

IN THE SUPREME COURT OF PENNSYLVANIA

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No. 1 EM 2008

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**PHILADELPHIA ENTERTAINMENT AND DEVELOPMENT PARTNERS, L.P., d/b/a  
FOXWOODS CASINO PHILADELPHIA,**

*Applicant/Petitioner,*

v.

**CITY COUNCIL FOR THE CITY OF PHILADELPHIA and THE CITY OF  
PHILADELPHIA,**

*Respondents.*

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**APPLICATION FOR RELIEF SEEKING ENFORCEMENT OF THE ORDER OF  
THE SUPREME COURT OF PENNSYLVANIA DATED APRIL 2, 2008,  
PURSUANT TO RULES 123 AND 2591(B) OF THE PENNSYLVANIA  
RULES OF APPELLATE PROCEDURE**

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LeRoy S. Zimmerman, Atty. I.D.: 07278  
Robert A. Graci, Atty. I.D.: 26722  
**ECKERT SEAMANS CHERIN  
& MELLOTT, LLC**  
213 Market Street, 8th Floor  
Harrisburg, Pennsylvania 17101  
Telephone: (717) 237-6000

Michael K. Coran, Atty. I.D.: 55876  
Glenn A. Weiner, Atty. I.D.: 73530  
Keith Lorenze, Atty. I.D.: 205698  
**KLEHR, HARRISON, HARVEY,  
BRANZBURG & ELLERS LLP**  
260 South Broad Street – 4th Floor  
Philadelphia, Pennsylvania 19102  
Telephone: (215) 568-6060

*Attorneys for Applicant/Petitioner, Philadelphia Entertainment and  
Development Partners, L.P., d/b/a Foxwoods Casino Philadelphia*

On December 20, 2006, the Pennsylvania Gaming Control Board (the "Gaming Board") voted to award one of two Category 2 licenses to operate a stand-alone, slot machine casino in Philadelphia to applicant/petitioner Philadelphia Entertainment and Development Partners, L.P. d/b/a Foxwoods Casino Philadelphia ("Foxwoods Casino Philadelphia" or "Foxwoods"). Today, nearly nineteen months later, the site selected by the Gaming Board for the Foxwoods casino remains a large vacant lot. The reason for this state of affairs is simple: since the Gaming Board's decision, respondents, City Council for the City of Philadelphia ("City Council") and the City of Philadelphia (the "City" or "City Administration"), have frustrated the implementation of the Pennsylvania Race Horse Development and Gaming Act (the "Gaming Act"), 4 Pa. C.S. §§ 1101, *et seq.*, by erecting every roadblock imaginable to prevent Foxwoods from developing its property.

Now, despite this Court's opinion and order in this matter, *Philadelphia Entertainment & Dev. Partners, L.P. v. City Council*, --- Pa. ---, 943 A.2d 955 (2008) (the "Opinion"), the City continues to obstruct the orderly development of the Foxwoods casino. The City's latest ploy was to refuse to issue to Foxwoods a zoning and use registration permit (the "Zoning Permit"). Foxwoods submitted all information required by all applicable provisions of the Philadelphia Zoning Code (the "Zoning Code"), including a site plan exactly the same as that approved by the Philadelphia City Planning Commission (the "Planning Commission") and deemed finally approved by this Court in the Opinion, but the Planning Commission failed to carry out its mandatory duty to direct issuance of the permit, citing a purported new, unpublished policy of the City to require additional information, such as traffic studies and private easement agreements with other property owners, for some unspecified class of projects before issuing a zoning permit. Since the Zoning Permit is a prerequisite to a number of other necessary permits

and approvals, the failure to issue the Zoning Permit creates a bottleneck to making progress on the development, achieving the City's goal of further delaying the project in an attempt to force re-siting.

The City's flagrant disregard for the Commonwealth's sovereignty and the decision of this Court amounts to contempt. As a result of its inability to obtain the cooperation from the City mandated by the Gaming Act and this Court in its Opinion, Foxwoods has been forced to file this application seeking to have the Opinion enforced by mandating issuance of the Zoning Permit and granting other critical relief.

### BACKGROUND

#### **I. EVENTS OCCURRING PRIOR TO THIS COURT'S APRIL 2, 2008 OPINION IN THIS ACTION**

##### **A. The Foxwoods Casino Philadelphia is Sited by the Gaming Board's Exercise of its Exclusive Authority**

1. On December 20, 2006, the Gaming Board voted to award Foxwoods a Category 2 license to place and operate slot machines at a facility to be known as Foxwoods Casino Philadelphia to be constructed on property that Foxwoods owns at 1499 South Christopher Columbus Boulevard in Philadelphia. The Gaming Board issued its formal order and adjudication on February 1, 2007. Opinion, 943 A.2d at 957. This Court affirmed the Gaming Board's decision on July 17, 2007. *Riverwalk Casino, L.P. v. Pa. Gaming Control Bd.*, 592 Pa. 505, 926 A.2d 926 (2007). On October 17, 2007, Foxwoods paid the requisite \$50 million license fee required by the Gaming Act, *see* 4 Pa. C.S. § 1209(a) (relating to imposition of slot machine license fee). Opinion, 943 A.2d at 960.

2. Gaming licenses are site specific. Once the Gaming Board has chosen to locate a license at a particular site, the licensee may not move its facility to any other site without Gaming Board approval "for good cause shown." 4 Pa. C.S. § 1329.

3. As this Court repeatedly has held, choosing the location of Category 2 licensed facilities was a decision only for the Gaming Board and not for municipal governments. In *Pa. Gaming Control Bd. v. City Council*, 593 Pa. 241, 262, 928 A.2d 1255, 1267-68 (2007) (emphasis added), the Court stated unequivocally:

Section 1304(b)(1) repeatedly states without equivocation that “Category 2 licensed facilities...shall be located by the [B]oard in cities of the first class,” and both Section 1304(b)(1) and 1307 refer to “Category 2 licenses” or “Category 2 licensed facilities” that have been “located by the [B]oard.” 4 Pa. C.S. §§ 1304(b)(1), 1307. We further observe that in these provisions, *the General Assembly has not afforded the electorate of a first class city the right to consider, affect or override the Board's location decision once it is made.*

In *HSP Gaming, L.P. v. City Council*, 595 Pa. 508, 939 A.2d 273, 287 (2007), the Court reiterated that, despite municipalities’ retention of zoning power for casino developments,

[a] political subdivision has no power to override the statutory provisions of the Gaming Act regarding the situs of a licensed gaming facility or to use its authority to zone to impede implementation of the Gaming Board's decision in that regard. A member of City Council does not have the authority to use local zoning processes to overturn the Gaming Control Board’s approval of an applicant's Category 2 slot machine license. The PAGE [*Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, 583 Pa. 275, 877 A.2d 383 (2005)] decision was never intended to permit council members in the City of Philadelphia to pressure successful applicants with promises or enticements of expeditious zoning approvals should they relocate their facilities to another site especially when a suggested alternate site was originally rejected by the Gaming Control Board.

B. The Local Zoning Process is Frustrated by Deliberate Inaction in City Council and, Therefore, Foxwoods Initiates this Action

4. The Zoning Code contains a designation, Commercial Entertainment District (“CED”), Phila. Code, §§ 14-400 *et seq.* (the “CED Ordinance,” attached as Ex. 1), designed specifically to accommodate gaming facilities. Respondents have contended consistently that CED is the only zoning designation in the Zoning Code that would permit

licensed gaming. Prior to this case, Foxwoods' property was not zoned CED and the City has never enacted an ordinance zoning any property CED, to this day.

5. The CED Ordinance requires that, for a property to be zoned CED, the developer must submit a plan of development to the Planning Commission for its review and approval. Phila. Code, § 14-403(2). The CED Ordinance's "rigorous demands" require submission of "comprehensive information" to the Planning Commission during the plan of development review stage. *HSP Gaming*, 939 A.2d at 287. In addition to the site plan for the district, the developer must submit a landscaping plan, a transportation management plan, a parking management plan, recommendations for off-site roadway improvements and their funding, and an indication of land dedicated for public use. Phila. Code, § 14-403(3). In addition to approval of the plan of development by the Planning Commission, a property must be designated a CED and the plan of development approved by City Council by ordinance. Phila. Code, § 14-403(1).

6. Seeking re-zoning to CED, Foxwoods submitted its CED plan of development (*see* Ex. 2) to the Planning Commission on April 17, 2007. *Opinion*, 943 A.2d at 958.

7. On May 30, 2007, after Foxwoods spent months working with the City to prepare a plan of development that addressed issues of concern to the City Administration and to residents living near the Foxwoods site, then-Mayor John Street submitted three bills related to Foxwoods' plan of development (the "Initial CED Legislation") to City Council. *Opinion*, 943 A.2d at 958.

8. The Initial CED Legislation would have: (1) designated the Foxwoods site as a CED; (2) approved Foxwoods' plan of development; and (3) revised two rights-of-way. The

Initial CED Legislation was read before an open session of City Council, but no member of City Council was willing to sponsor it. Opinion, 943 A.2d at 958.

9. On August 21, 2007, the Planning Commission approved Foxwoods' plan of development subject to two provisos:

1. Foxwoods may only apply for building permits for development beyond what is labeled as Phase I in the Plan of Development if, in addition to all other necessary approvals from relevant governmental bodies, Foxwoods has completed a transportation plan that, in the City's determination after receiving the advice of the City Planning Commission, adequately addresses and funds the needs of an expanded casino complex.

2. The City Solicitor certifies that an agreement has been reached between the City and Foxwoods that adequately and appropriately addresses the issues raised by the Philadelphia Gaming Advisory Task Force, including, but not limited to, a commitment by Foxwoods to support a Special Services District.

Opinion, 943 A.2d at 958.

10. On November 28, 2007, then-City Solicitor Romulo L. Diaz, Jr., certified that the City and Foxwoods had reached the agreement referenced in the second proviso to the Planning Commission's approval of Foxwoods' plan of development, Opinion, 943 A.2d at 958, and, on January 4, 2008, the City and Foxwoods executed the envisioned "Development and Tax and Claim Settlement Agreement" ("Development Agreement," attached as Ex. 3), pursuant to which Foxwoods will confer millions of dollars of benefits on the City, its school district and its residents in exchange for, *inter alia*, the City's agreement to work in good faith with Foxwoods to obtain all licenses, approvals, consents, permits or similar authorizations required from any City agency to develop, construct and operate the Foxwoods gaming facility as set forth in the approved plan of development, including the development of a streamlined process for dealing with all involved City agencies. In reliance on this Development Agreement, Foxwoods has made payments required by the agreement to the City, which has accepted them, as set forth below in paragraph 24.

11. The Development Agreement provides, among other things, that:

2. APPROVALS; STREAMLINED PROCESS; CONSTRUCTION.

(a) The City and PEDP hereby agree to work together in good faith pursuant to applicable law to promptly obtain the following:

(i) approval by the City Council of the Ordinances as contemplated by the then approved Plan of Development as the same may be amended from time to time as provided in this Agreement;

(ii) all other licenses, approvals, consents, permits or similar authorizations required from any Governmental Entity and commissions of the City to develop, construct and operate the Foxwoods Casino Philadelphia as set forth in the Plan of Development, including, without limitation, regarding the construction of all required utilities, foundations, grading, infrastructure and other improvements, whether on and off of the Property (collectively, together with the Ordinances, being referred to as the "Approvals").

(b) The City agrees to implement a streamlined development process for the Foxwoods Casino Philadelphia including, but not limited to: (a) project coordination assistance from the Managing Director's office; (b) opportunities to consult with appropriate municipal staff in a timely fashion to ensure that the Foxwoods Casino Philadelphia can be developed and constructed in the most time- and cost-efficient manner possible; (c) assisting (on a good faith basis) in PEDP's obtaining expedited appearances or hearings before the Philadelphia Zoning Board of Adjustment, the Philadelphia Board of License and Inspection Review and the City Council where required or appropriate for zoning and similar matters; and (d) *timely municipal review processes, where required, with the City causing most reviews and comments to be completed within ten (10) business days.*

(c) The terms of this Agreement will not constitute a waiver of the City's regulatory authority or of PEDP's applicant responsibilities not otherwise addressed by this Agreement.

\* \* \*

(e) The City and PEDP further agree to work together in good faith pursuant to applicable law to obtain any and all Approvals, including, without limitation, adoption of any future ordinances by the City Council, as may be required to develop, construct and operate subsequent phases of the Foxwoods Casino Philadelphia, as contemplated by the then approved Plan of Development as the same may be amended from time to time as provided in this Agreement.

Ex. 3, ¶ 2 (emphasis added).

12. Notwithstanding the Planning Commission's approval of Foxwoods' plan of development in August 2007, none of the three bills composing the Initial CED Legislation, or any alternative proposal, was introduced in City Council by December 28, 2007, when Foxwoods filed its Verified Petition for Review ("Petition") in this matter. Opinion, 943 A.2d at 958. In the Petition, Foxwoods argued that it had been unable to secure the necessary zoning and use registration, building and other permits necessary to commence construction as a result of City Council's inaction, thereby curtailing the implementation of statewide tax relief to the citizens of the Commonwealth. Opinion, 943 A.2d at 960-61. Foxwoods also contended that the delay has had a significant impact on the City's five-year financial plan that includes approximately \$71 million in host fees to the City and \$5 million annually in host fee payments for the Philadelphia School District attributable to licensed gaming operations. Opinion, 943 A.2d at 961-62.

13. In the Petition, Foxwoods requested that this Court issue an order similar to that previously entered in *HSP Gaming*, 939 A.2d at 287-88: (1) declaring that the site approved by the Gaming Board for the Foxwoods casino is zoned as a CED pursuant to Section 14-400 of the Zoning Code; (2) declaring that, pursuant to Section 14-400, Foxwoods' plan of development that was approved by the Planning Commission is deemed finally approved; (3) declaring that all revisions, relocations, strikes and vacations of easements and public rights-of-way identified in the approved plan of development are authorized; (4) directing the City to take all actions necessary to implement the relief granted; and (5) retaining jurisdiction to address any further matters that should arise. Opinion, 943 A.2d at 958.

14. On January 4, 2008, the City filed a brief in response to the Petition, stating that it believed that *HSP Gaming* mandated that Foxwoods' requested relief be granted



because there was no material difference between where Foxwoods then stood and where HSP Gaming stood when this Court issued its decision in *HSP Gaming*. Opinion, 943 A.2d at 958.

15. After the Honorable Michael Nutter assumed the Philadelphia Mayor's office on January 7, 2008, the new City Administration aligned itself with City Council in efforts to prevent the further development and construction of Foxwoods Casino Philadelphia and to exert pressure on Foxwoods to relocate to a site other than the one approved more than a year earlier by the Gaming Board.

16. The new City Administration went on record in this Court to oppose the Foxwoods project when, on January 25, 2008, the City filed an application seeking to withdraw its brief in response and to file a new brief in opposition to the Petition, asserting that it was entitled to "correct" what the new City Administration now deemed an "erroneous" legal interpretation. The primary stated basis for the City's reversal of position was the introduction of legislation in City Council on January 24, 2008. Opinion, 943 A.2d at 959. The legislation consisted of two ordinances introduced by Councilman Frank DiCicco that ostensibly would have approved Foxwoods' plan of development and zoned the Foxwoods site as a CED, but were larded with eight conditions designed to further delay the development by requiring further action by City Council at an unspecified date in the exercise of Council's apparently unfettered discretion. *See* Ex. 4 (Proposed Legislation); Opinion, 943 A.2d at 959 and 964. It was evident at this point that the new City Administration now was making a concerted effort to join City Council in its opposition to the Foxwoods project.

17. In the Opinion, the Court recounted how Councilman DiCicco had led City Council's "obstructionist behavior" against the Gaming Board's siting decision for the Foxwoods casino. Councilman DiCicco exerted controlling influence over legislation affecting

Foxwoods because the site is located in his councilmanic district and City Council, pursuant to the local tradition of “councilmanic prerogative,” deferred to the opposition of Councilman DiCicco. Opinion, 943 A.2d at 961.

18. In its Opinion, the Court concluded that City Council had failed to act to implement the December 20, 2006 decision of the Gaming Board awarding a Category 2 license to Foxwoods. The Court further noted that, although there was a new mayor in Philadelphia who had a different view than the former mayor, “the future cannot undo the past.” The Court therefore held that, as in *HSP Gaming*, City Council’s failure to act, for purposes of delay, was beyond its power, and entitled Foxwoods to the same relief as *HSP Gaming*. Opinion, 943 A.2d at 966.

19. Accordingly, the Court granted the following relief to Foxwoods:

- (1) the site approved by the Pennsylvania Gaming Control Board for the Foxwoods Casino Philadelphia is zoned as a Commercial Entertainment District pursuant to Chapter 14-400 of the Philadelphia Code as in existence on November 1, 2007;
- (2) pursuant to Chapter 14-400, [Foxwoods’] plan of development as approved on August 21, 2007 by the City Planning Commission, including all provisos thereto, is declared to be fully approved and shall require no further approval as if City Council for the City of Philadelphia had approved the same;
- (3) all revisions, relocations, strikes and vacations of easements and public rights of way identified in the plan of development as approved by the Planning Commission are authorized;
- (4) *the City of Philadelphia is directed to take all actions necessary to implement the relief granted, including making all necessary changes to City records, maps and plans, and receiving, reviewing and acting upon all applications from [Foxwoods] in the ordinary course and in compliance with this Court’s order;* and
- (5) *jurisdiction is retained.*

Opinion, 943 A.2d at 966 (emphasis added).

20. After this Court entered its opinion and order on April 2, 2008, City

Council sought reargument, which was denied on May 9, 2008.

**II. EVENTS THAT HAVE TRANSPIRED SINCE THE COURT ISSUED ITS OPINION REFLECT THAT THE CITY HAS NO INTENTION OF ABIDING BY THE COURT'S ORDER**

**A. Commencing in January 2008, the New City Administration Delays Implementation of the Gaming Board's Siting Decision**

21. The new City Administration's attempt to reverse course and abandon its prior legal position in this case shortly after Mayor Nutter's inauguration in early January 2008, was a harbinger of further difficulties to come. At that time the City embarked on a systematic strategy to slow progress of the Foxwoods project and delay indefinitely implementation of the objectives underlying the Gaming Act. While publicly professing to have abided by this Court's order and to have engaged with Foxwoods in the development process, the City Administration, in reality, pursued precisely the opposite course. The City Administration has made it abundantly plain that its goal is to force re-siting of the Foxwoods casino, in contravention of the Gaming Act and the decisions of this Court.

22. At the time the Petition in this case was filed, the City, under the Street Administration, recognized its obligations to implement the order of the Gaming Board under the Gaming Act, but its hands were tied by City Council's refusal to approve Foxwoods' plan of development and zone Foxwoods' property as a CED. The prior City Administration's efforts to implement the order of the Gaming Board included, among other things, bi-weekly meetings between the City departments and Foxwoods at which representatives of the various City departments were accessible and available to review, discuss and comment upon previous applications, submissions and approvals still required and additional information that was needed. The last of these meetings occurred on December 20, 2007. During that last meeting, the City requested that Foxwoods present at the next meeting its plans for the \$5 million in

offsite sewer improvements, intended solely to improve an existing sewerage problem in the surrounding neighborhood that is in no way related to the Foxwoods project, that Foxwoods had agreed to make and fund on behalf of the City. Ex. 3, ¶ 11. It was anticipated that the next meeting would occur in January 2008.

23. Immediately after taking office, Mayor Nutter announced that the City would undertake a re-evaluation of all casino matters and expressed his skepticism about the sites chosen by the Gaming Board. See Ex. 5 (*Plan Philly*, "Nutter calls for complete casino study" (Jan. 9, 2008); *Philadelphia Evening Bulletin*, "Nutter: Hope's the word" (Jan. 9, 2008) at 4 ("I'm not thrilled with the sites. I think the selection process was flawed and that the City got the short end of the deal . . . . I'll make my own decisions after my examination and evaluation process")).

24. At Foxwoods' request, the new City Solicitor and other City representatives agreed to meet on January 17, 2008, at which time Foxwoods tendered to the City a check in the amount of \$875,000, representing the first payment for settlement of the parties' real estate tax dispute under section 12(c)(ii) of the Development Agreement. Ex. 3, ¶ 12(c)(ii). In addition, Foxwoods requested that the City resume the prior practice of bi-weekly meetings, and, of most immediate concern, schedule a meeting with the Water Department for Foxwoods to present the plans the Water Department had requested previously for the offsite sewer improvements Foxwoods had agreed to make in the Development Agreement. Foxwoods was advised that any meeting with any City department had to be scheduled through Teresa Gillen, senior advisor to the Mayor on economic development and casino issues. Thus, as outlined below, because of this protocol, Foxwoods was prohibited from meeting directly with City departments.

25. Following the exchange of several phone calls and emails with Foxwoods in which Foxwoods asked for the meeting with the Water Department, Ms. Gillen finally stated in an email dated March 14, 2008, nearly two months later, that the City would not permit the meeting to take place, stating that, “[s]ince the Foxwoods legislation is still working its way through City Council, we feel it would be premature to have meetings about detailed plans and permits. Once Council acts, we can discuss those items.” *See* Ex. 6. The “Foxwoods legislation” referred to by Ms. Gillen were the two proposed ordinances introduced by Councilman DiCicco as a further delay tactic on January 24, 2008.

26. By letter dated March 25, 2008, Foxwoods advised Ms. Gillen that: (a) these issues would need to be addressed regardless of the outcome of the City Council hearings, as the site of the project had been determined already by the Gaming Board; (b) waiting for the conclusion of the City Council hearings to address these issues would only further delay this project; and (c) the City had obligations in the Development Agreement to, among other things, work with Foxwoods in good faith to enable it to obtain all licenses, approvals, consents, permits and similar authorizations promptly. *See* Ex. 7. Nonetheless, the City refused to have a meeting between Foxwoods and the Water Department.

27. Meanwhile, City Council scheduled hearings on the bills introduced by Councilman DiCicco before its Rules Committee for February 25, March 10, April 4 and April 30, 2008. By letter dated February 19, 2008, counsel for Foxwoods advised the City Solicitor that Foxwoods would participate in the hearings, in good faith and out of respect for City Council, while reserving all of its rights with respect to its claims in this action. *See* Ex. 8. City Council proceeded to hold the hearings as scheduled.

28. Notwithstanding the ruling by this Court on April 2, 2008, City Council

continued to hold hearings on April 4 and 30, 2008 on the January 24 proposed ordinances, even though this Court already had granted the relief that ostensibly was the subject of the two proposed ordinances: *i.e.* approving Foxwoods' plan of development and zoning the Foxwoods site as a CED. By letter dated April 4, 2008, counsel for Foxwoods advised the City Solicitor that, as a result of this Court's ruling, the hearings had been rendered moot; nonetheless, Foxwoods would continue to attend the hearings out of respect for City Council and Foxwoods' firm desire to continue to work with all branches of the City government to maximize the benefits to the City and its residents that will be achieved from the Foxwoods project. Foxwoods reserved all of its rights, including those granted by this Court in the Opinion. *See Ex. 9.*

29. Mayor Nutter appeared in City Council to testify at the April 4 hearing, two days after this Court's decision. He applauded City Council for continuing its hearings on the Foxwoods site. The Mayor staked out his position explicitly, stating, "It is clear that the proposed Foxwoods site is the wrong site for Philadelphia," and "the long arm of the judicial branch has reached into this City Council and snatched out this Council's will and ability and political responsibility to represent the interests of the citizens of this city." The Mayor further claimed that the "Pennsylvania Supreme Court continues to seek to put its judgment in place of the legislative and executive branches here in the City," and stated that "if we are to have gaming in Philadelphia, there is a way to do it, there is a way to do it right, that works for the citizens of this city, that works for the citizens of this Commonwealth of Pennsylvania, and does not leave us with what has been characterized as a slot box. That doesn't serve anyone's interests at all." *Ex. 10 at 121-22, 124-25, 127.*

30. The Mayor also said: "I think this is a bad site for Philadelphia and for Pennsylvania for all of the reasons that I laid out, including even financial reasons." He noted:

“So I think that our options [to challenge the Foxwoods project] are varied, and we will explore them and then announce them at a subsequent point in time. But I think that there are still many miles to go before this particular activity reaches a conclusion.” Ex. 10 at 134-35.

31. The Mayor closed his remarks to City Council by saying: “The decision the other day [i.e., this Court’s Opinion of April 2, 2008] was the decision. The last I checked, the 18 of us are still in charge of the City of Philadelphia.” Ex. 10 at 135.

32. The new City Solicitor testified before City Council on April 30, 2008. When asked by two City Council members if the Development Agreement with Foxwoods could be renegotiated or voided, she responded that she was “not sure that [her office had] found a legal basis to either renegotiate it or to void it.” Ex. 11 at 82-83. The obvious implication of this question and the Solicitor’s response was that the new City Administration was exploring ways to void or re-negotiate the Development Agreement.

B. The City Embarks on a Political Campaign to Force Re-Siting

33. As a result of this Court’s ruling of April 2, 2008, Foxwoods finally was able to begin the process of obtaining local permits and approvals necessary to develop its project. Foxwoods, through its professional consultants, methodically developed a critical path analysis of what permits and approvals were necessary to begin construction. The first step called for submission of an application for the Zoning Permit. Foxwoods submitted this application on May 5, 2008, as is described in greater detail below.

34. As is also set forth in detail below, despite the plain language of the relief granted by this Court in its Opinion, despite the contractual obligations binding the City in the Development Agreement and despite the unambiguous terms of the applicable CED Ordinance, the new City Administration has failed and refused to follow the law, has failed to issue Foxwoods’ Zoning Permit and instead has ratcheted up a transparent public campaign to force

Foxwoods to re-site its casino.

35. At the same time, as is again set forth below in greater detail, while the City Administration has taken every conceivable measure at its disposal to bog the Foxwoods permitting approval process down in a bureaucratic quagmire, City officials, including the Mayor, repeatedly have issued statements assuring the public that they are complying with the obligations set forth in the Court's Opinion and otherwise. The City's statements are utterly transparent, as the City has done nothing but, arbitrarily and in an extra-legal fashion, abuse the straightforward permitting approval process in the hopes that Foxwoods and the Commonwealth will give in to the City's political pressuring.

C. The Process for Obtaining Necessary Permits in Philadelphia

36. In Philadelphia, the Department of Licenses and Inspections ("L&I") issues zoning permits and building permits. Phila. Code §§ 14-1703(1), 4-A-302.1.<sup>1</sup> Building permits are required for construction or demolition of any structure or "clearing, grubbing or earth disturbance of any land in excess of 5,000 square feet." Phila. Code, § 4-A-301.1.1. No building permit may be issued without prior issuance of zoning and use registration permits. Phila. Code, §§ 14-1702(4), 4-A-301.1.4.

37. To apply for a zoning permit, a developer ordinarily must submit site plans to L&I. The Zoning Code provides that:

No zoning or use registration permits shall be issued unless:

(a) The owner or his agent authorized in writing files a plan in duplicate drawn to scale showing the actual lot dimensions, use or intended use, height or size, and location of the building or buildings on the lot, together with such other information and data as the Department may require;

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<sup>1</sup> Relevant excerpts of the Philadelphia Zoning (§§ 14-1700 *et seq.*) and Building (§§ 4-A-301 *et seq.*) Codes are attached as Exs. 12 and 13.



(b) Such plan is approved by the Department as showing compliance with the applicable provisions of this Title;

(c) The required fee is paid.

Phila. Code, § 14-1703(2). In addition, the Building Code provides further elaboration on the information required on site plans submitted with a zoning permit application:

In the case of new construction, additions and demolition, the zoning and building permit applications shall be accompanied by a site plan showing to scale the size and location of all new construction and all existing structures on the site, distances from lot lines, the established street grades and the proposed finished grades, and as applicable, flood hazard areas, floodways, and design flood elevations; and it shall be drawn in accordance with an accurate boundary line survey.

Required accessibility features shall be shown including but not limited to: parking spaces, public transportation stops and accessible routes.

In the case of demolition, the site plan shall show all construction to be demolished and the location and size of all existing structures and construction that are to remain on the site or plot.

Phila. Code, § 4-A-305.2.1.1

38. To supplement these Code requirements, both L&I and the Planning Commission have published their own submission completeness checklist requirements. *See* Exs. 14 & 15. L&I's official checklist of "Plan Information Requirements" sets forth various items that are required to be shown on the site or "plot" plan. In no event is a traffic study required, not even under the list of prerequisite approvals L&I requires from the Streets Department. L&I's website also lists the information required to be shown on a zoning permit application and a zoning site plan. *See* Ex. 14. Again, no traffic study is required.

39. The Planning Commission's "Developer's Checklist – Plan Specification" describes more detailed information that is required on zoning site plans. But again, no traffic

study is required.

40. Thus, the site plan submitted to obtain a zoning permit is meant to be a schematic engineering plan that shows enough information to allow a review and analysis of the site plan against the zoning use and dimensional requirements of the Zoning Code that are applicable to the property.

41. The CED Ordinance modifies the usual procedure slightly to redirect zoning permit applications to the Planning Commission for the Commission to confirm that the plans are in accord with the approved plan of development. Phila. Code, § 14-404(1). If the Planning Commission determines that the plans are in accord with the approved plan of development, the Commission is mandated to approve the plans and send them to L&I to issue the permit. Phila. Code, § 14-404(1)(a).

42. In addition to the typical zoning permit application form, related zoning site plans must be submitted under the CED Ordinance, as is always required for land development. In particular, the zoning site plans must contain the following information and conform to the plan of development:

No City department shall issue any building or zoning permit for any parcel zoned Commercial Entertainment District unless the Commission shall have approved the applicant's development plans as consistent with the requirements of this Chapter. The plans shall contain, as a minimum, the following information and details:

- (a) Plans for the development of the entire district, or for a separate lot, parcel, or block within the district;
- (b) The height, and use of all buildings and structures;
- (c) All proposed set-backs and open space;
- (d) The gross floor area of all buildings;
- (e) Any proposed change to the existing confirmed street

layout within or surrounding the boundaries of the district;

(f) The total occupied area of the district, expressed in square feet and percentages;

(g) A landscaping plan;

(h) A parking plan, including all driveways leading thereto and the size and location of all private drives or public streets intended to be used for automobile traffic. All proposed plans for off-street parking lots shall be approved by the Department of Streets;

(i) The size and location of all off-street loading facilities;

(j) The size and location of any signs.

Phila. Code, § 14-404(2). No traffic study is required to be submitted.

43. The CED Ordinance further provides that the Planning Commission shall seek the recommendations of the Streets and Water Departments and shall act on the application within 45 days. The CED Ordinance provides:

(3) The Commission shall take no action on any proposed plans unless the Commission shall have first referred the plans to the Streets Department and the Water Department for their review. Said departments shall have thirty days to offer their recommendations. If the Commission fails to approve, disapprove, conditionally approve or table the proposal within 45 days after submission of complete plans to the Commission, the approval of the Commission shall be presumed. The Commission shall reply in writing informing the proponent as to the action that the Commission has taken.

(4) Where the approval of the Department of Streets is required before the issuance of a permit, including as provided in Sections 14-404(2)(h) and 14-408(2), relating to off-street parking, if the Department fails to approve, disapprove or conditionally approve the proposal within 45 days after submission of complete plans to the Department, the approval of the Department shall be presumed.

Phila. Code, § 14-404(3)-(4).

44. Issuance of the Zoning Permit is a prerequisite to filing plans and

applications for review with other City agencies such as the Water Department, L&I and the Streets Department. Most importantly, a building permit for clearing, grading, asphaltting, foundation or other construction work cannot issue until several other City approvals, starting with issuance of the Zoning Permit, are obtained. Among other necessary permits that cannot issue without prior issuance of the Zoning Permit are plumbing (both for water and sewer service to any buildings and for external water and sewer work), electrical, HVAC, sprinkler, and Highway Occupancy (for any curb cuts for access to the property or off-site work). Thus, the City's failure to issue the Zoning Permit creates an effective bottle-neck for the application and issuance of a substantial number of other permits, consents, licenses and approvals. All such permits and approvals other than the Zoning Permit are referred to collectively as the "Subsequent Permits and Approvals" and individually as a "Subsequent Permit and Approval."

D. Foxwoods Applies for a Zoning Permit

45. As noted above, on May 5, 2008, Foxwoods sought the Zoning Permit by submitting its Zoning and Use Registration Permit Application and Zoning Site Plans (collectively, the "Zoning Permit Application," attached as Ex. 16) for review by the Planning Commission, pursuant to § 14-404 of the CED Ordinance.

46. While under § 14-404 of the CED Ordinance, the Planning Commission had 45 days, or until June 19, 2008, to either approve, disapprove, conditionally approve or table the Zoning Permit Application, Phila. Code, § 14-404(3), the City agreed in § 2(b)(d) of the Development Agreement to complete the review within 10 business days.

47. Rather than take any of the authorized actions, the Planning Commission, through its Acting Executive Director, advised Foxwoods, by letter dated June 18 and delivered to Foxwoods' counsel on June 19, 2008, that its Zoning Permit Application was "incomplete." Ex. 17. Ignoring the commitment in the Development Agreement to review the Application

within 10 business days, the Planning Commission waited until the 45th day to deliver its letter, even though it based its conclusion of incompleteness on enclosed comments from the Streets Department dated two weeks earlier (June 4, 2008). Had the City been acting in good faith, as required by § 2 of the Development Agreement, *see* Ex. 3, ¶ 2, it should have shared those comments with Foxwoods and requested input on Foxwoods' position regarding the comments. Instead, the City took the full time period allotted under the CED Ordinance to review the application to advise Foxwoods that its application allegedly was incomplete. This is but one example of the City's tactics to delay issuance of critical permits and approvals to impede, frustrate and stop the development of the Foxwoods project.

48. Pursuant to § 14-404(1) of the CED Ordinance, once a plan of development is approved, the scope of the Planning Commission's review of a zoning permit application is limited solely to determining if the "accompanying plans are in accord with the approved Plan of Development." Phila. Code, § 14-404(1). In essence, the role of the Planning Commission at this stage is to compare the plans submitted with the zoning permit application for consistency with the plans comprising the plan of development.

49. The zoning site plans that accompanied Foxwoods' Zoning Permit Application were exact reproductions of the plan of development plans approved by the Planning Commission on August 21, 2007 and by this Court on April 2, 2008. *Compare* Ex. 15 with Ex. 2.<sup>2</sup>

50. Once the Planning Commission determines that the "proposed plans are in

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<sup>2</sup> Exhibit 2 (the plan of development plans submitted to the Planning Commission) includes one more page than Exhibit 16 (the site plans submitted with the Zoning Permit Application). The plan of development plans include a page numbered C1004Z and named "Phase 2 & 3 Zoning Plan." Since the Planning Commission did not approve the Phase 2 and 3 plans, Foxwoods did not seek a Zoning Permit for Phases 2 and 3 and, accordingly, did not include drawing number C1004Z with the Zoning Permit Application.

accord with the approved Plan of Development,” then “the Commission *shall approve* the proposed plans and return them to the Department of Licenses and Inspections for the issuance of zoning permits.” Phila. Code, § 14-404(1) (emphasis added).

51. Foxwoods’ plan of development is fully approved by virtue of the decision of the Planning Commission and the Opinion of this Court. Consequently, pursuant to § 14-404 of the CED Ordinance, Foxwoods’ “accompanying plans” were “in accord with the approved Plan of Development” and, therefore, the Planning Commission had no discretion but to approve the Zoning Permit Application and to direct L&I to issue the Zoning Permit.

52. Instead, in its letter of June 18, the Planning Commission claimed that Foxwoods’ Zoning Permit Application was incomplete because it did not submit a complete traffic mitigation plan, a transportation plan, a parking plan, and proposed street layout changes, citing §§ 14-403 and 404 of the CED Ordinance. Ex. 17.

53. However, as discussed above in detail, such materials are not part of a zoning permit application under any provision of the Zoning Code. Such materials were submitted by Foxwoods to the Planning Commission in 2007 under § 14-403 of the CED Ordinance, which specifies materials to be submitted to the Planning Commission in connection with its consideration of plan of development approval. This requirement, however, is not pertinent to zoning permit application review under § 14-404 of the CED Ordinance. Requiring further review of such materials at the time the zoning permit application is submitted is a direct violation of this Court’s mandate and an effort by the new City Administration to use delay in issuing this gateway permit, by re-reviewing what was approved already by the Planning Commission in its approval of the plan of development in August 2007, as part of the Administration’s campaign to force re-siting.

54. Further, the Planning Commission's statement regarding the Zoning Permit Application being incomplete because of the allegedly "missing" transportation plan, parking management plan, and proposed street layout changes information is a pretext concocted to avoid issuing the Zoning Permit and flout the order of this Court. Those materials were provided to the Planning Commission as part of the plan of development submission in 2007. On July 3, 2007, former Planning Commission Executive Director Janice Woodcock acknowledged receipt of, among other items, Foxwoods' transportation and parking management plans. Ex. 18. In July 2007, the Planning Commission also required Foxwoods to submit supplemental and revised transportation and parking management plans and information to enable the Planning Commission to complete its plan of development approval review. Accordingly, Foxwoods did submit revised transportation and parking management plans, among other items, and the Planning Commission approved Foxwoods' plan of development on August 21, 2007.

55. Moreover, representatives from the City Law Department, Streets Department and Planning Department met with representatives of PennDOT and Foxwoods several times to discuss Foxwoods' traffic study and mitigation plan, including a meeting on August 17, 2007, which resulted in Foxwoods being instructed to prepare its "30% Design" submission. A copy of that submission was delivered to the Streets Department on or about January 14, 2008. *See* Ex. 19 (Jan. 14, 2008 let. from J.L. Greene to P. Mulligan). Thereafter, PennDOT transmitted comments to Foxwoods addressing the 30% Design by letter dated April 17, 2008 (Ex. 20), which also contained comments of the Streets Department. Foxwoods responded to the April 17 comment letter by letter dated June 10, 2008 (Ex. 21) and addressed all of the items, including comments based on input from the Streets Department. The Streets

Department was copied on this response as well.

56. Thus, by the time the June 18, 2008 Planning Commission letter was delivered, the Streets Department had received and reviewed a much greater amount of traffic information from Foxwoods than what was submitted as part of the original plan of development submission, yet ignored it in arriving at its list of 19 alleged deficiencies. Indeed, in its comments appended to the Planning Commission's June 18 letter, the Streets Department stated that it did not consider the Orth Rodgers Off-Site Improvements/Traffic Mitigation Plans, while tacitly admitting that it had those plans in its possession.

57. In response to the Planning Commission's letter, on June 24, 2008, Foxwoods explained in writing that these comments/requests for additional information are not valid Streets Department comments or requests, and are not authorized by the Zoning Code at the zoning permit application review stage. Ex. 22. Instead, they may be relevant to the building permit application review, or the "design review submission" stage, as set forth in § 14-411 of the CED Ordinance, Phila. Code, § 14-411, but, of course, Foxwoods cannot reach those later stages or obtain the Subsequent Permits and Approvals without first obtaining the Zoning Permit.

58. With respect to the claim that the application was deficient based upon the comments transmitted by the Streets Department to the Planning Commission Staff, Foxwoods pointed out that none of the alleged deficiencies had any bearing whatsoever on issuance of a Zoning Permit. Foxwoods explained further that: (a) many of the items had been addressed by the 30% Design Traffic Mitigation Plan that Foxwoods previously submitted to the Streets Department; (b) other items consisted of construction design information, easement issues, and rights-of-way issues that never before have been required to be provided at a zoning permit review stage, but, instead, are provided during the building permit review and on-site



construction stages; and (c) other items consisted of off-site improvements that also are beyond the scope of a zoning permit review.

59. The transparent pretext of the City's position is reflected most notably in Item #19 regarding a drainage right of way that, while shown on the site plans as vacated, had not been removed from the City Plan. While the Streets Department characterized this as a deficiency, it in fact represents the City's failure to remove the right of way from the City Plan, as the City was ordered to do by the Court in the Opinion, 943 A.2d at 966 (directing the City to make all necessary changes to City plans to reflect relief granted by the Court, including vacations of easements shown on plan of development).

60. While the June 24 letter was discussed with City representatives at a subsequent meeting, as described below, to this date, the City has not responded in writing to the June 24 letter.

61. The City's refusing to issue the Foxwoods Zoning Permit is incontrovertible evidence of the new City Administration's deliberate efforts to frustrate the siting decision made by the Gaming Board more than 18 months ago.

E. Further Actions by the City Administration and City Council to Thwart the Foxwoods Development

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62. The City's handling of the Zoning Permit Application is part and parcel of its efforts to delay and impede the construction of the Foxwoods project. For example, on May 15, 2008, when Foxwoods' project manager asked the City's Minority Business Enterprise Council ("MBEC") to attend a pre-bid meeting for potential minority and women contractors, provide input on proposed minority and women contractors to be invited to the meeting and make a set of bid documents available for review in MBEC's offices by potential minority and women contractors, MBEC refused any involvement with the Foxwoods project, claiming it was

“premature.” See Ex. 23 (May 15, 2008 T.N. Ward let. to MBEC).

63. The new City Administration’s attempts to impede, frustrate and stop the development of the Foxwoods project became even more apparent from the response to Foxwoods’ requests to meet with the City Solicitor to discuss moving forward with the project.

64. In light of the Opinion, the parties’ mutual commitments in the Development Agreement, and the submission of the Zoning Permit Application, counsel for Foxwoods contacted the City Solicitor on May 19, 2008 and requested a meeting to discuss moving forward with the permit process and establishing a direct line of communication with the City Solicitor’s office. Ex. 24.

65. Counsel for Foxwoods first was advised that the City Solicitor would not be available to meet with Foxwoods until the middle of the following week. However, when trying to confirm a meeting date, the City Solicitor’s office advised that the City Solicitor would not be available to meet until after June 23 – more than a month later. Counsel for Foxwoods wrote to the City Solicitor on May 28, 2008, suggesting that it would be beneficial to meet prior to the June 19, 2008 deadline for the Planning Commission to issue Foxwoods’ Zoning Permit and also to discuss the refusal of the MBEC to participate in Foxwoods’ pre-bid meeting with potential subcontractors. Ex. 25.

66. The City Solicitor responded by letter dated May 30, 2008, stating that “since the evaluation of that [Zoning Permit] application is purely an operational process, no need exists for the lawyers to meet at this time. That conclusion, along with my fairly tight schedule resulted in my determination that a meeting with you would be best scheduled after June 23.” Ex. 26.

67. Subsequently, the City Administration has revealed further its plans to

continue to challenge the Foxwoods site. On June 18, 2008, the date of his Planning Commission Staff's "deficiency" letter to Foxwoods, after inaccurately claiming that City Departments were meeting regularly with Foxwoods, the Mayor said on a radio broadcast: "I've expressed serious concern, and many others have, with regards to Foxwoods. Obviously if there were a better location I'd be much more interested in that. But there's no doubt in my mind there will be two casinos in Philadelphia. *The question on the one [Foxwoods] is where.*" Ex. 27 (emphasis added).

68. When the City Solicitor finally met with Foxwoods on June 23, 2008, after the Planning Commission's letter refusing to act on the Zoning Permit Application, the City Solicitor told Foxwoods' representatives that she did not consider the issuance of the Zoning Permit to be a legal matter and that Foxwoods should meet with the Planning Commission staff to discuss the contents of the June 18 letter. This was the first indication Foxwoods had received from the City that Foxwoods could meet directly with City Departments, which was contrary to the instructions it received in its January 17, 2008 meeting with representatives of the new City Administration, when Foxwoods was told that all such meetings had to be coordinated through the Mayor's senior adviser, Teresa Gillen (who subsequently had refused to schedule any meetings). Foxwoods representatives noted that they felt there were legal issues to be discussed based upon the ruling of this Court which, among other things, ordered the City to receive, review and act upon all applications from Foxwoods in the ordinary course and based upon the City's obligations under the Development Agreement. Nonetheless, the City Solicitor directed Foxwoods to address its concerns to the Planning Commission.

69. Foxwoods promptly attempted to set up a meeting with the Planning Commission staff, but after such a meeting had been scheduled for Thursday, June 26, 2008, it

was postponed by the Planning Commission Staff until July 2, 2008.

70. On July 2, 2008, Foxwoods representatives met with members of the Planning Commission Staff, Teresa Gillen and an attorney from the City Law Department. At this meeting, Foxwoods asked whether the Planning Commission had reviewed Foxwoods' letter of June 24, 2008. The Acting Executive Director of the Planning Commission informed Foxwoods, for the very first time, that, at the direction of the Mayor and the Commerce Director, the City Administration had a new "policy" to require traffic studies, including traffic mitigation efforts, on all projects "of scale" prior to issuing zoning permits. This purported policy, according to the City representatives at the meeting, was not to be found anywhere in writing (including in the Zoning Code or CED Ordinance) and the City representatives refused to disclose whether it had been applied to any other project, and could not define the class of projects to which the policy purportedly applied. *See* Ex. 28 (July 15, 2008 let. from Foxwoods to Planning Commission). Indeed, the new "policy" was not even referenced in the Acting Executive Director's June 18 letter (Ex. 17) setting forth the purported deficiencies in the Zoning Permit Application.

71. The City representatives at the meeting further notified Foxwoods that, until Foxwoods addressed the 19 items contained in the Planning Commission's letter of June 18, 2008, the City was "not in a position to approve" the Zoning Permit Application. *See* Ex. 28.

F. Recent Public Statements by the City Administration

72. Notwithstanding this Court's rulings that the City may not change a siting decision made by the Gaming Board, the Mayor has only increased his campaign to force casino re-siting.

73. On June 26, 2008, Mayor Nutter made it abundantly plain that he does not plan to abide by the Supreme Court's Opinion, but instead will conduct an all-out effort to try to

force Foxwoods to another site. Delaying issuance of the Zoning Permit, and likely future permits, is part of that strategy.

74. During a presentation of the PennPraxis waterfront plan at the Independence Seaport Museum on Penn's Landing, Mayor Nutter called for further study of the two casinos planned to be built in Philadelphia, indicating to the audience that they “‘simply do not fit’ in the riverfront plan.” See Ex. 29 (June 27, 2008 Philadelphia Daily News, *Nutter: No more secrets on the river after Penn's Landing plan*).

75. The Mayor further called upon PennPraxis to conduct an analysis and make recommendations in the next 30 to 60 days to answer what he called “‘the essential question: Can the casino plans at their proposed locations work or not? An honest, legitimate, third-party analysis must be conducted.’” See, Ex. 30 (June 27, 2008 Philadelphia Inquirer, *Nutter endorses PennPraxis waterfront plan*).

76. The Mayor’s comments suggest that the analysis of this precise question already undertaken by the Gaming Board in choosing the sites for the Philadelphia casinos was not honest, legitimate or independent. As this Court concluded in affirming the licensing decision, nothing supports the suggestion that the Gaming Board’s actions were not thorough, forthright and undertaken with integrity. See generally, *Riverwalk*, 592 Pa. 505, 926 A.2d 926.

77. It is telling that the Mayor would choose PennPraxis to conduct a so called “‘honest, legitimate, third-party analysis” since, immediately prior to the Mayor's comments, Harris Steinberg, the executive director of PennPraxis, stated that the casino designs do not match the riverfront plan, saying, “‘They’re essentially large, windowless boxes,” and that “‘this is the antithesis of what the vision calls for.” Steinberg also stated that the purpose of the 60-day study is to determine whether casino traffic would interfere with the plan to transform Delaware

Avenue and Columbus Boulevard into a pedestrian-friendly boulevard, served by light rail. *See* Ex. 30.

78. The Mayor told the group at the presentation that he now considers the PennPraxis plan's conclusions the official policy of his administration, directly linked to his economic goals and, in an apparent reference to the April 2, 2008 Opinion of this Court, stated: "We will not be forced into decisions today about our waterfront that may harm future generations of that valued place." *See* Ex. 30.

79. As though the Mayor's motives were not obvious enough on the surface, Teresa Gillen, the Mayor's senior advisor on casino issues, made plain that PennPraxis was not an "honest, legitimate, third-party," stating: "[The Mayor's] not being coy; he's not sending [PennPraxis] on a neutral fact-finding mission. What he's asked PennPraxis to do is clarify why this is a bad location." *See* Ex. 31 (June 28, 2008 Philadelphia Inquirer, *Nutter commissions study on casinos*). Ms. Gillen also made plain the City's strategy to delay issuance of critical permits and approvals as a means of implementing the Mayor's goal of impeding, frustrating and stopping the development of the Foxwoods project, stating, "[T]here are still a number of permits both operators need to get from the city. There's lots of regulatory approval they still need.' She hastened to say the City was 'making sure we stay within the letter and spirit of the law, as the courts have instructed,' but that doing so, 'does not require the city to abandon all review.'" Ex. 31.

80. The City's re-siting campaign rose to new heights on July 8, 2008. On that day, Mayor Nutter sent a letter to State Senator Vincent Fumo and State Representative Dwight Evans, which he copied to several dozen other public officials, but not Foxwoods. In the letter, the Mayor sought to enlist the support of Senator Fumo and Representative Evans in his

effort to force both the Foxwoods and Sugarhouse casinos to relocate. Ex. 32.

81. In this letter, the Mayor stated that, over the past four months, his administration purportedly had “discovered a number of outstanding legal and regulatory issues that would have to be addressed before either Foxwoods or Sugarhouse would be able to begin construction.” Ex. 32 at 1. As had been his administration’s tactic since the outset, the Mayor continued to assert the veneer of cooperation:

I want to make it clear that my staff has been in regular contact with representatives of both casinos since I came into office in January. We have been following the mandate of the Supreme Court, but have been mindful that the City – and the Commonwealth – maintain certain legal powers and responsibilities relating to water, sewer, streets, traffic, historic, environmental and other planning issues. For the last six months, we have worked with the casino representatives when possible to resolve the issues that can be resolved, while maintaining the City’s position that neither of these sites is the best site for a casino project.

Ex. 32 at 1. As set forth above, the Mayor’s letter is inaccurate in describing the contact the City has had with the casinos as “regular” since he came into office in January and suggesting that the Administration has “worked with the casino representatives when possible to resolve the issues that can be resolved.” To the contrary, the new Administration’s approach to “regular contact” with Foxwoods and resolving issues, thus far, has been to deny or delay Foxwoods’ requests for meetings and then denying its request to move forward with the project.

82. The Mayor then self-servingly commented on the status of Foxwoods’ Zoning Permit Application:

Since June 19, 2008, when the City Planning Commission notified Foxwoods that its zoning application was incomplete, representatives of the Planning Commission have begun to meet with representatives of Foxwoods to address the Commission’s concern about the application’s deficiencies.

Ex. 32 at 1-2. What the Mayor describes as an explanation of the “Commission’s concern about

the application's deficiencies" could refer only to the July 2, 2008 meeting at which Foxwoods was advised for the first time that there is a new unwritten and incomplete "policy" being applied to Foxwoods that apparently had not been applied to any other project.

83. The Mayor then went on to explain that Foxwoods and Sugarhouse still require additional permits and approvals and listed what he believed those to be. He then concluded his letter by stating:

For all these reasons, the obstacles to casino development at the present sites would seem to be practically insurmountable. Therefore, I look forward to working with you both to identify alternative sites.

Ex. 32 at 3. While the Mayor's letter describes some permits and approvals required prior to opening the Foxwoods Casino Philadelphia to the public, the letter inaccurately suggests that these items are problematic or unique to Foxwoods' site. The letter also asserts inaccurately that these items must be resolved before commencement of construction. Other issues listed are simply incorrect. The items listed and Foxwoods response are as follows:

a. *Foxwoods, as appropriate sequentially, must submit complete plans for and obtain zoning, foundation and building permits, from the Department of Licenses and Inspections before it can proceed with construction.*

As indicated above, neither the foundation nor building permits, among others, can be issued under the Zoning Code until the City issues the Zoning Permit. However, as also noted above, the City refused to issue the Zoning Permit on the pretext of an unwritten "policy" that apparently is being applied only to Foxwoods.

b. *Foxwoods has applied for but not yet received its Act 537 sewer permit from the Pennsylvania Department of Environmental Protection.*

This is a permit that is applied for and issued on all projects and will be issued to Foxwoods in due course. Contrary to the Mayor's suggestion, there is nothing "problematic" with the Foxwoods site that will impede issuance of this permit.



c. *Foxwoods must receive a Highway Occupancy Permit from PennDOT and the City before it can construct its facility. A number of complicated issues must be addressed before the issuance of this permit, according to PennDOT and the Streets Department. These issues relating to traffic mitigation, including traffic ingress and egress patterns in adjacent properties and signal and lane changes in Columbus Boulevard, with potential infringement on required sidewalk dimensions.*

It is misleading to suggest that the Highway Occupancy Permit must be issued before construction of the facility can begin. Issuance of a Highway Occupancy Permit is NOT a prerequisite to construction. While highway improvements will be completed prior to opening the facility, the highway improvements can and usually do occur concurrently with construction of the facility.

More importantly, as noted above, Foxwoods is substantially through the process of addressing the traffic issues raised by both PennDOT and the Streets Department, as the City knows.

d. *Foxwoods' physical plans, which are only 30 percent complete, must be completed before the City can award a building permit.*

This is simply incorrect. Foxwoods' "physical plans" are complete in more than sufficient detail to permit issuance of all permits and to begin permit, other than the City's continual efforts to interfere with and delay the approval process.

The reference to "30%" completion of plans is misleading as the "30% drawings" refer to traffic construction drawings. Moreover, the traffic *design* drawings are complete. After completion of the traffic design drawings and acceptance of the concepts by PennDOT and the Streets Department, the next step in the process is to submit what are referred to as "30% Design" drawings to those agencies for review. Those drawings are actually traffic *construction* drawings. As noted above, these drawings were requested in August, 2007, submitted in January, 2008 and commented upon by the City and PennDOT in April, 2008, which comments were addressed by Foxwoods on June 10, 2008.

To confuse the 30% traffic construction drawings with drawings pertaining to the construction of the facility is either a misrepresentation or misunderstanding of the facts and the application process.

84. In short, the content of the Mayor's letter encapsulates plainly the City's

obfuscation of the issues in its effort to generate a case for re-siting, despite the clear mandate of the Gaming Act and this Court's Opinion, and the wrongful treatment that Foxwoods has received at the hands of the City of Philadelphia. The only "insurmountable obstacles" to the development of the Foxwoods casino are the contumacious actions of the respondents.

G. The Actions of the Respondents Have Caused Substantial and Irreparable Injury to Foxwoods and the Commonwealth

85. For each month that Foxwoods' operations have been and continue to be delayed, Foxwoods has incurred and will continue to incur millions of dollars in lost projected net profits. Furthermore, for each month that Foxwoods' operations have been and continue to be delayed, Foxwoods has spent and will continue to spend hundreds of thousands of dollars in unrecoverable out-of-pocket expenses.

86. As previously noted, Foxwoods made payment of the statutorily-required slot machine \$50 million license fee on October 17, 2007. *See* 4 Pa. C.S. § 1209. It is estimated that payment of this fee, together with other carrying costs Foxwoods is incurring, such as land acquisition and financing costs, salaries, insurance, design and professional fees, prior to the issuance of final, nonappealable zoning and building permits has caused and will continue to cause Foxwoods undue financial hardship in the amount of approximately \$80,000 per day.

87. Moreover, the delay in constructing and opening the Foxwoods casino is costing the Commonwealth millions of dollars in tax revenue every month that will never be recovered, thus denying tax relief to the citizens of the Commonwealth.

88. These lost revenues and profits have accrued and will continue to accrue each and every day that Foxwoods' gaming operations were, are, and continue to be delayed due to City Council inaction in the past and City Administration's continuing inaction which began in January, 2008. They will never be recovered and will impact significantly the future

distribution of funds to state and local governmental programs and the extent to which tax relief ultimately becomes available to the citizens of the Commonwealth.

89. The General Assembly provided in the Gaming Act a mandate to require the “timely implementation of casino gaming.” 4 Pa. C.S. § 1506. This legislative mandate has been stymied for far too long by the City’s refusal to honor its commitments under the Development Agreement with Foxwoods and in direct contravention of this Court’s order of April 2, 2008, which requires that the City take all actions necessary to implement the relief the Court granted, including making all necessary changes to City records, maps and plans, and receiving, reviewing and acting upon all applications from Foxwoods in the ordinary course and in compliance with this Court’s order.

#### LEGAL DISCUSSION

#### **I. FOXWOODS IS ENTITLED TO COMPREHENSIVE RELIEF ENFORCING THIS COURT’S APRIL 2, 2008 ORDER**

90. Appellate courts have the authority to issue further orders enforcing their prior decisions in a matter. 42 Pa. C.S. § 323 (Pennsylvania courts have all legal and equitable powers necessary to enforce their orders); *Casey v. Zoning Hearing Bd.*, 459 Pa. 219, 230, 328 A.2d 464, 469 (1974); *Raum v. Board of Supervisors*, 29 Pa. Commw. 9, 15-16, 370 A.2d 777, 782-83 (1977) (ordering plans approved and permits to be issued, among other relief, because of township’s actions to delay development).

91. This Court has retained jurisdiction of this matter to address any further matters that should arise.

92. By its deliberate action in refusing to issue a Zoning Permit to Foxwoods as required by the CED Ordinance, by its concerted efforts to delay Foxwoods’ attempts to pursue the lawful permit process, and by its campaign to force the re-siting of the Foxwoods

casino, all as set forth above, the City has violated paragraph 4 of this Court's order of April 2, 2008.

- A. The City Should Be Ordered to Issue the Zoning Permit to Foxwoods Because Foxwoods' Zoning Permit Application Complied With All Requirements Set Forth in the Zoning Code and the City Has No Authority to Require Foxwoods to Submit Additional Information Not Required by the Zoning Code

93. The Zoning Code requires submission of an application and accompanying site plans that demonstrate that the proposed development meets the use and dimensional requirements of the applicable zoning designation for issuance of a zoning permit. Since Foxwoods submitted the required application along with site plans that were exact duplicates of those approved by the Planning Commission in the plan of development approval, the Planning Commission was mandated to approve Foxwoods' site plans and forward them to L&I to issue the Zoning Permit. Phila. Code, § 14-404(1)(a) (if "proposed plans are in accord with the approved Plan of Development and is otherwise in accord with the provisions of Chapter 14-400, the Commission shall approve the proposed plans and return them to the Department of Licenses and Inspections for the issuance of zoning permits").

94. The Planning Commission's failure to act in accordance with its mandatory obligations under the Zoning Code is in violation of law. The Court should order the City to issue the Zoning Permit.

95. Moreover, the City's attempt to impose a new "policy" on Foxwoods' Zoning Permit Application also is unlawful.

96. First, the purported "policy" is a sham that was not promulgated in a proper way to make it a viable regulation of the Planning Commission, even if the Planning Commission were to have authority to promulgate such a regulation. The "policy" is not in writing, has not been subject to notice and hearing and has not been published anywhere. *See,*

e.g., Phila. Home Rule Charter, § 8-407 (attached as Ex. 33) (requiring approval of Law Department, public filing with Department of Records, public advertising, opportunity for hearing and publication for regulations of any City department, board or commission to become effective); *Borough of Baldwin v. Matthews*, 394 Pa. 53, 55-6, 145 A.2d 698, 699 (1958) (authority of officer to deny permit must be spelled out clearly in duly enacted rules or regulations). Furthermore, even the oral description of the “policy” demonstrates that it is too vague to be a meaningful guideline for applicants to follow. Indeed, the Planning Commission Staff could not state the criteria for defining the “projects of scale” to which the new purported policy applies, rendering even those applicants who might have heard of the policy verbally unable to determine whether their project may or may not fit under the policy’s rubric.

97. Second, municipalities may not require developers to submit additional information and meet additional requirements for issuance of a permit that are not set forth in the applicable municipal code. *Appeal of Fiore*, 74 Pa. Commw. 328, 331, 459 A.2d 911, 913 (1983) (municipality may not refuse permit based on traffic concerns “on a case by case basis with no guidelines”); *Stauffer v. Weisenberg Township Bd. of Supervisors*, 934 A.2d 783, 787-89 (Pa. Commw. Ct. 2007). Thus, the Planning Commission’s demand for evidence of private easement agreements or traffic mitigation plans, unsupported by any provision in the Zoning Code, is impermissible.

98. Third, it is apparent from the City’s refusal to identify any other project to which it has applied the supposed new policy, inability to articulate the contours of the policy, and public campaign aimed at delaying construction of the Foxwoods project in an effort to force re-siting that the policy is a discriminatory pretext invented solely for the purpose of delaying Foxwoods’ construction. That the purported “policy” is pretext is further demonstrated by the

Streets Department's failure to consider the traffic studies that it had in its possession when preparing comments to the Zoning Permit Application. For these reasons as well, the City's failure to issue the Zoning Permit is in violation of the Zoning Code and the City's obligations under the Gaming Act, the Development Agreement and this Court's Opinion.

B. The City Should Be Ordered to Approve or Deny All Requests or Applications for Subsequent Permits and Approvals Within Ten Business Days, in Accordance With the Development Agreement

99. Foxwoods entered into the Development Agreement with the City after lengthy negotiations. The Development Agreement confers substantial benefits on the City and the School District. In return, the City agreed to process all required permits, approvals, licenses, consents or other similar authorizations in good faith and on an expedited basis. The City specifically committed to processing all such requests within ten business days.

100. Despite this agreement, the City has made plain that it does not intend to honor its commitments to Foxwoods, let alone its obligations under this Court's Opinion, to move the construction of the Foxwoods Casino Philadelphia forward in a prompt and timely fashion at the location selected by the Gaming Board. The City's actions thwart the implementation of the Gaming Act and deprive the citizens of Pennsylvania of the benefits anticipated by the General Assembly in its enactment of the Gaming Act. Instead, the City apparently intends to use every regulatory lever available to it to delay and obstruct the Foxwoods project.

101. The delay experienced at this point has cost both Foxwoods and the Commonwealth untold millions of dollars.

102. To limit the further delay in implementation of the Gaming Act, the Court should order the City to abide by its negotiated obligation to act on all applications and requests for Subsequent Permits and Approvals within ten business days and order that any such requests

or applications upon which the City does not act within ten business days shall be deemed approved.

C. The Court Should Appoint a Special Master to Resolve Efficiently Any Future Disputes Between Foxwoods and the Respondents Regarding Subsequent Permits and Approvals

103. Pursuant to § 1506 of the Gaming Act, 4 Pa. C.S. § 1506, the Court may appoint a special master to aid the Court in resolving matters arising under the Gaming Act. The behavior and pronouncements of the City Administration make it plain that the City likely will continue to use the permitting process to delay the Foxwoods project. To avoid the parties returning to the Court repeatedly over each permit or other approval needed from the City, Foxwoods requests that the Court appoint a special master and provide for expedited presentation of matters to, and review of them by, the master, as set forth below in the prayer for relief.

D. The Court Should Allow the Special Master to Grant Attorney's Fees and Costs Incurred in Preparing This Application to Foxwoods

104. The actions of the City, after having been told on numerous occasions that it cannot challenge the siting decisions of the Gaming Board, have been taken solely for the purpose of delay and are dilatory, obdurate and vexatious, warranting the Court granting Foxwoods the attorney fees and costs incurred in pursuing this application. Pa. R.A.P. 2744; 42 Pa. C.S. § 2503.

**RELIEF REQUESTED**

WHEREFORE, applicant/petitioner Philadelphia Entertainment and Development Partners, L.P. d/b/a Foxwoods Casino Philadelphia respectfully requests that the Court enter an order enforcing its order of April 2, 2008 as follows:

A. Requiring the City to issue and deliver to Foxwoods within two (2) business days of the Court's order the Zoning Permit due in response to the Zoning Permit Application submitted by Foxwoods to the Planning Commission on May 5, 2008 and, if the City does not comply with such order, assessing a specified *per diem* penalty to require compliance;

B. With respect to each of the Subsequent Permits and Approvals, including, but not limited to those described in paragraph 44, requiring the City, through the appropriate City agencies, boards and commissions, to either approve or deny each Subsequent Permit and Approval in writing within ten (10) business days of receipt of each Subsequent Permit and Approval application from Foxwoods, as the City is obligated to do by ¶ 2(b) of the Development Agreement. If the City fails to approve or deny a requested Subsequent Permit or approval within 10 business days, the Permit or Approval shall be deemed approved. Any denial of a Subsequent Permit and Approval shall set forth all reasons supporting the denial, with specific reference to any statute, ordinance, rule, regulation, or other law supporting the denial;

C. As authorized by section 1506 of the Gaming Act, 4 Pa. C.S. § 1506, appointing a master whose powers, duties and responsibilities shall include, but not be limited to, the following:

1. With respect to any application for a Subsequent Permit and Approval, or any other permit, license or other authorization required from the City for the construction, use or occupancy of the Foxwoods Casino Philadelphia, that the City does not approve in the manner set forth in ¶ B, above, the master shall hear and determine requests by Foxwoods concerning the propriety of the City's failure to approve the application for the Subsequent Permit and Approval.



2. Specifying a procedure to be implemented for the master's review as follows:

a. Foxwoods shall submit the application, the City's written denial and a written submission setting forth the reasons why the denial should be overturned.

b. The City shall thereafter have five (5) business days to submit to the master a written submission setting forth the reasons why the denial should be upheld.

c. Within ten (10) business days of the City's submission, the master shall issue a report and recommendation to the Court determining whether the application for the Identified Permit in issue shall be deemed approved.

d. Each report and recommendation shall become an order of the Court unless, within five (5) business days of the date of the report and recommendation, a party files with the Court an application challenging the report and recommendation.

e. In the event that a party files an application challenging a report and recommendation of the master, the responding party shall have five (5) business days to file a response to such application.

3. Pursuant to Rule 2744 of the Pennsylvania Rules of Appellate Procedure, and 42 Pa. C.S. § 2503, authorizing the master, upon receipt of an application from Foxwoods, to determine the amount of reasonable counsel fees to which Foxwoods is entitled as a result of having to prepare and file this application and any subsequent application. The procedure for determining such applications shall be in accord with ¶ 2 above.

4. Authorizing the master to assess sanctions in the form of monetary penalties against either respondent for its failure to comply with any order of this Court.

D. Ordering such other relief as may be just.

Respectfully submitted,



LeRoy S. Zimmerman, I.D. No. 07278  
Robert A. Graci, I.D. No. 26722  
ECKERT SEAMANS CHERIN &  
MELLOTT, LLC  
213 Market Street, 8th Floor  
Harrisburg, Pennsylvania 17101  
(717) 237-6000

Michael K. Coran, I.D. No. 55876  
Glenn A. Weiner, I.D. No. 73530  
Keith Lorenze, I.D. No. 205689  
KLEHR, HARRISON, HARVEY,  
BRANZBURG & ELLERS LLP  
260 South Broad Street, 4th Floor  
Philadelphia, Pennsylvania 19102  
(215) 568-6060

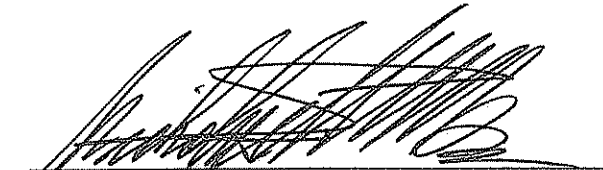
*Counsel for Applicant/Petitioner, Philadelphia  
Entertainment and Development Partners,  
L.P., d/b/a Foxwoods Casino Philadelphia*

Dated: July 16, 2008

VERIFICATION

I hereby verify that I am the Vice President and General Counsel of Philadelphia Entertainment and Development Partners, L.P., d/b/a Foxwoods Casino Philadelphia ("Foxwoods"), that I am authorized to make this verification on Foxwoods' behalf, that I have reviewed the foregoing Application for Relief Seeking Enforcement of the Order of the Supreme Court of Pennsylvania dated April 2, 2008, Pursuant to Rules 123 and 2591(B) of the Pennsylvania Rules of Appellate Procedure, and that, to the best of my personal knowledge or on information and belief, the factual statements therein are true and correct. I understand that this verification is made subject to the penalty of perjury for unsworn falsifications to authorities pursuant to 18 Pa. C.S. § 4904.

Dated: July 16 2008

  
Nicholas F. Moles

**CERTIFICATE OF SERVICE**

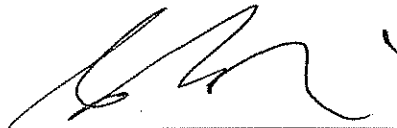
I certify that, on July 16, 2008, I served a copy of the foregoing Application for Relief Seeking Enforcement of the Order of the Supreme Court of Pennsylvania Dated April 2, 2008, Pursuant to Rules 123 and 2591(b) of the Pennsylvania Rules of Appellate Procedure and the Exhibits thereto upon the following counsel of record via hand delivery, addressed as follows, which service satisfies the requirements of Pa.R.A.P. 121:

Richard G. Feder, Esquire  
City of Philadelphia Law Department  
1515 Arch Street, 17th Floor  
Philadelphia, PA 19102  
(215) 683-5013

Counsel for the City of Philadelphia

James W. Christie, III, Esquire  
Ronald F. Brien, Esquire  
Brian Vance, Esquire  
Christie, Pabarue, Mortensen & Young, P.C.  
1880 John F. Kennedy Boulevard  
10th Floor  
Philadelphia, PA 19103  
(215) 587-1678

Counsel for City Council for the City of Philadelphia



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Glenn A. Weiner