IN THE SUPREME COURT OF THE STATE OF NEVADA

DAN AND CAROLEE JONES; WRPV TRUST; FGPV TRUST; PEAVEY AND HOOTS; JOHNSON LIVESTOCK, LLC; GORRELL TRAINING, LLC; LJ LIVESTOCK, LLC; MARTI HOOTS; GEORGIA BLACK; AND CLEVELAND AND DEBORA FRAZIER,
Appellants,
vs.
ELKO COUNTY BOARD OF COMMISSIONERS; WARREN RUSSELL; SHERRI EKLUND-BROWN; MIKE NANNINI; CHARLIE MYERS; AND JOHN ELLISON,
Respondents.

No. 52848

FILED

DEC 22 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a petition for a writ of mandamus in a land use action. Fourth Judicial District Court, Elko County; Robert E. Rose, Judge.

In January 2008, the Elko County Planning Commission considered an application by James and Theresa Currivan for the division of land located in Starr Valley, Nevada, into 40-acre parcels. Appellants (collectively, the Joneses) are neighbors of the Currivans who opposed the division. After hearing testimony and comments from many neighbors who would be affected by the division, including the Joneses, the Planning Commission approved the Currivans' application. The Joneses appealed the decision to respondent Elko County Board of Commissioners. After one commissioner disqualified himself from the matter due to a conflict of interest, the Board reached a 2-2 tie vote on the issue of whether to

approve the Planning Commission's decision. The Board informed the Joneses that because there was a tie vote, the Planning Commission's decision remained intact. Thereafter, the Joneses petitioned the district court for a writ of mandamus, asking that the district court compel the Board to turn over all transcripts and recordings of the proceedings and requesting that the district court render a decision on the merits. The district court determined that the Board's tie vote resulted in a decision and, as such, pursuant to Kay v. Nunez, 122 Nev. 1100, 146 P.3d 801 (2006), the Joneses already had an adequate remedy at law—a petition for judicial review. Therefore, the district court denied the Joneses' petition because a petition for a writ of mandamus was not the proper mechanism to challenge the Board's decision. This appeal followed.

This appeal raises one legal question: whether a petition for a writ of mandamus, rather than a petition for judicial review, is the appropriate method for challenging a land use decision when a hearing by an administrative appeals board results in a tie vote. For the reasons stated below, we conclude that judicial review is the appropriate method for challenging a land use decision in these circumstances. Accordingly, the district court did not abuse its discretion in denying the Joneses' petition for mandamus relief. As the parties are familiar with the facts, we do not recount them further except as necessary to our disposition.

The district court did not abuse its discretion when it denied the Joneses' petition for a writ of mandamus

Standard of review

We review a district court's decision denying a writ petition for abuse of discretion, Nunez, 122 Nev. at 1105, 146 P.3d at 805, but we

address issues of statutory construction de novo. Id. at 1104, 146 P.3d at 804.

A petition for a writ of mandamus is not the proper mechanism for the Joneses to challenge the Board's land use decision

The Joneses argue that the Board's tie vote denied them the benefit of a decision under NRS 278.3195, which provides that a party aggrieved by a decision of a governing body, such as the Board, may appeal that decision to the district court by filing a petition for judicial review. According to the Joneses, a petition for a writ of mandamus was the proper method to challenge the Board's decision. The Joneses contend that judicial review was not an available avenue to challenge the Board's action because it failed to make a decision by virtue of its tie vote. We disagree.

In Nunez, the controlling case in this appeal, Nunez applied for a nonconforming zone change, which was unanimously approved by the Clark County planning commission. 122 Nev. at 1102-03, 146 P.3d at 803-04. An affected neighbor appealed the decision to the Clark County board of commissioners, objecting to any possible waiver of development standards. Id. The board of commissioners voted to approve the application and waive certain development standards. Id. at 1103, 146 P.3d at 804. The affected neighbor filed petitions for judicial review and for a writ of mandamus. Id. The district court denied both petitions. Id. On appeal, we addressed the proper procedure for challenges to an administrative board's zoning and planning decisions. Id. at 1104-06, 146 P.3d at 804-05. We held that the appropriate manner to challenge a land use decision made by an administrative appeals board is through a

petition for judicial review, not a petition for a writ of mandamus. Id. at 1105-06, 146 P.3d at 805.

Here, the district court properly determined that the Board reached a decision. The Board's members split 2-2 over the appeal from the Planning Commission's discretionary decision to approve the Currivans' application for a land division.[1] Because a majority of the Board did not vote to overturn the discretionary action taken by the Planning Commission, the result was a decision by the Board to leave intact the approval of the Currivans' application for a land division. It follows that the proper method for the Joneses to challenge the Board's decision to uphold the Planning Commission's action is through a petition for judicial review, not a petition for a writ of mandamus. See NRS 278.3195(4); Nunez, 122 Nev. at 1105-06, 146 P.3d at 805.

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[1]The Joneses cite to Board of Commissioners v. Dayton Development Co., 91 Nev. 71, 75-76, 530 P.2d 1187, 1190 (1975), for the proposition that the tie vote by the Board did not constitute a decision. We conclude that Dayton is inapposite. The board in Dayton reached a tie vote with regard to a recommendation of the planning commission rather than a decision of the planning commission. Id. at 73, 530 P.2d at 1188. Because only a recommendation had been made by the planning commission, a tie vote by the board truly resulted in no decision because there was no earlier decision that the board's tie vote upheld. Id. at 75, 530 P.2d at 1190. Here, on the other hand, the Planning Commission was vested with the authority to approve or disapprove zoning issues, and thus, it made an actual decision rather than a recommendation. A majority of the Planning Commission voted in favor of the proposed land division after holding a public hearing where it heard testimony and arguments.

Accordingly, we conclude that the district court did not abuse its discretion by denying the Joneses' petition for a writ of mandamus. For the reasons set forth above, we

ORDER the judgment of the district court AFFIRMED.

Parraguirre, C.J.

Hardesty, J.

Douglas, J.

Cherry, J.

Saitta, J.

Gibbons, J.

Pickering, J.

cc: Chief Judge, Fourth Judicial District Court
Hon. Robert E. Rose, Senior Judge
Robert L. Eisenberg, Settlement Judge
James M. Copenhaver
Katie Howe McConnell
Elko County District Attorney
Elko County Clerk