IN THE SUPREME COURT OF THE STATE OF NEVADA

DP OPERATING PARTNERSHIP, L.P., A DELAWARE LIMITED PARTNERSHIP,
Appellant,
vs.
STOREY COUNTY AND ITS BOARD OF COUNTY COMMISSIONERS, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA; STOREY COUNTY LICENSING BOARD; GREG J. HESS, STOREY COUNTY COMMISSIONER; CHARLES HAYNES, STOREY COUNTY COMMISSIONER; ROBERT KERSHAW, STOREY COUNTY COMMISSIONER; PATRICK WHITTEN, STOREY COUNTY SHERIFF; AND TAHOE-RENO INDUSTRIAL CENTER, LLC,
Respondents.

No. 39399

FILED

JAN 22 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Rubach
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

The appellant, DP Operating Partnership, L.P. (DP), appeals from a district court order denying its petition for a writ of mandamus, an application for injunctive relief, an application for an order compelling arbitration, and declaring that no violation of Nevada's open meeting law occurred. We reverse that portion of the district court's order determining that Lance Gilman's brothel application substantially complied with Storey County's brothel ordinances and denying the petition for a writ of mandamus on that basis. We affirm the district court's order in all other respects.

04-01284

FACTUAL HISTORY

Storey County (the County), Lance Gilman (through a corporation in which he is a minority shareholder—Tahoe-Reno Industrial Center, LLC (TRIC)), and others jointly developed the Tahoe-Reno Industrial Center (the Industrial Center), a 102,000-acre industrial park in the County. County Commissioners worked with Gilman for several months on a service and management plan for the Industrial Center.

On September 28, 1998, DP closed escrow on a portion of the Industrial Center. On February 19, 1999, TRIC recorded covenants, conditions, and restrictions (CC&Rs) on the Industrial Center, which prohibited brothels or other prostitution-related business activity. The County, TRIC, and DP entered into a development agreement on February 1, 2000, which noted that the "County has no right or obligation to enforce any provisions of the CC&Rs" recorded on the Industrial Center. The agreement required the signatory parties to arbitrate any disputes.

In November 2000, TRIC purchased McCarran Ranch, a property adjacent to the Industrial Center. Cash Asset Management, LLC, owned by Gilman, later purchased parcel 3A of the property from TRIC. TRIC annexed the remainder of McCarran Ranch to the Industrial Center, and it became subject to the Industrial Center's CC&Rs. The three sides surrounding parcel 3A as well as the proposed access road to 3A were subject to the CC&Rs. TRIC later de-annexed the McCarran Ranch property from the Industrial Center.

On January 2, 2001, Gilman applied to the Storey County Licensing Board (the Board) for a brothel license for two undisclosed sites. With the application, Gilman submitted a personal history, an unaudited personal financial statement, and a list of personal assets. On the

financial statement, Gilman listed his net worth as $15,109,316,000, but this was clearly a typographical error. Gilman listed his assets on another form as $15,109,316.00. That day, the Board read the application at a public meeting.

Sheriff Pat Whitten, a member of the Board,[1] had twenty years of experience in banking and finance before becoming a sheriff. The Storey County Commissioners believed that he was qualified to research a brothel applicant's financial background. Sheriff Whitten interviewed Gilman's references and examined Gilman's financial statement. On January 15, 2001, the Sheriff submitted a written report to the Board, noting that Gilman's tax returns from the past five years reflected a "sizable" adjusted gross income and stating his opinion that Gilman was financially solvent to operate two brothels.

The Sheriff reported that the application was complete except that Gilman submitted neither a CPA-audited financial statement nor specific information for either of the two proposed brothel sites. He recommended that either before or as a condition of granting the two licenses, Gilman submit a CPA-audited financial statement, a credit bureau report, verification that he was under no tax liens of record, and the physical locations of the two proposed brothels. In summation, the Sheriff stated: "I have not discovered any information that I consider to be cause to deny the brothel licenses . . . ." On January 16, 2001, Gilman withdrew the application.

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[1]The Board consists of the four County Commissioners and the Sheriff.

Gilman reapplied on December 17, 2001, for a single brothel license for a brothel located at parcel 3A, and the application went for a "first reading" at a regularly scheduled Board meeting later that day. The new application did not include an updated financial statement.

The Board placed the brothel license on the agenda for its January 2, 2002, meeting. In the interim between the two applications, the Sheriff continued his investigation of Gilman and verbally submitted his findings to the Board at the regularly scheduled January 2, 2002, public meeting; he completed a background check of Gilman and could not find anything to impair the Board's approval of a license. He did not conduct a background check on Susan Austin, the proposed manager of the brothel, as Gilman had not paid the fees for such an investigation. The Sheriff did not find many changes from Gilman's initial application, except that at some point, the Board learned that Gilman was in the midst of divorce proceedings.[2] At the meeting, the Board discussed the Sheriff's additional research on Gilman's application and concluded that Gilman was qualified to hold a brothel license. No person indicated a desire to speak during the ten- to fifteen-minute discussion on the license application. A Board member moved to approve the license and another member seconded the motion. Chairman Greg Hess inquired whether there was any public comment on the motion. No one showed interest in

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[2]The Sheriff did not note that Gilman and his wife's property were subject to $1,006,881.01 in Internal Revenue Service tax liens of record, in March 2000. This lien was reduced to $468,170.74 by April 2000. In Gilman's first application, he acknowledged that liens had been filed against him. It is not apparent from the record whether Gilman and his wife were still subject to tax liens when he reapplied for the brothel license.

commenting, and people began to leave the meeting. The Board voted and approved the license application. Although Chairman Hess abstained from voting on the application because he planned to submit a bid for concrete work at the brothel, the three other Board members voted to approve the license.

On January 17, 2002, Gilman applied for a rough grading permit for the brothel site, and the next day the Storey County Building Department issued the permit.

PROCEDURAL HISTORY

Following license approval, DP filed an original and then an amended complaint, a petition for a writ of mandamus, and an ex parte motion for an order compelling arbitration, a temporary restraining order, and a preliminary injunction.[3] DP specifically alleged that the Board failed to comply with the mandatory sections of the County's brothel ordinance, the County failed to comply with its own zoning ordinances, the Board failed to allow public comment before granting the brothel license, and because the development agreement between the County, DP, and TRIC contained an arbitration agreement, the district court should stay further licensing, construction, or operation of the brothel and refer the matter to arbitration.

DP requested relief in the form of: (1) a writ of mandamus compelling the County to faithfully enforce the provisions of its brothel ordinance and void the brothel license; (2) injunctive relief; (3) a stay of any further actions by the County on granting a brothel license to Gilman

[3]The same day, DP also filed a demand for arbitration with the American Arbitration Association, naming the County, its Board of Commissioners, TRIC, and Gilman as respondents.

and a stay of construction or operation of the brothel; (4) referral of the dispute to arbitration; and (5) an order finding that the County violated Nevada's open meeting law and voiding any actions taken at the January 2, 2002, meeting. The district court then held a hearing on DP's amended complaint.

At the hearing, Darrell Dean Haymore, a Storey County building official, planning administrator, and grade planning manager, testified that he attended the January 2, 2002, Board meeting and noticed that several Industrial Center business representatives and residents who lived near the proposed brothel location were present. He was surprised that no one spoke when Chairman Greg Hess asked for further discussion on the application. After the meeting, he approached Alfredo Alonso, DP's representative who attended the meeting, and asked why he did not speak. Mr. Alonso allegedly said, "[T]his isn't the venue we're going to handle it in."

Haymore testified that the brothel did not violate any County "location ordinances" that apply to motels or their proximity to the Truckee River. Specifically, Haymore explained that a brothel is not a motel and thus its proximity to the river did not violate County zoning ordinances, which prohibit motels near the river. Additionally, three other brothels—the Old Bridge Ranch and the two Mustang Ranches—were located within several hundred feet of the Truckee River. He stated that the purpose of the location ordinances prohibiting motels near the river was to reduce effluent flow into the river. This effluent problem would not occur with Gilman's proposed brothel because the brothel would be connected to the Industrial Center General Improvement District, which would provide water and sewer service.

Haymore explained that the County Code does not define the term "brothel," and so he examined the definition of a "motel" and a "congregate residence" under the Uniform Building Code[4] to ascertain a proper definition of "brothel." He did not believe the term "brothel" fit within the definition of "motel"; rather, he opined that it was more like a "congregate residence." However, at the time of the hearing, he did not have the construction plans for Gilman's brothel, so he could only speculate. He concluded that a brothel was not a motel and noted that in the past, the County never considered a brothel to be a motel. Additionally, he testified that the brothel would still need to submit final plans and go through a final plan check review before the County would issue building permits.

Chairman Hess testified that the County recently reworked its brothel ordinance "to make sure the Commissioners had discretion on where the brothels were placed, how they were operated and try to get the best people in there to operate the brothels." He explained that the Board did not require Gilman to file a CPA-audited financial statement because it did not believe the statement was necessary in this case. According to Chairman Hess, the intent of the CPA-audit provision was not to determine a person's financial situation, but rather

> to find out who he is associated with and where his money comes from. The reason this was brought up and we didn't feel the CPA audit was needed is we did an extensive background check

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[4]The Uniform Building Code defines a "congregate residence" as "a shelter, convent, monastery, dormitory, fraternity or sorority house, but does not include jails, hospitals, nursing homes, hotels or lodging houses." Unif. Bldg. Code § 204-C (1994).

> financially on Mr. Gilman and we couldn't find where he was associated with anybody that we weren't pleased with operating a brothel. This was brought in because of an association with AGE. Everybody knows Joe Conforte was behind that and we wanted to avoid this type of circumstance from happening again.

Chairman Hess also stated that the County's interactions with Gilman regarding the Industrial Center gave the Board a positive impression of Gilman's reputation as a business owner and community member. Additionally, the Board was further influenced on the brothel's location by the facts that Gilman held a major stake in the Industrial Center and was willing to locate a brothel nearby.

Following the hearing, in an order filed on February 25, 2002, the district court denied DP's requests for relief. The district court concluded that: (1) the County substantially complied with statutory procedures and substantial evidence supported the Board's grant of a license to Gilman; (2) while both DP's and the County's interpretations of the County's ordinances were reasonable, the court deferred to Haymore's testimony regarding the definition and placement of brothels in the County and concluded that the County's interpretation was reasonable, supported by substantial evidence and not arbitrary or capricious; (3) the Board's January 2, 2002, meeting complied with Nevada's open meeting law; and (4) the arbitration agreement did not pertain to this dispute because the agreement did not apply to either the brothel property or Gilman. DP appeals from that order.

DISCUSSION

Justiciability

Before we heard oral arguments in this matter, the County filed a motion to dismiss DP's appeal, contending that because DP failed to

seek a stay or injunction pending appeal, the construction and opening of the brothel rendered DP's appeal moot. DP responded that it was not required to seek a stay or injunction pending appeal because this court may order the remedies it seeks even if the brothel is constructed and in operation. We ordered the parties to address the motion at oral argument. Following argument, both DP and the County filed supplemental authorities.

Subject to a few exceptions, we will refuse to exercise our jurisdiction in moot cases. "A moot case is one which seeks to determine an abstract question which does not rest upon existing facts or rights."[5] Further, "[c]ases presenting real controversies at the time of their institution may become moot by the happening of subsequent events."[6]

This court has concluded, for example, that when a party sought an injunction to restrain construction of a noxious business, and construction was completed before the district court's resolution of the party's complaint, the case became moot,[7] and that an appeal became moot because an act sought to be restrained occurred pending appeal.[8]

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[5]NCAA v. University of Nevada, 97 Nev. 56, 58, 624 P.2d 10, 11 (1981).

[6]Id.

[7]Pac. L. Co. v. Mason Val. M. Co., 39 Nev. 105, 153 P. 431 (1915); see also Building & Constr. Trades v. Public Works, 108 Nev. 605, 836 P.2d 633 (1992) (petition to force re-bidding of project barred by laches when petition was filed after construction commenced and petitioner knew of commencement of construction).

[8]Edwards v. City of Reno, 45 Nev. 135, 198 P. 1090 (1921).

The County's motion to dismiss seems to imply that DP only sought an injunction to enjoin the brothel's construction. If this were DP's only basis for relief, the present appeal would likely be moot. However, DP also requested a writ of mandamus to require the County to comply with its relevant ordinances, an order referring the dispute to arbitration, and a declaration that an open meeting law violation occurred, all of which are still viable bases for relief. Because this court may still fashion effective relief if warranted, this case is not moot. Therefore, we deny the County's motion to dismiss.

Compliance with brothel ordinances

DP contends that the district court should have issued a writ of mandamus to void Gilman's brothel license, as his brothel application did not strictly comply with the procedural requirements under Storey County Code chapter 5.16 (the brothel ordinances). We agree.

A district court may issue a writ of mandamus under NRS 34.160 to "compel the performance of an act which the law especially enjoins as a duty resulting from an office." "Mandamus is an extraordinary remedy which 'will not lie to control discretionary action, unless discretion is manifestly abused or is exercised arbitrarily or capriciously.'"[9] "A district court's decision to grant or deny a writ petition is reviewed by this court under an abuse of discretion standard."[10] In this case, the district court considered and rejected DP's argument that the

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[9]Mineral County v. State, Dep't of Conserv., 117 Nev. 235, 243, 20 P.3d 800, 805 (2001) (quoting Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981)).

[10]DR Partners v. Bd. of County Comm'rs, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000).

Board did not comply with its brothel ordinances. Consequently, in determining whether the district court abused its discretion in denying writ relief, we necessarily undertake a de novo examination of those ordinances.[11]

DP argues that the district court abused its discretion when it determined that the Board substantially complied with its brothel ordinances. According to DP, the Board must strictly enforce the brothel ordinances, and its waiver of certain mandatory provisions cannot constitute compliance. Specifically, DP asserts that the lack of a CPA-audited financial statement, which would have shown that Gilman was not worth $15 billion, the failure to investigate the proposed manager of the brothel, and the lack of a written report from the Sheriff, notwithstanding the Sheriff's verbal updates between the two license applications, combined with the plain language of the brothel ordinance stating that an application "shall set forth" such a statement, the investigation "shall" be made, and the Sheriff "shall" report,[12] were duties to act that a writ of mandamus may compel. DP contrasts this language with sections in the brothel ordinances that speak in terms of "may," which permit discretion.

This court has held that statutes or ordinances that provide for the granting of a privileged license should be strictly construed against

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[11]City of Reno v. Reno Gazette-Journal, 119 Nev. ___, ___, 63 P.3d 1147, 1148 (2003) (questions of statutory analysis are questions of law, which are reviewed de novo).

[12]Storey County Code §§ 5.16.090, 5.16.100.

the licensee.[13] This rule requires that Gilman, as the applicant for a County brothel license, strictly comply with the Story County brothel ordinances. Therefore, the district court was incorrect in determining that substantial compliance was the appropriate standard of review when determining whether Gilman's application complied with the ordinances.

The brothel ordinances specifically require Gilman to submit a CPA audited financial statement to the Board, that the Sheriff conduct a background investigation of the brothel manager, and that the Sheriff provide the Board with a written report of his findings concerning the application. While the brothel ordinances grant the Board some discretion in making its final determination of whether to grant or deny an application for a brothel license, nothing in the ordinances permits the Board to waive the mandatory requirements set forth in the ordinances or gives the Board the ability to determine that Gilman's application substantially complied with the ordinances. Gilman was required to strictly comply with the brothel ordinances and this he did not do. Therefore, the district court abused its discretion when it determined that Gilman had substantially complied with the County's brothel ordinances and refused to issue the requested writ.

Compliance with the zoning ordinance

DP contends that the district court abused its discretion when it found that brothels are not required to comply with County zoning ordinances. DP asserts that the County ignored its zoning ordinance when it approved the brothel application for the location requested by

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[13]Carson City v. Lepire, 112 Nev. 363, 914 P.2d 631 (1996) (liquor); West Indies v. First National Bank, 67 Nev. 13, 214 P.2d 144 (1950) (gambling).

Gilman. DP also argues that because the County collects a room tax from motels and includes brothels in its tax collections, this tax scheme suggests that a brothel is a motel under the zoning ordinances.

The County argues that DP incorrectly focuses on the zoning ordinance in challenging the brothel's placement. According to the County, the brothel ordinance controlling brothel location is more specific and restrictive, thus trumping the more general zoning ordinance. The County posits that brothel ordinance section 5.16.040(A) grants the Board the "full and sole authority" to determine "where such houses of ill-fame shall be located, within the county" and section 5.16.060(A) grants the Board the authority to deny a brothel application if the proposed location is unsuitable. The County also notes that while the zoning ordinance does not mention brothels, the County has promulgated a full ordinance to regulate brothels and their location, and under those regulations, the location of the brothel was proper.

As discussed above, "[a] district court's decision to grant or deny a writ petition is reviewed by this court under an abuse of discretion standard."[14] The district court examined the zoning ordinance to determine whether the County's interpretation of that ordinance was reasonable and whether the zoning ordinance or brothel ordinance controls the placement of brothels in the County. This, again, is a question of statutory construction, which we review de novo.[15]

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[14]DR Partners v. Bd. of County Comm'rs, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000).

[15]City of Reno v. Reno Gazette-Journal, 119 Nev. ___, ___, 63 P.3d 1147, 1148 (2003).

Section 5.16.040(A) of the brothel ordinance grants the Board the "full and sole authority" to determine where brothels "shall be located, within the county." Further, the ordinance grants the Board coextensive powers with the County Commissioners to deny an application for a brothel if the location is unsuitable and delineates several locations that may be deemed unsuitable at the discretion of either the commission or the Board.

Despite DP's contention that the zoning ordinance controls because it is the more restrictive ordinance,[16] we find no conflict between the two ordinances. Section 17.10.064 of the zoning ordinance, defines a "motel" as:

> Any group of buildings or dwellings having two or more units providing for dwelling, living or sleeping therein, with or without cooking facilities, primarily intended for transient use, and having individual on-site parking areas allocated to each unit.

However, section 17.10.064 does not include "brothel" within its definition of a "motel." Thus, we conclude that the zoning ordinance does not apply to brothels.

This conclusion is buoyed by section 5.16.060(A)(3) of the brothel ordinance, which states that the licensing Board may deny a brothel application if the brothel location is to be near a motel or hotel. This language implies that the County did not consider brothels to be either motels or hotels and so the terms are mutually exclusive. While the two ordinances could be in pari materia because they both deal with the

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[16]Section 17.02.040 of the zoning ordinance states that the more restrictive ordinance controls if it conflicts with the zoning ordinance.

location of buildings, the two ordinances deal with separate factual situations and impose different duties upon the County.[17] If the County intended that a "brothel" be included within the definition of "motel," it is unlikely that the ordinance would specifically state that brothels cannot be located near motels. Because we conclude that a "brothel" is not a "motel" for purposes of the County's zoning ordinance, we find no abuse of discretion by the district court in concluding that the zoning ordinance did not apply to limit the location of Gilman's brothel.[18]

DP also argues that the placement of the brothel violated section 17.80.030 of the zoning ordinance, which prohibits motels within

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[17]See Union Plaza Hotel v. Jackson, 101 Nev. 733, 735, 709 P.2d 1020, 1021-22 (1985)("There is no rule of construction which will authorize the application of provisions contained in one law respecting a certain officer or body, to another and different officer or body mentioned in another law, although the laws be in pari materia, and the duties imposed upon such officers be similar in character.")(quoting V. & T. R.R. Co. v. Ormsby County, 5 Nev. 341, 347 (1870)); see also City of Boulder v. General Sales Drivers, 101 Nev. 117, 118-19, 694 P.2d 498, 500 (1985) ("It is presumed that in enacting a statute the legislature acts with full knowledge of existing statutes relating to the same subject.").

[18]Additionally, DP argues that brothels fall within the zoning ordinance because the County collects a room tax from brothels as well as motels. However, the County does not tax only brothels and motels. The County collects the tax from motels, hotels, RV parks, and brothels. For example, in 2000, the County collected a room tax from the VC RV Park, Chollar Mansion (a bed and breakfast), and the Old Bridge Ranch (a brothel). The RV park does not fit within the common idea of what a "room" is and, using DP's argument, it would fit under the definition of a "motel." The record does not contain an explanation of the County's tax scheme or the reason why the County collects "room taxes" from so many different types of establishments. Thus, that the County collects a room tax from brothels does not compel us to conclude that a "brothel" is a "motel."

4,000 feet of the Truckee River.[19] The reason for this prohibition, as stated by section 17.80.010(B), is to prevent the discharge of human effluent into the river. However, Mr. Haymore testified that the brothel was connected to sewer and water mains and thus the brothel would not discharge effluent into the river. Because we have concluded that a "brothel" is not a "motel," this section does not apply. However, even if it did, the brothel's elimination of effluent discharge through a sewer connection satisfies the purpose of the restriction.[20]

Arbitration

DP contends that the district court abused its discretion when it refused to issue an order compelling the County, Lance Gilman, and TRIC to arbitrate.

Disputes are presumptively arbitrable, and "[c]ourts should order arbitration of particular grievances 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an

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[19]Section 17.80.030 states in part:

> The construction, use, location, operation or maintaining of manufactured/mobile home parks, trailer parks, recreational vehicle parks, and motels is prohibited in that part of the county lying and being within four thousand feet of the northerly boundary of Storey County, and said northerly boundary being the centerline of the Truckee River . . . .

[20]We also conclude that DP's arguments regarding zoning areas lack merit given our conclusion that a brothel is not subject to the County zoning ordinances.

interpretation that covers the asserted dispute.'"[21] The role of a district court is limited to determining the arbitrability of disputes and enforcing arbitration agreements.[22] If a dispute is arbitrable, the arbitrator, rather than the court, must consider and rule upon the merits of and defenses to the underlying dispute.[23]

The district court concluded:

> The development agreement did not apply to the proposed brothel property nor did it apply to Lance Gilman who was not a party to the agreement in his personal capacity. Therefore, the agreement to arbitrate did not apply to this matter.

DP states that the County's grant of Gilman's brothel license near the Industrial Center breached the implied duty of good faith and fair dealing contained within the February 1, 2000, agreement. Because the agreement contained a clause that the development of the project would further the public purpose of "enhancing the Property as an attractive location for Development of commercial and industrial users to build and operate businesses," DP contends that the County could not take action to damage the Industrial Center, even though the brothel parcel was "outside

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[21]Int'l Assoc. Firefighters v. City of Las Vegas, 104 Nev. 615, 620, 764 P.2d 478, 481 (1988) (quoting AT&T Technologies v. Communications Workers, 475 U.S. 643, 650 (1986)).

[22]See Clark Co. Public Employees v. Pearson, 106 Nev. 587, 590, 798 P.2d 136, 138 (1990).

[23]See id. at 591, 798 P.2d at 138 ("Nevada's Uniform Arbitration Act prohibits courts from considering the merits of the underlying disputes in making the more limited threshold determination of arbitrability."); see also NRS 38.045(5) (repealed effective Oct. 1, 2003) (new version codified at NRS 38.221(4)).

the recorded coverage of the TRI Center's CC&Rs, which preclude brothels." Thus, DP asserts that the arbitration clause was subject to "an interpretation that covers the asserted dispute" and the district court should have ordered arbitration of that dispute.

We conclude that the district court properly determined that the dispute was not subject to the arbitration clause contained in the Industrial Center development agreement. The brothel property was neither a part of the Industrial Center nor subject to the CC&Rs; the development agreement did not personally bind Gilman, and the County was under no obligation to enforce the CC&Rs that prohibited brothels in the Industrial Center. Therefore, the district court properly denied DP's request to order the parties to arbitration.

Open meeting law

DP contends that the County violated NRS 241.020, Nevada's open meeting law because: (1) the first reading of Gilman's brothel license application occurred on December 17, 2001, just hours after its submission to the Board, and without three days' public notice; (2) discussion occurred on the application after the first reading; (3) the Board did not provide an opportunity for public comment at the January 2, 2002, meeting; and (4) the district court improperly placed the burden on DP when it determined that the lack of public comment occurred because DP's representative did not assert himself and comment at the meeting. Thus, DP concludes that this court should declare the brothel license void.

"A district court's factual determinations will not be set aside unless they are clearly erroneous and not supported by substantial evidence."[24]

The district court concluded that the Board's January 2, 2002, meeting did not violate the open meeting law. The court found that a Board member made a motion to approve the license and the motion was seconded. The court further found that when Chairman Hess asked for public comment before the Board voted on the motion to approve the license, Mr. Alonso did not attempt to assert himself and comment on the matter.

DP alleges that the only impropriety at the meeting was that it did not have an opportunity to comment on the brothel application. The record belies this allegation, however, and substantial evidence supports the district court's conclusion that DP simply chose not to utilize its opportunity to comment at the January 2, 2002, meeting. Consequently, the district court did not err in concluding that no open meeting law violation occurred.[25]

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[24]Dewey v. Redevelopment Agency of Reno, 119 Nev. ___, ___, 64 P.3d 1070, 1075 (2003).

[25]DP additionally argues that the Board's December 17, 2001, meeting violated the open meeting law. However, DP did not expressly raise this argument in its pleadings and papers filed with the district court, and consequently, the district court did not address this issue in its order.

We need not consider arguments raised for the first time on appeal. Diamond Enters., Inc. v. Lau, 113 Nev. 1376, 1378, 951 P.2d 73, 74 (1997). However, even had DP properly raised the issue below, it lacks merit. The Board did not "consider" the application at the December 17, 2001, meeting. Instead, it properly delayed consideration of and action on

continued on next page . . .

CONCLUSION

The district court erred in not granting DP's requested writ of mandamus, as Gilman's failure to strictly comply with the brothel application ordinance negated the validity of his application and the Board erred in relying upon the application to grant Gilman's license. However, the district court correctly ruled that the brothel's location did not violate the zoning ordinance, that this dispute was not subject to arbitration, and that the Board did not violate the open meeting law. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.[26]

Shearing, C.J.

Agosti, J.

Rose, J.

Becker, J.

Maupin, J.

Gibbons, J.

. . . *continued*
Gilman's application until the January 2, 2002, meeting when the Board could properly produce an agenda to give the public advance notice and an opportunity to comment on the application.

[26]This matter was submitted for decision by the seven-justice court. As the Honorable Myron E. Leavitt, Justice, died in office on January 9, 2004, this matter was decided by a six-justice court.

cc: Hon. William A. Maddox, District Judge
Lionel Sawyer & Collins/Reno
Allison, MacKenzie, Russell, Pavlakis, Wright & Fagan, Ltd.
Mark H. Gunderson, Ltd.
Storey County Clerk