IN THE SUPREME COURT OF THE STATE OF NEVADA

70 LIMITED PARTNERSHIP,
Appellant,
vs.
MCCARRAN INTERNATIONAL AIRPORT AND CLARK COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA,
Respondents.

No. 56448

FILED

JAN 25 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Appeal from a district court summary judgment in a takings action. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

Appellant 70 Limited Partnership (70 LP) filed a complaint against respondents Clark County and McCarran International Airport (collectively, the County) alleging that certain parcels of land that it formerly owned were inversely condemned by respondent Clark County's enactment of certain ordinances limiting the height of buildings that can be constructed in aircraft approach zones near respondent McCarran International Airport. These ordinances included, among others, Ordinance 1221, which was enacted in 1990, and Ordinance 1599, which was enacted in 1994. The district court subsequently dismissed all of 70 LP's claims that were based on ordinances enacted more than 15 years prior to the complaint, including its Ordinance 1221-based claims, as barred by the applicable limitations period.

13-02704

Following additional proceedings, the district court was presented with three summary judgment motions, two from Clark County and one from 70 LP. Initially, Clark County sought partial summary judgment on 70 LP's remaining Ordinance 1599-based claims to the extent that those claims pertained to the airspace above the Ordinance 1221 height thresholds. 70 LP then filed a countermotion for summary judgment asserting that the building height limitations in Ordinance 1599 resulted in a taking of its airspace with regard to the parcels at issue in the case and Clark County responded with its own countermotion for summary judgment, arguing that 70 LP had not demonstrated that any usable airspace had been impacted by the enactment of Ordinance 1599.

The district court ultimately granted summary judgment in Clark County's favor on all of 70 LP's remaining claims and denied 70 LP's countermotion for summary judgment.[1] With regard to airspace already taken by Ordinance 1221, the district court held that, based on the dismissal of 70 LP's Ordinance 1221 claims as barred by the limitations period, the height threshold imposed by Ordinance 1221 acted as the "ceiling" on any airspace takings claims based on Ordinance 1599. The district court then went on to conclude that the County's experts offered undisputed opinions that 70 LP could have obtained a height variance under Ordinance 1599 in excess of the Ordinance 1221 height thresholds and that there was no taking of "useable airspace" because, if variances

[1]We note that the district court failed to address 70 LP's argument that the County does not have title to the land because it did not proceed with any of the four methods for acquiring title: an eminent domain proceeding, an inverse condemnation action, adverse possession, and direct transfer.

were taken into account, the buildable heights of the properties in question were actually higher after the enactment of Ordinance 1599.

On appeal, 70 LP challenges only the grant of summary judgment to Clark County on its Ordinance 1599 based claims regarding the airspace between the height limitations imposed by Ordinance 1599 and Ordinance 1221 and the denial of its countermotion for summary judgment as to liability with regard to this airspace. This court reviews a district court's grant of summary judgment de novo. Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate when, after examining the record in a light most favorable to the nonmoving party, no genuine issues of material fact remain and the moving party is entitled to judgment as a matter of law. Id.

70 LP argues that the district court erred by granting summary judgment to Clark County and denying 70 LP's motion for partial summary judgment because the enactment of Ordinance 1599 resulted in a regulatory per se taking of its airspace and no genuine issue of material fact exists as to the airspace taken by the enactment of that ordinance. It asserts that the district court's erroneous ruling was based on its misplaced reliance on irrelevant evidence regarding variances. The County responds that this appeal is not about whether 70 LP exhausted its administrative variance remedies by filing for a variance; rather, it contends that the district court correctly found that 70 LP failed to offer any evidence showing that any "useable airspace" was taken by Ordinance 1599 or that the market value of its parcels was diminished.[2]

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[2]While the County contends that 70 LP failed to offer any evidence showing that useable airspace was taken by Ordinance 1599, this

continued on next page . . .

"Whether a taking has occurred is a question of law that [this court] review[s] de novo." Moldon v. County of Clark, 124 Nev. 507, 511, 188 P.3d 76, 79 (2008). In McCarran International Airport v. Sisolak, 122 Nev. 645, 137 P.3d 1110 (2006), a landowner brought an inverse condemnation action against Clark County and McCarran International Airport, arguing that Ordinance 1221 and Ordinance 1599 effectuated a per se regulatory taking of the airspace above his property, in violation of both the United States and Nevada Constitutions. This court agreed, concluding that these ordinances effectuated a per se regulatory taking because they "authorize[d] the permanent physical invasion of . . . airspace" and "excluded the owners from using their property and, instead, allow[ed] aircraft to exclusively use the airspace." Id. at 666, 137 P.3d at 1124. The court further held that "[t]he essential purpose of the ordinances . . . [was] to compel landowner acquiescence" to that invasion. Id. Additionally, this court explained that the property owner did not have to demonstrate the existence of low and frequent overflights over his property to establish the taking because the case involved the regulation

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. . . continued

argument is belied by the record. 70 LP's expert did opine that "[t]he allowance of a variance based on practical difficulty or unnecessary hardship must meet a significantly different standard under ordinance 1599 than that contained in ordinance 1221" and that "[t]here is a significant difference on the 7 parcels in the use restrictions contained in Ordinance 1221 and Ordinance 1599." Additionally, both 70 LP's expert and the County's expert offered calculations of the slice of airspace that existed between the Ordinance 1221 and Ordinance 1599 thresholds.

of property through airport height restriction ordinances. Id. at 664-65, 137 P.3d at 1123-24.

This appeal involves one of the same ordinances at issue in Sisolak, Ordinance 1599, and thus, the analysis set forth in that decision is applicable to this matter. Applying Sisolak here, because Ordinance 1599 authorized a permanent physical invasion of 70 LP's airspace and compelled landowner acquiescence to that invasion, the ordinance effectuated a per se regulatory taking of 70 LP's property; no further analysis is necessary to determine whether such a taking occurred. Thus, to the extent that the district court took the availability of variances into account and considered evidence pertaining to variances in concluding that no taking of 70 LP's airspace had occurred, the district court erred.[3] Indeed, Sisolak clearly states that "evidence regarding variance procedures is irrelevant to establish whether a property owner is entitled to compensation for a regulatory per se taking." Id. at 672, 137 P.3d at 1128; accord Hsu v. County of Clark, 123 Nev. 625, 636, 173 P.3d 724, 732 (2007) (reaffirming the position taken by this court in Sisolak). Instead, such evidence is relevant only to determining "the amount of

[3]Additionally, as to the district court's finding that Ordinance 1221 had already taken 70 LP's airspace, and as such Ordinance 1599 could not also have taken that space, we reject this as a grounds for summary judgment. Ordinance 1221 placed a restriction limiting buildings to a 50:1 slope. Ordinance 1599 placed a restriction limiting buildings to an 80:1 slope. They are not the same prohibition, and thus, because the statute of limitations had not run on the Ordinance 1599 claims, 70 LP is entitled to a finding of a taking per se. However, we do note that the court's finding in this regard may be relevant to a damages determination.

compensation due." Sisolak, 122 Nev. At 672, 137 P.3d at 1128. Under these circumstances, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court. On remand, we direct the district court to enter partial summary judgment in 70 LP's favor and to conduct further proceedings on the issue of damages only.[4]

Pickering, C.J.
Pickering

Gibbons, J.
Gibbons

Hardesty, J.
Hardesty

Douglas, J.
Douglas

Cherry, J.
Cherry

Saitta, J.
Saitta

[4]The Honorable Ron D. Parraguirre, Justice, voluntarily recused himself from participation in the decision of this matter.

cc: Hon. Elizabeth Goff Gonzalez, District Judge
Ara H. Shirinian, Settlement Judge
Paul C. Ray, Chtd.
Lemons, Grundy & Eisenberg
Brownstein Hyatt Farber Schreck, LLP/Las Vegas
Clark County District Attorney/Civil Division
Armstrong Teasdale, LLP/Las Vegas
Law Offices of Thomas D. Beatty
Pisanelli Bice, PLLC
Eighth District Court Clerk