

# The “Primary Business” Conundrum: State of Restricted Gaming Laws in Nevada

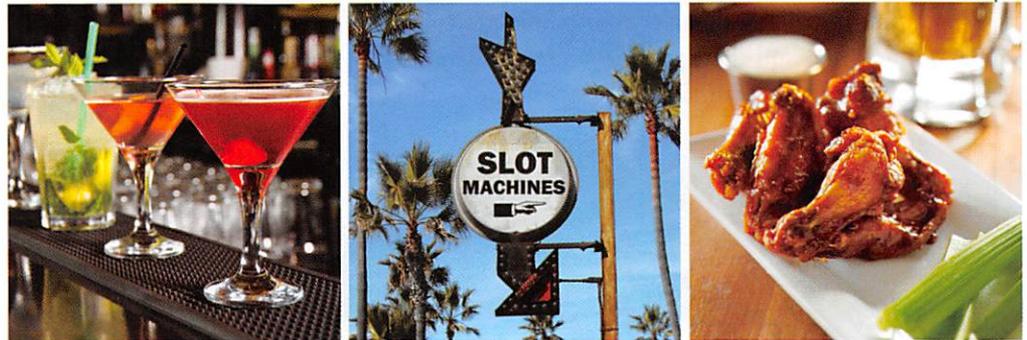
By Sean Higgins

Unlike most states around the country that limit gaming to casinos, lotteries, or some combination thereof, Nevada has long allowed “restricted” gaming in smaller businesses throughout the state. Over the years, the types of businesses where gaming has been permitted have changed somewhat, but today there are five types of establishments which are recognized: taverns, grocery stores, convenience stores, drug stores & liquor stores.

<sup>1</sup>NRS 463.0189 defines a restricted location as follows: “‘Restricted license’ or ‘restricted operation’ means a state gaming license for, or an operation consisting of, not more than 15 slot machines and no other game or gaming device, race book or sports pool at an establishment in which the operation of slot machines is *incidental to the primary business of the establishment.*” (Emphasis added)

For most of the enumerated businesses, the statutory language is straightforward and easily applied when an applicant appears before gaming regulators. The Regulations of the Nevada Gaming Commission (“NGC Reg.”), define each of the businesses with the exception of a tavern.<sup>2</sup> Moreover, these businesses also pass the visual test. Meaning, “I know what it is when I see it.” Additionally, the Gaming Control Board and the Nevada Gaming Commission review the factors in NGC Reg. 3.105(2)(a)-(g), when licensing all restricted establishments. The licensing of these defined businesses types has changed very little over the years and the statutes, regulations and ordinances dealing with these businesses have remained relatively unchanged for over 15 years.

Unfortunately, the same may not be said about the licensure and regulation of taverns. It is generally agreed that a “tavern” is an establishment at which alcohol is sold by the drink to the general public. Beyond that, there has been great debate as to what constitutes a tavern for purposes of obtaining a



restricted gaming license. The seminal questions are (i) what is a “primary business,” and (ii) what does it mean for gaming to be “incidental” to that primary business. The NGC Reg. 3.015(2) factors are considered during an applicant’s initial licensing process before the Gaming Control Board and therefore may not always be an accurate method of determining what an establishment’s primary business is or if gaming is incidental to that primary business. The past several years have seen a litany of revisions to: (i) the Nevada Gaming Commission Regulations; (ii) local ordinances dealing with taverns; and (iii) the Nevada Revised Statutes. These multiple amendments have tried to answer these questions. Many would argue that these attempts have by and large failed to provide any clarity to the two questions above.

The reason for this heightened interest in defining a tavern is the proliferation, real or imagined, of the slot parlor, or slot arcade, model. While some variation of these businesses have been in operation since the 1990’s, it was not until after the 2006 passage of the Nevada Clean Indoor Air Act that these businesses became the favored model in the tavern market. There were 18 of these types of businesses in operation in 2006 and by 2014 there were 101.<sup>3</sup>

The movement to better define what a tavern is, and what such an establishment must provide to its patrons, started in earnest in 2010. Since that time, there have been at least 5 attempts made to set some level of minimum standards and guidelines that a tavern must meet should it want restricted gaming in its establishment. The April 2011 amendments to the Clark County Code, the August 2011 amendment to NGC Regulation 3.015, and the 2013 legislative amendments to NRS 463.161(4), all set forth similar minimum requirements.<sup>4</sup> These included: minimum square footage in public areas, minimum restaurant seating, minimal operational hours of a kitchen, and a physical bar with a minimum number of seats at that bar. None of these requirements has slowed the progression of slot parlors. The operators have simply applied creative solutions in an attempt to minimally comply with the new requirements set out in each of these amendments.

Henderson decided it needed to go further with its amendment to the Henderson Municipal Code in December 2013.<sup>5</sup> In addition to the requirements implemented by NRS 463, Henderson required: (i) a 75 seat restaurant; (ii) an expanded definition of “meals,” and (iii) 2 employees present during all hours of operation. Since this code revision was implemented, there has not been a new single slot parlor model opened in that jurisdiction.



Clark County, although it had just amended its code in 2011, felt compelled to again amend its code in 2014, due to the fact that slot parlor operators continued to purchase existing taverns and convert them to their models. The revisions added a definition of “grandfathered taverns,” which were taverns in operation prior to the effective date of the Nevada Clean Indoor Air Act. These grandfathered taverns were allowed to continue to operate as they always had operated. All taverns opened after that date would

either have to operate a “bar,” employ a dedicated kitchen employee at all times the kitchen was operational, and serve hot meals that were not pre-packaged. If a tavern did not comply with those requirements, it would have to demonstrate that it received not more than 50% of its revenue from slot machines. If it could not satisfy this 50% threshold, the number of slot machines would be reduced to a maximum of 7 machines.<sup>6</sup> Taverns will have to report their compliance with these requirements in January 2016, at which time it can be determined whether these ordinance revisions are effective. The Clark County ordinance is the first attempt to measure whether a tavern has a primary business after such a business has been operating. This sets a new standard in regulation of taverns holding restricted gaming licenses.



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<sup>1</sup> NGC Regulation 3.015.3(a)-(e).

<sup>2</sup> NGC Regulations 1.075; 1.101; 1.130 & 1.141.

<sup>3</sup> State of Nevada GCB Listing of Locations Sorted by Primary Business Name.

<sup>4</sup> CCC 8.20.020.385; NGC Regulations 3.105(2) (h)(1-4), (9)(a)-(c), (10), (11), and (14); and SB416 & AB360 from the 77th Session of the Nevada Legislature.

<sup>5</sup> HMC Title 4.32; 4.36; & 19.5.5.

<sup>6</sup> CCC 8.20.020.023, .024, .385, .387, and .388.