# NOTICE OF MEETING and AGENDA

April 18, 2013 Meeting

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

Thursday, April 18, 2013
1:00 p.m.
Pathfinder Regional Vocational Technical High School
240 Sykes Street
Palmer, Massachusetts

## PUBLIC MEETING - #64

1. Call to order

2. Approval of Minutes
   a. March 28, 2013
   b. April 4, 2013

3. Administration
   a. Master schedule
   b. Secretary and Treasurer - VOTE

4. Casino Career Institute - Update

5. Public Education and Information
   a. Report from the Ombudsman
   b. Host Community Referendum emergency regulation – VOTE

6. Region C

7. Other business – reserved for matters the Chair did not reasonably anticipate at the time of posting

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

4/15/13
(date)

Stephen P. Crosby, Chairman

**Date Posted to Website:** April 16, 2013 at 1:00 p.m.

2.a

# Meeting Minutes

**Date:** March 28, 2013

**Time:** 1:00 p.m.

**Place:** Division of Insurance
1000 Washington Street
1st Floor, Meeting Room 1-E
Boston, Massachusetts

**Present:** Commissioner Gayle Cameron
Commissioner James F. McHugh
Commissioner Bruce Stebbins
Commissioner Enrique Zuniga

**Absent:** Commissioner Stephen P. Crosby, Chairman

**Call to Order:**

Commissioner McHugh opened the 61st public meeting. He stated that Chairman Crosby will not be present at today's meeting. Commissioner McHugh chaired the meeting in Chairman Crosby's absence.

**Approval of Minutes:**

See transcript pages 2-3.

Commissioner McHugh stated that the Commission has no minutes to review today but he will prepare several sets for the next meeting.

**Administration:**

See transcript pages 3-5.

Master Schedule – Commissioner Zuniga stated that the Commission continues to contemplate the three scenarios regarding slots parlor processing and license issuing. He is preparing a framework to allow the Commission to reanalyze those scenarios and contemplates having this framework ready for discussion at the next Commission meeting. He stated that the Commission has tentatively scheduled the determination of suitability for the slots parlor applicants for April 30, with the possibility of being done sooner if the investigations proceed faster than scheduled.

**Qualifier Status Review:**

See transcript pages 5-11.

General Counsel Blue stated that she is bringing to the Commission a request for a vote on a qualifier. She stated that if an individual or entity has a significant interest in an applicant, that person must submit to the Commission qualification process or divest all of its interest in the applicant. She stated that Vornado, which has an interest in the Sterling Suffolk application, declined to participate in the qualification process so the Commission advised the entity and associated individuals that they would need to divest. The divestiture process might take more time than the Commission has scheduled for background investigations, so she has looked at other jurisdictions to determine if there is a way to address this issue. She stated that one other jurisdiction's approach suggests that Vornado could place that interest into a blind trust with an independent trustee who would then become the qualifier and submit to the qualification process. Any transfer out of that trust would be subject to the Commission's transfer regulations and the transferee would also have to qualify.

Ms. Blue stated that before the Commission today is a request to approve the request to withdraw the Vornado entities and related individuals from qualification if Vornado places its interest into a trust with an independent trustee, who is from the firm of Hemingway and Barnes, with the knowledge that Vornado will have no influence or impact on that interest while it is in the trust. The Vornado blind trust is a temporary measure created with the understanding that the trust would divest Vornado's entire interest to a new investor.

Commissioner Stebbins asked if the Commission has input into who Vornado selects as a trustee. Ms. Blue indicated that the Commission does not have input into the selection, but has reviewed the individual and believes that he is independent. Commissioner Zuniga asked if Vornado has a projected timeline for the divestiture. Ms. Blue stated that Vornado would like to do it as soon as possible.

Commissioner McHugh stated that if Vornado executes the trust agreement, then control of Vornado's interest will be solely in the hands of the trustee, who will go through the Commission's qualification process. Once the trustee transfers this interest to another person or entity, the transferee will also have to go through the Commission's qualification process. Commissioner Zuniga asked if the trust agreement will delay the Commission's determination of suitability. Ms. Blue stated that she has spoken with Director Wells who has indicated that the trust agreement should not delay the process.

*Motion made by Commissioner McHugh that the Commission approve placement of the interests of the Vornado entities in Sterling Suffolk Racecourse into a blind trust over which Vornado has no control; and require that the trustee qualify through the Commission's normal qualification process; and upon the trustee's becoming a qualifier, permit the Vornado qualifiers to withdraw. Motion seconded by Commissioner Cameron. The motion passed unanimously by a 4-0-0 vote.*

**Public Education and Information:**

See transcript pages 11-13.

Report from the Ombudsman: Ombudsman Ziemba stated that he is still in the process of collecting all the information that would be needed for a full discussion of the Category 2 licensing schedule, so he would like to postpone that discussion until the Commission's next meeting. He stated that he continues to hold conversations with host and surrounding communities, and, when setting deadlines, the Commission should take into account the ability of both host and surrounding communities to understand the impacts of the proposed casino. He stated that he has set a deadline of this week for applicants to respond on whether or not they are interested in utilizing the RPA planning process. The response has been that applicants are very interested in having a planning session with the regional planning agencies, but a few do not yet want to commit to utilizing the RPAs.

Ombudsman Ziemba reported that he has held conversations with the Central Mass Regional Planning Commission regarding the additional applicant in Worcester, and he anticipates having a fruitful dialogue with it as the process continues.

**Regulation Update:**

See transcript pages 13-33.

Regulation Update – Counsel Grossman stated that the legal staff has attempted to incorporate into the regulations all of the Commissioners' comments from Monday and made a few additional adjustments. He stated that he also added to Sections 102-117 of the existing regulations a provision relative to legal challenges, stating in essence that no person or local government entity may challenge or seek to enjoin Commission action based on a claim that an applicant and/or the Commission has not complied with Commission regulations.

Mr. Grossman stated that the Commission has also made amendments to the language dealing with the confidentiality of the RFA-1 applications, expanding the process presently in place to include the RFA-2 applications. Commissioner McHugh stated that the Commission is dealing with 21,000 pages of personal information and some applicants have asked that additional information be kept confidential. The Commission is working through these requests and is making every effort to get through this process as quickly as it can. He stated that under Mass General Law the Commission is not permitted to release information that is exempt from disclosure for privacy reasons.

Mr. Grossman referred to Sections 118-131. He referenced additional language in Section 119.03(2) intended to clarify the evaluation criteria. He stated that under the Office of Campaign and Political Finance regulations, when the applicant reimburses the host community for the cost of the election, the applicant would have to disclose this information. He said that he added language to the regulations to reflect this requirement. He stated that he also added a section to deal with arbitration, if necessary, to determine the fair market value of a gaming establishment upon the transfer of the license.

Commissioner Stebbins referenced language requiring all applicants to disclose political contributions and asked why he included this language if all applicants are barred from making political contributions. Mr. Grossman stated that one section of the legislation deals with a ban on political contributions and another section deals with the disclosure of certain contributions, so the sections might appear to be inconsistent with one another. He stated that the prohibition is

on making contributions to an individual, politician, or candidate for office, however, the legislation contains no prohibition against making a contribution to a community or a division of a community. Applicants must disclose those types of community contributions.

Commissioner McHugh stated that these draft regulations represent an enormous amount of work done by Counsel Grossman and the Commission's consultants, and the draft regulations are something that the Commission can be proud to place before the public for comment.

*Motion made by Commissioner McHugh to accept these draft regulations and authorize legal staff to forward them to the Local Government Advisory Committee and to carry out all the steps necessary for their formal promulgation following period of public comment antecedent to a public hearing. Motion seconded. The motion passed unanimously by 4-0-0 vote.*

Schedule Update – Counsel Grossman stated that he will file the regulations with the Local Government Advisory Committee by tomorrow, and the Commission must then wait 14 days before taking the next step required by the Administrative Procedure Act. He stated that the goal is to file the regulations with the Office of Secretary of State by April 12, 2012 and the law requires a 21-day period between the filing and public hearing. The notice published in the Massachusetts Register must also precede the public hearing by seven days, so they are looking at a public hearing date of May 3, 2013. He stated that under this schedule the Commission can file the final regulations for publication by June 7, 2013 at the latest.

Evaluation Criteria – Commissioner McHugh stated that before the Commission is the Evaluation Criteria Matrix which incorporates all the changes discussed at Monday's Commission meeting. He stated that the Commission will further transform this matrix into the application form. He stated that if the Commission agrees, the Commission could post the matrix tomorrow and solicit public comment. The Commission agreed to post the matrix for public comment.

**Racing Division:**

See transcript pages 33-44.

Administrative Update – Director Durenberger stated that she will present at the Commission's next meeting the amendments to their proposed legislation accompanied by a draft report. She will also provide a first quarter update outlining where the Racing Division is at the end of its first 90 days of exclusive control over Massachusetts horse racing. She anticipates that her presentation will be lengthy.

Proposed Phase II Regulation Changes to 205 CMR 4.00, Rules Governing Racing – Director Durenberger stated that Counsel has brought to her attention that she must strike from the proposed regulations all language stating "or later revisions." She reviewed the applicable sections with the Commission.

She stated that before the Commission are written submissions received from the Jockeys' Guild, an email exchange from the Jockey Club, a submission from Mr. Paul Booker at Suffolk Downs, a 2011 submission from Suffolk Downs, and a packet with the proposed changes. She stated that she received clarification from the Secretary of the Commonwealth regarding the best way to

move forward with the Phase II rulemaking process. The Secretary recommended that she put the proposed changes before the Commission today for a vote to adopt the regulations on an emergency basis and to simultaneously proceed through the regular rulemaking process.

Commissioner Cameron made reference to the very positive letter received from the Jockeys' Guild and stated that Director Durenberger deserved these accolades. Director Durenberger stated that in the fall she will be undertaking Phase III rulemaking, which includes the definitions of the different racing officials and their duties.

*Motion made by Commissioner McHugh to adopt the proposed changes to 205 CMR 4.00 that are before the Commission on an emergency basis, and simultaneously commencing the formal promulgation process for those rules by sending them tomorrow to the Local Government Advisory Committee and by authorizing Director Durenberger, in conjunction with the legal staff, to take all other steps necessary to have the regulations promulgated formally. Motion seconded by Commissioner Cameron. The motion passed unanimously by a 4-0-0 vote.*

*A brief recess was taken.*

Commissioner McHugh reconvened the 61st public meeting.

**Research Agenda:**

See transcript pages 44-103.

Commissioner Zuniga introduced a team from UMass Amherst who responded to the Commission's research agenda RFP: Dr. Rachel Volberg and Dan Hodge, who were present at the meeting, and Rob Williams who participated remotely by telephone. He stated that the Commission invited the team today to help the Commission better understand the nuances of this project.

Dr. Volberg addressed the Commission. She stated that she was very excited to be discussing this research project with the Commission as she has been involved in full-time gambling research for 28 years and has always wanted to conduct this type of study. She stated that no other jurisdiction has included research as part of its gaming legislation and she is very happy that Massachusetts has done so. She stated that the data produced by their study will be very valuable to every citizen of the Commonwealth, the applicants, the operators, regulators, legislators, members of the host and surrounding communities, and perhaps the international community as well.

Dr. Volberg stated that she designed the project to ultimately generate early warning signs of potential changes in the social and economic impacts produced by new forms of gaming in Massachusetts. She stated that the information generated from this study will incorporate evidence-based and empirical data into the development of measures that will minimize harm associated with casino gambling and internet gambling in the future. She stated that her team consists of a multidisciplinary, scientifically rigorous Massachusetts based team that she recruited before the RFR came out. She expressed her belief that this research will be a shining example of a world-class gaming research study. She provided background information and an overview of the design of the study which will use a cross-sectional rather than a cohort

approach. Mr. Hodge stated that a cross-sectional design involves surveying the population at several different points in time, whereas a cohort study would generate a sample and track those individuals every year over time.

Dan Hodge described the economic research factors of the project. He stated that the goal is to look at the net economic and fiscal impacts of expanded gaming. He stated that this project will span multiple years, with the goal of measuring impacts as they occur over time by tracking and combining a number of economic and fiscal metrics. He provided information on how the study would accomplish these goals and answered questions from the Commissioners.

Commissioner McHugh asked how the Commission will pay for this study. Commissioner Zuniga stated that the legislation gave the Commission a tool to fund this effort by way of the Public Health Trust Fund, of which the Commission is a trustee. He stated that the legislation sets a floor that the Commission can assess on an annual basis and a tax on the gross gaming revenue funds this trust in later years. He emphasized the legislative requirement that the Commission undertake this research study and the Commission will have to begin the study before the state begins to feel impacts from gaming. He recommended that the Commission initially fund the study for a short period and then continue providing funds as the Commission receives revenue from the licensees.

Commissioner McHugh asked what the role of the Gaming Policy Advisory Committee will be, because that Committee is supposed to advise the Commission during the course of this study. Commissioner Zuniga stated that under the legislation, the Gaming Policy Advisory Committee sets the annual research agenda. However, the Committee, of which the Governor's appointee is the chair, has not yet been set up. Dr. Volberg stated that it is her intention to report research results to this Committee on a regular basis as soon as it is created.

Commissioner Stebbins asked how the researchers would interact with the Commission's Director of Research and Problem Gaming. Dr. Volberg stated that the Director can attend a number of conferences on problem gaming and benefit from introductions that her team could make. She stated that the team would plan to work very closely with the Director in terms of the various decisions that have to be made as a result of the team's research.

Commissioner McHugh expressed concern with the cash flow piece of this process and recommended moving ahead with the negotiations and contract, including a projection of cash flow to match up to the Commission's budgetary projections. The Commission would then approve the negotiated contract after reviewing the cash flow consequences that the contractual arrangements produced.

*Motion made by Commissioner McHugh that the Commission authorize Commissioner Zuniga to begin the process of drafting the scope of work and undertaking contract negotiations for the research project with the team comprised of UMass Amherst et al, as part of their response to RFR #MGC-Research-2012, dated January 7, 2013, and bring the fruits of those negotiations, plus a cash flow analysis, back to the Commission for final approval. Motion seconded by Commissioner Stebbins. The motion passed unanimously by a 4-0-0 vote.*

Commissioner McHugh stated that he and Commissioner Stebbins have been discussing the composition of the team to assist in reviewing the RFA-2 applications. Commissioner Stebbins

stated that the AIA has reviewed the evaluation criteria and provided him with a list of the types of professional consultants that the Commission should utilize for this application review. He recommended using a firm with experience in analyzing mergers and acquisitions to review the financial information. He stated that he would like to create a framework for an RFP for these services. Commissioner McHugh recommended continuing this discussion at the Commission's next meeting.

Commissioner McHugh announced that the Commission's April 4 meeting will begin at 9:00 a.m. due to the number of items on the agenda, which includes discussions on racing, scheduling, and Region C.

Commissioner McHugh stated that the Commission received a letter from the law firm of Todd & Weld contending that the Commission has no authority to open Region C to commercial gaming until it concludes that the Bureau of Indian Affairs would not take land into trust. He stated that he has a different opinion on this matter, but the Commission has not formally taken a position on the issue.

*Motion made to adjourn, motion seconded and carried unanimously.*

**List of Documents and Other Items Used at the Meeting**

1. Massachusetts Gaming Commission March 28, 2013 Notice of Meeting and Agenda
2. March 28, 2013 Massachusetts Gaming Commission Memorandum Regarding Vornado Trust
3. Massachusetts Gaming Commission Draft Regulations Updates to 205 CMR 102.00 through 117.00
4. Massachusetts Gaming Commission Draft Regulations New 205 CMR 118.00 through 131.00
5. Massachusetts Gaming Commission Draft Evaluation Criteria
6. Massachusetts Gaming Commission – Racing Division March 28, 2013 Memorandum Regarding Proposed Regulatory Changes to 205 CMR 4.00 – Phase II Recommendation: Adoption of Proposed Regulations on Emergency Basis
7. Proposed Changes to 205 CMR 4.00
8. Written Submissions Received Regarding Proposed Changes to 205 CMR 4.00
9. UMass Amherst Presentation: Massachusetts Gaming Commission Research Agenda, Social & Economic Impacts of Gambling in Massachusetts

/s/ James F. McHugh
James F. McHugh
Secretary

(6) A host community may not hold an election in accordance with M.G.L. c.23, §15(13) until the commission has issued a positive determination of suitability to the applicant in accordance with 205 CMR 115.05(3) unless the following conditions are satisfied:

a) Prior to the request by the applicant for an election in accordance with 205 CMR 124.02(1), the governing body of the community formally approves of holding the election prior to a positive determination of suitability having been issued to the applicant by the commission; and

b) at the expense of the applicant, the community has conducted a process for informing the community about the commission's determination of suitability standards and procedures, which shall include, but not be limited to, the provision of a notice designed to be received by voting households within the community informing such households that an election is to be held for which the applicant has yet to be issued a positive determination of suitability, that the commission will make its determination of suitability after completing a thorough background investigation of the applicant, its principal operating officers and investors, and that the commission will not permit the applicant or its principal operating officers or investors to proceed with the application unless it determines that they are suitable to operate a gaming facility in Massachusetts. The content of the notice shall be forwarded to the commission for approval prior to dissemination. A description of other methods to so inform the community about the commission's determination of suitability standards and procedures shall also be forwarded to the commission prior to holding of the election. Any failure to issue the notice to one or more voting households shall not be deemed by the commission to be a failure to meet the requirements of this section, provided that a community demonstrates reasonable efforts to comply with the requirements of this section.

5.b

**Edward M. Pikula, Esq.**
***City Solicitor***

Law Department
36 Court Street, Room 210
Springfield, MA 01103
Office: (413) 787-6085
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Fax: (413) 787-6173
Email: epikula@springfieldcityhall.com

**THE CITY OF SPRINGFIELD, MASSACHUSETTS**

April 11, 2013

John Ziemba, Ombudsman
Massachusetts Gaming Commission
84 State Street, Suite 720
Boston, MA 02109

*Re: Host Community Referendum emergency regulation/suitability determinations*

Dear Mr. Ziemba:

Please accept this letter, sent on behalf of my client, the City of Springfield, to request clarification and greater certainty with regard to the Massachusetts Gaming Commission's suitability investigations pursuant to Mass. Gen Laws, ch. 23K and regulations promulgated thereunder. Without clarification and certainty, there will be undue delay in the process for implementing the Gaming Act.

The City of Springfield participated in policy discussions with the Commission at the time Springfield issued it Phase I RFQ/P. Under the policy, a vote on a host community agreement would not take place before the Commission has made a decision on qualifications of the applicant, but a host community and prospective applicant need not wait until the completion of the RFA-1 process before signing a host community agreement if they choose to do so.

In reliance on the policy and the Commission's release of its RFA-1, as part of Phase II of the City's RFQ/P process, and prior to the City selecting the casino company (or companies) with whom it will negotiate a host community agreement, the City required that each participant in Phase II of the City's RFQ/P process become an "applicant" with the Commission by paying the Commission's application fee and completing and submitting to the Commission its completed RFA-1.

The policy and the City's Phase II RFQ/P process was premised on the understanding that suitability determinations would take about 6 months, and also with the understanding that investigations as to suitability would begin when the applicants paid their fees and submitted their applications. Both Springfield applicants filed their applications prior to the January 15, 2013. Springfield has been conducting a selection

process and is in the process of negotiation host community agreements with two casino companies.

However, these negotiations will be forced to drag on, and residents will not be allowed to vote if suitability determinations are not finalized in the near future.

At that time the policy was developed the understanding was that investigations would be completed in a time frame such that Springfield could complete its host community agreement negotiations, execute an agreement, as set forth in the policy, and the suitability determinations would be complete by then, or shortly thereafter, so that a referendum could be held.

It is Springfield's hope to complete negotiations and approve a host community agreement in time to hold a referendum election on the June 25, 2013 special election date, or shortly thereafter. However, under the timeframe discussed at the last meeting of the Commission, suitability determinations are not scheduled to be complete until sometime after June, and possibly into August or even later. Assuming an August 1 determination as to suitability, in order to meet the 60 to 90 day deadline to hold a referendum, a company could not request an election until there was certainty that it would be found suitable within the 60 – 90 day window., thereby unduly delaying the timeframe to hold a referendum until the fall, or maybe winter.

We hope the above information will further our respective goals of working in a cooperative and timely fashion to implement the intent of the Gaming Act.

Very truly yours,

Edward M. Pikula, City Solicitor

cc: Mayor
Chief Development Officer
Shefsky & Froelich

5.b

April 16, 2013

**BY EMAIL**
Massachusetts Gaming Commission
84 State Street
10th Floor
Boston, Mass. 02109

**RE: Proposed Emergency Regulation of April 12, 2013**

No Eastie Casino represents a broad cross-section of concerned citizens and stakeholders with strong interests in the future of East Boston. We are writing to comment on the Gaming Commission's ("the Commission") proposed emergency regulations which would permit applicants for casino licenses in the Commonwealth to proceed to a public referendum prior to the suitability determination now required by 205 CMR 115.00.

We strongly urge the Commission to reject this proposed measure in its entirety for the reasons outlined below.

## I. There is no cognizable "emergency" sufficient to justify this extreme measure other than Vornado Realty Trust's refusal to submit to routine background checks.

Regulations may be adopted on an emergency basis only if an agency determines that such action "is necessary for the preservation of the public health, safety or general welfare, and that observance of the requirements of notice and a public hearing would be contrary to public interest." G.L.C.. 30A sec. 2.

The Commission has **completely failed to identify any exigency whatsoever** which would even begin to approach this standard. In its announcement of this proposed measure in a letter dated April 11, 2013, the Commission noted only that unidentified "constituents" (including the applicants themselves) had expressed concern that the existing suitability determination requirements "may unnecessarily delay the licensing process." We do not accept that the mere potential for delay of a highly speculative development project with enormous potential consequences for East Boston and surrounding communities qualifies as a danger to "public health, safety or general welfare" under any circumstances. In fact, we assert that the opposite is true: waiting for a determination of financial viability and background checks to be completed prior to a vote in host communities will assist voters, who will benefit from having full information about casino applicants and curtail election expenses should the applicants fall short of meeting the Commission's standard.

Furthermore, we are dismayed that the only apparent "emergency" presented here is Vornado Realty Trust's recent well-publicized refusal to submit its executives to routine criminal background checks. Pursuant to the familiar "unclean hands" doctrine, **parties have no right to object to any delay for which they are plainly and solely responsible.** Vornado's willful disregard for the policies and procedures of this Commission are an affront to the public's right to a transparent casino licensing process, which is plainly "in the public interest."

II. **205 CMR 115.00's suitability determination process is an essential prerequisite to responsible casino licensing, and should not be waived, modified, or expedited under any circumstances.**

The mandatory suitability standards and procedures outlined in proposed 205 CMR 115.00 are entirely reasonable, and **should not be unduly burdensome for any qualified good-faith applicant**.[1] By permitting a public referendum on a given casino license prior to the completion of the suitability determination process, these emergency regulations not only threaten to vitiate this process entirely, but could ultimately result in a far lengthier and more expensive process were an applicant to be deemed unsuitable only after the referendum had been held

Ordinary citizens must subject themselves to basic suitability determinations prior to receiving licenses to carry firearms, practice law, or otherwise earn their livelihoods in at least fifty of the professional trades and professions in the Commonwealth overseen by the Department of Professional Licensure. No reasonable person would expect to be able to "provisionally" possess and carry a handgun or sell alcoholic beverages to the public pending completion of mandatory criminal background checks. Given the nature and scale of the proposals at issue here, it would fly directly in the face of the public interest to treat casino licensing applicants any differently.

III. **These emergency regulations will almost certainly be moot by the time that they are properly reviewed and promulgated.**

Emergency regulations are automatically given the force of law for three months before they must be properly promulgated in accordance with the rulemaking provisions of the Administrative Procedures Act. This three-month window would be more than enough time to put this matter to a planned vote in June, thereby rendering the basic purpose of these measures moot. This end-run around the APA is plainly unacceptable in and of itself.

## CONCLUSION

Adoption of this "emergency" measure would constitute an abdication of the Gaming Commission's responsibility to the Commonwealth to provide fair and measured oversight over the application process—both prior to and following a public referendum. Rushing the casino licensing process to a vote via "emergency" regulations before the applicants have been properly vetted and deemed suitable would be as unnecessary to the overall process as it would be fundamentally unfair.

In light of the above, we would respectfully request that the Gaming Commission reject the proposed "emergency" regulations in their entirety and that completion of 205 CMR 115.00's suitability determination process continue to be required in full for each applicant prior to any future public referendum.

Respectfully submitted,

Matt Cameron
Jessica Curtis-Schnittjer
Celeste Ribeiro

*on behalf of*
No Eastie Casino

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[1] These include not only the criminal background checks which Vornado seeks to bypass, but a determination of financial stability and a number of other essential threshold determinations presently required by statute and regulation.

5.b

## Reilly, Janice (MGC)

**From:** Driscoll, Elaine (MGC)
**Sent:** Friday, April 12, 2013 12:24 PM
**To:** Reilly, Janice (MGC)
**Subject:** public comment on host comunity referendum

**From:** Bresilla, Colette (MGC) **On Behalf Of** mgccomments (MGC)
**Sent:** Friday, April 12, 2013 11:25 AM
**To:** Glovsky, Eileen (MGC)
**Subject:** FW: Background checks

**From:** Mimi Goss [mailto:mimi_goss@yahoo.com]
**Sent:** Friday, April 12, 2013 11:11 AM
**To:** mgccomments (MGC)
**Subject:** Background checks

Dear Commission Members,

As a resident of East Boston, one of the impacted communities, I need to know that the gaming applicant vying to become my neighbor is honest, has integrity, and is financially stable. In this vein, I respectfully request that you hold off on authorizing community referendums until all background checks have been completed. How else will my neighbors and I know who we're voting for?

Similarly, many East Boston and Revere residents are sorely disappointed in your decision to allow the Suffolk Downs / Caesars application to move forward unscathed after the pull-out of Vornado. How can the removal of one of the applicant's major investors -- for refusing background checks, no less -- not demonstrate an unstable operation and serve as a warning sign for the future? It does for many East Boston and Revere residents, and it should for the Gaming Commission.

Communities and towns are already disadvantaged in this process, being up against the marketing and lobbying dollars of multinational corporations. It is not too late to rectify both of these situations, and we expect that you will do so in a timely fashion.

Best Regards,
Maureen Goss
East Boston, MA

## Reilly, Janice (MGC)

**From:** Driscoll, Elaine (MGC)
**Sent:** Friday, April 12, 2013 12:25 PM
**To:** Reilly, Janice (MGC)
**Subject:** public comment on host community referendum

**From:** Glovsky, Eileen (MGC)
**Sent:** Friday, April 12, 2013 11:50 AM
**To:** Driscoll, Elaine (MGC)
**Subject:** FW: Background Checks and Voting

Eileen Glovsky
*Director of Administration*

Massachusetts Gaming Commission
84 State Street 10th Floor
Boston, MA 02109
TEL 617-979-8413 | FAX 617-725-0258
www.massgaming.com
*follow us on*

**From:** Bresilla, Colette (MGC) **On Behalf Of** mgccomments (MGC)
**Sent:** Friday, April 12, 2013 10:56 AM
**To:** Glovsky, Eileen (MGC)
**Subject:** FW: Background Checks and Voting

Hi Eileen,

This one just came in a few minutes ago.

Thank you,

Colette

**From:** smh00a@gmail.com [mailto:smh00a@gmail.com] **On Behalf Of** Steve Holt
**Sent:** Friday, April 12, 2013 10:39 AM
**To:** mgccomments (MGC)
**Subject:** Background Checks and Voting

Dear Commission Members,
As a resident of East Boston, one of the impacted communities, I need to know that the gaming applicant vying to become my neighbor is honest, full of integrity, and financially stable. In this vein, you must hold off on authorizing community referendums until all the background checks have been completed. How else will my

neighbors and I know who we're voting for?

Similarly, many East Boston and Revere residents are sorely disappointed in your decision to allow the Suffolk Downs / Caesars application to move forward unscathed after the pull-out of Vornado. How can the removal of one of the applicant's major investors -- for refusing background checks, no less -- not demonstrate an unstable operation and serve as a warning sign for the future? It does for the majority of East Boston and Revere residents, and it should for the Gaming Commission.

Communities and towns are already disadvantaged in this process, being up against the marketing and lobbying dollars of multinational corporations without the Massachusetts Gaming Commission "bending" laws meant to protect them. It is not too late to rectify both of these situations, and we expect that you will do so in a timely fashion.

Please do not hesitate to contact me for any reason.

Best Regards,

Steve Holt
68D Marginal St
East Boston, MA 02128
617-447-6519

## Bresilla, Colette (MGC)

**From:** K Harper <kmaharper@charter.net>
**Sent:** Tuesday, April 16, 2013 10:02 PM
**To:** mgccomments (MGC)
**Subject:** Referrendum regulation

I do not see the need for this - it is an "emergency" 100% created by the Commission. With their current behavior & attitude the decision will go 'round & 'round - the state of MA will never reap the benefits of jobs, incremental revenue...

Regretfully,

Karen Harper

Sent from my NOOK

## Bresilla, Colette (MGC)

**From:** bghaller <barbara@barbarahaller.com>
**Sent:** Saturday, April 13, 2013 7:43 PM
**To:** mgccomments (MGC)
**Subject:** Host Community Referendum

As a member of a potential host community for a slots parlor, I am opposed to this emergency referendum change. Things are confusing enough. Our understanding of who has authority for what and when is ever-changing. Stop the merry-go-round!

## Bresilla, Colette (MGC)

**From:** Schaefer, David <dschaefe@holycross.edu>
**Sent:** Friday, April 12, 2013 10:07 PM
**To:** mgccomments (MGC)
**Subject:** proposed change in regulations regarding approval of slots casino

As a citizen of Worcester, and as a political scientist, I find the proposed change in regs designed to hold community referenda on casino proposals BEFORE the MGC has engaged in an assessment of the applicant, to be completely unacceptable and a violation of the constitutional-democratic process. Before citizens can make a fully INFORMED vote on a casino proposal, they need to know NOT ONLY that the MGC promises to closely scrutinize the developer, but exactly WHAT the MGC investigation turned up - not merely a "yes or no." Rush Street Entertainment, the proposed casino operator in Worcester, has a LONG LIST of violations of state law in other states where it has operated - including allowing minors to gamble, along with numerous persons who had previously had themselves placed on "do not gamble" lists. It is also known for regularly litigating its local property tax assessments, using high-priced law firms (beyond Worcester's capacity to rival) to succeed in having the taxes lowered. No "awareness" campaign to take place prior to the referendum can substitute for having the MGC make a detailed assessment of Rush Street Entertainment's record BEFORE citizens are called to vote on its proposal.

There IS NO "EMERGENCY" that can justify this last-minute change in regs. I OPPOSE the change in the strongest possible terms. Sincerely, David L. Schaefer, 8 Cricket Lane, Worcester; Professor of Political Science, Holy Cross College

## Bresilla, Colette (MGC)

**From:** MGC Website <website@massgaming.com>
**Sent:** Wednesday, April 17, 2013 10:05 AM
**To:** mgccomments (MGC)
**Subject:** Contact the Commissioner Form Submission

**Name**

Matthew Morano

**Email**

mfmorano@gmail.com

**Subject**

Re: Community Referendums

**Questions or Comments**

Dear Commission Members,

As a property owner in East Boston, one of the impacted communities, I need to know that the gaming applicant vying to become my neighbor is honest, full of integrity, and financially stable. In this vein, you must hold off on authorizing community referendums until all the background checks have been completed. How else will my neighbors and I know who we're voting for?

Similarly, many East Boston and Revere residents are sorely disappointed in your decision to allow the Suffolk Downs / Caesars application to move forward unscathed after the pull-out of Vornado. How can the removal of one of the applicant's major investors -- for refusing background checks, no less -- not demonstrate an unstable operation and serve as a warning sign for the future? It does for the majority of East Boston and Revere residents, and it should for the Gaming Commission.

Communities and towns are already disadvantaged in this process, being up against the marketing and lobbying dollars of multinational corporations, without the Massachusetts Gaming Commission "bending" laws meant to protect them. It is not too late to rectify both of these situations, and we expect that you will do so in a timely fashion.

Best Regards,
Matthew Morano

**ROSEMARY MILLER**

32 Gledhill Avenue
Everett, MA 02149

617-394-0865
Rosemary53@comcast.net

April 6, 2013

Via email and US Mail mgccomments@state.ma.us

**Mr. Stephen Crosby, Chair**
**Massachusetts Gaming Commission**
84 State Street, 10th Floor
Boston, MA 02109

Dear Chairman Crosby:

As a resident of Everett and a member of the Everett Common Council, I would like to address the proposed Wynn Casino for the City of Everett. I am very familiar with the area that the casino is proposed as I lived on Mystic Street as a child and then again as an adult when I bought the family home.

During the time I lived there as a child, the area was used by Monsanto to create a variety of chemical which were not known to be toxic. Later as society became aware of the potential harm, we were left with an area that was left virtually unusable.

The City of Everett has an opportunity—perhaps a once in a lifetime opportunity—to have that land cleaned by a business organization that can justify the cost. Once that land is mitigated, it will also lead to the cleaner water and perhaps one day, water that can be used for various recreational uses including swimming.

Our city is not very large, just over 3 square miles and there does not remain much land area that can be developed in a manner that would provide much needed revenue to the city. As an old industrial city, Everett suffers from multiple large businesses moving out and into more rural areas of the country. The development of a casino would provide a much needed revenue, jobs and improvement to a blighted area. The potential for further growth to the area of the city that I once called home would be invaluable. Our proximity to Boston and Logan Airport as well as the ability to access the property by car, train and boat makes it an ideal location to serve as a resort destination. With views to downtown Boston and easy access to area colleges, it provides a place for student families to stay when visiting.

While I realize the license will not be granted until early next year, I wanted to express my support in favor of this location and to highlight that it would also serve to serve our environment in a positive manner.

Sincerely,

Rosemary Miller

**Bresilla, Colette (MGC)**

**From:** rob@audisseyguides.com on behalf of Rob Pyles <rob@audisseymedia.com>
**Sent:** Saturday, April 13, 2013 5:52 PM
**To:** mgccomments (MGC)
**Subject:** Background checks

Dear Commission Members,

As a resident of East Boston, I am surprised and deeply concerned that you are considering allowing community referendums WITHOUT all the background checks being completed. How else will my neighbors and I know who we're voting for?

I urge you to consider the voices of those in the affected communities.

Thank you,

Robert Pyles

494 Sumner Street

East Boston

## Bresilla, Colette (MGC)

**From:** MGC Website <website@massgaming.com>
**Sent:** Saturday, April 13, 2013 10:53 AM
**To:** mgccomments (MGC)
**Subject:** Contact the Commissioner Form Submission

**Name**

Susanna Starrett

**Email**

starrett@hotmail.com

**Subject**

Casinos

**Questions or Comments**

Please! East Boston residents demand that the state hold off on community votes until background checks are complete!

## Bresilla, Colette (MGC)

**From:** MGC Website <website@massgaming.com>
**Sent:** Saturday, April 13, 2013 10:27 AM
**To:** mgccomments (MGC)
**Subject:** Contact the Commissioner Form Submission

**Name**

Julie DeMauro

**Email**

julie_Demauro@hotmail.com

**Phone**

(781)284-7960

**Subject**

Authorizing community Votes before Back Ground Checks

**Questions or Comments**

I am writing to express my concern about your board not following through with the orginal details of the bill that said all partners in casino's must submit to and pass a back ground check. This is a delicate matter for those living in the area of a purposed casino and for the sake of everyone involved, the process laid out and sold to us should be followed. Back grounds checks are a must and if they are not complete then there should be no vote no exceptions.

## Bresilla, Colette (MGC)

**From:** MGC Website <website@massgaming.com>
**Sent:** Friday, April 12, 2013 6:11 PM
**To:** mgccomments (MGC)
**Subject:** Contact the Commissioner Form Submission

**Name**

Leiha Maldonado

**Email**

leihafaymaldonado@gmail.com

**Phone**

(617)513-3100

**Subject**

Completing Background Checks for Casino Principals

**Questions or Comments**

I DEMAND that the gaming commission hold off on community votes until background checks are complete. The Globe reported yesterday that the Board is leaning toward letting the votes happen while background checks are being completed. This is simply unacceptable and unsure a NO vote from me on general principal. The vote is not a non-binding agreement. There is nothing that states that if the background checks are not clean, the vote will be voided. Without the background checks I cannot make an informed decision.

## Bresilla, Colette (MGC)

**From:** MGC Website <website@massgaming.com>
**Sent:** Tuesday, April 16, 2013 11:33 PM
**To:** mgccomments (MGC)
**Subject:** Contact the Commissioner Form Submission

**Name**

joey lopresti

**Email**

joeloey12@gmail.com

**Subject**

no eastie casino

**Questions or Comments**

dont even think about a casio in eastie. we took it on thechin with all the oil tanks and fuel deliveries, and the. with logan airport eating up ojr parks and residential areas. there are dozens of construction projects on the table in the city and state. you got some balls trying to guilt people to vote for a casino that way. we had a local pol giving out suffolk downs hats to senior citizens at an eastie senior home to butter them up. shameful! we're going to get more crime, lower quality of life, more traffic, more pollution, higher insurance rates, lower property value while pols and their buddies get paper bags full of cash. the latios will get cocktail waitress jobs and the city will become even more of a dump. an urban casino makes as mjch sense as a horse on a boat, you fools. tell the indians to go build a casino on a raft in the harbor. stay the he! ll out of my city!

## Bresilla, Colette (MGC)

**From:** Janeponcia@aol.com
**Sent:** Wednesday, April 17, 2013 10:37 AM
**To:** mgccomments (MGC)
**Subject:** Casino

Dear Commission Members,
As a resident of East Boston, one of the impacted communities, I need to know that the gaming applicant vying to become my neighbor is honest, full of integrity, and financially stable. In this vein, you must hold off on authorizing community referendums until all the background checks have been completed. How else will my neighbors and I know who we're voting for?

Similarly, many East Boston and Revere residents are sorely disappointed in your decision to allow the Suffolk Downs / Caesars application to move forward unscathed after the pull-out of Vornado. How can the removal of one of the applicant's major investors -- for refusing background checks, no less -- not demonstrate an unstable operation and serve as a warning sign for the future? It does for the majority of East Boston and Revere residents, and it should for the Gaming Commission.

Communities and towns are already disadvantaged in this process, being up against the marketing and lobbying dollars of multinational corporations, without the Massachusetts Gaming Commission "bending" laws meant to protect them. It is not too late to rectify both of these situations, and we expect that you will do so in a timely fashion.

Best Regards,

Jane Poncia
160 Cottage Street
Apt 202
East Boston, Ma. 02128

5.b

**Bresilla, Colette (MGC)**

**From:** sandlandau <sandlandau@aol.com>
**Sent:** Monday, April 15, 2013 1:54 PM
**To:** mgccomments (MGC)
**Subject:** A SLOT MACHINES PARLOR IN WORCESTER

Gentlemen/Ladies:

As citizens of Worcester, and as an attorney (retired) and a physician (retired), we find the proposed change in regulations (designed to hold community refe renda on casino proposals before the MGC has engaged in an assessment of the applicant) to be completely unacceptable and a violation of the constitutional/democratic process. Before citizens can cast fully informed votes on a casino proposal, they need to know not only that the MGC promises to closely scrutinize the developer, but exactly what the MGC investigation turned up -- not merely a "yes" or "no."

Rush Street Entertainment, the proposed casino operator in Worcester, has a long list of violations of state law in other states where it has operated -- including allowing minors to gamble, as well as numerous persons who had previously had themselves placed on "do not gamble" lists. It is also known for regularly litigating its local property tax assessments, using high-priced law firms (beyond Worcester's capacity to rival) to succeed in having their taxes lowered. No "awareness" campaign to take place prior to the referendum can substit ute for having the MGC make a detailed assessment of Rush Street Entertainment's record before citizens are called to vote on its proposal.

There is no "emergency" that can justify this last-minute change in regs. We oppose the change -- and the policy -- in the strongest possible terms.

Sincerely,

Edward Landau, M.D.
Sandra S. Landau, Attorney
770 Salisbury Street, #565
Worcester, MA 01609

5.b

## Bresilla, Colette (MGC)

**From:** Claire Brill <cwbrill@gmail.com> on behalf of Claire Brill <cwbrill@alumni.clarku.edu>
**Sent:** Sunday, April 14, 2013 7:23 PM
**To:** mgccomments (MGC)
**Subject:** against emergency changes to gaming regulations

I am opposed to changing the regulations to allow a referendum to go forward before an approval of an applicant by the Mass Gaming Commission. There is no need to rush the process; it will only benefit the gambling companies not the Commonwealth. The citizens of the impacted communities need all the time and support of the gaming commission to get all the facts in the face of the deep pockets of the gambling developers.

Please do not change the regulations.

Claire Brill
94 Acushnet Ave
Worcester, MA 01606

5.b

## Bresilla, Colette (MGC)

**From:** MGC Website <website@massgaming.com>
**Sent:** Tuesday, April 16, 2013 3:30 PM
**To:** mgccomments (MGC)
**Subject:** Contact the Commissioner Form Submission

**Name**

Samuel Albertson

**Email**

sca496@mail.harvard.edu

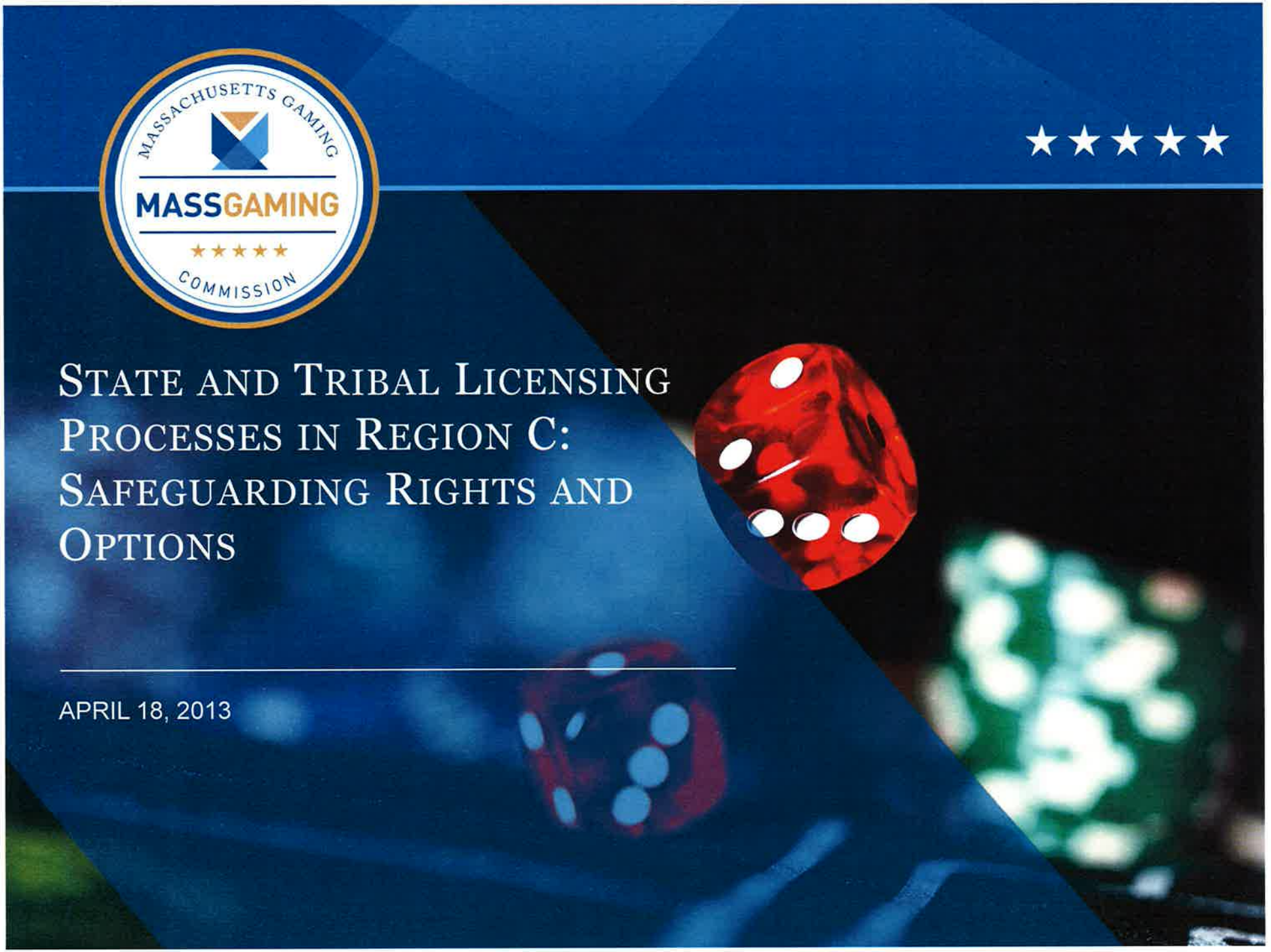
**Questions or Comments**

Hello. As a devote resident and new homeowner in East Boston, one of the impacted communities, I need to know that the gaming applicant vying to become my neighbor is honest, full of integrity, and financially stable. In this vein, you must hold off on authorizing community referendums until all the background checks have been completed. How else will my neighbors and I know who we're voting for?

Similarly, many East Boston and Revere residents are sorely disappointed in your decision to allow the Suffolk Downs / Caesars application to move forward unscathed after the pull-out of Vornado. How can the removal of one of the applicant's major investors -- for refusing background checks, no less -- not demonstrate an unstable operation and serve as a warning sign for the future? It does for the majority of East Boston and Revere residents, and it should for the Gaming Commission.

Communities and towns are already disadvantaged in this process, being up against the marketing and lobbying dollars of multinational corporations, without the Massachusetts Gaming Commission "bending" laws meant to protect them. It is not too late to rectify both of these situations, and we expect that you will do so in a timely fashion.

Best Regards,
Sam Albertson




# State and Tribal Licensing Processes in Region C: Safeguarding Rights and Options

APRIL 18, 2013

# QUESTION

The question on which the Commission has sought public comment is whether the Commission should or should not open Region C to commercial RFPs with the Commission deciding whether to issue a commercial license to an applicant taking into account economic and other circumstances as they exist at the time of the licensing decision, in light of the statutory objectives that govern expanded gaming in the Commonwealth.



# IF THE ANSWER TO THAT QUESTION IS "YES"

- The Commission will issue a commercial Phase 1 RFP – The State and Federal Trust Land process will be unaffected and will continue as before

- When the Commission issues the Phase 1 RFP, it will simultaneously set a deadline for commercial responses - The Tribal-State and Federal Trust Land process will be unaffected and will continue as before

- After receiving Phase 1 applications, the Commission will make Region C commercial applicant suitability determinations - The Tribal-State and Federal Trust Land process will be unaffected and will continue as before

- After the suitability determinations are made, the Commission will issue a site specific Phase 2 RFP and a deadline for responses – The Tribal-State and Federal Trust Land process will be unaffected and will continue as before



# IF THE ANSWER TO THAT QUESTION IS "YES"

- After the Phase 2 RFP deadline, the Commission, using criteria it will use in Regions A and B, will make a decision about award of a commercial license after taking into account the economic consequences what then appears to be the status of the Tribal-State and Federal Trust Land process, the contents of the commercial Phase 2 RFP responses, the regional and statewide gaming and other economic conditions then existing and forecast, and all other relevant information as it then exists

- Based on the schedule for Regions A and B, it is likely that the Commission will be in a position to make its Region C licensing decision toward the end of 2014

# If the answer to that question is "No"

Region C will remain closed to commercial applications until the Tribal State and Federal process is completed with a favorable or unfavorable decision or the Commission is able to conclude that all necessary favorable decisions will not be forthcoming

The Commonwealth of Massachusetts
MASSACHUSETTS SENATE

SENATOR MARC R. PACHECO
*First Plymouth and Bristol District*

STATE HOUSE, ROOM 312B
BOSTON, MA 02133-1053
TEL. (617) 722-1551

MARC.PACHECO@MASENATE.GOV
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*Senate Vice Chairman*
TELECOMMUNICATION, UTILITIES AND ENERGY
TRANSPORTATION

April 16, 2013

Mr. Stephen Crosby
Chairman
Massachusetts Gaming Commission
84 State Street, Suite 720
Boston, MA 02109

Dear Chairman Crosby:

I am writing today as a follow-up to my testimony on April 4, 2013 before the Commission at Bristol Community College, relative to opening Region C to commercial casino licenses. As I stated then and reiterate now, I believe if the legislature had intended to set a certain date for which to allow the Mashpee Wampanoag tribe's land-in-trust application to be approved, we would have set that date in the gaming authorization legislation or during debate on the approval of the Wampanoag/State negotiated Compact, last July.

You may recall during House debate on acceptance of the Compact there was an effort lead by one of the South Coast House legislators, who was opposed to Compact, to amend it by inserting a date certain for land-into-trust, and with a date of October 1, 2014 for which to open Region C to commercial licenses. House members dismissed that option by voting not to allow amendments. The message was clear, the legislative intent was to allow the Compact to stand as drafted and to move forward without any changes; ultimately why I voted in supported the measure. The legislature has the ability at any time to amend the gaming law through various proposed legislation. As a matter of fact, next week we begin debate on the Fiscal 2014 budget, presenting an opportunity to amend the gaming act if legislature so desires.

I am concerned with the speed in which the Gaming Commission is moving forward in an attempt to alter the gaming legislation/Compact—especially since the Gaming Commission has been operating without a full complement of staff for more than a full year after the Commission was fully appointed, and approximately16 months since the

gaming legislation became law. I mention this not to be critical of the Commission's efforts to fill key positions, as I feel the Commission is doing a fine job. I'm sure the Commission is taking its time to fill these positions as they do not want to act hastily in making important personnel decisions.

With respect, I ask the Gaming Commission not to act hastily, and refrain from opening Region C to commercial gaming licenses at this time.

Sincerely,

Marc R. Pacheco


April 16, 2013

Mr. Stephen Crosby, Chairman
Massachusetts Gaming Commission
84 State Street
Boston, MA 02109

**Re: Expanded gaming in Southeastern Massachusetts**

Dear Chairman Crosby:

MGM Resorts International (MGM) wanted to take this opportunity to provide feedback to your recent message on April 14, 2013 discussing the ongoing deliberations of expanded gaming in Southeastern Massachusetts.

MGM is concerned at the distinct and real possibility that opening Region C to the commercial license process may result in a fourth category 1 license. This would significantly alter the Massachusetts gaming market and may impact the overall value of each of the three individual Category 1 licenses originally contemplated by the legislature following years of detailed studies of the market.

The Massachusetts Legislature thoughtfully and deliberately put in safeguards to protect the gaming market and maximize the value of each of the three Category 1 casino licenses it contemplated. Legislators were sensitive to the vagaries of this unique industry and wanted to provide an incentive for world class gaming operators to compete for the privilege to operate in Massachusetts. The Commission's consideration of opening up Region C to a commercial Category 1 license is a significant decision that will create instability in this market with many direct and indirect adverse impacts on the remaining licenses.

The Commission is charged with the extraordinary responsibility to find the appropriate balance between the rights of the Mashpee Wampanoags and the economic development goals of Southeastern Mass. However, MGM feels that the Commission's mission also includes the safeguarding of the opportunities upon which the current license applicants entered this bidding process. The potential impact of over development will not stop at the southeastern region border. Each operator will realize the impact of an additional casino license should the MGC move forward with a commercial license process in Region C.

While each and every applicant deals with robust competition in every jurisdiction in which they operate they also chose to compete in Massachusetts based on a statute and set of rules that provided them with the ability to maximize their investment. The potential for a fourth license in the Commonwealth was not a possibility any applicant considered when they balanced the significant capital expenditure expected from them and the scope of the market based on the statute.

The act authorizing expanded gaming was clear on the ability of the Commission to seek a commercial license for Region C under Chapter 23K and the standard that would trigger that process. Section 91 (e) of Chapter 194 of 2011 mandates that if "the commission determines that the tribe will not have land taken into trust by the United States Secretary of the Interior, the commission shall consider bids for a category 1 license in Region C under said chapter 23K." The definitive language in this section serves as important benchmark that protects the spirit and the intent of the law to limit the total number of category 1 licenses while maximizing the value of those licenses.

Chairman Crosby in his message regarding the status of expanded gaming in Southeastern Massachusetts identified a concern of the Commission is "Region C being left in a state of extended uncertainty while the other regions moved forward." Respectfully, the speed at which the Mashpees can complete their land in trust process is not a basis on which to risk the entry of a fourth Category 1 license into this market.

At this point we do not believe it is reasonable to determine "that the tribe will not have land taken into trust", and that is the standard that the Commission is required to apply. Indeed, today the Mashpees put the Commonwealth on notice that they intend to continue to pursue their federally protected right to operate a Category 1 facility, and that if the Commonwealth proceeds with allowing a potential fourth Category 1 license, that the tribe will withhold all revenue payments otherwise payable to the Commonwealth under its compact. Because of this fact, and the issues addressed above, MGM does not believe the Commission should compromise the Massachusetts gaming market or limit the value of an individual license solely based on an effort to keep Region C on the same timetable as Regions A & B.

Additionally, as disruptive to the market as a fourth licensee would be, enabling one of those licensees to operate without any tax payments to the Commonwealth, will provide a significant competitive advantage to that facility, i.e., the Mashpees, allowing them to spend significantly more capital and marketing dollars to extend their reach into the regions of the other Category 1 licenses.

There is an additional potential adverse impact that opening up Region C would cause to the other licensees. If such an opportunity were made available, and the threat of a neighboring Mashpee facility exists (which based on the Mashpee's statements today, is very real), MGM is concerned that the new commercial license that is made available may not result in robust competition, i.e., the threat of a neighboring facility entering the market will dissuade most quality applicants from participating. For example, with the threat of a future Mashpee facility, will the Commission be able to provide such a licensee with the minimum mandatory 15 year exclusive period in that region as contemplated by the gaming act? If that new license opportunity results in little or no activity, the financial and credit markets could take a negative view on the quality of the Commonwealth market in general, which could

have adverse impacts on the ability of the Region A and B operators to access that same capital, or at a minimum, the cost of that capital may increase based upon a perceived weakness in the market.

For these reasons, MGM respectfully requests that the Commission resist the temptation to bypass the statutory question at hand, in which it is clear that the legislature wanted the burden on the Commonwealth, that is: can the Commission reasonably determine "that the tribe will not have land taken into trust". The question is not whether the Mashpees will have that process completed in a timeline that applies to the other commercial licenses.

If the Commission believes it must retain some further control on the timing of a Region C operator, MGM respectfully requests that the Commission provide the Region A & B operators at least 5 years post-opening before allowing what could be a potential fourth operator in the market to open its facility. If the Commission can provide the other operators with that window to operate under a stable environment, it will allow the Commission to better determine the progress, or lack thereof, of the Mashpees to complete their regulatory process, and to make the requisite determination of whether the Mashpees are capable of completing that process.

Thank you again for the opportunity to provide comments.

Sincerely,

**Bill Hornbuckle**
President and Chief Marketing Officer, MGM Resorts International
President and Chief Operating Officer, MGM Springfield

Cc: Commissioner Gayle Cameron
Commissioner James F. McHugh
Commissioner Bruce Stebbins
Commissioner Enrique Zuniga
Rick Day, Executive Director
Catherine Blue, General Counsel
John Ziemba, Ombudsman

6.

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Howard M. Cooper
E-mail: hcooper@toddweld.com

April 12, 2013


**By Hand Delivery**

Mr. Stephen Crosby
Chairman
Massachusetts Gaming Commission
84 State Street, Suite 720
Boston, MA 02109

Re: Mashpee Wampanoag Tribe

Dear Chairman Crosby:

As you know, this office represents the Mashpee Wampanoag Tribe.

This letter responds to the Commission's April 4, 2013 solicitation of public comment on the question of whether the Commission should open Region C to applications for a commercial license at this time. Previously, the Tribe has explained that the Commission lacks authority to undertake the action it proposes based upon, among other things, clear expressions of legislative intent. This letter will not repeat the Tribe's position in this regard, which is expressly reserved. Instead, the Tribe will focus its comments on why it believes the Commission's proposed course of action is not in the best interests of the citizens of the Commonwealth and would constitute a reckless and improper substitution of the Commission's own judgment for the judgment of the Legislature which studied expanded gaming in Massachusetts for years, carefully crafted the Expanded Gaming Act, Acts 2011, c. 194, and determined that there should be no more than 3 casinos in the Commonwealth, one each in Regions A, B and C.

At the hearing, you stated that the Commission has "made an effort to figure out legislative intent" because the Commission is "trying to figure out what they [the Legislature] would want us to do under these circumstances." (Transcript at page 220). You further stated that based upon discussions you had with unidentified legislators "it is…quite clear that the Legislature's higher priority as between waiting for a long time or having the possibility downstream of two [casinos in Region C], waiting for a long time is less desirable." (Id.) As you know, the day following the hearing I wrote to you on behalf of the Tribe requesting the names of the legislators with whom you spoke and a summary of the information they provided. I asked that this information be posted on the Commission's web site so that the public could comment on it. Given that the Commission has scheduled a vote for April 18, 2013, I asked that this happen as soon as reasonably possible. When you failed to respond, I wrote to you again on April 10, 2013, in response to which you sent me a letter which provided neither the names of the legislators nor any description of the information related to "legislative intent" upon which the Commission is apparently relying. Of course, this lack of transparency means that the Tribe

and the public cannot comment on a critical source of information based upon which the Commission has said publicly it is making its decision.

With all due respect, Chairman Crosby, what you reported during the April 4th meeting is inconsistent with actual facts known at the time of the debate and passage of the Expanded Gaming Act. As you know, in connection with its consideration of expanded gambling in Massachusetts, the Commonwealth retained Spectrum Gaming Group, an independent research and professional services firm, to analyze a legislative proposal to authorize three destination resort casinos in the Commonwealth. Spectrum issued a lengthy report dated August 1, 2008. The path upon which the Commission is now considering embarking ignores the clear and direct warning by Spectrum of the "potentially disastrous effects" a fourth casino comprised of a tribal gaming facility will have on the economics underlying the gaming regime set up under the Act.

At page 284 of that report, in the section, *Effects of a tribal casino in Massachusetts,* the following very clear statement appears:

> A tribal Class III casino and perhaps even a Class II casino in Massachusetts could have a **significantly negative effect on commercial casinos in the state, especially if a commercial casino is located near a tribal casino**. The situation would have **potentially disastrous effects** on commercial casinos in the Commonwealth, as a tribal casino in this case would potentially contribute no tax money to the Commonwealth, and would obviously cause a decline in the gross gaming revenues to the commercial casinos. (Emphasis supplied.)

Indeed, your own public comments reported in the media in June 2012, confirmed your personal recognition that the Act is intended to allow up to one casino in each of the three designated regions in Massachusetts, including the Southeast, that "[i]f a compact is reached and approved by the legislature, as long as the commission believes there's a reasonable chance that land-in-trust will happen, it will not issue a commercial license," and "[t]here was always going to be the possibility that a Native American tribe could have a casino by federal rights... This gives some high degree of certainty that there would be just one [casino in southeastern Massachusetts]." See Avon Messenger article, a copy of which is enclosed as a courtesy.

before 31st revised it.

The path upon which the Commission now appears ready to embark threatens to undermine the Legislature's carefully considered response to the warning provided by the Spectrum Report. To be sure, irrespective of what the Commission decides to do, the Tribe will continue to pursue its federal rights to operate a casino, whether Class III under the Compact or Class II outside the Compact, while exploring its opportunity for possible remedies should the Commonwealth fail in its federal requirement to negotiate and conclude a compact in good faith. In either case, it will operate without any revenue share to the Commonwealth if the Commission licenses a second casino in Region C. In good faith, and in partnership with Governor Patrick, the Tribe has agreed to a revenue share which will support rather than undermine the gaming regime set up by the Act Through this continuing partnership with the Tribe, the Commonwealth will avoid the "potentially disastrous effects" that the Spectrum Report warned the Commonwealth about very clearly. Only the Commission's proposed action threatens to derail this partnership and leave the Commonwealth with nothing.

It is also worth noting that the Commission's recently expressed view of the intent of the Legislature is wholly at odds with its prior position before the United States Court of Appeals for the First Circuit as reflected in that Court's (Lynch, J.) August 1, 2012 opinion. There, based upon the Commission's judicial submissions, the Court stated:

> The statute does not, by its literal terms, preclude issuance of a category 1 license in Region C if a compact has been approved. However, KG argued before the district court and on appeal that the statute does bar issuance of a license if a compact is approved 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**. *KG Urban Enters., LLC v. Patrick*, 693 F.3d 1, 6 (1st Cir. 2012) (Emphasis supplied).

It is mystifying how the Commission now believes that it can abandon its positions advanced in court. It is equally mystifying why it would do so in order to pursue a course of action that will have "potentially disastrous effects" on the viability of commercial casinos in Massachusetts under the Act.

The Commission's urgency to move forward on a commercial license in Region C seems based on its perception that tribal success is questionable, or at least likely to be delayed for a series of years. This perception is rooted in a number of errors leading to a distorted view of reality. Those errors have been purposefully advanced by those who seek to take over the opportunity to develop Region C.

All parties should be clear about the self-interest of those who predict years of delay on the trust decision. Those predictions come from the would-be commercial competitor of the Tribe which itself promises years of litigation. Then, because of its own threatened litigation, this commercial interest complains about the delays the Tribe faces in getting land into trust. In other words, the Tribe's competitor creates the very conditions for which it criticizes the Tribe and the land into trust process. The Commission must not countenance this cynical manipulation of its deliberations. Otherwise, it simply invites litigation for the purpose of delay only, without regard to the harm likely frivolous litigation does to the interests of the Tribe, the Commonwealth, and the public in the Taunton region.

If the prospect of litigation is relevant, though, the Commission must also take into account delays the Tribe's competitors may face from litigation by the Tribe. Be assured that the Tribe will take all steps, including pursuing its rights in court, to protect its interests. Should actions be taken by the Commission which unfairly and unlawfully impair the Tribe's ability to provide for its citizens through economic development, the Tribe will make every effort to seek judicial relief and remedies. After 400 years of injustice and deprivation, the Tribe's obligations to its citizens require no less.

The following particulars, without limitation, demonstrate the errors in the analysis of those who predict the Tribe cannot, or will not in a timely manner, get land placed into trust for it:

- **The *Carcieri* analysis for the Tribe's trust application is nearing completion and the Tribe expects a positive determination.**

First, it is incorrect, as some assert, that the Secretary's authority under the Indian Reorganization Act ("IRA"), 25 U.S.C. § 465 is limited to tribes that were recognized in 1934. In *Carcieri,* the Supreme Court determined that the Secretary's authority is limited to those tribes "under Federal jurisdiction" as of 1934, but there is nothing in that opinion that equates federal jurisdiction with federal recognition of a tribe. Indeed, because the parties there conceded that the tribe before the Court was not under federal jurisdiction in 1934, there was no occasion for the Court to consider the meaning of federal jurisdiction. 555 U.S. at 395. But Justice Breyer, writing in concurrence, did comment on the phrase. He observed that it may not be as restrictive as it first appears, since there may have been tribes under federal jurisdiction in 1934 even though the federal government did not believe so at the time. *Id.* at 397-398.[1] Thus, federal recognition as of 1934 is not necessary to establish federal jurisdiction over a tribe as of that date.

Second, even in those cases where federal officials at the time disclaimed jurisdiction over a particular tribe, federal jurisdiction over that tribe may nonetheless exist. In fact, correspondence like the 1937 correspondence involving Mashpee is present in the history of other tribes already found by the Department of the Interior to be under federal jurisdiction in 1934. The concept of federal recognition was only beginning to evolve as of 1934 and federal officials frequently made mistakes regarding the nature of the federal-tribal relationship, erroneously citing disqualifying conditions like simultaneous state jurisdiction. *See, e.g., Joint Tribal Council of Passamaquoddy Tribe v. Morton,* 528 F.2d 370, 378 (1st Cir. 1975) ("Maine's assumption of duties to the Tribe did not cut off whatever federal duties existed.")

Third, the Department of the Interior has adopted a standard to determine whether a tribe was under federal jurisdiction known as the Cowlitz standard, after the first tribe to which the Department applied it. *See* discussion below. This standard has been applied to several tribal applications for land into trust since its initial adoption. At least two of these tribes were not federally recognized in 1934 and yet the Department found them to be under federal jurisdiction in 1934 and the Department has placed land into trust for them. Thus, federal legislation to overturn the *Carcieri* decision is not necessary for the Department to place land into trust for tribes. The Administration and tribes have sought federal corrective legislation. But they do so to eliminate the harassing litigation that the decision has spawned, the confusion that the decision engenders, and the administrative burden and costs it imposes in making this factual inquiry to

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[1] It bears emphasis that Justice Breyer wrote in concurrence, not dissent. Thus, the dismissive attitude of his comment by Chief Judge Lynch at oral argument in *KG Urban Enterprises v. Patrick,* Case No. 12-1233, on June 7, 2012, was wrong. Chief Judge Lynch mistakenly identified Justice Breyer's opinion as a dissent and of no value. KG Urban's reliance on this point before the Commission, then, should likewise be rejected. *See* Sajer Letter, dated March 17, 2013.

trust applications.[2] But this corrective legislation is not necessary to process the Mashpee or any other tribe's application for land into trust. The Department has continued to do so since the decision, for Mashpee and other tribes.

Finally, the Department's *Carcieri* analysis for the Mashpee land into trust application is in its final stages. It is unsupported speculation to suggest that this analysis takes years. In every case thus far, the Department has completed its *Carcieri* analysis in months, not years. The Mashpee material, which is voluminous, has been under submission since September of 2012 and has since been under active review by the Department. This analysis is done by the Solicitor's Office at the Department of the Interior. It makes its way up through staff attorneys at that office with the final review and decision made by the Solicitor personally. The Mashpee *Carcieri* analysis has made its way through the Solicitor's Office and is now on the Solicitor's desk. As you know, the Tribe has been advised that the *Carcieri* analysis is a "top priority" and will be completed by early 2013. *See* Tompkins letter, dated March 20, 2013; Washburn letter, dated December 31, 2012.

In sum, the Tribe expects a positive *Carcieri* analysis and expects it very soon. Once that happens, all that remains on the Tribe's trust application is the environmental analysis. The Commission has already been advised that this process is well underway and has revealed "no red flags." The final decision on the Tribe's trust application is months away, not years, and the Commission must allow that administrative process to work its way to conclusion.

- **There is nothing in the on-going Cowlitz litigation that indicates a delay in or a negative outcome for the Mashpee land into trust application.**

First, the final Cowlitz decision was made when the Department's self-stay policy was in place. This is the policy under which the Department announces its decision to place land into trust, stays the decision for 30 days to await any litigation to challenge the decision, and holds the stay until the litigation is resolved. The Department adopted this policy when the Quiet Title Act was deemed to bar any challenge to trust acquisitions after the land had gone into trust. This is no longer the law after the Supreme Court's decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak,* 132 S.Ct. 2199 (2012). *See* discussion below. This self-stay policy was in place at the time of the Cowlitz decision so that the Department did not then, and has not since, actually placed the Cowlitz land into trust. Because the circumstances in support of the self-stay policy no longer exist, the delay in placing the Cowlitz land into trust says nothing about the timing on the Mashpee trust application.

Second, there is very little possibility that the Cowlitz litigation will result in setting aside the standard that the Department is now employing to make the *Carcieri* analysis for Mashpee.

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[2] *See, e.g.,* Statement of President Jefferson Keel, National Congress of American Indians, Addressing the Costly Administrative Burdens and Negative Impacts of the Cariceri and Patchak Decisions, before the Senate Committee on Indian Affairs, Sept. 13, 2012; Statement of Larry Echo Hawk, Assistant Secretary - Indian Affairs, before the Senate Committee on Indian Affairs, Oct. 13, 2011.

Under the Administrative Procedures Act, the Department's analysis is presumed to be valid, with the challenger facing a substantial burden of persuasion to set it aside. *Environmental Defense Fund, Inc. v. Costle,* 657 F.2d 275, 283 (D.C. Cir. 1981). Further, the Department is entitled to deference to its interpretation of "under Federal jurisdiction" under the IRA. *Shakopee Mdwatkanton Sioux (Dakota) Community v. Babbitt,* 107 F.3d 667, 670 (8th Cir. 1997) (interpretation of the IRA deserving Chevron deference, citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843-44 (1984)). As a result, the plaintiffs in the Cowlitz litigation face a steep uphill climb to set aside the Secretary's decision (and virtually certain revised decision) in adopting a standard to govern the "under Federal jurisdiction" *Carcieri* determination.

Whatever and whenever the outcome of the Cowlitz litigation, then, the possibility that the Department's Cowlitz standard in making the *Carcieri* analysis will be overturned is extremely remote. That being the case, there is nothing in the pending Cowlitz litigation that casts any doubt on the substance or the timing (see below) of the Mashpee *Carcieri* analysis.

- **The Department's prior self-stay policy will likely *not* delay a decision to place the Mashpee parcels into trust.**

Before the Supreme Court ruling in *Patchak*, the Interior Department had instituted a policy of "self-stay" of trust acquisitions to permit the completion of any challenge filed in the 30 day period following decision on a trust applications, because Quiet Title Act was understood to render the decision immune from challenge once the United States accepted title on behalf of a tribe. Unlike the past, the courts now understand that such administrative decisions are challengeable, under the Administrative Procedures Act for a period of six years after final decision, rendering a stay unnecessary. As a result, in two separate federal courts, the United States informed judges presiding over such challenges that it intended to proceed to acquire title to land as two which challenges were timely filed, unless an injunction were granted preventing that action. Injunctions were denied in both cases, trust title accepted, and litigation will or will not proceed for the time necessary to resolve the dispute. *See Stand Up for California! v. U.S. Dept. of the Interior*, Civ. No. 12-2039 and 12-2076 (BAH), 2013 WL 324035, (D.D.C. Jan. 29, 2013); *Cachil Dehe Band of Wintun Indians of Colusa Indian Community v. Salazar*, No. 2:12-CV-3021-JAM-AC, 2013 WL 417813 (E.D. Cal., Jan 30, 2013). With these recent developments, a challenger can arrest completion of an acquisition only by satisfying all injunction requirements, and cannot interpose years of delay merely by filing a complaint. Past assumptions, that a meritorious application can be indefinitely obstructed, are simply invalid. The Commission should not rush its own judgment based on outdated advice.

In addition to all of the above, the Tribe is also deeply concerned about clear misunderstandings on the part of the Commission about the basic rights of Native American tribes and how these misunderstandings have now infected the "process" in which the Commission is engaged. The transcript of the hearing held last week reveals a decision making process hampered by an incomplete understanding of guiding principles of federal law, including and specifically the rights and obligations of the parties under the Indian Gaming Regulatory Act (the "IGRA") and compacts negotiated pursuant to that Act. The guiding principal is that the Tribe participates as a fully acknowledged sovereign government, subject to federal law, and

within state authority only insofar as it is consistent with federal law. As recognized by the United States Supreme Court, and as confirmed by the United States Congress, a tribal gaming facility is a governmental operation, not subject to state regulation at all – except as part of a negotiated agreement between the Tribe and its representatives, on the one hand, and the Commonwealth and its representatives, on the other, as authorized by the Massachusetts legislature. The present compact, negotiated between the Governor and the Tribe, expressly allocates regulatory responsibilities as its primary function under IGRA, which established the compacting process as "a viable mechanism for settling various matters between two equal sovereigns." S. Rep. 100-446, 100th Congress, 2d Session at 13 (1988)(Senate Report accompanying IGRA as enacted).

Once the Tribe and the Commonwealth embark on the compact process, IGRA requires that it proceed in good faith to accomplish joint regulatory goals, but not serve to unfairly obstruct tribal opportunity to conduct gaming. Several of the Commissioners' comments appear to conflict with intentions clearly set out in the Senate Report as follows:

> In the Committee's view, both State and tribal governments have significant governmental interests in the conduct of class III gaming. States and tribes are encouraged to conduct negotiations within the context of the mutual benefits that can flow to and from tribe and States.
>
> * * *
>
> It is the Committee's intent that the compact requirement for class III not be used as a justification by a state for excluding Indian tribes from such gaming or for the protection of other State-licensed gaming enterprises from free market competition with Indian tribes.

*Id.* at 13-14.

Against this context, and while the negotiated compact is still awaiting approval by the Legislature, the Commission's evaluation of the prospects of tribal gaming development seems ill-considered and intentionally designed to undermine the Compact as it is being considered by the Legislature in favor of a commercial license. At page 219 of the transcript, you introduced the discussion by saying:

> So, as I'm sitting here, the compact arrangement is an imperfect arrangement, is a suboptimal arrangement in terms of protecting the public interests.
>
> So, if we're wrestling with can we possibly influence which of the two outcomes we select, there is some reason to think, in my view, that the compact is less desirable.

With this comment setting the stage, the Commission's discussion then moved to forecasting an ultimate decision in Region C based upon the Commission's view of the best available economic terms, and the incredible statement that the Commission will ultimately

make its choice between commercial licensing and tribal exclusivity by asking the Tribe to bid against its own interests and the Compact in order to avoid the issuance of a commercial license in the future:

> . . . if we go down the commercial route, we're still going to have the Tribe sitting there doing whatever the Tribe does. **And if it comes to us with a proposition that it can demonstrate is economically attractive to the Commonwealth, maybe more attractive than the option that the commercial bidder has, we can look at that and we can make that decision.** *Id.* at 226 (Emphasis supplied).

Again, it is hard to view these statements as anything other than an effort intended to interfere with the Compact before the Legislature and the Tribe's federal rights now and going forward.

The Tribe urges the Commission to consult with legal counsel knowledgeable about the rights of Native American tribes under federal Indian law before it proceeds further. The Tribe remains willing to meet with the Commission to discuss these important issues and offers that at any such meeting it will bring nationally prominent Indian law counsel to facilitate the discussion.

Very truly yours,

Howard M. Cooper

HMC:ma
Enclosure

cc: Chairman Cedric Cromwell
Gayle Cameron, Commissioner
James F. McHugh, Commissioner
Bruce Stebbins, Commissioner
Enrique Zuniga, Commissioner

6/20/12 Avon Messenger (Stoughton, Mass.) (Pg. Unavail. Online)
2012 WLNR 12936135

Avon Messenger (Stoughton, MA)


June 20, 2012

Section: business

# Land-in-trust could prove issue in Mashpee shot at Taunton casino

Gerry Tuoti

Taunton

The Massachusetts Gaming Commission has not yet determined what criteria it will use to make a decision that could have a major impact on the casino landscape in southeastern Massachusetts.

State Gaming Commission Chairman Stephen Crosby, speaking Tuesday in Taunton, said he hasn't decided what the commission will consider when evaluating the Mashpee Wampanoag tribe's chances of getting its federal land-in-trust application approved. Without federal approval, the tribe could not pursue a casino under the Indian Gaming Regulatory Act.

"It's so far away from where we are, we just haven't talked about that," Crosby said.

Under the state law that legalized casino gambling, a federally recognized American Indian tribe has an exclusive first shot at the one casino allowed in southeastern Massachusetts. If the Gaming Commission, however, determines that the tribe's federal land issues are too significant to overcome, it has the authority to solicit bids from commercial entities for the casino license.

The Mashpee, whose casino proposal won support from Taunton voters in a recent referendum, are currently negotiating a compact with the governor. If the state legislature doesn't approve a compact between the state and the tribe by July 31, that would also open the process to commercial bidders.

"If a compact is reached and approved by the legislature, as long as the commission believes there's a reasonable chance that land-in-trust will happen, it will not issue a commercial license," Crosby said, adding that such a compact could be completed within the next week or two.

Crosby was the guest speaker at a forum the Taunton Area Chamber of Commerce and Pro-Home Inc. hosted at Benjamin's Restaurant.

State Rep. Keiko Orrall, R-Lakeville, was among those in attendance who asked questions during the Q&A portion of the forum. When she asked Crosby how long after July 31 the commission would wait to determine whether the Mashpee Wampanoag tribe's land-in-trust application has a shot at federal approval, he said it was difficult to pin down a specific amount of time.

"I think too terribly long would be some number of years," Crosby said.

The state law, he said, is intended to allow up to one casino in each of three designated regions of Massachusetts, including the Southeast. The provision that allows the Gaming Commission to open the bids up to commercial entities if it determines the tribe's chances of getting land-in-trust are unreasonable, he explained, is designed to prevent the region from languishing in casino limbo if the federal-tribal process stalls.

"The legislation was designed to make sure southeastern Massachusetts would have an opportunity for a casino," he said.

Another factor in the process could be a 2009 Supreme Court decision that the Department of the Interior can only take land into trust for tribes under federal jurisdiction before the 1934 Indian Reorganization Act. Some observers say that decision makes the process all but insurmountable for the Mashpee, although Mashpee leaders have said for months that they believe they will overcome that obstacle.

Crosby also discussed the state's rationale for giving an American Indian tribe the first shot at the southeastern Massachusetts market. If the state were to issue a license for a commercial casino in southeastern Massachusetts, the Mashpee could still pursue a tribal casino in the region under the federal Indian Gaming Regulatory Act. If that happened there would be four casinos in Massachusetts. The state law allows for three casinos because that's the number state officials decided Massachusetts could sustain without the market getting oversaturated.

"There was always going to be the possibility that a Native American tribe could have a casino by federal rights," Crosby said. "This gives some high degree of certainty that there would just be one (casino in southeastern Massachusetts)."

The Bureau of Indian Affairs is holding a scoping meeting Wednesday night in Taunton to solicit public comments as it prepares an environmental impact statement on the Mashpee Wampanoag tribe's land-in-trust application.

At Tuesday's forum, Crosby also spent some time discussing the portion of the gambling law that allows for one slot machine parlor in Massachusetts. Raynham Park owner George Carney has long expressed interest in getting slots at his facility. Crosby said the Gaming Commission hasn't yet discussed which locations, relative to a casino site, would be best for suited for a slots parlor.

"Whether you want the, close together or you don't want them close together, we haven't discussed yet," he said. "The legislation says nothing about the siting of a slots parlor."

Contact Gerry Tuoti at gtuoti@tauntongazette.com.

**--- Index References ----**

Industry: (Entertainment (1EN08); Gaming Industry (1GA25); Freight Transportation Regulatory (1FR22); Commercial Construction (1CO15); Construction (1CO11); Freight Transportation (1FR88); Casinos (1CA80); Transportation (1TR48))

Region: (USA (1US73); Massachusetts (1MA15); Southern Asia (1SO52); Americas (1AM92); Asia (1AS61); Indian Subcontinent (1IN32); U.S. New England Region (1NE37); North America (1NO39))

Language: EN

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April 16, 2013

Chairman Stephen Crosby and
Commissioners
Massachusetts Gaming Commission
84 State Street, Suite 720
Boston, Massachusetts 02109

RE: Region C - Request for Comments Posted 4/5/13

Dear Chairman Crosby and Commissioners:

I write in response to the Commission's request for public comment (posted on the MGC website on April 5, 2013) regarding the prospect of opening Region C to a competitive, commercial process. Specifically, the request for comment reads as follows:

> "In an effort to expedite next steps for Region C (Southeastern Mass), MGC is requesting public comment as to why the Commission should or should not open Region C to commercial RFPs with the Commission deciding whether to issue a commercial license to an applicant **taking into account economic and other circumstances as they exist at the time of the licensing decision in light of the statutory objectives that govern expanded gaming in the Commonwealth.**"

For all of reasons set forth below, the Commission must act now to open the Southeast Region to commercial gaming applicants pursuant to a process **which mirrors in all respects the fair and competitive process now underway in the other Regions of the Commonwealth.**

1. Timing of an IGRA Casino.

As we stated in our letter to the Commission dated December 27, 2012 (copy attached), and as more thoroughly set forth in significant detail in the letter/memorandum dated March 18, 2013, submitted to the Commission by our Indian gaming counsel (the "Indian Gaming Memo" - copy attached), continuing the exclusivity which has been unconstitutionally granted to the Mashpee Tribe in Region C effectively insures that there will be **no** gaming in the Southeast for many years to come. In the wake of the Supreme Court's 2009 decision in *Carcieri,* the Mashpee Tribe is not legally eligible to obtain land in trust. On the basis of *Carcieri* alone, it is eminently reasonable for the Commission to conclude that the Mashpee will not have land taken into trust at any time, without a correcting act of Congress. Moreover, the Supreme Court's recent *Patchak* decision assures that if the Department of the Interior attempts to take land into trust for the Mashpee in violation of *Carcieri,* that decision would be subject, for a period of **six years,** to legal challenge by a broad class of potential plaintiffs (several of whom testified at the Commission hearing on March 21, 2013). A legislative *Carcieri* fix is not anticipated, and it will be many years before the Supreme Court resolves the viability of an "under federal jurisdiction"

theory for taking land in trust. If the Commission does not open Region C to commercial bids now, the Region, which is the most economically depressed Region of the State - having an unemployment rate in the area of 14%, will fall irretrievably behind the rest of the Commonwealth.

2. Opening Region C to Commercial Competition is in the Best Interest of the Southeast Region and the Commonwealth.

The primary reason that states across the country are turning to gaming is to increase tax revenues. If the Commission votes to open Region C to commercial competition, then the Commonwealth will, relatively quickly **and with certainty**, reap *25%* of the gross gaming revenues generated by a commercial gaming property. The latest proposed Compact between the Commonwealth and the Mashpee Tribe (which has not yet been approved by the legislature or by BIA) provides that the Commonwealth will receive no gross gaming revenues from the Mashpee if the Commission opens Region C to commercial competition. As discussed below, the motives behind this proposed Compact are suspect at best, particularly when the BIA, in its rejection of the first Compact with the Mashpee, indicated that 6.5% of gross gaming revenues (as a floor, not a cap) would be acceptable to BIA. One of the clearly stated legislative objectives of Chapter 194 is for the Commission to maximize potential tax revenues to the Commonwealth, a goal which will be best realized by opening Region C to commercial applications as quickly as possible. A commercial casino will pay to the Commonwealth 25% of gross gaming revenues and a significant license fee. However, if commercial gaming is precluded from Region C, an IGRA casino may, in the distant future (if ever), pay the Commonwealth between 15% and 17% of gross gaming revenues, and will not pay a license fee. The revenue lost to the Commonwealth, assuming (i) that an IGRA casino does not begin operations for six years after a commercial casino could have begun operations and (ii) that the gross gaming revenues of a commercial casino and an IGRA casino are each $600,000,000, will be approximately $1,000,000,000 during the six year period and approximately $50,000,000 per annum thereafter.

3. The Mythical "Danger" of a Fourth Casino.

Opening the Southeast Region to commercial gaming does nothing to deprive the Mashpee Tribe of its federal IGRA rights. If the Mashpee Tribe is eventually able to acquire land in trust for gaming purposes, the market in the Southeast Region at that time will determine whether an IGRA casino can be financed and built in the Region. If the answer is yes, then such a casino will be financed and built. If the answer is no, it will not be built. It is important to keep in mind that, in the intervening years, the Commonwealth and Region C would receive the economic and other benefits provided by a commercial casino.

4. Lack of Commission Oversight of an IGRA Casino.

As carefully explained in the Indian Gaming Memo, the broad and exclusive constitutional power granted to Congress over Indian affairs severely limits the powers of the states to regulate Indian Tribes and their activities (including gaming) on Indian lands. IGRA effectively eliminates a state's ability to regulate tribal gaming on sovereign Indian lands, except

to the very limited extent authorized by IGRA. This means that the Commission's ability to regulate a Mashpee casino will be non-existent, when compared to a commercial casino. However, by permitting a competitive bidding process in Region C, the Commission will be able to choose between a number of first-rate proposals from highly successful, experienced gaming companies. Without a competitive bidding process, Region C will, at best, have to wait for a very long time and then accept, for better or worse, whatever type of gaming property, product and customer experience the Mashpee Tribe chooses to build and offer if it obtains sovereign land.

5. The Mashpee are not Far Ahead.

The Mashpee claimed at the March 21 hearing that their project is far ahead of any possible commercial project in the Southeast. As several other persons at the hearing testified, **that is not true**. We first investigated the possibility of a project in the Southeast Region in 2007. Since that time, we have invested over $6,000,000 toward the possible development of the Cannon Street site and a second site will eventually become the new home of NStar's operations in New Bedford (thereby assuring that no NStar jobs are lost in New Bedford as a result of our taking over the current NStar location). We entered into complex purchase agreements for the NStar site, the current Sprague site and the replacement site for NStar in 2008 and 2009, after conducting extensive due diligence on all of the sites. Since that time, we have continued to work closely with NStar in connection with its continuing environmental remediation activities at its site. In choosing the NStar and Sprague sites, we saw an opportunity to: (1) remediate a significant brownfield site, (2) reutilize a beautiful, historic structure that is currently unused and in disrepair, (3) develop a unique gaming property that will be integrated into the street grid of an historic and vibrant city, (4) increase public access to New Bedford's historic waterfront, (5) increase the number of visitors to New Bedford's historic downtown, and (6) deliver jobs and economic revitalization to a Region with an 11%-12% unemployment rate. In short, our Cannon Street Project will be a world-class gaming destination that adds to the vibrancy of New Bedford and the entire Southeast Region. We have been working on this Project for six (6) years and we are in a position to move forward rapidly with the start of construction after being granted a commercial license, if that were to occur. The Mashpee site was not put under contract until 2012. Simply put, we are far ahead of anyone in the Southeast at this time.

6. The Proposed New Compact.

Finally, I believe it is necessary to discuss briefly the proposed, new Compact which the Governor recently signed with the Mashpee. To us, the proposed Compact represents a blatant disregard for the interests of the citizens of the Commonwealth and the Southeast Region in particular by attempting to choke off commercial competition in that Region. For no discernable reason, other than to assist a single, small Indian tribe and it wealthy foreign financial backers (Genting - Malaysia) in their attempt to stifle commercial competition and dissuade the Commission from opening the Southeast Region to such competition, the proposed Compact, if approved, would allow an Indian casino to exist and conduct Class III gaming (table games - which would not be permitted under IGRA without a Compact) while not paying any share of gross gaming revenues to the Commonwealth if the Commission were to open the Southeast Region to competitive commercial competition. However, we believe that the Massachusetts legislature will see the proposed Compact for what it is and have the good sense to reject the

proposed Compact for the following reasons: (i) the Compact gives the Indians Class III gaming (table games) with zero revenue to the Commonwealth, unless commercial competition is eliminated, (ii) there is no compelling reason for the legislature to approve the Compact because the Mashpee do not now have and may never obtain land in trust; (iii) the proposed Compact, if approved, will choke off competition, even if the Region has been opened by the Commission, due to the unnecessary and absurd economic advantage being provided to the Mashpee, (iv) the unconscionable economic advantage being given to the Mashpee will do significant damage not only in the Southeast, but to all commercial casinos trying to operate in the other Regions of the State, (v) the Mashpee do not need the Compact to pursue land in trust -- all of their IGRA rights remain intact, including the right to do Class II gaming without a Compact, (vi) why consider a Compact which gives the Mashpee table games but gives the State no share of gross gaming revenue when BIA itself indicated that the State should be entitled to some share of gross gaming revenue, and (vii) since approval of the Compact will choke off commercial competition in the Southeast Region for an undetermined period of time, the proposed Compact, like Section 91(e) of the Gaming Act, is unconstitutional.

For all of the foregoing reasons, we urge the Commission to open Region C to commercial gaming applicants **on terms identical** to those upon which the Commission has opened Regions A and B. Although there is some language in the request for comment (highlighted at the beginning of this letter) which we do not totally understand, we assume that it is the intent of the Commission, if it decides to open Region C (which obviously we strongly support), to conduct commercial competition in Region C in the same manner and subject to the same terms, conditions and considerations as in Regions A and B, and not to make the process in Region C somehow qualified, different or "dual-tracked." We previously discussed our objections to a "dual tracked" process in our letter to you dated December 14, 2012 (copy attached).

Again, thank you for providing KG Urban Enterprises with an opportunity to express our thoughts and concerns.

Very truly yours,

Barry M. Gosin

ATTACHMENT

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December 27, 2012

Chairman Steven Crosby & Commissioners
Massachusetts Gaming Commission
84 State Street, Suite 720
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RE: Region C Status Review

Dear Chairman Crosby and Commissioners:

I write in response to the Commission's December 18, 2012 meeting, at which the Commissioners voted to postpone action on Region C for another 90 days. While KG Urban Enterprises is certainly pleased with the Commission's recent focus on Region C, we are extremely disappointed that the Commission declined to open the region to commercial bids on the same terms as Regions A and B.

The discussion of Region C at the past three Commission meetings has left us particularly concerned with the Commission's oft-stated and re-stated premise that any decision to open the commercial licensing process in Region C might somehow be "arbitrary." And that any recognition by the Commission that the Mashpee tribe does not have a legal path forward to a federally-licensed IGRA casino would also be somehow "arbitrary." In his memorandum released on December 4, 2012, Commissioner McHugh informed the Commission that the path envisioned for the Mashpee by the legislature and the Commission does not, in point of fact, exist. What is therefore truly arbitrary is the Commission's insistence on interminably delaying the opening of Region C to commercial competition on the same terms as Regions A and B.

On June 12, 2012, Chairman Crosby announced that this delay would be not only arbitrary but apparently also forever, stating that he "would presume the tribe has the ability to get land into trust if it reaches a deal with the state and it's approved by the legislature." This was then and remains today unsupported by and contrary to the facts of the federal land in trust process. And it was then, and is now, also contrary to prevailing federal law regarding the Mashpee tribe's legal status in the wake of the Supreme Court's 2009 decision in *Carcieri v. Salazar*: as an un-landed tribe not recognized before 1934, the Mashpee tribe was not in June 2012 legally eligible for federal land in trust, and the tribe remains legally ineligible for land in trust today. Neither the negotiation nor the passage of a tribal gaming compact by a Governor or state legislature has any bearing on the Federal land in trust process. The existence of a pre-negotiated gaming compact with the state cannot cause land to be taken into trust by the Department of Interior for a tribe which is otherwise legally ineligible for land in trust. The Commission's insistence on tethering the land in trust question to a state gaming compact in its own deliberations has been arbitrary from the start, and has ignored both the processes and criteria followed by the United States Department of the Interior *and* prevailing federal law.

In mid-December, this time in spite of Commissioner McHugh's memorandum expertly delineating the multiple and immense legal obstacles which lie ahead of the Mashpee's pursuit of land in trust, the Commission formally voted to impose *another* arbitrary delay regarding the status of Region C. The most recent delay, this time for another 90 days, was based once again on the erroneous factual and legal premise that a new Compact will have any bearing on the Mashpee tribe's insurmountable land in trust problems, identified so concisely by Commissioner McHugh. Moreover, the Commission left unclear whether the new deadline is an actual deadline -- or whether the Commission simply agreed to again on March 15th commence further discussions regarding the largely irrelevant status of the state gaming Compact. As Commissioner Zuniga himself noted at the December 18th meeting, the Commission essentially voted to wait ninety days to find itself in the same position it was in on the 18th: with the Mashpee tribe perhaps holding a renegotiated Compact, but with land in trust, as Commissioner McHugh explained, still not legally available to the Mashpee. And with Region C having fallen another three months behind the rest of the Commonwealth.

In fact, the Governor himself stated on December 17th that his current Compact discussions with the Mashpee amounted to, in his own words, no more than "bits and pieces." Thus, the assumption underlying the Commission's vote, specifically that final negotiation and approval of a new Compact are imminent, was again arbitrary -- it was absolutely contrary to the Governor's own characterization of the Compact situation 24 hours earlier.

KG has to date spent in excess of $5 million on land transaction costs, option payments, environmental assessments and remediation plans, and other project work to create what we presumed would be a proposal that the Commonwealth could heartily embrace. A project that would include a $50 million privately-funded clean-up followed immediately by the redevelopment of a beautiful but presently contaminated piece of a historic working waterfront. We wish to highlight that as the Commission continues to hold Region C in abeyance, KG is obligated to continue to spend substantial sums simply to stand still and wait: option payments on the Cannon Street site, option payments for a new home for NStar that will keep all of their current Cannon Street jobs in New Bedford, and the legal and other consulting fees necessary to maintain option agreements of this complexity.

We also are mystified at the intense focus by the Chairman at the December 18th meeting on the revenue that will allegedly be "lost" to the Commonwealth if the Mashpee tribe were to open a federally-licensed Class II gaming property in the future with a commercial resort already licensed and operating in Region C. The Commission has in its hands the October 16, 2012 letter and legal opinion from the Bureau of Indian Affairs rejecting the Mashpee-Commonwealth Compact. The first strong message in the BIA letter is the ruling and admonition that the Department of Interior will not permit an Indian casino to pay the equivalent or near-equivalent of a commercial casino tax rate to the Commonwealth. The Commission thus already knows with certainty that the tax rate paid by a Mashpee tribal casino will have to be far below the 21.5% tax rate in the first Compact if a new Compact is to be approved by BIA. In fact, Commissioner McHugh noted in his memorandum that BIA itself has now explicitly pegged the value of Region C tribal exclusivity at only 6.5%. In sharp contrast, if the Commission licenses a Category I commercial casino in Region C, the Commonwealth will reap a guaranteed 25% of gross revenues generated by that commercial property. Gross revenues which Spectrum Gaming, Innovations Group, and Gaming Market Advisors have *all* projected will be in excess of $600 million for a Region C casino property. We would note that the delivery of revenue to the Commonwealth is one of the implicit underpinnings of the legislative intent underlying the Gaming Act.

We would also like to call attention to the fact that land taken into trust for an Indian tribe by the Department of Interior becomes the legal equivalent, for state and local legal purposes, of an Indian reservation. The Commission is thus presently going out of its way to facilitate the creation of a *sovereign* tribal casino that would sit on *sovereign* Indian land, and which under federal law, including IGRA, would *not* be legally subject to Gaming Commission jurisdiction or regulatory oversight. While the Governor attempted in the rejected Compact to subject the Mashpee casino to Commission oversight on issues ranging from vendor approval to design layout, the *second* clear message sent by the Department of the Interior in the October rejection letter from BIA is quite clear: Interior will *not* permit the Commonwealth use the compacting process to get the Mashpee Tribe to subject itself to regulation by a state Gaming Commission just like other commercial casinos in the Commonwealth.

This federal policy regarding tribal sovereignty will be enforced *regardless* of the Mashpee leadership's willingness to submit itself to state oversight in order to get a Compact approved by the legislature. Interior views its role, and the intent of the IGRA statute, as not permitting an Indian Tribe to agree to any compacting terms that are inconsistent with the tribe's sovereignty. As KG has attempted to explain over the past several years, there is no such thing as a state-regulated IGRA casino overseen by a state gaming commission. Interior's letter serves as a wake-up call, both to the Commission and to the citizens of the Commonwealth, that an IGRA casino operated by the Mashpee would be a legally *sovereign* entity: subject neither to a state commercial gaming tax-rate much beyond the 6.5% cited by Judge McHugh from the October BIA rejection letter, nor to *any* of the statutory regulation or Commission oversight that are legally imposed on commercial casinos and operators by the Gaming Act. In fighting so hard for the creation of an Indian casino and *only* an Indian casino in the Southeast, the Commission is essentially voting itself out of all regulatory and oversight authority in all of Region C. The compacting process cannot change federal law or Department of Interior policy on this.

Commissioner Cameron asked rhetorically at the Commission's December 4th meeting why the Commission shouldn't simply license a commercial casino in all three Regions, allow the Southeast region to reap the jobs and economic development that it will produce, let the taxpayers reap the 25% tax on gross gaming revenues on *three* commercial casinos, and let the market determine in the future whether a sovereign Class II Indian casino might also succeed in the Southeast should the Mashpee one day *gain* the legal right to have land taken into trust by the federal government. KG would note the Commission's responsibility to the *entire* Commonwealth, and respectfully ask why the Commission would indefinitely delay the licensing of a commercial property in Region C on the off chance that the Commonwealth might one day collect a dramatically *lower* percentage of revenue from a *sovereign* Indian casino over which the Commission has *no* oversight or authority to even regulate vendor selection, on sovereign land that might someday theoretically be placed in trust for the Mashpee tribe if the Supreme Court's *Carcieri* decision is someday rendered null and void -- something that can be accomplished only by a majority of both houses of Congress.

The December 18th Commission proceedings also left KG quite puzzled that any of the Commissioners see it as the Commission's proper role to shield the Mashpee tribe, at the expense of both the Southeast region of the Commonwealth and those who wish to bid on a Category I license in Region C, from anything that might harm the tribe's ability to persuade the legislature to approve a *second* compact. We would note that the first Compact was rejected by the Department of the Interior on its merits, following rigorous adherence by the Commonwealth to the process set forth in the Gaming Act itself. The Gaming Act authorizes the Commission to make a finding that the Mashpee will not get land in trust. And, as Commissioner McHugh and Chairman Crosby have correctly noted, the statute empowers the Commission to issue a commercial license in Region C even *absent* such a finding. But the

statute does *not* designate the Chairman to provide cover for a Mashpee effort to shepherd a *second* compact through the legislature, which seemed to be the justification offered on December 18th for not opening the commercial licensing process in Region C.

Most importantly, it remains utterly incomprehensible to KG that the Commission continues to accept the Mashpee assertion, now put forth for the past three-and-a-half years, that the *Carcieri* decision somehow does not apply to the Mashpee, and that land in trust for the tribe is thus both "inevitable" and right around the corner. In point of fact, it is neither. A decision handed down by a Supreme Court majority is the law of the land. Under the Court's *Carcieri* ruling, the Mashpee tribe is by federal law not legally eligible for land in trust. A result that is not legal cannot be inevitable, nor imminent. As Chief Judge Sandra Lynch herself noted in oral arguments before the First Circuit in June 2012, the notion of an alternative legal pathway to land in trust appeared only in a *concurrence* by Justice Breyer, and was explicitly *not* adopted by the majority of the Justices in their decision for the Court. A concurring opinion of this sort provides no legal basis of any kind for an executive agency to ignore or circumvent the majority opinion of the Court. It is thus unclear to KG why the Commission should be providing protective cover at the expense of an entire region of the Commonwealth and *all* of its taxpayers, to an Indian tribe with 1) no reservation land, 2) no trust land, 3) its right to trust land explicitly foreclosed by the Supreme Court in 2009, and 4) its Compact already rejected on the merits by the United States Department of the Interior. Moreover, with the Supreme Court's recent *Patchak* decision, and as Commissioner McHugh explained in detail in his memorandum, were the Department of the Interior to attempt to circumvent the *Carcieri* decision, and take land into trust for the Mashpee in violation of the Supreme Court's ruling in that case, that land in trust decision would itself be subject, for a period of *six years*, to legal challenge by *any* individual homeowner or property owner in Southeastern Massachusetts.

We feel it both important and significant to note that opening the Southeast region to the commercial licensure does *nothing* to deprive the Mashpee of the tribe's federal IGRA rights, should they one day in the future gain the right to land in trust. Nor would opening Region C to the same commercial licensing process underway in Regions A and B in any way deprive the Mashpee the opportunity or ability to compete for the Region C commercial license, on a level playing field, and under the same rules as all other commercial license applicants in the Commonwealth. KG has long stated publicly, as we did in December in response to a specific query from Chairman Crosby, that we have absolutely no objection to the possibility, should we be fortunate enough to be awarded a commercial license in Region C, of competing with a federally-licensed IGRA casino operated by the Mashpee should the tribe one day down the road succeed in securing the legal right to Indian lands in the Southeast. Similarly, KG has no objection to competing with a Mashpee bid for the Region C commercial license, so long as the application process is identical to those in the other two Regions of the Commonwealth. It is the Mashpee, not KG, which seeks from the Commission a protected opportunity in the Southeast, one for which they need not compete, a competitive advantage *completely* untethered from IGRA, one which IGRA does not in *any* way offer nor provide to an un-landed tribe in the Mashpee's legal situation.

Finally, as we have long noted and appreciated the Commission's stated desire to remain aware of industry perception and reactions to the gaming licensure process in the Commonwealth, I would like to respectfully share with the Commission the nature of the feedback we have received from casino operators and investors alike in the wake of the Commission's recent discussions and vote regarding Region C. The combination of the "dual track" proposal, the vote to wait *another* 90 days to consider action on Region C, and the Commission's acceptance of the Mashpee tribe's assertion that neither *Carcieri* nor *Patchak* apply to the Mashpee, when the impact of both decisions on non-landed tribes such as the Mashpee are widely known and well-understood throughout the commercial gaming industry, has produced several common and quite unfortunate responses from industry players to the Commission's December proceedings: "the Southeast process clearly is rigged for the Indians no matter what" and "the Governor is going to tell the Commission to give the Southeast license to the Indians."

Moreover, each statement or announcement of delay regarding Region C, including the Chairman's statements earlier in 2012 that "the die is cast" and "the train has left the station," has resulted in casino operators and gaming investors alike telling us, "the Governor wants the Commission to delay the Southeast until KG gives up and goes home, so the Indians can have the license one way or the other." Needless to say, it seems clear that the Commission's decisions and public statements regarding the Region C question have had the unfortunate effect of further discouraging any future commercial interest or investment in Region C, instead reinforcing the gaming industry's prevailing and oft-stated (to us) conclusion that the entire Southeast region of the Commonwealth is "wired for the Indians." Sadly, perhaps the most common refrain we have heard over the past year is, "the fact the Mashpee have no right to the Indian lands they need for an IGRA casino is why they need the Commission to clear the field for them like this in the Southeast."

I urge that the Commission immediately reconsider the Region C question when it reconvenes in January 2013, and vote to open the commercial licensing process in Region C on the same terms as Regions A and B.

Thank you for providing KG Urban Enterprises with the opportunity to comment, and for considering our prior comments in the Commission's recent deliberations.

Very truly yours

Barry M. Gosin

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Chairman Stephen Crosby and Commissioners
of the Massachusetts Gaming Commission
Massachusetts Gaming Commission
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**Re: Gaming on Indian Lands under the Indian Gaming Regulatory Act; Process to Apply for Land-in-Trust under the Indian Reorganization Act**

Dear Commissioners:

I represent KG Urban Enterprises, LLC. In connection with the Commission's discussion on March 21 regarding a competitive bidding process for Region C, KG Urban requested that I prepare a brief overview of the Department of the Interior's ("DOI") land-in-trust process and review timeline and the prerequisites for tribal gaming under the Indian Gaming Regulatory Act ("IGRA").

## I. Summary

- The Supreme Court's decision in *Carcieri v. Salazar* precludes the Secretary of the Interior from taking land into trust for tribes recognized after 1934.
    - Tribes may only operate casinos on tribal lands pursuant to the IGRA. Possession of tribal lands is a prerequisite to tribal gaming.
    - The Secretary of the Interior is authorized to take land into trust for the benefit of a tribe under the Indian Reorganization Act ("IRA").
    - In *Carcieri v. Salazar*, however, the Supreme Court held that the Secretary lacks authority under the IRA to take land into trust for a tribe that was not under federal jurisdiction at the time of the IRA's enactment in 1934.
    - Congress has not enacted legislation to overcome the prohibition of *Carcieri*.
    - Although the Secretary has begun to take land into trust for a handful of recently recognized tribes under a theory that they were under "federal jurisdiction" as of 1934, the Secretary's first acquisition of trust land for the

Cowlitz Tribe under that theory has been challenged in federal court and is not likely to be resolved for years.

- That legislative proposals have been repeatedly introduced to overcome *Carcieri* demonstrate Congressional recognition that legislative action is necessary to empower the Secretary of the Interior to take land into trust for tribes federally recognized after 1934, and that the Secretary presently has no authority to do so.

- Even if *Carcieri* were to be overruled by Congress, the land-in-trust process is a lengthy, deliberate review that mandates public input at multiple stages.
  - BIA recognized that the taking of land into trust for casino development is an undertaking with significant environmental impacts. Accordingly, BIA is proceeding to assess the impact of the proposed Taunton casino under the most deliberative and rigorous process – preparation of an environmental impact statement.
  - Data regarding the periods of time required by BIA to conduct environmental review of other proposed acquisitions of land for tribal casino development indicates that the review process takes six or more years.
  - BIA's preparation of an environmental impact statement for the Taunton casino proposal is at the start of the process.

- Tribal gaming under IGRA, whether Class II bingo or Class III casino gaming, is permitted only on "Indian lands," not on any land owned by a tribe.
  - Without a reservation or trust land, a tribe cannot conduct gaming of any kind.
  - Without land-in-trust, any subsequent steps towards gaming under IGRA (gaming ordinance, determination of exception to gaming on land acquired after 1988) are without effect and may never become effective.
  - The Secretary may designate qualifying land taken into trust as a tribe's initial reservation under IGRA to allow a tribe to operate gaming, but only if that land is first taken into trust under the IRA. IGRA provides no authority for the Secretary to take land into trust.
  - Were the Secretary to take land-in-trust for a tribe recognized after 1934, that decision will not end the uncertainty, but will instead prolong it for at least an additional six years pending legal challenges allowed under the Supreme Court's *Patchak* opinion.

## II. Federal Legal Overview

The U.S. Constitution grants Congress treaty authority and plenary power to regulate commerce with Native American tribes. That authority, coupled with the federal government's enactment of IGRA, means that apart from the tribes, only the federal government may regulate tribal gaming on Indian land. A state has no authority to regulate tribal gaming except pursuant to IGRA's limited authority to enter into compacts with tribes to permit casino gaming on Indian lands within the state.

IGRA governs tribal gaming on Indian lands, e.g., reservations and land taken into trust for a tribe and over which the tribe exercises governmental power.

The Secretary of the Interior is authorized to take land into trust for the benefit of a tribe under the Indian Reorganization Act ("IRA"). However, in *Carcieri v. Salazar*, the Supreme Court held that the Secretary lacks authority under the IRA to take land into trust for a tribe that was not under federal jurisdiction at the time of the IRA's enactment in 1934. Congress has not enacted legislation to overcome the prohibition of *Carcieri*. Although the Secretary has begun to take land into trust for a handful of recently recognized tribes under the theory that they were under "federal jurisdiction" as of 1934, the Secretary's first acquisition of trust land for the Cowlitz Tribe[1] under that theory has been challenged in federal court and is not likely to be resolved for years. Furthermore, the fact that legislative proposals have been repeatedly introduced to overcome *Carcieri* demonstrates that a legislative fix – and not court action – is required before land can be taken into trust for tribes that were not federally recognized in 1934.

The land-into-trust process – even if *Carcieri* were to be overruled by Congress – is lengthy and subject to litigation, especially for the purpose of developing a tribal casino. Once a tribe applies to have land taken into trust, affected state and local governments have the right to comment on the impact of removing the land from the tax rolls and of anticipated jurisdictional problems or potential conflicts of land use. The environmental impact of taking the land into trust must also be assessed under National Environmental Policy Act ("NEPA"). The land-in-trust process to acquire land for gaming involves a lengthy administrative review that includes a series of stages with public input at each stage and typically takes years to complete. Litigation challenging the Secretary of the Interior's decision to take land into trust adds further delay. Finally, the Supreme Court's recent decision in the *Patchak* case extended the period in which challenges may be brought to the Secretary's decision to take land into trust from **thirty days to six years**, and authorized challengers to raise, among other issues, the *Carcieri* issue that the Secretary lacks authority under the IRA to take land into trust for tribes recognized after 1934.

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1 The nearly decade-long efforts of the Cowlitz Indian Tribe to acquire land-in-trust for a casino are detailed in Section II.C.1., below.

## III. Discussion

### A. The U.S. Constitution assigns plenary authority to Congress in the arena of Indian affairs.

Article I, § 8, cl. 3 of the U.S. Constitution provides that the "Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Congress, because of its constitutional authority to enter treaties and to regulate commerce with Indian tribes,[2] has plenary power to legislate in the field of Indian affairs.[3] The broad and exclusive power of Congress over Indian affairs, through the Supremacy Clause, substantially limits the powers of the states and leaves little room for state regulation of Indian tribes and their activities (including gaming) on Indian lands.[4]

Congress has affirmatively legislated in the area of tribal gaming. Congress enacted the IGRA[5] to provide a statutory basis for the operation and regulation of gaming by Native American tribes on Indian land.[6] IGRA "expressly preempt[s] the field in the governance of

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[2] "The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself. Article I, § 8, cl. 3, provides Congress with the power to 'regulate Commerce . . . with the Indian Tribes,' and thus, to this extent, singles Indians out as a proper subject for separate legislation. Article II, § 2, cl. 2, gives the President the power, by and with the advice and consent of the Senate, to make treaties. This has often been the source of the [federal] Government's power to deal with the Indian tribes." *Morton v. Mancari*, 417 U.S. 535, 551-52(1974).

[3] *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (citing *Morton v. Mancari*, 417 U.S. 535, 551-552 (1974) (noting the unique legal status of Indian tribes under federal law and the plenary power of Congress, based on a history of treaties and the assumption of a "guardian-ward" status, to legislate on behalf of federally recognized Indian tribes). "With the adoption of the Constitution, Indian relations became the exclusive province of federal law." *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 234 (1985).

[4] *See* 1-5 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.02[1], 5.02[2] ("The courts have recognized that Congress has "plenary and exclusive authority" over Indian affairs. The term "plenary" indicates the breadth of congressional power to legislate in the area of Indian affairs, and the term "exclusive" refers to the supremacy of federal over state law in this area."); *see also United States v. Lara*, 541 U.S. 193, 200 (2004) (Congress has "broad general powers to legislate in respect to Indian tribes"); *Washington v. Confederated Bands & Tribes of the Yakima Nation*, 439 U.S. 463, 470 (1979) (noting the plenary and exclusive power of Congress over Indian affairs); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72 (1996) (reaffirming that Indian commerce is "under the exclusive control of the Federal Government.").

[5] 25 U.S.C. §§ 2701-2721.

[6] *Seminole Tribe*, 517 U.S. at 48.

gaming activities on Indian lands"[7] and eliminates a state's ability to regulate tribal gaming on Indian lands located within the state except to the limited extent authorized by IGRA.[8] Congress enacted IGRA expressly to preserve and balance mutual and competing federal, state, and tribal interests in Indian gaming on Indian lands.[9] Tribal-state compacts are at the core of the scheme Congress developed to strike this balance. Accordingly, the only avenue for significant state involvement in tribal gaming is through Secretary of the Interior-approved tribal-state compacts covering class III casino gaming.[10]

In short, tribal gaming is solely a matter of federal law. Neither Massachusetts nor any other state has authority to regulate "tribal gaming" outside of IGRA.[11] Thus, an IGRA casino in Taunton, as proposed by the Mashpee, will be subject to state regulation only to the very limited extent permitted under a tribal-state compact.

**B. IGRA regulates tribal gaming on "Indian lands."**

Under IGRA, tribal gaming, whether Class II bingo or Class III casino gaming, is permitted only on "Indian lands" and not on any land owned by a tribe. IGRA defines "Indian lands" as (1) land within an Indian reservation, and (2) land that has been taken into trust by the federal government or held by the federal government subject to restriction against alienation and over which a tribe exercises governmental power.[12] Without a reservation or trust land, a tribe cannot conduct gaming of any kind. A tribe cannot simply purchase land and offer gaming on it. As the Ninth Circuit has explained, "IGRA pertains only to Indian lands," and "regulates activities only on Indian lands."[13] This limitation is

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7 S. Rep. No. 100-446, 100th Cong., 2d Sess., at 6, *reprinted in* 1988 U.S. Code Cong. & Admin. News, at 3071, 3076.

8 *See, e.g., Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536 (8th Cir. 1996) (the text and structure of IGRA, its legislative history and its jurisdictional framework indicate that Congress intended it to completely preempt state law); *Tamiami Partners v. Miccosukee Tribe of Indians*, 63 F.3d 1030 (11th Cir. 1995) (occupation of Indian gaming field by IGRA is evidenced by broad reach of IGRA's regulatory and enforcement provisions and underscored by comprehensive regulations adopted under IGRA).

9 *See Confederated Tribes of Siletz Indians of Or. v. United States*, 110 F.3d 688, 693 (9th Cir. 1997); S. Rep. No. 100-446, at 1-2 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071.

10 *See Gaming Corp.*, 88 F.3d at 544.

11 *See Gaming Corp.*, 88 F.3d at 549 ("If a state, through its civil laws, were able to regulate the tribal licensing process outside the parameters of its compact with the [tribal] nation, it would bypass the balance struck by Congress.").

12 *See* 25 U.S.C. § 2703(4) (definition of "Indian lands").

13 *Artichoke Joe's v. Norton*, 353 F.3d 712, 735 (9th Cir. 2003).

"critical," given the "well-established connection between tribal lands and tribal sovereignty."[14] A tribe's "governing powers and economic rights extend only as far as the borders of Indian lands," and tribes "shed their sovereignty" once "outside" those lands.[15]

In addition, IGRA generally prohibits gaming on land acquired by the Secretary of the Interior in trust for the benefit of an Indian tribe after October 17, 1988 unless one of the exceptions specified in IGRA is met.[16] These exceptions include land taken into trust in settlement of a land claim, as the initial reservation of a tribe, or as a restoration of lands for a tribe restored to federal recognition.[17] Whether lands taken into trust qualify for gaming under an exception to IGRA's prohibition against gaming on land acquired after 1988 is a legal determination, not a policy decision.[18] Indian land decisions are issued by either the DOI Solicitor's Office or by the National Indian Gaming Commission's general counsel.[19]

On February 7, 2013, Kevin Washburn, DOI Assistant Secretary – Indian Affairs, issued a letter to the Mashpee (the "Washburn Letter") conveying a preliminary policy determination that, **if taken into trust,** the lands sought to be acquired would qualify as the tribe's initial reservation under an exception to IGRA's prohibition on gaming on land acquired after 1988. The Washburn Letter likely means that because the Mashpee do not have a reservation, any land that might be taken into trust would, **if actually taken into trust**, constitute the Mashpee's first or "initial" reservation. It is unclear at this time whether the DOI solicitor has issued a legal opinion regarding whether the lands in Mashpee and Taunton sought to be acquired in trust meet the legal requirements of IGRA.[20] As of the date

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14 *Id.*

15 *Id.*

16 25 U.S.C. § 2719(a).

17 *See* 25 U.S.C. §2719(b)(1)(B)(i-iii). IGRA itself provides no authority to take land into trust for a tribe. *See, e.g.*, Testimony of George T. Skibine, Acting Deputy Assistant Secretary – Indian Affairs for Policy and Economic Development, Department of the Interior, at the Oversight Hearing Before The Senate Committee On Indian Affairs Concerning Taking Land Into Trust, May 18, 2005, at 2 (*available at* http://www.gpo.gov/fdsys/pkg/CHRG-109shrg21427/html/CHRG-109shrg21427.htm).

18 *See* June 18, 2010 Secretary Salazar Memorandum to Assistant Secretary - Indian Affairs, re: Decisions on Indian Gaming Applications ("For applications or requests submitted under one of these exceptions [settlement of land claim, initial reservation, or restoration of lands for a tribe restored to federal recognition] in IGRA, their approval largely depends upon a legal determination as to whether the application or request meets one of the delineated exceptions under IGRA. I recommend that you obtain such a legal determination from the Solicitor's Office."). *See also* 25 C.F.R. § 292.3(b) (tribe may obtain opinion whether newly acquired land meets IGRA exception to allow gaming).

19 *See* 25 C.F.R. § 292.3.

20 *See* 25 C.F.R. § 292.6.

of this memorandum, no such legal opinion has been posted to the National Indian Gaming Commission website where such opinions are ordinarily made available to the public[21] or to the website of the DOI Office of Indian Gaming.[22]

Furthermore, this policy determination, like others that pertain to implementation of gaming under IGRA (e.g., approval of gaming ordinance,[23] execution of tribal-state gaming compact[24]), **is without effect unless and until a tribe has land in trust**. A prospective determination that land, if taken into trust, would satisfy an exception to IGRA to permit gaming is a separate determination from the land-in-trust process itself, which is governed not by IGRA but by the IRA.[25]

It is unlikely that issuance of the Washburn Letter, which addresses a prospective exception to IGRA, will speed up the processing of the Mashpee's trust land application under the IRA. By way of example, in the case of the Cowlitz Tribe, the NIGC general counsel issued a legal opinion in November 2005 finding that land to be taken into trust for the Cowlitz was "restored land" or an "initial reservation" and thus could be used for gaming if taken into trust. DOI did not issue a decision on the trust land application until December 2010 – **five years after issuance of the NIGC general counsel legal opinion regarding the land.** As of 2013, **more than seven years after issuance of the NIGC general counsel opinion** that land proposed to be taken into trust for the Cowlitz would qualify for gaming under an IGRA exception, the Cowlitz effectively still do not have land in trust.

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21 *See* http://www.nigc.gov/Reading_Room/Indian_Land_Opinions.aspx.

22 *See* http://www.bia.gov/WhatWeDo/ServiceOverview/Gaming/index.htm.

23 *See* June 5, 2012 letter from Tracie L. Stevens, Chairwoman, National Indian Gaming Commission, to Cedric Cromwell, Mashpee Wampanoag Tribe (noting that the Tribe has no Indian lands and advising that "approval [of gaming ordinance] is granted for gaming only on Indian lands, as defined in IGRA, over which the Tribe has jurisdiction.").

24 *See* Tribal-State Compact between the Mashpee Wampanoag Tribe and the Commonwealth of Massachusetts, July 12, 2012 at ¶ 2.6 ("IGRA requires that a tribe's gaming must be conducted on Indian lands, which includes land taken into trust by the United States."); ¶ 2.8 ("Neither federal nor Commonwealth law requires the Governor ... to negotiate a compact with a tribe before it has land that is qualified under IGRA for gaming by the tribe"); ¶ 9.1.1 ("The Tribe presently has no lands held in trust, for Gaming purposes or otherwise."). *See also* October 12, 2012 letter from Kevin K. Washburn, Assistant Secretary – Indian Affairs to Deval Patrick, Governor of the Commonwealth of Massachusetts (disapproving compact).

25 *See* Skibine testimony, n.16, supra, at 2 (Section 20 of IGRA, 25 U.S.C. § 2719, which prohibits gaming on land acquired after October 17, 1988 unless one of the specified exceptions is met, is "a separate and independent requirement to be considered before gaming activities can be conducted on land taken into trust after October 17, 1988, the date IGRA was enacted into law").

**C. The land in trust review process is lengthy; it is precluded by *Carcieri* for tribes that were not federally recognized until after 1934.**

1. The land-in-trust process

Subject to the limitation imposed by the U.S. Supreme Court's opinion in *Carcieri v. Salazar*, 555 U.S. 379 (2009), discussed below, the Secretary of the Interior is authorized to take land into trust for the benefit of a tribe under the IRA.[26]

The land-in-trust process is a lengthy undertaking[27] that requires the Secretary to evaluate the tribe's connection to the parcel in question; environmental impacts; jurisdictional issues; potentially conflicting land uses; the effect on state and local governments and tax rolls; and the claimed economic benefits to the tribe.[28] Much of this analytical work is done by the Bureau of Indian Affairs ("BIA") during the course of the review process required under NEPA to assess the environmental impact of taking the land into trust. Such a review typically takes many years and is subject to court challenge.

The uncertain and lengthy process of acquiring land in trust is illustrated by the Cowlitz Indian Tribe's trust land application review process. On November 12, 2004, BIA issued a notice of intent to prepare an Environmental Impact Statement ("EIS") pursuant to NEPA to address the potential environmental impacts of taking 151.87 acres into trust for the Cowlitz to use for a casino and hotel.[29] It was not until December 17, 2010, **six years later**, that the Assistant Secretary – Indian Affairs issued a final agency determination to acquire land in trust for the Cowlitz Tribe.[30] That decision was followed immediately by two

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26 Indian Reorganization Act, Ch. 576, §5, 48 Stat. 985, *codified at* 25 U.S.C. § 465.

27 *See KG Urban Enterprises, LLC v. Patrick*, 693 F.3d 1, 27 (1st Cir. 2012) (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2203 (2012) for the "lengthy administrative review" of a request to have land taken into trust for the purpose of operating a casino).

28 *See* 25 C.F.R. Part 151.

29 *See* http://www.cowlitzeis.com/.

30 This chart summarizes the Cowlitz land-in-trust review process:

| | |
|---|---|
| November 12, 2004 | BIA issues Notice of Intent to Prepare an Environmental Impact Statement for the Proposed Cowlitz Indian Tribe's Trust Acquisition and Casino Project, Clark County, WA |
| December 1, 2004 | Public Scoping meeting |
| November 12 – December 13, 2004 | Scoping Comment Period |

lawsuits challenging the DOI decision to take land into trust for the Cowlitz Tribe and is not likely to be resolved for years.[31] As a result of the complexity of the land-in-trust process and, in many cases, resulting litigation relating to DOI land-in-trust decisions, land-in-trust acquisitions have taken many years to be reviewed and finally determined, while others remain pending despite the passage of many years. As noted below, the Supreme Court's *Patchak* decision has significantly compounded the uncertainty of the land-in-trust process.

| | |
|---|---|
| February 2005 | BIA issues Draft Environmental Impact Statement Scoping Report for Cowlitz Indian Tribe Casino Project outlining the range of environmental issues to be addressed, the types of project effects to be considered and the range of project alternatives to be analyzed |
| April 12, 2006 | Notice of Availability for the Draft Environmental Impact Statement solicits public comment |
| April 12 – August 25, 2006 | Public comment period on Draft Environmental Impact Statement |
| June 14 & 15, 2006 | Public hearing on Draft Environmental Impact Statement |
| May 2008 | BIA issues Final Environmental Impact Statement which addresses filing of the final environmental impact statement with the USEPA for the Tribe's proposed fee-to-trust transfer, reservation proclamation, casino-resort project in Clark County, WA and approval by NIGC of a gaming management contract |
| May 30, 2008 | BIA issues Notice of Availability of Final Environmental Impact Statement for the Cowlitz Indian Tribe's Proposed 151.87 Acre Fee-to-Trust Transfer, Reservation Proclamation, and Casino-Resort Project, Clark County, WA, for public comment |
| December 17, 2010 | Final agency determination to acquire approximately 151.87 acres of land into trust for the Cowlitz Tribe |

[31] The Secretary's decision to take land into trust for the Cowlitz Indian Tribe of Washington, which was federally recognized in 2002, was immediately challenged in two lawsuits. *See Clark County v. United States Department of the Interior*, U.S. District Court for the District of Columbia, No. 1:11-cv-00278-RWR (complaint filed on January 31, 2011); *Confederated Tribes of the Grand Ronde Community of Oregon v. Salazar*, U.S. District Court for the District of Columbia, No. 1:11-cv-00284-RWR (complaint filed on February 1, 2011). Interior advised that it will not take the land into trust for the Cowlitz until 60 days after the date of the federal district court decision, **which is expected to take more than three years to resolve**. Stephanie Rice, *La Center casino a high-stakes case*, The Columbian, March 20, 2011 (*available at* http://www.columbian.com/news/2011/mar/20/high-stakes-case/). On March 13, 3013, because of defects in the Cowlitz record of decision, the district court remanded the case to the Department of the Interior to prepare a new record of decision.

The following chart illustrates the length and complexity of the land-in-trust process for a sample of tribes seeking to operate gaming on land to be acquired in trust.

| | |
|---|---|
| Estom Yumeka Maidu Tribe (Enterprise Rancheria) | BIA commenced the process to take 40 acres of land into trust for a casino in Yuba County, California on May 20, 2005. The trust land application process was not completed until November 2012 – **seven years later**. *See* http://www.enterpriseeis.com/. |
| Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians of Michigan (a/k/a the Gun Lake Tribe) | This is the land acquisition at the center of the *Patchak* litigation. The Gun Lake Tribe submitted its application to have land in Wayland Township, Michigan, taken into trust on August 8, 2001. *See Patchak v. Salazar*, 646 F. Supp. 2d 72 (D.D.C. 2009). The Secretary took land into trust for the Gun Lake Tribe on April 18, 2005. *Id.* Three years later, on August 1, 2008, Patchak filed suit, asserting that the Secretary lacked authority under the IRA to acquire land for the Gun Lake Tribe because the tribe was not a federally recognized when the IRA was enacted in 1934 and, therefore, the land acquisition was in violation of *Carcieri*. Ultimately, on April 24, 2012, **more than ten years after the Gun Lake Tribe applied to have land taken into trust**, the U.S. Supreme Court found that Patchak had standing to raise these challenges and remanded the case. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199 (2012). |
| Federated Indians of Graton Rancheria | In February 2004, BIA issued a notice of intent to assess the environmental impact of taking 254 acres of land into trust for a casino project in Sonoma County, California. A decision was issued **more than six years later**, in October 2010. *See* http://gratoneis.com/. |
| North Fork Rancheria of Mono Indians | In October 2004, an EIS was prepared to assess the environmental consequences of taking 305.49 acres into trust for a casino resort in Madera County, California. **Eight years later**, in November 2012, the Assistant Secretary made a final agency determination to acquire the land in trust. *See* http://www.northforkeis.com/. |
| Menominee Indian Tribe of Wisconsin | On July 7, 2004, BIA issued a notice of intent to prepare an EIS to assess the environmental effects of taking 223 acres (the site of the Dairyland Greyhound Park in Kenosha, Wisconsin) into trust for a casino hotel project. *See* http://www.kenoshaeis.com/. **After more than eight years, no final decision has been made to take land into trust.** |
| Ione Band of Miwok | On November 7, 2003, BIA began to assess the environmental impact of taking 228 acres in Amador County, California into trust for a |

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|---|---|
| Indians | proposed casino project. **Nearly nine years later,** on May 24, 2012, DOI announced its intent to take the land into trust. *See* http://www.ioneeis.com/. Two suits were filed in federal court challenging the decision.[32] |
| Samish Indian Nation | On August 11, 2011, BIA began work to assess the environmental effects of taking approximately 11.41-acres into trust for the construction of a casino in Skagit County, Washington. A draft EIS has not yet been issued for public comment. *See* http://samisheis.com/. After that, a final EIS must be completed and issued for public comment before a decision to take land into trust can be made. |

The Mashpee land-in-trust application process is in the initial stages of review.[33] On May 31, 2012, BIA issued a notice of intent to prepare an EIS to address the potential environmental impacts of taking 170 acres of land in Mashpee, Massachusetts and 151 acres of land in Taunton, Massachusetts into trust, to include a casino on the land in Taunton. BIA issued a scoping report outlining the issues to be considered as part of the review in November 2012, but has yet to issue a draft EIS for public comment, conduct further review in response to those comments, prepare and issue a final EIS for public comment, or issue a record of decision on the land-in-trust application.

2. Limitation imposed by *Carcieri v. Salazar* on the authority of the Secretary of the Interior to take land into trust for tribes recognized after 1934.

As discussed above, there is little prospect that the Mashpee will obtain land-in-trust in the foreseeable future. The federal land-in-trust process has been in a state of paralysis since the Supreme Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009). In *Carcieri*, the Court held that the Indian Reorganization Act – which authorizes the Secretary of the Interior to acquire land in trust "for the purpose of providing land for Indians," 25 U.S.C. § 465 – authorizes the acquisition of land in trust only for tribes that were under federal jurisdiction when the statute was enacted in 1934. 555 U.S. at 381-382. While, Justice

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[32] *See County of Amador v. U.S. Dept. of Interior*, No. 2:12-cv-01710, U.S. District Court for the Eastern District of California (filed June 27, 2012); *No Casino in Plymouth and Citizens Equal Rights Alliance v. Salazar*, No. 2:12-cv-01748, U.S. District Court for the Eastern District of California (filed June 29, 2012).

[33] *See* 77 Fed. Reg. 32132, May 31, 2012 (BIA notice of intent to prepare environmental impact statement for proposed fee-to-trust transfer of property in Taunton, MA and Mashpee, MA by the Mashpee Wampanoag Tribe); Scoping Report, Mashpee Wampanoag Tribe Fee-to-Trust Acquisition and Destination Resort Casino Mashpee and Taunton, Massachusetts, November 2012.

Thomas did not explicitly say that Congressional action would be needed to reverse the Court's decision. But that is implicit in every statutory decision the Court issues, so there is rarely a need to say it. A holding that the Secretary lacks statutory authority to take certain actions is generally understood to mean what it says unless Congress takes action to undo that decision. As a result, the Secretary currently has no statutory authority to take land into trust for tribes, such as the Mashpee, that were recognized by the federal government after 1934.

Absent an act of Congress, *Carcieri* bars the Secretary from taking any land into trust for the Mashpee.[34] Since 2009, there have been various proposals by members in both houses of Congress to overrule *Carcieri* by statute, but all of those efforts have failed. The recognition by Congress that legislative action is necessary to empower the Secretary of the Interior to take land into trust for tribes federally recognized after 1934 indicates that Congress concurs that the Secretary presently has no authority to do so. Chief Judge Sandra Lynch echoed the position of both the Federal judiciary **and** the United States Congress during the oral argument before the United States Court of Appeals for the First Circuit on KG Urban's appeal. Chief Judge Lynch suggested that an act of Congress is required to authorize the Secretary to take land into trust for tribes federally recognized after 1934, and observed that Congress has not adopted Justice Breyer's theory that tribes may have been under federal jurisdiction in 1934 although the federal government did not then know it.[35]

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[34] DOI has sought to take land into trust for tribes federally recognized after 1934 under the theory articulated by Justice Breyer in his concurring opinion in *Carcieri* that a tribe may have been "under federal jurisdiction" in 1934 although the federal government did not believe so at the time. 555 U.S. at 397-8 (Breyer, J., concurring). That theory is currently being tested in the courts and will not be resolved until a case reaches the U.S. Supreme Court. But even under that narrow view, a tribe seeking land in trust would have to prove that it was "under federal jurisdiction" in 1934 in order to even be *eligible* to have land taken into trust. That additional showing would only further delay the land-in-trust process and create one more obstacle to a tribe's acquisition of such land.

[35] Oral argument before the United State Court of Appeals for the First Circuit, *KG Urban Enterprises v. Patrick*, Case No.: 12-1233, June 7, 2012 (posted to http://www.ca1.uscourts.gov/files/audio/audiorss.php). The colloquy between Chief Judge Lynch and counsel for the Commonwealth included the following:

> COUNSEL FOR THE STATE: And if by July 31st the legislature were to approve a tribal compact, then Section 91E, the dismissal of the claim, should be upheld on the ground that it's subject to rational basis review and easily meets it.
>
> CHIEF JUDGE LYNCH: Why? Why when there are no Indian lands? You know, this is a bit of an extraordinary step, given that, at present, there is no power in the Secretary to approve a compact if a compact is reached, because the tribe does not have reservation land, does not have Indian lands, and it totally depends on an act of Congress.

The Attorneys General of 17 states, **including the Attorney General for the Commonwealth of Massachusetts,** signed a letter in April 2009 to the ranking members of the Senate Committee on Indian Affairs and the House Committee on Natural Resources urging them not to rush a legislative overturn of *Carcieri* that ignores legitimate state and local interests.[36] They noted frustration with the land-into-trust process and expressed concern that a rush by Congress to override *Carcieri* will undermine the ability of states and local communities to exercise their core governmental functions, including civil and criminal enforcement and taxing. To date, all legislative "fixes" to *Carcieri* have failed largely because of concerns – especially in the Senate[37] – about the acquisition of land for gaming.

3. *Patchak* expanded standing to sue and extended the time to challenge land-in-trust decisions, including challenges to the ability of the Secretary of the Interior to take land into trust for tribes recognized after 1934.

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COUNSEL FOR THE STATE: So at least a few points in there, taking the last one first, it may or may not depend on an act of Congress.

CHIEF JUDGE LYNCH: Why not? You better explain that to me, because the way I presently understand it, it does depend on an act of Congress.

COUNSEL FOR THE STATE: As Justices Breyer and Souter pointed out, in their opinions in Carcieri, a tribe that is federally recognized after 1934, might be able to make a factual showing that they were nonetheless, under federal jurisdiction as of 1934 with respect to the--

CHIEF JUDGE LYNCH: Yes, but Congress has not adopted the position of the dissent, that's not the basis for it at all.

36 *See* April 24, 2009 letter from the State Attorneys General of Alaska, Colorado, Connecticut, Florida, Hawaii, Iowa, Kansas, **Massachusetts,** Michigan, Mississippi, Ohio, Rhode Island, South Carolina, South Dakota, Tennessee, Texas and Utah to Senators Dorgan and Barrasso of the Senate Committee and Representatives Rahall and Hastings of the House Committee on Natural Resources, re: Congressional Committee hearings re: Carcieri v. Salazar, 555 U.S. __ (2009) (*available at* http://turtletalk.wordpress.com/2009/04/29/seventeen-state-ags-urge-congress-not-to-quick-fix-carcieri/).

37 Senators expressing such concerns include Senator Diane Feinstein (D-Calif.) and Senator. Charles Schumer (D-NY). Senator Schumer cautioned the Secretary of the Interior not to circumvent the legislative process and the decision of the Supreme Court in an effort to address the Carcieri decision unilaterally. *See* March 8, 2010 letter from Senator Schumer to Secretary Salazar (*available at* http://www.schumer.senate.gov/record.cfm?id=322881). Senator Schumer noted that "[t]he specific words chosen by Congress demonstrate that it was the will of legislature to limit the authority of the Secretary with respect to taking land into trust. This limitation can be changed only by another act of Congress, not unilaterally by the executive branch. Indeed, the Court noted 'Congress left no gap in 25 U. S. C. §479 for the agency to fill.'" *Id.* (citing *Carcieri*, 555 U.S. at 391).

Federal litigation of the issues raised by the Mashpee's application to acquire land-in-trust for gaming, including the Secretary's authority to take land into trust under *Carcieri*, likely will delay implementation of tribal gaming in the Commonwealth for years.[38] The potential for delay was significantly increased by the Supreme Court's 2012 decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199 (2012). *Patchak* expanded the pool of potential challengers and extended the time limit to bring a legal challenge to the Secretary's decision to acquire land in trust for a tribe.

In that case, the Supreme Court ruled that Patchak, a property owner near the land taken into trust, had standing under the Administrative Procedure Act ("APA") to challenge both the acquisition of the land based on its proposed use as a casino and the authority of the Secretary under the IRA to take the land into trust for the Gun Lake Tribe, which had not been federally recognized until 1998.[39] Patchak brought suit three years after the Secretary had taken land into trust. **Prior to *Patchak*, a party challenging a decision to acquire land in trust for a tribe had only a thirty-day window under DOI regulations to seek judicial review.[40] Under *Patchak*, however, a challenge to a land-in-trust decision may be brought within the APA's six-year statute of limitations.[41]**

I would be happy to discuss these issues further with the members of the Commission.

Sincerely,

Marsha A. Sajer

cc: Barry M. Gosin
Andrew M. Stern

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38 The *Carcieri* case is a useful example. The *Carcieri* case began in 1998 when the Governor of Rhode Island challenged the decision of the Secretary of the Interior to take land into trust for the Narragansett Indian Tribe. That case **concluded eleven years later**, when the Supreme Court held that the Secretary lacks authority to take land into trust for tribes that were not under federal jurisdiction as of 1934.

39 132 S.Ct. at 2204, 2211-12.

40 *Id.*, 132 S.Ct. at 2217 (Sotomayor, J., dissenting) (citing 25 C.F.R. § 151.12).

41 *Id.*

ATTACHMENT

KG Urban Enterprises

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December 14, 2012

Mr. Steven Crosby
Chairman
Massachusetts Gaming Commission
84 State Street, Suite 720
Boston, Massachusetts 02109

RE: Region C Status Review

Dear Chairman Crosby:

I write as an equity principal in KG Urban Enterprises. As you are aware, KG has been working for many years on our plan for an urban waterfront resort casino in the City of New Bedford, in Region C.

At its meetings on December 4 and December 11, 2012, the Massachusetts Gaming Commission (the "Commission") discussed at some length the status of Region C. At both meetings, there was extensive discussion of the possibility of a "dual" or "parallel" track application process for a commercial resort gaming license in Region C. Since the Commission has invited public comment before voting on the implementation of a dual or parallel track process, I am writing to express KG's views on this concept. We wish to respectfully state that such a parallel or dual track is profoundly problematic from both a business and legal standpoint.

It is imperative that once the commercial licensing process is opened in Region C, that process must not be subject to revocation or suspension on any basis which is not also applicable to the processes in Regions A and B. Specifically, the Region C commercial license process cannot be conditional, subject to, or contingent upon the progress the Mashpee Wampanoag tribe might make toward an Indian casino. A contingent process will leave many gaming investors unable to commit the substantial capital as well as the time, effort and personnel resources necessary to proceed as an applicant in a process that could be aborted for reasons having nothing to do with the quality of a proposed project. Under the "dual track" process discussed by the Commission, an applicant is forced to assess not just its own ability to win a license on the merits, as in Regions A and B, but faces an additional and highly-significant variable totally outside each applicant's control, or even ability to influence through its own business decisions. Specifically, there is the possibility that the strength of a Region C applicant's qualifications, and the quality of the proposal itself, could be rendered irrelevant if the Mashpee tribe is deemed to have achieved "sufficient progress" toward an Indian casino.

Region C has been thus far ignored by most of the commercial gaming industry because of the Massachusetts Gaming Act's preference for the Mashpee tribe. The implementation by the Commission of a conditional or contingent process will simply compound this existing inequity. A contingent process will continue to leave the Southeast in an inferior position relative to Regions A and B by fundamentally distorting the economics of applying for the Region C license, and thereby discouraging investment in Region C.

The Commissioners have all correctly noted during your deliberations regarding Region C that commercial applicants in Regions A and B will all expend substantial resources to compete for a resort gaming license with no guarantee of winning that license. But that competition will occur solely on the merits. Any competition for a single commercial concession in a particular jurisdiction presupposes that everyone who competes cannot win. In fact, all competitors enter the process knowing that all but one of them will in fact lose. But they also enter the process knowing that the wise investment of additional time and effort in their proposal will increase their chances of prevailing. A decision to compete thus becomes a classic business decision regarding both the allocation of resources and the tactical and strategic decision-making (both on selection and deployment of personnel, and on the substance of the proposal itself) which causes an applicant and its investors to conclude that the company's qualifications and proposal will best all others. The process in Regions A and B is the same for everyone -- the existence of the process, and of the commercial license on which the applicants are bidding, are not in doubt.

Moreover, all applicants in Regions A and B enter the licensing process with both the knowledge and expectation that the process will proceed to a conclusion. Each applicant's risk hangs only on its own ability to put forward the best proposal. An applicant is wagering its own resources on its own ability to be better than its competitors and that is the very essence of the business a casino builder and operator is in. And while several Commissioners have noted that the Commission can decline to issue a license at the close of the process in those Regions, the Act permits this only should the Commission fail to receive any meritorious proposal. Thus every applicant in Regions A and B enters the competitive fray with the certainty that as long as its proposal is sufficiently meritorious, it will win -- either because it beats out other meritorious proposals, or because the Commission deems it meritorious even in the absence of other meritorious proposals. Neither the actions of any one applicant, nor the actions of an outside party, can suspend the process itself, affect the very existence of the process itself, nor affect the availability of the license itself.

In stark contrast, a contingent process in Region C will cause the Southeast to be viewed by investors not as a conventional allocation of resources to compete in an open commercial licensing process on the merits as they do in other jurisdictions, but as a fundamentally flawed business proposition: an uncertain and therefore potentially reckless investment in a process that remains subject to being aborted based on outside events beyond an applicant's control. This is a risk that quite simply does not exist in Regions A or B. And it is a risk of an entirely different nature than the risk taken by Region A and B applicants. Those applicants are betting solely on their own ability to put forth the winning application. Indeed, it is the very fairness of the process mandated by the Commission for Regions A and B, a process with no variables other than merit and quality, which has already attracted such a deep pool of interested applicants and will result in such a wide variety of proposals in those Regions.

We understand that the Commission proposes at this time to commence only with Phase I under the dual or parallel track, and intends to reassess the Indian situation once applicants have been qualified before deciding whether to open Phase II of the process to formal applications and proposals. This does not mitigate or fundamentally alter the critical flaws of a dual or parallel track process outlined above – it magnifies them. True, the $400,000 fee to pre-qualify is not, by itself, onerous in the context of qualifying to propose and build a $500,000,000 casino resort property. But when one factors in the internal and outside resources needed to complete the pre-qualification process, the fatal flaw remains the same: the Commission is creating and commencing with a contingent process that may or may not ultimately proceed. This obligates Region C applicants to commit to a creeping expenditure of substantial resources to qualify for a Phase II that may not ever actually begin. It is exactly this type of uncertainty that

frightens away those who invest in high-visibility, large-scale commercial gaming development. Applicants for pre-qualification in Regions A and B faced no such uncertainty when the Commission commenced with Phase I.

Finally, even beyond the business implications of the entire Region C process possibly being aborted based on an extraneous factor, that the process would be aborted specifically because of the Mashpee's pursuit of tribal gaming implicates the fundamental violation of the Equal Protection Clause inherent in Section 91 of the Massachusetts Gaming Act. In fact, a dual or parallel track process for Region C created and implemented solely because of the Mashpee Wampanoag Tribe's existence, while Regions A and B proceed on a single track that guarantees a decision on the merits, only serves to underscore the serious Constitutional issues which have already been raised. As the Commission is aware, we continue to vigorously pursue our Constitutional claims before Judge Nathaniel Gorton in the United States District Court in Boston, as directed by the United States Court of Appeals for the First Circuit.

For all of the foregoing reasons, we urge the Commission to level the playing field in the entire Commonwealth by opening Region C to commercial gaming applicants on terms identical to those upon which the Commission has opened Regions A and B. Such action by the Commission will not only keep Region C from falling further behind the other Regions, it will attract the largest and deepest pool of qualified applicants, and thereby reap for Southeastern Massachusetts the economic benefits the legislature intended to deliver to the entire Commonwealth of Massachusetts when it passed the Gaming Act. To be clear, KG asks not that the Commission implement our notion of a "fair" process for Region C. We ask the Commission to do no more, but no less, than implement in the Southeast the Commission's own concept of a fair commercial licensing process: the one the Commission itself created for and is presently implementing in Regions A and B.

I hope that the foregoing is helpful to the Commission as it continues to discuss and deliberate the future of Region C.

Thank you for providing KG Urban Enterprises with the opportunity to comment.

Very truly yours,

Barry M. Gosin

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# The Commonwealth of Massachusetts

HOUSE OF REPRESENTATIVES
STATE HOUSE BOSTON, MA 02133-1020


SHAUNNA L. O'CONNELL
STATE REPRESENTATIVE
3RD Bristol District

Committees:
House Ways and Means
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April 16, 2013

Massachusetts Gaming Commission
84 State Street, Suite 720
Boston, MA 02109

Dear Commission Members,

As a State Representative for the city of Taunton, I write to convey my concern regarding the potential decision of the Massachusetts Gaming Commission to open Region C to bids for commercial casino development and respectfully urge the commission to refrain from doing so.

During the debate over expanded gaming in the Commonwealth, careful consideration was given to the rights of federally recognized Indian tribes to conduct gaming and how the Commonwealth would work with a gaming-eligible federally recognized tribe in a fair, practical way that would acknowledge their unique rights while also protecting the Commonwealth's interests and maximizing job creation and economic development in Southeastern Massachusetts.

Legislators engaged in extensive debate over these matters before we ultimately passed the Expanded Gaming Act of 2011 and sent it to Governor Patrick for his signature.

Among the issues debated were the requirements the law would impose on a tribe as well as whether any deadlines should be imposed. To date, the Mashpee Wampanoag Tribe has met all of the requirements set forth in the legislation.

As you are aware, the legislature considered, and ultimately rejected, setting a deadline on the Tribe to receive its land in trust. Amendments were filed that would have imposed this deadline, they were debated, and the legislature voted not to include such a deadline. The statute clearly provides that the gaming commission can consider bids for a Category 1 license in Region C only if the commission first determines that the tribe will not have land taken into trust by the

United States Secretary of Interior. At this time the commission has no basis to make that determination.

I am aware that some of my colleagues are in favor of opening up the bid process now so that their districts may have the opportunity to attract a destination resort casino. However, the fact remains that the Expanded Gaming Act respects the federal rights of the Mashpee Wampanoag Tribe to conduct gaming in Southeastern Massachusetts. The Tribe has met every requirement of this law.

The City of Taunton and its residents have overwhelmingly approved the project and are deeply invested in bringing this incredible economic opportunity not only to the city, but to the entire Southeast region.

At this point in time the tribe must be allowed to continue to move forward in the process, as the Expanded Gaming Act calls for, so that we ensure we have one successful casino in Region C in a timely manner.

Thank you for the opportunity to comment on this matter.

Sincerely,

Shaunna O'Connell
State Representative

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# The Commonwealth of Massachusetts

House of Representatives

State House, Boston 02133-1054

April 16, 2013

Mr. Stephen Crosby
Chairman, Massachusetts Gaming Commission
84 State Street, Suite 720
Boston, Massachusetts 02109

Dear Chairman Crosby,

Since my letter to you dated December 17, 2012, the Legislature has been asked to extend the compact with the Mashpee Wampanoag tribe for the rights to proceed with expanded casino gaming development in Southeastern Massachusetts. Also, since that time, no further developments have transpired that would make me confident in compact terms that would be sufficiently beneficial to the Commonwealth and to the cities and towns to be impacted in Southeastern Massachusetts. Because of the very uncertain nature of these proceedings, I once again respectfully ask that the Gaming Commission open up region C for proposals that will allow for the best possible development in our region.

As defined by statute created by the Legislature, the Mashpee Wampanoag's deadline to secure land in trust and approval from the Department of the Interior has come and gone. Regardless of whether or not there is a new compact or extension provided, this delay in licensing for an expanded gaming facility hurts southeastern Massachusetts. To reiterate points from my December letter, the circumstances that we face with regard to economic development and unemployment in the southeastern Massachusetts region, particularly in New Bedford, Fall River and Brockton, make this delay all the more painful. This region has suffered because of imposed delays or flat out denials for other services by Boston and in favor of Boston and other points that are considered more important. The intent of the Legislature was to instill fairness in the process, but that right and benefit will continue to elude Southeastern Massachusetts if we are forced to once again draw up a compact that may or may not be acceptable to the Federal Government, further delaying any opportunity for development.

I urge you and the Commission to reconsider the delay, and I hope that you open the licensing process up for private investors in this area. It is the right thing to do and the legally appropriate thing to do as well. If you should have any questions, please do not hesitate to contact me at (617) 722-2396. Thank you for your consideration.

With every best wish, I remain

Sincerely,

Christopher M. Markey
State Representative, Ninth Bristol District