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MEMORANDUM

TO: Carson City Board of Supervisors
FROM: Todd E. Reese, Senior Deputy District Attorney
DATE: February 2, 2022
RE: *Appeal from the Carson City Planning Commission
Item 15.A on the February 3, 2022 Board of Supervisors Agenda*

BACKGROUND

This memorandum provides analysis and discussion for the Carson City Board of Supervisors (“Board”) on the issues of legal standing and the appropriate standard of review for the Board’s consideration of an administrative appeal by Doreen Mack, Jennifer Verive and Robert Buttner, and Kathleen Franco of the Carson City Planning Commission’s decision on December 15, 2021, to approve a request by Carson Valley Meats, the applicant, for a special use permit to allow for a slaughterhouse on property zoned General Industrial (“GI”), located on the south side of Hwy 50 E and east of Detroit Road, portions of APNs 008-371-38, 008-371-39 and 008-371-10 (now collectively APN 008-371-54).

DISCUSSION

1. Legal Standing

Challenges to Planning Commission decisions concerning special use permits may be made in accordance with local ordinances that have been adopted under Nevada Revised Statutes (“NRS”) 278.3195. Under Section 18.02.060 of the Carson City Municipal Code (“CCMC”), certain persons can file an administrative appeal of a Planning Commission decision. Such an appeal is then considered by the Board. When considering an administrative appeal, the Board must first determine whether the appellant has standing to appeal before reaching the merits of the appeal. City of N. Las Vegas v. Eighth Judicial Dist. Court., 122 Nev. 1197, 1204-05, 147 P.3d 1109, 1114-15 (2006). If the Board determines that an appellant does not have standing, then the Board’s consideration of that appeal comes to an end. Id. at 1210, 147 P.3d at 1118 (holding that if the Board does not decide whether a party has standing, the Board’s “administrative authority to hear and rule on the merits of [an] appeal [is] never properly invoked.”).

NRS 278.3195(1) specifies that Carson City's ordinance must provide for an appeal by "any person who is aggrieved by a decision" of the Planning Commission. CCMC 18.02.060(4)(a) 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." Thus, the applicant can appeal, or any "aggrieved party" can appeal, provided that the person appealing "participated in the administrative process." An appeal by an applicant, however, is not at issue in this appeal, and therefore is not discussed further.

Initially, participation in the administrative process generally includes, at a minimum, participating in public comment at the hearing where the decision being appealed was made, whether by providing written or verbal comment. In this case, all of the appellants participated in public comment before the Planning Commission; accordingly, the appellants have satisfied this requirement.

The term "aggrieved party," however, is not as neatly addressed. Who an "aggrieved party" may be is not defined in Carson City by NRS 278.3195. Because the Nevada Revised Statutes do not specify who an "aggrieved party" may be, local ordinances may address "who may appeal from a planning commission decision." City of N. Las Vegas, 122 Nev. at 1206. CCMC 18.02.060, however, also does not define who an "aggrieved party" may be.

In the absence of binding statute or regulation, case law serves as guidance to determine who is an "aggrieved party." For general court appellate purposes, an "aggrieved party" is a person "whose personal or property right has been 'adversely and substantially affected.'" Kay v. Nunez, 122 Nev. 1100, 1106, 146 P.3d 801, 806 (2006) (citing Estate of Hughes v. First Nat'l Bank, 96 Nev. 178, 180, 605 P.2d 1149, 1150 (1980)). In the context of a municipality abandoning street right-of-way, an "aggrieved party" has been held to be "any person, whether or not a landowner, . . . [who] has suffered special or peculiar damage differing in kind from the general public." L & T Corp. v. Henderson, 98 Nev. 501, 504, 654 P.2d 1015, 1016-1017 (1982) (cited by Kay, 122 Nev. at 1106, 146 P.3d at 806). Therefore, to the extent these cases serve as guidance, 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; and (2) that asserted right or the peculiar damage suffered differs from the general public and is not simply a matter of public concern.

The CCMC provides some guidance in identifying persons with personal or property interests specifically affected by a Planning Commission decision. CCMC 18.02.045 specifies who must receive notice of Planning Commission hearings, and CCMC 18.02.045(3)(b)(2) provides that notice for the property in question must be sent to "every owner of record of property and every tenant of a mobile home park which is located within 600 feet of the application property." The notice requirements identify a specific group of owners and tenants who have a personal or property right that differs from the general public. In other words, those owners and tenants are close to the project and, therefore, may be impacted by it. Thus, owners

and tenants who received notice of the Planning Commission hearing would have standing to appeal. However, none of the appellants are within this noticing area.

The CCMC is silent as to property outside of the noticing area; thus an appellant has standing if he or she (1) has a personal or property right that has been adversely or substantially affected; and (2) that asserted right or the peculiar damage suffered differs from the general public and is not simply a matter of public concern.

In this matter, appellants allege, among other things, that the slaughterhouse will generate odors and noises. While the Board need not accept claims supporting standing that are unsupported by *any* evidence, in this case at least some evidence was submitted that a slaughterhouse in general might generate odors and noise. Given that Dr. Verive, Mr. Buttner, and Ms. Franco Simmons' parents, Mr. and Mrs. Howard, own property on August Drive, just outside of the noticing area, the odors and noise might affect their property. This would be an impact to their property that is a special or peculiar impact to appellant's property that differs in kind from the general public. Based on these facts, it appears that Appellants Verive and Buttner, and Franco Simmons have standing to appeal the Planning Commission's December 15, 2021, decision to approve a special use permit for a slaughterhouse.

As to Ms. Mack's appeal, either individually or on behalf of the "Downtown 2020 Group," the appeal does not suggest that the appellant has a personal or real property right that suffers a specific harm from the slaughterhouse—the listed property is "Downtown" or close to downtown Carson City, and there is no suggested harm that affects the listed property as opposed to Carson City generally. Thus, Ms. Mack and the "Downtown 2020 Group" appear to lack standing to appeal the Planning Commission's decision. Accordingly, the Board should request clarification of her standing from Ms. Mack, and find that she does not have standing if she is not able to identify a personal or property interest that has suffered a harm different from the general public.

2. Evidentiary Standards and Standards of Review

Standards of review are different from evidentiary standards. An evidentiary standard is the quantum of proof that a trial court, or the commission hearing the matter in the first instance – here the Planning Commission, uses to judge a matter and the evidence before them. Caraveo v. Perez (In re Estate of Bethurem), 129 Nev. 869, 875, 313 P.3d 237, 241 (2013). The most common civil evidentiary standards are a preponderance of the evidence and clear and convincing evidence. A preponderance of the evidence means "more likely than not"; or, in other words, 51 percent of the evidence is a preponderance of the evidence. Id. at 876, 313 P.3d at 242 (holding that in order to meet the preponderance of the evidence standard, the proponent must present evidence showing that the event was "more likely than not."); Hedges v. Obama, 890 F. Supp. 2d 424, 469 (S.D.N.Y. 2012) ("A 'preponderance standard' simply asks whether a fact is more likely than not--51 percent likely . . ."). Clear and convincing evidence is a higher standard of evidence, and means that the evidence demonstrates that the claims are highly probable, or substantially more likely to be true than untrue. See United States v. Demauro, 483 F. Supp. 3d 68, 79 (D.N.H. 2020).

In this case, CCMC 18.02.080(5) provides that the findings made by the Planning Commission must be made by a preponderance of the evidence. Thus, the Planning Commission was required to determine whether the evidence presented to it more likely than not proved the finding it was required to make.

On appeal of that decision, the Board does not apply the evidentiary standard, it applies a standard of review. A standard of review is the amount of deference given to the decision on appeal. See Williams v. Eighth Judicial Dist. Ct., 127 Nev. 518, 525, 262 P.3d 360, 365 (2011). Broadly, the standards of review are either a de novo review or a review for an abuse of discretion. Id. Under a de novo standard of review, the reviewing body reviews the evidence on its own and draws its own conclusions from the evidence. Fiduciary Trust Co. v. Fiduciary Trust Co., 445 A.2d 927, 930 (Del. 1982). Under an abuse of discretion standard of review, deference is provided to the body making the decision and the reviewing body determines whether the decision is arbitrary or capricious or not based on substantial evidence. Nev. Dep't of Pub. Safety v. Coley, 132 Nev. 149, 153, 368 P.3d 758, 760-761 (2016). In either case, the Planning Commission, body making the decision, is said to have “erred” if, after the Board applies the appropriate standard of review, the Board determines that the Planning Commission came to the wrong conclusion.

It is important to note that these are judicial standards of review. In the appeal, the Board is acting as a quasi-judicial body, and therefore must discern the standard of review from the statutes and ordinances governing this appeal. In this case, the standard of review is not explicitly established. NRS 278.3195 does not provide for the Board’s standard of review of Planning Commission decisions. CCMC 18.02.060(2) provides that the Board may “affirm, modify, or reverse” the Planning Commission’s decision. CCMC 18.02.060(4)(b) provides that new evidence should not be considered by the Board, but that if substantial new evidence becomes available that was not available at the time of the Planning Commission’s decision, the application shall be referred back to the Planning Commission for further consideration. Because CCMC 18.02.060(4)(b) requires new evidence to be excluded from the Board’s consideration, the Board’s review is not de novo, the Board is reviewing the Planning Commission’s decision based on the evidence and argument presented to the Planning Commission, and it should give some deference to the Planning Commission’s decision.

When determining how much deference to give, the judicial standards of review provide guidance. Applying the abuse of discretion standard of review, the Board should decide whether the Planning Commission acted in an arbitrary or capricious manner or whether substantial evidence supports the Planning Commission’s decision. City of Reno v. Estate of Wells, 110 Nev. 1218, 1222-23, 885 P.2d 545, 548-49 (1994). Arbitrary action is a baseless decision, one that ignores the law, one that was made without any apparent grounds for the decision, or one that was made “just because we did it.” Id.; City Council of Reno v. Irvine, 102 Nev. 277, 279, 721 P.2d 371, 373 (1986). A capricious decision is a decision based on “a sudden turn of mind without apparent motive; a whim.” City of Reno, 110 Nev. at 1222, 885 P.2d at 548 (quoting City Council of Reno, 102 Nev. at 278-79, 721 P.2d at 372). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. Id.

CONCLUSION

Based on the foregoing analysis and discussion, Appellants Verive and Buttner, and Franco Simmons have standing to appeal the Planning Commission's December 15, 2021, decision to approve a special use permit for a slaughterhouse. It does not appear that Appellant Mack or the "Downtown 2020 Group" has standing to appeal based solely on their written appeal—the appeal does not suggest that Ms. Mack or the "Downtown 2020 Group" has a personal or real property right that suffers a specific harm from the Planning Commission's approval of the slaughterhouse.

When the Board considers the appeal, the Board should apply an abuse of discretion standard of review and determine whether the Planning Commission acted in an arbitrary or capricious manner or whether substantial evidence supports the Planning Commission's decision.