

LAND USE LAWS IN NEVADA

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INTRODUCTION

Land use regulation is, as regulations go, a relatively new process. Judicial intervention into that process is an even more recent phenomenon. The United States Supreme Court stated “all property in this country is held under the implied obligation that the owner’s use of it shall not be injurious to the community.” Mugler v. Kansas, 123 U.S. 623 (1887). This was the earliest indication that a municipality could limit the use of land. After this pronouncement, local governments and the courts showed reluctance to interfere with the use of privately-owned property. New York City enacted the first zoning regulations in 1916. Zoning and land use regulations, were upheld by the United States Supreme Court in the landmark case of Euclid v. Amber Realty Co., 272 U.S. 365 (1926). Authority for zoning regulations were found in the states’ “police power” which is deemed necessary for the protection of the public health, morals, safety and welfare. The police power is still the recognized basis of governmental regulation of land use.

Most every state, county, city and community now has some sort of land use regulation (the City of Houston, Texas being the most notable exception). With growing concerns about scarce resources, air pollution, traffic congestion and growth, governmental regulation of land use has become more extensive and complex.

Litigation over regulation and restraints on the development of private property has significantly increased. Until last few decades, the United States Supreme Court upheld land use regulations. The local land use regulations were left to the local elected and appointed administrative agencies and municipalities. The local authorities, through their legislative mandate, are given broad discretion to administer land use regulations. However, the discretion

of the elected representatives has been significantly limited over the last two decades by both the state and federal courts. Nevada has done so with the cases of City of Reno v. Travelers Hotel, 100 Nev. 436, 683 P. 2d 960 (1984) and Nova Horizon v. City of Reno, 105 Nev. 92, 769 P. 2d 721 (1989). Similarly, the United States Supreme Court cases of First English Evangelical Lutheran Church v. County of Los Angeles, 472 U.S. 304, 107 S. Ct. 2378 (1987); and Nolan v. California Coastal Commission, 483 U.S. 825, 107 S. Ct. 3141 (1987), represent a change in judicial attitude toward restraints on land use imposed by local agencies. Important limitations on the exercise of the police power in land use cases are now being imposed. Currently, a mistake in the planning process may subject the regulating agency or municipality to monetary damages.

The planning process devolves into a dispute between an individual's private property rights and the perceived best interests of the local community.

The relationship between the developer and the local permitting authorities sometimes reflects the adage that opposites attract, primarily because of these participants mutual, but disparate, concerns with the proposed development. Local governments usually hold out the welcome mat for new development because of the increased tax base. Still, regardless of the experience of a developer or obvious desirability of a project, governmental officials generally believe that as representatives of the community, they are best qualified to rule upon the development proposal. Moreover, local governments are increasingly seeking extractions from the developer as a means of funding most (if not all) of the added community services which will be needed for the new development. This technique allows the political officials to avoid the unpopular task of seeking to impose a heavier tax burden upon the community as the result of a new project.

In contrast to the governmental representative, the developer is usually confident that the project has been skillfully planned and sees little need for the many suggestions offered or requirements created by the permitting officials. Further, the wide array of governmental entities, which must be satisfied, seems a continual nuisance and bureaucratic morass. Finally, many developers believe that the local government is unfairly attempting to add costs to the project to avoid expenses which should be borne by government. After all, the argument goes, the developer is also a taxpayer, the development project will add to the tax

base of the community and the many fees and assessments are an unfair extraction.

Deems and Jenette, A Practical Guide to Winning Land Use Approvals and Permits at 1-5, Sec. 1.01[2].

It is one of the principal functions of the land use professional to insure these competing interests work together. If possible, such disputes should be resolved during the administrative process. Few, if any, applicants or protestors wish to obtain their objectives through court system, which is expensive and time-consuming.

A. THE POWER TO ZONE: WHO HAS IT, WHAT DOES IT COVER, WHERE DOES IT STOP?

In Nevada, the power to zone is delegated to County Commissions, City Councils, Planning Commissions, Boards of Zoning Adjustment and special Hearing Examiners.

NRS § 278.020(1) (2001).¹ Planning Commissions are given their powers in NRS §§ 278.030-265; Boards of Zoning Adjustment in NRS §§ 278.270-278.310; Special Hearing Examiners in NRS §§ 278.262-265 and 278.315.

1. The Board of Zoning Appeals – Powers, Process, Standards, Findings of Fact Statutory Regulations:

a. **NRS § 278.270** provides that the governing body of any county or of any city which enacts zoning regulations under the authority of NRS §§ 278.010 - 630, inclusive, may provide by ordinance for a Board of Zoning Adjustment.

b. **NRS § 278.300** states that a Board of Zoning Adjustment shall have the following general powers:

(1) The power to hear and decide appeals;

¹ “For the purpose of promoting health, safety, morals or the general welfare of the community the governing bodies of cities and counties are authorized and empowered to regulate and restrict the improvement of land and to control the location and soundness of structures.” NRS 278.020(1) (2001).

- (2) The power to decide a request for a zoning variance.
- (3) The power to interpret zoning maps; and
- (4) The power to decide a request for a special use permit or special exception.

c. **NRS § 278.280** states that the Board may be comprised of the following:

- (1) Members of the governing body; or
- (2) Not more than seven appointed members.

This statute also provides that one member of the board may be a member of the Planning Commission.

d. **NRS § 278.310** defines who may appeal a decision to the board:

- (1) Appeal to the board of zoning adjustment may be made by:
 - (a) Any person aggrieved by his inability to obtain a building permit or by the decision of any administrative officer or agency or enforcement of the provisions of any zoning regulation of any regulation relating to the location or soundness of structures.
 - (b) Any officer, department, board or bureau of the city or county affected by the grant or refusal of a building permit or by other decision of an administrative officer or agency based on or made in the course of the administration or enforcement of the provisions of any zoning regulations.
- (2) The time within which an appeal must be made and the form of other procedure relating thereto, shall be as specific in the general rules provided by the governing body to govern the procedure of the board of zoning adjustment and in the supplemental rules of procedure adopted by the board of zoning adjustment.

e. **NRS § 278.315** gives the Board of Zoning Adjustment the authority to hear and decide a request for a variance, special use permit, conditional use permit or other special exception.

f. **NRS § 278.317** provides that the governing body may reserve to itself the power to review the board's decision regarding a variance, special use permit or other special exception.

Standard of Review

The standard of review of the decisions and findings of fact of a board is the same standard that applies to most zoning decisions, "Substantial Evidence." The Nevada Supreme

Court has defined substantial evidence as “that which a reasonable mind might accept as adequate to support a conclusion.” Enterprise Citizens Action Committee v. Clark County Bd. Of Commissions, 112 Nev. 649, 918 P. 2d 305 (1996); City of Las Vegas v. Laughlin, 111 Nev. 557, 893 P. 2d 383 (1995).

In addition, if the Board is empowered to decide zoning variances. The statute that provides this power, NRS § 278.300(c) also defines variances.² The statute requires that some type of hardship must exist in order to grant a variance. In Enterprise Citizens Action Committee, supra, the Nevada Supreme Court addressed the issue but did not adopt a definition for a hardship. The Court reviewed definition of hardships from other states and determined that the applicant had not established on the record that a hardship existed. We are left to conclude that the Nevada Supreme Court will look at hardships on a case by case basis and not provide municipalities with a definition of what is and is not a hardship.

2. Ubiquitous Manufactured Housing and Its Implications for Your Town.

NRS § 461.260 grants municipalities the authority to regulate manufactured housing. The statute states:

1. Local enforcement agencies shall enforce and inspect the installation of factory-built housing and manufactured buildings.
2. Local use zone requirements, local fire zones, building setback, side and rear yard requirements, site development and property line requirements, as well as the review and

² “Where by reason of exceptional narrowness, shallowness, or shape of a specific piece of property at the time of the enactment of the regulation, or by reason of exceptional topographic conditions or other extraordinary and exceptional situation or condition of the piece of property, the strict application of any regulation enacted under NRS 278.010 to 278.630, inclusive, would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardships upon, the owner of the property, to authorize a variance from that strict application so as to relieve the difficulties or hardship, if the relief may be granted without substantial detriment to the public good, without substantial impairment of affected natural resources and without substantially impairing the intent and purpose of any ordinance or resolution.”

regulation of architectural and aesthetic requirements are hereby specifically and entirely reserved to local jurisdictions notwithstanding any other requirement of this chapter.

3. A local government authority may inspect Nevada manufacturers of factory-built housing or manufactured buildings to ensure compliance with all the provisions of NRS 461.170. Before conducting an initial inspection of any such manufacturer, a local government authority must give 10 days' written notice to the administrator of the division. The local government authority is not required to give notice to the administrator before conducting subsequent inspections of the manufacturer.

This regulation gives municipalities broad discretion in deciding on applications for manufactured housing. This discretion is used in the form of an aesthetic review. See Board of County Comms'rs of the County of Clark v. CMC of Nevada, Inc., 99 Nev. 739, 670 P. 2d 102 (1983).

3. Recent Case Histories:

- a. Garvin v. Ninth Judicial Dist. Court ex rel. County of Douglas, 59 P.3d 1180, (2002) The constitutional initiative process can be used to enact zoning legislation. The initiative process can also be used to modify a municipality's master plan.

- b. County of Clark v. Doumani, 114 Nev. 46, 952 P. 2d 13 (1998). The master plan establishes a standard which is entitled to deference and carries a presumption of applicability. Limitation period for appeal begins to run only when notice of the final decision is filed. When evidence for and against is equal, it is an abuse of discretion to not follow master plan.

- c. Carson City v. Lepire, 112 Nev. 363, 914 P. 2d 631 (1996). The Court has held that public opposition to a proposal is sufficient ground for denial. The United States

Constitution simply does not forbid democratic government to succumb to individual and public pressure in reaching land use decisions that work to the detriment of an individual litigant.

d. Enterprise Citizens Action Committee v. Clark County, 112 Nev. 649, 918 P. 2d 305 (1996). While we are not compelled to employ any of these definitions, we conclude that respondents have failed to prove, pursuant to any of these definitions, that the strict application of the zoning regulations would result in a hardship or difficulty which merited the granting of the variance...[I]t is incumbent upon the property owner to prove what the hardship or difficulty is, i.e., the owner of the property would be deprived of all beneficial uses of the land if the land was used solely for the purpose allowed in that zone, the value of the property would decrease significantly if the property was used solely for the purpose allowed in that zone, a reasonable return on the property would not be realized unless the variance was granted, the land is virtually useless as zoned or no feasible use could be made of the land as zone. The statute indicates that relief in the form of actual damages is available only to the party which submitted the application requesting an improvement or change of use on its property and only after the responsible agency acts arbitrarily in imposing some type of restriction on the use of the property in excess of the agency's statutorily derived powers. The statute does not provide for relief in the form of actual damages for a party challenging the application,

B. APPEAL PROCESS.

The appeal process for zoning decisions is through a writ of mandamus to the District Court. Any appeal must be made within 25 days of the notice of final action (not the decision). NRS § 278.0235 An applicant or a protestor may appeal an adverse zoning decision.

Appeals made to the district court are just that, appeals. No evidence, beyond the record from the body that rendered the final decision, is admitted. No testimony may be taken, no discovery is allowed. Therefore, it is vital that a good record be made before the zoning board.

1. **Making a Record:** Consider the following when appearing before a zoning board:
 - a. Changed conditions since the adoption of a master plan;
 - b. The particular issue was not contemplated when the master plan was adopted;
 - c. Change in growth patterns in the area and the potential impact the application will have on the existing neighborhood;
 - d. Whether the use is consistent or compatible with the users in the area or the development trends being established;
 - e. Traffic considerations;
 - f. Aesthetic considerations;
 - g. Crime factors;
 - h. Availability of resources and utilities to the service area;
 - i. Whether the development is commensurate with the character and the physical limitations of the land;
 - j. Specific and substantial comments made at the public hearing; and
 - k. Health, safety, morals and general welfare considerations.

Case law holds that one factor alone may not be substantial evidence. Many factors together provide a very strong basis for any zoning decision.

The public hearing on a request for a land use permit is the “trial.” The parties supporting and opposing the application must be like the attorney at trial, prepared to make a persuasive case for their request. Proper preparation is vital.

Many projects will cause opposition. If possible, the Applicant should meet with the opposition to attempt to assuage their concerns. If nothing else, the Applicant can learn what the opposition will say at the hearing, and be prepared to counter issues the opposition will raise.

A staff report is typically done well prior to the hearing and an applicant will thereby learn whether staff supports or opposes the project. If staff opposes the project, the applicant must be prepared to address this opposition at the hearing. The best way to deal with staff

opposition is to be prepared to compromise and meet before the public hearing with the staff in hopes of obtaining a favorable report.

A developer should know whether adjacent property owners and/or neighborhood organizations support or oppose a proposed project, should consider how persuasive the spokesperson for the organization will be and whether it makes sense to address the opposition of the neighborhood organization in the developer's initial presentation. Appearance at the local Citizen's Advisory Board or Townboard is recommended and comments made by the public should be considered.

An applicant should prepare exhibits and summaries of the evidence supporting the project to present at hearings.

In making the presentation of exhibits, the applicant should ensure that each exhibit is clearly received, identified and preserved for the record. In hotly contested hearings, a court reporter may be utilized. A bound volume of exhibits makes control of the physical record easier.

Remember, statement of counsel for interested parties and interested parties unsupported by proof is not substantial evidence. City of Council of the City of Reno v. Traveler's Hotel, 100 Nev. 436, 439, 683 P.2d 960, 961 (1984).

First, staff will read their report into the record. Then the Applicant will make its presentation. Then opposition groups are allowed to present their testimony or evidence. Finally, the applicant will be given a chance to address issues raised by the opposition. At this point, the public hearing is closed and the board discusses the application. Questions may be asked of staff, the applicant or the opposition.

The record will consist of all the application material, staff report, testimony, exhibits submitted, and comments by the zoning board.

Once an appeal is filed, the appellant has 120 days to serve the complaint and summons on the respondents. Appeals by applicants should name the zoning board that made the final decision. Appeals by protestors should name the zoning board, the applicant and the property owner.

Once served, any private party has 20 days to answer the complaint. Municipalities have 45 days to answer the complaint. The municipality will also prepare and produce the record. At that point, any party may request the court set a briefing schedule. The appellant will file and opening brief. The respondents will file oppositions, and the appellant may file a reply brief. At that point, a hearing is set by the court on its own volition or at the request of a party. The court will then hear argument, and render a decision. An order is prepared and signed by the court, and then any party wishing to appeal may do so to the Nevada Supreme Court.

2. Burden of Proof: The rule in Nevada, is that local zoning decisions are entitled to a presumption of validity. Coronet Homes, Inc. v. McKenzie, 84 Nev. 250, 439 P. 2d 219 (1968).

A Writ of Mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station, or to control an arbitrary or capricious exercise of discretion. County of Clark v. Doumani, 114 Nev. 46, 52, 952 P.2d 13, 17 (1998).

Mandamus is the proper legal means when seeking to have a zoning decision reviewed.

In reviewing a municipality's zoning decision, the substantial evidence standard of review is appropriate. "[T]he general rule that a court is not empowered to substitute its judgment for that of a zoning board, in this case the board of county commissioners, when the

board's action is supported by substantial evidence.” Nova Horizon v. City Council of the City of Reno, 105 Nev. 92, 94, 769 P.2d 721, 722 (1989). While a municipality is entitled to the benefits of the substantial evidence analysis, it is still required to exercise its discretion within the limits of the zoning power. The Nevada Supreme Court defined these limits as the requirement that zoning ordinances be enacted for the health, safety, morals or general welfare of the community. Id. The Supreme Court went on to add although the board’s discretion is entitled to a presumption of validity, the Master Plan is also entitled to deference. Doumani, 114 Nev. at 52, 952 P.2d at 17. Master plans are to be accorded substantial compliance under Nevada’s statutory scheme. Nova Horizon, 105 Nev. at 97, 769 P.2d at 724. Municipalities are given latitude to exercise their discretion in zoning matters, but still are required to follow the Master Plan under Nevada law.

It should be noted that in review of municipality zonings decisions, the Court is limited to the record that is made before the municipality. Enterprise Citizens Action Comm. v. Clark County Bd. Of Comm’rs, 112 Nev. 640, 653, 918 P.2d 305, 308 (1996).

A municipality’s zoning decision will be overturned if it was unreasonable, discriminatory or without substantial relationship to the public health, safety, morals and general welfare. Nova Horizon, 105 Nev. at 95, 769 P.2d. 3722 quoting with approval Town of Vienna Council v. Kohler, 244 S.E.2d 542, 548 (1978). Additionally, the Nevada Supreme Court has also held that zoning that is inconsistent with surrounding property zoning is arbitrary and, therefore, invalid. Nova Horizon, quoting with approval City of Conway v. Housing Authority, 584 S.W.2d 10 (1979).

Zoning that lacks factual information to back it up constitutes an abuse of discretion. Nova Horizon, quoting with approval Lowe v. City of Missoula, 525 P.2d 551 (1974) (restrictive

zoning impressed on landowner's property was so lacking in fact information as to constitute an abuse of discretion; rezoning held to be invalid). Failure to give deference to a Master Plan, when evidence on both sides of the question is equal, is an abuse of discretion.

We conclude that because the evidence presented in support of and in opposition to the proposed development was roughly equal, the District Court did not abuse its discretion in determining that the Board abused its discretion by failing to give deference to the Master Plan and denying the rezoning request.

Doumani, 114 Nev. at 54, 952 P.2d at 18.

The burden in an appeal is on the party challenging such a decision to overcome that presumption of validity in a particular case. City of Henderson v. Henderson Auto Wrecking, Inc., 77 Nev. 118, 359 P. 2d 743 (1961). Zoning ordinances providing that applicant seeking special use permit must present evidence that use is necessary to public health, convenience, safety and welfare and for promotion of general good of community is not unconstitutional on theory that it places an unreasonable burden on applicant for a special use permit. Coronet Homes, Inc. v. McKenzie.

3. Legislative v. Administrative Actions

"A municipal ordinance may be either legislative or administrative. Kleiber v. City of San Francisco, 18 Cal.2d 718, 117 P.2d 657 (1941). The decision in Denman v. Quin, 116 S.W.2d 783, 786 (Tex.Civ.App.1938), offers an oft-used test for drawing the distinction: 'An ordinance originating or enacting a permanent law or laying down a rule of conduct or course of policy for the guidance of the citizens or their officers and agents is purely legislative in character, and referable, but an ordinance which simply puts into execution previously-declared policies, or previously- enacted laws, is administrative or executive in character, and not referable.' This legislative-administrative dichotomy is often vague, but it is this very vagueness which has given the courts considerable leeway in balancing two competing interests: that of

protecting government from unwarranted harassment and the equal interest in protecting benefits to be won through direct legislation.” Forman v. Eagle Thrifty Drugs & Markets, Inc. 89 Nev. 533, 537, 516 P.2d 1234, 1236 (1973) overruled on other grounds