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. 106

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

v.

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

Defendants.

CASE NO.: A-17-758528-J

DEPT. NO.: XVI

SUPPLEMENTAL APPENDIX OF EXHIBITS IN SUPPORT OF MOTION FOR IMMEDIATE STAY WHILE CITY'S PETITION FOR WRIT OF MANDATE IS PENDING BEFORE THE NEVADA SUPREME COURT ON ORDER SHORTENING TIME

VOLUME 22

The City of Las Vegas ("City") submits this Supplemental Appendix of Exhibits in Support of the City's Motion For Immediate Stay While City's Petition for Writ of Mandate is Pending Before the Nevada Supreme Court on Order Shortening Time.

Exhibit	Exhibit Description	Vol.	Bates No.
A	City records regarding Ordinance No. 2136 (Annexing 2,246 acres to the City of Las Vegas)	1	0001-0011
B	City records regarding Peccole Land Use Plan and Z-34-81 rezoning application	1	0012-0030

Exhibit	Exhibit Description	Vol.	Bates No.
C	City records regarding Venetian Foothills Master Plan and Z-30-86 rezoning application	1	0031-0050
D	Excerpts of the 1985 City of Las Vegas General Plan	1	0051-0061
E	City records regarding Peccole Ranch Master Plan and Z-139-88 phase I rezoning application	1	0062-0106
F	City records regarding Z-40-89 rezoning application	1	0107-0113
G	Ordinance No. 3472 and related records	1	0114-0137
H	City records regarding Amendment to Peccole Ranch Master Plan and Z-17-90 phase II rezoning application	1	0138-0194
I	Excerpts of 1992 City of Las Vegas General Plan	2	0195-0248
J	City records related to Badlands Golf Course expansion	2	0249-0254
K	Excerpt of land use case files for GPA-24-98 and GPA-6199	2	0255-0257
L	Ordinance No. 5250 and Excerpts of Las Vegas 2020 Master Plan	2	0258-0273
M	Miscellaneous Southwest Sector Land Use Maps from 2002-2005	2	0274-0277
N	Ordinance No. 5787 and Excerpts of 2005 Land Use Element	2	0278-0291
O	Ordinance No. 6056 and Excerpts of 2009 Land Use & Rural Neighborhoods Preservation Element	2	0292-0301
P	Ordinance No. 6152 and Excerpts of 2012 Land Use & Rural Neighborhoods Preservation Element	2	0302-0317
Q	Ordinance No. 6622 and Excerpts of 2018 Land Use & Rural Neighborhoods Preservation Element	2	0318-0332
R	Ordinance No. 1582	2	0333-0339
S	Ordinance No. 4073 and Excerpt of the 1997 City of Las Vegas Zoning Code	2	0340-0341
T	Ordinance No. 5353	2	0342-0361
U	Ordinance No. 6135 and Excerpts of City of Las Vegas Unified Development Code adopted March 16, 2011	2	0362-0364
V	Deeds transferring ownership of the Badlands Golf Course	2	0365-0377
W	Third Revised Justification Letter regarding the Major Modification to the 1990 Conceptual Peccole Ranch Master Plan	2	0378-0381
X	Parcel maps recorded by the Developer subdividing the Badlands Golf Course	3	0382-0410
Y	EHB Companies promotional materials	3	0411-0445
Z	General Plan Amendment (GPA-62387), Rezoning (ZON-62392) and Site Development Plan Review (SDR-62393) applications	3	0446-0466
AA	Staff Report regarding 17-Acre Applications	3	0467-0482

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Exhibit	Exhibit Description	Vol.	Bates No.
BB	Major Modification (MOD-63600), Rezoning (ZON-63601), General Plan Amendment (GPA-63599), and Development Agreement (DIR-63602) applications	3	0483-0582
CC	Letter requesting withdrawal of MOD-63600, GPA-63599, ZON-63601, DIR-63602 applications	4	0583
DD	Transcript of February 15, 2017 City Council meeting	4	0584-0597
EE	Judge Crockett's March 5, 2018 order granting Queensridge homeowners' petition for judicial review, Case No. A-17-752344-J	4	0598-0611
FF	Docket for NSC Case No. 75481	4	0612-0623
GG	Complaint filed by Fore Stars Ltd. and Seventy Acres LLC, Case No. A-18-773268-C	4	0624-0643
HH	General Plan Amendment (GPA-68385), Site Development Plan Review (SDR-68481), Tentative Map (TMP-68482), and Waiver (68480) applications	4	0644-0671
II	June 21, 2017 City Council meeting minutes and transcript excerpt regarding GPA-68385, SDR-68481, TMP-68482, and 68480.	4	0672-0679
JJ	Docket for Case No. A-17-758528-J	4	0680-0768
KK	Judge Williams' Findings of Fact and Conclusions of Law, Case No. A-17-758528-J	5	0769-0793
LL	Development Agreement (DIR-70539) application	5	0794-0879
MM	August 2, 2017 City Council minutes regarding DIR-70539	5	0880-0882
NN	Judge Sturman's February 15, 2019 minute order granting City's motion to dismiss, Case No. A-18-775804-J	5	0883
OO	Excerpts of August 2, 2017 City Council meeting transcript	5	0884-0932
PP	Final maps for Amended Peccole West and Peccole West Lot 10	5	0933-0941
QQ	Excerpt of the 1983 Edition of the Las Vegas Municipal Code	5	0942-0951
RR	Ordinance No. 2185	5	0952-0956
SS	1990 aerial photograph identifying Phase I and Phase II boundaries, produced by the City's Planning & Development Department, Office of Geographic Information Systems (GIS)	5	0957
TT	1996 aerial photograph identifying Phase I and Phase II boundaries, produced by the City's Planning & Development Department, Office of Geographic Information Systems (GIS)	5	0958
UU	1998 aerial photograph identifying Phase I and Phase II boundaries, produced by the City's Planning & Development Department, Office of Geographic Information Systems (GIS)	5	0959

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Exhibit	Exhibit Description	Vol.	Bates No.
VV	2015 aerial photograph identifying Phase I and Phase II boundaries, retail development, hotel/casino, and Developer projects, produced by the City's Planning & Development Department, Office of Geographic Information Systems (GIS)	5	0960
WW	2015 aerial photograph identifying Phase I and Phase II boundaries, produced by the City's Planning & Development Department, Office of Geographic Information Systems (GIS)	5	0961
XX	2019 aerial photograph identifying Phase I and Phase II boundaries, and current assessor parcel numbers for the Badlands property, produced by the City's Planning & Development Department, Office of Geographic Information Systems (GIS)	5	0962
YY	2019 aerial photograph identifying Phase I and Phase II boundaries, and areas subject to inverse condemnation litigation, produced by the City's Planning & Development Department, Office of Geographic Information Systems (GIS)	5	0963
ZZ	2019 aerial photograph identifying areas subject to proposed development agreement (DIR-70539), produced by the City's Planning & Development Department, Office of Geographic Information Systems (GIS)	5	0964
AAA	Membership Interest Purchase and Sale Agreement	6	0965-0981
BBB	Transcript of May 16, 2018 City Council meeting	6	0982-0998
CCC	City of Las Vegas' Amicus Curiae Brief, *Seventy Acres, LLC v. Binion*, Nevada Supreme Court Case No. 75481	6	0999-1009
DDD	Nevada Supreme Court March 5, 2020 Order of Reversal, *Seventy Acres, LLC v. Binion*, Nevada Supreme Court Case No. 75481	6	1010-1016
EEE	Nevada Supreme Court August 24, 2020 Remittitur, *Seventy Acres, LLC v. Binion*, Nevada Supreme Court Case No. 75481	6	1017-1018
FFF	March 26, 2020 Letter from City of Las Vegas Office of the City Attorney to Counsel for the Developer Re: Entitlements on 17 Acres	6	1019-1020
GGG	September 1, 2020 Letter from City of Las Vegas Office of the City Attorney to Counsel for the Developer Re: Final Entitlements for 435-Unit Housing Development Project in Badlands	6	1021-1026
HHH	Complaint Pursuant to 42 U.S.C. § 1983, *180 Land Co. LLC et al. v. City of Las Vegas, et al.*, 18-cv-00547 (2018)	6	1027-1122
III	9th Circuit Order in *180 Land Co. LLC; et al v. City of Las Vegas, et al.*, 18-cv-0547 (Oct. 19, 2020)	6	1123-1127
JJJ	Plaintiff Landowners' Second Supplement to Initial Disclosures Pursuant to NRCP 16.1 in 65-Acre case	6	1128-1137
LLL	Bill No. 2019-48: Ordinance No. 6720	7	1138-1142

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Exhibit	Exhibit Description	Vol.	Bates No.
MMM	Bill No. 2019-51: Ordinance No. 6722	7	1143-1150
NNN	March 26, 2020 Letter from City of Las Vegas Office of the City Attorney to Counsel for the Developer Re: Entitlement Requests for 65 Acres	7	1151-1152
OOO	March 26, 2020 Letter from City of Las Vegas Office of the City Attorney to Counsel for the Developer Re: Entitlement Requests for 133 Acres	7	1153-1155
PPP	April 15, 2020 Letter from City of Las Vegas Office of the City Attorney to Counsel for the Developer Re: Entitlement Requests for 35 Acres	7	1156-1157
QQQ	Valbridge Property Advisors, Lubawy & Associates Inc., Appraisal Report (Aug. 26, 2015)	7	1158-1247
RRR	Notice of Entry of Order Adopting the Order of the Nevada Supreme Court and Denying Petition for Judicial Review	7	1248-1281
SSS	Letters from City of Las Vegas Approval Letters for 17-Acre Property (Feb. 16, 2017)	8	1282-1287
TTT	Reply Brief of Appellants 180 Land Co. LLC, Fore Stars, LTD, Seventy Acres LLC, and Yohan Lowie in *180 Land Co LLC et al v. City of Las Vegas*, Court of Appeals for the Ninth Circuit Case No. 19-16114 (June 23, 2020)	8	1288-1294
UUU	Excerpt of Reporter's Transcript of Hearing on City of Las Vegas' Motion to Compel Discovery Responses, Documents and Damages Calculation and Related Documents on Order Shortening Time in *180 Land Co. LLC v. City of Las Vegas*, Eighth Judicial District Court Case No. A-17-758528-J (Nov. 17, 2020)	8	1295-1306
VVV	Plaintiff Landowners' Sixteenth Supplement to Initial Disclosures in *180 Land Co., LLC v. City of Las Vegas*, Eighth Judicial District Court Case No. A-17-758528-J (Nov. 10, 2020)	8	1307-1321
WWW	Excerpt of Transcript of Las Vegas City Council Meeting (Aug. 2, 2017)	8	1322-1371
XXX	Notice of Entry of Findings of Facts and Conclusions of Law on Petition for Judicial Review in *180 Land Co. LLC v. City of Las Vegas*, Eighth Judicial District Court Case No.A-17-758528-J (Nov. 26, 2018)	8	1372-1399
YYY	Notice of Entry of Order *Nunc Pro Tunc* Regarding Findings of Fact and Conclusion of Law Entered November 21, 2019 in *180 Land Co. LLC v. City of Las Vegas*, Eighth Judicial District Court Case No.A-17-758528 (Feb. 6, 2019)	8	1400-1405
ZZZ	City of Las Vegas Agenda Memo – Planning, for City Council Meeting June 21, 2017, Re: GPA-68385, WVR-68480, SDR-68481, and TMP-68482 [PRJ-67184]	8	1406-1432

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Exhibit	Exhibit Description	Vol.	Bates No.
AAAA	Excerpts from the Land Use and Rural Neighborhoods Preservation Element of the City's 2020 Master Plan adopted by the City Council of the City on September 2, 2009	8	1433-1439
BBBB	Summons and Complaint for Declaratory Relief and Injunctive Relief, and Verified Claims in Inverse Condemnation in *180 Land Co. LLC v. City of Las Vegas*, Eighth Judicial District Court Case No.A-18-780184-C	8	1440-1477
CCCC	Notice of Entry of Findings of Fact and Conclusions of Law Granting City of Las Vegas' Motion for Summary Judgment in *180 Land Co. LLC v. City of Las Vegas*, Eighth Judicial District Court Case No.A-18-780184-C (Dec. 30, 2020)	8	1478-1515
DDDD	Peter Lowenstein Declaration	9	1516-1522
DDDD-1	Exhibit 1 to Peter Lowenstein Declaration: Diagram of Existing Access Points	9	1523-1526
DDDD-2	Exhibit 2 to Peter Lowenstein Declaration: July 5, 2017 Email from Mark Colloton	9	1527-1531
DDDD-3	Exhibit 3 to Peter Lowenstein Declaration: June 28, 2017 Permit application	9	1532-1533
DDDD-4	Exhibit 4 to Peter Lowenstein Declaration: June 29, 2017 Email from Mark Colloton re Rampart and Hualapai	9	1534-1536
DDDD-5	Exhibit 5 to Peter Lowenstein Declaration: August 24, 2017 Letter from City Department of Planning	9	1537
DDDD-6	Exhibit 6 to Peter Lowenstein Declaration: July 26, 2017 Email from Peter Lowenstein re Wall Fence	9	1538
DDDD-7	Exhibit 7 to Peter Lowenstein Declaration: August 10, 2017 Application for Walls, Fences, or Retaining Walls; related materials	9	1539-1546
DDDD-8	Exhibit 8 to Peter Lowenstein Declaration: August 24, 2017 Email from Steve Gebeke	9	1547-1553
DDDD-9	Exhibit 9 to Peter Lowenstein Declaration: Bill No. 2018-24	9	1554-1569
DDDD-10	Exhibit 10 to Peter Lowenstein Declaration: Las Vegas City Council Ordinance No. 6056 and excerpts from Land Use & Rural Neighborhoods Preservation Element	9	1570-1577
DDDD-11	Exhibit 11 to Peter Lowenstein Declaration: documents submitted to Las Vegas Planning Commission by Jim Jimmerson at February 14, 2017 Planning Commission meeting	9	1578-1587
EEEE	GPA-72220 application form	9	1588-1590
FFFF	Chris Molina Declaration	9	1591-1605
FFFF-1	Fully Executed Copy of Membership Interest Purchase and Sale Agreement for Fore Stars Ltd.	9	1606-1622

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Exhibit	Exhibit Description	Vol.	Bates No.
FFFF-2	Summary of Communications between Developer and Peccole family regarding acquisition of Badlands Property	9	1623-1629
FFFF-3	Reference map of properties involved in transactions between Developer and Peccole family	9	1630
FFFF-4	Excerpt of appraisal for One Queensridge place dated October 13, 2005	9	1631-1632
FFFF-5	Site Plan Approval for One Queensridge Place (SDR-4206)	9	1633-1636
FFFF-6	Securities Redemption Agreement dated September 14, 2005	9	1637-1654
FFFF-7	Securities Purchase Agreement dated September 14, 2005	9	1655-1692
FFFF-8	Badlands Golf Course Clubhouse Improvement Agreement dated September 6, 2005	9	1693-1730
FFFF-9	Settlement Agreement and Mutual Release dated June 28, 2013	10	1731-1782
FFFF-10	June 12, 2014 emails and Letter of Intent regarding the Badlands Golf Course	10	1783-1786
FFFF-11	July 25, 2014 email and initial draft of Golf Course Purchase Agreement	10	1787-1813
FFFF-12	August 26, 2014 email from Todd Davis and revised purchase agreement	10	1814-1843
FFFF-13	August 27, 2014 email from Billy Bayne regarding purchase agreement	10	1844-1846
FFFF-14	September 15, 2014 email and draft letter to BGC Holdings LLC regarding right of first refusal	10	1847-1848
FFFF-15	November 3, 2014 email regarding BGC Holdings LLC	10	1849-1851
FFFF-16	November 26, 2014 email and initial draft of stock purchase and sale agreement	10	1852-1870
FFFF-17	December 1, 2015 emails regarding stock purchase agreement	10	1871-1872
FFFF-18	December 1, 2015 email and fully executed signature page for stock purchase agreement	10	1873-1874
FFFF-19	December 23, 2014 emails regarding separation of Fore Stars Ltd. and WRL LLC acquisitions into separate agreements	10	1875-1876
FFFF-20	February 19, 2015 emails regarding notes and clarifications to purchase agreement	10	1877-1879
FFFF-21	February 26, 2015 email regarding revised purchase agreements for Fore Stars Ltd. and WRL LLC	10	1880
FFFF-22	February 27, 2015 emails regarding revised purchase agreements for Fore Stars Ltd. and WRL LLC	10	1881-1882
FFFF-23	Fully executed Membership Interest Purchase Agreement for WRL LLC	10	1883-1890

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Exhibit	Exhibit Description	Vol.	Bates No.
FFFF-24	June 12, 2015 email regarding clubhouse parcel and recorded parcel map	10	1891-1895
FFFF-25	Quitclaim deed for Clubhouse Parcel from Queensridge Towers LLC to Fore Stars Ltd.	10	1896-1900
FFFF-26	Record of Survey for Hualapai Commons Ltd.	10	1901
FFFF-27	Deed from Hualapai Commons Ltd. to EHC Hualapai LLC	10	1902-1914
FFFF-28	Purchase Agreement between Hualapai Commons Ltd. and EHC Hualapai LLC	10	1915-1931
FFFF-29	City of Las Vegas' First Set of Interrogatories to Plaintiff	10	1932-1945
FFFF-30	Plaintiff 180 Land Company LLC's Responses to City of Las Vegas' First Set of Interrogatories to Plaintiff, 3rd Supplement	10	1946-1973
FFFF-31	City of Las Vegas' Second Set of Requests for Production of Documents to Plaintiff	11	1974-1981
FFFF-32	Plaintiff 180 Land Company LLC's Response to Defendant City of Las Vegas' Second Set of Requests for Production of Documents to Plaintiff	11	1982-1989
FFFF-33	September 14, 2020 Letter to Plaintiff regarding Response to Second Set of Requests for Production of Documents	11	1990-1994
FFFF-34	First Supplement to Plaintiff Landowners Response to Defendant City of Las Vegas' Second Set of Requests for Production of Documents to Plaintiff	11	1995-2002
FFFF-35	Motion to Compel Discovery Responses, Documents and Damages Calculation, and Related Documents on Order Shortening Time	11	2003-2032
FFFF-36	Transcript of November 17, 2020 hearing regarding City's Motion to Compel Discovery Responses, Documents and Damages Calculation, and Related Documents on Order Shortening Time	11	2033-2109
FFFF-37	February 24, 2021 Order Granting in Part and denying in part City's Motion to Compel Discovery Responses, Documents and Damages Calculation, and Related Documents on Order Shortening Time	11	2110-2118
FFFF-38	April 1, 2021 Letter to Plaintiff regarding February 24, 2021 Order	11	2119-2120
FFFF-39	April 6, 2021 email from Elizabeth Ghanem Ham regarding letter dated April 1, 2021	11	2121-2123
FFFF-40	Hydrologic Criteria and Drainage Design Manual, Section 200	11	2124-2142
FFFF-41	Hydrologic Criteria and Drainage Design Manual, Standard Form 1	11	2143
FFFF-42	Hydrologic Criteria and Drainage Design Manual, Standard Form 2	11	2144-2148
FFFF-43	Email correspondence regarding minutes of August 13, 2018 meeting with GCW regarding Technical Drainage Study	11	2149-2152

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Exhibit	Exhibit Description	Vol.	Bates No.
FFFF-44	Excerpts from Peccole Ranch Master Plan Phase II regarding drainage and open space	11	2153-2159
FFFF-45	Aerial photos and demonstrative aids showing Badlands open space and drainage system	11	2160-2163
FFFF-46	August 16, 2016 letter from City Streets & Sanitation Manager regarding Badlands Golf Course Drainage Maintenance	11	2164-2166
FFFF-47	Excerpt from EHB Companies promotional materials regarding security concerns and drainage culverts	11	2167
GGGG	Landowners' Reply in Support of Countermotion for Judicial Determination of Liability on the Landowners' Inverse Condemnation Claims Etc. in *180 Land Co., LLC v. City of Las Vegas*, Eighth Judicial District Court Case No. A-17-758528-J (March 21, 2019)	11	2168-2178
HHHH	State of Nevada State Board of Equalization Notice of Decision, *In the Matter of Fore Star Ltd., et al.* (Nov. 30, 2017)	11	2179-2183
IIII	Clark County Real Property Tax Values	11	2184-2199
JJJJ	Clark County Tax Assessor's Property Account Inquiry - Summary Screen	11	2200-2201
KKKK	February 22, 2017 Clark County Assessor Letter to 180 Land Co. LLC, re Assessor's Golf Course Assessment	11	2202
LLLL	Petitioner's Opening Brief, *In the matter of 180 Land Co. LLC* (Aug. 29, 2017), State Board of Equalization	12	2203-2240
MMMM	September 21, 2017 Clark County Assessor Stipulation for the State Board of Equalization	12	2241
NNNN	Excerpt of Reporter's Transcript of Hearing in *180 Land Co. v. City of Las Vegas*, Eighth Judicial District Court Case No. A-17-758528-J (Feb. 16, 2021)	12	2242-2293
OOOO	June 28, 2016 Letter from Mark Colloton re: Reasons for Access Points Off Hualapai Way and Rampart Blvd.	12	2294-2299
PPPP	Transcript of City Council Meeting (May 16, 2018)	12	2300-2375
QQQQ	Supplemental Declaration of Seth T. Floyd	13	2376-2379
QQQQ-1	1981 Peccole Property Land Use Plan	13	2380
QQQQ-2	1985 Las Vegas General Plan	13	2381-2462
QQQQ-3	1975 General Plan	13	2463-2558
QQQQ-4	Planning Commission meeting records regarding 1985 General Plan	14	2559-2786
QQQQ-5	1986 Venetian Foothills Master Plan	14	2787
QQQQ-6	1989 Peccole Ranch Master Plan	14	2788
QQQQ-7	1990 Master Development Plan Amendment	14	2789
QQQQ-8	Citizen's Advisory Committee records regarding 1992 General Plan	14	2790-2807

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Exhibit	Exhibit Description	Vol.	Bates No.
QQQQ-9	1992 Las Vegas General Plan	15-16	2808-3257
QQQQ-10	1992 Southwest Sector Map	17	3258
QQQQ-11	Ordinance No. 5250 (Adopting 2020 Master Plan)	17	3259-3266
QQQQ-12	Las Vegas 2020 Master Plan	17	3267-3349
QQQQ-13	Ordinance No. 5787 (Adopting 2005 Land Use Element)	17	3350-3416
QQQQ-14	2005 Land Use Element	17	3417-3474
QQQQ-15	Ordinance No. 6056 (Adopting 2009 Land Use and Rural Neighborhoods Preservation Element)	17	3475-3479
QQQQ-16	2009 Land Use and Rural Neighborhoods Preservation Element	18	3480-3579
QQQQ-17	Ordinance No. 6152 (Adopting revisions to 2009 Land Use and Rural Neighborhoods Preservation Element)	18	3580-3589
QQQQ-18	Ordinance No. 6622 (Adopting 2018 Land Use and Rural Neighborhoods Preservation Element)	18	3590-3600
QQQQ-19	2018 Land Use & Rural Neighborhoods Preservation Element	18	3601-3700
RRRR	Supplemental declaration of Seth Floyd	19	3701-3703
RRRR-1	Southwest Sector Land Use Map (1992)	19	3704
RRRR-2	10/10/1991 Planning Commission Minutes	19	3705-3707
RRRR-3	10/22/1991 Planning Commission Minutes	19	3708-3712
RRRR-4	11/14/1991 Planning Commission Minutes	19	3713-3715
RRRR-5	11/26/1991 Planning Commission Minutes	19	3716-3718
RRRR-6	12/12/1991 Planning Commission Minutes	19	3719-3726
RRRR-7	12/12/1991 Planning Commission Resolution adopting 1992 General Plan	19	3727-3728
RRRR-8	2/5/1992 City Council Meeting Minutes	19	3729
RRRR-9	2/18/1992 Recommending Committee Meeting Minutes	19	3730-3750
RRRR-10	2/19/1992 City Council Meeting Minutes	19	3751-3752
RRRR-11	3/12/1992 Planning Commission Meeting Minutes	19	3753-3754
RRRR-12	3/16/1992 Recommending Committee Meeting Minute	19	3755
RRRR-13	4/1/1992 City Council Meeting Minutes	19	3756-3758
RRRR-14	Ordinance No. 3636 (adopting new general plan)	19	3759-3761
RRRR-15	2/13/1992 Citizens Advisory Committee Meeting Minutes	19	3762-3765
RRRR-16	3/27/1991 Citizens Advisory Committee Mailout	19	3766-3775
SSSS	Excerpts of NRCP 30(b)(6) Designee of Peccole Nevada Corporation – William Bayne	19	3776-3789

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Exhibit	Exhibit Description	Vol.	Bates No.
TTTT	Findings of Facts, Conclusions of Law and Order Regarding Motion to Dismiss and Countermotion to Allow More Definite Statement if Necessary and Countermotion to Stay Litigation of Inverse Condemnation Claims Until Resolution of the Petition for Judicial Review and Countermotion for NRCP Rule 56(F) Continuance	19	3790-3801
UUUU	Declaration of Christopher Molina in Support of the City's Countermotion for Summary Judgment and Opposition to Motion to Determine Property Interest	19	3802-3803
VVVV	Declaration of Seth Floyd	19	3804-3805
VVVV-1	Master planned communities with R-PD Zoning	19	3806-3810
VVVV-2	General Plan Maps for Master Planned Communities with R-PD zoning	19	3811-3815
WWWW	**Plaintiff Landowners' Motion on Order Shortening Time to 1) Apply Issue Preclusion to the Property Interest Issue; and 2) Set a Short Hearing to Allow the Court to Consider: a) Judge Williams' Findings of Fact and Conclusions of Law on the Take Issue; b) Evidence that was Presented in the 35 Acre Case on the Take Issue; and c) Very Recent Nevada and United States Supreme Court Precedent on the Take Issue**	**20**	**3816-3877**
XXXX	**Newspaper Articles**	**20**	**3878-3897**
YYYY	**City Council Meeting of October 6, 2021 Verbatim Transcript – Agenda Item 63**	**20**	**3898-3901**
ZZZZ	**Transcripts of September 13 & 17, 2021 Hearing in the 133-Acre Case (Case No. A-18-775804-J)**	**21** **22**	**3902-4280**
AAAAA	**Plaintiff Landowner's Opposition to City of Las Vegas' Motion to Remand 133-Acre Applications to the Las Vegas City Council filed 8/24/2021**	**22**	**4281-4310**

DATED this 11th day of October, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on the 13th day of October, 2021, I caused a true and correct copy of the foregoing **SUPPLEMENTAL APPENDIX OF EXHIBITS IN SUPPORT OF MOTION FOR IMMEDIATE STAY WHILE CITY'S PETITION FOR WRIT OF MANDATE IS PENDING BEFORE THE NEVADA SUPREME COURT ON ORDER SHORTENING TIME— VOLUME 22** to be electronically served with the Clerk of the Court via the Clark County District Court Electronic Filing Program which will provide copies to all counsel of record registered to receive such electronic notification.

/s/ Jelena Jovanovic
An employee of McDonald Carano LLP

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EXHIBIT “ZZZZ”

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CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND COMPANY LLC, ET AL., Petitioners, vs. CITY OF LAS VEGAS, Respondent.	CASE#: A-18-775804-J DEPT. XXVI

BEFORE THE HONORABLE GLORIA STURMAN
DISTRICT COURT JUDGE

FRIDAY, SEPTEMBER 17, 2021

RECORDER'S AMENDED TRANSCRIPT OF PENDING MOTIONS

APPEARANCES:

For the Petitioners:	JAMES J. LEAVITT, ESQ. KERMITT L. WATERS, ESQ. ELIZABETH M. GHANEM, ES. AUTUMN L. WATERS, ESQ.
For the Respondent:	GEORGE F. OGILVIE, III, ESQ. ANDREW W. SCHWARTZ, ESQ. PHILIP R. BYRNES, ESQ. REBECCA L. WOLFSON, ESQ. J. CHRISTOPHER MOLINA, ESQ.

RECORDED BY: KERRY ESPARZA, COURT RECORDER

Case Number: A-18-775804-J

Las Vegas, Nevada, Friday, September 17, 2021

[Case called at 10:04 a.m.]

THE COURT: We'll get the appearances of counsel and then we'll begin.

MR. LEAVITT: Would you like us to go first, Your Honor, Plaintiffs?

THE COURT: Sure.

MR. LEAVITT: Good morning, Your Honor. James. J. Leavitt on behalf of 180 Land and Fore Stars land owners.

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

MS. GHANEM: Good morning, Your Honor. Elizabeth Ghanem on behalf Plaintiffs.

MR. WATERS: Kermitt Waters, Your Honor, on behalf of the landowners.

MR. LEAVITT: And also our two legal assistants, Jennifer Knighton and Sandy Guerra, in the courtroom with us also, Your Honor.

THE COURT: All right, with you?

MR. SCHWARTZ: Good morning, Your Honor. Andrew Schwartz for the City.

MR. MOLINA: Good morning, Your Honor. Chris Molina for the City.

MR. OGILVIE: Good morning, Your Honor. George Ogilvie on behalf of the City.

MR. BYRNES: Good morning, Your Honor. Phil Byrnes for the City.

THE COURT: All right, counsel. So Mr. Schwartz, you want to pick up where you left off on whatever day it was?

MR. SCHWARTZ: Yes, Your Honor. Thank you.

I want to thank the court for giving me more time to address the claim that the property owners have constitutional rights to building permits just by virtue of zoning. This is -- it's an extremely important principle. What the developer is proposing here is a radical change in land use law and property law in Nevada. And that's not an exaggeration. In the 1970s and '80s, the State Legislature for Nevada gradually changed the land use regulatory system in Nevada. Whereas the former system was marked by very little regulation and property owners had great freedom to use their property and build on their property as they saw fit with very little oversight from the government.

In the 1980s and 1990s, the Nevada Legislature made a C change in the way land use is regulated in the State of Nevada. It determined that there should be much more -- much more regulation to make sure that development served the community, that it was safe, that it was aesthetically pleasing, that it provided proper infrastructure, that communities were planned for the best interests of the community. And there was a de-emphasis on the rights of property owners to build on property. And I wanna take the Court through that change because that affects -- that directly affects what the alleged constitutional right that's at issue here, whether it's valid or not, and I think the Court will see it is

not a valid point.

So it's clear from all authority, including the *Oliver* case that the developer likes to rely on, that zoning does not confer rights. The purpose of zoning is to exclude certain uses and to limit an owner's use of the property. So the theory that a property owner has constitutional rights granted by zoning doesn't fit with the entire concept of zoning. The first zoning case was *Euclid v. Ambler Realty,* and in that case -- prior to 1926 and prior to that case, developers in the community, or owners, could do virtually anything they wanted with their property. The only limit on their use was of a public nuisance. In that case, the U.S. Supreme Court upheld a zoning ordinance which said that the community could exclude certain uses from a zone to -- it was to allow a zone to be solely residential. So it excluded industrial uses and noxious uses that might interfere with the residential use.

That's the purpose of zoning. And unanimous Nevada authority holds that zoning does not confer property rights. It's not for the interests of property owners, as the developer claims here. And a denial of a property right is not a taking. That's not the test for a taking. If you're denied a property right, your remedy is a petition for judicial review requiring the government to allow you to do what you say you have a right to do. But the test has nothing to do with takings. The test for takings is the economic impact of the regulation on the property.

Now, the developer relies on the *Sisolak* case for the proposition that zoning confers constitutional rights on the property. They can do whatever they want as long as it's permitted by -- it's a

permitted use in the zone. In other words, if it's -- if residential use is a permitted use in the zone, the developer claims -- and this is -- this would completely up-end all land use regulation in the State of Nevada. The landlord contends they have a constitutional right to build anything they want without this -- the exercise by the government of discretion to limit that right, and they claim that *Sisolak* supports that theory. It does not. *Sisolak* is a takings case -- a physical takings case where the Court held it had nothing to do with zoning. It had everything to do with the owner's rights to exclude other people.

And the Court said if you -- if property is vested in an owner, which means you own it, you own the fee simple, that's the use of vesting in the *Sisolak* case. To get a preliminary title for it, it tells you who owns the property. It's called vesting. The property is vested in such. In this case, the property was vested in the developer. It owned the fee simple interest. The *Sisolak* court did not say that the property owner has a vested right to build whatever they want as long as it's a permitted use by zoning. The *Sisolak* court refers to zoning in the context of damages of the value of the property. The zoning permitted certain uses.

So in valuing the property, the court said, yeah, you consider the zoning, what's allowed. If zoning allows only residential, and open space, and recreation, well, you can't value the property based on a -- you know, a high-rise office building. That's the context in which the court in *Sisolak* discussed the zoning. It had nothing to do with the right to exclude others. It doesn't matter what the zoning is if you're denied

the right to exclude others of physical taking. It doesn't matter what the zone is. You're entitled to compensation for a physical taking.

That's not this case. This motion goes to the categorical under *Penn Central* claims, which only concern regulation of owner's use of the property. And the court said, in *Sisolak*, not that the property owner had a right to build in the air space, but it had a vested right in the air space, which means it owned the air space. That's all it said. That's all that that decision meant.

In this case, as I'll explain, the R-PD7 zoning grants the City broad discretion to restrict the owner's use of the property. The developer's theory is completely inconsistent with that ordinance. And as I indicated -- as I argued at some length on Tuesday, *Sisolak* is a physical takings case and has nothing to do with the categorical and incentive claims, which concern regulation of use.

I want to take the Court through two state statutes and the Las Vegas zoning ordinance, which I think will make it abundantly clear that property owners do not have constitutional rights to build whatever they want as long as it's a permitted use. But I do want to refer the Court to Judge Herndon's decision. And by the way, Judge Herndon's decision was a final decision on the merits. It was not set aside by Judge Trujillo. She has not issued any orders in the case.

Judge Herndon's decision was well-reasoned. He took the proposed findings of fact and conclusions of law of both parties, and he took some from each, and he modified the decision. He really dug deep into these issues. And everything he said in his decision is

well-supported by Nevada and federal case law and statute, and the developer can't refute any of it because it's all right.

But at page 16 of his -- which is 10 of 11, Your Honor, in our exhibits.

THE COURT: No, I've got it.

MR. SCHWARTZ: Page 16, Judge Herndon said, "because the right to use land for a particular purpose is not a fundamental constitutional right, courts generally defer to the decisions of legislatures and administrative agencies charged with regulating land use." And Judge Herndon goes on at some length to explain how the land use regulatory system in Nevada works. There are separation of powers. Local agencies have broad discretion to regulate land for the community good. And the only situation in which a property owner is entitled to compensation for a taking is where the regulation either wipes out or virtually wipes out the property's value or interferes with objective investment-backed expectations.

And on page 20 of Judge Herndon's decision, he cites the authority for that proposition. It's the *State v. 8th Judicial District* case, *Kelly v. Tahoe Regional Planning Agency,* and the *Boulder City* case. And they all say the same thing. This is the test for a taking. Whether the property owner was denied some right is not the test for a taking, even if it had the right. And of course, it didn't have the right.

Now, I'd like to refer the Court to tab 39, please. And that is the Nevada Revised Statutes 278.150. And that's the -- this is the statue that orders local agencies to prepare a master plan. A master plan and

general plan are synonymous. And in subsection 2, it says that these master plans will be a basis for development of the city. And then in section 5 -- subsection 5, it says that the governing body shall adopt each of the elements in its master plan set forth in NRS 278.160.

278.160 is tab 40. And that says that the master plan, with the accompanying charts, drawings, diagrams, schedules, and reports, may include the following elements. And one of those -- and you can see a number of elements. And one of those, in subsection D, is the land use element. And it sets forth in subsection D that they concern community design and standards and principles governing subdivision and suggested patterns for community design and development. And a land use plan inventorying the types of land use and comprehensive plans for the most desirable utilization of the land.

So then the legislature adopted later, in a later section, in NRS 278.250, which is back to tab 16, Your Honor. NRS 278.250. And this is the zoning ordinance, the statute that requires local agencies to adopt zoning ordinances. And it says, within the zoning district, it, that means governing body, can regulate and restrict. So zoning regulation restricts. It doesn't confer rights. There is no law in the State of Nevada or anywhere else that holds that zoning confers rights. It's a radical proposition that would take the State back before all of these statutes to a place where property owners had virtual freedom to do what they wanted with their property. That's in the past. That's not this case.

It says it can regulate and restrict the -- basically, use of property. And it says in 2, and this is significant, the zoning regulation

must be adopted in accordance with the master plan or land use and the design. And then what follows is A through O. And this tells cities what they should do to regulate and restrict use of property to protect community interests to make for a well-planned community.

And then in subsection 4, the legislature said, in exercising the powers granted in this section, the governing body may use any controls relating to land use or principles of zoning that the governing body determines to be appropriate.

So this is significant in that you have a master plan, and the master plan is the equivalent of a constitution. And the statutes implement the constitution. They have to be consistent with the constitution. Same thing with a master plan and zoning ordinances. The master plan is like the constitution. It sets all the policies for what land can be used for and the zoning has to be consistent with it. It has to implement that.

But, moreover, these statues -- and if you look through A through O, it kind of covers the universe of what you want to do to point -- to have a sound planning apparatus. It grants the government wide discretion -- wide discretion, to restrict the use of land for the community. And that discretion is completely inconsistent with the theory that zoning ordinances grant constitutional rights to do what you want without discretion. You cannot have discretion and at the same time have a constitutional right to a building permit. They can't coexist.

Okay. Now, I'd like to refer the Court to the R-PD7 zoning ordinance. Well, let me back up. Tabs 28 through 33, I won't take the

Court through those in detail, but those are all the -- this is the Unified Development Code, which is part of the Las Vegas Municipal Code. And these set the general principles for zoning and planning in the City of Las Vegas. And you will see that these -- and I've highlighted portions of these ordinances that show that the City has wide discretion. It exercises discretion at all levels in approving building permits.

So now, looking at -- oh, here it is. Tab 27, Your Honor. This is the R-PD7. The R-PD zoning ordinance. And I will spend a little time with this because this is what's at issue here. Tab 27 says, the RPD district has been to provide for flexibility and innovation in residential development with emphasis on enhanced residential amenities, efficient utilization of open space, the separation of pedestrian and vehicle traffic. Emphasize efficient utilization of open space. Further on in that section, it says that, the regulation has to remain sufficiently flexible to accommodate innovative residential development.

Then, in Subsection C, it sets forth the uses that are permitted -- permitted in an RPD zone. In this case, the property is zoned R-PD7, which means no more than seven residential units per acre, or other -- whatever uses, group care homes, childcare, family homes. No more than seven per acre. Then section C(3) says that the director, that's the Director of Planning, gets to use his or her judgment in applying this ordinance. And then in subsection D, it says, the approving body, and this is the Planning Commission and the City Council. The City Council has the final word on building permits. The approving body may attach to the amendment to an approved site development plan

review whatever conditions are deemed necessary to ensure the proper amenities and to assure that the proposed development will be compatible with surrounding existing and proposed land use.

So what we see is in state law, a wide degree of discretion. And in state statute. Judge Herndon went through in detail the wide discretion granted to local public agencies in Nevada under Nevada case law. And now the statute that applies here shows a wide degree of discretion. This says that the City can approve a development project that proposes a permitted use. Approve it with conditions or disapprove it. It has that discretion. The only constitutional limitation on that power is the takings clause. And the only -- and the takings test is, does the regulation wipe out or nearly wipe out the economic value of the property or interfere with objective reasonable investment-backed expectations. That's the test.

Okay. So the Nevada Supreme Court has said, the Nevada Supreme Court is unanimous -- unanimous, that where there is discretion, there is no property or vested right to a building permit. It's just that simple. And there's clearly discretion in this case. And so those cases are directly applicable. I want to refer the Court to tab 18, the *Stratosphere* case. They all say the same thing, but *Stratosphere* is a good case because it involves the City of Las Vegas, and it involves the same developments scheme here, a site development permit that's required for every development in the City of Las Vegas. And in the *Stratosphere* case, tab 18, at 120 Nev 527, the Court said that in the context of governmental immunity, we have defined a discretionary act

as an act that requires a decision requiring personal deliberation and judgment.

The language used in Section 19.18.050 clearly indicates a discretionary act on the part of the City Council. And that's -- 19.18.050 is the requirement that the City approve a tentative map, and that is discretionary. All of the other permits required, you got a site development permit, a rezoning permit, a general plan amendment, all involved discretion.

And then, I'm at 120 Nev 528. The court said -- and this just demolishes the developer's claim in this case. Under section 19.18.050, the City Council must approve the Stratosphere's proposed development of the property through the City's site development plan review process. And the site development plan review process which is required here is UDC 19.16.100, and that's tab 33. And that says every application for development in the City of Las Vegas has to have a site development permit. And this is saying that the City must approve the Stratosphere's proposed development of the property through the City's -- the site development plan review process. That process requires the Council to consider a number of factors and to exercise its discretion in reaching a decision. There is no evidence that Stratosphere had a vested right to construct the proposed ride.

We have -- we've cited *Boulder City*, tab 19, the *T* case, tab 20, *City of Reno*, tab 21, *Havana Contractors*, tab 22, *City of Reno*, tab 23, *Board of County Commissioners*, tab 24. They all say the same thing.

Now, the developer claims that these cases are not relevant

because they were supposed -- they were petition for judicial review cases, but that's -- that is dead wrong. A petition for judicial review is a procedure. It is a remedy. It is not a -- there's no substantive law of petitions for judicial review. No substantive law. And the developer hasn't cited any authority that there's a substantive law of petitions for judicial review. In a petition for judicial review, the standard is substantial evidence, limited to the administrative record. The remedy is equitable. That's a procedure and a remedy. There is no substantive PJR.

So those cases that rely on the discretion granted to public agencies -- and the law in Nevada is there is no property right conferred by zoning. That's what those cases say. That is the Nevada law of property and land use regulations. That applies in a PJR case, or a regulatory taking case, or any case. That's the law. That's the substantive law of property and land regulation in the state of Nevada.

And to establish with finality that this argument that these cases are petition for judicial review cases and therefore don't apply to any other case, I mean, it defies logic, and it defies all of the case law. But if the Court would please look at the *Boulder* case -- *Boulder City* case, tab 19, at page -- at 110 Nev 246. So that's on page -- well, page 6 of this opinion, at the top left. It says Boulder City -- Boulder City challenged the denial of its permit as a Constitutional due process violation, not a PJR. Boulder City could not have violated Cinnamon Hill's 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's this case. This is the Nevada Supreme Court saying they've got nothing. Their claim is wrong. This is not a PJR case, or at least that claim wasn't subject to a PJR. It was a constitutional challenge, just like this case. This is a challenge under the takings clause in Nevada and the federal constitutions. It's a constitutional challenge. I mean, *Boulder City* proves the point that this is not -- that there's no substantive law of PJR. If that were the case with the Boulder City, the Supreme Court in the *Boulder City* would have said, well, we've got two parallel systems of land use law in this state. One if you sue for a PJR, one if you sue for a constitutional violation. That's kind of a ridiculous proposition.

So what the developer is saying here is that if you are this -- that we have two parallel systems of property law and land use law in this state. So if you're a City Council, and you're presented with a building permit application, if you deny it or condition it in a way that the developer doesn't like, in other words exercise -- if you exercise your discretion, if the developer later after this happened sues for a PJR, the court is going to apply an abuse of discretion standard, a substantial evidence standard, and a failure to comply with the law.

But if the developer later sues for a regulatory taking, you have no discretion. That's a paradox. That can't be. That can't be the law, and it isn't. And there's no -- if you look at the developers briefs and their proposed findings, there is no authority to support what they're

saying. None whatsoever. All the authority is on the other side.

In addition to this, Your Honor, we have the 9th Circuit in the 180 Land case. The developer sued the City and two members of the -- former members of the City Council in federal court. And they made the identical claim that they're making here, that they had a constitutional right to a building permit for the 103rd Street property -- for the Badlands property. And the 9th Circuit held -- and again, they made it the identical argument, and the 9th Circuit held no. And our reading of Nevada law is you do not have a property or vested right in zoning. And that was a final decision between the same parties, on the merits, on the identical issue. And under general principles of issue for preclusion, that decision ought to be binding. You don't get a re-do. Once that decision has been made, it binds.

By the way, on the previous page of the *Boulder City* case, at the bottom right, that's page 5, I just want to refer the Court to the part I've highlighted there where the court said no taking. No taking because the denial of the permit didn't destroy all viable economic value. And so that's the test for a taking, not whether you've been denied some right, whether you have that right or not.

And Your Honor, the 9th Circuit decision that I referred to is tab 25. And there, 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 under discretion of the decision-maker. So what's the court saying there? It's saying that

property -- what property interests an owner has, is determined by state law. They're referring to the Nevada law of property. We reject as without merit Plaintiffs' contentions that certain rulings in Nevada state court litigation established that Plaintiffs were deprived of a constitutionally protected property interest.

Now, Judge Williams' order -- Judge Jones ordered that findings of fact and conclusions of law in the 17 acre case that the Court received yesterday from the developer's counsel. Those are interlocutory orders. But I understand that they are -- they can be persuasive, but they also have to be correct.

Well, in denying the petition for judicial review in the 35 acre case, Judge Williams was correct. He said -- and that's at tab 26, the decision of the City Council to grant or deny applications for a general plan amendment, rezoning, and site development plan review is a discretionary act. A zoning designation does not give the developer a vested right to have its development applications approved.

Also, in that same decision, Judge Williams said, compatible zoning does not ipso facto divest a municipal government of the right to deny certain uses based upon considerations of public interest. In that the developer asked for exceptions to the rules, its assertion that approval was somehow mandated simply because there is R-PD7 zoning on the property is plainly wrong.

Then Judge Williams said, it is well within the Council's discretion to determine that the developer did not meet the criteria for a general plan amendment or waiver found in the Unified Development

Code and to reject the site development plan and tentative map application accordingly, no matter of the zoning designation. Then Judge Williams said, the Court rejects the developer's argument that the R-PD7 zoning designations on the Badlands property somehow required the Council to approve its applications. Statements from planning staff or the city attorney that the Badlands property has an R-PD7 zoning designation do not alter this conclusion.

Now, the developer argues that those statements from Judge Williams were made in the context of a petition for judicial review and that they have no application to their regulatory takings claim. And I submit that that is dead wrong. There is no substantive law of PJR. Judge Williams cited authority, extensive authority to Nevada property laws and land use regulatory laws. The fact that it was a PJR has nothing to do with the facts and the underlying legal basis for Judge Williams' decision to deny the petition for judicial review. It wasn't PJR law.

The developer also argues that Judge Williams' decision was based on Judge Crockett's finding that the Badlands was subject to a PROS designation in the City's general plan, which does not allow residential use. And that when Judge Crockett was reversed by the Nevada Supreme Court, that his conclusion that the property was -- Judge Crockett's conclusion that the property, the Badlands, was subject to the PROS designation, goes out the window. Well, that's a fact. The PROS designation was imposed by ordinance, by the City, and repeatedly reconfirmed by ordinance of the City, and it was in effect

when the developer bought the property. It's a fact. Judge Herndon found that that was a fact.

You can't just get rid of facts just because you sue under a different cause of action. That's a fact. And the effect of the PROS designation is the law. Nevada Revised Statutes 278.150, the R-PD7 zoning, and the City's general plan all provide that the PROS designation applies to this property and does not permit residential development. The City has discretion. Judge Williams said the city has discretion to change the PROS designation. If it has discretion, the property owner cannot have a constitutional right to a building permit. I cited to Judge Herndon's findings of facts and conclusions of law, where Judge Herndon said a landowner does not have a fundamental constitutional right to use the land for a particular purpose. It's directly on point.

And now, this a -- and the next point, Your Honor, is an absolutely crucial point. The developer claims that eminent domain cases hold that a property owner has a constitutional right to build whatever they want as long as it's a permitted use by the zoning. And they cite for that proposition several cases, including -- and this is their Exhibit 1. They cite *City of Las Vegas v. Bustos* and *Clark County v. Alper* [phonetic]. Okay. So this case, the instant case, is about whether the City can restrict the use of property as long as it doesn't wipe out the value. That's what this case is about.

So the Court is asked to determine whether the City is liable for a regulatory taking. That's an inverse condemnation, where the property owner is the Plaintiff, claims what you've done is wiping out or

nearly wiping out. And the issue here is liability, first. And if the City is liable, then the Court or a jury determines what the just compensation is, and that's based on the value of the property. In sharp contrast, in an eminent domain case, the City initiates the action, and it concedes liability. It concedes liability and the only issue is the value of the properties.

Yeah. Inverse condemnation, the liability is the issue. If liability is determined based on the tests for liability, which are wipeout, or near wipeout, or investment-backed expectations. If there's a determination taken, then the Court looks at damages. The cases that the developer sites are either eminent domain cases where liability is not an issue, so they couldn't possibly -- they couldn't possibly state the standard for liability for a regulatory taking, and they don't. And there are a couple of cases in there that are inverse cases, but the developer cites to a discussion of value.

In the *Alper* case that the developer relies on saying eminent domain, regulatory takings, same thing. Apply all the same rules. Well, of course, that's ridiculous because liability is not an issue. Liability is at issue here. Liability is not an issue in eminent domain cases.

In the inverse cases the developer cites, the discussion was about value, that there had been a finding of a taking. And the discussion was value, and in that case, the *Alper* court said we determine value the same way we do in eminent domain cases. It makes a lot of sense. Those cases say that in determination of value, an appraiser, the expert witness for each side, has to go through the following analysis.

The appraiser determines what the property can be used for physically, economically, and legally. So in the determination of what the property can be used for legally, the appraiser must consider the restrictions on use of the property from zoning. The appraiser doesn't consider what rights zoning grants because zoning doesn't grant rights. It restricts the use.

These cases say that the appraiser cannot assume a use of property that's not allowed by the zoning in valuing the property unless there's a reasonable probability that the City will change the zoning. That's the analysis that an appraiser goes through in giving an opinion of value of the property.

So the part of these cases that the developer relies on actually say the opposite of what the developers say. They say you can't -- you have to consider the zoning limits on the use of properties and value. You can't go wild and say, well, the property could be used for a 40 story office building if that's not allowed by zoning. Those cases don't remotely say what the developer says here. Nevada eminent domain law provides that zoning must be relied upon to determine a landowner's property interest. That's false. To determine the property value.

Your Honor, those eminent domain cases and a couple of inverse cases that discuss value, in addition to statements by the former city attorney and a planner, are the developer's case. They say that's the law. And of course, what Judge Williams said, "statements from planning staff for the city attorney that the Badlands has an R-PD7 zoning

designation, do not alter this conclusion. It's just that -- it's pretty simple. If the former city attorney wasn't familiar with the law, the state law, local law, or constitutional law, that doesn't bind this Court or a member of the planning staff. None of those statements are relevant.

What binds this Court are cases from the Nevada Supreme Court and statutes from the Nevada Legislature. And there is no [indiscernible]. As I said, the Court is being asked to say that discretion is out the window in Nevada for land use planning. And that's not an exaggeration. And you would think to make such a radical change in the law, that the Court would want to rely on at least one case, at least one statute. But there's absolutely nothing. If you read the developer's cases, there is no case that says what they are claiming here, and all the authority is the opposite.

Again, their theory is -- it just isn't -- there's a disconnect between their theory and zoning law. Zoning doesn't grant rights. So, you know, the developer never says, well, you have a right -- you have a right to build. They're relying on -- the developer is relying on Judge Williams' order, and that's tab 26. And at the end of Judge Williams' order -- I'm sorry it's not tab 26. Your Honor, I'm having trouble putting my finger on that order.

But the order says, in their -- in the -- in granting this motion to determine property interest, it says two things. One, the property is zoned R-PD7. That's never been at issue. Of course, it zoned R-PD7. The City has never disputed it. The developer acts like that's some sort of a victory for the developer that the City has denied that. And the

developer says the City denies that there is R-PD7 zoning or that zoning has any effect on the use of the property, the developer's right. And that's a straw man argument. We don't argue that. We argue that both zoning and the general plan apply. And they apply in very -- in very clear ways under local and state law.

But they submitted an order to Judge Williams, and they led him into error. The order says that single family and multi-family residential uses are the, T-H-E, the legally permitted uses in the plan. Now, if you look at permitted uses by right in the property, if you look at tab 27, and the R-PD residential zoning district, it says that the R-PD district provides for flexibility and innovation in residential development with emphasis on enhanced residential amenities, efficient utilization of open space, now that's key. So single family and multi-family are not the only legally permitted uses, but also open space. And then, if you go down to subsection C, we see that there are home occupations, childcare family homes, childcare group homes, all permitted.

So they led Judge Williams into error when they submitted an order that said -- that made it sound like that residential use, single family and multi-family use, the use they want to make, are the only legally permitted uses in the district. That's false. Other uses are permitted, including open space.

So here's what happened in this case. The developer ignores -- avoids the history of this case. In 1991 -- in 1990, '91, '90, the City approved the Peccole Ranch master plan, 1539 acres. It re-zoned a 614 acre part of that property R-PD7 in a tentative zoning. That's how the

City worked back then. It tentatively zoned property, and then when the property was built out, it would make the zoning permanent. So in 1991, the City re-zoned a 614 acre portion of the property R-PD7.

Then, in 1992, the City Council adopted a new general plan. This was the City really changing the way it did things. It became much more active, had a much more rigorous land use regulatory program with the 1992 general plan. And in that plan, it designated 250 acres of that 614 acre property PROS, parks, recreation, and open space, that did not permit residential use. And the rest of the property was designated residential in the general plan, a residential use, a low-density or a medium-density residential use in that [indiscernible]. That's exactly what R-PD7 -- R-PD zoning [indiscernible].

Okay. So the developer is treating this case like *Lucas* case, where you've got a lot, one lot, surrounded by other residential lots, all developed. And the State of South Carolina says you can't build on this lot. Well, a house on that lot is the only use for that lot. And you know, I think that it makes sense. Well, if the only use you've got is to build one house on your property, and the government says no, you can't, well, that could be a taking. That very well could be.

But that is not this case. We had a 1500 acre master planned community, and the whole point of the master plan is to decide where the houses are going to go, where's the recreation and open space going to go, where the roads going to go, the fire station, the hotel and casino, the retail, to plan a sound community. A community that's safe and provides quality -- a high quality of life. That's the whole point of these

regulations.

And so when the City re-zoned a portion of the property, of the PRNP, the 614 acres, to R-PD7, it did exactly what it's supposed to do. In that area, that large area, it decided, well, here are the houses and here is the open space. And in fact, in approving the Peccole Ranch master plan, the City conditioned the approval on the set aside of recreation and open space. The zoning -- under the zoning. The zoning requires it.

Again, the City has discretion as to where the open space is going to go. But this zoning requires it, and it was part of the approval. They approved a project that had recreation and open space in it, a golf course. It was also a condition of the developers of the PRNP to participate in a gaming district, that they set aside a golf course. That was a condition.

Now, the developer argues -- and this is false. The developer argues that -- it's a straw man argument -- that the City contends that those conditions of development -- that the City argues that those conditions required that the property stay in open space or recreation permanently. That is not our argument. The conditions -- and the developer also argues there were no such conditions because the approvals of the Peccole Ranch master plan don't say, as a condition of zoning approval, you will set aside open space. That's not how this works. That's not how these approvals work. They approved a project that had in it, streets and houses, retail, a number of things, and open space. So their approval -- everything in the approval, is a condition. It

doesn't have to say this is a condition. However, the gaming district approval was specifically conditioned on the set aside the golf course.

So the Peccole is then built out. The Peccole Ranch master plan, with thousands of housing units, hotel, casino, retail, and the golf course. And this developer participated in that. Built the Queen Church Towers, Tivoli retail facility, and benefited from the amenity of the open space.

Now, the developer bought the open space and claims I have around the build in this area because I have a -- you know, I have -- because the property is zoned R-PD7. Again, Your Honor, their theory is absurd. That means that -- every property is zoned for some uses, some for residential, some for industrial, some for agricultural. Every property in this state, practically, is zoned, except maybe federal property. So that means that any owner of property has a constitutional right to build whatever they want as long as it's a permitted use in the zone.

It's just such a fantastic notion. It also means that anytime a government agency denies the development permit or conditions it, it's a taking, because they have a constitutional right to develop. Again, it's just -- it's stretching the law to the point of breaking. That can't be the law. But that's what they're asking to do. And they say that they have Constitutional rights to build in the property. Well, they say they have a right to build single or multi-family residential. Well, does the City -- you know, apparently the City doesn't have any discretion. Can the City limit them to one house? If they have a right to build residential, what does that mean? One house? In this case, 133 acres times 7, the density, the

931 houses? What rights do they have?

What they're saying, again, amounts to the City has no discretion. They've never said, well, exactly what right they have, and that's because their theory just doesn't fit. It doesn't fit within the law of zoning or taking. It gets even more absurd. This means that -- their theory would mean that every time a city or county re-zones property to impose any new restrictions, it's a taking because they have a constitutional right under zoning. So that means the City can't change the zoning without paying compensation. The whole thing just is -- just collapses, Your Honor. And again, the R-PD district says the City is to provide enhanced residential amenities and sufficient utilization of open space that it approves.

UDC Section 19.10.050 says that in an RPD zone, single family and multi-family and supporting uses are allowed. The open space, the golf course, and the drainage for the 133 acre property was a supporting use. That's allowed. Residential is not the only use alone. And in fact, R-PD zoning encourages open space. It says single family and multi-family residential or supporting uses, to the extent they are determined by the director to be consistent with the density approved for the district and are compatible with surrounding uses. The whole section is just infused with discretion. It's pervasive. And under the *Stratosphere* and other cases, it's pretty simple. If the agency has discretion, there's no property value.

Now, the developer relies on a play on words of the concept of a permitted use, and a permitted use by right. The developer argues

that if a use is a permitted use in a zone, that means they have a Constitutional right to build it. That's not the case. And that obviously isn't the case because the *Stratosphere* case was deciding Las Vegas law. And all zones have a permitted use. That's what the zones are for. Again, *Euclid v. Ambler*. Housing is permitted; other uses are not permitted.

So permitted means that the government can allow that use in the zone. It cannot allow a use in the zone that's not permitted. That's what permitted means. It's not -- it's the opposite of what the developer claims. That limits saying what uses are permitted in the zone and limits the uses in that zone. It doesn't confer rights on owners to make those rights. So their theory is just, again, a big disconnect with zoning law.

The definition of a permitted use in Las Vegas is a -- a permitted use is permitted as a matter of right. Not by right. They misquoted in their order they presented to Judge Williams. It's permitted as a matter of right. Single family and multi-family residential uses are permitted uses. So that means they are permitted as an added right in an R-PD7 zone.

In tab 28 is the definition of permitted use, Your Honor. So the developer ignores all the authority that says that just because a use is permitted in the zone doesn't mean that you have a constitutional right, a property right or a vested right, to make that use. The City has discretion. And the definition of permitted has been the same for a long time. So the Court couldn't have decided that the City has discretion, and the owner has no property rights if permitted as a matter of right

meant that the owner has a Constitutional right. That would blow up -- again, that would blow up all land use law and return to an age where owners had virtual freedom to do what they wanted.

The definition of permitted use is a use of land in a zoning district as a matter of right if it is conducted in accordance with the restrictions applicable to that district. That says discretion. In the RPD district, what are the restrictions to that district? Well, you have the -- you have a number of uses that are permitted uses, and then you have all this discretion to require supporting uses such as open space, ancillary uses. Again, the R-DP ordinance is infused with discretion. So permitted as a matter of right doesn't mean at the developer has a constitutional right. Permitted means it's not -- not permitted. The only way that the City Council could allow a use in a zone that's not permitted is to amend the zoning ordinance.

Okay. Now, Your Honor, it gets even more difficult for the developer. They don't have a constitutional right under zoning, but they fail -- the general plan is also an insurmountable obstacle to their claim. How can the developer have a constitutional right under the zoning to build wherever it pleases as long as it's a permitted use where the general plan of the City has designated the Badlands PROS, which does not allow housing. The two aren't compatible. They can't have such a constitutional right because the general plan doesn't allow it.

I cited to the Court Nevada Revised Statute 278.25.02, that's tab 16. It says, all zoning must be consistent with the general plan. I refer the Court to tab 43. This is UDC 19.00.040. It says the adoption of

this title is consistent and compatible with and furthers the goals, policies, objectives, and programs of the general plan. It is the intent of the City Council that all regulatory decisions made pursuant to this title be consistent with the general plan, and then it goes on. And then, it even makes a stronger statement. For purposes of this section, consistency with the general plan means not only consistency with the plan's land use and density designations, that's the PROS, that's a land use and density designation, but also consistency with all policies and programs of the general plan, including those that promote compatibility of uses and densities and orderly development consistent with available resources.

So this says two major -- three major things. One, zoning must be consistent with the general plan. Zoning implements the general plan. The general is the Constitution. It's a higher authority. And it says that in implementing the general plan, the City has -- in implementing zoning ordinances, they have to be consistent with the letter of the general plan. You know the land use designations in the general plan are controlling. They're also kind of the spirit of the plan and all of the plan's provisions.

In the *AmWest* case versus *City of Henderson*, the Court said -- the Nevada Supreme Court said, at the bottom of the first page in yellow, we agree with the District Court that AWD does not have vested rights in its 1989 master plan. In order for rights in the proposed development project to vest, zoning or use approvals must not be subject to further governmental discretionary action affecting the project.

And then on the next page, Your Honor, in the paragraph that starts with without overruling, the Court said, "This Court held, pursuant to NRS 278.250, that municipal entities must adopt zoning regulations that are in substantial agreement with the master plan." The *Nova Horizon* case, at 105 Nevada 92, a 1989 case, says the same thing. So if the developer has to obtain an amendment of the general plan to allow residential development in the Badlands, it can't have a constitutionally protected property or vested right on their zoning to build houses.

Nevada -- excuse me. Las Vegas UDC 19.16.010(a) is tab 29. It says in subsection A, "as otherwise provided by this title, approval of all maps, vacations, re-zoning, site development plan reviews," remember, a site development plan review is required for every development project in the state with a few exceptions." Special use permits, very -- the law shall be consistent with the spirit and intent of the general plan. I cited in the subsequent tabs are a number of other ordinances -- I won't take you through those in detail -- that require zoning to be consistent with the general plan, all development to be consistent with the general plan.

I will refer the Court, though, to the UDC 19.16 .100, which is tab 33. I think this is significant. I've highlighted in yellow the important parts of that ordinance, Your Honor. And that says that -- in subsection A, the purpose of the site development plan review process is to ensure that each development, number one, is consistent with the general plan, this title, and other regulations. And then in the subsequent sections, it just goes to show how much discretion the City exercises. You know, it

contributes to the long-term attractiveness of the city. Well, that requires discretion. It contributes to the economic vitality of the community.

Your Honor, every property is unique, and you can't have one size fits all in zoning and planning regulations. What the legislature is telling cities is you shall use your discretion to plan your communities to achieve these objectives. There has to be discretion.

THE COURT: It this, like, a good time we could discuss -- we have these four different cases pending and each of these four parcels that -- the developer chose to do it this way. Each of these four parcels were submitted separately. The cases are all separate. And they're all at a different point in the process. I'm not going to say procedure because procedure is for court. I would say zoning process. So can we talk about that and how --

MR. SCHWARTZ: Yeah.

THE COURT: I mean, thank you very much for the historical perspective, but how does this apply to this situation we're in specifically here? We have the 17 acre case with Judge Jones. I appreciated seeing the order yesterday. I thought it was interesting that he said he felt that Herndon's order was very specific to Herndon's -- the situation in Herndon's case, which is the 65 acres, which apparently never had anything submitted. So clearly not ripe. I mean, Herndon's right on that. I don't think anybody can question it. He's right. That case is not ripe. Nothing was ever done.

The 30 -- the 17 acre, that seems to be this whole mess where that was approved, and then the property -- the neighbors sued,

so we had Crockett's order. It goes up to the Supreme Court. Somehow, in the midst of all this, something happens. I've never really been clear on what happened to the 17acre case. It's not mine. I don't care. But it is it relevant, because what Judge Jones says is look, this is a different case. Seventeen acres, we have this whole problem of, you know, did they or didn't they revoke it or, you know. And, you know, Herndon says, well, it doesn't matter, it was void because while Crockett's order was in place, that voids it. But then, the Supreme Court reinstates it.

So there we have the problem of Judge Williams' case, which is the 35 acres. Again, a different situation. The petition for judicial review is denied, and then they proceed on this other, you know, what we now understand to be -- it should be a separate case, which is this constitutional part of the case. And there, we have this whole problem where there was some action taken that had to do with amending the general plan. And so that's -- he sees that as significant and that's different in that case.

And so then we get to this case. So can we just talk about, I mean, because seriously, we've had enough of this.

MR. SCHWARTZ: Sure.

THE COURT: Can we just talk about some specifics of the case, please?

MR. SCHWARTZ: Well, that's what I've been doing. And this is a motion to determine property interest.

THE COURT: No, I haven't heard anything about the facts. So I would like to get into the specifics, because I see each of these four

cases is very different. They're all at a very different stage. I don't see how you could say well, Judge Trujillo did this, or Judge Jones did that, or Judge Herndon did this. They're all different.

MR. SCHWARTZ: I agree, and I'm not saying that that's what --

THE COURT: So let's talk.

MR. SCHWARTZ: I'm talking about the *Stratosphere,* and the other cases, and the statutes.

THE COURT: Let's move on, please.

MR. SCHWARTZ: That applies directly to --

THE COURT: Let's talk very specifically the history of this case, of these facts, because again, each of these cases have unique facts. Very different. So we're talking about 133 acres. Let's go. Let's go.

MR. SCHWARTZ: Okay. So if the Court thinks that Judge Herndon was right about the --

THE COURT: A hundred percent.

MR. SCHWARTZ: -- the ripeness --

THE COURT: Yes.

MR. SCHWARTZ: -- this is the exact same situation because --

THE COURT: And is that because what happened here is the City Council didn't, technically, act.

MR. SCHWARTZ: Correct.

THE COURT: They took if off calendar.

MR. SCHWARTZ: Correct. The burden is on the developer, and that's the *Haney* [phonetic] case, and we cited at tab 13. And there are other cases. The burden is on the developer. If they want to sue for a taking, they've got to file at least two applications and have them denied on the merits, and they have to be for just the property at issue. They can't be for that and the other property. Because if you combine it with other property, well, the decision maker could have other considerations that involve that other property. It's got to be two applications for the property at issue, and they have to be denied. And then you may have a ripe claim if there's no more discretion in the City.

That never occurred here. They say they filed four applications, but one of them was the 133 applications, which was never decided on the merits, so that doesn't count for taking purposes, for ripeness purposes. And the NDA --

THE COURT: And again, this is the developer chose to do it this way.

MR. SCHWARTZ: Yes.

THE COURT: They wanted to submit one massive plan for all 200-and-whatever acres, they could have. They chose not to. They did it in these little -- these segments. They broke it up.

MR. SCHWARTZ: Okay, yes. So why --

MR. LEAVITT: If I might interrupt?

THE COURT: No.

MR. SCHWARTZ: Your Honor, I object to Mr. Leavitt.

THE COURT: I told him to sit down.

MR. SCHWARTZ: He's constantly interrupting my arguments.

THE COURT: I told him to sit down. Thanks.

MR. SCHWARTZ: I'm sorry?

THE COURT: I said I told him to sit down. Thank you.

MR. SCHWARTZ: Okay. Your Honor, the other three applications that Mr. Leavitt said were for the 133 acre properties were one major development agreement, but that wasn't a site specific application for the 133 acre property. A development agreement basically does two things. It says if you approve it, then the government won't change the law, but you still have to provide -- file the site development permit, a zoning permit, a general plan amendment, other permits under the UDC to have an application that the City could have acted on that only concerned the 133 acre property.

So that doesn't count. And Judge Herndon went into great detail to explain why it didn't count, because they made the same argument. Then they say they filed applications for a fence and for access. Those applications were not to develop the property such that they could be denied any development and habitation. They were just for certain things on the property. They never -- and this is in -- the assistant city planner filed a declaration, and I can get that declaration for the Court. They never filed the right application. They weren't denied. That's false that they were denied.

They were required to file a certain type of application, as to which, the planner has discretion. Now they say, oh, that planner

abused their discretion. Well, they can't come in here in a takings case and argue that. If there was an abuse of discretion, they had a remedy of a petition for judicial review if they wanted a fence or if they wanted access. They didn't do that. The statute of limitations is past. They can't come in here and ask this court to conduct what is essentially a petition for judicial review and review the decision of that planner about what type of application was required.

Again, access and a fence. This is about denial of any use, their third cause of action and, therefore --

THE COURT: And so then how did it get on calendar? Because there's a lot in their complaint about all these things that counselor said. Counselor Cerroda [phonetic], he said this. And then there's all -- there's just all these factual allegations of all these, like, things that people were saying and how this is all some big plot.

MR. SCHWARTZ: Your Honor, that is all a complete red herring. A taking, the test is quite simple, *Boulder City*, appellate, state. The takings test is quite simple.

THE COURT: Okay.

MR. SCHWARTZ: You have to have an action of the governing body alone that restricts your use.

THE COURT: And so -- again, so -- and actions is what I'm looking for.

MR. SCHWARTZ: Yes.

THE COURT: So is there an action?

MR. SCHWARTZ: No.

THE COURT: It somehow gets on the agenda, and then somehow, it gets off the agenda.

MR. SCHWARTZ: What? I'm sorry, the --

THE COURT: The 133 acres.

MR. SCHWARTZ: -- 133 [indiscernible] decision?

THE COURT: The 133 acres.

MR. SCHWARTZ: So --

THE COURT: Somehow it's on the agenda, and then it's just, their version, magically off. Your version, it wasn't final and couldn't be submitted.

MR. SCHWARTZ: It wasn't magically off. It was all conducted out in the open.

THE COURT: Okay.

MR. SCHWARTZ: There was -- the City Council struck the applications because the developer failed to file a major modification application as required by Judge Crockett's order.

THE COURT: Okay.

MR. SCHWARTZ: This Court, now --

THE COURT: So here we go. Now, so we got this major modification order. So that was what was required by Judge Crockett. That was the law as it stood at the time until it's voided by the Supreme Court. So because there's not this major modification, does the mere fact that later Judge Crockett is overturned by the Nevada Supreme Court, does that somehow make this whole thing wrongful retroactively? Because that seems to be what the argument is.

MR. SCHWARTZ: Of course not. The City -- I think this Court here in your findings of fact and conclusions of law in October -- was it 29th of 2019?

THE COURT: Right.

MR. SCHWARTZ: Of course, they couldn't, or they would be in contempt. And Judge Herndon recognized this in his order. They made the same argument. They said that the 133 acre applications were an application to develop the property that related to the 65 acre property and showed that it was futile. Judge Herndon correctly said no, they couldn't approve that application because it didn't contain a major modification application, or they would have been in contempt of Judge Crockett's order.

And that's what this Court found. I think this is already argued and determined by this Court. And so yes, it is the height. It would be the height of injustice to require the City to pay compensation to this developer for not letting it develop anything in the 133 acre property where the City was never even given a chance to consider an application on the merits. That -- yeah, that's this case.

THE COURT: Okay. So what does that mean? What is your position with respect to their motion for summary judgment?

MR. SCHWARTZ: Well --

THE COURT: I know you said their whole theory is wrong, that this two-part process is wrong, that that's not the law. Fine. But what does it mean here?

MR. SCHWARTZ: Here, we're talking about their motion to

determine property interest.

THE COURT: Right.

MR. SCHWARTZ: Here's what happened --

THE COURT: And that's why I asked why wasn't the counter-motion taken off? It seems to me that it's either they're right and the Court should, what, grant their motion or deny their motion. What is the effect of granting versus denying? And so that's why I said, why was the counter-motion taken out? I kind of liked that counter-motion.

MR. SCHWARTZ: I'd like to address that, Your Honor. Okay. So the developer is dead in the water on the takings -- on the takings doctrine, for a variety of reasons. The PRNP, is the parcel as a whole, they got 85 percent of it developed. You can't carve out the Badlands and say, oh, now you have to let me develop that. You can't do that under takings. That's a developer trick. All the courts are on it. The U.S. Supreme Court and the Nevada Supreme Court in the *Kelley* case. So they can't do that.

Well, what if the PRNP is not the parcel as a whole? What if it's just the Badlands? Well, the City approved 435 luxury housing use the Badlands. So they can't show a wipeout or interference with their investment expectations. It increased their value by five or six times.

THE COURT: Well so, and here's my question --

MR. SCHWARTZ: And so --

THE COURT: Yeah. Again, like I said, it was their choice to chop this all up into these individual little parcels. But -- so on the one hand, are we looking at this as a whole or are we looking at this as four

separate parcels? Because the mere fact that the 17 acres now -- well, you know, whatever is going on with Judge Jones is, you know, whatever. But -- so they had the zoning on the 17 acres at one point. So that's now got some more increased value, but they've chopped this up into these other three parcels. Does that somehow give them -- provide a different evaluation as to each individual sub-parcel as to whether or not there's value to that sub-parcel?

MR. SCHWARTZ: Yes. Good question. This is classic segmentation. And Judge Herndon said when they bought the property in 2015, they then shut down the golf course, segmented the property, put each property under a different owner -- owner's name, but they're all the developer, and then they proceeded to apply to develop individual properties. And then, when they got approval on one, they didn't get approval on the others, they didn't file on others. Then they sued the City on all four, but only individually. That was their choice. And they asked for damages for each property.

Why did they carve the property up? Why did they segment it? It's the classic developer trick. You know, if you -- let's take the PRNP, 1500-some acres. The City allows them -- it says you got to set aside 250 acres for the golf course. So we allow you to develop 85 percent, and it was thousands of housing units in the development. Then the developer sells off the 250 acres. Well, this developer comes in. He says, okay, you now have to let me build something on the golf course. You have to let me build some houses on the golf course or it's a taking because it's a wipeout.

The courts say, huh-huh, no, you can't do that. We look at the parcel as a whole. The golf course was an ancillary use. It was part of this part of this 1500 acre development. And so you can't carve it out, just like they can't buy the Badlands, the 250 acre Badlands, and then divide it into four parts. The City approves development on one, and they say, so you have -- but you have to let me build housing on the 133 acre property or it's a wipeout. Well, and I think the court says, no, wait a minute. The Badlands was under one ownership, one use. You bought the property all at the same time.

That's classic segmentation, and we cited these cases to show they have no claim. And that's why they've got this nutty theory that zoning confers property rights. Now, can I address your question, Your Honor?

THE COURT: Yes.

MR. SCHWARTZ: Okay. So the developer can't win this case because they've got nothing under the takings doctrine. So they made up this theory of zoning rights. And then, they filed a motion to determine property interest with Judge Williams. And Judge Williams granted the motion and just signed that order. And in their order, they said, well in a regulatory takings case, there are these two sub-inquiries. And you have to determine the property interest before you can determine whether that property interest was taken. That's obviously true.

But they contended that it has to be a two stage process. So what they did is they filed this motion to determine property interest,

which is really a summary adjudication motion on one element of their taking claim, but they called it to determine property interest. And then they used the Williams order to say -- to try to get our motion in the -- our motion for summary judgment in the 65 acre case knocked off calendar so that they would -- the court would only hear their motion.

So they would frame the issue and not get into any of the history of this or any of the law on takings, but frame the issue with their crazy theory. That's their only way that they can prevail in this case.

THE COURT: Okay. But --

MR. SCHWARTZ: Judge Herndon heard them both at the same time. The developer -- let me -- if I can, that's how we got to this case.

THE COURT: Uh-huh. Right.

MR. SCHWARTZ: Then they misled Judge Jones in citing the *Sisolak* and the *Alper* case, that you have to do a two-stage process and you have to have a separate motion for a determination of property interest. The City filed its counter-motion for summary judgment, which adjudicated the same issue. Just like a breach of contract case. You go into a breach of contract case, summary judgment. Is there a contract? If there is, was it breached? Here, do they have a property interest? If so, was it taken? So --

THE COURT: Okay. Well, you know, with all due respect for my colleagues, I'm not sure they were misled by anything. These cases are all different. Judge Williams has a case where the problem was allegedly that there was some denial due to failure to file a general plan

amendment. So that's an action that's taken. Okay. So I get that. Judge Jones very clearly says, look, I can't follow Herndon because Herndon's case is so different. Herndon's case, no action was taken. No action was taken. Clearly, the 65 acre case is in its own category.

So what Judge Herndon's -- what Judge Jones is saying, well, look, maybe there's something going on here, because we have this whole problem where when this whole thing gets interfered with by the neighbors and Crockett's order gets in place, and then everything has to stop because you've got, you know, an injunction pending and, you know, what are you going to do? Are you going to violate that? So obviously, you can't. So something happens on that 17 acres, which I still can't understand. And so maybe they've got something here. So he says we'll go forward, maybe you've got something here. It's different.

So with all due respect to my colleagues, I do not believe that they are stupid. I believe that they all look at their cases individually. And Judge Herndon's case decision is very good about this. It lays them all out and how each of them is different. And Judge Jones says he's right, they're all different. This case isn't the 65 acre case. So ripeness isn't a problem here. We need to go forward because maybe there's something here in this alleged taking. Let's see. Let's go forward.

I don't think he's stupid and being misled. I think what he is saying is each of these four parcels has a different procedural history which requires a different analysis. So let's focus on us.

MR. SCHWARTZ: Well, so here's what happened in this case.

THE COURT: Yeah.

MR. SCHWARTZ: The developer filed its motion to determine property interest.

THE COURT: All right. I wasn't talking about the procedure. I'm talking about the facts. Because with all due -- even though this is a summary judgment, you got to look at the facts. And I believe that my colleagues -- as I said, I think Judge Herndon and Judge Jones lay it out pretty clearly. The facts are different in every one of these situations. And so how do you analyze the facts? I don't want to talk about the procedural motions. I'm talking about what's the merits of the case.

MR. SCHWARTZ: Well Your Honor, we filed a motion for summary judgment. He filed a counter-motion for summary judgment. And then the Court said I'm going to hear the developer's motion to determine property interests, and I am not going to hear the City's summary judgment motion. And you --

THE COURT: I don't remember saying that.

MR. SCHWARTZ: -- you removed it from the calendar. And so we withdrew the motion because the Court removed it from the calendar. We lay all this out in our motion for summary -- our counter-motion for summary judgment. We lay it all out.

THE COURT: Because I read it, so I'm -- I said I wouldn't hear it?

MR. SCHWARTZ: Yes.

THE COURT: I don't remember that.

MR. SCHWARTZ: Well, that's because when Mr. Leavitt presented you with an order, the order said we're going to hear the

City's motion to remand and motion to dismiss first, and then we're going to hear the developer's motion to determine property interest. And the City's motion -- we're not going to hear the City's motion --

THE COURT: Okay.

MR. SCHWARTZ: -- for summary judgement. So the Court took it off calendar, so we withdrew the motion, because it wasn't going to be heard. So what we're here today for is this motion to determine property interest.

THE COURT: Right. Okay.

MR. SCHWARTZ: And so we address this motion because it's an element of the takings claim in our motion for summary judgment. And the cases that Mr. Leavitt relied on for -- that he gets to go first with his theory, *Sisolak* and *Alper*, they resolved this claim on summary judgment or trial, not in a separate motion, so they knocked the City's motion off calendar. So that's why we're here today.

So I can tell the Court why this case is different. It's identical to the 65 acre case because it was not ripe, and it is identical to all the other cases in the fact that you don't have a property interest in zoning, so their theory of relief goes out the window. And I was going through with the Court all the reasons why they don't have such a property interest to --

THE COURT: Yeah. I don't know --

MR. SCHWARTZ: -- so that the Court would deny their motion.

THE COURT: Thank you. So two things. We have the one

issue, which I'm sure they'll argue that this is ripe, because it's not the 65 acres. The 65 acres, nothing ever got filed. They just said, you know, it's futile. The City is never going to do anything for us, so let's just sue them. So fine. So here, there was -- and this is what is just -- like, I'm trying to understand what the respective positions are with respect to the facts. I like facts, so let's talk about the facts.

They submit something, which somehow makes it through the process, somehow, and it gets on an agenda, but then it goes off the agenda because there's something missing. So that's not action?

MR. SCHWARTZ: No. I --

THE COURT: I'm not sure I understand.

MR. SCHWARTZ: I think it's the opposite.

THE COURT: Okay.

MR. SCHWARTZ: They filed a set of applications, a site development review application, another application, an application to amend the general plan, as they were required to do because their application was for housing. The general plan doesn't allow housing. They filed these set of applications, and when the City Council ruled on the applications, the City Council said two things. Number one, this property was part of a larger property that the developer applied for a general plan amendment previously. You can't apply for a general plan amendment on the same property within one year. That's in the UDC.

But more important, the developer failed to file a major modification application, which Judge Crockett said was required. So there was a discussion about what you should do, and the city attorney

made his recommendations. But what the Council did was strike the applications because there was no major modification application filed, and it wasn't the City Council's responsibility to file one for the developer. It was the developer's responsibility under Judge Crockett's order. The developer didn't like Judge Crockett's order, so it didn't file. The City Council may have also decided you can't file a general plan application for the same property within one year. But the main reason they did it was because it didn't have a major modification application with it. Now the developer wants to -- is asking the Court to get into the motivations of the City Council members.

THE COURT: Yeah.

MR. SCHWARTZ: They didn't like the developer [indiscernible]. That's completely irrelevant. That's a red herring. The takings doctrine provides that it's not a taking unless it wipes out or nearly wipes out the economic value.

THE COURT: Okay. Thank you.

MR. SCHWARTZ: It doesn't matter why, why the City did what it did. That's the *Lingle* case. The *Lingle* case says it doesn't matter one bit what the motivations were, if they wanted to get this developer, or if they didn't like the developer. It doesn't matter what anyone said. It doesn't matter what anyone did. The only thing that matters is the action of the decision-maker. In this case, it was the City Council.

THE COURT: So -- and is this where we get into the segmentation issue? Because like I said, I mean, what do you do? Do

you prorate the $4 million over the whole 200-and-however-many acres? I mean --

MR. SCHWARTZ: You mean the purchase price?

THE COURT: Yeah. Because I'm trying to figure out how do you argue --

MR. SCHWARTZ: No. They bought --

THE COURT: -- wipeout or nearly wipeout?

MR. SCHWARTZ: They bought a 250 acre golf course and [indiscernible] for four and a half million dollars.

THE COURT: Right. Right.

MR. SCHWARTZ: Now, they say that they paid, I don't know, 45 million or 100 million. There's not a --

THE COURT: It's varied.

MR. SCHWARTZ: -- single document to support that.

THE COURT: Understood.

MR. SCHWARTZ: So they paid four and a half million. Then they got approval for the 435 acre property, which they shouldn't have carved it up. Or if they did, they can't come into this Court and say, hey, you won't let me develop the 133 acre property, because they already got to develop all of the Peccole Ranch master plan. They already got 435 units on the 17 acre property. That increased their investment in the entire property by five times, and they've still got 233 acres left to develop or use for parks and recreation and open space.

THE COURT: So you would go all the way back to the original Peccole.

MR. SCHWARTZ: You have to.

THE COURT: Which by the way, I used to live in Peccole Ranch about 30 years ago.

MR. SCHWARTZ: One has to. And we briefed this -- we brief this in our motion for summary judgment.

THE COURT: Right. So are you suggesting that we go all the way back to the original Peccole Ranch development and the whole -- all the way from Sahara to -- we're basically into the freeway.

MR. SCHWARTZ: The original --

THE COURT: The whole development --

MR. SCHWARTZ: -- Phase Two, 1500 --

THE COURT: -- and not just their four and a half million-dollar golf course.

MR. SCHWARTZ: Yeah. That's what the U.S. Supreme Court and the *Kelley* court require. You look at the factors, and you don't let developers segment property and then claim, oh, you've deprived me of any use or development of this property when it's not the whole property. That's a developer trick so that they get greater density. You see, this how they do it. They buy a 250 acre golf course, and they say, okay, we want to build as many houses as we can. So what we do is we carve it up into four parts, we apply for 435 units on one. I mean, how much has the City -- the City has discretion. How much are they going to give us on this? Well, you know, if we just have this one property, maybe we'd get 500 units. Okay.

They carve it up into four parts. Then they apply for

development on one part. They get it approved, which is -- this case should be over. The 17 acre case should have been thrown out. You can't have a taking if the government approves your project. But they get it approved, and then they say, okay, we want to develop the 133 acre property. And the City says no. You've got to develop the whole Peccole Ranch master plan, and this was supposed to be the open space. We have discretion. We want to keep it. Our general plan says this is PROS. It said that when you bought the property. You knew that you couldn't do this unless we exercised our discretion. You took a chance. And the City says no, we don't -- and again, the City didn't do this.

But if the City said no, or as Mr. Leavitt argues, it would be futile to apply to develop on the 133 acre property. You know, he fought remand because they don't want to actually -- they don't want the City to actually call their bluff. But he said it's futile. So even if it were futile, they don't have a taking because they segmented the property. They got substantial value from the Badlands. They got substantial value if you expand your analysis of the parcel as a whole, from the PRNP. So they weren't injured. In fact, their gamble paid off. They paid four-and-a-half million for a 250 acre golf course. They shut it down, and they got 435 luxury units approved already. And the City --

THE COURT: Well, they say they don't.

MR. SCHWARTZ: Pardon me?

THE COURT: They say they don't anymore, but.

MR. SCHWARTZ: Well, that's nonsense, Your Honor.

THE COURT: I know. I know. I know.

MR. SCHWARTZ: And if you look at --

THE COURT: But anyway, so --

MR. SCHWARTZ: If you look at tab 3 --

THE COURT: So can we get to the -- like, the so what? So you're saying deny the motion for summary judgment because -- because what?

MR. SCHWARTZ: This is a motion to determine property interest. It's a disguised motion for summary adjudication of one issue. We're saying deny the motion to determine property interest on the law. When the Court gets to the merits of the -- you know, that claim goes away that they have a constitutional right to build in a -- you know, just because it's zoned for residential. That goes away, and they're stuck. They're stuck with their categorical and Penn Central claims, what they've actually alleged in those claims, which is that the City wiped them out, or nearly wiped them out, or under *Penn Central*, it interfered with their investment-backed expectations.

THE COURT: Okay. There we go. Now we're where I want to be. So say you say I don't believe that you have a theoretical -- like, a vested property interest in the fact that you may theoretically be able to build and assuming that you can get the zoning change. And so when you don't get the zoning change, you therefore have your damage.

However, here's my question. They've alleged all this, like, you know, carrying costs and all this delay, and it's been years and years and years. So that seems to me to be something different. And that seems to me that that's where they're saying they fall under *Penn*

Central because hypothetically speaking, had this gone forward in whatever year -- what year was this? I don't know, 2016. We would have been done building this out and, you know, houses in Las Vegas are selling for probably twice what they're really worth. So we would have made all this money. So it seems like that's really what they're saying, is that that's the value. That's where they have a damage claim.

MR. SCHWARTZ: No, you don't get there --

THE COURT: I don't think that is.

MR. SCHWARTZ: They didn't have a right to build, so you don't get to --

THE COURT: Okay.

MR. SCHWARTZ: -- what expenses they had or their carrying costs. That's the -- you know, developers -- you can make a lot of money as a developer. You can also -- you know, you can make bad decisions. They bought a golf course that they now claim is not economic. They voluntarily shut it down. They paid a price. That's the *Guggenheim* [phonetic] case that we've had put in your -- that is tab 50. The *Guggenheim* case. *Guggenheim* says you get what you pay for. In that case, a man bought a mobile home park that was subject to rent control. He said rent control is a taking. And the court said, are you kidding? And this is an en banc decision of the Ninth Circuit. En banc. They said are you kidding? You bought the property subject to the rent control. You pay the price that reflected it. You pay price that reflected the value as restricted. Now you can't come to us and say that, you know, we need to get rid of the rent control when you knew about it, and that it's

preventing you from making a profit.

THE COURT: Right.

MR. SCHWARTZ: It's exactly the same situation here. The PROS designation was adopted by the City, by ordinance in 1992, and reconfirmed over and over again, and it was in effect when the developer bought the property. You cannot use property for residential --

THE COURT: Now that's my next question.

MR. SCHWARTZ: -- and then take four and a half million based on the fact --

THE COURT: They've changed a bunch of -- like, there's a new plan here, lots of pretty pictures, 2020. New maps, all sorts of stuff. So what's the significance of -- I mean --

MR. SCHWARTZ: They didn't change --

THE COURT: -- it's been how many years?

MR. SCHWARTZ: -- the PROS.

THE COURT: So have things -- have things changed?

MR. SCHWARTZ: No. I can take you through. And I --

THE COURT: Yeah, where are those things?

MR. SCHWARTZ: -- I can take you through Exhibits I through Q.

THE COURT: Yeah, here they are.

MR. SCHWARTZ: Tab 41. Now -- and, Your Honor, the PROS designation is fatal to their takings claim. And that's why they throw all this mud against the wall about why they're invalid, including that the

City didn't follow the right procedures in adopting these ordinances. The burden is on them to show that the City didn't, and they had 25 days to bring a PJR to challenge that. They didn't do that, so they can't come into this court and make that argument.

So Exhibit I is the 1992 general plan where the City -- and by the way, all of these -- we've given the Court excerpts here. The Exhibit -- the Exhibit QQQ is all of these exhibits, the entire thing, because the developer has alleged in the past, oh, we only attach excerpts. You know, we had some mercy on the Court, and we didn't want to attach -- so Exhibit I. I think we're going to need to go to Exhibit QQQ, Your Honor, to see the maps, or QQQQ, to see the maps. And I have not given that to the Court.

THE COURT: No, it's -- it should be on here.

MR. SCHWARTZ: But -- oh, here it is. All right. So Exhibit I, which is the first one in the tab. And I think it's Bates page -- or we've numbered our exhibits. This is 0229, page 0229. And that shows the Badlands as parks. This is the 1992 general plan. This was a major change in the City's plans. They adopted this 1992 plan, and they adopted these maps. The developer is going to tell you that the City didn't follow the proper procedures, but that's false. And again, statute of limitations has run. But even so, we filed with the Court, I think Exhibit RRRR, that explains that these maps -- these general plan maps were all adopted, particularly the 1992 general plan, was adopted in accordance with all procedures. So I won't get into that, Your Honor. That's a red herring.

So there you show these -- the Badlands in the configuration that was originally proposed. Then, on page -- let's see. Oh, I think it's at our page 248, Your Honor, deep in Exhibit R. It's --

THE COURT: Yeah, it's a map. I've got it.

MR. SCHWARTZ: Okay. That shows -- that's the [indiscernible]. That shows the original golf course configuration in green. And then in the key, you'll see it says parks, schools, recreation, open space. Okay. So that's -- this was adopted by ordinance of the City Council in 1992. And that imposed the PROS designation. And remember, the general plan is the constitution. That's the highest authority.

Then in Exhibit L, adopting the Las Vegas 2020 general plan, which was in the year 2000, the map -- well it looks like the map for the southwest section has been left off, Your Honor. The definition of parks, recreation, and open space is at page 269, but I'll take you forward to Exhibit N, as in Nancy, and that was the 2005, again, readopting the land use element of the 2020 master plan. And there, you see at page 291 --

THE COURT: Yeah, I do.

MR. SCHWARTZ: There, you'll see -- and that is the current -- that is -- that was the configuration of the Badlands, the 250 acre Badlands, after it was built out. It changed the contours. The developer argues, oh, well, you know, the PROS designation doesn't apply because the original PROS was on a different configuration. Well, the City Council then adopted, by ordinance, these plans with a map that showed it in its current configuration.

So then you get to Exhibit O, and that is the 2009 version -- 2009 ordinance, excuse me. And at page 301, you see the very same Badlands, same configuration. Then you get to Exhibit P, which is a 2011 ordinance. Again, same definition of parks, recreation, and open space at 316 and at 317. That's it. This was the map in effect when the developer bought the property. It knew. It knew that it couldn't develop the property unless it got the City Council, in its discretion, to lift that general plan designation of PROS to a designation that allowed residential use. And finally, in Exhibit Q, which was the most recent adoption of the plan, at page 322, same configuration. That's what's in effect today.

So Your Honor, even if -- even if the Court were to find, and I don't think the Court can under the law of takings, find that it would have been futile for the developer -- you know, that the case is ripe. In other words, that the developer complied with the ripeness prerequisite to a taking claim, and even if the City -- the Court found that the City had denied applications to develop housing on the 133 acre property, there wouldn't be a taking for two reasons.

First, because when the developer bought the property, the PROS designation did not allow residential use. The developer paid a price for that property that reflected that fact. That's the *Guggenheim* case. The second reason is because the developer segmented the property. Even if there weren't the PROS designation, the City said you cannot develop the 133 acre property with housing. We want it to stay an open space for the community. They segmented the property. They

got substantial development of the Badlands. They got substantial development of the PRNP. They can't come into this court, carve out a piece of property, and say either you let me develop this or it's a taking. That's the part that was a hold-up. So that's the case we make in our motion for summary judgment.

THE COURT: Okay. But we're talking about theirs. So their motion for summary judgment should be denied, because they -- first of all, they're wrong on the law. So I understand your argument is they're wrong in the law, that the mere fact that property is zoned something doesn't mean you are absolutely 100 precent entitled to build what you want to build.

MR. SCHWARTZ: Got no entitlement. None.

THE COURT: No entitlement from zoning alone. So instead, you have to have some action taken by the governmental entity to deny you whatever rights you do have. And here, we're missing action.

MR. SCHWARTZ: No.

THE COURT: Okay. Sorry.

MR. SCHWARTZ: We -- well, we argue in opposition to this motion --

THE COURT: Right.

MR. SCHWARTZ: -- that it's moot because the case isn't ripe. You can't have a taking if there is no action that meets one of the takings tests, which is the wipeout or the categorical taking, a mere wipeout, or interferes with their investment-backed expectations for *Penn Central*. And their investment-backed expectations are the four and a half million

dollars they invested in this property that they have a right to expect the City to allow them to develop the 133 acre property so they can make big bucks. They don't have that right, because the law restricting use to residential was in effect when the developer bought the property. They knew about it.

THE COURT: Okay.

MR. SCHWARTZ: They don't have a Constitutional right --

THE COURT: Okay.

MR. SCHWARTZ: -- for the City to change it.

THE COURT: All right. So this motion should be denied and what?

MR. SCHWARTZ: The Court should put our motion for summary judgment back on calendar.

THE COURT: Yeah.

MR. SCHWARTZ: They can oppose it. Mr. Leavitt is going to stand up, and he's going to wave Judge Jones' order at the Court that Judge Jones handed down yesterday. And there's a lot in Judge Jones' order.

THE COURT: Right. Like I said, I've got the most important thing, which he said this is a different case.

MR. SCHWARTZ: But the law is the law.

THE COURT: Herndon's is right.

MR. SCHWARTZ: What I'm saying is the law is the law.

THE COURT: Ruled on ripeness. This isn't the same case, so --

MR. SCHWARTZ: I'm saying the law --

THE COURT: -- even --

MR. SCHWARTZ: -- the law of property -- the law of property in Nevada and land use regulation is the law. It applies to that case, to this case. Judge Jones -- this order was prepared by the developer.

THE COURT: No, I understand.

MR. SCHWARTZ: Judge Jones signed it without any modifications. There is a lot in this order that's going to contradict what I've been saying. And I could go through this order one by one, as Mr. Leavitt's going to do, and explain why this is wrong. This is wrong.

They cite the *Bustos* case, and the *Buckwalter* case, and the -- and the *Alper* case for -- they have a constitutional right for -- a constitutional right to build housing in the 133 acre property.

THE COURT: Okay.

MR. SCHWARTZ: Those are eminent domain cases. They have nothing to do with liability. They don't say that. They depend on -- you know, they depend on the courts taking their word for it, and they misrepresent those cases gravely.

So Your Honor, I would -- I would like an opportunity to just go through this order briefly just to point out where --

THE COURT: And then can we take a break?

MR. SCHWARTZ: Yes. In paragraph six --

THE COURT: The facts or --

MR. SCHWARTZ: -- excuse me, paragraph seven of Judge Jones' order.

THE COURT: Which part? Paragraph six?

MR. SCHWARTZ: I'm sorry, the --

THE COURT: They're --

MR. SCHWARTZ: Oh, there. The paragraphs are numbered numerically.

THE COURT: It's under findings of fact?

MR. SCHWARTZ: Yes, in the findings of fact.

THE COURT: Got it.

MR. SCHWARTZ: I'm sorry.

THE COURT: I got it.

MR. SCHWARTZ: They say -- their Exhibit 30 shows that the 17 acre property was zoned R-PD7 in May 1981. That's false. It was temporarily zoned R-PD7 in 1991, I think. And then permanently zoned in 2001. That's an important fact because they say it's always been zoned R-PD7, and we have a right -- we've always had a right to build anything we want in the property as long as it's permitted use in that zone.

They say that -- in paragraph nine, that the R-PD7 zoning ordinance in 2001, this time the right one -- by the way, Exhibit 30 in paragraph seven has nothing to do with zoning. It's the first page of the brief -- of one of the developer's briefs. It's not a zoning ordinance. In paragraph nine, that when the City permanently zoned the 133 acre property R-PD7 in 2001, the ordinance said all ordinances or part of ordinances for sections in conflict with this are hereby repealed. The R-PD7 zoning and the general plan designation of PROS are not in conflict. R-PD7 zoning allows for ancillary open space. Therefore, the

PROS designation does not conflict.

Your Honor, I want to show you just a couple of maps here. Okay. I can't get my PowerPoint.

[Counsel confer]

MR. SCHWARTZ: Here we go. Your Honor, I'm going to show you 10 slides. The first five are other planned developments in the City of Las Vegas. Painted Desert is the first one. And can we cycle through these? You'll see residential around a golf course or around open space. These properties are zoned -- the entire thing is zoned residential, just like the Badlands. Entire thing. In fact, the Badlands is part of a 614 acre zoning. So these are just like the Badlands. Painted Desert is one. Next? Oh, I'm sorry. Is that the second one?

THE COURT: Los Prados, yeah.

MR. SCHWARTZ: Los Prados. Third, Canyon Gate. Fourth, Lakes at Sahara, and then finally, Desert Shores. Okay. All of those are just like the 614 acres in the PRNP. Then let's go through the next slide. So you see the houses, and you see the golf course or the open space in between, just like the -- this property.

Okay. So now, we're back. We've done -- the first one is -- just a second. Okay. So Desert Shores, this shows the general plan designation of the property. And it shows that the residential is designated for a residential use and the open space, the golf course, is designated PROS. There are five of these that we're bringing to the Court's attention. Lakes at Sahara, Canyon Gate, Painted Desert, Los Prados.

Okay. So the zoning is compatible with the general plan because the City came along and zoned the entire thing. But the zoning allows for open space. It in fact encourages open space. So then they designate for, in the general plan, the housing under a residential designation and the open space under the PROS designation. This is common practice. That's what they did here.

So what they are saying is every owner of this area, these, they have a constitutional right to build housing in this open space? Again, every property owner's property is zoned. They have a constitutional right to build in it? Okay. So --

THE COURT: Well, some of these have deed restrictions. And that's the true significance.

MR. SCHWARTZ: Well, they may, but that's not relevant because --

THE COURT: Okay.

MR. SCHWARTZ: -- this is regulation. This is land use regulation.

THE COURT: Okay. Go on.

MR. SCHWARTZ: In fact, one of Mr. Leavitt's ten orders where the court said that they have a constitutional right to build here is a deed restriction case that has nothing to do with regulation. It's the neighbors and the developer, they have a contract with CC&Rs. It has nothing to do with regulation.

THE COURT: Okay.

MR. SCHWARTZ: So by saying that all -- anything in conflict

here is repealed. They're arguing that the master plan designation PROS was repealed. The master plan is not part of the UDC. It's not an ordinance. It's the master plan. It wasn't repealed. It's not in conflict anyway. They are consistent.

And then they say in paragraph 10 -- and this is the note. This residential zoning conferred the right to develop the 17 acre property residentially. That's false. That is contrary to all authority. In paragraph 14, they say the zoning and the likelihood of rezoning governs the property interest determination in this inverse condemnation case. False. If the City wipes them out, or near wipes them out, they may have a takings claim, but it has nothing to do with the zoning and their rights under zoning.

They cite *Sisolak*. They say *Sisolak* -- they say in *Sisolak*, zoning was also used to determine the compensation due Mr. Sisolak. This is the first time that they haven't misrepresented what Sisolak said. That's correct. The zoning was used to determine the damages that Sisolak incurred after the court found there was a taking. It had nothing to do with whether the developer had rights to develop that property.

They cite -- then they cite *Alper, Bustos, Buckwalter, Andrews*, all those cases, and they say that they're the same, that the court relies on these eminent domain cases, they're governed by the same rules and principles applied to formal condemnation proceedings. Well, yeah, just value. They're really misrepresenting those cases. They have nothing to do with liability nor could they possibly have anything to do with liability because the City concedes liability in an eminent domain

case.

They then cite to NRS 278.349, a state statute that says that on tentative map applications, that zoning prevails over the general plan. This isn't relevant because the zoning and the general plan are not inconsistent. But in 1991, the State Legislature amended NRS 278.250. That's the state statute that says zoning must be consistent with the master plan. It said in its previous versions, zoning shall be consistent with the master plan. They amended it to say zoning must be consistent with the master plan. And that was 14 years after this 278.349 was adopted.

The amendment shows the legislative intent that, you know, this -- unfortunately, they didn't amend this because this is inconsistent. But the later amendment made it -- and they were emphatic -- zoning must be consistent with the general plan. Again, not relevant because there's no conflict. But if they were, the general plan would prevail. All the other cases, authorities, you know, the *Stratosphere* case and the other cases, they cite to 278.250, or the *AmWest* case cites to 278.250 as controlling.

They talk about City departments that supported the developer. The City attorney supported the developer. Completely irrelevant. They don't make the law. They don't make the law. The City Council makes the law. And the only thing that the Court can consider is the effect of the law or a decision on a permit application, which is the action that allegedly was -- well, it wasn't taken in this case, but they allege that there would be an action. If they actually got consideration

on the merits, they allege that that action would be to deny. That's the only action you could consider if it happened.

They cite to the tax assessor. The tax assessor has nothing to do with any of these regulations. The tax assessor's opinion is completely irrelevant insofar as they construe it. And the tax assessor is, again, valuing property. It has nothing to do with the liability for a regulatory taking. Insofar as they say the tax assessor thinks that they have a constitutional right to develop housing on the property, of course the tax assessor has no authority to make that determination.

They allege that their zoning verification letter from the City gives them a constitutional right to develop the property. Well, let's look at the zoning verification letter.

THE COURT: I thought we were going to go through this quickly. Can we -- seriously, we need to take a break. So can we wrap this up so that we can take a break?

MR. SCHWARTZ: Yes. All right. Tab 37 --

THE COURT: We'll appreciate that.

MR. SCHWARTZ: -- the zoning letter doesn't say any of that. It says you got R-PD7 zoning. Here's what's permitted. It doesn't say anything about rights or constitutional rights.

They claim that *City of Henderson*, the new case, they claim that that case holds, that because the Court shouldn't mix petitions for judicial review and civil complaints. But that means that *Stratosphere* and the other cases, *Boulder City*, all those cases that were petition for judicial review cases, that the underlying law that they rely on, the

underlying substantive law they rely on, goes out the window. That's absurd. That's an absurd interpretation of *City of Henderson*.

They claim that the Nevada Supreme Court -- in paragraph 47, the Nevada Supreme Court precedent relies on zoning to determine the property interest in inverse. Fine. They don't cite a case because there is no case. It's the opposite. The law is the opposite.

Well, you know, it comes back down to they've got eminent domain cases, and they have a statement of the city attorney. The city attorney said there is absolutely no document that we could find that really explains why anybody thought it should be changed to PROS. That's really the best argument they got going, the former city attorney statement. And just because the former city attorney was unaware of Exhibits I through Q, you know, and the master plan, and how to find the master plan on the website, because the city attorney was unaware of all that doesn't mean that that's the law. Thank you, Your Honor.

THE COURT: All right. Thank you. So Mr. Leavitt, I would just ask you, again, like, incredibly briefly, how long is it going to take you to do a reply? Because it's 20 after, so can we just take a brief recess and wrap this up in a relatively short period of time or do we take our lunch break?

MR. LEAVITT: About an hour, Your Honor. Hour.

THE COURT: Okay.

MR. LEAVITT: There's a lot of things that I need to address.

THE COURT: All right. Okay. So then, we will return at 1:30. Thank you. We'll be in recess until 1:30.

[Recess from 12:21 p.m. to 1:31 p.m.]

MR. LEAVITT: Your Honor, I've looked at this. I might go a little bit over an hour. Just a head's up. Not much.

THE COURT: Okay.

MR. LEAVITT: Okay. So, Your Honor, as you'll recall, we appeared before you at a status check hearing. And, you know, at that status check hearing, we presented to you the case law on the state of Nevada on how to -- and it's the specific procedure that every single inverse condemnation case must go through in the state of Nevada. And that procedure is step one -- well, first of all, and the Court said, just like this, and I'm going to quote them, "We undertake two distinct sub inquiries."

And so, the Nevada Supreme Court requires two distinct sub inquiries of these inverse condemnation cases. And so, when we were before you at the last status check, we presented that case law to you and we explained, Judge, we have to do two distinct sub inquiries in this case. We first have to decide the property interest issue, which is the bundle of sticks --

THE COURT: But we first have to decide if you have a case.

MR. LEAVITT: Well, yeah.

THE COURT: Yeah.

MR. LEAVITT: No. Well, Your Honor, no, I agree with you on that. Absolutely. We first have to decide the property interest issue and then --

THE COURT: No. We have to decide if you have a case. If

your case isn't ripe, you don't have a case, and we're done, right?

MR. LEAVITT: And I'll talk about that, Your Honor, because --

THE COURT: I'd like to be done. I think we're done.

MR. LEAVITT: What's that?

THE COURT: I said I think we're done. I mean I -- seriously, I reread all the decisions of all the other decisions.

MR. LEAVITT: Right.

THE COURT: All four of these cases are very different.

MR. LEAVITT: They are. And so, Your Honor --

THE COURT: So I'm not really persuaded by what anybody else has done. Every case is different.

MR. LEAVITT: And I agree with you on that. But if the Court will let me. Then you move to the second issue, which is whether there's been a taking. Your Honor, the ripeness issue only comes up at that second issue. It cannot up at the first issue. And, Your Honor, if -- we have the status check order, and this is what happened, is we appeared in front of you and we made this argument. And we said, Judge, we're only going to talk about the property interest issue. And we'll talk about the take issues at a later date. And the take issues do involve the ripeness issue. That's the only time ripeness comes up.

And at that status check hearing and in the Court's order, the Court said to us we're not required to brief those issues. And so, we have not briefed those issues. We haven't briefed the ripeness issue. We haven't briefed the case law in the state of Nevada that says that a per se categorical taking, a per se regulatory taking, and a non-

regulatory taking are not subject to a ripeness standard. The Nevada Supreme Court flatly stated that ripeness does not apply to three of our claims. And so, Judge, that's why we didn't brief ripeness.

The sole issue that we briefed before you today is extraordinarily narrow. It's just what property rights did the landowner have prior to the city interfering with those property rights. And Judge Williams and Judge Jones did the same exact thing. They said there's two distinct sub inquiries. And I -- and in those cases, they said -- here's what Judge Jones said. The landowner's request narrowly addresses the first sub inquiry. This Court will only determine the first sub inquiry. So that's all Judge Jones decided was the first sub inquiry, the property interest issue. He did not decide ripeness or the take issues. Judge Williams said --

THE COURT: But, you see, here's my problem.

MR. LEAVITT: Yeah.

THE COURT: There was action taken in the 17 acre case. There was action taken in the 35 acre case. There's no action taken in this case. So is there ripeness or that -- is that just like what are your property interests, your property interest is -- I mean you have an interest in your property, but what is their interest in zoning?

MR. LEAVITT: Absolutely. And I'll talk about it.

THE COURT: If there's no action taken.

MR. LEAVITT: And, Your Honor, there was action taken. And we didn't brief that for you. We didn't brief that for you because we were expressly told, in finding number six here, that the parties are not

required to brief the take issue at the hearing, that the Court will only decide -- they'll only decide the property interest issue. And the Court even cited in its order the *Sisolak* case that says that we're going to do it this way, because this is the procedure the *Sisolak* case requires us to follow.

So, Your Honor, if this court enters an order on the ripeness issue, we will have been denied our due process, because we haven't addressed the ripeness issue and we haven't addressed the take issue yet. But -- and, Your Honor, when we do address those issues, I will lay out to you, Your Honor, that we did file an application for the 133 acre property.

THE COURT: Well, Your Honor.

MR. LEAVITT: Yeah.

THE COURT: I understand that.

MR. LEAVITT: Not only --

THE COURT: But it was taken off calendar.

MR. LEAVITT: No, Your Honor. And that's what I -- that's what I'm saying. For the 100 -- for the whole property, when the landowners wanted to develop the individual 133 acre property, they were expressly told that the only application they could file to develop the 133 acre property was a master development agreement. And this is the evidence we'll present to you at the take side, and that's undisputed evidence. We have undisputed evidence that that's the only application the city would accept to develop the 133 acre property.

And the landowner, Your Honor, worked two-and-a-half

years on that application and paid an extra million dollars in fees. And the City wrote that application, Your Honor, that master development agreement application to allow the development of the 133 acre property. The City wrote it. And the planning department said that -- this was important -- that the master development agreement which would have allowed the development of the 133 acre property, the planning department said it was consistent with zoning. They said it was consistent with the Nevada Revised Statutes. And they said it was consistent with the city's master plan. And the planning department actually -- the planning commission approved that master development agreement to allow the 133 acre property to be developed. It went to the city council. And the City Council had a hearing and denied it.

So, Your Honor, yes, there has been an application, and yes, it has been heard by the City Council, and yes, it has been denied. But, Your Honor, that's only for the ripeness issue, which is part of the take. So that -- I know, Your Honor. I'm going to go back. I'm going to go back to this very narrow issue that we're here for today. And this is what the Nevada Supreme Court said. They said, in an inverse condemnation case, the Court has to first decide the bundle of sticks -- and this is what they say -- prior to the government interfering with those bundle of sticks.

So before the government takes any action against the property, the district court judge is required for define the bundle of sticks. And that makes sense. Here's why. Because once you define the bundle of sticks prior to government action, you can say okay, this is

what the landowner had. Then and only then can you move to the next phase and then say okay, here's the aggregate of government action. How did that impact the bundle of sticks. How many sticks did the government take out through its actions. We're not at that second phase. We're not at the phase where we talk about ripeness on what the government did. We're only at the phase of deciding an extraordinarily narrow issue. What did the landowner have prior to the City interfering with those rights? And that's what the Nevada Supreme Court said the court must decide. That's what Judge Jones decided. That's what Judge Williams decided. And they're both following this procedure, and they both --

THE COURT: But their cases are different.

MR. LEAVITT: No, Your Honor, they're not.

THE COURT: They're -- they are.

MR. LEAVITT: No, no, no. Let me say this.

THE COURT: Every one of these cases turns on very different facts.

MR. LEAVITT: I agree with you.

THE COURT: And I appreciate you guys are talking about all these theoretical legal issues, but you're not -- you don't look at it the way we do.

MR. LEAVITT: Okay.

THE COURT: We look at our case.

MR. LEAVITT: I agree.

THE COURT: My case is very different from their cases.

MR. LEAVITT: I agree when you get --

THE COURT: So --

MR. LEAVITT: -- to the take side.

THE COURT: Okay. All right.

MR. LEAVITT: When you get to the take side. But, Your Honor, here's why they're the same exact when you're on the property interest side, because every one of these properties had the same exact zoning. Every -- so that's what we're -- that's why I say Judge, you're right, I agree with you. When we're talking about ripeness and we're talking about takings, law that we haven't briefed to you today, the cases will be fact specific. And that's actually -- that's what the courts even hold as you look at the aggregate of actions against this one specific piece of property. But we're not there, Your Honor.

And so, when we're talking about the narrow property interest issue, all of the facts are the same for all four cases. All of the facts that the -- all of the properties have the same exact zoning. And so, Your Honor, it -- we have a huge concern in representing the landowner in this matter right now that we've now moved, and counsel has made significant argument in regards to the take issue and the ripeness issue. And we haven't briefed that. And that's a concern for -- we haven't briefed it according to the Court's order, and we haven't briefed it according to the Nevada Supreme Court procedure and due process for deciding these cases.

The very narrow issue that we briefed is what was the property interest prior to the government interference. And so, we have

a huge concern, Your Honor. If you're going to move over into the take side and start deciding take issue and ripeness issues, that causes us great concern, because we haven't been heard on that. We're only being heard and we --

THE COURT: What are you proposing?

MR. LEAVITT: Yeah. We're only -- our -- in fact, it's our motion, Your Honor. And we write very clearly in our motion that we're very narrow in our request.

And remember, when the city filed their countermotion, they properly removed it according to the order, the status check order.

THE COURT: Okay. Well, since then I've read all this stuff, and I think I was wrong. I -- seriously, I just think this is the wrong approach.

MR. LEAVITT: Well, Your Honor, you mean to decide -- to do the two distinct sub inquiries?

THE COURT: No, that this is a whole wrong approach. Like I said, I think that Judge Herndon had it right.

MR. LEAVITT: Oh, on the ripeness issues and things like that?

THE COURT: I think he's right. As I look at this --

MR. LEAVITT: Uh-huh.

THE COURT: -- all these -- your 17 acre case and your 35 acre case --

MR. LEAVITT: Right.

THE COURT: -- is very different. Very different --

MR. LEAVITT: Uh-huh. No.

THE COURT: -- from your 65 and 133.

MR. LEAVITT: And that goes to the ripeness issue. But, Judge -- yeah, Your Honor. And the reason I'm bringing this up is because Judge Herndon I understand -- Judge Herndon did not address and resolve the property interest issues that we're here for today. He expressly said he did not decide that.

THE COURT: Exactly.

MR. LEAVITT: Okay. Yeah. So he's only on the taking side. He -- yes, that's what he said.

THE COURT: I think he said that this is all premature.

MR. LEAVITT: Absolutely, because he decided the taking issue. See, Your Honor. And that's why Judge Trujillo, in that case, set that order aside, as he said wait -- Judge Trujillo said wait a minute. He didn't follow the mandatory two-step procedure. And because he didn't follow --

MR. SCHWARTZ: Objection, Your Honor. That misstates the evidence. I --

THE COURT: Sir, please have a seat. Have a seat. We didn't let Mr. Leavitt interrupt you. So --

MR. LEAVITT: Okay. And since he didn't follow the mandatory two-step procedure, I, Judge Trujillo, now have to do that. Okay.

And then, Your Honor, the 17 acre case is different. You're right, when you get to the facts. And when you start talking about

ripeness, this was another thing that she found -- Judge Trujillo found with the Herndon order is that, wait a minute. There's three claims that the landowners have that the Nevada Supreme Court expressly said are not subject to a ripeness standard. And I'll explain that later, Judge, exactly why. The Nevada Supreme Court says exactly why three of our claims are not subject to the ripeness standard. And so, Judge Trujillo said listen, I've read the case law and Judge Herndon was wrong. The ripeness standard doesn't apply to three claims. You're -- just let me -- if I can, Your Honor, just one --

MR. SCHWARTZ: Objection, Your Honor. No foundation, Your Honor.

THE COURT: Please, sir. Please don't interrupt. We didn't let him interrupt you. We aren't going to let --

MR. SCHWARTZ: Sorry.

THE COURT: -- you interrupt him. Thank you.

MR. LEAVITT: So here, let me explain. I'll just explain just very briefly one of them. A per se regulatory taking. The Nevada Supreme Court, that's one of our taking claims. The Nevada Supreme Court, in the *Sisolak* case, this is what they said. They said *Sisolak* was not required to exhaust his administrative remedies by applying for an application before bringing his inverse condemnation claim for a per se regulatory taking of his property.

In other words, the Nevada Supreme Court said it's a per se regulatory taking claim. Ripeness standard doesn't even apply. And then in the *Hsu* case, Your Honor, the Nevada Supreme Court addressed

that issue again and said where there's a per se taking, a per se categorical taking or a per se regulatory taking. The Court said we conclude that the landowners were not required to apply or otherwise exhaust their administrative remedies prior to bringing the claim.

So that -- so, Your Honor, if we get to the ripeness side and the take side, I'll cite you this case law and I'll say to you, Judge, you don't do a ripeness analysis under a per se regulatory taking or per se categorical taking, which are claims. We've also cited a non-regulatory de facto taking claim. And in the case of *State v. Eighth Judicial District Court*, the Nevada Supreme Court, again, did not apply a ripeness standard. Here's why. Because when you're focusing on those claims, the Nevada Supreme Court says you look at one thing. You look at the government's actions towards the property.

And the Nevada Supreme Court said those actions can be anything. You have to look at the aggregate of the government's actions.

THE COURT: Okay.

MR. LEAVITT: And --

THE COURT: And what are they here?

MR. LEAVITT: What's that?

THE COURT: And what is it here? What happened here?

MR. LEAVITT: Well, Your Honor --

THE COURT: What do you think happened?

MR. LEAVITT: -- that's -- see, your question, it's a concern for me, because we're not -- we didn't brief that issue for you --

THE COURT: Okay.

MR. LEAVITT: -- because we're not at the take side. But I can tell --

THE COURT: Well, with all due respect, this is the way you wanted it. And all you've done is create a whole bunch of questions for me, because I'm just not seeing how we get there. This is the approach you wanted to take.

MR. LEAVITT: Yes, Your Honor. And the approach I want to take today was that you just define the property, you define the bundle of sticks.

THE COURT: But I don't think you can do that until we get past this question that I have, which is what are you talking about.

MR. LEAVITT: Okay. I'll do it. I'll do it, Your Honor. I'll do -- I'll absolutely go to the facts. This is what -- and you know what, Your Honor? The history is important. So I'll go through the history. And you asked this of counsel. Here's the facts, okay, Your Honor.

Because counsel said that the planning commission and the city attorney, they don't adopt the law, but they do state the facts. And, Your Honor. We've laid out the facts. Here's the facts. The landowner, in 2001, approaches Mr. Peccole and says I want to buy this property. And the Peccole family disclosed to him that there's no restrictions on development. The landowners then go to the city of Las Vegas on three different occasions, and the city of Las Vegas discloses to the landowner, as part of his due diligence, that the property is zoned R-PD7, that R-PD7 trumps everything, and that the landowners have the right to develop.

So these are facts, Your Honor, that are critical to why we're here today.

And so, after the landowner gets that information from the city of Las Vegas, he says to the city of Las Vegas I want you to do a study to confirm what you just told me. Again, all part of his due diligence. And the city of Las Vegas does a three-week study and comes back to the landowner prior to his acquisition of the property. And the city told him you have R-PD7 zoning. Your R-PD7 trumps everything. And you have the right to develop your property.

And so, he asked the City of Las Vegas to put that in writing as part of his due diligence. And the City of Las Vegas did that, which is Exhibit number 134. That's the zoning verification letter. And, Your Honor, the zoning verification letter in -- that was issued to the landowner from the City of Las Vegas, prior to his acquiring the property, says, unequivocally, the property is zoned R-PD7, which means seven units to an acre. The zoning verification letter then discloses to the landowner the R-PD7 is intended to provide flexibility and residential development.

Then the letter says the density that you're allowed to build on your R-PD7 is identified by a number. And then they say right in the letter that they give to our client, for example, R-PD4 means you can build four units to an acre. Again, this is the zoning verification letter that he received prior to acquiring the property. And then the -- then that letters says, and I'll quote, "A detailed listing of the permissible uses on your property and the applicable requirements for R-PD7 are in our code."

Your Honor, the landowner didn't just show up one day and buy the property. He did 14 years of due diligence. And during that 14 years of due diligence, he confirmed with the city of Las Vegas on at least four or five different occasions, including in writing, that the property is zoned R-PD7. The R-PD7 trumps everything else. And R-PD7 gives the landowner the right to develop the property.

So here's -- so that right there, Your Honor, lays that first -- the foundation, the foundational facts for that first issue of the property interest. So your question is okay, well, what happened after that? Your Honor, after the -- oh, I need to point something out here, Your Honor. When the landowners acquired the property, there were five different parcels. The landowners didn't insidiously split this property up. And if I may, I'm going to, I'm going to quote -- there's a deposition that was taken by Peter Loinstein in this matter, Your Honor. And this says volume one. It's part of the record. Peter Loinstein. He said -- the question was, and he was referring to this property. "Okay. So you the city wanted the developer here to subdivide the property; is that correct?"

And then the answer is, "As part of the submittal, we were looking for that to be accomplished prior to notification. Yes."

So the property -- the landowners purchased five parcels. And then, Your Honor, Peter Loinstein, who's the head planner of the City of Las Vegas, Your Honor, he's the one that the landowners were working with. Peter Loinstein confirmed that the City asked the landowners to divide the property up as part of the development. So

then what happened is the landowners went to submit their development applications.

And you had a great question, Judge. Why are these cases all separate? Here's why. Because when the landowners file a development application, for example, for the 35 acre property, and a city denies it, they have 25 days to bring the lawsuit. So they had to bring the lawsuit immediately for the 25 acres. When they refused to accept the applications for the 133, they then filed the lawsuit for that one, because they had to file it within 25 days.

THE COURT: It's the petition for judicial review.

MR. LEAVITT: Petition for judicial review.

THE COURT: Yeah.

MR. LEAVITT: Under the old law, joining the claims together. So, Your Honor, that's why there's four separate lawsuits is because the landowners were following this process to try and develop the property, and they had to bring them at the appropriate time. Thereafter, the landowners sought to join them, and they received opposition from the city of Las Vegas on the joinder. So, Your Honor, that's where we are today, and that's why they're split up.

Now your question is -- okay. I'm going to move to the take side for just a minute, so the Court can see the larger context. The landowners then go to the city and say we want to build. We want to build. And the city said you can only do one application, the master development agreement. The landowners did it, as I explained to you, and the city denied it. The landowners then said we want to at least

access our property to use it. And the City denied the access permit. Wouldn't even let them access their property.

Why is that so important? Because the Nevada Supreme Court, in two cases, held that landowners have the absolute right to access their property. In a case called *State v Schwartz*, the Nevada Supreme Court said when you abut property here, here, and here, you have a legal right to access your property. And in discovery, the city admitted that the landowners have the legal right to access their property. And the city denied that access.

Then, Your Honor, one of the important parts of ownership is being able to exclude other people. And so, the landowner said we want to put a fence around our property. And they said we want to prohibit other people from coming onto it. And we want to also fence our ponds. And the City of Las Vegas denied those applications also, Your Honor.

So right now we have three denial of applications to use the 133 acre property. And then, Your Honor, here was the -- probably the worst part of what happened at the City of Las Vegas is the City then drafted a bill. It's called Bill 2018-5 and 2018-24. That bill did three things. It targeted only the landowner's property. It made it impossible to develop the property. And then this is what that bill said, Judge. It said all of the public have, they said, ongoing public access to the property. That bill right there, in and of itself, is a taking. And let me explain why.

In the *Sisolak* case, the Nevada Supreme Court held that if the government engages in actions that preserve property for use by the

public or authorize the public to enter onto property, if they adopt a bill that authorizes the public to enter onto your property, that is a per se taking. Makes sense. If there is a --

THE COURT: Well, that's what I talked to Mr. Schwartz about. It's like -- as I said, there's, well, various different causes of action in here. And there's a lot of these allegations about things that the city did.

MR. LEAVITT: Absolutely.

THE COURT: They seem somewhat unrelated to like the specific narrow question of was this denial of the -- well, actually, that was my problem. I didn't see a denial. This -- when they took this 133 acre application off the agenda and didn't act on it --

MR. LEAVITT: Yes.

THE COURT: -- was that a taking? Well, that didn't really seem to me to be -- like what right to that? That doesn't make any sense. This other stuff, as I said, well, what's that, that's something else.

MR. LEAVITT: And I'm telling you the something else.

THE COURT: Okay.

MR. LEAVITT: So you have to look at the aggregate of government actions. You just don't look at one action.

THE COURT: Okay.

MR. LEAVITT: And remember, the master development agreement was to develop the 133 acre property. And here's -- Your Honor, the City said you can only develop the 133 acre property with the master development agreement. The landowners after that was denied

tried the single application and the City struck them. Your Honor, the landowners also tried a singular application for the 35 acres. And the City denied it, because it wasn't the master development agreement. That's why when you say there wasn't a denial, there absolutely was. The only application the landowner were permitted to file to develop the 133 acre property was worked on for two-and-a-half years and filed and submitted to the City Council and denied.

THE COURT: Which one was denied? Because we've been talking about this one that goes under the agenda. And they --

MR. LEAVITT: Uh-huh.

THE COURT: -- talk it off. They say well that's not -- it doesn't have -- I forget what it was. It didn't -- it has something it didn't need.

MR. LEAVITT: Yes.

THE COURT: And so, they take it off. And so, how is that a denial?

MR. LEAVITT: That's different.

THE COURT: Okay.

MR. LEAVITT: That's totally different. The master development agreement is totally different. That's what I'm saying. There are numerous applications filed by the landowners to try and use the property. The master development agreement was for the whole 250 acre property --

THE COURT: Right.

MR. LEAVITT: -- including the 133 acre property. And

remember, that's the only application the city would accept to develop the property. It refused to accept any other application. And that application was undeniably denied, Your Honor. That's not disputed in this case, that that application was denied.

So we have an application, and we have a denial of that application. In addition to that, we have the three other attempts to use the property, which were applications to use the property. Your Honor, the landowners asked for access, and the City wouldn't even let them access onto their property. That's a denial of an application. The landowners also wanted to fence it, and they wouldn't let them fence it. That's another denial of an application.

But I think even more important than that -- that's important, obviously, but you have these three denials where the City was putting up a shield saying you can't use your property. But then they took out their sword and went and jabbed it into the property and adopted a bill that said you can't even use your property. Your Honor, that bill is critical. And we'll present that evidence to you on the take side, where the city said we're going to target one property here, your property. We're going to make it impossible to develop. We -- you can't develop the property, and you have to allow the public to use your property.

Now you're probably saying why would the city possibly do that? Here's why. We will present to you the evidence at the take part of this case, where the surrounding property owners went to the City of Las Vegas and said to the City of Las Vegas we do not want you to allow these people to use their property. We have that -- we have the affidavit

evidence. We have the emails. We have the written statements by the city itself, where the city says we're preserving this property for use by the surrounding landowners. So, Your Honor, that's the take evidence that we will present to you, specific to this 133 acre property.

Your Honor, is there any more questions that you have?

THE COURT: Yeah, because I'm trying to understand then -- because, as I said, there were all these different causes of action in --

MR. LEAVITT: Yes.

THE COURT: -- your complaint. Are you saying that they all have to go through this same process of determining, quote, your bundle of sticks? Because with all due respect, with respect to, you know, taking the application off the agenda, you know, I don't see that as being a violation that rises to the level -- it seems premature.

MR. LEAVITT: Okay.

THE COURT: As I said, there are all these other allegations about things that the city did. Didn't allow them access. Why are you not allowed to fence your property? Does that cause you harm? It seems like -- those like a tort. Those are more like the city didn't properly allow you to make use of your property and to protect your property. You don't want people dumping. I mean the place is going to turn into a junkyard. I mean so you've got to be able to protect your property. I understand that.

So that seems to be the -- different -- and it doesn't have to -- seem to have anything to do with this -- what you're talking about, which is this overall they wouldn't let us, I guess, develop our property. And

they seem very different and distinct. And I'm trying to figure -- what are you -- how do you define what you believe your bundle of sticks is, because these are all different things, but to you they seem to be all one big thing. And I don't get it. I don't see how they can be.

MR. LEAVITT: Two things. Under all of the claims, yes, the Nevada Supreme Court says you have to do the two distinct sub inquiries. Second thing, on a tort, Your Honor, you hit it on the head. You can't sue the government for a tort --

THE COURT: Right. Right. That's what I said.

MR. LEAVITT: -- under these circumstances. You can only sue them in imminent domain.

THE COURT: Right, because -- discretionary act. So they have --

MR. LEAVITT: Absolutely.

THE COURT: They have immunity.

MR. LEAVITT: So we have to sue them in inverse condemnation and say you took our property. But, Your Honor, the other part is I understand the 133 acre application standing alone was stricken from the agenda. But, Your Honor, we have another application, a master development agreement application that was denied. Your Honor, but here's the situation. The landowners have a piece of property. They have zoning. They have the right to use it. They go to the City. They say there's only one road you can go down to build. That's the master development agreement. They do every single thing the city says. They file the application to develop, and then the City says

no. That's your classic taking action.

The exact same thing happened in a case called *Del Monte Dunes v City of Monterey*. It went to the United States Supreme Court. The city of Monterey denied the application to develop. And then the Del Monte Dunes sued, and the United States Supreme Court, and the United States Supreme Court held that that was a taking.

But, Your Honor, here's my great concern, and my great problem here, again, is I'm at a huge disadvantage. And I think you are too, Your Honor, because you haven't heard our case. You haven't heard our facts. You haven't heard our taking facts. And so, your last question there is so how do you define the bundle of sticks? You have to define them before the government action. They have to be defined at that point in time. And that's what the -- that's what the Nevada Supreme Court said. Here's what the Court said. They said in analyzing a taking claim, we undertake two distinct sub inquiries, a) whether the appellant's real and personal property constitutes private property under the constitution. So they say we decide A first. Then they go on and say, b) whether the city's actions denied -- in that case it was access -- whether the city's actions denied them access to constitute a taking.

The Nevada Supreme Court adopted this mandatory procedure, and the mandatory procedure makes sense. And that's why, at the last hearing that we had, said we're going to split these two issues entirely up and separate them. And that's why --

THE COURT: Well, that was your recommendation, and I agreed to go along with it. I now think it's wrong.

MR. LEAVITT: Okay.

THE COURT: This doesn't make any sense. It's out of context. I think this is not a good approach.

MR. LEAVITT: Your Honor, I -- the only way I guess I could respond to that is to say it's the approach the Nevada Supreme Court has required us to take. And the Nevada Supreme Court, I mean it -- they -- I mean the -- to address it for a second time, the Nevada Supreme Court did it again. And here's what the Court said in *Sisolak*.

Accordingly, the Court -- this is their language. Accordingly, the Court must, first, determine whether there plaintiffs possess a valid interest in the property affected by the government action before proceeding to determine whether the government action at issue constituted a taking. So that's what the United -- the Nevada Supreme Court said you -- that's what the -- the language they used, the Court must, first, determine the property interest before proceeding to determine the take issue.

And, Your Honor, yes, I did invite you to do that. And yes, that's -- and the only reason I did that, Your Honor, is because I want to avoid error on appeal. I don't want the Court to -- I don't want to go through a whole process here, and then we go to the Nevada Supreme Court, and the Nevada Supreme Court remands it.

THE COURT: Okay. Well, here's my problem with *Sisolak*. Okay. So Mr. Sisolak, not then governor, owns these -- like this raw land.

MR. LEAVITT: Yes.

THE COURT: And the City passes an ordinance --

MR. LEAVITT: Yes.
THE COURT: -- that says height restrictions.
MR. LEAVITT: Absolutely.
THE COURT: That's not what we're talking about here.
MR. LEAVITT: Excuse me, Your Honor.
THE COURT: We aren't talking about that here.
MR. LEAVITT: We're talking about the same thing.
THE COURT: It's totally -- no, it's not.
MR. LEAVITT: Let me explain. And, Your Honor, again, you're at a disadvantage, because I haven't briefed that for you.
THE COURT: Okay.
MR. LEAVITT: And that's why it's a huge concern for me. In Sisolak, we tried those cases. What happened is the city adopt -- the county adopted height restriction ordinance number 1221.
THE COURT: Uh-huh.
MR. LEAVITT: It did one thing. It authorized the airplanes to enter at a certain air space above the property in 1990. We then sued the county, and we went through 14 years of litigation. And the Nevada Supreme Court said the passage of the ordinance that authorized the public to use the property was the taking.
THE COURT: Okay. So that was 10 years after he bought the property.
MR. LEAVITT: Yes. Oh, absolutely. He bought the property, and the Nevada Supreme Court said that, in 1990, when the ordinance was adopted, that was the taking.

THE COURT: He had air space rights.

MR. LEAVITT: Yes.

THE COURT: What rights here -- you're saying zoning is a right. How is zoning a right? Because it's not saying we can't use your property because we're going to land planes over the top of Badlands.

MR. LEAVITT: Right.

THE COURT: That's not what they said.

MR. LEAVITT: No. No. What they said -- what the ordinance said, Your Honor --

THE COURT: No, I'm not talking about *Sisolak*. I'm talking about here.

MR. LEAVITT: I know.

THE COURT: Yeah.

MR. LEAVITT: The City adopted an ordinance here --

THE COURT: Right.

MR. LEAVITT: -- that expressly states -- it's written right in the ordinance -- that the landowners -- it's up. Here it is right here. This is ordinance -- this is the bill, 2018-25. It says the landowners must allow ongoing public access to their problem.

THE COURT: Okay. So again, to me, that seems very different from the 133 acres developing. That's why I said it seems to me like it's -- it almost sounds -- like I said, it's not a tort, because you can't sue for tort, but those -- that seems very different to me from the zoning action. That's this, overall, the county takes punitive actions against us. They don't want us developing our land.

MR. LEAVITT: Yeah.

THE COURT: They're going to not let us use it. That's a different case than the 133 acre specific -- so that's why I didn't understand why these things are all separated out, because these zoning applications seem to be one thing. And all these other things that's like pattern and practice that you allege, it seemed more global. And so, I'm trying to figure out why did you separate that into -- I mean that just didn't make any sense to me.

MR. LEAVITT: No, Your Honor --

THE COURT: The PJRs, with respect to specific denials of specific zoning applications, are one thing.

MR. LEAVITT: Right.

THE COURT: This big, you know, you not letting us use this, because you keep enacting all these crazy laws that keep --

MR. LEAVITT: Right.

THE COURT: -- Mr. Lloyd from using his land --

MR. LEAVITT: Right.

THE COURT: -- that seems like one thing. But yet, it's split up into four different cases. And that's where I just -- it seems like an odd choice.

MR. LEAVITT: Well, and some of the facts are different. You were right, Your Honor. Some of the facts are different. But I want to go back to the bill.

THE COURT: Okay.

MR. LEAVITT: The bill specifically authorized the public to go

onto the 133 acre property. It was specific to that property. It said you have to allow ongoing public access to the 133 acre property. And if I may, just two months ago, the United States Supreme Court had the exact issue before it, in a case called *Cedar Point v Hassid*. In *Cedar Point v Hassid*, two months ago, the United States Supreme Court had to decide whether a statute adopted by California -- and this is what the statute said. It said farmers had to allow the union to go onto their property something like -- I can't remember how many days a year, like a couple -- a few --

THE COURT: Yeah.

MR. LEAVITT: -- days a year. So you --

THE COURT: [Indiscernible]

MR. LEAVITT: You have to allow them to go onto the property.

THE COURT: Right.

MR. LEAVITT: That's the *Cedar Point v Hassid* case. One of the landowners in that case that sued the farmer, the unions hadn't even come onto his property yet. The United States Supreme Court held that is a per se taking. When you adopt a statute that authorizes the public to go onto property, that's a per se taking. That means it's a taking in and of itself. And when we move to the taking side of this case, we're going to present to you this bill that the city adopted that said the landowners must allow the public -- all the public, not just some but all of the public to go onto their property.

THE COURT: This is what I'm trying to figure out. What are

you saying you want defined? Because as I told you, I think a lot of times now, I have an issue with this -- like what's -- but, essentially, it's been severed off. It's the PJR. The 133 acres denied. That to me is, one, it's a very concrete thing. I just don't see it. I don't think it's right. I don't think that's --

MR. LEAVITT: Okay.

THE COURT: And that's why I was asking. What about -- and I asked Mr. Schwartz this. What's all this other stuff that they're alleging in here about these -- what these city counselors were up to and all these allegations that the City had this plot and this plan and this effort to try to keep them from using this whole big --

MR. LEAVITT: Yeah.

THE COURT: -- you know, Badlands.

MR. LEAVITT: Those are --

THE COURT: That seems to me to be very different.

MR. LEAVITT: Those are specific to the 133. And, Your Honor, we will -- again, at the take side of this, we will present that evidence where the City specifically targeted the 133 acre property.

THE COURT: Okay. I'm -- maybe I'm not making myself clear.

MR. LEAVITT: Okay. Go ahead.

THE COURT: Specifically the PJR.

MR. LEAVITT: Yeah.

THE COURT: We went in. We had this application.

MR. LEAVITT: Yeah.

THE COURT: They took it off the agenda. File a PJR. Fine.
MR. LEAVITT: Got it.
THE COURT: That's a very specific thing.
MR. LEAVITT: Right.
THE COURT: And that's where I -- so I felt like that's where I thought Herndon was right.
MR. LEAVITT: Right.
THE COURT: That's not right. There's no actual final action there. The rest of all this, which is what I'm trying to get you people to explain to me, is this -- all this -- I often -- I don't know, it's not really pattern and practice, but that's what it is. It's like the history --
MR. LEAVITT: Yes.
THE COURT: -- of how the City dealt with Badlands. They had, you know, the big fancy people like Jack Bennion mad at them --
MR. LEAVITT: Right.
THE COURT: -- over taking away the golf course.
MR. LEAVITT: Right.
THE COURT: So they said oh, wait a minute, we're going [indiscernible] detail work out. Although, as they point out, you know, we went in and fought for the 17 acres at the Supreme Court. We were on their side. So --
MR. LEAVITT: So --
THE COURT: -- to me, they're two different things. So are you asking the Court to say -- this is what I think you have for your, quote, take consideration. All this other stuff that they did, to me, that

seems like it's a whole different case.

MR. LEAVITT: Totally is, Your Honor. We're here today just on the inverse condemnation case.

THE COURT: Uh-huh.

MR. LEAVITT: That's only why we're here today is on the inverse condemnation case. Okay. Everything else that I've talked about to you today about the government action towards the property is not relevant to why we're here today. You asked me about those take issues, and I addressed them.

THE COURT: Right. So there's -- and here's --

MR. LEAVITT: Yeah.

THE COURT: So then the next step is if we're talking about the zoning action, which, you know, that's the PJR. I think that's a different thing.

MR. LEAVITT: Totally.

THE COURT: Now we're going to just talk about this whole rest of the allegations in the complaint.

MR. LEAVITT: Yes.

THE COURT: Their point is first you have to say do you have a right.

MR. LEAVITT: Yes, absolutely.

THE COURT: What's the right?

MR. LEAVITT: Okay. So that's where I want to go to now.

THE COURT: Okay.

MR. LEAVITT: And so, Your Honor, that's the, that's the,

that's the question is what property rights --

THE COURT: Right.

MR. LEAVITT: -- does the landowner have. It's the, it's the, it's --

Can we bring this one up?

And may I approach, Your Honor?

THE COURT: Sure.

MR. LEAVITT: I can just hand this to you. And that's what I addressed on Monday.

THE COURT: Is it the same one? Because I still have them.

MR. LEAVITT: I can -- I'll give you another one, because it summarizes it pretty well. It summarizes it pretty well. May I approach, Your Honor?

THE COURT: If it's one of these, I've got them.

MR. LEAVITT: Okay. Let's do that. Three questions on the property.

[Counsel confer]

MR. LEAVITT: So the three questions on the property, Your Honor --

THE COURT: I've got it.

MR. LEAVITT: I know, but I can't find mine now.

THE COURT: Do you want mine?

MR. LEAVITT: No, no, no, no. Hold on, Your Honor.

[Counsel confer]

MR. LEAVITT: Yeah. Here it is, Your Honor. Yes.

THE COURT: Good work is gone.

MR. LEAVITT: So this is how the property interest issue and we're -- the sole issue we're here today on the inverse condemnation cases was all.

THE COURT: All right.

MR. LEAVITT: Is number one, is zoning used to determine the property rights? Okay. That's the proverbial issue before you. That's the number one issue is how do we decide that. We turn to the next page, Your Honor. And the next page, the Nevada Supreme Court addressed this issue in six cases. And remember, in the *Sisolak* case, that's the case where the court said we have to do two distinct sub inquiries, right? That's the one the court said that in. We must, first, define the property.

And so, in that case, on page 4 of our outline here, I have the page from the *Sisolak* case, where the court used zoning to determine the property right. That's important, because Mr. Sisolak, exactly like our client, had a vacant piece of property. And so, the court had to say okay, what does Mr. Sisolak have. They had to, they had to define his property interests for purposes of the take. And -- go ahead.

THE COURT: Sisolak owned raw desert.

MR. LEAVITT: Raw desert.

THE COURT: Your client bought a golf course.

MR. LEAVITT: No, Your Honor. Your Honor, he acquired raw land. It's the same thing. It was being used as a golf course. And, Your Honor, at the time of the take, the golf course was closed, and it was

converted to -- it was --

THE COURT: I thought he, I thought he closed it.

MR. LEAVITT: It was closed. He closed it. It was shuttered because it was an absolute financial failure. What he --

THE COURT: It's also apparently a really difficult golf course to play.

MR. LEAVITT: From what I understand. I don't golf, Your Honor, but from what I understand.

THE COURT: Everybody I know who golfs says it's the hardest one in town. So --

MR. LEAVITT: But what he had at the time of the taking -- remember, he had a vacant piece of property with R-PD7 zoning. What did Mr. Sisolak have? A vacant unused piece of property with H-2 zoning. So the Nevada Supreme Court had to decide, okay, what are Mr. Sisolak's property rights. And the Nevada Supreme Court decided Mr. Sisolak's property right was a vacant piece of property with H-2 zoning that gave him the right to build into the space. He didn't have entitlements. All he had was zoning. And the Nevada Supreme --

THE COURT: Which they changed?

MR. LEAVITT: Huh?

THE COURT: Which they did -- after this ordinance, that affected his right to build.

MR. LEAVITT: No. His zoning was not changed.

THE COURT: No. His zoning was. The ordinance changed --

MR. LEAVITT: The ordinance said now the public can enter

into your air space. But here's the point. If Mr. Sisolak didn't have the right to use his air space under that zoning, there wouldn't have been a taking. So that's what the Court said. I -- that's why the court said we have to separate these out and the court first decided the H-2 zoning on his vacant piece of property gave him the right to develop. And, Judge, they used these words. Gave him the vested right to develop his property. That's the words the Nevada Supreme Court uses. And I'm going to, I'm going to address that in just a minute, Your Honor.

And then -- so, and then, we go to the next case, which is the *Alper* case. And Your Honor, I'm going to go through these kind of quickly. In the Alper case, it's an inverse condemnation case. Again, the Nevada Supreme Court looked at the zoning to determine the property rights that Mr. Alper had in the inverse condemnation case.

And then they did the same thing in the next case, which is *Alper v. State*. Same thing. They looked at the H-2 zoning. They actually took a copy of the zoning and put it into the case and said, we're going to use the H-2 zoning to determine Mr. Alper's property rights in this inverse condemnation case.

And then we go the next case. This is an interesting case, the *Buckwalter* case. Again, Mr. Buckwalter was actually using his property for apartments. And how -- what property right did the Nevada Supreme Court identify there? They said it's zone for casino. And so that -- they said that gave him the right to use the property for a casino. And therefore, that's how they identified the property right, based on zoning and the rights you have under the zoning.

And I want to go to a couple more cases. *Andrews v. Kinsburg* [phonetic]. The Court said, again, the property was zoned, and they used that. But I want to end with City of Las Vegas v. Bustos because counsel addressed City of Las Vegas v. Bustos. If we can bring that up. In City of Las Vegas v. Bustos, the Nevada Supreme Court said, the district court properly considered the current zoning of the property, as well as the likelihood of a zoning change to determine the property rights that Mr. Bustos had.

Now, what we brought to you, Judge, we brought to you three inverse condemnation cases where the Court went through the exact same thing we're asking you to do. And they used zoning to determine the property rights. We also brought to you three eminent domain cases where they use zoning to determine the value of the property. And counsel says, well, you don't use -- that's irrelevant here because in those cases, they just use zoning to value the property. Well, Your Honor, you don't value something that you don't have. So whether it's a direct eminent domain case or an inverse condemnation case, the very first step is to identify the property interest. Then and only then can you determine whether it was taken in an inverse condemnation case. And in a direct condemnation case when the government admits liability, then and only then can you value that property. So no matter what case we're in, you always have to determine the property rights before the government interferes with those property rights.

And if I may -- if I may -- if I may do one thing in the *Bustos* case, Your Honor, again, because counsel addressed it. In the *Bustos*

case, you can see that there's a footnote. It's footnote 10 behind the citation. And then -- I'll just reference it, Your Honor. In footnote 10, there's ten cases cited. The Nevada Supreme Court cited ten cases to say zoning is what's used. And they even said, if you have the reasonable probability of a higher zoning, that's what's used to determine the property rights.

So what the Court looks at is what was the property's condition, what did it look like, what did the landowner have before the government entered the picture. And so that's why they said in ten cases in the *Bustos* case you always look at and focus on zoning. And Judge, the Nevada legislature adopted the same type of rule.

Now, counsel -- you heard counsel. Counsel said what you have to look at is the master plan. So really, that's where the fight is, Judge. That's where the fight is in this case. The City says you should use the master plan to determine the property rights. And the landowner's saying you should use zoning to determine property rights. That's really where the fight is. Sorry, Your Honor. I had to catch my breath there.

The Nevada Legislature resolved that issue. And here's what the Nevada Legislature said in 278.349. They said, i there is an existing ordinance that is inconsistent with a master plan, the zoning ordinance takes precedence. Zoning is of the highest order. The master plan is down here. And then, Your Honor, we've also submitted to you an Attorney General opinion from the executive branch where the Attorney General's Office did an analysis, the same exact analysis, and concluded

that it's always been the intent in the State of Nevada under the legislative provisions that zoning is of the highest order, and it supersedes a master plan.

That the master plan is -- they wrote it right here. They said, it's also intended that local ordinances control over general statements or provisions of a master plan. Why? Because zoning, Your Honor, sinks its teeth into the property. It runs with the land no matter what. A master plan is exactly what the title says. It's a plan that the city has for future possibilities on properties. That's all it is. That's why the Court's focus for why we're here today -- that's why the courts always focused on zoning.

And Your Honor, there is no case that -- and we stay within the box of inverse condemnation case. There is six cases that use zoning to determine property rights. There's not one inverse condemnation case in the State of Nevada that uses a master plan to determine property -- the property rights issue. Not one.

And so Your Honor, we also go to the next section here. You have three City of Las Vegas departments. You'll recall that I went through this where the City Attorney's office prior to trial has submitted briefs to you, Your Honor. They've submitted affidavits to you. They've submitted briefs to other eighth judicial district courts. And in those briefs, they have confirmed what I'm telling you today. Uniformly, every single one of those city attorneys represented to the Eighth Judicial District Court and the Nevada Supreme Court that zoning is of the highest order and the master plan is below zoning. That the courts must

use zoning to determine property rights in the State of Nevada.

We turn to the next page, Your Honor. That's also been the practice of the city planning department. Can we turn that next page? Your Honor, can you see what we're bringing up on the screen?

THE COURT: Yes.

MR. LEAVITT: Okay.

THE COURT: Yes.

MR. LEAVITT: Okay. So this is the city planning department. The city planning department over the -- remember, the landowners did all of this due diligence. And the city planning department confirmed over the 14 years that the landowners did due diligence that zoning was of the highest order and that the master plan was below the zoning, and that the zoning trumped everything else, meaning that when determining property rights in the City of Las Vegas, zoning applied.

And if we turn to the next one, which is the Tax Department of the City of Las Vegas. And Judge, this is critical here. After the landowners acquired the property, the City Tax Department came to the landowners and said, we now under NRS 361.227 have to determine what the taxes are on your property. And that statute requires the City Tax Department to determine the lawful use of the property. And what did the City Tax Department use to determine the lawful use? They used the R-PD7 zoning and said R-PD7 zoning gives you, the landowner, the legal right to use the property for residential uses. The City than put an 88 million dollar value on the landowner's residential property and then taxed them a million dollars a year.

THE COURT: Now, those are all directed to Michelle Schaeffer who is county assessor. So how did that work?

MR. LEAVITT: Yes, Your Honor, if I may.

THE COURT: Because it looked like it was county me, so.

MR. LEAVITT: The City of Las Vegas adopted a city charter.

THE COURT: Uh-huh.

MR. LEAVITT: And the City of Las Vegas City Charter in Section 3.12, decided and elected to make that county tax assessor its county assessor.

THE COURT: Okay.

MR. LEAVITT: This is what it says.

THE COURT: It's city tax assessor. Okay. Got it.

MR. LEAVITT: I'm sorry, you're right.

THE COURT: Uh-huh.

MR. LEAVITT: The county assessor of the county is exofacial the city assessor of the city. So that's the City's charter. This is actually in the City's constitution here.

THE COURT: Uh-huh.

MR. LEAVITT: That's their charter where they elected to be bound by everything the county assessor does. And the city was well aware of that. And the city was collecting taxes from the landowners based on that residential use, which is based on zoning.

So Your Honor, we have -- and I've got to be clear here. The landowners entered into a stipulation to that effect. So we have a stipulation from -- between the landowner and a city department that the

lawful use of the landowner's property is based on R-PD7 zoning and that that zoning is residential, and the lawful use of the property is residential. We have that stipulation.

And so Your Honor, we have three city departments now that have agreed because we talked about the facts. And I love what you said here, I want to see the facts. Those are the facts. Those are the historical facts. All three departments of the City of Las Vegas have conceded, agreed, and stipulated that the zoning on the property is R-PD7, that R-PD7 gives the right to use the property residential, and that that should be used to determine the use of the property.

So then we go to question number 2, Your Honor. If we can flip to the -- question number 2 is, okay, what is the zoning on the property, right? So we have the -- we have the law -- the unequivocal law that says zoning has to be used to determine the property rights, right? So the next question is what's the zoning. We don't have a dispute on that. If we go to this page right here, Your Honor, and we flip a couple pages over, the 133 acres zoning is R-PD7. Residential --

MR. SCHWARTZ: What is it you're referring to?

MR. LEAVITT: Residential --

MR. SCHWARTZ: Thank you.

MR. LEAVITT: -- plan development, seven units per acre. That's what the landowners acquire at the time they acquired this property was an R-PD7 zoned property. Okay. Everybody agrees to that. Here's -- here it is right here, Your Honor. This one right here. So then the final question to determine the property rights issue is question

number 3 if we can go to that. Question number 3, what does this R-PD7 zoning give to the landowners?

And Judge, this was the exact question before Judge Williams, and it was the exact question before Judge Jones. Both of them addressed this very, very narrow issue is what does R-PD7 give to the landowners. And this was what -- that was their question. That was the number one question because remember, Your Honor, the 17 acre property had R-PD7. The 35 acre property had R-PD7. The 133 acre property had R-PD7. And this is what Judge Williams said. The Court concludes that 19.10.050 lists single family and multi-family residential as the legally permissible uses of R-PD7's own properties. That issue has been fully litigated in the 35 acre case and resolved by Judge Williams.

The issue was also fully litigated before Judge Jones. Judge Jones agreed. He said the same thing, Your Honor, is that the R-PD7 zoning -- let me get there. The Court's indulgence. He said, the legally permitted uses of properties owned R-PD7 are included in the city's code and that code provides that the legally permissible uses are single-family and multi-family residential. I understand, Your Honor, that the 17 acre and the 35 acre property do have different take facts. But they don't have different property interest facts. The facts are the exact same for the Williams 35 acre case and the exact same for the Jones 17 acre case. In both of those cases, the Court said I used zoning to determine the property interest. The zoning is R-PD7. And the city's R-PD7 gives the landowner the legal right to use the property for single-family multi-

family residential uses prior to any interaction with the government

THE COURT: But see they also have elements of this action being taken on the zoning application that I have a problem with in this case. You've got your, like, eight causes of action here.

MR. LEAVITT: Yes.

THE COURT: Petition for judicial -- again, we have to separate this --

MR. LEAVITT: Yes.

THE COURT: -- pleading, I guess. So you've got your petition for judicial review. And then you have -- I'm not really quite sure if this is part of the condemnation or if this is -- I guess this is your condemnation. So first alternative cause of action for a dec relief. Second is preliminary injunction, which really seem more to go with this zoning problem. Third, this is where we get into categorical taking, consensual regulatory taking, per se regulatory taking, nonregulatory taking, which is really kind of the one that it seemed like this was headed. Seventh is temporary taking. Again, kind of seemed like that was the problem when they wouldn't let you put up your fence.

MR. LEAVITT: Right.

THE COURT: So like I said, these sound almost like torts to me. And you can't have torts as a discretionary meeting. So to me that's -- it's different where you have the cases where there's a zoning action.

MR. LEAVITT: Okay. And so Your Honor, yes. Okay. The cases are the same in this narrow property interest issue. The cases

then become different because the city did take different action towards each one of the properties.

THE COURT: Uh-huh.

MR. LEAVITT: Okay. And you're right. And maybe I should explain it. We're teasing out the inverse condemnation claims. Your Honor, this is extraordinarily -- I agree, this is extraordinarily confusing -- is that you have to tease out the petition for judicial review claims from the inverse condemnation claims. Those have to be -- we argued that on Monday and we said they have to be separated out.

THE COURT: Uh-huh. Yeah.

MR. LEAVITT: We're not here on the petition for judicial review claims at all. We're here just on the inverse condemnation claims. And when we decide the inverse condemnation claims, we obviously have to -- we've talked about this --

THE COURT: But here's what I'm trying to understand. What do you think is part of the inverse condemnation plan? As I said, the zoning action I have a problem with.

MR. LEAVITT: Okay.

THE COURT: I think Herndon's right on that.

MR. LEAVITT: Uh-huh.

THE COURT: You don't have the multiple actions taken and the denial and the equitable refusal. I get your point though that you've got this problem with this Lowie bill and this, like, pattern of what happened --

MR. LEAVITT: Right.

THE COURT: -- that appears kind of suspect at the commission meetings.

MR. LEAVITT: Right.

THE COURT: Like I said, that sounds almost in tort to me. And that tort is discretionary. So what are you actually saying that is? And that's why I'm struggling with what kind of an interest is that?

MR. LEAVITT: So --

THE COURT: That's bizarre.

MR. LEAVITT: -- a government tort, Your Honor, another name for it is inverse condemnation. The government torts are inverse condemnation cases. This is what the courts say is all government action in the aggregate must be considered when deciding an inverse condemnation case. So what --

THE COURT: I tried an inverse condemnation case once where he -- Paul Christenson said a mobile home park could expand --

MR. LEAVITT: Yeah.

THE COURT: -- if they made the rest of -- because it's right by Ellis --

MR. LEAVITT: Uh-huh.

THE COURT: -- made the rest of their -- if they had impact proof mobile homes. There was I guess a bunker.

MR. LEAVITT: Those were good times.

THE COURT: Yeah. So I mean, I've done this. I mean, I get that. But that was like -- that was how that was tried. It wasn't about a petition for judicial review, or you did a bad zoning thing. It was you

acted unreasonably --

MR. LEAVITT: Exactly.

THE COURT: -- and you made it impossible for us to -- because what are we going to build, bunkers? No, these are mobile homes. So I understand what you're saying. I mean, I've been here, I've done that.

MR. LEAVITT: Yeah.

THE COURT: Okay. But this is why -- because of how -- no offense -- this was all smooshed into one big thing --

MR. LEAVITT: I know.

THE COURT: -- I have issues with the way this is pled. And it just doesn't make any sense to me. What are you trying to say you think this Court should do with this motion to define what you believe has been taken because I'm not sure it has been?

MR. LEAVITT: Right.

THE COURT: But I get your point that you think something nefarious happened.

MR. LEAVITT: Yeah, because we -- and we haven't briefed the take issue.

THE COURT: Exactly.

MR. LEAVITT: So you don't have that before you. So I understand, Your Honor, that we haven't briefed that. We haven't had the opportunity to present that. So we're not asking you to say what's been taken. We're absolutely not asking you that today. All we're asking you for is what did the landowner have in his possession as his property

right before he went to the City of Las Vegas and asked to develop? That's what the Court requires us to do.

THE COURT: Uh-huh.

MR. LEAVITT: So -- and the reason I say that is because the Court requires us to say, okay, I've got to find out what Mr. Lowie had. What did he have? Because if he didn't have a property right, they didn't take anything, right? If you don't -- for example, if you -- I'm trying to think of a -- the example the Court used. If you're not an owner of a property, Judge, then of course, you don't have the right. If you have a property and you don't have -- and it's -- let's say this.

You have a property, and it's landlocked, right, the Court has to first define that property. The Court has to first say it's landlocked. And then we go to the next phase which is, well, the government didn't allow you access to your property. Was there anything taken? No, because your property was landlocked. But you can't decide that second step unless you first decide the property interest issue. So that's what we're saying here.

Here's -- and let me put it in a real nutshell. We're saying, Judge, here's what we want. We want an order from you which is exactly like Judge Jones and Judge Williams. We want an order that says on the 133 acre property, the landowners have R-PD7 zoned property and that R-PD7 zoned property gave him the legal right to use that property for single-family and multi-family residential uses. That's it. And --

THE COURT: It gave him the right to apply for approval. It

didn't -- it didn't give him the right to do it. That's the problem I have.

MR. LEAVITT: Well, I get what you're saying.

THE COURT: You have the right to apply. And see, that's why I said to me, I see this -- all this issue of did they do all these things deliberately to keep him from doing that. That's a totally separate thing from the zoning. He had the right to apply for approval.

MR. LEAVITT: Okay. But --

THE COURT: He didn't have the right to build. Otherwise, he wouldn't have had to apply for the right to build.

MR. LEAVITT: Now, Your Honor, what that -- and respectfully to the Court, that says that landowners don't have property rights. That -- no, that's what it says.

THE COURT: It's just the opposite of what he says. It says --

MR. LEAVITT: Yeah.

THE COURT: -- okay. All right.

MR. LEAVITT: No, because if you don't -- if all you have is the right to apply and the city has discretion to deny that, what does that mean?

THE COURT: They have to act reasonably.

MR. LEAVITT: No. It means you have no property rights.

THE COURT: Okay.

MR. LEAVITT: That's what that means is you have no property rights. Now, that's why -- Judge, that's why the Court says you have to separate out what the government did --

THE COURT: Okay.

MR. LEAVITT: -- from the property right. And Your Honor, that would mean that the Nevada Supreme Court was wrong in *Sisolak* because in *Sisolak*, the Court said his property was zoned for hotel casino. That gave him the right to use the property for hotel casino.

THE COURT: No. It gave him access to the air space. The ordinance affected his air space. Same problem with my aircraft impact proof mobile homes.

MR. LEAVITT: If I -- and Your Honor, I think I might be able to answer it this way.

THE COURT: Sure. Go ahead.

MR. LEAVITT: May I approach? So this is the government's arguments in this case.

THE COURT: Okay.

MR. LEAVITT: And I think this will resolve it. First, the city made the argument the petition for judicial review law should apply. Okay. They cited to you 16 of their 26 cases -- or 16 of their first 26 exhibits were petition for judicial review law. Petition for judicial review law does give the city discretion. But remember, we were here on Monday, and we argued ad nauseum for why these cases had to be separated out and the petition for judicial review law could not apply here. They're like water and oil. That's what counsel said. They even wanted the case dismissed because they were so different. The body of law is so very different.

So you can't bring petition for judicial review law into inverse condemnation law. And I'm concerned that that's what's happening.

The city has cited to you the *America West* case, the *Stratosphere* case, all of these cases that are petition for judicial review cases that say the government has discretion to deny land use applications. And they're bringing that over into inverse condemnation law. And let me explain why that's so inappropriate. Your Honor, if we could turn to the next page here. It says, the City's argument relies upon petition for judicial review law. That's that one, Your Honor. Okay. Actually, we can go to this one right here. You see this one?

THE COURT: Uh-huh.

MR. LEAVITT: Okay. So here's the City's argument. The City has discretion under petition for judicial review law to decide the property may not be used. Therefore, there are no rights in the City of Las Vegas. And he said it. This is their argument. I wrote it down. He said, if the city has discretion, there is no property right. And when you're in a petition for judicial review case, which are all of the cases that the City has cited to you, that's correct, the City does have discretion to deny land use applications. But you can't carry that discretion over to inverse condemnation cases. Otherwise, counsel will say, if the City has discretion, there is no property right.

Let me tell you how the Nevada Supreme Court resolved that in *Sisolak*. This is what they said. They said the City can't apply valid zoning ordinances that don't amount to a taking. So Your Honor, they don't have this absolute discretion. Otherwise, you and I don't have property rights in the City of Las Vegas. That's what he said. I'll quote it. "If the City has discretion, there is no property right."

That exact same argument was made in *McCarran International Airport v. Sisolak*. And if I could refer the Court to the quotes from *Sisolak*. They're right here. There are six of them that reject that argument. They say the first inalienable right in the constitution is a right to acquire, possess, and protect your property. They say in Nevada, we've adopted expansive property rights in the context of inverse condemnation cases. And then they go on to say this. Governor Sisolak's property was zoned for development of a hotel. Governor Sisolak's property had "the vested property interest" in the air space above his property. Then they say this. Governor Sisolak's property rights include the right to possess, use, and enjoy the property.

So when you come over into an inverse condemnation case, you have to use the zoning. And that discretion stays in the PJR side of the case. You cannot carry that discretion over, otherwise, there are no property rights, exactly as counsel just argued.

THE COURT: All right. So here's the problem we've got here though.

MR. LEAVITT: Yes.

THE COURT: So 30 years, Mr. Peccole builds Badlands.

MR. LEAVITT: I'm sorry, built what?

THE COURT: Built the golf course.

MR. LEAVITT: Got it.

THE COURT: He builds Badlands. Okay. Fine. Later, it's purchased by Mr. Lowie.

MR. LEAVITT: Yes.

THE COURT: He says, this is an impossible golf course to play, it's terrible, it doesn't make any sense, let's close it.

MR. LEAVITT: Right.

THE COURT: Nobody wants to play here. It's too hard.

MR. LEAVITT: Got it.

THE COURT: So we should build on it.

MR. LEAVITT: Right.

THE COURT: So we need to change the zoning of it --

MR. LEAVITT: Got it.

THE COURT: -- because it's approved for a golf course that was built. Let's change that into houses. Right, that's what the application was for?

MR. LEAVITT: No, Your Honor.

THE COURT: Okay.

MR. LEAVITT: And here, let me explain why. Mr. -- the evidence -- the uncontested evidence shows that Mr. Peccole from the very beginning never put a golf course zoning on the property.

THE COURT: He didn't put a deed restriction on it.

MR. LEAVITT: He didn't put a deed restriction. Neither did he zone it for golf course. For golf course the zoning is C-V.

THE COURT: True.

MR. LEAVITT: And I didn't bring the exhibit with me but -- so here's what happened is Mr. Peccole kept the property at R-PD7 zoned property, which means up to seven units per acre. Then he said -- then, listen to what he did.

THE COURT: They didn't -- he didn't change -- they weren't trying to change the zoning. They were trying to change the use.

MR. LEAVITT: Okay. But this is what Mr. -- let me state it this way. Mr. Peccole always intended to develop the 250 acre property. That's the evidence that's in the case. We've cited --

THE COURT: Right. Yeah. He didn't put a zone -- a deed restriction for that reason.

MR. LEAVITT: And he didn't put -- not only did he not put a deed restriction on it, but when he drafted the Queensridge CC&Rs for all the homeowners, he expressly said that the golf course can be developed. And if I may, Your Honor, I'll show you one page from that. I'll provide you one page.

THE COURT: Well, anybody who lives on a golf course in this town knows this. Some of them have it. Some of them don't.

MR. LEAVITT: So here's -- this is a page from the CC&Rs. Future development. This is the golf course property.

THE COURT: Uh-huh.

MR. LEAVITT: He kept the property for development. He specifically put in the CC&Rs that the golf course property is not part of the Queensridge community, that the golf -- that nobody has any rights to the golf course community, and nobody can stop development of the golf course community. And then he listed the amenities and he expressly stated that the golf course community is not one of the amenities. So the plan here for Mr. Peccole was to always develop the property into homes. And he kept the zoning on the property to allow

that to happen. And Your Honor --

THE COURT: So it's developed though because it was not developed with houses on it, right?

MR. LEAVITT: Correct.

THE COURT: I mean, there was a period of time it was --

MR. LEAVITT: It was a golf course.

THE COURT: -- a golf course.

MR. LEAVITT: Yes.

THE COURT: So in order to then take that golf course and build homes on it, you need to get that changed.

MR. LEAVITT: No. No. And here's why.

THE COURT: Okay.

MR. LEAVITT: Because Mr. Peccole from the beginning always intended to develop the property for residential. So he kept the zoning R-PD7 on the property. He never went in and said, hey, I want this to be zoned golf course. He never said I want to keep the deed restriction on it. He specifically and expressly kept the residential zoning.

THE COURT: But it wasn't houses. It was a golf course. That's the use to which it was for.

MR. LEAVITT: Exactly. And Your Honor, we've presented the evidence that back in the days when he built the golf course, that was actually contrary to the -- or he didn't actually even file the applications necessary to build the golf course. It was always intended to be a residential development.

THE COURT: Uh-huh.

MR. LEAVITT: It was never -- or I'm sorry, let me state it this way. It was very clear that the golf course was an interim use until he got ready to develop the property into homes.

THE COURT: Wasn't there also a wash?

MR. LEAVITT: There's a wash. Absolutely. Through part of the property, there's a wash. And there's actually a development agreement with the City to reconfigure that wash to allow development. So that was the plan from the very beginning, Your Honor. The plan was always to develop this property residential. And the residential zoning carried all through the years. All the way from 1981 up to today, that zoning has never changed.

THE COURT: So it's your position then that, you know, like I said, for *Sisolak* -- *Sisolak* is different. He owned land, which was zoned a certain way. And because of that land, he acquired certain rights.

MR. LEAVITT: Yes.

THE COURT: Which they changed when they enacted the ordinance that said you couldn't build that high.

MR. LEAVITT: Okay.

THE COURT: That was the problem in Sisolak.

MR. LEAVITT: Yeah.

THE COURT: What did they do here? He had land. It was being -- zoned a certain way. Being used --

MR. LEAVITT: Right.

THE COURT: -- for a certain purpose.

MR. LEAVITT: Right.

THE COURT: He wanted to change the use.

MR. LEAVITT: Well, no. And Your Honor, I guess the better way to say this --

THE COURT: How do you -- if you're not changing the use from golf course to houses, what do you call that?

MR. LEAVITT: Well, no, no, no.

THE COURT: That's change of use.

MR. LEAVITT: No, no, no. He -- you're right. He closed the golf course and went to use the property for the purpose for which it was always intended. Let me give you another example.

THE COURT: Okay. All right.

MR. LEAVITT: Okay. In the *Hsu* case -- the *Hsu* case is another airspace taking case. In the *Hsu* case, that property was being used as a mobile home. It was actually -- it was -- we litigated that case for 14 years. It was a mobile home.

THE COURT: Right.

MR. LEAVITT: And the county argued our air space is not changing that use, therefore there's not a taking. And then the United States -- or the Nevada Supreme Court rejected that argument. They said that the property, even though it was being used as a mobile home, had H-2 zoning, which gave them the right to build into the airspace. Our same exact facts here. We have a golf course, but we have R-PD7 zoning which gives us the right to build single-family and multi-family residential units on it. And the government has stopped us from doing that. So it's the same exact scenario.

Again, in *Hsu*, the property being used is a mobile home, but it had zoning for hotel casino, H-2. And the Court found that that zoning defined the property interest the landowners had. So that's all we're asking for here is exactly as was done in the *Hsu* case is to say even though the property was being used as a golf course, it had RPD 7 zoning, which gives the landowner the legal right to use it for single-family and multi-family residential uses. It just doesn't give the legal right to apply, otherwise you have no property rights. Again, that's the rule in PJR law. But when you go to a domain law, the rule is very different. Zoning must be used. And the rights that are permissible under that zoning are how the property is defined. I hope I made that straight, Your Honor. So that's the very, very narrow is.

And if I may refer back to this page right here because the Department of Justice made that same exact argument that you have discretion, so you really don't have property rights. Here's what the United States Supreme Court said two months ago. Just two months ago the Court said, under the Constitution, property rights cannot be so easily manipulated. And then they said the protection of property rights is necessary to preserve freedom. So in that *Hassid* case, the *Cedar Point Nursery* case, the party in that case tried to make the exact same argument that's being made here today. Since the government has discretion to deny these land use applications, there is no property right. And the court said, well, wait a minute, you're manipulating property rights.

THE COURT: Okay. Well, the -- and here's a really good

point. The judgment that this court immediately entered an order finding PROS designation on the 133 acre property is invalid.

MR. LEAVITT: Correct.

THE COURT: I thought you just told me it was R-PD7.

MR. LEAVITT: Yes. Now, that's -- and that's -- yes. The property is zoned R-PD7.

THE COURT: Right.

MR. LEAVITT: But what all courts have found, and what the city argues is that there is a master plan land use designation of PROS.

THE COURT: Right.

MR. LEAVITT: Zoning is different from a master plan. And so yes, we asked for that. Judge Jones just entered an order stating that it was not -- the PROS is not valid.

THE COURT: Okay.

MR. SCHWARTZ: He did not.

MR. MOLINA: He did. He did. It says that.

MR. LEAVITT: Yes, it says that in the order. I think Mr. Molina just corrected Mr. Schwartz that it does say that in the order. So Your Honor, would it be okay if -- I'd like to --

THE COURT: Okay. If you want --

MR. LEAVITT: What's that?

THE COURT: The CF --

MR. LEAVITT: Yeah. Can I approach? Because I have another one that talks about what zoning rights are in the City of Las Vegas. This is right here. So what are zoning rights? What does the City

Code say about zoning rights? This is the City Code. It says -- 19.18.020 says, zoning district is defined as certain uses that are permitted. Permitted uses are then defined as uses that are permitted as a matter of right. So when you have a zone designation of R-PD7, and it says the permitted uses are single-family, multi-family residential uses, that's a use permitted as a matter of right under the City's own code. Otherwise, Your Honor, there'd be no property rights. You would go and buy a piece of property that has H-2 zoning on it, and you'd have no property rights. And this has been the law in the State of Nevada for 50 years is that zoning determines the property rights.

And Your Honor, we -- I've also referred in our brief to -- this is Las Vegas Municipal Code 19.12.010. This is the City's land use table. And in the land use table it says the uses permitted as a principle use in that zoning district, by right. So when you have a use that's permitted -- and Your Honor, that's 19.12.010. The City's own code says that when you have a use that's permitted, you can use that property as a matter of right, by right, which is why Judge Jones and Judge Williams in both of their decisions stated -- used those words. They said when you have zoning, it gives you the legal right to use that property for that use. And Your Honor, I got -- if I may have the Court's indulgence. I got a little sideways here.

So I want -- I'd like to now, Your Honor, address the City's -- actually, let me go back for just a moment, Your Honor, because I really want to focus for just one more minute. And then I'm going to go to another argument that the city made to you. And what I like to focus on

is those four -- or those six cases that we've cited to you. Remember we cited to you those six Nevada Supreme Court cases that all relied upon zoning? There were -- the reason we did this, there was three inverse condemnation cases and three eminent domain cases. We cited both of those cases because the Nevada Supreme Court said that the cases are the constitutional equivalent of one another and that the same rules and procedures apply to both eminent domain and inverse condemnation cases. And in all of those cases, the courts again use zoning to determine the property rights.

[Pause]

MR. LEAVITT: Sorry, Your Honor.

[Pause]

MR. LEAVITT: Okay. Your Honor, if I can now go to -- we were -- I was following along here on the City's arguments because I do want to have the opportunity to respond to some of the City's other arguments on this issue. And the main argument that the City made Your Honor was this PROS argument. And if I may, Your Honor, I'd like to approach. I've just got one more for you --

THE COURT: Okay.

MR. LEAVITT: -- on the PROS issue. It says rebuttal to the City's masterplan PROS argument. So here, Your Honor, is the City's argument. What they say is they say, Judge, you should not use the zoning to determine the property rights. You should use the PROS to determine the property rights. What I did right here, Your Honor, is I summarized the ten times where this PROS issue was presented to the

courts and the ten times the courts did not accept the PROS argument.

Number one, Judge Williams in his 35 acre property interest motion rejected the City's PROS argument. Judge Jones just two days ago, again, rejected the City's PROS argument, laid it out in detail. The City in number three made the PROS argument as part of the 35 acre case to dismiss it. Judge Jones -- Judge Williams denied that. That issue went to the Nevada Supreme Court. It was presented three times to the Nevada Supreme Court. And the Nevada Supreme Court did not accept that PROS argument that the City made.

There was one time when the City's PROS argument was accepted. It's number four. It's the Crockett order. Judge Crockett accepted the City's PROS argument. That issue went up to the Nevada Supreme Court. And the Nevada Supreme Court reversed Judge Crockett's order. And then the argument was made vehemently to the Nevada Supreme Court that the PROS was on the property and the court should apply the PROS and a petition for rehearing and reconsideration. And the court rejected it again.

The City filed the PROS argument as a reason to dismiss the 17-acre case. And Judge Bixler denied the PROS argument. And then the Queensridge homeowners, Your Honor, this is a -- this is another important part right here. The Queensridge homeowners brought a lawsuit to try and stop development on the whole 250 acre property. And the district court judge in that case said two things critical to why we're here today. They said the property had RPD 7 zoning and that RPD 7 zoning gives the landowner the right to develop. That's a quote from

that district court decision that was appealed to the Nevada Supreme Court and affirmed.

So we have this issue that's been litigated heavily. It's a very narrow issue that's before you, heavily litigated. Should you apply zoning, or should you apply the masterplan PROS? And there's been ten orders that have said you don't apply the master plan PROS, instead you apply zoning. And we have a specific case saying that the R-PD7 zoning gives the landowner, the right to develop. Those orders were affirmed by the Nevada Supreme Court.

THE COURT: Okay. Here's what I'm thinking.

MR. LEAVITT: Okay.

THE COURT: As I said, we have to -- now that we know we have to separate the PJR and the condemnation cases --

MR. LEAVITT: Yes.

THE COURT: -- trying to do that. As I said, the zoning issue to me seems -- does not seem to be right, which is why all the condemnation issues related to the zoning question to me, I just -- I'm not seeing.

MR. LEAVITT: Uh-huh.

THE COURT: What I've always said seemed to me to be something was this issue of what's with the Lowie bill --

MR. LEAVITT: Yeah.

THE COURT: -- what's with pulling the application off the agenda? What were they doing there? Were they, you know, setting up the landowner for failure?

MR. LEAVITT: Yes.

THE COURT: That to me is what the condemnation action is about.

MR. LEAVITT: Yes.

THE COURT: Maybe I'm wrong about what you think it is.

MR. LEAVITT: You're correct.

THE COURT: So -- but my problem is it's things like, should you have access to your property. If they're not going to let you develop it, can't you at least fence it, so people don't dump on it?

MR. LEAVITT: Right.

THE COURT: I mean, I drive past that corner all the time.

MR. LEAVITT: Uh-huh.

THE COURT: So I'm just trying to figure out, what are you trying -- when you say you want to determine what this bundle of sticks is, that for me is what it is. It's this question of -- the zoning issue I don't think we're at yet because I don't -- they never actually finally said for all these oddball reasons that, you know, Crockett's order was up on appeal. I said, well, I'm not going to decide it -- I mean, I'm going to dismiss it unless Crockett gets overturned. That's all the zoning issues. They want it remanded. And I said, okay, fine, makes sense, we should just decide the PJR and not just give -- let's decide the PJR. So we'll rule on that at another time.

But this condemnation case that you -- we've got to go forward on this condemnation case now, decide what the bundle of sticks are. That's where I'm troubled with this idea that somehow there

was some denial of a zoning right when I can't see that it's ever been denied. I see this as a different problem, that they're interfering with his ability to plan and develop.

MR. LEAVITT: Totally agree.

THE COURT: Totally different question.

MR. LEAVITT: I get it. You -- Judge, you're right. Okay. So what you're saying is, I can't see the interference with the zoning, right?

THE COURT: Right.

MR. LEAVITT: But we do see clearly the interference with the development. Clearly, they did that.

THE COURT: Right. There's some --

MR. LEAVITT: I mean, it's very clear.

THE COURT: -- that's --

MR. LEAVITT: Yeah. Very clear.

THE COURT: -- something else.

MR. LEAVITT: Yeah. So it's -- although it's something else, it's all part of that taking action. Interference with zoning is part of the taking because that's government action towards the property. Denying applications, again, you know, interfering with the development property, that's again government action to take the property. So -- but before we get to that government action that takes the property, before we get to the government action that interferes with that zoning, you have to come over and define the bundle of sticks.

THE COURT: Okay. And so this is where, like, I keep get -- we keep getting. And I -- my problem is I can't really say -- I mean,

you're -- you want to say that they have this absolute right --

MR. LEAVITT: Uh-huh.

THE COURT: -- to build houses.

MR. LEAVITT: Correct, Your Honor.

THE COURT: And I'm saying, I don't see that that's been interfered with yet because we got interrupted. Through third-party -- I love Judge Crockett more than anybody else. The man's amazing. But it interfered with this whole process.

MR. LEAVITT: Got it.

THE COURT: And then we got remanded to go to court. Whatever. So I don't see that.

MR. LEAVITT: Right.

THE COURT: What I see is all this other stuff that was in there from day one.

MR. LEAVITT: Right. Okay.

THE COURT: What are they up to?

MR. LEAVITT: So you're right. You don't see where they interfere with that legal right to use the homes.

THE COURT: To build the homes.

MR. LEAVITT: To build the homes.

THE COURT: Uh-huh.

MR. LEAVITT: You don't see that because we haven't briefed it for you.

THE COURT: Okay.

MR. LEAVITT: We have -- we don't have that issue before

you. All we have before you -- and that's why it's such a narrow issue. It's so -- and that's what Judge Jones said, that's what Judge Williams said is this is an extraordinarily narrow issue. They say before the City interfered with the zoning, before the City interfered with development, what did the landowner have. And all we're here today is to decide what did the landowner have.

THE COURT: Right. So this is what I --

MR. LEAVITT: That's it.

THE COURT: -- this is what I'm trying to get at is since I don't think in this retrospect of 133 acres --

MR. LEAVITT: Yeah.

THE COURT: -- that the right to build the houses has ever been finally determined.

MR. LEAVITT: Okay.

THE COURT: It got sidetracked. But there was this whole other -- and I keep calling it pattern of practice. I don't know what you'd call it. Course of action, history, whatever. That something was going on with respect to no money is going to allow this developer to change the golf course into houses. It was some sort of a pressure from the community. We don't want to give up this beautiful golf course. It was a desert. We don't want to give up this beautiful golf course and have a bunch of houses there. So what does the City do? They find all these roadblocks.

But -- so this is where I'm trying to figure it out. Where I struggle with this is if you're saying they had an absolute right to build,

you know -- seven houses is a lot of houses on an acre -- seven houses per acre on 133 acres, you haven't been interfered with that. What's been -- what's happened is you've had the hearing costs and all the hassles and all the efforts of trying to develop it over these many, many years. And they keep throwing up these artificial roadblocks. To me that's -- like I said, it's not because you have a right to the zoning. You have a right to have it considered. I agree with you there. You have a right to have -- to apply for it, to change it. I understand that. But my problem is are -- if you're trying to say my client has an absolute right to seven houses -- how many is -- how many acres is it? Seven times 133, whatever that is.

MR. LEAVITT: We're not saying that.

THE COURT: Okay.

MR. LEAVITT: Yeah. Your Honor, we're not saying that. All we're asking you to do, Your Honor -- this is all we're asking you to do --

THE COURT: Okay.

MR. LEAVITT: -- is --

THE COURT: Are you on the same thing?

MR. LEAVITT: I'm sorry, Your Honor. It's the three questions now.

THE COURT: The three questions.

MR. LEAVITT: Three questions. At the very last page there --

THE COURT: Yes.

MR. LEAVITT: -- that's R-PD7 zoning.

THE COURT: Okay.

MR. LEAVITT: Judge Jones didn't say, you have the right to build 700 homes. Judge Williams didn't say you have the right to build 700 homes. Neither of them said that in their decision. What they did is they went to this code, and they looked at permitted uses. And they said that LVMC 19.10.050 lists single-family and multi-family residential uses as the legally permissible uses on R-PD7 zoned properties.

THE COURT: Right.

MR. LEAVITT: So they said that's what you get to use your property for. They didn't say you get 700 or 800 homes. That's not what they said. Then they went on to say, therefore, the landowner's motion to determine property interest is granted in its entirety and it's ordered that the 35 acre property is zoned R-PD7 at all times and the permitted uses by right of the 35 acre property are single-family and multi-family residential. That's what this says.

THE COURT: Uh-huh.

MR. LEAVITT: It says, permitted uses, single-family and multi-family residential. Well, how is permitted uses defined in the City's code? It means you get to use it as a matter of right. So when you have a residential zoned property, you have the right to use your property residentially. When you have a commercial zoned property, you have the right to use it for commercial purposes. Now, what you're talking about is if you want to build a 7-11 on your commercial property, yeah, you have to go and apply and get the application for that 7-11. If you have an H2 property, you have the right to build a hotel casino on that property.

Now, when you're going -- when you say, hey, I want to build -- that doesn't mean you can build a 400 story hotel casino there. There's certain things you have to do. You still have to comply. All these orders do is they say zoning is R-PD7 and the permitted uses under R-PD7 are legal single-family residential and multifamily residential, which gives the landowner the right to use the property for that purpose. You see, what counsel said to you is he said, Judge, they're asking to build whatever they want, they're asking to build 900 units, they're asking to build whatever. That's not what we're saying here today, Judge. We're just saying apply the zoning to determine the property rights, as was done in six cases, and find, as was done in the Sisolak case, that the zoning gives the landowner the right -- it's a residential zoning -- the right to use the property for residential uses. That's exactly what Sisolak said.

THE COURT: See, here's my problem. I have a hard time with *Sisolak* being applicable here because *Sisolak* had raw desert zoned for a certain purpose. They didn't change the zoning on its property. They changed an ordinance for the height restrictions. His right was to the air space. They changed the ordinate saying he couldn't use his air space.

MR. LEAVITT: Yeah.

THE COURT: That was the problem with *Sisolak*. Here you have somebody who has a golf course. They don't use it as a golf course. It's a terrible golf course. They wanted to build houses.

MR. LEAVITT: But Your Honor --

THE COURT: So they need to change these.

MR. LEAVITT: Yeah. But you don't need to change the zoning.

THE COURT: Right. I get that. I get that.

MR. LEAVITT: Yeah.

THE COURT: So that's my point is I'm struggling with --

MR. LEAVITT: I get it.

THE COURT: -- how we merge --

MR. LEAVITT: I got it.

THE COURT: What it is exactly --

MR. LEAVITT: I got it.

THE COURT: -- you want to do in this alleged taking part of the case because as I've said, I see the zoning PJR part of it very different. I think --

MR. LEAVITT: Right.

THE COURT: -- it might even be dismissed because it seems like that's premature. What you have over here in this other part of the case though, that's what I've said -- that always seemed to me to be -- like I said, I know you can't say tort. But it -- that seemed to me to be something because there seemed to be something going on --

MR. LEAVITT: Right.

THE COURT: -- where there was some interference in the efforts that were being made to figure out how can we do something with our land, even if it's just put a fence up so people stop dumping on it.

MR. LEAVITT: Right. I got that. So it's akin -- and maybe I -- I keep saying *Sisolak*. So the better case is the *Hsu* case. That's the better case to use.

THE COURT: Okay. Probably. Yeah.

MR. LEAVITT: Yeah. Because in the *Hsu* case, mobile homes were being used on the property that had zoning for H-2. In this case, there's a golf course that's on the property that has zoning for residential.

THE COURT: Residential. Uh-huh.

MR. LEAVITT: And in the *Hsu* case the Court held, even though the property was used as a golf course, it had the right to build a hotel casino because it had an H-2. We're asking you for the exact same. Even though the property's being used as a golf course, it has residential zoning, which gives them the right to use it for single-family and multi-family residential uses.

THE COURT: Right.

MR. LEAVITT: Now, obviously, at some point -- well, that's the rule we're asking for. We're not asking for more, Judge. We're not asking you to define the number of units that can be built. We're not asking you for that. We're just saying, number one, that you say that zoning applies, and number two, what that zoning says. That -- and that again, Your Honor, is -- I understand on the take side the 35 and 17 acre cases are different. But on the -- this property bundle of sticks side, they're identical. Absolutely identical issues. There's no difference in the cases between the 17 acre case and the 35 acre case. And maybe I

should have explained that better, Your Honor, on exactly what the issue is, how we're teasing out. I probably should have explained that better. And I probably should have explained a little bit better that we're not asking to build whatever we want. We're asking for a very limited and narrow order.

THE COURT: Well, I think the concern that the City has is that your -- they view your argument as any landowner has an absolute vested right to use their property within whatever its zoned, no matter what the -- how -- no matter what. They have the absolute right to use it. No matter what other zoning regulations, no matter what other master plans, no matter what other uses are being used, no matter what it's already being used for that you want to change it from, you have an absolute right to do what you want to do. I don't think that's true.

MR. LEAVITT: Right. I agree.

THE COURT: And I don't think you would necessarily agree with that. They're concerned about that. And that is the logical extension of this argument. I see how -- why they're concerned. But -- so I'm trying to say, specifically, what do you want this to say --

MR. LEAVITT: I understand.

THE COURT: -- because as I've said, I don't see this as a case where attorney action was taken. This whole other universe of things that were going on including like -- what do you mean you can't even build fence? All of those kinds of things to me are something.

MR. LEAVITT: Yes.

THE COURT: And I'm trying to figure out what it is you want

from this Court with respect to everything else that's in your complaint.

MR. LEAVITT: Yeah. First, let me explain what I don't want.

THE COURT: Okay.

MR. LEAVITT: Okay. I don't want to decide the take issue today. I don't want to decide whether the City interfered with zoning. I don't want to decide whether the City interfered with development because I haven't briefed it, I haven't argued it, and the Court held that we were not required to brief it, so we did not. So that's what I don't want.

THE COURT: Okay.

MR. LEAVITT: All I want is for a definition of the property rights. And here's what it would be is number one, the property has R-PD7 zoning. Okay. Everybody stipulates to that, so that easily can be put in the order. Okay. Then, a finding that Section A of 19.10.050, which is this right here says the intent for the R-PD district is residential development. So that's the second finding we would want is the intent of R-PD7 is residential development. That's in Section A.

THE COURT: Uh-huh.

MR. LEAVITT: And then go down to section C, which says -- and I'm quoting from Judge Jones' order here -- that section C lists the permitted land uses as single-family and multi-family residential uses. That's what the permitted land uses are. And then what we do is we go to say, okay, what does permitted land uses mean? Permitted land uses is defined by Judge Jones, by Judge Williams, and by the City's own code that you have the legal right to use the property for that general

use. Just that general use. Residential. That's all we're asking for, Judge. We're not asking you to take the next step, which is -- which means you can build 700 units and that you can build this many units. That's not what we're asking for.

THE COURT: Okay. That last one is the one that's problematic.

MR. LEAVITT: Okay.

THE COURT: I don't have a problem with your first two.

MR. LEAVITT: Got it.

THE COURT: The last one is the one that I think is where the City is -- their hair's on fire --

MR. LEAVITT: Okay.

THE COURT: -- because if you take that to its logical extension --

MR. LEAVITT: Uh-huh.

THE COURT: -- that is saying you have an absolute positive right, the City cannot exercise its discretion, you must be allowed to build. And this is where I think the problem is with what Judge Jones did. And I think this is where we kind of got strayed from what Judge -- the importance of what Judge Herndon did because Judge Herndon was right in what he said. In the 65 acre case, it wasn't right. No application had ever been made.

MR. LEAVITT: Okay.

THE COURT: So he's right about that. There is no application. So why is it -- he stopped there. And other people say you

shouldn't stop there, you should still keep going because -- and that's my point here is with respect to the 133 acres on the issue that Judge Herndon addresses, I agree with him 100 percent right down the line.

MR. LEAVITT: Okay.

THE COURT: So the problem is when you go to that last step.

MR. LEAVITT: Okay.

THE COURT: That's the problem.

MR. LEAVITT: Okay. So let me --

THE COURT: You have the right to apply.

MR. LEAVITT: Okay. Okay. So here's -- let me tell you where I think it's a little incorrect. And I'll tell you why, Judge.

THE COURT: Okay.

MR. LEAVITT: Okay. Is we all agree -- so we're past the R-PD7. We all agree --

THE COURT: Right.

MR. LEAVITT: -- zoning applies.

THE COURT: I think so. Yeah. I think so.

MR. LEAVITT: We all agree that the zoning is R-PD7.

THE COURT: Right.

MR. LEAVITT: So we got those two findings. Okay. So the third finding is -- okay -- and it's very specific. In an inverse condemnation case what does R-PD7 give you. Okay. That's the precise issue.

THE COURT: Right.

MR. LEAVITT: And here --

THE COURT: And this is where I think we diverge.

MR. LEAVITT: Exactly. So the question is in an inverse condemnation case, does the City have discretion to deny that use? And Your Honor, the answer is unequivocally no.

THE COURT: Okay.

MR. LEAVITT: And let me explain why. Okay. If we're in a petition for judicial review case, of course they have discretion, right. They have discretion to deny the use. Okay. But if they deny -- if they exercise that discretion, that's a taking. But let me explain why that discretion can't carry over to the eminent domain case because if you have the residential zoning that gives you the legal right to use your property for homes, right, it gives you the legal right.

THE COURT: Uh-huh.

MR. LEAVITT: And then if you take the next step and say, but the City has discretion to deny those land use applications, then you have no property right because all the City would have to do in an inverse condemnation case -- all they've had to do is say we have discretion to deny your zoning, therefore, you never had a property right, therefore, we can never take anything. That's the problem.

THE COURT: I think that where we diverge is you have a right to build residential --

MR. LEAVITT: Yes.

THE COURT: -- homes on the land --

MR. LEAVITT: Yes.

THE COURT: -- subject to -- subject to whatever other zoning codes, building codes, whatever other codes this -- whatever interest the city has, whatever they have to look at --

MR. LEAVITT: Absolutely.

THE COURT: -- in order to approve. And so to me --

MR. LEAVITT: Right.

THE COURT: -- what you're saying is we have this right, that's our property right, you can't do anything about property right. We have this absolute property right. It's not absolute.

MR. LEAVITT: And maybe I said it wrong. And let me be clear. We're not saying that we can come in and do whatever we want. Absolutely. All we're asking for is you have the legal right to build single-family, multi-family residential, okay --

THE COURT: And see, this is where I --

MR. LEAVITT: -- but --

THE COURT: -- this is where I diverge from you.

MR. LEAVITT: But --

THE COURT: I think you have the legal right to apply for this.

MR. LEAVITT: Okay. But let me finish, Your Honor.

THE COURT: All right.

MR. LEAVITT: If I could finish.

THE COURT: All right.

MR. LEAVITT: I agree with you the City still has discretion. For example, sewer, drainage, traffic, compatibility. There's those kind of issues. But Your Honor, if all you have is a legal right to apply, that's

not a property right. That's no right at all.

THE COURT: Oh, see, I guess that's where we disagree.

MR. LEAVITT: Yeah.

THE COURT: That's where we disagree.

MR. LEAVITT: Because if you -- listen, if my -- if I go and I buy a 40 acre property that's zoned hotel casino on the Las Vegas strip and I paid 40 million dollars for it and all I have is the legal right to apply, I have nothing.

THE COURT: No. But you -- absolutely. You have the legal right to apply the hotel casino because it complies. And so you can -- as long as you meet every other standard, whatever requirements there are that the city or county have, then you can build. But it doesn't mean you get the absolute right --

MR. LEAVITT: Well --

THE COURT: Hypothetically speaking, remember Red Rock Casino?

MR. LEAVITT: I remember Red Rock. Yes. I've got you.

THE COURT: You remember Red Rock? They want -- they had the right to build 300 feet. They had the right to build up to 300 feet.

MR. LEAVITT: Yes.

THE COURT: The neighbors -- I might know some people who are involved in this. The neighbors said, wow, that's a lot, it's really only supposed to be 10, you're asking to build 300.

MR. LEAVITT: Got it.

THE COURT: It's supposed to be ten. Stay at ten. You know,

they're not -- Aliante had to stay at ten. They were going to keep it to ten there because they had these -- you know, they had the -- all around the valley -- they had to build around the valley.

MR. LEAVITT: Uh-huh.

THE COURT: Stations have their --

MR. LEAVITT: I remember.

THE COURT: -- places all around the valley. They were all zoned for ten stories. They wanted to build them all 300.

MR. LEAVITT: Right.

THE COURT: And the neighbors were able to keep it to 200.

MR. LEAVITT: Absolutely.

THE COURT: So you have the right to apply to build what you want to build on your land subject to whatever else there may be that might limit it. In that case it was a bunch of neighbors screaming. And every time they have fireworks, they have to send us a letter.

MR. LEAVITT: I got that letter, by the way.

THE COURT: So -- like the other day, what was it? I forget. Like their anniversary or something.

MR. LEAVITT: Yeah. But what --

THE COURT: It's also so startling when you get a letter from them.

MR. LEAVITT: But Stations Casino bought a vacant piece of land --

THE COURT: Right.

MR. LEAVITT: -- with hotel casino zoning.

THE COURT: Right.
MR. LEAVITT: That hotel casino zoning gave them the right --
THE COURT: To build a hotel. Yeah.
MR. LEAVITT: There it is. But it didn't give them the right to do whatever they want.
THE COURT: It didn't give them the right to build a 300 story.
MR. LEAVITT: And that's all we're asking for --
THE COURT: Uh-huh.
MR. LEAVITT: -- is that we have an R-PD7 zoned property, which gives us the right to build homes. We're not saying that we can build seven-story homes or that we can build a high-rise condo.
THE COURT: And see, I guess this is where I think that we're diverging from that is you view we have the right to build homes.
MR. LEAVITT: Yes.
THE COURT: And my view is no, you own this property, and you have the right to apply for all the permits to build on it in accordance with what it was zoned for, a hotel. And you wanted to build it 300 feet. We didn't let you build it 300 feet. We made you -- the neighbors only wanted you to build it 100 feet. So we made you keep it at 200 feet. That's how that process works.
MR. LEAVITT: I agree. But Your Honor, they had the underlying right to build a hotel casino, right?
THE COURT: Uh-huh. Right. Yeah. Okay.
MR. LEAVITT: Okay. That's all we're asking for is that we

have the underlying right --

THE COURT: Okay.

MR. LEAVITT: -- to build single-family, multi-family. That's it. We're not taking it the step further and saying, hey, that means we can build 500 feet.

THE COURT: And I guess this is -- for me, I have a modifier there where you don't, which is you have the right to apply to build on that property in accordance with the zoning.

MR. LEAVITT: And --

THE COURT: You don't have the right to build, which is what I think you're --

MR. LEAVITT: Well, Judge, if you don't have the right to build, then we would have no right.

THE COURT: Yes, you do.

MR. LEAVITT: What is the right?

THE COURT: Because you have the right to apply. And that to me is the right. It's not the right to do it. It's the right to seek approval to do it because otherwise, there's no zoning code. What's the point of having it.

MR. LEAVITT: Exactly. And that's where we're at is what does --

THE COURT: See, that's the only thing we disagree on. I think after, you know, two full days of this, we've narrowed it down to where you and I have a disagreement. I agree with everything else here. I don't have any problem with it. Like I said, I think you can -- you can

make all four of these orders in all four of these cases line up. They make perfect sense --

MR. LEAVITT: Okay.

THE COURT: -- if you look at the facts.

MR. LEAVITT: Here is the --

THE COURT: It makes perfect sense what Judge Williams does. It makes perfect sense what Judge Jones does. The only thing I disagree with -- and I understand why Judge Herndon did what he did.

MR. LEAVITT: Okay.

THE COURT: I'm not so sure that it was -- he was wrong in stopping. I think he was probably right in stopping.

MR. LEAVITT: Okay.

THE COURT: But here now that we know we have to split these, the zoning, PJR issue, and the --

MR. LEAVITT: Yes.

THE COURT: -- condemnation case --

MR. LEAVITT: Uh-huh.

THE COURT: -- here's where it -- the one thing -- the only thing I disagree with these other people on. And that is how you define the right. And for me, you have the right within the zoning code to seek approval to build what you want to build. You may not be given that approval because there may be other things that prevent you from building what you want to build. You may want to build the most ugliest building in the world --

MR. LEAVITT: Yeah.

THE COURT: -- but it's within the zoning. And the City says, absolutely not, that's a ridiculous looking building, we're not going to let you build it. So it's not the right to do it. It's the right to apply to do it.

MR. LEAVITT: Okay. And if I may --

THE COURT: And that's where you and I differ.

MR. LEAVITT: And if I may, Your Honor.

THE COURT: Yeah.

MR. LEAVITT: I -- the same exact issue was present in the *Hsu* case. It really was.

THE COURT: Uh-huh.

MR. LEAVITT: Okay. Because the Court didn't say in the *Hsu* case that you only have the right --

THE COURT: I hope you know that I printed that.

MR. LEAVITT: Or --

THE COURT: Let me get it.

MR. LEAVITT: Yeah. And in the *Sisolak* case, the court didn't say you just have the right to apply. They didn't say that. What they said is that zoning gave them the right to develop --

THE COURT: Right.

MR. LEAVITT: -- hotel casino. Okay. And Judge, I want to be really clear that what we're asking for is not a specific plan. We're not asking you to say, hey, we can have a specific plan. We're just asking you to, as the courts have done in the other cases, use the zoning to determine the property rights and what property rights are permitted under that zoning.

THE COURT: Exactly. And that's what I keep saying. My view of what the property right is, you're right, is to seek to use your land in accordance with the applicable zoning.

MR. LEAVITT: In accordance --

THE COURT: I know that Ms. Ghanem doesn't agree with me, but that's what I believe.

MR. LEAVITT: Well, yeah.

THE COURT: And I appreciate that differs because your view is you have the right to do it.

MR. LEAVITT: I think we're talking -- I think we might be talking about the same thing. And here's why is because I think what you're saying is you have the right to seek approval to use the property for that zoning. Your Honor, the *Hsu* case is 123 Nev 625.

THE COURT: Yeah. I --

MR. LEAVITT: Okay.

THE COURT: We found it at the same time, I think.

MR. LEAVITT: And --

THE COURT: Our internet is just so fast.

MR. LEAVITT: I've got you. And Life is Beautiful is going on down here right now. And so it's a big mess right now.

THE COURT: Yeah.

MR. LEAVITT: If I may, Your Honor. I think I might be able to -- I know you're looking at that. So while you're looking at that I'm --

THE COURT: Right. So that's why I said, you know, if -- an order to come out of this -- I understand an order to come out of this.

And I'm just trying to tell you where I think it is.

MR. LEAVITT: Okay.

THE COURT: Only talking about the condemnation --

MR. LEAVITT: Yes.

THE COURT: -- because we've had to sever off the PJR. I don't -- and that's where I see Judge Herndon 100 percent on the ripeness because this predated all that. So he was -- he got hung up on the ripeness, and he's stuck. It's -- it makes total sense.

MR. LEAVITT: Okay.

THE COURT: And I agree with him that he was right when he did that. We now have this new case that says sever these two issues. So you know, all the zoning stuff, the PJR stuff, totally separate. He never looked at this other part of the case.

MR. LEAVITT: Right.

THE COURT: I get the point that the judge truly is looking at the other part of the case, just as Judge Jones and Judge Williams are. They got there differently because their cases are factually different. Now we're here in this 133 acre case. As I've said, I always thought this other stuff -- I don't know what to call it -- all the other causes of action, that that was something. And I understand your point that you have to define what it is.

MR. LEAVITT: Yeah.

THE COURT: So if we're -- and to go to the next step, I understand we need this order. So here's my -- I have no problem with the first two things that you've said.

MR. LEAVITT: Okay.

THE COURT: I just don't define that last one the exact same way you do. So maybe there's a way we can come to a common understanding of what that last one is. I think your version's a little --

MR. LEAVITT: Okay. Can I have a 30 second sidebar with co-counsel?

THE COURT: Yes, you can. And meanwhile, I'm looking at *Hsu*. Which by the way, is H-S-U. It's spelled H-S-U.

[Pause]

THE COURT: Give us a minute here, the Clerk stepped out.

[Pause]

So we'll go back on the record and see if we can come up with language for our third item.

MR. LEAVITT: I think we get there, Judge.

THE COURT: Okay.

MR. LEAVITT: You tell me when you're ready.

THE COURT: We're ready.

MR. LEAVITT: Okay, Your Honor. So, I mean, in the -- just really quick. In the *Sisolak* and *Hsu* cases, I'm looking at it. They said that the property was zoned for development of a hotel, a casino, or apartments. And in the *Alper* case, what they did is they just printed the zoning code in the decision itself. So maybe we could just do this, Your Honor. Is zoning is used to determine the property rights issue. The zoning is R-PD7, and just do like what they did in the *Alper* decision and say, the property may be used for residential, or the permitted uses

under that code provision are single family, multi-family residential. Just copy like what the Court did here in the *Alper* case. And the way we could do that is going to the -- going to the --

[Counsel confer]

MR. LEAVITT: With the -- there it is. With the R-PD7 in the back, Your Honor. So we say the R-PD7 zoning applies. The permitted land uses in the R-PD7 are single family, multi-family residential. We're just simply quoting from the zone. And then that way we don't add -- I think what's causing concern here is we want the word legally permitted. We want the words, as a matter of right.

THE COURT: Right.

MR. LEAVITT: And that's directly from the code, which is exactly what the Court did in *Alper*.

THE COURT: I can go there.

MR. LEAVITT: Okay.

THE COURT: Yeah. Okay. So then to be clear about what we're doing.

MR. LEAVITT: Okay.

THE COURT: I'm granting your motion, I believe, in part.

MR. LEAVITT: Okay.

THE COURT: Because I think the way it was originally framed; it would have addressed both.

MR. LEAVITT: Got it.

THE COURT: And given our recent decision that we have to sever the PJR and the condemnation case, I specific -- I believe that with

respect to the zoning issues that Herndon's analysis of ripeness is correct. So that would mean that I wouldn't -- I'm not going to discuss the zoning issue. However, all of the other causes of action in this, like, multi-part complaint, I understand how they stated cause of action, even in our really limited Nevada motion to dismiss, which is why I don't think it's appropriate. I think there's something there.

So if we're going to define it, my belief is with your first two items, which are -- you had land zoned R-PD7. I would add something to that, which would be previously used as a golf course, and when he acquired it, and that that zoning use includes residential homes. Because the rest of what I'm concerned about is the -- all the stuff that happened at the meeting. How it appeared like there was some sort of -- I don't know, you didn't use the word conspiracy, but it kind of almost seemed like that's where it was headed.

MR. LEAVITT: I'll probably use it later.

THE COURT: Okay. You'll use it later. Yeah, the actions taken at the zoning meetings, which you view as interfering in that right, to me didn't actually deny the zoning, because we never got there, but there were actions taken in that process that you believe interfered with your client's right to use that property. So that, I believe, you can pursue through inverse condemnation. Not because you were denied zoning, but because of in this process other things happened, so you had [indiscernible]. Did it amount to a taking?

MR. LEAVITT: And so what will --

THE COURT: That's part two.

MR. LEAVITT: And I just want to refine it. So what we'll do is zoning is used to determine property rights issue. The zoning is our --

MR. OGILVIE: No, Your Honor.

MR. LEAVITT: Your Honor, can I speak without being insulted. We've gone --

THE COURT: Yeah. Yeah. You can -- I'll allow you to object later, but --

MR. LEAVITT: We've gone through this, Your Honor.

THE COURT: Yeah, just say what you want to say.

MR. LEAVITT: So zoning is used -- zoning is used in eminent domain cases and inverse condemnation cases to determine the property rights issue, which is consistent with the six cases. The zoning on the property is R-PD7. And the -- we could just quote that the property was previously used as golf course when acquired, and that the permitted uses -- we'll just use the exact one we got out of the code, the permitted land use is our single family, multi-family residential.

THE COURT: Now the challenge that we have here is this idea that zoning defines the property rights.

MR. LEAVITT: Uh-huh.

THE COURT: The problem that I have with that is zoning defines what you can apply to use your property as, not your absolute right. Within that zoning, you could apply to use your property with something that complies with that zoning.

MR. LEAVITT: Well, you --

THE COURT: And so the way I think you're putting it, it just --

it makes it seem that, you know, you've got -- and you've said, you never said we've got the right to seven houses per acre. I appreciate your clarifying that.

MR. LEAVITT: Yeah.

THE COURT: So that's my problem, is when you say -- the way that sounds to me is that because zoning defines the property rights, we have this absolute right to build seven per acre and the absolute right to do it.

MR. LEAVITT: Yeah. And --

THE COURT: And that's why I'm saying it doesn't. What zoning does is it defines what you can apply to do with your land.

MR. LEAVITT: And, Your Honor, I think --

THE COURT: And that's --

MR. LEAVITT: -- so now we're back to where we were before. And I thought --

THE COURT: Yeah. And that's always what I've said.

MR. LEAVITT: -- and I thought we got beyond that. But here's all I want.

THE COURT: I've never given up on that.

MR. LEAVITT: I know. I've got to tell you -- here's all I want, Your Honor.

THE COURT: Okay.

MR. LEAVITT: Okay. Is that under the six Nevada Supreme Court cases that are inverse condemnation cases -- and we can just say it this way. In those six cases, the Nevada Supreme Court used zoning to

determine the property rights. They did. That's undisputed.

THE COURT: Okay.

MR. LEAVITT: You can read the cases, and you can see that the Nevada Supreme Court used the zoning. In not one of those cases did the Court use the master plan. It used zoning to determine property rights. Otherwise, there would be no reason to --

THE COURT: Well, that's true.

MR. LEAVITT: That's true. Otherwise, there would be no reason to quote the R-PD7 zoning in this case.

THE COURT: Right. Okay.

MR. LEAVITT: So then the next step would be that the zoning in this case is R-PD7. And then all we do is we then say -- we can just use the language from 19.10.050 on what that zoning is.

THE COURT: Okay. So, again, let's be very, very clear about this. And I know this is the sticking point between the two us. I just -- I'm very uncomfortable with this idea that zoning defines the property interest. Your property interest is to use your property in the way that conforms to the zoning.

MR. LEAVITT: Agreed.

THE COURT: You have the right to apply to use your property in the way that it's complied with the zoning. I know that that's the distinction between the two of us that you don't agree with. And so that's my -- that's our hang up. And that is a hang up, because I cannot agree that it's an absolute. Which you may not be intending it to be this, but it seems to me that you're making it an absolute right, and I just

[indiscernible].

MR. LEAVITT: And I'm not, Your Honor.

THE COURT: Okay.

MR. LEAVITT: But here's what -- and I think maybe it's the use of the verbage.

THE COURT: Okay. All right.

MR. LEAVITT: Okay. What the Court saying is you have the right to -- they don't say you only have the right to apply, otherwise, again, there's no [indiscernible]. What they say is you have the right to use the property consistent with the zoning.

THE COURT: Correct. Okay. Right.

MR. LEAVITT: Okay. So maybe if we just change the word apply to use, and then that would, I think, result --

THE COURT: A landowner's use of their property is defined by the zoning.

MR. LEAVITT: Yeah, I know.

THE COURT: Yeah. I have no problem with that.

[Counsel confer]

MR. SCHWARTZ: Your Honor, am I going to get a chance to respond to this?

THE COURT: In a minute, yeah.

MR. LEAVITT: Your Honor, this is my motion.

THE COURT: Yeah, in conclusion you can. Yeah. You can.

MR. LEAVITT: If you've got an opposition, I got a reply.

THE COURT: I'll let you have something to say in the end

because when it comes to drafting an order, I'm sure he'll have issues with how the order is drafted.

MR. LEAVITT: Yeah. And, Judge, maybe we can just -- because I get the concern. Maybe we can just use the exact language right --

THE COURT: Are we looking for our three-part thing?

MR. LEAVITT: -- right out of the *Sisolak* case.

THE COURT: Oh, *Sisolak*.

MR. LEAVITT: Yeah.

[Counsel confer]

MR. LEAVITT: And maybe there's another way to say it, Judge. And, actually, maybe this is the best way to do it, which is from the *Hsu* and *Sisolak* cases, and from the *Bustos* case, is that zoning is used. The R-PD7 is zoning, and you can use the property consistent with the zoning. I think that gets us there. You can use the property consistent with the zoning. Instead -- and I see the concerns. You don't want us to put in there legal, legal, legal this, and is right, is right, but you can use the property consistent with the zoning. There should not be a consternation about that.

THE COURT: Okay. All right. Great. Thank you. And if you have something brief to say in conclusion, Mr. Schwartz. Briefly.

MR. SCHWARTZ: Yes.

THE COURT: Briefly in conclusion. Because we're to the point where now we are discussing what counsel is going to put in the order. I'm granting it in part. I'm only granting it in part as to the portion

of the complaint that deals with their --

MR. LEAVITT: Property.

THE COURT: -- inverse condemnation claim, other than the zoning issue, which I believe has to be severed out and solely separate, and I think is not ripe. So we're only looking at those other issues in the complaint alleged. Okay. Great.

MR. LEAVITT: And, Your Honor, since we got to that issue of, hey, we use zoning here, and we're going to use the R-PD7, I'm not addressing any other arguments to rebut this whole master plan, because we're already at zoning, according to the six Nevada Supreme Court cases.

But what I'll say is that in the *Bustos* case, the Nevada Supreme Court made it really clear that it would be reversible error to not use the zone.

THE COURT: Okay.

MR. LEAVITT: And so if we say the zoning applies, it's R-PD7, and the property would -- the property right was to use the property consistent with the zoning, I think we could go that route; is that correct? I think that would be --

THE COURT: So this may not be the part that Ms. Ghanem is thinking of from *Sisolak*, but an individual must have a property interest in order to support a takings claim. Accordingly, the Court must first determine whether the plaintiff possesses a valid interest in the property affected by the governmental action, that is, whether the plaintiff possessed a, quote, "stick in the bundle of property rights," before

proceeding to determine whether the governmental action at issue constituted a taking. The term, quote, "property," includes all rights inherent in ownership, including the right to possess, use, and enjoy the property.

That's your right.

MR. LEAVITT: Yes.

THE COURT: The county argues that the district court erred in finding he had a vested property interest in the airspace. And so they're beginning this whole discussion about how airspace is a recognized right.

So I'm looking to see if there's another place here where you're looking to see how they define it.

MR. LEAVITT: Yes. There is, Your Honor. Hold on, Your Honor. I got it, Your Honor.

THE COURT: And acquiring, possessing --

MR. LEAVITT: I got it right here.

THE COURT: -- and protecting the property are inalienable rights. The Nevadan's property rights are protected by our Constitution. These property rights include at least usable airspace of the adjacent land.

MR. LEAVITT: And then it goes on, Your Honor, to talk about -- and, right. The County -- and this was the real rub of that case. It's on footnote -- or it's at headnote 3. The county argues that the District Court erred in finding that Sisolak had a vested property interest in the airspace above his property. That vested property right was based upon

his zoning, which allowed him to build up to there. And so that's what the county's big rub was in that case and that's what the City's rub is here.

And the Nevada Supreme Court goes on to define that property right and uses the word vested two or three more times in that section. And if we go to where it says 1120, it talks about the inalienable right and those rights including, at least the usable airspace, and then got on to say that that airspace is vested in the lone owner, and that he has the right to own that usable airspace -- or he owns that usable airspace and may use it.

Now, obviously, it would have to be consistent with the zoning, and that's what the Court said previously under the section under property, under the facts section.

[Counsel confer]

MR. LEAVITT: And, Your Honor, I think footnote 26 also addresses the very issue that we're talking about. Footnote 26. And that was the county's argument at footnote -- because the county said, listen, you didn't apply yet, so you don't have a property right. And this is what the Court said.

THE COURT: Well, so I think that what we can say is that the motion is granted in part. The Court determines that what the landowner acquired was property zoned R-PD7, which had been previously used as a golf course.

MR. LEAVITT: And there would just be one thing, which is, and he can use the property consistent with the R-PD7 zone.

THE COURT: Well, which -- an R-PD7 zoning permits, blah, blah, blah.

MR. LEAVITT: Yeah. Yes.

THE COURT: Yeah.

MR. LEAVITT: And, Judge, that's what --

THE COURT: And, again, I'm not saying he can use it for that. I'm saying he has the right to seek approval to do blah, blah, blah.

MR. LEAVITT: Well, Your Honor, this is what --

THE COURT: So this is my challenges --

MR. LEAVITT: Yeah, and I --

THE COURT: -- this can't go as far as you want me to go.

MR. LEAVITT: And I see that where you want to add that you only have the right to apply, but that's not, because here's what the Court said in *Sisolak*.

THE COURT: Okay. Uh-huh.

MR. LEAVITT: They said, the property is zoned for development of a hotel, casino, or apartments.

THE COURT: Right.

MR. LEAVITT: We can just use that exact language out of *Sisolak*. We use that exact language. We can just say the property is zoned R-PD7 and that R-PD7 is zoned for development of residential units. That's all -- we can use the same --

THE COURT: Okay.

MR. LEAVITT: -- exact language that they have here.

THE COURT: All right. Thank you.

MR. LEAVITT: And --

THE COURT: Oh, I'm sorry.

MR. LEAVITT: No. And so, of course, obviously, the language you put in there is what's in the code, which is it's zoned for -- or to be able to use the property consistent with that zoning, which is single family, multi-family residential, Your Honor. And then we can take out that legally permissible uses. We don't even have to add the second section, because we can read the code itself, which says what you can use it for. So you can say zoned for development of residential units. Exactly as *Sisolak* says, Your Honor.

THE COURT: Okay. Thanks.

MR. LEAVITT: All right. Thank you, Your Honor.

THE COURT: In conclusion from the City. Just very briefly, and then I'll tell Mr. Leavitt what I think his order [indiscernible]. And I do mean brief.

MR. SCHWARTZ: I'm sorry, Your Honor.

THE COURT: And I do mean brief.

MR. SCHWARTZ: Yes. The Court is absolutely right. Zoning does not confer rights period. There's no authority that zoning confers any rights. And the Court is absolutely right. The zoning allows you to apply for a use that's permitted by the zoning. In other words, you can't apply for an industrial use in a zone that only permits residential. That's it. That's this case. It doesn't give you a constitutional right to build anything, whether it's consistent with the zoning or not.

THE COURT: And that's why I said we're not going to talk

about the zoning. My problem is with did you interfere with did you interfere with his ability to use his property? Did not letting him put up a fence, was that a problem? I don't know.

MR. SCHWARTZ: That's --

THE COURT: That's what needs to be explored.

MR. SCHWARTZ: That's what a taking case is.

THE COURT: Right. And that's --

MR. SCHWARTZ: This is a taking case and the test for a taking is wipeout or near wipeout --

THE COURT: Right. And that's what we have to --

MR. SCHWARTZ: -- interference --

THE COURT: And that's what you have to see --

MR. SCHWARTZ: -- or --

THE COURT: -- if that's here.

MR. SCHWARTZ: Right. Or --

THE COURT: That's why [indiscernible].

MR. SCHWARTZ: -- or a physical taking. *Sisolak* is a physical taking case.

THE COURT: Right. Yeah.

MR. SCHWARTZ: And this motion only concerns right to use the property. You know, for them to apply and approve. *Sisolak* has nothing to do with this case. *Hsu* has nothing to do with this case. We would be fine with an order that says I don't -- that says, the property -- the 133 acre property has been zoned R-PD7 since 1991 or whenever it is. The R-PD7 zoning ordinance, UDC 19.10.0 --

THE COURT: I have it here.

MR. SCHWARTZ: -- speaks for itself, and that the property was used for a golf course at the time the developer bough it.

THE COURT: Well, again, that's probably --

MR. SCHWARTZ: And then the developer has the right to apply to use the property for a use permitted by the R-PD7 zoning ordinance.

THE COURT: Yeah. Again, way more than I was willing to do. So, again, the 133 acres is part of the larger parcel, whatever. It was previously used as a golf course and zoned R-PD7 or zoned R-PD7, uses the golf course when he acquired it. Whichever way makes more sense, like, grammatically. And that the zoning rights are what they are. Because, as I said, I don't think this is a zoning case. This about all that other stuff --

MR. SCHWARTZ: Okay.

THE COURT: -- that interferes with his quiet --

MR. SCHWARTZ: That's fine.

THE COURT: -- like *Sisolak* talks about, his quiet and peaceful use and enjoyment of his land.

MR. SCHWARTZ: I think what the Court's saying is that the property owner has a right to apply to use the property for a use that's permitted by the R-PD7 zoning ordinance. I think that's what the Court is saying. I think we can cut through this if we submit opposing orders, and I think the Court could then see --

THE COURT: You know, we don't really do that anymore

because we don't -- the methodology that we use now to process orders is very different, where we get digital orders, and we sign them. It's very difficult to do competing orders. I would certainly allow you an opportunity to review the order that Mr. Leavitt writes and to submit in correspondence, but you can't take a second order, because these orders -- when there's multiple orders on the same thing in our queue, it gets very messy, because we can't process them. They're just digital, and they're in there, and things get signed that shouldn't get signed, so it's a mess. So I don't -- I wouldn't take a competing order.

I will tell you, you can certainly submit something commenting on his order. I've got no problem with that.

MR. SCHWARTZ: Your Honor, Mr. Leavitt is going to submit an order that says that the --

THE COURT: And I've already told him I'm not going to --

MR. SCHWARTZ: -- developer --

THE COURT: I've already told him I'm not going to sign an order that looks like the one Judge Jones' signed.

MR. SCHWARTZ: Okay.

THE COURT: I won't do it.

MR. SCHWARTZ: He's going to submit an order that says the developer has a right to use the property for a use permitted by the R-PD7 zoning ordinance. That's -- that is -- they don't right. Zoning doesn't confer rights. That's the whole thing.

THE COURT: Okay.

MR. SCHWARTZ: All those cases they're relying on --

THE COURT: As I said many, many, many, many times, I will sign an order that says that in this particular -- the portion of this case that deals with the inverse condemnation that Mr. Lowie -- well, the Plaintiff acquired a parcel of land -- part of the larger parcel of land, consisting of this 133 acres at issue here, zoned at all times R-PD7, which had been used, for however many years, as a golf course.

MR. SCHWARTZ: Okay.

THE COURT: R-PD7 zoning is whatever it is period, end of story.

MR. SCHWARTZ: Very good. Thank you, Your Honor.

THE COURT: He has rights on that land, absolutely. And whatever that is, it is what it is. I'm just -- I'm not going to say what I think either of you wants me to say. They want to make it more narrow; you want it much more broad, and I think I've told you where I diverge from both of you is that you get something when you acquire land by virtue of the zoning, but you don't get the absolute right to the zoning.

MR. SCHWARTZ: Understood.

THE COURT: You get the right to seek approval of how you want to use your land. Because in this case, it's not about the zoning, it's about all the other stuff that was going on. That's what I think this part of this condemnation case is about.

MR. LEAVITT: I think I know my marching orders, Your Honor.

THE COURT: Thank you, Mr. Leavitt. I appreciate it. And, as I said, send them an order so they can write a letter. Like I said, I don't

want a competing order. That's messy. But I would -- if you want to submit an order saying why you think it's wrong, you can submit an order saying why you think it's -- a letter saying why you think it's wrong. I just can't take competing orders. There's just -- we don't have any way to process them. It's a mess. We usually just throw them away. It's hard to do.

MR. OGILVIE: Thanks. I'll remember that the next time I spent an hour on a competing order.

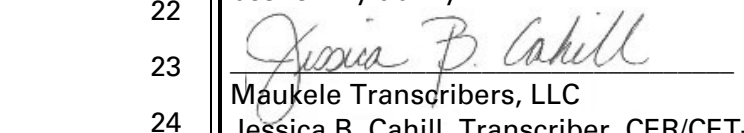
THE COURT: Yeah. It's gotten to be a real mess with this virtual system. So it's granted in part. I believe, Mr. Leavitt is going to prepare the order. Thank you very much.

MR. LEAVITT: Your Honor, thank you for all your time.

THE COURT: Thank you. It's been interesting and educational. A walk down memory lane.

[Proceedings concluded at 3:54 p.m.]

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



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DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND COMPANY, LLC, a Nevada limited liability company, FORE STARS, Ltd., SEVENTY ACRES, LLC, a Nevada Limited Liability Company,, DOE INDIVIDUALS I through X, DOE CORPORATIONS I through X, and DOE LIMITED LIABILITY COMPANIES I through X, Petitioners, *vs.* CITY OF LAS VEGAS, political subdivision of the State of Nevada, ROE government entities I through X, ROE CORPORATIONS I through X, ROE INDIVIDUALS I through X, ROE LIMITED LIABILITY COMPANIES I through X, ROE quasi-governmental entities I through X, Respondent.	Case No.: A-18-775804-J Dept No.: XXVI **PLAINTIFF LANDOWNERS' OPPOSITION TO CITY OF LAS VEGAS' MOTION TO REMAND 133-ACRE APPLICATIONS TO THE LAS VEGAS CITY COUNCIL** **Hearing Date: September 10, 2021** **Hearing Time: 9:00 a.m.**

Plaintiffs 180 Land Co LLC, Fore Stars, LTD., and Seventy Acres, LLC (collectively "Landowners") hereby oppose Defendant City of Las Vegas' ("City") Motion to Remand 133-Acre Applications to the Las Vegas City Council (the "City's Motion"). This Opposition is made

and based on the following Memorandum of Points and Authorities, the papers and pleadings on file herein, the Appendix of Exhibits In Support of Plaintiff Landowners' Motion to Determine Property Interest filed on July 21, 2021 and supplements thereto, and any oral argument the Court may entertain on the matter.

A. THE CITY'S REQUEST FOR REMAND IS IMPROPER

1. There is Nothing for the City to Remand as the Landowners' PJR was Dismissed.

Procedurally, the City is unable to remand the Landowners' Petition for Judicial Review (PJR) as it was ***dismissed*** and only the Plaintiff can revive a dismissed claim. The City asked for, and received, a dismissal of the Landowners' Petition for Judicial Review ("PJR"). In an Order signed by this Court on October 2, 2019 (but not provided to the Landowners until July of 2021) this Court held that:

> "1. The City's Motion to Dismiss is **GRANTED IN PART** as to the Petition for Judicial Review on the grounds of issue preclusion. 2. The Petition for Judicial Review is **DENIED** without prejudice should Judge Crocket's Order be overturned on appeal." Order filed July 30, 2021.[1]

Once a cause of action is dismissed, even without prejudice (the denial was without prejudice, not the dismissal), the claim is dead, unless Plaintiff files a new cause of action or the matter is overturned on appeal. Dismissed without prejudice means "removed from the court's docket in such a way that the plaintiff may refile the same suit on the same claim." Black's Law Dictionary 482 (Bryan A. Garner ed., 8th ed., West 1999). There is simply no procedural tool for ***the City*** to revive the Landowners' PJR, which is what the City would have to do in order to have the

[1] This order drafted and improperly held for nearly two years by the City includes "findings" on items that were never before the Court. The record from City has not even been transmitted for this Court's consideration. This is the third time the City has placed false "findings" in Court orders causing Judge Williams to issue an order *nunc pro tunc* and striking other portions of orders.

Landowners' PJR remanded to the City Council for the City to consider reversing its past actions to deny all use of the Landowners' Property.

2. The City's Remand Argument is Based on an Incorrect "Ripeness" Standard.

Additionally, the City's entire remand argument is based on an incorrect legal analysis of the exhaustion of administrative remedies / "ripeness" doctrine. The City argues that "a taking claim is unripe unless the owner has filed at least two applications for development of the specific property at issue and the agency has denied both on the merits" and "[b]ecause the City Council has not acted on the merits of the 133 Acre-Applications, the City cannot as a matter of law have taken [the Landowners'] property." City Mot. 4:9-12. First, the Nevada Supreme Court has never required "at least two applications for development" to ripen any inverse condemnation claim as asserted by the City. It is an entirely made-up rule. Second, Nevada's ripeness doctrine **only** applies to one of the Landowners' four inverse condemnation claims. The City's exhaustion of administrative remedies ripeness standard comes from the 1978 Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978), that applies to only a Penn Central regulatory type inverse condemnation claim. The Landowners have filed three other claims – a per se categorical taking, per se regulatory taking, and non-regulatory / de facto taking and a ripeness standard does not apply to these three claims.

In regard to the two "per se" claims, the Nevada Supreme Court held in Sisolak, that "per se" taking claims - "per se regulatory" and "per se categorical" claims - are entirely exempt from an exhaustion of remedies / ripeness analysis. Sisolak, supra ("Sisolak was not required to exhaust administrative remedies by applying for a variance before bringing his inverse condemnation action based on a regulatory **per se** taking of his private property." Id., at 664). Justice Maupin made the Court's holding clear in his dissent in Sisolak – that all "per se" inverse condemnation claims were exempt from a "ripeness" analysis - "While I disagree with the majority that a

regulatory per se taking has occurred in this instance, **I do agree that *Loretto* [per se regulatory] and *Lucas* [per se categorical] takings, like per se physical takings, do not require exhaustion of administrative remedies**." Sisolak at 684, emphasis added. And, the Court reaffirmed this rule again in Hsu v. County of Clark, 123 Nev. 625, 173 P.3d 724, 732 (2007), holding "[d]ue to the "per se" nature of this taking, we further conclude that the landowners were not required to apply for a variance or otherwise exhaust their administrative remedies prior to bringing suit." The reason for this rule is that *Per se* means "of, in, or by itself; standing alone, without reference to additional facts." Black's Law Dictionary 1162 (Bryan A. Garner ed., 7th ed., West 1999). Accordingly, in a "per se" taking, the government actions, in and of themselves, amount to a taking requiring the payment of just compensation and there is no defense to this taking. ***There is no prerequisite, such as filing an application to ripen the claim***.

The ripeness doctrine also does not apply to the Landowners' nonregulatory/de facto taking claim. As set forth above, the standard for a nonregulatory/de facto taking is whether the City's actions "substantially impaired" or substantially interfered with the use and enjoyment of the Landowners' 133 Acre Property and, if so, there is a taking. The Nevada Supreme Court made it clear in the State v. Eighth Judicial District Court, 131 Nev. 411 (2015) and Sloat v. Turner, 93 Nev. 263 (1977) cases that the ripeness doctrine does not apply to this claim as ripeness is not listed in either case as an element to the claim.

Finally, even if the City's "two applications" analysis was the rule, as explained above (and in more detail below), the Landowners filed, and the City already denied, **four applications** to use the 133 Acre Property – as explained below.

3. The City's Remand Argument Relies Heavily on the Herndon Order that is Self-Limiting and has Been Set Aside.

The City heavily cites an order signed by Judge Herndon in the 65 Acre Case when he was sitting in Department 3. City Mot. at 8-9. This order is of no effect as **it was set aside** and a new

trial was granted by Judge Trujillo, who conducted a three-day evidentiary hearing and will issue a new order next month in the 65 Acre Case. Furthermore, Judge Herndon specifically limited his set aside order and held it should not be used in the three other cases:

> "there are three companion cases still pending with similar issues and any ruling by this court on the remaining issues could be construed as having preclusive effect in the other pending court actions, must like the then controlling Crockett Order was previously perceived to have had in both the 35 -Acre Property case and the 133-Acre Property case." (*LO Appx., Ex. 32 Herndon Order, 35:5-14*.)[2].

Therefore, pages 8-9 of the City's motion should be disregarded as they cite to this self-limiting, set-aside order.

4. The Landowners Do Not Oppose Approval.

To be clear, the Landowners do not oppose approval of development on their residentially zoned property as they have made valiant efforts to develop – only to be denied by the City. As explained in detail below, after the Landowners acquired the 250 Acre Property (that includes the 133 Acre Property), the City took the unusual step to dictate to the Landowners the **only** way it would allow development and then denied this **only** way to development. The City dictated that it would only accept a Master Development Agreement (MDA) application to develop the entire 250 Acre Property as one unit; the City itself drafted the MDA and dictated how each part of the 250 Acre Property would be developed, including the 133 Acre Property, and it took the City 2.5 years to complete the MDA (with the Landowners input). The City MDA was presented to the City Council for approval and the City Council **denied** the MDA in its entirety.

Also explained below, after the denial of the MDA, the Landowners then submitted applications to develop the 133 Acre Property as a stand-alone parcel (apart from the rest of the 250 acres), the City forced the Landowners to submit a GPA application at that time, and when

[2] All "*LO Appx. Ex."* referenced herein are from the Appendix of Exhibits in Support of Plaintiff Landowners' Motion to Determine Property Interest filed on July 21, 2021 and supplements to.

the Landowners submitted the applications, including the GPA application to the City Council, the City Council said the GPA application (which the City forced the Landowners to submit) was improper and used that as a reason to **strike** the 133 acre applications altogether. Also explained below, the City then denied another application to access the 133 Acre Property and another application to fence the 133 Acre Property. Also explained below, the City thereafter, then adopted two City Bills that: 1) targeted only the Landowners' 250 Acre Property; 2) made it impossible to develop the property; and 3) forced the Landowners to allow the adjoining property owners "ongoing public access" to their property. Therefore, the City already denied **four applications** to use the 133 Acre Property and adopted two City Bills to preclude development so the "adjoining property" owners could use the property. Despite this treatment by the City for the past 5 years, the Landowners want to develop the 133 Acre Property.

B. ANY ARGUMENT TO DELAY THESE PROCEEDINGS PENDING A REMAND OR TO CONSIDER A DISMISSAL FOLLOWING REMAND WOULD BE IMPROPER

Any argument by the City to use the requested remand as a reason to delay moving forward with the inverse condemnation claims is without merit.

1. Delay or Dismissal is Improper as the Taking Already Occurred and Neither Remand Nor any Other City Actions Can Erase that Taking.

The United States Supreme recently held in three cases that dismissal of an inverse condemnation action based on subsequent government actions (such as a "remand") is improper. In Arkansas Game & Fish Comm'n v. United States, 568 U.S. 23, 33 (2012), the United States Supreme Court held that once government actions have worked a taking of property, "no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." In Knick v. Township of Scott, Pennsylvania, 139 S.Ct. 2162, 2170, 2172 (2019), the Court held that, "a property owner acquires an irrevocable right to just compensation immediately upon a taking" and then reasoned, "A bank robber might give

the loot back, but he still robbed the bank." In Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2074-2075 (2021), the Court held "[t]he duration of an appropriation – just like the size of an appropriation [internal citation omitted] bears only on the amount of compensation. [internal citation omitted]. For example, after finding a taking by physical invasion, the Court in *Causby* remanded the case to the lower court to determine 'whether the easement taken was temporary or permanent,' in order to fix the compensation due…*Nollan* clarified that appropriation of a right to physically invade property may constitute a taking 'even though no particular individual is permitted to station himself permanently upon the premises.'"

Therefore, even if this Court grants the City's request to remand and the City Council NOW approves development, this has no impact on whether a taking has already occurred. A remand and approval could only impact the amount of damages the City must pay. Therefore, delay or dismissal is never proper under these circumstances and, accordingly, the Landowners' inverse condemnation claims should proceed forward despite any decision on the City's remand motion.

2. Delay or Dismissal is Improper as This Court Already Denied Dismissal.

Moreover, on August 27, 2018, the City filed a motion to dismiss the Landowners' inverse condemnation claims, arguing that the Landowners' taking allegations (more fully set forth below) could not amount to a taking. *LO Appx. Ex. 19.* On February 15, 2019, this Court issued a minute order denying the City's motion to dismiss the inverse condemnation claims. *LO Appx. Ex. 20.* Therefore, the Landowners should be permitted to proceed with their claims that a taking already occurred, even if there is a remand.

C. THE TAKING FACTS SHOW THAT THIS COURT CORRECTLY DENIED DISMISSAL AND THAT A TAKING ALREADY OCCURRED AND ANY DELAY / DISMISSAL ARGUMENT IS MISPLACED

This Court has ordered that "the Court will not entertain arguments at the September 10, 2021, hearing on whether the Landowners' property interest has been taken by inverse

condemnation," but will first decide the Landowners' Motion to Determine Property Interest. *Status Check Order, filed August 18, 2021, p. 3:15-22.* The following facts, however, are provided for the Court to show that the Landowners have alleged facts sufficient to show a taking already occurred, making the right to payment of just compensation "irrevocable" and any subsequent actions by the City cannot erase this taking. Knick, supra ("a property owner acquires an irrevocable right to just compensation immediately upon a taking." Id., at 2172).

1. All City Actions in the Aggregate Must Be Considered

The City's argument in its pleadings that this Court's review of the City's taking actions is limited to a review of only "official actions" of the City Council has been rejected by the Courts.

Judge Williams did an analysis of this very issue and concluded, in denying the City's motion to dismiss the 35 Acre Case, that an inverse condemnation case "is of constitutional magnitude and requires **all government actions** against the property at issue be considered." *LO Appx., Ex. 8, pp. 000172-173, specifically 000173:1-2.* The law supports Judge Williams decision as the Courts hold, "the form, intensity, and the deliberateness of the **government actions** toward the property must be examined … **All actions by the [government], in the aggregate**, must be analyzed." Merkur v. City of Detroit, 680 N.W.2d 485, 496 (Mich.Ct.App. 2004). Emphasis added. *See also* State v. Eighth Jud. Dist. Ct., 351 P.3d 736 (Nev. 2015) (*citing* Arkansas Game & Fish Comm's v. United States, 568 U.S. --- (2012)) (there is no "magic formula" in every case for determining whether particular government interference constitutes a taking under the U.S. Constitution; there are "nearly infinite variety of ways in which **government actions** or regulations can effect property interests." Id., at 741); Lehigh-Northampton Airport Auth. v. WBF Assoc., L.P., 728 A.2d 981 (Comm. Ct. Penn. 1999) ("There is no bright line test to determine when **government action** shall be deemed a de facto taking; instead, each case must be examined and

decided on its own facts." Id., at 985-86). Emphasis added. *See also* Cedar Point Nursery, supra (government action "by whatever means" can result in a taking. Id., at 2072).

Even valid "government actions" can amount to a taking as the Takings Clause "is designed not to limit governmental interference with property rights *per se,* but rather to secure compensation in the event of otherwise proper interference amounting to a taking."[3] Accordingly, all of the City's actions in the aggregate, "by whatever means," must be considered when deciding whether the City's actions have amounted to a taking of the Landowners' Property.

2. The Relevant City Actions Began When the City Agreed to Take the Landowners' Property for the Surrounding Neighbors.

The Landowners' own a total of 250 acres of residentially zoned land ("250 Acre Residential Zoned Land" and/or "250 Acres" and/or "Land") - the 133 Acres Property, the 65 Acre Property, the 17 Acre Property and the 35 Acre Property.

Immediately after acquiring the 250 Acres, the Landowners moved to develop, but a small group of surrounding neighbors in the Queensridge Community opposed the development, even though all of the disclosure documents to the Queensridge Community provided actual notice that the 250 Acre Property was developable. On or about December 29, 2015, one of the neighbors met with the Landowners, bragged that his Queensridge Community is "politically connected," that they could stop all development, and that they wanted 180 acres of the 250 Acre Residential Zoned Land, including water rights, handed over for free. *LO Appx. Ex. 94, Decl. DeHart, at 002836 ¶2*. The Landowners refused and reported this extortion attempt to the F.B.I. Id. The surrounding neighbors vowed to continue to file lawsuits until they got their way. *LO Appx. Ex. 149 LV*RJ article ("This is the first lawsuit to bring an end to that process, I don't know whether it will be the last one."). In an email to a Queensridge homeowner that supported development, one

[3] First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315 (1987).

of the neighbors boasted [w]e have done a pretty good job of prolonging the developer's agony from Sept 2015 to now." *LO Appx Ex. 143, email regarding prolonging developer's agony.*

During this time, another surrounding neighbor enlisted his longtime friend Las Vegas City Council Member Bob Coffin to stop the Landowners' development of the 250 Acres. *LO Appx. Ex. 147*, *LO Appx. Ex 122 at 004230,* ("do they know I am voting against the whole thing?"); *LO Appx., Ex 126 at 004244 ("**a majority [of the City Council] is standing in his [Landowners] path [to development]")*. Within months of the Landowners' acquisition of the 250 Acres, Councilman Coffin told Mr. Lowie, a Landowner representative, that he could build "anything he wanted" on 70 acres of the land, but the Landowners needed to hand over the demanded 180 acres to the neighbors along with the water rights. *LO Appx. Ex 35 Decl. Lowie (2) at 000741 ¶5* This was again repeated several months later, in April 2016, when Councilman Coffin told the Landowners that to allow any development at all on the 70 acres, the Landowners would have to "hand over" the 180 acres, and associated water rights, in perpetuity. *Id at ¶ 6.*

The Landowners refused to "hand over" the 180 acres and the Councilman intensified his position calling the Landowners' representative a "sonofab[…]," "A[…]hole," "scum," "motherf[…]er," "greedy developer," "dirtball," "clown," and Narciss[ist]" with a "mental disorder," and sought "intel" against the Landowners through a private investigator as "dirt may be handy" in case he needs to "get rough" with the Landowners. *LO Appx. Exs. 121, 127, and 130.*

Likewise, another surrounding neighbor "suggested" to then-Councilman Bob Beers, who held the seat for Ward 2, which included Queensridge and the 250 Acre Residentially Zoned Land, it would do his political career well to hold up development of the 250 Acres.

> Q. You also indicated that the homeowners were suing to slow it down so that there wouldn't be any development in their lifetime? A. Yes, sir.
>
> Q. And where did you get that understanding? A. Mr. Binion told me that.

> Q. He [Binion] was asking you to break the law? A. He was asking to have the City get in the way of the of the landowner's rights, yes.
>
> Q. And that's what he was asking you to do was to cause delay as you say?
> A. Yes. . . . A. I attempted to kindly reject his offer. . . .
> A. I think he was discussing the potential for –for a political campaign against me."

LO Appx., Ex. 142, Deposition of Councilman Bob Beers pages 31-36.

When councilman Beers rejected the offer, the surrounding neighbors campaigned against him and, on July, 2017, successfully replaced him with Steve Seroka, who had vowed, during his campaign, to stop all development and then followed the direction of these individuals to delay hearings on applications, instructed staff to legislate against development, and denied and struck applications for development. *See LO Appx., Ex. 146, Schreck -Seroka email (directing Seroka on an upcoming City Council hearing, and Seroka informing Schreck 133 Acre coming up for hearing and suggesting "may be delayed . . ."); Ex. 148, Transcr. Sept. 6, 2016 City Council Meeting; Ex. 54, Denial of MDA, Ex. 114, Transcr. of 5.16.18 City Council Meeting (Bill 2018-5).* As is more fully discussed below, the City followed the direction of the surrounding neighbors and denied all use of the 250 acre property, intent on giving it so the surrounding neighbors.

The City did not even try to hide its unconstitutional actions. Seroka, as a Councilman, at a public meeting on June 21, 2018, told all of the Landowners' neighbors that the Landowners' Property belonged to the neighbors and the neighbors had the right to use the Landowners' Property as recreation and open space.

> "So when they built over there off of Hualapai and Sierra –Sahara –this land [250 Acres] is the open space. Every time that was built along Hualapai and Sahara, this [250 Acres] is the open space. Every community that was built around here, that [250 Acres] is the open space. The development across the street, across Rampart, that [250 Acres] is the open space….it is also documented as part recreation, open space…That is part recreation and open space…" *LO Appx., Ex. 136*, 17:23-18:15, HOA meeting page
>
> "Now that we have the documentation clear, ***that is open space for this part of our community. It is the recreation space for this part of it***. It is not me, it is what the

law says. ***It is what the contracts say between the city and the community, and that is what you all are living on right now***." *LO Appx., Ex. 136*, 20:23-21:3, HOA meeting (emphasis added).

And, in accordance with Councilman Seroka's direction, ***the neighbors are using the Landowners' Property***. *See LO Appx., Ex. 150, Affidavit of Donald Richards and pictures attached thereto wherein Mr. Richards attests that the neighbors are using the Landowners property and that they have told him "it is our open space." Id. at §6 & 7.* The neighbors are using the Landowners' Property pursuant to a City Ordinance (referenced below) that forces the Landowners to let the public use their property. *LO Appx., Ex. 136, 137, 48, 89, 92, 108, 150.*

3. Specific City Actions to Prohibit *ALL* Use of the 133 Acre Property to Preserve it for the Surrounding Property Owners.

Immediately after purchasing the 250 Acres in early 2015, the Landowners and their land use attorney, Christopher Kaempfer ("Attorney Kaempfer"), met with the City of Las Vegas Planning Department to begin development of the individual 17, 35, 65, and 133 Acre parcels as the residential real estate market was increasing in early 2015 and the carrying costs for this vacant property are significant.[4] The Landowners wanted to quickly develop the properties and development of the parcels one at a time as this was the most financially feasible development. While the Landowners had a vision of how to develop the Land, the City directed the type of applications necessary for approval of development. *LO Appx,. Ex. 34, Decl. Lowie (1), para. 11.*

The City adamantly insisted that the **only** application it would accept to develop any part of the Land was a Master Development Agreement (MDA) to develop the entire 250 Acre Residential Zoned Land under one development plan; the City repeatedly refused to accept

[4] For example, the Clark County Tax Assessor valued the entire 250 Acre Residential Zoned Land at about $88 million and, based on this residential land value, the Landowners were paying (and continue to pay) about $1 million per year in real estate taxes alone without deriving any residential income from the property. *LO Appx., 49, 50, 51, 52, 151, 152, Tax Assessors' valuations and taxes*.

individual applications to develop each parcel. *LO Appx., Ex. 34, Decl. Lowie (1); Ex. 48 Decl. Kaempfer.* "Mayor Goodman informed [the Landowners during a December 16, 2015, meeting] that due to neighbors' concerns the City would not allow 'piecemeal development' of the Land and that one application for the entirety of the 250 Acre Residential Zoned Land was necessary by way of a Master Development Agreement ("MDA")" and that during the MDA process, "the City continued to make it clear to [the Landowners] that it would not allow development of individual parcels, but demanded that development only occur by way of the MDA." *LO Appx. Ex. 34*, Decl. Lowie, at 00538, para. 19, at 00539, para. 24:25-27. Attorney Kaempfer states: 1) that he had "no less than seventeen (17) meetings with the [City] Planning Department" regarding the "creation of a Development Agreement" which were necessitated by "public and private comments made to me by both elected and non-elected officials that they wanted to see a plan – via a Development Agreement – for the development of the entire Badlands and not just portions of it;" and, 2) the City advised him that "[the Landowners] either get an approved Development Agreement for the entirety of the Badlands ***or we get nothing***." *LO Appx., Ex 48, Decl. Kaempfer, paras 11-13.* Emphasis Added.

The Landowners opposed the City mandated MDA, because it is not required by law or code and more importantly, it would significantly increase the time and cost to develop. *LO Appx., Ex 34, Decl. Lowie (1), para. 20.* Nevertheless, the City left the Landowners no choice, so they moved forward with the City's proposed MDA concept, that included development of the 133 Acre Property, along with the 17, 35, and 65 Acre properties. *Id*.

The MDA process started in or about Spring of 2015 and through this process the City dictated to the Landowners exactly how the City wanted the Land developed, including the 133 Acres, and the precise information and documents the City wanted as part of the MDA application. L*O Appx., Ex 34, Decl. Lowie (1), paras. 20-21.* The City's demands were oppressive,

unreasonable, and overburdensome, with the City Planning Department and City Attorney's Office drafting the MDA almost entirely.[5] The Mayor indicated that City Staff had dedicated "an excess of hundreds of hours beyond the full day" working on the MDA. *LO Appx., Ex. 54, lines 697-701.*

These City demands, as part of the MDA, ***cost the Landowners more than $1 million over and above the normal costs for a development application*** of this type, further demonstrating the City's oppressive demands. *LO Appx. Ex. 34, Decl. Lowie (1), para. 21:4-6.* In an effort to comply, so that development could occur, the Landowners agreed to every single City demand and paid over $1 million in *extra* application costs. *LO Appx. Ex. 34, Decl. Lowie (1), para. 20:26-27. See also e.g. LO Appx. Ex. 55, City required MDA concessions signed by Landowners and Ex. 56, MDA memos and emails regarding MDA changes.* The Mayor even stated, "you did bend so much. And I know you are a developer, and developers are not in it to donate property. And you have been donating and putting back... And it's costing you money every single day it delays." *LO Appx., Ex. 53 lines 2462-2465.* Councilwoman Tarkanian commented, "I've never seen that much given before." *LO Appx., Ex. 53 lines 2785-2787; 2810-2811.*

The City demands, prior to the MDA being submitted for approval included, without limitation, detailed architectural drawings including 3D digital models for topography, elevations, etc., regional traffic studies, complete civil engineering packages, master detailed sewer studies, drainage studies, school district studies. *LO Appx. Ex. 34, Decl. Lowie (1), p. 6, para. 21.* Mr. Lowie's stated, "[i]n all my years of development and experience such costly and timely requirements **are never required prior to the application approval** because no developer would make such an extraordinary investment prior to entitlements, ie. approval of the application by the City." *LO Appx. Ex. 34, Decl. Lowie (1), p. 6, para. 21:6-10.* Emphasis added.

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[5] *LO Appx., Ex. 53, June 21, 2017 Transcr. City Council Meeting, LO 00000367 lines 333-335; 446 lines 2471-2472; 447 lines 2479-2480; 465 lines 2964-2965; Ex. 54, August 2, 2017 Transcr. City Council Meeting, p. 26 lines 691-692.*

The City also demanded onerous concessions as part of the MDA.[6] Non-exhaustive City demands / concessions made of the Landowners, as part of the MDA, included: 1) donation of approximately 100 acres as landscape, park equestrian facility, and recreation areas; 2) building brand new driveways and security gates and gate houses for Queensridge; 3) building two new parks, one with a vineyard; and, 4) reducing the number of units, increasing the minimum acreage lot size, and reducing the number and height of the towers.[7] The City required at least 700 changes and 16 new and revised versions of the MDA.[8]

After a year and a half of demands, 16 re-drafts, and no end in sight, it became clear the City was intent on engaging in a never-ending process that was imposing unreasonable burdens on the Landowners over and above the normal application process. The Landowners communicated their frustration, stating the unreasonable changes to the MDA were always at the request of the City: "[w]e have done that through many iterations, and those changes were not changes that were requested by the developer. They were changes requested by the City and/or through homeowners [surrounding neighbors] to the City."[9] The City Attorney also recognized the "frustration" of the Landowners due to the length of time negotiating the MDA.[10]

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[6] As just one example of this, *see LO Appx., Ex. 57, LO 00001838-1845.* Another example of the significant changes requested and made over time can be seen in a redline comparison of just two of the MDAs – the MDA dated July 12, 2016 and the MDA dated May 22, 2017. *LO Appx., Ex 58.* During just this eight-month period there were 544 total changes to the MDA. *Id.* These changes can also be seen in a redline comparison of the "Design Guidelines" that were part of the MDA. *LO Appx., Ex. 59.* Another 157 changes were made to these Design Guidelines in just over one year from the April 20, 2016, to May 22, 2017, version. *Id.*

[7] *LO Appx., Ex. 60, LO 00001836; Ex. 54, lines 599-601; Ex. 60, LO 00001837*; *LO Appx., Ex. 53, lines 2060-2070; Ex. 60 and Exhibit 55*.

[8] *LO Appx,. Exs. 58 and 59,* final page of exhibits which show the over 700 changes. *LO Appx., Ex. 61* consists of 16 versions of the MDA generated from January, 2016 to July, 2017. *LO Appx. Ex 61, LO 00001188 - L0 00001835.* Importantly, the Landowners expressed their concern that the MDA process may cause them to lose the property. *LO Appx. Ex. 53, LO 00000447-450.*

[9] *LO Appx., Ex. 54, Transcr. August 2, 2017 City Council Meeting, lines 378-380.*

[10] *LO Appx., Ex. 53, Transcr. June 21, 2017 City Council Meeting, lines 2990-2993.*

Seeing no end in sight to the City-mandated MDA process, the Landowners approached the City Planning Department to develop the 35 Acre Property as a stand-alone development, rather than as part of the MDA, and asked the Planning Department to set forth all requirements to develop the 35 Acre Property by itself. *LO Appx. Ex. 34, Decl. Lowie, p. 6, para 23.* The City Planning Department helped prepare the residential development applications for the 35 Acre Property. *LO Appx. Ex. 34, Decl. Lowie, p. 6, para. 24*. The applications were completed. *Id.; LO Appx, Exs. 62-72, 35 Acre Applications.* The City Planning Department issued Staff Reports stating that the jointly prepared applications were consistent with the R-PD7 hard zoning, met all requirements in the N.R.S. and the City's Unified Development Code, and recommended approval to allow development of the 35 Acre Property. *LO Appx., Ex. 73, City Planning Department Staff Report to Planning Commission; Ex. 74, City Planning Department Staff Report to City Council; Ex. 75, Transcript, February 14, 2017, Planning Commission, 35 Acre Applications.*

The 35 Acre Property applications were presented to the City Council for approval on June 21, 2017. Tom Perrigo, the City's Planning Director, stated at the hearing that the proposed development met all City requirements and should be approved. *LO Appx., Ex. 53, Transcr. June 21, 2017 City Council meeting, 35 Acre Applications, pp. 22-23, lines 566-587.* One City Council member said the 35 Acre Property applications met all City requirements; that the proposed development was "so far inside the existing lines [the Las Vegas Code requirements]." *LO Appx., Ex. 53, Transcr. June 21, 2017 City Council meeting, 35 Acre Applications, p. 97, lines 2588-2590.* The City Council, however, re-stated its firm position against individual development applications and insisted on the MDA for the entire 250 Acre Residential Zoned Land: 1) "I have to oppose this, because it's piecemeal approach (Councilman Coffin);" 2) "I don't like this piecemeal stuff. I don't think it works (Councilwoman Tarkanian); and, 3) "I made a commitment that I didn't want piecemeal," there is a need to move forward, "but not on a piecemeal level. I

said that from the onset," "Out of total respect, I did say that I did not want to move forward piecemeal." (Mayor Goodman). *LO Appx., Ex. 53, Transcr. June 21, 2017 City Council meeting, 35 Acre Applications, p. 98:2618; 104:2781-2782; 118:3161; 49:1304-1305; 92:2460-2461.*

The City Council, contrary to its own Planning Department, Planning Commission, the City Code, and the Nevada Revised Statutes, denied the 35 Acre Property applications. *LO Appx. Ex. 93, 35 Acre Application Denial Letter; see also Ex. 53, Transcr. June 21, 2017, City Council meeting, 35 Acre Applications, p. 109:2906-2911*; *Ex. 76, 35 Acre Applications City Council Minutes.* The City's official position at the hearing was: 1) the applications were consistent with zoning and met all requirements in the Nevada Revised Statutes and City Unified Development Code (Title 19); and, 2) the sole reason for denial was the City wanted one MDA for the entire 250 Acres, not "piecemeal" development. "The City continued to make it clear to [the Landowners] that it would not allow development of individual parcels but demanded that development only occur by way of the MDA." *LO Appx. Ex. 34, Decl. Lowie, p. 6, para. 24:25-27.*

Intent on developing the 250 Acres, the Landowners turned back to the oppressive MDA. In total, the Landowners worked with the City for 2 ½ years on the MDA (between Spring, 2015, and August 2, 2017) and accepted all 700 changes and at least 16 different City re-drafts. The property sat idle during this City delay, with the Landowners paying all carrying costs (including over $1 million per year in real property taxes).

On August 2, 2017, (approximately 40 days after the City denied the applications to develop the 35 Acre Property as a stand-alone project on the sole basis it wanted the MDA) the MDA application (that would allow development of the entire 250 acre property, including the 133 Acre Property),[11] was presented to the City Council for approval - a day that will live in infamy

[11] *LO Appx., Ex. 79, MDA Application; Ex. 80, MDA Application, Bill No. 2017-17; LO Appx., Ex., 81, Master Development Agreement; Ex. 82, MDA Addendum; Ex. 83, MDA Design*

forever for the Landowners. The City Planning Department issued a Staff Report, stating the MDA met all requirements in N.R.S. and the City's Unified Development Code and that the MDA should be approved. *LO Appx., Ex. 77, MDA City Staff Report to City Council.* Despite offering the MDA as the only application the City would accept to develop any part of the 250 Acres (including the 133 Acre Property); repeated assurances from the City that it would approve the MDA after denying the 35 Acre Property stand-alone applications; the fact that the City itself drafted the MDA; and the City's own Planning Department recommending approval, **the City denied the MDA** altogether on August 2, 2017. *LO Appx. Ex. 78, MDA- Denial Minutes; Ex 54, Transcr. August 2, 2017, City Council meeting (MDA), pp. 149:4154-4156; 153:4273-4275.*

The City did not ask the Landowners to make more concessions, it simply denied the MDA, which denied development of the entire 250 Acre Property, including the 133 Acre Property. *LO Appx. Ex. 34, Decl. Lowie, p. 7, para. 26. LO Appx. Ex. 78, MDA- Denial Minutes; Ex. 54, Transcript, August 2, 2017, City Council (MDA), pp. 149:4154-4156; 153:4273-4275.*

4. The City Also Struck Applications to Develop the 133 Acre Property.

The City also denied the Landowners' request to develop the 133 Acre Property by striking the applications from being heard. But that is not all that occurred in relation to these applications. The actions taken by the City in regard to these applications are perhaps the most egregious and telling of the City's real intent to take the land from the Landowners without paying for it.

As part of the numerous development applications filed by the Landowners between 2015 and 2018 to develop all or portions of the 250 Acres, in October and November 2017, after the MDA denial, the Landowners filed detailed applications to develop the 133 Acre Property with residential units, consistent with the R-PD7 hard zoning. *LO Appx., Ex. 97, 133 Acre Applications,*

Guidelines; Ex. 84, MDA Justification Letter; Ex. 85, MDA Location and Aerial Maps; Ex. 86, MDA Supporting Documents (1); Ex. 87, MDA Supporting Documents (2).

Combined; Ex. 98, 133 Acre Applications, Justification Letter. The City Planning Staff provided a detailed analysis recommending approval, because the proposed residential development was consistent with the R-PD7 hard zoning and it met all requirements in N.R.S. and the Unified Development Code. *LO Appx., Ex. 99, Ex. 100, Ex. 101, Ex. 102 and Ex. 103, City Planning Staff Reports for all 133 Acre Applications.* The Planning Commission held hearings and likewise recommended approval. None of this mattered to the City as certain councilmembers had a different agenda - "that over my dead body" would development be allowed.

In accordance with this agenda, the City Council **first unnecessarily delayed the matter for *months***[12] and then in a surprise move to all, refused to grant or deny the applications, and instead **struck the applications** at the hearing.[13] *LO Appx., Ex. 105, 133 Acre Application, May 17, 2018, Notice Letters Striking Applications; LO Appx., Ex. 106, Transcr. May 5, 2018 City Council meeting (133 Acre Strike Applications), 004480:2082-84.*

An important fact that the City left out of its motion to remand is that during the delay by the City, the Councilmembers publicly considered whether the development applications should

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[12] *LO Appx., Ex. 104, Transcr. February 21, 2018, City Council meeting (133 Acre App. Abeyance), pp. 13-14.* Public records obtained by the Landowners show that at least one of the councilmembers (Steve Seroka) was working with the Queensridge opponents to intentionally delay the matter. *LO Appx., Ex. 146.*

[13] For these applications, the City forced the Landowner to file a GPA or else it would not "consider the applications." *LO Appx., Ex. 129, letter to City Planning Department*. The Landowners complied but filed under protest. *LO Appx., Ex. 129*. Remarkably, the City struck the applications on the basis that the GPA, the very application the City forced the Landowners to file, *was untimely pursuant to the City Code.* The City thus, required the Landowner to file the application for a GPA that it would later use as a reason for denial claiming it "violated the code we have in place for a 12-month cooling off period" [application for a general plan amendment [GPA]. 2018 – May 16, 227-232. Again, implementing a catch-22 barrier to development of this Land. The City Planning Department objected and testified that this application was filed at their "request" and not required when there is no change in zoning. *LO Appx. Ex. 135 City Council Transcript, May 16, 2018, 004443:1029-1035, 004446:1114-1115.* Yet the City struck all of the applications and refused to consider development of the 133 Acre Property. *Id., at 004471:1851-004472:1860, 004480:2083-84.*

require a "major modification" or a general plan amendment (sometimes referred to as "GPA").[14] The City Planning Department specifically found that "no application for a General Plan Amendment or Major Modification are required" and further found the appeal to be "specious." *LO Appx. Ex. 196, Staff Recommendations, January 3, 2018, pp. 3-4.* Accordingly, on January 3, 2021, the City denied the appeal rejecting the idea that a major modification was required.[15] Thus, the City cannot honestly claim in these proceedings that it had no choice but to strike the applications due to Judge Crockett's decision. *See* City Mot 2:3-5. This is nothing more than a thinly veiled attempt to avoid liability for those actions.

Moreover, it was by the City's own actions that the applications were not heard on the merits. The City's refusal to hear the applications on the merits and 3 years later claim that the case is unripe because the City didn't "get to" hear the applications on the merits is absurd and another catch 22 created by the City to steal the Land from the Landowners. The City cannot benefit by its outrageous actions and move the Court for a remand and dismissal due to those very actions.

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[14] In an attempt to delay the matter and prevent development, the leader of the Queensridge Community protesting development, was working behind the scenes with the City and filed an "appeal" to the Landowners applications to develop the 133 acre property claiming that a major modification applications was required. Although there is no mechanism to consider an appeal of an application by a third party, the City did indeed consider this issue twice, rejecting the notion that a major modification or GPA were required. Moreover, during the hearing related to appealing Judge Crockett's Order, the CITY ATTORNEY informed the Council of its options that did not include "striking" the applications "to end the argument completely, you could make a decision to change your code or just make a policy call . . ." *LO Appx. Ex. 135, May 16, 2018 City Council Transcript, 004428:618-623.*

[15] The following day in a move to force a different outcome, Councilman Coffin (an opponent to development that attempted to get intel on the applicant to prevent development presumably through some form of coercion) rescinded his vote, claiming he made a mistake and the matter was once again considered a week later on January 17, 2018, and denied reconsideration. *LO Appx. Ex. 197, City Council Transcript, January 17, 2018, ad passim, p. 18:487-489.* At that time, the Judge Crockett decision was already rendered. *LO Appx. Ex. 106, City Council Transcript, 003140:616-17.*

5. The City Adopted Two Bills to Preserve the Landowners' Property for the Surrounding Neighbors Use.

After denial of the MDA, the City also raced to adopt two City Bills that solely target the 250 Acre Residential Zoned Land, prevent all use of the Land, and force the Landowners to allow the surrounding property owners to use the Land - Bill No. 2018-5 and Bill No. 2018-24.[16] *LO Appx., Ex. 107, Bill No. 2018-5; LO Appx., Ex. 108, Bill No. 2018-24; Ex. 109, Transcr. November 7, 2018 City Council meeting (Adopt Bill No. 2018-24), p. 146.* The sole and undisputed analysis performed to determine the properties impacted by these two Bills concluded the Bills targeted only the Landowners' 250 Acres.[17] The City's own councilperson acknowledged as much, stating "**I call it the Yohan Lowie [a principle with the Landowners] Bill**."[18] And, the uncontested evidence verifies that these Bills authorize the public, including the surrounding property owners, to physically enter the Landowners' Property – a text book per se regulatory taking - by requiring the Landowners to provide for "***ongoing public access*** ….[and to] ensure that such access is maintained." *LO Appx., Ex. 108, Bill No. 2018-24, p. 11, section G.2.d.*

In addition, the uncontested evidence shows these two Bills impose impossible barriers to develop the 250 Acre Residential Zoned Land. For example, on August 13, 2018, the City advised the Landowners' engineering company that "zoning/planning approval of the entitlements on a

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[16] It is no coincidence that the 133 Acre Property applications were delayed until the day of the hearing on the adoption of these Bills. Notably, the Bills were adopted and less than 2 hours later 133 Acre applications were stricken from the agenda forcing the Landowner to "start over". *See LO Appx., Ex. 135, Transcript 5/15/18 Agenda items 71 & 74-83, page 26 line 740.*

[17] *LO Appx., Ex. 10, Transcript, October 15, 2018, Recommending Committee (Bill No. 2018-24), p. 7:169-191; Ex. 111, Bill No. 2018-24, Kaempfer Opposition, October 15, 2018, Part 1; Ex. 112, Bill No. 2018-24, Kaempfer Opposition, October 15, 2018, Part 2. See also Ex. 113, Bill No. 2018-24, Hutchison Opposition Letter, July 17, 2018.*

[18] *LO Appx., Ex. 114, Transcript, May 16, 2018, City Council (Bill No. 2018-5), p. 17:487 and p. 1:57-58. See also LO Appx., Ex. 115, Bill No. 2018-5, Fiore Opening Statement, p. 1; LO Appx., Ex. 116, Transcript, May 14, 2018 Recommending Committee (Bill No. 2018-5), p. 6:149-50.*

property are required to be approved prior to conditional approval being given on a TDS [technical drainage study]." *LO Appx., Ex. 117, GCW Meeting Minutes, highlighted*. Yet, Bill No. 2018-24, that was signed by the City attorney on June 27, 2018, and adopted on November 7, 2018, states as a requirement to submit an application to develop, approval of a "conceptual master drainage study." *LO Appx., Ex. 108, Bill No. 2018-24, section (e)(1).* Thus, a development application could not be submitted without a drainage study and a drainage study could not be conducted without approval of a development application. This is the proverbial catch-22.

Just some of the additional (impossible to meet) barriers included in the Bills which must be satisfied ***before*** a development application can even be submitted are the following: a **master plan** (showing areas proposed to remain open space, recreational amenities, wildlife habitat, areas proposed for residential use, including acreage, density, unit numbers and type, areas proposed for commercial, including acreage, density and type, a density or intensity), a **development agreement (which the City had already denied with the MDA**), an **environmental assessment**, a phase I environmental assessment report, a master drainage study, a master traffic study, a master sanitary sewer study, a **3D model of the project with accurate topography**, **CC&Rs for the development area**, *a closure maintenance plan showing how the property will continue to be maintained as it has in the past* (providing security and monitoring), , and ***anything else*** "the [City Planning] Department may determine are necessary." *LO Appx., Ex. 107, Bill No. 2018-5 and Ex. 108, Bill No. 2018-24, ad passim.* No developer would engage in these outrageous costs ***before*** submitting an application. The City knew this, which is why it imposed the same solely on the Landowners' Property.

Bill 2018-24 also makes it a misdemeanor subject to a $1,000 a day fine or "imprisonment for a term of not more than six months" if the Landowners do not comply with the Bill's outrageous requirements, including maintaining the golf course, even if it is losing money and forcing ongoing

public access. *LO Appx., Ex. 108, Bill No. 2018-24, p. 12.* The City Staff confirmed that the Closure Maintenance Plan part of the Bill (which is where the authorization for public access is found) ***would be applied retroactively***. *LO Appx., Ex. 118, Transcr. November 7, 2018 at 03487-03488, 03607, 03616-03617, City Council minutes for Bill 2018-24; LO Appx., Ex. 119, Transcr. September 4, 2018 at 3710 lines 255-261.* In other words, the City adopted a Bill that forces the Landowners to acquiesce to a physical occupation of their Property by forcing the Landowners to allow "***ongoing public access***" onto their Property or be subjected to criminal charges.[19]

The City's own councilwoman Fiore stated these City Bills were "the latest shot in a salvo against one developer." *LO Appx. Ex. 114, 003848-3849.*

6. The City Denied the Landowners Access and Fencing.

The City would not even grant access or fencing rights to the Landowners. In August 2017, after the MDA denial, the Landowners filed a routine over the counter request with the City for three access points to streets the 250 Acre Residential Zoned Land abuts – one on Rampart Blvd. and two on Hualapai Way. *LO Appx., Ex. 88, Access Application*; *LO Appx., Ex. 90 at 002818*, LVMC 19.16.100(f)(2)(a) and 19.16.100(f)(2)(a)(iii). The Nevada Supreme Court has held that a landowner cannot be denied access to abutting roadways, because all property that abuts the roadway has a special right of easement for access purposes and this is a recognized property right in Nevada. Schwartz v. State, 111 Nev. 998 (1995). The Court held that this right exists "despite the fact that the Landowner had not yet developed access." Id., at 1003. Ignoring the law, the City denied the access application citing as the sole basis for the denial, the potential impact to "***surrounding properties***." *LO Appx., Ex 89, Access Denial Letter, LO 00002365.* Emphasis added. In violation of its own City Code, the City required that the matter be presented to the City

[19] The City's counsel must have finally convinced the City that these Bills subjected the City to inverse condemnation liability and, on January 15, 202, the City repealed the Bills. But, as explained above, subsequent actions cannot erase a taking that has already occurred.

Council through a "Major Review" process (LVMC 19.16.100(G)(1)(b)), which is substantial. *LO Appx., Ex. 90, LVMC 19.16.100.* It requires a pre-application conference, plan submittal, circulation to interested City departments for comments, recommendation, requirements, and publicly noticed Planning Commission and City Council hearings. The City placed this extraordinary barrier to access, because the City is preserving the property for the use of the owners of the "***surrounding properties***."

Also in August, 2017, after the MDA denial, the Landowners filed a routine over the counter request to install chain link fencing with the City to enclose two water features/ponds that are located on the 250 Acres. *LO Appx., Ex. 91, Fence Application; LO Appx., Ex. 90,* LVMC 19.16.100(f)(2)(a) and 19.16.100(f)(2)(a)(iii). The City denied the application, again stating its consideration for the "***surrounding properties***." *LO Appx., Ex 92, Fence Denial.* Emphasis added.

7. Evidence of the City's Intent.

The City did not even try to hide its intent to preserve the Landowners' property for the "surrounding residents." As explained in the preceding section, the City's access and fence denial letters referenced consideration for "surrounding properties." The City denial letters for the 35 Acre Property stated the denials were, in part, due to "concerns over the impact to proposed development on ***surrounding residents***." *LO Appx., Ex 93, 35 Acre Application, Denial Letters.* And, Attorney Kaempfer testified that, "despite our best efforts, and despite the merits of our application(s)" no development was going to be allowed unless the Queensridge Community agreed and the leader of that group firmly stated they would not agree - "I would rather see the golf course [250 Acres] a desert than a single home built on it." *LO Appx., Ex. 48, Declaration of Attorney Chris Kaempfer, p. 2, para. 12.* This was also confirmed by documents obtained as part of a FOIA request, which show the City wanted the 250 Acres "turned over to the City" for $15 Million to be preserve for the surrounding neighbors. *LO Appx., Ex 144, City Memorandum*

– *Thoughts on EP Opioid Lawsuit, p. 3.* And, the City Council meetings are replete with the neighbors demanding the City preserve the Landowners' Property for their own use.

8. The City Tax Assessor.

In their attempts to develop, the Landowners even presented to the City Council, the Notice of Decision[20] by the City's own tax assessor[21] that the lawful use of the 133 Acre Property is "residential" based on a "Zoning Designation: R-PD7,"[22] that the tax assessor valued the 250 Acres at approximately $88 million[23] based on this "residential" use, and that the City was collecting real estate taxes from the Landowners that amounted to ***over $1 million per year*** ($527,521.25 on the 133 Acre Property, alone[24]) based on this lawful residential use and this lawful use should be permitted. None of this mattered to the City as it was preserving the Property for the surrounding owners. And, the City's scheme to "Purchase Badlands and operate" for "$15 Million," (which equates to less than 6% of the tax assessed value ($88 million)[25] **shocks the conscience**.

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[20] *LO Appx., Ex. 120, Tax Assessor Notice of Decision, submitted with 133 Acre Applications.*

[21] *See* City Charter, Sec. 3.120 (1) ("The County Assessor of the County is, ex officio, the City Assessor of the City.")

[22] NRS 361.227(1) mandates that the Tax Assessor determine the taxable value of real property based on the "lawful" use to which property may be put and the Tax Assessor determined the "lawful" use of all parts of the 250 Acres to be "residential." *LO Appx., Ex. 120, Tax Assessor Notice of Decision, submitted with the 133 Acre Applications; Ex. 49, Tax Assessor Values, $88 Million; Ex. 51, Tax Assessor Valuation for 35 Acre Property; Ex. 151, Tax Assessor Valuation of the 65 Acre Property; Ex. 152, Tax Assessors Valuation, including the 65 Acre Property; Ex. 153 Taxes currently assessed on the 65 Acre Property.*

[23] *LO Appx., Ex. 49, Tax Assessor Values, $88 million (the $88 million is the composite value by the Assessor of all parts of the 250 Acre Land).*

[24] *LO Appx., Ex. 152, 004843-4848; Ex. 49, 001164, 001166, 001168.*

[25] The Tax Assessor value of $88 million is recognized as low, because "[a]lthough the assessor is required to appraise the value of the property, it is an open secret that the assessment rarely approaches the true market value." Nichols on Eminent Domain, at § 22.1, 22-6. This shows an incentive to deny all use of the property so the City can purchase the property for pennies on the dollar, which is an unconstitutional act in itself.

D. THE ABOVE CITY ACTIONS ARE A TAKING AND NOTHING THE CITY DOES ON REMAND CAN ERASE THIS TAKING

1. Third Claim for Relief – Per Se Categorical Taking.

The Nevada Supreme Court holds that a per se categorical taking (the Landowners' Third Claim for Relief) occurs where government action "completely deprives an owner of all economical beneficial use of her property," and, in these circumstances, just compensation is automatically warranted, meaning there is no defense to the taking. Sisolak, supra, at 662.

Nevada's per se categorical taking standard is met here. As detailed above, the City denied/struck **four applications** to use the 133 Acre Property (**100%** the Landowners attempts) – the City denied the MDA application (that included the 133 Acre Property development), struck the 133 Acre stand-alone application, denied the access application, and denied the fence application. The City also denied the 35 Acre stand-alone applications. The City then adopted two Bills that solely target the Landowners' Property, make it impossible to develop, and force the Landowners to allow the public to use their property – all for the benefit of the surrounding neighbors. *LO Appx., Ex. 107, 108, 48, 136, 150.* As a result, the property lies vacant and useless,[26] all while the Landowners are paying $527,521.25 per year in real estate taxes and significant other carrying

[26] In addition to the golf course operations being a financial loss, the golf course was not a legal or economic use. A golf course use is one "that is not allowed," in any residential zoned land, such as the 250 Acre Residential Zoned Land. *See LVMC 19.12.010 (showing a golf course use prohibited on any residential zoned land).* The City Assessor issued a "Notice of Decision" that as of December 1, 2016, prior to the filing of this case, the golf course was not the "lawful" use of the property. *LO Appx., Ex. 120, Tax Assessor Notice of Decision, submitted with 133 Acre Applications.* While only an interim use, the golf course was shuttered over four years ago, because it was a financial failure, even when the Landowners leased the land for ***free*** to the operator. *LO Appx., Ex. 45, Golf Course Closure, September, 2015 & May, 2016, Par 4 Letter to Fore Star; Ex. 46, Golf Course Closure, December 1, 2016, Elite Golf Letter to Yohan Lowie; Ex. 47, Golf Course Closure, Keith Flatt Depo, Fore Stars v. Nel.*

costs. Not only has the City's actions "completely deprive[d] [the Landowners] of all economical beneficial use of [their] property," the actions have caused a negative value.

2. Fifth Claim for Relief - Per Se Regulatory Taking.

The Nevada Supreme Court holds that a per se regulatory taking (the Landowners' Fifth Claim for Relief) occurs where government action "authorizes" the public to use private property or "preserves" private property for public use. Sisolak, supra, at 1124-25 and Hsu, supra, at 634-635. When this occurs, just compensation is automatically warranted, meaning there is no defense to the taking. Sisolak, supra, at 662. For example, in the Sisolak and Hsu cases there was a taking, because the County of Clark adopted Ordinance 1221 that preserved Mr. Sisolak and Mr. Hsu's airspace for aircraft to use. In Knick v. Township of Scott, Pennsylvania, 139 S.Ct. 2162 (2019), there was a taking, because the Township of Scott adopted an ordinance requiring that "[a]ll cemeteries … be kept open and accessible to the general public during daylight hours." Therefore, even if the public is not physically using property, if the government engages in action that "authorize" the public to use private property or "preserves" private property for public use, this is a per se regulatory taking.

Nevada's per se regulatory taking standard is met here. As detailed above, the City openly admitted its actions authorized the public to use the 133 Acre Property. The City adopted Bills 2018-5 and 2018-24 which target only the 250 Acres to prevent development and expressly states the Landowners **must** allow "ongoing public access" and "plans to ensure that such [public] access is maintained." *LO Appx., Ex. 108, Bill 2018-24- see Section G(2)(d).* The City openly admitted that it was denying all use of the 133 Acre Property for the "surrounding properties" which allowed the surrounding properties to use the 250 Acres for a viewshed and for recreation. *LO Appx., Ex. 89, 92, 136, 150.* This was confirmed by Attorney Kaempfer who testified that, "despite our best efforts, and despite the merits of our application(s)" the

surrounding property owners wanted to use the property for their viewshed and the City would not allow development unless "virtually all" of them agreed to allow the development and the leader of that group firmly stated they would not agree - "I would rather see the golf course [250 Acre Land] a desert than a single home built on it." *LO Appx., Ex. 48, Declaration of Attorney Chris Kaempfer, p. 2, para. 12; see also LO Appx., Ex. 94, Declaration of Vickie DeHart.* Finally, as explained above, one Councilman, at a public meeting on June 21, 2018, told all of the Landowners' neighbors that the Landowners' Property belonged to the neighbors and the neighbors had the right to use the Landowners' Property as recreation and open space and they are using the property. *LO Appx., Exs 136 and 150.* As a result of the City's actions, the 133 Acre Property has been preserved for public use and the public is authorized to use the Property.

3. Sixth Claim for Relief - Non-regulatory De Facto Taking.

The Nevada Supreme Court holds that a non-regulatory / de facto taking (The Landowners' Sixth Claim for Relief) occurs where, there is ***no physical invasion***, but the government has "taken steps that directly and substantially interfere [ ] with [an] owner's property rights to the extent of rendering the property unusable or valueless to the owner." State v. Eighth Judicial District Court, 131 Nev. 411, 421 (2015). The Court relied on Richmond Elks Hall Assoc. v. Richmond Red. Agency, 561 F.2d 1327, 1330 (9th Cir. 1977), where the Ninth Circuit held that "[t]o constitute a taking under the Fifth Amendment it is not necessary that property be absolutely 'taken' in the narrow sense of that word to come within the protection of this constitutional provision; it is sufficient if the action by the government involves a **direct interference with or disturbance of property rights**." Emphasis added. Nevada is not alone in adopting this de facto taking law as the great majority of other jurisdictions have adopted a similar rule.[27] Nichols on Eminent Domain

[27] *See e.g.* McCracken v. City of Philadelphia, 451 A.2d 1046 (Pa.Cmwlth. 1982) (holding that a court should focus on the "cumulative effect" of government action and "[a] de facto taking occurs when an entity clothed with eminent domain power **substantially deprives** an owner of the use

summarily describes this non-regulatory / de facto taking claim as follows: "[c]ontrary to prevalent earlier views, it is now clear that **a de facto taking does not require a physical invasion or appropriation of property**. Rather, a **substantial deprivation of a property owner's use and enjoyment of his property** may, in appropriate circumstances, be found to constitute a 'taking' of that property or of a compensable interest in the property..." 3A Nichols on Eminent Domain §6.05[2], 6-65 (3rd rev. ed. 2002). Therefore, a Nevada non-regulatory / de facto taking occurs where government action renders property unusable or valueless to the owner, substantially impairs or extinguishes some right directly connected to the property, or damages the property.

Here, it is clear, based on the above facts, that the City has substantially interfered with the use and enjoyment of the Landowners' Property, meeting the standard for this taking claim.

E. CONCLUSION

For the foregoing reasons, the City's request for a remand is a red herring. And, even if there is a remand and approval of the 133 Acre applications, no subsequent action by the City can relieve the City of liability for the taking of the Landowners' Property that has already occurred.

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and enjoyment of his property" or where there is an 'adverse interim consequence' which deprives an owner of the use and enjoyment of the property." Id., at 1050. Emphasis added.); Robinson v. City of Ashdown, 783 S.W.2d 53 (Ark. 1990) (when government **"substantially diminishes** the value of a landowner's land" just compensation is required. Id., at 56. Emphasis added.). Mentzel v. City of Oshkosh, 146 Wis.2d 804, 812-813, 432 N.W.2d 609, 613 (1988) (taking occurred when the City of Oshkosh denied the landowner's established liquor license because the City of Oshkosh desired to acquire the landowner's property and it sought to reduce the value of its acquisition.); City of Houston v. Kolb, 982 S.W.2d 949 (1999) (taking found where the City of Houston denied a subdivision plat submitted by the Kolbs for the sole purpose of keeping the right-of-way for a planned highway clear to reduce the cost for the State in acquiring the properties for the highway.). *See also LO Appx., Ex. 96, Summary of Other Jurisdiction's De Facto Taking Law.*

Accordingly, the City's pending motion is designed for delay purposes and should be denied.

DATED this 24th day of August, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the Law Offices of Kermitt L. Waters, and that on the 24th day of August, 2021, pursuant to NRCP (5)(b) a true and correct copy of the foregoing **OPPOSITION TO CITY OF LAS VEGAS' MOTION TO REMAND 133-ACRE APPLICATIONS TO THE LAS VEGAS CITY COUNCIL** was made by electronic means, to be electronically served through the Eighth Judicial District Court's filing system, with the date and time of the electronic service substituted for the date and place of deposit in the mail and addressed to each of the following:

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