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 FOR SUMMARY JUDGMENT

Introduction

When the Massachusetts Gaming Commission (the "Commission") voted, on April 18, 2013, to open up Region C (Southeastern Massachusetts) to commercial applicants – thereby providing KG Urban Enterprises, L.L.C. ("KG Urban") with the only functional relief it requested in its Amended Complaint – the Commission did not, in this Court's view, render the instant litigation moot. What the Commission's vote did do, however, was to defeat KG Urban's cause of action, as that claim was defined by the First Circuit in KG Urban Enterprises, L.L.C. v. Patrick, 693 F.3d 1 (1st Cir. 2012). Because KG Urban can no longer prevail on the merits of that claim, this Court should grant summary judgment in the defendants' favor, and against KG Urban.

Procedural and Factual 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. Among other things, the Gaming 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 are 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 ("IGRA") provides a mechanism for Indian tribes to conduct gaming on tribal lands without state licensure. See, 25 U.S.C. § 2710(d). Accordingly, the Gaming Act created a temporal window within which a tribe could carry the IGRA process to fruition. 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 they existed at all, in Region C. 25 U.S.C. § 2710(d). The Gaming Act also contemplated 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 by the United

States Secretary of the Interior,"[1] 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 negotiated, and the Massachusetts Legislature 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 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).

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[1] 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, the First Circuit affirmed this Court's denial of preliminary injunctive relief, but 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 (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 question of when KG Urban would be able to apply for a license bore heavily on the Equal Protection Clause claim that KG Urban asserts in this litigation. 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 (the "Second Compact") has since been negotiated and signed, and has been submitted to the Massachusetts Legislature for approval.[2] 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.

The Commission, however, 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 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). The Commission

[2] On September 10, 2013, the Legislature's Joint Committee on Economic Development and Emerging Technologies, by an 8-1 margin, reported a bill to approve the Second Compact out of committee with an "ought to pass" endorsement. To date, neither house of the Legislature has taken action on the bill.

has set September 30, 2013, as the deadline for submission of Category 1 license applications in Region C.

In the wake of the Commission's decision to open Region C to private applicants, the defendants, on May 28, 2013, filed a motion to dismiss this litigation for want of subject-matter jurisdiction (docketed as paper # 114). More specifically, the defendants argued that, because the Commission's action had effectively granted to KG Urban all of the relief it had sought in its Amended Complaint, the action had become moot. In denying that motion, this Court held that it was "unclear" whether the Commission's action had in fact rendered KG Urban's claim moot. KG Urban Enterprises, L.L.C. v. Patrick, 2013 WL 4495121 (D. Mass. 2013) at *3. The Court denied the motion because it found that under the "voluntary cessation exception" to the mootness doctrine, a government defendant cannot orchestrate the mootness of pending litigation by unilaterally changing its conduct, unless it can demonstrate an "absolute certainty" that the challenged conduct could not "reasonably be expected to recur." Id. at *4. In this case, the Court concluded, where Region C applications had not even been filed yet, "nothing precludes the Gaming Commission here from simply changing its mind and canceling the commercial application process in Region C." Id.

Thus, the Court ultimately concluded that the Commission's action in opening Region C to commercial applications was not quite enough to deprive the Court of jurisdiction. As will be discussed below, however, it is more than enough to deprive KG Urban of judgment on the merits.

ARGUMENT

I. Standard of Review

As the First Circuit recognized, and as both parties have previously conceded, "the level of scrutiny that applies to § 91[(e)] is dispositive of the equal protection claim" in this case. 693 F.3d at 16. There is no dispute that Section 91(e) authorized the Commission to treat the Mashpee Wampanoag Tribe's bid to operate a casino in Southeastern Massachusetts differently from commercial bids in that same region. The Commission gave effect to this differential classification until April 18, 2013, when it voted to open Region C to all prospective applicants. What this Court must decide is whether that classification scheme is based upon a racial distinction (as KG Urban contends) or upon a political distinction (as the defendants contend).[3] The Court must make this decision consistent with the analysis of KG Urban's claim that the First Circuit has already undertaken.

The parties appear to agree that no material facts are in dispute that would preclude entry of summary judgment at this time.

II. The Commission's Opening of Region C to Commercial Applications Defeated KG Urban's Equal Protection Claim.

Throughout the history of this litigation, the parties' fundamental positions regarding Section 91(e) and its impact on Region C licensing have remained unchanged. From the outset, KG Urban has maintained that, because Section 91(e) requires the Commission to open Region C to commercial applicants only upon the failure of the compacting process or upon a Commission determination that the Mashpee Wampanoag Tribe "will not have land taken into trust by the United States Secretary of the Interior," the statute creates an impermissible

[3] If the distinction is one grounded in the tribe's political sovereignty in furtherance of the IGRA, then it satisfies the Equal Protection Clause unless it constitutes "the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment." New Orleans v. Dukes, 427 U.S. 297, 303-04 (1976). If, by contrast, the distinction is one made on racial grounds, then it must withstand strict judicial scrutiny. As the First Circuit observed, each party has conceded that, if it loses the level-of-scrutiny battle, it cannot win the case.

classification based on race. That is to say, KG Urban argues that the proponents of a tribal casino in Region C receive a favorable classification vis-à-vis commercial applicants in that region solely because they are members of a specified racial group (i.e., American Indians), a classification which must survive strict judicial scrutiny in order to pass muster under the Fourteenth Amendment.

Likewise from the beginning, the defendants have argued that Section 91(e) may be read as creating a classification scheme based on a political distinction, not a racial one. That is to say, the defendants have argued that Section 91[4] merely recognized Indian tribes as sovereign entities with certain political rights under the IGRA (and not as entities comprised of members of a particular racial group), and that therefore any differential treatment accorded to the tribes under Section 91 was reviewable only under the more relaxed "rational basis" standard. It was on that basis that this Court not only denied the requested injunction, but dismissed the case, in February of 2012.

When called upon to review that judgment of dismissal, the First Circuit deconstructed KG Urban's claim and, in so doing, introduced several layers of nuance into the analysis. First of all, the First Circuit noted that, while the federal government is expressly authorized to extend "special treatment on [Indians'] behalf when rationally related to the Government's unique obligation toward the Indians," KG Urban, 693 F.3d at 18-19 (quoting Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658, 673 n.20 (1979) (internal quotations omitted)), "[s]tates do not enjoy the same relationship with Indians."

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[4] KG Urban's original complaint challenged the constitutionality of Section 91 in its totality, and therefore sought an injunction barring implementation of that entire section. The present Amended Complaint has narrowed that challenge , attacking the constitutionality only of Section 91(e).

Id. at 20 (quoting Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 500-501 (1979)). Accordingly, the First Circuit found that the separate classification of compacted Indian Tribes in Section 91 constituted a permissible political distinction to the extent that the classification was made to facilitate the implementation of a federal statute explicitly granting rights to Indian tribes like the Mashpee Wampanoag Tribe. In this case, the First Circuit noted, such authorization could only be found in the IGRA.

However, the First Circuit went on to find that whether the IGRA confers such rights upon the Mashpee Wampanoag, and therefore authorizes Massachusetts to "facilitate" the tribe's exercise of those rights, is presently unknowable. 693 F.3d at 24. Or, perhaps more correctly, the answer to that question will become apparent only in retrospect.

Briefly stated, the IGRA provides a pathway for Indian tribes to authorize and operate casinos on tribal land. Under 25 U.S.C. § 2710(d)(1), a tribe may operate a full-service, resort-style casino[5] only if: the gaming activity is conducted on "Indian lands"; the tribe has adopted the requisite gaming ordinances, which have been reviewed and approved by federal regulators; the state in which the Indian lands are located permits and licenses such gaming "for any purpose by any person, organization or entity"; and the tribe has entered into a compact with the state, which contract has been approved by the Bureau of Indian Affairs ("BIA"). 25 U.S.C. § 2710(d)(1)(A)-(C).

Some, but not all, of these conditions precedent have to date been satisfied by the Mashpee Wampanoag Tribe. The tribe has enacted the requisite ordinances, and the Massachusetts Legislature, in enacting the Gaming Act, has legalized what the IGRA calls Class III gaming in the Commonwealth. However, as noted above, the original compact between the

[5] The IGRA refers to such resort-style casinos as "Class III gaming." The Massachusetts Gaming Act, by contrast, refers to them as "category 1" licensees.

tribe and the state was not approved by the BIA, and the Second Compact between the tribe and Massachusetts still awaits approval by the Legislature and, as a consequence, has not yet been submitted to the BIA for approval.

Perhaps the biggest outstanding action-item, however, is the tribe's pending application to the BIA to have land taken into trust for its benefit, upon which a casino may be sited. As the First Circuit recognized, the Mashpee Wampanoag Tribe currently owns no land in Region C that qualifies as "Indian lands" for purposes of Section 2710(d)(1). It has, however, filed a petition with the BIA to have a 170-acre parcel of land in Taunton, Massachusetts, taken into trust for its benefit. The BIA's proceeding to consider that petition has been ongoing for more than two years now; while the tribe has furnished this Court with several portents of a near-term resolution, including a March 20, 2013 letter from the BIA's solicitor calling the tribe's petition a "top priority" for the agency, there is no clear timetable for the BIA's resolution of that question (or for any appeals that may be taken therefrom). Moreover, as discussed more fully below, it remains an open question whether the BIA may legally take land into trust on behalf of a tribe that had not yet attained federal recognition in 1934, the year when Congress enacted 25 U.S.C. § 465, the statute that empowered the Secretary of the Interior to take land into trust; as an ancillary matter, it is not yet clear whether the BIA may approve a compact between a state and a tribe that does not presently have Indian lands held in trust. Both of those questions will be answered, in the first instance, by the BIA in proceedings brought by the Mashpee Wampanoag Tribe.

Given the unresolved questions about whether the Mashpee Wampanoag Tribe was eligible to partake in the benefits conferred by the IGRA, the First Circuit noted that:

> [W]hether § 91 is "authorized" by the IGRA such that it falls within Yakima and is subject to only rational basis review

> is far from clear, presents a difficult question of statutory interpretation, and implicates a practice of the Secretary of the Interior not challenged in this suit.

Because the viability of KG Urban's equal protection claim turns entirely on questions of statutory application that have not yet been – but will be – resolved in another forum, the First Circuit could have stopped right there; it could have vacated the order dismissing the case, and remanded the matter to this Court with instructions to stay its prosecution until such time as the dispositive legal questions had been finally answered by the BIA. The First Circuit could have ordered this Court, on the appropriate future date, to enter judgment in favor of KG Urban (if the BIA, after exhaustion of all appeals, had rejected either the Mashpee Wampanoag Tribe's land-into-trust application or its tribal-state compact) or the defendants (if the BIA had approved both applications). In other words, it could have reduced these remand proceedings to a purely ministerial exercise.

But it did not. Instead, the First Circuit went on to observe that "[i]f the Secretary is willing under the IGRA to approve a tribal-state compact contingent on the relevant land being later acquired in trust,[6] then the Commonwealth can argue that § 91 establishes a parallel mechanism, meant to facilitate the purposes of the IGRA, if not precisely authorized by the IGRA, for a limited period of time." 693 F.3d at 25. The First Circuit went on to explain that this "limited period of time" was the critical factor. The longer it took for the BIA's decisions to be issued, and for any legal challenges thereto to be litigated, the First Circuit reasoned, the more

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[6] This threshold qualification appears already to have been satisfied. In its October 12, 2012 letter conveying its rejection of the first compact between the Commonwealth and the Mashpee Wampanoag Tribe, the BIA explained, in granular detail, its numerous reasons for declining to approve that agreement. Notably, the BIA raised no objection to the fact that the Mashpee Wampanoag Tribe had not yet had land taken into trust for its benefit, and as a result did not yet own land on which it could lawfully operate a casino. See October 15, 2012 Letter from Jennifer Grace Miller (docketed as paper # 72), at Exhibit A.

likely it would become that KG Urban would suffer harm of a constitutional dimension. The First Circuit alluded to the protracted review often necessary in resolving a land-into-trust application. Id. at 27 (citing Match-E-Be-Nash-She-Wish Bank of Pottawatomi Indians, 132 S.Ct. at 2203 warning of "lengthy administrative review"). It also noted delays that could be occasioned by a possible rejection of the tribal-state compact and any renegotiation of a second compact that would necessarily ensue.

Most pointedly, however, the First Circuit articulated its concern that "the Commission might wait years until the Secretary makes a determination as to the compact or land in trust application before itself acting under § 91." Id. at 26. Because neither of the triggers contained in Section 91(e) contained a fixed time limit or required the Commission to act at any time prior to final determination by the BIA, the First Circuit worried that KG Urban's wait might prove interminable, and that an opening of Region C to commercial applicants at some far-future date might prove meaningless, given the substantial head start that successful applicants in Regions A and B would have enjoyed by that time. Accordingly, rather than directing this Court merely to await passively the ultimate conclusions of the BIA, the First Circuit remanded the case with instructions to, among other things, monitor "the passage of time and the continuation of the status that there are no 'Indian lands' in the region." Id. at 25. KG Urban's claim, the First Circuit concluded, retained some vitality, if only to serve as a vehicle to deliver the company from a future state of protracted limbo.

But, as a result of the Commission's decision to open Region C to commercial applications, KG Urban never entered that state of limbo. Finding that it had implied discretionary powers under Section 91(e) to open Region C to all comers whenever it deemed such action appropriate, the Commission has set September 30, 2013, as the deadline for all

prospective commercial casino operators in that region to submit their applications. The Commission has further set December, 2014, as its own deadline for deciding which Region C applicant, if any, will be approved – a date approximately six months after final decisions in Regions A and B are to be announced. And it has committed to the same decisional calculus in Region C as it will employ in the other two regions: It stated that it will determine "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).

To the extent that Section 91(e) established a "parallel mechanism, meant to facilitate the purposes of the IGRA . . . for a limited period of time," the Commission's decision served as an announcement that that "limited period of time" has come to an end. KG Urban, and other prospective private applicants in Region C, need not wait indefinitely for an opportunity to pursue licensure. Whether or not Section 91(e) ultimately proves to have been "authorized" by the IGRA, KG Urban need not await that determination. And, under the First Circuit's analysis, the prompt end of that wait likewise extinguishes KG Urban's Equal Protection claim.

As a final point, KG Urban suggested for the first time in opposing the defendants' motion to dismiss that even if Region C is open to commercial applicants, and even if the same criteria will be used to evaluate Region C applications as in the other two regions, Section 91(e) still effects some sort of impermissible race-based classification because, in analyzing Region C proposals, the Commission will necessarily take into account the presence in that region of

Indian tribe(s) that may have a pathway to casino operation under the IGRA. This Court should categorically reject this attenuated theory, for three distinct reasons:

First, in evaluating the "economic and other circumstances at they exist at the time of the licensing decision" in each of the three geographical regions, the Commission will be compelled to evaluate factors unique to that region. Some proposed casinos may be situated so as to compete with already-existing casinos in neighboring states. Others may face challenges based on the demographics or other conditions in their host communities or adjacent cities and towns. That commercial applicants in Region C may be evaluated based on the possibility of competition from an Indian casino – depending on the status of the Mashpee Wampanoag Tribe's various federal proceedings in the fall of 2014 – is not different in kind from the factors the Commission will be weighing in the other regions.

Second, that one or more tribes with possible federal gaming rights happen to be located in Region C is not a product of the statute KG Urban is challenging. The tribes' presence in that region predates European settlement of Massachusetts. The tribes' (possible) pathway to casino operation on tribal lands was created by the IGRA itself, enacted by Congress in 1988, and not by Section 91(e). That the Mashpee Wampanoag Tribe may ultimately qualify to operate a resort-style casino in Region C is a function of the Governor's authority to enter into compact negotiations with the tribe – authority conferred by St. 2011, c. 94, §§ 91(a)-(d), sections of the Gaming Act not challenged by KG Urban in its Amended Complaint. In short, to the extent that different factors will be in play in evaluating applications in Region C, none of those factors arose from Section 91(e) of the Gaming Act, nor would the invalidation of Section 91(e) – the only "live" relief sought in the Amended Complaint – remove them.

Third, all of the factors making Region C "different" were known to KG Urban long before the Gaming Act was passed. KG Urban made the calculated business decision to target New Bedford as a site for its prospective casino development. It must live with the consequences of this business decision.

III. This Court Need Not Decide the Mashpee Wampanoag Tribe's Eligibility to Have Land Taken Into Trust, Nor Should It Do So.

Throughout this litigation, KG Urban has argued that the Gaming Act's separate classification of compacted Indian tribes (i.e., the Mashpee Wampanoag Tribe) cannot be authorized under the IGRA because, as a tribe that did not attain federal recognition until sometime after 1934, the Mashpee Wampanoag Tribe was legally ineligible to have land taken into trust in its behalf, and could therefore never satisfy the IGRA's requirement that gaming be conducted "on Indian lands." See 25 U.S.C. § 2710(d)(1). That argument arises from the Supreme Court's holding in Carcieri v. Salazar, 555 U.S. 3795, 129 S.Ct. 1058 (2009), that 25 U.S.C. § 465, the statute that authorizes the Secretary of the Interior to take land into trust for the benefit of Indian tribes, may be invoked only for the benefit of Indians "now under Federal jurisdiction" at the time of that statute's enactment (i.e., 1934).

The reach of Carcieri, and its application to land-into-trust applications like those filed by the Mashpee Wampanoag Tribe, is far from clear, particularly in light of the concurring opinion in that very case, joined by three justices, suggesting that a tribe may satisfy the "now under Federal jurisdiction" language of § 465 even if was not federally recognized in 1934, provided that, in retrospect, the tribe was subject to some form of federal jurisdiction, "even though the Federal Government did not believe so at the time." Id. at 1069 (Breyer, J., concurring). As the First Circuit noted, the BIA has not yet decided the Carcieri question in the context of the

Mashpee Wampanoag Tribe's application, nor has the Supreme Court yet evaluated the proposition advanced by the concurring justices.

After this case was remanded, however, KG Urban suggested that, in light of the long wait before any definitive answer to the Carcieri question was likely to emerge from the pending BIA proceedings and any judicial challenge(s) thereto, this Court should resolve the issue here, even though (a) it would not have the benefit of the view of the agency charged with implementing the statute, and (b) the Mashpee Wampanoag Tribe, whose rights under 25 U.S.C. § 465 would be at issue, is not a party to this litigation. This Court properly expressed reluctance to decide that issue in a vacuum. Should KG Urban renew its request at this stage, the Court should again reject the invitation: The question is no longer material to the outcome of this case; and, even if it were, it is should be decided, in the first instance, by the BIA.

A. The Mashpee Wampanoag Tribe's Eligibility to Have Land Taken Into Trust for Its Benefit is No Longer Material To the Resolution of This Case.

As discussed above, the First Circuit found that Section 91 of the Gaming Act was defensible, at least for a "limited time," as a legislative act to facilitate the implementation of the IGRA. When this case returned to this Court on remand, KG Urban suggested, in effect, that no such "limited time" need elapse if KG Urban could demonstrate the futility of the Mashpee Wampanoag Tribe's land-into-trust application. According to KG Urban, this was a reason for this Court to consider the Carcieri issue even as it remained pending before the BIA: If the tribe had no gaming rights under the IGRA, KG Urban contended, then there would be nothing for Massachusetts state law to "facilitate," and no reason for KG Urban to wait even a "limited time" before being allowed to seek Region C licensure. However, as explained above, that "limited time" has now elapsed. Any impediment created by Section 91(e) – or, indeed, by any other

section of the Gaming Act – has been taken down, and KG Urban, like any other prospective applicant, is free to pursue a category 1 license in Region C. Accordingly, no legitimate purpose is served by this Court in effect predicting how the BIA and/or the Supreme Court would decide the Carcieri issue. That issue is no longer material to the resolution of this case.

B. Under the Doctrine of Primary Jurisdiction, the Carcieri Question Should be Resolved, in the First Instance, by the BIA.

Even if resolution of the Carcieri issue were necessary to resolve the instant litigation, the BIA – as the administrative agency charged with implementing and enforcing both the IGRA and the Indian Reorganization Act of 1934 – remains the proper forum to resolve it.

The First Circuit has consistently held that "the primary jurisdiction doctrine permits and occasionally requires a court to stay its hand while allowing an agency to address issues within its ken." United States Public Interest Research Group v. Atlantic Salmon of Maine, L.L.C., 339 F.3d 23, 34 (1st Cir. 2003) citing Association of International Automobile Manufacturers v. Commissioner, Massachusetts Department of Environmental Protection, 196 F.3d 302, 304 (1st Cir. 1999). The doctrine "is a prudential doctrine developed by the federal courts to promote accurate decisionmaking and regulatory consistency in areas of agency expertise." Automobile Manufacturers, 196 F.3d at 304.

As a leading commentator has explained:

> If a court concludes that an issue raised in an action before the court is within the primary jurisdiction of an agency, the court will defer any decision in the action before it until the agency has addressed the issue that is within its primary jurisdiction. The court retains jurisdiction over the dispute itself and all other issues raised by the dispute, but it cannot resolve that dispute until the agency has resolved the issue that is in its primary jurisdiction.

2 Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* 271 (3rd ed. 1994).

Primary jurisdiction is "specifically applicable" where, as here, the plaintiff's claim (i.e., KG Urban's equal protection claim) is "properly cognizable in court" but contains "some issue within the special competence of an administrative agency." American Automobile Manufacturers Association v. Massachusetts Department of Environmental Protection, 163 F.3d 74, 81 (1st Cir. 1998) (quoting Reiter v. Cooper, 507 U.S. 258, 268 (1993)).[7] As a general matter, the First Circuit "relies on three factors to guide the decision on whether to refer an issue to an agency under the primary jurisdiction doctrine: (1) whether the agency determination lies at the heart of the task assigned the agency by Congress; (2) whether agency expertise is required to unravel intricate, technical facts; and (3) whether, though perhaps not determinative, the agency determination would materially aid the court." Pejepscot Industrial Park, Inc. v. Maine Central Railroad Co., 215 F.3d 195, 205 (1st Cir. 2000). Application of the doctrine is also highly favored where there is a need for "national uniformity in the interpretation and application of a federal regulatory regime." American Automobile Manufacturers, 163 F.3d at 81. Where these factors militate in favor of awaiting agency review, the doctrine also requires the court to await the litigation of any appeals that arise from the agency determination as well:

> If the issues referred to the agency . . . are critical to judicial resolution of the underlying dispute, the court cannot proceed with the trial of the case until the agency has resolved those issues. In many cases, the court that has referred the issues to the agency also must wait until the agency's decision has either been upheld or set aside by a different reviewing court.

American Automobile Manufacturers, 196 F.3d at 94.

[7] It is noteworthy that the First Circuit's cases analyzing primary jurisdiction focus on resolution of the issue that is the subject of the administrative proceeding, not on the dispute between the parties at bar. Indeed, where primary jurisdiction is invoked, the District Court retains jurisdiction over the parties' dispute, while it awaits the agency's determination on the issue that is subject to the agency's expertise. Accordingly, it is immaterial whether, as here, the parties to the judicial dispute are not the same parties contesting the issue before the agency; it matters only that, as here, the issue is common to both proceedings.

The Pejepscot factors are readily applicable here. Determining which tribes fall under federal jurisdiction is clearly within the "heart of the task" assigned to the BIA by Congress. BIA familiarity with the various statutory regimes governing Indian affairs for almost two centuries, and their consistent application to diverse tribes from around the country, will be indispensable to a coherent analysis of that question. And the BIA's analysis, together with that of any court reviewing it under the Administrative Procedures Act, would no doubt aid this Court in its inquiry. Accordingly, even if it were necessary to apply Carcieri to the Mashpee Wampanoag Tribe's land-into-trust petition in order to resolve KG Urban's claim – which it is not – that application should be carried out in the first instance by the BIA, not by this Court.

Conclusion

For the reasons discussed above, this Court should enter summary judgment in favor of the defendants, and against KG Urban, on all claims of the Amended Complaint.

Respectfully submitted,

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September 23, 2013

Certificate of Service

I hereby certify that this document was filed through the Electronic Case Filing (ECF) system and thus copies will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF); paper copies will be sent to those on the NEF as non-registered participants on or before September 23, 2013.

/s/ Daniel J. Hammond