

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellant,

vs.

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

Respondents.

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

Appellants/Cross-Respondents,

vs.

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

Respondent/Cross-Appellant.

No. 84345

Electronically Filed
Sep 30 2022 10:37 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

No. 84640

**AMENDED
JOINT APPENDIX
VOLUME 126, PART 4**

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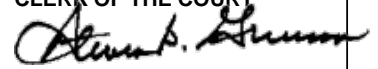
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Attorneys for Plaintiff Landowners

DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND CO., LLC, a Nevada limited liability
company, FORE STARS Ltd., DOE
INDIVIDUALS I through X, ROE
CORPORATIONS I through X, and ROE
LIMITED LIABILITY COMPANIES I through
X,

Plaintiffs,

vs.

CITY OF LAS VEGAS, political subdivision of
the State of Nevada, ROE government entities I
through X, ROE CORPORATIONS I through X,
ROE INDIVIDUALS I through X, ROE
LIMITED LIABILITY COMPANIES I through
X, ROE quasi-governmental entities I through X,

Defendant.

Case No.: A-17-758528-J

Dept. No.: XVI

NOTICE OF ENTRY OF:

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND ORDER
DENYING THE CITY'S MOTION FOR
IMMEDIATE STAY OF JUDGMENT;
AND GRANTING PLAINTIFF
LANDOWNERS' COUNTERMOTION
TO ORDER THE CITY TO PAY THE
JUST COMPENSATION**

Hearing Date: January 19, 2022

Hearing Time: 10:00 a.m.

PLEASE TAKE NOTICE that the Findings of Fact and Conclusions of law and Order
Denying the City's Motion for Immediate stay of Judgment; and Granting Plaintiff landowners'
Counter-motion to Order the City to Pay the Just Compensation ("Order") was entered on the 9th
day of February, 2022.

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A copy of the Order is attached hereto.
DATED this 10th day of February, 2022.

LAW OFFICES OF KERMITT L. WATERS

/s/ James J. Leavitt
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Attorneys for Plaintiffs Landowners

1 **CERTIFICATE OF SERVICE**

2 I HEREBY CERTIFY that I am an employee of the Law Offices of Kermitt L. Waters, and
3 that on the 10th day of February, 2022, pursuant to NRCP 5(b), a true and correct copy of the
4 foregoing: **NOTICE OF ENTRY OF: FINDINGS OF FACT AND CONCLUSIONS OF**
5 **LAW AND ORDER DENYING THE CITY'S MOTION FOR IMMEDIATE STAY OF**
6 **JUDGMENT; AND GRANTING PLAINTIFF LANDOWNERS' COUNTERMOTION TO**
7 **ORDER THE CITY TO PAY THE JUST COMPENSATION** was served on the below via the
8 Court's electronic filing/service system and/or deposited for mailing in the U.S. Mail, postage
9 prepaid and addressed to, the following:

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23 /s/ Sandy Guerra
24 an employee of the Law Offices of Kermitt L. Waters

FFCL/ORDER
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DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND CO., LLC, a Nevada limited liability
company, FORE STARS Ltd., DOE
INDIVIDUALS I through X, ROE
CORPORATIONS I through X, and ROE
LIMITED LIABILITY COMPANIES I through
X,

Plaintiffs,

vs.

CITY OF LAS VEGAS, political subdivision of
the State of Nevada, ROE government entities I
through X, ROE CORPORATIONS I through X,
ROE INDIVIDUALS I through X, ROE
LIMITED LIABILITY COMPANIES I through
X, ROE quasi-governmental entities I through X,

Defendant.

Case No.: A-17-758528-J
Dept. No.: XVI

**FINDINGS OF FACT AND CONCLUSIONS
OF LAW AND ORDER DENYING THE
CITY'S MOTION FOR IMMEDIATE STAY
OF JUDGMENT; AND GRANTING
PLAINTIFF LANDOWNERS'
COUNTERMOTION TO ORDER THE
CITY TO PAY THE JUST
COMPENSATION**

Date of Hearing: January 19, 2022
Time of Hearing: 10:00 a.m.

This matter came before the Court on January 19, 2022, with Plaintiffs, 180 LAND
COMPANY, LLC and FORE STARS, Ltd. (hereinafter "Landowners") appearing through their
counsel, James Jack Leavitt, Esq., of the Law Offices of Kermitt L. Waters, along with the
Landowners' in-house counsel Elizabeth Ghanem Ham, Esq., and with the City of Las Vegas

1 (hereinafter “City”) appearing through its counsel, George F. Ogilvie III, Esq. and Christopher J.
2 Molina, Esq. of McDonald Carano, LLP and Andrew M. Schwartz, Esq., of Shute, Mihaly and
3 Weinberger, LLP.

4 Having reviewed and considered the pleadings, arguments of counsel, the evidence
5 presented, the file and other matters referenced herein, the Court hereby enters the following
6 Findings of Fact and Conclusions of Law and Order:

7 **I. FINDINGS OF FACT**

8 **A) Procedural Posture**

9 This is an inverse condemnation case brought by the Landowners against the City for the
10 taking by inverse condemnation of their approximately 35 acre property (“Landowners’ Property”
11 or “Subject Property”). The Court has reviewed extensive pleadings and has allowed lengthy
12 hearings on the facts and law relevant to the inverse condemnation issues in this matter and entered
13 findings of fact and conclusions of law on those issues. On October 12, 2020, the Court determined
14 the legally permissible use of the Landowners’ Property prior to the City’s actions at issue. *See*
15 *Findings of Fact and Conclusions of Law Regarding Plaintiff Landowners’ Motion to Determine*
16 *“Property Interest” filed October 12, 2020.* After competing motions for summary judgment on
17 liability were filed and following four days of hearings, the Court granted summary judgment in
18 the Landowners’ favor, finding the City took by inverse condemnation the Landowners’ Property.
19 *See Findings of Fact and Conclusions of Law Granting Plaintiffs Landowners’ Motion to*
20 *Determine Take and For Summary Judgment on The First, Third and Fourth Claims For Relief*
21 *filed October 25, 2021 (hereinafter “FFCL Re: City’s Taking”).* Thereafter, the parties stipulated
22 to a bench trial wherein uncontroverted evidence established that the value of the Landowners’
23 Property taken by the City was \$34,135,000 and the City was ordered to pay this amount as just
24

1 compensation for the taking. *Finding of Fact and Conclusions of Law on Just Compensation* filed
2 November 18, 2021 at ¶ 9, 15, 50 and 52.

3 The City moved the Court to stay payment of the award based on NRCP Rule 62 and NRAP
4 Rule 8. The Landowners opposed the City's stay request and filed a countermotion to have the
5 City pay the award based on NRS 37.140, 37.170 and State v. Second Judicial District Court, 75
6 Nev. 200 (1959).

7 **B) The City is in Possession of the Landowners' Property.**

8 Based upon the undisputed evidence in this case, this Court found the Landowners have
9 established a "*per se*" taking of their property. *FFCL Re: City's Taking* at ¶ 154-175. A "per se"
10 taking means the City is in possession of the Landowners' Property. *Id.* The City has taken the
11 Landowners' Property for the surrounding neighbors' use and enjoyment and has prevented the
12 Landowners from doing anything with the Subject Property that would interfere with the
13 surrounding neighbors' use of the Subject Property. The City has preserved the Subject Property
14 for public use and has authorized the public to use the Subject Property. The City has additionally
15 denied any use of the Landowners' Property that would conflict with said public use resulting in a
16 complete deprivation of any economically beneficial use of the Subject Property.

17 For example, the City prevented the Landowners from constructing a fence around the
18 Subject Property, as a fence would prevent the surrounding neighbors from using the Subject
19 Property. *FFCL Re: City's Taking* at ¶ 87-95. The City passed ordinances (Bills 2018-5 and 2018-
20 24) that: 1) targeted only the Landowners' Property; 2) made it impossible to develop; and 3)
21 preserved the Landowners' Property for the surrounding neighbors' use by ensuring the
22 surrounding neighbors had ongoing access to the Landowners' Property. *FFCL Re: City's Taking*
23 *at* ¶ 103-122. The City ordinances authorized the surrounding neighbors to use the Landowners'
24 Property for recreation and open space and the City went into the community and told the

1 surrounding neighbors that the Landowners' Property was theirs to use as their own recreation and
2 open space. *FFCL Re: City's Taking at ¶ 116-122*. The City denied the Landowners access to their
3 own property because the City did not want the Landowners' access to impact the surrounding
4 neighbors use of the Landowners' Property. *FFCL Re: City's Taking at ¶ 96-103*. Uncontested
5 expert opinion established that the City's actions left the Subject Property with zero value. *FFCL*
6 *Re: City's Taking at ¶ 145-148*. Accordingly, the Landowners have been dispossessed of the
7 Subject Property by the City and the City is in possession of the Subject Property for a public use.

8 **II. CONCLUSIONS OF LAW**

9 "Inverse condemnation proceedings are the constitutional equivalent to eminent domain
10 actions and are governed by the **same rules and principles that are applied to formal**
11 **condemnation proceedings.**" County of Clark v. Alper, 100 Nev 382, 391 (1984)(emphasis
12 added).

13 NRS 37.140 provides that any "sum of money assessed" against the government in an
14 eminent domain or inverse condemnation action must be paid within 30 days of the final judgment
15 – "The [government] must, within 30 days after final judgment, pay the sum of money assessed."
16 NRS 37.140. This statute uses the mandatory "must" language and provides no exceptions.

17 NRS 37.170 mandates that, as a precondition to an appeal in an eminent domain or inverse
18 condemnation case, the government must pay the award. NRS 37.170. The Nevada Supreme
19 Court addressed the applicability of NRS 37.170 in the case of State v. Second Judicial District
20 Court, 75 Nev. 200 (1959). In that case, the State of Nevada made the *same arguments the City*
21 *made here* – that it does not need to pay an award as a condition to appeal. The district court in
22 Second Judicial District Court denied the State's request and ordered payment of the award. *Id.*,
23 at 202. The State appealed. The Nevada Supreme Court affirmed, rejecting the State's arguments.
24 Accordingly, as held in Second Judicial District Court "the deposit provided by NRS 37.170 is a

1 condition to the condemnor’s right to maintain an appeal while remaining in possession.” Id., at
2 205.

3 After considering the mandatory language under NRS 37.140, which grants a landowner a
4 substantive right whereby the government must, within 30 days after final judgment, pay the sum
5 of money assessed in an eminent domain or inverse condemnation case, as well as the mandate
6 under NRS 37.170 which preconditions any appeal on payment of the sum of money assessed
7 (addressed in Second Judicial District Court), the Court is compelled to deny the City’s Motion for
8 Immediate Stay of Judgment in this matter. The Court’s decision is based on a determination that
9 the more specific eminent domain statutes, such as NRS 37.140 and 37.170, which grant the
10 Landowners substantive rights, take precedence in this special proceeding over the general rules of
11 procedure relied upon by the City. *See Doe Dancer I v. La Fuente, Inc.*, 137 Nev. Adv. Op. 3, 431
12 P.3d 860, 871 (2021) (recognizing the “general/specific canon” that when two statutes conflict, “the
13 more specific statute will take precedence, and is construed as an exception to the more general
14 statute.” Id., at 871.); City of Sparks v. Reno Newspapers, Inc., 133 Nev. 398, 400, 401 (2017) (“it
15 is an accepted rule of statutory construction that a provision which specifically applies to a given
16 situation will take precedence over one that applies only generally.” Id., at 400-401). Additionally,
17 with the 30-day delay in payment under NRS 37.140, the City will have sufficient time to seek a
18 stay, if appropriate, from the Nevada Supreme Court.

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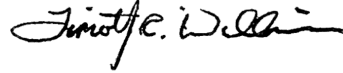
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1 **III. ORDER**

2 **IT IS HEREBY ORDERED THAT** the City's Motion for Immediate Stay of Judgment
3 shall be **DENIED**. Additionally, the Landowners' Countermotion to Order the City of Las Vegas
4 to pay the just compensation assessed shall be **GRANTED**. The City is hereby ordered to pay all
5 sums assessed in this matter within 30 days of final judgment and as a condition to appeal.

6 Dated this 9th day of February, 2022

7 

8 **58B 72C B710 CB01**
Timothy C. Williams
District Court Judge

MH

9
10 Respectfully Submitted By:

Content Reviewed and Approved By:

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

MCDONALD CARANO LLP

12 /s/ Autumn L. Waters

declined to sign

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14 James J. Leavitt, Esq. (NV Bar No. 6032)
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1 CSERV

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA

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5
6 180 Land Company LLC,
7 Petitioner(s)

CASE NO: A-17-758528-J

DEPT. NO. Department 16

8 vs.

9 Las Vegas City of,
10 Respondent(s)

11 **AUTOMATED CERTIFICATE OF SERVICE**

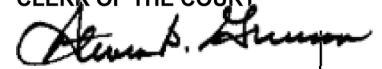
12
13 This automated certificate of service was generated by the Eighth Judicial District
14 Court. The foregoing Findings of Fact, Conclusions of Law and Order was served via the
15 court's electronic eFile system to all recipients registered for e-Service on the above entitled
16 case as listed below:

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TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

180 LAND COMPANY, LCC,)	
)	
Plaintiff,)	CASE NO. A-17-758528-J
)	
vs.)	DEPT. NO. XVI
)	
LAS VEGAS, CITY OF,)	
)	
Defendant.)	Transcript of
)	Proceedings

BEFORE THE HONORABLE TIMOTHY C. WILLIAMS, DISTRICT COURT JUDGE

FRIDAY, FEBRUARY 11, 2022

**CITY OF LAS VEGAS' MOTION TO AMEND JUDGMENT
(Rules 59(e) and 60(b) AND STAY OF EXECUTION)**

APPEARANCES: (Via BlueJeans Videoconference)

FOR 180 LAND COMPANY, LLC:	JAMES J. LEAVITT, ESQ.
	ELIZABETH M. GHANEM, ESQ.

FOR CITY OF LAS VEGAS:	ANDREW W. SCHWARTZ, ESQ.
(Appearing in person)	GEORGE F. OGILVIE, III, ESQ.

RECORDED BY: MARIA GARABAY, COURT RECORDER
TRANSCRIPTION BY: LGM TRANSCRIPTION SERVICE

1 LAS VEGAS, NEVADA, FRIDAY, FEBRUARY 11, 2022, 1:18 P.M.

2 * * * *

3 COURT RECORDER: We're on the record, Your Honor.

4 THE COURT: All right. And I want to say good
5 afternoon to everyone.

6 MR. OGILVIE: Good afternoon, Your Honor.

7 THE COURT: All right.

8 MR. SCHWARTZ: Good afternoon, Your Honor.

9 MR. LEAVITT: Good afternoon, Your Honor.

10 THE COURT: Okay. And let's go ahead and set forth
11 our appearances for the record.

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

14 MS. GHANEM: Good afternoon, Your Honor. Elizabeth
15 Ghanem Ham also on behalf of plaintiff landowners.

16 MR. OGILVIE: Good afternoon, Your Honor. George
17 Ogilvie.

18 MR. SCHWARTZ: Andrew Schwartz.

19 MR. OGILVIE: Go ahead, Andrew.

20 MR. SCHWARTZ: I'm sorry, George. It's Andrew
21 Schwartz representing the City, Your Honor.

22 MR. OGILVIE: George Ogilvie on behalf of the City
23 as well, Your Honor.

24 THE COURT: All right. Does that cover all
25 appearances?

1 MR. LEAVITT: That does on behalf of plaintiff,
2 Your Honor.

3 THE COURT: All right. And let's go ahead and get
4 started. Mr. Ogilvie, good afternoon to you, sir.

5 And anyway, it's my understanding we have one matter
6 on this afternoon. Is that correct?

7 THE CLERK: That's correct.

8 THE COURT: And that's the City of Las Vegas' motion
9 to amend judgment and to stay execution.

10 MR. SCHWARTZ: That's correct, Your Honor. This is
11 Andrew Schwartz. I'll be arguing for the City.

12 THE COURT: All right. And, sir, you have the floor.

13 MR. SCHWARTZ: Thank you. Your Honor, this motion
14 is simple and straightforward. In the November 24, 2021
15 judgment, the Court required the City to pay the landowners
16 \$34,135,000, but did not provide that if the City pays that
17 money to the developer that the City would take title to the
18 property in question. And whereas, of course, the City
19 objects to the judgment and objects to payment of the money
20 and has contended that the City's appeal would stay the
21 obligation to pay that money, the City is -- and we are aware
22 that the Court disagrees with that position and has ordered
23 the City to pay the money within 30 days, specifically in its
24 motion to deny the City's motion for a stay -- in its order
25 denying the City's motion for a stay filed on February 9, the

1 Court said that the City has to pay the money, the judgment in
2 30 days and as a condition of appeal. That order denying the
3 City's motion to stay also did not require that if the City
4 pays the money that title to the property would be transferred
5 to the City.

6 So what we're asking is that that order and that the
7 judgment, the November 24, 2021 judgment be amended to state
8 that if the City pays the money to the developer that the
9 City -- that title to the property would be transferred to
10 the City.

11 Now, the developer takes the position that the
12 judgment doesn't have to say that because this is an eminent
13 domain case and the eminent domain law requires that the
14 City pay the money into the court within 30 days and that the
15 Court would then order -- issue a final order of condemnation
16 transferring title. That procedure doesn't apply, so that's
17 not satisfactory to make sure that the City is transferred
18 title to the property if the City pays the money.

19 And I would like to address why that eminent domain
20 statute is not appropriate here. That statute, it's NRS
21 37.160, applies to eminent domain actions, and those are
22 actions where a public agency files an eminent domain action
23 because it needs the property for a public project. The
24 agency often takes early possession of the property while
25 the issue of valuation is being litigated. And then it's

1 appropriate when judgment is entered that the agency has to
2 pay for the property because the agency needs the property and
3 is going to take possession and title of the property, if the
4 possession isn't already obtained. So it makes sense that
5 the public agency would have to pay the money as a condition
6 of receiving title to the property.

7 That's not our case here. This is a case where
8 the Court ordered damages of 34 million plus for the City's
9 regulation of the use -- of the owner's use of the property.
10 The Court did not order any damages for the City's alleged
11 physical possession of the property. The City has never taken
12 physical possession of the property. It has not dispossessed
13 the property. There is no evidence to that effect. And even
14 if this Bill 2018-24 law that the developer claims authorized
15 the public to enter the property, even that -- well, it
16 didn't apply and we established that it didn't apply. The
17 Court disagrees with that. But even if it did apply, that
18 legislation was repealed in January of 2020.

19 So to have -- so this case is not at all equivalent
20 to an eminent domain case where the government has taken or
21 will take physical possession of the property because it needs
22 the property. This is a case where the Court awarded damages
23 for the City's regulation of the owner's use. And there are
24 only three cases in Nevada where that claim has been made, a
25 taking for excessive regulation of the owner's use. That's

1 the State case and the Kelly case and the Boulder City case.
2 In all three of those cases the court found that the action of
3 the agency did not affect a taking. So the court never faced
4 the issue of what you do if the court awards a judgment or a
5 regulatory taking of the property or regulation of the owner's
6 use. That's a case where the owner still has possession and
7 title of the property but the claim is that the regulation of
8 the owner's use has effectively taken the property. So in
9 that case the agency doesn't want the property, doesn't need
10 it for a public project.

11 And so therefore, as we have argued, and I admit
12 the Court rejected it, we think erroneously that the Court
13 rejected the fact that this is a regulatory taking case where
14 the City doesn't want or need the property. And so if the
15 City pays the money to the developer and takes title and
16 possession of the property and the judgment is reversed on
17 appeal, it's going to be extremely difficult to unwind that
18 transaction, to retrieve that money. And the City in the
19 meantime can't do anything with the property because it may
20 have to give the property back.

21 So we don't think that it's at all appropriate in
22 this case for the City to have to pay the money within 30 days
23 and then apply the eminent domain procedure that transfers
24 title to the City. We recognize that the Court has heard this
25 argument and rejected it, but I did want to make a record here

1 that this is not a case where the Court has awarded damages
2 for a permanent, physical occupation of the property. This is
3 not a case where the City had dispossessed the property owner.
4 In the case of Tahoe-Sierra v. Tahoe Regional Planning Agency
5 in the U.S. Supreme Court, that's at 535 U.S. 302, it's a
6 2002 case, in that case the court said that there's this
7 long-standing distinction between acquisitions of property
8 for public use on the one hand and regulations prohibiting
9 private use.

10 So it drew a sharp distinction between these
11 physical takings cases where the government takes physical
12 possession or the public takes permanent physical possession.
13 It says that -- and that holding is echoed in the McCarran
14 International Airport v. Sisolak case from the State of
15 Nevada. And that's at 122 Nev. 645, a 2006 case, at pages
16 662 and 663. The court there said that categorical rules --
17 categorical means the same things as per se -- these rules
18 apply either when the owner has to suffer a permanent physical
19 invasion of her property. I'm quoting there, "a permanent
20 physical invasion" or deprives the owner of beneficial use
21 of the property.

22 So the first case is the physical taking case where
23 either the government physically takes possession of the
24 property or authorizes someone to physically occupy the
25 property. The court in Sisolak said, "In determining whether

1 a property owner has suffered a per se taking by physical
2 invasion, a court has to determine whether the regulation has
3 granted the government physical possession of the property or
4 whether it merely forbids certain private uses of the space.
5 If the regulation forces the property owner to acquiesce to
6 a permanent physical invasion, compensation is automatically
7 warranted since this constitutes a per se taking. This element
8 of required acquiescence is at the heart of the concept of
9 occupation."

10 The second type of per se taking, complete
11 deprivation of value, is not at issue in this case. So the
12 courts there are distinguishing between the present case, this
13 Badlands case where the Court found that the City's limitation
14 of the owner's use was a taking. There's no evidence and the
15 Court cited to no evidence that the City has physically
16 occupied the property or that the City's ordinance, 2018-24,
17 has authorized the public to permanently occupy the property.

18 Now, at best -- and again, that ordinance doesn't
19 apply in this case, but even if it did it could only be found
20 to have authorized public occupation for the 15 months that
21 that ordinance was in effect. Now, we contend that, of
22 course, that didn't happen. It didn't apply. The public
23 didn't occupy the property as a result of the ordinance. But
24 even if it did, it doesn't qualify as a permanent physical
25 invasion. So therefore these procedures for payment of the

1 judgment into court in exchange for the public taking the
2 property for a public project don't apply.

3 What we're asking for, and we're not -- we're not
4 expecting the Court to change its decision that it's going to
5 apply the eminent domain laws. We want to make a record that
6 they don't apply. All we want -- we're asking for is that
7 that judgement from November 24 stay; that if the City pays
8 the money into court that title has to transfer because the
9 way the judgment reads now the City has to pay the money into
10 court but the Court doesn't say in exchange you get title
11 to the property. So, of course we'll let the Nevada Supreme
12 Court decide whether the City has to pay the money now or
13 later, but regardless of the outcome of the appeal, if the
14 City pays that money to the developer, it should at least
15 get title to the property.

16 So that's the limited relief we're asking for is
17 that the Court amend the judgment to state that if the City
18 pays the money then title will be transferred to the City.

19 Thank you.

20 THE COURT: Thank you, sir.

21 Mr. Leavitt, sir.

22 MR. LEAVITT: Yes. Good afternoon, Your Honor.
23 Hearing Mr. Schwartz' argument today, we don't have a
24 disagreement over what the impact is when the government
25 pays the money. We have a disagreement over the procedure.

1 And so counsel is arguing for a procedure that is
2 nowhere in Nevada law. It's not in any of the statutes nor
3 any of the case law. They've cited no support for their
4 procedure. What the City wants is they want to pay the funds
5 and then get a quit claim deed. That's not the procedure in
6 Nevada. Nevada has a very, very specific procedure for what
7 occurs when the government pays the funds in an eminent domain
8 case and an inverse condemnation case, and it's set forth in
9 37.260 -- or, I'm sorry, 37.160.

10 And that procedure is very clear. It says after
11 the government pays the money a final order of condemnation
12 is prepared and it states -- it first describes the property.
13 And we've done hundreds of these final orders of condemnation.
14 They describe the property, number one. That's easily done.
15 Number two, they describe the purpose of such condemnation,
16 and the purpose of such condemnation is very well set forth
17 in the findings of fact and conclusions of law on the take
18 issue. We will simply quote those verbatim in the final order
19 of condemnation. And then title to the property described
20 therein will vest in plaintiffs for the purposes stated
21 therein.

22 Now, that's the final order of condemnation statute,
23 37.160. That was adopted in 1965. There has been two
24 limitations subsequent to that statute that were adopted in
25 2005 and another one in 2008. First, in 2005 the Nevada State

1 Legislature decided to adopt -- right here, they decided to
2 pass 37.270. And what 37.270 states is that notwithstanding
3 any other provision of law. In other words, notwithstanding
4 NRS 37.160, that if the government tries to sell that property
5 it will automatically revert back to the original owner of
6 the property for the price that was paid. That's the statute.

7 The Constitution was amended in 2008 to specifically
8 reference a final order of condemnation. In Article 1,
9 Section 22, subsection 6, it specifically references final
10 orders of condemnation and says that if property is not used
11 within five years for the purpose for which it was taken, then
12 the property will automatically revert back to the property
13 owner by repaying the original purchase price. And then they
14 say the five years begins to run from the date of entry of
15 the final order of condemnation.

16 So the process here is the same that should be
17 followed in every eminent domain case in the state of Nevada.
18 Every inverse condemnation case that's ever been done in
19 the state of Nevada is there will be a final order of
20 condemnation, it will describe the property, describe the
21 purpose for the taking. It will say title will vest once the
22 City pays the property, and then there must be a provision
23 that complies with 37.270 and the Constitution that states
24 that if the government tries to sell that property to a
25 private individual other than the landowner, the landowner

1 will have the -- the original landowner -- the original
2 landowner will have the opportunity to repurchase that
3 property for the price that was paid originally by the
4 government.

5 That's the only thing we're asking for here is
6 that the statutes be followed and that the Constitution be
7 followed. Counsel made a whole bunch of arguments about what
8 happened in this case about the taking. He said this isn't
9 a per se categorical taking where the government has denied
10 all economic viable use of the property. Judge, there's a
11 finding. The first finding in the conclusion of law section
12 of the findings of fact and conclusions of law states that
13 there's been a per se categorical taking, which means a denial
14 -- and then it goes on to state there's been a denial of all
15 economic viable use of the property.

16 The next finding in the conclusions of law is that
17 there's been a per se regulatory taking of the property. And
18 a per se regulatory taking of the property is based upon the
19 physical use of the property. As you'll recall, Councilman
20 Seroke announced to the public that the landowner's property
21 was a park and it was for a park for their recreation. The
22 City then passed a bill stating that the landowners couldn't
23 use their property and that they had to allow ongoing public
24 access to their property. In other words, it was taken for a
25 park. And then the next finding in the findings of fact and

1 conclusions of law, I believe it's Number 117, is that the
2 landowners produced unequivocal evidence that the public was
3 actually using the property.

4 So, yes, this is a physical appropriation. This
5 is a per se taking. And those findings have already been
6 made, have already been set forth in the findings of fact and
7 conclusions of law and we're well past that. The sole reason
8 we're here for today is to decide how does title pass once
9 the government pays the money. And as I stated previously,
10 Your Honor, title should pass according to the statutes
11 pursuant to a final order of condemnation.

12 And I'll say just one last thing. It appears that
13 the government doesn't want that reversionary language in
14 there in the final order of condemnation. It appears that
15 the government is saying once we, the government, pay for
16 this property, we ought to be able to do whatever we want
17 with it. That's not the way the eminent domain statutes read;
18 number one.

19 Number two, it further shows what the predatory
20 actions of the government were here. As you'll recall, Your
21 Honor, from the very beginning, at the very beginning of this
22 case, the very first fact is that the surrounding property
23 owners contacted the landowners and told them that they had
24 to give the property to the surrounding property owners; that
25 the landowners had to give their property to the surrounding

1 property owners. That's what started this whole lawsuit. And
2 then there's evidence that those surrounding property owners
3 went to the City of Las Vegas officials and had them prohibit
4 the landowner from using their property in an attempt to
5 preserve this property -- well, not an attempt -- to preserve
6 this property for the surrounding property owners.

7 So our concern here, Your Honor, is that that
8 predatory action is continuing. In other words, the City
9 is trying to get title without the constitutional and the
10 statutory restrictions, which state that you don't get to --
11 once the government takes property by inverse condemnation,
12 it doesn't just get to willy-nilly do with it what it wants.
13 It has a purpose for which it was taken and that it cannot
14 retransfer that property to a private entity or a private
15 person without first offering it to the original owner from
16 whom it was taken for the original price. The Constitution
17 is clear. The statutes are clear, Your Honor.

18 So, again, we don't oppose that title will pass to
19 the City once the money is paid, but we have to follow the
20 statutes, which are 37.160 and 37.270, Your Honor. And that's
21 all I have, Your Honor, unless you have a question for me.

22 THE COURT: I don't.

23 All right. And we'll hear from the reply.

24 MR. SCHWARTZ: Your Honor, this is not an eminent
25 domain case. This is a case of first impression. This is an

1 inverse condemnation case of first impression. There are
2 only three cases where the Nevada Supreme Court has analyzed
3 a claim that regulation of the use -- the owner's use of
4 property is a taking. That's what this Court found, that the
5 City's regulation of the owner's use, a limitation of the
6 owner's use is a taking.

7 And the appraisal that was offered in evidence by
8 the developer is based on a determination that -- or the
9 judgment in this case is based on a determination that the
10 appraiser's conclusion that the City's regulation of the
11 use of the property, the private property of all value, the
12 owner's use, that's the basis of the judgment. That's the
13 basis of the \$34 million payment, not any physical invasion,
14 because there wasn't a physical invasion. But even if there
15 was, there wasn't any damages. There was no evidence of
16 damage and the Court didn't assess any damage.

17 So there are three cases in Nevada where this claim
18 was analyzed, and in those cases the court found no taking.
19 We think those cases should have been controlling in this case
20 and there shouldn't have been a finding of a taking. But the
21 Court has found a taking for an excessive regulation of the
22 owner's use. There is no case, there's no authority as to
23 how you handle the payment in that case, the payment of the
24 judgment, because all the cases are either eminent domain
25 cases or inverse condemnation cases where the government took

1 physical possession of the property and didn't file an eminent
2 domain case. They're all cases in which the government wanted
3 the property, it was an involuntary sale of the property by
4 the property owner, so the government could take the property
5 for a public project. There is no public project here; not
6 public project. The City doesn't want the property. It has
7 no use for the property.

8 THE COURT: I mean, well, it occurs to me -- it
9 could be argued, based upon the facts, that the public project
10 was open spaces and a park for the adjoining property owners.
11 And I think that's the problem we have here. But go ahead.

12 MR. SCHWARTZ: No. That's a regulation of the
13 owner's use. The claim here is that by regulating --
14 restricting the owner's use to what is allowed in the PROS
15 designation, Parks, Recreation and Open Space, the claim is
16 that that is a physical taking. And I just quoted from the
17 Sisolak case, from the Sierra-Tahoe case, that is not a
18 physical taking. That is not a per se physical taking.
19 A regulation of use is different from a physical occupation.
20 There has to be a physical occupation by the government. So
21 by requiring that the owner continue using that property for
22 PROS, it's not a physical taking. Eminent domain only applies
23 in physical takings where the agency is taking the property
24 for a public project. So those cases don't apply.

25 I don't think the Court needs to decide this issue,

1 however, if it says in the judgment that if the City pays
2 the money that the title will be transferred to the City.
3 That's all we're asking for here. I think this is water
4 under the bridge. You know, we disagree with the Court about
5 the difference between a physical and a regulatory taking.
6 We don't think there's any law on this.

7 You can't apply the eminent -- a good example is
8 what counsel is saying about the right to repurchase the
9 property. What's the purpose of that policy in state eminent
10 domain law? Well, it's where a property owner's property is
11 involuntarily taken from them, physically taken from them for
12 a public project. If the government doesn't use the property
13 for the public project and the property owner wants the
14 property back, they didn't want to give it to the government
15 in the first place, that's not our case. So that doctrine
16 makes no sense. The City doesn't want the property. It's
17 not an involuntary sale to the City.

18 THE COURT: But, really, isn't that more of --

19 MR. SCHWARTZ: It's an involuntary purchase.

20 THE COURT: Isn't that more of an argument versus
21 the conduct of the City Council in this case? Right? They
22 made statements regarding the use of the property for the
23 public.

24 MR. SCHWARTZ: Well, okay.

25 THE COURT: I mean, didn't -- but I mean --

1 MR. SCHWARTZ: So you're talking about the alleged
2 statement of one council member.

3 THE COURT: I mean, it's a City Council member.
4 I mean --

5 MR. SCHWARTZ: That can't bind -- even if that
6 statement was made, that doesn't bind the City. The defendant
7 here is the City. The City acts through the City Council, a
8 majority vote of the City Council. An individual City Council
9 member can't bind the City to something like this. There's
10 no -- there's absolutely no authority and that wouldn't make
11 any sense. City Council members make statements in their
12 individual --

13 THE COURT: Well, it does make sense in this regard
14 because the entire City Council, their actions ultimately
15 were no different than that one City Councilman. Right?

16 MR. SCHWARTZ: Oh, there's no evidence of that.
17 There's absolutely no evidence of that.

18 THE COURT: Well, but I mean, there is evidence of
19 it because of their actions. Ultimately, what did the City
20 Council do in this case?

21 MR. SCHWARTZ: The City Council denied applications,
22 one application to build housing on the 35-acre property.

23 THE COURT: And I have a question for you. What do
24 I do with this language --

25 MR. SCHWARTZ: That's all it did.

1 THE COURT: Wait. I have a question for you. This
2 is straight out of the Alper case. And please understand
3 this. I do understand what my limitations are and I do
4 understand and respect some of your arguments. But the bottom
5 line is this. What do I do when the Nevada Supreme Court in
6 the Alper case back in 1984 -- that's a long time ago -- said
7 the following. This is their quote: "Inverse condemnation
8 proceedings are the constitutional equivalent to an eminent
9 domain action and are governed by the same rules and
10 principles that are applied to formal condemnation
11 proceedings."

12 Now, and the reason why I think that's important
13 to point out, I'm not going to say I don't necessarily respect
14 and understand some of the arguments the City has made, but
15 the Nevada Supreme Court has ruled and set forth in the Alper
16 decision that it is a constitutional equivalency, right there,
17 to eminent domain actions and are governed -- and they went
18 further. When you really think about it, they went further
19 and they said the following, "and are governed by the same
20 rules and principles that are applied to a formal condemnation
21 proceeding." Okay. What does that mean? Well, that tells me
22 that I'm going to follow the rules as set forth in Chapter 37.
23 They haven't made a distinction for me to follow.

24 MR. SCHWARTZ: Well, Your Honor, can I address that?
25 Can I address that, Your Honor?

1 THE COURT: I mean, my point is, they haven't made
2 a distinction for me to follow.

3 MR. SCHWARTZ: I don't think that's correct. Can
4 I address that, Your Honor?

5 THE COURT: That's why I'm -- and the reason I'm
6 asking that question, and of course I'm going to give Mr.
7 Leavitt an opportunity to comment on it, too, but all my
8 decisions in many respects come back to Alper. That's a
9 statement by our Nevada Supreme Court. I just can't ignore
10 it and do what I want to do.

11 But, go ahead, sir. Go ahead and comment.

12 MR. SCHWARTZ: The Alper statement needs to be put
13 in context. Alper was a physical takings case. It was really
14 an eminent domain case. It was an inverse case in that the
15 City took physical possession of the property for a public
16 project. It filed one of these certificates instead of filing
17 an eminent domain action. And the property owner had to bring
18 an inverse condemnation action for the physical taking of its
19 property to force the government agency to essentially bring
20 an eminent domain action, which it did.

21 So, there, the government needed the property for
22 a public project and the issue in Alper was -- so it was
23 equivalent to an eminent domain case. The government there --
24 what was at issue was not whether the government had a right
25 to take the property or whether the government was liable for

1 a taking. The parties stipulated. The government physically
2 took my property; of course the government is liable. This
3 is like an eminent domain case.

4 And the court there said, yeah, eminent domain is
5 equivalent to inverse but in terms of value. That statement
6 of the court, Your Honor, needs to be put in context. It
7 would make no sense -- it makes no sense in the context of
8 an inverse condemnation case where what's at issue is the
9 regulation of the owner's use of the property. That's a
10 completely different type of case. And logically an eminent
11 domain -- the rules for eminent domain cannot apply to the
12 question of liability in a case like that.

13 This is a case like State, Kelly and Boulder City.
14 Government regulates the owner's use of the property
15 excessively, such that it is deemed the equivalent -- the
16 equivalent of a physical taking, but it's a completely
17 different concept.

18 So the rules for eminent domain where the owner --
19 where the agency concedes liability for the taking, we're
20 taking the property, we need it for a public project and we're
21 going to pay for it, the only issue is how much you pay. So
22 those rules that apply in eminent domain couldn't possibly
23 apply in a case like this where what's at issue is a liability
24 for a regulatory taking, a liability for a regulatory taking
25 because liability is not at issue in those eminent domain

1 cases. And conceptually they're completely different. It's
2 a physical taking of the property. You take possession and
3 title for a public project. In a regulatory taking case like
4 the case here, liability is -- depends on how much has the
5 government limited the owner's use of the property. So you
6 can't just willy-nilly apply rules for eminent domain to a
7 regulatory taking case.

8 Now, yes, this issue goes to -- the issue before
9 the Court is whether -- you know, how should the judgment be
10 paid, what's the timing of the judgment and how should title
11 transfer if the judgment is paid? Well, it makes no sense to
12 apply the eminent domain rules here because the City doesn't
13 want the property. And if the City pays the developer
14 \$34 million plus for this property and then the City takes
15 title to the property, it can't do anything with the property
16 because if the City wins on appeal it's going to have to give
17 the property back. That's going to be difficult enough, but
18 a greater problem, as we pointed out to the Court, is the
19 money is going to be gone. The City is not going to be able
20 to recover that money.

21 Now, in an eminent domain case that's not a problem
22 because the City wants the property. It needs the property.
23 It needs it for a public project. So, yes, it's going to have
24 to pay some money. In this case it's an involuntary -- it's
25 not an involuntary sale of the property, and so the City is

1 going to be in deep trouble if it wins on appeal and it has
2 already paid that money.

3 So that's what we argued. You know, I think the
4 Court -- we think that the developer is leading the Court
5 into error here, but the Court has decided that in spite of
6 the City's arguments that the City is going to have to pay
7 the money now. So I'm not expecting the Court to reverse
8 that, even though I think we're dead right. But I do think
9 the Court should at least recite in the judgment that if the
10 City is going to be compelled to pay this money that at least
11 the City is going to receive title to the property.

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

13 Mr. Leavitt, any comments you wanted to make, sir,
14 on the questions I raised?

15 MR. LEAVITT: Yeah, I'll briefly address the first
16 question which does -- counsel addressed the issue of whether
17 eminent domain and inverse condemnation law are the same
18 and whether -- I'm sorry, the constitutional equivalent,
19 whether the same rules and principles apply and he tried to
20 distinguish Alper. Very briefly, Your Honor, Alper was an
21 inverse condemnation case where the Court held that same
22 ruling that you just quoted.

23 We also cited to you Argier v. Nevada Power Company,
24 which was a direct condemnation action. And in that case we
25 cited to inverse condemnation law in a direct condemnation

1 action. And the Nevada Supreme Court held that was proper,
2 quoted Alper and said inverse condemnation law also applies
3 in direct condemnation cases.

4 We also cited to 5th & Centennial v. City of North
5 Las Vegas, which is now a pre-condemnation damage case. And
6 in that case again the Nevada Supreme Court held that an
7 inverse condemnation case and a direct condemnation case
8 are the constitutional equivalent of one another and a pre-
9 condemnation damage case is a type of inverse condemnation
10 case, and therefore they're the constitutional equivalent
11 and the same rules apply.

12 So no matter whether we're in an inverse case, a
13 direct case or a pre-condemnation damages case, the Nevada
14 Supreme Court reverts to that rule that they're all the
15 constitutional equivalent and the same rules and principles
16 apply. And why do they do that? Because once you get past
17 liability, whatever case you're in the rules are the same
18 from then on. That's why the court has done that.

19 And the Nevada Supreme Court never once has said
20 here's our body of law for inverse condemnation cases and
21 here's our body of law for direct condemnation cases. That
22 would be totally unworkable. The court would have to somehow
23 split hairs and say, well, this is the law for inverse, this
24 is the law for direct. The Court said that it's not going to
25 do that and in Nevada it has elected not to do that.

1 Now, one other thing I'll just reference very
2 briefly, Your Honor, is that counsel said that, well, if this
3 was a physical taking case then the eminent domain rules would
4 apply. This Court found -- I'll very briefly summarize this.
5 This Court found in its findings of fact and conclusions of
6 law and you alluded to it. Number one, the councilman stated
7 to the surrounding property owners, this is your open space,
8 this is your park. It didn't end there. Then the entire City
9 Council adopted a bill that targeted only this landowner's
10 property, made it impossible to build on the property, and
11 then said this property is for the surrounding property owners
12 to use, and forced the landowner as part of that bill to allow
13 ongoing public access to the property.

14 The next fact is, and I'll quote this one in the
15 findings of fact and conclusions of law. "The landowners
16 presented uncontested evidence that the neighbors are using
17 the 250-acre property. Don Richards, the superintendent,
18 submitted a declaration that those entering onto the property
19 advised him that it was our open space. And they learned
20 that it was their open space from the City, not only from the
21 councilman but from the City Council adopting a bill saying
22 it was their open space.

23 Your Honor, that's no different than condemning a
24 parcel of property in a direct condemnation action, putting a
25 sign on it and saying this is the park. I'll use Jaycee Park,

1 that's where I grew up in downtown, this is Jaycee Park and
2 the public enters onto the park. That's the same exact thing
3 that happened here.

4 Therefore, even under counsel's argument that if
5 this is a physical take then eminent domain law would apply,
6 we have a physical take and therefore even under his argument
7 eminent domain should apply.

8 So, Your Honor, we could just do an order here out
9 of this hearing which states that once the money is paid a
10 final order of condemnation will be issued pursuant to NRS
11 37.170 and 37.270. Both of those provisions have to be in
12 that order so that the final order of condemnation applies and
13 the reversionary rights apply. And, I'm sorry, Your Honor,
14 one other thing would be in there, which is the constitutional
15 provisions which are subsection 1 and subsection 6 of Article
16 1, Section 22.

17 Thank you, Your Honor.

18 THE COURT: Thank you, sir.

19 And, Mr. Schwartz, you get the last word, sir.

20 MR. SCHWARTZ: Thank you, Your Honor. None of the
21 cases that the developer has cited, either in this hearing
22 or in their papers, involved anything other than either an
23 eminent domain action or an inverse condemnation action that
24 was in effect an eminent domain action where the public agency
25 took physical possession of the property for a public project.

1 Throughout this litigation the developer has
2 conflated physical and regulatory taking. Eminent domain
3 involves a physical taking. A regulatory taking involves a
4 regulation of the owner's use. It doesn't involve a physical
5 taking. So all of the cases simply that the developer cited
6 don't apply and they don't apply as a matter of logic. Here,
7 as we said, there is no precedent for applying the eminent
8 domain procedure to a case where regulation of the owner's
9 use is at issue.

10 Now, we have already litigated this issue of
11 physical taking. We think that the Court's judgment -- we
12 think there's no evidence of a physical taking, of a permanent
13 physical taking. The legislation did not say what counsel
14 said it says. It didn't apply to this property. There's no
15 action of the City Council that authorized the physical --
16 the public physically occupy the property and the City hasn't
17 dispossessed the property owner.

18 We're not expecting the Court to change the Court's
19 mind on that. But we think that the judgment should not
20 recite that the eminent domain law procedure applies. We
21 think that the Court should just merely say if the City pays
22 the judgment that title shall be transferred to the City, and
23 not specify a procedure because we think it's error to apply
24 the eminent domain procedures here because that implies that
25 the City has to pay the money, has to pay the judgment within

1 30 days, which is completely appropriate in an eminent domain
2 case where the government wants the property and is not going
3 to give it back, but it's completely inappropriate in this
4 case where the government does not want the property and an
5 appeal could require unwinding the whole transaction.

6 An appeal in an eminent domain case doesn't unwind
7 the transaction. The government is going to keep the property.
8 Maybe the government will have to pay more or less, but the
9 government keeps the property. That's not our case. If we
10 win on appeal, the City wins on appeal, it's going to be a
11 nightmare to try to unravel this transaction. And that's why
12 we think the judgment should just say merely that if the City
13 pays the judgment that title shall be transferred to the City.

14 Thank you.

15 THE COURT: All right. Thank you, sir.

16 This is what I'm going to do. And I think it's
17 important, once again, and I don't mind saying this. As far
18 as a lot of my decisions in this case, they were based upon
19 the holding and the comments of our Nevada Supreme Court in
20 the Alper case. And it's important to point this out because
21 I think it goes a little bit further than the City feels
22 because first it says "inverse condemnation proceedings are
23 the constitutional equivalent to eminent domain actions."

24 And here's my point. They didn't stop there; right?
25 If they stopped there, maybe we would have some potentially

1 arguments for gray areas as to what that means. But then they
2 go further and they say, "and are governed by the same rules
3 and principles that are applied to a formal condemnation
4 proceeding." Period, close quote. It's right there.

5 And so based upon that case, and that's a 1984 case,
6 it's been around for a long time, and a lot of the other cases
7 that have been cited, our Nevada Supreme Court has had an
8 opportunity, if they wanted to draw distinctions they could
9 do that, but they never did.

10 And so here's my point. As far as the motion to
11 amend the judgment pursuant to Rule 59(e) and 60(b), I'm going
12 to deny it. Just as important, too, I'm going to follow the
13 statutory mandate as it pertains to payment and the like under
14 NRS 37.160 and 37.270 and the Nevada Constitution. That's
15 what I'm going to do.

16 All right. And so, anyway --

17 MR. SCHWARTZ: Thank you, Your Honor.

18 THE COURT: -- Mr. Leavitt, will you prepare an
19 order and circulate it?

20 MR. LEAVITT: Yes, Your Honor. I'll prepare an
21 order and run it by Mr. Ogilvie.

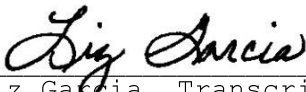
22 THE COURT: Okay. All right. And I think that's
23 it; right? We don't have anything further scheduled?

24 THE CLERK: That's it.

25 THE COURT: All right. Everyone enjoy your day.

1 MR. OGILVIE: Have a good weekend, Your Honor.
2 THE COURT: You have a good one, too, sir.
3 MR. LEAVITT: Thank you, Your Honor. Have a good
4 weekend.
5 MS. GHANEM HAM: Thank you.
6 (PROCEEDINGS CONCLUDED AT 2:03 P.M.)
7 * * * *

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



Liz Garcia, Transcriber
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