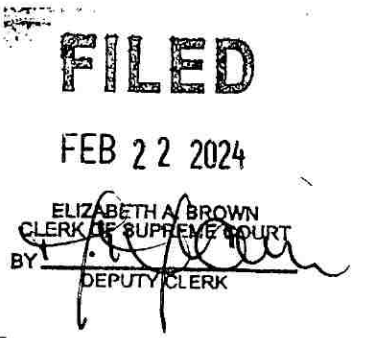
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

AIR FLANDES, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Appellant,
vs.
CLARK COUNTY PUBLIC RESPONSE OFFICE, AN AGENCY OF CLARK COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA,
Respondent.

No. 86140-COA



ORDER OF AFFIRMANCE

Air Flandes, LLC, appeals from a district court order denying a petition for judicial review in an administrative enforcement action. Eighth Judicial District Court, Clark County; Joseph Hardy, Jr., Judge.[1]

Air Flandes, LLC, is the owner of real property located at 4330 Flandes Street in Las Vegas.[2] Posts from the rental website VRBO that were introduced at the administrative proceedings in this case appear to show that the property was listed for daily or weekly rental in April and May of 2021. In May 2021, respondent Clark County Public Response Office issued a rehabilitation notice to Air Flandes, requiring it to cease short-term rentals of the property, which, according to the notice, amounted to a violation of Clark County Code (CCC) Chapter 11.14 (2019) and could subject Air Flandes to penalties of up to $1,000 per day.

[1]Pursuant to Rule 2.11(C) of the Nevada Code of Judicial Conduct, both parties waived any disqualification of the Honorable Deborah Westbrook, Judge, from taking part in the consideration of this appeal.

[2]We recount only the facts as necessary for this disposition.

During the summer months of 2021, CCC enforcement officers continued inspecting the property, and they noted that several individuals at the property stated that they were renting it for short periods of time. In July, the County issued a notice of lien informing Air Flandes that it had "placed" a $13,000 lien against the property and that Air Flandes had violated CCC sections 30.44.010(b)(7)(C) (2022) and 11.14.020(c). Section 30.44.010(b)(7)(C) provides that "[t]ransient commercial use of residential development for remuneration is prohibited in all residential zoning districts, or in any miscellaneous zoning district of this Title, except as otherwise expressly permitted." Section 11.14.020(c) provides that "[r]ehabilitation . . . includes structural improvements . . . and any other measure to improve the appearance of property or maintain the property in a decent, safe and sanitary condition, including, but not limited to . . . transient lodging." According to the Notice, "[t]he lien is not effective until the Notice of Lien is recorded by the County Recorder and mailed to the last known owner at his last known address." Air Flandes requested a hearing before a designee of the Clark County Board of Commissioners.[3]

At the September 2021 hearing, Code Enforcement Officer Alicia Gonzalez, who had inspected the property and posted the notices, testified for the County. She described the conversations with two separate individuals who had been staying at the property in June and July and who indicated that they were renting for short periods ranging from five to eight nights, respectively. According to the designee's decision, the County also submitted numerous exhibits, including the VRBO postings showing that the property was available to rent for a minimum of three days. There is

[3]In August, the County also issued a total of $350 in administrative citations for the allegedly unlawful rentals.

no indication in the record that Air Flandes, which was represented by counsel at the hearing, raised any arguments challenging the apparent placement of the lien or the lawfulness of any action taken by the County. In an administrative decision issued in March 2022, the designee found that,

> Based on the evidence and arguments presented at the hearing by [the Clark County Public Response Office], I find by a preponderance of the evidence that Air Flandes, LLC is in violation of Clark County Code 30.44.010(b)(7)(C) and Clark County Code 11.14 and I uphold the Notice of Lien issued on July 21, 2021 in the amount of $13,000. Air Flandes LLC shall immediately stop using the Property for transient commercial remuneration and comply with Clark County Code.

However, the designee also determined that "[d]ue to a Clark County change in the [County] process regarding the issuing of fines or civil penalties for short term rental violations, the Civil Penalty lien in the amount of $13,000 was never recorded or placed on the Property."

Despite this apparent uncertainty as to whether the lien had been placed or recorded, Air Flandes filed a petition for judicial review challenging the designee's decision pursuant to NRS 278.3195 and CCC 11.14. After filing the petition, Air Flandes submitted a public records request to the County, requesting it to send the "[r]ecord on [a]ppeal" to Air Flandes' counsel via email. The record indicates that the County received and completed this request, transmitting to Air Flandes the "appeal hearing packet," the designee's decision, and the audio of the hearing.

In the petition for judicial review, Air Flandes argued that the County did not have authority to regulate short-term rentals at the time it issued the penalty. It also argued, in the alternative, that short-term rentals are governed exclusively by Title 30 of the CCC and that,

accordingly, the County may not issue penalties pursuant to Title 11. Air Flandes also claimed that the designee's decision was not supported by substantial evidence and that the penalty amounted to an excessive fine under the United States and Nevada Constitutions. The district court rejected these arguments and denied Air Flandes' petition. This appeal followed.

On appeal, Air Flandes again argues that the amount of the lien is constitutionally excessive, that the decision was not supported by substantial evidence, and that Title 11 of the code does not permit penalties to be imposed for transient lodging governed by Title 30. It also contends, for the first time on appeal, that the County violated its due process rights under the United States and Nevada Constitutions by failing to give it adequate notice of the proceedings pending against it. It also claims that the County failed to create an adequate record of the proceedings before the designee and that such failure is reversible. Air Flandes also argues that various statutes and provisions of the CCC require the penalty to have been placed in a different time or manner. We disagree.

The penalties and fines issued by Clark County do not violate Air Flandes' due process rights

Air Flandes claims for the first time on appeal that the County violated the Due Process Clauses of the United States and Nevada Constitutions by failing to give it adequate notice prior to issuing the penalties and fines at issue in this case.

"When reviewing a district court's denial of a petition for judicial review of an agency decision, this court engages in the same analysis as the district court: [it] determine[s] whether the agency's decision was arbitrary or capricious and was thus an abuse of the agency's discretion." *Rio All Suite Hotel & Casino v. Phillips*, 126 Nev. 346, 349, 240

P.3d 2, 4 (2010) (internal quotation marks omitted). Arguments raised for the first time on appeal are typically deemed waived. *State ex rel. State Bd. of Equalization v. Barta*, 124 Nev. 612, 621, 188 P.3d 1092, 1098 (2008). When a party seeks judicial review of an agency action, any arguments not made before the agency are waived. *Id.* However, "issues of a constitutional nature may be addressed when raised for the first time on appeal." *Levingston v. Washoe County*, 112 Nev. 479, 482, 916 P.2d 163, 166 (1996), *opinion modified on reh'g*, 114 Nev. 306, 956 P.2d 84 (1998). Constitutional claims are reviewed de novo. *Eureka County v. Seventh Jud. Dist. Ct.*, 134 Nev. 275, 279, 417 P.3d 1121, 1124 (2018).

Amendments V and XIV § (1) of the United States Constitution and Article 1, Section 8(2) of the Nevada Constitution provide that "[n]o person shall be deprived of life, liberty, or property, without due process of law." "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Grupo Famsa, S.A. de C.V. v. Eighth Jud. Dist. Ct.*, 132 Nev. 334, 337, 371 P.3d 1048, 1050 (2016) (quoting *Mullane v. Cent. Hanover Bank & Tr, Co.*, 339 U.S. 306, 314 (1950)). Put simply, "[p]rocedural due process requires notice and an opportunity to be heard." *Sw. Gas Corp. v. Pub. Utils. Comm'n of Nev.*, 138 Nev. 37, 46, 504 P.3d 503, 511 (2022) (internal quotation marks omitted). "Whether a particular method of notice is reasonable depends on the particular factual circumstances." *Grupo Famsa*, 132 Nev. at 337, 371 P.3d at 1050 (quoting *Tulsa Pro. Collection Servs., Inc. v. Pope*, 485 U.S. 478, 484 (1988) (alterations omitted)). However, "[n]otice must be provided at the appropriate stage so that parties

can provide meaningful input in the adjudication of their rights." *Sw. Gas*, 138 Nev. at 46, 504 P.3d at 511 (internal quotation marks omitted).

Here, Air Flandes first received notice of its violation on May 7, 2021, when the rehabilitation notice was mailed to the property at issue. Officer Gonzalez testified to posting the notice at the property the next day. The notice apprised Air Flandes of its violation of CCC 30.44.010(b)(7)(C) and 11.14 and stated that starting "June 12, 2021 a lien for civil penalty shall be assessed on the property in the amount of $1000.00 for each day that you fail to rehabilitate the conditions on this notice." In all caps, the notice also informed Air Flandes of its rights to contest the penalty: "The owner may appeal this notice by requesting an administrative hearing before the designee of the board."

Air Flandes took no action in response to this notice. Code enforcement officers continued physically inspecting the property during June and July 2021 and made contact with two separate individuals who stated that they were currently renting the property for five and eight nights, respectively. Accordingly, a lien for $13,000—$1,000 for each of the thirteen nights—was placed by the County on July 22 and physically posted by Officer Gonzalez.

Air Flandes received adequate notice of proceedings pending against it when the rehabilitation notice was posted at and mailed to the property prior to the issuance of the notice of lien. As required by CCC 11.14.050 (2019), which governs the contents of a rehabilitation notice, the notice here described the conditions requiring rehabilitation and provided that a lien, in the amount of $1,000 per day, could be placed on the property if Air Flandes did not rehabilitate the conditions, i.e., cease renting the property unlawfully. Moreover, the notice informed Air Flandes of its right

to appeal. Accordingly, the notice was sufficient "to apprise [Air Flandes] of the pendency of the action and afford [it] an opportunity to present [its] objections." *Grupo Famsa*, 132 Nev. at 337, 371 P.3d at 1050 (quoting *Mullane*, 339 U.S. at 314). The notice was mailed to Air Flandes and conspicuously posted on the front door of the property. Under these "factual circumstances," the County acted "reasonabl[y]" in ensuring that Air Flandes would receive notice of the proceedings pending against it. *Id.* (quoting *Tulsa Pro. Collection Servs.*, 485 U.S. at 484).

Contrary to Air Flandes' argument, due process did not preclude the County from subjecting it to penalties for conduct that occurred *after* the receipt of notice; under the due process clause, "[n]otice must be provided at the appropriate stage so that parties can provide meaningful input in the adjudication of their rights." *Sw. Gas*, 138 Nev. at 46, 504 P.3d at 511 (internal quotation marks omitted). At the time of the alleged unlawful rentals in June and July of 2021, and at the time of the hearing in September 2021, Air Flandes was already on notice that short-term rentals were violative of the county code and that continuing to make the property available for such rentals could subject it to a lien in the amount specified in the notice. Because Air Flandes received "notice and an opportunity to be heard," we conclude that its due process rights were not violated. *Id.* (quoting *Callie v. Bowling*, 123 Nev. 181, 183, 160 P.3d 878, 879 (2007)).

The $13,000 civil penalty is not constitutionally excessive

Air Flandes also contends that the $13,000 fine amounts to an "excessive fine" under the Eighth Amendment of the United States Constitution and Article 1, Section 6 of the Nevada Constitution.

The Eighth Amendment of the United States Constitution and Article 1, Section 6 of the Nevada Constitution prohibit the imposition of "excessive fines." The Eighth Amendment applies to the states through the

Fourteenth Amendment. *Timbs v. Indiana*, 586 U.S. ___, ___, 139 S. Ct. 682, 686-87 (2019). This prohibition against excessive fines applies to civil penalties issued by units of local government. *City of Las Vegas v. Nev. Indus., Inc.*, 105 Nev. 174, 178, 772 P.2d 1275, 1277 (1989). Courts should focus on four factors: "(1) the nature and extent of the crime, (2) whether the violation was related to other illegal activities, (3) the other penalties that may be imposed for the violation, and (4) the extent of the harm caused." *United States v. $100,348.00 in U.S. Currency*, 354 F.3d 1110, 1122 (9th Cir. 2004) (citing *United States v. Bajakajian*, 524 U.S. 321, 337-40 (1998)).

Here, VRBO postings included in the administrative record appear to show that the property at issue was being rented for as much as $1,342 per night. This belies Air Flandes' argument that "Clark County has not . . . [shown] that this fine is proportionate to the gravity of Air Flandes' alleged misconduct." Moreover, because this court is to consider "other penalties that may be imposed for the violation," Air Flandes' contention that the penalty is excessive because it is greater than the maximum penalty for certain criminal offenses, such as voluntary manslaughter and battery with the use of a deadly weapon, fails. *Id.* Those offenses, unlike the offense provided by CCC 11.14.030 (2019), also carry potential sentences of incarceration. *See, e.g.*, NRS 200.080 (providing for a maximum prison term of 10 years for voluntary manslaughter), NRS 200.481(2)(e)(2) (providing for a maximum prison term of 15 years for battery committed with a deadly weapon). Indeed, even misdemeanor offenses may be punishable by fines of up to $1,000 or imprisonment for up to six months. *See* NRS 193.120(3).

Air Flandes' argument that "the record is silent as to what harm Air Flandes caused by renting its property on a short-term basis" is similarly unavailing. The record contains the complaints made to the County concerning "all the short term rentals" in the neighborhood of the complainant, including the property at issue in this case. The complaint states that the houses offering short-term rentals are "illegal and yet . . . still are continuously rented to very large parties." Moreover, the designee took notice of numerous sections of the county code concerning transient lodging, such as CCC 11.14.020(c), which defines "[r]ehabilitation" as "structural improvements . . . to . . . maintain the property in a decent, safe and sanitary condition, including . . . transient lodging." Accordingly, the record contains substantial evidence of the legislative purpose behind the prohibition of short-term rentals, namely, to maintain residential "property in a decent, safe and sanitary condition" as well as the harm caused by Air Flandes in particular. CCC 11.14.020(c). Therefore, we conclude that the penalty in this case is not an excessive fine under the United States and Nevada Constitutions.

Air Flandes has failed to demonstrate that the administrative record is inadequate

Air Flandes argues that the County committed "reversible error" because it did not create and transmit to the district court an adequate record of the administrative proceedings. Therefore, Air Flandes argues that the district court also committed reversible error by making its determination without an adequate record. Air Flandes' argument relies heavily on various provisions of the Nevada Administrative Procedure Act, NRS 233B.010-233B.150, that govern judicial review of agency action.

In response, the County argues that it is not bound by NRS Chapter 233B because it is not an "agency" of the state executive branch

under the Administrative Procedure Act. The County also notes that Air Flandes failed to object at the administrative hearing or request for the administrative record to be supplemented.

As set forth above, arguments not raised at the agency level are generally waived on appeal. *Barta*, 124 Nev. at 621, 188 P.3d at 1098. However, we may review arguments that raise "plain" errors. *Bradley v. Romeo*, 102 Nev. 103, 105, 716 P.2d 227, 228 (1986) ("The ability of this court to consider relevant issues *sua sponte* in order to prevent plain error is well established."). An error is plain if "the error is so unmistakable that it reveals itself by a casual inspection of the record." *Williams v. Zellhoefer*, 89 Nev. 579, 580, 517 P.2d 789, 789 (1973) (quoting *Allison v. Hagan*, 12 Nev. 38, 42 (1877). Plain error review is applied in civil cases only to address serious errors affecting the "substantial rights" of parties. NRS 47.040(2) (providing that appellate review of "plain errors affecting substantial rights" is not precluded); *In re Parental Rights as to J.D.N.*, 128 Nev. 462, 469, 283 P.3d 842, 847 (2012) (using plain error review to consider an error in a termination-of-parental-rights case).

We conclude that Air Flandes fails to demonstrate that a plain error occurred below. Nonetheless, we take this opportunity to review and reject this argument on the merits to clarify the proper manner in which parties to administrative proceedings before county agencies should ensure that the record is sufficiently developed to facilitate judicial review.

At the outset, we reject Air Flandes' contention that the County is bound by the Administrative Procedure Act. Under the Act, an "[a]gency" is "an agency, bureau, board, commission, department, division, officer or employee of the Executive Department of the State Government authorized by law to make regulations or to determine contested cases." NRS

233B.031. However, Nevada law is clear that counties and political subdivisions thereof are not units of the state executive department and are therefore not "agencies" subject to the Administrative Procedure Act. *See* Nev. Const. art. IV, § 25 ("The Legislature shall establish a system of County and Township Government which shall be uniform throughout the State."); *Washington v. Clark Cnty. Liquor & Gaming License Bd.*, 100 Nev. 425, 428, 683 P.2d 31, 33-34 (1984) (describing the county board as "an administrative agency not governed by the Administrative Procedure Act"); *see also Jungo Land & Invs., Inc. v. Humboldt Cnty. Bd. of Comm'rs*, No. 3:10-cv-257-RCJ-VPC, 2011 WL 2632912, at *3 n.1 (D. Nev. July 5, 2011) ("The Nevada Administrative Procedures Act does not apply because the [Humboldt County Board of County Commissioners] is a county commission and not a state executive department commission.").

Here, Air Flandes fails to identify an applicable statutory or county code provision concerning creation or transmittal of a record of agency proceedings that the County or the designee violated. Air Flandes' petition for judicial review was filed pursuant to NRS 278.3195 and CCC 11.14.070 (2019). Those provisions authorize judicial review of decisions of "governing bodies" and orders of designees of the board of county commissioners following hearings, respectively. *See* NRS 278.3195(4) (authorizing judicial review); NRS 278.015 (defining "governing body" to include a board of county commissioners). However, neither provision explicitly requires the board to create a transcript or recording of the hearing or to transmit to the court any such transcript following a petition for judicial review.

Moreover, the record indicates that the County transmitted all the requested records, including an audio recording of the hearing, to Air

Flandes' counsel via email. On appeal, Air Flandes does not claim that it did not receive these records. Additionally, in Air Flandes' briefing in the district court, it did not contend that the agency record was deficient nor did it attempt to supplement the record. As we have previously stated, "a sufficient record is . . . necessary for appellate review of administrative decisions." *Highroller Transp., LLC v. Nev. Transp. Auth.*, 139 Nev., Adv. Op. 51, ___, 541 P.3d 793, 805, 2023 WL 8287412, at *9 (Ct. App. 2023).[4]

Indeed, it is the responsibility of the petitioner to ensure that there is "a fully developed record at the agency level" so that the court can "properly evaluate arguments made in a petition for judicial review." *Id.* In addition, the County's responding brief filed in the district court also contained numerous exhibits from the administrative proceedings, including the rehabilitation notice, the notice of lien, the code enforcement officer's reports, and the designee's written decision. The district court was therefore provided with a sufficient record to enable review of the County's action, and the County did not, as Air Flandes suggests, "violat[e]" the separation of powers by thwarting judicial review. We conclude that the alleged inadequacy of the record does not amount to plain error. *Bradley*, 102 Nev. at 105, 716 P.2d at 228; *cf. Cuzze v. Univ. & Cmty. Coll. Sys. of Nevada*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (holding that the appellant is responsible for making an adequate appellate record and that missing portions are presumed to support the district court's decision).

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[4]While *Highroller*, unlike the case at hand, addressed the decision of an agency subject to the Nevada Administrative Procedure Act, this court's holding concerning the need for a developed record was not directly predicated on any particular provision of the Act. *See* 139 Nev., Adv. Op. 51, ___, 541 P.3d at 805, 2023 WL 8287412, at *9.

Air Flandes' remaining arguments concerning the timing and placement of the lien, as well as the County's authority to regulate short-term rentals, provide no basis for reversal

Air Flandes makes several other arguments on appeal. It contends that, under "Dillon's Rule," NRS 244.137, which limits local government authority, the County lacked authority to regulate the short-term rental industry at the time the alleged violations occurred. It also claims that the County violated CCC 11.14.030 by placing a lien on the property prior to citing Air Flandes for a code violation and by placing a single penalty for conduct that involved multiple separate infractions. Air Flandes also contends that the County improperly relied on Title 30 of the Clark County Code to support a penalty being placed on the property pursuant to Title 11. Finally, it argues that the designee's decision upholding the penalty was not supported by substantial evidence.

We have considered these arguments and conclude that they do not warrant reversal.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.[5]

_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

[5]To the extent Air Flandes raises arguments not specifically addressed herein, we have considered the same and conclude they do not present a basis for relief.

cc: Hon. Joseph Hardy, Jr., District Judge
Persi J. Mishel, Settlement Judge
Hutchison & Steffen, LLC/Reno
Clark County District Attorney
Clark County District Attorney/Civil Division
Eighth District Court Clerk