No. _____

In The
Supreme Court of the United States

NEVADA RESTAURANT
SERVICES, INC. dba DOTTY'S,

Petitioner,

v.

CLARK COUNTY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The first question presented is whether a local legislature can, consistent with the requirements of the Due Process Clause, enact an ordinance imposing arbitrary, disproportionate, and unanticipated retroactive requirements upon a business in order for that business to keep the gaming licenses granted by the legislature years prior to enactment of the new ordinance.

2. The second question presented is what standard should be utilized by the federal courts to determine whether retroactive laws violate the Due Process Clause of the Fifth Amendment.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner, who was the Plaintiff-Appellant below, is Nevada Restaurant Services, Inc., doing business as Dotty's. Dotty's is a Nevada Corporation that operates a number of taverns offering beverages, food, and gaming throughout Nevada. Dotty's is not a publicly traded corporation, issues no stock, and has no parent corporation. There is no publicly held corporation with more than a 10% ownership stake in Dotty's.

Jackpot Joanies FP, LLC; Jackpot Joanies DF, LLC; and Eclipse Gaming SHMP LLC (collectively, the "Joanies LLCs") were Plaintiffs-Appellants who were consolidated into the case below. The Joanies LLCs are Nevada Limited Liability Companies that operate a number of taverns offering beverages, food, and gaming in Las Vegas, Nevada. Upon information and belief, there is no publicly held corporation with more than a 10% ownership stake in the Joanies LLCs.

Respondents, who were Defendants-Appellees below, are Clark County, a Municipal Corporation in the State of Nevada, and the Board of Commissioners of Clark County, the governing board authorized to conduct business and adopt laws on behalf of Clark County. Neither of the Respondents are publicly traded corporations. They issue no stock, and have no parent corporations. Upon information and belief, there are no publicly held corporations with more than a 10% ownership stake in Respondents.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Dotty's respectfully submits this petition for a writ of certiorari.

OPINIONS BELOW

The opinion of the court of appeals for the Ninth Circuit (Pet. App. 1) is not reported in the Federal Reporter, but is available on Westlaw at 2016 WL 146062. The first opinion of the District Court for the District of Nevada, granting the Respondents' motion for partial judgment on the pleadings (Pet. App. 47), is not reported in the Federal Reporter, but is available on Westlaw at 2012 WL 4355549. The second opinion of the District Court for the District of Nevada (Pet. App. 7), granting Respondents' motion for summary judgment, is reported and available at 981 F. Supp. 2d 947.[1]

JURISDICTION

The Ninth Circuit Court of Appeals entered judgment on January 5, 2016. Petitioner timely filed a petition for *en banc* rehearing on January 19, 2016, and

[1] While a final judgment was not entered in the district court until the granting of the motion for summary judgment in 981 F. Supp. 2d 947, this petition is solely concerned with the substantive due process arguments originally addressed by U.S. District Judge Dawson in 2012 WL 4355549.

the court of appeals entered an order denying that petition on February 11, 2016. Petitioner was accordingly required to file the instant petition no later than May 11, 2016. Sup. Ct. R. 13.1 and 13.3. This Court therefore has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. AMEND. V.

STATEMENT OF THE CASE

1. This Court has recognized that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf v. USI Film Products*, 511 U.S. 244, 265, fn. 17 (1994) (*citing Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 842-44, 855-56 (1990) (Scalia, J., concurring) and

Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775 (1936)). In *Landgraf*, Justice Stevens particularly noted that the "presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact." *Landgraf*, *supra*, 511 U.S. at 270. *See also Vartelas v. Holder*, 132 S. Ct. 1479, 1486 (2012) (*citing Landgraf*).

"Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions. For this reason, '[t]he retroactive aspects of [economic][2] legislation, as well as the prospective aspects, must meet the test of due process': a legitimate legislative purpose furthered by rational means." *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992) (*quoting Pension Benefit Guaranty Corporation v. R.A. Gray & Co.*, 467 U.S. 717 (1984)). This Court's "decisions . . . have left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience." *E. Enterprises v. Apfel*, 524 U.S. 498, 528 (1998).

Where retroactive legislation "substantially interferes with [a plaintiff's] reasonable investment-backed

[2] In this instance, the bracketing is original to the quoted text.

expectations," that legislation is disfavored and likely unconstitutional. *See id*. at 532 (*citing Landgraf*). Writing for a plurality of the Court, Justice O'Connor wrote that due process is violated where retroactive statutory liability is "arbitrary and irrational." *See id*. at 537 (with three Justices concurring in the opinion and one Justice concurring in the judgment).

In interpreting the Fifth Amendment, this Court therefore "limits retroactive statutes under the Due Process Clause as part of its longstanding 'prohibition against arbitrary and irrational legislation.'" *United States v. Ubaldo-Figueroa*, 347 F.3d 718, 727 (9th Cir. 2003), *opinion amended and superseded on denial of reh'g,* 364 F.3d 1042 (9th Cir. 2004) (*citing United States v. Carlton*, 512 U.S. 26, 30 (1994)).

2. The instant case illustrates perfectly why this Court has a long-standing policy disfavoring retroactive legislation where that legislation imposes unanticipated and disproportionate liability. Here, Petitioner Dotty's argued to both the district court and the Ninth Circuit Court of Appeals that Clark County enacted a new ordinance—referred to here as L-252-11 or as the "Ordinance"—that violated the Due Process Clause of the Fifth Amendment by retroactively imposing expensive, arbitrary, and unanticipated requirements on Dotty's taverns in order for those taverns to keep their County gaming licenses, which in many cases had been granted years ago without a hint that these onerous conditions would later be imposed by the County. For example, the Ordinance required

that Dotty's locations install a bar of a minimum height and that 8 of the 15 gaming machines at every location be changed from freestanding machines to machines that were embedded into the new bar; these changes required costly remodels in multiple locations and effectively gutted the Dotty's business model. The record before the Ninth Circuit demonstrated no specific reason for the precise new requirements imposed by the County. Indeed, it appears that the County's requirements were arbitrary and defied Dotty's reasonable investment-backed expectations.

a. On September 21, 2012, the district court ruled for the Respondents on their motion for partial judgment on the pleadings. The district court ignored the decision of this Court in *Landgraf* in favor of the older case *General Motors Corp. v. Romein*, 503 U.S. 181 (1992), holding that "[a]bsent violation of a specific constitutional provision, courts will up hold [*sic*] 'the retroactive aspects of economic legislation, as well as the prospective aspects' if they meet the test of due process." Pet. App. 61. The district court then concluded that "[t]here is no due process violation where 'it is at least fairly debatable that the [governing body's][3] conduct is rationally related to a legitimate governmental interest'" (*citing Halverson v. Skagit County*, 42 F.3d 1257, 1262 (9th Cir. 1994)). Pet. App. 62. The district court's holding is squarely contradicted by this Court's decisions in the *Landgraf* and *Apfel* cases.

b. The Ninth Circuit affirmed this part of the district court's decision. In a unanimous opinion by

[3] Bracketing original.

Ninth Circuit Judges Bybee and Christen, as well as U.S. District Court Judge Chen, the court of appeals agreed that "[t]he County has put forward a rational justification for the retroactive nature of the Ordinance"; that is, ensuring that gaming activity in taverns like those operated by Dotty's was "incidental" to the taverns' primary business. Pet. App. 4-5. Like the district court, the court of appeals failed to discuss how its analysis squared with this Court's binding precedent in *Landgraf* or in *Apfel*; the *Apfel* case in particular post-dated any of the circuit judges' citations in this portion of the Ninth Circuit opinion by approximately four years. *See id*.

c. The Ninth Circuit's judgment is now final. Dotty's timely sought rehearing *en banc* on January 19, 2016. Pet. App. 73. The Ninth Circuit denied that petition on February 11, 2016. Pet. App. 71-73. Accordingly, Dotty's now seeks review of the Ninth Circuit's holding, as well as a finding that the County's retroactive legislation affecting the gaming licenses held by Dotty's taverns is unconstitutional pursuant to this Court's binding, precedential decisions in *Landgraf* and *Apfel*, both of which were ignored by the lower courts.

REASONS FOR GRANTING THE PETITION

I. THE DECISIONS OF THE DISTRICT COURT AND THE NINTH CIRCUIT COURT OF APPEALS HAVE DECIDED AN IMPORTANT FEDERAL QUESTION—THE CONSTITUTIONALITY OF RETROACTIVE LEGISLATION—IN A WAY THAT DIRECTLY CONFLICTS WITH THIS COURT'S DECISIONS IN *LANDGRAF* AND *APFEL*.

This Court's immediate review of the instant case is necessary because, despite being presented with the controlling authority from this Court on the issue of retroactive legislation, the lower courts have failed to acknowledge or follow that precedent. Instead, they cited to a handful of older cases and an incomplete standard for determining the constitutionality of retroactive statutes. This incomplete enforcement of Supreme Court precedent has created a situation in which Dotty's has consistently been unable to obtain fair or predictable results in line with this Court's longstanding jurisprudence regarding retroactive laws. Absent strict and unambiguous guidance from this Court, the largest circuit court of appeals in the country will continue to issue decisions based on a legal standard that is neither correct nor Constitutional.

"A statute has retroactive effect when it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past. . . ." *I.N.S. v. St. Cyr*, 533 U.S. 289, 321 (2001) (internal citations omitted). In

determining whether a law is retroactive, and therefore has the possibility of offending substantive due process, the Court "should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations." *See id*. (*citing Landgraf* and *Martin v. Hadix*, 527 U.S. 343, 358 (1999)).

This Court has long recognized that "[r]etroactivity is not favored in the law." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). "By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." *Id*. This is because, as the Court held nearly a century ago, "[t]he power to require readjustments for the past is drastic . . . ; it ought not to be extended so as to permit unreasonably harsh action without very plain words." *Brimstone R. & Canal Co. v. United States*, 276 U.S. 104, 122 (1928). *See also Hamdan v. Rumsfeld*, 548 U.S. 557, 576 (2006) (*citing Landgraf* for the idea that "[i]f a statutory provision would operate retroactively as applied to cases pending at the time the provision was enacted, then our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.") (internal quotes omitted), and *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37-38 (2006) (*citing Landgraf* in the construction of retroactive legislation).

In his concurring opinion in *Apfel*, Justice Kennedy questioned the idea, which appears to have been relied on by the lower courts in the instant case, that economic legislation may be held to a lower Constitutional standard than other types of retroactive laws:

> Although we have been hesitant to subject economic legislation to due process scrutiny as a general matter, the Court has given careful consideration to due process challenges to legislation with retroactive effects. As today's plurality opinion notes, for centuries our law has harbored a singular distrust of retroactive statutes. . . . The Court's due process jurisprudence reflects this distrust. For example, in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752 (1976), the Court held due process requires an inquiry into whether in enacting the retroactive law the legislature acted in an arbitrary and irrational way. Even though prospective economic legislation carries with it the presumption of constitutionality, "[i]t does not follow . . . that what Congress can legislate prospectively it can legislate retrospectively. The retrospective aspects of [economic][4] legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." *Id.*, at 16-17, 96 S.Ct., at 2893. . . . [This Court's] decisions treat due process challenges based on the retroactive character

[4] Bracketing original.

> of the statutes in question as serious and meritorious, thus confirming the vitality of our legal tradition's disfavor of retroactive economic legislation. Indeed, it is no accident that the primary retroactivity precedents upon which today's plurality opinion relies in its takings analysis were grounded in due process.

Apfel, *supra*, 524 U.S. at 547-48 (concurring opinion). Justice Kennedy therefore appears to have considered retroactive economic legislation to present serious due process questions that should be given due consideration by federal courts.

The modern enforcement of that historical standard, as discussed by Justice Kennedy in *Apfel*, was ignored by the Ninth Circuit Court of Appeals in this case. In holding that the retroactive action by the County against the tavern gaming licenses of Dotty's was Constitutional, the Ninth Circuit cited instead a case 14 years older than *Apfel*: *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984). There, the Court cited many of the same historical authorities as Justice Kennedy would 14 years later before concluding that the "burden [regarding a due process claim] is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *Id*. at 730. But this Court later cautioned in *Apfel* that such a purpose could not be used to justify a "disproportionate and severely retroactive burden" on a litigant. *See Apfel*, *supra*, 524 U.S. at 536. To borrow the words of Justice Kennedy, the Dotty's situation "represents one of the

rare instances where the Legislature has exceeded the limits imposed by due process." *See id*. at 549.

Landgraf, which was ignored by both the trial and appellate courts in this matter, required those courts to do more than simply acknowledge a legitimate legislative purpose for the retroactivity of the Ordinance. "It will frequently be true . . . that retroactive application of a new statute would vindicate its purpose more fully. That consideration, however, is not sufficient to rebut the presumption against retroactivity." *Landgraf*, *supra*, 511 U.S. at 285-86. "Statutes are seldom crafted to pursue a single goal, and compromises necessary to their enactment may require adopting means other than those that would most effectively pursue the main goal." *Id*. at 286.

Most recently, on April 20, 2016, Justice Ginsburg, writing for the Court, cited *Landgraf* in reaffirming that "[t]he Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause 'may not suffice' to warrant its retroactive application." *Bank Markazi v. Peterson*, No. 14-770, 2016 WL 1574580, at *9 (U.S. Apr. 20, 2016). In other words, an examination of the legislative purpose and method behind the retroactive application of a law is necessary in order to determine whether it comports with the Due Process Clause.

Here, the lower courts have completely ignored the holdings of *Landgraf* and *Apfel* in evaluating the

scope of the retroactive hardship on a gaming licensee like Dotty's. While the lower courts acknowledged a legitimate legislative purpose for the retroactive legislation, they failed to complete the Constitutional analysis by questioning how the retroactive legislation served that goal, as well as whether the legislation inflicted a "disproportionate and severely retroactive burden" on Dotty's, which the Ordinance did by requiring costly, arbitrary, and unwarranted remodels simply for Dotty's to retain its gaming licenses and stay in business.

The analyses of both the district court and the court of appeals were limited to whether a legitimate government purpose existed that could be connected to the ordinance. Pet. App. 61-62 and 4-5, respectively. In this way, they failed to complete the retroactivity analysis required by this Court in *Landgraf* and *Apfel*. Had the lower courts followed the guidance of this Court, they would have taken into account Dotty's arguments that the burden of retroactivity was disproportionately and arbitrarily imposed upon Dotty's. Dotty's simply could not have anticipated that burden when it originally obtained its gaming licenses. Nor did the County ever appear to consider giving "grandfathering" treatment to Dotty's licenses, despite the fact that Dotty's advocated for this treatment. The County's arbitrary and capricious use of broad legislative power has therefore taken from Dotty's a significant private interest, and Dotty's is left without a legal remedy through no fault of its own.

II. THIS COURT SHOULD GRANT CERTIORARI TO PROVIDE CLEAR GUIDANCE TO LOWER COURTS REGARDING THE CONSTITUTIONAL DUE PROCESS STANDARD FOR RETROACTIVE LAWS, USING A MORE DEFINITIVE TEST IN PLACE OF *AD HOC* DETERMINATIONS.

The actions of the district court and the Ninth Circuit Court of Appeals have set a confusing precedent for the future of substantive due process cases as they relate to retroactive legislation. Under the Ninth Circuit's interpretation of this Court's precedent, it seems unlikely that any retroactive law could ever be overturned as a violation of substantive due process, even though that result was clearly not what was intended by the majority results in *Landgraf* and *Apfel*.

Certiorari is necessary in the instant case to instruct the circuit courts, particularly the largest circuit court in the country, regarding proper analysis of retroactive laws under the Due Process Clause of the Fifth Amendment. Nearly a decade ago, one legal scholar foreshadowed the instant case by remarking on this Court's history considering retroactive laws:

> One can decide to determine the value of these substantive interests on an *ad hoc* basis, as the Court currently does in its retroactivity jurisprudence, with traditional distinctions lurking in the background. Alternatively, one might use a more transparent and categorical approach to rights protection, accepting some inevitable over and under inclusion.

> The strongest argument for retroactive liabilities is that they evoke proper incentives by making actors foresee that they may have to internalize costs that the law in force at the time they act allows them to externalize. Indeed, the Court and many commentators are most likely to countenance retroactive liabilities when they seem to have a decent fit with past externalized costs. But decisions about such fits with past wrongs are better made by courts under existing liability schemes. It is true that disallowing legislative retroactive liabilities will leave some costs externalized and sacrifice some desirable deterrence. One should compare the unfairness and inefficiency of this result, however, to the unfairness and inefficiency of a legal system that treats retroactive legislation as normal.

Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 Geo. L.J. 1015, 1062-63 (2006). Professor Woolhandler's article specifically suggests a distinction between public and private rights with regard to statutory retroactivity, pointing out that, historically, private rights (like the ones defended by Dotty's in the matters below) were not subject to retroactive laws, while public rights were. *See id*. at 1023-36.[5]

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[5] Professor Woolhandler further notes that public rights generally have included such items as: (1) proprietary interests of government; (2) interests in exercising delegated governmental power; (3) the governmental interest in enforcing penal and regulatory law, including the law of public nuisance; (4) purely statutory (*i.e.*,

This Court's consideration of the instant case, then, goes far beyond the facts of the dispute between Dotty's and Clark County, Nevada. The problem of statutory retroactivity is one that has existed in American law for well over a century. Despite this Court's well-meaning attempts to carve out a simple, easy-to-follow body of law on the issue, lower courts appear unable to discern when and how to apply the concept of substantive due process to retroactive actions by state, county, and other local legislatures. The instant case presents a prime opportunity for this Court to provide important clarification on an enduring and vital issue of Constitutional law.

If this Court chooses not to review the instant question, the effects will be widespread, effusive, and difficult to remedy. Local legislatures like Clark County make daily decisions about business licenses and how to affect those licenses with legislation. If this Court does not provide a clear standard for retroactive legislation, problems like those presented by Dotty's are guaranteed to continue surfacing in state and federal courts, with the results inconsistent at best and unconstitutional at worst.

In granting the instant petition, this Court would have the opportunity to provide critical guidance to lower courts and legislatures across the country, improving government efficiency and services while safeguarding the rights of business owners like Dotty's,

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non-common-law) claims of individuals; and (5) taxation. *See id*. at 1021.

who rely on and expect consistency from local authorities in the granting and regulating of licenses vital to their businesses.

CONCLUSION

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 6, 2016

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEVADA RESTAURANT SERVICES, INC., DBA Dotty's, Plaintiff-Appellant, And JACKPOT JOANIES FP, LLC, Consolidated Plaintiff; JACKPOT JOANIES DF, LLC, Consolidated Plaintiff, ECLIPSE GAMING SHMP, LLC, Consolidated Plaintiff, Plaintiffs, v. CLARK COUNTY, a Municipal Corporation; BOARD OF COUNTY COMMISSIONERS OF CLARK COUNTY, Defendants-Appellees.	No. 13-17252 D.C. Nos. 2:11-cv-00795-APG-PAL 2:11-cv-00824-APG-PAL MEMORANDUM* (Filed Jan. 5, 2016)

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

NEVADA RESTAURANT SERVICES, INC., DBA Dotty's, Plaintiff, And JACKPOT JOANIES FP, LLC, Consolidated Plaintiff; JACKPOT JOANIES DF, LLC, Consolidated Plaintiff, ECLIPSE GAMING SHMP, LLC, Consolidated Plaintiff, Plaintiffs-Appellants, v. CLARK COUNTY, a Municipal Corporation; BOARD OF COUNTY COMMISSIONERS OF CLARK COUNTY, Defendants-Appellees.	No. 13-17253 D.C. Nos. 2:11-cv-00795-APG-PAL 2:11-cv-00824-APG-PAL

Appeal from the United States District Court
for the District of Nevada
Andrew P. Gordon, District Judge, Presiding

Argued and Submitted December 11, 2015
San Francisco, California

Before: BYBEE and CHRISTEN, Circuit Judges and CHEN,** District Judge.

Appellants Nevada Restaurant Services, Inc. and Jackpot Joanies FP, LLC (collectively "Plaintiffs"[1]) appeal two district court orders granting Defendant Clark County's ("the County") motion for partial judgment on the pleadings and motion for summary judgment. We have jurisdiction under 28 U.S.C. § 1291, and review the district court's orders de novo. *See Lyon v. Chase Bank USA*, 656 F.3d 877, 883 (9th Cir. 2011); *Harris v. Cty. of Riverside*, 904 F.2d 497, 500 (9th Cir. 1990). For the reasons outlined below, we affirm.

Constitutional Claims

1. Plaintiffs' procedural due process challenge fails. Because Clark County Ordinance L-252-11 ("the Ordinance") was legislative rather than adjudicatory in nature, "due process [was] satisfied when the legislative body perform[ed] its responsibilities in the normal manner prescribed by law." *Halverson v. Skagit Cty.*, 42 F.3d 1257, 1260 (9th Cir. 1994), *as amended on denial of reh'g* (1995) (citation omitted);

** The Honorable Edward M. Chen, District Judge for the U.S. District Court for the Northern District of California, sitting by designation.

[1] Unless otherwise noted, this disposition addresses common claims raised by both Plaintiffs.

see also Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915).[2]

Alternatively, Plaintiffs have not shown that the process afforded to them by the County fell below the constitutional threshold. *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Plaintiffs received multiple notices from the County informing them of the proposed legislation, and were extended repeated opportunities – via the submission of written comments and at public hearings – to make their concerns known to the County.

2. Plaintiffs' substantive due process challenge also fails. When, as here, plaintiffs "rely on substantive due process to challenge governmental action that does not impinge on fundamental rights," courts "merely look to see whether the government *could* have had a legitimate reason for acting as it did." *Halverson*, 42 F.3d at 1262 (internal quotation marks omitted). The County has put forward a rational justification for the retroactive nature of the Ordinance – ensuring compliance with Clark County Code § 8.04.040(B)(3)'s requirement that the gambling permitted by Class A Slot Machine Licenses remains merely "incidental" to the licensee's primary business

[2] Even accepting Plaintiffs' argument that the County did not follow Nevada law precisely, the deviation did not amount to a constitutional violation. *See Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1060 (9th Cir. 2012) ("It is axiomatic . . . that not every violation of state law amounts to an infringement of constitutional rights.").

purpose. *See Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984) (holding that retroactive aspects of legislation must satisfy due process, a burden "met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose").

3. The Ordinance does not violate the Equal Protection Clause. First, because the Ordinance – a legislative action of general applicability that applies to hundreds of taverns – does not single out Plaintiffs for regulation, Plaintiffs' "class of one" argument fails. *See Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Second, the provision of the Ordinance that exempts taverns licensed prior to December 22, 1990, is rationally related to the County's economic goals. *See City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (noting that when a challenged legislative action does not involve "fundamental personal rights" or "inherently suspect distinctions such as race," local governments are "accorded wide latitude in the regulation of their local economies").

4. Jackpot Joanies's facial vagueness challenge lacks merit, as the language of the Ordinance is not "impermissibly vague in all of its applications." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982).[3]

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[3] Plaintiffs have filed motions asking this court to take judicial notice of County legislative materials, video recordings of County hearings, and citations issued to Plaintiffs by the County. We **GRANT** Plaintiffs' motions, *Lee v. City of Los Angeles*,

(Continued on following page)

5. The district court properly dismissed Jackpot Joanies' freestanding § 1983 claim. 42 U.S.C. § 1983 is "not itself a source of substantive rights," but rather a "method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes." *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979).

Nevada Statutory Claims

1. We agree with the district court that the County's preparation and publication of the Business Impact Statements substantially complied with the provisions of Nev. Rev. Stat. §§ 237.080, .090.

2. We reject Plaintiffs' claim that Nev. Rev. Stat. § 244.187 forecloses the County's ability to regulate gambling within its jurisdiction. *See Clark Cty. Liquor & Gaming Licensing Bd. v. Simon & Tucker, Inc.*, 787 P.2d 782, 783 (Nev. 1990) ("The power to license, regulate, and prohibit gambling is within the discretion of the municipal agency empowered to govern gambling and such agency has a wide margin of discretion.").

AFFIRMED.

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250 F.3d 668, 688-89 (9th Cir. 2001), and **DENY** the County's motions to strike portions of Plaintiffs' reply briefs. Our decision to grant Plaintiffs' motions for judicial notice, however, does not change our conclusion that the Ordinance is not unconstitutionally vague.

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

NEVADA RESTAURANT SERVICES, INC., d/b/a DOTTY'S, Plaintiff, JACKPOT JOANIES FP, LLC; JACKPOT JOANIES DF, LLC, and ECLIPSE GAMING SHMP LLC, Consolidated Plaintiffs, v. CLARK COUNTY, a Municipal Corporation; BOARD OF COUNTY COMMISSIONERS OF CLARK COUNTY; and DOES I through X, Defendants.	Case No. 2:11-cv-00795-APG-PAL Consolidated with: Case No. 2:11-cv-00824-APG-PAL **ORDER ON MOTIONS FOR SUMMARY JUDGMENT** (Dkt. Nos. 38, 39 and 42) (Filed Oct. 4, 2013)

Pending before the Court are motions for summary judgment filed by plaintiff Nevada Restaurant Services, Inc. ("Dotty's") [Dkt. #38] and defendant Clark County (the "County") [Dkt. # 42], and the Joinder [Dkt. # 39] to Dotty's Motion filed by consolidated plaintiffs Jackpot Joanies FP, LLC, Jackpot Joanies DF, LLC, and Eclipse Gaming SHMP LLC

(collectively, "Jackpot Joanies"). The parties have agreed that there are no genuine disputes of material fact; thus, the Court can enter judgment as a matter of law. FED. R. CIV. P. 56(a).

Dotty's[1] challenges the County's adoption of Ordinance L-252-11 (the "Ordinance"). The Ordinance amended Clark County Municipal Code Chapter 8.20 by adding new requirements for "taverns" with restricted gaming licenses – most notably, a bar with eight embedded slot machines (out of a total of 15 allowed machines), 2,500 square feet of open space, and a "tavern restaurant" with 25 seats. Some of the new requirements were retroactively applied, depending on a tavern's date of licensure.

In its Motion, Dotty's does not challenge the County Board's discretionary decision to adopt the Ordinance (i.e., the soundness or wisdom of the County Board's decision). Rather, Dotty's first contends that the County Board did not comply with the procedures mandated by NRS §§ 237.080 and 237.090, which require local governments to prepare a business impact statement ("BIS") with specified content before adopting a proposed rule.

Dotty's next contends that the Ordinance violates NRS § 244.187, which allows county governments to "displace or limit competition" in specified industries

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[1] Because Jackpot Joanie's joined in the arguments set forth in Dotty's Motion for Summary Judgment, references herein to Dotty's include Jackpot Joanie's.

not including gaming. Dotty's argues that the exclusion of gaming from NRS § 244.187 deprives counties of the power to limit competition in gaming, which Dotty's contends is the Ordinance's principal intention and effect. For the reasons set forth below, Dotty's arguments are rejected.

I. Business Impact Statement – NRS §§ 237.080, 237.090

A. Standard of Review

The BIS statute does not specify the judicial standard of review that applies to challenges to the adequacy of a BIS. Nor has the Nevada Supreme Court articulated the applicable standard of review. The Nevada Supreme Court's interpretation of the mandamus statute (NRS § 34.160) is instructive, however.[2] "A writ of mandamus will issue when the respondent has a clear, present legal duty to act. Mandamus will not lie to control discretionary action . . . , unless discretion is manifestly abused or is exercised arbitrarily or capriciously." *Round Hill Gen. Improvement Dist. v. Newman*, 637 P.2d 534, 536 (Nev. 1981). A distinction exists between ministerial duties, which a government body has no discretion to not perform, and discretionary actions, to which courts must grant considerable deference. *See id.* The procedures mandated by the BIS statute are

[2] Dotty's Amended Complaint seeks mandamus, judicial review, injunctive relief, and declaratory relief. [Dkt. # 10.]

ministerial, as conceded by the County [Dkt. # 41 at 20:22-24], because government bodies have no choice but to perform them before enacting a proposed rule. NRS §§ 237.080, 237.090.

The Court is also guided by the review standard that courts have applied to other states' BIS statutes and to similar federal and state environmental impact statement statutes. Oregon has a fiscal impact statement ("FIS") requirement that is analogous to Nevada's BIS requirement. *See Oregon Cable Telecomms. Ass'n v. Dep't of Revenue*, 240 P.3d 1122 (Or. Ct. App. 2010). In *Oregon Cable*, the Oregon Court of Appeals analyzed the adequacy of an FIS, first determining what the statute required as a matter of law and then comparing the FIS against that standard:

> We have focused on the policy objectives . . . to determine the adequacy of agency fiscal impact statements. . . . The overarching policy objective of the fiscal impact statement is to provide protections against arbitrary and inadequately publicized government conduct. . . . [I]n instances *where the information provided is sufficient to allow the public and affected businesses to assess their particular positions and financial situations and determine the likely impact on them*, a procedural challenge to a rule based on an allegedly inadequate fiscal impact statement will fail. If, however, the statement falls short of that standard, the rule must be declared invalid.

Id. at 1128 (internal quotation marks and citations omitted, emphasis added). In other words, Oregon

courts will not invalidate a rule because of procedural errors that do not meaningfully impact the participatory and informational objectives of the FIS statute.

An Environmental Impact Statement ("EIS") is similar to a BIS in that both include statutorily-mandated information for the purposes of enabling meaningful comment by affected persons and entities and of fostering informed and reasoned decision-making by government bodies.[3] The policies underlying the EIS notice requirements are similar to Oregon's FIS statute:

> The adequacy of an EIS depends upon whether it was prepared in observance of the procedure required by law. . . . The Ninth Circuit has adopted a "rule of reason[ ]" test that requires inquiring into whether an EIS contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences, and *whether the EIS's form, content, and preparation foster both informed decisionmaking and informed public participation.*

Havasupai Tribe v. U.S., 752 F. Supp. 1471, 1490 (D. Ariz. 1990), *aff'd* 943 F.2d 32 (9th Cir. 1991)

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[3] The National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4331-4370h, governs the content of EISs for federal matters.

(emphasis added). The review of EIRs[4] by California state courts is essentially the same:

> Where a party seeks judicial review . . . on the grounds of noncompliance with [CEQA[5]], the inquiry shall extend only to whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence. . . . Generally speaking, an agency's *failure to comply with the procedural requirements of CEQA is prejudicial when the violation thwarts the Act's goals by precluding informed decision-making and public participation.*

San Lorenzo Valley Comm'y Advocates for Responsible Educ. v. San Lorenzo Valley Unified Sch. Dist., 44 Cal. Rptr. 3d 128, 140 (Cal. Ct. App. 2006) (emphasis added).

The Oregon FIS approach and the federal and California EIS/EIR approaches are fundamentally the same. Because Dotty's challenges only the pre-decision procedural requirements of Nevada's BIS statute, the Court's review is limited to whether the County

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[4] In California, the relevant document is termed an environmental impact report ("EIR"), rather than an environmental impact statement ("EIS").

[5] The California Environmental Quality Act ("CEQA"), CAL. CODE PUB. RES. §§ 21000-21189.3, governs the content of that state's EIRs.

"proceeded in [the] manner required by law" and, if not, whether any "failure to comply with the procedural requirements" of the BIS statute thwarted its goals by "precluding informed decision-making [by the County] and . . . participation" by affected businesses. *Id.* Dotty's confirms that the goal of "the business impact statement process is to provide a streamlined and efficient way for affected businesses to have a voice in the ordinance-adoption process and for busy board members to fairly evaluate the anticipated economic impact their actions may have on local businesses so they can make an ***informed*** decision." [Dkt. # 38 at 10 (emphasis in original).]

B. Statutory Requirements for a Business Impact Statement

NRS § 237.080 sets forth the procedures leading up to the preparation of a BIS, while NRS § 237.090 governs the content of a BIS.

1. Proper Notice of the Proposed Rule – NRS § 237.080(1)

NRS § 237.080(1) provides:

> Before a governing body of a local government adopts a proposed rule, the governing body . . . must notify trade associations or owners and officers of businesses which are likely to be affected by the proposed rule that they may submit data or arguments to the

> governing body . . . as to whether the proposed rule will:
>
> > (a) Impose a direct and significant economic burden upon a business; or
> >
> > (b) Directly restrict the formation, operation or expansion of a business.

On February 9, 2011, the County sent to tavern, liquor, and gaming licensees and to related community partners a "Notification of Proposed Amendment Changes to Clark County Code." The notice included three Proposed Ordinances. [Dkt. # 38-4 at 2.] On February 15, the County sent out a revised notice with a fourth Proposed Ordinance. [Dkt. # 42-6 at 4.] These two notices stated that the Proposed Ordinances would be introduced on March 1, and that a public hearing was scheduled on March 15. On March 4, the County issued another revised notice. [Dkt. # 38-6 at 2.] This notice requested comments specifically under the BIS statute, extended the response deadline from March 4 to March 28, stated that the Proposed Ordinances had been introduced on March 1, and repeated that a public hearing was scheduled. [*Id.*] This notice was posted in nine publications, including the minority press, and made available on the County's website. [Dkt. # 38-11 at 4.] The County then issued a Comparison Matrix ("Matrix") highlighting the similarities and differences among the proposed ordinances. [Dkt. # 41-8 at 6-10.] On March 21, the County issued a Frequently Asked Questions ("FAQ") document to provide even more information to stakeholders about the proposals. [Dkt. # 38-7 at 2-5.]

The County accepted comments on the Proposed Ordinances through the close of business on March 28, 2011. [Dkt. # 38-11 at 4; Dkt. # 42 at 6.] The County then prepared a BIS for each Proposed Ordinance based on the information submitted by Dotty's and others. The four BISs were published for review by interested parties before the April 5, 2011 County Board meeting (at which the Ordinance was approved), were included on the agenda for the meeting, and were made part of the meeting's record. [Dkt. # 42 at 8; *see* Dkt. # 38-11 at 5-7.]

Dotty's argues that the notice of the four Proposed Ordinances did not sufficiently allow affected businesses to assess the proposals' impacts because businesses could not know which ordinance would ultimately be considered for adoption. Dotty's also argues that the County Board's final adoption of a hybrid bill (combining portions of some of the proposals) rendered it impossible for businesses to properly comment up front. The County responds, correctly, that requiring a notification to include only the precise wording of one proposed rule (with no alternatives) would significantly frustrate and delay the legislative process.

NRS § 237.080 does not specify what must be included in a notice of a proposed ordinance, but Dotty's is correct that the notice must contain sufficient information for affected businesses to fairly determine the effects of the proposed ordinances. Under the federal Administrative Procedure Act ("APA") notice of a proposed rule "shall include . . .

either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3).

> [The notice need not] announce the final rule that ultimately is adopted. The final rule permissibly may differ from versions that were presented to the public in the notice of proposed rulemaking. . . . The public's right to comment is protected if the final rule is a *logical outgrowth* of the proposals on which the public had the opportunity to comment.

Hall v. U.S. E.P.A., 273 F.3d 1146, 1163 (9th Cir. 2001) (internal quotation marks and citation omitted, emphasis added).

The rule-making procedures in the Nevada Administrative Procedure Act ("Nevada APA") differ from those in NRS § 237.080(1) and (2). The state "agency that intends to adopt, amend or repeal a permanent regulation must deliver to the Legislative Counsel a copy of the proposed regulation." NRS § 233B.063(1). The agency then must give notice of its intended action, and the notice must include "a statement explaining how to obtain the approved or revised text of the proposed regulation prepared by the Legislative Counsel." NRS § 233B.0603(1)(a)(3). Although these procedures differ from those in the BIS statute and the federal APA, the goal – providing notice of the subject matter of the hearing – is similar. "Inherent in any notice and hearing requirement are the propositions that the notice will accurately reflect the subject matter to be addressed and that the

hearing will allow full consideration of it. . . . A hearing is not meaningful without an awareness of the matters to be considered." *Pub. Serv. Comm'n of Nevada v. Sw. Gas Corp.*, 662 P.2d 624, 626 (Nev. 1983) (internal quotation marks and citations omitted).

The question then is whether the Ordinance is a logical outgrowth of the four Proposed Ordinances described in the notices. While some modifications were made during the County Board hearing, the Ordinance is essentially an amalgamation of the four Proposed Ordinances. The 2,500 square foot "open space" requirement was contained in Proposed Ordinances 1 and 3. The "bar+8 embedded slots" requirement is a softening of the 10 embedded slots in Proposed Ordinances 1 and 3. The "tavern restaurant" requirement was included in Proposed Ordinances 1 and 3, although the prohibition on counting bar seats toward the 25-seat minimum was added later. The 2,000-feet distance requirement was a compromise of the 2,640 feet, 2,500 feet, and 2,000 feet limitations in, respectively, Proposed Ordinances 1, 3 and 4. The retroactivity aspects of the Ordinance appear to be a compromise among all the Proposed Ordinances, with the greatest similarity to Proposed Ordinance 3. The Ordinance does not contain any wholly new requirements that could reasonably be called a surprise. The Ordinance is certainly a logical outgrowth of the four Proposed Ordinances.

Dotty's argues that the County's issuance of the FAQ and the Matrix was a response to the public's

confusion about the four proposals. That may be true, but those documents served well to clarify the Proposed Ordinances and highlight the differences among them. Including the FAQ and Matrix, the notices gave affected businesses sufficient information to determine whether the Proposed Ordinances would impose a direct and significant economic burden on them or directly restrict the formation, operation, or expansion of a business; this is all the statute requires. NRS § 237.080(1). The Ordinance did not vary so much from the Proposed Ordinances that the up-front comments were inapplicable or otherwise insufficient to communicate the business community's concerns to the County Board.

Dotty's also contends that the notice should have explicitly warned that under NRS § 237.080(2), the failure to respond would result in a rebuttable presumption of no significant economic effects. But the statute has no such requirement. The County need not communicate every aspect of the BIS statute in the notice. Regulated businesses are responsible to make themselves aware of applicable laws and regulations. *See United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971) ("The principle that ignorance of the law is no defense applies whether the law be a statute or a duly promulgated and published regulation."). Thus, the County complied with NRS § 237.080(1).

2. Determination of Economic Burdens – NRS § 237.080(3) and (5)

After the notice period has expired, "the governing body . . . shall determine whether the proposed rule is likely to: (a) impose a direct and significant economic burden upon a business; or (b) directly restrict the formation, operation or expansion of a business. . . ." NRS § 237.080(3). "After making a determination pursuant to subsection 3, the governing body . . . shall prepare a business impact statement." NRS § 237.080(5). Dotty's argues there is no evidence that the County made the required determination. However, the County's preparation of the four BISs, and their content, indicate otherwise.

The BISs are strong evidence that the County made a determination pursuant to NRS § 237.080(3). Without such a determination, it would be quite difficult, and unnecessary, to prepare a meaningful BIS. Moreover, the BISs' discussions of the Proposed Ordinances' economic effects – including the difficulties that some taverns will have operating under stricter regulations – support the conclusion that "a determination" was made for each Proposed Ordinance. Accordingly, the County complied with NRS § 237.080(3) and (5).

3. Consideration of Methods to Reduce Impacts – NRS § 237.080(4)

The BIS statute also required the County to consider methods to reduce the potential economic burdens of the Proposed Ordinances.

> If the governing body . . . determines . . . that a proposed rule is likely to impose a direct and significant economic burden upon a business or directly restrict the formation, operation or expansion of a business, the governing body . . . shall consider methods to reduce the impact of the proposed rule on businesses, including, without limitation:
>
> (a) Simplifying the proposed rule;
>
> (b) Establishing different standards of compliance for a business; and
>
> (c) Modifying a fee or fine set forth in the rule so that a business is authorized to pay a lower fee or fine.

NRS § 237.080(4). The County argues that its consideration of four different Proposed Ordinances, each with varying business impacts, and its adoption of the final Ordinance that "modified slightly and blended parts of the four proposals make[ ] clear that the [County Board] at the hearing on April 5, 2011 considered methods to reduce impacts and still meet the public health and safety goals embodied in the ordinance." [Dkt. # 41 at 17-18.] The County further contends that it "considered the impact and made efforts to ameliorate the impact while advancing the

public interest . . . to avoid so-called slot parlors or arcades." [*Id.* at 18.]

Dotty's argues that the County's realization that the proposals might curtail the additions of new taverns in Clark County "triggered the County's duty . . . to consider methods to reduce this impact." [Dkt. # 49 at 5.] Dotty's contends the County did nothing to reduce this impact, and that the "version that was ultimately adopted incorporated all of the most impactful portions of each proposed rule." [*Id.*]

Dotty's is correct that NRS § 237.080(4) imposes upon the County the duty to consider methods to reduce the Proposed Ordinances' potential impacts. Once the County considers such methods, however, its duty is discharged. The statute does not require the County to adopt any such methods. The statute requires the County only to "consider" such methods.

The four different Proposed Ordinances – and the County Board's discussion of them at the April 5, 2011 hearing – demonstrate that the County considered a variety of methods to reduce the potential negative business impacts. The Proposed Ordinances had different distance separation requirements, different retroactivity provisions, different requirements for embedded slots, and different "open space" requirements.[6] Ultimately, the County Board adopted

[6] Dotty's assertion that the County Board adopted all of the Proposed Ordinances' most impactful provisions is incorrect. Some of the proposals required ten embedded slots; the Ordinance requires eight. Two of the proposals required 2,640 feet

(Continued on following page)

a hybrid Ordinance, combining aspects of the Proposed Ordinances. The County complied with NRS § 237.080(4).

4. Summary of Public Response – NRS § 237.090(1)(a)

NRS § 237.090(1) specifies what information must be included in a BIS. First, a BIS must include "[a] description of the manner in which comment was solicited from affected businesses [and] a summary of their response. . . ." NRS § 237.090(1)(a). Dotty's contends that the BISs did not contain "fair" summaries. [Dkt. # 38 at 11-12.] Specifically, Dotty's asserts that the BISs (i) did not reflect the strong concern, as expressed in the affected businesses' comments, that the proposed rules were protectionist measures for the casino industry; (ii) did not reflect that various tavern owners wanted the rules to be prospective because retroactive rules would force some to close their taverns; and (iii) did not tally the comments to

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and 2,500 feet of separation between taverns; the Ordinance requires 2,000 feet. Proposed Ordinance 4 included "full retroactivity for previously licensed taverns" [Dkt # 41-8 at 9]; the Ordinance exempts certain taverns licensed before December 1990 from the "bar+8 embedded slots" requirement and certain taverns licensed before December 2010 from the 2,500 square foot "open space" and the "tavern restaurant" requirements. Even if the County had adopted the most stringent requirements in the Proposed Ordinances, however, that would not constitute a violation of NRS 237.080(4) because the County considered methods to reduce impacts to business. The consideration is what counts under NRS 237.080(4), not the result.

\indicate that those against the proposed rules outnumbered those in favor by 13 to 1. [*Id.*] Dotty's contends that the County Board could not fairly weigh the true business impacts of the proposed rules because the BISs' summaries did not reflect the number and breadth of negative comments or the objectors' concerns. [*Id*.]

The statute mandates no particular level of specificity for the "summary" of responses. [Dkt. # 49 at 7.] Reference to dictionaries for definitions of common terms is permissible. *U.S. v. Santos*, 553 U.S. 507, 511 (2008) (relying on Webster's New International Dictionary). In relevant part, Merriam-Webster defines "summary" as "covering the main points succinctly."[7] "Succinct," in turn, is defined as "marked by compact precise expression without wasted words."[8] Thus, the summary need only cover the comments' main points in an efficient and precise manner; it need not catalog every objection or tally the votes for or against a proposal.

While the BISs contain no section entitled "summary of responses," they adequately summarize the responses received during the notice period. [*See* Dkt. # 38-10 at 2-4.] As the Proposed Ordinances were not identical, the BISs varied in how the comments were

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[7] Merriam-Webster definition of "summary," http://www.merriam webster.com/dictionary/summary.

[8] Merriam-Webster definition of "succinct," http://www.merriam webster.com/dictionary/succinct.

summarized, but the gist of each BIS is the same. The general opposition to "additional regulation of tavern and gaming operations" is noted, "as current tavern owners are hard pressed to keep businesses open under the current regulations." [*Id.* at 3.] Tavern owners' particular concerns of costly remodeling and new gaming devices are included, as is their concern over the potential loss in business value. [*Id.*] The limitation on competition that would result from new regulations is noted. [*Id*.] Although framed as a "beneficial effect" for surviving tavern owners, the concern by at-risk tavern owners over forced closures is included in the BISs.

The BISs also noted concerns about negative impacts on business growth flowing from the 2,500-square foot "open space" and 2,000-foot "door-to-door" distance requirements. [*Id.* at 7.] The BISs noted that the County received comments favoring limiting the number of "slot parlors" in the County. [*Id.*] Possible conflicts with the Americans with Disabilities Act were noted as well. [*Id.*] Some commentators expressed concern about surviving the current recession with new regulations. [*Id.* at 11.] Others objected to the requirement of a 25-seat restaurant as an impediment to growth. [*Id.* at 15.]

The BISs adequately summarized the comments received. Even if the BISs did not meet the precise requirements of the statute (although the court expressly finds they did), affected businesses were not deprived of the opportunity to meaningfully participate in the legislative process, and the County Board

was not precluded from making reasoned, informed decisions. The BISs fulfilled their purpose of providing sufficient information about the comments received. Moreover, the entirety of the comments was attached to the BISs, further improving affected businesses' and the County Board's ability to review and understand the comments. Accordingly, the County complied with the "summary" requirement of NRS § 237.090(1)(a).

5. Estimated Economic Effect – NRS § 237.090(1)(b)

A BIS must include "[t]he estimated economic effect of the proposed rule on the business which it is to regulate, including, without limitation: (1) [b]oth adverse and beneficial effects; and (2) [b]oth direct and indirect effects." NRS § 237.090(1)(b). In relevant part, Merriam-Webster defines "estimate" as "a rough or approximate calculation."[9] A BIS must include then an approximation (even if nonspecific) of the adverse, beneficial, direct, and indirect economic effects of the proposed rules on regulated businesses. *See Oregon Cable*, 240 P.3d at 1127. The statute is silent as to what constitutes a proper estimate, but only a "significant underestimat[ion]" is actionable upon a petition for review to a county board of commissioners. NRS § 237.100(1)(b).

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[9] Merriam-Webster definition of "estimate," http://www.merriam webster.com/dictionary/estimate.

Dotty's contends that the BISs are "devoid of any real discussion of the [proposals'] economic effect on the tavern industry." [Dkt. # 38 at 13.] Dotty's argues that the BISs fail to consider or insufficiently consider (i) the number of taverns that will be forced to retrofit; (ii) the costs associated with remodeling to comply with the new requirements; (iii) the possible conflicts with the Americans with Disabilities Act and the Nevada Clean Indoor Air Act ("Nevada CIAA"); and (iv) the loss of customers who dislike in-bar slot machines. [*Id.*] Dotty's next asserts that the purported beneficial effects stated in the BISs – financial benefits to complying tavern owners and unrestricted gaming licensees resulting from less competition – are not "truly economically beneficial to the tavern industry" and thus cannot be considered beneficial. [*Id.*]

Dotty's further argues that the BISs do not include various indirect economic effects. The new requirements, Dotty's alleges, will make it more expensive to open a new tavern because fewer locations are available that can accommodate the 2,500-square foot interior "open space" requirement and the 2,000-foot separation between taverns. This, in turn, will negatively affect the local commercial real estate industry; several landlords so testified at the April 5, 2011 hearing. [*See* Dkt. # 38-11 at 42-46.] Finally, Dotty's argues that the BISs ignore the indirect economic effects on the County of lost tax revenue, lost jobs, broken contracts with vendors and suppliers, vacant commercial properties that will lead to

blight, and increased law enforcement costs. [Dkt. # 38 at 13-15.] As a result of the allegedly insufficient disclosure of economic effects, Dotty's contends the County Board was unable to make an informed decision. [Dkt. # 49 at 7.]

At root, this is a question about specificity. Dotty's calls for a more detailed analysis, while the County contends that the statute requires only an estimate of such effects, not a detailed breakdown. The court addresses each of Dotty's concerns while keeping in mind the ultimate goals of the BIS statute: to enable meaningful participation by affected businesses and informed governmental decision-making. *See San Lorenzo Valley*, 44 Cal. Rptr. 3d at 140; *Havasupai Tribe*, 752 F. Supp. at 1490; *Oregon Cable*, 240 P.3d at 1128.

Dotty's contention that the BIS should have provided the exact number of currently licensed taverns that will need retrofitting is unavailing because the County could not know precisely which taverns fell into that category. Dotty's did not provide that information, and it would not be reasonable to expect the County to individually survey each tavern. The BISs disclosed the number of licensees that could be affected. Moreover, the BISs disclosed that: (i) some taverns would need "costly remodeling;" (ii) the in-bar slot and "tavern restaurant" requirements would directly affect taverns' ability to respond to current and changing market needs; and (iii) new in-bar slot machines could cost approximately $15,000. This approximation, even if sparse in dollar amounts,

was sufficient to foster participation by affected businesses and informed decision-making by the County Board.

Likewise, Dotty's contention that the BISs did not sufficiently disclose the economic effects of the potential conflicts with the ADA and Nevada CIAA is unconvincing. The BISs disclose, as an indirect economic effect, that the in-bar slot machines may violate the ADA. While the BISs do not mention the Nevada CIAA, the comments submitted by Dotty's (which were attached to the BISs) indicate that the addition of a restaurant may force taverns to become non-smoking establishments under the Nevada CIAA. [Doc. 38-8 at 5.] Dotty's demands revenue-loss analysis, but the County was not in a position to determine how much revenue each tavern would lose upon conversion to a non-smoking facility.[10] Nor did Dotty's substantiate its assertion that the restaurant requirement would compel taverns to become non-smoking. The approximation of economic effects may omit indirect effects that are speculative and incapable of even rough quantification. *See Northcoast Envtl. Cntr. v. Glickman*, 136 F.3d 660, 668 (9th Cir. 1998). In any event, Dotty's comments about the Nevada CIAA were attached to the BISs, so the County

[10] Detailed information about the physical condition of specific taverns, the related retrofit costs, and the potential loss of customers are not available to the County absent an exhaustive and expensive tavern-by-tavern survey or the tavern owners providing the information themselves.

Board and the public were on notice of this potential issue.

Similarly, the BISs were not required to include the indirect effect of the loss of clientele that could result from in-bar slot machines. It would be extraordinarily difficult, if not impossible, for the County to approximate what this loss could be. The BISs' discussion that tavern owners "prefer to select machines based on the needs of their customers" instead of facing an in-bar slot requirement is sufficient to advise that some customers may not like the in-bar machines. [*E.g.*, Dkt. # 38-10 at 3.] Any more detail would have been speculative.

The BISs also sufficiently address Dotty's contentions that the new requirements will increase the cost of opening a new tavern and will have indirect effects on commercial real estate and on the County itself. The BISs acknowledge, as an indirect effect, that commercial real estate may suffer and that vacancies add to crime and to an overall reduction in the marketability of commercial property. [Dkt. # 38-10 at 15.] This is sufficient. Indeed, several landowners so testified at the County Board hearing, confirming that the Board was informed about this issue before adopting the final Ordinance. [Dkt. # 38-11 at 38, 62.] More importantly, the statute only requires the estimated economic effect on the "business which [the proposed rule] is to regulate." NRS § 237.090(1)(b) (2011). Because the Proposed Ordinances did not regulate commercial real estate businesses (such as

brokers or landlords), the BISs were not required to estimate such economic effects.

Dotty's final contention – that the listed beneficial effects were not actually beneficial to the tavern industry – also fails. NRS § 237.090(1)(b) does not require that the County estimate economic effects for an industry as a whole. Rather, it requires estimated effects for regulated businesses. Under "beneficial effects," the BISs stated that some (but not all) tavern owners would benefit financially if they comply with the new rules. [*E.g.*, Dkt. # 38-10 at 4.] The BISs also stated that some tavern owners would be hard pressed to stay open under the new regulations. [*Id.*] Whether the harm to some tavern owners outweighs the benefit to other tavern owners is a policy issue for the County Board, not this Court. The BISs sufficiently estimated the economic effects by identifying adverse and beneficial effects to different groups of tavern owners.

Finally, and perhaps most importantly, the estimated economic effects set forth in the BISs provided sufficient information for meaningful participation by affected businesses and informed governmental decision-making. The BISs addressed each adverse economic effect that Dotty's identified in its briefing (with the exception of the Nevada CIAA) at a sufficient level of specificity. And, as discussed above, Dotty's did not provide enough information to the County to enable a meaningful economic analysis of the Proposed Ordinance's potential indirect effect of

forcing taverns to become non-smoking establishments under the Nevada C1AA and the attendant economic consequences. It would be cost-prohibitive (if not impossible) to require the County to determine exactly how many taverns would face retrofit or related expenses and how much those changes might cost. Moreover, the entirety of Dotty's comments was incorporated into the BISs, so interested parties and the County Board were aware of the Nevada CIAA-related concerns before the April 5, 2011 meeting.

To the extent the BISs underestimated any particular economic effects, those underestimations were not significant. *See* NRS § 237.100(2)(b). Although the identified economic effects are not the same in each BIS (nor should they be because each Proposed Ordinance was different), the BISs read together paint a comprehensive picture of the estimated economic effects of the Proposed Ordinances. Accordingly, the County complied with NRS § 237.090(1)(b).

6. Impact Reduction – NRS § 237.090(1)(c)

BISs must include "[a] description of the methods that the governing body of the local government . . . considered to reduce the impact of the proposed rule on businesses and a statement regarding whether the governing body . . . actually used any of those methods." NRS § 237.090(1)(c). Dotty's argues that the BISs are "silent as to what methods were considered," and that the County's assertion it complied by circulating four versions of the proposed rule does not explain whether or to what extent the County actually

considered the various proposals. [Dkt. # 38 at 16.] The County responds that its consideration of four proposed rules was sufficient to comply with NRS § 237.090(1)(b).

> Each BIS contains this statement:
>
> > The following constitutes a description of the methods that the local government considered to reduce the impact of the proposed rule on business and statement whether any, and if so which, methods were used: . . . *Three additional proposed ordinances, which vary in compliance regulations and grandfathering provisions, have been made available for public comment concurrently with this proposed ordinance.*

[Dkt. # 38-10 at 3, 7, 11, 15 (emphasis in original).] This statement sufficiently describes the methods considered to reduce impacts. The County considered four alternate rules, each with varying restrictions (e.g., distance restrictions, number of bar-top machines, retroactivity) to address possible impacts. The language of NRS § 237.090(1)(c) – requiring a statement as to "whether the governing body . . . actually used any of those methods" – is not directly tailored to this situation, where more than one proposal is circulated and considered by the County Board. Nevertheless, the BISs satisfied the goal of the statute by informing affected business owners of the various proposals so they could determine the likely impact of each proposal, assess their particular positions, and participate in the process. *See Oregon*

Cable, 240 P.3d at 1128. Ultimately, it was up to the County Board to decide which method (or combination of methods) would be used by voting after consideration of public comments. The BISs satisfied NRS § 237.090(1)(c).

7. Estimated Cost of Enforcement NRS § 237.090(1)(d)

BISs must include "[t]he estimated cost to the local government for enforcement of the proposed rule." NRS § 237.090(1)(d). Dotty's argues that the BIS is inadequate because it does not account for law enforcement costs resulting from anticipated blight. The statute requires only an estimate of the costs to enforce the proposed rule, not the potential secondary costs to the local government that may indirectly flow from the proposed rule. The BISs satisfied NRS § 237.090(1)(d) by estimating there would be no additional enforcement costs beyond what the County already spent to enforce the then-existing scheme.

8. Explanation of Reasons for More Stringent Provisions – NRS § 237.090(1)(f)

"If the proposed rule includes provisions which duplicate or are more stringent than federal, state or local standards regulating the same activity, [the BIS must include] an explanation of why such duplicative or more stringent provisions are necessary." NRS § 237.090(1)(f). Addressing this requirement, the BISs state only that "[t]he proposed rule includes

provisions, which duplicate or are more stringent than federal, state or local standards regulating the same activity. The following explains *which* such duplicative or more stringent provisions are necessary. . . . The proposed rule is more stringent than Nevada Gaming Regulation 3.015." [Dkt. # 38-10 at 4 (emphasis added).] Dotty's contends that this failure to explain "why" (as opposed to "which") more stringent provisions are necessary is fatal. [Dkt. 38 at 16.] The County responds that the explanation for the need for more stringent regulation is found in the "beneficial impact" section of each BIS – specifically, that "all other gaming licensees will benefit from reductions in competition" and that "[c]omments included those in favor of limiting the amount of 'slot parlors' in Clark County." [Dkt. # 41 at 19.]

Part of the error may be the County's apparent misinterpretation of NRS § 237.090(1)(f). The "which" in the BISs should be "why" under NRS § 237.090(1)(f). Regardless, the BISs technically violated NRS § 237.090(1)(f) by failing to explain why the more stringent provisions are necessary. However, this technical violation is not fatal because the affected parties clearly understood the County's reasons for considering the more stringent Proposed Ordinances.

Testimony at the County Board hearing confirms that the reasons behind the proposed ordinances were well known ahead of time. Attorney Todd Bice (representing a supporter of the Proposed Ordinances) explained "the legal and factual predicate for why action is needed." [Dkt. # 38-11 at 12-15.] Concern

stemmed from the belief that various tavern licensees had exploited the then-current state and county rules to call themselves taverns, but that gaming was the primary source of revenue. [*Id.*] The Proposed Ordinance were designed to ensure that taverns operate as taverns (e.g., with kitchens, restaurants, and bars), in which gaming is incidental, not primary.

Attorney Christopher Kaempfer (representing Dotty's at the County Board hearing) confirmed that Dotty's was aware of the reasons for the Proposed Ordinances. He testified that "we were initially told that the purpose in bringing this Dotty's issue to the forefront was to stop the proliferation . . . of Dotty's. Your new ordinances do that." [Dkt. # 38-11 at 25.] On several instances, the County staff and some of the County Commissioners express concern over the "proliferation" of such establishments. [*E.g.*, Dkt. # 38-12 at 36.] Attorney Mark Ferrario (also representing Dotty's) testified that he researched the history of the Proposed Ordinances to determine how the process evolved up to the time of the County Board hearing. [Dkt. # 38-11 at 29.] Ferrario noted that in December 2011, then-County Manager Virginia Valentine posted a notice expressing concern that numerous establishments operating as taverns were conducting business where gaming was the primary, rather than incidental, source of income. [*Id.*] Ferrario also commented on the BISs' failure to comply with NRS § 237.090(1)(f): "What's missing from the impact statement is why do you need it, why is it necessary. So we have some *procedural flaws*

with the process." [*Id.* at 37-38 (emphasis added).] However, none of Dotty's representatives (and none of the representatives of other affected business owners) complained that they did not understand why the more stringent requirements were necessary.

Thus, the County's violation of NRS § 237.090(1)(f) was not prejudicial to the goals of the BIS statute: "to provide a streamlined and efficient way for affected businesses to have a voice in the ordinance-adoption process and for busy board members to fairly evaluate the anticipated economic impact their actions may have on local businesses so they can make an informed decision." [Dkt. # 38 at 10 (emphasis deleted); *Havasupai Tribe v. U.S.*, 752 F. Supp. 1471 at 1490; *San Lorenzo Valley Comm'y Advocates*, 44 Cal. Rptr. 3d at 140; *Oregon Cable*, 240 P.3d at 1128.] The evidence clearly indicates that the affected businesses and public were well aware of the reasons underlying the more stringent proposed regulations. Thus, under the facts of this case, the violation of NRS § 237.090(1)(f) does not render the Ordinance invalid.

II. Limiting Competition – NRS § 244.187

Finally, Dotty's contends that the Ordinance runs afoul of NRS § 244.187 because that statute precludes the County from limiting competition in the gaming industry. That statute provides:

> A board of county commissioners may, to provide adequate, economical and efficient services to the inhabitants of the county and

> to promote the general welfare of those inhabitants, displace or limit competition in any of the following areas:
>
> [1.] Ambulance service.
>
> [2.] Taxicabs and other public transportation. . . .
>
> [3.] Collection and disposal of garbage and other waste.
>
> [4.] Operations at an airport. . . .
>
> [5.] Water and sewage treatment. . . .
>
> [6.] Concession on, over, or under property owned or leased by the county.
>
> [7.] Operation of landfills.
>
> [8.] . . . construction and maintenance of benches and shelters for passengers of public mass transportation.

NRS § 244.187.

Dotty's contends that because gaming is not listed in this statute, the County cannot displace or limit gaming competition. [Dkt. # 38 at 18.] Dotty's further contends that one intended effect of the Ordinance is to limit competition in gaming. This is a reasonable conclusion in light of the BISs' listing of limited competition as a "beneficial effect" of the Proposed Ordinances and the County's admission that one of the several rationales for the Proposed Ordinances was to limit competition (albeit not for

competition's sake alone). [Dkt. # 42 at 22-23; Dkt. # 57 at 9-10.]

The County responds that Dotty's misinterprets NRS § 244.187, and that the County has "almost limitless" power to regulate liquor and gaming, as this Court has previously held. [Dkt. # 41 at 21-23.] The County argues that the statute cannot be read to limit its police powers in areas outside of the enumerated list, and that the Ordinance's true purpose is to ensure that gaming in taverns is merely incidental to the tavern business.

A. Legal Standard

"If the ordinance was (1) within the scope of authority granted the county by the state government, (2) aimed at serving some legitimate public purpose[,] and (3) rationally related to that purpose, this court will not second-guess the county government." *Individuals for Responsible Gov't v. Washoe Cnty.*, 110 F.3d 699, 704 (9th Cir. 1997) (internal quotation marks and citation omitted). Dotty's challenge lies in the first part of this test: whether NRS § 244.187 excludes from counties' scope of authority the ability to limit competition in gaming.

Local governments in Nevada, including counties, have broad power to regulate gaming. "The power to license, regulate, and prohibit gaming is within the discretion of the municipal agency empowered to govern gambling and such agency has a wide margin of discretion." *Clark Cnty. Liquor & Gaming Licensing*

Bd. v. Simon & Tucker, Inc., 787 P.2d 782, 783 (Nev. 1990). In that case, the Nevada Supreme Court (examining whether Clark County had exceeded its power by denying a gaming license) confirmed that counties have the same wide discretion to regulate gaming as a "municipal agency." *See id.*

The power to license, regulate, and prohibit gaming is inherently anti-competitive, but that does not necessarily render illegal the exercise of that power.

> Although the requirement of any license or the enforcement of any regulation on business is, to some extent, necessarily in restraint of trade, not all such restraint is unlawful. In general, the state may restrain trade through licensing regulations under the police power, if the restraint is reasonable and is a necessary result of the enforcement of valid regulatory measures.

51 AM. JUR. 2d *Licenses and Permits* § 19 (1970). In the absence of any other law then, counties may legally regulate gaming even if such regulation has an anti-competitive effect so long as the rational basis test is satisfied. *See Washoe Cnty.*, 110 F.3d at 704.

Dotty's argues that the list of businesses in NRS § 244.187 does not include gaming; therefore, the County cannot limit gaming competition. Dotty's argument rests on the presumption that the inclusion of one thing implies the exclusion of all others – the canon of statutory interpretation known as *expressio*

unius est exclusio alterius. State v. Javier C., 289 P.3d 1194, 1197 (Nev. 2012). *Expressio unius* is not absolute, however. It is only "a presumption that when a statute designates certain persons, things or manners of operation, all omissions should be understood as exclusions." *Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 885 (9th Cir. 2005). It is a "rule of interpretation, not a rule of law. The maxim is a product of logic and common sense, properly applied only when it makes sense as a matter of legislative purpose." *U.S. v. Bert*, 292 F.3d 648, 652 n.12 (9th Cir. 2002) (internal quotation marks and citation omitted). The Supreme Court has used more forceful language:

> We do not read the enumeration of one case to exclude another unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it. . . . As we have held repeatedly, the canon *expressio unius est exclusio alterius* does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an associated group or series, justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence. . . .

Barnhart v. Peabody Coal Co., 537 U.S. 149, 168-69 (2003) (internal quotation marks and citations omitted). For Dotty's to prevail then, there must be some indication that the Legislature considered including gaming in NRS § 244.187 and chose to omit it. *See Stockmeier v. Psychological Review Bd.*, 135 P.3d 807,

811 (Nev. 2006) (the ultimate purpose of statutory construction is to discern legislative intent).

B. Application

The statute's legislative history and counties' broad power to regulate gaming in Nevada indicate that the Legislature's exclusion of gaming from NRS § 244.187 was not intentional. NRS § 244.187 was originally enacted in 1960. Its initial scope was very limited as it authorized counties to grant exclusive franchises only for garbage services. 1960 Nev. Stat. 433. In 1983, the Assembly Committee on Legislative Functions commissioned a study on the effect of federal antitrust laws on the licensing of businesses by local government. Assembly Comm. Res. 18, 62d Leg. Sess. (Apr. 19, 1983). The study was ordered in response to a decision by the U.S. Supreme Court that local government entities were not immune from federal antitrust suits solely on the basis of being a political subdivision of the state. *Cmty. Commc'ns Co., Inc. v. City of Boulder*, 455 U.S. 40 (1982). The Supreme Court held that local governments enjoyed the state's sovereign immunity only if the state authorized the anti-competitive practice at issue. *Id.* at 4950.

The 1983 Nevada study interpreted *City of Boulder* to mean that a state may grant immunity to local governments only if the state adopts a statute which clearly articulates and affirmatively expresses its intent to displace competition with regulation, and the state is involved in supervising the anticompetitive

program. LEGISLATIVE COMM'N OF THE LEGISLATIVE COUNSEL BUREAU, EFFECT OF FEDERAL ANTITRUST LAWS ON THE LICENSING OF BUSINESSES BY LOCAL GOVERNMENTS, Bulletin No. 85-19 at 3 (Oct. 1984). Prior to publishing the final report, questionnaires were sent to all city managers in Nevada to determine which activities of local government may be subject to scrutiny by the courts for violating federal antitrust laws. *See id.* at 8. "The areas of *public services* in which the local governments were authorized to displace competition . . . were then chosen from the responses to the questionnaire." *Id.* at 9 (emphasis added). The focus was on public services rather than on the entire business community.

In January 1985, Assembly Bill 10 was introduced: "[a] Act relating to local governments; authorizing those governments to replace economic competition in certain areas of *public services* with regulated anticompetitive services; and providing other matters properly relating thereto." Journal of the Assembly at 30 (Jan. 24, 1985) (emphasis added). In June 1985, the bill was enacted into law. Among other things, it added the current list of public services for which a county may displace or limit competition. 1985 Nev. Stat. 1240-41.

There is no evidence that the Legislature considered including gaming in NRS § 244.187 and then chose to omit it. The questionnaires sent as part of the Assembly Committee's study did not include gaming, and the responses to the questionnaires did not add gaming as an area of antitrust concern. The

business areas listed in NRS § 244.187 are members of "an associated group or series," that is, public services. *Barnhart*, 537 U.S. at 168. Because gaming is not a public service and apparently was not contemplated by the Legislature in relation to NRS § 244.187, the inference that it was not included "by deliberate choice" is not justified. *Id.*

The legislative intent of NRS § 244.187 was to immunize counties against federal antitrust lawsuits in certain areas of public service – an expansion of power or a protection of power that already existed – rather than to limit counties' power in areas not listed in the statute. Therefore, the legal maxim *expressio unius* is inapplicable here. NRS § 244.187 does not prohibit counties from displacing or limiting competition in gaming.

Moreover, the contrary holding would lead to an absurd and unreasonable result. If NRS § 244.187 operated as Dotty's contends, counties would have no power to displace or limit competition in any area not listed in this statute. That simply cannot be. Because regulation is inherently anti-competitive (in varying degrees), Dotty's reading of the statute would gut counties' regulatory power in spite of the various organic acts that grant such power to them. *See, e.g.*, NRS §§ 244.335 (county business licensing in unincorporated areas), 244.345 (county gaming licensing in unincorporated areas), 244.350 (county liquor regulation), 463.180 (county gaming licenses), 463.230

(same).[11] Statutes should not be read in a manner that produces an absurd or unreasonable result. *V & S Ry., LLC v. White Pine Cnty.*, 211 P.3d 879, 882 (Nev. 2009).

Because the County's scope of authority includes limiting gaming competition, the final issue is whether the Ordinance is rationally related to a legitimate government purpose. *Washoe Cnty.*, 110 F.3d at 704. "The 'rational basis' test generally presumes that the law is constitutional, and thus, the courts show

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[11] While the Nevada Supreme Court has not spoken on whether counties may displace or limit competition in areas not listed in NRS § 244.187, the Nevada Attorney General has issued one opinion on point. 1993 Nev. Op. Atty. Gen. 14 (1993). The Attorney General opined that a Clark County ordinance requiring all locksmiths to have a physical location of a certain size (rather than operate exclusively as mobile businesses) did not violate NRS § 244.187. *Id.* The Attorney General first noted that the state has delegated the power to regulate locksmiths to counties, and then reasoned that because the ordinance was enacted in order to promote the public welfare, it was entitled to a presumption of validity. *Id.* (citing *Koscot Interplanetary, Inc. v. Draney*, 530 P.2d 108 (Nev. 1974)). The Attorney General determined that the ordinance was a reasonable means of controlling trade, in part because it did not amount to the grant of an exclusive franchise. *Id.* The Attorney General concluded that the Ordinance's requirements constituted a rational means to protect the public. *Id* The present matter is analogous. The Ordinance does not grant an exclusive franchise. Moreover, locksmithing, like gaming, is not listed in NRS § 244.187. The Attorney General did not interpret NRS § 244.187 to diminish counties' power to regulate unlisted areas in a manner that restrains trade. Although not binding on this Court, the opinion of Nevada's highest legal officer has persuasive value.

deference to the legislation." *Tarango v. State Indus. Ins. Sys.*, 25 P.3d 175, 182 (Nev. 2001) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)).

Dotty's argues that limiting competition was the County's sole motivation for the Ordinance. While limiting competition was one of the County's goals – the County admitted that more stringent regulations were necessary, in part, to limit competition – the County cites additional reasons for the Ordinance: limiting "slot parlors," ensuring that businesses whose primary focus is gaming do not face direct competitors that pay less taxes, and preserving jobs in Clark County. [Dkt. # 41 at 22-23.] Preserving jobs and preventing restricted licensees from unfairly competing with unrestricted licensees are both legitimate government purposes. The County has wide discretion to determine which means to employ in order to meet these objectives. The Ordinance's new requirements are rationally related to the County's purposes in enacting the Ordinance. Accordingly, the Ordinance does not violate NRS § 244.187 and is within the County's scope of authority.

III. Conclusion

The Ordinance complies with almost all of the relevant statutes. The only violation (of NRS § 237.090(1)(f)) did not prejudice the public or any of the affected businesses. The policy goals of the BIS statues were fulfilled in that the procedures utilized to create and adopt the Ordinance enabled meaningful

participation by affected businesses such as Plaintiffs, and informed decision-making by the County Board. Therefore, Dotty's' challenges to the Ordinance fail.

Based on the foregoing, the Court GRANTS the County's motion for summary judgment [Dkt. # 42], DENIES Dotty's motion for summary judgment [Dkt. #38], and DENIES Jackpot Joanie's motion for summary judgment [Dkt. # 39]. The Clerk shall enter judgment accordingly.

DATED THIS 4th day of October, 2013.

/s/ [Signature]
ANDREW P. GORDON
UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

NEVADA RESTAURANT SERVICES, INC. D/B/A DOTTY'S, *et al.*, Plaintiffs, v. CLARK COUNTY, *et al.*, Defendants.	Case No. 2:11-CV-00795-KJD-PAL Consolidated with 2:11-CV-00824-KJD-PAL **ORDER** (Filed Sep. 21, 2012)

Before the Court is the Motion for Partial Judgment on the Pleadings (#19) of Defendant Clark County and the Board of County Commissioners of Clark County (collectively "Defendants" "the County" or "the Board"). Plaintiff Nevada Restaurant Services, Inc. d/b/a Dotty's ("Dotty's") filed an opposition (#22) and the County filed a reply (#28).

Also before the Court is the County's Motion to Dismiss (#10). Plaintiff Jackpot Joanies FP, LLC filed an opposition (#23) and the County filed a reply (#29).

I. Background

The Plaintiffs in this consolidated proceeding own gaming and drinking establishments in Clark County that operate under "Class A" gaming licenses. These licenses "permit the operation of a total of fifteen or fewer slot machines *incidental* to the primary

business at the establishment wherein the slot machines are to be located." Clark County Code (the "Code") § 8.04.040(B)(3) (emphasis added). Plaintiffs operate their businesses in neighborhood locations such as strip malls, and feature a "living room" atmosphere rather than a traditional tavern setting. Unlike many traditional taverns, Plaintiffs' businesses do not have bars or structurally embedded gaming machines. Instead, alcohol is served directly to customers or ordered from behind a low counter, and the slots are free-standing and arranged in an open lounge environment. This business model generally requires many fewer employees than the more traditional tavern model. Plaintiffs' businesses have been expanding and they now operate in dozens of locations.

Because Plaintiffs operate with limited gaming licenses which are intended only to provide incidental gaming, their business model became controversial. The Board of County Commissioners (the "Board") received complaints that gaming was a substantial portion of Plaintiffs' business and that Plaintiffs' businesses were operating more like slot arcades than traditional taverns. According to some critics, slot arcades do not provide the employment and other benefits and services frequently required of gaming operators with unrestricted licenses. Some members of the Board believed that Plaintiffs were misusing their licenses or taking advantage of a loophole in the restricted license or at least had potential to do so.

On December 21, 2010, the County approved a 70-day moratorium on new tavern liquor licenses in Clark County while the issue was addressed. On February 11, 2011, the County noticed to the public three alternative amendments to the County's tavern laws which were designed to address the questions related to the controversial use of restricted gaming licenses in taverns. Commissioner Sisolak, who had prepared one of the proposed amendments governing taverns with Class A gaming licenses, modified his version and made it available to the public on February 14, 2011. A fourth version proposed by Commissioner Giunchigliani was made public on February 15, and revised on March 1. On February 25, 2011, the Clark County Department of Business License distributed a document in a grid format outlining the various versions of the ordinance amendments and the key points of each.

In response to concerns raised by Plaintiffs, the County released a new version of the amended ordinance outlining the proposed changes on March 4, 2011, and the Department of Business License issued a list of answers to "frequently asked questions" on March 21, 2011. The County allowed public comments until March 28, 2011 and held a public hearing on April 5, 2011.

At the hearing many members of the community spoke for and against the proposed changes, including tavern owners, neighborhood associations, and private individuals. Plaintiffs had the opportunity to be heard and exercised that right by giving lengthy

statements. Plaintiffs were represented by counsel at the hearing and submitted both written and oral objections to the amendments.

Following the public comments, the members of the Board held a public debate on the proposed amendments in order to reach a satisfactory compromise. The compromise version of the amendment passed by a vote of 5-2 and required, *inter alia*, that taverns operating under Class A limited gaming licenses are required to have a bar and at least eight slot machines embedded in the bar, and that taverns that were licensed prior to April 22, 1990 were exempted from the new requirement. The County drafted an ordinance reflecting the decision made by the Board and this version (the "Ordinance") went into effect on April 19, 2011.

Plaintiffs each filed suit separately and consolidated their actions on October 20, 2011 (2:11-cv-00824-KJD-PAL Dkt. #12). The County moved for dismissal of Plaintiffs' causes of action for violation of the Procedural Due Process Clause, Substantive Due Process Clause, Equal Protection Clause and 42 U.S.C. § 1983.

II. Discussion

A. Motion for Judgment on the Pleadings

Fed. R. Civ. P. 12(c) is "functionally identical" to Rule 12(b)(6), and the "same standard of review" applies to a motion brought under either rule. *Cafasso v.*

General Dynamics C4 Systems, *Inc.*, 637 F.3d 1047, 1054 n.4 (9th Cir. 2011). Judgment on the pleadings or dismissal under Rule 12 is appropriate when, even if all material facts in the pleading under attack are true, the moving party is entitled to judgment as a matter of law. *Hal Roach Studios, Inc. v. Ricard Feiner & Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir.1989).

To survive motions of this type, a party must show more than "labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). Instead, the "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* Plausibility, in the context of a motion under Rule 12, means that the plaintiff has pleaded facts which allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The *Iqbal* evaluation illustrates a two-prong analysis. First, the Court identifies "the allegations in the complaint that are not entitled to the assumption of truth," that is, those allegations which are legal conclusions, bare assertions, or merely conclusory. *Id.* at 1949-51. Second, the Court considers the remaining factual allegations "to determine if they plausibly suggest an entitlement to relief." *Id.* at 1951. If the allegations state plausible claims for relief, such claims survive. *Id.* at 1950.

B. Procedural Due Process

Plaintiffs seek to recover for violations of the Procedural Due Process Clause of the Fourteenth Amendment.[1] To analyze procedural due process claims, courts conduct a two-step inquiry to determine 1) "whether there exists a liberty or property interest which has been interfered with by the State" and 2) "whether the procedures attendant upon that deprivation were constitutionally sufficient." *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 460 (1989) (citations omitted).

1. Property Interest

A threshold requirement to a procedural due process claim is the showing of a fundamental liberty or property interest protected by the Constitution. *Enquist v. Oregon Department of Agriculture*, 478 F.3d 985, 997 (9th Cir.2007). This matter deals

[1] In their Complaints, Plaintiffs pled their constitutional claims as individual causes of action and then realleged the same as "Violation of 42 U.S.C. § 1983." § 1983, also known as the Civil Rights Act of 1871, provides a private cause of action against state actors, including municipalities, for violation of rights protected by the United States Constitution. *Monelt v. Dept. of Social Services of New York*, 436 U.S. 658, 701 (1978). Each of Plaintiffs' federal constitutional claims is made pursuant to § 1983. However, "that section is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes." *Baker v. McCollan*, 443 U.S. 137, 145 (1979). Accordingly, the sixth cause of action is a nullity.

with a property interest. Property interests are not created by the Constitution but "by existing rules or understandings that stem from an independent source such as state law rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Thornton v. City of St. Helens*, 425 F.3d 1158, 1164 (9th Cir. 2005). "'To have a property interest in a benefit, a person clearly must have more than an abstract need or desire' and 'more than a unilateral expectation of it. He [or she] must, instead, have a legitimate claim of entitlement to it.'" *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005) (quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)). The Supreme Court has held that "a benefit is not a protected entitlement if government officials may grant or deny it in their discretion" and that a property interest arises only when conferral of the benefit is truly mandatory. *Id.* at 545 U.S. 756; *see also Foss v. National Marine Fisheries Service*, 161 F.3d 584.588 (9th Cir. 1998) (property interest exists where "regulations establishing entitlement to the benefit are . . . mandatory in nature."). The expectation of entitlement is determined largely by the language of the law governing the benefit. *Wedges/Ledges of Cal. v. City of Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994).

The County's Code of Ordinances, the relevant law governing gaining licenses, states that "the operation [of a] gambling facility, when authorized by such license, is a privileged business subject to regulations." Code § 8.04.020(A). The Code also states:

> These regulations define business license department procedure and regulate gaming operations within the jurisdiction of the board, but do not in any degree limit the general power of the board to grant or deny applications for licenses and to impose conditions, limitations and restrictions upon a license or to restrict, revoke or suspend a license for cause after hearing, or to immediately suspend or limit a license in an emergency. These regulations are to be liberally interpreted so as to grant the board broad final discretion in all licensing matters.

§ 8.04.020(C).

Plaintiffs argue that they have a property interest in their existing licenses,[2] and that since they have already been granted the licenses, the imposition of additional conditions prior to renewal of the licenses amounts to a "back-door revocation of [Plaintiffs'] existing, duly-granted licenses."

The Code plainly states that the Board has general power, without limits, to "impose conditions" on

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[2] Plaintiffs assert that this case is "not about the denial of an application for a license." (Oppo. at 10.) To the extent Plaintiffs assert that the 70-day moratorium on new licenses constituted a deprivation of due process, they have failed to state a claim. Plaintiffs have failed to cite authority indicating a property interest in a pending license. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, (2002) (holding that moratoria pending land-use planning decisions do not constitute takings).

the license without any hearing. Code § 8.04.020(C). Since the Board has discretion to impose conditions, a licensee does not have an expectation of entitlement to a license free from the imposition of new conditions. Conversely, the Code's hearing and cause requirements shows that restriction, suspension, or revocation of existing licenses are not discretionary. *See Burgess v. Storey County Bd. of Com'rs*, 116 Nev. 121, 992 P.2d 856 (Nev. 2000) ("Because the revocation of a brothel license in Storey County requires a hearing and a showing of good cause, Burgess had a reasonable expectation of entitlement to his brothel license.") In other words, Plaintiffs have a legitimate claim of entitlement to their licenses *only* when the County acts to "restrict, revoke or suspend" their gaming licenses. No entitlement is affected when the County imposes reasonable conditions in order to renew a license because renewal free from new conditions is not mandatory.

Plaintiffs conclusorily allege that the new conditions are a "back-door revocation." If the Court accepted Plaintiffs' argument then the Board's discretion to impose conditions would be eviscerated, since any unhappy licensee could make the same argument. The Code gives the Board discretionary authority to impose conditions. Plaintiffs have not pled facts showing that conferral of a renewed license free of new conditions is mandatory and so do not have a property interest in their licenses that is affected by the Board's action here. Accordingly, Plaintiffs have

failed to plead a plausible claim under the Procedural Due Process Clause.

2. Sufficiency of Procedure

Although Plaintiffs have failed to show a property interest, the Court will also examine their claim that the Procedural Due Process Clause was violated by deficient procedure. Procedural due process requires that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333. Due process is a flexible concept that "calls for such procedural protections as the particular situation demands." *Id.* at 334, (1976) (citing *Morissey v. Brewer*, 408 U.S. 471, 481 (1972)).

The Ninth Circuit has set forth a "rule of thumb" that where the "action complained of is legislative in nature, due process is satisfied when the legislative body performs its responsibilities in the normal manner prescribed by law." *Halverson v. Skagit County*, 42 F.3d 1257, 1260 (9th Cir.1995) (internal quotation marks omitted). However, the Ninth Circuit has also held that "[i]t is axiomatic . . . that not every violation of state law amounts to an infringement of constitutional rights." *Samson v. City of Bainbridge Island*, 683 F.3d 1051, 2012 WL 2161371 (9th Cir. 2012).

(citations omitted). A plaintiff does not have a federal due process claim where a local agency enacts a policy without following state law procedural requirements unless the procedure is also required by the federal constitution. *Jacobs v. Clark County School Dist.*, 526 F.3d 419, 441 (9th Cir. 2008) (holding that failure to consult parents before instituting school policy may have violated state law, but was not a Due Process Clause violation); *see also Pro-Eco, Inc. v. Bd. of Comm'rs of Jay County, Ind.*, 57 F.3d 505, 514 (7th Cir.1995) (alleged violation of state procedural statute relating to passage of ordinance does not violate the Constitution).

It is undisputed that Plaintiffs received notice of the key provisions of draft proposals that were being considered, received notice of the official hearing, had an opportunity to participate in preparation of the business impact statement, and appeared with their counsel and participated in the hearing on April 5, 2011. Notwithstanding these facts, Plaintiffs contend that the process they were afforded prior to passage of the Ordinance was not just insufficient, but "fundamentally unfair."[3] Plaintiffs base this contention on

[3] Dotty's pleadings contain several exaggerations and instances of charged language, including incessantly referring to the Ordinance as the "anti-Dotty's law" or "anti-Dotty's ordinance" and describing its passage as part of an "assault" and an "anti-Dotty's crusade." Further, Dotty's opposition disrespectfully refers to one of opposing counsel's arguments as "utter nonsense." The Court cautions Dotty's counsel that overly dramatic language of this type is unhelpful to the Court in reaching a just result.

an alleged failure to comply with various provisions of state law including NRS § 237.080 which sets forth specific requirements for preparation of a business impact statement, and because the final version of the ordinance debated and passed at the April 5, 2011 meeting was not identical to the proposed amendments which were circulated prior to the meeting.

The facts as pled by Plaintiffs show, at most, minor and technical violations of state procedural statutes and do not show that any of the procedures alleged to have been violated were also constitutionally required. *Jacobs*, 526 F.3d at 441. Plaintiffs' other contention – that the notice given was defective because the proposed amendment debated at the meeting and eventually passed was not identical to those circulated prior to the meeting – seeks to impose an impractically high standard of notice on legislative bodies. Plaintiffs cite no authority suggesting that notice of every possible permutation of an ordinance is constitutionally required to satisfy due process. In light of Plaintiffs' acknowledgment that the County provided them with notice of key provisions, versions of the proposed amendments, and a list of frequently asked questions, Plaintiffs fail to plead facts showing a plausible constitutional violation. Plaintiffs were given appropriate notice and a meaningful opportunity to be heard. The situation presented here did not require more process.[4] Accordingly, Plaintiffs' claim

[4] Even if the imposition of the new conditions affected a property interest, in situations like this, where the private interest is

(Continued on following page)

that the process was constitutionally insufficient also fails.

C. Substantive Due Process

The constitutional guarantee of substantive due process prevents the government from engaging in conduct that "shocks the conscience" or interferes with rights "implicit in the concept of ordered liberty." *United States v. Salerno*, 481 U.S. 739, 742 (1987) (internal citations omitted). Substantive due process provides no basis for overturning validly enacted laws unless they are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Spoklie v. Montana*, 411 F.3d 1051 (9th Cir. 2005); *see also Richardson v. City and County of Honolulu*, 124 F.3d 1150, 1162 (9th Cir. 1997). Whether the Ordinance is the only or best approach is irrelevant. Courts will not act as a "super-legislative" body to question the wisdom of otherwise constitutional acts by the Board. *Autotronic Systems, Inc. v. City of Coeur D'Alene*, 527 F.2d 106, 108 (9th Cir. 1975).

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purely financial, there is an entitlement to less procedure. *See Brewster v. Board of Educ. of Lynwood Unified School Dist.*, 149 F.3d 971, 986 (9th Cir. 1998) (employee threatened with reduction in pay was entitled to less procedure than employee threatened with termination).

1. The Law is Related to Public Welfare

Plaintiffs allege no facts that show the County's actions were irrational or that [sic] County could have had no legitimate reason for its decision. Plaintiffs argue that the "only one real purpose" of the law is to move their customers to competitors. In response, the County states that "Clark County determined that tavern businesses, that are not full-fledged casinos, pose a detriment to the health, safety and welfare of the community when the gaming aspect of the business is paramount to selling alcohol."

The County has a legitimate interest in promulgating ordinances that facilitate the proper use of gaming licenses. Regulations aimed at preventing misuse of restricted licenses and closing loopholes in licenses that provide only for "incidental" gaming are well within the County's purview. The County also has an interest in requiring that businesses with the privilege of holding a gaming license provide employment, services, and amenities to the community. Further, alcohol and gambling have significant public health and welfare implications, and the County has a legitimate interest in ensuring that both activities are conducted in a sustainable and safe manner. The Court will not second guess the County's determination that taverns operating under limited gaming licenses should comply with certain physical requirements, including having eight bar-top gaming devices, to enhance public welfare. Accordingly, Plaintiffs' substantive due process claim fails.

2. Retroactive Application is Appropriate

Plaintiffs also argue that the law violates due process because it is retroactive. The Constitution does not prohibit retroactive legislation, and retroactive laws, particularly in an economic context, are routinely sustained by the Courts. *See Licari v. C.I.R.*, 946 F.2d 690, 693 (9th Cir. 1991). Absent violation of a specific constitutional provision, courts will up hold [sic] "the retroactive aspects of economic legislation, as well as the prospective aspects" if they meet the test of due process. *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992) (citations omitted). Therefore, retroactive legislation does not violate substantive due process, "[p]rovided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means. . . ." *Bowers v. Whitman*, 671 F.3d 905, 916-917 (9th Cir. 2012); *see also Gadda v. State Bar of Cal.*, 511 F.3d 933, 938 (9th Cir. 2007) (retrospective economic legislation need only survive rational basis review in order to pass constitutional muster). For example, in *Hotel & Motel Ass'n. of Oakland v. City of Oakland*, a new city ordinance reclassified certain existing hotels operating under a "non-conforming use" classification in a way that required them to comply with certain maintenance, habitability, security, and record-keeping standards. The Ninth Circuit held that the reclassification did not violate the substantive due process rights of existing businesses even though "continued operation is conditioned on a business's compliance with the new regulations" since the new

regulations were related to a legitimate government interest. 344 F.3d 959, 968 (9th Cir. 2003). There is no due process violation where "it is at least fairly debatable that the [governing body's] conduct is rationally related to a legitimate governmental interest." *Halverson v. Skagit County*, 42 F.3d 1257, 1262 (9th Cir. 1994).

As set forth above, the Ordinance is rationally related to the legitimate government purpose of ensuring proper use of Plaintiffs' licenses, which provide for "incidental" gaming only. Although continued operation of Plaintiffs' businesses is conditioned on compliance with the new regulations, the retroactive aspect of the law is rationally related to the County's legitimate interest in enforcing the long-established restrictions on gaming licences [sic]. Plaintiffs do not offer anything to show that the County lacked a rational basis for enacted [sic] the retroactive provision of the law, and according [sic] the Court "may not question its judgment." *Spoklie* 411 F.3d at 1059. Accordingly, the Ordinance's retroactive application does not violate substantive due process.

3. Additional Authority Under the Twenty-first Amendment

Under the Twenty-first Amendment, governments have authority in relation to drinking establishments that is beyond the general welfare power because states have the power to prohibit the sale of alcohol. This broad authority empowers local governments to "impose an almost limitless variety of restrictions" on

these establishments. *Walker v. City of Kansas City, Mo.*, 911 F.2d 80, 91 (8th Cir. 1990) (citing *California v. LaRue*, 409 U.S. 109, 111-12 (1972)). Similarly, governments have expansive authority in relation to gambling because it implicates no constitutionally protected right and is a "vice" activity that can be "banned altogether." *United States v. Edge Broadcasting* Co., 509 U.S. 418 (1993).

Plaintiffs' argument that the Ordinance violates substantive due process carries little weight since Plaintiffs' businesses provide both alcohol and gambling. These activities are subject to "almost limitless" restriction by the County. Plaintiffs provide no authority suggesting that the County exceeded its sweeping power to regulate alcohol and gaming when it passed the Ordinance. Further, Plaintiffs have provided nothing to show that the "almost limitless" authority cannot be used to pass reasonable retroactive legislation. Accordingly, Plaintiffs do not state a plausible claim for violation of their substantive due process rights.

D. Vagueness

A statute may violate the Due Process Clause if it is impermissibly vague. A facial vagueness challenge outside the context of the First Amendment "present[s] a hurdle that is difficult for the [plaintiff] to scale." *Hotel & Motel Ass'n of Oakland v. City of Oakland*, 344 F.3d 959, 971 (9th Cir.2003) "[A] party challenging the facial validity of an ordinance on

vagueness grounds outside the domain of the First Amendment must demonstrate that 'the enactment is impermissibly vague in all of its applications.'" *Id.* (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982)). A statute can be impermissibly vague for either of two independent reasons: (1) "it fails to provide persons of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits," or (2) "it authorizes and encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000).

Plaintiffs argue that the Ordinance is impermissibly vague for two reasons: (1) because it is unclear whether a tavern is required to have a restaurant, and (2) because it is unclear whether a tavern is required to have a bar. Plaintiffs have failed to plead facts showing that a person of reasonable intelligence would misunderstand the requirements of the Ordinance. The plain language of the statute draws a distinction between a tavern, where a bar and a restaurant are permissive, and a "tavern making an application for a Class A Slot Machine License," where they are not. Plaintiffs' claim of confusion is not plausible since the Ordinance unambiguously states that only taverns that apply to be operated in connection with the Class A gaming license are required to have a bar and restaurant. Plaintiffs have failed to plausibly plead vagueness and accordingly, the vagueness challenge fails.

E. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Equal Protection Clause requires the government to treat all similarly situated persons alike. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). A municipal law does not violate the Equal Protection Clause, "[i]f the ordinance does not concern a suspect or semi-suspect class or a fundamental right, we apply rational basis review and simply ask whether the ordinance is rationally-related to a legitimate governmental interest." *Honolulu Weekly, Inc. v. Harris*, 298 F .3d 1037, 1047 (9th Cir.2002) (internal quotation marks and citation omitted). Disparate government treatment will survive rational basis scrutiny "as long as it bears a rational relation to a legitimate state interest." *Patel v. Penman*, 103 F.3d 868, 875 (9th Cir.1996). In order to state a claim for an equal protection violation, a plaintiff must plead facts that, if true, would show that the governing body acted irrationally and in a manner "unrelated to the achievement of any combination of legitimate purposes." *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

The parties agree that Plaintiffs are not part of a protected class. Plaintiffs complain that the Ordinance violates the equal protection clause by exempting taverns licensed prior to December 22, 1990 from the new requirements. The County argues, based transcripts attached to Plaintiffs' Complaint, that this

provision was included after public debate in order to prevent hardship to long-established businesses and out of concern that older taverns might not have the necessary physical space to make the needed changes.

Plaintiffs claim that the County's justification does not make sense because older businesses have had longer to repay capital costs and that, if anything, new taverns should be exempted because a 20-year old tavern "likely needs to update and modernize its facilities and equipment anyway." (Dkt. #22 at 28.) By advancing this speculative argument, Plaintiffs actually illustrate how the Ordinance is related to the legitimate government interest of mitigating the impacts of new regulation on businesses based on how long they have been operating. It is also related to the legitimate government interests discussed *supra*, especially facilitating proper use of restricted gaming licences [sic]. While Plaintiffs disagree with the determination made by the County about how to advance this interest and make conclusory allegations about an improper motive,[5] they fail to plead facts showing that the County's actions were unrelated to a

[5] Plaintiffs cite *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 944 (9th Cir.2004) in support of their argument that their allegations of an improper motive are sufficient to allow the equal protection claim to proceed to trial. However, *Squaw Valley* was a so-called "class of one" case where the government action was targeted at a specific landowner and where there was selective enforcement. In this case, Plaintiffs are not a "class of one" and the Ordinance has general application.

legitimate government interest and irrational. Similar grandfather provisions have survived rational basis scrutiny. *See*, *e.g. City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (upholding ban on all street vendors except those who had operated in city for more than 20 years in order to preserve character of neighborhood). Accordingly, Plaintiffs have not pled facts sufficient to state a claim for an equal protection violation.

F. Cause of Action Under Nevada Constitution

Plaintiffs pled their due process and equal protection claims under both federal and state law. These rights under the Nevada Constitution are identical to those under federal law. Since the Court has dismissed the equal protection and due process claims under federal law, they are similarity dismissed under the Nevada Constitution.

III. Leave to Amend

Plaintiffs have requested leave to amend in the event that the Court grants the Motion for Judgment on the Pleadings. Courts should "freely give" leave to amend when there is no "undue delay, bad faith[,] dilatory motive on the part of the movant . . . undue prejudice to the opposing party by virtue of . . . the amendment, [or] futility of the amendment . . . " Fed.R.Civ.P. 15(a); *Foman v. Davis*, 371 U.S. 178 (1962). Generally, leave to amend is only denied when it is clear that the deficiencies of the complaint cannot

be cured by amendment. *See DeSoto v. Yellow Freight Sys.*, *Inc.*, 957 F.2d 655, 658 (9th Cir.1992). Given this generous standard, the Court is compelled to allow Plaintiffs to amend their Complaint. Should Plaintiffs choose to amend their Complaint, they must do so within twenty one days of entry of this Order.

IV. Summary and Conclusion

A motion for judgment on the pleadings requires the Court to determine if Plaintiffs have stated plausible facts which show that they are entitled to relief. Plaintiffs have failed to do so.

A property interest is created when conferral of a benefit is truly mandatory. The Clark County Code gives the County discretion to impose new conditions on gaming licenses. Plaintiffs have failed to plausibly plead a [sic] that they have a valid property interest in renewal of their licenses without any new conditions. Since the Ordinance does not restrict, revoke, or suspend their licenses, it does not affect a property interest. Accordingly, Plaintiffs fail to plead a property interest giving rise to a procedural due process claim.

Plaintiffs also allege that the County violated procedural due process by failing to give sufficient notice of the proposed amendments and by failing to properly prepare a business impact statement as required by state law. The County did provide notice of the major provisions of the proposed amendments. Plaintiffs have no legal support for the unrealistically high standard of notice they seek to impose on the

County. Further, Plaintiffs allege only minor, technical breaches of state law that do not rise to the level of constitutional violations.

Plaintiffs' substantive due process claims fail because the Complaint does not allege plausible facts showing that the Ordinance is not rationally related to a legitimate government interest. Specifically, the Ordinance is related to the County's interest in ensuring that gaming licenses are used properly, requiring businesses holding gaming licenses provide employment, services, and amenities to the community, and maintaining public health and welfare. The Constitution does not prohibit retroactive application of laws, so long as they are rationally related to a legitimate government interest. Further, the County has almost unlimited authority to regulate gambling and alcohol.

Plaintiffs' claim that the law is impermissibly vague fails because the law unambiguously requires a "tavern making an application for a Class A Slot Machine License" to have a bar and a restaurant.

Finally, Plaintiffs fail to plead a plausible a [sic] equal protection violation because they allege no facts showing that the County could not have a rational basis for exempting taverns licensed prior to December 22, 1990 from the new requirements.

IT IS HEREBY ORDERED THAT the Motion for Partial Judgment on the Pleadings (#19) of Defendant Clark County and the Board of County Commissioners of Clark County is **GRANTED**.

IT IS FURTHER ORDERED THAT Defendant Clark County and the Board of County Commissioners of Clark County's Motion to Dismiss (2:11-cv-00824-KJD-PAL Dkt. #10) is **GRANTED**.

IT IS FURTHER ORDERED THAT Plaintiffs are granted leave to amend their Complaint. Should Plaintiffs choose to amend their Complaint, they must do so within twenty one days of this order.

DATED this 21st day of September 2012.

/s/ Kent J. Dawson
Kent J. Dawson
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEVADA RESTAURANT SERVICES, INC., DBA Dotty's, Plaintiff-Appellant, And JACKPOT JOANIES FP, LLC, Consolidated Plaintiff; JACKPOT JOANIES DF, LLC, Consolidated Plaintiff, ECLIPSE GAMING SHMP, LLC, Consolidated Plaintiff, Plaintiffs, v. CLARK COUNTY, a Municipal Corporation; BOARD OF COUNTY COMMISSIONERS OF CLARK COUNTY, Defendants-Appellees.	No. 13-17252 D.C. Nos. 2:11-cv-00795-APG-PAL 2:11-cv-00824-APG-PAL District of Nevada, Las Vegas ORDER (Filed Feb. 11, 2016)

NEVADA RESTAURANT SERVICES, INC., DBA Dotty's, Plaintiff, And JACKPOT JOANIES FP, LLC, Consolidated Plaintiff; JACKPOT JOANIES DF, LLC, Consolidated Plaintiff, ECLIPSE GAMING SHMP, LLC, Consolidated Plaintiff, Plaintiffs-Appellants, v. CLARK COUNTY, a Municipal Corporation; BOARD OF COUNTY COMMISSIONERS OF CLARK COUNTY, Defendants-Appellees.	No. 13-17253 D.C. Nos. 2:11-cv-00795-APG-PAL 2:11-cv-00824-APG-PAL District of Nevada, Las Vegas

Before: BYBEE and CHRISTEN, Circuit Judges and CHEN,* District Judge.

* The Honorable Edward M. Chen, District Judge for the U.S. District Court for the Northern District of California, sitting by designation.

Judges Bybee and Christen voted to deny Nevada Restaurant Services, Inc.'s petition for rehearing en banc, and Judge Chen recommended denying the petition for rehearing en banc.

The panel judges voted to deny Jackpot Joanies FP LLC's petition for rehearing. Judges Bybee and Christen voted to deny Jackpot Joanies FP LLC's petition for rehearing en banc, and Judge Chen recommended denying the petition for rehearing en banc.

The full court has been advised of both petitions for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Nevada Restaurant Services, Inc.'s petition for rehearing en banc, filed January 19, 2016, is DENIED.

Jackpot Joanies FP LLC's petition for rehearing and petition for rehearing en banc, filed January 19, 2016, is DENIED.