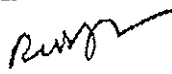


**City of Philadelphia**

LAW DEPARTMENT  
One Parkway  
1515 Arch Street  
17<sup>th</sup> Floor  
Philadelphia, PA 19102

**MEMORANDUM**

*Privileged and Confidential Advice of Counsel*

**TO:** Honorable Frank DiCicco, Councilman  
**FROM:** Romulo L. Diaz, Jr., City Solicitor   
**DATE:** November 13, 2007  
**SUBJECT:** SugarHouse Application for Submerged Lands License

On October 29, 2007, the Department of Commerce received, in care of the Department of Licenses and Inspections, an application ("Application") for a license for construction or improvements on submerged lands from HSP Gaming, L.P. ("Applicant"). Applicant seeks a license to make use of submerged lands in the Delaware River, which use has not been granted previously to the Applicant by the General Assembly. You have asked for an opinion on the basis for the Application, including where the state has granted the City the authority to consider such an Application, and how the City has applied and utilized such authority.

The following opinion first reviews the Director of Commerce's authority under relevant law, and then summarizes the procedure governing consideration of the Application under the Philadelphia Code.

**I. Authority of Director of Commerce**

By Act No. 321 of June 8, 1907 (the "1907 Act"), the General Assembly authorized the director of the City's Department of Wharves, Docks and Ferries to "issue a license or permit for the erection and making" of any "proposed structure, extension, alteration, improvement or repair that will encroach upon [the Delaware River]." *See* 53 P.S. § 14199. The Act requires that the director conduct a hearing on any such application, after publication of notice, and that the license or permit "shall not be unreasonably withheld." *Id.*

By Act No. 261 of May 29, 1913 (the "1913 Act"), the General Assembly supplemented, *inter alia*, the City's authority under the 1907 Act, including authorizing the City, by ordinance, to regulate and determine the license fees for the license and approval required under the 1907 Act. *See* 53 P.S. § 14199.

By Ordinance of July 8, 1915 (the "1915 Ordinance"), the City enacted legislation regulating and determining the fees for licenses or permits issued by the Department of Wharves, Docks and Ferries, as authorized by the 1913 Act. This 1915 Ordinance was subsequently amended by an Ordinance of July 25, 1940, and by an Ordinance of February 23, 1949. Pursuant to the 1951 Home Rule Charter, § A-101, the responsibilities of the former Department of Wharves, Docks and Ferries were vested in the new Department of Commerce. The 1915 Ordinance, as amended, was codified ultimately in §18-103 of the Philadelphia Code, which is discussed in further detail below.

In 1978, the Pennsylvania Attorney General in *Construction Along Delaware and Schuylkill Rivers*, 8 Pa. D & C. 3d 438 (1978), recognized the authority of the Director of Commerce to issue licenses pursuant to Section 10 of the 1907 Act:

It is our view that anyone desiring to construct, alter or extend facilities into the Delaware or Schuylkill Rivers need not seek from the General Assembly a statute authorizing the grant of an interest in the submerged land on which the construction is to be done inasmuch as the General Assembly has already authorized, by statutes, the Director of Commerce of the City of Philadelphia, for those portions of the rivers within the City of Philadelphia, and the Navigation Commission for the Delaware River and its navigable tributaries, for portions outside of Philadelphia, to grant the required interest in the river bed.

*Id.* It is my opinion and you are so advised that the Attorney General's opinion confirmed the Director of Commerce's authority to issue a license under the 1907 Act.

Subsequent to the Attorney General's opinion, the General Assembly, by Act No. 325 of November 26, 1978, adopted the Dam Safety Act, 32 P.S. §§ 693.1 *et seq.* (the "Dam Safety Act"). It is noteworthy that while the Dam Safety Act specifically repealed similar licensing provisions of another 1907 act authorizing the Navigation Commission to issue licenses outside the City of Philadelphia, the Dam Safety Act neither repealed nor addressed the Director of Commerce's authority under the 1907 and 1913 Acts. *See* 32 P.S. § 693.27(a). Taken in context, this evidences an intent to *preserve* the City's powers under the 1907 and 1913 Acts.<sup>1</sup> Indeed, in Section 15 of the Dam Safety Act the General Assembly prohibits the grant of any permits for projects occupying submerged lands in any navigable river unless "the applicant . . . holds an . . . interest in such submerged lands pursuant to other specific authority from the General Assembly." Dam Safety Act, Section 15 (emphasis added). Such "specific authority" was granted to the City in the 1907 Act, 53 P.S. § 14199, and, thus, Section 15 of the Dam Safety Act does not impose any prohibition on permit issuance relevant here. Therefore, it is my

<sup>1</sup> The local authority to issue such licenses dates to the time of the original 1701 Charter of William Penn, and has been affirmed consistently by numerous acts of Provincial and General Assemblies since that time. For an in depth discussion of this history, see *Kusenberg v. Browne*, 42 Pa. 173 (1862). This long tradition further reinforces the conclusion that had the General Assembly intended to repeal the local authority to grant such licenses in enacting the Dam Safety Act, it would have done so explicitly.

opinion that nothing in the Dam Safety Act was intended to supersede the authority of the Director of Commerce under the 1907 and 1913 Acts.<sup>2</sup>

## II. Procedures Applicable to Application

Philadelphia Code Section 18-103 sets forth generally the procedure for issuance of a license or permit for encroachments into the waterway. Specifically, Section 18-103 states that, before any "proposed structure, extension, alteration, improvement or repair will encroach upon the [Delaware River]," the Director of Commerce shall conduct a public hearing upon application for a permit. Phila. Code § 18-103(3). Such hearing shall be "preceded by notice by advertisement twice a week for two successive weeks in two newspapers of general circulation published in the City." *Id.* Moreover, the applicant arranges and pays for the advertising. *Id.* at § 18-103(3)(a).

The applicant is responsible for a fee for issuance of the license of \$1.50 per \$1,000 cost of construction up to \$100,000, and \$.75 for each additional \$1,000 cost of construction thereafter. *Id.* at § 18-103(4). Although the hearing on the license application is to be conducted by the Department of Commerce, the license application is to be processed by the Department of Licenses and Inspections *Id.* at § 18-103(2), (3)(a).

You also have requested examples of where the Director of Commerce has exercised the authority discussed herein since passage of the Home Rule Charter. I have in my possession a ledger book containing original licenses issued by the City from 1908 through 1968 (License Nos. 1-424), which is available for review at your convenience. We also have attempted to access later records of the Department of Commerce, but it appears such records either have been lost or misplaced since the Department of Commerce relocated its offices in the 1980s. From our own files, we have identified several examples of licenses, the most recent of which from July 1, 1974 (License No. 436), is attached for your information.

Attachment

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<sup>2</sup> I note that the General Assembly amended the Dam Safety Act by Act No. 70 of October 23, 1979, to extend the Act to water obstructions and encroachments (the "Dam Safety and Encroachments Act"). However, the Dam Safety and Encroachments Act did not address or, I believe, affect the City's power under the 1907 and 1913 Acts.

Moreover, although not directly controlling, the Pennsylvania Commonwealth Court has held that the Dam Safety and Encroachments Act did not create a sufficiently comprehensive regulatory scheme that would preempt municipal regulation in flood plain areas. *In re Appeal of Hoover*, 608 A.2d 607 (Pa. Cmwith. 1992).

FEES: NONE

ESTIMATED COST: \$3,400,000



LICENSE #436

# DEPARTMENT OF COMMERCE DIVISION OF PORT OPERATIONS

*Philadelphia, July 1 19 74*

*By Authority vested in me by the Commonwealth of Pennsylvania I hereby authorize Commerce Department City of Philadelphia,*

*heirs, executors, administrators, or assigns to encroach on the waterway of the Delaware River by the construction of five, fifty feet diameter sheet pile cells with concrete platform and fender pile; two timber pile clusters; modifications to existing concrete apron at Chestnut Street and Walnut Street; modifications to existing concrete apron at Dock Street; and construction of a floating finger pier at Dock Street, between Market St. and Spruce St. in front of their property on the west side of the Delaware River, Phila., Pa.*

*Subject to the Laws of the Commonwealth, Ordinances of City Council and rules and regulations of the Department of Commerce. Work under this license must be commenced within six months.*

*The Working Plans, Materials and Construction to be approved by me, and three days notice to be given prior to the commencement of the work.*

*Approved:*  
  
Deputy City Representative and Director of Commerce

Commissioner, Department of Licenses and Inspections