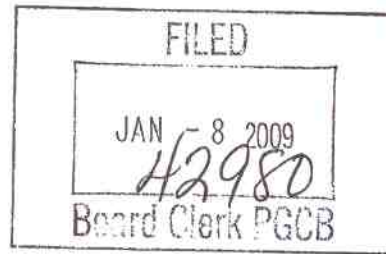


LEVINE, STALLER, SKLAR, CHAN
BROWN & DONNELLY, P.A.
3030 Atlantic Avenue
Atlantic City, NJ 08401
(609)348-1300 Telephone
(609)345-2473 Facsimile
Attorneys for HSP Gaming, L.P.



IN RE:
THE APPLICATION OF
HSP GAMING, L.P. FOR AN
EXTENSION OF TIME

COMMONWEALTH OF PENNSYLVANIA
BEFORE THE PENNSYLVANIA GAMING
CONTROL BOARD

PGCB Docket No. 42920

**BRIEF OF HSP GAMING, L.P. IN OPPOSITION TO
PETITION TO INTERVENE**

HSP Gaming, L.P. ("HSP") submits this Brief in Opposition to the Petition to Intervene ("Intervention Petition") in HSP's Application for an Extension of Time ("HSP Application") filed by six of the 253 members of the Pennsylvania Legislature (the "Legislators").

Preliminary Statement

The Intervention Petition should be denied as the Legislators are unable to meet the elements required for intervention under the Regulations of the Pennsylvania Gaming Control Board ("Gaming Board"). In apparent recognition of their inability to meet the regulatory standard, the Legislators have not even attempted to address two of the three requirements. Accordingly, the Intervention Petition should be rejected.

The Intervention Petition filed by the Legislators is part of an ongoing campaign to overturn the decision of the Gaming Board that awarded a Category 2 Slot Machine License to HSP to build and operate a casino located at the former Jack Frost refinery site ("SugarHouse Site") along the Delaware River in the City of Philadelphia (the "City" or "Philadelphia") – a decision that was affirmed by the Supreme Court of Pennsylvania. Riverwalk v. Pennsylvania Gaming Control Board, 926 A.2d 926 (Pa. 2007).

The Legislators claim in their Petition that they seek intervention to insure that the economic benefits from gaming in Philadelphia will not be further delayed. Yet, many of these very same Legislators (and their political allies) have made many public pronouncements that their real goal is to prevent HSP from developing and operating the Sugarhouse Casino at the location selected by the Gaming Board. In their Petition, they criticize HSP for not developing the casino that they and the City have actively attacked, opposed and frustrated. See Intervention Petition at ¶18; see also Application for the Appointment of a Special Master dated January 8, 2009 filed with the Supreme Court of Pennsylvania, a copy of which is attached hereto as Exhibit A.

Legal Argument

I. Intervention under the Gaming Board's Regulations.

Pursuant to 58 Pa. Code §493a.12, the Gaming Board may grant a Petition to Intervene if it determines:

1. The person has interest in the proceeding which is substantial, direct and immediate.
2. The interest is not adequately represented by a party to the proceeding.
3. The person may be bound by the action of the Board in the proceeding.

Thus, the regulation requires that a prospective intervener first satisfy three elements. If those three factors are met, the Board may then, in its sole discretion, determine if intervention is warranted under all of the relevant circumstances.

In this matter, the Legislators are unable to satisfy any of the criteria in §493a.12. Indeed, the inability to meet any of these requirements is evidence that the actual motive driving this Intervention Petition is not to protect any legitimate interest, but to further vex the Board and HSP. Each element of the Regulation is addressed below.

1. **Requirement One: The Legislators do not Have Substantial, Direct and Immediate Interest.**

The law in Pennsylvania regarding what is necessary to satisfy the three parts of this first requirement is both plain and well established. In Pittsburgh Palisades Park v. Commonwealth of Pennsylvania, the Supreme Court of Pennsylvania specifically addressed what substantial, direct and immediate interest must exist for standing:

An interest is "substantial" if it is an interest in the resolution of the challenge which "surpasses common interest of all citizens in procuring obedience to the law." Likewise, a "direct interest" mandates a showing that the matter complained "caused harm to the party's interest", i.e., a causal connection between the harm and the violation of the law. Finally, an interest is "immediate" if the causal connection is not remote or speculative.

585 Pa. 196, 204 (2005) (citations omitted).

Petitioners clearly fail under this test. They have no extraordinary interest in the SugarHouse Petition, they will suffer no harm if the relief sought is granted and there is no immediate causal connection between them and the applicant's request. Their transparent goal is delay and cause further costs to be incurred by HSP.

The Supreme Court of Pennsylvania has also stated unequivocally that "taxpayer status" (as asserted by two of the Legislators) does not satisfy the substantial, direct and immediate interest standard as such status merely asserts the common interest of all taxpaying citizens. See William Penn Parking Garage v. Pittsburgh, 346 A.2d 269, 281 (Pa. 1975). Despite this clear law, the Legislators, inexplicably, proffer taxpayer status as the basis for satisfying the direct, substantial and immediate interest prong. They certainly are aware of the well established precedent. Yet, no attempt is made to distinguish – or even cite – the long-standing Supreme Court precedent.

The Legislators also cloak themselves with what they call "legislative capacity" as a basis for urging a direct, substantial and immediate interest in HSP's Application. The decision they cite, however, specifically states that as a general rule, a legislator is not entitled to standing based solely on his or her status as a legislator.¹ Levdansky v. DEP, 1998 E.H.B. 571 (1998).

In Levdansky, the ALJ concluded that "the Board has held that a legislator has no personal stake in the outcome of the appeal where he is seeking to intervene in his capacity as a state representative and his interest is not direct, immediate and substantial. While Representative Levdansky is permitted to participate as an *amicus curiae* in the capacity of a state legislator, his position as a legislator does not confer upon him any special status in the proceedings before the Board; he must demonstrate an interest beyond any citizen's general interest." Id. (citing Concord Resources Group

¹ In Will v. Beal, 26 Pa. Cmwth. 298, 305 (Pa. Cmwth. 1976) the Court determined that "Legislators, as Legislators, are granted standing to challenge executive actions when specific powers unique to their functions under the Constitution are diminished or interfered with. Once, however, votes which they are entitled to make have been cast and duly counted, their interest as Legislators ceases." (emphasis added) HSP's Application clearly does not involve the diminution of or interference with legislative powers by executive action and the Legislators have not suggested otherwise.

of Pennsylvania, Inc. v. DER, 1992 E.H.B. 1563). Thus, rather than supporting the Legislators' position, the Levdansky decision specifically rejects it.

Based on the foregoing, it is clear that the Legislators cannot establish a direct, immediate and substantial interest in the HSP Application.

2. Requirement Two: The Legislators' Interest is Adequately Represented.

In the present matter, the interests of the Commonwealth's taxpayers, including the Legislators, are represented by the Gaming Board's Bureau of Investigations and Enforcement ("BIE") which is independently charged with enforcing the provisions of the Gaming Act. 4 Pa. C.S. 1517(a). In addition, the Gaming Board, the members of which are appointed by the Governor and the Legislature, is charged with fulfilling the legislative intent of the Gaming Act.

In the Gaming Act, the Pennsylvania Legislature specifically granted the Gaming Board the "general and sole regulatory authority over the conduct of gaming and related activities." 4 Pa. C.S. §1202(a) (emphasis added). The Gaming Act also provides that an application for an extension of time under §1210 is made to the Gaming Board. The BIE, in conjunction with the Office of Enforcement Counsel ("OEC"), is then charged with the duty to independently investigate the application and report to the Board. Id. at §1517 (a.1) and (a.2).

No attempt is made by the Legislators to state how their interests are not adequately represented by BIE, the OEC and the Gaming Board, the latter of which is comprised, in part, by the Legislature's own appointees. Additionally, as noted above, the Legislators' Memorandum of Law completely fails to address this prong of the intervention requirements.

3. **Requirement Three: The Legislators Will Not Be Bound By the Gaming Board's Decision.**

The Legislators also fail to comment on this prong of the intervention analysis. The reason is obvious. The only party that will be bound by the Gaming Board's decision in this matter is HSP.

Based on the foregoing, the Legislators are unable to satisfy the three prongs of the intervention requirements under §493a.12(b).

II. **The Obstacles and Tactics of the Anti-Gaming Movement, which includes the Legislators, have delayed economic benefits to Philadelphia and the Commonwealth and granting Intervention status will only further delay the matter.**

The Legislators' attempt to mask their intent to usurp the role of the Gaming Board by alleging that they only want to help Philadelphia obtain the economic benefits of casino gaming. We agree with the Legislators' statement that "the intended economic benefits should not be further delayed." See Intervention Petition at ¶12. Granting the Application to Intervene or to appear as *amicus* will not further those ends and will simply result in more delay and cost – their true motive.

Utilizing the Gaming Board's 2006 Financial Suitability Task Force projections, the Commonwealth is losing over \$170 million in tax revenue per year, including approximately \$12.5 million to the City. In addition to lost gaming tax revenue, the City also loses other tax revenue which would be generated by the SugarHouse Casino, such as real estate taxes, business privilege tax, the City's portion of sales tax, net profits tax and the employee wage tax. Perhaps most immediate in the current

economic environment, the SugarHouse Casino will create 1,400 construction jobs and over 1,000 permanent casino jobs once opened.

To put these losses in context, the library closings proposed by Philadelphia Mayor Michael Nutter, and recently rejected by the Court of Common Pleas, were projected to save the City \$8 million annually; eight months of projected casino taxes which would go to the City based on the Gaming Board's projections could fund the libraries. The deactivation of fire engine and ladder companies will save the City approximately \$10.5 million; ten months of projected casino taxes which would go to the City based on the Gaming Board's projections could keep the fire and ladder companies operating. The starting salary with benefits for a new Philadelphia police officer is approximately \$55,000 per year – less than two days of projected casino taxes which would go to the City based on the Gaming Board's projections.

The Legislators claim that the Sugarhouse site is "controversial" and that HSP should have filed an application to relocate the casino. See Intervention Petition at ¶¶ 15 and 45. Of course, any development site can be labeled controversial. However, the Legislators ignore the fact that the Gaming Board was delegated by the Pennsylvania Legislature as the sole authority to select the sites where casinos would operate in the Commonwealth (4 Pa C.S. §1101 et. seq.) and riverside sites were identified from the beginning as superior locations for a Philadelphia casino. The Philadelphia Gaming Advisory Task Force, in October 2005 (composed of 47 Philadelphia Civic leaders), recognized that such sites would be "an anchor ... to reinvigorate and activate the remainder of the riverfront." Id. at 101. The Gaming Board, likewise, found:

The River-view properties provide an exciting yet tranquil setting for the building of a new industry in Philadelphia, providing opportunities for the development along the riverfront not only of casinos, but also of hotels with associated amenities which will spur other riverfront economic development. Further, as several proposals have demonstrated, the River can actually be incorporated into the proposals creating a synergy between the Delaware River, the waterfront properties and the City. Finally, the riverfront locations are each located to take advantage of their access to center-city Philadelphia, the convention center, hotels and other existing Philadelphia business and attractions in a way that provides easy access to a host of visitors and tourists for entertainment while staying in Philadelphia.

And, as the Board is well aware, the Supreme Court of Pennsylvania affirmed the Board's decision.

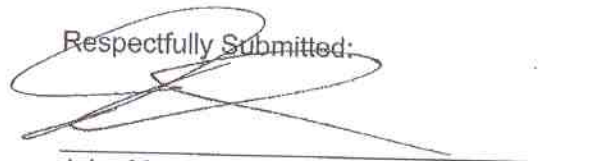
CONCLUSION

In short, the Legislators have failed to demonstrate any interest in this matter that would warrant intervention. The true purpose of their Intervention Petition is delay and purposes other than appropriate administration of the Gaming Act. Further delay and cost of intervention is not in the public interest. As demonstrated above, the Legislators fail to meet the requirements for intervention under the Gaming Board's regulations, and therefore, intervention should be denied.

Similarly, *amicus* status should not be granted as the issues presented are perfectly within the knowledge and expertise of the Board, BIE and OEC and a grant of *amicus* status would only serve to delay matters and increase costs. Finally, the Board's long-standing precedent of receiving written comments on matters before it sufficiently permits the Legislators' views (already well-known) to be expressed.

WHEREFORE, for the foregoing reasons, HSP respectfully requests that the Gaming Board deny the Legislators' Petition to Intervene and for *amicus* status.

Respectfully Submitted:



John M. Donnelly
Michael D. Sklar
LEVINE, STALLER, SKLAR, CHAN,
BROWN & DONNELLY, P.A.
3030 Atlantic Avenue
Atlantic City, NJ 08401
(609)348-1300 Telephone
(609)345-2473 Facsimile

Dated: January 8, 2009

Counsel for HSP Gaming, L.P.

S:\DONNELLY\HSP\Extension of Time (Slot Machines)\Brief (Opposition to Intervention) 1-8-09 Final.doc