SUPREME JUDICIAL COURT
COMMONWEALTH OF MASSACHUSETTS

SJC NO. _____

APPEALS COURT NO. 2021-P-0771

FBT EVERETT REALTY, LLC,
Plaintiff/Appellant

v.

MASSACHUSETTS GAMING COMMISSION,
Defendant/Appellee

APPLICATION FOR DIRECT APPELLATE REVIEW OF FBT EVERETT REALTY, LLC

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Dated: September 14, 2021

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i. Request for Direct Appellate Review

The plaintiff below and appellant here, FBT Everett Realty LLC ("FBT"), respectfully requests that this Honorable Court grant direct appellate review of and reverse the decisions by the Superior Court (Kaplan, J. and Salinger, J., respectively): (i) dismissing FBT's claim for tortious interference; and (ii) granting summary judgment to the Defendant-Appellee Massachusetts Gaming Commission (the "Commission") on FBT's claim for a regulatory taking of property.[1] A copy of those opinions are attached hereto as Exhibit 1 and Exhibit 2, respectively, and a copy of the docket reflecting that final judgment has entered is attached as Exhibit 3.

As addressed in greater detail below, this case involves FBT's sale to Wynn Resorts ("Wynn") of a 34 acre parcel of land in Everett, Mass. (the "Everett Parcel") on which now sits the Encore Boston Harbor Resort. In December 2012, Wynn entered into an Option Agreement which gave it the right to purchase the Everett Parcel from FBT for $75 million in the event it was awarded a license to operate a resort casino in

[1] As will be explained more fully below, this case was originally filed in the Business Litigation Session of Suffolk Superior Court, but was later transferred to Middlesex Superior Court and specially assigned to Judge Kaplan, and upon Judge Kaplan's retirement, Judge Salinger, in order to cure a potential jurisdictional defect.

the Metro Boston area. During the Commission's statutorily required investigation into Wynn's suitability to hold a casino license, the Commission came to believe, erroneously, that FBT had made deliberate misrepresentations to Wynn and the Commission about the ownership composition of FBT. In order to punish FBT for this perceived malfeasance, the Commission, acting completely outside of its statutory authority, devised a plan to coerce Wynn into eliminating the "casino-related premium" from the agreed-upon purchase price of $75 million. The Commission threatened that if Wynn did not act according to its wishes, it would deem Wynn "unsuitable" to operate a casino in Massachusetts thereby rendering Wynn ineligible to receive a gaming license.

Although the Commission had no lawful authority to use FBT's perceived malfeasance as a basis to find Wynn unsuitable or to impose any sort of financial penalties on FBT or its members, in response to the Commission's threats, Wynn predictably did what the Commission wanted it to do: namely, forced FBT to accept a dramatically lowered price of $35 million for the Everett Parcel based on the counterfactual assumption that the property was being sold to develop a "big box" store rather than a multi-billion dollar resort casino. FBT had no choice but to accept the

reduced purchase price because otherwise the Commission would have, according to its threats, torpedoed the entire deal by finding Wynn unsuitable to receive a casino license. In that event, Wynn threatened that it would sue FBT for hundreds of millions of dollars of lost profits.

FBT originally filed suit against the Commission on November 14, 2016, asserting a single count for tortious interference with contract. In moving to dismiss the original complaint, the Commission argued, and the trial court agreed, that it qualifies as a "public employer" under the Massachusetts Tort Claims Act, G.L. c. 258 ("MTCA"), rendering it immune from suit for "any claim arising out of an intentional tort, including ... interference with contractual relations." G.L. c. 258, § 10(c).

The MTCA distinguishes between "public employer[s]," which are immune from suit for intentional torts, and "independent bod[ies] politic and corporate," which are not. G.L. c. 258, § 1. The MTCA does not define "independent body politic and corporate," and for years, courts have relied on a framework developed by the Appeals Court in Kargman v. Boston Water & Sewer Comm'n, 18 Mass. App. Ct. 51 (1984), to analyze the question whether a particular governmental or quasi-governmental entity is entitled to the protections of the MTCA. The Kargman analysis

focuses on two principal factors: financial independence and political independence. Id. at 56-57. This Court, however, has cautioned that "[a]ny doubts about [a public entity's] status under the difficult and uncertain designation of 'independent body politic and corporate' should be resolved against such a designation, 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 meant to replace." Lafayette Place Assocs. v. Bos. Redevelopment Auth., 427 Mass. 509, 532 (1998) (quoting Rogers v. Metropolitan Dist. Comm'n, 18 Mass. App. Ct. 337, 338-339 (1984)). The result of this admonition, it appears, is that no court since Lafayette was decided has found a public entity to be anything other than a "public employer," notwithstanding indicia of financial and political independence of the type held by the Appeals Court in Kargman to render an entity an "independent body politic and corporate." Any public entity, no matter how financially and politically independent, will exhibit *some* characteristics which support a contrary argument. Indeed, here, although the Commission exhibits numerous characteristics of both financial and political independence – the most important being that it could and would fund any judgment or settlement of this matter without resort

to taxpayer money – the trial court, citing to Lafayette, held that the presence of any factors suggesting a lack of independence compel a finding that the entity is a public employer. Ex. 1 at *5-7. Clarity is needed in this area; the Court should use this case as an opportunity to consider the continued validity of the Kargman test and, if it is no longer valid, offer guidance for lower courts on how to determine whether a public entity is an "independent body politic and corporate" for purposes of the MTCA.

Before the trial court issued its decision dismissing the claim for intentional interference, FBT amended its complaint to add constitutional claims alleging a taking of property without just compensation.

In response to a second motion to dismiss brought by the Commission, the trial court (Kaplan, J.) allowed FBT's claim for a regulatory taking of real property to proceed, on the theory that the Commission unlawfully coerced Wynn into destroying FBT's property right to sell the Everett Parcel for its highest and best use. See A&D Auto Sales, Inc. v. United States, 748 F.3d 1142 (Fed. Cir. 2014).

A regulatory action can become a compensable taking under the Fifth Amendment if the government interference has gone "too far." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). "To analyze

whether a regulation goes so far as to constitute a taking, the Supreme Court has indicated that there is no set formula; the determination depends upon the particular circumstances of the case." 767 Third Ave. Assocs. v. United States, 48 F.3d 1575, 1580 (Fed. Cir. 1985) (citing Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978)). The court must engage in an "ad hoc, factual inquiry." Penn Central, 438 U.S. at 124. This "ad hoc, factual" inquiry usually involves application of a three-factor test first articulated by the Supreme Court in Penn Central Transportation Co. v. New York City, 438 U.S. at 124. Under Penn Central, courts assess: (1) the character of the governmental action, (2) the economic impact of the regulation on the claimant, and (3) the extent to which the regulation interfered with distinct investment-backed expectations. Loveladies Harbor v. United States, 28 F.3d 1171, 1176-77 (Fed. Cir. 1994) (citing Penn Central, 438 U.S. at 124).

The Commission has long maintained in defense of FBT's regulatory taking claim that FBT could not prevail on its claim because it could not demonstrate any reasonable, investment-backed expectation of selling the Everett Parcel for a casino-related premium where casino gaming was illegal in Massachusetts at the time it acquired the Everett Parcel. The Commission moved to dismiss FBT's amended

complaint on this basis (among others); however, the trial court (Kaplan, J.), reasoned that a lack of investment-backed expectations, by itself, did not provide grounds for dismissal of the amended complaint where that factor "must be considered in light of the interrelated Governmental Action factor." Exhibit 4, Dkt. No. 19.3, at p. 18. Nonetheless, following Judge Kaplan's retirement and re-assignment of the case to Judge Salinger, the Commission prematurely moved for summary judgment on this very same ground, before discovery had been completed and thus in the absence of a complete record upon which to evaluate and weigh all of the Penn Central factors. Judge Salinger held that the fact that FBT, at the time it acquired the Everett Parcel, could not reasonably have expected to sell the Parcel for a casino use, was fatal as a matter of law to FBT's regulatory taking claim, irrespective of what evidence might exist concerning the other two Penn Central factors.

While Judge Salinger's ruling finds some superficial support among federal precedents in this area, see, e.g., Love Terminal Partners, L.P. v. United States, 889 F.3d 1331, 1346 (Fed. Cir. 2018), it is contrary not only to Judge Kaplan's prior ruling, but to the weight of other authority, holding that the Penn Central factors are not elements of a prima facie case, but factors which must be balanced

against one another on a full record. See, e.g., Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 322, 326, 333 (2002); Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring); Maine Educ. Ass'n Benefits Trust v. Cioppa, 695 F.3d 145, 153 (1st Cir. 2012). In granting summary judgment to the Commission based on the absence of investment-backed expectations alone, without so much as considering the other factors, the trial court improperly elevated the investment-backed expectations factor to dispositive status.

Regulatory takings claims under Article 10 of the Massachusetts Declaration of Rights are analyzed using the same framework as federal regulatory takings claims and Massachusetts courts rely heavily on applicable federal precedents in this area. See Fitchburg Gas & Elec. v. Department of Pub. Utils., 467 Mass. 768, 775 n.8 (2014). It is therefore important that this Court correct any confusion regarding the proper application of the Penn Central factors and reject the notion that the absence of any one factor may be deemed dispositive as a matter of law without any analysis or balancing of the other factors on a complete record.

ii. Prior Proceedings

FBT originally filed suit against the Commission on November 14, 2016, asserting a single count for tortious interference with contract. The Commission moved to dismiss the original complaint on the grounds that it qualifies as a "public employer" under the MTCA rendering it immune from suit for intentional interference. Although the trial court (Kaplan, J.) ultimately agreed that the Commission is immune under the MTCA and dismissed the tortious interference claim on this basis, see Ex. 1, FBT in the interim amended its complaint to add constitutional claims alleging a taking of property without just compensation.

In response to a second motion to dismiss brought by the Commission, the Court (Kaplan, J.) allowed FBT's claim for a regulatory taking of real property to proceed, on the theory that the Commission unlawfully coerced Wynn into destroying FBT's property right to sell the Everett Parcel for its highest and best use.[2] See Ex. 4. The Commission thereafter

[2] FBT filed its original complaint alleging tortious interference in Suffolk Superior Court, where it was assigned to the Business Litigation Session, with the docket number 2016-03481-BLS1 (the "Suffolk Docket"). While the Commission's motion to dismiss FBT's amended complaint alleging constitutional takings claims was pending, the trial court (Leibensperger, J.) sua sponte raised the question whether, pursuant to G.L. c. 79, § 14, FBT's takings claims were required to be brought in Middlesex County where the majority of the Everett Parcel is located. See Exhibit 5, Suffolk

brought a third-party complaint against Wynn Resorts for indemnity, contribution and unjust enrichment. The unjust enrichment count survived Wynn's motion to dismiss.

On September 16, 2020, the trial court consolidated fact discovery in this case with the related case of FBT Everett Realty, LLC v. Feldman et al., No. 1784-cv-03547, which involves claims of legal malpractice arising from the FBT-Wynn land transaction. All parties to both cases thereafter observed an informal stay of discovery while efforts were made at achieving a global settlement. No depositions were taken and no schedule had been set for the completion of discovery or summary judgment motion practice.

Nonetheless, the Commission moved for summary judgment, making the same argument it made when moving

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Docket at Paper No. 22. In order to avoid the risk that jurisdiction in Suffolk County might later be deemed defective, the case was transferred pursuant to G.L. c. 211B, § 10 to Middlesex County (where it was assigned a new docket number, 1881CV00304), and then specially assigned to Judge Kaplan for all purposes, pursuant to Superior Court Standing Order 9-80. See Exhibit 6, Suffolk Docket Paper No. 24. Judge Kaplan then ruled on the Commission's motion to dismiss the amended complaint, dismissing some claims but allowing FBT's claim for a regulatory taking of real property to proceed. Upon Judge Kaplan's retirement, the case was re-assigned to Judge Salinger, who entered summary judgment in the Commission's favor on the surviving regulatory taking claim.

to dismiss FBT's regulatory taking claim: that FBT could not show interference with reasonable investment-backed expectations, and this alone was dispositive of FBT's regulatory taking claim, irrespective of what evidence might be developed in discovery concerning the other two Penn Central factors. The trial court (Salinger, J.) agreed, and granted summary judgment in the Commission's favor. See Ex. 2. Final judgment entered on June 16, 2021. See Ex. 3.

iii. Summary of the Facts

In 2009, FBT acquired title to the Everett Parcel. Exhibit 7, Rule 9A(b)(5) Statement of Material Facts ("SOMF") ¶ 1. The Parcel was formerly the site of a Monsanto chemical plant and was heavily environmentally contaminated from past operations. Id. ¶ 4. Between 2009 and 2012, FBT marketed the property for a variety of potential uses, including as the site of big box store or a transfer station. Ex. 7, SOMF ¶¶ 6-7. Once casino gaming was legalized in Massachusetts with the passage of the Gaming Act in November 2011, the site soon began to attract interest from casino developers, including Och-Ziff Capital Management, and later, Wynn. Id. ¶¶ 11, 14. FBT retained a consultant, TM Capital Advisers, to assist it in marketing the property as a casino site, in exchange for a success fee of between 3% and 5% if the

property was sold for a casino use. Exhibit 8 at pp. 17-18; Exhibit 9.

Wynn first expressed interest in the property in November 2012. Ex. 7 (SOMF) at ¶ 14. On December 19, 2012, FBT and Wynn entered into an Option Agreement ("Option Agreement") whereby Wynn agreed to pay FBT $100,000 per month during a 24-month option period for the right to purchase the Everett Parcel for $75 million in the event that Wynn was awarded a casino license. Id. ¶ 15. Pursuant to the Option Agreement, FBT would have no involvement or financial stake in Wynn's construction or operation of the casino resort. Id. Wynn did not seriously pursue or acquire an option on any other potential casino sites; if it were awarded the license, it would close on the sale of the Everett Parcel and build its casino there, as it eventually did. Exhibit 10 at pp. 126, 135-36; Exhibit 11 at pp. 23, 27.

The Option Agreement obligated FBT to several significant liabilities which were to be funded by further investments by the owners of FBT. For example, FBT was obligated to expend up to $2.5 million to obtain an easement for a perimeter roadway on the site. Exhibit 12 at § 5.3. FBT was also responsible for performing certain baseline environmental cleanup, id. at § 5.7, the costs of which were estimated at $10 million. See Ex. 11 at

pp. 29, 33. In addition, FBT was required to fund any environmental cleanup costs over and above the baseline costs on a 50/50 basis with Wynn, subject to a cap of FBT's obligation which was discussed at $2.5 million but which the parties left open pending additional due diligence by Wynn. Ex. 12 at § 5.7.6. In total, the monetary obligation undertaken by FBT pursuant to the Option Agreement could have totaled in excess of $15 million.

In January 2013, Wynn filed an application with the Commission for a license to operate a resort casino on the Everett Parcel. Ex. 7 (SOMF) ¶ 17. The Commission, through its Investigation and Enforcement Bureau ("IEB"), began its suitability investigation into Wynn and the so-called "qualifiers" associated with the Wynn application (namely, Wynn's corporate affiliates and officers and directors). Exhibit 13. At no point did the Commission identify FBT or any of its members as either applicants or qualifiers subject to a suitability investigation, nor could it have under the applicable statutory and regulatory definitions. Id. at p. 12; Exhibit 14 at p. 188; Exhibit 15 at pp. 103-104.

In July 2013, the IEB learned of a series of recorded phone calls between Charles Lightbody and Darin Bufalino, an inmate in state prison. Ex. 13 at p. 64. In these calls, the men discussed the Everett

casino project and gave law enforcement the impression that Mr. Lightbody, who was a convicted felon with alleged ties to organized crime, retained some kind of ownership interest in FBT. Id. Lt. Kevin Condon of the IEB later testified that the tapes were concerning to him because he believed it would "affect the integrity of the entire gaming process if a person like Charles Lightbody was involved in it." Exhibit 16 at p. 101.

Shortly after they listened to the Lightbody/Bufalino tapes, the IEB determined that they should interview the principals of FBT. Ex. 13 at pp. 77-83. The three members of FBT, Dustin DeNunzio, Anthony Gattineri and Paul Lohnes, were interviewed between July 9 and July 16, 2013, as was Mr. Lightbody, a former member of FBT. Id. During their consensual interviews with the IEB, Messrs. DeNunzio, Gattineri, and Lohnes each identified Lightbody as a former owner of FBT. Id. Nevertheless, the IEB erroneously concluded that the FBT principals had lied during their interviews regarding the ownership status Lightbody in FBT. Id. at pp. 84-88. The IEB apparently believed that Lightbody was still a hidden owner of FBT, and that the FBT principals had falsified paperwork making it appear as though Lightbody had exited FBT in August 2012, rather than at some later date or not at all. Id.

The IEB and the Commission became angry at the FBT principals' perceived lack of candor and lack of cooperation with the IEB's investigation. See, e.g., Exhibit 17; Exhibit 18; Ex. 11 at p. 93.[3] The IEB and the Commission desired to send an immediate, and financially painful, message to FBT (including its majority owner Paul Lohnes, who has never been accused of any wrongdoing whatsoever) by preventing FBT from realizing a casino-related premium – or, what the law would describe as fair market value – for the Everett Parcel. Exhibit 19; Exhibit 20 (referring to $40 million price reduction as a "fine"). However, as the Commission knew, it lacked the lawful authority to directly impose a financial penalty on FBT or its members, see id., so it devised a scheme that was a means to achieve the same end: the IEB and the Commission would threaten to find Wynn unsuitable to receive a casino license (despite the Commission's view that Wynn had done nothing wrong) unless FBT

[3] Commissioner McHugh laid bare his and the Commission's outrage and desire to send a message at a December 13, 2013 hearing: "This commission cannot succeed in doing its work, if people are not going to be candid with us. It is intolerable to have people tell us things that aren't true. It's intolerable for people to hide things from us. It's intolerable for people to behave in a way that requires us to chase them around to get the answers to simple facts. And we've got to demonstrate that point early, and we've got to demonstrate that point often." Ex. 11 at p. 93.

acceded to the IEB's and the Commission's desire that FBT receive a dramatically reduced price for its land – one which eliminated that so-called "casino-related premium." Ex. 14 at p. 167; Ex. 11 at pp. 18, 22.[4]

Wynn acceded to the IEB's threats and preferences. Wynn commissioned an appraisal of the Everett Parcel which relied on two assumptions: that the land was free of environmental contamination and could not be used for a casino resort. Ex. 7 (SOMF) ¶ 18. The appraisal came back with a value of $35 million, thus placing a $40 million valuation on the casino-related highest and best use of the Parcel. Id. Wynn then informed FBT that the purchase price would have to be reduced from the previously agreed upon $75 million to $35 million because otherwise the Commission would find Wynn unsuitable to hold a casino license; if FBT refused, Wynn would sue FBT and its principals seeking to recover hundreds of millions in lost profits. Exhibit 21; Exhibit 22 at 222, 226-27.

[4] IEB Director Karen Wells testified at the Commission hearing concerning the FBT issue that she notified Wynn that how they "proceeded at this point [i.e., once being notified of the perceived FBT problem], and their position regarding the sellers receiving a financial windfall as a result of the gaming facility was something that the IEB would report on regarding [Wynn's] suitability." Ex. 11 at p. 18. At the same hearing, Wynn General Counsel Kim Sinatra thanked the IEB for "helping us to craft a proposed curative action in the effort to continue to move [our] application forward." Id. at p. 22.

Faced with no alternative, FBT was forced to accept $40 million less than the price agreed-upon in the Option Agreement. The parties executed an amendment (the "Ninth Amendment") to the Option Agreement, reducing the purchase price to $35 million and reallocating the parties' obligations with respect to the costs of environmental clean-up. Exhibit 23.[5] The Commission accepted this price reduction as a condition of finding Wynn suitable to hold a casino license. Ex. 11 at pp. 95-97. In addition, the Commission required FBT's principals to certify under oath that there was no hidden ownership in FBT and that the monies each member would receive from the sale of the Parcel would go solely to the three disclosed members. Id. Wynn and FBT closed on the sale of the Parcel pursuant to the Ninth Amendment on January 2, 2015. Ex. 7 (SOMF) ¶ 22.

Not satisfied with the $40 million fine it had imposed on FBT, the Commission referred the matter to the United States Attorney's Office for prosecution. Ex. 11 at pp. 95-97. Two of FBT's principals, Dustin DeNunzio and Anthony Gattineri, along with former member Charles Lightbody, were indicted and prosecuted for wire fraud. See United States v. DeNunzio et al.,

[5] Prior amendments to the Option Agreement were executed to extend the environmental due diligence period and address other ministerial matters.

No. 14-cr-10284-NMG (D. Mass.). A jury acquitted all three on the strength of the evidence showing that neither Wynn nor the Commission was defrauded. Id. at ECF No. 516.

iv. Statement of the Issues on Appeal

There are three principal issues on appeal, all of which were clearly raised and preserved below. Without limiting a full presentation of issues in a final brief, the principal issues are: (1) whether under Kargman, the Commission is sufficiently politically and financially independent from the Commonwealth to be considered an "independent body politic and corporate" rather than a "public employer" under G.L. c. 258, and thus amenable to suit for intentional interference with contract; (2) whether it was error to hold that proof of reasonable, investment-backed expectations is an "essential element" of FBT's regulatory takings claim and award summary judgment to the Commission based on the perceived failure to show reasonable investment-backed expectations without even considering the other Penn Central factors; and (3) whether it was error to measure FBT's reasonable, investment back expectations as of the time it acquired the Everett Parcel, even though the right which was taken – the right to sell the Parcel for a casino use – did not come into existence until years later.

v. Argument

A. The trial court erred in elevating to dispositive status the perceived lack of reasonable investment-backed expectations without weighing that factor against the other Penn Central factors on a full record.

A regulatory action can become a compensable taking under the Fifth Amendment if the government interference has gone "too far." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). A common thread that runs through virtually all Supreme Court regulatory takings cases in the past forty years is the rejection of per se rules to determine if a regulation has gone "too far" and become a compensable taking. See, e.g., Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 322, 326, 333 (2002); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984); Kaiser Aetna v. United States, 444 U.S. 164, 174-75 (1979); Penn Central, 438 U.S. at 123-24; Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring). "To analyze whether a regulation goes so far as to constitute a taking, the Supreme Court has indicated that there is no set formula; the determination depends upon the particular circumstances of the case." 767 Third Ave. Associates v. United States, 48 F.3d 1575, 1580 (Fed. Cir. 1985) (citing Penn Central, 438 U.S. at 124).

Courts must engage in an "ad hoc, factual inquiry." Penn Central, 438 U.S. at 124.

Under Penn Central, courts use a three-factor balancing test to evaluate claimed regulatory takings, assessing: (1) the character of the governmental action; (2) the economic impact of the regulation on the claimant; and (3) the extent to which the regulation interfered with distinct investment-backed expectations. Loveladies Harbor v. United States, 28 F.3d 1171, 1176–77 (Fed. Cir. 1994) (citing Penn Central, 438 U.S. at 124). "Designed to facilitate a careful examination and weighing of all the relevant circumstances, the context-sensitive 'Penn Central' factors operate not as a 'checklist of items that can be ticked off as fulfilled or unfulfilled,' but rather as 'lenses through which a court can view and process the facts of a given case.'" Maine Educ. Ass'n Benefits Trust, 695 F.3d at 153 (quoting Philip Morris, Inc. v. Harshbarger, 159 F.3d 670, 673 (1st Cir. 1998)).

As Justice O'Connor explained in her concurrence in Palazzolo v. Rhode Island:

> [t]he Takings Clause requires careful examination and weighing of all the relevant circumstances in this [Penn Central] context. . . . **Investment-backed expectations, though important, are not talismanic under Penn Central. Evaluation of the degree of interference with**

> **investment-backed expectations is one factor** that points toward the answer to the question of whether the application of a particular regulation to particular property "goes too far."

533 U.S. at 634, 636 (O'Connor, J., concurring) (emphasis supplied). Thus, Justice O'Connor emphasized, the "temptation to adopt what amount to per se rules in either direction must be resisted." Id. at 636.[6]

The clear takeaway from Justice O'Connor's concurrence in Palazzolo, as adopted by the majority in Tahoe-Sierra, 535 U.S. at 326, 322, 333, is that courts may not properly regard the absence of investment-backed expectations (or any other factor) as legally dispositive without even considering the other factors, as to do so would be to give investment-backed expectations "talismanic"

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[6] A majority of the Supreme Court later substantially adopted Justice O'Connor's views regarding the proper application of the Penn Central factors in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002), reaffirming the Court's commitment to "resist the temptation to adopt per se rules in our cases involving partial regulatory takings" in favor of an approach "designed to allow 'careful examination and weighing of all the relevant circumstances,'" including "considerations of 'fairness and justice[.]'" Id. at 326, 322, 333 (quoting Palazzolo, 533 U.S. at 633, 636 (O'Connor, J., concurring)). The Tahoe-Sierra majority specifically endorsed Justice O'Connor's view that "interference with investment-backed expectations is one of a number of factors that a court must examine" to determine takings liability. Id. at 336.

significance. Rather, "[t]o comport with Palazzolo, courts must consider and balance all the relevant partial takings factors before determining whether a taking has occurred, regardless of the outcome of the investment-backed expectations criterion." J. David Breemer & R. S. Radford, The (Less?) Murky Doctrine of Investment-Backed Expectations After Palazzolo, and the Lower Courts' Disturbing Insistence on Wallowing in the Pre-Palazzolo Muck, 34 Sw. U. L. Rev. 351, 398-99 (2005). Judge Kaplan recognized precisely this point in denying the Commission's motion to dismiss FBT's regulatory taking claim, reasoning that its arguments concerning the lack of investment-backed expectations did not provide grounds for dismissal where that factor "must be considered in light of the interrelated Governmental Action factor." Ex. 4 at p. 18.

Here, contrary to the Supreme Court's consistent rejection of per se rules in this area, the trial court held that a showing of interference with reasonable, investment-backed expectations is an "essential element" of a claim for a regulatory taking. Ex. 2 at 6. This was error.

To be sure, the trial court's ruling that a lack of investment-backed expectations is dispositive of a regulatory taking claim finds some superficial support in the case law. See id. But the critical

distinction which the trial court failed to recognize is that in virtually all cases in which the absence of investment-backed expectations was found to be outcome-determinative, the court had engaged in a weighing and balancing of all three Penn Central factors on a full record, and determined, as a matter of fact rather than law, that the absence of investment-backed expectations overwhelmed the other factors.[7]

The trial court's ruling that interference with reasonable investment-backed expectations is an "essential element" which must be proven in all cases is contrary to the Supreme Court's ruling in Hodel v.

[7] See, e.g., Anaheim Gardens, L.P. v. United States, 953 F.3d 1344, 1351 (Fed. Cir. 2020) ("[i]n the context of the Penn Central balancing test, the complete absence of reasonable distinct investment-backed expectations *can* weigh sufficiently heavily to be dispositive of a takings claim" [emphasis supplied]); Mehaffy v. United States, 499 Fed. Appx. 18, 21 (Fed Cir. 2012) ("The trial court . . . analyzed the facts using the Penn Central framework and concluded that Mr. Mehaffy could not show he had a reasonable investment-backed expectation to fill the property, nor that the government action was retroactive or targeted against him specifically."); Norman v. United States, 429 F.3d 1081, 1091 (Fed. Cir. 2005) (noting that the trial court, during a "trial on the merits," "weigh[ed] the three factors of the Penn Central ad hoc analysis to determine whether a regulatory taking occurred"); Monsanto Co. v. Acting Adm'r, U.S. E.P.A., 564 F. Supp. 552, 566 (E.D. Mo. 1983) (considering all three Penn Central factors), vacated and remanded sub nom. Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).

Irving, 481 U.S. 704 (1987), that a takings claim may succeed in the absence of reasonable investment-backed expectations where the other two Penn Central factors weigh in favor of a compensable taking. See id. at 715 (affirming finding of regulatory taking under Penn Central despite describing the plaintiff's purported "investment-backed expectations" in the subject property as "dubious"). While Hodel involved the elimination of the rights of descent and devise for certain fractional interests in Native American lands and thus the Court rightly described the character of the taking as sufficiently "extraordinary" to overwhelm the lack of investment-backed expectations, id. at 716, the trial court here did not have before it any evidence concerning the character of the governmental actional and thus had no basis upon which to conclude that the deliberate destruction, for punitive purposes, of FBT's right to sell its property for the $40 million premium Wynn was willing to pay is not extraordinary in its own way.[8]

[8] After all, the government action here did not actually restrict the uses to which the Everett Parcel could be put or prohibit a casino from being built there. Instead, the Commission simply denied FBT its inherent right to receive the $40 million premium that attended such a use, which it had bargained for and which it would have received but for the Commission's interference.

In ruling that the absence of investment-backed expectations was dispositive of FBT's takings claim, the trial court relied heavily on the Supreme Court's decision in Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984). But the Court in Monsanto did not hold that the absence of reasonable investment-backed expectations will be dispositive as a matter of law in every case. Rather, it held that on the particular facts of that case – which involved Monsanto voluntarily submitting proprietary data to the government with full knowledge that it would be shared with others – "the force of this factor is so overwhelming . . . that it disposes of the taking question[.]" Id. at 1005. The Monsanto Court confirmed that the regulatory takings analysis involves an "ad hoc, factual" inquiry. Id. The Supreme Court's subsequent decision in Hodel, and its reaffirmation of the rejection of per se rules in Tahoe-Sierra, 535 U.S. at 322, 326, 333, confirms that Monsanto did not establish a per se rule that the absence of investment-backed expectations will be dispositive as a matter of law in every case.

B. The trial court improperly measured FBT's expectations at the time it acquired the Everett Parcel rather than when the property right taken came into existence.

The trial court further erred by holding that FBT could not have had any reasonable investment-backed expectation of selling the Everett Parcel for a casino use because casino gaming was illegal when FBT acquired the site in 2009. While most cases look to a property owner's expectations as the date of the acquisition of the real estate, see, e.g., Love Terminal Partners, L.P. v. United States, 889 F.3d 1331, 1345 (Fed. Cir. 2018) ("what is relevant and important in judging reasonable expectations is the regulatory environment at the time of the acquisition of the property" [internal quotations omitted]), in the unique circumstances of this case, where the right taken – the right to sell the property for a casino use – came into existence only after the acquisition of the real estate, investment-backed expectations must be measured from the enactment of the Gaming Act through the date of the taking.

Any other legal framework would result in a situation where government authorities can take private property rights with impunity, no matter how egregious their conduct, provided the rights to be taken were created after the landowner purchased the property. For example, assume a landowner purchased a property zoned for agricultural use. Further assume that the zoning body rezones the relevant district to include residential uses. In reliance on these

changes, the landowner subdivides its property and invests in development activities to build residences. Under the trial court's analysis, the zoning body could not be held liable for a taking even if it used targeted, spot zoning to change the zoning back to agricultural because that was the zoning that was in place at the time the property was purchased. This approach ignores the enhanced rights created by residential zoning and the investment-backed expectations therein as evidenced by the landowner's efforts to develop the property as residences. Cf. Palazzolo, 533 U.S. at 627 ("Were we to accept the State's rule, the post enactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable."). In sum, in these unusual circumstances, investment-backed expectations should be measured by the economic commitments undertaken by FBT in reliance on the enhanced value created by the Gaming Act through the time of taking.

C. The trial court erred in concluding that the Commission is a "public employer" under G.L. c. 258.

The Commission is not immune from FBT's suit for intentional interference with contractual relations because the Commission qualifies as an "independent body politic and corporate," and thus is excluded from

the definition of public employer under the G.L. c. 258. As a result, the Commission may be sued in tort, including for intentional torts such as intentional interference with contractual relations.

Kargman v. Boston Water and Sewer Comm'n, 18 Mass. App. Ct. 51, 55 (1984), remains the "leading case" setting forth the standard for determining whether a state entity is an "independent body politic and corporate." Lafayette Place Assocs. v. Boston Redev. Auth., 427 Mass. 509, 529 (1998). The Kargman court identified a number of different factors which demonstrate whether a state entity is financially and politically independent of the Commonwealth. Here, as a self-funded entity that operates without substantive oversight by the Commonwealth and is run by independent Commissioners who are not state officials, the Commission is financially and politically independent of the Commonwealth. While space constraints preclude a full analysis of all the ways in which the Commission is financially and politically independent, most significant is the undisputed fact that the Commission is completely self-funded and could and would satisfy any judgment in this case without resort to taxpayer dollars.[9] FBT reserves full argument on this issue to its merits brief.

[9] As the Commission's 2016 Annual Report, a public document, shows, not one tax dollar is used to fund

vi. Reasons Direct Appellate Review Should Be Granted

Direct appellate review is appropriate in this case. FBT's regulatory takings claim involves significant constitutional questions as to which confusion has developed in the case law, and appears to involve a matter of first impression concerning the proper date upon which to measure FBT's reasonable, investment-backed expectations. The Court should use this opportunity to correct any confusion regarding the proper application of the Penn Central factors, reaffirm the "ad hoc, factual" nature of the inquiry, and reject the notion that the absence of any one factor may be deemed dispositive as a matter of law without any analysis or balancing of the other factors on a complete record. Accordingly, the regulatory takings claim involves: a) questions of law involving both the Massachusetts and United States Constitutions; and b) novel issues of law (when a court should evaluate investment backed expectations where the right taken only came into existence after

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the Commission, and the Commission increases or decreases licensee assessments as needed for its operations. See Gaming Commission 2016 Annual Report, Exhibit 24 hereto, at pp. 24-25; see also G.L. c. 23K, § 56(c) (Commission is authorized to assess levies on licensees to cover "[a]ny remaining costs of the [C]ommission necessary to maintain regulatory control over gaming establishments" that are not covered by other fees assessed under G.L. c. 23K or other designated sources of funding).

the landowner purchased the real estate). See Mass R. App. P. 11(a)(1) and (2).

As for the question whether the Commission is a "public employer" under G.L. c. 258, the Court should use this case as an opportunity to consider the continued validity of the Kargman test and, if it is no longer valid, offer guidance for lower courts on how to determine whether a public entity is an "independent body politic and corporate" for purposes of Chapter 258. The answer to this question is certainly in the public interest as it has broad implications to potential tort plaintiffs with claims against any quasi-governmental entity in the Commonwealth. See Mass. R. App. P. 11(a)(3).

CONCLUSION

For each of the foregoing reasons, this Honorable Court should grant direct appellate review of the Superior Court's decisions.

Respectfully submitted,

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Dated: September 14, 2021

Rule 16(k) Certification

I, Christian G. Kiely, herewith certify that the foregoing application complies with the rules of court that pertain to the filing of briefs, including but not limited to: Mass. R. App. P. 11 (applications for direct appellate review) and Mass. R. App. P. 20(a) (form of briefs, appendices, and other papers). I further certify that the foregoing brief complies with the applicable length limitations in Mass. R. App. P. 11 because it is produced in the monospaced font Courier New at size 12, 10.5 characters per inch.

/s/ Christian G. Kiely
Christian G. Kiely

Certificate of Service

I, Christian G. Kiely, hereby certify that on this 14th day of September, 2021, one copy of the foregoing was served via email upon all counsel of record as follows:

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