

IN THE SUPREME COURT OF THE STATE OF NEVADA

MAX MASERANG,
Appellant,
vs.
CONCERNED CITIZENS OF
LOGANDALE,
Respondent.

No. 39867

FILED

MAY 04 2004

ORDER OF REVERSAL

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. R. [Signature]*
CHIEF DEPUTY CLERK

This is an appeal from a district court order granting a petition for a writ of mandamus. The Clark County Board of Commissioners approved the appellant Max Maserang's request for a zoning change regarding land in Moapa Valley, on which Maserang planned to build a commercial shopping center. Respondent Concerned Citizens of Logandale, opposing the development, petitioned for a writ of mandamus. The district court concluded that the Board of Commissioners abused its discretion in accepting inadequate reports in violation of Clark County Code requirements and failing to follow our directives in Enterprise Citizens v. Clark County Commissioners.¹ Consequently, the district court granted Concerned Citizens' petition. On appeal, Maserang argues that (1) the district court applied the wrong standard in reviewing the Board of Commissioners' decision, and (2) the district court had no jurisdiction to grant the writ because Concerned Citizens failed to exhaust its administrative remedies.

¹112 Nev. 649, 918 P.2d 305 (1996).

FACTS

On March 19, 2001, Maserang applied to the Clark County Comprehensive Planning Department to rezone 29.5 acres of property located near the east side of State Highway 169 and the north side of Don Benjamin Circle in Moapa Valley, Logandale. The property lies four miles south of Interstate 15 and is a part of the Northeast Clark County Land Use and Development Guide (Master Plan) which the Board of Commissioners adopted in 1994. While the Commissioners anticipated the need for commercial development in Moapa Valley and zoned some areas for commercial use,² the Commissioners designated the subject property "residential."

Because of this prior designation, Maserang sought to rezone the property from R-A (Rural Agriculture) and R-U (Rural Open Land) to C-2 (General Commercial). The rezoning would allow Maserang to build a 217,000-square-foot shopping center with nineteen buildings, including fast food restaurants, a convenience store with gasoline pumps, retail buildings, office buildings, other restaurants, and a lube shop. Because no public sewer facilities serviced the area, Maserang proposed to utilize septic tanks with leach fields, located within the public parking areas. Although the Master Plan contained a commercial node designation about half a mile away from Maserang's proposed location, Maserang chose to apply for a zoning change.

On April 25, 2001, the Moapa Valley Town Board voted to deny the application because the change did not conform to the Master

²The commercial nodes the Master Plan designated were the Town Center, the intersection of Whipple Avenue and State Highway 12, and the west side of State Highway 12 at the Logandale/Overton boundary.

Plan and was "totally surrounded by homes." On June 21, 2001, the Clark County Planning Commission held a public hearing on the matter. The Planning Commission's staff recommended denying Maserang's application because the proposal did not comply with the Master Plan. Staff also had concerns about Maserang's ability to provide adequate wastewater disposal facilities and how such facilities would affect the water quality of adjacent residential wells. Despite staff's recommendation, the Planning Commission conditionally approved rezoning for some of the requested parcels. The approval conditions included reduction to C-1 (Local Businesses) zoning, design review on final plans and any significant changes, intense landscaping, and relocation of the gasoline pumps to avoid residence proximity.

On July 18, 2002, Maserang's zoning change application came before the Board of Commissioners for a public hearing pursuant to Title 30.16.060 of the Clark County Code. At the hearing, the Board heard testimony both in support of and in opposition to the zoning change. Maserang presented the Board with 221 postcards, 3 letters, and a 21-signature petition favoring his application. Concerned Citizens responded with 182 cards, 31 letters, and a 899-signature petition in opposition to the zoning change. The testimony in support of the petition focused on the need for more commercial services in Moapa Valley, the appropriateness of the subject property for such a development, and Maserang's willingness to accommodate the neighbors' concerns. The testimony in opposition of Maserang's petition emphasized that the proposed zone change would not conform to the Master Plan and that the Moapa Valley residents wanted to preserve their rural lifestyle. Concerned Citizens suggested that there was no need for additional commercial services because Moapa Valley did

not have extensive growth and many local stores had shut down for lack of business. Concerned Citizens also voiced fears of a negative neighborhood, traffic, and wastewater impact.

After hearing from both sides, the Board commented on the proposed change. Commissioner Erin Kenny noted the possibility of large advertisement signs disturbing the neighborhood surroundings. Commissioner Mary Kincaid-Chauncey pointed to a uniformity of design problem if Maserang decided to sell some of the commercial spaces. Nevertheless, Commissioner Kincaid-Chauncey stated that the project "would be good for the area" and that in a shopping center, businesses would "feed off the other businesses." Commissioner Chip Maxfield objected to the proximity of fast food restaurants and existing homes. Because of these considerations, the Board approved the zoning change request, subject to numerous conditions,³ addressing these concerns.⁴

Dissatisfied with this result, Concerned Citizens filed an action in the district court against Maserang and the Board, seeking a

³"Design review as a public hearing on final plans for each phase of the development and any significant changes; berm with intense landscaping along south property line, intense landscaping buffer . . . along the entire perimeter of the site; no access to Paiute Street and Don Benjamin Circle; drainage and traffic studies and compliance; . . . [m]onument signs only; no fast food restaurants south of the convenience store. . . . [A]pplicant is advised that the convenience store with gasoline pumps needs to be relocated to a point where it was at least 200 feet from any residential use or 1000 feet from a well or another land use application shall be required."

⁴These conditions were included in the Letter of Intent issued by Clark County. A Letter of Intent is a conditional approval of the zoning change which lapses if the conditions are not fulfilled within a specific time period. Therefore, the change is tentative.

writ of mandamus reversing the Board's decision. The mandamus petition asserted that the Board's approval was "arbitrary and capricious and without legal authority and in violation of Clark County Code regarding zoning." After hearing oral arguments, the district court concluded that the Board had abused its discretion in granting Maserang's application based on inadequate reports and in failing to defer to the Master Plan. Consequently, the district court granted Concerned Citizens' petition and reversed the Board's decision. This appeal followed.

DISCUSSION

Standard of review on appeal

A writ of mandamus is an extraordinary remedy that issues "to compel the performance of an act that the law requires as a duty resulting from an office, trust or station, or to control an arbitrary or capricious exercise of discretion."⁵ We review the district court's grant or denial of a writ petition for abuse of discretion.⁶

However, "[t]he grant or denial of a rezoning request is a discretionary act."⁷ When the district court evaluates a zoning decision, the district court's only function is to ascertain whether there was substantial evidence before the Board of Commissioners which would sustain the Board's actions.⁸ If substantial evidence supports the

⁵State of Nevada v. Dist. Ct. (Ducharm), 118 Nev. 609, 614, 55 P.3d 420, 423 (2002).

⁶County of Clark v. Doumani, 114 Nev. 46, 53, 952 P.2d 13, 17 (1998).

⁷Id.

⁸Enterprise Citizens, 112 Nev. at 653, 918 P.2d at 308.

legislative act, there is no abuse of discretion.⁹ "Substantial evidence is that which 'a reasonable mind might accept as adequate to support a conclusion.'"¹⁰ The district court's function is limited because zoning is a legislative matter and a "presumption of validity attaches to local zoning enactments and amendments."¹¹ On appeal, our function is the same as the function of the district court, i.e., to determine whether substantial evidence supports the Board's determination.¹² "Like the district court, this court is limited to the record made before the Board in reviewing the Board's decision."¹³ Simply put, if we determine that substantial evidence supported the Board's determination, the Board did not abuse its discretion and the district court's decision to reverse the Board's determination constitutes an abuse of discretion.

The district court's standard of review

Maserang argues that the district court incorrectly applied the Enterprise Citizens "extraordinary hardship" standard in reviewing the Board's decision to grant Maserang's zoning change application. We agree.

⁹Doumani, 114 Nev. at 53, 952 P.2d at 17.

¹⁰Yamaha Motor Co. v. Arnoult, 114 Nev. 233, 238, 955 P.2d 661, 664 (1998) (quoting State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986)).

¹¹Doumani, 114 Nev. at 53, 952 P.2d at 17; see also McKenzie v. Shelly, 77 Nev. 237, 242, 362 P.2d 268, 270 (1961).

¹²Enterprise Citizens, 112 Nev. at 653, 918 P.2d at 308.

¹³Id.

Under Clark County Code § 30.16.060, parties applying for a zoning change must submit an application to the Board of Commissioners containing, among other things, reports about the proposed change's effect on the community. The application must include wastewater treatment, traffic, and neighborhood impact reports.¹⁴ The Code provision does not require an applicant to show an extraordinary reason for receiving a zoning change.

The district court reversed the Board's decision because (1) the Board failed to request and Maserang failed to provide the wastewater, traffic, and neighborhood impact reports the Clark County Code required for a zoning change application; (2) the Board failed to follow our directives in Enterprise Citizens v. Clark County Commissioners¹⁵ in allowing Maserang to submit cursory reports as a part of his application; and (3) the Board failed to give deference to its approved Master Plan when Maserang did not provide adequate reasons for deviating from the plan. The district judge's "cursory reports" remark pertained to the wastewater, traffic, and neighborhood impact reports Maserang had to submit under the code. The district court determined that the county ignored some of its approval requirements when it granted the zoning change based on "ineffective and really incomplete and not sufficient" reports. We conclude that the district court erred in applying the Enterprise Citizens standard to the case at bar.

¹⁴Clark County Code § 30.16.240(a)(17)(B), § 30.16.240(a)(17)(C), § 30.16.240(a)(17)(H).

¹⁵112 Nev. 649, 918 P.2d 305.

In Enterprise Citizens, the Union Pacific Railroad Company owned a parcel of land adjacent to a railroad track, zoned for residential use.¹⁶ When Inland Properties, Inc., agreed to operate a sand and gravel pit on the parcel, Union Pacific filed for a zoning change, a conditional use permit, and a zone variance to accommodate Inland's operations.¹⁷ The Board of Commissioners held a public hearing regarding the three applications. At the hearing, local property owners voiced concerns about noise, dust particle control, traffic, and safety. Nevertheless, after Union Pacific submitted environmental studies mitigating these concerns and presented evidence that the project would economically benefit the city, the Board approved all three applications.¹⁸

Some of the local property owners filed a petition for a writ of mandamus in the district court seeking to overturn the Board's decision. The district court denied the petition and the property owners sought relief from this court.¹⁹ On appeal, we stated that by county law, an applicant for a variance had the burden to prove that because of the property's unusual characteristics, a strict application of the zoning regulations would result in "exceptional practical difficulties to, or exceptional and undue hardships" upon the property owner.²⁰ Concluding that Union Pacific presented no substantial evidence to meet its burden,

¹⁶Id. at 651, 918 P.2d at 306.

¹⁷Id. at 652, 918 P.2d at 307.

¹⁸Id.

¹⁹Id. at 652-53, 918 P.2d at 307-08.

²⁰Id. at 654, 918 P.2d at 308.

we held that the Board abused its discretion in granting the variance and the district court erred in denying appellants' writ petition.²¹ We also stated that the Board should have accorded substantial deference to the master plan and the Board abused its discretion in completely ignoring the plan.²²

The district court erroneously applied Enterprise Citizens to the case at bar. At the May 30, 2002, petition hearing, the district judge stated:

Now, let's address the true issue, that which was before the Supreme Court and addressed in Enterprise Citizens, which is for non-conforming use. The applicant has the burden of proof that there is some extraordinary reason why the master plan should not be followed. What is the extraordinary reason that the county commission found . . . ?

(Emphasis added.)

The district court later commented, "I think that [the] record is that it [the community] is divided, somewhat evenly divided. Now, under Enterprise, the municipal government has to have a compelling reason to vary from the master plan . . . and an evenly divided community . . . is not a compelling reason to do the change."

Subsequently, the district judge remarked:

[T]he county commission did not follow the Supreme Court mandate in Enterprise Township because they have a divided community. They did not, they being the developer, didn't meet its burden. The county commission erred as a matter

²¹Id. at 656, 918 P.2d at 309.

²²Id. at 659, 660-61, 918 P.2d at 311, 312.

of law when it granted them the zoning change, because there was an insufficient showing that there was a zone change [sic] should occur.

(Emphasis added.)

Finally, the district court remarked:

[T]he county commission erred as a matter of law. They didn't follow Enterprise Township, and this zoning should not have been granted, at least not at the time they granted it, because they were not given sufficient information. To simply state in one sentence that there is [sic] no neighborhood properties and there is no impact on the community is insufficient information and it is a violation of its own ordinance.

Notwithstanding the Code's requirements, the district court applied a heightened standard of review. The Enterprise Citizens standard does not apply to the case at bar because Maserang applied for a zoning change, not for a variance. Clark County Code § 30.16.060 does not require an applicant to show any extraordinary hardships resulting from the strict application of existing zoning.

Arguably, the district court's remarks about the report insufficiency suggest that the district court properly analyzed the Board's decision under a "substantial evidence" standard. However, a close review of the record suggests otherwise. The district judge's very first reference to Enterprise Citizens reflected her erroneous belief that Maserang had the burden of proof to show an extraordinary reason justifying a deviation from the Master Plan. The second reference discussed the lack of a compelling reason for deviating from the plan. Both these references show that the district court applied a heightened scrutiny in reviewing the Board's determination. Although the district judge's third reference to Enterprise Citizens discussed the community's mixed feelings about the

project, the judge still stated that Maserang failed to meet his burden. Once the district court misapprehended the standard of review, it continued to examine the Board's decision under a heightened scrutiny. In essence, the district court found no substantial evidence to show that Maserang presented an extraordinary reason for receiving a zoning change.

Notably, Concerned Citizens focuses on the district court's discussion regarding the reports and the Board's alleged failure to defer to the Master Plan. Concerned Citizens argues that Enterprise Citizens stands for the general proposition that the Board may not ignore its own code requirements to facilitate development and thus the district court merely held the Board to the code provisions. However, Concerned Citizens' broad reading of the Enterprise Citizens holding fails to explain the district court's "extraordinary reason" and "compelling reason" comments. Additionally, the Board's decision to include various conditions as prerequisites for full approval indicates that the Board did consider its code requirements and the Master Plan. We, therefore, conclude that the district court applied the wrong standard of review. The district court should have considered whether substantial evidence supported the Board's decision.

Substantial evidence

Maserang contends that the district court erred in reversing the Board's decision because substantial evidence supported the decision. We agree.

"The grant or denial of a rezoning request is a discretionary act."²³ "If a discretionary act is supported by substantial evidence, there is no abuse of discretion."²⁴ The district court's function is to ascertain that the Board adequately focused on the merits of the project and impact on the community.²⁵

To begin, the Planning Commission conditionally approved Maserang's application. At the July 18, 2002, public hearing, Maserang presented the Board with 221 postcards, 3 letters, and a 21-signature petition favoring his application. The President of Moapa Valley Rotary Club testified that the club "voted unanimously to overwhelmingly support" the project because "[w]e feel that it- its [sic] needed in the valley." A Moapa Valley resident supporting the zoning change application stated that the valley was growing and "[w]e feel that it's a good plan. It's in a good location."

Although Maserang's proposed change varied greatly from the Master Plan,²⁶ James Ludwig, the project manager, testified that the subject property sat in a natural basin that reduced the project's visual impact on surrounding neighbors. Ludwig also stated that the property was "very unique because it impacts the least amount of any area that you

²³County of Clark v. Doumani, 114 Nev. 46, 53, 952 P.2d 13, 17 (1998).

²⁴Id.

²⁵Nova Horizon v. City Council, Reno, 105 Nev. 92, 98, 769 P.2d 721, 724 (1989).

²⁶R-A and R-U to C-1. Maserang initially sought to rezone the property to C-2, but the Planning Commission conditioned its approval on reduction to C-1.

can find in the entire valley." The Board heard evidence that the project would have a common "village courtyard" theme constructed by using stucco, Spanish tile, and accent stone to ensure that the project blended with the desert tones. Ludwig also represented to the Board that the project included intense landscaping to minimize the impact on surrounding properties.

While the Master Plan had designated commercial nodes in the area, the Board concluded that Maserang's proposed location would be a better choice for a commercial shopping center because it was a larger lot and afforded a better opportunity for a common theme development. Because the project involved only seventeen percent building coverage, the Board decided that there would be more open space and less commercial saturation. In making this determination, the Board reviewed zoning maps and considered the Planning Commission staff's analysis that the proposal did not conform to the Master Plan. Commissioner Kincaid-Chauncey also felt that the commercial center would benefit the community because small businesses would "feed off" each other. Although there was substantial testimony in opposition to Maserang's petition, we are not at liberty to weigh conflicting evidence.²⁷ We conclude that the district court erred in reversing the Board's decision.

Deference to the Master Plan

Maserang argues that the district court again applied the wrong standard of review in holding that the Board failed to give deference to the Master Plan. We find Maserang's argument persuasive.

²⁷Taylor v. Thunder, 116 Nev. 968, 974, 13 P.3d 43, 46 (2000).

"The master plan of a community is a 'standard that commands deference and a presumption of applicability,' but should not be viewed as a 'legislative straightjacket from which no leave can be taken.'"²⁸ Because of the presumed validity of a board's decision, judicial intervention in zoning determinations is improper "absent clear necessity."²⁹ However, in Doumani, we held that where "the evidence presented in support of and in opposition to the proposed development was roughly equal, the district court did not abuse its discretion in determining that the Board abused its discretion by failing to give deference to the master plan."³⁰

In this case, Maserang presented the Board with 221 postcards, 3 letters, and a 21-signature petition favoring his application. Concerned Citizens responded with 182 cards, 31 letters, and a 899-signature petition in opposition to the zoning change. The district court determined that the community was "divided, somewhat evenly divided," "[i]t's about 50-50." The district court stated that "[u]nder Enterprise, the municipal government has to have a compelling reason to vary from the master plan and . . . an evenly divided community . . . is not a compelling reason to do the change."

We conclude that the district court misconstrued Enterprise Citizens. Enterprise Citizens does not mention that a municipality needs a compelling reason to deviate from a master plan; it states that the Board

²⁸Doumani, 114 Nev. at 53-54, 952 P.2d at 17 (quoting Enterprise Citizens, 112 Nev. at 659, 918 P.2d at 311).

²⁹Nova Horizon, 105 Nev. at 96-97, 769 P.2d at 724.

³⁰Doumani, 114 Nev. at 54, 952 P.2d at 18.

erred in completely ignoring the master plan.³¹ Unlike Enterprise, the numerous conditions the Board included in its approval indicate that the Board did not completely ignore the plan.

Although Doumani appears to support the district court's reasoning, our holding in Doumani differs from the district court's finding. In Doumani, we concluded that the Board abused its discretion in not deferring to the master plan when the evidence in support of and in opposition to the proposed change was roughly equal.³² We reached this decision after considering testimony from the community and Commissioner Woodbury, reviewing letters and petitions, the Town Board recommendation, and the Board zoning staff's approval.³³ In the instant case, the district court remarked that the community, not the evidence, was equally divided. We conclude that the district court erred in

³¹Enterprise Citizens v. Clark Co. Comm'rs, 112 Nev. 649, 660-61, 918 P.2d 305, 312 (1996).


³²Doumani, 114 Nev. at 54, 952 P.2d at 18.

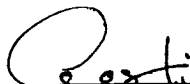
³³Id. at 54, 952 P.2d at 17-18.

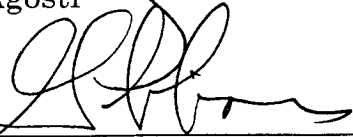
determining that the Board needed a compelling reason to deviate from the master plan and that it improperly failed to defer to the plan.

Accordingly, we

ORDER the judgment of the district court REVERSED.


_____, J.
Becker


_____, J.
Agosti


_____, J.
Gibbons

cc: Hon. Sally L. Loehrer, District Judge
Kummer Kaempfer Bonner & Renshaw
Law Office of Garry L. Hayes
Clark County Clerk