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MEMORANDUM

TO: Carson City Board of Supervisors
FROM: Dan Yu, Deputy District Attorney
DATE: November 17, 2016
RE: *Appeal from the Carson City Planning Commission - Silver Bullet of Nevada, LLC (Bodine's Northtown Plaza) as applicant for a Special Use Permit.*

BACKGROUND

This memorandum is intended to provide general guidance to the Board of Supervisors ("Board") on the issues of legal standing and the appropriate burden of proof in the Board's consideration of the administrative appeal which was filed by the Carson Nugget Casino Hotel, Gold Dust West Hotel, Carson City Max Casino and SlotWorld Casino (collectively, "Appellant") to challenge a decision of the Carson City Planning Commission ("Planning Commission") to approve the application of Silver Bullet of Nevada, LLC ("Applicant") for a Special Use Permit ("SUP") for the purpose of operating a gaming establishment to be known as Bodines Northtown in Carson City. This memorandum incorporates by reference the staff report submitted by the Carson City Planning Division as supporting material, as well as the letter of appeal submitted by the Appellant, dated October 3, 2016 and the letter submitted by the Applicant on October 24, 2016 raising the issue of standing.

DISCUSSION

1. Legal Standing.

In Nevada, the governing body of a local government, such as the Board, exceeds its authority in deciding an appeal from a planning commission if it fails to first determine whether the appellant had standing to bring the appeal. *See* City of N. Las Vegas v. Eighth Judicial Dist. Court., 122 Nev. 1197, 1204 (2006). Thus, the question of standing is a threshold issue before the Board and a determination of whether the Appellant has standing must be made before the merits of the appeal are considered. Id. A finding by the Board of whether a person is "aggrieved" by a decision of the City's Planning Commission is significant because that decision in turn determines whether the Appellant has standing to bring its appeal; aggrievement is standing.

Challenges to planning commission decisions concerning special use permits may be made in accordance with local ordinances that have been adopted pursuant to Nevada Revised Statutes ("NRS") 278.3195. The provisions of NRS 278.3195, which were enacted by the Nevada Legislature in 2001, require most governing bodies of local government to adopt an ordinance establishing procedures by which any person who is aggrieved by a decision of its regional planning agency may file an appeal to the governing body. Under those same provisions, in a county whose population is 700,000 or more (at present, only Clark County), a person is "deemed to be aggrieved" if the person appeared in person, through an authorized representative or in writing before the local government's regional planning agency "on the matter which is the subject of the decision." NRS 278.3195(1). The statute, however, is silent with regard to who may qualify as an "aggrieved" party in any other county that does not meet the population threshold. Because the statutory designation of who may qualify as an "aggrieved" party under the provisions of NRS 278.3195(1) do not apply to counties whose population is not 700,000 or more, that term does not apply to a person who files an appeal to the Board in Carson City challenging a decision of the Planning Commission. Stated differently, there is no statutory definition of "aggrieved" for purposes of an appeal from the Planning Commission.

Similarly, Carson City Municipal Code ("CCMC") also does not define who is an "aggrieved" party for purposes of an administrative appeal from a decision of the Planning Commission. Instead, CCMC 18.02.060(4) simply provides that "any project applicant or any aggrieved party may file an appeal as specified in this section provided that the appellant has participated in the administrative process prior to filing the appeal." In City of N. Las Vegas, involving an appeal from the approval of a special use permit, the Nevada Supreme Court held that the Nevada Legislature's act of choosing not to define "aggrieved" for appeals in certain counties with lower population thresholds indicated an intent by the Legislature not to preclude local ordinances "from addressing who may appeal from a planning commission decision" and therefore an "ordinance adopted under NRS 278.3195 may validly broaden the definition of who may appeal." 122 Nev. at 1206.

In this matter before the Board, there is no question that the Appellant "participated in the administrative process prior to filing the appeal." But the Applicant argues, in essence, that because the Appellant in this matter is not the "project applicant" and also because CCMC has not expressly expanded or enlarged the group of persons who may appeal, the Board must, under the Nevada Supreme Court's holding in Kay v. Nunez, find that the Appellant as "one whose personal or property right has been 'adversely and substantially affected ....'" 122 Nev. 1100, 1106 (2006).

However, it is the opinion of this office that the Applicant's interpretation of the Nevada Supreme Court's ruling in Kay is incorrect. In Kay, the issue before the court was whether the appellant had standing to seek *judicial review*, and not whether the appellant had standing to file an *administrative appeal*. Id. As the court explained, because the governing body to which the appellant had initially submitted an administrative appeal pursuant to ordinance to challenge the decision of the planning commission had already conceded during the administrative phase that the appellant had standing, the appellant necessarily had standing to bring a petition for judicial review on the same matter. Id. at 1106-07. Thus, although the court recognized that it had

previously in other cases required an "aggrieved" party to show that his or her personal or property right has been "adversely and substantially affected," the court declined to apply that standard for "appellate purposes" where the appellant had already satisfied standing requirements at the administrative appeal level. Id. Therefore, the Nevada Supreme Court's holding in Kay is neither binding nor instructive with regard to the question of standing in this administrative appeal before the Board.

Relying on a string of court decisions from other jurisdictions, the Applicant also urges the Board to deny standing to the Appellant based on the general proposition that the Applicant has not suffered any special or particular injury different in kind from the general public and "whose only objection to granting a variance or exception is that it would create business competition." Those cases cited by the Applicant also involve standing for judicial review purposes, some in the unique context of taxpayer standing before certain courts, and not for administrative appeal pursuant to authority under local ordinance.

As discussed above, CCMC does not define who is an "aggrieved" party for purposes of an appeal from the Planning Commission. NRS 278.3195 also does not define the term for smaller counties such as Carson City. Although the Nevada cases cited by the Applicant only discuss standing at the judicial level and analyze the meaning of "aggrieved" in the context of NRS 278.3195, it is noteworthy that CCMC 18.02.060(4) is modeled after that statutory provision, especially with its requirement that the "aggrieved" party must have "participated in the administrative process prior to filing the appeal." Based on the plain meaning of that ordinance language, the broader term "participated in" parallels and encompasses the requirement set forth in NRS 278.3195(1) which deems a person to be "aggrieved" if the person appeared in person, through an authorized representative or in writing before the local government's regional planning agency. The absence of a definition for "aggrieved" in CCMC notwithstanding, because CCMC 18.02.060(4) fairly follows NRS 278.3195(1) in every other regard, both the Nevada cases and the other state cases discussed by the Applicant bear some relevance, though not binding in precedent, in determining the issue of the Appellant's standing to bring its administrative appeal before the Board as an "aggrieved" party under CCMC.

Therefore, to the extent the cases relied upon by the Applicant serve as guidance, it may be properly argued that a party who appeals a decision of the Planning Commission pursuant to CCMC 18.02.060 only has standing as an "aggrieved" party if, in general, there is some showing that the appellant: (1) has a personal or property right that has been adversely or substantially affected, as discussed in Kay, *supra*; and (2) that asserted right is an interest in the matter which differs from the general public and is not simply a matter of public concern.

Based on the foregoing, and in the absence of any clear, binding precedent established by the Nevada Supreme Court, whether the Appellant in this matter has standing appears to be more a question of fact than a question of law. In its letter of appeal, the Appellant challenges the Planning Commission's granting of the SUP on the grounds that the approval is inconsistent with the goals of the Master Plan, the required findings set forth in CCMC 18.02.080 concerning the economic impact of an approved SUP and that the SUP application was defective for failure by the Applicant to obtain necessary gaming license approvals. Therefore, the Appellant has not, as the Applicant suggests, relied solely on an argument that approval of the SUP would create

business competition. Furthermore, because the Appellant is a group of property owners engaged in the same, highly regulated business of operating gaming establishments as the Applicant, the Appellant has asserted a colorable claim that there are property rights which are affected by the approval of the SUP and that claim is more than one which comes from a matter of generalized, public concern. Accordingly, it is the opinion of this office that the Appellant has standing to bring its appeal challenging the Planning Commission's granting of the SUP.

2. Burden of Proof.

In its letter of appeal, the Appellant describes the "standard of review" for the Board in hearing its appeal. For additional clarity, the following discusses the legal distinction between "substantial evidence" and "preponderance of the evidence."

As the Appellant correctly explains, "substantial evidence" is evidence which "a reasonable mind might accept as adequate to support a conclusion." Enterprise Citizens v. Clark Co. Comm'rs, 112 Nev. 649, 653 (1996). However, "substantial evidence" is a standard of judicial review and not a standard of proof. Kay, 122 Nev. at 1105; *see also,* Nassiri v. Chiropractic Physicians' Bd. of Nev., 327 P.3d 487, 489 (Nev. 2014). On review, Nevada courts will look to the administrative record and determine whether substantial evidence supports the administrative decision. Kay, 122 Nev. at 1105.

"Preponderance of the evidence," on the other hand, is a standard of proof. Nassiri, 327 P.3d at 420. CCMC 18.02.080(5) expressly requires, in approving an application for a SUP, that "[f]indings from a preponderance of evidence must indicate that the proposed use" will meet certain enumerated requirements. Thus, if the Board proceeds to the merits of the Appellant's appeal, it should determine whether a preponderance of the evidence supported the Planning Commission's findings with respect to the SUP that was granted to the Applicant.

CONCLUSION AND RECOMMENDATIONS

Based on the foregoing analysis, it is the opinion of this office that the Appellant has standing to appeal the Planning Commission's approval of the Applicant's SUP application. It is also the opinion of this office that if the Board considers the merits of the appeal, the Board should determine whether a preponderance of evidence supported the Planning Commission's findings in its approval of the Applicant's SUP application.

Accordingly, it is the recommendation of this office that:

1. The Board should determine that the Appellant has standing to appeal the decision of the Planning Commission and consider the merits of the appeal; and
2. In considering the merits of the appeal, the Board should determine whether a preponderance of the evidence supported the Planning Commission's findings in granting the SUP.