**IN THE SUPREME COURT OF GUAM**

**ELIZABETH BARRETT-ANDERSON,**
**ATTORNEY GENERAL OF GUAM,**
Plaintiff-Appellant,

**v.**

**JOHN P. CAMACHO, DIRECTOR, GUAM DEPARTMENT OF REVENUE AND TAXATION; EDDIE BAZA CALVO, GOVERNOR OF GUAM, ATLAS AMUSEMENT ENTERPRISES, INC.; DARRYL R. STYLES D/B/A D&D GAMES; GUAM MUSIC, INC; and DOES 1-10**
Defendants-Appellees.

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**DARRYL L. STYLES D/B/A D&D GAMES,**
Cross-Claimant,

**v.**

**GOVERNMENT OF GUAM**
Cross-Defendant.

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**PACIFIC AMUSEMENT, INC,**
Intervenor-Cross-Claimant,

**v.**

**JOHN P. CAMACHO, DIRECTOR,**
**GUAM DEPARTMENT OF REVENUE AND TAXATION**
Cross-Defendant.

# OPINION

## Cite as: 2015 Guam 20

Supreme Court Case No.: CVA14-013
Superior Court Case No.: CV0780-13

Appeal from the Superior Court of Guam
Argued and submitted on February 26, 2014
Dededo, Guam

Appearing for Plaintiff-Appellant:
Marianne Woloschuk, *Esq.*
Assistant Attorney General
Office of the Attorney General
590 S. Marine Corps Dr., Ste. 706
Tamuning, GU 96913

Appearing for Defendant-Appellees:
Sandra Cruz Miller, *Esq.*
Office of the Governor of Guam
513 S. Marine Corps Dr.
Adelup, GU 96910

BEFORE: ROBERT J. TORRES, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.

***CARBULLIDO, J.:***

**[1]** Plaintiff-Appellant Elizabeth Barrett-Anderson, Attorney General of Guam ("AG"),[1] appeals the trial court's dismissal of her complaint seeking a declaratory judgment as to the validity of certain regulations governing the licensing and use of electronic gaming devices in Guam. The trial court dismissed for lack of subject matter jurisdiction, concluding that the AG had failed to exhaust administrative remedies under the Administrative Adjudication Law ("AAL"). The AG argues that the court erred in dismissing the action because (1) the AAL does not apply to the case or (2) exhausting administrative remedies would have been futile. She also requests that this court decide the validity of the regulations in the first instance.

**[2]** Defendant-Appellees John Camacho, Director of the Guam Department of Revenue and Taxation ("DRT"), and Eddie Baza Calvo, Governor of Guam, argue that the AG's office labors under a conflict of interest that deprives it of standing to bring the instant appeal. They also argue that the trial court correctly concluded that it was without jurisdiction and that this court lacks jurisdiction to decide the validity of the regulations in the first instance. Defendant-Appellees Atlas Amusement Enterprises, Inc., and Guam Music, Inc., join in asserting these arguments.

**[3]** For the reasons herein, we reverse.

[1] By order of this court dated February 3, 2015 and pursuant to Rule 23(c) of the Guam Rules of Appellate Procedure, Attorney General Barrett-Anderson was substituted for Leonardo M. Rapadas, who was a named party to this action in his official capacity.

## I. FACTUAL AND PROCEDURAL BACKGROUND

**[4]** This case is the latest entry in a prolonged dispute between the AG, the executive branch, and owners of electronic gaming devices concerning the legality of the licensing and operation of such devices in Guam. The following facts are relevant to our adjudication of the present matter.

**[5]** On October 17, 2001, the legislature enacted Public Law 26-52, "An Act to Repeal and Reenact § 64.40 of Title 9 and § 39110 of Title 22, All of the Guam Code Annotated, Relative to Illegal Cockfight." Guam Pub. L. 26-52 (Oct. 17, 2001). The law called for DRT "to promulgate necessary rules and regulations to create a comprehensive regulatory scheme to regulate all gaming on Guam; *provided*, that the rules and regulations shall restrict gaming activities to those authorized and licensed on Guam as of August, 2001." P.L. 26-52:4.

**[6]** Pursuant to this authority, DRT filed gaming control regulations with the Legislative Secretary on January 3, 2003. According to the Compiler's 2012 Note included with Title 3 Chapter 7 of the Guam Administrative Rules and Regulations ("GAR"), DRT's submission stated that "[u]pon codification of these regulations, Chapter 5 of Title 11 of the Guam Code Annotated will be repealed and re-enacted, to be replaced by these regulations" and "Chapter 39 of Title 22 Guam Code Annotated is hereby repealed in its entirety and re-enacted under Chapter 5 of Title 11 Guam Code Annotated."[2] 3 GAR 7, 2012 Note (2004). The submitted regulations authorized limited gaming activities in Guam, including the use of "[e]lectronic gaming devices[3]

[2] The Compiler's Note goes on to say "However, section 4 of Public Law 26-52 did not authorize the Department of Revenue and Taxation to repeal and reenact existing Guam law. Section 4 of Public Law 26-52 authorized the Department of Revenue and Taxation only to 'promulgate necessary rules and regulations to create a comprehensive regulatory scheme to regulate all gaming activities on Guam.' The gaming control regulations are not codified in the Guam Code Annotated, but placed in this chapter." (citation omitted).

[3] "Gaming device" is defined under the submitted regulations as:

that have been registered, or were at any time previously registered, by the Department of Revenue and Taxation pursuant to 11 Guam Code Annotated, Chapter 22, Article 2, prior to August 1st, 2001." 3 GAR § 7114(a)(5) (2003). The regulations further provided that "[a]n electronic gaming device owner's license is required for anyone owning such devices for limited gaming purposes. Each license issued pursuant to this paragraph . . . shall expire one (1) year from the date of its issuance but may be renewed upon the filing of an application for renewal." 3 GAR § 7115(a)(2) (2003).

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> [A]ny equipment or mechanical, electromechanical or electronic contrivance, component or machine used remotely or directly in connection with gaming or any game which affects the result of a wager by determining win or loss. The term includes:
>
> (1) A slot machine.
>
> (2) A collection of two or more of the following components:
>
> (A) An assembled electronic circuit which cannot be reasonably demonstrated to have any use other than in a slot machine;
>
> (B) A cabinet with electrical wiring and provisions for mounting a coin, token or currency acceptor and provisions for mounting a dispenser of coins, tokens or anything of value;
>
> (C) A storage medium containing the source language or executable code of a computer program that cannot be reasonably demonstrated to have any use other than in a slot machine;
>
> (D) An assembled video display unit;
>
> (E) An assembled mechanical or electromechanical display unit intended for use in gambling; or
>
> (F) An assembled mechanical or electromechanical unit which cannot be demonstrated to have any use other than in a slot machine;
>
> (3) Any mechanical, electrical or other device which may be connected to or used with a slot machine to alter the normal criteria of random selection or affect the outcome of a game.
>
> (4) A system for the accounting or management of any game in which the result of the wager is determined electronically by using any combination of hardware or software for computers.
>
> (5) Any combination of one of the components set forth in paragraphs (A) to (F), inclusive, of subsection (2) and any other component that the Commission determines, by regulation, to be a machine used directly or remotely in connection with gaming or any game which affects the results of a wager by determining a win or loss.

3 GAR § 7102(n) (2003).

**[7]** Pursuant to these regulations, the DRT issued licenses to electronic gaming device owners for several years. In 2008, the AG counseled DRT that the machines being licensed were actually illegal gambling devices under 11 GCA § 22202. That law states: "No slot machine or amusement device set to make progressive or automatic payouts *shall* be licensed under this Section. No gambling devices as defined in 9 GCA § 64.20(b)[4] shall be licensed under this Section." 11 GCA § 22202 (as amended by P.L. 29-002:15 (May 18, 2007). DRT agreed with the AG's conclusion and sent notices to electronic gaming device license holders, including Guam Music Inc. ("GMI"), that it would not be renewing their licenses.

**[8]** Shortly after, the Acting Governor of Guam issued a directive to John Camacho, then acting Director of DRT, ordering him to issue the licenses. The licenses were issued immediately. In response, the AG filed a Petition for Writ of Mandamus in the Superior Court, seeking to compel DRT to revoke the licenses. The petition was granted and GMI filed a motion seeking to intervene and stay the enforcement of the order. GMI also filed its own Petition for Writ of Mandamus, seeking to compel DRT to reissue the licenses. Several years of litigation followed, including multiple appeals to this court and remands to the trial court. *See Limtiaco v. Camacho*, 2009 Guam 7; *Rapadas v. Benito*, 2011 Guam 28.

**[9]** On April 2, 2013, the dispute was apparently resolved when GMI, DRT, and the AG entered a Stipulation and Order for Dismissal ("Stipulation") in Rapadas v. Camacho, SP0141-08, agreeing to dismiss the cases. In the Stipulation, the parties stated that "at this stage of the

[4] Gambling device is defined in the Guam Code Annotated as "any coin operated device which, when operated, may return winnings (other than free games not redeemable for cash) of value to the user based partially or completely upon chance, by the operation of which a person may become entitled to receive winnings of value. . . . [including] any slot machines, video poker machines and other machines or devices which afford the opportunity of winnings, payouts, malfunction refunds to the player, or giving the player or user anything of value under any guise or form based partially or completely upon chance." 9 GCA § 64.20(b) (2005).

proceedings, the Office of the Attorney General is counsel of record for both Petitioner [AG] and Respondent [DRT]." Rapadas v. Camacho, SP0141-08, (Stipulation & Order at 2-3, Apr.2, 2013).

**[10]** On July 9, 2013, the legislature enacted Public Law 32-060. P.L. 32-060 (July 9, 2013). Section 1 of the bill, Legislative Findings and Intent, referenced DRT's 2003 regulations and stated that it was the intent of the legislature "to place in statute the policy of regulating gaming activities allowed by law [and] collecting fees and taxes that would be due from duly licensed operators." P.L. 32-060:1. It also added § 5205, entitled Limited Gaming Activities — Authorized and Unauthorized, to Title 11 of the Guam code, which reads, in relevant part:

> (a) The following are the only limited gaming activities authorized in Guam under this Act:
>
> (1) Bingo or lottery that is conducted by a tax exempt non-profit organization as authorized in Title 9, Guam Code Annotated, § 64.70(b);
>
> (2) Cockfighting that is conducted at a licensed cockpit, and that all wagers are present at the cockpit, as authorized in Title 9, Guam Code Annotated, § 64.40; and
>
> (3) Carnival or Liberation Day gaming, as authorized in § 64.62; and
>
> (4) All other limited gaming activities as authorized pursuant to statute.

11 GCA § 5205(a) (as amended by P.L. 32-060:2).

**[11]** On August 15, 2013, the AG filed suit for declaratory relief against the Director of DRT and Governor Calvo (collectively "DRT") and electronic gaming device license holders GMI, Atlas Amusement Enterprise, Inc. ("Atlas"), Darryl Styles d/b/a D&D Games ("D&D"), and unnamed license holders. The complaint alleged that DRT, under directive of the Governor, issued 217 licenses to electronic gaming device owners in April 2013 and continued to issue licenses after the AG advised DRT to refrain from issuing licenses and to revoke outstanding licenses. The complaint sought a judgment declaring (1) that DRT's 2003 regulations

concerning the licensing of electronic gaming devices were void and without force or effect, and (2) that P.L. 32-060 did not make those regulations valid and that Guam law continued to prohibit the licensing of electronic gaming devices.[5] Record on Appeal ("RA"), tab 7 at 9 (First Amended Compl., Aug. 15, 2013).

**[12]** DRT moved to dismiss the action, asserting, among other things, that the AG should have first sought a declaration from DRT regarding the validity of the regulations prior to commencing an action in the Superior Court. RA, tab 58 at 3 (Dec. & Order, Mar. 21, 2014). DRT also argued that the AG's office was disqualified from participating in the case because the AG previously represented DRT in the matter when filing the April 2, 2013 Stipulation and Order. *Id.* The trial court granted the motion and dismissed the case without prejudice for lack of subject matter jurisdiction based on the AG's failure to exhaust administrative remedies.[6] *Id.* at 8-9. The court did not address DRT's arguments regarding disqualification of the AG's office.

**[13]** This appeal followed.

## II. JURISDICTION

**[14]** This court has jurisdiction over this appeal pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 114-9 (2015)) and 7 GCA §§ 3107(b) & 3108(a) (2005).

[5] D&D filed a cross-claim against the Government of Guam through DRT. D&D's claim concerned the provision in DRT's 2003 regulations requiring electronic gaming devices to have been previously registered prior to August 1, 2001 in order to be registered. D&D sought a judgment declaring this provision to be unconstitutional for depriving D&D of equal protection and due process. Pacific Amusement, Inc. ("Pacific"), another owner of electronic gaming devices, intervened in the action and filed a cross-claim against DRT, seeking a similar judgment declaring the provision to be unconstitutional.

[6] The court also dismissed without prejudice Pacific's cross-claim, as Pacific requested relief only in the case that DRT's motion to dismiss was not granted and, furthermore, Pacific had not exhausted administrative remedies in regards to the relevant provision. RA, tab 58 at 9 (Dec. & Order).

## III. STANDARD OF REVIEW

**[15]** "Our review of whether a party has standing is *de novo*." *Taitano v. Lujan*, 2005 Guam 26 ¶ 15. We review a trial court's interpretation of Guam's Administration Adjudication Law *de novo*. *See Guam Fed'n of Teachers ex rel. Rector v. Perez*, 2005 Guam 25 ¶ 14. "Whether a plaintiff has exhausted the required administrative remedies is a question of law reviewed *de novo*." *Guam Fed'n of Teachers v. Gov't of Guam*, 2013 Guam 14 ¶ 26.

## IV. ANALYSIS

### A. The AG's Standing

**[16]** As a threshold matter, we must first address DRT's argument that the AG lacks standing. DRT argues that the AG, in bringing the action that is the subject of this appeal, is laboring under a conflict of interest in violation of Rules 1.7 and 1.9 of the Guam Rules of Professional Conduct ("GRPC") and that she therefore lacks standing to bring the instant appeal. We are not persuaded.

**[17]** "Standing is a threshold jurisdictional matter. Thus, we have held that a court has no subject matter jurisdiction to hear a claim when a party lacks standing. The question of standing focuses on who may bring an action. In essence, the relevant inquiry is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Benavente v. Taitano*, 2006 Guam 15 ¶ 14 (citations and internal quotation marks omitted). "[A] party acquires standing either by suffering an injury in fact or as the beneficiary of express statutory authority granting standing. Where standing is statutorily conferred, the court's analysis begins with a straight statutory construction of the relevant statute to determine upon whom the Legislature conferred standing and whether the [parties] here fall in that category." *Id.* ¶ 18-19

(citations and internal quotation marks omitted). "Our review of whether a party has standing is *de novo*." *Lujan*, 2005 Guam 26 ¶ 15.

**[18]** As DRT acknowledges in its brief, 7 GCA § 25104 grants an aggrieved party with the right to appeal, and the AG was aggrieved by the trial court's dismissal of the action for declaratory relief. Appellee's Br. at 10 (July 31, 2014). Furthermore, as we discuss below, the AG's action is governed by the AAL, and the AG has the inherent power to bring an action under the AAL challenging an agency's rules and regulations on behalf of the citizens of the Territory. *See* 5 GCA § 30103 (2005) ("The Attorney General shall have . . . the right to . . . bring action on behalf of the Territory representing the citizens as a whole for redress of grievances which the citizens individually cannot achieve, unless expressly limited by any law of Guam to the contrary.").

**[19]** Nonetheless, DRT argues that the AG lacks standing due to the alleged GRPC violations, citing to the Ninth Circuit case *Lenhard v. Wolff*, 603 F.2d 91 (9th Cir. 1979), for the proposition that this court may *sua sponte* disqualify the AG's office for lack of standing. That case involved a felon on death row who had discharged his attorneys in order to represent himself. *Id.* at 92. Those discharged attorneys attempted to bring a stay of execution and an appeal from the denial of a writ of habeas corpus without the felon's permission. *Id.* The court concluded that the attorneys had no standing to pursue a stay or appeal, as the felon was competent to discharge them and was no longer their client, and thus denied the stay and dismissed the appeal. *Id.* at 93. The court did not "disqualify" the attorneys but rather concluded that they had previously been discharged and therefore could not initiate a case that the interested party did not want initiated. *See id.* at 92-93. Thus, the case is not instructive with regard to the instant appeal.

**[20]** Contrary to DRT's assertions, standing concerns a party's relationship to a dispute, not an attorney's. DRT's unsupported contention that a conflict of interest on the part of an attorney leads to a lack of standing is therefore incorrect. Without deciding whether any GRPC violations have occurred, we conclude that we have jurisdiction to consider the instant appeal irrespective of DRT's argument that the AG's office should be disqualified.[7]

**B. Administrative Exhaustion**

**1. Application of the AAL**

**[21]** Since DRT's jurisdictional argument is unavailing, we proceed to the merits of the appeal. The AG claims that the trial court improperly dismissed the case for failure to exhaust administrative remedies under the AAL. She first argues that, contrary to the trial court's conclusion otherwise, the AAL is not applicable to the case. We disagree.

**[22]** The AG filed an action for declaratory relief pursuant to 7 GCA § 26801, which provides in relevant part:

> Any person . . . who desires a declaration of his rights or duties with respect to another . . . may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an action in the court having jurisdiction for a declaration of his rights and duties in the premises . . . ."

7 GCA § 26801 (2005). The trial court determined, however, that the AG's action was governed by section 9309 of the AAL, which provides that:

> (a) The validity of any rule may be determined upon petition for a declaratory judgment thereon addressed to the Superior Court of Guam, when it appears that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair the legal rights or privileges of the petitioner. The agency shall be made a party to the proceeding. The declaratory judgment may be rendered only after the petitioner has first requested the agency to pass upon the

[7] The proper vehicle for adjudicating DRT's allegations that the AG's office has violated the GRPC is a motion to disqualify filed in the trial court. Since no such motion was filed, and the court made no ruling as to disqualification, that issue is not before us at this time.

> validity of the rule in question and the agency has so ruled or has failed to rule within ninety (90) days.
>
> (b) The court shall declare the rule invalid if it finds that it violates provisions of law, exceeds the statutory authority of the agency or was adopted without compliance with statutory rule-making procedures.

5 GCA § 9309 (2005). The preceding section of the AAL, section 9308, allows for any interested person to petition any agency directly for a declaratory ruling concerning its regulations. *Id.* § 9308 ("On petition of any interested person, any agency may issue a declaratory ruling with respect to the applicability to any person, property or state of facts of any rule or statute enforceable by it."). The trial court concluded that "[b]ecause [the AG] failed to exhaust [her] administrative remedies by failing to request Defendant DRT to pass on the validity of 3 [GAR] § 7114(a)(5), this Court lacks subject matter jurisdiction" and dismissed the case without prejudice. RA tab 58 at 8 (Dec. & Order).

**[23]** On appeal, the AG argues that 7 GCA § 26801 is the proper vehicle in this case. This issue presents a question of statutory interpretation. When interpreting a statute, "the plain language of a statute must be the starting point." *Aguon v. Gutierrez*, 2002 Guam 14 ¶ 6. Our task is to determine whether the language is "plain and unambiguous" by reference to "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole. *Id (*quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). "[I]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Sumitomo Constr., Co. v. Gov't of Guam*, 2001 Guam 23 ¶ 17 (quotation marks omitted). This court reviews a trial court's interpretation of Guam's Administration Adjudication Law *de novo*. *See Guam Fed'n of Teachers ex rel. Rector v. Perez*, 2005 Guam 25 ¶ 14.

**[24]** Read in isolation, 7 GCA § 26801 appears to provide the AG with an avenue to challenge the regulatory scheme without the need to seek administrative remedies. But, "the language of [a] statute cannot be read in isolation, and must be examined within its context . . . [which] includes looking at . . . other related statutes." *Aguon*, 2002 Guam 14 ¶ 9 (citations omitted). Section 9309 of the AAL allows a court to declare an agency rule invalid if it finds that it "violates provisions of law, exceeds the statutory authority of the agency or was adopted without compliance with statutory rule-making procedures." 5 GCA § 9309(b). This is the exact relief sought by the AG. Allowing her to proceed under the more general action for declaratory relief found at 7 GCA § 26801 would ignore the context of a comprehensive statutory scheme that provides specifically for challenges to agency rules. California courts have recognized this in stating that "[t]he doctrine of exhaustion of administrative remedies may not be circumvented by bringing . . . actions for declaratory relief." *Bleeck v. State Bd. of Optometry*, 95 Cal. Rptr. 860, 871 (Ct. App. 1971).

**[25]** Reading the AAL holistically, we conclude that section 9308 of the AAL provides the mechanism for challenging the validity of an agency rule by petitioning the relevant agency through its prescribed procedures. Section 9309, in turn, provides the mechanism for challenging the validity of an agency rule in the Superior Court, subject to the administrative exhaustion requirement. As the AG sought to challenge the validity of DRT's gaming device regulations in the Superior Court, her action was governed by the AAL's Section 9309.

**[26]** In urging us to conclude otherwise, the AG argues that our decision should be controlled by the Hawaii Supreme Court case, *Citizens Against Reckless Dev. v. Zoning Bd. of Honolulu*, 159 P.3d 143 (Haw. 2007). In that case, the court held that the declaratory ruling procedure of

Hawaii's Administrative Procedure Act was not meant to be used to challenge already-made agency decisions. *Id.* at 156. In coming to this conclusion, the court stressed that the relevant statute provided for a petition for a declaratory ruling as to the applicability of any rule. *Id.* Because Section 9308, by its terms, also provides for a ruling with respect to the applicability of any rule, the AG argues that the same reasoning applies to the AAL.

**[27]** We do not find this authority to be persuasive in this context. First, the plaintiffs in *Citizens* were not challenging the validity of a rule but a specific zoning decision. *Id.* at 155. They were afforded an opportunity to appeal that decision but failed to timely do so. *Id.* The court's holding effectively prevented the plaintiffs from circumventing the timeliness rules. *See id.* at 160. Here, DRT's issuance of electronic gaming device licenses is not the same type of already-made decision, since it is an ongoing practice rather than a specific agency decision.

**[28]** Second, the court's rationale in deciding *Citizens* was specific to Hawaii's statutory scheme governing administrative law. Although Section 9308 of Guam's AAL uses the term "applicability" in its text, it is entitled "Petition: Declaratory Ruling on Validity." Read in context with Section 9309, it is clear that Section 9308 is the mechanism for requesting an agency ruling on validity that Section 9309 requires to be exhausted prior to seeking a judicial determination. Hawaii's administrative law scheme is distinguishable because it does not require administrative exhaustion before seeking a judicial determination on the validity of an agency rule. Haw. Rev. Stat. § 91-7 (2015) ("Any interested person may obtain a judicial declaration as to the validity of an agency rule . . . by bringing an action against the agency in the circuit court of the county in which petitioner resides or has its principal place of business. The action may be maintained whether or not petitioner has first requested the agency to pass upon the validity of

the rule in question.") Thus, the court's reasoning in *Citizens* does not apply to Guam and the instant appeal.

**[29]** Accordingly, we reject the AG's contention that the trial court erred in refusing to consider the case as a general action for declaratory relief under 7 GCA § 26801.

**2. The Futility Exception**

**[30]** Having determined that the AG's action was governed by the AAL, we next consider whether the trial court properly concluded that it was without jurisdiction due to the AG's failure to satisfy the administrative exhaustion requirements of Section 9309. The AG admits that it did not petition DRT for a ruling regarding the validity of the relevant regulations, but argues that her failure to do so was excused by the futility exception to the doctrine of administrative exhaustion. We agree.

**[31]** "The doctrine of exhaustion of administrative remedies is well established in the jurisprudence of administrative law. The doctrine provides that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Woodford v. Ngo*, 548 U.S. 81, 88-89 (2006) (citation and internal quotation marks omitted). We have previously explained the reasoning behind this doctrine:

> The basic purpose . . . is to lighten the burden of overworked courts in cases where administrative remedies are available. A second justification for upholding the doctrine of exhaustion of administrative remedies is . . . that even where the administrative remedy may not provide the specific relief sought by a party or resolve all the issues, exhaustion is preferred because agencies have the specialized personnel, experience and expertise to unearth relevant evidence and provide a record which a court may review.

*Carlson v. Perez*, 2007 Guam 6 ¶ 69 (citation and internal quotation marks omitted).

**[32]** Generally, when a statute requires exhaustion of administrative remedies, a party's failure to exhaust deprives the court of subject matter jurisdiction. *See DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth.*, 2014 Guam 12 ¶ 23. Certain judicially recognized exceptions, however, apply to the doctrine of administrative exhaustion that can confer jurisdiction on a court despite a party's failure to exhaust. One such exception is the futility exception. Under the futility exception, a party need not exhaust administrative remedies if the record reflects that it would be futile to do so. *Blaz v. Cruz*, No. Civ. App. 84-0014A, 1985 WL 56592 at *4 (D. Guam App. Div. Apr. 29, 1985). "Whether a plaintiff has exhausted the required administrative remedies is a question of law reviewed *de novo*." *Guam Fed'n of Teachers v. Gov't of Guam*, 2013 Guam 14 ¶ 26.

**[33]** The AG argues that the futility exception applies in this case because DRT has already made it clear through its actions that it considers the relevant regulations to be valid.[8] Specifically, the AG points to two letters sent by the AG's office to DRT. The first advised DRT that the licensing of electronic gaming devices was prohibited by law and requested that DRT immediately revoke outstanding licenses. RA, tab 41 at Ex. A (Mem., Apr. 11, 2013). The second sought DRT's position with regard to the legality of the licenses, stating: "If we do not hear otherwise from you, this Office will assume that it is now you[r] position that the gaming devices are legal and you will, therefore, be issuing new licenses." RA, tab 41 at Ex. B (Mem., June 3, 2013). It is undisputed that DRT did not reply to the letters and continued to issue licenses.

[8] We note that the futility exception was not substantially briefed below. Nonetheless, the AG did argue in its opposition to the motion to dismiss that any attempt to exhaust administrative remedies would be futile; RA, tab 41 at 9 (Pl. Opp. Mot. Dismiss, Dec. 2, 2013); and, therefore, the issue is sufficiently preserved on appeal.

**[34]** We agree with the AG's argument that it would have been futile to exhaust its administrative remedies. DRT's actions in the face of the AG's advisements clearly demonstrate that it believes the relevant regulations to be valid. Indeed, DRT's counsel admitted at oral argument for this appeal that DRT's position is that the regulations are valid and that the issuance of electronic gaming device licenses is lawful. Oral Argument at 10:44-10:46 (Feb. 26, 2013). Accordingly, any attempt by the AG to challenge the regulations' validity at the agency level would have been futile. Therefore, the doctrine of administrative exhaustion does not apply and the trial court has subject matter jurisdiction to consider the merits of the AG's request for declaratory relief.[9]

**C. Validity of the Regulations**

**[35]** Finally, the AG asks this court to decide the validity of the relevant regulations in the first instance. We are not inclined to do so.

**[36]** The AG argues that it is appropriate for this court to decide the issue in the first instance because the question of the regulations' validity is purely one of law. Although we agree with the AG that it would be within our power to do so,[10] we have demonstrated a general policy to allow the trial court to decide issues before it in the first instance, even questions of law. *See, e.g.*, *Enriquez v. Smith*, 2012 Guam 15 ¶ 19 (determination of whether plaintiff's actions fell within purview of Citizen Participation in Government Act should be made by trial court in first instance); *Gutierrez v. GPA*, 2013 Guam 1 ¶ 60 (leaving to trial court to decide in first instance

[9] Because we agree that the futility exception applies, we need not consider the argument that the AG's office implicitly complied with Section 9309's requirement of administrative exhaustion.

[10] DRT's argument that we cannot decide the validity of the regulations pursuant to 7 GCA § 4104, which affords this court with jurisdiction to grant declaratory judgments requested by the governor or legislature, is a non-sequitur, as the AG has not sought relief pursuant to that statute. Rather, the AG asks us to decide the issue in exercising our appellate jurisdiction over the trial court's disposal of the action.

question of whether income approach was appropriate method of compensation in temporary taking case). In accordance with this policy, we choose instead to remand the case to the trial court to resolve in the first instance the validity of the regulations and any corresponding factual issues.

## V. CONCLUSION

**[37]** Accordingly, the trial court's decision granting DRT's motion to dismiss is **REVERSED** and we **REMAND** the matter to the trial court for further proceedings in accordance with this opinion.

Original Signed By: **F. Philip Carbullido**

F. PHILIP CARBULLIDO
Associate Justice

Original Signed By: **Katherine A. Maraman**

KATHERINE A. MARAMAN
Associate Justice

Original Signed By: **Robert J. Torres**

ROBERT J. TORRES
Chief Justice

I do hereby certify that the foregoing is a full true and correct copy of the original on file in the office of the clerk of the Supreme Court of Guam.

JUL 02 2015

By: Clerk of Court