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Office of the Attorney General
State of Connecticut

April 17, 2018

The Honorable Joe Aresimowicz
Speaker of the House
State of Connecticut
House of Representatives
Legislative Office Building, Suite 4100
Hartford, CT 06106

Dear Speaker Aresimowicz:

You have requested opinions on several gaming-related issues. First, you ask questions about the amendments to the existing gaming agreements with the Mashantucket Pequot Tribe and the Mohegan Tribe (Tribes), and the federal approval thereof, required by Public Act 17-89. Second, you inquire about the implications of a decision in a pending U.S. Supreme Court case that could result in the lifting of a federal prohibition on sports betting. And third, you ask about the legal consequences of legislation creating a request for proposal process for sports betting or casino gaming.

In summary, we conclude that (1) Public Act 17-89's condition that the amendments to the existing gaming agreements be approved by the U.S. Department of the Interior (Interior) has not been satisfied; (2) because that condition has not been satisfied, Public Act 17-89's authorization to conduct casino gaming in East Windsor is not yet effective; (3) eliminating the federal approval condition would raise risks for the current gaming arrangements with the Tribes about which we have previously opined and continue to have serious concerns; (4) if the federal ban on sports betting is found to be unconstitutional, the Tribes would not have the exclusive right to provide sports betting to the public; and (5) legislation similar to Special Act 15-7 that would provide for a request for proposal process for sports betting or casino gaming, but requiring subsequent legislation to actually authorize such activity, would not affect the existing gaming arrangements with the Tribes.

Compact Amendments and Public Act 17-89

Last year, the General Assembly enacted Public Act 17-89, which authorized MMCT Venture, LLC (MMCT), an entity jointly owned by the Tribes, to conduct casino gaming at a facility in East Windsor. That authorization was subject to the satisfaction of several conditions, including in particular the amendment of the Mashantucket Procedures and the Mohegan Compact (Compacts) and of the related Memoranda of Understanding between the State and the Tribes (MOUs). The amendments to the Compacts must provide that the authorization of MMCT to conduct casino gaming would not terminate the moratorium on video facsimile games in the Compacts, and the amendments to the MOUs must provide that the authorization would not relieve the Tribes of their revenue sharing obligations under the MOUs. After approval by the General Assembly pursuant to Conn. Gen. Stat. § 3-6c, the amendments were to be submitted to Interior for approval pursuant to the Indian Gaming Regulatory Act (IGRA). P.A. 17-89, § 14(c).

The Governor and the Tribes executed the amendments to the Compacts and the MOUs, the General Assembly approved them, and they were submitted to Interior for approval. Under IGRA and its regulations, Interior had 45 days to affirmatively approve or disapprove the proposed amendments or, in the absence of approval or disapproval within that time, the amendments are to be deemed approved. 25 U.S.C. § 2710(d)(8)(C); 25 C.F.R. § 293.12. Interior neither affirmatively approved nor disapproved the amendments. Further, it did not publish in the Federal Register, as required by the regulations, that the amendments were approved, disapproved or deemed approved. The State and the Tribes thereafter jointly filed suit against Interior in the federal district court for the District of Columbia. *Connecticut, et al. v. Zinke, et al.*, No. 1:17-cv-2564-RC. Among other things, the State and the Tribes maintain that the amendments were deemed approved by operation of law and that such approval must be published in the Federal Register. The lawsuit remains pending.

Your first question asks whether, in light of the position the State and the Tribes have taken in the litigation, the condition in Public Act 17-89 of federal approval of the amendments has been satisfied. First, the issue is in litigation. Although we have confidence in the position we have taken that the amendments should be treated as deemed approved, it remains possible that the court could rule adversely. To take action on the assumption that the State and the Tribes will succeed in the ongoing litigation would be highly imprudent. Second, and just as importantly, IGRA and its implementing regulations provide that Interior's

approval of compact amendments is effective upon publication in the Federal Register. 25 U.S.C. § 2710(d)(3)(B); 25 C.F.R. § 293.15. Such publication has not occurred, and indeed an order requiring Interior to publish approvals of the amendments is part of the relief the State and the Tribes seek. Therefore, it is our opinion that the federal approval condition has not been satisfied.

As a follow up question, you ask if MMCT is now authorized to operate the proposed gaming facility in East Windsor. Because, in our opinion, the federal approval condition has not been met, MMCT does not have such authority yet.

You further ask for an opinion about the legal effect of removing the federal approval condition. Prior to the enactment of Public Act 17-89 when the General Assembly was first considering proposals for a gaming facility, we provided a letter to the legislative leadership addressing, among other things, the risks of proceeding with such a proposal without amending the Compacts and the MOUs. Letter to Legislative Leadership dated April 15, 2015 (copy attached). In that letter we discussed the not insubstantial risk that authorizing a gaming facility without the amendments and federal approval of them could potentially terminate the moratoriums on video facsimiles in the Compacts and the revenue sharing obligations under the MOUs. We therefore recommended that as part of any legislative authorization that amendments and Interior Department approval be required as conditions. *Id.* at 2-4; *see also* A.G. Op. No. 2017-02, 2017 WL 1052342 (2017).

Our view of the risks of proceeding without federal approval of the amendments is unchanged. Indeed, subsequent events and actions of Interior only reaffirm our view that approval of the amendments is highly recommended to protect the State's interests under the Compacts and the MOUs.[1]

Sports Betting

You note that the U.S. Supreme Court has recently heard arguments in *Christie v. NCAA*, Nos. 16-476, 16-477, involving the claim of the State of New

[1] We have evaluated possible alternative approaches the Tribes have proposed to help mitigate the risks of removing the federal approval condition, including most recently a proposal to enter a new agreement the Tribes contend would not require Interior approval under IGRA. However, because of the inherent legal uncertainty and novelty associated with such a course of action, we remain of the view that, in the absence of federal approval of the amendments to the Compacts and the MOUs, the State would remain at substantial risk of the termination of the Compacts' moratoria and the MOUs' revenue sharing arrangements. *See* Letter to Legislative Leadership dated April 15, 2015.

Jersey that the prohibitions of the federal Professional and Amateur Sports Protection Act (PASPA) on state-sanctioned sports gambling violates the anti-commandeering doctrine of the Tenth Amendment. A decision is likely before the end of the Supreme Court's current term in June. You ask, if the Supreme Court concludes that PASPA is unconstitutional, would the Tribes have the exclusive right to offer sports wagering. Of course, any views we express now on the effect of the Supreme Court's decision on the state of the law on sports betting could be altered by the Court's actual ruling.

Connecticut's agreements with the Tribes require the legislature to carefully consider a number of factors before legalizing sports wagering. In the event PASPA is struck down and state law continues to prohibit sports wagering (as it presently does), because sports wagering is a Class III game under federal law and is not an authorized game under either of the respective Compacts, the Tribes would still be prohibited from conducting sports wagering on their reservations.

Moreover, it is our opinion that if sports betting were to become lawful in Connecticut, the Tribes would not have an exclusive right under the existing Compacts and MOUs to offer it. The Compacts set out a list of authorized games. Mashantucket Procedures, § 3; Mohegan Compact, § 3. Sports betting is not listed as an authorized game. By contrast, for example, pari-mutuel betting on horse and dog racing and jai alai games are authorized games. *Id.* The exclusion of sports betting from the specific list of authorized games is compelling evidence that the Compacts do not presently authorize it. *See Mayer v. Historic Dist. Comm'n*, 325 Conn. 765, 776 (2017) (when items expressed are of an associated group, it can be inferred that items not mentioned were deliberately excluded). Amendments to the Compacts would be necessary to authorize the Tribe's sports betting, as contemplated under section 17 of the Compacts. Thus, our opinion is that the Compacts do not presently authorize the Tribes to conduct sports betting on their reservations. Nor are we aware of any other federal or state law that would be a basis for the Tribes to assert an exclusive right over sports betting.

The Tribes may argue, however, that a state law permitting sports wagering in Connecticut would violate the exclusivity provisions of the MOUs. Those provisions state that the Tribes are relieved of their obligation to pay the State a portion of the gross operating revenues from the operation of video facsimiles of games of chance on their reservations if state law is changed to permit "video facsimiles or other commercial casino games." *E.g.*, Mohegan MOU, at 2. Although it is our view that sports wagering is not a video facsimile,

whether it is a "commercial casino game" is an open question. That term is not defined in the MOUs or Compacts. How a court might resolve that question is uncertain.

If the state passed a law permitting sports wagering and a court concluded that it does constitute a commercial casino game, the Tribes could cease making payments to the State under the MOUs. In that event, however, the Tribes and the State would be restored to their respective rights under the Compact moratoria. Under those moratoria, the Tribe's authority to operate slot machines and other video facsimiles of games of chance on their respective reservations would remain an unresolved legal question, as it was prior to the time the MOUs were entered.

Request for Proposal Legislation

Your final question is about the legal effect of a law, similar to Special Act 15-7, which would establish a request for proposal process for sports betting or casino gaming but would not authorize such gaming until a subsequent act of the legislature. It was our view that the request for proposal process established under Special Act 15-7 did not implicate the Compact moratoriums or the revenue sharing obligations under the MOUs.[2] *See* Letter to Speaker Brendan Sharkey dated May 27, 2015. The reasoning set forth there applies equally here.

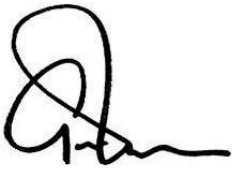
The pertinent provisions of both the Compacts and the MOUs speak only to laws that authorize the operation of commercial casino games or video facsimiles of games of chance. Section 15(a) of the Compacts provides that the moratoria on the operation of video facsimile games by the Tribes terminates if "***the existing laws or regulations of the State are amended to expressly authorize the operation of any video games of chance for any purpose by any person, organization or entity***." *E.g.*, Mohegan Compact, § 15(a) (emphasis added.) The MOUs, in turn, provide that the Tribes' obligation to make payments to the State shall continue "so long as no change in State law is enacted to permit the operation of video facsimiles or other commercial casino games ***by any other person*** and ***no other person*** within the State lawfully operates video facsimile games or other commercial games…." *E.g.*, Mohegan MOU, at 2 (emphasis added). Because the contemplated legislation would not itself authorize any gaming but rather just a preliminary process that would remain contingent on further legislative action, we take the same view as we did for Special Act 15-7

[2] The process under Special Act 15-7 did ultimately culminate in the subsequent enactment of Public Act 17-89.

that the existing arrangements under the Compacts and MOUs would not be affected. If the legislature were to consider in this or subsequent legislation the actual authorization of gaming, such authorization would raise very serious concerns of the sort we expressed prior to the enactment of Public Act 17-89.[3] *See* Letter to Legislative Leadership dated April 15, 2015.

We trust this is responsive to your questions.

Very truly yours,



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[3] The Tribes have suggested that Special Act 15-7 is distinguishable because it could only lead to the operation of a facility operated by an entity jointly owned by them and thus posed no risk to the revenue-sharing provisions of the MOU. *See* Letter to Governor Malloy dated March 23, 2018, at 2. That is not our view, and we expressly advised that gaming authorization of a jointly owned entity did pose risks to the Compacts and the MOUs. Letter to Legislative Leaders dated April 15, 2015.