IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF NORTH LAS VEGAS, Appellant/Cross-Respondent, vs. 5TH & CENTENNIAL, LLC, A NEVADA LIMITED LIABILITY COMPANY; 5TH & CENTENNIAL II, LLC, A NEVADA LIMITED LIABILITY COMPANY; 5TH & CENTENNIAL III, LLC, A NEVADA LIMITED LIABILITY COMPANY; ALL FOR ONE FAMILY TRUST; BRIAN A. LEE, AND JULIE A. LEE, TRUSTEES FOR THE ALL FOR ONE FAMILY TRUST; AND BRIAN A. LEE; AND JULIE A. LEE, Respondents/Cross-Appellants.	No. 58530 **FILED** MAR 21 2014 TRACIE K. LINDEMAN CLERK OF SUPREME COURT BY R. Malone DEPUTY CLERK
CITY OF NORTH LAS VEGAS, Appellant/Cross-Respondent, vs. 5TH & CENTENNIAL, LLC, A NEVADA LIMITED LIABILITY COMPANY; 5TH & CENTENNIAL II, LLC, A NEVADA LIMITED LIABILITY COMPANY; 5TH & CENTENNIAL III, LLC, A NEVADA LIMITED LIABILITY COMPANY; ALL FOR ONE FAMILY TRUST; BRIAN A. LEE; AND JULIE A. LEE, Respondents/Cross-Appellants.	No. 59162

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

14-09052

This is an appeal and cross-appeal from a final district court order in an eminent domain matter.[1] Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

Beginning in 2002, appellant/cross-respondent the City of North Las Vegas (the City) planned, adopted, and began construction on a seven-mile-long, eight-lane, high-speed, super-arterial roadway along North 5th Street to relieve regional traffic congestion from Interstate 15 (the Project). Over eight years, the City and others conducted a number of studies, developed reports, budgeted, and authorized planning documents for the Project. The City's 2004 amendment to its Master Plan of Streets and Highways (AMP-70-04) allowed for North 5th Street to be widened up to 150 feet and provided that development applications be conditioned upon landowners giving up a 75-foot right-of-way on the land fronting that street. The Project was divided into two sections: a northern half, from Owens Avenue to Cheyenne Avenue; and a southern half, from Cheyenne Avenue to Clark County 215. Between 2000 and 2005, respondents/cross-appellants 5th & Centennial, LLC; 5th & Centennial, II, LLC; 5th & Centennial, III, LLC; All for One Family Trust; and Julie and Brian Lee (collectively, the Landowners) acquired five vacant parcels totaling more than 20 acres on the northwest corner of North 5th Street and Centennial Parkway (the Property), in the northern half of the Project.

The Landowners wanted to sell the Property to developers. In 2006, the Landowners rejected a $14,500,000 offer from Camden USA, Inc., to develop the Property for residential purposes. A year and a half later, the Landowners accepted an offer from Insight EMD, LLC (Insight)

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[1]The Honorable Ron Parraguirre, Justice, voluntarily recused himself from participation in the decision of this matter.

for $18,750,000. After depositing $560,000 and proceeding to escrow, Insight canceled the sale because it believed AMP-70-04 placed too many limitations on the Property for commercial development.

When the economy stalled in recent years, so did the City's progress on the northern half of the Project, which relied on federal funding. According to the City's planning documents, upon approval of a development application, the Landowners would likely be required to give up a 75-foot right-of-way on their land that fronts North 5th Street. However, at present, no such development application has been filed. On January 1, 2010, the Landowners filed a complaint against the City for inverse condemnation and precondemnation damages. Following an eight-day bench trial, the district court awarded $4,250,000 in precondemnation damages to the Landowners. The district court also dismissed without prejudice the Landowners' inverse condemnation cause of action because it was unripe. The district court further awarded the Landowners $1,062,500 in attorney fees, $109,140.33 in costs, and $357,611.30 in prejudgment interest.

The City now appeals, arguing that (1) precondemnation damages cannot be awarded when the district court determines an inverse condemnation cause of action to be unripe, (2) the district court abused its discretion in calculating the precondemnation damages award, (3) the district court abused its discretion in awarding the Landowners attorney fees as special damages, and (4) the district court abused its discretion in awarding the Landowners costs that were not supported by proper documentation. The Landowners filed a cross-appeal, arguing that the district court (1) erred when it found that their inverse condemnation cause of action was unripe; (2) erred in its calculation of the prejudgment interest award; and (3) erred in refusing to incorporate the fees, costs, and

prejudgment interest award into a single amended judgment pending this appeal.

The precondemnation damages award was not clearly erroneous and was supported by substantial evidence

The City argues that the district court erroneously awarded $4,250,000 in precondemnation damages because its activities did not cross the threshold from "mere planning" to the acquiring stage as required by this court's previous decisions. The City argues that only the southern portion of the Project had gone beyond planning, not the northern portion where the Property is situated. We disagree.

Precondemnation damages are a separate claim from an inverse condemnation action because no taking is required

In order to recover precondemnation damages, no physical or regulatory taking is required; precondemnation damages exist independently and apart from inverse condemnation actions. *See Buzz Stew, L.L.C. v. City of N. Las Vegas*, 124 Nev. 224, 230, 181 P.3d 670, 674 (2008) (holding "to the extent that . . . a taking must occur to recover [precondemnation] damages . . . , that requirement has been eliminated"). A governmental entity may be liable for precondemnation damages if (1) the entity has taken official action amounting to an announcement of its intent to condemn, (2) the entity "acted improperly" after taking such official action, and (3) these actions result in damage to the landowner. *Id.* at 228-29, 181 P.3d at 672-73. The pivotal issue regarding an announcement of intent is whether the "activities have gone beyond the planning stage to reach the acquiring stage." *Id.* at 229, 181 P.3d at 673 (internal quotations omitted). "The acquiring stage occurs 'when condemnation has taken place, steps have been taken to commence eminent domain proceedings, or there has been an official act or expression of intent to condemn.'" *Id.* (quoting *State ex rel. Dep't of Transp. v. Barsy*, 113 Nev. 712, 720, 941 P.2d 971, 977 (1997), *overruled*

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on other grounds by GES, Inc. v. Corbitt, 117 Nev. 265, 268 n.6, 21 P.3d 11, 13 n.6 (2001)). In *Buzz Stew*, we determined that an entity expressed its intent to condemn when it adopted a resolution for the "need and necessity" of a landowner's property. *Id.*

A landowner can show the entity acted improperly if it "unreasonably delay[ed] an eminent domain action after announcing its intent to condemn the landowner's property." *Id.* Improper conduct includes a delay or oppressive conduct that decreases the market value of a property, "especially when the government fails to retract its announcement to mitigate its detrimental effects." *Id.* Precondemnation damages dissuade public agencies from "prematurely announcing their intent to condemn private property." *Id.* What qualifies as a reasonable period of time depends on the circumstances, but we have previously noted that "the shorter the period between announcement and initiation of the action, the greater the chance of being found reasonable." *Id.* at 230, 181 P.3d at 673-74. This determination is a question of fact. *Id.* at 230, 181 P.3d at 673. When supported by substantial evidence, this court will not set aside a district court's findings of fact unless they are clearly erroneous. *Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 486, 117 P.3d 219, 223 (2005).

Ample evidence supported the district court's factual findings

The district court's exhaustive findings of fact, conclusions of law, and judgment detailed the array of evidence it relied on in awarding precondemnation damages. The district court found that the City undertook, adopted, and implemented the seven-mile-long, limited access Project. This official action went beyond mere planning, establishing the first prong of the Landowners' precondemnation claim. *See Buzz Stew*, 124 Nev. at 229, 181 P.3d at 673 ("The pivotal issue [regarding an announcement of intent] is whether the public agency's activities have

gone beyond the planning stage to reach the acquiring stage." (internal quotations marks omitted)). As to the second prong, improper conduct, the district court found the City's nearly eight-year delay was unreasonable because the Landowners "suffered substantial damages and saw the value of their property plummet during the period of time that the City was, in effect, 'freezing' the property in its effort to 'bank' the land north of Cheyenne." *See id.* ("[A] landowner can show that the public agency acted improperly by unreasonably delaying an eminent domain action after announcing its intent to condemn the landowner's property."). The district court found that "following the City's announcement of the Project, and its corresponding announcement of its intent to condemn a portion of [the] Landowners' Property, there was an unreasonable delay in implementation of the Project by the City." Further, the district court found that the "City's dilatory actions have caused significant uncertainty on [the] Landowners' Property and a corresponding pre-condemnation decrease in the market value of the Property . . . ." The district court also found that evidence at trial demonstrated that activities along North 5th Street were "unfair and oppressive" to the Landowners.

We conclude that substantial evidence supported the district court's precondemnation damages award, and its determination was not clearly erroneous. *See Buzz Stew*, 124 Nev. at 229, 181 P.3d at 673 (precondemnation damages permit recovery from damages caused from a public agency unreasonably delaying an eminent domain action after announcing its intent to condemn). The district court's conclusion was particularly appropriate because the Property was undeveloped, and therefore, the Landowners were unable to use it once the City announced its intent to condemn. Unlike developed property where the Landowners could have collected rent in the interim, the Landowners could not utilize

the Property because the City's oppressive conduct and nearly eight-year delay essentially froze it.

The record reflects that a significant amount of evidence supported the district court's finding that the City: (1) took official action amounting to an announcement of its intent to condemn; and (2) following such action, engaged in improper conduct. The record indicated the following official action and improper conduct: (1) in July 2004, the City decided to widen the North 5th Street roadway right-of-way without providing property owners along North 5th formal notice that this decision would affect their property rights; (2) at a hearing on October 6, 2004, the City announced its intent to condemn when it amended its Master Plan of Streets and Highways to include plans for a general frontage requirement of 100-150 feet along North 5th Street (AMP-70-04);[2] (3) that same month, the City, through its then-presiding mayor, reconfirmed the announcement of its intent to condemn the property; (4) in November

[2]At the public hearing, Clete Kus, the City Public Works representative, announced, "the primary purpose [of AMP-70-04] was to obtain dedication along the undeveloped part of the North 5th corridor." North Las Vegas City Commissioner Steve Brown confirmed "[t]he vote is made with the understanding that they are making a change that will eventually [a]ffect property owners." Brown then publicly announced that "even though eminent domain and condemnation is not being discussed at this meeting, this is the first step of the process." We have previously articulated the impact a plan can have on a prudent purchaser. *See Cnty. of Clark v. Alper*, 100 Nev. 382, 390, 685 P.2d 943, 948 (1984) ("The adoption of the general plan and the transportation study by the county commissioners was equivalent to a public announcement that the Alper parcel would be subject to the future widening of Flamingo Road. Based on these planning guides, it would be apparent to the prudent purchaser that the county would not approve any use or development which is inconsistent with the widening project or which would not alleviate the traffic congestion.").

2004, the City published the North 5th Street Corridor Study, which further confirmed the City's intent and contained plans, diagrams, and pictures that created uncertainty regarding the Landowners' property; (5) published in 2005, the City's Capital Budget for years 2007-2011 allocated $121,575,400 to the Project; (6) in 2005, the City also entered into multiple contracts with the Regional Transportation Commission of Southern Nevada (RTC) for the Project; (7) the City imposed right-in/right-out turning restrictions along the entire length of the North 5th super arterial corridor in August 2006 to preserve its high-speed character;[3] (8) in November 2006, the City revised its comprehensive Master Plan to incorporate the Project into its land use planning and zoning criteria; (9) in December 2007, the City published the North 5th Project Development Report, which contained specific engineering details demonstrating the City's intent to acquire a portion of the Landowners' property; (10) the City's eminent domain complaints from 2010 concerning other properties along the North 5th Street in the northern section demonstrated the Project was more than conceptual; and (11) the parties stipulated into evidence project maps demonstrating many of the privately-held parcels the City had acquired for the necessary right-of-way for the project.[4]

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[3]We note that although a city, through zoning, can generally control turn restrictions, precondemnation damages are appropriate in this case because the City caused uncertainty and a decrease in the market value of the Property when it was not forthright with its intentions regarding the Project and failed to move forward with its intended condemnation of the Property.

[4]The City's person most knowledgeable on the Project, Dr. Quiong Liu, reinforced many of these facts through his testimony at trial.

The district court found that despite all these actions, the City (1) failed to move forward with its intended condemnation of the Landowners' property, which caused uncertainty and decreased the market value of the Property; and (2) should have been more forthright in disclosing its intentions regarding the Landowners' property. The Landowners also demonstrated at trial that the City treated North 5th Street property owners with developed property differently by paying some of them just compensation while forcing others with undeveloped property to dedicate the increased right-of-way as a condition of development. The Project, with its restrictions to access, overpass at Centennial, dedications, exactions, super-arterial roadway construction costs, and potential "take" for the RTC park-and-ride significantly affected the fair market value of the Property, resulting in precondemnation damages. *See Buzz Stew*, 124 Nev. at 229, 181 P.3d at 673 (when calculating precondemnation damages, a court will consider the effect the "[e]xtraordinary delay or oppressive conduct following an announcement of intent to condemn" has on the fair market value of the property). Although the City's planning documents may have included the phrases "preliminary," "conceptual only," and "subject to change," its actions belied these disclaimers. Therefore, we conclude that substantial evidence supported the district court's precondemnation damages order.

The district court did not abuse its discretion in calculating precondemnation damages

The City argues that the district court rejected all expert testimony relevant to damages and created its own arbitrary methodology based on a comparison of offers to purchase the Landowners property, which was legally insufficient. We disagree.

The district court has wide discretion in calculating an award of damages, and we will not disturb an award absent an abuse of

discretion. *Diamond Enters., Inc. v. Lau*, 113 Nev. 1376, 1379, 951 P.2d 73, 74 (1997). A party seeking damages has the burden of proof in providing the district court with an evidentiary basis for it to properly determine damages. *Frantz v. Johnson*, 116 Nev. 455, 469, 999 P.2d 351, 360 (2000). A party does not need to prove damages with mathematical exactitude, and some uncertainty as to the actual amount of damages will not prevent recovery. *Id.* Further, the district court may consider the impact that a governmental entity's oppressive conduct has on the fair market value of a property when calculating precondemnation damages. *Buzz Stew*, 124 Nev. at 229, 181 P.3d at 673.

In October 2006, the Landowners rejected Camden's $14,500,000 offer to purchase their property for residential development and held out for a higher priced commercial usage offer of purchase. This decision was consistent with the Landowners' investment-backed expectations. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). The district court found that the City's failure to fully disclose its project plans in 2006 precluded the Landowners from making a fully informed decision regarding the Camden offer. A year and a half later, the Landowners accepted Insight's offer for $18,750,000. During Insight's due diligence, it concluded that because of future ingress and egress limitations due to the Project, the Property's use as a commercial shopping site was no longer feasible and terminated escrow. The district court found that but for the Project, the Landowners would have sold the Property to Insight for $18,750,000. The district court found that "[t]he City's failure to disclose its limited access, super arterial plans for the Project in 2006 precluded Landowners from making a fully informed decision as to the Camden . . . offer."

We conclude that the district court's award of $4,250,000 in precondemnation damages was within its wide discretion and based upon

evidence presented at the bench trial. This award represented the difference between the rejected Camden offer and the Insight Deal. The district court considered the Landowners' investment-backed expectations that they lost by rejecting the Camden offer and accepting the Insight Deal.[5] The district court found the amount was a fair result based on the evidence that the Project had played a significant role in causing damages to the Landowners, but also took into account the economic situation that coincided with Insight's decision to terminate its Purchase and Sale Contract. The Landowners' appraisal expert testified that the Property lost $7,725,000 in value due to the Project, while the City's expert testified that the loss was only $2,760,000. The district court's calculation of $4,250,000 in damages was within this range and based on the evidence that it heard regarding concerns such as impact on fair market value. *See Buzz Stew*, 124 Nev. at 229, 181 P.3d at 673 ("Extraordinary delay or oppressive conduct following an announcement of intent to condemn certain property conceivably reduces the market value of that property—especially when the government fails to retract its announcement to mitigate its detrimental effects."). We therefore conclude that the amount was within the district court's wide discretion in a bench trial and in light

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[5]The City maintains that the Landowners had actual knowledge of the Project's planning prior to completing their investment, and the district court should not have discarded these investment-backed expectations in calculating damages. We disagree. Even though the Landowners acquired their fourth and fifth parcels with knowledge of the Project's development, this fact does not bar the recovery of precondemnation damages. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 630 (2001) (holding that a plaintiff's regulatory takings claim was "not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction").

of the uncertainty in amounts.[6] *See Frantz*, 116 Nev. at 469, 999 P.2d at 360.

The district court abused its discretion in awarding attorney fees

The City argues that Nevada law specifically prohibits the recovery of attorney fees in all eminent domain actions except for prevailing inverse condemnation causes of action pursuant to NRS 37.185 and NRS 37.120. The City further argues that NRS 37.185 prohibits the Landowners from recovering any attorney fees because the Landowners only prevailed on their precondemnation damages cause of action. We agree.

The district court has sound discretion whether to award attorney fees, and we will not overturn such a decision absent a manifest abuse of discretion. *Kahn v. Morse & Mowbray*, 121 Nev. 464, 479, 117 P.3d 227, 238 (2005). Attorney fees are generally "not recoverable absent a statute, rule, or contractual provision to the contrary." *Horgan v. Felton*, 123 Nev. 577, 583, 170 P.3d 982, 986 (2007). When interpreting a statute, this court first examines its plain language to determine the Legislature's intent behind the statute. *Westpark Owners' Ass'n v. Eighth Judicial Dist. Court*, 123 Nev. 349, 357, 167 P.3d 421, 427 (2007). This court avoids statutory interpretation that "would render words or phrases superfluous." *Flamingo Paradise Gaming, L.L.C. v. Chanos*, 125 Nev. 502, 509, 217 P.3d 546, 551 (2009). If the statute's language is clear and

[6]The City argues that the district court should have valued the parcels separately, instead of a single five-parcel unit, and it was plain error not to apply NRS 37.110. We decline to consider this argument because it is raised for the first time on appeal by both parties, and the City's own expert treated the Property as a whole for valuation purposes during the bench trial. *See Dermody v. City of Reno*, 113 Nev. 207, 210, 931 P.2d 1354, 1357 (1997).

unambiguous, this court will not look beyond the statute. *Westpark*, 123 Nev. at 357, 167 P.3d at 427.

NRS 37.185 states:

> Except as otherwise provided in this section, *in all actions in eminent domain, neither the entity that is taking property nor the owner of the property is liable for the attorney's fees of the other party*. This section does not apply in an inverse condemnation action if the owner of the property that is the subject of the action makes a request for attorney's fees from the other party to the action.

(Emphasis added.) When defining just compensation, NRS 37.120(3) states:

> *In all actions in eminent domain*, the court shall award just compensation to the owner of the property that is being taken. Just compensation . . . . must include . . . reasonable costs and expenses, *except attorney's fees*, incurred by the owner of the property that is the subject of the action.

(Emphasis added.)

We conclude that the broad "all actions in eminent domain" language in NRS 37.185 includes an action for precondemnation damages because precondemnation damages are rooted in eminent domain law. We further conclude that precondemnation damages do not fall within NRS 37.185's inverse condemnation exception because *Buzz Stew*'s holding delineates two independent causes of action. 124 at 230, 181 P.3d at 674 ("to the extent that . . . a taking must occur to recover [precondemnation] damages . . . , that requirement has been eliminated").

Because we conclude that we must uphold the district court's award of precondemnation damages, even though the inverse condemnation cause of action was not ripe, precondemnation damages are also separate from inverse condemnation causes of action for the purpose

of attorney fees. Therefore, we reverse the district court's award of attorney fees because the Landowners' successful claim for precondemnation damages did not fall within NRS 37.185's inverse condemnation attorney fees exception.

The district court did not abuse its discretion in awarding the Landowners' costs

The City argues the district court's award of costs must be reduced because (1) the supporting documentation was either untimely or not provided at all, (2) some of the costs were not available by statute, and (3) the Landowners did not properly itemize and document the requested costs. We disagree.

The determination of costs is within the sound discretion of the district court, and we will not disturb the district court's decision absent an abuse of discretion. *Bergmann v. Boyce,* 109 Nev. 670, 679, 856 P.2d 560, 565-66 (1993). Under NRS 18.020, "[c]osts must be allowed of course to the prevailing party" after entry of a judgment. Even when an award of costs is mandated, "the district court still retains discretion when determining the reasonableness of the individual costs to be awarded." *U.S. Design & Constr. Corp. v. I.B.E.W. Local 357*, 118 Nev. 458, 463, 50 P.3d 170, 173 (2002). These costs must be "actual and reasonable, rather than a reasonable estimate or calculation of such costs." *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1352, 971 P.2d 383, 385-86 (1998) (internal quotations omitted). Determining reasonableness may necessitate detailed documents, such as itemizations, which are only required where the district court cannot determine necessity and reasonableness without such documentation. *See id.* at 1353, 971 P.2d at 386. Further, NRS 18.005(5) provides that a district court may award costs for:

> Reasonable fees of not more than five expert witnesses in an amount of not more than $1,500 for each witness, unless the court allows a larger

> fee after determining that the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee.

The Landowners timely filed their verified memorandum of costs on May 23, 2011, and sought $205,053.03, a large portion for expert witness fees. Affidavits from the law firms and Landowner Representative, Brian Lee, supported the memorandum. The verified memorandum of costs also included detailed spreadsheets with itemized costs and disbursement records attached as exhibits. The City filed its motion to retax costs, and the Landowners' opposition included over 500 pages of additional documentation, including invoices and detailed materials to support the itemized costs.[7] After reviewing these documents, the district court awarded the Landowners costs as a prevailing party in the amount of $109,140.33. The district court found that the Supplemental Cost Clarification could relate back to the Landowners' initial memorandum of costs because the five-day period in NRS 18.110(1) is subject to expansion for "such further time as the court or judge may grant . . . ."

We conclude that the district court acted within its sound discretion in considering the documentation within both the Landowners' memorandum of costs and opposition to the City's motion to retax. The district court deviated from the expert fee ceiling in NRS 18.005(5) because of the complex nature of the case, the extensive history of the Project, and the specialized experts that were needed. The district court retaxed some of the expert costs associated with the inverse condemnation cause of action, which it had dismissed without prejudice. We conclude

[7]The district court referred to this additional documentation as the "Supplemental Cost Clarification."

that the district court did not abuse its discretion when it granted the remaining reasonable and necessarily incurred costs. *See Bobby Berosini*, 114 Nev. at 1352, 971 P.2d at 385-86.

The district court did not err in dismissing the inverse condemnation cause of action when the Landowners suffered no physical or regulatory taking

The Landowners argue that the district court improperly dismissed their inverse condemnation action because it was ripe for judicial review. The Landowners contend that a per se regulatory taking does not require a property owner to seek a variance, and even then, administrative remedies would have been futile. We disagree.

"Whether the government has inversely condemned private property is a question of law that we review de novo." *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 661, 137 P.3d 1110, 1121 (2006). However, "the district court's findings of fact will not be disturbed on appeal if they are supported by substantial evidence." *City of Las Vegas v. Bustos*, 119 Nev. 360, 365, 75 P.3d 351, 354 (2003). In an inverse condemnation action, the property owner seeks compensation for the government's taking of property, either physically or by regulatory means, without payment of just compensation. *See United States v. Clarke*, 445 U.S. 253, 255-57 (1980). Further, inverse condemnation proceedings are constitutionally equivalent to eminent domain actions. *Alper*, 100 Nev. at 391, 685 P.2d at 949.

The Nevada Constitution provides that "[p]rivate property shall not be taken for public use without just compensation having been first made, or secured." Nev. Const. art. 1, § 8(6). To prevail on an inverse condemnation cause of action, the property owner must demonstrate: (1) "an invasion or an appropriation of some valuable property right which the landowner possesses," and (2) such "invasion or appropriation must directly and specially [cause] the landowner . . . injury." *Sproul Homes of*

Nev. v. State ex rel. Dep't of Highways, 96 Nev. 441, 444, 611 P.2d 620, 621-22 (1980).

Per se regulatory takings do not require the landowner to apply for a variance or otherwise exhaust his or her administrative remedies prior to bringing suit. *Hsu v. Cnty. of Clark*, 123 Nev. 625, 635, 173 P.3d 724, 732 (2007); *Sisolak*, 122 Nev. at 664, 137 P.3d at 1123. Although the Landowners argue that the City's actions constituted a per se regulatory taking, we conclude that they do not. A per se regulatory taking can occur when a government regulation requires the owner to suffer a "permanent physical invasion" of the property, however minor. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005); *see Sisolak*, 122 Nev. at 667, 137 P.3d at 1125 (concluding that a per se regulatory taking occurred when airplanes physically invaded the property owner's airspace in accordance with the regulation at issue); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 438 (1982) (per se regulatory taking occurred when state law required landlords to permit cable companies to install cable facilities in apartment buildings).[8]

The Landowners did not suffer a physical invasion or appropriation

The Landowners' inverse condemnation challenge addresses two main actions by the City: (1) the alleged dedication of a 75-foot right of way on the parcels' 5th Street frontage, plus the 50-foot right of way on the parcels' Centennial Parkway frontage; and (2) the decision to build a solid center median that prevents left-turn access along 5th Street.

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[8]A second kind of regulatory taking, not argued by the Landowners, occurs when regulations completely deprive an owner of "'*all* economically beneficial us[e]' of [the] property." *Lingle*, 544 U.S. at 538 (first alteration in original) (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992)).

"[T]he mere planning of a project is insufficient to constitute a taking for which an inverse condemnation action will lie." *Sproul Homes*, 96 Nev. at 443, 611 P.2d at 621 (citing *Selby Realty Co. v. City of San Buenaventura*, 514 P.2d 111, 116 (Cal. 1973)). Therefore, the threshold question in this case is whether the City's actions went beyond planning and actually resulted in a permanent physical invasion or appropriation. If no such invasion occurred, the Landowners do not fall under the per se regulatory taking exception established in *Sisolak* and needed to avail themselves through the planning and development process before filing suit.

Frontage

The City Council amended its Master Plan of Streets and Highways on August 25, 2004 to include plans for a general frontage requirement of 100-150 feet along North 5th Street in order to accommodate six lanes of traffic, a bus lane, pedestrian walkways, and landscaping. On October 19, 2005, the City Council adopted Ordinance 2194, which required the private developer to construct components of the super-arterial roadway as a condition of development. Ordinance 2194 also approved the development applications for the Craig Road commercial development and the Deer Springs way commercial development.

However, unlike the property owners at Craig Road and Deer Springs Way, who submitted development applications, here, the Landowners have not applied for a development permit and have not had their development conditioned on providing rights-of-way to the city. Further, unlike the property owner in *Sisolak*, who suffered a physical invasion when airplanes entered his airspace in accordance with the regulation at issue in that case, here, there is no indication that the City has ever physically entered the Landowners' property consistent with AMP-70-04 or any other regulation related to the Project.

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Only when the City Council has had the opportunity to consider the Landowners' development application and decide the appropriate conditions to place on the property would this court be able to determine the regulations' economic impact on the Landowners' property and whether any taking was appropriate under the exaction doctrine.[9] *See Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837-39 (1987) (government's requirement of easement to Pacific Ocean as condition for issuing building permit lacked an "essential nexus" to an appropriate public purpose); *Dolan v. City of Tigard*, 512 U.S. 374, 394-95 (1994) (government's requirement of land dedication of property along creek for flood control purposes as condition for building permit lacked an "essential nexus" to an appropriate public purpose); *see also Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. ___, ___, 133 S. Ct. 2586, 2594-97, 2599 (2013) (outlining the "unconstitutional conditions" and exaction doctrines when the government grants or denies a land-use permit application).[10]

We conclude that the City's conduct relating to the Project was insufficient to support an inverse condemnation cause of action. Some

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[9]The Landowners argue that the general developmentapplication process is irrelevant because it offers no relief from the alleged taking. However, we conclude that the district court appropriately relied on *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 191 (1985), for the proposition that inverse condemnation cases are "not ripe until a plaintiff avails itself of the local government's development application process by which it might first obtain relief."

[10]Although the Landowners filed a notice of supplemental authorities regarding *Koontz*, we conclude that it does not change our inverse condemnation analysis because the Landowners admittedly have not submitted a development application. *See* 570 U.S. at ___, 133 S. Ct. at 2591.

other action would be necessary, such as a development application and subsequent ordinance conditioning the Landowners' development on the dedication requirements, to support a finding that a per se regulatory taking occurred. Therefore, we conclude the Landowners' suit for the taking of their frontage property is premature, and the district court correctly dismissed their inverse condemnation cause of action because it was not ripe.

Access on North 5th Street

The Landowners also argue that the City deprived them of access to the Property by adopting a right-in/right-out vehicular access restriction, plus a solid median along North 5th Street. Under this restriction, northbound vehicles on North 5th Street cannot make a left turn into the Property. The Landowners admit this restriction is not a physical taking and instead argue it amounts to a regulatory taking that destroyed or substantially impaired their rights of ingress and egress.

The Landowners rely on two cases to support this proposition: *State ex rel. Dep't of Highways v. Linnecke*, 86 Nev. 257, 468 P.2d 8 (1970), and *Schwartz v. State ex rel. Dep't of Transp.*, 111 Nev. 998, 900 P.2d 939 (1995). In both cases, this court made clear that a landowner "abutting a public highway has a special right of easement . . . for access purposes. . . , [and that] right may not be substantially impaired without payment of damages to the affected property owner." *Schwartz*, 111 Nev. at 1003, 900 P.2d at 942. However, neither case is factually similar to the situation here.

In *Linnecke*, the property owners previously had direct access from their land onto a highway, but after the State took part of the land, their only point of ingress and egress required them to travel one and a half miles farther in order to reach the highway. 86 Nev. at 258-59, 468 P.2d at 9. In that case, the district court properly found the action

constituted a substantial impairment of access and required just compensation. *Id.* at 262, 468 P.2d at 11. However, this court also made clear, "[i]f [the property owner] has free and convenient access to his property and his means of egress and ingress are not substantially interfered with, he has no cause for complaint." *Id.* at 260, 468 P.2d at 10. In *Schwartz,* the property owners' direct access to the highway was precluded, and the only other point of ingress and egress was through a frontage road which was 13 feet higher than the highway. 111 Nev. at 1000, 900 P.2d at 940. The district court refused to allow testimony regarding the "before and after" values of the land, which this court determined was reversible error. *Id.* at 1002-03, 900 P.2d at 942.

The Landowners failed to show a substantial impairment of access to a public highway. Whereas in *Schwartz* and *Linnecke,* the property owners were physically blocked from reaching the public highway, the Landowners here still have free and convenient physical access to southbound North 5th Street even after the right-in/right-out and solid median restrictions. Though less than ideal for a commercial developer, we conclude that the access restrictions the City imposed are simply minor impairments compared to the mile-and-a-half detour in *Linnecke* or the 13-foot grade in *Schwartz.* Therefore, we conclude that no regulatory taking occurred. Although the parties argue extensively over the variance procedures that may or may not be available for a solid median and potential futility issues, we conclude that these arguments lack merit given that the access restrictions do not amount to a substantial impairment on the Landowners' rights of ingress and egress.

Since the district court dismissed their claims without prejudice, the Landowners are free to renew their claims once they have filed a development application with the City and fully realized the limitations placed on the Property by AMP-70-04. However, since the

Landowners failed to avail themselves to the development application process at this point and do not fall under the *Sisolak* exception, we conclude the district court did not err in dismissing their inverse condemnation action.[11]

The district court erred in its calculation of prejudgment interest

On cross-appeal, the Landowners argue that the district court erred in calculating their prejudgment interest award. We agree.

We review de novo the district court's determination of the point at which prejudgment interest begins to accrue. *State Drywall, Inc. v. Rhodes Design & Dev.*, 122 Nev. 111, 115-16, 127 P.3d 1082, 1085 (2006). Rather than using the date upon which the City's oppressive and unreasonable behavior began, the district court used the date of service of the summons and complaint on the City pursuant to the general interest rule under NRS 17.130(2). NRS 17.130(2), which the district court relied upon, provides that "[w]hen no rate of interest is provided by contract *or otherwise by law*, or specified in the judgment, the judgment draws interest from the time of service of the summons and complaint until satisfied" (emphasis added).

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[11]In light of our conclusion that that substantial evidence supported the district court's decisions relating to the precondemnation damages and inverse condemnation action, we also conclude that the district court did not err in declining to dismiss both claims by summary judgment prior to trial. Regarding the precondemnation damages action, genuine issues of material fact existed as to whether the City's expression of intent was to condemn, whether it had gone beyond planning and into the acquiring stage, and whether condemnation harmed the Landowners. As to the inverse condemnation action, genuine issues of material fact existed as to the impact of AMP-70-04, the City's subsequent actions, and whether the City's conduct may have constituted a per se regulatory taking.

The Nevada Constitution defines just compensation as "that sum of money, necessary to place the property owner back in the same position, monetarily, without any governmental offsets, as if the property had never been taken." Nev. Const. art. 1, § 22(4). "Just compensation shall include, but is not limited to, compounded interest and all reasonable costs and expenses actually incurred." *Id.* This court has interpreted the term "just compensation" to include "interest from the date of taking." *City of Sparks v. Armstrong*, 103 Nev. 619, 623, 748 P.2d 7, 9 (1987). Further, NRS 37.175(4), which applies specifically to eminent domain cases, requires the district court to consider three factors in its determination of prejudgment interest: (1) the date on which the computation of interest will commence, (2) the rate of interest to be used to compute the award of interest, and (3) whether the interest will be compounded annually.

Since Nevada treats precondemnation damages actions as a type of eminent domain case, we conclude that the district court erred in using the general interest rule from NRS 17.130(2) instead of the more specific eminent domain rule from NRS 37.175(4). NRS 17.130(2) applies as a default rule in the absence of any other statute specifying the date from which prejudgment interest should run. In this case, however, NRS 37.175(4) specifically applies to eminent domain cases, which include precondemnation damages actions. Therefore, NRS 37.175(4) controls, and we conclude that NRS 37.175 directs the district court to calculate the interest from the date of the taking. In precondemnation damages cases, the appropriate date to use would be when the injury resulting from the oppressive and unreasonable conduct first begins. As the district court erred in its application of the law, we reverse and remand this case to district court in order to properly determine the date at which

prejudgment interest starts, using the first date of compensable injury resulting from the City's oppressive and unreasonable conduct.

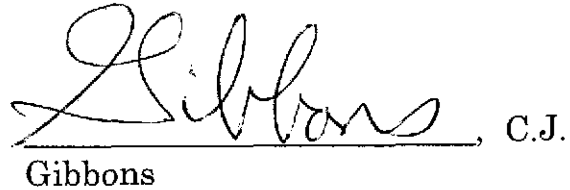
The district court properly dismissed the Landowners' request to amend the original judgment to include attorney fees, costs, and interest

The Landowners argue that the district court erred in refusing to incorporate the fees, costs, and prejudgment interest award into a single amended judgment pending the appeal in order to ensure post-judgment interest properly accrues on the entire award. We disagree.

This court reviews the scope of the district court's jurisdiction de novo. *Argentena Consol. Mining Co. v. Jolley Urga Wirth Woodbury & Standish*, 125 Nev. 527, 531, 216 P.3d 779, 782 (2009). "[A] timely notice of appeal divests the district court of jurisdiction to act and vests jurisdiction in this court." *Mack-Manley v. Manley*, 122 Nev. 849, 855, 138 P.3d 525, 529 (2006) (internal quotation marks omitted). However, even when divested of jurisdiction with respect to issues in a pending appeal, "the district court retains jurisdiction to enter orders on matters that are collateral to and independent from the appealed order." *Id.* at 855, 138 P.3d at 529-30.

Because the issues of attorney fees, costs, and interest are squarely before this court in the appeal and cross-appeal, they are not collateral. *Id.* at 855, 138 P.3d at 530 (concluding the district court had no authority to rule on a post-judgment motion to modify a child custody arrangement while that issue was "squarely before this court" on appeal). Therefore, we conclude the district court properly declined to amend the original judgment to include attorney fees, costs, and interest.

Accordingly, we ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.[12]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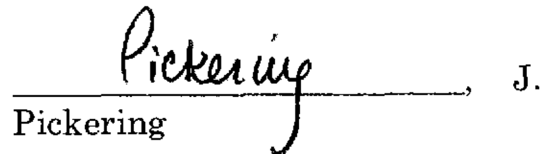
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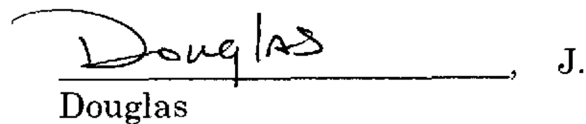
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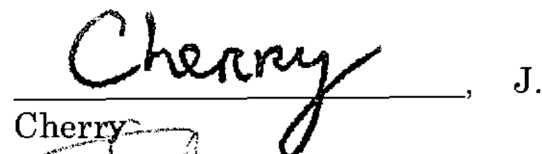
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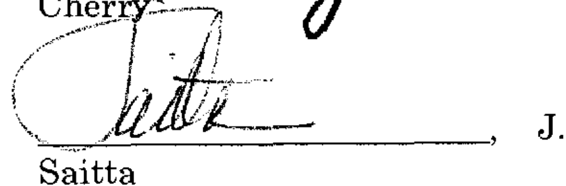
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cc: Hon. Mark R. Denton, District Judge
Paul H. Schofield, Settlement Judge
Marquis Aurbach Coffing
Kemp, Jones & Coulthard, LLP
John Peter Lee Ltd.
Eighth District Court Clerk

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[12]We have considered the parties' remaining arguments and conclude they are without merit.