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EMINENT DOMAIN - MASSACHUSETTS

FBT Everett Realty, LLC v. Massachusetts Gaming Commission

Supreme Judicial Court of Massachusetts, Middlesex - May 23, 2022 - 489 Mass. 702 - 187 N.E.3d 373

Vendor, which bought land before legalization of casino gaming and then after legalization entered into agreement for option to purchase contingent on purchaser securing license to operate casino on the land, filed action against state gaming commission, asserting claims for intentional interference with contract and regulatory taking, alleging that commission's concerns about hidden criminal ownership interests in vendor resulted in its refusal to approve purchaser's application for license to operate casino on land unless purchase price was lowered so that value of casino-use premium on sale of land was transferred from vendor to purchaser.

The Superior Court Department granted commission's motion to dismiss intentional interference claim and granted commission's motion for summary judgment on regulatory taking claim. Vendor applied for direct appellate review, and the Supreme Judicial Court granted the application.

The Supreme Judicial Court held that:

- Trial court was required to consider all three *Penn Central* factors before deciding whether to grant commission's motion for summary judgment on vendor's regulatory taking claim;
- Genuine issues of material fact existed as to whether commission directed a compelled transfer of property or merely accepted it as cure to its concerns about undisclosed criminal ownership interest in vendor, precluding summary judgment on vendor's regulatory taking claim; and
- Commission was "public employer" immune from liability for intentional interference with contractual relations under Massachusetts Tort Claims Act (MTCA).

Trial court was required to consider all three Penn Central factors, including economic impact, interference with investment-backed expectations, and character of government action, before deciding whether to grant state gaming commission's summary judgment motion on vendor's regulatory taking claim, alleging that commission's concerns about hidden criminal ownership interests in vendor resulted in its refusal to approve purchaser's application for license to operate casino on land unless purchase price was lowered so that value of casino-use premium was transferred to purchaser; investment-backed expectations was only one factor that courts had to consider, and other factors were important, given the significant diminution in value and unusual and disputed character of government action.

Genuine issues of material fact existed as to whether state gaming commission directed a compelled transfer of property or merely accepted it as cure to its concerns about undisclosed criminal ownership interest in vendor, precluding summary judgment on vendor's regulatory taking claim against commission based on commission's purported refusal to approve purchaser's application for license to operate casino on land unless purchase price was lowered so that value of casino-use premium on sale of land was transferred from vendor to purchaser.

Factor of reasonable investment-backed expectations weighed heavily against finding a regulatory taking, in vendor's action alleging that state gaming commission's concerns about hidden criminal ownership interests in vendor resulted in its refusal to approve purchaser's application for license to operate casino on land unless purchase price was lowered so that value of casino-use premium on sale of land was transferred from vendor to purchaser; vendor bought land two years before gaming was legalized and could not have reasonably expected to sell property as site for development of casino, and vendor's investments in the land after gaming was legalized remained subject to commission's discretionary decision of whether to award gaming license for development of casino on the property.

Substantial economic impact weighed in favor of finding regulatory taking, in vendor's action alleging that state gaming commission's concerns about hidden criminal ownership interests in vendor resulted in its refusal to approve purchaser's application for license to operate casino on land unless purchase price was lowered so that value of casino-use premium on sale of land was transferred from vendor to purchaser; vendor had negotiated agreement that purchaser would pay $100,000 per month for the right to buy the land for $75 million if purchaser were awarded license, and commission's purported actions intended to deprive vendor of any casino-use premium and reduced purchase price to $35 million causing $40 million reduction in value of the land.

Factor of character of government action weighed in favor of finding regulatory taking, in vendor's action alleging that state gaming commission's concerns about hidden criminal ownership interests in vendor resulted in its refusal to approve purchaser's application for license to operate casino on land unless purchase price was lowered so that value of casino-use premium on sale of land was transferred from vendor to purchaser; character of action was highly unusual as commission did not continue to investigate until it could determine whether there was in fact some undisclosed criminal ownership interest but instead purportedly compelled transfer of property for $40 million less than agreed upon price.

State gaming commission was "public employer" immune from liability under Massachusetts Tort Claims Act (MTCA) for vendor's claim alleging that commission intentionally interfered with contract for option to purchase land by purportedly refusing to approve purchaser's application for license to operate casino on land unless purchase price was lowered so that value of casino-use premium on sale of land was transferred from vendor to purchaser; legislature's rejection of express proposal to fully waive gaming regulation and enforcement agency's tort immunity suggested that legislature did not intend for commission to be liable, and commission enjoyed substantially less political independence and financial independence than port authority.

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