

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARY BARTELL AND GARY R.
SCHMIDT, INDIVIDUALS,
Appellants,

vs.

WASHOE COUNTY, A POLITICAL
SUBDIVISION OF THE STATE OF
NEVADA, ON RELATION OF ITS
BOARD OF ADJUSTMENT,
Respondent.

No. 48968

FILED

MAY 06 2008

TRACE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Appeal from a district court order affirming a county board's decision regarding a county code violation. Second Judicial District Court, Washoe County; Robert H. Perry, Judge.

Appellants Mary Bartell and Gary Schmidt are the owners of real property in Washoe County. Running across their property is Neilson Road, a private road used to access approximately 20 other properties. Each property owner using the road holds a non-exclusive easement allowing use of the road for "roadway and utility purposes."

On March 14, 2005, Washoe County received a complaint that Bartell and Schmidt were storing several vehicles, including two antique fire trucks, on their property in plain view of Neilson Road. Bartell and Schmidt refused to move the fire trucks from view, and the County informed Bartell and Schmidt of its intent to issue a misdemeanor citation for violation of Washoe County Development Code (WCDC) 110.306.35, which prohibits outdoor storage of inoperable vehicles in any area visible from a "street."

Bartell and Schmidt appealed to the Board of Adjustment, which upheld the determination that Bartell and Schmidt were in violation of WCDC 110.306.35. Bartell and Schmidt appealed that determination to the Board of County Commissioners, who upheld the decision of the Board of Adjustment. Bartell and Schmidt then filed a petition for writ of mandamus in district court, “appealing” the decision of the County Commissioners. The district court, apparently treating Bartell and Schmidt’s petition as a petition for judicial review, ultimately found that the findings of the County Commissioners were supported by substantial evidence, and affirmed the determination that Bartell and Schmidt were in violation of WCDC 110.306.35.

Bartell and Schmidt appeal, arguing primarily that the County Commissioners’ findings that (1) Neilson Road is a “street,” and (2) that the fire trucks were “stored,” rather than “displayed,” were not supported by substantial evidence. We address each of these claims below.

Propriety of mandamus petition and standard of review

As a preliminary matter, we note that Bartell and Schmidt improperly filed a petition for writ of mandamus, rather than a petition for judicial review, in the district court. A writ of mandamus is an extraordinary remedy, and 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.¹ A

¹NRS 34.160.

writ of mandamus will not issue if the petitioner has a plain, speedy and adequate remedy in the ordinary course of law.²

Under NRS 233B.130(1), any party of record aggrieved by a final decision in an administrative proceeding is entitled to judicial review of the decision. NRS 233B.130(2) outlines the specific requirements for filing a petition for judicial review in district court. In this case, Bartell and Schmidt were aggrieved by the decision of the Board of Adjustment, an administrative agency, and the affirmance of that decision by the County Commissioners. As the decision of the County Commissioners is a final decision, Bartell and Schmidt could have filed a petition for judicial review. Accordingly, we conclude that Schmidt and Bartell had a plain, speedy, and adequate remedy, indicating that mandamus relief was not appropriate.³

Nonetheless, it appears that the district court properly treated Bartell and Schmidt's petition as one for judicial review, rather than as a petition for writ of mandamus. Therefore, we will review the district court decision as a denial of a petition for judicial review.

When reviewing a district court's disposition of a petition for judicial review, this Court's role is "is identical to that of the district court: to review the evidence presented to the agency in order to determine

²NRS 34.160; see also NRS 34.170.

³See Kay v. Nunez, 122 Nev. ___, ___, 146 P.3d 801, 805 (2006) (concluding that when a petition for judicial review was an available remedy, a petition for judicial review, not a petition for writ of mandamus, was the appropriate means to seek review of an administrative agency decision).

whether the agency's decision was arbitrary or capricious and was thus an abuse of the agency's discretion."⁴ A decision is not arbitrary or capricious if it is supported by substantial evidence.⁵ Substantial evidence is evidence that a reasonable person would accept as adequate to support a conclusion.⁶ In examining the evidence presented to the administrative agency, this court may not look beyond the administrative record, and must defer to the administrative agency regarding the weight and credibility of evidence.⁷

The agency determination that Neilson road was a "street" is supported by substantial evidence

Bartell and Schmidt first argue that the County Commissioners incorrectly determined that Neilson Road was a street or public road for the purposes of WCDC 110.306.25. WCDC 110.306.25(a) specifically provides that "[n]o area visible from the street shall be used for outdoor storage of inoperable vehicles." The general definitions section of the development code defines street as "a public right-of-way or easement which affords a primary means of access to abutting property."⁸

In arguing that Neilson Road is not a "street" under WCDC 110.902.15, Schmidt and Bartell primarily contend that Neilson Road is

⁴United Exposition Service Co. v. SIIS, 109 Nev. 421, 423, 851 P.2d 423, 424 (1993).

⁵Id.

⁶Id. at 423, 851 P.2d at 425.

⁷Id. at 423, 851 P.2d at 424.

⁸WCDC 110.902.15.

not a public use easement. In this, Schmidt and Bartell argue that the only easements granted were non-exclusive public utility and access easements to approximately 20 parcels of property, and that no public right-of-way exists, by either express or implied grant, or by prescription. We conclude that this argument lacks merit.

As indicated above, under WCDL 110.902.15, a street is either “a public right-of-way or easement which affords a primary means of access to abutting property.” (Emphasis added). Based on this use of “or,” it is reasonable to conclude that the term “public” only modifies “right-of-way,” and does not indicate that any easement must also specifically provide for general public access. In this case, Bartell and Schmidt’s own filings to the Board of County Commissioners stated that “[t]here are approximately 20 Non-Exclusive easements for the benefit of approximately 20 individual properties (parcels) that use Neilson Road as access to their property.” Thus, we conclude that under the WCDL definition of “street,” the Board of Adjustment and County Commissioner’s determination that Neilson Road was a street is supported by substantial evidence.⁹

⁹Because we conclude that the Board of Adjustment and County Commissioner’s determination that Neilson Road was a “street” is supported by the plain language of WCDL 110.902.15, we need not evaluate Bartell and Schmidt’s claim that the Board of Adjustment and County Commissioners improperly relied on the statutory definition of “public road” contained in NRS 405.191(3) in their analysis. However, we are inclined to conclude that the Board of Adjustment and County Commissioners did not err in looking to the provisions of NRS 405.191(3) for guidance. Therefore, we note that testimony before the Board of Adjustment and County Commissioners that Neilson Road was a “public road” under the definition of NRS 405.191(3) further supports our
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The determination that the firetrucks were “stored” is supported by substantial evidence

Bartell and Schmidt additionally contend that the fire trucks were “displayed,” rather than “stored” under the WCDC. We disagree. WCDC 110.306.35(e)-(g), the only provisions of the section relating to “display,” provide that

(e) General Requirements, Outdoor Display. A use in a Commercial or Industrial Regulatory Zone may display products sold or manufactured on-site in the area between the property line and the face of the main building, except that the display shall not be closer than fifteen (15) feet to the front property line.

(f) Outdoor Display for Merchandise. Except for the uses enumerated in (g) of this section, the outdoor display of merchandise in the area between the front and side property lines and the front and side faces of the main building shall not cover more than fifty (50) percent of this area.

(g) Outdoor Display for Automobiles, Boats, Recreational Vehicles and Heavy Equipment. The outdoor display of automobiles, boats, recreational vehicles and heavy equipment shall not cover more than eighty-five (85) percent of the area between the front and side property lines and the front and side faces of the main building.

Read together, we conclude that these code provisions clearly contemplate the display of merchandise for sale in a commercial or industrial zone. As

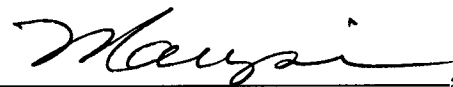
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conclusion that the County Commissioners’ determination is supported by substantial evidence.

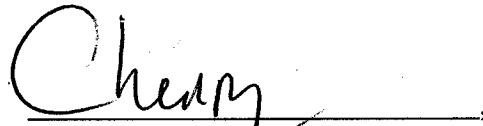
Bartell and Schmidt's property is not zoned commercial or industrial, and the fire trucks were not offered for sale, we further conclude that the County Commissioner's determination that the fire trucks were not "displayed" is supported by substantial evidence.

Therefore, for the reasons stated above, we

ORDER the judgment of the district court AFFIRMED.

 J.

Maupin

 J.

Cherry

 J.

Saitta

cc: Hon. Robert H. Perry, District Judge
Glade L. Hall
Washoe County District Attorney Richard A. Gammick /Civil
Division
Washoe District Court Clerk