2014 WL 7896570
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.

In the Matter of the VETO BY GOVERNOR Chris CHRISTIE OF MINUTES OF NEW JERSEY RACING COMMISSION of June 20, 2012 Minutes and New Jersey Racing Commission Action Taken at that Meeting Relating to Agenda Item 10 as to Freehold Raceway Off–Track, LLC and ACRA Turf Club, LLC.

Argued Sept. 16, 2014. | Decided Feb. 23, 2015.

On appeal from the New Jersey Racing Commission Action and Veto/Action by the Governor.

Attorneys and Law Firms

Christina Vassiliou Harvey argued the cause for appellant New Jersey Thoroughbred Horsemen's Association, Inc. (Lomurro, Davison, Eastman & Muñoz, P.A., attorneys; Michael D. Schottland, of counsel; Michael J. Fasano and Ms. Harvey, on the brief).

George N. Cohen, Deputy Attorney General, argued the cause for respondents Governor Chris Christie and New Jersey Racing Commission (John J. Hoffman, Acting Attorney General, attorney; Lewis A. Scheindlin, Assistant Attorney General, of counsel; Judith A. Nason, Deputy Attorney General, on the brief).

John M. Pellecchia argued the cause for respondents Freehold Raceway Off–Track, LLC and ACRA Turf Club, LLC (Riker, Danzig, Scherer, Hyland & Perretti, L.L.P., attorneys; Mr. Pellecchia, of counsel and on the brief; Kellen F. Murphy and Cristin M. Boyle, on the brief).

Before Judges MESSANO, OSTRER and SUMNERS.

Opinion

PER CURIAM.

***1** In 2001, the Legislature passed the "Off–Track and Account Wagering Act" (OTAWA), *N.J.S.A.* 5:5–127 to –160, which legalized off-track betting in New Jersey. The statute allowed for the creation of no more than fifteen off-track wagering (OTW) sites in the state. To operate an OTW site, parties needed to obtain licenses, which the New Jersey Racing Commission (the Commission) distributed to the New Jersey Sports and Exposition Authority (the Authority). Pursuant to a "participation agreement," the Authority would then assign the licenses to approved "permit holders," i.e. "holder[s] of an annual permit to conduct a horse race meeting issued by the [C]ommission."*N.J.S.A.* 5:5–129.

The Authority subsequently entered into a participation agreement with Freehold Raceway Off–Track, LLC. (FROT) and ACRA Turf Club, LLC. (ACRA), pursuant to which the rights to all OTW licenses were distributed among the Authority, FROT and ACRA.

By 2010, however, only three OTW facilities were open, and, frustrated by such slow progress, the Legislature amended OTAWA to require that parties to existing participation agreements "ma[ke] progress" towards establishing an OTW facility. *L.* 2011, *C.* 26 § 1 (codified at *N.J.S.A.* 5:5–130(b)(1)). If there was insufficient progress, the rights to a permit could be forfeited and made available to designated horsemen's associations, including the New Jersey Thoroughbred Horsemen's Association (THA).*See N.J .A.C.* 13:74–1.1 (" 'Horseman's organization' means the New Jersey Thoroughbred Horsemen's Association....").

During its June 20, 2012 meeting, the Commission took two actions that are the subjects of this appeal. Pursuant to *N.J.S.A.* 5:12–223, the Commission allocated $10 million in "purse augmentation" funds to various New Jersey horse racing tracks. However, Governor Chris Christie partially vetoed the minutes of the Commission's meeting, thereby negating this decision. The THA challenges that veto.

At the same meeting, based on applications submitted by FROT and ACRA, the Commission determined that both had made sufficient progress toward opening OTW facilities and neither was required to forfeit its permit or post security to maintain its license. The THA challenges the Commission's decision in this regard.

Lastly, the THA argues that the meeting was conducted in violation of the Open Public Meetings Act (OPMA), *N.J.S.A.* 10:4–6 to –21, specifically, that the Commission permitted the Governor's counsel to be present during a closed executive session and, thereafter, the Commission published redacted minutes of the meeting in violation of

the OPMA. The THA argues that we should order the production of unredacted minutes and consider same before we reach the merits of its appeal.[1]

We have considered these arguments in light of the record and applicable legal standards. We reject the THA's arguments regarding the OPMA and otherwise affirm.[2]

I.

***2** In March 2012, the Commission began accepting submissions from various stakeholders "setting forth their positions on the amount of monies the Commission ... should consider for the augmentation of purses in the current fiscal year."In response, the THA requested fifty-percent of the monies distributed. The Authority opposed the augmentation of any purses, citing "its effort to create a self-sustaining course for the horse racing industry," and noting that "track operations at both the Meadowlands and Monmouth Park ha[d] been shifted ... to the private sector" pursuant to agreements "structured in a manner to eliminate the need for purse subsidies of any kind."On June 20, 2012, the Commission voted to distribute $10 million for the augmentation of purses. The THA received no allocation.

On June 25, pursuant to *N.J.S.A.* 5:5–22.1, the Governor vetoed the distribution plan. Reminding the Commission that he had vetoed its allocation of purse augmentation monies in 2011, the Governor noted that his previous "position ... ha[d] not changed."[3]Echoing the sentiments of the Authority, the Governor wrote that the Commission's distribution "r[an] completely counter to the goals of creating a competitive and financially self-sustaining industry."

The THA argues that the Governor's veto violated New Jersey's "constitutional requirement of separation of powers," and the Governor's exercise of his veto was "arbitrary and capricious." In *In re Veto,* we considered and rejected identical arguments brought by another horseman's association, the Thoroughbred Breeder's Association of New Jersey. In particular, after examining the entire legislative scheme, we refused to apply "the usual standard of review-whether the Governor's decision was arbitrary, capricious or unreasonable."*In re Veto, supra,* 429 *N.J.Super.* at 292. We stated:

> [I]f we were to consider whether the Governor's stated reasons for exercising his veto were supported by substantial evidence, or whether his conclusions were reasonably reached ... we would tread dangerously close to the boundary line separating our Constitutional power to review executive action, and the statutory and constitutional power accorded another co-equal branch of government. In our view, consideration of whether the Governor's veto of the Commission's minutes was factually sound or good policy "presents a non [-]justiciable political question," and can play no part in our review.
>
> [*Id.* at 292–93 (quoting *Gilbert v. Gladden,* 87 *N.J.* 275, 282 (1981)).]

The THA argues that for various reasons, review of the Governor's veto is appropriate and subject to the arbitrary, capricious or unreasonable standard we traditionally apply to review of administrative action. *See, e.g., Brady v. Bd. of Review,* 152 *N.J.* 197, 210 (1997) ("Unless a Court finds that the agency's action was arbitrary, capricious, or unreasonable, the agency's ruling should not be disturbed."). It suffices to say that we see no principled reason to overturn our prior decision.

***3** In light of our decision in *In re Veto,* the THA also argues that "any law giving the Governor the unreviewable right to veto" violates the " 'actions in lieu of prerogative writ' clause of the Constitution."*See N.J. Const.,* Art. VI, § V, ¶ 4 ("Prerogative writs are superseded and, in lieu thereof, review, hearing and relief shall be afforded in the Superior Court, on terms and in the manner provided by rules of the Supreme Court...."). But the THA mischaracterizes our prior holding. We did not state that the actions of the Governor were beyond review. Quite the contrary, we fully recognized our constitutional power to review the Governor's actions. *In re Veto, supra,* 429 *N.J.Super.* at 291–92. We only held that our review was limited to whether the Governor's discretionary action violated the Constitution or statutory grants of, or limits on, his authority. *Id.* at 292. The THA's argument on this point requires no further discussion. *R.* 2:11–3(e)(1)(E).

II.

A.

We briefly set forth the factual background and procedural history that led to the Commission's decision regarding FROT's and ACRA's continued statuses as permit holders.

On September 8, 2003, the Authority entered into a

participation agreement with FROT and ACRA that allocated the rights to the fifteen OTW licenses among the three parties. The agreement was approved by the Commission on February 23, 2004, and the Attorney General on March 10, 2004.[4]The Authority, FROT and ACRA each opened one OTW site, and, as of 2010, these were the only OTW facilities functioning in New Jersey. 44 *N.J.R.* 43. As noted, in response to the slow pace of OTW site development, the Legislature amended OTAWA in 2011, and again in early 2012. *See L* . 2011, c. 26; *L.* 2011 c. 205 [hereinafter the amendments] (codified at *N.J.S.A.* 5:5–130(b)); *see also* 44 *N.J.R.* 42(a) (describing purpose of amendments).

The amendments required permit holders to deposit cash, "a bond, or an irrevocable letter of credit ... in the amount of $1 million for each facility in the permit holder's share that remains to be licensed, which deposit shall be paid to the [C]ommission [by June 28, 2012]."[5]*N.J.S.A.* 5:5–130(b)(1)."[W]ithin one year of making the deposit," the license holder was required to demonstrate "substantial progress in the [C]ommission's judgment pursuant to the progress benchmarks issued by the [C]ommission and the New Jersey Economic Development Authority ... toward establishing the off-track wagering facility or facilities."*Ibid.* If such progress was shown, the deposit would be returned. *Ibid.*

Conversely, if the permit holders failed to demonstrate "substantial progress," "the amount deposited or posted [was to] be forfeited and distributed by the [C]ommission to the representative horsemen's organization in this State for use in establishing an off-track wagering facility or facilities under [*N .J.S.A.* 5:5–130(b)(2)]."*N.J.S.A.* 5:5–130(b)(1). The amendments also provided for the forfeiture of a permit holder's right to an OTW license (1) if a permit holder failed to make a deposit, and (2) if a permit holder made a deposit but failed to "ma[ke] progress toward establishment [of an OTW facility] within one year of making such deposit."*Ibid.* In either case, the permit holders' OTW rights would "no longer be considered as part of [its] share, and [would] be available to be established by a horsemen's organization in this State."*Ibid.*

***4** Finally, critical to the issues presented on appeal, the newly-amended statute provided an exception:

> [I]f the [C]ommission finds that a permit holder is making progress toward obtaining an off-track wagering license and establishing an off-track wagering facility ..., the [C]ommission may allow a permit holder to retain its share of the off-track wagering facilities to be established, provided the permit holder continues to make progress on an annual basis. *For the purposes of this section, a permit holder shall be deemed to have made progress toward establishing its share of off-track wagering facilities, and shall not be subject to a cash deposit or be required to post a bond or irrevocable letter of credit as set forth in this section, if it has entered into an agreement, in connection with good faith negotiations over the sale or lease of a racetrack under the permit holder's control, to transfer allocated off-track wagering licenses or facilities to an individual or entity that is a bona fide prospective purchaser or lessee, or has demonstrated to the satisfaction of the Commission that the execution of such an agreement is imminent based upon the portions of such an agreement agreed upon in principle by the parties as evidenced by a memorandum of understanding or similar accord, or has demonstrated to the satisfaction of the [C]ommission that negotiations concerning such an agreement have been unsuccessful and the permit holder has plans for soliciting new sources of interest or entering into new negotiations that, in the judgment of the [C]ommission, have a reasonable likelihood of resulting in a successful conclusion.*
>
> [*Ibid.* (emphasis added).]

Regulations were subsequently promulgated and are now codified at *N.J.A.C.* 13:74–2.5. They provide:

> The Commission may allow a permit holder to retain its share of off-track wagering facilities that have not received a license ... without making a deposit or posting a bond or irrevocable letter of credit ..., if the Commission finds that the permit holder is making progress ... toward obtaining an off-track wagering license and establishing an off-track wagering facility in accordance with the benchmarks set forth ... below....
>
> ....
>
> ... A permit holder shall be deemed to have made progress toward establishing its share of off-track wagering facilities if it has entered into an agreement, in connection with good faith negotiations over the sale or lease of a racetrack under its control, to transfer allocated off-track wagering licenses or facilities to an individual or entity that is a bona fide prospective purchaser or lessee, or if no such agreement has yet been reached, the permit holder has demonstrated to the satisfaction of the Commission either:
>
> (A) The execution of such an agreement is imminent based upon the portions of such an agreement agreed upon in principle by the parties as evidenced by a memorandum of understanding or similar accord; or

***5** (B) Negotiations concerning such an agreement have been unsuccessful and the permit holder has plans for soliciting new sources of interest or entering into new negotiations that, in the judgment of the Commission, have a reasonable likelihood of resulting in a successful conclusion.

> I. In order for the Commission to deem that sufficient progress has been made to meet the requirements of the benchmark ... above, the permit holder shall bear the burden of establishing to the satisfaction of the Commission that the plans for soliciting new sources of interest or entering into new negotiations have a reasonable likelihood of resulting in a successful conclusion.
>
> II. To ensure that the permit holder remains in compliance with the benchmark ... above, the Commission may require the filing of periodic or regular reports; or

[ ] If a permit holder does not meet the requirements set forth ... above, the permit holder shall be deemed to have made progress toward establishing its share of off-track wagering facilities if it can demonstrate to the Commission that as of the date upon which a deposit, bond, or irrevocable letter of credit is due:

(A) It has identified a suitable location for a proposed off-track wagering facility;

(B) It has entered into an agreement with the governing body of the local municipality within which the proposed off-track wagering facility is to be located establishing the payment in-lieu-of taxes the Authority or the permit holder must pay to the municipality ...; and

(C) The permit holder can demonstrate that it has met one of the following benchmarks, it has:

> I. Obtained fee title ownership of the proposed property;
>
> II. Obtained a leasehold interest in the proposed property for a period of not less than five years;
>
> III. Entered into an option agreement with a property owner to acquire either [of the] above; or
>
> IV. Executed a letter of intent with the current property holder in sufficient detail to demonstrate the material factors of a purchase or lease or agreement.
>
> [*N.J.A.C.* 13:74–2.5 (indentation omitted).]

Prior to the June 20, 2012 Commission meeting, both FROT and ACRA submitted petitions requesting retention of their OTW licenses without the necessity of posting security.

FROT argued it had met the regulatory benchmarks because it had identified three suitable OTW facility sites, had signed a letter of intent with a broker to acquire a "ten-year lease with optional five-year extensions" for one of the sites, was working with another real estate firm to identify suitable sites in Middlesex County and had retained "several professionals in the legal design and consulting areas in order to assist in the development of" the sites. Additionally, FROT contended that, as an existing OTW licensee, it did not need "outside financing source[s]," and exempting FROT from posting a bond or forfeiture was in the "best interests of racing." FROT also noted that under the participation agreement, it had exclusive rights to develop OTW sites in certain counties, and any violation of those rights would be challenged.

***6** ACRA's petition claimed it satisfied the benchmarks because it identified a suitable location in Egg Harbor Township, had entered into a letter of intent with a realtor to obtain a ten-year lease with "two optional five-year extensions for the property" and had retained several professionals to assist in the development of the facility. ACRA reiterated the same arguments made by FROT regarding rights provided by the participation agreement.

As reflected in the minutes of the meeting, the Commission found that "FROT ha [d] demonstrated compliance with [the] benchmarks."It noted that FROT's failure to obtain a lease for one of the properties did not "undermine its demonstration of progress" because *N.J.S.A.* 5:5–130(b)(1) provides that permit holders may retain their shares if it was found that progress was made towards "establishing *an* off-track wagering facility." Since FROT had "identified suitable locations for two of the OTW facilities within its share," the Commission concluded it had made sufficient progress.

The Commission also found that ACRA had "complied with each of the applicable benchmarks promulgated by the Commission" because it "ha[d] identified a suitable location[ ] for the proposed OTW facility in Egg Harbor," did not need to make a payment-in-lieu-of-taxes because it was leasing the property, and had "an executed letter of intent ... to acquire a 10–year lease ... for the proposed property."

Accordingly, the Commission approved a resolution finding that both FROT and ACRA were in compliance with the relevant benchmarks. However, out of concern

that "a finding of progress would allow ... permit holders to ... do nothing in developing their share of their OTWs," the Commission also required FROT and ACRA to make monthly progress reports and submit a formal progress report six months after the meeting. On June 25, Governor Christie approved the Commission's "determination that the permit holders[s][are] making progress toward obtaining an off-track wagering license and establishing an off track wagering facility."

B.

The THA challenges the Commission's determination that FROT and ACRA were making sufficient progress and their eligibility for OTW licenses should not be forfeited and no security need be deposited. The THA contends that neither FROT nor ACRA complied with the benchmark standards set by OTAWA, and the Commission crafted a remedy that was not provided by the statute, namely, having FROT and ACRA report monthly on their progress, as opposed to the annual report required by OTAWA. The THA also argues that the Commission's hearing on FROT and ACRA's progress lacked requisite formality and, hence, the decision was arbitrary, capricious and unreasonable.

"Our review of administrative agency action is limited."*Russo v. Bd. of Trustees,* 206 *N.J.* 14, 27 (2011) (citing *In re Herrmann,* 192 *N.J.* 19, 27 (2007))."An administrative agency's final quasi-judicial decision will be sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record."*Herrmann, supra,* 192 *N.J.* at 27–28. In this regard, our inquiry is limited to

> ***7** (1) whether the agency's decision offends the State or Federal Constitution; (2) whether the agency's action violates express or implied legislative policies; (3) whether the record contains substantial evidence to support the findings on which the agency based its action; and (4) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.
>
> [*In Re Taylor,* 158 *N.J.* 644, 656 (1999) (indentation omitted).]

In addition, "an agency's interpretation of its own regulations is [generally] entitled to substantial deference."*Hartman v. N.J. Racing Comm'n,* 352 *N.J.Super.* 490, 496 (App.Div.2002).

The THA argues neither FROT nor ACRA complied with the benchmarks in *N.J.S.A.* 5:5–130(b)(1) and the relevant regulations because they failed to demonstrate the proposed sites under investigation met "the suitability standard," and neither had executed a "letter of intent ... in sufficient detail to demonstrate the material factors of a purchase or lease agreement."[6]*N.J.A.C.* 13:17–2.5(a)(1)(i)(1)(C)(IV). We disagree.

The Commission noted that OTAWA only required that FROT and ACRA make progress towards finding a suitable location for one facility in its share, and it specifically determined that FROT "identified suitable locations for two of the three [OTWs] within its share."Regarding ACRA, the Commission concluded it had found a suitable location in Little Egg Harbor.

Both FROT and ACRA note that the statute and regulations emphasize that geographic locations of proposed OTW facilities should be outside the proximity of other "planned or existing off-track wagering facilities,"*N.J.A.C.* 13:74–2.1(g), and that this principle is found in the participation agreements which emphasize "geographic exclusivity." We see no reason to second-guess the suitability of these sites, particularly since we accord deference to the Commission's particularized expertise in this area. *See, e.g., N.J. Soc'y for Prevention of Cruelty to Animals v. N.J. Dep't of Agric.,* 196 *N.J.* 366, 370 (2008) (noting that courts must give "due deference to the considerable expertise of [an] agency").

We also find no merit to the THA's challenge to the adequacy of the letters of intent. FROT submitted two letters of intent setting forth in detail the landlord's specifications regarding any proposed lease. It is true that ACRA's letter of intent contained identical terms as FROT's letter regarding a proposed Bordentown site, and it was executed by the same individuals on behalf of FROT, ACRA and the landlord. The THA argues this proves the letters were "a sham."

OTAWA and the regulations only required a letter of intent with "material factors of a purchase or lease agreement," not a binding contract. *N.J.A.C.* 13:74–2.5(a)(1)(i)(1)(C)(IV). We cannot conclude that the Commission acted in an arbitrary, capricious and unreasonable fashion by determining that the letters of intent were sufficient under the governing regulations and OTAWA.

***8** We also reject the THA's argument that the

Commission essentially knew that neither FROT nor ACRA had adequately complied with the statute or regulations, because the Commission crafted an interim remedy, i.e., requiring monthly updates from both. The THA claims this was essentially a conditional extension of the existing permits and "not within the powers granted to the Commission under [OTAWA]."

Contrary to the THA's assertions, however, the regulations plainly permit the Commission's actions. *See N.J.A.C.* 13:74–2.5(a)(1)(i)(1)(B)(II) ("To ensure that the permit holder remains in compliance with the benchmark *...the Commission may require the filing of periodic or regular reports....* " (emphasis added)).[7]

Lastly, we reject the THA's argument that the Commission's decision could only be reached after a more formalized hearing. The record reveals that the Commission received petitions from FROT and ACRA months before the meeting and circulated them to various stakeholders, including the THA, for written comments. The transcript from the June 20, 2012 meeting indicates that the THA filed no written comments. However, at the meeting, the public and interested stakeholders were permitted to question the facts asserted in the petition and to urge the Commission to forfeit the pool of licenses and make it available to the interested horsemen's groups.

Neither the statute nor the regulations describe the nature of the hearing required. We have said that

> [t]he term "hearing" does not have a fixed meaning in the field of administrative law; it varies with the types of issues considered. Thus, when a statute requires a hearing, the question is not whether a hearing should be held, but rather what type of proceeding is appropriate to the nature of the case.
>
> [*In re Bell Atlantic–New Jersey, Inc.,* 342 *N.J.Super.* 439, 443–44 (App.Div.2001).]

"What is required in each instance, as a hearing appropriate to the nature of the case, is a proceeding that promotes fundamental fairness and fosters the integrity of governmental processes."*Id.* at 444. Here, we conclude that the Commission conducted a hearing that met these standards, and we find no basis to reverse the decisions made.

III.

During the June 20, 2012 meeting, the Commission met in closed executive session with the Deputy Attorney General (DAG), who provides the Commission with legal advice and was otherwise present during the public portion of the meeting. The stated purpose of the executive session was to obtain the DAG's legal advice on a number of issues, including allocation of purse augmentation monies and the petitions filed by FROT and ACRA. Also in the executive session was Brett Tanzman, an Assistant Counsel to the Governor assigned to the Authorities Unit.

Subsequently, the Commission issued redacted minutes of the executive session. Those state that Tanzman "informed the Commission of the Governor's strong policy regarding this matter, referenced the Governor's decision to veto the Commission's allocation of monies last year and indicated that the Governor's position on this very important issue ha[d] not changed."The THA argues that the Commission violated the OPMA because it "met behind closed doors and allowed an interested party to appear in private to advocate its position away from the public eye."

***9** The OPMA "reflects New Jersey's long 'history of commitment to public participation in government and to the corresponding need for an informed citizenry.' " *McGovern v. Rutgers,* 211 *N.J.* 94, 99 (2012) (quoting *S. Jersey Publ'g Co. v. N.J. Expressway,* 124 *N.J.* 478, 486–87 (1991)). The Legislature directed that the act "be liberally construed in order to accomplish its purpose and the public policy of the State." *N.J.S.A.* 10:4–21.

The OPMA provides that "all meetings of public bodies shall be open to the public at all times,"*N.J.S.A.* 10:4–12(a), however, it also lists nine instances in which a public body may temporarily exclude the public. Specifically, *N.J.S.A.* 10:4–12(b)(7) provides,

> A public body may exclude the public only from that portion of a meeting at which the public body discusses any ... matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer.

Our Supreme Court has held that this exception is "duplicative of the protection otherwise afforded by the attorney-client privilege and work-product doctrine."*Payton v. N.J. Tpk. Auth.,* 148 *N .J.* 524, 558 (1997).

The THA does not contend that the Commission violated the OPMA by convening a closed session to receive the advice of the DAG assigned as its counsel. It argues that Tanzman's presence during the executive session means the attorney-client privilege was waived and, therefore, the issuance of a redacted set of minutes violates the OPMA. It urges us by formal motion to compel the Commission to produce an unredacted set of minutes.

As we made clear in *In re Veto,* the Commission is part of the executive branch of government, and all executive power is vested with the Governor. 429 *N.J.Super.* at 287–89. "By enacting *N.J.S.A.* 5:5–22.1, the Legislature clearly intended to provide the Governor with direct executive control because it provided him with authority to veto the Commission's minutes, thereby nullifying any of its actions."*Id.* at 289.

For these reasons, we reject the THA's argument. There can be no dispute that the Commission's decision to enter executive session did not violate the OPMA because that was clearly justified under the exception noted above. Indeed, the THA does not suggest otherwise. Moreover, despite the THA's claim that Tanzman was permitted to make a "private" pitch to the Commission, the undisputed fact is that it had no effect. The Commission voted to allocate the purse augmentation monies anyway, forcing the Governor to exercise his veto.[8]

Affirmed.

Footnotes

1 The THA filed a motion seeking to compel disclosure of the minutes. We address that below. *See infra* note 8 and accompanying text. Additionally, shortly before the case was argued, the THA moved to supplement the record with a certification filed by FROT's and ACRA's counsel in a somewhat related federal lawsuit. We deny that motion.

2 We reject the argument by FROT and ACRA that the appeal should be dismissed because the THA lacks standing. Our courts embrace "a liberal approach to standing to seek review of administrative actions."*In re Camden Cnty.,* 170 *N.J.* 439, 448 (2002)."[S]tanding ... is available to the direct parties to that administrative action as well as anyone who is affected or aggrieved in fact by that decision."*Id.* at 446. Although the Commission did not allocate any purse augmentation monies to the THA, the THA submitted a request and, hence, it was a direct party to the Commission's decision. The THA was also aggrieved by the Commission's decision regarding the progress FROT and ACRA were making toward establishing OTW sites because, as we explain below, under the statutory scheme, the THA was potentially eligible to obtain any forfeited license. *See N.J.S.A.* 5:5–130(b).

3 We discussed in detail the 2011 veto in our previous decision, *In re Veto by Governor Chris Christie,* 429 *N.J.Super.* 277 (App.Div.2012) [hereinafter *In re Veto*], *certif. denied,*214 *N.J.* 116 (2013).

4 In order to issue an OTW license to the Authority, which can then assign the license to a permit holder, the regulations promulgated under OTAWA require the Commission to make a "final determination on the application." *N.J.A.C.* 13:74–2.1(j).

5 Alleging violations of the federal and state constitutions, FROT and ACRA sought to enjoin enforcement of the amendments in federal district court. Because the Commission decided not to forfeit their rights to an OTW license or compel payment of security, their motion was dismissed without prejudice.

6 FROT and ACRA argue that the benchmark regulations "had expired by the time of the June 20, 2012 meeting and therefore did not carry the force of law."During the meeting, however, the Commission chose to apply the expired regulations because "at the time the petitions were filed ... [the] benchmarks set forth therein were duly promulgated effective rules."The regulations are currently in effect and re-codified at *N.J.A.C.* 13:74–2.5. The regulations apply because they further the clear legislative intent of OTAWA. *See Seashore Ambulatory Surgery Ctr., Inc. v. N.J. Dep't of Health,* 288 *N.J.Super.* 87,(97–98) (App.Div.1996) (applying expired regulations retroactively).

7 In its brief, FROT argues that in 2013, the Commission subsequently approved the assignment of a license to operate an OTW facility in Gloucester Township, and that this fact somehow "eviscerates" the THA's appeal and renders it moot. Not only do we disagree with the argument, we strongly disapprove of a party including items in its brief or appendix that are not part of the appellate record without first obtaining relief by way of a motion to supplement the record.

8 Based upon our reasoning, the THA's late-filed motion to compel production of an unredacted set of minutes is denied.

2014 WL 7896570

End of Document