

THE COMMONWEALTH OF MASSACHUSETTS
MASSACHUSETTS GAMING COMMISSION

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

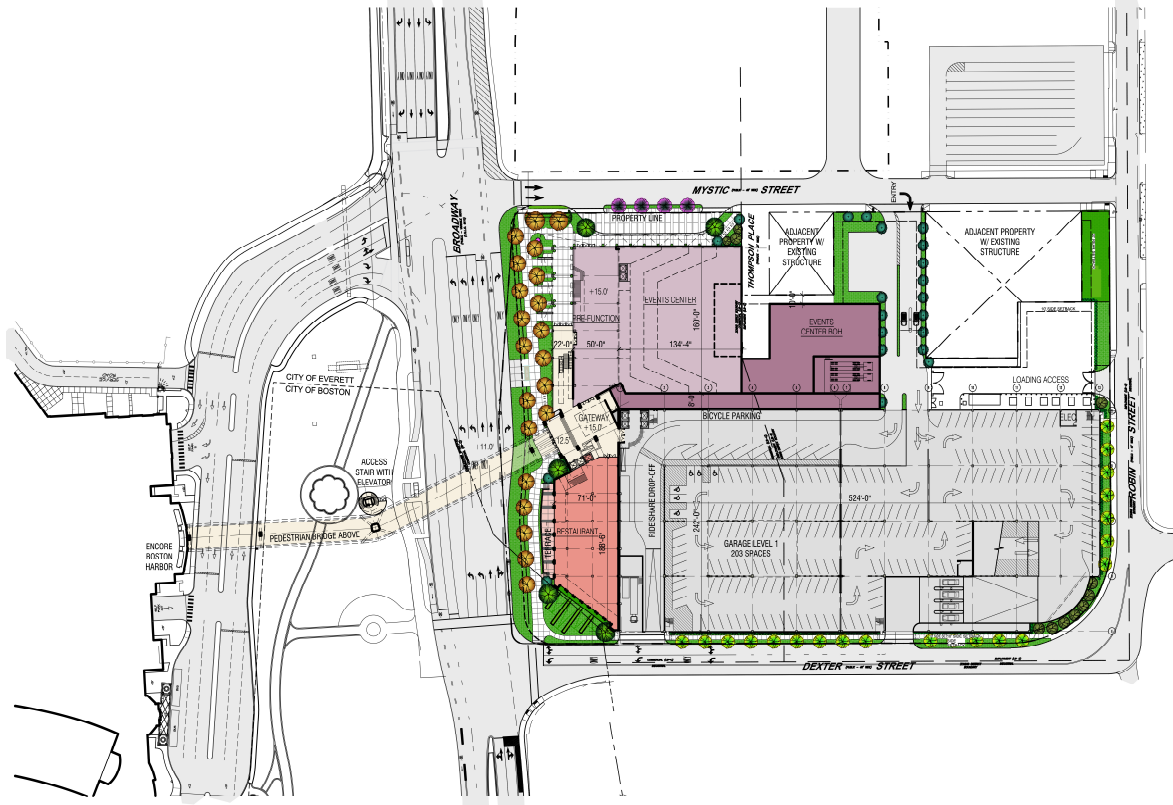
Wynn MA, LLC (“Wynn MA”) respectfully submits this memorandum to the Massachusetts Gaming Commission (the “Commission”) in support of its position that the proposed East of Broadway Development in Everett, Massachusetts (the “Proposed Project”) is not part of the premises of the gaming establishment 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.

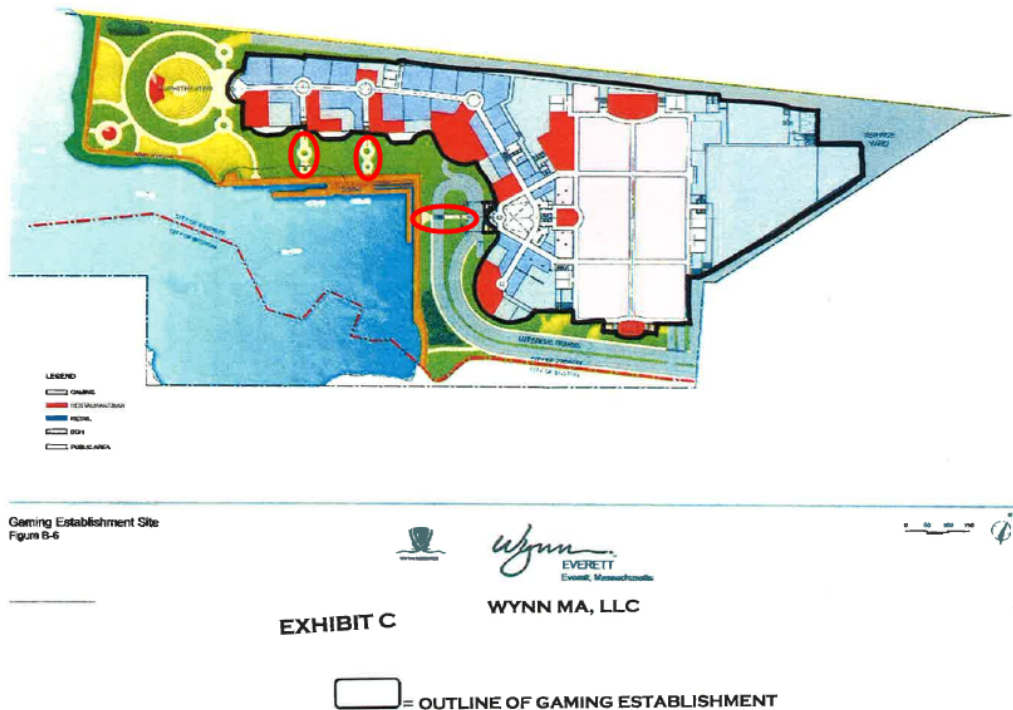
The Commission’s 2014 Decision makes clear that the Legislature did not intend to include non-traditional structures—like the pedestrian bridge—in the gaming establishment. The Commission excluded non-traditional structures from both Mohegan’s and Wynn MA’s gaming establishments. In the discussion related 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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