guage at issue, as well as the language and design of the statute as a whole.") (Kennedy, J.). This reading is consistent with the statute's text, gives effect to all its terms, and makes practical sense. As I would affirm, not reverse, I respectfully dissent.

LESLIE LYNN MILLER, Appellant, *v.*
BRETT ROBERT MILLER, Respondent.

No. 69353

March 15, 2018 412 P.3d 1081

Appeal from a district court divorce decree and determination of child support. Eighth Judicial District Court, Family Court Division, Clark County; Charles J. Hoskin, Judge.

Reversed and remanded with instructions.

Pecos Law Group and *Jack W. Fleeman*, Henderson, for Appellant.

Christopher P. Burke, Las Vegas, for Respondent.

Fine Carman Price and *Michael P. Carman*, Henderson, for Amicus Curiae State Bar of Nevada, Family Law Section.

Before the Supreme Court, En Banc.

OPINION

By the Court, Hardesty, J.:

In this opinion, we address a matter of first impression: how to interpret and apply Nevada's child support statutes where both parents share joint physical custody of one child but one parent has primary physical custody of the other child. We provide guidance on how to calculate child support in this type of custody arrangement. We further stress the importance of the district court's duty to make sufficient findings of fact when deviating from the statutory formula for child support calculations.

Appellant Leslie Miller and respondent Brett Miller are the parents of two minor children. They divorced in 2015 and, through family mediation, reached an agreement on almost all aspects of the divorce, including custody of the children. They agreed to share joint physical custody of one of their children, but Leslie has primary physical custody of the other child because that child lives with Leslie and stays with Brett every other weekend. The parents were

unable, however, to reach an agreement on child support. The district court determined that Brett was to pay Leslie $345 in monthly child support. Leslie filed a motion for reconsideration, to amend the judgment, and for findings of fact and conclusions of law on the child support calculation, arguing that there was no controlling Nevada authority governing a split custody situation like theirs, the district court's $345 award fell below the statutory guidelines, and the award was unreasonable given the parties' incomes and circumstances. Additionally, at the hearing on Leslie's motion, Leslie requested the district court to explain how it arrived at the amount of $345, but the district court provided no calculations.

The district court denied Leslie's motion, finding that its $345 award was in the children's best interests. The court explained that it had "run the numbers using the statutory percentages of 18% for one child and 25% for two children and given the comparative incomes, the deviation factors permitted under NRS 125B.080(9), and all circumstances, the $345 per month in child support is the appropriate figure." Leslie brings this appeal challenging the district court's child support award.

DISCUSSION

On appeal, Leslie argues that the district court abused its discretion by not providing specific findings of fact to explain the deviation from the amount of child support owed under the statutory guideline. Leslie further argues that the amount of child support is unreasonable under the child support guidelines and based on the parties' custody arrangement and respective incomes. Brett argues that there is no statute that provides a guideline for determining child support in a custody situation like the Millers', so the district court could not have abused its discretion. The parties, the district court, and amicus curiae, the State Bar of Nevada Family Law Section (FLS), have asked this court to determine the appropriate formula for the calculation of child support in this type of situation. The parties and FLS provide formulas based on their varying interpretations of NRS 125B.070, the statute that provides the baseline percentages of income for determining child support.

We have not previously considered the application of NRS 125B.070 to a split custody scenario where both parents share joint physical custody of one child and one parent has primary physical custody of another child. However, we are not without statutory guidance and jurisprudence. Therefore, in this opinion, we analyze Nevada's statutory child support framework and caselaw. Next, we consider the district court's determination of the child support award in this case and the parties' and FLS's interpretations of NRS 125B.070. Finally, we apply the appropriate formula to the Millers' custody arrangement to clarify the steps district courts must take when determining the appropriate child support amount.

Nevada's child support framework

"[Q]uestions of statutory construction, including the meaning and scope of a statute, are questions of law, which [we] review[ ] de novo." *City of Reno v. Reno Gazette-Journal*, 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003). NRS 125B.020(1) states that "[t]he parents of a child . . . have a duty to provide the child necessary maintenance, health care, education and support."[1] This duty is defined in NRS 125B.070, which is the starting point for calculating child support. In NRS 125B.070, the Legislature set forth a formula for determining the "obligation for support," which is a flat rate percentage of a parent's gross monthly income that each parent owes for the support of their children based on the number of children they have.

NRS 125B.070(1)(b) explains the "obligation for support" as follows:

> "Obligation for support" means the sum certain dollar amount determined according to the following schedule:
>
> (1) For one child, 18 percent;
> (2) For two children, 25 percent;
> (3) For three children, 29 percent;
> (4) For four children, 31 percent; and
> (5) For each additional child, an additional 2 percent,
>
> of a parent's gross monthly income, but not more than the presumptive maximum amount per month per child set forth for the parent in subsection 2 for an obligation for support determined pursuant to subparagraphs (1) to (4), inclusive, unless the court sets forth findings of fact as to the basis for a different amount pursuant to subsection 6 of NRS 125B.080.

Accordingly, the plain language of NRS 125B.070 demonstrates that the "obligation of support" for two children is 25 percent of

[1]We acknowledge that the Nevada Legislature unanimously adopted Assembly Bill 278 in 2017, which created the Committee to Review Child Support Guidelines to examine Nevada's existing child support guidelines and provide recommendations and revisions that "ensure that the application of such guidelines results in appropriate awards of child support." 2017 Nev. Stat., ch. 371, Legislative Counsel's Digest, at 2280; A.B. 278, 79th Leg. (Nev. 2017). A.B. 278 "repeals the provisions of existing law establishing the general formula for calculating child support." 2017 Nev. Stat., ch. 371, Legislative Counsel's Digest, at 2280. The current child support statutes that establish the formula for calculating child support include NRS 125B.070 and NRS 125B.080, which we address in depth in this opinion. Pursuant to A.B. 278, "the repeal of such provisions becomes effective on the effective date of the regulations adopted by the Administrator [of the Division of Welfare and Supportive Services of the Department of Health and Human Services] establishing child support guidelines." *Id*. Any discussion in this opinion related to the child support statutes is based on the statutes in effect at the commencement of this litigation in 2015, and we recognize that the statutory framework may change based on the new child support guidelines.

each parent's income. The percentage of income is determined without regard to the custody arrangements the parents have with their children. *See* NRS 125B.070; *see also Wright v. Osburn*, 114 Nev. 1367, 1368-69, 970 P.2d 1071, 1072 (1998). In *Wright*, we held that NRS 125B.020 and NRS 125B.070, read together, require each parent to provide a minimum level of child support depending on the number of children, and "[t]his requirement is independent of the custody arrangements." 114 Nev. at 1368, 970 P.2d at 1072. Our holding in *Wright* made clear that each parent's obligation of support is calculated first, and then the physical custody arrangement governs how much support a parent owes to the other parent. *Id.* at 1368-69, 970 P.2d at 1072.

In *Barbagallo v. Barbagallo*, we acknowledged that the definition of "obligation of support" contained in NRS 125B.070 was "designed to relate to the traditional and once quite typical post-divorce situation in which one parent (usually the mother) is the 'custodial parent' and the other parent (usually the father) is the 'noncustodial parent.'" 105 Nev. 546, 548, 779 P.2d 532, 534 (1989), *overruled on other grounds by Wright*, 114 Nev. at 1368, 970 P.2d at 1072. However, upon review of the legislative history for NRS 125B.070, the originally proposed legislation included a formula for joint physical custody arrangements and examples of calculations for determining child support where the parents have two children but each parent does not have the children for exactly 50 percent of the time.[2] Hearing on A.B. 424 Before the Assembly Judiciary Comm., Exhibit E, 64th Leg. (Nev., April 13, 1987). While those calculations were removed from the final bill, we conclude, as the court in *Barbagallo* did, that the definition of "obligation for support" is broad enough to apply to custody arrangements other than primary physical custody. 105 Nev. at 548-49, 779 P.2d 532 at 534.

We have previously applied the formula set forth in NRS 125B.070 to two types of custody arrangements. The first type is where one parent has primary physical custody of a child. In such situations, the application of NRS 125B.070 is straightforward: the noncustodial parent must pay the custodial parent the appropriate percentage of his or her gross monthly income. *Bluestein v. Bluestein*, 131 Nev. 106, 109 n.1, 345 P.3d 1044, 1046 n.1 (2015). The second type of custody arrangement is where the parents share joint physical custody of a child. *Wright*, 114 Nev. at 1368-69, 970 P.2d at 1072. In a joint physical custody arrangement, "the higher-income parent is obligated to pay the lower-income parent the difference between

[2]Each of the calculations included in the legislative history begins with calculating the parents' obligation for support under NRS 125B.070, regardless of the custody arrangement of the parents. *See* Hearing on A.B. 424 Before the Assembly Judiciary Comm., Exhibit E, 64th Leg. (Nev., April 13, 1987).

the parents' statutorily calculated child support amounts." *Bluestein*, 131 Nev. at 109 n.1, 345 P.3d at 1046 n.1.[3]

Under both of these custody arrangements, the next step in the child support calculation after determining each parent's obligation for support is to ensure the obligation for support does not exceed the "presumptive maximum amount per month per child" set forth in NRS 125B.070(2). *Wesley v. Foster*, 119 Nev. 110, 113, 65 P.3d 251, 253 (2003) ("The *Wright* offset should take place before, not after, application of the cap.").

Finally, upon completion of each of those steps, the district court has discretion under NRS 125B.080 to adjust the child support amount it derived from its calculations under NRS 125B.070. Subsection 9 of NRS 125.080 lists 12 factors for the district court to consider when deviating from the statutory amount of child support. If the court chooses to deviate from the statutory amount of support, "the court *shall* . . . [s]et forth findings of fact as to the basis for the deviation from the formula; and [p]rovide in the findings of fact the amount of support that would have been established under the applicable formula." NRS 125B.080(6)(a)-(b) (emphasis added); *Anastassatos v. Anastassatos*, 112 Nev. 317, 321, 913 P.2d 652, 654 (1996) (stating that "the district court's failure to set forth findings of fact as to the basis for the deviation constitutes reversible error").

The district court's, parties', and FLS's interpretations of NRS 125B.070

We are now asked to determine the appropriate allocation of child support where one parent has primary physical custody of one child but both parents share joint physical custody of another child. The district court, parties, and FLS have each interpreted NRS 125B.070 differently, and their interpretations have produced child support awards ranging in amounts from $345 to $832.19. We begin by reviewing the district court's award of child support in this case. Next, we consider the parties' and FLS's varying interpretations of NRS 125B.070.

---

[3]Though *Wright* did not reference NRS 125B.070's legislative history, the calculation articulated in *Wright* is the same formula for joint physical custody that was originally included in the early draft of A.B. 424. *Compare* Hearing on A.B. 424 Before the Assembly Judiciary Comm., Exhibit D, 64th Leg. (Nev., April 13, 1987) ("The court shall, if . . . there is an equal division of the physical custody of a child between both parents, direct the parent whose gross monthly income is higher to pay an amount of support each month which is equal to the difference between his obligation for support and the obligation for support of the other parent . . . ."), *with Wright*, 114 Nev. at 1369, 970 P.2d at 1072 (concluding that in joint physical custody scenarios, the district court must "[c]alculate the appropriate percentage of gross income for each parent; subtract the difference between the two and require the parent with the higher income to pay the parent with the lower income that difference").

"Matters of . . . support of minor children of parties to a divorce action rest in the sound discretion of the trial court, the exercise of which will not be disturbed on appeal unless clearly abused." *Flynn v. Flynn*, 120 Nev. 436, 440, 92 P.3d 1224, 1227 (2004) (internal quotation marks omitted). We review a district court's child support determination for abuse of discretion and "will uphold the district court's determination if it is supported by substantial evidence." *Id*. Although a district court has discretion in awarding child support, the district court must follow the statutory guidelines when calculating the initial child support award and when deviating from the statutory calculations. *See* NRS 125B.080(6); *Wallace v. Wallace*, 112 Nev. 1015, 1021, 922 P.2d 541, 544-45 (1996).

In this case, the district court awarded child support to Leslie in the amount of $345 a month. To explain this award, the district court stated that it had "run the numbers using the statutory percentages of 18% for one child and 25% for two children and given the comparative incomes, the deviation factors permitted under NRS 125B.080(9), and all circumstances, the $345 per month in child support is the appropriate figure."[4] First, it is clear that the district court erred by considering "18% for one child and 25% for two children" because the Millers have two children. Therefore, as discussed above, under NRS 125B.070(1)(b)(2), the district court should have determined each parent's support obligation by calculating 25 percent of each parent's income. In addition to this error, the district court did not state the amount of the support obligation it calculated based on its interpretation of NRS 125B.070, before the deviation. *See* NRS 125B.080(6)(b) (stating that the district court *shall* "[p]rovide in the findings of fact the amount of support that would have been established under the applicable formula").

Finally, the district court did not include in its findings of fact the deviation factors it applied to result in an award of $345, as required by NRS 125B.080(6). Therefore, it is completely unclear how the district court arrived at the amount of $345. Accordingly, we reverse the district court's child support award because of the failure to make sufficient factual findings. *See Davis v. Ewalefo*, 131 Nev. 445, 450, 352 P.3d 1139, 1142 (2015) (explaining that, while a district court's discretionary decisions are generally reviewed deferentially, "deference is not owed to . . . findings so conclusory they may mask legal error"). We take this opportunity to consider the appropriate application of NRS 125B.070 to the Millers' particular custody arrangement, as we acknowledge that it is not entirely clear from the statute, given the varying formulas proposed by the parties and FLS.

[4]During the hearing, the district court stated that it did not bring the notes showing the calculations for the sum of $345 to the hearing, and no calculations were included in the written order that followed.

FLS urges this court to interpret NRS 125B.070 as defining a parent's child support obligation based on each parent's custody arrangement with an individual child. Thus, FLS would calculate Leslie's obligation for support at 18 percent of her income because in its view, she only has a child support obligation for the child she shares jointly with Brett. FLS would then calculate Brett's obligation for support at 25 percent of his income, and offset the two. At the time the parties filed their financial disclosure forms, Leslie indicated that her gross monthly income was $3,986.66 and Brett's gross monthly income was $4,304.97. Thus, Leslie's obligation of support under FLS's method would be $717.60, and Brett's obligation of support would be $1,076.24, which, when offset, results in a child support award of $358.64.

The problem with this method is FLS's starting point for calculating the obligation for support under NRS 125B.070. The plain language of NRS 125B.070 sets forth the parent's obligations of support based on the number of children they have, not based on the custody arrangement.[5] Because a parent's child support obligation based on the number of children a parent has is independent of the child custody arrangement, FLS's formula does not align with the plain language of the statute. Not only does FLS's calculation misapply the flat rate percentage defined in NRS 125B.070, it also offsets the awards under *Wright*, which is incorrect where a parent has primary physical custody of a child. *See* 114 Nev. at 1368-69, 970 P.2d at 1072 (offsetting the parents' support obligations when the parents share joint physical custody).

Likewise, Brett's interpretation and one of Leslie's interpretations begin with calculating each parent's obligation of support based on one child, which is contrary to the plain language of the statute.[6]

---

[5]We note that neither the parties nor FLS provides authority that allows the district court to calculate a parent's obligation of support under NRS 125B.070 based on the parent's individual custody arrangement with each child. Rather, this application of NRS 125B.070 is contrary to the plain language of NRS 125B.070 and our prior interpretation of the statute in *Wright*.

[6]Step one of these approaches is calculating 18 percent of each parent's gross monthly income: 18 percent of Leslie's income is $717.60, and 18 percent of Brett's income is $774.89.

Under Leslie's approach, her obligation is subtracted from Brett's under *Wright* for the child they share jointly, which equals $57.30. Next, Leslie adds that amount to the full support obligation owed for the child whom she has primary physical custody, $774.49, which results in a child support award of $832.19.

Under Brett's approach, Leslie's obligation is subtracted from Brett's, and then Brett's income is multiplied by 7 percent to account for the difference be tween 18 and 25 percent in step one. This results in a child custody support award of $358.64. This approach not only incorrectly applies NRS 125B.070, but also incorrectly offsets the two support obligations. Under *Wright*, the district court only offsets the amount of child support when the parents share joint physical child custody. 114 Nev. at 1368-69, 970 P.2d at 1072.

We agree, however, with Leslie's other interpretation, which begins with NRS 125B.070 and applies 25 percent to each parent's income to ascertain each parent's obligation of support. We conclude that this interpretation, which we set forth below, provides the appropriate application of NRS 125B.070 to a custody situation where both parents share joint physical custody of one child and one parent has primary physical custody of the other child.

Application of Nevada's child support framework to the Millers' custody arrangement

In order to provide guidance to the district court, we now apply the child support guidelines to the Millers' custody arrangement. The first step in calculating child support is to determine each parent's child support obligation under NRS 125B.070. Here, Leslie and Brett have two children. Therefore, Leslie's and Brett's obligations for child support are 25 percent of their respective gross monthly incomes. NRS 125B.070(1)(b)(2).

Applying the 25-percent obligation for support to each parties' income results in a $996.67 support obligation for Leslie and a $1,076.24 support obligation for Brett. Because this amount is for two children, we conclude that the next appropriate step is to divide the parents' respective support obligations by two to determine the amount of support owed per child. Leslie therefore owes $498.34 per child, and Brett owes $538.12 per child. Because Leslie and Brett share joint physical custody of one child, those amounts are offset pursuant to *Wright*, resulting in Brett owing Leslie $39.78 per month for the child they jointly share. 114 Nev. at 1368-69, 970 P.2d at 1072. Because Leslie has primary physical custody of the other child, the amount of support Brett owes for that child ($538.12) is not offset. Thus, the amount of child support that Brett owes pursuant to NRS 125B.070 for both children would be $577.90, which falls within the presumptive maximum amount of support as defined in NRS 125B.070.[7]

[7]We note that if Leslie and Brett had only one child for whom Leslie had primary physical custody, Brett's child support obligation would be 18 percent of his gross monthly income, or $774.80 per month. *See* NRS 125B.070(1)(b)(1). Based on our interpretation of NRS 125B.070 as it currently exists, Brett's child support obligation in this case for two children should be $577.90. Thus, we recognize this anomaly since the framework of NRS 125B.070 demonstrates that a parent's obligation of support increases with each additional child. Though a parent's obligation increases, it does not double with each additional child because some of the costs involved with child-rearing are fixed costs. *See Barbagallo*, 105 Nev. at 549, 779 P.2d at 535 (noting that some of the fixed expenses involved in child-rearing include "rent, mortgage payments, utilities, car maintenance and medical expenses"). Moreover, Brett's support obligation accounts for the fact that he shares joint physical custody of one of the children. This case and the parties' divergent arguments and calculations demonstrate this is an important issue for the Committee to Review Child Support Guidelines to

After calculating this amount, the district court has discretion to deviate from that amount based on the factors in NRS 125B.080. We reiterate that in doing so, the district court must sufficiently explain its findings of fact, the deviation factors considered, and the amount of the child support award absent any deviation. *See* NRS 125B.080.

CONCLUSION

This case requires that we consider the appropriate application and interpretation of NRS 125B.070 to a child custody arrangement where both parents share joint physical custody of one child but one parent has primary physical custody of the other child. We conclude that based on Nevada's child support statutes and our jurisprudence, the proper calculation under NRS 125B.070 is to first determine each parent's support obligations based on the flat rate percentage correlated with the number of children the parents have. Next, the support obligation should be divided based on the number of children the parents have. After the support obligations are determined, the parents' obligations are offset for any children they share jointly pursuant to *Wright*, and the offset amount shall be added to the full amount of the child support obligation for the noncustodial parent. The district court must still ensure that the amount does not exceed the presumptive maximum support amount in NRS 125B.070(2). Finally, if the district court finds it appropriate, it shall apply the deviation factors in accord with NRS 125B.080 and, in doing so, make sufficient factual findings to explain the deviation. Accordingly, we reverse the district court's child support award of $345 and remand with the foregoing instructions.

Douglas, C.J., and Cherry, Gibbons, Pickering, Parraguirre, and Stiglich, JJ., concur.

---

consider. Because NRS 125B.070 does not address the split custody situation presented by this case, the approach we set forth provides a clear and workable formula that is consistent with our prior jurisprudence, and the district court has discretion to increase this statutorily based amount if it finds a deviation proper under NRS 125B.080.

NULEAF CLV DISPENSARY, LLC, a Nevada Limited Liability Company, Appellant, *v.* THE STATE OF NEVADA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF PUBLIC AND BEHAVIORAL HEALTH; ACRES MEDICAL, LLC; and GB SCIENCES, LLC, a Nevada Limited Liability Company, Respondents.

GB SCIENCES, LLC, a Nevada Limited Liability Company, Cross-Appellant, *v.* THE STATE OF NEVADA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF PUBLIC AND BEHAVIORAL HEALTH; ACRES MEDICAL, LLC; and NULEAF CLV DISPENSARY, LLC, a Nevada Limited Liability Company, Cross-Respondents.

No. 69909

March 29, 2018 414 P.3d 305

Appeal and cross-appeal from a final judgment in an action concerning entitlement to a medicinal marijuana dispensary provisional license. Eighth Judicial District Court, Clark County; Eric Johnson, Judge.

Affirmed in part, reversed in part, and remanded.

[Rehearing denied May 24, 2018]

Pisanelli Bice PLLC and *Todd L. Bice* and *Dustun H. Holmes*, Las Vegas, for Appellant/Cross-Respondent Nuleaf CLV Dispensary, LLC.

Adam Paul Laxalt, Attorney General, and *Linda C. Anderson*, Deputy Attorney General, Carson City, for Respondent/Cross-Respondent The State of Nevada Department of Health and Human Services, Division of Public and Behavioral Health.

Greenberg Traurig, LLP, and *Tami D. Cowden, Mark E. Ferrario*, and *Moorea L. Katz*, Las Vegas, for Respondent/Cross-Respondent Acres Medical, LLC.

Smith & Shapiro, LLC, and *Sheldon A. Herbert* and *James E. Shapiro*, Henderson, for Respondent/Cross-Appellant GB Sciences, LLC.

Before the Supreme Court, En Banc.

OPINION

By the Court, Parraguirre, J.:

NRS 453A.322 governs the registration process for medical marijuana establishments in Nevada. Specifically, NRS

453A.322(3)(a)(5) provides that an applicant seeking to obtain a medical marijuana establishment registration certificate must obtain approval from the local government where the establishment is to be located certifying that the applicant is in compliance with applicable zoning restrictions and building requirements. In this appeal, we are asked to determine whether NRS 453A.322(3)(a)(5)'s requirement must be satisfied before an applicant can receive a registration certificate. We conclude that it does not and that the registration certificate is deemed provisional until the applicant is able to satisfy NRS 453A.322(3)(a)(5). We therefore affirm in part, reverse in part, and remand.

I.

Respondent, the Division of Public and Behavioral Health of Nevada's Department of Health and Human Services (Department), is tasked with carrying out the provisions of NRS 453A.320-.370 regarding the production and distribution of medical marijuana.[1] NRS 453A.370. In particular, NRS 453A.322 governs the registration process for those seeking to operate medical marijuana establishments and imposes a duty on the Department to register the establishment and issue medical marijuana establishment registration certificates. A "[m]edical marijuana establishment registration certificate" is "a registration certificate that is issued by the [Department] pursuant to NRS 453A.322 to authorize the operation of a medical marijuana establishment." NRS 453A.119 (internal quotation marks omitted).

Each year, the Department accepts applications for registration certificates over the course of ten business days and must evaluate and rank the applicants pursuant to certain criteria set forth in NRS Chapter 453A and NAC Chapter 453A. *See* NRS 453A.322; NRS 453A.324; NRS 453A.328; NRS 453A.370. "[N]ot later than 90 days after receiving an application to operate a medical marijuana establishment," the Department must issue registration certificates to qualifying applicants. NRS 453A.322.

Pursuant to NRS 453A.322(3)(a)(5), an applicant must submit "proof of licensure with the applicable local governmental authority or a letter from the applicable local governmental authority certifying that the proposed medical marijuana establishment is in compliance with [zoning] restrictions and satisfies all applicable building requirements." Accordingly, the City of Las Vegas (City) enacted Las Vegas Municipal Code (LVMC) 6.95.080, which requires the City to notify the Department when a "proposed location has been found in conformance with land use and zoning restrictions" pursuant to NRS 453A.322(3)(a)(5).

---

[1]The Legislature amended NRS Chapter 453A effective July 2017. Unless otherwise specified, this opinion refers to the 2014 version of NRS Chapter 453A. 2013 Nev. Stat., ch. 547, § 10, at 3695-3729.

In August 2014, the Department accepted applications, and its 90-day prescribed deadline to issue registration certificates fell on November 3, 2014. One business day before the conclusion of the Department's 90-day-review period, the City issued a letter to the Department under LVMC 6.95.080. The Department did not consider the City's letter and timely released its rankings the following business day. Pursuant to the Department's rankings of Las Vegas applicants, appellant Nuleaf CLV Dispensary, LLC (Nuleaf) ranked third, respondent/cross-appellant GB Sciences, LLC (GB) ranked thirteenth, and respondent/cross-respondent Acres Medical, LLC (Acres) ranked in the thirties. With regard to Clark County dispensaries, the Department can issue up to 40 certificates, but only 12 of those certificates can be allotted to dispensaries located in the City. NRS 453A.116(4) (defining a medical marijuana establishment to include a medical marijuana dispensary); NRS 453A.324(1)(a); NRS 453A.326(1). Thus, only Nuleaf ranked high enough to receive a certificate.

However, despite Nuleaf receiving a registration certificate, Nuleaf had been denied a request for a compliance permit by the City in its letter issued to the Department pursuant to LVMC 6.95.080. As such, GB brought the underlying suit against the Department and Nuleaf, alleging that the Department should have disqualified Nuleaf due to its failure to obtain approval from the City under NRS 453A.322(3)(a)(5). While GB's suit was pending, Acres filed a separate suit against the Department, seeking a writ of mandamus to compel the Department to recalculate its score because the Department had inadvertently omitted certain points while totaling Acres' score. The district court granted Acres' petition, and Acres moved up to thirteenth place while GB moved down to fourteenth place. The Department then filed a notice of entry of order regarding Acres' new ranking in the underlying suit.

Thereafter, GB moved for summary judgment on its declaratory judgment claim and sought a mandatory injunction requiring the Department to revoke Nuleaf's certificate and reissue it to GB. Nuleaf filed a countermotion for summary judgment, arguing that the Department correctly interpreted NRS Chapter 453A's statutory scheme to permit an applicant to receive a provisional certificate pending its ability to receive approval from the applicable local government. While the summary judgment motions were pending, Acres moved to intervene in the underlying suit, arguing that the Department should reissue Nuleaf's registration certificate to Acres instead of GB due to Acres' new score and adjusted ranking. The district court issued an order concluding that the application requirement enumerated under NRS 453A.322(3)(a)(5) was an absolute prerequisite for receiving a provisional registration certificate and that Nuleaf should have been disqualified for failing to do so. The district court further concluded that Acres, as opposed to GB,

was entitled to receive the registration certificate due to its corrected score. Accordingly, the district court (1) granted in part GB's motion for summary judgment requesting a declaration that Nuleaf was improperly issued a certificate pursuant to NRS 453A.322(3)(a)(5), (2) denied in part GB's motion for summary judgment requesting that the Department reissue a certificate to GB, (3) issued an injunction directing the Department to revoke Nuleaf's certificate and reissue the certificate to Acres, and (4) denied Nuleaf's countermotion for summary judgment.

II.

As an initial matter, we consider whether declaratory relief was an available form of judicial relief in this matter. We recently held that "a disappointed applicant for a medical marijuana establishment registration certificate does not have a right to judicial review under the APA or NRS Chapter 453A" because "the application process provided by NRS 453A.322 does not constitute a contested case." *See State, Dep't of Health and Human Servs. v. Samantha Inc.*, 133 Nev. 809, 810, 815-16, 407 P.3d 327, 328, 332 (2017). Nonetheless, we also acknowledged that our holding did not preclude an applicant from seeking "other forms of judicial relief, including but not limited to . . . declaratory relief." *Id.* at 816, 407 P.3d at 332. Specifically, declaratory relief is available under NRS 30.040, which provides, in relevant part, that any person "whose rights, status or other legal relations are affected by a statute, . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder." Here, GB sought a judicial determination regarding the proper construction of NRS 453A.322(3)(a)(5) and a declaration of the parties' rights with respect to the provisional registration certificate that was issued to Nuleaf. Accordingly, we conclude that GB properly sought declaratory relief as a form of judicial relief in the district court, and we next consider whether the district court erred in granting summary judgment on GB's request for declaratory relief.

III.

This court reviews a district court's order granting summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.* When deciding a summary judgment motion, all evidence must be viewed in a light most favorable to the nonmoving party. *Id.*

In addition, "[t]his court's role in reviewing an administrative agency's decision is identical to that of the district court. Although we defer to an agency's findings of fact, we review legal issues de

novo, including matters of statutory interpretation." *Poremba v. S. Nev. Paving*, 133 Nev. 12, 15, 388 P.3d 232, 235 (2017) (citation omitted). An agency's interpretation of a statute that it is authorized to execute is entitled to deference "unless it conflicts with the constitution or other statutes, exceeds the agency's powers, or is otherwise arbitrary and capricious." *Cable v. State ex rel. Emp'rs Ins. Co. of Nev.*, 122 Nev. 120, 126, 127 P.3d 528, 532 (2006).

In light of the district court's order granting summary judgment on GB's declaratory judgment claim, the parties dispute the proper construction of NRS 453A.322(3)(a)(5) regarding whether an applicant must obtain prior approval from a local government to receive a registration certificate. GB and Acres argue that NRS 453A.322(3)(a)(5) plainly provides that an applicant must provide proof of local licensure or a letter certifying compliance with all relevant requirements from the applicable local government before the Department's 90-day statutory deadline for issuing certificates. Nuleaf argues that an applicant's failure to satisfy NRS 453A.322(3)(a)(5)'s requirement merely renders any registration certificate provisional until the applicant is able to do so. We agree with Nuleaf.

A.

"When the language of a statute is plain and subject to only one interpretation, we will give effect to that meaning and will not consider outside sources beyond that statute." *Nev. Att'y for Injured Workers v. Nev. Self-Insurers Ass'n*, 126 Nev. 74, 84, 225 P.3d 1265, 1271 (2010). Conversely, "when the statute is ambiguous and subject to more than one interpretation, we will evaluate legislative intent and similar statutory provisions" and "construe the statute in a manner that conforms to reason and public policy." *Id.*

In determining whether NRS 453A.322 is ambiguous, there are three interrelated statutes to consider: NRS 453A.322 itself, NRS 453A.326, and NRS 453A.328. First, NRS 453A.322 provides, in relevant part:

> 3. Except *as otherwise provided* in NRS 453A.324, 453A.326, 453A.328 and 453A.340, not later than 90 days after receiving an application to operate a medical marijuana establishment, the [Department] *shall register* the medical marijuana establishment and issue a medical marijuana establishment registration certificate . . . *if*:
>
> (a) The person who wishes to operate the proposed medical marijuana establishment *has submitted to the* [*Department*] *all of the following*:
>
> . . . .
>
> (5) . . . proof of licensure with the applicable local governmental authority or a letter from the applicable local

> governmental authority certifying that the proposed medical marijuana establishment is in compliance with [zoning] restrictions and satisfies all applicable building requirements.

(Emphases added.) Second, NRS 453A.326(3) provides as follows:

> 3. In a local governmental jurisdiction that issues business licenses, the issuance by the [Department] of a medical marijuana establishment registration certificate *shall be deemed to be provisional* until such time as:
>
> (a) The establishment is in compliance with all applicable local governmental ordinances or rules; and
>
> (b) The local government has issued a business license for the operation of the establishment.

(Emphasis added.) Third, NRS 453A.328 provides, in relevant part, that "[i]n determining whether to issue a medical marijuana establishment registration certificate pursuant to NRS 453A.322, the [Department] shall, *in addition to the factors set forth in that section*, consider [this section's] criteria of merit." (Emphasis added.)

Here, the plain language of the three interrelated statutes is ambiguous as to whether the Department can issue a certificate for an applicant who fails to satisfy NRS 453A.322(3)(a)(5)'s requirement. Consistent with GB and Acres' interpretation, NRS 453A.322(3) may be interpreted to require applicants to provide proof of local approval before they can be considered for the Department's ranking system under NRS 453A.328. *See* NRS 453A.322(3)(a)(5) (providing that the Department "shall register the medical marijuana establishment . . . if . . . [t]he person who wishes to operate the proposed medical marijuana establishment has submitted" proof of local approval). Conversely, Nuleaf's interpretation is also reasonable in that NRS 453A.328's language suggests that NRS 453A.322(3)'s requirements are merely "factors" for the Department to consider in issuing a certificate. *See* NRS 453A.328 (stating that "[i]n determining whether to issue a . . . registration certificate pursuant to NRS 453A.322, the [Department] shall, in addition to the factors set forth in that section, consider the following criteria of merit"). Furthermore, while NRS 453A.322(3)(a) states that the Department "shall" register a medical marijuana establishment when it has satisfied that subsection's requirements, nothing in the statute prohibits the Department from considering an applicant that fails to meet the requirements. Therefore, we conclude that NRS 453A.322(3)(a)(5) is ambiguous, and we turn to both NRS 453A.322's "legislative history and our rules of statutory interpretation." *Leven v. Frey*, 123 Nev. 399, 404, 168 P.3d 712, 716 (2007).

B.

We conclude that NRS 453A.322's legislative history provides little guidance in resolving the pertinent ambiguities of the statute;

however, in applying established statutory construction principles, we conclude that NRS 453A.322 permits the Department to issue a provisional certificate until the applicant is able to satisfy all applicable zoning and building requirements.

Here, all of the parties agree that NRS 453A.322 plainly requires the Department to issue registration certificates no later than 90 days after receiving an application. However, NRS Chapter 453A imposes no such time requirement on local governments in submitting letters to the Department pursuant to NRS 453A.322(3)(a)(5). In light of the time requirement imposed on the Department, and lack thereof for applicable local governments, adopting GB and Acres' interpretation of NRS 453A.322(3)(a)(5) would produce unreasonable results. *Leven*, 123 Nev. at 405, 168 P.3d at 716 (providing that "[w]hen construing an ambiguous statutory provision," this court should avoid rendering any part of a statute meaningless, "and a statute's language should not be read to produce absurd or unreasonable results" (internal quotation marks omitted)). For example, under GB and Acres' interpretation, local governments may (1) interject last minute and effectively force the Department to readjust its applicant rankings and potentially violate its statutorily mandated deadline for issuing certificates, or (2) preclude otherwise qualified applicants from receiving certificates for that calendar year by simply failing to notify the Department pursuant to NRS 453A.322(3)(a)(5).

Here, the City submitted its letter pursuant to LVMC 6.95.080(D) just one business day before the Department's 90-day limit to release the rankings of the applicants and issue certifications. The Department explained that it had 519 applications to review, score, and rank accordingly. As such, requiring the Department to consider the City's last-minute letter by disqualifying applicants who failed to obtain approval and readjust its ranking would have likely caused the Department to violate its 90-day deadline for issuing certificates. Similarly, if the City had failed to notify the Department before the 90-day deadline, the Department would have been forced to disqualify all applicants seeking to operate in the City. Thus, we conclude that adopting the district court's interpretation of NRS 453A.322(3)(a) would produce unreasonable results.

Nonetheless, GB and Acres argue that Nuleaf's interpretation of NRS 453A.322 would disrupt the crucial interplay between the Department and local authorities in overseeing the medical marijuana establishment registration process. We disagree.

The Department specifically recognizes that "the issuance of a medical marijuana establishment registration certificate by the [Department] is provisional and not an approval to begin operations as a medical marijuana establishment until" the establishment (1) complies with all applicable local governmental ordinances and rules, and (2) receives a business license or approval from the applicable local

government to commence operation. NAC 453A.316. In the instant case, Nuleaf's establishment must satisfy all relevant Las Vegas municipal codes before commencing operation. *See* LVMC 6.95.020; LVMC 6.95.040; LVMC 6.95.080; LVMC 6.95.090. Moreover, "[i]f a medical marijuana establishment is not fully operational within 18 months after the date on which the [Department] issued the medical marijuana establishment registration certificate, the [Department] may revoke the medical marijuana establishment registration certificate." NAC 453A.324. Accordingly, we conclude that the Department's ability to issue provisional registration certificates does not supersede local governmental approval for the operation of medical marijuana establishments.

Finally, we must afford great deference to the Department's interpretation of a statute that it is tasked with enforcing when the interpretation does not conflict with the plain language of the statute or legislative intent. *See Meridian Gold Co. v. State ex rel. Dep't of Taxation*, 119 Nev. 630, 635, 81 P.3d 516, 519 (2003) (noting "courts generally give great deference to an agency's interpretation of a statute that the agency is charged with enforcing" (internal quotation marks omitted)); *see also City of Reno v. Reno Police Protective Ass'n*, 118 Nev. 889, 900, 59 P.3d 1212, 1219 (2002) (acknowledging that "[a]n agency charged with the duty of administering an act is impliedly clothed with power to construe it as a necessary precedent to administrative action [and] great deference should be given to the agency's interpretation when it is within the language of the statute" (alterations in original) (internal quotation marks omitted)). This holds true in light of GB and Acres' competing interpretation of NRS 453A.322. *See Malecon Tobacco, LLC v. State ex rel. Dep't of Taxation*, 118 Nev. 837, 841-42 n.15, 59 P.3d 474, 477 n.15 (2002) (acknowledging that "[c]ourts . . . must respect the judgment of the agency empowered to apply the law to varying fact patterns, even if the issue with nearly equal reason [might] be resolved one way rather than another" (alterations in original) (internal quotation marks omitted)).

Accordingly, we conclude that the Department has the authority to issue registration certificates to applicants who have not satisfied NRS 453A.322(3)(a)(5)'s requirement and that a certificate is deemed provisional until the applicant obtains proper approval by the applicable local government. Thus, we reverse the district court's order to the extent that it relied on an erroneous interpretation of NRS 453A.322.[2]

[2]In light of this conclusion, we need not reach Nuleaf's remaining arguments concerning the district court's ability to direct the Department to revoke Nuleaf's registration certificate and reissue it to Acres. We further need not reach GB and Acres' arguments on cross-appeal regarding entitlement to Nuleaf's registration certificate.

IV.

For the reasons set forth above, we (1) affirm the district court's order denying in part GB's summary judgment motion seeking mandatory injunction; (2) reverse the district court's order (a) granting in part GB's summary judgment motion seeking declaratory relief, (b) directing the Department to reissue the registration certificate to Acres, and (c) denying Nuleaf's countermotion for summary judgment; and (3) remand for further proceedings consistent with this opinion.

Douglas, C.J., and Cherry, Gibbons, Pickering, Hardesty, and Stiglich, JJ., concur.

JASON KING, P.E., NEVADA STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, Appellant, *v.* RODNEY ST. CLAIR, Respondent.

No. 70458

March 29, 2018 414 P.3d 314

Appeal from a district court order resolving a petition for judicial review in a water rights matter. Sixth Judicial District Court, Humboldt County; Steven R. Kosach, Senior Judge.

Affirmed.

Adam Paul Laxalt, Attorney General, and *Justina A. Caviglia*, Deputy Attorney General, Carson City, for Appellant.

Taggart & Taggart, Ltd., and *Paul G. Taggart* and *Rachel L. Wise*, Carson City, for Respondent.

Before the Supreme Court, En Banc.

OPINION

By the Court, Stiglich, J.:

This case concerns respondent Rodney St. Clair's entitlement to water rights connected to a property that he purchased in 2013. Upon finding an abandoned well on the property, St. Clair applied to the State Engineer for a permit to temporarily change the point of diversion of the underground water source from that well to another location on his property. To support that application, St. Clair submitted a Proof of Appropriation, in which he claimed that a prior owner of

the property had established a vested right to the underground water source. In ruling on St. Clair's application for a temporary permit, the State Engineer found that a prior owner had indeed established a right to appropriate underground water, but a subsequent owner abandoned that right through years of nonuse. Upon St. Clair's petition for judicial review, the district court overruled the State Engineer's decision, finding insufficient evidence that any owner of the property intended to abandon the property's water right. We affirm because nonuse evidence alone was insufficient to support a finding of an intent to abandon.

FACTS AND PROCEDURAL HISTORY

In 2013, Rodney St. Clair purchased real property in Humboldt County, Nevada. Upon finding remnants of a well casing on the property, St. Clair filed two documents with the State Engineer. The first was a Proof of Appropriation, in which St. Clair claimed a pre-1939 vested right to appropriate underground water. The second was an application for a permit to temporarily change the place of diversion of that water.

To support his Proof of Appropriation, St. Clair submitted documents establishing that the property in question was first acquired by George Crossley in 1924 pursuant to the Homestead Act of 1862. Several months later, Crossley deeded the land, with all appurtenances, to Albert H. Trathen. The Trathen family maintained ownership over the property until 2013, when St. Clair bought it. All property taxes were paid from 1924 to the present.

St. Clair's documentation also included Crossley's 1924 land patent application, in which Crossley indicated that a drilled well existed on the property. St. Clair submitted pictures of remnants of the well existing on the property in 2013. By that time, the well had become inoperable, and St. Clair admitted in his application that the land had not been irrigated recently and that he did not know when it was last irrigated.

In ruling on St. Clair's application, the State Engineer found sufficient evidence that Crossley had appropriated underground water and put it to beneficial use prior to March 25, 1939, thus vesting a pre-statutory right to appropriate underground water pursuant to NRS 534.100.[1] However, the State Engineer also found that the water was not used continuously from 1924 to the present and that there was "no evidence pointing to a *lack* of prior owners' intent to abandon the water right." Based on those findings, the State Engineer concluded that the vested water right had been abandoned. The State Engineer therefore denied St. Clair's application seeking

[1]The State Engineer appears to have erroneously cited to NRS 534.080(1) instead of NRS 534.100.

a temporary change of place of diversion on the basis that no appropriated water was available.

St. Clair petitioned for judicial review. While the district court accepted the State Engineer's findings that the well was inoperable and that water had not been put to beneficial use for some time, the court reasoned "that non-use of the water is not enough to constitute abandonment" of a water right. The district court noted that the property contained no improvements inconsistent with irrigation and the evidence indicated that all taxes and assessments on the property were paid from Crossley's time up until the present. Thus, the district court overruled the State Engineer's abandonment finding as being unsupported by substantial evidence and ordered the State Engineer to grant St. Clair's application for a permit to change the place of diversion. The State Engineer appeals.

DISCUSSION

When this court reviews a district court's order reversing an agency's decision, we apply the same standard of review that the lower court applied: we determine whether the agency's decision was arbitrary or capricious. *See Pyramid Lake Paiute Tribe of Indians v. Washoe Cty.*, 112 Nev. 743, 751, 918 P.2d 697, 702 (1996). According to that standard, factual findings of the State Engineer should only be overturned if they are not supported by substantial evidence. *See id.* Substantial evidence is "that which a reasonable mind might accept as adequate to support a conclusion." *Bacher v. Office of the State Eng'r*, 122 Nev. 1110, 1121, 146 P.3d 793, 800 (2006) (internal quotation marks omitted). We review purely legal questions de novo. *See In re Nev. State Eng'r Ruling No. 5823*, 128 Nev. 232, 238-39, 277 P.3d 449, 453 (2012).

The State Engineer misapplied Nevada law in finding that nonuse alone established a prior owner's intent to abandon water rights

"A right to use underground water . . . may be lost by abandonment." NRS 534.090(4) (2011).[2] The party asserting abandonment "bears the burden of proving, by clear and convincing evidence," that an owner of the water right intended to abandon it and took actions consistent with that intent. *See Town of Eureka v. Office of the State Eng'r*, 108 Nev. 163, 169, 826 P.2d 948, 952 (1992). Clear and convincing evidence "is beyond a mere preponderance of the evidence." *See Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 1260 n.4, 969 P.2d 949, 957 n.4 (1998) (internal quotation marks omitted); *see also In re Discipline of Drakulich*, 111 Nev.

[2]NRS 534.090 has been amended twice since 2013, when the State Engineer ruled on St. Clair's application. *See* 2017 Nev. Stat., ch. 147, § 1, at 656-58; 2017 Nev. Stat., ch. 517, § 9, at 3505-07. We cite to the version of NRS 534.090 in effect in 2013.

1556, 1566, 908 P.2d 709, 715 (1995) (clear and convincing evidence "need not possess such a degree of force as to be irresistible, but there must be evidence of tangible facts from which a legitimate inference . . . may be drawn" (internal quotation marks omitted)).

The State Engineer's primary argument is that the district court erroneously focused on St. Clair when it found insufficient evidence of an intent to abandon the water right connected to the property. The relevant intent, the State Engineer claims, is that of the previous landowners who allowed the well to fall into disrepair and failed to put the water to beneficial use.

The State Engineer is correct that, assuming a prior owner has taken actions consistent with abandonment, it is that owner's intent that controls. Otherwise, water rights could be abandoned by one property owner and then revived 50 years later by a subsequent owner, potentially resulting in over-appropriation of water. *See Haystack Ranch, LLC v. Fazzio*, 997 P.2d 548, 554 (Colo. 2000) ("[S]ubsequent efforts by current owners to put water rights to beneficial use cannot revive water rights already abandoned by previous owners.").

The question is what constitutes sufficient evidence of a prior owner's intent to abandon. The State Engineer argues that decades of nonuse were sufficient to establish that a prior owner intended to abandon the water right.

Contrary to the State Engineer's argument, however, "Nevada law does not presume abandonment of a water right from nonuse alone." *United States v. Alpine Land & Reservoir Co.*, 510 F.3d 1035, 1038 (2007); *see also Revert v. Ray*, 95 Nev. 782, 786, 603 P.2d 262, 264 (1979) ("Abandonment, requiring a union of acts and intent, is a question of fact to be determined from all the surrounding circumstances."); *Franktown Creek Irrigation Co., Inc. v. Marlette Lake Co.*, 77 Nev. 348, 354, 364 P.2d 1069, 1072 (1961) ("[I]t is necessary to establish the owner's intention to abandon and relinquish such right before an abandonment can be found."); *Barry v. Merickel Holding Corp.*, 60 Nev. 280, 290, 108 P.2d 311, 316 (1940) ("[I]n abandonment the intent of the water user is controlling. To substitute and enlarge upon that by saying that the water user shall lose the water by failure to use it for a period of five years, irrespective of the intent, certainly takes away much of the stability and security of the right to the continued use of such water.").

In this case, an extended period of nonuse is evidenced by the property's inoperable well and unirrigated land. However, that nonuse evidence alone does not shift the burden to St. Clair to prove an intent *not* to abandon the water right.[3] To shift the burden on

[3]To the extent that *Alpine Land* suggests that nonuse evidence constitutes "some evidence of abandonment" that shifts the burden to the applicant, we reject that interpretation of Nevada law. *See* 510 F.3d at 1038, 1038 n.5.

this issue, the State Engineer would have to show additional evidence indicating an intent to abandon—for example, evidence that an owner made improvements to the land inconsistent with irrigation, or evidence that the owner failed to pay property taxes during the period of nonuse. *See Revert*, 95 Nev. at 786, 603 P.2d at 264 (considering "delinquent taxes" as evidence supporting a finding of abandonment). We find no such evidence in this record.

Considering "all the surrounding circumstances," *id.*, there is not clear and convincing evidence that St. Clair's predecessor intended to abandon the water right. In concluding otherwise, the State Engineer misapplied Nevada law by presuming abandonment based on nonuse evidence alone. In so doing, the State Engineer acted arbitrarily and capriciously. Therefore, the district court correctly overruled the State Engineer's ruling with regard to abandonment.

The State Engineer's additional claims lack merit

The State Engineer makes several additional claims. First, the State Engineer argues that the district court exceeded its authority when it ordered the State Engineer to grant St. Clair's temporary application, rather than remanding to the State Engineer to consider factors other than abandonment. Given that the temporary application expired on June 10, 2017, this issue is moot, and we decline to address it.[4] *See Nat'l Collegiate Athletic Ass'n v. Univ. of Nev., Reno*, 97 Nev. 56, 58, 624 P.2d 10, 11 (1981).

Second, the State Engineer argues that the district court abused its discretion by expanding the record on review. In particular, the State Engineer argues that the court erred in granting a request from St. Clair to take judicial notice of legal briefs and prior State Engineer decisions in unrelated matters. In so doing, the State Engineer argues, the district court went beyond determining "whether substantial evidence *in the record* supports the State Engineer's decision." *Revert*, 95 Nev. at 786, 603 P.2d at 264 (emphasis added). However, this issue is not properly before us because the State Engineer failed to preserve it with its opposition filed five months after St. Clair's request for judicial notice. The district court properly denied that opposition as untimely. *See* D.C.R. 13(3) (requiring written opposition to be filed within ten days of service of the opposing party's motion). We therefore decline to address this issue. *Archon Corp. v. Eighth Judicial Dist. Court*, 133 Nev. 816, 822-23, 407 P.3d 702,

[4]By contrast, the issue of abandonment addressed above is not moot because the State Engineer's abandonment ruling remains in effect. At least as of November 7, 2017, St. Clair had another application to change the place of diversion pending before the State Engineer. The State Engineer's ruling of abandonment on St. Clair's Proof of Appropriation would have required that application to be rejected.

708 (2017) (noting that this court may decline to consider issues improperly presented to the district court).

Third and last, the State Engineer argues that the district court violated NRCP 52 by adopting in full an order drafted by St. Clair. Prior to approving St. Clair's drafted order, the district court held a hearing to consider the State Engineer's objections to specific language within that order. That the district court found those objections unpersuasive does not mean that the court neglected its duty to make factual findings. It is common practice for Clark County district courts to direct the prevailing party to draft the court's order. *See* EDCR 1.90(a)(5) ("[A] judge or other judicial officer shall order the prevailing party to prepare a written judgment and findings of fact and conclusions of law.").

CONCLUSION

An extended period of nonuse of water does not in itself establish clear and convincing evidence that a property owner intended to abandon a water right connected to the property. In this case, there was no additional evidence indicating an intent to abandon, so the State Engineer's finding of abandonment was unsupported by substantial evidence. Therefore, we affirm the district court's decision.

Douglas, C.J., and Cherry, Gibbons, Pickering, Hardesty, and Parraguirre, JJ., concur.

COMSTOCK RESIDENTS ASSOCIATION; and JOE McCARTHY, Appellants, *v.* LYON COUNTY BOARD OF COMMISSIONERS, Respondent.

No. 70738

March 29, 2018 414 P.3d 318

Appeal from a district court order denying a petition for a writ of mandamus concerning disclosures under a public records request. Third Judicial District Court, Lyon County; Steven R. Kosach, Senior Judge.

Reversed and remanded.

John L. Marshall, Reno; Luke A. Busby, Reno, for Appellants.

Stephen B. Rye, District Attorney, Lyon County, for Respondent.

Before the Supreme Court, En Banc.

OPINION

By the Court, Cherry, J.:

In this appeal, we consider a district court's denial of a petition for a writ of mandamus to compel disclosure of records where members of the Lyon County Board of Commissioners conducted county business on private cellphones and email accounts. We conclude that the grounds on which the district court denied the records requests were erroneous and remand this case to the district court to determine whether the requested records concern "the provision of a public service," as defined in *Las Vegas Metropolitan Police Department v. Blackjack Bonding, Inc.*, 131 Nev. 80, 86, 343 P.3d 608, 613 (2015), and this opinion, and are within the control of the county or its commissioners.

FACTS AND PROCEDURAL HISTORY

In 2013, the Lyon County Board of Commissioners received an application to alter the zoning within Lyon County to allow for industrial development. The Board received reports from the county's planning staff and held public hearings, after which they voted to recommend denying the proposed zoning change. At a subsequent meeting of the county commissioners, the issue was reintroduced and the zoning change approved. Appellant, the Comstock Residents Association (CRA), brought suit against the Board, challenging the approval of the zoning change.

As part of that suit, CRA made a public records request of Lyon County and its commissioners, seeking communications concerning the approval of the zoning change, regardless of whether they occurred on public or private devices. Lyon County provided phone records, emails, and other records that were created or maintained on county equipment and some public records created on private devices as well. However, Lyon County also notified CRA that it did not provide or pay for phones or email accounts to any commissioners. The county's website listed the commissioners' personal phone numbers and email addresses as their contact information. The county concedes that these private telephones and email addresses were used to conduct county business.

CRA subsequently filed a petition for a writ of mandamus to compel the county to disclose all public records of the commissioners' communications regarding the change to the county's zoning plan, including those communications contained on the commissioners' private cell phones and email accounts. The district court denied CRA's petition, reasoning that the records were not (1) open to public inspection, (2) within the control of the county, and (3) records

of official actions of the county or paid for with public money. CRA subsequently appealed to this court.

DISCUSSION

Standard of review

This court reviews the denial of a writ petition for abuse of discretion, but reviews questions of statutory interpretation de novo. *Blackjack*, 131 Nev. at 85, 343 P.3d at 612.

Communications on private devices or servers are not categorically exempt from the Nevada Public Records Act

Under the Nevada Public Records Act (NPRA), codified in NRS Chapter 239, all public books and public records of a governmental entity must be open to public inspection unless declared by law to be confidential. NRS 239.010(1). A governmental entity includes elected or appointed officers of this state's political subdivisions. NRS 239.005(5)(a). The NPRA is intended to "foster democratic principles by providing members of the public with access to inspect and copy public . . . records to the extent permitted by law," and this court will construe the Act's provisions liberally to achieve this purpose. NRS 239.001(1), (2). It is in the interest of transparency that the NPRA facilitates "public access to information regarding government activities." *Pub. Emps.' Ret. Sys. v. Reno Newspapers, Inc.*, 129 Nev. 833, 836-37, 313 P.3d 221, 223 (2013). To achieve the important democratic principles served by the NPRA, we begin from a presumption that public records must be disclosed to the public. *Id.* at 837, 313 P.3d at 223-24. The burden is then on the governmental entity to show by a preponderance of the evidence that the records sought are either confidential by statutory provision, or the balance of interests weighs clearly in favor of the government not disclosing the requested records. *Id.* at 837, 313 P.3d at 224. Even in the instance that an exemption on disclosure is applicable or the balance of interests weighs against disclosure, the restriction "must be construed narrowly." NRS 239.001(3). Amongst the things considered public records, subject to disclosure under the NPRA, are records of private entities used in "the provision of a public service." *Blackjack*, 131 Nev. at 86, 343 P.3d at 613; *see also* NRS 239.001(4).

A. Public records are not limited to records maintained in government offices, but include all records concerning the provision of a public service

The Board first argues that the district court properly denied the records request on the ground that the records were not open to public inspection. The Board asserts that NRS 239.010(1)'s requirement

that all public records "be open at all times during office hours to inspection by any person" indicates that only records maintained in government offices constitute public records.

On its face, NRS 239.010(1) does not state that only records maintained in government offices constitute public records, and the requirement that public records "be open at all times during office hours to inspection by any person" is not clear as to whether those records must be immediately available on demand at a government office. Therefore, we look at other provisions in the NPRA for guidance, and the Board's interpretation contradicts other provisions of the NPRA and our precedent on this topic. *See Watson Rounds P.C. v. Eighth Judicial Dist. Court*, 131 Nev. 783, 789, 358 P.3d 228, 232 (2015) ("[W]henever possible, a court will interpret a rule or statute in harmony with other rules or statutes." (quoting *Nev. Power Co. v. Haggerty*, 115 Nev. 353, 364, 989 P.2d 870, 877 (1999))).

"The use of private entities in the provision of public services must not deprive members of the public access to inspect and copy books and records relating to the provision of those services." NRS 239.001(4). The NPRA further allows five business days for a governmental entity to resolve a public records request. NRS 239.0107(1). In light of these requirements, NRS 239.010(1) cannot be read as limiting public records to those that are physically maintained at a government location or on a government server and are immediately accessible to the public during the business hours of that governmental entity. Such an interpretation would render both NRS 239.001(4) and NRS 239.0107 meaningless, as the records of private entities rendering public services would not necessarily be stored at the government office, and providing a time frame for resolving a records request would be unnecessary if records were required to be immediately produced for inspection at that location. Because of this, we reject the Board's interpretation.

Furthermore, the Board's argument contradicts this court's previous decisions where we have compelled the production of public records when they have been in the possession of private parties, *see Blackjack*, 131 Nev. at 82, 86-87, 343 P.3d at 610, 613 (concluding that Clark County Detention Center call records were subject to disclosure under a public records request even though the records were in the possession of a private telephone service provider), and addressed whether individual emails sent by a government official were subject to disclosure under a public records request, despite the fact that emails are not open for immediate inspection at a government office, *see Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 876, 885-86, 266 P.3d 623, 625, 631 (2011) (requiring specific reasons for withholding the governor's emails sent on a state-issued email account from disclosure under the NPRA). The logical interpretation of NRS 239.010(1), and the one that best satisfies the

Legislature's requirement to construe the Act liberally to maximize public access, NRS 239.001(2), is that public records maintained by government agencies must be readily available for inspection by the public, but this statute does not limit what qualifies as a public record.

The proper question for determining whether the requested records maintained on the county commissioners' private cellphones and email accounts constitute public records subject to disclosure under a public records request, *see* NRS 239.001(4), is whether they concern "the provision of a public service" as defined in *Blackjack*, 131 Nev. at 86, 343 P.3d at 613. In *Blackjack*, we held that where a private entity possesses records of a governmental entity performing "a service rendered in the public interest," those records constitute public records and must be disclosed pursuant to the NPRA. *Id.* at 85-86; 343 P.3d at 612-13 (quoting *Merriam-Webster's Collegiate Dictionary* 944 (10th ed. 1994)). While the public service in *Blackjack* was the provision of telephones at Clark County Detention Center, *id.* at 83, 343 P.3d at 611, we find its definition of a public record to be applicable here.

Here, Lyon County concedes that its commissioners conducted county business, performing their duties as public servants, through their private phones and email addresses. It is further clear that the commissioners themselves are governmental entities, subject to the NPRA. NRS 239.005(5)(a). Because this court must liberally construe NRS Chapter 239 in order to facilitate "public access to information regarding government activities," *PERS*, 129 Nev. at 836-37, 313 P.3d at 223, and records of communications regarding the zoning change in Lyon County exist on the commissioners' private phones and servers, communications made in the performance of the commissioners' duties on behalf of the public fall within this definition of a public service. The NPRA's requirement of transparency in the performance of government activities necessarily includes within the definition of the provision of a public service actions performed by governmental entities for the public's benefit. A number of jurisdictions have come to similar conclusions that records concerning the performance of the public's business are public, *see, e.g., City of San Jose v. Superior Court*, 389 P.3d 848, 854 (Cal. 2017); *Doyle v. Town of Falmouth*, 106 A.3d 1145, 1149 (Me. 2014); *Cowles Publ'g Co. v. Kootenai Cty. Bd. of Cty. Comm'rs*, 159 P.3d 896, 900 (Idaho 2007); *City of Champaign v. Madigan*, 992 N.E.2d 629, 636-37 (Ill. Ct. App. 2013), and their storage on private devices does not alter that determination, *see, e.g.*, *City of San Jose*, 389 P.3d at 858; *Nissen v. Pierce Cty.*, 357 P.3d 45, 53-54 (Wash. 2015); *City of Champaign*, 922 N.E.2d at 639. However, the district court did not make any findings as to which specific communications were made in furtherance of the public's interests or would

be exempt from the NPRA, and we remand this matter to the district court with instructions to determine whether the requested records regard the provision of a public service and are subject to disclosure.

B. Records that can be generated or obtained by the county or its commissioners are within the county's control

In denying the petition, the district court also concluded that the records were not public records because they were not in the control of the county. The Board contends that public records are only subject to requests if they are within the legal custody or control of "[a]n officer, employee or agent of a governmental entity." NRS 239.010(4). They argue that under NAC 239.041, the governmental entity must have all rights of access to the record and be charged with its care for the record to be within the entity's legal custody. Because the Board is not charged with maintaining records of the private emails and phone communications of its commissioners, the Board concludes the county does not have legal custody or control of the records in question.

While NAC 239.041 provides a definition of legal custody, this regulation applies to local government records management programs created under NRS 239.125(1) and serves to determine whether requests for public records of a certain type are properly directed to that program. The administrative regulations do not limit the reach of the NPRA, but merely establish regulations for good records management practices of those local programs. *See* NRS 239.125(1); *see also* NRS 378.255(1) (indicating that the State Library, Archives and Public Records Administrator may set standards for the effective management of records of local and state government entities). The best practices for local government record management and what constitutes a public record for purposes of the NPRA are distinct, and we are careful not to conflate them here.[1]

As discussed above, a record within the possession of a private entity may still constitute a public record subject to disclosure upon

[1]This same analysis applies to the district court's findings that the designation of "nonrecord materials" as those that are not records of an official government action, NAC 239.051, and definition of public record as one paid for with public money, NAC 239.091 (repealed 2014), are dispositive in determining whether the records sought fall under the NPRA. Both are administrative regulations pertaining to local records management programs, and do not determine the overall scope of the NPRA for the reasons discussed.

Additionally, the Board's citation to *Nevada Policy Research Institute, Inc. v. Clark County School District*, Docket No. 64040 (Order of Reversal and Remand, May 29, 2015), in support of applying the definitions of public records given in NAC 239.051 and NAC 239.091 (repealed 2014) is unpersuasive. We consider, for their persuasive value, unpublished dispositions filed after January 1, 2016. NRAP 36(c)(3). As the cited unpublished disposition was issued prior to January 1, 2016, it is not considered for its persuasive value here.

request. *See* NRS 239.001(4); *Blackjack*, 131 Nev. at 82, 86-87, 343 P.3d at 610, 613. It does not follow, then, that a public record is inherently beyond the control of a governmental entity by virtue of the fact that it exists on a device or server not designated as governmental. While Lyon County does not provide the subject phones or email accounts, the commissioners themselves are governmental entities, NRS 239.005(5)(a), and their custody of the requested records would satisfy the requirement of legal custody under NRS 239.010(4).

In *Blackjack*, we concluded that the Las Vegas Metropolitan Police Department had sufficient control of the requested public records based on "substantial evidence . . . that the requested information could be generated [by the private entity] . . . and could be obtained [by the governmental entity]." 131 Nev. at 86-87, 343 P.3d at 613. Whether the governmental entity had effective control over the requested record is a question of fact, and therefore, the district court erred by strictly applying the administrative definition of legal custody and it is incumbent on the district court, on remand, to determine whether the commissioners are able to produce the requested public records.[2]

---

[2]The Board also raises two other arguments regarding the practicality of disclosing public records maintained on private devices or servers and the potential for these public records requests to violate the privacy rights of the county commissioners. The Board has only speculated that some of the records requested may be difficult to obtain or would require the county to adopt costly practices for maintaining such records. We see no certain connection between concluding that public records stored on private devices or servers may be subject to disclosure and a requirement that the county take costly measures to maintain and manage private servers and devices. Our decision here is limited to our holding that public records stored on private devices or servers may still be subject to disclosure under the NPRA. Moreover, if any commissioner wishes to challenge the disclosure of any particular record, they are free to do so in the district court.

The Board's argument that the privacy rights of the commissioners could be violated by disclosing public records from the commissioners' private devices and emails cannot be evaluated without further development of the district court record. Having concluded that public records are not beyond the NPRA's reach merely because they are privately maintained, we decline any bright line rule that privacy concerns always outweigh the presumption that public records are to be disclosed. *PERS*, 129 Nev. at 837, 313 P.3d at 223-24. Although only those records that concern the public's business are subject to disclosure, there are privacy protections available that allow the district court to determine the public records are protected as confidential, *id.* at 837, 313 P.3d at 224, find the interest in nondisclosure clearly outweighs the interest in disclosure, *id.*, or redact portions of the record not required to be disclosed as a public record, *Reno Newspapers, Inc. v. Haley*, 126 Nev. 211, 219-20, 234 P.3d 922, 927-28 (2010). However, the governmental entity bears the burden to make a particularized showing that the public record is exempt from disclosure, *Gibbons*, 127 Nev. at 880, 266 P.3d at 628, and "[a] mere assertion of possible endangerment" is not sufficient, *Haley*, 126 Nev. at 218, 234 P.3d at 927 (quoting *CBS, Inc. v. Block*, 725 P.2d 470, 474 (Cal. 1986)).

CONCLUSION

We conclude that the NPRA does not categorically exempt public records maintained on private devices or servers from disclosure. To withhold a public record from disclosure, the government entity must present, with particularity, the grounds on which a given public record is exempt. We reverse and remand to the district court for further proceedings to determine whether the requested records were made in "the provision of a public service," as defined in *Las Vegas Metropolitan Police Department v. Blackjack Bonding, Inc.*, 131 Nev. 80, 86, 343 P.3d 608, 613 (2015), and this opinion, and are in the control of the county or its commissioners. If it is determined that the requested records indeed constitute public records, the county or the commissioners themselves may raise any challenge to the presumption that the public records are to be disclosed.

Douglas, C.J., and Gibbons, Pickering, Hardesty, Parraguirre, and Stiglich, JJ., concur.

PETER M. SOUTHWORTH, Petitioner, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE ROB BARE, District Judge, Respondents, and LAS VEGAS PAVING CORPORATION, Real Party in Interest.

No. 73655

March 29, 2018 414 P.3d 311

Original pro se petition for a writ of mandamus or prohibition challenging the denial of a motion to dismiss for lack of jurisdiction.

Petition granted.

Peter M. Southworth, Ridgecrest, California, in Pro Se.

Emerson Law Group and *Phillip R. Emerson*, Henderson, for Real Party in Interest.

Before the Supreme Court, En Banc.

OPINION

By the Court, Gibbons, J.:

This petition asks this court to determine whether the time to appeal outlined in the Justice Court Rules of Civil Procedure (JCRCP), specifically the time set forth in JCRCP 98, is jurisdictional and

mandatory, therefore removing from the district court's jurisdiction an untimely appeal from justice court.

FACTS AND PROCEDURAL HISTORY

This case arose originally as a small claims action in the Las Vegas Justice Court Township. Petitioner Peter Southworth filed a small claims complaint against real party in interest Las Vegas Paving Corporation (LVPC). The matter was first heard by a referee appointed by the justice of the peace in accordance with NRS 4.355 and as incorporated by Rule 48 of the Justice Court Rules of Las Vegas Township. After the referee made his findings of fact, conclusions of law, and recommendations, recommending that Southworth receive only a portion of his requested relief, Southworth filed a formal objection. A de novo formal objection hearing was held, and the justice of the peace pro tempore entered a final judgment granting Southworth full relief on March 22, 2017. Notice of the judgment was mailed to the parties on March 24, 2017. On April 7, 2017, LVPC appealed that final judgment to the district court.

Southworth moved to have the appeal dismissed under JCRCP 98, which states that a notice of appeal from a small claims action in justice court to district court must be filed within five days of entry of judgment. LVPC first argued JCRCP 72, which allows for 20 days to appeal, governed the proceeding.[1] Alternatively, LVPC argued that the district court should exercise its discretion under JCRCP 1 to expand the time to appeal outlined in JCRCP 98, as the procedure used in the justice court was confusing and the notice of appeal was filed only two days late. The district court agreed with this latter argument and denied Southworth's motion to dismiss, thereby exerting jurisdiction to hear the matter despite an untimely appeal. Southworth now petitions this court for a writ of mandamus or prohibition arresting the district court's improper exercise of jurisdiction or compelling the district court to grant his motion to dismiss.

DISCUSSION

The issue before this court is whether the time to appeal outlined in JCRCP 98 is jurisdictional and mandatory, or whether a district court may exercise discretion to expand the time to appeal where "literal application of [the] rule would work hardship or injustice." JCRCP 1. Southworth asks this court to hold that JCRCP 98 is jurisdictional and mandatory and to issue a writ of prohibition arresting the district court from entertaining an appeal that is untimely under that rule.

[1]The district court found, and we agree, that this matter was clearly a small claims proceeding governed by JCRCP 98, not JCRCP 72. Thus, we reject this argument as being without merit.

First, we examine whether writ relief is available in this context. "Because the district court has final appellate jurisdiction over cases arising in justice's court, [petitioners] cannot appeal to [the appellate] court and may seek relief only through a writ petition." *Sellers v. Fourth Judicial Dist. Court*, 119 Nev. 256, 257, 71 P.3d 495, 496 (2003) (footnotes omitted). As a general rule, we decline to entertain writ petitions that request review of a decision of the district court acting in its appellate capacity; however, where the district court has improperly refused to exercise its jurisdiction, has exceeded its jurisdiction, or has exercised its discretion in an arbitrary or capricious manner, we make an exception to that general rule. *State v. Eighth Judicial Dist. Court (Hedland)*, 116 Nev. 127, 134, 994 P.2d 692, 696 (2000). Where a district court has exercised jurisdiction over an untimely appeal from a justice court, a petition for a writ prohibiting the district court from hearing that matter is properly before this court and may issue. *City of Las Vegas v. Eighth Judicial Dist. Court*, 107 Nev. 885, 887, 822 P.2d 115, 116 (1991); *see also* NRS 34.320. Accordingly, we determine that, because Southworth alleges that the district court exceeded its jurisdiction, the matter is properly before us and a writ of prohibition is the appropriate form of relief.

Second, we hold that the rule governing timeliness of appeal from small claims actions in justice court to district court is "clear and absolute to give parties and counsel fair notice of the procedures for vesting jurisdiction in" the district court. *See Phelps v. State*, 111 Nev. 1021, 1022, 900 P.2d 344, 345 (1995). The rules state that JCRCP 98 governs the time to appeal from small claims actions in justice court and that a notice of appeal *must* be filed in district court within five days of entry of judgment. JCRCP 98; *see also* JCRCP 2, 72. The rules further provide that "[f]ailure of an appellant to take any step *other than* the timely filing of a notice of appeal does not affect the validity of the appeal." JCRCP 72 (emphasis added). In other words, failure to file a notice of appeal from a small claims action in justice court within five days clearly affects the validity of the appeal.

Moreover, while JCRCP 1 gives the district court discretion to act outside the scope of the rules where "literal application of [the] rule[s] would work hardship or injustice," we further hold that such a broad, discretionary rule cannot be used to expand the time to appeal. *See Scherer v. State*, 89 Nev. 372, 374, 513 P.2d 1232, 1233 (1973) ("The timely filing of a notice of appeal is jurisdictional and is an essential prerequisite to the perfection of an appeal."). We have repeatedly indicated in analogous settings that exercising such discretionary authority is inappropriate in the context of appeal time limits. *See, e.g.*, *City of Las Vegas*, 107 Nev. at 887, 822 P.2d at 116 (holding a district court exceeds its jurisdiction and can be arrested

by writ for entertaining untimely appeals from judgments of conviction entered in municipal court); *Walker v. Scully*, 99 Nev. 45, 46, 657 P.2d 94, 94 (1983) (holding that a district court lacks authority to extend the 30-day period to file a notice of appeal set forth by the Nevada Rules of Appellate Procedure).

CONCLUSION

We hold that the appeals time limit set forth in JCRCP 98 is jurisdictional and mandatory. Because LVPC filed its appeal outside the allotted five-day period, the district court did not have jurisdiction to entertain the untimely appeal. We therefore grant the petition and direct the clerk of this court to issue a writ of prohibition instructing the district court to arrest its exercise of jurisdiction over LVPC's appeal.

Douglas, C.J., and Cherry, Pickering, Hardesty, Parraguirre, and Stiglich, JJ., concur.