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1900 MARKET STREET PHILADELPHIA, PA 19103-3508 215.665.2000 800.523.2900 215.665.2013 FAX www.cozen.com

January 25, 2008

F. Warren Jacoby
Direct Phone 215.665-2154
Direct Fax 215.701.254
fjacoby@cozen.com

VIA COURIER/HAND DELIVERY

Pennsylvania Supreme Court
Office of the Prothonotary
Room 468, City Hall
Philadelphia, PA 19107

Re: Senator Vincent J. Fumo, et al. v. City of Philadelphia and
HSP Gaming, L.P., No. 207 EM 2007

Dear Sir or Madam:

Enclosed for filing please find original and 12 copies of HSP Gaming, L.P.'S Application For Ancillary Relief And A Stay Pursuant To Pa.R.A.P. 123, 1701, And 1781 with Supporting Exhibits.

Kindly time-stamp the extra copies of each of these documents and return them to our courier for delivery to our office.

Should you have any questions, please do not hesitate to contact the undersigned.

Respectfully submitted,

COZEN O'CONNOR

A handwritten signature in cursive script, appearing to read "F. Warren Jacoby".

By: F. WARREN JACOBY

FWJ:mts

Enclosures

cc: Shelley R. Smith, Esquire (w/enc) (Via Hand Delivery and Email)
Catherine M. Recker, Esquire (w/enc) (Via Hand Delivery and Email)
Christopher B. Craig, Esquire (w/enc) (Via Federal Express and Email)

RECEIVED
JAN 25 2008
SUPREME COURT
EASTERN DISTRICT

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

SENATOR VINCENT J. FUMO,	:	No. 207 E.M. 2007
REPRESENTATIVE MICHAEL H.	:	
O'BRIEN, SENATOR MICHAEL J.	:	Petition for Review filed by Vincent J.
STACK, REPRESENTATIVE JOHN J.	:	Fumo, et al. In the Nature of An Appeal
TAYLOR, REPRESENTATIVE MICHAEL	:	from a Final Determination of A Political
P. McGEEHAN, and REPRESENTATIVE	:	Subdivision Pursuant to 4 Pa. C.S.A.
ROBERT C. DONATUCCI,	:	§1506 and 53 P.S. §14202
	:	
Petitioners	:	
	:	
v.	:	
	:	
THE CITY OF PHILADELPHIA,	:	
	:	
Respondent	:	
	:	
HSP GAMING, L.P.,	:	
	:	
Respondent-Intervenor.	:	

**HSP GAMING, L.P.'S APPLICATION FOR ANCILLARY RELIEF AND A STAY
PURSUANT TO Pa.R.A.P. 123, 1701, AND 1781**

Respondent-Intervenor, HSP GAMING, L.P. ("HSP Gaming"), by and through its
counsel, files this Application for Ancillary Relief and a Stay Pursuant to Pa.R.A.P. 123, 1701,

and 1781 seeking a declaration that the Notice of Revocation of License Issued in Error which was issued by Respondent, the City of Philadelphia (the "City") on January 24, 2008 ("Revocation Notice"), is null and void, and seeking a stay of the effect of such Revocation Notice pending a final decision on this Application. The Revocation Notice purports to revoke the license ("License") issued by the Commerce Department of the City of Philadelphia ("Commerce Department"), granting HSP Gaming's application ("Application") to the Commerce Department for a license pursuant to 53 P.S. § 14199 to construct improvements on certain lands beyond the low water mark of the Delaware River described in the Application ("Submerged Lands"). Simply stated, under Rule 1701 of the Pennsylvania Rules of Civil Procedure ("Rule 1701"), the City had no jurisdiction to take such action and to revoke the License because the Commerce Department's November 27, 2007 final determination to issue the License (the "Final Determination") is currently on appeal in the above captioned case and in *Fumo et al., v. City of Philadelphia, et al.*, (207 E.M. 2007). As such, Rule 1701 mandates that the Revocation Notice is null and void for lack of jurisdiction. *Stanton v. Lackawanna Energy, Ltd.*, 915 A.2d 668, 673 (Pa. Super. 2007).

Moreover, not only does the City lack jurisdiction to change its position on the Final Determination and the issuance of the License thereunder while this Court considers two appeals therefrom, the City is estopped from reversing or changing its position. *See Segal v. Zoning Hearing Bd. of Buckingham Twp.*, 771 A.2d 90, 95 (Pa. Cmwlth. 2001) ("The doctrine of judicial estoppel has been applied to prevent a litigant from taking a position in an appeal contrary to the position taken before an administrative tribunal."). The City cannot reverse its consistently held position in support of the License to suit the political whims of the moment, and the City may not change its position as the result of the change in administration. *See Borough of Malvern v.*

C.N. Agnew, 11 Pa. Cmwlth. 285, 289, 314 A.2d 52, 53 (1973) (“If we were to permit a municipality to void building permits merely because of the results of a political election changing the complexion or philosophical thinking of the governing body of a municipality, only chaos could result.”).¹

In sum, the sole authority to determine the validity of the Final Determination and the License issued thereunder is vested in this Court upon the filing of the Petitions for Review in this case and in 208 E.M 2007, and this Court’s authority does not and should not depend upon the outcome of political elections or changing administrations. In circumstances reminiscent of the delay tactics and deliberate inaction of City Council which led to this Court’s decision in *HSP Gaming, L.P. v. City Council for the City of Philadelphia*, __ Pa. __, __ A.2d __, 2007 WL 4226871 (2007), Philadelphia’s new mayoral administration is playing fast and loose with official processes, both judicial and administrative, undermining the timely and proper implementation of the Gaming Act. Regrettably, this Application is required to redress unlawful action by the City’s new administration, which action is calculated to improperly divest this Court of its jurisdiction and appellate role in matters presently before this Court. Therefore, HSP Gaming respectfully requests that this Court grant the requested relief and, in support thereof, HSP Gaming avers as follows:

I. FACTUAL BACKGROUND

1. In their Petition for Review filed on December 26, 2007, Petitioners claim that the Commerce Department had no authority to grant the License to HSP Gaming to construct certain

¹ HSP Gaming expressly reserves the right to challenge the merits and reasoning, or lack thereof, of the Revocation Notice by filing an appropriate appeal at a later time pursuant to a Petition for Review. HSP Gaming further reserves any and all arguments and grounds for appeal regarding the Revocation Notice until such time as it files its appeal if one is necessary. HSP Gaming files this Application here to address the City’s lack of jurisdiction and estoppel because the above captioned matter, and the City’s arguments in it and in the proceedings below, give rise at this time to the Rule 1701 and estoppel arguments in this case.

improvements on the Submerged Lands, even though the General Assembly explicitly granted this specific authority to the predecessor of the Commerce Department under Section 14199 of Title 53 of the Pennsylvania Statutes (Act 321 of June 8, 1907, Pamphlet Law 488, § 10) (“Section 14199/Act 321”).² A true and correct copy of the Petition for Review is attached hereto as Exhibit A.

2. On December 27, 2007, the Prothonotary for this Court issued a letter directing the City, and the other parties, to file an Answer to the Petition for Review by January 14, 2008.

3. On December 28, 2007, the City filed its Answer and Brief in Opposition to the Petition for Review. Therein, the City confirmed that the Commerce Department was properly authorized to issue the License pursuant to Section 14199/Act 321, which has never been repealed and remains the law today. Moreover, the City’s Answer explained that, at the time that the Commerce Department issued the License, the City Solicitor had previously issued his opinion and had also testified at a public hearing setting forth and confirming the basis for the Commerce Department’s authority to issue the License. A true and correct copy of this Answer is attached hereto as Exhibit B.³

4. Also on December 28, 2007, HSP Gaming filed its Answer in Opposition to the Petition for Review and two Applications for Summary Relief, one on the grounds that Petitioners lack standing and the other setting forth that HSP Gaming’s right to relief is clear on the merits. A true and correct copy of HSP Gaming’s Answer in this case is attached hereto as Exhibit C.

² In 1951, Philadelphia’s Home Rule Charter transferred this authority from the Department of Wharves, Docks and Ferries of the City of Philadelphia to the Commerce Department. Philadelphia City Charter § A-101.

³ In addition, on December 27, 2007, the City Council for the City of Philadelphia and City Councilmember Frank DiCicco filed a Petition for Review to appeal the Final Determination to issue the License in *City Council et al., v. City of Philadelphia, et al.*, (208 E.M. 2007). On January 4, 2008, the City filed its answer in that case, again supporting the License and opposing any challenge thereto.

5. On January 11, 2008, following the change of administrations, the City filed a motion seeking fourteen days to review its position and decide whether to file a substituted Answer to the Petition for Review. Nothing in the City's requests purported to inform the Court or the parties how such an answer might differ from the Answer that the City had originally filed.⁴ HSP Gaming vigorously contests any attempt by the City to contradict the position taken in City's Answers filed of record in these appeals.

6. Even though the City Solicitor had already issued an opinion on the authority of the City to issue the License, the City Solicitor publicly testified at the Hearing below in support of the License, and the City had twice filed answers in cases pending before this Court in support of the License, on January 24, 2008, the City, under a newly elected mayor, issued the Revocation Notice purporting to revoke the License.

II. STATEMENT OF MATERIAL FACTS

A. The Selection of HSP Gaming's Riverfront Site

7. Under the Pennsylvania Race Horse Development and Gaming Act ("Gaming Act") 4 Pa.C.S. §§ 1101 *et seq.*, the Pennsylvania Gaming Control Board ("Gaming Board") has the sole authority to select the sites of casinos in the City of Philadelphia. *Pennsylvania Gaming Control Bd. v. City Council of Philadelphia*, ___ Pa. ___, ___, 928 A.2d 1255, 1264 (2007); *HSP Gaming, L.P. v. City Council of Philadelphia*, ___ Pa. ___, ___, ___ A.2d ___, ___, 2007 WL 4226871, *11 (2007).

8. On December 20, 2006, following receipt of substantial evidence and public comments, as well as an extensive review of five competing applications, the Gaming Board voted to approve the Category 2 slot machine license applications of HSP Gaming and

⁴As discussed below, when viewed in context of the City's subsequent actions, it seems clear that the City's requests for the extensions were not made in good faith, but rather part of an orchestrated and improper attempt to revoke the riparian License.

Pennsylvania Entertainment & Development Partners (“Foxwoods”), specifically designating and approving the riverfront sites at which each was to construct its licensed gaming facility.

9. On February 1, 2007, the Gaming Board issued a 113-page Order and Adjudication setting forth in detail the evidence and reasons in support of its licensing decisions. The Gaming Board stated therein that “[s]imply stated, successful applicants were the applicants which possessed the projects which the Board evaluated, in its discretion, to be the best projects for licensure under the criteria of the Act.” *See In re HSP Gaming Application*, Docket No. 1356, at p. 7 (PGCB, Feb. 1, 2007).

10. In granting HSP Gaming’s application, the Gaming Board found that the riverfront location presented numerous benefits to the City.

Also significant in the Board’s opinion and to its decision is the Delaware River which flows past these two locations. The River-view properties provide an exciting yet tranquil setting for the building of a new industry in Pennsylvania, providing opportunities for the development along the river-front not only of casinos, but also of hotels with associated amenities which will spur other riverfront economic development. Further, as several proposals have demonstrated, the River can actually be incorporated into the proposals creating a synergy between the Delaware River, the waterfront properties and the City. Finally, the riverfront locations are each located to take advantage of their access to center-city Philadelphia, the convention center, hotels and other existing Philadelphia business and attractions in a way that provides easy access to a host of visitors and tourists for entertainment while staying in Philadelphia.

See In re HSP Gaming Application, Docket No. 1356, at p. 84.

11. The Gaming Board also found that HSP Gaming’s casino will maximize the advantages and opportunities presented by its riverfront location.

HSP/Sugarhouse provides a vibrant complex on a 22 acre peninsula extending into the Delaware River with a phased development including a proposed 500 room hotel and spa, event center, 4,250 parking spaces, 5,000 slot machines, a marina, water fountains, riverside sculpture garden and side-perimeter access for

the public to the Delaware River. With entrances both off Delaware Avenue and from the river marina, the HSP proposal takes full advantage of the Delaware River frontage to present a first class facility which would instill pride in any city.

See In re HSP Gaming Application, Docket No. 1356, at p. 90-91.

12. Thus, the Gaming Board found that HSP Gaming's casino will "capture the essence of what the Board finds to be right for Philadelphia – the development of the Delaware Riverfront in a manner taking advantage of sweeping views, easy access from a major interstate and the river, all in an atmosphere of upscale grandness." *See In re HSP Gaming Application*, Docket No. 1356, at p. 93.

B. License Application and Hearing

13. On October 29, 2007, pursuant to Section 14199/Act 321, HSP Gaming submitted its Application to the Commerce Department for the License to construct its facility, in part, on the Submerged Lands described in the Application. (*See Application at 2*).

14. The Application also included HSP Gaming's Plan of Development for the construction project, which described the construction in detail. (*See HSP Gaming's Plan of Development ("Plan of Development")*).⁵

15. Thereafter, the Commerce Department scheduled a public Hearing on HSP Gaming's Application for November 15, 2007 and, in accordance with Section 14199/Act 321, HSP Gaming caused Notice of the Hearing to be posted on the property and published in newspapers of general circulation. (Nov. 15, 2007 Hr'g Tr. ("Hr'g Tr.") at R. 259).⁶

⁵ The Planning Commission for the City of Philadelphia had previously reviewed, considered and approved HSP Gaming's Plan of Development, after a full hearing, on May 21, 2007.

⁶ As used in this Application, the page-number references preceded by "R" refer to the sequentially numbered pages of the four-volume "Exhibits in Support of HSP Gaming LP's Answer in Opposition to Petition for Review," which was filed in both 207 E.M. 2007 and 208 E.M. 2007.

16. On November 13, 2007, the City Solicitor for the City of Philadelphia, Romulo L. Diaz, Jr., issued his Opinion addressed to Petitioner DiCicco, a Councilmember for the City of Philadelphia, regarding HSP Gaming's Application and the authority of the Commerce Department to act upon it and issue a license for riparian lands. (*See* City Solicitor Op. at R. 453).

17. In his Opinion, the City Solicitor provided a history of the Commerce Director's authority to issue licenses for submerged lands located within the City of Philadelphia and advised that the Dam Safety and Encroachments Act did not supersede the authority of the Commerce Director under Section 14199/Act 321. (*Id.*)

18. On November 15, 2007, the Commerce Department held the previously scheduled Hearing chaired by the Commerce Director. (Hr'g Tr. at R. 243-363).

19. At the Hearing, HSP Gaming submitted evidence and testimony in support of its Application, and the Commerce Director received into evidence documents and testimony from representatives of City government as well as members of the public and other elected officials, including Petitioner DiCicco. (Hr'g Tr. at R. 243-363).

20. At the Hearing, the evidence established that, at present, the preponderance of the Submerged Lands are not submerged and certainly are not navigable because the part of the river there consists of mud, rubble, and the remains of unused and unusable piers, (Hr'g Tr. at R. 262-266), and the Submerged Lands are currently in a state of decay such that they are inaccessible and in fact make the river inaccessible to the public by creating a barrier of decayed rubble that cannot be safely traversed. (Hr'g Tr. at R. 262- 66; App. at R. 236-37; Pictures of Submerged Lands at 934-36).

21. The evidence also established that the Submerged Lands are covered with hundreds of old pilings from former pier and wharf structures that were once used to conduct

maritime activities. (Hr'g Tr. at R. 262-266). As a result of the debris and state of decay, the Submerged Lands are currently fenced off for public safety reasons, thus rendering the waterfront completely inaccessible. (Hr'g Tr. at R. 266).

22. HSP Gaming's completed project will drastically improve the Submerged Lands, allow access to the riverfront, and make the land conducive to maritime activity. HSP Gaming would construct a public dock as well as a pier structure with a public promenade that would provide public access to the riverfront to allow city residents to enjoy the river. (Hr'g Tr. at R. 263). The docks will be built for a ferry and water taxi to promote transit over the river to and from destinations on both sides of the river. (Hr'g Tr. at R. 268). The public promenade will span the entire length of the riverfront on the Submerged Lands. (Hr'g Tr. at R. 265). The promenade will include abundant landscaping, new lighting, and attractive furnishings, as well as a fan-shaped and tiered plaza overlooking the river to host summer concerts, performances, and year-long fitness opportunities. (Hr'g Tr. at R. 272). The landscaped open spaces will include paths to the riverfront, and the riverfront will have clearly identified paths for joggers and bikers, as well as quiet seating areas. (Hr'g Tr. at R. 267). In all, the project will provide 1,600 feet of construction with access along the riverfront, or the equivalent of four city blocks. (Hr'g Tr. at 272).

23. Without the License, the facility would be built with the mud and debris filled land as a barrier between the facility and the river, thus continuing to restrict access to and enjoyment of the river. (Hr'g Tr. at R. 263).

C. The Commerce Department's Final Determination

24. On November 27, 2007, after consideration of all of the testimony and documents submitted to it in conjunction with the Application, the Commerce Director issued the Final

Determination on behalf of the Commerce Department granting HSP Gaming's License. (See Final Determination at 1-10, attached to the Petition for Review).

25. The Commerce Director found that the Application involved the layout, usage, and construction of HSP Gaming's facility at the location selected by the Gaming Board. (See Final Determination at 1-2).

Applicants seek permission to erect and construct upon Commonwealth-owned lands in the Delaware River immediately adjacent to its property, but on the landside where piers end along the river (the "Applicant Submerged Lands"). The construction will include certain improvements and structures, and the filling in of portions of the Delaware River and enclosure of the entire improved and filled area with a new bulkhead structure, all of which shall be part of the Sugarhouse Casino Project (the "Project"). The Project will be located at 941-1025 N. Delaware Avenue in the City of Philadelphia . . . a location selected by the Pennsylvania Gaming Control Board.

(Final Determination at 1-2).

26. The Commerce Director further observed that the construction and layout will extend beyond the low-water mark, thus requiring the License:

As the Premises are developed for the Project, Applicant plans, among other things, to widen and extend Pier 41. . . .demolish and remove the dilapidated structures at Piers 42, 43, and 46 North; remove the fill between Piers 41 and 42 North and Piers 43 and 44 North; construct approximately 1,200 feet of bulkhead/high-deck structure and 2,100 feet of public greenway; . . . and design and construct the casino and the accessory buildings and facilities, including the driving and loading of test pilings, set forth in the Application. This will involve construction both east and west of the low-water mark.

(Final Determination at ¶ 12) (emphasis added).

27. The Commerce Director noted that the Submerged Lands currently are in a state of disarray, are vacant and fenced off for safety purposes, and render the waterfront completely inaccessible to the public. (See Final Determination, Findings of Fact at ¶¶ 8-11).

28. The Commerce Director found that the proposed development would drastically improve the waterfront by allowing construction of HSP Gaming's Project to extend to the waterfront. (See Final Determination, Findings of Fact at ¶¶ 14-17).

29. The Commerce Director found, "Applicant's proposed Project ensures public access to the Delaware riverfront by including a public dock and a pier, a landscaped public right of way at least 50 feet wide across the eastern boarder of the Premises, and a fan-shaped waterfront public park." (See Final Determination, Finding of Fact, at ¶ 14; see also Final Determination, Conclusion of Law, at ¶ 13 ("Licensing the use of the Applicant Submerged Lands for the Project, in the manner contemplated by the Plan of Development, will improve all aspects of the Project, and positively will enhance the impact of the development of the Delaware River, and on all who use the river for recreation, navigation, fishery and commerce.")).

30. On November 27, 2007, in accordance with the Final Determination, HSP Gaming paid the City of Philadelphia the sum of \$282,270.00 as payment of the fee for the License, and was issued the License and thereafter undertook substantial work on the riparian lands. (See a true and correct copy of HSP Gaming's cancelled check at R. 472).⁷

III. RULE 1701 DIVESTED THE CITY OF JURISDICTION AND THE NOTICE IS NULL AND VOID

31. The City's Revocation Notice is null and void because a government unit may not rescind or reconsider its decision while an appeal is pending before this Court. Pa.R.A.P. 1701.

32. "Except as otherwise prescribed by these rules, after an appeal is taken or review of a quasijudicial order is sought, the trial court or other government unit may no longer proceed further in the matter." Pa.R.A.P. 1701(a).

⁷ In addition, in accordance with the Gaming Act, on October 17, 2007, HSP Gaming paid to the Gaming Board the \$50 Million License Fee for its gaming license pursuant to 4 Pa.C.S. § 1209 as directed by the Board's Order dated October 2, 2007.

33. Therefore, unless one of the specifically enumerated exceptions in Rule 1701 applies, any determination or decision by the City after the filing of the Petition for Review in this case and in *Fumo v. City of Philadelphia* (207 E.M. 2007), is a nullity for lack of jurisdiction. *Bell v. Kater*, 839 A.2d 356, 357 (Pa. Super. 2003).

34. Here, none of the exceptions applies. Significantly, Rule 1701(b) requires that any reconsideration occur within the 30-day period prescribed for filing the Petition for Review. *See* Pa.R.A.P. 1701(b)(ii). As the Commerce Department issued its Final Determination and the License on November 27, 2007, this period expired on December 27, 2007.

35. Moreover, although Rule 1701(d) creates an exception for original jurisdiction petitions for review, the Petitions for Review in this case and in *Fumo v. City of Philadelphia*, (207 E.M 2007) were each appellate jurisdiction petitions for review under Section 1506 of the Gaming Act, 4 Pa.C.S. § 1506, of the Commerce Department's quasijudicial order issued following notice and the Hearing. *See* GOODRICH-AMRAM, § 1701:41 (Rule 1701(d) "makes clear that the filing of an original jurisdiction petition for review does not affect the power or authority of the government unit to proceed further in the matter. Of course, if an appellate jurisdiction petition for review is filed, Rule 1701(a) is applicable and the government unit is precluded from proceeding further in the matters, subject to the exceptions in Rule 1701(b) and (c).").

36. Accordingly, the Rule 1701(d) exception does not apply and the City's Revocation Notice is therefore null and void. *Stanton v. Lackawanna Energy, Ltd.*, 915 A.2d 668, 673 (Pa. Super. 2007) ("Pursuant to the Rules of Appellate Procedure, the trial court lacked the authority to enter the March 3, 2003 order, and we must deem the order void.").

37. Indeed, once a decision or order is appealed only the appellate court can pass on the validity of that decision. *Baronti v. Baronti*, 381 Pa. Super. 134, 136 n.1, 553 A.2d 1131,

1132 n.1 (1989). Thus, a lower tribunal cannot rescind or vacate its own decision while that decision is on appeal. *Daughen v. Fox*, 372 Pa. Super. 405, 419, 539 A.2d 858, 865 (1988); *see also Covace v. Balint*, 418 Pa. 262, 275-76, 210 A.2d 882, 889 (1965) (error for trial court to modify order from which appeal had been taken); *Sowers Estate*, 383 Pa. 566, 573, 119 A.2d 60, 64 (1956); *Kingsly Clothing Mfg. v. Jacobs*, 344 Pa. 551, 553, 26 A.2d 315, 316 (1942); *Pellegrini v. State Harness Racing Comm'n*, 922 A.2d 33, 35. (Pa. Cmwlth. 2007).

38. Therefore, although the City would prefer to ignore its own position in the two cases currently pending before this Court (207 E.M. 2007 and 208 E.M. 2007), and even ignore that these cases are currently pending, under Rule 1701 this Court is vested with the sole discretion to review the Commerce Department's November 27, 2007, Final Determination to issue the License. This review is now solely a legal and appellate matter that cannot be disturbed by a government unit.

IV. THE CITY IS ESTOPPED FROM ALTERING ITS POSITION AND CANNOT ALTER ITS POSITION BASED SOLELY ON A CHANGE IN ADMINISTRATION.

39. The City repeatedly and consistently advocated in favor of the issuance of the License, by, among other things, issuing the City Solicitor's Opinion on November 13, 2007 and by the testimony of the City Solicitor and other City representatives at the Hearing.

40. In addition, the City has twice filed Answers in this Court in support of the License.

41. The doctrine of judicial estoppel prevents the City from maintaining a position here contrary to its consistently held position in support of the License because the City successfully maintained this position during the proceedings below. *Morris v. South Coventry Tp. Bd. of Supervisors*, 898 A.2d 1213, 1218 (Pa. Cmwlth. 2006) ("a party to an action is judicially estopped from assuming a position inconsistent with his or her assertion in a previous

action if his or her contention was successfully maintained.”); *Segal v. Zoning Hearing Bd. of Buckingham Tp.*, 771 A.2d 90, 95 (Pa. Cmwlth. 2001) (“The doctrine of judicial estoppel has been applied to prevent a litigant from taking a position in an appeal contrary to the position taken before an administrative tribunal.”).

42. Judicial estoppel is “designed to protect the integrity of the courts by preventing litigants from ‘playing fast and loose’ with the judicial system by adopting whatever position suits the moment.” *Sunbeam Corp. v. Liberty Mut. Ins. Co.*, 566 Pa. 494, 500, 781 A.2d 1189, 1192 (2001). “In essence, the doctrine prohibits parties from switching legal positions to suit their own ends.” *Id.*

43. Here, the City has done precisely what judicial estoppel prohibits. First, it successfully advocated in support of the License during the Hearing below, issued the License, and then filed Answers in this Court in support of the License. When it suited the political moment, the City abruptly switched its legal position. Thus, judicial estoppel prevents the City from revoking the License.

44. Although the Rules of Appellate Procedure specifically permit a party to notify the Court of a change in the law after the case has been submitted to the Court, *see* Pa.R.A.P. 2501, the City has not, and indeed cannot, claim that the law has changed in this case. Rather, it is clear that the City issued the Revocation Notice solely as a result of the administration change on January 7, 2008.

45. Courts, however, do not allow cities to revoke licenses or permits simply as a result of a change in administration. “If we were to permit a municipality to void building permits merely because of the results of a political election changing the complexion or philosophical thinking of the governing body of a municipality, only chaos could result.” *Borough of Malvern v. C.N. Agnew*, 11 Pa. Cmwlth. 285, 289, 314 A.2d 52, 53 (1973).

46. This case clearly underscores the potential for chaos predicted in *Borough of Malvern*. One week, the City files answers in support of the License in two pending matters before this Court, and the next, despite lacking any authority or jurisdiction, the City purports to revoke the very same License.

47. As a result, assuming, *arguendo*, that the City had jurisdiction to issue the Revocation Notice, which as discussed above it did not, it is estopped from playing fast and loose with this Court by changing its position based on change in political administration.

V. HSP GAMING IS ENTITLED TO INTERIM RELIEF UNDER RULE 1781 IN THE FORM OF A STAY OF THE JANUARY 24, 2008 REVOCATION PENDING FULL CONSIDERATION OF THE RELIEF SOUGHT IN THIS CONSOLIDATED APPLICATION

48. Although, as discussed above, the City's Revocation Notice is null and void and therefore has no legal effect, its issuance has the practical effect of calling into question the validity of HSP Gaming's License until this Court can issue a ruling declaring that the Revocation Notice is null and void.⁸

49. Therefore, for the reasons raised in this Application, HSP Gaming respectfully requests that this Court issue an Order expressly staying the effectiveness, if any, of the Revocation Notice until the Court can make a final determination and issue a final order regarding whether the Revocation Notice is null and void.

50. In *Pennsylvania Public Utility Com'n v. Process Gas Consumers Group*, 502 Pa. 545, 467 A.2d 805 (1983), the Supreme Court announced the standard governing relief in the nature of a stay pending petition for review under Pa.R.A.P. 1781. Under *Process Gas*, the

⁸ In addition, even if somehow the City had jurisdiction to issue the Revocation Notice, which Rule 1701 clearly forecloses, HSP Gaming still has the right to appeal the City's Revocation Notice under Section 1506 of the Gaming Act and expressly reserves its right to do so. Thus, until this Court can issue a ruling on the effect of Rule 1701 on the Revocation Notice, the issue as to the potential validity of the Revocation Notice would remain in question, thus requiring that HSP Gaming exercise its right to appeal.

applicant must establish: 1) a likelihood of success on the merits; 2) irreparable injury if a stay is denied; 3) issuance of a stay will not substantially harm other interested parties; and 4) issuance of a stay will not adversely affect the public interest. *Tri-State Asphalt Corp. v. Com. Dept. of Transp.*, 135 Pa. Cmwlth. 410, 420, 582 A.2d 55, 60 (1990) (quoting *Process Gas*, 502 Pa. at 552-53, 467 A.2d at 808-09).

51. First, as discussed above, HSP Gaming is likely to succeed on the merits of its claim that the Revocation Notice is void and illegal because: 1) Rule 1701 divested the City of any authority on the issue of the License during the pendency of the appeals in this Court; 2) the City is estopped from changing its position before a tribunal to suit whatever is convenient for the City at that moment; and 3) the City may not, as a matter of law, revoke a license simply as the result of a change in administration.

52. Second, the City's Revocation Notice has and will continue to cause irreparable harm to HSP Gaming because it is a void and illegal action calling into question the validity of HSP Gaming's License. An illegal and/or void government action causes *per se* irreparable harm. *Hempfield Sch. Dist. v. Election Bd. of Lancaster County*, 133 Pa. Cmwlth. 85, 90-91, 574 A.2d 1190, 1193 (1990). In addition, irreparable harm results as a matter of law where a tribunal attempts to issue orders for which it lacks jurisdiction. *Churchill Corp. v. Third Century, Inc.*, 396 Pa. Super. 314, 329, 578 A.2d 532, 40 (1990). Similarly, this Court has the inherent authority to issue orders "to protect and preserve the integrity of the judicial system and to supervise the administration of justice." *In re Franciscus*, 471 Pa. 53, 59, 369 A.2d 1190, 1193 (1977).

53. Moreover, this Court has previously recognized that illegal government action to delay or interfere with HSP Gaming's right to construct a casino at the location selected and approved by the Gaming Board causes irreparable harm. *Pennsylvania Gaming Control Bd. v.*

City Council of Philadelphia, __ Pa. __, 932 A.2d 869 (Pa. 2007); *Pennsylvania Gaming Control Bd. v. City Council of Philadelphia*, __ Pa. __, 928 A.2d 1255 (Pa. 2007). A stay will prevent injury that may not be compensated by damages because revocation of the riparian license will prevent HSP Gaming from proceeding with the development of the SugarHouse Casino as approved by the Pennsylvania Gaming Control Board.

54. Third, the issuance of the requested stay will not harm any party. As the Revocation Notice is legally void, no party could rely or act upon on it to its benefit and the stay will do nothing more than prevent any confusion as to the validity of HSP Gaming's License resulting from the issuance of an improper and void Revocation Notice. As such, a stay will restore the *status quo* as it existed before the City purported to revoke the License without any jurisdiction or authority, and thus a stay will not harm other parties.

55. Fourth, for these same reasons, issuance of the stay is in the public interest. In granting the License the Commerce Director specifically concluded that HSP Gaming's proposed use of the riparian lands would serve the public interest. Moreover, it is in the public interest to protect the jurisdiction of this Court during an appeal, a policy codified in Rule 1701. Furthermore, it is in the public interest to ensure that the City does not overstep its jurisdiction or wrongfully cast doubt upon the validity of HSP Gaming's License while this Court has the sole jurisdiction to determine the legal validity of the riparian License.

VI. CONCLUSION

56. As set forth above, the City lacked jurisdiction to proceed further regarding the riparian License in any manner once this Court was vested with appellate jurisdiction to rule on the legal validity of the License by reason of the filing of the two pending appeals regarding the Final Determination and License. Pa.R.A.P. 1701. Thus, the Revocation Notice is null and void as a matter of law. *Stanton v. Lackawanna Energy, Ltd.*, 915 A.2d 668, 673 (Pa. Super. 2007)

("Pursuant to the Rules of Appellate Procedure, the trial court lacked the authority to enter the March 3, 2003 order, and we must deem the order void.").

57. In addition, the City is estopped from changing its legal position before this Court after consistently advocating for issuance of the License. *Sunbeam Corp. v. Liberty Mut. Ins. Co.*, 566 Pa. 494, 500, 781 A.2d 1189, 1192 (2001). Indeed, permitting a city to revoke a license merely as a result of a change in administration would create chaos in the public, private, and judicial sectors. *Borough of Malvern v. C.N. Agnew*, 11 Pa. Cmwlth. 285, 289, 314 A.2d 52, 53 (1973).

58. Therefore, HSP Gaming respectfully requests that this Court enter an Order declaring the Revocation Notice null and void as a matter of law.

59. In addition, while this Court considers the merits of the issues that HSP Gaming has raised in this Application, HSP Gaming respectfully requests that this Court enter an Order declaring that the City's Revocation Notice is stayed pending further Order of the Court because HSP Gaming has established that: 1) it is likely to succeed on the merits of its argument that the Revocation Notice is null and void; 2) absent the stay HSP Gaming's interests will be irreparably harmed; and 3) because the Revocation Notice is void, the stay will not harm any party and is in the public interest.

VII. RELIEF SOUGHT


WHEREFORE, for all of these reasons, HSP Gaming respectfully requests this Honorable Court to enter an Order:

- A. Declaring that the January 24, 2008 Notice of Revocation of License is null and void as a matter of law because the City lacked jurisdiction to revoke the License once the appeals in 207 E.M. 2007 and 208 E.M. 2007 were filed;

- B. Declaring that the January 24, 2008 Notice of Revocation of License is null and void as a matter of law because the City is estopped from changing its position with respect to the License for the reasons set forth above;
- C. Staying the effect of the Notice of Revocation of License pending a final determination on the merits of the issues raised in this Application – namely whether the City lacked jurisdiction to issue the Revocation Notice under Rule 1701 and/or is estopped from issuing the Revocation Notice;
- D. Enjoining the City from taking any further action that may in any way affect, impair, limit, or revoke HSP Gaming’s riparian License during the pendency of the appeals in 207 E.M. 2007 and 208 E.M. 2007 and until further Order of the Court; and
- E. Granting such other and further relief as this Court deems just.

Respectfully submitted,

**COZEN O’CONNOR
LAMB McERLANE PC
SPRAGUE & SPRAGUE**



Stephen A. Cozen (PA ID #03492)
F. Warren Jacoby (PA ID #10012)
Jennifer M. McHugh (PA ID #66723)
Cozen O’Connor
1900 Market Street
Philadelphia, PA 19103

Richard A. Sprague (PA ID #04266)
Thomas A. Sprague (PA ID #34716)
Charles J. Hardy (PA ID #16912)
Sprague & Sprague
135 S. 19th Street, Suite 400
The Wellington Building
Philadelphia, PA 19103

William H. Lamb (PA ID #04927)
Scot R. Withers (PA ID #84309)
Lamb McErlane PC
24 East Market Street
P.O. Box 565
West Chester, PA 19381-0565

Dated: January 25, 2008

*Attorneys for Respondent-Intervenor,
HSP Gaming LP*

RECEIVED
JAN 25 2008
SUPREME COURT
EASTERN DISTRICT

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

No. 207 E.M. 2007

SENATOR VINCENT J. FUMO, et al.,
Petitioner

vs.

THE CITY OF PHILADELPHIA
Respondents

and

HSP GAMING, L.P.

**EXHIBITS IN SUPPORT OF HSP GAMING LP'S
APPLICATION FOR ANCILLARY RELIEF AND A STAY
PURSUANT TO Pa.R.A.P. 123, 1701, AND 1781**

Stephen A. Cozen (PA ID #03492)
F. Warren Jacoby (PA ID #10012)
Jennifer M. McHugh (PA ID #66723)
Cozen O'Connor
1900 Market Street
Philadelphia, PA 19103

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Lamb McErlane PC
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P.O. Box 565
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Charles J. Hardy (PA ID #16912)
Sprague & Sprague
135 S. 19th Street, Suite 400
The Wellington Building
Philadelphia, PA 19103

EXHIBIT A

BEFORE THE PENNSYLVANIA SUPREME COURT
EASTERN DISTRICT

SENATOR VINCENT J. FUMO,
REPRESENTATIVE MICHAEL H. O'BRIEN,
REPRESENTATIVE WILLIAM F. KELLER,
SENATOR MICHAEL J. STACK,
REPRESENTATIVE JOHN J. TAYLOR,
REPRESENTATIVE MICHAEL P. McGEEHAN, AND
REPRESENTATIVE ROBERT C. DONATUCCI, each
in their official capacity as members of the Pennsylvania
General Assembly, and individually as resident taxpayers,

Petitioners,

v.

CITY OF PHILADELPHIA,

Respondent.

07 EM 2007

PETITION FOR REVIEW
IN THE NATURE OF AN APPEAL OF A FINAL DETERMINATION
OF A POLITICAL SUBDIVISION PURSUANT TO
4 Pa.C.S.A. § 1506 AND 53 P.S. § 14202

I. Introduction.

Senator Vincent J. Fumo, Representative Michael H. O' Brien, Representative William F. Keller, Senator Michael J. Stack, Representative John J. Taylor, Representative Michael P. McGeehan, and Representative Robert C. Donatucci (hereinafter, the "Philadelphia waterfront state legislators") in their official capacities as members of the Pennsylvania General Assembly and individually as Commonwealth taxpayers, hereby file this Petition for Review in the Nature of an Appeal of a Final Determination of a Political Subdivision involving the construction,

occupancy and location of a licensed slots facility pursuant to 4 Pa.C.S.A. § 1506 and Pa.R.App.P. 1513.

Though involving the construction, occupation and location of a casino, this matter neither involves slots gaming nor implicates the provisions of the Pennsylvania Race Horse Development and Gaming Act. Rather, this appeal is fundamentally related to the authority of the City of Philadelphia to exercise powers that are otherwise exclusively within the sole province of the General Assembly. Each of the Philadelphia waterfront state legislators represents districts that are contiguous with the Delaware River, and pursuant to the Pennsylvania Constitution is charged with the responsibility of ensuring that Commonwealth lands are preserved in trust for the public – including the submerged lands of the Delaware. Pa. Const., art. I, § 27. Consequently, in their official capacity, the Philadelphia waterfront state legislators possess a substantial and direct interest in the manner in which the submerged lands of the Delaware may be conveyed for private development. The initiation and participation in this matter by the Philadelphia waterfront state legislative delegation is purposefully intended to express to this Court the bipartisan, bicameral and unified position of each member that the authorization to convey Commonwealth lands is solely the prerogative of the General Assembly.

The Philadelphia waterfront state legislators seek judicial review of the decision of the City of Philadelphia Commerce Department (hereinafter the “Commerce Department”) to authorize and approve the issuance of a “Submerged Lands License” to HSP Gaming, LP, (hereinafter “HSP”) for the explicit purpose of constructing a casino and entertainment complex upon the submerged lands of the Delaware River – an action that has appropriately been

criticized as an “end run” and “shortcut” around the normal state legislative process.¹ The City’s action is a direct and substantial usurpation of the legal authority and traditional prerogative of the members of the state legislature to exclusively determine – when, how or even if, Commonwealth lands may be conveyed. Accordingly, each of the Philadelphia waterfront state legislators is directly and substantially aggrieved by the Commerce Department’s action.

This matter, if left uncontested, would create a new precedent, permitting any developer, who was otherwise unsuccessful in obtaining legislative authorization to occupy submerged lands of the Commonwealth or who did not wish to comply with legislatively imposed terms or conditions, to simply apply to the City of Philadelphia Commerce Department for a more favorable deal. The consequence of such an outcome would be to invite developers along the Delaware River to occupy state lands in a manner not supported or otherwise authorized by the General Assembly, thus depriving (1) the legislators from exercising their legislative function to consider and specifically authorize the disposition of Commonwealth lands in trust for the public; and, (2) the residents and taxpayers of the Commonwealth of any revenue or other consideration in exchange for the encroachment, development and occupation of state lands.²

¹ See, Editorial, “Riverfront Casinos; Stop the Shortcuts,” *Philadelphia Inquirer* (November 21, 2007).

² It is worthwhile noting that opposition to the Commerce Department’s licensing decision is not confined to the Philadelphia waterfront state legislators – rather, the entire General Assembly has voiced its objection to this usurpation of its exclusive authority. For example, on December 12, 2007, the Senate passed two different bills, 49-0, that if enacted, would affirm the legislature’s “existing, sole and exclusive” authority to specifically authorize the conveyance of any interest in Commonwealth lands. See, 191 *Legislative Journal of the Senate of Pennsylvania* (December 12, 2007) (Senate voted to pass House Bills 1621 and 1627).

In a separate action the day before, the House of Representatives voted, 200-0, to adopt a resolution specifically declaring the chamber’s objection and determination that the City does not possess the legal authority to convey any interest in the submerged lands of the Commonwealth.

II. Basis for Jurisdiction.

1. This Honorable Court has jurisdiction over this matter pursuant to section 1506 of the Pennsylvania Race Horse Development and Gaming Act (Act of July 5, 2004, P.L. 572, No. 71, *as amended*, Act of November 1, 2006, P.L. 1243, No. 135; 4 Pa.C.S.A. § 1101, *et seq.*) as this is an appeal of a final decision of a political subdivision involving the construction, occupancy and location of a licensed facility. A final decision to issue a "Submerged Lands License" would ordinarily be filed with the Court of Common Pleas pursuant to 53 P.S. § 14202, however, section 1506 of the Pennsylvania Race Horse Development and Gaming Act directs, under these circumstances, that this appeal be filed with this Court.

III. Parties Seeking Review.

2. Petitioner, State Senator Vincent J. Fumo, is a duly elected member of the Senate of Pennsylvania, representing the residents of the 1st State Senatorial District. Senator Fumo's legislative district encompasses the proposed location of HSP's casino entertainment complex. Not only was Senator Fumo an active participant in the underlying proceedings before the City Commerce Department and presented record evidentiary testimony in opposition to the Submerged Lands License Application, but a substantial portion of Senator Fumo's senatorial district is contiguous with the waterways of the Delaware River. Senator Fumo routinely introduces, considers, deliberates and votes upon legislation authorizing the conveyance of Commonwealth lands, including submerged lands. In his official capacity, Senator Fumo has

191 *Legislative Journal of the House of Representatives* (December 11, 2007) (House Resolution 523 calls upon the state Department of General Services to challenge the action of the City of Philadelphia Commerce Department).

voted against any attempt to shortcut or otherwise expedite the conveyance of riparian property interests to HSP. *See, e.g., 190 Legislative Journal of the Pennsylvania Senate* (October 27, 2006) (Senate of Pennsylvania voted, overwhelmingly, to concur with House amendments rejecting proposed statutory language that, if enacted, would have expedited the conveyance of riparian rights to HSP.) Senator Fumo is also a resident and taxpayer in the Commonwealth. Senator Fumo has a substantial, direct and immediate interest in this matter.

3. Petitioner, Michael H. O'Brien, is a duly elected member of the Pennsylvania House of Representative, representing the residents of the 175th State House District. Representative O'Brien's legislative district encompasses the proposed location of HSP's casino entertainment complex. Not only was Representative O'Brien an active participant in the underlying proceedings before the City Commerce Department and presented record evidentiary testimony in opposition to the Submerged Lands License Application, but a substantial portion of Representative O'Brien's House district is contiguous with the waterways of the Delaware River. Representative O'Brien routinely introduces, considers, deliberates and votes upon legislation authorizing the conveyance of Commonwealth lands, including submerged lands. In his official capacity, Representative O'Brien has sponsored legislation opposing the action of the City of Philadelphia and HSP's effort to circumvent the normal state legislative conveyance process. *See, 191 Legislative Journal of the House of Representatives* (December 11, 2007) (House Representatives voted, 200-0 to adopt a resolution calling upon the state Attorney General to pursue legal action enjoining the City's conveyance of any interest in the submerged lands of the Commonwealth). Representative O'Brien is also a resident and taxpayer in the Commonwealth. Representative O'Brien has a substantial, direct and immediate interest in this matter.

4. Petitioner, State Representative William F. Keller, is a duly elected member of the Pennsylvania House of Representatives, representing the residents of the 184th State House District. Representative Keller's legislative district is contiguous to the proposed location of HSP's casino entertainment complex. Not only was Representative Keller an active participant in the underlying proceedings before the City Commerce Department and presented record evidentiary testimony in opposition to the Submerged Lands License Application, but a substantial portion of Representative Keller's House district is contiguous with the waterways of the Delaware River. Representative Keller routinely introduces, considers, deliberates and votes upon legislation authorizing the conveyance of Commonwealth lands, including submerged lands. In his official capacity, Representative Keller has repeatedly voted against any attempt to shortcut or otherwise expedite the conveyance of riparian property interests to HSP. *See, e.g., 190 Legislative Journal of the House of Representatives* (October 17 & 24, 2006) (House of Representatives voted, overwhelmingly, to reject proposed statutory language that, if enacted, would have expedited the conveyance of riparian rights to HSP.) Representative Keller is also a resident and taxpayer in the Commonwealth. Representative Keller has a substantial, direct and immediate interest in this matter.

5. Petitioner, State Senator Michael J. Stack, is a duly elected member of the Senate of Pennsylvania, representing the residents of the 5th State Senatorial District. Senator Stack's legislative district encompasses significant planned waterfront development along the Delaware River, and as a consequence, Senator Stack has routinely introduced and voted for legislation that has conveyed Commonwealth interests in submerged lands to private developers within his legislative district. A substantial portion of Senator Stack's senatorial district is contiguous with

the waterways of the Delaware River. In his official capacity, Senator Stack has voted against any attempt to shortcut or otherwise expedite the conveyance of riparian property interests to HSP. *See, e.g.*, 190 *Legislative Journal of the Pennsylvania Senate* (October 27, 2006) (Senate of Pennsylvania voted, overwhelmingly, to concur with House amendments rejecting proposed statutory language that, if enacted, would have expedited the conveyance of riparian rights to HSP.) Senator Stack is also a resident and taxpayer in the Commonwealth. Senator Stack has a substantial, direct and immediate interest in this matter.

6. Petitioner, State Representative John J. Taylor, is a duly elected member of the Pennsylvania House of Representatives, representing the residents of the 177th State House District. Representative Taylor's legislative district encompasses significant planned waterfront development along the Delaware River, and as a consequence, Representative Taylor has routinely introduced and voted for legislation that has conveyed Commonwealth interests in submerged lands to private developers within his legislative district. A substantial portion of Representative Taylor's House district is contiguous with the waterways of the Delaware River. In his official capacity, Representative Taylor has repeatedly voted against any attempt to shortcut or otherwise expedite the conveyance of riparian property interests to HSP. *See, e.g.*, 190 *Legislative Journal of the House of Representatives* (October 17 & 24, 2006) (House of Representatives voted, overwhelmingly, to reject proposed statutory language that, if enacted, would have expedited the conveyance of riparian rights to HSP.) Representative Taylor is also a resident and taxpayer in the Commonwealth. Representative Taylor has a substantial, direct and immediate interest in this matter.

7. Petitioner, State Representative Michael P. McGeehan, is a duly elected member of the

Pennsylvania House of Representatives, representing the residents of the 173th State House District. Representative McGeehan's legislative district encompasses significant planned waterfront development along the Delaware River, and as a consequence, Representative McGeehan has routinely introduced and voted for legislation that has conveyed Commonwealth interests in submerged lands to private developers within his legislative district. A substantial portion of Representative McGeehan's House district is contiguous with the waterways of the Delaware River. In his official capacity, Representative McGeehan has repeatedly voted against any attempt to shortcut or otherwise expedite the conveyance of riparian property interests to HSP. *See, e.g.* 190 *Legislative Journal of the House of Representatives* (October 17 & 24, 2006) (House of Representatives voted, overwhelmingly, to reject proposed statutory language that, if enacted, would have expedited the conveyance of riparian rights to HSP.) Representative McGeehan is also a resident and taxpayer in the Commonwealth. Representative McGeehan has a substantial, direct and immediate interest in this matter.

8. Petitioner, State Representative Robert C. Donatucci, is a duly elected member of the Pennsylvania House of Representatives, representing the residents of the 185th State House District. Representative Donatucci's legislative district encompasses significant planned waterfront development along the Delaware River, and as a consequence, Representative Donatucci has routinely introduced and voted for legislation that has conveyed Commonwealth interests in submerged lands to private developers within his legislative district. A substantial portion of Representative Donatucci's House district is contiguous with the waterways of the Delaware River. In his official capacity, Representative Donatucci has repeatedly voted against any attempt to shortcut or otherwise expedite the conveyance of riparian property interests to

HSP. See, e.g. 190 *Legislative Journal of the House of Representatives* (October 17 & 24, 2006) (House of Representatives voted, overwhelmingly, to reject proposed statutory language that, if enacted, would have expedited the conveyance of riparian rights to HSP.) Representative Donatucci is also a resident and taxpayer in the Commonwealth. Representative Donatucci has a substantial, direct and immediate interest in this matter.

IV. Government Unit.

9. Respondent, the City of Philadelphia is a home-rule municipality authorized by the First Class City Home Rule Act, 53 P.S. §§ 13101-13157, and is the sole City of the First Class within the Commonwealth of Pennsylvania. The Department of Commerce and the Department of Licensing and Inspection are municipal departments within the City of Philadelphia created pursuant to Section 3-100(d) of the Philadelphia City Charter. Neither municipal department has a corporate existence separate from the City of Philadelphia and therefor may only be included in this matter in the name of the City of Philadelphia. 53 P.S. § 16257.

V. Party to the Underlying Proceeding.

10. HSP is a Delaware limited partnership whose application to build and operate a slots machine casino entertainment complex on a 22-acre site on North Delaware Avenue, to be known as "SugarHouse Casino," was approved by the Gaming Board pursuant to its February 1, 2007 Order and Adjudication. HSP applied for and received a Submerged Lands License from the Commerce Department authorizing the occupation and development of submerged lands of the Delaware River for the purposes of constructing a slots machine casino entertainment

complex.

NOTICE TO PARTICIPATE

Pursuant to Pa.R.App.P. 1513 (d), HSP is directed to serve and file a notice of intervention pursuant to Pa.R.App.P. 1531 with this Court within 30 days if intending to participate in this matter.

VI. Determination Sought to be Reviewed / Action Sought to be Enjoined.

11. The Philadelphia waterfront state legislators seek review of the decision issued November 27, 2007 by which the Commerce Department approved the Application of HSP for a license permitting the occupation and development of submerged lands of the Delaware River. *In re Application of HSP Gaming, L.P., pursuant to Philadelphia Code § 18-103* (Commerce Department Determination, November 27, 2007); Attachment "A."

12. Additionally, the Philadelphia waterfront state legislators seek review of the action by the Commerce Department approve the issuance a "Submerged Lands License" pursuant to its decision to approve the Application of HSP for the license by the Department of Licenses and Inspections. *See, Department of Commerce Submerged Lands License* (November 27, 2007); Attachment "B."

VII. Brief Summary of Factual Background.

13. On October 29, 2007, HSP formally submitted an application to the Director of Commerce pursuant to the Act of June 8, 1907 (P.L. 433, No. 321), *as amended*, 53 P.S. § 14199, seeking what it described as a "Submerged Lands License" for the property located at 941-1025 North Delaware Avenue, Philadelphia, in order to occupy and construct a slots casino

complex upon the submerged lands of the Commonwealth. *See*, Application of HSP Gaming, LP for a Submerged Lands License, Section 1; Attachment "C" (Only application section 1 describing the development site has been included, other voluminous application exhibits have been omitted, but are incorporated by reference).

14. On November 13, 2007, the Solicitor of the City of Philadelphia, in response to an inquiry by a member of Philadelphia City Council, issued a legal opinion purportedly detailing the legal authority of the Director of the Philadelphia Commerce Department to issue a license authorizing the occupancy and construction of a casino entertainment complex upon the submerged lands of the Delaware River. *See*, Memorandum of Romulo L. Diaz, Philadelphia City Solicitor (November 13, 2007); Attachment "D". The sole existing statutory authority cited by the City Solicitor for proposition that the Commerce Department may authorize the occupancy and development of the submerged lands of the Commonwealth is section 10 of Act 321 of 1907 (53 P.S. § 14199).

15. Pursuant to the Philadelphia Code, Chapter 18-100, a public hearing was conducted on November 15, 2007, at the Philadelphia Convention Center. The public record was held open for further submissions until the close of business on November 16, 2007.

16. During the Commerce Department Hearing, substantial evidence was placed upon the record disputing the public interest value of HSP Gaming's Application. *See, e.g.*, Philadelphia Commerce Department Hearing Transcript at 45-51; Attachment "E"(Representative Michael O'Brien testified as to the opposition of most members of the Philadelphia state House delegation to the proposed license, and questioned the legal authority of the City to convey an interest in the submerged lands of the Commonwealth); *Id.* at 51-63

(Senator Vincent J. Fumo testified and formally sought and received consent to include in the evidentiary record a detailed legal memorandum outlining the General Assembly's exclusive authority to convey property interest in the submerged lands of navigable waterways); *Id.* at 63-68 (Philadelphia Councilman Frank DiCicco testified and outlined evidence questioning the public interest value, and pointing out the public harm, associated with the Submerged Lands Application); *Id.* at 63 (Representative William Keller submitted written testimony in opposition to the City's conveyance of the license, which was included in the evidentiary record).

17. On November 27, 2007, the Director of the Commerce Department, Stephanie W. Naidoff, issued a final "License Determination," which included Findings of Fact and Conclusions of Law. *In re Application of HSP Gaming, L.P., pursuant to Philadelphia Code § 18-103* (Commerce Department Determination, November 27, 2007); Attachment "A."

18. The License Determination issued by the Department of Commerce failed to acknowledge the participation of the state legislators, and dismissively noted in a footnote the substantial record evidence challenging the public interest value of the application and the legal authority of the City to grant an interest in the submerged lands of the Commonwealth. The Findings of Fact and Conclusions of Law characterized such evidence, including the testimony of both public officials and residents, as irrelevant. *See*, Commerce Department Determination at 2, footnote 1; Attachment "A".

19. In addition, the Commerce Department Director rejected the entire analysis of the detailed legal challenge to her authority by making the blanket statement "the City Solicitor has concluded that the City, and the Commerce Department Director specifically, are authorized by state and local law to act on the instant application." *Id.* Conspicuously, the Commerce

Department's decision did not include any legal analysis setting forth its authority to convey an interest in Commonwealth lands. The Commerce Department Director referenced the Solicitor's statement at the hearing for the support of the Department's legal authority. Hearing Transcript at 10-11; Attachment "E". No other record testimony, including any memorandum, brief or report, concerning the legal authority of the Commerce Department by the City Solicitor was acknowledged, entered into the evidentiary record, or otherwise made public during the hearing.

20. As part of the Commerce Department Director's Findings of Fact, it was noted that approximately 12 acres of submerged lands within the Delaware River were subject to the HSP's request for a submerged lands license. Commerce Department Determination, at 3, ¶ 5. The submerged lands constitute 52 percent of the total area of the premises to be used for the casino entertainment complex. *See*, Application of HSP Gaming, LP for a Submerged Lands License, Section 1a; Attachment "F" (HSP map depicting, in orange, the area of the development site consisting of the submerged lands of the Commonwealth upon which the casino entertainment project is to be constructed).

21. Within an hour immediately following the Commerce Department's Determination, the City of Philadelphia Department of Licenses and Inspections issued a "Submerged Lands License" authorizing HSP to "encroach upon the waterway of the Delaware River and to construct upon submerged lands" a "casino and entertainment complex with up to 5,000 slot machines and other lawful attractions and ancillary facilities. . .". *See*, Department of Commerce Submerged Lands License (November 27, 2007); Attachment "B."

22. To date, HSP has not made any payment or provided any consideration to the Commonwealth for the occupation and construction of a 5,000 slot machine casino entertainment

complex upon the submerged lands of the Commonwealth.

23. To date, no legislation has been introduced, considered, deliberated or voted, that if enacted, would specifically authorize the conveyance of a title, easement, right-of-way or other interest in the submerged lands of the Commonwealth abutting 941-1025 North Delaware Avenue in the City of Philadelphia, to either HSP or the City of Philadelphia.

VIII. Grounds for Appeal / Declaratory and Injunctive Relief Sought.

As a matter of state law, the Pennsylvania General Assembly, not the City of Philadelphia, possesses the sole and exclusive authority to authorize the conveyance or use of submerged lands belonging to the Commonwealth of Pennsylvania.

24. Article 1, Section 27 of the Pennsylvania Constitution provides that public natural resources, such as submerged lands, are “the common property of all of the people,” and that the Commonwealth, not the City of Philadelphia, “shall conserve and maintain them for the benefit of all the people.”

25. The Dam Safety and Encroachments Act (32 P.S. § 693.2, *et seq.*), enacted in 1978, explicitly provides, “no title, easement, right-of-way or other interest in submerged lands or other real estate of the Commonwealth may be granted except as expressly provided by . . . specific authority from the General Assembly.” (Emphasis added) 32 P.S. § 693.15(e).

26. Consistent with the Dam Safety and Encroachments Act, the Pennsylvania Administrative Code (71 P.S. § 51, *et seq.*), provides that a “department, board, or commission shall not sell or exchange any real estate belonging to the Commonwealth, or grant any easement, right-of-way, or other interest over or in such real estate, without specific authority from the .

General Assembly to do so . . .". (Emphasis added) 71 P.S. § 194(a).

27. The Dam Safety and Encroachments Act explicitly provides that "[a]ll other acts or parts of acts inconsistent herewith are hereby repealed to the extent of such inconsistency." As a consequence, the Dam Safety and Encroachments Act implicitly repealed whatever authority the Commerce Department may have otherwise possessed to grant licenses permitting the occupation and development of Commonwealth submerged lands.

28. Accordingly, the Director of Commerce acted without legal authority in purporting to authorize HSP to "encroach upon the waterway of the Delaware River and to construct upon submerged lands" of the Commonwealth.

As a matter of state law, the City of Philadelphia's licensing authority under Act 321 of 1907 is explicitly limited to the construction or repair of wharves, piers, bulkheads, docks, slips and basins, and does not permit the City to grant a license for the construction of a casino entertainment complex upon the submerged lands belonging to the Commonwealth of Pennsylvania.

29. Act 321 of 1907 authorizes the Director of the Commerce Department to issue licenses permitting the construction of wharves, piers, bulkheads, docks, slips and basins and to permit a person or persons to "construct, extend, alter, improve or repair any wharf, or other building in the nature of a wharf, or bridge or other harbor structures." 53 P.S. § 14199.

30. HSP Gaming, LP, has applied and been approved for a license by the Pennsylvania Gaming Control Board for the placement and operation of up to 5,000 slot machines at a casino entertainment complex to be constructed and located at 941-1025 North Delaware Avenue in the City of Philadelphia. *See*, City Commerce Department License Determination at 1.

31. A casino entertainment complex is not a wharf, pier, bulkhead, dock, slip, basin,

building in the nature of a wharf or bridge or other harbor structure.

32. Accordingly, the Director of Commerce acted without legal authority in purporting to authorize HSP to “encroach upon the waterway of the Delaware River and to construct upon submerged lands” of the Commonwealth for the purposes of constructing “a casino and entertainment complex with up to 5,000 slot machines and other lawful attractions and ancillary facilities . . .”.

As a matter of state law, the City of Philadelphia’s licensing authority under Act 321 of 1907 does not convey a title, easement, right-of-way, or other legally enforceable interest in the submerged lands of the Commonwealth.

33. To date, the General Assembly has not considered, deliberated or enacted any legislation that specifically authorizes the conveyance of any title, easement, right-of-way or other legally enforceable interest in the submerged lands of the Commonwealth, abutting 941-1025 North Delaware Avenue in the City of Philadelphia, to either HSP or the City of Philadelphia.

34. The City of Philadelphia does not possess any title, easement, right-of-way or other transferable interest in the submerged lands of the Commonwealth. *City of Philadelphia v. Commonwealth*, 284 Pa. 225, 130 A. 491 (1925).

35. HSP does not possess any title, easement, right-of-way or other interest in the 12 acres of submerged lands abutting its development site -- consisting of approximately 52 percent of the land necessary for HSP Gaming’s proposed casino entertainment complex. *See*, Commerce Department License Determination at 3, ¶ 5; Attachment “A”.

36. Accordingly, the Commerce Department’s Submerged Lands License cannot convey

to HSP any title, easement, right-of-way, or other legally enforceable interest in the submerged lands of the Commonwealth.

As a matter of state law, HSP did not comply with the mandatory requirement under Act 321 to provide a deed or other evidence of title to the premises on which the casino entertainment complex is to be constructed.

37. HSP does not possess any title or deed in the 12 acres of submerged lands abutting its development site at 941-1025 North Delaware Avenue in the City of Philadelphia— consisting of approximately 52 percent of the land necessary for HSP Gaming’s proposed casino entertainment complex. *See*, Commerce Department License Determination at 3, ¶ 5; Attachment “A”.

38. HSP does not possess any title or deed evidencing its ownership of the non-submerged lands portion of its development site at 941-1025 North Delaware Avenue in the City of Philadelphia. *See*, Commerce Department License Determination at 3, ¶ 6; Attachment “A”

39. Rather, as part of its application to the Commerce Department, HSP produced; a “Consent by Fee Owner” document indicating the consent of the actual property owner, LHTW Corporation and 1001 Christopher Columbus Boulevard LLC, to the application of HSP to apply for a Submerged Lands License from the Commerce Department; and, a “Memorandum of Agreement of December 27, 2005,” stating that HSP has an option to buy the property (terms and conditions of the option agreement have not been publically disclosed). *See*, Application of HSP for a Submerged Lands License, HSP Exhibit and Application section 7a; Attachment “G”.


40. Act 321 of 1907 explicitly requires an applicant for a Submerged Lands License to “produce his or their deed or deeds, or other evidence of title, to the premises on which such proposed structure . . . is to be erected . . .”. (Emphasis added) 53 P.S. § 14199.

41. Accordingly, HSP failed to comply with Act 321's requirement to provide a deed or other evidence of its title to the premises on which the casino entertainment complex is to be constructed.

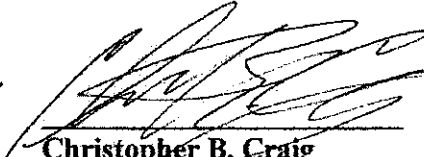
IX. Relief Sought.

WHEREFORE, Senator Vincent J. Fumo, Representative Michael O'Brien, Representative William F. Keller, Senator Michael J. Stack, Representative John J. Taylor, Representative Michael P. McGeehan, and Representative Robert C. Donatucci, constituting the entire delegation of state elected officials who represent legislative districts bordering the Delaware River within the City of Philadelphia, respectfully requests this Honorable Court to review the Department of Commerce's decision to approve HSP's Application for a Submerged Lands License, and declare, as a matter of state law, its deficiency as set forth in this Petition for Review, and enjoin HSP from trespassing upon the submerged riverbed lands of the Commonwealth without specific authorization from the General Assembly, enjoin the City of Philadelphia, the Commerce Department of the City of Philadelphia, and the Department of Licenses and Inspections of the City of Philadelphia from authorizing the use of such lands without specific authorization from the General Assembly, and grant such other relief as may be in the interest of justice.

Respectfully Submitted,



Catherine M. Recker
Attorney No. 56813
Robert E. Welsh, Jr.
Attorney No. 28143
Welsh & Recker, P.C.
2000 Market Street, Suite 2903
Philadelphia, Pennsylvania 19103
215.972.6430
cmrecker@welshrecker.com



Christopher B. Craig
Attorney No. 65203
Counsel, Senate Democratic Appropriations
Committee
Room 545, Main Capitol Building
Harrisburg, Pennsylvania 17102
717.787.5662
ccraig@fumo.com

Counsels for Philadelphia Waterfront State Legislators

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

SENATOR VINCENT J. FUMO,
REPRESENTATIVE MICHAEL H. O'BRIEN,
REPRESENTATIVE WILLIAM F. KELLER,
SENATOR MICHAEL J. STACK,
REPRESENTATIVE JOHN J. TAYLOR,
REPRESENTATIVE MICHAEL P. MCGEEHAN, AND
REPRESENTATIVE ROBERT C. DONATUCCI, each
in their official capacity as members of the Pennsylvania
General Assembly, and individually as resident taxpayers,

Petitioners,

v.

CITY OF PHILADELPHIA,

Respondent.

207 EM 2007

CERTIFICATION OF SERVICE

I, Christopher B. Craig, attorney for the Philadelphia waterfront state legislators, hereby certify that two copies of the attached document were served by overnight mail to the addresses indicated below. I further certify that the manner of service satisfies the requirements of Pa. R.A.P. 121, and 2187(a).

Stephen A. Cozen, Esquire
Cozen O'Connor
1900 Market Street
Philadelphia, PA 19103
215. 665. 2020
scozen@cozen.com
Counsel for HSP Gaming LP

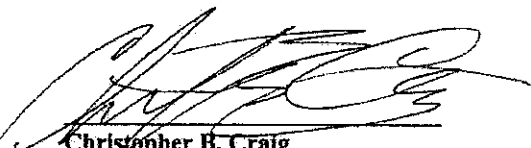
Romulo L. Diaz, Jr., Esquire
City Solicitor
Law Department
1515 Arch Street, 17th Floor
Philadelphia, PA 19102
215. 683.5036
romulo.diaz@phila.gov
Counsel for City of Philadelphia

John Donnelly, Esquire
3030 Atlantic Avenue
Atlantic City, NJ 08401
609. 347.1199
jdonnelly@levinestaller.com
Counsel for HSP Gaming LP

James Christie, Esquire
Christie, Pabarue, Mortensen and Young
1880 John F. Kennedy Boulevard, 10th Floor
Philadelphia, PA 19103
215. 587.1600
jwchristie@cpmv.com
Counsel for Philadelphia City Council for the City of Philadelphia

Richard Sprague, Esquire
Sprague & Sprague
135 S. 19th Street, Suite 400
The Wellington Building
Philadelphia, PA 19103
215. 561. 7681
RASprague@SpragueandSprague.com
Counsel for HSP Gaming LP

William Lamb, Esquire
24 East Market Street
P.O. Box 565
West Chester, PA 19381-0565
610.430.8000
wlamb@chescolaw.com
Counsel for HSP Gaming LP



Christopher B. Craig
Attorney No. 65203
Counsel, Senate Democratic Appropriations Committee
Room 545, Main Capitol Building
Harrisburg, Pennsylvania 17120
(717) 787-5662
ccraig@fumo.com
Counsel for Philadelphia waterfront state legislators

EXHIBIT B

RECEIVED

DEC 28 2007
SUPREME COURT
EASTERN DISTRICT

IN THE SUPREME COURT OF PENNSYLVANIA

No. 207 E.M. 2007

**SENATOR VINCENT J. FUMO, REPRESENTATIVE MICHAEL H. O'BRIEN,
REPRESENTATIVE WILLIAM F. KELLER, SENATOR MICHAEL J. STACK,
REPRESENTATIVE JOHN J. TAYLOR, REPRESENTATIVE MICHAEL P.
McGEEHAN, AND REPRESENTATIVE ROBERT C. DONATUCCI,**
Petitioners,

v.

THE CITY OF PHILADELPHIA,
Respondent,

and

HSP GAMING, L.P.,
Intervenor-Respondent.

REPLY BRIEF AND ANSWER OF RESPONDENT THE CITY OF PHILADELPHIA

December 28, 2007

ROMULO L. DIAZ, JR., CITY SOLICITOR, ID 88795
CITY OF PHILADELPHIA
1515 Arch Street, 17th Floor
Philadelphia, PA 19102
Tel: (215) 683-5003; Fax: (215) 683-5068

By: **FLASTER/GREENBERG, P.C.**
Abbe F. Fletman, ID 52896
Kevin Greenberg, ID 82311
8 Penn Center, 15th Floor
1628 John F. Kennedy Boulevard
Philadelphia, PA 19103
Tel: (215) 279-9393; Fax: (215) 279-9394
Attorneys for the City of Philadelphia

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I. INTRODUCTION

In their petition, petitioners challenge the legal authority of the City of Philadelphia ("City") to grant a submerged lands license, even where the General Assembly clearly has delegated the authority to grant such a license to the City. HSP Gaming, L.P. ("HSP"), is one of two operators licensed by the Gaming Control Board to construct and operate a casino in Philadelphia. The site selected by the Gaming Control Board is located at 941-1025 N. Delaware Avenue (the "Property"). Construction of the proposed casino requires that HSP obtain the legal right to build over a portion of the submerged lands of the Delaware River.

In October 2007, HSP filed an application with the City for a license to construct a portion of its casino on state-owned submerged lands pursuant to the process outlined by state law. That process is pursuant to an express delegation from the General Assembly authorizing the City to license construction over the submerged lands of the Delaware River. The delegation from the Commonwealth to the City continues a policy that has been followed since early in the Colonial period.

Pursuant to state law, upon receipt of the application, the Director of Commerce of the City of Philadelphia ("Commerce Director") was obligated to conduct a public hearing and issue a decision on the application. A public hearing was thus held on November 15, 2007, before the Commerce Director. Most of the testimony at the hearing, both in favor of and opposed to the license, focused on the arguments for and against the location of HSP's SugarHouse Casino and did not address the underlying issues relating to the development upon submerged lands. After weighing all the evidence presented, the Commerce Director granted the license. Pursuant to the decision, and upon payment of the applicable fee, the license was issued by the Department of Licenses and Inspections on November 27, 2007.

Petitioners make much of the alleged lack of deference paid to their opinion, but substantively make only two arguments: (i) that the City was not, in fact, authorized to issue the license; and (ii) that the Commerce Director's decision was erroneous because HSP does not hold legal title to the riparian land upon which the license was granted.

These arguments are erroneous. Pursuant to Act 321 of 1907, as amended, the City had the clear legal authority to issue the license sought by HSP. Moreover, HSP submitted evidence of equitable title to the land, which was legally sufficient to support the grant of a license.

II. INTERVENTION

HSP filed a notice of intervention on December 27, 2008. Respondent does not object to the intervention.

III. JURISDICTION

Respondent does not contest that jurisdiction lies with this Court. *See* 4 P.S. § 1506; *Pa. Gaming Control Bd. v. City Council of Phila.*, 928 A.2d 1255, 1262-64 (Pa. 2007); *HSP Gaming, L.P. v. City Council for the City of Phila., et al.*, 2007 WL 4226871 (Pa. Dec. 3, 2007) (“*HSP Decision*”).

IV. STATEMENT OF FACTS

On October 29, 2007, HSP filed an application (the “Application”) for a license to develop upon submerged lands on the Property. *See* Petitioners Attachment C. The Application was filed pursuant to state law, and a companion section of the Philadelphia Code.

The applicable state law is 53 P.S. § 14199, which permits application to an office now subsumed within the office of the Commerce Director. The provision states:

Whenever any person or persons shall desire to construct, extend, alter, improve or repair any wharf, or other building in the nature of a wharf, or bridge, or other harbor structures, situate wholly within any city of the first class, such person or persons shall make application to the director, stating in writing the nature and extent of such proposed structure, extension, alteration, improvement or repair, and file in the office of the director the plans and specifications showing fully the proposed structure, extension, alteration, improvement or repair, and produce his or their deed or deeds, or other evidence of title, to the premises on which such proposed structure, extension, alteration, improvement or repair is to be erected or made,-- whereupon, if such proposed structure, extension, alteration, improvement or repair will encroach upon the waterway, the director shall give notice of the time and place of hearing such application, to all parties interested, by advertising twice a week for two successive weeks, in two newspapers of general circulation published within the said city, and by posting notice upon the said premises; and if the director, upon such hearing, or without such hearing where such hearing is not required by the provisions hereof, shall approve such proposed structure, extension, alteration, improvement or repair, and the plans and specification submitted therefor, he shall give his assent to, and issue a license or permit for, the erection and making thereof, and cause the fact of the issue of such license or permit to be recorded in his office, in a book to be kept by him for that purpose, and such license or permit shall not be unreasonably withheld: Provided, That necessary repairs, costing one hundred dollars or less and not affecting the stability or strength of the structure, may be made without first procuring a license or permit.

Whenever any person or persons shall desire to construct, extend, alter, improve or repair any structure to be erected, or already erected, on ground supported by bulkheads, and to be used, or already used, for the purpose of loading or unloading passengers or freight on or from vessels; or any structure to be physically connected, or already physically connected, or to be used or already used, as appurtenant to any wharf or structure hereinbefore described, situate within any city of the first class,--and for such purpose he or they shall have applied for a permit from the Bureau of Building Inspection in said city, the said Bureau of Building Inspection shall notify the director of the Department of Wharves, Docks and Ferries, of such application, and shall thereafter grant the permit applied for, only when the application shall have received the approval of the said director, which he is hereby empowered to grant.

The cities of the first class may, by ordinance, regulate and determine the license fees for the license and approval required by the provisions of this act.

53 P.S. § 14199 (2007).

Section 14199 is implemented by Section 18-103 of the Philadelphia Code, which states:

- (1) A permit shall be obtained before any pier, wharf or other harbor structure is built, extended, altered, improved or repaired, other than necessary repairs of the existing structure costing not more than \$300.
- (2) Application for such permit shall be made to the Department of Licenses and Inspections in such form as the Department requires.
 - (a) No permit shall be issued unless the proposed construction will conform to the regulations of the Department of Commerce.
- (3) If the proposed structure, extension, alteration, improvement or repair will encroach upon the waterway, no permit shall be granted until a public hearing on the application has been held by the Department of Commerce, preceded by notice by advertisement twice a week for two successive weeks in two newspapers of general circulation published in the City.
 - (a) The applicant for the permit shall arrange and pay for the advertisements and furnish the Department of Licenses and Inspections with proof of such advertisement prior to the hearing.
- (4) The fee for the issuance of a permit shall be \$1.50 per \$1,000 cost of construction up to \$100,000 and \$.75 for each additional \$1,000 cost of construction thereafter, but the fee shall not be less than \$10 where a public hearing is required, nor for less than \$3 where no public hearing is required.
- (5) The Department of Licenses and Inspections may itself or by contract remove any structure built without the permit required by § 18-103(1) or in violation of the regulations of the Department of Commerce, the cost to be charged against the owner. The Law Department may take such action for the collection of such costs, by lien or otherwise, as may be authorized by law.

Phila. Code § 18-103 (2007).

Following the required public notice, a hearing (the "Hearing") on the Application was held on November 15, 2007. Testimony presented at the Hearing focused not only on the submerged lands license application but also on the advantages and disadvantages of gaming in general, and on the location of the SugarHouse Casino. Testimony was presented by the City Solicitor, the Mayor's Chief of Staff, the Executive Director of the Philadelphia City Planning Commission, a representative of the Department of Licenses and Inspections, Senator Vincent Fumo, Representative Michael O'Brien, Representative William Keller (via written submission), Councilman Frank DiCicco, SugarHouse Casino, and approximately 28 members of the general

public, some representing community groups, others representing trade unions, and some representing only themselves. Further written submissions were accepted until the end of the day on November 16. Hundreds of exhibits were received.

Having weighed the evidence before her, on November 27, 2007, the Commerce Director issued her decision, including findings of fact and conclusions of law, granting the license. *See* Petitioners Attachment A (“License Decision”).

Later on November 27, the applicant paid the license fee and received the license to which it was entitled.

Petitioners filed this challenge on December 26, 2007.

V. ARGUMENT

A. Standard of Review

In carrying out the express delegation of authority from the General Assembly, the Commerce Director functioned much like an administrative agency, although one that had to comply with the procedural requirements of Section 18-103 of the Philadelphia Code. As such, the Court’s standard of review should be similar to that in an appeal from a decision of an administrative agency. Specifically, the review is limited to determining whether the agency’s adjudication violates appellants’ constitutional rights, contains an error of law, or is unsupported by substantial evidence. *See Alpha Auto Sales, Inc. v. Dept. of State*, 644 A.2d 153 (Pa. 1994); *Chester Extended Care Ctr. v. Commonwealth, Dept. of Public Welfare*, 586 A.2d 379 (Pa. 1991); *Commonwealth Comm’n on Charitable Orgs. v. Ass’n of Cmty. Orgs. for Reform Now*, 463 A.2d 406 (Pa. 1983).

B. The Legislature Specifically Delegated to the Commerce Director Decisions Regarding Submerged Lands in Philadelphia

The local authority to license the use of the riparian lands in the Delaware River dates to the time of the original 1701 Charter of William Penn, and has been affirmed consistently by numerous acts of Provincial and General Assemblies since that time. *See Kusenberg v. Browne*, 42 Pa. 173 (1862) (detailing history of such licenses); *see also* Act of March 29, 1803, 4 Sm.L. 67; Act of March 25, 1805, P.L. 160, 4 Sm.L. 232, Act of February 7, 1818, P.L. 72, 7 Sm.L. 34, Act of April 8, 1868, P.L. 755. Through most of the 19th Century, and until 1907, a local body, the Board of Port Wardens, handled all building permits in the Delaware River. *See, e.g.*, Act of Feb. 18, 1853 (P.L. 88).

Eventually, as Philadelphia and its surrounding counties continued to grow, the burden of managing construction upon the Delaware River became too great for a single organization. Recognizing this, the General Assembly, on June 8, 1907, passed a series of bills addressing riparian law in Pennsylvania. *See Philadelphia Solicitor Opinion 161* (July 26, 1907) (“Four different statutes were passed during the late session of the Legislature with respect to wharves, the late Board of Wardens and the navigation of the river, all of them approved on June 8, 1907.”). These Acts, numbered 318, 321, 322, and 323, abolished the Board of Wardens, and split its functions between two separate bodies, the Board of Commissioners of Navigation and the Philadelphia Department of Wharves, Docks, and Ferries. *Laws of Pennsylvania*, p. 482-502 (1907). The Board of Commissioners of Navigation was tasked with regulating the use of the Delaware River, except for the portion within Philadelphia, which was to be supervised by the City’s Department of Wharves. *Id.*

In Act 321, the General Assembly delegated to the director of the City’s Department of Wharves, Docks and Ferries the authority to “issue a license or permit for the erection and

making” of any “proposed structure, extension, alteration, improvement or repair that will encroach upon [the Delaware River].” See Act No. 321 of June 8, 1907, P.L. 488 (“Act 321”).¹

C. The Attorney General’s Opinion of 1978 Confirmed the Commerce Director’s Authority

During the transition to home rule in 1951, the Department of Wharves, Docks and Ferries was abolished and the duties of that office were transferred to the Department of Commerce. See Home Rule Charter, § A-101 (1951). The transferred duties included the functions relating to the granting of submerged lands licenses under Act 321, as amended. See Attorney General’s Official Opinion No. 78-19, *Construction Along Delaware and Schuylkill Rivers*, 8 Pa. D & C. 3d 438, 446-47 (1978) (“1978 Opinion”).

In 1978, the Pennsylvania Attorney General recognized the authority of the Director of Commerce to issue licenses pursuant to Act 321:

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

1978 Opinion at 446-47. In that advice, provided to the Secretary of Environmental Resources, the Attorney General further stated that “the statutes enacted by the Pennsylvania General Assembly for the creation of the Navigation Commission for the Delaware River and

¹ In 1913, the General Assembly supplemented the City’s authority under the 1907 Act, including authorizing the City, by ordinance, to regulate and determine the license fees for the license and approval required under Act 321. See Act No. 261 of May 29, 1913 (“Act 261”). In 1915, the City enacted legislation regulating and determining the fees for licenses or permits in the Department of Wharves, Docks and Ferries, as authorized by Act 261. See Ordinance of July 8, 1915. This initial rate-setting ordinance, as amended, is today codified in Section 18-103 of the Philadelphia Code. See, e.g., Ordinance of July 25, 1940; Ordinance of February 23, 1949.

its navigable tributaries and the Director of Commerce of the City of Philadelphia empowered those bodies to grant an interest in the river bed (a license) for the construction of facilities below the low-water mark of the Delaware and Schuylkill Rivers.” *Id.* at 440. The license alone is sufficient to allow construction. *Id.* at 443, 445.

D. The History of the Dam Safety and Encroachments Act Demonstrates that the Delegation is Still Valid

This regulation of the Delaware River was relatively unchanged until 1978 when, during the passage of the Dam Safety Act, the Legislature reorganized the suburban successor to the Board of Commissioners of Navigation, the Navigation Commission, returning it to state control. *See* Act of November 26, 1978 (P.L. 1375, No. 325). Although it dramatically altered the regulatory structure for the Delaware River where it abutted Delaware and Bucks County, the Dam Safety Act made no changes to the status quo in Philadelphia. *Id.*

Petitioners’ argument is based upon a misreading of the Dam Safety Act, and the amendments to it, which resulted in the Dam Safety and Encroachments Act. In fact, the original 1978 Dam Safety Act, which contained the repealer language on which petitioners focus, intentionally excluded any mention of encroachments, electing to regulate only “dams and reservoirs.” *See* Act of November 26, 1978 (P.L. 1375, No. 325).

When the repealer provision was first enacted, there would have been no conflict at all with the City’s power under Act 321, because the Dam Safety Act did not regulate docks, wharves, and other water-based structures. *See id.* It was not until 1979 that the Dam Safety Act was amended to include regulation of these types of water obstructions and encroachments. *See* Act of October 23, 1979 (P.L. 204, No. 70).

When the Dam Safety Act was amended to extend to encroachments, a new repealer provision was adopted, but that repealer did not include the Delaware River and its navigable

tributaries. See Act of October 23, 1979 (P.L. 204, No. 70), § 27; see also Act of June 25, 1913 (P.L. 555, No. 355) (“the term ‘water obstruction,’ as used in this act, includes any dam ... or any other obstruction whatsoever, in, along, across, or projecting into any stream or body of water wholly or partly within, or forming part of the boundary of, this Commonwealth, except the tidal waters of the Delaware River and of its navigable tributaries.”). As such, the repealer provision contained in what is now the Dam Safety and Encroachments Act never altered the City’s delegated authority to issue submerged lands licenses along the Delaware River.

Petitioners also seem to place a great deal of importance on Section 15 of the Dam Safety and Encroachments Act, entitled “Projects affecting submerged lands of the Commonwealth.” Petition at 25. Such reliance is misplaced. Section 15 does not spell out the process for a grant of a license but instead lists the prerequisites an applicant needs before the Department can issue a permit for projects affecting submerged lands of the Commonwealth. Act of October 23, 1979 (P.L. 204, No. 70), § 15. The prerequisites remain in place and the permit must still be sought under the applicable process. *Id.* In Philadelphia, that process is pursuant to Act 321 and Section 18-103. 53 P.S. §§ 14199-14200; Phila. Code § 18-103. Nowhere do petitioners allege that the applicable process was not followed.

B. The Delegated Authority Included the Authority to Authorize Industrial and Other Construction Above Piers and Fill Above the Submerged Lands

Act 321 included the authority for the City to “license or permit” the erection and construction of any “proposed structure, extension, alteration, improvement or repair that will encroach” upon the Delaware River. See Act 321; see also 53 P.S. § 14199.

Contrary to petitioners’ argument, the specific grant of authority was not limited to the construction of “wharves, piers, bulkheads, docks, slips, and basins.” See Petition ¶ 29. Section 14199 specifically extends to “harbor structures” and further extends to “any structure to be

erected, or already erected, on ground supported by bulkheads” ... “or any structure to be physically connected, or already physically connected, or to be used or already used, as appurtenant to any wharf or structure hereinbefore described.” 53 P.S. § 14199.

Petitioners argue that a casino is not a “harbor structure” even if it is built on piers, supported by bulkheads, and has a wharf attached, a naked assertion not backed by any authority or reasonable definition. A harbor structure is, in fact, just what it says -- a structure constructed on a harbor. *See Webster’s II New College Dictionary* (1999) at 504 (defining harbor as a “sheltered part of a body of water deep enough to provide anchorage for ships”), 1094 (defining structure as “something constructed, esp. a building or part”). Section 14199 implicitly defines the combined term by referring to “any structure to be erected, or already erected, on ground supported by bulkheads” ... “or any structure to be physically connected, or already physically connected, or to be used or already used, as appurtenant to any wharf or structure hereinbefore described.” *Id.*

In fact, petitioners’ definition is contrary to generations of development in Philadelphia and elsewhere. These provisions have been utilized, over the past century, to authorize construction of a variety of industrial and commercial buildings over riparian lands. As this Court stated in 1925:

The [C]ommonwealth has benefited by permitting its property to be developed by its agents or citizens. Large investments of public and private capital have been made on account of it. This development has proven most useful to the city, as well as the state at large. The city of Philadelphia has been delegated, through the [Commerce Director’s predecessor], the authority to license the construction of these extensions.

City of Philadelphia v. Commonwealth, 130 A. 491, 493 (Pa. 1925).

On the site of the SugarHouse Casino alone, over much of the same area supported by bulkheads that are subject of the Application, 16 licenses were issued over the past century to

permit construction over submerged land. While some of these licenses authorized construction of piers, others authorized construction over riparian lands of the very sugar refinery for which the SugarHouse Casino is named. These licenses have permitted a wide variety of commercial and industrial development, including the concert venues at Penn's Landing and a municipal incinerator plant a few blocks from the site of the SugarHouse Casino. *See, e.g.*, licenses attached as Exhibits 1 and 2.

E. The Commerce Director had an Affirmative Duty to Decide Application

Having received the Application, the Commerce Director was under an affirmative duty to consider and decide the application. Phila. Code 18-103. Nothing in Section 14199 or in the Philadelphia Code would have authorized the Commerce Director to refuse to consider the Application. 53 P.S. § 14199; Phila. Code 18-103. Although the grant of the license was not mandatory, it was mandatory that she consider the application. *Id.*

Had the Commerce Director refused to even consider the application, she would have been subject to a mandamus action to force her to implement the scheme authorized by the General Assembly. *See Aviation Properties, L.L.P. v. Chanceford Twp. Bd. of Supervisors*, 923 A.2d 1099 (Pa. 2007) (compelling township to adopt zoning regulations to comply with the Airport Zoning Act); *Coady v. Vaughn*, 770 A.2d 287, 289 (Pa. 2001) (“A proceeding in mandamus is an extraordinary action at common law, designed to compel performance of a . . . mandatory duty where there exists a clear legal right in the plaintiff, a corresponding duty in the defendant, and want of any other adequate and appropriate remedy.”); *see also HSP Decision* at *11 (City officials cannot undertake deliberate inaction to thwart or delay gaming and holding that “deliberate inaction by [City] Council for the purposes of delay” constituted an improper

action to override the statutory provisions of the Gaming Act and justified both jurisdiction and extraordinary Court action).

F. The Legislature May Alter the Delegation

Petitioners need not rush to this Court complaining of creating “new precedent” that authorized an end run around the “normal” state legislative process to “convey” Commonwealth lands. Petition at 3. Despite petitioners’ allegations, there is no great threat to the Commonwealth’s sovereignty. Quite the opposite, the City is merely acting to effectuate authority delegated to it by the General Assembly in a manner consistent with 300 years of history. Further, the City has never attempted to convey any fee owned by the Commonwealth but has, instead, simply issued the license authorized by Act 321.

Petitioners’ argument that developers will rush to the Commerce Director for the authority to obtain licenses to build on riparian lands is overblown. Historically, the General Assembly has sold these lands for prices below that required by Section 18-103. In fact, under the new regime proposed by the Department of General Services, HSP would pay less for a license from the Commonwealth than it paid for the license from the City. *See* License Decision at 10, n.5.

For whatever reasons, the General Assembly is always free to repeal Act 321 or any part of it. In fact, there appear to be a number of bills designed to effectuate this process underway in the Legislature. *See* Petition at 3, n.2.

F. Equitable Title is Sufficient Title for Land Use License Decisions

Petitioners make much of the irrelevant fact that HSP holds an option and not clear title to the Property. However, under Section 14199, the applicant for a submerged lands license must present its “deed or deeds, or other evidence of title.” 53 P.S. § 14199. It is well

established in Pennsylvania that the purchaser of real estate has an equitable title to property and standing in land-use matters upon execution of an agreement of sale. *See, e.g., Am. Hous. Trust, III v. Jones*, 696 A.2d 1181, 1182 (Pa. 1997); *Logan Square Neighborhood Ass'n v. Zoning Bd. of Adjustment of Phila.*, 379 A.2d 632, 634 (Pa. 1977); *O'Neill v. Phila. Zoning Bd. of Adjustments*, 120 A.2d 901, 902 (Pa. 1956); *Mut. Benefit Ins. Co. v. Goschenhoppen Mut. Ins. Co.*, 572 A.2d 1275, 1277-1278 (Pa. Super. 1990). When a buyer obtains a purchase option on property, equitable title passes to the optionee effective as of the date of the inception of the option. *See Guido v. Township of Sandy*, 880 A.2d 1220, 1226-1227 (Pa. 2005); *Shaffer v. Flick*, 520 A.2d 50, 51-52 (Pa. Super. 1987). Equitable title also has been held to be the relevant title for riparian rights cases. *See, e.g., Morris v. McNamee*, 17 Pa. 173, 1851-WL 5847 at *4 (Pa. 1851).

To deem equitable title insufficient for purposes of granting a submerged lands license would be completely contrary to this precedent. *See, e.g., Smith v. Glen Alden Coal Co.*, 32 A.2d 227 (1943) (different remedies for breach demonstrate that the seller's interest in the property itself is subordinate to the buyer's interest).

HSP produced proof of equitable title in the form of a Memorandum of Agreement recorded January 10, 2006, in the Department of Records, various deeds, and the consent of the party from whom it has an option to purchase the property. *See License Decision, Findings of Fact 6.*

The recorded memorandum of agreement proved sufficiently that HSP is the contract purchaser and equitable title owner of the Property. Moreover, HSP has submitted evidence demonstrating the consent of the record title holder/seller to the Application. *See License Decision, Finding of Fact 7.* Thus, Applicant has demonstrated sufficient evidence of title to the

Property on which the proposed structure, extension, alteration, improvement or repair is to be erected or made.

Further, it would be both preposterous and contrary to the record for the Court to adopt petitioners' position that the license for development applies only to construction over riverbeds to which the applicant owns a fee interest. As stated by the Attorney General in 1978, it "is evident from a review of the case law that historically no interest greater than a license has been intended to pass to riparian owners along the Delaware River and its navigable tributaries for construction of obstructions below the low-water mark." 1978 Opinion at 443; *see also United States v. Pa. Salt Mfg. Co.*, 16 F.2d 476 (E.D. Pa. 1926). The right to construct over riparian lands belongs to the owner of the adjacent lands, subject to a license from the Commonwealth. *See, Philadelphia v. Commonwealth*, 284 Pa. 225 (1925); *Ball v. Slack*, 2 Whart. 508 (Pa. 1837). The entire purpose of the licensing scheme is to authorize such construction, a premise that the petitioners' argument would invalidate.

**G. Petitioners Point to No Other Inadequacy in the Process
the Director of Commerce Followed, and thus the License is Valid**

The petition makes no other allegations of inadequacy in either the substance or the process followed by the Commerce Director. As such, the Court should not disturb the License Decision.

VI. ANSWER

As directed by the Court, the City of Philadelphia, in answer to the petition states:

Basis for Jurisdiction

1. Respondent does not contest jurisdiction lies with this Court. See 4 P.S. § 1506; *Pa. Gaming Control Bd. v. City Council of Phila.*, 928 A.2d 1255, 1262-64 (Pa. 2007); *HSP Gaming, L.P. v. City Council for the City of Phila., et al.*, 2007 WL 4226871 (Pa. Dec. 3, 2007).

Parties Seeking Review

2. Admitted in part and denied in part. It is admitted that State Senator Fumo represents the First State Senatorial District, which encompasses the Property and which borders the Delaware River. It is admitted that Senator Fumo testified before the Commerce Director. It is admitted that Senator Fumo is a resident of the Commonwealth. The remainder of the paragraph consists of information about which respondent, after reasonable investigation, is without information to admit or deny and the remainder of the paragraph constitute conclusions of law to which no further response is required.

3. Admitted in part and denied in part. It is admitted that State Representative O'Brien represents the 175th State House District, which encompasses the Property and borders the Delaware River. It is admitted that Representative O'Brien testified before the Commerce Director. It is admitted that Representative O'Brien is a resident of the Commonwealth. The remainder of the paragraph consists of information about which respondent, after reasonable investigation, is without information to admit or deny and the remainder of the paragraph constitute conclusions of law to which no further response is required.

4. Admitted in part and denied in part. It is admitted that State Representative Keller represents the 184th State House District, which borders the Delaware River. It is admitted that Representative Keller submitted written testimony to the Commerce Director. It is admitted that Representative Keller is a resident of the Commonwealth. The remainder of the paragraph consists of information about which respondent, after reasonable investigation, is

without information to admit or deny and the remainder of the paragraph constitute conclusions of law to which no further response is required.

5. Admitted in part and denied in part. It is admitted that State Senator Stack represents the 5th State Senate District, which borders the Delaware River. It is admitted that Senator Stack is a resident of the Commonwealth. The remainder of the paragraph consists of information about which respondent, after reasonable investigation, is without information to admit or deny and the remainder of the paragraph constitute conclusions of law to which no further response is required.

6. Admitted in part and denied in part. It is admitted that State Representative Taylor represents the 177th State House District, which borders the Delaware River. It is admitted that Representative Taylor is a resident of the Commonwealth. The remainder of the paragraph consists of information about which respondent, after reasonable investigation, is without information to admit or deny and the remainder of the paragraph constitute conclusions of law to which no further response is required.

7. Admitted in part and denied in part. It is admitted that State Representative McGeehan represents the 173th State House District, which borders the Delaware River. It is admitted that Representative McGeehan is a resident of the Commonwealth. The remainder of the paragraph consists of information about which respondent, after reasonable investigation, is without information to admit or deny and the remainder of the paragraph constitute conclusions of law to which no further response is required.

8. Admitted in part and denied in part. It is admitted that State Representative Donatucci represents the 185th State House District, which borders the Delaware River. It is admitted that Representative Donatucci is a resident of the Commonwealth. The remainder of

the paragraph consists of information about which respondent, after reasonable investigation, is without information to admit or deny and the remainder of the paragraph constitute conclusions of law to which no further response is required.

Governmental Unit

9. Admitted.

Party to the Underlying Proceeding

10. Admitted in part and denied in part. HSP is a Delaware limited partnership which was awarded a Category 2 Slot Machine License by the Gaming Control Board to develop the SugarHouse Casino at the Property. The remainder of the paragraph constitutes characterizations which are denied.

Determination Sought to be Reviewed/Action Sought to be Enjoined

11. Admitted in part and denied in part. The Commerce Department issued on November 27, 2007, the license determination, a copy of which was filed by petitioners as Attachment A. The remainder of the paragraph consists of conclusions of law to which no further response is required.

12. Admitted in part and denied in part. The City issued the license, a copy of which was filed by petitioners as Attachment B, on November 27, 2007. The remainder of the paragraph consists of conclusions of law to which no further response is required.

13. Admitted in part and denied in part. HSP filed the Application on October 29, 2007, and characterizations of the Application are denied.

14. Admitted in part and denied in part. The City admits that petitioners submitted as Attachment D an opinion issued by the City Solicitor. The remainder of the paragraph consists of conclusions of law to which no further response is required.

15. Admitted.
16. Admitted in part and denied in part. Substantial testimony, both in favor of and against the location of the SugarHouse Casino was placed upon the record at the Hearing. The remainder of the paragraph consists of conclusions of law to which no further response is required.
17. Admitted.
18. Denied. The decision of the Commerce Director is a matter of public record and any characterizations of it are denied. The decision did acknowledge the participation of state legislators. *See* License Decision at 2, n.2. The remainder of the paragraph consists of conclusions of law to which no further response is required.
19. Denied. The opinion of the Commerce Director and the statements on the record are matters of public record and any characterizations of it are denied. The remainder of the paragraph consists of conclusions of law to which no further response is required.
20. Admitted.
21. Denied. The opinion of the Commerce Director and the statements on the record are matters of public record and any characterizations of it are denied. The remainder of the paragraph consists of conclusions of law to which no further response is required.
22. Denied. After reasonable investigation, respondent lacks knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 22 and it is therefore denied.
23. Denied. The paragraph consists of conclusions of law to which no further response is required. As a further response, respondent specifies that the license was granted pursuant to Act 321 of 1907, as amended.

Grounds for Appeal/Declaratory and Injunctive Relief Sought

First Asserted Ground for Relief

Respondent incorporates by reference its answers to paragraphs 1-23 of the petition.

24. Denied. The paragraph consists of statements and conclusions of law to which no further response is required.

25. Denied. The paragraph consists of statements and conclusions of law to which no further response is required.

26. Denied. The paragraph consists of statements and conclusions of law to which no further response is required.

27. Denied. The paragraph consists of statements and conclusions of law to which no further response is required.

28. Denied. The paragraph consists of statements and conclusions of law to which no further response is required.

Second Asserted Ground for Relief

Respondent incorporates by reference its answers to paragraphs 1-28 of the petition.

29. Denied. The paragraph consists of selective statements and conclusions of law to which no further response is required.

30. Admitted.

31. Denied. The paragraph consists of conclusions of law to which no further response is required.

32. Denied. The paragraph consists of conclusions of law to which no further response is required.

Third Asserted Ground for Relief

Respondent incorporates by reference its answers to paragraphs 1-32 of the petition.

33. Denied. The paragraph consists of conclusions of law to which no further response is required. As a further response, Respondent specifies that the license was granted pursuant to Act 321 of 1907, as amended.

34. Admitted in part and denied in part. The City's actions pursuant to Act 321 of 1907 are pursuant to an express delegation of authority from the General Assembly. The paragraph otherwise consists of conclusions of law to which no further response is required.

35. Denied. The paragraph consists of conclusions of law to which no further response is required.

36. Denied. The paragraph consists of conclusions of law to which no further response is required.

Fourth Asserted Ground for Relief

Respondent incorporates by reference its answers to paragraphs 1-36 of the petition.

37. Denied. The paragraph consists of conclusions of law to which no further response is required.

38. Denied. The paragraph consists of conclusions of law to which no further response is required.

39. Admitted in part and denied in part. Admitted that HSP submitted the evidence of ownership, equitable title, and permission of the owner of legal title referenced in Findings of Fact 6 and 7 of the License Decision. The paragraph otherwise consists of conclusions of law to which no further response is required and information about which, after reasonable investigation, respondent lacks sufficient information or knowledge upon which to respond.

40. Denied. The paragraph consists of statements and conclusions of law to which no further response is required.

41. Denied. The paragraph consists of statements and conclusions of law to which no further response is required.

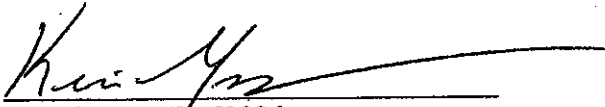
VII. CONCLUSION

WHEREFORE, respondent, the City of Philadelphia, respectfully requests that the Court deny the petition of Senator Vincent J. Fumo, Representative Michael H. O'Brien, Representative William F. Keller, Senator Michael J. Stack, Representative John J. Taylor, Representative Michael P. McGeehan, and Representative Robert C. Donatucci.

Respectfully submitted,

ROMULO L. DIAZ, JR., CITY SOLICITOR, ID 88795
CITY OF PHILADELPHIA
1515 Arch Street, 17th Floor
Philadelphia, PA 19102
Tel: (215) 683-5003; Fax: (215) 683-5068

FLASTER/GREENBERG P.C.

By: 
Abbe F. Fletman, ID 52896
Kevin Greenberg, ID 82311
8 Penn Center, 15th Floor
1628 John F. Kennedy Boulevard
Philadelphia, PA 19103
Tel: (215) 279-9393; Fax: (215) 279-9394
Attorneys for the City of Philadelphia

Dated: December 28, 2007

CERTIFICATE OF SERVICE

I, Christine E. Thelen certify that, on this day, the 28th day of December, 2007, I caused a true and correct copy of the foregoing entry of appearance to be served upon the persons and in the manner indicated below, which satisfies the requirements of Pa. R.A.P. 121:

By Hand Delivery:

Catherine M. Recker
Robert Eugene Welsh, Jr.
Welsh & Recker
2000 Market Street, Suite 2903
Philadelphia, PA 19103

By First Class Mail:

Stephen A. Cozen
F. Warren Jacoby
Jennifer M. McHugh
Cozen O'Connor
1900 Market Street
Philadelphia, PA 19103

Richard A. Sprague
Thomas A. Sprague
Charles J. Hardy
Sprague & Sprague
135 S. 19th Street, Suite 400
The Wellington Building
Philadelphia, PA 19103

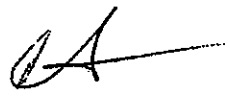
Christopher B. Craig
Senate Democratic Appropriations Committee
Room 545, Main Capitol Building
Harrisburg, PA 17120

Romulo Liberio Diaz, Jr.
City of Philadelphia Law Department
1515 Arch Street, 17th Floor
Philadelphia, PA 19102

William H. Lamb
Lamb McErlane, P.C.
24 E. Market Street
P.O. Box 565
West Chester, PA 19381

John M. Donnelly
Levine, Staller, Sklar, Chan, Brown &
Donnelly, P.A.
3030 Atlantic Avenue
Atlantic City, NJ 08401

Date: December 28, 2007



Christine E. Thelen
ID 206340

EXHIBIT C

RECEIVED

DEC 28 2007

**SUPREME COURT
EASTERN DISTRICT**

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

No. 207 E.M. 2007

SENATOR VINCENT J. FUMO, et al.,
Petitioners

vs.

THE CITY OF PHILADELPHIA
Respondents

and

HSP GAMING, L.P.,
Respondent-Intervenor

**HSP GAMING, L.P.'S ANSWER IN OPPOSITION TO THE PETITION FOR
REVIEW FILED BY SENATOR VINCENT J. FUMO, et al.**

Stephen A. Cozen (PA ID #03492)
F. Warren Jacoby (PA ID #10012)
Jennifer M. McHugh (PA ID #66723)
Cozen O'Connor
1900 Market Street
Philadelphia, PA 19103

Richard A. Sprague (PA ID #04266)
Thomas A. Sprague (PA ID #34716)
Charles J. Hardy (PA ID #16912)
Sprague & Sprague
135 S. 19th Street, Suite 400
The Wellington Building
Philadelphia, PA 19103

William H. Lamb (PA ID #04927)
Scot R. Withers (PA ID #84309)
Lamb McErlane PC
24 East Market Street
P.O. Box 565
West Chester, PA 19381-0565

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HSP GAMING, L.P.'S ANSWER IN OPPOSITION TO PETITION FOR REVIEW

NOW COMES Respondent-Intervenor, HSP GAMING, L.P. ("HSP Gaming"), by and through its counsel, to file this Answer in Opposition to the Petition for Review ("Petition") filed by Senator Vincent J. Fumo, Representative Michael H. O'Brien, Representative William F. Keller, Senator Michael J. Stack, Representative John J. Taylor, Representative Michael P. McGeehan, and Representative Robert C. Donatucci (collectively, the "Legislators") seeking to overturn the decision and license ("Decision") issued by the Commerce Department of the City of Philadelphia ("Commerce Department"), granting HSP Gaming's application ("Application") for a license pursuant to 53 P.S. § 14199 ("License") to construct improvements on certain submerged lands described in the Application ("Licensed Lands").

I. INTRODUCTION

Section 14199 of Title 53 of the Pennsylvania Statutes (Act 321 of June 8, 1907, Pamphlet Law 488, §10 ("Section 14199/Act 321")) provides that any entity wishing to construct any wharf or other harbor structure within a City of the first class encroaching upon the waterway may apply to the Director of the Commerce Department of the City of Philadelphia (as the successor to the Director of the Department of Wharves, Docks and Ferries of the City of Philadelphia) for a license for that purpose, and that such license shall not be unreasonably withheld. 53 Pa. C.S 14199. HSP Gaming seeks to build a structure encroaching upon the Delaware River waterway; it followed all of the statutory prerequisites set forth in Section 14199/Act 321; and was appropriately granted a License for that purpose by the Commerce Department. As the uncontroverted evidence presented at the November 15, 2007 hearing ("Hearing") regarding the License before the Commerce Department established, granting the License will improve commerce on the Delaware riverfront, improve navigation on the Delaware River, and improve access to the Delaware riverfront. As such, the Commerce Department

properly found that the grant of the License to HSP Gaming will benefit the City of Philadelphia and the Commonwealth of Pennsylvania, and that there was and is no reasonable basis to withhold the License.

In their Petition, and the arguments set forth therein, the Legislators completely ignore Section 14199/Act 321 and its efficacy. First, they unreasonably attempt to restrict the definitions of "pier" and "harbor structures" and claim that HSP Gaming's proposed structure does not fall within the ambit of these definitions. However, taking the entire context of the statute into consideration, it is clear that the term "harbor structures" includes all structures encroaching upon the waterway. Indeed, the former owner of the land in question, The Pennsylvania Sugar Company, later known as the National Sugar Refining Company, obtained many licenses pursuant to Section 14199/Act 321 and its predecessors to construct various industrial facilities and to operate a sugar factory on the land in question. Under the Legislators' asserted definition of the term "harbor structures," a sugar factory and similar improvements are no more of a "harbor structure" than HSP Gaming's proposed facility. Therefore, history establishes that the term "harbor structures" includes all encroachments on the waterway, including those contemplated to be placed on the Submerged Lands by HSP Gaming as set forth in its Application. Moreover, HSP Gaming's proposed construction and facility includes uses traditionally associated with piers and other harbor and riverfront structures, including places for a ferry, water taxi and public dock, a promenade open to the public, and other improvements to the shore line benefiting the City and the Commonwealth.

The Legislators argue strenuously that only the General Assembly has the authority to grant an interest in Commonwealth lands, such as the Submerged Lands at issue here. This is misleading. While a grant of an interest in Commonwealth land must be pursuant to the General Assembly's specific authorization, it does not necessarily follow that only the General Assembly

may grant every license. Instead, a license may be granted where the General Assembly has otherwise delegated the issuance of a license to another body, such as is the case when the General Assembly enacted Section 14199/Act 321 specifically delegating authority to the Commerce Director to issue such licenses.

Consequently, HSP Gaming respectfully requests that this Court enter an Order dismissing the Legislators' Petition for Review in its entirety.

II. STATEMENT OF JURISDICTION

This Court has jurisdiction over final orders of a local instrumentality involving the layout, usage, and construction of state-authorized gaming facilities. See 4 Pa.C.S. § 1506.

Specifically, pursuant to Section 1506, the General Assembly determined that:

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.

The Commerce Department's Decision specifically sets forth that the License involves the layout, usage, and construction of HSP Gaming's facility. Therefore, because the Commerce Department is an instrumentality of the City of Philadelphia, and its Decision to issue the License to HSP Gaming to construct improvements on the Submerged Lands involves the usage, layout, and construction of a licensed facility, this Court has exclusive appellate jurisdiction over the instant Appeal. See *Pennsylvania Gaming Control Bd. v. City Council of Philadelphia*, ___ Pa. ___, ___, 928 A.2d 1255, 1264 (Pa. 2007).

III. PARTIES

Intervenor-Respondent, HSP Gaming, is a Delaware limited partnership whose application to build and operate a Category 2 slot machine facility on a 22-acre site on North Delaware Avenue, to be known as the "SugarHouse Casino," was approved by the Pennsylvania Gaming Control Board ("Gaming Board") pursuant to its February 1, 2007 Order and Adjudication ("Adjudication"). HSP Gaming's service address is: c/o Charles J. Hardy, Esquire, Sprague & Sprague, The Wellington Building, Suite 400, 135 South 19th Street, Philadelphia, Pennsylvania 19103.

Respondent, the Commerce Department of the City of Philadelphia, is a department of the City of Philadelphia, created pursuant to Section 3-100(d) of the Philadelphia City Charter. Stephanie Naidoff is the Director of Commerce for the City of Philadelphia ("Commerce Director"). The Commerce Department's service address is: c/o Romulo L. Diaz, Jr., Esquire, City Solicitor, City of Philadelphia Law Department, One Parkway, 1515 Arch Street, 17th Floor, Philadelphia, Pennsylvania 19102.

Petitioner Vincent J. Fumo is a duly elected member of the Senate of Pennsylvania and represents residents of the 1st State Senatorial District.

Petitioner Michael H. O'Brien, is a duly elected member of the Pennsylvania House of Representatives, and represents residents of the 175th State House District.

Petitioner William F. Keller is a duly elected member of the Pennsylvania House of Representatives and represents the residents of the 184th State House District.

Petitioner Michael J. Stack is a duly elected member of the Senate of Pennsylvania and represents the residents of the 5th State Senatorial District.

Petitioner John J. Taylor is a duly elected member of the Pennsylvania House of Representatives and represents the residents of the 177th State House District.

Petitioner Michael P. McGeehan is a duly elected member of the Pennsylvania House of Representatives and represents the residents of the 173th State House District.

Petitioner Robert C. Donatucci is a duly elected member of the Pennsylvania House of Representatives and represents the residents of the 185th State House District. Hereinafter, the Petitioners shall be referred to collectively as "Legislators."

IV. STANDING OF THE LEGISLATORS – FAILING TO ASSERT ANY INJURY TO SPECIFIC DUTIES DERIVING FROM THEIR STATUS AS LEGISLATORS, THEIR PETITION FOR REVIEW MUST BE DISMISSED FOR LACK OF STANDING¹

There exists no constitutional provision, statute or decision of this Court, or decision of any other court of this Commonwealth, that grants individual members of the General Assembly standing to challenge the actions of a political subdivision as, purportedly, beyond the powers of that political subdivision. Indeed, to grant the Legislators standing to maintain this Petition would be wholly unprecedented, and contrary to the limited scope of legislative standing. See, e.g., *Wilt v. Secretary of Pub. Welfare*, 26 Pa. Cmwlth. 298, 305-06, 363 A.2d 876, 881 (1976); *George v. Pub. Utility Comm'n*, 735 A.2d 1282, 1286-87 (Pa. Cmwlth. 1999). See, also, *Russell v. DeJongh*, 491 F.3d 130, 133-38 (3d Cir. 2007) (individual legislators lack standing to challenge executive branch enforcement actions of existing laws). *Cf. Kennedy v. Sampson*, 511 F. 2d 430, 433-36 (D.C. Cir. 1974) (individual senator had standing to challenge an allegedly illegal 'pocket veto' on ground that he was being denied his right to vote to override the veto).

The Commonwealth Court's *Wilt* decision is instructive, particularly as the court engaged in an extended analysis of legislative standing with reference to the significant body of Federal law on the subject. Plaintiff William Wilt, a member of the Pennsylvania House of

¹ Contemporaneous with the filing of the instant Answer, HSP Gaming has filed in this Court an Application for Summary Relief, seeking dismissal of the Legislators' Petition for Review on the basis of, *inter alia*, lack of standing.

Representatives, filed suit to enjoin the Department of Public Welfare from operating a geriatric center as a mental-health care facility. *Wilt*, 26 Pa. Cmwlth. at 299, 363 A.2d at 878.

Addressing *Wilt*'s standing, the court properly began with this Court's general principles of standing: Standing requires a direct, substantial interest in the claim advanced. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 363 Pa. 168, 202, 346 A.2d 269, 286 (1975).² "A 'direct' interest mandates a showing that the matter complained of 'caused harm to the party's interest,' *i.e.*, a causal connection between the harm and the violation of law." *Society Hill Civic Ass'n v. Pa. Gaming Control Bd.*, 928 A.2d 175, 184 (Pa. 2007). "The core concept of standing is that 'a party who is not negatively affected by the matter he seeks to challenge is not aggrieved, and thus, has no right to obtain judicial resolution of his challenge.'" *In re Milton Hershey School.*, 590 Pa. 35, 42, 911 A.2d 1258 (2006) (quoting *City of Philadelphia v. Commonwealth*, 575 Pa. 542, 838 A.2d 566, 577 (2003)). See, also, *In re Hickson*, 765 A.2d 372, 382 (Pa. Super. 2000) ("The concept of standing is fundamental to our jurisprudence. Traditionally, access to the judicial process is limited to individuals who are aggrieved, *i.e.*, those who have a direct, immediate and substantial interest in the matter sought to be litigated.").

The *Wilt* court next reviewed the leading Federal cases, including *Kennedy v. Sampson*, 511 F. 2d 430 (D.C. Cir. 1974), in which an individual senator was *granted* standing to challenge an allegedly illegal "pocket veto" on the ground that the Senator was being deprived of his constitutional right to vote to override the President's veto, and *Metcalf v. National Petroleum Council*, 407 F. Supp. 257 (D. D.C. 1976), in which a congressman was *denied* standing to claim

² "A 'substantial' interest is an interest in the outcome of the litigation which surpasses the common interest of all citizens procuring obedience to the law. A 'direct' interest requires a showing that the matter complained of caused harm to the party's interest. An 'immediate' interest involves the nature of the causal connection between the action complained of and the injury to the party challenging it." *In re Hickson*, 573 Pa. 127, 821 A.2d 1238, 1243 (Pa. 2003).

that certain actions impaired the effectiveness of legislation for which he had voted and his vote had been duly counted.

According to the *Wilt* court, what emerged from its careful review of these state and Federal cases was the principle that:

legislators, as legislators, are granted standing to challenge executive actions when specific powers unique to their functions under the Constitution are diminished or interfered with. Once, however, votes which they are entitled to make have been cast and duly counted, their interest as legislators ceases. Some other nexus must then be found to challenge the allegedly unlawful action.

26 Pa. Cmwlth. at 305, 363 A.2d at 876.

Applying these principles of legislative standing, the *Wilt* court explained that, for example, because Pennsylvania's Constitution grants members of the Senate the duty to approve or disapprove certain gubernatorial appointments, any interference with the performance of that duty would cause injury to individual Senators sufficient to confer standing to protect their constitutional right to vote for or against the confirmation of executive branch appointees. *Id.* at 306, 363 A.2d at 881.

In contrast to those hypothetical disenfranchised Senators, *Wilt* only complained that the purpose of the bill for which he voted and which had passed was being frustrated, thereby purportedly harming the effectiveness of his vote. Rejecting that basis for standing, the *Wilt* court explained that "once *Wilt's* vote had been duly counted and the bill signed into law, his connection with the transaction *as a legislator* was at an end. Therefore, he retains no personal stake, as required by *William Penn, supra*, in the outcome of his vote which is different from the stake each citizen has in seeing the law observed. He therefore has no standing to sue in his capacity as a legislator." *Id.* at 306, 363 A.2d at 881 (emphasis in original). The Legislators here can and should fare no better than Representative *Wilt*.

Attempting to shoehorn their Petition within the limited framework of legislative standing, each Legislator claims to represent a legislative district that either embraces HSP's site, "is contiguous to" that site, or is "contiguous with the waterways of the Delaware River." (See, e.g., Petition at ¶ 4 (Rep. Keller, whose district is "contiguous to" HSP's site); ¶ 5 (Sen. Stack, whose district is "contiguous with" the Delaware River). Each Legislator further claims, in similar phrasing, to have repeatedly voted against any attempt to "shortcut" or "expedite" the conveyance of riparian property interests to HSP. See Petition at ¶ 2 (Sen. Fumo), ¶ 3 (Rep. O'Brien), ¶ 4 (Rep. Keller), ¶ 5 (Sen. Stack), ¶ 6 (Rep. Taylor), ¶ 7 (Rep. McGeehan), ¶ 8 (Rep. Donatucci)). Finally, each Legislator claims to "have a substantial, direct and immediate interest in the matter," without providing any specific facts in support thereof. (Petition at ¶¶ 2-8).

First, it is well-established that a mere talismanic reference in a pleading or petition to phrases such as "substantial, direct, and immediate interest" does not confer standing. See *Farmland Indus. v. Penn Dairies*, 81 Pa. Cmwlth. 340, 347, 473 A.2d 730, 734 (1984) (petitioner's allegation of "irreparable, direct and immediate injury" represented "conclusory allegation" lacking specificity required to confer standing); Pa.R.Civ.P. No.1029 (legal conclusions are deemed denied), and Pa.R.A.P. 1517 (applying Rules of Civil Procedure to appellate pleadings); *Soc'y Hill Civic Ass'n v. Pa. Gaming Control Bd.*, ___ Pa. ___, ___, 928 A.2d 175, 178 (2007).

Second, the Legislators' averments about the proximity of their respective districts to either the location of the SugarHouse site or to the Delaware River waterfront are irrelevant to the basic principles of standing articulated in cases such as *Wilt* and, more generally, *William Penn Garage*. Pursuant to statutory authorization originating in 1907, the Philadelphia Commerce Department granted HSP Gaming the right to construct a portion of the SugarHouse

Casino on riparian lands. If this action of a political subdivision somehow impaired the Legislators' rights, *qua* legislators, the rights of every member of the General Assembly would be similarly impaired, and every member would have standing to challenge the Commerce Department's actions. Thus, that a particular legislator may represent a district embracing property potentially affected by the Commerce Department's powers under Section 14199/Act 321 is wholly irrelevant to the standing analysis.

Third, although the Legislators contend that a state statute which delegated to the City the authority to convey riparian lands has been impliedly repealed by a subsequent state statute, they fail to make any connection between that legal argument (which HSP rejects, *see supra* at pp 20-56), and their own standing to make that legal argument which is, in essence, simply a question of statutory construction. In sum, whether Section 14199/Act 321 was repealed in 1978, or remained in effect as of November 27, 2007, has nothing to do with any purported impairment of the Legislators' "specific powers unique to their functions under the Constitution." *Wilt*, 26 Pa. Cmwlth. at 305, 363 A.2d at 876

Indeed, the Legislature spoke in 1907, and Section 14199/Act 321 was at that time signed into law. Thereafter, the connection between the individual legislators who voted on that bill and the legislation itself was, in *Wilt's* terms, "at an end." Following that legislative action, no legislator retained any "personal stake" in the matter, as required by *William Penn*, in the outcome of his vote. Once legislation is enacted, individual legislators have no continuing direct interest in how the legislation is applied (or not applied) of any greater weight or dimension than "each citizen has in seeing the law observed."³ *Id.* at 306, 363 A.2d at 881.

³ Although the Legislators cite Article I, § 27 of the Pennsylvania Constitution, which proclaims public natural resources as "the common property of all of the people," the Legislators fail to connect this provision to the constitutional duties imposed on any individual legislator, or how

Finally, each Legislator claims to be a "resident and taxpayer in the Commonwealth," presumably in an effort to invoke the limited concept of "taxpayer standing." Taxpayer standing represents "an exception to the general requirement of aggrievement in circumstances in which government action might otherwise go unchallenged." *Citizens Against Gambling Subsidies, Inc. v. Pa. Gaming Control Bd.*, 591 Pa. 312, 320, 916 A.2d 624, 627 (2007) (citing *Application of Biester*, 487 Pa. 438, 409 A.2d 848, 851, n. 5 (Pa. 1979)). "The once liberal approach granting individuals standing based upon their interest as taxpayers was rejected by our Court in the seminal decision of *Application of Biester*, 487 Pa. 438, 443, n. 5, 409 A.2d 848, 851, n. 5 (1979), which reinvigorated the traditional requirements of standing that an individual must establish an interest in an action that surpasses the common interest of all taxpaying citizens." *Pittsburgh Palisades Park, LLC v. Commonwealth*, 585 Pa. 196, 206, 888 A.2d 655, 661 (2005).⁴

Under *Biester*, a taxpayer has standing to challenge an act if: (1) the governmental action would otherwise go unchallenged; (2) those directly and immediately affected by the complained-of matter are beneficially affected and not inclined to challenge the action; (3) judicial relief is appropriate; (4) redress through other channels is unavailable; and (5) no other persons are better situated to assert the claim. See *Pittsburgh Palisades*, 888 A.2d at 662; see also *Consumer Party of Pennsylvania v. Commonwealth*, 510 Pa. 158, 507 A.2d 323, 329 (1986) (summarizing *Biester* taxpayer exception standing requirements).

the City's actions could have purportedly impaired the performance of such duty. (*See* Petition at p. 2.) Thus, this reference to the Constitution does nothing to establish or support the Legislators' standing.

⁴ "The prevention of a waste of tax revenue has been held to be "an interest which is *not* immediate because the detriment to the taxpayer is too remote since he is not directly or specially affected by the loss." *Biester*, 487 Pa. at 444, 409 A.2d at 851 (emphasis added). Rather, it is "merely the same interest all citizens have in having others comply with the law or the constitution." *Id.*

Here, it would be senseless to presume a political subdivision's purported usurpation of Commonwealth property would remain unchallenged unless individual legislators were granted standing to challenge such action. Indeed, the Commonwealth itself is uniquely able to challenge any allegedly unlawful usurpation of its property by a political subdivision. Nor do the Legislators suggest that the Commonwealth is somehow "disinclined" to defend its property. See Faden v. Philadelphia Housing Authority, 424 Pa. 273, 278, 227 A.2d 619, 621-22 (1967) ("[A]lthough many reasons have been advanced for granting standing to taxpayers, the fundamental reason for granting standing is simply that otherwise a large body of governmental activity would be unchallenged in the courts."). Thus, taxpayer standing is simply inapposite here. See also Citizens Against Gambling Subsidies, Inc. v. Pa. Gaming Control Bd., 591 Pa. 312, 320, 916 A.2d 624, 629 (2007) ("Taxpayer standing has been considered by this Court in various contexts, but it is generally applied as a basis to support a challenge before a court or agency having original jurisdiction, and not as a justification for an initial entry onto the record of an existing adjudicative matter for the first time via the filing of an appeal.")

In sum, there exists no constitutional provision, statute or decision of this Court, or decision of any other court of this Commonwealth, that grants individual members of the General Assembly standing to challenge the actions of a political subdivision as, purportedly, beyond the powers of that political subdivision. Indeed, to grant the Legislators standing to maintain this Petition would be wholly unprecedented, and contrary to the limited scope of legislative standing. See e.g., Wilt v. Secretary of Pub. Welfare, 26 Pa. Commw. 298, 305-06, 363 A.2d 876, 881 (1976); George v. Pub. Utility Comm'n, 735 A.2d 1282, 1286-87 (Pa. Commw. 1999). See, also, Russell v. DeJongh, 491 F.3d 130 (3d Cir. 2007) (individual legislators lack standing to challenge executive branch enforcement actions of existing laws). *Cf.*

Kennedy v. Sampson, 511 F. 2d 430 (D.C. Cir. 1974) (individual senator had standing to challenge an allegedly illegal 'pocket veto' on ground that he was being denied his right to vote to override the veto). For all these reasons, the Petition for Review should be dismissed.

V. DETERMINATION SOUGHT TO BE REVIEWED PURSUANT TO THIS COURT'S APPELLATE JURISDICTION

The Determination sought to be reviewed is the November 27, 2007 Decision of the Commerce Director for the City of Philadelphia granting HSP Gaming's Application for a Submerged Land License. The Legislators request in Paragraphs 11 and 12 of their Petition that this Court review the Commerce Department's decision to approve HSP Gaming's Application and the issuance of the License.⁵ For the reasons set forth below, the Legislators' request should be denied in its entirety as having no basis in fact or in law.

⁵ It should be noted that, as opposed to the Relief identified in Paragraphs 11 and 12 of their Petition, the Relief Sought by the Legislators on page 19 of their Petition is far ranging, including a request that this Court "enjoin HSP from trespassing upon the submerged riverbed lands" and "enjoin the City of Philadelphia, the Commerce Department of the City of Philadelphia, and the Department of Licenses and Inspections of the City of Philadelphia from authorizing the use of such lands without specific authorization from the General Assembly...." However, nowhere in their Petition do the Legislators set forth any factual or legal justification for such broad relief, these complaints were not raised below, and thus it is respectfully submitted that the Court, in considering the Legislator's Petition should deem such requests waived, and only determine whether the Legislators are entitled to the relief sought in paragraphs 11 and 12 of their Petition. Moreover, the heading of Section VI of the Petition states "Determination Sought to be Reviewed/Action Sought to be Enjoined". However, nowhere in Section VI is injunctive relief requested, although in Section IX of the Petition, entitled "Relief Sought", Petitioners request therein, without having established any facts or law in support thereof, for restraint directed to HSP Gaming and to the City and two of its Departments, in addition to a declaratory judgment. Not only have the Petitioners failed to present any basis for such relief, but in the first instance any relief sought by the Petitioners in the nature of a restraint directed to the effectiveness of the License issued by the Commerce Director must be directed to the Commerce Director. 53 Pa. C.S. §14199; *see also* Pa.R.A.P. 1781(a).

VI. STATEMENT OF MATERIAL FACTS

A. Statutory History

Under Pennsylvania law, it is well-established that a riparian land owner, *i.e.*, the owner of property abutting a river, has title to the property up to the low-water mark of the river, but the Commonwealth retains title below the low-water mark. *United States v. Pennsylvania Salt Mfg. Co.*, 16 F.2d 476, 479 (E.D. Pa. 1926).

In 1907, the Pennsylvania General Assembly enacted two statutes that delegated authority to two different entities to grant licenses in Commonwealth lands beyond the low-water mark of rivers ("submerged lands") in Pennsylvania, which continued prior authority dating back to William Penn's Charter. See Hearing Tr. at 10 – 11 and the City Solicitor Opinion. First, it enacted Section 14199/Act 321. This statute allowed the Director of Wharves, Docks, and Ferries of the City of Philadelphia ("Department of Wharves") (the predecessor to the Commerce Department) to license encroachments on the waterways and construction on submerged lands situated solely within cities of the first class upon certain conditions – (1) that there be requisite notice; and (2) after a hearing. Section 14199/Act 321.⁶

On that same day, the General Assembly enacted Act 322 of June 8, 1907, Pamphlet Law 496, §§ 7-8 ("Act 322"), to create the Navigation Commission ("Navigation Commission") for the Delaware River. Sections 7 and 8 of Act 322 were codified at 55 P.S. §§ 6-7.⁷ Unlike Act 321, this Act did not specifically relate to Cities of the first class. However, similar to Act 321, under Act 322 the General Assembly authorized an agency, this time the Navigation Commission, to issue licenses to riparian land owners.

⁶ Philadelphia is the only City of the first class in Pennsylvania. *Society Created to Reduce Urban Blight v. Zoning Bd. of Adjustment of City of Philadelphia*, 921 A.2d 536, 543 (Pa. Cmwlth. 2007).

⁷ As will be discussed later, Act 322 was later repealed; Act 321 was not.

By Act No. 261 of May 29, 1913 (the "1913 Act"), the General Assembly supplemented, *inter alia*, the City's authority under Section 14199/Act 321, including authorizing the City, by ordinance, to regulate and determine the license fees for the license and approval required under the Section 14199/Act 321. By Ordinance of July 8, 1915 (the "1915 Ordinance"), the City enacted legislation regulating and determining the fees for licenses or permits issued by the Department of Wharves, which Ordinance was subsequently amended by an Ordinance of July 25, 1940, and by an Ordinance of February 23, 1949.

In 1929, the General Assembly enacted the Administrative Code of 1929, Pamphlet Law 177, April 9, 1929, which codified that no department or commission could grant an interest in any Commonwealth land, which would include submerged lands, without specific authority from the General Assembly. Specifically, the General Assembly provided:

(a) Except as otherwise in this act expressly provided, a department, board, or commission, shall not sell or exchange any real estate belonging to the Commonwealth, or grant any easement, right of way, or other interest over or in such real estate, without specific authority from the General Assembly to do so.

71 P.S. § 194(emphasis added).

Thereafter, the Navigation Commission and the Department of Wharves continued to grant licenses relating to the Commonwealth's submerged lands pursuant to the specific authority from the General Assembly under Act 321 and Act 322. (See Application at 50-64.⁸ Indeed, the former owner of the SugarHouse site on the Delaware Riverfront, The Pennsylvania Sugar Company, later known as the National Sugar Refining Company, obtained licenses pursuant to Section 14199/Act 321 from the City of Philadelphia, with the most recent of those which have been found and included in the Application being issued in 1967. (*Id.* at 187-221).

⁸ HSP Gaming filed with this Brief a copy of the complete record created below, as Exhibits in 4 separate volumes. Each Exhibit volume has its own table of contents. Accordingly, for the Court's convenience, HSP shall refer to each document by title and appropriate page number.

Five of those licenses which have been found and included in the Application were issued by the Department of Wharves after the Administrative Code of 1929 was enacted. (*Id.* at 187-221).

In addition, the City of Philadelphia has records dated as recently as 1975 of a license issued by the Department of Commerce pursuant to Section 14199/Act 321. (See Philadelphia City Solicitor Op., dated November 13, 2007 ("City Solicitor Op.") at 455. However, the records of licenses after 1975 have been lost in the City archives. See City Solicitor Op. at 455.

Pursuant to the 1951 Home Rule Charter, § A-101, the responsibilities of the Department of Wharves were transferred to the new Department of Commerce. *Id.* at p. 454. Upon the effective date of the 1951 Home Rule Charter, the powers of the Department of Wharves were invested in the Department of Commerce. (See November 15, 2007 Department of Commerce Hr'g Tr. ("Hr'g Tr.") at 252).

The Commerce Department's authority to issue licenses pursuant to Section 14199/Act 321 was confirmed by the Pennsylvania Attorney General in 1978, when he issued an opinion recognizing the Commerce Director's authority pursuant to such statute. In particular, the Attorney General opined:

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

Construction Along Delaware and Schuylkill Rivers, 8 Pa. D & C. 3d 438 (1978).

Thereafter, also in 1978, the General Assembly, by Act No. 325 of November 26, 1978, adopted the Dam Safety and Encroachment Act, 32 P.S. §§ 693.1 *et seq* ("Dam Act"). While the

Dam Act specifically repealed the similar license provisions of Act 322,⁹ it did not repeal Act No. 321, which authorized the Commerce Director to issue licenses for submerged lands as in the case of the License. Thus, Section 14199/Act 321 is still the law in this Commonwealth and expressly provides for the General Assembly's delegation of authority to the Commerce Director to issue licenses for riparian lands located within the City of Philadelphia.

B. License Application and Hearing

On October 29, 2007, pursuant to Section 14199/Act 321, HSP Gaming submitted its Application to the Commerce Department for a License to construct its facility, in part, on certain submerged lands described in the Application ("Submerged Lands"). (See Application at 2. The Application also included HSP Gaming's Plan of Development for the construction project, which described the construction in detail. (See HSP Gaming's Plan of Development ("Plan of Development"). Thereafter, the Commerce Department scheduled a public hearing on HSP Gaming's Application for November 15, 2007, and in accordance with 53 P.S. § 14199, HSP Gaming caused Notice of the Hearing to be posted on the property and published in newspapers of general circulation. (Hr'g Tr. at 17).

On November 13, 2007, the City Solicitor for the City of Philadelphia, Romulo L. Diaz, Jr., issued his Opinion addressed to the Honorable Frank DiCicco regarding HSP Gaming's application for a submerged lands license. See City Solicitor Op. at 453. In his Opinion, the City Solicitor provided a history of the Commerce Director's authority to issue licenses for submerged lands located within the City of Philadelphia and advised that the Dam Act did not supersede the authority of the Commerce Director under Act 321 and the 1913 Act. *Id.*

On November 15, 2007, the Department of Commerce held the previously scheduled Hearing chaired by the Commerce Director. (Hr'g Tr. at 243-363). At the Hearing, HSP Gaming

⁹ "The following acts and parts of acts and supplements thereto are hereby repealed absolutely: . . . Sections 7 and 8 of the act of June 8, 1907 (P.L. 496, No. 322)."

submitted evidence and testimony in support of its Application, and the Commerce Director received into evidence documents and testimony from representatives of City government as well as members of the public and other elected officials, including Petitioners Fumo and O'Brien. (Hr'g Tr. at 243-363).

At the Hearing, the evidence established that, at present, the Submerged Lands are not submerged and certainly are not navigable because the part of the river there consists of mud, rubble, and the remains of unused and unusable piers. (Hr'g Tr. at 262-266). As a result, the Submerged Lands are currently in a state of decay such that they are inaccessible and in fact make the river inaccessible to the public by creating a barrier of decayed rubble that cannot be safely traversed. (Hr'g Tr. at 262-266). The Submerged Lands are covered with hundreds of old pilings from former pier and wharf structures that were once used to conduct maritime activities. (Hr'g Tr. at 262-266). As a result of the debris and state of decay, the Submerged Lands are currently fenced off for public safety reasons, thus rendering the waterfront completely inaccessible. (Hr'g Tr. at 266).

HSP Gaming's proposed facility would drastically improve the Submerged Lands, allow access to the riverfront, and make the land conducive to maritime activity. HSP would construct a public dock as well as a pier structure with a public promenade that would provide public access to the riverfront to allow city residents to enjoy the river. (Hr'g Tr. at 263). The public promenade will span the entire length of the riverfront on the Submerged Lands. (Hr'g Tr. at 265). The promenade will include abundant landscaping, new lighting, and attractive furnishings, as well as a fan-shaped and tiered plaza overlooking the river to host summer concerts, performances, and year-long fitness opportunities. (Hr'g Tr. at 272). The landscaped open spaces will include paths to the riverfront, and the riverfront will have clearly identified paths for joggers and bikers, as well as quiet seating areas. (Hr'g Tr. at 267). In all, the project

will provide 1,600 feet of construction with access along the riverfront, or the equivalent of four city blocks. (Hr'g Tr. at 272). The docks will be built for a ferry and water taxi to promote transit over the river to and from destinations on both sides of the river. (Hr'g Tr. at 268).

Without the License, the facility would be built with the mud and debris filled land as a barrier between the facility and the river, thus continuing to restrict access to and enjoyment of the river. (Hr'g Tr. at 263).

C. Commerce Department Decision

On November 27, 2007 after consideration all of the testimony and documents submitted to it in conjunction with the Application, including that submitted by or on behalf of Petitioners Fumo¹⁰ and O'Brien, the Commerce Director issued a Decision on behalf of the Commerce Department granting HSP Gaming's License (the "Decision"). See Decision at 1-10, attached to Petition as Exhibit "A". The Commerce Director found that the Application involved the layout, usage, and construction of HSP Gaming's facility at the location selected by the Gaming Board. See Decision at 1-2.

Applicants seek permission to erect and construct upon Commonwealth-owned lands in the Delaware River immediately adjacent to its property, but on the landside where piers end along the river (the "Applicant Submerged Lands"). The construction

¹⁰ At the Commerce Department Hearing, Petitioner Fumo submitted a memorandum dated November 14, 2007, from Christopher Craig, Esquire (one of the counsel for the Legislators herein), wherein it was argued that the Attorney General opinion does not apply because it addressed the since repealed statute, 55 P.S. § 7. (See Christopher Craig Mem. dated November 14, 2007). The memo contends that while 55 P.S. § 7 is similar to 53 P.S. § 14199, there is a significant difference. 55 P.S. § 7 specifically states that a license can be issued to extend a wharf or pier "into or on the aforesaid river and its navigable tributaries." The memo infers, therefore, that 53 P.S. § 14199 does not apply to structures that extend into the river bed. First, this would render Section 14199 totally superfluous, because the state does not need to delegate the authority to the City of Philadelphia to regulate wharves or piers that do not extend into the river. Furthermore, it defies common sense to say that a pier would not extend into the river. Finally, and perhaps most significantly, Section 53 P.S. § 14199 by its own terms applies to structures that "encroach upon the waterway." Therefore, the contention that Section 53 P.S. § 14199 does not apply to structures that extend into the river is wholly without merit.

will include certain improvements and structures, and the filling in of portions of the Delaware River and enclosure of the entire improved and filled area with a new bulkhead structure, all of which shall be part of the Sugarhouse Casino Project (the "Project"). The Project will be located at 941-1025 N. Delaware Avenue in the City of Philadelphia . . . a location selected by the Pennsylvania Gaming Control Board.

Decision at 1-2.

The Commerce Director further specified that the construction and layout will extend beyond the low-water mark, thus requiring the License:

As the Premises are developed for the Project, Applicant plans, among other things, to widen and extend Pier 41. . . .demolish and remove the dilapidated structures at Piers 42, 43, and 46 North; remove the fill between Piers 41 and 42 North and Piers 43 and 44 North; construct approximately 1,200 feet of bulkhead/high-deck structure and 2,100 feet of public greenway; . . . and design and construct the casino and the accessory buildings and facilities, including the driving and loading of test pilings, set forth in the Application. This will involve construction both east and west of the low water mark.

Decision at ¶ 12 (emphasis added).

The Commerce Director noted that the Submerged Lands currently are in a state of disarray, are vacant and fenced off for safety purposes, and render the waterfront completely inaccessible to the public. See Decision, Findings of Fact at ¶¶ 8-11. The Commerce Director found that the proposed development would drastically improve the waterfront by allowing construction of HSP Gaming's Project to extend to the waterfront. See Decision, Findings of Fact at ¶¶ 14-17. The Commerce Director found, "Applicant's proposed Project ensures public access to the Delaware riverfront by including a public dock and a pier, a landscaped public right of way at least 50 feet wide across the eastern boarder of the Premises, and a fan-shaped waterfront public park." See Decision, Finding of Fact, at ¶ 14. See also, Decision, Conclusion of Law, at ¶ 13 ("Licensing the use of the Applicant Submerged Lands for the Project, in the manner contemplated by the Plan of Development, will improve all aspects of the Project, and

positively will enhance the impact of the development of the Delaware River, and on all who use the river for recreation, navigation, fishery and commerce.”).

On November 27, 2007, in accordance with the Decision, HSP Gaming paid the City of Philadelphia the sum of \$282,270.00 as payment for the License, and was issued the License.

(See a true and correct copy of HSP Gaming’s cancelled check at 472).¹¹

VII. ARGUMENT

A. STANDARD OF REVIEW

This action is the first appeal filed from a final order, determination, or decision of local instrumentality involving zoning, usage, layout, construction, and occupancy, including size, bulk, and use of a licensed facility pursuant to Section 1506 of the Pennsylvania Race Horse Development and Gaming Act (the “Gaming Act” or “Act 71”), 4 Pa.C.S. § 1101 *et seq.* Section 1506 provides in full:

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.

Therefore, this Court’s standard of review of a final decision of a political subdivision involving the construction, occupancy, and location of a licensed facility is limited to

¹¹ The Legislators’ contend in paragraph 22 of their Petition that HSP Gaming has not paid the Commonwealth any monies for its occupation and construction of a 5,000 slot machine casino entertainment complex. This is incorrect. Although the making of any such payment is not relevant to the determination by this Court of the Legislators’ Petition, and the relief sought therein, in accordance with the Gaming Act, on October 17, 2007, HSP Gaming paid to the Gaming Board the \$50 Million License Fee for its gaming license pursuant to 4 Pa.C.S. §1209 as directed by the Board’s Order dated October 2, 2007.

determining whether the political subdivision committed an abuse of discretion or an error of law. See generally *Allegheny W. Civic Council v. Zoning Bd. of Adjustment*, 547 Pa. 163, 167, 689 A.2d 225, 227 (1997). For the reasons set forth herein, the Commerce Department did not abuse its discretion and did not commit an error of law in rendering its Decision and issuing the License to HSP Gaming and, therefore, the Legislators' Petition for Review should be summarily denied.

B. HSP GAMING'S RIGHT TO RELIEF IS CLEAR AND HSP GAMING IS ENTITLED TO JUDGMENT AS A MATTER OF LAW

1. SECTION 14199 CONSTITUTES "SPECIFIC AUTHORITY" FROM THE GENERAL ASSEMBLY TO LICENSE THE SUBMERGED LANDS

The Legislators frame their argument in a manner that attempts to obfuscate the relief sought by HSP Gaming from the City in the nature of its License, and thus the authority of the City to issue same. Rather than acknowledging that the issue before this Court can only be the authority of the City to issue such License to HSP Gaming, and the effect of same, the Legislators assert and reassert that it is the Commonwealth of Pennsylvania, and not the City, that has the sole and exclusive authority to authorize the use of submerged lands belonging to the Commonwealth of Pennsylvania. However, this argument misses the mark by a wide margin, and ignores the fundamental issues that need be considered by this Court.

The question is not whether the submerged lands are owned by the Commonwealth of Pennsylvania, as opposed to the City, but whether the Commonwealth of Pennsylvania has delegated to the City and specifically given it the authority to issue licenses, such as the License that is at issue in this appeal.¹²

¹² In Paragraph 23 of their Petition, the Legislators argue that "[T]o date, no legislation has been introduced, considered, deliberated or voted, that if enacted, would specifically authorize the conveyance of a title, easement, right-of-way or other interest in the submerged lands of the Commonwealth abutting 941-1025 Delaware Avenue in the City of Philadelphia, to either HSP or the City of Philadelphia." (Petition at 14). However, for all of the reasons set forth in this

As stated above, under Pennsylvania law, the owner of property abutting a river has title to the property up to the low-water mark, but the Commonwealth retains title below the low-water mark. The General Assembly has expressly provided that only an Act of the General Assembly may authorize the conveyance of any interest in Commonwealth property:

(a) Except as otherwise in this act expressly provided, a department, board, or commission, shall not sell or exchange any real estate belonging to the Commonwealth, or grant any easement, right of way, or other interest over or in such real estate, without specific authority from the General Assembly to do so.

71 P.S. § 194.

However, HSP did not need another Act of the General Assembly to obtain riparian rights, and thus its License, so long as an existing statute delegated the authority to the City of Philadelphia or some other governmental entity to convey these rights. In this regard, in 1907 the General Assembly enacted two separate statutes that expressly delegated the authority to grant riparian rights.

In Act 322, the General Assembly delegated the authority to the Navigation Commission to grant licenses to certain riparian rights along the Delaware River outside of the City of Philadelphia's boundaries.

Brief, and in the City Solicitor Opinion, the Legislators have simply misstated the issue and the law. Section 14199/Act 321 clearly authorizes the Commerce Department to issue the License for the Submerged Lands to HSP Gaming, as it has done.

Section 5 of the Restatement of Property (1936) defines a license as "an interest in land ... generally [including] varying aggregates of rights, privileges, powers and immunities and distributively to mean any one of these." Comment c to Section 5 makes the point that if a purchaser has a right, privilege, power or immunity with respect to land, he has an interest in it. Section 512 of the Restatement of Property (1944) defines a license as "an interest in land ... which (a) entitles the owner of the interest to a use of land, (b) arises from the consent of [the owner], (c) is not an incident to an estate in the land and (d) is not an easement." Comment c to Section 512 provides that "a privilege to use certain land constitutes an interest in that land. *Kalins v. Com., State Real Estate Comm'n*, 92 Pa. Cmwlth. 569, 578-79, 500 A.2d 200, 204 (1985).

Whenever any person . . . shall desire to construct, extend, or alter any wharf or pier . . . into or on the aforesaid river and its navigable tributaries, such person . . . shall make application to the president of the commissioners . . . and file in the office of the president . . . plans and specifications . . . and produce their deed or deeds, or other evidence of title, to the property to be so occupied, altered, or improved . . . the commissioners shall give their assent and issue a license for the erection.

55 P.S. §§ 6, 7 (emphasis added).

Also on the same day in 1907 as Act 322 was enacted, the General Assembly enacted Section 14199/Act 321, which delegated the authority to the Department of Wharves to convey riparian rights to certain submerged lands within the City of Philadelphia. This provision states in full:

Whenever any person or persons shall desire to construct, extend, alter, improve or repair any wharf, or other building in the nature of a wharf, or bridge, or other harbor structures, situate wholly within any city of the first class, such person or persons shall make application to the director, stating in writing the nature and extent of such proposed structure, extension, alteration, improvement or repair, and file in the office of the director the plans and specifications showing fully the proposed structure, extension, alteration, improvement or repair, and produce his or their deed or deeds, or other evidence of title, to the premises on which such proposed structure, extension, alteration, improvement or repair is to be erected or made,-- whereupon, if such proposed structure, extension, alteration, improvement or repair will encroach upon the waterway, the director shall give notice of the time and place of hearing such application, to all parties interested, by advertising twice a week for two successive weeks, in two newspapers of general circulation published within the said city, and by posting notice upon the said premises; and if the director, upon such hearing, or without such hearing where such hearing is not required by the provisions hereof, shall approve such proposed structure, extension, alteration, improvement or repair, and the plans and specification submitted therefor, he shall give his assent to, and issue a license or permit for, the erection and making thereof, and cause the fact of the issue of such license or permit to be recorded in his office, in a book to be kept by him for that purpose, and such license or permit shall not be unreasonably withheld: Provided, That necessary repairs, costing one hundred dollars or less and not affecting the stability or strength of the structure, may be made without first procuring a license or permit.

Whenever any person or persons shall desire to construct, extend, alter, improve or repair any structure to be erected, or already erected, on ground supported by bulkheads, and to be used, or already used, for the purpose of loading or unloading passengers or freight on or from vessels; or any structure to be physically connected, or already physically connected, or to be used or already used, as appurtenant to any wharf or structure hereinbefore described, situate within any city of the first class,--and for such purpose he or they shall have applied for a permit from the Bureau of Building Inspection in said city, the said Bureau of Building Inspection shall notify the director of the Department of Wharves, Docks and Ferries, of such application, and shall thereafter grant the permit applied for, only when the application shall have received the approval of the said director, which he is hereby empowered to grant.

The cities of the first class may, by ordinance, regulate and determine the license fees for the license and approval required by the provisions of this act.

53 P.S. § 14199 (emphasis added).

2. A LICENSE UNDER SECTION 14199 PERMITS THE LICENSEE TO CONSTRUCT ON RIPARIAN LANDS WITHOUT FURTHER LEGISLATIVE ACTION.

The Attorney General Opinion in *Construction Along Delaware and Schuylkill Rivers*, 8 Pa. D & C. 3d 438 (1978), specifically found that Section 14199/Act 321 and Act 322 constituted a delegation of authority that permitted riparian land owners to obtain rights beyond the low water mark without any further action by the General Assembly. Based on the legislative history of these respective licensing statutes, the Attorney General reasoned that the reference to "deed or deeds, or other evidence of title" referred not to title over the Commonwealth land beyond the low-water mark, but instead only required evidence of title over the riparian lands abutting the river. *Id.* "It is our opinion that the deed or title referred to . . . above is the deed or title to the riparian land down to the low-water mark. It does not refer to title in the bed of the river." *Id.*

The Attorney General observed that the original licensing statute specified that the license applicant must provide their "deed or deeds for said lot or lots." It reasoned that "lot or

lots" refers to dry land, not deeds to submerged lands which "were of course never subdivided in the traditional manner of 'lots.'" *Id.* at 443.

The Attorney General also noted that Pennsylvania courts have recognized that a riparian land owner could construct into the river beyond his property line. "It is true that it is the policy . . . not to license constructions on the river front of lands by other than abutting property owners; but this circumstance does not affect the legal rights of the licensee to construction beyond his property lines." *Id.* at 444 (quoting *United States v. Pennsylvania Salt Mfg. Co.*, 16 F.2d 476, 481 (E.D. Pa. 1926)). Thus, the Attorney General concluded "in no instance has a court insisted, or so much as mentioned, the possibility of requiring a riparian land owner to have title to land below the low-water mark in order to obtain a license for construction. In fact, the opposite is true." *Id.* at 445(emphasis added).

In addition, the history of the development of the Delaware River supports the conclusion that a riparian land owner need not obtain title to the river bed to construct beyond the low-water mark. "In point of fact, the Delaware River has been developed to its present state through the use of licenses, not submerged land conveyances. This development has taken place under statutes with language essentially identical to that being clarified by this opinion. Proof of title to land below the low-water mark has not been required in the past. There is no sound reason for requiring it at the present time." *Id.* at 446 (emphasis added).

Accordingly, the Attorney General found that no further act of the General Assembly was required to obtain a license to construct beyond the low-water mark. "It is our view that anyone desiring to construct, alter or extend facilities into the Delaware . . . need not seek from the General Assembly a statute authorizing the grant of an interest in the submerged land on which the construction is to be done inasmuch as the General Assembly has already authorized, by

statutes, the Director of Commerce of the City of Philadelphia . . . to grant the required interest in the river bed.” *Id.*

The current version of Section 14199/Act 321 contains nearly identical language to that interpreted in *Construction Along Delaware and Schuylkill Rivers*. In fact, it requires a license applicant to provide proof of “their deed or deeds, or other evidence of title, to the premises on which such proposed structure, extension, alteration, improvement or repair is to be erected or made.” 53 P.S. § 14199 (emphasis added). Just as the Attorney General interpreted “lots” to refer to property above the low-water mark, rather than the riverbed, it seems incongruous to refer to submerged lands as a “premises.” Thus, the reference in Section 14199/Act 321 to “premises” indicates that a property owner seeking a license need only produce the deeds or deed to the land abutting the river up to the low-water mark, as the river bed can hardly be described as a “premises.”

Other provisions of Title 53 of the Pennsylvania Statutes indicate that a license under Section 14199/Act 321 allows a riparian owner to construct beyond the low-water mark. “The waters in rivers outside the low water mark being the property of the commonwealth, no owner of land inside of said low water mark shall be authorized to erect any wharf . . . without first procuring a license so to do from the board of wardens of the port, as provided by existing laws.” 53 P.S. § 16831. In addition, even though title remains in the Commonwealth, the owner of the wharf may receive compensation for its use and may convey the wharf by deed. 53 P.S. §§ 16832-33. Moreover, in describing the penalty for failing to obtain a license, the General Assembly provided:

If any person or persons shall construct, alter, or improve any wharf or building or harbor structure, as aforesaid, within the limits of said cities, beyond low-water mark, without license or an order of court, as hereinafter provided, first having been obtained, such wharf or building or harbor structure shall be deemed a public or common nuisance.

53 P.S. § 14200 (emphasis added).

This notes and confirms that construction of any building beyond the low-water mark will not be a public nuisance so long as it is licensed. Accordingly, once HSP Gaming obtained a license under Section 14199/Act 321, it does not need any further action from the General Assembly to obtain riparian rights, notwithstanding the arguments of the Legislators and the provisions of 71 P.S. § 194 upon which they seemingly rely.

3. SECTION 14199/Act 321 HAS NOT BEEN REPEALED

The Dam Act, which was adopted in November 1978, specifically repealed Act 322, but did not repeal Section 14199/Act 321. See 32 P.S. § 693.27 (“The following acts and parts of acts and supplements thereto are hereby repealed absolutely: . . . Sections 7 and 8 of the act of June 8, 1907 (P.L. 496, No. 322)”). Although the Dam Act also specifically repealed all acts or parts of acts inconsistent with it, no case has found that the delegation of authority to the Commerce Director under Section 14199/Act 321 is inconsistent with the Dam Act. The Dam Act is not inconsistent with Section 14199/Act 321 so long as the Dam Act is interpreted merely to provide an additional regulatory process, rather than a conflicting means of conveying property rights.¹³

The Solicitor for the City of Philadelphia reached a similar conclusion. In Footnote 2 of the City Solicitor Opinion, he opined that “the Dam Safety and Encroachments Act did not address or affect the City’s power under Section 14199/Act 321 and the 1913 Act.”¹⁴ Moreover,

¹³ The City Solicitor also found that “[i]t is noteworthy that while the Dam Act specifically repealed similar licensing provisions of another 1907 Act authorizing the Navigation Commission to issue licenses outside of the City of Philadelphia (i.e., Act 322), the Dam Safety Act neither repealed nor addressed the Director of Commerce’s authority under Section 14199/Act 321 and the 1913 Act. See 32 P.S. §693.27(a)” City Solicitor Op. at 454.

¹⁴ Act No. 261 of May 29, 1913, wherein the “General Assembly supplemented, *inter alia*, the City’s authority under the 1907 Act, including authorizing the City, by ordinance, to regulate and determine the license fees for the license and approval required under the 1907 Act. See 53 P.S. §14199.

although not directly controlling, the Pennsylvania Commonwealth Court has held that the Dam Act did not create a sufficiently comprehensive regulatory scheme that would preempt municipal regulation in flood plain areas. *In re Appeal of Hoover*, 608 A.2d 607, 609-10 (Pa. Cmwlth 1982).

In addition, the same Attorney General who issued the opinion in *Construction Along Delaware and Schuylkill Rivers* issued an opinion one year earlier, in 1977, stating that a property owner obtaining a permit under the Water Obstructions Act [Act of June 25, 1913, P.L. 555, codified at 32 P.S., Part II, Chapter 25, §§681-691, and repealed on October 23, 1979 by P.L. 204, No. 70] needed further authorization from the General Assembly to obtain riparian rights. See Attorney General Official Opinion No. 77-20, 1977 WL 22837 (Dec. 30, 1977). There, the Attorney General stated that an applicant for a water obstruction permit under the Water Obstructions Act must obtain "an easement or other interest in the submerged land below the low-water mark from the General Assembly of the Commonwealth by a duly enacted statute." *Id.* It observed that the Water Obstructions Act was merely regulatory and not intended to convey property rights. *Id.* That Act, unlike Section 14199/Act 321, was expressly repealed by the Dam Act. Thus, this decision demonstrates that Section 14199/Act 321 served a different purpose, *i.e.* to permit the conveyance of rights rather than the regulation of safety, and thus the General Assembly intentionally left it out of the Dam Act repealer clause.

Therefore, at no time has the General Assembly expressly or by implication revoked the delegation to the Department of Wharves to convey riparian rights pursuant to Section 14199/Act 321. Accordingly, on that basis, Section 14199/Act 321 remains good law and, under *Construction Along Delaware and Schuylkill Rivers*, an applicant, such as HSP Gaming, obtaining a license under this statute, such as the License, would not need any further authorization from the General Assembly.

4. THE CITY CONTINUES TO EXERCISE DELEGATED AUTHORITY OVER RIPARIAN LANDS IN THE CITY OF PHILADELPHIA, AND THE CITY SOLICITOR HAS CONCLUDED THAT THE COMMERCE DEPARTMENT HAD THE LEGAL AUTHORITY TO CONDUCT THE HEARING AND ISSUE THE SUBMERGED LANDS LICENSE

Although the position of Director of the Department of Wharves no longer exists, the powers of this position have been vested in the Director of Commerce for the City of Philadelphia. See Philadelphia City Code § 18-102 n.3 (“Powers of Department of Wharves, Docks and Ferries now vested in the Department of Commerce.”). Moreover, the Attorney General Opinion in *Construction Along Delaware and Schuylkill Rivers* specifically recognized that the Department of Wharves no longer existed and instead found that the Commerce Director had the authority to grant the licenses in question. “The predecessor of the Director of Commerce of the City of Philadelphia with respect to the grant of a license for the construction of facilities below the low-water mark within the city of Philadelphia was the Department of Wharves, Docks and Ferries for the City of Philadelphia.” *Id.* Thus, the Attorney General specifically found that the Commerce Director of the City of Philadelphia had the specific authority from the General Assembly to issue the subject licenses. *Id.*

Furthermore, the Philadelphia Code § 18-103, whereby the City of Philadelphia maintains its authority over riparian lands by requiring a permit, states:

A permit shall be obtained before any pier, wharf or other harbor structure is built, extended, altered, improved or repaired, other than necessary repairs of the existing structure costing not more than \$300.

(2) Application for such permit shall be made to the Department of Licenses and Inspections in such form as the Department requires.

(a) No permit shall be issued unless the proposed construction will conform to the regulations of the Department of Commerce.

(3) If the proposed structure, extension, alteration, improvement or repair will encroach upon the waterway, no permit

shall be granted until a public hearing on the application has been held by the Department of Commerce, preceded by notice by advertisement twice a week for two successive weeks in two newspapers of general circulation published in the City.

(a) The applicant for the permit shall arrange and pay for the advertisements and furnish the Department of Licenses and Inspections with proof of such advertisement prior to the hearing.

Phila. Code §18-103.

Thus, not only has the City retained its authority over riparian lands, but it has specifically provided that the Department of Commerce, the successor to the Department of Wharves, will issue regulations regarding riparian lands. See Phila. Code §18-103(2)(a). The City has also incorporated the specific notice and hearing requirements from Section 14199/Act 321 into its permitting process. This is further evidence that the City has not overruled the General Assembly's delegation of authority under Section 14199/Act 321 and has instead retained authority over riparian lands.

At the Hearing, Romulo L. Diaz, Jr., the Solicitor for the City of Philadelphia, testified.

At that time, he opined that, among other things:

The director of Commerce has the legal authority to consider the submerged lands license application of SugarHouse Casino pursuant to Act 321 enacted by the General Assembly on June 8th, 1907. Under Act 321, the predecessor of Commerce Department, the Department of Wharves, Docks and Ferries was given the authority to grant licenses to build on the bed of the Delaware River below the water line.

The responsibilities of the Department of Wharves, Docks and Ferries were transferred to the Commonwealth (sic) department under the 1951 Home Rule Charter. Such local authority to license construction in the submerged lands in the Delaware River in Philadelphia is a long-standing tradition dating back to the time of the 1701 Charter of William Penn and has been reaffirmed since by numerous acts of judicial and general assemblies.¹⁵

¹⁵ See, e.g., Footnote 1 to the City Solicitor Opinion. In the City Solicitor Opinion, Mr. Diaz concluded that "[I]t is my opinion and you are so advised that the Attorney General's [of the

In other words, the director of Commerce's authority derives from a specific authority granted by the Pennsylvania General Assembly. This authority was noted by the Pennsylvania attorney general in 1978 and has not been repealed by any subsequent act of the General Assembly.

(Hr'g Tr. at 252-253).

Simply stated, the Dam Act changed the regulatory requirements and did not alter or rescind the Commerce Director's authority to grant licenses over riparian lands located within the City of Philadelphia. Further, as 71 P.S. § 194 and the Attorney General Opinion establish, the Dam Act did not alter the requirements that a land owner needs "specific authority from the General Assembly" because this requirement was already in place.

"Repeals by implications 'are not favored and will not be implied unless there be an irreconcilable conflict between statutes embracing the same subject matter'" *Commonwealth, Dep't of Education v. The First School*, 471 Pa. 471, 483, 370 A.2d 702, 708 (1977). In addition, there is a rule of statutory construction that requires that a specific statute control over a more general one:

Whenever a general provision in a statute shall be in conflict with a special provision in the same or another statute, the two shall be construed, if possible, so that effect may be given to both. If the conflict between the two provisions is irreconcilable, the special provisions shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted later and it shall be the manifest intention of the General Assembly that such general provision shall prevail.

1 Pa.C.S. § 1933.

The Dam Act does not provide a method of obtaining a possessory interest in lands, and is merely regulatory. Thus, it does not conflict with Section 14199/Act 321 and therefore cannot repeal it by implication.

Commonwealth of Pennsylvania] opinion confirmed the Director of Commerce's authority to issue a license under the 1907 Act." City Solicitor Op. at 454.

5. **SECTION 14199/ACT 321 APPLIES TO WHARVES, PIERS AND HARBOR STRUCTURES, AMONG OTHER IMPROVEMENTS, AND ALLOWS LICENSES FOR ANY BUILDING UPON RIPARIAN LANDS**

Notwithstanding the contentions of the Legislators, Section 14199/Act 321 clearly applies to the type of structures and improvements proposed in the Application. Certainly the proposed structures and improvements abutting into the river are not wharves, as they are not a "structure projecting from the shore that permits boats or ships to lie alongside for loading or unloading." *McIntyre v. Board of Sup'rs of Shohola Tp.*, 614 A.2d 335, 337 (Pa. Cmwlth. 1992). Section 14199/Act 321, however, not only applies to "wharfs" and "buildings in the nature of a wharf", but also applies to "wharfs" and "harbor structures."¹⁶ The term "harbor structure" is undefined in Pennsylvania statutes or case law. It is apparent from the context, however, that it means something other than a wharf.¹⁷

In addition, Section 14199/Act 321 allows for a license for building on land supported by a bulkhead if the construction would be used "for the purpose of loading or unloading passengers or freight on or from vessels." Since the General Assembly expressly provided this qualification in that context, its exclusion of this qualification from the description of a "harbor structure" demonstrates that the General Assembly intended "harbor structure" to include structures with purposes other than loading and unloading vessels.

Furthermore, the provision for punishment for unlicensed construction demonstrates that Section 14199/Act 321 licenses can be given for any building extending into the river. It states

¹⁶ By way of example, the definition of the word "pier" from the Random House Dictionary of the English Language is "a structure built on posts extending from land out over water, used as a landing place for ships, an entertainment area, a strolling place, etc.; Jetty." It is respectfully submitted that the factual record at the Hearing establishes that the proposed structure is, in addition to being a "harbor structure," a pier within the meaning of that definition.

¹⁷ "[I]n construing a statute, the courts must attempt to give meaning to every word in a statute as we cannot assume that the legislature intended any words to be mere surplusage." *Commonwealth v. Ostrosky*, 589 Pa. 437, 450, 909 A.2d 1224, 1232 (2006).

that "any wharf or building or harbor structure, as aforesaid, within the limits of said cities, beyond low-water mark, without license" is a nuisance. 53 P.S. § 14200 (emphasis added).

Thus, this indicates that any building beyond the low-water mark can be licensed to avoid punishment for creating a nuisance. Furthermore, Section 14200 requires that construction of a licensed building beyond the low-water must commence within six months. In doing so, it states, "all cases where any license or order has been or shall be given or made, permitting the erection . . . of any wharf, building, or harbor structure, aforesaid, beyond low-water mark of the waterways, or any harbor structure, . . . the person or persons to whom such license or order has been or shall be granted shall, within six months from the date of said license or order, commence the work for which such license or order shall have been granted." 53 P.S. § 14200 (emphasis added). Hence, the General Assembly contemplated that licenses would issue for any building beyond the low-water mark.

Moreover, as is clear from the submissions that HSP Gaming has made to the Planning Commission of the City, and in its Application for its License submitted to the Department of Commerce, the structures and other improvements that HSP Gaming proposes to build on the Submerged Lands consist of substantial improvements to the waterfront in the form of the promenade and other features which are not only an essential part of the waterfront improvements, but serve to create an infrastructure at the subject site that will materially enhance the waterfront along the Delaware well beyond the present environment. The waterfront promenade and water taxi dock are the anchor harbor structures for the development. While the parking garage supports the casino, its purpose is to also provide parking for those that want to utilize the harbor structure. Likewise, while the casino has its intended use, it also supports the harbor structure by providing restrooms, food and beverage outlets (including dining on the harbor structure), entertainment, lodging safety and shelter. The greenways on the north and

south sides of the site provide walking access to the harbor structure without entering the casino facility. The bottom line, this facility is designed around and focused upon a harbor use, and the waterfront is the key component of the design. (u, e.g., Application at § 6). As, the Commerce Director, in her License Determination, concluded:

Licensing for the use of the Applicant Submerged Lands for the Project, in the manner contemplated by the Plan of Development, will improve all aspects of the Project, and positively will enhance the impact of the development on the Delaware River and on all who use the river for recreation, navigation, fishery, and commerce.

Decision, Conclusion of Law at ¶ 13.

Finally, a review of the records of the City of Philadelphia indicates that at least 434 Submerged Lands Licenses have been issued by the City, pursuant to the authority delegated it by the Commonwealth of Pennsylvania.¹⁸ Many of those licenses involved the right to place structures and related improvements on submerged lands which would not constitute "harbor structures" as that term is defined by the Legislators in Paragraphs 29 through 31 of their Petition.

6. AS REQUIRED BY SECTION 14199/ACT 321, HSP GAMING PRODUCED TO THE COMMERCE DEPARTMENT "EVIDENCE OF TITLE"¹⁹

Although the Commerce Department clearly considered this issue as part of its review and issued a Conclusion of Law that "[A]pplicant has demonstrated sufficient evidence of equitable title to the Premises" (Decision, Conclusion of Law ¶ 7, citing to Findings of Facts ¶¶ 6 and 7), in their Petition for Review, the Legislators contend that HSP Gaming does not possess "any title or deed in the 12 acres of submerged lands abutting its development site" (See, e.g., Petition at 37 (Paragraph 37)) or any title or deed "evidencing its ownership of the non-submerged lands portion of the development site at 941-1025 Delaware Avenue in the City of

¹⁸ See, e.g., City Solicitor Op. at 455.

¹⁹ See, also, a discussion of this issue in Section 2 above.

Philadelphia. (See, e.g., Petition at 38 (Paragraph 38).²⁰ According to the Legislators, Section 14199/Act 321 required HSP Gaming, as an applicant for a Submerged Lands License, to “produce his or their deed or deeds, or other evidence of title, to the premises on which such proposed structure...is to be erected...”. (Emphasis added by Petitioners) (Petition at ¶ 40). Thus, the Legislators raise two questions. The first, whether evidence of ownership of the submerged lands is required. The second, whether equitable ownership of the abutting fast land is sufficient.

As to ownership of the submerged lands, if HSP Gaming was the owner of the submerged lands, no license would be necessary and the within proceedings would never have occurred. This point was made forcefully by the Attorney General in the 1978 opinion *Construction Along Delaware and Schuylkill Rivers*: “It is our opinion that the deed or title referred to ...is the deed or title to the riparian land down to the low-water mark. It does not refer to title in the bed of the river.” (Official Opinion No. 78-19, at 441).

As to the sufficiency of equitable ownership, it should first be noted that the Legislators have chosen to underline and thereby emphasize the words “his or their” in relationship to the words that next follow: “deed or deeds.” While the Legislators fail to explain the relevance of such emphasis, it can only be assumed that they are suggesting that the “deed or deeds” must be those of the applicant for the License. However, in fact, the words “his or their” also clearly are intended to refer to the phrase “or other evidence of title,” which makes clear that the requirement in question is not intended to be limited, nor is it so limited, to a “deed or deeds.”

Likewise, in Paragraph 39 of their Petition, the Legislators state that:

...as part of its application to the Commerce Department, HSP produced; (sic) a ‘Consent of Fee Owner’ document indicating the consent of the actual property owner, LHTW Corporation and

²⁰ Among other things, by reason of the License, HSP Gaming, in addition to whatever other title it possesses in the subject premises, possesses such rights as derive from the License.

1001 Christopher Columbus Boulevard LLC, to the application of HSP to apply for a Submerged Lands License from the Commerce Department; and, a 'Memorandum of Agreement of December 27, 2005,' stating that HSP has an option to buy the property (terms and conditions of the option agreement have not been publically (sic) disclosed). (See Attachment "G") (emphasis added).

(Petition at ¶ 34). However, nowhere in Attachment "G" is the term "option" utilized, and in fact the Memorandum of Agreement refers solely to an agreement between HSP Gaming, as buyer, and the above described seller, "providing, among other matters, for the purchase by Buyer and the sale by Seller" of the very property for which the Legislators contend HSP Gaming has no evidence of title. (See, e.g., Paragraph 1 of the Memorandum of Agreement contained in Attachment "G").

As was recognized by the Commerce Department, and is a well-established tenet under Pennsylvania law, title to property need not be in the form of a deed, nor must it be "legal" in nature, and such title can and does for purposes of the determination of interests in real property include "equitable" title. Under Pennsylvania law a contract purchaser is the equitable owner of real estate and has standing in land use matters. *O'Neill v. Philadelphia Zoning Board of Adjustment*, 384 Pa. 379, 387, 120 A.2d 901, 902 (1956); *Logan Square Neighborhood Asso. v. Zoning Board of Adjustment of Philadelphia*, 32 Pa. Cmwlth. 277, 281, 379 A.2d 632, 634 (1977).

For various historic and intrinsic reasons (one of which is the uniqueness of a parcel of real property), when you enter into an Agreement of Sale to buy real property you are not merely agreeing to buy it; you have bought it. The wording may be executory, but it is self-executing. It may be worded like a memorandum, but it forthwith makes you the equitable owner, which means the actual owner. You would not be jumping the gun if you created an easement before receiving the deed. It follows logically that if you, the Buyer, die, the equitable ownership, a freehold, will descend to your heirs as real property. You can encumber the property by mortgage, which will be valid, although subject to the Seller's lien on the legal title for the balance of the purchase price You may find it helpful to know that if, as

Buyer, you pay the purchase price in full and enter into exclusive possession, from a purely legal point of view it is not even essential for you to have a deed . . . Of course this is not intended to suggest that you refrain from insisting upon a deed... The statement that as Buyer you do not need a deed is just to illustrate your legal position and the importance of the Agreement.

As far as the Seller is concerned, the property ceases to be real property although he still holds legal title. But he holds it merely as trustee for the Buyer and as security for the balance of the purchase price. In the event of the Seller's death, his interest, having been converted to personalty, in the nature of a demand for money, goes to his personal representative and not to his heirs. . . . The Seller's interest "becomes a chose in action, a personal demand for the consideration money which in case of death goes to his personal representatives, and the legal title is held only as security for the payment of the debt."²¹

Samuel A. Goldberg, Sales of Real Property (Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association, 1971), Chapter 1 page 1 (internal citations omitted)(footnote added).

VIII. CONCLUSION

The Legislators state in their Petition that "[t]he initiation and participation in this matter by the Philadelphia waterfront state legislative delegation is purposefully intended to express to this Court the bipartisan, bicameral and unified position of each member that the authorization to convey Commonwealth lands is solely the prerogative of the General Assembly." (Petition at 2). However, this argument is flawed, and is an attempt to expand "by assertion" the Legislators' view as to their own authority, whether or not a legislative or other legal basis for such authority exists. As is more fully set forth in this Answer, and the City Solicitor Opinion, the General Assembly has previously empowered the Commerce Department to issue the License, and thus the Legislators' assertion to the contrary is, in its most simple form, is an effort by the

²¹ The nature of the title held by HSP Gaming, and for which it produced evidence as part of its Application for a Submerged Lands License, was an equitable title under an agreement of sale, and not as the holder of an option to purchase the subject property from the Seller identified above.

Legislators to undo politically what has been specifically authorized by a prior Act of the General Assembly, which remains in full force and effect to this day.

IX. RESPONSES TO ALLEGATIONS IN SEPARATE PARAGRAPHS

I. Introduction

HSP Gaming, L.P. ("HSP Gaming") submits by way of further answer, the following responses to the Legislators' Petition for Review as follows:

II. Basis for Jurisdiction

1. Admitted.

III. Parties Seeking Review

2. Admitted in part and denied in part. It is admitted only that State Senator Vincent J. Fumo is a duly elected member of the Senate of Pennsylvania and represents the residents of the 1st State Senatorial District. By way of further answer, after reasonable investigation, HSP Gaming is without knowledge or information sufficient to form a belief as to the truth of the remaining averments contained in Paragraph 2 of the Petition for Review and hence, same are denied. To the extent a responsive pleading is necessary, the remaining averments contained in Paragraph 2 of the Petition for Review are denied. Finally, the remaining averments contained in Paragraph 2 of the Petition for Review are irrelevant for purposes of this Action.

3. Admitted in part and denied in part. It is admitted only that Michael H. O'Brien, is a duly elected member of the Pennsylvania House of Representatives and represents the residents of the 175th State House District. By way of further answer, after reasonable investigation, HSP Gaming is without knowledge or information sufficient to form a belief as to the truth of the remaining averments contained in Paragraph 3 of the Petition for Review and hence, same are denied. To the extent a responsive pleading is necessary, the remaining averments contained in Paragraph 3 of the Petition for Review are denied. Finally, the remaining

averments contained in Paragraph 3 of the Petition for Review are irrelevant for purposes of this Action.

4. Admitted in part and denied in part. It is admitted only that William F. Keller, is a duly elected member of the Pennsylvania House of Representatives and represents the residents of the 184th State House District. By way of further answer, after reasonable investigation, HSP Gaming is without knowledge or information sufficient to form a belief as to the truth of the remaining averments contained in Paragraph 4 of the Petition for Review and hence, same are denied. To the extent a responsive pleading is necessary, the remaining averments contained in Paragraph 4 of the Petition for Review are denied. Finally, the remaining averments contained in Paragraph 4 of the Petition for Review are irrelevant for purposes of this Action.

5. Admitted in part and denied in part. It is admitted only that State Senator Michael J. Stack is a duly elected member of the Senate of Pennsylvania and represents the residents of the 5th State Senatorial District. By way of further answer, after reasonable investigation, HSP Gaming is without knowledge or information sufficient to form a belief as to the truth of the remaining averments contained in Paragraph 5 of the Petition for Review and hence, same are denied. To the extent a responsive pleading is necessary, the remaining averments contained in Paragraph 5 of the Petition for Review are denied. Finally, the remaining averments contained in Paragraph 5 of the Petition for Review are irrelevant for purposes of this Action.

6. Admitted in part and denied in part. It is admitted only that John J. Taylor, is a duly elected member of the Pennsylvania House of Representatives and represents the residents of the 177th State House District. By way of further answer, after reasonable investigation, HSP Gaming is without knowledge or information sufficient to form a belief as to the truth of the remaining averments contained in Paragraph 6 of the Petition for Review and hence, same are

denied. To the extent a responsive pleading is necessary, the remaining averments contained in Paragraph 6 of the Petition for Review are denied. Finally, the remaining averments contained in Paragraph 6 of the Petition for Review are irrelevant for purposes of this Action.

7. Admitted in part and denied in part. It is admitted only that Michael P. McGeehan, is a duly elected member of the Pennsylvania House of Representatives and represents the residents of the 173rd State House District. By way of further answer, after reasonable investigation, HSP Gaming is without knowledge or information sufficient to form a belief as to the truth of the remaining averments contained in Paragraph 7 of the Petition for Review and hence, same are denied. To the extent a responsive pleading is necessary, the remaining averments contained in Paragraph 7 of the Petition for Review are denied. Finally, the remaining averments contained in Paragraph 7 of the Petition for Review are irrelevant for purposes of this Action.

8. Admitted in part and denied in part. It is admitted only that Robert C. Donatucci is a duly elected member of the Pennsylvania House of Representatives and represents the residents of the 185th State House District. By way of further answer, after reasonable investigation, HSP Gaming is without knowledge or information sufficient to form a belief as to the truth of the remaining averments contained in Paragraph 8 of the Petition for Review and hence, same are denied. To the extent a responsive pleading is necessary, the remaining averments contained in Paragraph 8 of the Petition for Review are denied. Finally, the remaining averments contained in Paragraph 8 of the Petition for Review are irrelevant for purposes of this Action.

IX. Government Unit

9. Admitted.

X. Party to the Underlying Proceeding

10. Admitted in part and denied in part. It is admitted only that pursuant to the February 1, 2007 Order and Adjudication of the Pennsylvania Gaming Control Board, HSP Gaming's application for a category 2 slots machine license was granted and that the Pennsylvania Gaming Control Board approved of HSP Gaming's proposed site located on North Delaware Avenue. It is further admitted that on or about October 29, 2007, HSP Gaming submitted an Application to the Commerce Department for the City of Philadelphia seeking a license pursuant to 53 P.S. § 14199. The remaining averments contained in Paragraph 10 of the Petition for Review are denied.

VI. Determination Sought To Be Reviewed/Action Sought To Be Enjoined

11. Denied as stated. It is admitted only that the Legislators request this Court to (1) review the Commerce Department's decision to approve HSP Gaming's Application for a Submerged Lands License; (2) declare, as a matter of law, its deficiency; (3) enjoin HSP Gaming from trespassing upon the submerged lands without specific authorization of the General Assembly; and (4) enjoin the City of Philadelphia, the Commerce Department of the City of Philadelphia, and the Department of Licenses & Inspection of the City of Philadelphia from authorizing the use of such lands without specific authorization from the General Assembly. The remaining averments contained in Paragraph 11 are denied.

12. Denied as stated. It is admitted only that the Legislators request this Court to (1) review the Commerce Department's decision to approve HSP Gaming's Application for a Submerged Lands License; (2) declare, as a matter of law, its deficiency; (3) enjoin HSP Gaming from trespassing upon the submerged lands without specific authorization of the General Assembly; and (4) enjoin the City of Philadelphia, the Commerce Department of the City of Philadelphia, and the Department of Licenses & Inspection of the City of Philadelphia from

authorizing the use of such lands without specific authorization from the General Assembly. The remaining averments contained in Paragraph 12 are denied.

XI. Brief Summary of Factual Background

13. Denied as stated. It is admitted only that on October 29, 2007, HSP Gaming submitted an Application to the Director of Commerce pursuant to the Act of June 8, 1907 (P.L. 433, No. 321), as amended, 53 P.S. § 14199, seeking a submerged lands license for property located at 941-1025 North Delaware Avenue, Philadelphia, Pennsylvania. The remaining averments contained in Paragraph 13 of the Petition for Review are denied. Finally, HSP Gaming's Application, as a written document, speaks for itself.

14. Denied as stated. It is admitted only that on November 13, 2007, City Solicitor Romulo L. Diaz, Jr., Esquire, prepared a memorandum opinion setting forth, among other things, the Director of Commerce's authority under relevant law and summarizing the procedure governing consideration of HSP Gaming's Application. The remaining averments contained in Paragraph 14 of the Petition for Review are denied as conclusions of law to which no responsive pleading is necessary. To the extent a responsive pleading is necessary, the remaining averments contained in Paragraph 14 are denied. Finally, the City Solicitor Opinion, as a written document, speaks for itself.

15. Admitted.

16. Admitted in part and denied in part. It is admitted only that substantial evidence was placed on the record during the November 15, 2007 Commerce Department Hearing. It is further admitted that Petitioner Fumo and O'Brien presented testimony at the Commerce Department Hearing. The remaining averments contained in Paragraph 16 of the Petition for Review are denied.

To the contrary, the substantial evidence at the Commerce Department Hearing established that, at present, the Submerged Lands are not submerged and are not navigable because the part of the river there consists of mud, rubble, and the remains of unused and unusable piers (Hr'g Tr. at 262-266). As a result, the Submerged Lands are currently in a state of decay such that they are inaccessible to the public and therefore, the river is inaccessible to the public because the barrier of rubble cannot be transversed. (Hr'g Tr. at 262-266). Moreover, as a result of the debris and decay of former structures, the Submerged Lands are fenced off for public safety reasons, rendering the waterfront completely inaccessible. (Hr'g Tr. at 266).

Moreover, there was substantial evidence submitted at the Commerce Department Hearing establishing that HSP Gaming's proposed facility would drastically improve the Submerged Lands, allow access to the waterfront, and make the land conducive to maritime activity. HSP Gaming would construct a public dock as well as a pier structure with a public promenade providing public access to the riverfront enabling city residents to enjoy the river and riverfront. (Hr'g Tr. at 263). The public promenade as contemplated would span the entire length of the riverfront on the Submerged Lands and provide abundant landscaping, new lighting, and attractive furnishings, in addition to a fan-shaped and tiered plaza overlooking the river to host summer concerts, performances, and year-long fitness opportunities. (Hr'g Tr. at 272).

The evidence established that the Submerged Lands would be improved to also include landscaped open spaces, with paths to the riverfront, and the riverfront will have clearly identified paths for joggers and bikers, as well as quiet seating areas. (Hr'g Tr. at 267). In all, the testimony submitted at the Hearing established that HSP Gaming's facility would provide 1,600 feet of construction with access along the riverfront, or the equivalent of four city blocks of improved, accessible, landscaped access to the Submerged Lands. (Hr'g Tr. at 268).

Finally, the Commerce Department Hearing Transcript, as a written document, speaks for itself.

17. Admitted.

18. Denied. The averments contained in Paragraph 18 of the Petition for Review constitute conclusions of law to which no responsive pleading is necessary. To the extent a responsive pleading is necessary, the averments contained in Paragraph 18 of the Petition for Review are denied. To the contrary, the License Determination by the Commerce Director did not fail to acknowledge the participation of the Legislators, and did not dismissively note the evidence challenging the Application. Instead, the Commerce Director simply noted as was proper that the numerous comments submitted by the Legislators and members of the public did not speak to the Application but rather the location of the proposed casino facility, which was a decision outside the scope of the Commerce Department Hearing and which was already affirmed by this Court. By way of further answer, the averments contained in Paragraph 18 of the Petition for Review misstate the issue and the law before this Court. Section 14199/Act 321 clearly authorizes the Commerce Department to issue the License for such submerged lands to HSP Gaming, as it has done.

19. Denied. The averments contained in Paragraph 19 of the Petition for Review constitute conclusions of law to which no responsive pleading is necessary. To the extent a responsive pleading is necessary, the averments contained in Paragraph 19 of the Petition for Review are denied. To the contrary, the Commerce Director properly rejected the legal challenge to her authority by relying upon her counsel's advice and opinion as to the propriety of the proceedings on November 15, the authority of the Commerce Department pursuant to Section 14199/Act 321, and the Application. By way of further answer, the averments contained in Paragraph 19 of the Petition for Review misstate the issue and the law before this Court. Section

14199/Act 321 clearly authorizes the Commerce Department to issue the License for such submerged lands to HSP Gaming, as it has done.

20. Denied as stated. It is admitted only that as part of the Commerce Director's Findings of Fact, it was noted that approximately 12 acres of submerged lands were subject to the Application. The remaining averments contained in Paragraph 20 of the Petition for Review are denied. To the contrary, the allegations of Paragraph 20 of the Petition are merely a distillation of the Legislators' interpretation of the Commerce Department's Findings of Facts as referenced therein. Irrespective of the total acreage of the Submerged Lands for which the License was issued, nowhere in the Petition do the Legislators make any assertions as to why the amount of such acreage is relevant to the determination by this Court of the Legislators' Petition, and the relief sought therein. Finally, the Commerce Director's Decision, as a written document, speaks for itself.

21. Denied as stated. After reasonable investigation, HSP Gaming is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 21 of the Petition for Review and hence, same are denied. To the extent a responsive pleading is necessary, HSP Gaming does not know when the Commerce Director made her Decision. It is admitted, however, that on November 27, 2007, the City of Philadelphia issued to HSP Gaming the License, the provisions of which speak for themselves. Irrespective of the accuracy or lack of accuracy of the assertions of the Legislators regarding the amount of time that expired following the Determination prior to the issuance of the License, nowhere in the Petition do the Legislators make any assertions as to why such amount of time is relevant to the determination by this Court of the Legislators' Petition, and the relief sought therein.

22. Denied. The averments contained in Paragraph 22 of the Petition for Review are denied. To the contrary, although the making of any such payment is not relevant to the

determination by this Court of the Legislators' Petition, and the relief sought therein, in accordance with the Gaming Act, on October 17, 2007, HSP Gaming paid to the Gaming Board the \$50 Million License Fee for its gaming license pursuant to 4 Pa.C.S. §1209 as directed by the Board's Order dated October 2, 2007.

23. Denied. The averments contained in Paragraph 23 are denied. To the contrary, for all of the reasons set forth in this Answer, and in the City Solicitor Opinion, the Legislators have simply misstated the issue and the law. Section 14199 clearly authorizes the Commerce Department to issue the License for such submerged lands to HSP Gaming.

XII. Grounds for Appeal/Declaratory and Injunctive Relief Sought

24. Denied as stated. Article I, Section 27, of the Constitution states:

That the general, great and essential principles of liberty and free government may be recognized and unalterably established, WE DECLARE THAT - Natural Resources and the Public Estate
Section 27. The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Pa. CONST., art. I, § 27. However, such provision is subject in the first instance to the provisions of specific Acts of the General Assembly relating to the granting of interests in submerged lands. Section 14199/Act 321 was adopted by such an Act of the General Assembly, and has been in force since 1907, pursuant to which over 434 licenses have been issued by the City regarding the use of such submerged lands, without any additional approval by the Commonwealth – or its legislators – regarding any of such particular licenses. Section 14199/Act 321 clearly authorizes the Commerce Department to issue the License for such submerged lands to HSP Gaming, as it has done. Therefore, the foregoing provisions of the Pennsylvania Constitution are not relevant to the determination by this Court of the Legislators'

Petition, nor are they relevant or applicable to any asserted standing by the Legislators in this matter.

25. Denied as stated. HSP Gaming does not dispute that the section of the Dam Safety and Encroachment Act quoted by Petitioners in Paragraph 25 literally states what is set forth in Paragraph 25. However, Section 14199/Act 321, which is an Act of the General Assembly, clearly and specifically authorizes the Commerce Department to issue the License for such submerged lands to HSP Gaming, as it has done. The remaining averments contained in Paragraph 25 of the Petition for Review are expressly denied.

26. Denied as stated. HSP Gaming does not dispute that the section of the Administrative Code (71 P.S. §194(a)) quoted by Petitioners in Paragraph 26 literally states what is set forth in Paragraph 25. However, Section 14199/Act 321, which is an Act of the General Assembly, clearly and specifically authorizes the Commerce Department to issue the License for such submerged lands to HSP Gaming, as it has done. The remaining averments contained in Paragraph 26 of the Petition for Review are expressly denied.

27. Denied as stated. HSP Gaming does not dispute that the section of the Dam Safety and Encroachment Act quoted by Petitioners in Paragraph 27 literally states what is set forth in Paragraph 27. However, Section 14199/Act 321, which is an Act of the General Assembly, clearly and specifically authorizes the Commerce Department to issue the License for such submerged lands to HSP Gaming, as it has done. By way of further answer, it is denied that the Dam Safety Encroachment Act, either explicitly or implicitly, repealed whatever authority the Commerce Department may have otherwise possessed under Section 14199/Act 321 to grant licenses permitting the occupation and development of Commonwealth submerged lands, including, without limitation, the License issued for the Submerged Lands. Although the Dam Safety and Encroachment Act specifically repealed the similar license provisions of Act No. 322

of 1907, it did not repeal Act No. 321 of 1907, which authorized the Commerce Director's authority to issue licenses, as it did with the License that is the subject of this appeal. Thus, Section 14199 is still the law in this Commonwealth and expressly provides for the General Assembly's delegation of authority to the Commerce Director to issue licenses for riparian lands located within the City of Philadelphia as provided by the Administrative Code (71 P.S. §194(a)). The remaining averments contained in Paragraph 27 of the Petition for Review are expressly denied.

28. Denied. For the reasons set forth in the Answer of HSP Gaming, HSP expressly denies the averments contained in Paragraph 28 of the Petition for Review. To the contrary, and for the reasons set forth in the Answer of HSP Gaming, the City Solicitor Opinion and in Paragraph 27 above, the Commerce Director had full legal authority to issue the License to HSP Gaming for the reasons stated by the Commerce Director in her License Determination.

29. Denied as stated. Act 321 of 1907 specifically authorizes the Commerce Director, as the successor to the Director of the Department of Wharves, to issue licenses in the nature and type of the License presently before this Court, permitting any person or persons who desire to construct, extend, alter, improve or repair any wharf, or other building in the nature of a wharf, or bridge, or other harbor structures, situate wholly within any city of the first class, to do so upon the issuance of such license, as is the case with the instant License issued by the Commerce Director. The remaining averments contained in Paragraph 29 of the Petition for Review are denied.

30. Denied as stated. As stated on page 1 of the License Determination, HSP Gaming submitted its Application for the License to permit the construction of the improvements on the Submerged Lands pursuant to Section 14199/Act 321 and Chapter 18-100 of the Philadelphia Code as more fully set forth in the Application, and in the License Determination.

Section 14199/Act 321 clearly authorized the Commerce Department to issue the License to the Submerged Lands to HSP Gaming, as it has done. The remaining averments contained in Paragraph 30 of the Petition for Review are denied.

31. Denied as stated. As more fully set forth in the Application and the License Determination, and in the Plan of Development, the License was applied for by and issued to HSP Gaming for structures and other improvements that HSP Gaming proposes to build on the Submerged Lands consisting of substantial improvements to the waterfront in the form of the promenade and other features which are not only an essential part of the waterfront improvements, but serve to create an infrastructure at the subject site that will materially enhance the waterfront along the Delaware well beyond the present environment. The waterfront promenade and water taxi dock are the anchor harbor structures for the development. While the parking garage supports the casino, its purpose is to also provide parking for those that want to utilize the harbor structure. Likewise, while the casino has its intended use, it also supports the harbor structure by providing restrooms, food and beverage outlets (including dining on the harbor structure), entertainment, lodging safety and shelter. The greenways on the north and south sides of the site provide walking access to the harbor structure without entering the casino facility. As can be clearly determined, this facility is designed around and focused upon a harbor use, and the waterfront is the key component of the design, and as more fully set forth in HSP Gaming's Answer is clearly a "harbor structure" or other improvement as contemplated by Section 14199/Act 321. (See Application, 12-13; 77-78). The remaining averments contained in Paragraph 31 are expressly denied.

32. Denied. The averments contained in Paragraph 32 of the Petition for Review are denied. To the contrary, and for the reasons set forth in the Answer of HSP Gaming, the City Solicitor Opinion and in Paragraphs 29 through 31 above, inclusive, the Commerce Director had

full legal authority to issue the License to HSP Gaming for the reasons stated by the Commerce Director in her License Determination.

33. Denied. The averments contained in Paragraph 33 of the Petition for Review are denied. To the contrary, and for the reasons set forth in the Answer of HSP Gaming, the City Solicitor Opinion and in this Answer, Section 14199/Act 321, which is an Act of the General Assembly which has not been repealed, and is in full force and effect, clearly and specifically authorizes the Commerce Department to issue the License for the Submerged Lands to HSP Gaming, as it has done.

34. Denied. The averments contained in Paragraph 34 of the Petition for Review are denied. To the contrary and for the reasons set forth in the Answer of HSP Gaming, the City Solicitor Opinion and in this Answer, Section 14199/Act 321, which is an Act of the General Assembly which has not been repealed, and is in full force and effect, clearly and specifically authorizes the Commerce Department to issue the License for the Submerged Lands to HSP Gaming, as it has done. Pursuant to Section 14199/Act 321, the Commonwealth, pursuant to an Act of the General Assembly authorized the City, through the Commerce Director, and her predecessors, to issuance licenses with respect to the construction, extension, alteration, improvement or repair of improvements on the Submerged Lands for which the Commerce Director rightfully issued the License to HSP Gaming.

35. Denied. The averments contained in Paragraph 35 of the Petition for Review are denied. To the contrary and for the reasons set forth in the Answer of HSP Gaming, and the City Solicitor Opinion, Section 14199/Act 321, which is an Act of the General Assembly which has not been repealed, and is in full force and effect, clearly and specifically authorizes the Commerce Department to issue the License for the Submerged Lands to HSP Gaming, as it has done. Pursuant to Section 14199/Act 321, the Commonwealth, pursuant to an Act of the General

Assembly authorized the City, through the Commerce Director, and her predecessors, to issuance licenses with respect to the construction, extension, alteration, improvement or repair of improvements on the Submerged Lands for which the Commerce Director rightfully issued the License to HSP Gaming.

36. Denied. The averments contained in Paragraph 36 of the Petition for Review are denied. To the contrary, and for the reasons set forth in this Answer and the City Solicitor Opinion, Section 14199/Act 321, which is an Act of the General Assembly which has not been repealed, and is in full force and effect, clearly and specifically authorizes the Commerce Department to issue the License for the Submerged Lands to HSP Gaming, as it has done. Pursuant to Section 14199/Act 321, the Commonwealth, pursuant to an Act of the General Assembly authorized the City, through the Commerce Director, and her predecessors, to issuance licenses with respect to the construction, extension, alteration, improvement or repair of improvements on the Submerged Lands for which the Commerce Director rightfully issued the License to HSP Gaming.

37. Denied as stated. To the contrary and for the reasons set forth in the Answer of HSP Gaming, and the City Solicitor Opinion, Section 14199/Act 321, which is an Act of the General Assembly which has not been repealed, and is in full force and effect, clearly and specifically authorizes the Commerce Department to issue the License for the Submerged Lands to HSP Gaming, as it has done. By way of further response, there is no requirement that HSP Gaming possess any title or deed in the 12 acres of submerged lands abutting the development site in question. The Attorney General Opinion in *Construction Along Delaware and Schuylkill Rivers*, 8 Pa. D & C. 3d 438 (1978) specifically found that Section 14199 and 55 P.S. § 5 and 6 constituted a delegation of authority that permitted riparian land owners to obtain rights beyond the low water mark without any further action by the General Assembly. Based on the

legislative history of the licensing statutes, the Attorney General reasoned that the reference to "deed or deeds, or other evidence of title" referred not to title over the Commonwealth land beyond the low-water mark, but instead only required evidence of title over the riparian lands abutting the river. *Id.* "It is our opinion that the deed or title referred to . . . above is the deed or title to the riparian land down to the low-water mark. It does not refer to title in the bed of the river." *Id.* The Attorney General observed that the original licensing statute specified that the license applicant must provide their "deed or deeds for said lot or lots." It reasoned that "lot or lots" refers to dry land, not deeds to submerged lands which "were of course never subdivided in the traditional manner of 'lots.'" *Id.* at 443.

The Attorney General also noted that Pennsylvania courts have recognized that a riparian land owner could construct into the river beyond his property line. "It is true that it is the policy . . . not to license constructions on the river front of lands by other than abutting property owners; but this circumstance does not affect the legal rights of the licensee to construction beyond his property lines." *Id.* at 444 (quoting *United States v. Pennsylvania Salt Mfg. Co.*, 16 F.2d 476, 481 (E.D. Pa. 1926)). Thus, the Attorney General concluded "in no instance has a court insisted, or so much as mentioned, the possibility of requiring a riparian land owner to have title to land below the low-water mark in order to obtain a license for construction. In fact, the opposite is true." *Id.* at 445 (emphasis added).

In addition, the history of the development of the Delaware supports the conclusion that a riparian land owner need not obtain title to the river bed to construct beyond the low-water mark. "In point of fact, the Delaware River has been developed to its present state through the use of licenses, not submerged land conveyances. This development has taken place under statutes with language essentially identical to that being clarified by this opinion. Proof of title to land

below the low-water mark has not been required in the past. There is no sound reason for requiring it at the present time.” *Id.* at 446 (emphasis added).

Accordingly, the Attorney General found that no further act of the General Assembly was required to obtain a license to construct beyond the low-water mark. “It is our view that anyone desiring to construct, alter or extend facilities into the Delaware . . . need not seek from the General Assembly a statute authorizing the grant of an interest in the submerged land on which the construction is to be done inasmuch as the General Assembly has already authorized, by statutes, the Director of Commerce of the City of Philadelphia . . .to grant the required interest in the river bed.” *Id.* The remaining averments contained in Paragraph 37 of the Petition for Review are denied.

38. Denied as stated. The current version of Section 14199/Act 321 contains nearly identical language to that interpreted in *Construction Along Delaware and Schuylkill Rivers*. In fact, it requires a license applicant to provide proof of “their deed or deeds, or other evidence of title, to the premises on which such proposed structure, extension, alteration, improvement or repair is to be erected or made.” 53 P.S. § 14199 (emphasis added). Just as the Attorney General interpreted “lots” to refer to property above the low-water mark, rather than the riverbed, it seems incongruous to refer to submerged lands as a “premises.” Thus, the reference in 53 P.S. § 14199 to “premises” indicates that a property owner seeking a license need only produce the deeds or deed to the land abutting the river up to the low-water mark, as the river bed can hardly be described as a “premises.”

As was recognized by the Commerce Department, and is a well established tenet under Pennsylvania law, title to property need not be in the form of a deed, nor must it be “legal” in nature, and such title can and does for purposes of the determination of interests in real property include “equitable” title. Under Pennsylvania law a contract purchaser is the equitable owner of

real estate and has standing in land use matters. *O'Neill v. Philadelphia Zoning Board of Adjustment*, 384 Pa. 379, 387, 120 A.2d 901, 902 (1956); *Logan Square Neighborhood Assoc. v. Zoning Board of Adjustment of Philadelphia*, 32 Pa. Cmwlth. 277, 281, 379 A.2d 632, 634 (1977). The remaining averments contained in Paragraph 38 are denied.

39. Denied as stated. Although as part of the Application, HSP Gaming submitted to the Commerce Director at "Consent of Fee Owner" and a "Memorandum of Agreement of December 27, 2006", nowhere in Attachment "G" is the term "option" utilized. In fact, the Memorandum of Agreement refers solely to an agreement between HSP Gaming, as buyer, and the above described seller, "providing, among other matters, for the purchase by Buyer and the sale by Seller" of the very property for which the Legislators contend HSP Gaming has no evidence of title. (See, e.g., Paragraph 1 of the Memorandum of Agreement contained in Attachment "G"). The remaining averments contained in Paragraph 39 of the Petition for Review are denied.

40. Denied as stated. HSP Gaming does not dispute that the section of the Section 14199/Act 321 quoted by Petitioners in Paragraph 40 literally states what is set forth in Paragraph 40. The Commerce Department clearly considered this issue as part of its review and issued a Conclusion of Law that "[A]pplicant has demonstrated sufficient evidence of equitable title to the Premises." (Conclusion of Law No. 7, citing to Findings of Facts Nos. 6 and 7). For the reasons set forth in this Answer and the License Determination, HSP Gaming has satisfied the aforementioned requirement of Section 14199/Act 321 regarding title. The remaining averments contained in Paragraph 40 of the Petition for Review are denied.

41. Denied. The averments contained in Paragraph 40 are denied. To the contrary, the Commerce Department clearly considered this issue as part of its review and issued a Conclusion of Law that "[A]pplicant has demonstrated sufficient evidence of equitable title to

the Premises.” (Decision, Conclusion of Law at ¶ 7, citing to Findings of Fact ¶¶ 6 and 7). For the reasons set forth in this Answer and the License Determination, HSP Gaming has satisfied the aforementioned requirement of Section 14199/Act 321 regarding title.

VII. RELIEF SOUGHT

WHEREFORE, for all of these reasons, HSP Gaming respectfully requests this Honorable Court to enter an Order²²:

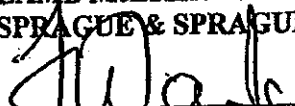
- A. Dismissing the Petition for Review filed by the Legislators; and
- B. Affirming the grant and issuance of the Submerged Land License on November 27, 2007 by the Department of Commerce of the City of Philadelphia to HSP Gaming, L.P.; and

²² It should be noted that, as opposed to the Relief identified in Paragraphs 11 and 12 of their Petition, the Relief Sought by the Legislators on page 19 of their Petition is far ranging, including a request that this Court “enjoin HSP from trespassing upon the submerged riverbed lands” and “enjoin the City of Philadelphia, the Commerce Department of the City of Philadelphia, and the Department of Licenses and Inspections of the City of Philadelphia from authorizing the use of such lands without specific authorization from the General Assembly....” However, nowhere in their Petition do the Legislators set forth any factual or legal justification for such broad relief, these complaints were not raised below, and thus it is respectfully submitted that the Court, in considering the Legislator’s Petition should deem such requests waived, and only determine whether the Legislators are entitled to the relief sought in paragraphs 11 and 12 of their Petition. Moreover, the heading of Section VI of the Petition states “Determination Sought to be Reviewed/Action Sought to be Enjoined”. However, nowhere in Section VI is injunctive relief requested, although in Section IX of the Petition, entitled “Relief Sought”, Petitioners request therein, without having established any facts or law in support thereof, for restraint directed to HSP Gaming and to the City and two of its Departments, in addition to a declaratory judgment. Not only have the Petitioners failed to present any basis for such relief, but in the first instance any relief sought by the Petitioners in the nature of a restraint directed to the effectiveness of the License issued by the Commerce Director must be directed to the Commerce Director. Act 321.

C. Granting such other and further relief as this Court deems just.

Respectfully submitted,

**COZEN O'CONNOR
LAMB McERLANE PC
SPRAGUE & SPRAGUE**


Stephen A. Cozen (PA ID #03492)
F. Warren Jacoby (PA ID #10012)
Jennifer M. McHugh (PA ID #66723)
Cozen O'Connor
1900 Market Street
Philadelphia, PA 19103

Richard A. Sprague (PA ID #04266)
Thomas A. Sprague (PA ID #34716)
Charles J. Hardy (PA ID #16912)
Sprague & Sprague
135 S. 19th Street, Suite 400
The Wellington Building
Philadelphia, PA 19103

William H. Lamb (PA ID #04927)
Scot R. Withers (PA ID #84309)
Lamb McErlane PC
24 East Market Street
P.O. Box 565
West Chester, PA 19381-0565
*Attorneys for Intervenor-Respondent,
HSP Gaming LP*

Dated: December 28, 2007

PROOF OF SERVICE

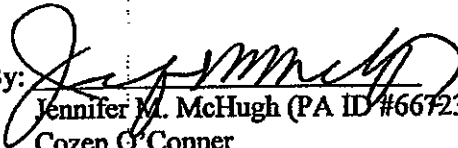
I hereby certify that I am this day serving two complete copies of the foregoing document upon the persons and in the manner indicated below which service satisfies the requirements of

Pa.R.A.P. 121:

Service by email and first class mail, addressed as follows:

Romulo L. Diaz, Jr., Esquire City Solicitor City of Philadelphia 1515 Arch Street, 17 th Floor Philadelphia, PA 19102 (215) 683-5036 <i>Counsel for the Department of Commerce for the City of Philadelphia</i>	Catherine M. Recker, Esquire Welsh & Recker, P.C. 2000 Market Street Suite 2903 Philadelphia, PA 19103 (215) 972-6430 <i>Counsel for Senator Vincent J. Fumo, et al.</i>
Christopher B. Craig, Esquire Counsel, Senate Appropriations Committee Room 545, Main Capitol Building Harrisburg, Pennsylvania 17102 (717) 787-5662 <i>Counsel for Senator Vincent J. Fumo, et al.</i>	Kevin Greenberg, Esquire Flaster/Greenberg, P.C. 8 Penn Center, 15 th Floor 1628 John F. Kennedy Boulevard Philadelphia, PA 19103 (215) 279-9912 <i>Counsel for City Council for the City of Philadelphia</i>

Dated: December 28, 2007

By: 
Jennifer M. McHugh (PA ID #66723)
Cozen & Conner
1900 Market Street
Philadelphia, PA 19103


PROOF OF SERVICE

I hereby certify that I am this day serving two complete copies of the HSP Gaming, L.P.'S Application for Ancillary Relief and a Stay with Supporting Exhibits upon the persons and in the manner indicated below which service satisfies the requirements of Pa.R.A.P. 121:

Service by email and first class mail, addressed as follows:

<p>Shelley R. Smith, Esquire Acting City Solicitor Richard G. Feder Kelly Diffily City of Philadelphia 1515 Arch Street, 17th Floor Philadelphia, PA 19102 (215) 683-5036 <i>Counsel for Respondent the City of Philadelphia</i></p>	<p>Catherine M. Recker, Esquire Welsh & Recker, P.C. 2000 Market Street Suite 2903 Philadelphia, PA 19103 (215) 972-6430 <i>Counsel for Senator Vincent J. Fumo, et al.</i></p>
<p>Christopher B. Craig, Esquire Counsel, Senate Appropriations Committee Room 545, Main Capitol Building Harrisburg, Pennsylvania 17102 (717) 787-5662</p>	

Dated: January 25, 2008

By: 
Jennifer M. McHugh (PA ID #66723)
Cozen O'Conner
1900 Market Street
Philadelphia, PA 19103