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March 27, 2014

VIA ELECTRONIC MAIL (ahorne@shpa.com)

Arthur J. Horne, Jr., Esquire  
Shipley & Horne, P.A.  
1101 Mercantile Lane, Suite 240  
Largo, Maryland 20774

Re: CB-7-2014, Subtitle 10,  
Finance and Taxation, Sections 10-308 & 10-309  
Prince George's County Code  
(2011 Edition; 2013 Supplement)

Dear Mr. Horne:

I am Maryland counsel for MGM National Harbor, LLC ("MGM") in connection with its participation in the Maryland Video Lottery Facility Location Commission's ("the Location Commission") selection process for the award of a Video Lottery Operation License ("Operation License") in Prince George's County ("the County"). I write for two purposes: First, to set forth reasons why CB-7-2014 ("the Bill") should be withdrawn; and second, if the Bill is not withdrawn, to provide suggested amendments to the most recent draft of the Bill, in an effort to minimize the material conflicts between the Bill and State law, and between the Bill and the proposed County Benefits Agreement ("the CBA").

*The Bill Should be Withdrawn*

In its current form, the Bill is problematic on a number of fronts. The authority of the Location Commission to award the Operation License to MGM arises from State gaming law. See Md. Code Ann., State Government § 9-1A-01, *et seq.* Those State statutes and regulations are complex, purpose-driven provisions. They controlled the contents and requirements of the Location Commission's Request for Proposals ("the RFP") and set forth myriad requirements to qualify for the Operations License. The State Gaming Law, the RFP and the Proposal MGM submitted in response create binding

obligations upon MGM that cannot be modified by County legislation, except in limited circumstances. *See State Gov't § 9-1A-10(a)(2); RFP § 2.20.3.* Those limited circumstances – where such modification is expressly permitted by Maryland law and by the United States Constitution – are not met by the Bill in its present form.

The crux of the problem here is that the Bill's present provisions create unnecessary and potentially irreconcilable conflicts between State, and County laws. And in its current iteration, the majority of the Bill's language is inconsistent with the most recent draft of the County Benefits Agreement. Those inconsistencies and contradictions, if left unchanged, will cause conflicting interpretations going forward in a number of important regards. That situation, which will inevitably impede the timely opening of MGM's facility and delay the economic benefits to the County and its citizens, is not in anyone's best interests.

Set forth below are several examples of the material conflicts and ambiguities referred to above:

- Bill Section 10-308(g) defines "Development agreement" as an "executed written agreement" between "the County Executive and a video lottery facility licensee." The CBA as drafted has two signatories: "Prince George's County, Maryland" and "MGM National Harbor, LLC." But the County is not the County Executive; and even more important, MGM National Harbor, LLC is not *yet* a "video lottery facility licensee" which the Legislation, at Section 10-308(i), defines as "*the holder of a video lottery operation license.*" (emphasis added) The Maryland Lottery and Gaming Control Commission will not issue the 15-year Operation License to MGM until the facility is ready to open. Accordingly, MGM cannot "hold" the license until that license is issued to MGM.
- The Bill uses the defined term "Best efforts" in several places. The CBA does not use that term; it refers to "Commercially Reasonable Efforts." The Legislation's "Best efforts" definition is not entirely clear and that poses practical problems going forward. The reported Maryland cases where litigation has ensued over the meaning of "Best Efforts" typically arise where the subject agreement leaves that term undefined or does not provide a workable standard. For example, in *First Union Nat'l Bank v. Steele Software Sys. Corp.*, 154 Md. App. 97, 138 (2003), the court observed that:

–Best Efforts is a term "which necessarily takes its meaning from the circumstances." 154 Md. App. at 138.

–Best Efforts is a standard that “has diligence as its essence and is imposed only on those contracting parties that have undertaken such performance.” *Id.* at 140, citing E. Allan Farnsworth, *Trying to Keep One’s Promises: The Duty of Best Efforts in Contract Law*, 46 U. Pitt L. Rev. 1, 7-8 (1984).

–Best Efforts “can mean the efforts the promisor has used in similar contracts where the adequacy of its efforts was not questioned.” 154 Md. App. at 173.

–A party committed to using Best Efforts “may still give reasonable consideration to its own interests.” *Id.*

- The CBA expressly uses the term “goals” for MBE Participation, CMBE Participation, LBE Participation, County Resident Participation (Construction), and County Resident Hiring. But Bill Section 10-309(a)(3) is expressly couched in terms of “percentage requirements” for the employment of County residents and Section 10-309(a)(1) requires that the licensee “shall meet or exceed annual percentages(s) of certified count-based business participation set forth in a development agreement....” That is potentially problematic given the limitations of State Gov’t § 9-1A-10(a)(2) and RFP § 2.20.3.
- Section 10-309(a)(3) of the Bill, which pertains to the “percentage requirements for the employment of County residents set forth in a development agreement,” is far broader than CBA section 2.8. The Bill says nothing about “Best efforts” and, as noted above, is couched in terms of “shall meet or exceed annual percentage requirements.” The Bill imposes no other limits on County resident employment “requirements.” In contrast, CBA section 2.8 expressly provides that MGM’s efforts are subject to: (1) the requirements of RFP section 6.30 (which, in accordance with Maryland gaming law, requires a preference for hiring “qualified employees from the communities within 10 miles of the Video Lottery Facility” which includes residents of DC, Northern Virginia and possibly other Maryland counties besides Prince George’s County); and (2) “the availability of experienced workers residing in the County.”
- The Bill’s definition of “County based business” expressly imports Section 10A-101 of the Prince George’s County Code. The Code’s definition, in Section 10A-101(a)(13), differs in substantial ways from the CBA’s definition of “Local Business Enterprise.” For example, the Code provision requires, among other things, that the County-based business have its “principal place of operation” within the County and be “certified” by the Purchasing Agent. But the CBA defines a LBE as simply “a business that maintains a place of operation located within the County” and no certification is required.

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- Moreover, the Bill's definition of "County-based minority business" is a "business enterprise" that is "a County-based business" and has "a valid minority business certification recognized by the Office of Central Services." Given the definition of the County based business noted above, that would not square with the CBA's definition of an MBE.
- To the extent the Prince George's County Code is relevant to filling in definitional gaps, I note that Sections 10A(a)(26) and (27) of the Code contain definitions of "Minority business enterprise" and "Minority individuals" that do not match the CBA's MBE definition. For example, the CBA's definition of MBE in section 1.6 requires that the entity be "owned and controlled" by the same minority individual or individuals who "manage[] or operate[]" the entity on a daily basis. But the Code definition, in Section 10A(a)(26), appears not to require the entity's minority owner(s) to be the same "minority individual(s)" who manage and control the "daily business affairs and essential productive operations" of the entity.
- Another example of Code vs. CBA definition in the MBE context is that the CBA includes as MBEs not-for-profit entities that are organized to promote the interests of physically or mentally disabled individuals; in that regard, the Code includes only "Service Disabled Veterans" in its definition of "Minority individuals" in Section 10A(a)(27).
- The Bill, in Section 10-309(b), requires the "development agreement" to "include a Video Lottery Facility Compliance and Reporting Plan" and lists a number of components that must be part of that Plan. The CBA does not presently contain any such reporting provision; instead, it provides for an "oversight committee" in section 2.5 to monitor compliance.

The Bill is not a necessary predicate for an enforceable CBA. All of these conflicts and accompanying issues can be avoided by the Bill's withdrawal. For those reasons, I urge that result.

*CBA  
needs to  
meet the bill  
not vice versa*

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*Addressing the Most Problematic Bill Provisions*

In the event withdrawal of the Bill does not occur, I am forwarding herewith a redlined revision of the Bill. The redlined changes are intended to address the most problematic Bill provisions. At a minimum, those provisions should be made consistent with the most current version of the CBA, which was drafted to comply with Md. Code Ann., State Government § 9-1A-01, *et seq.*

Sincerely,

A handwritten signature in black ink, appearing to be 'P. Andrews', written over a circular stamp or mark.

Philip M. Andrews

Enclosure

cc: MGM National Harbor, LLC (w/ enclosure)

COUNTY COUNCIL OF PRINCE GEORGE'S COUNTY, MARYLAND

2014 Legislative Session

Bill No. CB-7-2014

Chapter No.

Proposed and Presented by Council Members Franklin, Campos, Davis, Harrison, Toles,  
and Turner

Introduced by \_\_\_\_\_

Date of Introduction \_\_\_\_\_

**BILL**

1 AN ACT concerning

2 Video Lottery Facility Economic Opportunities

3 For the purpose of requiring compliance with local business, local minority business, and local  
4 hiring requirements in a development agreement negotiated by the County Executive and a video  
5 lottery facility licensee, subject to the approval of the same by County Council resolution, as a  
6 condition of the use of a video lottery facility.

7 BY adding:

8 SUBTITLE 10. FINANCE AND TAXATION.

9 Sections 10-308 and 10-309,

10 The Prince George's County Code

11 (2011 Edition; 2013 Supplement).

12 SECTION 1. BE IT ENACTED by the County Council of Prince George's County,  
13 Maryland, that Sections 10-308 and 10-309 of the Prince George's County Code be and the same  
14 are hereby added:

15 SUBTITLE 10. FINANCE AND TAXATION.

16 DIVISION 22. VIDEO LOTTERY FACILITY LOCAL BUSINESS AND HIRING

17 REQUIREMENTS.

18 Sec. 10-308. Definitions.

19 In this Division, the following definitions have the following meanings unless the meanings  
20 below conflict with any provision of the development agreement:

1 (a) "Best efforts" means the efforts that a reasonable commercial enterprise in the business  
2 of developing large-scale, mixed-use real estate projects in urban and suburban locations that it  
3 intends to own and operate on a long-term basis would use, consistent with good faith business  
4 judgment, in order to achieve completion of the applicable project in a timely manner and in  
5 accordance with approved budgets to the maximum extent practicable have been made to meet  
6 the requirement as set forth in a development agreement.

7 (b) "County-based business participation" means the percentage of the total purchase value  
8 as defined in the development agreement contract dollars paid to County-based businesses,  
9 including purchase value contract dollars paid to subcontractors.

10 (c) "County-based minority business participation" means the percentage of the total  
11 purchase value as defined in the development agreement contract dollars paid to County-based  
12 minority businesses, including contract dollars purchase value paid to subcontractors.

13 (d) "County-based minority business" means a business enterprise that both

14 ~~(i)~~ (i)

15 ~~is~~ is a County-based business; and

16  
17 \_\_\_\_\_ (ii) is a minority business enterprise as defined by the development agreement;

18 and

19 ~~(ii)~~ (iii) has a valid minority business certification recognized by the Office of Central  
20 Services.

21 (e) "County based business" means a local business enterprise as defined in the development  
22 agreement whose principle place of operation, as determined by the Office of Central Services, is  
23 in Prince George's County, MD.

24 (f) "County resident" has the meaning set forth in Section 10A-101 of the Code.

25 (g) "Development agreement" in this Division means an executed, written agreement  
26 between the County Executive and a video lottery facility licensee, approved by resolution of the  
27 County Council.

28 (h) "Compliance with the development agreement" in this Division means a video lottery  
29 facility licensee is not in breach of the development agreement.

30 (i) "Video lottery facility" has the meaning set forth in Section 9-1A-01, State Government  
31 Article, Annotated Code of Maryland.

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1 (j) “Video lottery facility licensee” means the holder of a video lottery operation license or  
2 the awardee of a video lottery operation license selected by the Maryland Video Lottery Facility  
3 Location Commission.

4 (k) “Video lottery operation license” has the meaning set forth in Article XIX of the  
5 Maryland Constitution.

6 (l) “Video lottery terminal” has the meaning set forth in Section 9-1A-01, State Government  
7 Article, Annotated Code of Maryland.

8 **Sec. 10-309. Video Lottery Facility Economic Opportunities.**

9 (a) Pursuant to authority set forth in Section 9-1A-10(a)(3), State Government Article,  
10 Annotated Code of Maryland, a video lottery facility licensee shall comply with the following  
11 requirements:

12 (1) In the construction and operation of any video lottery facility located in the County, a  
13 video lottery facility licensee shall use best efforts to meet or exceed annual percentage(s) of  
14 county-based business participation set forth in a development agreement negotiated between the  
15 video lottery facility licensee and the County-Executive, subject to approval of the development  
16 agreement by resolution of the County Council.

17 (2) In the construction and operation of any video lottery facility located in the County, a  
18 video lottery facility licensee shall use best efforts to meet or exceed annual percentage goal(s)  
19 for county-based minority business participation set forth in a development agreement negotiated  
20 between the video lottery facility licensee and the County-Executive, subject to approval of the  
21 agreement by resolution of the County Council.

22 (3) In the construction and operation of any video lottery facility located in the County, a  
23 video lottery facility licensee shall use best efforts to meet or exceed annual percentage  
24 requirements for the employment of County residents set forth in a development agreement  
25 negotiated between the video lottery facility licensee and the County-Executive, subject to  
26 approval of the agreement by resolution of the County Council.

27 (b) **Video Lottery Facility Compliance and Reporting Plan.**

28 Any development agreement authorized by this Division shall include a Video Lottery  
29 Facility Compliance and Reporting Plan to facilitate and ensure satisfaction of the requirements  
30 of the agreement. A Video Lottery Facility Compliance and Reporting Plan shall include, but  
31 not be limited to including, reasonable procurement and employment reporting requirements,  
32 standards and procedures for determining best efforts, employment training and preparation

1 efforts, local business capacity building, penalty or charitable supplement and enforcement  
2 provisions, and community outreach components to be complied with by the video lottery  
3 facility licensee on an ongoing basis.

4 (c) Any development agreement authorized by this Division shall include a statement  
5 detailing any equity investment opportunities in relation to the Facility to be made available to  
6 Prince George's County residents, as determined by the video lottery facility licensee in its sole  
7 discretion, such as via direct monetary or other equity investment, ownership of independent in-  
8 line businesses, ownership of retail pad sites, ownership of business franchises, ownership of  
9 service businesses, and/or ownership of any other for-profit businesses.

10 (d) Approval of a development agreement by resolution of the County Council under this  
11 Division shall occur prior to the issuance of any building permits for the video lottery facility and  
12 compliance with the development agreement shall be a stated condition of approval for any  
13 building or use and occupancy permits for the video lottery facility. A development agreement  
14 authorized by this Division may be adjusted by mutual consent of the video lottery facility  
15 licensee and the County Executive, subject to approval of any such adjustment by County  
16 Council resolution.

17 SECTION 2. BE IT FURTHER ENACTED that the provisions of this Act are hereby  
18 declared to be severable; and, in the event that any section, subsection, paragraph, subparagraph,  
19 sentence, clause, phrase, or word of this Act is declared invalid or unconstitutional by a court of  
20 competent jurisdiction, such invalidity or unconstitutionality shall not affect the remaining  
21 words, phrases, clauses, sentences, subparagraphs, paragraphs, subsections, or sections of this  
22 Act, since the same would have been enacted without the incorporation in this Act of any such  
23 invalid or unconstitutional word, phrase, clause, sentence, subparagraph, subsection, or section.

24 SECTION 3. BE IT FURTHER ENACTED that this Act shall take effect on the date it  
25 becomes law.

Adopted this \_\_ day of \_\_\_\_\_, 2014.

COUNTY COUNCIL OF PRINCE  
GEORGE'S COUNTY, MARYLAND

BY: \_\_\_\_\_  
Mel Franklin  
Chairman

CB-7-2014 (Proposed DR-2B)

ATTEST:

\_\_\_\_\_  
Redis C. Floyd  
Clerk of the Council

APPROVED:

DATE: \_\_\_\_\_ BY: \_\_\_\_\_  
Rushern L. Baker, III  
County Executive

KEY:

Underscoring indicates language added to existing law.

[Brackets] indicate language deleted from existing law.

Asterisks \*\*\* indicate intervening existing Code provisions that remain unchanged.