

Exhibts

FILED
Electronically
CV20-01687
2022-06-20 12:53:19 PM
Alicia L. Lerud
Clerk of the Court
Transaction # 9108327

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

3105

**IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE**

RYAN WITTICH, an individual; TAMI WITTICH, an individual; ALFERD KNEPPER, an individual; KATHERINE KNEPPER, an individual; CARLOS GONZALEZ, an individual; SAMANTHA GONZALEZ, an individual; MARIO FRUGOLI, an individual; MARCIA FRUGOLI, an individual; JOHN BIRD, an individual; GINA BIRD, an individual; JOHN JEFFREY, an individual; GRANT GARRISON, an individual; WARREN STOKES, an individual; JAMES FERRIS, an individual; ROBERT F. GEORGETON, an individual; NANCY BEUTEL, an individual; and MARVICE BEUTEL, an individual,

Plaintiffs-Petitioners,

vs.

COUNTY OF WASHOE, a political subdivision of the State of Nevada; CITY OF SPARKS, a political subdivision of the State of Nevada; SAFE EMBRACE, a Nevada nonprofit corporation; and DOES I through X, inclusive,

Defendants-Respondents.

Case No.: CV20-01687

Dept. No.: 15

ORDER GRANTING ISSUANCE OF WRIT OF MANDAMUS

Before this Court is Petitioners' Petition for Writ of Mandamus against the City of Sparks (the "City") and Washoe County (the "County") dated October 21, 2020. The City and County moved to dismiss the Petition, and on May 17, 2021, this Court entered an *Order Denying*

1 *Washoe County's Motion to Dismiss and Denying City of Sparks' Motion to Dismiss and*
2 *Briefing Schedule.*

3 Petitioners filed their Opening Brief on July 30, 2021. The City and County filed
4 separate Response Briefs on August 30, 2021, and Petitioners filed their Reply Brief on October
5 11, 2021. The parties argued the Petition on November 18, 2021. Safe Embrace appeared at the
6 hearing but did not participate in oral arguments. All parties appeared before this Court for a
7 status hearing on May 31, 2022 and presented additional arguments.

8 After reviewing the moving papers, the transcript from the oral argument, and the Court
9 having heard and taken into consideration further oral arguments from the parties, the Court
10 hereby GRANTS the Petitioners' request for a Writ of Mandamus directing the City of Sparks to
11 revoke the improperly issued approvals and directing the County of Washoe to revoke Safe
12 Embrace's business license allowing it to operate as a group care facility.¹

13 A writ of mandamus is an extraordinary remedy. Smith v. Eighth Judicial Dist. Court In
14 & For County of Clark, 107 Nev. 674, 679, 818 P.2d 849, 853 (1991). The petitioner has the
15 burden of proof to demonstrate that extraordinary relief is necessary. Pan v. Eighth Judicial Dist.
16 Court ex rel. County of Clark, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004); Kochendorfer v. Bd.
17 of County Com'rs of Douglas County, 93 Nev. 419, 422, 566 P.2d 1131, 1133 (1977). The
18 decision whether to consider a petition for extraordinary relief is within the Court's discretion.
19 Smith, 107 Nev. at 677, 818 P.2d at 851. However, a writ must issue if there is not a plain,
20 speedy, and adequate remedy in the ordinary course of the law. NRS 34.170.

21 A writ of mandamus is available to compel the performance of an act that the law
22 requires, to control an arbitrary or capricious exercise of discretion, or to correct a manifest
23 abuse of discretion. NRS 34.160; Nalder v. Eighth Judicial Dist. Court of Nev., 136 Nev. 200,
24 207, 462 P.3d 677, 685 (2020); Int'l Game Tech., Inc. v. Second Judicial Dist. Court, 124 Nev.
25 193, 197, 179 P.3d 556, 558 (2008); Bd. of Com'rs of City of Las Vegas v. Dayton Dev. Co., 91
26 Nev. 71, 75, 530 P.2d 1187, 1189 (1975) (citing State ex rel. Johns v. Gragson, 89 Nev. 478, 515

27
28 ¹ The Court notes that the Petition included a third request for a writ of mandamus directing Washoe County to impartially enforce its development codes against the Property. The Court finds that this request could potentially yield unintended consequences and therefore declines to include this relief in the writ.

1 P.2d 65 (1973); Henderson v. Henderson Auto, 77 Nev. 118, 122, 359 P.2d 743, 744 (1961).
2 “An arbitrary or capricious exercise of discretion is one founded on prejudice or preference
3 rather than on reason, or contrary to the evidence or established rules of law.” State v. Eighth
4 Judicial Dist. Court (Armstrong), 127 Nev. 927, 931-32, 267 P.3d 777, 780 (2011).

5 “When [a writ is] issued by a district court or a judge of the district court it shall be made
6 returnable before the district court.” NRS 34.160. The Court finds the exceptional circumstances
7 presented in this case warrant mandamus relief.

8 **A. Petitioners Have No Plain, Speedy, and Adequate Remedy in the Ordinary**
9 **Course of Law.**

10 Petitioners in this matter live near the property located at 1995 Ponderosa Drive (the
11 “Property”), which is owned by Defendant Safe Embrace. On or about November 21, 2017, Safe
12 Embrace filed a development application with the City seeking to construct a 1,923 square-foot
13 addition on the Property. On or about January 21, 2018, the City administratively approved Safe
14 Embrace’s request. It is undisputed that Petitioners did not receive notice of the development
15 application or notice of the City’s approval of same. Subsequently, on February 28, 2018, Safe
16 Embrace submitted building application WBLD18-104678 to the City, which the City approved
17 and issued on May 3, 2018. On July 17, 2019, Safe Embrace received its certificate of
18 occupancy, which notes 15 beds in the “existing dwelling” and 13 beds in the “new addition,” for
19 a total of 28 beds.

20 At the time of the approvals described above, the Property was located within the City’s
21 sphere of influence pursuant to NRS 278.026(7), 278.02788, and the Truckee Meadows Regional
22 Planning Agency’s Regional Plan. Pursuant to the Regional Plan and the underlying statutory
23 authority in NRS Chapter 278, the City asserted planning jurisdiction over the Property.
24 However, with the adoption of the 2019 Regional Plan in October of 2019, the Property was
25 removed from the City’s sphere of influence and placed back into the County’s jurisdiction. Now
26 that the Property is within Washoe County’s jurisdiction, the City claims it is without jurisdiction
27 to review or reverse any of its prior decisions, and Washoe County claims it does not have
28

1 jurisdiction to review the decisions previously made by the City and that it must accept the City's
2 approvals and allow the use to continue as a nonconforming use.

3 The City and County argue that mandamus relief is not appropriate because Petitioners
4 failed to exhaust their administrative remedies. Petitioners argue that no administrative remedies
5 could be sought because they were deprived of notice of the approvals and therefore had no
6 standing to seek a petition for judicial review under NRS 278.3195(4). The Court finds that
7 because the City's approvals were made without notice to Petitioners, the Petitioners had no
8 standing and no opportunity to participate in any timely appeal of the City's decisions. See
9 Benson v. State Eng'r, 131 Nev. 772, 777, 358 P.3d 221, 224 (2015) (a party need not exhaust
10 administrative procedures when those efforts would be "vain and futile."); see also Engelmann v.
11 Westergard, 98 Nev. 348, 353-54, 647 P.2d 385, 388-89 (1982) (concluding that the expiration
12 of the statute of limitation precluded the requirement to exhaust administrative remedies because
13 a request for administrative review would be considered "untimely and futile").

14 The City and County further argue that mandamus relief is not available to Petitioners
15 based on the doctrine of laches. The Court does not find that Petitioners acted with any lack of
16 diligence or delay in seeking judicial remedies.

17 The City and County contend that mandamus relief is not proper under the vested rights
18 doctrine. Petitioners argue that the vested rights doctrine does not apply in this case as there was
19 no subsequent changes in the zoning codes that occurred after Safe Embrace received the
20 improper approvals from the City of Sparks. See City of Reno v. Nevada First Thrift, 100 Nev.
21 483, 487, 686 P.2d 231, 234 (1984) ("when a building permit has been issued, vested rights
22 against changes in zoning laws exist after the permittee has incurred considerable expense in
23 reliance thereupon." (emphasis added); see also Bd. of County Com'rs of the County of Clark v.
24 CMC of Nevada, Inc., 99 Nev. 739, 670 P.2d 102, 107 (1983) ("vested rights against changes in
25 zoning laws exist only after the issuance of a building permit and the commencement of
26 construction..." (emphasis added)). The Court agrees and finds that the vested rights doctrine
27 does not preclude issuance of the writ.

28

1 Based on the above, the Court finds that there is no plain, speedy, and adequate remedy
2 in the course of law available to Petitioners.

3 **B. The City of Sparks Abused its Discretion When Approving the Development**
4 **Application.**

5 Petitioners argue that Safe Embrace's proposed use of the Property fits squarely within
6 the "social assistance, welfare, and charitable services" use category which is defined as follows:

7 Establishments that provide social assistance services directly to clients such as
8 children, elderly persons, disabled persons, homeless persons, or veterans. Social
9 assistance may include (1) food, medical relief, counseling or training. Examples
10 include adoption agencies, youth centers (except recreational only), child
11 guidance organizations, youth self-help organizations, foster care placement
12 services, community action services agencies, marriage counseling services
13 (except by offices of mental health practitioners), crisis intervention centers,
14 multipurpose social services centers, family social services agencies, self-help
15 organizations (except for disabled persons, the elderly, persons diagnosed with
16 intellectual and, developmental disabilities), family welfare services, suicide crisis
17 centers, hotline centers, telephone counseling services, community food services
18 (includes collection, preparation, and delivery of food, clothing and blankets for
19 needy persons), and (2) ***housing services including short term emergency shelter
20 for victims of domestic violence, sexual assault, or child abuse***; temporary
21 residential shelter for the homeless, runaway youths, and patients and families
22 caught in medical crises; or transitional housing for low-income individuals and
23 families.

24 SMC 20.08.002 (emphasis added).

25 The City admits that the addition to the Property "should not have been processed as a
26 group home." *City of Sparks' Response to Petitioners' Opening Brief in Support of Petition for*
27 *Writ of Mandamus* at 2:3-4. The City further admits that Safe Embrace's use was misclassified
28 and should have been either (i) a social assistance, welfare, and charitable services use or (ii)
would not clearly fall within any listed land use category. The Court finds that neither of these
uses were permissible in the Property's zoning district at the time the development application
was approved.

The City of Sparks' Zoning Code provides a use table that governs the permitted, special,
and accessory uses for each zoning district. SMC 20.02.013. The social assistance, welfare, and
charitable services use is not permitted in the zoning district within which the Property is located.

1 See Sparks Municipal Code (“SMC”) 20.02.013(A)(1) (“No uses are allowed in any zoning
2 district except those specifically listed as a permitted or conditional use in the Use Table.”)
3 Additionally, SMC 20.02.013(B) provides that “[u]ses not listed in the use table, are presumed to
4 be prohibited. For uses not considered in the use table, a case can be made, [sic] the use is
5 materially similar to uses permitted in the respective zoning district. The case will be considered
6 by the Planning Commission through the Conditional Use Permit process.” (emphasis added). It
7 is undisputed that Safe Embrace did not apply for a conditional use permit. An application for a
8 conditional use permit would have required the planning commission to analyze the impacts on
9 surrounding properties, document the actual or projected characteristics of the proposed use, and
10 provide notice and a public hearing. SMC 20.05.008. Instead of following this process, the City
11 abused its discretion when it misclassified the use of the Property and approved the development
12 application via administrative review.

13 The permits that were granted as a result of the City’s arbitrary and capricious approvals
14 must be revoked. A building official shall not issue any permit unless the plans for the proposed
15 construction or use fully conform to all building codes and zoning regulations then in effect.
16 NRS 278.610(2)(a). “Permits presuming to give authority to violate or cancel the provisions of
17 [the International Building Code] or other ordinances of the jurisdiction shall not be valid.”
18 Mesagate Homeowners’ Ass’n v. City of Fernley, 124 Nev. 1092, 1101, 194 P.3d 1248, 1254
19 (2008) (citing Int’l Bldg. Code § 105.4 (2003); see also, Denargo Mkt. Neighbors Coal. v. Visser
20 Real Est. Invs., 956 P.2d 630, 632 (Colo. App. 1997) (finding that the zoning administrator’s
21 admittedly improper act of reclassifying the use of a property had the effect of invalidating the
22 permit); Hurt v. Caldwell, 222 Va. 91, 97–98, 279 S.E.2d 138, 142 (1981) (finding that a
23 building permit that “did not comply with the applicable ordinances of [the jurisdiction] then in
24 existence and was, in effect, a nullity.”) Additionally, when a certificate of occupancy is issued
25 in connection with a building for which a building permit has been obtained, it is subject to the
26 infirmities of the building permit; thus, if the building permit is void, then a subsequent
27 certificate of occupancy pursuant to the permit is similarly void and revocable. Bekermus v.
28 Nardy, 123 Misc. 2d 378, 472 N.Y.S.2d 570 (Sup. Ct. 1984).

1 Accordingly, as a result of the City's abuse of discretion, the development approvals,
2 building permit, and certificate of occupancy must be revoked.

3 **C. The Business License was Improperly Issued as a Result of the City's Abuse of**
4 **Discretion.**

5 On November 21, 2018, Safe Embrace applied for a Washoe County business license
6 requesting to add a use and described its business as "a group care facility – increasing beds from
7 9 to 32 maximum." Because Safe Embrace was located in the City's sphere of influence at the
8 time of the application, the City's planning and zoning staff was required to sign-off on the
9 planning/zoning issues before the Washoe County business license could be issued. The City
10 signed off on the planning and zoning issues based on the improper approvals discussed above.
11 On October 9, 2019, Sparks City Manager Neil Krutz sent a letter to the Interim Washoe County
12 Manager David M. Solaro explaining that the City's planning staff approved the business license
13 in error. Thus, the City's arbitrary and capricious land use classification affected the propriety of
14 the subsequent business license issued by Washoe County.

15 A business permit may be revoked "if there exists a compelling public necessity
16 justifying revocation, as where the conduct of that business constitutes a public nuisance."
17 Sunset Amusement Co. v. Bd. of Police Commissioners, 7 Cal. 3d 64, 80, 496 P.2d 840 (1972)
18 (citing Jones v. City of Los Angeles, 211 Cal. 304, 315, 295 P. 14 (1930)). Washoe County
19 Development Code ("WCDC") § 110.910.10(b) provides that "[e]recting, operating or
20 maintaining any property or structure contrary to the provisions of a development regulation
21 shall be and is hereby declared to be unlawful and a public nuisance." Furthermore, Washoe
22 County Code 25.018(2)(e) provides that good cause exists for revocation of a business license
23 when a licensee "violates, in the conduct of the business, a federal, state, city, or county law,
24 rule, ordinance, or regulation."

25 The Court finds that the City's arbitrary and capricious land use classification led to Safe
26 Embrace's operation of the Property contrary to the applicable development regulations. Thus,
27 the County has a duty to revoke the business license pursuant to Washoe County Code
28 25.018(2)(e).

1 CONCLUSION


2 This Court having read and reviewed the verified Petition for Writ of Mandamus filed
3 herein by Petitioners, the Affidavits appended thereto and the Memorandum of Points and
4 Authorities in support thereof, the briefs submitted thereafter, and the oral argument presented to
5 this Court, finds that Petitioners have no plain, speedy, and adequate remedy in the ordinary
6 course of law and a writ of mandamus must issue pursuant to NRS 34.170. The Court further
7 finds that the writ is proper because the City of Sparks abused its discretion when it approved the
8 development application and misclassified the proposed use of the Property. Thus, the Court
9 being fully advised and good cause appearing,

10 IT IS HEREBY ORDERED that the Petition for Writ of Mandamus is granted in the
11 following respects:

12 (1) A writ of mandamus shall issue against the City of Sparks directing that it revoke
13 the approvals related to the November 21, 2017 development application submitted by Safe
14 Embrace, the approvals related to the WBLD18-104678 building application, and the certificate
15 of occupancy issued as a result thereof.

16 (2) A writ of mandamus shall issue against Washoe County directing that it revoke
17 the business license that is allowing Safe Embrace to operate as a group care facility.

18 DATED this 20th day of June, 2022.

19 
20 _____
21 DISTRICT JUDGE
22 Honorable David A. Hardy

23 Submitted by:

24
25 _____
26 Samantha J. Reviglio, Esq.
27 ROBERTSON, JOHNSON
28 MILLER & WILLIAMSON
50 W. Liberty Street, Suite 600
Reno, NV 89509
(775) 329-5600

1 samantha@nvlawyers.com

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28