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. 98

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

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

Reporter's Transcript of Telephonic Proceedings

Tuesday, September 28, 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

Tuesday, September 28, 2021 **9:17 a.m.**

P R O C E E D I N G S

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THE COURT: Calling the next matter, that happens to be page 3 of the calendar, 180 Land Company versus the City of Las Vegas.

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 landowner, 180 Land, and our legal assistant from in-house counsel is Jennifer, and she'll be assisting with the presentation.

THE COURT: All right.

MR. MOLINA: Chris Molina on behalf of the city.

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

THE COURT: All right, counsel. I just want to say good morning to everyone. And you can see now why I took a cautious approach as far as live appearances in the courtroom.

Unfortunately, and I think we can all agree to a person, this courtroom is not large enough for general civil litigation/business court, it's not. So fortunately I'm being moved, and I guess the powers that be listened to me on that. And so Judge Ahlf and I and Judge Denton will all be going to the 16th floor, and I guess that's going to be the business court floor. But I still handle general civil litigation too,

but I think that will be a benefit for everyone.

So at this point have you had a chance to set up and all those wonderful things?

MR. LEAVITT: The plaintiffs are ready to proceed, Your Honor.

MR. MOLINA: I believe we have Andrew Schwartz on the line. I just wanted to confirm.

THE COURT: What we're going to do is we're going to formally set forth our appearances for the record. I don't think we've done that yet, have we?

MR. MOLINA: We just did, except I don't think Mr. Schwartz --

THE COURT: Mr. Schwartz, are you there, sir?

MR. SCHWARTZ: Yes, I am, Your Honor. Good morning. Andrew Schwartz for the city.

THE COURT: And actually, I think we have a better connection, you know, than we had yesterday. I think it's pretty clear.

For the record, Mr. Schwartz, we can't see you on the video.

All right. And so is there anything preliminarily we need to do before we get started?

MR. LEAVITT: On behalf of the plaintiffs, no, Your Honor.

THE COURT: All right. And for the defense?

ALL DEFENSE COUNSEL: No, Your Honor.

THE COURT: All right. And madam court reporter, are you ready to proceed, ma'am?

THE COURT REPORTER: Yes, Judge. Thank you.

THE COURT: And I guess we might as well continue on.

And it's my recollection, Mr. Leavitt, you weren't completed yet; is that correct, sir?

MR. LEAVITT: What's that?

THE COURT: You weren't finished yet.

MR. LEAVITT: Oh, no, I've got a bit more, Your Honor.

THE COURT: Okay. So we'll go ahead and hand the floor to you, sir.

MR. LEAVITT: Thank you, Your Honor.

THE COURT: You may approach the lecturn.

MR. LEAVITT: Thank you.

And, Your Honor, I apologize for yesterday with the whole Power Point mixup. I was actually very upset at myself because I had it ready that morning and I wanted to make sure we emailed it to Mr. Schwartz. So immediately upon returning to the office, we regrouped and made sure that he got a copy of it. I apologize, Your Honor.

Your Honor, where we left off yesterday is we were talking about the Peccole Ranch Master Plan and the Government's argument that the property is an open space for the Peccole Ranch Master Plan. We completed that discussion.

We concluded that there are no restrictive covenants on the property. We concluded that there's no open space designation on the property. We concluded that the surrounding property owners all find disclosures, recognizing that the 250-acre property is available for a future development, and that it is not an open space or golf course property.

Now, to wrap up that Peccole Ranch Master Plan argument, I want to address the city's five examples that they showed you, Your Honor. As you'll recall, the city showed you some examples of golf courses across the valley, there were five of them. Each one of those golf courses has a deed restriction requiring it to remain a golf course. Each one of those golf course is owned by an HOA, and they're not privately owned properties. Unlike this case where there's no deed restriction on the 250-acre property, the 250-acre property is privately owned, and it is expressly recognized in the area based upon the disclosure documents that we presented to the Court that the 250-acre property would never be an amenity for the surrounding property owners.

And if I may, Your Honor, this Court can take judicial notice of those properties that are actually an amenity in the Peccole area. I'll just give one, Piggott School, P-I-G-G-O-T-T. It's a school. Remember, Mr. Peccole owned this entire area, and there's a school which is identified in that area, that's Piggott School. Piggott School is owned by the

School Board of Trustees. It is zoned C-V. And if you'll recall, Your Honor, Mr. Peccole and the city of Las Vegas worked together in 1990 to remove any C-V designation from this 250-acre property, but the property that was going to be reserved for the public, Piggott School, retained or has that C-V zoning designation.

And so you can see where the difference between how property in this area was handled that was preserved for an amenity, it's zoned C-V, and it's owned by the public. You can see the difference between that and the 250-acre property in this case that where the C-V zoning was specifically removed, and it is a privately-owned property.

And that's similar to this Court's example that this Court gave about Green Valley, where you see the public uses and they're specifically reserved for the public, unlike the property here.

Now, Your Honor, what I'm going to do now is I'm going to answer a couple questions that I thought were pertinent that obviously you wanted an answer to that you asked. Then I'm going to go to the property interest issue, and I'm going to address that property interest issue that the Government addressed during about seven hours of their presentation, and then I'm going to close out on the take issue, which was the original reason why we came here.

But yesterday you asked what economic value is left on

the property? And as this Court will recall, we continued this hearing so that the city could actually do specific discovery on economic value. That was a big fight we had.

THE COURT: And I do remember that. And as a trial judge I don't mind saying this, and I know litigants sometimes overlook this issue, but there's a reason why I do certain things, I don't mind saying this. I wanted to take that off the table as an appellate issue, right? Because that is one of the -- they do talk about economic impact on a lot of cases, and I just wanted to make sure that everyone had a full and fair opportunity to investigate and develop that issue.

MR. LEAVITT: Absolutely. And we respect that decision, Your Honor, and so we did all have that opportunity to complete that discovery. The city did the depositions it needed to do. And when that question was presented to you, the only answer that the city gave was, Well, it's an amenity for the area. That's what the city said. We know that's not true, because the disclosures of all the individuals in the area, they were told it's not an amenity for the area.

But, Your Honor, we did, the landowner did complete the discovery on the economic impact, and that is Exhibit No. 183 to the landowners' documents in this case. That is an appraisal report by an appraiser; he's an MAI appraiser, which means --

THE COURT: And which exhibit is that again, sir?

MR. LEAVITT: It's Exhibit No. 183, Your Honor. Let me make sure it's part of this. If not, I have it.

THE COURT: I have it.

MR. LEAVITT: In our exhibit book. You have the large one with the red cover.

THE COURT: Yes, I do.

MR. LEAVITT: Okay.

THE COURT: And that's 183?

MR. LEAVITT: Yes.

THE COURT: I have it, sir.

MR. LEAVITT: Okay. And if we turn to Exhibit No. 183, this is an appraiser by the DiFederico Group. Mr. DiFederico carries the highest designation that an appraiser can have, which is a member of the Appraisal Institute, MAI Appraiser. He's been appraising property in the Las Vegas valley for approximately 30 years.

You can see there that he appraised the property on the first page there.

We turn to the second page, Your Honor, this is just the summary of his report. He completed this report on April 23, 2021, which is Bates stamped 005213. This appraiser report, because it was timely completed, was produced to the city of Las Vegas in discovery. And the very relevant part, this is just a summary, we turn to the very last page of his appraiser report, and -- or this summary sheet here. It's Bates

stamp 005216. I can point out to the Court what Mr. DiFederico determined. He said that the value of the landowners' property before any government interference was $34,135,000. And then he considered all of the taking facts that we've been discussing in this case, and he concluded that after the Government interfered with this property it has a zero value. And you can read that at the last sentence, he says, I analyzed the property as if it could be developed under the RPD-7 zone, and then I considered all of the actions that the Government engaged in towards this property, and, frankly -- and he said in the after value, the value would be zero.

I believe that once Mr. DiFederico is testifying, he'll say I actually think it's a negative value, because the landowner not only cannot use the property for residential purposes because of the city's actions, but the city is taxing him $205,000 a year on this property as if it could be used for a residential purpose.

So your question was very poignant, because we have -- and, Your Honor, I know that this Court decides whether there's a denial of all economic viable use of the property, but this is extremely persuasive evidence of a denial of all economic viable use of the property. It's an opinion by a certified appraiser who went through this entire case and determined there's zero value left after the Government interfered with the use and enjoyment of the landowners' property.

It's an important point because the Nevada Supreme Court has analyzed these inverse condemnation cases and they said, quote, It's a battle of the experts, end quote.

The city did not do an appraiser report, Your Honor, and the city did not produce a rebuttal to this appraisal report. In fact, the city did no expert reports, so the only expert analysis that we have in this case, which is a battle of the experts, is Mr. DiFederico.

Despite the continuance and despite the time we gave for the city to determine the economic impact, it did not hire an expert -- well, it did not produce a report by an expert to do that. It did hire an expert, and we know that because that expert went and visited the landowners' property. But the city chose to not have that expert complete a report or even rebut the appraiser report that's been submitted.

The next question that the Court presented was, does the city have to pay for open space? And you remember Mr. Schwartz emphatically on Friday said absolutely not. That was a stunning statement. Because if you take private property and you force it to be open space, that's preserving that property for use by the public, and just the general provision of the United States Constitution and Nevada Constitution say "Nor shall private property be taken for a public use without payment and just compensation." Clearly compensation is required.

Secondly, Nevada has legislated that very issue.

Your Honor, NRS 37.039 -- and I just must assume that counsel was not aware of this. NRS 37.039.

THE COURT: 37.039. Hold for one second.

MR. LEAVITT: While you're looking for that, Your Honor, Chapter 37 are the eminent domain provisions, and this is 37.039.

And so the Court knows this, an 03 -- 030, there's a list of all the public uses, and then it says, "And any other public use." And then the legislature chose to create a very specific statute for open space because they wanted to make sure -- I'll just say it just like this, Your Honor, they wanted to make sure that what the city is trying to do in this case doesn't happen in Nevada where they force a landowner to have their property as open space but don't pay. It's conditions precedent to acquiring properties for purposes of open space.

They say, "Notwithstanding any other provision," and this is an important part of the bill, Your Honor, is the city is trying to say that this entire 250 acres is open space. It has to remain open space. And they even say, Your Honor, this -- and this becomes important on this part, too. The Government says, Well, if we approve 17 acres here, we can make the remaining 233 acres remain open space. Nevada has legislated this out so that the Government can't make these type of arguments. And the legislature says, Listen, if you're going

to identify property as open space, you can look at the bottom of subsection 1A, it lays out you have to offer compensation. You have to try and reach an agreement on the compensation. You go down to 2A, and they list all these requirements. And Judge, why, why did the legislature list all of these requirements that the Government has to go through before it can force a landowner to make their property open space? Because they didn't want what's happening here today to happen. They didn't want the Government to come in and say, We're going to force your property to be open space.

And then, Judge, if you go down to section 2A4, 2A4 says that you have to provide the owner of the property the value of the property plus damages, if any, as appraised by the agency. That has to automatically be given to the landowner, automatic. So the agency required, the city is required to appraise this property, determine its value, determine any damages, and pay that immediately to the landowner. And the way eminent domain statutes work is then if the landowner is not satisfied with that, we could have a litigation on the amount of compensation.

Your Honor, my real point in bringing that 37.039 to the Court's attention is clearly the Government can't just force somebody's property to remain open space, and clearly, the legislature took it very serious when a governmental entity is trying to force a landowner to designate their property as

open space.

Okay. All right. Your Honor, I don't know if you have any further questions on me on 37.039.

THE COURT: You know, I don't know how -- let me see. When was the statute enacted?

MR. LEAVITT: 2005, Your Honor.

THE COURT: Interestingly, I noticed they just put in that 50-year provision. That's very similar to the covenants running with the land, and to me it kind of makes sense, I mean, you can't have that designation forever.

MR. LEAVITT: Right.

THE COURT: Neighborhoods change, properties change, and so on. We've seen that many, many times how properties can change over 50 years.

MR. LEAVITT: Absolutely.

THE COURT: I get it, I do.

MR. LEAVITT: So if the city wanted this property to remain open space, this is what it had to have done, and it had to have paid for the property. And now what the city is doing is it's trying to force the property to remain open space without paying for it, in violation of that statute. And there's a provision, there's a paragraph in the *Sisolak* case, a very clear paragraph; it says if the Government tries to force a property owner in the state of Nevada to have their property remain in a -- or to convert their property to a public use but

not pay for it, in violation of a statute, the Nevada Supreme Court in the *Sisolak* case says that is a taking immediately. That's an inverse condemnation case. There's a whole paragraph on that in the *Sisolak* case.

So, Your Honor, now I want to go back to the property interest issue. Again, unless this Court has anymore questions for me on NRS 37.039.

THE COURT: Not at this time, sir.

MR. LEAVITT: Okay. So I want to -- now I've answered those few questions. I want to go back to the property interest issue, and I want to specifically address this question of PROS that the city has brought up.

And so what the city is arguing is they're saying, Judge, there is a master plan and the master plan says that the landowners' property is PROS.

And I'm sorry, Your Honor, do you have this book, the Landowners' Rebuttal to City Arguments 35-acre, the yellow one?

THE COURT: Yes, sir.

MR. LEAVITT: There we go. I'm on page 52 on the bottom right-hand corner.

THE COURT: All right. I'm there.

MR. LEAVITT: Page 52, Your Honor. So this is the city's argument. We turn to page -- the argument that there's a challenge.

We turn to page 53, the next page, Your Honor, the

landowners' position and the evidence shows there never was a legal PROS on the property to even begin with.

And if we turn to the next page, which is page 54, also up on the slide, you'll remember that Mr. Molina -- I can't remember what day it was, Thursday or so -- showed you this document; it's a 1981 city council meeting, and you can see on C it says, "Consideration of a document - generalized land use plan," and he quickly went through these maps for you. I'm going to slow it down a little.

If we flip to the next page, 55, the next page 55 is the original master plan designation for this 250-acre property. And, Judge, you can see we circled it in yellow, that's the general location of the 35-acre property, it's MED. And you look at the side, MED, what does it stand for? It stands for 6 to 12 residential units per acre.

So in 1981, Your Honor, the city's master plan had the 35-acre property identified as MED residential 6 to 12 units. That was consistent with the RPD-7 zoning that was on the property in 1981 also. So in 1981, you had RPD-7 zoning, which means 7 residential units, you have the city's own master plan that shows MED, which is 6 to 12 residential units, so you have the zoning that was consistent with the master plan - all the way back in 1981.

So now, the next question becomes did the city change this (indicating)? Did the city change the MED to PROS on the

landowners' property?

And we turn to the next tab, number 56, Your Honor, I'll just read one of these. Next tab, 56, is Exhibit 18 of planning commission meeting where this very issue came up in a planning commission meeting.

But on tab 56, the planning commission and the city Attorneys' Office did a full-blown study. And I want to refer to what Brad Jerbic says here at the bottom. He says, The planning commission or the Planning Department and the City Attorneys' Office researched the alleged change from MED to PROS. And this is what he said, There's absolutely no document that we could find that really explains why anybody thought it should be changed to PROS, except maybe somebody looked at a map one day and said, Hey, look, it's all golf course, it should be PROS, I don't know.

What he was saying there, which is confirmed by other testimony, is we couldn't find anything of how this property was changed from MED to PROS on the city's master plan.

Remember Mr. Molina showed you several maps that showed the property highlighted in green and said, Judge, because this map shows the property highlighted in green, it has to be PROS. Well, at the bottom right-hand corner of those maps, Your Honor, it says the maps are for reference only. They're not legally binding documents.

What would be legally binding is that the city showed

how the master plan was changed from the 1981 MED designation to PROS. And Your Honor, they couldn't have done it. They couldn't have changed it to PROS because the original zoning was RPD-7. The original master plan was MED. If they changed it to PROS, it would have been an illegal change because the zoning of RPD-7 was already in place.

Then we turn to the next tab, which is tab number 57. This is just a summary of the law. At the top it says the law to change the MED to PROS on a master plan. NRS chapter 278 has several requirements. The City's code says that if you're going to make a parcel specific amendment, you have to do certain things.

And this is the citation of the law, Judge, I could go through this in detail and spend an hour of all the requirements. But there's one specific requirement, and I don't know if it actually is listed in 278. The city, if it was going to change the MED to PROS, it had to go to Mr. Peccole here and say, Mr. Peccole, your property is designated MED; we're going to make a parcel specific change from MED to PROS, and they had to give him that notice.

During seven hours, the city not once gave you the document which said, Mr. Peccole, here is our parcel specific change from MED to PROS and now your parcel is going to be PROS. They didn't do that. And Mr. Peccole would have went through the roof had they tried to do that, because he met with

the city in 1990, as we went through those documents, and he and the city adopted Z-1790 to remove any C-V zoning and to assure that the proposed use of this 250-acre property was always residential. Your Honor, we didn't need seven and a half hours. What we needed was five minutes of an exhibit showing that the city gave notice that this was done to Mr. Peccole on this specific property, and it didn't happen.

Your Honor, I'd like to move to tab number 58. Let's indulge the city for just a moment, and let's assume that the city did adopt a PROS -- I'm sorry, Your Honor, not tab 58, I meant page 58 on my Power Point. I apologize to the Court.

Okay. So page 58 on my Power Point. Even if there is a PROS on the master plan, the zoning of RPD-7 would take precedence. So there never was a PROS, but let's assume there was. The Nevada Revised Statute, on page 59, is 278.349. It says that if any existing zoning ordinance is inconsistent with the master plan, the zoning ordinance takes precedence. So even if we have a PROS on the city's master plan, the RPD-7 zoning would take precedence.

Remember, counsel argued vehemently to you that the master plan is the Constitution, the master plan is of the highest order, that's the exact opposite of the statute.

And Your Honor, what counsel is going to say is this only applies to the tentative map process. Your Honor, this is the tentative map. This whole property would have had to have

gone through the tentative map process. That's -- when you go through the application process, you have to submit a tentative map. So clearly this applies to the landowners' property. Zoning takes precedence.

Now, if I could turn to the next tab. Sorry, next page, page 60, this is the city's own master plan that the city is arguing applies here over zoning. We've blown out on the right-hand side there, Your Honor, Exhibit No. 161. You can see the top left-hand side there it says, "master plan," and then it says, "provide general policies, a guiding framework." And then if you go to the right-hand corner where it says, "zoning ordinances,' it says, "provide specific regulations, the law." So the master plan that the city wants to apply itself recognizes that zoning is the law and a master plan is nothing more than policies. It's just that, Your Honor, it's a plan.

If I could turn to the next page, Your Honor, I'm going to go through this a little bit more in detail on another part. On page number 61, these are statements not by counsel here today, these aren't my arguments, these aren't the city's private attorney arguments, this is the City Attorneys' Office and the City Planning Department. Brad Jerbic: "I just want to break it down so that what happened over time. Somehow, PROS became the General Plan designation only after hard zoning was in place."

So he's saying somehow somebody wrote this PROS on this map, but hard zoning was already in place.

And then he said, "And the rule is hard zoning in my opinion does trump the General Plan designation."

Tom Perrigo, the next one, Exhibit No. 159.

"Q. If the land use and zoning are not in conformance then zoning would --

I'm sorry, actually it says, Answer.

"A. -- zoning would be the higher order entitlement, I guess.

"Q. So it's your position that zoning supercedes the General Plan?

"A. Yes."

Tom Perrigo, again, Your Honor, I've got over about ten of these statements from the City Attorneys' Office and the Planning Department. They're consistent always that zoning takes precedence over any general plan designation.

Your Honor, I'll turn to the next page, and I'll close out here on the PROS issue. On page 62 -- hold on a minute, Your Honor, let me make sure I got the right page. Actually, you know what, Your Honor, I want to reference Tom Perrigo's statement right there at the bottom, because I think it's critical to what the city had previously told you, that a general plan amendment was necessary on this property. Mr. Perrigo said, Even if that general plan action, his bold at

the bottom, didn't come forward, it doesn't take away the rights that the applicant had to the zoning.

So what happened during this process is the city said, Hey, Mr. Landowner, we want you to file a general plan amendment so that you remove this mistaken PROS off the property and it's consistent with your zoning. And we said, Listen we're not doing that, because if we don't need it, we already have zoning. And the Planning Department agreed that we didn't need to do that in order to develop. There was no variance required. There was no general plan amendment required.

THE COURT: I mean, it really makes sense just from a policy perspective, because when you look at zoning and zoning that's in place as far as property is concerned, if there's a conflict -- and I'm quite sure there's probably a lot of conflicts with the General Plan or the Master Plan -- my point is this, it would cause chaos.

MR. LEAVITT: Well, absolutely, Your Honor, that's why the courts and the City Attorneys' Office and the City Planning Department, and the City Tax Department have always relied upon zoning to determine property rights in Nevada.

Do you know, Your Honor -- go ahead.

THE COURT: From this perspective, I mean, it's my understanding that there was a tax bill issue that was based upon RPD-7 zoning, right?

MR. LEAVITT: Yes.

THE COURT: The taxes weren't submitted, and based upon an open space designation.

MR. LEAVITT: They were not, that's correct.

THE COURT: And my point is this, once again it would chaos.

MR. LEAVITT: Correct, Your Honor.

THE COURT: I mean, typically when a person goes in to the building department or any department and they want to develop, first thing they're going to look at, even when you buy the property, what's the zoning?

MR. LEAVITT: And, Your Honor, that's a perfect dovetail into the next section right here. Because what counsel said is they said, in one of the hearings, they said, Listen, this landowner messed up, he bought -- and this is the words he used -- he bought a pig in a poke.

But now I want to turn to this right here, Your Honor, the next tab, which is due diligence, and this is rebuttal of the city's argument that the landowner did not perform a proper due diligence, okay. And I want to turn to page number 11. This is a brief summary of the landowner's due diligence. And in 2001, he had been working with the Peccole family for six years in this area. He learned that the 250-acre property was RPD-7 zoned. He learned that it had, quote, the rights to develop, and he learned that, quote, it was intended for

residential development, and Peccole confirmed in 2001 that they would, quote, never, end quote, put a deed restriction on the property, Exhibit 34.

In 2001, the landowner goes and investigates the Queens Ridge CC&Rs and all of the disclosures for the surrounding area, and he finds out that the property is available for, quote, future development. That's what we have here, Your Honor, in the Queens Ridge CC&Rs, future development on the golf course property, and all land disclosures to the surrounding owners confirm this.

Then in 2005, I forgot to put it here, Your Honor, the landowner obtains the option to purchase the property. And in 2006, he then goes and meets with the head planner. The head planner says the 250-acre is RPD-7 and there's nothing that can stop development. That's the city's head planning official.

In 2014, he then meets with two more head planning officials, Peter Lowenstein and Tom Perrigo, and they conduct a three-week study at the city's planning department and they confirm, quote, the 250 acres is hard zoned for residential use and had vested rights to develop up to 7 units per acre, that zoning trumps everything, and any owner of the 250 acres can develop the property.

Your Honor, the landowner had not yet closed on the property when they got that three-week study. So they went to the city and said, We want you to put that in writing.

Now, before I go to what the city put in writing, Tom Perrigo, the head planner, his deposition was taken. He said if the land use and zoning are not in conformance, the zoning is the higher order entitlement. Peter Lowenstein had his deposition taken also. He said a zoned district gives a property owner property rights.

So you have a pointed question during these hearings. You said, Well, how did the city treat this zoning in the past. This is it, Your Honor.

And then the landowner says, Received all of this. And he says, Listen, before I close on this property, before I -- he allocated $45 million in cash to the property, and he entered into various complicated and very -- I guess the best way to say it is a lot of transactions that had a lot of hair on them over a ten-year period. And then he comes to the time to close and he attributes a hundred million dollars towards this 250-acre property. And before he's going to do that, he goes to the city and says, Listen, over the past 14 years, you've confirmed the due diligence for me, now I want you to put it in writing, and that's the next page, Your Honor, page number 12.

MR. MOLINA: Your Honor, I would just like to place an objection for the record that references to the documents and what was just said there lacks foundation.

THE COURT: What do you mean lacks foundation?

MR. MOLINA: There's no evidentiary support to support what Mr. Leavitt is saying about this hundred million dollars, this option in 2005, so we would just object to those statements.

THE COURT: Okay. I understand. But you're not objecting to Exhibit H -- I mean Exhibit 134, are you?

MR. MOLINA: I'm not objecting to Exhibit 134, no.

THE COURT: Objection noted, sir.

MR. LEAVITT: And, Your Honor, so what's interesting here is this is the city's letter. What we've been talking about is what was the city's position. And do you know, I think it was eight and a half hours the city didn't pull this letter out. That's a stunning thing. This is the city's position on zoning that they gave to the landowner prior to his purchasing the property and the city didn't even reference it in their argument. They say it's zoned RPD-7. And I will guarantee you, Your Honor, I've read this letter about 50 times and the words "open space," the words "PROS" and the words "master plan" don't appear in this letter. You can read the highlighted portion, Your Honor, where the city says, "RPD-7 is for residential development."

The city then goes on to say, the second sentence in the second paragraph, critical sentence, the density, the residential density allowed in RPD district shall be referenced by a numerical designation for that district. Then they even

give an example: RPD-4 allows up to 4 residential units per gross acre. Then they go on to say a detailed listing of the permissible uses and all applicable requirements of the RPD zone are in Title 19 of the City Code.

Judge, I'm going to go to the permissible uses in just a minute. This is what the city's representation was to the landowner. And why did they do that, Your Honor? If you turn to the next page, we can see why they did it.

The City Attorneys' Office confirmed that the landowners' due diligence wasn't accurate. Brad Jerbic, he stated on the record, counsel gave hard zoning to this golf course, RPD-7 which allows somebody to come in and develop. He then goes on to say that, quote, hard zoning trumps everyone else. Brad Jerbic and Phil Byrnes, we've attached all these documents, in a motion, in a 2011 condemnation case, said, "A master plan is a planning activity that has no legal effect."

Go down to number 3, Your Honor, these are affidavits now from the current City Attorney Bryan Scott and Jim Lewis in a 2011 inverse condemnation case where they say, "The Office of the City Attorney has consistently advised the City Council that the City's Master Plan is a planning document only."

Phil Byrnes, last one, number 4, this is specific to the 250-acre property: "In the hierarchy, the land use master plan designation is subordinate to zoning."

This is everything the City Attorney, all the way up

until this litigation confirmed this, agreed with everything I'm telling you, agreed with the landowners' due diligence, agreed that zoning controls.

Your Honor, if I could turn to the next page, number 14, you've already referenced this, I'm not going to go through it again, but this is the city's tax department also confirming the due diligence and confirming Exhibits 49 and 120.

THE COURT: I have a question from a legal perspective. How am I to treat these statements by Mr. Jerbic, Mr. Byrnes, Mr. Scott, Mr. Lewis, and so on.

MR. LEAVITT: They are -- here's -- there's a couple cases on that, but here's how. It's persuasive authority on the city's position, because the Planning Department and the City Attorneys' Office wrote Title 19 of the Code, they interpret Title 19 of the Code, and they sit in the council chambers and tell the City Council what Title 19 of the Code means, and the Nevada Supreme Court in a case said that the City Attorneys were -- the City Attorneys' interpretation and the Planning Department's interpretation of the Code is, quote, cloaked with the presumption of validity. So we have the individuals at the city who drafted these provisions and are interpreting them.

Now, there's case law saying that that is cloaked -- sorry, Your Honor.

THE COURT: I was just thinking about it from an evidentiary perspective, would they be admissions against interest?

MR. LEAVITT: We have a whole section, Your Honor, on admissions against interest. Your Honor, we absolutely have briefed that. But here's the problem with how the city presented this, is that was briefed in our motion to determine property interests that this Court already decided, and we laid out all the case law that that's an admission against interest. That's clearly one of the reasons you ruled the way you did, is you said this, I'm going to following the zoning, because that's what you've done for the past 50 years.

So yes, Your Honor, it is an admission against interest. We've cited that law and provided it to the Court previously.

And then if I may turn to page 15, Your Honor, I'll summarize this in one second. The landowners, on March 15, acquired Fore Stars which owned five parcels comprising the 250-acre property.

And so talking about admissions against interest, Your Honor, the landowners would have never allocated a hundred million dollars to this property and purchased it had the city sent them a letter that said the property is open space, the property is PROS. They would have never done that.

And, Your Honor, turning now to the next page,

page 16, here's some more admissions against interest. The city planners confirmed the landowners' due diligence and the use of the 35-acre property when the applications were filed

And, Your Honor, may I approach over to the easel?

THE COURT: Yes, you may, sir.

MR. LEAVITT: Okay. So as you'll recall, the City of Las Vegas required the Master Development Agreement. And as you'll recall, the thought here, they say -- and then what happened is the Planning Department gave a recommendation on the Master Development Agreement which would have allowed residential development, and we went through that. This is Exhibit 77, the City's Planning Department said, Listen, this conforms to everything; it conforms to the zoning; it conforms to the master plan; it conforms to NRS 278; it shows sensitivity to the surrounding area. So the city's own planning department, when the landowner submitted this Master Development Agreement, which the city denied, but prior to denying it, the city's planning department said, these landowner have zoning, and they have the right to do this.

I want to turn to the next page, Your Honor, page 18. And on page 18, remember the landowners filed another application to use the 35-acre property, with 61 lots. This is the City's Planning Department again confirming that the landowners have the right to do this.

We'll just look at the bottom. We've already gone

through this, Judge. I'll look at the bottom. The submitted tentative map is in conformance with all Title 19 and NRS requirements for this tentative map. Title 19 is the zoning code. So we have the city's own planning department, when the applications are filed, confirming the due diligence on the property.

Turn to the next page, Your Honor, page 19. This is Councilman Bob Beers when this was submitted. Remember what he said? He said, Listen, this is so far inside the lines - again confirming the landowners' due diligence that the property was zoned RPD-7 with the right to build.

Now, this next section, Judge, I think nails it right on the head. What does the Nevada Supreme Court -- so in this exact type of case, what does the Nevada Supreme Court rely upon when determining property rights? And that's the tab the Court relies on, zoning. Because of that tab, Your Honor, I'm going to go through six cases here. I'm not going to spend a lot of time on it, Your Honor, because it might take a while.

But tab 21, you go to tab 21 -- I'm sorry, page 21. This is the *Sisolak* case. Remember, Sisolak said you have to first determine the property interest. The facts, you can see on the left-hand side there is the facts, and then right below the facts is the property. And what did the Nevada Supreme Court rely upon to determine Mr. Sisolak's property interest? The zoning. The Court held that the properties were zoned for

development of a hotel, a casino or apartments. At no place in the *Sisolak* case does the Court say, Hey, is there a master plan in this area? Hey, is there some Peccole Ranch concept plan in this area similar to that? The Court relies upon zoning.

We go to the next case, Your Honor, it's another inverse condemnation case, *Clark County versus Alper*. I won't spend a lot of time on this one. It's page 22. It says, the Court said, "Due consideration should be given to the zoning ordinances."

Page 23 is another inverse condemnation case. This one is interesting. This is *Alper versus State*, page 23. The Nevada Supreme Court recognized the property on H2 zoning and they cut and pasted the H2 zoning into the decision and said, These are the legally permissible uses of the property. You can look at the top there, it says, under Clark County ordinances "uses permitted" in H2 zoning, and then they go through what they all are.

The point is the Nevada Supreme Court uses zoning to determine property rights in inverse condemnation cases.

Page 24 is an interesting case. It's one that you can see at the top there, Kermitt Waters did. It was one of the first cases I ever did with Mr. Waters. It's *County of Clark versus Buckwalter*. Look at this: "Although the property housed apartment buildings, it was zoned for commercial use, retail, food, beverage, gaming." That property was actually

being used as apartments, and the Nevada Supreme Court said it doesn't matter, it had zoning for gaming. And, Judge, you know how we valued that property in that case? Gaming. We didn't value it based upon apartments, even though it had been used for that use I think it was for like 20 years prior to that, they used the zoning.

Another case, the next page is 25, *Andrews versus Kingsbury*, another case where the Court used zoning.

And then page 26, I'll spend just a minute on this one because this is the case that this Court relied upon in its order, property interest order. This is what the Nevada Supreme Court said, this is an inverse -- this is a direct eminent domain case, *City of Las Vegas versus Bustos* -- the Court said, "We conclude that the district court properly considered the current zoning of the property as well as the likelihood of a zone change."

And then there's an interesting footnote in that case. It's footnote 1, it lists 10 cases, Your Honor, 10, where zoning was used to determine the property interest. In fact, in that *City of Las Vegas v. Bustos* case, the Nevada Supreme Court strongly indicates that if you use anything other than zoning, it's reversible error.

Now, Mr. Bustos, his property -- well, Your Honor, the point is that zoning was used to determine the property interest, okay, in the *Bustos* case.

And, Your Honor, I actually have all of those cases if you want a reprint of all those cases. I actually have them for the Court if it would like.

Okay. So page 27, the Nevada legislature confirms the zoning. We've already read this statute. Zoning trumps.

Go to page 29, the next page. The next page, 29, is an attorney general opinion. Even the Attorney General has weighed in on this issue, Your Honor. And the Attorney General issued an opinion where he says, (Reading) The enactment of that statute, the Nevada legislature in 1977 declared its intention that zoning ordinances take precedence over provisions contained in the master plan. They went on to read that that enactment buttresses our conclusion that Nevada legislature has always intended local zoning ordinances to control over a master plan.

I got two more, just a couple, two more on this, Your Honor, on zoning, and then I'm going to get to where the rubber meets the road.

Page 30, I just found this statute, it's NRS 40.005, it says, In any proceeding involving the disposition of land, in other words when you're dealing with land, the Court *shall* consider lot size and other applicable zoning requirements before ordering a physical division of the land.

Now, I know that 40 --

THE COURT: That's a partition case, right?

MR. LEAVITT: Exactly. That's not right on point.

THE COURT: I understand, but you're telling the Court this is what you do when you make that determination as to potential use, I guess.

MR. LEAVITT: Absolutely. It's not right on point. But, Judge, the point is the legislature has always intended zoning ordinances to apply. And this is just another example that when you're dealing with land, the Court is instructed, the legislature said you *shall* consider the zoning requirements. What I don't see in here is open space, PROS, master plan.

Next page is the real world. Lenders, bankers, brokers, investors, title companies, insurance companies, and even the government have always relied upon zoning, not a master plan.

And, Your Honor, do you see my statement there: No government entity has argued otherwise in these type of cases. This is the first time a government entity in the state of Nevada has argued that zoning doesn't apply and instead a master plan would apply.

And you know what good evidence I have for that - is the next page 32. This is the Declaration of Stephanie Allen. Stephanie Allen is a land use attorney in the state of Nevada. She works for Chris Kaempfer who has been doing land use for 40 years. She's been doing land use for 17 years. That means if

she billed 2,000 hours a year, 34,000 hours worth.

Paragraph 16: "During my 17 years of work in the area of land use, it has always been the practice that zoning governs the determination of how land may be used. The master plan designation has always been considered a general planning document." And listen to this sentence, "I do not recall any government agency or employee ever even making the argument that a master plan trumps zoning." 17 years. She hasn't even heard the argument that master plan trumps zoning - the argument being made here by the city today. This is the first time ever, Judge.

Now, so zoning should be used. Let's go to the next page, page 33. And page 34 is just the zoning verification letter.

And now, Judge, I want to go to where the rubber --

THE COURT: This is a general question, this is something I've always seen when it comes to ordinances enacted by the city. They always have some defining language and I think that this is one of them. We went over this in one of the other ordinances that was discussed at the very end. It will say that this ordinance trumps whatever happened in the past, so on and so on, right?

MR. LEAVITT: Yes, um-hm, and that's exactly what's happened here.

And do you know, I'll point this out, Judge, I won't

pull it out now, but the document that the city says adopts the PROS is ordinance number 3636. There's a section 3 in there, and you know what it says, it *shall* not affect zoning.

THE COURT: That's mandatory.

MR. LEAVITT: Absolutely. Because once -- zoning is claws into the land, it stays in the land. The master plan is in the government's archive. They're just back there planning the activities.

So now I want to turn to page 35, which is the RPD-7 zoning rights. And this is what this Court referenced before. We've already gone through this, I'm not going to spend a lot of time on it. But this is Las Vegas Municipal Code 19.10.050. Remember, the city zoning verification letter says you go to this to see your permitted uses. First the intent: The RPD has been to provide flexibility and innovation in residential development, and then as you well recognized, Your Honor, section C is permitted land uses. The number one permitted land use is single-family and multi-family residential. You have other land uses that are permitted: Home occupations and childcare and other child cares, right? Those are the only permitted uses in RPD-7.

Do you know this argument that the Government is making that this property has to be forced to remain open space or this property has to be forced to remain golf course. Those aren't even permitted uses. Those would be illegal uses under

an RPD-7 zoned property.

So the point here, Your Honor, is when you decided the property interest issue, you said, I'm going to follow zoning because that's what the Nevada Supreme Court requires, and the zoning here is RPD-7 and the legally permitted uses in RPD-7 zoning are single-family and multi-family residential, and, Judge, you were right, based upon this right here (indicating).

Now, can you pull this up? Do you have this? If not I can approach.

THE COURT: Which one is it?

MR. LEAVITT: You know what, I'll approach. I'll hand this to you, Your Honor. You don't have it in there. I just thought about it last night. What's the best way to give it to you.

THE COURT: Just approach.

MR. LEAVITT: Okay. I'm fully vaccinated and I've already had it, so I think I should be safe.

So this is what the city's own code says about zoning, okay, and what "permitted" means. So first, section 19.18.020 says, "Words and terms defined. What does zoning mean? An area designated on the zoning map in which certain uses are permitted and certain others are not permitted, according to this code." So when you have zoning, it means this is the uses that are permitted: Single-family, multi-family. Then it defines what it means by permitted uses: "Any use allowed in a zoning

district as a matter of right. As long as it's conducted in accordance with the restrictions, permitted uses are designated in the land use title by a letter P." I don't know if I have it in here, it doesn't look like. So a letter P means you have the right to use the property.

Let's turn to the next section of the Code here, Your Honor, the city's code 19.16.090. And this is the part right here that says what do you get when you get zoning, and section O is authorization to proceed. "Such approval of zoning authorizes the applicant to proceed with the process to develop and/or use the property in accordance with the standards, procedures of the city departments, and in accordance with the requirements of the Code."

Counsel said the other day that what "permitted" really means, Judge, is it's not not permitted. If that's what the city wanted to say, then on the definition of "permitted" right here, it would have said permitted means not not permitted. That's not what the Code said. It says, "Permitted means any use allowed in the zoning district as a matter of right."

Your Honor, I think I've hit that property interest issue enough. I mean, the city brought this up out of the clear blue. It wasn't supposed to be heard. I understand why the Court wanted to allow it to be heard, to make sure that they could be fully heard. But they brought it up out of the

clear blue. It had been fully decided and fully litigated before this Court entered a decision on the property rights issue previously, and there's absolutely no reason that that decision should be changed, and this Court didn't -- or the city didn't provide any reason why the Court should change its property interest order.

THE COURT: Well, I mean, there was no motion for reconsideration done on that issue, right?

MR. LEAVITT: Absolutely, Your Honor, there was not.

So now what I want to do, Your Honor -- and I think we've sent this. If not, I know -- okay, it's already been sent, okay, to Mr. Schwartz.

Now we want to turn -- and Your Honor, this looks a little thick and it looks daunting. It's not going to take much time to go through.

May I approach again, Your Honor?

THE COURT: Yes, you may.

MR. LEAVITT: Okay. So, Your Honor, we've established that the landowners had a residential zoned property which included the right to develop that property for single-family and multi-family residential uses. So now the question is did they take that?

And I'm just going to briefly go back where we were about 10 hours ago in arguments. If we go to the first tab there, Your Honor, I'm going to skip the front portion. Go to

the first tab there that's Taking Facts: "Taking facts, the aggregate of the city's actions," that's page 69.

If we go to page 70, we know we're supposed to look at the aggregate of the city's actions. This was one of those acts, just one of the acts that we looked at on page 70. Just remember -- and I talked about this yesterday, so I'm not going to spend a lot of time on it -- that councilman publicly announced, Hey, this property, the landowners' property is for your recreation use to the public. He then sponsored that Bill 2018-24 to force the landowners to allow that access, and the city did it. The city passed the bill, and the public is following that discretion, Your Honor, or that direction. The public is following exactly, exactly what they said they were going to do.

And Your Honor, what the city said -- they objected yesterday, and I want to address this just very briefly, the city said, Hey, we didn't enforce that provision, we didn't enforce 2018-24 against the landowner. It doesn't matter. The city adopted a statute which authorized the public to enter onto this landowner's property. And I can give you an example in the *Sisolak* case.

Clark County ordinance 1221 was adopted in 1990. The planes didn't start using the property until 1997. The Nevada Supreme Court said the taking was 1990 when the ordinance was adopted because it preserved the property for use by the public

and authorized the public to enter that air space, which is exactly what Bill 2018-24 does.

And, Your Honor, the Government's argument that, hey, we haven't enforced that is a non-starter, because as we stated, and we read that statute, the general provision says that section G *shall* apply to this landowner, and section G is where that ongoing access appears.

Your Honor, I'm not going to -- we've gone through all this, so I'm going to skip up because we did that before.

If we could turn to page 75. Page 75 is this right here (indicating), the landowners' plan for this 35-acre property. As you'll recall, the landowners attempted to develop the property as the city told him to, and the city denied that application.

We turn to page 76. There's the plan. It's half dense of everything else around the area. It met every single city requirement that there possibly could have been, and the city denied it.

So let's turn to page 77 here. What was the city's argument on page 77 for denying this 35-acre application, this stand-alone application? They said, Judge, we think they filed the wrong applications. That was counsel's argument. He said, Judge, the city was justified in denying the 35-acre applications because they filed the wrong applications. There's two problems with that. Number one, the city dictates the

applications; and secondly, this new-found argument that the city makes, that the landowners filed the wrong applications, appears nowhere in the hearing minutes, and it appears nowhere in the 35-acre denial letter.

Turn to the next page -- I'm sorry, Your Honor, if you could please follow me to the next page, page 78, this is the letter the city sent which denied the 35-acre applications. It's Exhibit 93. What they say is there is, Listen, you're going to impact the surrounding residents if you build, so we're not going to let you build, and also we need you to submit a master development agreement.

You know what's not in this denial letter, is counsel's new-found argument to you in this case that the landowners filed the wrong applications. I'll say it, Your Honor, that is an entirely invented argument that has no basis in fact and no evidence at all. It wasn't stated anywhere during their hearings, and it wasn't stated in the letter. They made it up for this purpose of this trial.

I'll just go to the next -- we'll go to the next tab, tab number 8. This is the Master Development Agreement. As you'll recall, the city denied the Master Development Agreement, which, again, remember the city said, Hey, we're only going to do a master development agreement. The landowners tried the 35-acre application, then they went back to the Master Development Agreement, and the city denied it.

Turn to page 81. This was the city's new-found argument on why the MDA, the Master Development was denied. They said you filed the wrong applications, Landowner. There's three problems with that. Number one, the city dictates the applications to file; number two, the evidence shows that the city drafted the Master Development Agreement; and number three, that wrong applications argument that the city is trying to present to you here today was never mentioned in the minutes, and it doesn't appear in the denial letter.

Page 82 is the affidavit of the landowner where he says, The City didn't ask us to change anything. They didn't ask for more concessions. They didn't ask for setbacks. They didn't ask for reducing anymore acres after they denied the MDA, they just rejected the MDA all together.

And, Judge, if I could pause here for just a moment. As this Court will recall, what the city made the landowner do under the Master Development Agreement, two and a half years. Do you know that there's a statute, NRS 278, that says once a landowner submits an application, the city is supposed to consider it in 90 days? The city denied -- or delayed this master development application for two and a half years. The city demanded outrageous concessions. I'll remind the Court, the city said you got to build new gates for Queens Ridge; you got to build an equestrian facility; you got to build a 70-acre park. And remember they handed him that letter and he signed it

and sent it right back to them, "As long as I can build." They made him pay an extra one million dollars just in application fees, above what everybody else in the valley would have to pay, and then they guaranteed it was going to be approved.

THE COURT: And as far as the 70 acres, would that have been set aside as open spaces?

MR. LEAVITT: Your Honor, it was actually going to be a park. It was going to be a park. Now, he would have owned it, but he said, Listen -- and Your Honor, if you look right here, in his plan here (indicating): Here's a park, here's a park, here's a park.

He was meeting -- you see this in other developments. They say, Hey, if you're going to build 61 homes, you got to have a couple parks; you see that all through Summerlin; you see it all through Green Valley. Build a couple parks here and you can build your development. So absolutely.

But I'll tell you, Judge, requiring 70 acres out of a 250-acre development is pretty onerous. Requiring him to build gates for the Queens Ridge community that he has nothing to do with, that's like, Your Honor, you go to build --

THE COURT: No, I get it.

MR. LEAVITT: Oh, you got it, okay?

THE COURT: I get it.

MR. LEAVITT: All right. I had a good example, but if you --

THE COURT: Yeah, I understand, I do.

MR. LEAVITT: And then so the landowner --

THE COURT: If you want to use the example for the record for a reviewing court to look at, you can do that.

MR. LEAVITT: You can.

THE COURT: You can, I'm just giving you the opportunity. Because, remember, you're not just arguing for me, potentially you're arguing to an appellate court.

MR. LEAVITT: Absolutely. But even though the city could not require him to do that, Your Honor, he agreed to do it. That's how badly he wanted to develop this property.

And then the Master Development Agreement that the city wrote, it's presented to the city for approval, and the city denies it, denies the Master Development Agreement that the city itself wrote.

MR. MOLINA: Your Honor, I got to object to that. The city did not write the Development Agreement.

MR. LEAVITT: I understood the objection. Just the response is, Your Honor, we submitted the documentation and the exhibits showing that the request to change were all made by the city. And I agree with counsel that there was interchange back and forth, but at the end of the day it was the City Attorneys' Office and the Planning Department that provided the last draft on what was to be approved.

Now, if we turn to page 83, let's just take a moment,

Your Honor, and accept the city's new-found argument that the wrong applications were filed for the 35-acre stand-alone application, or the MDA. If that argument is true, then the city perpetuated a profound -- I call it bad faith. I'm using a pretty simple or a pretty -- well, it should be a lot stronger word than that. They perpetuated a profound bad faith on the landowner for all the years the landowners tried to develop, because this is what the city told the landowners they had to do. All these years the city dictated the applications, and if the city is now saying that the applications were wrong, then the city acted in bad faith towards the landowners over all those years. And you know what Justice Stevens says about that bad faith? That it makes the landowners taking claim, quote, "Much more formidable," end quote.

When the Government -- he also said when the Government targets a landowner's property, when they act in bad faith and they target a landowner's property, Justice Stevens and the United States Supreme Court says, Listen, we're looking at that a lot closer. That makes the claim much more formidable.

We had a lot of discussion on the fence, Your Honor. Remember the city denied the fence? And I remember the city's excuses. I want to spend just a quick minute on this. The city perpetuated its denial of all the use of the property when it denied the fence. This is page 84.

Remember in *Cedar Point Nursery*, the United States Supreme Court said, Listen, the right to exclude is one of the most essential sticks in the bundle. The right to put up a fence is one of the most essential sticks in the bundle.

The landowners, as you'll recall, went up to the city and said, Listen, we want a fence here. And as you'll recall the city said, We're not going to let you have a minor review of your fence because of the surrounding property owners. We're going to require you to go through a major review. That's page 85, Your Honor.

The problem with that argument is, number one, the City Code says that a fence must be reviewed under a minor review. The fence application cannot be reviewed under a major review, and therefore the city violated its own code when it required a major review.

The next page is that city code, page 86. Las Vegas Municipal Code 19.16.100 says building permit level review, minor site development. It says that the -- and if you go down there, it says the construction types eligible for minor treatment are as follows: 1, 2, 3. You can see on-site signs, walls and fences. Makes sense. If you're going to put up a fence, it will be a minor review, you shouldn't have to go through the same review the Bellagio goes through. It's a fence.

Then in section 3, it says review by counsel, which is

the major review. And the last sentence of that review by counsel says, "The provisions of this paragraph 3, review by counsel, shall not apply to building permit level reviews described in paragraph 2A of this section F." The City violated its own code when it went to the landowners and said, You can't build a fence; You can't -- we're not letting you go through the minor review, you have to go through the Bellagio major review.

Then you turn to page 87 and we have the city's excuse. This was said on Friday, Your Honor. Counsel for the city says, well, the city must have succumbed to, quote, "political pressure," end quote. Or, stated another way, the city just didn't want the fence put up around the landowners' property because they were preserving that property for the surrounding property owners, and they wanted the surrounding property owners to continue to go onto the property - exactly as the councilman said, exactly as the bill was proposed, and exactly as Bill 2018-24 said. That's their pattern of conduct in this case, announced to the public that the 35-acre property is their recreation and adopt a bill to do it.

Now, this clearly was a taking action. It prohibited the landowners from excluding others, it allowed the public to enter, and it exposed the landowner not only to people coming on there, but significant liability. And you remember the city says, Well, Judge, The ponds are empty. That's worse. You got

a 30-foot drop now. Do you know that our managing, or the landowners' manager out there, his first thing every morning is to get into his UTV vehicle and make sure no one fell into the ponds. That's his number one job.

THE COURT: So we're talking about a 30-foot drop?

MR. LEAVITT: I believe that's what they represented to me. It's to the bottom, we can find out, but it's a large drop down into the pond, and then I believe it goes down to 30 feet. I may be wrong. Judge, let me say this for the record. I'm not sure if it's 30 feet. I'll assume it's only 10 feet. A 10 feet drop is still far enough to crack my head open.

And so we have this exposure to liability, we have the right to fence our property, and we're being prohibited from doing it, unlike everybody else in the valley.

Page 89, Your Honor --

THE COURT: And even under those facts, assuming it has water in it, there's no question it's potentially in the tract of nuisance that would place a landowner in a position where they had potential liability if some unfortunate event happened, just as important if it's empty, and if there's a five-foot drop or a ten-foot drop. I mean, a drop is a drop, and that's significant, where a person could suffer bodily injury.

MR. LEAVITT: And that was our concern, Your Honor.

And do you know that that was the landowners' number one concern?

If we turn to page 89, Your Honor, these are current pictures, and I'll ask the Court to take judicial notice of these current pictures. New Horizon Academy on West Charleston Boulevard got a fence.

Next page, 90, Leslie Pool Supply on West Charleston is closed. They got a fence.

Page 91, vacant land on West Charleston, they got a fence, just to exclude others and to protect it.

And this one is page 92, and I'll represent to you that the landowners own this property right next door to the Supreme Court building. They have equipment there which is just stored, and they have a fence around it.

So a fence was permitted for all of these other people in the city but not for our landowner.

And I heard something stated the other day. They said, Well, Judge, a fence wasn't really aesthetic. It was temporary until the landowners would build. They wanted to protect it immediately. You can put a chain link fence up immediately like everybody else in the valley was permitted to do. And they said, Well, it wasn't very aesthetic. Well, apparently a chain link fence is good enough for our Nevada Supreme Court but not the surrounding property owners, is what the government was arguing to you the other today.

And, Your Honor, on page 93 --

THE COURT: And I don't mind saying this, my thoughts are when it comes to health and safety issues, better to have a temporary fence in place, a structure, a fixture, until the ultimate resolution or case resolution occurs or until there's some sort of agreement with the city.

MR. LEAVITT: And that's what we tried, Your Honor.

And so I'll go to -- I already discussed 93.

Turn to page 94, the access issue. I'll be quick on this because we discussed it, Your Honor. But as you'll recall, *State -- Schwartz -v- State* says the landowners have a property right in access.

The Government in this case conceded during discovery, which becomes the facts of the case, that the badlands had legal access. This is what they admitted to: The landowners here on 35-acre property had legal access right here (indicating). That's what they wanted when they filed their application. They said, We want to use our legal access. Here's how we get to the property right here (indicating). We front Hualapai. We want to get onto the property for access purposes.

And as you'll recall, on page 95, the city sent the landowner a letter saying, You can't have it; we're not going to let you do a minor review; you got to go through the Bellagio major review. Why? Because they were preserving that property for the public.

And on page 96, Your Honor, I already discussed this, what was the impact of all these city actions? What was the impact of denying the 35-acre application, denying the Master Development Agreement, denying the fence, denying the access, telling the public that this is their property to use and then adopting a bill making it impossible to build? What was the impact of all these city's aggregate of actions? It's on page 96, I already discussed it, we already went through, Mr. DiFederico appraiser, Exhibit No. 183, said the impact is there is no value left.

Now, Your Honor, I do want to spend just a minute --

THE COURT: I want to make sure I understand the status of the evidence.

MR. LEAVITT: Yes.

THE COURT: There's no rebuttal to that.

MR. LEAVITT: None. And discovery closed two months ago. We're set for a trial October 25th, I believe your October 25th five-week stack.

There are four arguments the Government made, Your Honor, and I'll quickly move through each one of these arguments. I'll spend maybe three to five minutes on each of the arguments.

The first -- the next argument the Government makes is the ripeness argument. The Government says, Listen, the Landowners claims are not ripe, that's page 108. This exact

argument was previously presented to this Court. On page 109 is this Court's decision.

And, Judge, I'm just merely reminding the Court that this issue has already been litigated and decided. This Court held, in its order entered February 1, 2018, that the landowners' claims are ripe because 180 Land obtained a final decision from the city regarding the property at issue and a final decision by the responsible agency, informs the constitutional determination whether a regulation has deprived the landowner of all economic beneficial use of her property, of the property. You've already found this. You already rejected the city's ripeness argument.

Now, ripeness and futility go together, okay, they're one in the same. The Court decides whether ripeness applies in this case and then has to look at the facts and decide whether, hey, the claims are ripe. But the Nevada Supreme Court said to the landowners' three claims that we're moving for summary judgment motion on, the *per se* categorical, the *per se* regulatory, and the non-regulatory, that this ripeness analysis doesn't even apply. You don't have to go to the Government if it's already denied you all economic viable use. You don't have to file an application with the Government if they adopt a bill like in *Sisolak* that authorizes the public to get into your property. You don't have to go to the Government and file an application to ripen your claims or to determine futility if the

Government substantially, already substantially interfered with the use and enjoyment of your property. And, Your Honor, that's page 110. We can go through those cases, but the Court has already read *Sisolak*, I believe the Court has already read *Sue, and the State -v- Eighth Judicial District Court* case. The Nevada Supreme Court was not unclear there.

THE COURT: Well, again, as far as the ripeness issue and especially futility, I think that was pretty clear in *Sisolak*.

MR. LEAVITT: Very clear in *Sisolak*. In *Sisolak*, the Court said, the last sentence of the paragraph where they're talking about ripeness, they said Mr. Sisolak was not required to exhaust his administrative remedies because the city already adopted the bill. The height restriction ordinance, that when you're talking about a *per se* regulatory taking, that's a *per se* taking in and of itself. Ripeness and futility is not a defense.

And something was said -- well, I'll just say that the only place -- because there is a lot of body of law on this ripeness and futility issue. The Court said the only place that applies is a *Penn Central* case. Why? Because in *Penn Central* you're balancing three factors. You're looking at the economic impact to the landowner, the interference with investment-backed expectations, and the character of the government action.

So when you're analyzing those three prongs, which we submit are met under the facts of this case, but when you are analyzing those three prongs, then you apply ripeness and futility. But you absolutely do not apply it to the three claims the landowners are moving for summary judgment on, and the Nevada Supreme Court could not have been clearer on that issue.

And page 111, Your Honor, is the ripeness and futility standard. You remember counsel said that you need to have two applications. You know that law appears nowhere in the state of Nevada. All Nevada says is if you are going to analyze a ripeness analysis under a *Penn Central* case, then all you need is a final decision regarding the application at issue.

And then the Court said you don't even need to file an application if you can show it's futile, that next number 2 there: When exhaustion of available remedies, including the finding of a land use application is futile, the matter is deemed ripe for review. But, again, it doesn't matter here, because we're not -- we're moving for summary judgment on three claims, Your Honor that ripeness and futility do not apply to.

Again, I'll turn to page 112 here, Your Honor. I just will note for the Court that four denials and adopting a bill to prohibit use of the property and force the landowners to allow public to enter the property, I think meets ripeness by about 34 country miles, even if we were going to apply it. And

when you look at the aggregate of the Government's actions, it's clearly met.

I'm going to move forward, Your Honor, to rebuttal of segmentation. If you can go to that next tab where the city argues this segmentation. And I'm going to use this (indicating). Here's the segmentation argument that the City makes. The city says, Judge, we've met -- we approved an application on the 17 acres, therefore we get 233 acres for free. That's the argument. You know that's never been the law. Never has. Number one, segmentation would only apply in a *Penn Central* case. That's the only place it applies.

But Nevada expressly rejected this segmentation argument in a case called *City of North Las Vegas versus Eighth Judicial*. It's page 116, Your Honor, and there is the Nevada Supreme Court holding: A question often arises as to how to determine what areas or portions of the parcel being condemned and what constitutes separate and independent parcels. And the Court said, The legal units into which a land has been divided control that issue. That is, each legal unit, typically a tax parcel, is treated as a separate parcel. That's a 2017 decision.

So the Nevada Supreme Court said, Well, what we're not going to let the city do is look at the whole Peccole Ranch area and say, We only have to allow some people to build, and we can take everyone else's property under segmentation. They

also said we're not going to let the Government get 233 acres for free just because they approved something on 17 acres. They said you have to look at the properties differently. Again, that prevents the Government from saying, Hey, I let property owner A build, so now I don't have to let property owner B build.

THE COURT: Even if you have segmentation anyway, for example, the property here would be designated as not PROS, but it's actually RPD-7.

MR. LEAVITT: That's absolutely correct, Your Honor, and that's why you can't even have the segmentation. Because what the Government's segmentation argument is, all we have to do is let you build here and we can get the rest of this open space for free. You can't do that because, number one, this property is zoned RPD-7; number two, this property has separate ownership.

THE COURT: No, I understand that.

MR. LEAVITT: For our legal -- now, the Government is going to say, Well, it's the same people.

For purposes of the law --

THE COURT: It's -- I mean, I'm looking at the pleading in this matter, and understand the way title is held it does have a meaning for a lot of different reasons, and it's my understanding it's 180 Land Company.

MR. LEAVITT: That's absolutely correct.

And, Your Honor, I will point out, remember we went through NRS 37.039 that says if the Government wants to force somebody's property to remain open space, they have to pay for it. So the Nevada legislature says you don't get to say this is developable, but the 233 acres is open space. We talked about the statute that prohibited that from happening.

Now, I'll spend one minute on the *Kelly Tahoe* case, because the Government said, Judge, *Kelly Tahoe* says that the segmentation argument applies. That's not what *Kelly Tahoe* said. *Kelly Tahoe* said Kelly had a 40-acre parcel and he split it up into, we'll say 40 different lots like this, and Tahoe approved the development. They said you can build 36 of them now, but we're going to make you wait on four of them. Secondly, the appraiser said the property had significant value. Kelly tried to say, Hey, you've stopped these four lots from being developed and you've delayed them, therefore, I want you to pay me for that. And the Court said that's not a denial of all economic viable use, number one, and number two, your property has to be looked at as a whole.

The *Kelly* case is this; number one, the city approved this; number 2, the city then said, Hey, we have these four lots here. If you develop those in like one year instead of later, that's the *Kelly* case. If the Government had approved this development and said, Hey, just take these four right here and develop them later, we wouldn't be here today. That's what

happened in *Kelly*. And what the Court said is this, *Kelly* tried to say this was just a taking by not allowing me to develop those immediately. And the Court said no, you have to look at this whole subdivision, and we're letting you do it all, it has a significant value, but we're just delaying that.

So *Kelly* was an approval case where the Court found that there was not a denial of all economic viable use. It has zero application here.

What the Government is trying to do is compare this (indicating) to a 250-acre parcel and say as long as -- actually, if you take the Government's argument on segmentation, Judge, if the Government lets the landowner build an acre here (indicating), the Government gets 249 for free. He'll admit that. They'll say, yeah, that's what segmentation means. That's an outrageous argument which has never been accepted in the state of Nevada.

Your Honor, I'm going to -- I'm going to move to my final argument here, because this permeated the city's entire argument. It's called rebuttal of the removing take.

THE COURT: You just need what, another 15?

MR. LEAVITT: Yeah, if I could have another 15, I'll be happy.

THE COURT: Yeah, we'll take a break at 11:00.

MR. LEAVITT: So rebuttal of removing take, that tab, and it's right here. So what the city says to you is they say,

Judge, we sent the landowner a letter and we said, Oh, you can build now. They lost seven motions to dismiss, they lost several other issues, and once they saw liability coming, they said, Judge, here's a letter saying they can build. That was done in *Nick*.

In the *Nick* case, the Township of Scott responded to the lawsuit by staying enforcement of the ordinance. In the *Nick* case, Your Honor, Ms. Nick filed the lawsuit and the next day the Township of Scott stayed the ordinance.

In the *Del Monte Dunes* case, after denying Del Monte Dunes land use applications and being sued, the City of Monterey said, Hey, we'll allow you to develop now. This is the rule on the right-hand side (indicating): "Once the Government actions have worked at taking a property, no subsequent action by the Government can relieve it of the duty to provide compensation for the period during which the taking was in effect." They say -- these are quotes right out of the United States Supreme Court: "A property owner requires an irrevocable right to just compensation immediately upon a taking," and this is the example they use from the Court: A bank robber might give the loot back, but he still robbed the bank.

Here, the city hasn't even authorized the use of the property. It just sent the landowner a letter saying, Hey, everything is good. That's not the way it works, Your Honor. The way it works is you have a rule, and once you meet that

threshold of a taking, the landowner receives an irrevocable right to payment or just compensation, and there's absolutely nothing the Government can do to remove that. There's absolutely nothing the Government can do to erase a taking that already occurred.

That's why -- and this rule right here actually addresses the ripeness argument and the segmentation argument too, because the Government wants to tell you, Judge, the claim is not ripe yet. First of all, it doesn't apply to these three claims; and, secondly, the Court is very clear, once that taking happens, there's no going back, the constitutional provision kicks in to protect the landowner, separation of powers doesn't apply, and the Court can step in and order payment and compensation.

And, Your Honor, if you want to -- oh, I was just reminded of something, Your Honor. I entirely misspoke when I said the city said that the landowners can now build, in their letter, that's not what they said. They told the landowners, in their letter, after they lost all of these motions and they saw liability coming, the city sent the landowner a letter, and this is what they said: You can go reapply. They didn't say -- they didn't even say you can build. I totally misspoke. The letter says, Hey, start over. This Master Development Agreement process that we put you through hell for two and a half years, charged you an extra million dollars and then denied, start

over.

The Nevada Supreme Court and the United States Supreme Court don't require that. The United States Supreme Court says that would implicate an absolute harassment upon landowners, because all the city would have to say is every time just reapply, reapply, reapply, and no matter how many times they reapply, they just denied it.

Your Honor, one last case. The Government cited to you Boulder -- *Cinnamon Hills versus Boulder City*, and in that case the Government said, Hey, this shows that you don't have property rights in Nevada because the city has discretion. That *Boulder City versus Cinnamon Hills* case, Judge, in that case the Court found that there was not a denial of all economic viable use and that there wasn't a taking. I don't know if that was a concern, Judge. But in that *Cinnamon Hills* case, that's what the Court found. The Court did not find that there are no property rights in the State of Nevada.

Judge, here's where I'll conclude. We've provided you this, Judge, we've given you citations to United States of Nevada case law where the facts are much less egregious than the facts of this case, and the courts found it taking: *Sisolak*, *County of Clark versus Sue*; they stated the standards in *Sloat versus Turner and Schwartz*; they stated the standards in *State versus Eighth Judicial District*; the *Del Monte Dunes* case where the Court found a taking - significant cases where a

taking was found under facts much less egregious.

And this is where I think is critical for everything that's happened and everything that the Government has argued. The City's case, Your Honor, they have not cited to you even one case with taking facts like this where the Court did not find a taking. Not one. All they had to do, Judge, instead of all of this that they did was say, Judge, here's a case where the Court said here's the taking standard, the facts are like ours, and the Court did not find a taking. Not one case did they give you Your Honor, not one case.

Your Honor, if I could have just 30 seconds, I just want to make sure I didn't forget anything; is that okay?

THE COURT: Yes, you can, sir.

MR. LEAVITT: And I'll close this out right now.

(Pause in proceedings.)

MR. LEAVITT: I've been reminded of three things, Your Honor. First of all, the city's comments that they made, remember the City Attorneys' Office and everything that they've made, a lot of those were made in court proceedings and therefore the doctrine of judicial estoppel would apply also to prohibit the city from changing its position here.

And I've been reminded that that *Kelly* case that I discussed about segmentation, again, that was a *Penn Central* case where the *Penn Central* factors were applied under those contexts that segmentation they don't apply here in this case.

And, Your Honor, I'll close it out. You have our -- you have our list of what our claims are: The *per se* regulatory taking, the *per se* categorical taking, and the non-regulatory *de facto* taking. And, Your Honor, we believe that the facts in this case, when considered in the aggregate, meet each one of those standards.

And so where we are is we filed our motion, I've made my argument, the city did its opposition to those three claims, we've argued our reply to those three claims, and we'd ask that the Court enter a ruling on those three claims at this time.

THE COURT: I understand, sir.

I have one last question for you. What about the second claim for relief? They filed a motion for summary judgment, that's my recollection.

MR. LEAVITT: Yes. I'll be brief on it.

The second claim for relief, in response to the city's motion for summary judgment, is a *Penn Central* taking claim. We did not move for summary judgment on that, the city did. We would submit to the Court that the facts of this case meet the *Penn Central* standard also because the *Penn Central* standard considers, number one, the economic impact to the landowner. Clearly, we've gone through that; number two, the second factor that's considered is the interference with investment-backed expectations. Clearly, there's been interference with investment-backed expectations. We went through the due

diligence, and the city confirming that the property had the right to be developed, and the landowner allocated a hundred million dollars towards the property and the city prohibited the development. The final element of a *Penn Central* claim is the character of the government action.

And, Your Honor, we've seen the behind-the-scenes statements: "I want dirt on this guy, so I'm hiring a private investigator, I'm voting against the whole thing, we're allocating $15 million for this property." And, Judge, there were some emails that were so full of expletives that we didn't even include them in what we've cited up here.

The character of the government action towards this landowner has been abstruse and in bad faith, Your Honor, so we believe that all three elements of the *Penn Central* claim have also been met. But the reason we did not move for that is because if the Court finds a taking under any one of these three, then *Penn Central* doesn't even apply.

In fact, the Court said in *Sisolak*, *Penn Central* doesn't even apply under a *per se* regulatory taking; you don't even need to apply it. Under a *per se* categorical, you clearly don't need to apply a *Penn Central* analysis either; and under a non-regulatory *de facto* taking, the court said you don't need to apply a *Penn Central* analysis because the standards are different, and the Court knows that.

All right. Your Honor, anything else from me?

THE COURT: No, sir.

MR. LEAVITT: All right. Your Honor, so we would again move for summary judgment on those three claims. Thank you.

THE COURT: All right. And we'll take a 15-minute recess. It's five minutes to 11:00, and we'll let the city have its final word at 11:15, how's that?

MR. LEAVITT: All right. Thank you, Your Honor.

(Recess taken at 10:55 a.m.)

(Proceedings resumed at 11:13 a.m.)

THE COURT: All right. And we can hear the rebuttal from the city.

MR. SCHWARTZ: Thank you, Your Honor.

Your Honor, there can't be a taking in this case because the entire badlands was designated PROS in the General Plan, and that did not allow residential development. That's the law.

The developer argues that there's no case where the Court didn't find a taking on these facts. Well, that's not correct. The *State* -- and these are all in our exhibits, tabs 12 through 14 and beyond: The *State* case, the *Kelly* case, the *Boulder City* case, and dozens of federal cases that we've cited in our papers, some of which we've set forth in our exhibits, like dozens of federal cases such as *Lingle* and *Williamson County* on which the Nevada Supreme Court cases, *State*, *Kelly*

and *Boulder City* are based - all deny takings claims, and the developer completely ignores these cases.

State, *Kelly* and *Boulder City* say that a taking involving denial of use, involving a permit application, denial of a permit application requires a denial of all economically beneficial use of the property, so basically a wipeout. They all say that. That's the law in this state. These were not PJR cases. The *Boulder City* and the Ninth Circuit case that we cite between the same parties on the same facts saying there's no property -- no constitutional property right conferred by zoning was not a PJR case. If the zoning conferred constitutional rights on the property owner, then none of these cases would exist. There would be no need for a permit.

And, again, all property zoned, and so if you don't -- if you have a constitutional right to build whatever is a permitted use in that zone, you don't need a permit, there's no discretion on the part of the agency, and of course that's completely wrong. So we wouldn't have any of these cases, we wouldn't have any of these state statutes saying that the city has discretion when it comes to approval of a permit regardless of the zoning, and this Court has made that finding as a matter of law.

If the zoning conferred property rights, then *Stratosphere* in the entire body of case law would not exist. There would be no need for a permit. The agency would have no

discretion, and *Stratosphere* says, in Las Vegas, the city has discretion as to whether to approve the site development permit, and that includes a test discretion to approve a general plan amendment as well, and so it has discretion to lift the PROS designation or not; and if it has that discretion, it's completely incompatible with the constitutional right to build whatever they want as long as it's allowed by zoning.

If zoning conferred a constitutional property right on every owner of property in the State of Nevada, then the agency that adopted the zoning ordinance would have to compensate all those property owners every time it changed the zoning and took away any of those alleged rights, and of course that's absurd, and so is the theory that there is a constitutional right to build.

But I think what really puts this into focus is if zoning conferred a constitutional property right and, according to the developer's distinction between PJR cases and other cases, then if the City Council denies a permit application and the developer then sues with a PJR, the City Council had discretion. But if the City Council denies a permit application and then the owner sues for a regulatory taking, it had no discretion. That's obviously an absurdity and that is not the case here.

Now, the law isn't what city staff told the developer.

The test for a taking is not whether the city has, quote, targeted the developer or told the developer this or that or made the developer do this or that or made the developer expend money. None of that is relevant. 98 percent of counsel's argument for the developer is about matters that are completely irrelevant to whether there was a taking here. The taking test is clear - wipeout or near wipeout or interference with investment-backed expectations.

Why is the developer not moving for summary judgment on the *Penn Central* claim? That's odd. Because it's easier to show a *Penn Central* claim than their wipeout, complete wipeout thing, because in *Penn Central* you only needed near wipeout; where as with their first cause of action they label categorical taking, you need a wipeout. Well, it's because the developer is stuck with the fact that the property was designated PROS when it bought the property, and so its investment backed-expectations, which is a factor under *Penn Central*, come into play. It had no expectation that it could build residential on the property because of that designation.

And so that highlights -- the reason they're avoiding the *Penn Central* claim, even though it's easier to prove than their categorical claim, is because they don't want to have to face that fact. Also, it shows that the price they paid for the property, which is 4 and a half million, again, there is absolutely no evidence that the developer paid more than 4 and

a half million for the property. The City moved to compel the developer's documents on this issue. The developer finally produced the documents, and the developer admitted they have no documents whatsoever, not a shred, not a shred of evidence or document other than the developer's own claim that they paid more than 4 and a half million for the property. Remember the purchase and sale agreement was 7 and a half million, and the city has established that through the documents produced by the developer that they paid only 4 and a half million, and 3 million was in consideration for other property. The seller confirmed that in the seller's deposition.

But be that as it may, 4 and a half million is a golf course price. It's $18,000 an acre. Where is the developer? This appraisal they've got, their own initial disclosure say that if they could develop the property for residential, it would be worth $1.5 million per acre. Well, they paid $18,000 per acre instead of $1.5 million per acre for the badlands. That shows the developer knew that they couldn't develop residential on the property unless the city lifted the PROS designation.

(Inaudible objection made by Mr. Leavitt.)

So the fence is irrelevant, access is irrelevant, and it has nothing to do with the denial of all use of the property --

THE COURT: Sir, I don't want to -- I want you to keep

going, but there's apparently a lodged objection. You don't have the benefit of being here live, but if you could just pause for one second.

Mr. Leavitt, what's your objection, sir?

MR. LEAVITT: My objection is just the purchase price is set forth in a motion *in limine*, and we strongly disagree with that. But the second is the city under doctrine of judicial estoppel has submitted a pleading stating the developer's purchase price is not material to the city's liability for regulatory taking. They submitted a pleading where they said it's not even material, and counsel spent a lot of time on the purchase price. It wasn't material in any other case for liability, and the city brought in a pleading the purchase price is irrelevant when determining liability.

And, for the record, that pleading was filed on September 15th, 2021; it stated City's Response to Developer's Sur-Reply entitled Notice of Status of Related Cases.

MR. SCHWARTZ: Your Honor, the purchase price is not relevant to the takings claims, because no matter what the developer paid - and Judge Herndon also made this finding - even if they paid $45 million or a hundred million, as they say, by the city approving 435 acres -- 435 units in the 17-acre property, the city increased the value of the badlands, according to the developer's own evidence, by $26 million.

So it doesn't matter whether they paid 4 and a half

million or $45 million or a hundred million to show a taking. All that matters is the city didn't wipe out the value of the property. The city did the opposite. It approved 435 housing units in the parcel as a whole. That's a lot of units. There's no way that the developer can argue that it wiped out the value of the parcel as a whole when the City approved 435 units.

There's no dispute -- now, this appraisal that the developer has submitted, Your Honor, the city doesn't need to have an expert to rebut that appraisal. That appraisal is a sham. Here's why. The appraiser is required to determine what the highest and best use of the property is. The highest and best use is a use that's physically feasible and legally feasible.

The developer instructed the appraiser to disregard the PROS designation that provides that you can't use the 35-acre property for residential; it's against the law. So the appraiser likely disregarded the law, the legal use of the property, and found that the property could be used for residential, and then if it was valued -- if it could be used for residential, then it would be valued at $35 million. The fact is that -- and that it's worth zero if it could not be used for residential.

So what their appraiser is saying is that at the time the developer bought the property, the property was worth zero.

MR. LEAVITT: I just have an objection, Your Honor.

MR. SCHWARTZ: Worth zero because the PROS designation said you can't use it for residential. The developer -- the appraiser said you can't use the property for residential, and it's worth zero.

So there's been no taking. The City hasn't decreased the value of the property, it hasn't wiped out the value, because, according to the developer's own allegations and its own expert, the property was worth zero when it bought it. So we don't need an appraiser to say what the law is, the law is the law.

But the developer makes many, many strawman arguments, Your Honor. One is that that there was a condition of approval of the PRMP, Peccole Ranch Master Plan, that required the badlands to remain in open space in perpetuity. No, there was no such condition. The condition of approval was that the badlands be set aside as open space. That was both required for the gaming district and by the approval of the RPD-7 zoning for that 614-acre portion OF THE PRMP. That was required to be set aside for open space. The City could change that.

The city then later designated, in 1992, designated the badlands as PROS in the General Plan. The City can change that. There's no condition that the property has to remain in open space forever, and it's not a taking for the city to require the developer to set aside property when the city is approving a comprehensive plan, a master plan.

Now, in our Exhibits I through P, which is tab 18, Your Honor, we have shown the Court all of the ordinances that designate the badlands PROS. This is the law, it's not a guideline, these are ordinances, and that the General Plan is the highest law in planning in the city.

I would like to refer the Court to the end of tab 18, which is Exhibit P. It's from Exhibit P of the city's exhibits, and on page 0317, which is just before Exhibit Q -- so the pages are numbered on the bottom right, and this is page 317. It's a map, a general plan map of the southwest sector of the city. It's the last page before Exhibit Q, and it starts at page about 318. So this was the General Plan that was adopted by an ordinance with "P" in 2011, and this was the General Plan Map in effect when the developer bought the property. This map shows the 35-acre property as well as the entire badlands as PROS in the General Plan, and PROS is for -- allows for open space, recreation, parks, et cetera. It does not allow residential use. So this was the law in effect when the developer bought the property.

Now, at tab 38, at page 14, this Court said, in denying the PJR: For the purpose of promoting health, safety, morals or the general welfare of the community, governing bodies of cities are authorized with power to regulate and restrict the improvement of land and to control the location and soundness of structures, the city's discretion is broad.

Now, this is true whether the developer later sues for a PJR or a regulatory taking. The Court said the city did not have to require -- well, so the city didn't have to require dedication of property to the public, it didn't have to require dedication of the property to the city to take title. It didn't have to require CC&Rs to designate the land in the General Plan as PROS.

We've given the Court five examples of cases where the property was zoned RPD, but was -- but the open space portion of the area was designated PROS in the General Plan. Whether those properties also had CC&Rs or not is irrelevant. The City has the power to require the developer, as a condition of approval of a planned development, to set aside property for open space.

In fact, in Nevada Revised Statutes 278.250, the city -- the state legislature directs the city to, quote, "promote the conservation of open space," end quote.

In the City's Ordinance UDC 19.16.050, and this is at tab 27, that's the RPD-7 zoning. It says, RPD-7 zoning is to provide, quote, "enhanced residential amenities and efficient utilization of open space," end quote. That's what the city did here, that's what it's required to do for planned developments by the state and by its own ordinance.

And so open space -- again, in the Court's order, in which the developer prepared this order for the Court in its property rights motion, the Court said that single-family and

multi-family residential use are --

THE COURT: Sir, I have a question for you. You keep going back to the Master Plan, but what's the application of NRS 278.349, and that would be 2 -- I'm sorry, 3E, specifically dealing with conformity with zoning ordinances and master plans. What's the impact of that? What's the impact of that statute?

MR. SCHWARTZ: Your Honor, that is not controlling here, and the Court so found --

THE COURT: But wait a second. No, no, no, don't tell me. I want to know about this case, this claim for relief, because you're making statements and I want to know what the application of the statute is. If there's a discrepancy between the Master Plan and the ordinance, what does the Nevada legislature mandate takes precedence?

MR. SCHWARTZ: Okay. 278.349 was adopted in 1977. It said --

THE COURT: I don't want to know the history, I just want to know what's --

MR. SCHWARTZ: That's what I'm explaining, Your Honor, if you could allow me to explain. It was adopted in 1977. It said that, in considering -- in considering a tentative map, the Court shall, or the agency shall consider, and it said in subsection E that the consistency with the master plan, and if they're inconsistent then the zoning will prevail.

All right. In the *Nova Horizon* case in 1989, the *Nova Horizon* case, Nevada Supreme Court said, Well, consistency with the General Plan is -- there's a presumption that zoning has to be consistent with the General Plan, ignoring 349 because that only applied to tentative maps. So the Court said in *Nova Horizon* there's a general presumption that zoning has to be consistent with the General Plan, and that was based on the language of NRS 278.250 at the time. Now, that's the statute, and that's at -- that's at tab 21 and that's at the time: Zoning shall be consistent with the General Plan.

So then you have the Supreme Court saying, Well, that's a presumption and there may be cases in which it doesn't have to be consistent.

Then in 1991, the legislature, in reaction to *Nova Horizon*, said it doubled down on its expectation that zoning always has to be consistent with the General Plan, that zoning is subordinate to the General Plan. It changed the word "shall" to "must." The legislature said, Zoning *must* be consistent with the General Plan, and that's the wording that you'll find in tab 27, excuse me tab 21, in Nevada Revised Statute 278.250. It "must."

So not only was 278.349 not mandatory, it said that the agency shall consider, and it only applied to tentative maps. But the legislature changed the law to make sure that it always, in every case it complies, and you can't have a

situation where in most applications if there is a tentative map it's combined with a site development permit in Las Vegas, rezonings, other permit applications - all of those have to be consistent with the General Plan. So even if the tentative map doesn't have to be consistent, as part of that development for all practical purposes it must be consistent.

And now -- and this Court has so found in its decision denying the PJR, the Court made a ruling of law, and this applies to PJRs or regulatory takings in any cases. Tab 38 own page 20, paragraph 49, this Court said, "The Court rejects the developer's contention that NRS 278.3493(e) abolishes the council's discretion to deny land use applications."

First, NRS 278.3493 merely provides that the governing body shall consider a list of factors when deciding whether to approve a tentative map. Subsection E, upon which the developer relies, however, is only one factor. In addition, NRS 278.349(e) --

THE COURT: You can always exercise discretion. At the end of the day, it really comes down to one fact: Did they exercise their discretion and it results in a taking. That's the difference here, right? And if it deprives the landowner of all economic benefit, then that's a problem, right?

Because, I mean, I'm looking at it from this perspective. I recognize the discretion of the City Council. I'm not going to throw the City Council under the bus in

exercising discretion when they make decisions, and the decisions they make are based on politics, I get that, right?

But then when that interferes with the bundle of rights that landowners have, that's a different animal. That's why, put it this way, if this was the end of all end, a PJR, then whatever determination is made in the PJR would impact this case. We know that doesn't happen that way. In fact, the Nevada Supreme Court tried to remind me of that. I didn't need to be reminded of that, and I don't mind saying that, it's so simple. There are different burdens, different standards completely.

In many respects when it comes to petitions for judicial reviews, for the most part my hands are tied. I can't sit back and substitute my judgment for the City Council or for the Worker's Compensation Board, or anyone, I can't do that, right? If there's something in there to support their decision, I basically got to rubber stamp it. That's basically what it comes down to. It's a pretty high standard to overturn their decision making.

This is a different forum. We're in full-blown civil procedure. The question is this, whether the plaintiff has met their burden of proof. That's really and truly what it comes down to, and those are the factors I'm going to consider.

I'm not worried about any points and authorities that are being referred to as far as the petition for judicial review

is concerned. I just want to tell you, I'm looking -- and I think I've made that pretty clear in the past as far as that matter is concerned.

Because it's my recollection we had very, very rigorous discussion on this exact issue when Mr. Ogilvie was here, who is a very competent lawyer, I will admit. He's really good, but I disagree, and that's what it comes down to. And I feel pretty confident that the Nevada Supreme Court will agree with me on that issue, I don't mind telling you that.

But, sir, I don't want to cut you off. I want you to continue on with your discussion and make your record.

MR. SCHWARTZ: Your Honor, I think it's important to be clear about what the plaintiff's claims are. The plaintiff has a claim -- has put forward a claim that the zoning of the badlands confers a constitutional right to build whatever they want as long as it's a permitted use. Okay. That's not a test for a taking. A test for a taking -- I mean, this is a taking case. That's not a test for a regulation of use taking.

Putting aside *Sisolak* and all those physical takings claims, which the developer has completely blurred the sharp distinction between those two cases. For their first and second causes of action alleging that the city has denied the owner's use of the property and taken the property, they're claiming that they have a constitutional right to use that property for whatever they want as long as it's permitted by

the zoning.

Now, that's not the test for a taking, a taking for some right to develop. The test for a taking is a wipeout or a near wipeout or interference with investment-backed expectations. Whether the city has taken some right or not, even if they existed, isn't a taking.

The developer has spent 95 percent of their argument rearguing the PJR. That claim that they have a right to develop, if they had a right to develop, then the Court would have granted the PJR and we wouldn't be here. That's a PJR claim, and that's -- 95 percent of their argument, their authorities, their evidence goes to the PJR. It's important to draw that distinction. So the city is responding to that claim, that the city -- that they didn't have such a constitutional right, and that law is substantive law. There is no substantive PJR law. The Court has already found they didn't have that right. It doesn't matter whether it's a PJR or a regulatory taking. They don't have a right, a constitutional right conferred by zoning, period. That's the Nevada Law of Property and Land Use.

THE COURT: If that were the case -- I have a question for you. If that were the case then, we wouldn't have the *Penn Central* cases, would we?

MR. SCHWARTZ: Of course we would, yes.

THE COURT: That's my question. I was listening to

what you were saying, because in *Penn Central* you have to exhaust your administrative remedies -- is that correct? -- under *Penn Central*.

MR. SCHWARTZ: No, no.

THE COURT: Didn't you say that or --

MR. SCHWARTZ: No, no, that's the developer's characterization. I said you have to obtain a final decision. There's a big difference, insofar as --

THE COURT: Wait. Wait. But I thought in *Penn Central*, like weren't they talking about exhaustion of administrative remedies?

MR. SCHWARTZ: No.

THE COURT: I mean, isn't that what they -- strike that. I'll take that back.

Isn't that what they were talking about in *Sisolak*, right? In fact, isn't that what Justice Maupen even referred to in the dissent in the case? He said he disagreed, he felt that *Sisolak* should have been a *Penn Central* analysis.

But my point is this, and I understand futility, I understand *Penn Central*, but it seems to me that hypothetically one of the threshold questions when it comes to takings, if I'm following a *Penn Central* type case, and it goes to the issue of ripeness, that if you don't exhaust your administrative remedies, the case is not ripe to be determined under *Penn Central*, I kind of get that. But on the flipside of that, if

that's the case then, why isn't it if you exhaust your administrative remedies, that's not the final conclusion of the case? And that's my point.

MR. SCHWARTZ: Your Honor, I disagree with the premise, and I disagree with the conclusion.

THE COURT: Tell me why then. That's why I'm asking the question.

MR. SCHWARTZ: I intend to do that.

The ripeness doctrine is not exhaustion of administrative remedies. The ripeness doctrine requires a final decision. That means that you need two applications, at least two applications to be denied for the property at issue. You don't have to appeal to an appellate body, you don't have to file a PJR, you have to obtain two decisions denying application so that the Court can say, you know, there's a final decision here. They're not going to allow you to develop anything on the property. That hasn't occurred in this case.

The *Sisolak* case is a physical takings case, Your Honor. We've been going through this entire hearing with the developer, you know, willy-nilly citing *Sisolak* for all these rules that don't apply to the first two causes of action, because they concern regulation of the owner's use of the property. *Sisolak* is a physical takings case. I could quote the Court. The Court says ten times this is a physical --

THE COURT: Well, I've got a question for you. Why

isn't this -- here's my question: When the city enacted the ordinance in this case, wasn't that a physical taking?

MR. SCHWARTZ: Your Honor, a physical taking is --

THE COURT: The question is, and you can go ahead and answer it -- go ahead.

MR. SCHWARTZ: It's clear that a physical taking requires an ordinance that allows the public or the Government to physically invade the property, to walk on the property.

THE COURT: What about the public walking on the 35 acres here, wasn't that part of the statute or the ordinance?

MR. SCHWARTZ: No, Your Honor. If I could back up and address why *Sisolak* doesn't apply to the ripeness doctrine before we get to the physical taking claim. The Court asked why doesn't -- why did the Court say in *Sisolak* or the dissent say in *Sisolak* that the ripeness doctrine doesn't apply? That's because in a physical takings claim, the taking occurs when the Government exacts an easement to allow either the Government or the public to physically invade the property.

That's what happened in *Sisolak* and in *Nick* and in *Cedar Point*. The courts were quite clear that the ordinance, the statute in those cases exacted an easement of physical interest in property. It has nothing to do, nothing to do with regulation of the owner's use of the property, and there are different rules that apply. Of course the city has never argued

that the ripeness doctrine applies to a physical takings case, which is the developer's third cause of action. It only applies to cases where you have to apply for a permit and it's alleged that the Government denies use of the property.

And nor has the city ever argued that the ripeness document applies to non-regulatory taking claim. Of course it doesn't apply. If there's no regulation, there's no permit application, then you don't need a final decision. The decision in a physical takings case is made when the ordinance is adopted that exacts the easement.

So the *Sisolak* court never said that the ripeness doctrine does not apply to a claim regarding the owner's use, denial of the owner's use. In fact, it said the opposite. It said it does apply, but it said it does not apply in this case, which is a physical takings case. It doesn't logically apply, because you're not applying for a permit; you're not regulating the owner's use of the property.

The *Sisolak* court did not say that the owner has a constitutional right conferred by zoning to use their property. The Court said that in the context of the owner's damages, you determine damages based on the owner's -- based on zoning and other factors. Yeah, you have to consider zoning because that limits the use of the property.

So it said that the owner had a right to use the air space because it owned the property, it owned the fee simple

interest in the property. It didn't say it had the right to use the property because the property was zoned for some use. Zoning is irrelevant when you have a physical taking. The property could be zoned for a casino or for open space, for whatever. It doesn't matter. It's irrelevant. In a physical takings case, if you require the owner to allow others on the property, it's a taking. It has nothing to do with the first and second causes of action.

While I'm on that, and I do want to address the Court's -- the developer's physical taking claim and why the Bill 2018-24 did not exact an easement from the property owner, but if I could first address a point that I think is germane to the Court's question.

The developer claims that the *Bustos* case, the *Andrews* case, the *Buckwalter* case, the *Alper* case all say that the developer has a constitutional right conferred by zoning to build whatever they want, and that's false. That is dead wrong. Those cases, except for *Alper*, are eminent domain cases. In eminent domain, the city, the condemning agency concedes liability. The only issue in an eminent domain case is the value of the property.

Therefore, and so those cases cannot possibly set a standard for liability for a regulatory takings case, because it's not at issue in those cases, and they don't say that. None of them say anything about zoning conferring rights.

What they do say is basically the opposite, that in an eminent domain case, an appraiser who is valuing a property and determining the highest and best use, must consider the existing zoning of the property, that the appraiser can't assume that the property would be zoned for a higher or more profitable use unless it's reasonably probable that the agency would change the zoning.

So what the Court is saying is you're limited, the zoning limits the use. You can't assume a use that's excluded by the zoning. So it's really saying the opposite of what the developer is saying. The zoning doesn't confer rights, it limits your rights.

Now, one of those cases, the *Alper* case, is an inverse case, but *Alper* only deals again with value, and it says, in *Alper*, the Court found liability for an inverse condemnation, liability. So the issue in *Alper* was what's the value of the property? And the Court said, Well, we apply the same rules in inverse cases as we do in eminent domain cases. But what the Court meant was the same rules for value, not liability, because liability is not at issue, it's not an issue in an eminent domain case.

The Court made -- no eminent domain case makes any pronouncements about liability for regulatory takings. That's a wipeout or a near wipeout or interference with investment-backed expectations. By regulation, it has nothing to do with an

eminent domain case. So the Court in *Alper* said, We apply the same rules for the date of value as we do in eminent domain cases, and that's fine. That's all about value, and that's right.

When you're valuing a property -- if the Court were to find liability here, it couldn't apply those eminent domain cases to determine liability. It has to apply *State* and *Boulder City* and *Kelly* and *Lingle* and the other regulatory cases that set the standard.

But if the Court finds liability and we go to the valuation phase of the case, Well, then yeah, the eminent domain cases are going to be relevant because they set the rules for how you determine value in an eminent -- in a regulatory taking case. Totally irrelevant.

And the developer's theory, if somebody confers rights, is based on these -- this misinterpretation of all these cases. There is no case that says that zoning confers constitutional rights to build. All the cases say the opposite. All of the eminent domain cases that the developer sites basically say the opposite. The Supreme Court in the 17-acre case and the order of reversal said that you -- that the city properly required a General Plan Amendment, and that's completely inconsistent with the theory that you have constitutional rights in zoning.

Stratosphere and all the other cases, including

Boulder City, that was not a PJR case, are quite clear zoning doesn't confer any constitutional rights at all, doesn't require you to a building permit.

In fact, if I could, Your Honor, I'd like to address the physical takings claim because -- and, again, the Court should draw a clear, sharp distinction between physical takings and regulation of use takings. It shouldn't be applying physical taking rules to regulation of use. That's not proper.

The claim is that Bill 2018-24 exacted an easement in favor of the public on the developer's property, and that's false.

THE COURT: And tell me why it is. Because I'm looking at this bill, I have it right in front of me, and for the record, this would be ordinance 6650, and it appears to me it deals specifically and is interesting, the timing of this order, I don't mind saying that. And you look at the sponsor, it was Councilman Seroka. And I understand what it is attempting to do; it's dealing with repurposing of open spaces and golf courses, I see that.

But it appears to me, when I read this, ultimately there's a requirement to provide documentation regarding ongoing public access, and you're dealing specifically with private property. How is that any different than the air space in the *Sisolak* case? Because there, it appears to me if you're asking to provide documentation regarding ongoing public access, how

can they do that to private property?

MR. SCHWARTZ: Your Honor, this ordinance is completely different than the ordinance in *Sisolak*. *Sisolak*, the decision is quite clear that the ordinance in *Sisolak* exacted an easement for airplanes for the public to invade -- physically invade the property owner's air space at the time the ordinance was passed that exacted an easement. This ordinance does nothing of the sort.

First, the ordinance only applies to proposals for redevelopment of golf courses, only proposals. The ordinance was only in effect for 15 months, from November of 2018 through January of 2020. During that period, the developer -- none of the developer's proposals were in effect. They had all either been denied or voided by the Crockett order. So there were no -- so it only applied to proposals. It didn't apply, like *Sisolak*, it didn't apply to all property in the zone. Once that ordinance was adopted in the *Sisolak* case, all property in this particular zone, it exacted an easement from all properties in that zone.

This ordinance only applies to proposals, and there were no proposals. It was conditioned, it wasn't absolute, and it only applied to proposals. No proposals in effect while that ordinance was in effect.

THE COURT: Don't you think that -- don't you think that would have a chilling effect on proposals?

MR. SCHWARTZ: Your Honor, that's not the test for a physical taking.

THE COURT: No, but, I mean --

MR. SCHWARTZ: Timing is irrelevant. None of that is relevant to a physical taking, it has to exact an easement.

The ordinance imposed no substantive requirements, only application procedures. And Judge Herndon, Judge Herndon rejected this argument that --

THE COURT: Sir, you've got to listen to me. I don't care what other judges do, I don't.

MR. SCHWARTZ: The ordinance required a maintenance plan --

THE COURT: And I like Judge Herndon.

MR. SCHWARTZ: -- and the maintenance plan had to document a number of things, including ongoing public access.

The ordinance is absolutely clear, Your Honor, if the city does not -- did not notify an owner that they had to prepare the maintenance plan, then the owner did not have to document ongoing public access. And the evidence is undisputed that the city never required the owner of the badlands to submit a maintenance plan, so the ordinance did not apply to the badlands.

Furthermore, the ordinance applied -- only required the owner to, quote, document public access. There was no requirement to allow it.

So when the developer shut down the golf course in 2016, by 2018 there was no ongoing public access to maintain, even if it did apply. Even if the city had given notice and the developer had to submit the plan and the developer had to document whether there was ongoing public access, there was no ongoing public access to maintain, and so it couldn't apply to this developer. It couldn't apply and didn't apply.

THE COURT: When did they apply for the fencing?

MR. SCHWARTZ: Pardon me?

THE COURT: When did they apply for the fencing?

MR. SCHWARTZ: 2017.

THE COURT: And this ordinance -- would this ordinance have been in place during that time period?

MR. SCHWARTZ: No. But that -- the fencing is irrelevant, Your Honor. To have a physical taking denying -- even if the city had denied the fencing, and it didn't, the developer didn't file the proper application, and this is not the proper proceeding for the Court to second guess the city's staff persons --

THE COURT: I'm not second guessing the city's decision. I'm just assessing the impact of the city's decision. There's a big difference there.

MR. SCHWARTZ: Well, the only impact that's relevant in this case, Your Honor, is whether the city exacted an easement from the property owner. That's the only legal issue

that's relevant. All of the other evidence that the developer submitted, again, is a -- it's a retrial of the PJR, that the city somehow targeted the developer or had bad reasons for doing what it did.

Your Honor, takings doesn't consider means or ends, it doesn't consider whether the city's actions were wise or not or unwise, whether they were reasonable or unreasonable --

THE COURT: I agree. I'm not arguing. You're not listening to me. I'm not sitting here to assess the city from a political perspective as to why they made their decisions. I'm not here for that, I'm not. Ultimately, it comes down to what is the impact of the city's decisions, that's all I'm doing.

So I want to make sure the record is clear that I'm not sitting here questioning why, for example -- well, no, whether it was prudent or not for the city to make decisions in this case, right? I'm not here for that. I'm just addressing what is the impact of the decisions made by the City Council. Nothing more, nothing less.

I understand there was heated political issues here. And I will say this, that when you run for City Council, it's a political job. You all get it. You have constituents in your district, or whatever, and it is what it is. I mean, I respect that. They have to make decisions, they vote, but at the end of the day if their decision-making process results in the taking

of real property, or allegations of a taking, then I have to assess what the impact is. Nothing more, nothing less.

MR. SCHWARTZ: Well, yeah, but there was no taking.

THE COURT: Well, no, I understand that's your position, I do, I get that. I'm listening to that part.

What I'm trying to say is I'm not -- I'm not saying whether the City Council -- I'm not assessing the politics behind their decision. That's probably the best way to say that, because I know it's --

MR. SCHWARTZ: Your Honor, the developer argued that this ordinance, this ordinance 2018-24 was somehow retroactive, and required the developer to allow people on its property because it was retroactive. Well, that's wrong too.

The ordinance expressly states it only applies to proposals, and there were no proposals in effect when this ordinance was -- no proposals for redevelopment of the badlands when this ordinance was in effect, so it couldn't be retroactive if it simply didn't apply on its face.

The language --

THE COURT: Do we have any evidence as to why there was a sunset provision contained in the ordinance?

MR. SCHWARTZ: No, it was not in the ordinance. The City Council repealed it, Your Honor.

THE COURT: Okay.

MR. SCHWARTZ: And with regard to this retroactivity,

Nevada law is clear, statutes are otherwise presumed to operate prospectively unless they're so strong, clear and imperative that they have no other meaning or unless the intent of the legislature cannot be otherwise satisfied, and that's the *Segovia versus Eighth Judicial District* case, 133 Nevada 910, at page 915. That's a 2017 case.

So the statements of city staff that this bill is retroactive are irrelevant. The City Council decides whether an ordinance is to be retroactive, and here it adopted an ordinance that was clearly not retroactive.

So that's the developer's physical takings claim, and it's nothing like *Sisolak* or *Nick* or *Cedar Point*.

Now, Council Member Seroka telling neighbors -- the allegation is he told the neighbors you own the badlands, you can walk on it. Well, you know, this Court said in its decision denying the PJR that the statements of these individual city council members are irrelevant, that the action is -- the Court has to review actions of the governing body of the City Council. The statements of an individual City Council member have no impact, no legal impact on the property that could be deemed a taking. It has to be -- the Court can only look at decisions by a majority vote of the governing body. So that means yes, the Court can look at this ordinance 2018-24, but, you know, that might be relevant, and, yes, worth the Court's review, but not individual City Council members making

statements. I mean, they could say you own this Walgreen's over here. Is that speaking for the city, so they untrespass on the Walgreen's? Well, no, that's not relevant to the Court's inquiry here.

I want to address --

THE COURT: What about this, this is a different issue. What about the statements made by Seroka and the fact that he was the sponsor of the bill at issue, and do they come in as it pertains to intent --

MR. SCHWARTZ: No.

THE COURT: -- you know, the reason behind the bill. And tell me why not.

MR. SCHWARTZ: Because the statements of an individual legislator are irrelevant and, in fact, can't be considered in determining the intent of the legislation. It has to be -- that intent has to be determined based on what the legislation says. And the reason for that is a legislator who is opposed to the measure could say, Oh, this is what the bill means, as a way to say -- as a way to get in the record an improper intent in the legislation.

So the Court has to look to the legislation on its face. If the legislation is clear, then the Court doesn't conduct a further inquiry.

But just because Council Member Seroka said that this legislation means one thing or the City staff says it means one

thing is irrelevant.

But, Your Honor, I'm just reciting to the Court rules of legislative intent. They're completely irrelevant here. What Council Member Seroka said about the legislation and the intent of the legislation and Council Member Seroka's intent are completely irrelevant in a takings case.

THE COURT: And this is why I'm asking you the question, because I do understand statutory construction and interpretation, and unless there's an ambiguity in a general sense, you don't look to the legislative history, I get that, but this is a very, very unique scenario.

So what do I look at to make a determination, if it's required, as to bad faith and/or targeting a specific property owner as the plaintiff suggests? Or I don't look to that at all?

MR. SCHWARTZ: Your Honor, that's a very good question, and it goes to the theoretical basis for regulatory takings.

Here's what happened. 1922, Mayhan said functional equivalent of an eminent domain is a taking.

In the 1980s and 1990s and up to 2005, the United States Supreme Court and the lower courts were struggling with this issue. The issue was, well, is bad faith whether the law is a good law or a bad law, whether it's effective or not, is that relevant to the takings analysis?

And in 2005, the Supreme Court really tied a lot of the loose ends in takings cases together. And the Court said the wisdom or lack of wisdom, the efficacy or inefficacy of legislation, the intent of legislation, whether it's bad faith or good faith - all completely irrelevant, completely irrelevant. Those go to a -- those are a due process claim, or in this case go to a PJR. That's a PJR issue. The Court said completely irrelevant to takings. Takings assumes -- takings assumes that the legislation -- the regulation is valid. It assumes that the regulation is valid, but it has gone too far and wiped out the value.

So 95 percent of counsel's argument is that the City was in bad faith, that it abused this developer who did bad things to the developer to disparage the developer, that the timing shows that the city was out to get the developer and target the developer. 95 percent of what counsel has argued is completely irrelevant in a takings case.

And the *State* case relies heavily on the *Lingle* case. This is a Nevada Supreme Court state case, 2013 I think, relies on *Lingle*. Nevada is in lockstep with the United States Supreme Court on takings, except for physical takings where the Nevada Supreme Court has a broader view of physical takings than taking of regulation of use. In regulation of use they are exactly the same, and whether the regulation is intended to do something to the developer is completely irrelevant. The Court only looks at

the economic impact of the regulation on the property, and that has to be -- that is necessary. That test makes sense.

When I opened this argument I said, you know, the law is supposed to make sense. Well, if the Nevada legislature and the legislators of each state give local agencies discretion to regulate land use for the community, again, not for individual property owners but for the community, which Nevada does, it grants broad discretion, and this Court has so found, then you can't consider -- you can't have a takings doctrine that requires compensation if the landowner claims, well, you targeted me or you were out to get me. You can only look at the economic impact of the regulation on the property, otherwise you're interfering with the discretion that's granted to public agencies. As this Court said, that discretion is quite broad, and it's to protect the community, the general health, safety, and welfare.

So that's the reason why the Supreme Court said, you know, if we're going to make this takings doctrine logically, legally consistent, if we're going to make the theory of takings consistent, is that when a regulation goes too far and it wipes out value, well, that's like a taking in the Constitution.

Remember, the taking originally only meant eminent domain where the public agency takes the entire interest in the property, takes the entire interest in the property, takes the fee simple interest. If the taking were anything less, for

example, if the taking were because the Government passed a bad law, a law that wasn't going to work or that was unfair, if it were anything other than that, not only would it interfere with this broad discretion of public agencies who regulated land use, but it wouldn't be tied to the Constitution because it wouldn't be a taking, it wouldn't be the functional equivalent of eminent domain. So that's why the *Lingle* court made it very clear that none of this evidence that the developer submitted is relevant.

And this also goes to this issue of PROS, what the developer is arguing in this case. If the Court finds that the PROS designation is valid, and this Court has already found that, and that's a fact, it's a mixed question of fact and law. But the Court has already found that the PROS designation is valid and applies and that the developer has to obtain an amendment of that to develop the property for residential, the Court has already made that finding. That is completely inconsistent with a taking in this case. It's completely inconsistent with the fact that the City has no discretion and therefore the developer has constitutional rights to develop, and it's completely inconsistent with a ripe act, because that PROS applied to the property at the time the developer bought the property, and so this can't possibly be a taking, because the City didn't change the law. The law was in effect and the developer paid whatever price the developer paid. Whatever the price the developer paid, the City didn't change the value

because the PROS designation is valid.

And what *Lingle* said is takings assumes that the regulation is valid. If you're going to challenge the regulation as invalid, that's a due process claim, it's not a takings claim.

So in this case the developer challenges the validity of the PROS designation. That's not a takings claim. So we wouldn't be here if that could be a taking, because it challenged the validity.

Now, not only did the Court find that that PROS designation is valid and is superior to the zoning, but the PROS designation was imposed in 1992. There is a 25-day statute of limitations for the developer to challenge that ordinance. It was reapplied -- reaffirmed, confirmed. And all of the ordinances from Exhibit I through P that are in tab 18, including the page 317, which was from the 2011 ordinance, which was in effect when the developer bought the property, there's a 25-day statute of limitations to challenge all those designations.

The developer's argument that the property was never properly designated PROS and they didn't get notice, we submitted evidence that they did get -- that the City complied with every procedural requirement for that ordinance, but we didn't have to because the statute of limitations has run. The developer can't flip the burden for the city to prove that the

city complied with all of the regulations, applicable regulations to adopt that. The burden is on the developer to come in to court with a PJR in 25 days after that's adopted to establish that that ordinance is invalid. It's too late for all of the ordinances Exhibits I through P that we've submitted to the Court, including Exhibit -- through Q, including Exhibit P, which was in effect when the developer bought the property.

So this case is really quite simple, Your Honor. The Court has already found that the PROS designation is valid and prevails over zoning, that the developer had to lift that in order to develop property. They bought the property with a PROS designation in effect, and there can't be a taking. There can't be a taking by regulation, and there can't be a physical taking because the City didn't exact an easement.

Now, the developer also has submitted a non-regulatory taking claim. And I refer the Court to the title of that claim, "non-regulatory." Okay. The developer says that the City can be liable for a taking if it interferes with the property in some way, like denies a fence or access, and of course the City never denied access, it just denied additional access. So it's nowhere near like the *Schwartz* case or these other cases the developer cites.

THE COURT: What's the difference between denying -- if you deny additional access, that's a taking.

MR. SCHWARTZ: No, it's not.

THE COURT: Well, I'm telling you, I'm ruling it's a taking if you deny it.

MR. SCHWARTZ: There's no case that says that.

THE COURT: Well, but I've never heard anybody make that argument before. If you're saying that -- I mean, I'm listening to you, and I just -- it seems -- because I want to make sure you said -- what did you say again, that they deny -- it seems to me if you deny additional access, why wouldn't that be a taking?

MR. SCHWARTZ: Because you haven't wiped out the value of the property. They already had access. Not only did the City not deny access, it only required that they -- it said you have to file this application. They didn't file the application. They didn't challenge the City decision, as they should have, could have if they wanted to come into this Court and say that that was wrong. But even so, denial of additional access when they already had access is not a taking, it's not a wipeout. It's pretty simple.

So for their non-regulatory taking claim, they say that --

THE COURT: Here's my next question. What about the issue regarding property value? We talk about, you know, a reduction in the value of the property, et cetera, et cetera. What evidence do we have from a property evaluation that's been submitted by the City?

MR. SCHWARTZ: Well, we have -- well, we don't need a valuation to show that the City has not wiped out the value, because the City didn't just maintain the status quo, it didn't change any law.

In the *Lucas* case, *Lucas* is the classic takings case. You buy property, there's no restriction on residential use, the Government says no, now you can't -- it's a single-family lot, now you can't use it for residential. There's really no other use, so that could be a wipeout taking. It actually wasn't in *Lucas*, but it could be. That's not this case. That's the classic case.

This is a case where we have a plan development set aside of the open space as required by local and state law, and the City designates it PROS. It's designated PROS when the developer buys the property. The City said, Okay, well, we're not going to change the law, you've got what you bought.

So we don't have to submit evidence of what the property was worth when the developer bought it or what the property would be worth if the developer could develop it for residential. We don't have to -- the City doesn't have to prove that to show there's no taking, because the City didn't change the law. The PROS designation is valid. The developer still has exactly what it bought. So whatever the value was, the City didn't change, it didn't wipe out the value.

If, as the developer claims, the property was worth

zero when it bought the property because the property owner contends that if the PROS designation is valid, the property is worth zero, well, this Court has already found that the PROS designation is valid and applied, and so that means, okay, the property, take the developer at their word, the property is worth zero. The City didn't change the law. It didn't wipe out the value. It didn't change the value at all. The developer has not been injured. The value of the property hasn't changed, so we didn't have to submit any value to establish no taking in this case.

But, you know, we do use the developer's own evidence that the value of the badlands increased by at least $26 million when the City approved 435 units. We're using the developer's own evidence of value. Take the developer's appraisal. Okay. Instead of under the developer's initial disclosures where they say that the badlands is worth $1.5 million per acre, their appraisal that they got later says it's worth a million per acre. Okay. Great. If you say it's worth a million per acre, if you can develop it for residential, but when you bought it you can't develop it for residential, what good is the city appraisal going to be that says, Oh, well, if you could develop it for residential, it's not 35 million, it's 45 million or 50 million or 12 million? It doesn't matter. It's because the City didn't change the value of the property. In fact, it enhanced the value of the

property. The developer got a permit to build 435 units today and it still has 233 acres left that it can apply for development for or use for open space, buffer or golf course or other uses.

I'd like to address the non-regulatory claim if I could. That's the developer's fourth claim.

In saying that, well, the City can be liable for a taking and have to pay compensation if it interferes with the use of the property, that's not what the state court said. The developer failed to mention that the state court said that it has to render the property unusable or valueless. Unusable or valueless. It's basically the same test as a regulatory wipeout. This is just non-regulatory wipeout of some actions.

And the typical -- and the state court said, well, it indicated -- because it relied on two cases for what constitutes a non-regulatory taking, and those were physical takings cases not like *Sisolak*, not a regulatory physical taking case where the government adopts a legislation exacting an easement, but a physical taking case where maybe the government takes the property, or some city improvement, some government improvement physically damages the property owner's property, so that's a non-regulatory taking.

The other case that the state court indicated could be a non-regulatory taking is where there's an official announcement of an intent to condemn or a condemnation, and

while the property is under the threat of condemnation, the agency interferes with the property, and I refer to the *Richmond Elks Hall* case where the agency indicated it was going to condemn the property. I think it adopted a resolution of necessity: We're going to condemn this property. But they failed to proceed with the condemnation, and during that time it flooded the property and it, I assume, rendered the property unusable or valueless.

We don't have that case here. We don't have a case where there's a public improvement that fails that physically damaged the property. This is just a regulatory takings case. And there was never any announcement, official announcement of an intent to condemn that would trigger the other type of non-regulatory damages case. And the developer argues, Well, there's some note that's probably from Councilmember Seroka: Does the City have enough money to acquire the property? That's not an official announcement of an intent to condemn, which requires a vote of the City Council. So that doesn't count, that one council member considered proposing to condemn the property. That's doesn't count.

But then it gets even more difficult for the developer, because not only do they not allege any kind of physical damage to the property for improvement or other physical taking or that the city made an official announcement of intent to condemn the property, the evidence that they put

forward for their amendment is regulation of use, of excessive regulation of use. They just refer back to the evidence that they claim supports an excessive regulation of the owner's use of the property. That's a regulatory taking. So their non-regulatory taking is completely without merit.

Your Honor, I think -- I request that the Court review its decision denying the petition for judicial review.

THE COURT: I'm not going to review that. I'll address that right now, and I'll be really clear on that. I think I've been clear on that issue in the past. I mean, for example, you have a work comp claim, and it might have been the example I used before, and I thought about this, and I'm called upon as a judge to review a hearing master's decision in a workers' compensation claim where he makes a determination as to no injury due to the event. All I do under those circumstances is determine whether there's substantial evidence in the record to support his decision, his or her decision. Nothing more, nothing less. And if it is, and assuming there was no violation of the law, I go ahead and will affirm that decision.

Notwithstanding that, if there's a third-party claim in front of me where the driver of the automobile was involved in an accident that caused the injury, the findings don't come in in the independent tort case. I thought I was pretty clear on that. They don't, right? There's no preclusive effect. And

that's what we have here at the end of the day.

So I want to make sure it's clear, because there's different standards, different burden of proofs, my hands are tied as far as reviewing the City Council. They are, right? I can't -- I'm just telling you, I'm not going to do that.

MR. SCHWARTZ: Your Honor, you made findings of fact in your decision that those facts don't change whether you--

THE COURT: Those findings of fact were based -- wait a second, let me finish. Those findings of facts were based upon a different form of proof. It's a different case, right?

I'm just -- this is going to be my ruling. That's not going to be disturbed. It's a different burden. It's a different review, it just is.

MR. SCHWARTZ: All right. Your Honor, for the record, the finding of law, mixed fact and law that there is a PROS, that there are ordinances that adopt a PROS designation, and that that PROS designation is valid, that's a mixed question of fact and law and that's true whether the proceeding is a PJR or a regulatory taking claim. That doesn't change.

It's like saying, okay, you know, cows don't fly, and then saying, well, if the developer then sues for a regulatory taking that cows can fly, it's the same law, it's the same fact, it's the substantive law of the state, and they apply in a regulatory takings case, and the Court has already made that finding.

THE COURT: I have not made that finding.

MR. LEAVITT: You're correct, Your Honor, and I'm going to object.

THE COURT: Don't tell me I made that finding when --

MR. LEAVITT: Your Honor, this is about the 15th time counsel has argued this, and it's becoming oppressive and harassing, and we want counsel to move on and end this discussion.

THE COURT: I mean, I thought, you know what, I'll say this again for the record. Mr. Ogilvie can be very convincing. He did a very good job in presenting his argument on that issue, and I think I made a decision on that, right?

MR. LEAVITT: Correct.

THE COURT: I made a decision on that, and I think my decision was right in light of a recent decision the Nevada Supreme Court gave me where they didn't even make that decision yet, right? They were clear that there's different standards applicable. I get that, you know.

And for the record, I don't mind saying it, I mean, Mr. Ogilvie was very convincing. It was discussed vigorously, right?

MR. LEAVITT: Correct, Your Honor.

THE COURT: And you know --

MR. SCHWARTZ: Your Honor, I have one final point.

THE COURT: Go ahead.

MR. SCHWARTZ: One final point. The *Kelly* case, the developer argued that the *Kelly* case, in applying the segmentation rule, the *Kelly* case facts are virtually identical to this case. The distinction that counsel made was also wrong and not a distinction.

The *Kelly* case applies to parcel as a whole rule, and the facts are identical. The *Kelly* case did not hold that the segmentation rule only applies in the *Penn Central* case. That would be illogical. That would be absurd.

There's no difference in segmenting -- there's no difference in the analysis if you segment the property whether the segmented property was nearly wiped out versus all -- wiped out, nearly wiped out, wiped out, makes no difference for purposes of segmentation. The point of segmentation is that you can't focus on only a part of the property and conclude, well, the regulation has wiped out all value of that property, when it's part of a larger parcel of the whole parcel, and the City has not wiped out the value of the whole parcel.

So the *Kelly* case is directly on point, directly on point, and we think mandates a summary judgment for the City on the first two causes of action, as I've indicated for the categorical taking and the *Penn Central* taking.

The third cause of action is for a physical taking. The only evidence the developers put forward is this Bill 2018-24, and we've shown why that did not exact an easement

from the City, it didn't apply, and even if it did, it didn't require that the developer allow the public onto property.

And their non-regulatory taking claim, there's no evidence to support it, so we would request that the Court deny the developer's motion for summary judgment and grant the City's motion for summary judgment. Thank you.

THE COURT: All right. Is there anything else?

MR. LEAVITT: Nothing from the plaintiff, Your Honor.

THE COURT: All right. Sir, did you want to add anything?

MR. MOLINA: No, thank you, Your Honor.

THE COURT: Okay. I just wanted to make sure. You've been sitting there very patient.

Anyway, it's my understanding we've heard all evidence; is that correct?

MR. LEAVITT: That's correct, on behalf of the plaintiff, Your Honor.

THE COURT: And all evidence on behalf of defendant?

MR. SCHWARTZ: Yes.

THE COURT: This is what I'm going to do. There's -- we have a very rigorous and well-developed record in this case, and I'm going to make some decisions right now.

I'm going to ask a rhetorical question for everyone. Regarding the plaintiff's motion for summary judgment or summary adjudication of the *per se* regulatory taking, first claim for

relief, I'm going to grant that, for the record.

As it pertains to the *per se* categorical taking, third claim for relief based upon the current record we have, I'm going to grant that also.

Same thing for the fourth claim for relief, I'm going to grant that one too.

We've heard a lot of evidence in this case, and I think under the facts and circumstances it's pretty clear that we had a taking, and that's going to be my decision.

On that issue, Mr. Leavitt, I'm going to have you prepare findings of facts and conclusions of law on that issue and go into detail. You can rely upon the record, and some of the issues that have been raised during this very vigorous discussion and argument. Make sure you circulate it. If you have competing -- if the city doesn't agree, then the city can of course submit their proposed findings of facts and conclusions of law.

And I don't mind you putting in that, sir, because we've had a rigorous discussion as to the impact of the petition for judicial review, and I think I've been pretty clear as far as my view of the law in that regard, it's a completely different standard, I'm handcuffed. All I have to do is make sure that the decision is not clearly erroneous and/or there's substantial evidence in the record or there's no plain error as a matter of law. That's it. That's all I can do. This is a

much different forum, a much different scenario.

My final question is this. It comes down to the second claim for relief as it pertains to *Penn Central*, and it's the city's position that summary judgment should be granted on that issue as far as -- I mean, what does the plaintiff want to do with that claim now, sir?

MR. LEAVITT: Your Honor, once you found the taking under -- and Mr. Schwartz conceded this, once you found a taking under a *per se* categorical taking, that's a higher threshold than a *Penn Central* taking, so you wouldn't need to even enter findings on a *Penn Central* taking claim, because you've already entered the findings on the *per se* categorical taking claim.

Now, if the Court wanted us to provide an analysis on that, we could provide an analysis and say that those three standards have been met also.

THE COURT: Okay. I want to hear from the city on that, because I don't know.

MR. SCHWARTZ: Well, if the Court finds that there's a categorical taking, then I, you know, I'm not sure what the basis of the Court's ruling is, but it might apply the same to the *Penn Central* claim. If the Court finds that the city has met a test for a regulatory wipeout, then you certainly meet the test for economic impact for *Penn Central*.

Why don't you -- I propose we have the plaintiff put

in the order whatever they want. If they think that --

THE COURT: I just want to --

MR. SCHWARTZ: If they think that *Penn Central* claim, that they should get judgment on their *Penn Central* claim, they didn't move for it, but, you know, I think they should be required to say what effect the Court's ruling has on the *Penn Central* claim.

Probably, you know, if they moved on it, if the Court found that there's been a wipeout, then the Court probably would have granted summary judgment on the *Penn Central* claim, too, because it's a lower showing.

THE COURT: That's why I asked the question.

MR. LEAVITT: It would be -- in other words, in short it would be met also, Your Honor.

THE COURT: Okay. That will be part of my decision, too.

And prepare rigorous findings of facts -- I know you will, but it's important. Make sure it gets circulated.

MR. LEAVITT: I will, Your Honor.

THE COURT: And so I guess we're next up on that, looking at the dates, you're coming back -- okay, so we have a status check and trial readiness in two days, so we'll talk about other issues then.

MR. LEAVITT: Sounds good, Your Honor.

THE COURT: All right. So anyway, everybody enjoy

your afternoon.

MR. LEAVITT: You too, Your Honor. Thank you, and stay safe.

MR. MOLINA: Thank you, Your Honor.

THE COURT: Thank you, sir.

(Proceedings adjourned at 12:39 p.m.)

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Rhonda Aquilina, Nevada Certified #979

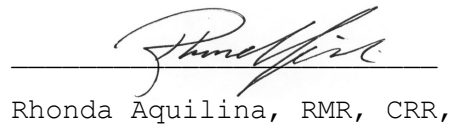
Reporter's Certificate

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 3, 2021



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