**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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

Desert Aire/Cross-Respondent,
vs.

GB SCIENCES NEVADA, LLC

Respondent/Cross-Desert Aire,

and

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

Respondent.

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# DESERT AIRE'S REPLY BRIEF ON APPEAL AND ANSWERING BRIEF ON CROSS-APPEAL

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## NRAP 26.1 DISCLOSURE

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

Appellant Desert Aire Wellness, LLC, is a Nevada limited liability company that is neither owned nor affiliated with any publicly traded company. The law firms whose partners or associates gave or are expected to appear for Desert Aire Wellness, LLC are FENNEMORE CRAIG, PC, and MCLETCHIE SHELL, LLC.

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DATED this 27th day of February, 2017.

*/s/ Margaret A. McLetchie*

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## INTRODUCTION

Desert Aire complied with all applicable State requirements for applying for a medical marijuana establishment ("MME") registration certificate to operate a medical marijuana business. It received preliminary approval from the State of Nevada's Division of Public and Behavioral Health (the "Division")[1], and then completed all necessary steps to obtain all required final licenses to operate, including obtaining local approval. It is currently operating a fully compliant dispensary in the City of Las Vegas and successfully serving patients. This Court should reject GB Sciences' late attempt to second-guess the judgment of the regulatory agencies responsible for issuing licenses to MMEs—and for monitoring their ongoing compliance and fitness to operate.

There are multiple separate reasons why Desert Aire is entitled to a reversal and, indeed, summary judgment in its favor. The reasons include:

> 1. There was substantial compliance since Desert Aire did everything it could to comply with Nevada law and, most importantly, its facility met the safety/distance requirements outlined in Nevada law at all points in time. Thus, the objective of the statute was met.
>
> 2. As outlined in the State's brief submitted in this action, the Court should give deference to the State's construction of the statute.

[1] As noted in Desert Aire's Opening Brief, the Division of Public and Behavioral Health is the State subdivision responsible for regulating medical marijuana businesses. (*See* Opening Brief at p. 3.)

3. The statute governing applications for medical marijuana establishments, Nev. Rev. Stat. § 453A.322, requires each applicant to submit its application on a form provided by the State. That form did not include the information GB Sciences now alleges Desert Aire should have included and, thus, should be construed in Desert Aire's favor to avoid manifest injustice.

4. This Court should use its inherit powers to construe Nev. Rev. Stat. § 453A.322 to avoid a manifest injustice because the information GB Sciences alleges Desert Aire should have included was not available to Desert Aire (or any other applicant) at the time that the applications for provisional registration certificates had to be submitted, and Desert Aire provided the best alternative proof to show its facility met the objectives of the statute.

5. Under the doctrines of equitable estoppel and laches, the Court should not require the State to revoke Desert Aire's license after Desert Aire relied upon the State's granting of that license years ago to proceed forward with obtaining all the final licenses, building permits, constructing the facility, marketing the facility, opening the facility and developing a patient base.

6. GB Sciences should be estopped (or barred by laches) from proceeding with its suit to revoke Desert Aire's license because it dismissed its prior suit against Desert Aire nine (9) months before initiating this lawsuit, during which time Desert Aire spent over a million dollars building its facility.

7. GB Sciences lacks standing to bring its claim since its application did not include the specific form of proof that its facility met the City of Las Vegas medical marijuana zoning requirements, *i.e.*, 1,000 feet from schools and 300 feet from community centers or churches.

## ARGUMENT

## I. THE APPLICABLE STANDARD OF REVIEW

As a preliminary matter, this Court should reject GB Sciences' argument for

a bifurcated standard of review for Desert Aire's claims. This Court's precedent makes plain that the district court's decision to grant summary judgment to GB Sciences must be reviewed de novo. *See, e.g., Wood v. Safeway*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) ("This court reviews a district court's grant of summary judgment de novo ..."). In its Answering Brief, GB Sciences argues that, rather than applying the de novo review to all of the issues presented in the instant case, this Court should apply two different standards of review. First, it asserts that the district court's interpretation of Nev. Rev. Stat. § 453A, Desert Aire's substantial compliance, the ambiguity of Nev. Rev. Stat. § 453A.322, the district court's "application of the statutes to the facts in this case," and GB Sciences' standing should be reviewed de novo. (*See* GB Sciences' Answering Brief on Appeal and Opening Brief on Cross-Appeal ("Answering Brief") at pp. 11-12.) Then, relying on out-of-state precedents, GB Sciences argues that this Court should review Desert Aire's laches and equitable estoppel claims under an abuse of discretion standard. (*Id.* at p. 12.)

Desert Aire submits that all of the assignments of error in this case should be reviewed by this Court de novo. However, even if the Court accepts GB Sciences' argument that a different standard of review applies to the laches and equitable estoppel claims, this Court should decline to apply the standard articulated by GB Sciences.

With regard to equitable estoppel, GB Sciences incorrectly asserts that this Court has not articulated a standard of review of equitable estoppel claims. In fact, it has. As this Court explained in *In re Harrison Living Trust*, 121 Nev. 217, 112 P.3d 1058 (2005), there are two potential standards of review. If the facts of a case are undisputed, "the existence of equitable estoppel is a question of law, which we review de novo." 121 Nev. at 223, 112 P.3d at 1062. If the facts of the case are disputed, the Court reviews a district court's decision under an abuse of discretion standard. *Id.* at n.23. Here, the material facts regarding Desert Aire's equitable estoppel claim are not in dispute. Accordingly, that claim should be reviewed *de novo*. *Id*. at 223.

As for the laches claims, if the Court were to apply something other than the de novo standard of review, the more appropriate standard is the hybrid standard the United States Court of Appeals for the Ninth Circuit applies when reviewing laches claims. As the Ninth Circuit explained in *Save the Peaks Coalition v. U.S. Forest Services*, it reviews de novo whether laches is a valid defense to a particular action and reviews a district court's decision whether to apply laches to the facts for abuse of discretion. *Save the Peaks Coalition v. U.S. Forest Services*, 669 F.3d 1025, 1031-32 (9th Cir. 2012).

## II. DESERT AIRE SUBSTANTIALLY COMPLIED WITH NEV. REV. STAT § 453A.322.

GB Sciences' primary argument in this case is that Desert Aire's registration

certificate should be revoked by the State because Desert Aire's State application did not meet the requirements of Nev. Rev. Stat. § 453A.322(3)(a)(5). (*See* Answering Brief at pp. 12-34.) However, Desert Aire substantially complied with the requirements of the statute by submitting the best available proof of its compliance with the City of Las Vegas' medical marijuana zoning restrictions. As set forth in the Opening Brief, this was the best any applicant could do, as the City had not issued any medical marijuana Special Use Permits ("SUPs") prior to the August 14, 2014 application deadline. (Opening Brief at p. 13.)

At the time of the 2014 application process, Nev. Rev. Stat. § 453A.322 was a new law regarding Nevada's medical marijuana requirements, and stated that if an applicant included all of the information contained in that statute (there were several subsections outlining information) the State "shall issue a registration certificate to the applicant." Nev. Rev. Stat. § 453A.322(3)(a)(5) was designed to make sure that the applicant's facility met any local jurisdiction's medical marijuana specific zoning restrictions. In this case, the City of Las Vegas medical marijuana specific zoning restrictions happened to mirror the State Medical Marijuana zoning restrictions, *i.e.*, 1,000 feet from any schools and 300 feet from any community centers/churches. *See* Nev. Rev. Stat. § 453A.322(3)(a)(2)(II). Because the State's requirements were the same as the City's, there was no need to comply with this statute as long as the applicant showed that it complied with the State's same

distance requirements. Thus, this whole case is much ado about nothing. However, even assuming applicants *did* have to comply with this subsection, Desert Aire did so, or at the very least substantially complied with the subsection.

Again, Nev. Rev. Stat. § 453A.322(3)(a)(5) required the applicant to provide proof that the applicant's facility met the City of Las Vegas' specific zoning restrictions. Although the subsection in question specified that the proof would be in the form of proof of licensure by the City of Las Vegas *or* a zoning letter from the City of Las Vegas, at the time the applications were due the City had not issued any licenses or zoning letters. Therefore, it was impossible for any applicant to comply with the subsection. The State's Answering Brief in this matter confirmed this. As explained by the State, "[t]he City of Las Vegas did not complete its review of any location until October 30, 2014 or issue any documentation of compliance [with the specific medical marijuana zoning restrictions] at the time of the submission of applications to the Division of Public and Behavioral Health ("the Division"). 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." (State's Answering Brief at p. 4.)

In light of this fact, Desert Aire did the best thing it could have done to comply with the subsection. Specifically, Desert Aire submitted a letter from a licensed engineer showing that in fact Desert Aire's facility met the City of Las Vegas

medical marijuana zoning restrictions. The letter from Baughman and Turner, Inc., licensed land surveyors, stated as follows:

> (1) There are no churches, teenage dance halls, parks or playgrounds, public libraries, daycare facilities or any other facility that would meet the definition of a community facility as defined by NRS 453A.322 located within a 300-foot radius of the proposed establishment.
>
> (2) There are no schools, public and/or private that provide formal education associated with pre-school through grade 12 within a 1,000-foot radius of the proposed establishment.
>
> (3) Proximity exhibit is attached.

(4 JA811.)

Thus, Desert Aire submitted with its application proof that the requirements set forth in Nev. Rev. Stat. § 453A.322(3)(a)(5) were met with respect to Desert Aire's facility. It did so the best way it could have possibly done since—as verified by the State's Answering Brief—the specific forms of proof required under Nev. Rev. Stat. § 453A.322(3)(a)(5) were unavailable at the time the applications were submitted. Indeed, such a letter was what the City of Las Vegas required applicants to admit to demonstrate it had met the City's medical marijuana zoning restrictions.

Desert Aire then obtained a special use permit from the City of Las Vegas and submitted it to the State. (2 JA249-50 (December 22, 2014 SUP approval letter).)[2] This further verified that its facility met the medical marijuana zoning restrictions

[2] Desert Aire also subsequently received a business license from the City. (2 JA297 (summary of agenda action approving license); 2 JA379 (license).)

set forth in the subsection relied upon by GB Sciences. Thus, Desert Aire either complied with or at least substantially complied with the subsection by doing the best it could do at the time the application was due and then following that up by getting a special use permit and business license from the City of Las Vegas.

Most importantly, for purposes of substantial compliance review pursuant to this Court's authority, at all points in time the objective of the statute—ensuring that the facility was 1,000 feet from schools and 300 feet from churches/community centers—was met by Desert Aire's facility. This is not in dispute.

This Court has repeatedly stated that the court should not technically enforce statutes where there has been substantial compliance, especially where policy and equity principles dictate allowing substantial compliance. In *Markowitz v. Saxon Special Servicing*, 129 Nev. Adv. Op. 69, 310 P.3d 569 (2013), the Court held that although a statute required a bank to come to a foreclosure mediation with an appraisal no more than 60 days old, the bank should not have lost the case merely because its appraisal was 83 days old. The *Markowitz* court stated the court should consider policy and equity principals along with the language of the statute as a whole to determine whether it should allow technical deviation from requirements of the statute. *Id.* at 571, 572.

Similarly, in *Schleining v. Cap One, Inc.*, 130 Nev. Adv. Rep. 36, 326 P.3d 4 (2014), this Court noted that where the purpose of the statute has been met, allowing

substantial compliance is proper. *See also, Nevada Equity v. Willard Pease Drilling, Co.*, 84 Nev. 300, 440 P.2d 122 (1968) ("The claimant substantially complied with the licensing scheme under both chapters. It is not suggested that *Willard Pease Drilling, Co.* was wanting in experience, financial responsibility, or indeed, in any particular detriment to the safety and protection of the public. It has passed the scrutiny of the contractor's board in these respects and issued a license. We shall not condone a forfeiture in the absence of any ascertainable public policy requiring us to do so.") *Id.* at 303.

Here, as in the cases cited above, when taking into account the purpose of the statute, the policy of the statute and equity principals it is clear the court should rule in Desert Aire's favor. Otherwise, it would suffer a manifest injustice in the form of a forfeiture. Further, as reflected in the State's Answering Brief (p.2), the purpose of the broader statutory scheme—safely providing medical marijuana to patients—would not be met.

Again, the purpose of the specific subsection at issue was to ensure that the facility met the City of Las Vegas' medical marijuana zoning restrictions. At all times Desert Aire's facility met the purpose of this statute since it complied with the City of Las Vegas' zoning requirements. Further, Desert Aire provided proof of this with its application. (4 JA811.) That the proof was not in the exact form set forth in the subsection is a technicality this Court can and should overlook based on the

above case law. This is especially true since it was impossible for Desert Aire *or any other applicant* to comply with the specific forms of proof required to show that applicant's facility met the City of Las Vegas' zoning requirements. Indeed, Desert Aire having provided the letter from the licensed engineer showing that its facility met those requirements. **Thus, the purpose of the subsection—that the applicant's facility met the City of Las Vegas' medical marijuana zoning restrictions—was therefore met by Desert Aire's facility at all times.** Thus, Desert Aire is entitled to a finding that it substantially complied with the statute under the above case law.

GB Sciences' only argument in opposition to the above is without merit. It attempts to argue that the purpose of the subsection was not met because the purpose was to involve the local jurisdiction in the decision-making process. (*See* Answering Brief at pp. 18-19.). However, a review of Nev. Rev. Stat. § 453A.322(3)(a)(5) demonstrates that this is not the case.[3] Rather, the purpose of the subsection is to ensure that the applicant's facility met the medical marijuana zoning requirements for the local jurisdiction—here the City of Las Vegas. There is nothing in the

[3] Further, in enacting the laws pertaining to MMEs, the 2013 Legislature created a comprehensive regulatory system. Thus, even if it did not intend to occupy the entire regulatory field, of course local regulations cannot preempt State law, including the Division's ability to determine the qualifications of applicants. *See Crowley v. Dufrin*, 109 Nev. 597, 604-05 (1993). Moreover, local authority must be interpreted narrowly, consistent with Dillon's Rule. *See, e.g., Ronnow v. City of Las Vegas*, 57 Nev. 332, 341-43 (1937). Thus, any suggestion by GB Sciences that the City had the authority to determine who the State granted provisional registration certificate to is entirely without support and without merit.

subsection requiring an applicant to provide proof that the City of Las Vegas had provided it a license in order to be issues a provisional registration certificate. To the contrary, the subsection specifically states that the applicant must provide proof that its facility met the City of Las Vegas' zoning restrictions and even provided one way to do so other than showing proof of local licensure.

Moreover, GB Sciences is conflating the requirements for a provisional registration certificate with those for a final registration certificate. While, as set forth above, the State's Application (for a *provisional* registration certificate did require proof that the applicant's facility met the City of Las Vegas' specific zoning restrictions, proof of final approval was not required until *after the provisional registration certificates were issued.* The Nevada Revised Statutes provide as follows:

> 3. 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.

Nev. Rev. Stat. § 453A.322(3)(a)(5). This statute GB Sciences relies on isolation should be read in conjunction with this provision. *See Washington v. State*, 117 Nev. 735, 739, 30 P.3d 1134, 1136 (2001) ("Statutes within a scheme and provisions

within a statute must be interpreted harmoniously with one another in accordance with the general purpose of those statutes and should not be read to produce unreasonable or absurd results."). As indicated above, after the State issued Desert Aire a provisional registration certificate, Desert Aire did obtain the required local approvals. The requirements of both Nev. Rev. Stat. § 453A.322 and Nev. Rev. Stat. § 453A.326 were met. The State then issued Desert Aire a final registration certificate.

Thus, the purpose of the statute pertaining to the provisional registration certificate application is to ensure location suitability—not that the City had issued the applicant a license before the State did or to allow the City to make decisions for the State. Here, Desert Aire met the City of Las Vegas' zoning restrictions and the same proof the City required to show this (a letter from the license surveyor) was included in its application to the State, and Desert Aire did in fact get approvals from the City of Las Vegas.

## III. THE COURT SHOULD CONSTRUE THE STATUTE BY GIVING DEFERENCE TO THE STATE'S CONSTRUCTION, WHICH MADE SENSE UNDER THE PRACTICAL REALITIES.

As this Court has explained, an administrative agency charged with the duty of administering a statute such as the one at issue in this case, "is entitled to receive deference from this court to its interpretations of the laws it administers so long as such interpretations are 'reasonable' and 'consistent with the legislative intent.'"

*State Indus. Ins. Sys. v. Miller*, 112 Nev. 1112, 1118, 923 P.2d 577, 581 (1996) (quoting *SIIS v. Snyder*, 109 Nev. 1223, 1228, 865 P.2d 1168, 1171 (1993)).

In this case, the Division's interpretation and application of Nev. Rev. Stat. § 453A.322 in issuing Desert Aire a provisional registration certificate was reasonable and consistent with the intent of the legislature. Thus, the district court erred in substituting its own judgment for that of the Division. *See Brocas v. Mirage Hotel & Casino*, 109 Nev. 579, 582, 854 P.2d 862, 865 (1993) ("It is well recognized that this court, in reviewing an administrative agency decision, will not substitute its judgment of the evidence for that of the administrative agency."); *see also Pyramid Lake Paiute Tribe of Indians v. Washoe Cty.*, 112 Nev. 743, 748, 918 P.2d 697, 700 (1996) (holding that "great deference should be given to the [administrative] agency's interpretation when it is within the language of the statute") (quotation omitted).

The first section in the State of Nevada's Answering Brief to Desert Aire's Opening Brief is entitled "The Division Is Entitled To Deference." (State's Answering Brief at pp. 2-6.) Desert Aire agrees with this section and the arguments contained therein. In that section, the State outlined its construction of the statute and the procedure it used based on that construction. It noted that "[t]he Division relied solely on the application submitted in their determination and the final scores for each section with the result of a comparison of similar applicants by a consistent

team of reviewers." (State's Answering Brief at pp. 2-3 (citing 3 JA519-563).)

Further, the Division did this without considering any licenses issued by any local jurisdictions. (*See* 1 JA140 (the State application specified that the Division would not consider additional materials not listed in the application).) In other words, the Division construed that statute as requiring it to rank the applicants within 90 days of an application deadline (which was August 18, 2014)[4], and, consistent with Nevada law, issue provisional registration certificates to the top qualifying candidates. *See* Nev. Rev. Stat. § 453A.326; NAC 453A.312. As noted above, as required by the applicable statute and regulations, the State only subsequently issued final registration certificates authorizing MMEs to operate if, *inter alia*, the qualified "provisional" candidates received final approvals from the local jurisdiction. *See* Nev. Rev. Stat. § 453A.370; NAC 453A.316.

Not only was this process consistent with the statutes pertaining to MME registration certificates (again, there is no subsection which required the state to consider any local jurisdictions' licensing process before doing its initial ranking of candidates and issuing provisional certifications), it gave practical effect to the fact that the applicants had to submit their applications prior to many local jurisdictions issuing licenses. As a result, according to the State's Answering Brief:

> The Division relied on Nev. Rev. Stat. § 453A.326(3), which provides the following:

[4] (*See* 1 JA139 (portion of application setting forth deadline for submission).)

> In a local governmental jurisdiction that issues business licenses, the issuance by a 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 government 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 government ordinances or rules."

(State's Answering Brief at p. 5.)[5]

Thus, the Division interpreted the statute as allowing it to give an independent review of the applications in order to issue a provisional registration certificate without requiring proof of a city license under Nev. Rev. Stat. § 453A.322, and then withhold a final approval until the applicant had complied with the requirement contained in Nev. Rev. Stat. § 453A.326(3) that an applicant was "in compliance with all applicable local governmental ordinances or rules; and . . . [t]he local government ha[d] issued a business license for the operation of the establishment." Nev. Rev. Stat. § 453A.326(3)(a) and (b).

[5] GB Sciences mistakenly asserts that Desert Aire Wellness received a notice of denial from the City of Las Vegas. (Answering Brief at p. 17.) This is not true. Desert Aire Wellness never received a denial from the City of Las Vegas but instead, was granted a special use permit by the City of Las Vegas in December 2014 (2 JA297), and a business license on February 8, 2016. (2 JA379; *see also* 2 JA297 (January 6, 2016 City Council Agenda summarizing approval of license).)

There is nothing inconsistent with this interpretation of the statutes. Rather, consistent with this Court's precedent, this interpretation gave effect to both Nev. Rev. Stat. § 453A.322 and Nev. Rev. Stat. § 453A.326. *See Leven v. Frey*, *1*23 Nev. 399, 405, 168 P.3d 712, 716 (2007) ("in interpreting a statute, this court considers the statute's multiple legislative provisions as a whole") (citation omitted). Again, the subsection in question—Nev. Rev. Stat. § 453A.322(3)(a)(5)—was about making sure that the applicant's facility met the applicable local jurisdiction's medical marijuana specific zoning restrictions. It did not prohibit the State from issuing a provisional certificate until the City had issued a final business license to the applicant. As a result, the State's interpretation of providing provisional registration certificates and then requiring the final local approvals before issuing the final registration certificate allowing the MME to operate is consistent with the statutes.

As a result, the Court should follow its policy that "[a]n agency charged with the duty of administrating 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 agencies 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).[6]

[6] In its Answering Brief, GB Sciences argues that Desert Aire failed to raise this

## IV. THE COURT SHOULD ALSO REVERSE THE LOWER COURT DECISION DUE TO THE AMBIGUITIES OF THE STATUTE IN ORDER TO AVOID AN ABSURD RESULT AND TO PREVENT MANIFEST INJUSTICE.

At best, the statute was ambiguous because it required the applicant to submit its application on the State's form. The statute mandates that "[a] person who wishes to operate a medical marijuana establishment *must* submit to the division an application on a form *prescribed* by the division." Nev. Rev. Stat. § 453A.322(2) (emphasis added).

Yet, it is undisputed that there was nothing on the State's prescribed form requiring the specific information set forth in Nev. Rev. Stat. § 453A322(3)(a)(5). Moreover, the statute merely states that, if an applicant included certain items, the Division, "shall issue the registration certificate and give the applicant a random 20-digit alpha numeric identification number." *Id.* There is nothing in the statute that says that if something is not included the State cannot issue a registration certificate.

The only requirements regarding the application were that the applicant submit the application on the form prescribed by the division under Nev. Rev. Stat. § 453A.322(1) and (2). That application mirrored NAC 453A.306, which outlines what is required in the State MME application. Desert Aires not only submitted the

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argument regarding deference to the State's interpretation of Nev. Rev. Stat. § 453A.322 in the district court. (Answering Brief at p. 13.) This is incorrect. Desert Aire raised this argument in its Motion for Reconsideration. (*See* 4JA794-95.)Thus, this Court is not precluded from considering this claim for relief.

application on the form issued by the Division but also included all the information required under NAC 453A.306.

Indeed, the application provided by the Division states no other information could be provided or at least would not be considered other than what was on the State prescribed form. (1 JA140.) Similarly, as outlined above, the alleged information required under the subsection cited by GB Sciences could not have been submitted because it was not available.

Nev. Rev. Stat. § 453A.322 did not include any specific requirement of proof that the City of Las Vegas licensure had been given. Instead, the only statute that requires proof of licensure by a local jurisdiction is Nev. Rev. Stat. § 453A.326, which states that such information is required before *final* approval by the state—not that such proof is required before the state could issue its initial rankings or *provisional* registration certificates. Again, this is especially true since it would have been impossible for any applicant to provide proof of licensure from the local jurisdiction when submitting its application by the mandated deadline. (*See* 3 JA570-76; *see also* State Answering Brief at p. 4) (noting same). As a result, pursuant to the State's policy of avoiding an interpretation of a statute in a way which would result in manifest injustice or public inconvenience, the Court should construe the statute similar to the way the State construed the statute. *State Ex. Rel McMillian v. Sadler*, 25 Nev. 131, 58 P.2d 84 (1899) (Whenever the interpretation of a statute or

constitution in a certain way will result in manifest injustice, or public inconvenience, courts will always scrutinize the statute or constitution closely to see if it will not admit of some other interpretation).

## V. THE COURT SHOULD ALSO CONSTRUE THE STATUTE THE WAY THE STATE DID TO AVOID AN ABSURD RESULT.

In interpreting statutes, this Court considers the policy and spirit of the law and will seek to avoid an interpretation that leads to an absurd result. *Smith v. Kisorin USA, Inc.*, 127 Nev. Adv. Op. 37, 254 P.3d 636 (2011); *see also Washington v. State*, 117 Nev. 735, 739, 30 P.3d 1134, 1136 (2001) ("Statutes within a scheme and provisions within a statute must be interpreted harmoniously with one another in accordance with the general purpose of those statutes and should not be read to produce unreasonable or absurd results.").

Interpreting the statute to require that the applicant show it met the City of Las Vegas' medical marijuana zoning restrictions (1,000 feet from schools and 300 feet from churches or community centers) through specific forms *when those forms were not available* would lead to an absurd result. Instead, the court should construe the subsection relied upon by Defendant as either allowing the applicants to provide alternative proof that their facility met the zoning standards set forth in the City of Las Vegas zoning restrictions (Desert Aire did through the zoning letter from the licensed engineer) or the specific proof required under the subsection sometime

before final license approval by the State (which is what the State did). Otherwise, every single applicant would now have their license subject to revocation since no one submitted the specific required proof set out in Nev. Rev. Stat. § 453A.322(3)(a)(5).[7]

## VI. THE DOCTRINE OF EQUITABLE ESTOPPEL APPLIES TO THIS CASE.

Under NAC 453A.332, the Division was required to notify applicants if it rejected their medical marijuana application certificates. *See id.* ("if the division denies an application for...a medical marijuana registration certificate…, the division must provide notice to the applicant or medical marijuana establishment that includes, without limitation, the specific reasons for the denial….") *See also* NAC 453A.332(4). Here, the Division never sent such notice to Desert Aire. Instead, it issued Desert Aire a provisional registration certificate, and subsequently issued a final registration certificate. In the interim, as described in the Opening Brief, Desert Aire spent millions of dollars to open its facility. Given these facts, GB Sciences is estopped from pursuing this suit against Desert Aire.

Such a conclusion is consistent with this Court's law. In *Nevada Pub. Employees Retirement Board v. Byrne*, 96 Nev. 276, 607 P.2d 1351 (1950), the Court held that an equitable estoppel prevented a government entity from denying benefits

[7] Further, as noted above at page 16, Nev. Rev. Stat. § 453A.322 and Nev. Rev. Stat. § 453A.326 need to be interpreted in a manner that gives both subsections effect.

as a result of a technical violation of a statute, stating:

> We would turn the doctrine of equitable estoppel up on its head if we were to hold that the power to correct an inequity, as injustice the one here, would, without more, defeat a court's inherent power to seek or do equity.

*Id.* at 280. Here, not only did the State not notify Desert Aire that its application was rejected as was required under NAC 453A.322, it actually issued both a provisional and final certificate to Desert Aire. (*See* 2 JA240-41 (November 3, 2014 application approval letter); *see also* (2 JA299 (Registration Certificate).) Desert Aire relied upon the same and spent millions of dollars including the life savings of several people, spent three years of their life without any pay, bought out another partner and proceeded forward with getting the final licensing, building the facility, getting all the final billing permits, marketing the business, opening the business and developing a substantial clientele. (4 JA822-23 (Declaration of Desert Aire member Brenda Gunsallas).

Needless to say, it would be a gross inequity and completely unjust if the State was required to revoke Desert Aire's license after all of the above. Indeed, the State's own brief makes it clear they do not want to do the same for these very reasons. (State's Answering Brief at p. 1 ("…the Division wishes to minimize any unnecessary disruption or barriers…and therefore, supports stability in the operation of existing dispensaries, including Desert Aire Wellness, in order to meet the needs of the community.".)

The case of *Southern Nevada Memorial Hospital v. The Department of Human Resources*, 101 Nev. 387, 705 P.2d 139 (1985) is instructive. In that case, a license was issued originally but upon appeal from another applicant, the department changed the decision and tried to revoke *Southern Nevada's* license. Although the applicant understood its license could get overturned on the appeal, the Nevada Supreme Court still found equitable estoppel against the government to be necessary to avoid manifest injustice and hardship. The Court stated that rooted in concepts of justice and right is the idea that the sovereign is responsible and a citizen has a legitimate expectation that the government should deal fairly with him or her. *Id.* at 141.

It would be unfair to revoke Desert Aire's registration certificate merely because Desert Aire did not include a piece of information that was not available to include, that was not included on the State's application form which the applicant had to follow (and could not include anything else), years after the applicant had been granted a provisional certificate and relied upon the same to do all the things set forth above. All because it did not comply with a subsection whose purpose was met by the applicant's facility at all times. If this is not a case to apply equitable estoppel, what is?

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## VII. GB SCIENCES SHOULD BE ESTOPPED FROM BRINGING ITS CLAIMS BY ITS OWN ACTIONS OF WAITING NINE MONTHS TO BRING THE PRESENT SUIT.

As pointed out in the State's response to the motion for reconsideration filed with the District Court, GB Sciences' own action warrants a reversal on estoppel grounds:

> The Second issue of "timing" is whether the challenge brought by Respondent to Desert Aire Wellness in this case is timely. Certainly the initial action in case number A-14-710597 filed on December 5, 2014, in Department 20 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, Respondent chose to dismiss Desert Aire Wellness from the litigation without prejudice and then filed a motion for summary judgment against the other Desert Aire Nuleaf on September 18, 2015. The motion for summary judgment was granted but the dispensary was awarded to another intervening party. Respondent then sought to bring Desert Aire Wellness back into the litigation in a motion filed November 16, 2015, but the Court denied that request. See, Exhibit 1 for Order Denying Respondent's Motion for Leave to Amend. Therefore, Respondent filed our present case against Desert Aire Wellness on December 2, 2015, which is a year after the initial challenge was brought and apparently after Desert Aire Wellness had taken the necessary steps to open the dispensary.

(4 JA840.)

GB Sciences asserts that Desert Aire should not prevail on its estoppel argument against GB Sciences since GB Sciences' expenditures of money during the 9 month timeframe between when GB Sciences dismissed its first suit against Desert Aire and then instituted a new action was done at Desert Aire's own risk since the dismissal was without prejudice. (Answering Brief at p. 26.)

This is a rather disingenuous argument. Certainly Desert Aire—or any other business in Desert Aire's position—would have moved forward after being dismissed from the lawsuit by GB Sciences, and the State not taking any action against Desert Aire to revoke or rescind its registration certificate. It was during the nine (9) month period between when GB Sciences dismissed its first suit against Desert Aire and filed the instant suit that Desert Aire incurred the bulk of its costs. During that time-frame, Desert Aire spent significant sums building the facility, committed to buying out partners, and incurred huge legal fees in getting the final approvals from the City of Las Vegas and the State. Thus, that nine (9) month period was crucial, and it was GB Sciences that took the risk when it dismissed Desert Aire because it knew that Desert Aire would rely upon that dismissal to incur those expenses. Accordingly, this provides another reason why the decision should be reversed.

## VIII. THIS COURT'S CASE LAW REGARDING LACHES ALSO MANDATES REVERSAL.

The case of *Carson City vs. Price* warrant a reversal of the Court's decision on laches grounds. The State accepted Desert Aire's application and did not provide notice that the application was deficient as the Nevada Administrative Code required if in fact Desert Aire's application was deficient. The State then provided Desert Aire with a provisional certificate. When the State did this they knew that Desert

Aire would move forward and expend significant sums based on that issuance. Desert Aire did in fact go forward spending approximately $2 million, several years of work, built the facility, opened the facility, marketed the facility and developed a substantial patient base.

Forcing the State to rescind the registration certificate it awarded to Desert Aire after the State determined Desert Aire had satisfied the requirements of the application process would be exceptionally inequitable. As a result, the Court should follow the rule in *Carson City v. Price*, 113 Nev. 409, 934, P.3d 1042 (1997) where the Court stated:

> Laches is an equitable doctrine which may be invoked when delay by one party works to the disadvantage of the other, causing a change of circumstances which would make the grant of relief to the delaying party inequitable." *Building & Constr. Trades v. Public Works*, 108 Nev. 605, 610-11, 836 P.2d 633, 636-37 (1992). "Thus, laches is more than a mere delay in seeking to enforce one's rights; it is a delay that works to the disadvantage of another." *Home Savings v. Bigelow*, 105 Nev. 494, 496, 779 P.2d 85, 86 (1989). "The condition of the party asserting laches must become so c hanged that the party cannot be restored to its former states.

*Id*. at 412-13.

Similarly, GB Sciences waited a year to file its lawsuit, during which time Desert Aire took the above actions, warrants a laches finding. Indeed, the State's brief both below and filed in this matter firmly support the laches arguments. (*See* State's Answering Brief at pp. 6-8.)

## IX. GB SCIENCES LACKS STANDING TO BRING THE ACTION.

"A party must have standing at the outset of a case and at all time throughout

the litigation." *Coal. for ICANN Transparency Inc. v. VeriSign, Inc.*, 771 F.Supp.2d 1195, 1200 (N.D.Cal.2011) (citing *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1193 (9th Cir.2000)). If there was a requirement that an applicant provide either a license or proof from the City of Las Vegas that the applicant met all of the City of Las Vegas' medical marijuana zoning restrictions (Desert Aire alleges there was not) it was due at the time of the application. There is no place in Nev. Rev. Stat. § 453.A322 which allows an entity to supplement its application. To the contrary, there was a deadline of when the application had to be submitted. (3 JA519.) The only allowance for supplementation would be if one of the members of the entity was disqualified due to a criminal background check. There were no other exceptions.

Thus, all licensees' licenses—including GB Sciences'—would have to be revoked, leaving GB Sciences without standing to pursue this action. There is no plain language in Nev. Rev. Stat. § 453A.322(3)(a)(5) that requires City licenses to be obtained during the ninety-day application period. The statute states that the person must submit the application, and a companion administrative code section states that the application must be filed by a deadline. There is nothing in the statute or any of the code sections which states that the licensing approval letter could be submitted at a later time. To the contrary, the statute's language makes it clear that if the letter was required it had to be submitted with the application by the deadline.

Otherwise why have a deadline. No other applicants submitted that information with their application—including GB Sciences. Further, no one ever supplemented their application with license approval.

It is true the State sent a letter to the State on October 30, 2014 (October 31, 2014 was a holiday and the next two days were a weekend. Thus, the State's provisional certificates had clearly been determined well before this timeframe). However, that is not the equivalent of the applicant submitting proof with its application. Indeed, neither GB Sciences nor anyone else ever submitted any proof with their application. Instead, the City submitted a letter to the State after the fact. Thus, no one complied with the statute if it was required. As a result, GB Sciences has no standing to bring its claims.

## X. GB SCIENCES IS NOT ENTITLED TO RELIEF ON APPEAL.

Again, if for any reason the Court were to rule against Desert Aire, GB Sciences is not entitled to the license. It did not comply with the subsection either since again it was impossible for anyone to comply with the subsection. Therefore, it is in the same boat as Desert Aire and all the other applicants. In addition, Desert Aire opposes GB Sciences' cross-appeal for the reasons set forth in the State's brief.

## CONCLUSION

For these reasons, and for the reasons set forth in its Opening Brief, Appellant Desert Aire respectfully requests that this Court vacate the district court's grant of

summary judgment to GB Sciences, and grant summary judgment to Desert Aire.

DATED this 27th day of February, 2017.

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## CERTIFICATE OF COMPLIANCE

Pursuant to Nev. R. App. P. 28.2:

I hereby certify that this brief complies with the formatting requirements of Nev. R. App. P. 32(a)(4), the typeface requirements of Nev. R. App. P. 32(a)(5) and the type style requirements of Nev. R. App. P. 32(a)(6) because the Reply Brief on Appeal and Answering Brief on Cross-Appeal has been prepared in a proportionally spaced typeface (14 point Times New Roman font).

I further certify that this Reply Brief on Appeal and Answering Brief on Cross-Appeal complies with the type-volume limitation of Nev. R. App. P. 28.1(e)(2)(A)(i) because it contains 7,797 words.

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 Nev. R. App. 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 this 27th day of February, 2017.

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## CERTIFICATE OF SERVICE

I hereby certify that the foregoing DESERT AIRE'S REPLY BRIEF ON APPEAL AND ANSWERING BRIEF ON CROSS-APPEAL was filed electronically with the Nevada Supreme Court on the 27th day of February, 2017. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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