

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

JLLJ DEVELOPMENT, LLC, A
MICHIGAN LIMITED LIABILITY
COMPANY, AND LANSING
FUTURE DEVELOPMENT II, LLC,
A MICHIGAN LIMITED LIABILITY
COMPANY,

PLAINTIFFS,

VS

CASE NO.
HONORABLE

KEWADIN CASINOS GAMING
AUTHORITY, A DULY AUTHORIZED
ENTITY CREATED UNDER THE
LAWS OF THE SAULT STE. MARIE
TRIBE OF CHIPPEWA INDIANS,

DEFENDANT.

EXHIBIT 3 TO COMPLAINT



Min Waban Dan

January 5, 2012

Tribal Attorney
Office

VIA CERTIFIED MAIL

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National Indian Gaming Commission
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Re: Request for Management Agreement and Proprietary Interest
Declination

Dear General Counsel Roberts:

I enclose for your review copies of two turn-key facility development agreements entered into as of December 19 2011 by the Kewadin Casino Gaming Authority, a governmental instrumentality of the Sault Ste. Marie Tribe of Chippewa Indians:

1. Amended and Restated Turn-Key Facility Development Agreement with Lansing Future, LLC, and
2. Amended and Restated Turn-Key Development Agreement with JLLJ Corporation.

The Tribe requests a written declination finding that neither of these Agreements constitutes a management agreement within the meaning of the Indian Gaming Regulatory Act or the National Indian Gaming Commission's regulations and, further, that neither Agreement grants to the developer a proprietary interest in violation of IGRA.

The two Agreements each involve a distinct project at a separate location in the state of Michigan but are otherwise substantially identical. Under each Agreement, the Tribe's Gaming Authority will develop, operate and maintain a casino on "Indian lands" pursuant to IGRA. The Tribe will purchase both proposed gaming sites with principal or interest derived from the Tribe's Self-Sufficiency Fund established under section 108 of the Michigan Indian Land Claims Settlement Act, Pub. L. 105-143 (MILSCA). Each gaming site will be gaming-eligible under IGRA pursuant to section 8 of MILSCA as land held in trust for the Tribe or owned by the Tribe in restricted fee status or held as reservation lands of

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the Tribe. As is explained in the Recitals of each Agreement, the Developer will "assist the Gaming Authority with the development, financing, construction and opening" of the planned permanent facility and of a possible separate temporary facility, and will provide the Tribe with financing and assistance for all pre-opening construction and development responsibilities and legal entitlements related to those facilities.

To assist in your review, I am providing below a summary of the key provisions of the two Agreements. I am also providing analyses demonstrating that neither Agreement constitutes a management contract under IGRA and, thus, does not require NIGC approval, and that the Agreements comply with IGRA's proprietary interest prohibition, especially in light of the Developer's required pre-opening financial support and other obligations, the development and regulatory uncertainties, and the loan repayment and development fee risks.

A. Key Provisions of the Development Agreements¹

Recitals. The Recitals explain, among other things, that "[t]he Gaming Authority shall have the sole and exclusive authority to operate, manage and maintain the Facility, the Equipment and all gaming activities conducted by the Gaming Authority," and that nothing in the Agreement "is intended to be or shall be construed as constituting a contract for management services as contemplated by IGRA." Recital H. In addition, "neither the Developer nor any affiliate thereof is to have any management authority or responsibilities with respect to the Facility, the Gaming Authority, the Equipment or any gaming activities conducted by the Gaming Authority." *Id.* Further, "neither the Developer nor any affiliate thereof shall have any proprietary interest whatsoever in the Facility, Gaming Authority, the gaming activities conducted thereby, or have any right to possess, control or encumber the Facility, the Gaming Authority, or any gaming activities conducted thereby, or any of the equipment owned by the Gaming Authority." *Id.*

Article I: Pre-Construction Period and Financing. Article I of each Agreement governs the Developer's financing of pre-construction development costs and costs for constructing and equipping a temporary facility, in advance of the development of the permanent facility. It provides that the Developer has made and will continue to make advances to the Authority for pre-construction and temporary facility construction costs up to \$10.0 million. The advanced amounts will be evidenced by

Capitalized terms not defined here are defined in the Development Agreements.

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various promissory notes (the "Note(s)"), the forms of which are attached to the Agreement. The Note(s) are limited recourse to the Authority as their sole source of repayment is the "Operating Profits" of the temporary and permanent facilities, which (as addressed below regarding Article IV) arise only if the planned facilities are ultimately completed and opened as contemplated and if certain financial tests are satisfied. Sections 1.2.1–1.2.4. Additionally, all such Article I debt of the Authority is non-recourse to the Tribe (*i.e.*, the Tribe shall have no obligation whatsoever to repay any portion of such debt), and repayment can only be paid from facility revenues if the Total Fixed Charge Coverage Ratio is greater than 1:00 to 1:00. Section 1.2.6.

Article II: Construction and Development Period and Financing.

Article II of each Agreement addresses construction and development matters related to the temporary and permanent facilities. This Article provides that the Authority shall select and enter into agreements with the general contractor, architect, engineer and other professionals performing work on the facilities (Sections 2.2.1, 2.5.1–.2), approves the facilities' final plans, designs and specifications (Section 2.5.4), and further selects the equipment for installation within the facilities and selects also the manufacturers or suppliers from whom equipment is purchased. Section 2.8. Among other things, the Developer agrees to provide to the Authority "such consultation and support as is necessary to assist the Gaming Authority to develop, construct and open" the facilities (Section 2.2), and to hire, manage and solely fund, without repayment or reimbursement from the Tribe or Authority, a Project Manager (Section 2.4.1.2) to, among various other duties, "supervise the progress of the design, development, construction and opening" of the facilities. Section 2.5.6.3.

Moreover, in addition to the Developer's \$10.0 million commitment with respect to the Pre-Construction Period, the Agreements obligate the Developer to "make or arrange for an interim construction loan to the Gaming Authority, in an amount sufficient to fund the Gaming Authority's budget for the Permanent Construction and Development Period through such time as a permanent construction loan, or a related bridge or interim loan, is closed." Section 2.3. The construction budget for the permanent facility is currently estimated to be \$135.0 million. Finally, nothing contained in this or any other agreement "grants or conveys to Developer any possessory right or interest whatsoever" in or to the temporary or permanent facility. Section 2.9.

Article III: Term and Early Termination. Article III of each Agreement sets forth the term of the Agreement, including provisions for its early termination. The term is seven years, subject to extension under

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certain circumstances. Section 3.1. The Authority may terminate the Agreement at any time after the forty-eighth but before the sixtieth month anniversary of the opening date of the Facility. In order to terminate the Agreement, the Authority must pay all outstanding obligations under the Note(s) and make a termination payment to the Developer. Section 3.2.

Article IV: Compensation. Article IV addresses compensation to the Developer. Section 4.1.3 provides that "in compensation for the risks, obligations and liabilities" of the Developer arising under the Agreement, the Authority agrees to pay Developer a fee of fourteen percent (14%) of the "Operating Profits" (a modified IGRA "net revenue" metric) from the temporary and permanent facilities, if any, on a monthly basis, from the date of the opening to the end of the Term. As with the Note(s), the only source of funds made available for payment of the Development Fee is the Gaming Authority's "Operating Profits" of the temporary facility, if any, and the Facility, if any.

"Operating Profits" is defined in Section 4.1.3, and is equal to gross revenues of the temporary or permanent facility reduced by (i) amounts paid out as, or paid for, prizes, (ii) total "Gaming-Related Operating Expenses" including, among other things, all customary operating expenses as contemplated by IGRA and 25 CFR 502.16, and also includes all class III compact revenue-sharing payments to the State of Michigan and any local government payments; and (iii) other payments made to any governmental agency or entity for the purpose of providing a service in support of, in furtherance of, or in assistance to the casino.

Each Agreement provides for a "minimum guaranteed monthly payment" to the Tribe, commencing one month after the opening date and equal to the Development Fee. Thus, the Tribe as a whole receives 86% of the net operating income from the temporary or permanent facilities, as the case may be (*i.e.*, 14% of the Operating Profits as a minimum monthly payment to the Tribe plus the remaining 72% of net income). Section 4.3 gives the Developer a security interest in any owned Equipment of the Authority located in the temporary or permanent facility. Further, subject to the limited security interests granted to Developer, the Tribal gaming enterprise "shall retain the sole proprietary interest in the gaming facility." Section 4.3.

Article V: Events of Default. Article V of each Agreement describes Events of Default and the parties' remedies. Among other things, it is an Event of Default if the Authority fails to make any payment within fifteen days of the due date, except that that the Gaming Authority's failure to make any payment due under the Agreement solely

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because the Operating Profits for such month is insufficient shall not be an Event of Default. Sections 4.1.4, 4.2, and 5.1.2. With respect to any Developer remedies, Section 5.3.1.2 specifically provides that the Authority shall have the "absolute right to the use, operation, possession and control" of the Facility and any equipment located in the Facility, subject only to the limited security interests granted to the Developer. In addition, the Agreement is not intended nor shall it be interpreted as constituting a contract for management services as contemplated by IGRA, and a court may not grant any person any management authority or responsibilities with respect to the facility or the Gaming Authority. Section 5.3.1.2.

Article VI: Miscellaneous. Article VI addresses miscellaneous issues including, without limitation, confidentiality, dispute resolution, governing law, and the Tribe's sovereign immunity waiver. As consistent with the repayment provisions above, the only assets available to satisfy any judgment or enforcement under the waiver of sovereign immunity are limited to the Operating Profits and the Equipment.

Exhibits B and C Notes. Exhibits B and C of each Agreement illustrate the form of the notes contemplated by Sections 1.2.1-1.2.4 of the Agreement. These forms evidence the respective loans by the Developer and set forth the Gaming Authority's commitment to repay those sums, plus interest, subject to the limitations set out in Section 1.2.6 of the Agreement (*i.e.*, limitation to Operating Profits, non-recourse to the Tribe, and at least a 1:1 Total Fixed Charge Coverage Ratio). The note amounts may be prepaid early to the Developer, without penalty. Further in the note, the Authority grants to the Developer, as lender, a security interest in the Authority's equipment located in the facility and gaming revenues from the facility.

B. Management Contract Analysis

A "management contract" is "any contract, subcontract, or collateral agreement between an Indian tribe and a contractor or between a contractor and a subcontractor if such contract or agreement provides for the management of all or part of a gaming operation." 25 CFR § 502.15. "Management" encompasses activities such as "planning, organizing, directing, coordinating, and controlling" a gaming operation. *See* NIGC Bulletin 94-5.

Each of these Development Agreements expressly prohibits the Developer's management in any capacity over all or any part of the

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temporary or permanent facilities or regarding the Gaming Authority and includes no other indicia of management. All of Developer's obligations under the Agreement exist only with respect to pre-opening activities of the temporary or permanent facilities, such as financing, consultation and support, and assisting the Authority with supervising the progress of the facilities' design, development, construction, and opening. *See e.g.*, Section 2.5.6.3. Further, no part of the Agreement permits the Developer to engage in any post-opening activity. Therefore, the Agreement does not constitute a management agreement and does not require NIGC approval.

The Agreements supply the Developer with no rights with respect to "planning, organizing, directing, coordinating, or controlling" the operation of the temporary or permanent facilities, nor do any employees of Developer have any such rights. Rather, the Developer's only role is to provide a turnkey facility or facilities, and while that role includes providing consulting services related to the development of the facility, such consulting services do not extend beyond completion, nor do they rise to the level of management in any regard. The Developer's only concern with respect to the temporary or permanent facilities, once the same are completed and placed into operation, is the Developer's interest in receiving payment of the Note(s) and Development Fee, and the limited security interest evidenced in the form of attached notes. Moreover, the Development Fee is to be paid only from the "Operating Profits" of the temporary or permanent facilities.

No part of either Agreement or of the promissory notes would provide the Developer with any right to control or manage any part of the Authority's gaming operation.

C. Sole Proprietary Interest Analysis

The Development Agreements do not grant to the Developer or permit the granting of a proprietary interest in violation of the Tribe's gaming ordinance or IGRA.

IGRA requires that "the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity." 25 U.S.C. § 2710(b)(2)(A). NIGC regulations further require that tribal gaming ordinances include such a provision. 25 CFR § 522.4(b)(1).

Neither IGRA nor NIGC or Interior Department gaming regulations define "proprietary interest." Black's Law Dictionary, 7th

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Edition (1999), defines "proprietary interest" as "the interest held by a property owner together with all appurtenant rights" An owner is defined as "one who has the right to possess, use and convey something." *Id.* "Appurtenant" is defined as "belonging to; accessory or incident to" *Id.* Reading these definitions together, a proprietary interest creates the right to possess, use and convey something.

IGRA's legislative history with respect to "proprietary interest" is minimal, offering only a statement that "the tribe must be the sole owner of the gaming enterprise." S. Rep. 100-446, 1988 U.S.C.C.A.N. 3071-3106, 3078. Congress's concept of "proprietary interest" appears therefore to be consistent with the phrase's ordinary definition, while emphasizing the concern that entities other than tribes (except in limited circumstances not relevant here) are not to share in the ownership of gaming enterprises.

As explained above and clear from the structure and text of the document, neither the Agreements nor the promissory notes give the Developer any right to possess, use or convey any part of the planned temporary or permanent facilities or gaming operations. The Agreements provide compensation to the Developer in the form of a "Development Fee" in return for the Developer's substantial financial and other obligations and notable risks related to completion and repayment. In addition to all such undertakings and risks, given the substantial turmoil in the capital markets since 2008 and the absence of successfully issued gaming or tribal gaming debt in the past several months, the Developer's obligation in Section 2.3 to "make or arrange" for an interim loan to the Authority sufficient to fund the \$135.0 million construction and development budget is substantial.

In addition, as explained above, the Development Fee is to be paid only from the "Operating Profits" of the temporary or permanent facilities, and only if those facilities are completed and certain financial covenants are satisfied. Moreover, the remedies provision specifically provides that, even in the event of a default by the Authority, the Authority will have the absolute right to the "use, operation, possession and control of the Facility, and any equipment located thereon" subject only to the limited security interests granted to Developer under the Agreement and Note(s). The Tribe supports the Agreement's compensation to the Developer, which the Tribe believes is warranted given the Developer's obligations and risks.

The Tribe and Developer consider the matters discussed above and terms of the Development Agreement and Notes, including all other Exhibits, submitted herewith to be highly confidential and not subject to

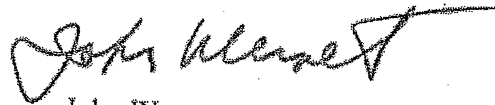
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Freedom of Information Act ("FOIA") requests. Please contact the Tribe immediately for our input upon any FOIA or other request for a copy of the Agreement, or any part of it, or this letter.

Because of anticipated project deadlines, it would be very helpful if a determination could be made by January 20, 2012. But, in any event, we would very much appreciate whatever you can do to expedite the process and we look forward to your response.

Please do not hesitate to contact me if I can be of assistance during your review. In addition, please feel free to communicate with the Developer and its counsel, Padraic McCoy or Rory Dilweg, at Tilden McCoy + Dilweg LLP, regarding the Agreement or the items discussed here.

Sincerely,



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Enclosures

Cc without enclosures: Joe Eitrem, Tribal Chairman
Padraic McCoy