

No. 12-1233

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

KG URBAN ENTERPRISES, LLC,

Plaintiff-Appellant,

v.

DEVAL L. PATRICK, in his official capacity
as Governor of the Commonwealth of Massachusetts, and

CHAIRMAN AND COMMISSIONERS OF THE
MASSACHUSETTS GAMING COMMISSION, in their official capacities

Defendants-Appellees.

On Appeal from the U.S. District Court for the District of Massachusetts
(No. 1:11-cv-12070-NMG)

APPELLANT'S MOTION FOR EXPEDITED CONSIDERATION

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February 27, 2012

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, KG Urban Enterprises, LLC, certifies that it has no parent corporation, and that no publicly held corporation owns 10% or more of its stock.

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Plaintiff-Appellant KG Urban Enterprises, LLC (“KG”) respectfully moves this Court for expedited consideration of the above-captioned appeal. KG sought a preliminary injunction in district court. The court recognized KG’s irreparable harm and the need for an expeditious decision, but denied relief on purely legal grounds. Expedited treatment of KG’s appeal is clearly warranted.

On November 22, 2011, Governor Deval Patrick signed legislation authorizing a significant expansion of legalized gaming in Massachusetts. *See* Act Establishing Expanded Gaming in the Commonwealth, St. 2011, c. 194 (“Act”). The same day, KG filed suit alleging that the Act violated, *inter alia*, the equal protection guarantees of the federal Constitution and Massachusetts Declaration of Rights. The Act authorizes three resort-style casinos. Two of the licenses for those casinos will be awarded on the merits through an open and competitive application process. The third license, however, is explicitly set aside for a federally recognized Indian tribe in the Southeastern region of the Commonwealth.

That license must be opened for competitive bidding on October 31, 2012 if, but only if, a tribe does not reach a “compact” with the Commonwealth by July 31, 2012. That “compact” is not a full-blown compact that would entitle a tribe to engage in gaming pursuant to federal law. Such a compact would require approval by the federal government, and, critically, would require the tribe to possess “Indian land”—trust land or a reservation—before the compact would become

effective. Rather, the “compact” envisioned by the Act is a creature of state law that extends—presumably indefinitely—the tribes’ exclusive ability to pursue gaming in the Southeastern region, despite the absence of any such Indian land. This is not a matter of furthering federal Indian gaming rights, but of creating a state-law preference for a tribe that does not now, and may never, qualify for federal Indian gaming rights.

KG is a development company that has invested nearly \$5 million in preparing a comprehensive redevelopment plan for a polluted site in downtown New Bedford. Because that site is in the Southeastern region, KG is barred from applying for a gaming license solely because it is not an Indian tribe. Moreover, as a practical matter, KG is barred from taking the steps now being actively pursued by entities in the rest of the Commonwealth because the set-aside has discouraged potential partners from pursuing gaming projects in the Southeast with anyone other than a tribe. Recognizing the immediate and irreparable threat the Act posed to its constitutional rights and investments, KG brought suit the day the Act was signed into law, seeking a preliminary injunction. Although the district court handled that request expeditiously, recognized KG’s irreparable injury, and rejected the Commonwealth’s arguments that the dispute was not ripe, it denied KG’s motion for a preliminary injunction and dismissed the complaint. This appeal was filed on the next business day.

Expedited consideration of this appeal is critical. The Act's set-asides for Indian tribes are severely skewing competition among gaming applicants in the Commonwealth. Numerous gaming operators have announced plans to apply for the licenses in the Eastern and Western regions, but the Southeast is a dead zone for everyone other than Indian tribes. Moreover, the Governor and the Mashpee Wampanoag Tribe are working aggressively toward negotiation of a gaming compact that, once signed, will permanently foreclose competition in the Southeast. Just hours after signing the Act into law, Governor Patrick met with the Mashpee Wampanoag Tribe and emphasized that "we want to make sure we do what we can to partner with the tribe on a commercial license," and that work on a compact "will begin as soon as today."¹ A prompt decision about the constitutionality of the Act's set-asides is needed to vindicate KG's constitutional rights and to clarify whether the Commonwealth's ongoing compact negotiations, and the unprecedented state-law benefits they are intended to bestow, are lawful.

FACTS AND PROCEEDINGS BELOW

A. The Gaming Act's Tribal Set-Asides

The Act authorizes up to three resort-style casinos, one each in the greater Boston area, Western Massachusetts, and Southeastern Massachusetts. *See Act*

¹ *See* George Brennan, "Tribes Eager to Make Play for Region's Casinos," *SouthCoastToday.com* (Nov. 23, 2011), <http://www.southcoasttoday.com/apps/pbcs.dll/article?AID=/20111123/NEWS02/111230324>.

§ 16, sec. 19(a). The Act also creates a five-member Massachusetts Gaming Commission (“Commission”), and vests that body with broad authority to oversee casino gaming in the Commonwealth. *See id.* secs. 3-6.

The gaming licenses in the Eastern and Western regions will be awarded on the merits through an open, competitive application process. Applicants in those regions must provide extensive information about their development proposals, finances, and corporate structures. *Id.* sec. 9(a). Each applicant, key person within the applicant entity, and financial investor must establish their suitability, financial responsibility, character, reputation, integrity, and general fitness to hold a gaming license. *Id.* secs. 12-14. The Commission must also conduct a thorough investigation of each proposal to assess how it will advance nineteen enumerated objectives, including: maximizing capital investment; protecting local businesses; preventing compulsive gambling; utilizing sustainable development principles; providing high-quality jobs; and maximizing tax revenues. *Id.* sec. 18. The Commission has “full discretion as to whether to issue a license.” *Id.* sec. 17(g). A successful license applicant must pay a one-time license fee of at least \$85 million, must commit to making a capital investment of at least \$500 million, and must pay a 25 percent daily tax on gross gaming revenue. *Id.* secs. 10, 55(a).

After establishing the general application procedures for gaming licenses, the Act creates an entirely separate set of procedures that apply only to the

Southeastern region, which includes Bristol, Plymouth, Nantucket, Dukes, and Barnstable counties. Section 91(a) of the Act provides that “[n]otwithstanding any general or special law or rule or regulation to the contrary, the governor may enter into a compact with a federally recognized Indian tribe in the [C]ommonwealth.” Act § 91(a). If such a compact is not reached by July 31, 2012, then the Commission must open the license for the Southeastern region to competitive bidding “not later than October 31, 2012.” *Id.* § 91(e).

Between now and July 31, 2012, only a tribe may negotiate with the Commonwealth to pursue gaming in the Southeastern region. The requirements for reaching a state-law compact that will make the temporary set-aside permanent are not demanding. A tribe must have “purchased, or entered into an agreement to purchase, a parcel of land for the proposed tribal gaming development and scheduled a vote in the host communities for approval” of that development. *Id.* § 91(c). And the state-law compact must be approved by the Massachusetts legislature by July 31, 2012. The Act appropriates \$5 million to the Governor for, *inter alia*, the “negotiation and execution of a compact with a federally recognized Indian tribe . . . to establish a tribal casino in region C.” *Id.* § 2A.

The Act thus grants the two federally recognized Indian tribes in Massachusetts an exclusive right to negotiate toward gaming in the Southeastern region between now and July 31, 2012, and the opportunity to make that exclusion

permanent. The Act essentially gives the tribes a right of first refusal on that license.² The Commission, charged with the responsibility to judge competing applications in the rest of the Commonwealth impartially, is also to “provide assistance to the governor” in negotiating a compact with a federally recognized Indian tribe. Act § 91(b).

B. KG’s Redevelopment Proposal for the Cannon Street Station

KG is a development company that specializes in the redevelopment of urban brownfield sites. KG employs an integrated method of development that incorporates gaming, retail, cultural, and commercial activities into the same project, with no artificial barriers between the development and the surrounding community. KG’s “urban gaming” model focuses on principles of walkability, connectivity, and sustainability, and focuses in particular on former industrial sites and the rehabilitation of the vintage industrial structures found on such sites.

In February 2007, KG identified a site in New Bedford that currently houses an abandoned power plant known as Cannon Street Station. Stern Decl. ¶ 9

² There are two federally recognized Indian tribes in Massachusetts—the Mashpee Wampanoag Tribe and Wampanoag Tribe of Gay Head (Aquinnah). The Commonwealth has taken the position that the Aquinnah waived any rights to conduct gaming in connection with a 1985 settlement of land claims. Thus, the Commonwealth’s position is that *only one tribe*—the Mashpee—is eligible for the set-aside in the Act. But even that tribe is currently ineligible to operate a casino under the federal Indian Gaming Regulatory Act (“IGRA”), 25 U.S.C. § 2701 *et seq.*, because it does not possess a reservation or trust land, which is a critical prerequisite to tribal gaming under IGRA.

(Ex. 1).³ This property is an ideal candidate for redevelopment because of its proximity to downtown New Bedford's cultural and entertainment center, its location on the historic New Bedford harbor, and the dramatic physical presence of the vintage power plant structure. *Id.* ¶ 10. KG assembled a team of nationally recognized experts to create a master plan for the site's redevelopment and environmental cleanup. That plan includes a multi-level casino, a hotel, restaurants, a conference center, retail shops, and an exhibition hall, all of which will sit directly on New Bedford's historic harbor and street grid. *Id.* ¶ 18. If KG receives a gaming license for the Cannon Street site, the total project investment will likely exceed \$1 billion, including approximately \$50 million for a privately financed cleanup of severe environmental contamination on the property. *Id.* ¶ 21.

KG has invested more than four years of work and approximately \$4.6 million to prepare its redevelopment plan for the Cannon Street Station. *Id.* ¶ 20. That investment is not self-sustaining, as KG must make escalating monthly payments to maintain its options on the Cannon Street property. *Id.* ¶¶ 11-12.

KG intends to apply for a gaming license for the Cannon Street site as soon as it is permitted to do so. *Id.* ¶ 22. Because of the Act's set-asides for Indian tribes, however, KG is locked out of the application process until at least July 31, 2012, and may *never* have an opportunity to compete for a license, regardless of

³ Declaration of Andrew M. Stern, Ex. B to Plaintiff's Memorandum in Support of Motion for Preliminary Injunction (DN 9) (Nov. 23, 2011).

the economic merits of its proposal. KG is a development company, not a gaming company or a casino operator. The effect of the set-asides is to make it impossible for KG to find a gaming company partner, because—while opportunities for fair competition exist in the rest of the Commonwealth—the set-asides effectively reserve opportunities in the Southeastern region for the tribes and their partners.

C. The District Court’s Decision

Recognizing its immediate irreparable harm from the Act’s set-asides, KG filed suit and sought a preliminary injunction the day the Act was signed into law. KG argued that the Act’s tribal set-asides violate the Equal Protection Clause and Massachusetts Declaration of Rights, and are preempted by the federal Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* KG sought a declaratory judgment and a preliminary injunction barring enforcement of the Act’s tribal set-asides. The Commonwealth opposed the motion on the ground that KG’s claims were not ripe for review and were unlikely to succeed on the merits.

The district court held a relatively expedited hearing on KG’s motion for preliminary injunction on January 31, 2012, and denied that motion on February 16, 2012. The court rejected the Commonwealth’s jurisdictional and procedural defenses, *see* Mem. Op. 7-16, but held that KG had not demonstrated a likelihood of success on the merits, *id.* 17-36. Believing itself bound by precedent, the court concluded that a preference for Indian tribes is “political” rather than racial, and

thus subject only to rational basis review. *Id.* at 25-31. At the same time, the court identified several significant problems with this doctrine, and noted that it likely would have ruled differently if it “were addressing the issue as one of first impression.” *Id.* at 28. KG filed a timely notice of appeal on the next business day, February 21, 2012.

ARGUMENT

I. The Act’s Tribal Set-Asides Are Significantly and Irreparably Distorting Competition for the Gaming License in the Southeastern Region

Under 28 U.S.C. § 1657(a), “each court of the United States . . . shall expedite the consideration” of any action “if good cause therefor is shown.” Expedited consideration of this appeal is warranted for three independent reasons:

First, the tribal set-asides in the Gaming Act are severely distorting the competitive landscape in the Southeastern region, right now. Since the Act was passed, five major national gaming operators have announced plans to apply for the gaming license in the Western region, and two of the largest gaming operators in the world (Caesars and Wynn Resorts) have announced ambitious development plans for the Eastern region. *See* Stern Supp. Decl. ¶ 6 (Ex. 2).⁴ The Southeastern

⁴ Supplemental Declaration of Andrew M. Stern (DN 22) (Jan. 30, 2012). The district court found certain statements in Mr. Stern’s supplemental declaration to be unduly argumentative, but the court denied the Commonwealth’s motion to strike and was willing to consider the factual statements in the declaration.

region, however, remains a dead zone for everybody other than Indian tribes. *See id.* ¶ 7. Because of the exclusive opportunity for tribes until July 31, 2012, and the substantial likelihood that those exclusive rights will become permanent, gaming operators and investors have simply steered clear of the Southeast. *Id.*

KG is incurring immediate and irreparable injury as a result of this distortion of competition. If it were able to obtain a gaming operator partner and additional investors, KG would be taking numerous steps, right now, to improve its development proposal and prepare its license application. Those are the same basic steps being taken right now by competitors in the other regions, against whom KG would have to compete if it prevails in this suit and wins a license through a competitive process. For example, KG would be conducting outreach with elected officials, local businesses, and citizens, and would be commencing the lengthy process of obtaining all necessary permits and approvals from the relevant regulatory agencies (which concern wide-ranging issues such as zoning, environmental remediation, traffic mitigation, and historic preservation). *See id.* ¶¶ 9-10. KG would also be preparing more detailed engineering and schematic plans and cost estimates. *Id.* All of this takes time and money, and it is not feasible for KG to wait another year or longer—while also making escalating option payments—just to find out whether it will even have the *opportunity* to apply for the Southeastern region gaming license. *Id.* ¶ 12.

Indeed, in holding that KG's claims were ripe for review, the district court found that "[t]he unsettled constitutionality of the legal provisions at issue in this case hampers not only the compact negotiation process but also region-wide investment" in the Southeastern region. Mem. Op. at 10. The "collateral effects" of that uncertainty are "*felt acutely* by [KG], which must decide whether to expend substantial resources to exercise options on and redevelop the Cannon Street Property." *Id.* (emphasis added). The court correctly recognized the risk that those resources would be "wasted" if resolution of this case were postponed until later this year. *Id.* It is thus critical that KG obtain a ruling regarding the constitutionality of the Act's tribal set-asides as soon as possible.

Second, Governor Patrick has made clear that he is actively proceeding with compact negotiations in order to meet the July 31, 2012 deadline. Three hours after signing the Act into law, Governor Patrick met with representatives of the Mashpee Wampanoag Tribe and emphasized that "we want to make sure we do what we can to partner with the tribe on a commercial license," and that work on a compact "will begin as soon as today."⁵ As the district court noted, "Governor Patrick has already begun negotiations with an Indian tribe but is currently

⁵ See George Brennan, "Tribes Eager to Make Play for Region's Casinos," SouthCoastToday.com (Nov. 23, 2011), <http://www.southcoasttoday.com/apps/pbcs.dll/article?AID=/20111123/NEWS02/111230324>.

foreclosed from entering into similar negotiations with private entities” such as KG. Mem. Op. at 10-11.

Just last week, the Commonwealth announced that it had hired two law firms and a financial consulting company “to help Gov. Deval Patrick negotiate a potential compact with the Mashpee Wampanoag Tribe.”⁶ The fact that the Commonwealth is aggressively proceeding with compact negotiations with the Mashpee makes an expedited decision from this Court critical. Once those compact negotiations are complete, it will become much more difficult to unscramble the egg if this Court subsequently finds the tribal set-asides to be unconstitutional. Needless to say, KG suffers irreparable injury from its ongoing race-based exclusion. But the need for expedition is further magnified by the prospect that the Governor is actively negotiating pursuant to an unconstitutional process, and that the Commission—which is nominally supposed to judge competing applications impartially—is statutorily required to assist with that process. *See* Act § 91(b).

Moreover, even if a tribe does not enter an approved gaming compact by July 31, 2012—in which case a competitive application process will ensue for the license in the Southeast—KG will still have suffered an irreparable harm with

⁶ *See* George Brennan, “State Hires Outside Help for Tribe Casino Deal,” *Cape Cod Times* (Feb. 17, 2012), <http://www.capecodonline.com/apps/pbcs.dll/article?AID=/20120217/NEWS/202170326>.

ongoing effects. By then, Indian tribes—in particular the Mashpee—will have had a nearly one-year head start to obtain joint venture partners and investors, and work with the Governor and Gaming Commission to prepare their license application. Thus, even if the Commission opens the Southeastern region to competitive applications for a commercial license, the tribe and its commercial partners will have an overwhelming advantage over all other applicants in applying for that license.

Third, although the district court denied KG’s motion for a preliminary injunction and dismissed the complaint, the court was clearly troubled by what the Commonwealth has done here, and “share[d] the plaintiff’s frustration with the prevailing equal protection doctrine.” Mem. Op. at 32. Indeed, the court noted that if it were “addressing the issue as one of first impression,” the outcome likely would have been different. *Id.* at 28. The court, however, mistakenly believed it was bound by Supreme Court precedent to treat a state’s categorical preferences for Indian tribes as a “political” preference rather than a racial preference.

As KG will explain at length in its merits brief, the federal government’s unique ability to deal with the tribes as political entities—and have arrangements limited to tribes assessed under rational basis review—stems from Congress’ Indian Commerce and Treaty Clause powers. States do not have comparable freedom to discriminate in favor of or against tribes unless they can satisfy strict

scrutiny. The district court suggested that the Act was subject to rational basis review to the extent it implemented federal law. But that conclusion ignores the critical facts that the “compact” process that grants tribes an exclusive right to negotiate until July 31, 2012, and allows them to make the exclusion permanent, is entirely a creature of state law. It also ignores the region-wide effect of the Act, which cannot be justified by reference to federal law that strictly limits tribal gaming to Indian lands.

Development of these arguments can and should await briefing on the merits of the appeal. But, for purposes of this motion, the district court’s significant reservations about ruling in favor of the Commonwealth should indicate that KG will have colorable arguments on appeal.

II. Proposed Briefing Schedule

If the Court agrees that expedited consideration is warranted, KG proposes the following briefing schedule:

Appellant’s Brief: Wednesday, March 21, 2012

Appellees’ Brief: Monday, April 16, 2012

Appellant’s Reply: Monday, April 30, 2012

Given that the relevant issues were briefed extensively before the district court, KG submits that this proposed schedule would give both parties ample time

to complete their filings. It would also ensure that the case is fully briefed in time for this Court's May sitting.

CONCLUSION

KG respectfully submits that there is good cause for expedited treatment of this appeal, and that the Court should adopt the proposed briefing schedule set forth herein.

February 27, 2012

Respectfully submitted,

/s/ Paul Clement

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February, 2012, this document was filed through the Electronic Case Filing system, and that copies will be sent electronically to the registered participants identified on the Notice of Electronic Filing.

/s/ Paul D. Clement

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

KG URBAN ENTERPRISES, LLC)

Plaintiff,)

v.)

Case No. _____

DEVAL L. PATRICK, in his)
official capacity as Governor of)
the Commonwealth of Massachusetts, and)

CHAIRMAN AND COMMISSIONERS)
OF THE MASSACHUSETTS GAMING)
COMMISSION, in their official capacities)

Defendants.)

DECLARATION OF ANDREW M. STERN

1. I, Andrew M. Stern, am over 18 years of age, am competent to testify about the matters set forth herein, and submit the testimony below based upon personal knowledge and information.
2. I am the Managing Director and Principal of KG Urban Enterprises, LLC (“KG”). In this position, I oversee and manage all of KG’s gaming and redevelopment projects, including each project’s design, legal, transactional, and government relations teams.
3. Before joining KG, I served as a Senior Vice President at the New York City Economic Development Corporation. Prior to that, I was an Assistant District Attorney in the Office of the Bronx District Attorney.
4. KG is an equity development company specializing in the redevelopment and adaptive re-use of urban industrial brownfield sites for urban gaming projects, with a focus on the rehabilitation of the vintage industrial structures found on such sites. As a result, KG’s efforts necessarily focus on cities with an industrial history.
5. KG employs an integrated method of redevelopment that incorporates gaming, retail, cultural, and commercial activities into a single project, with no artificial barriers between the development and the surrounding community. KG’s urban gaming model employs the principles of walkability, connectivity, urban design, and sustainability.

6. In contrast, many other developers build casinos on undeveloped greenfield sites, often near highway interchanges, requiring significant alteration of the natural landscape and the extension of roads, bridges, power lines, water, and sewer services to the new site.
7. KG's principals are partners in a joint venture that recently completed the initial phases of an urban gaming redevelopment project on the 130-acre Bethlehem Steel site in Bethlehem, Pennsylvania. After the Commonwealth of Pennsylvania awarded it a casino license, that joint venture, with Las Vegas Sands Corporation, invested in excess of \$900 million into converting part of the abandoned and deteriorating steel plant site into a thriving, multi-use property that includes casino gaming, hotel, entertainment, and retail components, as well as concept plans for the eventual residential conversion of the former Bethlehem Steel headquarters building. Additionally, the comprehensive redevelopment plan for the Bethlehem Steel site included development of several parcels of land for local organizations — namely, a local television station, a local performing arts non-profit, and the National Museum of Industrial History.
8. In February 2007, KG began the process of identifying suitable property for an urban gaming project in Massachusetts, which had been on the verge of legalizing casino gaming for several years.
9. After studying several sites in New Bedford — an industrial city that fits KG's business model — KG identified a site that currently houses, among other things, an abandoned 160,000 square foot power plant building known as Cannon Street Station. At present, the property houses operations run by two New England-based energy companies, Sprague Energy Corporation and NSTAR.
10. Based upon a careful market study and exhaustive site analysis, KG identified the Cannon Street Station property as an ideal candidate for redevelopment because of its proximity to downtown New Bedford's cultural and entertainment center, its location on the historic New Bedford harbor, the dramatic physical presence of the vintage power plant structure, and the need to undertake extensive environmental remediation and clean-up of the site. KG also concluded that the economically depressed region around New Bedford would benefit greatly from the jobs and tax revenue that the Cannon Street Station project would provide, and that the City of New Bedford itself would derive unique economic benefits from the redevelopment of a currently fenced-off waterfront site housing four contaminated oil tanks and a massive substation of live transformers.
11. After identifying the property, KG spent nearly two years negotiating separate purchase agreements with both Sprague Energy and NSTAR. Additionally, as part of the negotiations with NSTAR, KG spent a significant amount of time vetting possible replacement properties to which NSTAR could move the facility that it currently operates at the Cannon Street site. KG spent extensive time visiting properties throughout New Bedford, meeting with NSTAR representatives about the requirements for the replacement property, reviewing build-out plans for the replacement site with the NSTAR real estate, and negotiating a purchase agreement for the replacement property.
12. The purchase agreements for these properties are option contracts and, thus, even after the agreements were signed, KG is obligated to expend considerable time and resources

maintaining the options for each property. Specifically, as the current property owners undertake environmental remediation tasks and enter into or update agreements with regulators, KG must track and memorialize these updates in the environmental side agreements, resulting in additional legal fees and other costs. Likewise, in order to keep the options open, KG must make escalating monthly option payments for these properties, as well as periodic lump sum premium payments to extend the option term(s).

13. In addition to the purchase agreements, KG was obligated to negotiate environmental side agreements for each portion of the Cannon Street property in order to avoid taking on potentially limitless environmental liability. The agreements were based upon the results of an exhaustive environmental due diligence report that identified the specific contaminants present in the property's ground, harbor, and physical structures — including significant levels of asbestos, and other pollutants from oil residue and coal tar. The environmental side agreements detail the environmental remediation responsibility and liability KG would assume for each portion of the property if it were to exercise its options on the site.
14. From the time KG first identified the Cannon Street property, it assembled a team of nationally recognized experts to evaluate all aspects of the property, including the site's redevelopment potential, and then began to create a master plan to phase the site's design, environmental remediation, and construction. This team consisted of firms specializing in environmental remediation strategies; a casino design firm; an open space and landscape design firm; a historic preservationist; a nationally recognized interior design firm; an engineering firm; an architectural design and project management firm; and a team of attorneys.
15. While KG was negotiating the purchase agreements, this team of experts began investigating the site's physical and environmental condition by blanketing the property for several months, investigating the level of environmental contaminants on the property and determining the extent of remediation necessary to clean up the hazardous materials. The architects and engineers also thoroughly inspected the structural integrity of each building, analyzing each structure's viability for new uses. Based on the results of this investigation, KG's team of experts compiled a series of reports with a comprehensive remediation action plan, a cost analysis, and a detailed catalogue of the historic buildings, their structural integrity, and a mapping of all underground tunnels and piles.
16. KG's design team also spent a significant amount of time establishing communications and developing relationships with city, state and federal officials in order to both understand the city's needs and to communicate the project's benefits.
17. With the results of the environmental investigation, the structural analysis, the gaming market study, and the city's needs in mind, the design team developed a comprehensive concept plan for the property. According to this plan, KG and a joint venture partner would remediate all existing environmental contaminants located on the property, stabilize both the Cannon Street power plant building and the antique granite foundry located on the property, and remove several large and contaminated oil tanks from the site. The environmental remediation plan would allow NSTAR to continue its operations on the Cannon Street Station property during the remediation while its replacement

property is built-out. In total, the joint venture will invest approximately \$50 million in environmental remediation to make the property suitable for redevelopment.

18. The concept plan includes designs for the development of a multi-use property featuring a casino gaming floor, restaurants, a hotel, retail shops, a conference center, parking garages, and an exhibition hall. The design portion of the concept plan will ensure that the project adheres to the tenets of KG's urban gaming business model. In particular, this entire property will sit directly on the city's historic harbor and street grid, with walking connections throughout historic downtown New Bedford.
19. The Cannon Street redevelopment project will consist of two phases: the construction phase and the operational phase, both of which will bring economic benefit to the surrounding region. The construction phase will require significant procurement of goods and services from local businesses, thus creating jobs and increasing incomes in the New Bedford area. The operational phase, after the property opens, will bring about another wave of economic development, job creation, and increased tax revenue.
20. To date, KG has invested more than four years of work and \$4,656,019 in direct costs to prepare its comprehensive development plan for the Cannon Street Station project. This figure includes the costs of consultants, as well as the cost of option payments.
21. If KG ultimately receives a casino license for the Cannon Street site, the full multi-phase build-out of the property will likely exceed \$1 billion. This figure includes approximately \$50 million for a privately financed cleanup of the extensive environmental contamination on the property.
22. KG believes that its plan will offer the greatest economic benefit to the citizens of New Bedford and Southeastern Massachusetts, and it intends to apply for a casino license for the Cannon Street site as soon as it is permitted to do so.
23. In light of the significant commitment of time, effort, and money that is required to identify and evaluate potential development sites — particularly given that KG's preferred urban sites often require environmental remediation — it would take years of work and millions of additional dollars of investment for KG to prepare a comprehensive development plan for a different site in Massachusetts.
24. KG is an urban redevelopment company, not a casino operator. KG's ability to move forward on a project such as the Cannon Street Station depends on partnering with a casino operator (such as Las Vegas Sands for the Bethlehem project). Moreover, the pursuit of a capital-intensive redevelopment project ultimately requires significant financing from outside investors.
25. The recently enacted gaming bill inflicts immediate and irreparable harm on KG by artificially limiting competition for casino licenses only in the Southeastern region. Even if fair competition for a license in the Southeastern region is eventually allowed, the damage to the Cannon Street Station project and to the viability of a casino in the Southeastern region will be permanent. Much of the development work KG has undertaken with respect to the Cannon Street Station project cannot simply be put on hold, but would need to be redone from scratch.

26. In sum, the viability of KG's substantial investment in the Cannon Street Station project and the prospects for the long-term success of a casino in Southeastern Massachusetts depend critically on having a level playing field for the license application process, both within the Southeastern region and among projects in all three regions. By artificially skewing competition in the Southeastern region, and in that region alone, the gaming bill inflicts immediate and irreparable injury on KG.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 17th day of November, 2011.

A handwritten signature in blue ink, reading "Andrew M. Stern", is written over a horizontal line. The signature is stylized and cursive.

Andrew M. Stern

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

KG URBAN ENTERPRISES, LLC)

Plaintiff,)

v.)

Case No. 1:11-CV-12070-NMG

DEVAL L. PATRICK, in his)

official capacity as Governor of)

the Commonwealth of Massachusetts, and)

CHAIRMAN AND COMMISSIONERS)

OF THE MASSACHUSETTS GAMING)

COMMISSION, in their official capacities)

Defendants.)

SUPPLEMENTAL DECLARATION OF ANDREW M. STERN

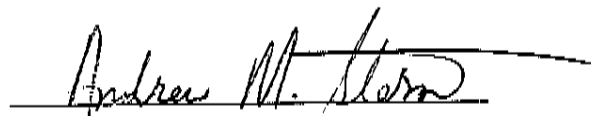
1. I, Andrew M. Stern, am over 18 years of age, am competent to testify about the matters set forth herein, and submit the testimony below based upon personal knowledge and information.
2. I provide this supplemental declaration in response to the Commonwealth’s post-briefing affidavit of Stephen P. Crosby, Chairman of the Massachusetts Gaming Commission. The statements in Mr. Crosby’s affidavit only reinforce the irreparable injury that KG Urban Enterprises is incurring as a result of the tribal set-aside provisions in the Massachusetts Gaming Act.
3. The post-briefing affidavit suggests that gaming applications will not be accepted before October 2012 and are unlikely to be awarded until the second half of 2013. Indeed, the affidavit even suggests that applications may not be accepted until after the October 31, 2012 deadline, by which, if there is not an approved compact with a tribe, the statute specifies that applications for a category 1 license in Region C “shall issue.” That suggests either that a compact with an Indian tribe will be approved (thus eliminating the October 31, 2012 deadline) or that the Commission would disregard the “shall issue” deadline.
4. In all events, Mr. Crosby seems to suggest that because the Commission will not accept applications until after July 31, 2012, the Act’s race-based provisions cause no immediate irreparable injury. To the contrary, that timetable makes immediate judicial review more critical, not less.

engineering plans, schematic plans, and cost estimates to prepare a comprehensive application. All of this will require considerable time and money, and it is simply not feasible for KG to wait another year or longer just to find out whether it will have the *opportunity* to bid on the gaming license in the Southeast.

11. In sum, the Act's tribal set-asides are skewing the application process in the Southeastern region *right now*. The Commission may or may not accept applications this year, but they are statutorily obligated to deal with the federally recognized tribes between now and July 31, 2012, and the disorganization portrayed by Mr. Crosby suggests that the period of racial exclusivity may even be extended. But whether or not that happens, the presence of the federal tribal preference is preventing KG from partnering with needed investors and gaming operators right now.
12. KG, or any non-tribal entity, cannot attract needed development partners in the Southeast as long as the tribal preference remains on the books. Steps that developers and gaming operators in the rest of the Commonwealth deem necessary and prudent to take now are not occurring in the Southeast, except with respect to the Mashpee and Genting. Moreover, as I explained in my opening declaration, KG is incurring substantial, ongoing costs—including but not limited to option payments on two different sites—to maintain the viability of the Cannon Street project. It is very unlikely that KG would continue to bear those costs indefinitely based on the mere *possibility* that, someday, it will be permitted to apply for a gaming license based on the economic merits of its proposal. We are being driven out of the marketplace by a racially exclusionary set-aside.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 30th day of January 2012.



Andrew M. Stern