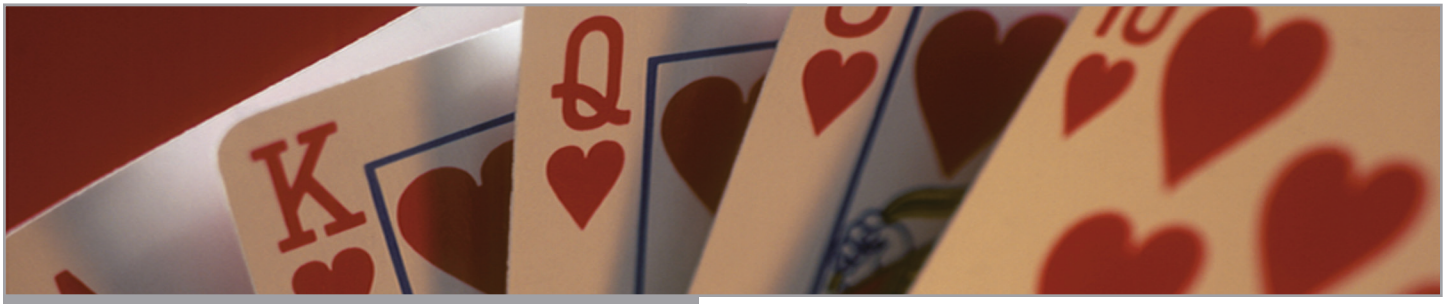
GAMING**LEGAL**NEWS



November 22, 2011 • Volume 4, Number 34

GAMING WEB SITES OF INTEREST

www.indianz.com
www.pechanga.net
www.indiangaming.org
www.nigc.gov
www.michigan.gov/mgcb
www.gaminglawmasters.com
www.casinoenterprisemanagement.com

WHAT IS MASSACHUSETTS REALLY PROPOSING FOR INDIAN GAMING?

by Dennis J. Whittlesey

The Massachusetts House and Senate have passed legislation that Governor Deval Patrick may have signed into law by the time of this publication's distribution. If signed, the law would authorize three casinos in regionally designated locations within the state, with a preference for the southeastern regional license to be issued to a federally recognized Indian tribe. The license preference was written for what unquestionably is Mashpee Wampanoag, the tribe that met the Mayflower in 1620 but was not federally recognized until the spring of 2007.

While the identity of the intended beneficiary tribe is clear, what the tribe would be getting with the preference is not.

At the outset, it should be noted that as of this writing, the author has reviewed the final bill that went to the Governor, and the provisions quoted below are contained therein.

Many critical provisions are ambiguous, but they clearly suggest that the tribal casino would have to operate as a state-licensed and state-regulated casino at the outset. For example, preconditions of the tribal casino licensure would include (1) a local community vote of approval and (2) a successful gaming compact negotiation between the Governor and the tribe, resulting in a compact that is subsequently approved by the state Legislature (known as the "general court"). Both must be completed by July 31, 2012.

The critical language from the final House bill (H.3807) is worth reviewing:

> The governor shall only enter into negotiations under this section with a tribe that has purchased, or entered into an agreement to purchase, a parcel of land for the proposed tribal gaming development and *scheduled* a vote in the host communities for approval of the proposed tribal gaming development. The governing body in the host community shall coordinate with the tribe to schedule a vote for approval of the proposed gaming

> establishment upon receipt of a request from the tribe. The governing body of the host community shall call for the election to be held *not less than 60 days* but not more than 90 days from the date the request was received. (Emphasis added.)

Thus, the tribe cannot commence compact negotiations until it has secured at least a purchase agreement interest in its proposed gaming site and scheduled a local community vote of approval. However, that vote cannot be conducted until at least 60 days from the date of the tribal request for the vote. Anyone with knowledge of the federal compact negotiation process under the Indian Gaming Regulatory Act ("IGRA") knows that these documents can be complicated and negotiations often take time, so time is critical for meeting the July 31 drop dead date for having the deal done and securing Legislative approval.

The bright side to this compact process is that the proposed law does not require the tribe to obtain compact approval from the Secretary of the Interior by July 31, although any compact for Indian gaming pursuant to IGRA does require Interior Secretary approval prior to the commencement of gaming activities. The dimmer side to this compact process is that nothing in the law requires – or even seems to contemplate – that the negotiated compact would *ever* be submitted to the Secretary. To the contrary, the act would require compact approval by the Legislature – also known as the "general court" – while ignoring any Interior review and approval/disapproval.

Again, H.3807 is informative:

> A compact negotiated and agreed to by the governor and tribe *shall be submitted to the general court for approval*. The compact shall include a statement of the financial investment rights of any individual or entity which has made an investment to the tribe, its affiliates or predecessor applicants of the tribe for the purpose of securing a gaming license for that tribe under its name or any subsidiary or affiliate since 2005. (Emphasis added.)

Thus, if the general court/Legislature does not approve the state compact by the July 31 deadline or if the state gaming commission at any time after August 1 determines that the tribe will not have land taken into trust by the Secretary, then the license would be withdrawn and opened for bids from all interested parties:

> Notwithstanding any general or special law or rule or regulation to the contrary, if a mutually agreed-upon compact has not been negotiated by the governor and Indian tribe or if such compact has not been approved by the general court before July 31, 2012, the [state gaming] commission shall issue a request for applications for a category 1 license in Region C pursuant to chapter 23K of the General Laws not later than October 31, 2012; provided, however, that if, *at any time on or after August 1, 2012*, the commission determines that the tribe will not have land taken into trust by the United States Secretary of the Interior, the commission shall consider bids for a category 1 license in Region C under said chapter 23K. (Emphasis added.)

Although informative, the foregoing language is also puzzling. While it calls for the commission to determine whether the tribe will have "land" taken into trust by the Secretary, nowhere is the *gaming site itself* required to be taken into trust. The act envisions a commission review of trust applications for land being acquired for "economic development" but that does not necessarily pertain to the casino site itself. Again, the language is informative:

> The commission shall continue to evaluate the status of Indian tribes in the commonwealth including, without limitation, gaining federal recognition or *taking land into trust for tribal economic development*. The commission shall evaluate and make a recommendation to the governor and the chairs of the joint committee on economic development and emerging technologies as to whether it would be in the best interest of the commonwealth to enter into any negotiations with those tribes for the purpose of establishing *Class III gaming on tribal land*.

While "Class III gaming" is a term defined in IGRA, the term "tribal land" is not. Nor is "tribal land" defined in the proposed Massachusetts act. In fact, it seems that "tribal land" in this case merely means *land owned by the tribe*. Ownership of land in fee appears to satisfy the statutory standard. Moreover, since there is no requirement that the *tribal gaming* (also an undefined term) be conducted on land accepted into trust for gaming and otherwise in accordance with IGRA, the inclusion of an independent Legislature review of any (a) trust application or (b) proposed "Class III gaming on tribal land" almost seems to be some kind of weapon with which the state can control future land acquisitions by the tribe.

As for the notion that the law really meant to say "trust land," any analysis of the statute would require some assessment as to why the act did not clearly say so. Fee land is easy and quick to acquire, but the fee-to-trust process is a complicated and time-consuming process. The delay in trust acceptance is in large part the product of the fact that trust acceptance is a "major agency action" that triggers the National Environmental Policy Act ("NEPA"). Compliance with the NEPA process is comprehensive, time-consuming, and expensive. At the present time, trust approvals generally are not rendered for several years. And, nobody can predict the final outcome until a trust decision is actually rendered.

So, the final House bill raises a number of provocative questions.

1. Does "tribal land" mean "trust land"?
2. Can the tribal casino offer gaming on tribally owned land not in trust?
3. If the tribe commences gaming on non-trust land, could it ever convert the facility to a federally regulated casino under IGRA?
4. Does the open-ended commission review ("at any time on or

after August 1, 2012") of *any* application for trust acceptance give the state an effective veto of any tribal land action – including an attempt to convert the casino into an Indian casino under IGRA – by arbitrarily "determining" that the land will never go into trust and invoking the provisions for cancelling the "tribal casino" license and submitting it to public bid?

There are other questions, but these demonstrate that the current bill leaves much uncertainty. Their answers cannot be gleaned from the legislation before the Governor.

NOTE: The author represented the Town of Middleborough, Massachusetts, in 2007 in the Town's negotiations with the Mashpee Wampanoag in developing an Intergovernmental Agreement for a federally regulated tribal casino within the Town's boundaries. That Agreement was approved by a Town Meeting on July 28, 2007.

IRS REQUESTS COMMENTS REGARDING THE ALLOCATION OF VOLUME CAP FOR TRIBAL ECONOMIC DEVELOPMENT BONDS

by Peter J. Kulick

With the enactment of the American Recovery and Reinvestment Act ("Recovery Act") in 2009, a new form of tax-exempt bonds was introduced aimed directly at Indian Tribal governments. The bonds, given a typical cumbersome nomenclature by Congress, are known as "Tribal Economic Development Bonds." The benefit for Indian Tribes is that the Recovery Act eliminated the controversial "essential governmental functions" test for bonds issued as Tribal Economic Development Bonds. Thus, for certain qualifying purposes, Tribes are authorized to issue bonds on a tax-exempt basis essentially on parity with state or local governments.

The Recovery Act established a $2 billion volume cap for Tribal Economic Development Bonds. Through two published forms of guidance, Notice 2009-51 and Announcement 2010-88, the IRS set forth procedures for Indian tribal governments to apply for a volume cap allocation. The published guidance allocated the $2 billion volume cap in two tranches to several different Indian Tribes.

While Tribal Economic Development Bonds were hailed for eliminating the essential governmental functions test for certain types of bonds issued by Indian Tribal governments, it turns out that the bonds have not been widely used in Indian Country. The IRS recently issued Announcement 2011-71 to request comments for the reallocation of unused volume cap. In the Announcement, the IRS estimated that 95% or more of the $2 billion volume cap is unused and, therefore, may be available for reallocation as of January 1, 2012.

The main thrust of Announcement 2011-71 is to seek comments with respect to the best means to allocate the volume cap in order to increase the odds that Tribal Economic Development Bonds are actually issued. As a result, the Announcement identifies several categories of information the IRS is considering requesting to reallocate volume cap.

The prospective criteria identified by the IRS include:

- Details regarding project costs.
- Plan for financing, including a description of the sources and uses of funds, anticipated issuance date, a schedule for spending proceeds of the bonds, the marketability of the bonds and the availability to obtain financing from other sources if required to pay project costs.
- Evidence of readiness to issue bonds.
- Use of a two-step allocation process, which would entail a preliminary commitment to allocate volume cap from the IRS and an actual allocation within a certain number of days, such as 60 days, prior to closing.

The IRS has also arranged telephone conference calls in order for Indian Country, members of the public finance community, and the general public to provide feedback relating to criteria identified in Announcement 2011-71. The next telephone consultation is on **December 7, 2011**, from 2-3 p.m. Eastern Time. Interested parties can participate in the IRS telephone consultations by dialing **1-888-285-4585** and entering participant code **775860**.

THE BATTLE OF TALLAHASSEE: WAR OVER CASINO GAMING

by Dennis J. Whittlesey

The Seminole Tribe has long claimed to be the only Eastern Tribe that was never conquered, and most historians will concur. The Seminoles faded into the swamps of Florida, continued their lifeways, and only confronted the Euro-American population on their own terms.

One of those terms was Indian gaming, which was prosperously conducted for many years without the Tribe even securing a Compact with the State of Florida that would have allowed an expansion of gaming from Class II (predominantly bingo in its various forms, including electronic, and certain other forms of gaming identified as Class II) while not venturing into the world of full-blown casino gaming known in the federal Indian gaming law as Class III. The tribal success was reflected in the Seminole's purchase of the Hard Rock franchise more than six years ago.

The Tribe did want Class III gaming and attempted over several years to initiate Gaming Compact negotiations with Florida without success. This changed when Charlie Crist was elected Governor and expressed interest in working with the Seminoles in return for his financially distressed state receiving financial payments from the consequent Class III revenues. The Seminoles' Compact path was long and tortured for political reasons associated with a continuing fight between Governor Crist and the State Legislature. Still, the ultimate result was a Compact executed in 2010 that provided for the Tribe to pay to the state an estimated $1 billion over five years in return for exclusive rights to offer certain forms of casino gaming within the state. That effectively works out to Florida's receiving some *$200 million* per year

from the Seminole Tribe's seven-casino gaming empire stretching from Coconut Beach on the east coast to Tampa in the north and to Immokalee on the west coast near Fort Myers.

With approval of that Compact, it seemed as though the Florida casino landscape was fairly settled, particularly since the state's beleaguered schools would be major beneficiaries of payments that were sure to continue as long as the Seminoles retained the exclusivity for certain gaming that effectively established a monopoly in the eyes of many.

The deal was a good one, by almost all accounts. The Tribe enjoyed its dominant position, and the state would have a predictable revenue stream for as far as the eye could see. However, after little more than a year after Compact approval, the picture has changed dramatically.

The Legislature is now considering legislation to license up to three mega-casinos in the Miami-Dade and Broward Counties in South Florida and smaller gaming facilities elsewhere. The problem is that the commencement of operations *in even one* would negatively impact – if not terminate outright – the Seminole Casino Payment Compact Provision. The measure is driven by visions of Miami becoming home to the largest casino *in the world* under a proposal being aggressively promoted by Genting, the Asian gaming giant that owns what currently is the world's largest casino and promises to develop an even larger facility on land it recently purchased in the Miami area. That land is the current site of *The Miami Herald* headquarters, located on the north edge of downtown Miami, and Genting reportedly paid some $236 million to acquire it. In promoting its effort to win the right to construct and operate a casino on that site, Genting pledges to finance nonstop air service between Asia and Miami to facilitate access for Asian travelers wishing to visit this would-be Crown Jewel of the global gaming industry.

However, Genting has serious competition.

Perhaps, the biggest name in gaming is Sheldon Adelson, whose companies operate major casinos in this country under the Sands and Venetian names and enormously successful properties in Macau, and he also has announced plans to seek a Miami casino license. And there is more competition to come.

Gaming impresario Steve Wynn recently entered the picture. He is well known as the genius who revolutionized the casino industry in Las Vegas, and today his signature Wynn Las Vegas and its adjoining identical twin sister casino/hotel named "Encore" are among the most-recognizable buildings in that city's skyline. Moreover, like Adelson, Wynn operates an extremely successful third "twin" casino/hotel in Macau.

In the face of this fast-developing interest in casinos in South Florida, the Seminole Tribe has declared its all-out opposition to *any* new legislation, and Principal Chief James Billie recently blasted the current legislative activity in Tallahassee as "disrespecting" the Seminole Compact.

With these gaming industry heavyweights already in the fight and the likelihood that others will surface in South Florida and other potential markets such as Jacksonville, it is no surprise to know that everyone involved in the Florida gaming scene, or seeking to become so, is hiring lobbyists in Tallahassee – making that city one of the very few places in the country where lobbying is a growth industry.

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It goes without saying that dreams of great lucre are driving the effort to authorize the new mega-casinos. The mantra of the lobbyists promoting the legislation is that the state won't need the guaranteed Seminole payments with the revenue to come from the billion dollar casino resorts properties to be developed. The message is that the guaranteed $200 million in annual tribal payments would pale in the face of state revenues generated by the new gaming regime.

The revenue projections may not be so clear-cut, however. While the state's Revenue Estimating Conference is still studying the financial impact of the legislation becoming reality, the state's chief economist already has issued a first analysis of the financial impact of the resort casinos that the *St. Petersburg Times* reports as concluding that the revenues would be far smaller than many of the public predictions. The report suggests that the total revenues realized from the prospective casinos could well be significantly lower than the revenue stream guaranteed by the Seminole Compact.

The St. Petersburg Times also reported that the casino analysis group Bernstein Research estimated in a report issued on October 24 that a major casino industry in Florida "has the potential to pull 15 percent of the business from Las Vegas." However, this projection is sharply tempered by the response from the state economists that they cannot now predict the impact any new casino revenues would have on state tax revenue "because the ultimate business plans and locations are currently unknown."

Finally, seizing on the ambiguity of the predicted financial benefits, even that lovable fellow Mickey Mouse is getting into the debate. The Walt Disney organization is deeply concerned that a mega-casino development in Miami could have a devastating impact on the gigantic tourism industry in the Orlando area, including Disney World. Moreover, the Orlando tourism industry has echoed the Disney concerns. It is safe to assume that the Disney and Orlando lobbyists are also very busy in Tallahassee.

The battle lines are drawn. The stakes could not be higher for the gaming industry in general and the participants in particular. And this war has just begun.