

IN THE SUPREME COURT OF THE STATE OF NEVADA

SCHULZ PARTNERS, LLC; WILLIAM
A. DOWNEY; AND HOWARD NORTON
AND BARBARA NORTON,
Appellants,

vs.

THE STATE OF NEVADA EX REL.
NEVADA DIVISION OF STATE LANDS
AND ZEPHYR COVE PROPERTY
OWNERS ASSOCIATION, INC., A
NEVADA NON-PROFIT
CORPORATION,
Respondents.

No. 55672

FILED

JUL 28 2011

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order dismissing a petition for judicial review of a buoy permit renewal. First Judicial District Court, Carson City; James Todd Russell, Judge.

Appellants Schulz Partners, LLC, William Downey, Howard Norton and Barbara Norton own three lots in Zephyr Cove facing Lake Tahoe. In December 2009, respondent Nevada Division of State Land (NDSL) approved the application of Zephyr Cove Property Owners Association (ZCPOA), the real party in interest, to renew and/or issue a permit to install sixty residential-use mooring buoys, one swim line, and one swim float to the bed of Lake Tahoe. Appellants provided comments in opposition to the application and, after the application was approved, Schulz petitioned NDSL for reconsideration. They argued that ZCPOA did not own the littoral parcel on which the buoys, swim line, and swim float would be placed; they asserted that the boundary lines of their lots extend to elevation 6223 feet, conflicting with ZCPOA's claim of ownership of the

beach or littoral parcel. Noting that Douglas County records indicate ZCPOA is the owner of the littoral parcel, the NDSL declined to disturb the ZCPOA permit.¹

Appellants filed a petition for judicial review, to which NDSL and ZCPOA responded with a motion to dismiss, challenging subject matter jurisdiction. The district court granted the motion to dismiss. Addressing appellants' arguments respecting ownership of the littoral parcel, the district court noted that the issue appeared to have been decided adversely to Schulz in other litigation and that, even if it had not, the issue should be "adjudicated in District Court in Douglas County, where the real property is located and not by the Division of State Lands."² Because "the process for issuing permits for buoys, swim lines and swim floats in Lake Tahoe, [as] described in NRS 445A.170-445A.190, inclusive, and NAC Chapter 445A[,] . . . do not require a hearing before

¹The permit states as Condition No. 3 that,

The permittees understand and agree that if their status as owners of a littoral parcel changes during the term of this permit such that the permittees are considered owners of a non-littoral parcel, this permit will be cancelled and all structures associated with this permit must be removed from Lake Tahoe immediately. A littoral parcel as defined by Nevada Administrative Code 445A.037 means a parcel of land adjoining the bed of Lake Tahoe.

²As to Schulz, we note that a similar argument respecting the beach area fronting Lot 3 was decided adversely to its position in Schulz Partners, LLP v. Zephyr Cove Property Owners Association, Inc., Docket Nos. 55006 and 55557 (Order of Affirmance, July 5, 2011).

the decision to issue a permit is made,” the district court held that the “issuance of [the] permit in this circumstance does not constitute a contested case pursuant to NRS 233B.032” and thus is “not subject to judicial review, under NRS 233B.130(1).” We agree and affirm.

DISCUSSION

This appeal raises the issue of whether the district court has subject matter jurisdiction to entertain a petition for judicial review of the issuance of a buoy permit by NDSL. We conclude that subject matter jurisdiction does not exist to review the issuance of the permit by NDSL to ZCPOA because the issuance of the permit was not a contested case pursuant to NRS 233B.032.

Statutory interpretation is a question of law, and this court reviews the district court’s interpretation of a statute de novo. Sims v. Dist. Ct., 125 Nev. 126, 129-30, 206 P.3d 980, 982 (2009). “Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself.” Madera v. SIIS, 114 Nev. 253, 257, 956 P.2d 117, 120 (1998) (quoting Erwin v. State of Nevada, 111 Nev. 1535, 1538-1539, 908 P.2d 1367, 1369 (1995)).

NRS 233B.130(1) provides for judicial review of an agency decision at the behest of a “party of record” who is “[a]ggrieved by a final decision in a contested case.” “‘Party’ means each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any contested case.” NRS 233B.035. A “contested case” is defined as “a proceeding . . . in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing, or in which an administrative penalty may be imposed.” NRS 233B.032 (emphasis added). Therefore, we

examine whether, in deciding the permit application, NDSL was required by law to provide notice and a hearing as prescribed by NRS 233B.121 or whether the proceeding was one in which NDSL may impose an administrative penalty.

NRS 445A.170(1) declares it “unlawful for any person, firm, association or corporation to . . . [c]onstruct a pier, breakwater or marina in or to alter the shoreline of Lake Tahoe . . . without first having secured written permission from the State Department of Conservation and Natural Resources.”³ NAC 445A.046 defines the procedure after the department receives an application for a permit to alter the shores of Lake Tahoe. Within ten days of receipt, the Department must provide notice of the application to:

- (a) Owners of adjacent littoral property;
- (b) Homeowner’s associations and general or special improvement districts which may be affected;
- (c) Governmental bodies which the Department determines should be notified; and
- (d) Persons who have informed the Department of their desire to be so notified.

NAC 445A.046(2). Objections and comments will be considered only if they are in writing and received within 30 days of the notice of the application. NAC 445A.046(3). “Within 10 days after the period for considering objections or comments has expired, the Department may set a date and time for a public hearing.” NAC 445A.046(4) (emphasis added).

³Respondent NDSL is a division within the Department of Conservation and Natural Resources.

The statute and its companion regulation do not require a hearing. Instead, they leave it to NDSL's discretion to decide whether to hold a hearing or not. The notice requirement of NAC 445A.046(2) merely requires the department to give notice of the pendency of the application and does not require any of the information required by NRS 233B.121(2).⁴ Finally, contrary to the Appellants' contention, affording a notice and comment opportunity does not qualify an agency action as a "contested case" under NRS 233B.121. The notice and comment allowed by NAC 445.046 does not require parties be given the opportunity to respond and present evidence and argument on all issues involved as required by NRS 233B.121(4). We have long held that NRS 233B.121's requirements must be met for a matter to qualify as a contested case under NRS 233B.032. State, Purchasing Div. v. George's Equipment, 105 Nev. 798, 804, 783 P.2d 949, 952-53 (1989).

⁴NRS 233B.121(2) requires

- (a) A statement of the time, place and nature of the hearing.
- (b) A statement of the legal authority and jurisdiction under which the hearing is to be held.
- (c) A reference to the particular sections of the statutes and regulations involved.
- (d) A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved.

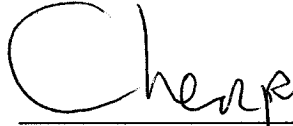
Therefore, we conclude that NDSL is not required by law to provide an opportunity for a hearing prior to its decision.⁵

Nor are we persuaded by Appellants' alternative argument: That the proceeding was one in which an administrative penalty may be imposed, thus meeting the alternative "contested case" criteria. Nevada's Administrative Procedure Act does not define the term "administrative penalty" nor have we done so. Black's Law Dictionary defines a "penalty" as a "[p]unishment imposed on a wrongdoer." Blacks Law Dictionary 1247 (9th ed. 2009). Applying this definition here, we reject Appellants' administrative penalty argument. Appellants' contention would require a definition of administrative penalty that is so broad that any action by an administrative agency could be construed as an administrative penalty. Mere dissatisfaction with a decision made by a state agency does not convert the decision into one imposing an administrative penalty. We conclude that the application for a buoy permit was not a proceeding in which an administrative penalty could have been imposed and NDSL did not subject Appellants to an administrative penalty by granting the permit.

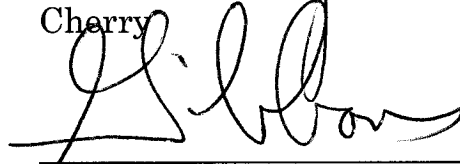
⁵Appellants' contention that a contested case existed because there was an infringement of a fundamental right and an unconstitutional regulatory taking is without merit. If there was an infringement of a fundamental right or an unconstitutional regulatory taking, Appellant's remedy was to commence an action against the state for those claims—a remedy the NDSL leaves open in Condition No. 3 of the permit. Those factors do not change the fact that the governing statutes and regulations do not impose a notice and hearing requirement. A petition for judicial review only considers whether the agency's decision was erroneous based on the factors listed in NRS 233B.135.

Because we conclude that NDSL is not required to provide notice and hearing, and the application was not a proceeding where an administrative penalty may be imposed, NDSL's decision to issue the permit did not meet the definition of a contested case. Therefore, the district court did not have subject matter jurisdiction and properly dismissed the petition for judicial review. Because we conclude that the district court properly dismissed the petition based on subject matter jurisdiction, we decline to comment on the validity or merit of the Appellants' remaining claims. Accordingly we,


ORDER the judgment of the district court AFFIRMED.


_____, J.

Cherry


_____, J.

Gibbons


_____, J.

Pickering

cc: Hon. James Todd Russell, District Judge
Robert G. Berry, Settlement Judge
Harry W. Swainston
Attorney General/Carson City
Bader & Ryan
Carson City Clerk