(LEAVE TO FILE GRANTED ON JULY 12, 2013)

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' REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS

Governor Deval L. Patrick and the Massachusetts Gaming Commission (together, the "State Defendants") hereby submit this brief reply to various points made by KG Urban Enterprises, L.L.C. ("KG Urban") in its opposition to the State Defendants' motion to dismiss the instant litigation as moot.

A. Given the Commission's Opening of Region C to Commercial Applicants, None of the Relief it Seeks Would Be of Any Practical Effect.

In its opposition, KG Urban postulates a variety of scenarios under which the company could still suffer "harm" of a constitutional dimension, notwithstanding the unanimous vote of the Massachusetts Gaming Commission (the "Commission") to open Region C to private

applicants for resort-style casino licensure.[1] Conspicuous by its absence, however, is any discussion of how this alleged harm would be mitigated, let alone cured, were the Court to grant the relief sought by KG Urban in its amended complaint. Indeed, even were this Court to: (a) hold that KG Urban's amended complaint remains justiciable; and (b) ultimately grant judgment to KG Urban in the forms prescribed in that complaint, then the legal relation between the parties will not have changed at all. In such instances, the proper course – indeed, the only available course – is dismissal.

In its amended complaint, KG Urban sought relief in two forms: an order commanding the Commission to open Region C to Category 1 commercial license applications; and a declaration that Section 91(e) of the Gaming Act was unenforceable because it allegedly effected a racial preference in violation of the equal protection clause. In its opposition, KG Urban argues that the requested relief is necessary because, in its absence, prospective licensees (like KG Urban) could participate in the licensing process for Region C, "only to be told at the end of the process that Region C will continue to be set aside for the Mashpee [Wampanoag Tribe]." Opposition at 7.[2]

Neither of the remedies KG Urban seeks in this litigation, however, would change this calculus. As the State Defendants noted in their motion to dismiss, the Commission has already taken the affirmative step that KG Urban would have this Court order it to take: It has opened

[1] At its May 30, 2013 public meeting, the Commission set September 30, 2013, as the deadline for receipt of private Category 1 licenses in Region C. A copy of the Commission's press release announcing this deadline is attached hereto as Exhibit A.

[2] This characterization of its own claim marks a departure from how KG Urban has previously described the relief it seeks. Throughout this litigation, KG Urban has insisted that it seeks only to compete, on an even playing field, with all other prospective applicants for licensure in Region C. However, now that the Commission has opened Region C to commercial applications, KG Urban suggests, for the first time, that any process in Region C that does not culminate in the award of a commercial license would constitute, ipso facto, a racial-preference "set aside" in favor of the Mashpee Wampanoag Tribe. Yet even if its amended complaint could fairly be read as attacking not a process, but rather a (potential) outcome of that process, and even if that attack were found to have some merit, KG Urban still fails to explain how the relief it seeks would alter that (potential) outcome.

Region C to commercial applications. It has set September 30, 2013, as the deadline for those applications. It has affirmed that the Commission, upon receiving and reviewing all applications, will 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." See Transcript of Commission's April 18, 2013 public meeting. Thus, by no later than September 30, 2013, KG Urban will have either (a) filed an application with the Commission, to compete for a Category 1 license, subject to the process and criteria set forth by the Commission; or (b) forfeited its standing to complain about that process. In either event, an order by this Court directing the Commission to open Region C to commercial applications would be, at best, superfluous. Indeed, as the State Defendants argued in their motion, such a request has long since become moot.

Nor would the invalidation of Section 91(e) of the Gaming Act insulate KG Urban from the potentially adverse result that it seeks to remedy. Section 91(e), in its entirety, states as follows:

> Notwithstanding any general or special law or regulation to the contrary, if a mutually agreed-upon compact has not been negotiated by the governor and Indian tribe, or if such compact has not been approved by the general court before July 31, 2012, the commission shall issue a request for applications for a category 1 license in Region C pursuant to Chapter 23K of the General Laws not later than October 31, 2012; provided, however, that if, at any time on or after August 1, 2012, the commission determines that the tribe will not have land taken into trust by the United States Secretary of the Interior, the commission shall consider bids for a category 1 license in Region C under said Chapter 23K.

St. 2011, c. 194, § 91(e). Even were this Court to accept KG Urban's invitation to strike down this section as constitutionally infirm, all that would be lost are the mandatory statutory triggers

pursuant to which the Commission shall open Region C to commercial applicants. However, given that the Commission has already found, and exercised, discretionary authority within Section 91(e) to open Region C to commercial bidders, this relief, too, would be of no practical import. Here, too, KG Urban finds itself in the position of asking for relief that, as a factual matter, it has already received.

What KG Urban appears to be complaining about – indeed, the only "live" controversy that it posits – is the scenario that it described at page 7 of its opposition: that the Commission accepts and evaluates applications from all comers in Region C; that it analyzes all "economic and other circumstances as they exist at the time of the licensing decision"; and that it ultimately awards no commercial license in Region C, either explicitly or implicitly because the imminent prospect of an Indian-operated casino in that region undercuts the economic viability of each commercial applicant's proposal. See Opposition at 7. To the extent that this is the outcome that KG Urban seeks to foreclose, its quarrel is not with Section 91(e), nor with any action (or inaction) of the Commission:

- To the extent that KG Urban complains that the Mashpee Wampanoag Tribe has a path to casino ownership and operation that does not require state licensure, this path was created by Congress in the Indian Gaming Regulatory Act (the "IGRA"). It cannot be the proper subject of a suit against the State Defendants.

- To the extent that KG Urban complains that the Commission may consider the impact of a potential tribal casino in evaluating the merits of each commercial applicant's proposal, and may elect to issue no commercial license in a region, or in the Commonwealth as a whole, it is a different section of the Gaming Act that conveys this authority upon the Commission. See St. 2011, c. 194, § 16, codified at M.G.L. c. 23K, §§ 18(7) (Commission "shall evaluate" benefits of

proposed site location vis-à-vis competition from out-of-state casino); 18(11) (Commission "shall evaluate" extent to which proposal maximizes total revenues received by the Commonwealth); and 18(13) (Commission "shall evaluate" extent to which proposal offers "the highest and best value to create a secure and robust gaming market in the region and the [C]ommonwealth"). This section, which applies equally to the Commission's analysis in all three regions, directs the Commission to base licensing decisions upon a myriad of economic and other considerations, and would appear to compel the Commission, at a minimum, to consider all facts on the ground – including the existence or imminence of an Indian gaming facility – in determining whether, and to whom, to award a license in a given region. KG Urban does not challenge M.G.L. c. 23K, § 18, in this litigation.

- To the extent that KG Urban complains that the Gaming Act, in authorizing the Governor to negotiate a compact with a federally recognized Indian tribe, conferred a competitive advantage upon the Mashpee Wampanoag Tribe (because absent a tribal-state compact, a tribe may not operate a resort-style casino under the IGRA), the Governor's compacting authority is contained in St. 2011, c. 194, §§ 91(a)-(d). Unlike KG Urban's original complaint in this matter, its amended complaint does not challenge any of those sections.

In short, at this late point in the process, none of the relief that KG Urban seeks in its amended complaint, even if granted, would redress the harms that it alleges it has suffered (or may suffer in the future).[3] Accordingly, its amended complaint should be dismissed as moot.

[3] KG Urban does suggest that, because Region C was opened to commercial applicants later than Regions A and B, and because the Commission will have to evaluate the potential for Indian gaming in Region C in connection with its licensing process there, the State Defendants' treatment of Region C (vis-à-vis the other two regions) may, in itself, constitute an equal protection violation. As a threshold matter, it is not even clear that the State Defendants have accorded differential treatment to Region C, given that the Commission must evaluate the potential impact of Indian gaming in that region when evaluating applicants' proposals in Regions A and B, as well. In any event, (a) KG Urban has not pleaded a geography-based equal protection claim in this litigation, and (b) even if it did, such a claim would be subject only to rational-basis review.

B. The Governor's Alleged Views As to the Meaning of Section 91(e) Are Irrelevant to the Disposition of KG Urban's Claim.

KG Urban argues that, even though the Commission has now interpreted Section 91(e) in such a way as to authorize its opening of Region C to commercial applicants, KG Urban may yet be harmed by that section because the Governor, who is also a defendant in this litigation, "has been singing a different tune from the Commission, and continues to believe that state law provides a regional monopoly for the Mashpee [Wampanoag Tribe] in Region C." Opposition at 10. Even if the various out-of-court statements ascribed to the Governor in KG Urban's opposition did indeed support that characterization of the Governor's subjective "belief" about the Gaming Act – which the State Defendants do not concede – they are immaterial to the disposition of KG Urban's claim, and have no bearing on whether that claim remains justiciable.

Section 91(e) confers a single duty upon the Governor: to negotiate, should he so choose, a compact with a federally recognized Indian tribe. The Governor has now fully acquitted himself of this duty.[4] It is the Commission, not the Governor, that is charged with interpreting the Gaming Act. It is the Commission's interpretation of the statute, not the Governor's, that is entitled to deference should it be challenged in state court. The Commission has now unequivocally construed Section 91(e) as conferring upon it the discretionary authority to open Region C to commercial applicants, and it has elected to exercise that authority.

Conclusion

For the reasons stated herein, together with the reasons set forth in the State Defendants' motion, the Court should dismiss KG Urban's amended complaint, with prejudice.

Respectfully submitted,

[4] Indeed, he has now done so twice, given that the First Compact was not approved by the federal Bureau of Indian Affairs.

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/s/ Daniel J. Hammond