IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 115,978

BOARD OF COUNTY COMMISSIONERS OF THE
COUNTY OF CHEROKEE, KANSAS,
Appellant,

v.

KANSAS RACING & GAMING COMMISSION, *et al.*,
Appellees.

CASTLE ROCK CASINO RESORT LLC,
Appellant,

v.

KANSAS RACING & GAMING COMMISSION, *et al*.,
Appellees.

SYLLABUS BY THE COURT

Under the facts of this case, the district court did not abuse its discretion by denying appellants' discovery requests, motion to amend, or request for an evidentiary hearing. Further, the district court correctly held the agency action did not result from an error of law and was supported by substantial evidence.

Appeal from Shawnee District Court; LARRY D. HENDRICKS, judge. Opinion filed May 5, 2017. Affirmed.

William R. Sampson, of Shook, Hardy & Bacon, L.L.P., of Kansas City, Missouri, argued the cause, and *Stephen W. Cavanaugh,* of Cavanaugh, Biggs & Lemon, P.A., of Topeka, and *Barbara Wright,* of Columbus, were with him on the briefs for appellant Board of County Commissioners of the County of Cherokee, Kansas.

Russel S. Jones, Jr., of Polsinelli PC, of Kansas City, Missouri, argued the cause, and *Brendan L. McPherson*, of the same firm, was with him on the briefs for appellant Castle Rock Casino Resort LLC.

Gregory P. Goheen, of McAnany, Van Cleave & Phillips, P.A., of Kansas City, argued the cause, and *Robert L. Turner, IV*, of the same firm, was with him on the brief for appellees Kansas Racing & Gaming Commission, *et al.*

Kevin M. Fowler, of Frieden, Unrein & Forbes, LLP, of Topeka, argued the cause, and *John C. Frieden*, and *Eric I. Unrein*, of the same firm, were with him on the brief for appellee Kansas Crossing Casino, L.C.

The opinion of the court was delivered by

STEGALL, J.: Castle Rock Casino Resort, LLC (Castle Rock) and the Board of County Commissioners of Cherokee County (Cherokee County) ask this court to review the State's selection of Kansas Crossing Casino, L.C. (Kansas Crossing) as the casino management firm authorized by the Kansas Expanded Lottery Act (KELA), K.S.A. 2016 Supp. 74-8733 *et seq.*, to manage the state-owned and operated casino in Southeast Kansas. Castle Rock proposed a large-scale casino in Cherokee County just across the state line from the Downstream Casino, located in Oklahoma. Kansas Crossing proposed a smaller casino in Crawford County farther from Downstream and several other casinos in Northeast Oklahoma.

Following an extensive process that produced an agency record containing thousands of pages, the Lottery Gaming Facility Review Board (Board) selected Kansas Crossing's proposed lottery gaming facility management contract. After the Board's decision was approved by the Kansas Racing and Gaming Commission (KRGC), both Castle Rock and Cherokee County filed actions pursuant to the Kansas Judicial Review Act (KJRA), K.S.A. 77-601 *et seq.*, in Shawnee County District Court, seeking judicial

review of the outcome. The lawsuits challenged: (1) the sufficiency of the evidence supporting the decision; (2) the legal interpretation given KELA by the state agencies; and (3) whether the decision was otherwise arbitrary or capricious. Importantly, while the lawsuits also made factual allegations suggesting improprieties occurred during the process, neither petition sought relief on the statutory grounds of either procedural improprieties or of disqualified persons participating in the Board's actions. The district court thus denied appellants' requests to investigate their allegations through traditional means of discovery and later denied their petitions on the merits.

On these facts, we hold that the district court acted within its broad discretion when it denied appellants' multiple discovery requests. We further determine that the district court correctly held that the Board's decision to select Kansas Crossing was supported by sufficient evidence; was not error as a matter of law; and was not arbitrary or capricious. As such, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 2007, the Kansas Legislature enacted the KELA, establishing four "gaming zones" in the state—northeast, southwest, south central, and southeast—and empowered the Kansas Lottery to operate one "lottery gaming facility" (*i.e.*, casino) owned by the state in each zone. K.S.A. 2007 Supp. 74-8702(f); K.S.A 2007 Supp. 74-8734(a); see *State ex rel. Six v. Kansas Lottery*, 286 Kan. 557, 570-73, 186 P.3d 183 (2008) (explaining Kansas' unique ownership of casinos under the KELA). The southeast gaming zone encompasses Crawford and Cherokee Counties. K.S.A. 2016 Supp. 74-8702(f)(2). Cherokee County is situated in the far southeast corner of the state, sharing a southern border with Oklahoma and an eastern border with Missouri. Crawford County is directly north of Cherokee County; it also borders Missouri.

In order to receive authorization to manage a casino in a gaming zone, applicants must submit proposed lottery gaming facility management contracts to the Kansas Lottery Commission for initial approval. K.S.A. 2016 Supp. 74-8734(b); see K.S.A. 74-8709 (establishing the Kansas Lottery Commission). Once the Lottery Commission approves one or more proposed management contracts with statutorily prescribed terms, it forwards the management contracts to the Lottery Gaming Facility Review Board (Board), which was established by KELA to select one of the proposals through a competitive bidding process. See K.S.A. 2016 Supp. 74-8734; K.S.A. 2016 Supp. 74-8735; K.S.A. 2016 Supp. 74-8736(b). Once the Board selects the contract that "best maximizes revenue, encourages tourism and otherwise serves the interests of the people of Kansas[,]" it then "submit[s] the contract to the Kansas racing and gaming commission for approval." K.S.A. 2016 Supp. 74-8736(b), (e). The voters of the county in which the casino would be located must approve by a majority vote the operation of a casino in their county. K.S.A. 2016 Supp. 74-8737.

Following the passage of KELA, contracts were awarded and casinos established in each gaming zone except the southeast. In 2007 and 2008, Kansas Penn Gaming, LLC, attempted but ultimately failed to open a casino in Cherokee County. After submitting a proposed facility management contract and entering into a number of land contracts, the company's efforts were thwarted by the successful development of the Downstream Casino, a large-scale casino built in Oklahoma directly across the state line from Penn Gaming's proposed site. See generally *Kansas Penn Gaming, LLC v. HV Properties of Kansas, LLC*, 662 F.3d 1275 (10th Cir. 2011).

With no other entities seeking to develop a casino in the southeast zone, the Kansas Legislature amended the KELA in 2014, lowering the zone's minimum infrastructure investment threshold requirement from $225 million to $50 million and reducing the privilege fee for being selected as a lottery gaming facility manager from

$25 million to $5.5 million. K.S.A. 2016 Supp. 74-8734(g)(2), (h)(6); L. 2014, ch. 92, sec. 1.

In January 2015, the Lottery Commission received four proposed facility management contracts for the zone. Shortly thereafter, one of the applicants withdrew, leaving Kansas Crossing, Castle Rock, and Emerald City Casino & Resort (referred to throughout the agency proceedings as "Camptown"). Kansas Crossing and Camptown each proposed to construct casinos at different locations in Crawford County, while Castle Rock proposed to build a casino in Cherokee County across from Downstream Casino. On April 24, 2015, the Lottery Commission approved and forwarded the three proposed facility management contracts to the Board.

Proceedings before the Board

The Board was made up of three members appointed by the governor, two members appointed by the president of the Senate, and two members appointed by the speaker of the House of Representatives. K.S.A. 2016 Supp. 74-8735(a). The governor selected Lisa Pleasure, Georgianna Mullin, and Jack Bower to serve on the Board. The senate president appointed Jeff Oakes and Don Alexander, while the speaker chose Kevin Cook and Gail Radke. Chaired by Jack Bower, the Board was charged with "determin[ing] which contract best maximizes revenue, encourages tourism and otherwise serves the interests of the people of Kansas." K.S.A. 2016 Supp. 74-8736(b).

In order to evaluate the voluminous proposals, the Board retained the consulting services of Union Gaming Analytics, LLC (Union Gaming) and its five subcontractors: Cummings Associates (Cummings); Casinonomics Consulting, LLC (Casinonomics); Civic Economics; EKAY Economic Consultants; and Macomber International, Inc. (Macomber). See K.S.A. 2016 Supp. 74-8735(h) (authorizing the Board to employ

"experts, consultants or other professionals . . . to provide assistance in evaluating a lottery gaming facility management contract submitted to the board"). The Union Gaming contract stated that it would provide the Board with a wide variety of consulting services, including: "Evaluation of each proposal's ability to attract local and regional visitation"; "[e]stimat[ion] of the local and state revenue to be generated by each proposal"; "[d]evelopment of independent revenue projections for each prospective lottery gaming facility manager proposal"; and "[r]eview of the financial suitability and stability of each lottery gaming facility manager's proposal."

From January 2015 through June 2015, the Board conducted seven open meetings pursuant to the Kansas Open Meetings Act (KOMA), K.S.A. 2016 Supp. 75-4317 *et seq*. Two of the Board's meetings were held on April 22, 2015—one in Cherokee County and another in Crawford County. During these meetings, members of the community had the opportunity to provide the Board with comments regarding the proposed casinos.

During the public meeting held on May 29, 2015, the Board heard extensive applicant presentations from Camptown, Castle Rock, and Kansas Crossing. Board members asked each applicant about its ability to finance the project, generate revenue, attract tourism, and compete in the market. Generally speaking, Castle Rock claimed it was "bigger and better than the other choices," while Kansas Crossing pitched itself as "the right location and the right size." After the presentations concluded, the Board took public comments.

Following the May 29 hearing, Union Gaming and its subcontractors submitted lengthy reports to the Board that provided estimates of gross gaming revenue (GGR), tourism attraction, and other economic concerns. These estimates generally placed Castle Rock as the proposal with the highest projections for revenue and tourism metrics. However, the written reports also expressed concerns about Castle Rock's financial

viability in light of the competition it would face from nearby Oklahoma casinos. For example, Casinonomics noted:

> "The Castle Rock site is within two miles of the Downstream Casino [in Oklahoma]. As a result of the Downstream's proximity and large size, Castle Rock revenues are estimated to be negatively affected by 37-48%, compared to the case if the Downstream did not exist.
>
> "The Camptown and Kansas Crossing properties would be harmed less because of the longer distance between them and the Downstream. The harm to them is estimated at around 5-10% of revenues.
>
> . . . .
>
> ". . . Results from this study suggest that the Downstream Casino is likely to have a large negative impact on any of the proposed Kansas casinos, but especially on the Castle Rock property."

Macomber raised similar concerns:

> "In competition for the pure locals' market, Castle Rock will be a new, big, 4-star, sparkling destination casino-resort that checks all the boxes in terms of expected activities to be offered in a better-than-locals'-only environment. Castle Rock is rather centrally located and easily accessible even if among the cluster of northeast Oklahoma competitor casinos. It is unclear whether the pricing will be off-putting to locals vis a vis pure locals' casino pricing.
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> "In uncontested locals' markets Castle Rock should do as well as the aforementioned price points will allow. In contested locals' markets where the competition ranges from a minimum of medium to high, the efficacy will also somewhat be a function of the Demand Stimulation Marketing effort and reinvestment rate Castle Rock is willing to make toward local players.

> "In terms of appealing to the 90-mile middle and outer ring regional Marketplace, the Castle Rock facilities are on par with the minimum Phase 1 critical mass needed to have a chance of being a success. *But, there is nothing overwhelming in the proposal. It is 'Bigger and Better' than the other two Applicant proposals but they are locals' centric. Castle Rock upon opening will compete with bigger and in some cases regional casinos closer to their target market segments. There is simply too much existing competition to declare Castle Rock 'enough' to generate the demand forecast*." (Emphasis added.)

Furthermore, Union Gaming determined that 10 other casinos were located within a 30-minute drive of the proposed Castle Rock location, whereas no casinos were located within a 30-minute minute drive of the proposed Kansas Crossing location. Within a 2-hour drive, however, both casinos faced competition from over 20 casinos.

During the June 10, 2015, public meeting, the consultants presented their methodologies, projections, and conclusions to the Board and the applicants. At the outset of the meeting, Union Gaming provided the Board with a summary of its 2019 projections for each casino, which it believed would be the "first [full] year of stabilized operations." These projections are summarized in the following table:

	Kansas Crossing	**Castle Rock**	**Camptown**
Number of Slots	625	1,400	750
Number of Table Games	16	51	20
Number of Hotel Rooms	120	200	62
Projected Gross Gaming Revenue (GGR)	$39 million	$47.8 million	$43.9 million
Percentage of GGR Coming from Kansas Residents	41%	31%	43%

	Kansas Crossing	Castle Rock	Camptown
Percentage of GGR Coming from Out-of-State Residents	59%	69%	57%
Visitors Each Year	540,753	687,501	608,493
Taxes Paid to State of Kansas	$9.4 million	$11.5 million	$10.5 million
Taxes Paid to Local Government	$1.2 million	$1.4 million	$1.3 million

When comparing Castle Rock's projections to its own projections, Union Gaming noted that Castle Rock projected its GGR at "just over 90 million," while Union Gaming estimated only $47.8 million in GGR. Casinonomics later suggested that this disparity was due to Castle Rock either underestimating its competition in the area or perhaps overestimating its revenue. Kansas Crossing, on the other hand, estimated its annual GGR at $47.2 million, while Union Gaming believed it would be $39 million.

Throughout the meeting, Board members questioned the consultants about the impact Downstream would have on Castle Rock's viability due to their close proximity to each other. Union Gaming provided the Board with an overview of the "very well-saturated" casino market in the northeast corner of Oklahoma and ultimately concluded: "[W]e don't believe [Castle Rock] is feasible because they'll not be able to have enough cash to pay off their debt on an annual basis."

Casinonomics summarized the predicted impact of the Oklahoma casinos. It identified Downstream as the largest Oklahoma competitor and believed Downstream would adversely affect Castle Rock more than the other two casinos due to its close proximity to Castle Rock. Casinonomics concluded that, though Castle Rock had the "potential to do very well," it was "certainly the riskiest when you consider the degree of competition." Macomber generally framed the distinction between the casinos as bigger risk, bigger gain for Castle Rock and lower risk, lower gain for Kansas Crossing and

Camptown, though it concluded, "The risk associated . . . is about the same for all in their own way." Following the presentations, the Board informed the applicants that they would have 5 days to submit comments, objections, and corrections to the consultants' reports.

The applicants submitted lengthy responses. Kansas Crossing generally agreed with the reports, while Castle Rock did not. Castle Rock emphasized the consultants' unanimity that it could generate the most revenue but took issue with Union Gaming's analysis, particularly regarding its ability to finance the project. Castle Rock tried to reassure the Board by informing it that Castle Rock's partners increased their financial commitments by an additional $60 million in project funds. The partners also stated that they would personally guarantee the remaining $35 million needed for development and operation, "if necessary to move the project forward." Furthermore, it asserted, "[I]n the event adequate senior lender construction financing cannot be secured to fund the casino, [the partners] will provide deeply subordinated debt on extremely favorable terms." Finally, Castle Rock detailed how the consultants "overstated the impact of Downstream on Kansas revenue projections" because they ignored, among other things, the "crushing debt load and high interest rate to which the Downstream facility is subject."

The consultants provided rebuttal reports and testimony that continued to question Castle Rock's ability to compete with Downstream and secure adequate financing. Initially, a Cummings representative responded to Castle Rock's assertion that it had ignored Downstream's heavy debt load by stating: "I agree that these payments are of some import to Downstream's financial position, but not so much that they would seriously crimp Downstream's ability to spend far more than any casino in Kansas on competitive warfare."

In fact, the representative expressed a bullish outlook for Downstream:

> "Downstream has proved an exceptional performer in a very competitive marketplace. In my analysis, it demonstrates one of the highest slot power ratings of any major casino in the U.S. I assume that Castle Rock will compete well, similar to what I assess to be the average of other attractive casinos in competitive markets, but I cannot responsibly assume that Castle Rock will match Downstream's demonstrated competitive abilities."

Using Castle Rock's revised capital structure, Union Gaming recalculated the new loan-to-cost ratio and compared it to the loan-to-cost ratio under Castle Rock's initial proposal. It concluded:

> "[E]ven with the new proposed capital structure, Union Gaming still has concerns regarding Castle Rock's ability to secure the necessary bank debt financing to complete the project.
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> ". . . [O]btaining the total required bank debt financing would be very difficult and furthermore such debt would likely include onerous indicative terms (interest rate, required loan amortization, etc.) that would call into question the project's ability to operate as a going concern."

Not to be deterred, Castle Rock responded by informing the Board that one of the partners had committed an additional $11 million of equity, leaving "only $24 million of required debt financing—the very amount which Union Gaming itself believes Castle Rock will be able to secure[.]" Castle Rock continued to disagree with Union Gaming's doubts concerning Castle Rock's viability. Castle Rock hoped that this additional commitment would serve as the "ultimate and final declaration of the Castle Rock partners' utmost confidence in the success of their proposal[.]"

On June 23, 2015, the Board convened for the final time to select one of the proposed facilities management contracts. At the outset of the meeting, Cummings, Macomber, and Union Gaming gave presentations regarding their rebuttal reports, during which they answered questions from members of the Board. Macomber told the Board that Castle Rock, as the bigger casino, had "more upside potential, but more risk," and the smaller casinos had "less upside potential" and "less risk," but "[b]igger is better if it works. It's not better if it doesn't." Union Gaming again addressed whether Castle Rock's increased financial commitments would improve its chances of success:

> "So while the leverage ratio under all those scenarios comes down for the new capital structure versus the old capital structure, it's still on the high end of the range. And we believe that the required additional bank financing would be very difficult and would likely be onerous with indicative terms, interest rate, required loan amortization, et cetera, and call into question, the project's ability to operate is a growing concern."

Afterward, the Board permitted all three applicants to make a final presentation, followed by questions from individual Board members for applicants and consultants. Castle Rock presented a lengthy final pitch to the Board, which included detailed testimony regarding its financing options. It assured the Board, "Castle Rock and all its partners will take all the risks and Kansas will get the big reward."

Next, the Board's counsel advised it of the voting process. In doing so, counsel explained that "[t]he review board shall determine which contract best maximizes revenue, encourages tourism and otherwise serves the interests of the people of Kansas. And that third category can encompass many things."

After each Board member stated that he or she did not have any inappropriate contact with the applicants, ballots were circulated and collected. The Board decided by public vote—five for Kansas Crossing and two for Castle Rock—to recommend that

Kansas Crossing be awarded the facility management contract. As the recording secretary announced the votes, each Board member explained his or her reasons:

"[Recording Secretary]: Don Alexander, Kansas Crossing Casino.

"Board Member Alexander: Again, I said this was going to be a very difficult decision, and it was. I obviously had Castle Rock scored higher on the first item of the revenue.

"I was a little bit more impressed with Kansas Crossing bringing tourism into the State and working with the partnerships. That was—you know, Castle Rock was the big one. Camptown was solid . . . financially and I didn't really just split the vote and go down the middle. It was based on partnerships and tourism.

"[Recording Secretary]: Thank you. Kevin Cook, Kansas Crossing Casino.

"Board Member Cook: For me I think the words that really jumped out and stuck with me throughout the entire process was 'properly sized to the market.'

"This is an applicant who has history with the State of Kansas, has started with other applicants, at other casinos in the State of Kansas, they have the background, they have a reasonable time line. Their facilities met the needs as described by the statute. They were the best overall Kansas draw, but still catering to the locals. It's very important to be part of the community.

"They have established those partnerships with Pittsburg State, with employment, with the tourism and overall I found them to be a solid plan throughout the entire process. They were able to maximize the revenues as described by statute.

"[Recording Secretary]: Thank you. Gail Radke, Kansas Crossing Casino.

"Board Member Radke: I felt that Kansas Crossing's management experience with successful green field was what was needed in this area. I also believe that they had the ability to be more adaptive to success as well as to restructuring if need be.

"I felt that they were realistic in their goals. They were stable in those goals. I also felt that the design of the facility is more with Kansas Midwest environment of somewhat modern. Camptown was maybe too western. Castle Rock was a little bit more contemporary for that rural area.

"I just thought that [Kansas Crossing] would have a . . . broader appeal for the area and for tourism. . . . [O]ne of the things that I was impressed with was that they worked with the local residents in calling a meeting to address those residents' concerns and try to create a better connection and better communication.

"And I think that's as I stated before I think that it is of the utmost importance for them to be integrated into the community.

"[Recording Secretary]: Thank you. Jeff Oakes, Kansas Crossing Casino.

"Board Member Oakes: After review of all this information, the consideration of the statute, the three pieces that we were to critique, I just feel it's the right fit. I think it's the right size. I feel it possibly has the best management team with the most experience with gaming in Kansas.

"I think the location of U.S. 400 and Highway 69 is a very good location. The consultants, I think, and Kansas Crossing numbers were the closest when looking at it and I'm really impressed with the amount of giving back to the community.

"[Recording Secretary]: Thank you. Georgianna Mullin, Kansas Crossing Casino.

"Board Member Mullin: Well I have to say that it was a very tough decision and I've liked at one time or another, each of the proposals. So I can't say that I had my mind

made up 100 percent when I came in here today and it's been going back and forth all along.

"Each time in the time line I've had different thoughts on each one of the applicants. But I will say that even doing research beyond this to see the partnerships and the local input that this group has had and other communities in Iowa and the scholarships and throughout the country, I feel that they are good corporate citizen, have good community collaboration.

"They are sustainable and that's been really the bottom line for me is to find—to look at the applicant that I feel is the most sustainable and reasonable in size.

"They do have past knowledge with the Kansas regulatory group and working with our boards and the Kansas work force and the employment. And that we're going to be keeping jobs more in the area of Kansas and maybe pulling some from Missouri, but that it's going to be a Kansas project in Kansas with no immediate local competition within a 30 minute drive.

"[Recording Secretary]: Thank you. Lisa Pleasure, Castle Rock Casino Resort.

"Board Member Pleasure: I selected Castle Rock because I think there's an opportunity to compete on a higher level in that region with the tribal entities. And I think in order to effectively compete in that region that you are going to have to have something that is—that's got a lot of wow to it.

"I also—we also received a lot of correspondence about the Kansas Crossing location and that was something that I factored into my decision as well.

"[Recording Secretary]: Thank you. Jack Bower, Castle Rock Casino Resort.

"Chairman Bower: Well, I like their location. I like the fact that they were near Joplin. I like the fact that they were near some of the wealthiest areas of northwest Arkansas. I like their unique marketing propositions. They're bigger. More revenue.

"I know there's a lot of discussion about the viability of some of their numbers, but I thought it would be the best decision to make."

Prior to the vote, the Board went into executive session three times. The first executive session occurred over the lunch break, and the last two occurred shortly before the members voted. The second executive session lasted about 1 1/2 hours, while the third lasted about 1 hour. The same day, after the vote, the Board sent notice to the KRGC that it had selected Kansas Crossing for the southeast gaming zone and based such selection on the best contract "that maximizes revenue, encourages tourism and is otherwise in the best interest of the state."

At some point after the Board approved Kansas Crossing's proposed management contract but prior to the KRGC's approval, the residents of Crawford County approved the casino through a ballot initiative.

Proceedings before the KRGC

Shortly after receiving the proposed facility management contract, the KRGC received hundreds of public comments, many of which disapproved of the Board's decision. In addition, Cherokee County sent the KRGC a letter arguing that Castle Rock would best maximize revenue and tourism as well as best serve the interests of Kansans. It did not allege any improprieties by the Board in the selection process.

In a separate letter, Castle Rock asked the KRGC to reject the Board's decision, also asserting that it had submitted the best contract. Castle Rock further alleged certain improprieties during the Board's review process. First, Castle Rock complained about the Board's decision to isolate itself in executive session on three occasions during the June

23 hearing. Castle Rock believed that the Board should not have been able to meet privately with its consultants and that Castle Rock should have been able to correct any alleged misstatements that may have been made by Union Gaming during these sessions.

Castle Rock further raised a concern over Board Member Cook's neutrality. It claimed that Cook had been seen speaking with, texting with, and making gestures to members of the Kansas Crossing group or its representatives. Castle Rock further claimed that Cook "openly lobb[ied] for Kansas Crossing" rather than objectively considering the various proposals. Lastly, Castle Rock complained that Kansas Crossing announced during the June 23 meeting that it would donate $100,000 to Southeast Kansas Tourism Region (SEKTR) over 10 years. It claimed that Board Member Alexander was the president of SouthEast Kansas, Inc. (SEK)—a company that was involved with tourism in Southeast Kansas. It suggested that this last-minute "sweetener" improperly influenced Alexander's vote.

Kansas Crossing submitted a response, generally reiterating Union Gaming's reservations about Castle Rock's economic viability and asking the KRGC to approve the contract.

On July 2, 2015, the KRGC held an open meeting in Topeka to consider Kansas Crossing's proposed facility management contract. First, a representative from the Lottery Commission assured the KRGC that Kansas Crossing's proposed facility management contract contained the statutorily required terms. Kansas Crossing then presented its proposal, and the commissioners held a public comment forum, during which several members of the public gave statements. Shortly thereafter, the attorney for Cherokee County argued that the KRGC should reject Kansas Crossing's contract because the interests of Kansans would best be served by a larger casino. At one point, one of the commissioners asked, "You're not suggesting, are you, that Castle Rock wasn't given a

full opportunity to be heard before the Review Board before they made their decision, are you?" The attorney responded,

> "I think the process that took place was appropriate. I think that Castle Rock was afforded the opportunity to provide the information to the Review Board. I simply disagree with the Review Board, and I ask you to disagree with the Review Board. I ask you to not approve their recommendation."

Next, Castle Rock generally asserted that the KRGC had the statutory authority to reject Kansas Crossing's facility management contract because it was not the best contract presented to the Board. Afterward, the KRGC recessed to an executive session to discuss the attorney-client privilege and review background reports. After returning, the members of the KRGC voted three to zero to approve Kansas Crossing's proposed facility management contract, with one member abstaining. Two of the commissioners offered the following rationale for their decision:

> "[COMMISSIONER MCKINNEY:] I would point out that when . . . this first started, I was initially surprised at the recommendation from the Review Board, and went into it with a number of questions. As I investigated it, it became my view that the Review Board has done a very thorough analysis in looking at a wide variety of details and aspects of the proposals, and I cannot find a compelling reason to overturn that decision; therefore, I will be voting in favor of the motion. Further discussion?
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> "COMMISSIONER KING: I guess I would just like to say the only reason that I can think of not going with what the Facility Review Board did was if there was anything arbitrary and capricious about the decision. I could find none. They did a lot more study than we were able to do. So I can find no reason to overturn their decision."

Proceedings before the District Court

On July 13, 2015—11 days after the KRGC approved the facility management contract—Cherokee County filed a verified petition for judicial review in Shawnee County District Court. The petition listed the KRGC, and its individual members; the Board, and its individual members; Kansas Lottery; and Kansas Crossing as the defendants. Cherokee County simply asserted that the Board did not comply with K.S.A. 2015 Supp. 74-8736(b) by selecting the contract that best maximizes revenue, encourages tourism, and otherwise serves the interests of Kansans. In its initial pleading, Cherokee County did not complain about Kansas Crossing's alleged sweetener made on June 23, nor the Board's executive sessions. It later included these allegations in an amended petition. In neither petition did Cherokee County question Union Gaming's qualifications to evaluate Castle Rock's financial viability.

For a remedy, Cherokee County asked the district court to vacate the KRGC's decision and remand with orders to restart the bidding process. The same day Cherokee County filed its initial petition, it submitted an application for temporary restraining order and motion for temporary injunction. Three days later, the district court conducted a hearing on Cherokee County's application. On July 31, the district court entered a memorandum decision and order denying Cherokee County's request, finding there was not a substantial likelihood that Cherokee County would prevail on the merits.

The same day the district court denied the temporary injunction, Castle Rock filed its own petition for judicial review in Shawnee County District Court, also alleging that the Board failed to select the proposed facility management contract that best maximizes revenue, encourages tourism, and otherwise serves the interests of Kansans. Contained within this general allegation, Castle Rock again took issue with the $100,000 purported

sweetener and the three executive sessions of the Board prior to its public vote on June 23. However, Castle Rock did not reassert its concerns over Cook's neutrality, and it did not question Union Gaming's qualifications to evaluate financial viability. Both Castle Rock's and Cherokee County's petitions invoked only K.S.A. 2016 Supp. 77-621(c)(4) ("the agency has erroneously interpreted or applied the law"), (c)(7) ("the agency action is based on a determination of fact, made or implied by the agency, that is not supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this act"), and (c)(8) ("the agency action is otherwise unreasonable, arbitrary or capricious").

Shortly after Castle Rock filed its petition, the district court granted Castle Rock's motion to consolidate its case with Cherokee County's. On September 8, 2015, Cherokee County and Castle Rock filed a joint motion for "case-specific discovery." The request claimed that "important improprieties occurred in the selection process." To support their claim that they were entitled to discovery, the movants pointed to allegations Cherokee County raised in its first amended petition:

> "'61. Board Member Don Alexander acknowledged that he "had Castle Rock scored higher on the first item of revenue," but he went on to state that he "was a little bit more impressed with Kansas Crossing bringing tourism into the state and working with the partnerships." *Id.* Upon information and belief, the reference to "tourism" and "partnerships" which formed the basis for Mr. Alexander's decision had nothing to do with the Kansans and non-Kansans who would visit and spend their dollars in the Southeast gaming zone, but with an improper "sweetener" added by Kansas Crossing and permitted out of time by the Review Board on June 23. (See discussion at ¶ 45 of this Verified Petition.) In short summary, Mr. Alexander is the President of SouthEast Kansas, Inc. ("SEK"), a regional alliance of business leaders in Southeast Kansas. On June 23, without any opportunity for any applicant to respond, Kansas Crossing "sweetened" its offer by committing an additional $100,000 to a Pittsburg-area marketing

association with which SEK is affiliated. In other words, in contravention of the Lottery's own policy, Kansas Crossing announced and the Review Board allowed this $100,000.00 "donation" from Kansas Crossing.

"'62. Prior to its "public vote" on June 23, the Review Board shut out the public and the applicants and isolated itself in no fewer than three executive sessions lasting more than four hours. No party in interest was given an opportunity to hear, respond to, or correct inaccuracies presented to the Review Board by Union Gaming.

"'63. During the July 16, 2015, hearing before this Court, counsel to the Lottery Review Board and the Kansas Gaming Commission offered extensive commentary on the thought process of the Review Board leading up to their "public vote." According to counsel, many of the Board members harbored concerns regarding Castle Rock's financial capabilities. The description given by counsel had nothing to do with the giving or receiving of legal advice. And if the behind-closed-doors discussions of June 23 had been protected until then by any privilege that attends an "executive session" of a state agency, that privilege was waived on July 16.

"'64. As to the Board members that allegedly harbored concerns regarding Castle Rock's financial viability, it is unclear why these members believed that it was their role to second-guess the Commission's prior approval of Castle Rock's financial ability. The Review Board's task was to find the contract which best maximizes revenue, best encourages tourism, and otherwise best serves the interests of the people of Kansas. While the review of some financial data is certainly within the Review Board's purview with regard to these factors (*e.g.* revenue), KELA clearly does not allow the review board to determine independently whether a pre-approved applicant has "sufficient access to financial resources." According to KELA, that jurisdiction resides solely with the Commission.

"'65. On July 2, 2015, by a vote of 3 to 0 with one Commissioner abstaining, the Kansas Gaming Commission "affirmed" the recommendation of the Lottery Review Board and awarded the lottery gaming facility management contract for the southeast gaming zone to Kansas Crossing. The Kansas Gaming Commission made its decision

> without any further inquiry into the numerous improprieties in the selection process, which were brought to the Commission's attention prior to its hearing.
>
> [. . . .]
>
> "'78. Because the votes in favor of Kansas Crossing were influenced by improper sweeteners, by improper and non-public discussion in executive sessions, and by any other improprieties that may be discovered, the decision was improper and not in the best interests of Kansans.'"

Appellants did not attach any supporting documents to the request.

On October 29—1 day before the hearing on the motion—Castle Rock and Cherokee County supplemented their discovery request with a proposed joint discovery plan. It listed six issues they wished to investigate: (1) Kansas Crossing's failure to disclose lobbyists working on its behalf in its application; (2) Board Member Cook's involvement with the primary attorney for Kansas Crossing, Clint Patty, with whom Cook acknowledged he shared a professional relationship; (3) the purposes of the Board's executive sessions; (4) Board Member Oakes' relationship with George Laham—a Kansas Crossing principal who allegedly boasted to have "hand delivered" Oakes' vote in favor of Kansas Crossing; (5) the purported sweetener offered by Kansas Crossing during the June 23 hearing; and (6) the process used by the Board in selecting Union Gaming to provide consulting services.

On October 30, 2015, the district court held a hearing on the discovery request. Following the parties' arguments, the district court denied the joint motion. On December 21, 2015, the district court entered a journal entry memorializing its decision. The heart of the ruling is as follows:

"The Kansas Judicial Review Act, K.S.A. 77-601 *et seq.* ('KJRA'), is designed to facilitate and expedite judicial review. Under the KJRA, this Court reviews challenged agency action much like an appellate court and is generally restricted to the agency record. While discovery may be available in judicial review proceedings under appropriate circumstances, the Court cannot authorize discovery whenever a plaintiff makes unsupported allegations under K.S.A. 77-619(a) and expresses the mere belief that something is out there to be found through discovery. Because Kansas law presumes the regularity of agency proceedings and actions absent evidence to the contrary, the Court believes that the requested discovery should be permitted only upon a prima facie showing of wrongful conduct supported by something of evidentiary value. However, Plaintiffs' motion rests on unsupported allegations and Plaintiffs have made no prima facie showing of wrongful conduct based on affidavits, appropriate verified statements or anything else of evidentiary value.

"The Court also observes that the petitions filed by Cherokee County and Castle Rock each specifically allege that the challenged agency action should be reviewed and set aside based on judicial review determinations under K.S.A. 77-621(c)(4), 77-621(c)(7) and 77-621(c)(8). While Plaintiffs seek discovery to pursue certain alleged improprieties in the selection process, neither Cherokee County nor Castle Rock expressly seek judicial review and determination of these allegations under K.S.A. 77-[621](c)(5) ('the agency has engaged in an unlawful procedure or has failed to follow prescribed procedure') or K.S.A. 77-[621](c)(6) ('the persons taking the agency action were improperly constituted as a decision-making body or subject to disqualification'). Petitions for judicial review require more than mere notice pleading and the Court is not required to examine more than 40 pages of Plaintiffs' petitions and guess at the scope of review. In this Court's view, the pending motion improperly seeks discovery on matters that exceed the scope of review expressly identified and requested by Cherokee County and Castle Rock in these judicial review proceedings."

On November 9, 2015—after the district court had announced its decision from the bench but before it had filed its journal entry—Castle Rock and Cherokee County sought leave to amend their petitions and renewed their joint discovery request. The

amended petitions would have invoked both K.S.A. 2015 Supp. 77-621(c)(5) and (c)(6) and included several purported affidavits from individuals associated with Castle Rock. The district court did not immediately rule on these motions.

Following extensive briefing by the parties, the district court entered a detailed memorandum decision and order denying Castle Rock's and Cherokee County's petitions on March 31, 2016. The district court initially determined that KELA did not require the Board to find Castle Rock's contract was the best because it was the biggest. The district court ruled that the Board was not precluded from considering the proposals' financial viability and that the Board was clearly aware of the statutory factors it was required to use.

After the district court listed each Board member's explanation for his or her vote, it made extensive findings regarding the substantial evidence supporting the Board's determination. The highlights of the court's findings are stated below:

> "At the outset of this discussion, the Court acknowledges the elephant in the room: the projections of every consultant in this matter predicted that Castle Rock's proposal could generate the most revenue, taxes, jobs, and tourism of all three proposed casinos. While the consultants varied in the numbers they projected . . . all agreed that Castle Rock was the biggest of the three proposals and that it would, if all went according to plan, produce the most revenue, tax money, overall jobs, and tourism. The Board was well aware of these projections. . . . There can be no doubt that Castle Rock offered the biggest proposal, which obviously detracts from the Board's ultimate conclusion. However, as Mr. Macomber testified, bigger is only better if it works. . . .
>
> "To further complicate the matter . . . the Board members were not particularly clear in articulating the reasons for their votes at the time the ballots were cast. A careful reading of their rationales, however, suggests that the majority of the Board simply did

not believe Castle Rock's proposals, grand as they were, were feasible in the southeastern Kansas market. . . .

"The Petitioners argue that these considerations do not properly take into account which proposal best *maximizes* revenue, tourism, and the interests of the citizens of Kansas, but they focus on the semantic meaning of 'best' or 'maximize,' rather than the underlying implication of the KELA criteria: that the Board select the *optimal* proposal, *i.e.*, the best *possible* proposal under the conditions of the market. As noted above, a failed proposal cannot best maximize anything, no matter how grand its projections may be. Thus, in order to determine whether the Board's decision was supported by substantial evidence, the Court must consider whether the consultants' predictions undermine the Board's concerns about the economic viability of Castle Rock in the southeastern Kansas market.

. . . .

"Reasonable minds might differ as to whether Castle Rock's proposal was economically viable. But the uncertainty of this proposal in light of the danger posed by Downstream Casino [in Oklahoma], *especially* to Castle Rock, cannot be doubted. The Board's decision to award a contract to Kansas Crossing—which everyone acknowledged to be much lower in risk, if also lower in theoretical reward—finds support in the extensive evidentiary record, even in light of the consultants' projections. Whether this Court would conclude as the Board did, if faced with the same evidence, is not the question. The consultants' projections do not undermine the Board's concerns about the economic viability of the Castle Rock proposal vis-à-vis that of Kansas Crossing, but, instead, support them. It is clear that economic viability was the primary factor in the majority of the Board members' decisions, although Kansas Crossing's management experience was also a consideration in support of *its* viability. As economic viability is inextricably tied with a proposal's ability to maximize tourism, revenue, and, generally, the interests of the citizens of Kansas, the Board was well within its rights to place these concerns above the consultants' estimates that, undeniably, favored Castle Rock."

Lastly, the district court determined that the Board's decision to select Kansas Crossing was not arbitrary, capricious, or unreasonable in light of the market uncertainties surrounding Castle Rock's proposal.

On April 28, 2016, Kansas Crossing filed a motion to alter or amend the judgment, asking the court to expressly deny the Castle Rock and Cherokee County request to amend their petitions, as well as their joint renewed motion for discovery. The motion further asked the court to specify that the judgment was confined to the agency record for judicial review. On June 6, 2016, the district court granted Kansas Crossing's motion.

Castle Rock and Cherokee County timely filed a notice of appeal. On June 27, 2016, we transferred the appeal to this court. Jurisdiction is proper. See K.S.A. 2016 Supp. 60-2102(b)(2) (providing this court with appellate jurisdiction over any final decision of the district court regarding any lottery gaming facility management contract entered into pursuant to KELA).

ANALYSIS

Appellants assert five claims of error—three by the district court and two by the Board. The alleged district court errors stem from the district court's denial of appellants' (1) discovery requests; (2) motion to amend petitions; and (3) request for an evidentiary hearing. In addition, appellants continue to maintain that (1) the Board misapplied and misinterpreted KELA by failing to make required findings; and (2) the Board's decision is not supported by sufficient evidence. We address each of appellants' claims in turn, and, finding no error, we affirm.

The district court did not abuse its discretion by denying the discovery requests.

Appellants first contend that the district court erred by not granting their initial request for discovery. "The decision to receive additional evidence on review of agency action is within the sound discretion of the district court." *Southwest Kan. Royalty Owners Ass'n v. Kansas Corporation Comm'n*, 244 Kan. 157, Syl. ¶ 4, 769 P.2d 1 (1989); see *Zimmerman v. Board of Wabaunsee County Comm'rs*, 289 Kan. 926, 961, 218 P.3d 400 (2009) (stating that district courts have "broad discretion in supervising the course and scope of discovery"). A district court abuses its discretion when no reasonable person would adopt the district court's position. *Cresto v. Cresto*, 302 Kan. 820, 848, 358 P.3d 831 (2015). An abuse of discretion also occurs when the district court's decision is based on an error of law or fact. *Wiles v. American Family Assurance Co.*, 302 Kan. 66, 74, 350 P.3d 1071 (2015).

Unless an agency is specifically exempted, the KJRA defines the scope of judicial review of state agency actions. K.S.A. 2016 Supp. 77-603(a); see K.S.A. 77-606 (stating that subject to this provision, the KJRA "establishes the exclusive means of judicial review of agency action"). When reviewing an administrative action under the KJRA, a court shall grant relief only when it determines that the agency violated one or more of the provisions listed in K.S.A. 2016 Supp. 77-621(c)(1)-(8). *Bluestem Telephone Co. v. Kansas Corporation Comm'n*, 52 Kan. App. 2d 96, 107, 363 P.3d 1115 (2015). Because appellants are the ones asserting the agency's action is invalid, they bear the burden of proving the invalidity on appeal. See K.S.A. 2016 Supp. 77-621(a)(1); *In re Equalization Appeal of Wagner*, 304 Kan. 587, 597, 372 P.3d 1226 (2016). This court exercises the same statutorily limited review of the agency action "as does the district court, *i.e.*, "'as though the appeal had been made directly to this court.'"" *Coma Corporation v. Kansas Dept. of Labor*, 283 Kan. 625, 628, 154 P.3d 1080 (2007) (quoting *Blue Cross & Blue Shield of Kansas, Inc. v. Praeger*, 276 Kan. 232, 245, 75 P.3d 226 [2003]).

The initial dispute between the parties concerns whether a court may order parties to use traditional means of discovery in a KJRA proceeding. Throughout this case, the state agencies have maintained that traditional discovery is unavailable in KJRA proceedings. Although there are several cases in which the district court has considered additional evidence, the general availability of traditional discovery in KJRA proceedings has been largely unlitigated. Indeed, it appears that only one panel of the Court of Appeals has briefly touched on the issue. See *L.E.H. ex rel. D.L.H. v. Kansas Dept. of SRS*, No. 111,576, 2015 WL 5036725, at *10 (Kan. App.) (unpublished opinion) (stating, "Discovery is not generally available during court review under the Kansas Judicial Review Act" but ultimately holding that because a mother did not file a motion for discovery or send a specific discovery request to the Kansas Department for Children and Families, she could not claim on appeal that K.S.A. 77-619[a] authorized the district court to permit discovery regarding her allegations that the KDCF engaged in concealment and spoliation), *rev. denied* 303 Kan. 1078 (2015); see Leben, *Challenging and Defending Agency Actions in Kansas*, 64 J.K.B.A. 22, 31-32 (June/July 1995).

Typically, the question of when a district court may receive additional evidence arises when a party wishes to supplement the agency record with evidence the party already possesses. See, *e.g.*, *In re Tax Appeal of Fleet*, 293 Kan. 768, 786, 272 P.3d 583 (2012) (stating that the district court was not statutorily authorized to allow a party to supplement the agency record with a corrected tax assessment). In the present case, it is difficult to discern whether the district court found that traditional discovery is unavailable in KJRA proceedings as a matter of law or made a case-specific determination that appellants did not demonstrate a sufficient factual basis to warrant traditional means of discovery.

However, we need not delve further into the district court's reasoning or provide answers to these questions. The district court articulated another reason for denying the appellants' discovery requests that is sufficient, standing alone, to justify the court's discretionary decision. The district court specifically ruled that the appellants did not "seek judicial review and determination of these allegations [of impropriety]." Therefore, "the pending motion improperly seeks discovery on matters that exceed the scope of review expressly identified and requested by Cherokee County and Castle Rock in these judicial review proceedings."

Pursuant to the KJRA, a court

"shall grant relief only if it determines any one or more of the following:

"(1) The agency action, or the statute or rule and regulation on which the agency action is based, is unconstitutional on its face or as applied;

"(2) the agency has acted beyond the jurisdiction conferred by any provision of law;

"(3) the agency has not decided an issue requiring resolution;

"(4) the agency has erroneously interpreted or applied the law;

"(5) the agency has engaged in an unlawful procedure or has failed to follow prescribed procedure;

"(6) the persons taking the agency action were improperly constituted as a decision-making body or subject to disqualification;

"(7) the agency action is based on a determination of fact, made or implied by the agency, that is not supported to the appropriate standard of proof by evidence that is

substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this act; or

"(8) the agency action is otherwise unreasonable, arbitrary or capricious." K.S.A. 2016 Supp. 77-621(c)(1)-(8).

At the time of their initial discovery requests, appellants had invoked subsections (4), (7), and (8) in their petitions. Pursuant to K.S.A. 2016 Supp. 77-614(b)(6), a petition for judicial review "shall set forth . . . the petitioner's reasons for believing that relief should be granted."

"In other words, a petition for judicial review must set forth the specific issues that will be raised before the district court. [Citation omitted.] This court has indicated this requirement serves two purposes: (1) It puts the district court and administrative agency on notice as to what issues will be reviewed, and (2) it assures that only issues that were raised at the administrative hearing will be considered on appeal." *Kingsley v. Kansas Dept. of Revenue*, 288 Kan. 390, 405, 204 P.3d 562 (2009).

K.S.A. 77-619(a), which addresses when district courts may receive evidence in a KJRA proceeding, provides:

"The court may receive evidence, in addition to that contained in the agency record for judicial review, *only if* it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:

(1) Improper constitution as a decision-making body; or improper motive or grounds for disqualification, of those taking the agency action; or

(2) unlawfulness of procedure or of decision-making process." (Emphasis added.)

K.S.A. 77-619(a)(1) and (a)(2) bear a striking resemblance to K.S.A. 2016 Supp. 77-621(c)(5) and (c)(6). Appellants failed to invoke the statutory means of obtaining judicial relief that could have given the district court statutory authority to allow discovery and receive evidence outside the agency record.

Appellants contend that all that was required to warrant broad discovery measures is a notice-type pleading sufficient to invoke the court's jurisdiction. To that end, they cite *Kingsley* and its line of cases discussing the extent to which petitioners must detail their allegations to invoke a court's jurisdiction in a KJRA proceeding. But such a discussion is beyond the narrow scope of the question in this case. Here, the district court was tasked with ruling on appellants' discovery requests—a request district courts are intimately familiar with and one traditionally afforded broad discretion. See, *e.g.*, *Miller v. Glacier Development Co.*, 284 Kan. 476, 498, 161 P.3d 730 (2007) ("As with all forms of discovery, the district court has broad discretion in allowing depositions.").

We have long held that "[t]here is a strong presumption of regularity in administrative proceedings." *Pork Motel, Corp. v. Kansas Dept. of Health & Environment*, 234 Kan. 374, 384, 673 P.2d 1126 (1983); see *Brown v. U.S.D. No. 333*, 261 Kan. 134, 151, 928 P.2d 57 (1996) (stating that a school board was "entitled to a presumption of regularity of its actions"); *Southwest Kan. Royalty Owners Ass'n*, 244 Kan. at 165 ("The [Kansas Corporation] Commission is vested with wide discretion and its findings have a presumption of validity on review."); *Kansas Racing Management, Inc. v. Kansas Racing Comm'n*, 244 Kan. 343, 365, 770 P.2d 423 (1989) ("A rebuttable presumption of validity attaches to all actions of an administrative agency and the burden of proving arbitrary and capricious conduct lies with the party challenging the agency's actions."); *Lewis v. City of South Hutchinson*, 162 Kan. 104, 120, 174 P.2d 51 (1946) ("There is ever a legal presumption 'that public officers do their duty, that they act fairly,

from good motives, and with the purpose and intention of obeying the law. Suspicion, surmise, insinuation, and innuendo are not enough to overthrow this presumption.'").

Given this strong presumption, we hold that the district court did not abuse its discretion when the appellants failed to designate the appropriate scope of review in their petitions. We further find it significant that appellants did not provide the court or the parties with a specific discovery plan until the day before the hearing on appellants' discovery requests. Under the circumstances of this case, we hold that the district court did not abuse its discretion.

Because we hold that the district court in this case acted within its broad discretion by denying appellants' discovery request as falling outside the scope of the petition, we decline to answer the broader question of whether traditional discovery is unavailable as a matter of law in KJRA proceedings. We note that our ruling today does not necessarily foreclose future litigants from seeking traditional discovery in KJRA proceedings—either pursuant to the inherent powers of the court or a statutory grant of authority—in the appropriate circumstances. See K.S.A. 77-619(a).

The district court did not abuse its discretion by denying the motion to amend petitions.

After the district court announced its decision to deny appellants' discovery requests, appellants quickly filed a renewed request for discovery and a motion to amend their petitions, attempting to remedy the court's concerns by including references to K.S.A. 2016 Supp. 77-621(c)(5) and (c)(6) and by attaching several alleged affidavits to their discovery requests.

After the district court entered its detailed memorandum decision denying the petitions on March 31, 2016, Kansas Crossing asked the court to expressly deny

appellants' supplemental requests. On June 6, 2016—after the court had denied appellants' petitions—the court expressly denied appellants' supplemental requests. The court explained that it believed it had addressed plaintiffs' renewed requests in its March 31, 2016, memorandum decision and order and that no further rulings were necessary. To the extent that determination was not made clear, the district court added two findings:

> "(1) Due to the urgent nature of this action as argued by both parties the requested amendments would have caused undue and unnecessary delay. The plaintiff[s] had sufficient time to request such amendments and did not do so for four months.
>
> "(2) The delay associated with such amendments and approval of discovery which the court had previously denied would have prejudiced the defendants and would have been an extreme hardship on the defendants. The amendments would have drastically altered the nature of this action."

This court generally reviews a district court's decision on a motion to amend pleadings for an abuse of discretion. *Thompson v. State*, 293 Kan. 704, 709, 270 P.3d 1089 (2011). We likewise review a district court's ruling on a motion to reconsider for an abuse of discretion. See *Exploration Place, Inc. v. Midwest Drywall Co.*, 277 Kan. 898, 900, 89 P.3d 536 (2004). An abuse of discretion occurs when (1) no reasonable person would take the view adopted by the trial court; (2) the ruling is based on an error of law; or (3) the ruling is based on an error of fact. *Wiles*, 302 Kan. at 74.

K.S.A. 2016 Supp. 77-614(c) provides that the "[f]ailure to include some of the information listed in subsection (b) in the initial petition does not deprive the reviewing court of jurisdiction over the appeal. Leave to supplement the petition with omitted information required by subsection (b) shall be freely given when justice so requires."

The district court gave two justifications for denying appellants' motions—lack of diligence and prejudice to defendants. However, appellants brief only the court's lack of diligence ruling. They do not address whether granting their requests would have caused an "extreme hardship on the defendants." An issue not briefed by a party is deemed waived or abandoned. *Superior Boiler Works, Inc. v. Kimball*, 292 Kan. 885, 889, 259 P.3d 676 (2011). On this basis alone, therefore, we conclude the district court did not abuse its discretion.

The district court did not abuse its discretion by denying the request for an evidentiary hearing.

The appellants also claim that they were entitled to an evidentiary hearing. After the district court orally denied appellants' request for discovery during the October 30, 2015, hearing, the parties agreed to an expedited briefing schedule for ruling on the petitions. Both parties were required to submit briefs by December 11, and any response by December 21. On November 9, appellants requested leave to amend their petitions and renewed their discovery request. On December 21, the district court filed its order detailing its decision to deny appellants' initial discovery request.

Because the district court had yet to directly rule on their motion to amend and renewed discovery request, appellants asked the district court—on page 69 of a 71-page brief—for "a hearing at which time they propose to present: (1) argument (2) testimony from live witnesses and (3) additional evidence, including evidence gained through discovery, if allowed by the Court." In the district court's order denying the petitions, it stated that "[t]he parties have not waived oral arguments, but the Court finds that such arguments would not materially aid its decision[.]" Appellants now contend that the district court was required to acknowledge the documents they submitted as evidence and rule on their request for an evidentiary hearing.

As the district court implicitly found, this request was nothing more than a duplicative renewed motion for discovery. Appellants' brief similarly acknowledges this reality by merely incorporating the arguments they made concerning discovery. Because the district court was within its discretion to deny the discovery requests, we cannot say that no reasonable judge would have concluded that an evidentiary hearing was unnecessary to resolve the pending issues and claims. We therefore hold that the district court did not abuse its discretion in denying appellants' request for an evidentiary hearing.

The Board did not misapply and misinterpret KELA by failing to make required findings.

Next, appellants assert that KELA required the Board to make specific findings when awarding a facility management contract. Appellants properly invoked K.S.A. 2016 Supp. 77-621(c)(4) in their petitions for review, which permits a court to grant relief where "the agency has erroneously interpreted or applied the law." When we are called upon to interpret or construe statutes, our standard of review is unlimited. *Norris v. Kansas Employment Security Bd. of Review*, 303 Kan. 834, 837, 367 P.3d 1252 (2016).

K.S.A. 2016 Supp. 74-8736 defines the Board's role in the management contract selection process and how it must determine which contract is "the best possible such contract." It states in relevant part:

> "(a) Upon approval of a lottery gaming facility management contract by the commission, but not later than 90 days after the deadline for receipt of proposals established pursuant to subsection (b) of K.S.A. 2016 Supp. 74-8734, and amendments thereto, the executive director and the prospective lottery gaming facility manager shall execute the contract, which shall be binding upon the parties only upon a *determination by the lottery gaming facility review board pursuant to this section that the contract is the*

best possible such contract, approval of the contract by the Kansas racing and gaming commission pursuant to this section and endorsement by resolution of the city governing body or county commission as required in K.S.A. 2016 Supp. 74-8734, and amendments thereto.

"(b) Upon execution of a lottery gaming facility management contract or contracts by the executive director, the executive director shall submit such contract or contracts to the lottery gaming facility review board. *The board shall determine which contract best maximizes revenue, encourages tourism and otherwise serves the interests of the people of Kansas. In making its determination, the board shall conduct public hearings, take testimony, solicit the advice of experts and investigate the merits of each contract submitted by the executive director.*

. . . .

"(d)(1) Not more than 60 days after all lottery gaming facility management contracts for a lottery gaming facility in a gaming zone have been submitted to the lottery gaming facility review board, the board: (A) If more than one lottery gaming facility management contract has been submitted for a lottery gaming facility in a gaming zone, *shall select by public vote the lottery gaming facility management contract, if any, which the board determines is the best possible such contract*; or (B) if the executive director submits only one lottery gaming facility management contract for a lottery gaming facility in a gaming zone, shall determine whether such contract is the best possible such contract." (Emphasis added.) K.S.A. 2016 Supp. 74-8736.

Appellants' argument is imprecise, but it appears they claim that specific fact findings were required because "[t]he decision of any administrative body should contain a finding of the pertinent facts on which it is based . . . ." See *In re Tax Appeal of Dillon Stores*, 42 Kan. App. 2d 881, 888, 221 P.3d 598 (2009). The plain language of K.S.A. 2016 Supp. 74-8736, however, reflects the legislature's clear intent to grant the Board broad discretion in selecting what it deemed to be the best contract. "Specific findings of fact by an administrative agency, while desirable in contested matters, are not

indispensable to a valid decision in the absence of a statute or rule requiring them." *Kansas Racing Management, Inc.*, 244 Kan. at 366. Because the statute does not specifically require findings of fact, we will not impose such a requirement on the Board. See *Kansas Racing Management., Inc.*, 244 Kan. at 366 (holding that the Kansas Racing Commission complied with the Kansas Parimutuel Racing Act where the act did not require the commission to enter findings of fact when awarding a license).

The Board was required only to determine the "best possible" contract utilizing the procedure and substantive criteria set forth in KELA. This is what the Board did, and we find no error in the way the Board interpreted or applied the law.

Substantial evidence supports the Board's decision to award the facility management contract to Kansas Crossing.

Finally, appellants assert that the Board's decision to award the facility management contract to Kansas Crossing is not supported by substantial evidence. Both Castle Rock and Cherokee County appropriately sought relief under K.S.A. 2016 Supp. 77-621(c)(7). Under that provision, judicial relief is available if

> "the agency action is based on a determination of fact, made or implied by the agency, that is not supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this act."

When reviewing an agency action under K.S.A. 2016 Supp. 77-621(c)(7), "the appellate court is limited to ascertaining from the record *if substantial competent evidence supports the agency findings*." *Jones v. Kansas State University*, 279 Kan. 128, 140, 106 P.3d 10 (2005). "Substantial evidence 'is evidence which possesses both

relevance and substance and which furnishes a substantial basis of fact from which the issues can reasonably be resolved.'" *Cresto v. Cresto*, 302 Kan. 820, 835, 358 P.3d 831 (2015) (quoting *In re Estate of Farr*, 274 Kan. 51, 58, 49 P.3d 415 [2002]); see *Kotnour v. City of Overland Park*, 43 Kan. App. 2d 833, 837, 233 P.3d 299 (2010) ("Although [K.S.A. 2009 Supp. 77-621] does not define the term 'substantial evidence,' case law has long stated that it is such evidence as a reasonable person might accept as being sufficient to support a conclusion.").

K.S.A. 2016 Supp. 77-621(d) dictates how to conduct substantial evidence review under 77-621(c)(7):

> "(d) For purposes of this section, 'in light of the record as a whole' means that the adequacy of the evidence in the record before the court to support a particular finding of fact shall be judged in light of all the relevant evidence in the record cited by any party that detracts from such finding as well as all of the relevant evidence in the record, compiled pursuant to K.S.A. 77-620, and amendments thereto, cited by any party that supports such finding, including any determinations of veracity by the presiding officer who personally observed the demeanor of the witness and the agency's explanation of why the relevant evidence in the record supports its material findings of fact. In reviewing the evidence in light of the record as a whole, the court shall not reweigh the evidence or engage in de novo review."

Subsection (d)—which the legislature added in 2009—altered an appellate court's analysis in three ways: "(1) It requires review of the evidence both supporting and contradicting the Board's findings; (2) it requires an examination of the presiding officer's credibility determination, if any; and (3) it requires review of the agency's explanation as to why the evidence supports its findings." *Redd v. Kansas Truck Center*, 291 Kan. 176, Syl. ¶ 1, 182, 239 P.3d 66 (2010) ("[T]he 2009 Kansas Judicial Review Act amendments to the standard of review apply only prospectively to agency decisions issued on or after

July 1, 2009."). As previously stated, this court conducts the same review of the agency's action as did the district court. *Coma Corporation v. Kansas Dept. of Labor*, 283 Kan. 625, 628, 154 P.3d 1080 (2007).

Turning to the evidence presented to the Board, Castle Rock's best argument—the "elephant in the room," as the district court characterized it—is the fact that it was projected to garner the largest amount of revenue and tourism. Consideration of these projections in isolation, therefore, suggests that Castle Rock would best meet the statutory standard. But as the district court correctly stated, "a failed proposal cannot best maximize anything, no matter how grand its projections may be." More simply put by Macomber: "Bigger is better if it works. It's not better if it doesn't."

From the outset of the selection process, the Board knew of Kansas Penn Gaming's failed attempt to establish a casino directly across the state line from Downstream Casino. During the selection process, Union Gaming briefed the Board of the "very well-saturated" casino market in Northeast Oklahoma, which it concluded would more directly affect Castle Rock than Kansas Crossing. Union Gaming also believed that Castle Rock's initial capital structure would not permit it to have sufficient cash to pay off its debt on an annual basis. Casinonomics was likewise concerned with how Downstream would affect Castle Rock's viability. And even after Castle Rock proposed a more competitive capital structure, Union Gaming remained apprehensive about Castle Rock's ability to secure the necessary financing not only to complete the project but to maintain its operations. The members of the Board echoed these concerns in their questions for Castle Rock. Yet neither the Board members nor the consultants seemed as concerned about Kansas Crossing's feasibility. Rather, one Board member ultimately explained that he chose Kansas Crossing because it was "'properly sized to the market'" and it would be "able to maximize the revenues as described by statute."

These economic considerations also bear on the third factor—which proposed facility management contract "otherwise serves the interests of the people of Kansas." K.S.A. 2016 Supp. 74-8736(b). An empty casino serves no interests, except perhaps those of Northeast Oklahoma. Beyond this, several of the Board members listed other reasons for selecting Kansas Crossing having nothing to do with Castle Rock's feasibility. Members who chose Kansas Crossing mentioned partnerships with the community, realistic goals, experience in Kansas gaming management, aesthetic fit, and good corporate citizenship. Board Member Oakes, for example, chose Kansas Crossing because "the consideration of the statute, the three pieces that we were to critique, I just feel it's the right fit. I think it's the right size."

In light of the record as a whole, the Board could reasonably conclude that Castle Rock—though bigger—posed an unacceptable risk. Certainly, a reasonable person could conclude that a smaller but more sustainable casino could better serve the interests of Kansans. We hold, therefore, that substantial evidence supports the Board's decision.

Affirmed.

LUCKERT, J., not participating.

MICHAEL J. MALONE, Senior Judge, assigned.[1]

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[1]**REPORTER'S NOTE:** Senior Judge Malone was appointed to hear case No. 115,978 vice Justice Luckert under the authority vested in the Supreme Court by K.S.A. 20-2616.