MASSACHUSETTS GAMING COMMISSION
PUBLIC MEETING #184

March 24, 2016
10:00 a.m.
Massachusetts Gaming Commission
101 Federal Street, 12th Floor
Boston, MA

NOTICE OF MEETING and AGENDA

March 24, 2016

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:

Thursday, March 24, 2016
10:00 a.m.
Massachusetts Gaming Commission
101 Federal Street, 12th Floor
Boston, MA

PUBLIC MEETING - #184

1. Call to order

2. Ombudsman Report – John Ziemba
   a. Mass Gaming & Entertainment, LLC - Response to Tribal Presentation

3. Administration – Ed Bedrosian, Executive Director
   a. Plainridge Park Casino Reconciliation Update – Commissioner Zuniga

4. Workforce, Supplier and Diversity Development – Jill Griffin, Director
   a. Diversity Goal/Business Technical Assistance Grants Program Update

5. 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 "Massachusetts Gaming Commission Meeting" at www.massgaming.com and emailed to: regs@sec.state.ma.us, melissa.andrade@state.ma.us.

3/22/16
DATE

Stephen P. Crosby, Chairman

Date Posted to Website: March 22, 2016 at 10:00 a.m.

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March 22, 2016

Mr. Stephen Crosby, Chair
Massachusetts Gaming Commission
101 Federal Street, 12th Floor
Boston, MA 02110

In Re: Region C – Mass Gaming & Entertainment, LLC
Public Hearing March 24, 2016

Dear Chairman Crosby:

On behalf of Mass Gaming & Entertainment, LLC, we respond to the February 29, 2016 letter from Todd & Weld LLP in which the Mashpees contend that the Massachusetts Gaming Commission ("MGC") (a) lacked the authority under § 91 of the Expanded Gaming Act to issue a request for commercial license applications in Region C in April 2013, and (b) currently lacks the authority to issue a Category 1 license for the Brockton casino-resort. The Mashpees' twin contentions in this regard—amplified by Mashpee Chairman Cedric Cromwell at the March 15 hearing—are wrong as a matter of law.

We take the opportunity also to respond to comments offered at the same March 15 hearing by one of the Mashpees' outside counsel, Arlinda Locklear, regarding the *Carcieri* issue in the citizens' lawsuit.

Finally we address the dramatically different litigation timelines presented by the already-filed citizens' lawsuit, challenging the Secretary's unprecedented land-into-trust decision, and the Mashpees' potential lawsuit against the MGC over its authority to issue a commercial license in Region C. The former action is conservatively estimated to take four to five years in federal court, and could last the better part of a decade. In contrast, the straightforward question of law presented in any lawsuit by the Mashpees would likely be addressed through a dispositive motion to dismiss at the outset of the case that likely would end the litigation in the trial court within a few months.

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EXECUTIVE SUMMARY

I. The MGC Has Clear Authority to Act as it Has in Region C.

A. Authority to Act Under The Expanded Gaming Act

The tribe's restrictive view of the MGC's authority to act is refuted by the plain language of § 91(e) as demonstrated by the MGC's reading of the statute over the past four years. To the extent there may have been a general understanding that the Mashpees would be given a "fair shot" at developing a possible tribal casino in Region C, the statute does not give—and could not legally confer—a perpetual free ride or set aside as the Mashpees' claim. Mashpee Chairman Cromwell is simply wrong in "paraphrasing" the statute to say, "Region C belongs to the tribe." (Public Hearing, March 15, 2016.)

Section 91(e) set two explicit milestones against which to judge the Mashpees' progress in Region C (i.e., the twin requirements of a state-tribal compact by a date certain and having lands in trust), and *required* the MGC to affirmatively act to open Region C to commercial license applications and bids should either of these explicit milestones not be met. The Legislature set these early mandatory triggers for MGC to act in Region C to prevent Region C from falling behind Regions A and B if the Mashpees faltered with their casino plans. By giving those specific directives to act, the Legislature did not otherwise limit the MGC's broad discretion to act in the best interests of the Commonwealth and Region C by issuing an RFA for commercial license applications at whatever time it deemed appropriate.

Furthermore, the U.S. Secretary of the Interior's decision to disapprove the July 2012 gaming compact nullified it and prevented the compact from satisfying § 91(e)'s milestone that the tribe secure a gaming compact by July 2012. The Secretarial disapproval came on October 12, 2012 and was a thorough repudiation of the purported agreement. That agreement never took effect and it never became a compact in the eyes of the law. The Secretary's disapproval ushered in more than a year of delays as the Mashpees and then-Governor Patrick addressed the substantial defects in the compact that led the Secretary to disapprove it. The Mashpees and the Governor had to go back to the drawing board to negotiate an entirely new compact and obtain all new approvals from the Massachusetts Legislature and Secretary of the Interior, a process that extended into February 2014. The Mashpees' failure to timely secure a legally effective gaming compact in 2012 caused precisely the kind of prolonged delays in Region C that the mandatory triggers were designed to prevent, and expressly triggered the MGC's mandatory duty to issue an RFA in Region C or, at the very least, provided the MGC ample cause to move forward with commercial licensing in Region C as a matter committed to the MGC's discretion.

B. The Continuing Absence of a Valid Gaming Compact

In tracing the Mashpees' problems with securing federal approval of their gaming compact we looked not only at the October 12, 2012 disapproval of the first compact but also the Secretary's publication on February 3, 2014 of what was called a "notice of taking effect" with respect to the second compact. The second compact was signed by Governor Patrick and submitted to the Secretary on November 15, 2013. The Secretary intentionally took no action within the 45-day review period that is provided for the Secretary to either approve or disapprove compacts. That purposeful inaction (*see, infra*, pp 10-11) made the second compact "take effect" by operation of law. The compact was thus "deemed approved" by operation of law.

We then looked at the language of the second compact, specifically Part 22 governing the effective date of the compact, i.e., what date the parties selected for the compact to become legally effective. Part 22 states that the compact will become effective only if the Secretary publishes a "notice of approval in the Federal Register."[1] As explained in detail in Section C below, when the Secretary publishes a notice of approval it means the Secretary has formally approved the compact within the 45-day window and is "vouching" for the compact's legality under federal law. The Commonwealth and the Mashpees expressly agreed to secure this formal Secretarial approval; it offers critical legal advantages over the "deemed approved" status that arises by operation of law when the Secretary takes no action. The parties, in Part 22, unambiguously made the compact's effective date contingent on securing the Secretary's affirmative approval. They did so not only by specifically citing the statutory provisions underlying that official, formal vouching but also by omitting any reference to the "deemed approved" process and the statutory provisions underlying that distinct decision path.

The "notice of approval" publication requirement stated in Part 22 was never satisfied because the Secretary did not approve the compact within the 45-day period and instead intentionally let the period lapse.

Thus, the second compact has never taken effect by its own terms. It is a legal nullity just as much as the first compact. What the Secretary issued in 2014—a "notice of taking effect" following the Secretary's inaction on the Mashpee's compact—is legally distinct from the Secretarial action of formally approving the compact within the review period. Only the latter represents a formal endorsement of the compact by the Secretary, which a court would review

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[1] Part 22 reads:

> This Compact shall become effective upon the publication of a notice of approval by the United States Secretary of the Interior in the Federal Register in accordance with 25 U.S.C. §§ 2710(d)(3)(B) and 2710(d)(8)(D).

deferentially, and it was only that formal endorsement—and official publication of a notice of approval to that effect in the Federal Register—that the parties agreed would satisfy Part 22 and cause the compact to take effect.

The fact that the Mashpees still lack a legally valid and enforceable compact impacts the proceedings here in two respects. First, for the immediate purposes of analyzing the MGC's authority to act, the compact is a legal nullity and all arguments based on Part 2.6 of the compact can be disregarded altogether. Second, the fact that the Mashpees and the Commonwealth need to renegotiate the compact to address, among other defects, the issue of the missing secretarial approval, raises the specter of further delays for the proposed tribal casino development. It is not at all clear what the new Governor might be prepared to renegotiate at this point and what the Legislature might be prepared to approve, even if the political will exists to resume negotiating with the Mashpees. A new Governor is in office, and many new members have been elected to the Legislature since 2013, which only adds to the uncertainty. The absence of a gaming compact removes an essential component of the Mashpees' plan to conduct Indian gaming. Without a valid gaming compact, the Mashpees have no legal right to engage in Class III gaming under IGRA, which covers casino-style games including table games and slot machines.

C. Even If the Compact Were Valid (It is Not) The MGC's Authority to Act in Region C is Undiminished.

1. Part 26 Does Not Establish a Set Aside for the Mashpees.

Finally, even if the second compact were somehow legally valid (which it is not), and Part 2.6 were relevant to consider in the analysis of the MGC's authority to issue a commercial license in Region C, the cited Part of the compact does not support the Mashpees' arguments for the following reasons:

(1) Part 2.6 purports to be an accurate statement of the terms contained in § 91(e) but in fact inaccurately translates and misstates the terms in § 91(e); to the extent the Mashpees now argue that Part 2.6 "expands on" the terms in § 91(e), that is not permitted—an executive agreement cannot modify a statute as a matter of law;

(2) Part 2.6 does not set out an enforceable term (see below, regarding being offered for "background only"); the enforceable terms are found in Part 9. Specifically, Part 9.2.1.4 of the compact reflects the parties' express contemplation of the MGC awarding a Category 1 commercial license in Region C. This refutes the claimed exclusive set aside for the Mashpees.

(3) Part 2.6 speaks only to the MGC's authority to issue an RFA; the MGC long ago decided to issue an RFA in Region C in 2013; Part 2.6 does not

stand, and cannot stand, as a barrier to the MGC now issuing a commercial license in Region C;

(4) The provisions in Part 2 (including Part 2.6) are presented for "background only" and, unlike the statutory provisions in § 91(e), do not establish enforceable obligations as a matter of law.

2. Even if Part 26 Supported Some Type of "Exclusive" Time-Limited "Leg Up" or "Fair Shot," the Record Shows The Mashpees Received It.

Even if the Part 2.6 were valid, enforceable, and established a permissible exclusive set-aside that barred both issuance of an RFA in 2013 and issuance of a commercial license in Region C until the Mashpees faltered, the tribe's failure to secure a valid and enforceable gaming compact by the end of December 2012 necessarily meant that the Mashpees had faltered and that any "exclusive" period of having a "leg up" was over.

Of course, the Mashpees' insist that the statute and compact "gave Region C to the tribe"—without imposing any time limits, no matter how significantly the tribe faltered and no matter what detriment occurred to the Commonwealth and Region C—even though that position is contradicted by the language of § 91, and unsupported by the text of the compact, and if found in either document would constitute an impermissible racial set-aside under the First Circuit's decision in *KG Urban*.

II. The Supreme Court's decision in *Carcieri*, reversing the land-into-trust decision for the Rhode Island Narragansetts, another Eastern tribe under state jurisdiction in 1934, dooms the Mashpees' land-into-trust decision here.

The Supreme Court's decision in *Carcieri* compels reversal of the Secretary's decision to take land into trust for the Mashpees. If the word "now" means "now" in the Indian Reorganization Act of 1934 ("IRA"), as the Supreme Court held in *Carcieri,* then "such members" means "such members" —i.e., members of any recognized tribe under federal jurisdiction in 1934—as plainly set forth in the same Act. There is no ambiguity in the language; this is an issue of reading comprehension, not statutory interpretation. The Secretary of the Interior cannot fabricate ambiguity in a statute to justify an ungrammatical reading. No deference is paid to an agency's ungrammatical reading of plain statutory text. And the record shows the Mashpees, like the Rhode Island Narragansetts in *Carcieri*, were under state jurisdiction and not federal jurisdiction in 1934. *Carcieri* stands as much of a barrier to the Mashpees as it did to the Narragansetts. Both category 1 and category 2 definitions of "Indian" in the Indian Reorganization Act of 1934 ("IRA") require membership in a recognized tribe under federal jurisdiction in 1934. The Mashpees are ineligible to have lands taken into trust under either definition because they were not a federally recognized tribe under federal jurisdiction in 1934.

Of course, the Secretary's decision to eschew the traditional definition of Indian in the IRA in favor of this unprecedented reading of the second definition demonstrates the Secretary's own recognition that the Mashpees are not eligible to have lands taken into trust under the IRA if the Act requires the Mashpees to have been under federal jurisdiction in 1934. That is the whole reason for the Secretary to torture the language of the second definition to try to free the Mashpees from that disabling statutory requirement.

The Mashpees' outside lawyer is simply wrong in arguing that the required grammatical reading of the IRA renders meaningless the language contained in category 2. The role of category 2 was explained by Indian Commissioner John Collier in 1936. (As explained in our November 3, 2015 to the MGC, Commissioner Collier is considered by the Supreme Court to be a leading authority on the IRA, having served as its principal architect.) Collier explained that the second definition of Indian under the IRA served a limited purpose, namely, to bring within the Act Indians who were (a) residing on reservations as of June 1, 1934 and (b) were members of a recognized tribe then under federal jurisdiction, but (c) were not at the time listed on the tribal rolls either because they were too young or otherwise had been overlooked. This was not intended to be an open-ended class that would extend IRA benefits indefinitely into the future for a vast universe of Indians (born and unborn), including Indians like the Mashpees who were then under state jurisdiction and came under federal jurisdiction decades later. Reading it in that ungrammatical fashion completely guts the temporal limitation in *Carcieri*.

III. The Timeline for the Federal Land-into-Trust Litigation Far Outstrips The Litigation Timeline for Any Potential Mashpee Lawsuit Against the MGC.

The Mashpees have explicitly threatened to take legal action against the MGC if it issues a commercial license in Region C. That threat, made both in writing and verbally at the March 15 public hearing, illustrates a serious misunderstanding of the Expanded Gaming Act and the First Circuit's decision in *KG Urban*. At the most, the Mashpees were entitled to a "fair shot" and received it in the form of 17-month head start before the RFA was issued in Region C. Any lawsuit against the MGC presents a straightforward question as to the scope of the MGC's statutory authority and would be easily defended, and most likely ended by a dispositive motion to dismiss brought at the outset of the case.

In contrast, the Secretary's record of decision for the Mashpees land acquisition required three years of legal and factual study and analysis by two federal agencies before the Secretary issued her unprecedented decision, and it will likely take much longer than that to work its way through the courts. It will probably take longer for the federal government to assemble and produce the administrative record in federal court in the citizens' lawsuit—the preliminary step in that litigation—than it will for the trial court to dismiss any misguided lawsuit that the Mashpees might bring against the MGC.

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ANALYSIS

I. The MGC Has Legal Authority to Issue A Commercial License in Region C to Mass Gaming.

The tribe's view of the MGC's lack of authority to act for the benefit of the Commonwealth and Region C is without merit for many reasons. We address in turn (1) the Commission's authority to act under the Expanded Gaming Act; (2) the MGC's prior analysis of its authority to act given the language in § 91(e); and (3) why the compact does not preclude the award of a commercial license now in Region C.

A. The Expanded Gaming Act

The Expanded Gaming Act—not the state-tribal compacts—determines the MGC's authority to act in Region C. Section 91(e) states as follows:

> Notwithstanding any general or special law or rule or regulation to the contrary, if a mutually agreed-upon compact has not been negotiated by the governor and Indian tribe or if such compact has not been approved by the general court before July 21, 2012, the commission shall issue a request for applications for a category 1 license in Region C pursuant to chapter 23K of the General Laws no later than October 31, 2012; provided, however, that if at any time on or after August 2, 2012 the commission determines that the tribe will not have land taken into trust by the United States Secretary of the Interior, the commissioner shall consider bids for a category 1 license in Region C under said chapter 23K.

As Commissioner McHugh correctly noted in his December 2012 memorandum to the MGC, § 91(e) provides a legislative command to make sure Region C did not fall behind while the Mashpees pursued their proposal to develop a tribal casino. That was a significant concern because the tribe's plans for a tribal casino had been long delayed by its failure to convince the Secretary to take lands into trust, dating back to 2007, with the *Carcieri* decision in 2009 apparently standing as an insurmountable barrier.

In light of the uncertain prospects for a tribal casino, the Legislature, when it enacted § 91(e) in 2011, set out two alternative mandatory triggers that would *compel* the MGC to move forward with commercial licensing in Region C. Specifically, the statute *requires* the MGC to issue an RFA for a Category 1 license in Region C should the compact not be approved by the General Court before July 31, 2012, and *requires* the MGC to consider bids in Region C if the MGC determines that the tribe will not have land taken into trust. Significantly, the Legislature did not include in § 91(e) any prohibition on the MGC acting, in its discretion, to issue an RFA for a Category 1 license application in Region C before either trigger was pulled and the MGC was *required* to act. Had the Legislature wanted to give the Mashpees a "free pass" in perpetuity —i.e., a true racial set aside without any prospect of competition, stating that no

commercial license applications could be received in Region C before the tribal casino was declared legally non-viable (by either the tribe's failure to secure an enforceable state-tribal gaming compact by a date certain or have lands acquired in trust without regard to how long it might take the tribe to exhaust its options), the Legislature would have used language to express that very different concept. Of course, that other language would have amounted to a true exclusive set aside which would be found unconstitutional under *KG Urban LLC v. Patrick*, 693 F.3d 1, 6 (1st Cir 2012).

In fact, § 91(e) contains no prohibitory language whatsoever much less a clear directive to the MGC to stand down on any and all commercial casino license applications unless and until the tribe has exhausted its options. The Legislature did not intend to hamstring or handcuff the MGC's discretionary authority to issue a Request for Applications (RFA) for a Category 1 license in Region C, if such an RFA would serve the best interests of the Commonwealth and Region C, in the MGC's judgment. The Expanded Gaming Act plainly authorizes the MGC to issue a commercial license in Region C to a well-qualified commercial license applicant at any point, without regard to the status of a tribal casino in Region C. At most, there may have been a shared understanding that the Mashpees would receive a "fair shot" at developing a tribal casino. That "fair shot" might or might not result in the tribal casino being the only casino in Region C. But giving the Mashpees a necessarily time-limited "fair shot" did not confer a right on the Mashpees to pursue all of its options without competition, without any time constraints, and no matter how the tribe faltered along the way. The MGC correctly determined that the statute did not leave it handcuffed on the sidelines, unable to act for the benefit of Region C and the Commonwealth, when the tribe failed to secure Secretarial approval of the first compact in 2012.

B. The MGC Correctly Determined That The Expanded Gaming Act Authorized It To Issue A Request for Commercial License Applications in Region C in 2013 and Authorizes The Commission to Award a Commercial License in Region C Now.

Beginning in December 2012, and continuing through April 18, 2013, the MGC analyzed and discussed its authority under M.G.L. ch. 194, § 91(e) to issue an RFA for a commercial license in Region C, as well as its authority to issue a commercial license in that Region. Section 91(e) states that the MGC "shall" issue an RFA for Region C if a compact between the Commonwealth and the tribe is not approved by the Legislature by July 31, 2012, as well as "shall" consider bids if the MGC determines that land will not be taken into trust for the tribe.

The MGC reached the conclusion that it *did* have the authority to issue an RFA for a commercial license in Region C, and that it ultimately has the authority to issue a commercial license if it deems such issuance to be in the Commonwealth's best interests. More specifically, after careful analysis and discussion, the MGC reached the following conclusions: 1) § 91(e)

was intended to allow the Mashpees a leg up in a casino in Region C, but it also set firm dates and conditions that would trigger the MGC's obligation to issue a commercial RFA for Region C; 2) the tight deadlines in § 91(e) reflect a clear Legislative intent that Region C (southeastern Massachusetts) not be left behind in the statewide pursuit of jobs and income— if the Mashpees failed to meet the deadlines, the MGC was required to pursue commercial bids to allow Region C to reap the economic benefits of a casino project; 3) § 91(e) does not prohibit the MGC from issuing a commercial RFA in Region C at any time—it merely set deadlines by which the MGC *was obligated* to issue a RFA, but did not limit the MGC's ability to do so at its own discretion; 4) § 91(e) does not contain an "exclusivity" provision, i.e., there is nothing in the statute that provides the Mashpees with the exclusive right to build a casino in Region C; 5) the MGC has discretion to issue a commercial RFA in Region C at any time; and 6) the MGC has discretion to issue a commercial license in Region C if it determines that is in the best interests of the Commonwealth. (MGC Public Meetings on December 4, 2012 [Meeting Transcript, pp. 40-43; 50-52]; December 18, 2012 [Meeting Transcript, pp. 44-45; 55-58]; April 4, 2013 [Meeting Transcript, pp. 193-196]; and April 18, 2013 [Meeting Transcript, pp. 104-106]).

The MGC also discussed the fact that the first compact executed by the Commonwealth and the Mashpees contained a "background" provision asserting that the MGC will not pursue a RFA for a Category 1 license in Region C "unless and until" it determines that land will not be taken into trust for the Mashpees. *See* Compact I (Section 2.6). The MGC expressly considered this specific language in the compact, and concluded that it does not accurately reflect or summarize the provisions of § 91(e). The MGC also noted that the compact was never approved by the federal government, and was of no legal effect. The MGC further noted that the compact contained provisions that addressed the issuance of a commercial license in Region C, and gave the Mashpees the right to terminate the Compact if such a license was issued. See Compact, Part 9.2.4. The MGC concluded that § 91(e) does not provide the tribe with the exclusive right to build a casino in Region C if land is taken into trust, and further concluded that contrary language in the Compact did not alter the clear statutory language or limit the MGC's discretion to issue a commercial license in Region C in any way. (MGC Public Meetings on December 4, 2012 [Meeting Transcript, pp. 40-43]; April 4, 2013 [Meeting Transcript, pp. 193-195]).

On April 18, 2013, after carefully considering all these issues, the MGC unanimously voted to open Region C to commercial applications for a Category 1 license. The MGC indicated that it would decide whether to issue such a license after taking into account the economic and other circumstances existing at the time of the licensing decision in light of the relevant statutory objectives governing gaming in the Commonwealth. (MGC Public Meeting on April 18, 2013 [Meeting Transcript, pp. 105-106]).

On September 24, 2015, the MGC noted that the federal government had now issued a decision taking land into trust on the tribe's behalf. The MGC reiterated its prior conclusion

that nothing in § 91(e) prohibits the Commission from issuing a commercial RFA for Region C at any time or precludes it from issuing a commercial license for that Region if it deems such issuance to be in the Commonwealth's best interests. The MGC concluded that it would proceed as planned, and that it would look at, consider and act on any pending RFA for a Category 1 license in Region C. (MGC Public Meeting on September 24, 2015 [Meeting Transcript, pp. 123-124; 130]).

Attached here as Appendix A is a summary of some of the key statements made by the MGC regarding its decision to issue a commercial RFA for Region C.

C. The State-Tribal Compact Does Not Preclude the Commission from Issuing the Region C License.

1. The Gaming Compact is Unenforceable By its Own Terms.

a. The Secretary's process of approving state-tribal gaming compacts: "approved" versus "deemed approved" compacts

As noted in the Executive Summary, the Secretary of the Interior has a 45-day review period within which to review the legality of any state-tribal compacts submitted to it for approval. The Secretary can take formal action within that period to either approve or disapprove the compact. If affirmatively approved during that review period, the approval is officially communicated by the Secretary by issuing a "notice of approval" published in the Federal Register. *See* 25 U.S.C. § 2710(d)(3)(B).[2] If the Secretary takes no action within the review period, and allows it to expire without either approving or disapproving the compact, the compact will take effect as a matter of law. 25 U.S.C. § 2710(d)(3)(C).[3] In that case the compact is "deemed approved" or "considered to have been approved." The Secretary communicates this default result by publishing a "notice of taking effect" in the Federal Register.

A statute directs the Secretary to publish the results of her decisions following review of state-tribal gaming compacts. That directive is contained in 25 U.S.C. § 2710(d)(3)(D), which

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2 Section 2710(d)(3)(B) provides:

> Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

3 § 2710(d)(8)(C) provides:

> If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter.

covers both the publication requirement for formally approved compacts under § 2710(d)(3)(B) and "deemed approved" compacts under 25 U.S.C. § 2710(d)(3)(C). But these two legally distinct Secretarial decision paths produce legally distinct publication notices: the Secretary's affirmative approval of a compact is called an "approval" and requires publication of a "notice of approval," while the absence of Secretarial approval and default status of "deemed approved" requires publication of a "notice of taking effect." § 2710(d)(3)(D),

The significance of these two different decision paths and treatments of compacts was explained by Assistant Secretary of Indian Affairs Kevin Washburn, when he testified before Congress in 2014.

> The CHAIRMAN. IGRA has a provision that if the Secretary doesn't approve an act within a certain period of time, it is deemed approved. Has that ever happened?
>
> Mr. WASHBURN. Absolutely. And let me explain why. If I affirmatively approve a compact, I am basically vouching for its legality. I am saying, this compact is okay. If instead we deem it approved, it is deemed approved only to the extent it is consistent with the Indian Gaming Regulatory Act . . .We sometimes have concerns about the legality of a compact . . .In those circumstances, we sometimes will allow the compact to become deemed approved so we don't have to decide on that question.
>
> In essence what we are doing in that situation is punting it to the parties or the courts to answer those questions. We are loathed to disapprove a compact. We don't like to do it.
>
> Transcript of Hearing Before the Committee on Indian Affairs, U.S. Senate (S. Hrg. 113-502) "Indian Gaming: The Next 25 Years" (July 23, 2014). Transcript available at https://www.gpo.gov/fdsys/pkg/CHRG-113shrg91664/html/CHRG-113shrg91664.htm.

The two distinct Secretarial decision paths and publication routes—formal approval within the 45-day period and default "deemed approved" by Secretarial inaction—are not legally fungible. The Secretary's formal statement that the compact is "approved," together with official publication in the form of a "notice of approval" in the Federal Register, carries with it the Secretary's affirmative finding that the compact is legal and does not violate federal law. This has legal, practical and political consequences because it means the Secretary is "vouching" for the compact's legality. Clearly, both the Commonwealth and the Mashpees would want this designation, as that would mean that in any litigation over the compact's enforceability, the court will treat the Secretary's findings under the *Chevron* deference principles, and the parties can defend the agreement by saying that they did everything within their power to secure federal approval.

In contrast, a compact that is "deemed approved" by operation of law carries with it no Secretarial findings. The Secretary is not "vouching" for the compact's legality but rather is expressing some level of doubt about its legality and is "punting" the agreement back to the parties and the courts to determine its enforceability. Obviously, neither the Commonwealth nor the Mashpees would desire this approval by default as this means in any litigation the court has no Secretarial findings to review and no deference is owed. *See Amador Cty., Cal. v. Salazar*, 640 F.3d 373, 383 (D.C. Cir. 2011) (inaction by Secretary within 45 review period is reviewable under APA but there is no record to review and thus no findings by Secretary to evaluate). This requires essentially de novo review in the district court where the parties are free to contest the legality of the compact under IGRA and other federal laws. A court will rightly question why the parties did not address the Secretary's concerns and secure formal approval of the compact. Thus, not only is the language of the compact clear, but such language clearly comports with the motive and intent of the parties in their agreement that formal approval from the Secretary would be a condition precedent to the effectiveness of the compact.

Moreover, at the heart of the current question about the compact's enforceability is this important distinction between affirmative Secretarial "approval" during the review period and the inferior status of "deemed approved" by operation of law when the Secretary fails to take any action.

b. The second compact by its own terms becomes legally effective only if the Secretary affirmatively "approves" it and publishes a "notice of approval" in the Federal Register, which did not happen.

Considering the motives of the Commonwealth and Mashpees, both the first and second compacts predictably contain the same express condition precedent clause that must be satisfied in order for the compact to become effective:

> This Compact shall become effective upon the publication of notice of approval by the United States Secretary of the Interior in the Federal Register in accordance with 25 U.S.C. §§ 2710(d)(3)(B) and 2710(d)(8)(D).
>
> Compact, Part 22.

The stated requirement of "the publication of approval" never occurred. The first compact was disapproved. The second compact was never approved; rather the Secretary took no action within the 45-day review period and let the compact take effect by operation of law. Instead of publishing the "notice of approval" as expressly required by Part 22 of the compact, the Secretary published a "notice of taking effect." The Secretary was not willing to declare the compact to be legal under federal law and in effect "punted" it back to the parties and the courts to determine its legality. The Commonwealth and the Mashpees did not receive the full Secretarial imprimatur they each desired and required under the compact.

Importantly, and consistent with the parties' intent, Part 22 of the compacts does not cite § 2710(d)(8)(C), which is the statutory section that provides for a compact to take effect if the Secretary does not approve or disapprove the compact within the 45-day review period. The parties' omission of that section from Part 22 is fatal to any claim that the compact took effect upon the Secretary issuing a "notice of taking effect."

Parties to state-tribal compacts invariably seek formal Secretarial approval and try to avoid having the compacts take effect by operation of law—for the reason noted above. The Mashpees and Commonwealth followed that practice here and specified that the compact would take effect only upon the Secretary publishing "a notice of approval" in the Federal Register. This was an important, bargained-for requirement to make sure that the compact was not saddled with the inferior status of a "deemed approved" compact with uncertain legal status.

Accordingly, by its plain terms, the compact never took effect as a matter of law. Because it never was effective, the agreement is void and unenforceable. Its terms are not binding on the parties—and, of course, those terms cannot bind the MGC in any event. For this reason alone, the tribe's reliance on the language of 2.6 in the Compact is altogether misplaced.

2. Even If The Compact Were Valid (It is Not) The MGC's Authority to Act Is Undiminished by The Compact.

   a. Part 2.6 of the Compact Does Not And Cannot Establish Any Substantive Rights Beyond Those Stated in § 91(e).

The Mashpee place great weight on Part 2.6 saying it sets out a legally binding representation that "the MGC will not issue a request for Category 1 License applications in Region C unless and until it determines that the Tribe will not have land taken into trust for it by the United States Secretary of the Interior." (Mashpees Letter at 3.) The Mashpees stress that the quoted provisions of the Compact are "mandatory, not discretionary" and "carry the full weight of law having been enacted by the Legislature." (*Id.* at 1.)

i. Part 2.6 inaccurately translates and impermissibly modifies § 91(e).

This section is non-substantive "background" (see subsection "iv" below) which may explain the sloppy and inaccurate drafting contained in Part 2.6. Whoever drafted it was purporting to repeat what § 91 says but inaccurately transcribed or translated the statutory language. Part 2.6 changes the statute's clear positive statement—that the MGC *must* issue a request for a commercial license application in Region C if either of two things happens while leaving open discretionary action at any time—and superimposes on that affirmative duty to act a new prohibition that the MGC must refrain from issuing a commercial license unless and until one of the two specified events occurs. That alteration of the statute—adding prohibitory language not found in the statute—is of no legal effect even if the compact were enforceable (it

is not), and even if the cited language were contained in a substantive portion of the compact (it is not—it is "background only"). This is because an executive agreement like the compact cannot supersede a statute. The compact does not have the force of statutory law; it is neither a session law like c.194 of the Expanded Gaming Act of 2011 nor a general statute like G.L.c.23K. The Compact was approved by the Legislature through a resolution vote only, and there was no amendment to § 91(e). *See* Chapter 2 of the Resolves of 2013, Resolve Relating to the Tribal-State Compact between the Mashpee Wampanoag Tribe and the Commonwealth of Massachusetts (voting to approve the Compact) (Approved November 15, 2013). As a matter of law, then, § 91(e) of the Expanded Gaming Act remains the law of Massachusetts; it has not been repealed, modified or superseded in any respect. Section 91(e) could only be amended by a bill enacted by the Massachusetts Legislature, upon the majority vote of both houses, and signed into law by the Governor. That has not happened.

ii. Part 2.6 does not establish an exclusive set aside.

The Mashpees' singular reliance on the background language contained in Part 2.6 ignores Part 9 of the compact and the parties' express contemplation of the MGC awarding a Category 1 commercial license in Region C. *See, e.g.*, Part 9.2.1.4. This refutes any notion of an exclusive set aside for the Mashpees. Read as a whole, the compact describes a process by which the Mashpees might or might not end up with a casino, and that might or might not be the only casino in Region C. There was always a possibility that the MGC would license a commercial casino in Region C, which would then lead to a contractual adjustment in the tribe's revenue sharing obligation with the Commonwealth.

iii. Part 2.6 refers only to a constraint on the issuance of a request for Category 1 License applications in Region C and does not address the MGC's present authority to issue a commercial license in Region C.

The Mashpees' argument also glosses over the fact that Part 2.6 does not address in any respect the MGC's authority to award a commercial license in Region C. Any limitation stated in Part 2.6 thus refers to events in the past, which the MGC has already concluded did not stand as a barrier to issuing the RFA in April 2013. The cited provision by its terms does not present a current restraint on the MGC's present authority to act in Region C.

iv. Part 2.6 provides "background only" and does not establish any substantive rights under the compact.

By its own terms, the provisions within Part 2 of the compact (labeled "Background") are provided for "background only" and do not set out any substantive rights "unless specifically indicated in Part 9." Compact, Part 2.13. The Mashpees thus are mistaken in looking to Part 2.6 as a source of any enforceable right, whether "exclusive" or otherwise, under the compact. But that is precisely what they incorrectly do.

2. Even Were Part 2.6 a Valid and Enforceable Provision And Could be Read to Establish an Exclusive Set Aside for the Mashpees Until They Faltered, The Record Shows The Mashpees Faltered Badly When The Secretary Disapproved the First Compact in October 2012.

Even if Part 2.6 contained valid and enforceable terms, and even if the executive agreement between the Governor and Mashpees were found to be enforceable and somehow restricted the MGC's discretionary authority to act within Region C, it is clear that the Mashpees' failure to secure federal approval of the 2012 compact provided sufficient grounds to issue the RFA in Region C. The July 31, 2012 deadline, set by statute and referenced in the compact, was expressly tied to securing approval of the Massachusetts Legislature within that tight deadline. However, the parties expressly agreed that federal approval would follow shortly thereafter knowing that the Secretary was obligated to act within 45 days of the parties' submission of the proposed compact—with that final step by the Secretary required to make the agreement legally effective and actually become a gaming compact. (*See* Section C, *supra.*) The Secretary's outright rejection of the first compact on October 12, 2012, nullified the agreement and required the parties to go back to the drawing board. That major step backward necessarily terminated any type of statutory or contractual "leg up" granted to the Mashpees. At most, reading the provisions of the compact liberally in favor of the Mashpees, they were to be given a competition-free head start or "leg-up" until they "faltered." (*See* Brief of Amicus Curiae, Suffolk University Law School, Indian Law and Indigenous Peoples Clinic, filed April 27, 2012 in *KG Urban* appeal, at 4 ("Section 91 strikes a reasonable balance between efforts to negotiate in good faith with a sovereign tribe and yet preserve the free market state system of competitive bidding should that first effort falter."). The Attorney General, the Commonwealth, the MGC and even the tribal advocates appearing as *amici* on behalf of tribal interests in the *KG Urban* case all appeared to recognize that the Mashpees' "fair shot" would presumably end if the Secretary disapproved the first gaming compact. *See KG Urban*, 631 F.3d at 26.

In sum, the language in the compact does not support the Mashpees' argument that the MGC lacks authority to issue a commercial license in Region C. Rather, the Expanded Gaming Act grants the MGC broad authority to exercise discretion in carrying out its duties, including with respect to issuing RFAs and awarding commercial licenses in Region C.

D. Judicial Estoppel Has No Application Here

The Mashpees incorrectly argue that the MGC should be judicially estopped from reading § 91(e) as it is written. The tribe argues that the MGC should instead be bound by the position allegedly taken by the MGC in *KG Urban*. However, the only prior "position" that the Mashpees point to in *KG Urban* is the following brief observation in the First Circuit's decision:

> KG argued before the district court and on appeal that the statute does bar issuance of a license of a compact by the legislature by July 31 and the Commission has not then

determined that the tribe will not have land taken into trust. **The defendants do not dispute that interpretation of the statute.**

Mashpees Letter at 2 (emphasis original in letter) (quoting *KG Urban Enters., LLC v. Patrick*, 693 F.3d 1, 6 (1st Cir. 2012)).

The First Circuit's opinion does not provide a record cite and our review of the briefs filed by the Massachusetts Attorney General both in the court of appeals and in the district court shows that the defendants (the Governor and the MGC) never offered their own interpretation of § 91(e). The defendants did not need to dispute the plaintiff's interpretation of § 91(e) to avoid liability; the statutory set aside was irrelevant to the Commonwealth's defenses to the Equal Protection claims. Because the defendants did not offer their own interpretation of the statute they did not stake out a "position" within the meaning of the judicial estoppel doctrine. *See Commonwealth v. Semedo*, 456 Mass. 1, 18 (2010) (party was not judicially estopped on issue when party did not present evidence on issue in previous proceeding and thus never actually asserted a position in previous proceeding). Accepting another party's contentions for purposes of argument, which may be required on a dispositive motion, cannot constitute an endorsement of the other party's position and thus does not constitute a "position" within the meaning of the judicial estoppel doctrine.

Judicial estoppel cannot be predicated on such a passive, non-position for two additional reasons as well.

First, the doctrine typically requires that the party-to-be-estopped to have prevailed on the position in the earlier litigation and be seeking to gain advantage in the subsequent litigation by staking out a different position. *See Paixao v. Paixao*, 429 Mass. 307, 309 (1999); *Otis v. Arbella Mut. Ins. Co.*, 443 Mass. 634, 641 (2005). The defendants in *KG Urban* obtained no benefit from accepting KG Urban's construction of the statute while simultaneously arguing for dismissal of the lawsuit. To the contrary, the Commonwealth's apparent tactical decision to remain silent on the interpretation of the statute, if anything, increased the difficulty of getting the case dismissed on an early motion. On these facts, the MGC cannot be said to have successfully maintained any position in the First Circuit, as the doctrine of judicial estoppel requires, nor is the MGC seeking to gain some unfair advantage by taking a "different" position here.

Second, the judicial estoppel doctrine requires the party seeking to invoke the doctrine to show that the party-to-be-estopped is taking a position in the current litigation that is "directly contrary" to its earlier position. *See Commonwealth v. DiBenedetto*, 458 Mass. 657, 671-672 (2011) (finding no judicial estoppel where argument is not "directly inconsistent" with previous argument). The Mashpees cannot show that the MGC has taken "directly contrary" positions here and in *KG Urban*. Indeed, nothing can be "directly contrary" to the passive, non-position taken by the defendants in *KG Urban*.

For each of the foregoing reasons, the MGC should reject the Mashpees' argument to apply judicial estoppel against itself and misread § 91(e).

II. The Record of Decision Will Fail Under *Carcieri.*

The Supreme Court reversed the First Circuit in *Carcieri,* and in doing so *reversed* 70 years of the Secretary and courts loosely reading the Indian Reorganization Act of 1934 (IRA). The Supreme Court's ruling in 2009—that "now" (as in "a recognized tribe now under federal jurisdiction") means 1934 when the statute was enacted—was based on the plain reading of the statute. The Supreme Court in *Carcieri* granted no deference to the Secretary's interpretation of the IRA and no court should give one iota of deference to the Secretary's tortured and ungrammatical construction of the IRA here.[4] Where, as here, the statutory language is clear and susceptible to one grammatical reading there is no room for agency input and no deference is due. The Secretary cannot fabricate ambiguity where a plain reading avoids it.

The Mashpees' counsel argued that a plain reading of the text renders Class 2 a meaningless category, duplicating Class 1. As we previously explained, Commissioner Collier advised his field staff in 1936 that Class 2 had a specific, limited application, offering a way for the Office of Indian Affairs to record members of recognized tribes under federal jurisdictions, living on reservations in 1934, who were not enrolled members of those tribes. These would include children not yet old enough to be recorded on tribal rolls and others who fit the category. Collier said there would be few people who would be counted under Category 2. As the principal author of the IRA, and as Commissioner of Indian Affairs, Collier knew what he was talking about when speaking to his field agents in 1936.

According to the Mashpees' counsel, the Department of Interior and Department of Justice took three years to conjure up this unprecedented *Carcieri* end-run and knew full well that a lawsuit was coming because it rested on a facially ungrammatical reading of the IRA, contrary to the statute's plain language. Such an extraordinary, abusive exercise of Secretarial authority was bound to be challenged in court.

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4 Notably, when interpreting the second criteria of the definition of "Indian" under the IRA (in a different context), a unanimous Supreme Court, in *U.S. v. John*, 437 U.S. 634, 650 (1978), stated that "The 1934 Act defined 'Indians' ... as 'all persons of Indian descent who are members of any recognized **[in 1934]** tribe now under Federal jurisdiction,' and their descendants who then were residing on any Indian reservation. " (brackets in original). Not only was this reading of the Act prescient with regard to the *Carcieri* holding 31 years later, but, at a minimum, it shows that nine learned and presumably reasonable Justices of the U.S. Supreme Court read the second definition of "Indian," relied upon by the Secretary, in a manner consistent with the Plaintiffs in the citizens' lawsuit against the Secretary.

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III. The Litigation Timeline for Challenging the Secretary's Land-into-Trust Decision, Which is Measured in Multiples of Years, Dwarfs The Length of Time It Will Take a Court to Dispose of The Mashpees' Misguided Claims Against the MGC, Should the Mashpees Sue.

The statutory interpretation question has been fully articulated by the MGC, framed in multiple letters from the Mashpees, and further developed by MGE's comments in this letter. As illustrated by KG Urban's lawsuit against the Governor and the MGC, a straightforward statutory interpretation question can be addressed easily as a pure question of law, and will often be disposed of by a pre-answer motion to dismiss. Thus, in the event the Mashpees commence a lawsuit against the MGC, legal counsel for the Commission will likely file a pre-answer dispositive motion to dismiss, which likely will be granted.

In contrast, the Secretary's record of decision presents a host of legal and factual issues beyond the Secretary's tortured reading of the IRA. As set out in the citizens' complaint, filed in federal court on February 4, 2016, the citizens are challenging, among other things, the Mashpees' status as a "tribe" within the meaning of the IRA, which raises factual issues about the history of the tribe and prior judicial determinations in federal court that the Mashpees were not a tribe as of 1975 and lacked standing to assert claims under the Indian Trade and Intercourse Act seeking return of aboriginal lands. Significant factual and legal also arise from the Secretary's finding that the Mashpees' "plantation" in 1934 was a "reservation" within the meaning of the IRA. The Secretary's determinations with respect to taking into trust two parcels, separated by 50 miles, and declaring them to be a single reservation and the Mashpees' "initial reservation" raise a bevy of factual and legal issues under IGRA. Whether the Mashpees have a significant historical connection to Taunton is likewise a fact-intensive inquiry that will take considerable time to work through in litigation. These fact-heavy issues will require considerable analysis of the administrative record by both the parties and the court. Thus, while the *Carcieri* issue reduces to a basic question of reading comprehension, the other claims in the citizens' lawsuit raise thorny and complicated legal and factual issues that ensure protracted litigation.

In all likelihood, it will take the Secretary longer to produce just the administrative record in federal court—the first step in judicial review under the Administrative Procedure Act—than it will take for a trial court to dispose of the Mashpees' claims against the MGC.

Sincerely,

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APPENDIX A

SUMMARY OF KEY STATEMENTS FROM THE MASSACHUSETTS GAMING COMMISSION ("MGC") REGARDING ISSUANCE OF A COMMERCIAL GAMING LICENSE FOR REGION C

December 4, 2012 – MGC Open Meeting (Meeting Transcript, pp. 50-51)

"It [Section 91(e)] never said that if the compact is granted or anything else happens with the Tribe that we don't issue a license. It was always left the possibility that there might be a commercial license. That was not an accident. I'm sure of that. And I don't know exactly and we can learn something about why that was, but this is very carefully written legislation. And that was not a mistake." (Commissioner Crosby)

April 4, 2013 – MGC Public Meeting #62 (Meeting Transcript, pp. 193-194)

"Section 91(e) says that the Commission must issue applications for Region C commercial licenses if there is no signed compact approved by the Legislature by July 31, 2012, condition one. Or if the Commission determines that the BIA will not take land into trust. So, if either of those two things happens, then the Commission must issue a commercial RFP in Region C.

The section does not prohibit, there's nothing in that section that prohibits the Commission from issuing an RFP for commercial licenses at any time. There's no prohibition in the statute. There's no prohibition in the text. The Commission is not barred by the text of the statute from issuing a commercial license." (Commissioner McHugh)

April 4, 2013 – MGC Public Meeting #62 (Meeting Transcript, pp. 195)

"Paragraph 2.6 of the current and former compact interprets Section 91(e) as stating that, and I'm quoting, 'The Commission will not issue' a commercial RFP in Region C unless it determines that the BIA will not take the land into trust. That is not what Section 91(e) says." (Commissioner McHugh)

April 4, 2013 – MGC Public Meeting #62 (Meeting Transcript, pp. 196)

"So structurally, the compact has built into it a remedy or a concession fee or concession fee schedule basically that kicks in if the Commission does what – if the Commission issues a

commercial RFP. It also gives the Tribe in the event that the Commission issues an RFP for a Category 1 casino and grants a license[,] the right to terminate the compact entirely and proceed without it." (Commissioner McHugh)

April 18, 2013 – MGC Public Meeting #64 (Meeting Transcript, p. 105)

"I move colleagues that the Commission open Region C to commercial RFPs with the Commission deciding whether to issue a commercial license to an applicant after taking into account economic and other circumstances as they exist as the time of the licensing decision in light of the statutory objective that govern expanded gaming in the Commonwealth and the discretion with which the expanded gaming statute clothes the Commission." (Commissioner McHugh)

September 24, 2015 - MGC Public Meeting #164 (Meeting Transcript, pp. 123-124)

"What is clear to me is, as one Commissioner, is the essential elements of the discussion we had in April of 2013. One, there is no tribal set aside in the statute. That tribe hasn't been carved out as the automatic beneficiary of the regency [sic] [Region C] licensing if land is taken into trust. And there is nothing in the statute that prohibits us from issuing a commercial license if that's what we choose to do.

Section 91E of the legislation has been focused on that [sic] says contains the circumstances under which we must solicit bids for a commercial casino, but it doesn't say when we may solicit bids and it doesn't tell us what the outcome of the solicitation is.

And in addition to that, the compact clearly contemplates circumstances under which we can issue a commercial license and puts in regency [sic] [Region C] even if the tribe builds a casino and what the consequences are doing in there. And those are the economic consequences I just mentioned at least to me.

So, it seems to me that we ought to proceed as we always have and take the RFA-2 application, look at it, look at what's in the best interest of the Commonwealth, make a decision and move forward." (Commissioner McHugh)

September 24, 2015 - MGC Public Meeting #164 (Meeting Transcript, p. 130)

"I come to the same bottom line conclusion that we should not change our plans." (Commissioner Crosby)

Gaming Revenue and Tax Impact Analysis:
Region C, Massachusetts

Prepared for:
Mass Gaming & Entertainment, LLC

March 22, 2016

Prepared by:

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GGR and Tax Impact Analysis: Region C, MA

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EXECUTIVE SUMMARY

This Innovation Group report assesses the reliability of gaming revenue forecasts conducted by Spectrum Gaming Group in a December 2015 report on behalf of the Mashpee Wampanoag Tribe. At issue are the fiscal impacts to the Commonwealth of Massachusetts in the event the Brockton casino is approved.

The following bullet points summarize our findings:

- The gaming revenue forecast offered by Spectrum is not credible. It defies the laws of gravity to award a lower market share to Brockton, which has a superior location.

Spectrum's Local Market (Gravity Model) Forecast

	Taunton	Brockton
Scenario 1	$414,255,799	$0
Scenario 2	$364,505,452	$263,375,396
Market Share Scenario 2	58%	42%

Source: Spectrum Gaming Group

- Access to population is the primary force behind a casino's market potential. Marketing spend and payout advantages can mitigate that force only to a degree, and not nearly to the magnitude proposed by Spectrum. The Innovation Group's drivetime gravity modeling awarded Taunton a higher attraction factor in recognition of its tax and marketing advantage but nevertheless resulted in a higher market share for Brockton in Scenario 2. Please note the following table includes local market revenue only, to maintain consistency with the Spectrum report; it does not include out-of-market revenue from such sources as tourism.

Innovation Group's Local Market (Gravity Model) Forecast

	Taunton	Brockton
Scenario 1	$332,462,572	
Scenario 2	$228,890,798	$303,528,870
Market Share Scenario 2	43%	57%

Source: Innovation Group

- Spectrum's high GGR forecast for Taunton has the effect of overestimating its revenue sharing (i.e., gaming tax) contribution, and the artificially low GGR estimate for Brockton has the effect of underestimating its tax contribution.
- If the Spectrum forecast is to be believed, the Taunton casino would be better off in Scenario 2. The 12% GGR impact from Brockton would be more than offset by the 17% savings on revenue sharing (i.e., 0% gaming tax rate), even accounting for the need for increased marketing.
- The examples cited by Spectrum in support of its argument are in no way analogous to Brockton and Taunton. The Native American casinos in Florida and New York are full-scale Class III casinos competing against slots-only racinos. Further, the Native

American casinos do not suffer from inferior locations, as Taunton will. In fact, in many cases the casinos have superior locations to their racino competition.

- Most devastatingly, the Spectrum report fails to acknowledge the fact that the slot facilities in Florida and New York are subject to smoking bans whereas the tribal casinos allow smoking, effectively giving them a 24%-36% advantage over their smoke-free competitors. This omission in itself undermines its entire discussion of Florida and New York. This smoking advantage will not apply in the case of Region C since the Commonwealth's smoking ban will apply to the Taunton casino.
- Therefore, the claimed $28 million gaming tax advantage to the Commonwealth without a Brockton casino is not a reliable figure. The Innovation Group's drivetime gravity modeling shows that the Commonwealth would receive $7 million more in gaming tax revenue in Scenario 2.
- Further, Spectrum fails to account for annual slot license fees and the upfront license fee of $85 million the Brockton casino would pay.
- Finally, the Commonwealth would receive economic and fiscal benefits from more than just gaming taxes and fees. As Spectrum acknowledges, "Two properties, by definition, would create more direct employment." What Spectrum fails to acknowledge is that the larger the direct impacts, the larger the indirect and induced impacts. Indirect and induced impacts are driven by direct impacts. Therefore, the construction and operation of two similarly sized casinos will create more economic development and fiscal impacts (beyond gaming taxes) for a state than just one casino.

SPECTRUM'S FISCAL ANALYSIS IS FLAWED

Spectrum's December 2015 report on behalf of the Mashpee Wampanoag Tribe claims that the Commonwealth would receive $28 million less in taxes on gaming revenue if the Brockton casino is approved. However, the gaming revenue forecast that forms the basis of the tax analysis is not credible, and the supporting examples Spectrum cites are false analogies.

The Gaming Revenue Projection is not Credible

The report examines two scenarios for Region C resort casino development:

1. Taunton Only
2. Taunton and Brockton

In Scenario 2, revenue sharing (or gaming taxes) for Taunton would drop to 0% from 17% in Scenario 1. Unfortunately, no Brockton-only scenario is offered in the Spectrum report.

The Spectrum analysis is confined to local gravity model revenues only, with the Spectrum report stating that out-of-market or tourism revenue "will not vary significantly under the proposed development scenarios" (21). This assertion is debatable, but to maintain an apples-to-apples comparison, the Innovation Group gaming revenues presented in this response are limited to the local market and therefore exclude out-of-market revenue from such sources as tourism.

Gross Gaming Revenue (GGR) Comparison

Spectrum achieves the $28 million tax differential by assigning 58% of Region C resort casino gaming revenue in Scenario 2 to Taunton, as shown in the following table, and only 42% to Brockton.

Spectrum's Scenario 2 Local Market Gross Gaming Revenue (GGR)

	Taunton	Brockton	Total
Scenario 1	$414,255,799	$0	
Scenario 2	$364,505,452	$263,375,396	$627,880,848
GGR split Scenario 2	58.1%	41.9%	100.0%

Source: Spectrum Gaming Group

This heavy weighting toward Taunton results in a low tax contribution by Brockton, as shown in the following table:

Summary of the Spectrum Analysis

	Taunton	Brockton	Plainridge	Other Massachusetts	Total
Scenario 1 GGR	$414,255,799		$106,890,563	$933,154,785	$1,868,556,946
Tax Rate	17%		49%	25%	
Taxes	$70,423,486	$0	$52,376,376	$233,288,696	$356,088,558
Scenario 2 GGR	$364,505,452	$263,375,396	$94,890,287	$862,908,910	$2,213,560,893
Tax Rate	0%	25%	49%	25%	
Taxes	$0	$65,843,849	$46,496,241	$215,727,228	$328,067,317
Tax Differential					-$28,021,241

Source: Spectrum Gaming Group

In Scenario 1, Taunton achieves GGR of $414 million from the gravity model only, compared to just $933 million for Wynn and MGM combined, a 44% ratio. Given that MGM faces limited competition in the western part of the state, and that Wynn will dominate the largest population base of Massachusetts, it is not credible that Taunton could approach near parity with the average GGR of those two facilities. The gaming tax advantage for Taunton in Scenario 1 is negligible.

In summary, the high GGR forecast for Taunton has the effect of overestimating its revenue sharing (i.e., gaming tax) contribution, and the low GGR estimate for Brockton has the effect of underestimating its gaming tax contribution. Further, Spectrum fails to account for annual slot license fees and the upfront license fee of $85 million the Brockton casino would pay.

As the Innovation Group estimated in its 2015 forecasting for Mass Gaming & Entertainment, gaming taxes to the Commonwealth, including the annual slot license fee, are projected to be $7 million higher in Scenario 2.

Summary of the Spectrum Analysis

	Status Quo*	Scenario 1	Scenario 2
Total State Revenue	$372,152,385	$405,201,629	$412,510,794
Change from Status Quo		$33,049,244	$40,358,408

Source: Innovation Group; *Status Quo includes Plainridge, MGM, and Wynn

According to the Spectrum analysis, Brockton would cause GGR at Taunton to decline by 12%. As noted, Spectrum does not offer a Brockton Only scenario. However, given its superior location it is more than reasonable to assume that, at a minimum, Brockton in a Brockton-Only scenario would achieve the same level of GGR as Taunton in Scenario 1. Utilizing this assumption, the implication is that Taunton would impact Brockton by 36%.

Impacts of Scenario 2: Spectrum

	Taunton	Brockton
"Only" Scenarios	$414,255,799	$414,255,799*
Scenario 2	$364,505,452	$263,375,396
% Change	-12%	-36%*

Source: Spectrum Gaming Group, *Innovation Group

These impacts and the gap between them are not credible given that Brockton is approximately 17 miles closer to the Boston area. Furthermore, they are well outside the estimates cited by Spectrum in a quote by the long-time gaming consultant Clyde Barrow, that cannibalization typically ranges between 20 and 30 percent.

By comparison, our estimates of impacts fall almost precisely within Mr. Barrow's range. In our gravity modeling we estimated that Brockton would impact Taunton by 31% whereas Taunton would impact Brockton by 19%, as shown in the table below. The larger percentage impact on Taunton results from the superior location of Brockton.

Impacts of Scenario 2: Innovation Group (Gravity Model Only)[1]

	Taunton	Brockton
"Only" Scenarios	$332,462,572	$375,603,014
Scenario 2	$228,890,798	$303,528,870
% Change	-31%	-19%

Source: Innovation Group

This raises the question as to why Spectrum chose to quote at such length from the *Cape Cod Times* article when the only actual numbers in the passage undermine Spectrum's analysis. We can only surmise that it gave Spectrum the opportunity to include inflammatory quotes from third parties disparaging the Brockton project—"death knell" and "no scenario where that comes out better for the state"—and the Innovation Group with a blatant falsehood that the Innovation Group "never factors in cannibalization."

EBITDA Analysis

Another indication that the Spectrum numbers are suspect is that the Taunton casino would be better off in Scenario 2. The 12% GGR impact from Brockton would be more than offset by the 17% savings on revenue sharing. The Innovation Group collected operating data from publicly traded casino companies to identify major operating expense categories for facilities comparable to the proposed Taunton casino. The goal was to derive a reasonable order-of-magnitude EBITDA[2] estimate for Taunton. The analysis resulted in an estimate of $175 million in EBITDA in Scenario 1, using Spectrum's revenue forecast for Scenario 1.

[1] By way of reference, the Innovation Group's total GGR estimates for Brockton, including out-of-market revenues from such sources as tourism, are $404.3 million in the Brockton-only scenario and $326.5 million in Scenario 2.
[2] Earnings before interest, taxes, depreciation and amortization, a commonly used measure of operating profit.

Taunton EBITDA Analysis Using Spectrum GGR Forecast ($000s)

	Scenario 1	Ratio
GGR	414,256	
Marketing, Promotions, and Comps	52,818	12.75%
All Other Operating Expenses	115,992	28.00%
Total Op Expenses	168,809	40.75%
Gaming Tax	70,423	17.00%
EBITDA	175,023	42.25%

In Scenario 2, marketing costs would be expected to rise along with increased competition, fixed costs would remain relatively unchanged, and variable costs could be reduced with reduced business volume. In all, EBITDA would increase by $15 million in the reasonably aggressive assumption that marketing related costs would increase by 20%, going from $53 million (or 12.75 of GGR) to $63 million (or 17.39% of GGR).[3]

Taunton EBITDA Comparison Using Spectrum GGR Forecast ($000s)

	Scenario 1	Scenario 2	Variance	Ratio Scenario 2
GGR	414,256	364,505	-12.0%	
Marketing, Promotions, and Comps	52,818	63,381	20.0%	17.39%
All Other Operating Expenses	115,992	111,103	-4.2%	30.48%
Total Op Expenses	168,809	174,485	3.4%	47.87%
Gaming Tax	70,423			0.00%
EBITDA	175,023	190,021	8.6%	52.13%

Summary

In summary, there are many reasons to doubt the consistency and credibility of the Spectrum analysis.

In its description of gravity model methodology, Spectrum writes:

> In addition, an inversely proportional relationship exists between visitation and distance. In other words, a greater distance makes visitation from any particular region less likely. This relationship has been shown to be exponential, such that the effects of a doubling in

[3] The Innovation Group performed a similar analysis using our GGR estimates for Taunton in Scenario 2 and concluded that Taunton's EBITDA would exceed $100 million.

> distance is amplified through a series of non-linear equations and leads to a precipitous loss in visitation. (16)

This highly accurate description of gravity modeling begs the question: how can Taunton, which is much farther from the majority of the population base for the Region C market, achieve this significant premium in market share?

Spectrum's answer, in effect, is that Taunton can overcome the laws of gravity by buying customers. This is an extremely dubious premise, and as the next section will unequivocally demonstrate, the "evidence" cited by Spectrum in support of it is fundamentally flawed.

The Supporting Examples are not at all Analogous

To support its implicit premise that Taunton's tax advantage will allow it to overcome the laws of gravity, the Spectrum report relies exclusively on gaming markets in Florida and New York, where according to Spectrum tribal casinos are able to out-compete commercial facilities because of lower tax rates.

To begin with Florida, the southern Florida Seminole and Hard Rock properties cited by Spectrum are full Class III[4] casinos with slots and table games competing against slot machines only at racetracks and frontons. Furthermore, neither the casinos nor the slot facilities enjoys a particular location advantage as the facilities are generally spread around the Miami-Fort Lauderdale metropolitan area.

Moreover, Spectrum's Florida analysis is pure speculation. As the report acknowledges, "the amounts spent on marketing programs are not reported for either the pari-mutuels or the Seminole casinos…" (10). Further, slot payout percentages are not reported by the Seminoles, while the pari-mutuels pay higher than the national average. The claim that the Seminoles are out-spending and out-pricing the slot facilities is based entirely on public comments by slot facility operators and a single Seminole Classic website ad, "Play the loosest slots in America!" The context of the public comments—were they a play for a lower tax rate? a plea for sympathy by besieged slot operators?—is not given, and the possibility that the Seminole website is an exaggeration is not entertained.

Spectrum fails to identify other reasons that the Seminole casinos apparently out-perform the slot facilities. What is the impact of the Hard Rock brand? What is the level of customer service? Are the Seminole casinos better managed? What is the significance of having table games? Table games are not only revenue generators in themselves, but they also add to the overall

[4] Class III is the highest category of gambling. Class III casinos offer house-banked slot machines and table games. Class II gaming is limited to gamblers betting against each other and is typically less attractive and lower in revenue generation than Class II gaming.

attractiveness of a casino and they typically increase slot machine revenue because of companion play.

Finally, and most devastatingly, the Spectrum report fails to acknowledge the fact that the slot facilities are subject to Florida's Clean Indoor Air Act whereas the Seminole casinos allow smoking. This omission in itself undermines its entire discussion of Florida (and New York). Jurisdictions that have imposed smoking bans have seen gaming revenue decline by 12%-18% where alternatives are convenient. This effectively means that the Florida and New York tribal examples cited by Spectrum have a 24%-36% advantage over their smoke-free competitors, since revenue lost by the smoke-free casino is gained by the tribal casino.

The smoking ban disadvantage faced by the Florida slot facilities will not apply in the case of Region C since the Commonwealth's smoking ban is to apply to the Taunton casino.

The New York discussion is on even thinner ice than the Florida examples since the Seneca Nation casinos generally enjoy far superior locations than their machine-only counterparts. The Hamburg and Batavia Downs racinos are remotely located whereas two of the Seneca's three casinos are located in the center of Niagara Falls and Buffalo. As for the third racino cited by Spectrum, Finger Lakes is 85 miles east of the nearest Seneca casino (Buffalo).

The Turning Stone casino was open for more than a decade before Vernon Downs. Turning Stone's decade-long monopoly in the Syracuse market allowed the Oneida Nation to amass the extensive resort amenities that were in place before Vernon Downs even opened. Neither facility enjoys a location advantage since they are essentially across the street from each other.

Moreover, not only are the New York racinos disadvantaged by not having table games, the machines they are limited to are Class II video lottery terminals, which are not as competitive a product as Class III slot machines.

The Spectrum analysis is further undermined by its erroneous tax rate analysis and its failure to acknowledge the tax-free offers the racinos are permitted to offer. Spectrum applied a statewide effective tax rate of 66.5% to the four small facilities it cited in upstate New York; this is erroneous since the smaller racinos in New York have a lower effective tax rate than the major revenue producers in the New York City area. For example, Hamburg's effective rate is only 55%, using the same distribution buckets as Spectrum (operator commission, marketing allowance, and capital award). Further, a large portion of the 10% "Gaming Floor and Administration" fee goes toward the operation and maintenance of the machines, so Hamburg's actual effective rate is likely less than 50%. The racinos are also able to offer free play credits net of taxes, which diminishes the marketing advantage of the tribal casinos.

As with the Florida analysis, there is very limited revenue data for the New York tribal casinos and absolutely no marketing or slot payout data. So here, too, the Spectrum analysis is speculation. The one piece of data presented for Turning Stone, $207 million in slot revenue in 2014, pales in comparison, for example, to the $537 million in GGR at Yonkers in 2014. Yonkers is a Class II VLT racino north of New York City and has the highest tax rate in the state.

Finally, as noted, New York racinos do not permit smoking whereas the tribal casinos are exempt from the state's smoking ban.

It is also worth noting that Spectrum ignores a major example right in the Commonwealth's backyard. The tribal casinos in Connecticut enjoyed a near-decade long duopoly in the entire New England market, allowing them to build massive resort facilities. However, despite these infrastructure advantages, and despite the tribe's enormous tax advantage,[5] the Twin River racino in Rhode Island has been highly competitive solely because it is much closer to the major population bases in Rhode Island and Massachusetts.

Access to population is the primary force behind a casino's market potential. Marketing spend and payout advantages can mitigate that force only to a degree, and not nearly to the magnitude proposed by Spectrum.

Spectrum's Discussion of other Economic Impacts Misses the Point

In its discussion of other economic impacts, Spectrum concedes that Rush Street is correct in asserting that two casinos in Region C would create more direct employment: "Two properties, by definition, would create more direct employment" (14). What Spectrum fails to acknowledge is that the larger the direct impacts, the larger the indirect and induced impacts.[6] Indirect and induced impacts are driven by direct impacts. Therefore, the construction and operation of two similarly sized casinos will create more economic development and fiscal impacts (beyond gaming taxes) for a state than just one casino.

While indirect and induced impacts at an individual casino would be reduced as a result of cannibalization, Region C as a whole would see increased employment, increased business volume, increased purchases of goods and services by the casino, and therefore increased indirect effects. As shown in the table below, the addition of Brockton to the Taunton-only scenario is projected to increase casino resort GGR in Region C by 60%, which in turn would have a greater economic impact on the state as a whole, even with reduced spending by each facility.

[5] The Connecticut tribes pay 25% of slot revenue to the State and 0% of table revenue, compared to approximately 60% on VLTs at Twin River and 17% on table revenue.

[6] As explained in the Spectrum report, indirect effects result from spending by the casino resort itself on goods and services whereas induced effects refer to spending by employees of the resort.

Innovation Group Impacts of Scenario 2 : Local Market GGR

	Taunton	Brockton	Total Relative to Taunton Only
"Only" Scenarios	$332,462,572	$375,603,014	$332,462,572
Scenario 2	$228,890,798	$303,528,870	$532,419,667
% Change	-31%	-19%	60%

Source: Spectrum Gaming Group, *Innovation Group

Even Spectrum's numbers result in a 52% increase for casino resort GGR in Region C with two casino resorts:

Spectrum's Scenario 2 Local Market (GGR)

	Taunton	Brockton	Total
Scenario 1	$414,255,799	$0	$414,255,799
Scenario 2	$364,505,452	$263,375,396	$627,880,848
Impact	58%	42%	52%

Source: Spectrum Gaming Group

This increased economic activity would add to the state's fiscal impacts, which are derived not only from gaming taxes. First of all, sales taxes on non-gaming amenities would generate revenue for the Commonwealth as well as for the City of Brockton.

Brockton Resort Casino, Sales and Hotel Tax Breakdown (MMs)

	Sales	Brockton Tax Revenue	Massachusetts Tax Revenue	Total Tax Revenue
F&B	$38.82	$0.29	$2.43	$2.72
Hotel	$11.52	$0.69	$1.38	$2.07
Retail	$1.62	$0.00	$0.10	$0.10
Total	$51.95	$0.98	$3.90	$4.89

Source: Massachusetts Department of Revenue, City of Brockton, Innovation Group

In addition, IMPLAN calculates the taxes that go into "production" such as business taxes (including sales taxes from the property's purchase of goods and services), payroll taxes, and state income tax from employee wages. The fiscal impacts resulting from the operation of the Brockton casino are shown in the table below. Again, while cannibalization from Taunton would reduce these numbers emanating from Brockton individually, the Commonwealth as a whole would experience a net gain.

Fiscal Impacts from Operations ($MMs)

	Total MA
Direct Effect	$7.54
Indirect Effect	$10.46
Induced Effect	$5.59
Total	$23.59

IMPLAN Group, LLC, IMPLAN System (data and software)

Moreover, the Spectrum report fails to acknowledge the one-time impacts of construction, which would support over 3,000 jobs on a full-year equivalent basis and add $278 million of value to the Massachusetts economy:

Brockton Construction Impacts—Total Massachusetts ($MMs)

	Employment	Labor Income	Value Added
Direct Effect	2,018	$142.49	$152.21
Indirect Effect	515	$33.68	$52.42
Induced Effect	848	$40.63	$73.37
Total	3,381	$216.80	$278.00

IMPLAN Group, LLC, IMPLAN System (data and software); The Innovation Group

DISCLAIMER

Certain information included in this report contains forward-looking estimates, projections and/or statements. The Innovation Group has based these projections, estimates and/or statements on our current expectations about future events. These forward-looking items include statements that reflect our existing beliefs and knowledge regarding the operating environment, existing trends, existing plans, objectives, goals, expectations, anticipations, results of operations, future performance and business plans.

Further, statements that include the words "may," "could," "should," "would," "believe," "expect," "anticipate," "estimate," "intend," "plan," “project,” or other words or expressions of similar meaning have been utilized. These statements reflect our judgment on the date they are made and we undertake no duty to update such statements in the future.

Although we believe that the expectations in these reports are reasonable, any or all of the estimates or projections in this report may prove to be incorrect. To the extent possible, we have attempted to verify and confirm estimates and assumptions used in this analysis. However, some assumptions inevitably will not materialize as a result of inaccurate assumptions or as a consequence of known or unknown risks and uncertainties and unanticipated events and circumstances, which may occur. Consequently, actual results achieved during the period covered by our analysis will vary from our estimates and the variations may be material. As such, The Innovation Group accepts no liability in relation to the estimates provided herein.

GGR and Tax Impact Analysis: Region C, MA

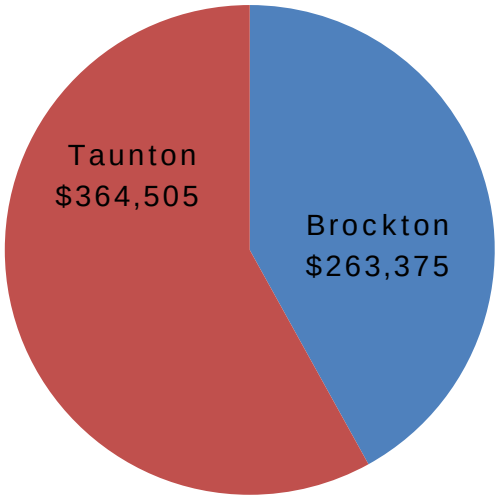
Presented to Massachusetts Gaming Commission

March 24, 2016

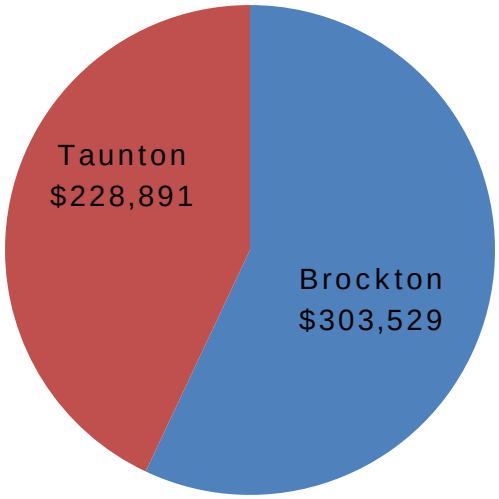
Spectrum's Unsound Forecast

- The gaming revenue forecast offered by Spectrum is not credible. It defies the laws of gravity to award a lower market share to Brockton, which has a superior location.

Spectrum Revenue (000s)



The Innovation Group Revenue (000s)

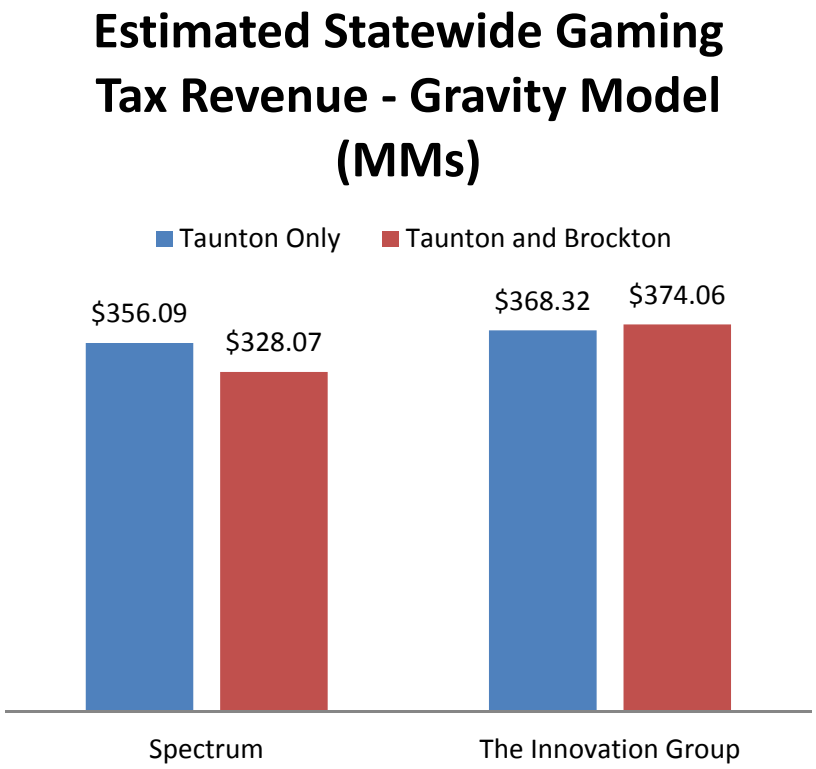


Spectrum's Unsound Forecast

- Access to population is the primary force behind a casino's market potential. Marketing spend and payout advantages can mitigate that force only to a degree, and not nearly to the magnitude proposed by Spectrum.

Gaming Tax Discrepancies

- Spectrum's high GGR forecast for Taunton = overstated gaming tax.
- Conversely, the artificially low GGR estimate for Brockton = understated gaming tax.
- TIG estimates a $6MM advantage in Scenario 2 (Taunton and Brockton)



Bottom Line Analysis

- If the Spectrum forecast is to be believed, the Taunton casino would be better off in Scenario 2 (Taunton and Brockton).
- The Innovation Group estimates that EBITDA would go up by $15 million in Scenario 2, using Spectrum's numbers.

Taunton EBITDA Comparison Using Spectrum GGR Forecast ($000s)

	Scenario 1	Scenario 2	Variance
GGR	414,256	364,505	-12.00%
Marketing, Promotions, and Comps	52,818	63,381	20.00%
All Other Operating Expenses	115,992	111,103	-4.20%
Total Op Expenses	168,809	174,485	3.40%
Gaming Tax	70,423		
EBITDA	175,023	190,021	8.60%

Spectrum's Unsound Forecast

- In summary, there are many reasons to doubt the consistency and credibility of the Spectrum analysis.
- Spectrum claims that Taunton can overcome the laws of gravity by buying customers. This is an extremely dubious premise, and the "evidence" cited by Spectrum in support of it is fundamentally flawed.

Examples Are Not Comparable

- The examples cited by Spectrum in support of its argument are in no way analogous to Brockton and Taunton.
- The Native American casinos in Florida and New York are full-scale Class III casinos (slots and tables) competing against slots-only racinos.
- Further, the Native American casinos do not suffer from inferior locations, as Taunton will.
- In fact, in many cases the casinos have superior locations to their racino competition.

Smoking Ban Impact

- Most devastatingly, Spectrum fails to acknowledge that the slot facilities in Florida and New York are subject to smoking bans whereas the tribal casinos allow smoking, effectively giving them a 24%-36% advantage over their smoke-free competitors.
- This omission in itself undermines its entire discussion of Florida and New York.
- This smoking advantage will not apply in the case of Region C since the Commonwealth's smoking ban will apply to the Taunton casino.

Twin River is More Comparable

- There is a more comparable example in Massachusetts' backyard.
- Twin River faces a huge tax disadvantage relative to tribal casinos in Connecticut (60% to 25% on slots and 17% to 0% on tables).
- Despite this disadvantage, it competes very effectively because of its greater proximity to population centers.

Economic Impact Analysis

- The Commonwealth would receive economic and fiscal benefits from more than just gaming taxes and fees.
- The larger the direct impacts, the larger the indirect and induced impacts.
- Therefore, the construction and operation of two similarly sized casinos will create more economic development and fiscal impacts (beyond gaming taxes) for a state than just one casino.

Economic Impact Analysis

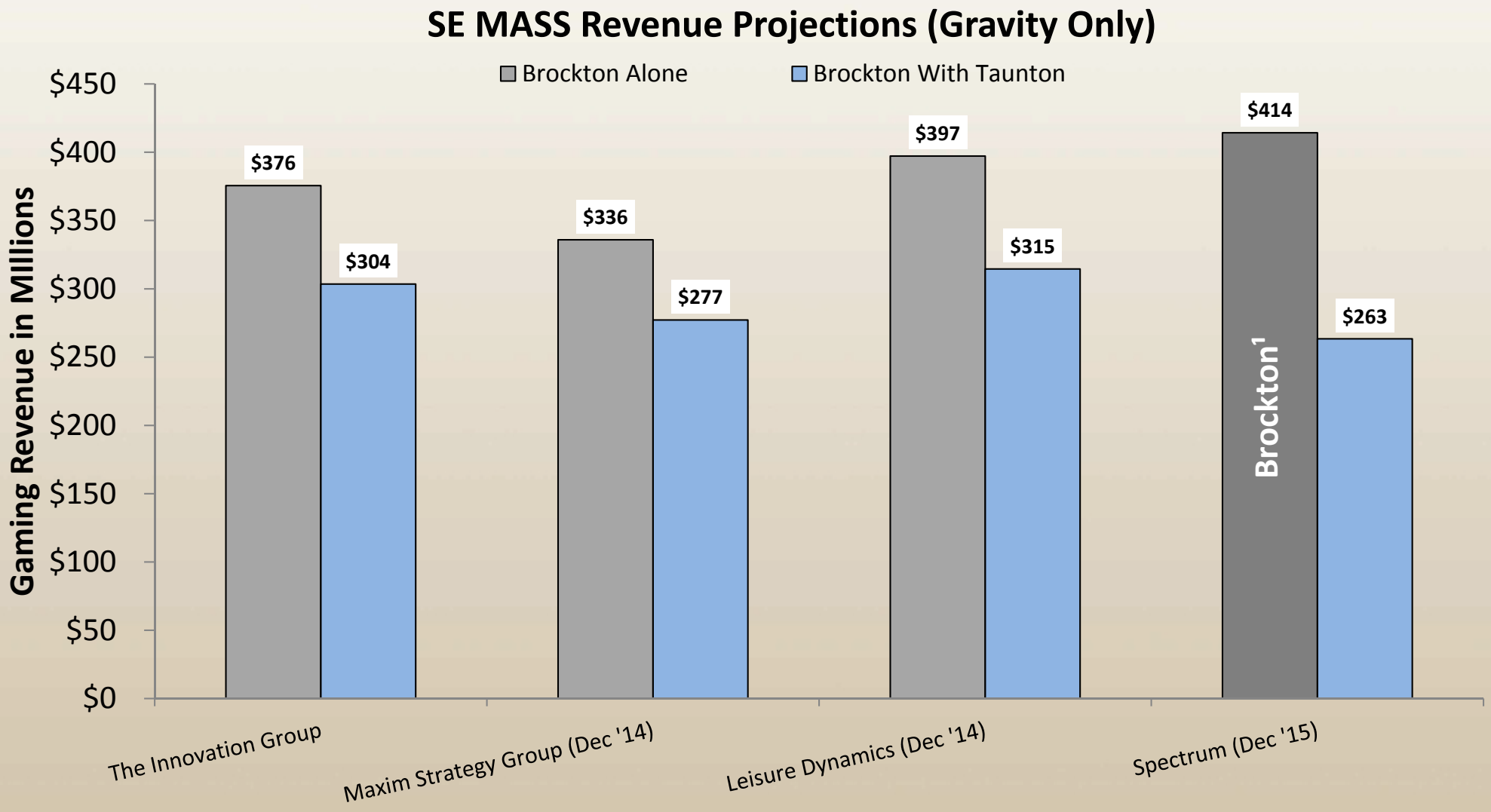
- While cannibalization would reduce economic impacts at an individual casino, Region C as a whole would see increased employment and increased purchases of goods and services by the casino.
- Casino resort GGR in Region C is estimated to increase 60% by The Innovation Group and 52% by Spectrum in Scenario 2 (Taunton and Brockton), which in turn would have a greater economic impact on the Commonwealth as a whole.
- Fiscal impacts from other sales and other non-gaming taxes from operations at Brockton are estimated to total over $28 million. Spectrum does not acknowledge this category of fiscal impacts.

MASS GAMING

& ENTERTAINMENT, LLC

March 24, 2016

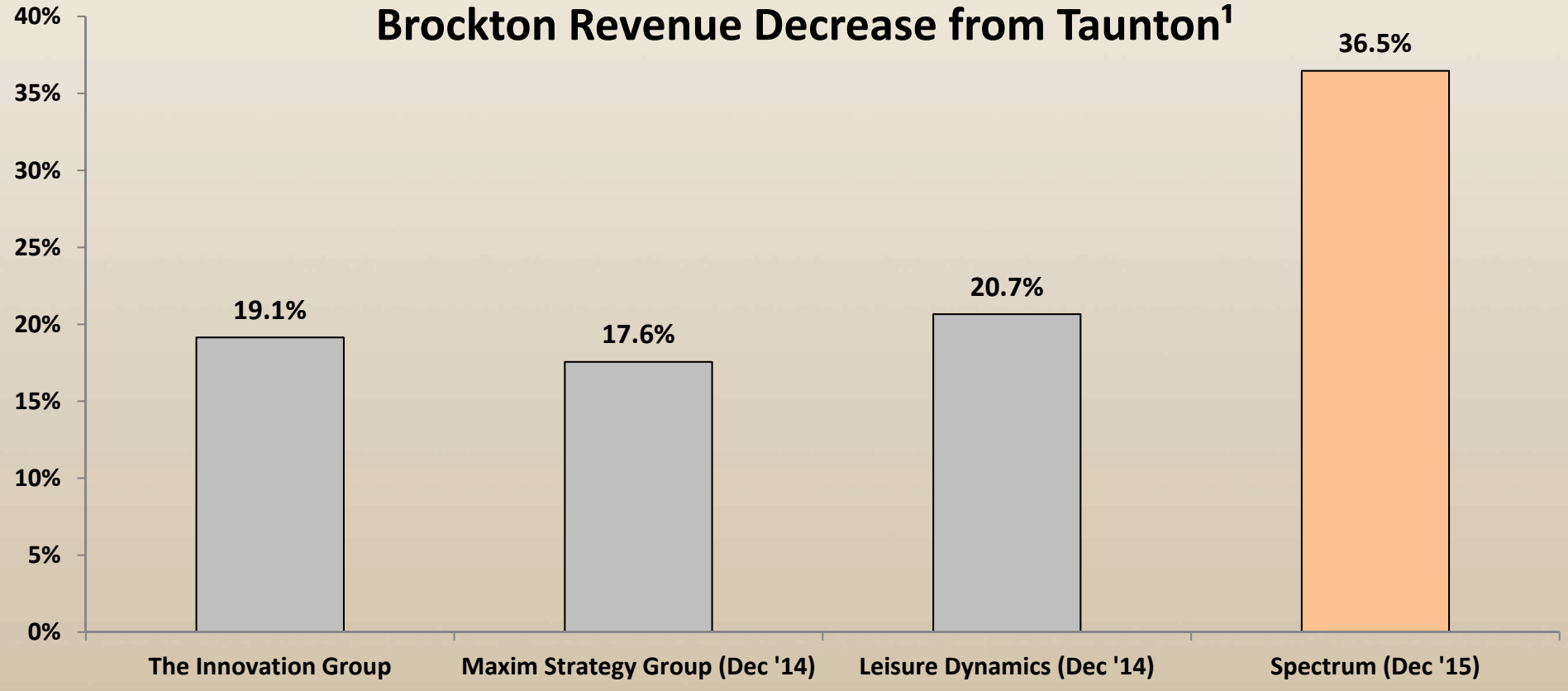
Spectrum Analysis is the Outlier



[1] Based upon Spectrum's estimate for Taunton. In actuality Brockton would be higher because of its superior location.

Spectrum Analysis is the Outlier

- Spectrum's numbers imply a 37% decrease to Brockton with Taunton, whereas the other three average 19%;
  - Other studies were done as part of our normal due diligence with reputable firms



[1] Spectrum baseline for Brockton is based upon the Taunton figures. Brockton's baseline would be higher based on location, thus increasing the impact even more than shown.

DECEMBER 2014

Comparative Gaming Revenue Potential for Region C Casino License: Brockton and Bridgewater

Prepared for Clairvest

By

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Comparative Gaming Revenue Potential for Region C Casino License: Brockton and Bridgewater

Introduction

Leisure Dynamics Research ("LDR") was retained by Clairvest to prepare a technical memorandum, forecasting top-line gaming revenue potential for two alternative sites for a Region C (Southeastern Massachusetts) gaming license, considering one location in Bridgewater and one at the Brockton Fairgrounds in Brockton. Based on our discussion with Clairvest, LDR assumes in this analysis that there would be approximately 3,000 gaming positions at the property (either location), including a hotel sized at approximately 300 guest rooms. The analysis also considers different scenarios with respect to regional competition. Specifically, our models compare and comtrast:

Scenario 1:
Clairvest in Bridgewater as the only full-scale casino in SE Massachusetts

Scenario 2:
Clairvest in Brockton as the only full-scale casino in SE Massachusetts

Scenario 3:
Clairvest in Bridgewater, with the Mashpee Wampanoag Tribe developing a casino in Taunton with 3,500 positions

Scenario 4:
Clairvest in Brockton, with the Mashpee Wampanoag Tribe developing a casino in Taunton with 3,500 positions

Scenario 1: Development in Bridgewater with no Wampanoag

LDR considers two sources of demand for the Clairvest casino. The first source would be day-trip demand from the population of the regional market area, as calculated through gravity models. We estimate the gaming revenue potential for this market segment would be $390 million ± $25 million or approximately 6.5 percent, depending on the attractiveness of the Plainridge facility and the amenities offered (overall attractiveness) at Clairvest's facility.

Scenario 1 Local Market Potential

Low	**Most Likely**	High
$363,799,776	**$390,061,218**	**$415,179,289**

The second source of demand would be gamers from outside of the local area, most of which would be accounted for through hotel room demand. We further note that some of the room demand would be from gamers within the regional market as accounted for in the gravity model, as many gamers from northern New England may not be day-trippers. Based on the projected source of demand, we estimate approximately 1 percent of the regional gamers would stay overnight, accounting for 57 to 69 rooms demanded per night, assuming an average win per day-trip gamer of $90 and an average occupancy rate of 1.8 gamers per room.

Based on LDR's experience in other markets, it is reasonable to assume a gaming win per occupied room would be in the range of $250 to $300. Therefore, for each of these overnight regional gamers we therefore inflate their gaming expenditure to the equivalent of $250 to $300 per room. As a result, the incremental gaming expenditure from regional room demand would be in the range of $1.8 million to $3.5 million.

Scenario 1 Local Market Overnight Gamer Revenue Potential

Rooms demanded/night	Day-trip Value	Overnight value @ $250/occupied room	**incremental value**
57	$3,370,410	$5,201,250	**$1,830,840**
63	$3,725,190	$5,748,750	**$2,023,560**
69	$4,079,970	$6,296,250	**$2,216,280**
Rooms demanded/night	Day-trip Value	overnight value @ $300/occupied room	**incremental value**
57	$3,370,410	$6,241,500	**$2,871,090**
63	$3,725,190	$6,898,500	**$3,173,310**
69	$4,079,970	$7,555,500	**$3,475,530**

Finally, we assume there will be non-regional demand for the hotel as well, based on the proximity to the interstate, the Cape and Boston, as well as for events to be held at the casino resort. For this estimate we examine the implications if the hotel can attain an occupancy rate in the range of 80 percent to 90 percent (inclusive of the local demand for rooms), again considering a win per occupied room in the range of $250 to $300.

This non-local market segment has the potential to contribute an incremental $15.6 million to $23.3 million in gaming revenues, as demonstrated in the following table, based on utilization of 57 to 69 rooms per night by local gamers.

Scenario 1 Non-Local Market Overnight Gamer Revenue Potential

Non-local rooms demanded per night @ 80% overall occ. (total 240 rooms demanded per night)	Non-local Gaming Revenues @ $250/room	Non-local rooms demanded per night @ 90% overall occ. (total 270 rooms demanded per night)	Non-local Gaming Revenues @ $250/room
183	$16,698,750	213	$19,436,250
177	$16,151,250	207	$18,888,750
171	$15,603,750	201	$18,341,250
Non-local rooms demanded per night @ 80% overall occ. (total 240 rooms demanded per night)	**Non-local Gaming Revenues @ $300/room**	**Non-local rooms demanded per night @ 90% overall occ. (total 270 rooms demanded per night)**	**Non-local Gaming Revenues @ $300/room**
183	$20,038,500	213	$23,323,500
177	$19,381,500	207	$22,666,500
171	$18,724,500	201	$22,009,500

In total, we project the range in gaming revenue potential in Scenario 1 would be $412 million, ± $29 million, or approximately 7 percent.

Scenario 1 Total Gaming Revenue Potential

Low	**Most Likely**	High
$382,329,366	**$411,931,653**	**$440,664,319**

In the most likely case scenario the win per position with 3,000 positions would be $376/day, with a high/low range of $349 to $402.

Scenario 2: Development in Brockton with no Wampanoag

Scenario 2 differs from Scenario 1 in that it assumes Clairvest develops at the Brockton Fairgrounds instead of in Bridgewater. All other development parameters are equal. From a regional capture rate perspective there would be greater demand from the Greater Boston market and the south suburban area, but less demand from central Massachusetts, i.e. from Framingham out to Worcester (points on the Mass Turnpike) due to the lack of direct access routes into Brockton from the north/northwest. A Brockton casino may also attract a less affluent demographic due to it being more of a blue-collar, urban environment than the more rural Bridgewater location. Ultimately, this scenario may generate very comparable revenues to Scenario 1, but may take a slightly greater patron visitation level to generate the revenues.

We estimate the gaming revenue potential for the defined local market segment would be $397 million ± approximately 5 percent, depending on the attractiveness of the Plainridge and Wynn facilities and the amenities offered (overall attractiveness) at Clairvest's facility.

Scenario 2 Local Market Potential

Low	**Most Likely**	High
$378,086,381	**$397,213,478**	**$417,248,023**

We do not perceive there would be a material difference in overnight room demand from the regional market relative to Scenario 1, such that the range in incremental gaming revenues from overnight guests would be comparable to that which was projected in Scenario 1.

In total, we project the range in gaming revenue potential in Scenario 2 would be $419 million, ± $23.5 million, or 5.5 percent.

Scenario 2 Total Gaming Revenue Potential

Low	**Most Likely**	High
$396,793,361	**$419,202,173**	**$442,792,183**

In the most likely case scenario the win per position with 3,000 positions would be $383/day, with a high/low range of $362 to $404.

Scenario 3: Bridgewater with Wampanoag

Scenario 3 differs from Scenario 1 in that it assumes the Mashpee Wampanoag will be successful in developing a casino of comparable size to Clairvest's in Taunton, such that Clairvest would be competing against an additional property in the market area between Boston and Providence. We project cannibalization of Clairvest's local market potential relative to Scenario 1 would be approximately 22 percent, resulting in a most likely case revenue projection of $305 million from the regional market area.

Scenario 3 Local Market Potential

Low	**Most Likely**	High
$277,251,277	**$304,611,510**	**$332,226,155**

The comparatively lower local market demand would imply fewer rooms per night demanded from the regional population. We estimate this range would fall to 53 to 64 rooms per night. As a result, we project the incremental gaming expenditure from regional room demand would be in the range of $1.7 million to $3.2 million.

Scenario 3 Local Market Overnight Gamer Revenue Potential

Rooms demanded/night	Day-trip Value	Overnight value @ $250/occupied room	**incremental value**
53	$3,133,890	$4,836,250	**$1,702,360**
59	$3,488,670	$5,383,750	**$1,895,080**
64	$3,784,320	$5,840,000	**$2,055,680**
Rooms demanded/night	Day-trip Value	overnight value @ $300/occupied room	**incremental value**
53	$3,133,890	$5,803,500	**$2,669,610**
59	$3,488,670	$6,460,500	**$2,971,830**
64	$3,784,320	$7,008,000	**$3,223,680**

Finally, we calculate non-regional demand for the hotel using the same methodology as in Scenario 1, this time with the assumption that the 300-room hotel would attain an occupancy rate in the range of 75 percent to 85 percent (inclusive of the local demand for rooms), as there would be fewer rooms demanded by regional gamers and the Taunton resort would create some saturation to regional room demand.

This non-local market segment has the potential to contribute an incremental $14.7 million to $22.1 million in gaming revenues, as demonstrated in the following table, based on utilization of 53 to 64 rooms per night by local gamers.

Scenario 3 Non-Local Market Overnight Gamer Revenue Potential

Non-local rooms demanded per night @ 75% overall occ. (total 225 rooms demanded per night)	Non-local Gaming Revenues @ $250/room	Non-local rooms demanded per night @ 85% overall occ. (total 255 rooms demanded per night)	Non-local Gaming Revenues @ $250/room
172	$15,695,000	202	$18,432,500
166	$15,147,500	196	$17,885,000
161	$14,691,250	191	$17,428,750
Non-local rooms demanded per night @ 75% overall occ. (total 225 rooms demanded per night)	**Non-local Gaming Revenues @ $300/room**	**Non-local rooms demanded per night @ 85% overall occ. (total 255 rooms demanded per night)**	**Non-local Gaming Revenues @ $300/room**
172	$18,834,000	202	$22,119,000
166	$18,177,000	196	$21,462,000
161	$17,629,500	191	$20,914,500

In total, we project the range in gaming revenue potential in Scenario 3 would be $325 million, ± $31 million, or approximately 9.5 percent.

Scenario 3 Total Gaming Revenue Potential

Low	**Most Likely**	High
$294,648,637	**$325,212,840**	**$356,364,335**

In the most likely case scenario the win per position with 3,000 positions would be $297/day, with a high/low range of $269 to $325. In total, relative to Scenario 1's most likely case, the impact of a casino in Taunton would be a 21 percent decline in revenue potential.

Scenario 4: Brockton with Wampanoag

Scenario 4 differs from Scenario 2 in that it assumes the Mashpee Wampanoag will be successful in developing a casino of comparable size to Clairvest's in Taunton, such that Clairvest would be competing against an additional property in the market area between Boston and Providence. Scenario 4 differs from Scenario 3 in that it assumes the Clairvest casino will be in Brockton instead of Bridgewater. The key differences here between the Brockton and Bridgewater locations reflect accessibility and intercepts from the central I-495 loop, including towns such as Framingham; this could be a fertile market for a casino in Bridgewater, but a Taunton casino could be a significant interceptor. We envision a more significant market for Brockton will be Brockton itself, as well as some of the urban and suburban cities and towns south and southwest of Boston. Thus, we would expect Taunton to be more of a threat to a Bridgewater casino than one in Brockton, but not a significantly greater one since the locations are still all relatively proximate.

We project cannibalization of Clairvest's local market potential relative to Scenario 2 would be approximately 21 percent, resulting in a most likely case revenue projection of $315 million from the regional market area.

Scenario 4 Local Market Potential

Low	**Most Likely**	High
$298,576,758	**$314,525,840**	**$331,124,457**

The comparatively lower local market demand would imply fewer rooms per night demanded from the regional population. We estimate this range would fall to 48 to 56 rooms per night, as the vast majority of demand would be from within a 30-mile drive. As a result, we project the incremental gaming expenditure from regional room demand would be in the range of $1.5 million to $2.8 million.

Scenario 4 Local Market Overnight Gamer Revenue Potential

Rooms demanded/night	Day-trip Value	Overnight value @ $250/occupied room	**incremental value**
48	$2,838,240	$4,380,000	**$1,541,760**
52	$3,074,760	$4,745,000	**$1,670,240**
56	$3,311,280	$5,110,000	**$1,798,720**
Rooms demanded/night	Day-trip Value	overnight value @ $300/occupied room	**incremental value**
48	$2,838,240	$5,256,000	**$2,417,760**
52	$3,074,760	$5,694,000	**$2,619,240**
56	$3,311,280	$6,132,000	**$2,820,720**

Finally, we assume the 300-room hotel would attain an occupancy rate in the range of 75 percent to 85 percent (inclusive of the local demand for rooms), consistent with the Scenario 3 assumption.

This non-local market segment has the potential to contribute an incremental $15.4 million to $22.7 million in gaming revenues, as demonstrated in the following table, based on utilization of 48 to 56 rooms per night by local gamers.

Scenario 4 Non-Local Market Overnight Gamer Revenue Potential

Non-local rooms demanded per night @ 75% overall occ. (total 225 rooms demanded per night)	Non-local Gaming Revenues @ $250/room	Non-local rooms demanded per night @ 85% overall occ. (total 255 rooms demanded per night)	Non-local Gaming Revenues @ $250/room
177	$16,151,250	207	$18,888,750
173	$15,786,250	203	$18,523,750
169	$15,421,250	199	$18,158,750
Non-local rooms demanded per night @ 75% overall occ. (total 225 rooms demanded per night)	**Non-local Gaming Revenues @ $300/room**	**Non-local rooms demanded per night @ 85% overall occ. (total 255 rooms demanded per night)**	**Non-local Gaming Revenues @ $300/room**
177	$19,381,500	207	$22,666,500
173	$18,943,500	203	$22,228,500
169	$18,505,500	199	$21,790,500

In total, we project the range in gaming revenue potential in Scenario 4 would be $335 million, ± $20 million, or approximately 6 percent.

Scenario 4 Total Gaming Revenue Potential

Low	**Most Likely**	High
$316,269,768	**$335,541,080**	**$355,735,677**

In the most likely case scenario the win per position with 3,000 positions would be $306/day, with a high/low range of $289 to $325. In total, relative to Scenario 2's most likely case, the impact of a casino in Taunton would be a 20 percent decline in revenue potential.

Summary Tables

	Low	**Most Likely**	High
Bridgewater Only	**$382,329,366**	**$411,931,653**	**$440,664,319**
Bridgewater and Taunton	**$294,648,637**	**$325,212,840**	**$356,364,335**
Taunton impact (% change)	-22.9%	**-21.1%**	-19.1%
Brockton Only	**$396,793,361**	**$419,202,173**	**$442,792,183**
Brockton and Taunton	**$316,269,768**	**$335,541,080**	**$355,735,677**
Taunton impact (% change)	-20.3%	**-20.0%**	-19.7%

Brockton Top line Gaming Revenue Estimates

A gravity model was used to assess the gaming revenue potential of a potential development at the Fairgrounds located in Brockton, Massachusetts. For purposes of this analysis, we assumed 2,700 gaming positions, a 250-room hotel with the appropriate supply and variety of additional amenities that would allow the property to be competitive.

The analysis analyzed the Brockton location with and without a competitive location near Taunton, Massachusetts at approximately the intersection of Highways 24 and 140.

It should be noted a site visit was not done for this analysis. Potential issues with location, traffic or accessibility could affect the assessment.

Market Demographics

To Come..

Map

To Come..

Model Inputs

Model Inputs	Massachusetts					Connecticut		Rhode Island	
	Brockton Fairgrounds	Plainridge Park Casino	Mashpee Wampanoag*	Wynn Resort Everett	MGM Springfield	Mohegan Sun	Foxwoods	Twin River	Newport
Estimated Development Costs		$225 million	N/A	$1.6 billion	$800 million				
Slots		1,250	3,000	3,072	3,000	5,440	5,765	4,540	1,097
Tables		0	110	125	75	300	350	80	0
Gaming Positions	2,700	1,250	3,660	3,822	3,450	7,240	7,865	5,020	1,097
Poker		0	40	25	25	45	100		
Hotel Rooms	250	0	300 *	500	250	1176	2577	0	0
LTM GGR ($M)									
Slots						$580.6	$485.0	$465.8	$45.2
Tables **						$191.6	$160.1	$79.6	$0.0
Total						$772.2	$645.1	$545.4	$45.2

*Phase 2

** CT Casinos do not report Table Game Rev. Estimated

Results

Without a competitor in Taunton, the Brockton location could potentially generate $379 million in gross gaming revenue from 3.9 million visits. The local market would be responsible for 89% of the revenue, while the 250-room hotel would generate incremental gaming revenue of $35 million.

If a competitor operated in Taunton, the Brockton facility would be negatively impacted approximately 16.6%, generating revenue of $316 million. Brockton is strategically closer to the population base of Boston and in fact, based on the modeling exercise generate approximately 8% more local market revenue than Taunton.

Brockton Fairgrounds				
	Without Mashpee Wampanoag	**With Mashpee Wampanoag**	**Impact**	**Impact %**
Local Market	$335.9	$277.2	-$58.7	-17.5%
Hotel	$38.4	$34.9	-$3.5	-9.1%
Other	$5.0	$4.2	-$0.9	-17.5%
Total Gross Gaming Revenue ($M)	**$379.3**	**$316.2**	-$63.1	-16.6%
Gaming Positions	**2,700**	**2,700**		
Win/Position/Day	**$385**	**$321**		
VISITS (M)				
Local Market	3.735	3.074	-0.661	-17.7%
Hotel	0.111	0.111	0.000	0.0%
Other	0.086	0.071	-0.015	-17.7%
Total Visits	**3.932**	**3.256**	-0.676	-17.2%
Win/Visit	**$96**	**$97**	$0.7	0.7%

MacLachlan, Amy (MGC)

From: MacLachlan, Amy (MGC)
Sent: Wednesday, March 23, 2016 11:03 AM
To: MGCcomments (MGC)
Subject: FW: Question regarding the fairness of the process concerning Region C

From: Stand UP for Brockton [mailto:standupforbrockton@gmail.com]
Sent: Monday, March 21, 2016 10:25 AM
To: MGCcomments (MGC)
Cc: Reilly, Janice (MGC)
Subject: Question regarding the fairness of the process concerning Region C

Commissioners,

I have a question regarding the upcoming hearing scheduled for Thursday, March 24th which includes on the agenda an opportunity for Neil Bluhm and MG&E to respond to the presentation last Tuesday by the Mashpee Tribe. Why is he being afforded this opportunity? It is my understanding that the role of the MGC is to hear the presentations by all parties, investigate the evidence presented and then render a decision.

Mr. Bluhm and his team have made at least two full presentations to the commissioners including a comprehensive repeat of earlier presentations on March 1st in Brockton. The only key difference in the earlier presentations is they have increased their numbers particularly on employment from their original presentation to the City of Brockton a year ago. There was nothing new in their presentation other than admitting to the funding of a law suit against the federal government for their decision on taking land in trust for the Mashpee Tribe.

The presentation by the Mashpee Tribe and their partners last week clearly answered all the unfounded accusations that MG&E have made against them. The funding of a futile law suit is not grounds to accept the word of MG&E on any matter.

Will the Mashpee Tribe be given an opportunity to refute the presentation of MG&E that is scheduled for this Thursday? If not, why not? Quite frankly, the presentations have all been made. The next event should be the planned closing of the Brockton meeting on March 29th.

The position of Stand UP for Brockton is that we have grave concerns about having any casino in Region C, but we understand the reality of that there is likely going to be one in Taunton with the Mashpee Tribe. Two casinos would be devastating to the local economies of so many communities. You have heard and received our many objections to having a casino in Brockton next to Brockton High and the traffic problems for which no valid mitigation has been proposed. We have been busy in preparing our own response to the 3/1 presentation by MG&E and the Mashpee Tribe presentation to present on 3/29. We can forego our formal presentation on 3/29 on legal matters that we have not previously presented if the 3/24 MG&E response does not become a reality. We are more the willing to allow the presentations already made stand and allow the MGC to weigh the evidence and make a decision in late April or beyond. The only thing left to do is for a final input of the citizens of Brockton on 3/29 and then comes your difficult task of making a decision.

Thank you,

Pastor Richard Reid
--
Stand UP for Brockton
http://www.nocasinoinregionc.info

No Documents

Massachusetts Gaming Commission
Diversity Goal/Business Technical Assistance Grants

Purpose of Grant:
One of the MGC's major strategic goals is to ensure to the maximum extent possible that the economic opportunities provided by the development and operations of the casinos are inclusive and reflective of the diversity of Commonwealth. The Expanded Gaming Law specifically requires Casino developers (licensees) to set their own diversity goals for the utilization of Minority, Woman and Veteran owned businesses as part of the design, construction and operations of the casino with a similar focus on hiring of diverse employees during the construction and operations of the casino. In order to optimize the outcomes for the diversity goals outlined in Chapter 23K, MGC is exploring funding efforts that have the potential to optimize the impact related to the diversity hiring and contracting goals.

With a goal of the building capacity of the small business and ensuring their success as casino vendors, MGC may consider funding planning grants or grants for the expansion of business technical assistance programs that can demonstrate a focus on one of the diverse populations outlined above and that target Massachusetts companies that have a contract or the potential of a contract with a Resort Casino (Category 1) or Category 2 Casino (slots only).

OBJECTIVES:
- Help diverse firms succeed in casino markets for goods and services, and as subcontractors to prime contractors during construction.
- Support joint ventures and collaboration for smaller contractors
- Provide specialized assistance to important underserved markets or regions near a casino licensee
- Provide high-quality assistance, such as one-on-one consulting, and training resources to support the needs of existing businesses including strategic and operational planning, financial analysis, opportunity development and capture, contract management, and compliance to eligible small businesses

Non-profits, public or quasi-public organizations must serve MA businesses that:
- are owned and controlled by economically and socially disadvantaged individuals including minority individuals, women and veterans;
- are located in areas of high unemployment or low-income.
- are owned by low-income individuals.
- have the potential of doing business with a casino in MA.

Grant Amounts and Distribution
The MA Gaming Commission may award grants and contracts totaling up to $100,000 to support a key focus of work articulated in the guidelines above. Up to $20,000 may be targeted for smaller grass roots, innovative and promising programs. Funds may be awarded in a competitive process open to proven or promising programs, partnerships or initiatives led by nonprofit, public or quasi-public entities. Applicants should demonstrate how they may provide supplemental funding or in-kind contributions for this program. The grants must be used or designated this fiscal year ending June 30, 2016 with the potential of refunding next fiscal year based on budget availability and performance. Maximum grant amounts to programs proposed as a collaborative joint proposal (defined as two or more eligible organizations sharing costs and providing complementary services in coordination with each other) not

Diversity Goal/Business Technical Assistance Grants Process	
Commission issues RFR	Friday, March 11, 2016
Bidders Conference - *Organizations interested in applying for funds will have an opportunity to ask clarifying questions about the RFR, Guidelines and Review Process and Timeline*	*Monday, March 21, 2016* *11:00 AM - 12:00 PM* *101 Federal Street, 12th Floor* *Boston, MA 02110* ***RSVP by Friday, March 18, 2016*** *to ny.mahasadeth@state.ma.us*
Deadline for Questions - *for those who cannot attend the bidders conference, please submit written questions to jill.griffin@state.ma.us*	Wednesday, March 23, 2016
Frequently Asked Questions - a summary of the bidders conference and any written questions will be posted to www.massgaming.org	Friday, March 25, 2016
Responses are due – Complete applications should be submitted	**April 13, 2016 (Wednesday) 5:00 PM**
Notification to applicants	April 22, 2016 (Friday):

Requests for Responses/Proposals

ABOUT

- Expanded Gaming Act
- Opportunities in the Expanded Gaming Industry
- Workforce and Supplier Development
- Diversity
- Plainridge Park Casino
- MGM Springfield
- Wynn Resort in Everett
- Horse Racing
- Host & Surrounding Communities
- Research Agenda
- Voluntary Self-Exclusion
- Tribal Gaming
- Charitable Gaming
- Requests for Responses/Proposals
- Frequently Asked Questions
- Requests for Public Comments

What You Need to Know

MassGaming will post all requests for procurements to www.CommBuys.com

Requests for Proposals

The official location for getting all the information about procurements is www.CommBuys.com

COMMBUYS is the only official procurement record system for the Commonwealth of Massachusetts' Executive Departments. COMMBUYS offers free internet based access to all public procurement information in order to promote transparency, increase competition, and achieve best value for Massachusetts taxpayers.

As a courtesy, MGC is posting the following RFR, which has been posted to CommBuys under bid #BD-16-1058-1058C-1058L-0000000758

Diversity Goal/Business Technical Assistance Grants RFR Final 3.10.16

RFR listed here

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Our mission is to create a fair, transparent, and participatory process for implementing the expanded gaming law in the Commonwealth.

web address