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Summary of Kay v. Nunez, 122 Nev. Adv. Op. No. 94

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Kay v. Nunez, 122 Nev. Adv. Op. No. 94, (Nov. 22, 2006)[1]

PROPERTY - ZONING/PROCEDURE

Summary

Appeal from a district court order which denied a petition for judicial review and a petition for a writ of mandamus, and challenged the Clark County Board of County Commissioners' authority to waive development standards.

Disposition/Outcome

Affirmed the district court's denial of Respondent's petition for judicial review, clarified that petition for writ of mandamus was statutorily incorrect procedure for redress of Respondent's grievance and held that Respondent had standing to challenge Planning Commission's decision.

Factual and Procedural History

The Respondent, Oscar Nunez, wished to replace three existing residential buildings on a parcel of land owned by him with a single "mixed-use" 16-story building. However, the zoning classification of the property, "H-1," would not permit such a use. H-1 designations are confined to limited resort and apartment use. Further, the H-1 designation allowed a maximum of 50 dwelling units per acre while the Respondent's proposed building contained more than 130 per acre.

The Respondent attempted to remedy this non-compliance by applying for a nonconforming zone change to a "U-V" designation because this classification does not limit the number of units per acre and allows the combination of "residential, commercial, recreational, and open space components into a single urban center."[2] However, while a U-V designation would remedy the Respondent's problem concerning the number of units per acre, the proposed building would not satisfy all of the requirements of a U-V designation. Accordingly, the Respondent applied for a waiver concerning some of the standards to accommodate the following: (1) excessive height that encroached on airport airspace; (2) a height/ratio setback 40 feet too short; (3) only 16,255 square feet reserved for recreational area rather than the required 39,393 square feet; (4) only 9,163 square feet of open space rather than the required 17,634 square feet; and (5) only 605 on-site parking spaces rather than the required minimum of 644 spaces. The Clark County Planning Commission Staff and the Paradise Town board recommended approval of the Respondent's application. The Clark County Planning Commission unanimously approved the Respondent's application subsequent to a public hearing.

Consequently, a resident of a nearby building, the Appellant James Kay, filed an administrative appeal with the Clark County Board of Commissioners. Another public hearing was held and, over the objections of the Appellant's counsel, the Board voted to approve the application and waive the U-V development standards as requested by the Respondent.

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[1] By Michael Hammer

[2] Kay v. Nunez, 122 Nev. Adv. Op. No. 94, *2 (Nov. 22, 2006).

The Respondent then filed both a petition for a writ of mandamus and a petition for judicial review with the district court. The district court denied both petitions.

Discussion

The Proper Procedure to Challenge a Board's Zoning or Planning Decision is to File a Petition for Judicial Review

The Court observed that a mandamus petition is appropriate only where no adequate or speedy legal remedy exists.[3] While past challenges to a governing board's zoning decisions had been made by petition for a writ of mandamus, the legislature enacted a statute, in 2001, which unambiguously states that the proper procedure for such a challenge is to file a petition for judicial review.[4] Because the statute provided a speedy and adequate remedy, the Court held the Respondent's petition for a writ of mandamus was inappropriate.

The Appellant Had Standing to File a Petition for Judicial Review

The Court rejected the Appellant's argument that the Respondent was not "aggrieved" and, therefore, lacked standing to file a petition for judicial review. The Court observed that in certain contexts a "special or peculiar injury" is necessary to be considered "aggrieved," but this is not the case when challenging local zoning and land use planning decisions. Pursuant to NRS 278.3195(1), the Board is required to adopt an ordinance which allows any person who is aggrieved by a planning commission decision to appeal. For counties having a population equal to or greater than 400,000, "a person shall be deemed to be aggrieved. . . if the person appeared, either in person, through an authorized representative or in writing, before [the Planning Commission] on the matter which is the subject of the decision."[5]

The Court further rejected that a different standard for being "aggrieved" applied in the context of a petition for judicial review than to appeal a Planning Commission decision to the Board. The Court concluded that this would produce an absurd outcome because a person who is statutorily permitted to challenge a Planning Commission decision to the Board would not necessarily be permitted to petition for judicial review to judicially challenge the same decision.

The Variance Standard Contained in NRS 278.300 Does Not Apply to the Board and NRS Chapter 278 Authorizes the Board to Enact a Waiver of Development Standards Procedure

Generally, the process for reviewing judicial review petitions involves examining a Board's decision for substantial evidence. However, the Respondent raised only legal questions subject to *de novo* review: (1) the Respondent argued a narrow statutory standard for granting variances in NRS 278.300 applied to the Board; and (2) the Board does not have authority under NRS Chapter 278 to grant a waiver of development standards.

The Court observed that "variances may be granted by a county board of adjustment when a parcel's shape or topographic conditions would result in exceptional practical difficulties

[3] NEV. REV. STAT. § 34.170 (2005).
[4] NEV. REV. STAT. § 278.3195(4) (2005).
[5] *Nunez*, 122 Nev. Adv. Op. No. at *4 (citing NEV. REV. STAT. § 278.3195(1) (2005)).

to or hardships upon the landowner."[6] Nonetheless, the Court noted that Clark County has not created a board of adjustment despite its statutory discretion to do so. The Court concluded that NRS 278.300's criteria applies only to boards of adjustment and do not limit the Board's authority to grant variances.

Additionally, the Court held that NRS Chapter 278 authorizes the Board to enact a waiver of development standards procedure. NRS 278.315(1) provides that the Board be empowered to create ordinances allowing the Planning Commission to grant special exceptions to development standards procedures. Clark County Code § 30.40.330 is just such an ordinance as it allows the Planning Commission to grant waivers of development standards.

Conclusion

Subsequent to holding that a petition for a writ of mandamus was an inappropriate procedural recourse for the Respondent, the Court affirmed the district court's order denying the Respondent's petition for judicial review. The Court concluded that, while the Respondent had standing to challenge the Board's decision, the Board had appropriately waived the development standards.

[6] *Id*. at *4-5.