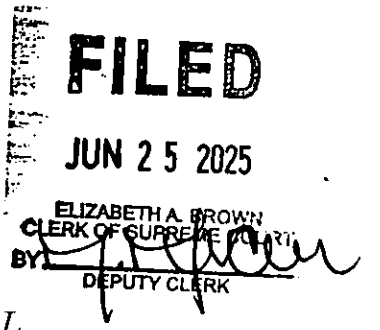
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CLARK COUNTY, NEVADA,
Appellant,
vs.
ABCNV, LLC, A NEVADA LIMITED LIABILITY COMPANY; AND PEPPER LANE HOLDINGS, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Respondents.

No. 89216-COA



ORDER OF REVERSAL

This is an appeal from a district court order granting a petition for judicial review of an order denying an application for a special use permit for a cannabis cultivation facility. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge.

Respondent ABCNV, LLC, sought to relocate its existing cannabis cultivation facility within Las Vegas to a property owned by respondent Pepper Lane Holdings, LLC. ABCNV applied for a special use permit for its new location, which would be situated near two other cannabis cultivation facilities, and approximately 1600 feet from Del Sol Academy of the Performing Arts, a high school. Apparently to address potential odor concerns, ABCNV submitted a technical memorandum with its permit application, prepared by an air quality consulting engineer, that evaluated the site plans and odor control measures and concluded that its systems would keep odor emissions well below accepted industry standards. According to the memorandum, the proposed facility would be completely enclosed and self-contained, with a single sealed entrance, indoor grow

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lights, irrigation systems, and multiple carbon filters on each of its three floors, ensuring that odors would not migrate outside the building.

Nadia Steger, the principal of Del Sol Academy, raised concerns regarding adding another "marijuana" cultivation center near the school in a letter to the Clark County Board of County Commissioners. In her letter, Principal Steger discussed an existing odor problem caused by the neighboring cannabis cultivation facilities and opposed the approval of any new cannabis establishments that could exacerbate this problem. Specifically, the letter raised concerns about how the odor from the nearby cannabis cultivation facilities negatively impacts the well-being of the school's 2,330 students and 196 faculty and staff members, noting that some days the school must decide whether to hold physical education classes indoors due to the smell.

The City of Las Vegas's planning department reviewed ABCNV's site plan and submitted a staff report to the Board that addressed the requirements of Title 30 of the Clark County Code, which governs land use, zoning, and development in Clark County. The report confirmed that the proposed relocation site met all required distance rules from community facilities, homes, schools, and gaming properties; featured advanced security systems; and was supported by an air and odor study that guided measures to minimize potential smells from cultivation activities. The report also included an email from a compliance and enforcement manager at the Department of Environment and Sustainability, who explained that 100 percent odor control is not possible because carbon filters, which at best remove 95 to 98 percent of odor-causing compounds, become saturated before their scheduled replacement, meaning some odors will inevitably

escape. Nevertheless, the planning department recommended approving the application.

The Board, acting as a board of adjustment, considered ABCNV's application at a publicly held zoning meeting. No person appeared at the public hearing in opposition to the application. Following arguments from ABCNV and Pepper Lane's counsel in support of the special use permit, the Board's chairman indicated he would not allow any incremental increase in odor in his district, citing existing issues noted in the letter from Principal Steger and his own experience, and the experience of others, smelling "marijuana" in the area. The Board then unanimously voted to deny ABCNV the special use permit.

ABCNV and Pepper Lane filed a petition for judicial review, naming appellant Clark County as the defendant. The district court granted the petition for judicial review, finding that the record lacked substantial evidence to support the Board's decision to deny ABCNV's special use permit application and that the application met all requirements under Clark County zoning law for approving a cannabis cultivation facility. Notably, the court found that the incremental-release standard cited during the public hearing as a reason for denial was not based on any established air quality regulation, and that substantial evidence, including ABCNV's technical memorandum, demonstrated the proposed cannabis cultivation facility would not cause adverse effects on air quality, nuisance odors, or similar impacts. The district court invalidated the Board's decision on ABCNV's application and ordered the special use permit to be issued. Clark County now appeals.

On appeal, Clark County argues that the district court erred in overturning the Board's denial of the special use permit because substantial

evidence, including existing odor problems, supported its decision and ABCNV failed to prove the facility would be compatible with the area and minimize negative environmental impacts as required by Title 30 of the CCC. In responding to this argument, ABCNV and Pepper Lane argue that the Board's decision lacked substantial evidence because it relied on an improper incremental-release standard; no witnesses opposed the application; no commissioner found that ABCNV failed to meet its burden of proof; and the Board, acting as a board of adjustment, lacked any authority to regulate odor.

Standard of review

"In a petition for judicial review, . . . the district court reviews the agency record to determine whether the [governing body's] decision is supported by substantial evidence." *Kay v. Nunez*, 122 Nev. 1100, 1105, 146 P.3d 801, 805 (2006). We "afford[ ] no deference to the district court's ruling," but examine the administrative record to determine whether substantial evidence supported the governing body's decision. *Id.* As with the district court, we are limited to the administrative record that the governing body relied upon in making its determination. *Id.* We will not substitute our own judgment for that of the governing body as to the weight of the evidence. *Stratosphere Gaming Corp. v. City of Las Vegas*, 120 Nev. 523, 530, 96 P.3d 756, 761 (2004).

The Board could consider the potential effects of odor on the area surrounding the subject property

The parties dispute whether the Board could properly consider the potential effects of odor when denying ABCNV's application for a special

use permit.[1] Although CCC 30.68.050 (2017) provides that odor is regulated by Clark County Air Quality Regulation Section 43, which is administered by the Board when acting as the air pollution control agency, that does not prevent the Board, when acting as the board of adjustment, from considering the effects of odor when deciding whether to issue a special use permit.[2] In fact, under CCC 30.16.010(7) (2019), an application for zoning development approval "must demonstrate compatibility with all applicable community goals . . . [including] [m]inimizing negative environmental impacts, including . . . odor." And to assist the Board in its responsibility of ensuring compatibility with community goals, CCC 30.16.070, Table 30.16-4(i)(2)(B) (2022), requires applicants for special use permits to demonstrate that "[t]he proposed use shall not result in a substantial or undue adverse effect on" the surrounding area or "matters affecting the public health, safety, and general welfare," which necessarily requires the Board to consider odor in evaluating applications for special use permits. Thus, we conclude that the Board, acting as the board of adjustment, properly considered the potential effects of odor in the area when deciding whether to issue a special use permit.

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[1]ABCNV raises this issue notwithstanding that it supported its application for a special use permit with a technical memorandum, which addressed odor control measures, for the Board's consideration.

[2]Because ABCNV's application was submitted before the most recent amendments to Title 30, which were adopted in August 2023 and became effective on January 1, 2024, the pre-amendment version of Title 30 applies. *See State ex rel. State Bd. of Equalization v. Barta*, 124 Nev. 612, 622, 188 P.3d 1092, 1099 (2008) (holding that regulations only "operate prospectively, unless an intent to apply them retroactively is clearly manifested"). Nevertheless, these amendments, if applied, would not affect our decision.

The Board's decision was supported by substantial evidence in the record

As mentioned above, under CCC 30.16.070, Table 30.16-4(i)(2)(B) (2022), an applicant for a special use permit bears the burden of demonstrating that "[t]he proposed use shall not result in a substantial or undue adverse effect on adjacent properties, character of the neighborhood, . . . or other matters affecting the public health, safety, and general welfare." Although the Board did not reference CCC 30.16.070 when denying ABCNV's application for a special use permit, this court "may imply the necessary factual finding[ ]" if the agency's "conclusion itself" provides a proper basis for the implied finding. *State, Dep't of Com. v. Soeller*, 98 Nev. 579, 586, 656 P.2d 224, 228 (1982). Here, the Board denied ABCNV's application for a special use permit due to concerns over the incremental release of odor from ABCNV's proposed cannabis cultivation facility. This reflects an implicit determination that any incremental increase in odor would result in a substantial or undue adverse effect on adjacent properties and be incompatible with community goals aimed at minimizing negative environmental impacts, including odor, and that ABCNV had failed to satisfy its burden under CCC 30.16.070 to demonstrate otherwise.

We will affirm the Board's decision to deny a special use permit if it is supported by substantial evidence, which is evidence that "a reasonable mind might accept as adequate to support a conclusion." *City of Las Vegas v. Laughlin*, 111 Nev. 557, 558, 893 P.2d 383, 384 (1995) (internal quotation marks omitted). In this case, ABCNV bore the burden to demonstrate compliance with the requirements for obtaining a special use permit. *See* CCC 30.16.070, Table 30.16-4(i)(2) (stating that "[n]o application shall be approved unless the applicant establishes that the use

is appropriate"). Two cannabis cultivation facilities were already operating in the area, and the Board's chairman effectively took judicial notice of the odor problem in his own district, stating that he and others had personally driven through the area and detected the smell of "marijuana." *See Tighe v. Von Goerken*, 108 Nev. 440, 443-44, 833 P.2d 1135, 1137 (1992) (rejecting the district court's determination that the Council's decision was based entirely on opinion, reasoning that "the Council exercised the equivalent of judicial notice in recognizing the actual environment surrounding the proposed tavern site," which was based on a council member's "specific knowledge attributable to the fact that the proposed tavern site was situated within his district").

Additionally, the Board considered the letter from Principal Steger that described the persistent and disruptive "marijuana" odor impacting the students and school activities. The letter expressed concern that approving another cannabis cultivation facility in the area would worsen the existing odor problem and negatively affect the broader community.

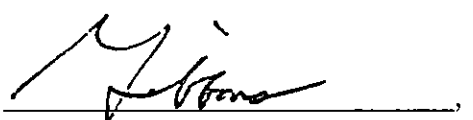
A public agency may rely on public testimony and submitted written protests when denying a special use permit. *See Redrock Valley Ranch, LLC v. Washoe County*, 127 Nev. 451, 461, 254 P.3d 641, 648 (2011) (deciding that 34 members of the public testifying "about increased fire risk, impacts to existing wells, impacts to wildlife and livestock, chemical storage, visual impacts, noise pollution, and air quality issues" constituted substantial evidence to support Washoe County's denial of a special use permit concerning water permit changes); *see also, e.g., Stratosphere Gaming*, 120 Nev. at 529-30, 96 P.3d at 761 (concluding that individuals testifying and submitting written protests about the lack of compatibility of

location, the increased traffic and resulting safety concerns, and increased noise qualified as substantial evidence to support the denial of the Stratosphere's special use permit for developing a new ride). ABCNV did not produce any evidence to contradict Principal Steger's letter and has never disputed that there is an existing cannabis odor in the area. We do not reweigh the evidence on appeal, and we conclude that substantial evidence supported the Board's decision to deny the special use permit, and that it was allowed to consider odor and its impact on the community when doing so.

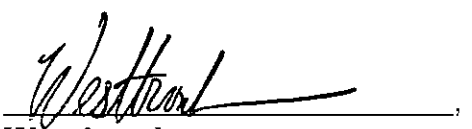
Based on the reasoning set forth above, we reverse the district court's order that invalidated the Board's decision denying ABCNV's special use permit application.[3]

It is so ORDERED.

_____, C.J.
Bulla



_____, J.
Gibbons



_____, J.
Westbrook

[3]Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered them and conclude that they either do not present a basis for further relief or need not be reached given our disposition.

cc: Hon. Timothy C. Williams, District Judge
Clark County District Attorney/Civil Division
Black & Wadhams
Eighth District Court Clerk