

**IN THE SUPREME COURT OF PENNSYLVANIA**

Consolidated filing in 207 EM 207 and 208 EM 208

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<b>SENATOR VINCENT J. FUMO, ET AL</b>	<b>: 207 EM 2007</b>
<b>Petitioners,</b>	:
	:
<b>v.</b>	:
	:
<b>CITY OF PHILADELPHIA,</b>	:
<b>Respondent.</b>	:

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<b>CITY COUNCIL OF THE CITY OF PHILADELPHIA</b>	<b>: 208 EM 2007</b>
<b>AND COUNCILMEMBER FRANK DICICCIO</b>	:
<b>Petitioners,</b>	:
<b>v.</b>	:
<b>CITY OF PHILADELPHIA, STEPHANIE W. NAIDOFF,</b>	:
<b>Respondent.</b>	:

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**CONSOLIDATED MOTION TO DISMISS APPEALS FOR MOOTNESS**

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**CITY OF PHILADELPHIA LAW DEPARTMENT**  
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Richard G. Feder, Chief Deputy City Solicitor, Appeals  
Kelly Diffily, Assistant City Solicitor  
By:  
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January 24, 2008

Attorneys for the City of Philadelphia

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CITY OF PHILADELPHIA  
CITY SOLICITOR

Respondent, the City of Philadelphia (the “City”) hereby moves this Court to dismiss these appeals as moot.

Today, January 24, 2008, the Acting Commerce Director of the City of Philadelphia revoked the license at issue in this case as issued in error. Consequently, the appeals that have been taken to this Court from the granting of that very license are moot because the license no longer exists.<sup>1</sup>

## **I. Facts And Procedural History**

The appeals to this Court have been taken from the issuance of a license, dated November 27, 2007, to HSP Gaming, L.P. (SugarHouse), by the City of Philadelphia, Director of Commerce and the Commissioner of Licenses and Inspections, to encroach upon the waterway of the Delaware River and to construct upon submerged lands the SugarHouse Casino Project.

That license was revoked today, and the revocation was served on Counsel for the license applicant today. A copy of the revocation is attached hereto as Exhibit “A” together with a Declaration from James Leonard, Chief Deputy City Solicitor, that the revocation was served today.

The revocation is not based upon any lack of authority by the City to issue the license. The revocation discusses the reasons supporting the revocation and makes it clear that, regardless of any future ruling by this Court on the legal authority available to the City to issue this license, the Commerce Director believes

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<sup>1</sup> Consequently, unless directed otherwise, the City also will not be briefing these case on the merits tomorrow, January 25, 2008.

that it should be revoked.

## **II. The Appeal Must Be Dismissed Because The Appeal Became Moot When The License At Issue Here Was Revoked.**

The appeals before this Court were taken from the issuance of the license to the SugarHouse Casino. The Petitioners challenged that decision to issue the license and claimed that the City did not have legal authority to issue it and that the City improperly exercised any authority it had. The Petitioners sought an Order from this Court effectively rescinding the license.

These appeals, attacking the Commerce Director's issuance, have become moot because the license no longer exists and the City no longer desires to issue it.

The Petitioners asked this Court to eliminate the license. That elimination has already been accomplished.

A decision by this Court as to whether the license was properly issued in the past would be a hypothetical and advisory opinion as to whether the Commerce Director in the future could decide to issue such a license in his discretion. Further, regardless of this Court's resolution of the question of whether the Commerce Director does have the authority to issue the license, or exercised it properly in the past, the Commerce Director has decided that he does not believe it appropriate to issue this license, so any decision of this Court with respect to the prior issuance would not lead to issuance of this license. *See Exhibit A, License Revocation.*

The Supreme Court has repeatedly stated that it will not decide moot questions. *See Pap's A.M. v. City of Erie*, 571 Pa. 375, 389, 812 A.2d 591, 599-

600 (2002); *see also In re Cain*, 527 Pa. 260, 590 A.2d 291 (Pa. 1991); *In re Gross*, 476 Pa. 203, 382 A.2d 116 (Pa. 1978). In *Pap's A.M.*, the Supreme Court summarized the mootness doctrine as follows:

The cases presenting mootness problems involve litigants who clearly had standing to sue at the outset of the litigation. The problems arise from events occurring after the lawsuit has gotten under way -- changes in the facts or in the law -- which allegedly deprive the litigant of the necessary stake in the outcome. The mootness doctrine requires that "an actual case or controversy must be extant at all stages of review, not merely at the time the complaint is filed."

571 Pa. at 389, 812 A.2d at 599-600 (citations omitted).

Therefore, an actual claim or controversy must be present at all stages of the judicial process, including during appellate review, for the case to be actionable or reviewable. If events occur to eliminate the claim or controversy at any stage in the process, the case becomes moot. *Id.*; *see also Taylor v. Pennsylvania Bd. of Probation and Parole*, 746 A.2d 671, 674 (2000).

Here, we have the quintessential example of the mootness. The matter in controversy has ceased to exist.

Thus, while Petitioners "clearly had standing to sue at the outset of the litigation," the revocation has "deprive[d] [Petitioners] of the necessary stake in the outcome" of the appeal. *Pap's A.M.*, 571 Pa. at 389, 812 A.2d at 599-600.

Petitioners are no longer aggrieved by any decision of the Commerce Director, because the Director has affirmatively revoked the decision which was appealed.

If, and when, the Commerce Director were to issue any similar license to a

casino, then and only then will a live controversy re-materialize, albeit under a set of new facts, including a new application and a new decision. Any such decision would not evade appellate review at that time.

Given that this case has been mooted in all respects by the revocation of the submerged lands license, this Court should dismiss the appeal for mootness.

WHEREFORE, for the forgoing reasons, the City of Philadelphia hereby moves this Court to dismiss this appeal for mootness.

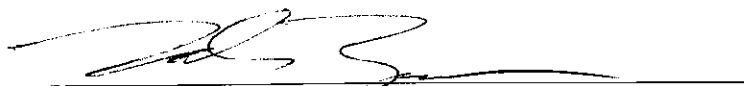
Respectfully submitted,

**CITY OF PHILADELPHIA LAW DEPT.**

SHELLEY R. SMITH, City Solicitor

Richard G. Feder, Chief Deputy City Solicitor, Appeals

Kelly Diffily, Assistant City Solicitor



By: Mark R. Zecca, Divisional Deputy City Solicitor

Special Litigation

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Attorneys for Appellee, The City of Philadelphia

Dated: January 24, 2008

# EXHIBIT A

**DECLARATION**

I, James P. Leonard, Chief Deputy City Solicitor, City of Philadelphia Law Department, hereby declare that on January 24, 2008, I served the attached Notice of Revocation of License Issued in Error upon the individuals and in the manner set forth below. I understand that the statements herein are made subject to the penalties of 18 Pa. C. S. A. Section 4904, relating to unsworn falsification made to authorities:

Thomas P. Witt, Esquire  
Bernard Lee, Esquire  
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Via Fax and Hand Delivery

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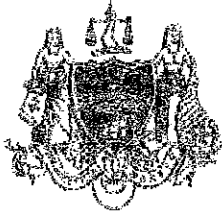
Mr. Robert Sheldon  
President  
SugarHouse Casino  
1080 N. Delaware Ave.  
8<sup>th</sup> Floor  
Phila., PA 19125  
Via Fax and Hand Delivery

Mr. Gregory Carlin  
HSP Gaming, LLC  
Suite 1900  
900 North Michigan Avenue  
Chicago, Illinois 60601  
Via Fax and Overnight Mail

Date: 1/24/08



James P. Leonard  
Chief Deputy City Solicitor  
Economic Development and Investments Unit  
City of Philadelphia Law Department



# CITY OF PHILADELPHIA

OFFICE OF THE DEPUTY MAYOR FOR ECONOMIC DEVELOPMENT  
& DIRECTOR OF COMMERCE  
1515 Arch Street, 12th Floor  
Philadelphia, PA 19102  
P 215-683-2001  
F 215-683-2097

## CITY OF PHILADELPHIA DEPARTMENT OF COMMERCE

### NOTICE OF REVOCATION OF LICENSE ISSUED IN ERROR

Mailing Date: January 24, 2008

ATTENTION: HSP Gaming, L.P.

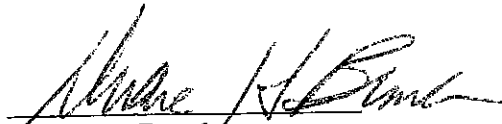
The license dated November 27, 2007, issued to HSP Gaming, L.P., by the City of Philadelphia, Director of Commerce and the Commissioner of Licenses and Inspections, to encroach upon the waterway of the Delaware River and to construct upon submerged lands the SugarHouse Casino Project, is hereby REVOKED as having been issued in error. Within thirty (30) days of the date of this Notice, you may request a hearing before the Director of Commerce to challenge the basis for this revocation and/or to allow consideration by the Director of additional factors, not previously or adequately considered by the Director of Commerce in the November 27, 2007, decision. Alternatively, you may file an appeal of this revocation within thirty (30) days of the date of this Notice.


The license was issued in error because, *inter alia*:

1. The Director of Commerce improperly excluded from proper consideration the appropriate use of the submerged lands, including its proposed use as a licensed gaming facility, a question expressly not decided by the Gaming Control Board and expressly left for the appropriate authorities to consider.
2. The scope of the license is insufficiently precise and is in need of clarification, in that the license purports to authorize the project as described in the Gaming Control Board's Adjudication, and/or as described in the Plan of Development approved by the City Planning Commission, which two descriptions are not identical. For a project of this magnitude and controversy, there must be no ambiguity regarding the scope of the authorization.



3. The Director of Commerce acted contrary to the intent and understanding of the Gaming Control Board and the General Assembly, in that the licensee was expected to seek from the General Assembly the right to encroach into the Commonwealth's waterways; and that the General Assembly would consider such request and apply statewide standards relating to riparian rights. To date, the General Assembly has not granted the licensee the requested encroachment rights. The Director of Commerce's decision to act in contravention of this expectation is contrary to the intent and expectation of the Gaming Control Board and the General Assembly, as well as local residents and the elected officials representing those residents; and, therefore, not in the best interests of the City or the general public.
4. The Director of Commerce should not exercise discretion to issue a license prior to resolution of the City's negotiations with the applicant with respect to wetlands mitigation or the Commonwealth Department of Environmental Protection's approval of an alternative mitigation plan, a prerequisite to the proposed encroachment into the Commonwealth's waterways. The Director of Commerce should exercise discretion in a manner consistent with the overall City interest in maintenance of wetlands.
5. Given the previously moribund nature of the City's authority under Act 321, the Director of Commerce should have exercised discretion not to expansively apply the authorization to permit a "harbor structure" to authorize a large scale casino project, and not to expansively allow an option to purchase to satisfy the requirement of title.
6. Based on the current record, including the deficiencies identified above, the issuance of the license is against the public interest, particularly when issued by and based on analysis performed by City officials who served at the pleasure of an appointing authority whose term of office was about to expire.

  
Duane H. Bumb,  
Acting Director of Commerce

  
John Elfrey,  
Acting Commissioner of Licenses and Inspections

## CERTIFICATE OF SERVICE

I, Mark R. Zecca, hereby certify that I am this day January 24, 2008, serving the foregoing **Motion to Dismiss for Mootness** upon the persons and in the manner indicated below, which satisfies the requirements of Pa. R.A.P. 121:

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**PA Senate Counsel Senate Democratic  
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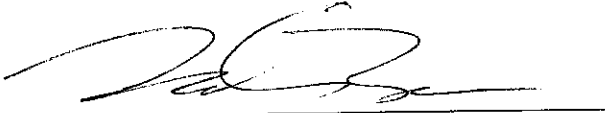
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Date: January 24, 2008

  
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Mark R. Zecca  
City of Philadelphia Law Department