been

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1 rejected by the Nevada Supreme Court. Therefore, your
2 Honor, in deciding the property interest in this case,
3 there are two Nevada inverse condemnation cases
4 directly on point that say the district court judge in
5 making the first sub inquiry should -- must rely upon
6 the current zoning.

7 And there is a decision on the 17-acre case
8 which was entered, your Honor, by the way, on March 5,
9 2020, which supports that exact same finding and
10 rejects the very arguments before you that the City is
11 going to make today.

12 So, your Honor, the next question would be
13 to -- okay, we need to determine, okay, what are those
14 uses that are permitted under the current zoning? The
15 parties have stipulated or agreed to in the pleading
16 that the zoning is residential planned development
17 district with the numerous -- with a number 7 behind
18 it, which means up to seven units per acre. In the
19 March 5, 2020, order out of the Nevada Supreme Court,
20 the Nevada Supreme Court looked to the city code to
21 determine the uses because that's where the zoning code
22 is.

23 In addition to that, your Honor, I think it's
24 important to point out that when the landowners were
25 doing their due diligence, we attached this document as

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1 Exhibit No. 3 to our motion. When the landowners were
2 doing their due diligence to decide whether to purchase
3 the 35-acre property, they approached the
4 City of Las Vegas and went through an official process
5 to get an opinion letter from the City of Las Vegas as
6 to what the permitted uses were of the 35-acre
7 property. And remember, this is prior to any
8 interference by the City of Las Vegas.

9 The landowners filled out a zoning
10 verification form. And the City of Las Vegas provided
11 them an official opinion letter on the permitted uses
12 of the 35-acre property. And said in Exhibit No. 3 in
13 this opinion letter, which is a zoning verification
14 letter, again issued to the landowner as part of their
15 due diligence, they stated that the property is zoned,
16 the 35-acre property is zoned R-PD7, which means
17 residential planned development district 7 units per
18 acre. And then went on to explain that the densities
19 allowed under the R-PD7 are designated by the number or
20 under the R-PD district are designated by the number.
21 And then made an important statement to the landowner
22 during his due diligence period.

23 The City stated, and that's Exhibit No. 3, a
24 detailed listing of the permissible uses. And all
25 applicable requirements for your R-PD7 zoned property

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1 are including in Title 19.

2 In other words telling the landowner as part
3 of his due diligence that your property is zoned R-PD7,
4 and that R-PD7 zoning designation will govern the use
5 of the property prior to any interference by the
6 government. Therefore, your Honor, clearly when
7 deciding this property interest issue that we brought
8 to you today that's required under Sisolak and ASAP
9 Storage, you need to focus on, number one, on the
10 zoning and, number two, rely upon the city code to make
11 the determination of the permitted uses under that
12 zoning.

13 And there's -- as we've laid out -- and, your
14 Honor, I'm not going to go through this in detail
15 because I think we laid it out sufficiently in our
16 motion and in our reply, but there's two specific
17 sections of the city code which address what the
18 permitted uses are on R-PD7 zoned property. I'll
19 address just one of them. It's Exhibit No. 5 to our
20 motion, and it's Section 19.10.050 of the city code.

21 That section is entitled R-PD residential
22 planned development district. And in the Section C of
23 that Las Vegas Municipal Code it specifically
24 identifies, expressly identifies "the permitted uses"
25 requested under that zoning. And it lists single

1 family and multifamily residential as those permitted
2 uses.

3 And the code itself defines what it means by
4 permitted use. What it means by permitted uses
5 according to the code is uses that may be made of a
6 property in a certain zoning distinction as a matter of
7 right.

8 Therefore, your Honor, according to the City
9 Code Section 19.16.050, subclass C, single family and
10 multifamily residential are uses that are permitted as
11 a matter of right under R-PD7 zoned property.

12 So, your Honor, that's our request to you.
13 And I will address just a couple arguments that the
14 City has made. But our request to you, your Honor, is
15 very straightforward and very narrow.

16 It is, number one, to make a finding that the
17 property is the hard zoned R-PD7. Number two, apply
18 that R-PD7 zoning as the Nevada Supreme Court did in
19 the March 5, 2020 order and as ordered and directed by
20 the Nevada Supreme Court in the Alper and Bustos
21 decisions.

22 And then find as a matter of -- that as -- or
23 that the landowners have as a matter of right the right
24 to use that R-PD7 zoned property prior to the
25 interference by the government for single family and

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1 multifamily residential uses. That's the exact
2 verbiage right out of the city code that we're
3 requesting here, your Honor.

4 So, your Honor, before I finish, though, I
5 want to talk about just very briefly two of the City's
6 arguments. The first City argument I referenced
7 earlier just a little bit and I want to address a
8 little bit more. And it's that the City can engage in
9 actions to deny the landowners the use of their
10 property, and those actions that are referenced in the
11 PJR matter, and, therefore, the landowners have no
12 property interest to begin with.

13 Again, that violates the Nevada Supreme Court
14 rule that these taking actions that are set forth in
15 the PJR matter cannot be considered when deciding the
16 underlying property interest that a landowner has in an
17 inverse condemnation case for any interference by the
18 government.

19 Let me just explain this by way of a quick
20 example. If the City built a roadway through the
21 35 acre property, that would be -- clearly be a taking.
22 And if the City refused to pay compensation, the
23 landowner would bring an inverse condemnation case
24 against the -- against the City.

25 In deciding the underlying property interest

1 that the landowner had, it would be improper for the
2 City to argue that the City has discretion to build a
3 35 -- the roadway through the 35-acre property,
4 therefore, there was no property interest to begin
5 with. As stated, the underlying property interest must
6 be decided prior and independent of any taking actions.
7 Meaning all of the City actions to deny the use of the
8 property that are referenced in the PJR matter should
9 not be considered when deciding the underlying property
10 interest in this case.

11 And that's why, your Honor, you entered three
12 orders. We've argued this ad nauseam in three separate
13 hearings. You entered three orders stating that only
14 inverse condemnation law can be used to decide these
15 issues that we're presenting to you today. And that
16 the PJR, findings of fact and conclusions of law should
17 not be used to make these findings.

18 Now, your Honor, the City's final argument is
19 that the City -- this 35-acre property is the only
20 property in the City of Las Vegas that is not governed
21 by the zoning. And they go so far as to say "zoning is
22 irrelevant". And then they say instead of -- instead
23 of applying the zoning, what this Court should apply is
24 a concept draft plan that was put together by
25 Mr. Peccole 30 years for this area for his vision that

1 was abandoned, that Mr. Jerbic states was never applied
2 by the City of Las Vegas and never implemented by the
3 City of Las Vegas, and important to the inquiry today,
4 was never recorded at the Clark County Records Office
5 or that you should apply the City's general plan that
6 also wasn't recorded and exists somewhere in some city
7 archive.

8 Now, that argument is legally incorrect and
9 factually incorrect. It's factually incorrect, your
10 Honor, because the City's own client, I don't know how
11 to say this, but Mr. Ogilvie or Mr. Schwartz' own
12 client has submitted statements and documents through
13 Mr. Jerbic, through planning director Tom Perrigo, and
14 Rule 11 pleadings and in two city affidavits in another
15 inverse condemnation case where they've laid out in
16 detail that zoning governs the use of the 35 acre
17 property, as we are arguing, and that the Peccole Ranch
18 Concept Plan and the City's general plan do not apply
19 to determine the property interest use.

20 Those are statements by their own client, your
21 Honor, that our argument is correct. The zoning should
22 be used to determine this underlying property interest.

23 This argument by the City is also legally
24 baseless because the Nevada Supreme Court already
25 rejected them, your Honor, on March 5, 2020. The

1 Nevada Supreme Court said you should focus on the
2 zoning, not the Peccole Concept Plan, not the City's
3 general plan, not cluster zoning, and not some implied
4 dedication on the property.

5 In addition to that, the Court in the Alper
6 case and the Bustos case both held that is reversible
7 error to not consider the current zoning, or rather the
8 Court is required to apply the current zoning to
9 determine the underlying property interest.

10 Now, your Honor, just finally, consider the
11 public policy alternative if you rule in the City's
12 favor. First of all you have to disregard the entire
13 zoning code. That would render the City's entire
14 zoning code superfluous. The largest part of the
15 Las Vegas Municipal Court would be rendered superfluous
16 because according to the City, the City's argument to
17 you today, zoning is irrelevant. You'd have to
18 disregard Nevada's recording and property notice
19 statutes because instead of applying zoning, the City
20 is going to -- asking you to apply to determine the
21 property interest unrecorded plans that were abandoned.

22 You'll turn title policy upside -- title
23 policy law upside down in Nevada because every single
24 title policy that's been issued based on the zoning of
25 the property will now be defective. Because the use of

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1 the property is not based on zoning, according to the
2 City. It's based on unrecorded plans that are archived
3 at City Hall. That's an unaccepted law. It's an
4 unacceptable policy.

5 Mr. Schwartz's own client has rejected that
6 argument, and the Nevada Supreme Court in two inverse
7 condemnation cases and most recently in the March 5,
8 2020, order on the 17-acre property right next day
9 rejected that argument, flatly, your Honor, when it was
10 directly presented to it.

11 So, your Honor, I want to conclude right here
12 with our request. Number one, the property is zoned
13 R-PD7. Everybody agrees to that. The name of the
14 zoning is residential planned development district up
15 to seven units per acre.

16 The second request that we have is that single
17 family residents and multifamily residents are
18 permitted as a matter of right under that zoning.

19 And, your Honor, that's our request to make
20 this initial determination, this first sub inquiry by
21 the Court on the property interest.

22 And if, your Honor, if you have any questions,
23 I can respond to them.

24 THE COURT: Sir, I have no questions at this
25 time. We'll hear from the City.

1 MR. LEAVITT: All right. Thank you, your
2 Honor.

3 MR. SCHWARTZ: Thank you, your Honor. This is
4 Andrew Schwartz for the City.

5 The developer -- the developer misrepresented
6 the issue before the Court, misrepresented the City's
7 argument. And it's in particular misrepresented the
8 decision of the Nevada Supreme Court in the Union case
9 and the 17-acre case. And I will get to that.

10 The developer is asking the Court to find that
11 R-PD7 zoning confers on developer a vested right to
12 approval of its application to develop housing in the
13 Badlands. It claims that this R-PD zoning constitutes
14 a property right. So if they can get the Court to hold
15 that they have a vested right to an approval, which is
16 a property, then they allege the City's taken that by
17 denying its development application. So that's what's
18 before the Court here.

19 The developer cites no authority whatever that
20 zoning confers a vested right.

21 The Nevada Supreme Court's defined a vested
22 right as a right to complete construction of a project
23 where construction's already begun based on a valid
24 approval. That's the vested rights doctrine in Nevada.

25 So the vested rights doctrine prevents the

1 regulatory agency from changing the law after the
2 developer started construction of the project.

3 Well, in this case there's no approval. In
4 fact, the City disapproved the application in question
5 on the 35 acre portion of the Badlands. So we can't
6 have a vested right. And the Court has already ruled
7 in this case that the R-PD7 zoning confers no vested
8 right. And that's in Exhibit A to our appendix.

9 Well, the developer claims that that ruling
10 was under this petition for judicial review, and they
11 claim a regulatory taking here where they say they
12 raised different facts and law. And so they argue that
13 they're not bound by the Court's -- well, they didn't
14 even refer to the Court's ruling in their -- they
15 didn't mention it in their opening brief.

16 The difficulty with that argument is there's
17 only one type of vested right in Nevada. And it's
18 an -- it requires reliance on an approved permit, and
19 whether zoning confers a vested right. That kind of
20 vested right is, therefore, a pure question of law.

21 So it's the same law that we're dealing with
22 here that the Court already addressed in denying the
23 petition for judicial review. It's only -- the
24 developer here is asking for damages instead for a
25 taking. Instead of an order that the Court require the

1 City to approve its application. So they're simply
2 asking for a different remedy for a vested right, but
3 under the same fact.

4 And the legal grounds that they're arguing
5 here are precisely the same grounds that the Court
6 addressed in its order denying the petition for
7 judicial review. It's the very same law. They're only
8 asking for a different remedy.

9 Therefore, the Court's earlier ruling that
10 zoning -- and the Court was quite clear about this --
11 zoning does not confer any vested right as a matter of
12 law. That ruling stands. It's binding here.

13 So this is -- What is this? This is, in
14 reality, a motion for reconsideration. Under the local
15 court Rule 2.24 they have to file a noticed motion for
16 reconsideration. It has to be filed 14 days after the
17 Court issued its ruling.

18 The state district court Rule 137 says that
19 you have to bring a noticed motion for reconsideration
20 if you want the Court to change its prior ruling. And
21 that's what they're -- exactly that's what they're
22 asking for here.

23 So this begs the question why is the developer
24 risking filing this improper motion for reconsideration
25 rather than something like a motion for summary

1 judgment on their takings claim? Well, the answer is
2 because they have no taking claim under the applicable
3 taking statute. There is no takings test that finds
4 that if you -- if you -- that the zoning confers a
5 vested right, and if you deny the application, an
6 application in exercise of discretion under that zoning
7 that it's a taking.

8 The Constitution says that you can't have a
9 taking without just compensation. So that was
10 originally intended to apply to just direct
11 condemnation, to eminent domain.

12 And then in 1922 the Court extended that
13 doctrine to regulation. But it made clear that a
14 regulatory taking has to be the functional equivalent
15 of an eminent domain.

16 So in 2005 in the Lingle case, the United
17 States Supreme Courts said a taking under any taking
18 test, either the categorical test or the Penn Central
19 test has to be a wipe out or a virtual wipe out of use
20 or value. It's not the taking of a vested right.

21 It applies to categorical as well as Penn
22 Central. And the Nevada Supreme Court in the Kelly
23 case said -- says that the developer can't carve up the
24 property, segment the property, the parcel as a whole
25 into smaller segments and then apply for development of

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1 the segment. And if it's denied development of one of
2 the -- one segment, claim a taking, claim a wipeout.
3 The Courts look to the parcel as a whole to see if the
4 owner has been wiped out.

5 So I refer the Court to Exhibit X which is in
6 the City's appendix. It's Volume two of two, 2-2, at
7 page 390.

8 And this motion should be addressing what are
9 the true takings test, not whether the developer has a
10 vested right in its approval, but whether the City has
11 taken the property under an applicable takings test.
12 And Exhibit X you can see that with the Peccole Ranch
13 Master Plan Phase 2, which is in -- circled in red.
14 That of the 1569 acres of that parcel, which is the
15 parcel as a whole here, that's the parcel the Court
16 should consider. It's not just the 35 acres carved out
17 of this property. 84 percent of that property was
18 developed with thousands of housing units and retail
19 and a hotel and a casino. And the 250-acre Badlands
20 Golf Course is shown in yellow. And that was set aside
21 for open space.

22 So even if the City didn't permit any
23 development in the Badlands, it still allowed
24 substantial development of the parcel as a whole, and
25 there can't be a taking. And even if the Badlands is

1 considered a parcel as a whole, the City approved 435
2 luxury housing units for construction in Badlands on a
3 17-acre portion of the property that the developer
4 carved out of the parcel as a whole.

5 So in so doing, the City not only did not --
6 did not wipe out the developer use, but it increased
7 the value of the Badlands, increased the use. So that
8 is the test that applies here and not whether the
9 property owner has a vested right to approval under the
10 zoning.

11 So the developer can't prevail on its takings
12 claim. That the Nevada Supreme Court decision the
13 developer referenced, the March 5th decision, found
14 that the developer didn't need to file a major
15 modification application to apply to develop the
16 17-acres. And that effect of that decision was to
17 reinstate the City's approval of the development in the
18 Badlands of 435 units. So that's fatal to the takings
19 claim on Badlands, including this 35-acre property.

20 So that that explains why we --

21 THE COURT: You know what, I have a question
22 for you. And I'm sitting here thinking about it. And
23 isn't it a little bit more nuanced than how you're
24 setting it forth on the record?

25 And I just want to make sure I'm clear. I did

1 read the opposition here. In fact, I think it was on
2 page 9 of the opposition where you stated that the
3 Court found that the zoning does not grant the
4 developer a vested right to have the developer's
5 application approved.

6 Isn't that a slightly different scenario we
7 are dealing with right now? Because there we had a
8 petition for judicial review. Here we have an inverse
9 condemnation claim being asserted. And what -- and the
10 reason why I am asking this. And I was listening to
11 the example given by plaintiff's counsel, and I thought
12 about this. And say I own a vacant property on a
13 thoroughfare on, say, Sahara. And it's vacant. But
14 it's, as far as the zoning, is zoned commercial, and
15 it's going to have some value based upon that.

16 And then the Clark County decides, you know
17 what, we need -- we already have the 215, we've grown
18 so much, we need another expressway that goes north and
19 south, and they take that property. They condemn it.
20 Inverse condemnation. They do it. There's a public
21 interest and so on.

22 How do I value as a trial judge the taking?
23 Wouldn't it be based upon the zoning that was in place?

24 MR. SCHWARTZ: Of course. Yes, your Honor.
25 Your Honor, you're talking about a direct condemnation.

1 THE COURT: Right.

2 MR. SCHWARTZ: That's not -- that's completely
3 different in this case. That is inverse condemnation.

4 THE COURT: But why would that differ in this
5 regard? Because at some point I have to decide, and
6 that's why I made the distinction here because it seems
7 to me it's -- it's -- this is a different issue being
8 raised by the plaintiff. Because I'm not being asked
9 in this scenario to make a determination as it relates
10 to the issue you raised. And, I guess, I had to
11 decide. Let me see if I can find it on page 9 of your
12 opposition. Specifically dealing with the Court found
13 that zoning does not grant the developer a vested right
14 to have his development application approved.

15 That's a different issue.

16 MR. SCHWARTZ: Well, your Honor, it's -- this
17 is a regulatory taking case. It's an inverse
18 condemnation case where liability is the issue. If
19 liability is determined based on a takings test that
20 the Nevada Supreme Court or the US Supreme Court has
21 adopted, then you move to whether -- what the damages
22 are. And that turns on the value of the property.

23 Then, of course, you need to consider zoning.
24 What would -- what could the property be used for in a
25 determination of value? But that's not what we're

1 talking about here.

2 We're talking about whether the City is liable
3 for a taking by denying an application. The City
4 didn't condemn a road through the Badlands. The
5 example that counsel gave is completely off point.

6 That's a direct condemnation where liability
7 is conceded by condemning the property, taking --
8 physically taking it. You're conceding liability.
9 Then you have to determine what's the fair market value
10 of the property.

11 And that's based on an opinion of appraisers.
12 And the appraisers, of course, consider the zoning of
13 the property to what uses would be permitted. But they
14 also have to consider, you know, like in a case like
15 this, that the City might not approve a development on
16 the property. For example, if the general plan says
17 that the property is, can only be used for public
18 parks, recreation, and open space according to its
19 history use.

20 And so the developer here has completely
21 confused valuation with liability, with damages with
22 liability.

23 So --

24 THE COURT: Is that what they're requesting
25 right now? Because I look at -- I'm looking at page 21

1 of the reply starting at line 19. And it appears the
2 thrust and focus of the motion requests two
3 determinations. And one, that the Court enter an order
4 that the 35 acre property is hard zoned R-PD7 as of the
5 relevant date of September 14, 2017, date of valuation.
6 And two, that's permitted use by right under R-PD7
7 zoning are "single family and multifamily residential."

8 MR. SCHWARTZ: Well, there is no dispute about
9 either of those two, your Honor.

10 That's not what --

11 THE COURT: Okay.

12 MR. SCHWARTZ: -- they're requesting. No, no,
13 they're -- the, you know -- they're requesting that the
14 Court find exactly what it rejected in the -- in the
15 petition for judicial review. They're requesting, in
16 their opening brief you look at page 9, it says at the
17 bottom page, lines 19 and 20.

18 Because this use interest was part of their
19 title to begin with, the landowners have a
20 vested right to use the 35-acre property for
21 residential development.

22 They asked -- they're asking the Court to find
23 that as a matter of law that a developer has a right,
24 an automatic approval of a development application that
25 does not exceed the density allowed by zoning.

1 Zoning is a limitation on use. The City can't
2 approve more than seven units per acre on the Badlands
3 property because the zoning limits the seven. But the
4 City has complete discretion to determine what the use
5 of that property would be, including no use. It has
6 complete discretion.

7 So if -- the developer is asking the Court to
8 find that just because the property is zoned R-PD7,
9 which is not disputed and has never been disputed, and
10 that because residential uses are permitted uses, that
11 they have a vested right. That they have a property
12 interest in approval of their specific application.

13 And the Nevada Supreme Court in six cases that
14 we've cited has rejected that proposition, and the
15 Court rejects that proposition. And it's the same
16 issue of law that the Court dealt with in the petition
17 for judicial review. They were just asking -- in that
18 case they were -- based on the same facts and the same
19 law, they were asking the Court to order the City to
20 approve their application. In this case, same facts
21 and law, they're asking the Court to give them money
22 damages.

23 And so, let me if I could, if I could read
24 from the Court's decision. This is Exhibit A in Volume
25 1, page 785. This is page 17 of the Court's findings

1 of fact and conclusions of law on petition for judicial
2 review. Paragraph 34:

3 The Court rejects the developer's argument
4 that the R-PD7 zoning designation on the
5 Badlands property somehow required the counsel
6 to approve its application.

7 That's exactly what the developer is arguing
8 here, and the Court simply rejected it. The Court went
9 on to say --

10 THE COURT: Isn't that -- isn't that a
11 different issue --

12 MR. SCHWARTZ: It's --

13 THE COURT: -- from an administrative
14 perspective? Isn't that a different issue?

15 Because I'm looking here. Even when I go to
16 page 10 of the moving papers, and I look at -- and at
17 the end of the day I have to look at what relief is
18 being requested. And once again, it appears starting
19 at line 12 of the motion on page 10 that the requested
20 relief entered it's two things. One, that the 35-acre
21 property is hard zoned R-PD7 as of the relevant dates
22 September 14, 2017, date of valuation.

23 And two, that the permitted use by right under
24 R-PD7 zoning are single family and multifamily
25 residential. Period. Close quote.

1 MR. SCHWARTZ: Well, first, as you already
2 determined that the property is zoned R-PD7. As far as
3 September 14, that's not the date of value, but that's
4 not really an issue here.

5 The permitted use by right under R-PD7 zoning
6 are single and multifamily residential.

7 THE COURT: I remember that. Because
8 understand, this case has somewhat of a history. And I
9 remember --

10 MR. SCHWARTZ: Yes.

11 THE COURT: -- I remember the great education
12 that was given to me probably a year or two ago as we
13 were discussing a petition for judicial review
14 vis-à-vis what R-PD7 specifically is. And I remember
15 the lawyers did a great job in reviewing that issue.

16 But at the end of the day, I mean, Mr. Leavitt
17 will tell me if I'm -- if they're asking for more than
18 this, but I look for what specific relief is being
19 requested.

20 And lawyers do what they do and they have
21 reasons for making specific requests. But it just
22 appeared to me that that's what the thrust and focus of
23 the motion was about.

24 MR. SCHWARTZ: Well, the -- on page 9, they
25 made it clear that they want you to decide they have a

1 vested right to the City's approval of their
2 application. That's where they're -- that's the whole
3 point of this motion.

4 And then on page 10 they say that the
5 permitted use by right under R-PD7 zoning are single
6 family and multifamily residential. It's not disputed
7 that the permitted use, permitted uses in R-PD7 are
8 residential uses. It's not in dispute.

9 What's at issue in this case -- I mean,
10 that's, it's right in the code. The code section for
11 R-PD7 say that it's single and multifamily residences
12 are permitted uses. The question in this case is is
13 the City's denial of their application to develop the
14 property a taking?

15 Now, it can't be because the City has already
16 approved development in the parcel as a whole, which is
17 the Peccole Ranch Master Plan. Or even if it's not the
18 Peccole Ranch, it's the Badlands.

19 THE COURT: But isn't that an another day?

20 MR. SCHWARTZ: You can't prevail --

21 THE COURT: Isn't that another day?

22 MR. SCHWARTZ: No. Because that's the test
23 for a taking and not whether the City has denied a
24 vested -- denied a vested right. First, they don't
25 have a vested right. That's what this motion is about.

1 But even if the City did disapprove their
2 application they had a vested right, it doesn't mean
3 there is a taking because it -- that's not the takings
4 test. The takings test is whether you wipe out or
5 virtually wipe out use or value of the parcel as a
6 whole. And the City has already approved 435 units in
7 the parcel as a whole.

8 So they can't prevail on any takings claim.
9 But specifically for this motion, they are asking you
10 to decide that they had a property right to approval of
11 their specific application, and that the City in
12 denying it took a property right, and it's a taking.
13 And that's contrary to all law.

14 Could I -- could I explain to the Court --

15 THE COURT: Well, I never -- I'm listening,
16 sir. You can explain whatever you want to. I don't
17 want to rush you.

18 MR. SCHWARTZ: Well, the Court said, and the
19 legal issue, again, is precisely the same here, the
20 same argument they made in the petition for judicial
21 review. They just asked for a different relief.

22 The Court said in its order denying the
23 petition for review a zoning designation does not give
24 the developer a vested right to have its developed
25 applications approved.

1 In order for rights in a proposed development
2 project to vest, zoning or use approvals must not be
3 subject to further governmental discretionary action
4 affecting project commencement. And the developer must
5 prove considerable reliance on the approvals granted.

6 The Court said -- and the four applications
7 submitted to the counsel for a general plan amendment,
8 tentative map, site development review, and waiver were
9 all subject to the council's discretionary decision
10 making no matter the zonings designation.

11 Mr. Leavitt has argued this morning that the
12 City could not deny the developer's application without
13 affecting a taking. That is what he argued this
14 morning. That's their argument in this case.

15 They made -- they made the same argument that
16 the zoning designation alone prevents the City from
17 denying the developer's application for the petition
18 for judicial review.

19 The Court said -- in its order the Court
20 rejects the developer's attempt to distinguish the
21 Stratosphere case which concluded that the very same
22 decision-making process at issue here was squarely
23 within the council's discretion no matter that the
24 property was zoned for the proposed use.

25 The Court said statements from planning staff

1 or the city attorney that the Badlands property has a
2 R-PD zoning designation do not alter this conclusion.

3 The developer purchased its interest in the
4 Badlands Golf Course knowing that the City's general
5 plan showed the property as designated for parks,
6 recreation, and open space, and that the Peccole Ranch
7 Master Plan Development Plan identified the property
8 for being for open space and drainage.

9 The Court said in paragraph 41 of its order,
10 the general plan sets forth the City's policy to
11 maintain the golf course property for parks, open
12 space, and recreation.

13 The City, and I'm paraphrasing, chose to
14 maintain the historical use for this area that dates
15 back to the 1989 Peccole Ranch Master Plan, Master
16 Development Plan presented by the developer's
17 predecessor.

18 The golf course was part of a comprehensive
19 development scheme, and the entire Peccole Ranch Master
20 Plan area was built around the golf course.

21 Now, here's the key the Court said in
22 paragraph 14. It is up to the council through its
23 discretionary decision making to decide whether a
24 change in the area or conditions justify the
25 development sought by the developer and how any such

1 development might look.

2 So the -- what's the Court saying? The Court
3 is saying that just because the property is zoned R-PD7
4 doesn't mean that the City has to approve the
5 developer's application. The City has discretion. And
6 the general plan, which is different from the zoning,
7 and the general plan prevails over zoning if they were
8 inconsistent.

9 And we've explained why they're not
10 inconsistent. But the general plan designation for the
11 property which was true, the time the developer bought
12 the property which is -- and that's -- that was the
13 general plan designation is set forth in Exhibits I, N,
14 P, U, and O.

15 The general plan designates its property for
16 parks, recreation, and open space. That does not allow
17 residential development. So how could the developer
18 have a vested right to this approval of an application
19 for development in the area without an amendment to the
20 general plan? That's exactly what the Court said in
21 paragraph 46 of its order denying the petition for
22 judicial review. The applications included requests
23 for a general plan amendment and waiver.

24 In that, the developer asked for exceptions to
25 the rules. Its assertion that approval was somehow

1 mandated simply because there is R-PD7 zoning on the
2 property is plainly wrong.

3 It is well within the council's discretion to
4 determine that the developer did not meet the criteria
5 for a general plan amendment or waiver found in the
6 Unified Development Code and to reject the site
7 development plan and tentative map application.
8 Accordingly, no matter the zoning designation.

9 The Court said in submitting a general plan
10 amendment application the developer acknowledged that
11 one was needed to require -- to reconcile the
12 differences between the general plan designation act
13 and the zoning.

14 In paragraph 54 the Court said that all
15 regulatory decisions made pursuant to this title be
16 consistent with the general plan. For purposes of this
17 section consistency with the general plan means not
18 only consistency with the plan's land use and density
19 designations, and in this case properties designated
20 PROS, no residential allowed, but also consistency with
21 all policies and programs of the general plan.

22 Then in paragraph 55 the Court said,
23 Consistent with this law, the City properly required
24 that the developer obtain approval of the general plan
25 amendment in order to proceed with any development.

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1 So the general plan did not allow residential
2 development of the property. The developer is arguing
3 here that because the property was zoned R-PD7 that the
4 City was required to approve its application. And that
5 would be directly contrary to all of the Court's
6 findings, conclusions of law in the order denying the
7 petition for judicial review.

8 And that's -- that law is no different whether
9 they're asking for -- asking for the Court to award
10 damages for a taking for denial of the application or
11 asking for the Court to order the City to approve the
12 application. It's the same facts. It's the same law.

13 You know, the contention that because a
14 residential use is a permitted use, as of right in the
15 general plan -- in the R-PD7 zoning section needs to be
16 understood for what it means. There are three types.
17 There are basically three types of uses, or four.

18 There's a permitted use. There's a use that's
19 only permitted with a conditional use permit or a
20 special use permit. And then there are prohibited
21 uses.

22 So if a use is permitted, that means -- and as
23 the ordinance says by right, that means that you don't
24 need a conditional use permit or a special use permit
25 in order to apply for the use. But you still need a

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1 cite development permit. And they -- the City still
2 has discretion to approve up to the maximum densities
3 or to approve no development. And that's what the
4 Court held in denying the petition for judicial review
5 where the developer made precisely the same argument.
6 That's what the Court held in -- the Nevada Supreme
7 Court held in the Stratosphere case.

8 In that case, the Court said the
9 City of Las Vegas has discretion. It doesn't have to
10 approve the developer's application. It has discretion
11 as to what to approve on the property.

12 Even if the use is a permitted use -- what the
13 developer is arguing, in essence, is that if a use is
14 permitted in a zone, if it's listed as a permitted use,
15 that means that you have to -- that the City has no
16 further discretion.

17 In other words, once the City zones property
18 saying you can develop up to seven units of
19 residential, all discretion is transferred to the
20 developer, and the developer decides what it's going to
21 apply for, and the City has to approve it, which turns
22 Nevada law upside down.

23 That's not the law. And we've cited six cases
24 in our brief from the Nevada Supreme Court that hold
25 that. And the Court cited some of them in its -- in

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1 its order denying the petition for judicial review.
2 And the Court relied on the Stratosphere case and said
3 that the developer's attempt to distinguish the
4 Statosphere case, which the Court found was directly on
5 point, is unavailing. The developer didn't even try to
6 distinguish the Statosphere case in this motion because
7 the Court's already ruled on that issue.

8 When you think about it, if the developer's
9 claim is that the City has to approve its project,
10 whatever it is, they say they have a vested right to
11 approval of a project, well, R-PD7 zoning says that
12 a -- that the maximum of seven units per gross acre can
13 be developed. It says that the purpose of R-PD7 zoning
14 is to -- is intended to provide flexibility. I'm
15 reading from the Uniform Development Code Section
16 19.10.050.

17 R-PD district is intended to provide for
18 flexibility and innovation in residential development
19 with emphasis on enhanced residential amenities,
20 efficient utilization of open space, the separation of
21 pedestrian and vehicle traffic and homogeny --
22 homogeneity of the land use patterns.

23 The density allowed in the R-PD district shall
24 be reflected by a numerical designation for that
25 district. Meaning that the planning commissioner of

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1 the city council can't approve more than the numerical
2 designation of units per acre without amending the
3 zoning code.

4 Then in Uniform Development Code Section
5 19.10.050(E) under R-PD7 zoning, it says single family
6 and multifamily residential and supported uses are
7 permitted in the R-PD district to the extent they are
8 determined by the director to be consistent with the
9 density approved for the district and are compatible
10 with the surrounding uses.

11 So, yeah, R-PD7 says that residential is
12 permitted, but exactly what is going to be permitted is
13 at the complete discretion of the planning commission
14 and the City Council. The code goes on to say, For any
15 use which pursuant to the section is deemed to be
16 permitted within the R-PD district, the director may
17 apply the development standards and procedures which
18 would apply to that if it were located in the
19 equivalent standard residential district.

20 Section 19-06.050(G).4 says Open Space and
21 Common Recreational Facilities in an R-PD7 district
22 shall be configured so as to permit optimal utilization
23 and shall be more or less centrally located so as to be
24 reasonable and readily accessible from all residences
25 built or proposed for the development.

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1 Nowhere do any of these sections say that any
2 development is by right in the sense that the developer
3 has a right to decide what's going to be developed and
4 the City doesn't.

5 These provisions provide abundant discretion
6 to the City to disapprove a condition development. So
7 it's impossible to square with the claim that all
8 discretion, once property is zoned all discretion lies
9 with the developer instead of the City. I mean, it's a
10 rather -- it's a very bizarre contention and would turn
11 the law on its head.

12 The developer even refers to the zoning for R2
13 property, not R-PD7 but R2. And says that the Court
14 should apply the standards in the R2 zoning which
15 allows residential use. But that even -- you know,
16 that doesn't apply to R-PD7. But even if it did, that
17 section said, Maximum dwelling units per acre is
18 determined by the underlying general plan designation
19 and may not exceed the density permitted under said
20 designation.

21 So it's clear the City has discretion. The
22 developer can't have vested rights to approval. The
23 City's disapproval of the 35-acre application was
24 within its discretion and can't be a taking.

25 But let's look at the developer's claim.

1 They're claiming that they have a right to approval of
2 whatever they apply for. Well, the R-PD7 zoning is
3 pretty vague about its standards. It's -- it allows
4 very broad discretion to decide, Well, here's where
5 we're going to put housing. Here's where we're going
6 to put open space.

7 So when you think about R-PD7 gives the
8 developer a vested right, a vested right to do what? I
9 mean, the City Council of the planning commission have
10 to decide, well, how much parking? Where is the
11 housing going to go? Where is the open space? Where
12 are the roads? How much parking is going to be
13 provided? What are the setbacks going to be? What are
14 the heights? What are the buildings going to look
15 like? These are all within the discretion of the
16 planning commission. So there's no way that it could
17 exercise that discretion if the developer had a vested
18 right to approval of whatever they proposed.

19 So the question is a vested right to do what?
20 The vested right concept doesn't make any sense in this
21 context because, you know, the vested right claim kind
22 of collapses under its own weight. You don't know what
23 you have a vested right to do except not exceed seven
24 units per acre. Well, that doesn't get you very far
25 when the -- even if that were true, when the planning

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1 commission and the city council hold discretion to
2 determine all the other aspects of the development.
3 Vested rights only makes sense in the context in which
4 it's defined by the Nevada Supreme Court. Which is,
5 okay, if you have a valid permit approval and you start
6 construction in reliance on that approval, the City
7 can't change the law on you. You're -- you get to
8 build the project as approved. That's the vested
9 rights doctrine.

10 And it's absolutely clear here that the
11 developer's claiming that they have a vested right,
12 which they claim is a property right, to approval of a
13 specific application, and the Court has already
14 rejected that.

15 All of the eminent domain cases they cite
16 about consideration of the zoning, they're all, you
17 know, eminent domain liability conceded, what's the
18 value of the property. So, yes, the appraisers have to
19 consider the zoning of the property in their opinion,
20 which is a hypothetical of what would the property sell
21 for on the open market. That is a completely different
22 issue than whether a developer -- a property owner has
23 a vested right to develop something merely because of
24 the zoning.

25 And I want to draw the Court's attention to

1 the open space designation. You know, I said earlier
2 that the developer has really appallingly
3 misrepresented what the Nevada Supreme Court held in
4 that case on the 17-acre property. That, your Honor, I
5 think if you read that opinion, or that -- it's not an
6 opinion; it's an order; it's an order of reversal --
7 you'll see that the Court didn't say anything like what
8 the developer has represented that decision to have
9 said.

10 In that case there was one issue before the
11 Court. And that was whether to apply to develop the
12 17-acre property the developer needed to file a major
13 modification application. That is the only issue
14 before the Court.

15 The City said -- the City said, No, you don't
16 have to file a major modification application. The
17 developer went ahead and filed a site development
18 application, a rezoning application, and an application
19 to amend the general plan.

20 The neighborhood group sued and claimed that
21 the developer had to file a major modification
22 application. Judge Crockett agreed. Invalidated the
23 City's approval of the project, again, over the City's
24 objection. The City agreed no major modification
25 application was required. And the Nevada Supreme Court

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1 then decided that very narrow issue.

2 It decided no major modification application
3 was required for the sole reason that in the Uniform
4 Development Code of the City, a major modification
5 application was required for a planned development and
6 it was not required for a residential planned
7 development. It's just what the code said. It was
8 a -- it was a pretty straightforward matter of
9 interpretation of the code.

10 And the Court did not -- the Court did not
11 find that the developer had a right or any right or
12 vested right or a property interest in the zoning. The
13 Court did not address that issue. It wasn't before the
14 Court. The Court didn't address that issue. And if
15 you read the order of reversal, you'll find that the
16 Court did not decide that.

17 The Court did not decide that the zoning
18 regulation was the only regulation that applied to the
19 property. The Court expressly recognized that this
20 developer was required to also file for an amendment of
21 the general plan designation of PROS.

22 On page, this is the exhibit -- that decision
23 is Exhibit FF to the City's Appendix in Volume III, at
24 page 516. The Supreme Court said on that page, The
25 governing ordinances require the City to make specific

1 findings to approve a general plan amendment, and cited
2 to the Las Vegas Municipal Code, a rezoning application
3 and a cite development plan amendment. The Court said
4 it does not, is not required to approve a major
5 modification application.

6 And I want to draw the Court's attention to
7 the contention that the developer made in its opening
8 brief where it grossly misrepresents what the Nevada
9 Supreme Court said. The developer said that the Nevada
10 Supreme Court found that the developer -- that the City
11 was required -- the developer was not required to -- I
12 got to find the exact language from the developer's
13 brief, from the reply brief where they said -- they
14 said, and I quote, they said that the Supreme Court
15 found that the developer could build residential
16 without applying for a major -- or could build
17 residential under the zone. And, in fact, the Court
18 found that the developer could apply to build under the
19 zone. There's all the Court found. So, you know,
20 that's a very serious misrepresentation of what the
21 Court held.

22 I want -- I refer the Court to our Exhibits I,
23 and N through P. Those are ordinances of the City that
24 the developer says don't exist, and if they do exist,
25 they don't apply because they're improperly enacted;

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1 although, the developer cites no evidence or authority
2 that they weren't properly enacted.

3 Those exhibits are ordinances of the City that
4 provide that the entire 250-acre Badlands is PROS,
5 designated PROS in the City's general plan, parks,
6 recreation, and open space. That designation does not
7 allow for residential development.

8 That was a designation of 211 acres of the
9 250-acre Badlands since 1992, again, by ordinance of
10 the city council and of the entire 250-acre Badlands
11 including the 35-acre property here since 1998,
12 including in 2015 when the developer bought the
13 property. So it was clear that was the open space
14 designation. And that the law is also clear as the
15 Court found in its decision, in its order denying the
16 petition for judicial review that the general plan --
17 that the zoning has to be consistent with the general
18 plan. We've cited abundant authority that the zoning
19 must be consistent with the general plan.

20 R-PD7 zoning is not inconsistent with the
21 general plan designation of open space because in R-PD7
22 zoning, the original developer decided we're going to
23 put residential here, we're going to put open space
24 here.

25 The City then designated the residential for

1 residential use in its general plan and the open space
2 for open space use in the general plan. And that's the
3 law. It's binding. You can't change that. You can't
4 develop residential in the open space without amendment
5 to the general plan. And amendment is at the city's
6 discretion.

7 So those exhibits that I cited to you all show
8 that even up to today with exhibits, I think, R,
9 Exhibit R that the Badlands is still designated PROS in
10 the general plan except for the 17 acres where the City
11 approved an amendment to allow the developer to build
12 on the 35 units.

13 So the developer can't have a vested right to
14 approval of its application unless the City amended the
15 general plan, which is at its discretion. The City can
16 leave the property in its historic use, which is PROS,
17 parks, recreation, and open space.

18 So there is absolutely no legal basis to
19 require that the City approve the application. And
20 that's what this motion is all about. So for the Court
21 to just -- you know, the relief that the developer
22 seeks in that last page of its motion that the property
23 is zoned R-PD7 and that residential use is permitted,
24 that's right in the statute. The Court doesn't need to
25 say that. Right in the statute, it says those things.

1 Although they put certain words in quotes.
2 All this motion -- and they admitted on page 10 of
3 their motion that what they're seeking is a ruling that
4 they have a vested right, that they have a property
5 interest. You don't have any property rezoning,
6 absolutely clear.

7 I want to make a couple of other points in
8 response to the developer. You know, the developer
9 says that general plan designation of the Badlands
10 is -- doesn't apply because the maps that were attached
11 to the ordinances that we've submitted to the Court say
12 that they're for reference only. Well, the developer
13 has selectively quoted from the notation on the maps.
14 The maps -- the full reference says that -- the full
15 note says that GIS maps are normally produced only to
16 meet the needs of the City. Due to continuous
17 development activity, this map is for reference only.
18 So they only quoted from the last four words.

19 Well, what that says is that at the time that
20 the city council approves a version of the general
21 plan, that map, the city council's constantly amending
22 the general plan to allow development at the request of
23 developers. So the map changes. And the map is held
24 by the -- is maintained by the planning department and
25 updated. But the map that's approved by the city

1 council in one point in time does become outdated.

2 But that doesn't mean that at the time the
3 city council approves that map that wasn't the open
4 space -- that wasn't the general plan designation for
5 property shown in the map. And we've shown the Court
6 maps from 1992, 1998, 2001, 2005, 2009, 2018. The
7 Badlands is consistently PROS.

8 So you've got statute city ordinances staring
9 you right in the face. The developer contends, well,
10 these don't exist or don't apply. And that's absurd.
11 And, again, the Court found in denying the petition for
12 judicial review that the PROS designation is binding,
13 that it requires amendment to develop residential in
14 the Badlands, and, therefore, that it's impossible for
15 the developer to have a vested right.

16 So I -- the Court should deny the motion. The
17 Court, I don't think, should indulge the plaintiff's
18 kind of obfuscation where they're asking you to say the
19 property is zoned R-PD7 and, say residential is a
20 permitted use. When they're going to take that -- if
21 the Court said -- merely says that, which is what the
22 statute says and it's undisputed, the way they put
23 quotes around "by right" and they want the Court to
24 find that they had a vested right, which means they had
25 a right to automatic approval of their application

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1 because it didn't provide for more than seven units for
2 gross acreage, and that's, therefore, a taking. That's
3 where we're going here. So I don't think the Court
4 should completely reverse itself from the petition for
5 judicial review and grant this motion.

6 Thank you.

7 THE COURT: Thank you, sir. And I have just
8 a -- and I do agree. I think the example I used before
9 was eminent domain example versus inverse condemnation.
10 I agree with that. But I was thinking about the
11 Sisolak case.

12 And I was thinking about it as you were
13 talking about it. I remember reading the Sisolak case.
14 I think that was in front of Judge Mark Denton. And
15 there you had a regulatory taking, it's my
16 recollection.

17 And so when they -- it seems -- didn't the
18 Supreme Court look at the Sisolak case, and I forget
19 the ordinance, but he, when he purchased the property
20 back in the 80s, it was subject to an ordinance
21 pertaining to height restrictions. And lo and behold
22 the -- I'm sorry, the county, and it might have been
23 McCarran Airport, I forget which one, but anyway, they
24 expanded the airport, and they implemented, more
25 restrictive height requirements. And, ultimately, and

1 I think his property was actually zoned commercial for
2 hotels, casinos, and those types of things. It's been
3 a while since I've read it. But at the end of the day
4 didn't the Supreme Court make a determination based
5 upon the status of the property and its zoning that
6 there was a taking?

7 And if I'm wrong you can tell me that.

8 MR. SCHWARTZ: Absolutely not.

9 THE COURT: I'm just --

10 MR. SCHWARTZ: Your Honor, the Sisolak case is
11 a physical takings case. The Court made it clear. It
12 said multiple times this is a physical takings case.
13 The authority is the Loretto case. This is not a
14 regulatory takings case.

15 In a physical takings case, while it's an
16 inverse condemnation case, the government deprives the
17 property owner of the right to exclude others. And
18 that's what --

19 THE COURT: Wait, wait, wait. Say that
20 again --

21 MR. SCHWARTZ: -- the airport --

22 THE COURT: I want to make sure I understood
23 what you're saying. I don't want to cut you off. I
24 want to make sure I understand. Repeat that again.

25 MR. SCHWARTZ: In a physical takings case, the

1 regulation deprives the property owner of the right to
2 exclude others in the public or the government.

3 That's what happened in the Sisolak case. It
4 is based on the Loretto case. The Loretto case is a US
5 Supreme Court case about 1982, '83. In that case, the
6 Court found that the New York City's requirement that
7 landlords of apartment houses allow cable companies to
8 put cable, cable facilities on their building, the
9 cables for cable TV. To require them to allow that is
10 a physical taking because you're deprived of a property
11 right. And it's one of the essential ticks in the
12 bundle of property rights, which is the right to
13 exclude others. That's a physical taking.

14 Now, in Sisolak, the Court found this is a
15 physical taking. The overflight law allows or requires
16 the owner to submit the plane flights in its airspace.
17 And the Court said that's a physical taking.

18 In one of the attributes of ownership is the
19 right to exclude others. That's a property interest.
20 A vested right. Again, zoning doesn't give you
21 property interest. Zoning limits your use of the
22 property. Doesn't grant a property interest. But when
23 you buy property, you have a property interest to
24 exclude others. And there in Sisolak, the Court said
25 that's a taking. That is not our case.

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1 We have a -- this is a pure regulatory takings
2 case. The City hasn't taken a road from their
3 property. It hasn't deprived the property owner of the
4 right to exclude others. It has disapproved its
5 application for a particular use of the property.
6 That's a regulatory taking, a pure -- a pure regulatory
7 taking. So Sisolak doesn't apply.

8 And what the developer here is arguing is that
9 you have a property right in zoning that can be taken
10 away if you're not allowed to develop some big -- you
11 know, again, what's the property -- what's the right?
12 Their argument collapses because you don't know exactly
13 what rights they have.

14 That's why the vested right doctrine doesn't
15 apply here. The vested rights doctrine doesn't give
16 the property owner a property right to develop whatever
17 they choose on the property as long as it's within the
18 black letter maximums of the code.

19 Again, we cite six Nevada Supreme Court
20 opinions that confirm. And, again, the Court made
21 these very findings. Exactly what I'm saying. And I
22 read you the Court -- it's exactly what I'm saying.
23 And exactly what the developer is telling you is not
24 true. Is if they have a property right in zoning. And
25 that simply can't be the law. Otherwise, public

1 agencies in Nevada would not -- would have no more
2 discretion.

3 Where is the developer going with this case?
4 The City, you know, again, putting aside the fact that
5 they can't make out a takings claim because the City
6 has already approved substantial development in the
7 parcel overall.

8 But putting that aside, where is the developer
9 going? They're saying that the City has to approve
10 their development and their development application for
11 this property, and that the City's disapproval is a
12 taking, and they should get -- now they should get paid
13 for what -- what they would have -- you know, what the
14 value of the property would have been if the City
15 approved it.

16 Well, that's contrary to all law, all law from
17 the Nevada Supreme Court, the US Supreme Court.
18 They're -- that means that the public agency no longer
19 has discretion to deny development. That means
20 developers get to build whatever they want.

21 When you look --

22 THE COURT: But, but the government --

23 MR. SCHWARTZ: The developer -- it's
24 ridiculous.

25 THE COURT: But my -- the government doesn't

1 have absolute unfettered discretion regarding any
2 decision they make.

3 What about this? And I pulled Sisolak up on
4 my --

5 MR. SCHWARTZ: Can I respond to that, your
6 Honor?

7 THE COURT: Yes. Go ahead.

8 MR. SCHWARTZ: Can I respond to your last
9 point?

10 THE COURT: Yeah. Go ahead.

11 MR. SCHWARTZ: In the law of regulatory
12 taking, the government and/or restrict use of property.
13 The only limitation, the only limitation is that it
14 can't wipe out or virtually wipe out the use or value
15 of the property. That's, that's what this case is
16 about. It's about the just compensation clause.

17 THE COURT: But what about --

18 MR. SCHWARTZ: And --

19 THE COURT: -- a deprivation of economic
20 benefit? You can have a regulatory taking under those
21 circumstances; right?

22 MR. OGILVIE: Well, that's -- no, no. That is
23 not correct. You're not -- the government is not
24 required to allow the most profitable use of property.

25 So, again, putting aside the fact that the

1 government has already approved development in the
2 Badlands, and that's the parcel as a whole. You
3 can't -- you can't carve up the property, the 35 acres.
4 Putting that aside, if you want to focus on the 35-acre
5 property, the government is not required to allow the
6 most profitable use of that property under takings law.
7 It's only required to allow some use. Some economic
8 use. But that's under the Constitution.

9 It is not a taking if you -- it's not a taking
10 if you disapprove a development application unless you
11 can show you've been wiped out or virtually wiped out.

12 So this issue of whether the developer has
13 vested rights or not, that's why the developer is
14 arguing here that they had a vested right in the zoning
15 because it's a -- they're claiming it's a property
16 right, and that if they can't -- that they have a
17 property right to build the exact development they
18 applied for with all its -- all its detail. They're
19 claiming they have -- they have a property --

20 THE COURT: Isn't that --

21 MR. SCHWARTZ: -- right to build whatever they
22 apply for.

23 THE COURT: But in a general sense, my
24 recollection in Sisolak, he didn't have a permit or any
25 approvals by McCarran Airport and/or Clark County

1 specifically when he purchased the property, right,
2 back in the 80s. And so the ordinances were changed
3 that impacted potentially the economic value of his
4 property when it came time to sell. And so he said,
5 Look, Judge, this is a taking of my property, and
6 consequently, I should be compensated for that.

7 MR. SCHWARTZ: No, the developer --

8 THE COURT: I'm paraphrasing there, but, I
9 mean --

10 MR. SCHWARTZ: Yeah.

11 THE COURT: -- isn't that the essence of what
12 happened there?

13 MR. SCHWARTZ: Well, no. It's not, your
14 Honor. The developer didn't show that the -- that
15 his -- the loss of his right to exclude planes from
16 certain -- from flying over his property, he didn't
17 show that that was -- or that the case wasn't decided
18 on whether that had an economic impact on him, like it
19 is here. That case was decided purely on the absolute
20 right to exclude others from your property.

21 In Loretto, you know, the -- which, on which
22 Sisolak is squarely based. In Loretto vs. Manhattan
23 Teleprompter, the cable, the placement of the cable on
24 the apartment house had a de minimis effect on the
25 value of the property. In fact, it probably improved

1 the value of the property. Because the tenants in
2 Loretto, Ms. Loretto's tenants had access to cable
3 telecoverage.

4 But the Court found with physical takings your
5 rights are absolute. If someone deprives you of the
6 right to exclude others, which is one of the most
7 precious rights, then you're entitled to just
8 compensation.

9 Now, the lower court ordered Ms. Loretto a
10 dollar in damages. A dollar. Because the right to
11 exclude others is, in the US Supreme Court's eyes and
12 the Nevada Supreme Court's eyes, sacred. You can't
13 deprive the property owner the right to exclude others.

14 This is a completely different case. This a
15 pure regulatory taking where the developer has the
16 burden to show that because the City didn't approve a
17 specific application or development on one part of the
18 Badlands that they were wiped out, or virtually wiped
19 out. And they can't show that. Again, because the
20 City approved substantial development in the Badlands.

21 And they only filed one application, you know,
22 one or two applications for a very extensive
23 development of the 35-acre property. Which, you know,
24 the City could always approve a lesser development.

25 But putting that aside, that's why the

1 developer needs the Court to say, again, contrary to
2 the Court's order in denying the petition for judicial
3 review that they had -- they had a constitutional
4 right. They had a property right to the City's
5 approval of their application. And that is -- that
6 that would turn all law on its head.

7 THE COURT: I just have one last question for
8 you. So what did the Court rely upon in the Sisolak
9 case from a valuation perspective? And I realize it
10 was a physical taking. I do understand that. But what
11 did the Court rely upon to make that determination?
12 The ordinances that were in place?

13 MR. SCHWARTZ: It relied -- it relied on the
14 law that said the property owner could not exclude
15 others. He couldn't -- it couldn't --

16 THE COURT: No. I'm --

17 (Unreportable cross-talk)

18 MR. SCHWARTZ: -- planes to fly over.

19 THE COURT: From a valuation perspective what
20 did they rely on?

21 MR. SCHWARTZ: I don't think the Court -- I
22 don't recall that the Court decided that issue yet.
23 That may -- that would probably be decided by the trial
24 court on remand that the Court found this is a physical
25 taking. The question there was liability. And when

1 you're talking about value, you have to distinguish
2 between liability for a regulatory taking and then if
3 there's liability, what are the damages.

4 Yeah, that turns on, that's the value of the
5 property. The value is influenced by zoning. You
6 know, you couldn't say that they have an absolute right
7 to approval of the project under the zoning.

8 You know, that's -- appraisers can't do that
9 because that's just not the law. But in -- the same
10 thing with a physical takings case. In Sisolak, there
11 was a finding that the City wasn't liable. And so the
12 Supreme Court found, yes, the City is liable for a
13 physical taking. And so that determination would have
14 had to have been made by the trial court as to -- what
15 is the value of that loss of that right to exclude
16 others.

17 THE COURT: Okay. Sir, anything else?

18 MR. SCHWARTZ: No, your Honor. Thank you.

19 THE COURT: Thank you.

20 All right. We'll hear from the plaintiff.

21 MR. LEAVITT: Thank you, your Honor. James
22 Leavitt on behalf of 180 Land again.

23 Your Honor, you hit -- you hit Sisolak right
24 on the head. And the reason I know about Sisolak is
25 because our office litigated -- actually, we commenced

1 and litigated those air space takings cases for
2 approximately 15 years.

3 Sisolak is an inverse condemnation case
4 exactly like this. Sisolak is a per se regulatory
5 taking case. That's the language the Nevada Supreme
6 Court uses in the case.

7 And the principle underlying number one issue
8 in the Sisolak case, your Honor, was whether the
9 landowner had a property interest. And the Nevada
10 Supreme Court had to decide the same exact issue you're
11 deciding right now, which was what kind of property
12 interest the landowner had in the Sisolak case. And
13 exactly, almost exactly as the City is arguing to you
14 here today, the County of Clark argued in the Sisolak
15 case that Sisolak had no property interest in his air
16 space because he didn't have an approval. Almost
17 verbatim the argument that the City is making to you
18 today was made to the Nevada Supreme Court by the
19 County of Clark, and the Nevada Supreme Court rejected
20 that argument.

21 The Nevada Supreme Court held that every
22 landowner -- exactly as you referenced in your example
23 to counsel. Every landowner in the State of Nevada has
24 a vested right to use, possess, and acquire their
25 property.

1 In fact, your Honor Article 1 Section 1 of the
2 Nevada State Constitution says that every landowner in
3 the state of Nevada has the inalienable right to use,
4 possess, and protect their property.

5 And the Nevada Supreme Court interpreted that
6 to mean that every landowner has the vested right to
7 use their property in the Sisolak case. And so that
8 underlying property interest issue was presented
9 directly to the Court.

10 And here's what the Court said. The Court
11 said an individual must have a property interest to
12 support a takings claim. And then went on to provide
13 the exact same analysis that I provided to you in my
14 opening argument. That you first have to decide that
15 underlying property interest.

16 You don't have to have an approval. You don't
17 have to have an entitlement. You have a property
18 interest. And the Nevada Supreme Court held in those
19 cases that I cited to you previously to determine the
20 property interest that the landowner has you have to
21 rely upon the zoning code. You have to rely upon the
22 zoning to make that determination.

23 And your question was spot on. Well, how did
24 they value the Sisolak property if he didn't have any
25 development applications? If he didn't have any

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1 approval? Well, the way they value the property, your
2 Honor, again, because we were intimately involved in
3 all these air space takings cases, is we valued the
4 property based on zoning. Because that's how it's been
5 done in the state of Nevada for the past 100 years. Is
6 properties are negotiated. Properties are purchased.
7 And people close on properties based upon the zoning.
8 Title is issued based upon the zoning.

9 And simply because you don't have an
10 entitlement or an approval yet, doesn't mean the
11 property has zero value. That same exact issue was
12 brought up in a case called Schwartz vs. State of
13 Nevada. And the State of Nevada made the same argument
14 that the City is making you here today in the Schwartz
15 case. Mr. -- or Phyllis Schwartz in that case argued
16 that she had a property interest to access to her
17 property. And the state of Nevada said, No, you don't
18 have a property interest because you have not yet
19 obtained an encroachment permit.

20 And the Nevada Supreme Court, again, rejected
21 that argument and held that every landowner who abuts a
22 roadway has a right of easement to that roadway which
23 is a property interest.

24 In other words you have the right to use your
25 property. So these arguments that have been made by

1 counsel that nobody in the City of Las Vegas has any
2 vested right until they get a development application
3 from the City of Las Vegas is an argument that's been
4 made by the State of Nevada, it's an argument that's
5 been made by the County of Clark to the Nevada Supreme
6 Court, and it's been flatly rejected. And it's been
7 flatly rejected because Article 1 Section 1 to the
8 Nevada State Constitution says we have an inalienable
9 right to use, possess, and protect our property. And
10 the Nevada Supreme Court interpreted that to mean that
11 every landowner has the vested right to use their
12 property. Therefore, your Honor, we understand Sisolak
13 well. That's what the Sisolak court held.

14 Now counsel, this is like, I think, probably
15 the fifth time counsel has accused me of making -- or
16 California counsel has accused me of making
17 representations. Apparently they're appalling and
18 grossly at this point. Your Honor, I will assure you I
19 will never make an appalling, gross or any type of
20 misrepresentation to this Court.

21 I understand the eminent domain law very well,
22 your Honor. And all we're simply asking for from you
23 today is that first sub inquiry that the Nevada Supreme
24 Court requires the district court to make in every
25 single inverse condemnation case. That's a very narrow

1 request.

2 Ninety-nine percent of what Mr. Schwartz just
3 argued to you has absolutely no relevance whatsoever to
4 that underlying issue. And, in fact, when you read to
5 him our request, it appears that he was somewhat
6 confused because he said, Well, that's not in dispute.
7 I have no idea, frankly, your Honor, why the
8 City of Las Vegas filed a 27-page opposition to this
9 motion.

10 And the reason why I have no idea is because
11 we've been -- Kermitt has been doing this for 45 years,
12 me for 25 years. We've never had once where an
13 opposing counsel in an inverse condemnation case even
14 implied that zoning was irrelevant.

15 In every single inverse condemnation case,
16 including the Sisolak case, including the Alper case,
17 including the Bustos case, the Nevada Supreme Court has
18 held that you must rely upon zoning to determine the
19 underlying property interest.

20 So our request, your Honor, is very
21 straightforward. That you enter a finding that there
22 is R-PD7 zoning on the property. And that the
23 permitted uses by right under the R-PD7 zoning are
24 single family and multifamily residential. And those
25 words "by right", your Honor, appear directly in the

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1 city code. The city code definition of permitted uses
2 is any use allowed in a zoning district as a matter of
3 right. So that's what permitted uses is defined as, as
4 a matter of right.

5 We've also cited to you the land use code, or
6 the land use table. And, your Honor, the City's land
7 use table does not, counsel correctly states, does not
8 include an R-PD7 zoning on the land use table.

9 However, to determine the uses of R-PD7 zoning
10 on the land use table, 19.10.050 clearly states that
11 the type of development permitted within the R-PD
12 district can be more consistently achieved using the
13 standard residential districts. So standard
14 residential districts are listed on the table. And the
15 code says what you're supposed to do for R-PD7 is
16 identify that standard residential district which is
17 most similar to R-PD7. And then -- and then those uses
18 that are permitted under that designation are permitted
19 under R-PD7.

20 We chose RPD2 -- or I'm sorry. We chose R2 on
21 that table because R2 allows 6 to 12 units per acre.
22 R-PD7 allows seven units per acre; therefore they're an
23 equivalent zoning district.

24 And if you look at that, we actually
25 superimposed it on page 13 of our reply. And under the

1 R2 zoning, there is a "P" for single family attached
2 and single family detached.

3 The P symbol is then defined in the table
4 itself. It says the uses permitted as a principle use
5 in that zoning district by right. Therefore, under
6 R-PD7 zoning, under the residential plans development
7 district zoning with a numerical No. 7 behind it, the
8 zoning allows -- or is -- or single family and
9 multifamily residential are uses permitted as a matter
10 of right, your Honor. So that's our request.

11 But I do have to address a couple of things.
12 You had a great question. You said what about property
13 that's not yet zoned? Doesn't it have value? You have
14 a 30-acre zoned commercial property, and the government
15 comes and takes that property, doesn't that -- isn't
16 there some value to that property? And then the
17 counsel's response to you, Well, that was a direct
18 case. This is an inverse case.

19 Well, California counsel perhaps doesn't know
20 that in the Alper decision, the Nevada Supreme Court
21 held that inverse condemnation rules are the same as
22 direct condemnation rules in the state of Nevada. What
23 the Nevada Supreme Court held is they said, We're not
24 going to apply one set of rules in a direct
25 condemnation case and an entirely different set of

1 rules in an inverse condemnation case.

2 The Nevada Supreme Court said the same exact
3 rules that apply to a direct case apply to an inverse
4 case. Meaning, in a direct case, you still have to
5 determine the property interest, your Honor. How are
6 you going to determine how to value it? Just the same
7 as you have to determine the property interest in an
8 inverse condemnation case.

9 New, I will say, your Honor, that when you
10 read the two requests that we made, counsel stated flat
11 out that's not in dispute. Your Honor, so that we
12 would ask that those two requests that we made to you
13 be put into an order because counsel said they're not
14 in dispute.

15 Counsel even said, your Honor, that's what the
16 statute says. He admitted to it. I'm not -- I'm,
17 frankly, somewhat confused why we have a 27-page
18 opposition from the City when all we're asking for is
19 this very narrow finding.

20 Again, 99 percent of what was just argued goes
21 to the taking issue which certainly, your Honor, we are
22 going to address at a later date. But I will -- I will
23 clarify one thing right now.

24 Our claim is not that the City denied one
25 application. Our claim is that the City engaged in

1 systematic and aggressive actions to prohibit all use
2 of the 35-acre property. You've heard those actions,
3 your Honor. It's not one. It's not two. It's not
4 three. It's eleven actions that the City engaged in to
5 stop and preclude all use of this property.

6 Now, of course, that's not being argued now.
7 We will argue that at a later date. But that's what
8 our claim is based upon. We've argued that to you in a
9 motion for summary judgment. You know that it's not
10 just one act by the City of Las Vegas but an aggregate
11 of numerous acts.

12 Now, last thing I'll address, your Honor, is
13 this issue about the petition for judicial review.
14 Okay. What counsel is saying is this. You don't have
15 a vested right in a petition for judicial review. That
16 means you don't have a vested right in an inverse
17 condemnation case.

18 Your Honor, you'll remember we argued this
19 issue three times before you. And in three different
20 orders you rejected that argument by the government.
21 Here's the March -- I believe it's the March -- yeah,
22 I'm sorry. The May 15th order. The May 15 order that
23 you entered, this is what was said. And this is why
24 you said that the petition for judicial review law
25 cannot be applied in an inverse case.

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1 Because you said in that order:

2 In an inverse condemnation case every
3 landowner in the state of Nevada has the vested
4 right to possess, use, and enjoy their
5 property. And if this right is taken, just
6 compensation must be paid.

7 And then you continued:

8 On the other hand, in petitions for
9 judicial review, the City has discretion to
10 deny a land use application as long as valid
11 zoning laws are applied.

12 So the way the interaction occurs here, your
13 Honor, is in a petition for judicial review certainly
14 the City of Las Vegas has discretion to deny a land use
15 application. However, when we move over to the inverse
16 condemnation proceeding, the City is responsible for
17 that discretion and must pay just compensation if it
18 denies the use of the property, all use of the
19 property.

20 And, by the way, your Honor, you had a good
21 question there. It doesn't have to be a denial of all
22 use of the property. The Nevada Supreme Court in the
23 Ad America case adopted de facto taking law in the
24 state of Nevada and found and adopt -- and relied upon
25 a case out of the Ninth Circuit where the landowners

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1 still had 1/3rd use of their property, and the Court
2 still found a taking because there was an economic
3 deprivation of property.

4 So when we get to that taking part, your
5 Honor, the Nevada Supreme Court has allowed just
6 compensation where there is an economic deprivation.
7 But that's a side note.

8 So, your Honor, in your orders in this inverse
9 condemnation case, which is why we don't need to go do
10 a motion for reconsideration in the petition for
11 judicial review, here's what you concluded in regards
12 to the property interest. You said in the May 15
13 order, Because we litigated this issue already any
14 determination of whether the landowner has a property
15 interest or the vested right to use the 35-acre
16 property must be based on eminent domain law rather
17 than the land use law that was relied upon in the
18 petition for judicial review.

19 That's why the petition for judicial review
20 findings cannot carry over to this side of the case.
21 Because even though there's discretion to deny land use
22 applications, when you move to an eminent domain case,
23 the Nevada Supreme Court has been very clear, every
24 landowner has a vested right to use their property.
25 Period.

1 And if the government prohibits that use, even
2 if it exercises its discretion, even if it has the
3 purest of intents, the government has to pay just
4 compensation for that loss.

5 Now, your Honor, there were several other
6 arguments, your Honor, that were absolutely irrelevant
7 to what we've talked about here. I'm going to save
8 those arguments for the day when we address the second
9 issue, which is whether the property has been taken.
10 But I just want to conclude by saying the zoning is
11 R-PD7. That's undisputed. The Nevada Supreme Court --
12 or the city code expressly states that single family
13 use and multifamily -- single family residential and
14 multifamily residential are uses permitted as a matter
15 of right. That's the words right out of the code.

16 So, your Honor, we respectfully request that
17 our motion be granted. Counsel himself said that it's
18 not in dispute. We can prepare the order consistent
19 with the motion and consistent with your findings here
20 today, your Honor.

21 Do you have any other questions for me, Judge?

22 THE COURT: No. I just have one just
23 overwhelming comment. And I think this can't be
24 overlooked because the denial of a land use application
25 by a governmental entity is a much different animal

1 than the bundle of rights held by a property owner as
2 it relates to real property ownership, which is very,
3 very unique and recognized under both the Nevada and
4 the United States Constitution. And it's a different
5 animal. And that's why I mentioned that a little
6 earlier. We're talking about a bundle of rights owned
7 by all property owners that own property.

8 And I think the Sisolak case was a pretty good
9 example as I thought about this issue. And he had a
10 certain bundle of rights that apparently based upon
11 government action and changes in ordinances as it
12 relates to his property that impacted the value.

13 MR. LEAVITT: Absolutely.

14 THE COURT: You know, and that's what we're
15 talking about here in a general sense.

16 And so what I'm going to do as far as the
17 motion is concerned, I'm going to grant the motion.

18 I see it's a different animal. And I do have
19 to have some baseline to work from. And that's to
20 determine what the bundle of rights the landowner has
21 in this case. I'm not -- whether -- and the land use
22 application is rejected or accepted, I'm not going
23 to -- that's not what's before me today. I'm just
24 determining what the bundle of rights will be.

25 And so anyway, Mr. Leavitt, prepare an order

1 for me and circulate it. If you can't agree on the
2 contents of the order, you can -- you can submit
3 competing orders.

4 MR. LEAVITT: I will do that, your Honor. And
5 thank you, your Honor --

6 MR. SCHWARTZ: Your Honor.

7 MR. LEAVITT: -- for your time.

8 THE COURT: Yes.

9 MR. SCHWARTZ: Your Honor, this is Andrew
10 Schwartz. Can I ask a question, please?

11 THE COURT: Yes.

12 MR. SCHWARTZ: I think we've had a long
13 hearing here. And we've -- we have -- in his final
14 comments, Mr. Leavitt made it clear that they want more
15 than what they asked for in the last page of their
16 motion. They want -- they want "by right" or
17 "permitted" to mean that they have a property interest.
18 So they're asking the Court to do more than just
19 verbatim grant what they asked for in the last section
20 of their brief. And --

21 MR. LEAVITT: Your Honor.

22 MR. SCHWARTZ: We've had this very long
23 hearing. And I don't think we understand. I don't
24 think there's any understanding of what by right or
25 permitted means.

1 MR. LEAVITT: Your Honor, I can prepare the
2 order.

3 MR. SCHWARTZ: We're just going to have
4 another -- it would seem to me, we're going to have to
5 have another proceeding to determine what that means
6 which is -- which is what counts.

7 MR. LEAVITT: Well, your Honor, I can prepare
8 the order consistent with the motion and consistent
9 with what counsel stated they do not dispute, which are
10 the two requests that we make in the order.

11 If they feel that there's something else that
12 needs to be litigated at that point in time, we can
13 litigate it. But it's not before the Court at this
14 time.

15 THE COURT: All right. Anything else?

16 MR. LEAVITT: That's it, your Honor. We'll
17 prepare the order.

18 THE COURT: Okay. And prepare the order. And
19 if you disagree on the contents, submit competing
20 orders, and I'll sign whichever one I feel is
21 appropriate or prepare my own order.

22 MR. LEAVITT: I appreciate that. Thank you,
23 your Honor. And thank you so much for your time. And
24 have a great day and be safe.

25 THE COURT: Everyone enjoy your day.

1 MS. HAM: Thank you, your Honor.

2 MR. LEAVITT: Thank you.

3

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5 (Proceedings were concluded.)

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1 REPORTER'S CERTIFICATE

2 STATE OF NEVADA)

:SS

3 COUNTY OF CLARK)

4 I, PEGGY ISOM, CERTIFIED SHORTHAND REPORTER DO
5 HEREBY CERTIFY THAT I TOOK DOWN IN STENOGRAPH ALL OF THE
6 TELEPHONIC PROCEEDINGS HAD IN THE BEFORE-ENTITLED
7 MATTER AT THE TIME AND PLACE INDICATED, AND THAT
8 THEREAFTER SAID STENOGRAPH NOTES WERE TRANSCRIBED INTO
9 TYPEWRITING AT AND UNDER MY DIRECTION AND SUPERVISION
10 AND THE FOREGOING TRANSCRIPT CONSTITUTES A FULL, TRUE
11 AND ACCURATE RECORD TO THE BEST OF MY ABILITY OF THE
12 PROCEEDINGS HAD.

13 IN WITNESS WHEREOF, I HAVE HEREUNTO SUBSCRIBED
14 MY NAME IN MY OFFICE IN THE COUNTY OF CLARK, STATE OF
15 NEVADA.

16

17

18 /s/ Peggy Isom
19 PEGGY ISOM, RMR, CCR 541

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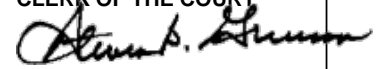
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DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND CO LLC, a Nevada limited liability
company, FORE STARS, LTD., a Nevada limited
liability company and SEVENTY ACRES, LLC, a
Nevada limited liability company, DOE
INDIVIDUALS I-X, DOE CORPORATIONS I-X,
and DOE LIMITED LIABILITY COMPANIES I-X,

Plaintiffs,

v.

CITY OF LAS VEGAS, a political subdivision of
the State of Nevada; ROE GOVERNMENT
ENTITIES I-X; ROE CORPORATIONS I-X; ROE
INDIVIDUALS I-X; ROE LIMITED-LIABILITY
COMPANIES I-X; ROE QUASI-
GOVERNMENTAL ENTITIES I-X,

Defendants.

CASE NO.: A-17-758528-J
DEPT. NO.: XVI

**NOTICE OF ENTRY OF ORDER
GRANTING THE CITY OF LAS
VEGAS' MOTION TO COMPEL AND
FOR AN ORDER TO SHOW CAUSE**

PLEASE TAKE NOTICE that the Order Granting the City of Las Vegas' Motion to
Compel and for an Order to Show Cause was entered in the above-captioned case on the 7th day of
October, 2020, a copy of which is attached hereto.

...

...

...

DATED: October 7, 2020.

McDONALD CARANO LLP

By: /s/ George F. Ogilvie III
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396 Hayes Street
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Attorneys for City of Las Vegas

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on the 7th day of October, 2020, I caused a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER GRANTING THE CITY OF LAS VEGAS' MOTION TO COMPEL AND FOR AN ORDER TO SHOW CAUSE** to be electronically served with the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification, and as referenced below to the following:

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Attorneys for City of Las Vegas

DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND CO LLC, a Nevada limited liability
company, FORE STARS, LTD., a Nevada limited
liability company and SEVENTY ACRES, LLC, a
Nevada limited liability company, DOE
INDIVIDUALS I-X, DOE CORPORATIONS I-
X, and DOE LIMITED LIABILITY
COMPANIES I-X,

Plaintiffs,

v.

CITY OF LAS VEGAS, a political subdivision of
the State of Nevada; ROE GOVERNMENT
ENTITIES I-X; ROE CORPORATIONS I-X;
ROE INDIVIDUALS I-X; ROE LIMITED-
LIABILITY COMPANIES I-X; ROE QUASI-
GOVERNMENTAL ENTITIES I-X,

Defendants.

CASE NO.: A-17-758528-J

DEPT. NO.: XVI

**ORDER GRANTING THE CITY OF
LAS VEGAS' MOTION TO COMPEL
AND FOR AN ORDER TO SHOW
CAUSE**

On September 9, 2020, the Court held a hearing on the Motion to Compel and For An Order
To Show Cause (the "Motion") filed by Defendant City of Las Vegas ("City") against third-party
Peccole-Nevada Corporation ("Peccole-Nevada"). George F. Ogilvie III, Esq., Seth T. Floyd, Esq.,
Andrew W. Schwartz, Esq. and Lauren Tarpey, Esq. appeared on behalf of the City; and James J.
Leavitt, Esq. and Elizabeth Ghanem Ham, Esq. appeared on behalf of Plaintiffs 180 Land Co., LLC
...

1 (“180 Land”) and Fore Stars, Ltd. (“Fore Stars”) (collectively “Plaintiff”). No appearance was
2 made on behalf of Peccole-Nevada.

3 Having considered (i) the Motion and exhibits attached thereto, including the Declaration
4 of George F. Ogilvie III, Esq., (ii) the Plaintiff’s Opposition to Defendant City of Las Vegas’
5 Motion to Compel and for an Order to Show Cause (“Opposition”), (iii) Supplement to Plaintiffs’
6 Opposition to Defendant City of Las Vegas’ Motion to Compel and for Order to Show Cause
7 (“Supplement”), (iv) the City’s Reply in Support of Its Motion to Compel and For An Order to
8 Show Cause (“Reply”), and (v) the oral arguments of counsel, and good cause appearing, the Court
9 finds, concludes and orders as follows:

10 **FINDINGS**

11 1. On March 6, 2020, the City served a Notice of Taking the Deposition of the
12 Custodian of Records for Peccole-Nevada Corporation and Notice of Issuance of Subpoena Duces
13 Tecum (“Peccole COR Notice”) on the Plaintiff to allow the Plaintiff to object to and seek the
14 issuance of a protective order against the Subpoena should it want to do so.

15 2. On March 9, 2020, the City also served a Notice of Taking the Deposition of NRCP
16 30(b)(6) Designee of Peccole-Nevada Corporation and Notice of Issuance of Subpoena Duces
17 Tecum (“Peccole 30(b)(6) Notice”) on the Plaintiff.

18 3. The Plaintiff did not object to either the Peccole COR Notice or the Peccole 30(b)(6)
19 Notice. And the Plaintiff also chose not to file any motion for a protective order.

20 4. On March 18, 2020, the City served the Peccole-Nevada NRCP 30(b)(6) Subpoena
21 Duces Tecum (“30(b)(6) Subpoena”) on Peccole-Nevada and on March 19, 2020, the City served
22 the COR Subpoena, which was the subject of the City’s Motion, on Peccole-Nevada.

23 5. The City effectuated service on Peccole-Nevada prior to the issuance of
24 Administrative Order 20-09 (“AO 20-09”), which precluded the service of subpoenas for 30 days
25 starting from March 20, 2020.

26 6. On March 18, 2020, Peccole-Nevada contacted the City regarding compliance with
27 the 30(b)(6) Subpoena. The City agreed to work with Peccole-Nevada regarding the timing of the
28 30(b)(6) deposition, noting that the City also served the COR Subpoena on Peccole-Nevada and

1 further stating that once Peccole-Nevada produced the documents in response to the COR
2 Subpoena, then the parties could discuss the 30(b)(6) deposition.

3 7. Peccole-Nevada did not file any motion to quash or motion for a protective order.

4 8. On June 8, 2020, in-house counsel for EHB Companies, the Plaintiff's parent
5 company, sent an email to Peccole-Nevada and copied the City. Counsel represented that there
6 existed a protective order over the requested documents based on a minute order by the Discovery
7 Commissioner and that the Plaintiff absolutely objects to the disclosure of any responsive
8 documents. However, there did not, and does not, exist any protective order.

9 9. On July 22, 2020, the Plaintiff's counsel again emailed Peccole-Nevada and told
10 Peccole-Nevada to hold off on producing any responsive documents.

11 10. Between March 2020 and July 2020, Peccole-Nevada represented to the City, on at
12 least three separate occasions, that Peccole-Nevada had responsive documents in its possession that
13 it would be producing in response to the COR Subpoena.

14 11. The City and Peccole-Nevada engaged in multiple discussions both through email
15 and/or telephone on April 27; April 28; May 27; June 2; June 9; and July 19-21, 2020.

16 12. On or about July 24, 2020, Plaintiff's counsel spoke with the City's counsel and
17 proposed that the documents requested be subject to a protective order and, if agreed, would be
18 produced. The City did not accept Plaintiff's offer.

19 13. On July 27, Plaintiff's counsel sent an email to the City's counsel and requested a
20 response to the July 24, 2020 proposal. The City did not respond.

21 14. Because Peccole-Nevada only produced one document on June 10, 2020 that was
22 responsive to the COR Subpoena, the City filed its Motion on July 31, 2020.

23 15. On August 14, 2020, the Plaintiff filed its Opposition and, on August 24, 2020, the
24 Plaintiff filed a Supplement to its Opposition.

25 16. Peccole-Nevada did not file an Opposition to the Motion. Instead, according to
26 Peccole-Nevada's counsel's declaration attached to the Supplement, the Plaintiff informed Peccole-
27 Nevada that the Plaintiff would provide defense and indemnification to Peccole-Nevada.

28 17. On September 2, 2020, the City filed its Reply.

1 18. On September 9, 2020, the Court held a hearing on the Motion.

2 19. If any of these findings of fact should more properly be identified as a conclusion of
3 law, it shall be deemed a conclusion of law.

4 **CONCLUSIONS**

5 1. Pursuant to Rule 45(a)(1)(D) of the Nevada Rules of Civil Procedure, a party may
6 command any third party to “produce documents, electronically stored information, or tangible
7 things,” which “requires the responding person to permit inspection, copying, testing, or sampling
8 of the materials.” *See* NRCPC 45(a)(1)(D).

9 2. “To invoke the protections of [Rule 45], the objecting party must file and serve
10 written objections to the subpoena and a motion for protective order under Rule 26(c) within 7 days
11 after being served with notice and a copy of the subpoena under Rule 45(a)(4)(A).” *See* NRCPC
12 45(a)(4)(B)(ii).

13 3. The responding third party may also serve objections to the subpoena; however,
14 Rule 45 mandates that the “person making the objection must serve it before the earlier of the time
15 specified for compliance or 14 days after the subpoena is served.” *See* NRCPC 45(c)(2)(B).

16 4. Rule 45 further allows a third party to file a motion to quash or modify a subpoena,
17 but the motion must be “timely.” *See* NRCPC 45(c)(3).

18 5. The Plaintiff did not object to the notice of the COR Subpoena, nor did it file a
19 motion for a protective order.

20 6. Peccole-Nevada did not object to the COR Subpoena, nor did it file a motion to
21 quash or modify the COR Subpoena.

22 7. Rule 37(a)(1) of the Nevada Rules of Civil Procedure provides that “[o]n notice to
23 other parties and all affected persons, a party may move for an order compelling disclosure or
24 discovery.”

25 8. Rule 45(c)(2)(B)(ii) of the Nevada Rules of Civil Procedure also allows a party who
26 issued a subpoena to move for an order compelling production.

27 9. The City properly noticed and served the COR Subpoena, and Peccole-Nevada must
28 be compelled to provide all responsive documents to the City.

10. If any of these conclusions of law should more properly be identified as a finding of fact, then it shall be deemed a finding of fact.

ORDER

IT IS HEREBY ORDERED that the City's Motion is **GRANTED**.

IT IS HEREBY FURTHER ORDERED that Peccole-Nevada is compelled to produce the documents and information requested under the COR Subpoena within seven (7) calendar days from the notice of entry of this Order.

IT IS HEREBY FURTHER ORDERED that the City's request for sanctions is **DENIED**.

Dated this 7th day of October, 2020.

Timothy C. Williams
DISTRICT COURT JUDGE ZJ

Submitted By:

McDONALD CARANO LLP

Content Reviewed and Approved By:

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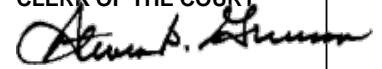
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7 (Additional Counsel Identified on Signature Page)

8 *Attorneys for City of Las Vegas*

10 **DISTRICT COURT**

11 **CLARK COUNTY, NEVADA**

12 180 LAND CO LLC, a Nevada limited liability
company, FORE STARS, LTD., a Nevada limited
13 liability company and SEVENTY ACRES, LLC, a
Nevada limited liability company, DOE
14 INDIVIDUALS I-X, DOE CORPORATIONS I-X,
and DOE LIMITED LIABILITY COMPANIES I-X,

15 Plaintiffs,

16 v.

17 CITY OF LAS VEGAS, a political subdivision of
the State of Nevada; ROE GOVERNMENT
18 ENTITIES I-X; ROE CORPORATIONS I-X; ROE
INDIVIDUALS I-X; ROE LIMITED-LIABILITY
19 COMPANIES I-X; ROE QUASI-
GOVERNMENTAL ENTITIES I-X,
20

21 Defendants.

CASE NO.: A-17-758528-J
DEPT. NO.: XVI

**NOTICE OF ENTRY OF ORDER
GRANTING THE CITY OF
LAS VEGAS' OBJECTION TO THE
DISCOVERY COMMISSIONER'S
REPORT AND
RECOMMENDATIONS**

23 **PLEASE TAKE NOTICE** that the Order Granting the City of Las Vegas' Objection to the
24 Discovery Commissioner's Report and Recommendations was entered in the above-captioned case
25 on the 12th day of October, 2020, a copy of which is attached hereto.

26 ...

27 ...

28 ...

DATED: October 12, 2020.

McDONALD CARANO LLP

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on the 12th day of October, 2020, I caused a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER GRANTING THE CITY OF LAS VEGAS' OBJECTION TO THE DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS** to be electronically served with the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification, and as referenced below to the following:

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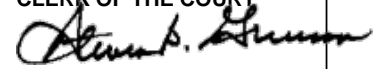
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/s/ Jelena Jovanovic

An employee of McDonald Carano LLP



ORDER

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Attorneys for City of Las Vegas

DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND CO LLC, a Nevada limited liability
company, FORE STARS, LTD., a Nevada limited
liability company and SEVENTY ACRES, LLC, a
Nevada limited liability company, DOE
INDIVIDUALS I-X, DOE CORPORATIONS I-
X, and DOE LIMITED LIABILITY
COMPANIES I-X,

Plaintiffs,

v.

CITY OF LAS VEGAS, a political subdivision of
the State of Nevada; ROE GOVERNMENT
ENTITIES I-X; ROE CORPORATIONS I-X;
ROE INDIVIDUALS I-X; ROE LIMITED-
LIABILITY COMPANIES I-X; ROE QUASI-
GOVERNMENTAL ENTITIES I-X,

Defendants.

CASE NO.: A-17-758528-J

DEPT. NO.: XVI

**ORDER GRANTING THE CITY OF
LAS VEGAS' OBJECTION TO THE
DISCOVERY COMMISSIONER'S
REPORT AND RECOMMENDATIONS**

On August 13, 2020, the Court held a hearing on the Objection to the Discovery
Commissioner's Report and Recommendations ("Objection") filed by Defendant City of Las Vegas
("City"). George F. Ogilvie III, Esq., Andrew W. Schwartz, Esq. and Phil Byrnes, Esq. appeared
on behalf of the City; and James J. Leavitt, Esq. and Elizabeth Ghanem Ham, Esq. appeared on
behalf of Plaintiffs 180 Land Co., LLC ("180 Land") and Fore Stars, Ltd. ("Fore Stars")

1 (collectively “Plaintiff”). For purposes of this Order only, the City and 180 Land are at times
2 referred to herein as the “Parties.”

3 Having considered (i) the Discovery Commissioner’s July 7, 2020 Report and
4 Recommendations (“DCRR”), (ii) the City’s Objection, (iii) Plaintiffs’ Response to Defendant City
5 of Las Vegas’ Objection to DCRR (“Response”), (iv) the facts of this case, (v) the Parties’ proposed
6 stipulated protective agreement, and (vi) the oral arguments of counsel, and good cause appearing,
7 the Court finds, concludes and orders as follows:

8 **FINDINGS**

9 1. This is one of four inverse condemnation actions filed by the Plaintiff and/or its
10 affiliates against the City related to approximately 250 acres of land commonly referred to in this
11 litigation as the “Badlands Property.”

12 2. The other three inverse condemnation actions are: (i) Eighth Judicial District Court
13 Case No.: A-18-780184-C; (ii) United States District Case No.: 2-19-cv-01469-JAD-NJK; and (iii)
14 United States District Court Case No.: 2-19-cv-01470-RFB-BNW.

15 3. On July 2, 2019, the City served, among other written discovery, Requests for
16 Production of Documents (“Requests”) on 180 Land.

17 4. On August 1, 2019, 180 Land provided a letter to the City representing that 180
18 Land’s responses to the Requests were not complete.

19 5. Between August and September 2019, the City and 180 Land engaged in
20 correspondence regarding 180 Land’s responses to the Requests.

21 6. On October 8, 2019, the City’s counsel requested 180 Land produce its responses to
22 the Requests and all responsive documents by October 18, 2019.

23 7. On October 9, 2019, 180 Land requested an extension from October 18, 2019 to
24 October 25, 2019 to respond to the Requests and produce the responsive documents.

25 8. On October 25, 2019, 180 Land requested an additional week to respond to the
26 Requests and produce the responsive documents.

27 9. On October 31, 2019, 180 Land requested the City enter into a stipulated protective
28 order to allow 180 Land to produce certain documents responsive to the Requests.

1 10. The City stated that it was willing to enter into a stipulated protective order but did
2 not agree to the proposed form and content provided by 180 Land as it was too onerous and
3 burdensome on the City.

4 11. Throughout November and December 2019, the City and 180 Land exchanged draft
5 stipulated protective orders.

6 12. In exchanging draft stipulated protective orders, the City and 180 Land could not
7 agree on the scope of the protective order, but the email communications between the City's counsel
8 and 180 Land's counsel demonstrates that 180 Land unequivocally agreed that the documents and
9 information produced by 180 Land in this matter could be used in the other three inverse
10 condemnation cases.

11 13. Because the City and 180 Land could not agree on whether the City could use the
12 information and documents produced by 180 Land in other non-inverse condemnation cases
13 between the Developer and/or its affiliates and the City, and because the Developer had taken the
14 position that dismissed plaintiff Seventy Acres, LLC ("Seventy Acres")¹ did not need to respond
15 to interrogatories propounded on it by the City since the City had already served interrogatories on
16 180 Land, the City filed a Motion to Compel Discovery (the "Motion").

17 14. On March 12, 2020, 180 Land filed its Opposition to Defendant City of Las Vegas'
18 Motion to Compel Discovery. 180 Land's Opposition did not oppose or object to its information
19 and documents produced in this matter being used in the other three inverse condemnation actions.

20 15. During the April 16, 2020 hearing on the City's Motion to Compel Discovery, 180
21 Land admitted that it had already agreed to allow the City to use the information and documents
22 produced in this matter in the other three inverse condemnation cases. *See* April 16, 2020 Transcript
23 of Proceedings at 10:23-24 ("MS. GHANEM HAM: ...So I want be clear, as well, we did agree to
24 allow them to use it in other – even in other inverse cases.") and 18:15-16 ("So we have already
25 agreed to allow them to use it in other inverse condemnation matters.").

26 _____
27 ¹ At the time the City served its interrogatories on Seventy Acres and filed its Motion to
28 Compel Discovery with the Discovery Commissioner, Seventy Acres was still a plaintiff in this
matter.

1 16. On July 7, 2020, the Discovery Commissioner issued her Report and
2 Recommendations recommending, in pertinent part, that the information and documents produced
3 by 180 Land would be protected pursuant to Rule 26(c) of the Nevada Rules of Civil Procedure to
4 be used in this matter only.

17. The Discovery Commissioner also stayed the responses owed by Seventy Acres to the City's interrogatories to allow Seventy Acres to file a motion to dismiss with the Court and remove itself as a party.

8 18. On April 28, 2020, the Developer filed a motion to dismiss Seventy Acres from the
9 case. On May 14, 2020, the Court granted the Developer's the motion to dismiss, and dismissed
0 Seventy Acres.

1 19. On July 10, 2020, the City filed its Objection, arguing that the Discovery
2 Commissioner ignored the agreement between 180 Land and the City that the City could use the
3 information and documents in this matter in the other three inverse condemnation cases. The City
4 also argued that the Discovery Commissioner erred in staying Seventy Acres' responses to the
5 interrogatories.

20. On July 23, 2020, 180 Land filed its Response. Although 180 Land admitted that it had agreed to allow discovery from this matter to be used in the three other inverse condemnation cases, 180 Land opposed the City's Objection, arguing that there was no stipulated protective order in place because the City rejected the offer and instead filed a motion to compel. 180 Land further argued that the City sought to circumvent discovery principles and use this matter to conduct discovery in other matters.

21. 180 Land also argued that because Seventy Acres was now a non-party, the Court could not order it to respond to prior written discovery.

24 22. If any of these findings of fact should more properly be identified as a conclusion of
25 law, it shall be deemed a conclusion of law.

26 CONCLUSIONS

1. EDCR 2.34(f)(1) provides that “[w]ithin 14 days after being served with a report, any party may file and serve written objections to the recommendations. Points and authorities may

1 be filed with an objection but are not mandatory. If points and authorities are filed, any other party
2 may file and serve responding points and authorities within 7 days after being served with
3 objections.”

4 2. Rule 26(c) of the Nevada Rules of Civil Procedure allows a Court to issue a
5 protective order to, among other things, specify terms for the disclosure or discovery or to limit the
6 scope of disclosure or discovery to certain matters. *See* NRCp 26(c)(1)(B) and (D).

7 3. Under the facts of this case, the Court cannot limit the use of discovery to this
8 litigation only.

9 4. Because the Court dismissed Seventy Acres from the case and Seventy Acres is now
10 deemed a “non-party,” the Court does not have jurisdiction over Seventy Acres to compel it to
11 respond to the interrogatories propounded on it by the City.

12 5. If any of these conclusions of law should more properly be identified as a finding
13 of fact, then it shall be deemed a finding of fact.

14 **ORDER**

15 **IT IS HEREBY ORDERED** that the City’s Objection is **GRANTED IN PART** and
16 **DENIED IN PART**.

17 **IT IS HEREBY FURTHER ORDERED** that the documents and information produced in
18 this litigation are not limited to this litigation only and may be used by the City in the three other
19 inverse condemnation cases: (i) Eighth Judicial District Court Case No.: A-18-780184-C; (ii)
20 United States District Case No.: 2-19-cv-01469-JAD-NJK; and (iii) United States District Court
21 Case No.: 2-19-cv-01470-RFB-BNW.

22 **IT IS HEREBY FURTHER ORDERED** that the documents and information withheld by
23 180 Land and which were the subject of the City’s Motion shall be produced within five (5) calendar
24 days after the notice of entry of this Order is filed.

25 ...

26 ...

27 ...

28 ...

IT IS HEREBY FURTHER ORDERED that because this Court no longer has jurisdiction over non-party Seventy Acres, the Court cannot compel Seventy Acres to respond to the interrogatories propounded on it by the City.

Dated this 9th day of October, 2020.


DISTRICT COURT JUDGE ZJ

Submitted By:

McDONALD CARANO LLP

Content Reviewed and Approved By:

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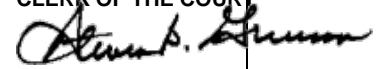
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15 *Attorneys for Plaintiff Landowners*

16 **DISTRICT COURT**
17 **CLARK COUNTY, NEVADA**

18 180 LAND COMPANY, LLC, a Nevada limited
19 liability company and FORE STARS, Ltd., DOE
20 INDIVIDUALS I through X, DOE
21 CORPORATIONS I through X, and DOE
22 LIMITED LIABILITY COMPANIES I through
23 X,

24 Plaintiffs,

25 vs.

26 CITY OF LAS VEGAS, political subdivision of
27 the State of Nevada, ROE government entities I
28 through X, ROE CORPORATIONS I through X,
ROE INDIVIDUALS I through X, ROE LIMITED
LIABILITY COMPANIES I through X,

Defendant.

) CASE NO.: A-17-758528-J

) DEPT. NO.: XVI

) **NOTICE OF ENTRY OF FINDINGS**
) **OF FACT AND CONCLUSIONS OF**
) **LAW REGARDING PLAINTIFF**
) **LANDOWNERS' MOTION TO**
) **DETERMINE "PROPERTY**
) **INTEREST"**

1 **NOTICE IS HEREBY GIVEN** that Findings of Fact and Conclusions of Law Regarding
2 Plaintiff Landowners' Motion to Determine "Property Interest" was entered in the above-captioned
3 case on October 12, 2020, a copy of which is attached hereto.

4 DATED this day 12th day of October, 2020.

5 **LAW OFFICES OF KERMIT L. WATERS**

6
7 **By:** /s/ James J. Leavitt

8 KERMIT L. WATERS, ESQ.

9 Nevada Bar No. 2571

10 JAMES J. LEAVITT, ESQ.

11 Nevada Bar No. 6032

12 MICHAEL SCHNEIDER, ESQ.

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14 AUTUMN WATERS, ESQ.

15 Nevada Bar No. 8917

16 *Attorneys for Plaintiff Landowners*

1 **CERTIFICATE OF SERVICE**

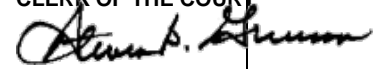
2 I HEREBY CERTIFY that I am an employee of the Law Offices of Kermitt L. Waters, and
3 that on the 12th day of October, 2020, I caused to be served a true and correct copy of the foregoing
4 document(s): **NOTICE OF ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW**
5 **REGARDING PLAINTIFF LANDOWNERS' MOTION TO DETERMINE "PROPERTY**
6 **INTEREST"** via the Court's filing and/or for mailing in the U.S. Mail, postage prepaid and
7 addressed to the following:

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24 /s/ Evelyn Washington
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Attorneys for Plaintiff Landowners

**DISTRICT COURT
CLARK COUNTY, NEVADA**

180 LAND COMPANY, LLC, a Nevada limited liability company, and FORE STARS, Ltd., DOE INDIVIDUALS I through X, DOE CORPORATIONS I through X, and DOE 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

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW REGARDING
PLAINTIFF LANDOWNERS' MOTION
TO DETERMINE "PROPERTY
INTEREST"**

Hearing Date: September 17, 2020
Hearing Time: 9:00 a.m.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs, 180 LAND COMPANY, LLC and FORE STARS, Ltd (hereinafter Landowners), brought Plaintiff Landowners' Motion to Determine Property Interest before the Court on September 17, 2020, with James Jack Leavitt, Esq of the Law Offices of Kermitt L. Waters, appearing for and on behalf of the Landowners along with the Landowners' corporate counsel, Elizabeth Ghanem Ham, Esq., and George F. Ogilve III Esq. and Andrew Schwartz, Esq. appearing for and on behalf

1 of the Defendant, City of Las Vegas (hereinafter the City). Having reviewed all pleadings and
2 attached exhibits filed in this matter and having heard extensive oral arguments on September 17,
3 2020, in regards to Plaintiff Landowners' Motion to Determine Property Interest, the Court hereby
4 enters the following Findings of Fact and Conclusions of Law:

5 **FINDINGS OF FACT**

6 1. Plaintiff 180 Land Company, LLC is the owner of an approximately 35 acre parcel of
7 property generally located near the southeast corner of Hualapai Way and Alta Drive within the
8 geographic boundaries of the City of Las Vegas, more particularly described as Clark County
9 Assessor Parcel 138-31-201-005 (hereinafter 35 Acre Property).

10 2. The Landowners' Motion to Determine Property Interest requests this Court enter an order
11 that: 1) the 35 Acre Property is hard zoned R-PD7 as of the relevant September 14, 2017, date of
12 valuation; and, 2) that the permitted uses by right under the R-PD7 zoning are single-family and
13 multi-family residential.

14 3. In their submitted briefs, the Landowners and the City presented evidence that the 35 Acre
15 Property has been zoned R-PD7 since at least 1990, including: 1) Z-17-90, Resolution of Intent to
16 Rezone the 35 Acre Property to R-PD7, dated March 8, 1990 (Exhibit H to City's Opposition, Vol.
17 1:00193); and, Ordinance 5353, passed by the City of Las Vegas City Council in 2001, which hard
18 zoned the 35 Acre Property to R-PD7 and repealed anything in conflict (Exhibit 10 to Landowners'
19 Motion).

20 4. In response to the Landowners' inquiry regarding zoning prior to purchasing the 35 Acre
21 Property, on December 30, 2014, the City of Las Vegas Planning & Development Department
22 provided the Landowners a Zoning Verification Letter, stating, in part: 1) the 35 Acre Property is
23 "zoned R-PD7 (Residential Planned Development District - 7 unites per acre);" 2) "[t]he density
24 allowed in the R-PD District shall be reflected by a numerical designation for that district.
25 (Example, R-PD4 allows up to four units per gross acre.); and 3) "A detailed listing of the
26 permissible uses and all applicable requirements for the R-PD Zone are located in Title 19 ("Las
27 Vegas Zoning Code") of the Las Vegas Municipal Code." Exhibit 3 to Landowners' Motion.
28

1 5. The City stated in its opposition to the Landowners' motion that the R-PD7 zoning on the
2 35 Acre Property "is not disputed." City's Opposition to Motion to Determine Property Interest,
3 10:17-18.

4 6. As stated in the City Zoning Verification Letter provided to the Landowners on December
5 30, 2014, the legally permitted uses of property zoned R-PD7 are include in the Las Vegas Municipal
6 Code (hereinafter LVMC), Title 19.

7 7. LVMC 19.10.050 is entitled "R-PD Residential Planned Development District" and is the
8 applicable section of the LVMC used to determine those permitted uses on R-PD7 zoned properties
9 in the City of Las Vegas. Exhibit 5 to Landowners' Motion.

10 8. LVMC 19.10.050 (C) lists as "Permitted Land Uses" on R-PD zoned properties "[s]ingle-
11 family and multi-family residential." Id.

12 9. LVMC 19.10.050 (A) also provides that "the types of development permitted within the
13 R-PD District can be more consistently achieved using the standard residential districts." Id. The
14 standard residential districts are listed on the City Land Use Table, LVMC 19.12.010. Exhibit 6 to
15 Landowners' Motion. The R-2 residential district listed on the City Land Use Table is the standard
16 residential district most comparable to the R-PD7 zoning, because R-PD7 allows up to 7 units per
17 acre¹ and R-2 allows 6-12 units per acre.² The "permitted" uses under the R-2 zoning on the City
18 Land Use Table include "Single Family, Attached" and "Single-Family, Detached" residential uses.
19 LVMC 19.12.010, Exhibit 6 to Landowners' Motion.

20 10. Table 1 to the City Land Use Table provides that if a use is "permitted" in a certain
21 zoning district then "the use is permitted as a principle use in that zoning district by right." Id.

22 11. "Permitted Use" is also defined at LVMC 19.18.020 as "[a]ny use allowed in a zoning
23 district as a matter of right." Exhibit 8 to Landowners' Motion.

24 12. The Landowners have alleged that the City of Las Vegas has taken the 35 Acre Property
25 by inverse condemnation, asserting five (5) separate inverse condemnation claims for relief, a

27 ¹ See City Zoning Verification Letter, Exhibit 3 to Landowners' Motion and LVMC
28 19.10.050 (A), Exhibit 5 to Landowners' Motion.

² See LVMC 19.06.100, Exhibit 7 to Landowners' Motion.

1 Categorical Taking, a Penn Central Regulatory Taking, a Regulatory Per Se Taking, a Non-
2 regulatory Taking, and a Temporary Taking.

3 **CONCLUSIONS OF LAW**

4 13. The Nevada Supreme Court has held that in an inverse condemnation, such as this, the
5 District Court Judge is required to make two distinct sub inquiries, which are mixed questions of fact
6 and law. ASAP Storage, Inc., v. City of Sparks, 123 Nev. 639 (2008); McCarran Int'l Airport v.
7 Sisolak, 122 Nev. 645 (2006). First, the District Court Judge must determine the “property interest”
8 owned by the landowner or, stated another way, the bundle of sticks owned by the landowner prior
9 to any alleged taking actions by the government. *Id.* Second, the District Court Judge must
10 determine whether the government actions alleged by the landowner constitute a taking of the
11 landowners property. *Id.*

12 14. The Landowners’ Motion to Determine Property Interest narrowly addresses this first
13 sub inquiry and, accordingly, this Court will only determine the first sub inquiry.

14 15. In addressing this first sub inquiry, this Court has previously held that: 1) “it would be
15 improper to apply the Court’s ruling from the Landowners’ petition for judicial review to the
16 Landowners’ inverse condemnation claims;”³ and, 2) “[a]ny determination of whether the
17 Landowners have a ‘property interest’ or the vested right to use the 35 Acre Property must be based
18 on eminent domain law, rather than the land use law.”⁴

19 16. Therefore, the Court bases its property interest decision on eminent domain law.

20 17. Nevada eminent domain law provides that zoning must be relied upon to determine a
21 landowners’ property interest in an eminent domain case. City of Las Vegas v. C. Bustos, 119 Nev.
22 360 (2003); Clark County v. Alper, 100 Nev. 382 (1984).

23 18. The Court concludes that the 35 Acre Property has been hard zoned R-PD7 since at least
24 1990.

27 ³ Exhibit 18 to Landowners’ Reply, App. at 0026 / 23:7-8

28 ⁴ Exhibit 18 to Landowners’ Reply, App. at 0010 / 7:26-27

1 19. The Court further concludes that the Las Vegas Municipal Code Section LVMC
2 19.10.050 lists single family and multi family residential as the legally permissible uses on R-PD7
3 zoned properties.

4 20. Therefore, the Landowners' Motion to Determine Property Interest is **GRANTED** in its
5 entirety and it is hereby **ORDERED** that:

6 1) the 35 Acre Property is hard zoned R-PD7 at all relevant times herein; and,

7 2) the permitted uses by right of the 35 Acre Property are single-family and multi-family
8 residential.

9 DATED this 9th day of October, 2020.

10
11 
12 DISTRICT COURT JUDGE ZJ

13 Respectfully Submitted By:

14 **LAW OFFICES OF KERMITT L. WATERS**

15 By: /s/ James J. Leavitt

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