IN THE SUPREME COURT OF MISSISSIPPI

NO. 2019-SA-01813-SCT

RW DEVELOPMENT, LLC

v.

MISSISSIPPI GAMING COMMISSION AND MISSISSIPPI GAMING & HOSPITALITY ASSOCIATION

DATE OF JUDGMENT:	11/12/2019
TRIAL JUDGE:	HON. CHRISTOPHER LOUIS SCHMIDT
TRIAL COURT ATTORNEYS:	GERALD BLESSEY MICHAEL F. CAVANAUGH MICHAEL E. BRUFFEY SCOTT E. ANDRESS LOUIS PATRICK FRASCOGNA
COURT FROM WHICH APPEALED:	HARRISON COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	GERALD BLESSEY MICHAEL F. CAVANAUGH
ATTORNEYS FOR APPELLEES:	OFFICE OF THE ATTORNEY GENERAL BY: DEANNE B. SALTZMAN AMELIA B. GAMBLE
NATURE OF THE CASE:	CIVIL - REAL PROPERTY
DISPOSITION:	AFFIRMED - 12/10/2020
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

CONSOLIDATED WITH

NO. 2019-SA-01815-SCT

RW DEVELOPMENT, LLC

v.

MISSISSIPPI GAMING COMMISSION

DATE OF JUDGMENT:	11/12/2019
TRIAL JUDGE:	HON. CHRISTOPHER LOUIS SCHMIDT
TRIAL COURT ATTORNEYS:	GERALD BLESSEY MICHAEL F. CAVANAUGH MICHAEL E. BRUFFEY LOUIS PATRICK FRASCOGNA
COURT FROM WHICH APPEALED:	HARRISON COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	GERALD BLESSEY MICHAEL F. CAVANAUGH
ATTORNEYS FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: AMELIA B. GAMBLE DEANNE B. SALTZMAN
NATURE OF THE CASE:	CIVIL - REAL PROPERTY
DISPOSITION:	AFFIRMED - 12/10/2020
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE RANDOLPH, C.J., COLEMAN AND CHAMBERLIN, JJ.

CHAMBERLIN, JUSTICE, FOR THE COURT:

¶1. This matter comes before the Court as the consolidation of two cases on appeal. In each case, the Circuit Court of Harrison County affirmed the decision of the Mississippi Gaming Commission (MGC) to deny the gaming site application of RW Development, LLC (RW). The MGC and the circuit court found that RW's proposed gaming site failed to meet the governing statutory and regulatory requirements under Mississippi Code Section 97-33-1 (Rev. 2014) in the first instance and 13 Mississippi Administrative Code Part 2, Rule 1.4(d) (adopted May 1, 2013), Westlaw, in the second. We agree, and we affirm the decision of the circuit court in both cases.

FACTS AND PROCEDURAL HISTORY

A) Pre-No. 2019-SA-01813-SCT

¶2. RW's proposed gaming site consists of seventeen acres of land located at the

intersection of Veteran's Avenue and U.S. Highway 90 in Biloxi, Mississippi. RW is the fee simple owner of this land. RW made its first of three applications for gaming site approval in 2008.

¶3. On July 17, 2008, the MGC unanimously voted to deny RW's gaming site application. In voting to deny, the MGC found that the mean high water line (MHWL) is statutorily defined "as the point where mean high water meets the shore," not the toe of the seawall. The MGC also found that RW failed to show it satisfied governing regulations that require RW to "own and/or lease the property to the shore" and to show how that property would be "an integral part of the overall project." In August of that year, RW sought judicial review of the MGC's denial of RW's gaming site application but, for unknown reasons, RW voluntarily dismissed the case the next day.

B) No. 2019-SA-01813-SCT

¶4. In June of 2016, RW submitted its application for gaming site approval for the second time. The MGC received input from the public for and against the proposed site, and in February of 2017, the MGC held a hearing at which RW gave reasons in support of approving its gaming site application. RW included within its application a survey that placed the MHWL at the toe of the seawall. RW's application showed that the location of its proposed gaming floor was located within eight hundred feet of that location. Treasure Bay Casino also submitted its own survey that had originally been prepared in opposition to RW's 2008 gaming site application. Treasure Bay's survey determined that the MHWL was south of the toe of the seawall. Also, during this application process, RW submitted a letter from the secretary of state that gave his opinion regarding the site. In his letter, the secretary

of state opined that the Public Trust Tidelands Boundary Line was the seawall.

¶5. On March 16, 2017, after reviewing all the evidence mentioned above, the MGC took up the matter and denied RW's second gaming site application. Following that decision, the MGC issued a statement explaining its reasoning for denying RW's application:

> The Commission finds that the mean high water line as defined by statute is the intersection of the tidal datum plane of mean high water with the shore regardless of whether that shore is a result of beach renourishment. In this location, the toe of seawall is not the mean high water line. Therefore, the proposed site is not within eight hundred (800) feet of the mean high water line.

RW then appealed the MGC's decision to the Harrison County Circuit Court.

¶6. On November 12, 2019, the Harrison County Circuit Court issued its order and found that the Public Trust Boundary Line is not interchangeable with the MHWL and that the survey provided by RW failed to establish a valid MHWL. The circuit court also found that the MGC had before it "competing surveys," referencing RW's survey and the survey submitted by Treasure Bay and that because of this fact, "[t]his court may not reweigh the evidence presented to the administrative agency or substitute its own judgment for that of the agency." Lastly, the circuit court found that RW had received due process. For those reasons, the circuit court affirmed the MGC's decision to deny RW's second gaming site application.

C) No. 2019-SA-01815-SCT

¶7. In June of 2017, the MGC received a third application from RW seeking approval of the proposed gaming site. During June and July of that year, the MGC received public input regarding RW's proposed site for this application. RW's application included a survey that did show the proposed gaming site within the required eight hundred feet of the actual

MHWL.

¶8. On July 27, 2017, after reviewing all submitted evidence, the MGC considered RW's third application at the MGC's monthly meeting. RW appeared through counsel, and the MGC entertained public comment. RW offered none. Ultimately, the MGC unanimously voted to deny RW's third gaming site application. The MGC explained the denial of RW's proposed gaming site in the following statement:

> The Applicant submitted a survey which established the location of the property and demonstrated a point of reference to determine the location of mean high water line. The gaming floor at the proposed site was within eight hundred (800) feet of this point.
>
> However, 13 Mississippi Administrative Code Part 2 Rule 1.4(d) requires,
>
> > Any point of reference used to determine the 800 foot distance from the mean high water line must be located on the applicant or licensee's premises. The applicant or licensee must own and /or lease the land that is contiguous both to the parcel used to conduct gaming and the point of reference used to determine the mean high water line, and this land must be shown to be an integral part of the project.
>
> The mean high water point of reference utilized in the survey is not located on the Applicant's premises nor does the Applicant own or lease the land contiguous to this point of reference. Finally the applicant did not demonstrate how this land could be an integral part of the project.
>
> Pursuant to statutory authority and following its interpretation of the pertinent laws and regulations, the Mississippi Gaming Commission deems that the request for site approval by RW Development, LLC does not meet its burden under the requirements for a legal site at which to conduct gaming.

Following the denial, the chairman of the MGC made his own statement explaining "that he voted to deny because gaming regulations barred the proposed location. However, in his opinion, the site was legal under Mississippi statute and that a regulation should not exist that

overrules a statute." RW appealed this third decision to the Harrison County Circuit Court.

¶9. On November 12, 2019, the Harrison County Circuit Court issued an order in which it found that the MGC's "interpretation of § 91-33-1 is reasonable, and the number of casino sites approved since 2006 and RW's denial speak to the validity of their interpretation of the statute." The circuit court further found that RW had failed to comply with the relevant gaming regulations because RW had failed to show it owned or leased the land contiguous to the point of reference. Further, it found that RW had failed to demonstrate the ability to make that land integral to the project. Lastly, the circuit court determined that the MGC did not deny RW due process. For those reasons, the circuit court in this case affirmed the MGC's decision to deny RW's third gaming site application.

¶10. Aggrieved by the circuit court's decision to affirm the MGC's denial of RW's proposed gaming site in both cases, RW now appeals to this Court.[1]

ISSUES PRESENTED

A) No. 2019-SA-01813-SCT

¶11. On appeal, the parties submit that the main issue is whether the Public Trust Tidelands Boundary Line is interchangeable with the MHWL. Additionally, the Court must also determine the following issues:

(1) Whether the MGC exceeded its statutory authority;

(2) Whether the MGC based its decision on any evidence and whether its decision was arbitrary and capricious; and

---

[1]Both parties filed briefs. Additionally, amicus curiae briefs in support of the MGC were filed by the Mississippi Gaming and Hospitality Association arguing, *inter alia*, that res judicata precludes RW from applying for gaming site approval.

(3) Whether RW received due process.

B) No. 2019-SA-01815-SCT

¶12. On appeal, the parties submit that the main issue is whether the MGC exceeded its statutory authority in promulgating 13 Mississippi Administrative Code Part 2, Rule 1.4(d). Additionally, the Court must also determine the following issues:

(1) Whether RW failed to comply with 13 Mississippi Administrative Code Part 2, Rule 1.4(d);

(2) Whether the MGC based its decision on any evidence and whether its decision was arbitrary and capricious; and

(3) Whether RW received due process.

STANDARD OF REVIEW

¶13. On appeal, this Court grants a "circuit-court judge presiding in a bench 'trial the same deference with regard to his findings as a chancellor.'" ***Falkner v. Stubbs***, 121 So. 3d 899, 902 (Miss. 2013) (quoting ***City of Jackson v. Perry***, 764 So. 2d 373, 376 (Miss. 2000)). Therefore, this Court reviews "the circuit court's interpretation and application of the law de novo, and its findings of fact will not be reversed if supported by substantial evidence." ***Id.*** (citing ***Davis v. Smith (In re Estate of Smith)***, 69 So. 3d 1, 4 (Miss. 2011)).

¶14. As for the standard of review for decisions made by the MGC, Mississippi Code Section 75-76-173(2) (Rev. 2016), the Mississippi Gaming Control Act, provides that review by the circuit court and by the Supreme Court is the exclusive vehicle for judicial review of the MGC decisions. ***Pickle v. IGT***, 830 So. 2d 1214, 1220 (Miss. 2002). The standard of review for such appeals is outlined as follows:

The reviewing court may affirm the decision and order of the commission, or

> it may remand the case for further proceedings or reverse the decision if the substantial rights of the petitioner have been prejudiced because the decision is:
>
> (a) In violation of constitutional provisions;
>
> (b) In excess of the statutory authority or jurisdiction of the commission;
>
> (c) Made upon unlawful procedure;
>
> (d) Unsupported by any evidence; or
>
> (e) Arbitrary or capricious or otherwise not in accordance with law.

Miss. Code. Ann. § 75-76-125(3)(a)-(e) (Rev. 2016).

¶15. A rebuttable presumption exists supporting an agency's decision, and the challenger bears the burden of proof. ***Pub. Emps.' Ret. Sys. v. Howard***, 905 So. 2d 1279, 1284 (Miss. 2005). A "Gaming Commission's decision will not be disturbed if it is supported by 'any' evidence." ***Miss. Gaming Comm'n v. Pennebaker***, 824 So. 2d 552, 556 (Miss. 2002).

¶16. Lastly, "[s]tatutory interpretation is a matter of law which this Court reviews de novo." ***Wallace v. Town of Raleigh***, 815 So. 2d 1203, 1206 (Miss. 2002) (citing ***Donald v. Amoco Prod. Co.***, 735 So. 2d 161, 165 (Miss. 1999)). "This Court no longer grants deference to an agency's statutory interpretation. Instead, we review these interpretations de novo." ***Parker v. Mallett***, 298 So. 3d 994, 997 (Miss. 2020) (citing ***King v. Miss. Military Dep't***, 245 So. 3d 404, 407-08 (Miss. 2018)).

DISCUSSION OF NO. 2019-SA-01813-SCT

I. Overview of the Proof Presented at the MGC Hearing

¶17. The MGC held a hearing after RW made its second application for site approval. At the hearing, various pieces of evidence were presented for the MGC to consider. One piece

of evidence was a survey presented by RW to show the location of the MHWL. While this survey showed RW's gaming site was within the eight-hundred-foot statutory requirement, the survey placed the MHWL at the toe of the seawall. Treasure Bay Casino also presented a survey at the MGC's hearing. Unlike RW's survey, this survey showed the MHWL located south of the toe of the seawall.

¶18. In addition to surveys, the MGC also considered a letter from the secretary of state and an attorney general opinion. In July of 2008, the secretary state wrote a letter commenting on the Public Trust Tidelands Boundary Line. He determined that the boundary for the tidelands was at the seawall at this location. A few months later, in September, the attorney general opined that "the boundary of the Public Trust Tidelands in developed areas where beach renourishment has occurred is the toe of the seawall, inland of the current mean high water line." Miss. Att'y Gen. Op., No. 2008-00426, 2008 WL 4560080, *Gemmill*, at *1 (Sept. 22, 2008).

¶19. In considering all the evidence, the MGC denied RW's second application for gaming site approval. The MGC found that the MHWL is the "intersection of the tidal datum plane of mean high water with the shore regardless of whether that shore is a result of beach renourishment." The MGC concluded that the MHWL is not "the toe of the seawall" at this location as argued by RW.

II. The Public Trust Tidelands Boundary Line is not interchangeable with the MHWL.

¶20. RW argues that MHWL is the toe of the seawall, which, in fact, is the Public Trust Tidelands Boundary Line in this location. At first glance, this argument creates confusion

because it contends that the MHWL is the same as the Public Trust Tidelands Boundary Line. A brief review of the law and history on this subject, however, clarifies that the Public Trust Tidelands Boundary Line is not interchangeable with the MHWL at RW's site.

A) The Public Trust Tidelands Act

¶21. Upon admittance into the Union, the federal government granted the state of Mississippi "title to lands subject to the ebb and flow of the tide and up to the mean high water level[.]" ***Hosemann v. Harris***, 163 So. 3d 263, 268 (Miss. 2015); *see also* ***Martin v. O'Brien***, 34 Miss. 21 (1857) ("[T]he shores of the sea below high water mark belong to the State as trustee for the public[.]"); ***Cinque Bambini P'ship v. State***, 491 So. 2d 508 (Miss. 1986); ***Phillips Petroleum Co. v. Miss.***, 484 U.S. 469, 484, 108 S. Ct. 791, 799, 98 L. Ed. 2d 877 (1988). The Mississippi Constitution provides that "[l]ands belonging to, or under the control of the State, shall never be donated directly or indirectly, to private corporations or individuals . . . ." Miss. Const. art. 4, § 95.

¶22. Over the years, many disputes arose over land ownership near the tidelands. Finally, in 1989, the Mississippi legislature passed the Public Trust Tidelands Act, codified in Mississippi Code Sections 29-15-1 through -23 (Rev. 2010). *See* ***Molpus v. Wiesenberg***, 633 So. 2d 983, 991 (Miss. 1994) ("The intent of the legislation was to finally put to rest the confusion and chaos surrounding Mississippi's shoreline property."). Within the act's legislative-purpose section, the legislature identified that its goal was "to resolve the uncertainty and disputes which have arisen as to the location of the boundary between the state's public trust tidelands and the upland property[.]" Miss. Code Ann. § 29-15-3(2) (Rev. 2010). Additionally, the Public Trust Tidelands Act required the secretary of state to map

the boundary of the public trust tidelands. Miss. Code Ann. § 29-15-7(1) (Rev. 2010). In developed areas, the mapped boundary was to be "the determinable mean high water line nearest the effective date of the Coastal Wetlands Protection Act," *id*., which was July 1, 1973. *See* ***Wiesenberg***, 633 So. 2d at 990. In undeveloped areas, the boundary was to be "the current mean high water line." Miss. Code Ann. § 29-15-7(1) (Rev. 2010).

¶23. In 1994, the Mississippi Supreme Court upheld the Public Trust Tidelands Act as constitutional. ***Wiesenberg***, 633 So. 2d at 999. In ***Wiesenberg***, the Court opined on the location of the boundary line of the Public Trust Tidelands. ***Wiesenberg***, 633 So. 2d at 991–92. Specifically, the ***Wiesenberg*** Court held that the Public Trust Tidelands Act requires that the 1973 MHWL of the Coastal Wetlands Act be used only as a "starting point" to determine the boundary line. ***Id.*** at 991. (emphasis added); ***Bayview Land, Ltd. v. State ex rel. Clark***, 950 So. 2d 966, 979 (Miss. 2006) (recognizing that the 1973 MHWL be used as a "*starting point* for determination of the MHWL in developed areas." (citing ***Wiesenberg***, 633 So. 2d at 986, 991)).

¶24. As previously discussed, the attorney general issued an opinion regarding the relationship between the location of the MHWL and the location of the boundary line of the Public Trust Tidelands. *Gemmill*, 2008 WL 4560080, at *1. The attorney general stated that his opinion was based on the ***Wiesenberg*** decision. *Id.* at *2. The attorney general concluded that "the boundary of the Public Trust Tidelands in developed areas where beach renourishment has occurred is the toe of seawall, *inland* of the current mean high water line." *Id.* at *1 (emphasis added). This language in the attorney general's opinion supports that the MHWL is separate from the boundary line of Public Trust Tidelands, and ***Wiesenberg***

affirms that notion.

B) Definition of the MHWL

¶25. The applicable statutory definition of the MHWL is found in Mississippi Code Section 29-15-1(d), which says that the "'mean high water line' means *the intersection of the tidal datum plane of mean high water with the shore.*" Miss Code Ann. § 29-15-1(d) (Rev. 2010) (emphasis added). The MHWL has been defined as follows:

> The mean high water line boundary is found at *the point at which the horizontal tidal plane of the mean high water intersects with the shore.* The vertical determination of mean high water is basically stable, being based on observations over nineteen years. The horizontal element of the boundary determination on a sandy beach is anything but stable. The intersection of the horizontal plane of mean high water changes with erosion and accretion, seasonal variations in the beach, wind, waves, storms and man-made changes to the beach- anything that changes the profile of the beach. As a result, "[a] water boundary determined by tidal definition is . . . not a fixed visible mark on the ground, but represents a condition at the water's edge during a particular instant of the tidal cycle." It follows that even the most accurate determination of the MHWL for a dynamic sandy beach is no more than a snapshot of the boundary at that particular time and place.

Donna R. Christie, *Of Beaches, Boundaries and Sobs*, 25 J. Land Use & Env't. L. 19, 34 (2009) (alterations in original) (footnotes omitted) (citations omitted) (emphasis added); *see* Katrina M. Wyman & Nicholas R. Williams, *Migrating Boundaries*, 65 Fla. L. Rev. 1957, 1966–67 (2013). Under both definitions, the MHWL is found at the shore.[2]

---

[2]Additionally, the National Oceanic and Atmospheric Administration (NOAA) defines the MHWL as "[t]he line on a chart or map which represents *the intersection of the land with the water surface* at the elevation of mean high water." NOAA Shoreline Website, *A Guide to National Shoreline Data and Terms*, https://shoreline.noaa.gov/glossary.html#partj (last visited Sept. 30, 2020); *see also* George M. Cole, *Tidal Water Boundaries*, 20 Stetson L. Rev. 165, 175 (1990) ("A primary source of tidal data is the National Ocean Service (NOS) of the National Oceanic and Atmospheric Administration (NOAA) of the United States Department of Commerce.").

C) The evidence presented contradicts RW's definition of the MHWL.

¶26. RW argues that the MHWL lies at the boundary of the Public Trust Tidelands or the "toe of the seawall," which is north of the current shoreline due to beach renourishment. In support of its argument, RW presented the letter from the secretary of state and the opinion issued by the attorney general, both from 2008. In his letter to the MGC, the secretary of state provided "[his] position as to the *Public Trust Tidelands*." (Emphasis added.) The secretary of state determined that "[p]ursuant to Section 29-15-7, [t]he Public Trust Tidelands Boundary in the area of the proposed RW Gaming site is the seawall." The attorney general had responded to a specific question: "[i]s the Public Trust Tidelands boundary the same as the 'mean high water line'?" *Gemmill*, 2008 WL 4560080, at *1. The attorney general answered by determining that "the boundary of the Public Trust Tidelands in developed areas where beach renourishment has occurred is the toe of seawall, *inland* of the current mean high water line." *Id*. (emphasis added).[3]

¶27. These pieces of evidence do not support RW's position. In stating the location of the Public Trust Tidelands boundary line, nowhere in the secretary of state's letter did the secretary make a determination that the MHWL is interchangeable with the boundary line of the Public Trust Tidelands. Additionally, by concluding that the boundary of the tidelands is "inland" of the MHWL, the attorney general's opinion shows that the boundary line of the

[3]In making his opinion, the attorney general relied on ***Wiesenberg***, in which this Court held that the MHWL as of the 1973 Coastal Wetlands Act is only a "starting point" and "not a mandatory bench mark" in determining the boundary line for the Public Trust Tidelands. ***Wiesenberg***, 633 So. 2d at 991 (emphasis omitted).

Public Trust Tidelands and the MHWL are two separate lines that are not interchangeable. *Id*. RW insists that the MHWL is the boundary of the Public Trust Tidelands. These pieces of evidence, as well as the statutory and technical definitions, however, contradict RW's position and show that the Public Trust Tidelands Boundary Line and the MHWL are two separate lines in this location.

D) The applicable gaming statute does not wholly incorporate the Public Trust Tidelands Act.

¶28. The applicable gaming statute is Mississippi Code Section 97-33-1. This provision includes the process of approval for a gaming site in the state of Mississippi:

> (I) The structure is owned, leased or controlled by a person possessing a gaming license, as defined in Section 75-76-5, to conduct legal gaming on a cruise vessel under paragraph (a) of this section;
>
> (ii) The part of the structure in which licensed gaming activities are conducted is located entirely in an area which is located no more than eight hundred (800) feet from the mean high-water line (as defined in *Section 29-15-1*) of the waters within the State of Mississippi, which lie adjacent to the State of Mississippi south of the three (3) most southern counties in the State of Mississippi, including the Mississippi Sound, St. Louis Bay, Biloxi Bay and Pascagoula Bay, or, with regard to Harrison County only, no farther north than the southern boundary of the right-of-way for U.S. Highway 90, whichever is greater; and
>
> (iii) In the case of a structure that is located in whole or part on shore, the part of the structure in which licensed gaming activities are conducted shall lie adjacent to state waters south of the three (3) most southern counties in the State of Mississippi, including the Mississippi Sound, St. Louis Bay, Biloxi Bay and Pascagoula Bay. When the site upon which the structure is located consists of a parcel of real property, easements and rights-of-way for public streets and highways shall not be construed to interrupt the contiguous nature of the parcel, nor shall the footage contained within the easements and rights-of-way be counted in the calculation of the distances specified in subparagraph (ii);

Miss. Code. Ann. § 97-33-1(b)(i)–(iii) (Rev. 2014) (emphasis added). In defining the

MHWL, this section references a single provision in the Public Trust Tidelands Act, which defines the MHWL as the "intersection of the tidal datum plane of the mean high water with the shore." Miss. Code Ann. § 29-15-1(d) (Rev. 2010).

¶29. RW argues that since Section 97-33-1(b) (ii) references the Public Trust Tidelands Act to define the MHWL, Section 97-33-1 incorporated the entirety of the Public Trust Tidelands Act and, therefore, its boundary lines. Thus, by incorporating the Public Trust Tidelands Act wholly, RW argues that the MHWL is the same as the boundary line of the Public Trust Tidelands Act, the toe of the seawall. RW "reinforces" this argument by using the phrase "of the waters within the State of Mississippi" from Section 97-33-1 to *further* connect Section 97-33-1 to Section 29-15-1. Miss. Code Ann. § 97-33-1(b)(ii) (Rev. 2014). RW argues that "[t]he phrase, 'of the waters' reinforces the context of the definition of MHWL as defined by [Section]29-15-1." RW attempts to equate the phrase "of the waters within the State of Mississippi" with, as RW states, the "tidelands below the MHWL whether they have been filled or not." It presents no support for this claim. Mississippi Code Section 49-17-5(1)(f) (Rev. 2012) provides that "waters of the state means all waters . . . including all streams, lakes, ponds, impounding reservoirs, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and all other bodies or accumulations of water . . . ." Nowhere does Section 49-17-5 define waters as encompassing water supplanted by the artificial sand beach.

E) The Mississippi legislature intended to limit gaming.

¶30. As RW and the MGC each argue for their definition of the MHWL, it is important to

note the intent behind enacting these restrictions to the gaming laws in Mississippi. Section 97-33-1 requires that gaming sites be within eight hundred feet of the MHWL. Miss Code Ann. § 97-33-1 (b)(ii) (Rev. 2014). The Mississippi legislature provided reasoning for enacting the Mississippi Gaming Control Act in Section 75-76-3. "All establishments where gaming is conducted and where gambling devices are operated, and manufactured, sellers and distributors of certain gambling devices and equipment must therefore be licensed, controlled and assisted to protect the public health, safety, morals, good order and general welfare of the inhabitants of the state." Miss. Code Ann. § 75-76-3(3)(c) (Rev. 2016).

¶31. Further, a federal court weighed in on constitutionality of Section 97-33-1. ***Richards v. Miss. Gaming Comm'n***, No. CIV.A. 1:94CV207-D-D, 1995 WL 1945463, at *1 (N.D. Miss. May 30, 1995). The court ultimately upheld the act and in so doing, it also commented on the "rational motives for the enactment of the Mississippi Gaming Control Act[.]" ***Id.*** at *3. The federal judge in ***Richards*** found that a primary reason for limiting gaming to areas near water was "to ensure that the legal gaming industry was tightly controlled." ***Id.*** Enforcement of gaming laws is more efficient when gaming is limited to specific geographic locations rather than the entire state. ***Id.*** This case illustrates the legislature's specific intent to limit, not expand, gaming in Mississippi.[4]

III. The sand beach is not an easement.

¶32. RW also contends that "[t]he sand beach is not a separate parcel of land owned by the

[4]The district court in ***Richards*** dealt with a pre-Hurricane Katrina version of Section 97-33-1 that did not include the current version's requirement that gaming sites be within eight hundred feet of the water. ***Id.*** at *1. Nonetheless, the law at that time still limited gaming activities to the water. ***Id.*** It was, if anything, more restrictive.

state" and that "[t]he sand beach surface is merely a *public easement* for recreational use layered on top of and within the littoral rights of the upland owner." (Emphasis added.) It is not entirely clear why RW refers to the sand beach as a "public easement." In responding to RW's assertion, the MGC acknowledges that Section 97-33-1 excludes "easements and rights-of-way *for public streets and highways*" from being counted for the eight-hundred-foot requirement. (Emphasis added.) Perhaps RW labels the sand beach as a "public easement" in an attempt to exclude the beach from being counted like public streets and highways which are excluded in the statute. A 1968 case from the United States Court of Appeals for the Fifth Circuit characterizes the beach otherwise. *See* ***United States v. Harrison Cnty.***, 399 F.2d 485 (5th Cir. 1968).

¶33. In 1928, Harrison County erected a seawall by way of easement acquired by eminent domain; in 1947, however, the seawall was destroyed by a severe hurricane. ***Id.*** at 488. At that time, Harrison County contracted with the federal government to rebuild the seawall with a protective beach, and in return, Harrison County promised to "assure perpetual public use of the beach and the administration thereof for public use only." ***Id.*** at 490. After this, however, people were denied access to the beach. ***Id.***

¶34. In ***Harrison County***, the Fifth Circuit held that the county was required to honor its contractual promise with the United States. ***Id.*** at 491. Notably for this case, ***Harrison County*** supports the fact that the sand beach is not an easement; rather, it is owned by the state of Mississippi. ***Id.*** at 488. Within its opinion, the Fifth Circuit recognized that after the 1928 seawall was completed,

> the incessant action of the waves washed away the sand to the south of these

> artificial barriers. Such beaches as existed south of the seawall disappeared. The land thus formerly occupied went under the water bottoms of the Mississippi Sound and became the property of the state, in trust for the people.

Id. The Fifth Circuit concluded that this land became property of the state because

> [the Supreme Court of Mississippi], by an unbroken line of decisions over 100 years, has declared that the State is the owner of lands in the beds of all its shores, inlets, and adjacent to the islands, over which the tides of the sea ebb and flow, and that it holds title as trustee for the people of the State.

Id. (internal quotation marks omitted) (quoting ***Parks v. Simpson***, 242 Miss. 894, 902, 137 So. 2d 136, 138–39 (1962)).

¶35. The Mississippi Constitution provides that such state owned land can "never be donated directly or indirectly, to private corporations or individuals . . . ." Miss. Const. art. 4, § 95. ***Harrison County*** concluded that the sand beach located near RW's site is state owned land reserved for "perpetual public use." ***Harrison Cnty.***, 399 F.2d at 488, 490. Therefore, the state does not have an easement and, further, any alleged easement would not be excluded from the eight-hundred-foot calculation allowed by Section 97-33-1. Further, because the beach is held for "perpetual public use," RW has no more access to the sand beach than the access afforded to the general public. ***Id.***

IV. The MGC's decision was supported by evidence and was not arbitrary and capricious.

¶36. RW argues that the MGC's decision to deny RW's second gaming site application was unsupported by the evidence and was arbitrary and capricious. As noted by the circuit court, the MGC was presented with competing surveys, and it is not the role of the court to "reweigh" evidence. Here, the circuit court was referring to the survey presented by RW that placed the MHWL at the "toe of the seawall" and the survey presented by Treasure Bay that

rejected the MHWL's placement at the boundary line of the Public Trust Tidelands. Additionally, as noted, the attorney general's opinion supports the MGC's decision by affirming that the Public Trust Tidelands Boundary Line and the MHWL are distinct. *Gemmill*, 2008 WL 4560080, at *1. Therefore, despite RW's assertion otherwise, the record indicates that the MGC supported its decision with evidence. *See* ***Miss. Gaming Comm'n v. Pennebaker***, 824 So. 2d 552, 556 (Miss. 2002) ("The Gaming Commission's decision will not be disturbed if it is supported by 'any' evidence."). Further, the MGC's decision was not arbitrary and capricious. The record shows that the MGC denied RW's second gaming site application because RW failed to meet the statutory requirements. The MGC's decision was supported by "reason and judgment," ***id.*** (quoting ***Miss. State Dep't. of Health v. Natchez Cmty. Hosp.***, 743 So. 2d 973, 977 (Miss. 1999)), and was not "done without reason, in a whimsical manner." ***Id.*** (quoting ***City of Biloxi v. Hilbert***, 597 So. 2d 1276, 1280-81 (Miss. 1992)). For these reasons, this Court concludes that the MGC's decision was supported by evidence and that it was neither arbitrary nor capricious.

V. Additional Arguments

¶37. Lastly, regarding the denial of RW's gaming site application, RW raises several additional arguments. First, RW argues that the MGC acted with no statutory authority in denying this second application. By statute, the law vests the MGC with the authority to consider for approval gaming site applications. Miss. Code Ann. § 75-76-29(3) (Rev. 2016). In considering RW's application, the MGC looked to the statute to find that the toe of the seawall is not the MHWL and determined that the proposed site is not within eight hundred feet of the MHWL. *See* Miss. Code Ann. § 97-33-1(b)(ii) (Rev. 2014) (providing that the

proposed gaming site must be "located no more than eight hundred (800) feet from the MHWL (as defined in Section 29-15-1) of the waters within the State of Mississippi."). In making its decision, the MGC merely tracked the language of Section 97-33-1, and, thus, RW cannot argue that the MGC failed to act with statutory authority.

¶38. Second, RW argues it received no due process. The record shows RW submitted an application for approval and the MGC held a hearing to consider it. During that time, RW presented its application, gave reasons supporting approval of its gaming site application, and submitted a survey to show the MHWL's placement. After reviewing all of the evidence and the arguments, the MGC denied RW's second gaming site application. RW received an opportunity to be heard at the hearing. No due process rights were violated. *See* ***Booth v. Miss. Emp. Sec. Comm'n***, 588 So. 2d 422, 428 (Miss. 1991).

¶39. Finally, any other arguments not raised by the parties at the trial court will not be discussed here. *See* ***Gale v. Thomas***, 759 So. 2d 1150, 1159 (Miss. 1999) ("As this Court has stated, time and again, an issue not raised before the lower court is deemed waived and is procedurally barred.").

VI. Amicus Curiae Brief

¶40. In support of the MGC, the amicus curiae brief alone raised a specific res judicata argument. Additionally, the amicus curiae argued that the legislative history, the statutory authority, and the evidence supported the MGC's decision. This Court declines to address these arguments further in light of the ultimate disposition of this opinion.

DISCUSSION OF NO. 2019-SA-01815-SCT

I. Overview of the Proof Presented to the MGC and the MGC's decision

¶41. In 2017, RW Development submitted its third application for gaming site approval. During June and July of that year, the MGC received public input on RW's proposed site. In the course of this application process, RW presented a survey attempting to satisfy the gaming site requirements. Specifically, RW's survey showed that its proposed site was within the required eight hundred feet of the MHWL.

¶42. Later in July of 2017, the MGC considered RW's proposed gaming site at its monthly meeting. RW appeared at the meeting through counsel, at which the MGC allowed public comment, but RW offered none. Then, upon review of all the evidence, the MGC unanimously voted to deny RW's third gaming site application. In its denial statement, the MGC acknowledged that RW's survey showed the proposed gaming site was within eight hundred feet of the MHWL. The MGC found, however, that RW's proposed site failed to satisfy 13 Administrative Code Part 2, Rule 1.4(d). It found that, as required by the rule, the reference point used to determine the MHWL is not located on RW's premises, and RW does not own or lease the land contiguous to this point of reference. Lastly, RW did not show how this land could play an integral part in the project. For those reasons, the MGC denied RW's third application for gaming site approval.

II. 13 Administrative Code Part 2, Rule 1.4(d), does not exceed statutory authority.

A) An agency's decision must not exceed statutory authority.

¶43. The question of whether an agency exceeded its statutory authority is not new. *See* ***Hawkins v. Hoye***, 108 Miss. 282, 66 So. 741, 744 (1914) (holding that the agency rule did not exceed statutory authority because the rule was "reasonable"). Promulgation of rules must be consistent with the general guidelines of the statute. Jeffrey Jackson, Mary Miller, Donald Campbell, et al., *Encyclopedia of Miss. Law* § 2:15 (2d ed.), Westlaw (database updated Oct. 2020); *see* ***Div. of Medicaid v. Miss. Indep. Pharmacies Ass'n***, 20 So. 3d 1236, 1238 (Miss. 2009) ("An agency may not adopt rules and regulations which are contrary to statutory provisions or which exceed or conflict with the authority granted by statute." (citing ***Miss. Pub. Serv. Comm'n v. Power & Light Co.***, 593 So. 2d 997, 1000, 1004 (Miss. 1991))).

¶44. In ***King v. Mississippi Military Department***, 245 So. 3d 404, 406 (Miss. 2018), a former employee of the Mississippi Military Department appealed her termination. On appeal, the Mississippi Supreme Court reviewed whether the decision of an administrative agency "was beyond the agency's power to adopt[.]" ***Id.*** at 407 (citing ***Watkins Dev., LLC v. Hosemann***, 214 So. 3d 1050, 1053 (Miss. 2017)). Before analyzing the merits, the Court announced that it has now "abandon[ed] the old standard of review giving deference to agency interpretations of statutes." ***Id.*** at 408. "Moreover, in deciding no longer to give deference to agency interpretations, we step fully in the role the Constitution of 1890 provides for the courts and the courts alone, to interpret statutes." ***Id.*** "This Court no longer grants deference to an agency's statutory interpretations. Instead, we review these interpretations *de novo*." ***Parker v. Mallett***, 298 So. 3d 994, 997 (Miss. 2020) (citations omitted).

B) The MGC has not exceeded its statutory authority.

¶45. Here, RW argues that the MGC exceeded its statutory authority by promulgating 13 Administrative Code Part 2, Rule 1.4(d). The portion of the rule that RW disputes states:

> Any point of reference used to determine the 800 foot distance from the mean high water line must be located on the applicant or licensee's premises. The applicant or licensee must own and/or lease the land that is contiguous both to the parcel used to conduct gaming and the point of reference used to determine the mean high water line, and this land must be shown to be an integral part of the project. The Commission has final authority in reviewing and approving each site as it pertains to meeting the requirements of this regulation.

13 Miss Admin. Code Pt. 2, R. 1.4(d).

¶46. The Mississippi Gaming Control Act sets out the MGC's specific authority to adopt rules. The Act states that "[t]he commission shall, from time to time, adopt, amend or repeal such regulations, consistent with the policy, objects and purposes of this chapter, as it may deem necessary or desirable in the public interest in carrying out the policy and provisions of this chapter." Miss. Code. Ann. § 75-76-33(1) (Rev. 2016). It further provides that the MGC has the authority to "[d]efin[e] and limit[] the area, games and devices permitted, and the method of operation of such games and devices, for the purposes of this chapter." Miss. Code. Ann. § 75-76-33(2)(k) (Rev. 2016). In adopting Rule 1.4(d), the MGC did in fact "define[] and limit[] the area" of gaming sites under the Mississippi Gaming Control Act. 13 Miss. Admin. Code Pt. 2, R. 1.4(d). Further, Rule 1.4(d) was adopted in accordance with the Mississippi Administrative Procedures Law. *See* Miss. Code Ann. § 25-43-1.101 (Rev. 2018).

¶47. Specifically, RW argues that 13 Administrative Code Part 2, Rule 1.4(d), "radically

departs" from Section 97-33-1, which provides that, "[t]he part of the structure in which licensed gaming activities are conducted is located entirely in an area which is located no more than eight hundred feet from the MHWL (as defined in Section 29-15-1) of the waters within the State of Mississippi." Miss. Code Ann. § 97-33-1(b)(ii) (Rev. 2014). In assessing a regulation's validity, the Court has specifically upheld gaming regulations that were deemed reasonable. The Court similarly faced an appeal concerning the validity of a regulation promulgated by the MGC and the MGC's ultimate approval of a site under that regulation. ***Miss. Casino Operators Ass'n v. Miss. Gaming Comm'n***, 654 So. 2d 892 (Miss. 1995). The Court ultimately upheld the regulation because it was "consistent with a *reasonable* interpretation of the statute." ***Id.*** at 894 (emphasis added). The Court later reaffirmed the same regulation as "a *reasonable* interpretation of Miss. Code Ann. § 97-33-1[.]" ***Miss. Gaming Comm'n v. Bd. of Educ.***, 691 So. 2d 452, 458 (Miss. 1997) (emphasis added).[5]

---

[5]The MGC rule that ***Casino Operators*** and ***Board of Education*** examined was "Regulation No. 2." This regulation gave definition to the words "waters south of the three most southern counties." The rule states:

> Waters within the State of Mississippi which lie adjacent to the three (3) most southern counties of the State. In addition to the Mississippi Sound, this would include St. Louis Bay, Biloxi Bay and Pascagoula Bay. However, the rivers and bayous leading into these bays, including, but not limited to the Jourdan River, Wolf River, Bernard Bayou, Tchoutachabouffa River, Pascagoula River and Escapatawpa are not within the authorized area. In determining where the river ends and the bay begins, an imaginary line shall be drawn from the foremost land mass at the intersection on the river and bay, straight across the river to the foremost land mass of the intersection on the other side.

Miss. Casino Operators Ass'n, 654 So. 2d at 894; ***Bd. of Educ.***, 691 So. 2d at 455

¶48. Turning specifically to 13 Administrative Code Part 2, Rule 1.4(d), the legislature, by enacting Section 97-33-1, limited the geographical location of gaming sites to areas near water to tightly control the gaming industry. *See* ***Richards***, 1995 WL 1945463, at *3. The MGC created Rule 1.4(d) to require that a gaming entity own or lease the premises where the reference point is used to determine the MHWL. It also requires that the gaming entity own or lease the land contiguous to the reference point and the gaming site. As previously established, it was the intent of the legislature to ensure geographic proximity to the water. *See* ***id.*** Rule 1.4(d) furthers that goal and does not conflict with Section 97-33-1. As noted by the district court in ***Richards***, "[t]his is certainly a legitimate objective considering the potential of the industry to foster criminal activity and consumer abuses." ***Id.*** We conclude that this regulation is reasonable and in furtherance of Section 97-33-1. *See* ***Casino Operators***, 654 So. 2d at 894. Therefore, this regulation does not exceed statutory authority.

III. RW fails to satisfy statutory and regulatory authority.

¶49. Even though RW argued that Rule 1.4(d) exceeded statutory authority, RW nonetheless argues that it satisfied the regulation. Ultimately, in considering RW's third gaming site application, the MGC found that RW had not satisfied Rule 1.4(d). For the following reasons, we agree with the decision of the MGC.

A) General Overview of Littoral-Rights Law

¶50. RW argues that because of its littoral rights, RW's "application clearly meets even the requirements" of Rule 1.4(d). Landowners have common-law littoral rights. Littoral rights

---

(emphasis omitted).

involve properties abutting an ocean and "are usually concerned with the use and enjoyment of the shore." ***Columbia Land Dev., LLC v. Clark***, 868 So. 2d 1006, 1012 (Miss. 2004) (internal quotation mark omitted) (quoting ***Stewart v. Hoover***, 815 So. 2d 1157, 1163 (Miss. 2002)). Additionally, though the section is titled, "Riparian rights," littoral rights are also codified in Section 49-15-9 (Rev. 2012). *See* ***Miss. State Highway Comm'n v. Gilich***, 609 So. 2d 367, 375 (Miss. 1992). Littoral rights under the statute include "the right to plant and gather oysters, construct bath houses, piers, and other structures in front of any land bordering on the Gulf of Mexico or Mississippi Sound." ***Id.***; *see* Miss. Code Ann. § 49-15-9 (Rev. 2012).

B) RW cannot use a littoral-rights theory to satisfy the MGC regulations.

¶51. In order to satisfy Rule 1.4(d), RW must own or lease the property upon which the reference point sits and the property contiguous to the reference point and RW's proposed gaming site. 13 Admin. Code Pt. 2, R. 1.4(d). The land in question is the sand beach. RW contends that its littoral rights make RW a "co-owner" of this property and because of that, RW contends that it satisfies the gaming regulations. RW is mistaken.

¶52. As it relates to RW's "co-owner" argument, this Court has held time and time again that littoral rights are not property rights but are merely licenses or privileges. ***Columbia Land Dev.***, 868 So. 2d at 1012; ***Watts v. Lawrence***, 703 So. 2d 236, 238 (Miss. 1997); ***Gilich***, 609 So.2d at 375; ***Catchot v. Zeigler***, 92 Miss. 191, 45 So. 707, 707 (1908). Also, as mentioned within the discussion of RW's second gaming site application, No. 2019-SA-01813-SCT, the Fifth Circuit held that the sand beach is owned by the state of Mississippi

and that the Mississippi Constitution forbids any donation of state-owned land to private entities. ***Harrison Cnty.***, 399 F.2d at 488; *See* Miss. Const. art. 4, § 95. Thus, RW's littoral rights cannot make RW a "co-owner" of the sand beach because RW's littoral rights are not property rights, *see* ***Columbia Land Dev.***, 868 So. 2d at 1012, and the Mississippi Constitution forbids the donation of the sand beach to RW. *See* ***Harrison Cnty.***, 399 F.2d at 488; *see* Miss. Const. art. 4, § 95.

¶53. In addition to the ownership requirement of Rule 1.4(d), RW must show how the sand beach will play an integral part in RW's project. 13 Admin. Code Pt. 2, R. 1.4(d). RW argues that it meets this requirement because RW's littoral rights will enable RW's patrons to enjoy "exclusive use of the sand beach" and RW's "future piers, wharfs and water-related recreational amenities." Again, the law does not support such a littoral-rights argument. In ***Harrison County***, the Fifth Circuit found that the "perpetual public use" of the sand beach was required. ***Harrison Cnty.***, 399 F.2d at 490. We agree. Thus, here, RW cannot claim the beach for its "exclusive use" merely because RW holds littoral rights.

¶54. In sum, RW cannot own the sand beach because of the prohibition against donation in the Mississippi Constitution. *See* Miss. Const. art. 4, § 95. RW could have attempted to obtain a public tidelands lease from the secretary of state for the sand beach area if it had a basis for such a lease, but it did not. *See* ***Columbia Land Dev., LLC***, 868 So. 2d at 1013 ("The Secretary of State, subject to approval by the Governor, has been granted via legislative enactment the discretion to enter into leases involving the public tideland property."). We do not opine as to what rights, if any, such a lease would have conveyed to RW or what effect it would have had on this case. Since RW cannot establish ownership nor

a leasehold interest, this Court concludes that RW fails to satisfy Rule 1.4(d).[6]

IV. The MGC's decision was supported by evidence and was not arbitrary and capricious.

¶55. RW Development argues that the MGC's decision to deny RW's third gaming site application was not based on any evidence and was arbitrary and capricious. As required by Rule 1.4(d), however, RW failed to present evidence showing that the MHWL point of reference was located on RW's premises, that RW owned or leased the land contiguous to its gaming site and the point of reference, and that the land would play an integral part in RW's project. RW cannot argue that the MGC's decision was unsupported by the evidence. RW had the burden to show that its application met the requirements. *See* ***Pennebaker***, 824 So. 2d at 554. Further, the MGC's decision was not arbitrary and capricious. The record shows that the MGC denied RW's third gaming site application because RW failed to meet the necessary requirements. The MGC's decision was supported by "reason and judgment" ***id.*** at 556 (quoting ***Natchez Cmty. Hosp.***, 743 So. 2d at 977), and not "done without reason, in a whimsical manner." ***Id.*** (quoting ***Hilbert***, 597 So. 2d 1280-81). For these reasons, we conclude that the MGC's decision was supported by evidence and that it was neither arbitrary nor capricious.

V. Additional Arguments

¶56. RW additionally argues that it received no due process before the MGC. The record indicates that RW submitted an application to the MGC. The record shows that the MGC

[6]Beyond the sand beach, RW also cannot construct anything on the water without first applying for permits from the Department of Marine Resources. *See* Miss. Code Ann. § 49-27-9 (Rev. 2012).

then accepted public input and the MGC considered RW's application before a monthly meeting. RW was present at this meeting but RW declined to offer any comment. After reviewing all the evidence and arguments, the MGC denied RW's third gaming site application. RW received an opportunity to be heard by the MGC, and therefore, no due process rights were violated. *See* ***Booth***, 588 So. 2d at 428.

¶57. Finally, this Court has considered all arguments raised by the parties. Any other argument not raised will not be addressed by this opinion. *See* ***Gale***, 759 So. 2d at 1159.

VI. Amicus Curiae Brief

¶58. In support of the MGC, the amicus curiae alone raised a specific res judicata argument. Additionally, the amicus curiae argued that the evidence supported the MGC's decision and that the MGC's decision was not arbitrary and capricious. The amicus curiae also made rebuttal arguments against RW's argument regarding the MGC chair's statement and RW's "state waters" argument. The Court declines to address these arguments further in light of the ultimate disposition of this opinion.

CONCLUSION

¶59. The Court agrees with and affirms both decisions of the Harrison County Circuit Court affirming the decision of the MGC. In both cases, RW Development failed to satisfy the statutory and regulatory gaming requirements. In No. 2019-SA-01813-SCT, RW failed to provide evidence that its proposed gaming site was within eight hundred feet of the MHWL. In No. 2019-SA-01815-SCT, RW failed to establish that the MHWL point of reference was located on RW's premises, that RW owned or leased the land contiguous to the point of reference and its proposed gaming site, and that the land would play an integral

part in RW's project.

¶60. **AFFIRMED.**

RANDOLPH, C.J., KITCHENS AND KING, P.JJ., COLEMAN, MAXWELL, BEAM, ISHEE AND GRIFFIS, JJ., CONCUR.