

IN THE SUPREME COURT OF THE STATE OF NEVADA

DR. VINCENT M. MALFITANO, AN  
INDIVIDUAL; VIRGINIA CITY  
GAMING, LLC, A NEVADA  
LIMITED LIABILITY COMPANY;  
AND DELTA SALOON, INC., A  
NEVADA CORPORATION,

Appellants,

v.

COUNTY OF STOREY, ACTING BY  
AND THROUGH THE STOREY  
COUNTY BOARD OF COUNTY  
COMMISSIONERS; AND STOREY  
COUNTY LIQUOR BOARD,

Respondents.

**Supreme Court No. 70055**

District Court Case No. 15 CC 0008

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APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT  
STATE OF NEVADA, STOREY COUNTY  
HONORABLE JAMES E. WILSON, JR.

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**APPELLANTS' OPENING BRIEF**

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Matthew B. Hippler, Esq., Nevada Bar No. 7015  
Scott Scherer, Esq., Nevada Bar No. 87  
Brandon C. Sendall, Esq., Nevada Bar No. 13246  
HOLLAND & HART LLP  
5441 Kietzke Lane, Second Floor  
Reno, Nevada 89511  
Tel: (775) 327-3048  
Fax: (775) 786-6179  
Email: mhippler@hollandhart.com  
sscherer@hollandhart.com  
bcsendall@hollandhart.com

*Attorneys for Appellants*

### **NRAP 26.1 DISCLOSURE STATEMENT**

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Appellant Dr. Vincent M. Malfitano is an individual. Appellant Virginia City Gaming, LLC is a Nevada limited liability company. Appellant Delta Saloon, Inc. is a Nevada corporation. Virginia City Gaming, LLC and Delta Saloon, Inc. are privately held and are owned by Appellant Dr. Vincent M. Malfitano. Neither entity has a parent corporation, and no publicly held company owns any interest or stock in Virginia City Gaming, LLC or Delta Saloon, Inc.

Holland & Hart LLP represents the Appellants in this proceeding. The following attorneys of the law firm Holland & Hart LLP have appeared for the Appellants in the District Court and on appeal: Matthew B. Hippler, Esq.; Scott Scherer, Esq.; and Brandon C. Sendall, Esq.

DATED this 18th day of August, 2016.

/s/ Matthew B. Hippler  
Matthew B. Hippler, Esq., Nevada Bar No. 7015  
HOLLAND & HART LLP  
5441 Kietzke Lane, Second Floor  
Reno, Nevada 89511  
Tel: (775) 327-3048  
Fax: (775) 786-6179  
*Attorneys for Appellants*

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## **I. INTRODUCTION**

The genesis of this case centers on two decisions made on October 6, 2015 – one was rendered by the Storey County Liquor Board, and the second was rendered by the Storey County Board of County Commissioners. The decisions related to Appellants’ liquor license and business license applications, which were denied by the Storey County Liquor Board and the Storey County Board of County Commissioners. When reviewed in totality, the record before the District Court demonstrates that the process leading to these two decisions was fundamentally flawed and that the decisions were a product of that defective process. The District Court’s upholding of these two decisions and the denial of Appellants’ Petition for Writ of Mandamus constitutes an abuse of discretion. Accordingly, the District Court’s decision should be reversed and remanded so that the District Court issues a writ of mandamus to compel the approval of Appellants’ applications for liquor and business licenses by the Storey County Liquor Board and the Storey County Board of County Commissioners.

## **II. JURISDICTIONAL STATEMENT**

This matter falls under the jurisdiction of the Nevada Supreme Court pursuant to NRAP 3A(b)(1). The Notice of Entry of Order Denying Petition for Writ of Mandamus was filed on March 9, 2016. Joint Appendix (“JA”), Volume VI at 871-885.<sup>1</sup> The Notice of Appeal was timely filed on March 25, 2016. VI JA 926-928. The District Court’s Order Denying Petition for Writ of Mandamus was a final order regarding Appellants’ Petition for Writ of Mandamus.

## **III. ROUTING STATEMENT**

This matter involves the United States and Nevada Constitutions and issues related thereto, including Due Process claims, Equal Protection claims, and claims related to an unconstitutionally vague ordinance. III JA 511-606; VI JA 871-885. Therefore, this matter is presumptively reviewable by the Nevada Supreme Court under NRAP 17(a)(13).

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<sup>1</sup> All subsequent citations to the Joint Appendix will refer to the volume number of the Joint Appendix and the precise page number(s) referenced. For example, “II JA 42-43” refers to Volume II of the Joint Appendix at pages 42-43.

#### **IV. ISSUES PRESENTED**

1. Did the District Court abuse its discretion when it concluded that Appellants' Due Process rights were not violated by the Storey County Liquor Board's decision to deny the liquor licenses?
2. Did the District Court abuse its discretion when it concluded that Appellants' Due Process rights were not violated by the Storey County Board of County Commissioners' decision to deny the business license?
3. Did the District Court abuse its discretion when it concluded that the Storey County Liquor Board did not violate the Equal Protection Clause?
4. Is Storey County Code Section 5.12.010(A) unconstitutionally vague?

## **V. STATEMENT OF THE CASE**

After being denied liquor and business licenses by the Storey County Board of County Commissioners (the “Commission”) and the Storey County Liquor Board (the “Board”), Appellants filed a Petition for Writ of Mandamus (the “Writ Petition”) in the District Court. The Writ Petition sought a reversal of the Board’s and the Commission’s decisions through the issuance of a writ of mandamus by the District Court to compel the granting of Appellants’ applications for liquor and business licenses. The District Court denied the Writ Petition, and this appeal now follows.

## **VI. STATEMENT OF FACTS**

### **A. Dr. Vincent M. Malfitano Begins His Business Endeavors in Virginia City.**

Appellant Dr. Vincent M. Malfitano (“Malfitano”) is the sole owner of Appellant Virginia City Gaming, LLC (“VCG”) and Appellant Delta Saloon, Inc. (“DSI”). I JA 4. VCG and DSI operate the Delta Saloon (“Delta”) and the Bonanza Saloon (“Bonanza”), which are both located in downtown Virginia City, Nevada. *Id.*

Malfitano purchased the Delta and the Bonanza on October 1, 2014 from their long-time owner and Virginia City resident, Angelo Petrini. I JA 4. Because Malfitano did not have a gaming license upon his purchase of the Delta and the Bonanza, he contracted with a licensed gaming operator to operate the two

properties. *Id.* Malfitano applied for a gaming license with the Nevada Gaming Commission (“NGC”). *Id.*

On August 5, 2015, the Nevada Gaming Control Board (“NGCB”) conducted a hearing on Malfitano’s gaming license application, and the NGCB recommended a denial of his application. I JA 227-233; III JA 512-515. The NGCB’s recommendation was publicly reported and was public knowledge shortly after August 5th. III JA 513. The NGCB’s recommendation was then forwarded to the NGC for consideration. I JA 227-233; III JA 512-515.

On August 20, 2015, the NGC conducted a hearing concerning the NGCB’s recommendation. III JA 556-562; III JA 512-515. Storey County Board of County Commissioner and Chairman Marshall McBride attended this August 20th hearing. I JA 114. At the conclusion of the hearing on August 20th, the NGC denied Malfitano’s application for a gaming license, and on September 17, 2015, the NGC signed and entered an order (the “NGCB Order”) reflecting the adoption of the NGCB’s recommendation by the NGC and the NGC’s denial of Malfitano’s application for a gaming license. I JA 227-233; III JA 512-515.

B. Malfitano Changes His Business Plan for the Delta and the Bonanza.

Because of the gaming license denial, Malfitano set about altering his business plan. I JA 4. Specifically, Malfitano decided to run the Delta and the Bonanza as non-gaming business establishments. I JA 5. This decision required

the removal of gaming equipment from both locations. *Id.* Malfitano terminated the relationship with the gaming operator, and he, VCG, and DSI filed applications with the Board and the Commission for general business licenses and liquor licenses. I JA 4.

C. At the September 1, 2015 Meeting, Promises Are Made.

Initially, it is important to note that the Board presides over all applications for liquor licenses, while the Commission presides over general business license applications. I JA 3. The Board is a four-member board comprised of the three-member Board of County Commissioners along with the Storey County Sheriff. *Id.*

The Commission and the Board first considered the applications for general business and liquor licenses at its September 1, 2015 public meeting. I JA 37-38. Even though the gaming operator at the Bonanza and the Delta would soon no longer be operating the business, the gaming operator still held the business and liquor licenses as of September 1st. *Id.* Thus, the Commission and the Board denied the applications for the liquor and general business licenses solely because there could not be duplicate licenses issued to the gaming operator and Malfitano, VCG, and DSI for the Delta and the Bonanza at the same time. *Id.* However, the Board promised Malfitano that “upon Dr. Malfitano taking control of the businesses, the [liquor license] application will be approved soon after,” and “[t]here would be no delay in obtaining the licenses.” *Id.* The Board also stated

“there is no reason not to license Dr. Malfitano except for the fact that it would be a duplication.” *Id.*

The above statements by the Board on September 1st guaranteeing the issuance of the liquor licenses were made after the Board already knew of the decision by the NGC and the NGCB to deny Malfitano a gaming license. I JA 114. The Board knew of the NGC’s decision because that topic was discussed before the NGC on August 20th, and Chairman McBride personally attended the hearing on August 20th. *Id.*

After the September 1st meeting and prior to the October 6th meeting, Malfitano, VCG, and DSI were issued a temporary liquor license by the Storey County Sheriff after the gaming operator vacated the Bonanza and the Delta. I JA 38; III JA 603-604.

D. At the October 6, 2015 Meeting, Everything Changes.

1. *Liquor License Applications.*

Prior to the October 6th meeting, the Storey County staff recommended approval of the liquor and business license applications for Malfitano, VCG, and DSI. II JA 53. Based on the staff recommendation and on the Board’s earlier promises at the September 1st meeting, Malfitano did not attend the October 6th meeting. VI JA 966-967.

As the Board began the meeting on the liquor license applications<sup>2</sup> and in a departure from the process for the other liquor license application at the meeting, the Board requested comment from its special legal counsel before any discussion between the Board members. I JA 98-102. The Special Counsel presented the legal framework of the relevant sections of the Storey County Code regarding general business and liquor licensing, including Storey County Code Section 5.12.010(A),<sup>3</sup> which provides that in order to be granted a liquor license, an applicant must demonstrate “[p]roof of financial standing to warrant an expected satisfactory and profitable business operation.” I JA 102-105. Special counsel stressed to the Board that it should specify particular reasons for its yet-to-be-made decision. I JA 105.

The Storey County Sheriff then presented the results of the Sheriff’s background investigation into Malfitano. I JA 105. The Sheriff stated that the investigation failed to reveal that Malfitano had any criminal history that would weigh against the granting of a license, and that the investigation demonstrated Malfitano’s significant finances and real estate holdings, which were available to

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<sup>2</sup> As the Board meeting began, two of the Board members – Chairman McBride and Commissioner Lance Gilman – disclosed that they owned competing businesses in downtown Virginia City. I JA 100-101. Nonetheless, they did not recuse themselves from deciding the liquor license applications of Malfitano, VCG, and DSI, which were their competitors. *Id.*

<sup>3</sup> Pursuant to NRAP 28(f), the Storey County Codes that are referenced in this brief are set forth in their entirety in an Addendum at the end of this brief.



operate the Bonanza and the Delta. I JA 105-106. The Sheriff also observed that to him, Malfitano's application was being addressed "with such bravado or gusto" at the meeting due to the recent denial of Malfitano's Nevada gaming license applications. I JA 106. Nevertheless, the Sheriff stressed that the standard for approval for a Nevada gaming license under NRS Chapter 463 is significantly more onerous than the lower standard for approval for county liquor licenses. *Id.* As a result, the Sheriff reiterated that his investigation into Malfitano revealed no issues that would preclude issuance of licenses, and he recommended the Board approve the liquor license applications. *Id.*

In response, the Special Counsel then introduced into the record a copy of the NGCB Order. I JA 106-107; I JA 227-233. The Special Counsel cited portions of the NGCB Order finding that Malfitano had business related problems that supported the denial of the gaming license. I JA 106-107. The Special Counsel suggested that the Board could use the NGCB conclusions when considering Malfitano's financial standing pursuant to Storey County Code Section 5.12.010(A). *Id.*

The Sheriff immediately noted in response that the NGCB's conclusions were in relation to the significantly more onerous standards used in Nevada gaming licensure proceedings as opposed to the lower Storey County Code standards. I JA 108. He then reiterated that the Storey County Sheriff's Office's

investigation showed Malfitano had significant financial resources and real property holdings in excess of \$5 million—sufficient to demonstrate adequate financial standing under the Storey County Code. I JA 108-109.

The Board began its discussions, and the Commissioners stated that the issues cited in the NGCB Order along with the removal of gaming operations (and assumed loss of revenue) call into question the profitability of the businesses going forward. I JA 115-120. The Commissioners' comments demonstrate that they assumed every item in the NGCB Order was accurate and relied on that order wholeheartedly. *Id.* Chairman McBride also stated that the removal of gaming from the Bonanza and the Delta would reduce the business's cash flow by 60 to 70 percent and that the businesses would not be sustainable. I JA 115. Chairman McBride cited to no evidence of this supposed loss of revenue, other than stating that his family has been in gaming since 1931. I JA 115-116.

The Sheriff noted that the previous applicant was licensed without any discussion of the applicant's finances, and if the Board were to selectively look into applicants' financial history and use other licensing entities' conclusions and standards, it appeared to him that the Board was applying a gaming standard to Malfitano, and that its inquiries into applicants are being done in a non-uniform and inconsistent manner. I JA 116-117. The Sheriff went on to state that he believed the incorrect gaming standard was being applied and that there are

licensed individuals in Storey County who have many of the issues raised in the NGCB Order, including prior lawsuits, tax liens, and judgments. I JA 120-121. The Sheriff then questioned whether the Board would have to review its existing licensees and future applicants under a different heightened standard. *Id.*

Chairman McBride then touched on the Board's real problem with Malfitano – he stated that a significant number of residents are “upset and displeased at the decision that now [Malfitano was] going to turn the Delta into a sports bar.” I JA 125. He went on to state that the Delta has a long history of gaming, that his family and the Delta had a friendly rivalry, and that with the Delta now changing its business model, “this isn't the way it's supposed to turn out, not at all.” I JA 125-126. Chairman McBride further noted that the NGC gave Malfitano a window of time to sell the Bonanza and the Delta so that gaming could remain at the properties, which Malfitano declined to do, and Chairman McBride commented that “from my chair, it's – it's not a good path” and “pretty much everybody is displeased [with Malfitano's decision not to sell the two properties].” I JA 126.

The Storey County District Attorney then advised the Board concerning Storey County Code Section 5.12.010(A) and also directed the Board to be specific as to its reasons for approving or denying the liquor licenses. I JA 130-131. Before voting, however, one of the Commissioners worried that the Board “might we want to . . . make a decision later and kind of verify the standings or do we need to?” *Id.*

No other Board member followed up on this comment, and the Board moved to vote on the liquor license applications. Malfitano's liquor license applications were denied, and the only basis provided was "based upon . . . the probability of financial instability to operate successfully here in Virginia City." I JA 131-132. The Sheriff opposed the denial of the applications, and the rest of the Board – made up of the three Commissioners – voted in favor of denial. *Id.* At no time during the October 6th meeting did the Commissioners – or Chairman McBride – explain the reason for the complete reversal of the Board's comments from the September 1st meeting in which they promised to issue the liquor licenses. I JA 100-132.

## *2. Business License Applications.*

The Commission next turned to the general business license applications. The Special Counsel noted that a business license application could be denied under Storey County Code Section 5.04.100(A)<sup>4</sup> until an applicant complies or agrees to comply with other existing ordinances and laws. I JA 132-133.

Storey County staff recommended that the business license for the Delta be granted, but that because the Bonanza had fire code issues, staff recommended denial of the Bonanza's business license. I JA 133-134. The Storey County Fire Protection District Fire Chief spoke in favor of denial, claiming that the Bonanza

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<sup>4</sup> See Footnote 3.

was not safe due to a sprinkler system not being in place. I JA 134-136. The Fire Chief stated that although there was a written agreement between Malfitano, the Bonanza, and Storey County agreeing that a sprinkler system could be installed in several months, the Fire Chief stated that the agreement was null and void in his opinion because he believed that agreement was contingent on Malfitano obtaining a gaming license. *Id.* The Commission then unanimously approved the Delta general business license and denied the Bonanza general business license. I JA 136-137.

E. Malfitano, VCG, and DSI File the Writ Petition To Overturn the Board's and the Commission's Arbitrary Decisions.

As a result of the Board's and the Commission's decisions, Malfitano, VCG, and DSI filed the Writ Petition with the District Court on October 13, 2015. I JA 1-235. They concurrently filed a motion for temporary restraining order and preliminary injunction, which the District Court later denied after a hearing. III JA 497-510. The Court permitted additional briefing by the parties regarding the Writ Petition. In this additional briefing, Malfitano, VCG, and DSI presented additional evidence to the District Court to support the Writ Petition.

Specifically, Malfitano, VCG, and DSI presented to the District Court evidence of the Board's historical practices in granting liquor licenses. Between July 2010 and September 2015, twenty applicants sought a liquor license in Storey County, and all of these applications were granted a liquor license by the Board,

except for a single applicant – Malfitano. III JA 517; III JA 607-629; IV JA 630-694; V JA 695-717.<sup>5</sup> In several instances, licenses were granted when criminal history checks had not yet been obtained, when the applicant's assets were significantly smaller than Malfitano's as shown by the Storey County Sheriff's report, and when the applicant owed money to many others. *Id.* This evidence establishes how Malfitano was inconsistently treated and how he was held to a higher and improper standard. This documentation is also consistent with the Storey County Sheriff's comments at the October 6th meeting that a different and higher standard was being improperly applied to the Appellants. I JA 105-109; I JA 116-121. In briefing before the District Court, the Board failed to address, let alone dispute, any of the five years' worth of documentation reflecting the Board's history of leniently issuing liquor licenses. V JA 751; V JA 718-745.

In addition, at the hearing on October 21, 2015 for the motion for temporary restraining order and preliminary injunction and later in the briefing to the District Court, Malfitano, VCG, and DSI presented a Storey County Business License Inspection Sheet. III JA 606. The Inspection Sheet expressly states that Malfitano "shall have 6 months to install systems after July 1, 2015." *Id.* Six months after July 1st is until January 1, 2016, and this agreement was not contingent on

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<sup>5</sup> The five years' worth of applications were filed under seal with the District Court, and Appellants have concurrently filed a motion to file these same documents under seal with this Court.

Malfitano obtaining a gaming license. *Id.* In its amended order denying the motion for temporary restraining order and preliminary injunction, the District Court concluded that the Storey County Fire Chief's statement to the Commissioners that Appellants were uncooperative was "wrong." III JA 504.

F. The District Court Gives the Board and the Commission a Chance to Explain Their Decisions.

On December 17, 2015, the District Court entered an order directing the Board and the Commission to explain the basis for their denials of Malfitano's, VCG's, and DSI's liquor and business license applications because "[t]he basis for the Boards' decisions is not clear." V JA 757-757. That was, of course, the problem that Malfitano, VCG, and DSI had been pointing out since the filing of the Writ Petition. Because of issues raised by the Writ Petition, the District Court ordered the Board and the Commission to "state on the record the basis for their decisions to deny the applications." *Id.*

On January 5, 2016, the Commission and the Board met pursuant to the District Court's directive, and the statements were telling. V JA 759-760. With respect to the denial of the liquor licenses, Chairman McBride stated that the sole facts underlying his decision was information that he obtained while attending the NGC hearing on August 20, 2015. V JA 769-770. That information did not apparently include the Sheriff's report. *Id.* Chairman McBride explained that he relied on the NGCB and its investigators, and **"I came back with the view that**

under Storey County Code, this business didn't qualify to receive a liquor license." *Id.* (emphasis added).

In his comments, Commissioner Gilman stated that his decisions were also driven by the information discussed at the NGC hearing and by Chairman McBride's comments. V JA 770-771. Commissioner Gilman also mentioned considering NGC Commissioner Townsend's comments from the NGC hearing,<sup>6</sup> and the Sheriff's comment that he did not think the business would succeed. V JA 771. Despite Commissioner Gilman's recollection, the Sheriff voted in favor of the liquor license being issued. V JA 772.

Commissioner McGuffey echoed the other Commissioners' comments, and he noted that although Malfitano had \$5 million in assets, he had other debt related to the Bonanza and the Delta and that it was brought up that Appellants were \$12 million in debt. V JA 771-772. He also stated that at the October 6th hearing, "it was noted that the loss of the gaming equates to about either 60 or 70 percent of the cash flow lost in those establishments." V JA 772.

With respect to the business licenses, Chairman McBride stated that he voted to deny the business license application because of the Storey County Fire

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<sup>6</sup> Commissioner Gilman's reference to NGC Commissioner Townsend's comments actually refers to a statement made by Chairman McBride on October 6th at the Board meeting. I JA 115. At the October 6th meeting, Chairman McBride restated what he had heard NGC Commissioner Townsend say at the August 20th NGC hearing. *Id.*



Chief informing the Commission that “they hadn’t been able to get the applicant to comply with their request of having a sprinkler system installed in the [Bonanza] property,” and “nothing had been completed upon the request of the Fire Protection District, so at that point, they deemed that the agreement was null and void.” V JA 762-763. Commissioner Gilman and Commissioner McGuffey echoed Chairman McBride’s comments. *Id.*

G. The District Court Permits Additional Briefing and Evidence and Then Renders Its Decision.

After the Board and the Commission met again on January 5, 2016, the District Court permitted additional briefing by the parties. V JA 776-778. In that briefing, Malfitano, VCG, and DSI submitted additional evidence to the District Court. In particular, at the October 6th meeting – and later reiterated during their January 5th comments – the Board stated that its denial was supported by the fact that despite the \$5 million in assets that the Sheriff’s report identified, Malfitano was supposedly \$12 million in debt. V JA 771-772. That is incorrect. As the evidence submitted to the District Court showed, the \$12 million debt that was being referred to is a mortgage on a large-scale and on-going assisted living facility in Antioch, California that Malfitano owns. V JA 792-793. A separate company, Cypress Meadows Antioch, LLC (“Cypress Meadows”), owns the living facility, which is a business that is controlled by Malfitano. *Id.* However, that company has

nothing to do with the Bonanza, the Delta, VCG, or DSI, and that company did not apply for a liquor license in Storey County. *Id.*

Also, the \$12 million debt is not a personal debt to Malfitano; it is solely a corporate debt of Cypress Meadows. V JA 792-793. The debt is secured by the facility and its real estate is worth more than \$12 million. *Id.* That debt is also non-recourse to Cypress Meadows and Malfitano, meaning that the lender cannot recover further compensation from Cypress Meadows or Malfitano and meaning that it has absolutely no bearing on Malfitano's personal financial standing for the purposes of the liquor licenses. *Id.* Malfitano also has received several informal offers in the last two years to buy Cypress Meadows and its assets, and these offers have exceeded \$18 million. *Id.* Moreover, Malfitano, VCG, and DSI have no tax liens, foreclosures, or judgments that remain owing or unsatisfied, and any that did exist are now over eight years old. *Id.* Consequently, all of the matters that related to the NGCB investigation have been resolved for several years. *Id.* Because the Board totally reversed its September 1st promises at the October 6th meeting, however, none of the above information could be provided to the Board prior to its decision. Yet, all of the above evidence was presented to the District Court. *Id.*

On March 7, 2016, the District Court entered its order denying the Writ Petition.<sup>7</sup> VI JA 858-870. The District Court concluded that the Board and the Commission did not violate Malfitano's, VCG's, or DSI's Due Process rights and did not treat them unequally in violation of the Equal Protection Clause. *Id.* The District Court also concluded that Storey County Code Section 5.12.010(A) was not unconstitutionally vague. *Id.*

## **VII. SUMMARY OF ARGUMENT**

Appellants held a legally protectable property interest because they had already obtained a temporary liquor license and because Appellants and the Board had already come to an agreement or understanding on the liquor licenses being granted. The Board harmed that property interest by failing to satisfy fundamental notions of Due Process in multiple ways (which the District Court recognized in an earlier order in the case) and by refusing to issue permanent liquor licenses to Appellants. Moreover, in refusing to issue a business license, the Commission relied on erroneous information. Consequently, Appellants' Due Process rights

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<sup>7</sup> Prior to the issuance of the order denying the Writ Petition, the District Court contacted the Storey County District Attorney asking it to submit an order denying the Writ Petition. VI JA 914-915. Appellants' counsel was not included in that communication, and prior to submitting the draft order to the District Court, the Storey County District Attorney did not provide a draft of the order to Appellants' counsel in conformity with FJDCR 19(4), FJDCR 32(3), or local custom and practice. VI JA 886-889.

were violated, and the District Court abused its discretion by upholding the Board's and the Commission's decisions.

The Board also intentionally treated Appellants differently than other liquor license applications without a rational basis to do so. Not only do five years' worth of liquor license applications demonstrate how differently the Board treated Appellants, but the Board's comments on two separate occasions also evidence its prejudices and preferences as well as how it applied an incorrect and higher standard to Appellants' liquor license applications. As such, Appellants were subjected to disparate treatment in violation of the Equal Protection Clause.

In addition, Storey County Code Section 5.12.010(A) is unconstitutionally vague because it fails to delineate specific standards as to what is or is not "satisfactory." This necessarily leads to subjective and arbitrary results, which is what occurred in this case.

For all of these reasons, the District Court's denial of the Writ Petition constitutes an abuse of discretion, and its decision should be reversed.

### **VIII. ARGUMENT**

#### **A. The District Court Abused Its Discretion When It Concluded that Appellants' Due Process Rights Were Not Violated by the Board's Decision to Deny the Liquor Licenses.**

##### **1. *Standard of Review.***

"A writ of mandamus is available to compel the performance of an act that the law requires . . . or to control an arbitrary or capricious exercise of discretion."

*Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). “Mandamus will not lie to control discretionary action, unless discretion is manifestly abused or is exercised arbitrarily or capriciously.” *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 603–04, 637 P.2d 534, 536 (1981). An exercise of discretion is considered arbitrary if it is “founded on prejudice or preference rather than on reason” and capricious if it is “contrary to the evidence or established rules of law.” *State v. Dist. Court (Armstrong)*, 127 Nev. 927, 931-32, 267 P.3d 777, 780 (2011) (citation omitted).

After the district court renders a decision on the writ of mandamus, this Court reviews the granting or denial of a writ of mandamus for an abuse of discretion. *Veil v. Bennett*, 131 Nev., Adv. Op. 22, 348 P.3d 684, 686 (2015); *see also DR Partners v. Bd. of County Comm'rs*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000). In applying this abuse of discretion standard, this Court has noted that although the district court has discretion, “this discretion is a legal discretion and cannot be sustained where there is no competent evidence to justify the court’s action.” *Lukey v. Thomas*, 75 Nev. 20, 22, 333 P.2d 979, 979 (1959).

## 2. *Argument.*

“The protections of due process attach only to deprivations of property or liberty interests.” *Burgess v. Storey County Bd. of Com'rs*, 116 Nev. 121, 124, 992 P.2d 856, 858 (2000) (quoting *Tarkanian v. Nat'l Collegiate Athletic Ass'n*, 103

Nev. 331, 337, 741 P.2d 1345, 1349 (1987)). Nevada courts have recognized that property interests subject to due process protections include an already issued license like in *Burgess*. *Burgess*, 116 Nev. at 124, 992 P.2d at 858. Most importantly, a party may have a protected property interest in a temporary license. *Groten v. California*, 251 F.3d 844, 850 (9th Cir. 2001) (holding that plaintiff had a protected property right to a temporary appraiser's license).<sup>8</sup>

Courts recognize that a protected property interest must stem from state law or from other understandings that support claims of entitlement to that interest. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). In *Gerhart v. Lake County, Mont.*, 637 F.3d 1013, 1020 (9th Cir. 2011), the plaintiff argued that the practices of the county commissioners supported his claim for an entitlement to the permit he sought. "The Supreme Court has long recognized the existence of constitutionally protected property interests where a governmental body employs policies and practices that create a legitimate claim of entitlement to a government benefit." *Gerhart*, 637 F.3d at 1020 (citing *Perry v. Sindermann*, 408 U.S. 593, 601, 92 S.Ct. 2694, 33 L.Ed.2d

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<sup>8</sup> Case law applying the Due Process clauses from the Fifth and Fourteenth Amendments to the U.S. Constitution apply with equal force in this case. *Reinkemeyer v. Safeco Ins. Co. of Am.*, 117 Nev. 44, 50, 16 P.3d 1069, 1072 (2001) (stating the Nevada Constitution's due process clause uses "virtually mirror" language to the U.S. Constitution, and Nevada therefore "look[s] to federal caselaw for guidance"). The same is equally true for other federal cases cited by Appellants on matters involving constitutional issues.

570 (1972) (holding that a protected property interest exists where there are “rules or mutually explicit understandings that support [a plaintiff’s] claim of entitlement to the benefit”)).

In *Gerhart*, the plaintiff argued that the commissioners’ practices created a system for granting permits that gave him a claim of entitlement to the permit. The *Gerhart* court disagreed and concluded that there was no evidence of an “agreement” or “mutual understanding” with the county, and that “[a] person’s belief of entitlement to a government benefit, no matter how sincerely or reasonably held, does not create a property right if that belief is not mutually held by the government.” *Gerhart*, 637 F.3d at 1020. In other words, a government’s practices alone might not create an entitlement to a government benefit, but when there is mutuality of agreement and understanding between the parties, that is enough to create the entitlement under the law. *Gerhart*, 637 F.3d at 1021.

In its order denying the Writ Petition, the District Court concluded that Malfitano did not have a protectable property interest because he relied only on the comments of one Board member and that those comments were later clarified to mean that the Board would again consider Malfitano’s liquor license application, not necessarily approve it. VI JA 865-866. There are three ways in which the District Court abused its discretion – one relates to the District Court ignoring

Malfitano's temporary license, the second relates to timing, and the third relates to ignoring the weight of the evidence.

a) *Appellants Have a Protectable Property Interest Because They Had a Temporary License.*

After the September 1st meeting and prior to the October 6th meeting, Malfitano, VCG, and DSI were issued a temporary liquor license by the Storey County Sheriff after the gaming operator vacated the Bonanza and the Delta. I JA 38; III JA 603-604. Courts have held that a plaintiff claiming a Due Process Rights violation has a legally protectable property right in a temporary license. *Groten*, 251 F.3d at 850. In its denial of the Writ Petition, however, the District Court completely ignored this fact. VI JA 858-869. This is critical because regardless of whether this Court concludes that there were or were not promises made, an agreement reached, or an understanding developed between the Board and Malfitano on September 1st about the issuance of the liquor licenses, it is uncontested that Malfitano had a temporary license as of October 6th, thereby having a legally protectable property right at the time of the Board's decision on October 6th, which affords Malfitano Due Process protections. By ignoring the temporary license, the District Court abused its discretion.



b) *The District Court's Decision Ignores the Timing of the Events.*

Although the District Court concluded that the Board's September 1st promises were later "corrected to clarify" on October 6th that the Board would not uphold those promises, the damage was done, and it was too late. It was too late because in reliance upon those promises and on the staff recommendation to approve the liquor licenses, Malfitano did not attend the hearing on October 6th when the Board completely reversed its position. VI JA 966-967. As the District Court noted in its order denying the motion for a temporary restraining order, Malfitano was not advised at any time between the Board meeting on September 1st and the Board meeting on October 6th that: (i) the NGC's decision would be discussed on October 6th; (ii) the NGC's decision would be used as a basis to deny the liquor licenses; (iii) the Board intended to go back on its promises to Malfitano from the September 1st meeting that it would issue the liquor license; or (iv) Malfitano should attend on October 6th and be prepared to answer questions about the NGC's decision. III JA 502.

The Board has not contested – because they cannot contest – that the minutes of the September 1st meeting provide that Chairmen McBride, speaking on behalf of the entire Board, stated that:

- “Upon Dr. Malfitano taking control of the businesses, the [liquor license] application will be approved soon after.”

- “There would be no delay in obtaining the licenses.”
- “There is no reason not to license Dr. Malfitano except for the fact that it would be a duplication.”

III JA 590-591.

It was not until the October 6th meeting that Chairman McBride attempted to walk back or “clarify” his September 1st comments, claiming that he “misspoke.” I JA 123-124. By failing to note the time between the Board’s September 1st promises and Malfitano’s reliance on them and then the later attempts to “clarify” those promises on October 6th, the District Court abused its discretion. In ruling on the Writ Petition, the District Court did not consider that the late clarification was of no effect whatsoever because the harm to Malfitano had already occurred. Ironically, the District Court did understand the significance of this problem in its order denying the motion for a temporary restraining order when it questioned the fairness of the October 6th hearing and accurately described it as an “ambush” and that Malfitano was “blind sided.” III JA 502. However, the District Court ignored these very points in ruling on the Writ Petition, which amounts to an abuse of discretion.

It is also worth emphasizing that despite Chairman McBride’s claim of misspeaking, at the time that he made his promises to Malfitano on September 1st, Chairman McBride already knew about the NGC’s decision to deny Malfitano a

gaming license because he attended the NGC's hearing. I JA 114. Despite that, Chairman McBride promised Malfitano that the license would be granted as soon as the duplication issue was set aside. I JA 37-38. To date, the Board and Chairman McBride have provided no explanation for their 180 degree reversal.

- c) *The Weight of the Evidence Establishes that the Board and Malfitano Had an Agreement or Understanding that the Liquor Licenses Would Be Granted.*

Even if the Court concludes that the issuance of the temporary license does not create a protectable property interest, the District Court ignored the weight of the evidence establishing that Malfitano and the Board did develop an agreement or understanding regarding the issuance of the liquor license. The *Gerhart* analysis directly applies to this case. However, in contrast to *Gerhart*, there is actual and substantial proof of an "agreement" and "mutual understanding" between the Board and Appellants, and these are in the statements and promises noted above that were made to Malfitano on September 1st. III JA 590-591. These statements by the Board clearly establish an intentional agreement and mutual understanding between the Board and Malfitano that the issuance of the licenses at the next meeting on October 6th was a *fait accompli*. Also, the Board's statements were made after it already knew of the NGC's Order, and despite that knowledge, it agreed to grant the liquor licenses to Malfitano once the duplication issue was resolved.

Additionally, the District Court ignored the strong and substantial evidence of the Board's historical practices in granting all liquor license applications that came before it, other than Malfitano's. III JA 517; III JA 607-629; IV JA 630-694; V JA 695-717. In many instances, licenses were granted when criminal history checks had not yet been obtained, when the applicant's assets were significantly smaller than Malfitano's, and when the applicant owed money to many others. *Id.* As noted in *Gerhart*, the Board's historical practices coupled with a mutuality of agreement and understanding between the parties creates an entitlement under the law. *Gerhart*, 637 F.3d at 1021. This pattern also highlights how Malfitano was treated inconsistently and was held to a higher and improper standard. Moreover, it is important to emphasize that the five years' worth of documents are consistent with the Storey County Sheriff's comments at the October 6th meeting that a different and higher standard was being improperly applied to the Appellants. I JA 105-109, 116-121.

Accordingly, Appellants' claim of entitlement to the liquor licenses is grounded in: (i) the Board's past practice of leniently granting these licenses; (ii) the agreement and mutual understanding that Appellants had with the Board as evidenced by the actions and statements of the Board on September 1st and which Malfitano relied upon; and (iii) the temporary liquor license that Malfitano

obtained prior to the October 6th meeting. The District Court ignoring all of this evidence constitutes an abuse of discretion.

d) *The Board's Process and Decisions Were Fundamentally Flawed.*

Once a protected property interest is established, a plaintiff claiming a violation of procedural due process must then allege that the governmental body used procedures that were constitutionally inadequate. *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989). Here, like in *Burgess* and as already noted by the Court in the Amended Order, Appellants were not advised at any time between the Board meeting on September 1st and the Board meeting on October 6th that: (i) the NGC's decision would be discussed on October 6th; (ii) the NGC's decision would be used as a basis to deny the liquor licenses; (iii) the Board intended to go back on its promises to Malfitano from the September 1st meeting that it would issue the liquor license; and (iv) Malfitano should attend on October 6th and be prepared to answer questions about the NGC's decision. III JA 502. None of these things happened, and instead, as described by the Court in the Amended Order, it became an "ambush." *Id.* Not only did the proceedings become an ambush, but the proceedings were flipped on their head when the Board completely reversed its guarantee from September 1st to issue the licenses to Malfitano.

In addition, as the Court has already stated in the Amended Order, “[t]he County Commission did not delay, did not seek additional information as to why the Sheriff’s report was so different from the NGCB’s Order, did not seek to verify anything, and did not give Malfitano an opportunity to be heard.” III JA 503. Instead, the Board:

- Prejudged Appellants’ liquor license applications because of comments heard at the NGC hearing on August 20, 2015 (*i.e.* “**I came back with the view** that under Storey County Code, this business didn’t qualify to receive a liquor license.”). V JA 769-770.
- Wrongly relied on the opinion of Chairman McBride, who stated that without gaming at Appellants’ properties, cash flow would be reduced by 60 to 70 percent, which meant that in his opinion the properties would not be a sustainable business for Appellants. I JA 115. That was clearly his own opinion, and most importantly, his statement was without any testimonial or documentary support whatsoever.
- Erroneously relied on statements from the NGC hearing on August 20th that Appellants were \$12 million in debt, and had lawsuits, liens, and foreclosures. V JA 771-772. In fact, none of this is true (V JA 792-793), and because of the Board’s actions, Appellants did not have the opportunity to provide this information to the Board.

In the *City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994), this Court accepted “the definitions of arbitrary and capricious, respectively, as ‘baseless’ or ‘despotic’ and ‘a sudden turn of mind without apparent motive; a freak, whim, mere fancy.’” *Id.* at 1222, 885 P.2d at 548 (citation omitted). In another case, this Court stated that “[a]n arbitrary or capricious exercise of discretion is one ‘founded on prejudice or preference rather than on reason,’ Black’s Law Dictionary 119 (9th ed. 2009) (defining “arbitrary”), or ‘contrary to the evidence or established rules of law,’ *id.* at 239 (defining “capricious”).” *Dist. Ct. (Armstrong)*, 127 Nev. at 931-32, 267 P.3d at 780.

Here, on October 6th and with “a sudden turn of mind without apparent motive,” the Board went in a completely new direction regarding the liquor licenses, despite its previous promises to Malfitano. It did so despite the Storey County Sheriff stating that his investigation established that Appellants had provided proof of financial standing sufficient to be issued liquor licenses, and he recommended that the licenses be issued. I JA 105-106. By its own admission and its comments on January 5th, the Board did not consider the Sheriff’s report, despite it being the only accurate and competent evidence before it and despite Sheriff’s report having been relied upon in five years’ worth of liquor license applications.

Moreover, because the Board knew of the NGC's and NGCB's decisions when it made its September 1st promises to Malfitano, there can be no explanation for the Board's flip flop other than a motivation that is one "founded on prejudice or preference rather than on reason," and one that is "contrary to the evidence or established rules of law." *Dist. Ct. (Armstrong)*, 127 Nev. at 931-32, 267 P.3d at 780. This is the very definition of an arbitrary and capricious decision, and as demonstrated by the record before the District Court, the Board's prejudice and preference for having gaming at the Delta and the Bonanza unfortunately infected the proceedings. Although the District Court recognized the defects in the process as stated in its Amended Order (III JA 503), its failure to reach the necessary conclusion based on its own findings constitutes an abuse of discretion.

B. The District Court Abused Its Discretion When It Concluded that Appellants' Due Process Rights Were Not Violated by the Commissions' Decision to Deny the Business License.

1. *Standard of Review.*

The standard of review is the same standard that is set forth in Section VIII(A)(1) above.

2. *Argument.*

At the temporary restraining order hearing on October 21st, Appellants presented a Storey County Business License Inspection Sheet, and it was also attached to Appellants' briefing. III JA 606; VI JA 958, 963. The Inspection Sheet expressly states that Appellants "shall have 6 months to install systems after



July 1, 2015.” III JA 606. Six months after July 1st is until January 1, 2016, and this agreement was not contingent on Malfitano obtaining a gaming license. *Id.* Although the Storey County Fire Chief testified that the Appellants had not been cooperating for months, the Inspection Sheet disproves that, and the District Court concluded in its Amended Order that the Fire Chief’s statement to the Commission was “wrong.” III JA 504. Notwithstanding that fact, the District Court concluded that the Commissioners’ decision to deny the business license was not arbitrary or capricious because according to the Fire Chief, the building was not safe. VI JA 864.

The District Court’s decision on the business license constitutes an abuse of discretion for two reasons. First, based on the Fire Chief’s own statements on October 6th, no changes had been made to the building while he continued to work with Appellants on the building. I JA 134-135. Taking that as true, the Fire Chief nonetheless agreed to allow Appellants through the end of 2015 to remedy the fire sprinklers. III JA 606. Similar to the Board’s flip flop, it is impossible to reconcile the Fire Chief stating in the Inspection Sheet on May 21, 2015 that the building was safe enough to allow Appellants until January 1, 2016 to install fire sprinklers with his statement on October 6th that suddenly the building was not safe. When there can be no explanation for the Fire Chief’s flip flop other than a motivation that is one “founded on prejudice or preference rather than on reason,” and one that

is “contrary to the evidence or established rules of law,” it is by definition an arbitrary and capricious decision. *Estate of Wells*, 110 Nev. at 1222, 885 P.3d at 548; *Dist. Ct. (Armstrong)*, 127 Nev. at 931-32, 267 P.3d at 780.

Second, the record before the District Court establishes that the Commission’s decision was based on incorrect and incomplete information. Whether by negligence or whether by an intentional omission, on October 6th, the Commission was not presented with the Inspection Sheet that clearly established that Appellants had until January 1, 2016 to install the sprinkler system by the previous agreement with the Fire Chief. Nevada law provides that a fact cannot be “wrong” and not also be arbitrary and capricious. An incorrect fact is by definition arbitrary and capricious because it is “contrary to the evidence.” *Dist. Ct. (Armstrong)*, 127 Nev. at 931-32, 267 P.3d at 780.

Because the Commission’s decision was contrary to the evidence, the District Court’s decision to uphold the Commission’s denial of the business license was an abuse of discretion.

C. The District Court Abused Its Discretion When It Concluded that the Board Did Not Violate the Equal Protection Clause.

1. *Standard of Review.*

The standard of review is the same standard that is set forth in Section VIII(A)(1) above.

## 2. *Argument.*

In its order denying the Writ Petition, the District Court concluded that Malfitano was not denied equal protection of laws because the Board had more information about Malfitano as a result of the NGC's decision. VI JA 867-868. Even if the Board arguably had more information about Malfitano than other liquor license applicants, that does not excuse disparate treatment when the evidence relied upon by the Board is erroneous. The Equal Protection Clause of the U.S. Constitution guarantees that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws," and the Nevada Constitution offers similar protections. U.S. Const. amend. XIV, § 1; *see also* Nev. Const. art. 1, § 7(b) and art. 4, § 21.

The United States Supreme Court has recognized that even if a plaintiff is not a member of a protected class, s/he may still bring an equal protection claim if s/he has been denied the equal protection of the law. In such a "class-of-one" claim, the plaintiff must demonstrate that s/he "has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000) (per curiam); *see also Gerhart v. Lake County, Mont.*, 637 F.3d 1013, 1021-1022 (9th Cir.2011). This Court has similarly recognized such claims. *In re Candelaria*, 126 Nev. 408, 416-17, 245 P.3d 518,

523 (2010) (explaining that an equal protection claim arises when a statute treats similarly situated people differently). To succeed on a “class of one” claim, Appellants must demonstrate that the Board: (1) intentionally (2) treated them differently than other similarly situated property applications, (3) without a rational basis. *Gerhart*, 637 F.3d at 1022; *see also Willowbrook*, 528 U.S. at 564.

As to the intent element, Appellants must show that the Board intended to treat them differently from other applicants. *Gerhart*, 637 F.3d at 1022. The evidence that the Board intended to treat Appellants differently, includes: (i) the Board promising Appellants on September 1st that the license would be granted, and it did so already knowing of the NGC’s decision. I JA 114; I JA 37-38. The only explanation for the Board’s flip flop is that it intended to treat Appellants differently; (ii) the Board was aware that its treatment of Appellants’ application was irregular because the Storey County Sheriff repeatedly noted that Appellants were being singled out and were being treated differently. I JA 106, 108-109, 116-117, 120-121; and (iii) although the *Gerhart* court noted that animosity is not a factor regarding the intent element, evidence of animosity exists in this case and is also evidence of the Board’s intention to treat Appellants differently. *Gerhart*, 637 F.3d at 1022-23. Regarding this last point, on October 6th, Chairman McBride spoke of the Delta’s history of gaming, and that “this isn’t the way it’s supposed to turn out, not at all.” I JA 125-126. He then stated that the NGC gave Malfitano

time to sell the properties to another person who would operate them as gaming properties, but Malfitano instead chose to run the properties as non-gaming businesses. I JA 126. Chairman McBride stated that “from my chair, it’s – it’s not a good path,” and that “pretty much everybody is displeased [with Malfitano’s decision not to sell the Properties].” *Id.* These comments demonstrate the Board’s motivation and intention to treat Appellants differently. The Board was unhappy with Appellants’ business plan for the Bonanza and the Delta, and that displeasure drove the decision-making process.

With respect to the disparate treatment element, the record before the District Court establishes considerable evidence of Appellants being treated differently than other applicants. In the last five years, the Board has received applications from twenty individuals or businesses, and not only have these applicants all been granted liquor licenses (except for Malfitano), but they have been granted licenses with minimal vetting and minimal investigation by the Board as previously noted. III JA 517; III JA 607-629; IV JA 630-694; V JA 695-717.

As the Storey County Sheriff plainly stated on October 6th, Appellants were held to a higher and improper standard, a standard that has never been employed in the history of the Board. This is why the Sheriff voiced his view that new standards were being used by the Board and that it was vastly different from past practices. I JA 105-109, 116-121. This is the very concern at the heart of a claim

for an Equal Protection violation. Indeed, the Board took the conclusions from the NGCB's Order, which were all made in relation to the analysis for Nevada gaming licensure under NRS 463.170 and which were unverified and conclusory, and applied them to the much lower standard to get a liquor license.

As to the rational basis element, Appellants must show that there was not a rational basis for treating Appellants differently from other applicants. *Gerhart*, 637 F.3d at 1023. As the Court has already stated in the Amended Order, "[t]he County Commission did not delay, did not seek additional information as to why the Sheriff's report was so different from the NGCB's Order, did not seek to verify anything, and did not give Malfitano an opportunity to be heard." III JA 503. The Board failed to allow Appellants an opportunity to respond to new concerns being raised, which were so diametrically different than the Board having previously stated on September 1st that "[t]here is no reason not to license Dr. Malfitano except for the fact that it would be a duplication." I JA 37-38. Furthermore, the Board did not stop to verify information in the NGC's Order, which are simply a series of conclusions, not facts, as the District Court previously noted. Having information that is not vetted or verified and then relying on it without allowing Appellants to know of the impending reliance upon such information or to allow Appellants to respond is not rational. Equal Protection demands more, and the Board's decision and its decision-making process were fundamentally flawed.

Suffice it to say, when you consider the Board flip flopping its position after making promises to Appellants, consider the Board ignoring the only accurate and competent evidence in the record regarding Appellants' financial status (the Sheriff's report) and instead relying on information that was not vetted or verified, consider the higher standard that was applied instead of the Storey County Code, consider the failure to let Appellants know of the impending reliance upon extraneous information, and consider the failure to allow Appellants to respond to the additional information, the Board's decision cannot be viewed as rational and cannot be viewed as legally supportable. There was not a rational or reasonable basis for the Board to treat Appellants differently from previous applicants, and this is especially true in light of the Board's promise to issue the licenses on September 1st.

Accordingly, the Board's denial of the liquor licenses to the Appellants is an Equal Protection violation, and the District Court's decision to uphold the Board's denial constitutes an abuse of discretion.

D. Storey County Code Section 5.12.010(A) Is Unconstitutionally Vague.

1. *Standard of Review.*

The constitutionality of a statute or ordinance presents a question of law that this Court reviews de novo. *State v. Hughes*, 127 Nev. 626, 628, 261 P.3d 1067, 1069 (2011).

## 2. *Argument.*

A statute or ordinance may be unconstitutionally vague and therefore void. The void for vagueness doctrine upholds critical Due Process rights, which are afforded to every citizen under the Nevada and United States Constitutions. U.S. Const. amend. V and XIV, § 1; Nev. Const. art. 1, § 8(5). Although the challenger bears the burden of establishing that a statute or ordinance is unconstitutional, it may be unconstitutionally void for vagueness if it “lacks specific standards” to guide its enforcement so as “to prevent arbitrary and discriminatory enforcement.” *Silvar v. Eighth Judicial Dist. Court*, 122 Nev. 289, 293, 129 P.3d 682, 685 (2006). Indeed, a vague law permits, and even encourages, arbitrary and discriminatory enforcement. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170, 92 S. Ct. 839, 847, 31 L. Ed. 2d 110 (1972). Moreover, the legal analysis used to evaluate a statute’s constitutionality is equally applied to analyze the constitutionality of county ordinances. *See, e.g., Silvar*, 122 Nev. at 292, 129 P.3d at 684; *Eaves v. Board of Clark County Comm’rs*, 96 Nev. 921, 923, 620 P.2d 1248, 1249-50 (1980).

Storey County Code Section 5.12.010(A) provides that applicants must provide “[p]roof of financial standing to warrant an expected satisfactory and profitable business operation.” No description or further explanation is provided for what is an “expected satisfactory” business operation. There are no specific



standards delineated in the ordinance as to what is or is not “satisfactory.” The term “satisfactory” is vague on its face because it is necessarily subjective and does not guide any applicant with specific standards on what may or may not be “satisfactory” to the Board. The ordinance also places the Board in the awkward position of having to judge a business’s likelihood of success prior to the business operating.

Statutes with similar language, albeit in different settings, have been struck down. In *McCormack v. Herzog*, 788 F.3d 1017 (9th Cir. 2015), an Idaho woman filed suit arguing that an Idaho abortion law was unconstitutionally vague. The law required physicians to make “satisfactory arrangements” with a hospital in order to perform procedures. The challenger argued that whether “satisfactory arrangements” with a hospital have been made does not suggest objectively determinable facts. The Ninth Circuit upheld the district court’s ruling that the term “satisfactory” was unconstitutionally vague because the term “lack[s] precise definition, and subject[s] physicians to sanctions based not on their own objective behavior, but on the subjective viewpoints of others.” *Id.* at 1031 (internal quotations and citations omitted). The court went on to note that the term “satisfactory” is not defined in the statute and is not a term of art. *Id.* Moreover, the term is “subjective and open to multiple interpretations.” *Id.*

The district court and the Ninth Circuit in *McCormack* even turned to the dictionary definition of “satisfactory,” which provided that “[s]atisfactory” means ‘sufficient to meet a condition or obligation.’” *Id.* However, instead of providing direction or clarity, the court concluded that “the definition[] raise[s] the same questions as the terms themselves: . . . satisfactory . . . or sufficient according to whom or what standard?” *Id.*

In applying a de novo review to this issue on appeal, the same analysis and concerns detailed in *McCormack* apply with equal measure to this case. Storey County Code Section 5.12.010(A) fails to define the term “satisfactory,” and it “lacks specific standards” to guide its enforcement. Also, the term “satisfactory” as used in Section 5.12.010(A) is subjective and is open to multiple interpretations just like in *McCormack*. Unsurprisingly, these failures in the ordinance have led to the Due Process concerns at the heart of the void for vagueness doctrine – arbitrary and discriminatory enforcement. *See Silvar*, 122 Nev. at 293, 129 P.3d at 685; *Papachristou*, 405 U.S. at 170. Appellants were held to a wrong, higher standard (*i.e.* the NGC’s gaming license standard), and they were treated unfairly, unreasonably, and differently by the Board when it determined that Appellants did not meet the requirements of Section 5.12.010(A).

Simply put, an ordinance that is vague enough to allow a governmental body free reign to rule upon and prejudge what it believes will not be a “satisfactory”

business operation leads directly to the arbitrary result that occurred here, which is constitutionally unsupportable. This problem was compounded when the Board ignored the actual evidence before it in the form of the Sheriff's report and only relied on the Board's assumptions about supposed lost revenue, rather than actual evidence. Accordingly, Storey County Code Section 5.12.010(A) is void for vagueness, and due to the pervasive Due Process violations in this case, the Court should grant the Writ Petition and order the Board to issue the liquor licenses to Appellants.

#### **IX. CONCLUSION**

The District Court's denial of the Writ Petition constitutes an abuse of discretion. The record before the District Court – and the record before this Court – unequivocally demonstrates that the Board and the Commission (i) prejudged Appellants' liquor license applications because of comments heard at the NGC hearing; (ii) wrongly relied on the opinion and assumptions of the Board and its Chairman, instead of actual evidence or facts; (iii) incorrectly applied the wrong legal standard in evaluating Appellants' applications; namely, they applied the gaming license standard used by the NGC for gaming applications, instead of applying Storey County Code Section 5.12.010(A), which is for liquor license applications in Storey County; and (iv) erroneously relied on the NGC's Order and

statements from the NGC hearing, instead of allowing Appellants an opportunity to respond to that conclusory order and statements.

Taken together, the Board's and Commission's decisions and process were fatally defective from the beginning to the very end, and the District Court's decision to uphold those decisions constitutes an abuse of discretion. Accordingly, Appellants request that this Court reverse the District Court's dismissal of the Writ Petition and remand to the District Court for the issuance of a writ of mandamus to compel the Board and the Commission to approve Appellants' applications for liquor licenses and VCG's application for a general business license.

DATED this 18th day of August, 2016.

/s/ Matthew B. Hippler

Matthew B. Hippler, Esq.

Nevada Bar No. 7015

Scott Scherer, Esq.

Nevada Bar No. 87

Brandon C. Sendall, Esq.

Nevada Bar No. 13246

HOLLAND & HART LLP

5441 Kietzke Lane, Second Floor

Reno, Nevada 89511

Tel: (775) 327-3048

Fax: (775) 786-6179

*Attorneys for Appellants*

## **X. CERTIFICATE OF COMPLIANCE**

1. 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 it has been prepared in a proportionally spaced typeface using Microsoft Word, Version 7, size 14, Times New Roman.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, and contains 10,027 words.

3. Finally, 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)(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 August, 2016.

/s/ Matthew B. Hippler

Matthew B. Hippler, Esq.

Nevada Bar No. 7015

HOLLAND & HART LLP

5441 Kietzke Lane, Second Floor

Reno, Nevada 89511

Tel: (775) 327-3048

Fax: (775) 786-6179

*Attorneys for Appellants*

### **CERTIFICATE OF SERVICE**

Pursuant to SCR 5(B), I certify as follows:

I am employed in the City of Reno, County of Washoe, State of Nevada by the law offices of Holland & Hart LLP. My business address is 5441 Kietzke Lane, Second Floor, Reno, Nevada 89511. I am over the age of 18 years and not a party to this action.

On August 18, 2016, I electronically filed the foregoing **APPELLANTS' OPENING BRIEF** with the Clerk of the Nevada Supreme Court via the Court's e-Flex system. Service will be made by e-Flex on all registered participants. In addition, I have served a copy of the above-named document via dropbox or similar program.

Anne Langer  
Storey County District Attorney  
Keith Loomis  
Deputy District Attorney  
P.O. Box 496 201 South C Street  
Virginia City, NV 89440

/s/ Marcia Filipas  
Marcia Filipas

## ADDENDUM

Pursuant to NRAP 28(f), the Storey County Ordinance sections that are referred to in Appellants' Opening Brief are reproduced below.

### Storey County Ordinance Section 5.04.100 Refusal

A. A license may be refused by any licensing agency until an applicant complies or agrees to comply with all other existing ordinances and laws in force, including the county master plan, and a license may be revoked for failure to comply therewith.

B. No business license shall be issued or renewed when, at the time of making application for any license or renewal thereof, the applicant, whether a tenant, legal owner, or landlord of the intended place of business is indebted to the county for any unpaid real property taxes or personal property taxes. The tax receiver may enter into an agreement with any person so indebted to the county to establish a schedule for the payment of such indebtedness and any delinquencies and interest thereon. In such agreement, the debtor shall acknowledge such debt to the county and shall agree that if any default occurs in the payment of any installment agreed to be paid thereunder, the entire amount to be paid shall become immediately due and payable, and the subject business license may be revoked. (Ord. 188, 2004: Ord. 161 § 2(part), 1999) (Ord. No. 10-232, § 2, 8-3-2010).



Storey County Ordinance Section 5.12.010 Application – Accompanying data

All new applicants for a liquor license, authorizing the sale of all alcoholic beverages on or off the premises, within the county, shall provide the county liquor license board with the following:

A. Proof of financial standing to warrant an expected satisfactory and profitable business operation;

B. A complete background as to the applicant's criminal record and experience in the saloon or liquor vending business;

C. A one thousand dollar nonrefundable investigative fee, unless otherwise specific in this chapter, with the annual fee as set forth in Chapter 5.04 of this title;

D. An authorization to conduct an investigation into the applicant's criminal history and an authorization signed by the applicant for the submission of the applicant's fingerprints to the Federal Bureau of Investigations for a National Background check. The licensing authority shall fingerprint the applicant and shall submit a complete set of the applicant's fingerprints, in accordance with the applicant's authorization, to the Central Repository for Nevada records of criminal history and to the Federal Bureau of Investigations as authorized by NRS 239B.010(1)(a). (Ord. 83 § 1, 1983) (Ord. No. 08-215, § 1, 9-2-2008).