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Memorandum

To : All Members Assembly Judiciary Committee

- Bernie Anderson, Chairman
- John Oceguera
- Barbara Buckley
- Jerry Claborn
- Marcus Conklin
- William Horne
- Harry Mortenson
- Genie Ohrenschall
- Sharon Angle
- David Brown
- John Carpenter
- Jason Geddes
- Don Gustavson
- Garn Mabey
- Rod Sherer

From: J.J. Jackson, on behalf of the Law Offices of Kermitt Waters, and Jim Leavitt, Esq.

Re : AB 397—Regarding changes concerning proceedings in actions for eminent domain

Date : March 19, 2003

Dear Chairman Anderson and Judiciary Committee Members:

Attached hereto, please find background materials regarding AB 397, prepared by Jim Leavitt, Esq., of the Law Offices of Kermitt L. Waters. It is our understanding that this measure is currently scheduled for hearing on March 25th, 2003 before the Committee. We are providing this information to you in advance of the hearing to assist you in understanding the purpose of this bill, and the reasoning for the requested change in statutes and the Nevada Rules of Civil Procedure.

AB 397 would make a change to Nevada statutes and civil procedure ***only*** in cases where the government is seeking to take the property of a private party through the exercise of eminent domain. It would modify the applicability of offers of judgment only in those type of cases, where there is a dispute as to the value of the property to be taken, between the government agency seeking to acquire the property through the exercise of eminent domain and the property owner. Please note that this change would have "dual applicability," in that it would apply to both the property owner and the agency seeking to take the property.

We look forward to presenting our testimony next week before the Committee, and encourage and invite the Members to contact me or Mr. Leavitt (702-733-8877) if you have any questions regarding AB 397 or the attached packet, or desire further information.

Subj: Re : AB 397
Date: 3/24/2003 7:21:09 PM Eastern Standard Time
From: "James Jackson" <Jjackson@thorndal.com>
To: <banderson@asm.state.nv.us>, <bbuckley@asm.state.nv.us>, <dbrown@asm.state.nv.us>, <dgustavson@asm.state.nv.us>, <Gmabey@asm.state.nv.us>, <Gohrenschall@asm.state.nv.us>, <hmortenson@asm.state.nv.us>, <Jcarpenter@asm.state.nv.us>, <jclaborn@asm.state.nv.us>, <Jgeddes@asm.state.nv.us>, <Joceguera@asm.state.nv.us>, <mconklin@asm.state.nv.us>, <Rsherer@asm.state.nv.us>, <sangle@asm.state.nv.us>, <Whorne@asm.state.nv.us>
Sent from the Internet (Details)

Mr. Chairman and Committee Members:

To clarify, it is the intention of the requestors of this bill that :

(a) The Offer of Judgement provision covered in Section 2, lines 7-11, would apply to both government agencies and entities seeking to acquire property through the exercise of eminent domain, and the property owner(s); and,

(b) That NRS 37.190 not be repealed if this measure is approved, such that the prevailing party at trial would still be able to recover costs as allowed under this statute, whether that prevailing party is the property owner(s) or the agency or entity seeking to take the property by eminent domain.

I hope that clarifies any concerns that have been expressed by others to the bill. We look forward to presenting testimony tomorrow morning.

Sincerely,

James Jackson
Thorndal, Armstrong, Delk,
Balkenbush & Eisinger
1100 E. Bridger Avenue
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(702) 366-0622
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SUMMARY OF REQUESTED CHANGES

Assembly Bill No. 397—Assemblymen Horne, Conklin, Sherer, Leslie, Chowning, Andonov, Arberry, Atkinson, Beers, Buckley, Carpenter, Christensen, Claborn, Collins, Geddes, Gibbons, Giunchigliani, Goicoechea, Goldwater, Grady, Griffin, Hardy, Hettrick, Koivisto, Mabey, Manendo, McClain, McCleary, Mortenson, Oceguera, Parks, Perkins, Pierce and Williams

March 17, 2003

Joint Sponsors: Senators Neal, Titus, Wiener, Cegavske, O''Connell, Carlton, Coffin, Mathews, McGinness, Nolan and Tiffany

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Referred to Committee on Judiciary

SUMMARY——Makes various changes concerning proceedings in actions concerning eminent domain. (BDR 3 -1082)

FISCAL NOTE: Effect on Local Government: No.

Effect on the State: No.

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EXPLANATION — Matter in ***bolded italics*** is new; matter between brackets ~~[omitted material]~~ is material to be omitted.

AN ACT relating to eminent domain; prohibiting penalties from being imposed upon a person for rejecting an offer of judgment and proceeding to trial in actions concerning eminent domain regardless of the outcome of the trial; repealing the provision limiting the allowance and apportionment of costs in proceedings concerning eminent domain; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. NRS 37.200 is hereby amended to read as follows:

37.200 ***1.*** Except as otherwise provided in this chapter, the provisions of NRS, Nevada Rules of Civil Procedure and Nevada Rules of Appellate Procedure relative to civil actions, new trials and appeals shall be applicable to and constitute the rules of practice in the proceedings in this chapter.

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2. Notwithstanding any other provision of law, no penalty may be imposed upon a person for rejecting an offer of judgment and proceeding to trial, regardless of the outcome of the trial. As used in this subsection, ""penalty"" includes, without limitation, any monetary damages, attorney''s fees and court costs.

Sec. 2. NRS 37.190 is hereby repealed.

Sec. 3. 1. The amendatory provisions of section 1 of this act apply to any action pending on or after October 1, 2003, whether or not the action was commenced before, on or after October 1, 2003.

2. The amendatory provisions of section 1 of this act do not apply to any action for which a final judgment has been entered and for which no further appeal may be filed.

TEXT OF REPEALED SECTION

37.190 Costs: Allowance and apportionment. Costs may be allowed or not, and if allowed may include a maximum of $350 for appraisal reports used at the trial and $150 for fees of expert witnesses who testify at the trial, and may be apportioned between the parties on the same or adverse sides, in the discretion of the court.

GENERAL INTRODUCTION

1. GENERAL INTRODUCTION

"Eminent domain" is a term used to describe special proceedings brought by the government ("the condemnor") against land or interests in land owned by a private landowner ("the condemnee"). To exercise the power of eminent domain is to "condemn" the property. The term "condemnation" is used interchangeably with the term "eminent domain".

The Fifth Amendment of the United States Constitution and Article I, Section 8, of the Nevada Constitution provide that private property shall not be taken for a public use (by a condemnor) without just compensation having been paid to the landowner. The Nevada Supreme Court has staunchly supported these constitutional mandates and has succinctly defined just compensation as that amount of compensation which is "real, substantial, full and ample" and which puts the landowner in "as good a position pecuniarily" as he would have been had his property not been taken. *Stagecoach Util., Inc., v. Stagecoach Gen. Imp. Dist.*, 100 Nev. 363, 364 (1986); *Clark County v. Alper,* 100 Nev. 382, 392 (1984).

In Nevada there are two sources of law governing condemnation cases which are tried in state courts: Nevada statutes (primarily NRS Chapter 37), and the decisional law of the Nevada and United States Supreme Courts.

Presently, the Nevada Supreme Court has become increasingly willing to defer to the Nevada legislature indicating that it is the function of the legislature to define the law in the area of eminent domain.

Therefore, it is of paramount importance that the existing statutory laws be strengthened to further the fair and equitable treatment of all landowners in Nevada condemnation cases. In each instance, the legislation proposed below will further support landowner rights and become consistent with both the Uniform Code of Eminent Domain and the long-standing laws of neighboring states.

NRS 37.190

COSTS IN AN EMINENT DOMAIN ACTION

A. Summary

Currently, the prevailing party in a civil action may request reimbursement of the costs of litigation under NRS Chapter 18. NRS Chapter 18 lists the type of reimbursable costs and allows reimbursement for expert fees up to $1,500.00 per expert, unless the court determines a larger fee is necessary under the circumstances of the case. NRS 37.190, however, limits reimbursement of Nevada landowners' costs of litigation to $350.00 for appraisal reports and $150.00 for expert witnesses who testify at trial. This means that while all other civil litigants may recover litigation costs, including $1,500.00 or more per expert witness, Nevada landowners involved in condemnation proceedings can only recover $350.00 for each appraisal report and $150.00 per expert witness. The amendment to NRS 37.190 proposes to allow Nevada landowners in eminent domain actions to recover costs where they are the prevailing party as allowed in all other civil actions.

B. Requested Bill Draft

NRS 37.190 currently provides as follows:

Costs may be allowed or not, and if allowed may include a maximum of $350 for appraisal reports used at the trial and $150 for fees of expert witnesses who testify at the trial, and may be apportioned between the parties on the same or adverse sides, in the discretion of the court.

The current amendment repeals NRS 37.190 so that all costs in eminent domain actions are governed by NRS Chapter 18.

C. Background

In the 1985 case of *Dep't of Highways v. Alper*, 101 Nev. 493 (1985), the Nevada Supreme Court held that a witness fee in a condemnation action may be limited to the $150.00 as provided in NRS 37.190.

In recent years, however, nearly all district court judges confronting the costs issue under NRS 37.190 have recognized the unfairness of the statute and, instead, applied the costs rules under NRS Chapter 18 in condemnation actions. At least three Judges in the Eighth Judicial District Court, Sally Loehrer, Michael Cherry, and Mark Denton have allowed reimbursable costs to landowners in eminent domain proceedings pursuant to the provisions of NRS 37.190. *See County of Clark v. Pyle, et al.*, case no. A371683; *County of Clark v. Snyder*, case no. A370637; *County of Clark v. Carson, et al.*, case no. A413809.

The basis for these District Court rulings is a landowner's constitutional rights to

payment of just compensation and equal protection under the laws. In fact, Judge Denton in his written Order cited to the "general policy of strict construction of eminent domain statutes in favor of landowner[s]."

These courts have recognized that limiting recovery of a Nevada landowner's costs to $350.00 for appraisal reports and $150.00 for fees of expert witnesses is grossly unfair because 1) all other civil litigants may recover expert witness fees and costs in excess of this amount; and 2) expert appraisal reports and testimony can cost anywhere from $10,000.00 to $140,000.00 or more in a condemnation action.

D. Policy and Legal Support for the Proposed Amendment

NRS 37.190, as written, may be applied to violate a Nevada landowner's rights under the Fifth Amendment to the United States Constitution and Article 1, section 8, of the Nevada State Constitution which both provide that just compensation must be paid for the taking of private property. A landowner cannot retain an appraiser to prepare an appraisal report and testify as an expert at trial for $500.00. A landowner also cannot find a professional engineer, an expert developer, or an economist to testify at trial for $150.00. Therefore, if expert appraisal fees are limited to $500.00 and all other expert fees are limited to $150.00 in condemnation actions, Nevada landowners will be required to pay their expert fees out of their just compensation award - even though they are the prevailing party - which would give them less than just compensation for the taking of their property.

Furthermore, limiting landowner's expert fees in condemnation actions to only $500.00 and $150.00 violates the equal protection clause of the United States Constitution. The Fourteenth Amendment of the United States Constitution provides that no State shall deny to any person within it's jurisdiction the equal protection of the laws. *U.S. Const. Amend. XIV*. The Fourteenth Amendment protects citizens from laws that discriminate on the basis of property ownership, which is a fundamental right. *Employment Div. Dept. Of Human Resources of Oregon v. Smith,* 494 U.S. 872, 903 (1990). State law classifications affecting this fundamental right to property are given the most exacting scrutiny. *Clark v. Jetter*, 486 U.S. 456, 461 (1988). This exacting scrutiny requires that the state law classification be "necessary to serve a compelling state interest and [is] narrowly drawn to achieve that end." *Madsen v. Women Health Center*, 512 U.S. 753, 766 (1994).

Limiting expert appraisal fees to $500.00 and other expert fees to $150.00 only in condemnation actions is a state law classification on the basis of property ownership and, therefore, it must pass the most exacting scrutiny test adopted by the United States Supreme Court. There is clearly no compelling state interest to deny landowners in condemnation cases their costs of expert fees when these fees were only necessary as a result of the government's forcible taking of property.

NRS 37.200

OFFERS OF JUDGMENT SHOULD NOT APPLY IN CONDEMNATION ACTIONS

A. Summary

Under NRCP 68 and NRS 17.115, a party may make an "offer of judgment" (basically a formal offer to settle the case for a specific amount of money) to an opposing party not later than 10 days before trial. If the offer is rejected, and the trial results in the rejecting party not recovering more than the offer of judgment, the rejecting party may be required to pay the offering party's costs, expert witness fees and attorney's fees.

Generally, the purpose of an offer of judgment is to promote the settlement of disputes prior to litigation. However, this judicial tool should not be applicable in eminent domain cases because it directly violates both the United States and Nevada Constitutions by deterring landowners from seeking just compensation at trial when their property is targeted for acquisition by the government and taken against their will.

Currently, the offer of judgment rule routinely forces landowners to settle their claims for far less than "just compensation" for fear that if their claims at trial garner less than the offer of judgment they could be responsible for paying the government's attorneys fees and costs of trial. These fees and costs are often deducted from any trial award of just compensation the landowner receives and threaten to force the landowner into indebtedness if said fees and costs exceed the trial award. Clearly, this proposition violates both the United States and Nevada Constitutions because it does not leave the landowner in "as good a position pecuniarily" as she would have been had her property not been taken. *Stagecoach Util., Inc., v. Stagecoach Gen. Imp. Dist.,* 100 Nev. 363, 364 (1986); *Clark County v. Alper,* 100 Nev. 382, 392 (1984).

The legislation proposed below will enforce both the United States and Nevada Constitutions and protect a landowner's constitutional right to receive just compensation for the value of her taken property.

B. Requested Bill Draft

Section 1. NRS 37.200 is hereby amended to read as follows:

37.200 ***1.*** Except as otherwise provided in this chapter, the provisions of NRS, Nevada Rules of Civil Procedure and Nevada Rules of Appellate Procedure relative to civil actions, new trials and appeals shall be applicable to and constitute the rules of practice in the proceedings in this chapter.

2. Notwithstanding any other provision of law, no penalty may be imposed upon a person for rejecting an offer of judgment and proceeding to trial, regardless of the outcome of the trial. As used in this subsection, ""penalty"" includes, without limitation, any monetary damages, attorney"s fees and court costs.

Sec. 2. NRS 37.190 is hereby repealed.

Sec. 3. ***1. The amendatory provisions of section 1 of this act apply to any action pending on or after October 1, 2003, whether or not the action was commenced before, on or after October 1, 2003.***
2. The amendatory provisions of section 1 of this act do not apply to any action for which a final judgment has been entered and for which no further appeal may be filed.

C. Background

On numerous occasions the government has taken a Nevada landowner's property and then forced the landowner to settle for less than just compensation by making an offer of judgment. On at least two other occasions where the jury verdict did not exceed the government's offer of judgment, the government attempted to force Nevada landowners to pay the government's attorney fees and costs which were well in excess of the entire just compensation award the landowners received at trial. This meant that the landowners received nothing for the taking of their property. Instead, they were forced to pay money from their pockets to the government.

In one particular instance the City of North Las Vegas took a parcel of property located at the southeast corner of Simmons Street and Red Coach Avenue from Donna Aimee Tucker. Ms. Tucker is not a wealthy individual; she has worked at Smiths Food King for fifteen years. The City offered Ms. Tucker $12,600.00 for the taking and damaging of her property. Ms. Tucker retained an MAI appraisal report which stated that she was entitled to $219,494.00 as just compensation for the taking and damaging of her property. As Ms. Tucker proceeded to trial to enforce her right to be justly compensated for the taking of her property the City made her an offer of judgment of $34,600.00. This meant that if Ms. Tucker recovered less than the $34,600.00 offer, she would be forced to pay the City's attorney fees and costs. The City had retained a large private firm in Las Vegas to handle the case and, therefore, Ms. Tucker was warned that the

City's attorney fees and costs could exceed $40,000.00. Thereafter, Ms. Tucker settled her case prior to trial for much less than her appraised property value because she feared that if she lost her case she would become a debtor because her limited income would not allow her to immediately pay off any outstanding balance of attorney fees and costs.

In another condemnation case Clark County took property from a small homebuilder, Monument Pointe, Ltd. The County originally offered Monument Pointe $8,000.00 for the taking and damaging of its property. Monument Pointe retained two different MAI appraisal reports which stated that it was entitled to more than $1,500,000.00 for the taking and damaging of its property and Monument Pointe's accounting records showed that its actual monetary loss due to the taking was in excess of $3,500,000.00. Thereafter, the County made Monument an offer of judgment of $400,000.00 and the case proceeded to trial. Thereafter, due to judicial error at trial, the jury returned a verdict of only $104,600.00 in favor of Monument, which was less than the County's $400,000.00 offer of judgment. The county the requested that Monument be held liable for attorney's fees for Clark County's outside counsel which totaled $420,944.00 and for costs accrued by that firm in the amount of $180,303.66.

D. Policy and Legal Support for the Proposed Amendment

Courts across the country have considered the applicability of offer of judgment provisions (similar to NRCP 68 and NRS 17.115) to condemnation trials and have determined that statutes subjecting landowners to liability for the government's attorney fees and costs is unconstitutional. *Southwestern Land Co. v. Hickory Jackson Ditch Co.*, 33 P.275 (Colo. 1983); *City of Anchorage v. Scavenius,* 539 P.2d 1169 (Alaska. 1975); *City of Westminister v. Hart*, 928 P.2d 758 (Colo. App. 1996), *cert. denied November 18, 1996.*

These courts have properly recognized that imposing the Government's costs of litigation upon a landowner violates the landowner's constitutional rights by reducing the landowner's jury verdict to less that just compensation - leaving him in less of a position pecuniarily than he would have been had his property not been taken. Support for this position is also found in the leading treatise on eminent domain. 1A JULIUS L. SACHMAN, NICHOLS' THE LAW OF EMINENT DOMAIN §4.109 (Rev. 3rd Ed. 1996).

A sampling of multi-state court opinions upholding a landowner's constitutional rights to obtain and retain just compensation is as follows:

Colorado courts found that a state statute allowing a defendant to recover its fees and costs accrued in a civil action from a plaintiff who recovers less than an offer of judgment could not apply to a constitutional condemnation proceeding. *City of Westminster v. Jefferson Center* Assoc., 958 P.2d 945 (Colo. 1997); *City of Westminster v. Hart*, 928 P.2d 758 (Colo. 1996). The Colorado Court of Appeals detailed a distinct difference between a constitutional condemnation action and a

separate civil proceeding reasoning that levying such a penalty against a landowner would substantially infringe upon a landowner's constitutional right to just compensation by subtracting these expenses against a jury award - thus leaving a landowner with less than full just compensation. *Id.*

Alaska courts have concurred and declined to infringe upon a landowner's entitlement to just compensation. *City of Anchorage v. Scavenius*, 539 P.2d 1169 (Alaska 1975). In *Scavenius*, the Alaska Supreme Court held that the rule pertaining to offers of judgment is inapplicable to condemnation actions and thus did not justify an award of costs and attorney's fees to the condemnor even though the judgment finally obtained by the property owner was less favorable than the offer. *Id.*

California courts have ruled in a similar fashion. The California District Court of appeals in *Consumer Holding Company v. County of Los Angeles,* 208 Cal.App.2d 419, 25 Cal.Rptr. 215 (Cal. Ct. App. 1962), also found that if condemnor expenses were subtracted from a landowner verdict after trial the compensation left for the landowner - if any - would not be just and his or her constitutional rights would be violated.

Likewise, supreme courts from several other states have also supported the rights of the landowner to retain his or her full and just compensation in the wake of the condemnor demanding to be reimbursed for litigation expenses when a landowner is awarded less than an offer of judgment. *See Arkansas State Hwy. Comm. v. Union Planter National Bank*, 333 S.W.2d 904 (Ark. 1960); *Kitsap County v. Melker*, 52 Wash. 49 (Wash. 1909).

In fact, some states so zealously guard a landowner's constitutional right to full and just compensation that they require that the landowner's attorney's fees and costs be paid by the government prior to trial - regardless of the outcome at trial. *Jacksonville Expressway Auth. v. Henry G. Du Pree Co.*,108 So. 2d 289 (Fla. 1959).

The rationale for the proposed Amendment is clear, condemnation actions involve a *constitutional right* to just compensation for land taken while other civil cases do not. Also, a defendant in an ordinary civil action is usually sued for something he has done or failed to do whereas, a defendant in a condemnation action is sued solely because he owns available land. 1A JULIUS L. SACHMAN, NICHOL'S, THE LAW OF EMINENT DOMAIN Sec. 4.109, 4-164 (Rev. 3rd Ed. 1996).

As detailed, *supra*, courts have been quick to acknowledge these differences so as not to set a precedent for ignoring offers of judgment in other civil cases while protecting a landowner's constitutional right to full just compensation by declining to levy a condemnor's fees and costs against a landowner whose verdict was less than the condemnor's offer of judgment. A closer look at the *City of Westminster v. Hart,* 928 P.2d 758 (Colo. Ct. App. 1996) *rehearing denied* (May 2, 1996), *cert. denied* (Nov. 18, 1996) illustrates this distinction made by the Colorado Court of Appeals when it held that offers of judgment were not applicable in condemnation actions because they

resulted in the landowner receiving less than just compensation for the taking of his property in violation of the constitutional guarantee of just compensation.

In *Westminster,* the City took property from a landowner and then made an offer of settlement pursuant to Colorado statute section 13-17-202(1)(a)(ii), in the amount of $35,000.00. *Id.*, at 759. Section 13-17-202(1)(a)(ii) provides that in any civil action in which a defendant makes an offer of settlement that is rejected by the plaintiff and the plaintiff does not recover a final judgment in excess of the settlement offered, the defendant shall be awarded the actual expenses accrued after the offer of settlement was made. *Id.*

Ultimately just compensation was less than the offer of settlement and the City moved for costs. The lower court rejected the City's request holding that **the provision was not applicable in an eminent domain action in which the constitutional power to take private property was exercised**. *Id.* The City appealed.

The appellate court rejected the City's argument that 13-17-202(1)(a)(ii) applied to all civil proceedings. It held that requiring the landowner to pay the City's expenses incurred under the statute would violate the landowner's constitutional right to payment of just compensation. *Id.*, at 760. The Court further stated that to hold otherwise would result in the landowner receiving less compensation than that awarded which would violate the Colorado constitution. *Id.*

Allowing offers of judgment in condemnation proceedings not only infringes upon Nevada landowners' constitutional rights by allowing less than just compensation, it also serves to chill the constitutional rights of Nevada landowners to pursue future claims for just compensation for their taken property in the courts for fear of losing more than just their property. A fear of substantial indebtedness has proven effective to coerce them to accept a tendered amount that only the government determines is just compensation. *City of Anchorage v. Scavenius*, 539 P.2d 1169 (Alaska 1975).