

IN THE SUPREME COURT OF THE STATE OF NEVADA

WESTPARK ASSOCIATES, LLC, A
NEVADA LIMITED LIABILITY
COMPANY; AND OXBOW
CONSTRUCTION, LLC, A NEVADA
LIMITED LIABILITY COMPANY,
Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK, AND THE HONORABLE
SUSAN JOHNSON, DISTRICT JUDGE,
Respondents,
and
WESTPARK OWNERS ASSOCIATION,
A NON-PROFIT CORPORATION,
Real Party in Interest.

No. 52683

FILED

JAN 20 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DENYING PETITION FOR WRIT OF
MANDAMUS OR PROHIBITION

This original petition for a writ of mandamus or prohibition challenges a district court order granting partial summary judgment in a constructional defect action.

The district court action concerns alleged constructional defects in a 144-unit condominium development in Las Vegas, Nevada. Of those 144 units, 36 units were offered for sale on their completion, while the remaining 108 subsequently constructed units were initially leased as apartments and then offered for sale approximately seven years later.

Recently, in Westpark Owners' Ass'n v. District Court, 123 Nev. ___, 167 P.3d 421 (2007), we considered whether the 108 subsequently constructed units constituted "new" residences under NRS Chapter 40, so that real party in interest could seek NRS Chapter 40

residential constructional defect remedies with respect to those 108 units. Under NRS 40.615, a “constructional defect” is a defect in the construction of a “new” residence, in the alteration or repair of an existing residence, or in an appurtenance. In Westpark, we addressed the first type of defect and concluded that a “new” residence was “a product of original construction that has been unoccupied as a dwelling from the completion of its construction until the point of sale.” Id. at ___, 167 P.3d at 429. Thus, the 108 units were not “new” residences, and as a result, unless a defect arose from an alteration or repair to the unit, those units were not susceptible to constructional defects compensable under NRS Chapter 40. Id.

Following our decision in Westpark, real party in interest moved the district court for “partial summary judgment,” requesting the court to allow it to seek, on behalf of the owners of the original 36 units, NRS Chapter 40 remedies with respect to the complex’s common elements. Real party in interest argued that it could seek those remedies on behalf of the 36 units’ owners, since, under NRS 40.615, a “constructional defect” includes a defect in the construction of an “appurtenance,” and under NRS 40.605, “appurtenance” includes common elements. See NRS 40.605(1) (defining “appurtenance” as “a structure, installation, facility, amenity or other improvement that is appurtenant to or benefits one or more residences, but is not a part of the dwelling unit,” including certain “common elements and limited common elements,” except those described in NRS 116.2102 constituting a unit’s boundary or serving only a single unit); NRS 40.605(2) (noting that “[c]ommon elements’ has the meaning ascribed to it in NRS 116.017”); NRS 116.017(1) (defining “common elements” in a condominium community as “all portions of the common-interest community other than the units”). Essentially, real party in

interest contended that the construction of the 108 units and their surroundings created a variety of newly constructed common element appurtenances.

The district court agreed and granted partial summary judgment, effectively allowing real party in interest to seek NRS Chapter 40 remedies with respect to the common elements. This writ petition followed.

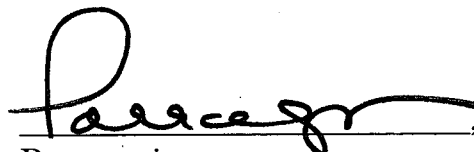
The writ of mandamus is available to compel the performance of an act that the law requires, or to control a manifest abuse of discretion. See NRS 34.160; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981). The writ of mandamus's counterpart, the writ of prohibition, is available to arrest the proceedings of a district court exercising its judicial functions, when such proceedings are in excess of the district court's jurisdiction. NRS 34.320. Both mandamus and prohibition are extraordinary remedies, however, and whether a petition will be considered is within our discretion. See Smith v. District Court, 107 Nev. 674, 818 P.2d 849 (1991). Petitioners bear the burden to demonstrate that our intervention by way of extraordinary relief is warranted. Pan v. Dist. Ct., 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

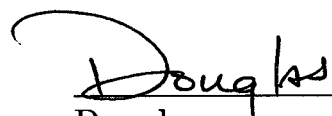
Having considered this petition and its supporting documentation, we are not persuaded that our intervention by way of extraordinary relief is warranted. Specifically, petitioners have not demonstrated that the district court was legally required to act differently, manifestly abused its discretion, or exceeded its jurisdiction when it allowed real party in interest to seek NRS Chapter 40 remedies with respect to any common element defects. Although petitioners argue that the common elements at issue—"essentially the buildings surrounding the 108 units"—are "limited common elements" excluded from the NRS 40.605


definition of appurtenance, petitioners do not further elaborate as to the particular nature of the common elements involved. Moreover, the district court's order merely states that real party in interest can seek NRS Chapter 40 remedies for defects to the common element appurtenances in general; the order does not address whether each particular common element at issue falls within the definition of appurtenance.¹

Accordingly, as our extraordinary intervention is not warranted, we

ORDER the petition DENIED.²


_____, J.
Parraguirre


_____, J.
Douglas


_____, J.
Pickering

cc: Hon. Susan Johnson, District Judge
Ellis & Gordon
Feinberg Grant Mayfield Kaneda & Litt, LLP
Eighth District Court Clerk

¹Nothing in this order precludes the district court from later making such particularized determinations.

²In light of this order, we deny as moot petitioners' motion for a stay.