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. 97

LAW OFFICES OF KERMITT L. WATERS
Kermitt L. Waters, Esq.
Nevada Bar No. 2571
kermitt@kermittwaters.com
James J. Leavitt, Esq.
Nevada Bar No. 6032
jim@kermittwaters.com
Michael A. Schneider, Esq.
Nevada Bar No. 8887
michael@kermittwaters.com
Autumn L. Waters, Esq.
Nevada Bar No. 8917
autumn@kermittwaters.com
704 South Ninth Street
Las Vegas, Nevada 89101
Telephone: (702) 733-8877

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

LAS VEGAS CITY ATTORNEY'S OFFICE
Bryan K. Scott, Esq.
Nevada Bar No. 4381
bscott@lasvegasnevada.gov
Philip R. Byrnes, Esq.
pbyrnes@lasvegasnevada.gov
Nevada Bar No. 166
Rebecca Wolfson, Esq.
rwolfson@lasvegasnevada.gov
Nevada Bar No. 14132
495 S. Main Street, 6th Floor
Las Vegas, Nevada 89101
Telephone: (702) 229-6629

Attorneys for City of Las Vegas

CLAGGETT & SYKES LAW FIRM
Micah S. Echols, Esq.
Nevada Bar No. 8437
micah@claggettlaw.com
4101 Meadows Lane, Suite 100
Las Vegas, Nevada 89107
(702) 655-2346 – Telephone

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

McDONALD CARANO LLP
George F. Ogilvie III, Esq.
Nevada Bar No. 3552
gogilvie@mcdonaldcarano.com
Amanda C. Yen, Esq.
ayen@mcdonaldcarano.com
Nevada Bar No. 9726
Christopher Molina, Esq.
cmolina@mcdonaldcarano.com
Nevada Bar No. 14092
2300 W. Sahara Ave., Ste. 1200
Las Vegas, Nevada 89102
Telephone: (702)873-4100

LEONARD LAW, PC
Debbie Leonard, Esq.
debbie@leonardlawpc.com
Nevada Bar No. 8260
955 S. Virginia Street Ste. 220
Reno, Nevada 89502
Telephone: (775) 964.4656

SHUTE, MIHALY & WEINBERGER, LLP
Andrew W. Schwartz, Esq.
schwartz@smwlaw.com
California Bar No. 87699
(admitted pro hac vice)
Lauren M. Tarpey, Esq.
ltarpey@smwlaw.com
California Bar No. 321775
(admitted pro hac vice)
396 Hayes Street
San Francisco, California 94102
Telephone: (415) 552-7272

Attorneys for City of Las Vegas

IN THE DISTRICT COURT

CLARK COUNTY, NEVADA

---o0o---

180 LAND COMPANY,	)	
	)	
Plaintiff,	)	Case Number
	)	A-17-758528-J
	)	
vs.	)	
	)	
CITY OF LAS VEGAS,	)	
	)	
Defendant.	)	
	)	

Reporter's Transcript of Telephonic Proceedings

Monday, September 27, 2021

BEFORE THE HONORABLE JUDGE TIMOTHY C. WILLIAMS

DISTRICT COURT JUDGE

Reported By: Rhonda Aquilina, Nevada Certified #979, RMR, CRR
Court Reporter

APPEARANCES:

(PURSUANT TO ADMINISTRATIVE ORDER 20-24, SOME MATTERS IN DEPARTMENT 16 ARE BEING HEARD VIA TELEPHONIC APPEARANCE)

For Plaintiffs:

LAW OFFICES OF KERMITT L. WATERS
704 South Ninth Street
Las Vegas, NV 89101
BY: JAMES J. LEAVITT
AUTUMN L. WATERS
ATTORNEYS AT LAW

For Defendants:

LAS VEGAS CITY ATTORNEYS' OFFICE
495 South Main Street, 6th Floor
Las Vegas, NV 89101
BY: BRYAN K. SCOTT
PHILIP R. BYRNES
REBECCA WOLFSON
DEPUTY CITY ATTORNEYS

McDonald Carano, LLP
2300 W. Sahara Ave., Ste. 1200
Las Vegas, NV 89102
BY: CHRISTOPHER MOLINA
ATTORNEY AT LAW

SHUTE, MIHALY & WEINBERGER, LLP
396 Hayes Street
San Francisco, CA 94102
BY: ANDREW W. SCHWARTZ
ATTORNEY AT LAW

Monday, September 27, 2021 **9:28 a.m.**

P R O C E E D I N G S

---o0o---

THE COURT: All right. Good morning to everyone.

ALL COUNSEL: Good morning.

THE COURT: I apologize for the brief delay. I had another matter I had to handle with another case, but I got to that done.

All right. And madam court reporter, are you ready to go?

THE COURT REPORTER: Yes, Judge. Thank you.

THE COURT: All right. Let's go ahead and set forth our appearances for the record.

MR. LEAVITT: Good morning, Your Honor. James J. Leavitt on behalf of the Plaintiff 180 Land landowners.

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

MS. GHANEM: Good morning, Your Honor. Elizabeth Ghanem.

MR. WATERS: Kermitt Waters on behalf of 180 Land.

MR. LEAVITT: And also our legal assistant Jennifer is with us to assist with the presentation, Your Honor.

THE COURT: Okay.

MR. MOLINA: Good morning, Your Honor. Chris Molina on behalf of the city.

MR. BYRNES: Phil Byrnes on behalf of the city.

MS. WOLFSON: And good morning, Your Honor. Rebecca Wolfson on behalf of the city.

THE COURT: All right. And once again good morning to everyone.

And it's my recollection this will be a continuation of our argument from last week; is that correct?

MR. LEAVITT: Correct, Your Honor.

MR. MOLINA: Your Honor, Andrew Schwartz is supposed to be appearing via Bluejeans. Looks like they're waiting for the moderator to start the meeting. I just got a text message from him. He may be in the wrong session.

(Off-the-record discussion.)

MS. WOLFSON: That's the information I received this morning. It was forwarded to you.

(Off-the-record discussion.)

(Pause in proceedings.)

MS. WOLFSON: I apologize for the delay, Your Honor. Anyway, I can confirm the information I received this morning is the correct information.

THE COURT: Yes.

(Off-the-record discussion.)

MS. WOLFSON: I passed that information along. I hope they are able to join us shortly.

(pause in proceedings.)

THE COURT: All right. Do we have Mr. Schwartz on the line? Can you hear us, sir?

You might have to hit star 4 to unmute.

MR. SCHWARTZ: I'm sorry. Good morning, Your Honor. I apologize for being late. I didn't have the right information.

THE COURT: That's okay. Sir.

Let's go ahead and note your appearance for the record.

MR. SCHWARTZ: Andrew Schwartz for the City of Las Vegas.

THE COURT: Okay. And it's my understanding everyone has placed their appearances on the record; is that correct?

MR. LEAVITT: Correct, Your Honor.

THE COURT: All right. Okay. And so we're going to continue on, Mr. Schwartz. You have the floor, sir.

MR. SCHWARTZ: Thank you, Your Honor.

Your Honor, a taking is a highly deferential test, and there's no taking here. Judge Herndon's decision is at tab 4, and Judge Herndon explained the takings test and why it is so narrow.

I want to first explain that Judge Herndon's decision was not set aside by Judge Trujillo as the developers represented. The issue --

THE COURT: Whether it did or didn't, it doesn't

really matter to me. I don't care what other trial judges do. I just want to be candid with everyone. Never have, never will.

MR. SCHWARTZ: Well, fine.

THE COURT: Now, if you want to explain -- if you want to argue maybe some of the points, that's fine, but I really don't care what other trial judges do, I mean, I don't. I don't mind saying that.

MR. SCHWARTZ: I understand.

THE COURT: I care about what the Nevada Court of Appeals and the Supreme Court does, I will say that.

MR. SCHWARTZ: All right. Well, I do want to point out that Judge Herndon, in paragraph three of his conclusions of law, found that because the right to use land for a particular purpose is not a fundamental constitutional right, courts generally defer to the decisions of legislators and administrative agencies with regard to regulating land use.

And the citation there was to the *Berman versus Parker* case, which is a United States Supreme Court case, which laid out the principles behind the local regulation of land and why there's such broad latitude allowed in land use regulation, and that the takings clause really is a very narrow remedy for property owners, and it only applies in cases of extreme, extreme government regulation, and we don't have that here. And certainly there is no constitutional right to develop --

THE COURT: I don't want to cut you off, sir. I was thinking about this over the weekend, and I don't know if it's been brought up, maybe it has and I overlooked it, but as far as the golf course is concerned, were there any restrictive covenants?

MR. SCHWARTZ: No.

THE COURT: The reason why I thought about that, I don't mind saying it, I thought about the Legacy example, and it's my recollection that there was like a 50-year restrictive covenant that limited the use of that specific parcel of property to a golf course, something like that.

Go ahead.

MR. SCHWARTZ: That's not relevant, Your Honor. Restricted covenant is a contract between two private parties, and that's not -- governments don't typically regulate the use of land by restrictive covenants except in certain subdivisions where they may require that the subdivider establish a homeowners' association and adopt CC&Rs to restrict the use of the property. This is not that case. This is a typical --

THE COURT: Let me finish. Let me finish. You're kind of going down the track that I was thinking about in this one respect. You said the government may require, depending on the circumstances for certain subdivisions, to have CC&Rs. And the reason why I thought about that is this, because when it comes to the golf course, if there was some concern that this

property would be used as open property designation, couldn't that have been a request or mandate by the Council or the Planning Commission or someone that, you know what, we really like this project, but we're concerned about the potential long-term viability of the golf course, why couldn't you put in a restrictive covenant that would limit the use of the golf course to a golf course so we reserve open spaces for like maybe, you know, a period of 20, 30, 40, 50 years, something like that.

MR. SCHWARTZ: Well, that would be -- that would be one way to regulate the use of property by requiring the developer to adopt CC&Rs, but that's not the way that -- that's not the way this is typically done outside of a subdivision, and there were subdivisions as part of the Peccole Ranch Master Plan. But the government doesn't have to do that, and it's not always the best idea because that limits the flexibility of the government in regulating the land use.

So, again, this -- the interest of the -- of the city in the -- in the Peccole Ranch Master Plan was that there be open space. As the Court may recall, the RPD-7 zoning ordinance says that the plan development shall be innovative and flexible in allocating the different uses on the property, including open space. It doesn't say golf course, and it doesn't even say recreation, it says open space. So the city's interest here was in open space and not a golf course. The developer decided that

it would -- that it would develop a golf course. That wasn't the city's requirement. The requirement was for open space.

So here, we have, you know, the city could have required a park or property left in its natural state. There is intrinsic value to open space. The choice was made by the developers.

THE COURT: And for the record, I'm not necessarily disagreeing with you, but is there a difference between open space as it relates to public property and private property?

And the reason why I'm bringing that up is this, if the city wanted open space -- and I don't know if we're speculating or not because, I mean, when it came to the plan approval, I don't think anybody has come in and testified as to specifically what the building department was doing when they approved Queensridge. But my point is this, if they wanted open space, they could have very easily required that as part of the CC&Rs, and that's my point.

MR. SCHWARTZ: There were no -- the city didn't require CC&Rs, and they could have. But that's not at all what interest we're looking at here.

The City was faced with a 1500-acre property. The City's task is to make sure that that property is designed -- that that development is designed in such a way to serve not only the interests of the people who were going to live and work and play on that property, but also the surrounding community.

That's their job. So when they tell the developer, Okay, we want housing over here, we want the retail here, we want the streets here, we want open space here - it's all part of the city's job to design -- to make sure that that property is -- they engage in sound planning for a quality community that's going to have amenities for the property owners. The City could have required retail. That's all to serve the property and --

THE COURT: I get that, but here's my question. I would anticipate, and correct me if I'm wrong on this, when it came to the Queensridge and Badlands Golf Course, it would have been Peccole that went to the city with the plan, and it was up to the city as to whether or not they wanted to approve the plan or not. I mean, that's kind of how that process occurs.

And so I'm saying hypothetically, if there was -- and this is more from an evidentiary perspective. Peccoles could have came in and made the request without a golf course, right? And it just depends, because, I mean, we don't have golf courses every three or four miles in Las Vegas, they're kind of rare. I mean, I get that. But my point is this, what -- we have argument, but what evidence do we have?

MR. SCHWARTZ: Well, the Court used the example of Chicago as a well-planned city. Okay, you've got a number of high rises in Chicago, and Chicago, you know, they're very deliberate about this planning. Their buildings are more iconic and there's greater separation between the buildings.

Why? So that you can see the buildings. So if they don't allow the developer to build an entire envelope out to the property line, it's because they want to preserve light and air for other buildings, they want to limit -- to enhance privacy, they want to limit noise, they want the public to be able to view the building in a certain way, so they regulate the size, the shape, the color of that building. That's all within their police power.

They're doing the same thing here in Peccole Ranch Master Plan. They're regulating all of the elements of the project for the best interest of the community. And so the issue is the city wants open space. Open space. Open space has intrinsic value, whether it's a golf course or a park or it's just land in its natural state, there's intrinsic value in open space to benefit the residents, the people who work in the PRMP, and the developer, because it adds value to the property.

And this developer in this case, the plaintiff here developed property in the PRMP and got more money for their luxury condos in Queensridge Towers and their retail in Tivoli Gardens because of that amenity. So the city did require this open space amenity for the project, and whether that open space is a golf course is not the city's -- and whether it's profitable or not is not the city's concern. The developer makes a choice. The developer makes a choice to set aside open space to get an approval and to enhance the value of the entire

project. That's why you can't segment the golf course out. The golf course is an integral part of this mission.

You know, I use the analogy of a machine. You've got a machine that has retail, it has housing of different types, it's got streets, it's got drainage, it has open space. You take out one part and you disrupt the plan.

So this was the open space with part of a plan. It doesn't have to be CC&Rs. That's hardly ever done in a large plan development like this. And the purpose of that open space, even if the golf course closes, it provides an amenity, a benefit to the PRMP and to the surrounding community because, as open space, it's a buffer against noise, it's a view shed, it provides light and air, it provides privacy to people, it's aesthetically pleasing. So there's all those values that, again, the state legislature requires the city to do certain things like this. And it's -- by requiring the developer to set aside retail on the property, the city is not taking that property for the city, it's imposing standards on a master planned community in the best interest of the people who are going to live and work in that community.

The same thing with open space. By requiring the developer to set aside open space, the developer can own the fee, fee simple interest in that open space, but that's a requirement that the city has a right, has a right to require to continue. It doesn't have to buy it just because the developer

decides, Well, I want to put a golf course on there, and I can no longer make any money on the golf course, therefore, I'm going to eliminate the open space for this community. That's taking a part of the machine out, and the courts do not require that. That's why we have the segmentation doctrine. That's why this is a classic segmentation case. The parcel as a whole was the PRMP and each part of it is, according to city, was important. The city -- if the city decides, Well, we're going to impose a PROS general plan designation on the property instead of CC&Rs, well, that could make sense because the city may say CC&Rs are perpetual, they're forever, they're not flexible, it's not a flexible tool.

In this case, and it's the city's prerogative, in this case we're going to use a regulation, the general plan designation of PROS, which is the highest law in the city, to say the future use of this property is open space. It doesn't matter what kind of open space it is that provides that benefit, but the city can amend the general plan, as it did with the 17-acre property, and allow residential development or some other development to the property. So it's a much more flexible tool than CC&Rs.

And then, I think the concept here is, Your Honor, the city didn't take that open space for the city, it required the developer to set it aside for the benefit of the PRMP.

So if the -- and, Your Honor, I think you had a

concern that you expressed Friday that, Well, this may not be the most economically efficient use of the space if it was used for a golf course and if a golf course is no longer viable, and I don't think that's been established. But assume that that's true, that if the city doesn't allow some commercial development of that property, then the city is somehow taking the property. Well, again, open space has intrinsic value for the PRMP, and so the city doesn't have to do that. It's not a taking if it requires it to continue in its historic use as open space.

But it's even harder for the developer to make that argument because the city did approve 435 luxury housing units in the Badlands. The city said, okay, you know, you operate this golf course, now you want to build residential, you're telling us the golf course isn't economically viable, okay, we'll approve 435 luxury units. Your Honor, that is a lot of housing. That's huge. And according to Judge Herndon, and according to the developer's own evidence, by approving 435 units in the Badlands, the Court -- the city increased just the value of that 17-acre part of the Badlands by $26 million, and that is now five times what the developer paid for the entire Badlands, and the developer still has 233 acres of the Badlands left to either propose some development or use as open space, which again which is an amenity.

You know, for the 435 units, is the developer going to

be able to sell those for more if they put housing on the rest of the Badlands or if they leave it open so that these residents have some open space to look at, you know, as a buffer for noise for privacy. That's a decision that the city has the discretion to make. But the developer can't complain, Well, you've taken the Badlands because I can't make a go at running the golf course. The city has already approved that.

And, Your Honor, you know, the irony is that this developer took advantage of that amenity of that open space. I mean, not everybody in the PRMP who works and lives in the PRMP is going to play golf. That open space is valuable to them for these other reasons that I've listed.

And so --

THE COURT: And I want to focus on the 35 acres. And you do set forth in your opposition and countermotion on page 32, it says, both categorical and *Penn Central* claims require a showing that the city's regulations wiped out or nearly wiped out the economic use of the property.

So my question is this, what's the economic use of the 35 acres?

MR. SCHWARTZ: The economic use is as open space for the PRMP. That's the value of the open space. The developer of the PRMP made the decision -- and this developer stands in that developer's shoes, and that developer decided that a 250-acre open space is going to be valuable for the community,

it's going to compliment the community, and so I'm going to increase the total value of the PRMP if I have open space. If I've got -- if I build out a hundred percent of this property and there's no open space, I'm, you know, it's not going to be as attractive for people to live and work in this community. It's got open space and that adds value. That decision was made in 1989 and 1990, and that can't be taken back. The developer made that decision.

And so it's not a taking for the city to say, Oh, now you can't -- you can't convert that open space that you set aside to enhance the overall value of your development. It's not a taking for the city to say, No, it shall continue in that use.

You know, that's really what --

THE COURT: And I don't know if the law does this, maybe we'll develop this doctrine in this case, I don't know, but is there a distinction between private property, open space, and city-owned, county-owned open space?

The reason why I keep coming back to that, at the end of the day this is private property, and that's so important to point out, it really and truly is. And so, I mean, I remember continuing discovery in this case, and one of the issues that I think Mr. Ogilvie really wanted to vet was the economics or the economic value of the property at issue, right? I don't forget anything. And the plaintiffs objected and said, Judge, no, we

have to go now, my client is paying out a lot of money per month. And I respected all of that, but I was more concerned with making sure everyone had a full and fair opportunity to develop their case. That's all, right? And we can all agree the wheels of justice are slow, they just are. They just grind very slowly, they just do.

So, I mean, don't I have to look at that issue regarding -- because you do say it here, "requires a showing that city's regulation wiped out or nearly wiped out the economic use of the property." And so my question is this, what economic use would the 35 acres have at this point, if any?

MR. SCHWARTZ: Well, the economic use is as part of the Peccole Ranch Master Plan; that it had an economic use in 1989 and 1990, and under the segmentation doctrine you can't carve that out after you've developed the PRMP and say now I set aside this open space, the city required to set aside as good sound planning, now I want to build in the open space.

It's ironic that this developer built in the PRMP, got the benefit of the open space. This developer already got the economic value out of the 35 acres because it enhanced the developer's Queensridge Towers project and the Tivoli Gardens project. That's the economic value.

And so the segmentation doctrine tells us that that was the economic value of the Badlands, that that value has

already been -- that value has already been obtained because it was an amenity for the other uses in the PRMP. It enhanced those values.

But, Your Honor, can I refer you to the *Guggenheim* case, please?

THE COURT: Yes, you can, sir.

MR. SCHWARTZ: Tab 56. Your Honor, maybe 57, yes, sorry, Your Honor, tab 57.

THE COURT: And I have it, sir, right in front of me.

MR. SCHWARTZ: So in this case, Your Honor, and I've highlighted some of the important language in the *Guggenheim* case on pages 6, 7 and 8., what this says is that -- and this is going to whether the city has wiped out the economic value of the 35-acre property.

Again, Your Honor, let's assume -- let's assume that this case is ripe, and it's not, because the city hasn't denied two applications to develop the 35-acre property, but let's assume that this is ripe. There's still no taking, because the property was designated PROS in the general claim when the developer bought the property.

Now, let me explain why that's significant. In the *Guggenheim* case, the Court said, the Court said -- we had a -- the plaintiff bought a mobile home trailer park that was subject to rent control. The developer then sued the city that imposed the rent control claiming, I can't make money on the

mobile home park because of this rent control. And the *Guggenheim* court -- and this is a Ninth Circuit, this was an *en banc* decision of the Ninth Circuit -- said, look, you bought the mobile home park when it was subject to the regulation in question; you paid a price for that property that reflected the fact that its use was legally limited, and so you can't say that you were wiped out or you can't say that there was even any economic impact of the city regulation on your property, if the city just declines to change the law so that you can make more money. The Court said that is not a taking. You're assumed to pay a price for the property that reflects its legal use.

And we have the same situation here. And, again, this assumes that this case is ripe and it's not. Judge Herndon was absolutely right when he found that the 65-acre case was not ripe because the city had not denied two specific applications for just a 65-acre property to be developed, and here we only have one, so it's not ripe. But assuming it's ripe, the developer went into this with its eyes open, and it can't now claim you have to let me make some use of the property that wasn't legal when I bought the property.

Now, in tab 38, Your Honor, is your decision on the PJR, and at pages 18 and 20, and 20 of that decision here's what the Court said: The four applications submitted to the Council for a General Plan Amendment were all subject to the

Council's discretionary decision-making no matter the zoning designation.

So there goes the developer's theory that they have some constitutional right under zoning. There's absolutely no authority for that, and this Court has found that they don't. There goes their case.

But let's move on. Did the city wipe out the value of the 35-acre property if you assume it's ripe and you allow that to be segmented, which again both assumptions are not correct but let's assume they are. Here's what this Court said: The developer purchased its interest in the Badlands Golf Course knowing that the city's General Plan showed the property as designated for parks, recreation, and open space, PROS, and that the Peccole Ranch Master Development Plan identified the property as being for open space and drainage, as sought and obtained by the developer's predecessor. The golf course was part of a comprehensive development scheme, and the entire Peccole Ranch master planned area was built out and around the golf course.

The Court went on: It is up to the Council through its discretionary decision making to decide whether a change in the area or conditions justify the development sought by the developer and how any such development might look. And the Court cited to the *Nova Horizon* case.

The applications included requests for a general plan

amendment and waiver, in that the developer asked for exceptions to the rules -- this is just like the plaintiff in *Guggenheim* -- in that the developer asked for exceptions to the rules, its assertion that approval was somehow mandated simply because there is RPD-7 zoning on the property is plainly wrong. It was 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 the zoning designation.

So the Court has said twice in these paragraphs of its decision that the developer's crazy theory that zoning confers rights and that zoning confers a constitutional right to build anything the developer wants as long as it's a permitted use in the zoning is wrong, and it's rejected by all authority.

THE COURT: Well, can't we all agree -- and I think it's important to point out -- there's a completely different standard here. The claims for relief are different. We're not talking about a petition for judicial review.

And I think I was pretty clear, we had a significant discussion in some of the prior motions. In fact, it's my recollection Mr. Ogilvie was quite strident in his position, and I rejected it completely in this case.

And so my question is this, why are we going down this road? Because I see the *Guggenheim* case distinctly different

because, at the end of the day, there were rent controls in place and they were getting paid so much per, I guess, for the mobile homes, whatever the sum might have been, and they were still making money.

In this case, here, it's my understanding that the golf course was no longer viable, and it's public property, and that's a totally different issue, right? And I keep coming back to my question, because you raised it and it hasn't been really addressed. I understand you're saying, Well, Judge, you know, the value is -- well, the Peccoles, I guess, reaped the value.

But I'm talking about the 35 acres, because it's my understanding right now, in its current condition, it has no value economically for the property owner. Because if the city says this has to remain open space, he can't put anything on that property. Consequently, what's the value of the 35 acres? We all know what it is, it would be zero, it just would. It would have no value whatsoever. And I guess that's my point.

And I just want to be very clear on this issue, there's a completely different standard when it comes to a standard for petition for judicial review. I'm looking to see whether or not the City Council abused its discretion, right? And that's the standard for the most part, and whether there's substantial evidence in the record to support the findings.

And that's a low threshold, I don't mind saying that,

it just is. This is a totally different scenario here. Right now you're in open court. This isn't a petition for judicial review. All the evidentiary requirements have to be met, right? Rule 56, I have to make a decision based upon admissible evidence, we all understand that. So I'm looking at it from that perspective, and whether the court of appeals and/or Supreme Court agrees or disagrees with my evaluation of this issue is another day.

But I understand your argument. You said, Well, Judge, the value is to the Peccoles. That's kind of how I see that, right? But as far as 180 Land Company, who is the current owners of the property, it seems to me that if this parcel of the property is going to remain open space, then it could be argued that the city has wiped out or nearly wiped out all economic use of the property, and that's really and truly what I want you to address.

Because maybe your argument is that I guess value can only transfer one time, I guess, when the property is originally developed? I mean, I don't know. Is there case law that says that? What about the current property owner? What about the bundled rights?

MR. SCHWARTZ: Yes, Your Honor, we addressed that in the -- that's the segmentation doctrine that the Court is talking about, and you can't segment property, the parcel as a whole, and then say that one part of it, the regulated part,

has no value, so now pay me. You have to look at the parcel as a whole.

But I would like to back up, Your Honor. I think that this is an extremely important issue, that there is no substantive law of PJRs; it is an empty vessel; it is a procedure. Inverse condemnation is a procedure with a different remedy and different evidentiary standards. However, what we're talking about here is --

THE COURT: We can all agree on that, I think.

MR. SCHWARTZ: What we're talking about here is the underlying substantive law of property and land use regulation in Nevada, and that law is the same. It's the same for whether you're bringing a PJR or you're bringing a takings claim or a due process claim, the law is that zoning does not confer a right of any kind, it limits use, it doesn't confer rights, and it doesn't confer a constitutional right to build anything you want. That's the underlying law that applies to both a PJR and an inverse claim.

Again, PJR, it's an empty vessel, it's just a procedure. So you can have -- and we're not talking about facts here. The Court made the facts clear. There's a PROS designation on the property, there's RPD-7 zoning on the property; what does that mean legally?

First, those are the facts. The Court said here's the legal import of that, these are questions of law not of remedy.

The standard is the same in a PJR or a regulatory taking case. There is no constitutional right to build under zoning, and so it's the same law, it's the underlying substantive law, and so the Court's conclusions about what that underlying substantive property law and land use regulatory law in Nevada, it's the same for both causes of action.

Your Honor, what that would be saying is if none of the Court's conclusions of law in the PJR about the city's discretion -- and, again, discretion cannot coexist with a constitutional right to build what you want. If that's true, then if --

THE COURT: I got a question for you. Hypothetically, a decision of a city council or a planning commission and/or county commission and the like, they can make a decision, the trial court can make a determination that their decision is not an abuse of discretion, right? But that doesn't stand for the proposition that notwithstanding the fact that they didn't abuse their discretion, that when exercising their discretion it resulted in a taking of property. That's the difference, and that's the way I see it. And that's a totally different animal, subtle but huge, right? You could exercise your discretion without abusing your discretion, but that doesn't mean that's a get-out-of-jail free card. That's probably the best way to say that.

I mean, I don't mind saying it, and I'm saying it

because that's the issue I want the Nevada Supreme Court and/or Court of Appeals to really hone in on, because that's part of my decision-making process. I think they're different. Yeah, you could exercise your discretion and not abuse it.

But if you, for example, going back to one of the issues you brought up, both categorical and *Penn Central* claims requiring a showing that the city's regulation wiped out or nearly wiped out the total economic use of the property. That's not a charge I'm required to look at when it comes to a petition for judicial review.

MR. SCHWARTZ: Absolutely right, Your Honor. But the plaintiff's theory, Your Honor, can I address that? The plaintiff's theory --

THE COURT: Yeah, but you said, "absolutely, right," that's good to hear.

MR. SCHWARTZ: The plaintiff's theory in this case is that they had a constitutional right, quote, right to build whatever they want on the 35-acre property as long as it's a permitted use by zoning. That's their theory. That's not a takings theory, Your Honor, that's PJR theory. That's absolutely right. And they lost the PJR, and the judge -- and this Court decided against them because it said zoning doesn't confer any rights. But their entire case, Your Honor, is a redo of the PJR.

Now, I think where we're going with this is --

THE COURT: You can make your record on that, but I'm not buying that one. Once again, I don't mind telling you my charge is much different, and I recognize that -- I forget how long it's been, but it's been quite a while, and I recognize that aspect of it, that this is a totally different animal as far as inverse condemnation law is concerned, and I thought I was pretty clear on that.

So all I'm saying, sir, I'm going to let you go ahead and make your record. But as far as my decision as it pertains to the petition for judicial review, I had a different charge. And I even think there's -- I don't mind saying this, and interestingly enough, I was never even called upon to even deal with that specific issue, but in a decision sent down to me from I think it was the Supreme Court, they even talked about the different standards, right? I didn't even get a chance in that case, it was so early on, it was a motion to amend, I granted it, and that was it, and then a writ was run up. I clearly understood that, I think I did, going back to a year, year and a half or so ago, the differences between a petition for judicial review and a claim for inverse condemnation before a trial judge. Totally different, different issues of law, different factual issues.

MR. SCHWARTZ: Your Honor, can I explain?

THE COURT: Yeah, you can, sir, but I'm just saying, and I think the law will -- I have a fairly high degree of

confidence that the law will agree -- I mean the courts will agree with me on that issue.

MR. SCHWARTZ: Your Honor, when I recite to the Court this passage from the decision on the PJR, I'm reacting to the plaintiff's claim. The plaintiff's claim in this case in the taking -- this is a takings case -- is really a do-over of the PJR, because they're claiming that they've got this constitutional right.

I am -- we have, and I am fully prepared now to summarize our case on what the real takings tests are, because everything the plaintiffs are arguing in this case is a redo of the PJR.

So I think I'm on the same page as the Court in that to show a regulatory taking, you have to show a wipeout or a near wipeout or interference with investment-backed expectations. The plaintiffs don't address that in their takings claim, they just want to redo the PJR.

So if now I could address the Court's concern about why the city has not taken the 35-acre property. We have three arguments --

THE COURT: Please go forward. I'm listening, taking notes.

MR. SCHWARTZ: One is that the case isn't ripe. The case isn't ripe because the Court doesn't know how far -- if a regulation goes too far and wipes out value unless it knows and

it has a final decision of the public agency and knows how far it goes.

So in the 65-acre case, Judge Herndon found they didn't even get to first base. They didn't have a ripe claim because they had denied two applications. So that's what the Court -- that's what the courts have required, including the Nevada Supreme Court in the *Kelly* case.

The *Kelly* -- you know, we have the categorical and *Penn Central* claims allege excessive regulation of use. And as I indicated on Friday, the developer is trying to confuse the Court with the *Sisolak* case, which is a physical takings case, not a regulation of use case, and so the ripeness doctrine does not apply in a physical takings case, the *Sisolak* case recognizes that. The developers misrepresented that case.

In a regulation of use case, you need to show that the regulation of the owner's use was the taking. It has to wipe out the economic value or a near wipeout of the value.

And again, this developer, Your Honor, the city didn't change the value of the property because the developer either knew that the property had -- was not viable as a golf course, in which case the city didn't make the developer buy the property, or it didn't know and it didn't do its due diligence, either way the city didn't make the developer buy the property. The developer, like *Guggenheim*, should have paid a price for that property that reflected its worth, and it was subject to

the PROS designation, so it couldn't be used for residential. So the developer can't come in and say, Hey, I paid a price for property that that would be $1.5 million per acre, which is the developer's evidence, assuming I could use it for residential when the law is clear that they couldn't.

THE COURT: Why is the law clear that they couldn't? Because it's my recollection, I keep going back to this, the property at issue I'm talking about the 35 acres, was owned as RPD-7.

MR. SCHWARTZ: Well, Yes, Your Honor, but the PROS designation is the general plan designation and that's consistent with the RPD-7 zoning.

As the Court may recall in U.D.C. 19.10.050A, RPD-7 zoning is for plan developments, and the city is encouraged -- it is encouraged to require the set-aside of open space. It did that. It said you're going to be able to develop, if it's a 614-acre part of the 1500-acre Master Plan, you can develop 84 percent of the PRMP and 16 percent is going to be the 250-acre set-aside for open space.

So that's -- that use of part of the property that's zoned RPD-7 for open space --

THE COURT: I don't want to cut you off, but was the golf course private or public? Do we know?

MR. SCHWARTZ: Private. And so would the property be if it were open space, if it were park, if it were an amusement

park, if it were any use, it would be private, but that doesn't mean that the city has to allow a change in the use if it's segmented from the whole.

So the developer bought property --

THE COURT: That's the issue. And I don't want to cut you off, sir, you're saying the golf course was private, meaning no public access, it was part of the Queensridge, I guess, community, is the best way to say that, and so the public had no access for ingress or egress; is that correct?

Sir, you can answer that.

MR. SCHWARTZ: Oh, by permission --

MR. MOLINA: The golf course was privately owned, but it was publicly --

MR. SCHWARTZ: It is a public golf course. It was open to the public.

THE COURT: And I don't want to cut you off. I was just wondering if it was like DragonRidge where it's a private golf course.

So it was a public golf course, and I do understand it was private ownership, I do get that.

But go ahead, that's all I wanted to know, whether it was a --

MR. SCHWARTZ: So the developer, Your Honor, is telling you, I bought a golf course, I paid 4 and a half million dollars for a golf course, and it turned out, you know,

I made a bad business decision and the golf course isn't worth anything, so now pay me, and not only that, pay me $386 million if you don't let me build residential. Although, of course, the city did allow them to build residential.

So, you know, the developer can't have it both ways. It can't, just like *Guggenheim*, you can't buy property and say, oh, you've wiped out my value, you've taken away my economic value. In *Guggenheim*, the developer said, or the owner said, Well, I can't make much or any money with this rent control in place.

It's the same facts, the same situation. The Court said, Wait a minute, you bought this property and now you're telling us we have to change the use; even though it's not in the best interest of the community we have to change the use so that you could make a profit? That was your business decision to buy that property. The city didn't make you do it, and you pay a price that reflects its value.

And as the Court said, the developer bought the property knowing that it was PROS in the General Plan. That doesn't allow residential development, so that can't be a taking.

But getting back to my ripeness point. In the *Kelly* case -- excuse me, in the *State* case, and State is at tab 12, the Court said, In Nevada, we apply the Williamson County ripeness doctrine. That doctrine is -- we don't know if

regulation has wiped out property. If the developer applies for some plan of development and the city says, No, well, we might approve something else; we might approve a less dense development; we might approve a different type of development, the city has broad discretion. It can approve lots of things that may not be the first project.

So before a takings claim can be ripe, the government agency has to deny two separate applications for development of the property and just that property, and then the claim might be ripe. Then the developer can say, All right, it's now clear what they're going to allow on the property and what they're not. Now you can tell me whether this meets one of the takings tests, which is a wipeout or a near wipeout.

And in the *Hoehne* case, Your Honor, which is at tab 17, the Court said the claim is not ripe unless there's a clear, complete and unambiguous, it's unambiguous that the agency has drawn the line clearly and emphatically as to the sole use which the property may be put. And that's exactly what Judge Herndon found: No, I can't speculate about what the city might allow on the property. They've only denied one set of applications for this property. The developer hasn't filed another set of applications.

The City sent a letter to the developer, which is at tab 7, after the court -- the Supreme Court reversed the Crockett order, and said, You don't need to file a major

modification application. Come in and file another application for the 35-acre property, and invited the developer to do that. The developer didn't want to develop the property, so it didn't file another application, it didn't ripen its claim, and that law is absolutely clear.

And the developer claims that the ripeness doctrine does not apply to its categorical takings claims. The developer concedes it applies to its *Penn Central* takings claims. That's illogical and against all law. We've cited to the Court the *Palazzolo* case, tab 15, and many other U.S. Supreme Court cases, lower court cases in our brief that the ripeness doctrine applies with full force to the categorical -- their wipeout claim, their categorical taking claim, and it has to. You can't have a -- you can't have a ripeness doctrine that applies if there's a near wipeout, but you don't have a ripeness doctrine that applies to a wipeout. It just makes no sense.

So the developer then argues, Well, I can't apply for another project because it's futile. Your Honor, we have a very odd situation here. This case is not only a first in which a developer has argued they have a constitutional right to build anything they want as long as it's a permitted use in zoning or it's a taking, that's a pretty bizarre claim.

But here we have a situation where the city approved 435 luxury units for construction in the Badlands and the city

said now you're ready to go, the Supreme Court has reversed the Crockett order, and your applications are reinstated. The Nevada Supreme Court said the applications, the approvals are valid, that's what the language the Court used, and that's in tab 2.

And the Court -- and after the Court reinstated those approvals, the city sent a letter to the developer, tab 3, that's Exhibit GGG, saying you're ready to go, you've got your permits, you're ready to develop for the 17-acre property, 435 units. The developer claims, Oh, no, I don't have a permit. It's the craziest thing, Your Honor. No, I don't have a permit, you nullified it, and the city said, No, no, really, you've got a permit, go build. That was more than a year ago that the city said this. The developer has done nothing.

Here's what happened in the 133-acre case. In 133-acre case, after Judge Crockett's decision, the City Council said, Among other things we -- your applications are incomplete because you haven't filed a major modification application. Judge Crockett ordered it, that's a final decision. We would be in contempt of Judge Crockett's order if we approved these applications without you filing this major modification application.

The developer goes to -- takes that up on a PJR, and Judge Sturman finds, yes, denies the PJR on the grounds that the City Council could not approve those applications because

there was no MMA filed, and that would be in violation of Judge Crockett's order.

So the city -- so after the Supreme Court reversed Judge Crockett's order, we are now back in Judge Sturman's court in the 133-acre case. The city moved to remand the 133-acre applications to the City Council because they never, never decided them on the merits. They found them incomplete under Judge Crockett's order. The developer has strenuously opposed a remand to give the City Council a chance to review those 133-acre applications for the first time on the merits.

This is the most bizarre situation I've ever seen where a developer has got one set of permits, the city is telling him to go back to the City Council because they couldn't review your applications on the merits, and the developer says, No, no.

So what we've got here is a clear situation where a developer bought property that the developer now claims had no value, so it had no value when the developer bought it, and now it wants this -- and it has segmented off that property and it wants the Court to just focus on that property and say, Oh, the city is taking my property, and I want $54 million even though the developer paid 4 and a half million for the entire 250-acre Badlands. And the developer has got permits for, you know, a huge number of units, and it declined to even pursue development on the 133-acre property.

So it's just a bizarre situation here where there's no taking, there's no injury, there's no damage to the developer because the city, by declining to change the law, did not change the value of that property, and you got a developer who instead just wants money. That's what this case is about, Your Honor. It's a shakedown. It's an attempt to use the courts to get the developer what, you know, $386 million for a 4 and a half million dollars investment. I mean, it's just unconscionable. So the case is ripe for the --

THE COURT: I don't look at businessmen as shakedown artists. And I don't mind saying this, I thought about this, too, it was known that there were problems with this golf course, right? And I'm certain if the city really early on, if they wanted, they could have bought out the property owner, right? Or they could have bidded for this golf course like everyone else when it went up for sale, right? If they were so concerned about open spaces, they could have done that. There's nothing to preclude the city from saying, Look, you know what, we're concerned about this golf course and it's a problem, it's happened before, let's go ahead and turn this into public spaces, you know.

Only problem with that is this, though, they probably would have to have public access, they probably couldn't segment it all, but they could have done something, I would think, and they didn't.

MR. SCHWARTZ: That's not the city's responsibility, Your Honor. The city's responsibility is to make sure that the community is well planned for the community. Its job -- the city's job isn't to help property owners make profits.

THE COURT: Well, then who's making profits?

MR. SCHWARTZ: That's not -- I mean, there's no case that says that, Your Honor. What the Court is talking about, there's no authority --

THE COURT: Does the city get a free pass? They can't force someone to do something with their bundle of rights that results in no value to the property and not pay for it. That's a big issue.

MR. SCHWARTZ: The property had -- Your Honor, the property had whatever value --

THE COURT: I'll tell you what, this is a question I have, and I want to make sure I understand it.

Judge Crockett's order wasn't published; is that correct? Is it a published decision?

MR. SCHWARTZ: It was a trial court decision. I don't know if it was published.

THE COURT: Okay. Is that --

MR. LEAVITT: Your Honor, Judge Crockett's decision was a final decision of the lower court. It was appealed to the Nevada Supreme Court, and then the Nevada Supreme Court reversed Judge Crockett's decision.

THE COURT: Right. But they didn't publish it, right?

MR. LEAVITT: No. No.

THE COURT: Okay. I was just curious because I didn't think so one hundred percent.

MR. LEAVITT: It was not, published, Your Honor.

MR. SCHWARTZ: It was an order of reversal, Your Honor, and they reinstated the permits, and the city hasn't --

THE COURT: The question I have, though, and understand I haven't looked at Judge Crockett's order in a long time, I haven't, but what was his decision based upon?

MR. SCHWARTZ: Oh, it was a number of factors.

THE COURT: And I'm sorry, I'm --

MR. SCHWARTZ: The history of the PRMP --

THE COURT: Sir, I don't want to cut you off. I'm sorry, that was a bad question.

What did Judge Crockett decide? That was my question.

MR. SCHWARTZ: Judge Crockett decided that to develop housing in the Badlands, the owner needed to file a major modification application under the U.D.C. The U.D.C. says major modification application required for a PD development. It does not say it's required for an RPD development. When it went up to the Supreme Court, they made a very narrow decision. Again, the developer has misrepresented that decision as supporting their bizarre claims in this case. The Court made a very narrow decision; it sided with the city, which argued

major modification application by the plain language of our U.D.C. not required for RPD. It is required for a PD. This is not PD, it's RPD. That was the sole basis of the Supreme Court's decision. They didn't say that zoning prevails over general plans. They didn't say that there's no PROS designation. They didn't say anything what the developer says, except that the city was required to obtain an amendment to -- the city was properly required an application to amend the General Plan, to amend the PROS designation before a development of residential in the Badlands.

So the Court there was saying the opposite, the opposite of what the plaintiff is arguing here, which is that the Supreme Court somehow found that the PROS designation either didn't exist or did not prevail over zoning. Again, there's no -- there's consistency between the zoning and the General Plan designation here, so there's no question about which prevails. But if there were an inconsistency, the law is absolutely clear in NRS 278.250 and in the *AmWest* case and the *Nova Horizon* case that the PROS designation prevails, and that was the case when the developer bought the property, as the Court observed.

THE COURT: Here's my question, though, and I might be wrong on this, but didn't Judge Crockett require plaintiff or the property owner -- or require that there would have to be some sort of amendment to the General Plan; is that what

happened?

MR. SCHWARTZ: Yes, that's right, and that is correct. That was --

THE COURT: Isn't that what you're requiring in this case right now?

MR. SCHWARTZ: Yes, yes, that is the requirement, but his decision was based on a number of factors.

THE COURT: And I don't want to cut you off, sir, your co-counsel wants to address that issue. But my question is this, I'm looking at it, and Judge Crockett required an amendment to the General Plan, and the Nevada Supreme Court said, No, that's not required. Okay, I get it, but --

MR. SCHWARTZ: No, no, no, they said the opposite.

THE COURT: Okay. What did they say? What did I say?

MR. SCHWARTZ: They said an amendment to the General Plan is required. They said an amendment -- the Supreme Court said amendment to the General Plan is required. They said a major modification application was not required in addition to the site review application, the rezoning application, other applications. They absolutely did, Your Honor.

In tab 2, you can see here the Court said in the order --

THE COURT: Your co-counsel wants to say something for the record. Is there anything that you want to add, sir? Go ahead. I don't want cut you off.

MR. MOLINA: So just to clarify. Judge Crockett's decision was based on an appeal that -- PJR that was filed by the homeowners.

THE COURT: Right.

MR. MOLINA: The City's approval of the 17-acre applications, and those applications included a General Plan Amendment. They did not include a major modification. The homeowners challenged the city's decision not to require major modification, and so there was no general -- the failure to file a general plan amendment was not at issue in that case as it is in this case. However, the Nevada Supreme Court, in reversing Judge Crockett's order, made clear that the developer had to file all applications required by the city's development code, which the General Plan Amendment is required here.

MR. SCHWARTZ: Your Honor, I'm in tab 2 on page 5 of the Supreme Court's decision. The Supreme Court said: "The governing ordinances require the city to make specific findings to approve a general plan amendment," and they cite to the Code as well as a rezoning application.

So the Nevada Supreme Court said the opposite of what the developer claims it said. It's saying that property was designated PROS to build residential in the property. The City properly required an amendment to its General Plan.

So Your Honor, in my limited time left, I want to address this segmentation doctrine if I could.

THE COURT: Go ahead.

MR. SCHWARTZ: What the developer is doing here is called segmentation. It's a developer trick to get greater density. The courts, including the *Kelly* court, the Nevada Supreme Court in *Kelly* said no, you cannot segment the property for purposes of takings analysis; that would allow you to require compensation in almost every case. It's a circular argument.

So in *Kelly*, which is tab 14, in *Kelly*, the developer subdivided property into 39 lots and built on 32 and then said to the agency, Now you have to let me build on the seven remaining lots. And the Court said, No, you've got substantial development, parts and the whole. You can't, you know, carve off lots whether you develop them yourself or sell them to another person. Now you can't claim, Hey, you're wiping me out because now these are all discrete lots with assessor's parcels.

In this case, we've got four development sites that the developer has identified that they put, in classic form, they put each property under a different owner. There are some entities that fall into the properties, but all four have different owners. It's classic segmentation where the developer, the developer stands in the shoes of the original developer for use as a whole. They got to build. They got the city's approval to agree to a comprehensive master planned area, 1500-some acres where there was an agreement as to what was

going to go where, and, again, it's a machine. You take one part out and the machine doesn't work.

So they come along later and they sell off the open space after they've got -- after the developer has gotten the benefit and it has sold all the units to people, to property owners who live on that open space or benefit from that open space, it enhances their value. The developer then sells off the open space and someone comes in and says, Oh, now you have to develop the open space or else I won't make enough money.

Again, the argument that you have to let me develop this or I will lose money, that's false, Your Honor, that's not the facts. The developer knew they couldn't build a residential when they bought the property. By the city saying, Well, we're not going to change the law doesn't change the property's value one bit. It doesn't wipe it out, it doesn't deprive them of anything that they bought. It leaves them in the status quo.

Just like in the *Penn Central* case, the Court said, Well, you've got -- you've got historic use of this property. You're not entitled to make the most profit from this property. You got what you've bought. In *Guggenheim*, you got what your bought. You paid a price.

They paid $18,000 an acre, that's a golf course price. They claimed that if they could build housing, it's worth 1.5 million per acre. That's a residential development price.

They knew, and the price they paid reflected that the property was limited in its use.

But, again, you can't -- you can't allow the developer to segment off property. The United States Supreme Court in the *Murr* case said, Well, there are three factors that tell us what the parcel of whole is. And the developer, by the way, has made no argument, they've cited no authority that they didn't -- that allows them to segment off the property in this fashion.

You look at the *Murr* case and the three factors. You look at, among other things, what's the relationship between the property that you're segmenting off and the rest of the property? You know, is there some interdependence of the property such that it should be treated as the parcel as a whole? And that's exactly what we have here. We have a property that was part of a master planned development community and enhanced the value of the rest of the property as an amenity, whether it's a golf course or open space it enhances the value.

And so under the *Murr* -- and by the way, the master plan was one owner, one master plan, all the different parts were approved at the same time, and so, you know, that is the classic parcel as a whole.

Now, if the PRMP is not the parcel as a whole and lets say the Court disagrees and says the PRMP is not the parcel as

a whole, the Badlands at a minimum is a parcel of the whole. It was in one use for 23, 25 years, one owner. It was sold from one owner to another owner as a golf course, as a functioning golf course. It was in one use. That's got to be the parcel as a whole.

So the developer can't then carve up the Badlands and say, Okay, you've allowed me to build 435 residential units on one part of the Badlands. Well, I'm going to sell off 35 acres for that property, and then the new buyer comes in and says, If you don't allow me to build housing on this property even though I bought it when housing wasn't legal, if you don't allow me to build housing on this property, then it's a taking and you have to pay me $54 million? Your Honor, this is classic segmentation.

The city -- you know, if you carve up the property in the way the developer did, you're always going to be liable for a wipeout, because as you get smaller and smaller, the city says, Well, you know, 435 units on 250 acres, that's a lot of units, that's pretty dense. Now you want more? They don't have to allow each part of the property to be developed. Again, they don't have to allow any of it to be developed, because the developer bought it when it was subject to these regulations, and so the developer has the same value of property that it had when it bought the property, the exact same value. So there can't be a taking here.

THE COURT: I have another question. I don't know if there's an answer to this or if this has even been pointed out as an issue, but I do understand your segmentation argument. My question is this, though -- and you brought up a very important point from a time factor -- this golf course functioned for about 22, 23 years. What is the impact of time on a segmentation, I guess where you could call this some sort of affirmative defense maybe? What impact does that have?

You know, because there's no question, and we see this all the time in all the major metropolitan areas, and 23 years is a long time. The character and nature of property could change in 23 years. And there's no question maybe early on there were benefits, but over time those benefits can dissipate, right? And so does this segmentation argument, does that -- can you make that same argument 20 years, 50 years, a hundred years down the road?

MR. SCHWARTZ: Your Honor, that's a very good point. I think it's -- I don't think it's relevant because the takings test requires a wipeout and, as I've explained, the city did not change the value of the property one bit.

But to answer your question about time, you know, that's the city's discretion, that's where the city's discretion comes into play, and this Court -- what the developer arguing here --

THE COURT: It's a general question, I mean, I'm just

thinking --

MR. SCHWARTZ: I think it's a great question. Great question.

What the developer is arguing here is, hey, the city was unfair and they were biased against us. And so whether the best use, the most efficient economic use, whether the best use of that property for the community is open space or golf course or housing or office or whatever the use, that is subject to the city's broad discretion. They exercised that discretion. They can exercise that discretion, but if they wipe out the value, then they have to pay compensation, but short of that or a near wipeout, they don't have to pay compensation. That's within their police power.

So when the Court -- when the Court was faced with a PJR in this case, the Court found that there was substantial evidence to support the Government's decision. That's the deferential test that the Court applied for PJR.

So when we're talking about fairness or efficiency or what's the -- you know, what is the optimal use of this property, that's a political decision, it's up to the city's discretion.

For the taking claim, the only concern, the only issue for this Court, the only legal issue is whether the city has wiped out the value or nearly wiped out the value. And as I indicated, the city did not change the value at all, because the

developer still has exactly what it paid for when it bought the property. Whether the city should change that, that's a good question, but that's what the Court said in the PJR, Well, you know, it's not my -- I can read from your findings of fact and conclusions of law on the PJR, Your Honor, tab 38. You said many times, you know, it's not my decision, it's not my decision to say what is the best use for this property. I'm going to leave that up to the -- you know, leave that up to the political system, to the Government, the city government. They have the expertise. They have the power. They have -- they're the entity that makes the decision. I don't make the decision. You said in paragraph 19 on --

THE COURT: I agree with that, but that's a different call to the question, right? It really and truly is. And that's my point, because right now we can look at it from this perspective. You could have a situation where hypothetically a city council or a county commission didn't abuse their discretion, but, notwithstanding that, their decision making results in a taking of private property.

MR. SCHWARTZ: Well, that's true, I agree.

THE COURT: We can all agree that's true.

MR. SCHWARTZ: But your question was about the timing of the parcel as a whole, and it says the parcel of a whole applies over time, and it absolutely does, but I was addressing the Court's concern that after --

THE COURT: Has that ever been addressed? Does anyone know?

MR. LEAVITT: It has, Your Honor.

THE COURT: Okay. I want to hear about that then.

MR. SCHWARTZ: What was that, Your Honor? I'm sorry, I missed that.

THE COURT: I asked a question whether or not that issue regarding the segmentation argument and the impact of time, has that ever been addressed by a court, and that was my question, and counsel on behalf of plaintiffs said, yes, it has been addressed.

MR. SCHWARTZ: Well, yes, it has, Your Honor, in the *Sierra-Tahoe* case. In the *Sierra-Tahoe* case, the court said not only can you not segment property geographically, you know, horizontally or vertically, in *Penn Central* you couldn't sever off the air space.

In the *Murr* case, you couldn't sever off one of the assessor's parcels from the other assessor's parcels because given the history of that property, they're really the parcel as a whole, and the court doesn't look at assessor's parcel boundaries exclusively to make that determination.

In the *Sierra-Tahoe* case, the Tahoe Regional Planning Agency imposed a 33-month moratorium on any development of single-family lots in the Basin while it studied permanent controls for the Basin. And there the Court -- the owner sued

and said, Hey, you've wiped out my value because during that 33-month period I could have no use of the property, and the Court said, No, we even apply the segmentation doctrine to time, to the segmenting the property over time.

So let's look at the issue of time in this case.

The Badlands is still functioning as the open space for that PRMP. People are still enjoying the views, the buffer, the buffer, the protection from noise, the privacy, seeing a natural area. They are still enjoying that. It's still adding value to all of that community.

And so it's not a question of there is -- you know, that that Badlands has become completely disconnected from the community such that it might be in the city's judgment, in the city's exercise of discretion, you know, it might be a good idea to change the use. Well, again, it's still functioning as the open space for the PRMP, so it's still -- so there are no facts to indicate, well, now you can segment off this property from the parcel as a whole given that the City Council has designated the property PROS in the General Plan, saying we want this property, at least for now; until we amend the General Plan, we want this property to continue functioning as the open space for this community, and so to sever it off would violate the segmentation doctrine.

And, again, it's a rule of fairness. You know, how can you plan -- how can you plan, a master planned community,

how can you plan a master planned community if the developer can buy a hundred acres, say I want to impose a master plan here, and the city says, okay, because of the topography, because of the surrounding development --

THE COURT: I'm sorry. I was just asking my law clerk --

MR. SCHWARTZ: Because of the surrounding development we're going to want the different uses to be in these different locations, including the amenities, I don't know, school or healthcare, police and fire, open space, transportation, roads. So, yes, the public agency says, Okay, here's where we want all the different parts to go. Well, if someone comes along and severs off part of it, part of the whole so that the machine might not work, they can't say, Well, unless you let me make a different use of this property, then the property that was -- that was programmed for this project when the master plan was approved, if you don't let me make a different use of this property, then you have to compensate me.

Well, it would be very difficult to use master planning in development, Your Honor, if that were the case, because the developer would build out the project and then sell off the parts of the project that it didn't want, and the new developer would come in and claim, Oh, I get to do whatever I want with this property because it no longer has the use that the original developer said it was supposed to be used for.

Well, the city says, Wait a minute. This is part of the master plan. This provides valuable benefits, enhancement of use and value of all this other property. We're not going to allow you to change that because that will disrupt our master plan.

And so that open space is as valuable and as useful today as it was in 1990, 1989 when the city imposed the PROS designation on the property.

So Your Honor, we extensively briefed this segmentation issue, and we've cited many authorities that are all consistent that segmentation is not permitted, otherwise it's so easy to show a taking, a wipeout taking, and this is just a classic segmentation.

Now, the developer is going to argue that the city made them segment the property, and that's false. The city didn't make them segment the property. The developer came to the city with a development plan, and the city said, Well, we want you to make sure that the lot lines are consistent. We don't want development sites straddling lot lines. And the city only required them to impose a rational set of assessor's parcels underneath the four development sites.

The decision to develop the property with four development sites was the developer's and the developer's own. But more important to the segmentation point, the decision to apply for development on each separate property and then sue, sue the city for a taking on each separate property, that's the

segmentation, that's where the segmentation really comes into play, because they're claiming now you wiped out one of my segments, even though the city let them build in the parcel as a whole, the Badlands or the PRMP, you know, 84 percent buildout, even though the city let them build, Okay, I've carved out this one part, you have to let me build on every part.

So that's how you get greater density. Let's say you approach an acreage and you say, okay, if I do a master plan with the city, maybe they'll allow me 500 units. So if I then carve it up into four parts, then apply for development on the first part, and let's say they give me 400 units on that part, then if they say, No, we don't want you to develop the other parts, we've already given you 400 units, you know, you carve the property up into four parts, but it's the parcel as a whole. We gave you 400 units, that's substantial development, you really did well.

In this case the developer paid 4 and a half million dollars for property that it now claims is worth 54, or that only 35 acres of the 250 acres is worth 54 million. Wow! That's a great deal for property.

MR. LEAVITT: I have an objection --

THE COURT: Sir, we have an objection. Wait. Sir, we have an objection.

Yes, sir, Mr. Leavitt.

MR. LEAVITT: Yes. As far as the purchase price is concerned, that's the subject of a motion *in limine* which includes the actual evidence, so we would object on that basis; and, secondly, Your Honor, I guarantee you we will not hear the words from counsel "I am done." It will not happen. He's repeated himself four times on this segmentation argument. He went through it four times. He's supposed to go for an hour today. We're not going to get any time to respond, Your Honor, if he doesn't -- I guarantee you we're not going to hear the words "I'm done," so we're going to have to at least put some limitation on how far he can go, Your Honor.

MR. SCHWARTZ: I'm done, Your Honor.

(Laughter)

THE COURT: Okay.

MR. LEAVITT: I stand corrected, Your Honor. I was wrong, but he just said he's done.

THE COURT: Sir, thank you.

MR. SCHWARTZ: Your Honor, I was responding to the Court's questions. I apologize for going over my hour.

THE COURT: That's okay, sir. And I just want to make sure we have a clear record here. Nothing more, nothing less.

All right. You want to take five minutes?

MR. LEAVITT: I have to use the restroom, Your Honor.

THE COURT: That's what I was thinking, I think everybody probably has to.

We'll take a restroom break and then come back and get started.

MR. LEAVITT: Thank you, Your Honor.

(Recess taken at 11:02 a.m.)

(Proceedings resumed at 11:12 a.m.)

THE COURT: Okay. We can go back on the record.

And Mr. Leavitt, you have the floor, sir.

MR. LEAVITT: Thank you, Your Honor.

Your Honor, I'm going to just very generally, I'm going to make a couple statements, then I'm going to respond to a couple of your questions, and then I'm going to go into my presentation.

To follow the city's argument here, there would be two things that are necessary: Number one, you have to reverse your property interest order of October 12, 2021 -- or 2020, that's the city's first request, is to reverse your property interest order.

Then their second request is to apply the *Penn Central* standard to all three of the landowners' claims. The reason I say that is because the *Penn Central* standard does say that you weigh three various factors, and you apply the segmentation. The Nevada Supreme Court was unequivocally clear in *Sisolak*, *Sue* and *State versus Hoehne* that *Penn Central* analysis shall not be applied to a *per se* categorical taking, a *per se* regulatory statement, and a non-regulatory *de facto* taking

claim which are the landowners' three claims, that you're not to apply a *Penn Central* analysis, and I'll give you one example.

For Mr. Sisolak, he had a piece of property and he had air space. The Nevada Supreme Court held that the County of Clark height restriction ordinance number 1221 reserved 66 feet and above for use by the public, and that was a taking. If we apply *Penn Central* to those facts and segmentation to those facts, Mr. Sisolak loses, because his property was segmented. He still kept below 66 feet, and he still can build on his land. So that's why the Nevada Supreme Court said, in the three claims that we're moving for summary judgment on, you shall not apply *Penn Central*, and you shall not apply segmentation. You look at the property as an individual property, and I'll address that a little bit more.

So those are our three claims, Your Honor. We're not talking about *Penn Central*, and the reason we're not talking about any *Penn Central* analysis is because our three claims are very limited. And the Court has said we will not apply *Penn Central* under these circumstances, because they say a *per se* categorical taking is a categorical -- is a taking in and of itself. They say a *per se* regulatory taking is a taking in and of itself. They say that a non-regulatory *de facto* taking is a taking where the Government substantially interferes with the use and enjoyment of property. There's no defenses. You don't

get to come in and say, Well, there's segmentation. You don't get to come in and say, Well, there's no ripeness. You don't get to come in and say, Well, there's no *Penn Central* factors. So the Court found that when we meet that threshold, if this Court says, Listen, I've got this standard and you've met the threshold, then that's a taking. So that's the first thing.

Then the second thing, Your Honor, is in *Sisolak*, this is the question I thought you had, was if the Government exercises its discretion and that results in a taking, is that a taking?

So you have this whole petition for judicial review and taking law, and the Government is over here saying, We have discretion to do whatever we want, and even if it results in a taking, there's no compensation. We have discretion under PJR to do whatever we want to a property, therefore, you have no property rights, and if you have no property rights, there's not a taking.

Here's what the Court said, they said the Government -- this is almost a verbatim quote: The Government has the right to apply valid zoning ordinances that don't rise to a taking. See, they leave that second part off. So the Government can exercise its discretion as long as it doesn't amount to a taking. But just because the Government doesn't have discretion doesn't mean there's no property rights.

Your Honor, now I want to talk about -- I want to

address two of your very poignant questions today. This is actually a little bit out of order of what I was going to do today. The question you asked is, is there a restrictive covenant or a condition that the property remain open space? From the very beginning, counsel said absolutely, and here's their argument, here's their argument. They say there was -- and I'll give you this, Your Honor. They say there was a Peccole Ranch Master Plan that was adopted, and that Peccole Ranch Master Plan is a planned development, a PD. And then they say as part of that PD, the landowners' property must remain open space. Must remain open space. That's their argument, Your Honor.

I'm going to tell you -- and you hit it right on the head. You said, well, that's your argument, where's the evidence? Okay. Now I'm going to show you the evidence that is the exact opposite of what counsel just told you.

And I want to start here, Your Honor. May I approach, Your Honor, with -- I have an outline here on the property rights issue.

THE COURT: Yeah, and make sure, do you have an extra copy for the --

MR. LEAVITT: Absolutely, Your Honor, I have a section that's called Rejection of the Peccole Ranch Concept Plan, okay, and this is the facts and the law.

But let me just state one thing really quick --

MR. SCHWARTZ: Your Honor, if I could interrupt. I don't have copies of these exhibits. Is there some way I could get copies?

MR. LEAVITT: I have one for counsel right here and, yes, we can email him. We will email that.

MR. SCHWARTZ: Could you email it now?

MR. LEAVITT: Yes, we will email it now.

MR. SCHWARTZ: Thank you.

MR. LEAVITT: But the argument that's being made, Your Honor, on this condition issue is what they say is they say there's this condition which is pending. The law is very clear that if the Government is going to claim there's a condition on a piece of property, it has to be abundantly clear in the ordinances, you can't imply a condition, you can't spend seven hours trying to tie documents together to say now there's a condition that the property remain open space.

And here's all the Government had to do, Your Honor. For seven hours through this hearing all they had to do was walk in with a big board where the condition was imposed on the property that it remain open space. You want to know why they didn't do that? Because it doesn't exist.

And so here's where I want to go -- do you mind if I hand this to you for the Court?

So, Your Honor, here's where I want to go through the city's Peccole Ranch Master Plan argument, and I want to go

through and explain that the exact opposite is true.

So if you go to the -- on the bottom right-hand corner, it's number 38, this is a statement made by 30-year veteran attorney Brad Jerbic about this exact Peccole Ranch Concept Plan argument that they're making to you. Your Honor, this is the city's agent. He said that the Peccole Ranch Phase II Plan was a very, very, very general plan. I've read every bit of it. If you look at the original plan and what's out there today, it's different. Then he went on to say, the Master Plan that we talk about, this Peccole Phase II Plan is not a 278(a) agreement, it never was, never has been, not a word of that language was in it.

Mr. Jerbic said that the Peccole Ranch Master Plan that counsel argued to you extensively here in this case was entirely abandoned. And you remember, Judge, that's when I jumped up and I said this is very disturbing, because counsel knows that this plan has been abandoned.

And then you go to the next page, Your Honor, this is the Nevada Supreme Court opinion in the 17-acre case. The Nevada Supreme Court said right there in yellow: "The parcel does not carry the planned development district zoning designation."

That's what they argued, that it was a planned development and you had to stick to that planned development. Instead, it's interesting what the Court said: The parcel

carries a zoning designation of residential plan development district. Residential, meaning it has a residential use.

So this whole argument about planned development being on the property, this whole argument about PRMP, Peccole Ranch Master Plan being on the property is entirely false.

We go to the next page, Your Honor, page 40, this proves it even further. This page 40 says that Peccole -- this is the original owner. You remember they said the landowner stepped in the shoes of the developer. Peccole and the City of Las Vegas worked together to assure that there was no restriction on the use of the 250-acre property, and, Your Honor, they took express action to make sure there was never an open space on the property. Remember, I stated from the beginning the intent was always to develop the property residentially.

In 1990 --

THE COURT: That's why I asked the simple question regarding -- and I don't know what the City of Henderson did when it came to the Legacy Golf Course, but they clearly had a 50-year -- I think it was 50-year restrictive covenant on the property.

MR. LEAVITT: Yes. And, Your Honor, not only am I going to show you there's no restrictive covenant on the property, I'm going to show you that everybody in the area signed disclosures recognizing that the 250-acre property was

not a golf course, not open space, and here it is right here: Available for future development. The exact opposite of what counsel has represented to you.

But let me go back to 1990, why everybody got these disclosures. The next tab is page number 41. This is what's been referred to as Z-1790, and it's Exhibit No. 154. The city and Peccole got together. And it's a little bit difficult to see in this, it says, "Gentlemen" -- this is the corrective letter. This is a letter of what happened, and if it's blown up on the right-hand side, and it's --

MR. SCHWARTZ: Your Honor, I haven't seen any of these exhibits. I don't have any of these exhibits. I'm at a real disadvantage out here.

MR. LEAVITT: It's Exhibit No. 154.

THE COURT: All right. Has that been emailed to him. Ma'am?

MS. WOLFSON: We're having trouble --

MR. LEAVITT: Can we have Sandy email it to him from our office?

MS. WOLFSON: The city used this exhibit.

MR. LEAVITT: The city used this exhibit as well, Your Honor. It's in their documents.

THE COURT: And, ma'am, for the record, which exhibit of the city was that, do you know?

MR. LEAVITT: 154.

THE COURT: Sir, it's 154 of the city.

MR. LEAVITT: It's 154 of the landowners, and it's Z-1790. And, Your Honor, this has been discussed extensively. They know what exhibit this is.

THE COURT: But I just want to make sure he knows what you're looking at, that's all.

MR. LEAVITT: Okay, good.

So we're looking at Z-1790.

THE COURT: Okay.

MR. LEAVITT: Okay. So at Z-1790, on page 41, it says the City Council held a meeting on April 4, 1990. They approved the request for reclassification of property, and then they describe the location of the property, which is the landowners' property in this case. And here's what it went from, Your Honor, we got to follow this: Non-urban, and then resolutions of intent, and then, Your Honor, right before the highlighted "2" it says "C-V." That's critical. It went from all these designations and C-V. You want to know why that's critical? Because C-V is the only zoning that allows open space or golf course. And what did the zoning go to? It went to R-3, RPD-7 and C-1. The City of Las Vegas and Peccole worked to take off any potential open space, any potential golf course use. And then, Your Honor, look what they put as the proposed use: Single-family dwellings, multi-family dwellings, commercial, office, and resort casino. This is in 1990. This

is the City of Las Vegas and Mr. Peccole, in 1990, saying we're not going to put any C-V zoning on this property, we're not going to put any golf course use --

THE COURT: And for the record, the C-V zoning, that is the open spaces designation?

MR. LEAVITT: That's the only zoning that allows open space or golf course. It was expressly and specifically removed from the property in 1990.

Then, importantly, Your Honor, we turn to the next page, page number 42, and we have the conditions that are listed. Remember counsel said one of the conditions is the property has to remain open space and golf course. You know what's not listed as a condition? Open space or golf course.

So we have an action by the City of Las Vegas and the landowners working together in 1990 to make positively sure that this 250-acre property remains available for residential use.

If Mr. Peccole and the City of Las Vegas wanted this property to remain open space, they could have very easily put on a condition "open space." They could have very easily put on there "golf course." They could have very easily kept on the C-V zoning, and the city could have very easily said you have to leave this property as open space or golf course. They did the exact opposite, and they put the zoning on the property which allow-- and, Your Honor, they even say what the proposed uses are: Single-family, multi-family, commercial, office, and

resort casino. They put it right there. Yet counsel spent seven hours, seven hours trying to convince the Court that this didn't happen. Argument of counsel, as you well know, Your Honor, as we all know is not evidence. This is evidence (indicating) of what actually occurred on the property.

Now, Your Honor, let's move to the next page, which is our Exhibit No. 130. This is on page 43. This is an inner-office memo at the City of Las Vegas that we had to obtain through public records, and the City of Las Vegas made their own search to see if there's a golf course open space condition, and they said, "There are no conditions mentioned that pertain to the maintenance of the open space/golf course area." The City did it own research and found that there was no condition, found that there was no restriction that the property remain open space or a golf course. That's why Brad Jerbic said -- Your Honor, this is contemporaneous with the facts of this case, contemporaneous with the facts of this case, Mr. Jerbic stated there was never a Peccole Ranch Master Plan.

Now, Your Honor, I want to turn to the next page 44. This is Exhibit No. 133 of our exhibits. We did an analysis, Exhibit No. 133. Here's the large board of this analysis that we did, and this is all supported by affidavit. This analysis shows an overlay on this area here. You can see -- maybe I'll orient ourselves here, Your Honor. This is Charleston

Boulevard (indicating), this is Haulapai (indicating), this is and Alta (indicating), and the landowners' property is between that area, and you can see the golf course kind of laid out there. Okay. This shows an overlay of what the Peccole Ranch Concept Plan was going to look like, and then it shows what was actually built. There are 1,014 units built, contrary to that original Peccole Ranch Concept Plan.

Now, let's think about that for just a minute, Judge. The City of Las Vegas said the Peccole Ranch Master Plan is the governing document here; the Peccole Ranch Master Plan is what everybody had to comply with; the Peccole Ranch Concept Plan was a PD plan that was binding, and that Peccole Ranch Master Plan bound this property to be open space and golf course. Number one, you just saw that the exact opposite happened in Z-1790; and number two, we see that the Peccole Ranch Master Plan was never followed, and the reason it was never followed, Judge, is because there was litigation between Triple 5 and Peccole who started the original Peccole Ranch Master Plan, and because of that litigation, they abandoned the plan all together. That's why Brad Jerbic said that plan has never been followed.

Now, Judge the next 1, 2, 3, 4 pages of the landowners' book of exhibits here, page 45, 46, 47 and 48, those are all the disclosures in the area. I'm not going to go through them, Judge. But you asked, Hey, what did people think was going to happen in this area? Let's just go through them.

Seller makes no representation about zoning or future development. Look at number 4 there: No golf course or membership privileges. Look at number 7: Views or location advantages. They're not there.

Now, let me turn to page 46, because counsel said something this morning that was a little disturbing to me. He said that the golf course was an amenity for the Queensridge community. Again, the exact opposite is the truth. If you look at page 46 here, these are the CC&Rs for Queensridge community. The existing golf course commonly known as Badlands is not a part of the Queensridge community or inexorable property. The existing 27 golf course, commonly known as "Badlands" is not a part of the property.

So you had a good question: Well, in Legacy, it was part of the property, the golf course. It had a 15-year restriction on it. Here --

THE COURT: I thought it was 50. Was it 15?

MR. LEAVITT: 50, sorry.

THE COURT: Yeah, I thought it was 50.

MR. LEAVITT: Here, they're expressly stating the exact opposite. It's not a part of the Queensridge community, it's not an amenity. We're disclosing to you that this property may be developed. This is written right in the Queensridge CC&Rs.

And, Judge, who wrote the Queensridge CC&Rs?

THE COURT: Peccole.

MR. LEAVITT: That's right.

THE COURT: I mean, that's --

MR. LEAVITT: I don't mean to ask the Court questions.

THE COURT: I know it's rhetorical. I get it, I do.

MR. LEAVITT: And why did he say it's not part of it? Because in 1990, he met with the city and they rezoned everything for that area and took out the C-V zoning specifically to make sure that this property here (indicating) was available for residential zoning. That's why he did it.

And, Judge, you go to the next page, we have more disclosures. I'll just refer to the one on the right. This is a disclosure for the properties in the area. Look at the current zoning on the contiguous parcels is, look at what the south is, and to the south, RPD-7 residential up to seven units per acre. Right there.

If this property here (indicating), the landowners' property was reserved as open space, why was everybody in this area being disclosed that the property to the south is RPD-7? Zoning classifications describe the land uses. You go on with the views, and they say, Listen, we're not giving you any rights to views here because it's available for development.

Then we go to the next page, page 48, this is the disclosures, a map put right inside of the city's -- or, I'm sorry, inside of the Queensridge CC&Rs. You can see where it's

highlighted as "not parked." I want to reference the Court to this little triangle at the top here (indicating). Do you see that little triangle at the top right below Alta Drive?

THE COURT: Yes.

MR. LEAVITT: That's the location of the 35-acre property right here (indicating).

Going out to the key at the bottom there it says, "subject to development rights." That doesn't sound like the Queensridge community was told this was going to be open space or golf course.

And then here is the kicker --

THE COURT: I mean, I don't mind saying this, I wasn't a land and planning use lawyer, but it just seems to me that if that were the case, there would be documents and evidence to support that.

MR. LEAVITT: And there are none. Instead, Judge, the documents and evidence that we submitted to you state the exact opposite.

I want to show you this document right here, Judge.

MR. SCHWARTZ: Your Honor, I hate to interrupt, but I have got one exhibit by email. I don't have -- I'm not getting these exhibits. I can't follow along.

MR. LEAVITT: This is the Queensridge CC&Rs that counsel has in his possession, Your Honor. Queensridge CC&Rs are attached as an exhibit, and I believe it's Exhibit No. 33;

is that correct?

MR. SCHWARTZ: Your Honor, these exhibits are in about 20 different volumes. They don't say -- the exhibit doesn't tell me which volume it's in. By the time I find these exhibits, counsel has moved on to another exhibit. Can't they send me an email copy of whatever he's showing to the Court?

MS. WATERS: Sir, it's taking a minute.

MR. LEAVITT: It's large, so it's taking a minute, which, Your Honor, this actually might be a good time for me to put on the record that when Mr. Molina was up here and I asked him for his email or his presentation, we never got it, it was never sent to us. So I haven't said that --

MR. MOLINA: I handed it to you.

MR. LEAVITT: No, that's not true. It was -- we asked for the presentation that night by email. They said it was too large and they couldn't send it to us, and they didn't give it to us the next day. He handed to me the old maps. He didn't hand to me their presentation.

MR. MOLINA: What?

MR. LEAVITT: So here's what we're doing. It's going to them. Their present counsel who is sitting here in the courtroom has a physical copy of the document, and it's being sent to them, Your Honor.

What's that?

MS. WATERS: And it's on the screen.

MR. LEAVITT: And it's on the screen, and we have on the screen the exhibit so he's able to see them.

THE COURT: Sir, can you see the screen? For example, there's a document up, it's Bates stamped 02685, Exhibit C. It appears to me to be a map, final map for the Peccole West. That's what's at the top. Underneath it in parentheticals is "Queensridge."

MR. SCHWARTZ: Your Honor, I can only see the Court, the bench. I don't see anything on my screen other than that, and an inset box with me.

MS. WATERS: It's still sending.

MR. LEAVITT: It's sending, Your Honor. They have it present, counsel has it.

THE COURT: You can see it now, sir. You should be able to see it now. Can you see it?

MR. SCHWARTZ: No, I can't, Your Honor. I just see the bench, I just see the judge and the man standing besides you, and now I see Mr. Leavitt standing behind the podium, but there's nothing on my screen other than that.

MS. WATERS: I'm sending it. It's saying "sending." I don't know how to rush that along. I mean, he has a copy of it.

THE COURT: Sir, do you have all the documents that are Bates stamped?

MR. SCHWARTZ: Your Honor, is that a question for me,

Andrew Schwartz?

THE COURT: Yes.

MR. SCHWARTZ: I don't have any documents other than the, I don't know, 20-or so volume of exhibits. And, again, the exhibits are not -- they don't tell you which volume they're in, so it's -- searching for them takes considerable amount of time.

THE COURT: Do you know which volume this is in?

MR. LEAVITT: Yes, Your Honor. We actually have -- let me just say it this way. We've produced all the volumes. On the front of the volume it has a list of all the exhibits plus the page number for every single exhibit. They're all in page number order.

THE COURT: This would be 2685, for the record.

MR. LEAVITT: Just for the Court's reference, these aren't unknown documents. These are documents which have been heavily litigated in both of these cases. Counsel is extremely aware of the Queensridge CC&Rs.

MR. SCHWARTZ: Your Honor, let's proceed. I'll just do the best I can. If Mr. Leavitt could give me the exhibit number and the volume it's in, that would allow me maybe to keep up. Thank you.

MR. LEAVITT: So for the record, this is the Queensridge CC&Rs, and I'll just go to the last page of the Queensridge CC&Rs, Your Honor, and this is where it says a map

with future development right over the landowners 35-acre property.

And also, I'll pause right here for just a moment. And this is all in the record. The adjoining property owners actually sued the landowners and said you shouldn't be able to build, because we think the property should remain open space; we think the property should remain as a golf course - the exact issue that's before you today that the city is arguing. The city was a party to that lawsuit that was later dismissed. You know what the outcome of that argument was, Judge? There's a decision by the district court in that case, and it's extensive findings of facts and conclusions of law. Here's what the Court said. The property is RPD-7 zoned. The landowners have the right to close the golf course, and here's what the quote was: The landowners have the, quote, right to develop, end quote.

This whole very issue of this is open space, that this is the Peccole Ranch Concept Plan, and that this has to remain a golf course was actually fully and fairly adjudicated, and the lawsuit against the property -- or lawsuit brought by the adjoining property owners, and the district court held they had the right to develop. That was appealed to the Nevada Supreme Court, and the Nevada Supreme Court affirmed it not once but three times, because the adjoining property owners kept filing petitions for rehearing.

So this whole underlying argument that the city is making, their whole argument rests on the property was supposed to be open space or golf course forever.

THE COURT: And for the record, the city was part of that lawsuit?

MR. LEAVITT: The city was part of that lawsuit to very begin with, and they asked to be dismissed from it. So they had full and fair notice of that issue, and they had full and fair opportunity to participate, and the city did not. You want to know why, Judge? This is what's been such disturbing in this case, is while the landowners were filing their applications, the city was on our side. The city agreed with us this entire time. The city said to the adjoining owners, this property is not a golf course property. The city said to the adjoining owners, this property is not open space.

Brad Jerbic, we just read his statement, that's a homeowners' association meeting where Brad Jerbic appeared, and Brad Jerbic says to these homeowners, he says: That was a very general plan. I've read every bit of it. If you look at the plan, what's out there today is different. He said, "We never followed the Peccole plan."

My point in bringing that up is we have always been on the same page with the city. When this litigation started, their private counsel took the exact opposite position and started arguing that the Peccole Ranch Concept Plan is now

binding on everybody, when they said the exact opposite for years.

Remember, Your Honor, when it -- I'll go through this. When we submitted, when the landowners submitted their applications to develop the 35-acre property, you remember what the Planning Department said? They have zoning, they can go forward and build. Remember when the landowner submitted their Master Development Agreement Application, what did the City Planning Department say? They have the zoning, they should be able to go ahead and build.

Never once during the application process did the city come forward and say, Hey, you have to leave this property open space; Hey, this property is golf course.

This whole open space/golf course argument is an invented argument for litigation, which is based only on argument by counsel, and is the exact opposite of the city's position for the past five years, and it's the exact opposite of the documentary evidence.

If we turn to -- this is ordinance number 5353, page 49 of our booklet, Exhibit No. 43, a well-known document in this case. This further confirms what I'm telling you, Your Honor. Again, evidence. Ordinance number 5353, it's undisputed that this occurred in 2001, and the Court can see the highlighted part there on 5353. It says, "The document shows for each parcel the zoning designation on the current

zoning atlas and the new zoning designation for the property." What happened here with ordinance number 5353, as the city explains, is it wanted to conform all of the zoning in the city, and it's undisputed in this case that in 2001 the city reconfirmed the RPD-7 zoning. And what's critical is what the city says in section 4 on the next page: "All ordinances or parts of ordinances or sections, subsections, phrases, sentences, clauses, paragraphs contained in the City Municipal Code, 1983 Edition in conflict herewith are hereby repealed."

So the city says unequivocally --

THE COURT: I mean, that language is typically -- and I've dealt with ordinances before, and that's general language that's in the -- I mean to the city's benefit, they always put that language in there just to make sure it's clear, clarity as you proceed forwards.

MR. LEAVITT: Absolutely. So what was the clarity they wanted to know? Zoning applied, that the RPD -- that the property was RPD-7 zoned.

And so they said we don't care what may or could or should have happened in the past, this property is now RPD-7 zoned property, which is consistent, Your Honor, with what happened on this property, which was to assure that there are only three zoning designations and to assure that the C-V designation was taken off.

Now, I want to turn to page 51.

THE COURT: What's the impact of, I mean, from a legal perspective, of the -- and, I mean, I don't know the exact term for it, but I'll call it the special ordinance that was approved by the City Council within the last few years specifically related to this property. What impact does that have legally?

MR. LEAVITT: Which ordinance are you referring to, Your Honor?

THE COURT: I'm talking about the one that you indicated that was prepared -- I mean, I'm sorry, approved by the City Council specifically addressing the golf course. You know what I'm talking -- you said, Judge this shouldn't happen, this is bargaining this defendant.

MR. LEAVITT: Oh, yes, okay, so that's ordinance number 2018-24, okay. This is after the city denied the 35-acre application, after the city denied the magic realm agreement after the city denied the fence, and after the city denied access, the city then took action specific towards the landowners' property. Here's the action they took. They said, number one, this bill targets only your property, 2018-24, they said that. There's no evidence to contradict that. Counsel has it, that it targeted only the landowners. Number two, it imposes requirements making it impossible to develop. So the city recognized the property was able to be developed because then they imposed impossible-to-meet requirements to develop;

and then, thirdly, here's the quicker. They said you have to allow the public to access the property. That was the operative language. They put --

THE COURT: By itself that takes it out of *Penn Central*.

MR. LEAVITT: Of course. And that's exactly what happened in the *Sisolak* case. That's exactly what happened in the *Sierra Point versus Hassid* case, and in both of those cases --

THE COURT: Do they -- do they --I mean --

MR. MOLINA: Absolutely not, Your Honor. In the Declaration of Peter Lowenstein that we went through last week, if you go through -- there's a section that specifically talks about this ordinance. It was not specific to their property, it was never applied to them, and this is absolutely false, and I just need to make an objection for the record. That's completely misstating what the evidence shows.

THE COURT: Now, when you say that it was never applied to them, wasn't the ordinance approved, though?

MR. MOLINA: The ordinance was approved, but it didn't automatically apply to them. The city had to either ask them to submit an open space plan or it would apply to a future golf course that closed. In this case the golf course was already closed at the time the ordinance was passed.

THE COURT: But it didn't -- there were no other golf

courses at issue, right?

MR. MOLINA: I mean, there are golf courses throughout the county?

THE COURT: No, no, no, there were no other golf course at issue, i.e., there were none that were failing, there were no other golf courses that were having --

MR. MOLINA: Well, there's Silverstone, that's another golf course in Las Vegas that failed.

THE COURT: And where is that ordinance again?

MR. LEAVITT: I will pull it up, Your Honor. It's Exhibit 108, Your Honor.

And as we're pulling this up, we can read the ordinance. We don't need Mr. Lowenstein to tell us what doesn't apply. It's an exhibit in our exhibit book, Your Honor.

THE COURT: Yes.

MR. LEAVITT: Landowners' exhibit. We could turn to Exhibit No. 108. That's -- it should have a red cover, and I have another book, Your Honor.

THE COURT: No, I have it here. Yes, I have it.

MR. LEAVITT: Okay. Exhibit No. 108. And once you get there, Your Honor, I can reference you.

THE COURT: I have it.

MR. LEAVITT: Okay. Now, the front page there at 003202, it says, A, General, so this is the ordinance that was passed by the City of Las Vegas. It says: "Any proposal by or

on behalf of a property owner to re-purpose a golf course or open space, whether or not currently in use as such," in other words it applies no matter what you've done so far, "is subject to the public engagement requirements in subsection (c) and (d) as well as the requirements pertaining to the development review and approval process, development standards and the Closure Maintenance Plan set forth in E(2)(G) exclusive." So it expressly states if you're going to change your property from an open space to a golf course, you are subject to (g), that's the operative one. And just so we're clear here, the only evidence we have is that this applies only to the landowners.

So let's flip over to section (g), which is 003211, bottom right-hand corner. See at the top there it says (g) Closure Maintenance Plan?

THE COURT: Yes.

MR. LEAVITT: Then we turn to the next page, and one of the requirements under that Closure Maintenance Plan is little (d) on page 003212. I don't know if you're there, Your Honor.

THE COURT: I'm there. "Provide documentation regarding ongoing public access."

MR. LEAVITT: There it is.

THE COURT: "Access to utility easements and plans to ensure that such access is maintained."

MR. LEAVITT: Why? Here is where it all fits in, Judge. Why did the city adopt this language that applies only to this landowners' property? Because it already denied the fence. It denied the landowners' fence to keep the public out.

And the city -- and do you remember why that fence was denied? Counsel told us on Friday. He said the fence was denied because of political pressure. What was that political pressure? The surrounding property owners wanted to be able to access the property, and so they put right in an ordinance that you have to allow ongoing public access. That act alone is a *per se* taking under *Sisolak*.

Now, it doesn't matter whether the public actually used it, but, Judge, we know they did. There's no, Hey, we're going to adopt this but it might or might not apply to you; Hey, we're going to adopt this but we're just kidding. That didn't happen as counsel is representing.

The very beginning of this ordinance says that section (g) shall apply to you, and it shall apply only to the landowners.

But let me back up for just a minute and put this bill in context. This is -- remember, the council member, who was the highest level member at the city, went to these homeowners and in their homeowners meetings said to them "This property is your recreation," that's what he said. He went to their meeting --

THE COURT: Is that Mr. -- for the record is that Mr. Seroka --

MR. LEAVITT: That's Mr. Seroka.

THE COURT: -- who sponsored the bill?

MR. LEAVITT: Who sponsored the bill. He went to the homeowners and said, "This property is your recreation, you get to use it." Then he followed up by sponsoring the 2018-24, and then he required that that language be put in there that the landowners must allow ongoing public access to the property. So remember, counsel said, Listen, statements of council members are irrelevant, I'll get to that in a minute. But in addition to saying that, he then sponsored the bill and the City Council adopted the bill, so there wasn't just a statement by a council member, there was a follow-up and an adoption of a bill.

THE COURT: Well, for all practical purposes, the City Council has spoken once this bill has been introduced and approved.

MR. LEAVITT: Absolutely. And, Judge, can I just give an example here? This was in the *Knick versus City* of -- *Township of Scott Pennsylvania*, exact same thing happened. In that case, the city adopted an ordinance saying that private landowners had to allow public to enter into their cemeteries around the property. Taking.

THE COURT: So, I mean, we can look at it factually.

The property owner was denied access, yet they're required, pursuant to the ordinance, to permit public access.

MR. LEAVITT: That's exactly what happened.

MR. MOLINA: Your Honor, that's not what the ordinance requires. This is a closure -- this provision addresses Closure Maintenance Plan, and if the landowner were going to provide access, then the Closure Maintenance Plan would need to address that. Completely misconstrues --

THE COURT: I'm just looking at the language, it says, "Provide documentation regarding ongoing public access."

MR. MOLINA: That's if the landowner allows ongoing public access. It's not saying that the landowner *must* provide ongoing public access.

MR. LEAVITT: I appreciate counsel's attempt to interpret the law, Your Honor, but the language is plain. It says you have to provide documentation showing that the public is coming onto the property. If counsel has objection to this evidence, he can enter it, or if he has an argument, he can wait until I'm done and then make that argument.

But, Your Honor, not only that, but we've presented as Exhibit 119 the council minutes which state the exact opposite of what counsel just told you. This is Exhibit 119, Bates stamped 004163. This is Robert Summerfield who is the head planner of the City of Las Vegas: "I want to be clear that the Closure Maintenance Plan, because the language does say

something along the lines of what we've been aware of, may close. But, again, where there's a golf course" -- he then goes on to explain that that provision applies retroactively.

That same language, Your Honor, appears several times in the minutes. Here we go right here. This is Exhibit No. 118: The retroactive provision. This is 003957. This is November 7, 2018 when this issue is being discussed. The retroactive provision. The only way this becomes retroactive -- and everybody has their own definition -- there's a potential for property that's golf course or open space that either has been or will be withdrawn, and they *have* to propose the Closure Maintenance Plan.

Then right here, page 004086, referring to 2018-24:

Our lawyer: I just want to ask you, is this retroactive? Does this go back to -- I mean, I haven't mentioned Badlands. I don't want to get into that much, but does this go back to any developer that is already in the process?

In other words he's saying is it retroactive?

Their attorney at that time, not during trial, but unbiased by the parts of litigation here, he says: To that extent all laws are retroactive. The one part of this ordinance that could be considered retroactive --

THE COURT: That's not necessarily true. If it's substantive in nature versus procedural. Procedural, they're

retroactive; substantive, no, prospective, unless it's specifically carved out.

But go ahead, I get it.

MR. LEAVITT: Well, he goes on to say right here: Insofar as the retroactively of this part, he says it needs to propose a Closure Maintenance Plan. He goes on to say that the city's intent on drafting 2018.24 was to mandate section (g) Closure Maintenance Plan on the landowners. He said it was intended to apply retroactively specific to these landowners.

And, Judge, we don't have to even go there. All we have to do is look at the general section right up front that says section (g) applies to the landowners when they try and change their property.

And the City Council spoke, they didn't say you have to provide ongoing public access only if we ask you to. They could have put that in there. The city could have put right in there behind that clause: You have to do this only if we ask you to. They didn't do that. They said you have to provide ongoing public access, which is consistent with Mr. Seroka's statement to the homeowners' association.

THE COURT: I mean, legally that's not much different, if any, from *Sisolak*.

MR. LEAVITT: That's the same exact thing, Your Honor, and that's what we've argued.

In Mr. Sisolak's case, the county adopted ordinance

number 1221 that said you have to allow the airplanes to use your air space. It's the same exact thing.

In *Cedar Point Nursery versus Hassid*, the State of California adopted a statute that said that the farm owners had to allow the labor unions to come onto their property 120 days of the year for 2 hours a day. Extremely less restrictive than this one. The United States Supreme Court said the adoption of that statute was a taking - a definitive statement by the United States Supreme Court in *Cedar Point Nursery*.

So, Your Honor, that -- and to keep in mind, in *Cedar Point Nursery*, Your Honor, the labor unions didn't even go onto the property, they were stopped, and the United States Supreme Court said it's irrelevant, whether they went on or not, you adopted the statute inviting them onto the property.

And then in this case it's even worse, Your Honor, because Mr. Seroka announced the public can use the property; they adopted a statute 2018-5 saying you can use the property; and then we have the affidavit of Don Richards, which has been submitted to the Court, and in the affidavit of Don Richards, Mr. Richards states unequivocally that he interviewed people coming onto the property, and they said, We're here because the city told us this is our recreation - even more egregious than the *Knick* case, even more egregious than the *Cedar Point Nursery* case.

So, Your Honor, I want to go on and I want to finish

off on this Peccole Ranch concept argument.

THE COURT: How much time do you anticipate that will take, Mr. Leavitt?

MR. LEAVITT: Just this last part right here?

THE BAILIFF: Just a reminder, we have to get out of here by noon.

MR. LEAVITT: Wow.

THE COURT: We have this afternoon, Mr. Leavitt.

MR. LEAVITT: We do have this afternoon?

THE COURT: Didn't we say this afternoon?

(Discussion off the record between the Judge and Clerk.)

THE COURT: No, I'm talking about our court. Didn't we say telephonically at my court?

MR. LEAVITT: Yeah, I think we can go telephonically, we could show up there.

THE COURT: Right, didn't I say that? I don't remember for sure.

MR. SCHWARTZ: I thought we were going tomorrow.

THE COURT: It is tomorrow? Okay. All right. Well, I'm not going to change anything.

MR. LEAVITT: Oh, okay. I misunderstood.

THE COURT: But tomorrow at 9:15 -- and, I mean, I'm very thankful that Judge Krall permitted me to use her courtroom. I just don't want to overstep my bounds because she has, I know, a lot of stuff this afternoon; is that correct?

And they've got to get prepared.

So what we'll do then -- and, you know what, I don't mind saying this, we're going to finish this up tomorrow, and that's just how I look at it. We have to have some sort of closure on these issues. We'll finish it up.

We start at what, 9:15 tomorrow?

(Off-the-record discussion.)

It will be 9:15.

MR. LEAVITT: Your Honor, so we could come live to your courtroom, your regular courtroom?

THE COURT: I mean, do we have any courtrooms available on this floor? My courtroom is about --

THE BAILIFF: Significantly smaller, Your Honor.

THE COURT: Significantly smaller.

MR. LEAVITT: Your Honor, I could stay back or I could even go back and sit at a table, but I just need --

THE COURT: See, this is how we would handle that if we do have -- if I permit you to come live, there would be two representatives per side and that's it.

MR. LEAVITT: That's fine, Your Honor.

THE COURT: Is there any objection to that? Because I want to be candid with everyone, I've never done more than that, first of all; secondly, it's a smaller courtroom, and notwithstanding, I want to make sure everyone has a full and fair opportunity to place their positions on the record, but

just as important, too, I do have to be concerned about safety --

MR. LEAVITT: Agree, Your Honor.

THE COURT: -- you know, for counsel, for everyone involved in this case, I don't mind saying that. Because for the record I take COVID-19 very seriously. In fact, I went out yesterday and got my booster (indicating).

MR. LEAVITT: I've been shot, too, Your Honor.

THE COURT: Yeah. But it's very, very important.

So this is --

UNIDENTIFIED SPEAKER: Your Honor, can I ask a question?

THE COURT: Yes, you may, ma'am.

(Question inaudible.)

THE COURT: Yeah, just two per side.

UNIDENTIFIED SPEAKER: Including the assistants?

THE COURT: Yes. But everyone can also listen. I mean, it will be video fed. And I'm going to make that for both sides, because that's about what we can do; is that correct, Mr. Marshal?

THE BAILIFF: If that's what you want, yes, Your Honor. I mean, I could see where we could probably have some people in the galley, if you'd like.

THE COURT: No, we haven't done that.

THE BAILIFF: Then we're not going to do that, Your

Honor, like you said.

THE COURT: We haven't done that at all.

So I don't want to -- especially right now because from a healthcare perspective -- and health, we have a lot of issues going on right now, and I think everyone is well aware of that. And, yes, I thought we would have been in a much different place four or five months ago, but unfortunately that's not the case.

So Mr. Leavitt, and for the city, too, we're going to finish this up tomorrow morning, we have to. We have one matter in the morning. I have one status check at 9:00 o'clock. 9:15 we can roll and we'll finish this up.

MR. LEAVITT: That sounds perfect, Your Honor. We look forward to that.

THE COURT: Just remember where you're at. And two representatives per side, it could be lawyer and legal assistant or two lawyers. It doesn't matter.

Bottom line, too, I don't mind saying this, everyone has done a wonderful job of getting me everything I need, from all the booklets and the evidence and charts and all those things. It greatly assisted me. I don't mind saying that.

And so we'll go ahead and recess. I have to respect Judge Krall. She's been so gracious to permit us to come in here. This is her courtroom. I wish my courtroom was set up like this.

Anyway, that's what we're going to do. And what we need to do is bring the banker's -- I'm sorry, library cart, Mr. Marshal, so we can take all this stuff back with us.

THE BAILIFF: Yes, Your Honor.

THE COURT: Anyway, let's recess until 9:15 tomorrow morning.

ALL COUNSEL: Thank you, Your Honor.

(Proceedings adjourned at 12:04 p.m.)

---o0o---

Rhonda Aquilina, Nevada Certified #979

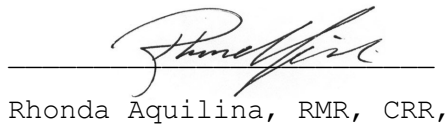
Reporter's Certificate

State of Nevada)
)
County of Clark)

I, Rhonda Aquilina, Certified Shorthand Reporter, do hereby certify that I took down in stenotype all of the proceedings had in the before-entitled matter at the time and place indicated, and that thereafter said stenotype notes were transcribed into typewriting at and under my direction and supervision and the foregoing transcript constitutes a full, true and accurate record to the best of my ability of the proceedings had.

In witness whereof, I have hereunto subscribed my name in my office in the County of Clark, State of Nevada.

Dated: October 6, 2021



Rhonda Aquilina, RMR, CRR, Cert. #979