

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. 15-00008-E
Electronically Filed
Sep 29 2016 02:34 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

Appeal from the First Judicial District Court,
State of Nevada, County of Storey
Honorable James E. Wilson, Jr.

**JOINT APPENDIX
VOLUME VI
PAGES 838-1034**

Matthew B. Hippler (SBN 7015)
Scott Scherer (SBN 87)
Brandon C. Sendall (SBN 13246)
HOLLAND & HART LLP
5441 Kietzke Lane, Second Floor
Reno, Nevada 89511
Tel. (775) 327-3000
Fax (775) 786-6179
Attorneys for Appellants

Anne Langer (SBN 3345)
Storey County District Attorney
Keith Loomis (SBN 1912)
Deputy District Attorney
P.O. Box 496 201 South C Street
Virginia City, NV 89440
Tel. (775) 847-0964
Fax (775) 847-1007
Attorneys for Respondents

Chronological Table of Contents to Appendix

<u>Document</u>	<u>Date</u>	<u>Vol.</u>	<u>Pages</u>
Petition for Writ of Mandamus with exhibits	10/13/2015	1	JA000001- JA000235
Ex Parte Motion for Temporary Restraining Order and Preliminary Injunction with exhibits	10/14/2015	2	JA000236- JA000471
Respondents' Answer and Return to Verified Petition for Writ of Mandate	10/19/2015	3	JA000472- JA000492
Respondents' Opposition to Motion for TRO and Preliminary Injunction	10/19/2015	3	JA000493- JA000496
Amended Order Denying TRO and Preliminary Injunction	11/10/2015	3	JA000497- JA000510
Petitioners' Brief In Support of Verified Petition for a Writ of Mandamus	11/23/2015	3	JA000511- JA000606
Petitioners' Brief In Support of Verified Petition for a Writ of Mandamus Exhibit 7 filed under seal - Declaration of Cyndy Arnold Regarding Petitioners' Brief	11/23/2015	3-5	JA000607- JA000717
Respondents' Supplemental Brief in Opposition to Verified Petition for Writ of Mandate	12/8/2015	5	JA000718- JA000745
Petitioners' Reply Brief to Respondents' Supplemental Brief	12/9/2015	5	JA000746- JA000755
Order Remanding to Storey Co. Board of County Commissioners and Storey Co. Liquor Board	12/17/2015	5	JA000756- JA000758
Transcript of Storey County Board of County Commissioners Open Meeting	1/11/2016	5	JA000759- JA000775
Stipulation and Order Regarding Briefing	1/16/2016	5	JA000776- JA000778
Petitioners' Brief Pursuant to Order Regarding Briefing Dated January 21, 2016	1/22/2016	5	JA000779- JA000793
Respondents' Supplemental Brief After Remand of Storey County	1/22/2016	5-6	JA000794- JA000844
Petitioners' Reply Brief Pursuant to Order Pursuant to Order Regarding Briefing Dated January 21, 2016	1/27/2016	6	JA000845- JA000851
Respondents' Reply to Petitioners' Brief Pursuant to Order Regarding Briefing Dated January 21, 2016	1/27/2016	6	JA000852- JA000857
Order Denying Petition for Writ of Mandate	3/7/2016	6	JA000858- JA000870
Notice of Entry of Order Denying Petition for Writ of Mandamus	3/9/2016	6	JA000871- JA000885
Petitioners' Objection to Order Denying Petition for Writ of Mandamus	3/16/2016	6	JA000886- JA000912
Respondents' Response to Petitioners' Objection to Order Denying Petition for Writ of Mandamus Dated March 7, 2016	3/24/2016	6	JA000913- JA000925

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Appellants' Notice of Appeal	3/25/2016	6	JA000926- JA000928
Transcript of Hearing on Motion for Temporary Restraining Order and Preliminary Injunction with exhibits	6/20/2016	6	JA000929- JA001034

- 7 10. Architect's name, address and Nevada state license number;
- 8 11. Engineer's name, address and Nevada state license number;
- 9 12. Cost of work, based on the retail price or a contractor's price for such work;
- 40 13. Date the work is to commence and the estimated date of completion.

B. Applications for building permits shall *must* be accompanied by ~~such the~~ fees as may be established by resolution of the board of county commissioners, which resolutions are on file in the county building department. (Ord. 172 § 1(part), 2000)

15.12.030 ~~Expiration by limitation--Reapplication procedures.~~

~~Every permit issued by the building official under the provisions of this chapter shall expire by limitation and become null and void if no inspections have been called for within a period of one hundred eighty days from issuance of permit. The permit will be considered active as long as inspections are called for and progress is occurring. If no inspections are made within one hundred eighty days, the permit must be renewed. A new permit shall *must* be obtained before the work can be recommenced at a fee of one-half of the amount required for the original permit, provided no changes have been made or will be made in the original application and plans are provided, further, that ~~such the~~ suspension of work has not exceeded one year. (Ord. 172 § 1(part), 2000)~~

15.12.040 Nontransferability.

All permits shall ~~be~~ are nontransferable.

A. Fees for *building* permits for construction that have been issued shall *may* not be transferable to a new owner or a new project location;

B. Fees for permits issueds for a specific project or scope of work shall *may* not be transferred to ~~able for~~ another project or and change of scope of work by the same owner. (Ord. 172 § 1(part), 2000)

15.12.050 ~~Number permitted to be issued.~~

~~A. Upon a study of the water availability and sewage capacity, and desirous of remaining in compliance with the National Pollutant Discharge Elimination System Permit, the building official is authorized to issue in the towns of Virginia City and Gold Hill, the following number of building permits on an annual basis, between January 1st and December 31st of each year:~~

~~1. Commercial permits, as approved by the Storey County public works director or board of county commissioners;~~

~~2. Residential permits and/or commercial permits, approved by the Storey County public works director, thirteen permits for each calendar year. Only two permits issued to any one builder per year, unless the board of county commissioners rule otherwise;~~

~~3. Silver City, Nevada (Lyon County) will be issued three water hook ups per calendar year.~~

~~B. "Commercial building permits," for the purposes of this chapter, are defined as all permits for the construction of other than single family residences.~~

~~C. Issuance limitations for residential building permits shall be limited to the following:~~

~~1. One permit for each owner applicant per year, whether such is issued to the individual~~

owner or to the owner's contractor or builder;

~~2. One permit for each developer, contractor, or speculative builder, building for resale, renting or leasing;~~

~~3. Unused permits available at the end of the year will be made available for a sixty-day period to all applicants with one additional permit only allowed for each applicant until the quota is exhausted. In the event the number of applicants exceeds the available permits, a lot drawing shall be conducted;~~

~~4. If available unused building permits exceed the number of applicants, the same may be carried over the next year, but no more than seven carry over building permits shall be accumulated during any yearly period.~~

15.12.060 Applicability.

Section 15.12.05 shall not be construed to apply to remodeling projects, additions and outbuildings which do not substantially enlarge existing use of water and sewage facilities on the property involved.

15.12.070 Building permit required.

No building or mobile/manufactured or modular home for human habitation or structural use in the county shall be constructed without first obtaining a building permit pursuant to all applicable county ordinances.

Residential Construction Requirements

15.12.080 Permits for septic system installation and well drilling required.

No well shall be drilled, nor septic system installed without first obtaining a *A permit must be obtained from the county building department before a person may drill a well and from the state division of health before a person installs a septic system or does any work in preparation for the well or septic system.* from the county building department for any such drilling, installation, or other work and excavation in furtherance thereof. (Ord. 172 § 1(part), 2000)

15.12.090 Water source required.

No *A building permit for any construction shall may not* be issued until the applicant has provided an adequate source of water fit for human consumption, either by drilling a well on the premises or by water being piped in through a public or private utility designed for the transportation of water. A "well serve letter" must be issued by that public or private utility designed for transportation and deliverance of water *and be submitted to the building department with the permit application.* (Ord. 172 § 1(part), 2000)

15.12.092 Domestic use and purpose defined.

"Domestic use" and "domestic purposes" extends to culinary and household purposes directly related to: 1) A single family dwelling; or 2) an accessory building for a single family dwelling, including, without limitation, the watering of a family garden and lawn, and the watering of livestock and any other domestic animal or household pet, if the amount of water drawn does not

exceed the maximum amount set forth in Nevada Revised Statute (NRS) 534.180.

15.12.094 Accessory dwelling unit and accessory structure defined.

A secondary or subordinate building or structure, i.e., mother-in-law quarters, which is located on the same lot as the main structure or dwelling, i.e., primary single family residence, is to be defined as an accessory building or accessory structure. Accessory structures applicable to this ordinance include, but are not limited to, garages, carriage houses, mother-in-law quarters, gazebos, greenhouses, barns, etc., when such structures are in any way connected to a water system, including the main structure's water system or the lot's well, but are not structurally attached in any way to the main structure.

A. *An attached accessory dwelling unit is a portion of or an addition to a single-family main dwelling that is designed to be used as a separate and independent dwelling unit. An attached accessory dwelling unit includes, at a minimum, permanent kitchen and bathroom (i.e. a toilet) facilities, but may also include living, sleeping, and eating facilities, all separated from the main unit by walls or ceilings and accessed through a lockable exterior or interior door. Converting part of, or adding on to, an existing single-family main dwelling may create an attached accessory dwelling. To be considered attached, the accessory dwelling unit must abut (i.e. be on the opposite side of a wall or ceiling) the habitable space of the main dwelling, or the ceiling of a garage attached to the main dwelling. Incidental and accessory features such as trellises, decks, patios, breezeways, or tool sheds will not be considered as establishing an attached dwelling unit. Typical uses include guest rooms, guest apartments and "granny flats."*

B. *A detached accessory dwelling unit refers to a dwelling unit on the same lot as the main dwelling unit, but which is physically separated from the main dwelling unit. A detached accessory dwelling unit is designed and configured to provide independent living facilities for one or more persons, and includes, at a minimum, permanent kitchen and bathroom (i.e. a toilet) facilities, but which may also include living, sleeping, and eating facilities. Typical uses include guesthouses, second units, "granny flats" and caretaker's quarters.*

C. *A detached accessory structure refers to a building or structure on the same lot as the main residential structure and devoted to a use incidental to that main residential structure. A detached accessory structure is not designed, configured, or used for human habitation. The detached accessory structure may be connected to water and wastewater systems subject to the recordation of a deed restriction prohibiting the use of the structure as a dwelling unit. Installation of both a kitchen and a toilet in a detached accessory structure requires the structure to be considered a dwelling unit and subject to the accessory dwelling unit provisions. Typical uses include storage buildings and sheds, barns and detached garages.*

15.12.096 Domestic use limit.

If the development and use of underground water from a well for an accessory dwelling unit of a single-family dwelling, as defined in section 15.12.094, qualifies as a domestic use or domestic purpose: As of the date of the adoption of this ordinance, if the development and/or use of underground water from a well is for an accessory structure of a single-family dwelling, as defined under "accessory structure" in this ordinance, the well shall be required to have a meter and the withdrawal of water from the underground domestic well shall be limited to two acre-feet per year. In addition, if the development and use of underground water from a well for an

accessory building of a single-family dwelling qualifies as a domestic use or domestic purpose pursuant to this ordinance:

A. The owner of the well ~~must~~ shall at his/her expense:

1. Obtain approval for that use from the ~~board~~ Board of Storey County Commissioners after a report and recommendation by the planning commission; and
2. Install a water meter, *at owner's expense*, capable of measuring the total withdrawal of water from the well; and
3. Ensure the total withdrawal of water from the well does not exceed two acre-feet per year; and
4. Report the use of water from the well to the Board of Storey County Commissioners or its designee on a form provided by the state engineer.

B. ~~The board or its designee must report the approval of the accessory structure on a form provided by the state engineer. The Board of Storey County Commissioners or its designee must~~ shall submit to the state engineer the use of water form from each applicable well owner.

C. The state engineer *is required to* shall monitor the annual use of water from the well.

D. If it is determined that more than two acre-feet of water in any one year period of time is withdrawn from a domestic well, the Board of Storey County Commissioners shall order the parcel owner to do one or more of the following:

1. Obtain and relinquish to Storey County additional water rights necessary to insure adequate water supply for the domestic use from within the water basin in which the parcel is located;
2. Pay an administrative fine not to exceed ten thousand dollars per day for each violation as determined by the board of county commissioners or state engineer;
3. Replace not more than two hundred percent of the water used, waste, or diverted.

E. If an administrative fine is imposed against a person pursuant to subsection B, and/or the person is ordered to replace any water pursuant to subsection C, the Board of Storey County Commissioners may require the person to pay the costs of proceeding, including investigative costs and attorney's fees.

F. The date of priority for the use of the domestic well to supply water to any accessory structure is the date of approval received by the owner of the well from ~~board~~ Board of Storey County Commissioners. The board of county commissioners or its designee shall report the approval of the accessory structure on a form provided by the state engineer. (NRS 534.180 § 2) (Ord. No. 11-236, § 1, 8-2-2011)

15.12.098 Legal.

—A. If any section of this ordinance or portion thereof is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such holding shall not invalidate the remaining parts of this ordinance.

—B. All ordinances, chapters, sections, subsections, clauses, phrases, or sentences contained in the Storey County Code which are in conflict herewith are hereby repealed.

—C. The ordinance shall be in full force and effect from and after its passage, approval, and publication as required by law.

15.12.099 Tampering and penalty.

A. Tampering: No one except an employee or representative of Storey County or the State of Nevada *may shall* at any time or in any manner operate or alter a water meter or otherwise interfere with a meter or its connections.

B. Penalty: Violation of any provision of this division constitutes a misdemeanor punishable by fine not to exceed five hundred dollars, imprisonment not to exceed six months, or both. Each and every connection or occupancy in violation of any provision of this division shall be deemed a separate offense under this division and punishable as such. (Ord. No. 11-236, § 1, 8-2-2011)

15.12.100 Sewage disposal system required.

No A building permit shall *may not* be issued unless the applicant has first installed a suitable sewerage disposal system meeting all applicable governmental standards, ~~of~~ or the owner must provide a "will serve letter" from a public or private sewage process utility designed to transport and process raw sewage.

15.12.110 Certificates of occupancy.

No building or structure shall be used or occupied, and no change in the existing occupancy classification or a building or structure or portion thereof shall be made until the building official issues a certificate of occupancy. No certificate of occupancy shall be issued prior to the completion and fulfillment of all conditions and requirement which may have been lawfully imposed upon the construction project pursuant to issuance of the building permit.

15.12.120 Temporary certificates of occupancy.

A temporary certificate of occupancy for the use of any portion of a building, may be issued at the discretion of the building official if he finds that no substantial safety or health hazard will result from occupancy before the construction is fully completed.

15.12.130 Modification of requirements.

The board of county commissioners may alter the conditions in this chapter to fit the circumstances upon application, if the same does not violate the spirit and intent of this chapter to protect the health, safety, and welfare of the inhabitants of the county, but may do so only after a hearing duly held. Such alternation is fully discretionary with the county commissioners.

15.12.140 Mobile homes and manufactured structures.

~~—No permanent building, modular structure or mobile home shall be moved into or within the county, nor shall be erected or installed, without the issuance of a building permit therefor. No such permit shall be issued until the applicant has first obtained a permit for a continuous perimeter concrete footing and a continuous masonry stem wall constructed in conformance with applicable ordinances, building codes, and state laws, and has installed a water and sewer system meeting all applicable government standards. Such buildings or mobile homes must comply with all existing use and zoning regulations applicable. (Ord. 172 § 1(part), 2000)~~

15.12.150 Violation--Penalty.

Any person, firm, or corporation violating any provision of this chapter is guilty of a

misdemeanor. (Ord. 172 § 1(part), 2000)

SECTION III: This ordinance will become effective on July 1, 2014.

Proposed on May 6, 2014.

by Commissioner All

Passed on May 19, 2014.

Vote: Ayes: Commissioners McBride

Gilman

Sjovangen

Nays: Commissioners None

Absent: Commissioners None

Marshall McBride

Marshall McBride, Chair

Storey County Board of County Commissioners

Attest:

Vanessa Stephens

Vanessa Stephens

Clerk & Treasurer, Storey County

This ordinance will become effective on July 1, 2014.

Draft 5-19-14

CERTIFIED COPY


The document to which this certificate is
is attached is a full, true, and correct copy of the original on
file and of record in this office.

Date January 15, 2016
Storey County Clerk and Ex-Officio Clerk of the First
Judicial District of the State of Nevada.

By Vanessa Stephens, Deputy
for Storey County

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8

Matthew B. Hippler
Scott Scherer
Brandon C. Sendall
HOLLAND & HART LLP
5441 Kietzke Lane, Second Floor
Reno NV 89511


Debra Burns

Matthew B. Hippler (SBN 7015)
Scott Scherer (SBN 87)
Brandon C. Sendall (SBN 13246)
HOLLAND & HART LLP
5441 Kietzke Lane, Second Floor
Reno, Nevada 89511
Tel.: 775-327-3049
Fax: 775-786-6179
mhippler@hollandhart.com
sscherer@hollandhart.com
bcsendall@hollandhart.com

Attorneys for Petitioners

2016 JAN 27 PM 2:01

ST. JOSEPH CITY CLERK

BY VS

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR STOREY COUNTY

DR. VINCENT M. MALFITANO, an
individual; VIRGINIA CITY GAMING,
LLC, a Nevada limited liability company;
and DELTA SALOON, INC., a Nevada
corporation,

Petitioners,

vs.

COUNTY OF STOREY, acting by and through
the STOREY COUNTY BOARD OF
COUNTY COMMISSIONERS and the
STOREY COUNTY LIQUOR BOARD,

Respondent.

Case No. 15-OC-00008 1E

Dept. No. II

**PETITIONERS' REPLY BRIEF PURSUANT TO ORDER REGARDING BRIEFING
DATED JANUARY 21, 2016**

Petitioners, Dr. Vincent M. Malfitano ("Dr. Malfitano"), Virginia City Gaming, LLC ("VCG") and Delta Saloon, Inc. (collectively, Dr. Malfitano, VCG, and Delta Saloon, Inc. are referred to herein as "Petitioners"), by and through their attorneys of record, Matthew B. Hippler, Scott Scherer, and Brandon C. Sendall of the law firm of Holland & Hart LLP, hereby submit this Reply Brief in response to Respondent's Supplemental Brief After Remand, filed on January 22, 2016. This Reply Brief is filed pursuant to the Order Regarding Briefing filed on January 21, 2016 and is based upon the following Memorandum of Points and Authorities as well as all other briefs filed by Petitioners in this case.

MEMORANDUM OF POINTS AND AUTHORITIES

A. Respondent's Argument Regarding the Business License Misses the Point.

In its supplemental brief, the Storey County Board of County Commissioners (the "Board") cites an Edition of the International Fire Code and argues that the Storey County Fire Chief was insistent on the installation of the fire sprinkler system in order to comply with the code. Petitioners have *never* argued that the fire sprinkler system did not need to be installed; rather, they have argued that the Fire Chief and the Board wrongfully took away the agreed upon time period in which Petitioners had to install the fire sprinkler system. Consequently, the Board's argument in reliance on the International Fire Code misses the point and ignores Petitioners' actual arguments.

Throughout these proceedings, Petitioners have argued that the Board relied upon erroneous information provided by the Storey County Fire Chief who: (i) ignored the agreement signed with Petitioners giving them additional time to install the fire sprinkler system at the Bonanza Saloon ("Bonanza"); and (ii) ignored the Storey County Business License Inspection Sheet that expressly stated that Petitioners "shall have 6 months to install systems after July 1, 2015," which was until January 1, 2016. As the Court concluded in the Amended Order dated November 10, 2015, the Storey County Fire Chief's statements to the Commissioners were "wrong." *Amended Order*, at 8:16-22. Moreover, 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 Petitioners on the building, and the Fire Chief nonetheless agreed to allow Petitioners through the end of 2015 to remedy the fire sprinklers. *See Transcript of October 6, 2015 Storey County Board of County Commissioners Meeting*, at 80-81.

By relying upon "wrong" information, the Board acted in an arbitrary and capricious manner. 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." *State v. Dist. Ct. (Armstrong)*, 127 Nev. Adv. Op. 84, ___, 267 P.3d 777, 780 (2011). Here, the facts and law support a determination that with respect to the business

1 license for the Bonanza, the Board acted in an arbitrary and capricious manner requiring the
2 granting of the Writ Petition.

3 Accordingly, Petitioners request that the Board be ordered to issue on an interim basis a
4 business license for the Bonanza for the number of days from October 6th – the date of the
5 business license denial – to the date of any order from this Court granting the Writ Petition
6 relating to the business license. That period of time represents the time period in which
7 Petitioners have been prejudiced in their ability to operate at the Bonanza because that time
8 period was effectively taken from them by the Board's action. Petitioners would have those
9 number of days to operate the Bonanza with an interim business license while they install the
10 fire sprinkler system. At the end of that time period, either the fire sprinkler system would be
11 installed and a permanent business license would be issued or the interim license would expire
12 while the fire sprinkler system is still being worked on.

13 B. Respondent's New Case Law Is Completely Inapplicable to This Case Because
14 Petitioners Have Not Raised Federal § 1983 Claims.

15 In its supplemental brief, the Storey County Liquor Board (the "Liquor Board") cites
16 two new cases, both of which are wholly inapplicable to this case.

17 In *San Bernardino Physicians' Services Medical Group v. County of San Bernardino*,
18 825 F.2d 1404 (9th Cir.1987), the physicians' group entered a four-year contract with the
19 Board of Supervisors for San Bernardino County to provide medical services to the county-
20 operated medical center. The county terminated the contract, allegedly without cause and
21 without a pre-deprivation hearing. The physicians' group sued under 42 U.S.C. § 1983, which
22 established a federal cause of action for deprivation, under color of state law, of rights
23 guaranteed by the United States Constitution or laws. The physician's group alleged that the
24 county's actions deprived it of a property interest without due process of law. The Ninth
25 Circuit held that the physicians' group contract was not property entitled to due process
26 procedural protections.

27 *San Bernardino* is irrelevant to this case because Petitioners have not pursued a federal
28 § 1983 claim in federal court or a federal § 1983 claim in state court. This is critical because

1 the holding in *San Bernardino* is premised on the intent behind § 1983, and the Court stated
2 that “[i]t is neither workable nor *within the intent of section 1983* to convert every breach of
3 contract claim against a state into a federal claim.” *Id.* at 1408 (footnote omitted). The Liquor
4 Board also cites to *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189 (2001), in which the
5 plaintiff also pursued a § 1983 claim. The Court held in that case that the California statutory
6 scheme did not deprive the plaintiff of its claim for payment under a contract without due
7 process of law because California law afforded plaintiff a sufficient opportunity to pursue the
8 claim in state court. *Id.* at 195.

9 Because Petitioners have not pursued a § 1983 claim in this case, *San Bernardino* and
10 *Lujan* are of no relevance to this case or to the analysis that this Court must utilize. As
11 Petitioners have argued previously in its briefing, *Gerhart v. Lake County, Mont.*, 637 F.3d
12 1013, 1020 (9th Cir. 2011), applies directly to this case as does other cases cited by Petitioners.
13 Ignoring that, however, the Liquor Board now attempts to embrace cases that are inapposite to
14 Petitioners’ arguments in this case. This Court should not take the bait.

15 C. The Liquor Board’s Decision Is Not Supported by Substantial Evidence.

16 The Liquor Board suggests in its supplemental brief that substantial evidence supports
17 the decision by the Liquor Board. As detailed in Petitioners’ Brief Pursuant to Order
18 Regarding Briefing Dated January 21, 2016, filed on January 22, 2016, Petitioners analyzed the
19 Liquor Board’s decision and their January 5th comments and specified how the decision was
20 built on a foundation of erroneous information.

21 The January 5th comments by the Liquor Board establish that it completely ignored the
22 Storey County Sheriff’s report into Petitioners’ finances, which determined that Petitioners
23 were financially sound, and instead the Liquor Board:

- 24 1) Prejudged Petitioners’ liquor license application because of comments
25 heard at the Nevada Gaming Commission (“NGC”) hearing on August
26 20, 2015 (i.e. “**I came back with the view** that under Storey County
27 Code, this business didn’t qualify to receive a liquor license.”

28 *Transcript of Storey County Board of County Commissioners Meeting*

1 on January 5, 2016, filed by Respondent with the Court on January 11,
2 2016, at 11:2-4 (emphasis added)).

3 2) Wrongly relied on the *opinion* of Chairman McBride, who stated that
4 without gaming at Petitioners' properties, cash flow would be reduced
5 by 60 to 70 percent, which meant that in his opinion the properties
6 would not be a sustainable business for Petitioners. *See Transcript of*
7 *October 6, 2015 Storey County Board of County Commissioners*
8 *Meeting*, at 61. That was clearly his own opinion, and most importantly,
9 his statement was without *any* testimonial or documentary support
10 whatsoever.

11 3) Erroneously relied on statements from the NGC hearing on August 20th
12 that Petitioners were \$12 million in debt, and had numerous lawsuits,
13 liens, and foreclosures. In fact, none of this is true as detailed in Dr.
14 Malfitano's declaration attached to Petitioners' Brief Pursuant to Order
15 Regarding Briefing Dated January 21, 2016. Yet, because of the Liquor
16 Board's actions, Petitioners did not have the opportunity to provide this
17 information to the Liquor Board, and it instead made a fundamentally
18 flawed, arbitrary, and capricious decision that it has now been
19 attempting to save.

20
21 The Sheriff's report supporting Petitioners' financial health was the only accurate and
22 competent evidence before the Liquor Board, and by ignoring it and elevating the impressions
23 of a single commissioner gained from attending the NGC hearing – coupled with false and
24 unsupported statements about gaming revenues – the Liquor Board's decision was not based on
25 competent evidence, let alone substantial evidence. In similar circumstances, the Nevada
26 Supreme Court has held that "substantial evidence" supporting a decision is not met by
27 opinions of council members, unsupported by proof. *See State ex rel. Johns v. Gragson*, 89
28 Nev. 478, 482, 515 P.2d 65, 67 (1973) (the City of Las Vegas' Zoning Board granted a home

1 occupation permit and then later terminated the permit without explanation). The Liquor
2 Board's decision was based on assumptions, falsehoods, and erroneous information to which
3 Petitioners never had the opportunity to respond. Opinions unsupported by evidence cannot
4 sustain the Liquor Board's decision.

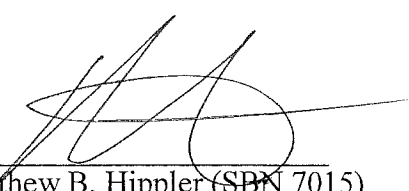
5 Finally, it is important to note that the Liquor Board's decision cannot now be saved by
6 asking them to reconsider its decision. The decision must stand or fall on its own, and the
7 Liquor Board has embraced its decision throughout these proceedings. However, these
8 proceedings have demonstrated that the Liquor Board's decision and the process leading to the
9 decision were fundamentally defective and fundamentally prejudiced Petitioners. The Court
10 has before it persuasive and substantial evidence to conclude that the Liquor Board's decision
11 and actions have violated Petitioners' rights and that relief is warranted. Petitioners respectfully
12 request that the Liquor Board's decision fall and that the Writ Petition be granted.

13 D. Conclusion.

14 For the reasons stated above and as set forth in Petitioners' other briefs filed in this
15 case, the Court should grant the Writ Petition and issue a writ of mandamus: 1) reversing the
16 Liquor Board's denial of Petitioners' applications for liquor licenses and reversing the Board's
17 denial of VCG's application for a general business license for the Bonanza; and 2) compelling
18 the Liquor Board to approve the liquor license applications and the Board to approve on an
19 interim basis as detailed above the business license application for the Bonanza.

20 The undersigned affirms that the foregoing does not contain the social security of any
21 person.

22 DATED this 27th day of January 2016.

23
24 
Matthew B. Hippler (SBN 7015)
HOLLAND & HART LLP
5441 Kietzke Lane, Second Floor
Reno, Nevada 89511
Attorneys for Petitioners
25
26
27
28

HOLLAND & HART LLP
5441 KIETZKE LANE
SECOND FLOOR
RENO, NV 89511

CERTIFICATE OF SERVICE

I, Martha Hauser, certify:

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.

I am readily familiar with Holland & Hart LLP's practice for collection and processing of its outgoing mail with the United States Postal Service. Such practice in the ordinary course of business provides for the deposit of all outgoing mail with the United States Postal Service on the same day it is collected and processed for mailing.

On January 27, 2016, I served the foregoing **PETITIONERS' REPLY BRIEF PURSUANT TO ORDER REGARDING BRIEFING DATED JANUARY 21, 2016**, by placing a true copy thereof in Holland & Hart LLP's outgoing mail in a sealed envelope, addressed as follows:

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


Martha Hauser

1 ANNE LANGER (SBN 3345)
2 STOREY COUNTY DISTRICT ATTORNEY
3 Keith Loomis (SBN 1912)
4 Deputy District Attorney
5 P.O. Box 496 201 South C Street
6 Virginia City, NV 89440
7 Tel. (775) 847-0964
8 Fax. (775) 847-1007
9 kloomis@storeycounty.org

2016 JAN 27 PM 4:34

BY

WB

Attorney for Respondent

8 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
9
10 **IN AND FOR STOREY COUNTY**

11 Dr. VINCENT M. MALFITANO, an
12 individual; VIRGINIA CITY GAMING LLC, a
13 Nevada limited liability company; and DELTA
14 SALOON, INC., a Nevada corporation,

Case No. 15 OC 00008 1E
Dept. No. II

15 Petitioners,

16 vs.

17 COUNTY OF STOREY, acting by and through
18 the STOREY COUNTY BOARD OF
19 COUNTY COMMISSIONERS and the
20 STOREY COUNTY LIQUOR BOARD,

Respondent.

21 **REPLY TO PETITIONERS' BRIEF PURSUANT TO ORDER REGARDING**
22 **BRIEFING DATED JANUARY 21, 2016**

23 Respondent, Storey County, by and through Deputy District Attorney, Keith Loomis,
24 hereby submits its Reply to Petitioners' Brief Pursuant to Order Regarding Briefing Dated
25 January 21, 2016 (Petitioner's Brief). This Reply is based upon the Briefs previously filed in this
26 matter, evidence previously produced and the attached Memorandum of Points and Authorities.
27
28

MEMORANDUM OF POINTS AND AUTHORITIES

Introduction:

This case is not as complicated as Petitioners' would like the Court to believe. It is a matter of whether the evidence in the record provided substantive reasons for denying Petitioners liquor and business licenses. Petitioners base their argument to the contrary by improperly transmuting the comments and conduct of a single member of the Liquor Board and Board of County Commissioners into the action of the Boards as a whole. Even if this Board member's vote is somehow discounted there would still have been a quorum on both Boards which voted to deny issuance of the licenses. The remaining Board members voting to deny the licenses had substantial reasons based on the evidence presented to vote as they did.

Liquor Licenses

Petitioners' assert that they make four points in regard to denial of the liquor licenses. The first of these is that the Liquor Board made a flip flop from the time of its "promises to grant liquor licenses" to the time of its subsequent denial of the licenses. They assert that Petitioners were harmed and prejudiced by the Liquor Board's inexplicable actions. Only Commissioner McBride, however, made representations about the future treatment of Petitioners' applications for liquor licenses. Even then, his statements were corrected by the county manager who asserted that the applications would subsequently be "considered" by the Board. Commissioner McBride concurred with this correction. It would appear to be the height of foolhardiness for an applicant with the muddy history of Dr. Maltifano, when combined with the recent resounding rejections of his applications for gaming and even landlord licenses, to blithely believe that all was well with his liquor license applications and that he need not appear to support them. No it was not the Board that harmed and prejudiced Petitioners. Rather it was the history of tax liens,

1 payment defaults, run-ins with regulatory agencies, litigiousness and failures to disclose
2 damaging facts that prejudiced and harmed Petitioners.

3 Petitioners' second point is equally off point. Here Petitioners assert that the Board
4 failed to consider the sheriff's report, "the only accurate and competent evidence in the record".
5 This "fact" is reportedly established by the transcript of the hearing of January 5, 2016.
6

7 First, no sheriff's report, other than the Sheriff's verbal comments at the time of the
8 October 6th hearing was provided to the Board. That is why there is no "report" included in the
9 record before the court. Second, in this court's order of remand, the Board was ordered to
10 provide the reasons why it denied liquor licenses to Petitioners. It was not ordered to report what
11 matters the board members considered in arriving at those reasons. Consequently, to represent
12 that the Board did not consider the report of the sheriff is wholly unsupported by the record.
13

14 Finally, the Sheriff's verbal statements were not the only accurate and competent
15 evidence in the record. Under Nevada's Administrative Procedure Act evidence in state
16 administrative cases is admissible if it is of a type commonly relied upon by reasonable and
17 prudent persons. NRS 233B.123; see also *State, Emp. Security v. Hilton Hotels*, 102 Nev. 606
18 (1986)(letter written by scheduler was hearsay, but properly admitted). Petitioners provide no
19 authority to the contrary. Here, Commissioner McBride related what he had learned at the
20 hearing before the Gaming Commission. Also admitted was the order issued by the Gaming
21 Commission which identified the numerous negative issues in Petitioners' histories and their
22 failures disclose many of them to the Commission. Such evidence is also admissible in local
23 administrative proceedings.
24

25 Petitioners' third point is a repeat of the assertion that the Board applied the higher
26 gaming standard to Petitioners' applications for liquor licenses. Again this assertion is
27
28

1 unsupported by the record. There is no question, but that the Liquor Board relied on information
2 obtained by the Gaming Commission in finding that Petitioners had not borne their burden of
3 proving they had the financial standing to warrant an expected satisfactory and profitable
4 business operation. SCC §5.12.010(A). This is similar to the Gaming Commission's requirement
5 under NRS 463.170(3) that the Commission be satisfied that an applicant has adequate business
6 probity, competence and experience, and that the proposed financing of the gaming operation be
7 adequate for the nature of the proposed operation. Due to the similarity of the licensing
8 requirements, it is clear that the evidence propounded under the gaming requirement is directly
9 relevant to that required for liquor licensing. Thus, it is not that the Liquor Board imposed a
10 higher standard of licensing on Petitioners. Rather it is that the Liquor Board was provided
11 directly relevant information from the much more extensive investigation conducted by the
12 Gaming Control Board agents than was done by the Storey County Sheriff. Was the Board
13 supposed to ignore information that Petitioners had previous regulatory run-ins, had problems
14 complying with their financial obligations, and had been dishonest with the Gaming
15 Commission? Of course not. The denial of the liquor licenses in this case was based upon the
16 much more extensive information available rather than upon the imposition of a higher standard.

17
18
19
20
21 Petitioners' fourth point is that Commissioner McBride's statement, that with the loss of
22 gaming, Petitioners stood to lose 60-70 % of their revenue, was not competent evidence.
23 Commissioner McBride, however, also questioned how Petitioners' could run a profitable
24 operation when you've just taken out the major source of revenue. (Petitioners Ex. 3 attached to
25 Verified Petition at 63 lns 15-20). Indeed, the Sheriff essentially concurred with this statement
26 (Id. @ 63 1-5). Thus while the actual percentage of reduction may be off, common sense
27 dictates that the loss of a line of business will reduce revenues. It appears that the commissioners
28

1 could rely on common sense reasoning in evaluating whether Petitioners' were likely to have a
2 profitable and successful business operation.

3 Under this fourth point Petitioners also assert that the statement made at the Gaming
4 Commission hearing and relayed to the Liquor Board, that Dr. Malfitano was \$12 million in debt
5 was false. In order to establish the error of the Gaming Control Board, Petitioners rely on the
6 Declaration of Dr. Malfitano. This is material outside the record reviewed by the Board and its
7 inclusion violates the rule of *Carson City v. Lepire*, 112 Nev. 363, 364-65 (1996). Accordingly,
8 objection is made to consideration of the Malfitano Declaration. If the Court will consider the
9 Declaration, then it is requested that Respondent also be allowed to supplement the record. The
10 supplement would include transcript of the hearing before the Gaming Commission.
11
12


13 **Business License.**

14 In regards to the business license, it is worth noting that even as of January 5th 2016,
15 Petitioners have still not complied with their obligation to install a sprinkler system. Scott
16 Scheerer, attorney for Petitioners, reported that Petitioners had only made substantial progress
17 towards their obligations with the Fire District. (Transcript of Jan 5, 2016 pg. 8 @ 24-25 pg. 9 @
18 1). Petitioners can reapply for a business license when they are in compliance.
19
20

21 **Conclusion:**

22 The reasons given for denying liquor and business licenses to the Petitioners are
23 substantial and reasonable. It is therefore respectfully submitted that the Petition for Writ of
24 Mandamus should be denied.

25 Dated this 27th day of January, 2016.

26 
27 Keith Loomis
28 Deputy District Attorney.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

Matthew B. Hippler
Scott Scherer
Brandon C. Sendall
HOLLAND & HART LLP
5441 Kietzke Lane, Second Floor
Reno NV 89511


Debra Burns

FILED

MAR 7 2016

Storey Co. Clerk

Deputy

ANNE LANGER (SBN 3345)
STOREY COUNTY DISTRICT ATTORNEY
Keith Loomis (SBN 1912)
Deputy District Attorney
P.O. Box 496 201 South C Street
Virginia City, NV 89440
Tel. (775) 847-0964
Fax. (775) 847-1007
klloomis@storeycounty.org

Attorney for Respondent

**IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF
NEVADA IN AND FOR STOREY COUNTY**

Dr. VINCENT M. MALFITANO, an
individual; VIRGINIA CITY GAMING
LLC, a Nevada limited liability company;
and DELTA SALOON, INC., a Nevada
corporation,

Petitioners,

vs.

COUNTY OF STOREY, acting by and
through the STOREY COUNTY BOARD
OF COUNTY COMMISSIONERS and
the STOREY COUNTY LIQUOR
BOARD,

Respondent.

Case No. 15 OC 00008 1E

Dept. No. II

ORDER DENYING PETITION FOR WRIT OF MANDAMUS

This case arises out of the filing of a Petition for Writ of Mandamus by
Petitioners (collectively Malfitano) challenging the refusal of Respondent,
(hereafter Storey County) to issue business and liquor licenses to Malfitano. In the

1 Petition and subsequent pleadings, Malfitano asserts that Storey County acted
2 arbitrarily and capriciously in denying those licenses. Malfitano also asserts that
3 the denial of the licenses denied him the due process of law and the equal
4 protection of the laws. These claims lack merit.
5

6 **History**

7
8 Petitioner, Vincent Malfitano, owns Virginia Gaming LLC, and Delta
9 Saloon Inc. Through these entities, he recently purchased the Delta and Bonanza
10 Saloons in Virginia City, Nevada. Prior to his purchase, the saloons had
11 conducted business pursuant to gaming, liquor and business licenses issued to its
12 prior owner. Even after his purchase, the saloons had gaming, liquor and business
13 licenses by virtue of being operated by a properly licensed lessee of Malfitano.
14 Malfitano subsequently sought gaming, liquor and business licenses for the
15 premises on his own behalf. The Nevada Gaming Control Board conducted an in
16 depth investigation into Malfitano's suitability to hold gaming licenses or to hold
17 landlord licenses as to premises on which gaming would be conducted. The
18 Gaming Control Board recommended to the Nevada Gaming Commission that all
19 such licenses be denied. The Gaming Commission held a lengthy hearing on the
20 requested licensure on August 20, 2015. It voted unanimously to deny the gaming
21 and landlord licenses to Malfitano for a variety of reasons including a failure to
22 demonstrate business competence, a failure to demonstrate business probity and
23
24
25
26
27
28

1 failures to disclose numerous and recent facts relevant to a showing of business
2 competence or probity.
3

4 Thereafter Malfitano applied to Storey County to obtain liquor and business
5 licenses to operate the Bonanza and Delta Saloons. These applications were first
6 heard on September 1, 2015. At that time, liquor and business licenses for the
7 premises were still held by Malfitano's lessee of the premises. Accordingly, due to
8 the fact that granting the requests would result in duplicate licenses, Storey County
9 denied the requested licenses.
10
11

12 Malfitano subsequently terminated the lease with the licensed lessee. He
13 reapplied for liquor and business licenses for the Delta and Bonanza Saloons. A
14 hearing into the applications was conducted by Storey County on October 6, 2015.
15 At the conclusion of the hearing, the Liquor Board refused to issue liquor licenses
16 for either the Delta Saloon or the Bonanza Saloon, The Board of County
17 Commissioners did issue a business license for the Delta Saloon, but refused to
18 issue a business license for the Bonanza Saloon.
19
20
21

22 On October 13, 2015, Malfitano filed his petition for a writ of mandamus.
23 He followed that filing, the next day, with the filing of an ex parte motion for a
24 temporary restraining order and for a preliminary injunction. This court held a
25 hearing on the motion on October 21, 2015. Following the close of the hearing,
26 this court denied the requests for the temporary restraining order and for the
27
28

1 preliminary injunction. This court did so on the grounds that it did not appear that
2 Malfitano had a likelihood of success on the merits of the claims, that Malfitano
3 did not establish a likelihood of irreparable harm and that Malfitano did not lack an
4 adequate remedy at law.
5

6
7 Subsequent to the issuance of that order, Malfitano requested and was
8 granted permission to file supplemental briefs addressing the propriety of the
9 requested writ relief. Malfitano, as did Storey County, both filed additional briefs.
10 Malfitano raised additional issues in the supplemental brief addressing due process
11 and equal protection issues and submitted additional evidence in support of these
12 issues. Storey County did not object to the raising of these new issues. Instead,
13 Storey County also briefed the new issues. In light of the new issues, this court
14 remanded the matter to Storey County for clarification of the reasons for the denial
15 of the liquor and business licenses.
16
17

18
19 Following the remand of the case, Storey County did hold a hearing to
20 address the Order of Remand. The members of the Boards who voted to deny the
21 licenses then set forth their reasons for denying the licenses. Two subsequent
22 rounds of supplemental briefing with evidentiary attachments addressing the
23 reasoning for denying the licenses, followed. Neither party has subsequently
24 requested further opportunity to present documentary or testamentary evidence.
25
26
27
28

1 The matter is fully submitted for decision on the merits of the Petition for Writ of
2 Mandamus.

4 **Standard of Review**

5 The writ of mandamus is available to compel the performance of a duty
6 required by law or to control a manifest or arbitrary or capricious exercise of
7 discretion. *State v. Dist. Ct. (Armstrong)*, 127 Nev. Adv. Opn. 84 @ p.3, 267 P.3d
8 777 (2011); *City Council v. Irvine*, 102 Nev. 277, 721 P. 2d 371 (1986) *Round Hill*
9 *Gen. Imp. Dist. V. Newman*, 97 Nev. 601, 603-04, 637 P. 2d 534 (1981). An act is
10 arbitrary when it is done in an apparent absence of any grounds or reasons for the
11 decision. *City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P. 2d 545
12 (1994). It is presumed that a licensing authority will not exercise its licensing duty
13 in an arbitrary or oppressive fashion. *Mills v. City of Henderson*, 95 Nev. 550, 552,
14 598 P. 2d 635 (1979). Additionally, liquor license boards are vested with broad
15 discretion in reviewing applicants for liquor licenses. *County of Clark v. Atlantic*
16 *Seafoods*, 96 Nev. 608, 610, 615 P. 2d 233 (1980). The burden is on the applicant
17 for a liquor license to demonstrate capriciousness by the Board. *Gragson v. Toco*,
18 90 Nev. 131, 133, 520 P.2d 616 (1974).
19
20
21
22
23
24
25
26
27
28

Discussion

Liquor Licenses

In this case an applicant for a Storey County liquor license is required to provide to the liquor board: "Proof of financial standing to warrant an expected satisfactory and profitable business operation." Storey County Code §5.12.010(A). The record contains substantial evidence supporting a finding that Malfitano did not meet this requirement.¹ Included in the record is a copy of the Nevada Gaming Commission's order denying Malfitano gaming and landlord licenses. In relevant part that order recites:

[Petitioners] filed applications with the BOARD and failed to disclose numerous, recent, and financially significant items including, but not limited to lawsuits, foreclosures, business interests, delinquent tax payments, tax liens, and default notices...

[Petitioners] failed to carry their burdens to demonstrate adequate business probity. This is demonstrated through nondisclosure of business related issues to the BOARD, significant employment related issue from MALFITANO'S assisted living business and his prior dental practice. Significant citations and actions by other regulatory agencies concerning MALFITANO's assisted living business and his prior dental practice, the existence of numerous prior tax liens, and the appearance of significant cash flow problems....

Commissioner McBride advised the Board that as a result of attending the hearing before the Gaming Commission he learned that Malfitano had twelve

¹ In reviewing the record regarding the denial of liquor and business license for an abuse of discretion, this court is limited to reviewing the record presented to the board and does not review after-supplied materials. See *Carson City v. Lepire*, 112 Nev.363, 364-65, 914 P. 2d 631 (1996).

1 million dollars in debt. He also pointed out that with the inability to obtain gaming
2 licenses, a major source of revenue for the saloons was lost. County Manager
3 Whitten pointed out that a history of foreclosures, delinquent tax payments, tax
4 liens, are serious contra-indicators of financial standing. Consequently, the
5 decisions to deny the issuance of the liquor licenses were not arbitrary and
6 capricious.
7
8

9 **Business License**

10 While the Board of County Commissioners granted a business license for the
11 operation of the Delta Saloon, it denied a business license for the operation of the
12 Bonanza Saloon. Under Storey County Code §5.04.100(A) the county can refuse
13 to issue a business license: "[U]ntil an applicant complies or agrees to comply with
14 all other existing ordinances or laws in force." Here, the Board was informed by
15 the Chief of the Fire District that he had been working with Malfitano to remedy
16 fire code deficiencies on the Bonanza premises. In his opinion the building was
17 not safe. Based on this evidence the decision to deny the business license was not
18 an arbitrary and capricious exercise of discretion.
19
20
21
22
23
24
25
26
27
28

Due Process

Property Interest

Malfitano asserts that he was denied the due process of law in the proceedings leading to the denial of the liquor and business licenses.² He asserts that he had reached an agreement with Storey County as a result of representations made to him by Commissioner McBride at the hearing on September 1, 2015. Those representations were that once Malfitano straightened out the issue of duplicate licenses, he would be granted a liquor license. Accordingly he asserts he had a protectable property interest in the contractual agreement to which due process of law principles should have applied.

Malfitano's contention that he had a protectable property interest is not tenable. Property interests protectable under the due process clause : "[A]re created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth*, 408 U.S. 564, 576 (1972). In order to have a property interest protected by the Fourteenth Amendment a person must have more than a unilateral expectation of a property interest. *Id.* Rather, he must have a legitimate claim of entitlement to the property interest. *Id.* Here, Malfitano relies on the

² In reviewing the constitutional claims, this court will consider all of the evidence submitted by the parties as this review is not limited to the evidence submitted to the Boards.

1 representations of a single member of the liquor board during the course of a
2 public meeting as establishing his property interest. The representations relied on
3 were corrected to clarify that the liquor board would subsequently *consider* the
4 applications for liquor licenses, not that it would approve the applications. Such
5 circumstances were insufficient to give rise to a protectable property interest.
6
7 Furthermore, even if it could be said that a contract was created, the creation would
8 have been void for violating Nevada's Open Meeting law as the matter was not set
9 forth on the agenda as one for the acceptance of a contract. NRS 241.036. Finally
10 even if a contract could be found, such a contract is not of the type which gives rise
11 to a property interest protected by the due process clause. See *Physicians Serv.*
12 *Med. Group v. San Bernardino Cty.*, 825 F. 2d 1404 (9th Cir. 1987). Accordingly,
13 Malfitano was not deprived of a property interest in violation of due process.

18 Void for Vagueness

19 Malfitano also asserted that SCC §5.12.010(A) is void for vagueness
20 because it fails to set forth a sufficiently detailed standard to control the discretion
21 of the liquor board. This vagueness allows for the arbitrary and discriminatory
22 enforcement of the ordinance.
23

24 Legislative enactments, such as ordinances are presumed constitutional
25 absent a clear showing to the contrary. *Starlets International v. Christensen*, 106
26 Nev. 732, 735 801 P. 2d 1343 (1990). The party challenging the enactment bears
27
28

1 the burden to make a clear showing that the enactment is unconstitutional. *List v.*
2 *Whistler* 99 Nev., 133, 660 P. 2d 104 (1983). Moreover, in the case of liquor
3 license ordinances, such ordinances are to be strictly construed against the
4 applicant for the license. *Carson City v. Lepire*, 112 Nev.363, 365-66, 914 P. 2d
5 631 (1996). Finally, where an area of licensing is the proper and necessary subject
6 of police surveillance and regulation, the grant of discretionary power to license
7 need not be restricted by specific standards. *Mills v. City of Henderson*, 95 Nev.
8 550, 552, 598 P. 2d 635 (1979); see also *State ex rel Grimes v. Board*, 53 Nev.
9 364, 372-73, 1 P. 2d 570 (1931).

10 In Nevada there is no inherent right in a citizen to sell intoxicants. *County of*
11 *Clark v. Atlantic Seafoods*, 96 Nev. 608, 610, 615 P. 2d 233 (1980); *Gragson v.*
12 *Toco*, 90 Nev. 131, 133, 520 P. 2d 616 (1974). Liquor boards are granted wide
13 discretion in the granting or denying of such licenses. Here, the applicant for a
14 liquor license is required to provide: "proof of financial standing to warrant an
15 expected satisfactory and profitable business operation." There is no showing that
16 this standard fails to meet a constitutional requirement of specificity applicable to
17 liquor ordinances.

25 **Equal Protection**

26 Malfitano also asserts that Storey County violated his right to the equal
27 protection of the laws where it has routinely issued liquor licenses to other
28

1 applicants without having to undergo the background scrutiny that Malfitano had
2 to undergo. He asserts that as a class of one he has demonstrated that the County
3 intentionally treated him differently from other similarly situated persons without a
4 rational basis for doing so.
5

6
7 In this case the County had a great deal more information about Malfitano's
8 background than it typically has with regard to an applicant for a liquor license.
9

10 This circumstance existed as a result of the background investigation conducted by
11 the Gaming Control Board. The results of that background investigation were
12 placed in the public record by virtue of their inclusion in the order denying
13 Malfitano gaming and landlord licenses. That order established that Malfitano
14 failed to disclose numerous recent and significant items related to his financial
15 stability. There is no showing that other applicants for liquor licenses were
16 similarly disingenuous in the information they provided to the liquor board. This
17 factor alone provides a rational basis for distinguishing between Malfitano and
18 other applicants for liquor licenses. Malfitano has not demonstrated that Storey
19 County violated his right to the equal protection of the laws.
20
21
22
23

24 **Ethical Issue**

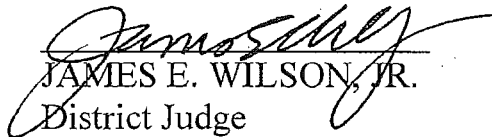
25 Malfitano also raises an ethics issue which arises under Nevada's Ethics in
26 Government Law. NRS 281A.010. It is the Nevada Ethics Commission which is
27 charged with investigating and enforcing alleged violations of Nevada's ethics
28

1 laws as they apply to public officers. NRS 281A.280; See also *Comm'n. On Ethics*
2 *v. Hardy*, 125 Nev. 285, 288, 212 P. 2d 1098 (2009). This court does not have
3 original jurisdiction over such matters. Accordingly, this issue will not be further
4 considered.
5

6
7 **Conclusion:**

8 Substantial evidence supports the decisions of the Storey County Liquor
9 Board to deny liquor licenses to Malfitano. Substantial evidence also supports the
10 decision of the Storey County Board of Commissioners to deny a business license
11 to Malfitano for the Bonanza Saloon. These decisions were not arbitrary and
12 capricious. Nor were Malfitano's rights to due process violated by either the
13 language of the ordinance under which Malfitano was compelled to make
14 application for a license or by the proceedings leading to the denial of the liquor
15 and business licenses. Finally, Storey County had a rational basis for denying
16 liquor licenses to Malfitano. Consequently the Petition for Writ of Mandamus and
17 all other relief requested is denied.
18
19
20
21

22 Dated this 4 day of March, 2016.
23
24

25 
26 JAMES E. WILSON, JR.
27 District Judge
28

Submitted by

Keith Loomis, No. 1912

Deputy District Attorney for Storey County

P.O. Box 496

Virginia City, NV 89440

Tel (775) 847-0956

Fax (775) 847-1007

kloomis@storeycounty.org

1 ANNE LANGER (SBN 3345)
2 STOREY COUNTY DISTRICT ATTORNEY
3 Keith Loomis (SBN 1912) Deputy District Attorney
4 P.O. Box 496 201 South C Street
5 Virginia City, NV 89440
6 Tel. (775) 847-0964
7 Fax. (775) 847-1007
8 kloomis@storeycounty.org

9 Attorney for Respondent

10 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

11 **IN AND FOR STOREY COUNTY**

12 Dr. VINCENT M. MALFITANO, an individual;
13 VIRGINIA CITY GAMING LLC, a Nevada
14 limited liability company; and DELTA
15 SALOON, INC., a Nevada corporation,

16 Petitioners,

17 vs.

18 COUNTY OF STOREY, acting by and through
19 the STOREY COUNTY BOARD OF COUNTY
20 COMMISSIONERS and the STOREY
21 COUNTY LIQUOR BOARD,

22 Respondent.

FILED
2016 MAR -9 AM 10:26

STOREY COUNTY CLERK

BY O. Neun
DEPUTY

Case No. 15 OC 00008 1E

Dept. No. II

23 **NOTICE OF ENTRY OF ORDER**

24 **DENYING PETITION FOR**

25 **WRIT OF MANDAMUS**

26 NOTICE is hereby given that on the 7th day of March, 2016, the Court duly
27 entered an Order Denying Petition for Writ of Mandamus. A copy of said Order is
28 attached hereto.

DATED this 8th day of March, 2016.

Keith Loomis
Keith Loomis (SBN 1912)
Deputy District Attorney for Storey County
P.O. Box 496 Virginia City, Nevada 89440
(775) 847-0964 kloomis@storeycounty.org

Mar. 7. 2016 11:55AM

No. 1872 P. 1

FILED

MAR 7 2016

Storey Co. Clerk

Deputy

1 ANNE LANGER (SBN 3345)
2 STOREY COUNTY DISTRICT ATTORNEY
3 Keith Loomis (SBN 1912)
4 Deputy District Attorney
5 P.O. Box 496 201 South C Street
6 Virginia City, NV 89440
7 Tel. (775) 847-0964
8 Fax. (775) 847-1007
9 klloomis@storeycounty.org

Attorney for Respondent

10 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF**
11 **NEVADA IN AND FOR STOREY COUNTY**

12 Dr. VINCENT M. MALFITANO, an
13 individual; VIRGINIA CITY GAMING
14 LLC, a Nevada limited liability company;
15 and DELTA SALOON, INC., a Nevada
16 corporation,

Petitioners,

vs.

18 COUNTY OF STOREY, acting by and
19 through the STOREY COUNTY BOARD
20 OF COUNTY COMMISSIONERS and
21 the STOREY COUNTY LIQUOR
22 BOARD,

Respondent.

Case No. 15 OC 00008 1E

Dept. No. II

23 **ORDER DENYING PETITION FOR WRIT OF MANDAMUS**

24 This case arises out of the filing of a Petition for Writ of Mandamus by
25
26 Petitioners (collectively Malfitano) challenging the refusal of Respondent,
27
28 (hereafter Storey County) to issue business and liquor licenses to Malfitano. In the

Mar. 7. 2016 11:55AM

No. 1872 P. 2

1 Petition and subsequent pleadings, Malfitano asserts that Storey County acted
2 arbitrarily and capriciously in denying those licenses. Malfitano also asserts that
3 the denial of the licenses denied him the due process of law and the equal
4 protection of the laws. These claims lack merit.
5

6 History

7
8 Petitioner, Vincent Malfitano, owns Virginia Gaming LLC, and Delta
9 Saloon Inc. Through these entities, he recently purchased the Delta and Bonanza
10 Saloons in Virginia City, Nevada. Prior to his purchase, the saloons had
11 conducted business pursuant to gaming, liquor and business licenses issued to its
12 prior owner. Even after his purchase, the saloons had gaming, liquor and business
13 licenses by virtue of being operated by a properly licensed lessee of Malfitano.
14 Malfitano subsequently sought gaming, liquor and business licenses for the
15 premises on his own behalf. The Nevada Gaming Control Board conducted an in
16 depth investigation into Malfitano's suitability to hold gaming licenses or to hold
17 landlord licenses as to premises on which gaming would be conducted. The
18 Gaming Control Board recommended to the Nevada Gaming Commission that all
19 such licenses be denied. The Gaming Commission held a lengthy hearing on the
20 requested licensure on August 20, 2015. It voted unanimously to deny the gaming
21 and landlord licenses to Malfitano for a variety of reasons including a failure to
22 demonstrate business competence, a failure to demonstrate business probity and
23
24
25
26
27
28

Mar. 7. 2016 11:55AM

No. 1872 P. 3

1 failures to disclose numerous and recent facts relevant to a showing of business
2 competence or probity.
3

4 Thereafter Malfitano applied to Storey County to obtain liquor and business
5 licenses to operate the Bonanza and Delta Saloons. These applications were first
6 heard on September 1, 2015. At that time, liquor and business licenses for the
7 premises were still held by Malfitano's lessee of the premises. Accordingly, due to
8 the fact that granting the requests would result in duplicate licenses, Storey County
9 denied the requested licenses.
10

11 Malfitano subsequently terminated the lease with the licensed lessee. He
12 reapplied for liquor and business licenses for the Delta and Bonanza Saloons. A
13 hearing into the applications was conducted by Storey County on October 6, 2015.
14 At the conclusion of the hearing, the Liquor Board refused to issue liquor licenses
15 for either the Delta Saloon or the Bonanza Saloon, The Board of County
16 Commissioners did issue a business license for the Delta Saloon, but refused to
17 issue a business license for the Bonanza Saloon.
18

19 On October 13, 2015, Malfitano filed his petition for a writ of mandamus.
20 He followed that filing, the next day, with the filing of an ex parte motion for a
21 temporary restraining order and for a preliminary injunction. This court held a
22 hearing on the motion on October 21, 2015. Following the close of the hearing,
23 this court denied the requests for the temporary restraining order and for the
24
25
26
27
28

Mar. 7. 2016 11:55AM

No. 1872 P. 4

1 preliminary injunction. This court did so on the grounds that it did not appear that
2 Malfitano had a likelihood of success on the merits of the claims, that Malfitano
3 did not establish a likelihood of irreparable harm and that Malfitano did not lack an
4 adequate remedy at law.
5

6
7 Subsequent to the issuance of that order, Malfitano requested and was
8 granted permission to file supplemental briefs addressing the propriety of the
9 requested writ relief. Malfitano, as did Storey County, both filed additional briefs.
10 Malfitano raised additional issues in the supplemental brief addressing due process
11 and equal protection issues and submitted additional evidence in support of these
12 issues. Storey County did not object to the raising of these new issues. Instead,
13 Storey County also briefed the new issues. In light of the new issues, this court
14 remanded the matter to Storey County for clarification of the reasons for the denial
15 of the liquor and business licenses.
16

17
18 Following the remand of the case, Storey County did hold a hearing to
19 address the Order of Remand. The members of the Boards who voted to deny the
20 licenses then set forth their reasons for denying the licenses. Two subsequent
21 rounds of supplemental briefing with evidentiary attachments addressing the
22 reasoning for denying the licenses, followed. Neither party has subsequently
23 requested further opportunity to present documentary or testamentary evidence.
24
25
26
27
28

Mar. 7. 2016 11:55AM

No. 1872 P. 5

1 The matter is fully submitted for decision on the merits of the Petition for Writ of
2 Mandamus.

4 Standard of Review

5 The writ of mandamus is available to compel the performance of a duty
6 required by law or to control a manifest or arbitrary or capricious exercise of
7 discretion. *State v. Dist. Ct. (Armstrong)*, 127 Nev. Adv. Opn. 84 @ p.3, 267 P.3d
8 777 (2011); *City Council v. Irvine*, 102 Nev. 277, 721 P. 2d 371 (1986) *Round Hill*
9 *Gen. Imp. Dist. V. Newman*, 97 Nev. 601, 603-04, 637 P. 2d 534 (1981). An act is
10 arbitrary when it is done in an apparent absence of any grounds or reasons for the
11 decision. *City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P. 2d 545
12 (1994). It is presumed that a licensing authority will not exercise its licensing duty
13 in an arbitrary or oppressive fashion. *Mills v. City of Henderson*, 95 Nev. 550, 552,
14 598 P. 2d 635 (1979). Additionally, liquor license boards are vested with broad
15 discretion in reviewing applicants for liquor licenses. *County of Clark v. Atlantic*
16 *Seafoods*, 96 Nev. 608, 610, 615 P. 2d 233 (1980). The burden is on the applicant
17 for a liquor license to demonstrate capriciousness by the Board. *Gragson v. Toco*,
18 90 Nev. 131, 133, 520 P.2d 616 (1974).
19
20
21
22
23
24
25
26
27
28

Mar. 7. 2016 11:55AM

No. 1872 P. 6

Discussion

Liquor Licenses

In this case an applicant for a Storey County liquor license is required to provide to the liquor board: "Proof of financial standing to warrant an expected satisfactory and profitable business operation." Storey County Code §5.12.010(A). The record contains substantial evidence supporting a finding that Malfitano did not meet this requirement.¹ Included in the record is a copy of the Nevada Gaming Commission's order denying Malfitano gaming and landlord licenses. In relevant part that order recites:

[Petitioners] filed applications with the BOARD and failed to disclose numerous, recent, and financially significant items including, but not limited to lawsuits, foreclosures, business interests, delinquent tax payments, tax liens, and default notices...

[Petitioners] failed to carry their burdens to demonstrate adequate business probity. This is demonstrated through nondisclosure of business related issues to the BOARD, significant employment related issue from MALFITANO'S assisted living business and his prior dental practice. Significant citations and actions by other regulatory agencies concerning MALFITANO's assisted living business and his prior dental practice, the existence of numerous prior tax liens, and the appearance of significant cash flow problems....

Commissioner McBride advised the Board that as a result of attending the hearing before the Gaming Commission he learned that Malfitano had twelve

¹ In reviewing the record regarding the denial of liquor and business license for an abuse of discretion, this court is limited to reviewing the record presented to the board and does not review after-supplied materials. See *Carson City v. Lepire*, 112 Nev.363, 364-65, 914 P. 2d 631 (1996).

Mar. 7. 2016 11:55AM

No. 1872 P. 7

1 million dollars in debt. He also pointed out that with the inability to obtain gaming
2 licenses, a major source of revenue for the saloons was lost. County Manager
3 Whitten pointed out that a history of foreclosures, delinquent tax payments, tax
4 liens, are serious contra-indicators of financial standing. Consequently, the
5 decisions to deny the issuance of the liquor licenses were not arbitrary and
6 capricious.
7
8

9 Business License

10 While the Board of County Commissioners granted a business license for the
11 operation of the Delta Saloon, it denied a business license for the operation of the
12 Bonanza Saloon. Under Storey County Code §5.04.100(A) the county can refuse
13 to issue a business license: "[U]ntil an applicant complies or agrees to comply with
14 all other existing ordinances or laws in force." Here, the Board was informed by
15 the Chief of the Fire District that he had been working with Malfitano to remedy
16 fire code deficiencies on the Bonanza premises. In his opinion the building was
17 not safe. Based on this evidence the decision to deny the business license was not
18 an arbitrary and capricious exercise of discretion.
19
20
21
22
23
24
25
26
27
28

Mar. 7. 2016 11:55AM

No. 1872 P. 8

Due Process

Property Interest

Malfitano asserts that he was denied the due process of law in the proceedings leading to the denial of the liquor and business licenses.² He asserts that he had reached an agreement with Storey County as a result of representations made to him by Commissioner McBride at the hearing on September 1, 2015. Those representations were that once Malfitano straightened out the issue of duplicate licenses, he would be granted a liquor license. Accordingly he asserts he had a protectable property interest in the contractual agreement to which due process of law principles should have applied.

Malfitano's contention that he had a protectable property interest is not tenable. Property interests protectable under the due process clause : "[A]re created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth*, 408 U.S. 564, 576 (1972). In order to have a property interest protected by the Fourteenth Amendment a person must have more than a unilateral expectation of a property interest. *Id.* Rather, he must have a legitimate claim of entitlement to the property interest. *Id.* Here, Malfitano relies on the

² In reviewing the constitutional claims, this court will consider all of the evidence submitted by the parties as this review is not limited to the evidence submitted to the Boards.

Mar. 7. 2016 11:56AM

No. 1872 P. 9

1 representations of a single member of the liquor board during the course of a
2 public meeting as establishing his property interest. The representations relied on
3 were corrected to clarify that the liquor board would subsequently *consider* the
4 applications for liquor licenses, not that it would approve the applications. Such
5 circumstances were insufficient to give rise to a protectable property interest.
6
7 Furthermore, even if it could be said that a contract was created, the creation would
8 have been void for violating Nevada's Open Meeting law as the matter was not set
9 forth on the agenda as one for the acceptance of a contract. NRS 241.036. Finally
10 even if a contract could be found, such a contract is not of the type which gives rise
11 to a property interest protected by the due process clause. See *Physicians Serv.*
12 *Med. Group v. San Bernardino Cty.*, 825 F. 2d 1404 (9th Cir. 1987). Accordingly,
13 Malfitano was not deprived of a property interest in violation of due process.

14 Void for Vagueness

15 Malfitano also asserted that SCC §5.12.010(A) is void for vagueness
16 because it fails to set forth a sufficiently detailed standard to control the discretion
17 of the liquor board. This vagueness allows for the arbitrary and discriminatory
18 enforcement of the ordinance.

19 Legislative enactments, such as ordinances are presumed constitutional
20 absent a clear showing to the contrary. *Starlets International v. Christensen*, 106
21 Nev. 732, 735 801 P. 2d 1343 (1990). The party challenging the enactment bears
22

Mar. 7. 2016 11:56AM

No. 1872 P. 10

1 the burden to make a clear showing that the enactment is unconstitutional. *List v.*
2 *Whistler*, 99 Nev., 133, 660 P. 2d 104 (1983). Moreover, in the case of liquor
3 license ordinances, such ordinances are to be strictly construed against the
4 applicant for the license. *Carson City v. Lepire*, 112 Nev. 363, 365-66, 914 P. 2d
5 631 (1996). Finally, where an area of licensing is the proper and necessary subject
6 of police surveillance and regulation, the grant of discretionary power to license
7 need not be restricted by specific standards. *Mills v. City of Henderson*, 95 Nev.
8 550, 552, 598 P. 2d 635 (1979); see also *State ex rel Grimes v. Board*, 53 Nev.
9 364, 372-73, 1 P. 2d 570 (1931).

10 In Nevada there is no inherent right in a citizen to sell intoxicants. *County of*
11 *Clark v. Atlantic Seafoods*, 96 Nev. 608, 610, 615 P. 2d 233 (1980); *Gragson v.*
12 *Toco*, 90 Nev. 131, 133, 520 P. 2d 616 (1974). Liquor boards are granted wide
13 discretion in the granting or denying of such licenses. Here, the applicant for a
14 liquor license is required to provide: "proof of financial standing to warrant an
15 expected satisfactory and profitable business operation." There is no showing that
16 this standard fails to meet a constitutional requirement of specificity applicable to
17 liquor ordinances.

18 Equal Protection

19 Malfitano also asserts that Storey County violated his right to the equal
20 protection of the laws where it has routinely issued liquor licenses to other
21

Mar. 7. 2016 11:56AM

No. 1872 P. 11

1 applicants without having to undergo the background scrutiny that Malfitano had
2 to undergo. He asserts that as a class of one he has demonstrated that the County
3 intentionally treated him differently from other similarly situated persons without a
4 rational basis for doing so.
5

6
7 In this case the County had a great deal more information about Malfitano's
8 background than it typically has with regard to an applicant for a liquor license.

9
10 This circumstance existed as a result of the background investigation conducted by
11 the Gaming Control Board. The results of that background investigation were
12 placed in the public record by virtue of their inclusion in the order denying
13 Malfitano gaming and landlord licenses. That order established that Malfitano
14 failed to disclose numerous recent and significant items related to his financial
15 stability. There is no showing that other applicants for liquor licenses were
16 similarly disingenuous in the information they provided to the liquor board. This
17 factor alone provides a rational basis for distinguishing between Malfitano and
18 other applicants for liquor licenses. Malfitano has not demonstrated that Storey
19 County violated his right to the equal protection of the laws.
20
21
22

23 Ethical Issue

24
25 Malfitano also raises an ethics issue which arises under Nevada's Ethics in
26 Government Law, NRS 281A.010. It is the Nevada Ethics Commission which is
27 charged with investigating and enforcing alleged violations of Nevada's ethics
28

Mar. 7. 2016 11:56AM

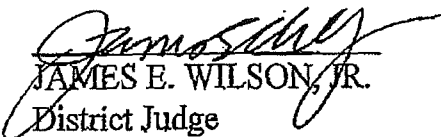
No. 1872 P. 12

1 laws as they apply to public officers. NRS 281A.280; See also *Comm'n. On Ethics*
2 *v. Hardy*, 125 Nev. 285, 288, 212 P. 2d 1098 (2009). This court does not have
3 original jurisdiction over such matters. Accordingly, this issue will not be further
4 considered.
5

6
7 **Conclusion:**

8 Substantial evidence supports the decisions of the Storey County Liquor
9 Board to deny liquor licenses to Malfitano. Substantial evidence also supports the
10 decision of the Storey County Board of Commissioners to deny a business license
11 to Malfitano for the Bonanza Saloon. These decisions were not arbitrary and
12 capricious. Nor were Malfitano's rights to due process violated by either the
13 language of the ordinance under which Malfitano was compelled to make
14 application for a license or by the proceedings leading to the denial of the liquor
15 and business licenses. Finally, Storey County had a rational basis for denying
16 liquor licenses to Malfitano. Consequently the Petition for Writ of Mandamus and
17 all other relief requested is denied.
18
19
20
21

22 Dated this 4 day of March, 2016.
23

24
25 
26 JAMES E. WILSON, JR.
27 District Judge
28

Mar. 7. 2016 11:56AM

No. 1872 P. 13

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Submitted by

Keith Loomis, No. 1912
Deputy District Attorney for Storey County
P.O. Box 496
Virginia City, NV 89440
Tel (775) 847-0956
Fax (775) 847-1007
kloomis@storeycounty.org

1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8

Matthew B. Hippler
Scott Scherer
Brandon C. Sendall
HOLLAND & HART LLP
5441 Kietzke Lane, Second Floor
Reno NV 89511

Debra Burns

Matthew B. Hippler (SBN 7015)
Scott Scherer (SBN 87)
Brandon C. Sendall (SBN 13246)
HOLLAND & HART LLP
5441 Kietzke Lane, Second Floor
Reno, Nevada 89511
Tel.: 775-327-3049
Fax: 775-786-6179
mhippler@hollandhart.com
sscherer@hollandhart.com
bcsendall@hollandhart.com

Attorneys for Petitioners

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR STOREY COUNTY

DR. VINCENT M. MALFITANO, an
individual; VIRGINIA CITY GAMING,
LLC, a Nevada limited liability company;
and DELTA SALOON, INC., a Nevada
corporation,

Petitioners,

vs.

COUNTY OF STOREY, acting by and through
the STOREY COUNTY BOARD OF
COUNTY COMMISSIONERS and the
STOREY COUNTY LIQUOR BOARD,

Respondent.

Case No. 15-OC-00008 1E

Dept. No. II

**PETITIONERS' OBJECTION TO ORDER DENYING PETITION FOR WRIT OF
MANDAMUS DATED MARCH 7, 2016**

Petitioners, Dr. Vincent M. Malfitano, Virginia City Gaming, LLC and Delta Saloon, Inc. (collectively, the "Petitioners"), by and through their attorneys of record, Matthew B. Hippler, Scott Scherer, and Brandon C. Sendall of the law firm of Holland & Hart LLP, hereby submit this Objection to the Order Denying Petition for Writ of Mandamus (the "Order"), which was filed on March 7, 2016. This Objection does not seek the reconsideration of the Court's Order and does not seek to alter or amend the Order. Rather, the purpose of this Objection is to make a record of objection to Respondent's counsel submitting a proposed order to the Court without complying with the First Judicial District Court Rules.

FILED

2016 MAR 16 PM 3:13

STOREY COUNTY CLERK

BY

DEPUTY

1 **I. Applicable Rules.**

2 FJDCR 19(4) provides:

3 All proposed findings, conclusions of law, judgments and decrees,
4 orders affecting the title to or creating or affecting a lien upon real
5 or personal property, appealable orders, and such other orders as
6 the Court may direct, shall be prepared, in writing, by the
7 prevailing party, and shall embody the Court's decision, where
8 applicable, and incorporate the decision by reference, unless the
9 Court shall otherwise order. The prevailing party shall serve a copy
10 of the proposed document upon counsel for all parties 5 days prior
11 to submission of the document to the Court Clerk and shall file a
12 proof of such service. Thereafter the prevailing party shall file a
13 request to submit the proposed document and the Court Clerk shall
14 then submit it to the Court. If opposing counsel intends to object to
15 the form or substance of any such document, or move to amend it,
16 counsel shall do so within 5 days after service of the proposed
17 findings and judgment upon all parties. The proposed document
18 (order, judgment, etc.) shall be submitted no later than 10 judicial
19 days following the hearing or trial.

20 In relevant part, FJDCR 32 discusses ex parte contact with the Court, and the rule
21 provides:

- 22 1. The Judges will not permit, receive or consider ex parte
23 communications.
- 24 2. Ex parte communication is any communication made outside
25 the presence of the parties concerning a pending or impending
26 proceeding.
- 27 3. All written communication for the Judges must be filed with
28 the Court Clerk, served on all parties, and contain proof of service.

29 **II. Respondent's Counsel Submitted a Proposed Order to the Court Without**
30 **Complying with FJDCR 32(3) or FJDCR 19(4).**

31 On March 7, 2016, the Court entered the Order, and Petitioners' counsel received a
32 copy of the Order on March 9, 2016. A copy of the Order is attached as **Exhibit "1"**. At the
33 bottom of the Order and although it is not signed, the Order states that it was submitted by
34 Respondent's counsel, Deputy District Attorney Keith Loomis.

35 Upon receiving the Order on March 9, 2016, Petitioner's counsel emailed Mr. Loomis
36 and asked if he submitted a proposed order to the Court and if the Court had requested that he

1 do so. *See Various Emails*, attached as **Exhibit “2”**. In response to that email and on March
2 10th, Mr. Loomis claimed ignorance of what was being asked of him. *Id.* That same day,
3 Petitioner’s counsel reiterated the same two questions in another email to Mr. Loomis. *Id.*
4 After not hearing from Mr. Loomis on March 11th, 12th, or 13th, Petitioner’s counsel again
5 asked on March 14th for the professional courtesy of a response from Mr. Loomis. *Id.* That
6 day, Mr. Loomis responded by again ignoring the question of whether he submitted a proposed
7 order to the Court. *Id.*

8 In light of Mr. Loomis’ telling and unprofessional refusal to answer the question, this
9 much is known. First, the Order appears to have been submitted to the Court for consideration
10 and signature by Mr. Loomis as demonstrated by the “submitted by” signature block. *See*
11 *Order*.

12 Second, throughout these proceedings, Mr. Loomis’ pleadings oftentimes include the
13 “@” symbol in his citations to cases instead of “at.” *See, e.g., Respondents’ Answer and*
14 *Return to Verified Petition for Writ of Mandate*, filed on October 19, 2015, at page 4, lines 15-
15 27; *Respondents’ Supplemental Brief in Opposition to Verified Petition for Writ of Mandamus*,
16 filed on December 8, 2015, at page 5, line 19 and page 8, line 17. The Order includes such an
17 “@” symbol. *See Order*, at page 5, line 8. As such, aside from the “submitted by” signature
18 block in the Order, Mr. Loomis appears to have drafted the Order.

19 Third, Mr. Loomis did not deny that he submitted a proposed order to the Court.

20 Fourth, pursuant to FJDCR 32(3), all written communication to the Court – including
21 written proposed orders – must be served on all parties. Petitioners’ counsel did not receive
22 from Respondent’s counsel a proposed order denying the Writ of Mandamus. *See Declaration*
23 *of Matthew B. Hippler*, attached as **Exhibit “3”**. If Respondent’s counsel decided to
24 proactively submit to the Court a proposed order without the Court first having requested such
25 an order or even if the Court had requested such an order from Respondent’s counsel, FJDCR
26 32(3) requires Respondent’s counsel to provide the proposed order to Petitioners’ counsel.

27 Fifth, beyond the plain language of FJDCR 32(3), FJDCR 19(4) is even more specific
28 in requiring a proposed order to be provided to opposing counsel prior to the proposed order


1 being submitted to the Court. Petitioners' counsel never received a proposed order denying the
2 Writ of Mandamus, and he learned of the Order having been submitted to the Court on March
3 9th and only after the Order had already been signed and filed by the Court on March 7th. *See*
4 *Declaration*. This situation is even more curious and disappointing since Respondent's
5 counsel had previously followed professional protocol and the requirements of FJDCR 32(3)
6 and FJDCR 19(4) in handling a proposed order earlier in the case. *See Email Dated October*
7 *22, 2015*, attached as **Exhibit "4"**.

8 **III. Conclusion.**

9 Based on the foregoing and by submitting a proposed order to the Court without first
10 providing it to Petitioners' counsel, Respondent's counsel violated FJDCR 32(3) and FJDCR
11 19(4), and this is true regardless of whether the Court asked Respondent's counsel for the
12 proposed order or not. Petitioners' counsel does not come to this frustrating conclusion lightly,
13 and Respondent's counsel was repeatedly provided an opportunity to explain the circumstances
14 leading to the entry of the Order. He declined that opportunity, and this Objection was
15 therefore necessary to make a clear record in this case of Respondent's counsel's violation of
16 FJDCR 32(3) and FJDCR 19(4).

17 The undersigned affirms that the foregoing does not contain the social security of any
18 person.

19 DATED this 16th day of March 2016.

20
21 
22 Matthew B. Hippler (SBN 7015)
23 HOLLAND & HART LLP
24 5441 Kietzke Lane, Second Floor
25 Reno, Nevada 89511
26 Attorneys for Petitioners
27
28

HOLLAND & HART LLP
5441 KIETZKE LANE
SECOND FLOOR
RENO, NV 89511

CERTIFICATE OF SERVICE

I, Martha Hauser, certify:

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.

I am readily familiar with Holland & Hart LLP's practice for collection and processing of its outgoing mail with the United States Postal Service. Such practice in the ordinary course of business provides for the deposit of all outgoing mail with the United States Postal Service on the same day it is collected and processed for mailing.

On March 16, 2016, I served the foregoing **PETITIONERS' OBJECTION TO ORDER DENYING PETITION FOR WRIT OF MANDAMUS DATED MARCH 7, 2016**, by placing a true copy thereof in Holland & Hart LLP's outgoing mail in a sealed envelope, addressed as follows:

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



Martha Hauser

EXHIBIT 1

EXHIBIT 1

FILED ✓

MAR 7 2016

Storey Co. Clerk

Deputy

1 ANNE LANGER (SBN 3345)
2 STOREY COUNTY DISTRICT ATTORNEY
3 Keith Loomis (SBN 1912)
4 Deputy District Attorney
5 P.O. Box 496 201 South C Street
6 Virginia City, NV 89440
7 Tel. (775) 847-0964
8 Fax. (775) 847-1007
9 klloomis@storeycounty.org

Attorney for Respondent

10 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF**
11 **NEVADA IN AND FOR STOREY COUNTY**

12 Dr. VINCENT M. MALFITANO, an
13 individual; VIRGINIA CITY GAMING
14 LLC, a Nevada limited liability company;
15 and DELTA SALOON, INC., a Nevada
16 corporation,

Petitioners,

vs.

18 COUNTY OF STOREY, acting by and
19 through the STOREY COUNTY BOARD
20 OF COUNTY COMMISSIONERS and
21 the STOREY COUNTY LIQUOR
22 BOARD,

Respondent.

Case No. 15 OC 00008 1E

Dept. No. II

24 **ORDER DENYING PETITION FOR WRIT OF MANDAMUS**

25 This case arises out of the filing of a Petition for Writ of Mandamus by
26
27 Petitioners (collectively Malfitano) challenging the refusal of Respondent,
28 (hereafter Storey County) to issue business and liquor licenses to Malfitano. In the

1 Petition and subsequent pleadings, Malfitano asserts that Storey County acted
2 arbitrarily and capriciously in denying those licenses. Malfitano also asserts that
3 the denial of the licenses denied him the due process of law and the equal
4 protection of the laws. These claims lack merit.
5

6 **History**

7
8 Petitioner, Vincent Malfitano, owns Virginia Gaming LLC, and Delta
9 Saloon Inc. Through these entities, he recently purchased the Delta and Bonanza
10 Saloons in Virginia City, Nevada. Prior to his purchase, the saloons had
11 conducted business pursuant to gaming, liquor and business licenses issued to its
12 prior owner. Even after his purchase, the saloons had gaming, liquor and business
13 licenses by virtue of being operated by a properly licensed lessee of Malfitano.
14 Malfitano subsequently sought gaming, liquor and business licenses for the
15 premises on his own behalf. The Nevada Gaming Control Board conducted an in
16 depth investigation into Malfitano's suitability to hold gaming licenses or to hold
17 landlord licenses as to premises on which gaming would be conducted. The
18 Gaming Control Board recommended to the Nevada Gaming Commission that all
19 such licenses be denied. The Gaming Commission held a lengthy hearing on the
20 requested licensure on August 20, 2015. It voted unanimously to deny the gaming
21 and landlord licenses to Malfitano for a variety of reasons including a failure to
22 demonstrate business competence, a failure to demonstrate business probity and
23
24
25
26
27
28

1 failures to disclose numerous and recent facts relevant to a showing of business
2 competence or probity.
3

4 Thereafter Malfitano applied to Storey County to obtain liquor and business
5 licenses to operate the Bonanza and Delta Saloons. These applications were first
6 heard on September 1, 2015. At that time, liquor and business licenses for the
7 premises were still held by Malfitano's lessee of the premises. Accordingly, due to
8 the fact that granting the requests would result in duplicate licenses, Storey County
9 denied the requested licenses.
10
11

12 Malfitano subsequently terminated the lease with the licensed lessee. He
13 reapplied for liquor and business licenses for the Delta and Bonanza Saloons. A
14 hearing into the applications was conducted by Storey County on October 6, 2015.
15 At the conclusion of the hearing, the Liquor Board refused to issue liquor licenses
16 for either the Delta Saloon or the Bonanza Saloon. The Board of County
17 Commissioners did issue a business license for the Delta Saloon, but refused to
18 issue a business license for the Bonanza Saloon.
19
20
21

22 On October 13, 2015, Malfitano filed his petition for a writ of mandamus.
23 He followed that filing, the next day, with the filing of an ex parte motion for a
24 temporary restraining order and for a preliminary injunction. This court held a
25 hearing on the motion on October 21, 2015. Following the close of the hearing,
26 this court denied the requests for the temporary restraining order and for the
27
28

1 preliminary injunction. This court did so on the grounds that it did not appear that
2 Malfitano had a likelihood of success on the merits of the claims, that Malfitano
3 did not establish a likelihood of irreparable harm and that Malfitano did not lack an
4 adequate remedy at law.
5

6
7 Subsequent to the issuance of that order, Malfitano requested and was
8 granted permission to file supplemental briefs addressing the propriety of the
9 requested writ relief. Malfitano, as did Storey County, both filed additional briefs.
10 Malfitano raised additional issues in the supplemental brief addressing due process
11 and equal protection issues and submitted additional evidence in support of these
12 issues. Storey County did not object to the raising of these new issues. Instead,
13 Storey County also briefed the new issues. In light of the new issues, this court
14 remanded the matter to Storey County for clarification of the reasons for the denial
15 of the liquor and business licenses.
16

17
18 Following the remand of the case, Storey County did hold a hearing to
19 address the Order of Remand. The members of the Boards who voted to deny the
20 licenses then set forth their reasons for denying the licenses. Two subsequent
21 rounds of supplemental briefing with evidentiary attachments addressing the
22 reasoning for denying the licenses, followed. Neither party has subsequently
23 requested further opportunity to present documentary or testamentary evidence.
24
25
26
27
28

1 The matter is fully submitted for decision on the merits of the Petition for Writ of
2 Mandamus.
3

4 **Standard of Review**

5 The writ of mandamus is available to compel the performance of a duty
6 required by law or to control a manifest or arbitrary or capricious exercise of
7 discretion. *State v. Dist. Ct. (Armstrong)*, 127 Nev. Adv. Opn. 84 @ p.3, 267 P.3d
8 777 (2011); *City Council v. Irvine*, 102 Nev. 277, 721 P. 2d 371 (1986) *Round Hill*
9 *Gen. Imp. Dist. V. Newman*, 97 Nev. 601, 603-04, 637 P. 2d 534 (1981). An act is
10 arbitrary when it is done in an apparent absence of any grounds or reasons for the
11 decision. *City of Reno v. Estate of Wells*, 110 Nev. 1218, 1222, 885 P. 2d 545
12 (1994). It is presumed that a licensing authority will not exercise its licensing duty
13 in an arbitrary or oppressive fashion. *Mills v. City of Henderson*, 95 Nev. 550, 552,
14 598 P. 2d 635 (1979). Additionally, liquor license boards are vested with broad
15 discretion in reviewing applicants for liquor licenses. *County of Clark v. Atlantic*
16 *Seafoods*, 96 Nev. 608, 610, 615 P. 2d 233 (1980). The burden is on the applicant
17 for a liquor license to demonstrate capriciousness by the Board. *Gragson v. Toco*,
18 90 Nev. 131, 133, 520 P.2d 616 (1974).
19
20
21
22
23
24
25
26
27
28

Discussion

Liquor Licenses

In this case an applicant for a Storey County liquor license is required to provide to the liquor board: "Proof of financial standing to warrant an expected satisfactory and profitable business operation." Storey County Code §5.12.010(A). The record contains substantial evidence supporting a finding that Malfitano did not meet this requirement.¹ Included in the record is a copy of the Nevada Gaming Commission's order denying Malfitano gaming and landlord licenses. In relevant part that order recites:

[Petitioners] filed applications with the BOARD and failed to disclose numerous, recent, and financially significant items including, but not limited to lawsuits, foreclosures, business interests, delinquent tax payments, tax liens, and default notices...

[Petitioners] failed to carry their burdens to demonstrate adequate business probity. This is demonstrated through nondisclosure of business related issues to the BOARD, significant employment related issue from MALFITANO'S assisted living business and his prior dental practice. Significant citations and actions by other regulatory agencies concerning MALFITANO's assisted living business and his prior dental practice, the existence of numerous prior tax liens, and the appearance of significant cash flow problems....

Commissioner McBride advised the Board that as a result of attending the hearing before the Gaming Commission he learned that Malfitano had twelve

¹ In reviewing the record regarding the denial of liquor and business license for an abuse of discretion, this court is limited to reviewing the record presented to the board and does not review after-supplied materials. See *Carson City v. Leptre*, 112 Nev.363, 364-65, 914 P. 2d 631 (1996).

1 million dollars in debt. He also pointed out that with the inability to obtain gaming
2 licenses, a major source of revenue for the saloons was lost. County Manager
3 Whitten pointed out that a history of foreclosures, delinquent tax payments, tax
4 liens, are serious contra-indicators of financial standing. Consequently, the
5 decisions to deny the issuance of the liquor licenses were not arbitrary and
6 capricious.
7
8

9 Business License

10 While the Board of County Commissioners granted a business license for the
11 operation of the Delta Saloon, it denied a business license for the operation of the
12 Bonanza Saloon. Under Storey County Code §5.04.100(A) the county can refuse
13 to issue a business license: "[U]ntil an applicant complies or agrees to comply with
14 all other existing ordinances or laws in force." Here, the Board was informed by
15 the Chief of the Fire District that he had been working with Malfitano to remedy
16 fire code deficiencies on the Bonanza premises. In his opinion the building was
17 not safe. Based on this evidence the decision to deny the business license was not
18 an arbitrary and capricious exercise of discretion.
19
20
21
22
23
24
25
26
27
28

Due Process

Property Interest

Malfitano asserts that he was denied the due process of law in the proceedings leading to the denial of the liquor and business licenses.² He asserts that he had reached an agreement with Storey County as a result of representations made to him by Commissioner McBride at the hearing on September 1, 2015. Those representations were that once Malfitano straightened out the issue of duplicate licenses, he would be granted a liquor license. Accordingly he asserts he had a protectable property interest in the contractual agreement to which due process of law principles should have applied.

Malfitano's contention that he had a protectable property interest is not tenable. Property interests protectable under the due process clause : "[A]re created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth*, 408 U.S. 564, 576 (1972). In order to have a property interest protected by the Fourteenth Amendment a person must have more than a unilateral expectation of a property interest. *Id.* Rather, he must have a legitimate claim of entitlement to the property interest. *Id.* Here, Malfitano relies on the

² In reviewing the constitutional claims, this court will consider all of the evidence submitted by the parties as this review is not limited to the evidence submitted to the Boards.

1 representations of a single member of the liquor board during the course of a
2 public meeting as establishing his property interest. The representations relied on
3 were corrected to clarify that the liquor board would subsequently *consider* the
4 applications for liquor licenses, not that it would approve the applications. Such
5 circumstances were insufficient to give rise to a protectable property interest.
6
7 Furthermore, even if it could be said that a contract was created, the creation would
8 have been void for violating Nevada's Open Meeting law as the matter was not set
9 forth on the agenda as one for the acceptance of a contract. NRS 241.036. Finally
10 even if a contract could be found, such a contract is not of the type which gives rise
11 to a property interest protected by the due process clause. See *Physicians Serv.*
12 *Med. Group v. San Bernardino Cty.*, 825 F. 2d 1404 (9th Cir. 1987). Accordingly,
13 Malfitano was not deprived of a property interest in violation of due process.
14

15 Void for Vagueness

16 Malfitano also asserted that SCC §5.12.010(A) is void for vagueness
17 because it fails to set forth a sufficiently detailed standard to control the discretion
18 of the liquor board. This vagueness allows for the arbitrary and discriminatory
19 enforcement of the ordinance.
20

21 Legislative enactments, such as ordinances are presumed constitutional
22 absent a clear showing to the contrary. *Starlets International v. Christensen*, 106
23 Nev. 732, 735 801 P.2d 1343 (1990). The party challenging the enactment bears
24

1 the burden to make a clear showing that the enactment is unconstitutional. *List v.*
2 *Whistler*, 99 Nev., 133, 660 P. 2d 104 (1983). Moreover, in the case of liquor
3 license ordinances, such ordinances are to be strictly construed against the
4 applicant for the license. *Carson City v. Lepire*, 112 Nev. 363, 365-66, 914 P. 2d
5 631 (1996). Finally, where an area of licensing is the proper and necessary subject
6 of police surveillance and regulation, the grant of discretionary power to license
7 need not be restricted by specific standards. *Mills v. City of Henderson*, 95 Nev.
8 550, 552, 598 P. 2d 635 (1979); see also *State ex rel Grimes v. Board*, 53 Nev.
9 364, 372-73, 1 P. 2d 570 (1931).

10 In Nevada there is no inherent right in a citizen to sell intoxicants. *County of*
11 *Clark v. Atlantic Seafoods*, 96 Nev. 608, 610, 615 P. 2d 233 (1980); *Gragson v.*
12 *Toco*, 90 Nev. 131, 133, 520 P. 2d 616 (1974). Liquor boards are granted wide
13 discretion in the granting or denying of such licenses. Here, the applicant for a
14 liquor license is required to provide: "proof of financial standing to warrant an
15 expected satisfactory and profitable business operation." There is no showing that
16 this standard fails to meet a constitutional requirement of specificity applicable to
17 liquor ordinances.

25 **Equal Protection**

26 Malfitano also asserts that Storey County violated his right to the equal
27 protection of the laws where it has routinely issued liquor licenses to other
28

1 applicants without having to undergo the background scrutiny that Malfitano had
2 to undergo. He asserts that as a class of one he has demonstrated that the County
3 intentionally treated him differently from other similarly situated persons without a
4 rational basis for doing so.
5

6 In this case the County had a great deal more information about Malfitano's
7 background than it typically has with regard to an applicant for a liquor license.
8

9 This circumstance existed as a result of the background investigation conducted by
10 the Gaming Control Board. The results of that background investigation were
11 placed in the public record by virtue of their inclusion in the order denying
12 Malfitano gaming and landlord licenses. That order established that Malfitano
13 failed to disclose numerous recent and significant items related to his financial
14 stability. There is no showing that other applicants for liquor licenses were
15 similarly disingenuous in the information they provided to the liquor board. This
16 factor alone provides a rational basis for distinguishing between Malfitano and
17 other applicants for liquor licenses. Malfitano has not demonstrated that Storey
18 County violated his right to the equal protection of the laws.
19
20
21
22

23
24 **Ethical Issue**

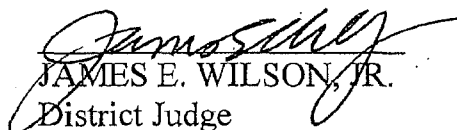
25 Malfitano also raises an ethics issue which arises under Nevada's Ethics in
26 Government Law, NRS 281A.010. It is the Nevada Ethics Commission which is
27 charged with investigating and enforcing alleged violations of Nevada's ethics
28

1 laws as they apply to public officers. NRS 281A.280; See also *Comm'n. On Ethics*
2 *v. Hardy*, 125 Nev. 285, 288, 212 P. 2d 1098 (2009). This court does not have
3
4 original jurisdiction over such matters. Accordingly, this issue will not be further
5 considered.

6
7 **Conclusion:**

8 Substantial evidence supports the decisions of the Storey County Liquor
9 Board to deny liquor licenses to Malfitano. Substantial evidence also supports the
10 decision of the Storey County Board of Commissioners to deny a business license
11 to Malfitano for the Bonanza Saloon. These decisions were not arbitrary and
12 capricious. Nor were Malfitano's rights to due process violated by either the
13 language of the ordinance under which Malfitano was compelled to make
14 application for a license or by the proceedings leading to the denial of the liquor
15 and business licenses. Finally, Storey County had a rational basis for denying
16 liquor licenses to Malfitano. Consequently the Petition for Writ of Mandamus and
17
18 all other relief requested is denied.
19
20
21

22 Dated this 4 day of March, 2016.
23
24

25 
26 JAMES E. WILSON, JR.
27 District Judge
28

Submitted by

Keith Loomis, No. 1912
Deputy District Attorney for Storey County
P.O. Box 496
Virginia City, NV 89440
Tel (775) 847-0956
Fax (775) 847-1007
kloomis@storeycounty.org

EXHIBIT 2

EXHIBIT 2

Matthew Hippler

From: Keith Loomis <kloomis@storeycounty.org>
Sent: Monday, March 14, 2016 4:51 PM
To: Matthew Hippler
Cc: Anne Langer; robert morris
Subject: RE: Court's order

Matt:

If you have a problem with the order or the way the court generated the order, take it up with the court.

Keith

From: Matthew Hippler [<mailto:MHippler@hollandhart.com>]
Sent: Monday, March 14, 2016 8:53 AM
To: Keith Loomis
Cc: Anne Langer; robert morris
Subject: RE: Court's order

Keith,

I would appreciate the professional courtesy of a response to my below email. Matt

From: Matthew Hippler
Sent: Thursday, March 10, 2016 1:30 PM
To: 'Keith Loomis'
Cc: Anne Langer; robert morris
Subject: RE: Court's order

Keith,

It's very simple. Did you submit a proposed order to the court? The order that was entered has a submitted by signature block at the end of the order with your name. If you did submit a proposed order, when were you contacted by the court to submit such a proposed order? – Matt

From: Keith Loomis [<mailto:kloomis@storeycounty.org>]
Sent: Thursday, March 10, 2016 1:19 PM
To: Matthew Hippler
Cc: Anne Langer; robert morris
Subject: RE: Court's order

Matt:

Not sure what this is about, but it looks like something you probably need to take up with the court.

Keith

From: Matthew Hippler [<mailto:MHippler@hollandhart.com>]
Sent: Wednesday, March 09, 2016 4:45 PM
To: Keith Loomis
Subject: Court's order

Keith,

I am in receipt of the attached order denying the writ. I was surprised to see your signature block at the bottom of the order indicating that you submitted a proposed order to the court without first serving me. Did you submit a proposed order to the court? When were you contacted by the court to submit a proposed order? I look forward to your response. – Matt

vCard	People	Practice Areas	Web Site
<div><div>HOLLAND&HART</div><div>Matthew B. Hippler, P.C. Partner mhippler@hollandhart.com</div></div> <div><div>Phone: 775-327-3049 Fax: 775-786-6179 Main: 775-327-3000</div><div>Holland & Hart LLP 5441 Kietzke Lane, 2nd Flr. Reno, NV 89511</div></div>			

CONFIDENTIALITY NOTICE: This message is confidential and may be privileged. If you believe that this email has been sent to you in error, please reply to the sender that you received the message in error; then please delete this e-mail. Thank you.

EXHIBIT 3

EXHIBIT 3

Matthew B. Hippler (SBN 7015)
Scott Scherer (SBN 87)
Brandon C. Sendall (SBN 13246)
HOLLAND & HART LLP
5441 Kietzke Lane, Second Floor
Reno, Nevada 89511
Tel.: 775-327-3049
Fax: 775-786-6179
mhippler@hollandhart.com
sscherer@hollandhart.com
bcsendall@hollandhart.com

Attorneys for Petitioners

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR STOREY COUNTY

DR. VINCENT M. MALFITANO, an
individual; VIRGINIA CITY GAMING,
LLC, a Nevada limited liability company;
and DELTA SALOON, INC., a Nevada
corporation,

Petitioners,

vs.

COUNTY OF STOREY, acting by and through
the STOREY COUNTY BOARD OF
COUNTY COMMISSIONERS and the
STOREY COUNTY LIQUOR BOARD,

Respondent.

Case No. 15-OC-00008 1E

Dept. No. II

DECLARATION OF MATTHEW B. HIPPLER

Pursuant to NRS 53.045, I, Matthew B. Hippler, declare as follows:

1. I am a partner in the law firm of Holland & Hart LLP and am counsel for
Petitioners in the above-entitled action. I am an attorney qualified and licensed to practice law
in the State of Nevada. I have personal knowledge of the matters stated herein. If called as a
witness, I am competent to testify as to the matters stated in this Declaration.

2. All of the pleadings and emails attached to PETITIONERS' OBJECTION TO
ORDER DENYING PETITION FOR WRIT OF MANDAMUS DATED MARCH 7, 2016 are
true and correct copies.

///

1 3. On March 7, 2016, the Court entered the Order Denying Petition for Writ of
2 Mandamus (the "Order"), and I received a copy of the Order on March 9, 2016.

3 4. Upon receiving the Order on March 9, 2016, I emailed Mr. Loomis and asked if
4 he submitted a proposed order to the Court and if the Court had requested that he do so. In
5 response to that email and on March 10th, Mr. Loomis claimed ignorance of what I asked of
6 him. That same day, I reiterated the same two questions to Mr. Loomis in an email. After not
7 hearing from Mr. Loomis on March 11th, 12th, or 13th, I again asked on March 14th for the
8 professional courtesy of a response from Mr. Loomis. That day, Mr. Loomis responded by
9 again ignoring the question of whether he submitted a proposed order to the Court.

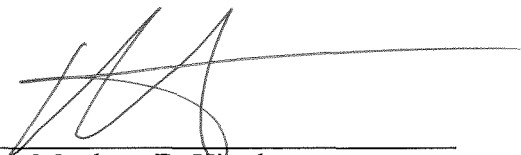
10 5. I did not receive a proposed order denying the Writ of Mandamus from
11 Respondent's counsel at any time prior to the Order being entered by the Court.

12 6. I learned of Respondent's counsel submitting a proposed order to the Court on
13 March 9th and only after the Order had already been signed and filed by the Court on March
14 7th.

15 I declare under penalty of perjury that the foregoing is true and correct.

16 Executed on March 16th, 2016.

17
18
19
20
21
22
23
24
25
26
27
28



Matthew B. Hippler

EXHIBIT 4

EXHIBIT 4

Matthew Hippler

From: Keith Loomis <kloomis@storeycounty.org>
Sent: Thursday, October 22, 2015 3:10 PM
To: Matthew Hippler
Cc: robert morris; Anne Langer
Subject: Proposed Order
Attachments: Proposed Order.docx

Matt

Attached is my first shot at the proposed order.

Keith Loomis
Deputy District Attorney
Storey County District Attorney's
Office
P.O. Box 496, 201 South C Street
Virginia City, NV 89440
(775) 847-0964

**** Notice**** This message and accompanying documents are covered by the electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2521. This email and any files transmitted with it are confidential and intended solely for the use of the individual or entity to whom they are addressed. If you are not the named addressee you should not disseminate, distribute or copy this e-mail. Please notify the sender immediately by e-mail if you have received this e-mail by mistake and delete this e-mail from your system. If you are not the intended recipient you are notified that disclosing, copying, distributing or taking any action in reliance on the contents of this information is strictly prohibited.



1 ANNE LANGER (SBN 3345)
2 STOREY COUNTY DISTRICT ATTORNEY
3 Keith Loomis (SBN 1912)
4 Deputy District Attorney
5 P.O. Box 496 201 South C Street
6 Virginia City, NV 89440
7 Tel. (775) 847-0964
8 Fax. (775) 847-1007
9 kloomis@storeycounty.org

Attorney for Respondent

10 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF**
11 **NEVADA IN AND FOR STOREY COUNTY**

12 Dr. VINCENT M. MALFITANO, an
13 individual; VIRGINIA CITY GAMING
14 LLC, a Nevada limited liability company;
15 and DELTA SALOON, INC., a Nevada
16 corporation,

Petitioners,

vs.

17 COUNTY OF STOREY, acting by and
18 through the STOREY COUNTY BOARD
19 OF COUNTY COMMISSIONERS and
20 the STOREY COUNTY LIQUOR
21 BOARD,

Respondent.

Case No. 15 OC 00008 1E

Dept. No. II

22 **RESPONSE TO PETITIONERS' OBJECTION TO ORDER**
23 **DENYING PETITION FOR WRIT OF MANDAMUS DATED**
24 **MARCH 7, 2016**

25 Respondent, by and through its attorney, Keith Loomis, Deputy District
26 Attorney for Storey County, Nevada hereby responds to Petitioners Objection to
27 the Order of this Court issued March 7, 2016. In their objection Petitioners
28

1 specifically assert that they do not seek reconsideration of the Court's Order, nor
2 do they seek to alter or amend the Order in any way. They do not suggest that the
3 order is exaggerated or unsupported by the record. They do not seek any type of
4 relief. Rather they assert that their sole purpose is to make a record of their
5 perception that the rules of this Court were violated by not submitting the proposed
6 order to Petitioners. This they have done. It appears, however, that their basis for
7 objection lacks merit.

11 **1. FJDCR 19(4) Does Not Apply to the Procedure Utilized in this Case.**
12 **a. There was no decision by the court to be incorporated in the**
13 **proposed order.**

14 Petitioners suggest that FJDCR 19(4) required Respondent to submit a
15 proposed order to Petitioners prior to submitting it to the Court. FJDCR 19(4),
16 however, appears to apply to a situation where an oral decision is made by the
17 Court in response to a hearing or oral argument or a similar proceeding occurring
18 in open court. The rule states, in part, that the order: "[S]hall be prepared in
19 writing, by the prevailing party, and shall embody the Court's decision, where
20 applicable, and incorporate the decision by reference,..." unless the Court shall
21 otherwise order."

25 In this case, there was no decision made at the close of an open court
26 proceeding. Rather Respondent received an e-mail from the Court's judicial
27 assistant directing that a proposed order be prepared in accordance with the
28

1 arguments in Respondent's brief. See Exhibit 1. Consequently, there was not a
2 decision from the Court which could be embodied in an order. This is in contrast
3 to the situation that occurred after the hearing on the motion for a temporary
4 restraining order and preliminary injunction. In that case, the court announced its
5 decision from the bench, ordered the prevailing party to prepare the order and
6 submit it to opposing counsel for review. That process was an application of Rule
7 19(4). The difference in the circumstances of the two matters suggests the
8 inapplicability of FJDCR 19(4) to the circumstances of the present objection.
9
10
11

12 **b. The direction from the court did not contemplate the**
13 **procedure set forth in FJDCR 19(4).**
14

15 FJDCR 19(4) goes on to state:

16 The prevailing party shall serve a copy of the proposed
17 document upon counsel for all parties 5 days *prior to submission of*
18 *the document to the Court Clerk and shall file proof of such service.*
19 *Thereafter the prevailing party shall file a request to submit the*
20 *proposed document and the Court Clerk shall then submit it to the*
Court. (emphasis added).

21 In this case, Respondent was directed to provide the proposed order directly
22 to the Court's judicial assistant not to the Court Clerk. Ex. 1. The direction from
23 the Court did not mention serving the proposed order on opposing counsel. This
24 again suggests the inapplicability of FJDCR 19(4).
25
26
27
28

1 **c. Under FJDCR 19(4) the Court was free to “otherwise order”.**

2 Even if FJDCR 19(4) does apply, the rule also provides that the obligation to
3
4 prepare a proposed order shall follow the procedure set forth in the Rule: “unless
5 the court shall otherwise order.” Clearly the Court is free to handle the preparation
6
7 of a proposed order in a different fashion. While the email from the Court is not
8 specifically identified as an “order” it is certainly an equivalent. Accordingly,
9
10 even if FJDCR 19(4) applies, the rule authorizes the Court to utilize a procedure
11 for obtaining a proposed order other than that procedure expressly set forth in the
12 Rule.
13

14 **2. Respondent did not Communicate Improperly With the Court.**

15 Petitioners also assert that the submission of the proposed order directly to
16
17 the Court somehow violates FJDCR 32. Petitioners refer to subsections 1, 2 and 3
18 of that rule which prohibit a party from communicating ex parte with the Court.
19
20 Petitioners neglect to mention that subsections 4 and 5 of the rule provide:

21 4. Purely procedural issues, e.g., continuances, may be
22 discussed with the judicial assistant or law clerk.

23 5. No attorney may argue or attempt to influence a judicial
24 assistant or law clerk upon the merits of a contested matter pending
25 before the Judge to whom that judicial assistant or law clerk is
26 assigned.

27 In this case it is questionable whether the submission of a proposed order
28 constitutes “communication” as contemplated by Rule 32. The submission of the

1 order is not an argument or attempt to influence the Court, a law clerk or a judicial
2 assistant on the merits of a contested matter. It is simply the provision of a
3 document requested by the Court. It is in the nature of a purely procedural issue,
4 i.e., the submission of a proposed order.
5

6
7 Even if the submission of the proposed order can be considered a
8 communication, that does not make the communication improper. Under NRS
9 34.300 the rules of practice in mandamus proceedings are largely governed by the
10 Nevada Rules of Civil Procedure. Under these rules, the Nevada Supreme Court
11 has specifically stated that NRCP 52(b); “now contemplates ex parte findings
12 subject to the right of the other party to move to amend the same ...”. See, *Foster*
13 *v. Bank Of America*, 77 Nev. 365, 373, 365 P. 2d 313 (1961); see also, *Foley v.*
14 *Morse & Mowbray*, 109 Nev. 116, 123, 848 P. 2d 519 (1993). Consequently,
15 there was nothing objectionable about submitting the proposed order as requested.
16
17
18
19

20 **Conclusion:**

21 The Court was free to utilize a procedure other than that expressly set out in
22 FJDCR 19(4) to obtain a proposed order. Requiring a prevailing party to prepare a
23 proposed order which is subject to a motion to amend pursuant to NRCP 52(b) by a
24

25 ///

26 ///

27 ///

1 dissatisfied opposing litigant is not a violation of the local court rules.

2 Accordingly, it is respectfully submitted that the objection is meritless.

3
4 Dated this 24th day of March, 2016.

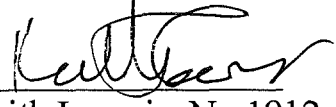
5 
6 Keith Loomis, No 1912
7 Deputy District Attorney
8 Storey County
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT 1

1 ANNE LANGER (SBN 3345)
2 STOREY COUNTY DISTRICT ATTORNEY
3 Keith Loomis (SBN 1912)
4 Deputy District Attorney
5 P.O. Box 496 201 South C Street
6 Virginia City, NV 89440
7 Tel. (775) 847-0964
8 Fax. (775) 847-1007
9 kloomis@storeycounty.org

10 Attorney for Respondent

11 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF**
12 **NEVADA IN AND FOR STOREY COUNTY**

13 Dr. VINCENT M. MALFITANO, an
14 individual; VIRGINIA CITY GAMING
15 LLC, a Nevada limited liability company;
16 and DELTA SALOON, INC., a Nevada
17 corporation,

18 Petitioners,

19 vs.

20 COUNTY OF STOREY, acting by and
21 through the STOREY COUNTY BOARD
22 OF COUNTY COMMISSIONERS and
23 the STOREY COUNTY LIQUOR
24 BOARD,

25 Respondent.

Case No. 15 OC 00008 1E

Dept. No. II

26 **AFFIDAVIT OF KEITH LOOMIS**

27 I, Keith Loomis assert that I am a Deputy District Attorney for Storey
28 County, Nevada and have personal knowledge of the matters set forth below.

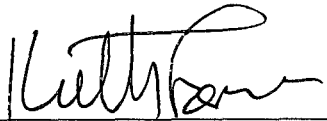
1. Attached hereto is the full email string between myself and the Judicial Assistant for Department II of the first Judicial District Court regarding

1 the Court's decision on the Petition for Writ of Mandamus filed by
2 Malfitano et al.

- 3 2. There were no other communications of any type between myself and the
4 staff or the judge of Department II of the First Judicial District Court
5 regarding the Court's decision of that matter other than the pleadings and
6 briefs filed in that case which were served on all parties.

7 The assertions set forth above are true and are made under the penalties of
8 perjury.

9 Dated this 24th day of March, 2016.

11
12 
13 _____
14 Keith Loomis

Virginia City, NV 89440
(775) 847-0964

Storey County is an equal opportunity provider

**** Notice**** This message and accompanying documents are covered by the electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2521. This email and any files transmitted with it are confidential and intended solely for the use of the individual or entity to whom they are addressed. If you are not the named addressee you should not disseminate, distribute or copy this e-mail. Please notify the sender immediately by e-mail if you have received this e-mail by mistake and delete this e-mail from your system. If you are not the intended recipient you are notified that disclosing, copying, distributing or taking any action in reliance on the contents of this information is strictly prohibited.



From: Gina Winder [<mailto:GWinder@carson.org>]
Sent: Friday, February 26, 2016 2:35 PM
To: Keith Loomis
Cc: Debra Burns
Subject: Malfitano

Hi Keith:

Please send a proposed order consistent with your briefs in this matter, by Friday, March 4, 2016. You can send it to me in word or wordperfect format please.

Best,

Gina M. Winder

Judicial Assistant, Dept. 2
First Judicial District Court
Honorable James E. Wilson, Jr.

(775) 882-1619
(775) 887-2296

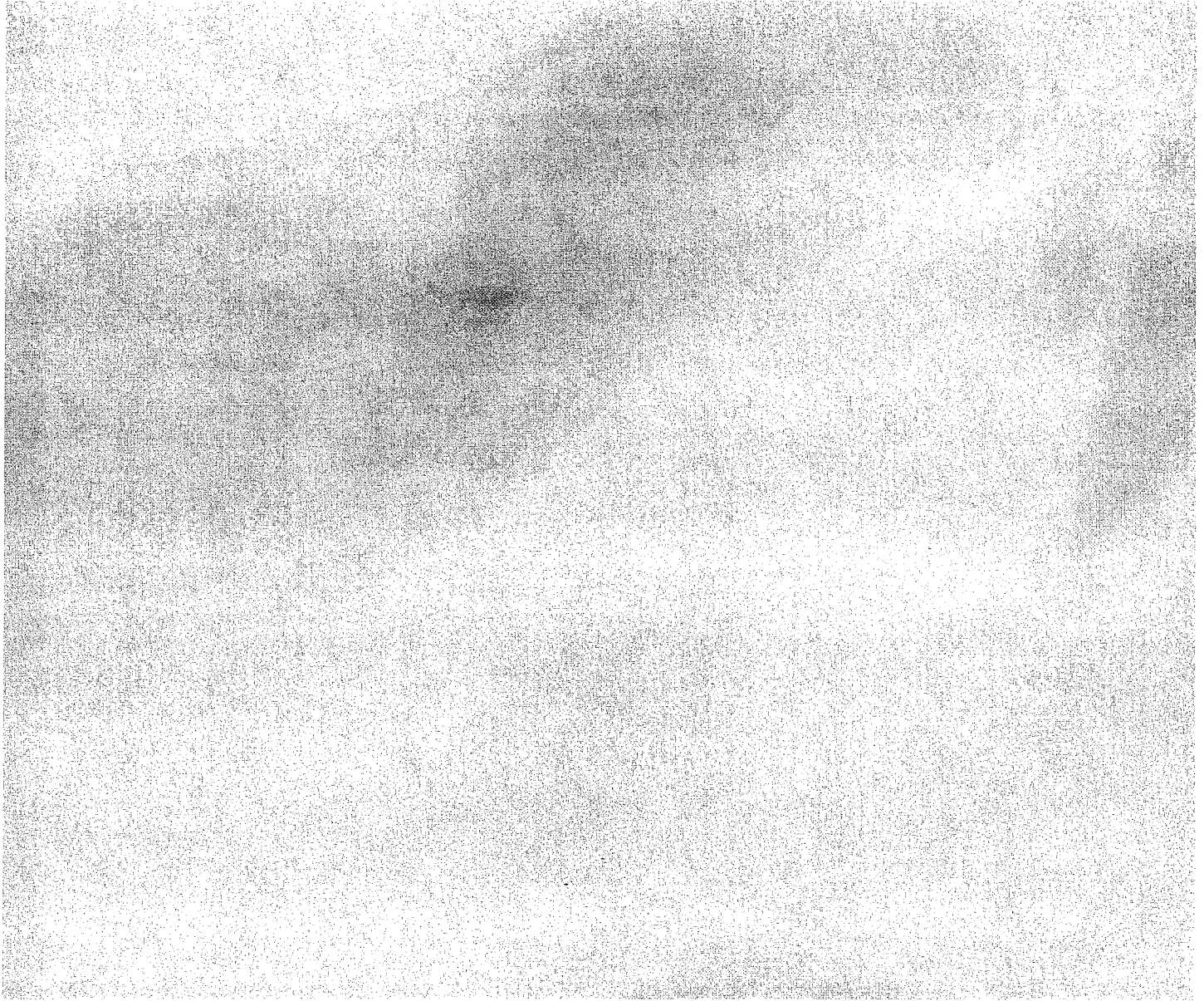
(775) 882-1619
(775) 887-2296

From: Keith Loomis [<mailto:kloomis@storeycounty.org>]

Sent: Friday, March 04, 2016 11:35 AM

To: Gina Winder

Subject: RE: Malfitano



Hi Gina

Attached is the proposed order as requested in your e-mail below. It is in a Word format.

Thanks

Keith Loomis
Deputy District Attorney
Storey County District Attorney's
Office
P.O. Box 496, 201 South C Street

Keith Loomis

From: Gina Winder <GWinder@carson.org>
Sent: Friday, March 04, 2016 11:43 AM
To: Keith Loomis
Subject: RE: Malfitano



Thank you.


Best,

Gina M. Winder

Judicial Assistant, Dept. 2
First Judicial District Court
Honorable James E. Wilson, Jr.

1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8

Matthew B. Hippler
Scott Scherer
Brandon C. Sendall
HOLLAND & HART LLP
5441 Kietzke Lane, Second Floor
Reno NV 89511


Debra Burns

HOLLAND & HART LLP
5441 KIETZKE LANE
SECOND FLOOR
RENO, NV 89511

Matthew B. Hippler (SBN 7015)
Scott Scherer (SBN 87)
Brandon C. Sendall (SBN 13246)
HOLLAND & HART LLP
5441 Kietzke Lane, Second Floor
Reno, Nevada 89511
Tel.: 775-327-3049
Fax: 775-786-6179
mhippler@hollandhart.com
sscherer@hollandhart.com
bcsendall@hollandhart.com

Attorneys for Petitioners

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR STOREY COUNTY

DR. VINCENT M. MALFITANO, an
individual; VIRGINIA CITY GAMING,
LLC, a Nevada limited liability company;
and DELTA SALOON, INC., a Nevada
corporation,

Petitioners,

vs.

COUNTY OF STOREY, acting by and through
the STOREY COUNTY BOARD OF
COUNTY COMMISSIONERS and the
STOREY COUNTY LIQUOR BOARD,

Respondent.

Case No. 15-OC-00008 1E

Dept. No. II

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Petitioners, Dr. Vincent M. Malfitano, Virginia City Gaming, LLC, and Delta Saloon, Inc., appeal to the Supreme Court of Nevada from the First Judicial District Court's Order Denying Petition for Writ of Mandamus. The Order was entered on March 7, 2016. A Notice of Entry of Order was filed on March 9, 2016.

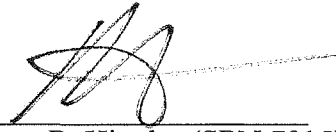
///

///

///

1 The undersigned affirms that the foregoing does not contain the social security of any
2 person.

3 DATED this 24th day of March 2016.



Matthew B. Hippler (SBN 7015)
HOLLAND & HART LLP
5441 Kietzke Lane, Second Floor
Reno, Nevada 89511
Tel. (775) 327-3000 / 786-6179 Fax

Attorneys for Petitioners

HOLLAND & HART LLP
5441 KIETZKE LANE
SECOND FLOOR
RENO, NV 89511

HOLLAND & HART LLP
5441 KIETZKE LANE
SECOND FLOOR
RENO, NV 89511

CERTIFICATE OF SERVICE

I, Martha Hauser, certify:

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.

I am readily familiar with Holland & Hart LLP's practice for collection and processing of its outgoing mail with the United States Postal Service. Such practice in the ordinary course of business provides for the deposit of all outgoing mail with the United States Postal Service on the same day it is collected and processed for mailing.

On March 24, 2016, I served the foregoing **NOTICE OF APPEAL** by placing a true copy thereof in Holland & Hart LLP's outgoing mail in a sealed envelope, addressed as follows:

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



Martha Hauser

JUN 20 2016 4:53 pm

Storey Co. Clerk

D. Mearns Deputy

FIRST JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF STOREY

-o0o-

DR. VINCENT M. MALFITANO, an
individual; VIRGINIA CITY
GAMING, LLC, a Nevada limited
Liability company; and Delta
Saloon, Inc., a Nevada
Corporation,

Appellants,

vs.

COUNTY OF STOREY, acting by and
through the Storey County Board
of County Commissioners; and
Storey County Liquor Board,

Respondents.

CERTIFIED COPY
The document to which this certificate is
is attached is a full, true, and correct copy of the original on
file and of record in this office.
Date June 20, 2016
Storey County Clerk and Ex-Officio Clerk of the First
Judicial District of the State of Nevada,
in and for Storey County
By D. Mearns, Deputy

MOTION FOR TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION

October 21, 2015

Virginia City, Nevada

COPY

Transcribed by:

DIANNE M. BRUMLEY, NV CCR #205
California CSR #6796

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

A P P E A R A N C E S

FOR THE APPELLANTS:
Holland & Hart
BY: MATTHEW B. HIPPLER

FOR THE RESPONDENTS:
KEITH LOOMIS
Storey County Deputy District Attorney

I N D E X

WITNESS PAGE

Vincent Malfitano

Direct examination by Mr. Hippler 27

Cross examination by Mr. Loomis 44

Re-direct examination by Mr. Hippler 68

Re-cross examination by Mr. Loomis 69

EXHIBITS MARKED ADMITTED

1 - inspection sheet 30 35

2 - sign-off sheet 31 35

3 - Sept. 3 e-mail 36 44

4 - meeting minutes 51 52

1 ***

2 VIRGINIA CITY, NEVADA, OCTOBER 21, 2015

3 ***

4 THE COURT: Please be seated. 15-OC-08,
5 Malfitano, Virginia City Gaming, LLC, Delta Saloon vs.
6 Storey County, Storey County Board of Commissioners and
7 the Storey County Liquor Board.

8 This is the time set for a hearing on a motion
9 for a temporary restraining order. Counsel, if you'll
10 state your appearances and who you have with you.

11 MR. HIPPLER: Good afternoon, your Honor.
12 Matthew Hippler on behalf of petitioners and I also have
13 here with me Dr. Vincent Malfitano.

14 MR. LOOMIS: Good afternoon, your Honor. Keith
15 Loomis on behalf of the Storey County District
16 Attorney's Office.

17 THE COURT: Thank you. Where is Mr. Pearce,
18 KOLO?

19 MR. PEARCE: Yes, your Honor.

20 THE COURT: I signed the order. You're going
21 to be allowed to videotape in here, but we don't allow
22 recording, so audio recording, an official record is
23 being made and that's a JAVS recording. I don't know if
24 you're familiar with those, so you'll be able to see and
25 hear on that, and that goes for anyone else. We don't

1 allow audio recording in the courtroom.

2 MR. PEARCE: So no audio recording. We'll turn
3 that off on our camera and will be gathering video only
4 then.

5 THE COURT: Thank you.

6 MR. PEARCE: Thank you, your Honor.

7 THE COURT: So I want to give you kind of an
8 overview of what we're going to do. I've read
9 everything, all the pleadings, the papers, the exhibits,
10 and I am familiar with all of it. So we're going to
11 have a discussion for a little bit and then we're going
12 to take a recess.

13 Are the commissioners, the sheriff available
14 for you to communicate with by phone?

15 MR. LOOMIS: The county manager is present. I
16 have one -- two commissioners.

17 THE COURT: Okay. We're going to take a break,
18 I'm not sure how long that's going to last, after we
19 have this initial discussion, so that you can talk with
20 your clients about what we're going to talk about and
21 then we'll come back and we'll see where we are.

22 So I want to go through and make sure that I
23 have some of what looked to me like undisputed facts
24 correct.

25 The first is that there was a meeting, a Storey

1 County Commissioners meeting on September 1st, 2015 and
2 during that meeting, the Chairman, McBride, explained
3 that it was the staff recommendation to deny the
4 licenses because it would duplicate licenses that
5 already existed with different businesses, but the same
6 locations.

7 Commissioner McBride continued, I'm reading
8 from the minutes on Page 5 in the last full paragraph.
9 "If Dr. Malfitano were to sever relations with Dewing
10 Gaming to operate the business himself, there would be
11 no delay in obtaining the licenses. There is no reason
12 not to license Dr. Malfitano except for the fact that it
13 would be a duplication," and then on the next page in
14 the second paragraph, County Manager Whitten said that
15 based upon the request from Sheriff Antinoro, he, Mr.
16 Whitten, explained that the license would be considered
17 for approval.

18 The next thing that happened was the State
19 Gaming Control Board denying Dr. Malfitano's application
20 for a gaming license.

21 Chairman McBride apparently attended the Gaming
22 Control meeting and heard what went on. I don't have a
23 transcript of that proceeding, but it resulted in the
24 order that the Gaming Control Board issued on August
25 26th, 2015. So I've got that backwards. The Gaming

1 Control order is dated before that commissioners
2 meeting. I thought that the commissioners meeting --
3 the September meeting took place and then the Gaming
4 Control.

5 MR. HIPPLER: If I may clarify, your Honor, the
6 Commission hearing took place on August 20th and the
7 subsequent order came out a few days later.

8 THE COURT: Okay.

9 MR. HIPPLER: And obviously all of that
10 occurred before the September 1st meeting that you've
11 described.

12 THE COURT: Okay. All right, thank you.

13 MR. LOOMIS: Judge, if I may respond to that.
14 The documents itself is a recommendation from the Gaming
15 Control Board to the Gaming Commission. The Commission
16 held its hearing. The order of the Gaming Commission
17 wasn't issued until September 17th which was
18 approximately 16 days after the County Board of
19 Commissioners hearing.

20 THE COURT: Okay. So then we get to the
21 October 6th, 2015 meeting where the licenses, the liquor
22 licenses were denied largely, if not solely, because of
23 the Gaming Control order, and here's the rub for me.

24 Dr. Malfitano is told initially there's no
25 reason for the licenses not to be granted. New

1 information comes to light, but as far as I know, and
2 you can correct me if I'm mistaken on this, he's not
3 informed that the Board is aware of the information that
4 the Gaming Control Board relied upon, the order that
5 that's now an issue, and he was not given an opportunity
6 to respond to it. Am I wrong on that?

7 MR. LOOMIS: Well, Judge, what I would say is
8 that Dr. Malfitano was obviously aware by the time the
9 hearing was held in front of the Board of County
10 Commissioners that his licenses had been denied by the
11 Gaming Commission and that there were significant issues
12 regarding his finances and business acumen and things
13 like that that were expressed in the order that was
14 signed by the Commission.

15 The other thing I would note is that the Board
16 of County Commission does not act through a single
17 person. It would take three commissioners to say, yes,
18 we'll approve it if everything else looks good, and --

19 THE COURT: I don't want to get into a lot of
20 argument at this point. I think I know where you're
21 going and I don't disagree with that.

22 MR. LOOMIS: Okay.

23 THE COURT: Did you want to say something on
24 those?

25 MR. HIPPLER: Yes, just a couple of points.

1 One, I don't know that your Honor mentioned it, the
2 minutes of the September 1st meeting at the top of Page
3 6, the first full paragraph, "Commissioner McBride also
4 stated that upon Dr. Malfitano taking control of the
5 businesses, the applications will be approved soon
6 after," and I wanted to point that out.

7 And then the second thing I wanted to point out
8 was that the agenda for October 6th, which is attached
9 to our motion as Exhibit 2, it was an agendized item and
10 it specifically states at the top of Page 3, item number
11 14, "Discussion/possible action approve liquor and
12 general business license for the Bonanza and the Delta,"
13 and the very last page of that Exhibit 2 also is the
14 recommended motion of approval of the liquor and general
15 business license that we're talking about, and that's
16 what my client relied upon.

17 THE COURT: And I was aware of that. My point
18 at this point is that he wasn't -- he being Mr.
19 Malfitano -- wasn't informed that an issue had arisen in
20 the minds of one or more Commissioners or the county
21 manager or the sheriff as a result of the Gaming
22 Commission. He's never had a chance -- has he had a
23 chance to respond to that to them?

24 MR. LOOMIS: Well, he did have the opportunity
25 to appear at the October 6th hearing to address it.

1 THE COURT: Other than that?

2 MR. LOOMIS: Not that I'm aware of.

3 THE COURT: Okay. And so he could have
4 attended the October 6th hearing, no doubt about it, but
5 the sequence of events, the meeting on -- the earlier
6 Commission meeting was that there's not going to be a
7 problem.

8 He doesn't know that new information is now
9 causing a problem, so he's not informed of it, he's not
10 addressed it, and so here we are. So this is what I'm
11 going to ask you to consider. We'll take a recess after
12 this so you can confer.

13 MR. LOOMIS: Judge, could I bring up one
14 more --

15 THE COURT: Go ahead.

16 MR. LOOMIS: Miss Kittes who is the general
17 manager of both of the Delta and Bonanza salons was
18 present during the course of the October 6th hearing and
19 did make some representations during the course of that
20 hearing.

21 THE COURT: She did, but she didn't really
22 address financial concerns.

23 MR. LOOMIS: She did not.

24 THE COURT: And she was not on notice that she
25 should be prepared to address financial concerns. She

1 didn't know that an issue had arisen with anyone based
2 upon the Gaming Control Board proceedings or order; is
3 that right?

4 MR. LOOMIS: I don't know what she was aware
5 of.

6 THE COURT: She didn't address finances,
7 though.

8 MR. LOOMIS: She did not.

9 THE COURT: Okay. And you're not aware of
10 anything that somebody in Storey County did to put her
11 on notice that she might want to be prepared for that?

12 MR. LOOMIS: I'm not specifically aware of
13 anything, no.

14 THE COURT: Okay. So I have a question that I
15 don't think was answered in any of the paperwork.

16 Did any of the.

17 Commissioners or anybody on the board, the
18 liquor board, which is the sheriff, or the County
19 Commission have the Gaming Control investigative report
20 at the time of the October 6th meeting?

21 MR. LOOMIS: I don't know the answer to that
22 question, either, Judge.

23 THE COURT: Okay. When it came -- well, during
24 the discussion by the liquor board, Commissioner Gilman,
25 at least twice, made a point of saying I don't

1 understand why there's a difference between the
2 sheriff's report and the Gaming Control report. I don't
3 understand why those are different, and Commissioner
4 McGuffey asked at one point if they shouldn't -- and I
5 can't remember the exact phrase he used. I don't think
6 he used the word verify, but it was shouldn't we check
7 on this information before we vote, and then asked or do
8 we need to do that, so here's what I'm going to ask you
9 to consider.

10 Why wouldn't it be fair and reasonable for the
11 Commission to consider the information that's in the
12 Gaming Control report, the investigative report, and Mr.
13 Malfitano given an opportunity to respond to it so that
14 the County Commission and the liquor board would have a
15 full statement of facts.

16 The Gaming Control order is a series of
17 conclusions. There's not a statement of facts contained
18 in it. The Commission was urged both by District
19 Attorney Langer, and I'm not sure what Robert Morris'
20 title -- Deputy District Attorney, or I think it was
21 special counsel maybe in the transcript, both said that
22 the Commissioners -- well, both the liquor board and the
23 Commissioners should state specifically what it is
24 they're relying on in making their decision.

25 There's discussion in the transcript, but at

1 the time the motion is made, it's not really clear what
2 facts they're relying upon, and so getting back again to
3 what I want you to talk about a little, why would it not
4 be in the best interest of everyone to withdraw the
5 order denying the liquor license for the Delta, have the
6 Board review the facts contained in the Gaming Control
7 investigative report letting Mr. Malfitano submit
8 additional information if he wants, and at some future
9 liquor board license meeting, with that more complete
10 statement of facts, exercise the same discretion they
11 wouldn't be giving up anything except having -- not
12 having this business operate until whenever the next
13 board meeting is with enough time for him to provide
14 some supplemental information and to get, if they don't
15 have, the Commission the Gaming Control investigative
16 report and go through that and see what they think.

17 I don't see how that prejudices anyone. It
18 potentially saves some jobs at the Delta in the
19 meantime. The Commission can still say we don't think
20 they've shown the financial -- it's not up to where we
21 want it to be, denied.

22 I've only talked about the Delta because the
23 Bonanza, and I haven't made up my mind because I don't
24 know if either of you have evidence you're going to want
25 me to consider, but my preliminary impression from all

1 the information I've reviewed so far, there's a fire
2 code violation and if they want to deny it, they should
3 deny it. The fire chief said it's a hazard. That's why
4 I've limited my comments to the Delta.

5 So that's what I want you to discuss is that
6 process that I've suggested. Before we do that, do you
7 have any questions or other comments you want to make?

8 MR. HIPPLER: With respect to the Bonanza, I
9 wanted to provide your Honor, if I could, just since you
10 raised that issue -- may I approach?

11 THE COURT: Yes.

12 MR. HIPPLER: This is something that we were
13 going to raise today obviously. It's a business license
14 inspection sheet signed on both May 15th as well as
15 May 21st saying in the notes section, "Conditional upon
16 fire sprinkler and fire alarm install, owner shall have
17 six months to install systems after July 1st, 2015."

18 That runs through obviously the end of December
19 of this year, and much like we talked about before, this
20 is again what my client relied upon in terms of having
21 time to get the sprinkler system set.

22 In addition, there are some e-mail
23 correspondence which perhaps after the break we can get
24 into further, but this is I think the most important and
25 relevant piece of information that I wanted to provide

1 your Honor while we were on that topic.

2 THE COURT: Any questions or comments?

3 MR. LOOMIS: Well, Judge, I'm going to object
4 to the introduction of this item of evidence under the
5 standards that I set out in the Points and Authorities
6 in opposition of the petition for Mandamus in that the
7 review of the record of a licensing board is on the
8 evidence produced during the course of the hearing in
9 front of the licensing board.

10 Obviously they had the opportunity to produce
11 this. They did not, so I don't think it's appropriately
12 in front of the Court at this point.

13 THE COURT: And I'm not going to consider it at
14 this point. I'm not going to make a decision about
15 whether it's going to be admitted later or not.

16 Do you have any questions or comments on what
17 it is I want you to talk with whatever representatives
18 you have here?

19 MR. LOOMIS: I do have some argument I'd like
20 to make.

21 THE COURT: I want you to talk to them first
22 and then I'm going to take the argument.

23 MR. LOOMIS: All right.

24 THE COURT: So nothing else at this point?

25 MR. LOOMIS: Nothing else at this point.

1 THE COURT: I was going to let them use the
2 jury room so that they would have some privacy. Do you
3 have somewhere in the courthouse that you can meet
4 privately with who is here with you?

5 MR. LOOMIS: Yes.

6 THE COURT: Okay. We are going to be then in
7 recess. When you're done speaking individually, I would
8 like for you to communicate together before, let the
9 bailiff know and we'll reconvene.

10 MR. LOOMIS: Will do.

11 THE COURT: We'll be in recess.

12 (A recess was taken.)

13 THE COURT: Please be seated. Back on
14 15-OC-08, Malfitano and others vs. Storey County and
15 others.

16 The parties, Mr. Malfitano and counsel and Mr.
17 Loomis are all present. Mr. Helling -- Mr. Hippler,
18 excuse me, anything you want to tell me?

19 MR. HIPPLER: We conferred. I understand that
20 there's nothing coming from the County with respect to
21 them being open to having this go back in front of the
22 Commissioners.

23 THE COURT: Okay.

24 MR. HIPPLER: And I don't know if Mr. Loomis
25 has anything more to add, but they didn't agree to

1 anything.

2 THE COURT: Mr. Loomis?

3 MR. LOOMIS: Judge, it's not that we're not
4 open to having Mr. Malfitano submit a new application to
5 the Board, which he is completely entitled to do. We
6 have no time frame on limiting when you can make a new
7 application, but we're not inclined to say that, yes,
8 we're going to allow him to operate these businesses in
9 light of the information that was gleaned during the
10 course of the last hearing.

11 There's a mass of evidence, it's beyond that
12 which was provided in the Gaming Control Board order or
13 the Gaming Commission order. There was additional
14 evidence provided by Chairman McBride, by Mr. Gallagher,
15 the county comptroller, by Mr. Whitten, the county
16 manager. There was a plethora of other evidence besides
17 just that provided in the order of the Gaming
18 Commission, and that information which I would suggest,
19 and I've argued in the petition, is substantial to
20 support the reason for denying the license.

21 So what we would ask the Court to do is rule on
22 the evidence that's been submitted and considered,
23 number one, and if Mr. Malfitano wants to come back,
24 he's welcome to do that. This I would note is an issue
25 raised by the Court, it was not raised by counsel for

1 Mr. Malfitano.

2 THE COURT: What issue?

3 MR. LOOMIS: The issue of whether or not he
4 should be given additional opportunity to present
5 evidence.

6 THE COURT: That's correct.

7 MR. LOOMIS: I would also note, your Honor,
8 that we reviewed the videotape and audio recording of
9 the September 1st meeting --

10 THE COURT: Excuse me for just a second. I was
11 told on the break that JAVS is having trouble picking
12 you up, so I'm going to have you sit while you speak.

13 MR. LOOMIS: I can appear in front of the
14 lectern, Judge.

15 THE COURT: Either one, just so you got the
16 microphone a little closer to your mouth.

17 MR. LOOMIS: Is that on? Okay. Judge, we
18 reviewed the audio and the video recording of the
19 September 1st hearing and we would acknowledge that
20 Chairman McBride initially indicated that these were
21 typically approved --

22 THE COURT: Hang on just a second. You're
23 getting into your argument on what you want me to do and
24 I'm going to let the petitioner go first on that.

25 MR. LOOMIS: All right.

1 THE COURT: First of all, do you have any
2 evidence you want to present? I'm not saying I'm going
3 to admit anything, I'm asking if you have any you want
4 to present.

5 MR. HIPPLER: Yes, we do, your Honor. There
6 are some documents in addition to my client testifying
7 today.

8 THE COURT: Mr. Loomis made an objection
9 earlier that it should be based upon the record. Why is
10 that not correct?

11 MR. HIPPLER: Obviously before the Court is not
12 only the petition for Writ of Mandamus, but most
13 importantly is the --

14 THE COURT: Before me today is the temporary
15 restraining order.

16 MR. HIPPLER: Exactly, and the motion for
17 preliminary injunction, and that standard is one that
18 requires as a matter of law and via rule that we have to
19 establish irreparable injury and a reasonable likelihood
20 of success on the merits and that's what we're focused
21 on today, and as part of making that record and
22 establishing the fact that Mr. Malfitano is being harmed
23 by the denial of the licenses, in fact we've got eight
24 employees from the businesses here today in support of
25 him, that's the focus of the evidence that we wanted to

1 get before your Honor.

2 One of the things that I just wanted to
3 preview, though, is that I was informed during the break
4 that your Honor has to leave shortly to return to Carson
5 for another matter, and so I don't know how long both
6 the testimony and the argument are going to take, but I
7 would ask the Court that if we don't finish the
8 proceedings, that we do whatever possible to have this
9 put on your calendar so we can finish the proceedings as
10 soon as possible, or even perhaps the temporary
11 restraining order issued to get us to that point so that
12 my client could operate in the meantime, so I just
13 wanted to let you know that we were informed of that.

14 THE COURT: What are the documents you're going
15 to want me to look at?

16 MR. HIPPLER: I'm happy to provide both counsel
17 and your Honor the documents, if I may.

18 THE COURT: Just give me an idea of what you
19 have.

20 MR. HIPPLER: Beyond what was included and
21 attached to the motion, the only other item that was not
22 already attached as an exhibit to the motion was an
23 e-mail exchange, which if I can provide to counsel and
24 your Honor.

25 THE COURT: Go ahead.

1 MR. HIPPLER: May I approach?

2 THE COURT: Yes.

3 MR. HIPPLER: After the September 1st hearing,
4 shortly thereafter Mr. Hames provided a letter and
5 followed it up with an e-mail correspondence to my
6 client inquiring about the sprinkler -- fire sprinklers
7 at the Bonanza, and the relevance of this e-mail is that
8 unlike what was stated at the October 6th meeting by Mr.
9 Hames and has been stated by the respondents in their
10 papers, is that there was no statement in the letter, no
11 statement in this e-mail to my client about the
12 agreement of May 15th somehow being null and void.

13 In other words, what this e-mail shows is the
14 exact opposite of a null and void position being taken
15 by the county. They wanted to make sure that the fire
16 sprinkler system was being focused on, which it
17 absolutely is. The design is nearly complete and it
18 will be done in conformity with the deadline that was
19 agreed to between my client and the county as evidenced
20 by the business license sheet that I provided earlier.

21 So in terms of written documentation, this is
22 the only other item in addition to the business sheet
23 that I intended on presenting today that goes beyond the
24 exhibits that were already attached to the motion, the
25 agenda, the minutes, et cetera.

1 The only other thing then was Dr. Malfitano's
2 testimony about how this has affected his business and
3 things such as that. That's what was going to be
4 presented here today in addition to argument, of course.

5 THE COURT: What, if any, evidence did you
6 have, Mr. Loomis?

7 MR. LOOMIS: Judge, I'm relying on the record
8 that was produced at the time of the hearing.

9 THE COURT: All right. I have one other
10 question before we get to the heart of the matter. Do
11 you disagree with District Attorney Langer and Special
12 Counsel Morris' advice to the Commissioners that they
13 should state the specific facts they're relying upon to
14 accept or deny?

15 MR. LOOMIS: Do I agree with that as a legal
16 standard? Judge, if you look --

17 THE COURT: Not as a legal standard, but as
18 something that should have been done at the Commission
19 meeting.

20 MR. LOOMIS: It's not a legal requirement, no.
21 It is helpful to the reviewing court in determining why
22 an action was taken, but the cases specifically state --
23 well, the City Council case vs. Irvine specifically
24 states that it is not absolutely required that a
25 licensing board submit findings in support of an action,

1 but it is helpful to the reviewing court if they do so,
2 but it's not a requirement of law.

3 THE COURT: Do you agree with that?

4 MR. HIPPLER: I think ultimately -- well, I
5 think that what it does is just as was stated. It helps
6 clarify the basis of the decision, and here you have an
7 absolute ambiguity of what the basis of the decision was
8 and in light of that, what you have is a supreme focus
9 on the Gaming Control Board order.

10 If you remove that from what was discussed,
11 there is only one item of evidence before the
12 Commissioners and that was the sheriff's report, the
13 sheriff's recommendation, et cetera, which was all very
14 supportive of the issuance of both the liquor
15 licenses -- well, I should say the liquor licenses
16 specifically and my client's positive financial
17 standing.

18 THE COURT: You said you only had -- Mr.
19 Malfitano was the only witness. He's got eight people
20 here to support him, but he's the only witness?

21 MR. HIPPLER: That is correct.

22 THE COURT: Would you please stand and face the
23 clerk here and raise your right hand?

24

25

1 VINCENT MALFITANO

2 having been duly sworn,

3 was examined and testified as follows:

4 THE COURT: Go ahead and have a seat up here.

5 MR. LOOMIS: Your Honor, may I have a
6 continuing objection to his testimony?

7 THE COURT: What's the objection if the
8 testimony is related to irreparable harm since that was
9 not an issue at the Commission meeting?

10 MR. LOOMIS: Well, Judge, under civil procedure
11 rule 65, they're required to submit an affidavit in
12 support of their application for the restraining order
13 demonstrating that irreparable injury.

14 That was not done in support of the motion for
15 the restraining order, and I've noted that --

16 THE COURT: Isn't that if it's an ex parte
17 motion if it's going to be an ex parte basis?

18 MR. LOOMIS: It doesn't require that it be on
19 an ex parte basis. This applies to temporary
20 restraining orders. I think that the temporary
21 restraining order is really something that occurs before
22 you have the hearing on the preliminary injunction, and
23 today is the day for the hearing on the preliminary
24 injunction.

25 THE COURT: I'm reading rule 65-B. The first

1 sentence says, "A temporary restraining order may be
2 granted without written or oral notice to the adverse
3 party or that party's attorney only if it clearly
4 appears from specific facts by affidavit or by verified
5 complaint." This isn't an ex parte hearing. You've
6 been given notice we're having a hearing.

7 MR. LOOMIS: Yes, I've been given notice. I
8 think we have moved beyond the restraining order and
9 moved into the preliminary injunction stage of the
10 request.

11 THE COURT: Why do you think that?

12 MR. LOOMIS: Because I think the ex parte
13 restraining order is something that occurs before we get
14 to the hearing in order to preserve the status quo in
15 the meantime and that's why an affidavit demonstrating
16 the irreparable injury has to occur when they submit the
17 request for the ex parte restraining order. Once we get
18 to the hearing, I think we're addressing solely the
19 issue of the preliminary injunction.

20 THE COURT: And tell me where -- what's the
21 rule that says that?

22 MR. LOOMIS: Well, I'm reading that from rule
23 65.

24 THE COURT: Do you have it with you, 65?

25 MR. LOOMIS: I don't have the specific rule,

1 but I'm aware of the fact that it doesn't specifically
2 preclude a hearing on the temporary restraining order,
3 but I think the point of the ex parte restraining order
4 is to allow the remedy to occur before you get to the
5 hearing, and once you get to the hearing, the question
6 is one of whether or not a preliminary injunction should
7 issue which is a question of the irreparable injury and
8 the likelihood of success on the merits.

9 THE COURT: I don't see in 65 -- the motion was
10 filed, you were given notice we set this hearing.
11 There's not a temporary restraining order.

12 MR. LOOMIS: There is not.

13 THE COURT: There is not. That's the purpose
14 of this hearing, so --

15 MR. LOOMIS: I would argue, Judge, that the
16 purpose of the hearing is for a preliminary injunction.

17 THE COURT: And you're referring back up to
18 that first language -- let's say it is a preliminary.
19 What's the rule that says for a preliminary hearing
20 they're required to file an affidavit?

21 MR. LOOMIS: The rule requires that an
22 affidavit be submitted with the request for the ex parte
23 restraining order demonstrating the injury.

24 THE COURT: If it's granted without notice.
25 That's what the rule says.

1 MR. LOOMIS: If it's granted without notice,
2 true.

3 THE COURT: And that's not what we have.

4 MR. LOOMIS: Well, Judge, the way I'm reading
5 the rule is the ex parte restraining order is the
6 initial remedy to get you to the hearing, and then once
7 you get to the hearing, you're addressing the
8 preliminary injunction.

9 THE COURT: Unless you have a hearing on the
10 temporary restraining order.

11 MR. LOOMIS: That's fine, Judge.

12 THE COURT: Go ahead.

13 MR. HIPPLER: Thank you, your Honor.

14 DIRECT EXAMINATION

15 BY MR. HIPPLER:

16 Q Dr. Malfitano, good afternoon. If you could
17 please briefly provide some background as to your
18 professional history to the Court.

19 THE COURT: In the interest of time, if there's
20 not an objection from the other side, let's get to the
21 irreparable harm.

22 MR. HIPPLER: Well, among other items, your
23 Honor, as I said, as I noted with the exhibits there's a
24 few other items, but I just thought that it might
25 benefit the Court to have a brief understanding of my

1 client's background if it pleases the Court. If you
2 would rather --

3 THE COURT: Let's come back to that.

4 MR. HIPPLER: Fair enough.

5 BY MR. HIPPLER:

6 Q When did you purchase the two properties at
7 issue?

8 A October 1st of 2014.

9 Q And from whom did you purchase them?

10 A Angelo Petrini.

11 Q And at that time did you have a gaming license?

12 A I did not.

13 Q After purchasing the properties, did you apply
14 for a gaming license?

15 A I did.

16 Q Since you did not have a gaming license, who
17 operated the properties for you?

18 A A lessee named Bruce Dewing under Dewing Gaming
19 Management.

20 Q And upon acquiring the properties, did you
21 invest certain capital in those properties?

22 A I did.

23 Q And can you describe the nature of that
24 investment?

25 A Before -- it evolved over a two-year period.

1 Before the close of escrow, I was probably invested in
2 the property about a million eight and a lot of that had
3 to do with licensing, Dewing bank rolling the
4 operations, and all his legal expenses, so I footed all
5 of that for him and that was before the close of escrow
6 on the 1st.

7 Q And is that figure that you just mentioned
8 separate and aside from the purchase price for the
9 properties?

10 A It is.

11 Q And that was an amount of money that you could
12 afford?

13 A Yes, sir.

14 Q And the nature of the work at the properties,
15 just very briefly describe that.

16 A During the transfer of ownership, inspections
17 by the different departments here in Virginia City.
18 There was ample list, a very detailed list of electrical
19 work that needed to be done at both properties, and
20 since October 1st, '14 we've done that and the only
21 thing left to do that's not been signed off is to
22 install the fire sprinkler at the Bonanza.

23 Q And with respect to the Bonanza fire sprinkler
24 system, did you meet with county officials in or about
25 May of this year?

1 A We did, with the county manager and all the
2 department heads, and that was to make sure that we had
3 completed everything that we were supposed to complete
4 so that we could move forward in obtaining our business
5 and liquor licenses.

6 MR. HIPPLER: Your Honor, may I approach the
7 Clerk and have marked an exhibit the inspection sheet?

8 (Exhibit 1 was marked.)

9 BY MR. HIPPLER:

10 Q Do you recognize that document?

11 A I do, sir.

12 Q What is that document?

13 A It is a sign-off, the final sign-off sheet for
14 all the work that needed to be complete in order to
15 obtain the business and liquor licenses.

16 Q And if I can turn your attention to the
17 handwritten portion in the middle of the page, can you
18 read that aloud?

19 A Yeah, that's the fire safety issue. It was
20 signed by Fitz Clinger from the fire department.
21 "Conditional upon fire sprinkler and fire alarm
22 installed, owner shall have six months to install
23 systems after July 1, 2015."

24 Q And did you rely upon that document?

25 A Yeah, the document speaks for itself.

1 Q And to clarify, when I say rely, did you rely
2 upon that document in terms of understanding the time
3 line in which you had to install the fire sprinkler
4 system?

5 A Yes, sir. We have until the end of this year,
6 but we've -- since September or when the original
7 agreement, the design of the fire system is almost
8 complete. It's ready to be submitted to the county for
9 design approval, and then from that, we go to bid, get a
10 price to install and we're off and running. We already
11 have a preliminary bid to do it and it's in the
12 neighborhood of 65 to \$70,000 to complete that work.

13 MR. HIPPLER: Your Honor, may I approach the
14 clerk again?

15 THE COURT: Yes.

16 (Exhibit 2 was marked.)

17 BY MR. HIPPLER:

18 Q On or about the time of the business license
19 inspection sheet that's dated May 15th, 2015, did you
20 have any discussions with the county about coming to an
21 agreement?

22 A We met with the county manager and all his
23 department heads at the county manager's office and I
24 just wanted to make sure I was dotting all my I's,
25 crossing my T's, so I just needed to make sure that with

1 this sign-off sheet, we were all set to go to be
2 agendized for the first reading -- pardon me, the second
3 reading of the business and liquor licenses. The county
4 manager advised all of us in the room that --

5 MR. LOOMIS: Objection, hearsay.

6 THE WITNESS: -- it would not --

7 THE COURT: Hold on.

8 MR. HIPPLER: It's not being offered for the
9 truth of the matter asserted, your Honor. It's relating
10 to his mindset in terms of the timing in which he needed
11 to deal with the sprinkler system.

12 THE COURT: Do you want to respond to that?

13 MR. LOOMIS: I'm not sure exactly what he's
14 going to be saying that was reported by County Manager
15 Whitten, but it sounds like he's going to say because he
16 told me this, this is what I did, and if that's what
17 he's going to use it for, that's for the truth of the
18 matter asserted.

19 THE COURT: The objection is overruled. You
20 can answer.

21 THE WITNESS: Pat Whitten specified to all of
22 us at the meeting that in fact it would be agendized for
23 the approvals, but since there was already a license
24 issued at that address, that they would not be able to
25 issue the license, but he said it would be appropriate

1 to go ahead, agendize and be approved, but not issued,
2 and it was described at the time I took over the
3 operation, Sheriff Antinoro at that particular point in
4 time would issue the temporary business and liquor
5 licenses, which he did, but at the hearing, Pat Whitten
6 reversed himself and asked that the license be not
7 preempted or denied.

8 MR. LOOMIS: Objection.

9 MR. HIPPLER: Same response before, your Honor.

10 THE COURT: If it's a statement that's being
11 offered against the other side, is it even hearsay? Is
12 Mr. Whitten as the county manager and a member of the --

13 MR. LOOMIS: Probably.

14 THE COURT: The objection is overruled. Go
15 ahead.

16 THE WITNESS: Mr. Whitten reversed course and
17 offered that -- or suggested that the licenses be
18 denied, and they were at that time, and --

19 BY MR. HIPPLER:

20 Q You're referring to the September 1st meeting
21 with the commissioners?

22 A That is correct, yes, sir, but at that time
23 McBride made a comment that says not to worry, there's
24 no reason why it shouldn't be granted, everything is in
25 place, we've gotten Sheriff Antinoro's report,

1 everything is fine, so it's just a matter of logistics.
2 We can't have two licenses on a property at the same
3 time, which I completely understood.

4 But I was more in tune to when I do take over,
5 I want to maintain the operation and the staff on site,
6 so that business and liquor license was pivotal in doing
7 that and I just wanted to make sure that that was going
8 to happen, and it did happen.

9 MR. HIPPLER: Before I go further, I wanted to
10 move to admit Exhibits 1 and 2.

11 THE COURT: Mr. Loomis?

12 MR. LOOMIS: I'm going to object to the
13 admission of those exhibits, your Honor, on the basis
14 they were not provided in the record of the proceedings.

15 THE COURT: Any response to that?

16 MR. HIPPLER: As was already discussed by your
17 Honor at the outset of the proceedings today, there was
18 never an opportunity to anticipate that there are any
19 problems coming up or brewing between the September 1st
20 and the October 6th meeting.

21 That's part of the reason, of course, why Mr.
22 Malfitano did not attend the October 6th meeting. If he
23 had, all of this would have certainly come out to rebut
24 the testimony or the comments at the October 6th meeting
25 from Fire Chief Hames.

1 Therefore, these are relevant to establish the
2 arbitrariness of the decision by the commissioners on
3 October 6th which is, of course, part and parcel of what
4 I need to establish for the issuance of a preliminary
5 injunction and ultimately the Writ.

6 THE COURT: The objection is overruled. One
7 and two are admitted.

8 BY MR. HIPPLER:

9 Q Going back for a moment, Mr. Malfitano, you
10 applied for a gaming license, correct?

11 A Yes, sir.

12 Q And that was denied?

13 A That is correct.

14 Q During that hearing, did you observe Mr.
15 McBride in attendance?

16 A I did.

17 Q And his attendance at the gaming hearing was
18 before September 1st?

19 A That is correct. It was August 20th.

20 Q After the September 1st commissioner meeting
21 that you have already testified about, did anybody from
22 the county at any level communicate with you about
23 having any additional concerns about the issuance of
24 both your liquor license or the business license?

25 A No, sir.

1 MR. HIPPLER: Your Honor, may I approach?

2 THE COURT: Yes.

3 (Exhibit 3 was marked.)

4 MR. HIPPLER: Your Honor, that is Exhibit 3
5 which is the September 3rd e-mail that I provided your
6 Honor earlier.

7 THE COURT: Okay. Go ahead.

8 BY MR. HIPPLER:

9 Q Mr. Malfitano, do you recognize that document?

10 A I do.

11 Q What is that document?

12 A This is an e-mail correspondence from Chief
13 Hames. With it attached was a certified letter that I
14 received in the mail subsequently a few days later
15 wherein he stated that he didn't feel like I was
16 complying with the agreement or contract that I had with
17 him and that the time had lapsed, and all I did was to
18 recollect his memory to say, Chief Hames, if you just
19 look at the agreement it's clearly on there, date to be
20 determined as to the final installation and reminded him
21 that on the sign-off sheet, Mr. Clinger put on there per
22 our agreement that I would have until the end of 2015 to
23 actually have it installed.

24 Once I sent him that e-mail, he quickly
25 responds and thanks me for the quick response and says,

1 "We are very happy that you will be moving forward with
2 the fire sprinkler plan submittal and installation.
3 Please have the contracts and other items to us by
4 October 3rd," which we did well in advance of
5 October 3rd.

6 Q And in the letter that you described that was
7 attached to the original e-mail, did Mr. Hames say that
8 he considered the May 15th contract null and void?

9 A No, sir.

10 Q Did that letter say that you wouldn't have
11 until the end of December to get the sprinklers in at
12 the Bonanza?

13 A No, sir.

14 Q Did the e-mail say either of those things,
15 either that you don't have until December 31st or that
16 the agreement is null and void?

17 A No. The e-mail was thanking me for doing what
18 I was doing.

19 Q When was the first time that you heard that Mr.
20 Hames' position was that the May 15th contract was null
21 and void?

22 A When I spoke to Miss Perkins and Mr. Kettis
23 directly after the meeting.

24 Q And the meeting you're referring to is the --

25 A October 6th.

1 Q October 6th meeting. Were you surprised to
2 hear that?

3 A I was stunned that a public official in a
4 public forum would misstate the facts.

5 Q Why didn't you attend the October 6th meeting
6 of the commissioners?

7 A A couple of reasons. I relied heavily on Mr.
8 McBride's statement that there is no reason or problem
9 with issuing both licenses and that the reason why it
10 was denied on that date was that it was just a logistics
11 issue, and I understood that, so I really felt based on
12 the minutes that were approved early on October 6th
13 meeting that this is just -- it's a done deal, there's
14 nothing else to do.

15 Secondary to that, one of the reasons why I
16 didn't attend or could not is because my father is
17 terminally ill and I was not able to leave.

18 Had I known what I know now that the D.A.
19 Langer opened my agenda item with the phrase, "Let's go
20 ahead and peruse his moral character," I thought, oh, my
21 God, what is going on now, and I didn't know that until
22 after I read the transcript.

23 Q Prior to the October 6th meeting, did you have
24 an opportunity to review the agenda for that meeting?

25 A Yes, sir.

1 Q And did you note anything with respect to the
2 licenses in the agenda?

3 A Yeah, it's clearly stated by Sheriff Antinoro,
4 he's suggesting approval of all licenses based on his
5 three or four month investigation, so there would have
6 been no reason for me, based on Sheriff Antinoro's
7 findings, based on what the Commission talked about on
8 September 1, that there would be any reason to deny the
9 licenses.

10 Q Did the sheriff communicate with you prior to
11 the September 1st meeting about what his recommendation
12 was going to be?

13 A Not specifically right before September 1st,
14 but once he had completed his investigation, he called
15 me to let me know everything was fine and that we're
16 going to proceed on to the agendized items.

17 Q Between September 1st and October 6th, did the
18 sheriff communicate with you about what his
19 recommendation was going to be on the October 6th
20 meeting?

21 A I don't recall if he did or he didn't.

22 Q Did you hear from anybody from the county
23 between September 1st and October 6th about what the
24 recommendation was going to be for your licenses?

25 A No, sir.

1 Q Without going into detail, is it accurate to
2 say that under the purchase agreement that you had with
3 Mr. Petrini, that you have to make occasional payments
4 to him?

5 A Yes, sir.

6 Q Have you missed any of those payments?

7 A None.

8 Q Have you missed -- since purchasing the
9 properties last October, have you missed any payments in
10 relationship to the properties?

11 A Not only have I not missed the payments, I pay
12 them early.

13 Q Do you have the financial standing to run these
14 two businesses in a profitable way?

15 A Absolutely.

16 Q After your gaming license was denied, what did
17 you do to figure out how you were going to move forward
18 and run these two properties?

19 A Well --

20 THE COURT: Hang on just a minute. How does
21 this apply to the temporary restraining order,
22 irreparable harm?

23 MR. HIPPLER: That's where I'm going, your
24 Honor. In terms of the business plan that my client
25 developed after the denial of the gaming license, he had

1 to obviously retool and focus his efforts on the
2 business and it pertains to the fact that now that the
3 licenses have not been issued, that he suffered a loss
4 of business, and also what I intend to ask him about is
5 essentially anger in the community about gaming not
6 being a part of these properties, so it's part and
7 parcel of those subjects. I can keep this brief if the
8 Court prefers.

9 THE COURT: Keep it brief and if there's
10 hostility in the community, how is that relevant to
11 irreparable harm?

12 MR. HIPPLER: Part of what it relates to is the
13 commissioner's own statements at the October 6th hearing
14 that appear in the transcript. In other words --

15 THE COURT: I'm familiar with those, but I
16 don't see how they're relevant.

17 MR. HIPPLER: Okay. I'll focus on the other
18 line of questions then.

19 BY MR. HIPPLER:

20 Q After the business and liquor licenses were
21 denied, have you had to lay employees off?

22 A My main focus was to redo the business plan so
23 that I could retain as many employees that wanted to
24 work. That was my main focus even without gaming, and
25 we've been able to do that. I offered employment to

1 everyone that worked there previously and the ones that
2 wanted to work, I am employing them even without the
3 gaming.

4 Q Is the Bonanza currently open?

5 A The Bonanza has been shut down due to the
6 denial of the business license.

7 Q Since what date?

8 A October 6th.

9 Q Is the Delta currently open?

10 A Barely.

11 Q And what are the nature of the operations there
12 currently?

13 A We sell popcorn and soda.

14 Q And have you lost business as a result of the
15 denial of the liquor and business licenses at both
16 properties?

17 A I can only tell you that in sitting there the
18 last 16 days and watching thousands of people stream in
19 the front doors and only be able to offer them popcorn
20 and soda, I would say that there is an absolute loss of
21 business.

22 Q Have you had the ability to quantify that?

23 A I have not.

24 Q So prior to the filing of the petition and the
25 motion for temporary restraining order and preliminary

1 injunction, did you have an opportunity to review those?

2 A Yes, sir.

3 Q And are all the factual assertions in those
4 pleadings accurate according to your personal knowledge?

5 A Yes, sir.

6 Q Lastly, Mr. Malfitano, how committed are you to
7 these two properties?

8 A As I said before to others, I didn't make an
9 investment in Virginia City. I made a commitment.
10 These are very expensive properties and they have
11 tremendous historical value.

12 I don't consider myself an owner of these
13 buildings, I consider myself the next steward, and when
14 I go into communities as I've done before, I do it with
15 a community focus. I want to employ as many as I can, I
16 want to grow the business and I want to --

17 MR. LOOMIS: Your Honor, this does not address
18 the --

19 THE WITNESS: I want to grow --

20 THE COURT: Hold on. What's the objection?

21 MR. LOOMIS: Object to further self-serving
22 statements. They don't address the irreparable injury.

23 THE COURT: Sustained.

24 MR. HIPPLER: I have no further questions. I
25 would move to admit Exhibit 3 which I believe is the

1 e-mail exchange.

2 THE COURT: Mr. Loomis?

3 MR. LOOMIS: Judge, I'll object on the same
4 grounds that this was not previously submitted to the
5 Board at the time of the hearing on the liquor license
6 and business license.

7 THE COURT: The objection is overruled. Three
8 is admitted.

9 MR. HIPPLER: I believe that those are the only
10 exhibits that I had, Madam Clerk, those three. No
11 further questions.

12 THE COURT: Go ahead.

13 CROSS EXAMINATION

14 BY MR. LOOMIS:

15 Q Mr. Malfitano, we're here to address the issue
16 of whether you've suffered irreparable harm as a result
17 of the denial of the liquor licenses. Do you understand
18 that?

19 A I do.

20 Q And how long have you had the -- how long ago
21 did you purchase the businesses from Mr. Petrini?

22 A October 1st, 2014.

23 Q Did you get a liquor license at that time?

24 A No.

25 Q Did you get a gaming license at that time?

1 A No.

2 Q Did you get a business license at that time?

3 A No. Didn't need one.

4 Q So you went ahead and purchased the properties
5 without trying to obtain any licenses in advance?

6 A It wasn't --

7 Q Is that true, yes or no?

8 A I didn't need one. That's the --

9 Q Did you apply for any of those after you
10 purchased the businesses directly after the purchase?

11 MR. HIPPLER: Objection, asked and answered.

12 THE COURT: Overruled. You can answer.

13 THE WITNESS: No.

14 BY MR. LOOMIS:

15 Q How long did it take you before you applied for
16 your gaming license?

17 A I applied immediately.

18 Q How long did it take for them to do your
19 investigation into your background?

20 A Nine months.

21 Q Okay. So the gaming licenses were denied back
22 in September of this year; is that correct?

23 A August 20th of this year.

24 Q That's when the Gaming Commission held its
25 hearing, the final order wasn't signed until September;

1 isn't that correct?

2 A That is correct.

3 Q When did you apply for your liquor license?

4 A I don't recall.

5 Q How long after you purchased the businesses did
6 you apply for your liquor licenses, approximately?

7 A I was not allowed. I didn't operate the
8 properties. I had a lessee. I was not allowed to apply
9 for business and/or liquor, period.

10 Q Well, you applied for a liquor license despite
11 the fact that you had a lessee on the property, didn't
12 you?

13 A As the time was nearing that I was going to
14 take it over, that's correct.

15 Q So you did apply for a liquor license while you
16 had a lessee on the property; isn't that correct?

17 A That is correct, with gaming approval.

18 Q You also applied for the business license while
19 you had a lessee on the property, didn't you?

20 A That is correct.

21 Q How long before you -- at what point did you
22 make those applications for the liquor license and the
23 business license?

24 A I don't recall, but the documents would speak
25 for themselves.

1 Q Shortly before the hearings?

2 A No.

3 Q October?

4 A I don't remember.

5 Q Did you do it in October of 2014?

6 A No.

7 Q Did you do it by January of 2015?

8 A I don't remember.

9 Q All right.

10 A The documents are available.

11 Q So what you have indicated is you paid for
12 these properties somewhere in the area of four million
13 dollars; is that right?

14 A That is correct.

15 Q And after that, you spent another 1.8 million
16 on, it sounds like mostly for Mr. Dewing's licensing; is
17 that correct?

18 A I don't know if that amount is correct, but
19 there was a substantial amount of money that was paid on
20 behalf of Dewing since he has no money.

21 Q Now, you could have allowed Mr. Dewing to
22 continue the operations at the businesses pending your
23 own licensing; isn't that correct?

24 A I did. He operated for one year.

25 Q When was the lease set to expire?

1 A Since he's had two eviction notices sent to him
2 for nonpayment, I think after that I just did it --

3 Q Did you send him the eviction notices?

4 A Of course. When you don't pay, you get
5 evicted.

6 Q So what you're trying to tell us is you're
7 irreparably harmed despite the fact you never got a
8 license for anything?

9 A I'm not trying to tell you that. That's your
10 characterization.

11 Q Now, you attended the hearing on September 17th
12 or September 1st before the Board of County
13 Commissioners; isn't that correct?

14 A That is correct.

15 Q And did you hear what Ms. Langer advised the
16 Board after Chairman McBride had suggested that approval
17 would be forthcoming?

18 A No.

19 Q You don't recall?

20 A No, sir.

21 Q Did you review the minutes of that hearing?

22 A Don't recall.

23 Q Do you recall what Chairman Whitten had to say
24 after -- or County Manager Whitten had to say after
25 Chairman McBride had made his comments?

1 A I do.

2 Q Do you recall him telling you that this was
3 subject to being considered?

4 A No.

5 Q You don't recall that?

6 A It's not what he put in the minutes.

7 Q Okay. Would you like to look at the minutes?

8 A No.

9 Q Because you're quite certain it's not in the
10 minutes?

11 A The minutes reflect McBride saying there's no
12 issue.

13 Q So you have no recollection of that meeting
14 other than what's in the minutes?

15 A My only recollection of that meeting is I was
16 denied and that's all I need to know.

17 Q You were telling us earlier that Chairman
18 McBride told you you'd get approved?

19 A No. He said there was no reason why this
20 shouldn't be approved.

21 Q You recall that?

22 A Of course, I do. It's in the minutes.

23 Q So all you know is what's in the minutes?

24 A I was standing at the podium. I could hear the
25 man.

1 Q What you told us was all you know is that you
2 were denied?

3 A That's correct.

4 Q So why would you assume that you're going to be
5 approved the next time?

6 A Why would I assume, because that's what they
7 said.

8 Q That's what you read in the minutes?

9 A They said it's only being denied because of a
10 procedural issue where two licenses can't be issued at
11 the same time. I understood that and I accepted that.

12 Q Okay. And the only reason you know that is
13 because you read it in the minutes?

14 A No, because I was told that in person.

15 Q At the hearing?

16 A Yes, sir.

17 Q So you recall testimony that was provided at
18 the hearing?

19 A Yes.

20 Q So do you recall the testimony that was
21 provided by County Manager Whitten?

22 A The only thing I remember Whitten saying was
23 because this is denied, I'm going to ask Sheriff
24 Antinoro to refund him, Dr. Malfitano, the fees that he
25 paid for the gaming portion of the licenses and that was

1 refunded. He said he would ask Sheriff Antinoro to make
2 an accommodation to do just that.

3 MR. LOOMIS: May I approach the clerk?

4 THE COURT: We're going to number sequentially,
5 so it will be number four.

6 (Exhibit 4 was marked.)

7 BY MR. LOOMIS:

8 Q Mr. Malfitano, let me show you what's marked as
9 Exhibit 4 --

10 A It's actually Dr. Malfitano.

11 Q -- the minutes of the September 1st, 2015
12 meeting. Under item 13, there is a reference to
13 comments made by County Manager Whitten. Would you
14 please review that part of the minutes?

15 A That sounds about right.

16 Q And what he says is the license will be
17 considered for approval, doesn't it?

18 A In here it does, yes.

19 Q Okay. And that's what you recall is what you
20 read in the minutes for the most part, isn't it?

21 A I don't recall that. You asked me what I
22 recalled. I told you what I recalled about what Whitten
23 said and that only had to do with refunding the gaming
24 portion of the business license.

25 MR. LOOMIS: Judge, that's been attached to the

1 verified petition for Mandamus as Exhibit 1 and I'd ask
2 that be remarked as Exhibit 4 and we can either take it
3 as part of the exhibits to the Writ or I can reintroduce
4 it as Exhibit 4.

5 THE COURT: Do you have any objection to it
6 being admitted?

7 MR. HIPPLER: I do not.

8 THE COURT: Four is admitted.

9 BY MR. LOOMIS:

10 Q Now, you testified on the stand that with the
11 approval of the minutes of the September 1st hearing at
12 the October 6th hearing in advance of the hearing on
13 your license that you thought everything was fine?

14 A That is correct.

15 Q Okay. How did you know that they had approved
16 the minutes of the September 1st hearing at that
17 October 6th hearing?

18 A I watched the audio portion of the tape.

19 Q Was it concurrent with the hearing itself?

20 A I watched it after the hearing.

21 Q Okay. So you didn't know in advance of that
22 hearing, or even at the time they approved those
23 minutes, whether or not the license is going to be
24 approved, did you?

25 A Actually, that's not true. I reviewed those

1 minutes before they were talked about. They're put out
2 before the hearing.

3 Q Your testimony today is that when they approved
4 those minutes at the October 6th hearing, you knew that
5 you were in good shape and didn't have to worry about
6 anything? I'm paraphrasing.

7 A No. Actually, I knew that the minutes came out
8 before the October 6th hearing and on there it clearly
9 said that there's no reason why they can't be approved,
10 the licenses.

11 Q What you testified here earlier today was that
12 when --

13 A So now I'm correcting my testimony as I think
14 about it.

15 Q So you acknowledge that you're mistaken?

16 A So be it.

17 Q What else are you mistaken on?

18 MR. HIPPLER: Objection, argumentative.

19 THE WITNESS: Not very much.

20 THE COURT: Hold on. Sustained.

21 BY MR. LOOMIS:

22 Q You were also advised at the September 1st
23 hearing that the sheriff was going to do the
24 investigation, and you were advised of the nature of an
25 investigation into a liquor license by County Manager

1 Whitten, weren't you?

2 A I knew he was going to do an investigation.

3 Q So you knew that investigation was coming up?

4 A Of course.

5 Q And you also knew that you had been denied
6 gaming licenses by the Gaming Commission?

7 A I applied for my --

8 Q That's a yes or no question.

9 A Restate it.

10 Q You also knew that the Gaming Commission had
11 made its decision in advance of the time that the
12 sheriff was going to do his investigation?

13 A That's untrue.

14 Q You didn't know that the sheriff was going to
15 do his investigation after the Gaming Commission
16 hearing?

17 A The sheriff did his investigation before the
18 Gaming Commission hearing.

19 Q Well, you were advised at the September 1st
20 hearing that the sheriff was going to do the
21 investigation?

22 A The investigation had already been done and
23 complete.

24 Q Then why did they have to advise you of the
25 nature of the investigation that the sheriff was going

1 to do? What did you understand from that?

2 A I understood that the investigation was done
3 long before September, long before September.

4 Q Well, you said in your testimony that you
5 didn't know what the sheriff was going to recommend.

6 A That's -- of course not. He's doing the
7 investigation and --

8 Q So you're going into -- you decide not to
9 attend the October 6th hearing, even though you don't
10 know what the sheriff is going to recommend, even though
11 the Gaming Commission has denied your gaming licenses
12 for what I would characterize as numerous nondisclosures
13 of financial problems; isn't that correct?

14 MR. HIPPLER: Objection. The question
15 misstates evidence, your Honor.

16 THE COURT: Overruled.

17 THE WITNESS: So here's what you're missing,
18 okay?

19 BY MR. LOOMIS:

20 Q Well, just answer my question.

21 A Let me answer your question.

22 Q Here's the question --

23 A Let me answer your question. There's one on
24 the floor.

25 THE COURT: Hold on, hold on, hold on. Let him

1 finish his answer when he's answering.

2 THE WITNESS: The investigation --

3 THE COURT: Hold on. I'm not done yet. You
4 need to let him finish his question. If you want to
5 interpose an objection, you need to stop talking by
6 either counsel when an objection is posed. Go ahead,
7 Mr. Loomis.

8 BY MR. LOOMIS:

9 Q The question was, you did not know what the
10 sheriff was going to recommend as a result of his
11 investigation, even though that recommendation was going
12 to be made to the Board of County Commissioners after
13 the Gaming Commission had denied your license?

14 A That's incorrect.

15 Q What's incorrect about it?

16 A What you just said. There was a first reading
17 of these licenses long before the Gaming Control Board
18 met. There was a first reading, and at that point the
19 investigation was over and he moved for full approval,
20 so it proceeded to the second reading.

21 Q So you're telling us now that you knew what the
22 sheriff was going to recommend?

23 A He called me and told me that he had no --
24 there was no adverse findings in his investigation.

25 Q You told us -- you testified earlier that

1 nobody had contacted you from the county --

2 A That's not what I said.

3 Q -- as to what the sheriff's investigation was
4 going to recommend.

5 A That's a complete mischaracterization of what I
6 said and what was asked of me. It was time specific,
7 but you don't recall that.

8 Q Did you know at the time of the October 6th
9 hearing what the sheriff was going to recommend?

10 A Yes.

11 Q What did you think he was going to recommend?

12 A Approval. It was in the documents
13 submitting --

14 Q There's no question pending.

15 A Of course not.

16 Q Now, Mr. Malfitano, in Exhibit 3, there is an
17 e-mail from you to Chief Hames on the second page of
18 that exhibit; is that correct?

19 A Yes.

20 Q And in that e-mail on the second full
21 paragraph, in the first paragraph in, it says, "Your
22 letter seems to indicate that you feel that I am not in
23 compliance with our agreement dated May 15th, 2015."
24 That's what you stated, didn't you?

25 A Yes.

1 Q You then went on to say, "Chief Hames, in that
2 agreement it states that upon VCG," and what's VCG?

3 A Virginia City Gaming.

4 Q That's one of the petitioners in this case,
5 isn't it?

6 A Yes.

7 Q That's your entity that was going to run the
8 Delta and the Bonanza, isn't it?

9 A That is correct.

10 Q So what it says is that, "Upon VCG receiving
11 its license to operate this property," and what license
12 were you referring to?

13 A It could be business license, liquor license.
14 It could be a number of different licenses.

15 Q Okay. But what did the agreement say? That's
16 what you're referring to, aren't you?

17 A I'm not sure what you mean by that.

18 Q Well, in the agreement it states that upon VCG
19 receiving its license to operate --

20 A Uh-huh.

21 Q In the agreement, what license were you
22 referring to?

23 A It could be any one of three.

24 Q Okay. Let's look at the agreement. Exhibit 2,
25 does that reference an agreement?

1 A It's an agreement itself. This is an
2 agreement.

3 Q It is an agreement, and does it reference a
4 license?

5 A Unrestricted gaming license.

6 Q And that's what you were referring to in the
7 e-mail, weren't you?

8 A More than likely.

9 Q You don't recall?

10 A More than likely.

11 Q So what you stated in the e-mail is that, "Upon
12 VCG receiving its license to operate," and more than
13 likely that's its gaming license since you hadn't even
14 applied for a business or a liquor license at that
15 point, had you?

16 A I'm not sure of the date.

17 Q "Upon receiving that license, VCG will
18 immediately move forward with the following conditions
19 as per the agreement. There was no requirement to move
20 forward with any of those conditions before then."
21 Isn't that what you stated in your e-mail to Chief
22 Hames?

23 A I may have.

24 Q Well, you've got the e-mail right there in
25 front of you.

1 A I just don't know what the relevance of that
2 is.

3 Q You've got the e-mail right there in front of
4 you, don't you?

5 A I do.

6 Q And it says that you will go forward with the
7 conditions once you receive your license which is most
8 likely, in your terms, the gaming license?

9 A Okay.

10 Q So in your -- the way you're describing to
11 Chief Hames, you have absolutely no obligation to move
12 forward unless you have your gaming license?

13 A I don't see it that way at all.

14 Q Well, that's what you said.

15 A I don't see it that way at all. Chief Hames
16 and everybody else was aware that I was going to
17 operate --

18 Q Can I go on with what you stated in your
19 e-mail?

20 A Please do.

21 Q Next line, "With that said, I want to make sure
22 you understand that we agreed that none of these
23 conditions would be accomplished until after licensure."

24 A Okay.

25 Q That's what you said.

1 A That's correct.

2 Q So it's not like you were cooperating with the
3 Fire District in getting these things done, your opinion
4 was I don't have to do anything until I get my gaming
5 license?

6 A Actually, that is untrue.

7 Q That's what you said.

8 A That's untrue because you need to read the next
9 line that you're failing to read. Want me to read it
10 for you? Can I read it for you? I mean, let's tell the
11 truth.

12 Q It's another self-serving statement from you.

13 A No, no, let's tell the truth. Are you opposed
14 to that?

15 Q It says, "So if you feel that I am not in
16 compliance, I apologize for any confusion there may be."

17 A "With all that being said, as you may be aware,
18 I will be moving forward operating both of my properties
19 as non gaming entities."

20 Q But --

21 A Doesn't it say that?

22 Q The point is, it was your view of the agreement
23 that you didn't have to do anything until you got your
24 gaming license?

25 A That was not my point of view at all.

1 Q That's what you said.

2 A But that's not the reality.

3 Q You never got your gaming license, so the
4 agreement is no longer in effect?

5 A He never let me know that. Did he let me know
6 that?

7 Q Did he have to tell you that?

8 A Of course, he did.

9 Q He reported to the Board that --

10 A He can unilaterally cancel a contract? I don't
11 think so, but apparently he thinks so.

12 Q Now, you had indicated that there's anger in
13 the community regarding not having a gaming license,
14 right?

15 A That is correct.

16 Q So the anger in the community has nothing to do
17 with turning down your liquor and business license; it
18 has to do with the fact you can't operate these
19 properties as gaming properties any more?

20 A I guess that's what the anger is about.

21 Q So this denial of the liquor license and the
22 business license is not the source of the anger against
23 your business?

24 A Oh, it's another nail in the coffin, sir.

25 Q But that's not what you testified to, is it?

1 A That's not true at all. I'm testifying right
2 now.

3 Q Now, one of the questions that you were asked
4 by counsel was, you have the financial standing to
5 operate these businesses?

6 A That is correct.

7 Q Okay. Now, at the Gaming Commission hearing,
8 there was some three hours of testimony presented; is
9 that correct?

10 A That is correct.

11 Q And you saw Chairman McBride at that hearing?

12 A I did.

13 Q And you attended it from Las Vegas?

14 A That is correct.

15 Q Okay. So you had the audio and the visual?

16 A Yes.

17 Q You're aware of the fact that the reason the
18 licenses were denied to you because you had tax liens?

19 A Is that a question?

20 Q That's a question.

21 A They're stale tax liens, over 15 years old.

22 Q That's what the Gaming Control Board --

23 A I understand.

24 Q -- recommended that you be denied because of
25 the existence of past tax liens; isn't that correct?

1 A That's one of the reasons.

2 Q And they also stated as a reason you had
3 notices of foreclosure against your real properties or
4 businesses you owned?

5 A That was their statement, that's correct.

6 Q That's right.

7 A But they're not facts.

8 Q That you had notices of default recorded
9 against your properties?

10 A Those are their --

11 Q That's one of the reasons that they denied your
12 gaming license, isn't it?

13 A That's one of their conclusions, not based on
14 fact.

15 Q They said you had cash flow problems?

16 A That was one of their conclusions, not based on
17 any fact.

18 Q They said that you had issues with regulatory
19 agencies over your businesses in California?

20 A That is their conclusion based on what they got
21 as a report, but there's no factor -- there's nothing
22 factual about that.

23 Q The commissioner on the Gaming Commission said
24 that you had 12 million dollars in debt?

25 A Really?

1 Q That's what was reported apparently by the
2 gaming agents that did your background investigation to
3 the Gaming Commission.

4 A Okay, here's a response to that.

5 Q Did your attorney respond to those allegations
6 during the course of that hearing?

7 A I don't know, but I'm going to respond now,
8 so --

9 Q I'm not asking you --

10 A You can't throw allegations out there --

11 THE COURT: Hold on.

12 THE WITNESS: -- and not ask --

13 THE COURT: When I say hold on, you need to
14 stop talking.

15 THE WITNESS: I get that.

16 THE COURT: All right. I'm not going to have
17 you talking over each other. He needs to finish his
18 question, he needs to finish his answer. If you think
19 it's nonresponsive or there's some other objection, pose
20 that, but don't be talking over each other.

21 BY MR. LOOMIS:

22 Q You heard the testimony that was presented at
23 the hearing before the Gaming Commission?

24 A Yes.

25 Q You heard the commissioners state that you had

1 12 million dollars in debt?

2 A Yes.

3 Q You knew what the recommendations of the Gaming
4 Control Board were well before you got to the Gaming
5 Commission, didn't you?

6 A Yes.

7 Q And those recommendations from the Gaming
8 Control Board identified the numerous problems that I've
9 already identified to you; isn't that correct?

10 A That is correct.

11 Q Did you have an opportunity to address those
12 matters at the time of the hearing before the Gaming
13 Commission?

14 A Each and every one of them, and they were
15 refuted by sworn testimony, by experts in the field that
16 refuted each and every one of their conclusions, but
17 they didn't want to listen to it and I was represented
18 by the best gaming lawyer in Nevada.

19 Q So despite the fact you had the opportunity to
20 rebut those allegations, those recommendations in the
21 Gaming Control Board report, you were given every
22 opportunity to rebut those, the Gaming Commission
23 decided against you?

24 A They did.

25 Q And they cited as reasons the reasons I've

1 given you?

2 A They did.

3 Q And it was irrelevant to the Board of County
4 Commissioners, but they found that you had lacked
5 sufficient business probity, correct?

6 A That's what they said.

7 Q They indicated that you had numerous problems
8 with your employees in your California businesses?

9 A That is a conclusion, not a fact.

10 Q All right. Have you redone your business plan
11 at this point?

12 A For what properties?

13 Q You told us you were going to redo your
14 business plan?

15 A For the Delta and the Bonanza?

16 Q Yes.

17 A Of course.

18 Q Where are they?

19 A They're in my head.

20 Q So you haven't put them down on paper anywhere?

21 A No.

22 Q Is that a recommended way of preparing business
23 plans?

24 A Are you in business? Have you ever done a
25 business plan?

1 Q Yes or no.

2 A My business plan is being executed, sir.

3 MR. LOOMIS: Nothing further, your Honor.

4 THE COURT: Re-direct?

5 RE-DIRECT EXAMINATION

6 BY MR. HIPPLER:

7 Q Do you have any tax liens against you
8 currently?

9 A I do not.

10 Q You mentioned that they were stale. What did
11 you mean?

12 A They're over 15, 16 years old.

13 Q Do you have any delinquent tax payments
14 currently?

15 A None.

16 Q Are those old as well?

17 A Correct.

18 Q How old?

19 A Most of the stuff is ten or 15 years old.

20 Q And would that be true for all of the items
21 that counsel asked you about that are in the Gaming
22 Control Board order?

23 A Correct.

24 Q Thank you. Nothing further.

25 THE COURT: Re-cross?

RE-CROSS EXAMINATION

BY MR. LOOMIS:

Q One of the major problems you faced in front of the Gaming Control Board was nondisclosure of many of the financial problems; isn't that correct?

A That was their conclusion.

Q Yes. Many nondisclosures.

A No, it wasn't many. It was 11 litigation cases.

Q You had like 40 lawsuits against you, you failed to disclose 11?

A I didn't fail to disclose them. I was relying on a very experienced lawyer that did the search to do it correctly. He failed to find this last 11, so --

Q The most recent 11 lawsuits?

A No. They actually were older than most, so I relied on him.

Q Were you familiar with those lawsuits?

A Pardon me?

Q Were you familiar with those lawsuits?

A Like I say, they're 15 or 20 years old.

Q All 40 of them?

A No. You asked me about the last 11.

Q The 11 that you didn't disclose?

A Again, it's not that I arbitrarily didn't

1 disclose them. I was relying on what the attorney did.

2 Q Okay. Did you sign the application after the
3 attorney prepared it?

4 A I did.

5 Q Did you review it before you signed it?

6 A I did.

7 MR. LOOMIS: Nothing further.

8 MR. HIPPLER: Nothing further.

9 THE COURT: You can step down. Mr. Hippler,
10 any other evidence?

11 MR. HIPPLER: No, your Honor.

12 THE COURT: Mr. Loomis?

13 MR. LOOMIS: No further evidence to present.

14 THE COURT: Argument?

15 MR. HIPPLER: Just to clarify, your Honor, I
16 know from what was mentioned to me before, I didn't know
17 what your schedule was, so are we --

18 THE COURT: I've arranged for another Judge to
19 take the 4:00 hearing in Carson City.

20 MR. HIPPLER: Yes, I do have argument, if
21 you'll just give me a moment to grab my things.

22 First of all, your Honor, I want to thank you
23 and your staff for doing everything that you could do
24 get this on your docket quickly and to review all the
25 materials. I very much appreciate that and I know Mr.

1 Malfitano appreciates that as well, and at bottom this
2 is a case of a business owner who simply wants a fair
3 shot to operate businesses here in Virginia City, and
4 after he identified this as an opportunity, he went full
5 forward with it and, unfortunately, suffered a setback
6 related to the gaming license, but that wasn't the end
7 of the story.

8 Unfortunately, why we're here is because of the
9 arbitrary decision made by the Storey County
10 Commissioners relating to my client's application for a
11 business license and a liquor license.

12 What the Storey County code provides for is
13 that in order to obtain a liquor license, you have to
14 have proof of current financial standing to warrant an
15 expected satisfactory and profitable business operation,
16 and as your Honor correctly noted at the outset, the
17 individual that was tasked with doing the report, the
18 sheriff, put together the materials related to that
19 investigation and came out with the conclusion that the
20 liquor licenses should be granted and issued, and I
21 would submit that in putting that together, whether or
22 not you believe me or Mr. Loomis that I don't think it
23 can be questioned that the sheriff was an objective
24 individual who had, as part of his job duties, an
25 obligation to inquire into my client's background, and

1 at the end of that investigation recommended that the
2 liquor licenses be approved because nothing came up and
3 the financial standing was established.

4 Unfortunately, as reflected very tellingly in
5 the transcripts that we provided the Court as Exhibit 3
6 to the motion, the process went sideways and it went
7 sideways in a number of ways.

8 First and foremost, it went sideways with the
9 improper focus and attention to the Gaming Control
10 Board's decision. This situation is not unlike somebody
11 who applies to be an FBI agent and has to undergo an FBI
12 background check and at the end of that investigation
13 it's determined that you can't be an FBI agent and then
14 somewhere down the line, somebody decides that, well,
15 you can't even become a mall security guard. Why is
16 that wrong?

17 It's wrong because the standards that are
18 applicable are apples and oranges, and that's exactly
19 the situation that we have here.

20 The Gaming Control Board looked into my
21 client's background through the prism of the statutory
22 framework provided by Nevada law and came to the
23 conclusion that it came to. As you heard here today,
24 it's worth emphasizing that the information that they
25 relied upon was stale, and what I mean by that is just

1 as my client testified to, you've got 15 year old tax
2 liens, et cetera, that they concluded resulted in him
3 not getting a gaming license, but the prism most
4 importantly through which the Storey County
5 Commissioners are supposed to examine any liquor license
6 applicant or business license applicant is radically
7 different from the prism to which the Gaming Control
8 Board operates.

9 The standards for gaming, like with my FBI
10 example, is a very, very high one. The Storey County
11 commissioner standing is much, much lower burden and
12 that is the burden that applies here, but as reflected
13 in the transcript, despite attempts by the sheriff and
14 others to steer them correctly, the commissioners
15 focused almost solely upon the order from the Gaming
16 Control Board.

17 As your Honor, again, pointed out at the outset
18 of the meeting today, my client, in fully relying upon
19 the proceedings that had occurred on September 1st did
20 not anticipate, was not on any notice, and certainly
21 relied upon the statements that were provided to him on
22 September 1st that things looked good, we simply can't
23 issue a liquor license or a business license now because
24 of the duplication issue, but he worked diligently to
25 make sure that when Mr. Dewing moved out, that he moved

1 in and had the proper licenses, but under the
2 circumstances there could not be a duplication, so no
3 problem, come back to us in October at the next meeting,
4 and the minutes reflect all of that.

5 THE COURT: I'm sorry to interrupt you, but you
6 talked about not being given notice. Does a party have
7 a due process right in an administrative hearing? Does
8 he have a right to be given notice of what's going to
9 come up so he can be prepared to address those issues?

10 MR. HIPPLER: I think that they do, and I think
11 the evidence of that is the fact that you have agendas
12 and minutes and that there's a public quality to this
13 process, and therefore, there are a notion of due
14 process rights and procedures that attach to this
15 process, but most importantly rather than --

16 THE COURT: Are you aware of any law that says
17 that, a rule or statute, case?

18 MR. HIPPLER: Not with me here today, your
19 Honor. I would be happy if the Court would request so
20 that I can provide such authority.

21 But most importantly, rather than those
22 notions, he relied on the very real facts of what
23 actually happened and what he was actually told on
24 September 1st in terms of his ability to get those
25 licenses, and most importantly, on September 1st what

1 did the commissioners, particularly Commissioner McBride
2 know? He had already heard everything that happened on
3 August 20th, he had already heard what came up at that
4 hearing.

5 None of that came up on September 1st, none of
6 that came up between September 1st and October 6th, so
7 there was no concern, if you will, on my client's part,
8 based upon that reliance as to what happened on
9 September 1st, that it was vital for him to be there on
10 October 6th, and instead Special Counsel shows up and
11 instead there is the absolute and primary focus on the
12 Gaming Control Board order as the basis for the denial
13 of the liquor license, and it's my argument, your Honor,
14 as detailed in the pleadings that we've submitted,
15 especially in relation to the motion for preliminary
16 injunction, that that focus was arbitrary and capricious
17 and, therefore, improper, and it's because of the prisms
18 through which the Gaming Control Board looks at that
19 information versus the Storey County Commissioners, and
20 again, that was the dilemma, if you will, that the
21 sheriff kept coming back to over and over and over again
22 during the proceedings making statements along the lines
23 of, I want to make sure that we're consistently applying
24 the standards because it sure doesn't feel like we are.
25 I'm paraphrasing, of course, but that's where the

1 sheriff came out, and I submit that he's the one that
2 got it right in this instance.

3 But in addition to the reliance on the Gaming
4 Control Board order being arbitrary and capricious, I
5 think it's also important to emphasize the language as I
6 mentioned before of the ordinance itself, that you've
7 got to have proof of financial standing to warrant an
8 expected satisfactory and profitable business.

9 All you need to do is look again at the
10 transcript to see that there were throughout assumptions
11 made by the commissioners as to cash flow of my client's
12 business, that they had no business making those
13 assumptions, certainly no evidence before them as to
14 what may or may not happen with respect to my client's
15 business moving forward, so not only did they pre-judge
16 his ability to successfully operate that business, but
17 those assumptions were grossly unfair and the ordinance
18 doesn't require a guarantee of success. It requires an
19 expected satisfactory and profitable business.

20 The point of the ordinance is they want to make
21 sure that if we're going to jump through all these hoops
22 and have a business in our community that sells liquor,
23 that we don't want them moving in and out of business,
24 we want to make sure that it's a stable business
25 environment, and the stability of this business, aside

1 from the gaming having to be removed from the
2 properties, is you have a year, notwithstanding the
3 previous owner's business operations there in a very
4 prime location here in Virginia City, but you have a
5 year of Mr. Malfitano successfully operating this
6 business, admittedly along with Mr. Dewing as the
7 operator, but as the testimony reflected, he was the one
8 putting all of the capital into this, he was the one who
9 put the 1.8 million into these two properties, so you
10 have nothing more --

11 MR. LOOMIS: I'm going to pose an objection at
12 this point. Previously we allowed testimony outside
13 what was heard at the hearing in terms of the question
14 of irreparability of harm. We're now addressing the
15 sufficiency of the evidence that was produced at the
16 hearing, and again, I'm going to object to any argument
17 based upon evidence not submitted to the Board.

18 THE COURT: Overruled. Go ahead.

19 MR. HIPPLER: So obviously to Mr. Loomis'
20 point, part of what needs to be established for the
21 issuance of a preliminary injunction in this instance is
22 the irreparable nature of the harm to my client, but
23 then also a reasonable likelihood of success in the
24 merits, and that's what I'm arguing at this moment.

25 So again, what was before the commissioners was

1 they knew a business had been operated with my client
2 for a year with no issues, they knew that with the
3 gaming license not being issued, that certainly there
4 would be changes, but the quotes themselves within the
5 transcript speak to the arbitrariness of the decision
6 making process that the commissioners undertook on
7 October 6th, and I'm sure since you read all of it
8 you're more than familiar with the quotes that I'm
9 talking about in terms of, oh, the revenue is going to
10 go down 60 to 70 percent.

11 That's just one of many examples, and that's
12 what establishes the arbitrariness of the decision, that
13 the reliance upon these assumptions, the reliance upon
14 things that were really not properly before them, on top
15 of the reliance that my client had that as of
16 September 1st rolling into October 6th that there
17 weren't going to be any issues, so you put all that
18 together and you look at it in the totality of the
19 circumstances and you have a situation that absolutely
20 rises to the level of being an arbitrary and capricious
21 decision that is not founded in the substantial evidence
22 that is required.

23 Now, in terms of the irreparable injury, one
24 business is closed and one business is operating with
25 snacks and sodas. That can't last forever. It just

1 can't, and my client simply wants the opportunity to get
2 those businesses to a place without gaming for the
3 moment, that he can have a chance to make a go of the
4 business of these properties.

5 THE COURT: Let me ask you about that, too, and
6 again, I'm sorry to interrupt because I don't want to
7 interrupt your flow, but why would not -- if Storey
8 County has done wrong, why would not an award of
9 monetary damages make him whole? What makes this
10 irreparable?

11 MR. HIPPLER: What makes this irreparable is
12 damage to reputation. Every day that these businesses
13 are not fully operating is a day that a resident goes by
14 that moves on past the Delta and the Bonanza to another
15 location. Every day that a tourist comes by who wants
16 to go in and get a cold beer on a warm day, can't do
17 that. They're never coming back, and so the irreparable
18 nature of the injury does include harm to reputation and
19 whatnot, and I don't think the county is going to be
20 cutting a check any time soon to my client to make him
21 whole as a result of these business losses that clearly
22 and obviously have occurred according to his testimony.

23 THE COURT: Is there any evidence to get damage
24 to reputation other than people passing by, whether
25 they're local or tourists?

1 MR. HIPPLER: Not at this time, your Honor.

2 THE COURT: Okay. Go ahead.

3 MR. HIPPLER: With respect to the business
4 license issue and the sprinklers, the documents speak
5 for themselves and the transcript speaks for itself.

6 What was discussed at the commission hearing on
7 October 6th was only, as we now know, only a small
8 portion of what had been discussed and agreed to between
9 the county and my client.

10 As reflected in Exhibit 1, separate and aside
11 from the May 15th agreement, he very clearly had until
12 December 31st to get the sprinkler system in, and with
13 respect to the contract in particular, the issue related
14 to the gaming license is not a condition precedent as we
15 have detailed in the pleadings or in the motion, but
16 rather, it's a timing mechanism.

17 In other words, when you take the May 15th
18 agreement and what is on the inspection sheet and look
19 at them together in a consistent fashion, what you
20 arrive at is that everybody agreed that there was a
21 window of time for my client to get the sprinkler system
22 in, and what the county code discusses about this in
23 terms of refusing a business license which is 5.04.100,
24 and I believe it might have been in the respondent's
25 pleadings, I don't believe that we necessarily quoted it

1 in a footnote or whatnot, so I have copies if the Court
2 requires it, but what it says is a license may be
3 refused by any licensing agency until an applicant
4 complies, or agrees to comply with all other existing
5 ordinances and laws in force, et cetera, and that's
6 exactly what you have here.

7 There was an agreement. There was an agreement
8 to comply. That process, as my client testified to, is
9 going forward, the design plans are nearly done, and
10 therefore when -- there was testimony by Mr. Hames which
11 I think can only accurately be characterized as
12 incomplete in light of the inspection sheet and the
13 previous agreement, that that decision was clearly
14 arbitrary to deny the business license.

15 So when you put the situation together, you've
16 got a situation where the standard by which the county
17 made -- the county commissioners made their decision was
18 one that was infected with arbitrariness based upon the
19 improper focus on the Gaming Control order, which I've
20 already discussed, but then also it was arbitrary
21 because of the assumptions that were made and the
22 business plan that my client has undertaken with moving
23 forward with these properties without gaming, that they
24 don't believe that it will be successful. Well, what
25 the county commissioners in pre-judging that issue have

1 done is to arrive at a decision that can only be
2 described as arbitrary.

3 In closing, I just want to emphasize one thing,
4 and that is, again, going back to something that Sheriff
5 Antinoro said on October 6th, and that is, he says, and
6 I'm reading from Page 62 of that transcript, "I know Mr.
7 Morris says we're not holding him to a gaming standard,
8 but in essence we are because everything that we're
9 talking about is what gaming says, what gaming says,
10 what gaming says," and I submit, your Honor, that that's
11 exactly what has gone on here and that the sheriff got
12 it right and the commissioners regrettably got it wrong,
13 and because of the arbitrariness of that decision and
14 the irreparable injury that has occurred, what we're
15 asking with the granting of the motion for a preliminary
16 injunction is that until the underlying merits of the
17 Writ petition can be ruled upon, that the denial of the
18 business license and the denial of the liquor licenses
19 be enjoined such that the interim licenses that have
20 previously been issued for both the liquor licenses and
21 the business license remain in effect, and then the
22 Court can address at a later time the underlying merits
23 of the petition for Writ of Mandamus. Thank you.

24 THE COURT: I want to ask you one other
25 question to go back to the irreparable harm. If Storey

1 County wrongfully denied the liquor license, is there a
2 remedy of law? Can he sue the Board, or is that -- do
3 they have immunity because it's a discretionary act?

4 MR. HIPPLER: I'm not aware -- I know the NRS
5 Chapter 34 does discuss that in a Writ petition context
6 that damages could in a proper case be possible, that as
7 part of that Writ petition process that damages can be
8 assessed by the trier of fact.

9 THE COURT: But I'm talking about an action.

10 MR. LOOMIS: And what I was going to say is
11 with respect to specifically whether or not the county,
12 as I have put it, it's not going to be writing a check
13 any time soon, I'm not aware of law that allows for my
14 client to be made whole in that fashion and to be sued
15 for monetary damages.

16 THE COURT: All right, thank you. One last
17 question not on the substance. If the temporary
18 restraining order is denied, do you have any other
19 evidence that you would present at a preliminary
20 injunction hearing?

21 MR. HIPPLER: On the whole, your Honor, I think
22 that as was discussed between yourself and Mr. Loomis
23 before, that if we were able to run in in the same week,
24 that would be one thing, and I think that the temporary
25 restraining order would be the proper vehicle, if you

1 wish, that we would be before the Court.

2 I think at this point, I agree that this
3 hearing today is really the motion for preliminary
4 injunction because the timing issue, if you will, that
5 necessitated us in crafting that pleading to be both has
6 become unnecessary, if you will, and so I think
7 characterizing today's proceedings as a motion for
8 preliminary injunction which your Honor would rule upon
9 is really the correct procedural posture, if you will,
10 for today's proceedings.

11 THE COURT: All right, thank you.

12 MR. HIPPLER: Thank you, your Honor.

13 THE COURT: Mr. Loomis?

14 MR. LOOMIS: Thank you, your Honor. What I'd
15 like to address first is one of the questions that was
16 raised by the Court, and that is the question of due
17 process.

18 Due process is a constitutional concept that
19 applies to deprivations of life, liberty and property.
20 Mr. Malfitano does not have a property interest in any
21 licenses at this point, and he did not have one at the
22 time of the hearing on October 6th.

23 Sometimes there is construed as a liberty -- a
24 due process right to a liberty interest which sometimes
25 involves the practice of a profession or something along

1 those lines, but the Toco case which is cited in my
2 Points and Authorities specifically says that there is
3 no inherent right in a citizen to sell intoxicants, so I
4 don't think there is any due process right involved in
5 this case in any respect, and I would also note that
6 there's no due process claim raised in the motion or in
7 the verified petition. It's been brought up essentially
8 by the Court, but I don't think there's any real due
9 process interest involved in today's proceedings.

10 What we do know is that this is a -- it's a
11 review of a local licensing board decision addressing
12 whether or not to issue these licenses. What we know
13 from the precedent that exists in this state is that
14 liquor license boards are vested with a great deal of
15 discretion. It is presumed that local licensing boards
16 act appropriately, and the burden is upon the petitioner
17 to demonstrate the arbitrary and capricious nature of
18 the action taken by the board.

19 Arbitrary and capricious has been set out in
20 some depth in my Points and Authorities and basically it
21 says that there has to be a reason for why they took the
22 action. Arbitrariness and capriciousness exists where
23 there's no reason, they just did it because they did it,
24 and in this case what we do know is there's been a fair
25 amount of argument about whether or not the appropriate

1 standard was applied, and I don't really think this case
2 has anything to do with standards.

3 What it does have to do with is the fact that
4 in this particular case, a much more extensive
5 investigation into the background of Mr. Malfitano was
6 conducted by the gaming authorities. That's unusual for
7 a licensing board to have that information. It was much
8 more extensive than that which was done by the sheriff,
9 but that information is publicly available and it was
10 relied upon by the board. Not the conclusions that were
11 drawn by the board, but by the evidentiary matters that
12 were set out in the Gaming Commission order.

13 So if we go back to the hearing on October 6th
14 itself, what we know is that at the beginning of the
15 hearing, the Board was advised that this is a hearing
16 that's not -- it's governed by the Storey County
17 ordinance 512.010 which says that, "The applicant has to
18 provide proof of financial standing to warrant an
19 expected satisfactory and profitable business
20 operation."

21 That's what they were advised was the standard
22 that they had to measure the evidence against in
23 arriving at their conclusion.

24 That standard was reiterated to them at several
25 times. I think Sheriff Antinoro reiterated it in his

1 cautions to the Board, and at one point Sheriff Antinoro
2 suggests that they're using the wrong standard and at
3 that point Special Counsel Mr. Morris steps in and says,
4 and I will quote him. This is just after Sheriff
5 Antinoro has said on Page 54 that he was concerned about
6 the standards that are being applied, and Mr. Morris
7 says, "And just to follow-up on the sheriff's comments,
8 I would remind the Board that it's not the gaming
9 requirements that the applicant has to meet. Today what
10 you're deciding is basically this one sentence, proof of
11 financial standing to warrant an expected satisfactory
12 and profitable business operation."

13 So I think what you're looking at is that
14 specific standard or that requirement, so it was
15 reiterated multiple times to the Board that the standard
16 that they had to measure the evidence against was the
17 standard that was set out in the ordinance, and where I
18 was quoting from was Page 55, lines six through 14.

19 Mr. Morris introduced the order from the Gaming
20 Commission because it was publicly available, it's a
21 public record, and he referenced those portions of the
22 order which referred to the evidence that was before the
23 Gaming Commission when they decided to issue their
24 denials of the licenses because the order itself, and
25 it's attached as an exhibit to the verified petition,

1 says that we have come to the conclusion based upon
2 these factors which are set out in the report, and those
3 included things such as tax liens, notices of default,
4 employment -- problems with employees in previous
5 businesses operated by Mr. Malfitano. They included
6 problems with cash flow, they included problems with
7 prior regulatory agencies.

8 Those are all cited in support of the
9 conclusions that were made by the Board, but they rely
10 on factual information, not conclusions.

11 There was also evidence aside from the order
12 that was introduced in the course of that hearing, and
13 that included the information from the county
14 comptroller, the county's chief financial officer
15 indicating that with the loss of the gaming licenses, or
16 it wasn't a loss, it was an inapplicability to be
17 licensed as a gaming operator in venues that
18 traditionally had gaming was going to significantly
19 affect the profitability of the business.

20 There was testimony from Chairman McBride. He
21 had attended the hearing before the Gaming Commission
22 which comprised some three hours of testimony before
23 that commission and he reported this is what I heard at
24 the Gaming Commission that was testified to from people
25 that were there, and those included, again, the issues

1 with the real properties that Mr. Malfitano and his
2 businesses had owned that had notices of default and
3 foreclosures, it included the fact that there were
4 problems with the cash flow, there were tax liens, there
5 were delinquencies, there were the problems that were
6 noted, and one of the things that Chairman McBride
7 specifically reported was that there were undisclosed
8 prior litigation and he indicated there had been some 40
9 lawsuits involving Mr. Malfitano, many of which had not
10 been disclosed.

11 That was reported to the Board, not from the
12 order of the Gaming Commission, but from the testimony
13 that was offered at the hearing.

14 Chairman McBride also explained that he has a
15 background in gaming and runs a business very similar to
16 what Mr. Malfitano was trying to run, and that's one of
17 the reasons why he disclosed that he had a liquor
18 license to a business on C Street here in Virginia City
19 and he said with the lack of gaming, the cash flow is
20 going to be reduced by about 60 to 70 percent, and
21 here's a person that runs a gaming institution and is
22 familiar with how they operate here in Virginia City. I
23 think that is information outside the record of the
24 Gaming Control order itself.

25 Sheriff Antinoro himself expressed his opinion

1 that without gaming to support the Delta and the
2 Bonanza, it was his view that just running them as bars
3 was likely to cause them to fail. His view was that
4 there simply isn't enough business to support a venue
5 being operated purely as a bar when it has been a gaming
6 venue. That was the opinion of Sheriff Antinoro.

7 County Manager Whitten indicated that he had a
8 past background in evaluating credit worthiness of
9 people applying for credit, and he discussed what he
10 called the five C's and indicated that the factors that
11 were cited by the Gaming Commission were factors that
12 would suggest that the person lacked the financial
13 strength and ability to conduct a business. That is
14 also evidence aside and apart from what was included in
15 the Gaming Commission order. He reported that the staff
16 recommendation to the Board was to deny the licenses.

17 At the close of the hearing and before any
18 motion was made, it was again reiterated to the Board
19 that the grounds on which the license could be granted
20 or denied were set out again in Storey County ordinance
21 5.12.010 and that was whether or not they had the
22 financial strength to operate successfully -- whether
23 they had proof of financial standing to warrant an
24 expected satisfactory and profitable business operation.

25 They were again advised of that, and they were

1 advised that they were to apply the information, not the
2 standards of the Gaming Control Board, in determining
3 whether or not that license should issue.

4 Commissioner Gilman ultimately made the motion
5 and he moved to deny the liquor licenses on the ground
6 of the probability of financial instability to operate
7 successfully here in Virginia City. That is a standard
8 that was consistent with the one that is set out in the
9 ordinance.

10 So I think this is a textbook example of how to
11 conduct a hearing, and the fact that there's independent
12 evidence and I think that the information from the
13 Gaming Commission order is admissible and relevant to
14 the standard to be applied under the ordinance.

15 It was not the -- the decision was not done
16 just because it could be done. It was done for a
17 reason, and that was because Mr. Malfitano's record of
18 how he's run his businesses and how this particular
19 business that was shaping up at this point did not
20 constitute proof of financial standing to warrant an
21 expected satisfactory and profitable business operation.
22 There was nothing arbitrary and capricious about this at
23 all.

24 As to the business license for the Bonanza, the
25 evidence that was submitted at the time of the hearing

1 was that Mr. -- in Chief Hames' view, the building was
2 not a safe one due to the problems with the fire code.
3 When asked by a participant in the audience whether
4 there was an agreement to give him more time, it was his
5 opinion that that agreement was null and void and that's
6 the agreement that was attached and your Honor has
7 allowed to be admitted over my objection as exhibit --
8 attached to the verified petition as Exhibit 6, and that
9 clearly states that, and as Mr. Malfitano said in his
10 e-mail, I don't have to do anything until I'm issued my
11 gaming licenses. That was what his response was in the
12 e-mail, and that's also what the agreement says. It's
13 dependent upon him being issued a gaming license. Well,
14 that's never going to happen, perhaps not, and if the
15 condition precedent to the county's obligation is not
16 going to occur, that excuses the county from its own
17 obligation to perform.

18 I think the chief was right in that that
19 contract was null and void, so what you're left with is
20 the fact that the building does not comply with the fire
21 and safety codes and Chief Hames' opinion as chief of
22 the fire district is that the building is unsafe.
23 Again, there's nothing arbitrary and capricious about
24 saying if the fire chief's opinion is that this is an
25 unsafe building and he's been working with them for nine

1 months, that's something that can be relied upon in
2 granting a denial.

3 So I think that, again, this is -- they didn't
4 deny the business license just because they could, or
5 they did it because they did it. They did grant the
6 business license to the Delta. It was reported it was
7 in full compliance with inspections, but the Bonanza
8 wasn't. So when I think you look at those, it
9 demonstrates a complete lack of support for a contention
10 that this was an arbitrary and capricious decision. It
11 doesn't rebut the presumption of regularity, it doesn't
12 meet the burden of establishing that it was arbitrary
13 and capricious, and I don't think it suggests that
14 there's any likelihood of success on the merits, so we'd
15 ask your Honor to deny the preliminary injunction.

16 THE COURT: Do you happen to have a reference
17 to a page where Chief Hames talked about -- where he
18 spoke?

19 MR. LOOMIS: Yes.

20 THE COURT: Maybe I found it. I thought I had
21 it marked. Maybe I just found it. Okay, I've got it.
22 Thank you. Give me one second. It's your motion, so
23 you get the last word.

24 MR. HIPPLER: Thank you, your Honor. Sheriff
25 Antinoro on Page 66 says, "I could care less about Mr.

1 Malfitano's business. I could care less about gaming
2 because we're not talking about a gaming license, we're
3 talking about a Storey County license. What I care
4 about is that we are applying things equally and fairly
5 across the board to all our license holders and all
6 past, present and future applicants.

7 A decision that's based upon improper evidence,
8 improper information or that is inconsistent is by
9 definition an arbitrary and capricious decision, and I
10 submit to your Honor that that's exactly what has
11 happened here that, as I noted before, the information
12 that was leapt upon by the commissioners was relating to
13 an investigation and burden that was so much higher than
14 a Storey County ordinance, and beyond that, that the
15 improper assumptions and judgments that were made about
16 my client's business and the likelihood of success also
17 led to an improper decision and an arbitrary decision,
18 and that when you come back to the language of the
19 ordinance that what was required was proof of financial
20 standing to warrant an expected satisfactory and
21 profitable business operation, they apparently expect a
22 guarantee of success and what my client wants, and I
23 think what's fair and reasonable, is an opportunity if
24 the licenses are issued, both for liquor and business,
25 to make a go of these businesses as he has for the last

1 year, and at bottom I think that he deserves such a shot
2 because of what happened in front of the commissioners
3 on October 6th, both in relationship to the liquor
4 license as well as the business license. Thank you,
5 your Honor.

6 THE COURT: I left some papers somewhere in
7 chambers. Would you bring those to me, please?

8 These are some notes I had made before that I
9 forgot to bring up to the bench with me. Mr. Loomis,
10 I'm going to have you prepare the order. I'm going to
11 speak at my normal speed, I'm not expecting you to get
12 all this down. You need to get a copy of the JAVS
13 recording. I'm going to want the order by Friday at
14 noon.

15 The issue before the Court is whether a
16 temporary restraining order/preliminary injunction
17 should be issued. The requirements for a temporary
18 restraining order are, first, that the petitioner show
19 irreparable harm.

20 The evidence argued by the petitioner that
21 there is irreparable harm is a loss of business having
22 to close the businesses, losing revenue now because he
23 can't sell alcohol, loss of reputation because people
24 pass by and don't go into his establishment because they
25 can't buy liquor or go in and turn around and leave

1 because they can't buy liquor.

2 The Court finds that that's not a loss of
3 reputation. There does seem certainly will be lost
4 revenue, but there's no convincing argument that there
5 is not an adequate remedy at law. The petitioner has
6 not shown irreparable harm.

7 I asked the question about immunity because I'm
8 not sure about that adequate remedy. That issue is now
9 raised by the parties, and therefore it has no
10 consideration in the decision.

11 The next requirement for a temporary
12 restraining order is a reasonable likelihood of
13 prevailing on the merits. The Court concludes that
14 there is not a likelihood of prevailing on the merits.
15 The Court concludes that there's substantial evidence in
16 the record supporting the denial of the liquor license.
17 That's what I'm talking about first, the liquor license
18 for the Delta.

19 Specifically in the transcript at Page 61, this
20 is Chairman McBride speaking. He says beginning at line
21 seven, "We're talking about financial stability," and
22 then he says that Commissioner Townsend -- Commissioner
23 McBride is saying that Commissioner Townsend on the
24 Gaming Control Board stated that Mr. Malfitano has
25 12 million dollars in debt.

1 On Page 62 of the transcript, this is Chairman
2 McBride continuing, he says, "It doesn't look like
3 there's any financial stability."

4 On Page 63 of the transcript, Chairman McBride
5 cites the Storey County code, Chapter 5.12, "An
6 applicant is required to provide to the county liquor
7 license board the proof of financial standing to one
8 expected satisfactory standing to" -- that's what the
9 transcript says, "To one expected satisfactory
10 profitable business operation. With everything that's
11 been laid out, can you operate a profitable operation
12 when you've just taken out the major source of revenue."

13 On Page 67 of the transcript, Manager Whitten
14 says that there is an appearance of significant cash
15 flow problems. That's based upon the Gaming Control
16 Board order, and he continues on to the next page saying
17 that there are serious contra indicators of financial
18 standing.

19 On Page 76 of the transcript, Ms. Langer
20 counsels the board that, "To get a liquor license, it
21 comes down to prove of financial standing to warrant an
22 expected satisfactory and profitable business operation.
23 That's it, none of this moral character doesn't apply."

24 On Page 77 of the transcript, Mr. Whitten said
25 that based upon the record -- he's saying what other

1 commissioners have said, that fairly and clearly in the
2 record you believe that there are reasons to be
3 concerned over the financial standing and ability to
4 conduct a business.

5 Chairman McBride, on the same page, says that
6 financial standing is a good measure to go by. That's
7 when Commissioner Gilman makes the motion which is to
8 deny the licenses for the liquor for both the Bonanza
9 and the Delta based upon the probability of financial
10 instability to operate successfully here in Virginia
11 City.

12 There are other references in the record to the
13 Gaming Control Board order which lists a number of
14 things that are not relevant to the financial -- the
15 ability of Mr. Malfitano to run his business, but there
16 is substantial evidence that I've just gone through in
17 that transcript that indicates -- that provides a basis
18 for the Board to deny the licenses.

19 In the order of the Gaming Control Board, on
20 Page 4 in the second paragraph, the Gaming Control Board
21 concluded a number of things, only two of which the
22 Court concludes bear on the issue of financial
23 suitability or the possibility of proceeding. One is
24 the nondisclosure of litigation. The other is the
25 appearance of significant cash flow problems.

1 Those are conclusions. There's no facts in the
2 order, there's no evidence that the liquor board members
3 were aware of the contents of the Gaming Control Board
4 investigative report which would contain the facts that,
5 hypothetically anyway, support the conclusions in the
6 order.

7 Even if the commissioners relied upon other
8 information that they should not have relied upon
9 because there's substantial evidence in the record to
10 support a denial, there is not sufficient evidence of
11 capricious or arbitrary action by the liquor board.

12 The Court asked the question about due process
13 in an administrative hearing. That was raised only by
14 the Court, not by the parties. Therefore, it has no
15 part in the decision.

16 The Court concludes that other evidence
17 referenced by Storey County to support the decision,
18 specifically Mr. Gallagher's statement which is at Page
19 59 of the transcript, he's talking about the best use of
20 the property being a gaming establishment, and beginning
21 at line 21, it's no longer going to be the case.
22 Profitability at that point of time comes somewhat
23 salted down, but then the important statement, I don't
24 know that.

25 Mr. Gallagher's statement does not support the

1 Board's finding of denial of the license.

2 Mr. McBride's statement regarding a decrease in
3 business of 60 or 70 percent is found at Page 71 of the
4 transcript. I have the wrong reference there, 71 is to
5 the 40 lawsuits.

6 The relevance of the nondisclosed lawsuits is
7 the nondisclosure, if the Board could have found that
8 Sheriff Antinoro's report was different because there
9 was nondisclosure based upon the Gaming Control Board
10 report.

11 What I was going to say about Chairman
12 McBride's 60 to 70 percent estimate is other than his
13 general experience, which there's no evidence that he's
14 ever experienced a shutdown of a gaming portion of a
15 business, there's no facts to support his 60 to
16 70 percent reduction opinion.

17 Two commissioners express concern about the
18 facts that they have before them. Commissioner Gilman
19 was concerned about the difference in the reports
20 between the sheriff and the Gaming Control, and
21 Commissioner McGuffey expressed the question of whether
22 they should delay and look into the matter further.
23 Sheriff Antinoro opposed the vote to deny, so it was
24 close.

25 I disagree with the argument that this was a

1 textbook example of how to run a hearing. It seems, in
2 fairness, that if things have changed, that a party
3 would be given notice of an opportunity to respond to
4 it.

5 Mr. Malfitano, from everything the Court has
6 seen, was led down a primrose path and blindsided by
7 this information and because he reasonably believed that
8 this was a sure thing done deal didn't appear, he had no
9 opportunity to address the information. That still
10 doesn't make the decision arbitrary or capricious
11 because there's substantial evidence in the record to
12 support the decision.

13 For those reasons, the motion for temporary
14 restraining order and preliminary injunction as to the
15 Bonanza liquor license is denied.

16 The Bonanza business license is denied because
17 Chief Hames stated at, if I got it right, Page 80 of the
18 transcript, that he had been working with the
19 petitioners for probably nine months. Generally
20 accepted practice for the district is six months. That
21 turns out, it appears from the evidence admitted today,
22 is wrong.

23 The fact that the Commission relied upon
24 inaccurate information, there's no evidence that they
25 knew it was inaccurate at the time they made their

1 decision does not make their decision arbitrary and
2 capricious, and more importantly, the reason for the
3 denial of the temporary restraining order and
4 preliminary injunction as to the Bonanza business
5 license is Chief Hames' statement that the building is
6 not safe. That's on Page 81 at line three.

7 That's the order. Is there anything else, Mr.
8 Loomis, you think should be included in the order?

9 MR. LOOMIS: I think that covers it, Judge.
10 Thank you.

11 THE COURT: Is there anything else you think
12 needs to be in the order?

13 MR. HIPPLER: No, your Honor. I would just ask
14 that Mr. Loomis, before the Friday noon deadline --

15 THE COURT: I'm going to do that. I'm going to
16 have you, Mr. Loomis, transmit a copy electronically to
17 Mr. Hippler by 5:00 tomorrow.

18 The reason for the timelines is if they want to
19 appeal, they need to be able to do that quickly, so an
20 electronic copy to him. Hopefully the JAVS recording
21 will be available to you this afternoon and you'll be
22 able to get that done tomorrow, so he's going to submit
23 the order. I want you to submit it electronically to
24 the judicial assistant because it's likely that I'm
25 going to make changes to it and that way I've got it and

1 I can word process it.

2 If you have objections to it, those need to be
3 filed by noon on Friday. Go ahead.

4 MR. LOOMIS: Judge, I am scheduled to be in
5 Lyon County tomorrow as a special prosecutor and I'm
6 going to be -- I have to -- I'm going to be off on
7 Friday because I have to move something.

8 THE COURT: Is there any reason Ms. Langer or
9 Mr. Morris can't prepare the order? They've been here
10 for the whole hearing.

11 MR. LOOMIS: They would have 30 days from the
12 date of notice of entry of the order to file the appeal.

13 THE COURT: I'm not worried about the time
14 after. I want -- if they're going to file an appeal, I
15 want them to be able to file that right away, so the
16 three days on the other end is not important to me. I
17 want them to be able to get it filed next week.

18 Is there a reason that Ms. Langer or Mr.
19 Morris, or both of them, cannot prepare that order based
20 on the JAVS recording?

21 MR. LOOMIS: They can do it.

22 THE COURT: So you're going to electronically
23 transmit a copy of that to Mr. Hippler by 5:00 tomorrow,
24 submit it to the judicial assistant electronically by
25 noon on Friday, and you'll have until Friday to file

1 your objections.

2 MR. HIPPLER: Yes, your Honor.

3 THE COURT: Anything else?

4 MR. LOOMIS: Nothing further. Thank you,
5 Judge.

6 THE COURT: Court is adjourned.

7 (A recess was taken.)

8 THE COURT: 15 OC 08, Dr. Malfitano and others
9 vs. Storey County and others.

10 Dr. Malfitano, the general rule is we use Mr.,
11 Ms. or Mrs. as opposed to doctors or other names so that
12 there's an equality where it's a doctor in a county, so
13 I've kind of stumbled between the two. There's no
14 problem with calling you Doctor and I didn't mean to
15 offend you by calling you Mister. That's just the
16 practice in most cases. Storey County is represented by
17 Mr. Loomis.

18 Mr. Hippler had spoken to the Court with Mr.
19 Loomis present prior to the hearing. I told them I
20 would allow him to make a motion after and he wants to
21 do that now. Go ahead.

22 MR. HIPPLER: The motion was simply that the
23 television reporters not be allowed to film or record
24 the proceedings, and ultimately there was a modified
25 motion by myself that they be allowed to film, but not

1 audio record the proceedings. That was the motion that
2 I made on behalf of petitioners.

3 THE COURT: Is there anything you want to add
4 or make a record on concerning that?

5 MR. LOOMIS: Nothing, Judge. Thank you.

6 THE COURT: The Court considered the request.
7 This is all a public record, and therefore I allowed the
8 news to video record, but not audio record because
9 there's a JAVS recording being contemporaneously made
10 during the hearing, so that was the reason for the
11 ruling.

12 Anything else you want to put on the record?

13 MR. HIPPLER: No, your Honor.

14 MR. LOOMIS: Nothing further.

15 THE COURT: All right. Court is adjourned.
16
17
18
19
20
21
22
23
24
25

1 STATE OF NEVADA)
2 COUNTY OF WASHOE) ss.
3

4 I, DIANNE M. BRUMLEY, a Certified Court Reporter
5 and Notary Public for the County of Washoe, State of
6 Nevada, do hereby certify that on Friday, the
7 17th day of June, 2016, I transcribed the
8 proceedings in the matter entitled herein;

9 That the foregoing transcript is a true and
10 correct transcription of the stenographic notes taken by
11 me in the above-captioned matter to the best of my
12 knowledge, skill and ability.

13 I further certify that I am not an attorney or
14 counsel for any of the parties, nor a relative or
15 employee of any attorney or counsel connected with the
16 action, nor financially interested in the action.

17
18 Dianne M. Brumley/ss

19 DIANNE M. BRUMLEY, NEVADA CCR #205

20 CALIFORNIA CSR #6796

21 BONANZA REPORTING - RENO
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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 **JOINT APPENDIX (VOLUME 6)**, 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

HOLLAND & HART LLP
5441 KIETZKE LANE
SECOND FLOOR
RENO, NV 89511