Melody Jeffries Peters
Registered Diplomate Reporter
Certified Realtime Reporter
Certified Realtime Captioner
Jeffries Court Reporting, Inc.
1015 Mount Avenue, Suite B
Missoula, Montana 59801
406.721.1143 office
mjeffries@montana.com

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

JEFF BECK, individually; AMY WEINBERG, individually; ZAC WEINBERG, individually; ALTA VIEWS, LLC; and on behalf of a class of similarly situated persons or entities,	Case No. CV-22-44-M-KLD August 22, 2023
Plaintiffs,	
-vs-	
CITY OF WHITEFISH, a Montana municipality, and DOES 1-50,	
Defendants.	
CITY OF WHITEFISH, a Montana municipality,	
Third-Party Plaintiff,	
-vs-	
FINANCIAL CONSULTING SOLUTIONS, INC.,	
Third-Party Defendant.	

BEFORE MAGISTRATE KATHLEEN L. DeSOTO
FOR THE DISTRICT OF MONTANA

Taken at Russell Smith Federal Building
Missoula, Montana
Tuesday, August 22, 2023
1:33 p.m. to 4:00 p.m.

Proceedings recorded by machine shorthand
Transcript produced by computer-assisted transcription

A P P E A R A N C E S

Mark Kovacich, Esq.
Caelan Brady, Esq.
Kovacich Snipes Johnson, P.C.
P.O. Box 2325
21 Third Street North, Suite 301
Great Falls, Montana 59403
mark@justicemt.com
Associated Staff:
dawnell@justicemt.com
and
Riley Wavra, Esq.
Laird Cowley, PLLC
2315 McDonald Avenue, Suite 220
Missoula, Montana 59801
rwavra@lairdcowley.com
Associated Staff:
kgrimes@lairdcowley.com
appearing on behalf of the Plaintiffs.

Marcel Quinn, Esq.
Hammer, Quinn & Shaw, PLLC
100 Financial Drive, Suite 100
P.O. Box 7310
Kalispell, Montana 59904-0310
marcelquinn@attorneysmontana.com
Associated Staff:
randijohnson@attorneysmontana.com
and
Natasha Prinzing Jones, Esq.
Thomas J. Leonard, Esq.
Boone Karlberg P.C.
201 West Main, Suite 300
Central Square Building
Missoula, Montana 59802
npjones@boonekarlberg.com tleonard@boonekarlberg.com
Associated Staff: nschreckendgust@boonekarlberg.com
appearing on behalf of the Defendant City of Whitefish.

A P P E A R A N C E S (contd.)

Baxter D. Drennon, Esq.
Jori Quinlan, Esq.
Hall Booth Smith, P.C.
101 East Front Street
Missoula, Montana 59802
bdrennon@hallboothsmith.com jquinlan@hallboothsmith.com
Associated Staff: kwakefield@hallboothsmith.com
appearing on behalf of the Third-Party Defendant Financial Consulting Solutions.

TUESDAY, AUGUST 22, 2023

THE COURT: All right. This is the time and place set for oral argument on Plaintiffs' motion to certify class in Beck versus City of Whitefish, Whitefish -- Whitefish versus FCS Group, Inc., at CV-22-44-M-KLD.

Why don't we begin with the Plaintiffs. Please introduce counsel and -- well, tell me who's going to be arguing.

MR. KOVACICH: Good afternoon, Your Honor. Mark Kovacich on behalf of the Plaintiffs, and I will be arguing today.

THE COURT: Okay.

MR. BRADY: Caelan Brady on behalf of Plaintiffs.

MR. WAVRA: Good afternoon, Your Honor. Riley Wavra on behalf of the Plaintiffs.

THE COURT: Thank you.

And for the City of Whitefish.

MS. QUINN: Marcel Quinn on behalf of the City, and I'm doing argument today.

THE COURT: Okay.

MS. JONES: Natasha Jones on behalf of the City.

MR. LEONARD: Tom Leonard on behalf of the City.

THE COURT: FCS.

MS. QUINLAN: Jori Quinlan with Hall Boone Smith on behalf of FCS.

MR. DRENNON: Your Honor, Baxter Drennon for FCS, and I'll be doing the arguing.

THE COURT: All right. I believe at least one party has exhibits; is that accurate? Or potentially has exhibits?

MS. JONES: (Nods head.)

THE COURT: Okay. Do you have enough for the clerk to have a copy and me as well?

MS. JONES: (Nods head.)

THE COURT: So, Sarah, please proceed that way.

All right. Mr. Kovacich.

MR. KOVACICH: Thank you, Your Honor. The purpose of Rule 23 and certifying a class action case is, of course, to allow parties access to justice where they might otherwise not be able to bring their disputes in Court, and there are cases that fit that mold because the individual amounts in dispute don't justify the effort of the litigation, but collectively bringing the claims together on behalf of a class makes the Court hearing the dispute practical and realistic.

In this case, the City of Whitefish overcharged more than 300 residents, probably closer to 400 residents, for water and sewer impact fees, and those charges not only violated the federal constitutional rights of those citizens, but also their rights under Montana state law.

The individual amounts on a per-property basis would be only a few thousand dollars, but the collective amount that the City overcharged its citizens is in the multiple millions of dollar range.

For those reasons, this is the exact type of case contemplated by Rule 23 where the individual claims could not realistically be brought, but that a dispute can be heard in a collective fashion as a class action.

The Defendants make several arguments to oppose class certification here disputing virtually every element of the test that the Court has to go through, going so far as to dispute numerosity, where we undisputedly have 3- to 400 members of this class and very clear law in the Ninth Circuit and in this district that would define numerosity under those circumstances.

Rather than going through the elements -- and I'm happy to discuss this however the Court would like -- but all of the Defendants' arguments can really be summarized as an effort to emphasize differences among class members, but the reality is those differences are either insignificant or completely nonexistent.

The real disputes in this case are all issues that are common to the entire class. Every manner in which the Plaintiffs allege that the City overcharged resulted in an overcharge that applied to all class members who actually

paid these fees.

The -- Of course the individual amounts that people were overcharged does vary, they're not the same, but they can be easily calculated, and the manner in which they would be calculated is not the subject of dispute here.

Now, the Defendants may raise disputes as to how calculations might be performed, but that is not really what's at issue in this case.

Once determinations are made about how the engineering evaluations were done and applied and the project costs that were included, those are all figures and calculations that would be applied across the board to the class members. And, in fact, those individual calculations have already been performed by experts retained by the Plaintiffs. And performed in the same manner that the City performed them when they originally came up with the amounts to charge, adjusting only for the issues that are in dispute, which is costs to be included and the engineering evaluation of how to apply the formula that was used.

THE COURT: So, Mr. Kovacich, can I ask you a question? I think that leads me to maybe the most significant jumping-off point that struck me while I was preparing for this today, and that is that it seems that there are a few different ways the Plaintiffs are approaching their case, both in terms of the liability side,

I guess I would say, and the damage side.

And my first impression when I was getting ready -- well, before I started reading the briefing, just reading the Complaint and having worked, of course, on the motion for judgment on the pleadings, is that it seemed to be much more -- the argument seemed to be much more based on the projects. I think they were referred to as, let's see, phantom, ineligible and improperly calculated future projects.

And then as I started getting ready for the argument, it seems that the Plaintiffs have maybe -- I don't want to say changed, maybe distilled or honed their argument a little bit differently and now it seems to be that the resolutions from the moment they were enacted were not in compliance with Montana law, therefore, giving rise to a taking at that time.

And the reason I bring that up is that that issue of when a person or an entity would be entitled to make a takings claim sort of permeates all of the issues raised by the Defendants in terms of individual issues predominating as opposed to class issues. So could you address that, please.

MR. KOVACICH: Yes, Your Honor, I can, and the Complaint -- original Complaint filed in this case references both the projects that the Court made mention of

as well as the calculations and the application of the collection chart that involved the engineering work done by FCS and a prior entity referred to as HDR, I think.

So those issues have been in the case from the get-go, both, and they remain. Both -- The Plaintiffs' allegations are that the overcharges resulted both from the improper calculations in the maximum daily use for -- of water for property is -- is a very big issue.

The City used the chart that it had come up and previously used for impact fees wrong, and then in addition to that, they included in their calculations projects that were not appropriate to be considered.

And so all of those issues have been there from the start, and it's the Plaintiffs' claim -- and this is also in the Complaint, and I can give the Court the citations to the paragraphs for this at 2932 -- the allegation as to those projects was that they were not properly included in the costs that would be used to calculate impact fees right from the start.

Under federal constitutional authority and the Montana state law at issue, a municipality can't just throw phantom costs for made-up or unrealistic projects and then charge fees for them.

THE COURT: But I -- Well, let me -- let me stop you there because that's sort of where I have an issue and where

I think the Defendants have an issue in terms of how you -- how and when a claim might arise, because a municipality, when deciding how and when to create impact fee resolutions, or what have you, certainly the projects aren't done already; they're anticipating doing them. So they're almost always going to go future projects. It's possible they could be in the works or, you know, under construction, but they're going to be future.

And when I read these paragraphs, you know, To date little or no money -- this is paragraph 28.1 -- To date little or no money has been spent on the South Water Reservoir Project.

And then I think the paragraph above describes how it's evolved and changed over time, including retitling, and then with the solar arrays -- and that's for 19- -- Resolution 1915, and I'm looking at paragraph 31 -- that they -- the City has spent little to no money on the solar array project and upon information and belief, it has scrapped the solar array project entirely.

So -- so -- And then the following paragraph talks about the Planning Department conducting a feasibility project -- feasibility study on the project in late 2019 that did not produce promising results.

So when I read that altogether, the understanding that I have is that the City plans on these projects, and there can

be a variety of reasons why they haven't been done to date and we can talk about that, but that moves the needle in terms of timeline, in my understanding, and that would also then change to a more individualized analysis of whether it was appropriate or not to include these projects, because unless there's a determination that from the moment these resolutions were passed, they were facially not compliant with the law, there's some period of time, at least, afterwards where it's possible that these projects may go forward. So, therefore, at least as to the argument regarding phantom, ineligible and so forth, that wouldn't apply.

And then if somebody has a -- has an impact fee imposed upon them later, after there's more evidence, arguably, to whether these are feasible projects or not, that would be a different analysis.

And that's where I'm getting hung up on the -- the individuality of each claim and whether that would predominate over class claims.

MR. KOVACICH: Well, a couple of things, Your Honor. So under the law, to include those projects initially for the impact fees it would pay, they had to be reasonable estimates of costs to be incurred because of the development.

THE COURT: Uh-huh.

MR. KOVACICH: And it's the Plaintiffs' allegation that they were not, and -- and so they should not have been included right from the onset.

Now, there are allegations about what happened later, and that speaks to the fact that these were not projects that were necessary because of that development, but we're five years later, nothing's happened on them, and they've continued with development.

Development from five years ago very clearly didn't cause the need for the cost of the solar array, and that reality is informed by the fact that they never did it and they're not going to do it.

Now --

THE COURT: But that's a -- that's a retrospective view, not a prospective view or even a current one, right?

So we can look today and say, well, five years ago they said they would do this, it's 2023, they haven't done it, you can make inference, arguably, that it's not going to happen.

But in 2018, which is when the impact fee resolution is passed and then it goes into effect in January of '19, isn't that the time period that we have to look at for whether it's reasonable?

MR. KOVACICH: Well, I think we could look at it at both times, and it could be found improper at either/or both

times.

Another important issue here, though, is that fee was paid once by our clients and the putative class, and those costs were included in that fee.

Now, I'll agree that the issue as to the language of that state statute that we're going to talk about becomes more problematic with the -- under the theory that a cost was properly included to begin with and later became improper, and that's not the allegation here. Our argument is it was improper all along.

Nonetheless, when it's found later to be improper, the person who paid for it is our clients and the putative class, and they have rights under the Constitution that can't be abrogated by a poorly worded state court statute. They're the ones who paid that cost.

And the whole concept of the taking claim under the Nollan/Dolan standard that the Court addressed on the motion for judgment on the pleadings is that a municipality cannot extortionately charge fees to a party seeking to develop his or her property. That is what is considered to be a taking.

So the developers, the people who originally paid fees to develop the property, are the ones who suffered that taking, even if it was because there was a charge included at that time that five years later they abandoned and it clearly becomes something that should not have been

included.

It would not -- they would not be compensated for that taking of their property that occurred by the City paying some subsequent property owner who just happened to buy the property for market value just like they could've bought any other property that wasn't subject to impact fees in 2019 or later.

THE COURT: But for the sake of argument, Mr. Kovacich, if -- and I'm not trying to say that you agree with this because I know that you don't -- but for the sake of argument, if the impact fee was appropriate from January of 2019 to December of 2019, when -- when it sounds like, at least as to the solar array, for example, there was a feasibility study done that indicated that it was not very viable, and the change in that viability, at that time, the entitlement to a refund would arise, and if a property owner had sold the property in the interim time period, wouldn't it both be due and refundable after the property owner had sold it, even though the property -- the original property owner had paid for the impact fee?

MR. KOVACICH: On that example, Your Honor, I agree that the refund would be due later. And I think that creates a more complicated issue than the Court needs to resolve here because the allegation is that those charges shouldn't have been included from the outset and just like

the other improper charges, they've been due since they were improperly collected, and under the Court's example where something clearly becomes refundable later, there's a problem with the language of that state court statute, but that doesn't mean that the person who paid that fee and suffered that loss is not the one entitled to a remedy under the federal Constitution or other state law theories. They're the party that was damaged by it.

THE COURT: So from your perspective, it doesn't make a difference at all who owns it; it's the party solely that paid it regardless of whether the appropriateness or inappropriateness of the impact fee is -- is certain at the time they paid it; is that correct?

MR. KOVACICH: Our claim in this case is that the fees were improper when collected for all of the reasons alleged in the Complaint, and for that reason, the parties who are entitled to damages for those fees are the parties who paid them.

If we change the scenario and say that we're addressing something that becomes refundable later when someone else owns the property, there is a difficult problem with the language of that state court statute saying when the refund is due. And --

THE COURT: How do you address that, because that's something we have certainly struggled with and just -- in my

mind, the statute is not ambiguous; I think it says what it says, I think it's pretty clear, so I think the real issue comes down to when it is due to be refunded.

And so if we find ourselves in a situation where it is due to be refunded after ownership has changed, how do we reconcile what seems to be a tension between takings law and the state statute?

MR. KOVACICH: Well, let me back up and just say I think part of the problem is the language of the statute is not clear for the Court just illustrated, it begs the question of when the refunds are due.

And the defense emphasizes that it could have said the refund goes to the party who paid it. It could just as easily say the refund goes to the owner of the property at the time the Defendant determines that it owes it or that a Court determines that it owes it. It doesn't say that either. So the question is when is it due.

Even with what the Defendant has agreed to do in this case it's problematic. They've sent letters out to property owners talking about a process whereby they might be entitled to a refund.

Well, that process alone has drug out for a year now. Ownership has changed again on some of these properties, including some properties that were owned by class representatives.

So the -- on the Defendants' theory, I guess, a refund is due when they decide that a refund is due, or is it not due until there's a Court determination that a refund is due or after an appeal?

I think a better and more workable interpretation of that statute that is more consistent with the federal constitutional law that the entire statutory scheme was intended to address is that it's due when it's improperly charged, and the -- it's very clear under the federal cases that are cited in our briefing, the Knick case, the --

THE COURT: But Knick doesn't address the issue of damages; Knick addresses when you have the ability to bring a takings claim, so that's a slightly different analysis, isn't it?

MR. KOVACICH: Well, under Knick, Pakdel, Koontz and other cases, it's very clear that the taking occurs at the time -- that the right to a remedy arises at the time of the taking.

And in an exaction case the taking occurs when the municipality improperly charges a property owner and conditions the use of the property on paying that charge.

And in this case, our class, the defined class of people who actually paid these improper fees, are the parties that suffered the taking and the parties that should be reimbursed upon a determination that the charges were

improper.

THE COURT: So if there's ultimately a decision or a determination either on summary judgment or by a jury that the resolutions themselves are not appropriate -- were not inappropriate, I'm sorry, but that things happened later in time that made the impact fees then appropriate, so, in other words, everything is fine in 2019 when these are in effect and for some time -- and I'm kind of focusing on the phantom -- what is it --

MR. KOVACICH: Right, if it --

THE COURT: -- phantom, ineligible, improperly calculated. So if everything is fine until those projects get scraped, or -- or, arguably, you can say they are scraped because it's been five years, isn't that -- I know that payment has already been made, but that's the determination of when it was wrong.

Prior to that, there was no determination that it was a wrongful exaction. So when there's a wrongful exaction, that's when the entitlement to refund arises; is that correct?

MR. KOVACICH: It is correct, but the party who was damaged by that exaction is still the party who paid it. It's not some subsequent property owner that just bought a property for fair market value in Whitefish.

THE COURT: Unless they passed it through.

MR. KOVACICH: Well, yeah, there's no evidence -- no credible evidence of those charges being passed through. Even under the defense theory, there's -- there's literature that suggests that taxes and things like that can become part of built into the value of property. It's not all of it.

And in this case, we're talking about a small subset of properties for which impact fees were paid over a couple-year period.

If I go to buy a property in Whitefish and I have two equal choices in all respects except one was built in 2018 and one in 2019, I'm not going to pay an extra five grand because the developer incurred an impact fee.

THE COURT: So, but like let's look at Alta Views and -- I'm trying to remember the other name of the very large developer that had multiple condominiums --

MR. KOVACICH: So that's -- that's Alta Views.

THE COURT: Okay. And there was another one in there too, but, I mean, those are properties that were developed by a developer individually, or a company or what have you, and then marketed and, assumably, the costs in bringing those properties to market were built into the market price. I mean, I think that's a reasonable assumption to make.

And, you're right, at this stage I have no evidence of

it, but that's my point, is that if there is a argument about whether those costs were passed through to the ultimate owner and consumer, isn't that an individual look that we have to take that's going to distract from any class -- any efficiencies that we might have from a class action?

MR. KOVACICH: Well, I don't think it is, Your Honor, because the -- again, the claim is that the charges were all improper when paid. If there's some scenario where it's determined that the fees became improper at a later date, under our theories and our claims, the party that was damaged by that, entitled to compensation for it is -- would still be the class members who paid it.

Now, what that means in terms of a current property owner and the language of that state court statute is a problem that would -- the Court would have to resolve in this case.

The question is whether the property owners who paid those fees are entitled to damages under the theories that they've pled, and our position, even under the scenario which I don't agree with, that the charges were proper to begin with and found improper later, our claim would still be that the party who suffered the harm by paying the improper charge is who is entitled to the compensation.

THE COURT: So what would happen -- and I agree,

it's not something that we need to decide here today and probably not something for the Court to decide at all, necessarily -- but what would happen if there was a finding or a determination ultimately that it's an improper -- improper impact fee; it should be refunded; it should be refunded to the owner at the time -- or whoever bore the cost, whether it was the contractor, initial owner or what have you, and then the current owners say to the City, I'm reading this statute. It says I get the money, you didn't pay me the money, I'm going to sue you for that?

I mean, that's not an outlandish outcome if -- if what you say is correct. And then how -- how would that be addressed?

MR. KOVACICH: That scenario is problematic, and the City would just have to defend and address those claims if they were brought in a separate proceeding.

It's no more problematic than to say that, as they're saying now, they're just going to pay refunds to people who didn't incur those costs and are not the party that suffered a constitutionally recognized loss by paying extortionate impact fees. That's also a problem.

If the class isn't certified and they pay some property owner $5,000 that was actually paid by Alta Views, there's -- that creates a claim by Alta Views as well.

So I think the statute using the language "when due"

could be problematic. I don't think it's problematic in this case because all of the allegations of improper charges were problems right from the start.

And the biggest problem, like in terms of quantifying the loss, the most substantial overcharge comes from the way the formula was used in the calculation of maximum daily demand for a household on a particular size meter in Whitefish, and there can't be any argument that that's something that arose later. That was a problem, without any question, right from the start.

And these other examples that we've now spent some time on, the handful of projects, there's also an argument and an allegation in the Complaint that they did not meet the criteria that has to be met for inclusion in impact fees right from the start.

THE COURT: So would it be possible, Mr. Kovacich, to -- because when I read the proposed class and then the definition of the class claims -- and, obviously, we can talk about that later -- but is it possible that a remedy to this whole issue is having a liability class solely based on whether the impact fees were wrongful from the outset so the moment that the ink is dry on those resolutions, if it's wrongful, then it's wrongful for everybody and then of course, like you say, it would just be a formula. I mean, did you pay impact fees? Yes, I did. You get them back.

And then we still have the issue of who gets them, but -- And, of course, that's live by the sword, die by the sword, right, because if it's not wrongful, then you have other problems.

MR. KOVACICH: The answer to the Court's question I think is, yes, I think we could revise the class definition in a way that would deal with that problem -- potential problem better.

I think there are some other issues that have been raised here as well that the best way to handle would be slight revisions to the way the class was defined.

For example, it's been pointed out that some of the people who paid fees after January 1 of 2019 actually paid them under the prior resolution. There are things like that that could be fixed in the class definition.

And, yes, I think this theoretical problem of when a refund is due based upon what I would characterize as a poorly worded statute could be remedied with some language in the class definition.

If we're ready to move on from that, I want to comment on something else, which is the filing of a declaration by the City of Whitefish yesterday. We would suggest that the Court not take that into consideration. The same counsel that filed it requested leave to file additional briefing on this motion, and that request was denied.

Now, the day before the hearing, they file a -- basically a factual argument and call it something other than a brief. We have no opportunity to respond to it given the timing, so I don't think it's proper to be considered as part of the record for this motion.

Nonetheless, I do want to address the topic that it focuses on because it's a topic that was raised in the briefing, and it's a classic straw man that the City set up solely for the purposes of this motion that we're here to argue today, and that is the idea that the refunds can't be determined without these onerous individual inspections of every single property.

Well, the City, before it charged any of these people impact fees, had the burden to demonstrate that its impact fee approach met the nexus and proportionality requirements to show that the impact fees were properly related to the charges, expenses, that they were based on, and they had no problem doing that using the building plans.

In fact, their whole scheme contemplated doing these fees based on the plans that people provided, and they charged millions of dollars to people developing property in Whitefish using that approach.

They didn't have to go inspect every property to follow the approach that they used and that they contended met their requirements under the law to show the nexus and the

proportionality.

Now, because they're faced with a class action and they're fighting a class action certification, they want to say that there's no way to determine what an impact fee should be without going out and inspecting every single property and counting the actual toilets.

They didn't have to do that to charge the fees. Why would they not be able to use the exact same plans that they used to charge the fees to figure out what adjustments should be made based on problems with -- other problems with how the charges were implemented?

And it wasn't -- it's not a secret to the City of Whitefish that there are some differences in construction between the building plans and the finished project. They have building inspections like every other municipality. They do plumbing inspections and then before anybody can get a Certificate of Occupancy, they go out and do a final inspection, and they can look at anything they want to make sure that all of the building codes are complied with.

They didn't -- At that time they didn't say, oh, we're going to have to count all these fixtures and make sure that you didn't put an extra sink in here and then adjust your impact fee. That wasn't necessary. Nobody claims that that's necessary now except the City for the sole purpose of disputing class certification in this case to make it look

like there has to be this super-involved individual inquiry into the details of every property.

THE COURT: Well, in the interest of accuracy, shouldn't they do that?

I mean, if there's going to be a refund, shouldn't the City get the best information it can, which is are you really entitled to a refund based on what actually was put into your home?

And so -- And you know, there's a lot about this case that is technical to someone like me in terms of plumbing and how the UPC operates and so forth, but at its most basic level, if you're charged by showerhead or fixtures, the allegation is that you improperly calculated based on number of fixtures and it turns out that, well, actually maybe we didn't because you have ten more than you said you were going to, shouldn't the City be able to at least get some credit for that? Or is your position that they messed it up from the beginning and so, therefore, they have unclean hands and shouldn't be able to -- to be as accurate as possible?

MR. KOVACICH: They just don't need to do that, and the discrepancies are likely to work both ways.

They weren't going out inspecting people's properties to make refunds before this case got filed, even though, through their own inspections, they could have easily

determined that, in fact, there are often discrepancies between building plans and what actually ends up getting constructed. There are probably cases where they got notice of changes because somebody needed to amend the plan and there's no evidence that they changed the impact fees for any of those reasons.

So, yeah, they could go out and inspect them all, just like they could have adopted an impact fee approach where they're going to inspect them all at the time they charge them.

So if that's the level of detail that's needed, then it should work both ways. They should have done that to begin with. They didn't. They instead found that it was reasonable enough to use the building plans to calculate people's charges and now refunds could be determined in the exact same manner.

And it wouldn't create this specter of individual issues for purposes of a class certification argument.

Another major theme in the Defendants' opposition briefs is the statute of limitations. There's a few things to talk about on this. So they take the position that all of the Plaintiffs' claims are subject to a six-month statute of limitations in Title 27, Chapter 2, I forget which subpart --

THE COURT: It's 209, I think.

MR. KOVACICH: That -- A few problems with that, but before I get to that, I also want to say that it's not a -- it's not nearly the significant issue that they try to pin it as because that six-month statute of limitations would also be subject to the discovery doctrine in 27-2-102, I think, and under any reasonable view of the evidence in this case, property owners in Whitefish had no reason to believe or no reasonable way to conclude that they had been overcharged until Mr. Gilman started digging into it, and the first indication of any public discussion of that was in September of 2021. The class action Complaint was filed in February of 2022, so even if the six-month statute did apply, all of the Plaintiffs' claims would have been filed within that statute.

Additionally, based upon the Burnett case in the United States Supreme Court, I think that case can't be reconciled with applying a six-month statute of limitations under Montana law to bar these federal civil rights claims that should be allowed a longer period for the same reasons the Court found that the claims in Burnett should have been allowed a longer period.

It's also a pretty broad interpretation of the language of that section of Title 27 to say that it was intended to cover these kinds of claims. What it says is it applies to the claims relating to a decision on land use, development,

et cetera. There was no land use decision as that language contemplates at issue here. This was an impact fee calculation that was determined by the City and put out to charge anyone who requested a building permit that would contemplate water or sewer services.

And so what statute would apply there, you know, I guess for purposes of today's argument, it's really not that important. There could be an argument that it's a two-year statute for property damage or it's a general tort statute of three years. Either way, and, for that matter, the six-months statute does not create any significant difference among the class representatives or putative class members because they would all have been filed within that time frame.

THE COURT: It strikes me as sort of interesting -- and I just thought about this while I was sitting here listening to you -- that if you're correct, we'll have sort of some inconsistent rulings based on when the claims arose because for the takings claims under the Knick case, the -- the entitlement to the refund arose the second that the wrongful impact fee was -- was assessed, yet at the same time, the statute of limitations for any state law claims doesn't begin until it's discovered, which is arguably when Mr. Gilman first started looking into it and then made his, you know, statements at a public meeting and so forth. So

it's sort of -- I don't know what to do about that. It just seems like it's sort of inconsistent where, one, we go back in time for and say the rules at that time, at that time it was right, and yet at the same time they get the benefit of the discovery doctrine, which tolls the statute from running, until they actually discover it.

So, again, I just -- It's just a comment that I --

MR. KOVACICH:: Yeah.

THE COURT: -- I just -- came to my mind when I was listening to you, Mr. Kovacich.

MR. KOVACICH: It's interesting, but it's also not --

THE COURT: Germane? (Laughter.)

MR. KOVACICH: -- unusual or uncommon. Anytime the discovery doctrine is applied, it has the purpose of tolling the statute of limitations. That doesn't mean there wasn't an injury. In most of those cases, there very clearly is an injury; the Plaintiff just doesn't know about it yet. And so the statute is tolled. Their right to bring a case to seek a remedy for it is delayed based on the policy of the discovery doctrine. But that doesn't mean that the injury didn't occur. The injury at issue here, the claims that we filed on behalf of our clients in the putative class, occurred when they paid money that they shouldn't have paid. And most of them -- all of them didn't realize that they had

been overcharged or why they'd been overcharged until sometime later when -- started by Mr. Gilman and then even -- most of them probably had no idea until they maybe read about this case and some people may not even know now.

But any -- any case involving the discovery doctrine and a tolling of the statute of limitations would have similar characteristics to that.

Aside from those major areas, so we talked about the property ownership timing issue, the statute of limitation arguments and the idea that it's impossible to calculate fees now without doing on-site inspections, all of the other differences that are highlighted by the Defendants are completely insignificant, things that really -- wouldn't be subject to dispute.

You know, they talk about the fees being paid at different times, different types of properties. Some people pay water, some people pay sewer. Almost everybody paid both, by the way. None of that is -- are issues that would become the focal point of the case because they're insignificant things that are easily dealt with.

And if those kind of differences could defeat class certification, we could never have a class action and there would be no reason to even have Rule 23 because, A, a good defense lawyer can come up with arguments to say people are different for this reason or that, but that's not the kind

of difference that defeats class certification.

It has to be a real dispute that would become the focal point of the litigation and distract from the ability of the Court to resolve common issues like we could here. The common issues of using the formulas wrong, charging for projects that they shouldn't have, those are all things that would be determined without reference to particular class members, but those things resulted in harm to every one of the class members.

Even the things that are a little more involved that we talked about, those are issues that can be resolved by a ruling of the Court on, you know, who is entitled to the refund based on interpretation of federal law, what does "when due" mean in the context of the allegations that were made here.

And the other point I want to make on that is it does create a difference. It creates a difference between the people who paid their fee and still own the property and those who paid the fee but do not, but that's a large group of people. It's probably half or more of the class, and so we're talking about a determination --

THE COURT: Which is? Which group is half of the class?

MR. KOVACICH: Well, if it's half, they're both half.

THE COURT: Okay. Good point. Good point.

(Laughter.)

MR. KOVACICH: I think what I said is it's half or more than half talking about those that no longer own the property.

THE COURT: No longer own it? Okay.

MR. KOVACICH: That would be my guess. I haven't done that calculation. I think the City's brief includes some numbers, but it's not precise.

In any event, any determinations that are -- that need to be made relative to that group can be made rather expeditiously and would apply to that entire group and that a statute of limitations argument, for example, if for some reason there -- it mattered whether it was six months or two years, that's a determination the Court can make and then it's going to apply to a large group of the class.

It's not like one person is subject to a unique statute of limitations argument or even one person is subject to these arguments about the state statute and when the refund was due or who's entitled to the refund.

Those are things that the Court can address that would apply not necessarily to the entire class, but to a large enough portion of the class that individual arguments is still not the focal point.

THE COURT: Can you address, Mr. Kovacich, how class

certification would impact your state law claims?

MR. KOVACICH: So we seek class certification for the federal and state law claims, and I'm not sure if I understand the focus of the Court's question, but it would be --

THE COURT: Well --

MR. KOVACICH: -- we would have a class -- our class representatives would represent the entire class as defined with respect to both their federal and state law claims.

THE COURT: And so my reading of the briefs -- and I guess my understanding of how it would work -- is that your claims of negligence and negligent misrepresentation wouldn't be individual conversations had between folks, but it literally is the resolution and asking them to pay and taking the payment, and that's the basis for both the negligence and the negligent misrepresentation claims?

MR. KOVACICH: Yes, Your Honor. These claims are not based on individual conversations that anyone had, and I know this is likely to be the subject of another motion and argument, particularly on the negligent misrepresentation, but our theories with respect to both are based on common facts.

The City represented to people that these were proper charges and that they met the legal requirements that we talked about earlier by sending them a bill and saying you

have to pay this in order to get your property developed in the manner that you're seeking to develop it, and negligence, negligence per se and negligent misrepresentation are all based on those actions which the City took with respect to all of these people.

THE COURT: Okay. Thank you.

MR. KOVACICH: Thank you, Your Honor. That's all I have right now.

THE COURT: All right. Ms. Quinn.

MS. QUINN: Thank you, Your Honor. First and foremost, Plaintiffs had a burden before coming here today and asking the Court to certify a class action, and that burden has been defined by United States Supreme Court case law for quite some time, and the burden in the Halliburton case, Supreme Court case 573 U.S. 253, kind of concisely states what that burden is, and it's not just relying on allegations in a Complaint and it's not relying on arguments of counsel.

The Halliburton case that says that Plaintiffs wishing to proceed through a class action must actually prove -- and not simply plead -- that their proposed class satisfies each requirement of Rule 23, including, if applicable, the predominance requirement of Rule 23(b)(3) and must carry their burden of proof before class certification.

The only things the Plaintiffs have provided the Court

in briefing to date through oral argument as evidence in support of the claim's suitability for class certification are the two resolutions and the list of potential class members prepared by Plaintiffs' counsel.

We would respectfully submit that that does not satisfy Plaintiffs' burden in proving for the Court's rigorous analysis, which is the standard, that the, actually, claims that they're pursuing from a liability basis as set forth in the Complaint are susceptible to common issues that predominate over individual ones. All we've heard are allegations and argument.

The Comcast case, which we cited in our briefing and has been repeatedly discussed in Ninth Circuit case law, specifies also that before class certification, the named Plaintiff has to put forth a damage model to show the Court that the damages are actually capable of measurement on a class-wide basis for the individual theories of liability and causes of action that they've alleged.

THE COURT: Well, Ms. Quinn, if Mr. Kovacich is correct and the resolutions were void from the beginning, isn't the damage model pretty easy to figure out? Did you pay it in? Yes, I paid it. Here's the money.

MS. QUINN: No, I would respectfully disagree with that given the causes of action and the allegations raised, which is the analysis for the class certification.

If they're proving that the ordinance themselves weren't properly supported by -- by the background the charges were too high, from a state law damage standpoint, it is still incumbent on the jury to determine cause and damages arising from that conduct, which necessarily includes issues such as how many fixtures were in the individual's home and what their true and accurate damages are.

And from a taking standpoint, the analysis about whether the ordinance was supported or not or meet Nollan and Dolan, still requires an assessment of the burden and the benefit to the City and the named Plaintiff for their property and assessing whether there's rough proportionality between the burden imposed, the fee imposed, and the benefit and the burden on the public in providing the services. And that requires analysis about what the actual services the Plaintiffs used for their property.

So, for example, the Weinbergs are a wonderful example about the individual issues that are going to be pervasive for each and every one of the causes of action. The Weinbergs applied for a building permit and submitting -- submitted construction plans and afterwards they installed additional fixtures in their home.

Their original fee for wastewater was $1,611. Because of the unreported fixtures in the Weinbergs' home, they are not owed any refund related to the shower error because it's

offset by virtue of the fixtures that they put in without proper notice to the City, and beyond that, the Weinbergs owe an additional $1,123.41 to the City for unauthorized fixtures.

And knowing what the actual fixtures in the Weinbergs' house is relevant to a jury assessing what their true and accurate damages are or any state law claim --

THE COURT: Well, but, I mean, let's not get the cart before the horse here. I mean, obviously if this case is not resolved on motions, there will be a jury trial. I understand that. But at the class certification level, that's not the burden the Plaintiff has to the meet. The Plaintiff does not have to establish what a jury verdict will be. It has to establish -- they have to establish a reasonable method for going forward in which individual issues do not predominate.

And so -- so I don't know that we need to -- I don't -- I'm not saying one way or the other necessarily, but I don't think it's as cut and dry as you -- as you portray it.

MS. QUINN: Well, the Plaintiffs have asked for a class certification. The motion presented to the Court is on all claims --

THE COURT: Right.

MS. QUINN: -- all state law claims and all federal claims and all bases of liability, which is numerous in

their Complaint and their discovery responses, and all damages.

That is the motion that the Plaintiffs have asked the Court to certify from a class bases and it's replete with issues of individual questions that outweigh any common ones that exist.

THE COURT: Well, the question that I posed to Mr. Kovacich, and I'll pose the same one to you, is isn't there something beautiful in the simplicity of just saying, all right, well, we're not going to certify a class as to all claims, all issues, but we will certify a class as to whether the resolutions or ordinances, whichever they're called, were void from the beginning?

In other words, if they inappropriate- -- if they violated Montana law from the outset -- and that's obviously something that would have to be briefed by the parties and then determined -- but if that's the case, then that would be one type of a certification that I can imagine that doesn't necessarily involve all the other issues and then other things can be handled at a later time.

It's not uncommon in class actions for there to be initial certifications, holding off on, for example, damage classes and so forth and then addressing those if need be, so -- And ultimately that's for the Court to do and to determine.

MS. QUINN: From a cause of action standpoint, what causes -- cause of action, what bases for liability would the Court be making that sort of certification decision under, and that's an issue because that one question isn't the standard for takings, for negligent misrep, and it's not going to answer the questions about liability, causation for damages for the actual claims that the Plaintiffs pursued.

The Plaintiffs could have asked the Court to certify a class -- a declaratory class, which is exactly what the Court is talking about here, to determine the issue of were those resolutions unconstitutional, and they haven't done so. That's not the bases of their motion for certification presented to the Court and it's not the bases for the motion for certification requested in the Complaint, which is under (b)(3).

And when we look at (b)(3), the purpose of a (b)(3) action is for monetary damages, and that's what this case is really about. They're pursuing monetary damages on behalf of developers at the expense of the landowners for these claims.

The question you pose is a discrete issue that might be relevant to some of the issues to reach a cause of action, but it isn't dispositive.

And so for the takings claim, again, for the Weinbergs as an example, we have to consider the burden and the

benefit. We have to ask the question what is the Weinbergs' property on Flathead Lake? What is the size of the house? What are the number of fixtures? What is the size of the meter they should have put in if they would have accurately reported their fixtures? How many fixtures did they add? Do they have a lawn? Do they irrigate? What is the size of the fee that was charged to assess rough proportionality based on each individual Plaintiff? And those are all individual questions --

THE COURT: Let me ask you a different question: Does the appropriateness of mixing together the FCS report and the HDR -- I think it's HDR -- prior, the 2007 report -- is that universal for all people? Either that was appropriately done or not appropriately done, or is that also individualized?

MS. QUINN: The resolutions that the City issued were premised on both the HDR report as well as the FCS report and that's stated in the -- in the preamble of those resolutions.

THE COURT: Right, so if that was inappropriate, it's inappropriate to all, correct?

MS. QUINN: No. Well, it depends. Unfortunately, the named class that the Plaintiffs have proposed include people who didn't even pay fees underneath the January 1, 2019 -- those ordinances --

THE COURT: Right.

MS. QUINN: -- so determining even class membership --

THE COURT: But that's a pretty easy carve-out. I mean, there's 300-some people involved. I mean, the submissions from both the Plaintiffs and from the City list all of the people by name and, you know, which -- which ordinance they were proceeding under, what they paid and so forth. If there are folks who paid under the -- they paid in 2019 but paid under the 2018 schematic, that seems to me to be a pretty easy thing to handle. I imagine that's how we probably got rid of Riverview. I think that was the Plaintiff that was recently dismissed. So I don't see that as an insurmountable issue to certification.

MS. QUINN: But even determining which class to certify is problematic. The main claim that they're pursuing here is the takings claim. It's the basis upon which this Court has jurisdiction, and for the takings claim, in their reply brief they redefine the class that they're asking you to certify to be property owners that owned property that bore the burden of actually paying the impact fees underneath of those resolutions, and those elements that they add of ownership and bearing the burden of the cost are critical elements for a takings claim because it has to be tied to an interest in property and

then actually bearing the fee is relevant to each and every one of their -- their causes of action.

So even before we get to trying to define a parameter of a class for any of these, we are facing individual questions that are impossible to answer on a class-wide bases. Ownership is public -- public records. That can be answered --

THE COURT: Uh-huh.

MS. QUINN: -- in fairness. But the issue of who bore the fee is a hundred percent individualized. And we provided a spreadsheet attached to our opposition brief that took their Plaintiff list and then went into the building permit applications and the building permits themselves to see who actually applied for and paid the fee.

And when you look at those, many of them were applied for and paid by architects, by general contractors, by -- There were some that were even paid by people leasing property.

And so trying to determine who ultimately bore the fee that would even have standing to have a takings claim to be part of a class certified for that -- that claim, whether broadly or a narrow issue, again goes to very individualistic questions that defeat the common question.

There's no reason the Plaintiff can't prove whether or not the ordinances were valid for their named Plaintiffs.

They say that the other individuals have small claims, but Riverview's claim is to the tune of hundreds -- or Alta Views' is hundreds of thousands of dollars in this case.

So their argument that people don't have an incentive to pursue this, it depends upon how much they paid. One of their named Plaintiffs would have an incentive.

And they had other options available to them --

THE COURT: But circling back, I'm just sort of hung up on this idea that if the calculations using the HDR report and the FCS together -- if that is wrong from the outset, can't we make a determination of that issue for a class-wide basis and then proceed to a damages phase separately where we have subclasses for folks?

Because, I mean, you're right, there are going to be some people who both owned it at the time, paid the fee at the time, still own it now. Very simple analysis.

There are going to be developers who owned it then, paid for it, sold it, don't own it now.

There are going to be -- I mean, you know, it's pretty standard when you're building a home that you have money, you have an account, the builder has it. The builder uses his check down at the City to pull permits and things like that, but it comes out of money paid for by the homeowner. All of that's going to be pretty easy, I would think, at that stage to -- to determine.

But I agree that, to some extent, that's individualized, but the ultimate determination of whether the underlying calculations were inappropriate, they're either inappropriate for everyone or they're not, right?

MS. QUINN: But that's one common issue --

THE COURT: Well --

MS. QUINN: -- that could be certified to have addressed, which is not what they've asked for, that declaratory, but to get to the monetary part, to see what other -- under (b)(3), whether predominance, whether this process is a superior way, we can't just consider that isolated issue. We have to consider the difficulties of figuring out who's in that class.

And for general contractors, some contractors have fixed fee agreements that may not have passed along the impact fee and until we ask that question, time and material versus a fixed fee, you know, we can't assume that people would be -- bore the actual fee.

And then even if we answer that question, we still have to consider from a predominance standpoint, looking at the causes of action, you know, whether all of the individual issues for the rest of the case still predominate over the benefit of that singular question.

And when we start looking at balancing the burden and the benefit for a takings claim, which is a hundred percent

individualistic, or looking at whether someone actually suffered a harm and if it caused them damages and the amount of the damages and if they passed those damages along to a subsequent purchaser, which we've heard argument on but we have no proof of, in reality, the expert disclosures to date differ on that subject; that their expert says, no, it's borne by the person who pays it; our expert says it gets passed along; and even that question is individualistic.

THE COURT: Those aren't before me, so --

MS. QUINN: This question about can we certify a class for that issue, the class that you would certify would potentially include a lot of people that don't even have standing, that didn't suffer damages, that went on to -- to future owners.

And so there's so many individual questions about whether they fit in the class at all, from ownership, to bearing the fee, to harm, to liability under the causes of action, that this simply isn't suited -- well-suited for a class certification, and the Plaintiffs can pursue the claim on an individual bases for their clients, which one has a substantial claim, and they have a right to attorney fees if they succeed on a takings claim. There's no reason to convert this to a class.

And one thing I really wanted to focus on is that their case isn't just about the ordinances and the resolutions,

that they've carved out the individual bases that they claim the City acted inappropriately, and they've chosen to include in their lawsuit the single-head shower issue, which, as this Court knows from involvement in prior briefing, that issue, once it came to the attention of the City, the City acknowledged the issue and started the refund process.

And what the City did, the problem -- I know that Plaintiffs counsel want to paint that inspections of the building was just to try to -- a farce to keep information for this case, it couldn't be further from the truth. The Rose Declaration establishes that when the City learned of this issue, they pulled out their fixture unit table, and, unfortunately, that table had a single line for bath/shower.

And so the way fixtures were counted in the past was just you have a tub or a shower and it's counted as one and assigned a 4. So single tubs, tub/shower combos, stand-alone showers with one head or two heads all are lumped into that single line, so the City had no way of knowing which individual people were actually impacted by this error. I mean, for all they knew, it could be a tub/shower combo which wouldn't be impacted.

And so that issue, which is one of their claims they're asking for class cert on and it's part of our audit process, that should be denied class cert.

The City is currently going through a process to address it, and there's absolutely no way that that issue could be addressed on a class-wide bases because it involves having to find out from individual Plaintiffs whether they have a single-head stand-alone shower.

And that's why letters were sent saying you may be subject to this error because the City didn't know. And until the City finds out from the individual Plaintiffs, we don't know who suffered an injury from that allegation of this class harm or not.

There is no common issue at all for that claim. There's no bases for them to ask the Court to include that in a class action because it can't -- the harm itself can't be determined universally.

THE COURT: And is the City, in fact -- if it goes, for example, to the Weinbergs' house and it sees that they are -- and I don't know -- Another thing that strikes me as difficult to establish since the City's record keeping was not very great on this issue is when it was put in. You know, I mean, additional fixtures may be put in during the building process and it just doesn't get inspected correctly or if there are any -- which is the City's problem, or they could be added in separately and the folks didn't get a permit, which is their problem, but is, in fact, the City now using this refund process to go to people and say,

actually, you owe us more money?

MS. QUINN: They're not actually asking for additional money, but we are considering those issues because they are --

THE COURT: What do you mean when you say "considering those issues"?

MS. QUINN: From a class action basis, not -- The City isn't considering charging Plaintiffs for that.

THE COURT: Okay.

MS. QUINN: Because if the Plaintiff put in more fixtures when they were building and didn't report it to the City, absolutely the City should be charging for it.

But, unfortunately, that issue is so individualized, like you said, did the City miss a fixture on a building plan? Did they change the building plan and not tell the City, which was the Weinbergs. Did they add fixtures after the original construction and not get a plumbing permit? All individual issues. And so we aren't asking for more money.

Properties are changing meter size in order to accommodate their existing units, if they needed to go up. And the City's also crediting properties for where the fixture count issue made them put in too high of a meter, and that also shows that meter size and fixture count when we're actually saying what is the true harm imposed by

individual Plaintiffs is individualistic and can't rely on the face of the building permit, particularly when the Plaintiffs have chosen themselves to include the shower issue as part of all of their claims.

And they haven't put it as cause one only. It is inherent in every single one of their causes of action.

For takings they're asking for that issue and trying to correct it, and so these issues about the inability to answer what the meters are, what the fixtures are, whether they're subject to an error, it -- it pervades all the causes of action.

THE COURT: What would the effect be if the showerhead issue was dropped?

Would that impact your analysis of whether a class action is appropriate?

MS. QUINN: If the -- No, unfortunately, because the issue is, from the takings standpoint, what's the burden and the benefit? The burden and the benefit of the actual project as constructed by the Plaintiff. If they put in extra fixtures unbeknownst to the City and used the City's services and put a burden on the City's water and wastewater, then the jury would have the right to know that individual defense and analysis to assessing liability for takings, whether the burden and the benefit -- Here, the Weinbergs should have paid 40 percent more.

THE COURT: So I'm -- I'm not following you exactly. My question is if the issue with the showerheads was dropped by the Plaintiffs, and I think what your response is, no, because we're going to bring it in --

MS. QUINN: Right, because 65 percent of what we've seen so far and the Rose Declaration wasn't a surprise to Plaintiffs' counsel. Our expert reports had included a smaller sample, but we got through some more recalculations, and the percentage is actually really close.

About 65 percent of homes have a change in fixtures from that which they paid impact fees. And Plaintiffs' counsel is incorrect when he says it's a wash both ways. That's absolutely false. There are a select few that have less fixtures, but pretty -- the vast majority put in multiple additional fixtures, from single sinks going to double sinks, putting in toilets and all -- all of the like.

And when we look at the takings claim, we believe the takings claim considers the actual impacts of the project, which is the actual burden the house put -- the Weinberg house put on the City's system to assess is the payment of the $1300 -- was it reasonable?

Well, it was more than reasonable, particularly given they snuck in additional fixtures that they should have paid approximately twice, and so --

THE COURT: So what I think what I'm hearing is we

might have made a mistake, but because they put in extra fixtures, ignore the mistake because they actually should be paying more.

So if our calculations are wrong and inappropriate, it doesn't make a difference because they put in extra sinks and toilets.

MS. QUINN: It goes to, in part, liability for takings because it's the burden and benefit. It also goes to causation and damages for every one of their causes of action, because they have an expert that's tried to come up with a formula for addressing this issue and he has to input what the fixtures and meters are for the purpose of determining the actual damages, which requires knowing what's actually there.

Their damages should be premised on the actual numbers of meters and fixtures in their house.

THE COURT: That's damages, not liability.

MS. QUINN: Liability on takings, liability on the shower audit issue, because the fixtures they added offset the two-fixture unit error that occurred.

THE COURT: So I guess -- and correct me if I'm wrong, but I think what I'm hearing is a government can -- can have a taking situation, so, in other words, the government can have an exaction or something that results in a taking, but if the Plaintiff does something to damage the

government back, then the taking is just -- they cancel each other out. Is that what you're saying?

MS. QUINN: Well, our position is no taking occurred. The taking analysis is not whether we agree with the mathematical decision the City -- FCS recommended or the City used.

THE COURT: Right.

MS. QUINN: That's the impact fee statute claim. They chose to bring a separate cause of action for a taking, and the taking standard is benefited balancing the benefit and burden, which doesn't force us to look at it from a microscopic view but look at it from a broader perspective.

And Dolan itself says damages are not calculated to a mathematical precision. Math shouldn't be required, which means it's acceptable for the jury and for the Court and for the parties to consider each individual house and whether the fee charged for them to connect and use the City's system is roughly proportional to the burdens and the benefits involved.

THE COURT: But isn't the Plaintiffs' argument that it can't be proportional and it's overly burdensome because it was illegal? Isn't that their basic argument?

MS. QUINN: In part, but the damages --

THE COURT: Well, no, I understand, but just in terms of whether there was something inappropriate done by

the City, it's -- it's, I think, pretty basic, which is, look, because these fees were inappropriately calculated and we were required to pay them as a condition precedent to getting a permit to build our home, or our condos or whatever, it is a taking under Nollan/Dolan.

MS. QUINN: Taking is not that precise. If they prove that our fees violated the impact fee statute, which is the hypertechnical argument, in part, that they're making, that doesn't necessarily mean it's also a taking. Taking is a different standard. And we're allowed to put on evidence of the burden and benefit based on the actual project that used our system considering what their fixtures were, including what they added.

THE COURT: So that's a merits argument, correct?

MS. QUINN: It is. It goes to liability. The --

THE COURT: And at the class certification level, I am not supposed to determine merit. So, in other words, I can't deny certification because of something that might ultimately come up at the merits level. That is something that is done afterwards.

MS. QUINN: But you do have to determine are these individual issues and are they common issues and which predominate, and what we're saying is this is an individual issue that impacts likely about 65 percent of the proposed class that's going to result in many trials about what

fixtures and what meters and what use and what the value of their property, how much water they use and -- and whether they irrigate, if they have a separate irrigation meter. Those issues are going to outweigh the limited common issue that's been proposed, which is merely that we paid under the same resolution. The benefit and burden is individualistic.

And even under takings, I found a case out of Oregon called Hammer versus City of Eugene, and they say -- It was a case where an exaction occurred, and the Plaintiff sued the City saying you don't have rough proportionality at the time that you imposed this fee and then the Plaintiff said, well, you can't come back and argue later rough proportionality existed because you didn't determine it at the time, and the Court started thinking about what the takings clause is really about. And as we all know, it's about just compensation.

And the Court said that Plaintiffs' rule of trying to limit the town to what information was known precisely at the time that the exaction was -- occurred, the proposed rule tells us nothing about whether justice requires compensation.

In fact, in cases in which there's rough proportionately, the rule would saddle taxpayers with the burden of paying compensation that justice doesn't require.

So, ultimately, the question in a takings claim is what

does justice require, which requires individual consideration of the actual fixtures that were put in by the Plaintiffs, the fact that the Weinbergs should have paid $1100 more than the 1200 they paid to determine if just compensation requires the City and the taxpayers to bear that additional cost.

THE COURT: So there can never be a class certification of an exaction case, correct?

MS. QUINN: No.

THE COURT: Okay.

MS. QUINN: It depends --

THE COURT: Well, you just said it's an individual determination of the nexus and proportionality, and you've said that every single person has to be examined individually, and if that's the case, there can never be a class certification involving an exaction --

MS. QUINN: I think it would --

THE COURT: -- going under the Nollan/Dolan standard.

MS. QUINN: -- it would depend on the nature of the exaction. So if exaction is water and wastewater services, I believe that is accurate because it is very individualistic looking at meters and fixtures, particularly where we know people have added fixtures.

THE COURT: Can you give me an example of an

exaction that would, in your opinion, be suitable for class certification?

MS. QUINN: An exaction that would apply equally and isn't based on individual specifics, I can't think of one offhand, but I think the issue with an exaction here is the exaction is based on so many individual issues -- the meters, the fixtures -- that if the exaction is based on individual issues, then it makes it where those individual issues are going to predominate when we have to look at it from a takings standpoint and what just compensation requires.

And we just have to look at the case that we have in front of us, which is would just compensation be due to individuals like the Weinbergs or the 65 percent of other people that changed their fixtures, and we don't believe it would, and that goes to the heart of liability.

THE COURT: All right.

MS. QUINN: Beyond that, the Court puts finger on a substantial issue in the Plaintiffs' Complaint, which is that Plaintiffs aren't merely complaining that the charge at the time it was assessed is improper. A reading -- a fair reading of the Complaint, which Plaintiffs' brief acknowledges, the Complaint itself is what's considered for class certification. That Complaint talks about spending, improper spending, it talks about the failure of the City to

issue refunds. Like the Court said, it talks about abandonment of projects or decisions not to pursue projects, which all of those issues change the time frame of when the purported class that they're seeking to represent would -- would exist. Because at the time -- And it would have been past December of 2019 is when they claim solar array was determined not to go forward. Well, then everybody before then may have properly paid a fee and they could argue a refund, but then the issue about the statute and to whom it's owed comes up, and that's a different class than the class that they're seeking to represent.

And so the fact that they're continuing to seize on these claims involving -- involving spending and refunds and they're expressly in their Complaint adds layers upon layers of individual issues that predominate over any common issue, which is the singular one that you've identified.

And I don't believe finding a singular issue that's common is sufficient to certify a class under (b)(3), which assesses the claims as a whole and the theories of liability and the damages.

And when we start going into that based on the claims asserted, it's so many individual questions, it's not suitable for class cert.

They've also raised the negligent misrepresentation claim arguing that's suitable for class cert. We've pointed

out -- Well, we asked them to dismiss the claim because the Plaintiffs testified no representation was made, and that's going to be the subject of a motion for summary judgment when the named class rep on this claim says I never got a written or verbal representation, and I quoted precisely the language in their Complaint, but it illustrates why it's not suitable for class cert.

Whether a representation was made, whether the Plaintiff heard it and relied on it and was damaged by it, those are all individual questions that have to be answered for a negligent misrep claim. It's just not suitable for a class cert.

The only thing that they pulled out in their reply brief, they pulled out an internal document of the City which is a calculation table that the City uses to input fixtures to say what it will be, and then the attorney argues it's an invoice -- and, again, this is why putting on some evidence to the Court about the suitability of class cert, that these things could actually be addressed on a class basis is important, because it's not an invoice. It's an internal document that has a City Bates stamp that the named Plaintiffs themselves said they didn't get a representation.

They haven't satisfied their burden of putting on information to the Court to determine the negligent misrep

or the other claims are suitable from -- for certification from liability, causation and damages standpoint.

The issue of their negligence per se claim includes even further problems because their negligence per se claim is based on a statute that specifies to whom the refunds are due and that that statute says that impact fees charged or -- or not spent in accordance with the statute then trigger the refund provision.

And their claims are based on the charging and the spending, but the statute specifies to whom those refunds are paid, which is not the class that they're seeking to be certified in this case.

In that class, a class action under that statute would be a moving target because it depends on when is a refund due, and you can't determine when a refund is due without their being disputed evidence from both sides and arguments about whether or when a refund is due to pinpoint a time to say these are the class members for that issue.

Because at any given time, people are being charged impact fees, they're selling their property, and so the class just inherently is in constant fluctuating change --

THE COURT: Unless the resolutions or ordinances were -- were void at the beginning and then everybody who paid would be a member of the class.

MS. QUINN: They haven't pursued -- That is not a

cause of action in their Complaint. Even their declaratory ruling is just -- Their damages that they're asking is not we want all refunds back. They haven't said that it's all unconstitutional. They're asking for the portion of what they claim was improperly charged based on their expert's recalculation of what those impact fees should be, so the delta.

So they're not even seeking and haven't presented to this Court claims in the Complaint. It hasn't been part of discovery, it hasn't been part of their interrogatory answers, the issue that you're presenting.

When we look at the case through its entirety and analyze each cause of action and the actual questions relevant to the causes of action as raised by the Plaintiffs, they're all individualistic and not suitable for class cert.

That's all that I have. Thank you.

THE COURT: All right. Thank you.

Mr. Drennon, I don't know if you have anything to add to that.

MR. DRENNON: I can be very brief, but if you wouldn't mind a very quick restroom break before we do that?

THE COURT: Certainly. Yeah, why don't we take ten minutes.

(Whereupon, the proceedings were in recess at

2:59 p.m. and subsequently reconvened at 3:11 p.m., and the following proceedings were entered of record:)

THE COURT: All right. Mr. Drennon.

MR. DRENNON: Your Honor, Baxter Drennon, FCS, and you asked a question earlier of Ms. Quinn about when a legal exaction could be a class, for an example, and one that I have personal experience with, unfortunately, is sales abuse tax that's improperly charged would be an example of when that's occurred.

Kind of moving forward, I'll try to be very brief. At the risk of using a metaphor from home that might not be as received here, I'll try not to replow any ground that Ms. Quinn has covered.

Your Honor, we're here on class certification in a matter that's been fully briefed by the Plaintiff with a proposed class and common questions that have been proposed, and there are fundamental questions that haven't been answered, can't be answered, and I'm not sure how you certify a class without the answer to those questions.

The first one the Court pointed out almost immediately this afternoon, and that is who can recover if they are successful in this matter.

Counsel's response to that, I think, effectively was that the state's statute on a refund was unconstitutionally void because it is vague and doesn't have language that at

least he agrees with.

It's my understanding under Montana law if you're going to make a challenge to the constitutionality of the state statute that there's a procedure that has to be followed, and that procedure hasn't been followed in this case, and I, frankly, think the statute's pretty clear and says that the refund is due to the owner of the property at the time that the refund is due.

Without --

THE COURT: So, Mr. Drennon, how do you square that then -- I don't think I've really gotten a great answer out of anybody, but I don't know that I have one myself either, which is how do you square that, then, with takings jurisprudence that would seem to stand for the proposition that when the takings occurs, that is when you are entitled to recoup whatever the government has inappropriately taken from you.

MR. DRENNON: Sure. I think some of that is based on standing because they have ownership of the property still, and I'm not sure how -- if it changes.

But here I think the reason the rule is there because if a individual no longer owns the property, how do they have standing to make a takings claim?

And here, once the statute recognized that and once they sell the property, the then owner of the property would have

the standing to make the claim and to recover the fee.

I have no way of knowing what the legislature thought when they set out the statute, but presumably they believed that the value of the fee was baked into the sale price when they went forward.

Part of the question for a takings is the benefit to the property -- or this type of taking is the benefit of the property -- to the property, and so if the property was benefited or harmed, that would be effectively baked in.

But I'm not sure it's one that I can answer or one that I have to. The Plaintiff has the burden of establishing that this case is appropriate for class certification, and at the very least, they have to show standing and that they have to show that the class that they've proposed is appropriate.

And without answering that question, I'm not sure how they do that, and they haven't done even a procedural process to answer the question.

If their -- if their solution is that the statute is unconstitutional under the federal Constitution, again, it's my understanding there is a state process for challenging that, and they haven't done it.

And so I'm not sure -- I'm not sure how we get past that, but that's where they are.

Moving past that, again, I don't want to go into the

individual issues that Ms. Quinn touched on, but one that I do think is worth noting, we talked about the statute of limitations briefly and the six-month issue.

Counsel kind of blew past the discovery rule and just assumed that that applies to every one of the proposed class members.

How could the discovery rule, without something more on an individualized basis, apply? They have to show that they could not, either reasonably or through reasonable due diligence, determine that that they had a cause of action.

The two --

THE COURT: So does that -- That argument really only applies if we're looking at the 209 statute of limitations, because if we are proceeding on the general three-year tort statute of limitations, there's no issue.

MR. DRENNON: Sure, but the 209 statute of limitations applies against claims -- applies to claims against municipalities related to the regulation of land use.

And although I don't -- I don't know if counsel would admit it, but he seemed to say that this wasn't a regulation of land use, which then gives us -- has a problem with a takings claim if we're not talking about regulating land use.

But that -- the language on 209 seems pretty clear on

that. As I was about to say, you have -- you have two resolutions that were presented publicly, there were public hearings on these fees. There was actually a public -- a committee on developmental impact fees, including members of the public.

I think they're going to have to make a showing -- I propose they have to make a showing, if they're going to rely on the discovery rule, why that they did not understand that they had a claim.

Plaintiffs' counsel characterized the fee as excessive and extortionary. I think people who are extorted know on the front end when they're extorted.

THE COURT: Unless it's hidden by the person that's extorting them.

MR. DRENNON: And then that -- Sure, but that gets into an individualized question, was it hidden from them, and how was it hidden and why didn't they know.

If we're going to -- if we're going to rely on the discovery rule as the basis to toll the statute of limitations, it requires an individual analysis of each person who's going to assert that.

And then last, Your Honor, just trying to short-circuit this, Montana Code gives the City the authority to enact these fees.

Today, at various times, the question has seemed are

Plaintiffs claiming that we have no authority whatsoever to have a fee at all or are they asking for a refund for the amount that's been overcharged, and I think their own briefing really answers those questions.

On pages 26 and moving forward of their reply brief related to class certification, they talk about the damages calculation in this case. And they don't talk about it as a zero-sum gain. They talk about an overcharge.

The recovery that they seek, the claims that they make relate to an overcharge. That's the class that they seek to certify, that's the case that they've pursued, that's the expert report that they have, and that's the language that they argue here.

We're not talking about a zero-sum gain. We're talking about what they allege is a fee that resulted in an overcharge, and the degree of that overcharge is the individual analysis that Ms. Quinn spoke about.

The issue with the fixture count and these other things, where that comes in is the degree of overcharge --

THE COURT: So, Mr. -- Mr. Drennon, I'm not trying to be obtuse about this, but if the calculations based on the mixture or the overlapping or whatever, sort of the Frankensteining of the HDR report and the FCS report is what results in this inappropriate calculation, isn't that the same for everybody?

Now, there may be variations based on the size of your house or what have you, but if the formula used to get to whatever the number is is uniformly wrong, can't that determination be made on a class-wide basis?

MR. DRENNON: I don't think so, Your Honor. If the claim is based on the Fifth Amendment of the constitution, the takings claim, which they say the Montana takings claim follows, effectively, the same analysis, you still have to ask the question.

So even if calculated errantly, which we don't concede, you have to show rough proportionality and essential nexus. They still have to establish those things.

And if we undercharged somewhere else, we get the benefit of that when you're doing that analysis. It's on --

THE COURT: So I guess -- and this is where I'm really having a disconnect -- what I'm hearing you say, and what I think I heard Ms. Quinn say, is that we can commit a constitutional violation, but as long as there's some other damage problem over here, the constitutional violation just gets swept under the rug, and that cannot possibly be.

MR. DRENNON: No, Your Honor. And I apologize, I actually have a note to address that. I don't agree with that assessment at all, but there is a question -- The constitutional violation has to have a -- there has to be a causal nexus between that and the damages.

And so it's -- because it's a takings clause and what it requires to establish a takings -- a takings claim and what it requires to establish, it still requires an analysis of -- of what the benefit is versus the burden.

And once you've done that analysis and say, okay, the benefit does not outweigh the burden, there was a taking, then you get to what the damages are.

But if -- if the burden -- if the property receives a benefit that outweighs the burden to it, it's not a taking.

You can -- you can have a -- under state law, federal law, you can have -- If we think about this in eminent domain standards, which is effectively the same thing, just kind of -- if the -- if you take the property through eminent domain and you improve the property, it still serves as a taking, but there are no damages for that.

THE COURT: Well, except for the owner doesn't have the property anymore and you've been completely deprived of its use.

MR. DRENNON: If the benefit -- Sure, if the bene-- but if the benefit of doing that to the remainder of their property increases the value of that property --

THE COURT: Oh, I see what you're saying.

MR. DRENNON: -- in an amount that exceeds the loss, there are no damages, and that's our -- that's where our point is except it works -- it's on both sides.

To establish a takings claim, you have to establish that the benefit does not exceed the burden, and so that's where the individual analysis comes in.

THE COURT: And I suppose that leads into the issue with the solar array and the South -- South Reservoir, which ultimately were not done, and that's going to be part of the City's -- or, I'm sorry, the Plaintiffs' argument that, well, how could there be a benefit because those projects were never done so there is no benefit at all.

MR. DRENNON: And I don't want to get too far into the merits, but the cost --

THE COURT: Well, we're already there.

MR. DRENNON: I know. -- the cost associated -- I think the Court will ultimately hear that the costs associated -- state solar array, the costs associated -- that was related to a water treatment plant -- the costs associated with the water treatment plant far exceeded what was expected or estimated at the time the fee was calculated.

THE COURT: Uh-huh.

MR. DRENNON: So those funds were actually used to be able to pursue the treatment plant, and so that -- that gets us away from individual -- the Plaintiffs' side on the individual analysis --

THE COURT: Right, because impact fees may not

include expenses for operations or maintenance of a facility.

MR. DRENNON: It's not -- that's not an O&M. That was to -- to build it out is what I'm saying.

THE COURT: Oh, okay.

MR. DRENNON: Not -- not an O&M issue.

THE COURT: All right. I see.

MR. DRENNON: Thank you, Your Honor. I don't have anything else at this time.

THE COURT: All right. Mr. Kovacich, so I have a few questions for you based on the arguments made by counsel for the City and for FCS, and the first is what do we do with this whole fixture issue, because the City's position, obviously, is that the fixture issue permeates every claim that you are seeking on behalf of your clients, so --

MR. KOVACICH: Two -- two things: The fixture issue is -- is part of the claims. It's a small part of the claims. This difference compared to the other things is really not the big issue in the case.

However, I want to go back to the fact that, apparently, it was fine and constitutionally permitted, according to the City, to base impact fees on building plans and that's what they did.

And so now if we go back and look at the -- at just things that should have -- that were improperly done using

those building plans, why can we not just calculate refunds based on the same building plans?

Why does there have to be a double standard where it's okay for them to use building plans to charge people, but God forbid, if somebody's entitled to a refund, we're going to go count their toilets and make sure that we offset any penny that we missed when we made the charge to begin with?

They could do this the same way that their program provided for and use the building plans. Simple to do.

Second thing, if we really do have to go out and count fixtures, then I guess, fine, let's count them. We're not talking about -- It's actually far less complicated than the technical issues on -- that we're going to have disputes on over the engineering calculations that admittedly apply to everybody.

I don't think we'll have much of a dispute if we have to go out and count bathtubs. I don't think that needs to be done, and neither did they when they charged people impact fees to begin with.

This --

THE COURT: Well, what --

MR. KOVACICH: -- this affidavit that counsel talked about, maybe I misheard her say that two-thirds of the people snuck toilets in and owed the City money.

Exhibit B is the list of the properties with

discrepancies, and I'm just looking at this thing here, it says "refund owed" for almost everybody. "No refund" on a few and then "owes City" on fewer than that.

Now, this is just the shower versus tub problem. You know, who owes -- who they really owe refunds to is more appropriately based on these bigger issues, which is doubling the maximum daily demand in your calculations and then using a maximum for each water meter as a -- as a bottom base and then adding on to that for toilets and bathtubs.

You know, these issues -- if our claims that are heard and we are successful in proving them are going to result in far greater refunds than what the City is offering, and most of these people they say are still entitled to a refund, from what I see here.

But it's not the kind of individual issue that would -- should defeat class certification here because it would become a focal point of the litigation.

Number one, we could just use the plans that they used to charge them to begin with. There's nothing wrong with that. And our experts have already done that.

And Counsel was talking about a spreadsheet where they can't tell if it's a shower or a tub. The building plans show if it's a shower or a tub.

Now, it might not be the same in every case as what

actually got built. That doesn't mean somebody snuck a bathtub into their property. Changes happen, and the City's aware of it, and they certainly had the opportunity to be aware of it. Nobody can live in those properties until they go out and inspect the whole thing.

If they were so worried about matching up fixtures to what they charged for impact fees, they could have done that in their final inspections.

They didn't think that they needed to. I don't think they needed to and they don't need to now. We can figure out refunds the same way they figured out the charges.

Counsel for FCS made reference to an analysis of property improvements having to be taken into account on every property for the takings analysis.

There is no property improvement involved here; this is a fee that these people paid. And there's lots of law that's clear that in order to charge a fee for a building permit for a property use, you have to meet these standards, and -- the nexus and the proportionality, and if you don't meet that, it's an unconstitutional fee, and the person who paid it is entitled to damages reflecting what that was.

It's not individualized here because these class members all paid the fee, and the problems that resulted in the overcharge are things that were common to all of them.

Now, once you have a resolution of what was and wasn't

proper, the next step does require a formula that's going to result in different amounts.

And, in fact, if the Court recalls, when the City argued its motion for judgment on the pleadings, it was very -- one of its primary focuses of the argument was that this was a legislative enactment, and in order to support that position, the City represented to the Court that this was a broadly applicable fee assessment and it was uniformly calculated based on a preset framework.

And other than the issues that we've talked about and the issues that are referenced in the Complaint, we agree with that, and once those issues are resolved and fixed, we can easily uniformly calculate what each person's fee should have been based on that same preset framework.

THE COURT: So let me ask you, Mr. Kovacich, because some of the things that everyone here has talked about today aren't actually before me, so I don't have expert reports. I mean, I know we have the issue with Mr. Campbell and so forth, but in terms of an expert that calculates the damages that you believe are owed to each of the potential class members, is it a delta between what should have been paid and what was actually paid? And how is what should have been paid calculated?

MR. KOVACICH: Yes, Your Honor. Thank you. It is a delta, that is the claim, but it's important to note that

that delta, as I said earlier, is based on the -- our claim that all of these problems with the charges were problems from the outset when the Plaintiffs -- who are defined in our class. We don't have different classes here or a class that's going to change. Our proposed class is the property owners who paid the fees.

And we had a digression in the City's argument about changing that to the person who bore the cost or whatever, but the point was just that, yeah, sometimes an architect wrote the check and then sent a bill to the property owner.

But the -- So the point is this class -- proposed class is the property owners who paid those fees, and the claim is that the fees in all respects that are alleged were improper at that time, and based on that, their damages are the difference between what would have been an allowable fee -- We're not saying they can't charge for an impact fee, but the ways that they charged improperly are -- can be recalculated in a way that squares with the nexus and the proportionality that they need, and so you can calculate that difference. And you can calculate it for every single class member.

THE COURT: Does that determination rely on -- and again, I'm kind of focusing on those projects because that seems to be a variable, a potential variable -- does that -- And let me back up, I guess, because I'm trying to

distinguish between what I think the argument is in relation to how the base calculations -- the formula for the base calculations was put together, and that's the combination of the FCS and the HDR report, that's going to be the same regardless, is my understanding. It's just -- it's a mathematical formula.

MR. KOVACICH: There could be no argument that it changed later.

THE COURT: Okay.

MR. KOVACICH: You know, this is this argument that they have to go count fixtures, you know, if they had counted them on the front end, it might have been different. And it's --

THE COURT: Well, but -- but, I mean, regardless of the fixtures, if the -- and I'm just going to a call it a multiplier, but that's not maybe the right way to talk about it, but if the -- if the base calculation was wrong, it's going to be wrong for fixtures one, two, three, four, 20. Doesn't make a difference. If the base calculation is wrong, it's wrong for everybody.

The other issue, though, is to the extent your argument is that the fact that they baked in these projects, which ultimately were not completed -- or I think I heard Mr. Drennon say that actually the wastewater one was -- is diverted to a different one I guess, but same wastewater --

The money was used for the wastewater plant.

MR. KOVACICH: Well, what he said is they want to justify the money they didn't spend on the solar array by saying we spent more on the wastewater plant. That's what he's saying.

THE COURT: Right, yeah. So I guess that's what I'm questioning is, is that something that would change because until they found out, for example, that the solar array wasn't viable, that's what it's earmarked for, that's what it was going to go for, and leaving aside the issue that the base multiplier was wrong, there's nothing wrong in saying we're going to have an impact fee that allows us to install a solar array in our wastewater plant.

MR. KOVACICH: Well, there could be an appropriate way to include a future cost like that, but, again, it's our claim here that they didn't because it was not a reasonably estimated cost that was related to the needs of the development.

And if that's the case, it was improper from the outset, and so now I think we can go back to some discussion of whether you could have a project that does meet that test initially and then something changes and they refunded that, that's a different scenario, and it does become more problematic.

But our claim would still be that the person damaged by

their failure to spend that money is the person who paid it. And that's the proposed class here.

THE COURT: What do you make of the argu- -- Well, let me rephrase that. Could you please address the argument that you were required to notify the AG that you were challenging the constitutionality of the refund statute.

MR. KOVACICH: I can, Your Honor, and at this point in the litigation, we haven't challenged the constitutionality of that.

I made a reference to trying to square hypotheticals with the fact that these property owners who paid those fees and suffered a taking had constitutional harm that's compensable, and interpretation of that statute that would lead a municipality to pay someone else for that would be -- have constitutional problems, and it's a -- it's a fundamental aspect of statutory interpretation that the Court should, when possible, give a statute meaning that would not violate constitutional rights, and so that's our position here.

Now --

THE COURT: So it's not a facially -- it's not a facial problem; it potentially could be an as-applied problem, potentially.

MR. KOVACICH: Depending on how it's interpreted, I think there could be constitutional problems with that

statute.

And we're here on a class certification motion that's been briefed for a long time, and as I'm sure the Court is expecting at this point, there's going to be more motions in this case, and depending on what that looks like, maybe there will be a letter to Austin Knudsen about whether he wants to talk about the constitutionality of that statute.

At this point, we haven't done that. I don't think that our argument requires that, and I think that the Court can make a decision on class certification that does not create constitutional problems with that language.

THE COURT: All right.

MR. KOVACICH: There was lots of discussion about factual issues and merits. As the Court has pointed out, a lot of this stuff isn't even in the record here.

I think I just have to comment on a couple of things. The characterization of the Weinberg situation, we don't agree with that. They do have some differences between the fixture counts that they paid fees on and what's actually in the property. It actually goes both ways. They had more fixtures in one place and less in another.

And, you know, again, I think the best way to deal with this would just be to follow the plan that they actually utilized to charge people these fees, which is going off the building plans, and Weinbergs, that can be done just like

everyone else.

Counsel also commented on the fact that we could continue this case with respect to the named class representatives, and that really just is absolutely not realistic.

Alta Views did develop a pretty large condominium complex. I think it was actually townhomes, is what they called it. Their damage calculation is -- I believe it's less than $200,000.

As the Court can imagine from what's happened so far and what we can expect in the rest of this case, even that claim is not one that can be realistically prosecuted individually in a court like this.

And that's not the analysis and not the important question. The important right that Rule 23 provides to citizens is to bring inappropriate cases -- their claims together. It's not just about Alta Views.

The overwhelming majority of people who paid these fees that were improper, and they suffered what to any one of them or most of them is a significant loss is in the single digit thousands of dollars. They can't file individual cases.

Even Alta Views, if it's $200,000, that's not a realistic damage claim for this type of case.

One final comment, and I may have touched on this

already, but I heard counsel say a number of times that people were sneaking fixtures into their properties.

The fact that the City when it charged for impact fees didn't use information that matched up with what was actually built is based on the way it set that fee program up, and I think that aspect of it is not really what's problematic here.

Again, we could use that. If you're going to use it to charge the fees, then there shouldn't be anything wrong with using it to recalculate those fees.

But this is -- You know, when people make changes to their construction, the City has access to that and every right to know that information.

And we don't need to go there, but even if we did, it would be fairly easy and would not create the kind of individual predominate issue that should defeat the policy in favor of allowing people who've suffered constitutional harm through takings to have their case heard in court.

And this case will not be heard in court in the absence of a class action certification. Thank you, Your Honor.

THE COURT: All right. Thank you. Well, we'll take this under advisement, and while you're all here, let's talk about the schedule.

As I pulled up the scheduling order today -- And, obviously, the schedule that we have in place is not

feasible given where we are because the -- unless I missed something, there's been at least one amendment to it, but every time I amend it I say something like all -- all other dates remain in full force and effect.

And so as far as I can tell and as far as I understand, the motions deadline, motions in limine and all of the final pretrial dates are still in place, which obviously is not realistic. I think those are going to be met.

So let's talk about what you all think is realistic in terms of getting this case to a trial. I think we'll have an order out on the class certification issue within a couple weeks. Hopefully on the shorter end of that.

Of course if there is a class certified, then that opens the door to a lot more process that has to occur and that generally, my experience, tends to slow down the regular trial schedule as well.

So I don't know if anyone wants to weigh in on that off the top of your head.

Mr. Kovacich?

MR. KOVACICH: Your Honor, I don't have, necessarily, a time frame in mind. We had hoped to keep the schedule, but I understand the Court's concern in that regard. I'm not really --

THE COURT: Well, let me just tell you--

MR. KOVACICH: -- against a change, but --

THE COURT: -- I mean, the reason that I think it has to change is, for example, I can't imagine that -- especially based on the things that people said here today that there aren't going to be motions filed, and that time is already blown, so -- Because it's fully briefed.

MR. KOVACICH: Oh. The Court did change the motion deadline.

THE COURT: Did I?

MR. KOVACICH: It hasn't quite hit us yet.

THE COURT: Okay. Because I didn't see that in the docket.

MR. KOVACICH: It is coming right up.

THE COURT: Okay.

MR. KOVACICH: I think summary judgment motions --

THE COURT: I showed it as September 8th.

MR. KOVACICH: Yeah, there was an order following the status conference that we had on the phone that you --

THE COURT: It changed the experts.

MR. KOVACICH: I thought it moved the motion deadline to be fully briefed to like the 22nd.

THE COURT: Did it?

MR. KOVACICH: I believe so.

THE COURT: Is that -- is that correct?

MS. QUINN: That's my understanding as well, so I think they're due --

THE COURT: Okay.

MS. QUINN: -- next Friday, but given the status that you're going to be working on class cert decisions and the number of motions for summary judgment that we're anticipating filing, I still believe that the Court's concern that the scheduling order dates may not be a viable or workable schedule, and what I would propose is that the scheduling order deadlines be stayed until we get your class cert decision and then we reconvene about appropriate dates to address motions and pretrial work after that class cert decision comes out.

THE COURT: Yeah, I don't want to do that. It makes me nervous to not have a schedule in place because I think things tend to fall through the cracks at that time, but -- but I think that what we can do, if you -- if you can give me a ballpark of what you think is realistic based not so much on a class certification issue, but based on motions for summary judgment, because if -- if there is a class certified, right, there would have to be the tinkering with the definition of the class, the class claim, notice would have to be -- we'd have to get a notice process set up for that, that can all, of course, be going on coexistent with other things at the same time.

So I don't think we need to stop everything until the class certification is handled, but given some realistic

dates, I think we should anticipate moving what we have now, which is a trial January 22nd of 2024.

And then, of course, backing out all of the deadlines from there, it just -- I just don't think it's workable or feasible because the trial deadline did not move. That I know for sure.

MR. KOVACICH: So, Your Honor, just throwing something out, if we looked at a trial something like three to four months later, I don't think we need three more months now to file motions, so with the concern about that whole process taking time and impacting what the trial looks like, that deadline should stay relatively close in time. You know, maybe -- maybe one month.

I know we've already talked about what we contemplated filing, and I can't imagine that the Defendants haven't done that.

You know, a class certification order, depending on what it looks like, could have an effect on that, but...

THE COURT: Yeah.

MR. KOVACICH: Or maybe 60 days until motion deadlines and then push -- We're going to have to look for a date that actually works for the trial.

THE COURT: Right.

MS. QUINN: If the case is not certified, I think the scheduling order remains workable. If the case is

certified, we're going to run into all of the issues that were raised in oral argument about how do we figure out who paid fees. And so if a case is certified, I would imagine we would be reopening discovery to try to figure out are fees passed along, who are potential members of the class. I can't imagine pushing a trial date out a month or even three months would be workable given the standing issues and the who's-in-the-class issues that we don't have answers for, and the Plaintiff hasn't given a proposed way to introduce who's in or out on those bases.

So I would prepare nine months out for trial.

THE COURT: That is not happening.

MS. QUINN: But, I mean, it's just the extent of information that has to be discovered is substantial, so the more months you're willing to give us, whether it's four months, five months, six months to try to dig into --

THE COURT: Well, it strikes me that the motion for summary judgment are what they are, right?

I already have -- it's called a motion to strike, it's a Daubert motion, really, on some level for Campbell. I imagine there's going to be some other motions like that. I think those exist irrespective of what the determination of class certification is, so I don't think that I have quite the doom-and-gloom approach to that as you might have, Ms. Quinn, but I do appreciate that there's going to have to

be some time baked in, probably more than 60 days. I think three months is probably appropriate.

Mr. Kovacich.

MR. KOVACICH: That is acceptable to the Plaintiffs, Your Honor. I do want to just comment also, however, discovery is closed. Expert disclosures have been made. They were made in contemplation of a class action, and they address issues that would apply class-wide including the exact things that Ms. Quinn is talking about.

I do not agree that we need to reopen scorched-earth discovery about things that have already been addressed in discovery and by the experts.

MS. QUINN: But we don't even know how to determine who's in the class. The Plaintiff hasn't discovered the information to answer all of the individual questions we have about who bore the fees and who's a property owner. We need to delve into individual stuff to make sure the class that's certified, actually the people have standing.

THE COURT: Well, do we know -- Can we tell who paid -- who wrote the check?

MR. KOVACICH: The information about who wrote the checks is in the --

THE COURT: City's records.

MS. QUINN: That's inaccurate.

THE COURT: The City doesn't keep records of that?

MS. QUINN: What we have is we have a printout receipt that on some instances puts the property record owner, but it doesn't necessarily mean that owner actually paid the fee. And then we have the building architect and the engineers and the tenants, which constitute about a hundred fifty of the properties that are at issue.

And so trying to figure out for all of these the other -- the one where the receipt doesn't say the actual owner's name, it either says nothing or it says a third party, I think those are about a hundred fifty. It's Exhibit B in our opposition. Those are the ones that we don't have a way to treat it like a class to figure out who's in or who's out on those.

So I think that if the Court was --

THE COURT: So are you anticipating deposing 350 people?

MS. QUINN: Potentially. It goes -- We don't have a way of defining the class to figure out who those people are. And it was Plaintiffs' burden, and that's why --

THE COURT: All right. Yeah, I don't want to hear any more argument.

MS. QUINN: No. Right.

THE COURT: I'm just trying to figure out deadlines and what we need to do.

Mr. Kovacich, is there a way to determine of your

clients -- potential clients -- I don't know what the City paperwork all says. I mean, I know there was an Exhibit B prepared for me -- or prepared for this. It's obviously a summary. It's not the underlying documents. I don't have those. I haven't looked at those.

MR. KOVACICH: I believe we can determine who paid the fees. In the limited cases where it wasn't clearly paid by the actual record owner of the property, some inquiry could be done to verify whether that cost was truly passed along.

Or if it was a contractor who charged a flat fee and ate the cost himself, that would be more like the situation where somebody sells the property for market value and didn't actually incur that damage.

But, yes, I think that could be figured out.

THE COURT: And is there a discovery request from the City as to those issues, or from FCS?

MR. KOVACICH: I -- I don't know exactly what the discovery requests say. I think there are requests that --

THE COURT: There arguably would be supplementation. I guess that's what I'm getting at.

MR. KOVACICH: Could be. I don't know off the top of my head if there's a request that would -- would require us to try and answer that.

I can tell the Court that we -- I believe we can get

that answered and provide that information without having 300 depositions.

THE COURT: Mr. Brady, did you want to say something either to Mr. Kovacich first or -- It's up to you.

MR. BRADY: There's a request to our Plaintiffs for proof of payment --

THE COURT: Okay.

MR. BRADY: -- if that expanded to the class...

THE COURT: Okay.

MR. BRADY: But they -- they also have their own records on who paid what, so...

THE COURT: Okay, Okay. I guess what I'm getting at is that if -- if the City's representation is that they cannot tell from their records who paid, that if there's arguably an existing discovery request that asks for proof of payment, that is something you could run to ground and provide a supplement to.

MR. BRADY: Yeah, for our Plaintiffs right now we know that they paid and that was what the request was for.

THE COURT: Okay.

MR. KOVACICH: And, yes, we can certainly work on that in the broader respect and I believe figure out for these people who actually paid and if there are some cases where the property owner did not.

THE COURT: Okay. So --

MR. KOVACICH: And that would be, I guess, something that would need to be done for class notice purposes.

THE COURT: It would.

All right. I'm looking at trial in May of 2024. And I don't know, obviously, the experts that you have, and I know there's going to be a fair amount of motion practice in relation to some of those experts and their testimony and so forth, but, Mr. Kovacich, if you had to give your best guess on how long you think it takes to try this case soup to nuts, what would you say?

MR. KOVACICH: Well, the case was set originally for seven days, I believe.

THE COURT: Okay.

MR. KOVACICH: Depending on what the Court entertains in terms of some of this individual stuff that was talked about today, if it were tried more in the manner that we envision, I think seven days is absolutely doable.

THE COURT: Okay. Ms. Quinn, I don't know who wants to weigh in on what your schedules are.

Ms. Jones, do you --

MS. QUINN: It depends on if the trial would be on liability, on liability and damages would impact the length, and so if it's soup to nuts, the longer, the better. Six weeks.

THE COURT: Also not happening. I think we got

W.R. Grace done in about six weeks, so I don't see this being a six-week trial. Very few things are six-week trials.

MS. QUINN: I haven't had a six-week trial so I wouldn't know, but knowing the number of issues that -- that we would want to be able to present to the jury, like I said, the longer -- the longest the Court is willing to -- to entertain, we would ask for.

THE COURT: All right. Mr. Drennon.

MR. DRENNON: I may be briefer than other folks, I don't know. Two or three weeks is kind of where I see this.

THE COURT: All right. I'm going to set it for two weeks. I think we can get it done in that time period.

MS. JONES: And, Your Honor, I have a two-week trial that starts May 6th in the Monsanto class where the Plaintiff is a --

THE COURT: Is what?

MS. JONES: The case is Mehmke versus Monsanto, so I have another trial that's in May. And then we have another trial that's in June, I believe. I think the Proof case was reset.

THE COURT: Okay.

MS. JONES: So for me personally, a trial in May is very burdensome and jams me between two significant case settings, one with this Court.

MR. DRENNON: And if we're set for two weeks, Judge, I start a products case -- I think it's the third Monday of May.

THE COURT: All right. July 8th.

MR. DRENNON: Other than that being my wife's birthday, that sounds great.

THE COURT: Well, I bet she would love Missoula in the summer.

MR. DRENNON: She would, she would.

THE COURT: That's the best time to be here.

MR. KOVACICH: July 8 is open for me, Your Honor. I would have preferred to make sure Cory doesn't have a problem.

Do you --

MR. WAVRA: I would indicate we have a 15-day jury trial scheduled in Wyoming during that time for a pretty significant products case. But it's up to you, Mr. Kovacich, if you want us to get in the way of that.

MR. KOVACICH: Let's go ahead and set it.

You're going to settle that one.

MR. WAVRA: Okay.

(Laughter.)

THE COURT: I think you got your marching orders there, Mr. Wavra.

MR. KOVACICH: Tasha is going to settle hers too.

THE COURT: All right. So does the 8th of July work.

MS. QUINN: Yes, Your Honor.

THE COURT: So we'll set it for two weeks starting the 8th. I'll back all the dates out other than that, but I will want a shorter leash on the motions, partially just because -- Unless -- unless you guys are engaging in mere puffery, I think there's going to be a lot of motions for us to decide, and so that's going to take a fair amount of Court resources so I want to make sure we have enough time to devote to them to get resolved in plenty of time for trial prep for everyone, so...

All right. With that, is there anything else we need to handle here today?

Mr. Kovacich, anything from the Plaintiffs?

MR. KOVACICH: No. Thank you, Your Honor.

THE COURT: You're welcome.

Ms. Quinn, anything from the City?

MS. QUINN: No, Your Honor.

THE COURT: Mr. Drennon, anything from FCS?

MR. DRENNON: No, Your Honor.

THE COURT: All right. We'll be in recess. Thank you.

MR. DRENNON: May I approach?

THE COURT: Sure.

MR. DRENNON: We haven't met. I just want to shake your hand.

(Discussion held off the record.)

(End of proceedings.)

REPORTER'S CERTIFICATE

I, Melody Jeffries Peters, a Registered Diplomate Reporter, Certified Realtime Reporter and Certified Realtime Captioner, certify that the foregoing transcript is a true and correct record of the proceedings given at the time and place hereinbefore mentioned; that the proceedings were reported by me in machine shorthand and thereafter reduced to typewriting using computer-assisted transcription; that after being reduced to typewriting, a certified copy of this transcript will be filed electronically with the Court.

I further certify that I am not attorney for, nor employed by, nor related to any of the parties or attorneys to this action, nor financially interested in this action.

IN WITNESS WHEREOF, I have set my hand at Missoula, Montana this 5th day of October, 2023.

Melody Jeffries Peters

/s/ Melody Jeffries Peters

Melody Jeffries Peters
Freelance Court Reporter

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