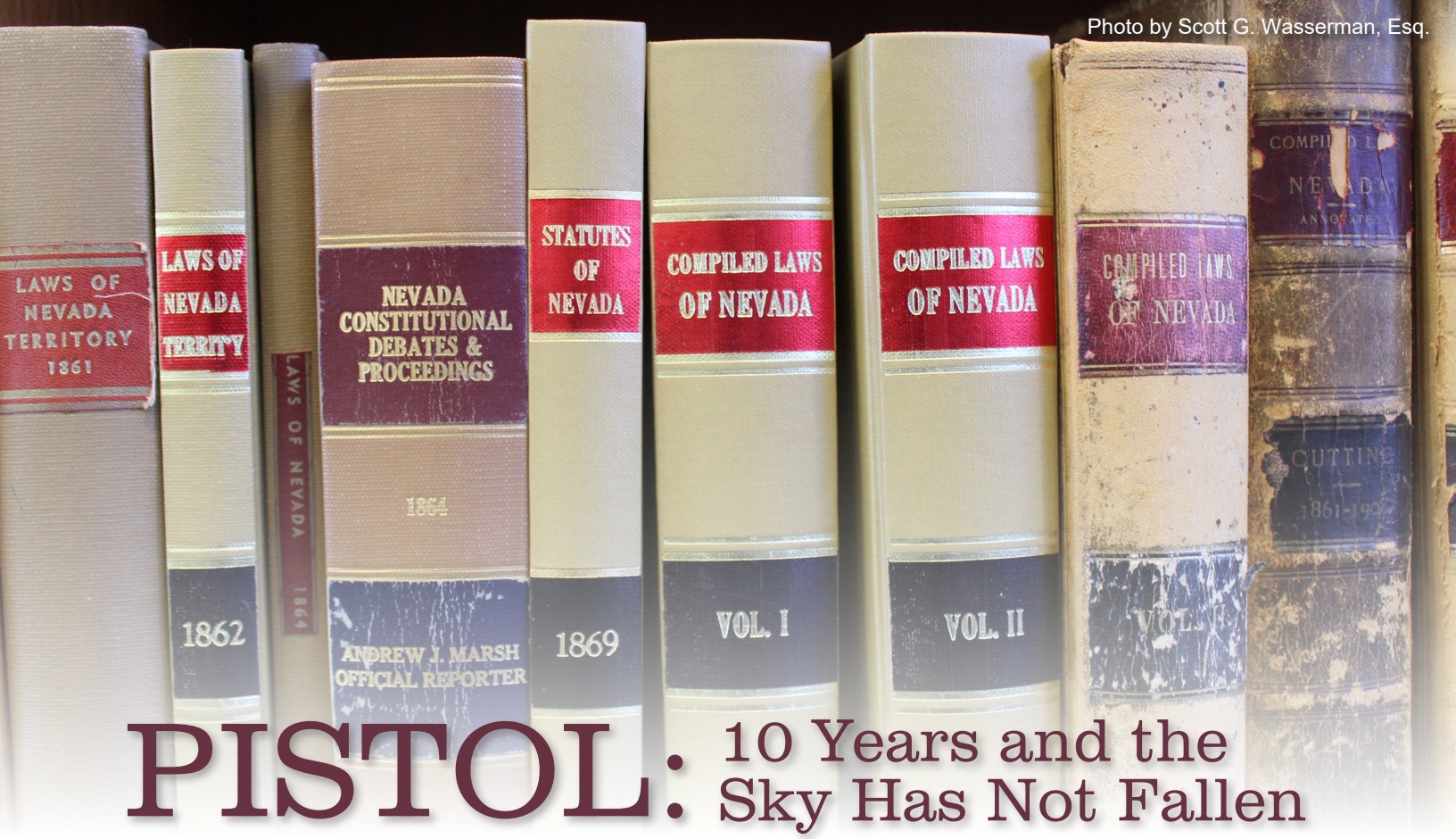

Photo by Scott G. Wasserman, Esq.

PISTOL: 10 Years and the Sky Has Not Fallen

BY KERMITT L. WATERS, ESQ., JAMES JACK LEAVITT, ESQ., MICHAEL A. SCHNEIDER, ESQ. AND AUTUMN L. WATERS, ESQ.

A ballot initiative to amend the Nevada Constitution is not an endeavor for the faint of heart. However, in 2006, People's Initiative to Stop the Taking of Our Land (PISTOL) did just that: drafted a ballot initiative styled the Nevada Property Owners' Bill of Rights and commenced the process. Challenges by disclosed and undisclosed governmental entities and their supporters mounted, and eventually there was a published opinion from the Nevada Supreme Court.[1]

Although the Supreme Court struck several provisions from the initiative, the remaining provisions now found in Article 1, section 22 of the Nevada Constitution proceeded to the ballot. From there, in two successive general elections (2006 and 2008), Nevada voters overwhelmingly adopted the initiative. The Property Owners' Bill of Rights, also commonly known as PISTOL, has now been the law of Nevada for nearly 10 years, and despite the doomsday scenarios voiced by entities that opposed it, the sky has not fallen.

It is impossible to fully understand exactly how PISTOL changed the legal landscape of eminent domain in Nevada, or exactly what actions by the government it has prevented, but to understand its efficacy, it is important to recognize what it changed. Riding on the public interest and disgust stemming from the U.S. Supreme Court decision of *Kelo v. City of New London*, 545 U.S. 469 (2005), in which it was determined that it is a public use for a local government, in the furtherance of an economic development plan, to take a citizen's home and give the land to a private corporation (Pfizer in this instance), the seeds for PISTOL were sown. However, it must be noted that Nevada had its own *Kelo*-type decision years before: *City of Las Vegas Downtown Redevelopment Agency v. Pappas*.[2] In *Pappas*, the Nevada Supreme Court held it was a public use (blight elimination/redevelopment) to use the power of eminent domain to take private property from an individual and use it in furtherance of a public-private development (Fremont Street Experience). Ultimately, it was taking private property from Pappas, a widow, and giving it to private interests. This was the foundation of PISTOL.

In light of the *Pappas* and *Kelo* decisions, the sea change that PISTOL brought about was that, in Nevada, "public use," which is the foundational requirement for the exercise of eminent domain, "shall not include the direct or indirect transfer of any interest in property taken in an eminent domain proceeding from one private party to another private party" and that "in all eminent domain actions, the government shall have the burden to prove public use." Nev. Const. Art. 1, § 22(1). Further, a property owner shall be entitled, at the property owner's election, to a "separate and distinct" jury trial "as to whether a taking is for a public use." *Id.* § 22(2). Presumably under PISTOL, if a taking is questionably based on a public use, this information will be ferreted out in the litigation, and the government will be forced to prove the taking is for a public use

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before a jury, who will ultimately decide the issue. As most takings are for actual public works projects such as roadways, flood control and other similar public facilities, use of this provision regarding jury trials has been rare, if used at all, since the adoption of PISTOL. However, the realization that any questionable public use could and would be challenged before a jury, along with the commandment that public use "shall not" include the direct or indirect transfer of property taken in an eminent domain action from one private party to another, has led several jurisdictions to end acquisitions for redevelopment. (In fact, some government entities largely defunded redevelopment programs/departments after PISTOL.) The questionable *Pappas*- and *Kelo*-type takings have not occurred since 2008. Clearly, the sky has not fallen. In a true testament to the market economy, private redevelopment has still succeeded and will continue to succeed, as seen in downtown Las Vegas.

In the nearly 10 years since its adoption, the Nevada Supreme Court has weighed in on a few of PISTOL's provisions, including:

Just Compensation and Compound Interest

In the precondemnation damages case of *City of N. Las Vegas v. 5th & Centennial*,[3] the Nevada Supreme Court, cited to Nev. Const. Art. 1, § 22(4) to conclude that "just compensation shall be defined 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. Just compensation shall include, but is not limited to, compounded interest and all reasonable costs and expenses actually incurred." In *5th & Centennial*, the court applied this definition to determine the commencement of the calculation for the interest award to the owner.

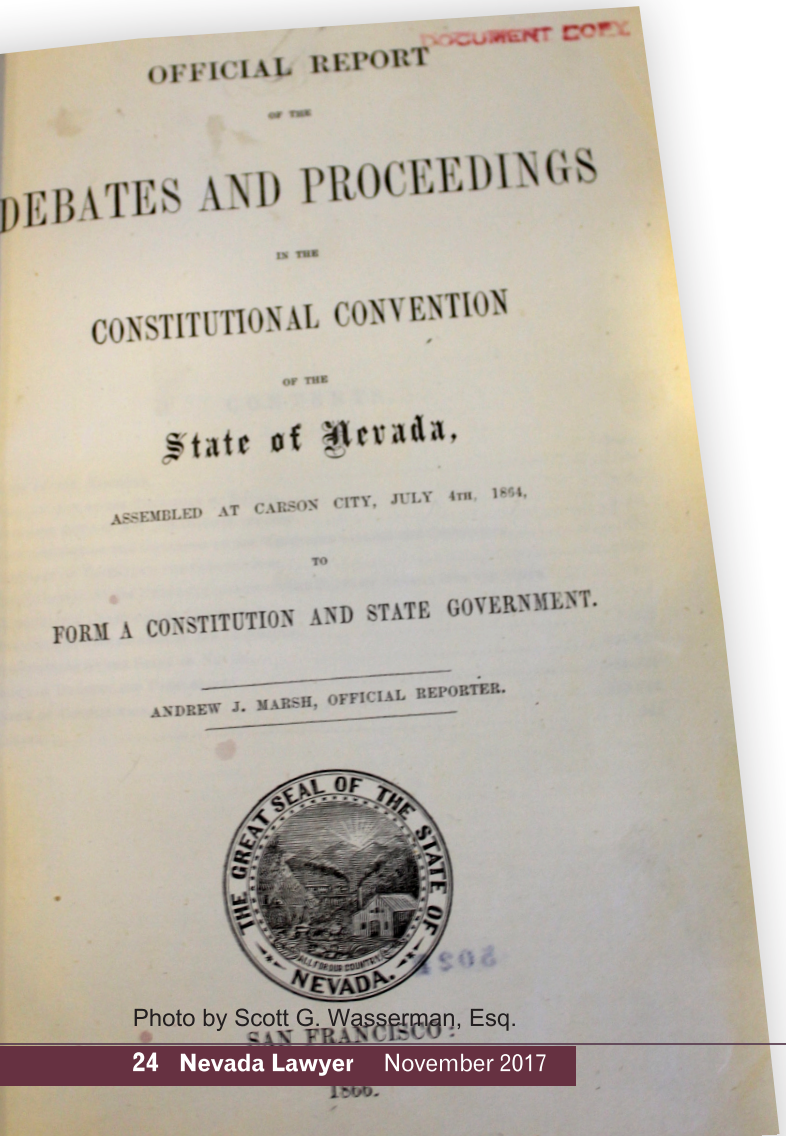

Photo by Scott G. Wasserman, Esq.

Reversion Back in Five Years

In a 2015 case known as *Ad America*,[4] the owner of developed and leased property claimed that the pre-condemnation actions by the Nevada Department of Transportation (NDOT), in conjunction with the City of Las Vegas, in developing the billion-dollar Project Neon amounted to a taking of the owner's property as of 2007. In analyzing what the Nevada Supreme Court labeled a "nonregulatory analysis" for certain potential takings claims, the court analyzed the PISTOL provision, Nev. Const., Art. 1, § 22(6), requiring that "property taken in eminent domain shall automatically revert back to the original property owner upon repayment of the original purchase price, if the property is not used within five years of the original purpose stated by the government." In rejecting the owner's claims, the court found that "making NDOT's compliance with federal law [i.e., disclosure of project plans and opportunity for public comment] a basis for compensation to [the owner] in these circumstances would undermine long-term public projects by requiring comprehensive funding for all acquisitions at the planning stage, which would, in turn, unreasonably expedite the need for acquired property to be put to use," under this PISTOL provision. In the *Ad America* case, the court used a provision of PISTOL as a basis to limit the expansion of owners' takings claims in Nevada.

Costs to the Government

In an effort to prevent an owner in "any eminent domain action" from being threatened with or forced to pay the government's attorneys' fees or costs, Nev. Const., Art. 1, § 22(7) provides: "[a] property owner shall not be liable to the government for attorney's fees or costs in any eminent domain action." However, in the 2015 opinion in *Buzz Stew, LLC v. City of N. Las Vegas*,[5] the Nevada Supreme Court declined to enforce this prohibition and awarded the government its costs against a landowner in an unsuccessful action for precondemnation damages, even though in 2014 the court concluded that rules applicable to eminent domain and inverse condemnation are also applicable in precondemnation damages cases.[6]

There has not been a landslide of opinions interpreting the provisions of this constitutional amendment during the past 10 years. For better or worse, the Nevada Supreme Court has largely not allowed the provisions of PISTOL to be used for a widespread expansion of landowners' rights in eminent domain actions. Accordingly, despite the doomsday scenarios voiced by the opposition at the time of PISTOL's passage, the sky has not fallen. **NL**

1. *Nevadans for the Prot. of Prop. Rights, Inc. v. Heller*, 122 Nev. 894, 141 P.3d 1235, (2006).
2. *City of Las Vegas Downtown Redevelopment Agency v. Pappas*, 119 Nev. 429, 76 P.3d 1 (2003).
3. 130 Nev. Adv. Op. 66, 331 P.3d 896 (2014).
4. *State v. Eighth Jud. Dist. Ct.*, 131 Nev. Adv. Op. 41, 351 P.3d 736 (2015).
5. 131 Nev. Adv. Op. 1, 341 P.3d 646 (2015).
6. *5th & Centennial*, 331 P.3d 896.

KERMITT L. WATERS obtained his Juris Doctorate and Bachelor of Law degrees from Texas Southern University in 1967. He is the only Nevada member of the Owners' Counsel of America, a national association representing landowners in eminent domain actions, and he authored the Nevada Property Owners' Bill of Rights (PISTOL).

JAMES JACK LEAVITT has been with the Law Offices of Kermitt L. Waters since 1995. He has handled more than 150 eminent domain actions and has presented approximately 25 of these cases to Nevada juries. He has also co-chaired several seminars on eminent domain.

MICHAEL A. SCHNEIDER joined the Law Offices of Kermitt L. Waters in 2002. He primarily practices eminent domain law, including complex business relocations and inverse condemnation actions.

AUTUMN L. WATERS joined the Law Offices of Kermitt L. Waters in 2002. Waters practices in the area of eminent domain law and has co-chaired and presented at several national eminent domain seminars.