

IN THE SUPREME COURT OF PENNSYLVANIA  
EASTERN DISTRICT

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No. 179 E.M. 2007

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HSP GAMING, L.P.,

SUPREME COURT  
EASTERN DISTRICT

*Applicant/Petitioner,*

v.

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

*Respondents.*

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HSP GAMING, L.P.'s APPLICATION FOR RELIEF PURSUANT TO  
RULES 123 AND 2591(b) OF THE PENNSYLVANIA  
RULES OF APPELLATE PROCEDURE SEEKING ENFORCEMENT  
OF THIS COURT'S DECEMBER 3, 2007 ORDER AND THE  
APPOINTMENT OF A SPECIAL MASTER

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## HSP GAMING'S APPLICATION FOR RELIEF

### I. Introduction

The Pennsylvania Race Horse Development and Gaming Act, 4 Pa.C.S. §§ 1101 *et seq.* (the "Gaming Act"), established a comprehensive regulatory framework for bringing the benefits of legalized slot machine gaming to the Commonwealth of Pennsylvania, its citizens, and its economy. While recognizing the need for close financial and operational scrutiny, the Pennsylvania legislature concluded that limited gaming would generate a diverse spectrum of benefits for the Commonwealth, including new jobs, enhanced tourism and entertainment, new sources of revenue for property tax relief and wage tax reduction, economic development opportunities, and substantial direct financial benefits for local governments and public schools. 4 Pa.C.S. § 1102.

This Court's December 3, 2007 directive to the City of Philadelphia could not have been more clear. As this Court recognized in its December 3, 2007 Opinion and Order, HSP Gaming requires certain permits, licenses and approvals from the City to proceed on a timely basis with the development and construction of the SugarHouse Casino. Recognizing that neither City Council nor the City could delay or obstruct casino development by manipulation of the zoning laws or other City requirements, this Court directed the City, among other things, to "review and act" on HSP Gaming's applications for permits and licenses "in the ordinary course and in compliance with this Court's Order."

As the undisputed facts set forth below establish, in open defiance of this Court's December 3, 2007 Order, the City has refused and continues to refuse to

properly act on HSP Gaming's applications or issue the critical licenses, permits, and approvals required for development and to which HSP Gaming is entitled. Accordingly, HSP Gaming files this Application, seeking enforcement of this Court's December 3, 2007 Order and all appropriate ancillary relief, including the appointment of a Special Master under §1506 of the Gaming Act and under this Court's inherent, broad authority to remedy violations of its Orders and to sanction the City for its defiance of this Court's December 3, 2007 Order.<sup>1</sup>

## II. Procedural Background

1. Through its February 1, 2007 Adjudication and Order, the Pennsylvania Gaming Control Board formally confirmed and elaborated on its December 20, 2006 approval of HSP Gaming's application for a license to develop and operate a slot machine facility, to be known as the "SugarHouse Casino," at a site on the Delaware River. In that same decision, the Gaming Board approved the application of Philadelphia Entertainment and Development Partners ("Foxwoods") to operate the Foxwoods Casino at a riverfront site in South Philadelphia.

2. On March 2, 2007, Riverwalk Casino, L.P., one of three losing applicants for Category 2 licenses in Philadelphia, filed a Petition for Review under §1204 of the Gaming Act, which vests this Court with "exclusive appellate jurisdiction to

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<sup>1</sup> On October 14, 2008, when faced with similar City stonewalling to that which is recounted here, in the appeal brought by Philadelphia Entertainment and Development Partners, this Court appointed the Honorable Joseph F. McCloskey as a Special Master with "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 [Foxwoods'] licensed gaming facility."

consider appeals of any final order, determination or decision of the board involving the approval, issuance, denial or conditioning of a slot machine license.” 4 Pa.C.S. §1204.

3. By Opinion and Order of July 17, 2007, this Court affirmed the Gaming Board’s Adjudication and Order in its entirety, upholding the Gaming Board’s approval of the license applications of HSP Gaming and Foxwoods, and its rejection of Riverwalk’s license application. *See Riverwalk Casino, L.P. v. Pa. Gaming Control Bd.*, 592 Pa. 505, 926 A.2d 926 (2007).

4. In addition to Riverwalk’s appeal, challenges to the Gaming Board’s Adjudication and Order were brought by Philadelphia’s City Council, neighborhood groups and individuals, including persons affiliated with anti-casino organizations. These appeals were captioned *Society Hill Civic Assoc. v. Pa. Gaming Control Bd.*, 51 EM 2007, *Heiko v. Pa. Gaming Control Bd.*, 41 EM 2007, *Neighbors Allied for the Best Riverfront v. Pa. Gaming Control Bd.*, 38 EM 2007, *City Council v. Pa. Gaming Control Bd.*, 39 EM 2007, and *Society Hill Civic Assoc. v. Pa. Gaming Control Bd.*, 40 EM 2007.

5. HSP Gaming intervened in each of these appeals. This Court thereafter dismissed each of these challenges to the Gaming Board’s Adjudication and Order. In dismissing the bulk of these challenges on the grounds of the Petitioners’ lack of standing, this Court specifically referenced and granted HSP Gaming’s Applications for Summary Relief. *See, e.g., Society Hill Civic Assoc. v. Pa. Gaming Control Bd.*, 593 Pa. 1, 24, 928 A.2d 175, 185 (2007) (“Application for Summary Relief filed on

behalf of HSP Gaming, LP, is granted. Petitioners' Petition for Review is dismissed" for lack of standing to appeal the Gaming Board's Category 2 license awards).

6. Earlier, in February, 2006, in anticipation of legalized gaming, Philadelphia had enacted an ordinance creating a new zoning classification for licensed gaming facilities, known as "Commercial Entertainment Districts," or "CEDs." This classification was enacted "to encourage the orderly development of major entertainment facilities and certain other uses in accordance with an approved plan of development." Phila. Code §14-401(1). The CED ordinance expressly recognized that the City had no authority to override the Gaming Board's exclusive authority to decide where Philadelphia's two slot machine facilities would be located. Phila. Code §14-405(2) ("Nothing in this Chapter shall limit the right of the Pennsylvania Gaming Control Board under the Act to identify the property on which it will permit a Category 2 licensed gaming facility within the City.").

7. On March 26, 2007, as required by the CED Ordinance and following months of coordination and consultation between HSP Gaming and representatives of various City departments, HSP Gaming submitted a proposed "Plan of Development" for the SugarHouse Casino to the City's Planning Commission. On May 22, 2007, following a public hearing, the Planning Commission approved HSP Gaming's Plan of Development. The Planning Commission then recommended that Philadelphia's City Council approve three bills needed for HSP Gaming to proceed with its development, namely bills to: (1) amend zoning for HSP Gaming's site for the SugarHouse Casino as a CED District; (2) approve HSP Gaming's Plan of

Development; and (3) authorize the revision of certain lines and grades on the site as well as provide a right of way for sewer maintenance.

8. Despite the cooperation of the administration of then Mayor John Street (the “Street Administration”), City Council made clear that these bills would not be approved, or even considered, by City Council.

9. Indeed, no member of City Council was initially willing to introduce the three bills that the Planning Commission had recommended. It was only after the Street Administration prevailed on Council member Juan Ramos – who had been defeated earlier that month in the City’s primary election – that any member of City Council was willing to so much as introduce these bills for consideration.

10. On May 24, 2007, Council member Ramos introduced the three bills before City Council. As this Court later determined, City Council simply refused thereafter to consider these bills, with deliberate intent to nullify the Gaming Board’s approval of HSP Gaming’s site and for the purpose of delaying, impeding and frustrating the approved development of the SugarHouse Casino.

11. Accordingly, on October 25, 2007, HSP Gaming filed a Petition for Review before this Court, seeking injunctive relief against both City Council and the City of Philadelphia. Specifically, HSP Gaming sought an order from this Court declaring that the bills pending before City Council were deemed approved, and prohibiting both City Council and the City from any further efforts to delay or frustrate the Gaming Board’s licensing decision through manipulation of the local zoning, permitting, and approval processes.

12. This Court's December 3, 2007 Opinion and Order granting HSP Gaming's Petition for Review recounted in detail City Council's efforts and public statements intended to frustrate, delay and impede development of the SugarHouse Casino. *See HSP Gaming, L.P. v. City Council for the City of Philadelphia*, 595 Pa. 508, 532, 939 A.2d 273, 287 (2007).

13. As this Court recognized, HSP Gaming's Petition for Review "provided extensive documentation that certain council members have made public statements regarding their efforts to obstruct and derail the Gaming Board's approval of HSP's facility." *HSP Gaming*, 595 Pa. at 524, 939 A.2d at 282.

14. More specifically, the efforts of City Council and individual council members to frustrate and delay implementation of gaming in Philadelphia, as well as public statements critical of HSP Gaming's approved site, included:

- a council member's press release announcing he intended to file an appeal from the Gaming Board's Adjudication, quoting the council member as stating "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";
- a council member's statement at a March 2, 2007 public hearing on Ordinance No. 070112 that "this was dumped on us, and we got to figure out a way in which we can slow this process down";
- a council member's announcement at the March 2, 2007 public hearing that he "intended to vote for the bills that [another council member had] put forth in an effort to slow this down or stop this process"; and
- a council member's sponsorship on April 19, 2007 of Resolution No. 070322 "[a]uthorizing the creation of a Special Committee on Gaming Alternate Site Selection of the City Council of Philadelphia, for the purpose of holding hearings and making written recommendations to identify alternate locations for slots parlors in the City...."

*HSP Gaming*, 595 Pa. at 524, 939 A.2d at 282-83.

15. In February 2007, an organization known as Casino-Free Philadelphia, which as its name suggests is devoted to keeping all casinos out of Philadelphia, had attempted to place a question on the May, 2007 primary ballot asking whether the Home Rule Charter should be amended to prohibit City Council from taking any action that would permit licensed gaming within 1500 feet of any residence, apartment, church, school, public park or playground, as well as any residentially zoned district or Institutional Development District in the City of Philadelphia. Casino-Free submitted to City Council petitions that purported to include at least 20,000 valid signatures of registered voter in support of the ballot question. Following an evidentiary hearing, the Honorable Ward F. Clark, specially appointed by this Court, found the signatures permeated with fraud and other irregularities and declared the Petition invalid.

16. If adopted, the proposed Charter amendment would have prevented the SugarHouse Casino from operating at the site approved by the Gaming Board and in effect, would have operated as a total bar to licensed gaming in the City.

17. As a further blatant example of its intent to “veto” the Gaming Board’s licensing decisions, City Council engaged in its own referendum initiative, unanimously passing an ordinance intended to submit an identical ballot question to Philadelphia’s electors. *HSP Gaming*, 595 Pa. at 524, n. 12, 939 A.2d at 282, n. 12. Again, if adopted this proposed Charter amendment would have abrogated the Gaming Board’s licensing and siting decisions.



18. The Gaming Board filed suit to enjoin City Council's proposed amendment from appearing on the ballot, and HSP Gaming intervened in support of the Gaming Board's position. On April 13, 2007, this Court granted the Gaming Board's Emergency Petition for Review and enjoined respondents from placing the proposed amendment on the ballot.

19. This Court's subsequent opinion, issued on August 3, 2007, explained that "the General Assembly intended for the [Gaming] Board to have the sole authority to locate Category 2 licensed facilities in cities of the first class. That is to say, only the [Gaming] Board makes the decision to locate a licensed facility. Section 1304(b)(1) repeatedly states without equivocation that 'Category 2 licensed facilities...shall be located by the [B]oard in cities of the first class,' and both Section 1304(b)(1) and 1307 refer to 'Category 2 licenses' or 'Category 2 licensed facilities' that have been 'located by the [B]oard.' 4 Pa.C.S. §§ 1304(b)(1),1307. We further observe that in these provisions, the General Assembly has not afforded the electorate of a first class city the right to consider, affect or override the Gaming Board's location decision once it is made." *Pa. Gaming Control Bd. v. City Council for the City of Philadelphia*, 593 Pa. 241, 262, 928 A.2d 1255, 1267-68 (2007).

20. Despite this Court's clear pronouncement that neither the City nor City Council had authority to purport to override the Gaming Board's sole authority to determine where Philadelphia's two casinos will be located, City Council continued unabated in its efforts to block development of the SugarHouse Casino at its Gaming Board-approved location.

21. As this Court recognized, a document released by the Council member leading the efforts confirmed that he would continue to use his councilmanic prerogative to delay the zoning legislation for the SugarHouse Casino:

When the Pennsylvania Gaming Control Board issued gaming licenses to SugarHouse and Foxwoods Casinos, I pledged to my constituents that I would fight their decision with every tool I had available. That's exactly what I've done but the bottom line is that we need the Governor's help.

I introduced several pieces of legislation to block or delay casino construction. Despite two public hearings, those bills have not been voted out of committee.

When Council Member Ramos introduced legislation permitting immediate construction of SugarHouse Casino, I successfully blocked its approval. However, in light of the recent court decisions, I don't know if I can maintain a Council majority to defeat the legislation.

And while I may still have additional options when Council reconvenes in the fall, I sincerely believe that our best hope of success is with additional support at the highest levels of State Government.

*HSP Gaming*, 595 Pa. at 525, 939 A.2d at 283.

22. Expressing his continuing desire for the relocation of the SugarHouse Casino and his intent to delay the necessary legislation for the construction of the casino at the site approved by the Gaming Board, on August 9, 2007 the Councilman for the district in which the SugarHouse site is located wrote to Governor Rendell: "On behalf of the communities I represent, I want to welcome your leadership and to thank you for considering alternate sites for gaming facilities in Philadelphia. In order to provide the State ample time to review this issue, I

pledge to you and my constituents 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.” *HSP Gaming*, 595 Pa. at 526, 939 A.2d at 283.

23. This Court’s December 3, 2007 Opinion and Order summarized the controlling legal principles at stake, once more making clear that neither the City nor City Council has:

[P]ower to override the statutory provisions of the Gaming Act regarding the situs of a licensed gaming facility to use its authority to zone to impede implementation of the Gaming Board’s authority 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.

*HSP Gaming*, 595 Pa. at 532, 939 A.2d at 287.

24. Based on the undisputed documentation submitted by HSP Gaming in support of its Petition for Review, this Court concluded that, with respect to the legislation described above, City Council had engaged in “deliberate inaction ... for the purpose of delay.” *Id.*

25. Given the controlling law and undisputed facts, this Court: (1) declared the SugarHouse Casino site zoned as a Commercial Entertainment District under Chapter 14-400 of the Philadelphia Code; (2) declared HSP Gaming’s Plan of Development for the SugarHouse Casino to be approved, without any further action by City Council; (3) declared that all revisions and vacations of easements and public rights of way identified in the Plan of Development were authorized; and (4)

expressly retained jurisdiction to enforce its Order. *HSP Gaming*, 595 Pa. at 533, 939 A.2d at 288.

26. Although the City, through the Street Administration had been working in good faith to implement the Gaming Board's licensing decisions, this Court's December 3, 2007 Order made clear that the City's continued compliance was central to the implementation of its declaratory relief.

27. This Court's December 3, 2007 Order thus directed the City "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 HSP Gaming in the ordinary course and in compliance with this Court's order.*" *HSP Gaming*, 595 Pa. at 534, 939 A.2d at 288 (emphasis added).

28. On January 4, 2008, Foxwoods filed a Petition for Review seeking relief substantially identical to the relief that this Court's December 3, 2007 Order granted to HSP Gaming.

29. Foxwoods' Petition for Review described in detail City Council's deliberate efforts to delay, obstruct and frustrate the development of its casino project through a clear pattern of legislative inaction and stonewalling.

30. On April 2, 2008, this Court granted Foxwoods' Petition, concluding that "City Council's failure to act, for purposes of delay, was beyond its power, and entitled [Foxwoods] to the same relief" that the Court granted HSP Gaming. *See Philadelphia Entertainment and Development Partners v. City Council for the City of Philadelphia*, 596 Pa. 422, 440, 943 A.2d 955, 966 (2008).

31. As set forth in detail below, however, with the inauguration of Mayor Michael Nutter (the “Nutter Administration”) in January, 2008, the Nutter Administration has assumed City Council’s role as the primary and driving force to obstruct and impede development of the SugarHouse Casino at the site approved by the Gaming Board.

32. Not only has the Nutter Administration improperly obstructed development of the SugarHouse Casino at the site approved by the Gaming Board, but the Nutter Administration also improperly created obstacles to the development of the Foxwoods Casino at its approved site.

33. Indeed, as this Court is aware, following this Court’s April 2, 2008 Order, Foxwoods requested that the City issue a zoning and use registration permit, which is a prerequisite for additional site preparation and construction permits. Although Foxwoods had provided the City with all information required by the Zoning Code, the new City administration rejected Foxwoods’ application as incomplete. The Nutter Administration claimed that under an admittedly unpublished policy, Foxwoods was required to submit additional information in support of its application, including a traffic mitigation plan, a transportation plan, a parking plan, and proposed street layout changes.

34. Foxwoods responded that this information had been submitted to the Planning Commission in connection with its plan of development and, in any event, was not information required to obtain a zoning permit under § 14-404 of the CED Ordinance.

35. On July 16, 2008, Foxwoods filed an Application seeking enforcement of this Court's April 2, 2008 Order, and requesting the appointment of a Special Master under § 1506 of the Gaming Act.

36. On October 14, 2008, this Court granted Foxwoods' Application and entered an order granting Foxwoods the following relief:

- (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.

37. As described in detail below, in blatant violation of this Court's December 3, 2007 Order, the Nutter Administration has egregiously refused to process applications and issue permits required for the timely development of the SugarHouse Casino, including a critical foundation permit. In sum, contrary to this Court's plain mandate, the Nutter Administration has failed to "review[] and act[] upon all applications from HSP [Gaming] in the ordinary course and in compliance with this Court's order." *HSP Gaming*, 595 Pa. at 533, 939 A.2d at 288.

38. Accordingly, HSP Gaming files this Application for Relief seeking enforcement of this Court's December 3, 2007 Order and all appropriate relief incident thereto, including the appointment of a Special Master under §1506 of the Gaming Act and under this Court's inherent, broad authority to remedy violations of its Orders and to sanction the Nutter Administration for its defiance of this Court's December 3, 2007 Order. HSP Gaming respectfully requests that this Court vest the Special Master with full authority to consider and resolve all existing and future disputes that may arise between HSP Gaming and the City with respect to any permits, approvals, licenses, or actions required for the timely development of the SugarHouse Casino, and as more fully set forth in HSP Gaming's Request for Relief below.

### III. Statement of Material Facts

- (a) **The Street Administration complied with its legal obligations with respect to HSP Gaming's development of the SugarHouse Casino**

39. From January 25, 2007 until the end of Mayor John Street's Administration ("Street Administration") on January 6, 2008, HSP Gaming maintained an excellent working relationship with the various City departments with regard to the SugarHouse Casino construction project.<sup>2</sup> [McKenna Aff. at ¶10].

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<sup>2</sup> The factual assertions set forth in this Application are supported by the Affidavit of Terrence J. McKenna ("McKenna Aff."), Project Executive at Keating Consulting, LLC, which is the development management consultant for Petitioner HSP Gaming. [Exh. "1" to Appendix]. McKenna manages HSP Gaming's development team for the SugarHouse Casino construction project. All exhibits are included in the Appendix being filed herewith.

40. On January 25, 2007, Street Administration officials from various City Departments, including then-City Solicitor Romulo L. Diaz, Jr., Janice Woodcock from the City's Planning Commission, John Elfrey from the Managing Director's Office, Charles Denny from the Streets Department, and Brian Mohl from the Water Department, met with HSP Gaming representative Terrence J. McKenna, to outline the City's plan to coordinate the SugarHouse Casino development process. [McKenna Aff. at ¶¶ 11, 12].

41. At the January 25, 2007 meeting, John Elfrey was appointed as HSP Gaming's primary contact at the City with regard to the casino development process. Elfrey's point of contact at HSP Gaming was McKenna. [McKenna Aff. at ¶12].

42. Adhering to this plan, McKenna would contact Elfrey when technical issues developed between HSP Gaming and the Street Administration, Elfrey would timely respond to McKenna's inquiries and direct the appropriate Street Administration officials to respond to the technical issues involving the SugarHouse Casino construction project. [McKenna Aff. at ¶18].

43. During the Street Administration, this process worked seamlessly. Phone calls from HSP Gaming to City officials were returned in a timely fashion. The City also scheduled bi-weekly meetings with HSP Gaming to discuss outstanding permitting and licensing issues related to the SugarHouse Casino project. The City representatives at these meetings included, among others, then-



City Solicitor Romulo L. Diaz, Jr., then-Managing Director Pedro A. Ramos, and Elfrey. [McKenna Aff. at ¶¶ 13, 17].

44. On August 2, 2007, HSP Gaming and the City reached a written agreement on a Term Sheet (the “Term Sheet”) that outlined the essential provisions of a Development and Tax and Claim Settlement Agreement between the parties. Among other things, the City and HSP Gaming agreed in writing to:

[W]ork together in good faith pursuant to applicable law to obtain the timely approval by the City Council and all other federal, state and local governmental agencies and entities (“Approvals”) of CED [Commercial Entertainment District] Site Designation Ordinance, the Plan of Development, ownership or equivalent leasehold interest in the riparian lands and all other approvals, consents and permits required to construct and operate the SugarHouse Casino, including, without limitation, regarding the construction of all required utilities, foundations, grading, infrastructure and other improvements, whether on and off of the site.

[McKenna Aff. at ¶ 14].

45. On December 17, 2007, the City and HSP Gaming entered into the Development and Tax and Claim Settlement Agreement (“Development Agreement”). Pursuant to the Development Agreement, the City specifically agreed that the City would “work in good faith pursuant to applicable law to timely obtain the Approvals necessary to permit the development, construction and operation of the SugarHouse Casino as contemplated by the then-approved Plan of Development as the same may be amended from time to time as provided in this Agreement, and applicable law, including the December 3 Order [of this Court]” and would implement a development process for the SugarHouse Casino, including: (i)

“opportunities to consult with appropriate municipal staff in a timely fashion to ensure that the SugarHouse Casino can be developed and constructed in the most time- and cost-efficient manner possible”; (ii) “timely municipal review processes, where required, *with the City causing most reviews and comments to be completed within ten (10) business days*”; and (iii) “project coordination assistance from the Managing Director’s office.” [McKenna Aff. at ¶ 15].

46. Pursuant to the Development Agreement, the Street Administration implemented an efficient development process for the SugarHouse Casino construction project. [McKenna Aff. at ¶ 16].

47. Coordination to obtain proper permits for the SugarHouse Casino project ran smoothly under the Street Administration. For example, on January 2, 2008, after extensive advance coordination between HSP Gaming and the City with respect to what issues the applications should address, HSP Gaming applied for a Rough Grading Permit, and on January 3, 2008, HSP Gaming applied for a Zoning Permit. Because the City knew in advance and had reviewed much of what was in the applications, the City was able to issue both permits to HSP Gaming on January 4, 2008. [McKenna Aff. at ¶¶ 19-20].

48. Unfortunately, the coordination that existed under the Street Administration stopped with the Nutter Administration. Indeed, as set forth below, the Nutter Administration has not only failed to complete its reviews of HSP Gaming’s various applications within the ten-day period required by the Development Agreement, the Nutter Administration has deliberately and utterly

violated that Agreement and this Court's December 3, 2007 Order. [McKenna Aff. at ¶¶ 22-26].

- (b) Under the Nutter Administration, the City has violated this Court's December 3, 2007 Order and the Development Agreement by failing to receive, review and act on applications from HSP Gaming in the ordinary course and in compliance with this Court's Order

49. HSP Gaming's once excellent working relationship with the City ceased with commencement of the Nutter Administration. Indeed, under the Nutter Administration, the City has ignored its obligations under both this Court's December 3, 2007 Order and the Development Agreement.

50. As reported in the *Philadelphia Daily News*, on January 9, 2008, Mayor Nutter's first full day in office, Mayor Nutter directed the Department of Licenses & Inspections ("L&I") to review the Zoning and Rough Grading permits issued to HSP Gaming during the Street Administration. [Exh. "2"]. On information and belief, aside from HSP Gaming, Mayor Nutter did not order the review of any other permits for any developer.

51. Indeed, almost immediately upon taking office, Mayor Nutter stated that his Administration would undertake a full review of all issues surrounding the SugarHouse Casino project, including but not limited to its approved location. [Exh. "3"].

52. At a January 24, 2008 City Hall press conference, Mayor Nutter announced that the City was revoking HSP Gaming's submerged lands license, which had been issued in November, 2007 after a full public hearing held by the City's Commerce Director. [Exh. "4"].

53. In early February, 2008, Mayor Nutter stated to *Plan Philly*: “The previous agreements regarding casinos – I didn’t agree to them. As far as I’m concerned, we are back at Square One. Everything is back on the table, from where they are, what they look like, and all the agreements with the City.” [Exh. “5”]. Mayor Nutter made this statement notwithstanding the fact that the Mayor’s City Solicitor Shelley Smith testified before City Council under oath that her Office could not find any legal grounds for the City to avoid its obligations under a similar development agreement between the City and Foxwoods. [Exh. “6” (City Council Rules Committee Trans. 4/30/2008, at p. 83)]. Additional comments by Mayor Nutter and senior Nutter Administration officials disparaging the SugarHouse Casino and its approved location are set forth in Section “g” below.

54. During the first month of the Nutter Administration, communications from the City to HSP Gaming regarding permitting issues virtually ceased. Where once City officials timely returned telephone calls and answered questions regarding project issues, the new Administration immediately implemented an open-ended reevaluation process as a result of which City officials refused to respond to HSP Gaming issues or inquiries or otherwise proceed in good faith with HSP Gaming’s pending permit applications. McKenna was informed of this new City position on January 30, 2008, by Elfrey, who Mayor Nutter had appointed as the Acting Commissioner of Licenses & Inspections. [McKenna Aff. at ¶¶ 22, 23, 26-28, 31-35].

55. Following several telephone calls to City officials, where HSP Gaming informed the City that its new position regarding the SugarHouse Casino project was in clear violation of the Development Agreement, the City appeared to backtrack from its earlier position. Indeed, Elfrey notified McKenna that the City was continuing to review HSP Gaming's applications and submittals related to the casino project, including the proposed Act 537 Planning Module for the SugarHouse Casino.<sup>3</sup> [McKenna Aff. at ¶¶ 35, 36, 41].

56. On January 31, 2008, Teresa Gillen, Senior Advisor to the Mayor for Economic Development, informed McKenna that she would now serve as HSP Gaming's primary point of contact with the City regarding the SugarHouse Casino project. McKenna promptly suggested to Gillen that HSP Gaming's team meet with incoming City officials to discuss the status of the SugarHouse Casino project and the pending permit applications. Gillen, however, summarily rejected this offer to meet. [McKenna Aff. at ¶42].

57. Although assuring HSP Gaming that it would abandon its initial position to halt all review of HSP Gaming applications and cooperate with HSP Gaming, the Nutter Administration failed to abide by that promise.

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<sup>3</sup> The Act 537 Planning Module details HSP Gaming's sewage discharge plan and documents that the City's collection and treatment system has adequate capacity to handle the projected flow from the SugarHouse Casino. Whenever a developer such as HSP Gaming constructs a project in Philadelphia, the City is required to amend its Act 537 Planning Module. The amended planning module then must be approved by the Pennsylvania Department of Environmental Protection ("DEP"). For HSP Gaming to obtain a foundation permit, without which the construction of this project cannot proceed, DEP must, among other requirements, approve the amended Act 537 Planning Module. [McKenna Aff. at ¶ 27, n.2].

58. As described more fully below, the Nutter Administration has disregarded this Court's December 3, 2007 Order, causing significant delays in the timely development of the SugarHouse Casino, which in turn has caused and will cause great harm to HSP Gaming and has denied the citizens of Philadelphia and of the Commonwealth the many benefits of legalized gaming. By way of example, the Nutter Administration has even failed to acknowledge HSP Gaming's foundation permit application, which application had in fact been previously submitted and filed with the City. [McKenna Aff. ¶ 107].

59. Further, the Nutter Administration has delayed and failed to timely review other HSP Gaming requests for approvals and plan reviews, and has even failed to provide routine letters requested by HSP Gaming for notice to utility owners with utility lines near the SugarHouse Casino site. Moreover, the City has continued to make public statements disparaging the location of the SugarHouse Casino site, and has delayed, impeded, and frustrated every aspect of the construction project, even to the point of issuing erroneous and false notices of violations to HSP Gaming. The recent examples cited herein reflect the Nutter Administration's pattern of obstruction in blatant defiance of the Gaming Act's clear mandate and this Court's December 3, 2007 Order.

- (c) The Nutter Administration falsely claims that HSP Gaming never applied for a foundation permit and the City has failed to issue the foundation permit to which HSP Gaming is entitled

60. On December 6, 2007, HSP Gaming submitted a final application to the City for a foundation permit that HSP Gaming requires to proceed with construction of the SugarHouse Casino. [McKenna Aff. at ¶ 21].

61. As of December 16, 2008, the Nutter Administration, through L&I, has claimed that HSP Gaming did not have a foundation permit application pending. This recent position taken by the City's new administration is demonstrably false and contrary to the City's own prior acknowledgements. [McKenna Aff. at ¶ 107].

62. Under the Philadelphia Building Code and Section A-302 of the Administrative Code, the City will issue a permit to construct a foundation once certain Zoning Unit and Water Department approvals are issued. The Zoning Unit approval is in the form of a zoning permit. The City's Water Department approval is in the form of an acknowledgement that: (a) storm water management has been addressed by the applicant; (b) potable water supply is available to the site; and (c) an amendment to the City's Act 537 Planning Module has been approved by the DEP. [McKenna Aff. at ¶ 102].

63. On October 29, 2007, as part of its application for a submerged lands license and at the City's request, HSP Gaming submitted to L&I a preliminary foundation permit application. On November 8, 2007, again at the City's request, HSP Gaming submitted additional information in support of its eventual foundation permit application. [McKenna Aff. at ¶ 97, 99].

64. On November 15, 2007, through an L&I official, the City confirmed that HSP Gaming had provided the necessary information and forms required as part of a foundation permit application. Indeed, L&I official Robert Murray, P.E. testified under oath at the Commerce Department's public hearing on HSP Gaming's application for a submerged lands license that HSP Gaming had "provided all the information and forms that would accompany a request for a Foundation Permit, with the exception of prerequisite approval for L&I Zoning Unit and the Philadelphia Water Department, which are not part of this application." Murray further testified that "[b]ased on this initial review, it is my opinion that the submittal meets the requirements of the Code and of the Department to have a foundation permit issued once all the prerequisite approvals are obtained. Additional information will be required with any application for a full building permit." [McKenna Aff. at ¶ 100].

65. On December 6, 2007, HSP Gaming submitted a complete foundation permit application to L&I for approval (with the exception of the Zoning Unit and Water Department prerequisite approvals, which would come directly from those departments). As of the date of this Application, and for at least four months prior hereto, all conditions for issuance of the foundation permit have been met, but the City has nonetheless failed to issue the permit to HSP Gaming. [McKenna Aff. at ¶ 101].



66. As stated previously, on January 4, 2008, L&I issued HSP Gaming a Zoning Permit, thereby fulfilling the Zoning Unit prerequisite of the foundation permit. [McKenna Aff. at ¶ 103].

67. On January 4, 2008, DEP issued a National Pollutant Discharge Elimination System (“NPDES”) permit to HSP Gaming. The NPDES permit addressed post-construction storm water management, as approved by the City’s Water Department. Therefore, issuance of the NPDES permit satisfied the first part of the three-part Water Department prerequisite approval for the foundation permit. (The Water Department provides review and commentary to the DEP relative to the post-construction storm water management portion of the NPDES permit). [McKenna Aff. at ¶ 104].

68. On September 11, 2008, DEP approved the revision to the City’s Act 537 Planning Module for the SugarHouse Casino project, thus fulfilling the second part of the Water Department’s three-part prerequisite approval.<sup>4</sup> The third and final part of the Water Department’s prerequisite approval is simply an acknowledgement that a public water supply exists to serve the site, and that it is properly sized, which the Water Department must issue on request because a public water supply exists and is of a sufficient size. [McKenna Aff. at ¶ 105, 106].

69. Notwithstanding the City’s own statements to the contrary and the various submittals by HSP Gaming as described above, on December 16, 2008, the

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<sup>4</sup> Although third parties have appealed DEP’s approval to the Environmental Hearing Board, that approval has not been stayed, and remains in full force and effect.

City, for the first time, claimed that HSP Gaming had not submitted a foundation permit application. When presented with HSP Gaming's time-stamped and complete foundation permit application, showing that HSP Gaming had indeed applied for a foundation permit, the City irrationally refused to acknowledge this evidence. If the City is permitted to maintain this position, HSP Gaming would have to start the foundation permit process all over again, preparing and submitting a new application with its voluminous technical information, including geotechnical reports and foundational drawings. [McKenna Aff. at ¶ 107, 108].

70. By failing to issue HSP Gaming's foundation permit, and indeed by denying that it had even received HSP Gaming's foundation permit application – which claim is blatantly contrary to the facts – the City is in clear violation of the Court's December 3, 2007 Order and the Development Agreement.

- (d) **The Nutter Administration failed to timely comment on or review HSP Gaming's Proposed Act 537 Planning Module, and failed to timely submit the proposed Planning Module to the Commonwealth**

71. During the Street Administration, HSP Gaming worked closely with the Philadelphia Water Department on the Act 537 Sewer Planning Module for the SugarHouse Casino. Officials of the Water Department during the Street Administration represented to HSP Gaming that they were comfortable with the Module as proposed, and should be able to provide all required approvals within a few days of being requested to do so. [McKenna Aff. at ¶ 28].

72. On October 27, 2007, the City published a public notice Act 537 Sewer Planning Module for the SugarHouse Casino development, soliciting public

comments, and the public comment period closed 30 days later. At that point, it was the City's obligation to respond to the public comments that the City had received.

[McKenna Aff. at ¶¶ 28].

73. With the commencement of the Nutter Administration, the City said it would halt review of the then-pending Act 537 Planning Module because the Administration opposed SugarHouse Casino's site. After HSP Gaming objected, the City purported to retreat from its position and indicated that it would continue to review HSP Gaming's proposed Act 537 plan. [McKenna Aff. at ¶¶ 28, 33-36, 41].

74. Once Mayor Nutter revoked HSP Gaming's submerged lands license, the Nutter Administration then used this revocation as grounds to again halt its review of the Act 537 Planning Module. Indeed, on February 8, 2008, Elfrey confirmed to McKenna that no City official would meet with HSP Gaming to discuss outstanding issues involving the Act 537 Planning Module because of the City's purported revocation of the submerged lands license. [McKenna Aff. at ¶ 52].

75. Notwithstanding that HSP Gaming had provided the City with proposed responses in January, 2008, on March 20, 2008, backing off its position that it would cease all work on the Act 537 Module pending resolution of the legality of the City's revocation of the submerged lands license, the City delivered to HSP Gaming its response to public comments on the Act 537 Planning Module for inclusion in the final Act 537 package that would go back to the City, and thereafter to DEP.

[McKenna Aff. at ¶ 69].

76. On March 24, 2008, following its receipt of the City's response to public comments, HSP Gaming submitted to the City's Water Department the final Act 537 Planning Module for final approval and subsequent submittal to DEP. Although HSP Gaming's final submittal included the City's authorized response to public comments, the Nutter Administration, without justification, still failed to approve the plan for submittal to DEP. [McKenna Aff. at ¶ 70].

77. Accordingly, on June 9, 2008, McKenna advised the Nutter Administration that under 25 Pa. Code § 71.53(b), because the City had failed to act within 60 days of the HSP's Gaming's final submission, the Act 537 Planning Module would be deemed approved by the City and ready for submittal to DEP. [McKenna Aff. at ¶ 80].

78. On September 11, 2008, DEP gave final approval to the Act 537 Planning Module for the SugarHouse Casino. [McKenna Aff. at ¶ 105].

79. The City's unreasonable and unjustified delay in initially providing official responses to public comments to HSP Gaming's proposed Act 537 Planning Module, and then in failing to grant final approval for submission to DEP, was in clear violation of this Court's December 3, 2007 Order and in violation of the Development Agreement.

(e) **The Nutter Administration has issued erroneous and false violation notices concerning the SugarHouse Casino project.**

80. In addition to failing to cooperate and timely review and act upon applications by HSP Gaming, the City has issued erroneous and false violation notices to HSP Gaming with respect to the SugarHouse Casino project.

81. On August 22, 2008, HSP Gaming informed the City that in light of this Court's ruling on the submerged lands license issued that same day, HSP Gaming would begin excavation activities to expose and remove underground obstructions on submerged lands. Following this notification, however, in yet another attempt to delay HSP Gaming's construction activities, Elfrey warned McKenna: "[D]o not commence in the riparian area until we review with our attorneys and review the permits." On August 25, 2008, the City's Water Department inspected the SugarHouse Casino project, without prior notice, finding no violations. [McKenna Aff. at ¶¶ 85, 86].

82. From August 25, 2008, through September 5, 2008, high-level L&I officials made numerous visits to the SugarHouse Casino site with a stated intent to shut down excavation activities on the submerged lands. The Nutter Administration was seeking to stop work on the submerged lands based upon the City's assertion that without a Chapter 105 Permit (Dams and Waterway's permit) from DEP, HSP Gaming was precluded from proceeding with any development activities on the submerged lands portion of its site. But since HSP Gaming had previously secured a submerged lands license that permitted all improvements east of the bulkhead line, no Chapter 105 permit was required from DEP to excavate on the submerged lands. [McKenna Aff. at ¶87]. In sum, the City had once again created a bogus justification in an effort to stop HSP Gaming's site work, and ultimately backed off its position.

83. On September 8, 2008, HSP Gaming received a Notice of Violation ("NOV") from the City dated September 2, 2008, stating that a revised rough

grading permit was required to excavate east of the bulkhead line. This NOV, however, was improper and unjustified, as HSP Gaming clarified later that same day with the City, because HSP Gaming's rough grading permit, issued on January 4, 2008, applied to the entire SugarHouse Casino site. [McKenna Aff. at ¶¶ 89, 90].

84. During the period of November 12 through November 18, 2008, HSP Gaming installed indicator piles on the SugarHouse Casino project site. On December 16, 2008, the City informed HSP Gaming that it was in violation of the law because HSP Gaming had not secured a building permit to install the indicator piles and that the City intended to shut down all construction work on the site on December 17, 2008. After HSP Gaming disputed this alleged violation, the City acknowledged that the City was incorrect in its initial position that the installation of the indicator piles required a building permit. The City again ultimately backed off its incorrect position. [McKenna Aff. at ¶¶ 93-95].

85. The City's actions described herein reflect not only its failure to cooperate with HSP Gaming since the start of the Nutter Administration, they also reflect the City's continuing efforts and intent to delay, obstruct and interfere with HSP Gaming's construction activities, in violation of the Court's December 3, 2007 Order and the Development Agreement.

**(f) Additional Examples of the Nutter Administration's violations of this Court's December 3, 2007 Order**

86. To date, the City has failed to review or act upon HSP Gaming's revised 100 Percent Drawings and Specifications for the Laurel Street Combined Sewer

Outfall (“CSO”) work,<sup>5</sup> which were revised by HSP Gaming after it received the City’s official comments to the original set of drawings and specifications. HSP Gaming submitted this revised CSO set to the City on April 18, 2008. [McKenna Aff. at ¶ 74].

87. The Laurel Street CSO project involves the: (a) relocation; (b) expansion; and (c) extension of the existing Laurel Street CSO. The CSO relocation work is contemplated to be completed in accordance with the approved plan of development for the SugarHouse Casino project. The expansion and extension work on the CSO (*i.e.*, the improvements to the current Laurel Street CSO) do not directly benefit the SugarHouse Casino project, but instead, are public works projects that the City has directed HSP Gaming to implement pursuant to the terms of the Development Agreement. The “improvement” work on the Laurel Street CSO will initially be funded and constructed by HSP Gaming on behalf of the City. The City, in turn, will reimburse HSP Gaming for the expansion and extension work as provided under the Development Agreement. [McKenna Aff. at ¶ 30].

88. The City has failed, to date, to provide necessary Water Department approvals that are required as part the water quality management permit application for the relocated CSO, which HSP Gaming is required to submit to the

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<sup>5</sup> There are approximately 173 CSOs throughout the City’s sewer system network, discharging to either the Schuylkill or Delaware Rivers. A combined sewer conveys both sanitary sewage and storm water runoff in the same pipe. During dry weather, the sanitary sewage is collected and directed to a wastewater treatment plant. During wet weather/storm events, the combined mixture of sanitary sewage and storm water is discharged to the river when the capacity of the collection/treatment system is exceeded. [McKenna Aff. at ¶ 30, n. 3].

DEP in order to begin the Laurel Street CSO work discussed above. [McKenna Aff. at ¶ 79].

89. On February 25, 2008, HSP Gaming requested that the City's Water Department prepare a routine letter, for use by HSP Gaming, to provide information to all utility owners with utility lines within the City-owned streets surrounding the SugarHouse Casino Project. The purpose of this letter would be to inform these utility owners (including private entities such as Verizon and PECO Energy and public entities such as Philadelphia Gas Works) that HSP Gaming was performing utility relocation work on behalf of the Water Department. This was a routine request to the City that required nothing more from the City than a simple letter of notification to utility owners. Notwithstanding the simple nature of this request, on March 13, 2008, Elfrey informed HSP Gaming that the City would not assist it in providing even this basic information to the utility owners. This is yet another example of the City's efforts to delay, obstruct and interfere with HSP Gaming's construction activities. [McKenna Aff. at ¶ 60].

90. Further, on April 1, 2008, the Nutter Administration notified HSP Gaming that the City also would not issue a public works notice verifying to utility owners that certain work required by those utilities under the Development Agreement is a public works project, for which the utilities had to bear their own costs. This request by HSP Gaming to the City was an effort to save the City approximately \$2 million. In furtherance of its policy of non-cooperation with HSP Gaming, however, the Nutter Administration yet again was unwilling to take even



the most minimal of action and issue the required notice. This failure will cost the City taxpayers approximately \$2 million which the City otherwise would not have expend on the work under Delaware Avenue. The Nutter Administration's position is particularly unfortunate given its public statements that the City is suffering a financial crisis, requiring the closing of libraries, public swimming facilities, and fire fighting resources. [McKenna Aff. at ¶¶ 60, 71].

91. On July 1, 2008, without proper justification, the Nutter Administration denied HSP Gaming permission to discharge groundwater to the City's Sanitary Collection system during the construction of the SugarHouse Casino project. HSP Gaming, through a subcontractor, made this routine request on May 19, 2008. Generally, such requests to discharge groundwater into the City's sewer system during construction are routine and approved by the City within a week or two of making such requests. Because of the City's position, HSP Gaming was required to make alternative provisions for the discharge of groundwater at additional cost and delay. [McKenna Aff. at ¶¶ 76, 77].

92. On July 8, 2008, Mayor Nutter sent a letter to State Senator Fumo and State Representative Evans outlining what the City believed were the outstanding approvals needed to be obtained by HSP Gaming to start construction of the SugarHouse Casino. In that letter the Mayor stated that the City would require HSP Gaming to comply with Air Management Regulation X, which in theory governs all air emissions from complex sources, as defined by the regulation. [Exh. "7"].

93. The current version of Regulation X was enacted in May 1974, and has never been enforced by the City for any type of real estate development addressed by the regulation. In fact, contrary to the requirements of the regulation, the City has never even “established procedures and guidelines for use in preparation, submission and review of air quality impact statements and shall prescribe the information to be supplied in order to determine the effect of the complex source on air quality.” [McKenna Aff. at ¶ 43].

94. Despite the fact that the City has never enforced or developed the appropriate guidance documents to comply with the regulation, the Nutter Administration is now unfairly requiring that HSP Gaming comply with this regulation. Furthermore, based upon HSP Gaming’s conversations with City Air Management personnel, the City cannot provide any guidance to comply with this regulation, and in turn does not have any internal guidance to evaluate any air quality impact statement submitted by HSP Gaming. [McKenna Aff. at ¶ 43]. In sum, the City is requiring that HSP Gaming comply with a regulation that the City has failed to implement for over 34 years and for which there are no guidelines or other criteria by which HSP Gaming could comply.

95. In all major developments in Philadelphia, upon the request of the developer, L&I routinely performs a preliminary plan review of the plans of the developer, to confirm the developer’s interpretation of certain building code requirements applicable to the project. Notwithstanding HSP Gaming’s request for preliminary plan review, delivered to the City on March 26, 2008, as of the filing of

this Application, the City has failed to conduct a preliminary plan review of HSP Gaming's project. [McKenna Aff. at ¶¶ 47 & n. 6, 61].

96. On January 30, 2008, HSP Gaming requested that the City Water Department provide coordination with HSP Gaming's engineers, so that the design of the proposed storm water improvements and CSO work, much of it requested by the City to reduce flooding in the Northern Liberties and Fishtown areas of Philadelphia, could be properly integrated with the City's storm water management system. The City initially refused to provide such coordination and make its personnel available to HSP Gaming's engineers, and with the exception of a brief window of communication in February 2008, the City has continued to refuse to provide that necessary coordination as of the date of this filing. [McKenna Aff. at ¶ 44].

97. The City has various water and habitat-related environmental projects it has identified for which it is seeking funding. HSP Gaming worked with the Street Administration throughout 2007 to identify sites that would be appropriate for HSP Gaming to fund, to help the City meet its goals, while at the same time providing additional tidal water, wetlands or other environmental upgrades which the Army Corps of Engineers would take into consideration in reviewing HSP Gaming's application to perform certain fill work and other modifications to the riverfront edge of the SugarHouse site. [McKenna Aff. at ¶ 96].

98. Although the Street Administration had identified specific projects in which it was particularly interested for HSP Gaming to become involved in,

including the Baxter water treatment plant former fish hatchery site used for educational purposes for City residents, as of the date of the filing of this Application the Nutter Administration has failed to give its approval to any participation by HSP Gaming in any of these projects. As a result of the Nutter Administration's inaction, HSP Gaming, at additional cost in dollars and delay, has proposed a modification of its Section 10/404 Permit currently pending before the Army Corps of Engineers. As a further result of this inaction, the City's environmental projects will not directly benefit from the proposed efforts of HSP Gaming. Upon information and belief, the primary reason that the Nutter Administration has failed to authorize HSP Gaming's participation in any offsite environmental project is the Nutter Administration's intent to delay issuance of the Army Corps of Engineers permit, which would subsequently delay construction of the SugarHouse Casino project at the location approved by the Gaming Board. [McKenna Aff. at ¶ 96].

99. Typical of the City's stonewalling efforts was its response to HSP Gaming's request to begin negotiating a contract for the CSO work. On March 12, 2008, counsel for HSP Gaming wrote to Mayor Nutter and City Solicitor Shelley R. Smith, requesting that the City begin the negotiation of a "developer agreement" for the CSO work, as required by § 10(g) of the Development Agreement. [Exh. "8"].

100. By letter dated April 3, 2008, Solicitor Smith responded that such negotiations were premature pending this Court's resolution of the status of HSP Gaming's submerged lands license. [Exh. "9"]. Yet to date, despite this Court's

August 22, 2008 decision sustaining the validity of that license and the subsequent denial of the City's Application for Reconsideration, the City has failed to commence the CSO contract negotiations as required by the Development Agreement.

(g) Further statements establishing the Nutter Administration's violations of this Court's December 3, 2007 Order and of the Development Agreement

101. Although the City is required under the Court's December 3, 2007 Order and the Development Agreement to cooperate with HSP Gaming with respect to the SugarHouse Casino project, the Nutter Administration has continually caused delays, obstructed and interfered with this construction project. The Nutter Administration also has continued to publicly reject the approved location of the SugarHouse Casino, demonstrating the Nutter Administration's intention to violate this Court's December 3, 2007 Order and the Development Agreement.

102. On June 4, 2008, a "senior representative" of the Nutter Administration told the *Philadelphia Weekly* newspaper that the City was pursuing any avenue available to relocate the SugarHouse Casino project. [Exh. "10"].

103. In June 2008, Teresa Gillen, the Nutter Administration's chief advisor on casino issues and HSP Gaming's point of contact for the City, stated in a philly.com news article that the Nutter Administration had commissioned a third-party design/urban planning consultant, PennPraxis, to "clarify why [the SugarHouse Casino site] is a bad location." [Exh. "11"].

104. In or around July 2008, Mayor Nutter wrote a letter to State Senator Vincent Fumo and Representative Dwight Evans, where he stated that the licensing hurdles established and controlled by the City, which HSP Gaming must

maneuver in order to construct the SugarHouse Casino project, are “practically insurmountable.” [Exh. “7”].

105. On August 27, 2008, the City provided comment letters to the Army Corps of Engineer (“ACOE”) to actively oppose the issuance of an ACOE permit that HSP requires to complete the SugarHouse Casino project. The City further stated in its comments to ACOE that “Mayor Nutter and his Administration ... have testified that it is not necessary or desirable to locate gaming establishments on Philadelphia’s riverfront.” [Exh. “12”].

106. In an October 2008 interview with the *Inquirer*, Mayor Nutter stated that he remained opposed to SugarHouse building on the waterfront. [Exh. “13”].

107. In a December 2008 interview with the *Philadelphia Daily News*, Mayor Nutter once again stated that it is his “preference” that HSP Gaming relocate its site for the SugarHouse Casino project. [Exh. “14”].

**(h) The Nutter Administration’s actions have caused substantial and irreparable injury to the Commonwealth, the taxpayers, and HSP Gaming**

108. The delays caused by the Nutter Administration in receiving, reviewing and acting upon all of HSP Gaming’s numerous applications and requests are depriving the Commonwealth and its taxpayers of millions of dollars in tax revenue every month that will never be recovered, thus denying tax relief to the citizens of the Commonwealth, along with the jobs and other benefits that the Gaming Act was intended to bring to the Commonwealth. Ironically, these same delays caused by the Nutter Administration are depriving the Philadelphia School District of millions of dollars annually, and depriving Philadelphia’s residents of much needed wage tax

relief, to say nothing of the delay in the creation of thousands of new jobs opportunities which will flow, directly and indirectly, from the construction and operation of the SugarHouse Casino.

109. Because HSP Gaming's casino operations have been and continue to be delayed by the Nutter Administration, HSP Gaming has incurred and will continue to incur hundreds of millions of dollars in lost gaming revenues, lost profits and other potential damages such as increased costs of construction. Further, for each month that HSP Gaming's casino operations have been and continue to be delayed, HSP Gaming has spent and will continue to spend approximately \$1 million in out-of-pocket expenses.

110. HSP Gaming's lost revenues, lost profits and consequent lost tax revenues to the Commonwealth and the City, have accrued and will continue to accrue each day that HSP Gaming's casino operations are delayed by the City's obstruction and deliberate inaction and harassment. In addition, the substantial change in the global economy and financing markets that occurred during the delay caused by the Nutter Administration will make this project more expensive to build and operate. These lost revenues will significantly impact the future distribution of funds to state and local governmental programs and the extent to which tax relief ultimately becomes available to the citizens of the Commonwealth and the City.

111. The Gaming Act mandates a "timely implementation of casino gaming." 4 Pa.C.S. § 1506. This General Assembly mandate has been stymied by the City's refusal to honor its commitments under the Development Agreement with HSP

Gaming and to take other actions as contemplated thereby, all of which are in direct contravention of this Court's December 3, 2007 Order, which requires the City 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 HSP in the ordinary course and in compliance with [the] Court's order ..." *HSP Gaming*, 595 Pa. at 534, 939 A.2d at 288.

112. The development of the SugarHouse Casino requires that permits and approvals for the various stages of construction be issued in a timely and orderly fashion. At this point, without a foundation permit, HSP Gaming is unable to even commence foundation work, the very first major stage of construction. If forced to fight the City's guerilla warfare against issuance of each and every subsequent permit or approval, orderly and rational development will be impossible and enormous additional expense will result from "start-and-stop" construction. In the ordinary course, the developer of a major project such as the SugarHouse Casino requires assurance that the City will not unjustifiably cause gaps between issuance of other future necessary permits, including the core and shell permits and the interior fit-out permits, which encompass electrical, plumbing, life safety and other integral parts of the building development. Without a Special Master to assure an orderly and rational permit and approval process, HSP Gaming will be at the mercy of a hostile City administration which can cause discontinuity, interruptions and unnecessary delays as it experiments with tactic after tactic to impede the SugarHouse Casino development.



#### IV. Legal Argument

113. The Court has the authority to issue further orders enforcing its prior decision in a matter. 42 Pa. C.S. § 323 (Pennsylvania courts have all legal and equitable powers necessary to enforce their orders); *Philadelphia Entertainment and Dev. Partners v. Philadelphia City Council*, \_\_ Pa. \_\_\_, 958 A.2d 1040 (2008) (appointing master to consider and resolve disputes regarding issuance of permits, approvals, licenses or other authorizations by the City of Philadelphia to enforce Court's prior decision); Pa.R.Civ.P. 2591(b).

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

115. By the actions described more fully above, the City has violated paragraph 4 of this Court's December 3, 2007 Order.

116. In addition to this Court's inherent authority to enforce and remedy violations of its Orders, the Court is granted additional authority to appoint a Special Master pursuant to § 1506 of the Gaming Act. *See* 4 Pa. C.S. § 1506 ("as appropriate, [this Court] may appoint a master to hear an appeal under this section."). For example, in *Philadelphia Entertainment*, a case with facts similar to those here, the Court appointed the Honorable Joseph F. McCloskey as Special Master with full authority to consider and resolve disputes arising from the City's refusal and delay in issuing permits, approval, licenses and other authorizations in conjunction with the construction activities of the Foxwoods Casino in Philadelphia.

117. This Court should appoint a Special Master to resolve efficiently the current and future disputes between the City and HSP Gaming regarding the City's

failure to timely receive, review and act upon applications from HSP Gaming for permits, approvals, licenses, authorization and other actions in the ordinary course and in compliance with this Court's December 3, 2007 Order.

118. The actions and inaction by the City, along with the public statements made by the Nutter Administration, make it clear that the City has sought to delay and will continue to seek to delay the SugarHouse Casino project by failing to receive, review and timely act upon the applications for permits, approvals, licenses and other authorizations and actions necessary for the timely construction, use and occupancy of HSP Gaming's SugarHouse Casino project.

119. The actions of the Nutter Administration, in clear contravention of the Court's December 3, 2007 Order, have been taken solely for the purpose of delay and are not only dilatory, but obdurate and vexatious, warranting the Court's award to HSP Gaming of its attorneys' fees and costs incurred in pursuing this Application. Pa.R.A.P. 2744; 42 Pa.C.S. § 2503.

#### V. Relief Sought

WHEREFORE, Applicant/Petitioner HSP Gaming, L.P. respectfully requests this Honorable Court to enter an order enforcing its Order of December 3, 2007, as follows:

(1) Ordering the City to issue to HSP Gaming the foundation permit for which it previously applied;

(2) As authorized by 4 Pa.C.S. § 1506 and this Court's inherent power to enforce and remedy violations of its Orders, appointing a Special Master in this

action with full authority to consider and resolve any disputes that have arisen or that may arise regarding the issuance of permits, approvals, licenses, variances, interpretations, waivers, or other authorizations or actions required by or from the City of Philadelphia involving zoning, usage, layout, construction and occupancy, including location (as approved by the Gaming Board), size, bulk, and use of HSP Gaming's licensed gaming facility, or in the enforcement of the City's obligations under the December 17, 2007 Tax Settlement and Development Agreement between HSP Gaming and the City, including without limitation disputes that may arise as a result of modifications, changes, revisions, or clarifications of any aspect of the development of the SugarHouse Casino as may be proposed by HSP Gaming consistent with the orderly and prompt construction and opening of HSP Gaming's Category 2 facility;

(3) Granting the Special Master authority to award to HSP Gaming the attorneys' fees and costs that HSP Gaming has incurred to prepare this Application, and any subsequent Application brought before the Special Master by HSP Gaming, and to assess sanctions against the City for failing to receive, review and timely act upon all applications and requests from HSP Gaming in the ordinary course and in compliance with the Court's December 3, 2007 Order; and

(4) Ordering such other relief as this Court deems just and appropriate.

Respectfully submitted,


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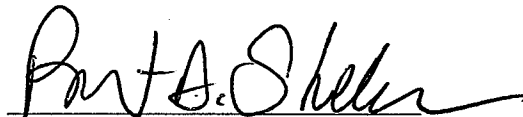
  
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Dated: January 8, 2009

*Counsel for HSP Gaming, L.P.*

## Verification

I, Robert Sheldon, hereby state that I am the President of Applicant HSP Gaming, L.P and verify that the statements made in the foregoing Application for Relief are true and correct to the best of my knowledge, information, and belief. I understand that I am making this Verification subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities.

  
Robert Sheldon

Dated: January 8, 2009

Proof of Service

I hereby certify that I am this day serving a complete copy of the foregoing Application for Relief and supporting Appendix upon the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 121:

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Dated: January 8, 2009

