

BEFORE THE MASSACHUSETTS GAMING COMMISSION

In the Matter of:

THE DETERMINATION OF THE  
GAMING ESTABLISHMENT FOR  
WHICH MOHEGAN SUN  
MASSACHUSETTS, LLC SEEKS A  
GAMING LICENSE

**Opening Brief of Mohegan Sun Massachusetts, LLC**

In accordance with the Commission’s vote on April 3, 2014, and the subsequent memorandum concerning the preparatory process for the Commission’s May 1, 2014 meeting (the “May 1 Process Memorandum”), Region A category 1 gaming license applicant Mohegan Sun Massachusetts, LLC (“MSM”) submits this memorandum concerning the gaming establishment for which it seeks approval.

I. MOHEGAN SUN MASSACHUSETTS, LLC SEEKS APPROVAL OF A GAMING ESTABLISHMENT ON LEASED PREMISES LOCATED ENTIRELY IN REVERE.

The task before the Commission, as stated at the April 3 meeting and in the May 1 Process Memorandum, is to:

Determine the premises of the gaming establishment for which Mohegan Sun Massachusetts, LLC seeks approval in its RFA-2 application.

The question is answered in the first instance by MSM’s RFA-2 application, in particular its original and supplementary filings in response to RFA-2 Question No. 4-79, which asks the applicant to “[p]rovide documentation showing the location of the proposed gaming establishment, including all amenities and significant structures.” As stated in those responses,

MSM's RFA-2 application seeks approval of a gaming establishment located on approximately 40 acres of land leased from Sterling Suffolk Racecourse, LLC ("Sterling Suffolk") and located in the City of Revere (the "Leased Premises").

The project site is located at the corner of Tomasello Drive and Winthrop Avenue in Revere. (See MSM RFA-2 Attachment 4-79-01 (Tab 1 of the accompanying Affidavit of Gary Luderitz "Luderitz Affidavit") and MSM RFA-2 Attachment 4-79-05 (Luderitz Aff. Tab 2)). In response to a request for clarification from the Commission, MSM provided RFA-2 Attachment 4-79-06 (Luderitz Aff. Tab 3), which is the Lease Plan, and RFA-2 Attachment 4-79-07, which is the legal description of Leased Premises depicted on the Lease Plan (Luderitz Aff. Tab 4). As shown on the Lease Plan and described in the legal description, the boundary of the Leased Premises runs along the city line between Boston and Revere for approximately 878 feet, but the property line does not cross over into Boston at any point.

The preliminary plan of the Leased Premises attached to the Binding Agreement for Definitive Ground Lease in Revere, Massachusetts, entered into on November 27, 2013 (the "Binding Agreement"), provides that "no portion of the Leased Premises shall be within the City of Boston." (MSM RFA-2 Attachment 2-04-02 Ex. A (Luderitz Aff. Tab 5)). More specifically, the plan, which is Exhibit A to the Binding Agreement, contains the following provision:

To the extent that further research into the definitive municipal boundary line between the Cities of Revere and Boston, Massachusetts determines that any portion of the Leased Premises shown on the attached plan is located within the municipal boundary of the City of Boston, then such portion shall automatically be deemed to be removed from the Leased Premises. For the purpose of clarity, no portion of the Leased Premises shall be within the City of Boston.

In sum, MSM seeks approval in its RFA-2 application of a gaming establishment located entirely in Revere and as depicted in MSM Attachment 4-79-06 and as described in MSM Attachment 4-79-07.

Looking to MSM's response to Question 4-79 to determine its gaming establishment is consistent with the Commission's precedent in designating the gaming establishment of the category 2 licensee, Springfield Gaming and Redevelopment LLC. In its Determination of Issuance of a License to Operate a Category 2 Gaming Establishment, at page 26, the Commission granted the license and stated simply that "[t]he gaming establishment is defined as: the site plan as provided by Springfield Gaming and Redevelopment LLC as part of its RFA 2 application as attachment 4-79-02."

II. THE LEASED PREMISES WILL CONTAIN ALL OF THE ELEMENTS OF THE GAMING ESTABLISHMENT, AS DEFINED BY CHAPTER 23K.

MSM is not suggesting that the Commission, in determining an applicant's gaming establishment, must accept at face value the site plan and legal description included in response to Question 4-79. Mass. General Laws Chapter 23K (the "Gaming Act" or the "Act") defines the term "gaming establishment," and the Question 4-79 site plan controls the determination of the gaming establishment only if the premises it depicts include the elements of a gaming establishment identified in the Act's definition. For MSM, it does.

A. The Gaming Establishment Includes The Gaming Area And Those Related Non-Gaming Structures Built And Operated By The Licensee On Its Land.

The Gaming Act defines a gaming establishment to be "the premises approved under a gaming license which includes a gaming area and any other nongaming structure related to the gaming area and may include, but shall not be limited to, hotels, restaurants or other amenities." M.G.L. c. 23K, § 2.

By making the gaming establishment a "premises," the Act makes clear that the establishment is a geographic area. See, e.g., Black's Law Dictionary (7th ed.) at 1199 (defining premises as "[a] house or building, along with its grounds"). By defining it as the premises "approved under a gaming license," the Act gives the Commission a role in determining that

area, subject to the guiding principle that premises must include the “gaming area and any other nongaming structure related to the gaming area.”

Identifying the “gaming area” is straightforward. The Act provides a definition of “gaming area” as the “portion of the premises of a gaming establishment in which or on which gaming is conducted.” M.G.L. c. 23K, § 2. While it takes two other definitions from the Act to specifically identify what counts as “gaming,” locating the gaming area is the easy part of determining the gaming establishment.<sup>1</sup>

The Act does not provide a separate definition of “other nongaming structure related to the gaming area,” although it gives guidance within the definition of gaming establishment by noting that the premises “may include hotels, restaurants, and other amenities.” Id. When the definition is read in conjunction with the remainder of the Gaming Act, and the whole statute is construed together as part of a comprehensive scheme, it is clear that the related nongaming structures to be included in the gaming establishment are those elements of a project built and operated by the licensee on its own land to provide, or to support provision of, entertainment and services to patrons.

Numerous provisions of the Gaming Act link the gaming establishment to the structures the licensee will build and operate on its land. For example, the elements included in the definition of gaming establishment correspond to the elements an applicant is required to build as part of its project, as established in the capital investment requirement. Section 10(a) provides that investment shall include “a gaming area, at least 1 hotel, and other amenities as proposed in the application for a category 1 license.” M.G.L. c. 23K, § 10(a). Also, the Act requires that an

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<sup>1</sup> “Gaming” is defined as “dealing, operating, carrying on, conducting, maintaining or exposing any game for pay” and a “Game” is a “banking or percentage game played with cards, dice, tiles, dominoes or an electronic, electrical or mechanical device or machine played for money, property, checks, credit or any other representative of value which has been approved by the commission.” M.G.L. c. 23K, § 2.

application include “the designs for the proposed gaming establishment, including the names and addresses of the architects, engineers and designers.” Id. § 9(9). References to the gaming establishment in the Act’s evaluation criteria also indicate it is limited to the applicant’s built project. Section 5(3) provides that, “with regard to the proposed gaming establishment,” the criteria are to include “an evaluation of architectural design and concept excellence, integration of the establishment into its surroundings, [and] potential access to multi-modal means of transportation,” among others.

In other places, the Act contemplates that the gaming establishment is that which is constructed on land owned or leased by the applicant. For example, to be eligible for a gaming license, an applicant must demonstrate that it will “own or acquire, within 60 days after a license has been awarded, the land where the gaming establishment is proposed to be constructed.” M.G.L. c. 23K, § 15(3). Moreover, in connection with the capital investment in the project, the Commission is directed to determine whether “it will include the purchase or lease price of the land where the gaming establishment will be located.” M.G.L. c. 23K, § 10(a); see also M.G.L. c. 23K, § 9(19) (requiring an applicant to state whether “the applicant purchased or intends to purchase publicly-owned land for the proposed gaming establishment”).

In sum, the gaming establishment includes a licensee’s gaming area and the non-gaming structures related to the gaming area that it builds and operates on the land that it acquires.

**B. All Elements Of Mohegan Sun’s Gaming Establishment Will Be On The Leased Premises In Revere.**

As part of its project, MSM is proposing to build gaming areas (referred to as the casinos or the casino floors), two hotels, food and beverage establishments, retail shopping stores, entertainment venues, meeting and conference space, a spa, and structured parking. Referring

back to the definition of “gaming establishment,” everything other than the casino floor constitutes “other nongaming structures related to the gaming area.”

The basic locations of these gaming and nongaming structures on the Leased Premises are shown on the plans submitted with MSM’s January RFA-2 supplement as Attachment 4-05-03. (Luderitz Aff. Tab 6). All elements of the project are located within Revere.

While the arrangement of some of the elements has shifted within the footprint of the building as planning has advanced since January, it remains the case that the gaming area and its related non-gaming structures will be entirely on the Leased Premises in Revere. Compare, for example, the floor plan diagram on page 12 of MSM RFA-2 Attachment 4-05-03 (Luderitz Aff. Tab 7) with an updated plan of the Resort Main Floor provided in response to the Commission’s requests for clarification as MSM RFA-2 Attachment 4-19-03 (Luderitz Aff. Tab 8). Planning will continue to evolve moving forward, but the result will remain the same: no element of the gaming establishment will be located in the City of Boston.

C. MSM’s Entrances And Primary Access Points Are In Revere.

Although roadways are not always conventionally considered structures, it seems appropriate to consider a resort casino’s entrance to be part of the gaming establishment. In the case of the MSM vehicle entrance at the intersection of Furlong Drive and Tomasello Drive, for example, there will be a monument sign (a structure) and the roadway leading to and from the port cochere will be built up so that it finishes above the entrance to the garage.

If the Commission were to determine that the vehicle entrance is part of the establishment itself, that would not change the fact that all of MSM’s gaming establishment is in Revere. As depicted on the site plans in MSM Attachment 4-05-03, the entrance is entirely on the Revere side of the city line. The same is shown on a conceptual site plan for the gaming establishment

dated March 31, 2014 (Luderitz Aff. Tab 9). A depiction of the monument sign is included at Tab 10 of the Luderitz Affidavit.

Similarly, MSM's principal access road from a public way will be entirely in Revere. Specifically, the primary approach will be on Furlong Drive off of Route 1A. A recent concept plan for this entrance can be found at Tab 11 of the Luderitz Affidavit. While this plan does not depict the Revere city line, it does show the end of this access way at the intersection of Furlong Drive and Tomasello Drive. Other plans referred to above confirm that the intersection is comfortably within Revere.

MSM understands that Revere City Planner Frank L. Stringi will be providing the Commission with an affidavit stating that he understands Furlong Drive to be the primary vehicle access drive and confirming that Furlong Drive is a public way from its intersection with Route 1A to approximately its first bend.

The primary pedestrian and public transportation entrance for the gaming establishment will be located at the intersection of Winthrop Avenue and Washburn Avenue in Revere. This entrance is near the MBTA's Beachmont Station as well as the bus stops located on either side of Winthrop Avenue. It is depicted on various pages of Attachment 4-05-03, most particularly on page 17.

The gaming establishment's secondary vehicle driveway will be across the Leased Premises via Tomasello Drive in Revere, from its intersection with Winthrop Avenue in Revere. This access way is depicted on the March 31 site plan (Luderitz Aff. Tab 9).

Due to existing legal commitments to permit unrelated third parties to access land adjacent to the Leased Premises from the Sterling Suffolk property, the gaming establishment

will also be accessible via Furlong Drive from the shopping center to the northwest of the Leased Premises and via Tomasello Drive from the remainder of the Sterling Suffolk property.

D. MSM's Water And Sewer Connections Will Be In Revere.

As with the resort casino's entrance, it is not clear whether the facility's connections to municipal water and sewer should be considered part of the gaming establishment. However, to the extent they are, it bears noting that MSM's gaming establishment will be connecting to the City of Revere's water and sewer systems and all of the connection points will be in the Revere. (Luderitz Aff. ¶ 13.) MSM understands that the City of Revere's Superintendent of Public Works will be submitting an affidavit to the Commission confirming that MSM has requested that Revere provide all necessary water and sewer service for the project and that, after system improvements for which MSM will pay, Revere will be able to provide the requested service.

III. **BOSTON IS NOT A HOST COMMUNITY FOR THE MSM PROJECT BECAUSE NO PART OF THE GAMING ESTABLISHMENT IS LOCATED IN BOSTON.**

Whether a municipality is a host community for a gaming establishment is entirely derivative of the location of the gaming establishment. The Gaming Act defines "host community" as "a municipality in which a gaming establishment is located or in which an applicant has proposed locating a gaming establishment." M.G.L. c. 23K, § 2. Because neither MSM's gaming area nor any of its "other non gaming structure[s] related to the gaming area" are located in the City of Boston, Boston is not a host community for the MSM gaming establishment.

The various points made by the City of Boston in its declaration of host community status as to Mohegan Sun do not alter the geographic facts as to location of the gaming establishment. Indeed, the Gaming Act anticipates and addresses many of the factors cited by Boston, but the



Act does not support a conclusion that those factors render Boston a host community for the MSM gaming establishment.

A. Access From Boston Via The Transportation Infrastructure Makes Boston A Surrounding Community, Not A Host.

In its declaration, Boston notes that MSM's patrons will make use of "Boston's airport, bus and rail service, harbor tunnels, roadways and other means for transportation." As an initial matter, it bears noting that the City of Boston does not own or operate the Massachusetts Port Authority's Logan Airport, the MBTA's bus and rail service, or MassDOT's harbor tunnels. But even putting that aside, the fact that the transportation infrastructure links the City of Boston to the resort makes Boston a prototypical surrounding community, not a host community. The Gaming Act defines "surrounding community" as a "municipalit[y] in proximity to a host community which the commission determines experience[s] or [is] likely to experience impacts from the development or operation of a gaming establishment, including [a] municipalit[y] from which the transportation infrastructure provides ready access to an existing or proposed gaming establishment." M.G.L. c. 23K, § 2 (emphasis added).

B. The Gaming Act Requires A Licensee To Cooperate With And Promote Regional Businesses.

The City of Boston also contends that it is a host community because MSM will offer its patrons "access to the City of Boston and its retail stores, restaurants, museums, cultural institutions, tourist attractions, institutions and other amenities of the City of Boston." MSM readily acknowledges that it will encourage its patrons to visit such places, not only in Boston but also in Revere and in all of its other surrounding communities. Indeed, the Gaming Act encourages it do so, while at the same time recognizing that providing access to institutions in the region does not convert the municipalities in which those institutions are located into host communities.

A “fundamental . . . policy objective[]” of the Gaming Act is “promoting local small businesses and the tourism industry, including the development of new and existing small business and tourism amenities such as lodging, dining, retail and cultural and social facilities.” To implement that goal, the Act requires the Commission to evaluate an applicant on the extent to which it will:

- promote local businesses in host and surrounding communities, including developing cross-marketing strategies with local restaurants, small businesses, hotels, retail outlets and impacted live entertainment venues (M.G.L. c. 23K, § 18(2)); and
- build a gaming establishment of high caliber with a variety of quality amenities to be included as part of the gaming establishment and operated in partnership with local hotels and dining, retail and entertainment facilities so that patrons experience the diversified regional tourism industry (M.G.L. c. 23K, § 18(5)).

MSM has worked hard, even before receiving a license, to build a network of local businesses with which it will partner. Over 160 businesses in MSM’s host and surrounding communities, including but not limited to Boston, have already signed up to participate in the Momentum rewards program. By its terms, the Gaming Act contemplates that such partners will be located in both the gaming establishment’s host community and in its surrounding communities. It nowhere suggests that an applicant creates a host community wherever it enters into a partnership with a local or regional establishment.

The Gaming Act also *requires* applicants to enter into agreements with the so-called impacted live entertainment venues (ILEVs), which are municipally owned and not-for-profit performance venues likely to experience negative impacts from the operation of the gaming establishment. MSM has two ILEV agreements, one covering the three theaters of the Citi Performing Arts Center in Boston and the other with the Massachusetts Performing Arts Coalition (MPAC), which includes seven theatres in seven cities and towns.

As with other local establishments, the Act never suggests that a municipality that hosts an ILEV becomes a host community for the gaming establishment. Accordingly, none of Boston, Cohasset, Hyannis, Lowell, Lynn, New Bedford, Springfield or Worcester are MSM host communities on account of the ILEV agreements.

C. The Location Of A Licensee’s Off-Site Impact Mitigation And Infrastructure Improvement Projects Does Not Affect The Determination Of The Location Of Its Gaming Establishment.

The Gaming Act requires an applicant to identify the impacts of its proposed gaming establishment and enter into mitigations agreements with communities to address them. M.G.L. c. 23K, § 15(7). The act also contemplates infrastructure improvements in conjunction with the development of gaming establishments. See, e.g., M.G.L. c. 23K, § 10(a). Once again, however, there is no indication that the location of traffic mitigation projects or off-site infrastructure improvements triggers host community status in a municipality where the gaming establishment is not located.

With respect to mitigation, for example, applicants are required to submit studies on both the local and regional infrastructure impacts of their developments. See M.G.L. c. 23K, § 9(13). To be eligible for a license, an applicant must “identify the infrastructure costs of the host and surrounding communities incurred in direct relation to the construction and operation of a gaming establishment and commit to a community mitigation plan for those communities.” Id. § 15(7). Similarly, the Act recognizes that some infrastructure improvements will take place within the premises of the gaming establishment and some are likely to be outside that boundary. Section 10(a) refers to infrastructure “designed to support the site,” as distinguished from being part of the site, and gives examples of “drainage, utility support, roadways, interchanges, fill and soil or groundwater or surface water contamination issues.” Id. § 10(a). Later in the same section, the Act again acknowledges a distinction between “infrastructure improvements on-site”

and those “around the vicinity of the gaming establishment.” Id. § 10(c). There is a significant distinction between the on-site and off-site infrastructure improvements: the off-site improvements, although paid for by the licensee, will be owned and operated by public entities (for example, the City of Revere or MassDOT).

Accordingly, that MSM has committed to a traffic mitigation project on Route 1A in Boston does not make that area of Boston part of MSM’s gaming establishment and does not convert Boston from a surrounding community to a host community.

D. The MSM Gaming Establishment Is Not Entangled With The Remainder Of Sterling Suffolk’s Property In East Boston.

As MSM’s Leased Premises is a subset of the land that Sterling Suffolk owns in Revere and East Boston, it necessarily abuts the remainder of Sterling Suffolk’s land. However, nothing in the proximity of the parcels, the terms of the Binding Agreement, or the Gaming Act or any other law or regulation makes the Boston portion of Suffolk Downs land part of the MSM gaming establishment. While the City of Boston’s declaration of host community status as to MSM states that the “Mohegan Sun development is intimately related and cannot be disentangled from the Suffolk Downs site,” it does not identify any basis for this conclusion or provide a connection between any such relationship or entanglement and the determination of the MSM gaming establishment.

Conclusion

For the reasons stated above, the Commission should conclude that the gaming establishment for which Mohegan Sun seeks approval in its RFA 2 application is the Leased Premises set forth on the plan at MSM RFA-2 Attachment 4-79-06 and described on MSM RFA–2 Attachment 4-79-07.

Respectfully submitted,

MOHEGAN SUN MASSACHUSETTS, LLC

By its counsel,



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