IN THE SUPERIOR COURT

OF THE

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

E-TOURS, INC., dba SAIPAN-E-TOURS, Petitioner, vs. MARIANAS VISITORS AUTHORITY, Respondent.	**CIVIL ACTION NO. 00-0078D** **DECISION**

I. INTRODUCTION

This matter came before the court for a hearing on the petitioner's Verified Petition for Judicial Review pursuant to 1 CMC § 9112. Brien Sers Nicholas, Esq., appeared on behalf of the petitioner, E-Tours, Inc. ("Petitioner"). Mark K. Williams represented the respondent, the Marianas Visitors Authority ("MVA"). The court, having reviewed the evidence and exhibits, heard and considered the witnesses' testimonies and counsel's arguments, and being fully informed of the premises, now renders its written decision. **[p. 2]**

II. FACTS

This complaint arises from Petitioner's unsuccessful bid for one of four "motorized and non-motorized" vendor permits issued by MVA for the Dai Ichi Hotel beach vendor site in Garapan. Petitioner had been operating a motorized sports equipment rental at the Dai Ichi Hotel site under a temporary vendor permit issued by MVA on February 3, 1999. (MVA's Mot. Dissolve T.R.O. Ex. A.) MVA was unable to complete the selection of vendors for the year 1999, and Petitioner was allowed to continue operating under its temporary permit.

In October 1999, MVA began soliciting bids for commercial beach vendor permits at all tourist sites for the year 2000 and posted public notices requesting bids and distributed applications

to interested parties. On November 6, 1999, Petitioner submitted its bid for the Dai- Ichi site to MVA on November 6, 1999, together with the required fee. All the bids received by MVA were placed in its office safe.

On December 29, 1999, a selection committee comprised of representatives from MVA, the Department of Public Safety, Coastal Resources Management Office, the Department of Commerce, and the Department of Public Lands met to recommend which applicants would be awarded permits for the year 2000. Only four permits were available for the Dai-Ichi site. The MVA staff took the bids from the safe and presented them before the committee. Petitioner's bid was left inadvertently in the safe and was not reviewed by the selection committee at that time. Thus the committee reviewed only four applicants for the Dai Ichi tourist site and recommended that all four be awarded permits for the year 2000.

On January 4, 2000, MVA notified Petitioner that MVA did not receive its bid for the year 2000, and Petitioner must vacate the Dai-Ichi vendor site to allow the newly selected vendor, Min Young, to set up operation. On January 7, 2000, Petitioner met with MVA's Managing Director and informed him that its bid was submitted to the office and requested that his bid be considered.

MVA eventually discovered Petitioner's bid in the safe and decided to withdraw all bid awards made at the December 29, 1999 meeting. On January 17, 2000, the selection committee met again to consider anew the bid submissions including Petitioner's bid. The committee reviewed the qualifications of all applicants and determined that all five applicants, including Petitioner, had the **[p. 3]** requisite experience, resources, and background to conduct the business of sporting rentals at the vendor site. The committee then reviewed the applicants' bid amounts and awarded the permits to the four applicants with the highest bids. Petitioner's bid was the lowest of the five applicants and thus its application was denied. Accordingly, on January 26, 2000, MVA wrote to Petitioner informing him that his bid had been rejected because it had the lowest bid and was directed to vacate the premises.

Petitioner, however, refused to relinquish possession of the vendor stand. On February 11, 2000, Petitioner filed an Ex-Parte Application and Supporting Declarations for Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction. Petitioner also filed on the

same day a Verified Petition for Judicial Review. The court granted the temporary restraining order, and ordered MVA to advise the court and to show cause why a preliminary injunction should not issue in this matter.[1] At the February 16, 2000 hearing the parties stipulated that Petitioner will continue its business operations at the vendor site provided that an expedited trial date would be scheduled. The trial was held on March 2, 2000.

III. ISSUE

Under its enabling statute and subsequent regulations, did MVA properly reject E'Tour's bid for a vendor permit?

IV. ANALYSIS

Petitioner contends that MVA's rejection of its bid for the Dai-Ichi beach area was made arbitrarily and capriciously and without any legal basis. MVA refutes the claim and states that its regulations require the selection of qualified applicants submitting the highest bids and because Petitioner had the lowest bid of the five applicants, under its regulations, Petitioner could not be awarded a permit. **[p. 4]**

The Administrative Procedures Act, specifically 1 CMC § 9112, provides for judicial review of agency actions. Under subsection (f), the court is empowered to decide "all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 1 CMC § 9112(f). The court furthermore shall "hold unlawful and set aside agency actions . . . found to be," *inter alia*, 1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; or 2) in excess of statutory jurisdiction, authority, or limitations, or short of statutory rights. 1 CMC § 9112(f)(2)(i) and (iii).

Although Petitioner relies on 1 CMC § 9112(f)(2)(i), as the ground for challenging MVA's decision here, as a preliminary matter, the court must examine MVA's jurisdiction, as established by statute, to determine MVA's regulatory authority as defined by statute. This process requires a

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[1] Although the TRO did indicate that the February 16, 2000 hearing would consider a permanent injunction, the court clarified that the present hearing was a hearing for a preliminary injunction.

review of MVA's enabling statute, which necessarily implicates 1 CMC § 9112(f)(2)(iii), a provision which empowers the court to set aside agency actions that exceed the parameters of its statutory authority.

Before embarking on the legal analysis of the issue here, the presentation of certain facts prior to the creation of MVA is necessary.

A. MVA's Predecessor: Marianas Visitors Bureau

Prior to MVA's establishment, the responsibility for tourism promotion and development was entrusted to the now defunct Marianas Visitors Bureau ("MVB") which was created by the Marianas District Legislature with the enactment of District Law 4-145 in 1976. MVB was governed by a board of directors, which then appointed a managing director to oversee the daily operations of MVB. In 1985, the Commonwealth Legislature ("Legislature") amended MVB's enabling statute, in particular 4 CMC § 2106 (repealed 1998), which prescribed MVB's powers and duties. Pursuant to subsection (3) of § 2106, MVB had the authority to "encourage, authorize, license, regulate, and control commercial uses on or near tourist sites, and to monitor and police the same." That specific grant of authority served as the basis for MVB to promulgate its vendor site regulations and to execute an agreement with then Marianas Public Land Corporation, wherein MPLC agreed to permit **[p. 5]** MVB to "supervise" public lands which were designated as "tourist sites."[2]

B. The Marianas Visitors Authority

In 1998, MVB was abolished and MVA was created as its successor with the enactment of Public Law 11-15, the Marianas Visitors Authority Act of 1998 (the "Act"). *See* Marianas Visitors Authority Act of 1998, PL 11-15. The Act repealed the MVB statute in its entirety and vested MVA with various duties, most of which originated from the repealed provisions governing the MVB. *Id.* §§ 5, 7, & 11 (1998); 4 CMC § 2106 (repealed 1998). Not included in the Act is the repealed provision, 4 CMC § 2106(r) that gave MVB jurisdiction "to encourage, authorize, license, regulate,

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[2] *See Park Vendor* Regulations, 8 Com. Reg. 4183 (1986); *Revised Marianas Visitors Bureau Designated Tourist Site Regulations*, 11 Com. Reg. 6693, 6696 (1989) (issued as emergency regulations); *Revised Marianas Visitors Bureau Tourist Site Regulations*, 12 Com. Reg. 6874, 6877 (1990); *Amendments to Designated Tourist Site Regulations*, 14 Com. Reg. 9974 (1992); *Revised Marianas Visitors Bureau Designated Tourist Site Regulations*, 18 Com. Reg. 14819 (1996). *See also Agreement between the Marianas Public Land Corporation and the Marianas Visitors Bureau* (Feb. 7, 1986).

and control commercial uses on or near tourist sites, and to monitor and police the same."[3]

C. MVA Regulations

After its creation in 1998, MVA adopted regulations ("MVA regulations"), effective May 15, 1999, to oversee commercial activity at designated "vendor sites."[4] *See Marianas Visitors Authority Vendor Site Regulations*, 20 Com. Reg. 16461, 16465 (1999). In material part, the MVA regulations provide that:

> Any person who intends to sell, lease, or otherwise transfer for gain or profit, any merchandise or service specified [in the regulations] within a designated Vendor Site . . . shall first obtain a permit from MVA. All vendor permits issued by MVA must include a permit from . . . [the Coastal Resources Management Office] if the Site is within 150 feet of the high water mark. All vendor permit holders must secure and maintain a valid business license from the Department of Commerce. All permits issued by MVA are non-transferable unless by prior written authorization by MVA.

20 Com. Reg. 16461, 16465 (1999). Citing the Act as the source of its authority, art. I, § 2(a) of the **[p. 6]** MVA regulations, which quotes nearly verbatim the repealed § 2106(r), states that: "Public Law 11-15 gives MVA the authority to encourage, authorize, license, regulate, and control commercial uses on or near Tourist Sites."[5] *Id*. at 16464.

C. Principles of Judicial Review

Even though Petitioner's argument regarding MVA's rejection of the bid hinges on 1 CMC § 9112(f)(2)(i), given the facts set out in the preceding section, the crucial question in this litigation centers around 1 CMC § 9112(f)(2)(iii), and whether the court may nullify the MVA regulations on the ground that MVA ventured beyond its jurisdiction under the Act by promulgating the vendor site regulations. The principle embodied in 1 CMC § 9112(f)(2)(iii) is consistent with the prevailing rule in administrative law that a regulation has the force and effect of law, but only when it is the product of an exercise of delegated legislative power. *See Portland Audubon Soc'y v. Endangered Species*

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[3] The record here does not include any evidence of an agreement between MVA and the Division of Public Lands, MPLC's successor, similar to that executed by MVB and MPLC in 1986.

[4] "Vendor site" is defined as "a physical site set forth in the appendices of these regulations over which MVA has the authority to encourage, authorize, regulate and control commercial uses." Marianas Visitors Authority Vendor Site Regulations, 20 Com. Reg. 16465 (February 18, 1999).

[5] The notice of adoption, entitled "Public Notice of Adoption of the Amendments to the Marianas Visitors Authority Vendor Site Regulations" was published in the 20 Com. Reg. 16461(1999). The Office of the Attorney General, pursuant to P.L. 10-50, approved the regulations "as to form and legal sufficiency."

Comm., 984 F.2d 1534 (9th Cir. 1993); *see also Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, ___ U.S. ___, 120 S.Ct. 1291, ___ L.Ed.2d ___ (2000)(holding that Congress precluded the Food and Drug Administration's jurisdiction to regulate tobacco products as customarily marketed). Thus, a regulation does not add something to a statute which is not in the statute, and, if it does, no amount of administrative interpretation will make it valid. *See Brannan v. Stark*, 342 U.S. 451, 72 S.Ct. 433, 96 L.Ed. 497 (1951).

In fashioning an analytical framework for examining the issue here, the court turns for guidance to the U.S. Supreme Court's seminal decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2781-2, 81 L.Ed.2d 694 (1984). Known as the *Chevron* doctrine, the two-part inquiry provides that in reviewing an administrative agency's construction of a statute it administers, a court must determine: first, whether the legislature has spoken directly on the precise question at issue; and, second, if the statute is silent or ambiguous with respect to this issue, whether an agency's response is based on a permissible construction of the statute. *Chevron U.S.A. Inc.*, 467 U.S. at 843, 104 S.Ct. at 2781-2. **[p. 7]**

Under the first prong of the test, where congressional intent is clear, the inquiry ends and the court must give effect to Congress's expressed intent. *Id.* Tools of statutory construction may be used to determine whether Congress has expressed a clear intent in a statute. *Id*. 467 U.S. at 843, 104 S.Ct. at 2782 n. 9. "If a court, employing traditional tools of construction, ascertains that Congress had an intention on the precise question at issue, that intention is law and must be given effect." *Id*.

With these principles in mind, the court finds that the Legislature has directly spoken on the issue and withheld from MVA's jurisdiction the power to regulate commercial activity at vendor sites.

D. <u>MVA Act</u>

The starting point in addressing an agency action is the enabling statute itself. As noted above, there is no definite expression in the Act conferring on MVA the power to regulate commercial activity at various areas in the Commonwealth. A long standing rule of statutory construction, embodied in the ancient maxim *expressio unius est exclusio alterius*, instructs that the

expression of certain powers implies the exclusion of others. *Marshall v. Gibson's Products, Inc. of Plano*, 584 F.2d 668, 675-76 (5th Cir. 1978); *See generally* SUTHERLAND STAT. CONST. § 47.23 (5th ed. 1992). Moreover, where a legislature has consistently made an express delegation of a particular power, its silence betrays an intent not to grant the power. *See id.* at 676.

The extent of MVA's jurisdiction in promoting tourism is prescribed in § 5 of the Act, which lists and describes MVA's various powers and duties individually. Nowhere in § 5 is there a reference to the regulatory function at issue here. By its own terms, § 5 limits MVA's duty to promote tourism to the individual functions described therein by stating that, "[t]he MVA shall promote tourism and attract tourists to the Northern Marianas . . ." and then proceeding to list each function ranging from the organization of promotional programs in subsection (a), to the coordination of efforts with all Commonwealth government entities including the mayors in subsection (n).

From the principle of *expressio unius est exclusio alterius*, the court finds that, in specifying the various functions in § 5, the Legislature meant to confine MVA's duty to promote tourism according to the powers described therein. Thus, by omitting the delegation of regulatory power over designated sites from the list, the natural inference to be drawn is that the Legislature intended to **[p. 8]** preclude MVA's jurisdiction to regulate commercial activity.

The court finds instructive the U.S. Supreme Court's recent decision in *Brown & Williamson Tobacco Corp.*, that the process of interpreting statutes must be guided to a degree by common sense as to the manner in which "[a legislative body] is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." *Brown & Williamson Tobacco Corp.*, ___ U.S. ___, 120 S.Ct. 1291, 1294-5, ___ L.Ed.2d ___ (2000).

Although an argument may be made that the particular MVA function at issue is implicit in § 5, the "authority to encourage, authorize, license, regulate, and control commercial uses on or near Tourist Sites" is by no means a mere ministerial act. This function calls for the exercise of a substantial governmental function. If the Legislature had intended to give MVA such a power, it would have provided so in the Act as it did with MVB. The court notes that, as example of express legislative delegation, the Coastal Resources Management Office by statute is vested with specific

jurisdiction to manage any use or activity with a direct or significant impact on coastal resources and to encourage the development of recreational facilities compatible with the surrounding environment and land uses. *See* 2 CMC § 1511(a)(4) & (20). Absent this type of a delegation, the court cannot engraft language into the Act to provide MVA with the statutory authority to regulate commercial activity at designated sites. That the Legislature had previously made such a delegation to MVB, but chose not to include a similar provision in the Act, is also a clear indication of its intent to preclude MVA's jurisdiction to regulate commercial activity at designated areas.

E. <u>The Act's Legislative History</u>

The court may consult legislative history for guidance in construing a particular statute. *See Commonwealth v. Hasinto*, 1 N.M.I. 377 (1990). A review of the Act's legislative history confirms the court's interpretation of the Act. The first version of PL 11-5, which passed the Senate, contained § 13(r) which would have given the proposed entity the power "[t]o encourage, authorize, license, regulate, and control commercial uses on or near tourist sites, and to monitor and police the same." *See* SB 11-29, SD2, 11th Com. Leg. § 13(r) (1998). The House of Representatives subsequently amended the Senate bill by offering a substitute committee draft and renaming the proposed entity as the Marianas Visitors Authority. The House Committee on Commerce and Tourism's report **[p. 9]** explained that the Senate bill required "significant amendments to fully accomplish the intent of the [proposed] Act." H.R. STANDING COMM. REP. NO. 11-9, at 1 (1998). The elimination of § 13(r) was among the significant amendments referred to in the committee report. The deletion of § 13(r) from the final bill, which was eventually approved, is a strong signal that the Legislature intended to exclude from MVA's jurisdiction regulatory power over commercial activity at various sites in the Commonwealth. The court may not ignore the import of the Legislature's actions in its deliberation of the Act. Thus, the court is duty-bound to give effect to the Legislature's express intent.

V. CONCLUSION

Based on the foregoing reasons, the court concludes that MVA exceeded its statutory authority under PL 11-15, by promulgating vendor site regulations published in the Commonwealth Register on February 18, 1999. Pursuant to 1 CMC § 9112(f)(2)(iii), the subject regulations are hereby declared to be unlawful and of no legal effect. Having found that the MVA vendor site regulations are invalid under 1 CMC § 9112(f)(2)(iii), the court need not address Plaintiff's argument that MVA acted arbitrarily and capriciously and without any legal basis under 1 CMC § 9112(f)(2)(i).

SO ORDERED this 19 APR 2000.

/s/ John A. Manglona
JOHN A. MANGLONA, Associate Judge