HANDBOOK

FOR
BINDING ARBITRATION

BETWEEN
AN APPLICANT FOR A GAMING ESTABLISHMENT LICENSE
AND A SURROUNDING COMMUNITY

TO REACH A
SURROUNDING COMMUNITY AGREEMENT

December 19, 2013

***For Region C Arbitration Dates – See the Commission's [Region C Timeline]**

Introduction

Under the Massachusetts Gaming Act, "surrounding communities" are municipalities in proximity to a host community which the Massachusetts Gaming Commission determines experience or are likely to experience impacts. A surrounding community and the applicant for a category 1 (casino) or category 2 (slots only) gaming establishment license must negotiate an agreement pursuant to the Gaming Act setting forth conditions for the gaming establishment to be located in proximity to the surrounding community. The agreement must include a community impact fee and stipulations of responsibilities between the surrounding community and the applicant, including stipulations of known impacts from the development and operation of a gaming establishment.

The Gaming Commission has promulgated regulations governing the determination of which municipalities are surrounding communities and the process for the execution of surrounding community agreements. The Commission encourages the applicant and each surrounding community to engage in a constructive dialogue and to reach a timely, mutually acceptable surrounding community agreement that is in the best interests of both parties. To date, many applicants and municipalities have done so, and existing surrounding community agreements between applicants and communities are posted on the Commission's website at: http://massgaming.com/about/host-surrounding-communities/surrounding-community-agreements/.

Both the Gaming Act and the Commission's regulations anticipate that there may be instances in which the parties are unable to reach consensus on a surrounding community agreement in a timely manner. In such cases, the Gaming Act provides that the Commission shall establish protocols and procedures for ensuring the conclusion of a negotiation of a fair and reasonable agreement between an applicant and a surrounding community to allow the applicant to submit a timely and complete application. The Commission's regulations (205 CMR 125.01(6) (c)) establish a binding arbitration process to govern these situations. To ensure the Commission's ability to take timely action on each application for a gaming license, these regulations establish the timing and procedure for resolving a material impasse between an applicant and the municipality concerning the surrounding community agreement.

This Handbook provides helpful guidance to each participant in the binding arbitration process – including the applicant, the municipality and the arbitrator (or panel of arbitrators) – so that the process can proceed in a smooth and timely manner. Any questions concerning the binding arbitration process or this Handbook should be emailed to the Commission's Deputy General Counsel Todd Grossman at todd.grossman@state.ma.us.

For ease of reference, attached to this Handbook are excerpts from the Gaming Act and the Commission's regulations relative to surrounding communities. In the event of a conflict, the Gaming Act and the Commission's regulations supersede this Handbook. For more information on surrounding community agreements, please consult the Commission's website at http://massgaming.com/about/host-surrounding-communities/.

Timing of Binding Arbitration

***For Region C Arbitration Dates – See the Commission's Region C Timeline**

Under the Commission's regulations (205 CMR 125.01(6)(c)), the applicant and the surrounding community must engage in the Commission's binding arbitration procedure if they do not file with the Commission their executed surrounding community agreement on or before **December 27, 2013** (thirty days from the date the Commission made the applicable surrounding community designation).

The required time line specified in the regulations and summarized in the table below begins between two national holidays (December 25 and January 1) and must be completed by early February of 2014.* The Commission encourages the parties to anticipate the scheduling difficulties this time line may present and to plan accordingly. For instance, if the parties anticipate that they may not be able to conclude their surrounding community agreement on or before the December 27, 2013 deadline,* the parties should begin as early as possible to (a) identify potential arbitrators that may be mutually acceptable, (b) explore the availability of the potential arbitrator(s) for an expedited assignment of this type, and (c) begin to prepare in advance their initial required submission to be filed with the arbitrator(s) once selected.

The required Category 2 time line for binding arbitration is as follows:

DEADLINE*	ACTION
12/27/13	Binding Arbitration Process Begins
Before selecting an arbitrator	The parties must file with the Commission a notice of intent to commence arbitration.
1/6/14	The parties select a neutral, independent arbitrator. If the parties cannot mutually select a single arbitrator, each party shall select one neutral, independent arbitrator who shall then mutually choose a third neutral, independent arbitrator. In the event that a third neutral, independent arbitrator is not selected by 1/6/14, the Commission or its designee shall select the third neutral, independent arbitrator.
1/6/14	Each party submits its best and final offer for a surrounding community agreement to the arbitrator and to the other party.
1/6/14-1/27/14	The arbitrator(s) conduct any necessary proceedings.
1/27/14	The arbitrator(s) file with the commission, and issue to the parties, a report specifying the terms of the surrounding community agreement between the applicant and the community
2/3/14	Either the parties sign a surrounding community agreement and file it with the commission, or the arbitrator's report shall be deemed to be the surrounding community agreement between the parties.

Qualifications of the Arbitrator(s)

Each arbitrator must be neutral and independent; free of bias and conflicts of interest; and capable of discharging his or her important responsibilities within the expedited schedule required by the Gaming Act and its implementing regulations. Arbitrators who reside in the surrounding community or who have any current financial or business interests in the applicant, the host or any of the applicant's surrounding communities are not eligible.

Arbitrators should disclose to the parties whether they have or have had any ongoing or past financial or business interests in (a) the applicant or its qualifiers, (b) the host community, (c) the applicant's surrounding communities, (d) any other applicant for a gaming license, (e) any host or surrounding community of any such applicant, or (f) any law firm or consultant representing any of them. Arbitrators should also disclose any relationship, experience or background information that may affect—or appear to affect—the arbitrator's ability to be impartial and the parties' belief that the arbitrator will be able to render a fair decision.

Taking into account disclosures (if any) by prospective arbitrators, the parties are free to select whomever they consider most appropriate to act as arbitrator. Candidates may include retired judges, professional arbitrators, practicing lawyers, university professors, or other individuals with pertinent expertise.

Selection of the Arbitrator(s)

The following rules govern the selection of the arbitrator(s):

1. The parties can select a single, neutral, independent arbitrator by mutual agreement.

2. If the parties cannot agree on a single arbitrator, then there will be a panel of three arbitrators selected as follows:

    a. Each party must select one neutral, independent arbitrator.

    b. Those two arbitrators then promptly choose a third neutral, independent arbitrator.

    c. If the two arbitrators fail to timely designate the third arbitrator, then the commission's general counsel will promptly select the third neutral, independent arbitrator.

Responsibilities of the Arbitrator(s)

The arbitrator (or the panel of three arbitrators acting by majority vote) shall:

1. Schedule an expedited hearing at a time and place convenient to the parties, unless the parties have agreed to waive the need for a hearing and to present their respective cases on the papers submitted to the arbitrator(s).

2. Preside over the binding arbitration process in a neutral and impartial manner, avoiding any actual or appearance of bias toward a party to the arbitration, or to an agent, attorney or witness;

3. Resolve all questions of fact and law pertinent to the binding arbitration process; and

4. Issue a final, binding decision concerning the surrounding community agreement consistent with the Gaming Act and the Commission's regulations.

Fees of the Arbitrator(s)

The applicant must pay the reasonable fees and expenses of the single arbitrator.

In the event that three arbitrators are engaged, two thirds of the reasonable fees and expenses shall be paid by the applicant and one third shall be paid by the surrounding community.

Rules Governing the Arbitration

The Commission's simplified, expedited binding arbitration process is created by and subject solely to the Gaming Act, the Commission's regulations and prior Commission decisions regarding surrounding communities, the pertinent provisions of which are attached hereto. In conducting the required binding arbitration proceedings, the arbitrator(s) must at all times abide by the substantive and procedural requirements of the Gaming Act and the Commission's regulations.

Subject to the Gaming Act and the Commission's regulations, the arbitrator(s) may exercise his/her/their discretion to conduct the proceedings in the manner the arbitrator(s) deem appropriate. To the extent the arbitrator(s) find it helpful to consult expedited arbitration rules developed by another body, arbitration association or dispute resolution entity, those rules are advisory only and do not supersede the Gaming Act or the Commission's regulations.

Except to secure the services of an arbitrator, discuss conflicts of interest, make arrangements to commence a hearing and address other procedural matters, no party shall have *ex parte* communications with the selected arbitrator(s).

Notwithstanding that the parties are in arbitration, in the interests of finding a solution that best fits the applicant and the municipality, the parties may continue to negotiate independently to arrive at a mutually agreed surrounding community agreement.

Best and Final Offers

Leading up to binding arbitration, the applicant and the surrounding community will have had the opportunity to exchange offers and negotiate toward a surrounding community agreement. The binding arbitration process comes into play when the parties are unable to reach an agreement on their own.

At the outset of the binding arbitration process, each party must submit to the arbitrator and to the other side the party's best and final offer (BAFO) for a surrounding community agreement. The BAFO is a significant document:

1. Unlike a term sheet, the BAFO must be in the form of a proposed surrounding community agreement.

2. The BAFO must contain all terms and conditions constituting the offeror's best and final offer for the surrounding community agreement.

3. The BAFO must be duly authorized by the party submitting it.

In conjunction with filing its BAFO, the applicant shall submit a copy of any surrounding community agreements already executed with other surrounding communities of the applicant. Either party may submit relevant, executed surrounding community agreements with other proposed gaming establishments.

Final Decision of the Arbitrator(s)

The purpose of the binding arbitration is to arrive at a fair and reasonable agreement between the applicant and the surrounding community. Based on the respective BAFOs submitted by the parties, the arbitrator(s) must file with the Commission and issue to the parties a report specifying the terms of the surrounding community agreement between the applicant and the community.

In reaching the final decision, the arbitrator(s) shall select the best and final offer of one of the parties and incorporate those terms into the report.

The arbitrator(s) may make adjustments to the selected best and final offer only if necessary to ensure that the report is consistent with the Gaming Act.

Considerations for the Parties in Making the Best and Final Offer

As either party's BAFO may (with certain adjustments) become the final surrounding community agreement between the applicant and the community, each party must carefully consider what terms and conditions to include in its BAFO. The parties may find it helpful to consider the following:

1. To the extent the parties can agree on some, but not all, terms and conditions of the surrounding community agreement, the parties should submit the agreed terms to the arbitrator(s) to narrow the scope of the issues in contention. Each party should include those agreed terms in its BAFO, identified as such.

2. The Commission's regulations require the applicant to submit to the arbitrator(s) and the other party copies of the surrounding community agreements the applicant has executed with other surrounding communities concerning the applicant's proposed gaming

establishment. In addition, either party may submit executed surrounding community agreements from other proposed gaming establishments in the commonwealth which the party considers relevant. The arbitrator(s) are not required to adopt any provisions from any such agreements; however, the arbitrator(s) may consider such provisions in determining the reasonableness of provisions in a BAFO.

3. The binding arbitration process focusses on the merits of each party's BAFO viewed in light of the Gaming Act and the Commission's regulations. The arbitrator(s) may limit or exclude from the arbitration process the history of the parties' negotiations leading to the BAFO, unless the arbitrator(s) consider that history to bear directly on the reasonableness (or lack of reasonableness) of the party's BAFO.

4. A party should not be overreaching in its demands in the BAFO. Overreaching by a party in a BAFO may lead the arbitrator(s) to conclude that the BAFO is not fair and reasonable.

Considerations for the Arbitrator(s) in Arriving at the Final Decision

Subject to the Gaming Act and the Commission's regulations, the goal of the arbitration process is to arrive at a fair and reasonable agreement between an applicant and a surrounding community. The arbitrator must select one of the BAFOs submitted and may only modify a BAFO if a term or condition contained therein is prohibited by c. 23K. In order to ensure a fair and reasonable outcome in selecting one of the BAFOs submitted, the arbitrator(s) may consider and evaluate factors permitted by the Gaming Act and the Commission's regulations which include but are not limited to:

1. The plan of construction of the gaming establishment;
2. Population, infrastructure, distance of the surrounding community from the gaming establishment and political boundaries;
3. The reasonableness and equity of each party's stipulations of respective responsibilities between the applicant and the surrounding community;
4. Each party's proposed stipulations of known impacts from the development and operation of the gaming establishment;
5. The evidence presented by the parties to support or negate the existence and magnitude, including costs to the community and its residents and businesses, of adverse impacts of the proposed gaming establishment on the surrounding community, identified in each party's proposed stipulations of known impacts;
6. The degree to which the proposed mitigation fee adequately and reasonably compensates the surrounding community for the adverse impacts found by the arbitrator(s) to affect the surrounding community;
7. The reasonableness of other conditions included in each party's BAFO;
8. Adverse impacts, community impact fees and other provisions in other surrounding community agreements submitted to the arbitrator(s) by either or both of the parties.
9. Information from the public relevant to the arbitrator(s) findings concerning impacts and community mitigation fee and the final determination as to which party's BAFO shall be used as the basis for the surrounding community agreement;

10. Prior Commission decisions on matters relating to surrounding communities;
11. Any adjustments necessary to the selected BAFO to come into compliance with the Gaming Act.
12. The arbitrator may consider positive impacts; however consideration of positive impacts cannot be used to cancel the consideration of any negative impacts.

Consequences of Recalcitrance

The Commission strongly encourages the parties to participate in the binding arbitration process expeditiously and in good faith. There are potentially serious consequences of failing or refusing to participate:

- If the applicant fails or refuses to participate in the arbitration process, the commission may deny the applicant's application for a Category 1 or Category 2 license or condition the issuance of the license on mitigation terms with respect to the proposed surrounding community that the commission determines are appropriate.

- If the surrounding community fails or refuses to participate in the arbitration process, the commission may deem that the community has waived its designation as a surrounding community. In such a case, the commission may (but is not required to) impose as a condition on any a Category 1 or 2 license a community impact fee and any requirements it deems appropriate requirements for mitigation of impacts from the development or operation of the licensed gaming establishment.

An applicant or surrounding community may petition the Commission for a finding that the other party has failed or refused to participate in the arbitration process set forth above and may request a remedy consistent with the foregoing. The Commission stresses that this petition is not to be used as a means to second-guess the results of the binding arbitration process, the decision resulting from which is final and not appealable.

Conclusion

The Commission believes that consensus between the parties is preferable to imposition of the terms of the surrounding community agreement by binding arbitration. However, if the parties are unable or unwilling to reach consensus, the procedure set forth in the Gaming Act, the Commission's regulations and this Handbook will determine the terms of the agreement between the applicant and the surrounding community.