



NOTICE OF MEETING AND AGENDA

Pursuant to the Massachusetts Open Meeting Law, G.L. c. 30A, §§ 18-25, and Section 20 of Chapter 20 of the Acts of 2021, notice is hereby given of a meeting of the **Massachusetts Gaming Commission**. The meeting will take place:

Thursday | March 10, 2022 | 10:00 a.m.
VIA CONFERENCE CALL NUMBER: 1-646-741-5292
MEETING ID/ PARTICIPANT CODE: 111 748 1097

Please note that the Commission will conduct this public meeting remotely utilizing collaboration technology. Use of this technology is intended to ensure an adequate, alternative means of public access to the Commission’s deliberations for any interested member of the public. If there is any technical problem with the Commission’s remote connection, an alternative conference line will be noticed immediately on www.massgaming.com.

All documents and presentations related to this agenda will be available for your review on the morning of the meeting date by visiting our website and clicking on the News header, under the Meeting Archives drop-down.

PUBLIC MEETING - #373

1. Call to Order

2. Approval of Meeting Minutes

a. June 24, 2021	VOTE
b. August 4, 2021	VOTE
c. September 9, 2021	VOTE

3. Development East of Broadway in Everett, MA – Joe Delaney, Chief of Community Affairs; Todd Grossman, General Counsel; Jacqui Krum, Senior Vice President and General Counsel at Encore Boston Harbor; Tony Starr, Attorney at Mintz Levin
 - a. The Commission will consider whether the development proposed across the street from Encore Boston Harbor will be determined as part of the existing gaming establishment and associated issues, including the permissible use of certain areas of the gaming establishment, such as the ballrooms, for the conduct of live entertainment, and MEPA related matters. **VOTE**

4. Business - Reserved for matters the Chair did not reasonably anticipate at the time of posting.



Massachusetts Gaming Commission

March 7, 2022

Cathy Judd-Stein

Chair

I certify that on this date, this Notice was posted as “Massachusetts Gaming Commission Meeting” at www.massgaming.com and emailed to regs@sec.state.ma.us. Posted to Website: March 8, 2022 | 9:30 a.m.



Massachusetts Gaming Commission



Massachusetts Gaming Commission Meeting Minutes

Date/Time: June 24, 2021, 10:00 a.m.
Place: Massachusetts Gaming Commission
 VIA CONFERENCE CALL NUMBER: 1-646-741-5292
 PARTICIPANT CODE: 111 489 1642

The Commission conducted this public meeting remotely utilizing collaboration technology. Use of this technology was intended to ensure an adequate, alternative means of public access to the Commission’s deliberations for any interested member of the public.

Commissioners Present:

Chair Cathy Judd-Stein
 Commissioner Gayle Cameron
 Commissioner Eileen O’Brien
 Commissioner Enrique Zuniga

1. [Call to Order](#) (0:00)

Chair Judd-Stein called to order the 348th public meeting of the Massachusetts Gaming Commission. Roll call attendance was conducted, and all four commissioners were present for the meeting.

2. [Approval of Minutes](#) (0:52)
 a. April 26, 2021

Commissioner O’Brien moved that the Commission approve the minutes of April 26, 2021, subject to any necessary changes for typographical errors or ministerial changes. The motion was seconded by Commissioner Cameron.

Roll call vote:
 Commissioner Cameron: Aye.
 Commissioner O’Brien: Aye.
 Commissioner Zuniga: Aye.
 Chair Judd-Stein: Aye.
 The motion passed unanimously.

3. [Administrative Update](#) (1:39)

a. Update on Internal COVID Policies

Executive Director Karen Wells updated the Commission on the results of the survey related to the Commission's internal Covid policy, particularly with respect to individuals working on-site. Executive Director Wells did not recommend any additional policy changes. The Commission thanked Executive Director Wells for a positive report.

b. [Update on Public Meetings](#) (5:07)

General Counsel Todd Grossman updated the Commission on the status of the Open Meeting Law following the rescission of the State of Emergency declared by the Governor during the pandemic. He advised that on June 15th, Chapter 20 of the Acts of 2021 was enacted, which instituted temporary amendments to the Open Meeting Law that will remain in effect until April 1, 2022. Specifically, the Special Act extended the suspension of the requirements that meetings be open to the public and that a quorum of the public body be physically present at a meeting.

Chair Judd-Stein noted that there will be additional IT implications for the return to public meetings. Digital Coordinator Austin Bumpus presented technology options for the Commission to use for public meetings moving forward. The Commission asked clarifying questions regarding the differences between what has been used in the past and what would be used under the new options. Communications Director Elaine Driscoll and Digital Coordinator Bumpus recommended that the Commission provide a link to meeting participants and post the live stream feed to the website for people wishing to view the meeting. The Commission agreed with this recommendation.

c. [On-site Casino Updates](#) (30:02)

IEB Director Loretta Lillios updated the Commission on on-site activities at the licensee properties. Director Lillios noted that the IEB is continuing to work with operational teams at the properties to ensure adequate security and safety measures are in place for events. Assistant Director of Investigations & Enforcement Bureau/Gaming Agents Division Chief Bruce Band reported that the properties have all been very busy and operations have been going smoothly. The Commission thanked Director Lillios and Assistant Director Band for this report.

4. [Legal Division and Investigations and Enforcement](#) Bureau (33:58)

a. MGM Transfer of Interest REIT Threshold Issues

General Counsel Todd Grossman introduced the proposed transfer of interest of the gaming establishment that comprises MGM Springfield from the licensee to a real estate investment trust (REIT). General Counsel Grossman noted that teams from the two parties in interest were present: MGM Growth Properties representing the REIT and MGM Resorts International, the parent of the gaming licensee.

Attorney Jed Nosal, on behalf of MGM Resorts International and certain of its affiliates collectively petitioning for a transfer in connection with MGM Springfield and MGM Growth Properties, introduced the following members of the team: James Stewart, Chief Executive Officer of MGM Growth Properties; Patrick Madamba, Senior Vice President and Legal Counsel for MGM Resorts International; Laura Norton, Senior Vice President and Legal Counsel for MGM Resorts International; Jessica Cunningham, Senior Vice President, Legal Counsel, and Assistant Secretary to MGM Resorts International; and Seth Stratton, Vice President and Legal Counsel to MGM Springfield.

General Counsel Grossman provided an overview of the legal authority related to transfers of interest and noted that the petitioners were requesting that the Commission opine on two legal issues related to the transaction: (1) whether the term of years from the resulting lease and sublease are satisfactory under the law, and (2) for approval of the trust instrument that was submitted in accordance with the regulations.

Mr. Nosal, Mr. Stewart, Ms. Norton, and Ms. Cunningham presented specific details and background regarding the petitioners' request for approval of a contractual transfer under the Commission's regulations of MGM Springfield's gaming establishment property from MGM to MGM Growth Properties, a publicly-traded real estate trust.

Commissioner Zuniga and Chair Judd-Stein asked clarifying questions regarding the lease renewal and Ms. Norton confirmed that the renewal option is at the sole discretion of the tenant. Mr. Nosal noted that there are other governing documents that would ensure the licensee continued to meet its commitments to the Commonwealth and to the host community.

Chair Judd-Stein asked several questions regarding the specific details of the agreement and noted that the Commission's role is to ensure that the agreement complies with both regulations and statute. There was a lengthy discussion regarding what the process would be in the event of suitability concerns with respect to the transferee and whether discretion would fall to the IEB or to the Commission. Commissioner O'Brien and Chair Judd-Stein clarified that the statute requires the Commission to make any final determination with respect to suitability.

Commissioner O'Brien moved that the Commission find that the Springfield Trust discussed today and as further specifically amended by discussion today meets the requirements set out in 205 CMR 116.10(6). The motion was seconded by Commissioner Zuniga.

Roll call vote:

Commissioner Cameron: Aye.

Commissioner O'Brien: Aye.

Chair Judd-Stein: Aye.

Commissioner Zuniga: Aye.

The motion passed unanimously.

Mr. Nosal further presented regarding the lease term, noting that the lease incorporates all renewals for a total term of 45 years. Mr. Nosal requested that the Commission find that the lease

term is consistent with the gaming act, Commission regulations, and prior precedent. There were comments from the Commission recognizing that this is advantageous for the Commonwealth.

Commissioner Zuniga moved that the Commission find that Chapter 23K § 15(3) relative to the term of years under a lease is not applicable to the proposed transfer of the MGM Springfield gaming establishment and that the term of years proposed in the master lease and sublease before it is satisfactory for all of the reasons discussed here today. The motion was seconded by Commissioner O'Brien.

Roll call vote:

Commissioner Cameron: Aye.

Commissioner O'Brien: Aye.

Chair Judd-Stein: Aye.

Commissioner Zuniga: Aye.

The motion passed unanimously.

5. [Investigations and Enforcement Bureau](#) (2:03:58)

a. Suitability Hearing Discussion

Director Lillios presented regarding the process for the Commission's determination of the suitability of casino qualifiers and summarized how this process has worked historically. She noted that the Commission's existing regulations provide that after receiving an IEB investigation report, the Commission may determine whether to hold a public hearing or an adjudicatory proceeding. She pointed out that the determination itself is up to the Commission to confirm or deny. She also noted that earlier, particularly during the RFA-1 process, the Commission conducted these determinations in a public adjudicatory hearing. She also noted that any negative determination would need to be made in an adjudicatory process to protect the applicants' rights and afford an opportunity to appeal. After the initial application processes, the Commission "transitioned" to a non-adjudicatory process. It is within the Commission's discretion to make that determination on a case-by-case basis.

Director Lillios suggested the possibility that the IEB could provide a completed investigation report to the Commission in advance of an agenda setting meeting and that the Commission could determine at that agenda setting meeting whether to move forward with a public hearing or an adjudicatory proceeding. She pointed out that the legal division would assist with any procedural requirements for the adjudicatory hearings.

The Chair commented that the qualifier determination responsibility is a core function of the Commission's mission. She further commented on the public adjudicatory hearing conducted shortly after her arrival which prompted her to ask the legal team and Commissioner O'Brien to review this process. Commissioner O'Brien commented that it would be helpful to review the language of the regulations in addition to the historic review of how we drifted to the less formal process to frame the discussion about compliance. She also drew an analogy to adjudicatory motions in the litigation context where there could be stipulated facts hearings in addition to full blown evidentiary hearings which may be akin to the clean reports frequently seen.

General Counsel Grossman provided an overview of the statutes and regulations governing the Commission's suitability review process for qualifiers. He pointed out that the Commission may only utilize the public hearing process with the qualifier's consent so the default in the regulation is an adjudicatory hearing. He further discussed the options for varying the scope of any adjudicatory process. He then described the public hearing process which requires making the redacted report public and receiving public comment. The Commission discussed the issue of receiving public comment on a suitability report and what that process would be. General Counsel Grossman noted that public comment would only be part of a public hearing process and not part of an adjudicatory proceeding process. Director Lillios commented that it would be helpful to remember the context of those requirements in the initial application phase compared to the present. She further noted that they have not been inviting public comment or publishing the redacted report as of late. General Counsel Grossman added that the public comment requirement was intended to allow a member of the public to bring forward any relevant information although he could not recall if that had in fact ever occurred.

Commissioner Zuniga asked for clarification as to whether public comment could be solicited prior to the completion of the report. General Counsel Grossman confirmed that it was intended to follow the report. Commissioner O'Brien then discussed conversations with IEB that had occurred to restructure the reports to make publication and redaction less cumbersome. Commissioner Zuniga recalled the public interest in the initial applications and raised the question as to whether the Commission intended to continue to seek that comment for all qualifiers.

There was discussion concerning the ability to ask questions that might not be appropriately asked in a public setting. General Counsel Grossman pointed out that the hearing is presumptively public but with mechanisms in line with jurisprudence to allow for closed sessions. Commissioner Cameron commented on the appropriateness of the process discussion given the possibility of online and sports betting. She further stated that she always understood that derogatory information would be handled in an adjudicatory process. She further stated that she always felt free to ask any question about the reports. The Chair commented that the current process was more informal that did not always allow for all Commissioners to hear each other's questions. The Commission further discussed the option of the Commission reviewing investigation reports prior to agenda setting meetings potentially in the revised format and determining at an agenda setting meeting if they would like an adjudicatory proceeding or could move forward with a public hearing depending on the information in the report and the need for questioning.

The Commission discussed next steps and advised Director Lillios and General Counsel Grossman to review the regulations for potential interim language as well as updated language related to the public comment requirement in the event a public hearing process is used.

6. [Commissioner Updates](#) (2:56:10)

Commissioner Zuniga informed the Commission that he had filed a 23(b)(3) disclosure to his appointing authority under Chapter 268A relative to the appearance of a conflict of interest. He

explained that this resulted from advice he received from the Ethics Commission prior to responding to a job posting for the International Center for Responsible Gaming (ICGR), on whose board members of Wynn Resorts, a former member of MGM Resorts, and the Commission's Mark VanderLinden sit. Commissioner Zuniga noted that he was disclosing this in conformance with the Commission's enhanced code of ethics.

7. [Other business](#) (3:00:33)

Commissioner Zuniga moved to adjourn. The motion was seconded by Commissioner Cameron.

Roll call vote:

Commissioner Cameron: Aye.

Commissioner O'Brien: Aye.

Chair Judd-Stein: Aye.

Commissioner Zuniga: Aye.

The motion passed unanimously.

List of Documents and Other Items Used

1. Notice of Meeting and Agenda dated June 24, 2021
2. [Commissioners' Packet](#) from the June 24, 2021, meeting (posted on massgaming.com)



Massachusetts Gaming Commission Meeting Minutes

Date/Time: August 4, 2021, 11:00 a.m.
Place: Massachusetts Gaming Commission
 VIA CONFERENCE CALL NUMBER: 1-646-741-5292
 PARTICIPANT CODE: 112 810 5176

The Commission conducted this public meeting remotely utilizing collaboration technology. Use of this technology was intended to ensure an adequate, alternative means of public access to the Commission's deliberations for any interested member of the public.

Commissioners Present:

Chair Cathy Judd-Stein
 Commissioner Gayle Cameron
 Commissioner Eileen O'Brien
 Commissioner Enrique Zuniga

1. [Call to Order](#) (0:08)

Chair Judd-Stein called to order the 351st public meeting of the Massachusetts Gaming Commission. Roll call attendance was conducted, and all four commissioners were present for the meeting.

2. COVID-19 related conditions

- a. Review and clarification of condition, agreed to on May 26, 2021 by the gaming licensees, that licensees shall conduct business in accordance with all COVID-19- related orders and advisories issued by the Governor or the Commonwealth of Massachusetts that remain in effect, as well as any applicable CDC guidelines

IEB Director Loretta Lillios provided an update to the Commission on guidance issued by the Governor and the CDC. Director Lillios noted that on May 26th, the Commission rescinded its Covid measures previously ordered for the licensees consistent with public guidance and with the Commonwealth's measures at the time. She explained that those measures were lifted subject to four conditions, one of which is subject to review and clarification. Director Lillios noted that the condition also applies to racing and simulcast licensees and explained that the relevant condition for review and clarification today provides that all licensees shall conduct business in

accordance with all Covid-19 related orders and advisories issued by the Governor that remain in effect as well as any applicable CDC guidelines. Director Lillios explained that further clarification on this condition is needed because there have been recent updates to guidance around masking from both the CDC and the Commonwealth’s Department of Health that are not in strict alignment. Director Lillios summarized both of those advisories.

Executive Director Wells noted that from an operations perspective, defaulting to the Governor’s approach would achieve consistency across the state, and there could be messaging that would recognize both the Governor’s guidance as well as the CDC guidance.

Jacqui Krum, General Counsel of Encore Boston Harbor; Gus Kim, Vice President and General Counsel of MGM Springfield; and North Grounsell, General Manager of Plainridge Park Casino, provided brief input from each of the licensees. Commissioner O’Brien inquired regarding the percentage of vaccinated employees at each property, any masking requirements, and any posted signage related to masking guidance.

Commissioner Zuniga noted that he was in favor of following the Governor’s guidance as it considers more nuanced local conditions. Chair Judd-Stein noted that public health is typically governed on a local basis and she is inclined to default to the state guidance.

Steve O’Toole from Plainridge Park Casino, Chip Tuttle from Suffolk Downs; and Sue Rodrigues from Raynham Park provided input from the racing side. Commissioner Cameron inquired regarding statistics for vaccinated employees as well as any masking requirements at each property.

There was extensive discussion among the Commission regarding the disconnect between the DPH and CDC guidance, the complexities of striking a balance while being mindful of the current health statistics in Massachusetts, and how precisely to amend the Commission’s May order to recognize both the DPH and CDC guidance. The Commissioners agreed that the Governor’s guidance should remain the controlling factor for the licensees while the CDC guidance should be a consideration rather than a mandate.

Commissioner O’Brien moved that the Commission amend so much of its order from May 26, 2021, relating to Covid restrictions for the licensees in Section 1 such that the phrase “as well as any applicable CDC guidelines” is stricken and in lieu replaced with “and in consideration of any applicable CDC guidelines.” The motion was seconded by Commissioner Zuniga.

Roll call vote:

Commissioner Cameron: Aye.

Commissioner O’Brien: Aye.

Commissioner Zuniga: Aye.

Chair Judd-Stein: Aye.

The motion passed unanimously.

Commissioner Zuniga moved to adjourn. The motion was seconded by Commissioner Cameron.

Roll call vote:

Commissioner Cameron: Aye.

Commissioner O'Brien: Aye.

Commissioner Zuniga: Aye.

Chair Judd-Stein: Aye.

The motion passed unanimously.

List of Documents and Other Items Used

1. Notice of Meeting and Agenda dated August 4, 2021



Massachusetts Gaming Commission Meeting Minutes

Date/Time: September 9, 2021, 10:00 a.m.
Place: Massachusetts Gaming Commission
VIA CONFERENCE CALL NUMBER: 1-646-741-5293
PARTICIPANT CODE: 112 593 9063

The Commission conducted this public meeting remotely utilizing collaboration technology. Use of this technology was intended to ensure an adequate, alternative means of public access to the Commission's deliberations for any interested member of the public.

Commissioners Present:

Chair Cathy Judd-Stein
Commissioner Gayle Cameron
Commissioner Eileen O'Brien

1. [Call to Order](#) (0:29)

Chair Judd-Stein called to order the 354th public meeting of the Massachusetts Gaming Commission. Roll call attendance was conducted. Commissioners Cameron and O'Brien and Chair Judd-Stein were present.

2. [Administrative Update](#) (1:59)

a. On-site Casino Updates

IEB Director Loretta Lillios updated the Commission on the status of the casinos, including changes to the former buffet area at Encore Boston Harbor, reopening of certain amenities at MGM Springfield, and public vaccination clinics held at Plainridge Park Casino. She noted that all three licensees are continuing to monitor updates to Covid-19-related orders and guidelines. Assistant Director of Investigations & Enforcement Bureau/Gaming Agents Division Chief Bruce Band reported that operations have been going smoothly at all three properties. The Commission thanked Director Lillios and Assistant Director Band for a positive report.

b. [Internal Reopening Plan](#) (7:29)

Executive Director Karen Wells provided an updated on the reopening of the Boston offices, scheduled for November 1st. She noted that the policy has been finalized in accordance with the Commission's directives and has been provided to staff. She further noted that HR is working on a template for hybrid work requests and is in the process of verifying vaccination status of the MGC team. The Commissioners commended the HR team, the working group, and Executive Director Wells for their work in creating a process for vaccination verification.

c. [Investigations and Enforcement Bureau Recognition of New Chief Enforcement Counsel, Heather Hall](#) (11:37)

IEB Director Loretta Lillios introduced the IEB's new Chief Enforcement Counsel, Heather Hall. The Commission welcomed Ms. Hall and expressed their happiness at having her join the MGC team.

3. [Racing Division](#) (17:19)

a. Race Horse Development Benefits for Drivers and Jockeys

Director of Racing Dr. Alexandra Lightbown presented regarding the Race Horse Development Fund benefits for jockeys and drivers covered by G.L. c. 23K, § 60(c)(iii). Dr. Lightbown noted that the Race Horse Development Fund is split into 80% for purses, 16% for breeders, and 4% for health and pension benefits for horsemen. She further noted that the statute directs the Commission to determine how much shall be paid annually by the horsemen's groups to thoroughbred jockeys or standardbred riders organizations for health insurance and other benefits. Dr. Lightbown reported that the Commission sought public comment and received comment from the New England Harness Horsemen's Organization, the New England HBPA, the Jockey Guild, and individual jockeys.

Dr. Lightbown provided background on the above organizations and their needs, and recommended that the HBPA provide \$1,000 each to disabled jockeys in the Jockey Guild from the Race Horse Development Fund, for a total of \$4,000 from the HBPA to the Jockey Guild to disburse to the jockeys.

Commissioner Cameron noted the extent of work that went into this nuanced issue and the Commission expressed their support for Dr. Lightbown's recommendations. Chair Judd-Stein noted the difficulty of this decision given the limited resources.

Commissioner Cameron moved for the reasons discussed today and outlined in the documentation in the Commissioner's packet in accordance with Chapter 23K, § 60(c)(iii), that the Commission direct that the NEBHPA pay \$1,000 for each disabled jockey to the Jockeys Guild this year for a total of \$4,000, and further move that the HHANE be directed to pay \$0 this year for such purposes. The motion was seconded by Commissioner O'Brien.

Roll call vote:

Commissioner Cameron: Aye.

Commissioner O'Brien: Aye.

Chair Judd-Stein: Aye.

The motion passed unanimously.

4. [Research and Responsible Gaming](#) (32.39)

a. Public Health Trust Fund Update

Director of Research and Responsible Gaming Mark Vander Linden presented an updated on the Public Health Trust Fund MOU. By way of background, Director Vander Liden explained that in 2014, the MGC and EOHHS entered into an MOU to memorialize their shared interests, goals, and responsibilities relative to addressing problem gambling and promoting responsible gaming. Director Vander Linden explained that the MGC, DPH, and EOHHS are now updating that 2014 MOU to advance all efforts around responsible gaming. The Commission thanked Director Vander Linden and all involved for their hard work in these efforts.

b. [Play My Way Update](#) (38:55)

Director Vander Linden provided an update on the implementation of Play My Way at MGM Springfield and Encore Boston Harbor. Director Vander Linden noted that Play My Way has been in place at Plainridge Park Casino since 2015 and that the development of Play My Way for MGM Springfield and Encore Boston Harbor required significant additional development because they use a different player management system.

Director Vander Linden explained that Play My Way was originally scheduled to launch in September 2020 but was delayed by Covid, and the Commission extended that date until September 2021. However, there as been a technical issue and the MGC has been working closely with IGT on a solution. In the interim, MGM Springfield has requested to extend the launch until April 1, 2022. Director Vander Linden recommended that the extension request be granted with the understanding that the process will be expedited to the extent possible.

Commissioner O'Brien requested that the Commission be provided with a three-month check in from both MGM Springfield and Encore Boston Harbor, whose launch is currently scheduled for September 2022, to make sure that they are still on their noted trajectories.

Commissioner O'Brien moved that for the reasons discussed today and outlined in the letter that is included in the Commissioners' Packet, the Commission allow MGM Springfield's request and extend the date for implementation of Play My Way as described in the MOU between the Commission and MGM and extend the date to April 1, 2022. The motion was seconded by Commissioner Cameron.

Roll call vote:

Commissioner Cameron: Aye.

Commissioner O'Brien: Aye.

*Chair Judd-Stein: Aye.
The motion passed unanimously.*

c. [Addictive Services Sub-Committee Update](#) (48:42)

Director Vander Linden explained that Chapter 23K, § 68 establishes a subcommittee of the Gaming Policy Advisory Committee to develop recommendations to address issues related to addiction services as a result of the development of gaming establishments in the Commonwealth. The subcommittee consists of five members representing the MGC, DPH, the Mass Council on Gaming and Health, and two Governor appointees. Director Vander Linden identified the appointed members of the subcommittee and noted that the subcommittee is now completely activated. The Commission thanked Director Vander Linden for this update.

5. [Commissioner Updates](#) (52:37)

a. IAGR Conference

Commissioner Cameron provided an updated on the IAGR Conference scheduled for next week. She thanked the MGC members for their participation as well as that of all presenters. Commissioner Cameron explained the rules for the event regarding social distancing and masking.

6. [Other business](#) (57:23)

Commissioner Cameron moved to adjourn. The motion was seconded by Commissioner O'Brien.

*Roll call vote:
Commissioner Cameron: Aye.
Commissioner O'Brien: Aye.
Chair Judd-Stein: Aye.
The motion passed unanimously.*

List of Documents and Other Items Used

1. Notice of Meeting and Agenda dated September 9, 2021
2. [Commissioners' Packet](#) from the September 9, 2021, meeting

MEMORANDUM

TO: Massachusetts Gaming Commission
FROM: Joseph Delaney, Chief of Community Affairs
Todd Grossman, General Counsel
RE: East of Broadway Development Everett, MA
DATE: February 10, 2022

Overview

Wynn MA, LLC, the gaming licensee that owns and operates Encore Boston Harbor (“EBH”), has proposed a new development on Lower Broadway across from the existing gaming establishment. According to the information provided by the licensee, the project consists of approximately: 20,000 square feet of restaurant space; a live entertainment venue with associated pre-function space; a 2,200-space parking garage; and a 400-foot pedestrian bridge across Broadway, which will connect the new development to the existing gaming establishment. Additional potential future developments include two hotels to the north of the proposed development. The immediate issue before the Commission is whether this development should be considered part of the Encore Boston Harbor’s current gaming establishment and thus, be subject to Commission regulation.

Background

Notice of Project Change - On February 28, 2017, EBH (formerly known as Wynn Boston Harbor) submitted a Notice of Project Change (“NPC”) to the Massachusetts Environmental Policy Act Office of the Executive Office of Energy and Environmental Affairs (“MEPA”). On April 7, 2017, MEPA issued a certificate on the NPC determining that the project did not require the submission of a Supplemental Environmental Impact Report. As part of this review, however, MEPA recognized that EBH had purchased additional property in the area and the NPC stated that:

Acquisition or development of other parcels acquired by Wynn Resorts or its subsidiaries in the project area¹, could be subject to MEPA review, including an NPC to the Wynn Boston Harbor Casino Resort. This determination will depend on a

¹ Certificate of Merger and Cancellation filed December 20, 2021. Three entities: 23 Bow Street LLC; 35 Mystic Street, LLC; and 51 Mystic Street, LLC had principal offices at One Broadway, Everett, MA, 02149 and were merged with and into East Broadway, LLC.

few factors including location, proposed uses and required State Permits. Wynn Resorts should consult with the MEPA Office regarding additional acquisition and development in the project area and potential MEPA review to ensure that projects are not improperly segmented.²

Second Amended Section 61 Findings - In response to the NPC Certificate, the Commission issued its Second Amended Section 61 Findings on May 29, 2019. The Commission's Section 61 findings referenced the NPC Certificate with respect to the anti-segmentation provisions.

The following is the pertinent excerpt from the Second Amended Section 61 Findings:

The NPC Certificate (at page 7) concludes that Wynn 'should consult with the MEPA Office regarding additional acquisition and development in the project area and potential MEPA review to ensure that projects are not improperly segmented.' The Rivergreen NPC Certificate (at page 6) 'strongly encourage(s) the Proponents to consult with the MEPA Office regarding the applicability of MEPA review if and when long-term uses are developed for the Lynde Playground and the Boston Freightliner site, and if additional property is acquired and/or new development is proposed.'

Wynn shall keep the Commission timely and fully informed with respect to all such matters, including without limitation the results of any such consultations with the MEPA Office, any such notice(s) of project change, and any such MEPA review. The Commission fully reserves its rights to evaluate, regulate, condition, and/or require mitigation with respect to any such matters as they relate to the Commission's jurisdiction and/or the Gaming Establishment, and to further amend the Commission's Section 61 Findings, and all amendments thereto, and/or the License for the Gaming Establishment as appropriate with respect thereto.³

Determination of the Gaming Establishment

The site of the proposed development project is owned by an entity named *East Broadway, LLC*. The Application for Site Plan Review, submitted to the City of Everett on November 22, 2021, states that East Broadway, LLC is a wholly owned subsidiary of Wynn Resorts, Limited. The annual reports filed in November of 2021 for both Wynn Resorts and East Broadway, LLC list Ms. Jacqui Krum as the SOC signatory. Neither

² Certificate of the Secretary of Energy and Environmental Affairs on the Notice of Project Change (EEA# 15060) (April 7, 2017) at page 17.

³ Massachusetts Gaming Commission Second Amended Section 61 Findings Issued Pursuant to M.G.L. c. 23K And M. G. L. c. 30 § 61, (May 29, 2019) at page 61.

LLC has a listed manager.⁴ Accordingly, it may be significant that the proposal is being advanced not by the gaming licensee, Wynn MA, LLC, but instead, East Broadway, LLC. Both are wholly owned subsidiaries of Wynn Resorts, Limited, but are in fact, separate legal entities. Notably, the licensee has indicated in its brief that the project “is being developed by Wynn Development (“WD”), an affiliate of Wynn MA.” Further clarity as to the role of each of the entities and their interrelationship will be required.

Given the proximity of the proposed development, and authority established in the NPC Certificate and the Second Amended Section 61 Findings, the issue before the Commission is whether the proposed project falls within the Commission’s jurisdiction. The primary inquiry then, is whether the Commission will deem the new development to be part of the existing “gaming establishment.”⁵ In this regard, the Commission has a great deal of discretion in determining the components that collectively comprise a gaming establishment. See e.g. G. L. c. 23K, §1 (providing that “the power and authority granted to the commission shall be construed as broadly as necessary for the implementation, administration and enforcement of [G. L. c. 23K].”).

The Commission issued a *Decision Regarding the Determination of the Gaming Establishment for Wynn MA, LLC* on May 15, 2014, when it initially considered the boundary of the present gaming establishment. This decision set out a four-part analysis to determine what portions of the premises will be part of a gaming establishment. The four-part analysis is wholly based on considerations and requirements set out in G. L. c. 23K.

The elements that the Commission set out for consideration are whether the feature:

- 1) is a non-gaming structure;
- 2) is related to the gaming area;⁶
- 3) is under common ownership and control of the gaming applicant; and
- 4) the Commission has a regulatory interest in including it as part of the gaming establishment.⁷

⁴ On November 22nd, 2021, East Broadway, LLC filed amended articles removing Massachusetts Property, LLC as its Manager.

⁵ G. L. c. 23K, § 2 defines “gaming establishment” as “the premises approved under a gaming license which includes a gaming area and any other nongaming structure related to the gaming area, and may include, but shall not be limited to, hotels, restaurants or other amenities.”

⁶ G. L. c. 23K, § 2 defines “gaming area” as “the portion of the premises of the gaming establishment in which gaming is conducted.

⁷ *Decision Regarding the Determination of the Gaming Establishment for Mohegan Sun MA, LLC, and Wynn MA LLC*. May 15, 2014 (page 7).

This analysis was employed by the Commission in determining not only the boundaries of each of the three present gaming establishments, but also amendments to the MGM Springfield boundary and, more recently, the Plainridge Park Casino boundary. Accordingly, we will use that analysis in the instant matter.

(1) Non-gaming Structure

By law, a non-gaming structure may include, but not be limited to hotels, restaurants, or other amenities. In the 2014 decision, the Commission carved out “structure” to be applied in the traditional sense to mean buildings and restaurants but not internal roadways, entrance to property, and exterior parking areas.⁸ Where the focus of the Commission’s review in this matter pertains to actual buildings, as opposed to roadways for example, the proposed development would likely meet the first part of the analysis as being a non-gaming structure. It is worth noting that the footbridge connecting the two properties would likely similarly meet this definition.

(2) Relation to Gaming Area

The second element of the analysis requires a determination as to whether the proposed development is related to the gaming area of the existing gaming establishment. The Commission noted in the 2014 decision that non-gaming structures that would be part of the gaming establishment included “hotels, meeting and convention spaces, spas, ballroom, retail areas, restaurants/food and beverage/lounge areas, nightclub, back of the house, underground parking areas, physical plant/facilities maintenance, and all public areas related to those spaces”⁹ The Commission determined that the structures were related to the gaming area in that they were included for purposes of “enhancing the gaming area by making the entire facility a more attractive destination.”¹⁰ The same analysis will have to be conducted relative to the components of this East Broadway development.

(3) Common Ownership and Control of Gaming Applicant

The question of ownership and control requires close consideration. In its 2014 determination, the Commission found ownership of certain amenities to be a necessary consideration in the determination of a gaming establishment. In the initial review, the Commission opined that the fact that regional attractions based within the City of Boston that had mitigation agreements and promotional related deals with the applicant did not mean that they were part of the gaming establishment as it would be impossible for the Commission to exercise any

⁸ *Id.* at page 8.

⁹ *Id.* at page 9.

¹⁰ *Id.* at page 10.

regulatory control over those facilities.¹¹ Moreover, the Commission did not have any regulatory interest in overseeing those areas.¹²

In the instant matter, East Broadway, LLC is separate entity from Wynn MA, LLC, but a wholly owned subsidiary¹³ of Wynn Resorts, Limited. Consequently, the determination of this issue may turn on the level of control the gaming licensee will exercise over the new development or whether they should be considered two separate entities. Again, for this purpose, it will be important to clarify the statement in the licensee's brief that the "Proposed Project is being developed by Wynn Development ("WD"), an affiliate of Wynn MA."

(4) "Regulatory Interest"

In its 2014 decision, the Commission reasoned that Part 4 of the analysis only comes into play where the first three parts of the analysis are satisfied. This is a highly discretionary decision but is rooted in the principles embedded in G. L. c. 23K. The Commission noted that a regulatory interest is important as "[s]uch control helps ensure the integrity of gaming in the Commonwealth through strict oversight."¹⁴

Some of the interests the Commission may consider in making this determination include: the requirement that employees working in certain areas are licensed and registered (or exempted from such requirements) in accordance with 205 CMR 134.00; ensuring that the Commission has knowledge of the flow of money through the structure; ensuring alcoholic beverage service is controlled under the gaming beverage license; ensuring that impacted live entertainment venue mitigation issues are addressed; and whether there is an interest in the Commission being able to conduct regulatory oversight, investigations, surveillance, and security operations at the property. These considerations, among other possible interests, should be weighed in determining whether this fourth element is met under the present circumstances. Though there are certainly specific factors to be considered, this is ultimately a highly discretionary determination.

Additional Considerations

Host Community Ballot Question: On June 22, 2013, residents of the City of Everett voted in favor of permitting a gaming establishment within their community after the City of Everett executed a Host Community Agreement with Wynn MA, LLC. In advance of the ballot

¹¹ See, page 9-10.

¹² *Id.* at page 9.

¹³ G. L. c. 23K, § 2 defines "Subsidiary" as "a corporation, a significant part of whose outstanding equity securities are owned, subject to a power or right of control, or held with power to vote, by a holding company or an intermediary company, or a significant interest in a firm, association, partnership, trust or other form of business organization, other than a natural person, which is owned, subject to a power or right of control, or held with power to vote, by a holding company or an intermediary company."

¹⁴ Decision, at page 9.

question, Mayor DiMaria sent a letter to voting households in Everett explaining the status of casino process and provided a summary of the Host Community Agreement.¹⁵ G. L. c. 23K, § 15(13) provided the exact language that was printed on the ballot.¹⁶ The Commission should consider the scope of this positive vote, i.e., whether the approval was geographically limited. Clearly, it allowed for siting at the present location. Whether such approval was intended to extend across the street is a matter the Commission should consider.

To this end, it is notable that the language in the host community agreement that was shared by the mayor with the voters, includes the following language: “Wynn, directly or through an affiliate, has or will acquire land and options to acquire land in the City in and around the area depicted in Exhibit A (the "Project Site").” This language could be read to suggest that it was contemplated that the gaming establishment could extend beyond the precise parcel of land that the present gaming establishment is located. This is further supported by the fact that a map of the parcel, and adjacent parcels, was included in the host community agreement.

Size of the Live Entertainment Venue – G. L. c. 23K, § 9 established the requirements for an application for a gaming license.¹⁷ As it specifically related to this ILEV issue, G. L. c. 23K, § 9 (11) required submission of:

a description of the ancillary entertainment services and amenities to be provided at the proposed gaming establishment, provided, however that a gaming **license shall only be permitted to build a live entertainment venue that has less than 1,000 seats or more that 3,500 seats.**

Accordingly, the number of seats to be included in the proposed live entertainment venue is a relevant consideration as to whether the letter and spirit of the law is being followed. Certainly, if a live entertainment venue were to be proposed on the same parcel by a completely unrelated entity, the Commission would have not ability to mediate the impact this may create on other venues in the Commonwealth. However, by virtue of the ownership of the parcel at present, this is a consideration. At present, the indication is that the venue will contain 999 seats; one fewer than the minimum prohibited number.

Impact on ILEVs – Wynn MA, LLC entered an Impacted Live Entertainment Venue (“ILEV”)¹⁸ agreement with the Massachusetts Performing Arts Coalition (“MPAC”) on

¹⁵ Letter from the Office of The Mayor, City of Everett, June 18, 2013.

¹⁶ Relevant portions of G.L. c. 23K §15(13), and 205 CMR 124.05 (2) provide, “Shall the (city/town) of _____ permit the operation of a gaming establishment licensed by the Massachusetts Gaming Commission to be located at _____ [description of site] _____? YES ___ NO ___”.

¹⁷ G. L. c. 23K, § 9 (9).

¹⁸ G. L. c. 23K, § 2 defines “Impacted live entertainment venue” as a “not-for-profit or municipally-owned performance venue designed in whole or in part for the presentation of live concerts, comedy or theatrical performances, which the commission determines experiences, or is likely to experience, a negative impact from the development or operation of a gaming establishment.”

January 30, 2013. Section 1.2 of the agreement states that: “In the event Wynn decides to build a live entertainment venue of the size or type described in 1.1 above at the Casino Site, it will, prior to taking substantial steps toward doing so, notify MPAC in writing describing its planned entertainment venue and promptly engage in good-faith discussions with MPAC and MPAC member venues to ensure compliance with the Gaming Statute.”

MEPA Status – It is our understanding that EBH has had conversations with MEPA regarding the proposed project, but MEPA has not formally weighed in on the project status. We also understand that EBH will be filing an Environmental Notification Form on the proposed project either in concurrent with this Commission review or shortly thereafter. The Commission’s decision will likely weigh on MEPA’s decision with respect to segmentation.

Encore Boston Harbor Transportation Demand Management (TDM) – As part of the original MEPA review process, EBH was required to reduce the size of their parking garage to encourage the use of alternative transportation modes. The construction of a 2,200-car parking garage directly across the street could be seen as circumventing these TDM requirements.

Pedestrian Bridge – As presently designed, the proposed project includes a pedestrian bridge over Broadway, which partially passes over the City of Boston. The Boston Public Improvement Commission will need to issue a permit to the developer before construction could be commenced. Moreover, if the Commission considers the bridge to be part of the existing gaming establishment, and if it runs through the City of Boston, it could have an impact on the existing status of the City of Boston, which was previously determined to be a surrounding community.¹⁹ The Commission previously determined that Boston was a not a host community as defined by G. L. c. 23K, §2. In reaching that conclusion, the Commission held, in pertinent part, that “[a] plain review of the definitions of host community and surrounding communities reveals a clear legislative intent that host community be determined based solely on matters of geography, and surrounding communities be determined based upon impacts.” This finding could be affected by the Commission’s determination relative to the status of the bridge.

Conclusion

There are many factors for the Commission to consider in its evaluation of the East Broadway proposal. In conducting its analysis, it is noteworthy that “the power and authority granted to the commission shall be construed as broadly as necessary for the implementation, administration and enforcement of [chapter 23K].” Moreover, in the 2014 determination, the Commission evaluated its statutory authority to determine the premises of the gaming establishment and concluded:

¹⁹ G.L. c. 23K, § 2 defines “Surrounding communities” as “municipalities in proximity to a host community which the commission determines experience or are likely to experience impacts from the development or operation of a gaming establishment, including municipalities from which the transportation infrastructure provides ready access to an existing or proposed gaming establishment.”

“[u]nder G.L. c. 23K, §10(a), hotels are necessarily part of the gaming establishment. Beyond that, though, by use of the term ‘may’ in the definition of ‘gaming establishment,’ the Legislature intended to provide the Commission great latitude in determining the components of the gaming establishment. The latitude was designed so that the Commission is able to include any element within the gaming establishment that it deems necessary to ensure proper regulation of the gaming licensee.”

Decision Regarding the Determination of the Gaming Establishment for Mohegan Sun MA, LLC, and Wynn MA LLC. May 15, 2014 (page 4).

THE COMMONWEALTH OF MASSACHUSETTS
MASSACHUSETTS GAMING COMMISSION

**WYNN MA, LLC'S MEMORANDUM ON THE PROPOSED EAST OF BROADWAY
DEVELOPMENT IN EVERETT, MASSACHUSETTS**

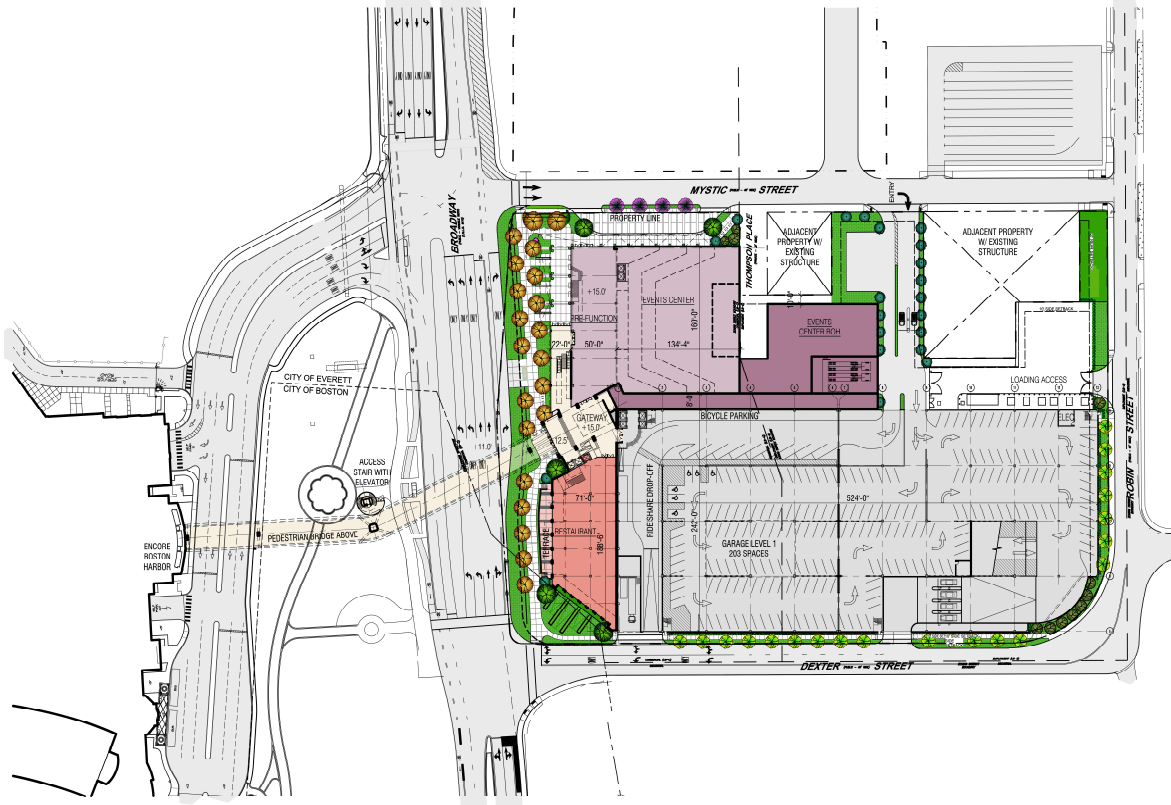
Wynn MA, LLC (“Wynn MA”) respectfully submits this memorandum to the Massachusetts Gaming Commission (the “Commission”) in support of its position that the proposed East of Broadway Development in Everett, Massachusetts (the “Proposed Project”) is not part of the premises of the gaming establishment identified by the Commission in its May 15, 2014 *Decision Regarding the Determination of Premises of the Gaming Establishment for Mohegan Sun MA, LLC and Wynn MA, LLC* (the “Decision”).

BACKGROUND

In January 2013, Wynn MA filed an application with the Commission for a Region A category 1 gaming license (the “License”) to operate a resort and casino on property located in Everett, MA. In response to Wynn MA’s application and an application filed by Mohegan Sun for a competing project in Revere, the City of Boston filed a challenge to its designation in both applications as a surrounding community based on the boundary of the gaming establishment. The Commission requested briefs and held a public hearing on the City of Boston’s challenge. A focus of the Commission’s review of the City of Boston’s challenge to its surrounding community designation was the boundaries of each project’s gaming establishment. On May 15, 2014, the Commission issued the Decision establishing a four-part test for determining the premises of the gaming establishment and defining both the Wynn MA and Mohegan Sun’s gaming establishment boundaries. *See, e.g., City of Boston v. Massachusetts Gaming Commission*, 33 Mass. L. Rptr. 247 (2015). In granting the License to Wynn MA, the Commission determined that a condition of the License is that the “Gaming Establishment” is as it had determined in its prior Decision. *Agreement to Award the Category 1 License in Region A to Wynn MA, LLC* at 1 (September 14,

2014), Ex. 2 (summary of conditions defining the term “Project”); *see also* Decision. Under the terms of its License, Encore Boston Harbor (“EBH”) opened its doors to the public on June 23, 2019.

The Proposed Project will be located on Broadway/Route 99 across the street from the EBH. Consistent with Everett’s 2013 Lower Broadway District Master Plan, which aims to “[t]ransform Lower Broadway into a vibrant mixed use urban neighborhood with a strong identity, civic spaces, employment opportunities, recreational amenities, and public access to the Mystic River,” and the Lower Broadway District Urban Renewal Plan, which created a Destination District with “desired uses in the District include[ing] restaurants, hotels, recreational uses, entertainment venues such as theaters, cinemas, and concert halls, recreational facilities, water transportation facilities, and retail stores,” the Proposed Project is a multi-use development, which includes the construction of an approximately 20,000-gross-square-foot, two-story restaurant/retail building with an outdoor dining terrace, a 999-seat Events Center and associated pre-function space, an approximately 2,310 space parking garage, as well as a pedestrian bridge to cross Broadway (Route 99). A diagram of the Proposed Project, including a rendering of the pedestrian bridge, is provided below:



The Proposed Project will have its own dedicated entrances for vehicular and pedestrian traffic.

The pedestrian bridge will traverse the six-lane truck route on Broadway, mitigating traffic congestion and significantly increasing pedestrian safety in this area. The current roadway operation includes exclusive pedestrian signal times to protect pedestrians from vehicles. The pedestrian bridge will provide a safer method of pedestrian protection than the current crosswalk, and the elimination of the pedestrian cycle would add 28% capacity back into the roadway, mitigating current traffic congestion. This pedestrian bridge will provide street access and egress via stairs and elevators on both sides of Broadway so that pedestrians can cross the six-lane truck route safely. In addition to providing this street access, the pedestrian bridge will also have an access point in the parking garage of the Proposed Project and an access point for EBH. This EBH access point will have a full time security check point to ensure that only eligible guests (*i.e.*, those older than 21 years of age), gain access to EBH. The pedestrian bridge does not provide direct access to EBH’s gaming area.

The Proposed Project is being developed by Wynn Development (“WD”), an affiliate of Wynn MA. Upon completion of the Proposed Project, portions of the Proposed Project, including the hotels, restaurant and events center, will be leased to and operated by a third party. Wynn MA will have no control over the operation of these businesses.

LEGAL STANDARD

The Commission determines the premises of the gaming establishment in the context of M.G.L. c. 23K and, specifically, the definitions of “gaming area,”^{1/} “gaming establishment,”^{2/} “host community,”^{3/} and “surrounding community”^{4/} found in G.L. c. 23K, §2. Decision at 7. The Commission ruled that the law sets forth a four-part test to “determine what features proposed by the applicant will be part of a gaming establishment.” *Id.* This four-part test asks whether the proposed feature: “(1) is a non-gaming structure, (2) is related to the gaming area, (3) is under common ownership and control of the gaming applicant, and (4) the Commission has a regulatory interest in including it as part of the gaming establishment.” *Id.* The fourth component of the test “only comes into play...where the first three parts are satisfied.” *Id.* In addition, “[t]he control element of part three is implicit in the M.G.L. c. 23K’s licensing and registration requirement, *see* G.L. c. 23K, §§30-32, the requirement for the licensee to own or control all land on which the gaming establishment is located, G.L. c. 23K, §15(3), and the statute’s general structure, which places control of the licensee at the heart of the Commission’s regulatory authority.” *Id.*

^{1/} “Gaming area”, the portion of the premises of a gaming establishment in which or on which gaming is conducted. M.G.L. c. 23K, §2.

^{2/} “Gaming establishment”, the premises approved under a gaming license which includes a gaming area and any other nongaming structure related to the gaming area and may include, but shall not be limited to, hotels, restaurants or other amenities. M.G.L. c. 23K, §2.

^{3/} “Host community”, a municipality in which a gaming establishment is located or in which an applicant has proposed locating a gaming establishment. M.G.L. c. 23K, §2.

^{4/} “Surrounding communities”, municipalities in proximity to a host community which the commission determines experience or are likely to experience impacts from the development or operation of a gaming establishment, including municipalities from which the transportation infrastructure provides ready access to an existing or proposed gaming establishment. M.G.L. c. 23K, §2.

In applying this standard to the amenities at EBH, the Commission specifically found:

[T]he gaming area, hotels, meeting and convention spaces, spas, ball room, retail areas, restaurants/food and beverage/lounge areas, nightclub, back of the house, underground parking areas, physical plant/facilities maintenance, and all public areas related to those spaces meet the 4 part test and are accordingly part of the gaming establishment. They are all non-gaming structures that are related to the gaming area. They are related in that they are included, at least in part, for purposes of enhancing the gaming area by making the entire facility a more attractive destination. They are all owned by Wynn. In its discretion, the Commission considers them to be amenities to the gaming area because it has an interest in, amongst other things, ensuring that all employees working in those areas are licensed or registered in accordance with 205 CMR 134.00 and having knowledge of the flow of money through these areas. Such control helps ensure the integrity of gaming in the Commonwealth through strict oversight.

Decision at 9 (emphasis added). As part of its Decision, the Commission included a rendering of the gaming establishment border. *See* Decision, Ex. C.

ARGUMENT

I. The Proposed Project Does Not Disturb the Commission's 2014 Determination of the Gaming Establishment Boundaries

In 2014, the Commission conducted a thorough analysis of the gaming establishment boundary for the Wynn MA project. It considered all the amenities at the facility and made findings as to what was necessary to include in the defined gaming establishment to ensure the integrity of gaming. The Proposed Project was not part of the land required for the gaming establishment and was not included as part of Wynn MA's application, nor is the Proposed Project required as a condition of licensure. The Proposed Project was not included as part of the Host Community Agreement between the City of Everett and Wynn MA, LLC.⁵ The Proposed Project does not alter any of the previous determined amenities that are part of the gaming establishment. The Proposed Project has no impact on the gaming area and it is located further from the gaming area than all the other non-gaming amenities that have been included as part of the defined gaming

⁵ See Exhibit A of April 19, 2013 Host Community Agreement between the City of Everett and Wynn MA, LLC.

establishment and is separated by a major public way.

The Commission already determined all elements that constitute the gaming establishment, as demarcated in Exhibit C to the 2014 Decision. This includes “any element within the gaming establishment that [the Commission] deems necessary to ensure proper regulation of the gaming licensee.” Decision at 7. With respect to the approved gaming establishment, no material facts have changed. With or without the Proposed Project, the gaming licensee will remain properly regulated. There is no justification from a gaming regulatory prospective to increase, or alter in any way, the gaming establishment boundary established in the 2014 Decision based on the Proposed Project. Adding the Proposed Project does not enhance the Commission’s control over the facility to ensure the integrity of gaming through strict oversight. As such, the 2014 determination of the gaming establishment boundary should not be disturbed.

II. In The Alternative, The Proposed Project Does Not Satisfy The Commission’s Four-Part Test, And It Should Not Be Considered Part Of Encore’s Gaming Establishment.

If the Commission finds that the Proposed Project justifies reopening the 2014 Decision, the Commission must find that the Proposed Project does not meet the criteria for being considered part of the gaming establishment. M.G.L. c. 23K, §2 defines “gaming establishment” to be the premises approved under a gaming license, which includes a gaming area and any other nongaming structure related to the gaming area and may include, but shall not be limited to, hotels, restaurants or other amenities. M.G.L. c. 23K, §2. In evaluating non-gaming amenities, the Commission delineates between non-traditional structures and non-gaming structures. Non-traditional structures are infrastructure such as roads and walkways. Non-gaming structures are traditional buildings such as hotels, underground parking garages, and restaurants. The Proposed Project includes a *non-traditional structure* (i.e., pedestrian bridge) and *non-gaming structures* (i.e., parking garage, hotels, restaurant, an events center, and utilities). Both elements of the Proposed

Project do not satisfy the Commission’s four-part test to determine what meets the definition of “gaming establishment.” As an initial matter, the pedestrian bridge—a non-traditional structure—fails part one of the test (*i.e.*, it is not a “non-gaming structure”), and thus cannot be part of the gaming establishment. The remainder of the Proposed Project is comprised of non-gaming structures that are (i) not related to the gaming area and (ii) will not be under the common ownership and control of Wynn MA—the licensee.^{6/} Moreover, the Commission does not have a regulatory interest in including the Proposed Project’s non-gaming structures as a part of the gaming establishment. Accordingly, the whole of the Proposed Project should not be included in the premises of EBH’s gaming establishment.

A. The Pedestrian Bridge Is a Non-Traditional Structure and Cannot Be Considered Part of the Gaming Establishment.

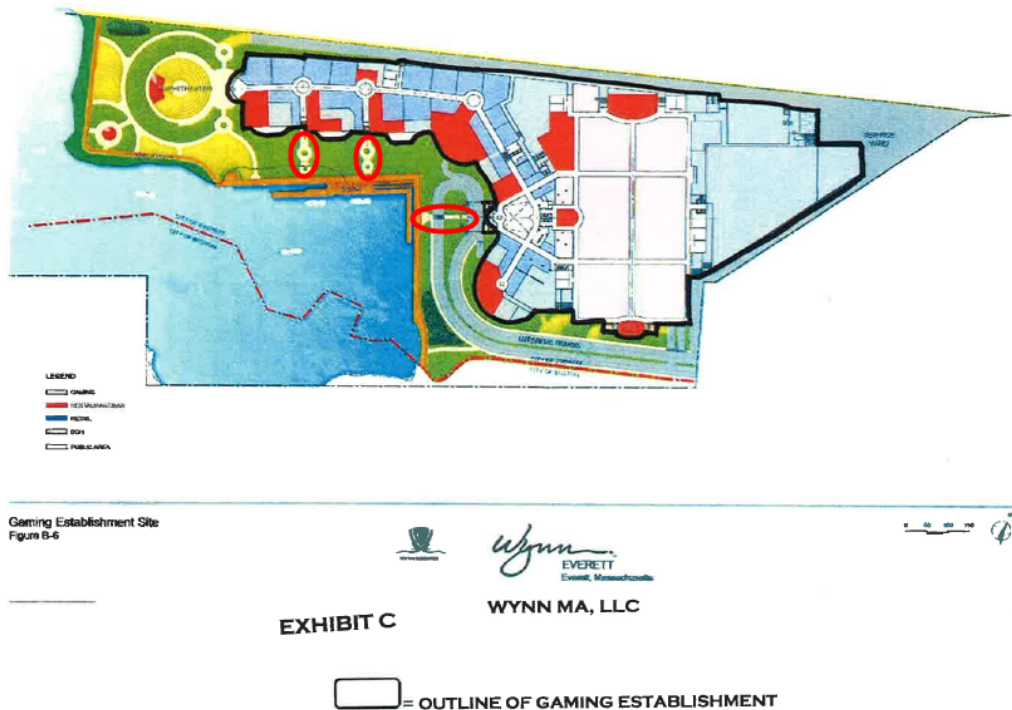
The Commission’s 2014 Decision makes clear that the Legislature did not intend to include non-traditional structures—like the pedestrian bridge—in the gaming establishment. The Commission excluded non-traditional structures from both Mohegan’s and Wynn MA’s gaming establishments. In the discussion related to Mohegan’s gaming establishment, the Commission excluded the “internal roadways on the site, entrance to the property, and exterior parking areas.” Decision at 8. The Commission explained: “by inclusion of hotels and restaurants as an example of an amenity in the definition of gaming establishment...the Legislature suggested that the term structure be applied in its traditional sense...where [internal roadways on the site, entrance to the property, and exterior parking areas] would not be structures in the traditional sense, they would not meet part 1 of the analysis and as such *cannot be included* as part of the gaming establishment.” *Id.* (emphasis added). With respect to Wynn MA, the 2014 Decision explained that Horizon Way—one of the roads by which one gains access to EBH—was not part of the gaming establishment.

^{6/} As discussed below, *see* Section II.D., Wynn Development may retain the option to operate the parking garage and/or certain of the utilities. This does not change the analysis.

The Commission explained:

Horizon Way does not satisfy the 4 part analysis and it is not part of the gaming establishment. For the same reason, internal roadways on the site, the harbor walk, and exterior parking areas are not part of the gaming establishment. None of these elements are structures in the traditional sense...Accordingly, they do not satisfy part 1 of the analysis and cannot be included as part of the gaming establishment. Further, under part 4, the Commission does not have any regulatory interest in overseeing those areas. Similarly, though it may be considered a structure, the Commission does not have any regulatory interest in overseeing the proposed dock for the water shuttle. They are all subject to governmental oversight in the ordinary course and there is no additional benefit to including those areas within the gaming establishment.

Decision at 9. The pedestrian bridge is just like the entrances and internal roadways on the EBH property (highlighted in red ovals on the figure below), which the Commission expressly excluded from the gaming establishment in its 2014 Decision.



See Decision, Ex. C. The Commission further omitted these non-traditional structures because, “they are all subject to governmental oversight in the ordinary course and there is no additional benefit to including those areas within the gaming establishment.” *Id.* Similarly, the pedestrian

bridge will be subject to oversight by the City of Everett's Department of Public Works and other relevant permitting authority(ies). As such, "the Commission does not have any regulatory interest in overseeing those areas." *Id.* Thus, the pedestrian bridge fails part one of the test, and cannot be part of the gaming establishment.

B. The Remaining Elements of the Proposed Project Are Non-Gaming Structures That Do Not Satisfy The Commission's Four-Part Test.

In the 2014 Decision, the Commission identified several categories of non-gaming structures including hotels⁷, meeting and convention spaces, spas, ball room, retail areas, restaurants/food and beverage/lounge areas, nightclub, back of the house, underground parking areas, physical plant/facilities maintenance, and all public areas related to those spaces. *See* Decision at 9. The remaining elements of the Proposed Project include plans for a parking garage, hotels, restaurants, an events center, and space for utilities, all of which are recognized non-gaming structures. No gaming will be conducted in any of these structures and they do not support the gaming area at EBH. The proposed event space will be less than 1,000 seats, and it will not host any gaming events. As such, the Proposed Project's non-gaming structures do not satisfy parts two through four of the four-part test, and thus are not part of the gaming establishment.

C. The Proposed Project Is Not Related to the Gaming Area.

Per the terms of M.G.L. c. 23K, §2, the gaming establishment "includes a gaming area and any other nongaming structure *related* to the gaming area and may include, but shall not be limited to, hotels, restaurants or other amenities." M.G.L. c. 23K, §2 (emphasis added). The

⁷ In the 2014 Decision, the Commission concluded that "hotels are necessarily part of the gaming establishment" based upon M.G.L. c. 23K, § 10(a)'s requirement that a category 1 project have a minimum capital investment and "shall include at least 1 hotel." The EBH's current gaming establishment satisfies § 10(a)'s minimum requirements providing discretion for the Commission to exclude an additional hotel that does not otherwise meet the standards for inclusion as part of the gaming establishment including not being related to the gaming area and not being in proximity to the gaming area.

Commission held that in order to be “related” to the gaming area, a non-gaming structure must be (i) “*for purposes of* enhancing the gaming area by making the entire facility a more attractive destination,”⁸ and (ii) be in close proximity to the gaming area.⁹ The Proposed Project’s non-gaming structures do not satisfy either requirement.

The Commission’s Decision identifying Wynn MA’s gaming establishment explained that “the hotels, meeting and convention spaces, spas, ball room, retail areas, restaurants/food and beverage/lounge areas, nightclub, back of the house, underground parking areas, physical plant/facilities maintenance, and all public areas...are all non-gaming structures that are *related* to the gaming area.” Decision at 9 (emphasis added). The Commission further explained, these non-gaming structures “are *related* in that they are included, at least in part, for purposes of enhancing the gaming area by making the entire facility a more attractive destination.” *Id.* Significantly, the related test does not apply to the gaming establishment as a whole but rather is narrowly tailored to non-gaming structures that enhance the gaming area. To meet the relatedness standard, there has to be a nexus between the non-gaming structure and the gaming area. The non-gaming structures that are part of EBH are designed to enhance the gaming area; they are intended to compliment and support the gaming area. The Proposed Project is not designed to enhance the gaming area, but rather for the purpose of implementing Everett’s urban renewal plan to redevelop the lower Broadway portion of Everett. The mere fact that it may provide ancillary benefits to EBH does not change its purpose.

The lack of proximity to the gaming area is also a factor in evaluating whether a non-gaming structure is related to the gaming area. In connection with its evaluation of the Mohegan Sun project gaming establishment, the Commission considered whether a horse racing track

⁸ Decision at 9 (emphasis added).

⁹ *See id.* at 8 (lack of proximity between entrance of the track and entrance of the Mohegan proposed gaming area).

owned and operated by Suffolk Downs was part of Mohegan's gaming establishment. Decision at 8. The Commission determined,

that it does not satisfy all elements of the 4 part test...and...is not an amenity to be included in the gaming establishment. Given the lack of proximity between the entrance to the track from the entrance to the gaming area, no infrastructure connecting the structures, lack of common ownership or control of track operations by Mohegan now, and in the future based upon the parties mutual agreement to delete the provision in the agreement between them that would have allowed Suffolk Downs to require Mohegan to manage the track and lack of any cross marketing plans or agreements between the two entities we find that the track is not related to the gaming area.

Id. The Proposed Project has its own separate pedestrian and vehicular entrances. Like the track, the separate entrances to the Proposed Project's non-gaming structures lack proximity to EBH's gaming area. They are across a major public way, a significant distance from the gaming area. The only connecting element—the pedestrian bridge—merely functions as an elevated crosswalk traversing the six-lane truck route on Broadway, mitigating traffic congestion, and increasing pedestrian safety in this area. The pedestrian bridge will provide street access via stairs and elevators. The pedestrian bridge will also provide access to EBH similar to a road or sidewalk. Access to EBH through the pedestrian bridge will be restricted and controlled through a security check point just as it is at any other access point to EBH such as Horizon Way.

D. The Proposed Project Is Not Under Common Ownership and Control of Encore.

The Proposed Project's non-gaming structures will be built on property owned by WD. WD will oversee construction of the Proposed Project, but once construction is complete, WD will lease certain of the non-gaming structures to an independent entity who, by the terms of the lease agreement with WD, will take control of the premises and manage and operate the hotels, restaurants, and events center.^{10/} By virtue of this landlord/tenant relationship, WD will relinquish

^{10/} WD will continue to be responsible for maintenance of the pedestrian bridge over Broadway, subject to regulation by the City of Everett.

control of these non-gaming structures to the operating entity except as is retained by the landlord in a typical commercial lease situation.

Under Massachusetts law, commercial landlords do not have “control” over leased premises where lease provisions give control of the leased premises to the tenant. *See e.g. Humphrey v. Byron*, 447 Mass. 332, 328-30 (Mass. 2006) (declining to hold commercial landlord liable in tort to an injured plaintiff for an injury that occurred on the leased premises because the landlord did not control the premises). In *Humphrey*, the Supreme Judicial Court found that the commercial landlord did not control the leased premises for purposes of imposing tort liability on the landlord because the lease agreement expressly gave control of the leased premises to the tenant. *Id.* at 330. There, the Court found that the landlord did not have control over the premises, even though the landlord “restricted the color of paint that the tenants could use in the interior” and “prohibited repairs and alterations without their approval.” *Id.*

Like *Humphrey*, WD intends to transfer all control of the hotels, restaurant, and events center to the lessee, who will be responsible for operating these businesses, keeping these premises safe, and will be able to make management decisions over these premises without approval from WD. All control of these business will transfer to the tenant upon the execution of the lease. While WD may retain the option to operate the parking garage and/or utilities, this option does not change the analysis. Landlords frequently retain control over common areas like parking lots or utilities to provide maintenance or cleaning services without impacting a tenant’s ability to make management decisions over the premises without approval from the landlord. WD’s operation of the parking garage and/or utilities will not affect the lessee’s control of the hotels, restaurants, and events center.^{11/} Thus, WD will not have common ownership and control of the Proposed Project.

^{11/} The principal purpose of the Proposed Project’s parking garage will be to service visitors to the hotels, restaurants, and events center and the utilities are not related to EBH’s gaming area, and neither call for Commission oversight.

E. The Commission Does Not Have a Regulatory Interest in Including the Proposed Project as Part of the Gaming Establishment.

The Commission's 2014 Decision makes it clear that the fourth component of the test "only comes into play...where the first three parts are satisfied." *Id.* As a result, the Commission's analysis should end there as neither the pedestrian bridge nor the several proposed non-gaming structures meet the first three parts of the Commission's test. However, even if the Commission were to assess the Proposed Project under the fourth element, the Commission does not have a regulatory interest in including the Proposed Project as part of the gaming establishment. The Commission's regulatory interest derives from an interest in regulating and maintaining the integrity of gaming. Decision at 9. The Commission's Decision explains that in considering certain structures to be amenities to the gaming area, the Commission has an "interest in, amongst other things, ensuring that all employees working in those areas are licensed or registered in accordance with 205 CMR 134.00 and having knowledge of the flow of money through these areas." *Id.* This regulatory interest plainly does not arise for the Proposed Project because, (i) the Proposed Project will not have any regulated gaming activities; (ii) the persons working in the Proposed Project area are not employees who would be required to be licensed under 205 CMR 134.00 with knowledge of the flow of money in EBH; and (iii) no money to or from EBH will flow through the day-to-day operations of the non-gaming structures at the Proposed Project. Importantly, employees at the Proposed Project do not have to access EBH to get to their jobs and EBH employees do not have to access the Proposed Project to get to their jobs.

Moreover, the only access point between the Proposed Project and EBH will have a security checkpoint clearly delineating where the gaming establishment begins and ends. As discussed above, while individuals may access EBH from the pedestrian bridge, they will be required to go through security to gain entrance to the facility as if they were entering through the front entrance. While the Commission may have an interest in the location where the pedestrian

bridge actually connects to the existing EBH gaming establishment, (just as the Commission does at the other entrances to the EBH), this interest extends no further than that location.

Further, the Proposed Project will be under the auspices of other government supervision in the normal course in connection with the permitting, construction and operation of the Proposed Project. There is no additional benefit in adding these areas to the gaming establishment to ensure additional government oversight through the Commission. Indeed, adding the Proposed Project would have the opposite effect, likely impeding its development and limiting its use. Just as important as assessing the benefits of being part of the gaming establishment, the Commission should consider the negative consequences as well. As Commission staff stated in reassessing (and reducing) MGM Springfield's gaming establishment boundary, carving out unrelated office space that had no functional or physical connection to gaming and a storage facility located across a public way: "It is clear that the application of the gaming establishment boundary has far reaching implications for the Commission's regulatory authority." *Memo from John Ziemba and Joe Delaney re: MGM Springfield Gaming Establishment Boundary*, April 23, 2018.

The impact from Commission regulatory authority on the Proposed Project would be equally far reaching and likely costly. Inclusion of the Proposed Project in the gaming establishment boundary would bring oversight and approval of the design and construction of the Proposed Project by the Commission. Employees may be required to be licensed or registered. The State Police would have jurisdiction within the boundaries of the Proposed Project. As part of the gaming establishment, the Proposed Project may be ineligible for certain tax credits, and subject to the Commission's capital investment requirements. A transfer of interest in the Proposed Project may require Commission approval. The Commission would be responsible for all alcohol licenses in the Proposed Project. Exercising this level of oversight serves no purpose for the Proposed Project nor would it ensure the integrity of gaming. Further, such oversight will

likely serve as a deterrent to ancillary development around gaming establishments, and additional investment by licensees in their host community.

CONCLUSION

For the foregoing reasons, Wynn MA respectfully requests that the Commission affirm its previous gaming establishment boundary, or in the alternative, confirm that the non-gaming structures that comprise the Proposed Project are not part of the premises of the gaming establishment identified by the Commission in its May 15, 2014 Decision.

Respectfully submitted,

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