

## Outside Counsel

## Expert Analysis

# Casinos Are Coming! Well, Not So Fast

**O**n Election Day in November 2013, New York voters took the unprecedented step of approving non-tribal casino gaming in the state. By the addition of 17 words to the state constitution, the dream of casino gaming—a dream many have been waiting more than 40 years for—became reality. But, it is 2014 and there are no casinos yet. Where are they? This article discusses the road map created by the governor and the Legislature to bring the “dream” of casino gaming to the Empire State and when it will occur.

### Where Have We Been?

Article I, Section 9, Subdivision 1 of the state constitution makes it clear that no gambling can occur in New York:

no lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling...shall hereafter be authorized or allowed within this state; and the Legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section.

This provision has been amended by vote of the people on three occasions—the first permitted “pari-mutuel betting on horse races... from which the state shall derive a reasonable revenue for the support of government...” The second authorized “lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the Legislature, the net proceeds of which shall be applied exclusively to or in aid or support of education in this state as the legislature may prescribe...”

Both of these exceptions defer the methods

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of operation of the pari-mutuel betting and of the lottery to the Legislature. Accordingly, the Racing, Pari-Mutuel Wagering and Breeding Law governs all horse racing and betting in the state and Article 34 of the Tax Law governs the operation and sale of lottery tickets in the state.

The November 2013 referendum approved by the voters added the following as a third exception to Subdivision 1:

and except casino gambling at no more than seven facilities as authorized and prescribed by the legislature....

Much has been written that casinos will bring revenue to the state, to local municipalities and to education—but unlike the two prior gambling exceptions, this provision leaves the Legislature to determine not only “how” casino gambling is implemented, but also “where” the revenue is to go.

### Why Seven Casinos?

In championing the move to authorize casino gambling in the state, Governor Andrew Cuomo correctly stated that gaming is all around us already. During the past 10 years, casino gambling has been authorized or expanded in Connecticut, Pennsylvania and Massachusetts—and even in New York. The Legislature has noted that New York already had pari-mutuel racing, the lottery, nine “casinos” at racetracks operated by the lottery and five tribal casinos (operated by the Seneca Nation of Indians, the Oneida Indian Nation and the St. Regis Mohawk Tribe). In fact,

the Legislature found that New York had more electronic gaming machines than any state in the Northeast.<sup>1</sup>

While the lottery and its “casinos” have been successful, raising an average of \$3.5 billion annually for education, the governor believed, and the Legislature agreed, that the state did not fully capitalize on the economic development potential of legalized gambling; that moneys from the state were flowing to border states. Why not keep that revenue within the state to benefit the people? Why not use that revenue to assist the economically distressed areas of the state, especially in the upstate region?

The governor and the Legislature negotiated the number of seven casinos as a balance between the state becoming a “mecca” for casinos on every corner of the state and having too few to achieve the state’s revenue goals. But once they reach the number seven, where exactly do they go?

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### Where Are We Now?

The Upstate New York Gaming Economic Development Act of 2013 (UGEDA) was signed by Cuomo as Chapter 174 of the laws of 2013.<sup>2</sup> UGEDA is the Legislature’s road map for the implementation of the 17 words added to the constitution. It grants the New York Gaming Commission authority to implement casino gaming within the state.<sup>3</sup> The commission, created by the Legislature in 2012, now reviews, governs

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and implements all gaming and gambling, including the lottery, pari-mutuel racing, charitable gaming and casinos.<sup>4</sup>

UGEDA first established the purpose of casino gaming.<sup>5</sup> The act's legislative findings include that upstate tourism constitutes a "critical component" of the state's economic infrastructure.<sup>6</sup> Four upstate casinos will attract non-New York residents and bring downstate New Yorkers upstate.<sup>7</sup> This attraction will in turn "boost economic development, create thousands of well-paying jobs and provide added revenue to the state."<sup>8</sup> Revenues from these casinos will be used to "increase support for education beyond that of the state's education formulae and to provide real property tax relief to localities."<sup>9</sup>

To help determine where, and when, the casinos will be located, UGEDA divides the state into two development zones, and within each zone, a number of development regions.<sup>10</sup> development zone one consists of Long Island, New York City, and Westchester, Rockland and Putnam counties.<sup>11</sup> The statute prohibits any casinos from opening in regional zone one.<sup>12</sup> The remaining counties of the state comprise zone two, within which six development regions are established.<sup>13</sup> Only three of zone two's development regions—regions 1, 2 and 5—are "open" for casino gaming right now.<sup>14</sup>

Development region 1 (sometimes referred to as the Catskill Region) includes the Catskill counties of Sullivan, Ulster, Greene and Delaware, plus the counties of Orange, Dutchess and Columbia. development region 2 (the Capital Region) includes the traditional capital district counties of Albany, Schenectady, Saratoga and Rensselaer, plus the counties of Washington, Fulton, Montgomery and Schoharie. Development region 5 (the Southern Tier) includes Broome, Tioga, Tompkins and Seneca counties, plus parts of Wayne, Schuyler and Chemung counties.<sup>15</sup>

UGEDA requires the Gaming Commission to appoint a Gaming Facility Location Board which will have five members.<sup>16</sup> Once three members are appointed, the board will have 90 days to issue a request for applications for zone two gaming facility licenses. The form of the application will be developed by the commission with assistance from the board. The board is also instructed to develop criteria to assess which applications will "provide the highest and best value to the state, the zone and the region" where the casino will be located.<sup>17</sup> While neither the board nor the criteria have been established as of this writing, there are clues to what the criteria will be throughout UGEDA. These include the requirement that the applicant must be able to receive a license.

The license will require an extensive background check, including a review of the applicants' character, associates, habits, financial records, and overall business activities.<sup>18</sup> The facility must meet certain requirements—the applicant must propose creating a destination resort casino "of the highest caliber" which is to include at least one hotel and other "quality" gaming amenities. The board will establish the required capital investment for the facility and require that the maximum revenues possible will be received by the state and the localities. The applicant will be required to submit a detailed market analysis detailing the benefits of the site location while also mitigating any potential impacts on the host or nearby localities.<sup>19</sup>

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Since UGEDA is intended to boost upstate tourism and provide economic benefits by way of tax relief, the applicant will need to demonstrate how the public supports its site and facility plan; how the applicant will operate the facility in partnership with and while promoting, local/existing hotels, restaurants and retail facilities; and how the new facility will partner with existing live entertainment facilities in the region.<sup>20</sup>

#### Where Are We Going?

By the middle of February, the board should be established and prepared to commence its work. The commission and the board will issue regulations for proceeding with the licensing and application requirements set forth in UGEDA. Those regulations should be issued before March 1, 2014. The request for applications can be expected sometime during March 2014. The response period should be between three and five months, but since many potential applicants are already working on the disclosed criteria, including location determinations and market studies, this period may be closer to 90 days.

So the best guess is that applications to the board will be due on or about June 30. A deci-

sion by the board should take anywhere from three to six months, but we should have an indication of the four locations during the fall. UGEDA requires the posting of the application fee and 10 percent of the required capital investment shortly after the award, and the facility is required to be completed within 24 months of the award.

In creating a structure that allows for the public bidding of the casino locations, the governor and the Legislature have created a transparent process that creates a fair and even playing field for any applicant who satisfies the basic criteria. The public procurement process provides each applicant the opportunity to "make their case" as to why their site, facility, and vision will provide destination tourism to upstate New York and maximum revenue to the state. To get the process right, the commission and the board need time to develop the application, draft the regulations, develop scoring criteria, conduct due diligence reviews and site visits, all of which take necessary time. In short, CASINOS ARE COMING!! But, look forward to the middle or end of 2015 at the earliest before the first roulette wheel is spun.

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1. See Racing, Pari-Mutuel Wagering and Breeding Law §1300(2), as added by L. 2013, ch. 174.

2. See Racing, Pari-Mutuel Wagering and Breeding Law §104 et seq., as added by L. 2013, ch. 174.

3. See State Finance Law §99-u(1), as added by L. 2013, ch. 55.

4. See Racing, Pari-Mutuel Wagering and Breeding Law §100 et seq., as added by L. 2012, ch. 60.

5. See Racing, Pari-Mutuel Wagering and Breeding Law §1300 et seq.

6. Id. at §1300(6).

7. Id.

8. Id. at §1300(5).

9. Id. at §1300(9).

10. See id. at §1310.

11. Id. at §1310(1).

12. Id. at §1311(1).

13. Id. at §1310(1), (2)(b).

14. See id. at §1311(1).

15. Racing, Pari-Mutuel Wagering and Breeding Law §1310(b)(1), (2), (5).

16. Racing, Pari-Mutuel Wagering and Breeding Law §1301(5), §109-a(1).

17. Id. at §1306(3).

18. See id. at §1306(2).

19. See id. at §1320(1), (2).

20. Id.