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IN THE SUPREME COURT OF THE STATE OF NEVADA

SCENIC NEVADA, INC.

Appellant,

Case No. 65364

v.

CITY OF RENO, a Political Subdivision
of the State of Nevada,

Respondent.

_____ /

APPELLANT'S PETITION FOR REHEARING

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Scenic Nevada, Inc. petitions for rehearing as to a single aspect of this Court's *en banc* decision in *Scenic Nevada, Inc. v. City of Reno*, 132 Nev. Adv. Op. 48 (June 30, 2016).

The Court wrote: “[t]hough a statute may be void *ab initio*, reenactment may cure the constitutional defect so long as the reenacted bill is free of constitutional infirmities.” *Id.*, *Slip Opinion*, p. 8.

The Court then held:

Here, it is undisputed that the Reno City Council enacted the Conforming and Banking Ordinances within the three-year legislative moratorium, rendering the ordinances void *ab initio*. However, when the City Council enacted the 2012 Digital Ordinance – nine years after the three-year legislative moratorium expired – it reenacted as amended both the Conforming and Banking Ordinances. *See* RMC §§ 18.16.902, 18.16.908.

...

Thus, upon reenactment, the constitutional defects in the Conforming and Banking Ordinances were cured.

Id., *Slip Opinion*, p. 9.

Scenic Nevada respectfully questions the proposition that the 2012 Digital Ordinance reenacted the Conforming and Banking Ordinances so as to undo their unconstitutional nature.

The Digital Ordinance is titled: “Ordinance Amending the Reno Municipal Code, Title 18, . . .”. (*JA 520*, emphasis added).

Section 1 of the Digital Ordinance begins: “Chapter 18 of the Reno Municipal Code is hereby amended by adding certain wording to and deleting certain information from Chapter 18.16, the same to read as follows: . . .”. (*Id.*, emphasis added).

In particular, the Digital Ordinance amends the Banking Ordinance by adding four words: “unless otherwise provided herein.” (*JA 521*). The Relocation Ordinance is amended by adding two clauses and a sentence. (*JA 530*).

Although the Banking and Relocation Ordinances were amended, in minor respects, absent from the legislation is any statement that the Reno City Council was reenacting those ordinances.

Black’s Law Dictionary (6th ed., 1990): defines “reenact” as “to enact again; to revive.” The Digital Ordinance contains no reference to the Reno City Council reenacting, enacting again, or reviving the Banking and Relocation Ordinances. Instead, the Digital Ordinance refers only to amending those ordinances. (*JA 520-521, 530*).

As to amending a law, Art. 4, §17 of the Nevada Constitution states:

Each law enacted by the Legislature shall embrace but one subject, and matter, properly connected therewith, which subject shall be briefly expressed in the title; and no law shall be revised or amended by reference to its title only; but, in such case, the act as revised or section as amended, shall be re-enacted and published at length.

The Constitution thus prohibits amendments by reference to the title of the statute only, and mandates that the full text of the amended statute must be published. “Re-enacted” is used in this context merely to describe the requirement of setting forth the text of the amended statute in full. The Constitution does not address the circumstances present in this case, in which a void and unconstitutional ordinance is amended, and it is alleged that merely by that amendment, the unconstitutional law has been reenacted and become new law.

Neither Scenic Nevada nor the City of Reno addressed this precise issue in the briefing, because it was not specifically an issue until it was raised by the Court’s opinion. Scenic Nevada’s brief did discuss the subject more generally, however, by pointing out that the Digital Ordinance was dependent upon the Banking and Relocation Ordinances, which are unconstitutional under Nevada Constitution Art. 1, §§ 2.3 and 4. (*Appellant’s Opening Brief*, p. 8, line 24 – p. 9, line 2; p. 10, lines 2-5.)

Now that the specific issue is raised as to the effect of the amendments, Scenic Nevada respectfully requests that the Court consider a statute that the Court may have overlooked. NRS 0.023 is part of the Preliminary Provisions of the Nevada Revised Statutes. It was proposed in 2003 by the Legislative Counsel Bureau as a clean-up bill relating to legislative operations. NRS 0.023 states:

The provisions of any law or statute which is reenacted, amended or revised, so far as they are the same as those of prior laws, shall be construed as a continuance of such laws and not as new enactments.

If any provision of a law is repealed and in substance reenacted, a reference in any other law to the repealed provision shall be deemed to be a reference to the reenacted provision.

NRS 0.023 applies to any “law or statute.” Therefore, it should apply to the ordinances of the City of Reno.

Thus, by virtue of NRS 0.023, the amendment of the Banking and Relocation Ordinances did not result in new enactments “so far as they are the same as prior laws.” Virtually all of the language in the Banking and Relocation Ordinances that was published as part of the 2012 Digital Ordinance is the same as prior laws, with only minor amendments. Therefore, the Banking and Relocation Ordinances should be construed as a continuance of the prior laws. They are not new enactments. *See* NRS 0.023. Because the prior laws are unconstitutional, and

they did not become new laws when they were amended in 2012, the 2012 Digital Ordinance left their unconstitutional status unchanged.

NRS 0.023 is clear and unambiguous. To the extent the intent of the statute is questioned, however, selections from the compiled legislative history of NRS 0.023, prepared by the Legislative Counsel Bureau, are attached to this petition, with the applicable portions earmarked. Section 19 of AB 542, which became NRS 0.023, was discussed by Lorne Malkiewich, Director, Legislative Counsel Bureau, on April 15, 2003 before the Assembly Committee. He explained:

It's for when we delete a provision and readopt it. There's a bill in this session on Chapter 62 of NRS. It's a huge bill that redoes the juvenile code. A lot of provisions are being repealed and readopted as Chapter 62A and 62B. If the statute is just being readopted in its entirety, with no change, what we want is for interpretation to go along with that section.

Minutes of the Meeting of Assembly Committee on Elections, Procedures and Ethics, 72nd Session, April 15, 2003, p. 2 (attached, preceded by relevant pages of the submissions to the Assembly Committee by the Legislative Counsel Bureau); *see also*, *Minutes of the Senate Committee on Legislative Affairs*, 72nd Session, May 22, 2003, pp. 4-5. The purpose of adopting NRS 0.023 therefore was to ensure that amending a repealed statute by publishing the text of the statute

containing the existing law does not create new law. It even stands more to reason that merely amending a void and unconstitutional statute neither reenacts or revives the void law, nor creates new law.

Accordingly, it is respectfully submitted that in the event that the Court has failed to consider NRS 0.023 in its analysis of the case and in reaching its decision, that the Court consider the statute.

It is further submitted that the Court consider granting this Petition for Rehearing to address the issue raised by the petition, and the possibility of modifying the opinion in *Scenic Nevada, Inc. v. City of Reno* to hold that the Banking and Relocation Ordinances were, and still are, unconstitutional, and thus, the 2012 Digital Ordinance, which is based on the Banking and Relocation Ordinances, also is unconstitutional.

Respectfully submitted,

DATED: July 18, 2015

LAW OFFICES OF MARK WRAY

By 
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:


[x] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 Point Times New Roman.

I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more and contains 1637 words; and

Finally, I hereby certify that I have read this *Appellant's Petition for Rehearing* and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. I further certify that this *Appellant's Petition for Rehearing* complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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 18th day of July, 2016.



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CERTIFICATE OF SERVICE

The undersigned employee of the Law Offices of Mark Wray certifies that a true copy of the foregoing document was sealed in an envelope with first class postage prepaid thereon and deposited in the U.S. Mail at Reno, Nevada on July 18, 2016 addressed as follows:

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THERESA MOORE

Sec. 18. Authorizes the Legislative Counsel to make name changes when codifying the Nevada Revised Statutes to reflect changes in the law or in the manner of codification. See summary of changes #9.

Sec. 19. Provides that laws that are repealed and reenacted are to be construed as continuations of the prior law. See summary of changes #10.

Sec. 20. Designates a symbol for denoting flush lines. See summary of changes # 11.

Sec. 21. Provides that session employees who work full time for 6 months or more are entitled to a full year of eligibility in the Public Employees' Retirement System (PERS), but solely for the purpose of eligibility for retirement. See summary of changes # 12.

Sec. 22. Eliminates the requirement that the Legislative Counsel Bureau provide staff services for the Nevada Silver Haired Legislative Forum. See summary of changes #13.

Sec. 23. Repeals unnecessary provision concerning preparation of fiscal notes. See summary of changes #2.

Sec. 24. Allows a person who is entitled to the additional service credit provided pursuant to section 21 to have PERS recalculate the benefit and to redeposit withdrawn contributions to the system. See summary of changes # 12.

Sec. 25. Provides that provisions concerning retirement benefits for session employees in sections 21 and 24 apply retroactively to any person who would have been entitled to those benefits. See summary of changes #12.

10. Provides that laws that are repealed and reenacted are to be construed as continuations of the prior law. We have restructured sections of NRS for ease of use and application, such as Title 53 concerning industrial insurance (new chapters 616A through 616D) or the current recodification of the juvenile law provisions (chapter 62 of NRS). If sections are merely recodified, the case law and interpretations should not be lost merely because the number of the section has changed. This amendment makes it clear that the new provisions should be construed as continuations of the prior law. Section 19.

11. Designates a symbol for denoting flush lines. NRS 0.025 explains flush lines and how they are to be read and interpreted in statutes. The section is amended to specify the symbol for flush lines. Section 20.

12. Provides that session employees who work full time for 6 months or more are entitled to a full year of eligibility in the Public Employees' Retirement System, but solely for the purpose of eligibility for retirement. Many people who have worked during session over the years have withdrawn their contributions (and thereby forfeited their service credit) because it would take 10 sessions (or more under prior law) to accrue enough service credit to vest in the system. With this change, a person could vest in 5 sessions. A person who withdrew of his or her contributions could repurchase the service credit, thereby qualifying for a benefit. The benefit itself would be based upon the actual time worked, but at least people would qualify for a benefit (that would grow each session). Sections 21, 24, 25.

13. Eliminates the requirement that the Legislative Counsel Bureau provide staff services for the Nevada Silver Haired Legislative Forum. The forum is raising enough money to support itself and hire staff. The LCB helped to get the forum established, but it now is demanding more resources than we can afford to allocate. Section 22.

Right now we maintain a directory of state and local government and the Legislative Manual. The day after it is printed, we get notified of a change, and it's out of date that quickly. We would like to do this online. We'd like to not have the requirement in the statute that we print a directory of state government.

Number 7 eliminated the Director as the Nevada Legislative Federal-State Coordinator. That was put in by one of my predecessors, and there's really no reason to put it in statute. What this is referring to is the NCSL [National Conference of State Legislatures] position. Leadership can designate that. If they want to designate me, I can. If they want to designate their secretary or somebody else to do that, they certainly can.

[Mr. Malkiewicz, continued] Number 8 is the one I'm proposing an amendment to, and I'm hoping you have a copy of the proposed amendment (Exhibit D). The problem we have is non-paid lobbyists often don't show up here. They're here once every three months, and if they forget to file their reports, it's a \$10-a-day fee. Someone who's paying \$15 for a license is being charged a several hundred-dollar fee because they didn't realize they didn't have to file their form, even though we say it 10 times in the report and on the forms and everything like that. At first I was proposing saying that we wouldn't make them file. I think a better approach is to say that for non-paid lobbyists, there isn't a fine, that if they don't file, we can still revoke their license for not filing on time, and we'd still warn them, but not have a non-paid lobbyist pay the fine. You could go either way on that. We could put in something that says that non-paid lobbyists don't have to file. The problem with that is that you don't know if it's that they didn't file because they forgot and really spent \$10,000 last month, or because they had no expenditures. This way, by just not having a fee for them for late filing, you would still get the reports every month.

Number 9 is allowing the Legislative Counsel to make name changes when codifying NRS [*Nevada Revised Statutes*] if it's incorrectly written, or if you're in codification combining sections, you need to put a definition in. If you have powers transferred from one agency to another, and one bill doesn't pick that up, we could change that in codification.

The tenth change is similar. It's for when we delete a provision and readopt it. There's a bill this session on Chapter 62 of NRS. It's a huge bill that redoes the juvenile code. A lot of provisions are being repealed and readopted as Chapter 62A and 62B. If the statute is just being readopted in its entirety with no change, what we want is for the interpretation to go along with that section. That's the change number 10 provides.

lobbyists. The commission has created the classifications of paid and nonpaid. They could exempt the classification of nonpaid from fines. This beefs up enforcement as far as revocation and will ensure we still get the reports. If someone merely does not submit a report, or continually submits it late, we would revoke the lobbyist's registration. We do not have nonpaid lobbyists paying fines.

Change nine allows the Legislative Counsel to make name changes in codifying the *Nevada Revised Statutes* (NRS), so if you changed the name of an agency, and it was missed in another bill, the Legislative Counsel could make the change throughout the NRS. If authority for something was transferred from one agency to another, a bill is introduced late in session to put that authority under the former entity. The Legislative Counsel could handle that in codification. Number ten is another one concerning the Legislative Counsel, and this is, for example, what we are doing this session with juvenile law. We are repealing chapter 62 of NRS and recodifying all the provisions in several chapters. What this is saying is if we are just recodifying current law, the interpretation of the old one would apply to the new one as well, so we would not lose the history of interpretation of the law.

SENATOR WIENER:

On that particular one, what will happen to Senate Bill (S.B.) 197? What would happen under current law?

SENATE BILL 197 (2nd Reprint): Repeals, reenacts, reorganizes and revises certain provisions relating to juvenile justice. (BDR 5-633)

MR. MALKIEWICH:

The problem right now is we do not know. A court could look at that section and say, "Well, yes, this reads the same as NRS 62.285 used to read, but it is a brand new section. Although we have years of interpreting 'child in need of supervision' to mean this, I am going to come up with a brand new interpretation." Section 19 of the bill puts a provision in the preliminary chapter of NRS that says to the court, "When you are interpreting this, if it was merely repealed and reenacted, that interpretation goes with it." Someone who is litigating a case can say, "Look at the preliminary chapter, look at the former NRS 62.285; this is just a recodification," and they should be able to get the court to look at those old cases to interpret it.

SENATOR WIENER:

I do not remember the effective date because we just concurred with it. Let us say the effective date of the changes in S.B. 197 is prior to the effective date of A.B. 542. What would occur with new chapter 62 and chapter 63 of NRS?

MR. MALKIEWICH:

I do not believe it will be a problem. I believe this will be a general rule of construction for the NRS, and since the recodification is in the NRS, it should apply regardless of which one takes effect first.

Change 11 designates a new symbol for flush lines. You can see the symbol in section 20 of the bill. We will put it in place next session when we are sure it does not cause the system to crash.

CHAIRMAN WASHINGTON:

For the education of some of the members of the committee, I used to see "flush line," and I wondered what that meant. Could you explain what flush means?

MR. MALKIEWICH:

If you look at section 20 of A.B. 542, you will see the explanation of a flush line, which is in subsection 2 of NRS 0.025. In a bit of exceptional cuteness on the bill drafters' part, they explained it with a section that uses a flush line. Subsection 2 says, "Text that follows a statute ..." and then lists conditions in the next three paragraphs. Text that follows those conditions is not designated as a separate section and begins flush to the left margin. It applies to the section as a whole. If you look at the top of page 12, the flush line symbol applies to the section as a whole or the whole subdivision rather than merely the preceding one. It is not part of paragraph (c) of subsection 2; it is part of subsection 2, as a whole.

CHAIRMAN WASHINGTON:

The reason I am asking is because I am sure as soon as this bill hits the Senate Floor, someone is going to ask what a flush line is, and I will have to answer the question.

MR. MALKIEWICH:

Subsection 2 of NRS 0.025 answers that question and uses the symbol we will have starting next session.