SJC-13196

FBT EVERETT REALTY, LLC vs. MASSACHUSETTS GAMING COMMISSION.

Middlesex. February 4, 2022. - May 23, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, & Wendlandt, JJ.

Gaming. Constitutional Law, Taking of property. Due Process of Law, Taking of property. Unlawful Interference. Contract, Interference with contractual relations. Governmental Immunity. Massachusetts Tort Claims Act.

Civil action commenced in the Superior Court Department on November 15, 2016.

A motion to dismiss was heard by Mitchell H. Kaplan, J., and, after transfer and special assignment, the case was heard by Kenneth W. Salinger, J., on a motion for summary judgment.

The Supreme Judicial Court granted an application for direct appellate review.

Christopher Weld, Jr., for the plaintiff.
Melissa C. Allison, Special Assistant Attorney General, for the defendant.

KAFKER, J. The plaintiff, FBT Everett Realty, LLC (FBT), bought land in Everett (Everett parcel) before the legalization

of casino gaming in Massachusetts. After legalization, FBT contracted to sell Wynn MA, LLC (Wynn), the property for $75 million if Wynn could secure a license to develop and operate a casino on the Everett parcel. During the license application process, the defendant Massachusetts Gaming Commission (commission) became concerned about, and investigated whether, there were hidden criminal ownership interests in FBT. Without resolving the criminal ownership issue, the commission determined that FBT should not be allowed to receive a "casino-use premium" on the sale of the Everett parcel. The commission communicated this concern to Wynn, warning that its casino license application might be jeopardized if this issue was not addressed. In response, Wynn reappraised the Everett parcel for its best non-casino use and pressured FBT to agree to lower the parcel's price to the newly appraised value of $35 million. The result of the commission's refusal to allow FBT to receive a casino-use premium was to transfer the value of that premium to Wynn. FBT later sued the commission to recover the lost $40 million premium, alleging various claims, including tortious interference with contract and a regulatory taking.

We conclude that FBT's tortious inference claim was properly dismissed because the commission is a public employer immune from suit for intentional torts under the Massachusetts Tort Claims Act (MTCA), G. L. c. 258. We reverse, however, the

motion judge's decision to grant summary judgment on the regulatory takings claim. The regulatory takings inquiry is a fact-intensive evaluation that should consider multiple factors, including not only reasonable investment-backed expectations but also the economic impact and character of the challenged regulatory action. The motion judge here limited his analysis to the investment-backed expectations factor. This was error, as he also should have considered the significant $40 million economic impact and the highly unusual character of the government action here -- conditioning the award of a casino license to Wynn on FBT not receiving a casino-use premium on the sale of the Everett parcel, thus effectively compelling the transfer of this economic benefit to Wynn. As there are material disputed facts on exactly what the commission expected or required Wynn to do, and what Wynn did on its own initiative, summary judgment cannot be granted on this record.

Background. 1. Facts. As appropriate in reviewing a grant of summary judgment, we "recite the material facts in the light most favorable to . . . the party who opposed the motion for summary judgment," here FBT. Sarkisian v. Concept Restaurants, Inc., 471 Mass. 679, 680 (2015), citing Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120 (1991). We summarize the facts based on the parties' agreed statement of facts and the documents in the summary judgment record. Ajemian

v. Yahoo!, Inc., 478 Mass. 169, 171 (2017). See Mass. R. Civ. P. 56 (c), as amended, 436 Mass. 1404 (2002).

In 2009, FBT bought the Everett parcel for approximately $8 million. Because the site was heavily contaminated, it required extensive environmental cleanup. At the time of FBT's purchase, casino gambling was illegal in Massachusetts. See Abdow v. Attorney Gen., 468 Mass. 478, 483 (2014). FBT explored different potential uses for the site, including developing the property as a "big box" retail store or storage facility.

Two years after FBT purchased the Everett parcel, the Expanded Gaming Act (gaming act), St. 2011, c. 194, was enacted, which created the commission, G. L. c. 23K, § 3, and legalized casino gambling at establishments operated by entities holding a category 1 license issued by the commission, G. L. c. 23K, §§ 2, 19. This legislation authorized the commission to issue a single category 1 license for each of three regions of the Commonwealth. G. L. c. 23K, § 19 (a). To operate a casino in Everett, a licensee would need to hold the category 1 license for "region A," the region encompassing the counties of Suffolk, Middlesex, Essex, Norfolk, and Worcester. Id.

After the gaming act passed, Wynn became interested in developing and operating a casino on the Everett parcel. In late 2012, it accordingly entered into an option agreement with FBT, which provided that Wynn would pay FBT $100,000 per month

for the right to buy the parcel for $75 million if it were to be awarded the category 1 license for region A. FBT also agreed to spend up to $2.5 million to obtain an easement to improve vehicular access to the property and to perform baseline environmental remediation on the site to bring it into compliance with applicable environmental laws.

In January 2013, Wynn filed an application for a category 1 license for region A. When the commission receives an application for a gaming license, the commission's enforcement agency, the Investigations and Enforcement Bureau (IEB), is to investigate the "suitability" of the applicant and its affiliates to hold a gaming license. G. L. c. 23K, § 12 (a). 205 Code Mass. Regs. § 115.01 (2018). In the course of this suitability investigation, IEB officers uncovered evidence leading them to suspect that Charles Lightbody, a convicted felon with apparent connections to organized crime, had a hidden ownership interest in FBT. This evidence included recorded telephone calls between Lightbody and an inmate in Massachusetts State prison, as well as discrepancies in FBT's financial documents.[1]

[1] In the recorded call between Lightbody and the prison inmate, Lightbody is heard saying it is a "good thing . . . nobody knows who's involved," to which the inmate responds: "[Y]ou need to double blind it. You need to triple blind it actually." Lightbody then replies: "Well, that's what we're doing."

When FBT's principals, Dustin DeNunzio, Anthony Gattineri, and Paul Lohnes, were questioned by the IEB about Lightbody's connection with the company, they explained that while Lightbody once had an ownership interest, this interest had been transferred to Gattineri before the option agreement with Wynn was signed. The IEB continued to suspect, however, that Lightbody retained an ownership interest, and that FBT's principals were concealing his continuing interest in FBT and hence in the transaction with Wynn.

The commission was troubled by what it believed to be a lack of candor by FBT's principals and their failure to fully cooperate with the IEB's investigation. It was also anxious that individuals with a criminal background and associations with organized crime should not profit from the award of a casino license to Wynn for the Everett parcel.

FBT alleges -- and the commission denies -- that the commissioners were angered by what they perceived as the FBT principals' lack of candor and obstructiveness, and sought to punish them by exacting a financial penalty on FBT. The record, which is based on the limited discovery that has occurred so far, reveals some evidence supporting FBT's allegation. At the commission's public meeting on Wynn's application and the FBT ownership issue, Commissioner James McHugh declared it "intolerable" for "people to tell [the commission] things that

aren't true" or to "hide things" from IEB investigators. McHugh insisted on the importance of sending a message that dishonesty or lack of cooperation with the IEB's work would not be tolerated, remarking: "[W]e've got to demonstrate that point early, and we've got to demonstrate that point often." He also voiced his concern that "none of the appreciation of [the Everett parcel] that came from the sale" should "go[] to somebody who's been dishonest." The IEB's director, Karen Wells, also testified during a related Federal criminal proceeding against Lightbody, DeNunzio, and Gattineri that the commission was concerned that if organized crime figures reaped a windfall from selling the Everett parcel to be developed into a casino facility, it would undermine public confidence in the casino licensing process.[2]

Wells communicated the commission's concerns directly to Wynn's executives. Indeed, as Wells subsequently stated at the commission's meeting on the FBT ownership issue, she informed Wynn that "their position regarding [FBT] receiving a financial windfall as a result of the gaming facility was something the IEB would report on regarding [Wynn's] suitability." Upon being advised by Wells of the commission's concerns, and of the risk

[2] In October 2014, Lightbody, DeNunzio, and Gattineri were indicted on Federal charges for their alleged efforts to hide Lightbody's financial interest in the Everett parcel. After a jury trial, all three were acquitted.

that the IEB would find it unsuitable for a license unless it took action responsive to these concerns, Wynn acted quickly to preserve its chances of receiving a gaming license, commissioning an appraisal of the Everett parcel based on its highest and best non-casino use. The appraiser valued the parcel at $35 million, based on the determination that the most valuable non-casino use was likely as "large box retail." Wynn then entered into negotiations with FBT regarding the purchase price. Fearing that the commission would otherwise find Wynn unsuitable, dooming Wynn's license application and FBT's sale of the Everett parcel to Wynn, FBT agreed in November 2013 to amend the option agreement to reduce the price from $75 million to $35 million, thus eliminating FBT's casino-use premium, while also capping FBT's obligations for environmental remediation at $10 million.

While it is disputed to what extent the commission was involved in directing or otherwise influencing the actions Wynn took to address the commission's concerns,[3] the record discloses evidence that the commission's staff worked with Wynn in shaping its response. In particular, Wynn's general counsel testified at the commission's meeting on the FBT ownership issue that the

[3] The commission denies in its brief that it "informed Wynn that it could address the commission's concerns by removing the 'casino premium' from the purchase price" of the Everett parcel.

commission had "help[ed] . . . to craft a proposed curative action" that would allow Wynn's application to move forward.

The commission accepted the removal of the casino-use premium as an adequate cure for its concerns, and in September 2014, the commission approved Wynn's application for the region A category 1 license. Three months later, Wynn purchased the Everett parcel from FBT for $35 million.

2. Procedural history. In November 2016, FBT sued the commission in the Superior Court for intentional interference with contract, alleging that the commission tortiously interfered with FBT's option agreement with Wynn. The commission moved to dismiss, contending that as a "public employer" under the MTCA, it was immune from suit for intentional torts such as intentional interference with contract. Agreeing with the commission's argument, the motion judge dismissed FBT's tortious interference claim.

While the commission's motion to dismiss the tortious interference claim was pending, FBT amended its complaint to add constitutional claims alleging a per se taking, a regulatory taking, and a violation of the contracts clause of art. I, § 10, of the United States Constitution. The commission moved to dismiss these new claims. Although the motion judge dismissed the per se taking claim and the contract clause claim, he allowed the regulatory taking claim to go forward, concluding

that FBT had alleged facts sufficient to plausibly suggest that the commission had coerced Wynn to negotiate a reduction in the purchase price that would eliminate the casino-use premium, and that this amounted to a regulatory taking. To reach this conclusion, the motion judge considered in particular the economic impact of the commission's actions, FBT's reasonable investment-backed expectations, and the character of the commission's actions. The judge understood the regulatory takings inquiry to be "fact sensitive," requiring the application of "several interrelated and well-established factors" recognized by the United States Supreme Court in Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123-128 (1978) (Penn Central).

While discovery was ongoing, and before any depositions had been taken, the commission moved for summary judgment on the remaining regulatory taking claim. A different judge of the Superior Court reviewed the commission's summary judgment motion from the one who had reviewed its prior motions to dismiss. This judge granted summary judgment, observing that because FBT bought the Everett parcel before the passage of the gaming act, it could not reasonably have expected to later sell the property for purposes of casino development. Because FBT could not establish that the commission had interfered with its reasonable investment-backed expectations, which the judge characterized as

an "[e]ssential [e]lement" of a regulatory taking claim, he concluded that the commission was entitled to summary judgment.

FBT now appeals from the grant of summary judgment on its regulatory taking claim, as well as from the earlier dismissal of its tortious interference with contract claim.

Discussion. 1. Regulatory taking claim. a. Standard of review. "We review an order granting or denying summary judgment de novo because the record before us is the same as the record before the motion judge, and the decision is a matter of law rather than of discretionary judgment." Lynch v. Crawford, 483 Mass. 631, 641 (2019). Summary judgment is proper when the evidence, viewed in the light most favorable to the nonmoving party, shows that "there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law" (citation omitted). Green Mountain Ins. Co. v. Wakelin, 484 Mass. 222, 226 (2020). See Mass. R. Civ. P. 56 (c).

b. Regulatory taking inquiry. To determine whether a government restriction on an owner's use of property has effected a compensable taking, where the restriction involves neither a physical invasion nor a complete deprivation of economically viable use, the Supreme Court has required a fact-intensive inquiry "designed to allow 'careful examination and weighing of all the relevant circumstances.'" Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,

535 U.S. 302, 321 (2002), quoting Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring). See Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 224 (1986); Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979). The Court has identified three factors, originally articulated in Penn Central, 438 U.S. at 123-128, as being of "particular significance" in this fact-dependent regulatory takings inquiry. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538-539 (2005); Connolly, supra at 224-225.

Specifically, to determine whether a restriction on property rights amounts to a taking, courts are to "balanc[e] . . . the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action." Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2072 (2021). Accord Fitchburg Gas & Elec. Light Co. v. Department of Pub. Utils., 467 Mass. 768, 783-784 (2014), quoting Daddario v. Cape Cod Comm'n, 425 Mass. 411, 416 (1997).[4]

[4] Both the takings clause of the Fifth Amendment to the United States Constitution and art. 10 of the Massachusetts Declaration of Rights "prohibit the taking of private property for public use without just or reasonable compensation." Fitchburg Gas & Elec. Light Co., 467 Mass. at 775. "To date, we have interpreted art. 10 consistently to provide property owners the same protection afforded under the just compensation clause of the Fifth Amendment." Blair v. Department of Conservation & Recreation, 457 Mass. 634, 642 (2010). There is no argument by

All three factors in the multifactor Penn Central test "should be taken into account" when determining whether a challenged regulation amounts to a taking. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984) (Monsanto). See Murr v. Wisconsin, 137 S. Ct. 1933, 1943 (2017), quoting Palazzolo, 533 U.S. at 617 (explaining that regulatory takings are to be evaluated based on "complex of factors" identified in Penn Central). Accord Blair v. Department of Conservation & Recreation, 457 Mass. 634, 644 (2010) (characterizing regulatory takings standard as "[t]he multifactor Penn Central balancing test"); Leonard v. Brimfield, 423 Mass. 152, 154 (1996) (Penn Central's "several interrelated factors . . . are to be considered in determining whether a compensable taking has occurred").

Rather than considering all three factors in the multifactor Penn Central test, however, the motion judge relied on just a single factor. The judge reasoned that because FBT could not demonstrate that the commission had interfered with FBT's reasonable investment-backed expectations, FBT had "no reasonable expectation of proving an essential element" of its regulatory takings claim, Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991), and summary judgment was proper. He

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FBT here that the State Constitution provides greater protection than the Federal Constitution.

thus granted summary judgment for the commission without considering the other two factors identified in Penn Central, namely the economic impact and the character of the government action. This was error, particularly given the significant diminution in value here -- lowering the amount paid from $75 million to $35 million -- and the unusual and disputed character of the government action, which we discuss in more detail infra.

In concluding that government interference with reasonable investment-backed expectations is essential to prove a regulatory taking, the motion judge relied heavily on Monsanto, 467 U.S. 986. There, the United States Supreme Court addressed whether the Environmental Protection Agency's use and disclosure of data that the plaintiff chemicals company had submitted in applying to register a pesticide amounted to a taking of the plaintiff's intellectual property. Id. at 997-998. After explaining that the evaluation of a regulatory takings claim is a fact-intensive inquiry that should take into account the three factors identified in Penn Central, the Court concluded that, with respect to certain of the data submitted, the absence of reasonable investment-backed expectations had a "force . . . so overwhelming" that it "dispose[d] of the taking question." Id. at 1005. Although focused on this factor, the Monsanto court also considered at least in passing the character of the regulation, stating that "pesticide sale and use . . . has long

been the source of public concern and the subject of government regulation." Id. at 1007. It also recognized the economic effects of the regulation, albeit without expressly balancing this factor in its analysis. Id. at 998.

The motion judge interpreted Monsanto to stand for the proposition that a regulatory taking claim must fail if the owner cannot prove interference with his or her reasonable investment-backed expectations.[5] We believe this reads too much

[5] This interpretation has found limited support at the United States Court of Appeals level, particularly in the Federal Circuit. See Love Terminal Partners, L.P. v. United States, 889 F.3d 1331, 1346 (Fed. Cir. 2018) ("The failure to establish reasonable, investment-backed expectations . . . defeats a regulatory takings claim as a matter of law" [alteration, quotation, and citation omitted]); Good v. United States, 189 F.3d 1355, 1363 (Fed. Cir. 1999) ("the government is entitled to summary judgment on a regulatory takings claim where the plaintiffs lacked reasonable, investment-backed expectations"). The broad sweep of Federal courts of appeals, when faced with a regulatory taking claim, have, however, engaged in a fact-intensive inquiry applying the multifactor Penn Central balancing test. See, e.g., Clayland Farm Enters., LLC v. Talbot County, Md., 987 F.3d 346, 353 (4th Cir. 2021), quoting Murr, 137 S. Ct. at 1943 (explaining that Penn Central "requires" courts considering regulatory takings claims "to balance 'a complex of factors'"); Bridge Aina Le'a, LLC v. Land Use Comm'n, 950 F.3d 610, 625 (9th Cir. 2020), cert. denied, 141 S. Ct. 731 (2021), quoting Tahoe-Sierra Preservation Council, Inc., 535 U.S. at 322 ("courts determine whether a regulatory action is functionally equivalent to the classic taking using 'essentially ad hoc, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances,' . . . set forth in the three Penn Central factors"); District Intown Props. Ltd. Partnership v. District of Columbia, 198 F.3d 874, 878-879 (D.C. Cir. 1999), cert. denied, 531 U.S. 812 (2000) ("regulatory takings cases should be considered on an ad hoc basis, with three primary factors [from Penn Central] weighing in the balance").

into Monsanto. We note that the Court has expressly cautioned that interference with investment-backed expectations is only "one of a number of factors that a court must examine" (quotation omitted). Tahoe-Sierra Preservation Council, Inc., 535 U.S. at 326 n.23. See Lingle, 544 U.S. at 540 (Penn Central inquiry does not turn "exclusively" on regulation's economic impact and degree of interference with legitimate property interests); Palazzolo, 533 U.S. at 634 (O'Connor, J., concurring) ("Investment-backed expectations . . . are not talismanic under Penn Central"). Moreover, as the Monsanto Court took care to observe, all three Penn Central factors are important, or at least may be important in determining whether a regulatory taking occurred, and should be considered in the regulatory takings inquiry. This is particularly true, as in the instant case, where the economic impact is significant and the challenged government action is not, as it was in Monsanto, a standard regulatory practice.

On this point, the Court's regulatory takings analysis in Hodel v. Irving, 481 U.S. 704 (1987), is instructive. The Court held that a statutory provision that abolished the descent and devise of certain undivided fractional interests in allotted Native American lands took the property of the owners of those interests without compensation, id. at 718, despite finding it "dubious" whether the owners had any investment-backed

expectations in passing on their interests, id. at 715. The near absence of any specific investment-backed expectations did not preclude the conclusion that there was a taking, because "the character of the Government regulation" at issue was "extraordinary," involving the virtual abrogation of the right to pass on a certain type of property to the owners' heirs. Id. at 716.

In sum, the motion judge erred in allowing summary judgment without considering the Penn Central factors other than reasonable investment-backed expectations. Although this error does not in itself compel us to deny the commission summary judgment, reviewing the summary judgment record de novo, and applying all three Penn Central factors, we conclude that there are material disputed facts precluding summary judgment on the limited existing record, particularly in regard to the nature of the commission's actions.

c. Reasonable investment-backed expectations. We begin by considering the extent of the commission's interference with FBT's reasonable investment-backed expectations. We have recognized that an important determinant of the reasonableness of an owner's investment-backed expectations is the regulatory environment at the time that the owner purchased or otherwise took title to the property at issue. See Leonard, 423 Mass. at 155, citing Monsanto, 467 U.S. at 1005 ("A property owner's

investment-backed expectations must be reasonable and predicated on existing conditions").

Here, FBT bought the Everett parcel two years before casino gaming was legalized in Massachusetts. At the time it purchased the property, therefore, it could not reasonably have expected to sell the property as a site for the development of a casino. This would have been the case even if FBT had a subjective expectation that casino gambling would be liberalized, because a reasonable expectation must be "more than a unilateral expectation" (quotation and citation omitted). Monsanto, 467 U.S. at 1005. See Bridge Aina Le'a, LLC v. Land Use Comm'n, 950 F.3d 610, 633 (9th Cir. 2020), cert. denied, 141 S. Ct. 731 (2021) ("starry eyed hope of winning the jackpot if the law changes" does not give rise to reasonable investment-backed expectations [citation omitted]). Given the primacy of the regulatory environment at the time of purchase in evaluating an owner's reasonable investment-backed expectations, the fact that casino gambling was illegal when the Everett parcel was purchased weighs heavily against a finding that FBT had substantial investment-backed expectations in reaping a casino-use premium on the sale of the property that were interfered with by the commission.

Nevertheless, while the regulatory environment at the time of acquisition is a critical consideration, that does not mean

that investment-backed expectations developed after the point of purchase should not be considered in the assessment of a property owner's reasonable expectations. Here, following the legalization of casino gambling in 2011, FBT became interested in selling the Everett parcel for a casino use in the summer of 2012, and entered into the option agreement with Wynn in December of that year. From 2012 onwards, FBT made net investments of about $900,000 in the property; these investments would have included the costs of purchasing an easement, undertaking environmental remediation, and preparing and marketing the parcel for sale to potential casino developers. FBT's investments in the Everett parcel from 2012 onward were reasonable to the extent that they were made partly in reliance on the set of "existing [regulatory] conditions," Leonard, 423 Mass. at 155, that prevailed after the gaming act was enacted.

Regardless, even these additional post-gaming act investments do not give rise to reasonable investment-backed expectations because they remained subject to the long-shot gamble that a gaming license would be awarded to develop a casino on the Everett parcel. "Speculative possibilities of windfalls do not amount to 'distinct investment-backed expectations.'" Guggenheim v. Goleta, 638 F.3d 1111, 1120-1121 (9th Cir. 2010), cert. denied, 563 U.S. 988 (2011). Here, the gaming act expressly provides that the commission "shall have

full discretion as to whether to issue a license," and accordingly, applicants "shall have no legal right or privilege to a gaming license." G. L. c. 23K, § 17 (g). Given the commission's very broad discretion, FBT could not have reasonably expected that Wynn would be awarded a region A casino gaming license.

Thus, we agree with the motion judge that the reasonable investment-backed expectations factor weighs heavily against the finding of a regulatory taking. At the time of purchase, gambling was not legal, and thus FBT could not then have had a reasonable expectation of selling its property for a casino use. Even allowing that postacquisition investments can sometimes give rise to reasonable investment-backed expectations, the prospect that Wynn would secure a casino gaming license was too speculative to ground reasonable investment-backed expectations in selling the Everett parcel with a casino-use premium.

This does not, however, end our analysis. The other two factors set out in Penn Central must be considered, and we do so here, before we can decide whether summary judgment is proper on the present limited record.

d. Economic impact. While "diminution in property value, standing alone," does not establish a taking, the extent of the diminution in value caused by a challenged regulation -- the "economic impact" of the regulation -- is a relevant factor in

the regulatory takings analysis. Penn Central, 438 U.S. at 124, 131. To measure economic impact, we "compare the value that has been taken from the property with the value that remains in the property." Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987) (Keystone).

In the instant case, there is the additional complication of whether it was the action of the commission, rather than Wynn, that caused economic loss to FBT. In general, where the government pressures a third party to take action that diminishes the value of the plaintiff's property, the government is responsible, for regulatory takings purposes, for the economic impact of the third party's action if the economic harm to the plaintiff was "direct and intended" and "the government's influence over the third party was coercive rather than merely persuasive." See A & D Auto Sales, Inc. v. United States, 748 F.3d 1142, 1154 (Fed. Cir. 2014).

Here, before the challenged actions by the commission took place, FBT had negotiated an agreement that Wynn would pay it $100,000 per month for the right to buy the Everett parcel for $75 million if Wynn were to be awarded a casino gaming license. Although the relevant facts are disputed, the record -- when viewed in the light most favorable to FBT -- indicates that the commission intended to deprive FBT of any casino-use premium on the sale of the Everett parcel and that it coerced Wynn into

renegotiating the price for the parcel, reducing it from $75 million to $35 million, by threatening to find Wynn unsuitable for a license.

Viewing the evidence in the light most favorable to FBT, the commission caused a $40 million reduction in the value of FBT's property by coercing action on the part of a third party, Wynn. Given that this represents a more than fifty percent diminution in value, the economic impact of the commission's actions here was substantial.

e. Character of the government action. Within the Penn Central inquiry, the "nature of the State's action" is a "critical factor in determining whether a taking has occurred." Keystone, 480 U.S. at 488. The character of the government action is an important factor because the guiding aim of the regulatory taking inquiry is to "identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property," Lingle, 544 U.S. at 539, for which compensation is required, and to distinguish such actions from exercises of the police power aimed at protecting "public health, public safety, and public morals," Abdow, 468 Mass. at 489, where compensation is not due. The considerations that courts have subsumed under the character of the government action factor -- such as whether the action is harm-preventing or nuisance-abating and whether the action

burdens some owners disproportionately -- are probative in distinguishing between regulations of property that are closer to exercises of the police power and those that are closer to exercises of eminent domain. See Merrill, The Character of the Governmental Action, 36 Vt. L. Rev. 649, 649, 672-673 (2012).

The character of the regulatory action here is highly unusual. When confronted with the possibility that someone with a criminal background had an undisclosed ownership interest in the parcel of land that a gaming license applicant intended to purchase to develop a casino, the commission did not continue to investigate until it could confidently determine whether there was in fact some undisclosed criminal ownership. Whether it concluded that it did not have the time, means, or need to complete its investigation is not clear from this record. Regardless, instead of completing or concluding its investigation of the ownership interests in FBT, the commission made favorable consideration of the application subject to lowering the amount of money the owners of FBT would receive for the property, thereby giving one private party, Wynn, a multimillion-dollar windfall at the expense of another private party, FBT. Whether the commission directed such a compelled transfer of property, or merely accepted it as a cure to its concerns about undisclosed criminal ownership interests at FBT, cannot be decided without further discovery.

In evaluating the character of the commission's actions here, we are conscious that the commission -- or, more specifically, the IEB -- is authorized by G. L. c. 23K, § 6 (b), to function as a "law enforcement agency" endowed with "such law enforcement powers as necessary to effectuate the purposes" of the gaming act. To the extent that the commission acts to "prevent[] activities similar to public nuisances" or to "stop[] illegal activity," the restrictions it imposes in that capacity on the use of private property will be considered exercises of the police power that do not require compensation. Keystone, 480 U.S. at 492 & n.22. Accord Giovanella v. Conservation Comm'n of Ashland, 447 Mass. 720, 735 (2006), cert. denied, 549 U.S. 1280 (2007) (regulations "limited to mitigating harms or nuisances . . . typically do not require compensation"). Indeed, we have specifically recognized that the "regulation of gambling . . . falls squarely within the core police power." Abdow, 468 Mass. at 489.

The problem, however, is the character of the action taken. The commission had broad discretion in addressing its concerns about potential concealed, criminal ownership interests in FBT. For example, it could have refused to consider Wynn's bid altogether until the issue of the ownership interest was resolved. Likewise, it could have rejected Wynn's bid if it could not resolve the ownership issue to its satisfaction. In

the light most favorable to FBT, however, the commission essentially compelled the transfer of the FBT property from FBT to Wynn for $40 million less than the agreed upon price without in any way resolving the criminal ownership issues subject to the exercise of the commission's investigatory and law enforcement powers. Government-compelled transfers of economic benefits from one private party to another in this context raise significant regularly taking concerns. This is true even when done to punish one party for its lack of candor or to ensure such persons do not reap a financial windfall from the award of a gaming license or to address the public perception that this was even a possibility.

Conditioning the grant of a governmental license on the renegotiation of a transaction between private parties in this way, so as to effectively transfer $40 million dollars from one to another, is "extraordinary." Hodel, 481 U.S. at 716.[6] Of

[6] Although the governmental action is extraordinary here as well as in Hodel, we do not mean to suggest that they are extraordinary in the same way. In Hodel, 481 U.S. at 716, the government action that the Court found "extraordinary" was the "virtual[] . . . abrogation of the right [of Native Americans] to pass on a certain type of property . . . to one's heirs." Moreover, the particular property right that was abrogated was one of hallowed vintage, having "been part of the Anglo-American legal system since feudal times." Id. The nature of the government action here, involving in effect the compelled transfer of a substantial economic benefit from one private party to another as a condition of receiving a government license, is highly unusual and in that respect extraordinary,

particular concern is how the burden imposed on FBT to address the commission's legitimate concerns was transformed into a benefit for Wynn. This transformation occurred despite Wynn having included the Everett parcel, owned by FBT, in its proposal, thus assuming some responsibility to resolve the ownership issue. Regulatory takings are more likely to be found for regulatory actions that have a skewed distributional impact, imposing burdens exclusively on some owners while generating benefits for others.

As the Supreme Court has explained, where a regulation "secures an 'average reciprocity of advantage' to everyone concerned," Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1018 (1992), quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922), it is more likely to be an exercise of the police power that "simply 'adjust[s] the benefits and burdens of economic life.'" Lucas, supra at 1017, quoting Penn Central, 438 U.S. at 124.[7] But where, as here, the government action instead "singles out the owner," Giovanella, 447 Mass. at 735,

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but it does not raise the fundamental societal and property law issues that the challenged regulation did in Hodel.

[7] A regulation that restricts the use of property secures an "average reciprocity of advantage" when it is designed such that each owner is "burdened somewhat" by the restrictions that the regulation imposes on the use of their property, but each, "in turn, benefit[s] greatly from the restrictions that are placed on others." Keystone, 480 U.S. at 491.

it is more akin to an exercise of eminent domain that calls for compensation. See Nollan v. California Coastal Comm'n, 483 U.S. 825, 835 n.4 (1987) (regulatory taking likely where owners were "singled out to bear the burden" of regulation); Armstrong v. United States, 364 U.S. 40, 49 (1960) (takings clause "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole").

Based on the limited record before us, taking the evidence in the light most favorable to FBT, we thus conclude that the character of the government action factor weighs in favor of finding a regulatory taking here.

f. Outcome of the regulatory takings analysis. Viewing the evidence in the summary judgment record in the light most favorable to FBT, we conclude that while FBT did not have a reasonable investment-backed expectation in reaping a casino-use premium when selling the Everett parcel, the commission's actions had a substantial, $40 million economic impact on FBT. The highly unusual character of the commission's actions, effectively compelling the transfer of $40 million from one private party to another in order to secure a government license, weighs in favor of finding a taking. When all three Penn Central factors are considered and balanced, therefore, we cannot say that the commission is entitled to judgment as a

matter of law on the available record. The entry of summary judgment for the commission on FBT's regulatory taking claim was therefore error. Accordingly, we reverse the motion judge's summary judgment order and remand FBT's regulatory taking claim to the Superior Court to allow the completion of discovery and further proceedings consistent with this opinion. Only when the disputed facts surrounding the commission's actions are fully developed and resolved will it be possible to properly decide FBT's regulatory taking claim.

2. Intentional interference with contract claim.

a. Standard of review. FBT appeals from the motion judge's dismissal of its tortious interference claim, arguing that the judge erred in determining that the commission is immune from suit for intentional torts, including intentional interference with contract, as a "public employer" under the MTCA.

"We review the allowance of a motion to dismiss de novo." Meehan v. Medical Info. Tech., Inc., 488 Mass. 730, 732 (2021), quoting Magliacane v. Gardner, 483 Mass. 842, 848 (2020). Accepting the facts alleged in the complaint as true, we inquire whether the factual allegations are "sufficient, as a matter of law, to . . . plausibly suggest an entitlement to relief." Dunn v. Genzyme Corp., 486 Mass. 713, 717 (2021), quoting Dartmouth v. Greater New Bedford Regional Vocational Tech. High Sch. Dist., 461 Mass. 366, 374 (2012).

b. Immunity of "public employers" from liability for intentional torts. The MTCA waives the governmental immunity that "public employers" have against tort liability for the "negligent or wrongful" conduct of their employees done "while acting within the scope of [their] office or employment." G. L. c. 258, § 2. But while public employers "shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances" for the negligence of their employees acting within the scope of their office or employment, id., the MTCA's immunity waiver does not extend to claims for intentional torts, including claims for "interference with contractual relations." G. L. c. 258, § 10 (c). With respect to intentional tort claims, the preexisting common-law doctrine of governmental immunity, under which "public employers were generally not liable for the torts of their employees," still applies. Spring v. Geriatric Auth. of Holyoke, 394 Mass. 274, 285 (1985). Consequently, even after the passage of the MTCA, "public employers remain immune from intentional tort claims." Id.

The MTCA broadly defines "public employers" to include "the commonwealth . . . and any department, office, commission, committee, council, board, division, bureau, institution, agency or authority thereof"; however, "the Massachusetts Port Authority, or any other independent body politic and corporate"

are excluded. G. L. c. 258, § 1. Whether the commission may be sued for intentional interference with contract therefore depends on whether it is a public employer that is immune from suit for intentional torts or, instead, an independent body politic and corporate that "do[es] not enjoy immunity from intentional torts under § 10 (c)." Lafayette Place Assocs. v. Boston Redev. Auth., 427 Mass. 509, 529 (1998).

c. Statutory text and legislative history. "As with all matters of statutory interpretation, we look first to the plain meaning of the statutory language." Commonwealth v. Mogelinski, 466 Mass. 627, 633 (2013), citing International Fid. Ins. Co. v. Wilson, 387 Mass. 841, 853 (1983) ("the primary source of insight into the intent of the Legislature is the language of the statute"). The motion judge accordingly focused on the express provision in the MTCA that "any . . . commission" of the Commonwealth is a public employer, G. L. c. 258, § 1, coupled with the commission's specific designation as the "Massachusetts gaming commission" in the gaming act, G. L. c. 23K, § 3. The plain language of the relevant statutory texts therefore strongly supports classifying the commission as a public employer.

The motion judge also found the legislative history of the gaming act instructive. An earlier version of the statute included a provision that would have established a

"Massachusetts Gaming Control Authority" with the power to "sue and be sued" and that was to be "liable in tort in the same manner as a private person." 2011 Senate Doc. No. 168. This proposed language is entirely absent from the gaming act as enacted. The judge found this to be compelling support for the proposition that the Legislature intended to classify the commission as a public employer immune from liability for intentional torts. We agree that this legislative history is instructive. The Legislature's rejection of an express proposal to fully waive the gaming regulation and enforcement agency's tort immunity strongly suggests that the Legislature did not intend for the commission to be liable for the intentional torts of its employees. See Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 442-443 (1987) ("Few principles of statutory construction are more compelling than the proposition that [the legislature] does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language" [quotation omitted]).

d. Case law interpreting G. L. c. 258, § 1. The case law interpreting the statutory definition of public employers lends further support to the conclusion that the commission is a public employer. Under G. L. c. 258, § 1, the Massachusetts Port Authority and "any other independent body politic and corporate" are excluded from the category of public employers.

To determine whether an entity qualifies as an independent body politic and corporate, the leading cases have examined the "financial and political independence" of the entity at issue. Commesso v. Hingham Hous. Auth., 399 Mass. 805, 808 (1987), citing Kargman v. Boston Water & Sewer Comm'n, 18 Mass. App. Ct. 51, 56–57 (1984). In testing the commission's financial and political independence, we apply two guidelines to channel our inquiry.

First, we find it significant that after repeated amendments to the MTCA that have progressively whittled down the list of entities excluded from the definition of public employers,[8] the Massachusetts Port Authority (Massport) is the sole entity that is expressly excluded from public employer status. Accordingly, unless an entity enjoys a similar level of financial and political independence as Massport, we decline to classify it as an independent body politic and corporate. Moreover, because of the "desirability of making the c. 258 regime as comprehensive as possible, thus avoiding reintroducing the 'crazy quilt' of immunities, . . . which the [MTCA] was

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[8] See, e.g., St. 1992, c. 343, § 5 (including any "local water and sewer commission" as public employer); St. 1993, c. 110, § 227 (including any "municipal gas or electric plant, department, board and commission" as public employer); St. 2009, c. 25, §§ 123-124 (removing Massachusetts Bay Transportation Authority from list of excluded entities); St. 2009, c. 120, § 40 (removing Massachusetts Turnpike Authority from list of excluded entities).

meant to replace," we resolve any doubts against designating an entity an independent body politic and corporate. Lafayette Place Assocs., 427 Mass. at 532, quoting Rogers v. Metropolitan Dist. Comm'n, 18 Mass. App. Ct. 337, 338-339 (1984).

We observe to begin with that the commission enjoys substantially less political independence than Massport, which we have described as "not merely a board or commission of the State government." Opinion of the Justices, 334 Mass. 721, 734 (1956). While Massport is "placed" in what is now the department of transportation, St. 1956, c. 465, § 2,[9] it is "only nominally" within the department, as it is "not to be subject to supervision or regulation in the ordinary sense of that or of any other department." Opinion of the Justices, supra at 733. In contrast, the commission is far more closely supervised, being required to report monthly to the Governor, the Attorney General, and various committees of the Legislature on "total gaming revenues, prize disbursements and other expenses for the preceding month." G. L. c. 23K, § 69. The commission is further required to "report immediately" to the same recipients "any matter which requires immediate changes in the laws in

[9] The "department of public works" referenced in St. 1956, c. 465, § 2, was renamed the Massachusetts Highway Department, St. 1991, c. 552, and later merged into the Department of Transportation, St. 2009, c. 25. See N-Tek Constr. Servs., Inc. v. Hartford Fire Ins. Co., 89 Mass. App. Ct. 186, 187 n.3 (2016).

order to prevent abuses or evasions of the laws, rules or regulations related to gaming or to rectify undesirable conditions in connection with the administration or operation of gaming in the commonwealth." Id.

The commission's relative lack of political independence can perhaps best be illustrated by comparing the litigation independence that Massport enjoys with the control that the Commonwealth exercises over the litigation activity of the commission. Massport is authorized "[t]o sue and be sued in its own name." St. 1956, c. 465, § 3 (d). In contrast, as the motion judge noted, the commission is designated by its enabling legislation as "a commission for the purposes of [G. L. c. 12, § 3]." G. L. c. 23K, § 3 (x). A commission covered by that statute is not generally empowered to direct its own litigation decisions. Instead, the Attorney General "shall appear" for the commission "in all suits and other civil proceedings . . . in which the official acts and doings of [the commission] are called in question." G. L. c. 12, § 3. Where a commission must be represented by the Attorney General in litigation under G. L. c. 12, § 3, we have recognized that "something other than that traditional attorney-client relationship exists," because it is not the commission that directs key decisions; rather, "the Attorney General . . . has control over the conduct of

litigation." Secretary of Admin. & Fin. v. Attorney Gen., 367 Mass. 154, 159 (1975).[10]

The commission is also far less financially independent than Massport. On the one hand, Massport is empowered to issue revenue bonds, St. 1956, c. 465, § 8, and to do so "without obtaining the consent of any department, division, commission, board, bureau or agency of the [C]ommonwealth," St. 1956, c. 465, § 10. In addition, Massport is authorized to collect "tolls, rates, fees, rentals and other charges," and these charges it collects are "not . . . subject to supervision or regulation by any department, division, commission, board, bureau or agency of the [C]ommonwealth or any political subdivision thereof." St. 1956, c. 465, § 14. Massport is also empowered to "acquire property in its own name, the title to which is . . . in it and not in the Commonwealth." Opinion of the Justices, 334 Mass. at 734. See St. 1956, c. 465, § 3 (j)

[10] To be sure, the IEB, as the commission's enforcement agency, is authorized to bring actions in the Superior Court to "restrain, prevent or enjoin" violations of the gaming act or to "compel" compliance with orders issued by the IEB. G. L. c. 23K, § 35 (c). But this authorization to obtain court orders to back up its enforcement activities hardly undermines our conclusion that, because the commission is not generally empowered to make its own litigation decisions, it has been endowed with far less political independence than Massport. The latter's broad power to sue and be sued in its own name indicates a far greater degree of political independence than the narrow power to bring suit to enforce compliance with the gaming act.

(Massport authorized to "acquire, hold and dispose of real and personal property"); St. 1956, c. 465, § 3 (k) (Massport authorized to "acquire in its own name" public or private lands and public or private ways); St. 1956, c. 465, § 4 (Massport authorized to purchase land, property, rights, rights of way, franchises, easements, and other interests in lands and to take title in its own name).

On the other hand, the commission finances its activities from the Massachusetts Gaming Control Fund, which is funded from fees assessed annually on gaming licensees, initial licensing applications fees, as well as "appropriations, bond proceeds or other monies authorized by the general court and specifically designated to be credited [to the Gaming Control Fund]." G. L. c. 23K, § 57. Unlike Massport, therefore, the commission may not issue its own bonds to fund its expenditures but must rely either on the fees it collects or on financing specifically authorized by the Legislature.

Moreover, while the commission is empowered to "collect taxes and fees" under the gaming act, G. L. c. 23K, § 4 (26), much of this revenue is channeled to entities other than the commission. For example, all taxes the commission collects on gaming licensees' gaming revenue must be transferred to various funds, established by statute, for which the vast majority of

the monies are subject to appropriation.[11] See G. L. c. 23K, § 59. In stark contrast to Massport, then, the commission does not control much of the revenue that it collects. The commission also lacks the power to acquire and hold real property.

Even without relying on the presumption against designating an entity an independent body politic and corporate, therefore, we are able to conclude that, because the commission enjoys significantly less political and financial independence than Massport, it is not an independent body politic and corporate under our precedents.

In sum, the language of the MTCA and the gaming act, the legislative history of the gaming act, and our precedents all support the conclusion that the commission is a public employer immune from liability for intentional tort claims, including claims for intentional interference with contractual relations. Because FBT's tortious interference claim is barred by the commission's immunity from suit, we hold that the motion judge properly dismissed that claim.

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[11] The exceptions are the Race Horse Development Fund, established under G. L. c. 23K, § 60, and the Community Mitigation Fund, established under G. L. c. 23K, § 61. The monies transferred to these funds -- 2.5 percent and 6.5 percent respectively of tax revenue received from category 1 licensees, G. L. c. 23K, § 59 (2) -- are not subject to appropriation and are administered by the commission.

Conclusion. We affirm the motion judge's allowance of the commission's motion to dismiss FBT's intentional interference with contract claim. We reverse, however, the entry of summary judgment in favor of the commission on FBT's regulatory takings claim, which we remand to the Superior Court for further proceedings consistent with this opinion.

So ordered.