UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

KG URBAN ENTERPRISES, LLC
Plaintiff,

v.

DEVAL L. PATRICK, in his official capacity as Governor of the Commonwealth of Massachusetts, and the CHAIRMAN AND COMMISSIONERS OF THE MASSACHUSETTS GAMING COMMISSION, in their official capacities,
Defendants.

Civil Action No. 1:11-CV-12070-NMG

DEFENDANTS' OPPOSITION TO THE MOTION FOR A PRELIMINARY INJUNCTION

MARTHA COAKLEY
ATTORNEY GENERAL OF MASSACHUSETTS

Kenneth W. Salinger (BBO # 556967)
Assistant Attorney General, Government Bureau
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
617.963.2075
ken.salinger@state.ma.us

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Introduction and Summary of Argument.

Plaintiff KG Urban Enterprises, LLC, is not entitled to a preliminary injunction that would bar Commonwealth of Massachusetts officials from implementing a new law authorizing casinos, or even to a more limited injunction barring implementation of the few statutory provisions that KG claims are unconstitutional on their face. KG challenges provisions of Mass. St. 2011, c. 194, (the "Act") that address: authority to negotiate a compact with a federally-recognized Indian tribe to govern casino gambling on any Indian lands that exist or may be acquired in Massachusetts; the implications of such a compact for the licensing of any other casino in southeastern Massachusetts; and the composition of a new Gaming Policy Advisory Committee. But KG has not met its burden of proving that it is entitled to any preliminary injunctive relief.

"A preliminary injunction is an 'extraordinary and drastic remedy,' that 'is never awarded as of right.' " *Voice of the Arab World, Inc. v. MDTV Medical News Now, Inc.*, 645 F.3d 26, 32 (1st Cir. 2011) (citations omitted) (quoting *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008)) (vacating preliminary injunction). "Rather, as the Supreme Court recently reaffirmed, '[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.' " *Id.* (quoting *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008)). KG has not done so.

I. KG's claims are not ripe. KG claims that if the Governor were to negotiate and the Legislature were to approve a new Tribal-State compact by July 31, 2012, or if the yet-unnamed members of the new Massachusetts Gaming Commission were to award a casino license in the northeastern or western portions of Massachusetts before doing so in the southeastern region, then § 91 of the Act would be unconstitutional. But these claims are based on mere speculation about future events that may never take place. The Court therefore has no jurisdiction to grant preliminary or permanent relief. See page 8, below.

II. KG would have little chance of prevailing even if all its claims were ripe. Pages 8-18.

II.A. On their face, the challenged provisions satisfy the constitutional requirements of equal protection. The Act is subject to rational basis review, not strict scrutiny. Pages 9-13.

It does not contain any race-based classification that treats Native Americans differently than other people. Instead, the compact-related provisions distinguish between federally-recognized Indian tribes and the rest of the world (including individual Native Americans as well as any entity owned or controlled by Native Americans that is not a federally-recognized tribe). This distinction is political, not racial. Pages 10-11. Furthermore, the Massachusetts Legislature has merely followed the direction of Congress in the federal Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*, ("IGRA") with respect to tribal casinos on Indian lands. Pages 11-13. And those provisions all have rational bases; indeed, KG makes no claim to the contrary. Pages 13-15.

II.B. Nor is KG likely to succeed on its claim that the Act conflicts with IGRA. The Supreme Court has held that IGRA cannot be enforced in an action seeking injunctive relief against State officials; as a result, the Court lacks jurisdiction to consider this claim. Page 15. In any case, nothing in the Act conflicts with IGRA. The Act authorizes a Tribal-State compact, as Congress expressly provided in IGRA. But if a compact is negotiated, the tribe will not be able to open a casino unless it receives the federal approvals required by IGRA. KG's argument to the contrary is based on a misreading of the Act. Pages 16-17. If the court had jurisdiction and found KG's misreading of the Act to be a plausible interpretation, then *Pullman* abstention would be required and Massachusetts courts would have to construe the Act in the first instance. Pages 17-18.

III. KG has also not met its burden of showing that it would suffer irreparable harm in the absence of preliminary injunctive relief. The Act does not bar KG from seeking a casino license on the basis of race. Nor has KG proved that the Act, on its face, renders KG's investment in a New Bedford site worthless. Pages 18-19.

IV. The motion should also be denied because the requested injunction would harm the public interest, identified by Congress and the Massachusetts Legislature, in having the Commonwealth move forward with attempting to negotiate a Tribal-State compact and implementing the other portions of the Act. Pages 19-20.

V. In any case, the statutory provisions challenged by KG are severable, and thus KG could not even in theory obtain an injunction barring implementation of the entire Act. Page 20.

Summary of Factual and Legal Background.

1. KG's Casino Gamble and the New Massachusetts Gaming Act.

KG made a bet years ago that the Commonwealth might someday authorize one or more casinos.[1] Until last month casinos were illegal in Massachusetts.[2] KG nonetheless bought an option on a New Bedford site in February 2007 and has invested in plans to develop that site as a casino, in hope that someday KG might get a license to do so.[3] KG believed it would get a significant competitive advantage if it could open the first casino in Massachusetts.[4]

The Massachusetts Legislature authorized several casinos in a statute that Governor Patrick signed into law on November 22, 2011.[5] (A copy of the Act is attached.[6]) KG filed suit challenging the Act a few hours later. It claims that certain provisions of the Act are unconstitutional on their face and could result in KG missing out on the first-mover advantage it had hoped for.[7]

The Act establishes a new Massachusetts Gaming Commission and authorizes it to issue one license to operate a gaming establishment with up to 1,250 slot machines and no table games (a "category 2" license) and to issue up to three licenses to operate casinos with both slot machines and table games ("category 1" licenses).[8] Each category 1 license must be in a different region of the state.[9] KG's site in New Bedford is in Region C, which consists of Bristol, Plymouth, Nantucket, Dukes, and Barnstable counties.[10]

The Commission has "full discretion as to whether to issue a license."[11] It need not award any licenses if it "is not convinced that there is an applicant that has both met the eligibility criteria and provided convincing evidence that the applicant will provide value" to the Commonwealth (for the category 2 license) or region (for category 1 licenses).[12]

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1 Compl. (doc. no. 1) ¶¶ 44-48.
2 Compl. (doc. no. 1) ¶ 9.
3 Compl. (doc. no. 1) ¶¶ 44-49; Stern Decl. (doc. no. 9-2) ¶¶ 8-20.
4 *Cf.* Compl. (doc. no. 1) ¶ 52; Gallawy Decl. (doc. no. 9-3) ¶¶ 15-17.
5 Compl. (doc. no. 1) ¶¶ 1, 9.
6 A searchable electronic version is available at: http://www.malegislature.gov/Laws/SessionLaws/Acts/2011/Chapter194 (last visited December 8, 2011).
7 Compl. (doc. no. 1) ¶¶ 51-80.
8 *See* Mass. Gen. L. c. 23K, §§ 2, 19, 20 (as added by Mass. St. 2011, c. 194, § 16).
9 Mass. Gen. L. c. 23K, § 19(a).
10 Mass. Gen. L. c. 23K, § 19(a); Compl. (doc. no. 1) ¶¶ 18, 52-53.
11 Mass. Gen. L. c. 23K, § 17(g).
12 Mass. Gen. L. c. 23K, §§ 19(a) & 20(a).

2. The Statutory Provisions Regarding a Possible Tribal-State Compact Were Adopted In Accord with the Federal Indian Gaming Regulatory Act.

The Legislature crafted the Act to work in harmony with IGRA, which allows federally-recognized Indian tribes to open casinos with slot machines and table games ("class III gaming") on "Indian lands" in any State that permits such gaming.[13] Congress passed IGRA in part to "promot[e] tribal economic development, self-sufficiency, and strong tribal government," and provide "a means of generating tribal revenue."[14] It did so in recognition that "Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local governance."[15] "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."[16]

IGRA provides that a tribe wishing to conduct class III gaming must ask the State to negotiate a Tribal-State compact governing such activities, and directs the State to negotiate "in good faith to enter into such a compact."[17] The compact may address, among other things, "the allocation of criminal and civil jurisdiction between the State and the Indian tribe" on Indian lands where the tribe wishes to conduct class III gaming, and the application of State and tribal law to regulate such gaming activity.[18] Once such a compact is negotiated, the tribe may engage in class III gaming if the compact is approved by the Secretary of the Interior and such gaming is authorized by the tribe in an ordinance or resolution that is approved by the Chairman of the National Indian Gaming Commission.[19] There are two federally-recognized tribes in Massachusetts and both may want to open a casino in the southeastern part of the state.[20]

The Legislature was aware that the tribes may be able to open a casino even if the Commonwealth refused to negotiate a compact.[21] In 1996 the Supreme Court held that a suit to

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[13] *See* 25 U.S.C. § 2710(1).

[14] 25 U.S.C. § 2702(1) & (3).

[15] *See State of Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 701 (1st Cir.), *cert. denied*, 513 U.S. 919 (1994) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978), and *Worcester v. Georgia*, 31 U.S. (6 Pett.) 515, 559 (1832)) (applying IGRA).

[16] *Id.* (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978)).

[17] 25 U.S.C. § 2710(3)(A).

[18] 25 U.S.C. § 2710(3)(C)(i) & (ii).

[19] 25 U.S.C. § 2710(d)(1)(A) & (d)(3)(B); Compl. (doc. no. 1) ¶¶ 37-38.

[20] Compl. (doc. no. 1) ¶ 20.

[21] The Legislature is presumed to be aware of federal statutes when it enacts related state statutes. *See, e.g., Mulhern v. MacLeod*, 441 Mass. 754, 760, 808 N.E.2d 778, 782 (2004).

enforce the States' IGRA duty to negotiate a compact in good faith could only be brought against States that consent to be sued and may not be brought against any State official.[22] In response, the Secretary of the Interior adopted regulations under which a tribe may seek federal approval of class III gaming on Indian lands, in a State that permits such gaming, even if the Tribe and State do not enter into a compact and the State asserts its immunity from suit to enforce IGRA.[23] KG notes that the Mashpee Wampanoag Tribe currently possesses no Indian lands in Massachusetts.[24] "Indian lands" include lands within an Indian reservation or held in trust by the United States for benefit of a tribe.[25] But the Legislature knew that if the tribe could obtain land and convince the United States to take it into trust, then the tribe may be able to obtain federal approval to engage in class III gaming even if the Commonwealth refused to negotiate a compact.[26] This could leave the Commonwealth unable to regulate gaming on any Indian lands.

To address this possibility, and consistent with IGRA, the Legislature included a provision in the new Act (section 91) that authorizes the Governor—with help from the Commission if he wants it—to negotiate "a compact with a federally recognized tribe in the commonwealth" that "has purchased, or entered into an agreement to purchase, a parcel of land" to be used as a casino and has "scheduled a vote in the host communities for approval" of the casino.[27] Any such compact must be approved by the Legislature.[28] If a tribe enters into a compact with the Commonwealth, then the tribe will be able to open a casino if it also obtains federal approval and

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[22] *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

[23] *See* 25 C.F.R. §§ 291.1 to 291.15. There is a split of authority as to whether these regulations are valid. *Compare Seminole Tribe of Florida v. Florida*, 11 F.3d 1016, 1029 (11th Cir. 1994) (holding that Secretary may promulgate such regulations), *aff'd on other grounds*, 517 U.S. 44, 76 n.18 (1996) (stating that Court expressed no opinion on whether Secretary may provide such a remedy), and *Santee Sioux Nation v. Norton*, 2006 WL 2792734, *6 (D.Neb. 2006) (upholding 25 C.F.R. § 291.1 *et seq.*), *with Texas v. United States*, 497 F.3d 491 (5th Cir. 2007) (holding 2-1 that Secretary lacked authority to promulgate these rules); *but see Texas*, 497 F.3d at 513-526 (Dennis, J., dissenting) (concluding that Secretary had authority under IGRA to promulgate these rules).

[24] Compl. (doc. no. 1) ¶¶ 20, 22.

[25] 25 U.S.C. § 2703(4); Compl. (doc. no. 1) ¶ 41.

[26] A tribe may only engage in gaming on lands acquired by the Secretary in trust for the tribe after October 17, 1988, if the Secretary "determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community," and the Governor of the State concurs. 25 U.S.C. §2719(b)(1)(A). The Act reflects a finding that, in general, gaming establishments in Massachusetts would not harm surrounding communities.

[27] St. 2011, c. 194, § 91(a)-(c).

[28] St. 2011, c. 194, § 91(d).

meets the other requirements of IGRA; no state license would be necessary, as a matter of federal law.[29]

Recognizing that any tribal casino opened in accord with IGRA is likely to be in the southeastern part of Massachusetts, the Legislature provided that if no compact has been approved by the Legislature by July 31, 2012, then the Commission shall issue a request for applications for a category 1 license in Region C by October 31, 2012.[30] If a compact is negotiated but "the commission determines that the tribe will not have land taken into trust by the United States Secretary of the Interior," the Commission shall then request such applications.[31] Thus, the Legislature recognized that, under IGRA, tribes may only open a class III casino on Indian lands.

3. It Will Be Some Time Before The Commission Can Issue Any Category 1 License.

Even without regard to § 91 of the Act, it is unlikely that the Commission would be in any position to consider applications for a Class 1 license in Region C before late 2012. The Commission will consist of five members, four of whom have not been appointed.[32] The initial appointments must be made by March 21, 2012.[33] The Governor, Attorney General, and Treasurer will each appoint one Commissioner, and a majority of those three constitutional officers will appoint the other two Commissioners.[34] No person may be appointed without undergoing a background check.[35] The Attorney General and Treasurer are accepting applications for the two positions they will fill until January 9, 2012.[36] The Governor, Attorney General, and Treasurer will be hiring a search firm to identify candidates for the two positions that will be filled by majority vote; that search firm will probably not be retained until late December 2011.[37] Once the five Commissioners are appointed, they must promulgate regulations to prescribe the form of any license applications, the information that applicants must provide, and the criteria that the

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29 *See* 25 U.S.C. § 2710(d).
30 St. 2011, c. 194, § 91(e).
31 *Id.*
32 *See* Mass. Gen. L. c. 23K, § 3. The Governor appointed the Chairman on December 13, 2011.
33 *See* Mass. St. 2011, c. 194, § 88.
34 Mass. Gen. L. c. 23K, § 3(a).
35 *Id.*
36 Salinger Aff. Ex. A (announcements of selection process for these positions).
37 Salinger Aff. Ex. B (announcement of selection process for search firm).

Commission will use to evaluate applications, among other things.[38] Then, by law, the Commission must first issue a request for applications for the category 2 license (i.e. slot machines only) before it even begins the process of seeking category 1 applications.[39]

It will take even longer for the Commission to issue any license. The Commission must first hire staff for its investigations and enforcement bureau.[40] By law the Commission cannot consider any license application until after the bureau investigates the suitability of the applicant; any partner, officer, director, manager, affiliate, or close associate of the applicant; and anyone with a financial interest in the proposed gaming establishment.[41] The Commission must then review the application, decide whether to request independent evaluations, conduct a public hearing, and issue a detailed statement of findings regarding each application.[42] Only after completing all that work may the Commission exercise its discretion to issue a gaming license.

4. KG Claims that Three Parts of the Act Are Unconstitutional on their Face.

KG asserts facial constitutional claims against three parts of the Act. First, it challenges § 91, which authorizes negotiation of a Tribal-State compact and is described above.[43] Second, KG challenges the Legislature's appropriation of $5 million for any and all costs of beginning to implement the Act, including but not limited to negotiating a compact with a federally-recognized tribe to establish a tribal casino in Region C.[44] Third, it also challenges a provision stating that one of the fourteen members of the new Gaming Policy Advisory Committee "shall be a representative of a federally recognized Indian tribe in the commonwealth."[45]

Although KG does not challenge any other parts of the 104-page statute, it seeks a preliminary injunction barring implementation of any provision of the Act.[46] In the alternative, KG asks the Court to enjoin the specific statutory provisions that KG actually challenges.[47]

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38 Mass. Gen. L. c. 23K, § 5(a)(1)-(4).
39 Mass. Gen. L. c. 23K, § 8(a).
40 Mass. Gen. L. c. 23K, § 6.
41 Mass. Gen. L. c. 23K, §§ 12 & 14.
42 Mass. Gen. L. c. 23K, §§ 12(c), 17, 18.
43 Compl. (doc. no. 1) ¶¶ 58, 65, 69-71, 75-80.
44 St. 2011, c. 194, § 2A, item 0411-1004; Compl. (doc. no. 1) ¶ 59.
45 St. 2011, c. 194, § 68(a); Compl. (doc. no. 1) ¶ 62.
46 *See* KG's Motion for Preliminary Injunction (doc. no. 2) at 1.
47 KG's Memorandum (doc. no. 9) at 44-45.

Argument.

I. THE CLAIMS REGARDING SECTION 91 OF THE ACT ARE NOT RIPE, AND THUS THE COURT LACKS JURISDICTION TO CONSIDER THEM OR GRANT INJUNCTIVE RELIEF.

KG's challenge to § 91 of the Act is not ripe. "[A] 'claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *City of Fall River v. Federal Energy Regulatory Comm'n*, 507 F.3d 1, 6 (1st Cir.2007) (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)). And KG cannot obtain preliminary injunctive relief based on an unripe claim. *E.g., Doe v. Bush*, 323 F.3d 133, *reh. denied*, 322 F.3d 109 (1st Cir. 2003). Indeed, the Court lacks Article III jurisdiction to consider an unripe claim. *E.g., Gilday v. Dubois*, 124 F.3d 277, 295 (1st Cir. 1997), *cert. denied*, 524 U.S. 918 (1998).

KG's main concern is that if the Commonwealth were to negotiate a Tribal-State compact, and if the tribe were to obtain federal approval to operate a casino in Region C, then KG may never have a chance to seek a category 1 license for its New Bedford site.[48] But that fear is entirely conjectural. It is quite possible that no compact will be negotiated by July 31, 2012, or that the Commission will determine that the United States is unlikely to take land into trust for the tribe. KG could then apply for a category 1 license in Region C. *See* St. 2011, c. 194, § 91(e).

KG's secondary concern, that in the absence of any Tribal-State compact the Commission might accept and act upon applications for category 1 licenses in Regions A and B before getting around to Region C, is just as speculative.[49] As explained above (at pages 6-8) it is quite possible that the Commission will consider applications for all three regions at the same time, in late 2012.

"Facial challenges" to the constitutionality of statutes "are disfavored for several reasons," including that they "often rest on speculation." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008). KG's claims in this case are a paradigmatic example.

II. EVEN IF THE CLAIMS WERE RIPE, KG IS UNLIKELY TO SUCCEED ON THE MERITS.

Even assuming that KG was asserting ripe claims, its motion for preliminary injunction would have to be denied because KG has no likelihood of success on the merits. *See, e.g., United States v. Weikert*, 504 F.3d 1, 5 (1st Cir. 2007) (reversing preliminary injunction on this ground).

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[48] *See* Compl. ¶ 51; KG's Memorandum (doc. no. 9) at 1-3, 11, 16, 39-41.

[49] *See* Compl. ¶ 52; KG's Memorandum (doc. no. 9) at 16, 40.

A. The Equal Protection Claims Have No Chance of Success.

1. The Challenged Provisions Are Subject Only to Rational Basis Review.

KG cannot succeed on its claim that the Act may give a federally-recognized Indian tribe a "region-wide race-based monopoly" and therefore is subject to strict scrutiny under the equal protection provisions of the United States and Massachusetts constitutions.[50] The Act's provisions concerning a Tribal-State compact do not create a suspect race-based classification, as a matter of law.

The rational basis test would apply here, and the more stringent strict scrutiny test would not, even if the Act could result in a federally-recognized tribe opening the only casino with both slot machines and table games in Region C. *See Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 731-736 (9th Cir. 2003), *cert. denied*, 543 U.S. 815 (2004); *United States v. Garrett*, 122 Fed.Appx. 628, 632-633 (4th Cir. 2005); *Flynt v. California Gambling Control Comm'n*, 104 Cal.App.4th 1125, 1141, 129 Cal.Rptr.2d 167, 179 (Cal. Ct. App. 1st Dist. 2002), *rev. denied* (Cal.), *cert. denied*, 540 U.S. 948 (2003). KG's rhetoric of "monopoly" is irrelevant; even if the Act gave tribes a monopoly, which it does not,[51] that would have "no bearing on identifying the appropriate standard under which to review the state law." *Artichoke Joe's*, 353 F.3d at 736 n.19.

Artichoke Joe's and *Flynt* applied rational basis review, and rejected equal protection challenges, to California laws that gave federally-recognized tribes the exclusive right to open casinos anywhere in the state, by allowing class III gaming on Indian lands under Tribal-State compacts negotiated pursuant to the IGRA while continuing to bar such casinos anywhere outside of Indian lands. *Artichoke Joe's*, 353 F.3d at 731-742; *Flynt*, 104 Cal.App.4th at 1129-1146, 129 Cal.Rptr.2d at 170-183. *Garrett* did the same with respect to similar North Carolina laws. *Garrett*, 122 Fed.Appx. at 630-633.

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[50] *See* KG's Memorandum (doc. no. 9) at 18-23; Compl. (doc. no. 1) ¶¶ 54-71.

[51] The unsupported reference by KG to a southeastern Massachusetts "monopoly" cannot be squared with KG's assertions that "Massachusetts is a single market" for gaming. KG's Memorandum (doc. no. 9) at 16; *see also* Compl. (doc. no. 1) ¶ 52. If Massachusetts is a single gaming market, or part of a larger regional gaming market, then a casino in Region C would have no monopoly but instead would compete with any category 1 casinos the northeastern and western regions of Massachusetts, with any category 2 slot machine establishment in the state, and with existing tribal casinos in southeastern Connecticut. *Cf., e.g., United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391-404 (1956) (no monopoly where products compete in same market); *Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182, 197-198 (1st Cir.), *cert. denied*, 519 U.S. 527 (1996) (monopoly power must be determined throughout relevant geographic market, and not in artificially constrained area).

More generally, "courts have applied rational basis review to state laws that promote tribal self-governance, benefit tribal members, or implement or reflect federal laws." *Greene v. Commissioner of Minnesota Dept. of Human Services*, 755 N.W.2d 713, 727 (Minn. 2008) (state law requiring tribal member to obtain services through tribal program); *accord, e.g., Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 500–501 (1979) (rational basis test applies to state law asserting jurisdiction over Indians and Indian territory in accord with express congressional authorization); *New York Ass'n of Convenience Stores v. Urbach*, 92 N.Y.2d 204, 212-213, 699 N.E.2d 904, 908 (1998) (rational basis test applies to state decision no longer to collect taxes from cigarette and motor fuel sales on Indian reservations).

The Act is similarly subject only to rational basis review, for two reasons.

a. The Act Does Not Establish Race-Based Classifications, But Instead Makes Political Distinctions Between Tribes and Others.

A state law that allows Indian tribes to open a casino pursuant to an IGRA-sanctioned compact, but does not allow other casinos outside of Indian lands, makes a political distinction between federally-recognized tribes and the rest of the world: it is not a race-based classification and thus is not subject to strict scrutiny. *Garrett*, 122 Fed.Appx. at 632; *Flynt*, 104 Cal.App.4th at 1141-1145, 129 Cal.Rptr.2d at 179-182. As the Ninth Circuit explained in discussing IGRA:

> The operative terms of IGRA expressly relate only to tribes, not to individual Indians. Only tribes, not individual Indians, may enter into compacts with other sovereign governments. ... Further, through IGRA's compacting process, and through its reliance on tribal governments and tribal ordinances to regulate class III gaming, the statute relates to tribal status and tribal self-government. **The very nature of a Tribal-State compact is political; it is an agreement between an Indian tribe, as one sovereign, and a state, as another**. The statute contemplates that the tribes must exercise their sovereign will in deciding whether to participate in class III gaming. *See* 25 U.S.C. § 2710(d)(1)(A) (providing for class III gaming only if authorized by a tribal ordinance or resolution).

Artichoke Joe's, 353 F.3d at 734 (emphasis added).

The same is true of the Act's provisions that KG is challenging. Those provisions authorize the Commonwealth to negotiate a compact with a federally-recognized Indian tribe pursuant to IGRA, allow the Governor spend monies to cover the costs of such negotiations, address the impact on category 1 licensing in Region C of any such Tribal-State compact and the possibility that a tribe may get federal approval to open a casino on current or future Indian lands, and require that one

member of a new advisory committee be a representative of a federally-recognized tribe. Mass. St. 2011, c. 194, §§ 2A, 68(a), & 91. None of the challenged provisions concerns individual Native Americans; all relate to rights of tribes under IGRA. They make a political distinction between federally-recognized tribes and all others (including non-tribal organizations owned or controlled by Native Americans), not a racial classification between individual Native Americans and others.

"For nearly two centuries now, we have recognized Indian tribes as 'distinct, independent political communities,' ... qualified to exercise many of the powers and prerogatives of self-government[.]" *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 327 (2008) (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832)). "Particularly during the last forty [now more than 50] years, Congress has endeavored to afford Indian tribes the latitude to pursue their social, political, and economic goals as they determine appropriate." *Penobscot Indian Nation v. Key Bank of Maine*, 112 F.3d 538, 554 (1st Cir.), *cert. denied*, 522 U.S. 913 (1997).

As a result, state and federal laws that apply differently to Indian tribes or in Indian territory reflect "not a racial classification, but a political one," and thus are subject only to rational basis review when applying the Equal Protection Clause. *Squaxin Island Tribe v. Washington*, 781 F.2d 715, 722 (9th Cir. 1986) (upholding state law giving preferential treatment to tribal liquor enterprises); *see also United States v. Antelope*, 430 U.S. 641, 646 (1977) ("Federal regulation of Indian tribes ... is governance of once-sovereign political communities; it is not to be viewed as legislation of a ' "racial" group consisting of "Indians" . . . .' " (quoting *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974)). Indeed, even a preference for individual members of federally-recognized tribes, as distinguished from a preference for tribes themselves, would be "political rather than racial in nature" because it would "exclude many individuals who are racially to be classified as 'Indians.'" *Morton v. Mancari*, 417 U.S. at 553 n.24.

KG's reliance on *Williams v. Babbitt*, 115 F.3d 657, 664-665 (9th Cir. 1997), *cert. denied sub nom. Kawerak Reindeer Herders Ass'n v. Williams*, 523 U.S. 1117 (1998), is misplaced.[52] The Ninth Circuit itself made clear, in *Artichoke Joe's*, that *Williams* does not apply to state laws that give Indian tribes a monopoly on opening casinos. *Williams* rejected the Secretary of the

[52] See KG's Memorandum (doc. no. 9) at 22-23.

Interior's view that "the Reindeer Act granted a preference to individual native Alaskans, who belonged to no tribal organization, that allowed them to engage in reindeer herding anywhere in Alaska, free from competition. So construed, the Act would not relate 'to Indian land, tribal status, self-government or culture,' " but instead would constitute a racial classification and be subject to strict scrutiny. *Artichoke Joe's*, 353 F.3d at 734 (quoting *Williams*, 115 F.3d at 664). But, just as in *Artichoke Joe's*, KG's "suggestion that *Williams* controls the outcome of the present case ignores the obvious distinctions between an unqualified preference for individual native Alaskans and the limited preference for tribes reflected in the text of IGRA" and § 91 of the Act. *Artichoke Joe's*, 353 F.3d at 734; *accord Garrett*, 122 Fed.Appx. at 632.

b. Section 91 Was Enacted In Response to IGRA.

There is a second, independent reason why the challenged provisions of the Act are subject to rational basis review. Congress has "plenary power over Indian affairs" and may "enact legislation singling out Indian tribes." *Yakima Indian Nation*, 439 U.S. at 501. Any congressional exercise of that power in a way that treats Indian tribes or their members differently, such as in IGRA, does not constitute invidious discrimination but instead is subject only to rational basis review. *Morton v. Mancari*, 417 U.S. at 551-555; *Artichoke Joe's*, 353 F.3d at 735-736. Similarly, if a State chooses to follow the federal lead, and adopts a state law regarding rights of Indian tribes or their members that was been authorized by Congress, the state law will also satisfy equal protection so long as it has a rational basis: strict scrutiny will not apply. *Yakima Indian Nation*, 439 U.S. at 501-502; *Artichoke Joe's*, 353 F.3d at 733-736.

Like the California law at issue in *Artichoke Joe's* and *Flynt*, the provisions of the Act regarding a possible Tribal-State compact were "enacted in response to IGRA," make classifications that "echo those made in IGRA," and were adopted under "the authority that Congress had granted to the" Commonwealth of Massachusetts "in IGRA." *See Artichoke Joe's*, 353 F.3d at 736. Thus, in accord with *Yakima Indian Nation*, rational basis review applies. *Id.*; *see also Greene*, 755 N.W.2d at 717-718, 727 (rational basis review applied to state law establishing tribal benefits program under authority granted by Congress in 1996 welfare reform act).

This is consistent with the standard of review for state laws regarding non-citizens, which KG invokes by analogy.[53] Much like in the realm of Indian affairs, Congress has plenary authority to regulate immigration and rights and benefits to be afforded aliens present in this country, and its exercise of that power is also subject only to rational basis review. *E.g., Mathews v. Diaz*, 426 U.S. 67, 79-84 (1976). "[I]f the Federal Government has by uniform rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass, the States may, of course, follow the federal direction." *Plyler v. Doe*, 457 U.S. 202, 219 n.19 (1982). Thus the rational basis standard applies to state laws that adopt or follow federal classification of aliens, even where no federal law required the State to do so. *E.g., League of United Latin American Citizens v. Bredesen*, 500 F.3d 523, 533 (6th Cir. 2007) (rational basis test applies to Tennessee law that allows only citizens and lawful permanent residents to obtain driver's license, and limits temporary resident aliens to a temporary certificate for driving that is not valid for identification); *LeClerc v. Webb*, 419 F.3d 405, 415-20 (5th Cir. 2005), *reh'g en banc denied*, 444 F.3d 428 (2006), *cert. denied*, 551 U.S. 1158 (2007) (same for Louisiana law that only allows citizens and lawful resident aliens to seek admission to state Bar, and bars nonimmigrant aliens from doing so); *Soskin v. Reinertson*, 353 F.3d 1242, 1255-1257 (10th Cir. 2004) (same for Colorado law incorporating federal welfare reform act eligibility rules into state Medicaid program); *Sudomir v. McMahon*, 767 F.2d 1456, 1466 (9th Cir. 1985) (same for California law incorporating federal eligibility rules into state aid to families with dependent children program).[54]

2. The Challenged Provisions Have Rational Bases and Thus Satisfy the Requirements of Equal Protection.

The challenged provisions of the Act easily meet the rational basis test. Indeed, KG makes no claim to the contrary.[55] It was rational for the Legislature to authorize the Governor to negotiate a Tribal-State compact in accord with IGRA, and to spend funds to cover related costs. "IGRA's drafters conceived of the Tribal-State compact as 'the best mechanism to assure that the

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[53] *See* KG's Memorandum (doc. no. 9) at 22 n.13.

[54] *Graham v. Richardson*, 403 U.S. 365 (1971), is not to the contrary, as it involved a state law that was not authorized by Congress and did not follow any federal classification of aliens. *See Graham*, 403 U.S. at 380-383 & n.14; *Soskin*, 353 F.3d at 1254-1255 (distinguishing *Graham* on this basis).

[55] *Cf.* Comp. (doc. no. 1) ¶¶ 54-71; KG's Memorandum (doc. no. 9) at 25-37; .

interests of both [federally-recognized tribes and States] are met with respect to the regulation of complex gaming enterprises' " on Indian lands. *Artichoke Joe's*, 353 F.3d at 726 (quoting S.Rep. No. 100-446, at 13 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3083). Such a compact will also further the important goals of promoting tribal economic development and self-sufficiency, and of determining how gaming and related activities on Indian lands will be regulated; thus negotiating a compact has a rational basis. *See* 25 U.S.C. § 2702; *Garrett*, 122 Fed.Appx. at 633; *Artichoke Joe's*, 353 F.3d at 731, 736.

It was also rational for the Legislature to reduce the chance that the southeastern part of Massachusetts could end up hosting two casinos with slot machines and table games, one run by an Indian tribe and authorized under IGRA and the other run outside of Indian lands and licensed under Massachusetts law. The Legislature could rationally conclude that it was in the public interest to promote economic development opportunities by allowing up to one such casino in each of the three regions defined in the Act, but not to have more than one such gaming establishment in any region. A statute that regulates gaming venues in order to promote economic development has a rational basis. *See Fitzgerald v. Racing Ass'n of Central Iowa*, 539 U.S. 103, 109-110 (2003) (differential tax rate favoring intrastate racetrack over intrastate riverboat gambling had rational basis and thus satisfied equal protection). The parts of § 91 providing that the new Commission shall solicit category 1 applications for Region C if no Tribal-State compact is negotiated by July 31, 2012, or if the Commission determines that the tribe will not have land taken into trust by the United States, rationally further this objective.

The possibility that the Act may apply differently in Region C counties than the rest of the state does not violate the requirements of equal protection. *See McGowan v. State of Maryland*, 366 U.S. 420, 427 (1961) (state law that applied differently in one county does not violate equal protection clause; "territorial uniformity is not a constitutional prerequisite"); *Walsh v. Commonwealth of Massachusetts*, 618 F.2d 156, 158 (1st Cir. 1980) (same). Indeed, it would not have violated equal protection if the Legislature had taken a different approach and permanently barred casino gambling in Region C except on Indian lands. *See Artichoke Joe's*, 353 F.3d at 740. Geographic distinctions regarding permissible activities are the essence of zoning and other land-

use regulations; such an exercise of States' police powers creates no equal protection problem. *E.g., Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 384-397 (1926); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 659 (10th Cir. 2006).

Finally, it was rational for the Legislature to require that one of the fourteen members of the new Gaming Policy Advisory Committee—the recommendations of which "shall be advisory and shall not be binding on the commission"[56]—be a representative of a federally recognized Indian tribe. Under IGRA, the tribes have a particular interest in and perspective on gaming. It was reasonable to conclude that this purely advisory body would benefit from that perspective.

B. The IGRA Preemption Claim Has No Chance of Success.

1. KG's Preemption Claim Fails for Lack of Subject Matter Jurisdiction.

Nor can KG succeed on its claim that the provisions of the Act concerning a potential Tribal-State compact are preempted by IGRA. The Court has no jurisdiction to consider this claim. IGRA is not enforceable in an action seeking declaratory or injunctive relief against state officials, because that would be contrary to Congress's intent. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 73-76 (1996). KG may not circumvent *Seminole Tribe* by invoking the Supremacy Clause and trying to bring suit under 42 U.S.C. § 1983.[57] Because the Supremacy Clause is "not a source of any federal rights," a claim of federal preemption may not be asserted under § 1983 unless the substantive federal statute creates a private right of action. *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989). But Congress had no power to waive States' immunity from suit in IGRA. *Seminole Tribe*, 517 U.S. at 55-73. And IGRA does not create any other private right of action to sue for an alleged failure by a State to comply with its provisions. *See, e.g., Hartman v. Kickapoo Tribe Gaming Comm'n*, 319 F.3d 1230, 1233 (10th Cir. 2003). Nor does the Court have jurisdiction under 28 U.S.C. §§ 2201-2202.[58] The declaratory judgment act authorized a new remedy, but is not an independent basis of jurisdiction and does not create any right of action. *E.g., Schilling v. Rogers*, 363 U.S. 666, 677 (1960).

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[56] St. 2011, c. 194, § 68(a).
[57] Compl. (doc. no. 1) ¶¶ 7, 73.
[58] Compl. (doc. no. 1) ¶ 7.

2. The Act, Properly Construed, Does Not Conflict With IGRA.

KG's preemption claim is based on a misreading of § 91 of the Act, and thus would fail even if the Court had jurisdiction to consider it. Section 91 does **not** "authorize[e] Indian tribes to engage in class III gaming without first obtaining the necessary federal approvals;" nor does it permit tribes to engage in gaming without satisfying the other requirements established by Congress in IGRA.[59] To the contrary, § 91 merely implements the IGRA provision in which Congress expressly authorizes, and indeed directs, the Commonwealth to negotiate with an Indian tribe a compact to govern the conduct of gaming activities. *See* 25 U.S.C. §2710(d)(3). If the Commonwealth and a federally-recognized tribe were able to negotiate such a compact, the tribe could not open a casino unless and until the Secretary of the Interior approved the compact and the tribe obtained all other federal approvals mandated by IGRA. *See* 25 U.S.C. § 2710(d). At that point the tribe would not need any state license before opening a casino, as KG appears to concede.[60] Nothing in the Act contemplates issuance of a state license to any tribe or purports to authorize a tribe to engage in gaming without complying with IGRA.

Because there is nothing in § 91 or in IGRA that precludes simultaneous compliance with both, and because § 91 will advance the congressional objective and directive that tribes and States negotiate compacts to govern gaming on Indian lands, the Act does not conflict with federal law. *See, e.g., Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 605-606, 614-616 (1991); *Grant's Dairy-Maine, LLC v. Commissioner of Maine Dept. of Agric.*, 232 F.3d 8, 15-18 (1st Cir. 2000). "Preemption is strong medicine, not casually to be dispensed." *Grant's Dairy*, 232 F.3d at 18. KG is unlikely to succeed in demonstrating "the kind of clear conflict that would warrant" a finding of federal preemption. *Id.*

Nor is there any merit to KG's claim that § 91 is preempted to the extent it would permit the Commonwealth to negotiate a compact that would obligate a tribe to make revenue-sharing payments from its gaming receipts to the Commonwealth.[61] In fact, IGRA expressly authorizes tribes to use gaming revenue "to help fund operations of local government agencies." 25 U.S.C.

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[59] KG's Memorandum (doc. no. 9) at 36.
[60] *See* KG's Memorandum at 35 ("[t]here is no such thing as a state-issued Indian gaming license").
[61] KG's Memorandum (doc. no. 9) at 34.

§ 2710(b)(2)(B)(v). It also authorizes Tribal-State compacts to provide for State assessments "in such amounts as are necessary to defray the costs of regulating" gaming activity and to address "any other subjects that are directly related to the operation of gaming activities." *Id.* § 2710(d)(3)(C)(iii), (viii). Thus, IGRA allows tribes to negotiate compacts requiring, for example, that they make payments to the host State for "support of state and local government agencies impacted by tribal gaming," "programs designed to address gambling addiction," and "regulatory costs incurred ... in connection with the implementation and administration of the compact." *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1113-1114 (9th Cir. 2003). Connecticut, New Mexico, and New York all negotiated tribal compacts that provide for casino revenue sharing payments to the States' general funds; the Secretary of the Interior did not disapprove those compacts. *Id.* at 1114 n.17; *but see Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1034 (9th Cir. 2010), *cert. denied*, 131 S.Ct. 3055 (2011) (holding that general fund revenue sharing is barred by IGRA). If the Commonwealth and a tribe were to negotiate a compact that imposed conditions in violation of IGRA, the Secretary would disapprove the compact. *See* 25 U.S.C. § 2710(d)(8)(B).

KG cannot demonstrate any likelihood of success on its facial challenge to the Act by arguing that § 91 might, someday, be applied in a manner preempted by federal law. "In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Washington State Grange*, 552 U.S. at 449-450. KG's claim that the Act is unconstitutional on its face "must fail" because, as shown above, the Act "has a plainly legitimate sweep." *See United States v. Booker*, 644 F.3d 12, 22 (1st Cir. 2011) (quoting *Washington State Grange*, 552 U.S. at 449).

3. *Pullman* Abstention Would Be Required If the Court Has Any Doubt About Whether KG's Interpretation of the Act Is Incorrect.

If the Court had jurisdiction and thought that KG's construction of the Act is plausible, rather than an obvious misreading of § 91, then *Pullman* abstention would be required and the Court would have to stay consideration of the preemption claim until KG pressed a ripe claim to a final decision in state court as to whether the Act allows a tribe to open a casino without

complying with IGRA.[62] *Pullman* abstention would be required because Mass. St. 2011, c. 194, has never been interpreted by a state court and, as shown above, is "fairly subject to an interpretation which will avoid ... the federal constitutional question." *Barr v. Galvin*, 626 F.3d 99, 108 (1st Cir. 2010) (quoting *Zwickler v. Koota*, 389 U.S. 241 (1967)) (vacating decision on the merits because *Pullman* abstention was required). The lack of any pending state court proceeding does not affect the availability and necessity of *Pullman* abstention. *Barr*, 626 F.3d at 108 n.3.

For this reason as well KG cannot demonstrate that it has any likelihood of succeeding on its preemption claim. *See Rivera-Feliciano v. Acevedo-Vila*, 438 F.3d 50, 63 (1st Cir. 2006). Unlike in *Rivera-Feliciano*, "considerations of equity and fairness" weigh against granting preliminary injunctive relief during a *Pullman* stay, as shown below. *Cf. id.* at 64.

III. KG HAS NOT PROVED IT WILL SUFFER IRREPARABLE HARM.

"The burden of demonstrating that a denial of interim relief is likely to cause irreparable harm rests squarely upon the movant." *Charlesbank Equity Fund II v. Blinds To Go, Inc.*, 370 F.3d 151, 162 (1st Cir. 2004). KG has not met that burden. The motion for preliminary injunction must be denied for that reason alone. *See, e.g., Foxboro Co. v. Arabian American Oil Co.*, 805 F.2d 34, 36-38 (1st Cir. 1986) (vacating preliminary injunction on this ground).

A preliminary injunction "should issue only where the intervention of a court of equity is essential in order effectually to protect property rights against injuries otherwise irremediable." *Voice of the Arab World*, 645 F.3d at 32 (quoting *Weinberger v. Romero–Barceló*, 456 U.S. 305, 312 (1982)). The mere "possibility of irreparable harm" is not enough. *Winter*, 555 U.S. at 22.

KG cannot meet its burden by asserting that it might be denied the opportunity to seek a category 1 license on the basis of race.[63] As shown above, the Act does not contain any race-based limitations. KG cannot meet its burden of showing irreparable harm merely "by alleging a deprivation of constitutional right." *Public Service Co. of New Hampshire v. Town of West Newbury*, 835 F.2d 380, 382 (1st Cir. 1987).

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[62] *Pullman* abstention takes its name from *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 499–502 (1941).

[63] *See* KG's Memorandum (doc. no. 9) at 37-38.

KG fares no better in complaining that it has invested substantial sums in its New Bedford site and that this investment will have been for naught if it turns out that the Commonwealth negotiates a Tribal-State compact or if the award of a category 1 license for Region C occurs long after such an award in Regions A and B.[64] Whether either of those scenarios will actually come to pass is a matter of pure speculation, as shown at pages 6-7 above. "A finding of irreparable harm must be grounded on something more than conjecture, surmise, or a party's unsubstantiated fears of what the future may have in store." *Charlesbank Equity Fund II*, 370 F.3d at 162. Furthermore, even if at some point KG could no longer seek or obtain a category 1 license, its investment to date would not "be rendered worthless."[65] KG would remain free to apply for a category 2 license (i.e. slot machines only) or to develop its New Bedford site into something other than a gaming destination, and thus it would not be "inevitab[le]" that KG could never recoup its investment. *Cf. Gilbert v. City of Cambridge*, 932 F.2d 51, 63 n.15 (1st Cir.), *cert. denied*, 502 U.S. 866 (1991) (failure of relatively "grandiose" development plan does not establish futility of "less ambitious plans" (quoting *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 347, 351-53 & n.9 (1986), a regulatory takings case)).

Nor can KG meet its burden of proving irreparable injury by complaining that it "must make option payments and other continuing investments" if it wants to keep alive its bet on the New Bedford site.[66] If the Act makes continued investment in New Bedford "look less attractive" to KG, it "could easily pull out;" because any continuing costs are "easily avoidable," a decision to incur them would be "self-inflicted" and thus could not satisfy the "irreparable injury" criterion as a matter of law. *San Francisco Real Estate v. Real Estate Invest. Trust of America*, 692 F.2d 814, 818 (1st Cir.1982) (vacating order that was in substance a preliminary injunction).

IV. ISSUING AN INJUNCTION WOULD HARM THE PUBLIC INTEREST.

The Court must "pay particular regard [to] the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24 (quoting *Romero–Barceló*, 456 U.S. at 312). Where, as here, granting the requested preliminary injunction would have an adverse

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[64] *See* KG's Memorandum (doc. no. 9) at 38-40.
[65] *See* KG's Memorandum (doc. no. 9) at 40.
[66] KG's Memorandum (doc. no. 9) at 38-39.

impact on the public interest that outweighs any harm to the plaintiff from denying relief, that "alone requires denial of the requested injunctive relief." *Winter*, 555 U.S. at 23.

Barring the Commonwealth from attempting to negotiate a Tribal-State compact would not be in the public interest, as Congress and the Massachusetts have both made clear. Congress directed States to negotiate such compacts. 25 U.S.C. § 2710(d)(3)(A). Congress wants States to enter into such compacts and facilitate tribal casinos on Indian lands— in states, like the Commonwealth, that have decided to permit gambling—in order to "promot[e] tribal economic development, self-sufficiency, and strong tribal government." *Id.* § 2702(1). Similarly, the Massachusetts Legislature found that "the deferred operation of [the Act] would tend to defeat its purpose, which is forthwith to provide for economic investments and job creation in the commonwealth[.]" Act Preamble (see addendum).

In weighing a motion for preliminary injunction, the Court must defer to the congressional and legislative determinations of what is in the public interest. *See Strahan v. Coxe*, 127 F.3d 155, 171 (1st Cir. 1997), *cert. denied*, 525 U.S. 830 and 525 U.S. 978 (1998).

V. THE CHALLENGED PROVISIONS OF THE ACT ARE SEVERABLE.

Although KG claims that several provisions of the Act are unconstitutional, it seeks a preliminary injunction barring implementation of the entire, comprehensive statute. But under Massachusetts law, "[t]he provisions of any statute shall be deemed severable, and if any part of any statute shall be adjudged unconstitutional or invalid, such judgment shall not affect other valid parts thereof." Mass. Gen. L. c. 4, § 6, clause Eleventh. Thus KG would not be entitled to an injunction against the entire Act even if it had proved that certain provisions were unconstitutional and had met the other prerequisites for preliminary relief, which it has not. *See Planned Parenthood League of Massachusetts v. Bellotti*, 641 F.2d 1006, 1023 (1st Cir. 1981).

Conclusion.

KG's claims are not ripe. Even if they were, KG has little or no chance of succeeding on the merits. KG also failed to establish that it would suffer irreparable harm if its motion were denied. And enjoining the Act, or even the provisions that KG actually challenges, would harm the public interest. The Court should therefore deny the motion for preliminary injunction.

MARTHA COAKLEY
ATTORNEY GENERAL OF MASSACHUSETTS

/s/ Kenneth W. Salinger .
Kenneth W. Salinger (BBO # 556967)
Assistant Attorney General, Government Bureau
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
617.963.2075
ken.salinger@state.ma.us

December 20, 2011

Certificate of Service

I hereby certify that this document was filed through the Electronic Case Filing (ECF) system and thus copies will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF); paper copies will be sent to those indicated on the NEF as non registered participants on or before December 20, 2011.

/s/ Kenneth W. Salinger .

Addendum: Mass. St. 2011, c. 194

H 3807

Chapter 194

THE COMMONWEALTH OF MASSACHUSETTS

In the Year Two Thousand and Eleven

AN ACT ESTABLISHING EXPANDED GAMING IN THE COMMONWEALTH.

Whereas, the deferred operation of this act would tend to defeat its purpose, which is forthwith to provide for economic investments and job creation in the commonwealth, therefore, it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. To provide for certain unanticipated obligations of the commonwealth, to provide for an alteration of purpose for current appropriations, and to meet certain requirements of law, the sums set forth in section 2A are hereby appropriated from the General Fund, unless specifically designated otherwise, for the several purposes and subject to the conditions specified in this section, and subject to laws regulating the disbursement of public funds for the fiscal year ending June 30, 2012; provided, however, that notwithstanding any general or special law to the contrary, appropriations made herein shall not revert and shall be available for expenditure until June 30, 2013. The sums shall be in addition to any amounts previously appropriated and made available for the purposes of these items.

SECTION 2A.

OFFICE OF THE GOVERNOR

0411-1004 To provide for certain costs associated with the implementation of expanded gaming including, but not limited to, costs related to legal, financial and other professional services required for the negotiation and execution of a compact with a federally recognized Indian tribe in the commonwealth to establish a tribal casino in region C $5,000,000

0810-1204 For the implementation and operation of the division of gaming enforcement within the department of the attorney general, established in section 11M of chapter 12 of the General Laws, for the investigation and prosecution of criminal activity relating to legalized gaming in the commonwealth pursuant to chapter 23K of the General Laws . $500,000

SECTION 3. Section 7 of chapter 4 of the General Laws, as appearing in the 2010 Official Edition, is hereby amended by striking out clause Tenth and inserting in place thereof the following clause:-

Tenth, "Illegal gaming," a banking or percentage game played with cards, dice, tiles or dominoes, or an electronic, electrical or mechanical device or machine for money, property, checks, credit or any representative of value, but excluding: (i) a lottery game conducted by the state lottery commission, under sections 24, 24A and 27 of chapter 10; (ii) a game conducted under chapter 23K; (iii) pari-mutuel wagering on horse races under chapters 128A and 128C and greyhound races under said chapter 128C; (iv) a game of bingo conducted under chapter 271; and (v) charitable gaming conducted under said chapter 271.

SECTION 4. Section 48 of chapter 6 of the General Laws is hereby repealed.

SECTION 5. Section 35 of chapter 10 of the General Laws, as appearing in the 2010 Official Edition, is amended by inserting after the word "Lottery", in lines 2 and 16, each time it appears, the following words:- and Gaming.

SECTION 6. Section 39 of said chapter 10, as so appearing, is hereby amended by inserting after the word "Lottery", in lines 13 and 19, each time it appears, the following words:- and Gaming.

SECTION 7. Sections 64 and 65 of said chapter 10 are hereby repealed.

SECTION 8. Said chapter 10 is hereby further amended by inserting after section 72 the following section:-

Section 72A. The commissioner of the alcoholic beverages control commission shall establish a gaming liquor enforcement unit whose responsibilities shall include enforcing, regulating and controlling the distribution of alcoholic beverages in a gaming establishment.

The gaming liquor enforcement unit shall work in conjunction and cooperation with the investigations and enforcement bureau within the Massachusetts gaming commission established in chapter 23K. The commissioner shall assign investigators and employees of the unit to the bureau, who shall report to the director of the bureau and to the commissioner; provided, however, that the Massachusetts gaming commission shall designate the number of investigators and employees necessary to staff the unit; and provided further, that the code of ethics established pursuant to subsection (m) of section 3 of chapter 23K shall apply to all investigators and employees of the unit. No investigator or employee of the unit, other than in the performance of official duties, shall place a wager in a gaming establishment licensed under chapter 23K. The commissioner shall establish a program to rotate investigators in and out of the unit. The alcoholic beverages control commission shall be reimbursed by the Massachusetts gaming commission for the costs of operating the unit; provided, however, that the Massachusetts gaming commission shall have final approval over the budget of the unit.

SECTION 9. Chapter 12 of the General Laws is hereby amended by inserting after section 11L the following section:-

Section 11M. (a) As used in this section the following words shall, unless the context clearly requires otherwise, have the following meanings:

"Commission", the Massachusetts gaming commission established in chapter 23K.

"Division", the division of gaming enforcement established in subsection (b).

"Gaming establishment", as defined in section 1 of chapter 23K.

(b) There shall be in the department of the attorney general a division of gaming enforcement. The attorney general shall designate an assistant attorney general as the director of gaming enforcement. The director may appoint and remove, subject to the approval of the attorney general, such expert, clerical or other assistants as the work of the division may require.

(c) The division shall enforce criminal violations of chapter 23K which shall include, but not be limited to: (1) investigating and prosecuting allegations of criminal activity related to or impacting the operation of gaming establishments or games; (2) receiving and taking appropriate action on referrals for criminal prosecution from the commission or any other law enforcement body; (3) providing assistance, upon request, to the commission in the consideration and promulgation of rules and regulations; (4) ensuring that there shall be no duplication of duties and responsibilities between the division and the commission; and (5) recommending persons to be placed on a list of excluded persons to be maintained by the commission.

No employee of the division and no person engaged by the division in the course of an investigation, other than in the performance of their official duties, shall place a wager in a gaming establishment licensed under chapter 23K during the period of their employment or assignment with the division. The attorney general shall establish a code of ethics for all division employees which shall be more restrictive than chapters 268A and 268B. A copy of the code of ethics shall be filed with the state ethics commission. The code shall include provisions reasonably necessary to carry out this section including, but not limited to: (i) prohibiting the receipt of gifts by a division employee from a gaming licensee, applicant, close associate, affiliate or other person or entity subject to the jurisdiction of the commission established in chapter 23K; and (ii) prohibiting the participation by a division employee in a particular matter as defined in section 1 of said chapter 268A that affects the financial interest of a relative within the third degree of consanguinity or any other person with whom such employee has a significant relationship as defined in the code of ethics.

Officers and employees of the gaming enforcement unit in the department of state police who are assigned to the division shall record their time and submit their total hours to the director of gaming enforcement. The division shall submit a request for reimbursement to the commission and the commission shall reimburse the department of state police.

The division shall submit quarterly requests to the commission for expenses associated with the operation of the division and the commission shall reimburse the division for such expenses; provided, however, that the commission shall not approve such a request if the request would exceed an annual reimbursement of $3,000,000.

SECTION 10. Chapter 12B of the General Laws is hereby repealed.

SECTION 11. Section 9 of chapter 13 of the General Laws, as appearing in the 2010 Official Edition, is hereby amended by striking out, in lines 17 and 18, the words ", as well as the state racing commission established by section 48 of chapter 6,".

SECTION 12. Section 9B of said chapter 13, as so appearing, is hereby amended by striking out, in lines 47 and 48, the words ", as well as the state racing commission established by section 48 of chapter 6".

SECTION 13. Said section 9B of said chapter 13, as so appearing, is hereby further amended by striking out, in lines 50 and 51, the words "or regulated by the state racing commission, as established by section 48 of chapter 6".

SECTION 14. Section 38 of chapter 22C of the General Laws, as so appearing, is hereby amended by inserting after the word "involving", in lines 36 and 37, the following word:- illegal.

SECTION 15. Said chapter 22C is hereby further amended by adding the following section:-

Section 70. The colonel of state police shall establish a gaming enforcement unit the responsibilities of which shall include, but not be limited to, the investigation of criminal violations of chapter 23K or any other general or special law pertaining to gaming.

The gaming enforcement unit shall work in conjunction and cooperation with the investigations and enforcement bureau within the Massachusetts gaming commission to enforce chapter 23K and with the division of gaming enforcement within the department of the attorney general to investigate criminal activity related to gaming. Officers and employees of the unit shall be assigned to the investigations and enforcement bureau and shall report to the deputy director of investigations and enforcement and to the colonel of state police. The colonel shall also assign officers of the unit to the division of gaming enforcement, who shall report to the chief of gaming enforcement and to the colonel of state police. No officer of the unit, other than in the performance of official duties, shall place a wager in a gaming establishment licensed under chapter 23K; provided, however, that the code of ethics established pursuant to subsection (m) of section 3 of chapter 23K shall apply to all officers and employees of the unit. The colonel shall establish a program to rotate officers in and out of the unit.

SECTION 16. The General Laws are hereby further amended by inserting after chapter 23J the following chapter:-

CHAPTER 23K.

THE MASSACHUSETTS GAMING COMMISSION

Section 1. The General Court finds and declares that:

(1) ensuring public confidence in the integrity of the gaming licensing process and in the strict oversight of all gaming establishments through a rigorous regulatory scheme is the paramount policy objective of this chapter;

(2) establishing the financial stability and integrity of gaming licensees, as well as the integrity of their sources of financing, is an integral and essential element of the regulation and control of gaming under this chapter;

(3) gaming licensees shall be held to the highest standards of licensing and shall have a continuing duty to maintain their integrity and financial stability;

(4) enhancing and supporting the performance of the state lottery and continuing the commonwealth's dedication to local aid is imperative to the policy objectives of this chapter;

(5) the commonwealth must provide for new employment opportunities in all sectors of the economy, particularly opportunities for the unemployed, and shall preserve jobs in existing industries in the commonwealth; this chapter sets forth a robust licensing process whereby an applicant for a gaming license shall submit a comprehensive plan for operating a gaming establishment which includes how the applicant will foster and encourage new construction through capital investment and provide permanent employment opportunities to residents of the commonwealth;

(6) promoting local small businesses and the tourism industry, including the development of new and existing small business and tourism amenities such as lodging, dining, retail and cultural and social facilities, is fundamental to the policy objectives of this chapter;

(7) recognizing the importance of the commonwealth's unique cultural and social resources and integrating them into new development opportunities shall be a key component of a decision to the award of any gaming license under this chapter;

(8) applicants for gaming licenses and gaming licensees shall demonstrate their commitment to efforts to combat compulsive gambling and a dedication to community mitigation, and shall recognize that the privilege of licensure bears a responsibility to identify, address and minimize any potential negative consequences of their business operations;

(9) any license awarded by the commission shall be a revocable privilege and may be conditioned, suspended or revoked upon: (i) a breach of the conditions of licensure, including failure to complete any phase of construction of the gaming establishment or any promises made to the commonwealth in return for receiving a gaming license; (ii) any civil or criminal violations of the laws of the commonwealth or other jurisdictions; or

(iii) a finding by the commission that a gaming licensee is unsuitable to operate a gaming establishment or perform the duties of their licensed position; and

(10) the power and authority granted to the commission shall be construed as broadly as necessary for the implementation, administration and enforcement of this chapter.

Section 2. As used in this chapter the following words shall, unless the context clearly requires otherwise, have the following meanings:-

"Affiliate", a person who directly or indirectly controls, or is controlled by, or is under common control with, a specified person.

"Applicant", a person who has applied for a license to engage in activity regulated under this chapter.

"Application", a written request for a finding of suitability to receive a license or engage in an activity which is regulated by this chapter.

"Bureau", the investigations and enforcement bureau in the commission.

"Business", a corporation, sole proprietorship, partnership, limited liability company or any other organization formed for the purpose of carrying on a commercial enterprise.

"Category 1 license", a license issued by the commission that permits the licensee to operate a gaming establishment with table games and slot machines.

"Category 2 license", a license issued by the commission that permits the licensee to operate a gaming establishment with no table games and not more than 1,250 slot machines.

"Capital expenditure", money spent by a gaming licensee to upgrade or maintain depreciable and tangible long-term physical assets that are capitalized on the gaming licensee's books under generally accepted accounting principles and excluding expenditures or charges for the usual and customary maintenance and repair of any fixed asset.

"Cashless wagering system", a method of wagering and accounting in which the validity and value of a wagering account, promotional account, wagering instrument or wagering credit, not including a slot machine printed voucher, are determined, monitored and retained for an individual by an electronic system operated and maintained by a gaming licensee which maintains a record of each transaction involving the wagering account, promotional account, wagering instrument or wagering credit, exclusive of the game or gaming device on which wagers are being made, including electronic systems which facilitate electronic transfers of money directly to or from a game or gaming device.

"Chair", the chair of the commission.

"Cheat", to alter the selection of criteria which determines the results of a game or the amount or frequency of payment in a game.

"Cheating and swindling device" or "cheating and swindling game", (i) a coin, token or slug other than a lawful coin or legal tender of the United States or a coin not of the same denomination as the coin intended to be used

by the gaming establishment while playing or using a slot machine in a gaming establishment, except that a "cheating and swindling device" shall not include a token or similar object which is approved by the commission; (ii) a bogus or counterfeit chip, coin or die; a marked card; a computerized, electronic, electrical, mechanical or magnetic device; a tool, drill, wire, key or other device designed, constructed or programmed specifically for: (A) use in obtaining an advantage in a game; (B) opening, entering or affecting the operation of a gaming device; or (C) removing from a slot machine, other gaming device or drop box any money or other contents; (iii) a tool, drill, wire, coin or token attached to a string or wire, or an electronic or magnetic device to facilitate the alignment of a winning combination; or (iv) a gaming device that has been manufactured, serviced, marked, plugged or tampered with, or placed in a condition or operated in a manner to: (1) deceive, or attempt to deceive, the public; or (2) alter, or attempt to alter, the normal random selection of characteristics, the normal chance of the game or the result of the game at a gaming establishment.

"Close associate", a person who holds a relevant financial interest in, or is entitled to exercise power in, the business of an applicant or licensee and, by virtue of that interest or power, is able to exercise a significant influence over the management or operation of a gaming establishment or business licensed under this chapter.

"Commission", the Massachusetts gaming commission established in section 3.

"Commissioner", a member of the commission.

"Complimentary service or item", a service or item provided at no cost or at a reduced cost to a patron of a gaming establishment.

"Conservator", a person appointed by the commission to temporarily manage the operation of a gaming establishment.

"Credit card", a card, code or other device with which a person may defer payment of debt, incur debt and defer its payment, or purchase property or services and defer payment therefor, but not a card, code or other device used to activate a preexisting agreement between a person and a financial institution to extend credit when the person's account at the financial institution is overdrawn or to maintain a specified minimum balance in the person's account at the financial institution.

"Credit instrument", a writing which evidences a gaming debt owed to a person who holds a gaming license at the time the debt is created, including any writing taken in consolidation, redemption or payment of a previous credit instrument.

"Division", the division of gaming enforcement in the office of the attorney general.

"Executive director", the executive director of the Massachusetts gaming commission.

"Gambling", the playing of a game by a patron of a gaming establishment.

"Game", a banking or percentage game played with cards, dice, tiles, dominoes or an electronic, electrical or mechanical device or machine played for money, property, checks, credit or any other representative of value which has been approved by the commission.

"Gaming", dealing, operating, carrying on, conducting, maintaining or exposing any game for pay.

"Gaming area", the portion of the premises of a gaming establishment in which or on which gaming is conducted.

"Gaming device" or "gaming equipment", an electronic, electrical or mechanical contrivance or machine used in connection with gaming or a game.

"Gaming employee", an employee of a gaming establishment who: (i) is directly connected to the operation or maintenance of a slot machine or game taking place in a gaming establishment; (ii) provides security in a gaming establishment; (iii) has access to a restricted area of a gaming establishment; (iv) is connected with the operation of a gaming establishment; or (v) is so designated by the commission.

"Gaming establishment", the premises approved under a gaming license which includes a gaming area and any other nongaming structure related to the gaming area and may include, but shall not be limited to, hotels, restaurants or other amenities.

"Gaming license", a license issued by the commission that permits the licensee to operate a gaming establishment.

"Gaming licensee", a person or entity who holds a gaming license under this chapter.

"Gaming position", a designated seat or standing position where a patron of a gaming establishment can play a game.

"Gaming service employee", an employee of a gaming establishment who is not classified as a gaming employee or a key gaming employee, but is required to register with the commission.

"Gaming vendor", a person who offers goods or services to a gaming applicant or gaming licensee on a regular or continuing basis which directly relates to gaming including, but not limited to, gaming equipment and simulcast wagering equipment manufacturers, suppliers and repairers.

"Gaming vendor license", a license issued by the commission that permits the licensee to act as a vendor to a gaming establishment.

"Governing body", in a city having a Plan D or Plan E charter the city manager and city council and in any other city the mayor and the city council and in towns the board of selectmen.

"Gross revenue" or "gross gaming revenue", the total of all sums actually received by a gaming licensee from gaming operations less the total of all sums paid out as winnings to patrons; provided, however, that the total of all sums paid out as winnings to patrons shall not include the cash equivalent

value of any merchandise or thing of value included in a jackpot or payout; and provided further, that "Gross revenue" shall not include any amount received by a gaming licensee from simulcast wagering or from credit extended or collected by the gaming licensee for purposes other than gaming; provided further, that the issuance to or wagering by patrons of a gaming establishment of any promotional gaming credit shall not be taxable for the purposes of determining gross revenue.

"Holding company", a corporation, association, firm, partnership, trust or other form of business organization, other than a natural person, which, directly or indirectly, owns, has the power or right to control, or has the power to vote any significant part of the outstanding voting securities of a corporation or any other form of business organization which holds or applies for a gaming license; provided, however, that a "holding company", in addition to any other reasonable use of the term, shall indirectly have, hold or own any such power, right or security if it does so through an interest in a subsidiary or any successive subsidiaries, notwithstanding how many such subsidiaries may intervene between the holding company and the gaming licensee or applicant.

"Host community", a municipality in which a gaming establishment is located or in which an applicant has proposed locating a gaming establishment.

"Impacted live entertainment venue", a not-for-profit or municipally-owned performance venue designed in whole or in part for the presentation of live concerts, comedy or theatrical performances, which the commission determines experiences, or is likely to experience, a negative impact from the development or operation of a gaming establishment.

"Institutional investor", any of the following entities having a 5 per cent or greater ownership interest in a gaming establishment or gaming licensee: a corporation, bank, insurance company, pension fund or pension fund trust, retirement fund, including funds administered by a public agency, employees' profit-sharing fund or employees' profit-sharing trust, an association engaged, as a substantial part of its business or operation, in purchasing or holding securities, or any trust in respect of which a bank is a trustee or co-trustee, investment company registered under the federal Investment Company Act of 1940, collective investment trust organized by banks under part 9 of the Rules of the Comptroller of Currency, closed end investment trust, chartered or licensed life insurance company or property and casualty insurance company, investment advisor registered under the federal Investment Advisers Act of 1940, and such other persons as the commission may reasonably determine to qualify as an institutional investor for with the purposes of this chapter.

"Intermediary company", a corporation, association, firm, partnership, trust or other form of business organization, other than a natural person, which is a holding company with respect to a corporation or other form of

business organization which holds or applies for a gaming license, and is a subsidiary with respect to a holding company.

"Junket", an arrangement intended to induce a person to come to a gaming establishment to gamble, where the person is selected or approved for participation on the basis of the person's ability to satisfy a financial qualification obligation related to the person's ability or willingness to gamble or on any other basis related to the person's propensity to gamble and pursuant to which and as consideration for which, any of the cost of transportation, food, lodging, and entertainment for the person is directly or indirectly paid by a gaming licensee or an affiliate of the gaming licensee.

"Junket enterprise", a person, other than a gaming licensee or an applicant for a gaming license, who employs or otherwise engages the services of a junket representative in connection with a junket to a licensed gaming establishment, regardless of whether or not those activities occur within the commonwealth.

"Junket representative", a person who negotiates the terms of, or engages in the referral, procurement or selection of persons who may participate in, a junket to a gaming establishment, regardless of whether or not those activities occur within the commonwealth.

"Key gaming employee", an employee of a gaming establishment who is: (i) in a supervisory capacity; (ii) empowered to make discretionary decisions which regulate gaming establishment operations; or (iii) so designated by the commission.

"License", a license required under this chapter.

"List of excluded persons", the list of excluded persons maintained by the commission under section 45.

"Lottery", the state lottery established in section 24 of chapter 10.

"Major policymaking position", the executive or administrative head of the commission and any person whose salary equals or exceeds that of a state employee classified in step 1 of job group XXV of the general salary schedule in section 46 of chapter 30 and who reports directly to the commission or the administrative head of any bureau or other major administrative unit within the commission and persons exercising similar authority.

"Non-gaming vendor", a supplier or vendor including, but not limited to, a construction company, vending machine provider, linen supplier, garbage handler, maintenance company, limousine service company, food purveyor or supplier of alcoholic beverages, which provides goods or services to a gaming establishment or gaming licensee, but which is not directly related to games.

"Operation certificate", a certificate of compliance issued by the commission to the operator of a gaming establishment.

"Person", an individual, corporation, association, operation, firm, partnership, trust or other form of business association.

"Promotional gaming credit", a slot machine or table game credit or other item issued by a gaming licensee to a patron to enable the placement of a wager at a slot machine or table game.

"Qualification" or "qualified", the process of licensure set forth by the commission to determine that all persons who have a professional interest in a gaming license, or gaming vendor license, or the business of a gaming licensee or gaming vendor, meet the same standards of suitability to operate or conduct business with a gaming establishment.

"Rewards card", a card issued to a patron of a gaming establishment that tracks the amount of money or time spent gaming in order to determine the value of provisions or complimentary services to the patrons at a gaming establishment.

"Slot machine", a mechanical, electrical or other device, contrivance or machine which, upon insertion of a coin, token or similar object therein, or upon payment of any consideration whatsoever, is available to play or operate, the play or operation of which, whether by reason of the skill of the operator or application of the element of chance, or both, may deliver or entitle the individual playing or operating the machine to receive cash, or tokens to be exchanged for cash, or to receive merchandise or any other thing of value, whether the payoff is made automatically from the machine or in any other manner, except that the cash equivalent value of any merchandise or other thing of value shall not be included in determining the payout percentage of a slot machine.

"State police", the department of state police established in chapter 22C.

"Subsidiary", a corporation, a significant part of whose outstanding equity securities are owned, subject to a power or right of control, or held with power to vote, by a holding company or an intermediary company, or a significant interest in a firm, association, partnership, trust or other form of business organization, other than a natural person, which is owned, subject to a power or right of control, or held with power to vote, by a holding company or an intermediary company.

"Surrounding communities", municipalities in proximity to a host community which the commission determines experience or are likely to experience impacts from the development or operation of a gaming establishment, including municipalities from which the transportation infrastructure provides ready access to an existing or proposed gaming establishment.

"Table game", a game, other than a slot machine, which is authorized by the commission to be played in a gaming establishment.

"Transfer", the sale or other method, either directly or indirectly, of disposing of or parting with property or an interest therein, or the possession thereof, or of fixing a lien upon property or upon an interest

therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, payment, pledge, mortgage, lien, encumbrance, gift, security or otherwise; provided, however, that the retention of a security interest in property delivered to a corporation shall be deemed a transfer suffered by such corporation.

"Wager", a sum of money or representative of value that is risked on an occurrence for which the outcome is uncertain.

Section 3. (a) There shall be a Massachusetts gaming commission which shall consist of 5 commissioners, 1 of whom shall be appointed by the governor; 1 of whom shall be appointed by the attorney general who shall have experience in criminal investigations and law enforcement; 1 of whom shall be appointed by the treasurer and receiver general who shall have experience in corporate finance and securities; and 2 of whom shall be appointed by a majority vote of the governor, attorney general and the treasurer and receiver general, 1 of whom shall have experience in legal and policy issues related to gaming and 1 of whom may have professional experience in gaming regulatory administration or gaming industry management. The governor shall designate the chair of the commission. The chair shall serve in that capacity throughout the term of appointment and until a successor shall be appointed. Prior to appointment to the commission, a background investigation shall be conducted into the financial stability, integrity and responsibility of a candidate, including the candidate's reputation for good character, honesty and integrity. No person who has been convicted of a felony shall be eligible to serve on the commission.

(b) Each commissioner shall be a resident of the commonwealth within 90 days of appointment and, while serving on the commission, shall not: (i) hold, or be a candidate for, federal, state or local elected office; (ii) hold an appointed office in a federal, state, or local government; or (iii) serve as an official in a political party. Not more than 3 commissioners shall be from the same political party.

(c) Each commissioner shall serve for a term of 5 years or until a successor is appointed and shall be eligible for reappointment; provided, however, that no commissioner shall serve more than 10 years. A person appointed to fill a vacancy in the office of a commissioner shall be appointed in a like manner and shall serve for only the unexpired term of such commissioner. The governor may remove a commissioner if the commissioner: (i) is guilty of malfeasance in office; (ii) substantially neglects the duties of a commissioner; (iii) is unable to discharge the powers and duties of the commissioner's office; (iv) commits gross misconduct; or (v) is convicted of a felony.

(d) Three commissioners shall constitute a quorum and the affirmative vote of 3 commissioners shall be required for an action of the commission. The chair or 3 members of the commission may call a meeting; provided,

however, that notice of all meetings shall be given to each commissioner and to other persons who request such notice. The commission shall adopt regulations establishing procedures, which may include electronic communications, by which a request to receive notice shall be made and the method by which timely notice may be given.

(e) Commissioners shall receive salaries not greater than three-quarters of the salary of the commissioner of administration under section 4 of chapter 7; provided, however, that the chair shall receive a salary equal to the salary of the commissioner of administration. Commissioners shall devote their full time and attention to the duties of their office.

(f) The commission shall annually elect 1 of its members to serve as secretary and 1 of its members to serve as treasurer. The secretary shall keep a record of the proceedings of the commission and shall be the custodian and keeper of the records of all books, documents and papers filed by the commission and of its minute book. The secretary shall cause copies to be made of all minutes and other records and documents of the commission and shall certify that such copies are true copies, and all persons dealing with the commission may rely upon such certification.

(g) The chair shall have and exercise supervision and control over all the affairs of the commission. The chair shall preside at all hearings at which the chair is present and shall designate a commissioner to act as chair in the chair's absence. To promote efficiency in administration, the chair shall, from time to time, make such division or re-division of the work of the commission among the commissioners as the chair deems expedient.

(h) All of the commissioners shall, if so directed by the chair, participate in the hearing and decision of any matter before the commission; provided, however, that at least 2 commissioners shall participate in the hearing and decision of matters other than those of formal or administrative character coming before the commission; provided further, that any such matter may be heard, examined and investigated by an employee of the commission designated and assigned by the chair, with the concurrence of 1 other commissioner. Such employee shall make a report in writing relative to the hearing, examination and investigation of every such matter to the commission for its decision. For the purposes of hearing, examining and investigating any such matter, such employee shall have all of the powers conferred upon a commissioner by this section. For each hearing, the concurrence of a majority of the commissioners participating in the decision shall be necessary.

(i) The commission shall appoint an executive director. The executive director shall serve at the pleasure of the commission, shall receive such salary as may be determined by the commission, and shall devote full time and attention to the duties of the office. The executive director shall be a person with skill and experience in management and shall be the executive and administrative head of the commission and shall be responsible for

administering and enforcing the provisions of law relative to the commission and to each administrative unit thereof. The executive director shall appoint and employ a chief financial and accounting officer and may, subject to the approval of the commission, employ other employees, consultants, agents and advisors, including legal counsel, and shall attend meetings of the commission. The chief financial and accounting officer of the commission shall be in charge of its funds, books of account and accounting records. No funds shall be transferred by the commission without the approval of the commission and the signatures of the chief financial and accounting officer and the treasurer. In the case of an absence or vacancy in the office of the executive director or in the case of disability as determined by the commission, the commission may designate an acting executive director to serve as executive director until the vacancy is filled or the absence or disability ceases. The acting executive director shall have all of the powers and duties of the executive director and shall have similar qualifications as the executive director.

(j) The executive director may, from time to time and subject to the approval of the commission, establish within the commission such administrative units as may be necessary for the efficient and economical administration of the commission and, when necessary for such purpose, may abolish any such administrative unit or may merge any 2 or more units. The executive director shall prepare and keep current a plan of organization of the commission, of the assignment of its functions to its various administrative units, offices and employees and of the places at which and the methods by which the public may receive information or make requests. A current copy of the plan of organization shall be kept on file with the state secretary and in the office of the secretary of administration and finance.

(k) The executive director may appoint such persons as the executive director shall consider necessary to perform the functions of the commission; provided, however, that chapter 31 and section 9A of chapter 30 shall not apply to commission employees. If an employee serving in a position which is classified under said chapter 31 or in which an employee has tenure by reason of said section 9A of said chapter 30 shall be appointed to a position within the commission which is not subject to said chapter 31, the employee shall, upon termination of service in such position, be restored to the position which the employee held immediately prior to such appointment; provided, however, that the employee's service in such position shall be determined by the civil service commission in accordance with the standards applied by that commission in administering said chapter 31. Such restoration shall be made without impairment of the employee's civil service status or tenure under said section 9A of said chapter 30 and without loss of seniority, retirement or other rights to which uninterrupted service in such prior position would have entitled such employee. During the period of such appointment, each person so

appointed from a position in the classified civil service shall be eligible to take any competitive promotional examination for which such person would otherwise have been eligible. Employees of the commission, including employees working in the bureau, shall be classified as group 1 pursuant to paragraph (g) of subdivision (2) of section 3 of chapter 32.

(l) The commission may require a prospective employee to: (i) submit an application and a personal disclosure on a form prescribed by the commission which shall include a complete criminal history, including convictions and current charges for all felonies and misdemeanors; (ii) undergo testing which detects the presence of illegal substances in the body; (iii) provide fingerprints and a photograph consistent with standards adopted by the state police; and (iv) provide authorization for the commission to conduct a credit check. The commission shall verify the identification, employment and education of each prospective employee, including: (i) legal name, including any alias; (ii) all secondary and post secondary educational institutions attended regardless of graduation status; (iii) place of residence; and (iv) employment history.

The commission shall not hire a prospective employee if the prospective employee has: (i) been convicted of a felony; (ii) been convicted of a misdemeanor more than 10 years prior to the prospective employee's application that, in the discretion of the commission, bears a close relationship to the duties and responsibilities of the position for which employment is sought; (iii) been dismissed from prior employment for gross misconduct or incompetence; or (iv) intentionally made a false statement concerning a material fact in connection with the prospective employee's application to the commission. If an employee of the commission is charged with a felony while employed by the commission, the commission shall suspend the employee, with or without pay, and terminate employment with the commission upon conviction. If an employee of the commission is charged with a misdemeanor while employed by the commission, the commission shall suspend the employee, with or without pay, and may terminate employment with the commission upon conviction if, in the discretion of the commission, the offense for which the employee has been convicted bears a close relationship to the duties and responsibilities of the position held with the commission.

(m) Chapters 268A and 268B shall apply to the commissioners and to employees of the commission; provided, however, that the commission shall establish a code of ethics for all members and employees that shall be more restrictive than said chapters 268A and 268B. A copy of the code shall be filed with the state ethics commission. The code shall include provisions reasonably necessary to carry out the purposes of this chapter and any other laws subject to the jurisdiction of the commission including, but not limited to: (i) prohibiting the receipt of gifts by commissioners and employees from any gaming licensee, applicant, close associate, affiliate or other person or

entity subject to the jurisdiction of the commission; (ii) prohibiting the participation by commissioners and employees in a particular matter as defined in section 1 of said chapter 268A that affects the financial interest of a relative within the third degree of consanguinity or a person with whom such commissioner or employee has a significant relationship as defined in the code; and (iii) providing for recusal of a commissioner in a licensing decision due to a potential conflict of interest.

(n) Immediately upon assuming office, each commissioner and employee of the commission, except for secretarial and clerical personnel, shall swear or affirm that the commissioner or employee possesses no interest in a person licensed under this chapter. No individual shall be employed by the commission if, during the period commencing 3 years prior to employment, that individual held any direct or indirect interest in, or was employed by, a licensee under this chapter.

(o) No employee of the commission shall pursue any other business or occupation or other gainful employment outside of the commission without the prior written approval of the commission that such employment will not interfere or be in conflict with the employee's duties to the commission.

(p) No commissioner shall hold a direct or indirect interest in, or be employed by, an applicant or by a person licensed by the commission for a period of 3 years after the termination of employment with the commission.

(q) No employee of the commission holding a major policymaking position shall acquire an interest in, or accept employment with, an applicant or licensee for a period of 2 years after the termination of employment with the commission.

(r) No employee of the commission in a non-major policymaking position shall acquire an interest in, or accept employment with, an applicant or licensee under this chapter for a period of 1 year after termination of employment with the commission.

(s) A commission employee assigned to a gaming establishment shall be considered an essential state employee.

(t) No commissioner or employee, other than in the performance of the commissioner's or employee's official duties, shall place a wager in a gaming establishment.

(u) The commissioners and those employees holding major policymaking positions shall be sworn to the faithful performance of their official duties. The commissioners and those employees holding major policymaking positions shall: (i) conduct themselves in a manner so as to render decisions that are fair and impartial and in the public interest; (ii) avoid impropriety and the appearance of impropriety in all matters under their jurisdiction; (iii) avoid all prohibited communications; (iv) require staff and personnel subject to their direction and control to observe the same standards of fidelity and diligence; (v) disqualify themselves from proceedings in which their

impartiality might reasonably be questioned; and (vi) refrain from financial or business dealings which would tend to reflect adversely on impartiality.

(v) The commissioners and employees shall not own, or be in the employ of, or own any stock in, a business which holds a license under this chapter, nor shall they have, directly or indirectly, a pecuniary interest in, or be connected with, any such business or be in the employ of or connected with any person financing any such business; provided, however, that immediate family members of commissioners and employees holding major policymaking positions shall not own, or be in the employ of, or own stock in, any business which holds a license under this chapter. The commissioners and employees shall not personally, or through a partner or agent, render professional services or make or perform any business contract with or for any regulated entity, except contracts made with the commissioners for the furnishing of services, nor shall the commissioners or employees directly or indirectly receive any commission, bonus, discount, gift or reward from a regulated entity.

(w) Neither the commission nor any of its officers, agents, employees, consultants or advisors shall be subject to sections 9A, 45, 46 and 52 of chapter 30, chapter 31 or to chapter 200 of the acts of 1976.

(x) The Massachusetts gaming commission shall be a commission for the purposes of section 3 of chapter 12.

Section 4. The commission shall have all powers necessary or convenient to carry out and effectuate its purposes including, but not limited to, the power to:

(1) appoint officers and hire employees;

(2) establish, and from time to time amend, a plan of organization that it considers expedient;

(3) execute all instruments necessary or convenient for accomplishing the purposes of this chapter;

(4) enter into agreements or other transactions with a person, including, but not limited to, a public entity or other governmental instrumentality or authority in connection with its powers and duties under this chapter;

(5) appear on its own behalf before boards, commissions, departments or other agencies of municipal, state or federal government;

(6) apply for and accept subventions, grants, loans, advances and contributions of money, property, labor or other things of value from any source, to be held, used and applied for its purposes;

(7) provide and pay for advisory services and technical assistance as may be necessary in its judgment to carry out this chapter and fix the compensation of persons providing such services or assistance; provided, however, that in exercising its authority under this clause, the commission may receive and approve applications from a municipality to provide for reasonable costs related to legal, financial and other professional services

required for the negotiation and execution of host and surrounding community agreements as provided in section 15, and to require that such costs be paid by the applicant for a gaming license;

(8) prepare, publish and distribute, with or without charge as the commission may determine, such studies, reports, bulletins and other materials as the commission considers appropriate;

(9) assure that licenses shall not be issued to, or held by, and that there shall be no material involvement directly or indirectly with, a gaming operation or the ownership thereof, by unqualified, disqualified or unsuitable persons or by persons whose operations are conducted in a manner not conforming with this chapter;

(10) require an applicant for a position which requires a license under this chapter to apply for such license and approve or disapprove any such application or other transactions, events and processes as provided in this chapter;

(11) require a person who has a business association of any kind with a gaming licensee or applicant to be qualified for licensure under this chapter;

(12) develop criteria, in addition to those outlined in this chapter, to assess which applications for gaming licenses will provide the highest and best value to the commonwealth and the region in which a gaming establishment is to be located;

(13) determine which applicants shall be awarded gaming licenses, gaming vendor licenses and other licenses in accordance with this chapter;

(14) determine a suitable debt-to-equity ratio for applicants for a gaming license;

(15) deny an application or limit, condition, restrict, revoke or suspend a license, registration, finding of suitability or approval, or fine a person licensed, registered, found suitable or approved for any cause that the commission deems reasonable;

(16) monitor the conduct of licensees and other persons having a material involvement, directly or indirectly, with a licensee for the purpose of ensuring that licenses are not issued to or held by and that there is no direct or indirect material involvement with a licensee, by an unqualified or unsuitable person or by a person whose operations are conducted in an unsuitable manner or in unsuitable or prohibited places as provided in this chapter;

(17) gather facts and information applicable to the commission's obligation to issue, suspend or revoke licenses, work permits or registrations for: (i) a violation of this chapter or any regulation adopted by the commission; (ii) willfully violating an order of the commission directed to a licensee; (iii) the conviction of a criminal offense; or (iv) the violation of any other offense which would disqualify such a licensee from holding a license, work permit or registration;

(18) conduct investigations into the qualifications of all applicants for employment by the commission and by any regulated entity and all applicants for licensure;

(19) request and receive from the state police, the criminal history systems board or other criminal justice agencies including, but not limited to, the Federal Bureau of Investigation and the Internal Revenue Service, such criminal offender record information relating to criminal and background investigations as necessary for the purpose of evaluating employees of, and applicants for employment by, the commission and any regulated entity, and evaluating licensees and applicants for licensure under this chapter;

(20) be present, through its inspectors and agents, at all times, in gaming establishments for the purposes of: (i) certifying revenue; (ii) receiving complaints from the public relating to the conduct of gaming and wagering operations; (iii) examining records of revenues and procedures and inspecting and auditing all books, documents and records of licensees; (iv) conducting periodic reviews of operations and facilities for the purpose of regulations adopted hereunder; and (v) exercising its oversight responsibilities with respect to gaming;

(21) inspect and have access to all equipment and supplies in a gaming establishment or on premises where gaming equipment is manufactured, sold or distributed;

(22) seize and remove from the premises of a gaming licensee and impound any equipment, supplies, documents and records for the purpose of examination and inspection;

(23) demand access to and inspect, examine, photocopy and audit all papers, books and records of any affiliate of a gaming licensee or gaming vendor whom the commission suspects is involved in the financing, operation or management of the gaming licensee or gaming vendor; provided, however, that the inspection, examination, photocopying and audit may take place on the affiliate's premises or elsewhere as practicable and in the presence of the affiliate or its agent;

(24) require that the books and financial or other records or statements of a gaming licensee or gaming vendor be kept in a manner that the commission considers proper;

(25) levy and collect assessments, fees and fines and impose penalties and sanctions for a violation of this chapter or any regulations promulgated by the commission;

(26) collect taxes and fees under this chapter;

(27) restrict, suspend or revoke licenses issued under this chapter;

(28) conduct adjudicatory proceedings and promulgate regulations in accordance with chapter 30A;

(29) hear appeals of the bureau's suspension or revocation of a license;

(30) refer cases for criminal prosecution to the appropriate federal, state or local authorities;

(31) issue subpoenas and compel the attendance of witnesses at any place within the commonwealth, administer oaths and require testimony under oath before the commission in the course of an investigation or hearing conducted under this chapter;

(32) ensure that there is no duplication of duties and responsibilities between the commission and bureau; provided, however, that the commission shall not place any restriction upon the bureau's ability to investigate or prosecute violations of this chapter or the regulations adopted by the commission;

(33) determine which municipalities are the surrounding communities of a proposed gaming establishment; provided, however, that in making such determination, the commission shall consider factors including, but not limited to, population, infrastructure, distance from the gaming establishment and political boundaries;

(34) establish parameters for elections under clause (13) of section 15;

(35) maintain an official internet website for the commission;

(36) monitor any federal activity regarding internet gaming and coordinate with the office of the treasurer and receiver general on implementing any measures necessary to protect the commonwealth's lottery and gaming interests;

(37) adopt, amend or repeal regulations for the implementation, administration and enforcement of this chapter;

(38) act as trustees for any gaming-related trust funds;

(39) designate impacted live entertainment venues; provided, however, that, in making such designations, the commission shall consider factors including, but not limited to, the venue's distance from the gaming establishment, venue capacity and the type of performances offered by that venue;

(40) provide assistance to the governor in negotiating a compact with a federally-recognized Indian tribe in the commonwealth; and

(41) regulate and enforce section 7A of chapter 271 relating to bazaars; provided, however, that nothing in this section shall limit the attorney general's authority over public charities pursuant to the General Laws.

Section 5. (a) The commission shall promulgate regulations for the implementation, administration and enforcement of this chapter including, without limitation, regulations that:

(1) prescribe the method and form of application which an applicant for licensure shall follow and complete before consideration by the commission;

(2) prescribe the information to be furnished by an applicant or licensee concerning an applicant or licensee's antecedents, habits, character,

associates, criminal record, business activities and financial affairs, past or present;

(3) prescribe the criteria for evaluation of the application for a gaming license including, with regard to the proposed gaming establishment, an evaluation of architectural design and concept excellence, integration of the establishment into its surroundings, potential access to multi-modal means of transportation, tourism appeal, level of capital investment committed, financial strength of the applicant and the applicant's financial plan;

(4) prescribe the information to be furnished by a gaming licensee relating to the licensee's gaming employees;

(5) require fingerprinting of an applicant for a gaming license, a gaming licensee and employees of a gaming licensee or other methods of identification;

(6) prescribe the manner and method of collection and payment of assessments and fees and issuance of licenses;

(7) prescribe grounds and procedures for the revocation or suspension of a license or registration;

(8) require quarterly financial reports and an annual audit prepared by a certified public accountant attesting to the financial condition of a gaming licensee and disclosing whether the accounts, records and control procedures examined are maintained by the gaming licensee as required by this chapter and the regulations promulgated by the commission;

(9) prescribe the minimum procedures for effective control over the internal fiscal affairs of a gaming licensee, including provisions for the safeguarding of assets and revenues, the recording of cash and evidence of indebtedness and the maintenance of reliable records, accounts and reports of transactions, operations and events, including reports by the commission;

(10) provide for a minimum uniform standard of accounting procedures;

(11) establish licensure and work permits for employees working at the gaming establishment and minimum training requirements; provided, however, that the commission may establish certification procedures for any training schools and the minimum requirements for reciprocal licensing for out-of-state gaming employees;

(12) require that all gaming establishment employees be properly trained in their respective professions;

(13) prescribe the conduct of junkets and conditions of junket agreements between gaming licensees and junket representatives;

(14) provide for the interim authorization of a gaming establishment under this chapter;

(15) develop standards for monitoring and enforcing a gaming licensee's agreement with impacted live entertainment venues;

(16) establish procedures and ensure compliance with the timelines for making the capital investments required under this chapter;

(17) require the posting of payback statistics of slot machines played in a gaming establishment; and

(18) establish security procedures for ensuring the safety of minors on the premises of a gaming establishment.

(b) The commission may, pursuant to section 2 of chapter 30A, promulgate, amend or repeal any regulation promulgated under this chapter as an emergency regulation if such regulation is necessary to protect the interests of the commonwealth in regulating a gaming establishment.

Section 6. (a) There shall be within the commission an investigations and enforcement bureau which shall be the primary enforcement agent for regulatory matters under this chapter. The bureau shall perform such functions as the chair may determine in relation to enforcement, including the investigation of all licensees under this chapter. The bureau shall be under the supervision and control of the deputy director of investigations and enforcement. The deputy director shall be the executive and administrative head of the bureau and shall be responsible for administering and enforcing the laws relative to the bureau and to each administrative unit of the bureau. The duties of the deputy director as provided in this chapter and in any other general or special law shall be exercised and discharged subject to the direction, control and supervision of the chair.

(b) The bureau shall be a law enforcement agency and its employees shall have such law enforcement powers as necessary to effectuate the purposes of this chapter, including the power to receive intelligence on an applicant or licensee under this chapter and to investigate any suspected violations of this chapter.

(c) Officers and employees of the gaming enforcement unit of the state police assigned to the commission under section 70 of chapter 22C shall work with employees of the bureau, under the direction of the deputy director, to investigate violations of this chapter by a licensee or to investigate any activity taking place on the premises of a gaming establishment. Officers assigned to work with the bureau shall record their time and submit total hours to the deputy director and the commission shall reimburse the state police.

(d) The bureau shall notify the division of gaming enforcement in the department of the attorney general of criminal violations by a gaming licensee. The bureau and the division shall cooperate on the regulatory and criminal enforcement of this chapter and may determine whether to proceed with civil or criminal sanctions, or both, against a gaming licensee.

(e) To further effectuate the purposes of this chapter with respect to the investigation and enforcement of gaming establishments and licensees, the bureau may obtain or provide pertinent information regarding applicants or licensees from or to law enforcement entities or gaming authorities and other

domestic, federal or foreign jurisdictions, including the Federal Bureau of Investigation, and may transmit such information to each other electronically.

(f) The gaming enforcement unit within the department of state police shall have exclusive police jurisdiction over any criminal activity relating to the operation of a gaming establishment or relating to games or gaming that occur inside a gaming establishment; provided, however, that the state police shall have concurrent jurisdiction with the law enforcement agency of the host community on all other policing matters. The commission, in consultation with the colonel of the state police, shall facilitate the execution of a memorandum of understanding with the law enforcement agency of the host community that shall include, but not be limited to, procedures involving: (i) assignment of police officers of the host community to the gaming enforcement unit of the state police; (ii) first responder calls from the gaming establishment; (iii) emergencies occurring within the gaming establishment, including the gaming area; and (iv) criminal investigations involving employees or patrons of a gaming establishment.

(g) Investigators and employees of the gaming liquor enforcement unit of the alcoholic beverages control commission assigned to the commission under section 72A of chapter 10 shall work with employees of the bureau, under the direction of the deputy director, to enforce, regulate and control the distribution of alcoholic beverages in a gaming establishment. Investigators assigned to work with the bureau shall record their time and submit their total hours to the deputy director and the commission shall reimburse the alcoholic beverages control commission.

Section 7. (a) The commission shall administer and enforce chapters 128A and 128C and any other general or special law related to pari-mutuel wagering or simulcasting. The commission shall serve as a host racing commission and an off-track betting commission for purposes of 15 U.S.C. 3001, et seq.

(b) The commission may grant a simulcasting license to a gaming establishment; provided, however, that the commission shall assess a percentage of the wagering received on in-state and out-of-state thoroughbred and harness races equal to that paid by a licensee under chapter 128C and the assessment shall be allocated to the Race Horse Development Fund established in section 60 to support purse assistance and breeding programs; provided further, that in granting any such license to a gaming establishment, the commission shall take into consideration the impact on preexisting facilities licensed pursuant to chapter 128A and said chapter 128C.

Section 8. (a) The commission shall issue a request for applications for category 1 and category 2 licenses; provided, however, that the commission shall first issue a request for applications for the category 2 licenses. All requests for applications shall include: (i) the time and date for receipt of responses to the request for applications, the manner they are to be received and the address of the office to which the applications shall be delivered;

(ii) the form of the application and the method for submission; (iii) a general description of the anticipated schedule for processing the application; (iv) the contact information of commission employees responsible for handling applicant questions; and (v) any other information that the commission determines.

(b) Requests for applications pursuant to subsection (a) shall be advertised in a newspaper of general circulation and on the official internet website of the commission.

(c) The commission shall establish deadlines for the receipt of all applications for a gaming license. Applications received after the deadline shall not be reviewed by the commission.

Section 9. (a) The commission shall prescribe the form of the application for gaming licenses which shall require, but not be limited to:

(1) the name of the applicant;

(2) the mailing address and, if a corporation, the name of the state under the laws of which it is incorporated, the location of its principal place of business and the names and addresses of its directors and stockholders;

(3) the identity of each person having a direct or indirect interest in the business and the nature of such interest; provided, however, that if the disclosed entity is a trust, the application shall disclose the names and addresses of all beneficiaries; provided further, that if the disclosed entity is a partnership, the application shall disclose the names and addresses of all partners, both general and limited; and provided further, that if the disclosed entity is a limited liability company, the application shall disclose the names and addresses of all members;

(4) an independent audit report of all financial activities and interests including, but not limited to, the disclosure of all contributions, donations, loans or any other financial transactions to or from a gaming entity or operator in the past 5 years;

(5) clear and convincing evidence of financial stability including, but not limited to, bank references, business and personal income and disbursement schedules, tax returns and other reports filed by government agencies and business and personal accounting check records and ledgers;

(6) information and documentation to demonstrate that the applicant has sufficient business ability and experience to create the likelihood of establishing and maintaining a successful gaming establishment;

(7) a full description of the proposed internal controls and security systems for the proposed gaming establishment and any related facilities;

(8) an agreement that the applicant shall mitigate the potential negative public health consequences associated with gambling and the operation of a gaming establishment, including: (i) maintaining a smoke-free environment within the gaming establishment under section 22 of chapter 270; (ii)

providing complimentary on-site space for an independent substance abuse and mental health counseling service to be selected by the commission; (iii) prominently displaying information on the signs of problem gambling and how to access assistance; (iv) describing a process for individuals to exclude their names and contact information from a gaming licensee's database or any other list held by the gaming licensee for use in marketing or promotional communications; and (v) instituting other public health strategies as determined by the commission;

(9) the designs for the proposed gaming establishment, including the names and addresses of the architects, engineers and designers, and a timeline of construction that includes detailed stages of construction for the gaming establishment, non-gaming structures and racecourse, where applicable;

(10) the number of construction hours estimated to complete the work;

(11) a description of the ancillary entertainment services and amenities to be provided at the proposed gaming establishment; provided, however, that a gaming licensee shall only be permitted to build a live entertainment venue that has less than 1,000 seats or more than 3,500 seats;

(12) the number of employees to be employed at the proposed gaming establishment, including detailed information on the pay rate and benefits for employees;

(13) completed studies and reports as required by the commission, which shall include, but not be limited to, an examination of the proposed gaming establishment's: (i) economic benefits to the region and the commonwealth; (ii) local and regional social, environmental, traffic and infrastructure impacts; (iii) impact on the local and regional economy, including the impact on cultural institutions and on small businesses in the host community and surrounding communities; (iv) cost to the host community and surrounding communities and the commonwealth for the proposed gaming establishment to be located at the proposed location; and (v) the estimated municipal and state tax revenue to be generated by the gaming establishment; provided, however, that nothing contained in any such study or report shall preclude a municipality from seeking funding approval pursuant to clause (7) of section 4 for professional services to examine or evaluate a cost, benefit or other impact;

(14) the names of proposed vendors of gaming equipment;

(15) the location of the proposed gaming establishment, which shall include the address, maps, book and page numbers from the appropriate registry of deeds, assessed value of the land at the time of application and ownership interests over the past 20 years, including all interests, options, agreements in property and demographic, geographic and environmental information and any other information requested by the commission;

(16) the type and number of games to be conducted at the proposed gaming establishment and the specific location of the games in the proposed gaming establishment;

(17) the number of hotels and rooms, restaurants and other amenities located at the proposed gaming establishment and how they measure in quality to other area hotels and amenities;

(18) whether the applicant's proposed gaming establishment is part of a regional or local economic plan; and

(19) whether the applicant purchased or intends to purchase publicly-owned land for the proposed gaming establishment.

(b) Applications for licenses shall be public records under section 10 of chapter 66; provided however, that trade secrets, competitively-sensitive or other proprietary information provided in the course of an application for a gaming license under this chapter, the disclosure of which would place the applicant at a competitive disadvantage, may be withheld from disclosure under chapter 66.

Section 10. (a) The commission shall set the minimum capital investment for a category 1 license; provided, however, that a gaming licensee shall make a capital investment of not less than $500,000,000 into the gaming establishment which shall include, but not be limited to, a gaming area, at least 1 hotel and other amenities as proposed in the application for a category 1 license; and provided further, that the commission shall determine whether it will include the purchase or lease price of the land where the gaming establishment will be located or any infrastructure designed to support the site including, but not limited to, drainage, utility support, roadways, interchanges, fill and soil or groundwater or surface water contamination issues, whether or not the applicant is an eligible owner or operator underchapter 21E and has suitable capital to finance its operations and the proposed capital investment. Upon award of a gaming license by the commission, the applicant shall be required to deposit 10 per cent of the total investment proposed in the application into an interest-bearing account. Monies received from the applicant shall be held in escrow until the final stage of construction, as detailed in the timeline of construction submitted with the licensee's application and approved by the commission, at which time the deposit shall be returned to the applicant to be applied for the final stage. Should the applicant be unable to complete the gaming establishment, the deposit shall be forfeited to the commonwealth. In place of a cash deposit, the commission may allow for an applicant to secure a deposit bond insuring that 10 per cent of the proposed capital investment shall be forfeited to the commonwealth if the applicant is unable to complete the gaming establishment.

(b) A licensee who fails to begin gaming operations within 1 year after the date specified in its construction timeline, as approved by the commission, shall be subject to suspension or revocation of the gaming license

by the commission and may, after being found by the commission after a hearing to have acted in bad faith in its application, be assessed a fine of up to $50,000,000.

(c) An applicant for a category 1 license shall submit its proposed capital investment with its application to the commission which shall include stages of construction of the gaming establishment and the deadline by which the stages and overall construction and any infrastructure improvements will be completed. In awarding a category 1 license, the commission shall determine at what stage of construction a licensee shall be approved to open for business; provided, however, that a licensee shall not be approved to open for business until the commission has determined that at least the gaming area and other ancillary entertainment services and non-gaming amenities, as required by the commission, have been built and are of a superior quality as set forth in the conditions of licensure; and provided further, that total infrastructure improvements onsite and around the vicinity of the gaming establishment, including projects to account for traffic mitigation as determined by the commission, shall be completed before the gaming establishment shall be approved for opening by the commission. The commission shall not approve a gaming establishment to open for business before the completion of the permanent gaming area.

(d) The commission shall determine the minimum licensing fee for each region, which shall not be less than $85,000,000, to be paid by a category 1 licensee within 30 days after the award of the license. The license shall set forth the conditions to be satisfied by the licensee before the gaming establishment shall be opened to the public. The commission shall set any renewal fee for such license based on the cost of fees associated with the evaluation of a category 1 licensee under this chapter which shall be deposited into the Gaming Revenue Fund. Such renewal fee shall be exclusive of any subsequent licensing fees under this section.

(e) The commission shall determine the sources and total amount of an applicant's proposed capitalization to develop, construct, maintain and operate a proposed gaming establishment under this chapter. Upon award of a gaming license, the commission shall continue to assess the capitalization of a licensee for the duration of construction of the proposed gaming establishment and the term of the license.

Section 11. (a) The commission shall set the minimum capital investment for a category 2 license; provided, however, that the gaming licensee shall make a capital investment of not less than $125,000,000 into the gaming establishment, which shall include, but not be limited to, a gaming area or other amenities as proposed in the application for a category 2 license; and provided further, that the commission shall determine whether it will include the purchase or lease price of the land where the gaming establishment will be located or any infrastructure designed to support the site, including, but not

limited to, drainage, utility support, roadways, interchanges, fill and soil or groundwater or surface water contamination issues, whether or not the applicant is an eligible owner or operator underchapter 21E and has suitable capital to finance its operations and the proposed capital investment. The investment required under this section shall be made within 2 years after receiving a gaming license; provided, however, that any infrastructure improvements necessary to increase visitor capacity and account for traffic mitigation shall not be considered part of the required capital investment and, as determined by the commission, shall be completed before the category 2 licensee shall be authorized to operate a slot machine at the gaming establishment.

(b) The commission shall determine the minimum licensing fee for a category 2 licensee, which shall not be less than $25,000,000 to be paid within 30 days after the award of the license.

(c) Upon award of a category 2 license, the commission shall continue to assess the capitalization of a licensee for the duration of construction of the proposed gaming establishment and the term of the gaming license.

Section 12. (a) Upon receipt of an application for a gaming license, the commission shall instruct the bureau to commence an investigation into the suitability of the applicant. In evaluating the suitability of the applicant, the commission shall consider the overall reputation of the applicant including, without limitation:

(1) the integrity, honesty, good character and reputation of the applicant;

(2) the financial stability, integrity and background of the applicant;

(3) the business practices and the business ability of the applicant to establish and maintain a successful gaming establishment;

(4) whether the applicant has a history of compliance with gaming licensing requirements in other jurisdictions;

(5) whether the applicant, at the time of application, is a defendant in litigation involving its business practices;

(6) the suitability of all parties in interest to the gaming license, including affiliates and close associates and the financial resources of the applicant; and

(7) whether the applicant is disqualified from receiving a license under section 16; provided, however, that in considering the rehabilitation of an applicant for a gaming license, the commission shall not automatically disqualify an applicant if the applicant affirmatively demonstrates, by clear and convincing evidence, that the applicant has financial responsibility, character, reputation, integrity and general fitness as such to warrant belief by the commission that the applicant will act honestly, fairly, soundly and efficiently as a gaming licensee.

(b) If the bureau determines during its investigation that an applicant has failed to: (i) establish the applicant's integrity or the integrity of any affiliate, close associate, financial source or any person required to be qualified by the commission; (ii) demonstrate responsible business practices in any jurisdiction; or (iii) overcome any other reason, as determined by the commission, as to why it would be injurious to the interests of the commonwealth in awarding the applicant a gaming license, the bureau shall cease any further review and recommend that the commission deny the application.

(c) If the bureau has determined that an applicant is suitable to receive a gaming license, the bureau shall recommend that the commission commence a review of the applicant's entire application.

Section 13. (a) An applicant for a gaming license, and any person required by the commission to be qualified for licensure, shall establish its individual qualifications for licensure to the commission by clear and convincing evidence.

(b) An applicant, licensee, registrant or any other person who shall be qualified under this chapter shall have the continuing duty to provide any assistance or information required by the commission and to cooperate in any inquiry or investigation conducted by the commission. Refusal to answer or produce information, evidence or testimony by an applicant, licensee, registrant or other person required to be qualified under this chapter may result in denial of the application or suspension or revocation of the license or registration by the commission.

(c) No applicant, licensee, registrant or person required to be qualified under this chapter shall willfully withhold information from, or knowingly give false or misleading information to, the commission. If the commission determines that an applicant, or a close associate of an applicant, has willfully provided false or misleading information, such applicant shall not be eligible to receive a license under this chapter. Any licensee or other person required to be qualified for licensure under this chapter who willfully provides false or misleading information shall have its license conditioned, suspended or revoked by the commission.

Section 14. (a) The commission shall require anyone with a financial interest in a gaming establishment, or with a financial interest in the business of the gaming licensee or applicant for a gaming license or who is a close associate of a gaming licensee or an applicant for a gaming license, to be qualified for licensure by meeting the criteria provided in sections 12 and 16 and to provide any other information that the commission may require.

(b) For each business that applies for a gaming license, the commission shall determine whether each officer and director of a corporation, other than a publicly-traded corporation, general partner and limited partner of a limited partnership, and member, transferee of a member's interest in a

limited liability company, director and manager of a limited liability company which holds or applies for a gaming license meets the standards for qualification of licensure pursuant to sections 12 and 16 and, in the judgment of the commission, any of a business's individual stockholders, lenders, holders of evidence of indebtedness, underwriters, close associates, executives, agents or employees.

(c) A person owning more than 5 per cent of the common stock of the applicant company, directly or indirectly, or a holding, intermediary or subsidiary company of an applicant company may be required to meet the qualifications for licensure under sections 12 and 16. The commission may waive the licensing requirements for institutional investors holding up to 15 per cent of the stock of the applicant company or holding, intermediary or subsidiary company of the applicant company upon a showing by the person seeking the waiver that the applicant purchased the securities for investment purposes only and does not have any intention to influence or affect the affairs or operations of the applicant company or a holding, intermediary or subsidiary company of the applicant company. An institutional investor granted a waiver which subsequently determines to influence or affect the affairs or operations of the applicant company or a holding, intermediary or subsidiary company of the applicant company shall provide not less than 30 days notice to the commission of such intent and the commission shall ensure that the institutional investor meets the qualifications for licensure under said sections 12 and 16 before the institutional investor may take an action that may influence or affect the affairs of the applicant company or a holding, intermediary or subsidiary company of the applicant company. Any company holding over 15 per cent of the applicant company, or a holding, intermediary or subsidiary company of an applicant company, shall be required to meet the qualifications for licensure under said sections 12 and 16.

(d) A person who is required to be qualified for licensure under this section as a general or limited partner shall not serve as such a partner until that person obtains the required approval or waiver from the commission.

(e) The commission shall require any person involved in the financing of a gaming establishment or an applicant's proposed gaming establishment to be qualified for licensure pursuant to sections 12 and 16 and may allow such person to seek a waiver pursuant to the standards in subsection (c).

(f) A person required to be qualified for licensure shall apply for qualification within 30 days after taking a position with the business. A person who is required to be qualified for licensure pursuant to a decision of the commission shall apply for qualification within 30 days after that decision.

(g) If a corporation or other form of business organization applying for a gaming license is, or if a corporation or other form of business organization holding a gaming license is to become, a subsidiary, each holding

company, intermediary company and other entity having an interest in the applicant shall be required to be qualified for licensure under sections 12 and 16.

(h) The commission shall require that a company or individual that can exercise control or provide direction to a gaming licensee or applicant for a gaming license or a holding, intermediary or subsidiary company of a gaming licensee or applicant for a gaming license be qualified for licensure under sections 12 and 16; provided, however, that the commission may allow such person to seek a waiver under subsection (c).

(i) The bureau shall investigate each person required to be qualified for licensure under this section and shall: (i) make a recommendation to the commission that the commission shall approve or deny the application for licensure; or (ii) extend the period for issuing a recommendation in order to obtain additional information necessary for a complete evaluation of the application for a license.

Section 15. No applicant shall be eligible to receive a gaming license unless the applicant meets the following criteria and clearly states as part of an application that the applicant shall:

(1) agree to be a licensed state lottery sales agent under chapter 10 to sell or operate the lottery, multi-jurisdictional and keno games; demonstrate that the lottery and keno games shall be readily accessible to the guests of the gaming establishment and agree that, as a condition of its license to operate a gaming establishment, it will not create, promote, operate or sell games that are similar to or in direct competition, as determined by the commission, with games offered by the state lottery commission, including the lottery instant games or its lotto style games such as keno or its multi-jurisdictional games;

(2) in accordance with the design plans submitted with the licensee's application to the commission, invest not less than the required capital under this chapter into the gaming establishment;

(3) own or acquire, within 60 days after a license has been awarded, the land where the gaming establishment is proposed to be constructed; provided, however, that ownership of the land shall include a tenancy for a term of years under a lease that extends not less than 60 years beyond the term of the gaming license issued under this chapter;

(4) meet the licensee deposit requirement;

(5) demonstrate that it is able to pay and shall commit to paying the gaming licensing fee;

(6) demonstrate to the commission how the applicant proposes to address lottery mitigation, compulsive gambling problems, workforce development and community development and host and surrounding community impact and mitigation issues as set forth in the memoranda of understanding required under this chapter;

(7) identify the infrastructure costs of the host and surrounding communities incurred in direct relation to the construction and operation of a gaming establishment and commit to a community mitigation plan for those communities;

(8) provide to the commission a signed agreement between the host community and the applicant setting forth the conditions to have a gaming establishment located within the host community; provided, however, that the agreement shall include a community impact fee for the host community and all stipulations of responsibilities between the host community and the applicant, including stipulations of known impacts from the development and operation of a gaming establishment;

(9) provide to the commission signed agreements between the surrounding communities and the applicant setting forth the conditions to have a gaming establishment located in proximity to the surrounding communities and documentation of public outreach to those surrounding communities; provided, however, that the agreement shall include a community impact fee for each surrounding community and all stipulations of responsibilities between each surrounding community and the applicant, including stipulations of known impacts from the development and operation of a gaming establishment;

(10) provide to the commission signed agreements between the impacted live entertainment venues and the applicant setting forth the conditions to have a gaming establishment located in proximity to the impacted live entertainment venues; provided, however, that the agreement shall include, but not be limited to, terms relating to cross marketing, coordination of performance schedules, promotions and ticket prices;

(11) pay to the commission a nonrefundable application fee of $400,000 to defray the costs associated with the processing of the application and investigation of the applicant; provided, however, that if the costs of the investigation exceed the initial application fee, the applicant shall pay the additional amount to the commission within 30 days after notification of insufficient fees or the application shall be rejected; and provided further, that not less than $50,000 of the application fee shall be used to reimburse the host and surrounding municipalities for the cost of determining the impact of a proposed gaming establishment and for negotiating community mitigation impact agreements;

(12) comply with state and local building codes and local ordinances and bylaws, including sections 61 to 62H, inclusive, of chapter 30;

(13) have received a certified and binding vote on a ballot question at an election in the host community in favor of such license; provided, however that a request for an election shall take place after the signing of an agreement between the host community and the applicant; provided further, that upon receipt of a request for an election, the governing body of the municipality shall call for the election to be held not less than 60 days but

not more than 90 days from the date that the request was received; provided further, that the signed agreement between the host community and the applicant shall be made public with a concise summary, approved by the city solicitor or town counsel, in a periodical of general circulation and on the official website of the municipality not later than 7 days after the agreement was signed by the parties; provided further, that the agreement and summary shall remain on the website until the election has been certified; provided further, that the municipality that holds an election shall be reimbursed for its expenses related to the election by the applicant within 30 days after the election; provided further, that the commission shall deny an application for a gaming license if the applicant has not fully reimbursed the community; provided further, that, for the purposes of this clause, unless a city opts out of this provision by a vote of the local governing body, if the gaming establishment is proposed to be located in a city with a population of at least 125,000 residents as enumerated by the most recentenumerated federal census, "host community" shall mean the ward in which the gaming establishment is to be located for the purpose of receiving a certified and binding vote on a ballot question at an election; provided further, that, upon the signing of an agreement between the host community and the applicant and upon the request of the applicant, the city or town clerk shall set a date certain for an election on the ballot question in the host community; provided further, that at such election, the question submitted to the voters shall be worded as follows: "Shall the (city/town) of _____ permit the operation of a gaming establishment licensed by the Massachusetts Gaming Commission to be located at ____[description of site]_____? YES _____ NO _____" ; provided further, that the ballot question shall be accompanied by a concise summary, as determined by the city solicitor or town counsel; provided further, that if a majority of the votes cast in a host community in answer to the ballot question is in the affirmative, the host community shall be taken to have voted in favor of the applicant's license; provided further, that, if the ballot question is voted in the negative, the applicant shall not submit a new request to the governing body within 180 days of the last election; and provided further, that a new request shall be accompanied by an agreement between the applicant and host community signed after the previous election; provided further, that if a proposed gaming establishment is situated in 2 or more cities or towns, the applicant shall execute an agreement with each host community, or a joint agreement with both communities, and receive a certified and binding vote on a ballot question at an election held in each host community in favor of such a license;

(14) provide a community impact fee to the host community;

(15) formulate for commission approval and abide by a marketing program by which the applicant shall identify specific goals, expressed as an overall program goal applicable to the total dollar amount of contracts, for

utilization of: (i) minority business enterprises, women business enterprises and veteran business enterprises to participate as contractors in the design of the gaming establishment; (ii) minority business enterprises, women business enterprises and veteran business enterprises to participate as contractors in the construction of the gaming establishment; and (iii) minority business enterprises, women business enterprises and veteran business enterprises to participate as vendors in the provision of goods and services procured by the gaming establishment and any businesses operated as part of the gaming establishment; and

(16) formulate for commission approval and abide by an affirmative action program of equal opportunity whereby the applicant establishes specific goals for the utilization of minorities, women and veterans on construction jobs; provided, however, that such goals shall be equal to or greater than the goals contained in the executive office for administration and finance Administration Bulletin Number 14. In furtherance of specific goals for the utilization of minorities, women and veterans on construction jobs, the licensee shall send to each labor union or representative of workers with which the applicant has a collective bargaining agreement or other contract or understanding, a notice advising the labor union or workers' representative of the applicant's commitments.

Section 16. (a) The commission shall deny an application for a gaming license or a license for a key gaming employee issued under this chapter, if the applicant: (i) has been convicted of a felony or other crime involving embezzlement, theft, fraud or perjury; (ii) submitted an application for a license under this chapter that contains false or misleading information; (iii) committed prior acts which have not been prosecuted or in which the applicant was not convicted but form a pattern of misconduct that makes the applicant unsuitable for a license under this chapter; or (iv) has affiliates or close associates that would not qualify for a license or whose relationship with the applicant may pose an injurious threat to the interests of the commonwealth in awarding a gaming license to the applicant.

(b) The commission shall deny an application for a license or registration, other than a gaming license or a license for a key gaming employee, under this chapter if the applicant: (i) has been convicted of a felony or other crime involving embezzlement, theft, fraud or perjury; provided, however, that for convictions which occurred before the 10-year period immediately preceding application for licensure, an applicant may demonstrate, and the commission shall consider, the applicant's rehabilitation and whether such conviction should not be an automatic disqualification under this section; (ii) submitted an application for a license under this chapter that contains false or misleading information; (iii) committed prior acts which have not been prosecuted or in which the applicant was not convicted but form a pattern of misconduct that makes the applicant unsuitable for a license

under this chapter; or (iv) has affiliates or close associates that would not qualify for a license or whose relationship with the applicant may pose an injurious threat to the interests of the commonwealth in awarding a gaming license to the applicant.

Section 17. (a) After a review of the entire application and any independent evaluations, the commission shall identify which communities shall be designated as the surrounding communities of a proposed gaming establishment; provided, however, that any community that has negotiated a surrounding community memorandum of understanding with the applicant that was submitted with the application shall be considered a surrounding community by the commission. In making that determination, the commission shall consider the detailed plan of construction submitted by the applicant, information received from the public and factors which shall include, but not be limited to, population, infrastructure and distance from the gaming establishment and political boundaries. If the commission determines a city or town to be a surrounding community and the applicant has not finalized negotiations with that community in its application pursuant to section 15, the applicant shall negotiate a signed agreement with that community within 30 days and no action shall be taken on its application prior to the execution of that agreement. Notwithstanding clause (9) of said section 15, in the event that an applicant and a surrounding community cannot reach an agreement within the 30-day period, the commission shall have established protocols and procedures for ensuring the conclusion of a negotiation of a fair and reasonable agreement between an applicant and a surrounding community in order to allow the applicant to submit a timely and complete application.

(b) After a review of the entire application and any independent evaluations, the commission shall identify which live entertainment venues shall be designated as impacted live entertainment venues of a proposed gaming establishment; provided, however, that any live entertainment venue that has negotiated an agreement with the applicant that was submitted with the application shall be considered an impacted live entertainment venue by the commission. If the commission determines a live entertainment venue to be an impacted live entertainment venue and the applicant has not finalized negotiations with that live entertainment venue in its application pursuant to section 15, the applicant shall negotiate a signed agreement with that live entertainment venue within 30 days and no action shall be taken on its application prior to the execution of that agreement. Notwithstanding clause (10) of said section 15, in the event an applicant and an impacted live entertainment venue cannot reach an agreement within the 30-day period, the commission shall have established protocols and procedures for ensuring the conclusion of a negotiation of a fair and reasonable agreement between an applicant and an impacted live entertainment venue in order to allow the applicant to submit a timely and complete application. A gaming licensee's

compliance with such agreements shall be considered upon a gaming licensee's application for renewal of the gaming license.

(c) The commission shall conduct a public hearing on the application pursuant to section 11 ½ of chapter 30A. An applicant for a gaming license and a municipality designated as a host or surrounding community shall be given at least 30 days notice of the public hearing. The commission shall hold the public hearing within the host community; provided, however, that the host community may request that the commission hold the hearing in another city or town.

(d) The public hearing shall provide the commission with the opportunity to address questions and concerns relative to the proposal of a gaming applicant to build a gaming establishment, including the scope and quality of the gaming area and amenities, the integration of the gaming establishment into the surrounding community and the extent of required mitigation plans and receive input from members of the public from an impacted community. During the hearing, the commission may take the opportunity to read into the record any letters of support, opposition or concern from members of a community in the vicinity of the proposed gaming establishment.

(e) Not sooner than 30 days nor later than 90 days after the conclusion of the public hearing, the commission shall take action on the application. The commission may: (i) grant the application for a gaming license; (ii) deny the application; or (iii) extend the period for issuing a decision in order to obtain any additional information necessary for a complete evaluation of the application; provided, however, that the extension shall be not longer than 30 days.

(f) Upon denial of an application, the commission shall prepare and file the commission's decision and, if requested by the applicant, shall further prepare and file a statement of the reasons for the denial, including specific findings of fact by the commission and the recommendation from the bureau relative to the suitability of the applicant pursuant to sections 12 and 16. Applicants may request a hearing before the commission to contest any findings of fact by the bureau relative to the suitability of the applicant.

(g) The commission shall have full discretion as to whether to issue a license. Applicants shall have no legal right or privilege to a gaming license and shall not be entitled to any further review if denied by the commission.

Section 18. In determining whether an applicant shall receive a gaming license, the commission shall evaluate and issue a statement of findings of how each applicant proposes to advance the following objectives:

(1) protecting the lottery from any adverse impacts due to expanded gaming including, but not limited to, developing cross-marketing strategies with the lottery and increasing ticket sales to out-of-state residents;