

IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 76240

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Elizabeth A. Brown
Clerk of Supreme Court

DANIEL OMERZA, DARREN BRESEE, and STEVE CARIA

Petitioners

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF
NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE
HONORABLE RICHARD F. SCOTTI, DISTRICT JUDGE, DEPT. II,
DISTRICT COURT CASE NUMBER A-18-771224-C,

Respondent,

and

FORE STARS, LTD.; 180 LAND CO., LLC; and SEVENTY ACRES, LLC,

Real Parties in Interest.

**APPELLANTS' APPENDIX TO
PETITION FOR WRIT OF PROHIBITION OR
ALTERNATIVELY, MANDAMUS - VOLUME III OF VIII**

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Brownstein Hyatt Farber Schreck, LLP, and that on this 2nd day of July, 2018, I electronically filed and served by electronic mail a true and correct copies of the above and foregoing **APPELLANTS' APPENDIX IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY, MANDAMUS - VOLUME III of VIII** properly addressed to the following:

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/s/ DeEtra Crudup
An employee of Brownstein Hyatt Farber
Schreck, LLP

1 general plan amendment rezoning and site development
2 review requests are dependent upon action taken on
3 the major modification, close quotes.

4 Next, the proposed development requires a
5 major modification on the Peccole Ranch Master Plan.

6 Next quote, the department of planning has
7 determined that any proposed development not in
8 conformance with the approved 1990 Peccole Ranch
9 Master Plan would be required to pursue a major
10 modification.

11 Next, the Peccole Ranch Master Plan must be
12 modified to change the land use designations from
13 golf/drainage to multi-family prior to approval of
14 the proposed general plan amendment.

15 The next quote, in order to redevelop the
16 property as anything other than a golf course or open
17 space, the applicant has proposed a major
18 modification of the 1990 Peccole master plan.

19 The last quote I'll reference of staff, in
20 order to address all previous entitlements on this
21 property, to clarify intended future development
22 relative to existing development, and because of the
23 acreage of the proposal for development staff has
24 required a modification to the conceptual plan
25 adopted in 1989 and revised in 1990.

1 This alone, without getting into the
2 question of substantial evidence, is legally fatal to
3 the City's current approval of this application
4 because legally they were required to first deal with
5 and make an approval of a major modification to the
6 master plan, and that was never done.

7 Instead, over the course of many months
8 there was a gradual retreat from talking about that,
9 and instead all of a sudden that discussion and the
10 need for following staff's recommendation just went
11 out the window.

12 I realize that the city attorneys office
13 offered his interpretation of the law and said that
14 he didn't think that a major modification was
15 required, but the Court's not bound by that, that is
16 simply counsel advising their client.

17 The city is not permitted to change the
18 rules and follow something other than what was
19 already in place.

20 The people who bought into this Peccole
21 Ranch Master Plan 1 and 2 did so in reliance upon
22 what the master planning was. They bought their
23 homes, some of them made a very substantial
24 investment, but no one making an insubstantial
25 investment, and they moved into the neighborhood.

1 I realize that something has happened with
2 the golf course. I myself have never been on this
3 property, I think I went to somebody's home that was
4 somewhere in Queens Ridge one time several years ago,
5 but that's been my total exposure to it, but I
6 understand there was a transfer of the golf course
7 leased property from one person to another, and
8 ultimately a decision was made to close the golf
9 course.

10 Though one of the things that was
11 interesting in the latter staff recommendations was
12 the applicant began to I guess wear down the City's
13 and the planning department's resistance to this idea
14 was -- well, I'll deal with that later.

15 The staff made it clear that a major
16 modification was mandatory.

17 The city can't decide to just ignore that
18 and not go through that process.

19 With regard to substantial evidence, I'm
20 not going to weigh evidence or offer my opinions on
21 whether the evidence was greater or less than
22 something to substitute fact finding by the city, but
23 the initial flaw, which is a fatal one, is the legal
24 flaw, which is failure to deal with the major
25 modification that was required in order to approve

1 this application. That in and of itself standing by
2 itself tells me that the city abused its discretion
3 in approving this plan.

4 When we look at the question of whether or
5 not substantial evidence supports it, it's ironic
6 that the city and Seventy Acres, they want to point
7 to staff recommendations that were made toward the
8 end of this process, but they want to disregard the
9 repeated recommendations by staff in the earlier
10 stages which made it clear that a major modification
11 was a requirement.

12 Respondents' claim that the staff reports
13 are substantial evidence supporting the city
14 council's approval, but ignore the fact that the
15 staff reports continuously emphasize that approval of
16 the applications were dependent upon a major
17 modification to the Peccole Ranch Master Plan.

18 Also, when I look at the testimony that was
19 offered by various people at the hearing.

20 I note that a Michael Buckley made a very
21 cogent but succinct presentation as to why he opposed
22 this application, and that is in the record at page
23 17,261 and 17,262.

24 Frank Shreck made an excellent explanation
25 as to why he was opposed to this, and that is in the

1 record at pages 17,262 to about 17,266, including his
2 responses to questions that were posed to him.

3 There was also an individual, I think his
4 name was George Garcia, who saw the big picture here,
5 and that is that the progress to all intents and
6 purposes is incompatible with the master plan that is
7 currently in existence out there, and that's why a
8 major modification would be necessary.

9 One would basically have to allow the tail
10 to wag the dog, so that the applicant's request to
11 allow it to develop the 17.49 acres as requested
12 would be permitted.

13 I think that in terms of the duties that
14 the city council has, as well as the planning
15 commission, it is to protect and serve. They need to
16 protect the property rights of those who are already
17 committed and invested in a project, and while they
18 can consider an application such as the one that is
19 under consideration here, the applicant did create
20 his own problems because the applicant -- a
21 representative for the applicant, Mr. Yohan Lowie,
22 testified at the hearing that he bought this property
23 before he got zoning approval to do what he
24 envisioned doing, and of course that paints him into
25 a corner.

1 The old saying is, you are buying a pig in
2 a poke, which means you're buying something in a
3 burlap sack, you don't know what it is, and you are
4 paying a price for it based upon what you think you
5 are buying.

6 The problem is, he also indicated that he
7 had secured pre-approval from every member of the
8 city council before he made this purchase.

9 Well, of course he's welcome to have
10 conversations with the members of the city council
11 about what his plans and intentions are, and by the
12 way it's not disputed by any members of the city
13 council he made that representation, and I guess I
14 could reference it specifically, it's in the record
15 at the November 16th, 2016 city council meeting, and
16 the pages 6454 he says at line 6 -- 7364 to 7365 -- I
17 came to all of you, every single one of you here,
18 before I purchased this golf course, and I told you
19 here's the dilemma.

20 Well, okay, but before making such a
21 substantial investment typically what one does is,
22 one makes the purchase conditioned upon being able to
23 secure the zoning that is going to make this a smart
24 and wise deal for the purchaser, and apparently that
25 wasn't done. The cart was put in front of the horse.

1 And I mention this parenthetically because whether he
2 did or didn't is of no consequence to me, I think
3 that's the purely legal determination that LVMC
4 19.040 was not complied with means necessarily that
5 city council abused its discretion, and their
6 approval of the application was legally improper.

7 I also think that with regard to whether
8 there's substantial evidence to support it that
9 cannot be said at all.

10 I think because the early indications from
11 the same staff representatives were that major
12 modification needed to be done, and the evidence
13 suggested that city council chose to just ignore and
14 side-step or otherwise steam-roll past it and do
15 simply what the applicant wanted, without
16 justification for it, other than the applicant's will
17 that it be done.

18 So that's my intended ruling.

19 I'm happy to hear from council for Seventy
20 Acres and from the City Of Las Vegas, but I need to
21 let you know that if I find you just repeating what
22 is said in your briefs that I read, I'm going to
23 interrupt you and say, you said that in your brief,
24 and I saw that.

25 I'm asking you to augment anything you wish

1 to augment.

2 Mr. Kaempfer.

3 MR. KAEMPFER: Thank you, Your Honor.

4 I will deal with just three points.

5 First of all, with regard to purchasing the
6 property as a pig in the poke, Mr. Lowie received a
7 letter from the City Of Las Vegas that is part of our
8 record indicating that the property is zoned for
9 17.49 acres RPD-7, so you rely -- You know, I've done
10 a little bit of this over the last 40 years, you rely
11 on representations that you get from the city as to
12 what property is zoned before you make that purchase.

13 So that is point number 1.

14 Point number 2 with regard to the
15 modification, it has to be remembered that there are
16 two separate applications that were filed.

17 The first application that was filed
18 related just to this 17 acres, that application was
19 delayed, so that we could at request of city council
20 do an application on all of the property. They
21 wanted to see everything. They wanted to see the
22 whole project develop.

23 It was with regard to that project, the
24 whole project developed, a development agreement that
25 they said, and we want you to do a major

1 modification.

2 So when we talk about when the major
3 modification is required, it's required when they ask
4 us to do the whole thing.

5 Now, ironically then we present the whole
6 thing in front of the city counsel, the planning
7 commission, the planning commission denies it. So we
8 withdraw that portion of it, and we move forward only
9 with the 17 acres.

10 So the major mod that we filed was with
11 this whole project, not with the 17 acres.

12 Now, that is the first point.

13 The second point, we then took the 720
14 units that we originally applied for, and reduced it
15 to 435. When it was reduced to that amount, it then
16 fit within the allowable remaining multi-family units
17 under the Peccole plans.

18 We have always believed, and we're going to
19 hear from the city that it's not part of the major
20 modification process, and they have demonstrative
21 evidence to show you in that regard, but --

22 THE COURT: Let me ask you, do you consider
23 this property where the 435 units would be to not be
24 part of the open area drainage?

25 MR. KAEMPFER: This part was all part of

1 the golf course.

2 THE COURT: Right.

3 MR. KAEMPFER: Not all the golf course has
4 drainage issues on it, and I thank you for asking.

5 No, it's -- All the golf course is part of
6 drainage, some have drainage issues, some don't.

7 We can develop some right now, others would
8 require a FEMA approval, so there's a lot --

9 THE COURT: I saw where a drainage plan was
10 to be submitted. Was it ever actually submitted?

11 MR. KAEMPFER: Yes, we submitted a plan, it
12 was reviewed, and the county approved conceptually
13 what we were doing, what we would have to do if we
14 wanted to develop the whole 250 because we have to go
15 underground with some underground boxes and then take
16 those out just like they did over at Tivoli across
17 the street.

18 But I can't emphasize enough, Your Honor,
19 that the two different applications, that this one
20 stands on its own, that if we were here on that 250,
21 and they filed for the major mod and had been denied,
22 the city was recommending we do that, actually the
23 city has determined -- and again, you're going to see
24 that they don't think this property is subject to the
25 major modification provisions at all, but even if it

1 is, by reducing the density from 720 to 435 we fit
2 within those numbers of Peccole Ranch, and the city
3 will confirm that.

4 So consequently when you fit within those
5 numbers, a major modification isn't required. That
6 is why staff recommendation at the time of the
7 planning commission was for a major modification.

8 When we got to the city counsel, there was
9 no requirement of a major modification was part of
10 the application we filed. So this application kind
11 of should stand on its own, and on its own the major
12 modification is not required or recommended.

13 Candidly, the city, as you well know, they
14 throw recommendations out all the time.

15 We knew in our minds that this was not
16 something that the law required or the code required,
17 but we said we would do it with regard to the whole
18 250.

19 Now, I do want to address one thing.

20 I live in Queens Ridge. I'd like to tell
21 you how sophisticated I am.

22 When I bought my home, I'm going to look at
23 the CC & R's and do all that, but I just want to
24 address very briefly the idea this was always
25 intended to be a golf course because if it were