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' REPLY
TO PLAINTIFFS" OPPOSITION
TO STATE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Governor Deval L. Patrick and the Chairman and members of the Massachusetts State Gaming Commission (together, the "State Defendants") hereby submit this reply to KG Urban's opposition to the State Defendants' motion for summary judgment. Because the State Defendants have already addressed most of the points KG Urban makes in its opposition in prior filings, this reply will only briefly reiterate the State Defendants' rebuttals to these arguments.

KG Urban's Amended Complaint Sought Only Access to Region C Application Process, Relief It Has Already Attained. In its Amended Complaint, filed after this case was remanded by the First Circuit, KG Urban sought only two forms of relief: (1) a declaration that Section 91(e) of the Gaming Act was unconstitutional; and (2) an order directing the Commission to open Region C to private applicants. Now that the Commission has voted to open Region C, and now that KG Urban has become the only private applicant to seek licensure in Region C, KG Urban's filings suggest that this suit is no longer about access to the licensing process, but rather about a

specific result. KG Urban now intimates that, unlike in Regions A and B, the only result of the process in Region C that would not violate the Equal Protection Clause would be the award of a Category 1 license to a private applicant (i.e., KG Urban). Any other result, KG Urban asserts, would demonstrate that the Region C licensing process has been "skewed" by "tribal preferences." See KG Urban Opposition at 4-6.

To the contrary, the section of the Gaming Act governing the award of Category 1 licenses in all three regions state that: ""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). Accordingly, in Region C, as in Regions A and B, the Commission could ultimately opt to award no Category 1 license for a variety of reasons, including but not limited to: no applicant satisfied the Gaming Act's eligibility or suitability requirements; no applicant demonstrated that its business plan was viable or would bring meaningful value to its region or to the Commonwealth; or all applicants faced significant competition from casino projects in other regions or neighboring states.

IG Urban is correct in noting that one criterion is potentially unique to Region C: That is, the Commission could conceivably conclude that a federally approved (or imminent) Indian casino in Region C would undermine the viability of a "second," state-licensed casino in the region. KG Urban is wrong, however, to ascribe this possible outcome to the residue of an allegedly "race-based" classification scheme in Section 91(e). Rather, in the event that the Commission were to determine that an incipient Indian casino created an insuperable obstacle to a potential private casino in Region C, such a scenario could only have arisen because of the

presence of a federally recognized Indian tribe in Region C, the rights conferred upon such a tribe by the IGRA, and the outcome of BIA proceedings involving the Mashpee Wampanoag Tribe's land-into-trust proceedings. None of these root causes were created by the Gaming Act (certainly not in Section 91(e)), and both the Legislature (in constructing the statute) and the Commission (in evaluating Region C applications) were entitled to consider these factors.

That the Mashpee Wampanoag Tribe is a "Landless Tribe" is a Condition, Not Necessarily a Characteristic. KG Urban continues to refer to the Mashpee Wampanoag Tribe as a "landless Indian tribe," as a predicate for its conclusory statement that the IGRA cannot possibly authorize a state to accord differential classification to a "landless tribe." While this formulation may be elegant (and literally true, so far as it goes), the First Circuit rejected it as an oversimplification.

There is no dispute that, as things stand today, the Mashpee Wampanoag Tribe lacks the requisite tribal land upon which resort-style casino gaming under the IGRA could be federally approved. But, as the First Circuit recognized, this status is not necessarily static or immutable. Indeed, the tribe is involved in a pending land-into-trust proceeding before the BIA which, if successful (after all subsequent appeals), will result in the tribe possessing "Indian lands" within the meaning of the IGRA. That, in turn, would render the Commonwealth's treatment of the tribe in Section 91(e) an accommodation, "for a limited time," to facilitate the purposes of the IGRA – a result that is fully countenanced under equal protection analysis.

What drove the First Circuit to remand this case was its concern that an indefinite period of time could elapse before the answer to that question – i.e., whether the Mashpee Wampanoag Tribe indeed had federal statutory rights under the IGRA that Section 91(e) could constitutionally facilitate – would become known. Indeed, because Section 91(e), by its terms,

could be read as authorizing the Commission to await the BIA's final answer to the land-into-trust question, no matter how long that may take, the First Circuit remanded this case to this Court to determine, in effect, how long a wait was too long. The Commission, however, acted unilaterally to end the wait, and to open Region C to private bidders. In so doing, it foreclosed KG Urban's equal protection claim, as that claim was understood by the First Circuit.

The Purpose Underlying Primary Jurisdiction is to Allow the Agency Charged with Enforcing a Statute to Interpret it, in the First Instance. Finally, KG Urban posits that there is no need to await the BIA's resolution of the so-called Carcieri question under the primary jurisdiction doctrine, because (a) that may take too long, and (b) in any event, the Supreme Court overruled, in part, that agency's interpretation of the applicable statutory scheme when it decided Carcieri in the first place, suggesting, in KG Urban's, that, "in reality . . it is the federal courts' views that will carry the day." KG Urban Opposition at 16.

This blithely overlooks the fact that, as the First Circuit has stated, "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). In the wake of Carcieri, the Bureau of Indian Affairs, in evaluating the land-into-trust applications of tribes that (like the Mashpee Wampanoag Tribe) were not federally recognized in 1934, will presumably use its expertise and analyze its own precedents to determine whether, as the Carcieri concurring opinion suggested, some degree of "federal jurisdiction" short of full recognition in 1934 was sufficient to make a tribe eligible to have land taken into trust on its behalf for gaming purposes.

In any subsequent appeal, reviewing courts will give some deference, under the Administrative Procedure Act, to the agency's conclusions, retaining the authority to reverse the BIA's holding if they find it to be legally erroneous.

As the State Defendants have previously explained, the Commission, in bringing a prompt end to the potentially unlimited waiting period warned of by the First Circuit, has foreclosed KG Urban's equal protection claim, making it unnecessary for this Court to decide whether or not the Mashpee Wampanoag Tribe is legally eligible to pursue federal casino approval under the IGRA. Even if resolution of that question were necessary, however, the Court should decline KG Urban's repeated invitations to decide that issue here, on a limited record, without any participation by the tribe whose rights under the IGRA would necessarily be litigated.

Conclusion

For the reasons stated above, and for the reasons set forth in the State Defendants' prior pleadings, the Court should grant summary judgment in favor of the State Defendants, and against KG Urban.

Respectfully submitted,

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/s/ Daniel J. Hammond