

*Stratosphere Gaming Corp. v. Las Vegas*, 120 Nev. Adv. Rep. 59 (2004)<sup>1</sup>

**ADMINISTRATIVE LAW**

**Summary**

Appeal challenging the Las Vegas City Council's denial of Stratosphere's site development plan application to develop a proposed ride. Stratosphere petitioned the district court for a writ of mandamus which was denied and filed a complaint for declaratory relief which was dismissed.

**Disposition/Outcome**

The Stratosphere's contentions were found to lack merit and thus the district court's denial of the petition and dismissal of the complaint were affirmed.

**Factual and Procedural History**

Stratosphere applied pursuant to §19.18.050 of the Las Vegas Municipal Code<sup>2</sup> to the City of Las Vegas for a site development plan review in order to construct a proposed ride. The City Planning and Development Department recommended approval of the proposed ride and it was submitted to the Las Vegas Planning Commission ("Commission"), which held a public hearing on the proposal. The Commission received 670 protests against the proposal and only seventy-eight approvals. After approximately twenty nearby residents and business owners spoke in opposition to the ride, the Commission failed to approve the application. This was followed by the Las Vegas City Council ("City Council") unanimously denying the Stratosphere's application for the proposed ride after receiving a similar number of protests and approvals from the public.

Stratosphere went to the district court and filed a petition for a writ of mandamus and complaint for declaratory relief. The district court denied the petition and dismissed the complaint after concluding that the City Council's review of a site development plan pursuant to §19.18.050 is a discretionary act and that the Stratosphere had no vested right to build the ride. Stratosphere appealed the decision contending that the City Council's review of a site development plan application is a nondiscretionary act and that Stratosphere had a vested right to build the ride. Additionally, even if there City Council's review was discretionary, Stratosphere contended that the decision to deny the application was not supported by substantial evidence.

---

<sup>1</sup> By Z. Ryan Pahnke

<sup>2</sup> §19.18.050 provides that a property owner seeking approval of a proposed commercial development plan must file a site development plan with the City's Planning and Development Department. It also provides the purpose of the review process and the criteria for the site development plan.

## **Discussion**

### *1. City Council's discretionary action and vested rights.*

Stratosphere's first two arguments contending that the City Council's review of a site development plan application is a nondiscretionary act and that Stratosphere had a vested right to build the ride were handled together. §19.18.050(A) of the Las Vegas Municipal Code governs the review of a site development plan by the City Council and provides the purpose of the review process.<sup>3</sup> §19.18.050(E) then gives the criteria for the site development plan review.<sup>4</sup> The footnoted language in §19.18.050 contemplates a discretionary act by the City Council and "discretionary act" has been defined as "an act that requires a decision requiring personal deliberation and judgment."<sup>5</sup>

As far as Stratosphere having a vested right to build the proposed ride, the Nevada Supreme Court has held that "[i]n order for rights in a proposed development project to vest, zoning or use approvals *must not be subject to further governmental discretionary action...*"<sup>6</sup> Under §19.18.050, the City Council is required to approve a proposed development plan through the City's site development plan review process which requires the Council to exercise discretion in order to reach a decision after considering a number of factors.

### *2. Substantial Evidence.*

The court then reached Stratosphere's alternative argument that the decision to deny the application was not supported by substantial evidence and that the City Council exercised its discretion in an arbitrary and capricious manner. "Substantial evidence" has been defined in Nevada as "that which 'a reasonable mind might accept as adequate to support a conclusion.'"<sup>7</sup> §19.18.050(E)(5) contemplates that the plan review process is intended to insure that a proposed

---

<sup>3</sup> According to §19.18.050(A), the purpose of the review process is to ensure that the development plan:

(1) Is consistent with the General Plan, this Title, the Design Standards Manual, the Landscape, Wall and Buffer Standards and other regulations, plans and policies of the city; (2) Contributes to the long term attractiveness of the City; (3) Contributes to the economic vitality of the community by ensuring compatibility of development throughout the community; and (4) Contributes to the public safety, health and general welfare.

<sup>4</sup> §19.18.050(E) provides that the review is intended to ensure that:

(1) The proposed development is compatible with adjacent development and development in the area; (2) The proposed development is consistent with the General Plan, this Title, the Design Standards Manual, the Landscape, Wall and Buffer Standards, and other duly-adopted City plans, policies and standards; (3) Site access and circulation do not negatively impact adjacent roadways or neighborhood traffic; (4) Building and landscape materials are appropriate for the area and for the City; (5) Building elevations, design characteristics and other architectural and aesthetic features are not unsightly, undesirable or obnoxious in appearance; create an orderly and aesthetically pleasing environment; and are harmonious and compatible with development in the area; (6) Appropriate measures are taken to secure and protect the public health, safety and general welfare.

<sup>5</sup> Univ. of Nev., Reno v. Stacey, 116 Nev. 428, 434, 997 P.2d 812, 816 (2000).

<sup>6</sup> Am. W. Dev. v. City of Henderson, 111 Nev. 804, 807, 898 P.2d 110, 112 (1995) (emphasis added).

<sup>7</sup> State, Emp. Sec. v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986) (quoting Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Edison Co. v. Labor Board, 305 U.S. 197, 229 (1938))).

plan is “harmonious and compatible with development in the area” and that it is not “unsightly, undesirable, or obnoxious in appearance.” The above language clearly invites public opinion, and in Nevada, a local government is allowed to weigh public opinion in making a land-use decision.<sup>8</sup> When a discretionary decision of this type has been made, the supreme court cannot substitute its judgment for that of the City Council as to the weight of the evidence.<sup>9</sup> Thus, in this instance, the concerns expressed by the community residents and businesses opposing the ride are substantial and specific and are among the criteria that the City Council must consider under §19.18.050 to validly reject a development plan.

### **Conclusion**

§19.18.050 of the Las Vegas Municipal Code contemplates a discretionary act by the City Council in reviewing site development plans. As a result of this discretion, Stratosphere could not have had a vested right to undertake the proposed development. Furthermore, the City Council’s consideration of public opinion in reaching a decision to reject the plan is not an abuse of discretion and such public opinion can be considered substantial evidence.

---

<sup>8</sup> See *Boulder City v. Cinnamon Hills Assocs.*, 110 Nev. 238, 249, 871 P.2d 320, 327 (1994) (citing *Greenbriar, LTD. v. City of Alabaster*, 881 F.2d 1570, 1579 (11th Cir. 1989)).

<sup>9</sup> See *Clark Co. Liquor & Gaming v. Simon & Tucker*, 106 Nev. 96, 98, 787 P.2d 782, 783 (1990) (existence of conflicting evidence did not compel interference with a Clark County Liquor and Gaming Licensing Board decision so long as the decision was supported by substantial evidence).