UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

KG URBAN ENTERPRISES, L.L.C., Plaintiff, v. DEVAL L. PATRICK, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE COMMONWEALTH OF MASSACHUSETTS, ET AL., Defendants.	CIVIL ACTION NO. 1:11-CV-12070-NMG

DEFENDANTS' MEMORANDUM OF LAW
IN SUPPORT OF MOTION TO DISMISS
FOR LACK OF SUBJECT-MATTER JURISDICTION

Governor Deval Patrick (the "Governor") and the Massachusetts Gaming Commission, by and through its members sued in their official capacities (the "Commission"; the Governor and the Commission collectively will be referred to as the "State Defendants") submit this memorandum in support of their motion to dismiss this case on the ground that it has become moot.

Background

On November 22, 2011, the Massachusetts Legislature enacted, and the Governor signed into law, "An Act Establishing Expanded Gaming in the Commonwealth," St. 2011, c. 194 (the "Gaming Act"). See KG Urban's Amended Complaint, ¶ 1. [1] Among other things, the Gaming

[1] Because the State Defendants' motion to dismiss is brought pursuant to Fed. R. Civ. P. 12(b)(1) (challenging this Court's subject-matter jurisdiction to adjudicate an action that has become moot), the Court is not limited to the facts as pleaded in the Amended Complaint, as it would have been with respect to a motion to dismiss under Fed. R. Civ. P. 12(b)(6). Rather, in order to evaluate its jurisdiction, the Court may inquire into – and the parties may make reference to – documents that bear on the jurisdictional question; the Court's duty is to evaluate "the facts as they

Act created the Commission, and authorized the Commission to accept and review applications to operate resort-style casinos in Massachusetts, and, at the conclusion of its review, at its discretion, to award one license to operate such a casino in any or all of three discrete geographical regions of the Commonwealth. Amended Complaint, ¶ 10. Those regions included the Greater Boston area, Western Massachusetts, and Southeastern Massachusetts. Id.

From the outset, the Gaming Act recognized that the facts on the ground were different in the Southeastern Region – which it denominated as Region C – than in the other two regions of the Commonwealth. The Legislature took notice of the fact that the two federally recognized Indian tribes in Massachusetts were both situated in Region C, and that, in certain circumstances, the federal Indian Gaming Regulatory Act (the "IGRA") provides a mechanism for Indian tribes to conduct gaming on tribal lands without state licensure. Accordingly, the Gaming Act created a window to facilitate the IGRA process. Within that window, the Governor was authorized to negotiate a tribal-state compact with a federally-recognized tribe; if that compact was subsequently approved by the federal Bureau of Indian Affairs, and if the tribe met all other requisites to conduct gaming on tribal lands under the IGRA, and met the requirement in St. 2011, c. 194, § 91(d), that the tribe "schedule[] a vote in the host communities for approval," then the tribe would be authorized to operate resort-style casino gambling on such tribal lands, which were presumed to be located, if at all, in Region C. The Gaming Act did, however, contemplate the potential for setbacks in the compacting and/or the IGRA processes; if either (a) no tribal-state compact had been approved by the Massachusetts Legislature on or before July 31, 2012; or (b) the Commission "determine[d] that the tribe will not have land taken into trust

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exist." Land v. Dollar, 330 U.S. 731, 735 n.4 (1947); accord, Fiori v. Truck Drivers Union Local 170, 130 F.Supp.2d 150, 153 (D.Mass. 2001).

by the United States Secretary of the Interior,"[2] then the Commission "shall consider bids for a Category 1 license in Region C." St. 2011, c. 194, § 91(e).

Two things happened in the immediate aftermath of the passage of the Gaming Act: (1) The Governor successfully negotiated, and the Massachusetts Legislature subsequently approved, a compact between the Commonwealth and the Mashpee Wampanoag Tribe, setting forth the terms pursuant to which the tribe would be permitted to operate a resort-style casino in Region C; and (2) KG Urban brought suit in this Court, challenging the constitutionality of Section 91 of the Gaming Act. Specifically, KG Urban alleged that, by classifying federally enrolled Indian tribes differently from other potential applicants for Category 1 licensure in Region C, Section 91 violated the Equal Protection Clause of the 14th Amendment, insofar as it allegedly accorded differential treatment on the basis of race. KG Urban therefore sought declaratory and injunctive relief (a) striking down Section 91 as unconstitutional; and (b) compelling the Commission to open up Region C to applications from commercial entities, including KG Urban itself.

In February, 2012, this Court issued an opinion denying KG Urban's request for preliminary injunctive relief, and dismissing its complaint for failure to state a claim. In essence, this Court held that, to the extent that the Gaming Act accorded any differential classification to compacted Indian tribes, it did so pursuant to authority delegated to the states by the IGRA, and was therefore subject only to rational-basis review, a standard that the Gaming Act easily satisfied. See KG Urban Enterprises, L.L.C. v. Patrick, 839 F.Supp.2d 388, 405 (D.Mass. 2012).

[2] Under the IGRA, an Indian gaming facility can only be conducted on tribal land, held in trust by the federal Bureau of Indian Affairs. At the time of the Gaming Act's passage, the Mashpee Wampanoag Tribe possessed no such "land in trust," but did have a petition pending before the Bureau of Indian Affairs seeking to have land in Taunton, Massachusetts, taken into trust for gaming purposes. That application remains pending at this time.

On appeal, however, the First Circuit, though it affirmed this Court's denial of preliminary injunctive relief, vacated the dismissal of this action as premature. The First Circuit held that whether Massachusetts was authorized to apply differential classification to an Indian tribe (here, the Mashpee Wampanoag Tribe) turns entirely on a question not yet answered by the relevant federal agency: i.e., whether or not the Bureau of Indian Affairs would, or even could, take land into trust on behalf of a tribe, like the Mashpee Wampanoag, that had not yet attained federal recognition in 1934 (the year of enactment of 25 U.S.C. § 465, the statute creating the land-into-trust procedure for the benefit of Indian tribes "now under federal jurisdiction"). See KG Urban Enterprises, L.L.C. v. Patrick, 693 F.3d 1, 21-22 (1st Cir. 2012), discussing, Carcieri v. Salazar, 565 U.S. 379, 129 S.Ct. 1058 (2009). Moreover, the First Circuit noted that, while the Bureau of Indian Affairs' final resolution of the Mashpee Wampanoag's pending land-into-trust application (and any judicial challenges thereto) would presumably provide a definitive answer regarding whether the tribe was eligible for gaming on tribal lands under the IGRA, there was nothing in the record to indicate when that decision would become final, or, indeed, when (if ever) KG Urban would have an opportunity to apply for a Category 1 gaming license in Region C. Id. at 26 (while Commission could "exercise its own authority in deciding whether to consider bids [from private applicants in Region C]," record was devoid of any indication "as to when the Commission may do so."). In the court's view, the answer to the latter question bore heavily on the Equal Protection Clause claim that KG Urban has asserted. Id. at 27.

Since this case was restored to this Court's docket in September, 2012, the Court has stayed its hand, implicitly deferring to the primary jurisdiction of the federal agencies where the Mashpee Wampanoag Tribe's applications to approve the tribal-state compact and to take land into trust remained pending. In October, 2012, the tribal-state compact was rejected by the

Bureau of Indian Affairs; a second tribal-state compact between the Commonwealth and the Mashpee Wampanoag Tribe has since been negotiated and signed, and has been submitted to the Massachusetts Legislature for approval. Meanwhile, no decision has been rendered in the land-into-trust proceeding; while the Bureau of Indian Affairs has not publicly committed to any timeframe for the resolution of that proceeding, a March 20, 2013 letter from the bureau's solicitor to the chairman of the Mashpee Wampanoag Tribe stated that a determination of the tribe's eligibility to have land taken into trust was "a top priority" for the agency, and stated that the bureau was "making substantial progress in its review." See April 1, 2013 Letter of Daniel J. Hammond (docketed as paper # 99) at Exhibit C.

Most recently, however, the Commission elected not to await final resolution of the Bureau of Indian Affairs' review of the Mashpee Wampanoag Tribe's application to take land into trust, but rather voted unanimously to open up Region C to commercial applications for a Category 1 casino license. At its public meeting on April 18, 2013, the Commission resolved to: "open Region C to commercial [applications], with the Commission deciding whether to issue a commercial license to an applicant after taking into account economic and other circumstances as they exist at the time of the licensing decision[,] in light of the statutory objective[s] that govern expanded gaming in the Commonwealth and the discretion with which the expanded gaming statute clothes the Commission." See Transcript of Commission's 4/18/13 public meeting, attached as Exhibit A to April 23, 2013 Letter of Daniel J. Hammond (docketed as paper # 104). It is anticipated that at its upcoming May 30, 2013 meeting, the Commission will identify a date upon which it will begin accepting commercial applications with respect to Region C. See Transcript of Commission's May 16, 2013 public meeting (attached hereto as Exhibit A) at 99-134.

ARGUMENT

THE COMMISSION'S DECISION TO OPEN UP REGION C TO COMMERCIAL APPLICATIONS RENDERED KG URBAN'S COMPLAINT MOOT; ACCORDINGLY, IT SHOULD BE DISMISSED.

A. This Case Fits the Relevant Criteria for Dismissal as Moot.

"Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a cognizable interest in the outcome." Powell v. McCormack, 395 U.S. 486, 496, 89 S.Ct. 1944 (1969). As the Supreme Court has explained on multiple occasions, mootness is nothing more than "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue through its existence (mootness)." United States Parole Commission v. Geraghty, 445 U.S. 388, 397, 100 S.Ct. 1202 (1980) (quoting Henry P. Monaghan, "Constitutional Adjudication: The Who and When," 82 Yale L.J. 1353, 1384 (1973)). As the First Circuit has further explained, to continue to litigate a case after the parties have come to lack a stake in its outcome is, in effect, to issue an advisory legal opinion – something courts are explicitly forbidden to do under Article III, § 2, cl. 1 of the Constitution. Overseas Military Sales Corp. v. Giralt-Armada, 503 F.3d 12, 16 (1st Cir. 2007). The proper course, rather, is to acknowledge that "a case or controversy ceases to exist, and dismissal of the action is compulsory." Cruz v. Farquharson, 252 F.3d 530, 533 (1st Cir. 2001).

That is precisely what has happened here. On or about January 7, 2013, KG Urban, at the Court's direction, filed its amended complaint in this matter. The only functional relief that KG Urban requested from this Court was a permanent injunction "[o]rder[ing] the Gaming Commission to immediately commence a commercial application process in Region C under the same race-neutral terms and conditions that apply in Regions A and B, including provisions designed to ensure that non-tribal gaming applicants are not placed at an unfair disadvantage as a result of the

lengthy delay in opening the Southeast to a competitive process." See Amended Complaint (docketed as paper # 83) at p. 20, ¶ (iv).

That is exactly what the Commission did at its April 18, 2013 public meeting. It elected "to open Region C to commercial applications," and went on to dictate the neutral criteria that it would use to determine which applicant, if any, will ultimately be awarded a Category 1 license for Region C. The Commission stated that it would decide "whether to issue a commercial license to an applicant after taking into account economic and other circumstances as they exist at the time of the licensing decision[,] in light of the statutory objective[s] that govern expanded gaming in the Commonwealth and the discretion with which the expanded gaming statute clothes the Commission." In other words, the Commission publicly committed itself to employ the same decisionmaking machinery that KG Urban would have had this Court order it to use, had this case proceeded to a judgment favorable to the plaintiff.

KG Urban will doubtless note that, in addition to injunctive relief, its Amended Complaint also sought a declaration to the effect that Section 91(e) of the Gaming Act – to the extent that it allegedly tied the Commission's discretion to open up Region C to commercial applications to the open-ended timeframe of the Bureau of Indian Affairs' land-into-trust proceedings – violated the Equal Protection Clause and the cognate provisions of the Massachusetts Declaration of Rights. However, to the extent that KG Urban posits that this constitutional claim remains "live," and therefore survives dismissal for mootness, it is mistaken. Whether treated as a facial or as-applied challenge to the statute, KG Urban's Equal Protection Clause claim is viable only to the extent that the Commission could not (in the case of a facial challenge) or did not (in the case of an as-applied challenge) interpret Section 91(e) in such a way as to afford KG Urban equal treatment with its prospective competitors, including Indian

tribes, in Region C. But that is not what has happened here. Rather, at its April 18, 2013 public meeting, the Commission (a) interpreted Section 91(e) as authorizing it to open up Region C to commercial applications, without awaiting the outcome of the Mashpee Wampanoag Tribe's land-into-trust application proceedings; and (b) voted to exercise that authority to begin accepting commercial applications.

Given this sequence of events, were the Court to retain jurisdiction over KG Urban's constitutional claims, it could ultimately do no more than issue, in effect, an advisory opinion on the hypothetical question of whether, if Section 91(e) were interpreted by the Commission as foreclosing it from accepting commercial application in Region C until some date in the indeterminate future, that section would violate the Equal Protection Clause. To enter such an opinion lies outside the jurisdictional reach of this Court. See Overseas Military Sales, 503 F.3d at 16.

To put the matter differently: Had this case not become moot, and had the Court proceeded to the merits of KG Urban's claims, it would not have reached the Equal Protection Clause question. So long as Section 91(e) was fairly susceptible of being read as permitting the Commission, at its discretion, to open up Region C to commercial applications at some point before the invidious delays warned of by the First Circuit, then this Court would have been foreclosed from addressing the constitutional claims. See, e.g., Sony BMG Music Entertainment v. Tenenbaum, 660 F.3d 487, 508 (1st Cir. 2011) (courts should not reach constitutional questions where statutory or common-law remedies may provide all relief to which plaintiff is entitled).

B. The Doctrine of Voluntary Cessation Does Not Save This Case From Mootness.

KG Urban suggested at the most recent status conference, and will likely reiterate here, that the common-law doctrine of voluntary cessation saves this action from mootness. Its reliance on that doctrine is misplaced.

As the Supreme Court explained most recently in Already, L.L.C. v. Nike, Inc., 133 S.Ct. 721, 727 (2013), the voluntary cessation doctrine was crafted to ensure that "a defendant cannot automatically moot a case simply by ending its unlawful conduct once sued." Id. at 727 (citing City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289, 102 S.Ct. 1070 (1982)). As the Already court further observed: "Otherwise, a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, pick up where he left off, repeating this cycle until he achieves his unlawful ends." Id. Accordingly, a party claiming mootness as a consequence of a voluntary act bears "the formidable burden of showing it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Id. (quoting Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 190, 120 S.Ct. 693 (2000)) (internal quotation marks omitted).

Following the Supreme Court's Already decision, the First Circuit observed that, given the rationale underlying the voluntary cessation doctrine, that doctrine "does not apply when the voluntary cessation of the challenged activity occurs because of reasons unrelated to the litigation." American Civil Liberties Union of Massachusetts v. U.S. Conference of Catholic Bishops, 705 F.3d 44, 55 (1st Cir. 2013) (citing M. Redish, Moore's Federal Practice, § 101.99[2]; see also Jordan v. Sosa, 654 F.3d 1012, 1037 (10th Cir. 2011) (same). What the doctrine was developed to prevent, then, was a defendant's litigation-driven sleight-of-hand, "maneuvers designed to insulate a decision from review." Knox v. Service Employees International Union, Local 1000, 132 S.Ct. 2277, 2287 (2012).

That does not at all describe what the Commission has done in the instant case. A review of the transcript of the April 18, 2013 public meeting, at which the Commission made its decision to open up Region C to commercial applicants, reveals that the individual commissioners elected to support that proposal for two principal and closely-connected reasons: (1) because it had grown concerned that the Mashpee Wampanoag Tribe's land-into-trust proceeding could stretch out well into the indefinite future; and (2) because waiting indefinitely for the resolution of that proceeding imperiled the chance of any gaming facility ever being built in Southeastern Massachusetts, the region of the Commonwealth hardest hit by the recent economic downturn. See, e.g., Transcript of April 18, 2013 public meeting (attached as Exhibit A to paper # 104) at 102 (Chairman Crosby stating that, if Commission waits for a prolonged period for resolution of land-into-trust proceeding, and that proceeding ends unfavorably for the Mashpee Wampanoag Tribe, "the Commonwealth loses the $85 million license fee from a commercial applicant. The Commonwealth loses a hundred million or so in revenues for every year that this unknown delay goes on. And the Commonwealth loses whatever economic development and jobs impact is of construction of a commercial facility."); and at 93 (Commissioner McHugh stating that opening up Region C to commercial applicants would honor Legislature's manifest intent "that Region C not be left behind.") Had the Commission been motivated solely, or even primarily, by a desire to moot KG Urban's lawsuit, it could have taken this action at any time after the suit was filed, or certainly after the First Circuit reinstated the litigation. But it did not. Rather, it acted only after it had grown concerned about the open-endedness of the land-into-trust proceeding, and after it had heard testimony from residents and elected officials in Southeastern Massachusetts about the negative economic impact of such a

potentially prolonged wait. The Commission's motives for acting, by themselves, carry this case outside the ambit of the voluntary cessation doctrine.

Moreover, that doctrine saves a case from mootness only where the defendant fails to demonstrate that "the allegedly wrongful behavior could not reasonably be expected to recur." Already, 133 S.Ct. at 727. Here, recurrence of the prior regime (i.e., waiting indefinitely for the conclusion of the land-into-trust proceeding) may have been a reasonable prospect had the Commission gone forward with the "parallel track" proposal it had first raised in December, 2012. As Commissioner McHugh explained at the April 18, 2013 public meeting, that earlier proposal contemplated opening Region C to commercial applications on a provisional basis, with the understanding that, if and when the Mashpee Wampanoag Tribe's compact and land-into-trust applications were approved by the relevant federal regulator, "we automatically stop the commercial side," effectively reinstating the tribe as the sole potential casino operator in Region C. "That other option," Commissioner McHugh stated, "the parallel track one, was one we discussed in December. But this is different." Transcript of April 18, 2013 public meeting, at 96.

Instead, what the Commission elected to do was to begin accepting applications (together with non-refundable application fees) from aspiring commercial developers in Region C. The Commission has stated that it will evaluate Region C proposals from all qualified applicants, then ultimately determine which proposal, if any, constitutes the best economic proposal for the Commonwealth, using the same criteria that the Commission will apply in Regions A and B. Id. at 96. Notably, and in contrast to the "parallel tracks" proposal discussed in December, the Commission's action does not contemplate a scenario whereby Region C would somehow become "closed" to commercial applicants: Even if the Mashpee Wampanoag Tribe successfully

completes both of its federal application processes before the date on which the Commission ultimately decides the fate of Category 1 gaming applications for Region C, the Commission has stated that it will evaluate the economic impact of the tribe's plan side-by-side with the proposals made by commercial applicants, and will choose the option (if any) that best satisfies the economic and other criteria set forth in the Gaming Act.

To be clear: Unless the Mashpee Wampanoag Tribe submits a commercial application for Category 1 licensure in Region C, it would not be a candidate for a state-issued gaming license. Rather, the tribe's route to operation of a resort-style casino in Southeastern Massachusetts lies in (a) having its tribal-state compact approved by both the Massachusetts Legislature and the Bureau of Indian Affairs; and (b) having land taken into trust for its benefit by the Department of the Interior. Upon successful completion of those steps, the tribe would become eligible to own and operate a Category 1 casino, subject only to federal regulation under the IGRA, and to whatever state oversight it has agreed to under its compact. No state license would be required, and none would be issued. Thus, when the Commission states that, in the event of the Tribe's attaining all necessary federal approvals, the Commission would evaluate any proposal by the tribe on an even footing with any proposal by a commercial applicant, what it means is that it would determine what state license, if any, should be awarded to which commercial applicant, in light of the tribe's ability to operate a resort-style casino in the region without state licensure.

In short, the Commission has not left itself any "escape hatch," the closing of which might have justified application of the voluntary cessation doctrine to this case.

Finally, even though the Commission has taken the effectively immutable step of opening Region C to commercial applicants – the only relief that KG Urban sought in its Amended

Complaint – KG Urban may nonetheless argue that an event outside the Commission's control could nonetheless reinstate the conduct of which it initially complained. Specifically, KG Urban suggested at the most recent status conference that a third party could potentially challenge the Commission's interpretation of Section 91(e) in a separate, state-court action and, if successful, could procure an order enjoining the Commission from accepting commercial applications in Region C.

This attenuated hypothetical, however, cannot be the basis for invoking the voluntary cessation doctrine. It is no more than conjecture, at this point, to presume both that such a lawsuit will be brought, and that, if commenced, will ultimately result in a retroactive "closing" of Region C to commercial applicants. To the extent that such a scenario could conceivably unfold, this Court should dismiss KG Urban's present action without prejudice, thereby permitting it to reinstate litigation against the Commonwealth if and when it were deprived of its present ability to pursue licensure in Region C. To do more would be to permit an action to remain on this Court's docket, even though no case or controversy presently exists.

Conclusion

For the reasons set forth above, in light of the Commission's action on April 18, 2013, KG Urban's suit against the State Defendants has now become moot. Accordingly, this Court should dismiss it, without prejudice.

Respectfully submitted,

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/s/ Daniel J. Hammond