

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,

vs.

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

Respondent.

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

RESPONDENT'S ANSWERING BRIEF

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I. INTRODUCTION

This case began in the District Court as a challenge to the merits of Storey County's decisions to deny Appellants liquor and business licenses. (Appellants will hereafter be referred to as Malfitano and/or by a singular masculine identifier). Once it became clear that the District Court was not impressed with the challenge to the merits of those decisions, the focus of the Malfitano challenge switched to the process by which the decisions were rendered. Once fully informed of how the process evolved, the District Court upheld the County's decision-making process. Its decision to do so does not constitute an abuse of discretion.

How Malfitano came to address the process issues and avoid the substance of the County's licensing issues is somewhat complicated. It began when Storey County refused to issue Malfitano liquor and business licenses. Following that refusal, Malfitano filed a Petition seeking a Writ of Mandamus to compel the County to issue the licenses. In the Petition, Malfitano asserted that the Storey County Liquor Board and the Board of County Commissioners decisions to deny liquor and business licenses were not supported by substantial evidence in the record and were therefore arbitrary and capricious. The Petition failed to claim the existence of even a single constitutional violation as grounds for granting the writ. The constitutional claims appeared only after it became clear that the District Court

saw little merit to Malfitano's claim that the County's licensing decisions were arbitrary and capricious. The District Court made this clear when it denied Malfitano a preliminary injunction on, among other grounds, that Malfitano was not likely to succeed on the merits of his claim.

It is true that in denying the preliminary injunction, the District Court criticized the process by which the denials occurred. With this criticism, Malfitano changed the nature of his claims to assert the constitutional issues now before this Court. It should be noted, however, that the District Court's criticism occurred before the County had the opportunity to address the constitutional issues or present evidence relevant to them. Once the parties completed briefing and submission of evidence relating to the constitutional issues, the District Court found that these claims also lacked merit. The District Court did so on the basis that Malfitano did not have a property interest in the licenses to which due process applied. It found that Malfitano's history of disingenuousness provided a rational basis for distinguishing between Malfitano and other applicants for liquor licenses. The District Court also found the Storey County Code §5.12.010(A) sufficiently definite to withstand a claim of vagueness. Malfitano has failed to demonstrate any abuse of discretion in these determinations. Accordingly, this Court should uphold the well-founded decision of the District Court.

II. STATEMENT OF THE FACTS

A. The Hearing by the Storey County Liquor Board of September 1, 2015

The facts relevant to the issues raised in this appeal begin on September 1, 2015, at a hearing before the Storey County Liquor Board. The Storey County Liquor Board consists of four persons, the three members of the Board of County Commissioners and the Sheriff of Storey County. See NRS 244.350(1).¹ At the hearing, the Liquor Board considered the applications of Malfitano for liquor licenses for the Delta and Bonanza Saloons. (I JA 0037). Due to the fact that issuance of the licenses would have been duplicative of existing licenses issued to Malfitano's lessee, the applications were denied. (I JA038). It is true that Commissioner McBride made statements to the effect, that once Malfitano resolved the duplicative license issue, there would be no delay in issuing the licenses and that there was no reason to deny the license except for the duplication issue. (I JA 0037). These comments were corrected by the county manager at that hearing to establish that the applications would only be considered not that they would be approved. (I JA038)². The District Court subsequently found that these

¹ Storey County Sheriff Gerald Antinoro did not attend the meeting of the Liquor Board held on September 1, 2015. (I JA 0033 referencing Roll Call).

² Mr. Whitten later explained that the reason he made this comment was to correct the representation that the licenses would be approved. (JA 0126 lns. 21-26 0127 lns. 1-3)

Commissioner McBride's statements did not create a contract between the Liquor Board and Malfitano. (VI JA 0865-0866).

B. The Nevada Gaming Commission Issues its Order Denying Gaming and Landlord Licenses to Malfitano on September 17, 2015.

Approximately two weeks after the Liquor Board closed its hearing on the Malfitano applications for licenses, the Nevada Gaming Commission (hereafter NGC), formally issued its order denying gaming and landlord licenses to Malfitano for the Delta and Bonanza Saloons. (I JA 0227-0232). While it is clear that Commissioner McBride attended the hearing on the gaming applications before the Gaming Commission on August 25, 2015, there is no evidence that any other member of the Liquor Board was aware of the existence of the hearing or aware of the outcome of that hearing prior to the issuance of the formal Order denying the gaming licenses.

C. Hearing of October 6, 2015 on Applications for Liquor and Business Licenses

1. The Appropriate Standard for Issuing a Liquor License is Provided to the Board

Subsequently, on October 6, 2015, the County held hearings on Malfitano's applications for liquor and business licenses. (I JA 0055). The hearings began with a short presentation by special counsel Robert Morris Esq. (I JA 0102-0105). In

that presentation, Mr. Morris advised the Board of the legal standards that applied to the grant or denial of a liquor license in Storey County. He advised that under SCC § 5.12.010 applicants for liquor licenses were required to provide the Board with proof of financial standing to warrant an expected satisfactory and profitable business operation. (I JA 0104). He advised that the Board needed to determine whether the evidence presented met this standard. (I JA 0105).

Following Mr. Morris's presentation, Sheriff Antinoro provided the results of his office's investigation into the background of the applicant. He reported that nothing in the applicant's criminal history would preclude him from having a license. (I JA 0106 lns. 1-4). He also stated that nothing in the applicant's financial background gave reason to expect that his business would fail. (I JA 0106 lns. 5-9). Later, however, Sheriff Antinoro did offer the opinion:

I'm not judging the applicant's business model. Uh, from a personal perspective, I think trying to run it just as a bar, that the business is probably going to fail, because there is not enough business supporting it.

(I JA 0117 lns. 1-5). Sheriff Antinoro also reported that, while he did not submit the financial information obtained from Malfitano to the Board, it appeared that Malfitano had \$5 million dollars in holdings. (I JA 0109 lns. 18 – 23) Sheriff Antinoro also offered his observation concerning the recent denial of gaming licenses by the NGC. He asserted that the Gaming Commission had a significantly higher standard for the issuance of gaming licenses than the standard used by the

County in issuing liquor licenses. (I JA 0106 lns. 10-17). He cited no authority for this assertion.

2. The Information Obtained by the Nevada Gaming Control

Board Investigation into Malfitano's Background is Submitted to the Board.

With the observation made by Sheriff Antinoro regarding the NGC standard of proof, Special Counsel Morris entered into the record a copy of the NGC's order denying gaming and landlord licenses to Malfitano. (I JA 0106 lns. 23-25 - 0107 lns. 1-3)(the order is found at I JA 0227). In the order, the Nevada Gaming Control Board (hereafter NGCB) first noted that Malfitano filed his application for licenses 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." (I JA 0230 lns 1-5)(Emphasis added). The NGCB found that Malfitano failed to carry his burden of demonstrating adequate business probity or competence. (I JA 0229). The NGCB based its findings of a lack of business *probity* and his lack of business *competence* on:

1. Failure to disclose business related issues to the Board,
2. Significant disclosed and non-disclosed litigation,

3. Significant employment related issues from Malfitano's assisted living business and his prior dental practice,
4. Significant citations and actions by other regulatory agencies concerning Malfitano's assisted living business and his prior dental practice,
5. The existence of numerous prior tax liens, and
6. The appearance of significant cash flow problems.

(JA 0107 lns. 8-20; JA 0230). The NGCB also found Malfitano not suitable to be the landlord of a gaming establishment due to a lack of business competence based upon significant issues regarding foreclosures, delinquent tax payments, tax liens and default notices concerning *real properties* owned by Malfitano or by businesses owned by him. The members of the NGCB unanimously recommended denial of the licenses to the NGC. The NGC so ordered. (I JA 0231 – 0232).

3. The Liquor Board is then Correctly Advised of the Relevance of the NGCB Information to the Liquor License Application.

Mr. Morris then advised the Storey County Liquor Board that the information in the NGC order could only be considered in determining the financial standing of the applicant for the liquor licenses and whether the Board could expect the applicant to conduct a satisfactory and profitable business operation. (I JA 0107 lns. 21-25).

At this point Sheriff Antinoro again expressed his concern that an applicant for a liquor license should not be held to the higher standard of proof required of the applicant for a gaming license. (I JA 0108 lns. 3-25, JA 0109 lns 1-5). Mr. Morris, however, correctly advised the Board that while an applicant for a liquor license did not have to meet the NGC standards, the information made available in the order could be considered in determining whether the applicant met the requirement of SCC §5.12.010 regarding his financial standing. (I JA 0109 lns. 6-14).

4. County Comptroller Provides Evidence Regarding Loss of Gaming Revenue

Hugh Gallagher, the Storey County Comptroller, offered his opinion as to the feasibility of conducting a business at the Delta and Bonanza Saloons. Both of these locations had traditionally been gaming sites. (I JA 0125 ln 25 – 0126 lns.1-5). In his view, the inability of Malfitano to obtain gaming licenses would affect the profitability of the businesses. (I JA 0113 lns. 12 -25). Comptroller Gallagher also questioned the truth of the representation that Malfitano had \$5 million in holdings. (I JA 0114 lns. 2-9).

5. Commissioners Weigh in on Malfitano Applications

Commissioner McBride then offered further information to the Liquor Board. He advised that after the NGCB voted to recommend denial of the gaming and landlord licenses to Malfitano, he decided to attend the hearing before the NGC at which the recommendations were to be considered. (I JA 0114 lns. 10-18). He listened to three hours of testimony at the hearing. (Id.) The NGC pointed out a whole host of problems in Malfitano's background including the lawsuits, foreclosures, delinquent tax payments, tax lien and default notices already mentioned. (I JA 0114 lns.23-25). In addition, Commissioner Townsend of the NGC, stated that Mr. Malfitano had debt in the amount of \$12 million. (I JA 0115 lns. 7-11). While Mr. Malfitano paid \$4 million for the Delta and Bonanza Saloons, \$2.5 million of that was debt. (I JA 0115 lns. 12-17). This all meant that the applicant was underwater by about \$7 million. (Id @ lns. 18-20).

Commissioner McBride, who had a background in gaming himself, noted that in the absence of gaming licenses, the applicant was going to have a reduced cash flow of 60/70 percent. (Id. @ lns20-25; JA 0116 lns.1-2). Later Commissioner McBride provided that most of the items considered by the NGC were items not disclosed by Malfitano, including approximately 40 undisclosed lawsuits. (I JA 0124 lns 10-25; 0125 lns.1-4).

Commissioner Gilman next weighed in. He noted the discrepancy between Sheriff Antinoro's investigation and that of the Gaming Control Board. He attributed the difference between the two to the more extensive investigation done by the NGCB than that done by the Sheriff. (I JA 0118 lns. 6-25).

Commissioner McGuffey then stated that he was not going to rely on what the gaming board said, but that the information provided gave him an idea of who the applicant was. (I JA 0119 lns.5-18). He indicated that the information about numerous prior tax liens, significant cash flow problems, lack of business probity and not showing integrity to run a business caused him questions. (I JA 0119 lns. 20-25; 0120 lns. 1-12).

6. County Manager Whitten Provides Insight as to Malfitano's Creditworthiness

County Manager Pat Whitten also offered his insight into the matter. He pointed to additional information in the NGC order addressing the denial of the landlord license. (I JA 0121 lns. 11-23). Mr. Whitten stated that he had experience in evaluating credit worthiness of applicants for lines of credit. He observed that the concerns expressed by Gaming were serious indicators of lack of financial strength and ability to conduct a business. (I JA 0122 lns. 4-24). He

stated that staff's recommendation to the Board was to deny the liquor licenses. (Id. @ 25).

7. Malfitano Represented by his General Manager

Special counsel Morris did suggest that the applicant could be questioned. (I JA 0109 ln. 24). He expressed surprise at the absence of Malfitano. (I JA 0110 lns. 18-19). Malfitano's general manager Tina Perkins, however, was present to represent Malfitano. (I JA 0110 - 0111). She did provide information regarding the status of the Delta and Bonanza Saloons. (I JA 0111). She wholly failed to address the negative information developed by the NGCB investigation.

8. The Liquor Board Votes to Deny the Liquor Licenses Because of Malfitano's Financial Instability

Towards the end of the hearing, Commissioner Gilman made a motion to deny the liquor licenses for the Delta and Bonanza Saloons based upon the probability of financial instability to operate successfully in Virginia City. (I JA 0131 lns. 24-25:0132 lns.1-3). This motion passed by a 3-1 vote with only Sheriff Antinoro voting against the motion. (I JA 0132 lns. 4-15).

9. The Board of County Commissioner Grants Business License for the Delta Saloon but denies Business License to the Bonanza Saloon.

The Board of County Commissioners then proceeded to address the issue of business licenses for the Delta and Bonanza Saloons. The County Manager

reported that all was in order for the Delta Saloon. (I JA 0133 Ins. 19-25). There was, however, a concern about the Bonanza Saloon meeting fire code requirements. The Storey County Fire Protection District Fire Chief advised that in his opinion due to the lack of sprinklers, the building was not safe. (I JA 0133-0135). The Board granted a business license for the Delta, but denied the business license for the Bonanza. (I JA 0136).

D. Malfitano Seeks Mandamus Relief

Malfitano shortly thereafter filed a Verified Petition for Writ of Mandamus. (I JA 0001). That was followed by the filing of a Motion for Ex Parte Restraining Order and Motion for Preliminary Injunction. (II JA 0236). Nowhere in the Petition or in the Memorandum of Points and Authorities in support of the Petition or in the Motions did Malfitano raise any issues with regard to due process, equal protection or any vagueness in the language of the Storey County ordinance. Rather, the primary arguments advanced were ones of whether the decisions of the Boards were arbitrary and capricious. (I JA 0014 – 0015). The parties briefed the arbitrariness issues in advance of the hearing on the Motion for Ex Parte Temporary Restraining Order and Preliminary Injunction. (I JA 0003-0029; III JA 0474 – 0495).

E. The Hearing on the Motion for Restraining Order and Preliminary Injunction.

The District Court held a hearing on the motion for restraining order and preliminary injunction on October 21, 2015. Near the close of that hearing and after the taking of all testimony, the District Court brought up, on its own accord, the issue of due process. (VI JA 1002 lns. 5-9). The District Court acknowledged that it raised the issue sua sponte. (VI JA 1027 lns. 12-15). The District Court stated that because the Court had raised the issue and not the parties, the issue would play no part in the decision on whether to grant or deny a preliminary injunction. (Id.). The Court ultimately denied the preliminary injunction in its Amended Order issued November 10, 2015. (III JA 0497). It did so on the grounds that Malfitano did not demonstrate irreparable harm, that he did have an adequate remedy at law, and, most importantly, that he did not demonstrate a likelihood of success on the merits that the Boards had acted arbitrarily or capriciously. (III JA 0506). The District Court stated that the record contained substantial evidence supporting a denial of the liquor license applications. (Id.) Similarly, the District Court found that substantial evidence existed in the record to deny the business license application for the Bonanza Saloon. (III JA 0508).

F. Malfitano Tries a New Route of Attack on the Boards' Actions.

Following the denial of the temporary restraining order and preliminary injunction, Malfitano continued with the briefing of the merits of his petition. (III

JA 0511). The nature of his contentions, however, changed significantly. He only cursorily addressed the substantiality of the evidence supporting the Boards' decisions. Instead, he turned to the process issues. Accordingly, he raised, for the first time, issues related to due process, equal protection and the vagueness of the Storey County ordinance. (Id.).

In all likelihood, Malfitano raised these issues because of the expressions of concern by the District Court about the fairness of the proceedings leading to the denial of the licenses. The expressions of concern, however, were made before the County had an opportunity to formally address the issues and to provide factual information relating to the issues. With the briefing of those issues by Malfitano, the County had the opportunity to do just that. The County argued that the disingenuousness demonstrated by Malfitano differentiated him from others whom had been granted liquor licenses. (V JA 0732 – 0734). There was therefore no violation of equal protection. The District Court agreed. (VI JA 0867-0868).

The County argued that as to a disfavored activity such as liquor sales, which are subject to a significant amount of police regulation and oversight, the specificity required of county ordinances is extremely relaxed, if not wholly nonexistent. (V JA 0728 – 0732). Accordingly, Storey County's Liquor License Ordinance met the required standard of specificity. The District Court agreed. (VI JA 0866 – 0867).

The County also demonstrated that Malfitano relied on the representations of Commissioner McBride, a single member of the liquor board. County Manager Whitten corrected Commissioner McBride's representation. (V JA 0721-0728). Consequently, Malfitano had only a hope of receiving liquor licenses, not a legitimate expectation of receiving liquor licenses. No explicit mutual understanding that the Board would issue liquor licenses to Malfitano existed. For this and other reasons, due process of law principles did not apply. The District Court agreed. (VI JA 0865 – 0866).

Consequently, once the County had a full opportunity to present the complete circumstances to the District Court and demonstrate the lack of merit to Malfitano's contentions, the District Court was comfortable with the proceedings as they occurred. The District Court, accordingly, denied the petition on its merits. This appeal followed.

III. SUMMARY OF ARGUMENT

Principles of due process apply to protect property and liberty interests from arbitrary and capricious deprivations. In order to be protected by due process the person must have a protectible property interest. Here, Malfitano had only a desire or hope that he would be issued liquor licenses. This hope, no matter how fervently held, does not rise to a property interest. Further, even if it could be said that somehow the parties arrived at an explicit, mutually held agreement that licenses would be issued, that is not the type of contract for which due process principles apply. Finally, the availability of a state authorized claim for breach of contract fully complies with due process principles.

Malfitano also claims that the County Licensing Boards treated him differently from other similarly situated applicants for liquor licenses without a rational basis for doing so. Malfitano's extensive failures to disclose relevant financial facts to the NGCB established a rational basis to distinguish Malfitano from other applicants for licenses as to which no similar history of disingenuousness was shown.

Finally, the ordinance which required Malfitano to bear the burden of demonstrating his suitability for a liquor license distinguishes the cases cited by Malfitano. In cases cited by Malfitano, persons are criminally prosecuted for

violations of allegedly vague statutes. The standard of specificity required of an ordinance regulating applications for liquor licenses is wholly different and provides extensive discretion to liquor licensing boards. The specificity of the Storey County ordinance complies with the standards of specificity required. Accordingly, the District Court did not abuse its discretion in declining to grant mandamus relief.

IV. ARGUMENT

A. The District Court did not abuse its discretion in holding that the Appellants failed to establish a due process violation as to the Denial of the Liquor Licenses

Malfitano initially argues that he had a property interest in the issuance of the licenses entitled to the protections of Due Process. He asserts that the district court abused its discretion in three respects in finding that due process did not apply. First, he asserts that Judge Wilson abused his discretion by ignoring the fact that Malfitano held a temporary liquor license which he asserts was a property interest subject to due process protection. Second, he asserts that the district court ignored the timing of the entry into the mutual understanding of the parties and the withdrawal of that understanding on October 6, 2015, the date the licenses were denied. Third he asserts that the decision of the District court was against the

weight of the evidence. All of these arguments are meritless and depend upon a mischaracterization of the record before this Court.

1. Temporary Liquor License did not Create a Property Interest for Malfitano.

Malfitano's first claim of abuse of discretion relies on an assertion that the district court ignored the existence of a temporary liquor license. That assertion is completely irrelevant to the issue of whether the denial of permanent liquor licenses at the hearing of October 6th resulted in a violation of due process. As noted in *Board of Regents v. Roth*, 408 U.S. 564, 576 (1972):

Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

In this case, the Storey County Code creates and defines the temporary liquor license. It states: "A temporary liquor license may be issued for the purpose of continuing an existing business during the period in which a liquor license application has been made, and prior to its approval or disapproval". SCC §5.12.130. The dimension of the temporary liquor license is that it is *temporary*. That is, it is in existence until the application for the permanent liquor license is approved or disapproved. It is the denial of the permanent liquor license that is the basis for the claim of a due process violation. The temporary liquor license was

neither revoked nor rescinded. It is just that its temporal existence came to an end upon the board's action on the application for a permanent license.

The case of *Grotten v. California*, 251 F.3d 844 (9th Cir. 2001) provides no support for Malfitano's contentions. *Grotten* stands for the familiar proposition that where there are substantive restrictions on an agency's discretion to grant or deny a license, a legitimate claim of entitlement to the license and therefore a property interest, may arise. In *Grotten* there were only two grounds on which a California agency could deny an out-of-state appraiser a temporary appraiser's license in California pursuant to a reciprocal licensing agreement. Those grounds were; (1) termination of the reciprocity agreement or, (2) invalidity of the applicant's license in the other state. If the reciprocal agreement remained in place and the applicant was validly licensed in the reciprocating state, then he was entitled as a matter of law to the license. He therefore had a legitimate claim of entitlement to the license, i.e., a property interest.

That is not the case presently before this Court. In *State ex rel Grimes v. Board*, 53 Nev. 364, 372-73, 1 P.2d 570 (1931) the court stated:

But it has been held that, for the carrying on of a business of a character regarded as tending to be injurious, such as dealing in intoxicating liquor, a wide discretion may be given to grant or withhold a license without prescribing definite and uniform rules of action

In *County of Clark v. Atlantic Seafoods*, 96 Nev. 608, 610, 615 P. 2d 233 (1968), the Court confirmed that wide discretion is conferred upon county liquor boards in reviewing applications for liquor licenses. See NRS 244.350(1). Indeed, under the Storey County Code, the burden is placed upon the applicant for a license to demonstrate: “Proof of financial standing to warrant an expected satisfactory and profitable business operation.” SCC §5.12.010. The applicant is additionally required to submit to an investigation into his criminal history and to provide his experience in the saloon or liquor vending business. *Id.* There is nothing in the code which commands the issuance of a liquor license should certain facts exist. There are not the substantive restrictions on the liquor board’s exercise of discretion, as existed in the *Groten* case, which would give rise to a legitimate claim of entitlement to a liquor license.

The fact that Malfitano was provided a temporary liquor license has no bearing on whether Malfitano had a legitimate claim of entitlement to the issuance of a permanent liquor license. An assertion to the contrary is simply a red herring. It certainly does not demonstrate any abuse of discretion by the district court in finding no due process violation.

2. The Timing of the Events Does Not Establish an Abuse of Discretion by the District Court.

Malfitano asserts that the District Court abused its discretion by failing to note the change in the Boards' position from the hearing of September 1st, to the hearing held on October 6th. He asserts that at the September 1st hearing, the County agreed to issue the liquor licenses once the duplicative license issue was resolved. He asserts that it was not until the October 6th hearing that the County attempted to walk back this promise. He asserts the fact that the District Court did not take into consideration this change of position in denying the Petition for mandamus constitutes an abuse of discretion. He does not articulate how this impacts his right to due process. In any event, this assertion is simply factually inaccurate. The District Court found that any representations made at the September 1st hearing were corrected at that hearing and did not give rise to a contract protectible under principles of due process. That finding is wholly supported by the record.

The record demonstrates that the issue of due process was first raised by the District Court in the hearing on the Motion for Temporary Restraining Order. In its order denying the temporary restraining order the District Court was apparently of the opinion that the Board had promised it would issue liquor licenses once the duplication issue was addressed. (III JA 0497 – 0509). The references by the

District Court that the Board changed its position between the hearing of September 1st, and the hearing of October 6th were made in the Amended Order denying the preliminary injunction (Id.). The statements were made before the process issues were addressed by the parties and before the District Court was fully advised of the actual facts that occurred.

Following the denial of the temporary restraining order and the preliminary injunction, Malfitano raised, for the first time, the constitutional issues. Both sides then submitted evidence and argument on these issues. Storey County pointed out that the actual comments made by County officials at the September 1st, hearing did not result in a promise to later issue liquor licenses. Rather, comments made by a single member of the Board, Commissioner McBride, to the effect that the licenses would issue were corrected *at that meeting* by the County Manager. Consequently, the suggestion that the District Court abused its discretion by failing to note the time between the Board's September 1st promises and Malfitano's reliance on them and then the later attempts to clarify those promises at the October 6th hearing is simply factually wrong. Malfitano is relying on the undeveloped factual record that existed prior to the time constitutional issues were raised as demonstrating the District Court's abuse of discretion. The District Court in denying the Petition for Writ of Mandamus noted that Commissioner McBride's

comments had been corrected and did not give rise to a contractual obligation to issue the licenses. (VI JA 0865-0866).

The proceedings in this case are similar to those that were addressed in *State v. Rosenthal*, 93 Nev. 36, 559 P 2d 830 (1977). There, an applicant for a gaming license alleged he was denied due process because he was not notified in advance of the licensing hearing of the charges that ultimately resulted in the denial of the license. This Court stated that the applicant misperceived the nature of the hearing. The licensing board had not charged the applicant with criminal acts. Rather the licensing board engaged in administrative proceedings in which the applicant bore the burden of proving his qualifications for the license. This Court held that the fact that the State did not advise Rosenthal of the issues he would have to address to get his gaming license did not violate Rosenthal's right to procedural due process. The same is true here. The licensing hearings were County administrative proceedings in which the burden rested on Malfitano to establish his qualifications for the licenses.

Here, Malfitano knew in advance of the licensing hearing of October 6, 2015, that the NGCB unanimously recommended to the NGC that Malfitano's applications for gaming and landlord licenses be denied. He also knew that the Gaming Commission unanimously denied all his applications for gaming and landlord licenses. He also knew that the reasons for denying the licenses were for

Malfitano's failure to carry his burden of demonstrating business competence, to carry his burden to demonstrate business probity, for nondisclosure of business related issues and for the appearance of significant cash flow problems. He also knew that he had already been denied liquor and business licenses by Storey County over his objection on September 1, 2015 due to duplication of licenses. He also presumably knew that in order to obtain liquor licenses he bore the burden of demonstrating financial standing to warrant an expected satisfactory and profitable business. The findings of the Gaming Control Board and Gaming Commission were directly relevant to this standard. For Malfitano to now claim that he blithely relied on the statement of a single member of the Liquor Board as a basis for deciding not to attend the hearing on his application for licenses, rings loudly false. As was stated in *Primm v. City of Reno*, 70 Nev. 7, 14, 252 P. 2d 835 (1953) wherein liquor and gaming licenses were denied to an applicant:

Nor may we regard the actions of the council as confiscatory in the light of petitioner's anticipatory investment. The requirement of a license was known to him. The hazards of regulation were known to him. There has never been a time in the history of legalized gambling in this state when the operator or investor in such enterprises has been free from such occupation risks. As has been stated, "Surely the individual cannot be permitted to speculate upon the community's not exercising its constitutional powers and then claim that the community is barred from interfering with the speculation (quotations and citations omitted).

The record solidly supports the District Court's decision that no violation of due process occurred in the way the County addressed Malfitano's licensing

application between the September 1st hearing and the hearing of October 6th. It certainly does not demonstrate an abuse of discretion by the District Court.

3. The District Court Decision that no contract was created is supported by the record.

Malfitano asserts that the District Court ignored the weight of the evidence demonstrating the existence of an actual contract between Malfitano and the Board. This contract, he asserts, created a property interest protected by principles of due process. No contract, however, existed between Malfitano and the Board.

Initially, it should be noted that a weight of the evidence standard is not the standard for reviewing the denial of mandamus relief. Rather, the appropriate standard is one of whether the district court abused its discretion in ruling as it did. *Veil v. Bennett*, 131 Nev. Adv. Opn. 22, 348 P. 3d 684, 686 (2015). In *Imperial Credit v. Eighth Jud. Dist. Ct.*, 130 Nev. Adv. Opn. 59 @ pg. 5, 331 P. 3d 862, 866 (2014) this Court explained:

[D]iscretionary power is subject only to the test of reasonableness, [which] requires a determination of whether there is logic and justification for the result. The trial court's discretionary power was never intended to be exercised in accordance with whim or caprice of the judge nor in an inconsistent manner. Stated another way, such discretion is improperly exercised when the judicial action is arbitrary, fanciful or unreasonable, or where no reasonable person would take the view adopted by the trial court.

(Citations and quotations omitted).

In this case, the issue is one of whether the interaction between the Board and Malfitano at the hearing of September 1, 2015 gave rise to a property interest protected by due process. This is true because in order to pursue a claim that a government's action violated a person's right to procedural due process, that person must demonstrate the existence of a protectible property interest. *Thornton v. City of St. Helens*, 425 F. 3d 1158, 1164 (9th Cir. 2005). It is well-established that in order for a person to have a property interest protected by the Due Process clause, that person must have more than a unilateral expectation that he will receive a benefit. As explained in *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972):

Certain attributes of "property" interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

In *Gerhart v. Lake County, Mont.*, 637 F. 3d 1013, 1020 (9th Cir.), *cert. denied* 132 S. Ct. 249 (2011) the Court did state that policies and practices of a public agency could give rise to a legitimate claim of entitlement. The *Gerhart* court, however, went on to state: "A person's belief of entitlement to a government benefit, no matter how sincerely or reasonably held, does not create a property

right if that belief is not mutually held by the government.” Moreover, the fact that the parties have certain mutually held expectations that certain events will occur does not create a protectible interest in property unless those expectations evolve to the level of an explicit agreement that certain events will occur. *Hyland v. Wonder*, 972 F.2d 1129, 1140 (9th Cir. 1992).

In this case, the County presented the District Court with the fact that statements made by Commissioner McBride were the statements of a single board member. No other board member echoed Commissioner McBride’s comments³. Further, after Commissioner McBride made his comments, and at the same meeting, County Manager, Pat Whitten advised the Board and the applicant that he had been asked to speak on behalf of the absent Sheriff Antinoro. He advised it was only that the application would be *considered*. (I JA 038). County Manager Whitten explained at a later time that the reason he made this statement was to

³ Malfitano argues that statements re issuance of the liquor licenses “were made after [the Board] already knew of the NGC’s order and despite that knowledge, [the Board] agreed to grant the liquor licenses to Malfitano once the duplication issue was resolved.” Opening Brief @ 24. Later Malfitano asserts: “Because the Board knew of the NGC’s and NGCB’s decisions when it made its promises to Malfitano, there can be no explanation for the Board’s flip flops other than a motivation that is one founded on prejudice or preference rather than reason.” Opening Brief at 29. These assertions of knowledge by the Board of the NGC and NGCB actions are unsupported by the record. There is no showing that any other member of the Liquor Board was even aware of the NGC and NGCB hearings prior to October 6th, much less that an order had been issued by the NGC.

correct Commissioner McBride's statements that the licenses would be approved. (I JA 0126 lns. 21-26; 0127 lns. 1-3). Commissioner McBride affirmed the correctness of the County Managers correction at the September 1 hearing. (V JA 0745 @ 10:38:57 – 10:39:20AM). At the close of hearing of September 1, 2015, Commissioner McBride stated that once the duplicate licensing issue was cleared up, the Board would *hear* the application as soon as possible. (V JA 0745 @ 10:46:13 AM – 10:46:30 AM). These subsequent comments and advisements make it clear that the necessary explicit mutual understanding did not exist.

The District Court found that Malfitano was advised at the September 1st hearing, that the applications for liquor licenses would only be considered for approval and that no contract had been created between Malfitano and the Liquor Board. (VI 0865 – 0866). It appears that a reasonable person could take the view taken by the District Court. Consequently the District Court did not abuse its discretion in taking the view that it did.

4. Past History does not Create a Property Right.

Malfitano argues that the Liquor Board's past history of granting liquor licenses supports its claim of an entitlement to the liquor licenses. This argument has been repeatedly found lacking by the courts. "[A] constitutional entitlement cannot be created-as if by estoppel- merely because a wholly and expressly

discretionary state privilege has been granted generously in the past.” *Conn. Bd. Of Pardons v. Dumschat*, 452 U.S. 458, 465, 101 S. Ct. 2460, 69 L. Ed 2d 158 (1981); *see also Cassidy v. State of Hawaii*, 915 F. 2d 528, 531 (9th Cir. 1990) (routine renewal of mooring permits did not give rise to legitimate claim of entitlement to renewal). Even in the *Gerhart* case, cited by Malfitano, the Court stated: “Similarly, here Gerhart’s claim of entitlement is grounded in the County’s past practice of leniently granting approach permits, without any evidence or allegation of a mutual understanding that he was otherwise entitled to a permit”. *Gerhart, supra*, @ 1021. Thus, it is not the routine granting of licenses that gives rise to a claim of entitlement. Rather, it is the existence of an explicit mutual understanding that gives rise to a legitimate claim of entitlement. As previously noted, the District Court did not abuse its discretion in finding that no such mutual understanding existed.

5. Open Meeting Law Voids the Existence of a Contract.

In order to demonstrate the existence of a protectible property interest, Malfitano was required to demonstrate that the property interest arose by virtue of state law-rules that secured the property interest. *Roth, supra*. Unless the contract which supports the property interest is authorized by state law, it does not give rise to a property interest. *Hyland v. Wonder, supra* @ 1140-41. Here, Malfitano claims that the purported explicit contract arose during the course of a duly noticed

public meeting of the Board of County Commissioners. Nowhere on the agenda for that meeting does it reflect that the Board of County Commissioners/Liquor Board was authorized to take action on a contract to provide a liquor license at a later date to Malfitano. (See V JA 0740 – 0743). Nevada's Open Meeting Law requires that all actions proposed to be taken by a board of county commissioners must be set forth on a duly noticed agenda. NRS 241.020(2)(d). Any action taken in violation of the Open Meeting Law is void. NRS 241.036. Consequently, even if the statements of Commissioner McBride could somehow be contorted into a contract, that contract was not authorized by law and was void. No protectible property interest arose.

6. A Contract, if One Existed is not the Type of Contract for which further Due Process Standards were Required.

Assuming arguendo that a contract existed between Malfitano and the Liquor Board, not every breach of contract by a government entity gives rise to a due process violation. In *Physicians Serv. Med. Group v. San Bernardino Cty.*, 825 F. 2d 1404, 1408 (9th Cir. 1987) the court stated:

Having recognized, as we must, that deprivation of contractual rights may create a claim under section 1983, we are faced with an equally compelling necessity to recognize that not every interference with contractual expectations does so. It is neither workable nor within the intent of section 1983 to convert every breach of contract claim against a state into a federal claim, We must bear in mind that the

Fourteenth Amendments was not intended to shift the whole of the public law of the states into the federal courts.

(Citations and quotations omitted). The *Physicians* court noted that the prime category of contractual relations protected by the due process clause related to employment contracts. In its view, the further one got from an employment contract, the less likely the contract was entitled to be treated as a protectible property interest. This was true because: “The right of an individual not to be deprived of employment that he or she has been guaranteed is more easily characterized as a civil right, meant to be protected by section 1983, than are many other contractual rights.” In the *Physicians* case, the contract in issue was deemed to be a supplier contract rather than an employment contract and was not entitled to the protection of due process.

In the present case, even if a contractual relationship could be found to exist, the contract is for the future issuance of a license to sell alcohol. It is nothing like the continuation of an individual’s gainful employment. Moreover, there is no immediate deprivation of real or personal property, or of the pursuit of an existing gainful occupation. So, assuming arguendo, the existence of a contract, it is simply not one to which due process principles apply.

7. Existence of Breach of Contract Remedy Satisfies Due Process.

In a related line of cases, it has also been held that if there has been a deprivation of property, if the state provides adequate post-deprivation remedies for the deprivation, there is no violation of due process. See e.g., *Hudson v. Palmer*, 468 U.S. 517 (1984). In *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 195 (2001) the Court concluded that a state remedy for breach of contract was sufficient to provide the process due to a subcontractor whom had contract payments withheld for failure to pay prevailing wages under state law. The court noted in part that state remedies were adequate because the plaintiff had not been deprived of a present possessory interest in property or of an existing right to pursue a gainful occupation. *Lujan, supra* @ 196.

Malfitano does have the right to pursue a breach of contract remedy if he really believes he can prove the existence of a contract. In these circumstances there has been no violation of a right to due process. Clearly no abuse of discretion by the District Court in finding no due process violation is demonstrated from this record.

B. The District Court did not Abuse its Discretion in Finding no Violation of Due Process When the County Denied a Business License for the Bonanza Saloon.

Malfitano asserts that the District Court abused its discretion in failing to find a due process violation when the Board of County Commissioners denied the issuance of a business license for the Bonanza Saloon. Malfitano makes no effort to identify a constitutionally protected property interest related to the business license. Rather Malfitano essentially relies on a straightforward state law claim of abuse of discretion by the Board in refusing to issue the license. In doing so, however, he relies heavily on evidence not submitted to the Board at the time it denied the business license i.e., a Storey County Business License Inspection Sheet. Malfitano concedes that this item of evidence was only attached to his briefing in support of his motion for a temporary restraining order and admitted into evidence at the hearing on that motion. This of course violates the requirement that a court reviewing the decision of a licensing board must rely on the evidence actually presented to the licensing board. *Carson City v. Lepire*, 112 Nev. 363, 364-65, 914 P. 2d 631 (1996). Moreover, the standards of review for reviewing the decisions of licensing boards are more favorable to the licensing board. It is *presumed* that a licensing authority will not exercise its licensing duty in an arbitrary or oppressive fashion. *City Council v. Irvine*, 102 Nev. 277, 279 @ fn. 4, 721 P. 2d 371 (1986); *Mills v. City of Henderson*, 95 Nev. 550, 552, 598 P.

2d 635 (1979). Further, In *City Council v. Irvine, supra*, 102 Nev. @ 278-79 the court explained:

The courts, as a general rule, have no business telling a city board who should or who should not be granted this kind of license or which cabaret licenses would be and which cabaret licenses would not be contrary to the public welfare. *Only rarely may a court interfere with such a decision of a municipality's governing board, and then only when it can be demonstrated by the one seeking the privilege that the governing board is acting outside of its legal powers.*

It is clear from these standards that an applicant for a license has a heavy burden to satisfy when the applicant attempts to demonstrate abuse of discretion by a licensing board for failing to issue a license.

In the present case, after closing the hearing on the issue of liquor licenses, the Board of County Commissioners opened the hearing on the question of issuing general business licenses for the Delta and Bonanza Saloons. Special Counsel Morris introduced the subject by providing a review of the legal standards for granting or denying such licenses. (I JA 0132 lns. 22-25; 0133 lns. 1-18). Under SCC §5.04.100(A) “A license may be refused by any licensing agency until an applicant complies or agrees to comply with all other existing ordinances and laws in force, including the county master plan, and a license may be revoked for failure to comply therewith.”

County Manager Whitten then advised the Board that the Delta was current on inspection requirements for both fire and building. (I JA 0133 lns. 19-25). He advised that Delta was eligible for a business license. (Id.) He further advised, however, that the Bonanza was not in compliance with fire code issues. (I JA 0134 lns. 1-9). The staff recommended issuance of the license to the Delta, but not to the Bonanza. (I JA 0136 lns. 9-11).

Gary Hames, the Storey County Fire Protection District Chief advised the Board that the District had been working with the Bonanza to bring it into compliance for about nine months. (I JA 0135 lns 21-25; 0136 lns. 1-2). He advised that, in his opinion, the building was not safe and recommended that a business license not be issued. (I JA 0135 lns. 2-8).

A member of the audience, Mr. Kiddis, questioned Chief Hames as to whether an agreement existed which would allow Malfitano until December 31st to install sprinklers. (I JA 0125 lns. 13-18). Chief Hames advised that there was an agreement in place, but that it was tied to the issuance of a gaming license, which did not occur. In his opinion that agreement was null and void. (I JA 0135 lns. 20-25).

Malfitano attached as an exhibit to his Petition for Writ of Mandamus a letter dated May 15, 2015, setting forth an agreement between Malfitano and the Storey County Fire Protection District re fire protection improvements for the

Bonanza (I JA 0235). This is the document that was not introduced into the record of the hearing before the County Commissioners. Even if it is considered, the agreement states that it is contingent upon Malfitano obtaining an unrestricted Gaming License. Since Malfitano was denied the gaming licenses, the agreement could not be performed. The Fire District had no obligation to perform pursuant to that agreement. See e.g., *NGA #2 Ltd. Liab. Co. v. Rains*, 113 Nev. 1151, 1159 (1997). In any event, it is not the fire district which issues business licenses. That is the decision of the Board of County Commissioners. If the Fire Chief offered an opinion that the building was unsafe, that is certainly information that the Board can rely on in deciding whether to issue the license⁴.

Thereafter the Board of County Commissioners voted to issue a general business license to the Delta but denied the issuance of a business license to the Bonanza. (I JA 0136 lns. 12-25; 0137 lns. 1-7). It is clear that the denial of the business license to the Bonanza was based upon the Bonanza's failure to comply with fire safety requirements. Accordingly the licensing board did not abuse its discretion in refusing to grant the license. In turn the District Court similarly did

⁴ It is worth noting that even after the expiration of the six month period set forth in the inspection report that Malfitano still had not complied with the requirement that a sprinkler system be installed. (V JA 0767 - 0768).

not abuse its discretion in finding no abuse by the Board of County Commissioners.

C. The Boards did not Violate Malfitano's Right to the Equal Protection of the Laws.

Malfitano also argues that the Liquor Board violated his right to equal protection of the laws when it denied him liquor licenses. Malfitano acknowledges that he is not a member of a suspect class, but argues that as a class of one, the Board intentionally treated him differently from other similarly situated persons without a rational basis for such treatment. The proceedings, however, demonstrate a rational basis for the distinction between Malfitano and other applicants for liquor licenses.

The District Court found that the Board did not violate Malfitano's right to the equal protection of the laws. The Board had considerably more information available to it than it had in typical liquor license applications. This was due to the extensive investigation conducted by the NGCB in response to Malfitano's applications for gaming licenses. This investigation concluded with determinations that Malfitano lacked business competence and probity and that he failed to disclose numerous recent and significant items related to his financial stability. In the District Court's view, the disingenuousness of Malfitano provided a rational basis for the difference in treatment between Malfitano and other liquor

license applicants. The issue is whether the District Court abused its discretion in making this finding.

Initially, Malfitano suggests that the County applied a higher and improper standard of review to his application when compared to other similarly situated applicants. Malfitano supports this assertion by reference to certain statements made by Sheriff Antinoro. Malfitano does not otherwise identify what that higher standard might have been.

The evidence does not support a contention that the Boards imposed a higher standard of review on Malfitano. What is true is that Malfitano was subjected to a much more rigorous background investigation at the hands of the NGCB than is typically done by the Storey County Sheriff's Office. (I JA 0118). The issue was then one of whether this information should be considered by the Liquor Board when deciding whether to issue liquor licenses to Malfitano.

There are several factors that warranted the Board in considering the questioned information. The information was first, a matter of public record. It was directly relevant to the statutory criteria for the issuance of a liquor license, i.e., that Malfitano show he had sufficient financial standing to warrant an expected satisfactory and profitable business operation. SCC §5.12.010(A).

Malfitano does not suggest any legal reason as to why the Liquor Board could not consider the evidence. Typically, hearings before administrative bodies are not subject to the formal rules of evidence. See e.g., *Rosenthal*, *supra* @ pg. 94; NRS 233B.123; NRS 463.313. Indeed, in *Carson City v. Lepire* 112 Nev. 363, 368, 914 P.2d 631(1966) the court stated that public opposition alone to the issuance of a liquor license is sufficient to deny the license. The question, typically, is whether the evidence submitted is of the type reasonably relied upon by reasonable and prudent persons in the conduct of their affairs. See NRS 233B.123(1); NRS 463.313(1)(d). Here it is submitted that a formal order of a government body based upon a lengthy evidentiary hearing and following a recommendation of the Gaming Control Board after a rigorous investigation is the type of evidence that would reasonably be relied on. It was therefore properly considered by the Liquor Board. Thus, it was not a matter of a higher standard being applied to the Malfitano application by the Liquor Board. Rather, it was that the Liquor Board had available to it the evidence from the more intensive investigation done by the Gaming Control Board. The consideration of the NGC order does not suggest a violation of equal protection.

Malfitano also relies on his arguments that promises were made to him at the September 1st hearing that were not followed through on, that he should have been informed that the Board would be relying on the NGC order and that he

should have been given an opportunity to respond. These tired arguments have nothing to do with whether there was a rational basis for denying the licenses to him, where they had not been denied to others. Malfitano was well aware of the existence of the NGC order. He had the opportunity to respond to any issues relating to his license application by appearing at the hearing of October 6th. Even after the denial of the licenses, he could have immediately reapplied for a license knowing well and good what concerned the Board.

The District Court found that there was no showing that other applicants for liquor licenses had been similarly disingenuous but nevertheless granted liquor licenses. This fact alone establishes the rational basis for denying Malfitano liquor licenses. It establishes that the District Court had a reason for finding no violation of Malfitano's right to the equal protection of the laws. There was no abuse of discretion on the part of the District Court in so finding.

D. Storey County Code Section 5.12.010 meets the specificity requirement of liquor license ordinances.

Malfitano argues that a portion of SCC §5.12.010 is unconstitutionally vague and is therefore void. In Malfitano's view the language within this section which states that an applicant must provide: "proof of financial standing to warrant an expected satisfactory and profitable business operation" is sufficiently vague as to allow arbitrary and discriminatory enforcement. In support of this contention,

Malfitano relies on standards applied in criminal prosecutions rather than standards applicable to applicants for licenses. When the application is for a liquor license, the standard of specificity is wholly different from that applicable to a statute by which a person can be sentenced to imprisonment. Here, the challenged language fully complies with the specificity required of ordinance governing the issuance of liquor licenses.

The burden of establishing the invalidity of an ordinance is a heavy one. A legislative enactment, such as an ordinance is presumed constitutional. *Schwartz v. Lopez*, 132 Nev. Adv. Opn. 73 @ pg. 15 (2016); *Starlets Intern., Inc. v. Christensen*, 106 Nev. 732, 735, 801 P.2d 1343 (1990); *List v. Whistler*, 99 Nev. 133, 137-38, 660 P. 2d 104 (1983). The party challenging the enactment bears a heavy burden to make a clear showing that the enactment is unconstitutional. *Schwartz, supra, Christensen, supra, List, supra*. In case of doubt, every possible presumption will be made in favor of the constitutionality of a statute, and courts will interfere only when the Constitution is clearly violated. *List, supra*. Moreover, in the specific case of liquor license ordinances such statutes are to be strictly construed against the applicant for the license. *Carson City v. Lepire*, 112 Nev. 363, 365-66, 914 P.2d 631 (1996). Malfitano did not carry this burden in attempting to demonstrate the invalidity of SCC §5.12.010(A).

In support of his contention that the ordinance is void for vagueness, Malfitano cites four cases all addressing criminal prosecutions.⁵ Such cases are irrelevant to a statute addressing the issuance of an occupational license. As noted in *Winters v. New York*, 333 U.S. 507, 515, 68 S. Ct. 665 (1948): “The standards of certainty in statutes punishing offenses is higher than in those depending primarily upon civil sanction for enforcement.” Here, there are not even civil sanctions available if an applicant fails to demonstrate its eligibility for a liquor license. Rather the only action taken is the denial of the license. The issue is then one of what is the appropriate standard required of ordinances regulating the issuance of liquor licenses.

The general rule applicable to licensing statutes, known as the “ordinary business rule” does require some degree of definiteness in standards applicable to the issuance of a license. See e.g., *Godshalk v. City of Winter Park*, 95 So. 2d 9, 12 (Fla. 1957); 9 *McQuillan, Municipal Corporations*, 3rd Ed. Rev. §26.83 pg. 286. Under this standard, the term “satisfactory”, when determining whether an applicant for a solicitor’s license had “satisfactory” character and business

⁵ *Silvar v. Eighth Judicial Dist. Court*, 122 Nev. 289, 129 P. 3d 682 (2006)(loitering for prostitution); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972)(criminal vagrancy); *Eaves v. Board of County Comm’rs*, 96 Nev. 921, 620 P. 2d 1248 (1980)(illegal escort services); *McCormack v. Herzog*, 788 F.3d 1017 (9th Cir. 2015)(illegal abortions).

responsibility was found legally sufficient to guide the exercise of discretion.

Moyant v. Borough of Paramus, 154 A. 2d 9, 22-23 (N. J. 1959).

There are exceptions to the standards required under the ordinary business rule. Where an area of licensing is the proper and necessary subject of police surveillance and regulation, the grant of discretionary power to license need not be restricted by specific standards. *Mills v. City of Henderson*, 95 Nev. 550, 552, 598 P. 2d 635 (1979)(pawn shop license); 9 *McQuillan, Municipal Corporations*, §26.85 pg. 295. It has even been held that where the issuance of a license confers a privilege rather than a property interest that constitutional due process standards do not apply. See e.g., *Morgan v. Texas Alcoholic Beverage Commission*, 519 SW 2d 250 , 253 (Tex Civ. App 1975)(license for sale of liquor was a privilege); *Parmenter v. Youman*, 31 So. 2d 387, 389 (Fla. 1947)(sale of liquor was a mere privilege, not a right, not necessary to prescribe specific rules of action to control discretion where discretion relates to matters within police regulation); see also *Rosenthal, supra* @ pg. 44. Indeed, in *Kochendorfer v. Board of Co. Comm'rs*, 93 Nev. 419, 424, 566 P. 2d 1144 (1977) this court stated with regard to the revocation of a liquor license:

The court below rejected the rationale in *Misurelli* and concluded that appellant had no due process rights under the Federal Constitution. It noted that due process presumes a protectible property or liberty interest. See *Board of Regents v. Roth*, 408 U.S. 564 (1972). This court and the majority of others have held that a liquor licensee has no such interest. See *Gragson v. Toco*, 90 Nev. 131, 520 P.2d 616 (1974). Accord, *Smith v. Iowa Liquor Control Comm'n*, 169 N.W. 2d 803 (Iowa 1969); *State ex rel. Garrett v. Randall*, 527 S.W.2d 366 (Mo. 1975).⁶

This language suggests that a vagueness standard does not have any application to a liquor licensing statute.

The present case involves an application for a liquor license. The U. S. Supreme Court has stated as far back as 1890 that there is no inherent right in a citizen to sell intoxicating liquors. *Crowley v. Christensen*, 13 U.S. 86, 91, 11 S. Ct. 13 (1890). The *Crowley* Court stated that the sale of intoxicating liquors was a business attendant with dangers. Accordingly, the authority to regulate the licensing of such an activity arose under the police power of the state. Under this authority, regulatory authorities had broad

⁶ The *Kochendorfer* court ultimately decided that the issue of a property interest did not need to be decided as the licensee had been provided due process in any event.

discretion in the licensing of such an activity, whereas they would not have such broad discretion in the licensing of harmless occupations.

This same rule has been applied in Nevada. In *State ex rel Grimes v. Board*, 53 Nev. 364, 372-73, 1 P.2d 570(1931) the court stated:

But it has been held that, for the carrying on of a business of a character regarded as tending to be injurious, such as dealing in intoxicating liquor, a wide discretion may be given to grant or withhold a license without prescribing definite and uniform rules of action

In both the *Gragson, supra*, and *Atlantic Seafoods, supra*, cases, the Court consistent with the *Grimes* statement, stated that the board delegated the authority to issue liquor licenses had “wide discretion” in reviewing applications for liquor licenses. Thus it does not appear that the standard set forth in SCC §5.12.010 is so vague as to impart unbridled discretion to the Liquor Board. Certainly, Malfitano has not borne his burden of demonstrating a clear constitutional violation.

V. CONCLUSION

The District Court’s denial of the Petition for Writ of Mandamus constituted a valid exercise of discretion. An abundance of evidence supported the determination that Malfitano did not meet the standard set forth in SCC §5.12.010 that he provide proof of financial standing to warrant an expected satisfactory and

profitable business operation. He had run-ins with regulatory authorities in his other businesses, he did not obtain the ability to conduct gaming at a business formerly supported by gaming, he had numerous debt issues in his past and had cash flow problems. He failed to disclose numerous recent and relevant financial facts to the gaming authorities including lawsuits and debts. Clearly, the Liquor Board was well justified in concluding that Malfitano did not meet the standard required by SCC §5.12.010.

Similarly, the District Court did not abuse its discretion in determining that the process by which the Board arrived at that conclusion did not violate Malfitano's rights. There was substantial evidence in the record before the District Court by which it could conclude that no express mutual agreement existed between the Board and Malfitano that the Board would issue the liquor licenses requested. To rely on the statement of a single member of the Board, which statement was corrected by the County Manager at that same meeting and acknowledged by the commissioner would appear to be the height of foolhardiness in light of the results of Malfitano's hearing before the NGC. Furthermore, even if a mutual agreement could somehow be conjured from the discussion at the hearing of September 1, 2015, a breach of contract action would satisfy due process and be


an adequate remedy at law. Due process considerations did not warrant the issuance of a writ of mandamus.

Similarly, the fact that Malfitano failed to disclose many salient facts regarding his financial situation, his history of litigiousness and other matters gave the Board reason to distinguish Malfitano from other applicants for liquor licenses. Malfitano provided no evidence that other applicants for liquor licenses were similarly disingenuous. Consequently, there was a rational basis for treating Malfitano differently than other applicants and therefore no violation of equal protection. The District Court did not abuse its discretion in so holding.

Finally, the standards for exercising discretion in the issuance of liquor licenses need not be set forth with the same specificity as do standards of conduct in criminal statutes. Boards considering applications for liquor licenses have broad discretion in considering such applications. The standard set forth in SCC §5.12.010 is not so indefinite as to confer unbridled discretion on the Board. Certainly the District Court did not abuse its discretion in so holding.

It is therefore respectfully submitted that the ruling of the District Court should be affirmed.

Dated this 30th day of September, 2016.


Keith Loomis

CERTIFICATE OF COMPLIANCE
(NRAP 28.2)

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

X This brief has been prepared in a proportionally spaced typeface using Word 2010 in font Times New Roman size 14; or

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2. I further certify that this brief complies with the page-or-type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:


X Proportionately spaced, has a typeface of 14 points or more and contains 10,902 words; or

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3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP

23(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Respectfully submitted this 30th day of September, 2016.



Keith Loomis

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c)(1)(A-D)(2)(3), I certify that I am an employee of the Office of the District Attorney of Storey County, Nevada, and that on or about the 3rd day of October, 2016, the foregoing **RESPONDENT'S ANSWERING BRIEF** was electronically filed with the clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-filing system (Eflex). Participants in the case who are registered with the Eflex as users will be served by the Eflex system as follows:

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