IN THE SUPREME COURT OF THE STATE OF NEVADA

ANN STAGER, AN INDIVIDUAL; JULIE STAPLETON, AN INDIVIDUAL; ZOE BROWN, AN INDIVIDUAL; JEROLD WAYNE, AN INDIVIDUAL; TRIBHUOON P. GOYAL, AN INDIVIDUAL; BRUCE MERTZ, AN INDIVIDUAL; GAIL MERTZ, AN INDIVIDUAL; ROMUALADO ARAGON, AN INDIVIDUAL; TAMMY J. BRADSHAW FAMILY TRUST, TAMMY J. BRADSHAW TRUSTEE; GREENBERG FAMILY TRUST; LARISA RAPPAPORT, AN INDIVIDUAL; WENDEL ENTERPRISES, LLC, A NEVADA LIMITED LIABILITY COMPANY; ENG FAMILY TRUST; SMITH LIVING TRUST; SANDRA RAMSEY, AN INDIVIDUAL; POLL FAMILY TRUST; DAVID EZRA, AN INDIVIDUAL; PHYLLIS R. SCHWARTZ, AN INDIVIDUAL; SMITH LIVING TRUST; CAROLYN WHEELER, AN INDIVIDUAL; DONOHUE REVOCABLE LIVING TRUST, MICHAEL R. BERK AND PEGGY S. DONOHUE, TRUSTEES; PAUL MURAD, AN INDIVIDUAL; LYNDON D. JACKSON, AN INDIVIDUAL; ILUVA BENJAMIN, AN INDIVIDUAL; JOANNE B. STUART, AN INDIVIDUAL; GARNETT K. HALL LIVING TRUST, GARNETT K. HALL, TRUSTEE; RONALD HASSO, AN INDIVIDUAL; VIVIAN ROSS, AN INDIVIDUAL; GERRI SERINO, AN INDIVIDUAL; CAROL RUSSELL TRUST, CAROL RUSSELL, TRUSTEE; FIVE WAY LAND, AN UNKNOWN BUSINESS ENTITY; LORI BLUMENTHAL, AN INDIVIDUAL; ALAN BLUMENTHAL, AN INDIVIDUAL; SUSAN YEHROS, AN INDIVIDUAL; CY YEHROS, AN INDIVIDUAL; WILLIE SALAT, AN INDIVIDUAL; R & C TYRE LIVING TRUST, ROBERT D. TYRE AND CARYN TYRE, TRUSTEES; AND KIMBERLY GYURAN, AN INDIVIDUAL,
Appellants,
vs.

No. 50570

FILED

JAN 11 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

10-00735

CLARK COUNTY BOARD OF COMMISSIONERS, A POLITICAL SUBDIVISION OF CLARK COUNTY, STATE OF NEVADA; AND FONTAINEBLEAU LAS VEGAS, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Respondents.

ORDER OF DISMISSAL AND AFFIRMANCE

This is an appeal from a district court order denying judicial review in a planning and zoning matter. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Dismissal of Fontainebleau

Respondent Fontainebleau Las Vegas, LLC, filed a voluntary petition for bankruptcy on June 9, 2009, while this appeal was pending. Our July 1, 2009, order recognized that this appeal was stayed as to Fontainebleau under the automatic bankruptcy stay provisions of 11 U.S.C. § 362(a), and we asked for a status report addressing certain issues, including whether the appeal may be resolved as to respondent Clark County Board of Commissioners (Board), to which the bankruptcy stay does not appear to apply. In its September 16, 2009, status report, Fontainebleau conceded that, unless expanded by the bankruptcy court, the automatic stay does not apply to non-debtor defendants, such as the Board, and stated that it had not requested the bankruptcy court to expand the automatic stay to include the Board. Fontainebleau also informed the court that its bankruptcy case remains pending.

Given the applicability of the automatic stay as to Fontainebleau, this appeal may languish indefinitely on our docket until the federal bankruptcy proceedings are concluded. Under these circumstances, we conclude that judicial efficiency will be best served if this appeal is dismissed, without prejudice, as to Fontainebleau. This

dismissal is without prejudice to appellants' right to move for reinstatement of this appeal upon either the lifting of the bankruptcy stay or final resolution of the bankruptcy proceedings, if appellants deem such a motion appropriate at that time.

The automatic stay, however, applies only to Fontainebleau as the debtor and not to the Board as a non-debtor co-defendant. Edwards v. Ghandour, 123 Nev. 105, 113-14, 159 P.3d 1086, 1091-92 (2007), reversed on other grounds by Five Star Capital Corp. v. Ruby, 124 Nev. ___, 194 P.3d 709 (2008); compare 11 U.S.C. § 362(a) (staying actions, in a Chapter 13 bankruptcy, only against the debtor) with 11 U.S.C. § 1301(a) (staying actions against a non-debtor individual that is liable for a consumer debt of the debtor); see Ingersoll-Rand Financial Corp. v. Miller Min. Co., 817 F.2d 1424, 1427 (9th Cir. 1987) (allowing an appeal to proceed as to a non-debtor co-defendant, against whom the automatic bankruptcy stay did not apply); Teachers Ins. & Annuity Ass'n of America v. Butler, 803 F.2d 61, 65 (2nd Cir. 1986) (same); Otoe County Nat. Bank v. W & P Trucking, Inc., 754 F.2d 881, 883 (10th Cir. 1985) (holding that the automatic stay did not apply to non-debtor co-defendant); see also Patton v. Bearden, 8 F.3d 343, 349 (6th Cir. 1993) (recognizing that only the bankruptcy court may extend the automatic stay under its equity jurisdiction pursuant to 11 U.S.C. § 105); Credit Alliance Corp. v. Williams, 851 F.2d 119, 121 (4th Cir. 1988) (recognizing that a court may enter a stay as to non-debtor defendants in unusual circumstances, but there was nothing unusual about the guaranty agreement in that case). Because the automatic stay has not been extended by the bankruptcy court, we are free to resolve the appeal as to the Board.

Affirmance of appeal as to the Board

Appellants are owners of residential condominium units in Turnberry Place in Las Vegas, Nevada, which is located behind respondent Fontainebleau's property. Both properties are located on H-1 zoned land, designated for limited resort and apartment district use. Following a public hearing, Fontainebleau obtained approval from the Board to increase, by 55 feet, the height of a previously approved garage/convention structure facing Turnberry Place.

Appellants petitioned the district court for judicial review, and subsequently amended the petition to include a request for an alternative writ of mandate. Specifically, appellants sought to have the district court compel the Board to deny Fontainebleau's application and enjoin any construction under the special use permit in order to give appellants time to obtain counsel's assistance. Alternatively, appellants sought a remand to the Board to allow appellants the opportunity to be adequately represented. Ultimately, the district court denied appellants' petition and this appeal followed.

Standard of Review

Under NRS 278.3195, a petition for judicial review, rather than a petition for writ relief, is the proper mechanism to invoke the district court's jurisdiction to examine the Board's land use decision. Kay v. Nunez, 122 Nev. 1100, 1105, 146 P.3d 801, 805 (2006). Accordingly, we review this appeal as taken solely from the district court's denial of appellants' petition for judicial review and will apply the same standard of review as the district court, that is "to determine, based on the administrative record, whether substantial evidence supports the administrative decision." Id. Substantial evidence is that which "a reasonable mind might accept as adequate to support a conclusion." State,

Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986) (quoting Richardson v. Perales, 402 U.S. 389 (1971)). We will not substitute our judgment for that of the Board as to the credibility of witnesses or the weight of the evidence on questions of fact. Century Steel v. State, Div. Indus. Relations, 122 Nev. 584, 137 P.3d 1155 (2006).

Setback requirements

Statutory construction is a question of law, which we review de novo. Kay, 122 Nev. at 1104, 146 P.3d at 804. When a statute is unambiguous, we interpret its language according to its ordinarily understood meaning and will not look beyond it. California Commercial v. Amedeo Vegas I, 119 Nev. 143, 145-46, 67 P.3d 328, 330 (2003). Clark County Code section 30.40.330 requires a ten-foot setback when the improvements are "adjacent to a residential use, otherwise no setback [is] required." Section 30.40.330 also requires that the rear setback comply with section 30.56.070 and figure 30.56-10, which impose a 3:1 setback requirement for improvements that are adjacent to "single family residential uses."

Here, appellants attempt to apply the term "single family residential uses" to describe Turnberry Place, which is a condominium subdivision with 721 condominium owners. But Clark County Code section 30.08's definition of "condominium" states that "[r]esidential condominiums are multiple-family dwellings." A "multiple-family dwelling unit" is similarly defined by section 30.08 as being "also known as an apartment or condominium, [and] means a dwelling unit within a building containing three (3) or more dwelling units." These code definitions comport with the county's historical interpretation, which we presume to be valid, see Boulder City v. Cinnamon Hills Assocs., 110 Nev. 238, 247, 871 P.2d 320, 326 (1994) (presuming that the city's

interpretation of its own land use laws is valid), that Turnberry Place is not a single-family residence but a multiple-family dwelling to which the single-family residential proximity standards do not apply.

Development agreement

We interpret a development agreement de novo according to principles of contract interpretation. See Diaz v. Ferne, 120 Nev. 70, 73, 84 P.3d 664, 666 (2004) (applying contract principles to interpret restrictive covenants for real property). When a contract is clear and unambiguous, we will enforce it as written, Kaldi v. Farmers Ins. Exch., 117 Nev. 273, 278, 21 P.3d 16, 20 (2001), and will give its words their "plain, ordinary and popular meaning." Tompkins v. Buttrum Constr. Co., 99 Nev. 142, 144, 659 P.2d 865, 866 (1983).

Here, section 2.03 of the development agreement provided for, among other things, "the maximum height and size of structures to be constructed on the Subject Property" and allowed the Fontainebleau project to be developed "with the land uses and development standards set forth in the Land Use Approvals." The agreement's definition of "Land Use Approvals" in section 1.01(n) included any "subsequent approvals." Section 3.02 of the agreement recognized that amendments to the agreement may be required by the county if Fontainebleau "seeks to obtain additional zoning or land use approvals." The development agreement's plain language, therefore, contemplated that future land use approvals would be sought and that changes to the project would be allowed as set forth in subsequent land use approvals. As the maximum height of the approximately 700-foot project was not changed and the development agreement allowed the Board to approve Fontainebleau's application to increase the garage's height from the previously approved height of 175 feet to a new maximum of 230 feet, we conclude there was no

violation of the agreement. Consequently, the district court did not err in concluding that the Board properly granted Fontainebleau's application to increase the garage's height.

Substantial evidence to support the Board's decision

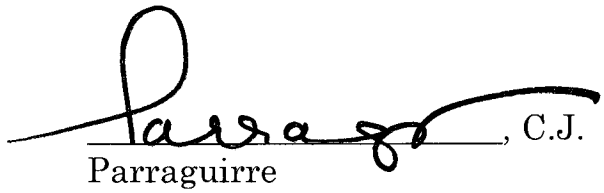
Appellants suggest that the Board's decision was not based on substantial evidence because it ignored neighbors' opposition to the project. While the number of supporters or opponents may affect the Board's decision, we cannot substitute our judgment for that of the Board as to the weight of the evidence, Stratosphere Gaming Corp. v. Las Vegas, 120 Nev. 523, 530, 96 P.3d 756, 761 (2004), and we must review this dispute "to determine, based on the administrative record, whether substantial evidence supports the administrative decision." Kay, 122 Nev. at 1105, 146 P.3d at 805. The appellate record shows that, at the start of the Board's hearing, the county planner noted that the Department of Comprehensive Planning had received 5 cards in support, 3 letters in protest, and 49 cards in protest to Fontainebleau's application. Two Fontainebleau representatives spoke in favor of the application and three Turnberry Place residents and appellants' attorney spoke in opposition.

The record also shows that original purchasers of units at Turnberry Place were notified in writing that future development would take place on the Fontainebleau property. Although there were complaints that Turnberry Place residents were not shown the Fontainebleau's plans until just nine days before the Board's hearing, the record is clear that the initial application had been submitted in 2006, numerous meetings with and activities on behalf of Turnberry Place residents and homeowners' associations concerning the project had occurred, and construction was underway. Thus, we conclude that substantial evidence supports the Board's decision to grant

Fontainebleau's use permit application and that the district court properly denied appellants' petition for judicial review.[1]

Accordingly, we deny appellants' requests for writ or injunctive relief or for a remand to the Board, and we affirm the district court's order denying judicial review.

It is so ORDERED.



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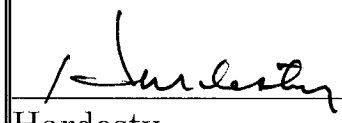

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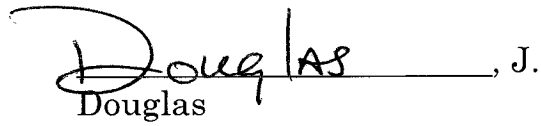

_____, J.
Douglas

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[1]We reject as meritless appellants' open meeting law argument because the commissioners properly conducted an open meeting, took public comments, and publicly deliberated. We further find no impropriety in the denial of appellants' request for a continuance, which was made at the meeting and was not on the agenda. Additionally, we reject appellants' argument that the denial of their request for a continuance was a violation of their due process rights, as appellants had prior notice of the hearing and thus had the opportunity to be heard. Mullane v. Central Hanover Tr. Co., 339 U.S. 306, 314 (1950). Finally, we reject appellants' equal protection argument as condominium owners do not fall within a suspect classification and Clark County has a rational basis for distinguishing single-family from multi-family residences and not applying the single-family setback ratio to H-1 zoned properties in order to promote orderly, compact, and efficient land use development. See Boulder City v. Cinnamon Hills Assocs. 110 Nev. 238, 248, 871 P.2d 320, 326 (1994) (citing Village of Belle Terre v. Boraas, 416 U.S. 1, 7-8 (1973)).

cc: Hon. Michael Villani, District Judge
Ara H. Shirinian, Settlement Judge
Moran Law Firm, LLC
Clark County District Attorney David J. Roger/Civil Division
Kummer Kaempfer Bonner Renshaw & Ferrario/Las Vegas
Eighth District Court Clerk