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. 120

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DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

180 LAND COMPANY, LLC, Plaintiff, vs. LAS VEGAS CITY OF, Defendant. AND RELATED PARTIES	CASE NO. A-17-758528-J DEPT NO. XVI **TRANSCRIPT OF PROCEEDINGS**

BEFORE THE HONORABLE TIMOTHY C. WILLIAMS, DISTRICT COURT JUDGE

WEDNESDAY, JANUARY 19, 2022

SEE NEXT PAGE FOR MATTERS

APPEARANCES (Via BlueJeans):

FOR PLAINTIFF LANDOWNER: JAMES J. LEAVITT, ESQ.
ELIZABETH M. GHANEM HAM, ESQ.

FOR CITY OF LAS VEGAS: GEORGE F. OGILVIE, III, ESQ.
J. CHRISTOPHER MOLINA, ESQ.
ANDREW W. SCHWARTZ, ESQ.

RECORDED BY: MARIA GARIBAY, COURT RECORDER
TRANSCRIBED BY: JD REPORTING, INC.

M A T T E R S

City's Motion for Immediate Stay of Judgment on OST

Plaintiff Landowner's Opposition to the City's Motion for Immediate Stay of Judgment and Countermotion to Order the City to Pay the Just Compensation Assessed

Plaintiff Landowner's Motion for Reimbursement of Property Taxes

Respondent's Motion to Retax Memorandum of Costs

LAS VEGAS, CLARK COUNTY, NEVADA, JANUARY 19, 2022, 10:06 A.M.

* * * * *

THE COURT: And next up, page 9 of the calendar, 180 Land Company, LLC, versus the City of Las Vegas.

Let's go ahead and set forth our appearances on the record.

MR. LEAVITT: Good morning, Your Honor. On behalf of the plaintiff landowner 180 Land, James J. Leavitt.

THE COURT: All right.

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

MS. GHANEM HAM: Good morning, Your Honor.

MR. SCHWARTZ: Andrew Schwartz for the City of (video interference).

MS. GHANEM HAM: Sorry. On behalf of plaintiff 180 Land, Elizabeth Ghanem Ham.

MR. SCHWARTZ: This is Andrew Schwartz representing the City of Las Vegas. Good morning.

THE COURT: And for the record, does that cover all appearances?

MR. MOLINA: I'm sorry, Your Honor. I think I was on mute. This is Chris Molina appearing for the City.

THE COURT: Okay. Is there anyone else?

(No audible response.)

THE COURT: All right. And before we get started,

Staff, do you want to take just a five-minute recess real quick? I think you do.

UNIDENTIFIED SPEAKER: Please, yes.

THE CLERK: Use the rest room.

THE COURT: What we're going to do is I'm going to take five minutes. We're going to take a quick five-minute break before we get started with 180 Land Company, and so we'll go ahead and you can mute them, and we'll come back in about five minutes.

THE COURT RECORDER: Thank you.

(Proceedings recessed at 10:08 a.m., until 10:12 a.m.)

THE COURT: All right. We can go back on the calendar.

THE COURT RECORDER: We're back on the record.

THE COURT: Okay. I mean, thank you. And anyway, we're back on the record, and we have a few motions set for this morning and a continuation of the motion from last week or the week before, and I guess we probably should start out with the City's motion for immediate stay; is that correct?

MR. OGILVIE: That's good, Your Honor. This is George Ogilvie.

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

MR. OGILVIE: Thank you, Your Honor. Just for the Court's edification, I'll be arguing this motion. Mr. Schwartz

will be arguing 180 Land's motion for reimbursement of property taxes, and Mr. Molina will be arguing the City's motion to retax costs.

THE COURT: All right.

MR. OGILVIE: Your Honor, by this motion for stay of judgment, the City seeks a stay of the enforcement of the judgment pending the Court's adjudication of the City's Rule 59 and Rule 60 motion to amend and the disposition of the City's appeal, which the City will file immediately after the resolution of the City's motion to amend.

Under Rule 62(d) and 62(e), the City is entitled to a stay pending appeal as a matter of right without posting security.

Additionally though, the City is seeking immediate relief in the form of a stay pending the disposition of the motion to amend that the City filed pursuant to Rule 59 and Rule 60. The hearing on that motion to amend is scheduled for February 8th, and, as we have seen with Your Honor, the Court doesn't take long to rule on such -- well, just about any motion, and so --

THE COURT: And, you know what, Mr. Ogilvie, I kind of take that as a compliment in a way because I don't mind saying this, and, you know, I'm handling business court now, and before that it was construction defect, and a lot of these cases are very, very complex. And from time to time I do have

to take matters under submission, but what I try not to do is to sit on them for any excessive period of time because I understand the importance of these issues, and when I can, I try to rule from the bench. I just do, but it is what it is.

And I know this is a really important case. That's why wanted to -- issue I should say that's why wanted to move it where you didn't have to rush, and I'm going to hand the floor back over to you, sir, because I want to hear everything you have to say, and, of course, I'll hear from the opposition, but you have the floor, sir.

MR. OGILVIE: Thank you, Your Honor. And I'm sure just about every litigant and counsel that appears in front of you appreciates the efficiency with which you deal with such matters.

So, but my point being, the City's request for a stay pending the adjudication of the Rule 59 and Rule 60 motion to amend is a very brief stay that the City is requesting.

Again, the hearing is scheduled for February 8th. If the Court rules from the bench, obviously it'll just be a matter of fashioning an order to implement that ruling. If the Court takes it under advisement, as the Court has recognized, it doesn't do so for very long.

So what the City is essentially seeking, for purposes of a stay pending a motion to amend is, you know, roughly a month from today, and so, as I will discuss in later in my

argument, there really isn't any prejudice to 180 Land if the Court issued a stay pending the adjudication of that motion to amend. But additionally, as I stated, we're not only seeking a stay pending the adjudication of that motion, but pending appeal as well.

And I will go into the Rule of Appellate Procedure 8(c) factors, which also warrant a stay in this matter.

So what I'm not going to do today, Your Honor, is belabor the Court's decisions that were set forth in the motion and which the City takes issue. You know, we've made those arguments multiple times, and, as the Court has recognized, the Nevada Supreme Court will review whatever decisions that this Court has issued.

What I want to address today is very simply that a stay of execution of the judgment is appropriate to allow the Nevada Supreme Court to review those rulings before 180 Land is allowed to execute on the judgment.

So if we start with the -- I'm going to take it a little bit in reverse chronological order. And that -- so I'm going to address the request for a stay pending appeal first, and under Rule 62(d) and (e), the City is entitled to a stay pending appeal as a matter of right.

We look at Rule 62(d)(2), it says, If an appeal is taken, a party is entitled to a stay by providing a bond or other security.

And then if we look at Rule 62(e), it states, When an appeal is taken by the State or by any county, city, town or other political subdivision of the State or an officer or agency thereof, the operation or enforcement of the stay -- of the judgment is stayed. No obligation, bond -- no bond, obligation, or other security is required from the appellant.

So if I break that down, it says, and break that down and apply it to what's before the Court today, Rule 62(e) says when an appeal is taken by the City and the operation or enforcement of the judgment is stayed, no security is required from the City. And if I then go back to Rule 62(d)(2) and it says again, If an appeal is taken, a party is entitled to a stay by providing a bond or other security.

So I looked up the word entitled. *Merriam-Webster* defines it as having a right to certain benefits or privileges. So if we apply Rule 62(d) and (e) to what's before the Court today, under Rule 62(d)(2), the City has a right to a stay, and under 62(e), no security is required from the City to obtain that stay.

Now, the Nevada Supreme Court has addressed this, and affirmed my arguments in the case *Clark County Office of Coroner Medical Examiner versus Las Vegas Review-Journal*, and the Court said, Upon motion, as a secured party, the State or local government is generally entitled to a stay of a money judgment under rule -- NRCP 62(d) without posting a supersedeas

bond or other security.

So I submit to the Court, Your Honor, that the only issue before the Court today is whether a stay should be granted pending the adjudication of the City's motion to amend. In accordance with Rule 62(d) and (e) and the Clark County Office of Coroner case that I just referenced, the City is entitled to a stay as a matter of right when it files its notice of appeal.

Had the City filed its notice of appeal yesterday or any time in the last month, it would be entitled to a stay as a matter of right without posting any security, but the City, and let me just for the Court's edification, I'm sure the Court is aware of this, had the Court filed or had the City filed a notice of appeal prior to adjudication of the motion to amend, the Supreme Court would have found that the motion or the notice of appeal was premature and would either -- would have required the City to voluntarily dismiss the notice of appeal.

Nonetheless, the point is, if the City didn't file the motion to amend, the City would have already filed a notice of appeal and would have been entitled to a stay as a matter of right.

Now, we also mentioned in the brief in our motion that the City is also requesting that the Court stay other decisions of the Court, namely the October 12, 2020, findings of fact and conclusions of law regarding the plaintiff

landowner's motion to determine the property interests, the October 25th, 2021, findings of fact and conclusions of law granting the plaintiff landowner's motion to determine take and for summary judgment on the first, third and fourth claims for relief and denying the City of Las Vegas, Las Vegas's countermotion for summary judgment on the second claim for relief, and, thirdly, the October 28, 2021, decision of the Court.

As I will argue in a couple of minutes, there isn't any prejudice to 180 Land if the Court granted a stay on the money judgment as well as the three rulings that I just referenced to allow the Nevada Supreme Court to review the Court's decisions on these four very momentous issues.

What the City -- what 180 Land has obtained is a money judgment, but in addition to seeking that money judgment, 180 Land has already contended that this Court's rulings, the three rulings that I just mentioned, are an issue preclusion bar to a local agency's exercise of discretion to deny or condition its approval on any application to develop property in Nevada as long as the proposed development is first permitted by the zoning. Without a stay of the three decisions that I referenced, the 180 Land will continue to assert this argument, and it already has, and we referenced that in our briefs. 180 Land has already sought to bar any discretion by the other three Judges overseeing these inverse condemnation

cases in the Eighth Judicial District Court by asserting issue preclusion. In other words, 180 Land has sought to take all discretion away from those other judges based on this Court's rulings that I referenced earlier.

The City submits that those Courts should be granted the discretion to rule as they deem fit under the facts and circumstances of the cases before them, that it is inappropriate for 180 Land to seek issue preclusion based on this Court's rulings, and therefore those rulings should be stayed pending a review by the Nevada Supreme Court.

So getting to the Rule of Appellate Procedure 8(c) factors, there's four factors. If the Court is inclined to examine further, does not grant the City's request just based on Rule 62, the Court -- Nevada Supreme Court reviews the request for a stay based on four factors.

The first factor is whether the object of the appeal will be defeated if the stay is denied. The second factor is whether the appellant will suffer irreparable or serious injury if the stay is denied. The third factor is whether the respondent will suffer irreparable or serious injury if the stay is granted, and the last factor is whether the appellant is likely to prevail on appeal.

Now, Your Honor, I'm not going to focus on the fourth factor, whether the appellant is likely to prevail on appeal. Based on the hearings, the multiple hearings that we've had

with Your Honor, I understand that the Court truly believes the rulings that it has made are sound and not going to be overturned on appeal. So I think it would be futile for me to try and convince the Court at this stage that the City is likely to prevail on appeal.

But I also want to point out that the Supreme Court -- Nevada Supreme Court has recognized that if one or two of these four factors are particularly strong, they may counterbalance other weak factors.

So taking the fourth factor out of the argument for purposes of today, I would submit to the Court that the other three factors are especially strong and weigh in favor of the City such that the Court should grant the stay.

Now, I'm going to just briefly address each one of the other three factors. The first factor, again, whether the object of appeal will be defeated if the stay is denied. So if Your Honor denies the stay and allows 180 Land to execute on the $34 million judgment and the other rulings, which for which the City or the 180 Land is seeking issue preclusion, the City and every other community in the State of Nevada could suffer irreparable harm if the stay is denied because property owners could claim a constitutional right to build anything they want as long as it complies with local zoning while the City's appeal is pending.

So the object of the -- part of the object of the

appeal, the nonmonetary aspect of the City's appeal would be defeated if the stay is denied, and the 180 Land is allowed to proceed to seek issue preclusion while the Nevada Supreme Court has yet to review this Court's decisions.

The second factor, whether the appellant will suffer irreparable or serious injury if the stay is denied, if the stay is denied, the City would be required to pay 180 Land $34 million in principal, plus the additional $50 million plus in prejudgment interest, attorneys' fees, property taxes and costs. But if the Nevada Supreme Court later reverses the judgment, the City is unlikely to retrieve the money paid to 180 Land because 180 Land is going to take the money and spend it, invest it, do whatever it seeks to do with that 34 million, and the likelihood of the City to recover that 34 million -- and again it's not just 34 million. The 180 Land is also seeking an additional 50 million.

So call it 80 million. The City coffers would be depleted by 80 million that the City is unlikely to retrieve if the Developer is entitled to execute on the judgment while the Nevada Supreme Court reviews this Court's decisions.

The third factor, whether the respondent will suffer irreparable or serious injury if the stay is granted, with respect to the money judgments, its only monetary damages that 180 Land would not suffer irreparable harm if a stay is entered. The $34 million judgment continues to accrue interest

and until the Nevada Supreme Court either affirms or reverses the -- this Court's decision, that interest would continue to accrue. The City isn't going anywhere, and that's why we have Rule 62(e) that does not require a municipality to post security pending appeal.

The State legislature and the State Supreme Court recognized that the municipality is going to be good for whatever judgment is ultimately rendered after a review by the Nevada Supreme Court. Therefore, with the judgment continuing to accrue interest, there is no harm or irreparable harm to 180 Land if a stay is issued.

So, Your Honor, simply the Nevada Supreme Court should be allowed to review this Court's decisions and resolve these critical issues of law before the City is required to part with $80 million of taxpayers' money.

The City seeks an order staying the rulings and the execution of judgment through the disposition of the City's appeal.

And therefore, we ask that the Court grant the motion to stay pending this Court's adjudication of the City's motion to amend. And rather than bring another motion for stay pending appeal, we're asking for that at this time as well.

THE COURT: Okay. Thank you, sir.

And we'll hear from the opposition.

MR. LEAVITT: Good morning, Your Honor. James J.

Leavitt on behalf of the plaintiff landowner 180 Land.

Your Honor, the arguments that Mr. Ogilvie just made have been made several times to the Nevada Supreme Court in the past. They were made in a published decision called second -- or *State versus Second Judicial District Court*. That decision was decided in 1959, Your Honor. It's been the law in the State of Nevada for 62 years. That case is based upon two specific statutes that were adopted to apply specifically to this type of case, an eminent domain case.

NRS 37.140 and NRS 37.170 were adopted to address the very arguments that Mr. Ogilvie presented to the Court. Judge, keep in mind where NRS 37.140 and .170 appear.

First of all, they appear in Title III of the Nevada Revised Statutes. Title III of the Nevada Revised Statutes applies to special actions and proceedings. Then the legislature took that special action and proceeding of eminent domain and adopted a specific law to apply in the specific context that we're in right now. Not only do we have NRS Chapter 37 appearing in Title III, which is special actions and special proceedings, but we have specific law within Chapter 37 to apply to the very specific issue that we're here for today.

37.140 is not unclear, Your Honor. It says the plaintiff must -- mandatory language -- within 30 days after final judgment, pay the sum of money assessed.

37.170 then closed the loop in the event the City or any other governmental entity decides to appeal, and if the City or any other governmental entity decides to appeal, 37.170 then says, as a precondition to appeal, the City or any other governmental entity must pay the sum of money assessed.

Section 2 of NRS 37.170 is real clear: "The defendant, who is entitled to the money paid into court for the defendant on any judgment..."

Your Honor, that says any judgment. It doesn't even use the words final judgment. It's says, if the City decides to appeal, the defendant is entitled to be paid that money pending appeal.

And then Section 1 says that any time after entry of judgment, and if the government is in possession of the property the government must pay the sum of money assessed pending appeal.

Now, the arguments that we just heard from Mr. Ogilvie were presented to the Nevada Supreme Court in *State versus Second Judicial District*, and the State of Nevada had to -- was in the same exact position that the City of Las Vegas is in right now, and the State of Nevada argued to the Nevada Supreme Court that it should not be required to pay the money on a verdict pending appeal.

The first argument that the State of Nevada says, Judge, our appeal will be defeated. The subject of our appeal

will be defeated if you don't give the -- if you don't give yourself, the Nevada Supreme Court the opportunity to review the lower court order before ordering payment.

The Nevada Supreme Court rejected that argument and said, listen, we're just requiring you to pay the money. You can still bring your issue before us, and if you prevail, then you can collect the money back, and on that issue, here is what the State said to the Nevada Supreme Court.

The State said that in any event that the construction is placed upon the State, which requires the State to pay that money, it would be an undue burden, and this is the undue burden the State argued in the eminent domain case to the Nevada Supreme Court:

> That a seeking to get the money back from a condemning, that which it should never have had and may have already squandered.

The exact argument that Mr. Ogilvie just made to you, the State of Nevada made to the Nevada Supreme Court and said, listen, the landowner may squander the money, and we may have to get that back.

Here's what the Nevada Supreme Court did. The Nevada Supreme Court did a balancing, and they had to make a public policy decision. They had to balance the City and the State's undue burden, as they describe it, of having to collect the money back in the event the matter is reversed or unless

judgment is paid against the landowner's constitutional right to timely be paid just compensation, and clearly, Your Honor, you can see what the Nevada Supreme Court did. They said, This is a burden which must be borne by every judgment debtor who appeals in absence of supersedeas. We do not regard such burden as unjust.

And here's what the Court said: When balanced against the condemnee's right to prompt compensation for property already taken.

The Nevada Supreme Court also rejected the other public policy arguments that were just made by Mr. Ogilvie, and here's how they did it. They said, the power not only to take possession of another's property, but also to postpone indefinitely the payment of just compensation is a power which may very well have an oppressive effect.

So what the Court did is they looked at the landowner's constitutional right to payment of just compensation, the oppressive effect a delay of payment may have on that landowner and weigh that against the government's arguments that were just presented by Mr. Ogilvie, which I won't repeat, and said that the landowner's constitutional right to prompt payment and just compensation far outweighs any of the arguments made by the government.

Here's what the Court said in regards to interest, because Mr. Ogilvie made the argument this is just about money.

This is just in -- they can get paid in interest.

The Court said the assurance of ultimate payment, plus interest may not be sufficient to meet the immediate needs of the condemnee either to his property or to his cash equivalent. In other words, the Court said, you cannot take property and then delay payment for that taking. It will have an oppressive impact on the landowner.

And, Your Honor, as you will recall during all of these proceedings, I have one consistent argument, and my consistent argument was, Judge, this case is having a crushing impact on our client. I repeatedly argued. I said, Judge, we need to get this case resolved, and I agree with Mr. Ogilvie. You quickly resolved it. Your decisions were very quick, but the City delayed this matter for four years.

Judge, we filed this case in 2017. We are now four and a half years after the property has been taken, four and a half years where the City tried to remove the case to federal court and delayed it. They delayed the summary judgment hearing because they wanted to get an economic analysis and then showed up at the summary judgment hearing saying they didn't need the economic analysis, that they used as a reason to get the delay.

Your Honor, I just want to -- I'm not going to belabor this point, but I will cite to one exhibit that we submitted during the summary judgment hearing. It's Exhibit

Number 143, and this is an e-mail that we discovered through a Freedom of Information Act request. It's an e-mail that was sent by the head of the surrounding property owner.

Listen to what the head of the surrounding property owner said, and as you'll recall, Your Honor, the entire case was about the City of Las Vegas working with the surrounding property owners to preserve this landowner's property for use by the surrounding property owners by denying a fence, by denying access, by passing a bill to authorize the public to use the property and absolutely prohibiting the landowner from using the property so that it can be preserved for the surrounding property owners.

This is what the head of the surrounding property owners in Exhibit 143 stated in an e-mail: We have done a pretty good job of prolonging the developer's agony from September 2015 to now. Judge, that's four and a half years. We have done a pretty good job of prolonging the developer's agony. That's what this motion is about here today. The Nevada Supreme Court has held that once a judgment is entered in an eminent domain case, that judgment must be paid so that the landowner's agony can be no longer prolonged.

And the agony is, Your Honor, that landowner has lost all use, all value of their property. The City has the property. The City has taken the property. That's the law of the case right now is the City has taken the property.

As you'll recall in the findings of fact and conclusions of law, a councilman said to all the surrounding property owners, This 250-acre property is yours for Parks and Recreation use. He then followed up on that and sponsored a bill to allow the public to use the property. And then we presented evidence through Don Richards's affidavit and numerous photos that the public was actually using the property at the direction of the City of Las Vegas.

Your Honor, this is no different than the City filing a condemnation action to take a property for a public park so the public can use it.

The City is in possession of the property, and the public is using the property pursuant to the law of this case.

And, Your Honor, as I stated, this has been the law for 62 years. The City of Las Vegas has had every opportunity, along with every other governmental, go to the Nevada Legislature and try and change this law. It either has tried to do it, and the legislature refused, or it has not done it because it knows the legislature will not reverse this law. It is a very specific law that applies over the general NRCP Rule 62 and NRAP 8 rules.

Your Honor, I'm not going to go into the NRAP elements, and the reason I'm not going to, because I just addressed them in *State versus Second Judicial District*. The exact same NRAP Rule 8 elements were argued to the Nevada

Supreme Court in *State versus Second Judicial District*, and the Nevada Supreme Court rejected every one of them and gave a specific and detailed policy reason for why NRAP 8 does not apply in this type of case.

Now, what the City has argued is, Judge, if you don't do this, the sky is going to fall, and those aren't my words that I used. Those are the words that the United States Supreme Court uses. The United States Supreme Court has heard these arguments, that if you rule in favor of a landowner, Judge, the sky is going to fall. If you order payment of funds, the sky is going to fall.

That argument was made in *Sisolak* to the Nevada Supreme Court, and this is what the Court held in Footnote 88: The Court rejects the County's contention that it cannot afford a taking finding.

And then the Court goes on to say, Any financial burden that the county must bear is irrelevant as to whether there has been a constitutional violation and a taking.

So any of these burdens that we're hearing from the City, they're entirely irrelevant to the constitutional issue of whether there has been a taking.

Your Honor, in *Arkansas Game and Fish versus U.S.*, a case that was written by Ruth Bader Ginsburg, she addressed this exact issue that the City presents about the sky's going to fall. Here's what she said in *Arkansas Game and Fish*:

> The slippery slope argument, we note, is hardly novel or unique. Time and again, in takings cases, the Court has heard the prophecy that recognizing a just compensation claim would unduly impede the government's ability to act in the public interest.

In other words, she's saying, we hear this argument all the time from the government. And this is what she said, quote, "We have rejected this argument," end quote.

Then she went on to explain how the sky did not fall after *Cosby* (phonetic), which was a United States Supreme Court decision, and then she goes on to say that our decision today will not result in a deluge of takings liability.

Judge, we can't base constitutional rights on whether the government thinks the sky is going to fall. I mean, sometimes it's hard to comply with the Constitution.

For example, it's hard to comply with the fourth amendment sometimes for the government. Does that mean that we need to erase the fourth amendment? Does that mean the right -- an individual's right against search and seizures should be erased because it's hard on the government? That's never been a proper argument, and it has been repeatedly rejected by the Courts, and it's been repeatedly rejected by the United States Supreme Court in the specific context of eminent domain cases.

Now, I believe what Mr. Ogilvie is going to do is when I finish arguing he's going to say, Judge, NRS 37.140 and NRS 37.170 only apply to direct condemnation cases. They don't apply in the context of an inverse condemnation case.

Let's take that. I'm going to address the case law on that in just a moment. But, Your Honor, let's take that to its logical argument.

So what the City is arguing is that if the City had properly followed the law, if the City had properly filed a condemnation action, then the City would be required to pay the funds as a precondition to appeal and within 30 days.

But the City says since it acted illegally and unconstitutionally and didn't file a proper condemnation action, and the landowner had to sue the government to get the take finding, it should get a break and should not have to pay the funds pending appeal. That's the City's argument, and that argument has been repeatedly rejected by the Nevada Supreme Court.

As you'll recall, during all these proceedings, the City of Las Vegas has argued that eminent domain and direct condemnation law does not apply. That exact issue has been resolved in two cases. I'll address them briefly, Your Honor.

The first one was the 1984 *County of Clark versus Alper* case. The case Mr. Waters did, and that case the issue was a date of valuation, and Mr. Waters argued to the Nevada

Supreme Court that NRS 37.120, that Chapter 37 that applies in Title III in the specific context of an eminent domain case applies equally to eminent domain cases and inverse condemnation cases, and the Nevada Supreme Court agreed, and here is what the Court said.

Inverse condemnation proceedings are the constitutional equivalent of direct eminent domain actions. That means they are identical.

And the Court went a second step and then said they are governed by the same rules and principles that are applied to formal condemnation proceedings.

The Nevada Supreme Court didn't say some of the rules and principles apply. They said that the inverse condemnation and direct condemnation cases are the constitutional equivalent of one another and the exact same rules and principles apply.

Now, *Alper* was an inverse condemnation case where direct eminent domain law was asking to be applied.

I want to refer the Court now to a 1998 -- I believe it's a 1998 case, yeah, *Argier versus Nevada Power Company*. This is a direct eminent domain case, and we represented the landowner in that case also, and in that case the issue was what is the -- which party was entitled to be paid compensation.

And in that case, that direct eminent domain case, we cited to the Nevada Supreme Court an inverse condemnation case

called Brooks Investment. I can't remember the exact name of it, but the case right now, Your Honor, but it was, yeah, Brooks -- *Brooks versus City of Bloomington*. So that *Brooks versus City of Bloomington* case was an inverse condemnation case that we were trying to apply in a direct condemnation action, and Nevada Power Company said, Judge, you shouldn't apply inverse condemnation law in a direct condemnation case, and here's what the Nevada Supreme Court said 14 years after *Alper*. It said this Court has held that the same rules that govern direct condemnation actions apply in inverse condemnation actions as well.

Therefore, Your Honor, we can have a lengthy discussion about NRAP 8. We can have a lengthy discussion about NRCP 60 and 62, but the Nevada State Legislature has decided to adopt very specific rules regarding payment of funds in an eminent domain case, and they supersede NRAP 8. They supersede NRCP 60, and those rules apply equally in an eminent domain case, as they apply -- a direct eminent domain case as they apply in an inverse condemnation case.

But, Your Honor, to allow the City to stay payment for another one, two, I don't know, maybe three years, would continue to have a profoundly oppressive effect on the landowners, despite with the City argues. The landowners have already had carrying costs of taxes at $1 million a year imposed by the City Tax Assessor. They've already had to pay

their attorneys for four and a half years. They've already had to pay all of the carrying costs of a vacant piece of property. They paid taxes based upon a lawful residential use that the City would not allow them to make of it.

And now the City, after a judgment is entered, wants to delay this matter further. I can't impress upon you how much of a further financial crushing impact that would have. And as the Nevada Supreme Court described it in *State versus Second Judicial District*, it would have an oppressive. That's the Nevada Supreme Court's words, not mine, but an oppressive effect. This is what the Court concludes:

> It might well through duress of circumstances compel the acceptance by a condemnee of compensation felt not to be just.

What the Court is saying there is it might well result in the landowner taking less than their constitutional right to just compensation, meaning, their constitutional rights would be denied.

And just one minute, Your Honor.

Mr. Ogilvie makes the argument that everything has to be stayed because other Courts might apply your ruling. Your Honor, we have specific laws on issue preclusion in the State of Nevada. What another Judge may or may not do has no bearing before this Court right now. There's no reason to stay any of the judgments.

They have been litigated for over four years. I don't think they could be any further litigated, and therefore, Your Honor, there's absolutely no reason to now start staying judgments, and particularly start staying payment, Your Honor.

Therefore, we would ask that this Court order payment of the -- all of the sums assessed within 30 days of the judgments of those sums being assessed under 37.140 and 37.170 in *State versus Second Judicial District*, Your Honor.

And Your Honor, I would answer any questions if you'd like me to.

THE COURT: None at this time, sir. I'll have some questions once Mr. Ogilvie is done.

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

THE COURT: And I understand, and for the record, I don't mind saying this, I understand the importance to all parties involved as far as this issue is concerned. I do. I get it. And I've been listening, and I'm going to listen to Mr. Ogilvie. Then I'll have a -- I might have a question or two after he's done.

MR. LEAVITT: Okay.

THE COURT: Mr. Ogilvie, sir.

(No audible response.)

THE COURT: Did we lose him?

MR. LEAVITT: George, we can't hear you.

THE COURT RECORDER: He's muted, Your Honor.

THE COURT: Yeah, hit star 4, Mr. Ogilvie.

MR. OGILVIE: Sorry. I didn't want to make any noise that would disturb Mr. Leavitt.

Your Honor, what we heard was a fairly emotional plea by 180 Land's counsel as to the effects of not staying this judgment. If we want to go back and argue the facts, I'll make a couple quick statements about the facts. When we're talking about the oppressive effect that Mr. Leavitt argued, the oppressive effect on an entity that purchased the entire property, the entire 250 acres for less than $3.5 million. So the oppressive effect of a stay is -- first of all nonexistent because it is simply a monetary judgment. And even if it was existent, it is -- the stay rulings affecting a purchase of three and a half million dollars.

Mr. Leavitt argued about the City delaying the proceedings by the removal and the delay to the motion -- 180 Land's motion for summary judgment. The City stands by the removal, Your Honor, the *Knick* case that came down from the Nevada Supreme -- or from the U.S. Supreme Court in 2020 or 2019, which stated that a landowner no longer needs to go to state court. It can go directly to federal court for an adjudication of an inverse condemnation proceeding. The City maintains that it was appropriately read to allow the City to then remove the case as new law.

Nonetheless, I don't want to belabor that point.

We've had the rulings on that. I'm just making the point, Your Honor, that the City's actions in this litigation, and particularly the argument that we delayed the proceedings by removing them to federal court were, I submit, legally sound and were engaged in no means for purposes of delay. The argument that we delayed the motion for summary judgment to obtain an economic analysis and then didn't proceed with one, that's not the case.

We also sought the stay to have the opportunity to review the merit of Mr. Richards's declaration that there were -- there was a public intrusion on the property, which there was no evidence of other than some select photographs taken by Mr. Richards; but also to take Mr. Lowie's deposition, which we took on August 12th, and it was critical for not just this case, but all of these Badlands cases that we take Mr. Lowie's deposition before any motion for summary judgment brought by 180 Land be heard.

And we brought forth evidence in our motion for summary judgment based on Mr. Lowie's deposition that in fact the City's argument that the -- that 180 Land purchased the property for less than three and half million dollars, again, not just the 35 acres, the entire 250 acres for less than three and a half million dollars was, in fact, validated and confirmed by all of the documents that we presented in Mr. Lowie's deposition. So the City has not delayed these

proceedings, and this is not an attempt to unfairly or oppressively delay the collection of a judgment.

The City's intention is to allow the Nevada Supreme Court to review these critical issues before $80,000 -- or $80 million, pardon me, $80 million or thereabouts, depending upon the Court's rulings on the remaining posttrial motions, before that money is taken from the taxpayers and awarded to the 180 Land in this case.

It is, again, imperative that the Nevada Supreme Court have the opportunity to review these proceedings. It is -- notwithstanding Mr. Leavitt's arguments about eminent domain, and I'll take those in a second, it is indisputed (sic) that Rule 62(d) and (e) allow a municipality such as the City to take and appeal and obtain a stay pending that appeal without the posting of any security.

As it relates to NRS 37.140 and 37.170, Mr. -- I agree with Mr. Leavitt when he said the law -- this law is very specific. It is very specific. It's specific solely to eminent domain, the eminent domain. This is not an eminent domain case.

The issue here that the City will take up on appeal is whether 180 Land had a constitutional right to approval of the applications at issue and whether there was a taking. The appeal isn't an acknowledgment that the City had actually exercised its right to eminent domain and improperly or

properly valued the property that was taken.

We're not -- the issue of value is not the appellate issue. The appellate issue, again, is whether 180 Land had a constitutional right to approval of the applications and whether there was a taking. That is not an eminent domain case, and the eminent domain law cited by Mr. Leavitt does not impact the City's right to entitlement to a stay pending appeal without the posting of security.

The -- of the -- Mr. Leavitt argued that there's no reason to stay these decisions, that other Court's decisions should not impact this Court. Well, that's diametrically opposed, completely contrary to the motions that 180 Land has brought in other cases, in the other inverse condemnation cases regarding the Badlands, in which 180 Land and its affiliates are citing this Court's three decisions that I referenced in my opening statements as having precedential effect, precluding any further consideration by those other departments on the issues addressed in these -- this Court's October 12th findings of fact, October 25th findings of fact and the October 28th decision.

So for Mr. Leavitt to argue that this -- that the other Court's decisions do not impact this Court is completely contrary to the positions that 180 Land and its affiliates are taking in before those other courts.

Your Honor, the rule, Rule 62 is very clear. The

City is entitled to a stay pending appeal. The only issue before this Court is whether or not that stay should extend to the time period pending the adjudication of the City's motion to amend. As I submitted in my opening statements, we're about a month away from that. There isn't a significant delay. Therefore, we request that the Court grant the motion, stay the execution of judgment and stay the other decisions issued by this Court pending the Court's adjudication on the City's motion to amend and also grant the stay as a matter of right to the City pending appeal.

THE COURT: All right. Is that it, Mr. Ogilvie? Because I do have some questions for you.

MR. OGILVIE: Thank you.

THE COURT: And, I mean, I, without question, considered, you know, in a normal circumstance, I understand the application of NRS-- I'm sorry, NRCP 62(e). I get that.

I do understand the Nevada Rules of Appellate Procedure 8C. I get that and the factors that were set forth therein.

But tell me this, and I was reading -- I remember reading the reply -- I'm sorry, the opposition. I think it was filed in this matter. Let's see if I can find it real quick by 180 Land Company, and I have a couple questions when I look at this, these issues, and my first, and this is an overall observation, and I remember I was reading it at page 8 of the

opposition, and according to page 8, 180 Land Company or the landowners would take the position that, for example, quote, the more specific eminent domain statutes and apply -- and laws apply over a general rule cited by the City.

I actually think it's probably a slightly different issue, and I just remember from time to time researching this issue when you have a conflict between statutory rights granted by the Nevada Legislature versus rules, you know, as adopted by our Nevada Supreme Court, and it can be a rule of civil procedure, an EDCR or whatever, and so to me, there potentially -- there appears to be a tension between rules of procedure versus substantive rights or grants by the Nevada Legislature.

And I don't think that was necessarily addressed head on, but if that is the case here, I guess I should say, Number 1, is that the case here where we have a grant of substantive rights pursuant to NRS Chapter 37.140, and I think the other one is .170 versus NRCP 62(e) and also Rule 8 under the Nevada Rules of Appellate Procedure, and I'm going to give both of you a chance to address that issue.

We can start first with you, Mr. Ogilvie.

MR. OGILVIE: Your Honor, the City submits that the Court need not even engage in that because Chapter 37 does not apply to these proceedings. Chapter 37 is eminent domain. This is an inverse condemnation action, and I understand that

the -- I understand 180 Land's position and arguments that the Nevada Supreme Court has ruled that the principles of eminent domain also apply to inverse condemnation proceedings.

But the fact remains, Your Honor, that they are very, very different proceedings. The only issue in an eminent domain proceeding is value.

The issues in this case, in an inverse condemnation action are far, far more complex. And again, whether or not the 180 Land as the Developer had a constitutional right to the approval of its applications and whether there was a taking, those are not included in eminent domain proceedings. Once that is determined, then -- and all we're talking about is value on the -- on an inverse condemnation action, I will agree that eminent -- that the proceedings are very similar, and principles of eminent domain can be applied to inverse condemnation proceedings.

But prior to a determination as to whether or not there is a taking, there is no similarity in these proceedings, and therefore, there is no application of rule -- of Chapter 37, eminent domain proceedings to inverse condemnation proceedings.

Now, secondarily, Your Honor, I would refer the Court to NRS 37.009, specifically, Subsection 2, and it defines final judgment as a judgment which cannot be directly attacked by appeal, motion for new trial or motion to vacate the judgment.

Until there is, in fact, final judgment, which is referenced in NRS 37.140, that the -- there is no right to payment of the judgment pending appeal.

So 37.140 requires payment of just compensation only after entry of a final judgment, and again, NRS 37.009, Sub 2 defines what final judgment means, and if you read that currently, currently, there is not a final judgment because this judgment, the judgment entered by this Court in October is subject to appeal, and therefore, under 37-point -- 37.009, Sub 2, it is not a final judgment, and as such, NRS 37.140 does not require payment at this time.

THE COURT: All right. I understand that, Mr. Ogilvie. Anything else you want to add, sir?

MR. OGILVIE: No, Your Honor.

THE COURT: Okay. And, Mr. Leavitt, sir.

MR. LEAVITT: Yes, Your Honor. I'll start with Mr. Ogilvie's final argument there on the definition final judgment. Mr. Ogilvie is correct, but he left off a portion of the statute. This loophole that Mr. Ogilvie just argued was closed by the Nevada Legislature in 1959 when it adopted NRS 37.170.

So what the Court -- what the legislature found is that arguments like Mr. Ogilvie's were being made, and so the legislature adopted 37.170 and said at any time after entry or of judgment and left off the word final judgment, it said any

time after entry of judgment or pending an appeal by either party from the judgment that the award must be paid, and so the Nevada -- or the Nevada Legislature erased the word final from 37.170, and then if you turn to 37.009, judgment is defined. And judgment is defined as, in 37.009, judgment means the judgment determining the right to condemn property and fixing the amount of compensation to be paid by plaintiff.

So once that judgment is entered and the government takes an appeal from that judgment, a precondition to that appeal is that the government must pay the sum of money assessed.

Again, Your Honor, that's set forth not only in NRS 37.170, but it's set forth in *State versus Second Judicial District Court* where the Court specifically states, it specifically states very clearly, Your Honor, that the deposit provided in 37.170 is a condition to condemnor's right to maintain an appeal.

Well, the Court has already interpreted 37.170 and determined that the legislature closed that loophole that Mr. Ogilvie just argued to assure that the payment is not delayed.

And, frankly, the argument that Mr. Ogilvie just made shows the legislature's intent, shows how strongly the legislature felt about assuring that landowners are timely paid just compensation.

Your Honor, I'll refer very quickly the Court to the findings of facts and conclusions of law regarding the take, and it's page 40, Finding Number 200. The Court cites to the Knick case.

This is the quote from the Knick case. Once there is a taking, compensation must be awarded because as soon as private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion or regulation, the landowner has already suffered a constitutional violation, and they gain an irrevocable right to be paid just compensation.

And so the delay here, Your Honor, violates that constitutional right to be paid immediately upon occupancy, physical invasion or regulation because a landowner has already suffered that constitutional violation.

Now, let me go to the first, which was your original question is, an overall observation, page 8. You're absolutely right, Your Honor. On page 8, you go to the bottom, and the page 8 near the bottom, we cite *Doe Dancer versus LaFuente*. In that case the Court had two conflicting statutes and held the general specific canon is that when two statutes conflict, the more specific statute will take precedent and is construed as an exception to the more general statute.

The *City of Sparks versus Reno Newspaper* is an accepted rule of statutory construction that a provision, which

specifically applies to a given situation will take precedence over one that applies only generally.

Admittedly, the City has to admit that NRAP 8 and NRCP Rule 60 apply generally, and NRS Chapter 37 applied to special proceedings. And one of those special proceedings is eminent domain.

THE COURT: Well, actually, Mr. Leavitt, I don't want to cut you off, sir, but my observation is slightly different in this regard. It appears to me we have substantive rights granted pursuant to this statute based upon the laws being enacted by the Nevada Legislature and signed off by the Governor. We all know how a bill becomes law, right, going back to --

MR. LEAVITT: Understood.

THE COURT: I forget who did that. Was that the electric company, whatever it was.

MR. LEAVITT: (Video interference) company.

THE COURT: Yes. But my point is this. Here we don't have a statutory conflict with another statute. We have a statutory conflict with the rule, and that was my overall question because in a general sense, when a rule, and, I mean, when a statute involves a substantive right, that would take precedence over a rule and -- from the procedural perspective.

And that was kind of what my observation was, that we had a scenario where potentially you had a -- you do have a

conflict, but it's potentially a rule versus a statute.

Do you see the difference?

MR. LEAVITT: Absolutely, Your Honor, and its something that I thought about, and that was my next argument is when you have a rule of procedure which conflicts with a substantive right that's been -- that has gone through committee, that has been passed by the Nevada Legislature or who has been elected by the voters in the State of Nevada and signed by the Governor who has also been elected by the voters of the State of Nevada, and it involves a substantive right, clearly that would take precedence over a procedural rule.

And there's actually a great case in the Nevada Supreme Court. I think it's called Teachers Building Materials (phonetic), where the Nevada Supreme Court specifically says that substantive rights in an eminent domain case always trump procedural issues.

This clearly is a substantive right. It's a substantive right to be paid. There couldn't be a more substantive right than the right to be paid.

Everything that we've done up to -- in this case up to this point involves the landowner's substantive right to be paid just compensation timely. So I would agree with the Court that that substantive right trumps that, and I -- I will cite to you one more case.

I've cited to you two cases where the Nevada Supreme

Court has held, couldn't be clearer, inverse condemnation proceedings are the constitutional equivalent to eminent domain actions. That's a quote, and yet the City continually argues inverse condemnation cases are different than eminent domain cases. The Nevada Supreme Court went on to say they're governed by the same rules and principles.

Another case I'll cite to this Court is *5th and Centennial* (phonetic). In *5th and Centennial*, the lower District Court Judge went -- it was a precondemnation damage case. So a type of eminent domain case. The District Court Judge in that case applied the general rule -- NRS Chapter 17 prejudgment interest rule. And the landowner said, well, wait a minute. This is an eminent domain case. You should apply NRS Chapter 37, and the lower District Court Judge ruled against the landowner and applied the general prejudgment interest statute of Chapter 17 and was reversed, and here's the quote. Here's what the Court says:

> Nevada treats precondemnation damage actions as a type of eminent domain case. Therefore, we conclude that the District Court erred in using the general interest rule from NRS Chapter 17 instead of the more specific eminent domain rule from NRS Chapter 37.

Your Honor, that rule has been cited at least five times by the Nevada Supreme Court that inverse condemnation

cases are the constitutional equivalent of eminent domain, and therefore Chapter 37 applies to inverse condemnation cases.

Alper has been cited 28 times since it's been decided in 1984. Therefore, Your Honor, we would have to deviate from that rule in order to rule in favor of the City. We have to apply a general rule and instead as a more specific, which is the exact opposite of the rule.

We'd have to find that inverse condemnation actions are different from eminent domain cases, contrary to Nevada's rule. And if we did that, Your Honor, what rule would apply? What body of law would apply? We don't -- in Nevada, we don't -- the Nevada Supreme Court has never said here's an inverse condemnation case, and here's the specific law that applies to an inverse condemnation case. They never did that. Instead the Court said they're the same, and therefore the same rules and principles apply. Therefore, Your Honor, 37.140 and the closed loophole set forth in 37.170 should be applied to this specific case, Your Honor.

THE COURT: All right. Thank you, sir.

And, Mr. Ogilvie, sir, you get the last word of course.

MR. OGILVIE: Your Honor, Mr. Leavitt cited the *Knick* case. So I just wanted to point out that the *Knick* case was a physical takings case, not a regulatory taking, such as the matter before the Court.

Addressing Mr. Leavitt's argument that Chapter 37 does not require a final judgment, I would refer the Court to NRS 37.140 where it states very clearly the plaintiff must within 30 days after final judgment pay the sum of money assessed. Therefore, I submit to the Court, again, I refer the Court back to what the definition of final judgment is. It is a judgment that has been affirmed if an appeal has been taken because only then can it not be challenged by appeal, motion for new trial or motion to vacate, as the definition of final judgment requires.

So even if we apply Chapter 37, and again, that is eminent domain, this is not an eminent domain matter, but even if we apply Chapter 37, NRS 37.140 references final judgment before the sum of money is assessed, and we do not have a final judgment at this time.

THE COURT: Mr. Ogilvie, what's the impact of Chapter 37.170 for this matter?

MR. OGILVIE: Chapter -- NRS 37.170 does not address this very issue, which is when the -- when payment must be made. First of all, again, let me, we submit that --

THE COURT: No. No. I understand your position there. I'm not overlooking your position. You're saying, look, Judge, there's a difference here between an eminent domain matter and inverse condemnation and as a result, it impacts the application of the statute. I get that.

I just want to know what your position would be as far as hypothetically, without waiving any position you take and what impact would 170 have, if any.

MR. OGILVIE: I think .170 needs to be read in conjunction with .140, and a, I mean, .170, Sub 3 talks about final judgment. It's not disregarded in .170, and reading .170 in conjunction with .140, I submit, requires a final judgment to be entered, even in an eminent domain case, which this isn't.

THE COURT: All right. Okay. Anything else from anyone? I just want to -- we've vetted this issue. There's no need to ping-pong, but I just want to make sure that there's anything anyone might have to say that has not been set forth on the record? I just want to make sure the record is clear in that regard.

MR. OGILVIE: Again --

MR. LEAVITT: Your Honor, I --

MR. OGILVIE: Go ahead.

MR. LEAVITT: I was just, for 30 seconds, Your Honor.

Your Honor, the argument that Mr. Ogilvie just made was made to the Nevada Supreme Court in *State versus Second Judicial District*, and the Court said such is not our view of the law. The deposit provided by NRS 37.170 is a condition to condemnor's right to maintain an appeal. Your Honor, it's a condition to appeal. That's why 37.170 was adopted was so that

it would be made. The deposit would be made as a condition to appeal, Your Honor.

THE COURT: All right. And, Mr. Ogilvie, you get the last word, sir.

MR. OGILVIE: Again, eminent domain is very different. It only applies when the City has actually appropriated the property for public use. That is not what is before the Court. Therefore, NRS-- or Chapter 37 does not apply. Even if it does apply, a final judgment is required.

What we have is a Developer (video interference) 250 acres of a golf course. The City took no action whatsoever to disturb its use as a golf course. The City simply denied -- affected its discretion to deny the only application that was ever submitted.

And again, it's not even a final decision by the City Council, but that's -- again, that's for the appellate court to review and decide whether or not there was a -- whether or not this action was even right because there was no second application submitted. So the Developer doesn't even know what the City may have approved even though it denied the initial applications.

Again though, the Developer purchased 250 acres for three and a half million dollars. The purported oppressive -- oppressiveness that Mr. Leavitt refers to doesn't exist. The irreparable harm to the taxpayers is evident because it's the

taxpayers will never recover whatever amount the final judgment is in this case.

If the City -- or if the Developer is allowed to execute judgment at this time, the City is entitled to a stay of the judgment as a matter of right under Rule 62. NRS 37 does not conflict with Rule 62, and therefore we submit that the Court should grant the requested stay.

Even if the Court found that a stay is not required in this event in the matter in the issues before the Court, the City would, if the Court denies the request in the City's motion, the City would request that this Court impose a stay to allow the City to seek an emergency stay from the Nevada Supreme Court.

THE COURT: And I understand that, sir. I do. I get it.

This is what I want to do, and, I mean, I've read all the points and authorities. I looked at the statutes, and I do really appreciate the argument, and this is a really, really important decision for everyone involved. I get it. I understand what's at stake.

And all I want to do is this, take a few days and just deliberate, more so than anything and think about it and go back and read the statute again, look at the cases. I mean, I -- it's a unique issue, and there's a lot at stake for everyone involved. So I just want to deliberate and maybe read

a little more. That's all I want to do. All right. So I'm going to just tell you that.

MR. LEAVITT: I appreciate that.

THE COURT: So I just want to -- it's like a jury making a decision. And this is a tough decision for me to make, but at the end of the day, I have to make that decision, and that's why I'm here. I get that. I do think it's important to sit back and reflect. I appreciate the arguments.

And so let's go ahead and move on to the next matter as far as reimbursement of property taxes and a motion to retax and so on.

What should we do next? Because I'm going to line these up.

MR. LEAVITT: The taxes may be the easiest one, Your Honor.

THE COURT: Which one is that.

MR. LEAVITT: Whichever one you'd like to do, Your Honor. We have taxes and costs.

THE COURT: Whichever one. It's up to you, sir. It doesn't matter to me.

MR. OGILVIE: Your Honor, I'd ask that we argue the motion to retax.

THE COURT: Okay. We'll do that one first.

MR. MOLINA: Good morning, Your Honor. This is Chris Molina on behalf of the City. I'll be arguing the motion to

retax, and I don't want to go line by line and review each item of costs that was disputed. I don't want to repeat anything that was in the briefs. I think that both the developer's opposition and the City's original motion have a pretty good line by line breakdown, at least the developer's motion does. The developer's opposition has a spreadsheet or a chart that was attached as Exhibit 11. That might be a useful guide for the Court to follow as we discuss this motion.

And I want to reiterate that, you know, the City is not trying to nickel and dime the Developer with this motion. The City did not dispute any costs that the City was able to verify based upon the documentation that the Developer submitted with its memorandum of costs. For example, with respect to the developer's claim for parking costs and lunch, the City was able to verify that the dates on the receipts match dates of hearings in front of this Court. And so the City did not move to retax those costs, and that is clearly reflected in this chart that I was just referring to, which is Exhibit 11 to the developer's opposition.

This contains at least a high-level summary of which costs are disputed, which ones are not disputed. There's also one cost that was amended, which I will get to in a second here.

But I want to sort of go through the main issues that we have here and then look at some of the evidence that was

submitted to the Court to, you know, explain why the City disputed certain costs and why that documentation and evidence does not necessarily substantiate or demonstrate that the costs claimed were actually necessarily and reasonably incurred.

So just kind of going to the big issues here. The main issue that we have really is that, as the Court is aware, there are four different inverse condemnation cases involving the Badlands property. They're in front of four different Judges in four different departments. And based on the documentation that was submitted, it is pretty clear that the Developer did not keep track of costs incurred in each case separately, and I will turn to Exhibit 5 to the Developer's Memorandum of Costs to sort of point this out.

Exhibit 5 contains a FedEx invoice and also a check from the office of Kermit Waters that corresponds to the amount that's on that invoice, and both the invoice and the check stub lack any indication that this cost was incurred in this case, which is why we disputed this, both on that ground as well as the fact that there was no explanation for why this cost was necessary.

And in opposition to the motion to retax costs, the Developer conceded that this was a cost that was actually incurred in a different case, the 65-acre case, which is in front of Judge Trujillo. So, you know, off the bat, we already know that there's some issues here in the way that the

Developer kept track of costs and failed to basically keep records or have some kind of methodology for separating those costs amongst the different cases.

And this raises issues with respect to several other categories of costs where it's just not apparent based on the documentation that was submitted that the costs actually relate to this particular case.

Another example, and this is the one that we focused on in our motion, was the developer's Westlaw bills, is that there's no record of which case the Westlaw bill corresponds to. And we're unable to sort that out based on the documentation that's submitted. It's just simply too many costs in there to really drill down and figure out when, you know, when those costs were incurred compared to the status of each of the four different cases.

But the point is that we just don't have any documentation submitted showing that the costs were incurred in one case or another or that the costs were divided according to some method that, you know, is sensible. We just don't have any evidence to demonstrate that in front of us.

And, you know, the same thing with respect to the developer's in-house copy fees. If you look at Exhibit 9 to the memorandum of costs, you know, it just says 180 Land, LLC, and it just has a, you know, a calculation sort of back of the tablecloth type calculation as to the cost for this. But

there's no breakdown on the dates on this particular one, and without the dates we certainly cannot determine whether any of these costs were actually or necessarily incurred in this particular case and not one of the other Badlands cases.

So failure to provide documentation demonstrating that the costs were incurred in this case was really the biggest issue with respect to the majority of the costs claimed.

We also have a dispute over whether or not it was necessary or reasonable for the Developer to retain two experts that were never disclosed and, you know, from the City's perspective, were never used or relied upon in this case. One of those experts is Global Golf Advisors, which is also apparently the same entity as GGA Partners.

The other expert that was not disclosed was Jones Roach & Caringella. There's a number of issues, you know, with respect to these particular costs, namely the fact that they were not disclosed. They were not used. That in and of itself demonstrates that their work was not necessary.

In the opposition to the memorandum of costs, the Developer argues that it was necessary to, you know, prepare them in advance of the expert disclosure deadline so that they could be prepared to rebut any arguments that the City made, but the fact of the matter is, is that the City did not retain or disclose -- or disclose any retained experts in this case,

and the Developer did not need to hire these experts to review arguments and experts that the City did not make or hire.

So right off the bat we would submit that the approximately $77,000 paid to Global Golf Advisors was not a necessary cost; and if it was necessary, we have no evidence in front of us to judge whether or not it was reasonable. We're not disputing that the cost was actually paid, but we just don't have evidence to establish its reasonableness, but the fact of the matter is it wasn't necessary to pay $77,000 to Global Golf Advisors.

Likewise, the Developer took a risk in retaining Jones Roach & Caringella prior to the expert disclosure deadline and paid them $30,000 to prepare for a rebuttal report that they never had to prepare, and so we would submit that these costs are also unrecoverable.

With respect to the only expert that was disclosed, Mr. Tio DiFederico, again, the City is not disputing that the Developer actually incurred the amount of costs claimed, $114,250. With respect to Mr. Tio DiFederico's fees, we would argue that there was certainly fees that were not necessary and not reasonable, particularly in light of the fact that Mr. DiFederico did not testify at trial and did not sit for a deposition.

And we would also argue that the developer's expert Mr. DiFederico employed this very complicated, complex

valuation method, the subdivision method analysis, which is, you know, questionably not admissible under certain circumstances, in Nevada and certainly in other jurisdictions. It's per se inadmissible.

But really what we're taking issue there, taking issue with there is that Mr. DiFederico did this subdivision analysis and applied it to three different hypothetical scenarios, two of which have really no bearing or similarity in reality.

And if you look at page 89 of Mr. DiFederico's report -- and we attached that as Exhibit A to the City's motion to retax costs, at page 89 of the report, it states that Mr. DiFederico relied on the following extraordinary assumption, and I'll just quote from this. It says, The values for the 16-lot and 7-lot scenarios are based on hypothetical condition that a waiver SDR and TMP approval -- that means a waiver Site Development Review and Tentative Map Approval -- similar to those approved for the 61-lot scenario were given to the development plans of 16 lots and 7 lots.

And so right there he says it in his own report at page 89 that these were just hypothetical scenarios that were based on this extraordinary assumption that these 16-lot and 7-lot subdivisions would be approved. And, in fact, this statement that I just quoted from actually assumes that the, quote, 61-lot scenario was approved, which is not correct, and

that's, you know, part of the reason why this case was started was because that 61 lot tentative map and site development review application were denied.

So again, you know, our arguments with respect to Mr. DiFederico's report, which is by far the most significant costs claimed here is that, you know, it wasn't necessary to incur this extent of a bill when Mr. DiFederico didn't testify, never sat for a deposition, didn't do a rebuttal report, didn't review any expert reports prepared by the City, and the fact that he unnecessarily spent a lot of time doing this subdivision method analysis and applying it to two hypothetical scenarios that have basically no basis in reality.

And on that basis we would submit that Mr. DiFederico's fees were unreasonable, and it's ultimately the developer's burden to establish that the $1500 cap is not appropriate and that the circumstances of Mr. DiFederico's testimony justify the excessive cost.

And the last sort of major issue that I wanted to sort of bring up here is that the City was the prevailing party in the petition for judicial review phase of this proceeding. The Developer did not respond to that argument in its opposition; however, you know, it would be our position that the Developer should not be entitled to recover costs for the petition for judicial review phase of this proceeding, particularly since, in light of the Nevada Supreme Court's

decision in the *City of Henderson* case, the petition for judicial review should not have been combined with original civil claims for inverse condemnation. The City did file a motion to dismiss at the beginning of this case on that ground, and it was denied, but --

THE COURT: You know what's interesting about that case, and I don't mind saying that, they weren't combined. But go ahead. They weren't. Yeah, but go ahead.

MR. MOLINA: Sure. And I know that Your Honor knows that case very well.

THE COURT: Yeah.

MR. MOLINA: So I won't go into the particular --

THE COURT: No, but I understand your point. I do. I get it. I do. I get it. I do.

MR. MOLINA: Right. And just to give the Court some kind of idea, a sense of, you know, what --

THE COURT: How do I make a determination in that regard, and I don't mind saying this. Many times when I'm looking at retaxing costs and award of fees and things like that, I kind of feel like I'm a forensic accountant, right, and it's tough. It really is. I mean, I'm familiar with the *Bobby Berosini* case, and, I mean, I get that, but for example, and the only reason I bring it up when you talk about DiFederico, the expert, what would be appropriate, if any, from an expert fee standpoint? Because we're talking about I guess the

claimed amount was $114,250.

MR. MOLINA: Well, if you're asking that question of me, Your Honor, my response is that there should be an appropriate reduction based on, you know, what we would to be an unnecessary parts of the report. We also have argued in our briefing that the -- Mr. DiFederico's analysis relied heavily on the Court's own opinion, especially with respect to the legally permissible use of the property, and therefore, you know, it was not necessary for him to conduct an independent investigation into that.

And, frankly, we don't know exactly what Mr. DiFederico spent all of his time on. His bills are very vague, and so it's very difficult for me to argue that it should be reduced by a specific amount because I can't link the documentation to any particular task, you know, just looking at the exhibits that were attached to the memorandum of costs.

And Exhibit 3 contains the invoices from Mr. DiFederico's bills, and it just says, you know, it has a breakdown of the number of hours and the dates, and then a description of what all of that included without necessarily, you know, identifying what, you know, what line item for each time entry corresponded to which task that was performed.

So, you know, I'm sort of at a loss because if there was that sort of detail, then we would've been able to go through and parse that out and come up with a more specific

figure as to what a reasonable cost would be, but we're just not in a position to be able to do that based on the documentation that was submitted.

And I'll just round out one other point that I was making about the City being the prevailing party on the judicial review, petition for judicial review proceeding. Just to give the Court an idea of what this, you know, included, there were roughly $15,000 of the Developer's Westlaw bills, which are not broken down by a case number, but about 15,000 of those costs were incurred prior to February 29th, which is -- I'm sorry, February 2019, which is the month in which the Court entered a nunc pro tunc order. That's what I would consider to be the final order in the PJR phase of the proceeding, and so, you know, that's another issue that we have here.

So there's $15,000 of Westlaw bills that were incurred prior to the resolution of the PJR, and then also, you know, you've got the developer's filing fees that are going to just be estimates based on what the docket was showing as having been filed. I haven't done an analysis of the docket to determine how many documents were filed prior to February 2019, but it's -- it's not insignificant.

So just to briefly recap, you know, the four main issues, from my perspective at least, is that we have multiple cases involving similar set of facts, same parties, same counsel, and none of the documentation submitted really breaks

any of that down by case.

Some of it can certainly be attributed directly to this case, such as, you know, court reporter's fees, and we didn't dispute the court recorders that were actually providing in court transcription services.

But at any rate, we don't have documentation separating the costs between the other four cases that we're not able to allocate specifically to this case.

And the second major issue that we have here is we've got undisclosed experts that were never used, never produced a report, and we think that those are just, per se, unrecoverable under the statute.

The third major issue that we have here is Mr. Tio Federico's report. We believe that costs were excessive based on the level of work that was performed, the number of hours that were required and the amount of time that was apparently spent on this very complex subdivision method analysis, which was applied to hypothetical situations that have no bearing in reality.

And then finally, you know, the fourth issue that we -- major issue that we have here is that a substantial number of these costs were incurred prior to the final resolution of the petition for judicial review, which the City was the prevailing party on.

And with that, I'll turn it over to Mr. Leavitt.

THE COURT: All right. Thank you, sir.

Mr. Leavitt.

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

Your Honor, the rule for recovering costs in an eminent domain, an inverse condemnation case is set forth in the Constitution, the Nevada Constitution, Article I, Section 22.4, and it says that a landowner -- a landowner should be awarded all of their reasonable costs and expenses actually incurred. And then it goes on to say that that is part of the just compensation award. So we're talking here now about a constitutional recovery here, which is part of the just compensation. Therefore, if the landowners get shorted on their costs that they had to pay in this case, then they're going to get shorted on their constitutional right to be paid just compensation.

And so the rule that's laid out by the Nevada Supreme Court -- or by the Nevada Constitution is, Number 1, the cost must be reasonable, and they must be actually incurred. That's the test.

And then the Nevada Supreme Court refined that test a little bit in the *5th & Centennial* case, and here's what they said in *5th & Centennial*.

Determining reasonableness may necessitate detailed documents such as itemizations, and then they go on to say

though, which are only required where the District Court cannot determine the necessity and reasonableness without such documents.

Judge, in this case it's met. For every -- and I'll address some of the concerns that Mr. Molina had, but for every cost that's been incurred, we provided the document or the Document (video interference) showing that that work was done. We provided the invoice showing that we were billed, that the landowner was billed, and we provided the check showing that the landowner wrote the check. Therefore, all of these costs were actually incurred. They were actually paid. So the only question is are they reasonable. The Nevada Supreme Court addressed that also in *the 5th & Centennial* case.

Judge Denton in that case increased significantly the costs that were granted above the statutory limits that Mr. Molina cited to you, and the Court found three reasons why Judge Denton was proper in doing that:

Number one, because of the complex nature of the case. The Court said, listen, that was a complex case. I would have to say we certainly meet that standard here, Judge. It's been going on for four years. We've been up to the Supreme Court and back. We've been to federal court and back. There's been three phases, the property phase, the take phase and the just compensation phase. This is a complex case, and it's been -- and it's been adjudicated over this four-year

period.

The second factor that the Court looked at to determine whether to increase the costs in that eminent domain case was the extensive history of the project. That factor is met here. There's been thousands of pages to go over the extensive history of what occurred here. You'll recall at the summary judgment hearing Mr. Molina spent probably about a day, an entire day at a hearing with thousands of pages of documents going over the extensive history. So that factor is met.

The third factor the Court looked at to increase the costs above this 1500 standard was the specialized experts that were needed. The Nevada Supreme Court has repeatedly held that an eminent domain case is a battle of the experts, and experts are absolutely needed in these cases.

Therefore, Your Honor, the test is was it reasonable and was it actually incurred. So with that test in mind, I'll turn to first the large one, which is Mr. DiFederico's report. Early on in this case, when this case was removed to federal court, the landowners submitted as part of their discovery in federal court right in the record, Your Honor, back in -- this is back in 2019, it is very likely that the expert appraisers in this case will each charge well in excess of $100,000. The City was put on notice of this back in 2019.

In addition to that, we've submitted the affidavit of Autumn Waters, who's been practicing exclusively in the area of

eminent domain for 18 years. In that affidavit she stated that it is common in these eminent domain and inverse condemnation cases, especially a complex one like this where the expert will charge in excess of a hundred thousand dollars and cited to a case we recently did where the expert appraiser charged $250,000 and didn't even testify at trial.

Therefore, Your Honor, the fee that Mr. Tio DiFederico charged in this case is not outside the realm of reasonableness. It's absolutely reasonable, and it's been proven by not only the discovery disclosure, but by the affidavit of Ms. Waters.

Now, Mr. Molina said, well, you can't really tell what work Mr. DiFederico did. Well, we can. We can look to his 136-page report where he lays out in detail the work that he did. We can also look to his work file, which is 7,048 pages. Therefore, Your Honor, his work is very detailed. It lays out exactly what he did.

The next question or the next challenge to Mr. DiFederico's report is Mr. Molina says, well, Mr. DiFederico used a subdivision method that is questionable. I've got three responses to that, Your Honor. First, the City stipulated to that report in as evidence. Therefore it cannot complain now about the subdivision approach that was used.

Number two, the findings of facts and conclusions of law regarding just compensation cite that a subdivision

approach with approval. The findings of fact and conclusions of law on just compensation lay out exactly what that subdivision approach is and why it was appropriate here. The Nevada Supreme Court in *Tacchino versus State Department of Transportation* held the subdivision approach is appropriate.

And, Your Honor, it is very common and, in fact, appropriate for an expert to use many methods to value property. I'll quote to you from a 9th Circuit Court of Appeals opinion Eden versus -- or Eden Memorial Park (phonetic) -- or U.S. versus Eden Memorial Park. In the majority of assignments, the appraiser utilizes all three methodologies. On occasion he may believe the value indication from one would be more significant. Yes, he -- yet he will use all three as a check against each other to test his own judgment. That's Ninth Circuit precedent. It's good for an appraiser to go through and use various methodologies.

I guess what the suggestion that's being made is that Mr. DiFederico should have just done one methodology. Then what we would hear from the City is well, his report is not reliable because he didn't do all three methodologies that the Courts say he should do, and he should check it. That's way various methodologies were used, and that's why he went through the 7-, 16- and 61-lot scenarios, was to do this as a check.

And, Your Honor, if the City really thought that there was something inappropriate about Mr. DiFederico's

report, they could have challenged it in a deposition and never did that. It's too late to challenge it, and they've stipulated to its admissibility.

Your Honor, I mean, at various times the City says in its motion that the work that Mr. DiFederico did was not necessary in this case, and his highest and best use just relied upon your order, and his take analysis just relied upon what was written in the findings of facts and conclusions of law regarding take. That's not true.

Mr. DiFederico went and did his -- he certainly looked at this Court's orders, but he states specifically in his report that he went and read the documentation to confirm them so that he could determine from an appraiser's viewpoint the impact of the City's actions. Therefore, Your Honor, it's simply not true to just say that he read your orders and then just rubber stamped them. That's not what happened. He did his own independent research, and it's set forth in his report. And the City could have deposed him and fleshed that issue out if it did not believe it to be true. They did not.

The second cost -- well, then therefore, Your Honor, this cost of $114,000, in a case like this, according to the affidavit of Autumn Waters, according to the work that was done by Mr. DiFederico, the invoices he submitted and the checks that were paid by the landowners to Mr. DiFederico are reasonable and were actually incurred in this case. The

landowners actually paid this expert that sum of money.

And I will note one last thing is the City makes the argument that, well, Mr. DiFederico shouldn't be able to charge for his trial preparation work. Your Honor, we prepared him for trial. We spent a lot of time comp assuming we were going to go to trial. And then, of course, the City stipulated to the admissibility of the report, which made it so he did not need to testify at the bench trial.

Your Honor, I'll turn to this. The GGA report, the golf course report, the government argues, well, this wasn't disclosed. And it never was a part of this case.

Your Honor, the GGA report was absolutely necessary in this case because the City early on repeatedly -- and the GGA report is the golf course report where the golf course expert makes a determination that a golf course use is not financially feasible.

As you'll recall early on in this case, the City repeatedly said that nothing -- there had been no action or no taking of the property because the landlord could still use the property for a golf course. But we had, in order to prepare for trial and properly present our case, hire a golf course expert who's a financial feasibility expert to rebut that City argument.

You'll recall that during the take phase of summary judgment, the City's Las Vegas Council admitted that the golf

course was not feasible, but their California Counsel, all the way up to the date of determining the take said, well, this may not -- a golf course may not be most economically efficient if it was used for a golf course, and if a golf course is no longer viable, and then he said, and I don't think that's been established. So he was even arguing that the golf course was feasible all the way up to the findings of -- or all the way up to the date that we were arguing the take issue. Therefore, this was an absolutely necessary document to prepare.

This expert had to interview past owners. He had to interview -- or the past owners. He had to analyze the past operations. He analyzed the national golf industry, and he analyzed the Las Vegas golf industry, and he concluded that a golf course use on the property was not financially feasible.

And here's where the report was used. Number one, it was given to Mr. DiFederico so that he could analyze it as part of his expert report. Expert appraisers are entitled to rely upon other experts. Secondly, it was produced to the City of Las Vegas. The City of Las Vegas had, again, every opportunity to depose this individual.

And thirdly, Your Honor, the golf course report is again referenced in the findings of facts and conclusions of law on just compensation. Therefore, this is a cost, Your Honor, this golf course report is a cost that was absolutely not only reasonable, but absolutely critical in this case, and

it was actually -- it was actually incurred.

And, Judge, you can determine that based upon the documents. The report was part of the case, Number 1, and number two, invoices were submitted, and number three, checks were used to pay for that.

Now, the third item that counsel brings up is this report and the fee by Jones Roach & Caringella for $29,625. Your Honor, we had a short period to do rebuttal reports, or surrebuttal reports. We exchanged expert reports, and I can't remember whether it was 30 or 60 days. We anticipated that the City would produce an appraisal report. So we hired a rebuttal expert. We, because of the enormous record in this case, because of the enormous history and facts, we started that rebuttal expert early on so that that expert could become acquainted with the facts.

Once the City produced no reports, that rebuttal expert became unnecessary. So we immediately told that expert to stop working, but those fees were actually -- or those costs were actually incurred in this case. And again it's reasonable, Your Honor, to retain a rebuttal expert. It's reasonable to get that rebuttal expert working early on prior to the reports being exchanged so that they can be prepared to rebut the other expert. Therefore, that Jones Roach & Caringella fee of 29,625 was appropriate.

The final issue that Mr. Molina brought up at this

hearing is the Westlaw billing. Your Honor, admittedly, the Westlaw billing was used for all four cases; however, this was the lead case. And, Your Honor, I -- and we put it in our brief. It is very reasonable to assume that all of those bills from Westlaw were used to assist with the 35-acre case because it was indeed the leading case. If this Court finds it reasonable to split them up, we understand that.

But, Your Honor, I tell the Court that the $50,000 in Westlaw, we had to research the take, the property interest. We had to go into separation of powers law that the government argued. We had to dive in to petition for judicial review law that the government argued. We had to dive into significant federal law that was totally irrelevant in Nevada that the government argued.

So those Westlaw bills were reasonable and necessary in this case. I would say it would be very difficult to say that, you know, none of it was used or part of it was used in this 35-acre case because, Your Honor, it was used. And it was used -- after used in this case, it was used in the other cases. And if it was used in the other case, it was used in this case, Your Honor. They do have very similar facts. So, Your Honor, that Westlaw bill also is appropriate.

I'll address just finally Mr. Molina's argument that, well, none of these costs should have been expended until after the PJR was dismissed in 2019. Again, not true, Your Honor.

As you'll recall, these cases were severed in 2017. That means that work was being done in the inverse condemnation case from 2017 all the way up to today. The work, again, at the same time the petition for judicial review case was going on, this 35-acre inverse condemnation case was going on, and, Your Honor, we have submitted no costs from the petition for judicial review case.

But, Your Honor, we have the documents. We've proven that the costs have been incurred. They've been actually paid. We've provided all of the checks. We've submitted to this Court Exhibit Number 11 which lays out each of those costs, some of which we've modified and withdrawn. We would ask that the Court enter a finding that those costs are reasonable, appropriate and should be reimbursed in this case as part of the landowner's just compensation award.

This is where I'll close. If we accept Mr. Molina's argument and you say, Judge, well, just give them 50,000 for the appraisal report, that means the landowner will have paid an extra 64,000 for the appraisal report, and that $64,000 will reduce his just compensation award below the constitutional threshold, and that constitutional right would be violated, Your Honor, because these costs are recoverable and part of the just compensation award.

Thank you, Your Honor. Any questions, I'd be happy to answer them.

THE COURT: None at this time.

Mr. Molina, sir.

MR. MOLINA: Thank you, Your Honor. I'll just pick up where Mr. Leavitt left off, and that is this argument that just compensation is somehow reduced if you don't award the landowner his costs, and that argument is itself incorrect. And just compensation is intended to compensate the landowner for the taking of property. The compensation must be based on the value of the property. It's not based on this, you know, overall economic situation of the Developer, as he likes the claim, and it's the same exact reason why attorneys' fees are not typically included in just compensation is that the just compensation is not intended to compensate the landowner for every economic burden that it has suffered due to a taking. It's to compensate the landowner for the taking of the property itself. So that is just one thing I wanted to hit up front.

With respect to this argument about the City's stipulation to the admissibility of Mr. DiFederico's report, I would submit that a stipulation to admissibility is a pretty low threshold. You know, we did not stipulate that Mr. DiFederico's fees were reasonable and, you know, I believe that this admissibility argument that the Developer is making mischaracterizes the arguments that the City is making, which is that, you know, none of the -- none of the report, you know, has any value and should not -- you know, the Developer should

not be permitted to recover any costs with respect to Mr. DiFederico's report, and that's simply not what we are arguing here.

You know, we basically argue that there were certain things that did not require the Developer -- Mr. DiFederico to do an independent analysis, and we've also argued that all of this time that was spent on this complex subdivision amount method was inappropriate, you know, given the fact that these were two totally hypothetical issues, and the Developer did mention, or Mr. Leavitt mentioned the *Tacchino* case, which, as we put in our briefs, you know, that did not necessarily state that the subdivision method is, you know, the preferred method of valuation.

It basically said that this is an acceptable method of valuation in cases where it's not purely based on hypothetical conjecture and speculation, which with respect to these two hypothetical scenarios that Mr. DiFederico included in his report, that's exactly what they are. They're hypothetical. They're, you know, based on conjecture. They're not necessary to the report.

As Mr. Leavitt argued, you know, an appraiser can apply multiple methods of valuation, you know, both the cost method, the comparable sales method, the income approach and to do all of those things would not be unreasonable, but to take the subdivision method analysis, which is really just one

subtype of one of those broader types of valuation, and to apply it to scenarios where he now has to, you know, make assumptions about costs for a hypothetical subdivision that nobody has ever proposed and was never approved by the City, I mean, that's just a waste of time, plain and simple, and it, you know, didn't require however much time Mr. DiFederico spent on it, which I'm not able to say, because I can't determine that based on the invoices.

So again, we're not saying that the Developer shouldn't be permitted to recover anything based on Mr. DiFederico's report. What we're arguing is that the cost should be reasonable based on, you know, what he did and, you know, comparing that to what he was actually -- what he actually needed to do, which was simply to value the property.

With respect to the Global Golf Advisors' report, Mr. Leavitt was very careful to argue that the City made this argument about being able to run a golf course early on in the case, and that's just something that the City never really continued to argue in the inverse condemnation phase of this case. The Developer cited to one instance where Mr. Schwartz argued on behalf of the City that the, you know, feasibility of a golf course had not necessarily been established but then assumed that it was not a feasible use of the property.

And so the City certainly didn't place that at issue, you know, to any great extent that necessitated 70,000 --

$77,000 paid to Global Golf Advisors for this report that, you know, it really wasn't required to generate.

And ultimately, you know, if the Developer wanted to use that report, it could have disclosed GGA as an expert witness, which it didn't do. It only disclosed the report as part of Mr. Tio Federico's expert witness file, his work file. So how was the City supposed to know that the Developer intended to claim costs for this when it never disclosed him as an expert?

And, you know, getting to Jones Roach & Caringella, probably pronouncing that incorrectly, but I'll call it the JRC, you know, the Developer said, well, it was absolutely necessary to retain them in advance of the expert disclosure deadline because it was such a short period of time between the initial expert disclosure deadline and the rebuttal expert disclosure deadline.

So the City stipulated to multiple extensions of the expert disclosure deadline at the developer's request, and it would have done the same for the rebuttal experts if that's what they wanted to do, but those were the times that they had proposed, was 30 days to prepare rebuttal reports.

And so they took a calculated risk to retain this expert without knowing whether the City was going to disclose an expert that they would need to use JRC to rebut. That's on them. The City should not be forced to bear the cost of the

developer's litigation strategy.

With respect to the Westlaw billing, Mr. Leavitt argued that this was the lead case, and so, you know, all of these bills, Westlaw bills reflect work that somehow benefited this case, and it's just not really the analysis that, you know, typically applies to these types of issues. You know, can we establish that the Westlaw bill was actually incurred and the cost was paid in connection with this case? We can't establish this based on the bills Mr. Leavitt acknowledged that he's making some sort of qualitative argument that, you know, because in his opinion this is the lead case that everything benefited this case, and I don't think that that's an appropriate argument to make.

Finally, the Developer claimed that -- Mr. Leavitt actually argued that, you know, about the prevailing party issue and costs that were incurred prior to the final resolution of the PJR. I would just note that we had previously mentioned to the Court that approximately $15,000 of that $50,000 of Westlaw bills was attributable to time before the final order on the PJR, and there were also several costs that were, you know, copying costs that appear to have been related to before that filing fees. The Developer in fact actually claimed the filing fee for the petition for judicial review as a cost, and so to say that they didn't claim any costs for the petition for judicial review is not accurate.

And I think that's all, Your Honor.

THE COURT: And for me, as far as the Westlaw is concerned, I think from just a reasonable perspective, I'd reduce that by -- because there's another three companion cases; right?

MR. MOLINA: Correct.

MR. LEAVITT: Yes, Your Honor.

THE COURT: Okay. We're going to reduce that by 75 percent and you get 25 percent of that for the Westlaw bill.

Now, it becomes much more problematic for me when it comes to the expert fees and costs because what's necessary, I don't think you look at what's necessary from an expert report perspective when it comes to civil litigation and for preparation for trial based upon the ultimate trial itself. And what I mean by that is this. Here we had a scenario where ultimately there was an agreement and/or stipulation and/or waiver or however you want to categorize it.

And so my point is this. That makes my job much more difficult because, for example, say hypothetically, if there had been motions in limine filed regarding DiFederico Group's opinions and hypothetically I narrowed his opinions and portions of his report. Then going back and extrapolating, for example, and I realize this wouldn't be exact, but hypothetically, if I made a determination that half of the work he performed would not be admissible because it, for example,

might not be the assistance requirement under *Hallmark*, that makes my decision a lot easier, but now I have the scenario where, for all practical purposes I don't think his opinion was really challenged; right?

And so -- and the reason why I bring that up, at the end of the day I do realize that whatever decisions I make, and this is important to point out, that when it comes to our Nevada Constitution, and more specifically Article I, Section 22, paragraph 4, just the just compensation award shall include all reasonable costs and expenses actually incurred; right? And it doesn't have language that deals specifically with based upon expert witnesses who testified at trial and/or no other qualifiers. It just appears to be all reasonable costs and expenses actually incurred.

I do understand the reasonableness, but my point coming back to that is this. It's easier for me to determine what potentially could be reasonable if the expert opinion was attacked, stricken and the like. And last, but not least, I think it's important to point out too that not all experts are trial experts, right, and we understand that.

And so, anyway, as far as the motion attacks the memorandum of costs, I'm going to go ahead and reduce the Westlaw fee by 75 percent and one fourth.

Let me look here. And as far as the claimed expert fees, and I guess this would be GGA Partners, Global Golf

Advisors, DiFederico and also Jones Roach, and it's my understanding that was being utilized for the purposes of rebuttal. And once again, I never got a chance to really -- there was no rebuttal testimony, the necessity for it. That doesn't mean he wasn't necessarily retained.

And so all I'm saying is this. Regarding the GGA Partners amount in the sum of $11,162.41, Global Golf Advisors in the amount of $67,094.00, DiFederico Group, I think the claimed amount is $114,250, and Jones Roach Caringella, $29,625 and zero cents, I'm going to let those stand.

And I think -- I know all the other claims, as far as expenses and costs, I'll let those stand too.

All right.

I guess the last issue is payment of property taxes; is that right -- reimbursement. I'm sorry.

MR. LEAVITT: Yes, Your Honor.

THE COURT: All right. Let's just dig into this quickly.

Mr. Leavitt.

MR. LEAVITT: Yes, Your Honor.

Just very quickly, there's two sources of law that we've referred to, the *County of Clark versus Alper* case. In *County of Clark versus Alper*, there's a one paragraph in the case where the Court specifically addresses reimbursement of taxes at headnote 19 and 20 and says that the District Court

was reversed with instructions to reimburse the Alpers for their property taxes actually paid after the land was taken by the County.

We also -- section -- Article I, Section 22 -- I'm sorry. Article I, Section 22 for the Nevada Constitution states that the landowner must be put back in the same position monetarily as if the property had not been taken, and therefore, Your Honor, the landowners are requesting reimbursement of taxes exactly as the award was granted in the inverse condemnation case of *Alper*.

The Court has entered a finding of a take in this case. It's findings of facts and conclusions of law on the take are very clear that the City of Las Vegas has taken the property, meeting all four standards of Nevada's taking law and therefore, Your Honor, the landowners ask for a reimbursement of their taxes in the amount of $976,889.38.

We -- we used August 2nd, 2017, as the date upon which the taxes should have no longer been paid, and we've calculated those taxes from August 2nd, 2017, and as set forth in our motion, we used that date because that was the first date of compensable injury, as stated in *5th & Centennial* case, and the reason we used that, Your Honor, is because as of on that date the City had already denied the singular application to develop the 35-acre property, and on August 2nd had denied the Master Development Agreement, which is the

only application the City stated it would approve to develop the property. All the while the City was taxing the landowners on a lawful use of residential. The City prohibited that residential use through two denials.

Therefore, Your Honor, we ask that those taxes be reimbursed pursuant to the inverse condemnation case of *County of Clark versus Alper*.

THE COURT: Okay. Thank you, sir.

And we'll hear from the opposition.

MR. SCHWARTZ: Yes, Your Honor. This is Andrew Schwartz representing the City.

Your Honor, can you hear me?

THE COURT: Oh, yes, sir, I can hear you very clear. I'm sorry.

MR. SCHWARTZ: Okay. Thank you. All right.

Your Honor, the *Alper* case doesn't apply here. The *Alper* case, in the *Alper* case, the City took physical possession of the owner's property to build a road. It did not file an eminent domain action. The Court said to the county, you should have filed an eminent domain action because you took physical possession of the property.

So the Court then -- the -- so it was an inverse condemnation case, but nothing like this case where the allegation is that the City's regulation abuse of the owners use of the property is a taking of the property. The City does

not -- has not taken physical possession of the property. The City does not want physical possession of the property for any public project, and will not take physical possession of the property.

This case is based on a regulatory taking, a denial of use. That's the allegation. There are three cases in Nevada where the Nevada Supreme Court considered this type of taking (indiscernible), and those are the State, the *State versus the Eighth Judicial District* case, the *Kelly* case, and the *Boulder City* case. In each of those cases, the Court found that the government agency had not denied all use of the property and therefore had not taken the property.

And those are the only cases -- so we don't have a Nevada Supreme Court case that's like this case where there's the allegation is denial of the owners use preregulation.

Now, it makes sense that if the government has actually taken possession of the property, like the *Alper* case, and in eminent domain cases where to build the public project, the government needs private property, it files an eminent domain case conceding liability, and then deposits the probable compensation, which the owner can then access, and then the government takes early possession of the property, builds the project, and, of course, of course, at the time of judgment, the money should be paid to the property owner, and all taxes, if the property owner pays taxes after the government has

physically taken possession, well, then, yes, those should be reimbursed, as in the *Alper* case and typically in an eminent domain case. And all the other cases that the Developer relies on are eminent domain cases where the government has or will take physical possession of the property for a public project.

And this is an issue in common that we had with the motion for the stay, Your Honor, where there's a critical distinction between the *Alper* case and this case where the City has not dispossessed the owner. It has not taken physical possession of property for a public project. And in that case, the City shouldn't have to pay the money, the judgment because it -- then, if appealed successfully, the Court is going to have to unwind the entire transaction.

But anyway, I don't want to get into the motion to stay. The Court has already taken that under submission.

But here so we have a situation where the property owner still had possession and title of the property during this entire period, and I want to point out that the property owner in its appeal of the assessment attaches, the assessor said well, your property is now a residential property. I'm going to assess you for residential use at the higher rate than the golf course. And the Developer initially appealed that determination, and in their brief, and we cited this in our papers in our briefs, Exhibits quadruple L. LLLL, at page 2709 of the defendants' exhibits. That's let me see. I think

that's Appendix 12. It's page 2209 and 22010.

The Nevada court argued to the assessor, the heading on page 8 of that brief to the assessor is the property may still be used for golf. And then it goes into some detail about why the property can still be used for golfing.

Now, the date of this brief is significant in that it was August 2nd. Excuse me. The date of the brief was August 29, 2017. Why is that date significant? Well, in this case, Your Honor, the Court had found that property owners have a constitutional -- constitutionally protected property right to use their and develop their property for any use that's permitted by zoning and that the government has no discretion.

And that, if that's the case, then on August -- on June 21, 2017, when the City disapproved the 35-acre application, the application that the Developer filed to build 61 units, housing units, on the 35-acre portion of the Badlands, that's the day the City denied those applications. If the Court is correct that the Developer had a constitutional right to approval of anything that they proposed, no discretion on the part of the City.

Then the taking occurred on that date, June 21, 2017. So this brief was filed after that occurred, more than two months after that occurred, and the Developer is saying, again, I quote from page 8, the heading, the property may still be used for golfing. That was the Developer's argument to try

to get the assessor to reduce the assessment for the property.

So it would be -- it would be unjust if the City were required to reimburse the Developer for property taxes that the Developer paid, which is the cost of owning property only if the Developer who remained in possession of the property, had title for the property, and the City would be required to reimburse the property owners for the taxes they paid, that would be unjust.

I also want to point out, Your Honor, that in -- in arguing that the appeal was too high, the Developer initially argued, well, we can still use the property for golf. Therefore, the property should be assessed at the lower rate. Then the Developer did some -- a very curious thing. It stipulated with the assessor to the higher amount. In other words, it abandoned its appeal.

Now, why did it do that? Because the property was designated PR-OS, park recreation open space in the City general plan, which under NRS 278.250 -- .150, and NRS 278.250 is the controlling law with regard to the use of that property.

The Developer could not succeed on its taking claims if -- if the Court found that the PR-OS designation prevented residential development of the property. The Developer bought property they could not use for residential in 2015, and the City merely declined to change the law for that use. So the Developer paid a price for that property that was -- that

should have taken into account the fact that it couldn't legally be used for golf course -- or excuse me, for housing.

Well, what does that say? Well, if, according to Mr. DiFederico, if the property could not be used for housing, the property was worth zero. So the Developer paid zero for the property -- or paid for property that couldn't be used for residential. So according to the Developer's own evidence, the property was worth zero when the Developer bought the property, and it was worth zero after the City denied the 35-acre applications in June of 2017, and it was worth zero on August 29, 2017, when the Developer filed this brief with the assessor arguing that the property could still be used for golfing.

So if the Developer is right, if the (video interference) is correct, that the property was worth zero because the Developer couldn't develop the property for housing, then that means that the property was worth zero at the time of this appeal. The Developer, however, did not argue to the assessor that the PR-OS designation prevented any housing use of the property unless the City in its discretion changed that.

Why didn't the Developer argue, well, you should assess my property at zero because of the PR-OS designation? Well, because that's where all the -- that was the big payoff that the City -- that the Developer wanted in the inverse

condemnation litigation was it had to disappear the PR-OS designation so that it could go for the large dollars, and that gamble certainly paid off where the Developer here was awarded $34 million, and is seeking another 55 million in interest, taxes and costs and attorneys' fees.

So it's very telling here that the Developer ceded in its brief to the assessor that it still had use of the property for golf course, and therefore, taxes, you know, are necessary to maintain the ownership of property. That's the cost of maintaining a property. You have to pay your property taxes.

Moreover, the Developer is arguing that well, they need to be reimbursed for their property taxes because they need to be made whole in this proceeding.

Well, there is no question, there can be no question here that the Developer has been made more than whole. The facts are these that the Peccole Ranch Master Plan was developed in the early 1990s, 1500-acre property, and that is a condition of approval of that development where the original Developer set aside the Badlands for golf course use.

The City then designated the golf course PR-OS in the City's general plan. This was the open space. This was the amenity to serve the Peccole Ranch Master Plan. That was the purpose of this. The project wouldn't have been approved if there hadn't been this amenity set aside.

The Peccole Ranch Master Plan was then developed. 84 percent of the property was developed. The Badlands remained a golf course. Again, as an amenity to serve the golf course and the surrounding community. That's the purpose of setting it aside.

So the undertakings law, you can't -- it makes sense. You can't then carve off the amenity that the Developer -- original Developer was required to set aside to serve the rest of the development and then say, well, now I don't have an economic use of that. Now, the government, you know, has to let me do whatever I want with the property or pay me. That's not the law.

But the issue here is whether the Developer is made whole. The whole parcel was Peccole Ranch Master Plan.

And by the way, this Developer benefited from that amenity by developing the Queensridge Towers, the Tivoli retail, the retail shopping center and other houses in the area. They benefited. They had greater value because of the amenity, and all of the property in the area still retains greater value if that amenity was continued.

So when you look at the parcel as a whole, by preventing housing use of the 35 acres, you're not taking anything from the Developer that the Developer owned. They didn't have a right to do that.

Then if you consider just the Badlands as the parcel

as a whole instead of the entire Peccole Ranch Master Plan, the City approved construction of 435 luxury units in the Badlands. You can't carve up the Badlands into four different parts. The Badlands was always a single economic unit. It was bought as a single economic unit. The City approved 435 luxury housing units.

According to the Developer's own evidence, that property, just that part of the Badlands had increased in value to about $26 million, and the Developer -- the Developer paid less than four and a half million dollars for the property. I think Mr. Ogilvie said less than three and a half, but I think that the purchase price was less than four and half million dollars, and that's been thoroughly documented, and there is no evidence to support the Developer's claim that the Developer paid more, that the purchase and sale agreement was for seven and a half million, and then the parties -- they -- the City has established through documents produced by the Developer and the deposition of the seller of the Badlands to the Developer, that the Developer really paid less than four and a half million dollars for the entire Badlands.

So one part is worth $26 million based on the City's approval. So it can't be the case that the Developer needs to be reimbursed for his property taxes to be made whole. If you look at the four a half million dollars purchase price, that's $18,000 an acre or $630,000 for just for the 35 acres.

The Developer has claimed without any evidence that the Developer purchased the Badlands for $45 million, and in other documents it claims it purchased it for a hundred million dollars. Again, no evidence whatsoever to support that. The Developer's admitted they have -- they don't have a document to support that. All the other documents are the other way.

But even if they did, Your Honor, that 45 million, that's $180,000 an acre, and a hundred million, is $400,000 an acre. This Court awarded the Developer almost a million dollars an acre in damages. So reimbursement of the million dollars --

THE COURT: Well, I mean, the damage calculation, it's my recollection -- wait a second. It's my recollection the damage calculation was essentially uncontroverted; right? And so my point is this. I mean, there's no reason to relitigate this as far as the valuation is concerned.

MR. SCHWARTZ: No, that's not -- I'm not controverting the damage calculation, Your Honor. In this motion we controverted the damage calculation because the appraiser assumed that the highest and best use of the property --

THE COURT: My point is this: That ship has sailed basically.

MR. SCHWARTZ: Basically was --

THE COURT: No. No. I mean, I don't want to sit

here and spend another hour. That ship has sailed, right, as far as that is concerned. There was no valuation expert offered. At the end of the day, it was uncontroverted, and my ruling as far as the evaluation is what it is.

And so here we have a really simple issue that's focusing on one claim, and that's reimbursement of the property taxes based upon the taking date in this case offered by the plaintiff.

MR. SCHWARTZ: Yes, and --

THE COURT: And ultimately, there's no dispute as to how much was being paid in property taxes; right? And then you have --

MR. SCHWARTZ: Oh, I don't dispute that, Your Honor.

THE COURT: Okay. Then I'm trying to figure out --

MR. SCHWARTZ: I am disputing that their entitlement to reimbursement.

THE COURT: -- and then we have a provision under the Nevada Constitution that deals specifically with making a potential individual landowner, property owner that's involved in a eminent domain and/or an inverse condemnation matter whole, and so how do you make them whole if they paid taxes on real property that they can't use, and there was a taking determination? It's a simple calculation.

MR. SCHWARTZ: Your Honor, I just -- I've cited to the Court their own brief where they contradicted that

statement. They said, and I quote, the property may still be used for golfing. That's the Developer's statement, but that doesn't matter in this case because --

THE COURT: But it doesn't matter because I made a determination --

MR. SCHWARTZ: -- because the City didn't take possession of the property.

THE COURT: Wait a second. Wait a second. It doesn't matter because I've already ruled on the value of the property. It was uncontroverted.

MR. SCHWARTZ: That's not --

THE COURT: All that other stuff doesn't matter.

MR. SCHWARTZ: That's not -- yes, Your Honor, but that's not the issue here.

THE COURT: Well, no, the issue is this. This property was owned R-PD7. It was taxed R-PD7, right, and the plaintiff has alleged that they couldn't use the property because of the actions of the City based upon a specific date. And as a result, they're paying property taxes for property they can't use. Heck, they couldn't even go out and put a fence up; right?

MR. SCHWARTZ: Oh, no. Can I address that, Your Honor?

THE COURT: I mean, I'm just saying it's a fact that they couldn't put a fence up; right?

MR. SCHWARTZ: Well, it's not a fact that they couldn't use --

THE COURT: I mean, the issue is -- I'm not --

MR. SCHWARTZ: -- of the property --

THE COURT: Sir, I'm going to tell you this.

MR. SCHWARTZ: -- they just admitted --

THE COURT: I mean, this is how I see it. I don't mind saying it. I'm going to give the argument made by Mr. Ogilvie at the very outset of this matter because I really want to think about it, and it's a big issue. I get that. But we're -- and that's an issue I have to give considerable consideration and looking at the statute, trying to make a determination as to whether I'm handcuffed as to what I really can do, whether I have any discretion at all. These are all things I think about, right. I don't mind saying that. I'll tell you what I'm thinking about on the record.

For example, when I look at the statute, the statutory scheme under Chapter 37, it could be argued, Judge, you had no discretion. You have to do this. I kinda get it. I understand what's going on. I understand Mr. Ogilvie's position as it relates to the specific rules, the appellate rules and Rules of Civil Procedure. I guess it was Rule 62. And so I get it. I mean, I understand what's going on here and what's at risk.

But this one here, we're not -- I'm not relitigating

anything. I've made a determination there was a taking on a specific date. There's no question the plaintiff was cutting checks for what, $50,000 per -- what was the time period? I saw it right in front of me.

But my point -- and that's it.

MR. SCHWARTZ: Your Honor, it's not -- we -- I don't think it's correct that the Developer couldn't use the property. I just quoted the Developer's admission that they could use the property, and they could use the property for any use allowed by the PR-OS --

THE COURT: I've already made a decision that there's a taking, sir.

MR. SCHWARTZ: -- designation.

THE COURT: I've made a decision that there's a taking. I respect the City's right to appeal the decision. I do. I just -- I mean, I get it, but based upon my determination, I'm looking at the calculation here. The ticker started running on August 21st, 2017, and as far as the amounts are concerned, it doesn't appear to be any issue regarding that. I mean, it's a different variations of $51,000 that were paid in certain installments, and we have the check.

And then I look at the Nevada Constitution and specifically what it mandates, and it focuses on in all eminent domain cases, actions, just compensation shall be defined as a sum of money necessary to place the property owner back in the

same position monetarily without governmental offsets. It's pretty -- I mean, we're making this so much more difficult than it has to be. We are.

MR. SCHWARTZ: Your Honor, there is no authority in Nevada that property taxes are reimbursed if the government hasn't taken physical possession of the property or is not going to take physical possession of the property for a public project.

THE COURT: Well, this will be -- this will be the case of first impression on that specific issue if that's the case.

MR. SCHWARTZ: Well, then I guess I'm arguing --

THE COURT: I get a lot of -- I don't mind saying this. I've got a lot of cases of first impression. Sometimes I'm right. Sometimes I'm wrong. I mean, I don't -- that's what I'm supposed to do, make decisions, and the Court of Appeals and/or Supreme Court, with their infinite wisdom and collective decision-making can say, look, Judge, you're wrong, and this is why, or, Judge, you're right, and this is why. I get it. That's the processes.

MR. SCHWARTZ: Well, my point, Your Honor, is that there is no case for a good reason, and that is because the only cases that allow property tax reimbursement, and *Alper* seems to be the only one, is where the government took possession of the property. The property owner was

dispossessed from the property, couldn't use it. That is --

THE COURT: But on the flip side --

MR. SCHWARTZ: -- not this case. This case the property owner kept possession --

THE COURT: Wait. Wait. Wait. Wait. Wait.

On the flip side, there's no cases that says, look, you can't do this; right?

MR. SCHWARTZ: I'm talking about reason, a reason there aren't any cases is because there is no -- it would be unjust to reimburse the property owner for property taxes when they still have possession and title of the property. That is why there are no cases --

THE COURT: And they have possession and title of property --

MR. SCHWARTZ: -- because that would be unjust.

THE COURT: -- that's zoned R-PD7, and they can't do anything with it. It's economically not viable to continue running this business, and everyone forgets this. They talk about open spaces and the like. I think I was pretty clear on this at one of the prior hearings. At the end of the day, what is a golf course? It's not a park. It's a business; right, green fees, pro shops, restaurants. At the end of the day, it's a business, and this was no longer a viable business. That's what it's all about.

MR. SCHWARTZ: Well, they're not entitled to make

their profit on that property. That was set aside as the Open Space Parks and Recreation for the development.

THE COURT: Well, then if that's the case --

MR. SCHWARTZ: There is no -- there is no entitlement.

THE COURT: You know what, I understand this, and then we'll be done.

If that's the case, the City should have bought the property at the very outset, and we wouldn't be here. And so we're going to burden the property order to sit on property that's economically not feasible, right, to run as a golf course, and we're going to let it remain open spaces forever as an amenity, and the City is not willing to pay for it. Well, that's why they have inverse condemnation law, I'll be candid with you.

MR. SCHWARTZ: Thank you, Your Honor. I don't have anything further.

THE COURT: All right. Thank you, sir.

Anything else, Mr. Leavitt?

MR. LEAVITT: No, Your Honor. I just -- I'd be very brief that the findings of facts and conclusion of law regarding the takes lay out in detail the taking actions, including a physical possession of the property.

And, Your Honor, based upon the *Alper* decision and even based upon Mr. Schwartz's argument that when the

government takes physical possession it must pay the taxes, even under his argument taxes must be paid pursuant to the findings of facts and conclusions of law.

Thank you, Your Honor.

THE COURT: All right. And that's going to be my decision. I'm going to grant plaintiff's motion for reimbursement of property taxes.

Last, but not least, I have a one matter under advisement, and I'm going to look at it as far as -- and consider it and contemplate it. I'm not going to make a decision right now. I'm going to maybe sometime next week.

I'm going to get it done relatively quick, but I want to -- I'll be candid with everyone. I want to think about it, because I understand the total impact. I understand the competing factors. I've looked at the statute over and over and so on. I understand the rules. There's tension there, and I'll issue a decision. All right.

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THE COURT RECORDER: And in light of that, everyone enjoy your day.

(Proceedings concluded at 12:49 p.m.)

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

Dana L. Williams
Transcriber

RPLY

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DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND CO., LLC, a Nevada limited liability company, FORE STARS Ltd., DOE INDIVIDUALS I through X, ROE CORPORATIONS I through X, and ROE LIMITED LIABILITY COMPANIES I through X, Plaintiffs, *vs.* CITY OF LAS VEGAS, political subdivision of the State of Nevada, ROE government entities I through X, ROE CORPORATIONS I through X, ROE INDIVIDUALS I through X, ROE LIMITED LIABILITY COMPANIES I through X, ROE quasi-governmental entities I through X, Defendant.	Case No.: A-17-758528-J Dept. No.: XVI **PLAINTIFF LANDOWNERS' REPLY IN SUPPORT OF THEIR MOTION TO DETERMINE PREJUDGMENT INTEREST** ***Hearing Date: February 1, 2022*** ***Hearing Time: 9:05 am***

COMES NOW Plaintiff Landowners, 180 LAND CO., LLC and FORE STARS Ltd. (hereinafter "the Landowners"), by and through their attorneys, the Law Offices of Kermitt L. Waters, and hereby files this Reply In Support of Their Motion to Determine Prejudgment Interest.

This reply is based upon the papers and pleadings on file, the appendix of exhibits and any evidence or argument heard at the time of the hearing on this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION – THERE IS ONLY ONE ISSUE IN DISPUTE IN REGARD TO PREJUDGMENT INTEREST

The City does not dispute that the Landowners are entitled to prejudgment interest as part of their constitutionally mandated just compensation - "Just compensation shall include, but is not limited to, **compounded interest** and all reasonable costs and expenses actually incurred." Nev. Const. art. I §22(4) (emphasis added); NRS 37.120(3). The City also does not dispute that to determine the Landowners' prejudgment interest, the Court must make three findings - 1) the date interest should commence; 2) the proper interest rate; and, 3) whether interest should be compounded monthly or annually. On finding #1, the City does not dispute that the date interest should commence is August 2, 2017. On finding #3, the City does not dispute that interest must be compounded annually. This leaves only finding #2 – the proper interest rate – which the City does dispute. Therefore, this reply will largely address the City's arguments on finding #2 - the proper interest rate. Although not necessary, the Landowners will also address the City's other irrelevant arguments that occupy most of the City's opposition.

II. REBUTTAL OF THE CITY'S ARGUMENTS RELATED TO THE PROPER INTEREST RATE

A. NRS 37.175 Does Not "Require" Prime Plus Two Percent

The City repeatedly argues in its Opposition that NRS 37.175 "require(s) prejudgment interest at the prime rate plus two percent." City Opp. p. 5, fn 2:17-18; p. 4:9. This is incorrect. NRS 37.175(4)(b) clearly states the Court must determine "the rate of interest to be used to compute the award of interest, which ***must not be less than*** the prime rate of interest plus 2 percent." Therefore, NRS 37.175 sets the "floor" interest rate at prime plus two percent; it does not cap it nor "require" prime plus two percent, as argued by the City. *See also* State ex rel. Dept. of Transp. v. Barsy, 113 Nev. 712, *overruled on unrelated issue* (1997) (eminent domain case

rejecting the argument that the statutory rate is prima facie evidence of a fair rate and holding the statutory rate is a "floor on permissible rates." Id., at 719).

B. The City Ignores the Proper Standard to Determine the Interest Rate

The Nevada Supreme Court holds that "once competent evidence is presented supporting another rate of interest as being more appropriate, the district judge must then determine which rate would permit the most reasonable interest rate." Barsy, at 718. The Supreme Court first explained that the purpose of awarding prejudgment interest in an eminent domain case is "to compensate the landowner for the delay in the monetary payment that occurred after the property has been taken." Barsy, at 718. This purpose is made very clear in County of Clark v. Alper, 100 Nev. 382 (1984). In Alper, the Court upheld an inverse condemnation award that valued the property as of the time of trial and provided interest for the period from the date of taking up to the award. The County argued that this was a "double recovery" and the Court disagreed, holding "[a]lthough the landowner has been benefitted by the time of trial valuation, he or she has still been **deprived of the use of the proceeds that should have been paid at the time of the taking. It is this loss that the award of interest compensates.**" Alper, at 392-393. The Supreme Court has held that the rate of return that is applied to determine this interest award must "put [the landowner] in as good position pecuniarily as he would have been if his property had not been taken." Id. In other words, the Court made it very clear that, to determine the proper interest rate, the district court should analyze how the landowner could have made "use of the proceeds" or, stated another way, the rate of return the landowner could have achieved had the award been timely paid. This is the only way to compensation for the "delay in the monetary payment" and put the landowner in as "good position pecuniarily" as he or she would have been had the property not been taken.

Nowhere in the City's brief is this analysis addressed. Instead, the City merely argues that NRS 37.175 "requires" prime plus two percent and then provides the calculation of interest based on this prime plus two percent. This City argument applies an incorrect analysis and thus, the City fails to oppose the Landowners' requested 23% interest rate.

C. The City Misinterprets the Barsy Case

The Landowners rely, in part, on the Barsy case, an eminent domain case, which determined the rate of return for purposes of awarding prejudgment interest based, in part, on the rate of return Mr. Barsy could have earned had he "invested his money in land similar to that condemned." Barsy, at 718. The Landowners follow the Barsy case and provide *two reports* that both conclude that had the $34,135,000 award been paid on August 2, 2017, the Landowners could have invested in land similar to the 35 Acre Property and achieved a rate of return of 23%. The Barsy case and the Landowners' analysis are right on point.

The City misinterprets Barsy. The City claims that the Barsy Court upheld the interest rate of return, "to account for Barsy's lost rental income during the eminent domain litigation" and the higher interest rate of return was required "due to the loss of tenants and hence his income from the property prior to and during the pendency of the eminent domain action." City Opp. 5:2-6; 8:27-9:5. This analysis appears nowhere in the Barsy case. The interest rate is addressed at pinpoints 718-719 and nowhere in those pages does the Court state that the higher rate of return was applied to determine interest due to "loss of tenants" and "income" as argued by the City. The Court states nothing even remotely close to what the City argues. Instead, as explained above, the Court is very clear on pages 718-719 of the Barsy case that the "purpose" of interest in an inverse condemnation case is to compensate for the "delay in the monetary payment" of the award and that the interest rate may be based on the rate of return that could have been achieved had the

landowner been timely paid and "invested his money in land similar to that condemned." Barsy, at 718-719.

D. The City Misinterprets Nevada's Eminent Domain Cases on Interest

The City also cites to Alper, Armstrong, and Barsy to assert no Nevada court has awarded a rate higher than prime plus two percent. City Opp., pp. 8-9. The City misinterprets these cases. In Alper, the Court did not make a determination of the interest rate; it held the statutory rate is the "floor" and remanded the case back to the lower court to decide the proper rate. Alper, at 394. In Armstrong, the Court also did not make a determination of the interest rate; it held "[t]he term 'just compensation' includes interest from the date of taking" and Mr. Armstrong's pre-judgment interest award "is not statutorily limited by NRS 37.175(2)" and remanded the pre-judgment interest issue to the district court to determine. Armstrong, 103 Nev. at 623. In Barsy, as explained above, the Court relied on the rate of return that could have been achieved had the landowner been timely paid and "invested his money in land similar to that condemned." Barsy, at 718-719. The Court then upheld the interest award based on the statutory prime plus two percent, because the prime plus two percent rate was very close to the rate of return on vacant land at that time. The Court relied on Mr. Barsy's expert, who testified to the rate of return on vacant land and then also testified that, "My opinion is that the .... Interest of prime plus two **comes reasonably close to** anticipating what the property owners would have done with the money." Barsy, at 718. Emphasis added.

Here, prime plus two percent is nowhere near what the Landowners could have achieved had the $34,135,000 been paid on August 2, 2017. Prime plus two percent during the relevant period ranges from 5.25% to 7.50%, while the rate or return on vacant land during the relevant period is 23% to 27%. *See City Opp., Exhibit C for prime plus two percent rates and Exhibits 1*

and 2 to Landowners' opening motion for vacant land rates. Therefore, 5.25% to 7.25% is the "floor" rate and 23 to 27% is the rate that meets the constitutional standard of just compensation.

E. The City Provides No Evidence to Rebut the Landowners' 23% Rate of Return

The Nevada Supreme Court has been clear that the determination of the rate of return to determine interest in an eminent domain case is a "question of fact" that is based on "evidence." Barsy, supra ("the determination of the property interest rate is a **question of fact**" and concluding that "the **evidence** adduced on the subject [interest rate] substantially supported the district court's finding." Id., at 718-719. Emphasis added.). The Landowners followed the Barsy rule and provided "evidence" of a rate of return commensurate with what they could have achieved had they "invested [their] money in land similar to that condemned." Barsy, at 718. First, the Landowners presented the analysis by appraiser Tio DiFederico that concludes that an investor who invested $34,135,000 in vacant residential land in the area of the 35 Acre Property in 2017 and held that investment until 2021, would have received a rate of return of 23%, to be compounded annually. *Exhibit 1 to opening motion.* Second, the Landowners presented the analysis by real estate expert Bill Lenhard that concludes that an investor that invested $34,135,000 in vacant residential land in the Southwest sector of Las Vegas (the location of the 35 Acre Property) in 2017 and resold it in 2021 would reasonably expect an annual rate of return of 25-27%, to be compounded annually. *Exhibit 2 to opening motion.* Mr. DiFederico and Mr. Lenhard both relied on the purchase and re-sale of properties during the relevant 2017-2021 time period to arrive at their conclusions. This is empirical *evidence* to support the pending *question of fact*, namely, the proper rate of return.

The City, relying on its incorrect argument that NRS 37.175 "requires" a rate of prime plus two percent, provides no contrary evidence. Accordingly, the City fails to provide any contrary evidence to rebut the 23% rate of return.

F. The City's Argument that 23% Provides an Award too High is Unfounded

The City's Opposition repeatedly complains that the 23% rate of return provides an interest award that is higher than the $34,135,000 verdict, even calling the Landowners' interest request "preposterous" and "outlandish." City Opp. 2:10,15. These arguments are frequently made by government agencies when faced with constitutionally mandated just compensation awards. Confronted with a similar argument by Clark County in the Sisolak case, the Court held, "any financial burden that the County must bear as a result of having to pay just compensation is **irrelevant** to the inquiry under the United States and Nevada Constitutions..." Sisolak, at fn 88. Emphasis added. And, specifically related to the award of interest in an inverse condemnation case, the Court held in Alper, "[a]s indicated by the award in the present case, prejudgment interest **may be very substantial** in protracted condemnation proceedings and may in fact **exceed the inflated value of the land.**" Alper, at 393. Emphasis added. In other words, the Nevada Supreme Court rejects the City argument that it is a financial burden to comply with the Constitution.

III. REBUTTAL OF THE CITY'S OTHER IRRELEVANT ARGUMENTS

A. The Landowners Are Not Seeking Consequential Damages Or a Windfall from a Hypothetical Investment

The City uses definitions from "Oxford Languages" to argue the difference between "interest" and "profit" and then claim the Landowners' interest request seeks "consequential damages" or a "windfall profit from a speculative investment." City Opp. p. 9-10. The City asserts the Landowners "concoct a hypothetical real estate investment project" and then claim this "investment project" could have earned them 23% a year. City Opp. 10:1-4. The City also claims the Landowners argue they needed $34 million to "engage in real estate development." City Opp. 3:5-6. None of this is correct. None of the arguments in the Landowners' moving papers or the analysis by Mr. DiFederico and Mr. Lenhard even remotely address "engaging in real estate

development" or a "hypothetical real estate investment project" to determine the rate of return. Instead, the Landowners' moving papers rely on Mr. DiFederico and Mr. Lenhard, who both analyze the real estate market, based on empirical data - the actual purchase and re-sale of **vacant, undeveloped** properties in the area of the 35 Acre Property from 2017-2021– to determine a rate of return the Landowners could have achieved had the $34,135,000 been paid in 2017 and invested that money in land similar to the **vacant, undeveloped** 35 Acre Property.[1] This is exactly what was approved to determine the rate of return for interest purposes in the Barsy case. *See* Barsy, at 718 (relying, in part, on the rate of return Mr. Barsy could have earned had he "invested his money in land similar to that condemned."). Therefore, the Landowners have not "concoct[ed] a hypothetical real estate investment project" to seek a "windfall" or "consequential damages" as asserted by the City.

B. The Landowners Have Made Valiant Efforts To Develop

The City's opposition tries to create a false narrative that the Landowners never wanted to develop and that the Landowners have rejected the City's recent invitations to start entirely over and begin the process to "re-apply" with the City to develop the 35 Acre Property. The City even claims the Landowners only interest in this case is "litigation" to receive a "massive gift from the public treasury," implying that the Landowners' spent nearly 15 years of due diligence and other significant efforts and resources to finally gain ownership of the property just so they could engage in expensive and protracted litigation with the City for the past 4 ½ years. First, this argument is entirely irrelevant to the pending issue – the proper rate of return for interest purposes. Second, the allegations are entirely without merit. As the Court is aware from sitting on this case for the past 4 ½ years of litigation, the Landowners went to **tremendous** efforts and expenses to

[1] The fact that both Mr. DiFederico and Mr. Lenhard rely on actual purchase and re-sales of properties to arrive at their rates of return rebuts the City's argument that their analysis are "rank speculation." *See* City Opp. 10:21.

investigate the 250 acres over a nearly 15 year period, gaining ownership of the property in 2015. The Landowners then went to additional **tremendous** efforts and expenses filing applications with the City to develop any part of the 250 acre property, including the 35 Acre Property. They filed applications to develop the 17 Acre Property that were initially approved, but then **clawed back** by the City. They filed applications to develop the 35 Acre Property that the City's own Planning Department and City Attorney's Office opined should be approved, but were **denied**. They filed applications to develop the 133 Acre Property which were abeyed by the City for months until the City could adopt a Bill to prohibit development altogether, adopting the Bill on the morning agenda and **striking** the 133 Acre applications on the afternoon agenda. The Landowners filed applications to develop the 65 Acre Property[2] along with all other parcels that made up the 250 acre property by way of the "Master Development Agreement" (MDA), that was mostly written by the City itself, took 2.5 years to prepare, cost the Landowners' over $2 million in application fees and other work, and the City's Planning and City Attorney's office recommended the MDA be approved – and the City **denied** that MDA application altogether. The City even **denied** the Landowners' routine over-the-counter fence request, which would have allowed the Landowners to prevent the public from using the Subject Property. The City **denied** the Landowners routine over-the-counter access request – denying the Landowners access to their own property. And, to make matters worse, the City then passed Bill No. 2018-24 that: 1) targeted only the Landowners' Property; 2) made it impossible to develop any part of the 250 acres; and, 3) forced the Landowners to allow the surrounding property owners to enter onto the property so they could use it as their park and recreation. The City's systematic and aggressive actions toward the Landowners and

[2] The City claims the Landowners "failed to file ***any*** application to develop the 65-Acre Property." City Opp., 3:4-5. Bold and italics in original. The City knows this is incorrect as the City would only accept ***one*** application to develop the 65 Acre Property – the MDA. And, the Landowners filed the MDA, which the City denied.

their Property could not have been clearer – the City prohibited the Landowners from using their property for any purpose and preserved the property for use by the surrounding property owners – a prima facie taking.

The Court heard all of this evidence and entered a FFCL Re: Take that details these City actions for 20 pages. *See FFCL Re: Take, pp. 10-29.* The Court's Findings of Fact and Conclusions of Law on Just Compensation, filed on November 18, 2021, then cites to the DiFederico appraisal report to sum up the City's actions as causing "**catastrophic damages** to this property." *See FFCL Re: Just Compensation, 11:10-12.* Emphasis added. Therefore, the Court knows the City's false narrative, that the Landowners allegedly never wanted to develop, is not true. It is the City that took aggressive and systematic actions that resulted in "catastrophic damages" to the Landowners' 35 Acre Property.

And, the City's "letters" inviting the Landowners to now "re-apply" is nothing more than litigation delay tactic – one that is often implemented by government agencies facing just compensation awards. These letters to "re-apply" were not sent early in these inverse condemnation cases; they were sent only after the City began losing in the four pending inverse condemnation cases. At that point, the Landowners had expended millions of dollars trying to develop, only to have the City deny all applications, deny access and fencing, and then pass laws to prohibit all development and preserve and authorize public use of the Subject Property – a prima facie taking. Therefore, the City's after-the-fact invitation to "re-apply" is nothing more than a litigation delay tactic, which the United States Supreme Court rejected in Knick v. Township of Scott, Pennsylvania, 139 S.Ct. 2162 (2019). In Knick, the Court held, "[t]he Fifth Amendment right to full compensation arises at the time of the taking, regardless of post-taking remedies that may be available to the property owner .... Once there is a taking compensation must be awarded because .... the landowner has *already* suffered a constitutional violation." Id., at 2170, 2172.

Italics in original. The Knick Court further held "a property owner acquires an irrevocable right to just compensation immediately upon a taking" and "[a] bank robber might give the loot back, but he still robbed the bank." Id., at 2172. The clear purpose for this rule is to categorically reject litigation delay tactics, like the City after-the-fact invitation letters to "re-apply."

C. The Landowners Principals Have Solely Utilized Business Funds for Land and Real Estate Acquisition and Development.

As presented during this case, the Landowners principals are experienced real estate developers having maintained a partnership over the past 25+ years. *See Exhibit 8, Declaration of Vickie DeHart.* The Landowners principals have utilized business funds solely for the purpose of land acquisition and real estate development where it is common practice of the partnership to reinvest the proceeds of a real property sales transaction through a 1031 exchange. *Id.* Moreover, for the entire existence of the partnership the partners have never placed the proceeds of any land or real estate sale into stocks or bonds or any other investment vehicle let alone one that would yield a prime plus two rate of return. *Id.* Accordingly, the City's false narrative that the Landowners are engaging in "rank speculation" that it would have invested those funds in real estate development is nothing more than a fictitious statement belying the facts and business purpose of the Landowners principals.

D. The City's Purchase Price Argument Has Already Been Rejected

The City's final argument is to claim that only $4.5 million was paid for the entire 250 acre property and, therefore, the Landowners' 23% rate of return should not be used. City Opp. pp. 5-6. First, this City purchase price argument is irrelevant. Second, it is incorrect. This entire $4.5 million purchase price narrative is based on a self-serving affidavit by the City's own private attorney, who claims to know what was paid for the property back in 2005, even though he has no personal knowledge whatsoever of the facts. *See City Appendix of Exhibits, filed on August 25, 2021, Exhibit FFFF, vol. 9, pp. 1591-1605.* Contrary to the City's narrative, the deposition

testimony of both PMKs for the Peccole Family and the Landowners confirmed: 1) the purchase occurred in 2005; 2) it was a "complicated" deal with "a lot of hair" on it; and, 3) it involved significant other consideration, with the Landowner PMK confirming the consideration way back in 2005 was in excess of $100 million. *See Landowners' Motion in Limine No. 1: To Exclude 2005 Purchase Price, pp. 3-10, filed September 7, 2021.* Moreover, the Court properly excluded this 2005 purchase price evidence, because it was not representative of the value of the 35 Acre Property as of the relevant September 14, 2017, date of valuation and the City failed to identify an expert witness to testify to the purchase price, among other reasons. *See Order Granting Plaintiffs' Motions in Limine No. 1, 2, and 3, pp. 2-5, filed on November 16, 2021. See also FFLC Re: Take, pp. 43-44 (explaining why the purchase price was not considered when deciding the take issue).* Finally, it has been shown that the Landowners' property, which the City took, was worth nearly $35 million and the Landowners have paid nearly $1 million in real property taxes.[3] Therefore, any reference to the alleged $4.5 million purchase price in 2005 is not only irrelevant to the pending rate of return question, but the City's narrative is also factually incorrect.

IV. CONCLUSION AND CALCULATIONS

Based on the foregoing the three necessary issues to calculate interest should be resolved as follows: 1) prejudgment interest commences on August 2, 2017 (uncontested); 2) 23% should be the rate of return (contested); and, 3) the rate of return should be compounded annually (uncontested). As set forth in the Landowners' moving papers, this result in prejudgment interest as follows:

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[3] Reference is made to the Landowners motion for reimbursement of taxes, argued to the Court on January 19, 2022.

1. From August 2, 2017 (date of take) – February 2, 2022 (anticipated date of entry of prejudgment interest order):

$34,135,000 x 23% for 4.5 years, compounded annually = **$52,515,866.90** in prejudgment interest. *See Exhibits 3, 4, and 5, to Landowners' opening motion - three different compound interest calculators inputting the above data and uniformly arriving at $52,515,866.90 in prejudgment interest.*

2. For the period August 2, 2022 – August 2, 2023 – **$54,601.92 per day** ($19,929,699.57 interest / 365). *See Exhibit 6, daily rates taken from the interest calculations for August 2, 2022 – August 2023.*

3. For the period August 2, 2023 – August 2, 2024 – **$67,160.36 per day** ($24,513,530.51 interest / 365).*See Exhibit 7, daily rates taken from the interest calculations for 2023 – August 2024.*

Two blanks were left in the FFCL re: Just Compensation and Judgment in Inverse Condemnation for prejudgment interest. It is respectfully requested that those two blanks now be filled in as follows:

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The City shall pay prejudgment interest in the amount of **$52,515,866.90** for interest up to ~~the date of judgment (October 27, 2021)~~ February 2, 2022,[4] and a daily prejudgment interest thereafter in the amount of **$46,687.19 (up to August 2, 2022); $54,601.92 (up to August 2, 2023); and, $67,160.36 (up to August 2, 2024)**, until the date the judgment is satisfied. NRS 37.175.

DATED this 24th day of January, 2022.

LAW OFFICES OF KERMITT L. WATERS

/s/ James J. Leavitt
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[4] The October 27, 2021, date should be changed to February 2, 2022, as this date reflects the anticipated date of entry of the prejudgment interest order, meaning interest should be calculated up to this date, with daily interest running thereafter until the City satisfies the judgment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the Law Offices of Kermitt L. Waters, and that on the 24th day of January, 2022, pursuant to NRCP 5(b), a true and correct copy of the foregoing: **PLAINTIFFS LANDOWNERS' REPLY IN SUPPORT OF THEIR MOTION TO DETERMINE PREJUDGMENT INTEREST** was served on the below via the Court's electronic filing/service system and/or deposited for mailing in the U.S. Mail, postage prepaid and addressed to, the following:

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Exhibit 8

DECLARATION OF VICKIE DEHART IN SUPPORT OF PLAINTIFF LANDOWNERS' MOTION TO DETERMINE PREJUDGMENT INTEREST

I, VICKIE DEHART, declare, allege and state as follows:

1. I am one of the principals of EHB Companies LLC, Manager of Fore Stars and 180 Land Co LLC, Plaintiffs in this matter. I make this declaration based on personal knowledge, except where stated to be upon information and belief, and as to that information, I believe it to be true. If called upon to testify to the contents of this declaration, I am legally competent to do so in a court of law.

2. For the past 25+ years my partners and I have been in the business of land acquisition, disposition, and real estate development.

3. From the inception of the partnership, we have utilized business funds solely for the purpose of land acquisition and real estate development. It is a common practice of the partnership to reinvest the proceeds of a real property sales transaction through a 1031 exchange. The partnership has never placed the proceeds of any land or real estate sale into stocks or bonds or any other investment vehicle that would yield a prime plus two rate of return.

4. If the City had paid the $34,135,000 award in this case on August 2, 2017, the proceeds would have been re-invested in vacant land and/or improved real property by means of a 1033 exchange (the eminent domain version of a 1031 exchange).

Executed this 24th day of January, 2022.

/s/ Vickie DeHart
Vickie DeHart

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Judicial Review/Appeal	COURT MINUTES	January 26, 2022

A-17-758528-J 180 Land Company LLC, Petitioner(s)
vs.
Las Vegas City of, Respondent(s)

January 26, 2022 **3:00 AM** **Amended Minute Order**

HEARD BY: Williams, Timothy C. **COURTROOM:** Chambers

COURT CLERK: Christopher Darling

JOURNAL ENTRIES

After review and consideration of the points and authorities on file herein, supplemental briefing, and oral argument of counsel, the Court determined as follows:

After considering the mandatory language under NRS 37,140, which grants a landowner a substantive right whereby the government must, within 30 days after final judgment, pay the sum of money assessed in an eminent domain or inverse condemnation case, this Court feels compelled to deny the City's Motion for Immediate Stay of Judgment in this matter. The Court's decision is based on a determination that the more specific eminent domain statutes, such as NRS 37.140, which grants landowners substantive rights, take precedence over the general rules of procedure relied upon by the City of Las Vegas.

Additionally, based upon the 30-day delay in payment, the City would have time to seek a stay, if appropriate, from the Nevada Supreme Court. Based on the foregoing, Defendant City of Las Vegas' Motion for Immediate Stay of Judgment shall be DENIED. Additionally, Plaintiff 180 Land Co.'s Countermotion to Order the City of Las Vegas to pay the just compensation shall be GRANTED. Counsel on behalf of Plaintiff 180 Land Company shall prepare a detailed Order, Findings of Facts, and Conclusions of Law, based not only on the foregoing Minute Order but also on the record on file herein. This is to be submitted to adverse counsel for review and approval and/or submission of a competing Order or objections prior to submitting to the Court for review and signature.

CLERK'S NOTE: A copy of this Minute Order has been electronically served to all registered users on this case in the Eighth Judicial District Court Electronic Filing System. /cd 1-26-2022/

CLERK'S NOTE: Minutes amended to correct which party is to prepare the order. A copy of this Amended Minute Order has been electronically served to all registered users on this case in the Eighth Judicial District Court Electronic Filing System. /cd 1-27-2022/

RPLY
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DISTRICT COURT

CLARK COUNTY, NEVADA

180 LAND CO., LLC, a Nevada limited liability company, FORE STARS Ltd., DOE INDIVIDUALS I through X, ROE CORPORATIONS I through X, and ROE LIMITED LIABILITY COMPANIES I through X, Plaintiffs, *vs.* CITY OF LAS VEGAS, political subdivision of the State of Nevada, ROE government entities I through X, ROE CORPORATIONS I through X, ROE INDIVIDUALS I through X, ROE LIMITED LIABILITY COMPANIES I through X, ROE quasi-governmental entities I through X, Defendant.	Case No.: A-17-758528-J Dept. No.: XVI **PLAINTIFF LANDOWNERS' REPLY IN SUPPORT OF MOTION FOR ATTORNEY'S FEES** **Hearing Date: February 3, 2022** **Hearing Time: 9:05 AM**

The Plaintiffs, 180 Land Co LLC and Fore Stars, Ltd. (hereinafter referred to as "Landowners") hereby Reply in Support of their Motion for Attorney's Fees as follows:

The City spends the first nine (9) pages of its Opposition arguing contrary to Nevada law. The City is not entitled to come to the Court and misrepresent that state of the law in Nevada.

NRPC 3.3[1]. The City knows that in Nevada a landowner who is successful in an inverse condemnation claim is entitled to his or her attorney fees. The City does not argue that the law should be changed, that would be permissible under NRPC 3.3, instead, the City argues that it is not the law, which is impermissible under NRPC 3.3. It is simply shocking that the City has spent 9 pages arguing contrary to the well established and known law that a successful inverse condemnation plaintiff is entitled to their attorney fees in Nevada.

A. *Buzz Stew* was Not an Inverse Condemnation Case, Instead, it was an Unsuccessful Precondemnation Damages Case

The City starts its opposition with reference to *Buzz Stew v. City of North Las Vegas*,131 Nev. 1, 341 Pl3d 646 (2015). City Opp. at 2:3-14. And, consistent with its prior arguments to the Court, the City lacks an understanding of this area of Nevada law. As the City points out, the undersigned counsel's office was counsel for *Buzz Stew*, and is, therefore, very aware of the facts and holding in *Buzz Stew*.

First, *Buzz Stew* was not an inverse condemnation case, instead, *Buzz Stew* was the first case in Nevada to establish that a landowner could bring a precondemnation damages claim absent a taking. *Buzz Stew v. City of North Las Vegas*, 124 Nev. 224, 230, 181 P. 3d 670, 674 (2008) ("Finally, to the extent that *Barsy* indicated that a taking must occur to recover damages related to

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[1] Rule 3.3 Candor Toward the Tribunal.

(a) A lawyer shall not knowingly: (1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; (2) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or (3) Offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonable believes is false.

. . .

a municipality's announcement of intent to condemn and its improper action with respect to that announcement, that requirement has been eliminated as to precondemnation damages. Accordingly, *Buzz Stew* is not required to show that a taking and the damages resulting from such a taking have occurred.")

Second, Buzz Stew was ultimately unsuccessful with his stand alone precondemnation damages claim, meaning the jury did not believe that the City of North Las Vegas had unreasonably delayed filing a condemnation action causing *Buzz Stew* damages. As background, in *Buzz Stew*, the City of North Las Vegas never filed a condemnation action, instead, the landowner sold his property and the new owner dedicated the land the City of North Las Vegas had originally sought. Accordingly, the holdings in *Buzz Stew* address an unsuccessful plaintiff in a precondemnation damages case, not a successful plaintiff in an inverse condemnation case. The case now before this Court is about a successful plaintiff / landowner in an inverse condemnation case. And, the law in Nevada is clear, **a successful plaintiff / landowner in an inverse condemnation case is entitled to their attorney fees.** *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 673 (2006); *Tien Fu Hsu v. County of Clark*, 123 Nev. 625, 637 (2007); 49 CFR § 24.107(c); Nev. Const., art. 1 § 22(4); NRS 37.185.(emphasis added). Therefore, the City's reliance on *Buzz Stew* is extremely misplaced.

B. *Sisolak* and the Relocation Act

The *Sisolak* opinion is clear, a successful plaintiff / landowner in an inverse condemnation case does not need to establish a nexus between the taking project and federal funds to recover attorney fees. *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 673-675 (2006). However, to be clear, the Landowners have unquestionably demonstrated that not only does the City receive federal funds but, the City also receives federal funds for its parks and open space programs which is what the City has taken the Landowners' property for here. *Exhibit 12-16.*

> "The city of Las Vegas is a sub-recipient of financial assistance from federal aid programs." Vol 1, Exhibit 12 at ATTY FEE MOT – 0104.
>
> "Adopted in 1998, SNPLMA allows the BLM to sell public land within a specific boundary around Las Vegas. The revenue from auctioned land sales, totaling $4.1 billion as of 2019, is split between the State Education Fund (5%), the Southern Nevada Waters Authority (10%), and an account for specific purposes, including: Development of parks, trails, natural areas, and other recreational public purposes in cooperation with local governments and reginal entities...***The City has previously been able to leverage SNPLMA for a wide range of parks and trails*** projects and renovations." Vol. 1, Exhibit 13, part 1 at ATTY FEE MOT – 0226 (emphasis added)
>
> "The Southern Nevada Public Lands Management Act (SNPLMA) allows the Bureau of Land Management (BLM) to dispose of public land, with a portion of land sales proceeds that may be used for conservation and the development of parks, trails and natural areas by local and federal agencies. ***The City accesses these funds*** through a competitive application process." Vol 2, Exhibit 13, part 2 at ATTY FEE MOT – 0235 (emphasis added).
>
> "The City receives revenue in other forms from the Federal [] government...to buoy City revenues, the City must also work to increase the overall share of competitively awarded grant funding, especially from Federal funding sources...of the biennial budget, the state general fund and Federal fund represent roughly two thirds of the budget..." Vol 2, Exhibit 13, part 2 at ATTY FEE MOT – 0272.
>
> City has sought between "$50-69 million" in Federal Funds for Parks, Trails and Natural Areas. Vol 2, Exhibit 14 at ATTY FEE MOT – 0386.

Therefore, even if a nexus was required, which it is not, the Landowners have met that requirement for both the City, itself, and also for the City's parks and open space programs, as they both receive federal funds. It must also be noted, that in the 17 Acre Case, the Landowners just received the City's responses to interrogatories seeking information about federal funding and the City in its responses claims that federal funds are not relevant and are not likely to lead to the discovery of evidence relevant to any issue in the case. *See Exhibit 19, City of Las Vegas' Response to Plaintiff Landowner Fore Stars, LTD.'s First Set of Interrogatories, Interrogatory No 4, page 7:27-8:1.* The City cannot maintain such contradictory positions - here claiming the Landowners have not established a nexus between federal funding and the City, and then in the 17 Acre Case, claim federal funding is irrelevant.

Nevertheless, Nevada has adopted the Relocation Act in its entirety. NRS 342.105. And, the Relocation Act unquestionably provides that an owner of real property ***shall*** be entitled to his or her attorney fees when, "[t]he court having jurisdiction renders a judgment in favor of the owner in an inverse condemnation proceeding" (*Exhibit 7*, 49 CFR 24) (emphasis added). This law could not be clearer and includes no qualifiers. Therefore, under both *Sisolak* and NRS 342.105 (which adopts the Relocation Act) the Landowners are entitled to their attorney fees.

C. Article 1 § 22 ("the PISTOL Amendments" According to the City) Absolutely Applies to Inverse Condemnation

As argued in the Landowners' opening motion, Article 1 § 22 of the Nevada Constitution clearly provides for the recovery of attorney fees. Nev. Const., art. 1 § 22(4) (just compensation includes "all reasonable costs and expenses actually incurred."). To avoid this clear law, the City argues in its opposition that Article 1 § 22, "the Pistol Amendments do not apply to inverse condemnation actions..." City Opp. at 8:8-9. This is not true. In *Nevadans for the Prot. Of Prop. Rights v. Heller*, 122 Nev. 894, 908, 141 P.3d 1235, 1244-1245 (2006), the Supreme Court acknowledged that Article 1 § 22 would apply to inverse condemnation actions. Specifically, when deciding whether a proposed section of the original initiative petition violated the single subject requirements for initiative petitions, the Court found that "[a]lthough this section ***would***, as the proponents contend, ***apply to many inverse condemnation cases***, which this court has held to be the 'constitutional equivalent to eminent domain,' it would also apply to myriad other government actions that do not fall even within the most broad definition of eminent domain." *Id.* Emphasis added. Therefore, without a doubt, the Nevada Supreme Court has recognized that Article 1 §22 ("the Pistol Amendments") would apply to inverse condemnation actions. Accordingly, Article 1 §22 applies to inverse condemnation actions and supports awarding the Landowners their requested attorney fees.

D. The City's Own Counsel Charges More Than $450 An Hour and He Does Not Limit His Practice to Condemnation Matters

The City advances that the Landowners' counsel should be limited to $450 an hour based on some report the City found online called the 2020 Real Rate Report. City Opp. at 11. What is tellingly absent from the City's Opposition is any reference to how much it pays its own private counsel. Mr. Ogilvie currently charges the City $550 an hour. *See Exhibit 17, McDonald Carano General Terms and Conditions of Engagement with the City.* This is important as this is Mr. Ogilvie's ***government rate*** **which is widely known to be lower than what is charged for private clients**. Moreover, Mr. Ogilvie does not limit his practice to condemnation matters, and, in fact, the City had to contract with yet another attorney for such background. In Nevada, experienced eminent domain and inverse condemnation counsel are compensated upwards of $1,392 per hour. (*Exhibit 8*). This was approved by the Nevada Supreme Court 15 years ago in Sisolak. Therefore, the Landowners' request for attorney fees ranging from $800 – $1,500 per hour is reasonable and customary in the field of inverse condemnation in Nevada.

E. The Landowners are Not Required to Show Billing Records, Affidavits are Sufficient

The City makes several incorrect statements in its attempt to obtain the Landowners' Counsel's billing records. City Opp. at 10:28-11:9. Billing records are not required and that is for a good reason. Attorney fees are awarded prior to an appeal, if the prevailing party had to disclose its billing records (which include attorney client privileged information and attorney work product information) that would force a party to forgo attorney fees in order to protect those privileges. Accordingly, an affidavit is sufficient to establish the hours an attorney worked, and not only in cases where an attorney was on a contingency agreement, as the City wrongfully argues. (City Opp. at 11:2). Instead, Rule 54 (d)(2)(B)(v)(a) only requires, "counsel's affidavit swearing that the fees were actually and necessarily incurred and were reasonable" which the Landowners'

Counsel's affidavits provide. Accordingly, the Landowners are entitled to their attorney fees, as requested.

1) The Landowners' Counsel Bill at 1/10 Hour Increments, Just Like the City's Counsel

The City makes the strange argument that Landowners' Counsel bill in increments that are rounded to the nearest hundredth and this somehow is a disqualifying fact. City Opp. at 11:7-8. There is no need to address the City's disqualifying argument, as it cites no authority, but more importantly, it is not true. The Landowners' Counsel does not round to the nearest hundredth. The Landowners' Counsel bills in 1/10 hour increments just like the City's Counsel. *Exhibit 17.* However, due to the fact that some hours had to be split between cases for this, and future motions for attorney fees, that is what accounts for the appearance of hundredth increments. *See Exhibit 18 ¶ ¶ 3-4, Declaration of Sandy Guerra.* Accordingly, the Landowners are entitled to their attorney fees, as requested.

The City also claims that "this is the first and only case" the Landowners' Counsel "have billed their time on an hourly basis." (City Opp. at 11:3-4). This is a wild misstatement of the Landowners' Counsel's declaration. What Landowners' Counsel state in their declarations is that they have not previously handled an inverse condemnation case on solely an hourly basis. Because the City has no basis for opposing the Landowners' request for attorney fees, it instead throws irrelevant and inaccurate accusations. The Landowners are entitled to their attorney fees, as requested.

2) The City's Own Counsel Has Billed More Hours than the Landowners' Counsel

The City alleges that it is difficult to determine the work that was done by Landowners' Counsel, an apparent attack on the number of hours Landowners' Counsel billed in this matter. City Opp. at 10-11. Tellingly absent, however, from the City's Opposition is any reference to how

many hours the City's counsel has billed. Had the City's counsel billed less than the Landowners' Counsel, that surely would have been a featured argument in the City's attack on the number of hours billed. That argument appears nowhere in the City's Opposition, and that is because the City's counsel has billed more hours than the Landowners' Counsel.

The Landowners have obtained the City's counsel's invoices through September 2021 by way of a Freedom of Information Act Request. Those invoices are attached hereto as *Exhibits 18a* and *18b*, however, they are voluminous and require a time-consuming effort to total all private attorney hours. Accordingly, the Landowners' Counsel's paralegal has added the time and provided an affidavit detailing how this process was undertaken. As shown from *Exhibit 18*, as of September 2021, the City has spent **7,274.10** attorney hours on the four inverse condemnation actions while, as discussed in the Landowners' moving papers, as of October 2021, the Landowners' Counsel has only spent **6,866.93** total attorney hours on all four cases. Landowners' Mot at 9:14-15. Therefore, it is known that the City's counsel has billed more attorney hours than the Landowners' Counsel demonstrating the reasonableness of the Landowners' Motion for Attorney Fees and the unreasonableness of the City's opposition. The Landowners are entitled to their attorney fees, as requested.

F. Hours Since October 31, 2021

The Landowners' moving papers calculated the hours worked up until October 31, 2021. As stated, a supplemental calculation of the additional hours worked since October 31, 2021 would be provided, as attorney and staff hours are still accumulating. Landowners' Mot. at fn 3. From November 1, 2021 to January 25, 2022 there have been an additional 313.06 attorney hours and 140.47 additional staff hours worked on this 35 Acre Case. *See Exhibit 20, Supplemental Declarations*.

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Attorney Hours since October 31, 2021

K. Waters	0.5 x $675 = $337.50	0.5 x $1,500 = $750
J. Leavitt	124.78 x $675 = $86,251.50	124.78 x $1,300 = $162,214.00
A. Waters	171.97 x $675 = $116,079.75	171.97 x $800 = $137,576.00
M. Schneider	15.8 x $675 = $10,665.00	15.8 x $800 = $12,640.00

Total additional hours 313.06 at $675 = $211,315.50

Total additional hours 313.06 at enhanced rate = $313,180.00

Legal Assistants since October 31, 2021

Total additional hours worked = 140.47 x hourly rate of $50.00 = $7,023.5

G. Conclusion

Nevada law supports an award of attorney fees, including the enhancement provided in the *Hsu* case. Accordingly, the Landowners request an attorney fee award, as set forth in the opening motion, in the amount of **$3,410,755.00 + $313,180.00** (hours since October 31, 2021) **=$3,723,935.00** and reimbursement of fees paid for the Law Offices of Kermitt L. Waters legal assistants in the amount of **$44,912.50 + 7,023.50** (hours since October 31, 2021) = **$51,936.00**.

DATED this 27th day of January, 2022.

LAW OFFICES OF KERMITT L. WATERS

/s/ Autumn Waters

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the Law Offices of Kermitt L. Waters, and that on the 27th day of January, 2022, pursuant to NRCP 5(b), a true and correct copy of the foregoing: PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR ATTORNEY'S FEES was served on the below via the Court's electronic filing/service system and/or deposited for mailing in the U.S. Mail, postage prepaid and addressed to, the following:

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