

NY Voters Approved Casino Expansion — Now What?



Law360, New York (November 08, 2013, 7:11 PM ET) -- On Nov. 5, 2013, New York voters overwhelmingly approved a state constitutional amendment authorizing up to seven Las Vegas-style casinos.[1] Gambling, however, is not a new concept in New York, a state that is already home to nine video lottery terminal facilities, five tribal Class III (Vegas-style) casinos and three tribal class II facilities.[2]

The language of the ballot referendum on the constitutional amendment asked voters only whether the Legislature should be given authority to authorize the casinos. Specifically, the ballot question asked:

The proposed amendment to section 9 of article 1 of the Constitution would allow the Legislature to authorize up to seven casinos in New York State for the legislated purposes of promoting job growth, increasing aid to schools, and permitting local governments to lower property taxes through revenues generated. Shall the amendment be approved?[3]

The location and process for implementation was left to the Legislature — a decision already made with the passage of the Upstate New York Gaming Economic Development Act (“Gaming Act”) in the summer of 2013.

The Gaming Act, considered a major compromise to allow for the expansion of gaming in New York between the state, Indian tribes already operating Class III casinos and New York’s existing video lottery terminal racinos, lays out a seven-year plan for the expansion of gambling in New York. The Gaming Act divided the state into two zones consisting of nine regions. The first major zone includes three regions covering the New York City area — from the suburbs north and west of the city out onto Long Island. The remaining six regions cover the upstate New York regions — or everything else.

Although billed as gambling expansion legislation, the Gaming Act includes a great deal of detail on specific location restrictions on casino expansion. Gambling expansion is prohibited in the New York City area for at least seven years — a reported compromise with the popular, highly profitable, already

existing VLT facilities in the New York City region, the Empire City Casino at Yonkers Raceway and Resorts World Casino at Aqueduct Racetrack.

In the upstate regions, gambling expansion is prohibited in the Buffalo region, a 10-county central region surrounding Oneida-run Turning Stone Casino and the northern region of the state. These three upstate prohibited regions were established to protect Class III tribal gaming facilities of the Seneca, Oneida and Mohawk, provide each tribe with exclusivity in its specific region and end protracted litigation surrounding the various tribal-state compacts and revenue sharing agreements thereunder.

So Where Is Gambling Expansion Permitted Under the Gaming Act?

While the constitutional amendment permits the Legislature to authorize seven casinos, under the Gaming Act, the New York State Gaming Commission is only authorized to license a total of four casinos in the three remaining regions — the Catskills, the Albany-Saratoga area and the Binghamton region along the Pennsylvania border.

The casinos authorized under this first wave of expansion will enjoy a seven-year exclusivity period on commercial gambling expansion in New York. After year seven, the Legislature can revisit gambling expansion and authorize three more casinos pursuant to the constitutional amendment. Depending on the compromised location for such future expansion, significant amendments to the Gaming Act will be required given the existing territorial prohibitions under the Gaming Act — a fight likely left for another day.

Under the Gaming Act, the state's tax revenue from gambling will essentially be divided as follows: 80 percent to the state for elementary or secondary education or property tax relief; 5 percent to the host city, 5 percent to the host county and 10 percent to other counties in the region.[4] Those distributions occur after 10 percent is distributed to counties in regions with exclusivity for Class III tribal casinos. The Gaming Act also authorized two Long Island off-track betting facilities to offer up to 1,000 VLT machines.[5]

New York Joins in on East Coast Regional Expansion

With the passage of the referendum, New York joins a host of neighbors in the region that have turned to commercial casino gambling expansion, partly in an effort to keep up with declining state tax revenues. In addition to New Jersey's long-established Atlantic City casinos, Pennsylvania, Delaware and Maryland all feature state-sponsored casinos. In addition, Connecticut has been home to two tribal casinos, Foxwoods Resort Casino and Mohegan Sun Resort & Casino, for roughly two decades. More recently, Massachusetts authorized commercial gambling in 2011 and is in the process of vetting casino applicants with hopes to break ground on its first facility in 2014. The New Hampshire Legislature also commissioned a task force to consider forms of gambling expansion.

How does New York's gambling expansion match up against its neighbors in terms of state revenue? Under the Gaming Act, the new casinos will be subject to the same slot machine tax rate as existing VLTs in the region (range from 37 to 45 percent) with a 10 percent tax on table games.[6] Pennsylvania's slot tax rate is 55 percent with a 12-16 percent rate on table games.[7] New Jersey's carries an effective tax rate on gross gaming revenue of 9.5 percent on all gross gaming revenue.[8] Once gambling kicks off, Massachusetts will enjoy a 25 percent rate on all gross gaming revenue from its Category 1, Vegas-style casinos.[9]

Internet Gaming — the Big Unknown?

There is no doubt legalized Internet gaming is in its infancy with New Jersey and Delaware launching intrastate Internet gaming this month and Nevada in its first few months of legalized Internet poker. Similar to the success of regional brick and mortar expansion, if Internet gaming turns out to be successful, will New York and other states look to Internet gaming as the next wave of gambling expansion? The Gaming Act makes little mention of Internet gaming. The only reference was minor provision essentially banning Internet cafes and electronic sweepstakes.[10]

The Gaming Act contains detailed language providing for the refund of licensing fees to the initial licensees if further gambling expansion was authorized by the state within the initial seven-year period. Seven years is an eternity in the digital world. The good news, should New York wish to enter the Internet gaming movement, is that the refunds detailed under the Gaming Act are only authorized if additional facilities are authorized within the seven-year exclusivity period.[11]

The Gaming Act is silent about fee refunds if other types of gambling, i.e., Internet gaming, are authorized within the seven-year exclusivity period. If New York did choose to authorize Internet gaming in the next seven years, one solution that might avoid any issue related to licensing fee refunds would be to follow the New Jersey and Delaware model by tying Internet gaming rights to the licensed casino facilities.

That being said, if the future of Internet gaming is now, can New York enter the market while staying true to the principles of The Gaming Act – a commitment to upstate tourism expansion? The legislative findings and purposes of the Gaming Act emphasize that “[t]he upstate tourism industry constitutes a critical component of [New York’s] economic infrastructure and that four upstate casinos will attract non-New York residents and bring downstate New Yorkers to upstate.”[12] With New York’s large population base, the potential for tax revenue from legalized Internet gambling may be the trump card.

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[1] Unofficial results have the proposed amendment passing with 57.1 percent of the statewide vote.

[2] N.Y. PML. LAW § 1300(1).

[3] The language of the ballot was not without its own controversy. In October, a lawsuit challenged the wording of the referendum, claiming the language “for the legislated purposes of promoting job growth, increasing aid to schools, and permitting local governments to lower property taxes through revenues generated” constituted advocacy language in violation of state law, had the potential to derail the referendum and cause havoc at the New York Board of Elections. Just three weeks before Election Day, a State Supreme Court Judge in Albany dismissed the lawsuit, finding the lawsuit had been filed too late and lacked merit.

[4] N.Y. STF. LAW § 97-nnnnn.

[5] N.Y. TAX. LAW § 1617-a(4).

[6] N.Y. PML. LAW § 1351.

[7] 4 Pa.C.S. § 2403 and 4 Pa.C.S. § 13A62.

[8] N.J.S.A. §5:12-1, et seq.

[9] M.G.L. c. 23K Â§ 55.

[10] N.Y. PEN. LAW § 156.40.

[11] N.Y. PML. LAW § 1311.

[12] N.Y. PML. LAW § 1300(3).

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