



CITY OF BOSTON • MASSACHUSETTS
OFFICE OF GAMING ACCOUNTABILITY
City Hall, Room 620 Boston, MA 02201

April 17, 2014

Via Electronic Mail Delivery
Massachusetts Gaming Commissioners
Massachusetts Gaming Commission
84 State Street, 10th Floor
Boston, Massachusetts 02109

Re: *Objections to Public Hearing on Determining a Gaming Establishment*

Dear Massachusetts Gaming Commissioners and staff:

The City of Boston (the “City”), on behalf of its residents, families, businesses and visitors, objects to the nature of the hearing to be conducted by the Massachusetts Gaming Commission (the “Commission”) as described in the Memorandum dated April 3, 2013, entitled *Determining a Gaming Establishment*. The process described therein unreasonably limits and compromises the City’s ability to receive and present evidence in support of the City’s declarations as a host community to both Region A gaming applicants. For the Commission to proceed in accordance with the process as outlined in the Memorandum would be violative of the City’s due process rights. Additionally, the City has grave concerns about prejudicial statements made by the Commission, as well as issues reported recently in the media regarding Region A.

A. Prejudicial Statements

Throughout the process, Chairman Crosby has made several statements, which the City deems prejudicial, including criticizing the City for asserting its host status on behalf of its public. Section 3(u) of the Gaming Act requires Commissioners to conduct themselves in a manner to render decisions that are fair and impartial and in the public interest, and to avoid impropriety and the appearance of impropriety. Taken together, the pending federal lawsuit, recent Commission statements, current press articles, and the Commissions’ own actions, create a cloud over the proceedings when Chairman Crosby participates. Therefore, the City believes, in the best interest of a transparent process, that Chairman Crosby should recuse himself from all licensing matters in Region A.

B. Mutable Process and Unfair Forum

To begin with, the Commission has set up various unfair processes. First, it called for an adjudicatory hearing that was not in compliance with its own Regulations. Next, it amended its own process for an adjudicatory hearing which further compromised the due process rights of the citizens of the City. Finally, after the City sent a letter questioning jurisdiction,¹ as well as the fairness and legality of the adjudicatory process, the Commission changed the process again, this time announcing a public meeting with extremely limited or no due process or civil procedure rights.

Setting aside any issues of jurisdiction, the City objects to the “legislative” procedure announced by the Commission because it does not match the “adjudicatory” question the Commission has set out to answer. The Commission intends to “[d]etermine the premises of the gaming establishment for which” both Region A applicants seek approval, and to issue findings describing them. Based on those findings, the Commission further intends to conclude whether Boston is a host community to either proposed casino.² Those determinations carry the hallmarks of adjudicatory decisions. They concern specific projects and determinations of fact related to the location of their sites and elements. They overwhelmingly affect the interests of two specific casino applicants and one municipality that claims each application deprives it of its statutory entitlement to a community impact fee and other contractual benefits.³

By contrast, acting in a legislative capacity involves making rules of general application and prospective effect.⁴ The determinations the Commission proposes will not set out rules that will take effect prospectively outside the context of these two casino applications. In fact, members of the Commission and its counsel took pains to clarify that its determinations would not have a broader ongoing effect outside of Region A. *See* Transcript, Massachusetts Gaming Commission Meeting April 3, 2014, p. 129.⁵

¹ On March 25, 2014, the City’s counsel informed the Commission “that there is a significant preliminary legal question concerning whether the Commission has jurisdiction to decide the issue of Boston’s host community status.”

² The Commission is attempting to create a forum to “organically” define the City’s status.

³ See Borden, Inc. v. Comm’r of Pub. Health, 388 Mass. 707, 716 (1983); see also Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226 (1908) (Holmes, J.) (“judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist.”).

⁴ See Cambridge Elec. Light Co. v. Dep’t of Pub. Utilities, 363 Mass. 474, 486 (1973); see also Prentis (“[l]egislation . . . looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.”).

⁵ If the Commission was to engage in an actual legislative process of interpreting the definition of “gaming facility” contained in G. L. c. 23K, § 3, such an interpretation would have application throughout the state, comments of the City of Boston, Wynn MA, LLC, and Mohegan Sun MA, LLC, would not be prioritized, and the Commission would likely seek input on how an interpretation would impact the operation of other statutory provisions that operate on the term “gaming establishment,” such as the jurisdiction of the Commission Enforcement Division, § 6(c), jurisdiction of the State Police, § 6(f), necessity of Commission approval for transfer of various assets, § 19(c), and compliance with ongoing capital expense requirements, § 21.

The Commission proposes no process for the City to obtain discovery from the applicants. It eliminates the City's opportunity to call witnesses, to cross-examine witnesses and to create an appropriate evidentiary record that is subject to legal review. It also fails to address the burden of proof and a mechanism to resolve factual disputes based on documentary submissions with no live testimony. In sum, the proposed procedure represents a thinly veiled attempt to "stack the deck" against the City on the "host community" issue so that the Commission can issue a Category 1 license in Region A without the City's interference in the process.

The City sheds light on the insufficiency of the Commission's process not to "nickel and dime issues," which the City believes is an unfair characterization; but to accurately express to the Commission and City's residents the thoughtful and fair approach the City is taking to this issue.

C. Commission Investigation Request

The City requests that the Commission investigate issues based on the following two (2) *The Boston Globe* articles: Andrea Estes and Sean P. Murphy, *Everett May Buy Site, Sell it to Wynn for Casino Use: Plan Comes as Gambling Panel Worries about Felon's Ties to Land*, THE BOSTON GLOBE, April 16, 2014, p. A1; and Andrea Estes and Sean P. Murphy, *Everett Landowner Resists Disclosure Pledge: Gambling Panel Wants Assurances Criminals won't Profit from Selling Property to Wynn*, THE BOSTON GLOBE, April 11, 2014, p. A1. The City believes that issues raised in these articles require the Commission to conduct further investigation. Our request appears to be consistent with statements of the Commission's spokesman that the Commission would need to review the new land proposal.

Furthermore, the City believes that the issues must be investigated, if not resolved, before Region A decisions of any kind can be made. The City requests that all proceedings relating to licensure in Region A be postponed pending the Commission's investigation into these matters. The City's concern is that results of such investigation could impact licensure of the entire region, and that conducting a public hearing on Boston's "host community" status is premature and could be rendered moot as it appears that the applicant has failed to meet the requirements of the Commission's conditional suitability determination. Decisions involving the Region A applicants cannot be made at this time given the uncertainty of the issues as raised in these articles.

While the Commission may think "[a] big price is being paid by a lot of people to try to accommodate the City's concerns," the City believes that preserving the democratic process and due process rights of its citizens is invaluable and consistent with the purposes of the Gaming Act.

Sincerely,

A handwritten signature in blue ink, appearing to read "Elizabeth Dello Russo".

Elizabeth Dello Russo
Senior Assistant Corporation Counsel
Gaming Accountability Office

Cc: Via Electronic Delivery

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