IN THE SUPREME COURT OF THE STATE OF NEVADA

SCENIC NEVADA, INC.,
Appellant,

vs.

CITY OF RENO, a political subdivision of the State of Nevada,
Respondent.

Supreme Court Case No. 65364

District Court Case No. CV12-02863

RESPONDENT'S ANSWERING BRIEF
(City of Reno)

Second Judicial District Court, County of Washoe
The Honorable Patrick Flanagan, District Judge

KARL S. HALL
Reno City Attorney
Nevada State Bar No. 23
JONATHAN D. SHIPMAN
Deputy City Attorney
Nevada State Bar No. 5778
P.O. Box 1900
Reno, Nevada 89505
(775) 334-2050
(775) 334-2420 Fax
Attorneys for Respondent

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NRAP 26.1 DISCLOSURE

The undersigned attorney filing Respondent's Answering Brief is a Deputy City Attorney for the City of Reno, a local government entity. As such, there are no required disclosures of the type and character described in NRAP 26.1.

STATEMENT OF FACTS

A. The Initiative Petition

On January 20, 2000, a volunteer organization called "Citizens for a Scenic Reno" ("CFASR") formed to lobby the Reno City Council to adopt stronger billboard controls. (JA Vol. 1, at 187-191, 1853.) On March 29, 2000, CFASR filed a municipal initiative petition which stated:

> New off-premise advertising displays/billboards in the City of Reno are prohibited, and the City of Reno may not issue permits for their construction. (JA Vol. 3, at 587.)

The initiative only applied to off-premises billboards, not on-premises advertising displays. The initiative appeared on the ballot in the 2000 general election as Question R-1; specifically:

> The construction of new off-premises advertising displays/billboards is prohibited, and the City of Reno may not issue permits for their construction. (JA Vol. 3, at 587.)

On November 7, 2000, Ballot Question R-1 passed with 57% approval. On November 14, 2000, (JA Vol. 1, at 193.), the initiative became effective and was codified as Reno Municipal Code ("RMC") § 18.16.902(a):

> The construction of new off-premises advertising

> displays/billboards is prohibited, and the City of Reno may not issue permits for their construction.

On November 14, 2000, the City Council adopted City Ordinance No. 5206 establishing a moratorium on the filing and acceptance of applications for billboards pending the amendments to the City's existing billboard ordinance. (JA Vol. 3, at 615-655.)

On January 22, 2002, the City Council enacted Ordinance No. 5295 (the "Conforming Ordinance"). (JA Vol. 3, at 542-576.) Under the Conforming Ordinance, the City Council clarified that the "no new billboards" language in the initiative meant that no *additional* billboards could be built in the City of Reno. In other words, billboards could be maintained, repaired, replaced or relocated provided the total aggregate number of billboards did not increase. The Conforming Ordinance effectively placed a cap on the total number of billboards within the City equal to the number of billboards that existed on November 14, 2000; specifically, RMC § 18.16.920(b):

> In no event shall the number of off-premise advertising displays exceed the number of existing off-premise advertising displays located within the City on November 14, 2000. This number shall include all applications for off-premises advertising displays approved in final action by the City on or before November 14, 2000 but unbuilt as well as those applications approved by a court of competent jurisdiction [...] (JA Vol. 3, at 562-563.)

In September 2002, CFASR changed its name to "Citizens For A Scenic Northern Nevada" and adopting its current name, "Scenic Nevada." (JA Vol. 1, at

35; 215.) Today, Scenic Nevada is a non-profit Nevada corporation whose mission is to educate the general public on the economic, social, and cultural benefits of scenic preservation by means of encouraging billboard and sign control, among other issues.

On June 11, 2003, the City Council enacted Ordinance No. 5461 (the "Banking Ordinance") which allowed billboard owners to remove and bank billboards from an existing location and erect the banked billboards at another location on a future date, provided the relocated billboards complied with all applicable sign code and regulations including RMC § 18.16.908(a). (JA Vol. 7, at 1569-1576.)

Between 2003 to 2012, neither Scenic Nevada nor the billboard industry challenged the constitutionality of the Conforming Ordinance or the Banking Ordinances.

Since the adoption of the Conforming and Banking Ordinances, the billboard industry has banked 93 signs. (JA Vol. 2, at 301.)

B. The Digital Ordinance

Until 2012, RMC § 18.16.905(l) required all billboard lighting to be directed toward the billboard. This requirement effectively prevented the construction of digital billboards in Reno.

On February 13, 2008, the City Council directed staff to initiate an amendment of the Reno Municipal Code to authorize the construction and

operation of digital billboards. (JA Vol. 1, at 217-218; JA Vol. 5, at 1053.) Thereafter, City staff, legal counsel, Scenic Nevada and billboard industry representatives held numerous public meetings to draft a Digital Ordinance. (JA Vol. 1, at 177, 185,226,235; JA Vol. 5, at 1062; JA Vol. 8, at 1877.) At the conclusion of a four year public process, City Council enacted Ordinance No. 6258, entitled "Digital Off-Premises Advertising Displays, including Light-Emitting Diode (LED)" (the "Digital Ordinance") on October 24, 2012. (JA Vol. 3, at 520-541.) The Digital Ordinance allowed existing, static billboards to be converted to digital billboards.

On November 16, 2012, Scenic Nevada filed a Complaint for Judicial Review to invalidate the Digital Ordinance. (JA Vol. 1, at 1-19.) The City filed a *Motion to Dismiss* on the basis that the Petition improperly raised substantive, as opposed to procedural, issues. The court granted the motion, but permitted Scenic Nevada to file an amended complaint challenging the Digital Ordinance. (JA Vol. 1, at 28.)

On April 15, 2013, Scenic Nevada filed its *First Amended Complaint* (the "Complaint") alleging the Digital Ordinance violated the Nevada Constitution, the Reno Municipal Code and the FHBA. (JA Vol. 1, at 32-51.) The Complaint requested declaratory relief pursuant to NRS 30.040.

The City filed a *Motion to Dismiss* on April 24, 2013. The court denied the City's motion. (JA Vol. 1, at 57.) The case went to trial on February 24, 2014.

(JA Vol. ,1 at 145.) On March 27, 2014, the court issued a Judgment in favor of Defendant City of Reno confirming the legality of the Digital Ordinance. (JA Vol. 3, at 476.)

SUMMARY OF ARGUMENT

There are four reasons why the City Council's adoption of the Digital Ordinance does not violate Article 19 of the Nevada Constitution. First, the three year prohibition on modifying initiatives set forth in Nev. Const. Art. 19, § 2.3 applies only to statutes, not municipal initiatives like the initiative adopted by Reno voters in 2000. Second, the Conforming Ordinance lawfully amended the initiative in accordance with the city charter. Third, assuming, *arguendo*, that the City violated the Nevada Constitution by adopting the Conforming Ordinance, Scenic Nevada is time barred from challenging the constitutionality of the Conforming Ordinance. Finally fourth, Scenic Nevada's constitutional challenge is moot.

ARGUMENT

A. The City did not violate Article 19 of the Nevada Constitution by adopting the conforming billboard ordinance less than three years after the adoption of the initiative

Non-home rule municipalities like the City of Reno only have powers expressly conferred upon them, implied powers necessary to effectuate the granted powers, and essential powers. 1-24 ANTIEAU ON LOCAL GOVERNMENT LAW,

SECOND EDITION § 24.01. Sec. 2.080(1) of the city charter[1] authorizes the City Council to "make and pass all ordinances, resolutions and orders not repugnant to the Constitution of the United States or the State of Nevada, or to the provisions of Nevada Revised Statutes or of this Charter, necessary for the municipal government and the management of the affairs of the City, and for the execution of all the powers vested in the City." In addition, for the purpose of promoting health, safety, morals, or the general welfare of the community, the Nevada Legislature authorized the City Council to regulate and restrict the improvement of land and to control the location and soundness of structures, including billboards, within the corporate limits of the city. NRS 278.020.

It is a general rule that the power to enact local legislation implies the power to suspend, amend or repeal it, providing that no property or contract rights have vested by reason of the passage of the enactment. 2-25 ANTIEAU ON LOCAL GOVERNMENT LAW, SECOND EDITION § 25.18. As the duly recognized legislative body for the City of Reno, the City Council has the right to adopt, modify and/or repeal city ordinances. City ordinances may be enacted on one day, and subsequently amended, annulled, repealed, set aside or suspended any time

[1] The Reno City Charter is state law, enacted and amended by the Nevada Legislature.

thereafter provided the City Council substantially complies with § 2.100 of the city charter.[2]

Nev. Const. Art. 19, § 2.1 states that "the people reserve to themselves the power to propose, by Initiative petition, *statutes* and *amendments to statutes* and *amendments to this Constitution*, and to enact or reject them at the polls." [Italics added.] Nev. Const. Art. 19, § 2.3 applies specifically to "statutes", and states that

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[2] **Sec. 2.100 Ordinances: Enactment procedure; emergency ordinances.**

1. All proposed ordinances when first proposed must be referred to a committee for consideration, after which an adequate number of copies of the proposed ordinance must be filed with the City Clerk for public distribution. Except as otherwise provided in subsection 3, notice of the filing must be published once in a newspaper qualified pursuant to the provisions of chapter 238 of NRS, and published in the City at least 10 days before the adoption of the ordinance. The City Council shall adopt or reject the ordinance, or an amendment thereto, within 45 days after the date of publication.

2. At the next regular meeting or adjourned meeting of the City Council held at least 10 days after the date of publication, the committee shall report the ordinance back to the City Council. Thereafter, it must be read as first proposed or as amended, and thereupon the proposed ordinance must be finally voted upon or action thereon postponed.

3. In cases of emergency or where the ordinance is of a kind specified in section 7.030, by unanimous consent of the City Council, final action may be taken immediately or at an emergency meeting called for that purpose, and no notice of the filing of the copies of the proposed ordinance with the City Clerk need be published.

4. All ordinances must be signed by the Mayor, attested by the City Clerk and published by title, together with the names of the Councilmen voting for or against passage, in a newspaper qualified pursuant to the provisions of chapter 238 of NRS, and published in the City for at least one publication, before the ordinance becomes effective. The City Council may, by majority vote, order the publication of the ordinance in full in lieu of publication by title only.

5. The City Clerk shall record all ordinances in a book kept for that purpose, together with the affidavits of publication by the publisher.

"[i]f the initiative petition proposes a *statute* or an *amendment to a statute*, [...] [a]n initiative measure so approved by the voters shall not be amended, annulled, repealed, set aside or suspended by the Legislature within 3 years from the date it takes effect." [Italics added.]

Unlike Nev. Const. Art. 19, § 2.3, Nev. Const. Art. 19, § 4 does not expressly limit a city council's ability to amend, annul, repeal, set aside or suspend initiative ordinances. Moreover, neither the city charter nor NRS chapter 268 places any express limits on the City Council's ability to amend, annul, repeal, set aside or suspend city ordinances or initiative ordinances. Instead, NRS 295.220 requires that a municipal initiative be treated in all respects in the same manner as ordinances of the same kind adopted by the council. Thus, like all ordinances, an initiative cannot be legally interpreted to conflict with the city charter, or operate to change or limit the effect of the charter. See, MUNICORP § 15:17 (3rd Edition) ("an ordinance must conform to, be subordinate to, not conflict with, and not exceed the city charter, and can no more change or limit the effect of the charter than a legislative act can modify or supersede a provision of the constitution of the state.").

In Horne v. City of Mesquite, 120 Nev. 700, 100 P.3d 168 (2004), the Nevada Supreme Court considered a case where two voter approved initiative ordinances conflicted with state law. The first ordinance dealt with public land sales, requiring the City to conduct all public land sales by a public auction or a

public sealed bid process. The second ordinance governed candidacy eligibility, requiring an elected official or public employee to file his resignation from office/employment before seeking election as mayor or city council member. Horne, 120 Nev. at 701, 100 P.3d at 168. Ultimately, the court struck down both initiatives, holding that that the citizens of the City of Mesquite did not have the legislative power to pass initiative ordinances that conflicted with NRS 266.267(1)(public land sales) or NRS 266.405(1)(candidate eligibility). Horne, 120 Nev. at 707, 100 P.3d at 172. The court reasoned that initiative petitions passed by the voters of a city are treated the same in all respects as ordinances passed by the city council of that city, and that the citizens have only those legislative powers that the local governing body possesses. Horne, 120 Nev. at 705, 100 P.3d at 171.

In the present case, similar to Horne, citizens of a locality have only those legislative powers that the local governing body possesses, so the initiative adopted by Reno voters in 2000 cannot impinge upon the Legislature's express grant of legislative authority to the City Council pursuant to § 2.080 of the city charter. Horne, 120 Nev. at 705, 100 P.3d at 171. Because the city charter preempts conflicting local legislation, the initiative may be amended, annulled, repealed, set aside or suspended by the City Council at any time for any reason provided the Council complies with § 2.100 of the city charter. To hold otherwise would be repugnant to the provisions of NRS 295.220 and § 2.080 of the city charter.

In short, the three year prohibition set forth in Article 19, § 2.3 applies only to statutes, not municipal initiatives, and specifically, not to the initiative adopted by Reno voters in 2000. Thus, the City did not violate Article 19 of the Nevada Constitution by modifying the initiative and adopting the Conforming Ordinance less than three years after the adoption of the initiative.

B. The Conforming Ordinance lawfully amended the initiative in accordance with the city charter

When a statute uses words which have a definite and plain meaning, the words will retain that meaning unless it clearly appears that such meaning was not so intended. Balboa Ins. Co. v. Southern Distrib. Corp., 101 Nev. 774, 710 P.2d 725 (1985); City of Las Vegas v. Macchiaverna, 99 Nev. 256, 661 P.2d 879 (1983). If language is plain and unambiguous, it must be given effect. State v. State of Nevada Employees Ass'n, Inc., 102 Nev. 287, 289-290, 720 P.2d 697, 699 (1986).

It is also a cardinal rule, where it is necessary to interpret or construe parts of a constitution, wherein a conflict of opinion has arisen as to the true intent the clauses in question should be read in the light of the whole constitution. Ex parte SHELOR, 33 Nev. 361, 373, 111 P. 291 (1910). In light of Ex parte Shelor, it is clear from the plain meaning of Art. 19, § 2.1[3], that § 2.3 only pertains to "statutes

[3] Nev. Const. Art. 19, § 2.1: "Notwithstanding the provisions of Section 1 of Article 4 of this Constitution, but subject to the limitations of Section 6 of this

and amendments to statutes and amendments to this Constitution." "Statutes", "Legislature" and "constitutional amendments" are words which have definite, plain and unambiguous meanings. Municipal ordinances are not statutes or constitutional amendments, either in terms of scope of authority or duration.

The terms "statutes" and "constitutional amendments" are plain and unambiguous in Article 19, and must be given effect. Because Art. 19, § 2.3 only applies to statutes, Nev. Const. Art. 19, § 2.3 is not intended to place a three year limitation on a city council's ability to amend, annul, repeal, set aside, or suspend initiative ordinances. Instead, Nev. Const. Art. 19 § 4 specifically addresses municipal initiatives:

> **Powers of Initiative and referendum of registered voters of counties and municipalities.** The initiative and referendum powers provided for in this article are further reserved to the registered voters of each county and each municipality as to all local, special and municipal legislation of every kind in or for such county or municipality. In counties and municipalities initiative petitions may be instituted by a number of registered voters equal to 15 percent or more of the voters who voted at the last preceding general county or municipal election. Referendum petitions may be instituted by 10 percent or more of such voters.

In interpreting legislation, Nevada follows the rule that "*expression unius est exclusion alterius*", which translates as the expression of one thing is the exclusion of the other. See, State v. Javier C., 289 P.3d 1194 (2012). The fact that the

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Article, the people reserve to themselves the power to propose, by Initiative petition, ***statutes and amendments to statutes and amendments to this Constitution***, and to enact or reject them at the polls." [Italics/emphasis added.]

Nevada Constitution distinguishes between initiative petitions relating to statutes and constitutional amendments in Art. 19, § 2, and initiative petitions relating to municipal ordinances in Art. 19, § 4, indicates that the framers intended that municipal initiatives be treated differently than initiative petitions relating to statutes and constitutional amendments; specifically, *nowhere in § 4 does it state that municipal initiatives approved by the voters of a city cannot be amended, annulled, repealed, set aside or suspended by a city council within three years from the date of adoption.*

Instead, pursuant to Nev. Const. Art. 19, § 5 (legislative procedures), the Legislature enacted NRS 295.195 to NRS 295.220, inclusive. NRS 295.220 specifically requires initiative ordinances to be treated in all respects in the same manner as ordinances of the same kind adopted by the council. As discussed above, Horne holds that the citizens of a locality have only those legislative powers that the local governing body possesses, and an initiative ordinance cannot impinge upon state law. Horne, 120 Nev. at 705, 100 P.3d at 171. Because the city charter is state law, the initiative cannot limit the City Council's ability to legislate. Accordingly, it follows that the three year prohibition set forth in Article 19 applies only to statutes and constitutional amendments, not municipal ordinances, and specifically, not to the initiative adopted in 2000. Thus, even if the Conforming Ordinance was inconsistent with the initiative, because the three year prohibition does not apply to municipal initiatives, the City did not violate Article 19 of the

Nevada Constitution by adopting the Conforming Ordinance less than three years after the passage of the initiative.

C. Even assuming, *arguendo*, that the City violated the Nevada Constitution by amending, annulling, repealing, and setting aside the initiative less than three years after its passage by adopting the Conforming Ordinance, Scenic Nevada is time barred from challenging the Conforming Ordinance

A cause of action challenging the constitutionality of the Conforming Ordinance would have accrued on January 22, 2002, the date the City Council adopted the Conforming Ordinance. Depending upon which statute of limitations applies, Scenic Nevada is 6-10 years beyond the applicable period of limitations for challenging the enactment of the Conforming Ordinance. *See, e.g.*, NRS 278.0235 (25 days)[4], NRS 11.190(3)(a) (three years), and NRS 11.220 (four years). Scenic Nevada is time barred.

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[4] The City Council adopted the Conforming and Digital Ordinances pursuant to NRS 278.020 ("For the purpose of promoting health, safety, morals, or the general welfare of the community, the governing bodies of cities and counties are authorized and empowered to regulate and restrict the improvement of land and to control the location and soundness of structures"). The short limitation period of NRS 278.0235 is important in connection with municipal actions because both the City and the general public need to be able to rely upon the ordinance going forward.

This case is a perfect illustration of this point. Since the adoption of the Conforming Ordinance, the City has allowed relocated billboards to be constructed and has banked 93 billboards from the billboard industry. (JA Vol. 2, at 301.) For the last 10 years, billboard companies have removed and "banked" billboards in reliance on the rights granted under the Conforming Ordinance to subsequently relocate that billboard. It is unfair, unreasonable and unlawful for Scenic Nevada to claim 10 years after the fact that the banking provisions in the Conforming

D. Scenic Nevada's constitutional challenge pursuant to Article 19 became "moot" three years from the date of adoption of the initiative

The question of mootness is one of justiciability. A controversy must be present through all stages of the proceeding, see Arizonans for Official English v. Arizona, 520 U.S. 43, 67, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997); Lewis v. Continental Bank Corp., 494 U.S. 472, 476-78, 110 S. Ct. 1249, 108 L. Ed. 2d 400 (1990), and even though a case may present a live controversy at its beginning, subsequent events may render the case moot. University Sys. v. Nevadans for Sound Gov't, 120 Nev. 712, 720, 100 P.3d 179, 186 (2004); Wedekind v. Bell, 26 Nev. 395, 413-15, 69 P. 612, 613-14 (1902).

In this case, the initiative was adopted on November 14, 2000. (JA Vol. 1, at 193.) The City Council adopted the Conforming Ordinance approximately 14 months later. (JA Vol. 3, at 542-576.) The claim that the Conforming Ordinance violates the three year prohibition found in Article 19 became moot when Scenic Nevada failed to seek judicial relief declaring the Conforming Ordinance unconstitutional on or before November 14, 2003, three years from the date of adoption of the initiative. Nearly ten years after the fact, the court cannot grant effective relief with respect to the alleged procedural constitutional violation at

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Ordinance are invalid and therefore, the billboard industry loses the right to construct the banked billboards.

issue, and this matter should be dismissed as moot. Personhood Nev. v. Bristol, 245 P.3d 572, 574, 126 Nev. Adv. Rep. 56 (2010).

Furthermore, even under Scenic Nevada's reasoning, three years after the enactment of the initiative in 2000 the City Council had the full right to pass an ordinance regulating billboards without reference to, or compliance with, the initiative. Here, the City Council adopted the Digital Ordinance in 2012—12 years after the passage of the initiative. The initiative could not legally bind the City Council in any manner when it passed the Digital Ordinance in 2012. Scenic Nevada's position that the Digital Ordinance is invalid because it somehow included provisions that may have been invalid in 2002 is not supported by any logic, reason or authority. In fact, the City Council could have repealed the initiative in 2003 or any time thereafter. Thus the initiative did not bind or limit the City Council's legislative discretion in 2012 when it adopted the digital board ordinance. Any inconsistency between the Digital Ordinance and the initiative is irrelevant.

CONCLUSION

In conclusion, the three year prohibition set forth in Nev. Const. Art. 19, § 2.3 applies only to statutes, not municipal initiatives, and not the initiative adopted by Reno voters in 2000. In addition, the Conforming Ordinance lawfully amended the initiative in accordance with the city charter. Scenic Nevada's challenge is

both time barred and moot. For these reasons, the Court should uphold the district court's Judgment in favor of Defendant City of Reno dated March 27, 2014.

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document filed in this court does not contain the social security number of any person.

Dated this 9TH day of February, 2015.

KARL S. HALL
Reno City Attorney

By: _____
Jonathan D. Shipman
Deputy City Attorney
P. O. Box 1900
Reno, NV 89505
(775) 334-2050
Attorneys for Respondent, City of Reno

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript of appendix where the matter relied on is to be found. I further certify that the brief complies with the typeface and type style requirements of Rule 32(a)(4)-(6) (14-point New Times Roman proportionally spaced typeface), as well as the page limitation under Rule 32(a)(7)(A)(i) (25 pages). I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 19TH day of February, 2015.

KARL S. HALL
Reno City Attorney

By: _____
Jonathan D. Shipman
Deputy City Attorney
P. O. Box 1900
Reno, NV 89505
(775) 334-2050
Attorneys for Respondent, City of Reno

CERTIFICATE OF SERVICE

I certify that I electronically filed *Respondent's Answering Brief (City of Reno)* with the Clerk of the Court by using the ECF system which served the following parties electronically:

MARK WRAY (SBN 4425)
Law Offices of Mark Wray
608 Lander Street
Reno, NV 89509
(775) 348-8877

Dated this 19th day of ~~February, 2015~~.

JILL ZARKER