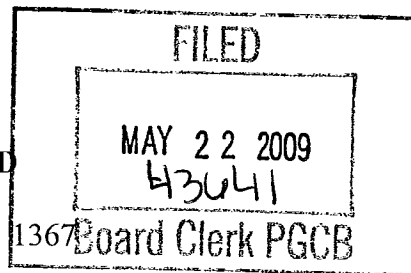


BEFORE THE
PENNSYLVANIA GAMING CONTROL BOARD



: Docket Number: 1367

: Counsel of Record:

**In re: Philadelphia Entertainment and
Development Partners, L.P., d/b/a Foxwoods
Casino Philadelphia**

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**FOXWOODS CASINO PHILADELPHIA'S PETITION TO EXTEND THE TIME TO
MAKE SLOT MACHINES AVAILABLE**

NOW COMES, Philadelphia Entertainment and Development Partners, L.P. ("Foxwoods Casino Philadelphia"), by and through its counsel, LeRoy S. Zimmerman, Esquire, and Robert A. Graci, Esquire, Eckert Seamans Cherin & Mellott, LLC and Stephen D. Schrier, Esquire, Blank Rome, LLP and hereby petitions the Pennsylvania Gaming Control Board (the "Board" or "PGCB") to extend the time to make slot machines available for play for good cause shown pursuant to section 1210 of the Pennsylvania Race Horse Development and Gaming Act

(“Gaming Act”), 4 Pa.C.S. § 1210, and, in support thereof, Foxwoods Casino Philadelphia avers as follows:

1. On December 20, 2006, the PGCB granted Foxwoods Casino Philadelphia’s application for a Category 2 Slot Machine License authorizing Foxwoods to operate a licensed facility in the City of Philadelphia. The Board’s licensing decision was subsequently memorialized in an Order dated, February 1, 2007. See Order dated, February 1, 2007, attached hereto as, Exhibit “A.”

2. Foxwoods Casino Philadelphia proposed to build its licensed facility at Columbus Boulevard, between Reed and Tasker Streets, on the South Philadelphia waterfront (“Columbus Boulevard Site”), and to begin construction of phase one of said project as soon as, *inter alia*, it obtained all approvals and permits from the City of Philadelphia.

3. By the express terms of the Gaming Act, the Pennsylvania General Assembly provided that the PGCB possesses the sole authority to determine the locations of licensed slot machine facilities, two of which were required to be located in the City of Philadelphia. *Id.* §§ 1103, 1202, 1304, 1307, 1325, 1329.

4. In recognition of the PGCB’s exclusive authority to locate two slot machine facilities within the City, and in anticipation of the PGCB’s selection of the two locations, City Council of the City of Philadelphia enacted, on March 9, 2006, Chapter 14-400 of the Philadelphia Zoning and Planning Code (the “Zoning Code”) to establish a new zoning classification, the Commercial Entertainment District (“CED”) which was the zoning the City required for construction of a licensed gaming facility in Philadelphia.

5. The CED Ordinance as enacted contemplated a three-step process to designate a property as a CED, which required the adoption of three ordinances by City Council. The first step required City Council to adopt an ordinance designating the property as a CED. Id. § 14-403(1). The second step in the process of designating a property as a CED required the applicant to submit a Plan of Development to the Planning Commission for review. If the Planning Commission finds that the Plan is consistent with the purposes of the CED District and is otherwise appropriate in terms of scale, density, accessibility and design for the neighborhood, the Plan of Development is then transmitted to City Council for its consideration. The third step in the process requires City Council to adopt an ordinance, approving the Plan of Development.

6. From the time of the Board's licensing determination on December 20, 2006, Foxwoods Casino Philadelphia worked diligently with the then Philadelphia City Administration in an effort to obtain CED zoning for the Columbus Boulevard Site in addition to all required approvals and permits from the City of Philadelphia. City Council, however, opposed location of Foxwoods Casino Philadelphia at the Columbus Boulevard Site and refused to consider or even introduce any of the ordinances required to zone the Columbus Boulevard Site a CED.

7. In light of the extraordinary governmental delays it was encountering, Foxwoods Casino Philadelphia petitioned the Board for an Extension of Time to Pay its \$50 million dollar License Fee in an effort to delay this enormous expense and the monthly interest expense associated therewith. Foxwoods Casino Philadelphia appeared before the Board on September 6, 2007. Ultimately, the Board ordered payment of the fee and it was paid timely on October 17, 2007. Almost two years have passed and Foxwoods has yet to realize the benefits of its license.

8. Notwithstanding the refusal of City Council to cooperate with Foxwoods Casino Philadelphia in passing the necessary zoning ordinances, Foxwoods Casino Philadelphia continued to diligently pursue its project with the then City Administration. As one example of its many efforts to advance the development of its project, Foxwoods entered into a Development and Tax Claim Settlement Agreement (“Columbus Boulevard Development Agreement”) on January 4, 2008 (based upon a Term Sheet executed on November 23, 2007), that established the future relationship between Foxwoods Casino Philadelphia and the City in developing the Columbus Boulevard Site, as well as a multitude of other development related areas.

9. Foxwoods immediately began performing its obligations under the Columbus Boulevard Development Agreement including payment of \$875,000 on January 17, 2008, representing the first installment of its real estate taxes due under the Columbus Boulevard Development Agreement, and payment of \$1.2 million on February 28, 2008 representing the second installment of real estate taxes due under the Columbus Boulevard Development Agreement.

10. Despite cooperation with the then City Administration, and extreme efforts to require City Council to act, Foxwoods Casino Philadelphia was unable to obtain the CED zoning from City Council. Foxwoods Casino Philadelphia filed four applications with the Supreme Court of Pennsylvania until the Supreme Court ultimately zoned the Columbus Boulevard Site a CED by Opinion dated April 2, 2008. 1 EM 2008. See Opinion dated, April 2, 2008, attached hereto as, Exhibit “B.” Those applications were filed over a period of 10 months:

A. Philadelphia Entertainment and Development Partners, LP v. City of Philadelphia, et al., No. 88 EM 2007 was filed on June 1, 2007 and denied on November 20, 2007.

B. Philadelphia Entertainment and Development Partners, LP v. City of Philadelphia, et al., No. 143 EM 2007 was filed on August 20, 2007 and denied on November 20, 2007.

C. Philadelphia Entertainment and Development Partners, LP v. City of Philadelphia, et al., No. 144 EM 2007 was filed on August 20, 2007 and denied on October 16, 2007.

D. As noted above, Philadelphia Entertainment and Development Partners, LP v. City Council for the City of Philadelphia and the City of Philadelphia, No. 1 EM 2008 was filed on December 28, 2007 and granted on April 2, 2008.

11. While the granting of CED zoning by the Supreme Court bypassed the refusal of City Council to grant zoning, Foxwoods Casino Philadelphia still had to obtain a zoning and use permit, building permits and other approvals from the City Administration.

12. On January 7, 2008, Mayor Nutter was sworn in as Mayor of Philadelphia. The new City Administration aligned itself with City Council in efforts to oppose the location of Foxwoods Casino Philadelphia at the Columbus Boulevard Site, culminating in its refusal to issue a zoning and use permit which Foxwoods Casino Philadelphia applied for on May 5, 2008 and which, under the CED Ordinance, the City was required to grant or deny within 45 days, i.e. by June 19, 2008. Rather than issue the zoning and use permit as required by the CED Ordinance, the City Administration deemed the application incomplete. The zoning and use

permit is a gateway permit issued by the Planning Commission staff who then stamps copies of the plans for submission to other City Departments to enable their review and issuance of building permits.

13. In response to the City's failure to issue the zoning and use permit, on July 16, 2008, Foxwoods Casino Philadelphia filed its fifth application to the Supreme Court which requested enforcement of the April 2, 2008 Order in 1 EM 2008 and appointment of a special master.

14. Thereafter, the City did not take any action regarding the requested permits. Foxwoods Casino Philadelphia was unable to move forward on the Columbus Boulevard site until the Supreme Court granted Foxwoods Casino Philadelphia's aforesaid application to enforce 1 EM 2008 by Order dated October 14, 2008, as will be discussed more fully below. See Order dated, October 14, 2008, attached hereto as, Exhibit "C."

15. Despite all of its efforts from the date the Board granted Foxwoods Casino Philadelphia's application for a Category 2 Slot Machine License on December 20, 2006, including an Order from the Pennsylvania State Supreme Court granting CED zoning, Foxwoods Casino Philadelphia was still unable to move forward to begin construction at the Columbus Boulevard Site and would remain in that position unless and until the Supreme Court granted the relief in its Application to enforce 1 EM 2008. As noted above, this did not occur until October 14, 2008.

16. On August 23, 2008, at the request of Governor Rendell, and while Foxwoods Casino Philadelphia's enforcement application was pending before the Supreme Court (but almost two months before it was granted), representatives of Foxwoods Casino Philadelphia

agreed to meet with the Governor, Mayor Nutter, Representative Dwight Evans, Representative William Keller, and other representatives of the governments of the Commonwealth and City of Philadelphia to discuss the possibility of moving the licensed facility from its current Board-approved location at the Columbus Boulevard Site to a new location.

17. This request presented significant challenges including the fact that the PGCB controlled siting issues and that Foxwoods Casino Philadelphia had invested substantial time, effort and money in developing the Columbus Blvd Site, including the successful negotiation of a Development Agreement with the City of Philadelphia and negotiations related to several necessary permits and approvals required for the development of the licensed facility at the Columbus Boulevard Site. Foxwoods Casino Philadelphia carefully considered the request before responding to it.

18. On September 9, 2008, Foxwoods met with the Governor, Mayor Nutter and other representatives of the governments of the Commonwealth and City of Philadelphia indicating that it would evaluate the *possibility* of relocating to the Gallery Complex, with the clear understanding that there could be no change of location without the prior approval of the PGCB for good cause shown and that Foxwoods was reserving and retaining all of its rights to build and operate its licensed facility at its Board-approved and selected Columbus Boulevard Site. This meeting took place over a month before the Supreme Court granted Foxwoods Casino Philadelphia's Application to enforce the Supreme Court's Opinion in 1 EM 2008 and appoint a master to assist it in obtaining the zoning and use permit and all other City approvals required to begin construction on the Columbus Boulevard Site. (A detailed chronology of all of the events described in Paragraphs 1 thru 17 above is attached hereto as Exhibit "D.")

19. Relocating to the Gallery Complex was an attractive alternative but also presented challenges, all of which had to be explored diligently prior to approaching the PGCB with a petition to relocate.

20. In considering the Gallery Complex as a potential site, the pros and cons were carefully considered by Foxwoods Casino Philadelphia. The positive aspects of relocating to the Gallery Complex are: that the location tied in with redevelopment efforts in Center City; the location has the potential of utilizing existing nightlife and entertainment amenities in Center City; the building was already constructed; the site would not require roadway and other infrastructure improvements enabling the opening a facility much sooner than Foxwoods Casino Philadelphia would be able to open at the Columbus Boulevard Site; there are 7,400 existing parking spaces (6,000 garage and 1,400 surface) within walking distance of the site; and, the Gallery Complex sits on top of a major City public transportation hub linking SEPTA rail lines, buses and the PATCO High Speedline. Although additional time would be required to explore this location alternative, it was highly warranted given the substantial potential benefits that would be realized by the Commonwealth, City and Licensee.

CONSIDERATION OF GALLERY II SITE

21. The first site Foxwoods Casino Philadelphia focused on was the only one available in the Gallery Complex at that time, namely the Gallery II site, located at the west end of the Gallery Complex, which is leased by Pennsylvania Real Estate Investment Trust (“PREIT”) from the City and had a major tenant that would require relocation followed by demolition of the relocated tenant’s space before construction could begin. This site required negotiations with PREIT, the City and the existing tenant. The challenge to negotiate a lease with

PREIT became more complicated given the fact that the City, through the Redevelopment Authority, also had ownership interests and control over the land under the site as well as all of the common areas. Considerable time and effort was required, and was spent to evaluate the potential of this site.

CONSIDERATION OF 801 MARKET STREET SITE

22. In early 2009, PREIT advised Foxwoods Casino Philadelphia that space located in the Strawbridge's building at 801 Market Street, the eastern end of the Gallery Complex, which had been slated for leasing to another tenant, had recently become available. PREIT asked Foxwoods Casino Philadelphia to consider that space as a possible location alternative. The specific space is located in the concourse (subway level) and first three floors (hereinafter referred to as the "801 Market Street Site") of the Strawbridge's Building. This site is also within the newly expanded Commercial Entertainment District Zone created by City Council on October 16, 2008 (see Paragraph 26, below).

23. The 801 Market Street site had additional advantages over the Gallery II Site. The Strawbridge's building is divided into two commercial condominium units: all the space from the 6th floor and below is totally owned by PREIT and floors 7 thru 13 are owned by Gramercy Capital Corporation ("Gramercy"). The 801 Market Street Site is located within the space owned by PREIT and this eliminated lease negotiation issues with the City Redevelopment Authority and relocation issues with any existing tenants. Moreover, since the space had been prepared for occupancy by another tenant, it was already demolished and ready for tenant occupancy. This would enable construction to begin as soon as all necessary approvals were obtained.

A. LEASE WITH PREIT

24. Recognizing the obvious advantages over the Gallery II site, Foxwoods Casino Philadelphia began negotiating a letter of intent to execute a lease with PREIT, subject to approval of relocation by the PGCB. PREIT has been advised and acknowledges that it will be required to be licensed appropriately by the Board. To date, the principal economic terms, together with a fundamental understanding as to basic lease terms, have been agreed upon. Negotiations to reach a final lease agreement are continuing, subject to resolution of an objection to required zoning changes by the owner of the commercial condominium units located on floors 7 thru 13 of the Strawbridge's building, as discussed more fully in Paragraph 27B, below.

B. CITY APPROVALS

25. Foxwoods Casino Philadelphia will not apply to the PGCB for relocation of the physical location of its licensed facility unless it has adequate assurances from the City that all approvals necessary to permit construction at the relocated site would be granted.

26. As a showing of good faith, immediately following the identification of the Gallery II site, the City proposed two ordinances: Bill No. 080742 which enlarged the Commercial Entertainment District zone where casinos can be located to the area bounded by 6th, Broad, Chestnut and Arch Streets (an area much larger than, and within which, the Gallery Complex is located); and Bill No. 080741 zoning the Gallery II site for a casino use. These two ordinances were introduced on October 16, 2008 and the ordinances were approved by City Council and signed by the Mayor in one month's time. This was done on an expedited basis and demonstrated that the City was sincere in its motives to move the Foxwoods Casino Philadelphia project forward if this Board, in its discretion, permitted relocation.

27. Similarly, with respect to the 801 Market Street site, the City introduced two Ordinances on April 16, 2009:

A. Bill No. 090294 will, among other things, amend Section 14-403 of the Philadelphia Code so that CED zoning will be deemed approved upon approval of a plan of development by the Philadelphia City Planning Commission thereby removing the third step in the original CED process described in Paragraph 5 above. Thus, City Council is not longer required to act a second time after Planning Commission approval to issue CED zoning. The effect of this amendment will be to expedite approval of zoning at the 801 Market Street Site. This Bill was heard by the City Council Committee on Rules on May 7, 2009, and acted upon favorably. It was presented for first reading by City Council on May 14, 2009 second reading on May 21, 2009, at which time it was approved. The Mayor has 14 days within which to sign or veto the bill. It is anticipated that the Mayor will sign the Bill immediately.

B. Bill No. 090295 will rezone the Gallery II Site to the zoning designation that existed prior to the adoption of the ordinances referred to in Paragraph 26 and will grant CED zoning for 801 Market Street. This Bill was heard by the City Council Committee on Rules on May 7, 2009, but was not acted upon due to an objection raised by Gramercy, the owner of the commercial condominium units located on floors 7 thru 13 of the Strawbridge's building. Accordingly, the City Council Committee on Rules took no action on the Bill until its next meeting. This was the first time Foxwoods Casino Philadelphia was given any

indication that Gramercy objected to the rezoning of 801 Market Street. The Bill was acted upon favorably by the Rules Committee on May 13, 2009 with a statement that City Council hoped the zoning objection by Gramercy would be resolved before adoption of the Bill. The Bill was presented for first reading by City Council on May 14, 2009 and for second reading on May 21, 2009, but was not acted upon as the Gramercy issue had not yet been resolved.

C. PENNSYLVANIA GAMING CONTROL BOARD APPROVAL

28. Foxwoods Casino Philadelphia made it clear, from the inception of discussions with the City and Commonwealth regarding relocation in August, 2008, that the most important determinative factor regarding relocation is approval by the PGCB.

29. The Legislature, when enacting the Gaming Act, anticipated that good reasons may arise that would support a slot machine licensee's request to move a licensed facility from one location to another.

30. The Gaming Act, 4 Pa.C.S. § 1329, provides that a slot machine licensee may petition the Board to permit the relocation of a licensed facility upon a showing of good cause.

31. Foxwoods Casino Philadelphia intends to petition this Board to relocate the physical location of its licensed facility to the 801 Market Street Site for good cause shown pursuant to section 1329 of the Gaming Act, 4 Pa.C.S. § 1329, as soon as it is assured that all material impediments to construction have been reasonably addressed.

32. In addition to meeting the good cause requirement of the Gaming Act, 4 Pa.C.S. § 1329, the aforesaid history of delays, and the Herculean efforts exerted by this licensee to develop the Columbus Boulevard Site, combined with the potential benefits of relocation of the

Foxwoods Casino Philadelphia to 801 Market Street, satisfy the good cause required in order to extend the time for a licensee to operate a minimum of 1500 slot machines pursuant to 4 Pa.C.S. § 1210 (a).

**FOXWOODS CASINO PHILADELPHIA HAS PRESERVED ITS RIGHTS TO
DEVELOP A LICENSED FACILITY AT ITS BOARD-APPROVED
COLUMBUS BOULEVARD SITE.**

33. Foxwoods Casino Philadelphia has been subjected to enormous delays, not of its own doing. In response, it has acted swiftly and forcefully to protect its Board-approved location, and its right to develop a first class gaming facility in the City of Philadelphia. Notwithstanding its reasonable efforts to evaluate and assess the viability of moving its licensed facility to first the Gallery, and currently the 801 Market Street site, Foxwoods Casino Philadelphia has not relinquished any rights that it has to develop its licensed facility at the Columbus Boulevard Site.

34. In the event that the relocation of its licensed facility cannot be accomplished, either for business reasons or this Board's determination, Foxwoods Casino Philadelphia remains committed to proceed with development of its licensed facility at the Columbus Boulevard Site.

**GOOD CAUSE EXISTS TO PERMIT FOXWOODS CASINO PHILADELPHIA
TO EXTEND THE TIME TO OPERATE 1500 SLOT MACHINES**

35. During the highly tumultuous period since the Board's licensing decision, many substantial changes have occurred to negatively impact the development of Foxwoods Casino Philadelphia at the Columbus Boulevard Site. While preserving all its rights to develop on its currently Board-approved site, Foxwoods has reassessed its project in its entirety, and has concluded that relocating its licensed facility to 801 Market Street would enhance its ability to

bring a first-class gaming facility to the City of Philadelphia, thereby best serving the key legislative objectives of expediting the generation of substantial tax revenue and economic development.

36. Foxwoods Casino Philadelphia will demonstrate, with appropriate studies, data and evidence, that the relocation of its licensed facility to 801 Market Street is the most reasonable and appropriate manner to expeditiously accomplish the goals of the Gaming Act.

37. The Gaming Act, 4 Pa.C.S. § 1210 (a), provides that slot machine licensees “shall be required to operate and make available to play a minimum of 1,500 machines at any one licensed facility within one year of the issuance by the board of a slot machine license unless otherwise extended by the board, upon application and for good cause shown, for an additional period not to exceed 24 months.”

38. Foxwoods Casino Philadelphia’s license was issued on May 29, 2008. Given the exceptional circumstances resulting in delay and the inability to develop the Columbus Boulevard Site, as well as the time delays required to evaluate the possibility of relocation to the Gallery Complex, as detailed above, Foxwoods Casino Philadelphia has been understandably prevented from meeting the required operation of 1,500 slot machines within one year of the issuance of its license, through no fault of its own.

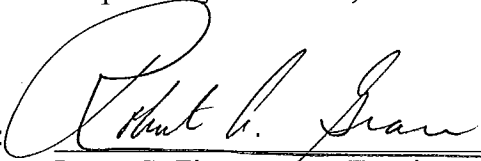
39. The extraordinary events that have transpired in the two and one half years since the Board awarded a license to Foxwoods Casino Philadelphia, provide ample good cause for the Board to extend the requirement of this licensee to operate 1,500 slot machines for an additional 24 months as provided in the Gaming Act, 4 Pa.C.S. § 1210 (a).

CONCLUSION

WHEREFORE, Philadelphia Entertainment and Development Partners, L.P., d/b/a Foxwoods Casino Philadelphia respectfully requests that this Honorable Board issue an Order providing the following:

- (A) Granting Foxwoods Casino Philadelphia's Petition pursuant to 4 Pa.C.S. § 1210(a);
- (B) Requiring that Foxwoods Casino Philadelphia shall operate at least 1500 slot machines at its licensed facility no later than May 29, 2011; and
- (C) For such other relief as the Board deems appropriate.

Respectfully submitted,

By: 
Leroy S. Zimmerman, Esquire
Robert A. Graci, Esquire
Stephen D. Schrier, Esquire

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

Dated: May 22, 2009

EXHIBIT A

**COMMONWEALTH OF PENNSYLVANIA
GAMING CONTROL BOARD**

IN RE:	:	
	:	
APPLICATION OF HSP GAMING LP	:	DOCKET NO. 1356
	:	
APPLICATION OF KEYSTONE REDEVELOPMENT PARTNERS, LLC	:	DOCKET NO. 1364
	:	
APPLICATION OF PHILADELPHIA ENTERTAINMENT AND DEVELOPMENT PARTNERS, LP	:	DOCKET NO. 1367
	:	
APPLICATION OF PINNACLE ENTERTAINMENT, INC. AND PNK (PA), LLC	:	DOCKET NO. 1751
	:	
APPLICATION OF RIVERWALK CASINO, LP	:	DOCKET NO. 1362
	:	
Applications for Category 2 Slot Machine Licenses in Philadelphia, PA a City of the First Class	:	
	:	

ORDER

AND NOW this 1st day of February, 2007, based upon the full and careful consideration of the record evidence before it, the provisions of the Pennsylvania Race Horse Development and Gaming Act (“Act”) (4 Pa.C.S. §§ 1101 – 1904, as amended) and the Act’s accompanying regulations, the Pennsylvania Gaming Control Board (PGCB) issues the following:

IT IS ORDERED THAT, the applications for licensure as Category 2 licensees in the City of Philadelphia of **HSP Gaming, LP** and **Philadelphia Entertainment & Development Partners, LP**, are **GRANTED** and the licenses are approved for the reasons set forth in the Gaming Control Board’s Adjudication of the Applications for Category 2 Slot Machine Licenses

in Philadelphia, PA, a City of the First Class, issued this date, and subject to satisfaction of the following conditions prior to the issuance of the Category 2 licenses:

1. The expiration of the thirty (30) day appeal period permitted by the Pennsylvania Rules of Appellate Procedure;

2. The payment of any outstanding fees, other than the \$50 million licensing fee, as determined by the PGCB pursuant to 4 Pa.C.S. § 1208;

3. The agreement to the Statement of Conditions of licensure to be imposed and issued by the Gaming Control Board, as evidenced by the signing of the agreements by HSP Gaming, LP's and Philadelphia Entertainment & Developments Partners, LP's executive officers or designees within five business days of the receipt of the Statement of Conditions from the PGCB; and

4. The payment of the one time \$50,000,000 slot machine license fee required pursuant to 4 Pa.C.S. § 1209, made by the latter of four months from the date of this Order or ten (10) calendar days following the conclusions of any appeals to the grant of this license pursuant to 4 Pa.C.S. § 1204 (if any), and no less than ten (10) business days prior to the beginning of the test period necessary to commence slot machine operations under 58 Pa. Code § 467.2(a)(9).

IT IS ORDERED THAT the applications for licensure as a Category 2 licensee in the City of Philadelphia of **Keystone Redevelopment Partners, LLC; PNK (PA), LLC** and **Riverwalk Casino, LP**, are **DENIED** for the reasons set forth in the Gaming Control Board's Adjudication of the Applications for Category 2 Slot Machine Licenses in Philadelphia, PA, a City of the First Class issued this date.

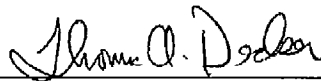
IT IS FURTHER ORDERED THAT the PGCB delegates to a designated Board member, in consultation with the Executive Director, authorization to permit HSP Gaming, LP

and Philadelphia Entertainment & Development Partners, LP to commence a test period pursuant to 58 Pa. Code § 467.2(a)(9), which test period shall commence on such date and time and shall continue for such duration as shall be determined by a designated Board member, in consultation with the Executive Director. A designated Board member, in consultation with the Executive Director, shall be authorized to establish, terminate, restrict, limit, extend or otherwise modify the test period or the hours thereof. The authority delegated shall include the right to order HSP Gaming, LP and Philadelphia Entertainment & Development Partners, LP to take whatever actions are necessary to preserve the policies of the Act, the regulations and any technical standards adopted by the PGCB and/or to assure an effective evaluation during the test period including permitting, limiting, restricting or prohibiting HSP Gaming, LP and Philadelphia Entertainment & Development Partners, LP from conducting slot operations.

IT IS FURTHER ORDERED THAT the PGCB delegates to a designated Board member, in consultation with the Executive Director, the ability to determine the successful completion of the test period and to authorize the effective date and time at which slot operations may commence pursuant to 58 Pa. Code § 467.2(b), such authorization to include a specific number of slot machines and gaming floor square footage. The authority delegated shall include the right to restrict, limit, condition or abrogate any authority to conduct slot operations and the authority to subsequently amend, modify or remove any restriction, limitation, condition or prohibition imposed pursuant to any authority granted hereunder;

that the delegation of authority to a designated Board member shall expire as determined by the PGCB; and

that in the event that a designated Board member cannot perform the delegated duties, the Chairman shall have the authority to select an alternate PGCB member to fulfill these duties.



Thomas A. Decker, Chairman
Pennsylvania Gaming Control Board

In accordance with 4 Pa.C.S. § 1204, the Supreme Court has been vested with exclusive appellate jurisdiction to consider appeals of any final order, determination or decision of the board involving the approval, issuance, denial or conditioning of all licensed entity applications. Pa.R.A.P. provides for any Petition for Review to a PGCB decision to be filed within thirty (30) days after the entry of the order.

EXHIBIT B

[J-69-2008]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, McCAFFERY, JJ.

PHILADELPHIA ENTERTAINMENT AND	:	No. 1 EM 2008
DEVELOPMENT PARTNERS L.P. D/B/A	:	
FOXWOODS CASINO PHILA,	:	Verified Petition for Review and
	:	Application for Summary Relief and
Petitioner	:	Expedited Briefing Schedule
	:	
	:	
v.	:	SUBMITTED: March 14, 2008
	:	
	:	
CITY COUNCIL FOR THE CITY OF	:	
PHILADELPHIA AND THE CITY OF	:	
PHILADELPHIA,	:	
	:	
Respondents	:	

OPINION

MR. CHIEF JUSTICE CASTILLE

DECIDED: April 2, 2008

Before us today is a Verified Petition for Review and an Application for Summary Relief and Expedited Briefing Schedule filed by Philadelphia Entertainment and Development Partners, L.P. ("PEDP"). PEDP seeks to compel City Council for the City of Philadelphia and the City to comply with their statutory duties to implement the December 20, 2006 decision of the Pennsylvania Gaming Control Board awarding one of two Category 2 slot machine licenses in the City to PEDP pursuant to the Pennsylvania Race

Horse Development and Gaming Act ("Gaming Act" or "Act"), 4 Pa.C.S. § 1101 *et seq.*¹ We recently granted this same relief to HSP Gaming, L.P. ("HSP"), the other successful applicant for a Philadelphia Category 2 slot machine license. See HSP Gaming, L.P. v. City Council, 939 A.2d 273 (Pa. 2007).

The Gaming Board has exclusive authority to determine the location of licensed slot machine facilities in, *inter alia*, the City of Philadelphia. 4 Pa.C.S. § 1304(b)(1). In anticipation of the Board's exercise of that authority, City Council had enacted Ordinance No. 051028-AA ("the Ordinance") on February 23, 2006, adding Chapter 14-400 to the provisions of the Philadelphia Code that govern zoning and planning. The Ordinance established a new zoning classification called Commercial Entertainment Districts ("CEDs"). As we noted in HSP, the Ordinance "was 'intended to encourage the orderly development of major entertainment facilities and certain other uses in accordance with an approved plan of development,' without interfering with the Gaming Board's approved locations of the casinos." HSP, 939 A.2d at 275 (quoting § 14-401 of the Ordinance, Phila. Code § 14-401(1)). Accordingly, Section 14-405 of the Ordinance provides, in pertinent part, as follows:

§ 14-405. Use Regulations.

* * * *

(2) Nothing in this Chapter shall limit the right of the Pennsylvania Gaming Control Board under the [Gaming] Act to identify the property on which it will permit a Category 2 licensed gaming facility within the City.

¹ The Gaming Act established three distinct categories of slot machine licenses for which interested parties may apply. 4 Pa.C.S. § 1301. Under Section 1304 of the Act, the Board is directed to locate two Category 2-licensed facilities within a city of the first class (*i.e.*, Philadelphia). 4 Pa.C.S. § 1304(b)(1). Upon issuance of a license by the Board "in its discretion," a successful applicant may place and operate slot machines at its licensed facility once constructed. 4 Pa.C.S. § 1301.

(3) Nothing in this Chapter shall be construed to prohibit any use that is exclusively regulated and permitted by the Commonwealth under the [Gaming] Act.

Phila. Code § 14-405.

In HSP, we reviewed the procedures set forth by the Ordinance that must be followed before construction of a gaming facility may begin:

[First,] a plan of development is submitted to the Philadelphia Planning Commission for approval. After a plan of development is approved by the Planning Commission, it is submitted to Council. Council is to take two separate actions to designate a site for casino development: (1) designate by ordinance the site as a Commercial Entertainment District, and (2) review and approve a Plan of Development that has been submitted by the Planning Commission. Phila. Code § 14-403(1), (2). Once the CED designation becomes effective, the underlying zoning classifications for all lots within the district are superseded.

HSP, 939 A.2d at 275. The Ordinance requires that the plan of development include comprehensive information about the CED district.²

² In particular, the plan of development must include the following information and details:

- (a) The extent, boundaries, and area of the district to include lot area and width dimensions;
- (b) The proposed maximum gross floor area;
- (c) The dimensions and heights of the proposed structures or existing structures to be retained as well as the use or uses intended for such structure;
- (d) The occupied area, gross floor area, and height of all buildings within the district;
- (e) The size and location of all parking areas; the size and location of all driveways leading thereto; and the size and location of all other private drives, ways or streets intended to be used by automobile traffic;

(continued...)

On December 20, 2006, the Gaming Board awarded PEDP a Category 2 license to place and operate slot machines at a facility to be known as Foxwoods Casino and to be located on property that PEDP owns at 1449 South Christopher Columbus Boulevard in Philadelphia.³ The Board's order and adjudication followed on February 1, 2007. Pursuant to Section 14-403 of the Ordinance, PEDP submitted its plan of development to the City

(...continued)

- (f) The size and location of all off-street loading facilities;
- (g) The size and location of any signs;
- (h) A landscaping plan;
- (i) A transportation management plan that details internal circulation systems, external access points, pedestrian flows, including to and from parking facilities, and estimates of levels of service on sidewalks and internal roads. The plan shall include a traffic and parking study prepared by a licensed traffic engineer, assessing the impacts of new traffic generated by the proposal on roadway and intersection capacity, public transit and other bus operations, and pedestrian and bicycle circulation and safety;
- (j) A parking management plan describing the proposed policy on and resources for parking for patrons, employees, and managers, and anticipated traffic and parking management resources;
- (k) Any recommendations on intersection improvements, new roadway construction, or widening of existing roadways, if required, and any traffic buffers to protect residential areas, including the manner of funding such improvements by the developer;
- (l) Any other information which the Commission may deem necessary, to include sufficient guarantees in the form of restrictive covenants running with the land or letters of intent for any lands to be dedicated for public use.

Phila. Code § 14-403(3).

³ The property extends eastward to the Delaware River and is bounded by Reed Street to the north and Tasker Street to the south.

Planning Commission on April 17, 2007.⁴ On May 30, 2007, after PEDP spent months working with the City to craft a plan of development that addressed issues of concern to the City and to residents living near the Foxwoods site, then-Mayor John Street submitted three CED bills related to PEDP's plan of development ("the CED Legislation"). The CED Legislation would: (1) designate the Foxwoods site as a CED; (2) approve PEDP's plan of development; and (3) revise two rights-of-way (vacate one right-of-way for water main purposes and widen another for drainage, water main, and gas main purposes). The CED Legislation was read before an open session of City Council, but no member was willing to sponsor it. On August 21, 2007, the Planning Commission approved PEDP's plan of development subject to the following two provisos:

1. Foxwoods may only apply for building permits for development beyond what is labeled as Phase I in the Plan of Development if, in addition to all other necessary approvals from relevant governmental bodies, Foxwoods has completed a transportation plan that, in the City's determination after receiving the advice of the City Planning Commission, adequately addresses and funds the needs of an expanded casino complex.
2. The City Solicitor certifies that an agreement has been reached between the City and Foxwoods that adequately and appropriately addresses the issues raised by the Philadelphia Gaming Advisory Task Force, including, but not limited to, a commitment by Foxwoods to support a Special Services District.

Exhibit F to Petition for Review at 3. On November 28, 2007, then-City Solicitor Romulo L. Diaz, Jr., certified that the City and PEDP had reached the agreement referenced in the

⁴ In the interim, on March 29, 2007, City Council enacted an ordinance, over the veto of then-Mayor John Street, submitting a ballot referendum that would have prohibited Council from taking certain actions that would have permitted gaming within designated areas of the City. Upon the Board's emergency petition, this Court permanently enjoined submission of the ballot question. See Pa. Gaming Control Bd. v. City Council, 928 A.2d 1255 (Pa. 2007).

second proviso to the Planning Commission's approval of PEDP's plan of development ("Proviso Two Agreement").

Notwithstanding the Planning Commission's approval of PEDP's plan of development in August 2007, none of the three bills composing the CED Legislation was introduced in City Council by January 4, 2008, when PEDP filed this Verified Petition for Review against City Council and the City, along with an Application for Summary Relief and Expedited Briefing Schedule.

In the two filings *sub judice*, PEDP requests that we issue an order similar to that entered in HSP Gaming: (1) declaring that the site approved by the Gaming Board for Foxwoods Casino is zoned as a CED pursuant to Section 14-400 of the Ordinance; (2) declaring that, pursuant to Section 14-400, PEDP's plan of development that was approved by the Planning Commission is deemed finally approved; (3) declaring that all revisions, relocations, strikes and vacations of easements and public rights-of-way identified in the approved plan of development are authorized; (4) directing the City to take all actions necessary to implement the relief granted; and (5) retaining jurisdiction to address any further matters that should arise.

Also on January 4th, the City filed a response brief, stating that it believed that HSP mandates that PEDP's requested relief be granted, given that there is no material difference between where PEDP stands today and where HSP stood when this Court issued its decision in HSP. After the Honorable Michael Nutter assumed the Philadelphia Mayor's office on January 7th, the City filed, on January 25th, an "Application for Leave to Withdraw 1/4/2008 Response Brief and to File the City's Brief in Opposition to Application for Summary Relief and Petition for Review." In this filing, the City reverses itself and now claims that PEDP's case differs from HSP's because there are significant continuing developments in this matter, including "critical legislation" introduced into City Council on January 24, 2008. The City asserts that it is entitled to change its legal position from what

it deems to be a prior incorrect legal interpretation, that the issues raised by PEDP should first be litigated in common pleas court, and that expedited review is unnecessary.⁵

A Brief in Opposition to PEDP's Petition for Review and its Application for Summary Relief and Briefing Schedule was filed by the City on January 25, 2008. In its Brief, the City notes that, the day before, on January 24th, two bills that are prerequisites to issuance of a CED zoning permit to PEDP were finally introduced: one that would rezone the Foxwoods site as a CED and a second that would approve PEDP's plan of development. Notably, as for the relief requested by PEDP, the City agrees that the relief is "virtually identical" to the relief that this Court ordered in HSP. City's Brief at 14 (filed Jan. 25, 2008). The City maintains, however, that the facts *sub judice* are distinguishable from those before us in HSP.

On February 21st, PEDP filed an Application for Leave to File Reply Brief in support of its January 4th application for summary relief. City Council filed a brief opposing PEDP's request for leave to reply on March 4th. On March 14th, this Court entered a *per curiam* order submitting this matter for decision on the existing briefs and taking the various ancillary matters under advisement.

In its petition for review, PEDP invokes this Court's appellate jurisdiction pursuant to Section 1506 of the Gaming Act, which provides as follows:

⁵ On February 5th, PEDP filed an answer opposing the City's application for leave to withdraw its initial brief; on February 13th, the City filed an Application for Leave to File Reply Memorandum in support of its January 25th application for leave to withdraw; and on February 21st, PEDP filed a brief opposing the City's request for leave to reply.

We hereby deny the City's Application to Withdraw its initial brief, but we will also accept the City's subsequent "Brief in Opposition." All succeeding applications respecting the City's litigation position are denied. Accordingly, we have considered both substantive filings by the City.

§ 1506. Licensed facility zoning and land use appeals

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.

In HSP, this Court held that City Council's refusal to act with respect to HSP's plan of development constituted a "final order, determination or decision" within the meaning of Section 1506. HSP, 939 A.2d at 280-81. In so holding, we reasoned that

[i]t would be an absurd result to conclude that an appeal from a political subdivision's final decision to approve or reject a plan of development may be taken immediately to this Court under § 1506, but that no such appeal may be taken if the political subdivision simply refused to act, thereby halting implementation of the Gaming Board's decision to locate a licensed facility. See 1 Pa.C.S. § 1922(1). Indeed, Council's interpretation would violate the Statutory Construction Act by requiring us to disregard the General Assembly's express instruction in § 1506 that it aims "to facilitate timely implementation of casino gaming."

Id. at 281.

Instantly, PEDP argues that City Council's failure to enact the CED Legislation respecting its planned casino likewise constitutes a "final order, determination or decision" for purposes of Section 1506. Therefore, PEDP contends, this Court's holding in HSP that Council's inaction triggered our Section 1506 jurisdiction is controlling here.

In response, the City, as represented by the new mayoral administration, attempts to distinguish HSP, emphasizing that, in that case, "there was no indication that the bills ever were going to move through Council, or that Council was giving any serious consideration

to the bills.” City’s Brief at 20 (filed Jan. 25, 2008). The City emphasizes that, in HSP, the legislation had been laying dormant for more than six months by the time this Court exercised our Section 1506 jurisdiction. In contrast, here, the City asserts, PEDP’s plan of development did not even become ripe for consideration by Council until November 28, 2007 at the earliest, when the City Solicitor certified that the parties had reached the Proviso Two Agreement, and only a month before the end of Council’s 2004-07 term. Moreover, the City notes, two CED bills were introduced on January 24, 2008 at the first business meeting of the new term. City Council does not challenge this Court’s Section 1506 jurisdiction in its Brief.

According to the City’s own calculation, it is now over seven months since the Planning Commission’s approval of PEDP’s plan of development, and ten months since Mayor Street submitted the CED Legislation. It is also four months since the City Solicitor’s certification. Yet no CED legislation has been enacted. While the City emphasizes that CED legislation has now been introduced in City Council, the same was true in HSP. As the pleadings in this case do not inform us that any CED legislation relating to PEDP’s approved plan of development has actually been enacted, we see no material difference between the circumstances before this Court in HSP and those presented today. Accordingly, we find that PEDP’s petition for review implicates our exclusive appellate jurisdiction under Section 1506 of the Gaming Act.

In seeking its requested relief, PEDP notes that the Gaming Board has exclusive authority to determine the location of licensed slot machine facilities in Philadelphia. PEDP alleges that City Council has endeavored to impede the enactment of CED legislation in direct contravention of the Gaming Board’s licensing decision and this Court’s decision in HSP. As a result, PEDP contends, PEDP has been unable to secure the necessary zoning and use registration, building and other permits necessary to commence construction. As one of many examples of what it calls City Council’s “obstructionist behavior,” PEDP cites a

press release issued by Councilman Frank DiCicco on December 20, 2006, the date on which the Board awarded slot machine licenses to PEDP and to HSP. In the press release, Councilman DiCicco, whose district encompasses the Foxwoods site, announced his intention to appeal the decision, stating, *inter alia*, "I think it's a horrible decision. I will do everything I can to delay construction of the facilities until some of these serious concerns are addressed." Exhibit L to Petition for Review. PEDP further notes that, on January 23, 2007, Councilman DiCicco introduced a series of eight proposed ordinances "intended expressly to delay, limit or exclude gaming from the sites selected by the Gaming Board." Petition for Review at ¶ 48. In a letter to counsel for PEDP dated January 25, 2007, the Councilman himself characterized the ordinances he proposed as a "legislative package that challenges the State's authority to dictate the City's economic development." Exhibit M to Petition for Review. PEDP also cites an August 9, 2007 letter to Governor Edward G. Rendell, in which the Councilman requested that the Governor consider other suggested sites for gaming facilities and pledged that "I will make my best effort to hold the necessary legislation that would permit casino construction until you complete a full review of the matter." Exhibit T to Petition for Review. Similarly, PEDP refers to an October 18, 2007 letter to then-Mayor Street in which the Councilman warned that "[u]ntil this body receives adequate answers from the City, the State and the operators, I can not and will not support legislation that permits construction of these projects." Exhibit X to Petition for Review.

PEDP further explains how it is that a single councilman could exert controlling influence over legislation affecting his district. PEDP notes that City Council's long delay in considering CED legislation is attributable to Council's adherence to the well-established local tradition of "councilmanic prerogative." According to PEDP, by following councilmanic prerogative, City Council has simply deferred to the opposition of Councilman DiCicco because the Foxwoods site is located in his councilmanic district. PEDP contends that City Council began to affirmatively demonstrate its deference to Councilman DiCicco's

opposition to the Gaming Board's decision, when, on March 15, 2007, it unanimously approved the anti-casino ballot referendum that this Court invalidated in Pennsylvania Gaming Control Board v. City Council, 928 A.2d 1255 (Pa. 2007), and, on March 29th, when Council re-enacted the ordinance over the veto of Mayor Street. As further evidence of the collective intransigence of City Council with respect to the Gaming Board's decision, PEDP cites a resolution Council enacted on April 19, 2007 purporting to rezone the Foxwoods site from C-3 Commercial to R-10A Residential and Council's overriding of the Mayor's veto on May 10, 2007.⁶

PEDP emphasizes that it has satisfied all preconditions to City Council's approval of the CED Legislation. PEDP notes that, on October 17, 2007, it paid the requisite \$50 million license fee required by the Gaming Act and that, on November 23, 2007, it reached the Proviso Two Agreement with the City.

PEDP asserts that City Council's refusal to implement CED zoning has caused irreparable harm because it has prevented PEDP from obtaining the zoning and other permits necessary to commence construction and operation of the gaming facility, thereby curtailing the implementation of statewide tax relief to the citizens of the Commonwealth. PEDP further contends that the delay also has a significant impact on the City's five-year financial plan that includes approximately \$71 million in host fees attributable to licensed gaming operations and \$5 million annually in host fee payments for the Philadelphia School District.

In response, City Council reiterates the argument made by the City in challenging jurisdiction -- *i.e.*, that PEDP's plan of development did not become ripe for Council's

⁶ PEDP challenged the constitutionality of the rezoning ordinance in Philadelphia Entertainment and Development Partners, L.P. v. City of Philadelphia, 937 A.2d 385 (Pa. 2007), where this Court held that the challenge was not ripe for adjudication because the ordinance had not yet been applied so as to subvert the Board's decision and hinder PEDP's desired use of its licensed Foxwoods site.

consideration until November 28, 2007 at the earliest, when the City Solicitor certified that the parties had reached the Proviso Two Agreement, only a month before the end of Council's term. Council further asserts that it is not for this Court or PEDP to inquire into the motivations of City Council (even though we have done so in HSP). City Council argues that Councilman DiCicco's actions cannot be imputed to all of City Council, referring to Councilman Juan Ramos' eventual introduction of a CED ordinance in HSP as indicative of the independence of other Council members in the instant case (even though no similar action was taken by any Council member on behalf of PEDP by the time of its filing).

City Council also argues that the Planning Commission's approval of PEDP's plan of development would require the abandonment of a right-of-way for water main purposes. Citing Section 1505 of the Gaming Act, 4 Pa.C.S. § 1505 (prohibiting Commonwealth and political subdivisions thereof from exercising eminent domain for construction of licensed gaming facilities), City Council argues that the Gaming Act expressly forbids the City from abandoning a right-of-way, as required by PEDP's plan of development. This Court lacks the authority, in City Council's words, to exercise "what would effectively be the equivalent of the power of eminent domain." City Council's Verified Opposition to Application for Summary Relief and Expedited Briefing Schedule at 15.

For its part, the City, again as represented by the new mayoral administration, restates City Council's claim that PEDP's plan of development was not ripe for consideration until former City Solicitor Diaz's November 28, 2007 certification. The City asserts that PEDP grossly misrepresents the facts in suggesting that City Council has refused to take any action on PEDP's plan of development and that Council is "guilty of 'deliberate inaction' akin to that found in HSP." City's Brief in Opposition to Petitioner's Application for Summary Relief and Petition for Review at 33. Instead, the City submits, Council is "actively considering a package of CED legislation and has simply not been

afforded a reasonable opportunity to undertake meaningful review." Id. The City therefore implores this Court not to "impose a timeframe on this process." Id. at 34.

The City's current position on Council's past action (or inaction) stands in stark contrast to the position the City took on the same issue under the Street administration, which oversaw the prior year's development of PEDP's plan. See Phila. Entm't & Dev. Partners, L.P. v. City of Philadelphia, 937 A.2d 385 (Pa. 2007) ("Rezoning Case") (deeming PEDP's challenge to constitutionality of rezoning ordinance unripe because ordinance had not yet been applied so as to subject Gaming Board's decision and hinder PEDP's desired use of its licensed Foxwoods site). After this Court denied relief in the Rezoning Case, PEDP applied for reargument, citing the intervening decision in HSP, supra, and arguing that it was now identically situated to HSP such that identical relief was warranted. In its own brief, the City supported PEDP's request for relief on reargument. The City's contemporaneous view of Council's action was expressed as follows:

The City has no objection to the Court issuing an order materially similar to that issued in HSP. For the City to perform its role under the state-mandated regulatory scheme, it is unfortunately necessary that the Court direct and authorize the City to take the steps required to issue a CED zoning and use registration permit to Foxwoods, thereby allowing Foxwoods to build the casino the General Assembly and the Gaming Control Board authorized on the Property.

Foxwoods' situation has evolved since this suit was commenced in June so that there is now no material difference between where Foxwoods stands today and where SugarHouse Casino stood before the Court ruled in HSP. Foxwoods has worked with the City for much of 2007 to craft a development proposal that addresses issues identified by the City, neighbors, and by Foxwoods itself, eventually reaching the same place where SugarHouse was at the time of HSP. Foxwoods has developed a Plan of Development that the Planning Commission approved, the same status that applied to SugarHouse at the time of HSP. As was the case for SugarHouse, proposed legislation designating the Foxwoods CED District, approving the Plan of Development, and addressing related roadway and sewer issues has been developed and transmitted to City Council. As was the case for SugarHouse,

City Council has steadfastly refused to address the proposed legislation, in Foxwoods' case, even declining to introduce the proposed bills.

In short, Foxwoods has proceeded through all the City's processes and now finds itself stymied by the same deliberate City Council inaction that led to this Court's decision in HSP.

City's Brief re PEDP's Application for Reargument in Rezoning Case at 6-7 (filed Dec. 12, 2007). In its initial brief in the case *sub judice*, the City reiterated this same position nearly verbatim. See City's Brief at 5-6 (filed Jan. 4, 2008).

The City, via the new mayoral administration, further argues that this Court should dismiss PEDP's request for relief pursuant to the doctrine of *lis pendens* because the issues *sub judice* are already being litigated in the Court of Common Pleas. See Rezoning Case, supra (transferring to common pleas court PEDP's request for writ of mandamus directing City to issue C-3 or CED zoning and use registration permit). Citing Rule of Civil Procedure 1028(a)(6) (allowing preliminary objections to be filed on grounds of pendency of prior action or agreement for alternative dispute resolution), the City contends that the instant case should be dismissed because it is duplicative of the re-zoning case currently before the common pleas court "with respect to the current substantive basis of the suit, the parties, and the relief requested." City's Brief at 37 (filed Jan. 25, 2008).

The City also specifically opposes the ancillary relief requested by PEDP -- *i.e.* authorization of all revisions, relocations, strikes and vacations of easements and public rights-of-way identified in PEDP's plan of development. Specifically, the City asserts that the requested street strikes were not ordered by the Gaming Board as part of licensure and that, even if the Board had so ordered, this would constitute an unauthorized exercise of the power of eminent domain. Finally, in the event this Court deems PEDP's plan of development approved, the City urges us to limit such approval to PEDP's right to build and operate a casino, as opposed to additional amenities (*e.g.*, restaurants, bars, retail shops,

and a multi-purpose showroom) beyond the scope of the Gaming Board's February 1, 2007 order.

In its reply brief, PEDP refutes the City's argument that PEDP's plan of development did not become ripe for consideration until November 27, 2007. Because approval of a plan of development is the second step in Council's two-step procedure set forth by the Ordinance before construction of a gaming facility may begin, PEDP argues that the fact that Council has failed even to take the first step (*i.e.*, establishment of the Foxwoods site as a CED) proves that this argument is merely "a pretext invented solely for the purposes of this litigation." PEDP's Reply Brief at 13. As for City Council's argument that the Gaming Act expressly forbids the City from abandoning a right-of-way, as required by PEDP's plan of development, PEDP replies that Council is collaterally estopped from raising this issue because it already did so unsuccessfully in HSP. See HSP, 939 A.2d at 288 (deeming approved "all revisions, relocations, strikes and vacations of easements and public rights of way identified in the Plan of Development"). With respect to the City's reliance on the introduction of two CED bills on January 24, 2008, PEDP asserts that the bills are "larded with eight conditions . . . that can be satisfied only by further action by City Council at some unspecified date and in the exercise of apparently unfettered discretion." PEDP's Reply Brief at 19 n.9.

With respect to the delay that PEDP has experienced in seeking implementation of the Gaming Board's decision awarding it a Category 2 license, we turn to our analysis in HSP concerning City Council's alleged obstruction of the same decision:

The comprehensive information required to be submitted to the City of Philadelphia's Planning Commission by the CED Ordinance demonstrates the rigorous demands of local zoning provisions with respect to the development of gaming sites. After the Planning Commission approved HSP's Plan of Development and the Plan was submitted to City Council for

its consideration, neither PAGE^{7]} nor the Philadelphia Code permitted City Council to refuse consideration of the submission for the purpose of delaying and obstructing implementation of the Gaming Board's Adjudication and Order regarding the situs of the gaming facility.

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

As recognized by the City of Philadelphia, the City ultimately has no discretion to preclude gaming. We conclude that the undisputed documentation establishes the deliberate inaction by Council for the purposes of delay. This deliberate inaction occurred after the submission of HSP's Plan of Development that was approved by the Planning Commission.

HSP, 939 A.2d at 287.

In our view, this case is controlled by our recent decision in HSP, and PEDP is entitled to the same relief that issued in that case. The key date for measuring Council's action (or inaction) is August 21, 2007, the day the Planning Commission approved PEDP's plan of development.⁸ At that point, the City, which had been working with PEDP in order to facilitate the state mandate on gaming and implementation of the Board's licensing decision, had already prepared and presented to Council legislation that would have

⁷ Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth, 877 A.2d 383 (Pa. 2005).

⁸ While both City Council and the City emphasize that the Planning Commission's approval was subject to provisos, we note that the same was true in HSP. See Exhibit AA to HSP's Petition for Review in HSP, supra, at 11.

facilitated the permitting process. Council, however, took no action in response to the Mayor's action or the Planning Commission's decision. Moreover, with respect to the reasons for Council's inaction, the same facts and background cited in HSP appertains here: there is ample evidence that the inaction was a deliberate attempt by Council to simply delay the construction of the casinos.

Further, this record also supports PEDP's argument that the fact that the City and PEDP did not reach the Proviso Two Agreement until November 2007 has been offered as but a *post hoc* rationalization on the part of City Council to explain its inaction. In August 2007, the same month that PEDP's plan of development was approved by the Planning Commission, Councilman DiCicco announced that he would prevent enactment of the CED Legislation until the Governor "complete[d] a full review." Having failed to secure such review, on October 18, 2007, the Councilman promised the former Mayor continued obstruction until Council "receive[d] adequate answers" from the City, the Commonwealth, and PEDP. Notably, the Councilman's letter to the Mayor, dated nearly two months after the Planning Commission had approved PEDP's plan of development, makes no mention of the allegedly awaited certification from the former City Solicitor that the Proviso Two Agreement had been reached. See Exhibit X to Petition for Review. Worse than merely waiting for news that the agreement had been reached, the Councilman continued to actively impede the Gaming Board's decision to locate the Foxwoods Casino in his councilmanic district. It was this same Councilman who was the source of much of the "deliberate inaction . . . for the purposes of delay" of which we found "undisputed documentation" in HSP. See, e.g., HSP, 939 A.2d at 282-83 (citing Councilman DiCicco's Dec. 20, 2006 press release); id. at 283 (quoting Councilman DiCicco's Aug. 9, 2007 letter to Governor Rendell).

As for Councilman DiCicco's colleagues, other than the belated introduction, on January 24, 2008, of two CED bills related to PEDP's plan of development **after the**

instant petition for review was filed, neither City Council nor the City cites any action taken by any other Council member in compliance with their statutory duties to implement the December 20, 2006 decision of the Gaming Board. Nor does Council explain why CED legislation could not have been considered and enacted at any time after August 21, 2007, subject to the same two provisos set forth by the Planning Commission when it approved PEDP's plan of development. City Council could have introduced, considered, and enacted legislation establishing the Foxwoods site as a CED even if it could not, in good conscience, approve PEDP's plan of development until the Proviso Two Agreement was reached. Indeed, as the City stated in its initial brief

City Council . . . mistakenly focuse[s] on th[e City Solicitor's] certification as an excuse for its illegal inaction. Under the Planning Commission's proviso, the City Solicitor's verification was a condition precedent to issuance of a zoning permit, not consideration by City Council, which under the Commercial Entertainment District Ordinance was free to separately consider the Plan of Development and accept or reject the Planning Commission's provisos.

City's Brief at 4 n.4 (filed Jan. 4, 2008) (citation omitted).

In short, the record *sub judice* simply does not allow us to conclude that City Council had acted to implement the December 20, 2006 decision of the Gaming Board awarding a Category 2 license to PEDP at the time PEDP sought the relief now at issue. We recognize there is a new executive in Philadelphia who has a different view than the former mayor. But the future cannot undo the past. Here, as in HSP, we conclude that Council's failure to act, for purposes of delay, was beyond its power, and entitles PEDP to the same relief.⁹ Accordingly, we will grant the following relief requested by PEDP:

⁹ In light of our conclusion that Council's inaction requires the same relief as in HSP, we need not address the additional arguments forward by Council and the City.

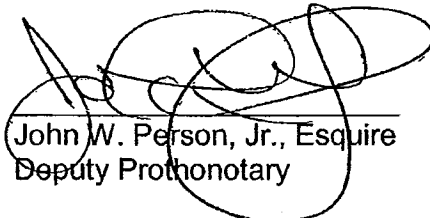
- (1) the site approved by the Pennsylvania Gaming Control Board for the Foxwoods Casino Philadelphia is zoned as a Commercial Entertainment District pursuant to Chapter 14-400 of the Philadelphia Code as in existence on November 1, 2007;
- (2) pursuant to Chapter 14-400, Philadelphia Entertainment and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

PEDP's February 21, 2008 Application for Leave to File Reply Brief is hereby granted.

Messrs. Justice Eakin and Baer, Madame Justice Todd and Mr. Justice McCaffrey join the opinion.

Mr. Justice Saylor files a concurring opinion.

Judgment entered
Dated: April 2, 2008



John W. Person, Jr., Esquire
Deputy Prothonotary

[J-69-2008]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

PHILADELPHIA ENTERTAINMENT AND DEVELOPMENT PARTNERS, L.P. D/B/A FOXWOODS CASINO PHILADELPHIA,	:	No. 1 EM 2008
	:	Verified Petition for Review and
Petitioner	:	Application for Summary Relief and
	:	Expedited Briefing Schedule
	:	
v.	:	
	:	
CITY COUNCIL FOR THE CITY OF PHILADELPHIA AND THE CITY OF PHILADELPHIA,	:	
	:	
Respondents	:	SUBMITTED: March 17, 2008

CONCURRING OPINION

MR. JUSTICE SAYLOR

I agree with the majority that HSP Gaming L.P. v. City Council, ___ Pa. ___, 939 A.2d 273 (2007), is controlling and, for that reason, Petitioners should receive treatment similar to that afforded to HSP. Absent such controlling precedent, I would favor the appointment of a special master to preside over the development of an evidentiary record and to offer recommended findings and conclusions, as I believe that such a record is conventionally necessary to address core, disputed factual matters, such as those regarding City Council's intentions and conduct. Accord HSP, ___ Pa. at ___, 939 A.2d at 288 (Saylor, J., dissenting).

EXHIBIT C

**IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT**

PHILADELPHIA ENTERTAINMENT AND	:	No. 1 EM 2008
DEVELOPMENT PARTNERS, L.P., d/b/a/	:	
FOXWOODS CASINO PHILADELPHIA,	:	
	:	Application for Relief Seeking
Applicant/Petitioner	:	Enforcement of the Order of the Supreme
	:	Court of Pennsylvania Dated April 2, 2008,
	:	Pursuant to Rules 123 and 2591(B) of the
v.	:	Pennsylvania Rules of Appellate
	:	Procedure
	:	
CITY COUNCIL FOR THE CITY OF	:	
PHILADELPHIA AND THE CITY OF	:	
PHILADELPHIA,	:	
	:	
Respondents	:	

ORDER

PER CURIAM

AND NOW, this 14th day of October, 2008, it is hereby ordered as follows:

(1) the City of Philadelphia is directed to issue the Zoning/Use Registration Permit that PEDP requested;

(2) pursuant to Section 1506 of the Pennsylvania Race Horse Development and Gaming Act, 4 Pa.C.S. §1506, the Honorable Joseph F. McCloskey, Senior Judge of the Commonwealth Court, is hereby appointed as Master in the above-captioned matter. The Master shall have full authority to consider and resolve such further disputes as may arise regarding the issuance of permits, approvals, licenses or other authorizations by the City of

Philadelphia for the construction, use and occupancy of PEDP's licensed gaming facility; and

(3) The Master shall address any such disputes, including requests for counsel fees or sanctions, in an expeditious manner and shall file a report with this Court setting forth the status and a summary of the proceedings within ten (10) days after completion of such proceedings.

Jurisdiction is retained.

Madame Justice Greenspan did not participate in the consideration or decision of this matter.

TRUE COPY FROM RECORD

Attest

OCT 14 2008


Patricia Johnson, Chief Clerk
Supreme Court of Pennsylvania,
Eastern District

EXHIBIT D

Foxwoods Casino Philadelphia Delay Timeline

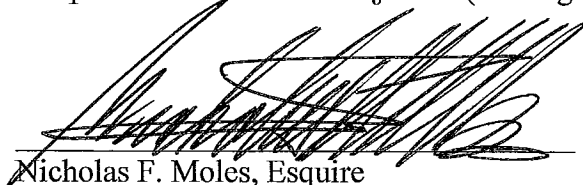
Date	
12/28/05	Foxwoods filed an application with the Gaming Board for a Category 2 slot machine license to operate a gaming facility to be located at its property in Philadelphia.
03/09/06	City Council enacted Chapter 14-400 of the Philadelphia Zoning and Planning Code (the "Zoning Code") to establish a new zoning classification, the Commercial Entertainment District ("CED").
09/14/06	City Council adapted a resolution to authorize a lawsuit to challenge the Gaming Act in the event that it preempted City Council's zoning authority.
12/20/06	The Gaming Board voted to approve Foxwoods' application for a Category 2 slot machine license.
01/23/07	City Council introduced a package of eight ordinances intended expressly to delay, limit or exclude gaming from the sites selected by the Gaming Board.
02/01/07	Gaming Board's Order and Adjudication granting licenses to Foxwoods and Sugarhouse.
03/01/07	Foxwoods had originally planned to being construction.
03/02/07	Riverwalk Casino, L.P. v. Pennsylvania Gaming Control Board, Respondent; Philadelphia Entertainment and Development Partners, LP, Intervenor, HSP Gaming, LP, Intervenor, No. 27 MM 2007 was filed.
03/02/07	Neighbors Allied for the Best Riverfront, et al. v. Pennsylvania Gaming Control Board, Respondent, HSP Gaming, LP, Intervenor, Philadelphia Entertainment and Development Partners, LP, Intervenor, No. 38 EM 2007 was filed.
03/02/07	City Council for the City of Philadelphia v. The Pennsylvania Gaming Control Board, Respondent, HSP Gaming, LP, Intervenor, Philadelphia Entertainment and Development Partners, LP, No. 39 EM 2007 was filed.
03/02/07	Society Hill Civic Ass'n, et al. v. Pennsylvania Gaming Control Board, Respondent, HSP Gaming, LP, Intervenor, Philadelphia Entertainment and Development Partners, LP, Intervenor, No. 40 EM 2007 was filed.
03/05/07	Jethro Heiko, et al. v. Pennsylvania Gaming Control Board, Respondent, HSP Gaming, LP, Intervenor, Philadelphia Entertainment and Development Partners, LP, Intervenor, No. 41, EM 2007 was filed.
03/06/07	A petition and ballot question to create a 1500 foot buffer zone were dismissed by the Court of Common Pleas of Philadelphia County in Albert v. Rafferty, February Term 2007, No. 3291 (Clark, J., sitting by designation).
03/15/07	City Council approved Bill No. 070112 and Resolution No. 070113 regarding the 1500 foot buffer, by unanimous votes. The Resolution provided for the submission to the City electorate on the May 2007 primary ballot of an amendment to the Philadelphia Home Rule Charter.
03/29/07	Bill No. 070112 (regarding creation of a 1500 foot buffer zone) was transmitted to the Mayor for his consideration. Mayor John F. Street vetoed the proposed ordinance.
03/29/07	City Council reconsidered Bill No. 070112 and voted to override Mayor Street's veto.
04/05/07	The Gaming Board filed an emergency petition for review in the State Supreme Court challenging the validity of the Anti-Casino Referendum Ordinance. Foxwoods intervened in the proceeding.
04/12/07	City Council introduced Bill No. 070264, which sought to expand the City's North Delaware Avenue Special District Controls section ("Delaware Avenue Controls") of the Zoning Code south to encompass the Foxwoods Property which would prohibit a casino.
04/13/07	The Supreme Court issued an order preliminarily enjoining placement of City Council's ordinance 07012 (regarding creation of a 1500 foot buffer zone) on the May 15, 2007 ballot.

04/18/07	Foxwoods filed its application for a zoning and use registration permit to permit construction on its site under the existing C-3 Commercial zoning.
04/19/07	City Council passed a resolution to rezone the Foxwoods Property from C-3 Commercial to R-10A Residential.
05/03/07	Mayor Street vetoed and returned the R-10A rezoning legislation to City Council for its reconsideration.
05/10/07	City Council proceeded to override the Mayor's veto unanimously and enact into law the legislation rezoning Foxwoods' Property from C-3 Commercial to R-10A Residential which would prohibit a casino.
05/10/07	City Council reintroduced the Anti-Casino Referendum Ordinance (Bill No. 070112) in the form of a proposed new miscellaneous section of the Zoning Code's Section 14-1600.
05/22/07	The Planning Commission voted to oppose the Anti-Casino Miscellaneous Bill.
05/30/07	The Mayor approved and transmitted to City Council for introduction during the following day's City Council session the Foxwoods CED Legislation, which was never acted upon.
06/01/07	Philadelphia Entertainment and Development Partners, LP v. City of Philadelphia, et al., No. 88 EM 2007 is filed in the Supreme Court.
07/17/07	The Court issued its Opinion and Order upholding the Gaming Board's decision in the Riverwalk, Neighbors Alliance, City Council, Society Hill and Heiko cases.
07/17/07	The Supreme Court affirmed the Board's Adjudication and February 1, 2007 Order approving the applications of Foxwoods and Sugarhouse for Category 2 Slot Machine Licenses.
08/09/07	City Council in a letter to Governor Edward Rendell, requests the Commonwealth's support in relocating the Foxwoods site.
08/20/07	
08/21/07	Philadelphia Entertainment and Development Partners, LP v. City of Philadelphia, et al., No. 143 EM 2007 and 144 EM 2007 were filed.
10/09/07	The Planning Commission approved the plan of development submitted by Foxwoods.
10/09/07	By letter, Governor Rendell explicitly rejected the effort to relocate casinos.
10/16/07	The Supreme Court dismissed Case 144 without prejudice as duplicative of the relief sought in Case 143.
10/17/07	Foxwoods paid the \$50 million licensing fee called for under the Gaming Act to the Commonwealth.
10/18/07	Mayor Street wrote to City Council to urge its members to move forward with the implementation of the Gaming Board's decision and reject the course of further stonewalling the process.
11/20/07	The Supreme Court issued a decision in 88 EM 2007 denying Foxwoods' application for relief.
11/23/07	Foxwoods and the City reached an agreement in principle on a term sheet outlining the essential provisions of a Development and Tax Settlement Agreement between Foxwoods and the City, which is intended to govern the development of Foxwoods' licensed gaming facility.
11/28/07	The City Solicitor certified that the Planning Commission's proviso to its August 21, 2007 approval of Foxwoods' plan of development requiring that Foxwoods and the City reach an agreement "adequately and appropriately" addressing the issues raised by the Philadelphia Gaming Authority Task Force has been satisfied through execution of the November 23, 2007 term sheet.
12/03/07	The Supreme Court rendered its decision granting Sugarhouse zoning.
12/04/07	Foxwoods filed an application for reargument in Philadelphia Ent. & Dev. Partners, L.P. v. City of Philadelphia, No. 88 EM 2007.
12/21/07	The Supreme Court entered an order denying Foxwoods' application for reargument in Case No. 88 EM 2007.
12/28/07	Philadelphia Entertainment and Development Partners, LP v. City Council for the City of Philadelphia, et al., No. 1 EM 2008 was filed.
01/17/08	At a meeting with the new City Solicitor and other City representatives, Foxwoods tendered to the City a check in the amount of \$875,000, representing the first payment for settlement of the parties' real estate tax dispute under its Development Agreement with the City

01/24/08	City Council proposed two ordinances that ostensibly would have approved Foxwoods' plan of development and zoned the Foxwoods site as a CED, but contained conditions designed to further delay the development.
01/25/08	The City filed an application to file a new brief in opposition to the Petition in 1 EM 2008, asserting that it was entitled to "correct" what the new City Administration now deemed an "erroneous" legal interpretation.
02/25/08	First City Council Hearing on ordinances prepared on January 24, 2008.
02/28/08	Foxwoods tendered a payment to the City in the amount of \$1.2 million representing the second installment of real estate taxes due under the Development Agreement
03/10/08	Second City Council Hearing on ordinances prepared on January 24, 2008.
04/02/08	The Supreme Court granted Foxwoods zoning in 1 EM 2008.
04/04/08	Third City Council Hearing on ordinances prepared on January 24, 2008.
04/30/08	Fourth City Council Hearing on ordinances prepared on January 24, 2008.
05/05/08	Foxwoods submitted its application to the City for a zoning and use permit.
06/18/08	
	Planning Commission through its Acting Executive Director, advised Foxwoods, by letter, that its Zoning Permit Application was "incomplete."
07/02/08	Foxwoods representatives met with members of the Planning Commission Staff and other representatives of the Administration to discuss the basis for it zoning and use application being deemed incomplete. Foxwoods was informed that, the City Administration had a new policy it was applying on all projects "of scale" prior to issuing zoning permits.
07/03/08	During the legislative budget session State Senator Vincent Fumo and State Representative Dwight Evans, along with other members of the legislature held a press conference indicating that the two Philadelphia casinos had better seriously consider relocating or legislative action would be taken to their detriment.
07/16/08	Foxwoods filed its Application to enforce the Supreme Court's Order granting it CED zoning.
08/01/08	Gov. Rendell requests meeting to discuss relocations.
08/23/08	At the request of Governor Rendell, representatives of Foxwoods Philadelphia agreed to meet with the Governor, former Senator Fumo, Representative Dwight Evans, Representative William Keller, Mayor Nutter, and other representatives of the governments of the Commonwealth and City of Philadelphia to discuss the possibility of moving our licensed facility from its current Board-approved location to a new location.
09/09/08	Foxwoods met with the Governor, Mayor Nutter and other representatives of the governments of the Commonwealth and City of Philadelphia indicating that it would evaluate the possibility of relocating to the Gallery Complex, with clear understanding that there could be no change of location without the prior approval of the PGCB for good cause shown and that Foxwoods was reserving and retaining all of its rights to build and operate at its Board-approved and selected site on Columbus Boulevard.
10/14/08	Supreme Court grants application to enforce 1 EM 2008 and appoints a Master.

VERIFICATION

I, Nicholas F. Moles, hereby state that the facts above set forth are true and correct (or are true and correct to the best of my knowledge, information and belief). I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities).

A handwritten signature in black ink, appearing to read 'Nicholas F. Moles', is written over a horizontal line.

Nicholas F. Moles, Esquire
Vice President and General Counsel
Philadelphia Entertainment and Development Partners, LP

Date: May 21, 2009