IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

CONSOLIDATED FILING IN NOS. 207 E.M. 2007, 208 E.M. 2007, AND 28 E.M. 2008

SENATOR VINCENT J. FUMO, ET AL.	:	**207 E.M. 2007**
Petitioners,	:	
v.	:	
	:	
CITY OF PHILADELPHIA,	:	
Respondent,	:	
and	:	
	:	
HSP GAMING, L.P.	:	
Intervenor.	:	

CITY COUNCIL OF THE CITY OF PHILADELPHIA, COUNCILMEMBER FRANK DICICCO,	:	**208 E.M. 2007**
Petitioners,	:	
v.	:	
	:	
CITY OF PHILADELPHIA, STEPHANIE NAIDOFF,	:	
Respondents,	:	
and	:	
	:	
HSP GAMING, L.P.	:	
Intervenor.	:	

HSP GAMING, L.P.,	:	**28 E.M. 2008**
Petitioner,	:	
v.	:	
	:	
CITY OF PHILADELPHIA	:	
Respondent.	:	

THE CITY OF PHILADELPHIA'S CONSOLIDATED APPLICATION FOR CONSOLIDATION OF 28 E.M. 2008 WITH 207 AND 208 E.M. 2007 PURSUANT TO Pa.R.A.P. 123 AND 513

Respondent in all matters, the City of Philadelphia (the "City"), by and through its undersigned counsel, hereby submits this Consolidated Application for Consolidation of 28 E.M. 2008 with 207 and 208 E.M. 2007 pursuant to Pa.R.A.P. 123 and 513 (the "Consolidated Application"). In support hereof, the City avers as follows:

1. On November 27, 2007, the City of Philadelphia issued to HSP Gaming, L.P. ("HSP"), a license to construct its planned SugarHouse casino over submerged lands in the Delaware River. Petitioners, Senator Vincent J. Fumo, *et al.*, filed a Petition for Review in 207 E.M. 2007 on December 26, 2007, and Petitioners, City Council of the City of Philadelphia, *et al.*, filed a Petition for Review in 208 E.M. 2007 on December 27, 2007 (collectively, the "2007 matters"). In each of the 2007 matters, petitioners challenge the validity of the issuance of the license.

2. On December 28, 2007, during the last days of the prior City administration, the City filed a Reply Brief and Answer in 207 E.M. 2007, just two days after the Petition for Review was filed and well before a response was due.

3. Also on December 28, 2007, HSP intervened in 207 E.M. 2007 and filed two Applications for Summary Relief, arguing, *inter alia*, that the City had the authority to issue the submerged lands license.

4. On January 4, 2008, the last working day of the prior administration, the City filed a Reply Brief and Answer in 208 E.M. 2007.

5. On January 7, 2008, a new mayor, Michael Nutter, took office and established a new City administration.

6. On January 14, 2008, the City filed Motions for Extension of Time in the 2007 matters to permit it time to consider whether to stand on the prior administration's briefs

and answers (filed on December 28, 2007 and January 4, 2008), or to seek leave to prepare and file new briefs and answers. The requests were unopposed by Petitioners and granted by this Court.

7. Also on January 14, 2008, HSP intervened in 208 E.M. 2007 and filed two Applications for Summary Relief, again arguing, *inter alia*, that the City had the authority to issue the submerged lands license.

8. On January 24, 2008, the City exercised its authority to revoke the submerged lands license at the center of the controversy in the 2007 matters.

9. On January 25, 2008, Intervenor HSP filed an Application for Ancillary Relief and a Stay in the 2007 matters in response to the City's revocation of the license, arguing, *inter alia*, that the City had no jurisdiction to revoke the license while the appeal of the license's issuance was pending before this Court.

10. On February 1, 2008, the City filed a Consolidated Brief in Response to HSP's Applications for Summary Relief and Application for Ancillary Relief and a Stay (the "Consolidated Brief in Response to HSP's Applications") in the 2007 matters, arguing, *inter alia*, that the City had the authority to issue the submerged lands license pursuant to the Act of June 8, 1907, P.L. 488, No. 321, 53 P.S. § 14199 *et seq.* ("Act 321"), and that the City could revoke that license at any time.[1]

[1] Also on February 1, 2008, the City filed a Consolidated Application for Leave To Withdraw Reply Briefs and Answers and To File City's Consolidated Brief in Response to Petitions for Review (the "Consolidated Application for Leave To Withdraw Briefs") in the 2007 matters. Attached to the Consolidated Application for Leave To Withdraw Briefs was a Consolidated Brief in Response to Petitions for Review, which in turn incorporated in full the City's Consolidated Brief in Response to HSP's Applications. The Court has not yet ruled on the City's Consolidated Application for Leave To Withdraw Briefs. In fact, the Court has taken under advisement that Consolidated Application, and all other ancillary matters pending in the 2007 matters, as explained *infra*.

11. On February 22, 2008, HSP started a "new" action by filing a Petition for Review, Application for Summary Relief, and Application for a Stay in 28 E.M. 2008 (the "2008 matter"), asserting the same arguments that it made in its briefs in the 2007 matters – *i.e.*, that the City had the authority to issue the submerged lands license and that the City could not revoke the license while appeals of its issuance were pending before this Court.

12. On February 22, 2008, Governor Rendell signed into law two acts of the General Assembly (the "2008 Acts") in which the General Assembly declared that the authority to grant a license to use submerged lands of the Commonwealth rests solely and exclusively with the General Assembly, which must specifically authorize such a grant. *See* Act of Feb. 22, 2008, P.L. __, No. 4; Act of Feb. 22, 2008, P.L. __, No. 5.

13. After these new statutes were enacted, on March 7, 2008, the City responded to HSP's applications in the 2008 matter by filing a Consolidated Brief in Opposition to HSP's Petition for Review, Application for Summary Relief, and Application for a Stay (the "Consolidated Brief in Opposition to HSP's Petition for Review") (attached hereto as Exhibit A). Taking into account the new legislation, this brief reflects for the first time an evolution in the City's position on the issue of whether the City had the authority to issue the submerged lands license to HSP. In light of the 2008 Acts, the City now submits that the Court should accept the Commonwealth's view that the City lacked authority to issue the submerged lands license to HSP in the first instance and that the license, therefore, is void *ab initio*. The City took this position for the first time in its response brief filed in the 2008 matter because it was the first opportunity the City had to file a pleading after the 2008 Acts were signed into law.[2]

[2] Petitioners in the 2007 matters filed applications seeking leave to submit supplemental briefs explaining the effect of the 2008 Acts on the 2007 matters. The City did not oppose those applications, but requested the (continued...)

14. On March 19, 2008, this Court entered an Order in the 2007 matters listing them for oral argument during the Harrisburg Session in May 2008, and limiting argument to the following issues: (1) whether the authority to authorize construction on the submerged lands under the Delaware River is vested in the City of Philadelphia or the Commonwealth of Pennsylvania; and (2) whether the City of Philadelphia may revoke a validly issued license while an appeal of the issuance of that license is before this Court. Further, the Court directed that these matters will be considered on the existing pleadings, additional briefing is not required, and all outstanding ancillary matters are under advisement. In a letter dated March 20, 2008, the Office of the Prothonotary informed the parties that oral argument in the 2007 matters was scheduled for May 12, 2008.

15. In consideration of HSP's Application for Special Argument Session, or in the Alternative, for Advancement of Oral Argument filed on March 26, 2008, the Court has now rescheduled oral argument for April 15, 2008.

16. Pennsylvania Rule of Appellate Procedure 513 provides:

> Where there is more than one appeal from the same order, or where the same question is involved in two or more appeals in different cases, the appellate court may, in its discretion, order them to be argued together in all particulars as if but a single appeal. Appeals may be consolidated by stipulation of the parties to the several appeals.

Pa.R.A.P. 513. The docket reports in the 2007 matters and 2008 matter already indicate that these matters are related and have similar issues.

(continued...)

opportunity to respond to any supplemental brief filed. Because this Court has not yet ruled on the applications, the City has not had the opportunity to brief the effect of the 2008 Acts in the 2007 matters.

17. Pursuant to Rule 513, the City requests that the Court consolidate the 2008 matter with the 2007 matters because the same issues are implicated in all three cases, and because the City's evolved position on the first issue on which the Court has requested argument is not reflected in any of the briefing submitted in the 2007 matters as the 2008 Acts had not been signed into law at the time the City filed its last brief in the 2007 matters. *See, e.g., In re Adoption of Godzak*, 719 A.2d 365, 366 n.1 (Pa. Super. 1998) (consolidating cases on appeal pursuant to Rule 513 because both appeals involved the same issue).

18. Specifically, with respect to the first issue – that is, which government entity has the authority to permit construction on submerged lands – the City's position has evolved over the course of the litigation, as explained above, because the General Assembly has now made it unmistakably clear that construction on any of this Commonwealth land without specific authorization from the General Assembly is prohibited. In the 2007 matters, the City had maintained the position that it had the authority to issue the submerged lands license under Act 321. Because the City's understanding of the law when it issued a submerged lands license to HSP was not consistent with the 2008 Acts, the City takes the position in its papers filed in the 2008 matter that it lacked the authority to issue the submerged lands license in the first instance and that the license, therefore, is void *ab initio*, and that the new laws make it clear that this revocable license must be revoked by the City. Because the City's current position on this issue, taking account of the new laws, could not have been presented in any of the City's briefs in the 2007 matters, consolidation of the 2008 matter with the 2007 matters will provide the Court a complete view of the City's position on this important issue on which this Court has requested argument.

19. Moreover, given the significance of the 2008 Acts, it is imperative that oral argument on this first issue proceed with full knowledge by this Court of this recent legislation and the City's position concerning its effect. Indeed, proper resolution of this issue hinges on the Court having the complete arguments of the parties.

20. The second issue listed for oral argument in the 2007 matters, concerning the validity of the City's revocation of the submerged lands license while appeal of its issuance is pending before this Court, is also an issue in the 2008 matter. In the 2007 matters, in response to HSP's request for Ancillary Relief, the City argues that the revocation of the license is well within the City's discretion, that Pa.R.A.P. 1701 does not prevent revocation of the license while appeal of its issuance is pending before this Court, and that the City is not judicially estopped from revoking the license. In the 2008 matter, the City expands on these arguments now squarely presented by HSP's "appeal" of the revocation and, thus, more fully explains why the City has the power to revoke the license in its discretion and why HSP has no vested right in the license that conceivably could prevent its lawful revocation. Thus, consolidation of the 2008 matter with the 2007 matters will provide the Court with the City's complete position on the second issue on which this Court has requested argument.

21. Accordingly, because the 2007 matters and 2008 matter present common issues, and because the City's brief which has already been filed with this Court in the 2008 matter presents the City's complete position on the issues before this Court in the 2007 matters, the City requests that this Court consolidate these matters or, in the alternative, docket in the 2007 matters the City's Consolidated Brief in Opposition to HSP's Petition for Review filed in the 2008 matter, as attached hereto as Exhibit A.

WHEREFORE, Respondent in all matters, the City of Philadelphia, respectfully requests that this Court grant its Consolidated Application and consolidate the 2008 matter with the 2007 matters or, in the alternative, docket in the 2007 matters the City's Consolidated Brief in Opposition to HSP's Petition for Review filed in the 2008 matter.

Respectfully submitted,

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PROOF OF SERVICE

I, David V. Dzara, hereby certify that on April 3, 2008, I caused true and correct copies of the foregoing Consolidated Application for Consolidation of 28 E.M. 2008 with 207 and 208 E.M. 2007 pursuant to Pa.R.A.P. 123 and 513 to be served upon the following counsel and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 121:

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Dated: April 3, 2008

David V. Dzara
David V. Dzara

EXHIBIT A

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

HSP GAMING, L.P.	:	**NO. 28 E.M. 2008**
	:	
Petitioner,	:	
v.	:	
CITY OF PHILADELPHIA,	:	
	:	
Respondent.	:	

CONSOLIDATED BRIEF IN OPPOSITION TO HSP GAMING, L.P.'S PETITION FOR REVIEW, APPLICATION FOR SUMMARY RELIEF, AND APPLICATION FOR A STAY PURSUANT TO PA.R.A.P. 1781

Dated: March 7, 2008

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I. INTRODUCTION

In this appeal, HSP Gaming, L.P. ("HSP") asks this Court to overturn the judgment of the Acting Commerce Director for the City of Philadelphia that the riparian license at issue should be revoked. HSP's justification for this extraordinary request is its mistaken belief that the license is irrevocable and that, regardless of what is in the public's best interest, it has a right to the license that cannot be taken away. HSP is wrong.

At this juncture, the Commonwealth (through newly enacted legislation) and the City of Philadelphia (the "City") agree that HSP should not retain the riparian license issued during the waning hours of Mayor Street's Administration and that the City never had the authority to issue it. The license's issuance thrust the City into conflict with its own City Council and with the State Legislature. Although everyone involved in the original gaming license process had always thought (and been told) that HSP would ask the Commonwealth for permission to use the Commonwealth's riparian lands to build a portion of its planned SugarHouse Casino, at HSP's request, the City, relying upon a moribund authority, took it upon itself to grant the license. As this Court well knows, a torrent of litigation followed. The new Acting Commerce Director – coming into the controversy afresh – determined that this result was not in the public interest. In particular, he found that due regard had not been paid to the environmental

issues, to the use to which the submerged lands were being put, and most importantly, to the position into which the license put the City with regard to its relationship with the Commonwealth, which owns the land. Accordingly, on January 24, 2008, the City revoked the riparian license.

On February 22, 2008, Governor Rendell signed into law two acts of the General Assembly in which the General Assembly clarified that the power to grant a license to use Commonwealth land rests solely and exclusively with the General Assembly, which must specifically authorize such a grant. *See* Act of Feb. 22, 2008, P.L __, No. 4; Act of Feb. 22, 2008, P.L. __, No. 5. The license at issue here was not so specifically authorized, and the Commonwealth's recent clarification is contrary to the City's understanding when it issued the license. This Court should accept the Commonwealth's and now the City's view that the City lacked any right to issue the riparian license in the first instance and that the license was void *ab initio*. Therefore, any discussion about the revocation is unnecessary as moot.

If, however, the Court decides to address the merits of the revocation, the Commonwealth's recent enactments have made what was already correct to be overwhelmingly obvious: that there is no doubt that the license's revocation was well within the discretion of the issuing authority acting to serve the public interest and should not be disturbed on appeal. There can be no dispute that the revocation

of a license to use the Commonwealth's land was within the City's authority where the license was issued without proper authority and its issuance put the City at odds with the General Assembly as well as City Council.

HSP tries to avoid this obvious result by arguing that in the eight weeks between the license issuance and the revocation, it obtained a vested right to use the land. It cannot have such a vested right in this type of license and could not begin to make such a showing here on any grounds for establishing such a right even if the vested rights analysis did apply. For example, the license's issuance was hotly contested, and from the moment the license issued, HSP knew the license would be challenged, and its issuance was immediately appealed to this Court. Thus, any reliance on the license was necessarily unjustified and unreasonable. As such, the City cannot be estopped from revoking this license, which the Commonwealth and the City agree was never properly authorized, and the City's decision to revoke the license must remain undisturbed.

II. FACTS AND PROCEDURAL HISTORY

On February 1, 2007, the PGCB issued an Order and Adjudication approving the application of HSP for a Category 2 Slot Machine License pursuant to the Pennsylvania Race Horse Development and Gaming Act ("Gaming Act"), 4 Pa.C.S. § 1101 *et seq.* Feb. 1, 2007 Order and Adjudication, HSP Vol. V at 1477-

1593.[1] By its Order and Adjudication approving HSP's application, the PGCB approved the land-based location of HSP's planned casino in the North Delaware Avenue corridor. *Id.* at 1591-92. Although HSP's development plan submitted to the PGCB contemplates possible construction of the SugarHouse Casino over certain submerged lands in the Delaware River owned by the Commonwealth, the PGCB did not, and in fact could not, grant HSP any rights with respect to that riparian land. In fact, in its Adjudication the PGCB explicitly recognized that HSP had not secured rights to the riparian lands and that the ultimate success of the SugarHouse Casino project was not dependent upon securing those rights:

> HSP does not own the riparian rights along this portion of the riverfront. However, it is confident that it will secure those rights and if it is not successful the design of the project could be changed to accommodate the lack of riparian rights.

Id. at 1500, ¶ 82. The PGCB noted in selecting HSP that "if they are not successful in securing riparian rights, they . . . have alternate plans to build quality facilities without the need for these rights." *Id.* at 1557.

Neil Bluhm, HSP's Chairman, testified before the PGCB that HSP's proposed casino "was not dependent on getting those riparian rights" and that to

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[1] In order not to overburden the Court with duplication of exhibits, where possible, the City will reference exhibits provided in HSP's five volumes of "Exhibits in Support of HSP Gaming L.P.'s Petition for Review." Reference will be made to volume number and sequentially numbered pages of the five volumes, similar to the manner HSP employed.

the extent HSP sought to use submerged lands, it would seek authority from the Commonwealth Administration or the General Assembly. Bluhm Testimony at PGCB Suitability Hearing, Nov. 13, 2006, at 97:25, 96:8-19 (attached hereto as Exhibit A). HSP never suggested that it would or could seek such authority from the City.

Despite its public statements that it would seek riparian rights from the Commonwealth, on October 29, 2007, HSP submitted an application to the Philadelphia Commerce Department for a license under Section 10 of the Act of June 8, 1907, P.L. 488, No. 321, 53 P.S. § 14199 *et seq.* ("Act 321"), to construct its facility over the Commonwealth's riparian lands. HSP Vol. 1. The Commerce Director held a public hearing on the application on November 15, 2007, HSP Vol. 2 at 241-442, and on November 27, 2007, issued a license to HSP to construct the SugarHouse Casino over the submerged lands. HSP Vol. 5 at 1461-1474. Members of the General Assembly as well as the district councilmen attended and made clear their intent to legally challenge any such issuance. HSP Vol. 2 at 285-308.

On December 26, 2007, a group of Philadelphia waterfront state legislators filed a Petition for Review in the Nature of an Appeal of a Final Determination of a Political Subdivision Pursuant to 4 Pa.C.S. § 1506 and 53 P.S. § 14202 (the "Fumo Petition," docketed 207 E.M. 2007), naming the City of

Philadelphia as respondent and claiming, *inter alia*, that the Commerce Department lacked authority to grant the license to HSP absent an explicit grant of specific authority by the legislature. City Council of the City of Philadelphia and Councilmember Frank DiCicco filed a similar petition dated December 27, 2007 (the "DiCicco Petition," docketed 208 E.M. 2007). HSP moved to intervene in the actions, and the Prothonotary issued a letter directing the parties to answer and respond to the Petitions by January 14, 2008.

In an unusual move, the City administration responded to the Fumo Petition on behalf of the City just one day later, on December 28, 2007, only six working days before the term of the new mayor was to begin. That same day, HSP filed an answer to the Fumo Petition, as well as its own Applications for Summary Relief, stating that the Petitioners lacked standing and asserting HSP's right to relief on the merits. On January 4, 2008, the last business day of the former mayor's term, the City responded to the DiCicco Petition. HSP responded to the DiCicco Petition on January 14, 2008, and filed Applications for Summary Relief in that matter that same day.

On January 11, 2008, the City, after the inauguration of Mayor Michael A. Nutter, filed a motion seeking an extension of time to evaluate the City's position and consider whether to file new responses to the Petitions. On January 22, 2008, this Court granted the City's requests, giving the City until

January 25 to respond to HSP's Applications in the Fumo case, and until January 28 to respond to the Petitions.

On January 24, 2008, the new Acting Director of Commerce served HSP with a Notice of Revocation of License. Appendix A of HSP's Petition for Review. In that Notice, the City set forth several reasons for the revocation, including the failure of the Director of Commerce to consider the appropriate use of the submerged lands, the intent and understanding of the PGCB and the General Assembly, and the lack of an approved wetlands mitigation plan. *Id.* The Notice also criticized the Director's expansive application of the City's licensing power based on an analysis performed by elected officials on the eve of their departure from office. *Id.* Although the Notice revokes the license issued on November 27 and vacates the decision of the Director of Commerce, it does not purport to be a final decision, and expressly invites HSP to seek further consideration by the Commerce Director, weighing the appropriate factors.

In light of its revocation, on January 25, 2008, the City filed a Consolidated Motion to Dismiss Appeals for Mootness in the Fumo and DiCicco actions, on the ground that the license's revocation rendered the pending controversies moot. On the same day, HSP filed an Application for Ancillary Relief and a Stay in both actions, seeking a declaration that the City's revocation of the license is null and void, and seeking a stay of the effect of the revocation

pending a final decision on the Applications. In the Applications, HSP did not challenge the merits of the revocation notice, but rather argued that the City lacked jurisdiction to issue the revocation and was judicially estopped from so doing.

On February 1, 2008, the City filed its Consolidated Answer and Response to HSP's Applications for Summary Relief and HSP's Applications for Ancillary Relief in the Fumo and DiCiccio actions.[2] On February 11, 2008, this Court denied the City's Consolidated Motion to Dismiss Appeals for Mootness. The Fumo and DiCiccio Petitions remain outstanding, as do HSP's Applications for Summary Relief, Ancillary Relief and a Stay in those actions, and the City's Consolidated Application for Leave to Withdraw Reply Briefs and Answers and to File Consolidated Response to Petitions for Review.

On February 22, 2008, HSP challenged the license's revocation on the merits by filing with this Court a Petition for Review, an Application for Summary Relief and an Application for a Stay Pursuant to Pa.R.A.P. 1781. By letter dated February 26, 2008, this Court directed the City to file its brief in response to HSP's Petition for Review, Application for Summary Relief and Application for a Stay on or before March 7, 2008. The City now files its Consolidated Brief in Response to

[2] The City also filed with that brief an application for leave to withdraw the responses to the Petitions filed on December 28, 2007 and January 4, 2008.

HSP's Petition for Review, Application for Summary Relief and Application for a Stay Pursuant to Pa.R.A.P. 1781.

III. ARGUMENT

A. This Court Does Not Have Subject Matter Jurisdiction Over the Claims Raised by HSP in Its Petition for Review

The sole basis relied upon to invoke this Court's jurisdiction in this matter is Section 1506 of the Gaming Act. That provision states:

> In order to facilitate timely implementation of casino gaming as provided in this part, notwithstanding 42 Pa.C.S. § 933(a)(2) (relating to appeals from government agencies), the Supreme Court of Pennsylvania is vested with exclusive ***appellate jurisdiction*** to consider appeals of ***a final order, determination or decision*** of a political subdivision or local instrumentality involving zoning, usage, layout, construction or occupancy, including location, size, bulk and use of a licensed facility. The court, as appropriate, may appoint a master to hear an appeal under this section.

4 Pa.C.S. § 1506 (emphasis added).

In interpreting the meaning of this provision over the past several months, this Court has made several things clear. *First*, Section 1506 provides this Court with only *appellate jurisdiction*, not with original jurisdiction. *See Philadelphia Entertainment & Development Partners, L.P. v. City of Philadelphia, ("PEDP")*, 937 A.2d 385, 393 (Pa. 2007) (refusing to entertain a petition in the nature of a mandamus action because mandamus involves the Court's original jurisdiction, and "[t]he jurisdiction Section 1506 vests in this Court is appellate,

not original."). *Second,* as the statute makes clear, this Court may hear appeals only from a *final* decision of a political subdivision or local instrumentality. *See HSP Gaming, L.P. v. City Council for City of Philadelphia*, 939 A.2d 273 (Pa. 2007). Accordingly, administrative remedies must be exhausted before a decision is "final" and subject to appeal. *Philadelphia Entertainment and Development Partners, L.P. D/B/A Foxwoods Casino Philadelphia v. City of Philadelphia, ("Foxwoods")*, 939 A.2d 290 (Pa. 2007).

In *Foxwoods*, Philadelphia Entertainment and Development Partners ("PEDP") sought a zoning permit from the Department of Licenses and Inspections for its Foxwoods casino. *Foxwoods*, 929 A.2d at 291-92. The Department denied the permit. *Id.* at 293. Although the Philadelphia Code provided a procedure for the Zoning Board to review the decision of the Department of Licenses and Inspections, PEDP did not avail itself of that procedure and instead filed an immediate appeal to this Court, claiming jurisdiction under Section 1506. *Id.* The defendants argued that this Court lacked jurisdiction because PEDP did not first appeal to the Zoning Board; therefore, the City's decision was not final. *Id* This Court agreed and concluded that the administrative scheme established by the Philadelphia Code provides that a Department decision on a zoning matter must be reviewed in the first instance by the Zoning Board. *Id.* at 296. Absent a decision

from the Zoning Board, there was no "final decision" to appeal and, thus, no appellate jurisdiction under Section 1506. *Id.*

This Court lacks jurisdiction to review the Acting Commerce Director's revocation at this juncture because the administrative process set forth in 53 P.S. § 14202 requires that the Court of Common Pleas for Philadelphia County exercise *original* jurisdiction before any decision can be "final and conclusive." Without a decision from the common pleas court, this Court cannot properly exercise *appellate* jurisdiction.

The City issued the riparian license at issue here pursuant to the authority vested in it by Act 321, a 1907 Act dealing with Wharves, Docks and Ferries. Act 321 sets forth a specific procedure for obtaining a "final" decision as to "any decision of the [Commerce Director], either granting or refusing, in whole or in part, an application for a license . . . *or as to any other matter or thing under this act.*"[3] 53 P.S. § 14202. That procedure, which applies to all decisions of the

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[3] Section 19 of the Act, 53 P.S. § 14202, reads:

> ***Any person or persons aggrieved by any decision of the said director, either granting or refusing, in whole or in part, an application for a license*** to erect, construct, extend, alter, or improve any wharf, pier, or bulkhead, or other harbor structure, ***or as to any other matter or thing under this act, may,*** within thirty days after the date of the said decision, ***present a petition to the court of common pleas of the proper county, setting forth the***

(continued...)

Commerce Director concerning licenses issued under the Act, including decisions to revoke,[4] vests original jurisdiction in the court of common pleas to review the Commerce Director's actions and make a decision that court thinks the Director "should have made." 53 P.S. § 14202.

Here, as in *Foxwoods*, there can be no decision to "appeal" until this original jurisdiction review by the court of common pleas is exhausted. That review by the court of common pleas in its original jurisdiction is a necessary part

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(continued...)

> ***facts of the case and the ground of the petitioner's complaint; and thereupon the said court,*** having first caused due notice of the presentation of the said petition, and of the time fixed for the hearing thereof, to be given to all persons whom they may deem legally interested therein, ***shall proceed to hear and determine the subject-matter of the said petition; and shall make such order in the premises as he may think the said director should have made, and the said order shall be final and conclusive.*** It shall be lawful for the said court to appoint a commissioner to take evidence to be used in the said hearing, and to make such order for the payment of the costs, by one or more of the parties to the proceedings, as justice may require.

53 P.S. § 14202 (emphasis added). Although Purdon's labels this section "Appeal from decision of director; petition to common pleas; notice; hearing; costs," the 1907 Act itself does not use the language "appeal" and instead uses the term "petition." Act No. 321 of June 8, 1907, P.L. 488, § 19.

[4] HSP concedes that the review scheme provided in Section 19 applies to situations where a riparian rights license is revoked or unreasonably withheld. *See* HSP's Petition for Review ¶ 14.

of Act 321's review scheme, and that court is the *only* entity that can review the Acting Commerce Director's decision to revoke the license. This review is not the type of general administrative *appeal* where the common pleas court exercises appellate jurisdiction, limits its review to the record developed by the agency, and renders a decision based only on that record as to whether the agency's decision was right or wrong. *Cf.* 2 Pa.C.S. §§ 753-54 (noting that the common pleas court, in an agency appeal, is generally to confine its review to the record developed in the agency). Rather, Section 19 requires the common pleas court to exercise original jurisdiction – to develop a record and render an independent adjudicative decision, *i.e.*, to "make such order . . . as he may think the said director should have made."[5]

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[5] Section 19 has all the features of original jurisdiction, as opposed to appellate jurisdiction. For example, the court is required to develop a record, as opposed to being required to rely upon a record developed by the agency. *See, e.g.*, Pa.R.A.P. 1513 (noting the differences between appeals in the appeals' court's original jurisdiction versus appellate jurisdiction). Notably, the text of Section 1506 says that this Court has appellate jurisdiction "notwithstanding 42 Pa.C.S. § 933(a)(2)." That statutory provision notes that courts of common pleas have "jurisdiction of appeals from final orders of government agencies," and in turn cites to 2 Pa.C.S. § 751 *et seq.*, which makes clear that the scope of those appeals is appellate jurisdiction, not original jurisdiction. Thus, the very text of Section 1506 supports the view that this Court may only exercise jurisdiction where it is essentially just substituting its review for the normal review of administrative agency decisions provided by common pleas courts.

As this Court held in *Foxwoods*, this type of scheme must be exhausted before any decision can be considered "final" under Section 1506. This direct appeal of the revocation to the Supreme Court cannot take the place of the original jurisdiction action in the common pleas court under Act 321 because this Court may exercise appellate jurisdiction only. *PEDP*, 937 A.2d at 393. Just as the petitioner in *Foxwoods* was required to exhaust the administrative scheme established by the Philadelphia Code for acquiring a zoning and use permit with the Philadelphia Department of Licenses and Inspections by first appearing before the Zoning Board, no decision on the revocation of a license to construct in a harbor may lie in this Court's jurisdiction without a decision from the court of common pleas required by Act 321. *See Foxwoods*, 939 A.2d 290.[6] Because no

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[6] This Court's decision in *Foxwoods* illustrates the point. There the Court noted that the Zoning scheme at issue had a two-step administrative procedure (the Department's decision, followed by the Zoning Board's decision), and then "under the Philadelphia Code, the decisions the Zoning Board issues are designated as appealable to the court of common pleas." *Foxwoods*, 939 A.2d at 296 (citing Phila. Code § 14-1807). In that case, it may well have been appropriate for this Court to have taken jurisdiction of any appeals after the Zoning Board decision, instead of the court of common pleas, because the common pleas court's jurisdiction under Phila. Code § 14-1807 and 2 Pa.C.S. § 752 is clearly *appellate* jurisdiction. Pursuant to Phila. Code § 14-1807, an appeal from a Zoning Decision is initiated through a Notice of Appeal (not a petition like 53 P.S. § 14202). Phila. Code § 14-1807(1). Unless the record developed before the Zoning Board is incomplete, the Court is limited to considering that record and may not take new evidence (whereas 53 P.S. § 14202 expressly requires that the Court make findings of fact and develop its own record). Phila. Code § 14-1807(4). In sum, once a decision is reached by the Zoning Board, the *only* jurisdiction available through the

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decision on the revocation has been rendered by the court of common pleas, this Court does not have appellate jurisdiction from a "final order" of a political subdivision. 4 Pa.C.S. § 1506.

B. If There Is Jurisdiction in this Court, It Should Uphold the Revocation

If this Court decides the Gaming Act vests it with jurisdiction to review the Acting Commerce Director's decision to revoke the license, it must review that decision under the highly deferential arbitrary and capricious standard.[7] The decision to revoke a riparian license is largely a question of judgment and discretion. It is well-settled that courts will not substitute their judgment for that of government entities acting with discretion absent a showing of bad faith, fraud, capricious action or abuse of power. *Blumenschein v. Housing Authority of Pittsburgh,* 109 A.2d 331, 334-35 (Pa. 1954), *cert. denied*, 350 U.S. 806 (1955). Because HSP has not, and indeed cannot, show that the Acting Commerce

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courts is appellate jurisdiction. By contrast, 53 P.S. § 14202 specifically requires that the court of common pleas first exercise *original* jurisdiction before a decision can be "final and conclusive."

[7] As explained above, in light of the recent legislation passed by the General Assembly clarifying its sole and exclusive authority to license use of Commonwealth land, this Court should decide the Fumo and DiCicco actions in petitioners' favor and rule that the license was void *ab initio*, rendering this action concerning the propriety of revocation moot. In the event this Court declines to do so, the City addresses the merits of its revocation herein.

Director's decision to revoke the riparian rights license was arbitrary and capricious, fraudulent, or made in bad faith, the revocation should be upheld.

1. The City Had the Power To Revoke the License in its Discretion

The riparian license at issue here was issued to HSP pursuant to Act 321.[8] Act 321 provides only for the issuance of *revocable* licenses. In fact, interpreting Act 321, the Office of the Attorney General concluded:

> ***It is our view that the General Assembly did not intend in these various statutes that title or any interest beyond a simple revocable license be granted to the applicant by the Director of Commerce*** or Navigation Commission to whom was delegated that authority by the General Assembly.

Office of the Attorney General, Commonwealth of Pennsylvania, Official Opinion No. 78-19, 8 Pa. D. & C.3d 438, 446 (Aug. 21, 1978) (emphasis added).[9] Thus, under Act 321, the City had the authority to revoke the license issued to HSP. To treat the license as irrevocable (as HSP attempts to do here) is to contravene the intent of the General Assembly in delegating the licensing authority to the City.

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[8] To City purported to issue the license in the first instance pursuant to the authority delegated to it by the General Assembly under Act 321. However, the recent legislation enacted by the General Assembly has clarified that this authority did not extend to the type of license issued in this case.

[9] During the riparian rights license application process, HSP called this opinion to the City's attention and urged reliance on it in support of the City's authority to issue the license. *See* Thomas Witt Testimony at License Application Hearing, HSP Vol. 2 at 257.

The Commerce Director's power to revoke a riparian license issued pursuant to Act 321 is wholly consistent with Pennsylvania common law. A license is no more than the grant of the privilege to act on *another's* land; it conveys no interest or estate. *Baldwin v. Taylor*, 31 A. 250 (Pa. 1895); *LARA, Inc. v. Dorney Park Coaster Co., Inc.*, 542 A.2d 220, 223 (Pa. Commw. Ct. 1988). Ordinarily, a land use license is revocable at will, absent a showing of detrimental reliance such that the licensee cannot be "restored to [its] original position" upon revocation. *Pa. Game Comm'n v. Bowman*, 474 A.2d 383, 385 (Pa. Commw. Ct. 1984); *see, e.g., Baldwin*, 31 A. 250; *LARA*, 542 A.2d at 224; *Dailey's Chevrolet, Inc. v. Worster Realties, Inc.*, 458 A.2d 956, 960 (Pa. Super. Ct. 1983); *Lake Naomi Club v. Pinecrest Development Corp.*, 47 Pa. D. & C.4th 294, 303 (Pa. Com. Pl. 2000).

Where public interests and government land are implicated, the right of revocation is even broader to ensure that the public interest remains protected and paramount as circumstances change. Indeed, absent a clear and unambiguous expression of intent to grant an irrevocable license, a state, municipality or other public authority may revoke a license to use public land even when the licensee may have incurred substantial expenditure in reliance thereon. *Branson v. City of Philadelphia*, 47 Pa. 329, 1864 WL 4685, at *2 (1864). As the *Branson* court explained:

> Every licensee from a public authority, whether a municipality, exercising a portion of the high powers of eminent domain, or the immediate agents of the Commonwealth herself, necessarily takes it subject to this right of eminent domain, to be exercised for the benefit of the public in the future, as well as the past. . . . [N]o obligation at law requires her to repair the mere consequences collaterally falling upon those who suffer from the exercise of a great reserved power of acting for the general good[.]
>
> ***In these cases it is affirmed to be a fixed principle that the state is never presumed to have parted [permanently] with one of its franchises in the absence of conclusive proof of such intention.***

Id. (emphasis added) (citations omitted). Other Pennsylvania Courts have followed *Branson*, drawing

> a clear distinction between a license by an individual which might become irrevocable by the expenditure of money on the faith of its continuance and a license by the State or one of its agents, such as a municipality or a public service corporation. ***The latter would never be held to have bound itself to a private individual in such a way as to prevent it from full performance in the future of its duty to the whole public.***

Ridgeway v. Philadelphia and Reading Railway Co., 22 Pa. D. 739, 1913 WL 4497, at *9 (Pa. Com. Pl. 1913) (emphasis added) (quotations omitted); *see also New York and Erie Railroad Co. v. Young*, 33 Pa. 175, 181 (1859) (noting "a grant by a public agent of limited powers, and bound not to throw away the interests confined to it, is different from a grant by an individual who is master of the subject. To revoke the latter, after an expenditure in the prosecution of it would be

a fraud; but he who accepts a license from the legislature, knowing that he is dealing with an agent bound by duty not to impair a public right, does so at his risk . . . ."). Thus, absent conclusive evidence to the contrary, all land use licenses granted by the state or its agents are inherently revocable.[10]

Here, there is no evidence of an express intention to grant HSP an irrevocable license. In fact, to the contrary, the Attorney General concluded that the only authority delegated by the General Assembly to the Commerce Director

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[10] The authorities HSP cites in its Petition for Review in an effort to circumscribe the Commerce Director's discretion to revoke the license do not address the power to revoke a license permitting use of *another's* land, much less the power of a government agency to revoke a license permitting use of public land. *See* HSP's Petition for Review ¶ 100. Rather, the two land use cases cited by HSP concern variances granted from land use restrictions imposed on private property. *See Limley v. Zoning Hearing Bd. of Port Vue Borough*, 625 A.2d 54, 56 (Pa. 1993) (concerning revocation of permission to operate a former private club as a public restaurant); *Mike's Sign Co. v. Dept. of Transp.*, 642 A.2d 634, 638 (Pa. Commw. Ct. 1994) (concerning revocation of a permit to erect an outdoor advertising sign). In these variance cases, the variance applicants sought permission from the state *to use their own private property*, in which they had recognized property rights, as they saw fit, unencumbered by use restrictions imposed by the state. Those cases are distinguishable from the situation here where HSP seeks a license *to use the Commonwealth's land*, and the only interest HSP has in that land is the use right granted by the license at issue.

The third case cited by HSP does not involve a land use restriction at all, but rather the grant of an occupational license. *See Judson v. Insurance Dept.*, 665 A.2d 523, 528 (Pa. Commw. Ct. 1995) (affirming decision by the Insurance Commissioner to revoke an insurance license as an appropriate act of discretion). Contrary to land use licenses, courts have recognized that occupational licenses create certain protected property interests. *Khan v. State Bd. of Auctioneer Examiners*, 842 A.2d 936, 946 (Pa. 2004).

under Act 321 was the authority to grant "a simple revocable notice." Office of the Attorney General, Commonwealth of Pennsylvania, Official Opinion No. 78-19, 8 Pa. D. & C.3d at 446. Thus, when the current Acting Commerce Director determined the license's issuance was contrary to the public interest and thus in error, it clearly was within his authority to revoke the license. *See Clothier v. City of Philadelphia*, 22 Pa. Super. 608, 1903 WL 3137, at *3 (1902) (upholding revocation of land use license by the City upon determination that the license was issued inadvertently).

2. Discretionary Governmental Actions Are Reviewed Under the Standard Set Forth in *Blumenschein*

Act 321 leaves the decision to grant, deny or revoke a license to the judgment and discretion of the Commerce Director. *See* 53 P.S. §§ 14199, 14202. It is well-settled that courts will not review the discretionary actions of governmental entities absent a showing of bad faith, fraud, capricious action or abuse of power. *Blumenschein,* 109 A.2d at 334-35.

> By a host of authorities in our own and other jurisdictions it has been established as an elementary principle of law that courts will not review the actions of governmental bodies or administrative tribunals involving acts of discretion, in the absence of bad faith, fraud, capricious action or abuse of power; they will not inquire into the wisdom of such actions or into the details of the manner adopted to carry them into execution.

Id. (footnotes omitted). The scope of review of discretionary executive decisions "is limited to the determination of whether there has been a manifest and flagrant abuse of discretion or a purely arbitrary execution of the agency's duties or functions." *Id.* at 335. As the *Blumenschein* Court noted, "*judicial* discretion may not be substituted for *administrative* discretion." *Id.* (emphasis in original). The arbitrary and capricious standard for review of discretionary administrative action set forth in *Blumenschein* is well-settled and has been followed consistently by Pennsylvania courts. *See, e.g., Slawek v. Commonwealth, State Bd. of Med. Educ. and Licensure*, 586 A.2d 362, 365-66 (Pa. 1991) (applying the *Blumenschein* standard to reinstate the revocation of a doctor's medical license by the State Board of Medicine); *Weber v. City of Philadelphia*, 262 A.2d 297, 302 (Pa. 1970) (upholding the decision of the City to reject all bids to operate a general concession at a sports stadium under the *Blumenschein* standard and noting that "[i]n passing upon the propriety and actions of municipal officials, judicial restraint rather than judicial intervention should guide the courts."); *NVC Computer Sales, Inc. v. City of Philadelphia*, 695 A.2d 933, 937 (Pa. Commw. Ct. 1997) (reversing the order of the trial court and finding that the City's withdraw of a bid was not arbitrary, collusive, fraudulent or committed in bad faith); *Karp v. Redevelopment Authority of the City of Philadelphia*, 566 A.2d 649, 652 (Pa. Commw. Ct. 1989) (reciting the *Blumenschein* standard as the appropriate standard for review of a bid award by

the City by the trial court); *Stubbs v. Snyder Tp., Jefferson County*, 361 A.2d 464, 466 (Pa. Commw. Ct. 1976) (affirming the decision of the trial court finding that township supervisors did not act in bad faith or abuse their discretion when condemning land for road purposes); *see also Mathies Coal Co. v. Commonwealth, Dep't of Envt'l Resources*, 559 A.2d 506, 512 (Pa. 1989) (citing *Blumenschein* with approval); *American Totalisator Co. v. Seligman*, 414 A.2d 1037, 1041 (Pa. 1980) (acknowledging that the *Blumenschein* standard is the appropriate standard of review for discretionary administrative decisions).[11]

HSP contends that Act 321's admonition that a license requested thereunder "shall not be unreasonably withheld" limits the Commerce Director's discretion to revoke the license. Where the Commerce Director revokes a license to use public land because he determines that the license is not in the public

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[11] To the extent HSP contends that the Acting Commerce Director's decision to revoke the license should be reviewed under a lesser "substantial evidence" standard, the cases on which it relies are inapposite. *See* HSP's Petition for Review ¶ 102. Both of the cases HSP cites address the scope of review of a zoning board's decision to grant a landowner a variance to use its own land (in which it has certain protected property interests) unencumbered by certain land use restrictions imposed by the state. *See Allegheny West Civic Council, Inc. v. Zoning Bd. of Adjustment*, 689 A.2d 225, 227 (Pa. 1997); *Valley View Civic Ass'n v. Zoning Bd. of Adjustment*, 462 A.2d 637, 639 (Pa. 1983). Here, HSP seeks review of the Acting Commerce Director's decision to revoke a license permitting HSP to use the Commonwealth's land (in which HSP has no protected property interest), not of a decision allowing HSP to use its own land unencumbered by restrictions imposed by the city or state.

interest, he cannot be deemed to have unreasonably withdrawn the license. Acting in the public interest is not unreasonable; it is what the Commerce Director is obligated to do. The Commerce Director certainly is not obligated to grant, nor is he restrained from revoking, a public land use license he determines to be against the public interest simply because it serves the private interests of a license applicant.[12]

3. The License's Revocation Should Be Upheld Under the *Blumenschein* Standard

HSP simply cannot sustain its heavy burden under the *Blumenschein* standard to establish that in revoking the license, the Acting Commerce Director acted in bad faith, capriciously or arbitrarily, committed fraud, or abused his power. To the contrary, Acting Director Bumb prudently called for further hearing and consideration after identifying several deficiencies that compromised the

[12] Moreover, Act 321 applies to all construction and repair of wharves and other harbor structures, regardless of whether such structures are situated wholly on private land or encroach onto submerged land owned by the Commonwealth. Thus, while there may be circumstances where it would be unreasonable to deny or revoke a license to erect a structure on the applicant's private land, when the applicant seeks permission to encroach onto public land, the analysis necessarily is different and any denial or revocation determined to be in the public interest cannot be deemed unreasonable. This is particularly so where, as here, the owner of the land, the Commonwealth, opposes the license and believes it was issued in error.

licensing process. In so doing, he acted in accord with the authority granted to the City by the Commonwealth to preserve the riparian lands for the general good.[13]

In deciding to revoke the license, Acting Director Bumb determined that its issuance under the circumstances was against the public interest. Accordingly, revocation here was not only permissible but clearly envisioned by the above-cited jurisprudence that based the inherent revocability of public land use licenses on the necessity of ensuring the future protection of the public interest. First, Acting Director Bumb found that the license's issuance failed to consider adequately the intent and interests of the Commonwealth and the General Assembly. Indeed, the members of the General Assembly representing the area are vehemently opposed to the grant of a riparian rights license by the City and

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[13] HSP contends that Act 321 itself somehow limits the factors the City may consider in deciding to revoke a license issued pursuant to the Act's authority. HSP relies on *In re Appeal of Obradovich*, 126 A.2d 435, 437 (Pa. 1956), and *Bagley v. Commonwealth, State Horse Racing Comm'n*, 326 A.2d 651 (Pa. Commw. Ct. 1974), for its assertion that a governmental unit's decision may not be based on considerations outside the relevant statute. *See* HSP's Petition for Review ¶ 164. The statutes at issue in those cases, however, provided detailed criteria that were to be considered in deciding whether to grant or deny the licenses at issue (neither of which involved the right to use another's property). In contrast, Act 321 does not specifically denote any criteria to be considered in determining whether it would be unreasonable to deny the license, but rather leaves the precise factors to be considered to the discretion of the Commerce Director. HSP's assertion, taken to its logical conclusion, would necessarily invalidate every revocation or denial of any riparian license by the Commerce Director, regardless of the facts on which the decision was based.

promptly filed an action in this Court opposing the license's issuance. *See* Fumo Petition. The failure to carefully consider the views of these officials, which were voiced clearly at the licensing hearing before the Commerce Director, and to try to reach some accommodation of interests prior to the license's issuance was particularly inappropriate because the Commonwealth holds the riparian land in trust for the people, and here the decision involves unprecedented use of that land in the districts represented by these officials.

Moreover, when granting HSP a gaming license, the PGCB expected HSP to seek the riparian rights from the Commonwealth, thereby ensuring consideration of the Commonwealth's interests. Exhibit A at 96:8-19. Indeed, the General Assembly recently passed legislation signed by the governor that makes clear the Commonwealth's view that the General Assembly must approve specifically any license to use the Commonwealth's land submerged in the Delaware River. *See* Act of Feb. 22, 2008, P.L __, No. 4; Act of Feb. 22, 2008, P.L. __, No. 5. Notably, this legislation was proposed in direct response to the City's issuance of the riparian license to HSP and was being considered at the time of the revocation. This legislation – which makes clear the Commonwealth's view that the license should not have been granted to HSP in the first instance and intent to preclude the issuance of similar licenses in the future – was properly considered by the City in making the decision to revoke, particularly because the City acted as

a mere agent of the Commonwealth in the licensing process. The current Acting Commerce Director's recognition that substantial weight should be given to the views of the Commonwealth – the owner of the disputed land – is well within his discretion and cannot be said to constitute bad faith, fraud, or capriciousness. Indeed, to ignore the intent of the Commonwealth in matters relating to the use of Commonwealth land would be an abuse of discretion. This subsequently enacted legislation provides additional support for the revocation, and this Court can uphold the revocation on any proper ground, including one not stated in the original revocation notice. *See Taylor v. Churchill Valley Country Club*, 228 A.2d 768, 768 (Pa. 1967).

Second, Acting Director Bumb determined that the license was issued contrary to the public interest because the former Commerce Director failed to consider the appropriate use of the riparian land. Although the PGCB approved the land-based location of the casino, it did not, and in fact could not, make any determination with respect to the submerged lands owned by the Commonwealth.[14] The former Commerce Director was aware that the license application contemplated use of the submerged lands for gaming; however, she did not

[14] Indeed, the PGCB acknowledged in its Order and Adjudication approving HSP's application a category 2 gaming license that HSP had not secured riparian rights to build over the submerged lands. Feb. 1, 2007 Order and Adjudication, HSP Vol. V at 1500, ¶ 82.

explicitly consider that use in deciding to issue the license and, in fact, appeared to be under the mistaken view that she could not make such consideration when that was a necessary factor for her to consider. This mistake of law is a fatal defect in the license issuance. *See* Director of Commerce Licensing Decision, HSP Vol. V at 1462, n. 1. In fact, *no one* has determined whether a casino is an appropriate encroachment into the waterways of the Commonwealth as compared to other potential uses. Contrary to HSP's mistaken assertion that the use of the riparian land is irrelevant to the decision whether to grant a license under Act 321, a determination of the best use of the Commonwealth's valuable riparian lands is central to the Commonwealth's obligation to hold the lands in trust for the public good.[15]

Third, Acting Director Bumb determined that the former Commerce Director failed to consider the license's effect on the riparian environment along Philadelphia's Delaware Riverfront and HSP's failure to obtain an approved wetlands mitigation plan. *See* Declaration of J. Barry Davis (attached hereto as

[15] The City does not suggest that the Commerce Director should have reconsidered whether the land-based site selected by the PGCB was appropriate for gaming. *That* question has been conclusively resolved by the PGCB. The question of the most appropriate use of the riparian land at issue here is a different issue altogether and not one delegated to or decided by the PGCB. Only the General Assembly has authority to decide the most appropriate use of the riparian land, and it never delegated that authority to the PGCB.

Exhibit B). Indeed, the Pennsylvania Department of Environmental Protection filed an amicus brief in both 207 & 208 E.M. 2007, asserting that the proposed SugarHouse Casino would not satisfy the public purpose requirements as set forth in Section 15 of the Dam Safety Act, 32 P.S. § 693.15. *See* Amicus Curiae Brief, 208 E.M. 2007, at 9, n.4. The Acting Commerce Director's determination that the City should have given thorough consideration to wetlands mitigation in Philadelphia was well within his discretion and well outside the *Blumenschein* standard for judicial review.[16]

Fourth, the license is impermissibly ambiguous, precluding a definite determination of the license's scope and the rights conveyed thereunder. The license authorizes HSP "to encroach upon the waterway of the Delaware River and to construct the SugarHouse Casino Project as described in the Application of October 29, 2007 (the "Application") upon the Licensee Submerged Lands." Appendix B of HSP's Petition for Review. Thus, to determine the scope of the

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[16] Because concerns regarding the environmental impact of the license on the riparian lands bear a direct relationship to the issuance of the riparian rights license, the instant case is easily distinguished from *Maritime Mgmt., Inc. v. Pennsylvania Liquor Control Bd.*, 621 A.2d 1097 (Pa. Commw. Ct. 1993), where the Pennsylvania Liquor Control Board denied a liquor license to the owner of a riverboat based in part on concerns about the boat's waste disposal system. While environmental waste concerns rightly have no place in the decision of whether to grant a liquor license, a riparian license's direct impact on the waterfront environment (which is in Philadelphia) should have been taken into account when making a decision as to what would be permitted in that waterfront environment.

authorization granted to HSP, one is directed to look to the project description as set forth in the application. The application, however, contains two different descriptions. At one point, the application states that the project for which HSP seeks a license is "described in detail within the Plan of Development." HSP Vol. I at 2. Later in the application, the "Description of SugarHouse Casino and Site" states: "For a more complete description of the proposal and plans for the SugarHouse Casino, and its ownership interests, see Adjudication of the [PGCB] at 16-29 (Docket No. 1356)." *Id.* at 12. The application thus provides two different descriptions of the project and therefore is ambiguous.

HSP now contends, in its Petition for Review, that the application's reference to the Adjudication was included "simply as background for the general description of the project," HSP's Petition for Review ¶ 123, but this *post hoc* explanation of the application cannot be reconciled with the language in the application stating that the Adjudication provides "a more complete description of the proposal and plans." HSP Vol. I at 12. HSP may well have *intended* to seek a license for the project as set forth in the Plan of Development, and *not* for the project as set forth in the Adjudication. But the license that was actually issued is *equally susceptible* to *either* description being preeminent, and thus plainly required revocation for purpose of clarification. A project of this magnitude simply cannot proceed without certainty as to the scope of the authorization. In

light of this obvious defect, the license needed to be revoked even if the City had the authority to issue the license in the first instance, which the City now concedes it did not have.

Finally, Acting Commerce Director Bumb determined that it was against the public interest to apply expansively the City's authorization to permit use of the land (including by qualifying a large scale casino project as a "harbor structure" and allowing an option to purchase to satisfy the requirement of title), particularly on the basis of an analysis hastily performed in the final days of an outgoing administration and in an unreasonably compressed timetable for a hearing on the application. HSP submitted its application to the Commerce Director on October 29, 2007, and the hearing on the application was held a mere 17 days later, on November 15, 2007. Although tightly fit within the statutory minimum schedule, it was an extremely and unreasonably short amount of time to prepare for a hearing on this complex, controversial, and unprecedented use of riparian land.

In light of the considerations, Acting Commerce Director Bumb determined the license's issuance under the circumstances was contrary to the public interest and exercised his discretion to revoke the license. In so doing, he acted in accord with the authority granted to the City by the Commonwealth to preserve the riparian lands for the general good and with the City's obligations under its Charter to insure that licenses are not issued without relevant

consideration of the public interest. *See* Phila. Home Rule Charter, § 4-500(a) and (b) (charging the Commerce Director with the duties to "maintain, improve and operate City wharf, dock and harbor facilities" and "promote and develop the City's commerce and industry"). As such, his actions clearly were not arbitrary and capricious, taken in bad faith, or fraudulent and, thus, the revocation must stand undisturbed. In fact, as argued above, the revocation is mandated by law.

4. Even Under the Standard of Review HSP Advocates, the Revocation Should Be Upheld

Even assuming *arguendo* that the appropriate standard of review of the revocation decision is the lesser standard advanced by HSP, the license's revocation should be upheld. The standard of review HSP embraces is articulated in the context of zoning variance permits, which are not truly discretionary insofar as they are issued subject to a host of objective criteria set forth in the enabling law. Its questionable applicability to the licensing issue here notwithstanding, the "abuse of discretion" standard advanced by HSP is "limited," consisting only of a determination of whether there was "a manifest abuse of discretion or an error of law." *Allegheny West Civic Council*, 689 A.2d at 227; *see also Valley View Civic Ass'n*, 462 A.2d at 639. Under this standard, a finding of abuse of discretion is proper "only if [the board's] findings are not supported by substantial evidence." *Valley View Civic Ass'n*, 462 A.2d at 639. "Substantial evidence" is defined "as such relevant evidence as a reasonable mind might accept as *adequate* to support a

conclusion." *Id.* at 640 (emphasis added). Findings must be upheld unless they demonstrate "a capricious disregard of [the] evidence." *Vanguard Cellular System, Inc. v. Zoning Hearing Bd. of Smithfield Tp.*, 568 A.2d 703, 707 (Pa. Commw. Ct. 1989). A court sitting in review "may not substitute its interpretation of the evidence" for that of the board. *Id.*

As discussed *supra* at Section III.B.3, the Acting Commerce Director acted with sound discretion in revoking the license. His decision was well-supported by the record, certainly meeting HSP's standard's minimum requirement of "adequate" evidence to support the decision. HSP has not shown, and simply cannot show, that Acting Director Bumb acted "with a capricious disregard of the evidence" required for the Court to overturn his decision.

5. HSP Has Not Obtained A Vested Right that Prevents the License's Revocation

Finally, HSP argues that even if the license were issued in error, HSP has obtained a vested right in the license, which prohibits the license's revocation. The land use license at issue here, however – a license to use public land issued by a public authority that implicates the public interest – is revocable at will absent an express intent to grant an irrevocable license. Moreover, the vested rights analysis HSP undertakes does not apply to land use licenses at all. Rather, to the extent land use licenses may become irrevocable (which this one cannot absent an explicit expression of intention to the contrary), they do so only under conditions that are

more stringent than the vested rights analysis advanced by HSP here. But even under the vested rights analysis, HSP fails to show that it has obtained the right needed to prevent revocation.

(a) The Vested Rights Analysis HSP Undertakes Does Not Apply to the License at Issue Here

As explained *supra* at Section III.B.1, the land use license at issue here – a riparian license to use land held by the Commonwealth in trust for the people, issued by the City of Philadelphia pursuant to authority vested in it by the General Assembly under Act 321 – is inherently revocable. *See* Office of the Attorney General, Commonwealth of Pennsylvania, Official Opinion No. 78-19, 8 Pa. D. & C.3d at 446; *Branson*, 47 Pa. 329, 1864 WL 4685, at *2. But, even if the license at issue here were a more typical land use license negotiated between two private parties (which it is not), the vested rights analysis HSP undertakes would be inapposite and of no avail to HSP.

In support of its vested right argument, HSP relies exclusively on cases involving land use permits and zoning variances. *See, e.g., Allegheny West Civic Council*, 689 A.2d 225 (manifest abuse of discretion or error of law standard of review applied in zoning variance case); *Valley View Civic Ass'n*, 462 A.2d 637 (same); *Petrosky v. Zoning Hearing Bd. of Upper Chichester Tp., Delaware County*, 402 A.2d 1385 (Pa. 1979) (vested rights doctrine applied in matter involving violation of setback requirements of the township zoning ordinance).

Pennsylvania land use law, however, does not treat land use licenses the same as land use permits and zoning variances. Ordinarily, a license is revocable at will. It conveys no interest or estate and becomes irrevocable only upon substantial expenditure or detrimental reliance. *Bowman*, 474 A.2d at 384. As explained in *Buffington v. Buffington*, 568 A.2d 194 (Pa. Super. Ct. 1989), the following conditions precedent must be satisfied to establish detrimental reliance sufficient to make a land use license irrevocable, with each condition requiring a positive response before considering the next:

1. Was a license issued?
2. Did the licensee justifiably rely on the license issued?
3. Did the licensee treat the land in a way he/she would not have absent the license?
4. Did the licensee do so to the extent that he/she cannot be restored to his/her original position?

See id. at 199. A license will not be deemed irrevocable if money damages would be sufficient to return the licensee to his/her original position.

HSP has not demonstrated, and indeed cannot demonstrate, any detrimental reliance on the riparian rights license at issue here, and thus cannot satisfy the conditions set forth in *Buffington*. HSP was fully on notice through the Attorney General's opinion that the license issued was revocable and, thus, can not claim it reasonably expected otherwise. Moreover, the claim that HSP justifiably relied on the license in the mere eight weeks between issuance and revocation

(during which time the license was being challenged in this Court) is absurd. Although a license was issued (in error) by the Commerce Department, its issuance was hotly contested, and HSP knew from the very moment it issued that it would be appealed. Indeed, the issuance was challenged almost immediately by the filing of two petitions for review before this Court.[17] Thus, to the extent HSP claims to have relied on the license, its reliance was not justified; it proceeded at its own risk. To the extent HSP claims to have expended licensing fees, such expenditures have not been to HSP's detriment. The City has returned to HSP the full fee paid by HSP for the riparian rights license, thus restoring HSP to its pre-license position.[18] *See* Declaration of Duane H. Bumb (attached hereto as Exhibit D). In addition, HSP cannot claim to have paid its gaming license fee in reliance on the

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[17] To the extent there is appellate jurisdiction in this Court, the filing of at least one of the petitions for review (that filed by the Waterfront Legislators) likely triggered an automatic supersedeas of the license issuance, making any reasonable reliance on the issuance of the license impossible. *See* Pa.R.A.P. 1736(a)(1), (b) (providing for automatic supersedeas upon appeal by any officer of the Commonwealth); Pa.R.A.P. 102 ("appeal" generally including proceedings on (appellate jurisdiction) petitions for review); *but see* 20 Darlington, *et al.*, *Pennsylvania Appellate Practice* 2d. § 1736:8 (2007-08) (collecting Commonwealth Court cases to the contrary, but failing to note that the logic of the automatic supersedeas extends equally to appellate jurisdiction petitions for review and traditional appeals).

[18] Although HSP has refused to accept the check returning the license fee, HSP surely cannot claim this self-serving refusal entitles it to a finding of detrimental reliance. *See* Ltr. from Stephen A. Cozen to Shelly R. Smith, dated Feb. 28, 2008 (attached hereto as Exhibit C) (acknowledging return of license fee).

riparian license. The gaming license fee was paid before the riparian license issued. *See* Ltr. from John M. Donnelly to Hon. Mary D. Colins, dated Oct. 17, 2007, HSP Vol. II at 458-460; Ltr. from Eileen H. McNulty to Ruth Penman, dated Oct. 17, 2007, HSP Vol. II at 461. Moreoever, regardless of the disposition of riparian rights license, HSP will retain the gaming license and represented to the PGCB that SugarHouse Casino is not dependent on the riparian rights, a statement on which the PGCB relied in issuing the gaming license.[19] To now claim that the gaming license fee was paid in reliance on the riparian license directly contradicts that statement. Finally, HSP has made absolutely no showing (nor can it) that it relied on the license to such an extent that it cannot be restored to its original position absent enforcement of the license.[20] As such, there simply is no basis for voiding the license's revocation.

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[19] Neil Bluhm, the chairman of HSP, told the PGCB that the proposed Sugarhouse Casino was "not dependent on getting those riparian rights." Exhibit A at 97:25. The PGCB's Adjudication selecting HSP as a gaming licensee relied specifically on HSP's lack of "riparian rights issues" and its representations that it could build a quality facility without riparian rights. Feb. 1, 2007 Order and Adjudication, HSP Vol. 5 at 1500, ¶ 82.

[20] Certainly, no such finding can be made absent an evidentiary proceeding. For this reason alone, HSP's Application for Summary Relief must be denied. *See* Pa.R.A.P. 1532(b) (providing for summary disposition of a petition for review "if the right of the applicant thereto is clear").

(b) Even if the Vested Rights Analysis Applies Here, HSP Does Not Have a Vested Right in the License

The doctrine of vested rights essentially operates as an exception to the general rule that a municipal zoning permit can be revoked at any time (*Commonwealth, Dept. of Environmental Resources v. Flynn*, 344 A.2d 720, 723 (Pa. Commw. Ct. 1975)) if necessary to achieve fairness and equity when a landowner relies on the permit prior to the permit being deemed invalid and revoked by the municipality. *Rudolph v. Zoning Hearing Bd. of Cambria Tp.*, 839 A.2d 475, 478 (Pa. Commw. Ct. 2003) (citing *Petrosky*, 402 A.2d at 1388). Not surprisingly, because *permits* typically involve permission to perform an act or series of acts upon one's own land as a matter of right, the test for determining whether a *permit* has become irrevocable is less stringent than the test for determining whether a *license* has become irrevocable. As such, the vested rights analysis, which applies to land use permits and on which HSP relies, requires a balancing of five factors to find that a party has vested rights:

1. Due diligence in attempting to comply with the law;
2. Good faith throughout the proceedings;
3. Expenditure of substantial unrecoverable funds;
4. Expiration without appeal of the period during which an appeal could have been taken from the issuance of the permit;
5. Insufficiency of evidence to prove that individual property rights or the public health, safety, or

> welfare would be adversely affected by the use of the permit.

Petrosky, 402 A.2d at 1388. Even if this test were applicable to the license at issue (which it is not), balancing these factors weighs against a finding that HSP has a vested right in the license.

Here, neither fairness nor equity weighs in favor of finding a right vested in HSP by virtue of its reliance on the license prior to the license's revocation. Most importantly, HSP never had any expectation of irrevocability based on the Attorney General's opinion, and the license was hotly contested, HSP knew from the moment it was issued that it would be appealed, and the license was appealed within the appeal period. As such, HSP cannot be deemed to have taken any action in justifiable reliance on the license that would weigh in favor of finding a vested right. To the contrary, any action taken by HSP in reliance on the license was taken expressly at HSP's own risk.

Moreover, as discussed in detail *supra* at Section III.B.3, the riparian rights license was issued in error and without full and proper consideration of the relevant factors. Throughout the licensing process, HSP was an active participant in the City's error as it sought the license from the City while fully aware that it was expected by PGCB and everyone else involved in the process that it would seek the license from the General Assembly itself, which clearly was the body to issue such licenses.

HSP also has not demonstrated that it acted in good faith. Throughout the licensing process, HSP knew that the outgoing administration was pushing the license through, despite vehement opposition from City Council and the local state legislators. As explained above, the Attorney General opinion on which HSP urged reliance during the license proceedings, makes clear that the riparian rights license is fully revocable. Thus, to the extent HSP claims to have proceeded with work in good faith and reliance on the license, it proceeded at its own risk. In contrast and contrary to HSP's contention, the City has not acted in bad faith and had jurisdiction to revoke the license because the City has determined the license was issued in error and because the license is inherently revocable. *See* Office of the Attorney General, Commonwealth of Pennsylvania, Official Opinion No. 78-19, 8 Pa. D. & C.3d at 446. Further, the City has not "abruptly changed its prior consistently held position in support of the License" in an attempt to divest this Court of jurisdiction. The City's position in support of the license was, in time, shortly held (less than two months elapsed from the license issuance and its revocation) and changed only because the City determined it was in the public interest to do so and because the Commonwealth has manifested its intent that the City should not issue this license and never had the authority to do so in the first instance.

In addition, HSP cannot demonstrate that it expended substantial unrecoverable funds in reliance on the riparian rights license because it still lacks the permits necessary to begin construction on the riparian lands. And as explained above, the City has returned the full license fee to HSP, and HSP cannot claim the fee associated with the gaming license was paid in reliance on the riparian license. *See* Exhibit D.

HSP's attempt to show that there is insufficient evidence of the license's adverse effect on the public interest, by stating reasons it believes the license's issuance was in the public interest, also fails. Two of the reasons HSP gives relate to gaming generally and not to the use of submerged lands and, thus, are immaterial to this analysis. HSP fails even to acknowledge Acting Commerce Director Bumb's findings that the license was not in the public interest, much less to show that they are somehow "insufficient."

Finally, the City cannot be estopped from revoking the license and following the law now that the Commonwealth has clarified that the City never had the authority to issue the license in the first instance. The issuance was void *ab initio* as a matter of law. The error of City officials cannot result in HSP having a license that the City did not have the authority to give, and no principle of estoppel mandates a different result. *See Central Storage & Transfer Co. v. Kaplan*, 410

A.2d 292 (Pa. 1979) (holding that estoppel will not lie against the government where the acts of its agents are in violation of positive law).

Accordingly, HSP has failed to demonstrate that a balancing of all the necessary factors weigh in favor of a finding that HSP has a vested right in the license. In fact, a balancing of the factors weighs against such a finding.

C. The City's Authority To Revoke the License Was Not Affected by the Proceedings Challenging Its Issuance in the First Instance

As discussed above, the City had the authority to revoke the license and acted with sound discretion in so doing. In fact, the license must be revoked because it is now clear that the City never had authority to issue it. Further, the City's authority (which is actually authority delegated from the Commonwealth) to revoke the license was not divested by Pa.R.A.P. 1701, nor was the City collaterally estopped from acting to revoke the license. Public policy weighs heavily in favor of permitting the City to revoke a revocable and discretionary license when doing so is in the public interest, as well as when it recognizes that the license was issued in error, regardless of whether the City has been defending its authority to issue that license. To hold otherwise would discourage parties from recognizing and taking steps to correct errors without the Court's intervention, and have the untenable effect of forcing decisions made in error to stand uncorrected. It also would have the effect of not allowing the public entity to act in the public

interest. That cannot be the law and would improperly restrain government ability to manage the Commonwealth lands.

1. Pa.R.A.P. 1701 Does Not Prevent Revocation of the License

The arguments raised in HSP's Petition for Review, that the Revocation Notice is null and void *ab initio*, fail. HSP contends that Rule 1701(a) of the Pennsylvania Rules of Appellate Procedure divests the City of its authority to rescind or revoke the license because of the filing of Petitions for Review in 207 E.M. 2007 and 208 E.M. 2007 challenging the City's issuance of the License. *See* Petition for Review ¶¶ 73-81. Rule 1701 does not apply to the revocation decision, however, because, by its terms, it only applies to appellate jurisdiction petitions for review. *See* Pa.R.A.P. 1701(a), (d); Darlington, *et al.*, *Pennsylvania Appellate Practice* 2d. § 1701:41 (2007-08) (Rule 1701 applies only to appellate jurisdiction petitions). As explained *supra*, the instant challenge is an original jurisdiction matter. Moreover, the filing of a petition for review of the licensing decision does not affect the City's authority to revoke the license. Further, even if Rule 1701 did apply, the revocation falls squarely within the exceptions provided in Rule 1701(b)(1) and 1701(d).

The threshold requirement under Rule 1701(a) for limitation of a government entity's jurisdiction is the issuance of a quasijudicial order. Rule 1701(a) provides: "Except as otherwise prescribed by these rules, after an appeal

is taken or review of a quasijudicial order is sought, the trial court or other government unit may no longer proceed further in the matter." Pa.R.A.P. 1701(a). The issuance of the license, not the revocation, is "the matter" before the Court that HSP contends divested the City of jurisdiction to issue the revocation. The revocation is its own separate event. Indeed, it could have occurred even if the license had been properly issued in the first instance. For example, because the license is revocable at will, even if it were not issued in error, but there had been a change of circumstances that weighed in favor of the public interest using the lands differently, the fact that the issuance was on appeal should not stop the government from revoking the license.

Moreover, the issuance of a license by the Commerce Director was not a "quasijudicial order," but rather an executive decision made by an executive officer. Indeed, the statutory scheme makes clear that the Commerce Director does not act in a quasijudicial manner. The Commerce Director is an executive official who is responsible for devising plans and making policy decisions as a member of the Mayor's Cabinet. Phila. Home Rule Charter §§ 3-100(a); 3-102; 4-500–502; *cf.* Act 321 § 6, 53 P.S. § 14191 (setting forth powers and duties of former Director of the Department of Wharves, Docks and Ferries), *superseded by* Phila. Home Rule Charter §§ A-100, A-101. The Director's decision whether to issue a license is a decision of a policy maker for the executive branch; he does not act here as a

quasijudicial officer. *See Lyness v. Commonwealth, State Bd. of Medicine*, 605 A.2d 1204, 1210 (Pa. 1992) (noting that it is unconstitutional for an administrative agency to adjudicate a matter where one party serves as both prosecutor and adjudicator). Thus, not surprisingly, Act 321 does not provide for quasijudicial procedures before the Director of Commerce. For example, the Director is not confined to consider only evidence of record. While providing a public hearing to allow public comment, the procedures do not allow for cross-examination. Such a proceeding is not quasijudicial in nature. *Perin v. Bd. of Supervisors of Washington Twp.*, 563 A.2d 576, 580 (Pa. Commw. Ct. 1989) (noting a public hearing lacks "the due process attributes" of a quasijudicial hearing). In sum, the procedures provided for in Act 321 are in the nature of an investigatory hearing, rather than a quasijudicial proceeding.

Even if Rule 1701(a) did apply to the decision of the Acting Commerce Director to rescind the license, the revocation of the license falls squarely within the exception in Rule 1701(b)(1), which provides that a government unit may "take such action as may be necessary to preserve the status quo" even after review of a quasijudicial order is sought. Pa.R.A.P. 1701(b)(1). "Status quo" has been defined as "the last actual, peaceable and lawful, non-contested status which preceded the controversy." *West Penn Power Co. v. Pa. Public Utility Comm'n*, 615 A.2d 951, 957 (Pa. Commw. Ct. 1992) (quoting *Miceli*

v. Unemployment Compensation Bd. of Review, 549 A.2d 113, 116 (Pa. 1988)). The revocation of the license restored the last non-contested status as to HSP's right to use the riparian lands, *i.e.*, no right of use. The Acting Commerce Director's action thus assured that there would be no construction on the riparian lands during the pendency of the Petitions for Review of the license's issuance, thereby preserving the status quo. Accordingly, the City had the jurisdiction to revoke the license under Rule 1701(b)(1).

Further, the "original jurisdiction" exception under Pa.R.A.P. 1701(d) permits the revocation of the license. Rule 1701(d) states: "The filing of a petition for review (except a petition relating to a quasijudicial order) shall not affect the power or authority of the government unit to proceed further in the matter . . . ." Pa.R.A.P 1701(d). Because, as discussed above, the decision of the Commerce Director is not a quasijudicial order, if this Court finds the revocation to be "in the matter" before this Court on the petitions challenging the license's revocation, the City retained jurisdiction to proceed further by revoking the license under Rule 1701(d).

Indeed, for the City *not* to have revoked the license now would have been bad faith. Because it is the Director's position that the license was issued contrary to the public interest and in error, it was incumbent upon him to so inform the Court. Notwithstanding HSP's baseless and impolitic accusations of

manipulating jurisdiction, the Acting Director of Commerce, almost immediately after taking office under the new Nutter Administration, came to the conclusion that the license was issued in error. Apparently, HSP believes the Director should have sat silently on his concerns and sprung them on HSP only if and after this Court upheld the issuance of the license. *That* would have been manipulating the Court's jurisdiction.

2. The City Is Not Judicially Estopped from Revoking the License

Under the doctrine of judicial estoppel:

> [A] litigant is estopped from assuming a position inconsistent with his position in a previous action, if the litigant was successful in that contention. To be successful, the court in the prior proceeding must have been persuaded to accept the litigant's position; in other words, the position must be litigated to conclusion. . . . However, for the doctrine to apply, the issues and the parties have to be the same, and the inconsistent positions must be asserted in the same or subsequent phase of the same proceeding or in a subsequent proceeding involving the same parties.

Philadelphia Suburban Water Co. v. Pa. Public Utility Comm'n, 808 A.2d 1044, 1061 (Pa. Commw. Ct. 2002) (citations omitted). HSP argues that this doctrine estops the City from revoking the license. That position is flawed for several reasons. First and most importantly, by revoking the license, the City is not asserting a position in this or any other judicial proceeding at all. It is simply

exercising its executive authority to rescind a license it now recognizes was issued contrary to the public interest and in error, as fully described above.

Second, the license's revocation is not inconsistent with the positions taken in this or any other proceeding.[21] The issue raised by the Petitioners in both 207 E.M. 2007 and 208 E.M. 2007 is limited to the question of "whether Respondent the City of Philadelphia is empowered to convey to HSP Gaming, L.P. ("HSP"), a private entity engaged in the business of operating slot machine parlors, an interest in the submerged lands of the Commonwealth of Pennsylvania without the specific and express consent of the Commonwealth." DiCicco Petition at 1. The Petition for Review filed by Senator Fumo, *et al.*, states, "this appeal is fundamentally related to the authority of the City of Philadelphia to exercise powers that are otherwise exclusively within the sole province of the General Assembly." Fumo Petition at 2. In contrast, the revocation takes a position on whether the Commerce Director properly exercised that authority. Because there is no inconsistency, judicial estoppel does not apply.[22]

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[21] To the extent HSP relies on the Responses/Answers prematurely filed by the City during the final days of the prior administration in the actions docketed 207 & 208 E.M. 2007, the City has filed a Consolidated Application for Leave to Withdraw its prior Responses/Answers in those matters on February 1, 2008, which is still pending before the Court.

[22] To the extent HSP suggests that the revocation is inconsistent with the City Solicitor's Opinion on November 13, 2007, and the Solicitor's and other City

(continued...)

Third, the doctrine applies only where the court in the prior proceeding accepted the litigant's position and where the position was litigated to conclusion. *Philadelphia Suburban Water*, 808 A.2d at 1061. No position taken by the City in 207 & 208 E.M. 2007 has been accepted by this Court or litigated to conclusion.

Further, the cases HSP relies upon in support of the notion that there is some sort of general rule that "prohibits the City from changing its [legal] position solely as a result of a political change ," Petition for Review ¶ 89, are not only inapposite, but support the City's position. For example, the case of *Fraternal Order of Policy, E.B. Jermyn Lodge #2, By Tolan v. Hickey*, 452 A.2d 1005 (Pa. 1982), did not involve a City's attempt to change its position during the course of litigation. Rather, in *Hickey*, this Court rejected the City of Scranton's attempt to change a provision in a collective bargaining agreement entered into by

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(continued...)

representatives' testimony at the license hearing, HSP cites nothing specific in support of any inconsistency. Moreover, even if HSP were able to show some inconsistency (which it has not), for the reasons explained above, the hearing before the Commerce Director was not a judicial or quasijudicial proceeding, so any position taken by representatives of the City therein is outside the reach of the judicial estoppel doctrine, which has as its purpose "to uphold the integrity of the courts." *Philadelphia Suburban Water*, 808 A.2d at 1061. It does not reach every statement made by a litigant in all forums at all times. Indeed, to speak of the City's "position" in a proceeding conducted by a City Cabinet official is nonsensical, when the Commerce Director is in fact the City official charged with formulating the City's "position."

a prior administration because allowing the City to re-write the contract would undermine the integrity of the collective bargaining process and defeat the expectations of public employees. *Id.* at 1007-08.[23] Importantly, in *Hickey* this Court applied an estoppel theory to prevent the change *despite* "the principle that one administration will not be permitted to bind its successor in the exercise of its discretion to make and effectuate policy." *Id.* at 1008.

Moreover, *Borough of Malvern v. Agnew*, 314 A.2d 52 (Pa. Commw. Ct. 1973), is distinguishable as well. In the first instance, the portion of the case on which HSP relies plainly is *dicta*, as the Commonwealth Court granted the appellees' motion to quash the appeal. In addition, there was no suggestion in that case that the process by which the building permits in question had been issued failed to conform to the law in place at the time of issuance. Rather, *Malvern* involved permits that were granted under ordinances passed by the municipality but later repealed by a newly-elected City Council. The permit holders had a legal

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[23] Similarly, *Horvat v. Jenkins Tp. School Dist.*, 10 A.2d 390 (Pa. 1940), involved an attempt to modify a contract, specifically, a newly-elected school board's attempt to void a principal's three-year employment agreement. And *Sweeney v. Lakeland School Dist.*, 319 A.2d 207 (Pa. Commw. Ct. 1974), also involved an attempt by a school district to avoid a contract entered into by its predecessor. Obviously, there is a fundamental difference between a government unit attempting to re-tread the terms of a valid contract and a government unit attempting to amend a position during the course of litigation to accurately reflect changed circumstances.

right to the permits they had obtained validly under existing law. In contrast, no one ever has a right to build upon the lands of the Commonwealth held in trust for the public, *e.g.*, the riparian lands at issue here. At most, the City, in its discretion, could only grant revocable licenses to use such land. The Commonwealth has now clarified that the City did not even have that authority at the time that the license was issued in this case.

D. HSP Is Not Entitled to A Stay Under Pa.R.A.P. 1781

In a separate application, HSP contends that it is entitled to a stay of the effect of the revocation, pursuant to Pa.R.A.P. 1781, pending this Court's resolution of the issues and arguments presented in its Petition for Review. Although styled as a "stay," HSP seeks an injunction to estop government action. Such an extraordinary remedy is wholly unjustified. Although an injunction may be justified to enjoin a licensee from acting under a license that has been revoked, enjoining the revocation itself rarely, if ever, makes sense. Clearly, when a license is revocable at will, no injunction may issue. *See LARA*, 542 A.2d at 224.[24]

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[24] HSP concedes that it did not present its Application for a Stay to the City prior to filing it with this Court. That alone is reason to deny HSP's request. *See Snizaski v. W.C.A.B. (Rox Coal Co.)*, 891 A.2d 1267, 1279 n.3 (Pa. 2006) ("[W]here a party has appealed a governmental determination to a reviewing court, an application for a stay or supersedeas must be filed with the deciding tribunal in the first instance.").

Moreover, HSP has not, and cannot, satisfy the standard governing relief in the nature of a stay pending a petition for review under Rule 1781, announced by this Court in *Pennsylvania Public Utility Comm'n v. Process Gas Consumers Group*, 467 A.2d 805 (Pa. 1983). Under *Process Gas*, an applicant seeking a stay pending review must establish:

1. A likelihood of success on the merits of the appeal;
2. Irreparable injury if a stay is denied;
3. Issuance of a stay will not substantially harm other interested parties; and
4. Issuance of a stay will not adversely affect the public interest.

Id. at 808-09; *Reading Anthracite Co. v. Rich*, 577 A.2d 881, 884 (Pa. 1990); *Young J. Lee, Inc. v. Commonwealth, Dept. of Revenue, Bureau of State Lotteries*, 474 A.2d 266, 272 n.8 (Pa. 1983). As set forth below, HSP has not satisfied any of these elements.

For all of the reasons set forth *supra*, HSP's Petition for Review challenging the revocation is not likely to succeed on the merits. Where a party challenging an injunction has raised substantial defenses on the merits, an injunction will not lie. *See Goslin v. State Bd. of Medicine*, 937 A.2d 531, 535-37 (Pa. Commw. Ct. 2007) (finding that petitioner failed to satisfy first prong of the *Process Gas* analysis due to meritorious arguments raised by respondent); *Thompson v. W.C.A.B. (Sacred Heart Medical Center)*, 729 A.2d 99, 102 (Pa. Commw. Ct. 1999) (same); *Fraternal Order of Police Lodge No. 5 v. City of*

Philadelphia, 557 A.2d 805, 807-08 (Pa. Commw. Ct. 1989) (finding that appellants failed to satisfy "probability of success on the merits" prong for preliminary injunction due to meritorious arguments raised by appellees).

HSP further argues that "[a] stay will prevent injury that may not be compensated by damages because revocation of the riparian license will prevent HSP Gaming from proceeding with the development of the SugarHouse Casino as approved by the Pennsylvania Gaming Control Board." Petition for Review ¶ 166. That simply is not true. HSP can go ahead and build the casino without the riparian lands. The PGCB did not, and in fact could not, approve the development of the casino on riparian lands. HSP's argument is directly contrary to the testimony offered by HSP's chairman, Neil Bluhm, at the suitability hearing conducted by the PGCB prior to issuing the category 2 licenses, where Mr. Bluhm stated that the proposed SugarHouse Casino was "not dependent on getting those riparian rights." Exhibit A at 97:25. Indeed, the PGCB's Order and Adjudication selecting HSP as a gaming licensee relied directly on HSP's lack of "riparian rights issues" and its representations that HSP can build a successful casino without securing rights to the riparian lands:

> HSP does not own the riparian rights along this portion of the riverfront. However, it is confident that it will secure those rights and if it is not successful the design of the project could be changed to accommodate the lack of riparian rights.

See Feb. 1, 2007 Order and Adjudication, HSP Vol. at 1500, ¶ 82.

Because HSP has not shown that it is likely to sustain any significant harm as a result of the license's revocation, let alone any harm that cannot be compensated adequately via money damages, its stay application must be denied.

Finally, it is undisputed that the Commonwealth owns the riparian lands at issue in this matter. The Acting Commerce Director determined the license permitting HSP to erect a casino on those lands was issued in error and that the license's revocation was necessary to protect the interests of the Commonwealth and the public for whose benefit the Commonwealth holds the lands. The Commonwealth now has made clear that it agrees that the license was issued in error and without proper authorization from the General Assembly. If this Court were to stay the revocation and permit HSP to begin construction on the riparian lands, it is the Commonwealth and the public interest that would be substantially and irreparably harmed. For this reason, a stay in this context makes little sense and must be denied.

IV. CONCLUSION

For the foregoing reasons, the City respectfully requests that this Court DISMISS HSP's Petition for Review, Application for Summary Relief and HSP's Application for Ancillary Relief, for lack of jurisdiction. However, if this Court does reach the merits, the City respectfully requests that this Court DENY

HSP's Petition for Review and Application for Summary Relief. Further, the City respectfully requests that this Court DENY HSP's Application for a Stay Pursuant to Pa.R.A.P. 1781.

Respectfully submitted,

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PROOF OF SERVICE

I, David V. Dzara, hereby certify that on March 7, 2008, I caused true and correct copies of the foregoing Consolidated Brief in Opposition to HSP Gaming, L.P.'s Petition for Review, Application for Summary Relief, and Application for a Stay Pursuant to Pa.R.A.P. 1781 to be served upon the following counsel and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 121:

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Dated: March 7, 2008

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David V. Dzara

EXHIBIT A

PENNSYLVANIA GAMING CONTROL BOARD

*****

SUITABILITY HEARINGS

IN RE: SUGARHOUSE CASINO

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PENNSYLVANIA STATE MUSEUM

THIRD AND FORSTER STREETS

HARRISBURG, PENNSYLVANIA

NOVEMBER 13, 2006, 12:30 P.M.

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. . . And with that, I'm going to
turn it over to Neil Bluhm, who is the chairman of

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HSP, who leads our Chicago contingent.

. . .

MR. BLUHM:
Good afternoon, Mr. Chairman and members of the Pennsylvania Gaming Control Board. I'm Neil Bluhm. Thanks for the opportunity to address you again. As John mentioned, I'm the chairman of HSP Gaming and we want to develop the Sugarhouse Casino at the Jack Frost Sugar refinery site on the Delaware River just north of the Ben Franklin Bridge.

. . .

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MR. MARSHALL:
Next question is, now do you have possession of the riparian rights that you'll need for your project?

MR. BLUHM:

We believe that there will be no question that we will get riparian rights. We believe that for a couple of reasons. First, we think we can get them either from the administration or alternatively through legislative action. The Administration would grant them under a proposed bill that is pending that has been adopted by the Senate and is pending in the House that we would expect would be voted on by the House and approved by and signed by the Governor. That bill, as I understand it, mandates that the Administration grant riparian rights to casinos upon paying fair market value for those rights.

MR. MARSHALL:

But you don't have a concern?

MR. BLUHM:

We have no concern, sir. And even if That bill was not enacted, there is a long history and policy of granting riparian rights to developers along

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the water. In fact, the two --- the condominiums right next to our site have, and were granted, riparian rights. As a developer in Chicago or in --- we were involved with Faneuil Hall when it was built in Boston near the water and the wharf. It's inconceivable to me that the Legislature would not grant riparian rights for a project of this sort when it's going to benefit the Commonwealth and the City of Pennsylvania (sic) and increase their revenues. So we have no concerns about getting riparian rights. In the extremely unlikely --- we don't view it as a

possibility, but if it could happen, we could still build our project but it would not be as good for the Commonwealth or the citizens around here.

MR. MARSHALL:

The point is your project's not dependent on ---?

MR. BLUHM:

That's correct.

MR. MARSHALL:

Yeah. I mean, it makes --- I understand what you're saying.

MR. BLUHM:

We'd have to change our design, but it's not dependent on getting those riparian rights.

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MR. MARSHALL:

Thank you.[. . .]

EXHIBIT B

DECLARATION OF J. BARRY DAVIS

J. Barry Davis hereby declares:

1. My name is J. Barry Davis. I am the Chief Deputy of Regulatory Affairs of The City of Philadelphia Law Department.

2. As part of my duties as Chief Deputy, I provide counsel to City departments on regulatory issues.

3. I have attended meetings with representatives of several City departments to discuss the issue of the "mitigation" required by the proposed SugarHouse project and its proposed encroachment on riparian lands.

4. SugarHouse representatives have requested that the City consider allowing SugarHouse to use a site owned by the City of Philadelphia along the Delaware River known as Pleasant Hill for a proposed mitigation.

5. Although the City has expressed preliminary interest in the SugarHouse request to use the Pleasant Hill site, the City has not offered the Pleasant Hill site to SugarHouse.

6. The City has not received a formal proposal for the Pleasant Hill site from SugarHouse.

7. The City has requested information from SugarHouse through its attorneys about other potential mitigation sites. The City has not received such information.

8. The City has not received copies of any submittals by SugarHouse of its mitigation plans to the state or federal agencies with jurisdiction and approval authority over the proposed encroachment on riparian lands.

I hereby certify that the facts set forth above are true and correct to the best of my personal knowledge, information and belief, subject to the penalties of 18 Pa. C.S. § 4904.

J. Barry Davis

Dated: Jan 31, 2008

EXHIBIT C

COZEN
O'CONNOR
ATTORNEYS

A PROFESSIONAL CORPORATION

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Chairman
Direct Phone 215.665.2020
Direct Fax 215.665.3701
scozen@cozen.com

February 28, 2008

VIA HAND DELIVERY
Shelley R. Smith, Esquire
City Solicitor
City of Philadelphia Law Department
1515 Arch Street, 17th Floor
Philadelphia, Pennsylvania 19102

Re: SugarHouse Casino

Dear Ms. Smith:

As you know, on November 27, 2007, our client, HSP Gaming, paid to the City of Philadelphia the Fee in the amount of $282,270 imposed by the Commerce Director in her Final Determination for the issuance to HSP Gaming of its License relating to the Submerged Lands. The authority of the City to issue the License is now the subject of three (3) appeals pending in the Pennsylvania Supreme Court (207 EM 2007, 208 EM 2007 and 28 EM 2008). In addition, there is currently pending before the Court in such matters applications submitted on behalf of HSP Gaming to declare that the City was without authority and had no jurisdiction to revoke such License, which the City improperly attempted to do pursuant to its Notice of Revocation of License Issued in Error ("Revocation Notice") issued on January 24, 2008.

Today, I received in the mail, by First Class Mail, a check (number 148-18379) issued February 25, 2008 by the City to HSP Gaming, which was sent to my attention, without a transmittal letter. From an examination of the Memo attached to the check, it would appear that it is intended to be a refund by the City to HSP Gaming of the Fee that it paid for the License.

As counsel for HSP Gaming, I am truly offended by the City's actions in this regard, given the pendency of the various matters before the Pennsylvania Supreme Court relating to the authority of the City to issue the License, and the authority and jurisdiction of the City to issue its Revocation Notice. For the City to take this action, under these circumstances, is

inappropriate and constitutes an effort to usurp the authority of the Pennsylvania Supreme Court before which both the City and HSP Gaming are presently litigating these issues on appeal.

I am therefore returning to you with this letter the aforementioned check, and on behalf of HSP Gaming categorically deny the authority or jurisdiction of the City to revoke the License, and maintain that until such time as the Pennsylvania Supreme Court finally rules on the authority of the City to issue the License, and the authority and jurisdiction of the City to revoke the License, such License shall remain in full force and effect.

Sincerely,

COZEN O'CONNOR

By: Stephen A. Cozen

SAC
Enclosure
cc: Richard A. Sprague, Esquire (w/enc) (Via E-Mail Only)
Neil Bluhme (w/enc) (Via E-Mail Only)
Gerg Carlin (w/enc) (Via E-Mail Only)
F. Warren Jacoby, Esquire (w/enc)

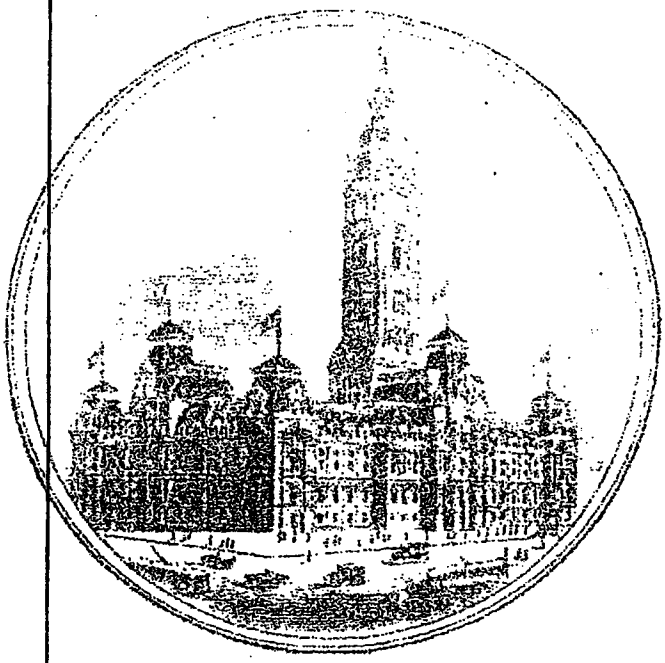
PHILADELPHIA\3568405\1 180277.000

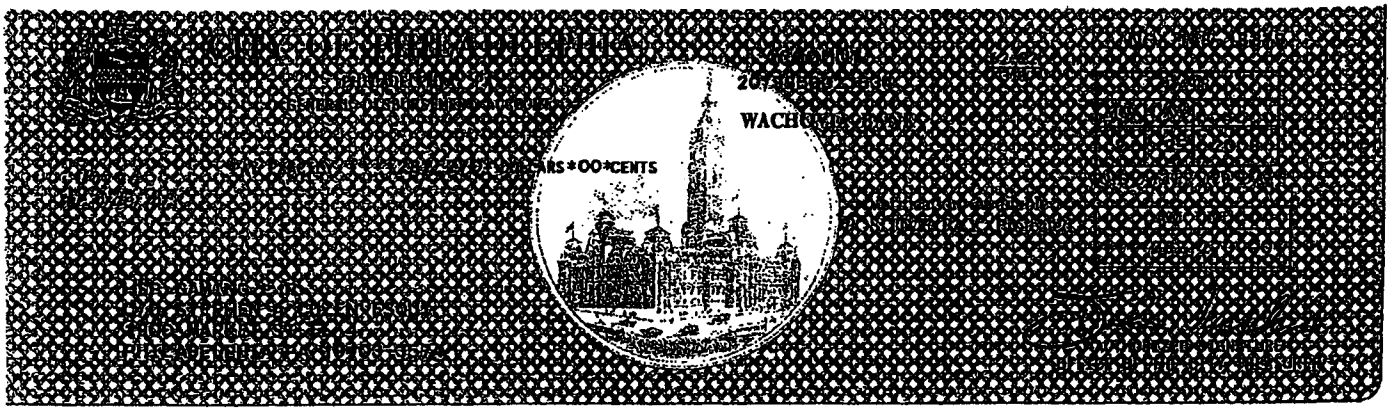
CITY OF PHILADELPHIA

VENDOR NO. DATE 02/25/2008 NO. 148-18379

VOUCHER NUMBER	PURCHASE ORDER NUMBER	DESCRIPTION	AMOUNT
RV01179254	8021302	OVERPAYMENT	**282,270.00
		FUND SOURCE INDEX — REFUND AMOUNT	
		010 3848 263601 — 282,270.00	
		TOTAL — 282,270.00	**282,270.00

FAMcks (07/2007)





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CITY OF PHILADELPHIA
CITY TREASURER'S OFFICE
640 Municipal Services Building
1401 John F. Kennedy Blvd.
Philadelphia, PA 19102-1681

http://www.phila.gov/treasurer/

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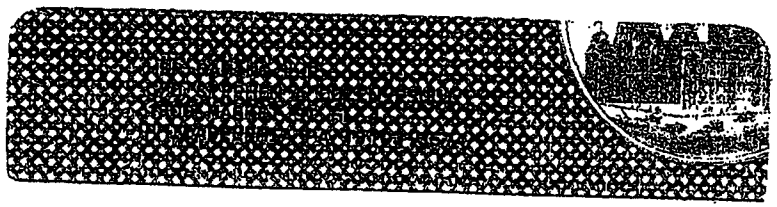

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EXHIBIT D

DECLARATION OF DUANE BUMB

Duane Bumb hereby declares:

1. I am Duane Bumb, Acting Commerce Director for the City of Philadelphia.

2. Under the former Commerce Director, the Commerce Department issued a Submerged Lands License to HSP Gaming, L. P. (SugarHouse) on November 27, 2007, for which it received payment of $282,270.00 as a license fee.

3. On January 24, 2008, the Commerce Department revoked said license.

4. As a result of the revocation, the Commerce Department is refunding to SugarHouse the entire license fee paid in the amount of $282,270.00.

I hereby certify that the facts set forth above are true and correct to the best of my personal knowledge, information and belief, subject to the penalties of 18 Pa. C.S. § 4904.

Duane Bumb
Acting Commerce Director
City of Philadelphia

Dated: Feb 1, 2008