UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

KG URBAN ENTERPRISES, LLC *Plaintiff,* v. DEVAL L. PATRICK, in his official capacity as Governor of the Commonwealth of Massachusetts, and STEPHEN CROSBY, GAYLE CAMERON, ENRIQUE ZUNIGA, JAMES MCHUGH, and BRUCE STEBBINS, in their official capacities as Chairman and Commissioners of the Massachusetts Gaming Commission *Defendants*.	)	Case No. 1:11-cv-12070

PLAINTIFF'S OPPOSITION TO COMMONWEALTH'S
MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Plaintiff KG Urban Enterprises, LLC ("KG") respectfully opposes the Commonwealth's motion to dismiss this case for lack of subject-matter jurisdiction (DN 115).

KG applauds the Gaming Commission's recent decision to initiate a commercial application process in Region C as a step in the right direction. But that action is hardly sufficient to moot KG's constitutional claims, for several independent reasons:

First, KG's claims are not moot because the Commission's voluntary decision to begin the process for accepting commercial applications does not provide KG all of the relief it has requested from this Court. In its amended complaint, KG has sought an injunction ordering the Commission to follow the same, race-neutral application process in Region C that it is currently following in Regions A and B. But the Commission has thus far taken only preliminary steps in what is likely to be a long process, and has essentially guaranteed it will follow a different process in Region C than in the other two regions—*i.e.*, a process that may result in denying a license to *any* commercial applicant in favor of a hypothetical tribal casino. Both of those reasons—the preliminary nature of the Commission's actions and its adoption of distinct procedures for Region C—render this dispute far from moot.

Indeed, the Commission has made a number of statements suggesting that both the application process in Region C and the ultimate outcome of that process may still be skewed by tribal preferences. In particular, the Commission has stated that commercial applicants in Region C will face an additional procedural hurdle in which their proposals are considered "in light of" the status of a Mashpee project at the time the Commission makes its licensing decisions. This is a unique aspect of the licensing process that applies only in Region C; the Commission has never suggested that its award of commercial licenses in Regions A and B will be influenced by the status of tribal gaming, even though the proposed Mashpee project is just 40

miles from the proposed commercial casinos in Region A (Boston). And, in terms of the *outcome* of the licensing process, the Commission's Chairman has suggested that regional exclusivity for a Mashpee tribal casino is still a possibility. Chairman Stephen Crosby has stated that the Mashpee currently have a "powerful head start" over commercial applicants, and that the tribe has "by far the best chance to end up getting what it wants"—namely, regional exclusivity without commercial competition.

Moreover, the Commonwealth's mootness arguments require a particularly demanding showing because it is the Commonwealth's own actions, not those of an independent third party, that the Commonwealth suggests have mooted this controversy. Courts have repeatedly held that alleged mootness based on a defendant's "voluntary cessation" of its own conduct must meet a higher standard of proof, in order to prevent defendants from resuming their unlawful conduct after the suit is dismissed. Under that test—which the Supreme Court has described as "stringent" and "formidable"—the ongoing uncertainty over how the commercial application process will proceed in Region C is more than sufficient to defeat the Commonwealth's claims of mootness.

Second, the Commission is not the only defendant in this case, and despite the Gaming Commission's preliminary steps to introduce commercial competition in the Southeast, the Governor continues to act as if Section 91(e) ensures regional exclusivity in Region C for the Mashpee. The Governor recently negotiated and signed an amended compact that contemplates regional exclusivity based on state law—and expressly not on the federal Indian Gaming Regulatory Act ("IGRA")—for which the Commonwealth will be compensated. And the Governor timed the introduction of the new compact with an eye to derailing the Commission's nascent efforts to open the Southeast to commercial competition. The Governor's staff has been

even more explicit in favoring a three-casino regime in which Boston and Western Massachusetts have commercial casinos, with the Southeast set aside for the Mashpee. Because the amended compact itself indicates that neither IGRA nor the compact provides for regional exclusivity (indeed, as this Court recently noted, the amended compact expressly contemplates the possibility of a commercial competitor), the Governor obviously views Section 91(e) as a continuing source of regional exclusivity. Thus, whatever steps the Commission has taken to initiate a commercial application process, at least one defendant clearly envisions differential treatment for the Southeast, and has taken steps to ensure that this is the case. That is more than sufficient to prevent this controversy from becoming moot.

Third, the Mashpee have asserted that the Commission's recent actions are unlawful under state law, and have threatened to sue the Commission in state court to invalidate any attempt to open Region C to non-tribal competition. Courts have repeatedly held that a government action does not render a case moot if it remains subject to actual or potential legal challenges, including challenges by non-parties such as the Mashpee. KG has sought relief from a federal court; voluntary action by the Commission, opposed by the Governor and subject to potential invalidation in state court, is no substitute. Although KG believes that the Mashpee's legal arguments lack merit, the threat of litigation over the Commission's actions is, by itself, sufficient to defeat any claim of mootness.

ARGUMENT

I. THE GAMING COMMISSION'S RECENT ACTIONS, WHILE WELCOME DEVELOPMENTS, ARE INSUFFICIENT TO MOOT KG'S CONSTITUTIONAL CLAIMS

A. The Commission Has Not Given KG All of the Relief It Seeks from This Court

An intervening event does not moot a pending case if "only partial or uncertain relief is afforded." Wright & Miller, *Federal Practice & Procedure* § 3533.2 (3d ed. 2013). That is, "[a]n intervening event … will only render a plaintiff's action moot if the plaintiff is divested of all personal interest in the result or the effect of the alleged violation is *completely eradicated* and the event will not occur again." *Dailey v. Vought Aircraft*, 141 F.3d 224, 227 (5th Cir. 1998) (emphasis added). As the First Circuit recently explained, dismissal for mootness is inappropriate if there are still "unresolved disputes" over how the intervening event will affect the plaintiff. *Chico Serv. Station v. Sol Puerto Rico*, 633 F.3d 20, 36 (1st Cir. 2011); *see also President v. Vance*, 627 F.2d 353, 363 (D.C. Cir. 1980) (rejecting claims of mootness when there were ongoing factual disputes over "whether all relief awarded has actually been implemented").

The Gaming Commission's recent actions, while certainly a welcome step in the right direction, do not moot KG's claims because there is a fundamental disconnect between the Commission's still-preliminary actions and the relief KG seeks from this Court. KG has requested a permanent injunction ordering the Commission to conduct *the entire licensing process*—up to and including the actual award of a license—"under the same race-neutral terms and conditions that apply in Regions A and B." DN 83 at 20. To date, the Commission has merely taken preliminary steps to *initiate* a commercial application process in Region C; the precise contours of that process are still taking shape, remain subject to revision, and will not produce a final decision on commercial license applications until October 2014 at the earliest.

The initiation of a process that could eventually moot a claim is not enough. A "mooting event" will occur only if the Commission actually awards a gaming license in Region C—either to KG or another commercial competitor—or some other independent event occurs (for example, the passage of a federal statute barring tribal preferences in gaming) that absolutely guaranteed a race-neutral process in Region C no different from the process in the other regions. Until such an event, KG will not have received *all* of the relief requested in its complaint. Although KG welcomes the Commission's preliminary steps toward commercial gaming in Region C, that is still no substitute for a permanent injunction from this Court *ordering* the Commission to conduct the application process on the same race-neutral terms and conditions as Regions A and B. "Partial relief in another proceeding cannot moot an action that legitimately seeks additional relief." *Flagstaff Med. Ctr. v. Sullivan*, 962 F.2d 879, 885 (9th Cir. 1992).

In all events, KG's equal protection claims are not moot because not only are the Commission's actions preliminary and subject to revision, but the Commission has made a number of public statements in which it suggested that the application process for Region C will not be identical to those in the other two regions and may yet be skewed by tribal preferences. In particular, the Commission has emphasized that its ultimate decision about whether to award a license in Region C will "tak[e] into account the economic consequences of the then current status of the Tribal-State and Federal Trust Land process."[1] That is, the Commission seems to envision an extra procedural step in the Region C application process in which it would "determine what state license, if any, should be awarded to which commercial applicant, in light

[1] *See* Mass. Gaming Comm'n, *MGC adopts a plan to open Southeastern Mass to commercial applications while providing Tribe additional time to pursue federal approvals* (April 18, 2013), *available at* http://massgaming.com/blog-post/mgc-adopts-a-plan-to-open-southeastern-mass-to-commercial-applications-while-providing-tribe-additional-time-to-pursue-federal-approvals/.

of the tribe's ability to operate a resort-style casino in the region without state licensure." DN 115 at 12. That is not a procedural step that will occur in Region A or B, even though the proposed casinos in Region A are only 40 miles from the Mashpee's proposed site in Taunton. Thus, the Commission has not even promised—let alone delivered—the same relief that KG has sought in its amended complaint.

In addition, Chairman Crosby stated at the April 18th meeting that the Mashpee have a "powerful head start" over commercial applicants, and that "[i]f the Tribe does what the Tribe says it will do, then it has by far the best chance to end up getting what it wants"—namely, regional exclusivity without commercial competition. 4/18/13 Comm'n Pub. Mtg. Tr. at 103 (Ex. A to DN 104). The Chairman has made no similar statement about the other two regions. Based on his statements, it is clear that Region C is still subject to disparate treatment and applicants in Region C face a distinct hurdle.

The Commonwealth is thus wrong to suggest (at 6-7) that the Commission has "committed itself to employ the same decision-making machinery that KG Urban would have had this Court order it to use." KG believes that the Equal Protection Clause prohibits *any* attempt to set aside the Southeastern region for an Indian tribe, whether through an explicit statutory set-aside or a softer, less explicit scheme that reaches the same outcome. As KG explained to both the Commission and this Court, an application process that "remains subject to being aborted based on outside events beyond an applicant's control" would be a "fundamentally flawed business proposition" and a "reckless investment." DN 80, Ex. 1 at 2; *see also* DN 80 (application process "that is expressly contingent on the Mashpee's actions" would be "plagued by all of the equal protection problems for which KG has sought relief in this litigation"). Commercial applicants such as KG are justifiably concerned about running the gauntlet of

background checks, host community votes, extensive proposals, mitigation studies, and hearings, *see* Act § 16, secs. 12-17—to say nothing of the purportedly non-refundable $400,000 application fee—only to be told at the end of the process that Region C will continue to be set aside for the Mashpee.[2]

B. The Commonwealth's Voluntary Cessation of the Challenged Conduct Further Undermines Any Claim of Mootness

The Commonwealth's effort to dismiss this case as moot faces a particularly high hurdle because it is the Commonwealth's own voluntary actions, and not the independent actions of a third party, that purportedly gave rise to mootness. It is well-established that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289 (1982). To prevent defendants from temporarily suspending challenged conduct only to "return to [their] old ways," the Supreme Court has established a "stringent" standard for determining whether a case has been mooted by a defendant's own voluntary conduct. *See Friends of the Earth v. Laidlaw Envtl. Svcs.*, 528 U.S. 167, 189 (2000). Under that test, a case will be deemed moot on account of voluntary cessation only if it is "*absolutely clear* that the litigant no longer [has] any need of the judicial protection that it sought." *Adarand v. Slater*, 528 U.S. 216, 224 (2000) (emphasis added); *see United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968). The party asserting mootness bears a "heavy"—indeed, "formidable"—burden of persuasion. *Laidlaw*, 528 U.S. at 189-90.

[2] The market speaks for itself. Gaming operators have flocked to Regions A and B, in which applicants expect that licenses will be awarded on the merits to the best project in each region. But they have largely bypassed Region C based on the well-founded fear that the region has been set aside for the Mashpee and the tribe's commercial partners.

The Commonwealth's recent actions do not remotely satisfy that standard. As noted above, there is pervasive and ongoing uncertainty over how the Commission plans to "tak[e] into account" the status of the Mashpee in deciding whether to award a commercial license in Region C. And, as elaborated next, the Governor—who is also a defendant in this case and a state actor bound by the Equal Protection Clause—has made clear that he continues to view the Southeast as earmarked for the Mashpee. This creates far too many unanswered questions to satisfy the demanding voluntary cessation standard.

For example, what if the tribe has nominally obtained land-in-trust but that determination remains subject to legal challenges under *Carcieri* and *Patchak*? Or what if two years from now the tribe still has not obtained land-in-trust but continues to assert that a favorable decision is imminent? Under such circumstances, it is entirely unclear whether the Commission would issue a commercial license for Region C or whether the Commonwealth will set the region aside for the Mashpee. What is clear is that the status of the Mashpee will have continuing significance for Region C but not the other two regions. This ongoing, region-specific uncertainty over how the application process will proceed is, by itself, sufficient to prevent the Commonwealth's own voluntary actions from mooting this case. It is not remotely clear at this point—much less "absolutely clear," *see Adarand*, 528 U.S. at 224—that the licensing process for Region C will mirror the processes in the rest of the Commonwealth.

The Commonwealth argues (at 9-11) that the voluntary cessation doctrine should not apply because the Commission's decision to begin accepting commercial applications was made for "reasons unrelated to the litigation." That claim cannot withstand scrutiny, and ignores the efforts of the Commission in general and former-Judge McHugh in particular to move with

expedition in light of the First Circuit's conclusion that the passage of time only strengthened KG's constitutional objections.

Since last December, the Commission has made clear that this litigation was one of the factors driving the Commission's need to address commercial licensing in Region C. *See* 12/4/2012 Memorandum from Commissioner McHugh Regarding Region C (attached hereto as Ex. A). At the April 18, 2013 meeting, Commissioner McHugh explained that "I don't think waiting is an option" because the Commissioners are "defendants in a lawsuit in the Federal Court now." 4/18/13 Comm'n Pub. Mtg. Tr. at 93 (Ex. A to DN 104). And he expressly cited the First Circuit's decision in this case, noting that "the last seven pages … talk about how the longer we wait without an undefined deadline, the more the wait begins to look like a violation of the equal protection clause." *Id.* at 93-94.

The Commonwealth's assertion (at 10-11) that the Commission's actions were motivated by "the open-endedness of the land-into trust proceeding," rather than a desire to resolve KG's claims, similarly ignores reality. Those are simply two sides of the same coin. It is the "open-endedness of the land-in-trust process" in combination with the seemingly indefinite nature of Section 91(e)'s racial set-aside of Region C that prompted the First Circuit's decision in this case (which was now issued nearly a year ago). And it was that decision's emphasis on the diminishing persuasiveness of the Commonwealth's position over time—as well as the pendency of KG's constitutional claims in this Court on remand—that made clear to the Commission that the status quo was unacceptable. There is thus no question that this case is governed by the "stringent" mootness standard that applies to voluntary cessation of the defendants' challenged conduct—a standard that the Commission's recent actions do not remotely satisfy.

II. KG'S CLAIMS ARE NOT MOOT BECAUSE THE GOVERNOR CONTINUES TO VIEW SECTION 91(e) AS A SOURCE OF REGIONAL EXCLUSIVITY FOR THE MASHPEE

Although the Commission's voluntary steps in the right direction are not sufficient to render this case moot, the Commonwealth's mootness argument faces a far more serious difficulty. The Commission is not the only defendant represented by the Commonwealth in this case. And one of the other defendants, Governor Deval Patrick, has been singing a different tune from the Commission and continues to believe that state law provides a regional monopoly for the Mashpee in Region C. Governor Patrick's recent actions and statements have made clear that—regardless of any positive actions taken by the Gaming Commission—the Governor intends to ensure that Region C is set aside for the Mashpee.

The Governor negotiated and signed a new gaming compact with the Mashpee to replace the compact that was rejected by the Interior Department last October. *See* DN 99, Ex. A. Both its timing and substance underscore the Governor's continuing intent to set aside the Southeast for the Mashpee. As for timing, it is no accident that the amended compact was made public on March 20, 2013, just one day before the Commission's public meeting in the Southeast to discuss initiating a commercial application process. And the substance of the amended compact confirms the Governor's intent to earmark the Southeast for the Mashpee. Sections 9.1.4 and 9.1.5 emphasize that the Mashpee may have "the opportunity to operate a casino in Region C on an exclusive basis," and underscore that this exclusivity is "extremely valuable to the Tribe." The amended compact further states that regional exclusivity is not a product of IGRA or any other federal law, but is exclusively a product of state law. Indeed, Section 9.1.2 of the compact emphasizes that IGRA "does not require a state to provide a tribe with geographic exclusivity as to the proposed location for its Gaming."

Nonetheless, it is clear that the amended compact itself is not the source of regional exclusivity. As this Court recently noted, the amended compact contemplates the possibility of commercial competition in Region C, *see* DN 117 at 18, by reducing the Commonwealth's revenue from a Mashpee casino to zero if commercial competition occurs, *see* Section 9.2.1.[3] The source of this regional exclusivity, since it is not the compact or IGRA, is quite obviously Section 91(e). Under these circumstances, where a party defendant continues to advocate a regional monopoly for the Mashpee in the Southeast to "further[] the Commonwealth's policy of controlling the expansion of gambling within Massachusetts, by limiting the total number of casinos within the Commonwealth to three," *see* Amended Compact § 9.1.5, KG's constitutional challenge to Section 91(e) is not remotely moot.[4]

If anything, the Governor's staff has been more explicit in their stated desire to reserve Region C for the Mashpee. At a hearing before the Joint Committee on Economic Development on May 15, 2013, the Governor's Chief of Staff, Brendan Ryan, testified that the Governor believes there should be no more than three casinos in the Commonwealth, that ratification of the amended compact will lock commercial competitors out of the Southeast, and that legislative action was critical in light of the Gaming Commission's decision to initiate a commercial

[3] Although Section 9.2 of the amended compact contemplates the possibility of a commercial gaming establishment in Region C, it appears designed to make the award of a commercial license highly unlikely by giving the Mashpee a near-insurmountable economic advantage (*i.e.*, a Mashpee casino is not required to pay any portion of its gross gaming revenue to the Commonwealth if a commercial gaming establishment has commenced operations in the Southeast).

[4] Nor has the Governor ever backed away from his earlier statement that Section 91(e) was designed to ensure that the Mashpee get a license one way or the other. *See* Matt Murphy, *Questions Linger for Southeastern Massachusetts as Tribal Casino Deal Reaches Legislature*, State House News Service (July 13, 2012) (Governor "would bet on" a Mashpee casino in Taunton, noting that "we'll know whether it's a commercial facility or a tribal facility fairly soon").

application process in Region C.[5] He further testified that Section 9.2.1 of the amended compact—which provides that the tribe will pay nothing to the Commonwealth if a commercial casino is licensed in Region C—is intended to influence the Commission's assessment of the viability of a commercial casino in the Southeast. In light of these active efforts by one of the defendants to ensure that Region C is set aside for the Mashpee—and not subject to the same race-neutral process as the other regions—this case is far from moot.

III. THE MASHPEE'S THREATENED STATE-LAW CHALLENGE TO THE COMMISSION'S ACTIONS FORECLOSES ANY FINDING OF MOOTNESS

Finally, KG's claims are not moot because even the Commission's modest attempt to initiate a commercial application process remains subject to threatened state-law challenges by the Mashpee. Courts have repeatedly held that a case is not moot when the government action that purportedly gives rise to mootness is still subject to further challenge. For example, in *Adarand*, the United States argued that the case was moot because the petitioner (a white-owned business) had been certified as "socially disadvantaged" by the Colorado Department of Transportation and was thus entitled to the same preferences as minority contractors. The Supreme Court disagreed, noting that it was "not at all clear" that the certification was valid, and that the certification could still be challenged by third parties under state law. 528 U.S. at 223.

Similarly, in *Exxon Mobil v. Saudi Basic Industries*, 544 U.S. 280, 291 n.7 (2005), the Court rejected a mootness argument based on the outcome of a parallel proceeding where the

[5] There is no official transcript of the May 15, 2013 hearing, and the statements set forth herein are reproduced from KG's notes of the hearing. KG would welcome the opportunity to depose Mr. Ryan to obtain a formal record of the Governor's purpose in negotiating and signing the amended compact if necessary to dispose of the Commonwealth's motion to dismiss. But as explained above and below, KG believes there are multiple other independent grounds for defeating this motion that would not require developing record evidence of Mr. Ryan's statements.

losing party in the other case had "represented that it will petition this Court for a writ of certiorari." *See also Crawford v. Apfel*, 235 F.3d 1298, 1303 (11th Cir. 2000) (case not moot where administrative decision that purportedly gave rise to mootness remained subject to reopening); *Shea v. Esensten*, 208 F.3d 712, 716 (8th Cir. 2000) (federal case not moot where state-court decision that awarded the plaintiff the same relief sought in the federal suit was "not yet final"); *National Audubon Society v. Davis*, 307 F.3d 835, 850 (9th Cir. 2002) (state's concession about the meaning of a state statute did not moot a preemption challenge where there was still a possibility that state courts could interpret the statute differently).

That is precisely the case here. The Mashpee have argued in no uncertain terms that "the Commission lacks lawful authority under the plain language of the Massachusetts Expanded Gaming Act, St. 2011, c. 194, even to consider opening Region C for applications for a Category 1 license." Letter from Howard M. Cooper to Hon. Stephen Crosby (Mar. 28, 2013) (attached hereto as Ex. B). According to the tribe, Section 91(e) contains an unequivocal set-aside that may be abrogated *only* if the Gaming Commission makes a finding that the Secretary of the Interior will not take land into trust for the Mashpee. The Mashpee have issued a number of thinly veiled threats suggesting that they may challenge the Commission's interpretation of the Act in state court under state law. *See id.* ("The Tribe reserves all of its rights in this regard."). The tribe has also run a number of television ads criticizing the Commission's decision, and Chairman Cedric Cromwell has described the Gaming Commission as a "rogue group" with "an elitist attitude that's not respectful of Indian sovereignty."[6]

[6] Gale Courey Toensing, *Cromwell: Massachusetts Gaming Commission is 'Rogue Group,'* Indian Country Today (April 24, 2013), *available at* http://indiancountrytodaymedianetwork.com/2013/04/24/cromwell-massachusetts-gaming-commission-rogue-group-149005.

Under the cases cited above, the Mashpee's threatened litigation over the Commission's authority to initiate a commercial application process in Region C is, by itself, sufficient to defeat a finding of mootness.[7] KG has sought a federal court order entitling it to equal treatment. A voluntary decision by the Commission (even one that was less tentative and treated Region C identically to the other regions) subject to challenge and invalidation in state court under state law is no substitute for such a federal-court order and does not render this case moot.[8]

The Commonwealth argues (at 12-13) that a potential state-court challenge to the Commission's actions by a "third party" is too "attenuated" to defeat a finding of mootness. The Commonwealth cites nothing in support of that contention and with good reason. Courts have repeatedly held that actual *or threatened* challenges by non-parties to the state action in question are sufficient to defeat any claims of mootness. In *Adarand*, for example, the Tenth Circuit adopted a variant of the Commonwealth's view only to be unanimously reversed by the Supreme Court. The Tenth Circuit concluded that potential state-law challenges to the plaintiffs'

[7] The Court's recent denial of the Mashpee's motion to intervene does not alter the effect of the tribe's threatened litigation. If the government action allegedly giving rise to mootness remains subject to actual or potential litigation, this is sufficient to defeat a finding of mootness even if the litigation was pursued by non-parties. *See Adarand*, 528 U.S. at 223 (case not moot in light of potential "third-party challenge[s]" to the petitioner's status as a disadvantaged business entity).

[8] The Mashpee's *substantive* interpretation of Section 91(e) underscores the seriousness and continuing importance of KG's challenge. According to the tribe, Section 91(e) was designed to reserve an entire region for a landless tribe unless and until the Commission can prove the negative that the tribe will *not* have land taken into trust. And an even more expansive interpretation of Section 91(e) was offered at the May 15th hearing by Committee Co-Chairman Joseph Wagner, who stated that the Commission was "violating" the Gaming Act because it was "not permitted" to put the Region C license out to commercial bid unless and until the Mashpee's land-in-trust application was denied by the Department of the Interior. If that is what the Act means, it is a flagrant set-aside that unquestionably violates the Equal Protection Clause as well as the First Circuit's decision in this case. *See KG Urban Enterprises v. Patrick*, 693 F.3d 1, 27 (1st Cir. 2012) (holding that "lengthy delays" in the tribe's progress toward a tribal casino would "undercut" the notion that the Act's tribal preferences are simply an accommodation of IGRA).

certifications were "too conjectural and speculative to avoid a finding of mootness." 528 U.S. at 224. The Supreme Court unanimously reversed, holding that even though the certifications had *not* yet been challenged under state law, the demanding standard of mootness was not satisfied because it was not "absolutely clear" that the plaintiff "no longer had any need of the judicial protection that it sought." *Id.*; *see also Saudi Basic Industries*, 544 U.S. at 291 n.7 (controversy remained "live" in light of *potential* certiorari petition).

Because the Commission actions allegedly giving rise to mootness may still be challenged by the Mashpee under state law, the Commonwealth's claims of mootness must be rejected. In light of KG's substantial efforts over the last year and a half to obtain a federal court order entitling it to equal treatment, voluntary action that may ultimately be invalidated on state-law grounds in state court is no substitute and no basis for finding mootness.

* * *

No one wishes this dispute were truly moot more than KG. From the beginning of this litigation more than a year and a half ago, KG has simply sought an opportunity to compete for a commercial license on a level playing field as in the other two regions. A promise to belatedly open a commercial application process in Region C is certainly a welcome development, but it is no substitute for the relief KG has sought. Not only is the application process subject to revision, but it does not treat applicants in Region C the same as those in the other regions. Only in Region C is there a final step in the process that requires consideration of the Mashpee's status. And whatever progress the Commission has made, the commercial process in Region C and Region C alone operates in the shadow of the Governor's continuing efforts to earmark the region for the Mashpee, as well as the Mashpee's own threats to initiate state-court litigation based on Section 91(e).

Under these circumstances, KG's suit is far from moot. The Commonwealth cannot remotely satisfy the demanding standard for mootness, let alone the heightened standard for voluntary cessation. KG seeks truly equal treatment now, not deferred consideration of whether the Region C license will even issue based on the tribe's then-current situation. The only way to bring a close to the ongoing dispute about regional exclusivity is for this Court to rule definitively that setting aside an entire third of the Commonwealth for a tribe is simply not an option open to a state under the Equal Protection Clause. As the Chief Justice recently explained: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Community Schools v. Seattle Sch. Dist. No. One*, 551 U.S. 701, 748 (2007). The way to stop discrimination on the basis of race when it comes to the award of a commercial license in Region C is for this Court to make clear to the Commonwealth that it must not discriminate on the basis of race.

CONCLUSION

The Commonwealth's motion to dismiss should be denied.

June 11, 2013

Respectfully submitted,

/s/ Paul D. Clement

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CERTIFICATE OF SERVICE

I, Jeffrey M. Harris, hereby certify that on June 11, 2013, Plaintiff KG Urban Enterprises, LLC's Opposition to the Commonwealth's Motion to Dismiss was filed through the ECF System and will be sent electronically to registered participants as identified on the Notice of Electronic Filing.

/s/ Jeffrey M. Harris

EXHIBIT A

3.d

MEMORANDUM

December 4, 2012

To: Chairman Crosby and Commissioners Cameron, Stebbins and Zuniga

From: Commissioner McHugh

Re: Region C

As we all are aware, by letter dated October 12, 2012, Kevin J. Washburn, Assistant Secretary of the Interior for Indian Affairs, rejected the July 12, 2012, compact between the Mashpee Wampanoag Tribe ("Tribe") and the Commonwealth regarding Class III gaming in the Taunton area, which is part of Region C under the Commonwealth's expanded gaming legislation. Anticipating that possibility, the compact itself requires renewed negotiations between the Commonwealth and the Tribe upon rejection of the initial effort. There is every reason to believe that those negotiations will proceed. Nevertheless, six factors combine to warrant the Commission's consideration of what would now be the most appropriate approach to gaming licensure in Region C. The six factors are (1) the content of the Secretary's rejection letter, (2) the First Circuit's decision in the K. G. Urban litigation ("the federal litigation"), (3) the possibility of state court litigation, (4) the so-called Carcieri decision, (5) the length of time it may take to resolve all of these issues and (6) the Legislative intent regarding Region C. This memorandum briefly explores each of those factors.

Dealing with the issues in the order just listed, the rejection letter focused on almost every component of the compact. The Secretary grouped what he perceived to be the compact deficiencies into four major categories. One was that the compact's revenue-sharing provisions went beyond any that were permitted by the Federal Indian Gaming Regulatory Act ("IGRA"). Another was that the compact contained agreements regarding a variety of issues unrelated to gaming "in clear contravention of IGRA's express limitation that gaming compacts may only address matters directly related to gaming." Yet another was that, in violation of IGRA, the Commonwealth sought in the compact to exercise jurisdiction over "activities not related to gaming, such as regulation of non-gaming suppliers, ancillary entertainment services and ancillary non-gaming amenities." Finally, the Secretary found that "there are numerous additional issues [in the compact] that create further problems and concerns."

Viewed individually or collectively, all of the components of the Secretary's letter raise significant impediments to a successful renegotiation and necessary legislative approval. Chief among those impediments, though, is the Secretary's treatment of the revenue-sharing provisions. In essence, the compact provided that the Tribe would pay to the Commonwealth 21.5% of net gaming revenues. If, however, the Commission authorized

another Class III gaming operation (a Category 1 license under our expanded gaming legislation), then the Tribe's payment to the Commonwealth would drop to 15% of net gaming revenues. In his letter, the Secretary said that, given the requirements of IGRA and the structure of the compact, the 6.5% difference was the maximum revenue share that IGRA permitted. Though some uncertainty inevitably accompanies any prediction, it appears that it could be very difficult for a new compact to produce a revenue share much greater than that 6.5%.

The second factor is the lawsuit brought by K.G. Urban ("Urban litigation"). Reduced to essentials, the First Circuit's decision in that litigation says that Urban does have a viable claim that § 91(e) of the expanded gaming legislation, if applied in a manner that prevents private developers from applying for a Category 1 license in Region C, creates a race-based preference that implicates the 14th amendment to the Constitution of the United States. The court concluded, however, that § 91(e), if applied in a manner that favors a Tribal development over a private development, may be authorized by IGRA if the section is viewed as a placing a temporary hold on non-tribal Category 1 applications so that the IGRA and land-in-trust processes can work their way through the required stages of approval. In the court's view, the longer the hold remains in place, particularly without any indication of when it will end, the less likely it is that the hold can be viewed as temporary. Put another way, the longer the Region C freeze on commercial applications for Category 1 licenses remains in place, the more likely it is that the freeze will be viewed as a racial preference unrelated to IGRA. A racial preference unrelated to IGRA would be very difficult for a court to sustain.

The third factor is related. In the Urban litigation, the First Circuit dismissed a claim based on the Massachusetts equivalent of the 14th Amendment's equal protection provisions. The dismissal, however, was without prejudice, thereby allowing Urban, or any other developers similarly situated, to challenge exclusivity provisions embedded in § 91(e) in the courts of the Commonwealth. Analysis of such a claim in the state courts would proceed in a somewhat different fashion, but the courts of the Commonwealth would not be required to reach the same result under state law that the Federal courts reached federal law.

The fourth factor is the U.S. Supreme Court's so-called Carcieri decision. That decision holds that the Federal land-in-trust statute only applies to a "recognized Indian tribe" that was "under Federal jurisdiction" when the statute was enacted in June, 1934. The federal government did not formally recognize the Mashpee Wampanoag tribe until 2007 and it was not formally under federal jurisdiction in 1934. To be sure, the dissent in Carcieri suggests that a tribe may have been under federal jurisdiction in 1934 even if the government had not formally acknowledged that jurisdiction. There is, therefore, some question as to what Carcieri really means. Cases now in progress may clarify the issue but

it is not clear when, or if, the Supreme Court will reach them. Because Carcieri simply interprets a federal statute, Congress has the power to change the future impact of the decision by amending the statute and there have been several unsuccessful efforts to do so. An active effort is now underway in the Senate to adopt an amendment by the end of the current lame-duck session but it is hard to predict whether that effort will be successful or, if it is, what the amending legislation's fate will be when it reaches the House. Thoughtful comments bearing on this issue are also contained in the November 27, 2012, letters from the law firms of Shefsky & Froelich and Goodwin Proctor that we received as part of the public comment process.

The penultimate factor is the Supreme Court's June, 2012, decision in the so-called Patchak case. In that case, the court held, for the first time, that individuals who were adversely affected by construction of a tribal casino had the right to bring suit in federal court to challenge the Secretary's decision to take lands into trust. Moreover, the challengers had the right to base their challenge on the Secretary's improper application of any criterion the statute contained or on the broader proposition that, as interpreted in Carcieri, the governing law prohibited taking the tribe's land into trust under any circumstances. The decision is significant not only because it may open the door to innumerable challengers but also because it may effectively set in place a six-year statute of limitations on bringing suit, with the statute commencing to run when the Secretary makes the decision to take the land into trust.

Finally, there is the intent to Legislature manifested when it adopted the expanded gaming legislation. You will recall that § 91(e) of the expanded gaming legislation states as follows:

> Notwithstanding any general or special law or rule 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.

The tight deadline § 91(e) contains clearly evince a Legislative intent that Region C not be left behind in the statewide pursuit of jobs and income that are the fundamental premise for the expanded gaming legislation itself.

Collectively, those factors warrant our consideration of the appropriate course to take with respect to Region C at the present time.

EXHIBIT B

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March 28, 2013

By Hand Delivery

Mr. Stephen Crosby
Chairman
Massachusetts Gaming Commission
84 State Street, Suite 720
Boston, MA 02109

Re: Region C

Dear Chairman Crosby:

I write on behalf of the Mashpee Wampanoag Tribe to correct a few of the many misstatements made by opponents of the Tribe's project to the Massachusetts Gaming Commission at the hearing held at Bristol Community College in Fall River last Thursday. The points set forth below are not exhaustive as the Tribe believes it is not necessary to repeat matters previously discussed with you and Commissioner McHugh.

The Tribe continues to believe the Commission lacks lawful authority under the plain language of the Massachusetts Expanded Gaming Act, St. 2011, c. 194, even to consider opening Region C for applications for a Category 1 license. The Commission's authority with Regard to Region C is expressly limited to taking action only when, and if, the Secretary of the Interior determines that she "shall not" take land into trust for the Tribe. This legislative intent was reaffirmed when the General Court approved the July 2012 Compact, and will be confirmed again when it approves the new Compact. More specifically, Section 2.6 of both compacts provide that the Commission "**will not issue a request for Category 1 License *applications* in Region C unless and until it determines that the Tribe will not have land taken into trust for it by the United States Secretary of the Interior**. " *See* Compact at Section 2.6 (emphasis supplied). Given Section 2.6, the plain language of the statute, and the substantial progress the Tribe has made with its trust application, it is premature for the Commission even to consider a request for applications in Region C at this time. The Tribe reserves all of its rights in this regard.

Let me now turn to some of the specific misstatements made to the Commission.

Opponents of the Tribe's project have incorrectly suggested to the Commission that the Tribe cannot have land taken into trust under the United States Supreme Court's decision in *Carcieri* as the Tribe was not recognized by the United States in1934. They misread the *Carcieri* opinion. The Court did not rule in *Carcieri* that a tribe must have been federally

recognized in 1934. Rather, it ruled that Tribe must have been "under federal jurisdiction" at that time. The Tribe has addressed the "under federal jurisdiction" inquiry in detailed and voluminous submissions to the Department of the Interior. The Tribe's submissions directly address federal correspondence claimed by opponents to disclaim federal jurisdiction over the Tribe. Such statements to Native Americans from a federal government then seeking to disclaim its responsibilities are common and do not determine the inquiry. Interior has taken land into trust in situations where similar erroneous correspondence from the federal government exists. Likewise, that the Tribe was under state jurisdiction as of 1934 is beside the point. Many tribes were subject to concurrent jurisdiction, and the United States Supreme Court has held that these relations did not alter the application of federal law. *See Oneida Indian Nation v. County of Oneida,* 414 U.S. 661, 670 (1974). With all respect, these issues are not properly before the Commission and it is only the determination by Interior which is relevant here. Regardless, the Tribe seeks a cooperative relationship with the Commission and for that reason we would be glad to make the Tribe's submissions available for review at my office if the Commission would like to see them.

As Assistant Secretary Washburn stated in his letter dated December 31, 2012, Interior will have a decision on the *Carcieri* issue in "early 2013." We understand that the Assistant Secretary has informed the Commission that the *Carcieri* review is now in its late stages and is in the hands of the Solicitor's Office. As Solicitor Hilary Tompkins has now told the Tribe in writing herself, the Office of the Solicitor considers the Tribe's application to be a "top priority, is making "substantial progress in its review, and will continue to actively consider the matter." This is all perfectly consistent with a decision being made in "early 2013."

Once the Tribe receives a favorable *Carcieri* decision, the two obstacles repeatedly cited by the Tribe's opponents will have been resolved. This will leave only the environmental review portion of the trust application process. At the hearing last week, the opponents of the Tribe incorrectly informed the Commission that it could take six years for Interior to complete its environmental review and for challenges to that review to be resolved. This too is incorrect.

As you know, the Bureau of Indian Affairs ("BIA") must comply with NEPA before the Secretary may acquire land into trust under the IRA. The Department processes fee-to-trust and NEPA concurrently. Significant progress has been made in the NEPA process and the Tribe anticipates it will be completed within the next year.

The NEPA process commenced on May 31, 2012, when the BIA published a Notice of Intent ("NOI") in the Federal Register announcing the proposed Federal action—to acquire certain lands in Taunton and Mashpee into trust for the benefit of the Tribe. The BIA then completed the NEPA scoping process (i.e., determining the scope of the environmental review to be completed)—the next NEPA milestone. Scoping for this proposed action comprised a public comment period (which ended July 2, 2012) and two public hearings, one conducted in Taunton on June 20, 2012, and the second in Mashpee on June 21, 2012. The Department issued a final Scoping Report on November 1, 2012, completing the required scoping under NEPA.

The next major milestone in the NEPA process—preparing the draft Environmental Impact Statement ("DEIS")—is nearly complete. All underlying technical studies (air, water,

traffic, socio-economic, etc.) have been completed and the BIA has prepared the DEIS and incorporated the defined scope, framework and depth of analyses identified during the scoping process. On February 8, 2013, the BIA, Regional Office (located in Nashville, TN and directly responsible for processing the Tribe's application) circulated the DEIS to internal Departmental offices for review and comment. Once internal review is complete, EPA will publish a Notice of Availability and the BIA will conduct a final public hearing to take final public comments on the DEIS. Once that period has ended, the BIA will use the DEIS to prepare the final Environmental Impact Statement ("FEIS").

Once complete, the EPA will publish a Notice of Availability of the FEIS in the Federal Register, which triggers a 30-day comment period. When the comment period expires, the BIA will issue a Record of Decision ("ROD") wherein the Assistant Secretary-Indian Affairs addresses any final comments and renders a decision as to the proposed action. The ROD will incorporate the BIA's final decision as to both NEPA and the Tribe's trust application.

As further illustrated below, the NEPA process is well underway and DEIS publication is anticipated to occur in spring 2013. Based on the progress to date and the anticipated timeline, we believe the NEPA process will be completed in less than one year from this date and will run concurrently with the Tribe's fee-to-trust application.

ANTICIPATED NEPA SCHEDULE

ACTION	**STATUS**
BIA prepares NOI	COMPLETED
NOI published in Federal Register with Notice of Scoping Meetings	COMPLETED
Scoping Meetings in Taunton and Mashpee	COMPLETED
Scoping Comment Period ends (30-days)	COMPLETED
Scoping Report submitted to BIA by environmental consultant	COMPLETED
BIA reviews and finalizes Scoping Report, Scoping Completed	COMPLETED
Perform and Complete all underlying Technical Studies	COMPLETED
Complete first draft of DEIS	COMPLETED
BIA reviews and circulates DEIS to Central BIA office	COMPLETED
EPA Publishes DEIS Notice of Availability in Federal Register	Spring 2013
DEIS Review and Comment Period (45-days); Public Hearing	Late Spring 2013
DEIS Comments Addressed; FEIS preparation commences	Summer 2013
FEIS review and circulates FEIS to Central BIA	Late Summer 2013
EPA Publishes FEIS Notice of Availability	Fall 2013

in Federal Register	
FEIS Waiting Period (30-days)	Winter 2013
NEPA Completed; AS-IA issues Record of Decision or ROD (approving federal action to acquire land into trust)	Early 2014

Finally, opponents of the Tribe incorrectly informed the Commission more generally that a challenge to any Interior decision taking land into trust for the Tribe will also take six years to resolve. Again, this is untrue, and essentially uses prior cases to obscure recent practice. As previously stated, the Tribe will move forward with its project as soon as the land is placed into trust by Interior. That decision includes the Department's satisfactory conclusion of the Environmental process. Thereafter, and in the recent Departmental practice, if any opponent of the Tribe with actual standing to sue decides to pursue litigation against Interior, the plaintiff will be obliged to seek and obtain a preliminary injunction very quickly. We have given you a number of court decisions that show how this has played out in actual practice. As in those cases, the soundness of the trust acquisition for Mashpee will overcome any request for a preliminary injunction and the Tribe will be allowed to proceed with its project notwithstanding litigation. Before the Supreme Court's Opinion in *Patchak*, the Department was concerned that any action before all challenges were exhausted could deny due process to those seeking review. Now that the Supreme Court has removed that concern, the Department is no longer compelled to "self-stay" all acquisitions, confident that the courts can sort out the need, if any, to enjoin acquisitions. Indeed, as we have also previously explained, any legal challenge will be brought if at all under the Administrative Procedures Act and the challenge will be an uphill battle based upon applicable standards of APA review.

I would be glad to speak with you further if you think it would be of assistance to the Commission.

Very truly yours,

Howard M. Cooper

HMC:ma

cc: James F. McHugh, Commissioner (by hand)
Chairman Cedric Cromwell