The Commonwealth of Massachusetts
Massachusetts Gaming Commission

NOTICE OF MEETING and AGENDA
December 12, 2012 Meeting

Pursuant to the Massachusetts Open Meeting Law, G.L. c. 30A, §§ 18-25, notice is hereby given of a meeting of the Massachusetts Gaming Commission. The meeting will take place:

Wednesday, December 12, 2012
1:00 p.m.
Division of Insurance
1000 Washington Street
1st Floor, Meeting Room 1-G
Boston, Massachusetts

PUBLIC MEETING - #41

1. Call to order
2. Discussion of Policy Questions if time permits: 3
   40
   32
   1
   2
   17
   37
   31
   Additional questions if time permits.
3. Other business – reserved for matters the Chair did not reasonably anticipate at the time of posting

I certify that on this date, this Notice was posted as "Gaming Commission Meeting" at www.mass.gov/gaming/meetings, and emailed to: regs@sec.state.ma.us, melissa.andrade@state.ma.us, brian.gosselin@state.ma.us.

12/10/12
(date)

Stephen P. Crosby, Chairman

Date Posted to Website: December 10, 2012 at 1:00 p.m.

Massachusetts Gaming Commission				
Framework for Addressing Policy Questions			1 Immediate action	
Update Date: December 6, 2012			2 Needs attention	
			3 May be addressed later	
Anticipated Date of Discussion	**Q #**	**Questions and/or Policies**	**Priority Level ***	**Follow Up**
		Questions Anticipated for Wednesday December 12		
Wednesday, Dec 11	40	Should the commission prescribe the games, rules and controls a licensee may have or should it solicit proposals from the applicants/licensees?	1 - 2	Cameron
Wednesday, Dec 11	32	Should the Commission set a time limit or other rules addressing the Tribal compact/land-in-trust issue in Region C?	1 - 2	Crosby / McHugh
Wednesday, Dec 12	1	How will we define "surrounding communities" and should we publish that definition early in the process?	2	Crosby / Ziemba
Wednesday, Dec 12	2	Should the Commission issue guidelines for municipalities which may be a surrounding community to more than one host community?	2	Ziemba
Wednesday, Dec 12	17	Should the Commission specify the minimum required content for a host community agreement?	2	Ziemba
Wednesday, Dec 12	37	Should the Commission set election criteria for a local referendum if there are more than one project on the ballot?	2	Ziemba
Wednesday, Dec 12	31	Will the Commission promulgate additional ethics or reporting standards for applicants and/or related municipalities?	2	Ziemba

Key Policy Question #3: What criteria will we use to decide which "not for profit or municipally-owned performance venues" are "impacted live entertainment venues" within the statute's meaning?

The enabling legislation sets out a fairly specific and complicated process for eventual determination of "impacted live entertainment venues" and the execution of agreements between applicants and such venues. Lifting from comments submitted by Sterling Suffolk Racecourse LLC and the Massachusetts Cultural Council, the relevant sections of the statute are as follows:

Massachusetts Gaming Commission:
Framework for Addressing Policy Questions
Comments of Sterling Suffolk Racecourse LLC

M.G.L. c. 23K, § 2 (emphasis added):

> "Impacted live entertainment venue", a not-for-profit or municipally-owned performance venue designed in whole or in part for the presentation of live concerts, comedy or theatrical performances, which the commission determines experiences, or is likely to experience, a negative impact from the development or operation of a gaming establishment. (emphasis added).

M.G.L. c. 23K, § 4 (emphasis added):

> The commission shall have all powers necessary or convenient to carry out and effectuate its purposes including, but not limited to, the power to:
>
> ...
>
> (39) designate impacted live entertainment venues; provided, however, that, in making such designations, the commission shall consider factors including, but not limited to, the venue's distance from the gaming establishment, venue capacity and the type of performances offered by that venue;

M.G.L. c. 23K, § 1 5(10):

> No applicant shall be eligible to receive a gaming license unless the applicant meets the following criteria and clearly states as part of an application that the applicant shall:
>
> ...
>
> (10) provide to the commission signed agreements between the impacted live entertainment venues and the applicant setting forth the conditions to have a gaming establishment located in proximity to the impacted live entertainment venues; provided, however, that the agreement shall include, but not be limited to, terms relating to cross marketing, coordination of performance schedules, promotions and ticket prices.

M.G.L. c. 23K, § 1 7(b) (emphasis added):

After a review of the entire application and any independent evaluations, the commission shall identify which live entertainment venues shall be designated as impacted live entertainment venues of a proposed gaming establishment; provided, however, that any live entertainment venue that has negotiated an agreement with the applicant that was submitted with the application shall be considered an impacted live entertainment venue by the commission. If the commission determines a live entertainment venue to be an impacted live entertainment venue and the applicant has not finalized negotiations with that live entertainment venue in its application pursuant to section 1 5, the applicant shall negotiate a signed agreement with that live entertainment venue within 30 days and no action shall be taken on its application prior to the execution of that agreement. Notwithstanding clause (1 0) of said section 15, in the event an applicant and an impacted live entertainment venue cannot reach an agreement within the 30-day period, the commission shall have established protocols and procedures for ensuring the conclusion of a negotiation of a fair and reasonable agreement between an applicant and an impacted live entertainment venue in order to allow the applicant to submit a timely and complete application. A gaming licensee's compliance with such agreements shall be considered upon a gaming licensee's application for renewal of the gaming license.

Mass Cultural Council/Mass Performing Arts Coalition

Section 9 (a)(11) – line 832:
(the commission shall prescribe the form of the application for gaming licenses which shall require, but not be limited to:)
(11) a description of the ancillary entertainment services and amenities to be provided at the proposed gaming establishment; provided, however, that a gaming licensee shall only be permitted to build a live entertainment venue that has less that 1,000 seas or more than 3,500 seats;

Basically the Legislation addresses the concern of live entertainment venues in two ways:

- It limits the size of live entertainment venues the gaming licensee may build, leaving a prohibited size of more than 1,000 and less than 3,500—presumably suggesting that venues of this size are of particular concern.
- The Legislation urges an applicant to reach out to "live entertainment areas" around them and to negotiate with those venues which the parties agree will be impacted; after evaluating the applicant's full proposal (pursuant to RFA-2) the Commission may determine if there are other live entertainment venues which it believes will qualify as an "***impacted*** live entertainment venue," and compel such venues and the applicants to negotiate an agreement within 30 days. In the event that such an agreement is not reached within 30 days, then, the Commission is directed to develop "protocols and procedures" that will ensure the conclusion of a "fair and reasonable" agreement between the parties.

Effectively, the question before us is first ***whether*** the Commission should now issue criteria which it will use in the event it must determine "impacted live entertainment venues," and if so, ***what*** those criteria should be.

The Commission received 8 responses to this question:

Respondent	Criteria
Sterling Suffolk Racecourse	**Focus on "protocols and procedures" and leave specific criteria to the parties, as such determinations are highly "fact intensive"**
Paul Vignoli	**Mileage from casino**
BrownRudnick/MGM Springfield	**Key issue is reasonable proximity to a casino with a "like-sized" venue; Springfield and Greater Boston are not proximate**
Martha Robinson	**Tax status should determine "non-profit" or "municipal"**
Alex Feinstein	**Within 20 miles**
Shevsky and Froelich/City of Springfield	**Consult with host communities who will have best knowledge about impacted venues**
MAPC	**Venues within "reasonable market area" with more than "minimal" impact, especially of similar type and size to venue in the casino.**
Mass Cultural Council/Mass Performing Arts Coalition	**Capacity of more than 1,000 seats; operation within a radius of 100 miles from a gaming establishment; performances of live music concerts, comedy or variety performance, or touring Broadway or theatrical shows**

The essence of the concern of regional live entertainment venues, as I understand it, is best expressed in this submission by the Mass Cultural Council:

> Many cultural and entertainment venues may be impacted by a Massachusetts Casino that uses headline performers to draw crowds, but the most direct risk will be to those live entertainment venues that present the same type of touring performances that regularly play casino venues. This "**supply side**" conflict is in the process of booking touring music, comedy, or theatrical performers. Casino venues, when booking performers, typically pay a premium above what a non-profit or municipal performing arts center would pay; and then **prohibit that performer or show from performing anywhere else within a 100 mile radius**, for a period for up to a year or more.

In other words, the venues are not simply concerned about their *audience* being siphoned off; they are principally concerned about their *performers* being siphoned off. The crux of this threat, apparently, is the fact of, and reach of, these geographic exclusivity clauses.

I look forward to further comment on this question, once we have tentatively proposed an answer, as the issues are complex and subtle. Based on the research and consideration I have done to date, I recommend the following:

- I recommend that we do **not** enumerate specific criteria for determining which live entertainment venues are "impacted live entertainment venues."
- I recommend that we issue an advisory that we will consider the following criteria in the event that we need to determine which venues are "impacted":
    - The relationship between the location of the venue and the geographic scope of exclusivity clauses that the applicant uses orally or in writing when booking performers.
    - Whether the venue presents performances of live music, comedy or variety performers, or touring Broadway or theatrical shows.

  The advisory would further encourage applicants to consult with host communities, Massachusetts Cultural Council and/or Massachusetts Performing Arts Coalition as to which venues are likely to be "impacted," and to proactively reach out to possible "impacted" venues to negotiate agreements, in order to avoid the substantial licensing delays in the event that such agreements are not made.
- I recommend that we establish as the required "protocols and procedures" a standard negotiation/mediation process which would consist of binding arbitration with three arbiters, one appointed by the venue, one appointed by the applicant, and one appointed by the previous two by consensus, with the cost of mediation to be borne by the applicant.

Massachusetts Gaming Commission

MEMORANDUM

Date: December 10, 2012
To: Commissioners
From: Gayle Cameron
Re: Policy Question # 40

Policy Question #40: Should the commission prescribe the games, rules and controls a licensee may have or should it solicit proposals from the applicants/licensees?

Legislative Summary:
There are no relevant sections in the legislation.

Strategic Plan Summary:
The Strategic Plan provides recommendations on rules of the game (pp. 158 – 163). The plan divides rules into two categories: integrity based rules that apply to all games and game specific rules regulating how the games are played. The strategic plan focuses primarily on game specific rules. The following are the pros and cons of regulator-established rules and operator-established rules:

Regulator-Established/Codified Rules:

1. Are standardized and applicable to all casino operators;
2. Generally provide less flexibility to operators when included in administrative code of regulations; modifications are possible only with submission and regulatory approval and apply to all casino licensees;
3. Assist regulators in oversight of game play in that rules apply equally to all operators with no variability;
4. Eliminates training regulators on differences in rules among casino operators;
5. Result in fewer patron disputes in that game rules do not differ among casino operators; and
6. If codified in regulations, may require more time to amend than changes permitted through internal control submission process.

Operator-Established Rules:

1. May lack consistency in play of game, payout amounts, wagers and other aspects of game play, but, by the same token, this allows for diversity in gaming options offered to players;
2. May contribute to higher incidence of patron disputes due to confusion and variability of rules from casino to casino;

3. May result in competitive advantage to one or more casino operators resulting from different odds, different wagers, different payouts, etc. A sophisticated gambler may discern which casino offers the better odds at that particular game, but the average casino patron may not;
4. Require additional training of regulators to detect deviations from rules due to variability in rules among casinos;
5. Game rules changes may be expedited when part of internal control submission review process as opposed to regulatory change process.

Whether the Commission includes detailed table game rules regulations or requires that each casino licensee submit its game rules as part of its internal control submission, approval of game rules should be subject to but not limited to the following:

1. An evaluation for compliance with regulations established, industry practices, and a complete mathematical analysis for the submitted game;
2. A review of manufacturer specifications for gaming equipment, cards, dice, wheel or ball;
3. Evaluation of the rules of play by game developer to include number of cards dealt, rank of hands, outcomes (whether winner or loser);
4. Payout schedules that support the mathematical analysis of expected play;
5. Calculation of house advantage;
6. Table layout including name of game, permissible wagers;
7. Number of decks of cards or dice used in the game; and
8. If submitted to a technical laboratory for analysis of game, the documents in support of that analysis.

Public Comment Summary:

- Sterling Suffolk Racecourse LLC—Rules of the games offered at Massachusetts gaming establishments should be consistent across the board for the benefit and protection of casino patrons. General consistency with other major gaming jurisdictions is also beneficial. Different rules for different casinos will tend to create confusion among the gambling public. SSR recommends that the Commission adopt uniform rules for each game it permits licensees to offer and that its rules be modeled on existing regulations in place in other major gaming jurisdictions.

Recommendation:

Other jurisdictions are split on the issue and there is no singular approach nationwide. New Jersey, West Virginia, Pennsylvania, and Delaware require standardized game rules across all casinos in the state. Illinois, Iowa, Ohio, and Louisiana allow the casino operators to develop game rules, subject to approval by the regulator. Likewise, our consultants do not agree on an approach that would best fit the Commission's needs. On the one hand, individualization of the rules for each casino allows casinos to distinguish themselves from each other, thus providing enhanced marketing opportunities. On the other hand, multiple sets of rules may make enforcement more difficult. Regulators need to be trained in the nuances of the rules each casino follows, and casino patrons need to have clearly defined and well

publicized game guidelines to avoid any disputes. This question requires further discussion by the Commission.

Key Policy Question #32: Should the Commission set a time limit or other rules addressing the Tribal Compact/Land-in-trust issue in Region C?

Commissioner McHugh and I have discussed this question and while it was urgent at one point, we do not believe that it is timely to address this question at this time, in this context. There are at present (as we have discussed at an earlier meeting) a plethora of Region C issues presently under deliberation and/or in play. If we adopt some version of the "parallel track" strategy discussed previously, we will stop the "Region C Delay Clock." Under these conditions, we have time to try "watchful waiting" as to what happens with the potential impediments to the Tribe's initiative.

Question 1 Analysis

Question: How will we define "surrounding communities" and should we publish that definition early in the process?

Discussion: There is a threshold question whether the MGC should further define surrounding communities. The issue of surrounding communities was a significant one in the legislative debate on the Gaming Act[1]. Although the Gaming Act requires the MGC to promulgate certain regulations in MGL c. 23K, §5, it does not require the MGC to further define "surrounding communities".[2] Instead, MGL c. 23K, §17(a) requires that the MGC shall identify "which communities shall be designated as the surrounding communities"... "after a review of the entire application and any independent evaluations." (emphasis added.) MGL c. 23K, §17(a) further states that in making the determination that a community is a surrounding community, "the commission shall consider the detailed plan of construction submitted by the applicant, information received from the public and factors which shall include, but not be limited to, population, infrastructure and distance from the gaming establishment and political boundaries." The structure of the MGL c. 23K application process anticipates that no statutory, and perhaps no regulatory definition, will fully resolve questions about what is a surrounding community, since the MGC is required to make a determination regarding such designations after the application is submitted. This suggests that the Legislature intended the MGC to make a case by case determination of the applicability of the surrounding community designation.

The definition of surrounding community is important both in the application stage and in decisions about how funds are allocated under the community mitigation fund. Another threshold question is whether a community can receive funds from the community mitigation fund even if it is not designated a surrounding community in the application stage. MGL c. 23K, §61 states that funds shall be available to assist communities and surrounding communities in offsetting costs related to gaming facilities including "communities ...in the vicinity of a gaming establishment". Because of the use of language (communities in the vicinity of a gaming establishment) distinct from the term "surrounding communities", it appears that a community need not be designated a surrounding community in order to receive funds from the community mitigation fund. This interpretation is further supported by MGL c. 23K, § 61's language specifying that "parties" instead of "host and surrounding communities" may request funds from the Mitigation Fund

Within this statutory context, the MGC has options:

1. Rely on just the statutory factors noted below in a case by case determination at the time of review of Phase 2 applications before the MGC, with no further guidance.
2. Through a guideline or a regulation, further refine the statutory factors with examples of the types of impacts that, taken together collectively, would result in a presumption that one is a surrounding community.

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[1] See the attached list of amendments filed to the Gaming Act during the debate in the Senate and House of Representatives.

[2] In comparison, MGL c. 23K, §5 requires the MGC to promulgate regulations covering 18 specific topics such as "the criteria for evaluation of the application for a gaming license including, with regard to the proposed gaming establishment, an evaluation of architectural design and concept excellence, integration of the establishment into its surroundings, potential access to multi-modal means of transportation, tourism appeal, level of capital investment committed, financial strength of the applicant and the applicant's financial plan"

3. Establish bright line tests through regulation prior to RFA-2 applications that would result in a surrounding community determination; or specifically determine which communities are surrounding communities to sites of gaming facilities identified by Phase 1 applicants.

Option 1. Option 1 places the most responsibility on the applicant to determine in the first instance which communities meet the definition and is consistent with the provisions of MGL c. 23K, §17(a) which states that the MGC shall make any surrounding community determination "a]fter a review of the entire application and any independent evaluations." While an unduly limited determination of surrounding communities by an applicant may limit the size of the applicant's mitigation financial commitments, applicants that fail to properly identify surrounding communities risk a less competitive application. Pursuant to MGL c. 23K, §18(19), the MGC shall weigh whether a potential facility has gained "public support in the host and surrounding communities." Further, such applicants risk the potential delay in the review of their application attendant to the MGC surrounding community determination process and potentially the requirement that the applicant negotiate an agreement with any newly designated surrounding community.

While Option 1 places proper responsibility on the applicant to make the first instance determination of surrounding communities, it is the least clear of the three options and fails to provide communities with guidance on whether an applicant should be engaging them in the application process.

Further, Option 1 may place a community at a disadvantage in determining the negative impacts that would be addressed in a surrounding community agreement. Because some communities may not be designated as a surrounding community until after the application is filed, those communities may not have access to resources to identify impacts prior to the application. MGL c. 23K, §17(a) establishes a window of thirty days within which an applicant and a newly designated surrounding community shall reach an agreement. Prior to the designation of becoming a surrounding community, no community can request funding from the applicant's application fee for review of impacts.[3] Thus, a newly designated surrounding community may have very little time to use any resources to determine impacts for the purpose of such regulations. In situations where no agreement could be reached in such thirty day period, perhaps evaluative resources could be utilized during the period after the thirty days when the MGC is required to help the parties to reach an agreement.

Option 2. Option 2 provides more guidance to both applicants and communities about what the MGC would deem to be a surrounding community. However, the determination of examples of impacts without the benefit of the specific details of an application is difficult. Below (in blue) we provide examples of impacts that could be considered by the Commission, after substantial input and revision. These examples are grouped within each of the factors that the statute directs in the consideration of what is a surrounding community. The examples are left intentionally broad and without numeric specificity.

It is anticipated that the examples (once finalized after substantial input) could be utilized by applicants and communities in a few important ways. First, applicants and potential surrounding communities could use such factors in any discussions prior to the filing of an application regarding the surrounding community status of a particular community. Also, applicants and potential surrounding communities could provide further evidence to the Commission after the application has been filed of the applicability of some or many of the factors and examples. In such event, each side could present evidence about

[3] MGL c. 23K, §4(7) (the powers of the Commission) states that "the commission may receive and approve applications from a municipality to provide for reasonable costs related to legal, financial and other professional services required for the negotiation and execution of host and surrounding community agreements as provided in section 15, and to require that such costs be paid by the applicant for a gaming license." Unless a community is a surrounding community, this section does not apply. However, there is no prohibition against potential surrounding communities requesting funding directly from applicants prior to the filing of the RFA-2 application.

the applicability of each of the factors, utilizing the provided examples or other evidence. At the time of deliberation, parties could provide more numeric, specific standards to provide further evidence that a particular factor or example provides evidence that a community either is or is not a surrounding community. For example, achievement or non-achievement of one of the MEPA thresholds (e.g. generation of 3,000 or more unadjusted new additional daily trips on roadways providing access to a single location, new withdrawal or expansion in withdrawal of 100,000 or more gpd from a water source that requires new construction for the withdrawal) impacting the particular community could be submitted as evidence.

The Gaming Act describes the factors that the MGC would take into account in making such a determination:

1. Geographic proximity. in order to be deemed a surrounding community, a municipality must be in "proximity to a host community" and "distance [of the community] from the gaming establishment and political boundaries" is to be considered.

While proximity to the host community and to the facilty could be viewed as independent factors, they might need to be considered in relation to each other. For example, while a common understanding of "surrounding communities" could be ones that geographically border a host community, such a definition fails to recognize that a gaming facility may be sited a far distance from a bordering community such that the community may face little or no impacts from the facility. This is a made more of a possibility when the host community is geographically large. Further, a community which has no border with a host community could experience significant impacts if its roads would be primary method of access to the gaming facility, for example. If the Legislature intended such a "common understanding" definition, it would have been very easy to include that standard in the Gaming Act. It did not do so. While sharing a common border with a host community should not result in a presumption of surrounding community status, the common border deserves to be considered as a factor.

If a community is one mile away from a gaming facility, it is likely to experience impacts. If a community is 50 miles away from a gaming facility, it is less likely to experience impacts. However, even within those extremes, arguments are possible that communities may or may not experience some impacts. For example, venue operators very far from the Connecticut casinos have indicated that their business is impacted. The Commission could set a number of miles or a commuting distance which it believes is a good indicator of the potential of impacts. However, absent some other justification, such a number or commuting distance could be attacked as being arbitrary. Instead, when the MGC is charged with determining whether a particular community before the MGC is a surrounding community, the MGC could instead just use the common sense approach that geographic proximity should be used as more of a factor in determining that a community is a surrounding community if that community is close to both the host community and the gaming facility. A potential surrounding community many miles away and of a lengthy commuting distance from a host community and gaming facility should be less likely to be viewed as a surrounding community. The Commission could potentially weigh the additional example of the proximity of residential areas in a potential surrounding community to the host community and gaming facility.[4] Proximity to residential areas is a commonplace tool in measuring impacts.

Below are a listing of potential examples that could be considered

- Proximity to host community
- Shared border with host community
- Proximity to gaming facility

[4] Please note that this suggestion was rejected by the Legislature as part of its consideration of amendments.

- Proximity of residential areas in potential surrounding community to gaming facility

2. Impact on transportation infrastructure. Pursuant to the MGL c.23K, §2 definition, surrounding communities include "municipalities from which the transportation infrastructure provides ready access to an existing or proposed gaming establishment." The term "ready access" is not defined. While a local road that feeds directly to a gaming facility would clearly provide "ready access", it is less clear whether "ready access" is provided by a community's federal interstate connection when that interstate also runs through many other communities.

Below are a listing of potential examples that could be considered:

- Level of service impacts on community including but not limited to projected changes in level of service at identified intersections and increased volume of trips on local streets
- Anticipated degradation of infrastructure from additional trips to gaming facility
- Transit ridership and station parking impacts
- Signficiant project vehicle trip generation weekdays and weekends for a twenty-four hour period and A.M. and P.M. peak vehicle trips generated on state and federal roadways intersecting a community

3. Development Impact. MGL c. 23K requires the MGC to evaluate the "detailed plan of construction" in making the surrounding communities designation and states that surrounding community is one impacted by the "development ... of a gaming establishment." Thus, the MGC shall evaluate pre-operational impacts on communities in making the surrounding communities designation.

Below are a listing of potential examples that could be considered:

- Construction noise
- Construction vehicles on community roadways
- Construction period traffic impact

4. Operational Impact. "[I]mpacts from the ...operation of a gaming establishment" are not further defined in the MGL c. 23K, §2 but may be described in other sections of the Gaming Act which describe impacts to be reviewed, including the [positive] impact on" local businesses in host and surrounding communities", the impact on "regional tourism industry", MGL. C. 23K, §18, the impact on the local and regional economy, including the impact on cultural institutions and on small businesses in the host community and surrounding communities (MGL c. 23K, §9(13), and "negative consequences of their business operations" (MGL c. 23K, §1) perhaps such as potential increased crime. MGL c. 23K, § 61 also lists certain potential operational impacts including local and regional education, transportation, infrastructure, public safety, housing, environmental impacts, and mentions impacts on water districts.

Below are a listing of potential examples that could be considered:

- Public safety impacts
- Increased demand on local and regional water and sewer systems
- Impacts from storm-run-off, associated pollutants, and changes in drainage patterns
- Stresses on community housing stock including any projected negative impacts on the appraised value of housing stock due to a gaming facility
- Negative impact on local, retail, entertainment, and service establishments
- Demonstrated impact on public education

5. Population. It is unclear how "population" shall factor into the determination of a surrounding community and whether the population shall include both the population of the host and surrounding community.

Option 3. Option3 would provide the most certainty regarding which communities are surrounding communities prior to the application. However, it is clear from the statute that the Commission shall make such definitive decisions about which communities are surrounding communities only "after a review of the entire application and any independent evaluations", pursuant to MGL c. 23K, §17(a). A pre-determination of which communities are surrounding communities prior to such an evaluation would seem to contravene the statute. Further, establishing bright line tests prior to review of the application may be akin to such a pre-application predetermination and thus may also not be in keeping with the statute. Further, given the wide ranging circumstances and impacts likely from each gaming facility and with each host community, establishing supportable bright line tests may not be possible.

Recommendation: It is recommended that the Commission adopt Option 2 and provide further refinement of the types of impacts that, taken in their totality, would have an impact on whether the Commission would determine a community to be a surrounding community after the Commission considers the RFA-2. The Commission would use the Option 2 factors and examples to organize its discussion in such a determination after an application has been filed.

In order to refine the above factors and examples, it is recommended that the MGC solicit immediate further public input relating to the discussion of this question. The MGC will then evaluate any comments received and publish a revised listing of factors and examples that the Commission will use in its discussions. Once finalized, the Commission would issue an advisory on the issue that can be utilized by host communities, surrounding communities, and applicants in their prior-to-application discussions. The advisory should stress that attention should be paid in such discussions to ensure that objective impacts are considered. In order to be useful to all parties involved in current discussions, the Commission should publish such advisory in January 2013.

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Statutory Language: MGL c. 23K, §2 defines "[s]urrounding communities" as "municipalities in proximity to a host community which the commission determines experience or are likely to experience impacts from the development or operation of a gaming establishment, including municipalities from which the transportation infrastructure provides ready access to an existing or proposed gaming establishment."

MGL c. 23K, §17(a) states: "After a review of the entire application and any independent evaluations, the commission shall identify which communities shall be designated as the surrounding communities of a proposed gaming establishment; provided, however, that any community that has negotiated a surrounding community memorandum of understanding with the applicant that was submitted with the application shall be considered a surrounding community by the commission. In making that determination, the commission shall consider the detailed plan of construction submitted by the applicant, information received from the public and factors which shall include, but not be limited to, population, infrastructure and distance from the gaming establishment and political boundaries. If the commission determines a city or town to be a surrounding community and the applicant has not finalized negotiations with that community in its application pursuant to section 15, the applicant shall negotiate a signed agreement with that community within 30 days and no action shall be taken on its application prior to the execution of that agreement. Notwithstanding clause (9) of said section 15, in the event that

an applicant and a surrounding community cannot reach an agreement within the 30-day period, the commission shall have established protocols and procedures for ensuring the conclusion of a negotiation of a fair and reasonable agreement between an applicant and a surrounding community in order to allow the applicant to submit a timely and complete application."

Question 2 Analysis

Question: Should the Commission issue guidelines for municipalities which may be a surrounding community to more than one host community?

Discussion- If a community is a surrounding community to more than one host community, there is some potential that the surrounding community might have a preference for a gaming facility at one of the host communities and that this preference would somehow disadvantage the other host community. Taken to the extreme, there is a potential that the surrounding community would either refuse to negotiate a surrounding community agreement with the non-preferred gaming facility or would insist upon terms that it is not requiring of the preferred facility.

Use of MGL c. 23K, §17(a) Procedure to Resolve Such Disputes. MGL c. 23K, §17(a) sets out a procedure for the Massachusetts Gaming Commission (MGC) to resolve negotiations between applicants and surrounding communities that have not been concluded by the time of the application to the MGC. The statute states that the MGC shall establish "protocols and procedures for ensuring the conclusion of a negotiation of a fair and reasonable agreement between an applicant and a surrounding community in order to allow the applicant to submit a timely and complete application."

In the event that a surrounding community fails to reach an agreement with an applicant because of any such preference, the MGC may be called upon to conclude such negotiations pursuant to the procedures outlined in MGL c. 23K, §17(a). In such context, the procedure for resolving such a negotiation may not be materially different from the procedure the MGC uses to resolve negotiations involving a surrounding community with just one host community. In both cases, the MGC will be called upon to resolve a negotiation between one applicant and one surrounding community. Although the protocols and procedures that the MGC would utilize to conclude such negotiations have yet to be determined, it is likely that the decision will be based upon the "known impacts from the development and operation of a gaming establishment" experienced by the surrounding community. MGL c. 23K, §15(9), (10).

In concluding negotiations between a surrounding community and an applicant, the MGC could potentially consider any similar mitigation measures the surrounding community has accepted in any agreement with another applicant (potentially a preferred applicant under this scenario). If similar impacts are predicted, any mitigation measures found in an executed agreement could be used as evidence of the types of mitigation measures in the non- executed agreement in order to establish "a fair and reasonable agreement." MGL c. 23K, §17(a), (b).

Good Faith Standard. In order to address fairness issues, the MGC could establish a good faith standard to be observed by all applicants, host communities, and surrounding communities. Any violation of such good faith standard would be considered by the MGC as part of its evaluation of gaming license applications. If actions by a surrounding community are determined by the MGC to be in bad faith, the MGC could weigh any such bad faith actions in the process to conclude negotiations involving

surrounding communities pursuant to the MGL c. 23K, §17(a) procedure to resolve disputes, once such procedure is crafted.

While establishing a good faith standard is fairly straightforward, proving a violation of such standard may be very difficult. As a result, it may be likely that proven violations of the good faith standard may be rare. For example, it is questionable whether a good faith standard should apply in a situation where a surrounding community executes prior-application agreements with two applicants but on different terms. Even though one agreement may be more favorable to the surrounding community than the other, the execution of both agreements prior to the application deadline may provide evidence that no bad faith exists. The execution of both agreements may instead demonstrate a surrounding community's motive to reach as advantageous agreements as possible while not impacting the ability of any applicant to file a complete application.

Recommendation: It is recommended that the MGC utilize the procedures specified in MGL c. 23K, §17(a) to resolve many disputes that may result from a surrounding community to more than one host community. The regulations that the MGC will issue to establish the procedures to resolve such disputes on agreements between surrounding communities and applicants may not require much further specificity for multiple host community situations. However, some additional provisions, including the use of similar executed agreements as evidence, should be added. The MGC received comments requesting the establishment of MGL c. 23K, §17(a) protocols and procedures as quickly as possible. It is recommended that he MGC do so in order to provide more certainty to host communities, surrounding communities, and applicants as they begin negotiations on agreements.

It is also recommended that the MGC should include a good faith standard in its regulations applicable to host communities, surrounding communities, and applicants.

.....

Statutory Background: MGL c. 23K, §17(a) specifies that "[i]f the commission determines a city or town to be a surrounding community and the applicant has not finalized negotiations with that community in its application pursuant to section 15, the applicant shall negotiate a signed agreement with that community within 30 days and no action shall be taken on its application prior to the execution of that agreement. Notwithstanding clause (9) of said section 15, in the event that an applicant and a surrounding community cannot reach an agreement within the 30-day period, the commission shall have established protocols and procedures for ensuring the conclusion of a negotiation of a fair and reasonable agreement between an applicant and a surrounding community in order to allow the applicant to submit a timely and complete application."

MGL c. 23K, §15(9) specifies that applicants shall "provide to the commission signed agreements between the surrounding communities and the applicant setting forth the conditions to have a gaming establishment located in proximity to the surrounding communities and documentation of public outreach to those surrounding communities; provided, however, that the agreement shall include a community impact fee for each surrounding community and all stipulations of responsibilities between

each surrounding community and the applicant, including stipulations of known impacts from the development and operation of a gaming establishment”

MGL c. 23K, §2 defines "[s]urrounding communities" as "municipalities in proximity to a host community which the commission determines experience or are likely to experience impacts from the development or operation of a gaming establishment, including municipalities from which the transportation infrastructure provides ready access to an existing or proposed gaming establishment."

MGL c. 23K, §17(a) further states that in making the determination that a community is a surrounding community, "the commission shall consider the detailed plan of construction submitted by the applicant, information received from the public and factors which shall include, but not be limited to, population, infrastructure and distance from the gaming establishment and political boundaries."

Surrounding Communities Amendments

House

Mr. Fernandes of Milford moves to amend H. 3702, in subsection 9 of Section 15, in line 1038, by adding after the word "establishment" the following:- ";provided further that, in the event that an applicant cannot reach agreement with one or more surrounding communities, such applicant shall submit for the commission's consideration a report of the full course of negotiations with such surrounding community, including the last position such applicant presented to, and was rejected by, such surrounding community. As a condition of a license grant hereunder the commission may require that an applicant fulfill the terms set forth within its last proposal to such surrounding community, or impose such reasonable additional or alternative terms as the commission deems appropriate. At the direction of the commission, the funds necessary to fulfill the terms and conditions of the agreements or commission order of mitigation shall be paid from the mitigation fund provided for in Section 61."

Mr. Fernandes of Milford moves to amend House 3702, in paragraph (a) of Section 17, in line 1115, by striking lines 1115 to 1120, inclusive, after the word "boundaries" and inserting in place therefore the following:- "If the commission determines a city or town to be a surrounding community and the applicant has not included a signed agreement with that community in its application, or reported as required by Section 15(a) hereof as to the course of negotiations, the applicant shall attempt to negotiate a signed agreement with that community within 30 days. When necessary the commission may facilitate the negotiation of fair and reasonable agreements between the applicant and surrounding communities."

Mr. Jones of North Reading, Mr. Peterson of Grafton, Mr. Hill of Ipswich, and Ms. Poirier of Attleboro move to amend House bill 3702 by inserting, in line 1120, after the words "surrounding communities", the following:
; provided, that if, after a further 30 days, an agreement is not reached, and the commission determines that the applicant has made a good faith effort to enter into a surrounding community memorandum of understanding with the community, the commission may waive this requirement";

Mr. Winslow of Norfolk moves to amend House bill 3702 by striking lines 344 through 347, inclusive, and inserting, in place thereof, the following:
'"Surrounding communities", municipalities in proximity to a host community which the commission determines experience or are likely to experience impacts from the development or operation of a gaming establishment, including municipalities from which the transportation infrastructure provides ready access to an existing or proposed gaming establishment; provided, however, that all communities that abut a host community and have a public way that crosses a municipal border into the host

community or have dwelling units within a ¼ mile radius of the gaming establishment shall be deemed surrounding communities.'.

Mr. Winslow of Norfolk moves to amend House bill 3702 by striking lines 344 through 347, inclusive, and inserting, in place thereof, the following:
'"Surrounding communities", municipalities in proximity to a host community which the commission determines experience or are likely to experience impacts from the development or operation of a gaming establishment, including municipalities from which the transportation infrastructure provides ready access to an existing or proposed gaming establishment; provided, however, that all communities that abut a host community shall be deemed surrounding communities.'.

Mr. Murphy of Burlington moves to amend House Bill 3702 in line 1031, paragraph (8) of section 15, by adding at the end thereof the following:- "each casino operator shall pay a local impact fee equal to 2% of the net gaming revenues to the department of revenue. The department shall allocate these funds directly to each municipality in the surrounding communities and the host community. For purposes of this calculation, the host community's population shall be multiplied by four. A surrounding community is a municipality within a twenty geographic mile radius from the casino."

AMENDMENT NO. 145 FILED: 9/09/2011 2:50 PM FOR H. 3702 Ms. Dykema of Holliston and Mr. Brownsberger of Belmont move to amend House, No. 3702
By striking out the definition of "Surrounding communities" in section 2 of chapter 23K of the General Laws, as inserted by SECTION 16, in lines 344 to 347, and inserting in place thereof the following 2 definitions:--
""Substantially impacted community", a municipality, other than a host community, (i) that has residentially zoned property within 2 miles of a proposed gaming establishment; and (ii) that has been designated as such by the commission under clause 33A of section (4).
"Surrounding community", a municipality, other than a substantially impacted community, that is in proximity to a host community and which the commission determines experiences or is likely to experience impacts from the development or operation of a gaming establishment, including a municipality from which the transportation infrastructure provides ready access to an existing or proposed gaming establishment.";
By inserting after clause (33) of section 4 of said chapter 23K, as so inserted, after line 630, the following clause:--
"(33A) Designate a municipality, other than a host community, as a substantially impacted community if requested to do so by a municipality: (i) that has residentially zoned property within 2 miles of a proposed gaming establishment and (ii) whose legislative body, subject to the charter of the municipality, has voted to request such designation. The commission shall not consider any factors other than the 2-mile requirement and the request made by the municipality."....

Ms. Dykema of Holliston Mr. Brownsberger of Belmont and Mr. Walsh of Framingham move to amend House Bill 3702 in SECTION 16 by striking out lines 344 through 347, beginning with "Surrounding communities" and ending with "gaming establishment." and inserting in place thereof the following paragraph:-

" "Surrounding communities", municipalities (a) that are located in whole or in part within two miles of the site of an existing or proposed gaming establishment; or (b) from which the transportation infrastructure provides ready access to an existing or proposed gaming establishment in proximity to a host community; or (c) that the commission determines experience or are likely to experience impacts from the development or operation of a gaming establishment."

Mr. Fernandes of Milford moves to amend H. 3702, in subsection 9 of Section 15, in line 1038, by adding after the word "establishment" the following:- ";provided further that, in the event that an applicant cannot reach agreement with one or more surrounding communities, such applicant shall submit for the commission's consideration a report of the full course of negotiations with such surrounding community, including the last position such applicant presented to, and was rejected by, such surrounding community. As a condition of a license grant hereunder the commission may require that an applicant fulfill the terms set forth within its last proposal to such surrounding community, or impose such reasonable additional or alternative terms as the commission deems appropriate. At the direction of the commission, the funds necessary to fulfill the terms and conditions of the agreements or commission order of mitigation shall be paid from the mitigation fund provided for in Section 61."

Mr. Dempsey of Haverhill moves to amend amendment number 17 to the bill by striking out the words "one or more surrounding communities, such applicant shall submit for the commission's consideration a report of the full course of negotiations with such surrounding community, including the last position such applicant presented to, and was rejected by, such surrounding community. As a condition of a license grant hereunder the commission may require that an applicant fulfill the terms set forth within its last proposal to such surrounding community, or impose such reasonable additional or alternative terms as the commission deems appropriate. At the direction of the commission, the funds necessary to fulfill the terms and conditions of the agreements or commission order of mitigation shall be paid from the mitigation fund provided for in Section 61." and inserting in place thereof the following words:-

provided further, that in the event an applicant cannot reach an agreement with a surrounding community, the applicant shall submit to the commission a report detailing the course of negotiations with the surrounding community, including the last offer proposed by the applicant and rejected by the surrounding community and the commission, as a condition of licensure, may require that an applicant fulfill the terms set forth in the last proposal or impose additional or alternative terms upon the applicant as the commission deems reasonable.

And further amend the amendment by inserting the following further amendment:-

And further amend the bill by striking out the words "included a signed agreement with that community in its application", in lines 1116 to 1117, and inserting in place thereof the words:- finalized negotiations with that community in its application pursuant to section 15;

Senate Surrounding Community Amendments

SURROUNDING COMMUNITIES

Ms. Spilka moves that the bill (Senate Bill 2015) be amended in section 2 of chapter 23K, as inserted by SECTION 16, by striking out the definition of "Surrounding communities" and inserting in place thereof the following definition:-

"Surrounding communities," municipalities (a) that are located in whole or in part within 3 miles of the site of an existing or proposed gaming establishment; or (b) from which the transportation infrastructure provides ready access to an existing or proposed gaming establishment in proximity to a host community; or (c) that the commission determines experience or are likely to experience impacts from the development or operation of a gaming establishment."

Clerk #13

Participation By Small Towns

Ms. Spilka moves that the bill (Senate number 2015) be amended at paragraph 13 of section 9 in chapter 23K, as inserted by SECTION 16, by inserting, at line 1077, after the word "election;" the following:- "provided further, that if a gaming establishment is proposed to be located in a municipality with a population of no more than 30,000 residents according to the most recently enumerated federal census, at a site which is within .75 miles of any other municipality with a population of no more than 30,000 residents according to the most recently enumerated federal census, then "host community" shall mean each such municipality for the purpose of receiving a certified and binding vote on a ballot question at an election;"

SURROUNDING COMMUNITY VOICE

Ms. Spilka moves to amend the bill (Senate Bill 2015) in section 19 of chapter 23K, as inserted by SECTION 16, by inserting after subsection (d) the following new subsection:-

(d ½) In determining which gaming applicant shall receive a gaming license in each region, the commission shall consider the relative support or opposition to each gaming applicant from the public in host and surrounding communities, including, but not limited to, the oral and written testimony received during the public hearing conducted pursuant to Section 17.

ABUTTING SURROUNDING COMMUNITIES

Ms. Spilka moves that the bill (Senate Bill 2015) be amended in section 2 of chapter 23K, as inserted by SECTION 16, by striking out the definition of "Surrounding communities" and inserting in place thereof the following definition:-

"Surrounding communities," municipalities in proximity to a host community that the commission determines experience or are likely to experience impacts from the development or operation of a gaming establishment, including municipalities from which the transportation infrastructure provides ready access to an existing or proposed gaming establishment; provided that all communities that abut a host community shall be deemed surrounding

communities; provided further that communities that are contiguous to an abutting community shall also be deemed surrounding communities."

REQUIRING A VOTE OF MUNCIPALITIES WITHIN THREE MILES OF A PROPOSED GAMING ESTABLISHMENT

Ms. Spilka moves to amend the bill (Senate Bill 2015) by striking out clause (13) of section 15 of chapter 23K, as inserted by SECTION 16 and inserting in place thereof the following clause:--

"(13) have received a certified and binding vote on a ballot question at an election in the host community, in favor of such license; have received a certified and binding vote on a ballot question at an election in each surrounding community located within 3 miles of the site at which the gaming establishment is proposed to be located, where the majority of such surrounding community votes were in favor of such license; provided, however that the vote shall take place after the effective date of this chapter;

...

Ms. Spilka moves to amend the bill, Senate No. 2015 in section 2 of chapter 23K of the General Laws, as inserted by SECTION 16, in lines 351 to 354, by striking out the definition of "Surrounding communities" and inserting in place thereof the following 2 definitions:--

"Substantially impacted community", a municipality, other than a host community, (i) that has residentially zoned property within 3 miles of a proposed gaming establishment; and (ii) that has been designated as such by the commission under clause 33A of section (4).

"Surrounding community", a municipality, other than a substantially impacted community, that is in proximity to a host community and which the commission determines experiences or is likely to experience impacts from the development or operation of a gaming establishment, including a municipality from which the transportation infrastructure provides ready access to an existing or proposed gaming establishment.";

Mr. Tarr moves to amend the bill (Senate, No. 2015), by striking lines 351 through 354, inclusive, and inserting, in place thereof, the following:

"Surrounding communities", municipalities in proximity to a host community which the commission determines experience or are likely to experience impacts from the development or operation of a gaming establishment, including municipalities from which the transportation infrastructure provides ready access to an existing or proposed gaming establishment; provided, however, that all communities that abut a host community shall be deemed surrounding communities."

Ms. Jehlen moves to amend the bill (Senate, No. 2015) by striking out Section 17 (c) and inserting in place thereof the following section:-

Section 17. (c) The commission shall conduct public hearings on the application pursuant to section 11A1/2 of Chapter 30A. There shall be at least one public hearing in the host community and at least one public hearing in each municipality that has residential property within 5 miles of the proposed gaming facility. An applicant for a gaming license and the municipality hosting the hearing shall be given at least 30 days notice of the public hearing.

Mr. Ross moves to amend Senate bill 2015 by striking out lines 351 through 354, inclusive, and inserting, in place thereof, the following:-

"Surrounding communities", municipalities in proximity to a host community which the commission determines experience or are likely to experience impacts from the development or operation of a gaming establishment, including municipalities from which the transportation infrastructure provides ready access to an existing or proposed gaming establishment; provided, however, that all communities that abut a host community and have a public way that crosses a municipal border into the host community or have dwelling units within Â½ mile radius of the gaming establishment shall be deemed surrounding communities.

Referendum for surrounding communities

Mr. Eldridge moves that the bill, S. 2015, be amended in line 1066 by inserting after the word "host community" the following:- "and in any community abutting the host community and in any community within five miles of the proposed gaming establishment";

And in line 1068 by striking the words "not less than 35 days but not more than 90 days" and inserting in place there of the following:- "not less than 90 days" ;

And in line 1070 by striking the words "60 days" and inserting in place thereof the following:- "90 days"

Regional Mitigation

Mr. Eldridge moves that the bill, S2015, be amended in line 2496 by inserting after the words "emergency services" the following:- "The commission may, at its discretion, distribute funds to a governmental entity or district other than a single municipality in order to implement a mitigation measure that affects more than one municipality, provided that said entity shall submit a written request for funding in the same manner as a municipality would be required to submit under subsection (c) herein

Rejected
Clerk #163

Surrounding Communities

Mr. Hedlund moves that Senate bill 2015 be amended in paragraph (9) of section 15 of the proposed chapter 23K, by adding at the end thereof the following:- "provided further, that in the event an applicant cannot reach agreement with a surrounding community, the applicant shall submit to the commission a report detailing the course of negotiations with the surrounding community, including the last offer proposed by the applicant and rejected by the surrounding community and the commission, as a condition of licensure, may require that an applicant fulfill the terms set forth in the last proposal or impose additional or alternative terms upon the applicant as the commission deems reasonable."

new definition:-

"Community Memorandum of Understanding- signed agreements between the host community or surrounding communities and the applicant setting forth the conditions to have a gaming establishment located in the host community or in proximity to the surrounding communities and documentation of public outreach to those surrounding communities; provided, however, that the agreement shall include a community impact fee for each host community and surrounding community and all stipulations of responsibilities between each host community and surrounding community and the applicant, including stipulations of known impacts from the development and operation of a gaming establishment"

And by inserting after line 277 the following new definition:-

"impact fee" shall include any agreement in writing between a host community or surrounding community and the applicant which specifies without limitation any direct payments or other commitments by the applicant to provide the host community or surrounding community with new or upgraded infrastructure, capital or operating costs for transportation, education, or public safety, or to minimize impacts on the environment, water and sewer infrastructure, or to meet the increased demand for housing, social programs, and municipal services. The cost of these payments or agreements shall not be awarded from the Mitigation Trust Fund. Any such agreement shall not disqualify a host community or surrounding community from making application to the Mitigation Trust Fund for further mitigation."

And by inserting after line 634 the following:-

"(33a) ensure that all environmental laws and regulations are followed and that impacts on natural resources in the host and surrounding communities as a result of a gaming facility are mitigated."

Surrounding Community Good Faith

Mr. Richard T. Moore moves to amend the bill (Senate, No. 2015) by inserting in subsection 9 of Section 15, after the word "establishment;" the following:- "provided further, that in the event an applicant cannot reach an agreement with a surrounding community, the applicant shall submit to the commission a report detailing the course of negotiations with the surrounding community, including the last offer proposed by the applicant and rejected by the surrounding community and the commission, as a condition of licensure, may require that an applicant fulfill the terms set forth in the last proposal or impose additional or alternative terms upon the applicant as the commission deems reasonable."; and

In Section 17, lines 1130 to 1131 by striking the words "included a signed agreement with that community in its application" and inserting in place thereof the following:- "finalized negotiations with that community in its application pursuant to section 15;"

Ms. Spilka moves that the bill (Senate Bill 2015) be amended in subsection (7) of section 4 of chapter 23k, as inserted by SECTION 16, by inserting at the end thereof the following new sentence:-
"In exercising its authority under this subsection, the Commission shall be authorized to receive and approve applications from a municipality to provide for reasonable costs related to legal, financial and other professional services required for the negotiation and execution of agreements as provided in this chapter, and to require that such costs be paid by the applicant, prospective applicant or other entity with which the municipality seeks to negotiate."

Question 17 Analysis

Question: Should the Commission specify the minimum required content for a host community agreement?

Discussion- Resolution of this question requires a discussion of how active a role the Commission should have in the negotiation of the agreement between a host community and an applicant. On one polar side of the argument, the Commission is advised to just evaluate the sufficiency of the host community agreement when it reviews license applications but to refrain from using its regulatory authority to impact negotiations between applicants and host communities while they are taking place. On the other polar side, the Commission is advised to utilize its authority and resources to ensure that host communities will not execute agreements with applicants that may disadvantage those host communities.

Arguments that the Commission should just utilize its authority to review host community agreements as part of an application but refrain from establishing regulatory minimums for the agreement include:

- Establishing the minimum content of a host community agreement presumes that the Commission knows better than the host community whether it should enter into such agreement and allow a gaming establishment into its community;
- The statute makes clear that the decision to enter into a host community agreement is with the host community itself and that the Commission has no role in approving it prior to receipt of a gaming application;
- Creating regulatory minimums would impact the authority and responsibility of local governments to determine what is in the best interests of their citizens;
- Host communities are in the best position to evaluate local conditions that vary from other host conditions and regulatory minimums may not be able to properly reflect local variances;
- Such standards may be subject to litigation and the attendant delay of litigation if they are deemed to be in excess of statutory authority;
- Establishing minimums through regulation may cause participants to delay negotiating agreements until after the lengthy time required to promulgate regulations;
- Since regulatory minimums are by their nature minimum standards, host communities likely will seek more robust and precise measure than possible in a regulation promulgated after months of deliberation and process; and,
- Once established, regulations take more time to amend, if additional circumstance or information becomes available to warrant a change in any minimum standard.
- The statute establishes procedures so that citizens are properly informed about the host community agreement when they make a decision on the ballot measure.
- The Commission could issue best practices guidelines that hosts communities could consider in negotiating host community agreements.
- Host community agreements could be legally challenged if they do not meet the strictures of the language of the regulatory minimums; and,

- The statute includes numerous minimum requirements that an applicant must meet in order to be licensed.

Arguments that the Commission should issue regulations to ensure that host communities will not execute agreements with applicants that may disadvantage those host communities include:

- The extensive experience many applicants have with such agreements may place host communities at a distinct disadvantage;
- Although resources are available to help host communities evaluate such agreements, host communities still may be at a disadvantage given the significant legal resources, other resources, and experience of applicants;
- The statute provides the Commission with broad power and authority to implement the purposes of the statute.
- Minimum requirements establish a floor for negotiations for host communities;
- Guidelines do not have the force of law and could not be enforced by the Commission;
- Inadequate host agreements may lead host communities to rely on resources from the Community Mitigation Fund, increasing competition for funds which may be needed for surrounding communities or other communities and entities impacted by gaming establishments.

Recommendation: The Commission should consider issuing guidelines regarding the minimum content for host and surrounding community agreements in the very near future, likely prior to the end of January. It is anticipated that some communities may be nearing the conclusion of negotiations with applicants. Such communities may decide to view such guidelines prior to concluding negotiations if the guidelines are available in a matter of weeks. Guidelines could be evaluated by host communities within the context of the particular circumstances of their own communities, given local conditions.

In addition to establishing such guidelines, the Commission should continue to make educational resources available to host and surrounding communities, including best practices analyses available from third parties. Attention should be paid to ensure such best practices documents are objectively based and do not unintentionally impact any one community or potential application more than other communities or potential applications.

Although such guidelines would not need to go through the required process for regulations, it is recommended that the Commission solicit input from applicants, communities, regional planning agencies, and other interested parties before and after such guidelines are drafted.

While the Commission should consider issuing such guidelines instead of regulations as a general rule, the Commission may want to consider some regulations regarding the content of host agreements. For

example, the Commission may want to require that all agreements shall include a provision that makes them subject to regulations or regulatory amendments that may be issued by the Commission.

Further, the Commission should consider requiring provisions that make them subject to amendment if the basis of the mitigation plan is substantially and materially changed. For example, the Commission might consider requiring a provision requiring the renegotiation of an agreement if a mitigation plan is predicated upon the establishment of a new interchange and that interchange is determined to be unbuildable by state or federal authorities.

Statutory Background: MGL c. 23K, §1 states that the "General Court finds and declares that... the power and authority granted to the commission shall be construed as broadly as necessary for the implementation, administration and enforcement of this chapter", that "applicants for gaming licenses and gaming licensees shall demonstrate...a dedication to community mitigation, and shall recognize that the privilege of licensure bears a responsibility to identify, address and minimize any potential negative consequences of their business operations."

MGL c. 23K, §15(8) specifies that applicants shall " provide to the commission a signed agreement between the host community and the applicant setting forth the conditions to have a gaming establishment located within the host community; provided, however, that the agreement shall include a community impact fee for the host community and all stipulations of responsibilities between the host community and the applicant, including stipulations of known impacts from the development and operation of a gaming establishment".

MGL c. 23K, §15(7)requires applicants to "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"

MGL c. 23K, §15(6) requires applicants to "demonstrate to the commission how the applicant proposes to address ...host and surrounding community impact and mitigation issues as set forth in the memoranda of understanding required under this chapter"

MGL c. 23K, §15(14) requires applicants to "provide a community impact fee to the host community."

MGL c. 23K, §15(11) specifies that "not less than $50,000 of the application fee shall be used to reimburse the host and surrounding municipalities for the cost of determining the impact of a proposed gaming establishment and for negotiating community mitigation impact agreements

MGL c. 23K, §15(13) states that "the signed agreement between the host community and the applicant shall be made public with a concise summary, approved by the city solicitor or town counsel, in a periodical of general circulation and on the official website of the municipality not later than 7 days after the agreement was signed by the parties"

MGL c. 23K, §17(d) specifies that the Commission shall hold a public hearing on gaming applicants which "shall provide the commission with the opportunity to address questions and concerns relative to the proposal of a gaming applicant to build a gaming establishment, including …the extent of required mitigation plans and receive input from members of the public from an impacted community."

MGL c. 23K, §18 states that the "commission shall evaluate and issue a statement of findings of how each applicant proposes to advance the following objectives", including, "mitigating potential impacts on host and surrounding communities which might result from the development or operation of the gaming establishment" and "promoting local businesses in host and surrounding communities"

MGL c. 23K, §4(7) states that the Commission may "provide and pay for advisory services and technical assistance as may be necessary in its judgment to carry out this chapter and fix the compensation of persons providing such services or assistance; provided, however, that in exercising its authority under this clause, the commission may receive and approve applications from a municipality to provide for reasonable costs related to legal, financial and other professional services required for the negotiation and execution of host and surrounding community agreements as provided in section 15, and to require that such costs be paid by the applicant for a gaming license;"

MGL c. 23K, §9(13) requires the Commission to prescribe the form of gaming applications which shall include "completed studies and reports as required by the commission, which shall include, but not be limited to, an examination of the proposed gaming establishment's: (i) economic benefits to the region and the commonwealth; (ii) local and regional social, environmental, traffic and infrastructure impacts; (iii) impact on the local and regional economy, including the impact on cultural institutions and on small businesses in the host community and surrounding communities; (iv) cost to the host community and surrounding communities and the commonwealth for the proposed gaming establishment to be located at the proposed location; and (v) the estimated municipal and state tax revenue to be generated by the gaming establishment; provided, however, that nothing contained in any such study or report shall preclude a municipality from seeking funding approval pursuant to clause (7) of section 4 for professional services to examine or evaluate a cost, benefit or other impact"

MGL c. 23K, §61(b) states that the "commission shall administer the [Community Mitigation] fund and, without further appropriation, shall expend monies in the fund to assist the host community and surrounding communities in offsetting costs related to the construction and operation of a gaming establishment including, but not limited to, communities and water and sewer districts in the vicinity of a gaming establishment, local and regional education, transportation, infrastructure, housing, environmental issues and public safety, including the office of the county district attorney, police, fire and emergency services…."

MGL c. 23K, §68(a) states that the "subcommittee [on community mitigation] shall develop recommendations to be considered by the commission to address issues of community mitigation as a result of the development of gaming establishments in the commonwealth including, but not limited to, how funds may be expended from the Community Mitigation Fund, the impact of gaming

establishments on the host community and surrounding communities including, but not limited to, the impact on local resources as a result of new housing construction and potential necessary changes to affordable housing laws, increased education costs and curriculum changes due to population changes in the region, development and maintenance of infrastructure related to increased population and utilization in the region and public safety impacts resulting from the facility and ways to address that impact."

MGL c. 23K, §68(e) states that "each local community mitigation advisory committee may provide information and develop recommendations for the subcommittee on community mitigation on any issues related to the gaming establishment located in its region including, but not limited to: (i) issues of community mitigation; (ii) ways in which funds may be expended from the Community Mitigation Fund; and (iii) the impact of the gaming establishments on the host and surrounding communities."

Question 37 Analysis

Question: Should the Commission set election criteria for a local referendum if there are more than one project on a ballot?

Discussion: MGL c. 23K, §15(13) sets forth a simple standard that no applicant shall be eligible to receive a license unless "a majority of the votes cast in a host community in answer to the ballot question [on the gaming establishment] is in the affirmative." The language of the ballot question required by MGL c. 23K, §15(13) is specific to each gaming establishment.

Under this standard, even though there may be multiple applicants put on the ballot, each applicant must receive a majority vote in order to be considered for licensure by the Commission. Since this is a fairly straightforward standard established by statute, there likely is no need for further criteria by the Commission.

Although MGL c. 23K, §15(13) allows cities with a population of at least 125,000 residents to determine (by choosing whether or not to opt out of this provision) if the election will be held in the ward where the gaming facility is to be located or held citywide, it is unlikely that a community could vote to subject one application to a ward vote and one application to a community vote. MGL c. 23K, §15(13) states that the vote in such a city shall be in the ward "unless a city opts out of this provision by a vote of the local governing body." If a community chooses to have both a ward vote and a citywide vote, it arguably has not voted to opt out of the provision for a ward vote (since a ward vote will also be occurring).

Recommendation- It is recommended that no further election criteria are necessary unless the Commission becomes aware of a situation that is meant to unfairly prejudice any applicant's ability to receive a fair consideration through the local ballot.

.....

Statutory Language: MGL c. 23K, §15(13) states that "[n]o applicant shall be eligible to receive a gaming license unless the applicant ....shall...have received a certified and binding vote on a ballot question at an election in the host community in favor of such license; provided, however that a request for an election shall take place after the signing of an agreement between the host community and the applicant; provided further, that upon receipt of a request for an election, the governing body of the municipality shall call for the election to be held not less than 60 days but not more than 90 days from the date that the request was received; provided further, that the signed agreement between the host community and the applicant shall be made public with a concise summary, approved by the city solicitor or town counsel, in a periodical of general circulation and on the official website of the municipality not later than 7 days after the agreement was signed by the parties; provided further, that the agreement and summary shall remain on the website until the election has been certified; provided further, that the municipality that holds an election shall be reimbursed for its expenses related to the election by the applicant within 30 days after the election; provided further, that the commission shall deny an application for a gaming license if the applicant has not fully reimbursed the community; provided further, that, for the purposes of this clause, unless a city opts out of this provision by a vote of the local governing body, if the gaming establishment is proposed to be located in a city with a population of at least 125,000 residents as enumerated by the most

recent enumerated federal census, "host community" shall mean the ward in which the gaming establishment is to be located for the purpose of receiving a certified and binding vote on a ballot question at an election; provided further, that, upon the signing of an agreement between the host community and the applicant and upon the request of the applicant, the city or town clerk shall set a date certain for an election on the ballot question in the host community; provided further, that at such election, the question submitted to the voters shall be worded as follows: "Shall the (city/town) of _____ permit the operation of a gaming establishment licensed by the Massachusetts Gaming Commission to be located at _____[description of site]_____? YES _____ NO _____" ; provided further, that the ballot question shall be accompanied by a concise summary, as determined by the city solicitor or town counsel; provided further, that if a majority of the votes cast in a host community in answer to the ballot question is in the affirmative, the host community shall be taken to have voted in favor of the applicant's license; provided further, that, if the ballot question is voted in the negative, the applicant shall not submit a new request to the governing body within 180 days of the last election; and provided further, that a new request shall be accompanied by an agreement between the applicant and host community signed after the previous election; provided further, that if a proposed gaming establishment is situated in 2 or more cities or towns, the applicant shall execute an agreement with each host community, or a joint agreement with both communities, and receive a certified and binding vote on a ballot question at an election held in each host community in favor of such a license;"

Question 31 Analysis

I. Introduction

This memorandum will address the issues raised by question 31 of the Massachusetts Gaming Commission's Framework for Addressing Policy Questions. Question 31 asks: Will the Commission promulgate additional ethics or reporting standards for applicants and/or related municipalities? This memorandum will also, in part, address the issue as it pertains to licensees.

In making a determination as to whether additional ethics or reporting standards should be imposed upon applicants, licensees, and municipal employees and officials we must first review the existing governing laws. There are 2 primary sources: (1) G.L. c.23K, and (2) the state ethics laws (G.L. c.268A, G.L. c.268B, and 950 CMR). A number of the most relevant provisions will be set forth in the memorandum for purposes of illustrating the comprehensive nature of the statutory scheme that the Legislature crafted in an effort to ensure the highest level of integrity for the subject parties. It is also worthwhile to note that where the Legislature did include a mandate that the Commission draft an enhanced code of ethics for itself and its employees, it did not include such a mandate relative to applicants for licensure and affected municipal officials. See G.L. c.23K, §3(m). Instead, it appears to have supplemented the existing ethics laws with gaming specific provisions.

For these reasons, and those set forth below, it is recommended that the Commission focus on the enforcement of ethics standards found in the State Ethics Law and new standards put in place in the Gaming Act rather than issuing new broad based ethics guidelines for applicants, licensees, and involved municipal official. While there may be need for some exceptions to this general recommendation, it is recommended that any new standards be evaluated within the context of the coverage of existing law.

II. Standards for Applicants and Licensees

At present, there are comprehensive restrictions and obligations imposed upon applicants for a gaming license and licensees. The following list, though not all-inclusive, identifies some of the principal applicable provisions.

A. *G.L. c.23K, Section 13(b).* (continuing duty of applicants/licensees to cooperate)
B. *G.L. c.23K, Section 13(c).* (duty of applicant/licensee to provide full and truthful information)
C. *G.L. c.23K, Section 21(a)(1).* (obligation of licensees to abide by statements made in application)
D. *G.L. c.23K, Section 21(a)(2).* (obligation of licensees to comply with all laws of the Commonwealth)
E. *G.L. c.23K, Section 21(a)(5).* (licensee may not change business governing structure without Commission approval)
F. *G.L. c.23K, Section 21(a)(6).* (licensee may not operate, invest in or own, in whole or in part, another gaming licensee's license or gaming establishment)
G. *G.L. c.23K, Section 21(a)(7).* (obligation of licensee to cooperate with the commission and the attorney general in all gaming-related investigations)

H. *G.L. c.23K, Section 21(a)(8). (*obligation of licensee to cooperate with the commission and the attorney general with respect to the investigation of any criminal matter)

I. *G.L. c.23K, Section 21(a)(10).* (obligation of licensee to inform the commission of any action which the gaming licensee reasonably believes would constitute a violation of chapter 23K, and shall assist the commission and any federal or state law enforcement agency in the investigation and prosecution of such violation)

J. *G.L. c.23K, Section 21(b).* (no person shall transfer a gaming license, a direct or indirect real interest, structure, real property, premises, facility, personal interest or pecuniary interest under a gaming license or enter into an option contract, management contract or other agreement or contract providing for such transfer in the present or future, without the notification to, and approval by, the commission)

K. *G.L. c.23K, Section 25(d)* (no gaming licensee shall alter its minimum internal controls until such system of minimum controls is approved by the commission)

L. *G.L. c.23K, Section 25(g)* (no key gaming employee or any other gaming official who serves in a supervisory position shall solicit or accept a tip or gratuity from a player or patron in the gaming establishment where the employee is employed)

M. *G.L. c.23K, Section 27(f).* (Commission to draft regulations prohibiting licensees from accepting EBT/public assistance funds or extending credit to individuals on income based public assistance)

N. *G.L. c.23K, Section 28.* (governing complimentary items and services)

O. *G.L. c.23K, Section 39(e).* (criminal provision dealing with use of cheating and swindling devices by licensees and employees at a gaming establishment)

P. *G.L. c.23K, Section 46.* (prohibiting an applicant from making contributions to municipal, county, or state office holders, candidates, or groups supporting candidates)

Q. *G.L. c.23K, Section 47.* (requiring a biannual disclosure of all political contributions or contributions in kind made by an applicant for a gaming license to a municipality or a municipal employee, of the host community of the applicant's proposed gaming establishment, and promulgation of regulations by the OCPF)

R. *G.L. c.268A, Section 2(a).* (illegal to give, offer, or promise anything of value to a state, county or municipal employee to influence an official act or omission)

S. *G.L. c.268A, Section 3(a).* (illegal to give, offer, or promise anything of substantial value to a state, county or municipal employee for or because of an official act or to influence an official act)

T. *G.L. c.268A, Section 4(b).* (illegal to give, offer, or promise compensation to a state employee in any particular matter in which the commonwealth is a party or has a direct and substantial interest)

U. *G.L. c.268A, Section 17(b).* (illegal to give, offer, or promise compensation to a municipal employee in any particular matter in which the city or town is a party or has a direct and substantial interest)

III. Standards for Municipal officers and employees

The state ethics laws (G.L. c.268A, G.L. c.268B, and 950 CMR) apply to the acts and omissions of municipal officials and employees. The following list, though not all-inclusive, contains some of the principal applicable provisions.

A. *G.L. c.268A, Section 2(b).* (illegal for municipal employee to accept anything of value intended to influence an official act or omission)

B. *G.L. c.268A, Section 3(b).* (illegal for municipal employee to accept anything of substantial value for or because of an official act or to influence an official act)

C. *G.L. c.268A, Section* 5(b½). (illegal for a former municipal employee who participated as such in general legislation on expanded gaming in the commonwealth or in the implementation, administration or enforcement of chapter 23K, to become an officer or employee of, or who acquire a financial interest in, an applicant for a gaming license or a gaming licensee under said chapter 23K within one year after his last municipal employment has ceased)

D. *G.L. c.268A, Section 6(a).* (any public official who in the discharge of his official duties would be required knowingly to take an action which would substantially affect such official's financial interests, unless the effect on such an official is no greater than the effect on the general public, shall file a written description of the required action and the potential conflict of interest with the state ethics commission)

E. *G.L. c.268A, Section 17(a).* (no municipal employee shall directly or indirectly receive or request compensation from anyone other than the city or town or municipal agency in relation to any particular matter in which the same city or town is a party or has a direct and substantial interest)

F. *G.L. c.268A, Section 19. (*generally illegal for municipal employee to participate as such an employee in a particular matter in which to his knowledge he, his immediate family or partner, a business organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment or has a financial interest)

G. *G.L. c.268A, Section 23(b*)(2). (obtaining unwarranted privileges based on position)

H. *G.L. c.268A, Section 23(b*)(3). (impermissible to act in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person)

I. *G.L. c.268B, Section 5*. (obligation of all public employees in major policymaking positions and officials to file statement of financial interest)

IV. Analysis and Recommendation

Given the existing comprehensive set of statutory prohibitions and obligations placed upon gaming license applicants, gaming licensees, and municipal officials and employees it is difficult to identify specific areas in need of enhancement at this time. Where the Legislature did mandate the creation of an enhanced code of ethics for commissioners and employees, but did not do so for others, and where it enacted specific statutory enhanced ethics provisions, the promulgation of an enhanced code of ethics by the Commission for gaming license applicants, gaming licensees, and municipal employees and officials may be beyond the Legislative intent behind the *Act Establishing Expanded Gaming in the*

Commonwealth. Further, we must consider the difficulty in effectively enforcing an enhanced code of ethics upon municipal employees and officials who are already subject to vigorous oversight by the State Ethics Commission.

Clearly, the prospective regulations will impose a robust set of operational and administrative standards and obligations upon gaming licenses. To that end, as it applies to licensees, this opinion is limited to purely ethics based requirements. Certainly, as the process evolves, however, it may become necessary to create further ethical restrictions or obligations on any party subject to the Commission's regulations.