

IN THE SUPREME COURT OF THE STATE OF NEVADA

DESERT AIRE WELLNESS, LLC,
a Nevada Limited Liability Company,

Appellant/Cross-Respondent,

vs.

GB SCIENCES NEVADA, LLC,

Respondent/Cross-Appellant,

and

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

Respondent,

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STATE RESPONDENT'S ANSWERING BRIEF

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SUMMARY OF ARGUMENT

The Division of Public and Behavioral Health (hereinafter “the Division”) has no interest in any particular medical marijuana establishment receiving a registration as a dispensary in the City of Las Vegas. When the Nevada Legislature allowed for the registration of medical marijuana dispensaries in Chapter 453A of the Nevada Revised Statutes, they clearly intended to create a limited and expedited process to meet the needs of the community. Both the legislative scheme and the Division failed to address the unique circumstances in the City of Las Vegas where the local entity enacted zoning ordinances but did not complete the local review until after the applications for registration were submitted with the Division.

The Division attempted to comply with all of the requirements set forth by the Nevada Legislature in this initial application process and is entitled to deference. If this Court finds fault with the process used by the Division in ranking the dispensary applications in the City of Las Vegas, the Division will open up a new application period as ordered by the District Court. However, the Division wishes to minimize any unnecessary disruption or barriers to access for patient in their choice of treatment and therefore, supports stability in the operation of existing dispensaries, including Desert Aire Wellness, in order to meet the needs of the community.

ARGUMENT

I. DIVISION IS ENTITLED TO DEFERENCE

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

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

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

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

of similar applicants by a consistent team of reviewers. (Joint Appendix (“JA”) Vol. III, pp. 519--563). The Division issued registrations during the prescribed 90 day time period which ended on November 3, 2014, and only issued registration to the top twelve dispensaries in the City of Las Vegas. (JA Vol. III pp. 594—596). In areas where a local government issued business licenses such as the City of Las Vegas, any registration was deemed provisional by law until the establishment was in compliance with local requirements according to NRS 453A.326(3).

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

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

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

The City of Las Vegas enacted zoning restrictions for these establishments in May and June of 2014. (JA Vol. pp. 473-484 and 486-517) The Division released its application on May 30, 2014, and accepted application from August 5-18, 2014. (JA Vol. III p. 519). Therefore, the final ordinance was amended after the application had been announced and released by the Division but prior to the ten day period when applications were submitted to the Division. However, the City of Las Vegas did not complete its review of any location until October 30, 2014 or issue any documentation of compliance at the time of the submission of applications to the Division. (JA Vol. III, pp. 570--576).

Therefore, no applicant was able to submit either proof of licensure or a letter from the City of Las Vegas at the time of the application because the City of Las Vegas had not completed their process. *See*, JA Vol. III 585-589 for Letter from City of Las Vegas to GB Sciences dated October 9, 2014. Instead, the City of Las Vegas notified the Division of those applicants who were in compliance in a letter dated October 30, 2014 (which was the last working day due to the Nevada Day holiday before the 90 day period ended on November 3, 2014). (JA Vol. III pp. 578-583). In this case, the pleadings show that Desert Aire Wellness eventually received approval from the City of Las Vegas but not at the same time that GB Sciences did because Desert Aire Wellness did not go forward with its

application on October 30, 2014 before the City. *Cf.* JA Vol II, p. 297 for final approval of Desert Aire Wellness by the City of Las Vegas.

In the proceedings below, the Division did not dispute that the Division did not make any changes in the scoring or ranking of the dispensaries based on the notification by the City of Las Vegas. Instead, the Division only considered the information contained in the applications which had been submitted within the ten day period. The Division did not consider local zoning approval because this information was not provided in the application. Instead, the Division relied on NRS 453A.326(3) which provides the following:

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

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

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

The District Court found the Division was in error in issuing a registration to Desert Aire Wellness after the Division had received notice of a denial from the City of Las Vegas. The Nevada Legislature did not address these circumstances or

process if the local authority with zoning restrictions provided evidence of approval after the ten day application period but before the 90 day review period had run for a determination by the Division. The underlying premise of the ruling of the District Court is that the Division was not entitled to deference in its interpretation of NRS 453A.322(3)(a)(5) and NRS 453A.326(3). This Court has confirmed that:

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

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

II. DIVISION REQUESTS COURT TO CONSIDER LACHES.

The initial challenge brought by GB Sciences to Desert Aire Wellness in a different District Court case (Case Number A-14-710597) filed on December 5, 2014 in Department 20¹ was timely because it was filed within 30 days of the notice of the registrations and before any medical marijuana establishment was operating. However, on April 1, 2015, GB Sciences chose to dismiss Desert Aire

¹ See, *Nuleaf Dispensary v. State of Nevada/GB Sciences v. State of Nevada*. Case No. 69909.

Wellness from that litigation without prejudice and then filed a motion for summary judgment against the other Defendant Nuleaf on September 18, 2015. (JA Vol. IV, pp. 706—606) The motion for summary judgment was granted but the dispensary was awarded to another intervening party. (JA Vol. III pp. 608—617). GB Sciences sought to bring Desert Aire Wellness back into the litigation in a motion filed November 16, 2015, but the District Court denied that request. (JA Vol. IV pp. 735-737).

The DIVISION agrees that this Court should consider whether laches prevent GB Sciences in filing a second lawsuit against Desert Aire Wellness. After one District Court Judge found the delay was too long to renew the suit against Desert Aire Wellness, GB Sciences filed a second lawsuit in our present case against Desert Aire Wellness on December 2, 2015. Our present case was not only filed a year after the initial challenge was brought, but relief was also sought after Desert Aire Wellness had taken the necessary steps to open the dispensary. Therefore, the equitable doctrine of laches may be applicable to GB Sciences in pursuing the second action against Desert Aire Wellness even though the first case was dismissed without prejudice. *See, Carson City v. Price*, 113 Nev. 409, 934 P.2d 1042 (1997) (Delay of one party works to the disadvantage of the other.)

III. DIVISION IS LIMITED IN PROVIDING A REMEDY.

The Nevada Legislature only authorized the Division to issue registration certificates “not later than 90 days after receiving an application to operate a medical marijuana establishment” as set forth in NRS 453A.322(3). The Division did not have statutory authority to advance the applicants from the 2014 application pool after the 90 day period had run as of November 3, 2014. The Legislature affirmed this interpretation in the last session when they established a “one time extension period opened by the Division in calendar year 2014 for the purpose of issuing eleven additional registrations by September 1, 2015” in Section 5 of Senate Bill 276. (JA Vol. III pp. 643-648). Therefore, if this Court concludes that the registration of Desert Aire Wellness was properly rescinded, the Division will open up a new application period to fill the vacant slot as ordered by the District Court in the case below. GB Sciences will be seeking alternative relief in its cross-appeal and request that this Court find that GB Sciences should have received the registration instead of Desert Aire Wellness. The Division continues to take the position that the Division does not have statutory authority to extend the initial application pool and issue additional registrations without further intervention by a court.

CONCLUSION

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

Dated: December 21, 2016.

ADAM PAUL LAXALT
Attorney General

By: /s/ Linda C. Anderson
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the type face requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in proportional spaced typeface using Microsoft Word 2010 in Times New Roman in 14 point font size.

I further certify that his brief complies with the page or type-volume limitations of NRAP 32(a)(7) because excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed thirty (30) pages.

I further 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 N.R.A.P.28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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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: December 21, 2016.

ADAM PAUL LAXALT
Attorney General

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

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Attorney General and that on December 21, 2016, pursuant to NRAP 25 and NEFCR 8 and 9, I electronically served the foregoing by using the electronic filing system to e-serve a copy on all parties registered and listed as users of the Nevada Supreme Court's electronic filing system, as follows:

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