UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, a federally recognized Indian Tribe,

Plaintiff,

v.

THE MICHIGAN GAMING CONTROL BOARD, et al.,

Defendants.
_____/

File No. 2:97-CV-67

HON. ROBERT HOLMES BELL

O P I N I O N

This is yet another chapter in the protracted litigation challenging the selection of casino developers in the City of Detroit. Currently before the Court is Plaintiff Lac Vieux Desert Band of Lake Superior Chippewa Indians' ("Lac Vieux") motion for further relief. In this motion Plaintiff requests the Court to declare all casino development agreements and licenses unlawful and void, to order a new casino developer selection process in which Lac Vieux is permitted to participate, and to enjoin all further casino gaming activity in the City of Detroit except by a conservator appointed by the Michigan Gaming Control Board until such time as the City conducts a reselection of casino developers.[1]

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[1]Plaintiff's motion requests the following relief:
1. an order declaring that the current casino development agreements and casino licenses are unlawful and void, effective January 11, 2002;

The Court has received objections to the relief requested from Defendant City of Detroit, Intervenor Defendants Atwater, Greektown, MGM, and Detroit Entertainment, and Amicus Michigan Gaming Control Board. Defendants object to Plaintiff's demands for judicial restructuring of the Detroit casino industry. They contend Plaintiff has failed to establish such actions are legally or equitably warranted.

Because the further relief Plaintiff is seeking is equitable in nature, this phase of the case is governed by equitable principles and requires the Court to exercise its sound

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> 2. an order enjoining all casino gaming activity in the City of Detroit, except as may be authorized by a conservator appointed by the Michigan Gaming Control Board pursuant to MCL 432.224, until the City conducts a reselection of casino developers pursuant to a fair and constitutional selection process in which Lac Vieux is permitted to participate;
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> 3. an order enjoining the City of Detroit from renewing, modifying or extending any casino development agreement that was entered into pursuant to the unconstitutional Detroit Casino Development Ordinance, Detroit City Code, § 18-13-1, *et seq*., or, if such agreements have been renewed, modified, or extended, Lac Vieux requests an order declaring such development agreements void; and
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> 4. an order requiring that the City prepare and submit to the Court procedures for the conduct of a new casino developer selection process, and to order that such new casino developer selection process: a) authorize Lac Vieux to submit a proposal for a casino development; and b) contain protective provisions that will remove the taint of the prior, unconstitutional selection process that would otherwise create a disadvantage for Lac Vieux or would create an advantage for the casino developers that were selected pursuant to the unconstitutional selection process.

(Pl. Mot. for Further Relief) (Docket # 221).

discretion. *Carroll v. City of Mount Clemens*, 139 F.3d 1072, 1079 (6th Cir. 1998) (holding that the granting of equitable relief lies within the sound discretion of the federal courts).

I.

A brief recitation of the background of this case is essential. In 1994 Atwater and Greektown promoted two ordinance initiatives designed to allow casino gambling in the City of Detroit. The Detroit voters approved the initiatives. Because casino gaming was still prohibited by Michigan state law, Atwater and Greektown sponsored a state ballot proposal, Proposal E, that would allow casino gaming in Detroit. Proposal E, known as the Michigan Gaming Control and Revenue Act, was adopted by the Michigan electorate in 1996 and codified at M.C.L. § 432.201 *et seq*. The Act contained a preference for those entities that had initiated approval of casino gaming in the City. M.C.L. § 432.206 (amended to repeal preference in 1997). In 1997 the City enacted the Detroit Casino Development Competitive Selection Process Ordinance which also contained a "preference" for those developers who promoted the State and the City initiatives to allow gaming. DETROIT CITY CODE §§ 18-13-1 *et seq*. Atwater and Greektown were the only developers who could qualify for the preference. *See generally*, *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd.*, 172 F.3d 397, 400-401 (6th Cir. 1999) ("*Lac Vieux I*").

Plaintiff Lac Vieux filed this action in February 1997 against the Michigan Gaming Control Board and the City of Detroit, claiming, *inter alia*, that the preference provisions in the state statute and the City Ordinance unconstitutionally infringed on Lac Vieux's First

Amendment and Equal Protection rights. The state statute was amended in July 1997 to remove the preference. On October 31, 1997, this Court entered summary judgment in favor of Defendants and dismissed the case in its entirety. On appeal, the Sixth Circuit affirmed the dismissal of the claims against the State, but remanded Lac Vieux's First Amendment and Equal Protection claims against the City of Detroit for further action. *Lac Vieux I*, 172 F.3d at 411.

In 1997 Mayor Dennis Archer selected three casinos pursuant to the Ordinance to develop casinos in the City of Detroit: MGM Grand, Detroit Entertainment (which took over Atwater and Circus Circus), and Greektown. In April 1998, the City filed with the Michigan Gaming Control Board ("MGCB") three certified development agreements identifying Greektown Casino, L.L.C., Detroit Entertainment, L.L.C., and MGM Grand Detroit, L.L.C. as the developers selected by the City to construct and operate casinos in Detroit. The selected developers filed their license applications with the MGCB in April and May of 1998. After conducting background investigations and contested case hearings, the MGCB concluded that the three applicants were eligible and suitable to obtain and hold casino licenses. The MGCB granted casino licenses to MGM Grand on July 28, 1999, to Detroit Entertainment, d/b/a MotorCity Casino, on December 14, 1999, and to Greektown Casino on November 8, 2000.

In April 1999 the Sixth Circuit held that Lac Vieux had stated a claim that the Ordinance was unconstitutional and remanded the case to this Court for further proceedings. *Lac Vieux I*, 172 F.3d at 411.

On October 21, 1999, Lac Vieux requested an order preliminarily enjoining the City from taking any action toward implementing the provisions of the Ordinance and enjoining the MGCB from taking any action to license for casino gaming any entity selected pursuant to the Ordinance pending a final decision of this Court on the merits. On December 2, 1999, this Court denied the request for preliminary injunctive relief.

The parties subsequently filed cross-motions for summary judgment on the issue of whether the Selection Ordinance violated the First Amendment. By opinion and order dated July 14, 2000, this Court held that the Ordinance did not violate the First Amendment. On January 11, 2002, the Sixth Circuit ruled, in a majority decision, that the preference provision of the Detroit Casino Selection Ordinance was unconstitutional and remanded for further action. *Lac Vieux Desert Band v. Michigan Gaming Control Board*, 276 F. 3d 876 (6th Cir. 2002) ("*Lac Vieux II*"), *cert. denied*, --- S.Ct. ----, 2002 WL 704462, 70 USLW 3656 (U.S. Jun 17, 2002) (NO. 01-1515).

On February 7, 2002, consistent with the Sixth Circuit's opinion, this Court issued an Order granting Plaintiff's motion for partial summary judgment and declaring the Selection Ordinance in its current form unconstitutional. Plaintiff has now filed its motion for further relief. Plaintiff seeks a declaration that casino development agreements and licenses are void

and an order requiring the City to undertake a new casino developer selection process in which Lac Vieux is allowed to participate.

II.

Because this case is before the Court on remand, this Court must consider, as a preliminary matter, whether the Sixth Circuit has given any guidance in its *Lac Vieux II* opinion as to how this Court should address Plaintiff's motion for further relief.

> [U]pon remand of a case for further proceedings after a decision by the appellate court, the trial court must proceed in accordance with the mandate and the law of the case as established on appeal. The trial court must implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces.

United States v. Township of Brighton, 282 F.3d 915, 919 (6th Cir. 2002) (quoting *Brunet v. City of Columbus*, 58 F.3d 251, 254 (6th Cir. 1995)).

The Sixth Circuit stated in *Lac Vieux II* that "[w]ith the preference, the ordinance is fatally unfair, and the casino licenses [sic] Detroit has issued to date are illegitimate." 276 F.3d at 879.[2] The Sixth Circuit also noted that "[b]y employing the preference, Detroit

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[2]The unfortunate use of the term "license" in the Sixth Circuit's opinion has caused some confusion, but it appears that the parties are now in agreement that the Sixth Circuit's reference to the illegitimacy of current "licenses" must be understood to refer to the City's development agreements rather than to the gaming licenses issued by the MGCB. This interpretation of the term "license" in the Sixth Circuit's opinion is undoubtedly correct. Under the Michigan Gaming Control and Revenue Act, M.C.L. § 432.201 *et seq.*, the City's role is to select developers, negotiate development agreements, and present certified development agreements to the MGCB. The MGCB's role is to investigate license applicants, approve or deny casino-related licenses and regulate the casino industry. The MGCB has no role in the City's selection process. The City has no role in, or authority to grant, casino licenses. *Barden Detroit Casino v. Michigan Gaming Control Board*, 230 F.3d

(continued...)

basically sought to end the high-stakes competition for two of the three Detroit casino licenses before it really began. This we cannot allow." *Id.* at 880.

Plaintiff contends that in order to implement this language, this Court must not only declare the Ordinance unconstitutional (as this Court has already done), but must also declare the development agreements and casino licenses to be unlawful and void and to order a "rebidding" of the casino developers. Plaintiff also contends that this language forecloses Defendants' laches claim.

This Court is not convinced that the Sixth Circuit's opinion should be read as a mandate regarding the equitable relief to be issued beyond a declaration that the Ordinance is unconstitutional. It appears to this Court that Plaintiff is improperly confusing the Sixth Circuit's analysis regarding the constitutionality of the Ordinance with the equitable issue of what further relief should now be granted.

"The issuance of an injunction is within the court's equitable discretion." *Charter Twp. of Huron, Mich. v. Richards*, 997 F.2d 1168, 1175 (6th Cir. 1993). "Before resorting to this extraordinary remedy, a court must balance the interests of the parties giving particular attention to the public consequences of a decree." *Id.* (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). "In shaping equity decrees, the trial court is vested with broad

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848, 854 (6th Cir. 2000). The only issue before the Sixth Circuit in *Lac Vieux II* was the constitutionality of the Detroit Ordinance regarding the selection of casino developers. The MGCB had previously been dismissed as a party to the case and the issue of the three developers' eligibility and suitability to hold a casino license was not before the Court of Appeals.

discretionary power." *Lemon v. Kurtzman* ("*Lemon II*"), 411 U.S. 192, 200 (1973) (plurality opinion). "[I]n constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable." *Id.* "In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding that those interests have constitutional roots." *Id.* at 201. An injunction "is not a remedy which issues as of course." *Weinberger*, 456 U.S. at 311 (internal quotations and citation omitted). A federal court "is not mechanically obligated to grant an injunction for every violation of law." *Id.* at 313. The Sixth Circuit accords great deference to the decisions of the district courts with respect to equitable relief. *Blue Cross & Blue Shield Mut. of Ohio v. Blue Cross & Blue Shield Ass'n.*, 110 F.3d 318, 322 (6th Cir. 1997); *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1480 (6th Cir. 1995).

A finding that a statute is unconstitutional does not render everything that was done pursuant to that statute void *ab initio*. As the Supreme Court noted in *Chicot County Draining District v. Baxter State Bank*, 308 U.S. 371 (1940), the actual existence of a statute, prior to a determination that it is unconstitutional "is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration." *Id.* at 374. A court must review the equities to determine what relief flows from a declaration that a statute or ordinance is unconstitutional.

Similarly, a finding that a municipal contract was improperly awarded does not necessarily require injunctive relief. In *Owen of Georgia, Inc. v. Shelby County*, 648 F.2d 1084 (6th Cir. 1981), the court held that the county's failure to justify its rejection of Owen on any permissible ground was clearly wrong and rendered the award of the contract to Pidgeon-Thomas invalid. *Id.* at 1094. While the court recognized that a declaratory judgment and an injunction were the only adequate means of protecting the public interest, the integrity of the competitive bidding process, and the rights of the individual bidder, the Sixth Circuit affirmed the district court's denial of an injunction forbidding the award of the contract to Pidgeon-Thomas. The court noted that because construction of the Criminal Justice Center was substantially complete it was now too late for injunctive relief to be effective. *Id.* *See also Cincinnati Electronics Corp. v. Kleppe*, 509 F.2d 1080 (6th Cir. 1975) (although process for awarding contract was unlawful, court did not set aside the results and instead held that the proper remedy was issuance of a declaratory judgment, and nothing more).

The only issue before the Sixth Circuit in *Lac Vieux II* was the constitutionality of the Ordinance. The Sixth Circuit did not have before it the issue of what equitable relief was appropriate or the facts upon which to base such a determination. The Sixth Circuit did not address the issue of Plaintiff's delay in pursuing injunctive relief or Defendants' detrimental reliance. Neither did the Sixth Circuit provide an analysis of what is necessary, fair or workable. Accordingly, because the issue of injunctive relief was not before the Sixth

Circuit on appeal, because the Sixth Circuit did not attempt to engage in a balancing of the equities, and because the Sixth Circuit accords great deference to the initial ruling of the district court on matters of equitable relief, this Court will not construe the potentially ambiguous language of the Sixth Circuit as a mandate regarding the relief that should be entered in this case.

III.

Plaintiff's request for declaratory and injunctive relief calls on this Court to declare the development agreements void and to order a new selection process pursuant to the Court's exercise of its equitable powers.

This is not the first time this Plaintiff has requested this Court to order a new selection process. On October 21, 1999, Plaintiff Lac Vieux filed a motion for preliminary injunction seeking to enjoin the development and licensing of the casinos selected pursuant to the Ordinance, and a reopening of the bidding process to all on an equal footing, without regard to preferences.

By opinion and order dated December 2, 1999, this Court denied Plaintiff's request for a new selection process, stating:

> Although Plaintiff has shown a strong likelihood of success on the merits of its First Amendment challenge to the Ordinance, Plaintiff has come forward with scant evidence that it has suffered any real harm that would be remedied by the issuance of a preliminary injunction. Because Plaintiff has shown little interest or ability to compete in a Detroit casino enterprise, an injunction would not benefit Plaintiff. It would serve no purpose other than to hurt others, including the casinos and the people of the City of Detroit and the State of Michigan. Furthermore, Plaintiff forfeited any equitable claim for

> injunctive relief by waiting two and a half years before applying for an injunction, all the while knowing that Defendants were making irreversible commitments toward the building, licensing, and opening of the three casinos.

(December 2, 1999, Opinion at 28).

Defendants contend that Plaintiff's motion for further relief should be denied for all the same reasons cited by this Court when it denied Plaintiff's motion for a preliminary injunction. Defendants note that the Sixth Circuit's decision holding the Ordinance unconstitutional does not advance Lac Vieux's claim to injunctive relief because in 1999 this Court assumed Lac Vieux would be successful on the merits. Moreover, Defendants contend the equities now weigh more heavily in their favor because Lac Vieux has waited an additional two years to bring its claim for injunctive relief.

Plaintiff contends that the relief it is seeking now is vastly different from the relief it sought in 1999. In 1999 Plaintiff sought to enjoin the licensing and development of the casinos. Today Plaintiff seeks a new selection process while the casinos continue to be operated by a conservator. Plaintiff contends that the relief it seeks today is different than the preliminary injunctive relief it sought in 1999 because Plaintiff's current request would not cause a loss of jobs or a loss of tax revenues, and the current developers will be able to make a profit from their four-to-six years of operating the temporary casinos. Plaintiff accordingly contends that the Court must conduct a new balancing of the equities.

There has been some discussion as to whether the 1999 opinion must be followed as the law of the case. "The law-of-the-case doctrine bars challenges to a decision made at a

previous stage of the litigation which could have been challenged in a prior appeal, but were not." *United States v. Adesida*, 129 F.3d 846, 850 (6th Cir. 1997) (citations omitted). "A party who could have sought review of an issue or a ruling during a prior appeal is deemed to have waived the right to challenge that decision thereafter, for '[i]t would be absurd that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost.'" *Id.* Because Plaintiff failed to appeal the December 1999 opinion and order denying their motion for preliminary injunction, Defendants contend the December 1999 opinion represents the law of the case.

Plaintiff, however, has presented somewhat contradictory caselaw to the effect that as a general rule, decisions on preliminary injunctions do not constitute law of the case and parties are free to litigate the merits. *William G. Wilcox, D.O., P.C. Employees' Defined Ben. Pension Trust v. United States*, 888 F.2d 1111, 1114 (6th Cir. 1989). "Because of the lesser burden of proof required to support a motion for preliminary injunction as contrasted with a motion for summary judgment, a trial court's disposition of the substantive issues joined on a motion for extraordinary relief is not dispositive of those substantive issues on the merits." *Id.*

While this Court affirms the legal analysis contained in the December 2, 1999, opinion denying preliminary injunctive relief, this Court does not consider itself bound by the factual findings in that opinion, and this Court will reconsider the equities in light of Plaintiff's

modified request for relief and the changes that have occurred subsequent to the Court's December 2, 1999, opinion.

IV.

This Court's first consideration in a balancing of the equities is the harm that Plaintiff will suffer if the requested injunctive relief is not granted.

Plaintiff invokes the familiar principle that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The Sixth Circuit has recently reiterated this general rule:

> This court previously has approved the granting of a preliminary injunction on the grounds that "even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief." The irreparable injury stems from "the intangible nature or the benefits flowing from the exercise of those rights; and the fear that, if these rights are not jealously safeguarded, persons will be deterred, even if imperceptibly, from exercising those rights in the future."

United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Regional Transit Authority, 163 F.3d 341, 363 (6th Cir. 1998) (quoting *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989)) (citations omitted).

The Sixth Circuit has identified Lac Vieux's First Amendment injury as "the disadvantage it faced in the bidding process because it did not support a particular side of a particular political issue." *Lac Vieux I*, 172 F.3d at 407. According to the Sixth Circuit the Ordinance had a chilling effect on political speech:

> The ordinance does create a substantial risk that parties will self-censor, thereby chilling speech. In this case the "chilling effect" arises because the

> statute limits the ability of persons or entities to take a particular political position freely, whether that position may be to support or to oppose a particular proposal or to remain neutral, without fear of being burdened in a subsequent bidding process for having supported the wrong side, or even for having supported *no* side of the given issue.

Id. at 407-08.

As this Court noted in its December 1999 opinion, constitutional harm is not necessarily synonymous with the irreparable harm necessary for issuance of injunctive relief. *Hohe v. Casey*, 868 F.2d 69, 73 (3rd Cir. 1989). In this case the Ordinance's chilling effect on Plaintiff's exercise of political speech has already occurred. The selection process is an accomplished fact. A declaratory judgment has now been entered declaring the Selection Ordinance in its current form unconstitutional. In light of the declaratory judgment, Plaintiff will not suffer First Amendment harm in the future as a result of the unconstitutional Ordinance. The declaratory judgment insures that Plaintiff can exercise its First Amendment rights in the future without fear that it will face some disadvantage because it did not support a particular side of a particular political issue.

In *United Food* the plaintiff union challenged on First Amendment grounds the transit authority's decision to reject the union's proposed wrap-around bus advertising. 163 F.3d at 346. The injunctive relief entered by the court and affirmed on appeal required the transit authority to accept the proposed ad. *Id*. at 346, 364. In *United Food* the relief entered directly addressed the plaintiff's expressive activity. That is not this case.

Plaintiff has not identified how the injunctive relief it currently seeks would help protect its First Amendment rights. Plaintiff has not identified what constitutional rights it will be deterred from exercising if it is not granted a chance to participate in a reselection process. What Plaintiff is seeking through a new selection process is not an opportunity to engage in expressive activity. What Plaintiff seeks is an opportunity to engage in economic activity. Whether it does or does not have that opportunity would not affect Plaintiff's ability or inclination to engage in political speech.

In an attempt to identify on-going constitutional harm, Plaintiff contends that its constitutional rights continue to be violated each time the City modifies, renews or extends the development agreements with the illegally-selected developers. "Each time that the illegitimate development agreements between the City and Intervenors are renewed or extended, Lac Vieux suffers a separate violation of its First Amendment rights, because each renewal or extension constitutes a ratification of the selection process that has been ruled a violation of Lac Vieux's constitutional rights." (Lac Vieux's Reply to Defendants' and Intervenors' opposition to Plaintiff's motion for further relief, at 2). Plaintiff cites *Leach v. Shelby County Sheriff*, 891 F.2d 1241(6th Cir. 1989), in support of the proposition that a governmental entity may be held liable for ratification of unconstitutional acts. *Id.* at 1248. *See also First Dakota Nat. Bank v. St. Paul Fire & Marine Ins. Co.*, 2 F.3d 801 (8th Cir. 1993) ("Void, fraudulent or illegal acts cannot be ratified.").

The Court is not persuaded by Plaintiff's effort to identify new and on-going constitutional injuries. *Leach* is inapposite. In *Leach* the court held that a sheriff's failure to investigate and punish his officers' abuse of paraplegic or physically infirm inmates amounted to a ratification of the officers' illegal acts and was sufficient to constitute the official policy of the county. No similar ratification of illegal acts is present in this case. The City's negotiations with those selected under an Ordinance later found to be unconstitutional does not constitute a ratification of the unconstitutional selection process. The Ordinance that was ruled unconstitutional addressed the selection process. It did not address the management or administration of the casino development agreements once they were entered into. The selection process was completed in 1997 and the three casinos are operating. The selection provisions of the Ordinance no longer play any role. The amendments of the development agreements have involved the adjustment of the on-going business relationship between the City and the developers selected in 1997. They do not involve a reselection of developers or any use of a preference. Accordingly, contrary to Plaintiff's assertions, each revision, extension or modification of the development agreements does not constitute a new violation of the Constitution. Plaintiff's request for further relief must be seen for what it is. Plaintiff is not seeking to prevent future violations of the Constitution. Plaintiff is seeking to reverse the unconstitutional selection process that took place five years ago. The injury was in the selection, not in the on-going development agreements.

The only present and continuing injury Plaintiff seeks to address through entry of the further injunctive relief is the economic harm Plaintiff contends it suffers as a result of not having been able to compete on an "even playing ground" for one of the three casino developer positions. The extent of this economic injury depends on practical realities. It depends on whether Plaintiff would have had a realistic chance at being selected to develop a casino in Detroit in the absence of the preference. Plaintiff would only be economically harmed if it would have been selected as one of the three casino developers. This harm is purely speculative. In December 1999, this Court found no evidence in the record to support Plaintiff's assertion that it was ready, willing and able to compete for a casino in Detroit in 1997. Although Plaintiff argued that the preference prevented it from securing a financial partner, this Court found this argument to be speculative as Plaintiff was unable to present any evidence of a single entity that declined to be a financial partner because of the preference. This Court noted that in order to demonstrate economic harm Plaintiff would have to demonstrate, at the very least, that it had a realistic interest and ability to submit a viable casino development proposal. Plaintiff did not make such a showing in 1999, and it still has not attempted to make such a showing.[3]

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[3]Plaintiff has come forward with evidence that it has agreed to join with Detroit businessman and entrepreneur Don H. Barden in pursuing a casino development should a new casino developer selection process be undertaken by the City of Detroit. (Declaration of Richard McGeshick at ¶ 2). Barden was one of the unsuccessful casino applicants in 1997. *See Barden Detroit Casino, L.L.C. v. City of Detroit*, 59 F. Supp.2d 641 (E.D. Mich. 1999). Plaintiff asserts in conclusory fashion that together Plaintiff and Barden have the ability to submit a competitive proposal for a Detroit casino development. (McGeshick Aff. at ¶ 4).

In connection with the harm to Plaintiff if an injunction does not enter, the Court must consider what Plaintiff has done to protect itself from harm. It appears that although Plaintiff has diligently pursued its First Amendment argument regarding the unconstitutionality of the Ordinance, it has not shown the same attention to its request for injunctive relief.

This Court reviewed this issue of laches in the December 1999 opinion. As noted in that opinion, the City adopted the Ordinance in 1997. In July 1997 Lac Vieux filed a motion for preliminary injunction to stay the selection process. Prior to a hearing on the motion Lac Vieux withdrew the motion for preliminary injunctive relief, and the case was presented to the Court on cross-motions for summary judgment. Lac Vieux appealed this Court's entry of summary judgment in favor of Defendants, but it did not request a stay pending appeal from either this Court or the Court of Appeals. Neither did it seek an expedited appeal.

The case was remanded by opinion dated April 12, 1999, and this Court received the mandate from the Sixth Circuit May 10, 1999. Plaintiff waited until October 1999 to file its motion for preliminary injunction. The motion was denied. Plaintiff did not appeal the denial of the motion although it could have done so under 28 U.S.C. § 1292(a)(1) which permits interlocutory appeals from orders of the district courts granting or denying preliminary injunctions. *See Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1480 (6th Cir. 1995) (noting that in 28 U.S.C. § 1292(a)(1) Congress fashioned a limited exception to the general rule that only final decisions of the federal district courts are reviewable on appeal).

When this Court entered summary judgment in favor of Defendants in 2000, Plaintiff appealed the Court's legal ruling, but once again Plaintiff failed to seek a stay from the Sixth Circuit or an expedited appeal.

One who seeks extraordinary equitable relief must move expeditiously to prevent others parties from making substantial changes in their positions. *Sims Varner Assoc. v. Blanchard*, 794 F.2d 1123, 1128 (6th Cir. 1986). In *Lemon II* the Supreme Court refused to grant an injunction to prevent reimbursement of parochial schools even though the statute authorizing reimbursement had been held unconstitutional on First Amendment grounds. "In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding that those interests have constitutional roots." 411 U.S. at 201. In *Bylinski v. Allen Park*, 169 F.3d 1001 (6th Cir. 1999), the Sixth Circuit affirmed the denial of injunctive relief where the plaintiffs had waited three years after first being assessed for the costs of sewer improvements to challenge the tax, and in the interim bonds had been sold and the sewer project was 85% complete. *Id.* at 1003. In *Sims Varner* the Sixth Circuit refused to nullify an allegedly unconstitutional architectural contract selection process where the plaintiff did not timely appeal the denial of the preliminary injunction and did not seek a stay pending appeal. Because the contract was substantially complete, the court found that awarding the contract to the plaintiff at such a late date would penalize the taxpayers of the state. 794 F.2d at 1128.

Because Plaintiff has not acted expeditiously to prevent others parties from making substantial changes in their positions, because Plaintiff has not shown that injunctive relief is necessary to prevent any further First Amendment harm, and because Plaintiff has not come forward with evidence that Plaintiff was ready, willing or able to submit a viable casino development proposal in 1997, the Court attaches very little weight to Plaintiff's assertion that it will suffer irreparable harm in the absence of the type of further relief it is requesting.

V.

When faced with the task of fashioning an equitable remedy, the Court must carefully consider not only the interests of the plaintiff who was injured, but also the legitimate expectations of others who are innocent of any wrongdoing. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 372 (1977).

The current casino developers are all innocent parties. All of them submitted detailed proposals pursuant to the Ordinance which satisfied, without regard to the preference, the City's stringent requirements for the highest quality, financially sound proposals that would, among other things, provide new employment opportunities and serve as a catalyst for economic development in the City. *See* Detroit City Code, § 18-13-1(a)-(j). There is no suggestion that any of the developers is legally responsible for enacting the Ordinance with its unconstitutional preference provision. In reasonable reliance on the validity of their selection under the Ordinance, all of the developers have expended enormous funds in the planning, development and construction of their casinos. There is no question that all of the developers would be adversely affected if the Court were to grant the relief Plaintiff requests.

Atwater is a member of Detroit Entertainment, L.L.C., which owns the MotorCity Casino. Atwater has presented evidence that it spent hundreds of millions of dollars to develop and construct the MotorCity Casino at its temporary facility. MotorCity developed its plans in anticipation that the business conducted at the permanent facility will be the same as that conducted at the existing "temporary" facility, utilizing the same management, employees, books, records, customer lists, and goodwill and much of the same equipment. (Affidavit of David Belding at ¶ 6). Atwater is now making plans to expand its operations at or near its current location, with added parking, numerous restaurants, retail space, convention space, a theater, hotel rooms, and gaming space. (Belding Aff. at ¶ 7). In addition to the substantial amount of time and money spent on development of the casino itself, Detroit Entertainment has offered evidence that it has committed to spending substantial sums on various business development projects in the City, has donated to numerous non-profit and charitable organizations in the City, and has paid millions of dollars to the State and the City in wagering taxes and fees, regulatory fees, and municipal service fees. (Affidavit of Rhonda Cohen at ¶¶ 19-22).

The Sault Tribe is the majority owner of the Greektown Casino. (Affidavit of William P. Connolly at ¶ 2). Members of the Sault Tribe have filed affidavits regarding the significant financial obligations the Sault Tribe has incurred for the Greektown Casino. Greektown has incurred costs exceeding half a billion dollars in pursuing its casino through the RFP/Q phases, negotiation of the development agreement with the City, licensing through

the MGCB, construction, opening and operation of Greektown Casino, and obtaining financing commitments for future casino development, all in reliance on the City's selection process. (Affidavit of Bruce Dall at ¶¶ 20, 26; Affidavit of Bernard Bouschor at ¶ 5). These financial obligations must be paid regardless of whether Greektown retains its license. (Connolly Aff. at ¶¶ 10-11). The Sault Tribe has forgone numerous other business opportunities in order to participate in the Greektown Casino project. (Affidavit of Marta Diaz at ¶ 21; Connolly Aff. at ¶ 13). Significant funds have been expended in attracting customers from the other casinos as well as new customers, achieving customer loyalty and brand recognition and training an experienced work force. (Bouschor Aff. at ¶ 5). Servicing the debts without Greektown Casino revenues is expected to require reductions in government expenditures, leading to reductions in tribal staff and curtailment of government services such as law enforcement, health care, housing, elder care, and the like. (Connolly Aff. at ¶ 12).

Although Plaintiff recognizes that MGM did not receive a preference under the Detroit Ordinance, Plaintiff is seeking a declaration that all three developers' development agreements and casino licenses are unlawful, an injunction against all three developers from operating their casinos, and an injunction requiring the City to put all three development agreements up for a new selection process. Plaintiff's proposed relief is particularly inequitable with respect to MGM. MGM was not eligible for, did not seek, and did not

receive any preferential treatment in the casino selection process. MGM was as much a victim of the preference provision as was Plaintiff.

According to the MGCB, the harm to the State outlined in this Court's December 1999 opinion denying Plaintiff's request for a preliminary injunction is still valid. The MGCB contends that any disruption of the continued operation of the three Detroit casinos will negatively affect State revenues and will nullify five years of lawful good faith State action intended to implement the Gaming Control and Revenue Act.

In viewing the equities, it is important to note that although Plaintiff challenged the constitutionality of the Ordinance in 1997, neither the City nor the selected casino developers acted in bad faith in operating under the presumption that the Ordinance was valid. As this Court observed in its December 1999 opinion:

> The Supreme Court, observing that state officials are entitled to rely on a presumptively valid state statute, rejected the argument that the state acted at its own risk when it proceeded to act under the statute despite the constitutional cloud over it. [*Lemon II*], 411 U.S. at 208-09. Although the statute had been under a constitutional cloud from the outset, and although it had ultimately been struck down on constitutional grounds, the Supreme Court found no need to prevent the State from expending the funds it had committed prior to the determination that the statute was unconstitutional. State officials should not be required to "stay their hands until newly enacted state programs are 'ratified' by the federal courts, or risk draconian, retrospective decrees should the legislation fall." *Id.* at 207.

December 1999 opinion at 23-24.

There is no evidence that the City acted in bad faith in enacting the Ordinance with the preference provision. A similar preference was also contained in the original State Act.

Plaintiff did not raise the First Amendment argument until a month before the City made the final selection of developers.[4] The City has legitimate concerns about the adverse effects of a new selection process. The City contends that the successful operation of the casinos has become crucial to the economic revitalization of the City. The casinos employ more than 8,000 people and generate approximately one hundred million dollars a year in tax revenue and fees for the City, which represents roughly 8% of the City budget. (Declaration of Kwame Kilpatrick at ¶ 5; Roger Short Affidavit at ¶¶ 4-7). The permanent casino complexes will bring more jobs, revenue and vitality to the City. (Kilpatrick Decl. at ¶ 6). Bringing finality to the casino project is also important so that the City can turn its attention to other important problems. (Kilpatrick Decl. at ¶ 8). An injunction closing the casinos or appointing an interim conservator would jeopardize the viability of the existing casinos and would create a hornet's nest of problems, including new lawsuits. (Kilpatrick Decl. at ¶ 9). The City cannot afford the disruption of going through a lengthy selection process again, particularly when it is likely to result in several more years of litigation and delay in bringing the permanent casino complexes on line. (Kilpatrick Decl. at ¶ 10).

Plaintiff suggests that Defendants' concerns are overstated. According to Plaintiff, the time is ripe for the Court to step in and order a new selection process because the current developers are still operating out of their temporary facilities and have not yet begun

[4]As noted in this Court's December 1999 opinion, the Ordinance was upheld against First Amendment challenge by two district courts. December 2, 1999, opinion at 23.

construction of permanent facilities or hotels. Plaintiff contends that the economic harm will be avoided by appointment of a conservator. With a conservator running the casinos, the casinos will remain in operation, no jobs will be lost, and the City will not lose its tax revenues. Plaintiff contends that even the current casino owners need not be concerned because their economic interests can be protected by a reimbursement provision.

Plaintiff's belief that appointment of a conservator can eradicate the harm to the current developers and the City is simplistic and unrealistic. The MGCB, appearing as an amicus in this phase of the case, has clarified that appointment of a conservator to operate the casinos will not result in a seamless transition from operation by licensees to operation by an independent third party. Although the Michigan Gaming Control Act has a provision for appointment of conservators, that provision is designed to appoint a conservator as a short-term fiduciary to wind up and sell assets, not to operate a casino indefinitely. Moreover, that provision does not define how the conservator will be paid. Appointment of a conservator presents a host of practical problems, including the termination of current licenses through administrative evidentiary hearings, locating and qualifying three conservators, determining how the existing developers are to be compensated for the confiscation of their property, transferring of title, and determining how to compensate the conservator. A determination would have to be made as to how many conservators would be appointed. Any conservator would need to be qualified, a process that would be time consuming. Furthermore, because any entity that is experienced and capable of running a

casino would likely be a competitor of the current casino developers, raising concerns on the part of the current developers regarding the conservator's access to its competitor's systems, data, and trade secrets. There are also concerns about what the appointment of a conservator would mean to the current developers' financing. Would lenders foreclose? Even after conservators are in place, operations of the casinos could be adversely affected by transitional difficulties, loss of efficiency, loss of brand marketing, employee demoralization and public uncertainty.

Because there are so many questions and uncertainties surrounding the appointment of a conservator, there is a strong possibility of lawsuits at every turn. The process will undoubtedly result in additional litigation, burdens on State government and the expenditure of limited State resources.

The fact that construction of the permanent facilities has been delayed until now does not suggest that this is an appropriate time to engage in a reselection of developers. The development agreements contemplated a continuous, on-going relationship between the City and the developers absent a default. (Affidavit of C. Beth DunCombe. at ¶¶ 11 & 16). There is no suggestion that any of the developers have defaulted in their obligations under the development agreements. Although construction has not begun on the permanent facilities, planning for these facilities has been in progress since the developers were selected in 1997. When the casino developers were selected in 1997, it was understood that they would be developing permanent casinos with hotel and convention facilities. (DunCombe

Aff at ¶¶ 4-5).[5] Allowance was made for the construction of temporary facilities until such time as the City of Detroit was able to obtain the Riverview Site where the permanent facilities would be located. (DunCombe Aff. at ¶¶ 8-9). The City of Detroit has not been able to obtain the property, so the parties have been required to renegotiate the location and timing for the development of the permanent facilities. (DunCombe Aff. at ¶¶ 13-15).

The fear that a reselection process would significantly delay the construction of the permanent facilities is not speculative. Although Plaintiff assumes that it will be the only other bidder besides the three current developers, Plaintiff has offered no basis for this assumption. Given the stakes involved, if the reselection were limited in this fashion, suits can be expected from those who contend their rights were violated by the preference given to Plaintiff. If the reselection were reopened to all who are interested, or to only those who bid in 1997, the experience from the 1997 selection process teaches that the City can expect lawsuits from those who choose not to participate (claiming the terms and conditions are unfair) as well as from those who participate but are not selected. Prior experience also teaches that a reselection process could take months, followed by months of negotiating the terms of the new development agreements, followed by more months of state investigations and hearings in the licensing phase.

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[5]C. Beth DunCombe was the President and C.E.O. of Detroit Economic Grown Corporation from March 1996 to January 2002, and was Chair of Mayor Archer's Casino Advisory Committee. (DunCombe Affidavit at ¶ 2).

The delay in bringing the permanent casinos online and the uncertainties that would be generated by a new selection process would affect the viability of the current casinos and undermine the economic revitalization of the City. Even if the current casino developers were ultimately reselected under a new process, they would suffer from the extra costs, delays and loss of goodwill that would accompany any interruption in their own operation of their casinos.

VI.

The public undoubtedly has an interest in knowing that the right to bid on public contracts is not conditioned on the relinquishment of First Amendment rights. As noted above, this public interest is addressed by the declaratory judgment. A reselection process is not essential to insuring that an unconstitutional preference is not used in the future.

The public has other interests that would be adversely affected by a reselection process. The public has an interest in the jobs, taxes, and revenue currently being generated by the three operating casinos. The public has an interest in the timely construction of the permanent casino complexes with their convention and hotel facilities. The public also has an interest in the constructive use of public funds and in not having public funds wasted in an academic reselection process.

VII.

The further relief Plaintiff is requesting is not likely to benefit Plaintiff. Plaintiff has never been able to show that there was any likelihood that it would be selected as a casino developer in the event that the selection process were begun anew.

The equities are no more in Plaintiff's favor today than they were when this Court denied Plaintiff's request for preliminary injunctive relief in 1999. In fact, because Plaintiff did not pursue its request for injunctive relief after 1999, the equities have tipped further in favor of the Defendants who have continued to make irreversible economic commitments in support of their casino development projects.

A balancing of the hardships reveals that the extraordinary further relief Plaintiff is now seeking is not warranted. A rebidding of the development agreements would harm the current casino developers even though they were not legally responsible for the unconstitutional Ordinance. Because there is no guarantee, or even any likelihood, that Plaintiff would be successful in a rebidding process, the harm to the innocent casino developers would be manifestly worse than any benefit Plaintiff would achieve by the reselection process. For all its diligence in pursuing its claim that the Ordinance was unconstitutional, Plaintiff has not been vigilant in asserting its request for a reselection process. As a result, Defendants have reasonably changed their position throughout the five years of this litigation to such a degree that restarting the selection process, with all the uncertainties that entails, would be manifestly unfair. Simply put, the egg cannot be

unscrambled at this late date. Plaintiff has already achieved substantially all of the relief it has requested. The Ordinance, with the preference, has been declared unconstitutional. That is all the relief that this Court can equitably give Plaintiff.

Accordingly, for all the reasons stated above, Plaintiff's motion for further relief will be denied. The Court will, however, entertain a motion for reimbursement of reasonable attorney fees pursuant to 42 U.S.C. § 1988 based upon Plaintiff's success on its legal challenge to the constitutionality of the Detroit Ordinance.

MGM has filed a cross-motion for summary judgment, contending that it is entitled to a ruling that its selection as a casino developer by the City of Detroit was, and is, valid because MGM was not eligible for, did not seek, and did not receive any preferential treatment in the casino selection process. In light of this Court's conclusion that Plaintiff is not entitled to further declaratory or injunctive relief against any of the three current developers, this Court finds it unnecessary to address MGM's request for independent relief.

An order consistent with this opinion will be entered.

Date: July 9, 2002

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, a federally recognized Indian Tribe,

Plaintiff,

v.

THE MICHIGAN GAMING CONTROL BOARD, et al.,

Defendants.
_____/

File No. 2:97-CV-67

HON. ROBERT HOLMES BELL

ORDER RE FURTHER RELIEF

In accordance with the opinion entered this date,

IT IS HEREBY ORDERED that Plaintiff's motion for further relief (Docket # 221) is **DENIED**.

IT IS FURTHER ORDERED that Defendant-Intervenor MGM Grand Detroit, L.L.C.'s motion for summary judgment and declaratory judgment as to MGM (Docket # 249) is **DENIED** as moot.

IT IS FURTHER ORDERED that Plaintiff may file a motion for attorney fees within thirty days of this order.

Date: July 9, 2002

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
CHIEF UNITED STATES DISTRICT JUDGE