Practicing Administrative Law Before a Municipality – What You Don't Know Could End Your Case Before It Even Starts

BY MATTHEW T. DUSHOFF, ESQ.

A little more than 10 years ago, I wrote an article for *Nevada Lawyer* based on a client who frantically calls your office telling you that she just received a Notice of Violation from a Nevada state licensing agency and needs your help. In this article, I want to talk about a client who received an administrative Notice of Violation from a municipality that plans to take action against your client's license. **In this article, "municipalities" are defined as cities and counties, as opposed to state agencies. This situation is an entirely different beast, and we will discuss what you need to know before you even begin to represent your client in such a matter.**

NRS 233B Does Not Apply

When I worked as a deputy attorney general under Frankie Sue Del Papa and Governor Brian Sandoval, we relied heavily on NRS 233B, NRS 622A, the Nevada Revised Statutes and the Nevada Administrative Code for the specific state agencies we represented. However, NRS 233B and NRS 622A both apply solely to state agencies.[1] The next obvious question, then, is where do you look to challenge a Notice of Violation that was issued to your client from a municipality? I am glad you asked. That brings us to the next section.

Each Municipality Has Its Own Code

Even with the 26 years of experience I have in administrative law, I can still fall into the trap of looking to NRS 233B when challenging a municipality's Notice of Violation. Think of each municipality as its own kingdom—each municipality has its own codes regarding the handling of its licensing matters. In Nevada, there are 16 different county codes and 18 different city codes.[2] For instance, in Clark County alone, you have six separate municipalities (Unincorporated Clark County, City of Las Vegas, City of Henderson, City of North Las Vegas, Mesquite and Boulder City). Each one of these municipalities has its own codes. You will need to determine which municipality issued the Notice of Violation and review the codes regarding the process of defending your client.[3]

Does Your Client Have a Due Process Right in Their License?

This is a very important determination. Whether your client has a due process right to their license could mean the difference between requiring notice and a hearing or not. The Nevada Supreme Court in *Burgess v. Storey Cty. Bd. Of Comm'rs*, 116 Nev. 121, 124 found that:

> "The protections of due process attach only to deprivations of property or liberty interests." *Tarkanian v. Nat'l Collegiate Athletic Ass'n,* 103 Nev. 331, 337, 741 P.2d 1345, 1349 (1987); *Wedges/Ledges of California, Inc. v. City of Phoenix, Arizona,* 24 F.3d 56, 62 (9th Cir. 1994). A protected property interest exists when an individual has a reasonable expectation of entitlement derived from "existing rules or understandings that stem from an independent source such as state law." *Bd. of Regents v. Roth*, 408 U.S. 564, 577, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972).

In *Burgess*, the court determined that since Storey County issued Burgess a brothel license, "Burgess had a reasonable expectation of entitlement to his brothel license. Therefore, we conclude that Burgess has a protected property interest in the license." *Id*. at 124-25. Contrast that with *Malfitano v. Cty. Of Storey*, 133 Nev. 276, 283–84 (2017), where the court held that

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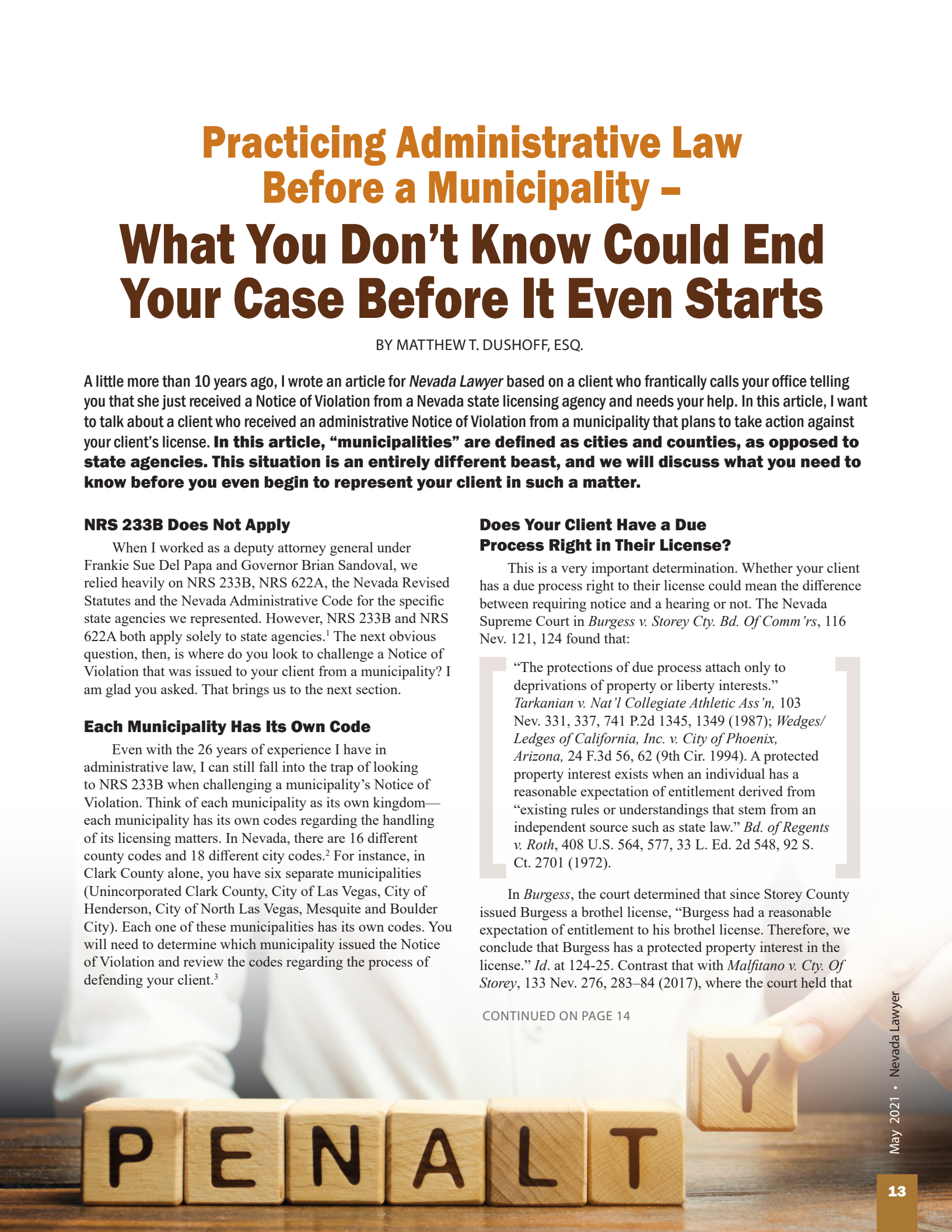

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Malfitano, who had a temporary liquor license as defined by the Storey County Code, "did not [demonstrate] a legitimate claim of entitlement to the [permanent] licenses at issue. Therefore, Malfitano had no property interest to which the due process notice requirements could apply…."

However, the Ninth Circuit in *Groten v. California*, 251 F.3d 844 (9th Cir. 2001),[4] where the state of California denied Groten a temporary appraiser license, found that Groten did have a federally protected due process interest in his temporary appraiser license. Specifically, the Ninth Circuit ruled that "While not every procedural statute creates entitlements, if the procedural requirements were intended to operate as a significant substantive restriction on the agency's actions, a property interest may be created." *Id*. at 850 (internal quotations omitted).

Accordingly, it appears if your client was issued a permanent license, they will have a property interest in keeping their license. Therefore, they would have due process rights to a hearing for the deprivation of that property interest. If your client was issued a temporary license, look to *Groten Factors* to determine whether your client has a due process right to their license.

Request a Hearing

Sounds obvious, right? However, if you do not request a hearing before the requisite deadline, then you may waive your client's right to a hearing.[5] This is jurisdictional.[6] Your client will lose without even having a chance to defend himself or herself. Each municipality has its own set of codes regarding the deadlines to file a request for a hearing. Make sure you know the deadlines and comply with them.

Hearing Process[7]

From my experience, this process is slightly different in every municipality. Think of each one of these as a minitrial. The municipality is going to provide evidence. You have a right to cross examine its witnesses. You have a right to provide your evidence, including your own witnesses. *Understand* that if the licensee does not appear or respond to the Notice of Violation, the municipality can default your client and, in many municipalities, shall default your client. Find out where the hearing is going to take place and who is presiding over the hearing. Though you may not have the right to discovery, ask for it anyhow. I have found that the people prosecuting your client will most likely provide you the evidence they intend to use in their case. You need to know the burden of proof.[8] Much like state administrative hearings, the rules of evidence apply, but they are relaxed in municipal hearings.[9] Some jurisdictions have presumptions like unincorporated Clark County (i.e. CCC 8.08.080: Disputable presumptions in all disciplinary proceedings before the hearing officer). Before you leave the hearing, ask who is drafting the order and how you will receive it. This request will be important if you lose and plan on appealing the order.[10]

Petitions for Judicial Review

A Petition for Judicial Review is like an appeal of the ruling at the administrative hearing to the district court. Review the municipality's code regarding the deadline to file a Petition for Judicial Review. For example, pursuant to Clark County Code 1.14.130, you only have 20 days from the date of the decision or service thereof to file the petition. Remember, this is jurisdictional. If you file outside the deadline, your appeal will be dismissed (with few exceptions).

In conclusion, at the end of the day, if you client comes to you with a Notice of Violation from one of the 34 different municipalities, don't rely on NRS 233B, but research the municipality's code for guidance on representing your client.

ENDNOTES:

1. NRS 233B.031 and 622A.120.
2. To find these codes, go to www.leg.state.nv.us/division/research/library/links/codes.html.
3. Note that many municipal licensing issues can affect your client's state license (i.e., liquor license and gaming license). In these cases, you will also need to keep aware of any potential state licensing issues as well.
4. The Nevada Supreme Court relied in part on *Groten* in the *Malfitano* ruling.
5. The Nevada Supreme Court set forth several factors for equitable tolling of the time to file. *See Sieno v. Emp'rs Ins. Co.*, 121 Nev. 146, 152–53 (2005). That being said, don't wait until after the date for the time to request a hearing to file your request. You do not want to be in the position of having to fight in court advocating for the doctrine equitable tolling.
6. *See Kame v. Emp't Sec. Dep't*, 105 Nev. 22, 25 (1989) (The time period for a petition for judicial review is jurisdictional and mandatory.).
7. Make sure that the hearing is recorded either stenographically and/or by an audio recorder.
8. For example, in Henderson, the burden of proof on the city is substantial evidence. HCC 4.06.220. However, in Reno, it is by a preponderance of the evidence. RCC 1.05.540.
9. For example, HCC 4.06.200 and RCC 1.05.535.
10. Note, not all initial appeals of a municipal hearing order go directly to the district court. For example, the Carson City Code 4.13.102(2) provides that the applicant or any aggrieved party in a liquor licensing matter may appeal the hearing officer's decision to the Carson City Liquor Board. If the board upholds the hearing officer's decision, then the party can request a Petition for Judicial Review.

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