



Plainridge Park Casino, Plainville, MA

# Mass Gaming: How We Built This

## VOLUME 1

By Todd Grossman, Carrie Torrisi and Justin Stempeck

**U**nprecedented! This was the refrain commonly bellowed in our direction as we sought to construct the infrastructure for the licensing and regulatory oversight of casinos in Massachusetts. Though often cloaked in concern, not adulation, we considered its use a term of endearment and an indication that we were moving in the right direction by exploring the best path forward for Massachusetts. Doing things “the way they have always been done” was appropriate in some circumstances, but not a great fit in others. We were, and continue to be, the beneficiaries of those who have done it before us. From that, we have been able to borrow, copy, and innovate.

In this article we will describe a few of the legal issues confronted by the Commission that helped shape the landscape in which significant early decisions were made.

Let’s start at the beginning. It was 2011. Only a few years removed from the subprime mortgage crisis and still in the midst of an economic recession, the Massachusetts Legislature was again dis-

cussing the legalization of casino gaming in the state. After years of debate, research, and compromise, the Legislature enacted *An Act Establishing Expanded Gaming in the Commonwealth* (“gaming act”) that was signed into law by Governor Deval Patrick on November 22, 2011. In an effort to create jobs, spur economic development, and repatriate gaming dollars crossing the borders to neighboring

states, casino gaming was coming to Massachusetts. The gaming act established the Massachusetts Gaming Commission, to be comprised of five commissioners, and authorized the Commission to license up to three casinos and one slots only facility (with no more than 1250 machines).

The act geographically divided the state into three regions and allowed for the siting of one casino in each region and the placement of the slot facility anywhere in the state. It was up to the Commission to implement the act including licensing of the casinos and slot facility. The Commission’s paramount objective was to ensure *public confidence in the integrity of the gaming licensing process and in the strict oversight of all gaming establishments through a rigorous regulatory scheme*. The license award processes in each region were competitive; that is, there were multiple bidders for each of the licenses at different points in the process.

After an at times intense deliberation resulting in a 3-2 vote, the Commission awarded the slots only gaming license to Penn National Gaming for a facility in Plainville, MA (known as Plainridge Park Casino). Next, it awarded a license to MGM Resorts for a destination resort casino in Springfield, MA (to be known as MGM Springfield and scheduled to open in September 2018). Finally, after a spirited competition with Mohegan Sun,

the Commission awarded the Region A (“Boston area”) gaming license to Wynn Resorts for a destination resort casino in Everett, MA (to be known as Wynn Boston Harbor and scheduled to be open in June 2019).

## Host Communities

Implicit in the gaming act is the notion that no casino would be located in a city or town where it was not welcome. To help guarantee this outcome, the law created the concept of the *host community*, the city or town where the casino was physically located. Before the Commission could even consider awarding a gaming license to an applicant, they would first have to seek the approval of the host community in two forms. First, the applicant needed an executed agreement with the host community. Negotiated with the mayor or other head of the local government, the agreement was to set forth all terms and conditions of the community hosting such a facility including “a community impact fee for the host community and all stipulations of responsibilities between the host community and the applicant, including stipulations of known impacts from the development and operation of a gaming establishment.” If an applicant was unable to execute an agreement, that was the end of the line and the Commission would never even have occasion to review the proposal. Even if an agreement was executed, there was a second hurdle an applicant had to clear. That is, they had to obtain a favorable vote in an election in support of the proposal from the citizens of the host community. In order to help inform the electorate, the law required the executed host community agreement to be posted publicly. If the applicant did not receive a favorable vote (over 50%), they would not be permitted to move forward with their application. Indeed, there were a number of applications that stalled at this point (Suffolk Downs and Foxwoods in Region A, and Hard Rock and Mohegan Sun in Region B). Only those who made it through this process were permitted to submit an application for a gaming license.

## Surrounding Communities

The gaming act also recognized the need to mitigate any known and unknown effects caused by the construction and operation of a

casino on cities and towns not deemed host communities but located in the general proximity of the casino. In addition to negotiating a mitigation agreement with the host community, an applicant was required to negotiate a mitigation agreement with each designated surrounding community. Surrounding communities were defined as those cities or towns “in proximity to” a host community which “experience or are likely to experience impacts from the development or operation” of a casino. Unlike the host community designation, which was based on where the casino was actually located, the surrounding community designation was based on actual impacts. This meant that a town could be located geographically adjacent to the host community but not be designated a surrounding community if it did not or was unlikely to experience any impacts created by the casino. The Commission requested that the applicants designate all of the cities and towns it believed to be surrounding communities. It then allowed any city or town that was not designated to petition the Commission to designate it as such. As it turned out (perhaps since the licensing process was a competitive one in which applicants were evaluated on numerous considerations including the approval or disapproval in the communities in which they’d be located), most municipalities that desired to be designated were in fact designated by the applicant. The Commission was only called upon to conduct a handful of hearings to determine surrounding community status.

Further, unlike the host community provisions of the law that essentially allowed the host community to veto a prospective application by either refusing to negotiate a mitigation agreement or voting in the negative at an election, the surrounding communities had no such power. In order to ensure that a surrounding community was unable to exercise a *de facto* veto, the Commission developed a “baseball style” arbitration process to resolve any deadlocks in mitigation negotiations. Each party was invited to present its best and final offer for a mitigation agreement to a panel of three arbitrators. The panel then selected the one that was most closely tailored to address the known or potential impacts of the casino. The process was

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## >> JURISDICTIONAL UPDATE: MASSACHUSETTS



Artist rendering of  
MGM Springfield

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designed to force the parties to reach a compromise instead of risking having the arbitrators select the other parties' proposal. There were a number of arbitrations conducted and the process was largely successful.

### Open Meetings

The Open Meeting Law, which requires that *deliberations* among members of a public body be held in public, has created its own set of challenges. One of the cornerstones of the Commission's mission, and the *sine qua non* to its success, was to *create and maintain a fair, transparent, and participatory process for implementing the expanded gaming law*. To that end, the Commission live-streams its public meetings over the Internet and makes all documents being reviewed at each meeting available on the Commission's website that same day. The meetings are then transcribed and the transcripts are posted on the website along with the meeting minutes.

Ensuring compliance with the law has not always been easy. In the Commission's infancy, its five members were getting up to speed on the intricacies of the gaming act and the gaming industry, and were working together daily in the same office with limited support staff, all without being able to communicate with each other like normal business partners



Artist rendering of  
Wynn Boston Harbor

would do in the private sector. All of their communications (from determining the dress code, to the selection of an executive director, to discussing nuances of the new law) were required to take place at public meetings.

The intersect of the open meeting law and the gaming suitability process for applicants and all qualifiers posed an interesting challenge in that the suitability reviews typically detailed confidential and personal information. The Commission was forced to navigate the law, including presentation of redacted reports in public, while ensuring adequate analysis and review of applicants. Similarly, the actual deliberations over the award of the casino licenses were held in public. Many of the applicants at the time remarked that they had never seen such a transparent (and nerve racking) decision making process played out right in front of them (and broadcast live over the Internet). Despite these issues, the Com-

mission has and continues to maintain a transparent and participatory process for implementing the gaming act.

### Public Records

In addition, the Commission has encountered challenges in its efforts to comply with the Massachusetts Public Records Law. The law largely mirrors the Federal Freedom of Information Act and presumes that all records in the possession of a government agency are public records and must be disclosed upon request, with certain enumerated exemptions. The exemptions are fairly limited; there is no

exemption within the law which could be applied to a situation in which a private entity routinely provides highly sensitive information to the state as a requirement of licensure. However, the gaming act contemplated this concern and includes two applicable sections. The first applies to entities during the application process and provides that *trade secrets, competitively-sensitive or other proprietary information provided in the course of an application for a gam-*

*ing license under this chapter, the disclosure of which would place the applicant at a competitive disadvantage, may be withheld from disclosure.* This exemption was used to protect information such as marketing and promotional strategies, unaudited financial statements, and surveillance and security plans. The second exemption applies to entities after the application process is complete and the license has been awarded. This section authorizes the Commission to protect information it considers to be a *trade secret or detrimental to the gaming licensee if it were made public* by entering into a nondisclosure agreement with the gaming licensee. The Commission has created a non-disclosure agreement application process to ensure that the exemption is uniformly applied and the confidentiality of information maintained. To date, the Commission has entered into nondisclosure agreements with two of its three licenses. These two additional gaming related exemptions to

the law help ensure that the gaming licenses can comfortably do business in Massachusetts, meet all necessary reporting requirements, and not place themselves at a competitive disadvantage from the release of trade secrets or proprietary information.

## Referendum

On November 4, 2014, Massachusetts voters went to the polls. The biggest draws that day were the races to elect a new governor and attorney general. Charlie Baker was elected governor by a slim margin over then Attorney General Martha Coakley, and Maura Healey was comfortably elected the new Attorney General. The most notable result for those involved with the state's nascent gaming industry, however, was that for ballot question #3. The Massachusetts Constitution allows citizens to propose changes to the law in the form of ballot

questions which are then voted on as part of the typical November elections. The Constitution lays out a number of subjects excluded from potential consideration as ballot questions, though. For example, no question may be proposed if it relates to the "reversal of a judicial decision", "makes a specific appropriation of money from the treasury", or if it is inconsistent with one's "right to receive compensation for private property appropriated to public use." The Attorney General reviews all proposed questions to ensure they pass constitutional muster. If they do, the question is placed on the ballot. If they do not, the question will not appear- unless a court orders otherwise, of course.

In 2014 Attorney General Coakley's office declined to approve a proposed question that would have repealed the gaming act and prohibited casino gaming. The group that proposed the ques-

tion appealed that decision to the state's highest court, the Supreme Judicial Court. The SJC reversed the decision and ordered the question be placed on the ballot. *See Abdow v. Attorney General*, 468 Mass. 478 (2014). At this point, the Commission had awarded gaming licenses to Penn National, MGM, and Wynn. Penn National was actually in the process of constructing its facility. Not surprisingly, an organization called the *Coalition to Protect Mass Jobs* was created to spearhead a vote 'no' on question 3 campaign. After a substantial advertising blitz, the movement was successful as Massachusetts voters rejected question 3 by a 60% to 40% vote. The gaming law had survived.

And so it is, the Massachusetts story continues to be written. Unprecedented? Perhaps. ♣

## INTERNATIONAL MASTERS OF GAMING LAW

IMGL wishes to thank the autumn conference co-chairs, committee members, the moderators, and the panelists for the contribution of their time and efforts in putting together the excellent educational opportunities IMGL is proud to provide at the 2018 Spring Conference.

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