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

STATE DEFENDANTS' OPPOSITION
TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Governor Deval L. Patrick and the chairman and members of the Massachusetts State Gaming Commission (together, the "State Defendants") hereby oppose the motion of the plaintiff, KG Urban Enterprises, L.L.C. ("KG Urban") for summary judgment. In so doing, the State Defendants renew their request that the Court enter summary judgment in their favor, pursuant to their September 23, 2013 motion.

Background/Points of Contention

The factual background and procedural history of this dispute are set out at length in the State Defendants' memorandum in support of their motion for summary judgment (docketed as paper # 140). Simply stated, the parties are in substantial agreement as to the factual predicate underlying KG Urban's claims. Specifically, the parties agree:

- That the Massachusetts Legislature enacted, and the Governor signed, the Act Establishing Expanded Gaming in the Commonwealth (the "Gaming Act") in November, 2011;

- That Section 91(e) of the Gaming Act created two triggering events upon the occurrence of which the Massachusetts Gaming Commission (the "Commission") "shall consider bids for a Category 1 license in Region C": either (a) if no tribal-state compact had been negotiated between the Governor and the Mashpee Wampanoag Tribe, and approved by the Massachusetts Legislature, before July 31, 2012; or (b) if the Commission "determine[d] that the tribe will not have land taken into trust by the United States Secretary of the Interior." St. 2011, c. 194, § 91(e);
- That neither of these triggering events under Chapter 91(e) has occurred;
- That the Commission nonetheless elected, in April 2013, to open Region C to commercial applicants, "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);
- That the Commission set September 30, 2013, as the deadline for commercial applicants to make their submissions to the Commission; and
- That KG Urban is the only commercial applicant to have made such an application with respect to a location in Region C.

What remains for this Court to decide, then, are three interrelated legal questions. First – and dispositive, in the State Defendants' view – is whether the Commission's opening of Region C to commercial applicants (including KG Urban, which has already applied for licensure) has extinguished KG Urban's cause of action, as it has foreclosed the potentially indefinite waiting

period of which the First Circuit warned. The State Defendants believe that this question must be answered in the affirmative, and that therefore the Court's inquiry should end here. If the Court should disagree, however, then it must also determine: (2) whether any surviving claim is a claim for differential treatment based on race, such that it is entitled to strict-scrutiny review; and (3) after applying the appropriate level of scrutiny, whether KG Urban is entitled to the relief it seeks on the facts of this case. The State Defendants will address each of these questions in turn, below.

ARGUMENT

A. The Commission's Opening of Region C to Commercial Applicants Did Not Buttress KG Urban's Equal-Protection Claim; It Defeated It.

In its opening memorandum, KG Urban argues that even though the Commission has now granted the only functional relief sought in KG Urban's amended complaint – i.e., opening Region C to commercial applicants – such relief not only is "insufficient to remedy [KG Urban's] Equal Protection harm," but actually "increase[s] [the company's] need for prompt relief from this Court." KG Urban Opening Memorandum at 20 (emphasis in original). This counterintuitive analysis not only misattributes the "harm" suffered by KG Urban in Region C, but more fundamentally misconstrues the nature of KG Urban's claims against the State Defendants, as those claims have been evaluated by the First Circuit. Indeed, the First Circuit's analysis compels the conclusion that those claims have not been buttressed or amplified by the Commission's actions in opening Region C; on the contrary, they have been foreclosed.

From the outset, KG Urban has attempted to position its argument as an airtight syllogism: that is, (a) unless specifically authorized to do so under federal law, states may not accord differential classification to Indian tribes, lest such treatment invite strict scrutiny as a racial preference under the Equal Protection Clause; (b) the Bureau of Indian Affairs ("BIA") has

not yet approved a compact between the Commonwealth and the Mashpee Wampanoag Tribe, nor has it approved the tribe's application to have land taken into trust on its behalf for gaming purposes, both of which it must do in order for the Commonwealth to claim it is according differential treatment to the tribe in furtherance of the tribe's rights under the IGRA; and, therefore (c) the Commonwealth has effected a racial preference, which cannot survive strict-scrutiny review.

On review, however, the First Circuit rejected the plaintiff's characterization, which asserted that the Commonwealth committed an Equal Protection violation simply by enacting Section 91(e). Rather, the First Circuit recognized that the question of whether the Gaming Act's treatment of the Mashpee Wampanoag Tribe was in furtherance of the purposes of the IGRA, and therefore permissible under the Equal Protection Amendment, turned entirely on the BIA's *ultimate resolution* of the tribe's compact-approval and land-into-trust applications. If both of those proceedings (and any attendant judicial review) were resolved in the tribe's favor, 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." KG Urban Enterprises, L.L.C. v. Patrick, 693 F.3d at 1, 25 (1st Cir. 2012). In other words, the First Circuit acknowledged that the question of who prevails in this case is tied inextricably to the question of whether the Mashpee Wampanoag Tribe ultimately succeeds in vindicating its rights under the IGRA. Id. Were it to do so, then it will have been entirely lawful for the Commonwealth to have accorded a different classification to the tribe in the Gaming Act; if not, then KG Urban may press its "race-based" Equal Protection claim.

The First Circuit further recognized, however, that any victory that KG Urban might obtain under the latter scenario (after determinations by the BIA and subsequent judicial review)

could potentially be a Pyrrhic one. The court was clearly concerned that, if KG Urban can only know at some point in the distant future whether it possesses a meritorious claim, then it would be functionally deprived of an economic opportunity. Therefore, the First Circuit cautioned that the State Defendants' defense – that Section 91(e) was designed to facilitate the implementation of the IGRA – would remain viable only "for a limited time." KG Urban, 693 F.3d at 25. It implied that, if KG Urban was forced to wait (without the ability to apply for a Region C license) for an indefinite period, while the open-ended proceedings before the BIA lurched forward, then the company's loss could take on a constitutional dimension. Accordingly, the First Circuit remanded this case to this Court with instructions to pay heed to "the passage of time and the continuation of the status that there are no 'Indian lands' in the region." 693 F.3d at 25. While the First Circuit set no parameters regarding how long a wait should precipitate intervention by this Court, it did enumerate factors – such as the length of land-into-trust proceedings, delays occasioned by a rejection of a tribal-state compact, and passivity on the part of the Commission in exercising its rights under Section 91(e) to open Region C to competitive bidding – that could result in an excessive (and potentially actionable) wait on the part of KG Urban.

But having exercised its discretion to open Region C to commercial bidders –without reference to the two explicit triggers in Section 91(e) – the Commission extinguished any surviving claim of discrimination based on an indefinite wait. Because of the Commission's action, the "limited time" permitted by the First Circuit for the State Defendants to facilitate the potential IGRA rights of the Mashpee Wampanoag Tribe is both finite and complete. KG Urban has been authorized to submit a commercial application for a full-service casino in Region C, and it has done so. Under the First Circuit's analysis, its Equal Protection claim cannot succeed.

KG Urban protests that, even if this is so, the company still runs the risk of suffering harm because the criteria the Commission will consider in awarding a Region C license are somehow different from those it will use in evaluating bids in the other two regions. In fact, they are not. For its part, KG Urban does not explain why it believes the criteria are different, nor does it present any evidence to demonstrate that different rules will apply in different regions. In voting to open Region C to commercial applicants, the Commission stated that it would "decid[e] 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). This language is no more than a summary of the statutory criteria that the Commission is required to apply in evaluating applications in all regions. 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").[1]

[1] KG Urban repeats in its opening memorandum assertions that it has made before: namely, that "the Commission has reserved the right to scuttle the commercial application process if the Mashpee [Wampanoag Tribe] have made some (unspecified) degree of progress toward an IGRA casino by the time the Commission makes its ultimate decision on the commercial applications." KG Urban Opening Memorandum at 21. While an earlier proposal rejected by the Commission would have opened Region C provisionally to commercial applicants, subject to a termination of the process in the event that the Mashpee Wampanoag Tribe prevailed in its federal

Rather, what KG Urban appears to be complaining about is the possibility that, after evaluating all of the statutory factors, the Commission may elect not to award *any* Category 1 license in Region C. Because KG Urban was the only commercial applicant to request licensure in Region C, its claim is essentially that any result in Region C, other than an award of a commercial license to KG Urban, violates equal protection. But a determination by the Commission not to award any license is expressly anticipated, in all three regions, by a section of the Gaming Law that KG Urban does not challenge: "Within any region, if the commission is not convinced that there is an applicant that has both met the eligibility criteria and provided convincing evidence that the applicant will provide value to the region in which the gaming establishment is proposed to be located, and to the commonwealth, no gaming license shall be awarded in that region." G.L. c. 23K, § 19(a) (emphasis added). Thus, the award of a Catergory 1 license in Region C, if any, will hinge upon the same factors that the Commission will consider in Regions A and B, including the potential economic and other benefits to the region and to the Commonwealth, in light of, among other things, competing casinos within or without Massachusetts. The Equal Protection Clause entitles KG Urban to no more.

B. Any Alternative Equal Protection Claim Would Fail.

1. Such a Claim Would Turn on Different Classification by Geographical Region, Not by Race.

If KG Urban presses an alternative Equal Protection claim in the wake of the Commission's opening of Region C to commercial applicants, it could argue no more than that commercial applicants in Region C were somehow being treated less favorably than commercial

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administrative proceedings, the action ultimately approved by the Commission contains no such proviso. On the contrary, the Commission has voted to conduct full review of commercial applicants in Region C.

applicants in Regions A and B. KG Urban has submitted no evidence that this is so. However, even if such a claim were viable, it would be subject only to rational-basis scrutiny. See Hodel v. Indiana, 452 U.S. 314, 331 (1981) ("Social and economic legislation that does not employ suspect classifications or impinge on fundamental rights must be upheld . . . when the legislative means are rationally related to a legitimate governmentpurpose").

KG Urban suggests that, unlike commercial applicants in other regions, Region C bidders may be subject to evaluation through the lens of whether the proposed casino will be economically viable notwithstanding possible competition from an IGRA casino in the same region. This possibility of different treatment, it suggests, would be the residue of racial preferences created by Section 91(e), and must therefore be judicially excised. This argument is specious for at least two reasons.

First, Region C is hardly alone in subjecting potential applicants to scrutiny of economic factors that bear on the viability of a proposed casino. Applicants in all three regions will have to demonstrate, among other things, that their proposed casinos will be economically advantageous notwithstanding competition from casinos in other regions or in adjacent states, or from any slots parlor that may be licensed. All will need to withstand scrutiny of the demographics of their proposed location, as well as the transportation network and infrastructure demands on their host community and adjacent cities and towns. Possible competition from an IGRA casino (if such a facility is even a viable possibility in the fall of 2014) is not different in kind from the factors the Commission will be evaluating in all regions.

Second, to the extent that the presence (or imminent possibility) of an Indian casino in Region C is a unique consideration inapplicable to other regions, this differing landscape was not created by the Massachusetts Legislature, and is certainly not a consequence of Section 91(e).

The presence of recognized Indian tribes in Region C of the Commonwealth (but not in the other two regions) is a pre-existing condition dating from before the colonial era. The legal capacity of an Indian tribe to secure at least some gaming rights without state licensure was created by the IGRA itself, a federal law not currently challenged by the plaintiff. That the Mashpee Wampanoag Tribe may succeed in building and operating a resort-style casino is a potential consequence of St. 2011, c. 194, §§ (a)-(d) (sections of the Gaming Law authorizing the Governor to enter into a compact with the Mashpee Wampanoag Tribe; such a compact is a prerequisite to obtaining authority from the BIA to build a Category 1, resort-style casino).

In short, any Equal Protection claim based on the assertion that different evaluation criteria will be applied in Region C would be doomed to failure, because (a) applicants in Region C do not receive differential treatment; and (b) even if they did, such treatment would be based on characteristics of that region that exist separate and apart from the challenged legislation. In any event, such a claim would be subject only to rational-basis scrutiny by this Court and, as KG Urban admitted before the First Circuit,[2] as a consequence would be doomed to fail.

2. The Commonwealth Had a Rational Basis For Treating Region C Differently Than Region A and B.

As noted above, any alternative Equal Protection claim brought by KG Urban can only allege differential treatment on the basis of geographical region, not on the basis of race. Given that such claims are reviewed only to ensure that the Legislature may have had some conceivable rational basis for drawing the distinction that it did,[3] Section 91(e) of the Gaming Act easily clears this hurdle.

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[2] See KG Urban, 693 F.3d at 16-17.

[3] Under this "most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause," City of Dallas v. Stanglin, 490 U.S. 19, 26 (1989), "it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth

Put simply, the facts on the ground in November, 2011, were materially different in Region C than in the other two regions created by the Gaming Act. Two federally recognized Indian tribes had historical ties to that region. One, the Gay Head Wampanoag Tribe of Aquinnah, had tribal lands in the region, but had contracted away any rights it may have had to conduct gaming on those lands. The other, the Mashpee Wampanoag Tribe, lacked tribal land, but already had a pending application to have land taken into trust on its behalf for the purpose of gaming. See 77 Fed. Reg. 32,132, 32,133 ((May 31, 2012). Recognizing the limited control the Commonwealth had over potential Indian gaming in Region C, the Legislature elected to create a window to see whether one of those tribes would achieve the required federal approvals, during which Region C would not be opened to commercial bidders. As construed by the Commission, Section 91(e) also conferred discretion upon the Commission to open Region C to commercial applicants if the duration of this "window" period threatened to become excessive.

These were entirely rational concerns that may have motivated the Legislature to enact the procedures and time limits encompassed by Section 91(e). As such, KG Urban can demonstrate no violation of the Equal Protection Clause.

CONCLUSION

For the reasons set forth above, the State Defendants respectfully request that this Court deny KG Urban's motion for summary judgment, and grant the State Defendants' motion for summary judgment.

Respectfully submitted,

MARTHA COAKLEY

Amendment." New Orleans v. Dukes, 427 U.S. 297, 303-04 (1976). Courts will presume the existence of a rational relationship between state action and a legitimate governmental purpose, subject to rebuttal of that presumption by the challenging party. Bowen v. Owens, 476 U.S. 340, 345 (1986).

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/s/ Daniel J. Hammond