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 OC 00008 1E

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

APPELLANTS' REPLY BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

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

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

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

DATED this 17th day of November, 2016.

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I. ARGUMENT

A. The Storey County Liquor Board's Answering Brief Fails to Address the District Court Permitting It the Opportunity to Explain Its Previous Denial of the Liquor Licenses, and This Failure Highlights a Fundamental Flaw With the Process That Led to the Denial of the Liquor Licenses.

In their Answering Brief, Respondents, the Storey County Liquor Board (the "Board") and the Storey County Board of County Commissioners (the "Commission"), fail to address the District Court providing the Board the opportunity to explain its previous decision to deny the liquor licenses. Specifically, on December 17, 2015, the District Court entered an order directing the Board and the Commission to explain the basis for the Board's denial of the liquor license applications filed by Appellants, Dr. Vincent M. Malfitano ("Malfitano"), Virginia City Gaming, LLC ("VCG"), and Delta Saloon, Inc. ("DSI"), because "[t]he basis for the Boards' decisions is not clear." V JA 756-757. The District Court wanted the Board to "state on the record the basis for their decisions to deny the applications." *Id.*

This step by the District Court was telling because: (i) Malfitano, VCG, and DSI had been pointing out since the filing of the Petition for Writ of Mandamus (the "Writ Petition") that the Board's decision was unexplainable from the record before the District Court; and (ii) the District Court agreed that the record was devoid of clarity as to the basis of the Board's decision. V JA 756-757. Instead of

clarity, however, the Board's additional explanation only created more confusion and exposed the prejudgment with which the Board brought to weighing the liquor license applications.

On January 5, 2016, the Board met pursuant to the District Court's directive. V JA 759-760. Chairman McBride stated that the only facts that formed the basis of his decision was information that he obtained while attending the Nevada Gaming Commission ("NGC") hearing on August 20, 2015. V JA 769-770. In stating this, Chairman McBride confirmed that he did not rely upon at all the only information about Malfitano and his financial standing that was properly before the Board – the Storey County Sheriff's report. *Id.* Instead, Chairman McBride went on to explain that he relied on the Nevada Gaming Control Board ("NGCB"), the NGCB's Order, and its investigators, and "**I came back with the view** that under Storey County Code, this business didn't qualify to receive a liquor license." *Id.* (emphasis added).

In its brief, the Board did not address, let alone discuss, Chairman McBride admitting that he prejudged and pre-decided Malfitano's, VCG's, and DSI's liquor license applications. The reason for the Board steering away from this issue in its brief is clear – there is no explanation or justification for Chairman McBride admitting to prejudging the liquor license applications.

Chairman McBride's admission – and the Board's silence on the subject in its brief – is important because it establishes that the Board's process and decision were fundamentally flawed from the outset, which is part of Malfitano's, VCG's, and DSI's claim that their Due Process rights were violated and that the District Court abused its discretion in holding otherwise. Unfortunately, the prejudgment by the Board was only the first step of many in a tainted process that eventually led to a defective and improper decision by the Board. Other steps that also led to the flawed conclusion include:

- At the September 1, 2015 meeting, the Board stated that "upon Dr. Malfitano taking control of the businesses, the [liquor license] application will be approved soon after," and "[t]here would be no delay in obtaining the licenses." I JA 37-38.
- Between the September 1st meeting and the upcoming October 6, 2015 meeting, the Board did not advise Malfitano, VCG, or DSI that the NGCB's Order would be discussed on October 6th. III JA 502.
- Between the September 1st meeting and the upcoming October 6, 2015 meeting, the Board did not advise Malfitano, VCG, or DSI that the NGCB's Order would be used as a basis to deny the liquor licenses. III JA 502.

- Between the September 1st meeting and the upcoming October 6, 2015 meeting, the Board did not advise Malfitano, VCG, or DSI that the Board intended to go back on its promises to Malfitano from the September 1st meeting that it would issue the liquor license. III JA 502.
- Between the September 1st meeting and the upcoming October 6, 2015 meeting, the Board did not advise Malfitano, VCG, or DSI that Malfitano should attend on October 6th and be prepared to answer questions about the NGCB's Order.[1] III JA 502.
- At the October 6th meeting, the Board wrongly relied on the opinion of Chairman McBride, who stated that without gaming at Appellants' properties, cash flow would be reduced by 60 to 70 percent. I JA 115. His own opinion – which is not evidence – was without any testimonial or documentary support whatsoever.

[1] It is worth noting that Storey County has been involved in previous Due Process violations that involved a failure to properly treat a licensee and properly provide notice to the licensee of the subjects to be discussed at an upcoming meeting. *Burgess v. Storey County Bd. of Com'rs*, 116 Nev. 121, 992 P.2d 856 (2000). The licensee in that case did not receive notice that at an upcoming meeting, certain subjects would be raised, and the Nevada Supreme Court concluded that "the Board failed to provide Burgess with proper notice of what was to be discussed at the license revocation hearing." 116 Nev. at 125, 992 P.2d at 858. Although *Burgess* involved a person who already had a license, it does not change the fact that there are echoes of that same conduct by the county in this case.

- At the October 6th meeting, the Board erroneously relied on statements from the NGC hearing on August 20th that Appellants were $12 million in debt, and had lawsuits, liens, and foreclosures. V JA 771-772. In fact, none of this is true (V JA 792-793), and because of the Board's actions, Appellants did not have the opportunity to provide this information to the Board.

Taking all of the above into consideration, the District Court concluded in its Amended Order that the October 6th meeting became an "ambush." III JA 502. When all of the facts are taken together, the Board's decision and process were fatally defective from the beginning to the end, and the District Court's decision to uphold those decisions constitutes an abuse of discretion. *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989) (once a protected property interest is established, a plaintiff claiming a violation of procedural due process must then allege that the governmental body used procedures that were constitutionally inadequate).

B. The Board and the Commission Misstate Facts to Justify Their Arguments.

In their Answering Brief, the Board and the Commission attempt to equate opinions with evidence by stating that the "County Comptroller provides evidence regarding loss of gaming review." Respondents' Answering Brief, at page 8. The Answering Brief then goes on to state that the comptroller "offered his opinion as

to the feasibility of conducting a business" at the two properties without gaming, and that profitability would be affected as a result. *Id.* The Answering Brief also states that the comptroller "questioned the truth of the representation that Malfitano had $5 million in holdings." *Id.*

Malfitano, VCG, and DSI simply point out that the actual record before this Court speaks for itself. Regarding profitability, the comptroller actually said that "profitability at that point of time, uh, comes somewhat salted down. I don't know that." I JA 113. In other words, far from offering an opinion on profitability, the comptroller acknowledges that he does not know the true effect of gaming not being at the properties. Moreover, regarding the Sheriff's report stating that Malfitano had $5 million in assets, the comptroller actually said that "I'm not sure if there's -- uh, if that's an audited statement or just an application, but if that's the case, then, uh, that also should be probably examined to see if that is not true." I JA 114. Thus, rather than questioning that Malfitano had $5 million in holdings, the comptroller inquired as to whether Malfitano had provided an audited financial statement or not. Both at the time of the October 6th meeting and now in its brief, the Board overlooks the fact that the Sheriff's investigation involved talking with and being provided information by not just Malfitano, but by Malfitano's accountant as well. I JA 108. The Sheriff later reiterated that his investigation

showed Malfitano had sufficient financial resources to demonstrate adequate financial standing under the Storey County Code. I JA 108-109.

Regrettably, the effort by the Board and the Commission to equate opinions with evidence is a theme in this case, and it happened again and again in the proceedings before the Board. For example, as noted above, Chairman McBride stated that without gaming at the properties, cash flow would be reduced by 60 to 70 percent. I JA 115. This statement was pulled out of thin air, and there is no evidence, testimony, or documents to support his statement. In addition, Chairman McBride stated that Malfitano did not disclose 40 lawsuits. I JA 125. However, the NGCB's Order does not say that. I JA 230.

Later, the county manager states that he has certain unspecified experience in the banking industry, and based on that vague experience, his opinion is that Malfitano lacks financial strength and ability. I JA 122. Again, there is no evidence, testimony, or documents to support his statement.[2] And critically, with this statement and with the other statements being spun from whole cloth, Malfitano was denied notice and denied an ability to respond.

[2] Although county staff recommended at the end of the meeting to deny the liquor license applications, this was not staff's original recommendation. Consistent with the Board's September 1st promise, staff recommended prior to the October 6th meeting that the Board approve the liquor license applications. I JA 53.

In the Answering Brief, the Board also suggests that Malfitano was represented by his general manager, keeping in mind, of course, that he did not attend the October 6th meeting in reliance on the Board's September 1st promise. *See* Respondents' Answering Brief, at page 11. Although the general manager was at the meeting on October 6th, she did not attend the meeting to represent Malfitano's interests and did not say that she was doing so. I JA 111. The only thing that she did was provide additional information on the current status of the two properties when asked by the Board. *Id.* For the Board to suggest that she was at the meeting as a replacement for Malfitano or was prepared to respond to the NGCB's Order is simply not true.

In the final analysis, the only proper, fully vetted, and fully documented information before the Board was the Sheriff's report, which concluded that Malfitano did have sufficient financial standing to obtain the liquor licenses. Because the Board ignored that report and considered extraneous, incomplete, and unverified information and because the District Court approved of the Board's reliance on such information, the District Court abused its discretion by not concluding that Malfitano's, VCG's, and DSI's Due Process rights were violated.

C. The Board and the Commission Miss the Point Regarding Due Process Case Law Cited by Appellants.

In the Answering Brief, the Board and the Commission misapprehend Malfitano's, VCG's, and DSI's arguments by missing the forest for the trees. In

particular, Malfitano, VCG, and DSI specifically argue on page 25 in their Opening Brief that:

> Appellants' claim of entitlement to the liquor licenses is grounded in: (i) the Board's past practice of leniently granting these licenses; (ii) the agreement and mutual understanding that Appellants had with the Board as evidenced by the actions and statements of the Board on September 1st and which Malfitano relied upon; and (iii) the temporary liquor license that Malfitano obtained prior to the October 6th meeting. The District Court ignoring all of this evidence constitutes an abuse of discretion.

Appellants' arguments rest therefore on the trifecta of facts that exist in this case. It is this totality of facts that support Appellants' Due Process claims. Keeping this in mind, Malfitano, VCG, and DSI cited to *Gerhart v. Lake County, Mont*., 637 F.3d 1013 (9th Cir. 2011). In *Gerhart*, the Court noted that "[t]he Supreme Court has long recognized the existence of constitutionally protected property interests where a governmental body employs policies and practices that create a legitimate claim of entitlement to a government benefit." *Gerhart*, 637 F.3d at 1020 (citing *Perry v. Sindermann*, 408 U.S. 593, 601, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) (holding that a protected property interest exists where there are "rules or mutually explicit understandings that support [a plaintiff's] claim of entitlement to the benefit")). Consequently, although a government's practices alone might not create an entitlement to a government benefit, those practices **along with** an "agreement" or "mutual understanding" between the parties is

enough to create the entitlement under the law. *Gerhart*, 637 F.3d at 1020-21.

Here, the Board and the Commission have not contested the leniency with which liquor licenses have been issued in Storey County for at least the last five years to applicants – except to Malfitano. III JA 517; III JA 607-629; IV JA 630-694; V JA 695-717. When you take that lenient "past practice" and couple it with the "agreement" or "mutual understanding" reached between the Board and Malfitano on September 1st along with the temporary license having been issued, a Due Process violation is the result.

The Board argues that the September 1st promises do not amount to an "agreement" or "mutual understanding." However, what else would you call it other than a "mutual understanding" when the Board tells Malfitano that "upon Dr. Malfitano taking control of the businesses, the [liquor license] application will be approved soon after," and "[t]here would be no delay in obtaining the licenses"? I JA 37-38. If that is not a mutual understanding, what is it? What else could it be?[3]

[3] Although the Board suggests that Malfitano is arguing that an "explicit contract arose" on September 1st, the Board ignores Malfitano's actual argument. His true argument – which comports with the language of *Gerhart* – is that by virtue of the statements and promises made to him on September 1st, the Board and Malfitano had an agreement or "mutual understanding" about the liquor licenses being approved. This does not therefore rise to the level of a written contract and Malfitano has never argued or suggested that; rather, he has argued that consistent with the language of *Gerhart*, the Board and Malfitano had a "mutual understanding" that the liquor license was going to be approved, and that "mutual understanding" does not fit within Nevada's Open Meeting Law and was therefore not subject to being agendized.

Thus, unlike the facts in *Gerhart*, there **is** actual and substantial proof of an "agreement" and "mutual understanding" between the Board and Appellants in this case, and these are in the statements and promises noted above that were made to Malfitano on September 1st. III JA 590-591. These statements by the Board clearly establish an intentional agreement and mutual understanding between the Board and Malfitano that the issuance of the licenses at the next meeting on October 6th was a *fait accompli*.

When the full scope of the Board's actions are viewed in context and in totality, the District Court erred by not concluding that a Due Process violation occurred, and the District Court thus abused its discretion.[4]

D. The Commission Ignores the Storey County Inspection Sheet that Is at the Heart of Appellants' Argument Regarding the Business License.

In the Answering Brief, the Commission ignores the Storey County Business License Inspection Sheet that is at the center of Appellants' arguments concerning the business license. Instead, the Commission focuses on an agreement that was signed by the Storey County Fire Chief, which mentions gaming and which he contends was void when Malfitano did not obtain his gaming license. I JA 235.

[4] The Board cites *Physicians Serv. Med. Group v. San Bernardino Cty*, 825 F.2d 1404 (9th Cir. 1987), for the argument that every claim being made under 42 U.S.C. section 1983 does not rise to the level of a breach of contract claim such as with an employment agreement. This case is easily distinguishable and irrelevant to the case at hand because Appellants have not suggested that this case concerns employment matters and they also have not yet asserted section 1983 claims. Accordingly, *Physicians Serv*. is inapplicable to this matter.

Although Appellants dispute that the agreement was void, Appellants focused their argument in their Opening Brief on the Inspection Sheet. The Inspection Sheet expressly states that Malfitano "shall have 6 months to install systems after July 1, 2015." III JA 606. The Inspection Sheet contains no language about the six months being contingent on a gaming license. *Id.*

Although the Fire Chief testified that the Appellants had not been cooperating for months, the Inspection Sheet disproves that, and either the Fire Chief was "wrong" as the District Court concluded or he outright lied to the Commission. III JA 504. Either way, the District Court affirming the Commission's decision was an abuse of discretion because the Commission's decision was "contrary to the evidence" (i.e. the Inspection Sheet) and was therefore arbitrary. *State v. Dist. Court (Armstrong)*, 127 Nev. 927, 931-32, 267 P.3d 777, 780 (2011) (citation omitted). In fact, it is difficult to imagine that a decision based on wrong information or on a falsehood is anything but an arbitrary and capricious decision.

E. The Board Violated Appellants' Right to Equal Protection of the Laws By Improperly Applying a Higher Standard to Their Liquor License Applications Without a Proper Reason To Do So.

To succeed on a "class of one" Equal Protection claim, Appellants must show that the Board: (1) intentionally (2) treated them differently than other similarly situated property applications, (3) without a rational basis. *Gerhart*, 637

F.3d at 1022; *see also Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000) (per curiam). In its Answering Brief, the Board only focuses on the last element concerning rational basis and therefore concedes that Malfitano has met the other two elements.

At bottom, the Board argues that Malfitano does not suggest any reason why the Board could not consider the evidence contained in the NGCB's Order. Malfitano's response to the Board's argument is simple, and it is the same as set forth in his Opening Brief – there was no rational basis for the Board to consider the NGCB's Order because, in the District Court's own words, "[t]he County Commission did not delay, did not seek additional information as to why the Sheriff's report was so different from the NGCB's Order, did not seek to verify anything, and did not give Malfitano an opportunity to be heard." III JA 503. One of the Board members even voiced concern on October 6th, which went unheeded – "might we want to . . . make a decision later and kind of verify the standings or do we need to?" I JA 130-131.

By relying upon another governmental body's order, which was simply a series of conclusions, not facts, as the District Court previously noted, the Board forged ahead without verifying or checking any of the information in the NGCB's Order and without providing an opportunity to Malfitano to respond, let alone know beforehand that the NGCB Order was going to be discussed. Indeed, not

only did the Board forge ahead, but as stated above, time after time it relied upon rank opinions of the Board members concerning supposed profitability, supposed creditworthiness, and supposed 60-70% loss in gaming revenue. These opinions were stated by the Board and county staff without any evidence, testimony, or documents whatsoever. Moreover, the Board ignored the only accurate, verified, and competent evidence in the record regarding Appellants' financial status, which was the Sheriff's report.

In these circumstances, the Board's decision cannot be viewed as rational and cannot be viewed as legally supportable. There was not a rational or reasonable basis for the Board to treat Appellants differently from previous applicants, and this is especially true in light of the Board's promise to issue the licenses on September 1st. Accordingly, the Board's denial of the liquor licenses to the Appellants is an Equal Protection violation, and the District Court's decision to uphold the Board's denial constitutes an abuse of discretion.

F. The Board Does Not Cite to Any Cases Holding that "Satisfactory" Is a Specific Enough and Enforceable Term in an Ordinance.

Malfitano, VCG, and DSI acknowledge the unique place in licensing schemes that liquor licenses hold. That said, ordinances relating to liquor licenses still cannot be so broad or so vague as to allow for "arbitrary and discriminatory enforcement" due to a lack of "specific standards." *Silvar v. Eighth Judicial Dist.*

Court, 122 Nev. 289, 293, 129 P.3d 682, 685 (2006). Due Process requires more than that.

In their Opening Brief, Malfitano, VCG, and DSI did not misleadingly cite to case law on this issue, and they were clear that the case law related to different settings than this matter. However, the analysis in, for example, *McCormack v. Herzog*, 788 F.3d 1017 (9th Cir. 2015), is directly applicable to this case, keeping in mind the de novo standard of review to this issue. In this case, Storey County Code Section 5.12.010(A) fails to define the term "satisfactory," and it "lacks specific standards" to guide its enforcement. Also, the term "satisfactory" as used in Section 5.12.010(A) is subjective and is open to multiple interpretations just like in *McCormack*.

Thus, these ambiguities are what leads inextricably to the Due Process concerns at the center of the void for vagueness doctrine – arbitrary and discriminatory enforcement. *See Silvar*, 122 Nev. at 293, 129 P.3d at 685; *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972). The Board held Appellants to a wrong and higher standard (*i.e.* the NGC's gaming license standard). An ordinance like this that is vague and that allows subjectivity and prejudgment on what the Board believes is a "satisfactory" business operation leads directly to the arbitrary result that occurred here, which is constitutionally impermissible. Of course, that decision was compounded when

the Board ignored the Sheriff's report and only relied on the Board's assumptions about supposed lost revenue, rather than actual evidence.

Additionally, two final points must be made concerning the Board's and the Commission's arguments. First, they cite to cases suggesting that Appellants do not have a constitutional due process right to a fair licensing process. *See* Respondents' Answering Brief, at page 43. None of the cases, however, cited by them are from Nevada or the Ninth Circuit. The cases are thus irrelevant and unavailing.

Second, the Board and the Commission cite to *Mills v. City of Henderson*, 95 Nev. 550, 598 P.2d 635 (1979), for the proposition that the granting of discretionary police power does not need to be restricted by specific standards. *Mills* is distinguishable from this case because pawnbrokers are vastly different from the selling of liquor, and the ordinance at issue in *Mills* is totally unlike Storey County Code Section 5.12.010(A) and does not include the term "satisfactory."

For all of these reasons, Storey County Code Section 5.12.010(A) is void for vagueness, and the Court should grant the Writ Petition and order the Board to issue the liquor licenses to Appellants.

II. CONCLUSION

If one were to simply tell a story involving these facts, what would an objective party think?:

1. An applicant applies to a governmental body for a license. Two of the decision-makers for that application own competing businesses to the applicant. I JA 100-101.
2. After attending a meeting regarding another application that the applicant is pursuing before a different governmental body, one of the decision-makers later admits – that before he even first heard the application before his governmental body – that "[he] came back [from the meeting on the other application] with the view that" the applicant did not qualify for the license that he had a future role in deciding. V JA 769-770.
3. Notwithstanding that fact, at the first meeting on the applicant's application, the applicant is told by the governmental body deciding his license that it is being denied for a technical reason and that once it is heard a second time, "the application will be approved soon after," that "[t]here would be no delay in obtaining the licenses," and that "there is no reason not to license [the applicant]." I JA 37-38.

4. The applicant is not told by the one decision-maker that he has already made up his mind to deny the application. In fact, that same decision-maker is the one that said "there is no reason not to license [the applicant]." I JA 37-38.

5. In reliance on the result from the first meeting and the governmental body's promises and statements, the applicant obtains a temporary license, and does not attend the second meeting. I JA 38; I JA 53; III JA 603-604.

6. Between the first meeting and the second meeting, the governmental body did not advise the applicant that the decision from the different governmental body would be discussed at the second meeting. III JA 502.

7. Between the first meeting and the second meeting, the governmental body did not advise the applicant that the decision from the different governmental body would be used as a basis to deny the liquor licenses. III JA 502.

8. Between the first meeting and the second meeting, the governmental body did not advise the applicant that it intended to go back on its promises to the applicant from the first meeting that it would issue the license. III JA 502.

9. Between the first meeting and the second meeting, the governmental body did not advise the applicant that he should attend the second meeting and be prepared to answer questions about the decision from the different governmental body. III JA 502.

10. At the second meeting, the governmental body ignored the Sheriff's report on its investigation into the applicant's financial standing. That report showed a positive financial standing, and the Sheriff reported that there was no reason to deny the license and recommended approval of the application. I JA 105-106.

11. One of the decision-makers – the same one who prejudged the application – stated his opinion that without gaming at the applicant's properties, cash flow would be reduced by 60 to 70 percent. The decision-maker cited to no evidence or documentation in support of his opinion. I JA 115-116.

12. The governmental body erroneously relied on statements from the different government body's decision that the applicant was $12 million in debt, and had lawsuits, liens, and foreclosures. V JA 771-772. In fact, none of that is true. V JA 792-793.

13. The applicant did not have the opportunity to respond at the second meeting to the opinions and assumptions made by the governmental

body or to the different government body's decision because he had no notice that the body would be reversing its previous promises from the first meeting and had no notice that the different governmental body's decision would be discussed.

14. One of the decision-makers stated that people in the community were "upset and displeased at the decision that now [the applicant was] going to turn the Delta into a sports bar." I JA 125. Because of the applicant's decision to remove gaming from the property, the decision-maker stated that the property's long history of gaming was coming to an end, and that "this isn't the way it's supposed to turn out, not at all." I JA 125-126. The decision-maker also criticized the applicant's decision not to sell the property and stated that "it's not a good path" and "pretty much everybody is displeased [with the applicant's decision not to sell the two properties]." I JA 126. In making these comments, the decision-maker revealed his true motivations in reviewing the application, and it should be noted that this is the same decision-maker that prejudged the application after having attended the different governmental body's meeting.

15. Because the governmental body's decision rested on the different governmental body's decision thereby ignoring the Sheriff's report,

one of the decision-makers worried that the body "might we want to . . . make a decision later and kind of verify the standings or do we need to?" I JA 130-131. His question was ignored and was not acted upon.

16. Despite the Sheriff's concerns that the governmental body was selectively look into the applicant's financial history and using the wrong standard to apply to applicant's application (I JA 116-117, 120-121), the governmental body denied the applicant's application.

17. Between July 2010 and September 2015, twenty other applicants sought a license from the governmental body, and all of these applications were granted a liquor license by the Board, except for a single applicant – the applicant at issue. III JA 517; III JA 607-629; IV JA 630-694; V JA 695-717. In several instances, licenses were granted when criminal history checks had not yet been obtained, when the applicant's assets were significantly smaller than the applicant's as shown by the Sheriff's report, and when the applicant owed money to many others. Id. This evidence is consistent with the Sheriff's comments at the second meeting that a different and higher standard was being improperly applied to the applicant. I JA 105-109; I JA 116-121. The governmental body has not contested the five years'

worth of documentation reflecting the body's history of leniently issuing licenses. V JA 751; V JA 718-745.

If one were to hear that story and then be asked – is what happened justifiable? Is it reasonable? Does what happened satisfy notions of due process? Does what happened satisfy notions of being treated equally under the law? Malfitano, VCG, and DSI respectfully submit that the answers to those questions are all, No. What happened to Appellants was not justifiable or reasonable, and it did not satisfy Due Process and Equal Protection principles.

For these reasons, Appellants submit that the District Court's denial of the Writ Petition constitutes an abuse of discretion, and Appellants request that this Court reverse the District Court's dismissal of the Writ Petition and remand to the District Court for the issuance of a writ of mandamus to compel the Board and the Commission to approve Appellants' applications for liquor licenses and VCG's application for a general business license.

DATED this 17th day of November, 2016.

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III. CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word, Version 7, size 14, Times New Roman.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, and contains 5,395 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 17th day of November, 2016.

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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 November 17, 2016, I electronically filed the foregoing **APPELLANTS' REPLY BRIEF** with the Clerk of the Nevada Supreme Court via the Court's e-Flex system. Service will be made by e-Flex on all registered participants.

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