

Statutory Standards and Procedures

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In Nevada, the power to make zoning decisions is granted to County Commissions, City Councils, Planning Commissions, Boards of Zoning Adjustment and Special Hearing Examiners. The relevant statutory references providing the express authority for these entities are found in the Nevada Revised Statutes (NRS) Chapter 278. The general power for County Commissions and City Councils to zone is contained in NRS 278.010 to 278.630. The general power of Planning Commissions is found in NRS 278.030 to 278.265. The general power of Boards of Zoning Adjustment is found in NRS 278.270 to 278.310. And the general power of Special Hearing Examiners is found in NRS 278.262 to 278.265 and 278.315.

In dealing with land use issues (as with any other legal problem), it is important to begin with the basics.

POLICE POWER

In Nevada, the power to regulate the use of land is embodied in NRS 278.020, which provides as follows:

Regulation by governing bodies of improvement of land and location of structures for general welfare.

1. For the purpose of promoting health, safety, morals, or the general fare 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.
2. Any such regulation, restriction and control must take into account
 - (a) The potential impairment of natural resources and the total population which the available nature resources will support without unreasonable impairment; and
 - (b) The availability of and need for affordable housing in the community, including affordable housing that is assessable to persons with disabilities. [Emphases added].

As Justice William O. Douglas stated in Berman v. Parker, 348 U.S. 26 (1954):

The concept of the public welfare is broad and inclusive . . . The values it represents are spiritual as well as physical, aesthetic, as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

This statement is recognized “as a correct description of the authority of a state or city to enact legislation under the police power.” Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848 (1980).

In exercising the police power, a city or county must act at times within certain state statutory guidelines. In handling land use issues, it is of critical importance to look first at these guidelines, whether statutory or contained in the local zoning ordinance.

MASTER PLANS

To begin with, most local governments in Nevada have prepared and adopted comprehensive long-term general plans for the physical development of their city, county or region. These plans, which are known as master plans, must be prepared and adopted in accordance with the provisions of NRS 278.150 through 278.230, inclusive. In addition, Washoe County has been required to develop a comprehensive regional plan for the physical development and orderly management of the growth of the region for a twenty year period (NRS 278.026 – 278.029, inclusive).

While NRS 278.160 spells out various elements which may be included in the master plan, NRS 278.150(3) and 278.170 specify that the only mandatory elements such a plan must include in Washoe County are a conservation plan, a housing plan and a population plan.

The mandatory conservation plan is described in NRS 278.160(1) (b) as follows:

Conservation plan. For the conservation, development and utilization of natural resources, including water and its hydraulic force, underground water, water supply, forests, soils, rivers and other waters, harbors, fisheries, wildlife, minerals and other natural resources. The plan shall also cover the reclamation of land and waters, flood control, prevention and control of the pollution of streams and other waters, regulation of the use of land in stream channels and other areas required for the accomplishment of the conservation plan, prevention, control and correction of the erosion of soils through proper clearing, grading and landscaping, beaches and shores, and protection of watersheds. The plan must also indicate the maximum tolerable level of air pollution.

The mandatory population plan is described in NRS 278.160 (1) (g) as follows:

Population plan. An estimate of the total population which the natural resources of the city, county or region will support on a continuing basis without unreasonable impairment.

Once a master plan has been adopted by the governing bodies of the cities or the counties, they are required by NRS 278.230 (1) (a) to determine upon recommendation of the Planning Commission reasonable and practical means for putting into effect the master plan or part thereof, in order that the same will serve as [A] pattern and guide for that kind of orderly

physical growth and development of the city or county which will cause the least amount of natural resource impairment and will conform to the adopted population plan, where required....

NRS 278.230 (2) then goes on to provide that “[T]he governing body may adopt and use such procedures as may be necessary for this purpose.”

As can be seen by the recent opinion of our Supreme Court in Serpa v. County of Washoe, 111 Nev. 1081, 901 P. 2d 690 (1995), a well thought out master plan be a powerful tool in the hands of local governments to carry out their objectives. In the Serpa case, Washoe County turned down an applicant’s proposed subdivision because it was inconsistent with the County’s long-term comprehensive plan, even though the proposal was consistent with the zoning on the property. The property was zoned for one house per acre and the applicant held sufficient certificated water rights to serve the proposed subdivision. However, the Master Plan prohibited the creation of lots which were less than 5 acres in size without the importation and dedication of new and different water rights from outside the hydrographic basin because such lots would negatively impact the quantity and quality of water in the area. In affirming the County’s denial of the proposed subdivision on one acre lots, the Court held as follows (111 Nev. At 1084):

Nevada law clearly directs county governments to maintain the quality of our natural resources and protect the public health by adopting long-term comprehensive plans for rational development and growth and rejecting any development proposals inconsistent with the relevant regional plan or the public welfare objectives underlying it. See NRS 278.250; NRS 278.0278. County governments are vested with discretion to the extent that a county government can independently define “orderly physical growth and development.” NRS 278.230(1). We believe that such discretion necessarily includes the ability of a county government to determine water availability for itself.

On the other hand, once a master plan has been adopted by a city or county, the local government is also bound by its mandate. In Nova Horizon v. City Council, Reno, 105 Nev. 92, 769 P. 2d 721, (1989), the Supreme Court reversed a District Court decision that there was substantial evidence supporting the City of Reno’s denial of a zone change and its holding the City’s land use/transportation guide was nothing more than a guide and would not be construed to compel a change in Zoning as follows:

Having determined that master plans are to be accorded substantial compliance under Nevada’s statutory scheme, and recognizing a new the general reluctance to judicially intervene in zoning determinations absent clear necessity, Board of Comm’rs v. Dayton

Dev. Co., Nev. 71, 530 P. 2d 118 (1975), we turn not to the issue of respondents' zoning action in the instant case. It is clear on the record that no evidentiary basis exists for the Council's denial of appellants' zone change request. It is equally clear that no deference, let alone presumptive applicability, was accorded Reno's master plan by the Council. In one instance, an expression of deference to a campaign promise was the stated basis for what was tantamount to a disregard for the master plan. The other expression offered as a specific basis for rejecting appellants' application was a pledge, presumably to constituents, to seek diversification in favor of higher employee wages. The latter point was equally untenable as a basis for zoning denial. Moreover, as noted above, the surrounding properties enjoyed the same zoning sought by appellants and no evidence, let alone reasoning, was present to justify a denial of appellants' request for rezoning. We, therefore, are compelled to reverse the district court on this point.

As can be clearly seen from this case, our Supreme Court determined that master plans are to be accorded substantial deference by governing bodies under Nevada's statutory scheme, and the Court ruled against the City of Reno because "no deference, let alone a presumptive applicability, was accorded Reno's master plan by the Council." [Emphasis added].

The holding in the Nova Horizon case could be utilized not only by unhappy applicants whose project may be turned down by the local government, but also by citizen groups opposed to the approval of a project which is inconsistent with the adopted master plan.

As can be seen by the above statutory scheme, and the accompanying case law, Washoe County not only has the power, but the duty, to establish realistic growth management policies to control development within their respective jurisdictions. Certainly, the other counties also have that power should they choose to adopt it. The adopted master plan is the foundation upon which such policies must be based with the population and conservation plans representing the cornerstones of that foundation. The population and conservation plans establish the parameters beyond which additional growth can no longer be tolerated.

ZONING

NRS 278.250 and 278.260 provide that the governing bodies may enact zoning ordinances to carry out the purposes discussed above. However, it must be remembered that zoning is merely a tool designed to effectuate the comprehensive long-term planning goals of the communities. Individual landowners have no vested rights in any particular zoning classification. The public welfare, as set forth in NRS 278.020 and elsewhere in NRS Chapter

278, must, by law, guide all decisions by the governing bodies in the field of zoning. This is further evidenced by the language of NRS 278.250(2) which provides that:

The zoning regulations must be adopted in accordance with the master plan for land use and be designed:

- (a) To preserve the quality of air and water resources.
- (b) To promote the conservation of open space and the protection of other natural and scenic resources from unreasonable impairment.
- (c) To provide for recreational needs.
- (d) To protect life and property in areas subject to floods, landslides and other nature disasters.
- (e) To conform to the adopted population plan, if required by NRS 278.170.
- (f) To develop a timely, orderly and efficient arrangement of transportation and public facilities and services, including facilities and services for bicycles.
- (g) To ensure that the development on land is commensurate with the character and the physical limitations of the land.
- (h) To take into account the immediate and long-range financial impact of the application or particular land to particular kinds of development and the relative suitability of the land for development.
- (i) To promote health and the general welfare.
- (j) To ensure the development of an adequate supply of housing for the community, including the development of an affordable house.

In conclusion, it is evident that local governments in Nevada have broad powers and a corresponding legal duty to adopt long-term comprehensive plans for the rational physical development of their jurisdictions tempered, at the very minimum, by the mandatory environmental constraints of our air and water resources. Furthermore, they have broad powers and a corresponding legal duty to adopt and use such procedure as may be necessary to effectuate the plan.

The adopted master plan must be internally consistent i.e., the land use plan cannot allow a greater number of potential residents than the population plan provides for. Similarly, the local zoning ordinances must be consistent with the adopted population plan. Without consistency, you do not have a legally defensible master plan. Additionally, without such consistency, your zoning ordinances could be vulnerable to legal challenge by pro-development and anti-development forces alike—a situation which could be detrimental to all parties concerned.

DIVISIONS OF LAND

Local governing bodies are called upon to review various divisions of land including subdivisions (NRS 278.320 – 278.460), parcel maps (NRS 278.461 – 278.469) and divisions of

land into large parcels (NRS 278-471 – 278.4725); and these land divisions must be reviewed in accordance with appropriate statutory guidelines.

SUBDIVISIONS

With regard to subdivisions, the governing body must consider the following provisions of NRS 278.349(3) in approving a proposed subdivision:

The governing body or planning commission if it is authorized to take final action on a tentative map, shall consider:

- (a) Environmental and health laws and regulations concerning water and air pollution, the disposal of solid waste, facilities to supply water, community or individual systems for sewage disposal;
- (b) The availability of water which meets applicable health standards and is sufficient in quantity for the reasonably foreseeable needs of the subdivision;
- (c) The availability and accessibility of utilities;
- (d) The availability and accessibility of public services such as schools, police protection, transportation, recreation and parks;
- (e) Conformity with the zoning ordinances and a master plan, except that if any existing zoning ordinance is inconsistent with the master plan, the zoning ordinance takes precedence;
- (f) General conformity with the governing body's master plan of streets and highways;
- (g) The effect of the proposed subdivision on existing public streets and the need for new streets or highways to serve the subdivision;
- (h) Physical characteristics of the land such as flood plain, slope and soil;
- (i) The recommendations and comments of those entities reviewing the tentative map pursuant to NRS 278.330 to 78.348, inclusive; and
- (j) The availability and accessibility of fire protection, including, but not limited to, the availability and accessibility of water and services for the prevention and containment of fire, including fires in wild lands.

The provisions of NRS 278.349(3) must not only be looked at in deciding whether to approve or deny a proposed subdivision, but are also critical in formulating conditions for approval.

PARCEL MAPS

NRS 278.462 sets forth the requirements which may be imposed by a governing body in approving a parcel map:

Requirements which may be imposed by governing body. The governing body or, if authorized by the governing body, the planning commission or other authorized person:

- 1. May require street grading, drainage provisions and lot designs as are reasonably necessary.
- 2. If it anticipates that the parcels will be used for residential, commercial or industrial purposes, may require offsite access, street alignment, surfacing and width,

water quality, water supply and sewage provisions as are reasonably necessary and consistent with the existing use of any land zoned for similar use which is within 60 feet of the proposed parcel. If the proposed parcels are less than 1 acre, the governing body or, if authorized by the governing body, the planning commission or other authorized person may require additional improvements which are reasonably necessary and consistent with the use of the land if it is development as proposed.

3. For a second or subsequent parcel map with respect to:
 - (a) A single parcel; or
 - (b) A contiguous tract of land under the same ownership, may require any reasonable improvement, but not more than would be required if the parcel were a subdivision.

As can be seen, the requirements which may be imposed by a governing body for a first parcel map are quite limited. However, a second or subsequent parcel map on a parcel or a contiguous tract of land under the same ownership may be treated as a subdivision in terms of improvements which can be required. In addition, it may be possible to utilize the provisions of your adopted master plan to bolster your position in asking for more than allowed by NRS 278.462 or even as a possible reason for denial.

MAPS OF DIVISION LAND INTO LARGE PARCELS

NRS 278.472(4) sets forth the requirements for a final map of division of land into large parcels as follows:

This map must show and define:

- (a) All subdivision lots by the number and actual acreage of each lot.
- (b) Any roads or easements of access which exist and which the owner intends to offer for dedication, any roads or easements of access which are shown on the applicable master plan and any roads or easements of access which are specifically required by the planning commission or governing body.
- (c) Any easements for public utilities which exist or are proposed.
- (d) Any existing easements for irrigation or drainage and any normally continuously flowing watercourses.

NRS 278.4725 provides for minimal access requirements for such a map as follows:

5. If the final map divides the land into 16 lots or more, the governing body or planning commission shall not approve a map, and a map shall not be deemed approved, unless:
 - (a) Each lot contains an access road that is suitable for use by emergency vehicles; and
 - (b) The corners of each lot area set by a professional land surveyor.
6. If the final map divides the land into 15 lots or less, the governing body may, if reasonably necessary, require the map to comply with the provisions of subsection 5.

LAND USE APPLICATION

The local governing bodies may also provide by ordinance for the granting of variances, special use permits or other special exceptions by the board of adjustment or planning commission (NRS 278.270 – 278.317, inclusive), and such ordinances generally set forth certain standards to be used to review such requests.

VARIANCES

With regard to variances, NRS 278.300(1)(c) provides that the board of adjustment shall have the following power:

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 by exceptional topographic conditions or other extraordinary and exceptional situation or condition of the piece of property, the strict application or 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.

In Washoe County, the following findings must be made in order to approve a variance:

Section 110.804.25 Findings. Prior to approving an application for a variance, the Board of Adjustment, the Planning Commission or hearing examiner shall find that all of the following are true:

- (a) **Comprehensive Plan.** The variance is consistent with the policies, action programs, standards and maps of the Comprehensive Plan and the applicable area plans;
- (b) **No Detriment.** The variance will not create a detriment to the scenic or environmental character of the surrounding area;
- (c) **Special Circumstances.** Because of the special circumstances applicable to the property, including size, shape, topography and location of surroundings, the strict application of the regulation deprives the property of privileges enjoyed by other property with the identical regulatory zone;
- (d) **Adequate Public Facilities.** An adequate public facilities determination in accordance with Division Seven has been made;
- (f) **Use Authorized.** The variance will not authorize a use or activity which is not otherwise expressly authorized by the regulation governing the parcel or property.

SPECIAL USE PERMITS

With regard to special use permits, the following findings must be made in Washoe County prior to the approval thereof:

Section 110.810.30 Findings. Prior to approving an application for a special use permit, the Planning Commission or Board of Adjustment shall find that all of the following are true:

- (a) Consistency. The proposed use is consistent with the action programs, policies, standards and maps of the Comprehensive Plan;
- (b) Improvements. Adequate utilities, roadway improvements, sanitation, water supply, drainage and other necessary facilities have been provided, the proposed improvements area properly related to existing and proposed roadway, and an adequate public facilities determination has been made in accordance with Division Seven;
- (c) Site Suitability. The site is physically suitable for the type of development and for the intensity of development; and
- (d) Issuance Not Detrimental. Issuance of the permit will not be significantly detrimental to the public health, safety or welfare; injurious to the property or improvements of adjacent properties; or detrimental to the character of the surrounding area.

Since an applicant for a special use permit is seeking to use his property in a way already sanctioned by the zoning ordinance, it is difficult to sustain the denial of a special use permit unless the use proposed would impact the area more severely than other uses permitted in that zoning district. For example, a significant increase of traffic may not be sufficient to deny a special use permit even if not fully mitigated if most other uses permitted in the zoning district would create similar impacts. On the other hand, the generation of large amounts of heavy truck traffic through adjoining residential neighborhoods may be sufficient, even if the applicant offers to upgrade the residential streets to handle the heavier trucks if most other uses in the zoning district would not create heavy truck traffic. Again, note the requirement in Section 110.810.30(a) of Washoe County's Development code that the proposed use be consistent with the Master Plan.

B. Recent Case Law.

1. In Advanced Specialty Gases, Inc., v. The County of Lyon, a political subdivision of the State of Nevada; and the Lyon County Board of Commissioners, a Petition for Judicial Review and Complaint for Damages was filed in which Advanced Specialty Gases, Inc., sued Lyon County for \$4 million for revoking its special use permit for its gas plant, which put the hazardous gas manufacturing plant out of business. Lawyers said the administrative hearing was inadequate and prejudicial. They claim lawyers for Dayton Valley developers submitted written material to the commissioners without giving Advanced Specialty Gases' a chance to see it. See Exhibit A.

2. In J.C.3N.C., Inc., et al, v. City of Reno, a political subdivision of the State of Nevada, a Petition for Judicial Review (NRS 278.0235) and Damages was filed. See Exhibit B. An Order has issued January 16, 2002, holding:

Upon review of the record, this Court is persuaded that Respondent's decision to deny the Special Permits to Petitioners was arbitrary and capricious. It is clear from the record that Petitioners ensured that all existing master plans, zoning and planning policies, regulations and findings were in place. The Wal-Mart project was approved by the Regional Planning Commission after the Regional Traffic Commission, State Department of Transportation, and the City Staff and Advisory Commission all approved the project. There is no question before this Court that this project is compatible because it was approved consistently at every step of the planning process. Respondent cannot rely on a last-minute, worst-case scenario traffic study at the eleventh hour to defeat all the other numerous and reliable studies and recommendations conducted over time to turn down permits for this project. Such conduct by Respondent was arbitrary. Accordingly, the Decision by the Reno City Council to deny Petitions the special use permits is hereby REVERSED.

See Exhibit C.

An editorial commented upon the City's actions. See Exhibit D.

3. 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. We, therefore, conclude that the limitation period does not begin to run when a final decision is rendered. Rather, the limitation period begins to run only when notice of the final decision is filed. 25 days are given per NRS 278.0235.

4. 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.

5. 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 zoned.

6. Southern Nev. Homebuilders Assn. v. Las Vegas, 112 Nev. 297, 913 P. 2d 1276 (1996). The City of North Las Vegas imposed a fee for funding fire protection and emergency medical services within the city to be paid when an applicant applied for a City building permit. The Southern Nevada Homebuilders Association filed a complaint for declaratory relief challenging the validity of the Ordinance. The District Court granted summary judgment to the Homebuilders Association on the grounds that the special building permits fees constituted an unlawful tax that substantially benefited those who were not subject to payment of the fees. The Supreme Court concluded that summary judgment was warranted, holding that to the extent the City had authority to adopt the Ordinance, it was preempted by NRS 278B.

7. Douglas Co., Contractors Association v. Douglas Co., 112 Nev. 1452, 929 P. 2d 253 (1996). Douglas County charged the maximum allowable Residential Construction Tax of \$1,000 per residential dwelling unit for the schools pursuant to NRS 287.331. On September 2, 1993, they imposed an additional fee of \$2,400 per dwelling unit for subdivisions which was referenced to as the “Fair Share Cost.” The County characterized the “Fair Share Cost” as either a “contract,” a “regulatory fee,” or a “fee in lieu of land dedication.” The Supreme Court concluded that the Nevada Legislature has carefully planned the means of orderly school financing within a statutory scheme structured to occupy the entire field on the subject. They then concluded that the “Fair Share Cost” program had been preempted by Nevada’s impact fee enabling legislation and remanded the matter to the District Court with Instructions to grant the Contractors Association’s motion for summary judgment.

8. American West Development, Inc. v. City of Henderson, 111 Nev. 804, 898 P. 2d 110 (1995), footnote 3. Nevada’s statutory scheme mandates that municipalities adopt zoning regulations that are in substantial agreement with approved master plans.

9. City of Reno v. Harris, 111 Nev. 672, 895 P. 2d 663 (1995). [W]e unequivocally held that the granting or denial of a use permit is generally within the prerogative of local governments. Finally, we note it is not the business of courts to decide zoning issues. Because of the Board’s particular expertise in zoning, courts must defer to and not interfere with the Board’s discretion if this discretion is not abused. ...Once it is established that an area permits several

uses, it is within the discretion and good judgment of the municipality to determine what specific use should be permitted.

10. City of Las Vegas v. Laughlin, 111 Nev. 557, 893 P. 2d 383 (1995). The grant or denial of a request for a special use permit is a discretionary act. If this discretionary act is supported by substantial evidence, there is no abuse of discretion. Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion. ...We conclude that the concerns expressed by the public, specifically those over increased traffic where children walk to school and preserving the residential nature of the neighborhood, established a valid basis for the denial of Laughlin's request for a special use permit.