NICHOLS V. BOARD OF COUNTY COMMISSIONERS

JOHN T. NICHOLS, DILIA C. MARTINEZ, PHILLIP H. REYNA, ERNEST CONCHA, DANIEL ROMERO, BONITA (BONNIE) S. KORMAN, EDWARD R. SYLVESTER, JENIFFER P. SYLVESTER and JUDY SUTTON,
Petitioners-Appellants,
v.
BOARD OF COUNTY COMMISSIONERS OF TAOS COUNTY,
Respondent-Appellee,
and
TOWN OF TAOS,
Intervenor/Respondent-Appellee.

No. A-1-CA-36002

COURT OF APPEALS OF NEW MEXICO

December 31, 2018

APPEAL FROM THE DISTRICT COURT OF TAOS COUNTY, Jeff McElroy, District Judge

COUNSEL

Atler Law Firm, P.C., Timothy J. Atler, Albuquerque, NM, Kerry Kiernan, P.C., Kerry Kiernan, Albuquerque, NM, Graeser & McQueen, LLC, Christopher L. Graeser, Santa Fe, NM, for Appellants

Susan C. Baker, Taos County Attorney, Quela Robinson, Assistant Taos County Attorney, Taos, NM, Rodey, Dickason, Sloan, Akin & Robb, P.A., Edward Ricco, Jocelyn Drennan, Albuquerque, NM, for Appellee Board of County Commissioners of Taos County, Law Offices of Stephen C. Ross, P.C., Stephen C. Ross, Santa Fe, NM, for Appellee Town of Taos

JUDGES

J. MILES HANISEE, Judge. WE CONCUR: MICHAEL E. VIGIL, Judge, EMIL J. KIEHNE, Judge Pro Tempore

AUTHOR: J. MILES HANISEE

MEMORANDUM OPINION

HANISEE, Judge.

{1} Petitioners appeal the district court's denial of their appeal of Respondent Taos County Board of Commissioners' (the Board) approval of the Town of Taos's (the Town) administrative permit for improvements to the Taos Regional Airport. Petitioners contend that the district court erred in (1) deferring to the County's interpretation of its land use regulations, specifically the County's conclusion that the improvement project was eligible for an administrative permit, and (2) concluding that Petitioners' procedural due process rights were not violated by the failure of two of the Board's commissioners to either recuse themselves or be disqualified from hearing Petitioners' appeal of the County's issuance of the permit. We affirm.

BACKGROUND

{2} Petitioners filed a complaint for declaratory judgment, writ of mandamus, and injunction regarding the issuance of an administrative permit approving the Town's plan to expand and improve the Taos Regional Airport. The permit was issued by the Taos County Planning Director, whose determination was first appealed by Petitioners to the Taos County Planning Commission, which held a hearing over the course of two days and upheld the County's issuance of the permit. Petitioners then appealed to the Board, which likewise upheld issuance of the permit following a separate two-day hearing. Petitioners next appealed to the district court, raising two issues:

> 1) whether the County followed its own regulations when it accepted and approved the Town's request for an administrative permit as a public facility or infrastructure instead of requiring the Town to obtain a major development permit for the airport project; and
>
> ….
>
> 2) whether two of the [Board's] [c]ommissioners who presided over the hearing were biased and therefore deprived [Petitioners] of their due process right to a fair hearing.

{3} The district court held a merits hearing, heard argument from counsel, and then affirmed the Board's decision, first providing the parties with a detailed letter ruling and subsequently issuing a five-page written order containing nineteen numbered findings of

fact and conclusions of law. Regarding the two issues before it, the district court first ruled that "[t]he County's interpretation of its ambiguous Land Use Regulations to require an administrative permit . . . is reasonable" and Petitioners' belief that "a Major Development permit should have been required in this case is without merit." Second, the district court ruled that Petitioners' due process rights were not violated based upon the participation of two members of the Board who had previously made statements indicating support for the then-future expansion and improvement of Taos Regional Airport, concluding that the prior statements[1] were "expressions of . . . general policy positions" that "are of the sort that are permissible by persons in public positions or seeking public office" and did not indicate that "either [c]ommissioner . . . prejudged any facts relating to whether the Town's permit application . . . complied with the land use standards at issue." The district court thus upheld the Board's decision to approve issuance of the permit and denied Petitioners' appeal.

{4} Utilizing Rule 12-505 NMRA, Petitioners next applied to this Court for a writ of certiorari, which was granted. The issues we consider on appeal are the same as those raised by Petitioners and ruled upon by the district court.

DISCUSSION

{5} We resolve administrative appeals by employing "the same standard of review used by the district court while also determining whether the district court erred in its review." *Paule v. Santa Fe Cty. Bd. of Cty. Comm'rs*, 2005-NMSC-021, ¶ 26, 138 N.M. 82, 117 P.2d 240. Our review is limited to ascertaining "whether the administrative agency acted fraudulently, arbitrarily or capriciously; whether the agency's decision is supported by substantial evidence; or whether the agency acted in accordance with the law." *Id*. When applying this administrative standard of review, we will not substitute our judgment for that of the fact-finder but we review questions of law de novo. *Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm'n*, 2003-NMSC-005, ¶ 17, 133 N.M. 97, 61 P.2d 806.

{6} As did the district court in acting in its own appellate capacity, we too have carefully reviewed the record proper, including the administrative record, pertinent pleadings, and prior proceedings, along with the district court's letter ruling and the findings of fact and conclusions of law set forth in its written order and the parties' briefs to this Court. Having done so, and based substantially upon the reasoning set forth by the district court, we affirm the district court's judgment and only briefly explain. *See* Rule 12-405(B) NMRA (providing that appellate courts may dispose of a case by non-precedential order, decision or memorandum opinion under certain circumstances). In affirming the factual and legal analysis carefully explained by the district court, we adopt the district court's letter ruling, issued on October 12, 2016, and its ensuing order upholding the Board's decision, issued October 20, 2016. We only briefly supplement the well-reasoned decision of the district court as to each issue.

Petitioners Fail to Establish That the County Failed to Act in Accordance With the Law by Issuing an Administrative Permit to the Town

{7} First, we supplement the correct reasoning the district court employed in rejecting Petitioners' argument that the County failed to follow its own land use regulations and upholding the Board's approval of the County's issuance of an administrative permit. We first note that there are in fact separate potentially applicable provisions for review of land use proposals that fall within different categories. There is a "major development" category, which applies to projects costing $5 million or more, which equal or exceed 80,000 square feet, or which uses more than five acres of land. Proposals that fall within this category are subject to a more stringent review process. There is also a "public utilities and infrastructure" category, which applies to projects such as firehouses, schools, libraries, and utilities. Proposals that fall within this category are subjected to lesser "administrative" review.

{8} There appears to be no dispute that the specific project here at issue has all of the attributes of a "major development." However, the project was subjected only to the less stringent "administrative" permitting process because the contemplated expansion of the airport likewise falls within the "public facilities and infrastructure" category, which is separate from and carved out of the "major development" project category, regardless of the project's cost or size.

{9} In its decision, the district court acknowledged that the County's land use regulations are ambiguous on this question. The gist of the district court's ruling on this issue, with which we agree, is that it is not clear whether *all* public utility projects are subject merely to administrative review, or *only those public utility projects that do not meet the "major development" criteria* are to be subjected to less stringent review. Simply put, the applicable land use regulations do not identify which category a project that is both a public infrastructure project, such as expansion of an airport, and a major development project falls into. Thus, the district court applied the agency's general entitlement to deference with respect to reasonable interpretation of its own regulations. *See Colinas Dev. Council v. Rhino Envtl. Servs. Inc.*, 2005-NMSC-024, ¶ 13, 138 N.M. 133, 117 P.3d 939 ("This Court will generally defer to an agency's reasonable interpretation of its own ambiguous regulations."); *San Pedro Mining Corp. v. Bd. of Cty. Comm'rs of Santa Fe Cty.*, 1996-NMCA-002, ¶ 18, 121 N.M. 194, 909 P.2d 754 (deferring to a county's reasonable interpretation of the land use code that it adopted where the county's intent was not clear).

{10} Petitioners' entire argument in this regard continues to rest on what they perceive to be the misinterpretation of these provisions. Given, however, that there is no dispositive outcome within the regulations themselves, leading us to agree with the district court that they are ambiguous as to this circumstance, we are required, as was the district court, to defer to the County's interpretation of its own ordinances.

Petitioners Fail to Establish That Their Due Process Rights Were Violated

{11} Second, we address Petitioners' argument that the Board violated Petitioners' due process rights by allowing two commissioners who "openly favored airport expansion" to hear Petitioners' appeal of the Town's permit. Due process requires that

"the proceedings looking toward the deprivation [of life, liberty, or property] must be essentially fair[,]" meaning that "a state cannot deprive any individual of personal or property rights except after a hearing before a fair and impartial tribunal." *Reid v. N.M. Bd. of Examiners in Optometry*, 1979-NMSC-005, ¶ 6, 92 N.M. 414, 589 P.2d 198 (internal quotation marks and citation omitted). In administrative proceedings, including quasi-judicial hearings concerning zoning matters, "due process is flexible in nature and may adhere to such requisite procedural protections as the particular situation demands." *State ex rel. Battershell v. City of Albuquerque*, 1989-NMCA-045, ¶ 17, 108 N.M. 658, 777 P.2d 386. A flexible approach to due process is necessary in such proceedings in recognition "that an administrative body may carry out executive or legislative functions in addition to its quasi-judicial role[.]" *U S West Commc'ns, Inc. v. N.M. State Corp. Comm'n*, 1999-NMSC-016, ¶ 25, 127 N.M. 254, 980 P.2d 37. Where a due process violation claim is based on alleged bias on the part of the fact-finder, "[t]he inquiry is not whether the [fact-finders] are actually biased or prejudiced, but whether, in the natural course of events, there is an indication of a possible temptation to an average [person] sitting as a judge to try the case with bias for or against *any issue presented*." *Reid*, 1979-NMSC-005, ¶ 7 (emphasis added). A prior statement by the fact-finder "indicating . . . bias and prejudgment of the issues" is a basis for disqualification, and failure to disqualify under those circumstances may violate a person's right to procedural due process. *Id.* ¶ 9.

{12} However, as this Court made clear in *Las Cruces Professional Fire Fighters v. City of Las Cruces* (*Fire Fighters*), 1997-NMCA-031, ¶ 23, 123 N.M. 239, 938 P.2d 1384, *Reid* does not signify that "a member of a tribunal is necessarily disqualified whenever prior conduct of the member indicates a view that would favor one party or the other." To the contrary, this Court recognized in *Fire Fighters* that "[m]embers of tribunals are entitled to hold views on policy, even strong views, and even views that are pertinent to the case before [them]." *Id.* ¶ 29. "[I]ndeed, they may well have been selected for their offices in part on th[e] basis [of their histories or opinions]." *Id.* ¶ 26. "Recognition of this reality counsels us against requiring that every decisionmaker start with a clean slate." *Id.* Accordingly, an official is not required to recuse himself just because he has previously expressed support for a particular policy. *Id.* ¶ 29. Rather, a statement or position is generally disqualifying only if it concerns the *specific* proposal or action that is before the tribunal. *See Carangelo v. Albuquerque-Bernalillo Cty. Water Util. Auth.*, 2014-NMCA-032, ¶ 70, 320 P.3d 492 ("Regardless of whether an official is actually biased, he appears biased when he expresses prejudgment of an issue in a pending case and will, therefore, need to recuse himself in most instances."). As this Court recognized in *Fire Fighters*, "A prejudgment or point of view about a question of law or policy, even if so tenaciously held as to suggest a closed mind, is not, *without more*, a disqualification." *Fire Fighters*, 1997-NMCA-031, ¶ 24 (emphasis added) (internal quotation marks and citation omitted).

{13} As articulated by the district court, "the issue before the Board . . . was whether the Town's application for an administrative permit complied with [Land Use Regulation] Section 4.7 (Compatibility Standards) and [Land Use Regulation] Section 4.8 (Performance Standards)." Thus, to establish a due process violation, Petitioners had

to, at a minimum, identify evidence tending to indicate "a possible temptation" by each allegedly biased commissioner to decide "with bias" the specific issue of whether the Town's application complied with applicable land use regulations, the only issue before the Board. *See Reid*, 1979-NMSC-005, ¶ 7. The district court found that Petitioners "have pointed to no evidence that [either commissioner] prejudged any facts relating to whether the Town's permit application complied with or did not comply with the two zoning standards at issue before the [Board]." The district court's letter ruling detailed the specific prior statements on which Petitioners' claims of bias were based. Examples include (1) a statement in an op-ed article by one commissioner, published fifteen months prior to the hearings the Board held on the project, in which the commissioner wrote, "The airport expansion is an important long term investment in our community that will improve the accessibility and safety of air travel into and out of Taos[,]" and (2) a post from the second commissioner's campaign Facebook page in which, as the district court described it, the commissioner "applauded the Town's efforts to move toward an expansion of the airport, calling it a plus from a public safety point of view." As to the first example, the district court noted that the statement was "made in the context of opposing the Town's annexation of the airport[,]" and as to the second, the district court explained that it was "made while campaigning for the commission." In other words, the district court concluded that when properly placed and understood in the context in which they were made, the complained-of statements in support of airport expansion reflected "[s]tatements of general public policy positions[,]" not prejudgment of the specific land-use-regulation issues presented to the Board in Petitioners' appeal of the Town's permit.

{14} On appeal, Petitioners argue that the commissioners' statements "cannot be justified as permissible points of view on policy." Petitioners contend that the district court "mistakenly relied upon" *Fire Fighters* in concluding that the commissioners' statements reflected permissible "general policy positions" on airport expansion rather than impermissible prejudgment evincing bias in favor of the specific development proposal before the Board. According to Petitioners, under *Fire Fighters* the commissioners could, at most, "have a background in the aviation industry or even in airport construction" or even "a general point of view that public safety related to the airport is important . . . without running afoul of *Reid.*" Petitioners further posit that "it cannot appear—as here—that the [c]ommissioner has already taken sides in favor of a particular expansion project prior to the evidentiary hearing on the project." We disagree with not only Petitioners' constrained reading of *Fire Fighters* but also Petitioners' continued characterization of the same, generic, out-of-context prior statements of support for airport expansion as constituting prejudgment of the specific proposal at issue. Without more, prior statements by the commissioners indicating their point of view about the policy issue of airport expansion is insufficient to mandate disqualification. *See Fire Fighters*, 1997-NMCA-031, ¶ 24.

{15} We agree with the district court's application of *Fire Fighters* and its commensurate conclusion that the commissioners' statements, taken in context, reflect "general policy positions" on the desirability of airport expansion, rather than disqualifying prejudgment of the specific zoning application that was ultimately brought

before the Board. As Petitioners even concede, the issue of airport expansion was a "well-known . . . proposal that had been debated in Taos for decades" and for which planning "had been underway since approximately 1986." That two elected officials had formed an opinion about and commented on that issue as a general matter did not, without more, require that they recuse themselves or be disqualified from voting on the issue of whether the Town's application complied with applicable land use regulations and zoning requirements.

CONCLUSION

{16} Adopting the district court's letter ruling and order upholding the decision of the Board, and for the foregoing reasons, we affirm.

{17} IT IS SO ORDERED.

J. MILES HANISEE, Judge

WE CONCUR:

MICHAEL E. VIGIL, Judge

EMIL J. KIEHNE, Judge Pro Tempore

1We include the specific complained-of statements within our discussion.