

A Run on the House: **How Nevada's Gaming Regulatory Authorities can Protect the Public During Emergencies**

By Jaime K. Black and Michael K. Morton

At the press deadline for this issue of the *Nevada Gaming Lawyer*, the gaming industry was in the midst of reopening after a 78-day shutdown mandated by the Governor of Nevada, which was implemented and enforced by the Nevada Gaming Control Board. Although Governor Grant Sawyer “respectfully urged”¹ businesses and entertainment to close in observance of President John F. Kennedy’s funeral in November 1963 (most licensees voluntarily halted gaming operations for portions of that day), this mandated closure, ordered to mitigate the spread of COVID-19 across the Silver State, was the first statewide government stoppage of all in-person gaming in Nevada since the “wide open” legalization of gambling in March 1931. This recent shutdown was a product of Governor Sisolak’s declaration of a public health emergency on March 12, 2020,² and implemented by the Governor’s Emergency Directive 002.³



The existence of the executive branch's emergency powers, both on the federal and state levels, has been settled law for generations. More specifically, the general police powers reserved to the states by way of the Tenth Amendment to the U.S. Constitution have also been continuously upheld by the courts in situations that threaten the public health. In 1905, the United States Supreme Court upheld a Massachusetts law that mandated vaccinations for smallpox, ruling that "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."⁴

However, not all emergencies are health-related. If a specific industry was targeted by bad actors, how state government is authorized to respond becomes paramount in addressing such an event. Since the gaming industry is the economic lifeblood of Nevada, a situation that may cripple the industry would need to be addressed with agility and accuracy, something that government bureaucracy sometimes hinders. With the creation of the Nevada Gaming Control Board (Board) and the Nevada Gaming Commission (Commission) in the 1950s, policymakers realized that the strict regulation of gaming in Nevada required such agility and accuracy, and the statutes that authorize the Board and Commission to regulate the industry without additional state oversight also allow the regulatory authorities to act quickly if needed in the case of an emergency.

Spinning the Slow Wheels of Government a Bit Faster

Anyone who has taken part in Nevada's regulatory process knows that regulations are not adopted overnight. Chapter 233B of NRS, Nevada's Administrative Procedure Act, establishes a framework that requires public workshops, public adoption hearings, drafting by the Legislative Counsel Bureau, and final approval by the Legislative Commission. Recognizing the need for the Board and Commission to keep pace with an ever-changing gaming industry, the Legislature has expressly exempted the Board and Commission from the requirements imposed by chapter 233B of NRS.⁵

Instead, the Board's and Commission's regulatory framework is set forth in NRS 463.145 to 463.15999, inclusive. Pursuant to NRS 463.145(1)(a), a proposed gaming regulation must be publicly posted for at least thirty days before the public meeting at which the Commission is scheduled to consider the proposal. Other than abiding by the Open Meeting Law requirements in chapter 241 of NRS, the Board and Commission can bypass public workshops if needed, and utilize both Board staff and the Office of the Attorney General for drafting of

the regulatory proposals. By not being required to hold public workshops (although the Board generally does) or submit proposed regulations to the Legislative Counsel for drafting, the Commission can often shave months – sometimes even a year – off the time it takes to adopt regulations when compared to other state agencies.



Faster, Still

However, if we learned anything from the protections put in place during the COVID-19 pandemic that closed businesses and encouraged people to stay home, even thirty days can seem like an eternity. Chapter 233B of NRS provides rules for the adoption of emergency regulations by public bodies that are subject to the requirements of the Administrative Procedure Act.⁶ Likewise, during an emergent situation that requires near-immediate action by the Board and Commission, the current regulatory framework in chapter 463 of NRS provides for some exceptions to the above regulatory rules imposed on the Commission.

NRS 463.145(1)(e) authorizes the Commission, in an emergency, to "summarily adopt, amend or repeal any regulation if at the same time it files a finding that such action is necessary for the immediate preservation of the public peace, health, safety, morals, good order or general welfare, together with a statement of the facts constituting the emergency." Therefore, if the Commission, likely after consultation with the Board, determined that an exigency existed whereby current gaming operations needed to be suspended, modified, or otherwise changed in order to preserve the general health, safety, and welfare of the public, the Legislature has given the Commission the authority to do just that without having to publicly post such regulatory changes thirty days in advance.

In a real emergency; however, facts and circumstances change by the minute, not by the day. Compliance with the Open Meeting Law's requirement that a meeting of a public body must be publicly noticed for at least three working days before the meeting⁷ could put the public at risk if the Board and Commission – or, in this case, any public body – needed to act with immediacy. NRS 241.020(11) defines an emergency as "an unforeseen circumstance which requires immediate action and includes, but is not limited to:

- (a) Disasters caused by fire, flood, earthquake or other natural causes; or
- (b) Any impairment of the health and safety of the public."

Therefore, based on the notice exception in chapter 241 of NRS and the exception from the thirty-day posting requirement in chapter 463 of NRS, the Commission could convene a meeting immediately and adopt regulations at that same meeting if such a dire need presented itself.

Unprecedented Times

Although the Board has not yet needed to adopt emergency regulations, to date, it has exercised its authority in other ways to protect the health, safety, and welfare of the public. After nearly three months of being shut down, Governor Sisolak allowed gaming operations to resume on June 4, 2020.⁸ Pursuant to section 35 of Emergency Directive 021, the Board was tasked with creating the framework for reopening and overseeing exactly how that framework would be implemented by gaming licensees. The Governor directed the Board to adopt this incremental reopening plan pursuant to the emergency powers granted to the Office of the Governor in chapter 414 of NRS.

Never in the history of its existence has the Board been faced with such a task. To ensure that the Board was implementing and enforcing the best possible health and safety practices when gaming operations resumed, the Board spent weeks consulting public health experts both in northern and southern Nevada, thoroughly reviewing guidance from the Centers for Disease Control and Prevention, and analyzing the procurement capacity for personal protective equipment.



The Board issued Industry Notice #2020-25 on May 1, 2020, which published the first iteration of the Board's Health and Safety Policies for Reopening after Temporary Closure.⁹ On May 7, the Commission ratified the Policies, and confirmed the Board's ongoing responsibility to issue additional or revised health and safety policies for the gaming industry. At the press deadline for this article, the Board has issued three substantive revisions to the Health and Safety Policies, taking into account the ever-changing data relating to the spread and mitigation of COVID-19 in Nevada.

Conclusion

The Administrative Procedure Act and the statutes relating to the adoption of regulations by the Board and Commission exist to ensure that the public has the ability to comment on and prepare for changes to requirements imposed on their everyday lives. One could say that those requirements themselves are public protections. However, the emergency regulatory powers of the gaming authorities discussed in this article, both those granted by the Legislature and by the Governor, provide the Board and Commission with the much needed latitude to act with speed to meet its most important statutory obligation – to protect the residents of and visitors to Nevada.



Jaime K. Black is the Chief of the Administration Division for the Nevada Gaming Control Board. Prior to her employment with the Board, Jaime was an associate attorney with an insurance defense litigation firm in Reno. She received her J.D. from Barry University School of Law, graduating magna cum laude, in the top 4% of her class.

Immediately after law school, she served as law clerk to the Honorable Melvin T. Brunetti, United States Court of Appeals for the Ninth Circuit (2008-2009).



Michael Kilpatrick Morton is the Senior Research Specialist for the Nevada Gaming Control Board, providing the Board with legal and policy advice. Prior to his tenure in the Executive Branch, Michael served as Senior Deputy Legislative Counsel to the Nevada Legislature. He received his J.D. from Saint Louis University School of Law,

where he served as a lead editor for the Journal of Health Law and Policy.

¹ Nev. Office of the Governor, Executive Memo (Nov. 23, 1963).

² Nev. Office of the Governor, "Declaration of Emergency for COVID-19" (Mar. 12, 2020), available at http://gov.nv.gov/News/Emergency_Orders/2020/2020-03-12_-_COVID-19_Declaration_of_Emergency/.

³ Nev. Office of the Governor, "Declaration of Emergency Directive 002" (Mar. 18, 2020), available at http://gov.nv.gov/News/Emergency_Orders/2020/2020-03-18_-_COVID-19_Declaration_of_Emergency_Directive_002/.

⁴ *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905).

⁵ See Nev. Rev. Stat. § 233B.039(1)(e)-(f).

⁶ See Nev. Rev. Stat. § 233B.0613.

⁷ See Nev. Rev. Stat. § 241.020(3).

⁸ Nev. Office of the Governor, "Declaration of Emergency Directive 021" (May 28, 2020), available at <https://nvhealthresponse.nv.gov/wp-content/uploads/2020/05/Directive-021-Phase-Two-Reopening-Plan.pdf>.

⁹ Nevada Gaming Control Board, Industry Notice #2020-25 (May 1, 2020), available at <https://gaming.nv.gov/modules/showdocument.aspx?documentid=16733>.