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.

No. 84345

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. 84640

JOINT APPENDIX, VOLUME NO. 96

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the golf course failed and it went out of business. It didn't go into bankruptcy.

MR. SCHWARTZ: It did not.

THE COURT: Why did it stop operating?

MR. SCHWARTZ: The developer shut it down.

THE COURT: Why?

MR. SCHWARTZ: Because, according to the developer, it wasn't an economic use. But that's not relevant.

THE COURT: Sir, you can just tell me what happened. It's my understanding they weren't making money; right. The golf course went -- you're saying -- I want to make sure you're going to say what I think you're going to say. You're going to say that the golf course wasn't experiencing economic problems that impacted its ability to conduct its day-to-day business as a golf course?

MR. SCHWARTZ: I'm not going to say that. I am not. But it's not relevant, Your Honor.

THE COURT: Well, that's another issue. But you were referring to it like it was a park that had already been designed and it was in place. And you can't buy public parks, we know that. But it wasn't a park. It was a golf course. It was a money-making venture; right? We can all agree to that.

MR. SCHWARTZ: No, Your Honor. Can I explain?

THE COURT: Okay. Tell me why a golf course was put there for other purposes other than making money. Because a golf course has to be viable.

MR. SCHWARTZ: That may be true, but the purpose -- the City's purpose was not for Peccole or any developer to make money on the golf course. The City's purpose in requiring a golf course, and, in fact, Peccole's purpose in setting aside the golf course, was to provide an open space, recreational for the community.

THE COURT: Why wasn't it just made to be a public park?

MR. SCHWARTZ: Well, there are all types of open space, recreation. There's --

THE COURT: Answer my question. Why wasn't this dedicated to the City then; right, as a park?

MR. SCHWARTZ: There's a big difference --

THE COURT: I know the difference. That's why I'm asking the question.

MR. SCHWARTZ: They don't have to dedicate it.

THE COURT: They don't have to, but I'm asking you why? I understand your argument, but this

is not a park. It was a golf course. And the golf courses are undergoing financial problems right now because they can't meet the day-to-day operations. People don't play as much golf as they used to. The cost of water has gone up. I'm not a businessman, but they're failing.

MR. SCHWARTZ: Your Honor --

THE COURT: Right?

MR. SCHWARTZ: Yes.

THE COURT: Okay.

MR. SCHWARTZ: They are. But that's not relevant to the -- this case concerns land use regulation and the law of takings.

So if the Court were to look at tab 19. This is NRS 278.150. This states that there shall be -- that each city shall prepare a comprehensive, long-term general plan for the physical development of the city.

So it's the state legislature telling cities, we want you to plan. And then it says, "the plan will be known as the master plan and be prepared as a basis for development of the city."

In subsection 5, Your Honor, on the second page, tab 19, it says that the city has to address the elements of the physical development of the city, A through H of section 160.

278.160 is tab 20. That says, "The master plan with the accompanying charts, drawings, diagrams, schedules, and reports, may include such of the following elements."

Okay. So on the third page of this exhibit, subsection D says, "The land use element must include provisions concerning community design, including for subdivision of land and suggestive patterns for community design and development."

Then it says, "It shall include an inventory of classification of types of natural land and comprehensive plans for the most desirable utilization of land."

Now --

THE COURT: And which one are you at, sir, again?

MR. SCHWARTZ: Page 3, subsection D.

THE COURT: D, as in dog?

MR. SCHWARTZ: D, as in dog. It says, "The land use plan has to address mixed-use development, transit-oriented development, master planned communities, and gaming enterprise districts."

So the open space, the PR-OS space, the Badlands in this case, is there for two reasons. One, because under -- well, let me back up.

Tab 21, Your Honor, is the zoning, state zoning law. This is NRS 278.250.

This says, "Within the zoning district it may regulate and restrict the erection, construction, reconstruction, et cetera of building structures on land."

Now, right there, Your Honor, that tells you that the purpose of zoning is not to grant rights. It restricts use. The whole premise of the --

THE COURT: Sir, I understand that. Go ahead.

MR. SCHWARTZ: No. No. This says, zoning restricts uses. Zoning doesn't grant rights. The developer claims that just the zoning. And all property is zoned. So they're saying that every property owner in this state that owns property that's zoned -- and, again, all property is zoned -- has a constitutional right to build any use that's permissible -- that's permitted in that zoning district. And the city, and the local agency, has no discretion.

That's what this case is about. That is absolutely false. This Court found that it was wrong in denying the PJR. The zoning law says --

THE COURT: Sir, I was very clear on this.

There's a difference as far as proof and standards are concerned as it pertains to a petition for judicial review. This is not a petition for judicial review. This is a civil action with a preponderance of the evidence standard in place.

There are claims for relief being made by the landowner. There's affirmative defenses being asserted by the City. And the City has its claims, too. That's a totally different issue. It is. And I have a high level of confidence as far as those issues are concerned as a matter of law, i.e., the different standards. As far as the petition for judicial review, my charge under Nevada law was very limited; right.

MR. SCHWARTZ: Your Honor, may I address that?

THE COURT: I can't substitute my judgment for that of the council. I was pretty clear on that.

MR. SCHWARTZ: May I address that?

THE COURT: Yeah. Go ahead. It's interesting. I got a decision from the Nevada Supreme Court on a case where there was a petition for judicial review filed in one of my cases, and they reminded me, although I knew this, it was never an issue, there's different standards involved. The only thing I felt bad about, when I got the decision, they didn't give me

a chance to address that. I knew that.

MR. SCHWARTZ: Your Honor, I would like to address that. I think this is an extremely important issue, and I would appreciate the chance to --

THE COURT: You have the floor, sir.

MR. SCHWARTZ: Your Honor, there is no question that the standard for judicial review of a PJR is substantial evidence for failure to proceed by law, which could lead to an abuse of discretion. There's no dispute that the remedy for a PJR is an equitable remedy. Court issues an order.

There's no dispute that the evidence in a PJR is limited to the administrative record. There's no dispute that in an inverse condemnation claim, a taking claim, that the standard for liability for a taking is there has to be a wipeout or near wipeout of economic value of the property or interference with investment-backed expectations.

Different standard for liability. There is no dispute that the remedy for a regulatory taking is damages, not equitable relief. And there is no dispute that the Court can seek to review evidence outside an administrative record in ruling on a taking claim.

THE COURT: I think everyone might agree to that. But go ahead, sir. I'm listening to you.

MR. SCHWARTZ: That's not to say, Your Honor, a PJR is an empty vessel. It's a process. It's a procedure and a remedy. There is no substantive law of PJR. There is no substantive law of PJR. PJRs are based on underlying substantive law.

In the PJR, this Court found, it said, "The Court rejects the developer's argument that R-PD7 zoning designation on the Badlands property somehow required the council to approve its applications."

And then the Court cited the Stratosphere case and other cases. Yes, they are PJR cases, but there are other cases that say the same thing that are not PJR cases that are constitutional challenges. And the Ninth Circuit in a case between these same parties on the very same issue, issued a decision and said, Nevada law of property -- this is Nevada law of property. There's no such PJR law of property. Again, it's an empty vessel. The Nevada law of property is that you do not have constitutional rights conferred by zoning. That's absolutely clear.

Let me refer the Court to the Boulder v. Cinnamon Hills case. That's tab 13. In Boulder City, the Court said -- and I've highlighted the portion of that case.

THE COURT: Hold on. I want to follow this

here. Go ahead, sir.

MR. SCHWARTZ: So on page 6 of the opinion, upper left, I've highlighted the portion that says, "Boulder City could not have violated Cinnamon Hills substantive due process rights. The grant of a building permit was discretionary. Therefore, under the applicable land use laws, Cinnamon Hills did not have a vested entitlement to a constitutionally protected property interest."

That wasn't a PJR challenge. That was a due process challenge. That was under the constitution. And the Court there is referring to the underlying Nevada law of property. There is no case anywhere, in any jurisdiction in this country, and certainly not in Nevada, that says that a property owner whose property is zoned, and, again, that's all property, has a right to do anything under zoning, no less a constitutional right.

We have set forth the Ninth Circuit decision in our papers. That's tab 37. We contend that this Ninth Circuit memorandum decision has issue preclusive effect. It is between the same parties. It is the very same issue; the developer argued they had a constitutional right to build residential under the zoning. And the Court said, no.

We quoted from the decision in our papers. There the Court said -- and I'm reading from page 4, the memorandum decision, Your Honor, the fourth line down. The court said, "To have a constitutionally protected property interest in a government benefit, such as a land use permit, an independent source, such as state law, must give rise to a legitimate claim of entitlement that imposes significant limitations on the discretion of the decision maker."

So they're referring to Nevada law of property and land use regulation. And they outright reject the claim that the developer made to you.

And, again, I refer the Court to the Stratosphere case, which involves the very same land use regulations that are at issue here. A site development permit was required to develop the property and the uniform development code of the City of Las Vegas.

This is tab 30. The Court there said in the Stratosphere case, tab 30, page 3, that, "The context of governmental immunity, we have to find a discretionary act as an act that requires a decision requiring personal deliberation and judgment."

And then on the next page, page 4 of the Stratosphere decision, it says, under section

19.18.050, and that's the Las Vegas Municipal Code, unified development code, "The city council must approve the Stratosphere's proposed development of the property through the city's site development plan review process. That process requires the council to consider a number of factors and to exercise its discretion -- I emphasize the word discretion -- in reaching a decision. There is no evidence that the Stratosphere had a vested right to construct the proposed rights."

We've attached the American West opinion at tab 31. We've attached the Teague opinion, tab 32, the City of Reno opinion at tab 33. The Nevada Contractors case, tab 34, the City of Reno case, tab 35, the CMC of Nevada, tab 36. And then that's followed by the Ninth Circuit opinion.

They all say the same thing, that under the underlying rights, underlying Nevada law of property, there's no vested right to do anything if the agency has discretion.

And I was taking the Court through the state law that grants the City wide discretion in approving or disapproving development permits. And that answers the Court's question, well, can the City require a developer in a planned development to set aside

property for roads? Absolutely. They have that police power under NRS 278.250.

And I was going to take the Court through 250 to show you how broad the state legislature has granted discretion to public agencies.

And I think, Your Honor, this goes to the heart of the case. Tab 21. So tab 21 is NRS 278.250. I apologize, Your Honor, for going so quickly through this.

THE COURT: I'm following you at each step of the way. You actually are very clear and to the point, sir.

MR. SCHWARTZ: All right. Now, this tells local agencies, you shall zone and your zoning shall do the following things. So in subsection 2, Your Honor, it says the zoning regulation must be adopted in accordance with the master plan for land use.

Okay. Right there. Why did we go through these facts this morning with the Court? To explain that zoning is subordinate to the master plan. The master plan is a higher authority. Zoning must be consistent with the master plan. And in this case, the Badlands Golf Course was PR-OS in the general plan.

The zoning is consistent -- and I'm jumping around here --

THE COURT: When you say that with the master plan, what do you mean by that, sir, as far as the golf course is concerned?

MR. SCHWARTZ: Well, okay. Your Honor, I will answer that question. Can I do that by taking you through -- because to answer that, I need to show you --

THE COURT: You have the floor, sir.

MR. SCHWARTZ: Tab 21.

THE COURT: Whatever you want to do, sir.

MR. SCHWARTZ: Tab 21 says what local agency is supposed to do with zoning. So subsection 2. The zoning regulations must be designed. I'm paraphrasing here. So let's go through these, Your Honor.

A. Air quality and water source.

B. Promote the conservation of open space.

So they're telling cities, you have to conserve open space. And protection of other natural and scenic resources.

So they gave the City the tool to protect open space. And that's exactly what it did in this case. It designated one part of the property for housing, another part for the open space. They're doing what they're supposed to do.

2C. Consider existing views.

THE COURT: Now, I'm asking you this question because I don't know the answer to it, sir. Do they have specific zoning requirements as far as golf courses are concerned and how they define --

MR. SCHWARTZ: Good question. In this case, the City did two things in creating the golf course. It approved the R-PD7PR-OS zoning for this 614-acre part of the PRMP. And part of that approval was contingent on the developer setting aside the golf course, open space. They're following their mandate from the state legislature, and they're also following the mandate in the R-PD7 zoning ordinance of the city.

And the second thing they did was the developer was required by state law, to be included in a gaming district to have recreation. And the developer decided the recreation in this case would be a golf course.

So the requirement that a gaming -- to participate in a gaming enterprise district to have recreation and open space, it's not so that the developer of the casino will make money or that their casino and hotel will make money. It's for the surrounding community. That's what zoning is for.

THE COURT: Here's the thing, though. And I

think this is kind of getting lost. And understand this was not my area of practice. But I'm looking at it from this perspective when they have these master plans. And, for example, if the plan is -- if the development is big enough -- we can use maybe Green Valley as an example. They might say, okay, developer, when you come in, in order to do this, you have to set aside maybe certain portions of your development for schools; right. And then they'll do the same thing for parks; right. And they'll do the same thing for a fire station and all those things; right. And they do that. And we all know that's common.

But my point is this. When they do that, does the developer still retain ownership of the land upon which the school is located?

MR. SCHWARTZ: Depends.

THE COURT: You see where I'm going on that?

MR. SCHWARTZ: I'll address it, Your Honor. I do. I do. In this case -- in this case, the developer retained ownership.

THE COURT: Of the school?

MR. SCHWARTZ: And that's very common.

THE COURT: But, I mean, what happens if --

MR. SCHWARTZ: Okay. Let met address that.

THE COURT: Don't they dedicate the school. And at the end of the day, the school becomes owned by the Clark County School District? And I don't know what the exact term of art would be, but it's set aside for public ownership, library, and so on and so on.

So when it comes to open spaces, it seems to me that would come under a park or a -- I mean, we have parks all over Las Vegas and those are dedicated and owned by the county or city. So I'm trying to -- this is what I'm trying to do. Is the City saying, look, open spaces and golf courses are the same?

MR. SCHWARTZ: It depends on the facts of each case. But, Your Honor, you have all kinds of open space requirements imposed on all types of projects. Sometimes in a rare situation do they require public dedication of a park. The parks that you see around you are largely acquired by the city either by voluntary purchase or eminent domain. They are not set aside from buildings.

THE COURT: Does the county or city require that as part of a large master plan like Green Valley?

MR. SCHWARTZ: It could. And let me address that. If it requires a dedication to the public, in other words, the public is going to take physical possession of that property, then there is a regulatory

takings doctrine that addresses that. That's not at issue in this case because the City did not take title to the property.

But when it approves a development and requires that the developer provide certain amenities for the community, the developer often owns the land, often owns that property, but it's required to provide amenities to the community. In this case, the golf course provided recreation, park, open space, not only to the residents that lived on the golf course, but to the surrounding community. That is the purpose of zoning.

The developer's theory of zoning, Your Honor, turns zoning upside down. Exclusionary zoning that we have here, it excludes certain uses from certain areas in order to protect the residents of that zone or the occupants of that zone from uses that the legislature doesn't want to see there. It doesn't confer rights. It can't confer rights. That's contrary to the whole concept of zoning.

But when it plans a planned development area, it commonly asks the developer, requires the developer, to plan for a quality, safe community. And more to the Court's point, public agencies commonly require dedication of property for road widening before you

develop the property.

The only thing they have to do there is show that there's a connection between the need for that dedication, again, if it's going to go to the public, the public agency has to show a connection, and that they're not exacting too much land from the property owner.

That's a regulatory takings test for exemptions that the U.S. Supreme Court has adopted. That does not apply here because the City didn't exact a physical interest in property. It replanned a planned development.

So going back to NRS 278.250. It says that --

THE COURT: Wait. I want to go back and follow you, sir.

MR. SCHWARTZ: This is tab 21, 278.250.

THE COURT: I'm with you.

MR. SCHWARTZ: This says, in Subsection 2E, "Cities have to plan to provide for recreational needs."

THE COURT: I get that. I do. I understand that. But at the very outset, you have the master plan. And I think Green Valley is probably a great example because that was the first master plan type

development in Clark County. I get it. You go in front of the Henderson City Council, and you have this plan for Green Valley. And there were certain areas set aside for parks, set aside for greenbelts, set aside for allotted schools, and so on.

And so once that master plan is approved, under those circumstances, the parks, for example, once construction is completed, they're no longer owned by, quote, the developer. There's some sort of dedication. And that's kind of what I'm focusing on. And this is the reason why I think it's important to point this out, and this is where I see a distinction when it comes to open spaces.

Here we're talking about recreational. That's fine. But the recreational needs are typically parks, walkways. I get that. But, once again, coming back to a failed business where there's private property, what happens then? Are you saying that, you know what, the developer has an obligation to keep that golf course running even though it doesn't make money?

MR. SCHWARTZ: No. The City is not the insurer for developers. Let's say the Peccoles still owned the property and the golf course failed. Well, the City has no responsibility to make sure that the Peccoles make money on that golf course.

If the City says, we want that to remain the open space amenity, because this golf course provided open space for the community. It provided recreation for the community. It provided a park for the community. That's what cities are supposed to do. That's what they did.

THE COURT: Don't they have to pay for that? See, here's the thing about it. And I'm not throwing anyone under the bus as far as the decision-maker is concerned. I'm looking at it from a legal perspective. But in your analogy, when the failed Peccole golf course and the City says, yeah, we want that to remain an open space, it seems to me, okay, if you want to do that, City, that's all right, but you're going to pay the Peccoles for that.

MR. SCHWARTZ: No, you don't. Because they bought the golf course knowing it couldn't be used for residential.

Now, I'll refer you to the Guggenheim case.

THE COURT: Remember, I mean, a golf course is a really great example because that was never a, quote -- that was private property. It's not a public golf course.

MR. SCHWARTZ: That's right.

THE COURT: Yeah, it provides some open

space, no question about it, but there's limited access; right. It's the best example, really and truly, I think, that we could have. And all I'm saying is this. Once the golf course fails, how can the City say, look, it has to remain an open space; you can't do anything else with this property? If the City does that, it seems to me, that we start conducting potentially, if the Peccoles wanted fair compensation for the City's use of their property and the restrictions, then I have to start conducting some sort of analysis that's being raised right now.

Go ahead, sir.

MR. SCHWARTZ: Your Honor, for three reasons that's not correct. First --

THE COURT: And we're making a good record here. Just want to tell you that. We are.

MR. SCHWARTZ: They're not liable for a taking if they don't wipe out the value of the parcel as a whole. That's the rule. The parcel as a whole is the PRMP. If the developer -- if part of the PRMP is not making money, that doesn't mean that the City is liable to compensate the developer for that part that's not making money. Because they made money on the other part.

It's the same if the Court says, well, I

don't think the PRMP is the parcel as a whole. We have demonstrated in our papers that this meets the factors of the Herrera case, the U.S. Supreme Court case. There has been no, no opposition points and authorities because they can't. Because there is no law supporting the developer.

The PRMP is the parcel as a whole. You can't carve it up and say, now, if you won't let me develop something on a tiny part of it, or 16 percent of it, where I've been able to develop 84 percent of it with a casino and a hotel and retail and thousands of housing units, now I'm going to carve out this one part and because the golf course may not be making money, according to the developer, I'm going to carve that out, you must let me build housing on it. And, not only that, I have a constitutional right to build whatever housing I want. That's ludicrous and that's not the law. And that's what's going on here.

But finally, finally, I've referred the Court to tabs 1 through 3.

THE COURT: Which tabs, again? I want to follow you.

MR. SCHWARTZ: Tabs 1 through 3. Tab 1. The City approved 435 luxury housing units on the Badlands. Tab 1. The Supreme Court, in its order of reversal,

reinstated those approvals after Judge Crockett voided them.

Then the City sent a letter to the developer saying -- and the City approved the development. And it supported its decision in the Supreme Court with an amicus brief saying, please reverse Judge Crockett. Reinstate these approvals.

Tab 3 is the City's letter to the developer saying, you're ready to go. You can now build your 435 luxury housing units, and we'll extend the period of time in which you have to do that by two years because this case was on appeal.

So we have a situation here where the City approved substantial development of the parcel as a whole. And that the developer here carved the property into four different development sites, applied on the individual sites, and now is suing -- I mean, not only on the three -- it's also suing on all four for damages for those parcels claiming, he wiped me out; I've got no use of this segment.

They segmented the property. That is forbidden in regulatory takings law. You can see why, for precisely this situation.

That allows a developer to say, okay, I've got this piece of property, and I want to build 1,000

units. The City has discretion. There's no way they're going to let me build 1,000 units.

So what I'll do is I'll carve it up into different pieces and see what I can get on some of the pieces. And then if the City says, well, no, we don't want you to develop these parts, we want it to be open space, or we want it to be some other use, then the developer, you know, we want you to leave it at open space. It was originally open space. We want you to leave it open space. We've let you develop significant development over here on this other part of the property.

So the developer says, no, these are now discrete segments of property. You wiped me out. That's a taking and pay me. That's a way to get more density. That's a developer trick. The courts are onto it. We briefed this.

The Penn Central case in 1978 started by saying, you can't carve the property into Grand Central Terminal and the airspace above the terminal, that's not the parcel as a whole, and then say, because we won't let you build in the airspace, that's a taking because you have no use of the airspace. No, it's not. If you look at the parcel as a whole of that property, they've had substantial use of the property

historically for Grand Central Terminal.

Tahoe Sierra case. Sierra Tahoe v. Tahoe Regional Planning Agency case says the same thing. You can't carve up the property temporally, if there's a moratorium on development, for 33 months and then afterwards the government can lift the moratorium. So you can't say that during that 33-month period, you wiped me out because I couldn't do anything with my property during that period. No, you don't carve up the property interest in that fashion.

Then we cited a number of other cases, and including the Murr case that is a recent case that sets forth clear standards for how to determine the parcel as a whole.

THE COURT: Hang on. Which tab is that, sir?

MR. SCHWARTZ: In our brief.

THE COURT: I just wondered if you have a tab.

MR. SCHWARTZ: I don't have the Murr case in a tab, Your Honor. It is in our brief. That's only our third argument as to why the developer -- we should get summary judgment. Because our first argument is that the case is ripe. That's going to require some time to explain. The second argument is that even if it's ripe for development, because the developer bought

the property with the PR-OS designation that did not permit housing, the developer can't now say, you have to let me develop housing because I have no economic use of these segments of the property.

And, of course, the City did approve the 435 units.

So we've got a situation here where a developer buys property that legally can't be used for housing. That's the law. It voluntarily shuts down the golf course. Then it applies to develop the golf course. It carves the property into four parts and applies to develop one part.

In the first application, the City up-zones the property. It changed the zoning from R-PD7, which has a maximum of 7 units per acre, but, again, also allows the open space. So they up-zone the property to R3, which allows medium density housing. And they lift the PR-OS designation that prohibited housing, and designate the property for a general plan designation that allows housing development.

According to the developer's own evidence, the value of just the 17-acre property increased by $26 million. Now the developer is suing the City not only on the 17-acre property where the City approved its project, but for the entire Badlands $386 million.

And it denies, it denies, that it has an approval of the 435 units on the 17-acre property.

So you don't need to know much about takings to know that something is very wrong here. They buy property for $4.5 million. They now want $386 million in damages, even though the City approved 435 units on the property.

So really they've got no injury, only a windfall project. And during the break, Your Honor, I was out in the hall and I saw on the wall this saying by Confucius. "Recompense injury with justice. Recompense kindness with kindness."

So you recompense injury with justice. The developer wasn't injured. They took a flyer on buying a golf course that they either knew or should have known might not be viable, that could not legally be developed for residential. And now -- and they want $386 million in damages because the City simply did not change the law.

Now, kindness with kindness. The City did change the law. 435 units, Your Honor, is a lot of units. And these are luxury units, too.

So what do they recompense the City for its kindness with? They even sued the City on the 17-acre property. So the only conclusion here is -- and,

again, this isn't -- I've just giving you an idea.

THE COURT: I'm listening, sir. I'm listening.

MR. SCHWARTZ: This is a Court -- this Court wants to do justice. And, you know, the law -- I find the law -- it's very impressive, the law in this country, Your Honor. The law is generally just and it's reasonable. It makes a lot of sense. You know, really sensible people are making these laws.

So how can we have a law in this country where a developer, as I said, buys a golf course not legally used for residential, $4.5 million, $18,000 an acre. And the City approves substantial development. And they now claim that they don't have a permit, which is absolutely preposterous, ludicrous. It's hard to find words at how ridiculous that is. And they want $386 million of damages.

This can't be the law, Your Honor, that they would now be entitled to $386 million in damages or any damages. And, in fact, it is not the law.

If the Court were to apply the law here, the law is quite reasonable. The law says, basically, local public agencies have broad discretion to regulate land use. It's a political issue. You've heard a lot about the politics of this, Your Honor. And these land

use issues are very highly charged.

The community is involved because the community is affected. And the land use regulatory laws are to protect the community. They're not to protect the property owner. They don't confer rights. That's what these statutes that I've shown the Court show.

And so the legislative and administrative branches have broad discretion to regulate land use delegated by the state legislature. And it exercises the general police power for the general health, safety and welfare.

I was going to read you the last section of the zoning law .250.

THE COURT: And which tab is that, sir?

MR. SCHWARTZ: That's tab 21. Which says, "In exercising the powers granted in this section" -- this the zoning, state zoning law, tab 4.

"In exercising the powers granted in this section, the governing body may use any controls relating to land use or principles of zoning the governing body determines to be appropriate."

And if you go above that, Your Honor, and look at Subsection K. They're supposed to zone to promote health and the general welfare. There couldn't

be anything more broad, and there couldn't be anything that makes it clearer that the agencies are entitled to discretion.

So here's how the law of taking works in a nutshell. Local agencies have broad power to regulate use of land for the general health, safety, and welfare for open space, recreation, all these other uses. Only if they go too far is the property owner entitled to compensation, only if they go too far.

And the courts have said -- and I want to get into that in a moment. The courts have said a regulation is a taking only if -- we're not going to interfere with this, what is a local political process, we're not going to interfere with that. These decisions are best made by planners and by legislators and city officials, in connection with the property owners. They all work together. They work it out. Only if there's a wipeout, because that's the functional equivalent to eminent domain.

And this law, again, makes a lot of sense when you think, well, all land is different, all communities are different. They have different values. We're going to leave it up to the local planners as to how they want to decide as to each property what's best for the community. Again, not what's best for the

landowner, what's best for the community.

So I want to take the Court through -- before we do this, I want to refer the Court to the R-PD7 zoning because I want to finish with that. I didn't finish my explanation of how that works.

THE COURT: Sir, take your time. Which tab was that?

MR. SCHWARTZ: Tab 27. This is the zoning ordinance at issue in this case. The entire Badlands was under this section. The first section says, "The purpose of a PD district is to provide for flexibility and innovation in residential development and efficient utilization of open space."

So what are they saying there? The City is going to look at a big piece of acreage, not a single-family lot, big piece of acreage. And we want to have the best plan for the community. We want to have the streets where they're going to make the most sense and the open space where it's going to make the most sense, and the housing where it's going to make the most sense.

Then it says later in that paragraph, and I've highlighted it for the Court, "flexible to accommodate innovative residential development."

Then the ordinance lists the uses that are

permitted in the zone. Your Honor, I need time to address what does permitted mean. Because the developer has misled the Court into thinking if a use is permitted, that means they have a constitutional right to build. And that's actually false.

A permitted use is a use that is not permitted -- it's a use that is not excluded from the zone. That's the whole purpose of zoning. In Euclid v. Amway, the first zoning case of 1926, U.S. Supreme Court said, it is constitutional for a city to limit uses in a zone by excluding other uses. It's permissible to limit this zone to houses. You can't put a pig farm in. That's exclusionary zoning. That's what all of this is.

THE COURT: Way back in the day, I used to represent Mr. Robert Combs, RC Farms. I know all about RC Farms.

MR. SCHWARTZ: Did you try to put one in a residential neighborhood?

THE COURT: Well, he was there before the residential neighborhoods came. We can agree. If you've been around in Las Vegas, I think everyone has been here for a longer period of time. And that's my limited involvement in this type of issue. Because Mr. Robert Combs was a very close friend of Neil

Galatz, where I used to work. And I remember Mr. Combs and his many issues that would come up from time to time specifically involving, I think it was, North Las Vegas City Council. That's my only --

MR. SCHWARTZ: I didn't mean to maline agriculture, Your Honor. Agriculture is great. But the City has a right to exclude it from a residential zone. And that's how zoning works. Again, the theory, the developer's theory here that the zoning provides is contrary to all of the authorities.

So Subsection C says what uses are permitted in the zone. Single-family and multi-family houses, home occupation, childcare, family home and childcare group home. And then it says -- and we know it also includes open space. Because in Subsection A, the section says, you want to put the houses in the open space in the right places, you're encouraged to have open space. You don't have to, but you can. It's within your police power.

Now, in Subsection C2, it says, "The director may apply the development standards and procedures."

And then in Subsection 3 it says, which in the director's judgment.

And now Subsection D, that really puts an exclamation point on this. "The approving body may

attach to the amendment to the site development plan review whatever conditions are deemed necessary to ensure the proper amenities and to ensure that the proposed development will be compatible with surrounding existing and proposed land uses."

THE COURT: All right. And I thought about that. And we can kind of agree that that's not necessarily what happened here. And here's my point. And understand this is not my bailiwick. I'm not a -- I didn't practice in the area of application before the building commission and the like as it relates to developing parcels and land and plans, et cetera. But say, hypothetically -- and I'm reading, for example, this provision that you referred to that was in tab 27. And it was the intent of the RPD district.

And so when I'm reading it, it says, quote, "The RPD district has been provided for flexibility and innovation in residential development with emphasis on enhanced residential amenities, efficient utilization of open spaces, the separation of pedestrian and vehicular traffic and homogeneity of the land use patents."

Here's my point. And I was thinking about it. I understand it's a big parcel. There's a lot of issues going on. Say, hypothetically, the City

rejected the initial plan of the developer, but they said something like this. You know what, we realize the golf course is no longer functioning, but maybe if you had wider greenbelts between the separation between the existing homes and the proposed homes. Just as important, too, we want to make sure the lot sizes are, quote -- let me see, what did they say here -- would be homogeneous to the community; right, and everything is -- so you would look in there with a new plan, you would never know that this wasn't part of the original plan. And that's kind of my point.

If they rejected it and said, this is what we want or something like this, as an alternative to their plan, I mean, that's a totally different animal versus open space, nothing more, nothing less.

MR. SCHWARTZ: Not for purposes of taking, Your Honor.

THE COURT: Well, that's my point. For the purposes of a taking. Because, in essence, you're saying, look, this land would have no value to the owner because it can't be used for any purpose other than providing open spaces for the public's use. And if you're going to do that, maybe the public should pay for that. That's kind of my point.

MR. SCHWARTZ: It was set aside for the

public's -- for public use, not physically, but it was set aside as recreation, park, and open space in the original plan. The City has discretion to keep that. So they can say, well, the golf course is -- to avoid a taking, again, assuming that there's no parcel as a whole doctrine, assuming that the Court allows them to segment the property and say, now the Court has to focus on just one segment, again, that's not the law. And we've established in our papers they can't do that. They've already had substantial development of even the Badlands. But assuming that the Court dispenses --

THE COURT: Answer this question. We talked about Penn Central. We're talking about vertical air spaces; right? Is that different? Because we're not talking about vertical air spaces here. We're talking about land, tracts of land. How is that different.

MR. SCHWARTZ: Because it's the parcel as a whole doctrine. If it includes temporal segmentation, like in Sierra Tahoe, it certainly includes vertical or horizontal segmentation. It depends on the situation. And that's why you have to analyze each case on its facts.

THE COURT: That's kind of what I'm getting to.

MR. SCHWARTZ: The PRMP was developed as a

single master plan by a single developer. It was approved. Then they sold off parts to other developers. Each part, each part, complemented the other parts. So you can't later come along and take out one part. That's the parcel as a whole doctrine. You can't do that.

Let's say an analogy is to a machine. You've got a machine that's running fine. It's got all its parts. You take a part of the machine out. You expect the machine to run. No. Each part complements the other parts. That's kind of a good analogy for the parcel as a whole doctrine.

And the courts are very clear on this, Your Honor. While we're on -- you know, I keep getting -- I think the Court had a good question that leads me to my discussion of the ripeness doctrine.

THE COURT: At least I'm asking decent questions. Go ahead.

MR. SCHWARTZ: I've got limited time here.

THE COURT: Take your time.

MR. SCHWARTZ: Tab 14 is the Kelly case.

THE COURT: I'm following you, sir.

MR. SCHWARTZ: This is the Nevada Supreme Court saying this is a parcel as a whole case. This is a segmentation case. Kelly develops, buys property,

subdivides it in 39 lots. Builds on 32. Says, hey, you have to let me build on the other 7. Nevada Supreme Court says, no way. You've segmented the property. You've had substantial development on the parcel as a whole. You don't have the right to build on the 7 lots.

The Kelly case also says on page 6 of the opinion I've cited to the Court on tab 14 top left --

THE COURT: This is in Kelly, for the record?

MR. SCHWARTZ: Yes, Kelly v. Tahoe Regional Plan. 109, page 6. Kelly there says what the test for a taking is. And I'm going to talk about three cases, the State v. Eighth Judicial District case, the Boulder City case, and the Kelly case. These are the Nevada Supreme Court cases that said that a taking for a use, a regulation of use type taking, not a Sisolak taking. That's a physical taking. A regulation of use taking, like the developer has alleged in its first two causes of action, the test is you have to deny all economically beneficial use of the land.

And the Court there found it did not deny all beneficial or economically productive use of the 7 lots because you got development of the 32 lots. And you'll notice in the developer's presentation of what they say is the law in the case, they scrupulously avoid these

three cases, which are directly on point. That's the test for a taking for a regulation of use, excessive regulation of use, in Nevada, as well as every other court in the country.

They don't cite that. Instead they say that they have this constitutional right conferred by zoning to build whatever they want. That's not the takings test. They have no such right. But even if they did, it wouldn't be a taking because a taking has got to be a wipeout or a near wipeout or interference with investment-backed expectations.

Why aren't they moving for summary judgment on their Penn Central case? Begs the question. One of the factors in the Penn Central claim is the government has to interfere with your investment-backed expectations. In other words, the takings law is really designed for the situation like you have in the Lucas case. Where you buy property that's where a certain use is permitted. Let's say it's residential use. Not this case, of course, because residential use was not permitted. But you buy property where residential use is permitted by the general plan, by zoning. And then the government changes the law. Nope, you can't use it for residential. You can't use it for anything. That's the Lucas case. Court there

said, that's a taking. That's a taking.

We don't have that case here. This isn't the case where the City changed the law. The City declined to change the law. They're under no obligation to change the law. This was part of the Peccole Ranch master plan, and they were under no obligation to do it. And, in fact, they did change the law to allow substantial development of the Badlands.

So the Kelly case is directly on point. And the landowner has not even attempted to refute that case.

Your Honor, I'd like to --

THE COURT: And tell me, what do I do with this language from Kelly? And this would be on, I guess, looking here at the cite, 648. This is where the court said, "The court, however, did point out these situations where regulatory actions are compensable without case specific inquiry and to the public interest advanced in support of their restraints. One, regulations that compel the property owner to suffer physical invasion of his property no matter how minute the intrusion and no matter how weighty the public purpose behind it. And, two, where regulations denied all economically beneficial or productive use of the land."

And so do I -- I'm just asking questions here. Do I consider that second point that was raised by the Nevada Supreme Court, where it says, "where regulations denied all economically beneficial or productive use of the land"?

MR. SCHWARTZ: You absolutely do. I think, Your Honor, you hit on -- that's the test for a taking.

Now, what I want to do here is I want to explain this takings test and how it fits in with this case. I'm going to give the Court just advanced notice. The Sisolak case the developer relies on -- they came Sisolak says everything and anything. The Sisolak is a physical taking case. And the passage the Court just read from Kelly citing the Lucas case, Kelly and Lucas distinguish between physical takings and regulations of use. Regulations of the owner's use has to be a wipeout or interference with investment-backed expectations. A physical takings case has to be a government law that denies the owner the ability to exclude others. In other words, it allows people, it allows planes or people, to physically invade the land. That's a physical takings case.

So Sisolak does not apply to the developer's -- what the developer calls -- the developer's regulation of use claims for denial of a

permit. Physical takings have nothing to do with denial of a permit.

THE COURT: Here's a question I have on that. What about the statement of the members of the city council as it relates to this is public court. We're making this public spaces. I'm just paraphrasing it, but I think there's some of that in the record right now. Is that a physical taking?

MR. SCHWARTZ: Absolutely not. There's a claim that a member of the city council told people they could trespass on the Badlands. That's not the City. That doesn't bind the City. They can say whatever they want. That's not the City's official policy. And what we're dealing with here is -- it has to --

THE COURT: Here's my question. Trust me, I don't want to cut you off, but in many respects, ultimately, doesn't the city council determine what the ultimate policy will be of the City as it pertains to land usage and the like?

MR. SCHWARTZ: Yes, it is.

THE COURT: Okay.

MR. SCHWARTZ: And so the Court should concern this case, all of that evidence that Mr. Leavitt spent hours on about the politics of this

situation, who said what and who did what and disparaging remarks about his client and individual city council members saying this or that, I think this or that, and the City staff saying this to the developer and saying that to the developer and the City attorney, none of that is at all relevant in this case, Your Honor. Because the only thing that counts is the law. And the law is made by a majority vote of the city council. And that's the only thing that can affect the owner's use of the property or legally authorize the public to go on. It's got to be a law.

THE COURT: I agree. But how did the city council vote in this case?

MR. SCHWARTZ: It voted to deny a permit application; okay. So that has to fit within a takings test. And I want to explain that to the Court; okay.

1922. Pennsylvania Coal v. May, the first regulatory takings case. So we have this takings clause in the Fifth Amendment of the U.S. Constitution. The U.S. Supreme Court said for the first time, if you deny the coal company the right to use this coal in order to require it to hold up the surface of the land, that could be the functional equivalent of a direct condemnation. Up to that point, the takings laws only meant eminent domain, direct condemnation.

This is the first case that uses the regulatory takings concept. If you deny all economic value of the property, then it could be the functional equivalent of an eminent domain and will require compensation.

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

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

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

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

property by the owner.

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

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

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

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

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

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

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

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

And courts had indulged that. They had --

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

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

So the access and fence is a red herring. It

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

Let me get back to Lingle.

THE COURT: Which one is that, sir?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

action.

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

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

THE COURT: You have the floor, sir.

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

THE COURT: I'm with you.

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

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

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

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

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

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

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

investment-backed expectation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT REPORTER: Yeah.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

front of me.

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

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

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

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

says.

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

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

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

THE COURT: Right. I see it.

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

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

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

The first and second causes of action --

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

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

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

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

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

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

Then Exhibit Q is the 2018. All throughout,

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

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

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

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

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

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

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

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

use of it.

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

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

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

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

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

MR. SCHWARTZ: Yes.

THE COURT: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: You know, and I keep going back

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

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

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

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

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

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

MR. SCHWARTZ: Let me finish.

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

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

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

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

MR. SCHWARTZ: Any case?

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

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

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

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

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

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

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

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

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

MR. SCHWARTZ: That's okay. Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

But I want to get back to this notion --

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

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

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

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

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

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

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

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

viable when the property was purchased; is that correct?

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

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

MR. SCHWARTZ: They want $54 million.

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

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

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

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

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

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

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

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

MR. SCHWARTZ: Yes.

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

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

And then the city council came along and said

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

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

MR. SCHWARTZ: Thank you, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. LEAVITT: Two hours, Your Honor.

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

MR. SCHWARTZ: Thank you.

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

MR. LEAVITT: Yes.

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

MR. SCHWARTZ: Yes, Your Honor.

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

MR. LEAVITT: Okay, Your Honor.

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

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

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

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

MR. SCHWARTZ: That's fine.

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

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

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

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

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

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

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

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

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

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

MR. SCHWARTZ: Thank you, Your Honor.

MR. LEAVITT: Thank you, Your Honor.

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

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ATTEST: FULL, TRUE, AND ACCURATE TRANSCRIPT OF

PROCEEDINGS.

/S/ Kimberly A. Farkas, RPR, CRR

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