Docket: **CIVIL ACTION NO. 2014-3253-BLS2**
Date: **August 3, 2017**
Parties: **MOHEGAN SUN MASSACHUSETTS, LLC, et al. VS. MASSACHUSETTS GAMING COMMISSION, et al.**
Judge: **Janet L. Sanders, Justice of the Superior Court**

MEMORANDUM OF DECISION AND ORDER ON MOTION TO COMPLETE ADMINISTRATIVE RECORD

This action arises from a decision by the Massachusetts Gaming Commission (the Commission) to award a license to Wynn MA, LLC (Wynn) to operate a casino in Everett, Massachusetts. In so doing, the Commission chose Wynn over Mohegan Sun Massachusetts, LLC (Mohegan), which had proposed a casino in Revere. Mohegan seeks to vacate the Commission's decision pursuant to GL. c. 249, § 4, alleging that the Commission improperly favored Wynn during the license application process and failed to apply the standards for granting a gaming license enumerated in the Massachusetts Expanded Gaming Act. The matter is now before the Court on Mohegan's Motion to Complete the Administrative Record. The motion seeks an order compelling the Commission to add the following categories of documents to the administrative record:

1. Communications, including emails, between a quorum of the Commission concerning the Region A licensing proceedings.

2. Drafts of the final commissioners' presentations reports and appendices, and communications between commissioners and consultants concerning same.

3. Interviews and documents relied on by the Investigation and Enforcement Bureau for section titled "The Historical Ownership of the Project Land by FBT Everett, LLC" in its suitability report on Wynn.

4. Documents concerning ex parte communications between the commissioners or Commission staff and an applicant or its agents.

This Court concludes that the Commission should not be compelled to produce these documents.

The SJC has indicated that it is appropriate to look to federal case law decided under the Administrative Procedures Act (APA), 5 U.S.C. § 706, in determining what should be considered part of the administrative record. See Douglas Envtl. Assocs., Inc. v. Department of Envtl. Protection, 429 Mass. 71, 74-75 (1999). Accordingly, given the absence of Massachusetts case law on the subject, this Court relies on federal decisions to decide whether the Administrative Record in the present case should be supplemented with documents from the four categories listed above.

Under the APA, an agency's designation of the administrative record is entitled to a "strong presumption" of administrative regularity absent "clear evidence" that such designation was improper. Pacific Shores Subdivision. v. U.S. Army Corps of Eng'rs, 448 F. Supp. 2d 1, 5 (D.D.C. 2006); see also Bar MK Ranches v. Yuetter, 994 F.2d 735, 740 (10th Cir. 1993). To rebut this presumption and therefore justify an addition to the administrative record, plaintiffs must first "identify the materials allegedly omitted from the record with sufficient specificity, as opposed to merely proffering broad categories of documents . . . that are 'likely' to exist as a result of other documents that are included in the administrative record." Committee of 100 on the Federal City v. Foxx, 140 F. Supp. 3d 54, 59 (D.D.C. 2015), quoting Banner Health v. Sebelius, 945 F. Supp. 2d 1, 17 (D.D.C. 2013). Second, they must put forward "concrete evidence" that the

documents they seek to add to the record were actually before the decision-maker — that is, that they were directly or indirectly considered. Cape Hatteras Access Pres. Alliance v. U.S. Dept of Interior, 667 F. Supp. 2d 111, 114 (D.D.C. 2009); see also Foxx, 140 F. Supp. 3d at 59. This Court concludes that Mohegan has not met its burden.

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As to the first requirement, Mohegan has failed to identify the materials allegedly omitted from the record with sufficient specificity. Rather, it has simply identified four broad categories of documents that it believes might exist. Mohegan maintains that it should not be required to identify particular documents because the Commission has sole custody of those documents, and the Commission alone knows what they contain. However, there is good reason to place the burden of specific identification on plaintiffs like Mohegan, particularly given the statutory scheme pursuant to which the licensing decision was made.

Certiorari review is intended to be a very limited procedure. See School Comm. of Hudson v. Board of Educ., 448 Mass. 565, 575 (2007). Permitting plaintiffs to seek broad categories of unspecified documents, as opposed to precisely identified documents, would essentially transform this narrow form of review into a process that involves the type of wide-ranging discovery that characterizes a conventional lawsuit. Indeed, if the burden were otherwise, plaintiffs "would be free to define the administrative record based on the materials they believe the agency must (or should) have considered, leaving to the court the unenviable task of sorting through a tangle of competing 'records' in an attempt to divine which materials were considered." Fund for Animals v. Williams, 245 F. Supp. 2d 49, 57 (D.D.C. 2003). Expanding judicial review would be particularly inappropriate in the instant case, where the decision at issue was made pursuant to a statutory scheme that gives the Gaming Commission "a tremendous amount of discretion" and thus requires a standard of judicial review that is "extremely deferential." City of Revere v. Massachusetts Gaming Commission, 476 Mass. 591, 605-606 (2017).

This Court also considers the burden placed on the Commission if it were to allow Mohegan's request. For example, Mohegan's request for all emails exchanged among a

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"quorum" of the Commission concerning the Region A licensing proceedings would require the Commission to review all the emails sent or received by Commissioners over a nine month time period. As stated in affidavits submitted by the Commission, there are literally hundreds of thousands of such emails, and review of each of them would require potentially thousands of hours in attorney time. By including in the Gaming Commission statute a specific provision (G.L.c. 23K §17(g)) that sharply curtails judicial review, the legislature expressed a clear intent to avoid costly and protracted legal battles. To allow Mohegan's request would be contrary to that intent.

Mohegan states that the standard this Court should apply is not one related to the burden of production but rather one which looks to whether the requested documents were "directly or indirectly considered" by the Commission. See Douglas Envtl. Assocs., Inc v. Dep't. of Envt'l Protection, 429 Mass. at. 75. This relates to the second requirement that the plaintiff must satisfy in order to rebut the presumption that the administrative record as compiled by the agency is incomplete. Although Mohegan asserts that the documents sought (if they exist) informed the Commission's decision to award the Region A license to Wynn and thus should be regarded as having been "indirectly considered" by it, Mohegan does not substantiate this claim, providing little beyond speculation. For example, Mohegan contends

that all drafts, communications, and ancillary documents related to each Commissioner's evaluation reports (Category 2) were "indirectly" before the Commission because they were generated in connection with the final reports that the Commission considered. It likewise contends the IEB documents it seeks (Category 3) were indirectly before the Commission because the IEB relied on those documents to create the suitability report it submitted. A document will be viewed as having been "indirectly" before the decision-maker, and therefore properly part of the

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administrative record, only if it was so heavily relied upon as to indicate that the decision-maker constructively considered it. See Center for Native Ecosystems v. Salazar, 711 F. Supp. 2d 1267, 1275-1277 (D. Co. 2010); Banner Health, 945 F. Supp. 2d at 28. There is no indication that the Commission heavily relied on these documents in rendering its ultimate decision.

For these reasons and for other reasons articulated in the Commission's Memorandum in Opposition, Mohegan's Motion to Complete the Administrative Record is DENIED.

Janet L. Sanders, Justice of the Superior Court

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