IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF SPARKS, a Municipal Corporation,

Appellant,

vs.

RENO NEWSPAPER, INC., a Nevada Corporation,

Respondent.

Supreme Court Case No. 69749

District Case No. CV15-01871

On Appeal from an Order Granting Petition for Writ of Mandamus from the Second Judicial District Court of the County of Washoe in the State of Nevada

APPELLANT'S REPLY BRIEF

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Properly adopted provisions of the Nevada Administrative Code "have the force of law." NRS 233B.040(1)(a). This Court has held that both rules promulgated by the Court and federal regulations are sufficiently authoritative to confer confidentiality upon records that would otherwise be subject to disclosure under NRS 239.010 and that statute's associated jurisprudence. *See Civil Rights for Seniors v. AOC*, 313 P.3d 216, 219 (Nev. 2013) (rules established by Supreme Court of Nevada governing state foreclosure mediation program*); City of Reno v. Reno Gazette-Journal*, 63 P.3d 1147, 1150 (Nev. 2003) (federal regulation). Although the Court has not yet decided a case in which the Nevada Administrative Code was the basis for a claim of confidentiality, the Newspaper suggests no reason why a state regulation cannot so serve.

A. The Administrative Procedure Act Affords a Plain, Speedy and Adequate Remedy to the Newspaper in this Case

Misquoted with emphasis by the Newspaper, what the Court actually said in *DR Partners v. Bd. of County Com'rs of Clark County* is that "[m]andamus is the appropriate procedural remedy to compel production of the public records in *this* case." *Compare* 6 P.3d 465, 468 (Nev. 2000) (emphasis added) *with* Respondent's Answering Brief (RAB), p. 12. Although the Court's conclusion in *DR Partners* is not so sweeping and universal as the Newspaper might wish, it is undeniable that mandamus has historically been the remedial vehicle used in public records cases.

The question is why? The answer: NRS Chapter 239 does not specify a remedy, it establishes a right.

NRS 239.010 requires that "unless otherwise declared by law to be confidential," all public records be open and available for public inspection. If the government denies a request for production of a public record, the requesting party may apply to the district court for an order requiring the document to be made available. NRS 239.011. The law, however, does not identify the type of action that must be commenced in the district court as a means to that end.

"A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion." *Int'l, Game Tech., Inc. v. Second Judicial Dist. Court*, 179 P.3d 556, 558 (Nev. 2008); *see also* NRS 34.160. Although the decision to entertain an extraordinary writ petition – such as mandamus – lies within the Court's discretion, *Libby v. Eighth Judicial Dist. Court*, 325 P.3d 1276, 1278 (Nev. 2014), the petitioner has the "heavy" burden to show that such relief is necessary. *Poulos v. Eighth Judicial Dist. Court*, 652 P.2d 1177, 1178 (Nev. 1982). The Court will generally refuse to issue an extraordinary writ when there is an adequate remedy at law. NRS 34.170; *Oxbow Constr., LLC v. Eighth Judicial Dist. Court*, 335 P.3d 1234, 1238 (Nev. 2014). Thus, previous disputes arising under NRS Chapter 239 in which the government has relied on state statutes [*e.g.*, *Reno*

Newspapers, Inc. v. Sheriff, 234 P.3d 922 (Nev. 2010)], court rules [*Civil Rights for Seniors v. AOC*, 313 P.3d 216 (Nev. 2013)], or federal regulations [*City of Reno v. Reno Gazette-Journal*, 63 P.3d 216 (Nev. 2013)] have been resolved by mandamus proceedings because NRS 239.011 does not specify the manner in which the action should be styled – a mandamus petition "is only appropriate if no adequate and speedy legal remedy exists," *Kay v. Nunez*, 146 P.3d 801, 805 (Nev. 2006), which has previously always been the case in actions that seek the disclosure of public records. *See* NRS 239.011.

In circumstances like these, however, where the primary disagreement between the parties is whether a state *regulation* applies to the facts of the case, the Nevada Legislature has prescribed a specific remedial procedure for resolving the dispute. The Administrative Procedure Act provides that:

> The validity or applicability of any regulation may be determined in a proceeding for declaratory judgment in the district court in and for Carson City, or in and for the county where the plaintiff resides, when it is alleged that the regulation, *or its proposed application*, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff. NRS 233B.110(1) (emphasis added).

The Newspaper argues that the instant Petition does not challenge the validity of a state regulation, instead describing the contest as a dispute over the City's "interpretation" of NAC 453A.714. RAB, p.12. But there is no meaningful discussion in the Answering Brief – nor can there be – regarding whether there is a distinction between the City's "interpretation" of NAC 453A.714 and the

"applicability" or "proposed application" of the regulation as described in NRS 233B.110(1). However the Newspaper chooses to label the disagreement, the immediate action can be distilled to this: the City believes NAC 453A.714 applies to the facts at hand and the Newspaper believes it does not. Because the Newspaper's Petition directly challenges the applicability of NAC 453A.714, the proper remedy is an action for declaratory relief brought under the authority of the Administrative Procedure Act.

In *Southern California Edison v. First Judicial District Court*, the Court resolved a nearly identical argument. There, the Court determined that although NRS 372.680 and NRS 233B.130 both provide for judicial intervention related to a disputed administrative ruling, because NRS 372.680 "does not define the nature of the action to be brought," the Administrative Procedure Act is the "sole remedy" for challenging the decisions of a state agency not exempted therefrom by NRS 233B.039. *Edison*, 255 P.3d 231, 234-35; 237 (Nev. 2011). That is exactly the friction in this case. The Newspaper had a right to request the business licenses at issue in this case as public records under NRS 239.010 just as Edison had a right to file claims for refund with the Department of Taxation under NRS 372.630. *See Edison*, 255 P.3d at 233. When the respective requests were denied, the Newspaper was entitled to judicial intervention pursuant to NRS 239.011 while Edison was authorized to commence an action by NRS 372.680. *See Edison*, 255 P.3d at 233.

Like NRS 372.680, NRS 239.011 does not define the nature of the underlying action, it describes the nature of relief that may be entered by a court. As such, the more specific Administrative Procedure Act controls, and the Newspaper was required to comply with the requirements of NRS 233B.110 just as Edison was obligated to avail itself of the process set out in NRS 233B.135. *See Edison*, 255 P.3d at 233.

The Newspaper postulates that the "only issue" in *Edison* was whether the reviewing court examined an administrative decision *de novo* or under a more deferential standard. RAB, p. 16 FN 1. Though an imperfect summary of that case, it highlights the difficulty with not following the statutory process for resolving this case. By avoiding the prescribed procedure for challenging the applicability of the Administrative Code, the Newspaper has escaped including the State as a party. Without the State as a party the record is devoid of evidence that might otherwise have been produced related to the drafting history of the regulation, and, most importantly, the agency's own interpretation of its regulation. This is precisely why the Legislature has set out a process and precluded reviewing courts from ruling on the matter until the State has had an opportunity to have its say.

"Unless the interpretation is plainly erroneous or inconsistent with the regulation, deference will generally be given to an administrative agency's interpretation of regulations it has drafted." *Sierra Pacific Power Co. v. Public Service Commission*, 634 P.2d 1200, 1203 (Nev. 1991) (Manoukian, J., concurring).

As such, "[a]n administrative agency…charged with the duty of administering an act, is impliedly clothed with power to construe the relevant laws and set necessary precedent to administrative action." *SIIS v. Snyder*, 865 P.2d 1168, 1171 (Nev. 1993). For its part, the City is entitled to rely on the State's interpretation of regulations, especially in this case, where the City has not advanced an argument based on a balancing test but has asserted, simply: this is the plain language of the regulation.

B. NAC 453A.714(1) is an Express and Unequivocal Declaration of Confidentiality Applicable to a Specific and Statutorily-Defined Class of People

The Newspaper's belief that previously enacted statutes conferring confidentiality on a more limited class of participants in Nevada's medical marijuana economy serve as some sort of legislative entrenchment precluding the future expansion of the protection against public disclosure is still wrong. *See* RAB, p. 28. The Legislature is presumed to enact statutes "with full knowledge of existing statutes relating to the same subject." *City of Boulder v. General Sales Drivers*, 694 P.2d 498, 500 (Nev. 1985). It is true that NRS 453A.610(1) and NRS 453A.700(1) protected the materials generated by university research regarding medical marijuana and the holders of state-issued medical marijuana registry identification cards and their attending physicians respectively. It is equally apparent that the state of the medical marijuana industry in Nevada has changed considerably in the fifteen

years since those statutes went into effect, a truism proven by the passage of SB 374 overhauling NRS Chapter 453A [JA077-124], the resulting promulgation of a comprehensive regulatory scheme by the Division of Public and Behavioral Health [Div. of Pub. & Behavioral Health R004-14], and the proliferation of medical marijuana establishments previously unaccounted for in the law. The Legislature opted to empower the Division of Public and Behavioral Health to adopt a regulatory framework as the primary tool for establishing the legal parameters within which this new economy exists. At its most fundamental level, this contest questions whether the Legislature can delegate the authority to pass laws protecting information from disclosure under the Public Records Law. The answer is obviously yes.

The Legislature may delegate the authority to make rules and regulations supplementing legislation as long as "the power given is prescribed in terms sufficiently definite to serve as a guide in exercising that power." *Banegas v. SIIS*, 19 P.3d 245, 248 (Nev. 2001). That is exactly what happened in this case: NRS 453A.370(5) *requires* the Division of Public and Behavioral Health to adopt a regulation which "protect[s] the identity and personal identifying information of *each* person who receives, facilitates or delivers services in accordance with [NRS

Chapter 453A]." [1] The resulting law, NAC 453A.714, expressly and unequivocally declares "[e]xcept as otherwise provided in NRS 239.0115 the name and any other identifying information of any person who facilitates or delivers services pursuant to this chapter or Chapter 453A of NRS are confidential, not subject to subpoena or discovery and not subject to inspection by the general public." [2] NAC 453A.714(1).

The Answering Brief urges the Court to reject the notion that "all participants in the medical marijuana industry in this state can conduct business under a veil of secrecy free from any public disclosure of their personal identities at any time."

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[1] As the Newspaper observes, NRS 453A.370(5) also includes a "standardless" requirement that the adopted regulation apply "as far as possible while maintaining accountability." *See* RAB, p. 20. NAC 453A.714(2)-(3) offer exceptions to the otherwise unequivocal grant of confidentiality; the subject information may be provided to state and local agencies for the express and limited purpose of enforcing the laws of the State. Whether this portion of the regulation is adequate, appropriate, or effective is not an inquiry for the Court, it is a question for the Legislature. *See Worthington v. Second Judicial District Court*, 142 P. 230, 241 (Nev. 1914).

[2] The Newspaper's obtuse complaint that NRS 453A.370 "is not a confidentiality statute" and that "[n]othing in this statute actually grants specific confidentiality for anything" is an incomplete thought: if the statute granted confidentiality on its own, the regulation would be unnecessary. *See* RAB, p. 19. That the Legislature opted to utilize the regulation making process to protect the contested information is not a legitimate issue before the Court unless the Newspaper is, in fact, challenging the validity of NAC 453A.714 or the regulation-making authority of the Division of Public and Behavioral Health despite advancing many arguments that it is not. *See* RAB, pp. 19-26.

RAB, p. 18. And yet, that is *exactly* what the Nevada Legislature and the Division of Public and Behavioral Health have enacted as the law of our state. *See* NAC 453A.714(1); NRS 453A.370(5). Questions concerning the wisdom, justice, policy, or expediency of a law are for the Legislature alone, and are beyond the prerogative of the Court. *Worthington v. Second Judicial District Court*, 142 P. 230, 241 (Nev. 1914). It is the "duty of the courts, to interpret and enforce the statute in accordance with the intention of the lawmaking body." *Washington v. State*, 30 P.3d 1134, 1136 (Nev. 2001). The Newspaper's argument concerning the application of NAC 453A.714(1) confuses the Public Records Law's instruction that lawfully enacted exceptions to the Public Records Law be "construed narrowly" [NRS 239.001(3)] for a requirement that only narrowly-tailored declarations of confidentiality be promulgated into law. *See* RAB, pp. 27-28. This perspective is disingenuous.

The Newspaper characterizes the City's preferred application of the law as broad and expansive. RAB, p. 27. If it is broad and expansive, it is because NAC 453A.714(1) itself – by virtue of its application to "any person" – is broad and expansive. But broad and expansive or not, *that* is the law. The narrowest possible construction of the phrase "any person" in the regulation is still "every person," just as the narrowest possible construction of the phrase "each person" in NRS

453A.370(5) is still "every person." [3] *See* Black's Law Dictionary 120; 597 (rev. 4th ed. 1968).

And despite the Newspaper's hand-wringing over the appearance of the term "deliver," in NAC 453A.714(1) and NRS 453A.370(5), it is both defined by statute [NRS 453A.060; NRS 453.051] and included in the statutory definitions for every type of medical marijuana establishment [NRS 453A.056; NRS 453A.105; NRS 453A.115; NRS 453A.116]; no interpretation of "deliver" is necessary. *See* RAB, p. 27. This is simply not a difficult case of statutory construction; NAC 453A.714 includes an explicit declaration of confidentiality that protects a specific and statutorily-defined class of people. It is true that the regulation offers a broad shield against disclosure, but that is the plain and unambiguous language adopted by the Division of Public and Behavioral Health and approved by the Legislature. That the Newspaper may disagree with their judgment is irrelevant.

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The City cannot determine for itself which laws of the State it will and will not follow; only the Division of Public and Behavioral Health can explain how it views the requirements of NAC 453A.714(1) and the jurisprudential history of this state requires that the Division's interpretation be afforded deference. To that end,

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[3] The word "person" generally means "a natural person, any form of business or social organization and any other nongovernmental legal entity." *See* NRS 0.039.

the Administrative Procedure Act delineates the sole manner in which a party may challenge the validity or proposed application of the regulation. The plain language of NAC 453A.714(1), read alone or in harmony with the other provisions of the statutory and regulatory framework governing medical marijuana in Nevada, evinces an obvious, express, and unequivocal exception to the obligations of the Public Records Law. The judgment of the district court should be reversed.

Respectfully submitted this 22nd day of August, 2016.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Reply Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface and type style requirements of NRAP 32(a)(5) and NRAP 32(a)(6) because the Reply Brief has been prepared in a proportionally spaced typeface using Microsoft Word for Windows 2013, in 14 point Times New Roman font.

2. I further certify that this Reply Brief complies with the page and type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), the document is comprised of 11 pages containing 2,545 words.

3. Finally, I certify that I have read this 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 Reply Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 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 22nd of August, 2016.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(1)(d), I hereby certify that I am an employee of the Sparks City Attorney's Office, Sparks, Nevada, and that on this date, I am serving the foregoing document(s) entitled **APPELLANT'S REPLY BRIEF** on the person(s) set forth below by placing a true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, at Sparks, Nevada, postage prepaid, following ordinary business practices to:

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