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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A13-0033**

In the Matter of the Request of North Metro Harness Initiative, LLC,  
to Amend its Plan of Operation to Include the Use of the  
TMS 300 Royal Match 21 Blackjack and Royal Match Progressive.

**Filed September 3, 2013  
Affirmed  
Bjorkman, Judge**

Minnesota Racing Commission

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Minnesota (for relator North Metro Harness Initiative, LLC)

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Considered and decided by Bjorkman, Presiding Judge; Halbrooks, Judge; and  
Rodenberg, Judge.

**UNPUBLISHED OPINION**

**BJORKMAN**, Judge

Relator challenges respondent's denial of its request to amend its plan of operation, arguing that (1) respondent erred by relying on an opinion from another agency, (2) substantial evidence does not support the decision, and (3) the decision is arbitrary and capricious. We affirm.

## FACTS

Respondent Minnesota Racing Commission (MRC) issued a license authorizing relator North Metro Harness Initiative LLC (North Metro) to conduct horseracing and card-club operations at Running Aces Harness Park. North Metro's plan of operation allows it to offer card playing, including manually dealt blackjack. On October 2, 2012, North Metro asked MRC for authorization to amend its plan of operation to include the use of TMS300 Royal Match 21 Blackjack and Royal Match Progressive (Table Master), a fully automated blackjack table.

MRC asked the Minnesota Department of Public Safety, Alcohol and Gambling Enforcement Division (Gambling Enforcement) whether North Metro's proposed use of Table Master would comply with Minnesota's gambling laws. After reviewing North Metro's request, which included a description of Table Master and its technical specifications, Gambling Enforcement determined that Table Master is a "gambling device" and "video game of chance" as defined by Minn. Stat. § 609.75, subds. 4, 8 (2012). Because North Metro is not among the entities to which a gambling device may be distributed under Minn. Stat. § 299L.07, subd. 2a(b) (2012), Gambling Enforcement opined that approval of North Metro's request would violate the law.

MRC conducted three public hearings during which North Metro provided testimony to support its request. Tracie Wilson, Running Aces Harness Park's CFO, testified that the card club currently offers two forms of blackjack. In the first, a dealer shuffles physical cards using an electronic shuffler with a random-number algorithm and manually deals the cards to players. The second form uses iTables. A dealer still uses an

electronic shuffler and deals physical cards to players. But iTables have electronic touchscreens for each player that display the value of players' cards<sup>1</sup> and permit players to make wagers, side bets, and plays (e.g., hit or stand). The iTable electronically determines the winners of the hand and distributes electronic credits accordingly.

Wilson explained that Table Master is a fully automated blackjack table. Table Master does not involve a human dealer or physical cards; rather, it deals electronic units (based on a 52-card deck) to the players, using an electronic shuffler with a random-number algorithm. Players insert money directly into Table Master and receive electronic credits, which are displayed on players' screens. Players use their screens to make wagers, side bets, and plays.

Table Master is manufactured by Shufflemaster Entertainment. Brandon Knowles, Shufflemaster's general manager, testified that Table Master is not a simulation of blackjack but the actual game of blackjack played electronically. Knowles stated that Table Master has been tested and recognized as a reliable blackjack table. But he acknowledged that most jurisdictions consider Table Master a slot machine because it uses a random-number generator to determine the game's outcome. Knowles testified that he did not know whether Minnesota law permits Shufflemaster to sell Table Master to North Metro.

North Metro argued that MRC should not rely on Gambling Enforcement's opinion because Minn. Stat. § 240.30, subd. 6 (2012), grants MRC exclusive authority to

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<sup>1</sup> As the cards are dealt, an optical camera scans the cards and displays their value on the touchscreens.

determine North Metro's request. North Metro asserted, contrary to Gambling Enforcement's determination, that Table Master is not a gambling device or video game of chance. North Metro further submitted a proposed order with findings of fact and conclusions of law, which incorporated these arguments. MRC staff agreed with Gambling Enforcement's determination and recommended that MRC deny North Metro's request.

During its third hearing on the subject, MRC voted to deny North Metro's request. North Metro asked MRC to state its reasons on the record, but MRC declined because it had moved to another item on its agenda. MRC subsequently issued a written order specifically stating that it declined to adopt North Metro's proposed order and declined to ignore Gambling Enforcement's opinion. This certiorari appeal follows.

## **D E C I S I O N**

By investigating North Metro's request to amend its plan of operation, weighing evidentiary facts, applying the law to the facts, and rendering a binding decision, MRC acted in a quasi-judicial manner. *See Minn. Ctr. for Env'tl. Advocacy v. Metro. Council*, 587 N.W.2d 838, 842 (Minn. 1999) (stating the three indicia of quasi-judicial action are "(1) investigation into a disputed claim and weighing of evidentiary facts; (2) application of those facts to a prescribed standard; and (3) a binding decision regarding the disputed claim"). An agency's quasi-judicial decision will be upheld unless it is "unconstitutional, outside the agency's jurisdiction, procedurally defective, based on an erroneous legal theory, unsupported by substantial evidence, or arbitrary and capricious." *Carter v. Olmsted Cnty. Hous. & Redevelopment Auth.*, 574 N.W.2d 725, 729 (Minn. App. 1998);

*see also Hinneberg v. Big Stone Cnty. Hous. & Redevelopment Auth.*, 706 N.W.2d 220, 225 (Minn. 2005). We do not retry facts or make credibility determinations and will uphold an agency's decision if it "furnished any legal and substantial basis for the action taken." *Senior v. City of Edina*, 547 N.W.2d 411, 416 (Minn. App. 1996) (quotation omitted); *see also Sawh v. City of Lino Lakes*, 823 N.W.2d 627, 635 (Minn. 2012).

**I. MRC did not err by relying on Gambling Enforcement's opinion.**

Whether an agency acted within its statutory authority is a question of law, which we review de novo. *In re Hubbard*, 778 N.W.2d 313, 318 (Minn. 2010). MRC has the exclusive power to authorize racetracks to operate card clubs in accordance with applicable laws and rules. Minn. Stat. §§ 240.07, subd. 3(b), .30, subd. 1 (2012). Racetracks must obtain approval from MRC of a card club's plan of operation and any subsequent amendments to the plan. Minn. Stat. § 240.30, subds. 1, 6(a), 7(a) (2012). In fulfilling its duties, MRC may request assistance from another state department or agency. Minn. Stat. § 240.04, subd. 7 (2012).

North Metro argues that because MRC has exclusive authority to approve amendments to a card club's plan of operation, the commission erred by relying on Gambling Enforcement's opinion. We disagree. The legislature expressly permitted MRC to seek assistance from other state departments in order to fulfill its duties. *See id.* Because Gambling Enforcement's duties involve licensing gambling-device distributors, MRC reasonably requested Gambling Enforcement's assistance in determining whether North Metro's use of Table Master complies with Minnesota's gambling laws. *See* Minn. Stat. § 299L.02, subd. 2(1) (2012) (authorizing Gambling Enforcement to conduct

background checks of applicants for licenses to distribute gambling equipment). And while Gambling Enforcement's opinion is not entitled to deference because it was not the result of formal rulemaking or adjudication, MRC may still rely on the opinion to the extent that it is persuasive. *See Martin ex rel. Hoff v. City of Rochester*, 642 N.W.2d 1, 21 (Minn. 2002) (stating that informal agency opinions may be used to persuade).

North Metro further contends that MRC wholly deferred to Gambling Enforcement's opinion and did not use its own expertise and independent judgment. We are not persuaded. The supreme court has emphasized that agencies must employ their own expertise to reach independent decisions and not simply rubber stamp the findings of another body. *See City of Moorhead v. Minn. Pub. Utils. Comm'n*, 343 N.W.2d 843, 846 (Minn. 1984). We discern no rubber stamping in this case. Rather, in reaching its decision, MRC considered Gambling Enforcement's opinion, MRC staff recommendations, Wilson's and Knowles's testimony, and North Metro's arguments and proposed order. MRC's written statement that it declined to ignore Gambling Enforcement's opinion reflects MRC's implicit determination that the opinion is persuasive in light of the entire record. Accordingly, we conclude that MRC did not err by relying on Gambling Enforcement's opinion.

## **II. Substantial evidence supports MRC's decision.**

When reviewing an agency's decision for substantial evidence, we evaluate the evidence in view of the record as a whole. *Cable Commc'ns Bd. v. Nor-west Cable Commc'ns P'ship*, 356 N.W.2d 658, 668 (Minn. 1984). Substantial evidence is "(1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion;

(2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety.” *Minn. Ctr. for Env'tl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 465 (Minn. 2002). A party challenging an agency decision has the burden to show that substantial evidence does not support the decision. *Carter*, 574 N.W.2d at 730.

North Metro argues that substantial evidence does not support MRC’s decision because (1) there is no evidence that Table Master is a gambling device and (2) use of Table Master constitutes card playing that is permitted under Minn. Stat. § 240.30 (2012). We address each of North Metro’s arguments in turn.

**A. Substantial evidence demonstrates that Table Master is a gambling device.**

A “gambling device” is defined as a contrivance that, in exchange for consideration, provides a person an opportunity to obtain something of value, other than free plays, whose outcome is determined principally by chance. Minn. Stat. § 609.75, subd. 4. A contrivance is “[s]omething contrived, as a mechanical device.” *The American Heritage Dictionary* 400 (5th ed. 2011). A gambling device also includes a video game of chance. Minn. Stat. § 609.75, subd. 4.

North Metro contends there is no evidence that Table Master is a gambling device. We disagree. Both Wilson and Knowles testified that Table Master is a fully automated blackjack table that allows players to wager money to win electronic credits, which can be exchanged for money. No human dealer is involved, and patrons play the game by depositing money into the machine. This testimony demonstrates that Table Master is a

mechanical device that provides players an opportunity to win something of value in exchange for consideration. And after reviewing Table Master's description and technical specifications, which include a mathematical analysis of the house's edge and the probability of winning side bets, Gambling Enforcement concluded that Table Master's outcome "is determined principally by chance." Gambling Enforcement further cited *United States v. Dicristina*, 886 F. Supp. 2d 164, 229-30 (E.D.N.Y. 2012), *rev'd*, \_\_\_ F.3d \_\_\_, 2013 WL 3984970 (2nd Cir. Aug. 6, 2013), which notes blackjack's outcome is predominantly based on chance.<sup>2</sup>

Moreover, North Metro has the burden to show that MRC should approve its proposed amended plan of operation. *See N. Mem'l Med. Ctr. v. Minn. Dep't of Health*, 423 N.W.2d 737, 739 (Minn. App. 1988) ("The burden of proof to show that a license should be granted is on the applicant."). North Metro presented no evidence to rebut Gambling Enforcement's opinion, MRC staff testimony, and other record evidence that Table Master is a gambling device. Based on our careful review of the record, we conclude that substantial evidence supports the determination that Table Master is a gambling device.<sup>3</sup>

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<sup>2</sup> Although *Dicristina* addressed whether poker was a game of chance, 886 F. Supp. 2d at 231, courts in other states have expressly held that blackjack is predominantly a game of chance. *See, e.g., Games Mgmt., Inc. v. Owens*, 662 P.2d 260, 264 (Kan. 1983); *Score Family Fun Ctr., Inc. v. Cnty. of San Diego*, 225 Cal. App. 3d 1217, 1222-23 (Ct. App. 1990); *State v. Eisen*, 192 S.E.2d 613, 616 (N.C. Ct. App. 1972).

<sup>3</sup> Because we conclude that Table Master is a gambling device, we do not analyze whether substantial evidence demonstrates that Table Master is also a video game of chance.

**B. Section 240.30 does not authorize MRC to use Table Master.**

North Metro asserts that even if Table Master is a gambling device, its use constitutes card playing, which North Metro is authorized to offer under Minn. Stat. § 240.30. Card playing is an activity where players “wager utilizing a 52-unit system comprised of a series of numbers, numbered two through ten, and the letters J, Q, K, and A, combined with four symbols commonly known as hearts, diamonds, spades, and clubs, wherein each individual unit constitutes the display of one of the 52 possible combinations.” Minn. Stat. § 240.01, subd. 25 (2012). Table Master is electronic blackjack, which involves wagering and uses a 52-unit system with a series of numbers, two through ten, and the letters J, Q, K, and A combined with four symbols known as hearts, diamonds, spades, and clubs. The definition of card playing does not require physical cards but rather uses the term “units.” *See id.* And card playing does not require a human dealer. *See id.* Table Master users are, in essence, playing cards.

But the fact that use of Table Master constitutes card playing does not end our analysis. Table Master is a gambling device. As such, distributors may not sell or provide Table Master to persons or entities other than (1) a federally recognized Indian tribe, (2) a person using the gambling device in his dwelling, (3) a licensed distributor, or (4) a person in another state who is authorized to possess a gambling device. *See* Minn. Stat. § 299L.07, subd. 2a(b). North Metro does not claim to be one of these entities. Therefore, while use of Table Master is card playing, it is not a form of card playing North Metro may offer because no distributor may provide Table Master to North Metro. And we discern no conflict between Minn. Stat. § 299L.07 (2012) and Minn. Stat.

§ 240.30; section 299L.07 does not define card playing or regulate card clubs but rather limits to whom gambling devices may be provided.<sup>4</sup> The evidence that Table Master is a gambling device and the law prohibiting distributors from providing gambling devices to North Metro substantially support MRC's denial of North Metro's request.

### **III. MRC's decision is not arbitrary and capricious.**

An agency's decision is arbitrary and capricious when the agency

- (a) relied on factors not intended by the legislature;
- (b) entirely failed to consider an important aspect of the problem;
- (c) offered an explanation that runs counter to the evidence; or
- (d) the decision is so implausible that it could not be explained as a difference in view or the result of the agency's expertise.

*Citizens Advocating Responsible Dev. v. Kandiyohi Cnty. Bd. of Comm'rs*, 713 N.W.2d 817, 832 (Minn. 2006). An agency's decision may also be arbitrary and capricious when it lacks articulated reasons. *Mammenga v. State, Dep't of Human Servs.*, 442 N.W.2d 786, 789 (Minn. 1989); *Carter*, 574 N.W.2d at 729 (stating that, to facilitate review, an agency must state the facts and its conclusions with clarity and completeness). But a decision is not arbitrary and capricious when there is a rational connection between the

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<sup>4</sup> North Metro argues that Minn. Stat. § 240.30 conflicts with Minn. Stat. § 609.755 (2012), which makes it a misdemeanor to possess a gambling device except when authorized by statute. We are not persuaded. Even if there is an irreconcilable conflict between the statutes, section 609.755 prevails because it specifically prohibits possession of gambling devices whereas section 240.30 generally allows card playing at card clubs. *See Schatz v. Interfaith Care Ctr.*, 811 N.W.2d 643, 649 (Minn. 2012) (stating that, when statutes conflict, a specific provision of one statute shall be construed as an exception to a general provision of another statute). Moreover, in denying the request, MRC only relied on section 299L.07, subd. 2a(b), which does not conflict with section 240.30.

facts found and the determination made. *In re Review of 2005 Annual Automatic Adjustment of Charges for All Electric & Gas Utils.*, 768 N.W.2d 112, 120 (Minn. 2009).

North Metro first argues that MRC's decision is arbitrary and capricious because MRC did not articulate the reasons behind its decision. We disagree. MRC's order expressly notes Knowles's testimony that Table Master is considered a slot machine in most jurisdictions and that he did not know whether Shufflemaster can legally sell Table Master to North Metro. The order references Gambling Enforcement's opinion that Table Master is a gambling device and states that MRC staff agrees with that determination. These statements demonstrate that MRC considered how Table Master functions and whether it constitutes a gambling device.

We reject North Metro's assertion that MRC's order is deficient for the reasons stated in *White Bear Rod & Gun Club v. City of Hugo*, 388 N.W.2d 739 (Minn. 1986). In that case involving the denial of a special-use permit to operate a gun club, the city council only listed its sources of information without describing how it evaluated or used the information. *White Bear Rod & Gun Club*, 388 N.W.2d at 742. The supreme court reversed and remanded, directing the city council to state the reasons for its decision in more than a conclusory fashion. *Id.* This case is different. Although MRC's findings could have been more detailed, MRC did not merely cite its sources of information. Rather, MRC's order discusses Gambling Enforcement's factual determinations and opinion, notes Knowles's testimony, and endorses MRC staff recommendations. MRC considered and declined to adopt North Metro's proposed order, essentially finding that North Metro did not show that its proposed use of Table Master would comply with

Minnesota law. We conclude MRC's order adequately expresses MRC's reasons for denying North Metro's request.

North Metro next argues that MRC's decision is arbitrary and capricious because it failed to consider that Minn. Stat. § 240.30 gives it the exclusive authority to approve or reject North Metro's proposed amendment. We disagree. North Metro repeatedly made this argument to the MRC and incorporated it into its proposed order. The MRC order notes that the MRC is authorized to seek assistance from other agencies and expressly declined to ignore Gambling Enforcement's opinion.

North Metro finally asserts that MRC arbitrarily failed to follow its own precedent because it approved use of the iTable but not Table Master. This argument is unavailing. Even though the game of blackjack remains largely the same whether played on Table Master or an iTable, Table Master falls within the statutory definition of a gambling device while the iTable does not. A gambling device is a "contrivance" that affords a player an opportunity to gain something of value in exchange for consideration. Minn. Stat. § 609.75, subd. 4. Table Master is a contrivance because it is a fully automated machine. Conversely, the iTable involves a human dealer who deals physical cards to the players. The iTable only has electronic screens that display the value of players' cards and credits and allow them to make plays. Accordingly, the iTable is an accessory to a blackjack game involving a human dealer. There is nothing inconsistent about MRC authorizing North Metro's use of the iTable but not Table Master.

In sum, we conclude that MRC did not err by relying on Gambling Enforcement's opinion, substantial evidence supports MRC's decision, and the decision is not arbitrary and capricious.

**Affirmed.**