

IN THE SUPREME COURT OF THE STATE OF NEVADA
OFFICE OF THE CLERK

NULEAF CLV DISPENSARY, LLC, A NEVADA
LIMITED LIABILITY COMPANY,

Appellant,

vs.

THE STATE OF NEVADA DEPARTMENT OF
HEALTH AND HUMAN SERVICES, DIVISION
OF PUBLIC AND BEHAVIORAL HEALTH;
ACRES MEDICAL, LLC; AND GB SCIENCES,
LLC, A NEVADA LIMITED LIABILITY
COMPANY,

Respondents.

GB SCIENCES, LLC, A NEVADA LIMITED
LIABILITY COMPANY,

Cross-Appellant,

vs.

THE STATE OF NEVADA DEPARTMENT OF
HEALTH AND HUMAN SERVICES, DIVISION
OF PUBLIC AND BEHAVIORAL HEALTH;
ACRES MEDICAL, LLC; AND NULEAF CLV
DISPENSARY, LLC. A NEVADA LIMITED
LIABILITY COMPANY,

Cross-Respondents

Supreme Court No. 16-009

Oct 13 2016 08:55 a.m.

District Court No. A710597

Trace K. Lindeman
Clerk of Supreme Court

STATE RESPONDENT'S ANSWERING BRIEF

**ATTORNEYS FOR THE STATE OF NEVADA,
DEPARTMENT OF HEALTH AND HUMAN SERVICES,
DIVISION OF PUBLIC AND BEHAVIORAL HEALTH**

Adam Paul Laxalt
Attorney General
LINDA C. ANDERSON, ESQ.
Chief Deputy Attorney General
Nevada Bar No. 4090
555 E. Washington Avenue, Ste. 3900
P: (702) 486-3077
Email: landerson@ag.nv.gov

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
SUMMARY OF ARGUMENT.....	1
ARGUMENT.....	2
I. DIVISION ENTITLED TO DEFERENCE.....	2
II. DIVISION UNABLE TO PROVIDE REMEDY.....	6
CONCLUSION.....	8
CERTIFICATE OF COMPLIANCE.....	9
CERTIFICATE OF SERVICE	10

TABLE OF AUTHORITIES

CASES	Page
<i>City of Reno v. Reno Police Protective Ass'n</i> 118 Nev. 889, 900, 59 P.3d 1212, 1219 (2002).	7
 STATUTES	
NRS 453A.320.	2
NRS 453A.322.	2, 3, 5, 7
NRS 453A.324.	2
NRS 453A.326.	2, 3, 5
NRS 453A.328.	3

SUMMARY OF ARGUMENT

The Division of Public and Behavioral Health (hereinafter “the Division”) has no interest in any particular medical marijuana establishment receiving a registration as a dispensary in the City of Las Vegas so the Division awaits a final determination by this Court to resolve this litigation. When the Nevada Legislature allowed for the registration of medical marijuana dispensaries in Chapter 453A of the Nevada Revised Statutes, they clearly intended to create a limited and expedited process to meet the needs of the community. Unfortunately, all parties to this litigation have contributed to the delay which has resulted in the City of Las Vegas having less than the allotted twelve dispensaries in operation.

Both the legislative scheme and the Division failed to address the unique circumstances in the City of Las Vegas where the local entity enacted zoning ordinances but did not complete the local review until after the applications for registration were submitted with the Division. The Division attempted to comply with all of the requirements set forth by the Nevada Legislature in this initial application process and is entitled to deference. If this Court finds fault with the process used by the Division in ranking the dispensary applications in the City of Las Vegas, the Division can either open up a new application period or proceed with the final registrant as ordered by the Court.

ARGUMENT

I. DIVISION IS ENTITLED TO DEFERENCE

The Division does not “license” and instead has the authority to issue certificates of registration for medical marijuana establishments pursuant to NRS 453A.322. The purpose of registration is set forth in NRS 453A.320 as follows:

The purpose for registering medical marijuana establishments and medical marijuana establishment agents is to protect the public health and safety and the general welfare of the people of this State. Any medical marijuana establishment registration certificate issued pursuant to NRS 453A.322 and any medical marijuana establishment agent registration card issued pursuant to NRS 453A.332 is a revocable privilege and the holder of such a certificate or card, as applicable, does not acquire thereby any vested right.

The Nevada Legislature provided that this “revocable privilege” does not implicate any property rights for due process concerns. The Nevada Legislature specified that the Division could accept applications only for ten business days once a calendar year as described in NRS 453.324(4). Further, the Legislature directed the Division to issue all resulting registrations within 90 days according to NRS 453A.322(3). The registration of dispensaries was a competitive process because Clark County was limited to 40 dispensaries with the Clark County Commission allocating 12 to the City of Las Vegas pursuant to NRS 453A.324 and NRS 453A.326.

The Division relied solely on the applications submitted in their determination and the final scores for each section were the result of a comparison

of similar applicants by a consistent team of reviewers. (App. 256-300) The Division issued registrations during the prescribed 90-day time period which ended on November 3, 2014, and only issued registration to the top twelve dispensaries in the City of Las Vegas. (App. 332-333) In areas where a local government issued business licenses such as the City of Las Vegas, any registration was deemed provisional by law until the establishment was in compliance with local requirements according to NRS 453A.326(3).

Although the application form for a medical marijuana establishment as described in NRS 453A.322(3) did not include evidence of approval by the local authority of compliance with zoning restrictions, the Nevada Legislature required in NRS 453A.322(3)(a)(5) that the applicant submit to the Division the following:

If the city, town or county in which the proposed medical marijuana establishment will be located has enacted zoning restrictions, proof of licensure with the applicable local governmental authority or a letter from the applicable local governmental authority certifying that the proposed medical marijuana establishment is in compliance with those restrictions and satisfies all applicable building requirements.

Therefore, any applicant was on notice that they needed to submit authorization from the local governmental authority to the Division or the application could be disqualified. The scoring and ranking by the Division focused on the criteria set forth by the Nevada Legislature in NRS 453A.328 rather than zoning issues which would remain in the realm of the local authority.

The City of Las Vegas enacted zoning restrictions for these establishments in May and June of 2014. (App. 208-218 and 221-252) The Division released its application on May 30, 2014 and accepted application from August 5-18, 2014. (App. 256) Therefore, the final ordinance was amended after the application had been announced and released by the Division but prior to the ten day period when applications were submitted to the Division. However, the City of Las Vegas did not complete its review of any location or issue any documentation of compliance at the time of the submission of applications to the Division. (App. 316-321) Therefore, no applicant was able to submit either proof of licensure or a letter from the City of Las Vegas at the time of the application because the City of Las Vegas had not completed their process. Instead, the City of Las Vegas notified the Division of those applicants who were in compliance in a letter dated October 30, 2014 (which was the last working day due to the Nevada Day holiday before the 90 day period ended on November 3, 2014). (App. 3316-321)

In the proceedings below, the Division did not dispute that the Division did not make any changes in the scoring or ranking of the dispensaries based on the notification by the City of Las Vegas. Instead, the Division only considered the information contained in the applications which had been submitted within the ten day period. The Division did not consider local zoning approval because this

information was not provided in the application. Instead, the Division relied on NRS 453A.326(3), which provides the following:

In a local governmental jurisdiction that issues business licenses, the issuance by the Division of a medical marijuana establishment registration certificate shall be deemed to be provisional until such time as:

- (a) The establishment is in compliance with all applicable local governmental ordinances or rules; and
- (b) The local government has issued a business license for the operation of the establishment.

Therefore the Division anticipated that the local authority would provide the final approval for operation and the Division could revoke a registration if any establishment failed to meet all applicable governmental ordinances or rules.

The District Court found the Division was in error in issuing a registration to Nuleaf CLV Dispensary after the Division had received notice of a denial from the City of Las Vegas. The Nevada Legislature did not address these circumstances or process if the local authority with zoning restrictions provided evidence of approval after the ten day application period but before the 90-day review period had run for a determination by the Division. The underlying premise of the ruling of the District Court is that the Division was not entitled to deference in its interpretation of NRS 453A.322(3)(a)(5) and NRS 453A.326(3). This Court has confirmed that:

[a]n agency charged with the duty of administering an act is impliedly clothed with power to construe it as a necessary precedent to administrative action [and] great deference should be given to the agency's interpretation when it is within the language of the statute.

City of Reno v. Reno Police Protective Ass'n, 118 Nev. 889, 900, 59 P.3d 1212, 1219 (2002) citations omitted. Therefore, this Court must determine whether the Division is entitled to deference in this inaugural application review when the Division limited their review to the applications submitted and did not consider the communication from the City of Las Vegas in their ranking of dispensaries.

II. DIVISION UNABLE TO PROVIDE A REMEDY

GB Sciences Nevada, LLC filed a timely challenge to the practices of the Division on December 5, 2014, by filing a complaint and motion for preliminary injunction. (App. 1-29 and 76-153) However, after the Court denied that motion at a hearing on December 31, 2014, Plaintiff GB Sciences Nevada, LLC took no further action until they changed counsel and filed a motion for summary judgment on September 18, 2015. (App. 76-173 and 160-176) Defendant NuLeaf CLV Dispensary, LLC did not file an answer until October 5, 2015, when they opposed the motion for summary judgment. (App. 364-376 and 377-419)

The intervenor Acres Medical LLC did not challenge the practices of the Division in scoring their application until they filed and served an amended petition for writ of mandamus on June 16, 2015, which was granted by another court on October 6, 2015. (App. 426-429) The Division filed notice of the

decision by Judge Cadish in this matter on October 15, 2015. (App. 420-429) Acres Medical LLC filed their motion to intervene in the present action on October 19, 2015, followed by their complaint in intervention filed on November 17, 2015. (App. 430-445 and 458-484) In an Order filed on December 15, 2015, the District Court granting GB Science Motion for Summary Judgment but awarded the registration to the intervenor Acre Medical LLC even though Acres had not challenged the registration of NuLeaf CLV Dispensary until a year later. (App 506-515) Because no stay was issued in this matter, Acres Medical, LLC currently has been issued the registration as directed by the Court but GB Sciences Nevada LLC contests that ruling in a cross-appeal.

The Nevada Legislature only authorized the Division to issue registration certificates “not later than 90 days after receiving an application to operate a medical marijuana establishment” as set forth in NRS 453A.322(3). The Division did not have statutory authority to advance the applicants from the 2014 application pool after the 90-day period had run as of November 3, 2014. The Legislature affirmed this interpretation in the last session when they established a “one time extension period opened by the Division in calendar year 2014 for the purpose of issuing eleven additional registrations by September 1, 2015” in Section 5 of Senate Bill 276. (App. 362). Therefore, if this Court concludes that the registration of Nuleaf CLV Dispensary was properly rescinded, the Division must

either open up a new application period to fill the vacant slot or abide by a decision of the Court as to whether either GB Sciences Nevada LLC or Acre Medical LLC should have a registration.

CONCLUSION

Again, no property interest exists for the plaintiff or any registrant in this matter and the Division does not have an interest in any particular establishment receiving a registration. The Division should be entitled to deference in the process it used to score and rank medical marijuana dispensaries. However, if this Court concludes that the Division should not have registered Nuleaf CLV dispensary, the Division can either accept new applications or abide by any determination of this Court and issue or revoke registrations as ordered.

Dated: October 12, 2016.

ADAM PAUL LAXALT
Attorney General

By: /s/ Linda C. Anderson
Linda C. Anderson
Chief Deputy Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the type face requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in proportional spaced typeface using Microsoft Word 2010 in Times New Roman in 14 point font size. I further certify that his 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 does not exceed thirty (30) pages. I further certify that this brief 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: October 12, 2016.

ADAM PAUL LAXALT
Attorney General

By: /s/ Linda C. Anderson
Linda C. Anderson
Chief Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing by using the electronic filing system on the 12th day of October, 2016. The following participants in this case are registered electronic filing system users and will be served electronically:

Todd L. Bice, Esq.
Dustun H. Holmes, Esq.
PISANELLI BICE PPLC
400 South 7th Street, Suite 300
Las Vegas, NV 89101

James E. Shapiro
Sheldon A. Herbert, Esq.
SMITH & SHAPIRO PPLC
2520 St. Rose Parkway, Suite 220
Henderson NV 89074

Mark E. Ferrario, Esq.
Moorea L. Katz, Esq.
GREENBERG TRAURIG LLP
3773 Howard Hughes Parkway, Suite 400
Las Vegas, NV 19169

/s/ Linda Aouste

Linda Aouste
Employee of the Office of the Attorney General