

↓ 103 Nev. 343, 343 (1987) Travelers Hotel v. City of Reno ↓

TRAVELERS HOTEL, LTD., a California Limited Partnership, Appellant and Cross-Respondent, v. THE CITY OF RENO, STATE OF NEVADA, Respondent and Cross-Appellant.

No. 16707

August 27, 1987

741 P.2d 1353

Appeal and cross-appeal from the trial court's judgment awarding damages, attorney's fees, and costs. Second Judicial District Court, Washoe County; Charles M. McGee, Judge.

Special use permit applicant brought action against city for damages arising out of denial of permit. The district court awarded damages and attorney fees. Appeal and cross-appeal were taken. The Supreme Court held that: (1) city's determination on whether to issue special use permit fell within statutory

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discretionary function exception to liability, and (2) special use permit applicant could not recover damages and attorney fees by virtue of statutes which became effective after cause of action accrued.

**Reversed in part, affirmed in part.**

*Stephen C. Mollath*, Reno, for Appellant and Cross-Respondent.

*Robert L. VanWagoner*, City Attorney, Reno; *Shamberger, Georgeson, McQuaid & Thompson*, Reno, for Respondent and Cross-Appellant.

*Brian McKay*, Attorney General, and *William E. Isaeff*, Chief Deputy, Carson City, as Amicus Curiae.

1. Municipal Corporations.

City ordinance allowed city officials discretion in balancing various factors to make a decision on whether to

grant special use permit; therefore, city's determination whether to issue permit fell within statutory discretionary function exception from municipal liability, and city was immune from award of attorney fees arising out of its denial of special use permit application. NRS 41.032, subd. 2.

2. Limitation of Actions.

A cause of action for damages arising out of any final action, decision or order of agency imposing requirements, limitations or conditions upon use of property in excess of those authorized by ordinances, resolutions or regulations accrues upon final action of state or local agency which places limitations on property in excess of those authorized by law. NRS 278.0233.

3. Municipal Corporation.

City's final action denying request for special use permit occurred prior to effective date of statutes allowing recovery of damages upon final action of state or local agency which places limitations on property in excess of that authorized by law and since there was no clear legislative intent to retroactively apply those statutes, special use permit applicant could not recover damages and attorney fees by virtue of those statutes. NRS 18.020, 278.0233, 278.0237.

**OPINION**

*Per Curiam:*

In the spring of 1983, Travelers Hotel, Ltd. ("Travelers") applied for a special use permit to build a hotel-casino complex in Reno. On June 13, 1983, the Reno City Council ("City") denied Travelers' application. On June 30, 1983, Travelers filed an application for a writ of mandamus challenging the City Council's action. The district court ordered the City to issue Travelers a special use permit, reasoning that denial of the permit "was an

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abuse of discretion and not supported by substantial evidence." On appeal, this court affirmed. City Council, Reno v. Travelers Hotel, 100 Nev. 436, 683 P.2d 960 (1984). Thereafter, Travelers initiated an action for damages.

In order to recover damages, Travelers relied on the tort theory, interference with prospective economic advantage. The district court held that the City's act in denying the permit was discretionary and damages could not be recovered by virtue of NRS 41.032(2).<sup>1</sup> The court however concluded that NRS 278.0233(1) was an appropriate basis for an award of actual damages, subject to the \$50,000.00 limitation found in NRS 41.035(1).<sup>2</sup> The trial court also awarded attorney's fees pursuant to NRS 278.0237(2).<sup>3</sup> We conclude that the trial court correctly determined that the City's action in considering and denying the special use permit was a discretionary function. We hold however that the

trial court erred in applying NRS 278.0233 and NRS 278.0237 to award damages and attorney's fees.

[Headnote 1]

Discretionary acts are those which require the exercise of

<sup>1</sup> NRS 41.032(2) provides:

Except as provided in NRS 278.0233 no action may be brought under NRS 41.031 or against an officer or employee of the state or any of its agencies or political subdivisions which is:

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2. Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the state or any of its agencies or political subdivisions or of any officer or employee of any of these, whether or not the discretion involved is abused.

<sup>2</sup> NRS 278.0233(1) provides:

1. Any person who has any right, title or interest in real property, and who has filed with the appropriate state or local agency an application for a permit which is required by statute or an ordinance, resolution or regulation adopted pursuant to NRS 278.010 to 278.630, inclusive, before that person may improve, convey or otherwise put that property to use, may bring an action against the agency to recover actual damages caused by:

(a) Any final action, decision or order of the agency which imposes requirements, limitations or conditions upon the use of the property in excess of those authorized by ordinances, resolutions or regulations adopted pursuant to NRS 278.010 to 278.630, inclusive, in effect on the date the application was filed, and which:

- (1) Is arbitrary or capricious; or
- (2) Is unlawful or exceeds lawful authority.

(b) The failure of the agency to act on that application within the time for that action as limited by statute, ordinance or regulation.

<sup>3</sup> NRS 278.0237(2) provides:

2. The court may award reasonable attorney's fees to the prevailing party in an action brought under NRS 278.0233.

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personal deliberation, decision and judgment. *Parker v. Mineral County*, 102 Nev. 593, 729 P.2d 491, 493 (1986). Travelers' proposed development constituted a "major project" and thus required the issuance of a special use permit. The ordinance required that certain factors be considered when determining whether to issue a permit. *See* RMC 18.06.05(g). In our view, the ordinance allowed city

officials discretion in balancing the various factors in order to make a decision. The City's determination whether to issue a special use permit falls within the discretionary function exception of NRS 41.032(2).

<sup>4</sup> The discretionary nature of the City's action also means that the City was immune from an award of attorney's fees against it. *See County of Esmeralda v. Grogan*, 94 Nev. 723, 725, 587 P.2d 34, 36 (1978).

[Headnotes 2, 3]

As noted above, the trial court allowed Travelers to obtain damages and attorney's fees pursuant to NRS 278.0233 and NRS 278.0237, despite the fact that those sections did not take effect until after the City denied Travelers' application for a special use permit. Statutes do not apply retrospectively unless there is a clear legislative intent to do so. *Rice v. Wadkins*, 92 Nev. 631, 555 P.2d 1232 (1976). The statutes in question do not manifest such an intent. We also reject Travelers' argument that its cause of action did not accrue until after July 1, 1983, the effective date of NRS 278.0233 and NRS 278.0237. A cause of action for damages accrues under NRS 278.0233 upon the final action of a state or local agency which places limitations on property in excess of that authorized by law. The City's final action denying Travelers' request for a special use permit occurred prior to the effective date of NRS 278.0233 and NRS 278.0237, and therefore the district court erred in allowing Travelers' to recover damages and attorney's fees by virtue of the statute.

Also, we reverse the trial court's award of costs in favor of Travelers because Travelers is not a prevailing party. *See* NRS 18.020.

In light of the foregoing, it is unnecessary to consider the remaining issues raised in the briefs.

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<sup>4</sup> The trial court declined to consider specifically whether NRS 34.270 is a basis for Travelers' recovery of damages. In our view, the City is immune from a damage claim pursuant to NRS 34.270 by virtue of the discretionary nature of its actions. *See County of Esmeralda v. Grogan*, 94 Nev. 723, 587 P.2d 34 (1978).