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## Slots in the City: A Critical Look at the Balance of Decision-Making Power in Gaming Legislation

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# SLOTS IN THE CITY: A CRITICAL LOOK AT THE BALANCE OF DECISION-MAKING POWER IN GAMING LEGISLATION

*Eric B. Becker\**

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### INTRODUCTION

The last twenty years have seen a dramatic rise in commercial gambling across the United States. One by one, states have enacted gaming-enabling legislation in an effort to promote economic development and increase tax revenue from formerly illegal activities. Recently, legislators have begun to tap into major metropolitan markets by licensing casinos in closer proximity to highly populated areas, and even in some of the nation's largest cities. Many politicians and businessmen view gaming as a powerful economic and tourism development tool. The bright lights, ringing bells, and the prospect of large winnings all contribute to the allure of casino gambling. Unfortunately, some patrons experience the negative effects attendant to gambling. Additionally, as an industry notorious for illicit behavior, gambling must be heavily regulated to best balance the intended benefits with the wide variety of potential side-effects.

These issues can become increasingly complex when gaming proponents seek to place casinos in urban areas. For the past few years, the casino issue has proven highly controversial in Philadelphia. After Pennsylvania State Legislators decided that the City of Brotherly Love would play host to two slot machine parlors, by passing the Pennsylvania Race Horse Development and Gaming Act, the process has been anything but smooth. Many citizens groups and local politicians have expressed grave concern over having casinos in Philadelphia and have tried to create a role for local government in regulating gaming. Over four years later, casino developers have yet to break ground in Philadelphia. So far, few new jobs have been created, and only attorneys and the Justices of the Pennsylvania Supreme Court have seen an increase in the demand for their labor. A host of lawsuits have indefinitely

delayed the process of building casinos in Philadelphia. Many of these problems could have been avoided if Philadelphians had been given an opportunity to participate in the matter. At a minimum, local actors could have been able to voice their opinions on gaming and the two casinos intended for the city.

This Note focuses on the ability of local governmental bodies and local actors to become involved when a state seeks to introduce casino-based gaming or license additional casino properties. Traditionally, states retain the power to make most gaming-related decisions, sometimes only allowing simple “yes or no” voter referenda. This Note argues that an increased role for local actors in bringing gaming to cities will best protect the interests of the people most affected by casinos.

Part I provides a brief background of gambling in America and the key aspects of gaming-enabling legislation in various states. Part II discusses local government law and theory. Part III examines aspects of casino gambling that highlight the importance of local involvement in the legislative and regulatory process. It also discusses case studies of commercial casino development in Philadelphia and Detroit. Part IV compares the introduction of gaming in the two cities to better understand the successful introduction of casinos in Detroit.

## I. GAMING

Gaming or gambling is defined by Black’s Law Dictionary as “the act of risking something of value, esp. money, for a chance to win a prize.”<sup>1</sup> Gamblers participate in the activity by placing wagers<sup>2</sup> in a variety of formats. Gaming is regulated at both the federal and state level.<sup>3</sup> Federal gambling statutes primarily serve to prohibit gaming activities and related financial transactions. In the United States there are five types of legal gaming: (1) charitable gaming, (2) commercial casino gaming, (3) lotteries, (4) Native American gaming, (5) and “pari-mutuel” wagering.<sup>4</sup>

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1. BLACK’S LAW DICTIONARY 701 (8th ed. 2004).

2. *Id.* at 1610 (defining “wager” as “1. Money or other consideration risked on an uncertain event; a bet or gamble. 2. A promise to pay money or other consideration on the occurrence of an uncertain event”).

3. *See* 18 U.S.C. §§ 1081-1084 (1994); 31 U.S.C. §§ 5361-5367 (2006).

4. AM. GAMING ASS’N, U.S. COMMERCIAL CASINO INDUSTRY: FACTS AT YOUR FINGERTIPS 3 (2008), available at [http://www.americangaming.org/assets/files/uploads/REVISED\\_FAYFT\\_PDF\\_FINAL\\_FEB\\_2008.pdf](http://www.americangaming.org/assets/files/uploads/REVISED_FAYFT_PDF_FINAL_FEB_2008.pdf) (internal citation omitted) [hereinafter “FACTS AT FINGERTIPS”].

Commercial casino gaming is the largest segment of the gaming market.<sup>5</sup> Casinos typically offer “banked” games in which the casino itself is participating in the game by taking wagers from patrons.<sup>6</sup> Commercial casinos exist in a variety of forms, the most recognizable being Las Vegas-style casinos, which are land-based and typically include entertainment and hospitality facilities beyond gaming.<sup>7</sup> Another common type of casino is the riverboat casino. Riverboat casinos exist in two distinct forms, “excursion” (mobile), and “dockside” (permanently moored boats).<sup>8</sup> An additional form is the “racino,” a casino that is located at a previously existing “pari-mutuel” racetrack facility.<sup>9</sup> Commercial casinos are extremely popular in the United States as 56.2 million people made 371 million trips to casinos in 2006.<sup>10</sup>

Pari-mutuel wagering is a form of gaming in which the total prize pool is based on the amount of money wagered by all participants.<sup>11</sup> Americans participate in pari-mutuel wagering when betting on horseracing, dog racing, jai alai, or similar games and events.<sup>12</sup> Forty-three states have authorized pari-mutuel wagering.<sup>13</sup> The racino form of commercial casino gambling involves other forms of gaming being introduced at a licensed pari-mutuel facility.<sup>14</sup>

### A. The History of Gaming in America

While the commercial casino many Americans associate with gambling is a recent invention, humans have been gambling for thousands of years.<sup>15</sup> Throughout history, governments have taken an active role in regulating gambling, frequently levying taxes on the activity.<sup>16</sup> The rationales behind gaming regulation have varied

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5. *See id.*

6. *See id.*

7. *See id.*

8. *See id.*

9. *See id.*

10. AM. GAMING ASS'N, 2007 STATE OF THE STATES: THE AGA SURVEY OF CASINO ENTERTAINMENT 7 (2007), available at [http://www.americangaming.org/assets/files/aga\\_2007\\_sos.pdf](http://www.americangaming.org/assets/files/aga_2007_sos.pdf) [hereinafter AGA SURVEY].

11. *See* FACTS AT FINGERTIPS, *supra* note 4, at 3.

12. *Id.*

13. AM. GAMING ASS'N, GENERAL INDUSTRY INFORMATION, [http://www.americangaming.org/Industry/factsheets/general\\_info\\_detail.cfv?id=15](http://www.americangaming.org/Industry/factsheets/general_info_detail.cfv?id=15) (last visited Sept. 21, 2008).

14. *See* FACTS AT FINGERTIPS, *supra* note 4, at 3.

15. *See* Ronald J. Rychlak, *The Introduction of Casino Gambling: Public Policy and the Law*, 64 *Miss. L.J.* 291, 294-98 (1995).

16. *See id.*

in different eras and across cultural boundaries.<sup>17</sup> Some governments simply sought to raise revenue, while others forbade or severely limited gambling as contrary to religious ideals.<sup>18</sup>

When settlers first came to what is now the United States, they brought gambling with them, eventually leading Puritan leaders to enact gaming regulation as they felt that gambling was a waste of time and therefore part of the greater sin of idleness.<sup>19</sup> Nonetheless, America was developed with funds derived from gambling; colonial governments used lotteries to finance the development of the colonies as they lacked the power to tax residents directly.<sup>20</sup> Following this lead, many early American ventures relied on lotteries to raise revenue.<sup>21</sup> However, around the turn of the nineteenth century state governments began to legislate against lotteries, and by the time of the Civil War there was a nearly nationwide ban on gambling activity.<sup>22</sup>

In the post-Civil War era gambling reemerged in various forms.<sup>23</sup> Some southern states returned to lotteries to address financial hardships.<sup>24</sup> Additionally, gambling was prevalent on riverboats cruising the Mississippi and in gaming halls and saloons across the expanding Western frontier.<sup>25</sup> Unfortunately, gambling was frequently accompanied by negative side-effects such as crime, violence, and poverty. State sanctioned lotteries eventually fell victim to criminal influences, leading regulators to end this form of legalized gambling.<sup>26</sup>

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17. *See id.*

18. *See id.*

19. *See id.*

20. *See id.* at 299.

21. *See id.* at 299-300. Rychlak provides examples such as Ivy League Universities, the Revolutionary War effort, and the establishment of hundreds of religious institutions. *Id.*

22. *See* I. Nelson Rose, *The Legalization and Control of Casino Gambling*, 8 *FORDHAM URB. L.J.* 235, 235 n.1 (1980). Professor Rose explains that anti-lottery forces were influential in bringing a halt to lotteries in all states other than Delaware, Kentucky, and Missouri. *Id.*

23. *See id.* (“The most infamous lottery of this time was the ‘Louisiana Lottery’ which was operated in New Orleans by New York gambling syndicate and penetrated every state of the nation despite anti-lottery laws.”).

24. *See id.* at 245 n.1.

25. *See* DENISE VON HERMANN, *THE BIG GAMBLE: THE POLITICS OF LOTTERY AND CASINO EXPANSION* 41 (2002) (referencing various forms of illegal and quasi-legal forms of gambling in Colorado “going back as far as the times of westward expansion and the great Gold Rush of the 1800s”).

26. *See* Rose, *supra* note 22, at 235 n.1.

The demise of lotteries brought gambling to a halt by the end of the nineteenth century.<sup>27</sup> As states continued to pass laws prohibiting gambling, many local governments took an active role in enforcing the bans, as well as creating local ordinances that further defined what types of gambling-related conduct were illegal.<sup>28</sup> The bases for modern gaming regulation legislation are rooted in the legal frameworks banning both commercial gaming and various types of illegal gambling.<sup>29</sup>

Like many activities prohibited by the government, gambling did not wither and die.<sup>30</sup> Extensive illegal gambling, ranging from underground card rooms and lotteries to bookmakers involved in sports gambling persisted.<sup>31</sup> Unfortunately, despite the development of a wide array of legalized gambling, the criminal element followed gaming into the modern era. As aspects of gambling are “easy to manipulate and have historically been subject to fraud,”<sup>32</sup> both organized and white-collar crime have been associated with the industry.<sup>33</sup> Gambling in America’s first casino town, Las Vegas, was in part developed and controlled by organized criminal enterprises.<sup>34</sup> “Street crime” has also been a problem associated with gambling.<sup>35</sup> Many compulsive gamblers resort to crime to finance their habits; others become mired in alcohol and illicit drug abuse. The long-standing presence of both illegal gambling and related crimes have proven that strict regulatory schemes are necessary to mitigate these societal harms.

For most of the twentieth century, states statutorily banned gambling, and many allowed local governments to enact specific gam-

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27. See Rychlak, *supra* note 15, at 302-03.

28. Paul D. Delva, *The Promises and Perils of Legalized Gambling for Local Governments: Who Decides How to Stack the Deck?*, 68 TEMP. L. REV. 847, 852-55 (1995).

29. See *e.g.*, *id.* at 852 (“Although more and more forms of gambling are permitted by state law, the practice remains largely prohibited in the United States by civil or criminal laws. Indeed, the increasing promotion of state-sponsored gambling contradicts state constitutional prohibitions and extensive criminalization of gambling in state law.”).

30. See Rose, *supra* note 22, at 249-51.

31. Professor Rose describes various forms of continuing illegal gambling including “numbers” games, sports betting with bookies, and both cards and dice games. *Id.*

32. E.L. Grinols & J.D. Omorov, *Development or Dreamfield Delusions?: Assessing Casino Gambling’s Costs and Benefits*, 16 J.L. & COM. 49, 53 (1996).

33. *Id.* at n.11.

34. See VON HERMANN, *supra* note 25, at 11 (“The image of casinos was linked for many years to the mob-controlled Las Vegas casinos such as the Flamingo, which was built in 1946 by ‘Bugsy’ Siegel.”).

35. See *id.*

ing-related laws.<sup>36</sup> Some local governments further suppressed gaming activities, often enacting much harsher limitations than those imposed by state laws.<sup>37</sup> The power for local governments to pass these types of laws stems either from direct grants by the state legislature within the legislative scheme or is implied by a lack of statutory language reserving all rights to control gaming with the state.<sup>38</sup>

On the other hand, some state statutory schemes preempt local governments from promulgating laws related to gaming.<sup>39</sup> As with other issues of local control, if state law comprehensively controls an area of law, such as gaming, courts traditionally defer to the state and prohibit the local actors from taking independent action.<sup>40</sup> Additionally, if a state's constitution contains provisions regarding gambling, courts will usually limit local government attempts to promote or suppress such activities.<sup>41</sup>

### B. The Modern Era: Casino Gaming

Today gaming is one of the most highly profitable<sup>42</sup> and strictly regulated<sup>43</sup> industries in the United States, with legalized commercial gambling occurring in all but two states.<sup>44</sup> Although Nevada legalized casino gaming in 1931<sup>45</sup>, the modern era of gambling in the United States truly began in the 1960s.<sup>46</sup> In 1964, New Hampshire became the first state to host a modern lottery,<sup>47</sup> prompting

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36. See Delva, *supra* note 28, at 854.

37. See *id.* at 854-55. Delva provides examples from courts of multiple states upholding local ordinances aimed at restricting gambling and like activities. *Contra* Rose, *supra* note 22, at 250-52 (using the term "benign prohibition" to describe how local governments frequently did not enforce gambling-related laws for a variety of reasons).

38. See Delva, *supra* note 28, at 854.

39. See *id.*

40. See *id.* at 854-55.

41. See *id.* at 854 (describing judicial treatment of the Louisiana Constitution when the Louisiana Supreme Court "held that . . . constitutional language creates in the legislature the exclusive right to define and suppress illegal gambling activities").

42. According to the American Gaming Association, gross gaming revenues in 2006 totaled \$32.42 billion. AGA SURVEY, *supra* note 10, at 2.

43. See FACTS AT FINGERTIPS, *supra* note 4, at 6.

44. See *id.* at 3.

45. See *id.* at 4.

46. See, e.g., Rose, *supra* note 22, at 245 n.1 (stating that a "third wave" of legalized gambling in America kicked off when New Hampshire authorized a lottery in 1964); Rychlak, *supra* note 15, at 303 ("From the turn of the century until the mid 1960's, there was fairly little legalized gambling and no state sponsored gambling in the United States. Overall . . . legal gambling was at a historic low in this nation.").

47. See FACTS AT FINGERTIPS, *supra* note 4, at 3.



many other states to provide for legalized forms of gambling in the following years.<sup>48</sup> Yet, for nearly fifty years Nevada would remain the only home to casinos in America. It was not until 1976 that New Jersey passed legislation aimed at revitalizing the beach resort of Atlantic City through the introduction of casinos.<sup>49</sup> The New Jersey legislature wanted to ensure the propriety of the industry by limiting casinos to Atlantic City as well as various other restrictive policies.<sup>50</sup> New Jersey's entrance into the world of gaming brought the state sizeable tax revenues, and in turn opened the eyes of many American legislators to the benefits of playing host to casinos. The last twenty years have seen a dramatic rise in gambling activity in the United States: there are now twenty states hosting commercial casinos.<sup>51</sup>

While most states share the primary goals of increasing tax revenue and economic development when introducing casino gambling, enabling legislation and gaming regulation differ greatly from state to state. Some regulatory schemes place limits on the number or location of gaming facilities, while others choose to restrict the games that operators can conduct in their facilities. No matter the stated goals of introducing gaming, all states have implemented some form of regulation to protect gamblers, prevent crime, and mitigate potentially negative side-effects of gaming.<sup>52</sup>

In creating a regulatory structure, state legislators must fully consider the benefits that they hope their state will receive from gaming operations, and define a set of goals for their state.<sup>53</sup>

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48. *See id.*

49. N.J. STAT. ANN. § 5:12-1(4) (West 1995) ("Legalized casino gaming has been approved by the citizens of New Jersey as a unique tool of urban redevelopment for Atlantic City. In this regard, the introduction of a limited number of casino rooms in major hotel convention complexes, permitted as an additional element in the hospitality industry of Atlantic City, will facilitate the redevelopment of exiting blighted areas and the refurbishing and expansion of existing hotel, convention, tourist, and entertainment facilities; encourage the replacement of lost hospitality-oriented facilities; provide for judicious use of open space for leisure time and recreational activities; and attract new investment capital to New Jersey in general and to Atlantic City in particular.").

50. *See id.*

51. *See* FACTS AT FINGERTIPS, *supra* note 4, at 3. This figure does not include states that have entered into gaming agreements pursuant to the Indian Gaming Regulatory Act.

52. Cory Aronovitz, *The Regulation of Commercial Gaming*, 5 CHAP. L. REV. 181, 181 (2002) (explaining that gaming regulation aims to promote integrity in gaming operations and instill confidence in gamblers that gaming operators are treating them fairly).

53. *Id.* at 182-88. Aronovitz defines the two main motivations for gaming regulation regarding economic benefits of and reaction to market competition. He further

Lawmakers should also clearly define a comprehensive public policy when enabling gaming.<sup>54</sup> Moreover, all comprehensive gaming laws should address licensing, operational controls, law enforcement, taxation, and accounting and auditing functions.<sup>55</sup>

Three dominant models for regulation have developed: the “Nevada model,” the “New Jersey model,”<sup>56</sup> and various “Hybrid models.”<sup>57</sup> The Nevada model of gaming regulation seeks to maximize economic benefits by creating a relatively free environment for gaming operators to respond to market demand for their services, while still ensuring that operations are legitimate.<sup>58</sup> Nevada gaming legislation neither limits the number of gaming licenses available in the state nor places geographic restrictions on gaming facilities. The New Jersey legislature took a vastly different approach to gaming regulation. The New Jersey regulatory model focuses on the potential negative effects of casino gaming and reserves power to the state over nearly every aspect of the casino industry.<sup>59</sup> One similarity between the two models is that both states rely on two separate administrative bodies to regulate gam-

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breaks down the potential economic benefits of introducing gaming as economic revitalization, new employment opportunities, tax revenue, and increased levels of tourism. He then articulates the potential for each type of economic benefit and explains that expectations frequently fall short once gaming moves from planning to the operational stage. *Id.*

54. *Id.* at 189. Aronovitz outlines a three-step process for creating gaming-enabling legislation: determining public policy, defining goals, and implementing legislation. Aronovitz contends that the implementation stage is unique and requires skills outside of the expertise of most legislators. *Id.*

55. *See id.* at 189-94. The licensing element of the law is a chief concern, as it will control who may own and operate casinos, where the casinos may be placed and who may work and manage gaming related activities. The licensing component of a comprehensive gaming law is most important for this Note, since it is the primary area where local actors can become involved in the process and influence the effects that gaming will have on their locality. Although other factors are important to the overall impact of gaming, I believe that those functions are best served by an administrative agency or agencies with the requisite expertise in the field.

56. *See id.* at 190; *see also* NAT'L GAMBLING IMPACT STUDY COMM'N, NATIONAL GAMBLING IMPACT STUDY COMMISSION FINAL REPORT 3-5 to 3-6 (1999), *available at* <http://govinfo.library.unt.edu/ngisc/reports/3.pdf>. [hereinafter NGISC]; Alvin J. Hicks, *No Longer the Only Game in Town: A Comparison of the Nevada and New Jersey Regulatory Systems of Gaming Control*, 12 SW. U. L. REV. 583, 585-89 (1980-1981).

57. Aronovitz, *supra* note 52, at 190-91.

58. NGISC, *supra* note 56, at 3-5. While there are few limits on the number and location of casinos, the state is highly involved in policing the industry. *Id.*

59. *Id.* The fact that gambling in New Jersey is restricted to Atlantic City reflects the philosophy that unrestrained gambling can prove disastrous for the state and its residents. *Id.*

ing.<sup>60</sup> The third framework, the “Hybrid” model, has been used by many of the states that introduced casino gaming in the last twenty years.<sup>61</sup> Hybrid models typically limit the number of gaming establishments and rely on a singular agency to perform all regulatory functions related to the industry.<sup>62</sup> The Hybrid model has proven popular and is in place in one form or another in many of the jurisdictions that have legalized gaming.<sup>63</sup>

Within these greater regulatory frameworks gaming legislation varies greatly. One such aspect of gaming legislation is the level of involvement for local actors in the gaming-enabling and casino licensing process. Local involvement in the process includes both actions taken by local governments and by voters who can voice their opinion by voting on the legality of gambling in their state, city, or county.

### 1. *Voter Approval of Gaming-Enabling Legislation*

In order for casino gaming to be legalized in a state, that state must take action to pass gaming enabling legislation or modify current laws to enable new forms of wagering.<sup>64</sup> Some states require voter approval before bills can pass into laws and the process of enabling gaming can begin. For example, the voters of New Jersey<sup>65</sup> and Michigan<sup>66</sup> participated in statewide referenda approving commercial gaming in their respective states, while voters

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60. Aronovitz, *supra* note 52, at 190. Both Nevada and New Jersey separate the administrative investigation and enforcement functions from those of administrative decision-making. *Id.*

61. *Id.*

62. NGISC, *supra* note 56, at 3-6. Mississippi has a unique regulatory scheme in which one agency is in charge of all functions like the other “hybrid” jurisdictions but (like Nevada) has no limit on gaming facilities, and (like New Jersey) puts limits on the potential location of properties. *Id.*

63. Aronovitz, *supra* note 52, at 190-91.

64. I. Nelson Rose, *Pennsylvania's New Slot Law*, 9 GAMING L. REV. 111, 111 (2005) [hereinafter Rose, *New Slot Law*] (“Legalizing gambling is not the same as decriminalizing it. When a state’s lawmakers decide to make gaming legal, they never repeal the state’s criminal anti-gambling statutes. Instead, the legislature creates a licensing system for operators and suppliers. A license has such great commercial value because it allows the holder to do something which would otherwise send that person to jail. Lawmakers have to decide what forms of gaming will be allowed and how many licenses will be issued.”).

65. N.J. STAT. ANN. § 5:12-1(b)(4) (West 1995) (“Legalized casino gaming has been approved by the citizens of New Jersey as a unique tool of urban redevelopment for Atlantic City.”).

66. See MICH. GAMING CONTROL BD., PROPOSAL E BALLOT LANGUAGE AND RESULTS [http://www.michigan.gov/mgcb/0,1607,7-120-1382\\_1450-12939--,00.html](http://www.michigan.gov/mgcb/0,1607,7-120-1382_1450-12939--,00.html). (last visited March 1, 2008). The vote on allowing casino gaming in Detroit was extremely close, with only 51.5% of voters in favor of gaming. *Id.*

did not have the opportunity to voice their opinions at the state level in Pennsylvania or Iowa.<sup>67</sup> Statewide referenda voting on gaming allows all voters, not only those in close proximity to potential casinos to participate in the decision-making process.

Another form of direct democratic participation in gaming-enabling legislation is voter referenda at the local level. Gaming-enabling legislation can limit citizen participation in the gaming enabling process by allowing only those in the city or county where a potential gaming establishment would be located to vote on the issues. For instance, gaming legislation in both Iowa<sup>68</sup> and Mississippi<sup>69</sup> provides for votes at the county level before a riverboat casino can be issued a license to dock and begin gaming operations. One key distinction between the two states is that in Iowa the state legislature requires a county referendum as part of the licensing procedure, whereas in Mississippi local residents must take affirmative steps to compel a vote on the issue.<sup>70</sup> Additionally, the Iowa gaming statutes also require voters to re-approve gambling in their county at predetermined dates or intervals.<sup>71</sup>

An alternative to approval by voters is approval of gaming by local lawmakers. For example the Michigan Gaming & Control Act (“MGCA”) requires that the local legislative body in any city that is eligible for gaming enact an ordinance approving of gaming.<sup>72</sup> As Detroit was the only city eligible for gaming under the act, the affirmative approval of the Detroit government was necessary for the act to have effect.

## 2. *Local Involvement in the Casino Licensing Process*

The distribution of gaming licenses is a key aspect of gaming-enabling legislation.<sup>73</sup> Licenses are required for the casino as a whole, casino ownership, employees in various roles, and even gaming equipment suppliers.<sup>74</sup> The decision to issue gaming licenses is typically vested in an administrative agency.<sup>75</sup> Investiga-

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67. AM. GAMING ASS'N, *INDUSTRY STATISTICS BY STATE*, <http://www.american-gaming.org/Industry/state/statistics.cfm> (last visited Mar. 1, 2008).

68. IOWA CODE ANN. § 99.F.7.11.a. (West 1996) (regarding riverboat gambling); IOWA CODE ANN. § 99.F.7.11.c (West 1996) (regarding licensing gambling games at licensed pari-mutuel racetracks).

69. MISS. CODE ANN. §19-3-79 (West 1994).

70. *Id.*

71. IOWA CODE ANN. § 99.F.7.11.d (West 1996).

72. MICH. COMP. LAWS ANN. § 432.206(1)(a) (West 2001).

73. *See* Aronovitz *supra* note 52, at 191-95.

74. *See id.*

75. *See id.*

tions into applicants' backgrounds are conducted in order to comply with laws regulating everything from criminal history to conflict of interest with political figures and connection to other gaming ventures.<sup>76</sup> States such as New Jersey and Nevada have independent agencies for the investigative and licensing functions.<sup>77</sup> In contrast, Pennsylvania vested both the authority to investigate applicants and to make all licensing decisions in the Pennsylvania Gaming Control Board.<sup>78</sup>

Local government actors may also play a role in determining which applicants can receive gaming licenses. Factors such as location, prospective overall economic impact and the applicants' prior gaming experience are considered in determining who should be licensed.<sup>79</sup> For example, pursuant to the MGCA, local government is highly involved in choosing which proposed casinos are eligible for licensing, as applicants must contract with the city of Detroit before applying for licensure.<sup>80</sup> Prior to submitting an application to the gaming board, all applicants must enter into a "certified development agreement" with Detroit.<sup>81</sup> Development agreements address areas of critical concern to local government, including but not limited to location, zoning, and infrastructure.<sup>82</sup> In Illinois, the power to decide if gaming will happen in a specific city or county rests in the hands of local government actors as part of the licensing process.<sup>83</sup>

## II. LOCAL GOVERNMENT

To understand the importance of granting local actors a role in the complex process of bringing casino gaming to a particular city or county, it is important to recognize the basic principles of local government law: the traditional nature of local legislative bodies in our political system and the developments that have led to the prevalence of "home rule" governments. Additionally, aspects of local government scholarship are important to consider in the con-

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76. *See id.*

77. *See supra* note 60 and accompanying text.

78. *See infra* note 177.

79. MICH. COMP. LAWS ANN. § 432.202(r) (West 2001).

80. *See id.* § 432.206(1)(b).

81. *Id.* Detroit may only have three pending development agreements at any given time. *Id.* § 432.206(2). If the board denies licensure to an applicant, the city is allowed to enter into another development agreement. *Id.*

82. *See* § 432.202(r).

83. *See* 230 ILL. COMP. STAT. ANN. 10/7-3 (West 2003).

text of the legislative process concerning enabling commercial gaming.

### A. Principles of Local Government in America

Local governments exist in a curious form, as they are nearly wholly subordinate to their state. City and other local governments have no innate power to act unilaterally.<sup>84</sup> The U.S. Constitution provides no rights for local governments against their states<sup>85</sup> and they are neither recognized nor provided for within our governmental system.<sup>86</sup> Therefore, Americans have no inherent right to governance at the local level.<sup>87</sup> Local governments' existence and authority are established by their home state alone.<sup>88</sup> This results in a relationship in which the local government can be seen as a "delegate"<sup>89</sup> or "agent"<sup>90</sup> of the state, acting with powers limited to those granted by the state.<sup>91</sup> The range of local government powers were traditionally defined by "Dillon's Rule,"<sup>92</sup> which states that if there is ambiguity regarding the power of a local government to take a specific action, a court should assume that the local authority does not have that power.<sup>93</sup> Therefore, without an express grant of power to take action on a specific subject, local governments were subordinate to their state legislatures.

In the era following the Civil War, many states enabled local governmental actors by amending their constitutions to include home rule.<sup>94</sup> Home rule amendments allowed localities to take control of issues of local concern through the adoption of their own

84. Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1062 (1980).

85. Richard Briffault, *Our Localism: Part I-The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 7 (1990) [hereinafter Briffault, *Our Localism*].

86. Frayda S. Bluestein, *Do North Carolina Local Governments Need Home Rule?*, 84 N.C. L. REV. 1983, 1985 (2006).

87. Briffault, *Our Localism*, *supra* note 85, at 7.

88. *See id.* Professor Briffault states that "local government is a creature of the state. It exists only by an act of the state, and the state, as creator, has plenary power to alter, expand, contract or abolish at will any or all local units." *Id.*

89. *Id.*

90. *Id.*

91. *See id.*; *see also* *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907) ("Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them.").

92. Briffault, *Our Localism*, *supra* note 85, at 8 ("Dillon's Rule operates as a standard of delegation, a canon of construction and a rule of limited power.").

93. *See id.*

94. *See id.* at 10.

charters and ultimately their own legislative initiatives.<sup>95</sup> Local governments operating under home rule are presumed to have the power to regulate any matter that does not run afoul of state law. While many home rule provisions compel local governments to refrain from taking actions at odds with state law,<sup>96</sup> conflicts nonetheless arise. One pertinent example is the conflict between the Philadelphia City Council and the Pennsylvania Gaming Control Board.<sup>97</sup> The judicial treatment of conflicts between local and state actors determines the balance of power in a given state.<sup>98</sup> As states may dominate local actors in a particular area of the law,<sup>99</sup> another decisive factor in the balance of power is determining what issues are considered state or local concerns.<sup>100</sup>

## B. Local Involvement and Control

Popular participation in the legislative process, local expertise, and decision-making ability are important factors regarding the decisions made by legislators and administrative officials in promulgating both gaming-enabling legislation and a regulatory scheme for the industry.

### 1. *Local Participation in the Political Process*

“One of the hallmarks of governance at the state and local level is direct democracy.”<sup>101</sup> In certain situations, the ability to vote on lawmakers for state office is insufficient to provide voters with enough influence over important issues,<sup>102</sup> and their interests are best served by direct participation in the decision-making process.<sup>103</sup> Most states provide their citizens with the ability to influ-

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95. *See id.* (“The home rule movement had two goals: to undo Dillon’s Rule by giving localities broad lawmaking authority and to provide local governments freedom from state interference in areas of local concern.”).

96. *See* Bluestein, *supra* note 86, at 1994.

97. *See infra* notes 216-32 and accompanying text.

98. *See* Bluestein, *supra* note 86, at 1994 (stating that judges frequently employ preemption or implied preemption analysis).

99. *See id.* This approach is exemplified by the doctrine of implied preemption, which entails an inquiry based on the premise that “the local action is invalid if the court concludes that general laws indicate a legislative intent to foreclose local regulations on particular subjects.” *Id.*

100. *See id.* at 1998.

101. Richard Briffault, *Beyond Congress: The Study of State and Local Legislatures*, 7 N.Y.U. J. LEGIS. & PUB. POL’Y 23, 29 (2003) [hereinafter Briffault, *Beyond Congress*].

102. *See* Frug, *supra* note 84, at 1069 (arguing that popular involvement in the decision-making process requires acting on the local level).

103. *See* Briffault, *Beyond Congress*, *supra* note 101, at 29-30.

ence the legislative process through voter referenda, a process giving voters final approval over legislation.<sup>104</sup> Some states go a step further and allow for voter-initiated legislation, providing voters with an opportunity to dictate state laws.<sup>105</sup> The ability to direct aspects of the state lawmaking process encourages citizens to become informed and assert control over their future, as participation is moot without true power.<sup>106</sup> On the other hand, direct democracy allows people to potentially act without the proper background knowledge or simply based on emotion.<sup>107</sup> Therefore, direct democracy cannot exist without limits as “the travails of democracy itself must be taken into account and carefully weighed.”<sup>108</sup> It is through the protections provided by state legislative action and judicial review that the devices of direct democracy have “flourished as significant adjuncts in the overall governmental scheme.”<sup>109</sup>

Another way for voters to make their voices heard is by electing local government officials. “Democratic participation is presumably more possible at the local level, where government bodies and public officials are more accessible and closer to home than they are at the state or national level.”<sup>110</sup> Local legislators also focus their efforts of matters of local concern and thus must be responsive to their electorate. If local government proves unresponsive to voters’ needs, those voters may be able to move to another locality that they think will better serve their goals and desires.<sup>111</sup> Further, if local governments do not have the actual power to influence the

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104. *See id.* Bills containing referenda requirements will not become law without securing voter approval. Additionally, some states allow the use of “optional referenda,” which permit opponents to petition for a referendum that could strike down the law. *Id.*

105. *See id.*

106. Frug, *supra* note 84, at 1070 (“Power and participation are inextricably linked: a sense of powerlessness tends to produce apathy rather than participation, while the existence of power encourages those able to participate in its exercise to do so.”).

107. Stanley H. Friedelbaum, *Initiative and Referendum: The Trials of Direct Democracy*, 70 *ALA. L. REV.* 1003, 1032 (2007) (“A recourse to direct democracy, regardless of the immediate provocation or remedial orientation, ought not to be taken as a roving commission to dilute essential services or revenue sources, to endanger individual rights or safeguards, or to undermine the independence of state courts.”).

108. *Id.* at 1033.

109. *Id.*

110. Richard Briffault, *Localism and Regionalism*, 48 *BUFF. L. REV.* 1, 16 (2000) [hereinafter Briffault, *Localism and Regionalism*].

111. *See id.*



areas most important to voters, there will be less incentive for political participation no matter the locale.<sup>112</sup>

## 2. *Local Expertise*

“[W]hoever must wear the shoe knows best where it pinches.”<sup>113</sup>

“The essence of home rule is to enable people of different communities to find different answers to the same question, to tailor government action to local needs, circumstances and preferences.”<sup>114</sup> Home rule has been described as “concerned with the decentralization of decision-making to give a forum to those whose lives are focused on the parochial—home, family, and neighborhood—and thus bring the government down to where the goats can get at it.”<sup>115</sup> From this perspective, home rule allows actors within the local government to provide for their constituents in the most responsive manner; local governments are more likely to understand “parochial” concerns and needs, and local governments’ interests are more closely aligned as members of the same community.

Local governments have long been the primary actors in several aspects of regulation, as well as providers of public services.<sup>116</sup> Much of this local action has been responsible for determining the character of our cities and counties. For example, local governments have long been recognized as the primary actor in matters of zoning and land use.<sup>117</sup> For over eighty years, local governments have regulated land use through zoning.<sup>118</sup> The ability to zone “is a means by which groups can encourage uses of physical spaces that

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112. See *id.* at 17; see also Frug, *supra* note 84, at 1067-70 & n.130 and accompanying text.

113. Michael Libonati, *Home Rule: An Essay on Pluralism*, 64 WASH. L. REV. 51, 71 (1989) (describing home rule in the context of a tradition of political discourse).

114. Richard Briffault, *Home Rule for the Twenty-First Century*, 36 URB. LAW. 253, 264 (2004). Professor Briffault argues for a “presumption of local power to act on matters that affect the locality and people within it.” *Id.* Nonetheless, he states that local action should be limited when regulations result in “cross-border consequences, burden[ing] interlocal activity, or interfer[ance] with state policies that must apply statewide.” *Id.*

115. Libonati, *supra* note 113, at 51.

116. See Briffault, *Home Rule*, *supra* note 114, at 256.

117. See Michael Hawkins, *Casinos and Land Use: Law and Public Policy*, 12 CONN. L. REV. 785, 789 (1980); see also Briffault, *Our Localism*, *supra* note 85, at 57-58. Professor Briffault states that “[f]ew actions affect local life more than changes in land use[.]” and then describes how local government actions had been widely upheld in light of the common practice of exclusionary zoning policies. *Id.*

118. See *Village of Euclid v. Amber Realty Corp.*, 272 U.S. 365, 387 (1926).

they like and discourage uses they do not like . . . .”<sup>119</sup> For zoning actions to be valid, statutes often require that actions be under a comprehensive plan.<sup>120</sup> Therefore continuity in actions taken by local governments regarding land use is an important consideration when casinos come to town.

### C. Regionalism and the Drawbacks of Local Control

“The theoretical case for localism rests on a set of arguments about the role of local governments in promoting governmental efficiency, democracy and community. But in contemporary metropolitan areas, the economically, socially and ecologically relevant area is often the region . . . Regionalism is, thus, localism, for metropolitan areas.”<sup>121</sup> Advocates of regionalism argue that the interconnectedness of modern cities and suburbs requires governmental cooperation in order to prevent critical matters being considered by local actors in isolation.<sup>122</sup> An important element of thinking in regional terms is that actions taken by local governments frequently result in externalities.<sup>123</sup> As “[l]ocal government law traditionally did not place obligations upon municipalities to examine the impact of their decision making upon adjacent local governments or the region[.]” localities have taken actions focusing on their best interests alone.<sup>124</sup>

In the context of popular participation, similar arguments exist for regional governance as an alternative to local governments; that those affected by decisions should have the ability to have input in choosing who will make those decisions.<sup>125</sup> Advocates urge that “[i]f the region is a real economic and sociological entity . . . then it needs a coterminous political entity to promote and protect its health, safety, and welfare.”<sup>126</sup> Without having regional governance, voters who can only be heard at the state level can become

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119. Richard C. Shragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 374 (2001-2002).

120. BARLOW BURKE, *UNDERSTANDING THE LAW OF ZONING AND LAND USE CONTROLS*, 87 (2002).

121. Briffault, *Localism and Regionalism*, *supra* note 110, at 2.

122. See Janice C. Griffith, *Regional Governance Reconsidered*, 21 J.L. & POL. 505, 509 (2005).

123. See Briffault, *Localism and Regionalism*, *supra* note 110, at 2.

124. Griffith, *supra* note 122, at 526. Professor Griffith highlights zoning as an area of law in which municipalities knowingly take actions that would be detrimental to their neighbors. *Id.*

125. See *supra* notes 107-10 and accompanying text.

126. Laurie Reynolds, *Local Governments and Regional Governance*, 39 URB. LAW. 483, 492 (2007).

disenfranchised, as the actions of neighboring localities result in potentially negative externalities.<sup>127</sup> Nonetheless, currently no major metropolitan area has a governmental body capable of dealing with problems on a regional level.<sup>128</sup> Therefore, citizens must rely on state governments and courts to limit local governmental actions resulting in negative externalities.

### III. WHO SHOULD DECIDE IF, WHERE, AND HOW WE GAMBLE?

#### A. States Motives for Controlling the Gaming-Enabling Process

The motivating factors for introducing casino gaming are a necessary starting point for evaluating the level of local involvement in the process. Primarily, states turn to commercial gambling in order to increase tax revenue,<sup>129</sup> as the industry is subject to high rates of taxation.<sup>130</sup> Other motivating factors include, but are not limited to: economic development and job creation, expansion of the tourism industry, and reaction to the legalization of gaming in neighboring states.<sup>131</sup> Cities and counties who host casino gaming usually hope to receive similar benefits from enabling gaming. As tax revenue is a driving force behind legalized gaming for legislators, states frequently tax the gaming industry at rates above other commercial ventures.<sup>132</sup> As states have the power to place strict limits on entry into the casino market, limiting competition for gamblers wagers, corporations are willing to enter into the business despite the steep tax structures.<sup>133</sup> Since gaming legislation is enacted at the state level, it is possible to create a regulatory structure entirely under state control. This approach allows for state legislators and administrative agencies, such as gaming control boards to exclude local government from influencing the industry.

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127. See Briffault, *Localism and Regionalism*, *supra* note 110, at 21-22 ("In metropolitan areas, democracy requires giving the regional electorate a voice in local decisions that have regional consequences. Only by widening the scale of participation to include all of those affected by local actions can local decision-making in metropolitan regions be made truly democratic.").

128. See Reynolds, *supra* note 126, at 498-99.

129. Revenue generated from taxing casino profits is considered a "voluntary" tax on citizens, since no one is required to engage in gaming. Rychlak, *supra* note 15, at 311-12. Politicians frequently favor this approach to revenue generation as a way to fill state coffers without resorting to unpopular tax hikes. *Id.*

130. See Aronovitz, *supra* note 52, at 182.

131. See *id.*

132. See *id.*

133. See *id.*

If gaming legislation allows for local involvement, the state's goals in introducing gaming might be frustrated by such action.<sup>134</sup> For instance, if voters in a county in Iowa<sup>135</sup> chose not to permit casinos or riverboat docking, the state would not be able to license gaming operations and therefore would not be able to gain tax revenues.<sup>136</sup> Thus, limiting local involvement in the gaming-enabling process could allow state legislatures and administrative agencies to swiftly introduce gaming.

An important factor to consider in determining which parties will be involved making gaming-related decisions is the implementation process. Properly implementing gaming legislation is critical to the success of the industry.<sup>137</sup> Putting gaming into action differs greatly from other aspects of the legislative process.<sup>138</sup> Implementation of a successful regulatory structure may require a different set of skills and knowledge than other aspects of legislating commercial gaming.<sup>139</sup> For this reason, lawmakers delegate the implementation and enforcement functions related to gaming to regulatory agencies.<sup>140</sup> A properly established regulatory agency has the ability to control key aspects of industry and issue policies without requiring legislative action.<sup>141</sup> Thus, a gaming regulatory agency has the ability to remain flexible and can react to market changes to best serve both the industry and the public.<sup>142</sup>

### **B. Local Ramifications of Casino Gaming**

The primary argument for involving local actors in the enabling and regulating gaming is that “the greatest impact [of gambling] is felt at the local level.”<sup>143</sup> The report issued after the most recent comprehensive investigation of the gambling industry asserted the need for local involvement in bringing gaming to a jurisdiction after acknowledging “the paucity of evidence of net impact derived from the introduction of gambling into an area where it does not

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134. See MICHAEL BELLETIRE, *LEGISLATING AND REGULATING CASINO GAMING: A VIEW FROM STATE REGULATORS* 14 (1999), <http://govinfo.library.unt.edu/ngisc/reports/belletire.pdf>.

135. See *supra* note 71 and accompanying text.

136. See *supra* notes 118-24 (discussing the benefits and burdens related to direct democracy).

137. See Aronovitz, *supra* note 52, at 189.

138. See *id.*

139. See *id.*

140. See *id.* at 204-05.

141. See *id.*

142. See *id.*

143. See NGISC, *supra* note 56, at 7-16.

already exist.”<sup>144</sup> The report issued a clear recommendation, stating that “[t]he Commission is committed to the idea that local government agencies should make careful and informed decisions about whether to permit gambling into their respective jurisdictions.”<sup>145</sup> Local actors, whether or not they are involved in the legislative process must address many concerns related to commercial gaming.

Local governments face a variety of social problems,<sup>146</sup> such as crime,<sup>147</sup> as well as issues related to economic transformation,<sup>148</sup> changes in ability to control land use,<sup>149</sup> and increased demand on services.<sup>150</sup> These potentially negative externalities<sup>151</sup> of gambling should be carefully evaluated in the process of creating and implementing gaming legislation.<sup>152</sup> While frequently removed from active participation in the process of bringing casino gaming into

144. *See id.* at 7-28.

145. *See id.*

146. *See id.* at 7-18 to 7-28. The section of the report titled “The Social Impact of Gambling” includes the following subsections: “Problem and Pathological Gambling,” “Adolescent Gambling,” “Suicide,” “Divorce,” “Homelessness,” and “Abuse and Neglect.” *Id.* Nearly all literature addressing gaming laws and the introduction of gaming to a state or municipality devotes significant attention to the social costs related to gambling as a chief concern in the legislative decision-making process. *See generally* Aronovitz, *supra* note 52, at 199-202; Rychlak, *supra* note 15, at 328-60 (including environmental issues in discussion on the impacts of gambling).

147. There is considerable debate within gaming research about the relationship between legalized gambling and crime levels. *See* NGISC, *supra* note 56, at 7-12 to 7-14; Lori Chapman, *Riverboat Gambling in the Great Lakes Region: A Pot of Gold at the End of the Rainbow or Merely “Fools Gold”*, 26 U. Tol. L. Rev. 387, 414 (1995) (questioning whether a relationship exists between increased crime levels and the introduction of gaming). Nonetheless, experts are confident that organized crime has been eliminated from ownership and operation of casinos. NGISC, *supra* note 56, at 3-1.

148. *See infra* Part III.B.2.

149. *See generally* Hawkins, *supra* note 117; Edward W. McClenathan, *Land Use Implications of Casinos and Racinos on Local Governments in New York State*, 39 URB. LAW. 11 (2007).

150. *See* McClenathan, *supra* note 149, at 115; Rychlak, *supra* note 15, at 292 (“In some parts of the State . . . traffic problems have multiplied, drainage and sewer systems are strained and social service are struggling to keep up with a growing homeless population.”).

151. *See* EARL L. GRINOLS, *GAMBLING IN AMERICA* 25 (2004) (“A *negative externality* is a harmful effect that a firm or household’s choices have on other firms or households and that does not operate through market forces.”).

152. *See id.* (“In the case of casinos, if an increase in the number of pathological gamblers leads to social problems whose costs must be borne by those other than the casinos, this is an externality. If the presence of casinos creates conditions that lead to increase in crime that must be dealt with through money provided by public taxes, then that is an externality. Casinos get the profits; society gets negative externalities.”).

existence, local governments end up with much of the responsibility to ensure that potential costs associated with gambling do not outweigh the intended benefits to citizens.

### 1. *Social Problems*

A wide variety of social problems can arise in the presence of casino gambling. While the net effect of these problems is difficult to quantify,<sup>153</sup> it is clear that gambling has negative effects on some individuals and those individuals can negatively impact their communities. Specifically, gambling addiction and the related consequences must be kept in mind when state legislatures enable gaming.<sup>154</sup> Problem or compulsive gambling behavior is widespread.<sup>155</sup> As legalizing gambling frequently results in the creation of new gamblers,<sup>156</sup> a city or county that embraces gambling will likely see an increase in problem gambling activity.<sup>157</sup> Although states may be able to provide resources to help combat problem gambling,<sup>158</sup> much of the impact is felt in the communities where problem gamblers reside. One important concern is that “poor people tend to spend a disproportionate amount of their income on legalized gambling.”<sup>159</sup> Many services provided to those who cannot support themselves are furnished at the local level. Therefore, local actors might be forced to bear the brunt of the costs associated with problem gamblers.

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153. See NGISC, *supra* note 56, at 7-18. Much of the problem in assessing research related to the social effects of gambling is that it has been performed on behalf of the industry and therefore has the potential for bias. *Id.*

154. BELLETIRE, *supra* note 134, at 11-12.

155. The National Council on Problem Gaming defines “problem gaming” as “[G]ambling behavior which causes disruptions in any major area of life: psychological, physical, social or vocational.” National Council on Gambling, <http://www.ncp-gambling.org> (last visited Sept. 7, 2008). The Council further states that:

The term ‘Problem Gambling’ includes, but is not limited to, the condition known as ‘Pathological,’ or ‘Compulsive’ Gambling, a progressive addiction characterized by increasing preoccupation with gambling, a need to bet more money more frequently, restlessness or irritability when attempting to stop, ‘chasing’ losses, and loss of control manifested by continuation of the gambling behavior in spite of mounting, serious, negative consequences.

*Id.*

156. See Rychlak, *supra* note 15, at 336.

157. See *id.*

158. Methods for combating problem gambling include telephone hotlines for problem gamblers, setting aside funds for treatment programs, training programs for casino employees, and requirements related to casino advertising. See *id.*

159. *Id.* at 353. Rychlak notes that some casino jurisdictions, including Biloxi, Mississippi, have seen a rise in homelessness, demand on soup kitchens, and increased numbers of pawn shops. *Id.*

## 2. *Economic Transformation*

The introduction of casinos can result in positive economic changes for both states and municipalities, but growth can come with risks.<sup>160</sup> A key concern for lawmakers is the effect that casinos can have on other businesses. While the potential for increased tourism can bring in new local revenue, frequently casinos end up drawing mostly local customers.<sup>161</sup> This can potentially result in local casino clientele spending less or no money at businesses they formerly patronized, resulting in “cannibalization,”<sup>162</sup> a phenomenon also known as the substitution effect. A recent study indicates that introducing casinos does not always have a negative impact on local business, yet recommends that “municipalities considering implementing, or expanding, a casino development strategy” consider the potential for cannibalization and shifts in the marketplace.<sup>163</sup> Local governments will be forced to sort out the consequences of these and other types of shifts in their municipal economies, whether the end results for the community are negative or positive.

## 3. *Land Use*

The process of introducing gaming touches on many aspects of land use and related law. Land use planning for gaming “involves every level of government—state, regional, county and local. Further, the most effective approach will encompass all of those potentially divergent interests.”<sup>164</sup> Municipalities who choose to, or are

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160. *See id.* at 332.

161. *See* William R. Eadington, *The Spread of Casinos in Tourism Development, in CONTEMPORARY ISSUES IN TOURISM DEVELOPMENT* 127, 131-34 (Douglas G. Pearce & Richard W. Butler eds., 2002); Rychlak, *supra* note 15, at 329 (“Gambling does not, however, create money out of thin air. It only transfers funds from losing gamblers to casinos, lucky winners, and the state. That money comes from losing players, who are often residents of the state.”).

162. NGISC, *supra* note 56, at 2-8 (defining “cannibalization” as “the phenomenon where the apparent increased economic activity produced by a casino may actually be the result of its having drained money away from local non-gambling businesses”); *see, e.g.*, George G. Fenich & Kathryn Hashimoto, *Perceptions of Cannibalization: What Is the Real Effect of Casinos on Restaurants?*, 8 GAMING L. REV. 247, 247 (2004) (“[W]hile many in the business community welcome casino development, one particular segment vehemently opposes it: the food and beverage segment. They claim that casinos, through their use of complimentary food and beverages (comps) to gamblers, will adversely affect the restaurant business segment outside the casinos, and local operators will not be able to compete with the higher wages paid by the casinos.”).

163. *Id.* at 258.

164. Hawkins, *supra* note 117, at 794 (positing that a task force charged with correlating the different zoning systems and plans could be useful in ensuring efficient land use planning regarding casino gaming).

forced to, embrace gaming frequently lose some level of control over land use,<sup>165</sup> an area of law historically left to local government discretion.<sup>166</sup> One key area of concern for municipalities is their ability to modify or use existing zoning laws in the process of determining where casinos will be located as zoning laws in many jurisdictions were drafted before casino gaming was legal.<sup>167</sup> Therefore, despite requirements that casinos be licensed and located in accordance with local zoning provisions, local control can be stripped away if licensing decisions are entrusted entirely to state controlled administrative agencies.<sup>168</sup>

A striking example of local actors eliminated from one of the most sensitive aspects of governmental control over land use is the statutory grant of eminent domain powers to the New Jersey Casino Reinvestment Development Authority.<sup>169</sup> As the power to enforce eminent domain is grounded in showing a valid public purpose for the use of the land, using taken land for new casino properties has potential for great controversy, as the properties are privately owned, for-profit institutions. In Detroit the potential use of eminent domain to secure waterfront property for casino facilities created much commotion,<sup>170</sup> despite the fact that the actions were taken by the city itself.<sup>171</sup>

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165. See, e.g., McClenathan, *supra* note 149, at 116 (“[I]n New York a broad grant of authority by the state legislature to the Division of Lottery, environmental impact determinations, which are required under the State Environmental Quality Review Act (SEQRA), have been made by the Division of Lottery, not the local government where the racino is located.”). McClenathan posits that this could have negative results on existing land use plans. See *id.*

166. See *supra* notes 117-20 and accompanying text.

167. See McClenathan, *supra* note 149, at 114-15 (positing that local land use planners would not have envisioned casinos in their municipality’s comprehensive plan because casinos are technically illegal in the State of New York).

168. See Pa. Gaming Control Bd. v. City Council of Phila., 928 A.2d 1255, 1266-69 (Pa. 2007) (holding that in accordance with title 4, sections 1304(b)(1) and 1307 of the Pennsylvania Code, the Pennsylvania Gaming Control Board has the sole authority to locate gaming facilities, yet implementation must be “according to the zoning and land use provisions a city has enacted”).

169. See N.J. STAT. ANN. § 5:12-182 (West 1996); see *supra* note 51 and accompanying text.

170. See generally Frank Aiello, *Gambling with Condemnation: An Examination of Detroit’s Use of Eminent Domain for Riverfront Casinos*, 46 WAYNE L. REV. 1639 (2000) (concluding that condemnation under eminent domain is inappropriate for acquiring land to be used for casinos, despite potential public benefits related to economic development).

171. *Id.*



#### IV. CASE STUDIES

##### A. Pennsylvania Case Study

###### 1. Background

The process of bringing casinos to Pennsylvania has followed a long and winding road despite the fact that the state already played host to lottery and pari-mutuel gaming. Beginning in the early 1990's, the state considered various proposals to bring gaming to the state in one form or another.<sup>172</sup> One major push by gambling proponents was the *Excursion Boat Gambling Act for Waterfront Economic Development*, which ultimately failed to pass into law over two sessions of the Pennsylvania General Assembly.<sup>173</sup> This failed attempt at bringing gaming to the state was similar to legislation in other states that chose to introduce riverboat gambling contingent on voter approval in local referenda. Pennsylvania considered riverboat gaming in the 1999-2000 General Assembly Session, but again failed to enact legislation enabling casino gaming.<sup>174</sup> The failed bill sought to enable slot machine gaming at existing racetrack facilities as well as riverboat gaming.<sup>175</sup> The bill made potential gaming licenses contingent on voter approval in statewide and local referenda.<sup>176</sup> Gaming legislation once again failed to become part of Pennsylvania Law during the 2001-2002 session. This turbulent background paved the way for the eventual legislative acts that would bring casinos to Pennsylvania.

###### 2. *The Pennsylvania Race Horse Development and Gaming Act*

Slots gaming finally became a reality in Pennsylvania on July 5, 2004 when Governor Edward F. Rendell signed the Pennsylvania Race Horse Development and Gaming Act ("PRGA") into law.<sup>177</sup>

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172. See Delva, *supra* note 28, at 868 (detailing various attempts to pass riverboat gaming legislation in Pennsylvania).

173. H.B. 1883, 1993 Gen. Assemb., Reg. Sess. (Pa. 1993); H.B. 939, 1995 Gen. Assemb., Reg. Sess. (Pa. 1995). H.B. 1883 had been left pending at the close of the 1993-1994 session and was "reintroduced with some changes." Delva, *supra* note 28, at 868 n.153.

174. H.B. 328, 1999 Gen. Assemb., Reg. Sess. (Pa. 1999).

175. *Id.*

176. *Id.* (requiring voters at both the state and local levels to approve of slots at existing racetrack facilities and riverboat gaming independently). The legislation as drafted gave voters the power to approve of slot machines at an existing racetrack while prohibiting an expansion into riverboat-based operations in their county or municipality. See *id.*

177. H.B. 2330, 2004 Gen. Assemb., Reg. Sess. (Pa. 2004). H.B. 2330 began as a one-page bill directing "the Pennsylvania State Police to provide the State Harness and Horse Racing Commission with criminal background checks and fingerprint date

The PRGA provided for slots gambling in a variety of settings across Pennsylvania; at existing pari-mutuel gaming facilities, at stand-alone slots parlors, and at facilities requiring a hotel and recreational facilities.<sup>178</sup> Unlike previous attempts to introduce slots gaming, the PRGA did not reserve any power for voters to stop gaming.<sup>179</sup> Additionally, the PRGA gave the power to make all licensing and locating decisions to the Pennsylvania Gaming Control Board (“PGCB”).<sup>180</sup>

The PRGA proved controversial from the outset. In December of 2004, petitioners, including concerned citizens and politicians, sued the Pennsylvania Commonwealth and individual government officials for injunctive relief, asserting various claims regarding the constitutionality of the PRGA.<sup>181</sup> The most significant substantive claim was that section 1506<sup>182</sup> of the PRGA improperly delegated “unrestricted land use and zoning *authority* and power to the gaming control board without providing clear, definite and reasonable

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on applicants for licenses.” Brian D. Kravetz, *The Supreme Court of Pennsylvania Sustains the Constitutionality of the Gaming Act: Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, 44 DUQ. L. REV. 551 (2006). During the required considerations by the House and Senate the bill evolved into 145 pages and became the Pennsylvania Race Horse Development and Gaming Act on July 1, 2004. *Id.* The House passed the bill on July 3, 2004 and the Senate on July 4, 2004. H.B. 2330.

178. 4 PA. CONS. STAT. ANN. §§ 1302, 1304-1305 (West 2008).

179. *See supra* notes 172-176 and accompanying text.

180. 4 PA. CONS. STAT. ANN. §§ 1202(b)(12), 1304(b) (West 2008).

181. *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, 877 A.2d 383 (Pa. 2005).

182. Title 4, section 1506 of the Pennsylvania Code in its original form read as follows:

The conduct of gaming as permitted under this part, including the physical location of any licensed facility, shall not be prohibited or otherwise regulated by any ordinance, home rule charter provision, resolution, rule or regulation of any political subdivision or any local or State instrumentality or authority that relates to zoning or land use to the extent that the licensed facility has been approved by the board. The board may, in its discretion consider such local zoning ordinances when considering an application for a slot machine license. The board shall provide the political subdivision, within which an applicant for a slot machine license has proposed to locate a licensed gaming facility, a 60-day comment period prior to the board’s final approval, condition or denial of approval of its application for a slot machine license. The political subdivision may make recommendations to the board for improvements to the applicant’s proposed site plans that take into account the impact on the local community, including, but not limited to, land use and transportation impact. This section shall also apply to any proposed racetrack or licensed racetrack.

Law of July 5, 2004, 4 PA. CONS. STAT. ANN. §1506 (West 2004) (current version at 4 PA. CONS. STAT. ANN. § 1506 (2006)).

lawful standards, policies and limitations to protect against unfettered board *action*.<sup>183</sup> The Pennsylvania Supreme Court agreed with the petitioners, holding section 1506 unconstitutional as “the General Assembly has failed to provide adequate standards and guidelines required to delegate, constitutionally, the power and authority to execute or administer that provision of the Act to the Board.”<sup>184</sup>

The original language of the statute clearly indicates that the General Assembly sought to take away any and all aspects of control related to locating casino properties from local government actors. While the court did not sever section 1506 as a means of granting local governments power to influence the process of casino introduction in Pennsylvania, such was the end result. The legislature amended the statute; section 1506 provides in its current form:

§ 1506. Licensed facility zoning and land use appeals

In order to facilitate timely implementation of casino gaming as provided in this part, notwithstanding [title 42, section 933(a)(2) of the Pennsylvania Code] (relating to appeals from government agencies), the Supreme Court of Pennsylvania is vested with exclusive appellate jurisdiction to consider appeals of a final order, determination or decision of a political subdivision or local instrumentality involving zoning, usage, layout, construction or occupancy, including location, size, bulk and use of a licensed facility. The court, as appropriate, may appoint a master to hear an appeal under this section.<sup>185</sup>

Although the amended statute allows local governments to retain control over significant land use matters, any such action taken by local governments could be interpreted as contrary to the sole power of the PGCB to determine the location of gaming facilities in Pennsylvania.<sup>186</sup>

Industry insiders and gaming experts also criticized the PGRA. Professor I. Nelson Rose, a leading authority on gaming law, blamed the law’s shortcomings on the character of gambling related politics in Pennsylvania.<sup>187</sup> Rose stated that “[b]ecause the Pennsylvania slot machine legislation was the result of years of political fights, it is not a model of what gaming regulation should

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183. Brief in Support of Petition Seeking Declaratory Judgment and Injunctive Relief at 49, *Pennsylvanians*, 877 A.2d 383 (Pa. 2004) (No. 229 MM).

184. *Pennsylvanians*, 877 A.2d at 419.

185. 4 PA. CONS. STAT. ANN. § 1506 (West 2008).

186. *See id.* § 1304(b).

187. *See Rose*, *New Slot Law*, *supra* note 64, at 112.

look like.”<sup>188</sup> Specifically, Rose critiqued the method of appointing members to the PGCB, as a complicated voting system designed to ensure party parity<sup>189</sup> and a stipulation that would permit “legislators and other public officials to own up to 1% of a slot operator.”<sup>190</sup>

Critics of the PGRA also felt that the law was not well suited for the cities of Philadelphia and Pittsburgh as the law only enabled slots gaming.<sup>191</sup> Detractors of this aspect of the law included casino mogul Steve Wynn, and Philadelphia political insider Paul Levy.<sup>192</sup> Along with others, Wynn and Levy felt that by only allowing slot machines, the law would not serve to increase tourism.<sup>193</sup> Wynn went as far as saying “[i]t’s a dumb law,” even calling it “an Atlantic City support bill.”<sup>194</sup> Slots-only parlors cater mostly to local customers, and are known in the industry as “casinos of convenience” for this reason.<sup>195</sup> Recently casino operators have shown that restaurants, shops and other entertainment venues within casinos can be more profitable than gaming itself.<sup>196</sup> It is also well known that slots parlors lack the mystique and glamour associated with table games which “attract younger, more upscale players and well-heeled tourists,” the segments of the market who have the disposable income to spend money on hotel rooms, shopping sprees and other expenditures that would help to bring diverse economic development to the city.<sup>197</sup>

Nonetheless, the PGRA was on the books and casinos were destined for Philadelphia, prompting City Council to enact Ordinance No. 051028-AA on February 23, 2006.<sup>198</sup> The ordinance added Chapter 14-400 to the section of the Philadelphia Code regulating zoning and planning.<sup>199</sup> The Ordinance created a new zoning clas-

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188. *Id.*

189. *Id.*

190. *Id.* Rose explains that 1% ownership was actually a compromise as well, as the Pennsylvania Senate had originally proposed a 5% cap. *Id.*

191. Inga Saffron, *Is a Downtown Casino in the Cards?*, PHILA. INQUIRER, Dec. 21, 2005, at A01. Levy ran both the Center City District, a business development district, and also the site selection committee for the mayor’s gaming task force.

192. *See id.*

193. *See id.*

194. *Id.*

195. *See id.*

196. *See id.* *See, e.g.,* AGA SURVEY, *supra* note 10, at 35 (finding that 49% of survey respondents said that food, shows, entertainment and everything else at casinos was more fun than gambling itself).

197. Saffron, *supra* note 191.

198. HSP Gaming, L.P. v. City Council, 939 A.2d 273, 275 (Pa. 2007).

199. *See id.*

sification, Commercial Entertainment Districts (“CED”), to facilitate the introduction of casinos to the city in accordance with PGCB’s licensing determinations.<sup>200</sup> The new law was carefully drafted as to avoid conflicting with the PGRA and the sole authority of the PGCB to make all casino licensing decisions. The code specified that once an applicant had been licensed, the applicant would submit a proposal to the City Planning Commission and upon approval of said plan, the site would be rezoned as a CED, superseding existing zoning classifications, thereby allowing for the development of gaming facilities.<sup>201</sup> Through this act, Philadelphia legislators prepared to receive the yet to be determined slots licenses destined for the city.

### 3. *The Hearing Process for the Philadelphia Slots Licenses*

The next step in the process of making casino gaming a reality in Pennsylvania was the review of applications for gaming licenses by the PGCB. The process was governed by section 1205 of the PRGA, which required that “consideration and resolution of all license or permit applications” would be conducted in accordance with title 2 of the Pennsylvania Code, or “procedures adopted by order of the board.”<sup>202</sup> The statute expressly grants the board the ability to deliberate without affording applicants an oral hearing.<sup>203</sup> Despite the inability for local actors to exert actual control over the process of choosing licensees, section 1205(b) of the PRGA obligates the board to conduct at least one public input hearing before licensing a facility.<sup>204</sup> Public input hearings must “be held in the municipality where the facility will be located and shall be organized in cooperation with the municipality.”<sup>205</sup> Public input hearings were the lone opportunity for Philadelphians to weigh in with the PGCB regarding casino gaming in their city.

Determining which applicants would be awarded licenses was governed primarily by eligibility requirements that focused on diverse employment plans and suitability to be involved in the gaming industry.<sup>206</sup> The board was also provided with ten factors to consider in evaluating which license applicants were best suited to

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200. *See id.*

201. *See id.*

202. 4 PA. CONS. STAT. ANN. § 1205(a) (West 2008).

203. *See id.*

204. *See id.* § 1205(b).

205. *Id.*

206. *See id.* § 1325(b).

serve the stated goals of enabling gaming in Pennsylvania.<sup>207</sup> While the majority of the factors related to diversity and the potential for job creation, other issues of local concern were to be considered. Two of the factors are issues of great concern for local government and residents. First, section 1325(1) asked the board to evaluate “the location and quality of the proposed facility, including, but not limited to, road and transit access, parking and centrality to market service area.”<sup>208</sup> Second, section 1325(9) takes into account “[t]he degree to which potential adverse effects might result from the project, including costs of meeting the increased demand for public health care, child care, public transportation, affordable housing and social services, will be mitigated.”<sup>209</sup>

The licensing process for the Philadelphia casinos officially began on December 28, 2005, the deadline for applications.<sup>210</sup> The board received five applications for the two licenses available for facilities in Philadelphia and voted on the applicants at an open meeting on December 20, 2006.<sup>211</sup> As part of the decision-making process and in accordance with the PRGA, the board held Public Input Hearings on April 10, 11, and 12 of 2006.<sup>212</sup> Each applicant submitted a traffic study as part of their application to address concerns related to increased traffic, a major concern of Philadelphia residents.<sup>213</sup> The board cooperated with the Pennsylvania Department of Transportation and a private firm to consider the traffic studies and proposed mitigation modifications related to each applicant’s plan for developing a casino.<sup>214</sup> Yet, the Philadelphia Department of Streets was entirely left out of the process of evaluating significant potential impacts of placing a casino at any one of the five proposed locations within the city. The board released their final Order and Adjudication on February 1, 2007, approving licenses for HSP Gaming, LP (SugarHouse Casino) and Philadelphia Entertainment & Development Partners, LP (Foxwoods Casino Philadelphia).<sup>215</sup>

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207. *Id.* § 1325(c).

208. *Id.*

209. *Id.*

210. See HSP Gaming LP, Case No. 1356 (Feb. 1, 2007) ([http://pgcb.state.pa.us/files/adjudications/Cat2\\_PHL\\_OA.pdf](http://pgcb.state.pa.us/files/adjudications/Cat2_PHL_OA.pdf)).

211. See *id.* at 7.

212. *Id.* at 4.

213. See *id.* at 14.

214. See *id.*

215. *Id.*

#### 4. *The Aftermath*

Since the board announced their choice of casino licensees, the process of implementing casino gambling has been tumultuous. The Pennsylvania Supreme Court has been busy sorting out a host of lawsuits. Concerned individuals along with four civic associations and a failed casino license applicant separately sued the gaming board in relation to their choice of applicants.<sup>216</sup> After the board's licensing decisions were validated by the court,<sup>217</sup> the Board took legal action itself and filed suit in an effort to stop Philadelphia's City Council from holding a referendum vote to determine if the city charter should be amended in consideration of the impending arrival of casinos to the city.<sup>218</sup> Under the proposed amendment:

[L]icensed facilities cannot be located on the sites that the Board approved, City Council cannot designate these sites as CEDs under Chapter 14-400 of the Philadelphia Code, and the City's Department of Licenses and Inspection cannot issue the permits that would be needed to develop the sites into gaming facilities.<sup>219</sup>

Despite an attempt to block the referendum by Mayor John Street, the Council voted to override the Mayor's veto and put the issue in hands of its constituents.<sup>220</sup> Consequently, the PGCB filed an emergency petition for review to the Pennsylvania Supreme Court in attempt to prevent the potential charter amendment from being included in the next ballot.<sup>221</sup>

In an opinion dated August 3, 2007, the court found that they had proper jurisdiction to hear the case pursuant to section 1506. The court stated, "the Ordinance is a determination or decision made by a political subdivision involving, *inter alia*, the location of licensed facilities."<sup>222</sup> The court stated that under sections 1304 and 1307 of the gaming act, "the General Assembly intended for

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216. See *Society Hill Civic Ass'n v. Pa. Gaming Control Bd.*, 928 A.2d 175 (Pa. 2007); *Riverwalk Casino, L.P. v. Pa. Gaming Control Bd.*, 926 A.2d 926 (Pa. 2007).

217. *Id.*

218. See *Pa. Gaming Control Bd. v. City Council*, 932 A.2d 869 (Pa. 2007).

219. *Pa. Gaming Control Bd. v. City Council*, 928 A.2d 1255, 1261-62 (Pa. 2007). Commercial Entertainment Districts ("CEDs") were established in the Philadelphia Code in March of 2006. When property was designated by the City Council as a CED, all underlying zoning restrictions would be superseded. Section 14-405 explicitly reserves the power to locate gaming facilities in the city to the PGCB and provides that CED status would in no way interfere with that licensing process. *Id.*

220. See *id.* at 1261.

221. See *id.* at 1262.

222. *Id.* at 1264.

the Board to have the sole authority to locate Category 2 licensed facilities in cities of the first class . . . [and] the General Assembly has not afforded the electorate of a first class city the right to consider, affect or override the Board's location decision."<sup>223</sup> The court next stated that the local government had influence over gaming related matters, through their power to zone. "After the Board's decision on location is made, the General Assembly intends for it to be implemented under and according to the zoning and land use provisions a city has enacted."<sup>224</sup> Finally the court engaged in a brief explanation of the relationship of Philadelphia, as a home rule city, to the Commonwealth and held that the Ordinance was directly in conflict with the Gaming Act and therefore constituted an "unlawful and unconstitutional exercise of power," and granted the Board a permanent injunction.<sup>225</sup> Thus, the Philadelphia City Council was limited to post hoc involvement in gaming-enabling process, issuing zoning approvals and related permits for the locations already approved by the PGCB.

This lawsuit did not serve to end the feuding between the city, the casino licensees, the PGCB, and the state. On October 25, 2007, HSP Gaming L.P. took the city to court to force their hand in designating their intended casino site as a CED in accordance with the city's code in order to comply with their statutory duties of implementing the licensing decision of the board.<sup>226</sup> In a lengthy opinion, the court ordered that the site be re-zoned as a CED, that HSP's development plan be declared "finally approved," and the city take all necessary steps to comply with the courts order.<sup>227</sup> Later that year, Foxwoods went to the state's highest court in order to obtain similar relief.<sup>228</sup> The court refused Foxwoods's request, leaving the matter in the hands of the Philadelphia Court of Common Pleas.<sup>229</sup>

Zoning approval did not spell the end of controversy surrounding HSP's planned SugarHouse casino, as the firm needed to obtain a license for riparian rights on the bank of the Delaware River. After the administration of Mayor John Street granted HSP a license to use the land in November of 2007, a petition was filed

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223. *Id.* at 1267-68.

224. *Id.* at 1269.

225. *Id.* at 1270.

226. HSP Gaming, L.P. v. City Council, 939 A.2d 273, 276 (Pa. 2007).

227. *Id.* at 288.

228. See Larry King, *Foxwoods Loses High-Court Ruling*, PHILA. INQUIRER, Dec. 12, 2007, at B02.

229. See *id.*



claiming that only the state had the power to issue riparian rights.<sup>230</sup> On January 24, 2008, the newly elected mayor of Philadelphia, Michael Nutter, revoked HSP's riparian license, claiming a flawed process that needed to be reevaluated.<sup>231</sup> On February 11, 2008, the Pennsylvania Supreme Court announced that they would rule on the issue of whether the state or the city had proper authority to issue the riparian rights license.<sup>232</sup>

Over two years after the PGCB announced the winning casino license applicants, construction has yet to begin on either the Sugarhouse or the Foxwoods properties. It is evident that the Pennsylvania Supreme Court as well as the Philadelphia Court of Common Pleas will remain intimately involved in the process of implementing gaming in the city. What remains unclear is how much more time and money the interested parties will spend on negotiation and litigation before Philadelphians hear the sounds of slots machines ringing within city limits.

## B. Detroit

### 1. *The Michigan Gaming Control and Revenue Act*

The effort to bring casinos to Detroit provides an interesting contrast to the current situation in Philadelphia, as the enabling process provided a role for voters and local governments actors. Unlike Pennsylvania, where lotteries and pari-mutuel gaming were the only in-state gambling options, Michigan hosted Native American-owned casinos.<sup>233</sup> Seven tribes operated seventeen casinos in Michigan by the end of 1996; the year voters approved legislation providing for three land-based casinos in Detroit.<sup>234</sup> While efforts to legalize casino gaming in Detroit had been in the works since the 1970's, no action had been taken by the state other than entering into gaming compacts with sovereign tribes.<sup>235</sup> The arrival of casino gaming in Windsor, Ontario, Canada, directly across the De-

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230. Marcia Gelbart, *Nutter Revokes Casino License*, PHILA. INQUIRER, Jan. 25, 2008, at A01.

231. *See id.*

232. Jeff Shields, *Pa. High Court to Rule on City's Say over Casino Permit*, PHILA. INQUIRER, Feb. 12, 2008, at B04.

233. MICH. GAMING CONTROL BD., HISTORY OF GAMING IN MICHIGAN, [http://www.michigan.gov/mgcb/0,1607,7-120-1382\\_1453-11371--,00.html](http://www.michigan.gov/mgcb/0,1607,7-120-1382_1453-11371--,00.html) (last visited Sept. 14, 2008).

234. *Id.*

235. *See id.*

troit River from Detroit in 1994 spurred lawmakers in Michigan to give serious consideration to the subject.<sup>236</sup>

On September 8, 1994, Michigan Governor John Engler created the Governor's Blue Ribbon Commission on Michigan Gaming to assess the issue of expansion of gaming in the state.<sup>237</sup> The order specified twelve issues for the Commission to study and craft recommendations for the Governor and Michiganders consideration, including "[w]hether additional gaming is desirable and beneficial and should be authorized by the legislature or Governor[.]" and "[w]hether the economic benefits from the legalization and establishment of land-based casinos and/or riverboat casinos in Detroit or other proposed locations around the state would outweigh any potential social or economic harm that may result."<sup>238</sup> The Commission responded positively to both inquiries.<sup>239</sup> In response to the baseline question of whether additional gaming should be authorized in the Michigan the report concluded that "[l]imited expansion of casino gaming in Michigan would be beneficial since it could add significantly to the state's economy, contribute additional tax revenues to local and state governments, provide an additional attraction for tourism and help to capture Michigan gaming dollars now being exported."<sup>240</sup> The fact that gaming options were already available to Michiganders was of significant importance to the Commission.<sup>241</sup> The report also stated that "[a]pproval of the voters should be received before any casino may be constructed in a local community[.]" and that "[d]uring negotiations with prospective owners/operators, the state should consult with the local government involved, especially on matters dealing with law enforcement and zoning."<sup>242</sup> Following the report, the Michigan lawmakers took action in the hopes of introducing commercial casinos to the state, all of which would be located in the city of Detroit.

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236. See, e.g., THE GOVERNOR'S BLUE RIBBON COMM'N, BLUE RIBBON REPORT (1995), available at [http://www.michigan.gov/mgcb/0,1607,7-120-1382\\_1452-14473—,00.html](http://www.michigan.gov/mgcb/0,1607,7-120-1382_1452-14473—,00.html).

237. See *id.*; see also Exec. Order No. 1994-24 (1994), available at [http://www.michigan.gov/mgcb/0,1607,7-120-1382\\_1452-14474—,00.html](http://www.michigan.gov/mgcb/0,1607,7-120-1382_1452-14474—,00.html).

238. *Id.*

239. See GOVERNOR'S BLUE RIBBON COMM'N, *supra* note 236.

240. *Id.*

241. See *id.* ("Michigan is in the untenable position of having casino-gaming readily accessible to its residents within and near the state, of having negative impacts, yet being without the revenue or benefits to help counter the problems.")

242. *Id.*

The gaming question was presented to Michiganders as Proposal E on Michigan's November 5, 1996, general election ballot.<sup>243</sup> The voters approved the proposal by a slim margin, with 51.5% of votes in the affirmative.<sup>244</sup> The Governor then signed into law an amended version of the Michigan Gaming Control and Revenue Act ("MGCRA").<sup>245</sup> The law provided for three casino facilities and established the Michigan Gaming Control Board ("MGCB") to handle regulatory and licensing functions for the industry.<sup>246</sup> The MGCRA gave local lawmakers and Detroit residents a significant role in developing casino gaming in the city. Detroit citizens had multiple opportunities to vote on casino gaming in their city. These citizens first participated in the statewide general election by voting on Proposal E.<sup>247</sup> Next they were able to vote pursuant to the MGCRA, as the act requires majority of voters in a city must approve of casino gaming in order for the licensing process to begin.<sup>248</sup>

## 2. *Local Control: The Development Agreement*

The Mayor of Detroit and the City Council were directly involved in establishing casinos in the city. Under section 432.206(1)(b) of the Michigan Code, before the MGCB could issue a gaming license, the operator making the proposal had to enter into a development agreement with a city that had "enacted an ordinance approving of gaming."<sup>249</sup> Additionally, under the Act, a city eligible for a casino was able to enact ordinances "governing

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243. MICH. GAMING CONTROL BD., *supra* note 66. The ballot read as follows: A Legislative Initiative to Permit Casino Gaming in Qualified Cities  
The proposed law would:

1. Permit up to three gaming casinos in any city that meets the following qualifications: has a population of 800,000 or more; is located within 100 miles of any other state or country in which gaming is permitted; and has had casino gaming approved by a majority of the voters in the city.
2. Establish a Gaming Control Board to regulate casino gaming.
3. Impose an 18% state tax on gross gaming revenues.
4. Allocate 55% of tax revenue to the host city for crime prevention and economic development; allocate remaining 45% of tax funds to state for public education.

*Id.*

244. *Id.*

245. See Authority for Temporary Casinos under Michigan Gaming Control and Revenue Act, Op. Att'y Gen. No. 7008, (Mar. 2, 1999), available at <http://www.ag.state.mi.us/opinion/datafiles/1990s/op10079.htm>.

246. See MICH. COMP. LAWS ANN. § 432.201 (West 2001).

247. See *supra* note 13 and accompanying text.

248. MICH. COMP. LAWS ANN. § 432.202 (1)(iii) (West 2001).

249. *Id.* § 432.206 (1)(b).

casino operations, occupational licensees and suppliers.”<sup>250</sup> The Act clearly explained the purpose and breadth of the “development agreements”:

§ 2(r) “Development agreement” means a written agreement between a city and a person naming the person as the designated developer of a casino in the city and covering certain subjects including, but not limited to: approval by the city of the location of the casino; certification by the city that the applicant has sufficient financial resources to construct and open the casino which it proposes to develop; zoning and site plan requirements; utility connection fees; infrastructure improvements; requirements to utilize local businesses and small businesses as suppliers; employment issues; compulsive gambling programs; insurance requirements; conceptual design approval; reimbursement for predevelopment and infrastructure costs, traffic engineering, and other transportation costs; plans for completion of destination attractions either within or outside the casino facility and ancillary development rights.<sup>251</sup>

Therefore, the Mayor and the City Council were able to take into consideration many aspects of the proposed casinos and negotiate with potential licensees about their projects. On November 20, 1997, Detroit Mayor Dennis Archer announced his choice of three casino operators from the eleven proposals that had been submitted earlier that year.<sup>252</sup> The chosen operators were Atwater/Circus Circus (Detroit Entertainment, LLC),<sup>253</sup> Greektown/Sault Ste. Marie Tribe of Chippewa Indians (Greektown Casino, LLC), and MGM Grand (MGM Grand Detroit Casino, LLC).<sup>254</sup> The Mayor finalized the development agreements with the three potential operators on March 12, 1998, followed by the City Council on April 9, 1998.<sup>255</sup> This allowed the MGCB to begin the process of investigating the applicants to determine if they should be awarded an operator’s license.<sup>256</sup> In June of 1998, the City Council adopted an ordinance to legalize gaming in the city, the final step necessary before the gaming board could conduct background investiga-

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250. *Id.* § 432.206 (1)(a).

251. *Id.* § 432.202 (r).

252. MICH. GAMING CONTROL BD., *supra* note 233.

253. The Detroit Entertainment Group’s Casino project would eventually be named MotorCity Casino. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

tions.<sup>257</sup> Later that month the Mayor approved proposals from the operators to open temporary facilities: the City Council approved the amended development agreements the following month.<sup>258</sup> The MGCB supported the amended agreements, verifying that temporary facilities were allowable under the MGCRA issuing Resolution 1998-06.<sup>259</sup> Temporary facilities were permitted to promote timely implementation of the MGCRA and get the casinos up and running.

### 3. *The Casino Era in Detroit*

The Mayor's and City Council's approvals did not guarantee a development agreement for a potential casino licensee. On August 4, 1998, Detroit citizens voted to support the Mayor's choices.<sup>260</sup> After the development agreements were approved, the MGCB awarded the first Detroit casino licenses in 1999.<sup>261</sup> On July 29, 1999, the MGM Grand Detroit began casino gaming operations, followed by MotorCity Casino<sup>262</sup> on December 14 of that year.<sup>263</sup> The third Detroit facility, Greektown Casino, received its license on November 8, 2000.<sup>264</sup> All three of the casinos operated successfully under their temporary status, as the city continued to evaluate plans for permanent casinos. In 2000, the first full year of gaming in Detroit, the casinos produced over \$60 million in tax revenue for the city and state.<sup>265</sup>

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257. MICH. GAMING CONTROL BD., HISTORICAL TIMELINE: SIGNIFICANT EVENTS RELATED TO CASINO GAMING IN MICHIGAN [hereinafter HISTORICAL TIMELINE], <http://www.state.mi.us/mgcb/timelin2.htm>, (last visited Mar. 5, 2008). The Casino Gaming Authorization & Casino Development Agreement & Compliance Ordinance on June 17, 1998, establishing both the legality of gaming in the city and a process for ensuring that license applicants comply with their development agreements with Detroit. *Id.*

258. *Id.*

259. MICH. GAMING CONTROL BD. RES. 1998-06, available at <http://www.state.mi.us/mgcb/rz-9806.htm#rz>. In March of 1999, Michigan Attorney General Jennifer Granholm issued a written opinion validating the legality of casinos opening in temporary facilities. Op. Att'y Gen. No. 7008, *supra* note 245.

260. HISTORICAL TIMELINE, *supra* note 257; David Goodman, *Casinos Face Barrier in Detroit*, LAS VEGAS REV.-J., Sept. 26, 1998, available at [http://www.reviewjournal.com/lvrj\\_home/1998/Sep-26-Sat-1998/business/8290638.html](http://www.reviewjournal.com/lvrj_home/1998/Sep-26-Sat-1998/business/8290638.html).

261. MICH. GAMING CONTROL BD. DETROIT CASINO INFORMATION, [http://www.michigan.gov/mgcb/0,1607,7-120-1380\\_1412---,00.html](http://www.michigan.gov/mgcb/0,1607,7-120-1380_1412---,00.html) (last visited Sept. 6, 2008).

262. *See supra* note 254.

263. *Id.*

264. *Id.*

265. MICH. GAMING CONTROL BD., 2000 ANNUAL CASINO REVENUE REPORT, [http://michigan.gov/mgcb/0,1607,7-120-1395\\_1469\\_7138---,00.html](http://michigan.gov/mgcb/0,1607,7-120-1395_1469_7138---,00.html) (last visited Sept. 6, 2008).

Although the temporary facilities were operating successfully, the road to permanent casinos in Detroit proved bumpy. In January 2002, the United States Court of Appeals for the Sixth Circuit decided *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Board*,<sup>266</sup> holding that aspects of the licensing process had been unconstitutional. Chief Judge Martin F. Boyce, Jr. held that the ordinance legalizing casino gaming in Detroit, section 18-13-1(i) of the Detroit City Code, provided an unfair advantage to two license applicants.<sup>267</sup> In September of that year, the court issued an injunction preventing the construction of permanent casinos in Detroit.<sup>268</sup> Over the next three years, the interested parties battled in both the Western District of Michigan and the Sixth Circuit.<sup>269</sup> Eventually, the Lac Vieux tribe entered in settlement agreements with Atwater/Detroit Entertainment and Greektown, which were approved by the Western District in April of 2004.<sup>270</sup> On April 28, 2005, the Sixth Circuit affirmed the district court's approval of the settlement agreement and consent decree, dismissing any remaining appeals and dissolving the injunction.<sup>271</sup> With the legal hurdles cleared, the city and the casino operators were able to begin the process of developing permanent casinos in Detroit, as the City Council approved rezoning of the sites for MotorCity and Greektown the following day, April 29, 2005.<sup>272</sup>

Despite these hurdles, casinos have been nonetheless profitable for the owners, the state of Michigan, and the city itself. Over 1999-2006, the three Detroit casinos paid over \$743 million in taxes.<sup>273</sup> 2007 was a landmark year for the casino industry and MGC in Detroit, as the MGM Grand Detroit opened its doors on October 3, 2007,<sup>274</sup> and MotorCity Casino Hotel opened its permanent facility on November 28, 2007.<sup>275</sup> Greektown expects to open their permanent facility, on the same location as the temporary ca-

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266. 276 F.3d 876, 878 (6th Cir. 2002).

267. *Id.* at 877, 78.

268. Greta Guest, *Ruling Allows Detroit's Casinos to Build Permanent Facilities*, DETROIT FREE PRESS, Apr. 29, 2005 (on file with author).

269. See *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Mich. Gaming Control Bd.*, 129 F. App'x 938 (6th Cir. 2005).

270. See Guest, *supra* note 268.

271. *Lac Vieux*, 129 F. App'x at 942.

272. Robert Ankeny, *Work on Permanent Casinos Takes a Step Forward*, CRAIN'S DETROIT BUS. 38, May 9, 2005, at 38.

273. DETROIT CASINO REVENUE REPORTS, [http://michigan.gov/mgcb/0,1607,7-120-1395\\_1469\\_7138--,00.html](http://michigan.gov/mgcb/0,1607,7-120-1395_1469_7138--,00.html) (last visited Sept. 14, 2008).

274. Joel J. Smith, *MGM's Grand Opening*, DETROIT NEWS, Oct. 3, 2007, at A1.

275. Joel J. Smith, *MotorCity Casino Hotel Opens to Public*, DETROIT NEWS, Nov. 29, 2007 (on file with author).

sino, sometime during 2008.<sup>276</sup> Like the other two facilities, the new Greektown property will include a hotel and expanded retail and dining options for casino patrons.

## V. COMPARING THE GAMING-ENABLING PROCESS IN PHILADELPHIA AND DETROIT

“The development of gambling policy has been incremental, even piecemeal, and has progressed for the most part without significant rational consideration of the longer-term impacts for the states and localities in which it occurs.”<sup>277</sup>

The commercial casino industry in America has seen great growth and expansion in recent years. As legislators in states lacking casino-enabling legislation see the increased tax revenues and other benefits of commercial gaming accruing to their peers, many will likely take action to introduce casinos. While some lawmakers might be reluctant to get into the gaming business, the goal of preventing tax dollars from leaving their jurisdiction may force their hand as gaming options develop in their neighboring states. In drafting new legislation, states can best serve their constituents by engaging local actors in the enabling and licensing process. Local participation is of great importance when casinos are introduced to metropolitan areas: properly protecting the interests of the residents of these regions is already a difficult task. Local involvement is critical at two stages of gaming-enabling: passing laws to enable commercial gaming and during the casino operator licensing process. As the first<sup>278</sup> major cities to deal with the issue, comparing the development of gaming in Philadelphia and Detroit provides a stark contrast in efficiency in introducing casino gambling.

### A. Mode of Legalization

Beginning with enabling gaming at the state legislative level, it was clear that local actors would have a significant impact on the casino issue in Detroit. In Michigan the question of legalizing gaming at all was put in the hands of the electorate. While the initial question of gaming was presented to voters outside of the city, the gaming statute requires the approval of the majority of Detroit vot-

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276. See Greektown Casino Website, General Information Section, <http://www.greektowncasino.com/GeneralInfo/2008.htm> (last visited Sept. 21, 2008).

277. VON HERMANN, *supra* note 25, at 30.

278. Unlike Philadelphia and Detroit, Las Vegas has developed into a major city because of casinos.

ers. Additionally, licensure required that the “local legislative body” of Detroit pass an ordinance approving gaming. Citizens of Detroit were also able to participate in the process by taking to the polls and voting. Most significantly, before the city’s development agreements with potential operators were considered final, Detroit citizens were able to voice their opinion on who would own the Detroit casinos and more importantly, where they would be located.

In stark contrast, in Pennsylvania, after years of failed legislative attempts to enable casino gaming, the General Assembly hurriedly pushed through legislation to bring slots gaming to locations across the commonwealth. The PGCA did not provide citizens at either the state or local levels to participate in the decision-making process. Neither the Mayor’s nor the Philadelphia City Council’s approval was required to authorize casino gaming. Furthermore, when the City Council attempted to empower their electorate, the Pennsylvania Supreme Court employed reasoning solidly grounded in Dillon’s Rule to preclude local involvement in gaming. Both the PGCA and the court’s holding ultimately left many Philadelphians feeling disenfranchised.

Although it is likely that there is no way for lawmakers to prevent opposition to gaming on every front, giving the citizens most likely to feel the impact of gaming an opportunity to voice their opinion is important. Simply providing voters with the opportunity of participating in referenda, or allowing their local elected officials significant participation in the matter serves to promote democracy and empower citizens.

### **B. Local Involvement in the Licensing Process**

The MGCA provided Detroit politicians with the opportunity to shape the face of casino gaming in their city. By requiring that applicants enter into development agreements with the city, the act gave Detroit a significant amount of control over who would be able to open a casino, and more importantly where in the city they could do it. Primarily municipal concerns such as zoning, site plans, and infrastructure were entrusted to the actors with the greatest expertise. The process of evaluating casino proposals before entering into development agreements allowed the city to assess which potential licensee’s plans would most benefit the city and its residents. Even more importantly, the city’s elected officials were able to evaluate the impact that an individual property and casino gaming generally would have on their city by grant-



ing temporary development agreements. Detroit politicians have thus been able to use casino gambling in coordination with other projects to begin revitalizing the city.

The situation in Philadelphia once again provides a stark contrast. The PGRA granted every responsibility related to introducing gaming to Pennsylvania to the PGCB, not allowing local government any meaningful involvement in the licensing process. Precluded from taking action before or during the licensing process, members of the disenfranchised Philadelphia City Council sought to force their way into the decision-making process, but they were ultimately denied. In line with the rest of the PGRA, the parties with the best ability to evaluate issues of local concern were left out of critical stages in the process. Philadelphia legislators' influence over the introduction of gaming was reduced to limited zoning determinations in the wake of the PGCB's licensing decisions. Ultimately time will tell if city lawmakers and citizens are able to exert meaningful influence over the Philadelphia casinos.

### CONCLUSION

U.S. Supreme Court Justice David Souter faced the subject of gaming during his tenure as the Attorney General of New Hampshire. Souter argued against bringing casinos to the state as it would attract visitors to his home state for the wrong reasons, and more importantly, gambling "would change the character of the part of the world closest to us."<sup>279</sup> This statement clearly articulates the reason local government should be involved in the gaming licensing and location decision making process.

There is no doubt that the introduction of casinos will have a major impact on any city or other locality. This is not a question of whether or not gaming will be beneficial, but a concern that arises once the state has determined that the benefits outweigh the burdens. Even if the state government excludes local actors from the enabling process, effective decisions about the location and purposes of gaming demands local involvement. An administrative agency comprised solely of state-appointed officials who lack the proper connection to the people and who have no direct accountability to the voters impacted by their decisions, should not have sole decision-making authority. People who are going to be living near and living with the casinos should have their say. While each

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279. Rychlak, *supra* note 15, at 360 (citation omitted).

city and state is unique and faces their own host of issues in enabling gaming, lessons can be learned from the recent events surrounding the PRGA in Philadelphia. Voters and local politicians alike can feel spurned when they are excluded from matters as important as casino gaming. The capability for local actors to help guide the healthy development of gambling necessarily requires that state enabling legislation reserves a role for local governments and voters in the process of introducing and licensing gaming operations in their municipality.

