

# STATE AND LOCAL REGULATION

## Navigating Through Murky Waters

By Maren Parry

Conflict in regulation—whether actual or perceived—can make it difficult for gaming licensees to feel confident that they are operating in conformance with all relevant state, local, and federal laws. Full compliance is especially important in the gaming industry where missteps can put a privileged license at risk.



The interaction between the state and local components of Nevada's regulatory structure has been particularly relevant in recent examinations of the definition of "incidental" in the context of restricted gaming, and also in the discussion of how the gaming industry should appropriately address the state's legislative authorization of the production and distribution of medical marijuana. In each case, the interaction between state and local regulators and regulations has created an element of ambiguity for licensees. This ambiguity has required industry participants to examine their business opportunities and associations, and to seek legal counsel to ensure compliance. To provide the best advice, practitioners need to pay close attention to the conversations surrounding topics that will influence compliance, especially where policies, procedures, and standards are not consistently interpreted and applied among the governing bodies.

Nevada gaming operators are required to be licensed by the State of Nevada, after which local counties and

municipalities can require licensure for gaming activity taking place within their borders.<sup>1</sup> This state and local licensing structure is based in part upon the historical context through which Nevada's gaming regulation was developed, and in part upon the variation among Nevada's counties. Elected lawmakers address the differing needs across the state by enacting laws that become effective when a county reaches threshold population figures.<sup>2</sup> State law provides the regulatory framework through enabling state legislation, and then appointed state regulators with specific gaming jurisdiction develop a foundation of regulations that are designed to protect the industry and the state as whole. Recognizing the diversity among communities within population bands, the state also authorizes local jurisdictions to enact ordinances reflective of local policies.<sup>3</sup>

Examples of local regulation can be found in the zoning permit requirements and distance separation ordinances adopted by Clark County and its incorporated cities to protect neighborhoods concerned with the proliferation of gaming.<sup>4</sup> In the rural counties, such additional requirements may be unnecessary and burdensome if a neighborhood bar with a few slot machines is the most that a small community can support. In the nonrestricted context, a licensee in a small county could not justify the investment in the minimum amenity standards that resort hotels on the Strip must demonstrate to operate a casino within Clark County. Addressing these types of individualized standards at the local level also gives county and municipal leaders the opportunity to listen to constituent concerns and respond to citizens in a way that would be impractical at the state level.

Through this delegated power, local regulators with a broad scope of responsibility for a geographic area are provided with a level of state oversight, without the simultaneous micromanagement of the details of the jurisdiction. This interaction between state and local regulation is typically uneventful, but occasionally a local jurisdiction's exercise of its power to adopt these supplemental standards creates uncertainty. In the case of a direct conflict, state law will prevail over local mandates. But sometimes, a peripheral or seemingly unrelated local action will create questions about overall compliance, or the

local political process may be utilized in a way that affects statewide gaming policy.

The widely publicized efforts to curb the “slot parlor model” of restricted gaming<sup>5</sup> have highlighted the impact of the local regulation of liquor on state gaming policy. Most local jurisdictions separately codify liquor and gaming regulations, but in practice they are usually enforced together. State law provides that only certain types of establishments are suitable for the conduct of gaming under a restricted license, including those that hold a local license to sell liquor by the drink for on-premise consumption.<sup>6</sup> This interaction between the state and local law triggered a significant discussion of how restricted gaming would continue in Clark County when the County Commission proposed code amendments changing the requirements to obtain a liquor license to operate as a tavern.<sup>7</sup>

The Clark County Commission, and thereafter, the Nevada Gaming Commission, each addressed the matter in 2011, followed by legislative amendments to state law in 2013.<sup>8</sup> When the language of Clark County’s ordinance was questioned in 2014 through the County’s enforcement process, the County re-opened the discussion to determine how it could further define “incidental,”<sup>9</sup> in the context of its gaming regulations. As local and then state rules were amended, licensees had to evaluate how to best adapt their business models to concurrently comply.<sup>10</sup>

To date, Clark County has not formally introduced any new amendments to its code, but its moratorium on tavern applications has prompted several hearings of the County Commission and before state gaming regulators to address the possible implications of further amendments. Commenting on the potential confusion that can develop under these circumstances, then-Nevada Gaming Commission Chairman Pete Bernhard stated, “We don’t want to see the rules changed every two years. . . . One of the worst things regulators can do is to provide uncertainty.”<sup>11</sup>



If local and state standards are not easy to apply concurrently, or if they adversely affect some licensees, it may prompt a challenge to the appropriate scope of local authority. The Legislature may choose to act to preempt further activity in order to implement a preferred policy or

to control possible backlash. If the result is that a traditionally local question is taken up at the state level, local jurisdictions may end up feeling hamstrung. Statewide, specific rules that reduce local discretion can provide reliability, but specificity can also reduce creativity, innovation, and the ability to expeditiously embrace new technology and address local concerns. If the rules become too specific, licensees will be limited in their ability to modernize without biennial legislative action followed by a campaign to amend local ordinances. Smaller jurisdictions may also not have the same opportunity to provide input on the standards, and may be disproportionately affected by the results.



Discussions related to matters that directly affect gaming regularly take place before local governing bodies, the Gaming Control Board and Gaming Commission, and in legislative committee hearings. Each body, made up of individuals with different backgrounds and biases, provides an opinion and ruling through a mutually exclusive rulemaking process. The laws are reduced to writing and codified, but how they will be enforced and whether there will be unintended consequences of their interaction with other rules may not be clear even to those who endured the lengthy hearings.

Tavern licensees are seeking to navigate the implications of regulations that are designed to be enforced together. In other circumstances, ambiguity results when full compliance with all relevant laws may not be possible, and licensees are seeking guidance to avoid enforcement actions from one jurisdiction or another. Although it appears to have been an unintended consequence, the legalization of medical marijuana by Nevada’s voters and the subsequent rulemaking associated with its distribution have left gaming industry participants with questions regarding how the gaming and medical marijuana industries can appropriately interact within Nevada’s economy.

A key provision of the Gaming Control Board’s enabling legislation charges it with upholding the public policy that “gaming [be] free from criminal and corruptive elements.”<sup>12</sup> Despite the regulation and licensure of the medical marijuana industry by the Nevada Division of Public and Behavioral Health and many local jurisdictions, medical marijuana remains illegal under



federal controlled substance laws.<sup>13</sup> The Board’s “Notice to Licensees” (May 6, 2014) states that the Board “does not believe investment or any other involvement in . . . medical marijuana . . . is consistent with the effective regulation of gaming”<sup>14</sup> has made it clear that it does not intend to overlook violations of federal law simply because voters (and other regulatory divisions within the same state) are treating involvement with medical marijuana as appropriate activity.

The Gaming Control Board’s statement seems to have dissuaded many licensees from betting their gaming suitability on this growing business opportunity, but it is not yet clear how great the separation between participants in the two industries must be. The Board recently recommended that a spousal relationship is not separate enough through its proposed condition that an applicant not be permitted to contract with a slot route operator because the spouse of the operator’s principal owner possessed an interest in a proposed marijuana dispensary.<sup>15</sup> The Gaming Commission was ultimately not required to address this aspect of the Board’s recommendation after the spouse’s interest in the dispensary was sold prior to the Commission hearing, but the Board’s action cannot be ignored in its implication for current and prospective licensees.

The Board and Gaming Commission have indicated that they do not intend to disregard the possible impact of a federal indictment of licensees, or the money laundering risks that accompany the cash-oriented medical marijuana industry. At the same time, many substantial real estate and business interests in this state are connected—even if only remotely—to gaming licensees. A prohibition of any crossover whatsoever could deal a blow to Nevada’s economy as it continues to recover from a recession. Until parameters are ultimately set through the rulemaking and enforcement process to outline the boundaries of “any other involvement. . . in medical marijuana,” licensees, property owners, suppliers, and possibly even attorneys will be forced to examine their business and personal relationships as they relate to the Control Board’s Notice to Licensees and its subsequent actions implementing this policy in individual situations.



Gaming attorneys are consistently faced with the task of advising clients on how they can best navigate the murky waters that can be created through regulations that conflict

or become confusing in their interaction or enforcement. As long as multiple sets of regulations coincide to define the industry’s parameters, gaming law practitioners must remain mindful of the importance of the local aspects of gaming, and should be able to identify and assist clients in anticipating possible conflicts or ambiguities.

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- <sup>1</sup> NRS 463.230 (Issuance of county license), NRS 463.180 (Qualifications for county license), NRS 463.190 (Qualifications for municipal license).
- <sup>2</sup> See, for example, NRS 463.1605 (Limitation on approval of nonrestricted license in county whose population is 100,000 or more; additional local regulation of resort hotels permissible), NRS 463.3072-3094 (Nonrestricted gaming licenses in certain counties), and many more.
- <sup>3</sup> See NRS 463.180 and 463.280.
- <sup>4</sup> For example, see Clark County Code 8.20.295 (Distance restrictions for tavern licenses), and Henderson Municipal Code 4.36.190 (License—Issuance restrictions—Proximity of taverns specified).
- <sup>5</sup> The term “slot parlor” in this context has generally come to refer to restricted gaming locations that do not resemble a sports bar with a full restaurant, and instead caters to “more mature women who feel safe in the Dotty’s style operation decorated with knickknacks.” Jane Ann Morrison, County Delays Action on Slot Parlor Rules, Las Vegas Review Journal, May 6, 2014. <http://www.reviewjournal.com/business/casinos-gaming/county-delays-action-slot-parlor-rules>
- <sup>6</sup> Regulation 3.015(3)(a).
- <sup>7</sup> “Tavern” means a bar, or lounge, where alcoholic liquors are sold at retail by the drink to the general public . . . . Clark County Code 8.20.020.385
- <sup>8</sup> NRS 463.161(2) now sets forth minimum operational requirements for a location to obtain a restricted license at an establishment licensed to sell alcoholic beverages by the drink in a county whose population is 100,000 or more. Beginning January 1, 2014, locations must be at least 2,500 square feet, have a permanent physical bar, and a 25-seat restaurant with on-premises kitchen.
- <sup>9</sup> NRS 463.0189
- <sup>10</sup> Conor Shine, Dotty vs. Goliath: Can the little slot tavern win a fight with Big Gaming?, Las Vegas Review Journal, May 4, 2014. <http://www.lasvegassun.com/news/2014/may/04/dotty-vs-goliath-can-little-slot-tavern-win-fight/>
- <sup>11</sup> Howard Stutz, Gaming Regulators Back to Debating Tavern Rules, Las Vegas Review Journal, August 22, 2013. <http://www.reviewjournal.com/business/casinos-gaming/gaming-regulators-back-debating-tavern-rules>
- <sup>12</sup> NRS 463.0129(1)(b)—Public policy of state concerning gaming; license or approval revocable privilege.
- <sup>13</sup> 21 U.S.C. §801, et seq.
- <sup>14</sup> Notice to Licensees #2014-39 dated May 6, 2014. Medical Marijuana Establishments <http://gaming.nv.gov/modules/showdocument.aspx?documentid=8874>
- <sup>15</sup> Howard Stutz, Slot route operator ‘blindsided’ by Gaming Control Board ruling, Las Vegas Review Journal, July 14, 2014. <http://www.reviewjournal.com/business/casinos-gaming/slot-route-operator-blindsided-gaming-control-board-ruling>.