4

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, SC SUPERIOR COURT

Ten Taxpayer Group	:	10-1277
	:	
v.	:	C.A. No. ~~05-1391~~
	:	
City of Fall River Redevelopment Authority	:	
Consisting of the Following Natural	:	
Persons who are named Herein Solely	:	
In their Official Capacity: William G. Kenney,	:	
Chairman, Dylan T. Ferreira, Ronald Rheaume	:	
Thomas Marin Sr., and Ann Keane	:	
	:	
	:	

MEMORANDUM IN SUPPORT OF OBJECTION TO PLAINTIFF'S APPLICATION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

Defendant requests that this Honorable Court deny the Plaintiff's Application for a Preliminary Injunction for the reasons stated within this Memorandum.

II. FACTS

On March 4, 2009, an approximately three-hundred (300) acre parcel ("Subject Premises" or "the land") was conveyed by the Commonwealth to the Fall River Redevelopment Authority (the "Defendant") pursuant to Chapter 266 of the Acts of 2002 (the "Act"). A copy of the Act is attached hereto as Exhibit 1. A recorded copy of the Release Deed (the "Release Deed") evidencing the transfer of the Subject Premises to the Defendant is attached as Exhibit 2. The Act authorizes the Defendant to develop land such as the Subject Premises for commercial, industrial and other economic development related purposes, excluding landfill or casino gaming purposes, without adhering to an urban renewal plan as defined by Massachusetts General Laws c. 121B § 1 and, further, the Defendant enjoys the same statutory authority it would possess for

land and structures, and other property, within an urban renewal project as defined by Massachusetts General Laws c. 121B § 1.

During the 2010 legislative session, the Massachusetts General Court debated and considered legislation which would allow for the construction of up to three (3) resort-style casinos within the Commonwealth. The Governor, Speaker, and Senate President all publicly supported the development and licensing of the resort style casinos in Massachusetts as a potential economic boost to a struggling statewide economy. Various cities and towns announced plans to host such developments, including the City of Fall River.

The Defendant had been approached by the Mashpee Wampanoag Indian Tribe (the "Tribe" or the "Buyer"), and its financial backer, to consider allowing the construction of a resort casino in Fall River if enabling legislation was passed by the Massachusetts General Court. After carefully considering a number of policy factors, including the City's 18% unemployment rate, the Defendant voted to support the potential venture and to seek the rescission of the prohibition contained within c. 266 and the Release Deed to use any of the land for casino gaming. State Senator Joan Menard of Fall River agreed to file and support such legislation.

On May 27, 2010, the Defendant did receive an opinion it had requested from Gregory W. Sullivan, the Inspector General of the Commonwealth, which indicated that Massachusetts General Laws c. 30B § 16 "would apply to any disposition of real property or interest therein not in accordance with the purposes and intent of the Act." The opinion did not speak to the effect M.G.L. c. 30B *et seq.* would have if the Massachusetts General Court removed the casino restriction from c. 266 and the Release Deed.

On July 1, 2010, Senator Menard addressed her colleagues on the Senate floor during the extensive debate on proposed casino legislation at which time she discussed the benefits a resort

casino would bring to her city through economic development, especially, the number of jobs that would be generated in Fall River and the surrounding region.

On July 31, 2010, after much debate, the Massachusetts General Court enacted, and sent to the Governor for his consideration, amended legislation authorizing casino gaming in the Commonwealth, and which included specific provisions to amend the Act in order to lift the deed restriction in c. 266 for the Subject Premises which prohibits casino/gaming and landfill development.

On August 2, 2010, the Governor returned to the Massachusetts General Court proposed casino legislation with amendments. However, the Governor left untouched the provisions which rescinded the deed restriction on the Subject Premises as it related to casino/gaming development in Fall River.

The Governor's proposed legislation was not voted upon by the time the General Court adjourned formal sessions on July 31, 2010. However, it is anticipated that bills will be reintroduced in the next legislative session to allow the Commonwealth's voters to consider allowing casino gambling in Massachusetts. Therefore, the Defendant continued its discussions with the Tribe and financial backers.

On October 19, 2010, the Defendant approved the sale of a sixty (60) acre portion of the Subject Premises (the "60 Acre Parcel"), with an option to purchase the remainder of the Subject Premises, to Project First Light, Inc., a Massachusetts corporation, owned or controlled by the Mashpee Wampanoag Tribe, a tribe recognized pursuant to federal recognition statutes subject to the specific terms and conditions set forth in a certain Purchase and Sale Agreement (the "Purchase Agreement"). An unexecuted copy of the Purchase Agreement is attached hereto as Exhibit 3 and a certain unexecuted Option Agreement (the "Option") is also attached hereto as

Exhibit 4 (hereinafter, the Purchase Agreement and the Option are collectively referred to as the "Agreements"). Pursuant to the Agreements, title to the 60 Acre Parcel, as well as the remainder of the Subject Premises, will be transferred and conveyed to the Buyer *subject to*, among other things, the deed restrictions set forth in the Release Deed.

The Buyer will take title to the 60 Acre Parcel of the Subject Premises subject to the same deed restrictions that are set forth in the Release Deed from the Commonwealth of Massachusetts to the Defendant, dated January 22, 2009 and recorded on March 4, 2009 in Book 7124 at Page 95 of the Bristol County Fall River District Registry of Deeds. These deed restrictions include the casino/gaming prohibitions provided by the Act.

Pursuant to the Agreements, the Defendant's obligation to sell and the Buyer's obligation to purchase the balance of the Subject Premises is subject to several specific preconditions, including, but not limited to, the repeal or removal of the existing deed restrictions by the General Court, prohibiting the use of the Subject Premises as a casino, which also includes the 60 Acre Parcel.

On October 22, 2010, the Plaintiff filed the instant Complaint in Bristol Superior Court.. As of October 25, 2010, Defendant has not signed the Agreements. In the event an injunction is granted in this matter, the Agreements cannot be executed, thereby inhibiting the ability of the parties to proceed and possibly preempting, altogether, a potentially significant economic benefit for the City of Fall River and the Commonwealth.

III. STANDARD FOR GRANTING AN APPLICATION FOR A PRELIMINARY INJUNCTION

A preliminary injunction is a drastic remedy that a court should not grant unless the movant, by a clear showing, carries the burden of persuasion. Carter v. Town of Douglas, 2000 Mass. Super. LEXIS 357, *5 (Mass. Super. Ct. June 22, 2000) (internal citation omitted).

Generally, a party seeking a preliminary injunction is required to show that an irreparable injury would occur without immediate injunctive relief. LeClair v. Town of Norwell, 430 Mass. 328, 331-332 (Mass. 1999) (internal citations and quotations omitted.) However, when a suit is brought, either by the government or a citizen acting as a private attorney general, to enforce a statute or a declared policy of the Legislature, the burden of proving irreparable harm is not required. Id (internal citations omitted). However, the Court must still determine whether a petitioner can establish a violation of the statute; the likelihood of success on the merits; and whether the requested relief promotes the public interest, or, alternatively, that an injunction will not adversely affect the public. Id, citing Commonwealth v. Mass. CRINC, 392 Mass. 79, 89, 466 N.E.2d 792 (1984)(internal citations omitted). Moreover, where a statutory violation is alleged, as here, the Court should specifically consider how that statutory violation affects the public interest. Id.[1]

IV. ARGUMENT

A. The Plaintiff has not shown a violation of the law and therefore cannot demonstrate a likelihood of success on the merits of its claims.

On a properly filed "ten taxpayers' suit," the petitioners must establish that a municipality's action violated a statute and adversely affected the public interest. Edwards v. City of Boston, 408 Mass. 643 (1990).

The Defendant has not violated any statute. The Agreements, as written, adhere to the provisions of the Act and are contingent upon the Massachusetts General Court, which originally imposed the prohibition against casino development, to rescind that prohibition, in order to allow the purchase by the Tribe of any further acreage beyond the 60 Acre Parcel and the development

[1] Massachusetts General Laws c. 40, § 53, provides a mechanism for taxpayers to enforce laws relating to the expenditure of tax money by the local government. Id. citing Edwards v. Boston, 408 Mass. 643, 646 (1990). In cases brought under this statute, the taxpayers are acting as private attorneys general. Id.

of a resort casino on that parcel. If the General Court does not pass such legislation, the option is not executed and no casino can be built. The 60 Acre Parcel is purchased pursuant to all present conditions of the Act and the Release Deed.

Moreover, M.G.L. c. 30B *et seq.* is not violated because the Act speficially exempts the transfer of the Subject Premises from the application of M.G.L. c. 30B *et seq.* Section 2 of the Act makes clear that the Authority possesses a statutory grant by which it may sell the Subject Premises, purchased pursuant to Chapter 266 by a procedure *other than that set forth in M.G.L. c. 30B et seq.* Section 2 states, "[t]he Fall River Redevelopment Authority may purchase, notwithstanding chapter 121B of the General Laws or any other general or special law to the contrary, from the division of capital asset management ... the parcels of land described in Section 1. The Fall River Redevelopment Authority ... without the necessity of adopting or adhering to an urban renewal plan, as defined in section 1 of said chapter 121B of the General Laws, and with respect to said land the Fall River Redevelopment Authority shall enjoy the statutory authority it would possess for land and structures and other property within an urban renewal project as defined in section 1 of said chapter 121B...." (emphasis added).

Section 2 makes clear that the Act was intended to govern, notwithstanding any other law to the contrary (i.e. M.G.L. c. 30B *et seq.*). Therefore, to the extent that M.G.L. c. 30B *et seq.* conflicts with the Act, the Act governs.[2] Furthermore, even assuming *arguendo* that the Act does not trump c. 30B, the language in Section 2 provides that the Authority is controlled by the statute and regulations governing disposition of real property within an urban renewal project

[2] Special laws, such as the Act, supersede the application of general laws, such as M.G.L. c. 30B *et seq.* See Haffner v. Dir. Pub. Safety of Lawerence, 329 Mass 709, 714 ("[S]trong terms are required to show a legislative intent to supersede by general act a special act which may be made in regard to a place, growing out of its peculiar wants, conditions, and circumstances.")(internal citations and quotations omitted); Firefighters' Retirement Ass'n of Providence v. Norberg, 476 A.2d 1034 (R.I. 1984) (A special act which cannot be construed in harmony with a general act must prevail).

and the exemption contained in M.G.L. c. 30B § 1(b)(25) is applicable here as well. Section 1(b)(25) provides that M.G.L. c. 30B is not applicable to "a contract to sell, lease, or acquire residential, institutional, industrial or commercial real property by a public or quasi-public economic development agency or urban renewal agency engaged in the development and disposition of said real property in accordance with a plan approved by the appropriate authorizing authority."[3] Indeed, the language regarding the possession of statutory authority within an urban renewal project was expressly added to make certain dispositions of land subject to M.G.L. c. 121B and not subject to M.G.L. c. 30B. Following the usual rules of statutory construction, the Act should be construed to give its language full meaning and not render its application superfluous. LeClair, supra. The Plaintiff cannot show that M.G.L. c. 30B is applicable to the Authority and the Agreements, and therefore, Plaintiff cannot show a likelihood of success on the merits.

B. The Court should also deny the Application because the Plaintiff cannot establish that Defendant's actions are not in the public's best interest.

The movants cannot show that the actions of the Defendant have adversely affected the public interest. On the contrary, the granting of their application for a temporary injunction would cause irrparable public harm. In LeClair v. Town of Norwell, the Supreme Judicial Court addressed an application for injunctive relief brought by taxpayers pursuant to M.G.L. c. 40 § 53. LeClair at 330. The LeClair Court reasoned that the taxpayer plaintiffs needed to show a likelihood of success on the merits of their claims and "whether the public interest would support entering an injunction or, in the alternative whether an injunction would adversely affect the public." Id (internal citations and quotations omitted). The Supreme Judicial Court refused to

[3] See St. Botolph Citizens Committee, Inc. v. Boston Redevelopment Authority, 429 Mass. 1, 13 (1999).

grant those taxpayers' their request for injunctive relief because it held that "to enter a preliminary injunction might do serious damage to the interests of the public." Id.

Here, Plaintiff's application would similarly cause serious damage to the public. First, Plaintiff's Application is premature.[4] Presumably, Plaintiff is misinformed or unaware of the preconditions set forth in the Agreements. Second, the Agreements are designed to promote the economic interests of the citizens of Fall River. The Defendant has set significant preconditions that must be met before any casino development could occur anywhere on the Subject Premises. As stated by Senator Menard on the floor of the Senate, the Subject Premises could eventually be used for a project that would promote job growth and tourism in Fall River. This Court can take judicial notice that Fall River is presently enduring an approximately eighteen percent (18%) unemployment rate. If certain conditions are met, the Buyer will be able to put the Subject Premises to its highest and best use, for a project that would lead to job creation in the short term (construction industry related employment), and, in the long term, significant tourist related employment. Just because these taxpayers disagree with the potential land use does not equate to their right to a preliminary injunction to prevent that potential use of the property in accordance with existing law or with the potential changes to the existing law. In fact, Plaintiff has a remedy and a right to testify at any House and Senate hearings against any proposed changes to the Act at the next session of the Massachusetts General Court.

Under LeClair, the equities clearly weigh in favor of denying Plaintiff's Application. Granting Plaintiff's Application will hinder the sale and could lead to the citizens of Fall River losing a potentially significant economic development.

[4] The Plaintiff's premature request, by itself, is sufficient grounds for this Court to deny the Application. See North v. City Council of Brockton, 341 Mass. 483, 483-84 (Mass 1960).

V. CONCLUSION

Based on the foregoing, the Defendants ask that this Honorable Court deny Plaintiff's Application for a Preliminary Injunction.

Respectfully submitted,
The City of Fall River Redevelopment Authority,
William G. Kenney, Dylan T. Ferreira, Ronald Rheaume, Thomas Martin Sr., and Ann Keane

By their Attorneys,

PANNONE LOPES DEVEREAUX & WEST LLC

William P. Devereaux (#122220)
Matthew C. Reeber (#670667)
Matthew G. Feher (# 676824)
317 Iron Horse Way, Suite 301
Providence, RI 02908
(401) 824-5100
(401) 824-5123 (fax)
wdevereaux@pldwlaw.com

CERTIFICATION

The undersigned hereby certifies that a true copy of the within was sent via electronic mail and hand delivery on this 26th day of October, 2010.

Lesley S. Rich, Esq.
Rich Law Associates
44 Bedson Road
Cranston, RI 02901

Earl W. Duval, Esq.
Elizabeth Thompson O'Keefe, Esq.
Duval, Klasnick, & Pastel LLC
10 Cedar Street, Suite 17
Woburn, MA 01801