

IN THE SUPREME COURT OF PENNSYLVANIA

No. ___ EM 2007

**PHILADELPHIA ENTERTAINMENT AND DEVELOPMENT PARTNERS, L.P., d/b/a
FOXWOODS CASINO PHILADELPHIA,**

Petitioner,

v.

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

Respondents.

**VERIFIED PETITION FOR REVIEW OF PHILADELPHIA ENTERTAINMENT AND
DEVELOPMENT PARTNERS, L.P., d/b/a FOXWOODS CASINO PHILADELPHIA**

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

Petitioner Philadelphia Entertainment and Development Partners, L.P., d/b/a Foxwoods Casino Philadelphia (“Foxwoods Casino Philadelphia” or “Foxwoods”) brings this action against respondents City Council for the City of Philadelphia (“City Council”) and the City of Philadelphia (the “City”) to obtain an order from this Court directing respondents to comply with their duties imposed by statute, ordinance and this Court’s recent decisions in *Pennsylvania Gaming Control Bd. v. City Council*, --- Pa. ---, 928 A.2d 1255 (2007) (hereafter the “Referendum” decision), and *HSP Gaming, LP v. City Council*, No. 179 EM 2007, --- Pa. ---, --- A.2d ---, 2007 WL 4226871 (Dec. 3, 2007) to implement the decision of the Pennsylvania Gaming Control Board (the “Gaming Board”) to locate a Category 2 slot machine casino at Foxwoods’ property in Philadelphia. In support of its verified petition for review, Foxwoods avers as follows:

I. INTRODUCTION

1. By the express terms of the Pennsylvania Race Horse Development and Gaming Act, 4 Pa. C.S. §§ 1101-1904 (the “Gaming Act”), the Pennsylvania General Assembly provided that the Gaming Board possesses the sole authority to determine the locations of licensed slot machine facilities, two of which were required to be located in the City of Philadelphia. *Id.* §§ 1103, 1202, 1304, 1307, 1325, 1329.

2. In recognition of the Gaming Board’s exclusive authority to locate two slot machine facilities within the City, and in anticipation of the Gaming Board’s selection of the two locations, City Council enacted, on March 9, 2006, Chapter 14-400 of the Philadelphia Zoning and Planning Code (the “Zoning Code”) to establish a new zoning classification, the Commercial Entertainment District (“CED”). The provisions of Chapter 14-400 (collectively, the “CED

Ordinance,” attached hereto as Exhibit A¹) were intended to “encourage the orderly development of major entertainment facilities.” Zoning Code, § 14-401(1). The CED Ordinance expressly permits “the erection, construction, alteration or use of one or more structures or land for,” *inter alia*, “licensed gaming facilities.” *Id.* § 14-405(1)(c).

3. The CED Ordinance also expressly recognizes the preemptive effect of state law as to the location of the licensed gaming facilities in the City. Section 14-405 states that “[n]othing in [the CED Ordinance] shall limit the right of the [Gaming Board] under the [Gaming Act] to identify the property on which it will permit a Category 2 licensed gaming facility within the City.” *Id.* § 14-405(2). Further, that same section also states that “[n]othing in [the CED Ordinance] shall be construed to prohibit any use that is exclusively regulated and permitted by the Commonwealth under the [Gaming] Act.” *Id.* § 14-405(3). *Accord Philadelphia Ent. & Dev. Partners, L.P. v. City of Phila.*, No. 143 EM 2007, --- Pa. ---, --- A.2d ---, 2007 WL 4532206 (Dec. 27, 2007) (hereafter “*PEDP*”) (attached hereto as Exhibit II).

4. Despite its express recognition of the preemptive effect of the Gaming Board’s decision regarding the locations of licensed gaming facilities within the City, City Council has refused, and continues to refuse, to implement the Gaming Board’s December 20, 2006 decision, and February 1, 2007 Order and Adjudication (attached hereto as Exhibit B), approving the locations for the licensed gaming facilities of Foxwoods Casino Philadelphia and HSP Gaming, LP (“HSP” or “Sugarhouse”).

5. City Council has engaged in actions, or deliberate inaction, intended either to delay or to nullify the Gaming Board’s decision as to the locations of the Foxwoods and HSP

¹ A true and correct copy of Chapter 14-400 of the Zoning Code is contained in Exhibit “A” of the Appendix of Exhibits filed contemporaneously herewith in support of Foxwoods’ Petition for Review. References to exhibits contained in the Appendix hereafter shall be in the form: “Exhibit ____.”

facilities. Following the issuance of the Gaming Board's Order and Adjudication, City Council enacted an ordinance on March 29, 2007 providing for a May 15, 2007 referendum on a proposed amendment to the City's Home Rule Charter that would have, if approved, effectively prohibited the conduct of licensed gaming activities within the City.

6. On April 13, 2007, on the Gaming Board's petition for review, this Court issued an order preliminarily enjoining placement of the proposed amendment on the May 15, 2007 ballot. *Pennsylvania Gaming Control Bd. v. City Council*, --- Pa. ---, 932 A.2d 869 (2007). On August 3, 2007, this Court permanently enjoined City Council and the City from placing the proposed referendum question on the ballot. *Referendum*, --- Pa. ---, ---, 928 A.2d 1255, 1270 (2007). This Court declared: “[U]nder the Gaming Act, the General Assembly obligates the [Gaming] Board to locate licensed facilities in first class cities and intends for the [Gaming] Board to make that decision alone. After the [Gaming] Board's decision on location is made, the General Assembly intends for it to be implemented under and according to the zoning and land use provisions a city has enacted.” *Id.* at ---, 928 A.2d at 1269.

7. City Council has defied the authority of this Court since the decision in the *Referendum* case was rendered by failing to implement the Gaming Board's decision “under and according to the zoning and land use provisions [City Council] has enacted.” City Council has refused even to consider, let alone enact, the legislation that is contemplated expressly by the CED Ordinance to allow for construction, and ultimately operation, of Foxwoods' licensed gaming facility, including: (1) an ordinance changing the zoning designation of Foxwoods' site from R-10A to CED (the “CED Designation Ordinance,” attached hereto as Exhibit C); (2) an ordinance approving Foxwoods' CED-compliant and Philadelphia City Planning Commission (the “Planning Commission”) approved plan of development (the “Plan of Development

Approval Ordinance,” attached hereto as Exhibit D); and (3) an ordinance vacating a right-of-way for water main purposes along what was formerly known as Dickinson Street and widening the existing right-of-way in what was formerly known as Reed Street by twenty feet (the “Ordinance Regarding Ancillary Items for Plan of Development,” attached hereto as Exhibit E).

8. All preconditions to City Council approval of the CED Designation Ordinance, the Plan of Development Approval Ordinance and the Ordinance Regarding Ancillary Items for Plan of Development (collectively, the “Foxwoods CED Legislation”) have been met. On May 30, 2007, the City approved and transmitted to City Council for introduction during the following day’s City Council session the Foxwoods CED Legislation. Although the proposed ordinances were read before City Council in open session, no Council member introduced any of the ordinances at that time, or at any time through the present. On August 21, 2007, the Planning Commission approved the plan of development submitted by Foxwoods. Philadelphia City Planning Comm’n, Meeting Minutes (Aug. 21, 2007) (attached hereto as Exhibit F). Since the Gaming Board already determined the location of Foxwoods’ licensed gaming facility, and since Foxwoods’ plan of development indisputably complies with all other zoning policy requirements set forth in the CED Ordinance, City Council’s decision to approve the proposed Foxwoods CED Legislation admits of no discretionary authority.

9. While the Planning Commission’s decision should have ensured that subsequent approval by City Council would follow as a matter of course, no member of City Council has introduced any of the proposed Foxwoods CED Legislation for its consideration to date. The introduction of such legislation, moreover, will not be forthcoming given the deference accorded the unwritten, uncodified practice of “councilmanic prerogative” by members of City Council. As will be explained in further detail below, the invocation of councilmanic prerogative by

Councilman Frank DiCicco, the councilman for the district in which both approved casino facilities will be located, has prevented City Council from considering any of the proposed Foxwoods CED Legislation.

10. On December 3, 2007, this Court rendered its decision in *HSP*, 2007 WL 4226871 (attached hereto as Exhibit G). In *HSP*, the Court granted the petition for review filed by HSP, the other Category 2 slot machine facility licensee in Philadelphia. HSP sought relief because City Council had refused to act on proposed ordinances rezoning HSP's property with a CED designation and approving HSP's plan of development for its site, as well as ancillary relief relating to revisions, relocations, strikes and vacations of easements and public rights-of-way set forth in HSP's plan of development. In *HSP*, this Court determined that it had appellate jurisdiction pursuant to 4 Pa. C.S. § 1506 to review City Council's refusal to act and ordered that HSP's property be deemed zoned CED, its plan of development deemed approved by City Council and the ancillary relief granted. *Id.* at *11.

11. Based on the Court's decision in *HSP*, Foxwoods filed an application for reargument in *Philadelphia Ent. & Dev. Partners, L.P. v. City of Philadelphia*, No. 88 EM 2007, --- Pa. ---, --- A.2d ---, 2007 WL 4105582 (Nov. 20, 2007) ("Case No. 88") (attached as Exhibit H). In its decision in Case No. 88, the Court had held that it did not have appellate jurisdiction to determine Foxwoods' claim that it was entitled to CED zoning for its property in Philadelphia. *Id.* at *6. In its application for reargument, Foxwoods explained that, during the pendency of the petition for review in Case No. 88, undisputed facts of public record established that Foxwoods was in a position materially identical to that of the petitioner in *HSP*. Like HSP, Foxwoods was a Category 2 slot machine facility licensee in Philadelphia. Like HSP, Foxwoods' proposed development was subjected to an unrelenting series of obstructionist tactics initiated by members

of City Council. And, like HSP, Foxwoods had ordinances proposed to City Council by the City administration and its plan of development approved by the Planning Commission, yet had encountered a brick wall with City Council.

12. On December 21, 2007, this Court entered an order denying Foxwoods' application for reargument in Case No. 88. *Philadelphia Ent. & Dev. Partners, L.P. v. City of Philadelphia*, No. 88 EM 2007, --- Pa. ---, --- A.2d ---, 2007 WL 4465229, *1 (Dec. 21, 2007) (attached hereto as Exhibit I). In a concurring opinion, Justice Castille stated that, on the basis of the record as it existed in Case No. 88, he agreed with the denial of reargument, but that he "would [have] allow[ed] [Foxwoods] the opportunity to amend the original filing in this matter to augment the record with additional and/or disputed facts that demonstrate that [Foxwoods] is in fact situated identically to the petitioners in [*HSP*]." *Id.* at *1 (Castille, J., concurring). Justice Baer similarly concurred in the denial of reargument on the basis of the state of the record in Case No. 88. *Id.* at *1 (Baer, J., concurring).

13. Foxwoods now brings the instant action supported by a more developed factual record of City Council's refusal to implement the Gaming Board's decision locating a licensed gaming facility at Foxwoods' site. Based on the undisputed facts in this case, this Court should not countenance City Council's inaction and open defiance of this Court's decisions in the *Referendum* and *HSP* cases. Rather, the Court should treat like matters alike and grant Foxwoods, as it did for the petitioner in *HSP*, the following relief: (1) declare that the site approved by the Gaming Board for the Foxwoods casino is zoned as a Commercial Entertainment District pursuant to the Philadelphia Code, Chapter 14-400 as in existence on November 1, 2007; (2) declare that, pursuant to Chapter 14-400, Foxwoods' plan of development as approved on August 21, 2007 by the Planning Commission, including all provisos thereto, is

deemed finally approved and shall require no further approval as if City Council for the City of Philadelphia had approved the same; (3) declare that all revisions, relocations, strikes and vacations of easements and public rights-of-way identified in the plan of development as approved by the Planning Commission are authorized; (4) direct the City to take all actions necessary to implement the relief granted, including making all necessary changes to City records, maps and plans, and receiving, reviewing and acting upon all applications from Foxwoods in the ordinary course and in compliance with this Court's order; and (5) retain jurisdiction in this Court to address any further matters should they arise.

II. STATEMENT OF JURISDICTION

14. The Gaming Act, as amended by Act No. 135 of 206, P.L. 1243, vests this Court with exclusive appellate jurisdiction over final orders, determinations or decisions of a political subdivision involving the location or use of a licensed gaming facility. 4 Pa. C.S. § 1506.

15. Section 1506 of the Gaming Act provides:

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 governmental agencies), the Supreme Court of Pennsylvania is vested with exclusive jurisdiction to consider appeals of a final order, determination or decision of a political subdivision or local instrumentality involving zoning, usage, layout, construction or occupancy, including location, size, bulk and use of a licensed facility. The court, as appropriate, may appoint a master to hear an appeal under this section.

4 Pa. C.S. § 1506 (emphasis added).

16. City Council's refusal to enact the Foxwoods CED Legislation represents the determination or decision of a political subdivision that involves the zoning, usage and location of a licensed gaming facility, and thus is within the scope of § 1506.

17. The Pennsylvania Rules of Appellate Procedure define "determination" to include "[a]ction or inaction by a government unit." Pa. R.A.P. 102 (emphasis added). *See also*

Marinari v. Department of Env'tl. Resources, 129 Pa. Commw. 569, 571, 566 A.2d 385, 386 (1990) (permitting appeal of inaction by the Department of Environmental Resources where “Petitioners to their detriment have endured the artificially prolonged opportunity cost of not developing their land for a landfill or any other purpose, because of DER’s inaction.”).

18. In *HSP*, this Court held:

[The] inaction of City Council in the present case constitutes a final order, decision or determination within the purview of § 1506. Council has decided to block bills that would designate HSP's site for a casino in a CED district and not to approve a Plan of Development. As a result, HSP has not been able to secure the approvals that it must have under the Philadelphia Code in order to develop its site into the licensed facility the Gaming Board approved. Council's refusal to act is no less an action that amounts to a final decision or determination involving the zoning of a licensed facility under § 1506 than the approval or rejection of a plan of development.

2007 WL 4226871 at *5.

19. The present case is identical in posture to the case *HSP* presented to this Court in *HSP*. City Council’s refusal to act upon the proposed Foxwoods CED Legislation constitutes a final order, determination or decision within the meaning of § 1506. Instead of acting upon the bills to designate Foxwoods’ site a CED, approve Foxwoods’ plan of development and address the ancillary items necessary for Foxwoods’ development, City Council, in direct contravention of this Court’s decisions in the *Referendum* and *HSP* cases, has decided to impede the enactment of the Foxwoods CED Legislation. Consequently, Foxwoods has been unable to secure the necessary zoning and use registration, building and other permits necessary to commence construction, and ultimately the operation, of the licensed gaming facility specifically approved by the Gaming Board. City Council’s refusal to act, therefore, “is no less an action that amounts to a final decision or determination involving the zoning of a licensed facility under § 1506 than

the approval or rejection of a plan of development,” *HSP*, 2007 WL 4226871 at *5, and this case falls within the Court’s appellate jurisdiction under § 1506 of the Gaming Act.

III. THE PARTIES

20. Petitioner Foxwoods Casino Philadelphia is a Pennsylvania limited partnership that successfully applied for a Category 2 slot machine license to operate a gaming facility at its property at 1499 South Christopher Columbus Boulevard, Philadelphia, Pennsylvania (the “Property”).

21. Respondent City Council is the City of Philadelphia’s legislative body as established by Philadelphia’s Home Rule Charter, Sections 2-100 through 2-106. City Council’s service address is: c/o Patricia Rafferty, Chief Clerk of City Council, City Hall, Room 402, Philadelphia, Pennsylvania 19107.

22. Respondent City of Philadelphia is a home-rule municipality pursuant to the First Class City Home Rule Act of April 21, 1949, P.L. 665, as amended, 53 P.S. §§ 13101-13157, and the sole city of the first class in the Commonwealth, with a service address of: c/o Romulo L. Diaz, Jr., Esquire, City Solicitor, City of Philadelphia Law Department, One Parkway, 1515 Arch Street, 17th Floor, Philadelphia, Pennsylvania 19102-1595.

IV. STATEMENT OF DETERMINATION SOUGHT TO BE REVIEWED PURSUANT TO THIS COURT’S APPELLATE JURISDICTION

23. Foxwoods seeks relief from City Council’s decision or determination to engage in continued, deliberate efforts to impede, obstruct or delay implementation of the Gaming Board’s order approving Foxwoods’ Category 2 slot machine facility application, and to nullify the Gaming Board’s decision locating one of the two Category 2 slot machine facilities at Foxwoods’ Property, by failing to enact the Foxwoods CED Legislation during its term that ended with its final session on December 19, 2007. In addition, Foxwoods seeks relief from City

Council's open defiance of this Court's decision in the *Referendum* case, which, *inter alia*, directed the City and City Council to implement that decision "under and according to the zoning and land use provisions [City Council] has enacted." --- Pa. at ---, 928 A.2d at 1269.

V. **STATEMENT OF MATERIAL FACTS**

A. **The Statutory Framework of the Gaming Act.**

24. In July 2004, the General Assembly enacted the Gaming Act, which provides for limited, legalized slot machine gaming in the Commonwealth. 4 Pa. C.S. §§ 1101-1904. The Gaming Act is intended to enhance horse racing and breeding programs, entertainment, employment and tourism in Pennsylvania, and to provide substantial new revenue sources for the state to permit tax relief for the citizens of the Commonwealth. *Id.* § 1102(2)-(3).

25. The Gaming Act created the Gaming Board and vested it with general and exclusive jurisdiction over the commencement and continual development of the Pennsylvania gaming industry, including the authority to license facilities and to provide continuing oversight of gaming activities conducted throughout the Commonwealth. 4 Pa. C.S. §§ 1201(a), 1202(a), 1202(b)(4).

26. The Gaming Act permits the Gaming Board to grant two stand-alone (Category 2) slot machine licenses at venues within the City of Philadelphia. *Id.* § 1304(b)(1). The Gaming Board has the sole authority to approve the location of licensed slot machine facilities under the Gaming Act. *Id.* §§ 1304, 1325, 1329.

27. By its terms, the Gaming Act directs the Gaming Board to proceed expeditiously in the gathering of applications and the issuance of licenses to ensure the prompt receipt by the Commonwealth and its citizens of the economic benefits expected from gaming. *Id.* § 1301.

28. In *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, 583 Pa. 275, 335, 877 A.2d 383, 415-19 (2005) ("*PAGE*"), the Supreme Court of Pennsylvania

held that the prior version of Section 1506 of the Gaming Act, which expressly preempted local zoning regulation of licensed gaming facilities, lacked adequate standards and guidelines to allow the Gaming Board to implement that portion of the Act and, therefore, was unconstitutional. The Court otherwise upheld the provisions of the Gaming Act vesting the Gaming Board with the authority to grant slot machine facility licenses for specific locations.

29. In the aftermath of the *PAGE* decision, the General Assembly, by Act No. 135 of 2006, P.L. 1243, amended Sections 1103 and 1202 of the Gaming Act to address the constitutional deficiencies identified in *PAGE* and to reemphasize that only the Gaming Board has the authority to determine where licensed slot machine facilities are to be located.

B. City Council Enacts the CED Ordinance into Law.

30. City Council began preparations for the advent of gaming by enacting into law, on March 9, 2006, the CED Ordinance. The provisions set forth therein established a new zoning classification, the “Commercial Entertainment District,” which was intended “to encourage the orderly development of major entertainment facilities and other uses in accordance with an approved plan of development.” Zoning Code, § 14-401(1).

31. The CED Ordinance expressly permits “the erection, construction, alteration or use of one or more structures or land for ... licensed gaming facilities.” *Id.* § 14-405(1)(c).

32. The CED Ordinance further provides a set of zoning regulations to govern various elements of the licensed gaming facilities in the City. For example, the CED Ordinance contains restrictions pertaining to the gross floor area (Zoning Code, § 14-406(2)); the open area (*id.* § 14-406(3)); the open area above the ground level (*id.* § 14-406(4)); the yards (*id.* § 14-406(5)); off-street parking (*id.* § 14-408); driveways, walkways, landscaping and lighting (*id.* § 14-408(2)(h)); and the placement of signs (*id.* § 14-410).

33. However, when enacting the CED Ordinance, City Council also expressly recognized the preemptive effect of state law as to the location of the licensed gaming facilities in Philadelphia. Section 14-405 states that “[n]othing in [the CED Ordinance] shall limit the right of the [Gaming Board] under the [Gaming Act] to identify the property on which it will permit a Category 2 licensed gaming facility within the City.” *Id.* § 14-405(2). Further, that same section also states that “[n]othing in [the CED Ordinance] shall be construed to prohibit any use that is exclusively regulated and permitted by the Commonwealth under the [Gaming Act.]” *Id.* § 14-405(3).

34. The CED Ordinance contemplates a two-step process to designate a property as a CED. First, City Council must adopt an ordinance designating the property as a CED. *Id.* § 14-403(1). Second, City Council must approve a “Plan of Development.” *Id.* Upon the effective date of the CED designation, all underlying zoning classifications are superseded with respect to the property at issue. *Id.*

35. The second step in the process of designating a property as a CED itself entails a two-step process. The Plan of Development first must be reviewed by the Planning Commission. If the Planning Commission “finds that the Plan is consistent with the purposes of such a District, is in compliance with the provisions of this Chapter, and is otherwise appropriate in terms of scale, density, accessibility and design for the neighborhood,” the Plan of Development is then transmitted to City Council for its consideration. *Id.* § 14-403(2).

36. City Council then must act upon the Plan of Development within the later of the fifth City Council meeting after the submission of the Plan or 45 days; otherwise, it is presumed that City Council has approved the Plan. *Id.* § 14-403(4).

37. Upon approval of the Plan of Development by City Council, and the adoption of an ordinance designating the property at issue to be a CED, the property owner is entitled to the issuance of the appropriate building and zoning permits if the Planning Commission determines, upon review of the application and accompanying proposed plans, that such plans are consistent with both the approved Plan of Development and the provisions of the CED Ordinance. *Id.* § 14-404(1).

C. Foxwoods is Awarded a Category 2 License by the Gaming Board.

38. On December 28, 2005, Foxwoods filed an application with the Gaming Board for a Category 2 slot machine license to operate a gaming facility to be located at its property in Philadelphia. Foxwoods was one of five applicants for the two Philadelphia licenses.

39. On December 20, 2006, the Gaming Board voted to approve Foxwoods' application for a Category 2 slot machine license, pursuant to the terms and conditions to be imposed by the Gaming Board. The Board awarded the other Category 2 license in Philadelphia to HSP.

D. The Gaming Board Determined the Location of Foxwoods' Gaming Facility.

40. On February 1, 2007, the Gaming Board issued its Order and Adjudication. In its decision, the Gaming Board identified Foxwoods' proposal as one of two that would best "serve the objectives of the [Gaming] Act" and, therefore, merited the award of a Category 2 license. *See* Exhibit B at 112. In the Adjudication, the Gaming Board specifically identified the Property as the future site for Foxwoods' Category 2 slot machine facility. *Id.* at ¶ 104 ("Philadelphia Entertainment's facility will be located on a 16 and one half (16 ½) acre parcel of vacant land on the Delaware Riverfront at the site commonly known as Piers 60, 62 and 63 in Philadelphia.").

41. In its February 1, 2007 Order, the Gaming Board conditioned its award of Category 2 licensure to Foxwoods upon Foxwoods' "agreement to the Statement of Conditions

of licensure to be imposed and issued by the Gaming Control Board.” *In re Application of HSP Gaming LP et al.*, Order (Feb. 1, 2007) at 2.² Among the conditions imposed by the Gaming Board was the requirement that Foxwoods secure all necessary governmental approvals for its property and commence construction of its gaming facility in a manner “substantially similar in all material respects to that proposed in its application to the Board.” *See* Statement of Conditions to Category 2 Slot Operator License #F-1367, at ¶¶ 50-53, attached hereto as Exhibit J.

42. It is beyond dispute that the Gaming Board determined the location of Foxwoods’ licensed gaming facility, in accordance with the application filed by Foxwoods with, and approved by, the Gaming Board. Moreover, the Gaming Act mandates that the location designated by the Gaming Board is the only site where Foxwoods’ license may be used. *See* 4 Pa. C.S. § 1329 (“Each slot machine license shall only be valid for the specific physical location within the municipality and county for which it was originally granted.”).

43. In selecting Foxwoods’ location, the Gaming Board specifically relied on the CED Ordinance and stated its expectation that the City would use the CED Ordinance to implement the Gaming Board’s decision. As the Gaming Board noted:

The City of Philadelphia has adopted an ordinance that has created a “Commercial Entertainment District” which, among other things, permits licensed gaming facilities. To date, the City has not indicated which areas will be designated as Commercial

² The Gaming Board’s order was challenged on appeal by a disappointed applicant, City Council and several neighborhood groups and individuals. In a series of related decisions, the Supreme Court upheld the order in all respects. *See Riverwalk Casino, L.P. v. Pennsylvania Gaming Control Bd.*, 592 Pa. 505, 926 A.2d 926 (2007); *Society Hill Civic Ass’n v. Pennsylvania Gaming Control Bd.*, --- Pa. ---, 928 A.2d 175 (2007); *Neighbors Allied for the Best Riverfront v. Pennsylvania Gaming Control Bd.*, 592 Pa. 609, 927 A.2d 199 (2007); *City Council v. Pennsylvania Gaming Control Bd.*, 592 Pa. 608, 927 A.2d 199 (2007); *Heiko v. Pennsylvania Gaming Control Bd.*, 592 Pa. 610, 927 A.2d 200 (2007). Since the time for petitioning the U.S. Supreme Court for *certiorari* has passed, those decisions are final and unappealable.

Entertainment Districts as it is waiting to see which applicants are licensed by the PGCB.

See Adj. at ¶ 81 (emphasis added). To date, more than a year after the Gaming Board voted to award Foxwoods its license, Foxwoods is still waiting for its site to be appropriately zoned as a CED by City Council.

E. The City Council's Refusal to Implement the Gaming Board's Decision.

44. Even before the Gaming Board issued its decision, City Council took initial steps to attempt to undermine the Gaming Board's authority by adopting a resolution on September 14, 2006 to authorize a lawsuit to challenge the Gaming Act in the event that it preempted City Council's zoning authority. *See* Resolution No. 060639, attached hereto as Exhibit K.

45. On the very day that the Gaming Board issued its decision to award Category 2 Licenses to Foxwoods and HSP – December 20, 2006 – Councilman Frank DiCicco³ issued a press release announcing his intent to appeal the Gaming Board's licensing decisions. Councilman DiCicco described the Gaming Board's siting selections of the Foxwoods and Sugarhouse proposals as "horrible," and pledged to do "everything I can to delay construction of the facilities" until his concerns about siting were addressed. *See* December 20, 2006 Press Release from Office of Councilman Frank DiCicco, attached hereto as Exhibit L.

46. Councilman DiCicco's press release made plain that his appeal of the Gaming Board's licensing decisions was actually part of a broader strategy to employ any means at his disposal to delay and obstruct development of the Foxwoods and Sugarhouse casinos.

47. Councilman DiCicco's opposition in this matter controls the actions of City Council because of his unique position as the Council Member for the district that includes both the Foxwoods and Sugarhouse sites. Under a tradition known as "councilmanic prerogative,"

³ Remarkably, Councilman DiCicco is the very same member of City Council who sponsored the CED Ordinance.

zoning legislation that affects property within any councilmanic district will not be passed by City Council unless the Council Member representing that district approves the legislation. Since other Members of City Council honor this tradition, Councilman DiCicco is uniquely positioned to block the City-approved zoning legislation for the development of the Foxwoods casino.

48. On January 23, 2007, Councilman DiCicco introduced a package of eight ordinances intended expressly to delay, limit or exclude gaming from the sites selected by the Gaming Board.

49. Councilman DiCicco, who had testified at the Gaming Board's hearings on the license applications that the City "has never enjoyed site selection ability," acknowledged in a January 25, 2007 letter to Foxwoods' counsel that his proposed legislation was designed to "challenge[] the State's authority to dictate the City's economic development." *See* Letter from Councilman Frank DiCicco to Jeffrey B. Rotwitt, dated January 25, 2007, a copy of which is attached hereto as Exhibit M. In that same letter, Councilman DiCicco refused to submit appropriate legislation to rezone the Foxwoods' Property CED, stating that "I can not be of assistance nor will I give the proposal [to submit CED zoning legislation for the Foxwoods Property] consideration." *Id.*

50. Councilman DiCicco, however, was not the only opponent of Foxwoods serving in City Council. On March 15, 2007, City Council approved Bill No. 070112 and Resolution No. 070113 by unanimous votes. The Resolution provided for the submission to the City electorate on the May 2007 primary ballot of an amendment to the Philadelphia Home Rule Charter that would, in essence, prohibit the conduct of licensed gaming activities within the

City.⁴ The proposed referendum tracked the language of a petition previously delivered to City Council by Casino Free Philadelphia, a virulently anti-casino group, to put the measure on the ballot pursuant to 53 P.S. § 13106. The petition, and the ballot question it proposed, were thrown out by the Court of Common Pleas of Philadelphia County on March 6, 2007 in *Albert v. Rafferty*, February Term 2007, No. 3291 (Clark, J., sitting by designation).

51. Bill No. 070112 was transmitted to the Mayor of Philadelphia for his consideration. By letter dated March 29, 2007, Mayor John F. Street vetoed the proposed ordinance.

52. On March 29, 2007, City Council reconsidered Bill No. 070112 and voted to override Mayor Street's veto. Accordingly, Bill No. 07112, a copy of which is attached hereto as Exhibit N, became law (the "Anti-Casino Referendum Ordinance") and required the submission of the proposed amendment to the Home Rule Charter to the City electorate for ratification on May 15, 2007.

53. On April 5, 2007, the Gaming Board filed an emergency petition for review in this Court challenging the validity of the Anti-Casino Referendum Ordinance. Foxwoods and HSP intervened in the proceeding. This Court entered orders preliminarily and then permanently enjoining placement of the proposed amendment to the Home Rule Charter on the ballot on April 13, 2007 and August 3, 2007, respectively. *Referendum*, 928 A.2d at 1262, 1270.

⁴ The actual text of the Resolution proposed the following question for submission to the City electorate:

Shall the Philadelphia Home Rule Charter be amended to prohibit Council from taking any action that would permit licensed gaming within 1500 feet of a residentially zoned district, an Institutional Development District, or certain residentially-related uses, and to prohibit the Department of Licenses and Inspections from issuing any license or permit authorizing licensed gaming within such areas?

54. In its opinion in the *Referendum* case, the Court emphasized that, under the express terms of the Gaming Act, the Gaming Board has exclusive authority to determine the location of the licensed facilities. *Id.* at 1267. It further held that, “[u]nder the [Gaming] Act, the General Assembly does not intend for the electorate of a first class city to be given the opportunity to consider, approve, disapprove, nullify or otherwise affect the [Gaming] Board’s decision once it is made or to prevent its implementation.” *Id.* at 1269.

55. Despite this Court’s preliminary injunction in the *Referendum* case, Councilman DiCicco continued his assault on Foxwoods’ efforts to obtain the necessary local approvals to construct its licensed gaming facility. On April 12, 2007, Councilman DiCicco introduced Bill No. 070264, which sought to expand the City’s North Delaware Avenue Special District Controls section (“Delaware Avenue Controls”) of the Zoning Code south to encompass the Foxwoods property. The Delaware Avenue Controls were imposed on areas north of Market Street to protect existing homes in the north Delaware Avenue area from rapid increases in nightclubs. The Delaware Avenue Controls prohibit restaurants, nightclubs, cabarets and other similar uses, as well as the expansion of any of these uses.

56. Councilman DiCicco’s sole reason for attempting to extend the Delaware Avenue Controls southward to the area of the Foxwoods property was to obstruct Foxwoods’ ability to develop its Property. This was confirmed by the testimony of City Planning Commission staff at a May 22, 2007 Commission Board meeting, to the effect that the staff knew of no other possible purpose for Councilman DiCicco’s proposal than to slow down the development of Foxwoods’ licensed gaming facility. Philadelphia City Planning Comm’n, Meeting Minutes (May 22, 2007), attached hereto as Exhibit O, at 8. Consequently, the Planning Commission, on that same date, voted to oppose Councilman DiCicco’s proposal. *Id.*

57. On April 18, 2007, Foxwoods filed its application for a zoning and use registration permit, pursuant to the CED Ordinance, with the City. *See Zoning/Use Permit Application*, dated April 18, 2007, attached hereto as Exhibit P.

58. The next day, on April 19, 2007, City Council passed a resolution that purported to rezone the Foxwoods property from C-3 Commercial to R-10A Residential. This proposed legislation would be applied only to the Foxwoods Property and not to any other adjoining or similarly situated waterfront property. The motivation behind this rezoning legislation was obvious -- to create another obstacle to Foxwoods' construction of a gaming facility.

59. The Foxwoods Property consists of approximately 30.2 acres located between the pierhead line of the Delaware River on the east and South Christopher Columbus Boulevard on the west and the former Reed Street to the north and Tasker Street to the south.

60. Adjacent properties are zoned G-2 Industrial and C-3 Commercial and contain commercial uses. Offices and garages for Comcast are to the north of the Foxwoods Property and a shopping center that includes a Wal-Mart, Home Depot and other "big box" retailers, is to the Property's south. On the west side of Columbus Boulevard are numerous commercial uses, such as a movie theater complex and additional strip shopping centers. The commercial uses surrounding the Property, as well as the Property itself, are separated from residential areas further to the west by the elevated Interstate 95 ("I-95") highway. There are no residential uses along the Delaware River waterfront in South Philadelphia in close proximity to the Property.

61. On May 3, 2007, Mayor Street vetoed and returned the R-10A rezoning legislation to City Council for its reconsideration. The Mayor stated in his veto message that the City Solicitor had advised him that the rezoning legislation was "illegal with respect to its intended purpose of preventing development of a casino at the location and is likely to be found

to constitute illegal spot zoning were it to become law.” See Let. from Hon. John F. Street to City Council, dated May 3, 2007, attached hereto as Exhibit Q.

62. First, Mayor Street found that “[t]he law on preemption is clear on this matter” and that the courts would “require the City to permit a casino at [the Foxwoods Property] regardless of the underlying zoning, given the preemptive effect of the [Gaming Board’s] license award.” Second, Mayor Street found the “proposed R-10A zoning for [the Foxwoods Property] would render it a residential island in a sea of industrial and commercial development without any non-arbitrary justification.” The Mayor ultimately concluded: “I am once again forced to veto an attempt to regulate land use in a way that clearly is both illegal spot zoning and preempted by state law.” *Id.*

63. Despite the informed legal judgments of the Mayor and City Solicitor, City Council proceeded to override the Mayor’s veto unanimously on May 10, 2007 and enact into law the legislation rezoning Foxwoods’ Property from C-3 Commercial to R-10A Residential.

64. Also on May 10, 2007, Councilman DiCicco reintroduced the Anti-Casino Referendum Ordinance (Bill No. 070112) in the form of a proposed new miscellaneous section of the Zoning Code’s Section 14-1600 (the “Anti-Casino Miscellaneous Bill,” attached hereto as Exhibit R).

65. The Anti-Casino Miscellaneous Bill, if enacted, would prohibit gaming anywhere within 1500 feet of a residential zoning district, church, school, or other similar use. For the same reasons set forth in the Pennsylvania Supreme Court’s opinion in the *Referendum* case, which held the Anti-Casino Referendum Ordinance invalid, the Anti-Casino Miscellaneous Bill constitutes an unconstitutional exercise of municipal power by the City Council.

66. The Planning Commission voted to oppose the Anti-Casino Miscellaneous Bill on May 22, 2007. *See* Exhibit O at 12.

67. On May 30, 2007, the Mayor approved and transmitted to City Council for introduction during the following day's session three bills relating to the zoning of the Foxwoods Property: the Foxwoods CED Designation Ordinance, the Foxwoods' Plan of Development Approval Ordinance and the Ordinance Regarding Ancillary Items for Plan of Development. *See* Lets. from Hon. John F. Street to City Council Transmitting Proposed Ordinances, with attachments, dated May 30, 2007, attached hereto as Exhibit S.

68. However, it soon became apparent that no action concerning the Foxwoods CED Legislation would be taken by City Council, whether on May 31, 2007 or at any time thereafter. Neither on May 31, 2007, nor at any time since, has even one of the seventeen members of City Council introduced the requisite Foxwoods CED Legislation.

69. Instead, the obstructionist behavior of City Council has continued unabated. On August 9, 2007, Councilman DiCicco wrote to Governor Edward Rendell, seeking the Commonwealth's support in relocating the site already selected by the Gaming Board for Foxwoods' licensed gaming facility: "In order to provide the State ample time to review this issue, I pledge to you and my constituents that I will make my best effort to hold the necessary legislation that would permit casino construction until you complete a full review of the matter." *See* Let. from Councilman Frank DiCicco to Hon. Edward Rendell, dated Aug. 9, 2007, attached hereto as Exhibit T.

70. On August 21, 2007, the Planning Commission approved, with provisos,⁵ the Plan of Development submitted by Foxwoods. While the Planning Commission's decision should have ensured that prompt subsequent approval by City Council would follow as a matter of course, to date City Council has taken no action whatsoever with respect to Foxwoods' approved Plan of Development or the Foxwoods CED Legislation.

⁵ The provisos to the approval of the rezoning of the Foxwoods site to CED included the following:

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

The provisos to the approval of the Design Review included the following:

- (1) Foxwoods Casino Philadelphia will pursue certification as a LEED-certified development and will take all commercially reasonable measures to achieve such certification.
- (2) A portion of the roof will be a green roof (approximately 10,000 square feet) with another 140,000 square feet will be a "Cool Roof" as classified by LEED standards for green buildings.
- (3) The north facing blank wall in Phase I will have a combination of vegetation, lighting, and/or other design features to create visual interest as viewed from the public trail.
- (4) The landscape area along Columbus Boulevard in front of the parking structure will be widened as much as technically feasible to permit more dense landscaping and screening along the sidewalk. The width of this design feature (including the possible narrowing or elimination of a traffic lane) will be examined with Streets, PennDOT and the City Planning Commission as engineering plans are finalized. In addition, Foxwoods will explore, and will consult with City and State authorities about, options to have the paving and paving treatments of the access road adjacent to the landscaped median designed to slow the speed of traffic as it passes by the sidewalk.
- (5) Architectural treatment of the parking garage will be provided on the façade facing Columbus Boulevard and will include vegetation, lighting, or other design features to create visual interest when viewed from the public street. When developed, plans will be provided to the City Planning Commission for review.
- (6) Subject to applicable regulatory approval, Foxwoods will provide appropriate vending and/or refreshments for sale during seasonal months to provide activity and amenities on the trail along the waterfront.

See Exhibit F.

71. By letter dated October 9, 2007, Governor Rendell explicitly rejected the effort to relocate casinos. *See* Letter from Hon. Edward Rendell to Gaetano Piccirilli, dated Oct. 9, 2007, a copy of which is attached hereto as Exhibit U. Governor Rendell explained that “[t]he commonwealth has no authority to require [the successful candidates for licensure] to accept alternate sites.... Therefore, I must reluctantly inform you that the issue of re-siting is over.” The Governor urged local residents to accept the locations for the gaming facilities selected by the Gaming Board and to join in discussions about how best to maximize the benefits such facilities will bring to their respective local communities.

72. Undeterred by Governor Rendell’s letter, Councilman DiCicco announced on October 10, 2007 that he “was digging in his heels.” *See* Jeff Shields, Rendell Says Casinos Stay: Neighbors Vow to Fight On, Phila. Inquirer, Oct. 10, 2007, at B3, 2007 WLNR 19828620 a copy of which is attached hereto as Exhibit V. While he appeared to recognize the preemptive effect of state law as to the locations of the two gaming facilities, Councilman DiCicco nevertheless declared that the City could continue to delay the advent of gaming here if the successful applicants for licensure in Philadelphia fail to put forth more convincing solutions to traffic and other local problems that the communities may confront.

73. On October 18, 2007, Mayor Street wrote to City Council to urge its members to move forward with the implementation of the Gaming Board’s decision and reject the course of further stonewalling the process. *See* Letter from Hon. John F. Street to City Council, dated Oct. 18, 2007, a copy of which is attached hereto as Exhibit W. After warning City Council that they “cannot jeopardize the opportunity the City does have to affect the nature of development along the City’s waterfront,” he stated plainly: “It is now Council’s turn to act.” *Id.*

74. Councilman DiCicco responded to Mayor Street's plea for action with a reiteration of his commitment to further stonewalling: "Until this body receives adequate answers from the City, the State and the operators I cannot and will not support legislation that permits construction of these [licensed gaming facility] projects." Let. from Councilman Frank DiCicco to Hon. John F. Street, dated Oct. 19, 2007, attached hereto as Exhibit X.

75. City Council's intransigence and attempt to force its preferences regarding siting on Foxwoods have been emboldened by this Court's decision in Case No. 88. The day after the Court's decision in Case No. 88 was issued, Councilman DiCicco was quoted in reaction to the decision as saying, "You want to get these things built, let's talk about re-siting, because if not, we're talking about another year or so before a final decision is made." Jeff Shields, State's Top Court Rejects Foxwoods' Plea for Action, Phila. Inquirer, Nov. 21, 2007, at B12, 2007 WLNR 23030495 (attached hereto as Exhibit Y). Furthermore, Councilman DiCicco subsequently proposed amending unrelated legislation in City Council that would have inhibited the issuance of permits for gaming facilities. See Proposed Amendment to Bill No. 070994 (attached hereto as Exhibit Z).

76. City Council's deliberate failure to take any action regarding the Foxwoods Plan of Development and the proposed Foxwoods CED Legislation at any time whatsoever over the last seven months demonstrates that City Council has, indeed, "dug in its heels" and committed itself, absent judicial intervention, to a program designed to delay and obstruct the development of the Foxwoods casino on the site chosen by the Gaming Board.

F. All Preconditions to the City's Implementation of CED Zoning have been Satisfied.

77. The Zoning Code requires that City Council ultimately take two actions to make effective a CED designation for the Foxwoods Property: (1) approve a Plan of Development; and (2) enact an ordinance designating the Property as a CED. *See* Zoning Code, § 14-403(1).

78. First, approval of the Plan of Development entails a finding by the Planning Commission that the plan submitted by Foxwoods is consistent with the purpose of the CED Ordinance and complies with the requirements set forth therein, followed by transmittal of the plan to City Council. *See id.* § 14-403(2).

79. As set forth above, Foxwoods submitted its Plan of Development to the Planning Commission on April 18, 2007.

80. In anticipation of review by the Planning Commission, on May 30, 2007, the Mayor submitted to City Council the Foxwoods CED Legislation, including the proposed CED Designation Ordinance, the Plan of Development Approval Ordinance and the Ordinance Regarding Ancillary Items for Plan of Development. *See* Exhibit S. *See also* Exhibits C, D & E.⁶ The proposed Foxwoods CED Legislation was read before an open session of City Council, but no member would sponsor the introduction any of the three proposed ordinances.

81. The Planning Commission voted to approve Foxwoods' Plan of Development on August 21, 2007. The Planning Commission thus determined, more than four months ago, that

⁶ On November 21, 2007, the Mayor also submitted to City Council a related bill designed to effectuate the Plan of Development by providing for various City plan changes related to transportation and relocating the sewer easement on the Foxwoods property from the extension of Dickinson Street to Reed Street. *See* Let. from John F. Street to City Council, dated Nov. 21, 2007 (together with enclosures), attached hereto as Exhibit AA. The proposed sewer easement is intended solely to improve drainage for the surrounding community and would be built at a cost to Foxwoods of up to \$5,000,000. It is not necessary for Foxwoods' proposed development as set forth in the Plan of Development approved by the Planning Commission. Despite the potential community benefits, none of the members of City Council have introduced this bill since its transmission.

Foxwoods' Plan of Development conforms to all of the requirements of the CED Ordinance and is consistent with the purpose of the CED Ordinance.

G. City Council Has Failed and Refused to Act on the Foxwoods CED Legislation and Approved Plan of Development.

82. Despite the submission of the Foxwoods CED Legislation to City Council on May 30, 2007 and the approval of the Plan of Development on August 21, 2007, City Council has taken no steps to introduce, refer to Rules Committee, hold a Rules Committee hearing to review the Foxwoods CED Legislation or otherwise take any steps of any sort whatsoever to process the Foxwoods CED Legislation and Plan of Development.

83. Janice Woodcock, Executive Director of the Planning Commission, recently explained the effect of City Council's deliberate inaction with respect to the Foxwoods CED Legislation. In a verification dated December 12, 2007, submitted by the City in response to Foxwoods' application before this Court for reargument in Case No. 88 EM 2007, Ms.

Woodcock stated, in relevant part:

15. PCPC's approval of the rezoning and the Foxwoods' Plan of Development on August 21, 2007, demonstrates that while complex issues can be expected in a development on the scale of Foxwoods Casino, these issues are neither unusual nor insurmountable.
16. Following PCPC approval, under the CED ordinance, the next step is consideration by City Council, specifically the opportunity to consider the legitimate issues raised by PCPC, as well as any other concerns it deems appropriate, and to itself evaluate whether Foxwoods' rezoning and its Plan of Development adhere to CED requirements and sufficiently mitigates against the legitimate issues raised.
17. Such consideration would have included a hearing at which time I would have moved for introduction of the Plan of Development as an amendment to the bill transmitted on May 30, 2007, in a manner similar to my requested amendment pertaining to SugarHouse Casino's Plan of Development.

18. No opportunity has existed to make such a motion because the bills have not been introduced, referred to the Rules Committee, nor been the subject of a Rules Committee hearing.
19. Up until the inaction by City Council, the Foxwoods CED process, which has been ongoing since early 2007, has functioned in the manner contemplated by CED legislation.

See Verification of Janice Woodcock, dated Dec. 12, 2007, attached hereto as Exhibit BB.

84. City Council's deliberate inaction has thus stymied and forestalled for Foxwoods the process contemplated for CED legislation since, at least, August 21, 2007. City Council's fall session closed on December 19, 2007, with no action whatsoever taken by City Council on the Foxwoods CED Legislation.

H. A Grant of Relief By This Court is The Best and Only Way to Effectuate the Legislative Mandate to Implement Gaming in Pennsylvania in a Timely Manner

85. The Gaming Board's vote to award Category 2 licenses to Foxwoods and HSP is now more than a year old. Despite the passage of time, neither Foxwoods nor HSP have been able to commence construction of their facilities. Instead, over the last year, both applicants have withstood an unending barrage of litigation and active legislative hostility from City Council. Foxwoods has defended its rights and interests over the course of the last twelve months and has fulfilled every reasonable request and requirement made of it by the Gaming Board, by the City, by community groups and others.

86. On October 17, 2007, despite not yet obtaining its zoning approvals, Foxwoods paid the \$50 million licensing fee called for under the Gaming Act to the Commonwealth.

87. On November 23, 2007, Foxwoods and the City reached an agreement in principle on a term sheet outlining the essential provisions of a Development and Tax Settlement Agreement between Foxwoods and the City, which is intended to govern the development of

Foxwoods' licensed gaming facility. *See* Let. from Romulo L. Diaz, Jr. to Nicholas F. Moles, dated Nov. 23, 2007 (together with enclosed Foxwoods Casino Philadelphia Development Agreement Term Sheet, dated Nov. 21, 2007), attached hereto as Exhibit CC. The parties expect to sign a final Development and Tax Settlement Agreement within a few days of the filing of this petition for review.

88. The term sheet evidences Foxwoods' commitment, in the words of the City Solicitor, "to address issues of importance to the City and community, including its transportation plan, a willingness to provide funding for a Community Benefits Agreement, and, to provide waterfront access" to the public. *Id.* The term sheet also reflects that "Foxwoods has made an important commitment to the quality of the Project" through its agreement to construct its licensed gaming facility in accordance with the CED Ordinance and certain environmentally-friendly building standards. *Id.*

89. Among the specific terms agreed to by Foxwoods in the term sheet were the following: (1) full funding of the cost of traffic mitigation measures required in support of Phase I of the development plans, as contained in the Orth-Rodgers Traffic Study presented to the Gaming Board and as modified and submitted to the Planning Commission; (2) development of an Economic Opportunity Plan in conjunction with the City that will embody the commitments already made in the Diversity Plan submitted to and approved by the Gaming Board; (3) exercise of commercially reasonable efforts to ensure that a significant percentage of the Foxwoods workforce and contractors are hired locally; (4) funding of a \$1 million new Special Services District to benefit the neighboring communities in terms of public safety, ambulatory and other emergency services; (5) provision of reasonable public access, free of charge, to the waterfront area and through publicly accessible outdoor spaces, along with assumption of reasonable costs

associated with the maintenance of such access; and (6) funding of up to \$5 million of the cost of sewer pipe improvements to assist the surrounding community. *Id.*

90. By letter dated November 28, 2007 to Janice Woodcock, the City Solicitor certified that the Planning Commission's proviso to its August 21, 2007 approval of Foxwoods' plan of development requiring that Foxwoods and the City reach an agreement "adequately and appropriately" addressing the issues raised by the Philadelphia Gaming Authority Task Force has been satisfied through execution of the November 23, 2007 term sheet. Letter from Romulo L. Diaz, Jr. to Janice Woodcock, dated Nov. 28, 2007, a copy of which is attached hereto as Exhibit DD.

91. On December 3, 2007, this Court issued its decision in *HSP*, 2007 WL 4226871. In this decision, the Court held that City Council engaged in deliberate inaction with respect to the designation of the Sugarhouse casino site as a CED and approval of the Sugarhouse Plan of Development after the Plan of Development had been approved by the Planning Commission. The Court therefore granted HSP's application for summary relief and ordered the Sugarhouse site declared zoned CED, the HSP Plan of Development declared finally approved, along with certain ancillary relief required by the Plan of Development.

92. In view of the Court's decision in *HSP*, on December 4, 2007, Foxwoods filed an application for reargument in Case No. 88. Foxwoods originally filed its petition for review in Case No. 88 on June 1, 2007, and briefing was completed by September 4, 2007. The Court had issued its decision on November 20, 2007.

93. In response to Foxwoods' application for reargument, the City submitted a brief. *See* Brief of Respondents The City of Philadelphia and The Department of Licenses and Inspections of the City of Philadelphia, *Philadelphia Ent. & Dev. Partners, L.P. v. City of*

Philadelphia, No. 88 EM 2007, dated Dec. 12, 2007, attached hereto as Exhibit EE. In its brief,

the City stated, in pertinent part:

Apparently based upon the intervening decision in *HSP*, and upon the intervening months of deliberate inaction by City Council, Foxwoods has filed the pending motion seeking reargument.

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

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

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

Id. at 6-7 (emphasis added).

94. On December 21, 2007, the Court issued a *per curiam* order denying Foxwoods' application for reargument in Case No. 88. In a concurring statement, however, Justice Castille explained:

On the current pleadings, I agree with the denial of the Application for Reargument. However, I would allow Petitioner Philadelphia Entertainment and Development Partners ("PEDP") the opportunity to amend the original filing in this matter to augment the record with additional and/or disputed facts that demonstrate that PEDP is in fact situated identically to the petitioners in *HSP*

Gaming L.P. v. Council for the City of Philadelphia, ___ A.2d ___
(Pa. 2007), 2007 WL 4226871. I would also retain jurisdiction.

Exhibit I. Justice Baer similarly issued a concurring statement explaining that his vote to deny reargument was premised on the state of the record in Case No. 88.

I. The City's Delay has Caused Harm to Foxwoods and the Commonwealth.

95. City Council's refusal to implement CED zoning with respect to the Foxwoods Property has caused, and will continue to cause, significant irreparable harm to Foxwoods and the Commonwealth of Pennsylvania and its taxpayers, including the City of Philadelphia and its taxpayers.

96. By refusing to implement CED zoning with respect to the Foxwoods Property, City Council has prevented Foxwoods from obtaining the zoning and other permits necessary to commence construction, and consequently operation, of its licensed gaming facility as authorized by the Gaming Board. The delay caused by City Council's conduct has curtailed the implementation of statewide tax relief to the citizens of the Commonwealth and resulted in extraordinary projected financial losses for Foxwoods and its investors.

97. Governor Rendell's 2007-08 Budget Address reflects his administration's allocation of nearly \$1 billion in tax revenue generated by gaming operations for the purpose of providing local property and wage tax relief, and to increase tourism in the Commonwealth. *See* 2007-08 Executive Budget Address of Hon. Edward Rendell, dated February 6, 2007, attached hereto as Exhibit FF.

98. The delay also significantly impacts the City's five-year financial plan, which includes approximately \$71 million in host fees attributable to licensed gaming operations and \$5 million annually in host fee payments for the Philadelphia school district. Further, postponement of gaming operations in the City will delay the anticipated receipt of somewhere

between \$58.2 million and \$77.8 million in tax-related City revenues. Declaration of Stacie Amsler, dated Mar. 15, 2007, attached hereto as Exhibit GG.

99. The General Assembly has dedicated \$100 million in revenue annually from the Commonwealth's assessment share of the gross terminal revenues to fund reductions in Philadelphia's wage tax and it is anticipated that an additional \$25 million will be available over the next five years to fund the Philadelphia school district. *See* Exhibit W.

100. Section 1403(b) of the Gaming Act imposes a 34% slot machine tax, along with a four percent local share assessment imposed upon each licensee's daily gross terminal revenue. Additionally, pursuant to Section 1405 of the Gaming Act, the state Race Horse Development Fund receives a gross terminal revenue assessment at 12 percent, while the state Gaming and Economic Development and Tourism Fund receives a five percent assessment of the gross terminal revenue.

101. For each month that Foxwoods' operations are delayed, Foxwoods will incur millions of dollars in lost projected net profits and will spend hundreds of thousands of dollars in out-of-pocket expenses.

102. Based on Foxwoods' projected revenues, the Commonwealth will lose \$499,950 per day for every day that Foxwoods' operations are delayed. *See* Exhibit GG at ¶15.

103. As previously noted, Foxwoods made payment of the statutorily-required slot machine license fee on October 17, 2007. *See* 4 Pa. C.S. § 1209. It is estimated, however, that payment of this fee prior to the issuance of final, nonappealable zoning and building permits will cause Foxwoods undue financial hardship by necessitating the expenditure of approximately \$400,000 per month in debt service for an indeterminate period of time, which will exceed the

time frame contemplated in the budgets prepared and submitted to the Gaming Board in support of Foxwoods' license application.

104. These lost revenues and profits will accrue each and every day that Foxwoods' gaming operations are delayed due to City Council inaction. They will never be recovered and will impact significantly the future distribution of funds to state and local governmental programs and the extent to which tax relief ultimately becomes available to the citizens of the Commonwealth.

105. The General Assembly provided in the Gaming Act a mandate to require the "timely implementation of casino gaming." 4 Pa. C.S. § 1506. This legislative mandate has been stymied for far too long by City Council.

106. The best hope to achieve the General Assembly's mandate is for the Court to accept this petition for review, review the matter on an expedited basis, and grant Foxwoods the relief to which it is entitled.

VI. GENERAL STATEMENT OF OBJECTIONS

107. Foxwoods Casino Philadelphia incorporates by reference paragraphs 1 through 106 above as if set forth fully herein.

108. As this Court repeatedly has held, pursuant to the Gaming Act, the Gaming Board has exclusive authority to choose the sites for gaming facilities. Once the Gaming Board makes its choice for location of gaming facilities, the Gaming Act does not permit local municipalities to "consider, approve, disapprove, nullify or otherwise affect the Board's decision once it is made or to prevent its implementation." *Referendum*, 928 A.2d at 1269.

109. The Gaming Act, therefore, imposes a mandatory duty upon the City to implement the Gaming Board's decision, and deprives the City of the power to prevent or

impede the implementation of the Gaming Board's decision concerning the site of the Foxwoods Casino Philadelphia.

110. The Court's opinion in the *Referendum* case further mandates the City's implementation of the Gaming Board's decision to locate the Foxwoods Casino Philadelphia at the Property "under and according to the zoning and land use provisions a city has enacted." 928 A.2d at 1269.

111. The Court further has explained that:

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

HSP, 2007 WL 4226871, at *11. *Accord PEDP*, 2007 WL 4532206 at *4-5, n.7 ("At the same time, however, we observe that the General Assembly's intent in 1506 to preserve a city's authority to zone does not mean that local zoning laws may be used to impede implementation of the Gaming Board's decision to locate a licensed facility by those authorized to effectuate those local laws. Recently, in *HSP Gaming L.P. v. City Council for the City of Philadelphia*, 179 EM 2007, J-122-2007 (per curiam) (Pa. December 3, 2007), we concluded that § 1506 gave this Court the jurisdiction to consider the refusal of Philadelphia's City Council to proceed with certain steps required under the CED Ordinance for the development of gaming facilities").

112. The CED zoning classification was enacted by City Council for the express purpose of streamlining the development of licensed gaming facilities while attempting to accommodate the legitimate concerns and interests of the surrounding community. Zoning

Code, § 14-401(1). As this Court has found, the CED Ordinance requires the submission of comprehensive information to the Planning Commission and “demonstrates the rigorous demands of local zoning provisions with respect to the development of gaming sites.” *HSP*, 2007 WL 4226871 at *10.

113. The Gaming Board relied on the CED classification in choosing the Foxwoods site. As this Court has noted, the Gaming Board’s adjudication noted that “the location of [Foxwoods’] site is fully compliant with the requirements of a CED district.” *Referendum*, 928 A.2d at 1269 n.10.

114. Moreover, the Court explained in *HSP*, 2007 WL 4226871, at *10, that, after Planning Commission approval of a gaming facility plan of development, “neither *PAGE* nor the Philadelphia Code permitted City Council to refuse consideration of the [approved plan of development] for the purpose of delaying and obstructing implementation of the Gaming Board’s Adjudication and Order regarding the sites of the gaming facility.”

115. Philadelphia adopted the CED classification as the specific zoning intended for the Gaming Board’s selection of the casino sites. The Gaming Board designated the locations. This Court should declare that the CED designation applies to the Foxwoods site without more.

116. The City has approved and transmitted to City Council for its consideration legislation that would (1) change the zoning designation of the Property from R-10A to CED, and (2) approve Foxwoods’ CED-compliant and Planning Commission-approved plan of development.

117. No member of City Council has introduced either piece of legislation for that body’s consideration.

118. City Council has a mandatory duty to designate Foxwoods' Property as a CED to satisfy City Council's obligations under the Supreme Court's directives in the *Referendum* case and in *HSP*.

119. Foxwoods' plan of development is consistent with the purposes and terms of the CED Ordinance, as confirmed by the Planning Commission's approval of it.

120. City Council has a mandatory duty to approve Foxwoods' plan of development to satisfy City Council's obligations under the Supreme Court's directives in the *Referendum* case and in *HSP*, and under the Zoning Code. Instead, City Council has used the zoning process improperly to impede gaming facility development and to try to force a change in the decision where to locate the facility.

121. *Foxwoods' claim to relief based on the deliberate inaction of City Council is even more compelling because here, unlike in HSP, where a lone member of City Council was willing to at least introduce HSP's proposed legislation, no member of City Council even has been willing to extend the same opportunity to Foxwoods and none likely ever will. In short, Foxwoods will never receive the legislative cooperation from City Council to which it is entitled and that is why Foxwoods must obtain that relief from this Court.*

122. Foxwoods has had, and continues to have, a clear legal right in City Council's designation of its Property as a CED and the approval of its plan of development as consistent with the purpose and terms of that ordinance.

123. City Council had a correspondingly clear duty to designate Foxwoods' Property as a CED and to approve Foxwoods' plan of development.

124. The Planning Commission has a corresponding duty to "prepare and adopt, from time to time modify, and have custody of a comprehensive plan of the City showing its present

and planned physical development.” Philadelphia, Pa. Home Rule Charter, § 4-600, a copy of which is attached hereto as Exhibit HH.

125. The Planning Commission thus possesses a mandatory duty to mark the Philadelphia City maps to reflect that Foxwoods’ Property is zoned as a CED.

126. Foxwoods has had, and continues to have, a clear legal right in the Planning Commission’s marking of the Philadelphia City maps to reflect that Foxwoods’ Property is zoned as a CED.

127. The Planning Commission has had, and continues to have, a correspondingly clear ministerial duty to mark the Philadelphia City maps to reflect all properties that meet the purpose and terms of the CED Ordinance.

VII. RELIEF SOUGHT

WHEREFORE, petitioner, Philadelphia Entertainment and Development Partners, L.P., d/b/a Foxwoods Casino Philadelphia, respectfully requests that the Court enter an order:

(A) Declaring that the site approved by the Gaming Board for the Foxwoods Casino Philadelphia is zoned as a Commercial Entertainment District pursuant to the Philadelphia Code, Chapter 14-400 as in existence on November 1, 2007;

(B) Declaring that, pursuant to Chapter 14-400, Foxwoods’ plan of development as approved on August 21, 2007 by the Planning Commission, including all provisos thereto, is declared to be finally approved and shall require no further approval as if the City Council of Philadelphia had approved the same;

(C) Declaring that all revisions, relocations, strikes and vacations of easements and public rights of way identified in the plan of development as approved by the Planning Commission are authorized;

(D) Directing the City to take all actions necessary to implement the relief granted,

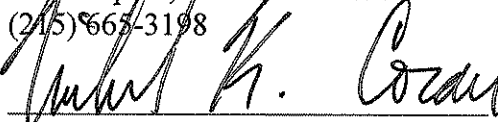
including making all necessary changes to City records, maps and plans, and receiving, reviewing and acting upon all applications from Foxwoods in the ordinary course and in compliance with this Court's order; and

(E) Retaining jurisdiction in this Court to address any further matters should they arise.

Respectfully submitted,

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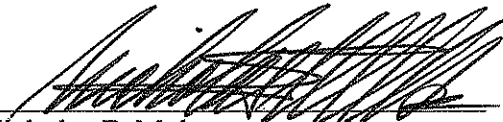
*Counsel for Petitioner, Philadelphia
Entertainment and Development Partners,
L.P., d/b/a Foxwoods Casino Philadelphia*

Dated: December 28, 2007

VERIFICATION

I, Nicholas F. Moles, Esquire, am Vice President and General Counsel of Foxwoods Casino Philadelphia. I hereby verify that I am authorized to make this verification on behalf of the petitioner, that I have reviewed the factual allegations of the foregoing Petition for Review and that the allegations are true and correct to the best of my personal knowledge or on information and belief. I understand that I make this verification subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsifications to authorities.

Dated: December 28, 2007



Nicholas F. Moles