

IN THE SUPREME COURT OF PENNSYLVANIA

No.

THE PENNSYLVANIA GAMING CONTROL BOARD,

Petitioner,

v.

CITY COUNCIL OF PHILADELPHIA; PATRICIA RAFFERTY, in her capacity as Chief Clerk of City Council of Philadelphia; PHILADELPHIA COUNTY BOARD OF ELECTIONS; and THE HONORABLE NELSON DIAZ, THE HONORABLE PAUL JAFFE, and THE HONORABLE GENE COHEN, acting City Commissioners, in their official capacity as the Philadelphia County Board of Elections,

Respondents.

EMERGENCY PETITION FOR REVIEW OF THE PENNSYLVANIA GAMING CONTROL BOARD CONCERNING THE ORDINANCE PASSED BY CITY COUNCIL FOR THE CITY OF PHILADELPHIA ON MARCH 29, 2007

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DATED: April 5, 2007

Pursuant to Rule 1512 of the Pennsylvania Rules of Appellate Procedure, NOW COMES Petitioner, Pennsylvania Gaming Control Board (the “Board”), by and through its counsel, and petitions for review of the decision of the City Council of Philadelphia (“City Council”) of an ordinance placing on the ballot of the May 15, 2007 primary election a referendum question concerning exclusionary zoning with respect to slots facilities licensed by the Board. In support thereof, the Board alleges as follows:

STATEMENT OF JURISDICTION

1. The Gaming Act vests this Court with appellate jurisdiction over final orders of a local instrumentality involving zoning of a licensed gaming facility. 4 Pa. C.S. § 1506.

2. 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 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.

3. This Court has appellate jurisdiction over this appeal from the passage by the City Council of Philadelphia of an ordinance placing a referendum question concerning exclusionary zoning with respect to slots facilities licensed by the Board on the ballot because the ordinance is a final decision of a local instrumentality in that City Council need take no further action to place the illegal question on the ballot or to make the proposed amendment effective.

4. Since the procedures for placing the question on the ballot were improper, the Court has the power to keep the question off the ballot as requested. *Mt. Lebanon v. County Bd. of Elections of the County of Allegheny*, 470 Pa. 317, 322, 368 A.2d 648, 650 (1977) (interpreting *Schultz v. Philadelphia*, 385 Pa. 79, 89-90, 122 A.2d 279, 284 (1956) as holding

that a court may “properly” keep questions off the ballot when “the procedure for placing the questions on the ballot was not followed”).

5. The decision of City Council is a “final” determination under Section 1506 of the Gaming Act because the City Council has done all the acts required to place the question on the ballot, the requested relief does not interfere with the deliberative process of City Council, the threatened operation of the Ordinance causes harm on a statewide basis, the referendum has no legal effect because it addresses matters of statewide concern beyond the powers of City Council under the Charter as limited by Article IX, Section 2 of the Pennsylvania Constitution, and the effect of the passage of the Ordinance and the possible approval by the electorate creates a genuine controversy, and not a hypothetical question, that will delay implementation of the Gaming Act. *Deer Creek Drainage Basin Auth. v. County Bd. of Elections*, 475 Pa. 491, 498-500, 381 A.2d 103, 106-108 (1977); *Mt. Lebanon v. County Bd. of Elections of the County of Allegheny*, 470 Pa. at 323, 368 A.2d at 650.

PARTY SEEKING REVIEW

6. Petitioner is the Pennsylvania Gaming Control Board (the “Board”), which was established pursuant to Gaming Act. The General Assembly has provided the Board general and sole regulatory authority over the conduct of gaming or related activities in the Commonwealth. 4 Pa. C.S. § 1202(a). The Gaming Act has specifically given the Board discretion to locate, issue, approve, renew, revoke, suspend, condition or deny issuance or renewal of slot machine licenses -- that is, licenses authorizing the placement and operation of slot machines at a licensed facility. 4 Pa. C.S. §§ 1304(b), 1325, and 1329.

7. The Board has the “general and sole regulatory authority over the conduct of gaming or related activities” under the Gaming Act. 4 Pa. C.S. § 1202(a)(1). “Conduct of gaming” is defined as “[t]he licensed placement and operation of games of chance under this part and approved by the Pennsylvania Gaming Control Board at a licensed facility.” 4 Pa. C.S. § 1103. In turn, a “licensed facility” is defined as “the physical land-based location at which a

licensed gaming entity is authorized to place and operate slot machines.” Thus, the Board has the sole authority to approve the location of licensed slots facilities.

8. The Gaming Act provides that the Board members are to serve in a fiduciary role for the Commonwealth. *See* 4 Pa. C.S. §1201(h.1)(h.2). As fiduciaries, the Board is required to exercise the care of a reasonably prudent person in protecting the funds and monies owed to the Commonwealth pursuant to operation of the Gaming Act. In prosecuting this Petition for Review, the Board is acting to protect the interests of the Commonwealth.

**GOVERNMENT UNIT THAT MADE THE DECISION SOUGHT TO BE
REVIEWED AND RELATED PARTIES THAT HAVE OR WILL
IMPLEMENT THE DECISION**

9. Respondent, Philadelphia City Council, enacted the Ordinance in question on March 29, 2007, with the purpose of adopting an impermissible change in the zoning laws of Philadelphia through a referendum and thereby effectively prohibiting gaming in Philadelphia.

10. Respondent, Patricia Rafferty, in her official capacity as Clerk of City Council, was required to certify a copy of the ballot question to the Philadelphia Board of Elections within five days of the adoption of the Ordinance. *See* 53 Pa. C.S. § 13109. In a letter dated March 30, 2007, Respondent Rafferty purported to certify the ballot question by sending a letter to Margaret Tartaglione, who had been a City Commissioner, but who is not serving as a member of the Board of Elections for the upcoming primary.

11. Respondent, Philadelphia Board of Elections is required to place the illegal ballot question on the ballot and ballot labels. *See* 53 P.S. § 13109.

12. Respondents, the Honorable Nelson Diaz, the Honorable Paul Jaffe, and the Honorable Gene Cohen, in their official capacities as acting Philadelphia City Commissioners, are required to carry out the duties of the Philadelphia Board of Elections (“Board of Elections”), Phila. Code § 2-112, and therefore must place the illegal ballot question on the ballot and ballot labels.

THE DECISION TO BE REVIEWED

13. The decision appealed is the passage by Philadelphia City Council of the Ordinance authorizing the submission of a referendum to the voters of Philadelphia to amend the Charter with a zoning restriction which is aimed at and, if adopted, would have the effect of nullifying the Board's grant of Category 2 licenses under the Gaming Act to Sugarhouse and Foxwoods. Exhibit 2, Bill No. 070112; Exhibit 3, Resolution No. 070113.

14. The Ordinance provides for the following ballot question to be placed before the voters of Philadelphia in the May 15, 2007 election:

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 gaming within such areas?

Exhibit 2, Bill No. 070112.

15. By its terms, the Ordinance identifies Resolution No. 070113 as containing the proposed amendments to the Charter. Those amendments would revise two sections of the Charter. Specifically, section 2-307 of Article II (Legislative Branch) would be amended to read as follows:

(2) Because licensed gaming facilities cause a deleterious effect on the aesthetics and economics of the areas in which they are located and cause the areas in which they are located to become a focus of crime and anti-social behavior, in order to prevent the deterioration of communities and neighborhoods in the City of Philadelphia, and to provide for the orderly, planned future development of the City, the Council shall not enact any bill, approve the creation of any district, nor take any action permitting the use of Licensed Gaming as defined and authorized by Act 71 of 2004 and any other Amendments to Title 4 of the Pennsylvania Consolidated Statutes in any area or district of the City of Philadelphia:

(a) Within 1500 feet of any residentially zoned district (regardless of the actual uses contained therein), Institutional

Development District or any of the following residentially related uses:

(i) Churches, monasteries, chapels, synagogues, convents, rectories, religious article stores, religious apparel stores, residential homes, legally occupied dwellings or apartment buildings, or Convention/Civic Center;

(ii) Schools, up to including the twelfth (12th) grade, and their adjunct play areas;

(iii) Public playgrounds, public swimming pools, public parks and public libraries.

(3) This amendment shall take effect upon approval by the voters and shall render null and void any previous enactment, approval or action taken by the City in conflict with this amendment. City Council Resolution No. 070113.

Similarly, Section 5-1000 of Article V (Executive and Administrative Branch - Powers and Duties) would be amended as follows:

(2) The Department of Licenses and Inspections shall not issue any license or permit authorizing Licensed Gaming as defined and authorized by Act 71 of 2004 and any other Amendments to Title 4 of the Pennsylvania Consolidated Statute unless the applicant is located within an area or district authorized for Licensed Gaming under Article II, Section 2-307(2)(a) of this Charter. City Council Resolution No. 070113.

STATEMENT OF OBJECTIONS

I. INTRODUCTORY STATEMENT

16. Pursuant to the Pennsylvania Race Horse Development and Gaming Act (“Gaming Act”), 4 Pa. C.S. §§ 1101-1904, the Commonwealth has decided that “limited gaming” would benefit the Commonwealth in that it would

enhance live horse racing, breeding programs, entertainment and employment in this Commonwealth; ...provide a significant source of new revenue to the Commonwealth to support property tax relief, wage tax reduction, economic development opportunities and other similar initiatives; ... positively assist the Commonwealth's horse racing industry, support programs intended to foster and promote horse breeding and improve the living and working conditions of personnel who work and reside in and

around the stable and backside areas of racetracks;...provide broad economic opportunities to the citizens of this Commonwealth...[and] enhance the further development of the tourism market throughout this Commonwealth, including, but not limited to, year-round recreational and tourism locations in this Commonwealth.

4 Pa. C.S. § 1102(2)-(6).

17. To achieve those ends, the General Assembly decided to locate two slots facilities in Philadelphia, 4 Pa. C.S. § 1304(b)(1), and to vest the Board with the “sole” authority to determine the location of such facilities. 4 Pa. C.S. §§ 1202, 1304, 1325, and 1329.

18. Pursuant to this authority, and in fulfillment of its obligations, on December 20, 2006, after extended investigations, public hearings, licensing hearings, and oral arguments, the Board approved “collectively and together in a comprehensive Statewide manner” the slots facilities license applications of eleven applicants, including applications for two slots facilities in the City of Philadelphia pursuant to the Board’s authority pursuant to 4 Pa. C.S. §§ 1301, 1304(b)(1), 1325(a), (b), (c)(1), and 1329. Exhibit 1, *In the Matters of the Applications for Category 2 Slot Machine Licenses in the City of the First Class, Philadelphia*, at 5 (Adjudication of the Pennsylvania Board Feb. 1, 2007) (referred hereinafter as the “Adj.”).

19. Nonetheless, on March 29, 2007, Respondent, City Council, enacted, over the veto of the Honorable John Street, Mayor of Philadelphia, an ordinance, whose practical effect would be to nullify and override the General Assembly’s decision to locate two slots facilities in Philadelphia at locations approved solely by the Board. The ordinance provides for a proposed amendment to Philadelphia’s Home Rule Charter (“Charter”), by way of referendum on the May 15, 2007 ballot, that would preclude any City law that would allow the locating of a gaming facility within 1500 feet of “any residentially zoned district ... or any churches, schools, or public playgrounds” (“Ordinance”). While the Ordinance purports to exercise the authority of a local instrumentality to promulgate zoning restrictions with respect to licensed gaming facilities within Philadelphia, the effect of the Ordinance goes well beyond limitations on local zoning as envisioned by the Gaming Act, such as usage, signage, types of construction, occupancy

limitations, parking, and traffic problems. Rather, it effectively precludes any gaming facility in Philadelphia in direct contravention of the provisions of the Gaming Act.

20. This Petition for Review invokes the Court's appellate jurisdiction pursuant to 4 Pa. C.S. § 1506, seeking an order vacating the Ordinance and enjoining the Board of Elections from placing the zoning question concerning licensed gaming facilities on the ballot in the upcoming May 15, 2007, primary.

21. In support thereof, the Board avers that the Ordinance is illegal and that City Council has violated both its own procedural requirements and the requirements governing the adoption of zoning laws in Cities of the First Class, in that:

- a. City Council failed to follow the required procedures in enacting the Ordinance itself in that (1) City Council did not provide sufficient notice of its public hearing on the proposed zoning question in the Ordinance as required by Phila. Code § 14-1708; (2) City Council's resolution, bill, and public hearing to enact the Ordinance were not undertaken pursuant to 53 P.S. § 13106, but rather were premised on a voter petition that was subsequently ruled invalid; and (3) the Clerk of City Council has failed properly to certify a copy of the proposed amendment to the Charter to the acting City Commissioners, in their official capacity as the Board of Elections as required by 53 P.S. § 13109.
- b. The Ordinance, insofar as it seeks to enact zoning legislation by referendum, violates the Zoning Enabling Act of 1929, 53 P.S. § 14752, the Charter, and Philadelphia's Zoning Code, Title 14 of the Phila. Code, which establish the exclusive procedures for the implementation of comprehensive zoning in Philadelphia. *See generally Minshall v. Board of Supervisors of Ferguson Twp.*, 50 Pa. Cmwlth. 541, 545-46, 413 A.2d 1165, 1166-67 (1980).
- c. Because the Ordinance has the practical effect of completely prohibiting lawful gaming in the City of Philadelphia without any connection to the public health, safety, or welfare or any record thereof, it is "unduly exclusionary" and

“unreasonable.” *Fernley v. Bd. of Supervisors of Schuylkill Twp.*, 509 Pa. 413, 418, 502 A.2d 585, 587 (1985) (holding invalid a zoning ordinance which totally banned multifamily dwellings); *Exton Quarries, Inc. v. Zoning Bd. of Adjustment of Whiteland Twp.*, 425 Pa. 43, 59, 228 A.2d 169, 179 (1967) (upholding the decision that an ordinance which created a total ban on quarries was unconstitutional and invalid).

- d. The Ordinance seeks to nullify and override the General Assembly’s decision, as set forth in the Gaming Act, to locate two slots facilities in Philadelphia and to vest the Board with the sole discretion to determine the location of such facilities and the Board’s decision to locate two facilities along the Delaware waterfront, in violation of Article IX, Section 2, of the Constitution of Pennsylvania and the Home Rule Act, 53 P.S. §§ 13101-13157.

II. FACTUAL BACKGROUND

A. The Gaming Act and the Board’s Granting of Category 2 Licenses

22. In July 2004, the General Assembly enacted the Gaming Act, which provides for legalized slot machine gaming in the Commonwealth.

23. The General Assembly mandated that the Board grant slot machine licenses to three categories of facilities: existing horse racing tracks (“Category 1”), stand-alone slot machine facilities in metropolitan and other tourist areas (“Category 2”), and hotel resort slot machine facilities (“Category 3”). 4 Pa. C.S. §§ 1301-1307.

24. The General Assembly further mandated that two of the authorized five “Category 2 licensed facilities and no more shall be located by the board within a city of the first class” - *i.e.*, within Philadelphia. 4 Pa. C.S. §§ 1304(b)(1).

25. As set forth in paragraph 7, *supra*, the Board has the sole authority to approve the location of licensed slots facilities because the Board has the “general and sole regulatory authority over the conduct of gaming,” which is defined as “[t]he licensed placement and

operation of games of chance under this part and approved by the Pennsylvania Gaming Control Board at a licensed facility.” In turn, a “licensed facility” is defined as “the physical land-based location at which a licensed gaming entity is authorized to place and operate slot machines.”

4 Pa. C.S. §§ 1103 and 1202(a)(1).

26. The Gaming Board has the sole discretion to issue slot machine licenses.

The board shall in its sole discretion issue, renew, condition or deny a slot machine license based upon the requirements of this part and whether the issuance of a license will enhance tourism, economic development or job creation is in the best interests of the Commonwealth and advances the purposes of this part.

4 Pa. C.S. § 1325(a).

27. One of the criteria for issuing the license is the “location . . . of the proposed facility.” 4 Pa. C.S. § 1325(c)(1). The slots facilities are “located by the board” (*see* 4 Pa. C.S. § 1304(b)) in that the Board in granting applications for slots licenses approves the applicant to operate at the facility identified by the applicant in its application.

28. Indeed, the Gaming Act also provides that licenses are valid only for the Gaming Board approved locations.

Each slot machine license shall only be valid for the specific physical location within the municipality and county for which it was originally granted. No slot machine licensee shall be permitted to move or relocate the physical location of the licensed facility without board approval for good cause shown.

4 Pa. C.S. § 1329.

29. In December 2005, the Board received five applications for the two available Category 2 gaming licenses in Philadelphia, creating a “competitive factor” that required the applicants to “convince the Board that their respective project should be among the two chosen by the Board to best serve the Commonwealth’s and the public’s interests in Philadelphia.”

Exhibit 1, Adj. at 5.

30. The Board engaged in extensive review and investigation of all five applicants following the comprehensive regulations enacted by the General Assembly. Exhibit 1, Adj. at 4.

31. The Board conducted three days of public input hearings (April 10-12, 2006) during which each of the five applicants made presentations and during which one hundred eighteen (118) individuals, including members of the community, spoke either in favor of or in opposition to gaming and the proposed projects. *Id.* In addition, during the public comment period, the Board received three hundred eight (308) written comments from the public relating to the proposals. *Id.* at 5.

32. The Board retained its own traffic expert, Edwards & Kelcey, to consider the impact casino development would have on traffic in the City. *Id.* at 14-15, ¶ 30.

33. On November 13-15, 2006, the Board publicly conducted licensing hearings on the Philadelphia applications. *Id.* at 5.

34. On December 20, 2006, the Board met during an open, public meeting in accordance with the Commonwealth's Sunshine Act and Section 1206 of the Gaming Act for the purpose of voting upon all pending applications and approving all permanent Category 1 and Category 2 licenses after consideration of all the applications, collectively and together in a comprehensive Statewide manner. *Id.* at 6.

35. In deciding to approve the applications of Sugarhouse and Foxwoods for Category 2 licenses in Philadelphia, the Board stated that "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 Gaming Act." *Id.* at 7.

36. Integral to the decision to approve the applications of Sugarhouse and Foxwoods for Category 2 licenses in Philadelphia was the location that each applicant proposed for its operations in the city. 4 Pa. C.S. § 1304. When considering an application for the gaming licenses, the Board took into account the location and quality of the proposed facility, including road and transit access, parking and centrality to market service area. 4 Pa. C.S. § 1325(c)(1). The Board also considered such factors as whether issuance of the licenses would enhance tourism, economic development or job creation. 4 Pa. C.S. § 1325(a).

37. The Board found that both Sugarhouse and Foxwoods are located on the riverfront and that the synergy provided by those riverfront locations and the proximity to Center City and the downtown Philadelphia area were positive factors. Adj. at 81. Moreover, “the location of each facility, as it relates to the other, creates the most advantageous locations”:

Both locations are largely separated from primary residential areas by Interstate 95 and it is anticipated that a significant amount of the patrons coming to the casinos will use Interstate 95 to access the sites. In addition, siting one location on the North Delaware Avenue corridor and the other location farther south and below the Ben Franklin Bridge, will spread out the patron traffic and avoid the traffic congestion that having two sites located close together would invariably bring to Philadelphia.

Id.

B. The Decision of Philadelphia City Council to Approve the Zoning Referendum

38. Casino-Free Philadelphia, Inc., is a community activist group zealously opposed to gaming in Philadelphia that, as its name suggests, seeks totally to prohibit slots facilities in the City.

39. Following the Board’s announcement of its licensing decision, members of Casino-Free Philadelphia, Inc. (hereafter collectively referred to as “Casino-Free Philadelphia”) circulated a petition purportedly seeking to amend Philadelphia’s City Charter to prohibit licensed gaming facilities in Philadelphia, by precluding City Council from enacting any bill that would allow licensed gaming pursuant to the Gaming Act within 1500 feet of any residentially zoned district (regardless of the actual uses contained therein), Institutional Development District or such residentially related uses as churches, schools, and public playgrounds. The petition also proposed to amend the Charter to prohibit the Department of Licenses and Inspections from issuing any license or permit authorizing Licensed Gaming “as defined and authorized by Act 71 of 2004 and any other Amendments to Title 4 of the Pennsylvania Consolidated Statutes” in that same area.

40. Effective on February 22, 2007, the Clerk of City Council accepted for filing Casino-Free Philadelphia's petition purporting to contain over 27,000 signatures of registered voters.

41. On February 22, 2007, a City Council member introduced Bill No. 070112 for an ordinance "[p]roviding for the submission to the qualified electors of the City of Philadelphia of a proposed amendment to the Philadelphia Home Rule Charter relating to the location of licensed gaming facilities within the City, *as proposed by a petition presented to the Council.*" (emphasis supplied). The text of the ballot question as set forth in the Bill was taken verbatim from Casino-Free Philadelphia's petition.

42. On February 22, 2007, a City Council member proposed Resolution No. 070113 to City Council. Resolution 070113 sets forth the proposed amendments to the Charter should the Zoning referendum pass. A copy of Resolution 070113 is attached hereto as Exhibit 3.

43. On March 1, 2007, in accordance with the requirements of 53 P.S. § 13108, a group of more than one hundred Philadelphia voters challenged the validity of the signatures and the sufficiency of Casino-Free Philadelphia's petition. *Petition of Sheldon L. Albert, et al. v. Patricia Rafferty*, Feb. Term 2007, No. 3291 (C.C.P. Phila.).

44. On March 2, 2007, just eight days after the Casino-Free Philadelphia's petition was filed, and despite the pending challenge to Casino-Free Philadelphia's petition, the City Council Committee on Law and Government held a public hearing to consider Bill No. 070112 and Resolution No. 070113 approving the petition. During that hearing, and indeed prior to its completion, this Committee approved the Bill and Resolution. Exhibit 4, *March 2, 2007 Hearing Transcript, City Council Committee on Law and Government* (hereinafter "March 2 Tr.").

45. During this hearing, Janice Woodcock, the Executive Director of the Philadelphia City Planning Commission, testified that the proposed zoning amendment to the Charter would have the effect of precluding all gaming in the City of Philadelphia. March 2 Tr. at 6-10. Attached as Exhibit 5 is a copy of the map used as an exhibit by Ms. Woodcock to illustrate the

locations where a slots facility could be located if the restrictions in the proposed zoning amendment were implemented.

46. Ms. Woodcock testified that even without considering all of the city's religiously affiliated locations or residences outside of residential districts, when considering the remaining Ordinance restrictions in conjunction with the Gaming Act's restrictions on locating a Category 2 casino within ten miles of an existing Category 1 casino (*see* 4 Pa. C.S. § 1304(b)), none of the available sites are feasible or authorized locations for a casino. March 2 Tr. at 8-10. For example, the area adjacent to the Betsy Ross bridge has limited access and permits residential homes. *Id.* at 8. Another potential site has a PECO transformer located directly in the middle of the site. *Id.* at 9. Another site has a "tank farm and liquefied gas terminal, which would not be suitable for gaming use." *Id.* at 9. The sole remaining site is the Navy Yard, which has limited access and is an active port. *Id.* at 10. Moreover, the development plan for the Navy Yard includes residential housing. *Id.* at 77-78.

47. During the March 2 hearing, City Solicitor Romulo Diaz stated that, "virtually all of the City -- not all, but substantially all of the City would be precluded from development for gaming purposes." *Id.* at 24. He expressed the opinion that the proposed zoning amendment to the Charter "would make extraordinarily large portions of the City off limits to gaming." *Id.* at 13.

48. On March 6, 2007, Judge Ward F. Clark of Bucks County reviewed the Section 13108 challenge and, after hearing testimony, held that Casino-Free Philadelphia's petition failed to include the required 20,000 signatures of registered voters. Therefore, he sustained the challenge and ruled that the petition was invalid. His order was docketed on March 8, 2007. *Petition of Sheldon L. Albert, et al. v. Patricia Rafferty*, Feb. Term 2007, No. 3291 (March 8, 2007 C.C.P. Phila.). *See* Exhibit 10, Order of Judge Ward F. Clark. Casino-Free Philadelphia filed an appeal but has withdrawn it.

49. On March 15, 2007, notwithstanding the invalidity of the petition and the illegality of the proposed zoning amendment to the Charter, City Council adopted Bill 070112 by ordinance by unanimous vote.

50. The same day, City Council also passed Resolution No. 070113 by unanimous vote. Resolution No. 070113, which is referenced in Bill No. 070112, contains the proposed amendments to the Charter. Those amendments would revise two sections of the Charter to virtually excluded all licensed gaming from Philadelphia.

51. On March 29, 2007, the Mayor of Philadelphia, John F. Street, declined to approve Bill No. 070112 pursuant to 351 Pa. Code § 2.2-202. After describing the benefits of gaming to the City of Philadelphia in terms of the growth of the hospitality industry and Convention Center expansion, unprecedented job creation, and substantial revenues, Mayor Street explained his reasons for vetoing the legislation:

The proposed Charter Amendment, if enacted, will not prohibit gaming in Philadelphia nor move the location of the gaming facilities, since state law clearly preempts any local legislation in the area of gaming. ...

In addition to its clear illegality, I have disapproved this Bill because I believe the proposed Charter Change Referendum, if enacted, will encourage the General Assembly to revoke the authority the City retains over the development of the proposed gaming sites. We cannot allow this to happen. ...

To the extent that this Bill serves to prevent the implementation of the state gaming act, the state may act to eliminate the current authority we have under state law and our Home Rule Charter. Without this process, the incentive for gaming operators to address City concerns will be greatly diminished. ...The result would be gaming establishments that are less responsive to local conditions, operating for years to come in ways that will be less accountable to the community.

Exhibit 6, Veto Letter of Mayor John F. Street dated March 29, 2007.

52. On March 29, 2007, City Council passed the bill without the Mayor's approval and it became "law" pursuant to 351 Pa. Code § 2.2-202.

53. In overriding the Mayor's veto, City Council requested that the Clerk of City Council certify the ballot question and transmit it to the County Board of Elections to handle the preparations necessary to place the referendum on the ballot.

54. In accordance with 53 P.S. § 13109, on March 30, 2007, Respondent Rafferty, the Clerk of City Council, purported to certify the ballot question by sending a letter to Margaret Tartaglione, who had been a City Commissioner, but who is not serving as a member of the Board of Elections for the upcoming primary. A copy of the letter is attached as Exhibit 9.

55. Having supposedly received the certified copy of the proposed amendments and ballot question, the Board of Elections is now required to undertake the ministerial act of "caus[ing] said ballot questions to be properly printed on the ballots or ballot labels." 53 P.S. § 13109.

56. Unless this Court acts, the following ballot question will be placed before the voters of Philadelphia in the May 15, 2007 election:

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 gaming within such areas?

Exhibit 2, Resolution No. 070112.

C. Harm to the Board, the Commonwealth and Its Citizens

57. Allowing the proposed amendment to be placed on the May 15, 2007 ballot would impose significant irreparable harm upon the Board, the Commonwealth, Commonwealth taxpayers, and the city of Philadelphia and its taxpayers.

58. The Ordinance has the effect of nullifying the authority and discretion that the General Assembly placed in the Board to identify the locations in the City of Philadelphia that would best serve the interests sought to be advanced by the Gaming Act.

59. In light of the problems with the handful of locations in Philadelphia that are both further than 1500 feet of residences, churches, and schools, and further than 10 miles from the licensed Category 1 slots facilities, the Ordinance has the effect of precluding the Board 's ability to comply with its obligation to license and regulate two Category 2 slots facilities in the City of Philadelphia.

60. The Board's decision and the underlying statutory scheme embodied in the Gaming Act contemplate prompt and faithful implementation of the award of the licenses to Sugarhouse and Foxwoods.

61. The Ordinance will, at a minimum, delay and may permanently preclude the openings of the new casino facilities in Philadelphia because the licenses cannot be issued until after all zoning issues have been resolved. This will result in the loss of tens of millions of dollars to the Commonwealth and its citizens. The money lost due to the delay will not be recovered upon any eventual opening of slots facilities in Philadelphia.

62. The revenues to the Commonwealth which will be lost as a result of the Ordinance include monies which would be collected as taxes and assessment on casino gross terminal revenues, which in turn are to be distributed statewide to the Pennsylvania Race Horse Development Fund, the Pennsylvania Gaming Economic Development and Tourism Fund, compulsive problem gaming treatment programs, volunteer fire company grants, local law enforcement grants, funds for counties, school districts and townships, and monies for property tax relief across the Commonwealth. 4 Pa. C.S. §§ 1406, 1407, 1408 and 1409.

63. If Sugarhouse and Foxwoods are not able immediately to move forward with their licensed projects, due to the potential amendment of the Charter, the Commonwealth will suffer numerous losses including interest on the \$50,000,000 license fees required to be paid by each authorized operator of a slots facility, and up to a 55% share of gross terminal revenues for every day the projects are delayed.

64. Moreover, in Philadelphia, as Mayor Street explained in his letter of veto (Exhibit 6), gaming is crucial to the growth of the hospitality industry in Philadelphia :

For the last 20 years, Philadelphia has focused on the hospitality industry as a significant component of the City's economic growth. ... The proposed gaming venues located convenient to the Central Business District will strengthen the critical mass of cultural offerings available in Philadelphia. ... Not only does gaming provide our hospitality industry another significant visitor attraction, a total of 5 percent of the expected \$3 billion in annual taxable revenue will assist in funding the expansion of the Pennsylvania Convention Center ... The projected growth of the Convention Center is expected to lead to 2,200 new hospitality-related jobs and \$145 million in increased economic impact in Philadelphia.

The Ordinance would deprive Philadelphia of those benefits.

65. Furthermore, in addition to 1,000 construction jobs associated with the building of each slots facility in Philadelphia, gaming is expected to bring between 7,000 and 12,000 new jobs to Philadelphia, including approximately 1,500 gaming operation jobs, between 2,100 and 4500 new jobs in other casino jobs, and between 3,900 and 6,400 new jobs from growth in businesses that support the gaming industry. *Id.* at 2. Again, the Ordinance would deprive Philadelphia and its citizens of those jobs.

66. The General Assembly has dedicated \$100 million in revenue from the Commonwealth's assessment share of the gross terminal revenues annually to fund reductions in Philadelphia's wage tax and an additional \$5 million annually to fund the Philadelphia school district. *Id.* at 3; *see also* 4 Pa. C.S. § 1403(c)(2)(iii)(A).

67. Thus, at a minimum, the mere pendency of the proposed Charter amendment delays casino operations and, consequently, the implementation of state and city wide tax relief to the citizens of the City of Philadelphia and the Commonwealth of Pennsylvania. If the proposed Charter amendment were to become law, it would permanently enjoin gaming operations in the City, depriving the citizens of the numerous benefits intended by the General Assembly when it passed the Gaming Act.

III. OBJECTIONS TO THE DECISION

A. City Council Failed To Follow The Required Procedures In Adopting The Ordinance

68. The Ordinance is invalid because City Council failed to follow the necessary procedures to enact it.

69. Philadelphia's zoning code requires that "not less than 15 days notice shall be given of public hearings on all zoning ordinances." Phila. Code § 14-1708.

70. The Zoning Enabling Act similarly requires fifteen days notice of public hearings:

[N]o such regulations, restriction or boundary shall become effective until after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. At least fifteen (15) days' notice of the time and place of such hearing shall be published in an official paper, or a paper of general circulation, in such city.

53 P.S. § 14755.

71. The resolution proposing the Charter change amendments and the bill proposing the Charter change referendum were both introduced on February 22, 2007. *See* Exhibits 2-3, Bill No. 070112 and Resolution No. 070113. City Council held a public meeting on both the resolution and the bill on March 2, 2007, eight days after they were introduced.

72. The Ordinance is invalid because City Council did not provide the 15-days notice of the public hearing on Bill No. 070112, required by both the Philadelphia Code and the Zoning Enabling Act.

73. The Home Rule Act provides that an amendment to the Charter may be initiated either by resolution of City Council or by a petition. 53 P.S. § 13106. City Council can either enact its own proposed amendment or approve a petition. 53 P.S. § 13106. Fewer members of Council are required to vote in favor of a Charter change referendum if it is initiated through the petition process, rather than by resolution of City Council.

74. Here, both the bill and resolution explicitly are based upon the petition initiated by Casino-Free Philadelphia and seek to adopt the petition, rather than propose City Council's

own amendment. Exhibit 3, Resolution No. 070113 (“Whereas, such a petition has been presented to the Council, and after review of the petition by the Clerk of Council, the petition has been accepted); Exhibit 2, Bill No. 070112 (“providing for submission . . .an amendment . . .as proposed by a petition.”).

75. The March 2, 2007 notice to the public and the March 2, 2007 public hearing were based on the assumption that the Charter change amendment was proposed by a valid petition of twenty thousand registered voters.

76. During the public hearing, City Council established that it had no intention of proceeding with its own proposed amendment, but merely sought to ratify the petition:

“[I]t is a completely different situation because this bill did not originate in City Council, this bill or resolution, but originated from the citizens who had a petition, who used a Charter amendment provision that has never been used before, and so it is different legally.”

March 2 Tr. at 55-56, Testimony of City Council Member Wilson Goode.

77. However, the petition presented by Casino-Free Philadelphia was ruled invalid on March 6, 2007.

78. Once it was revealed that the proposed amendment did not in fact have the support of twenty thousand registered voters and the imprimatur of public approval was removed, Bill No. 070112 and Resolution No. 070113, which were based on an invalid petition, were no longer valid without amendment.

79. Because the Ordinance was premised on the void petition, and because no bill originating with City Council was properly introduced, noticed, and subjected to a hearing, the Ordinance is invalid.

80. Moreover, the Clerk of City Council is required to certify a copy of the proposed amendment to the Charter to the acting City Commissioners, in their official capacity as the Philadelphia County Board of Elections. 53 P.S. § 13109.

81. On March 30, 2007, Respondent Rafferty, the Clerk of City Council, purported to certify the ballot question by sending a letter to Margaret Tartaglione, who had been a City Commissioner, but who is not serving as a member of the Board of Elections for the upcoming primary. Exhibit 9, Letter of Patricia Rafferty dated March 30, 2007.

82. Accordingly, the Clerk of City Council has failed properly to certify a copy of the proposed amendment to the Charter acting City Commissioners, in their official capacity as the Philadelphia County Board of Elections as required by 53 P.S. § 13109.

83. This Court has repeatedly recognized that procedural objections to an ordinance triggering a referendum are properly heard before the election in which the referendum is to be presented to the voters. *See, e.g. Mt. Lebanon v. County Bd. of Elections*, 470 Pa. at 320, 368 A.2d at 650 (recognizing that failure to follow statutory procedures for placing a referendum on the ballot concerning amendments to Mt. Lebanon's home rule charter should properly keep a question off the ballot); *City of Pittsburgh v. County of Allegheny*, 860 A.2d 616, 618 (Pa. Commw. 2004) (holding that a court may properly keep a referendum question off the ballot if the procedure for placing the question on the ballot was not founded).

84. In light of the failure to follow statutory procedures for placing the Charter Change referendum on the ballot, the Ordinance should be vacated and the Board of Elections and acting City Commissioners should be enjoined from preparing the ballot question for a vote by the electorate in the upcoming May 15, 2007, primary.

B. Zoning Regulations Cannot be Enacted by Voter Referendum

85. It is procedurally improper to implement zoning changes through a voter referendum. *See Minshall v. Bd. of Supervisors of Ferguson Twp.*, 50 Pa. Cmwlth. 541, 545-46, 413 A.2d 1165, 1167 (1980), and *Horsham Twp. Council v. Mintz*, 39 Pa. Cmwlth. 408, 395 A.2d 677 (1978), *affirming Mintz v. Horsham Twp. Council*, 102 Montg. L.R. 314 (1977). In each of those cases, which did not involve a city of the first class, the court looked to the Municipalities Planning Code (53 P.S. § 10101 *et seq.*), which was the governing zoning statute,

and the charter of each municipality to determine if zoning ordinances could be amended through voter referendum. Although the city charter in each case allowed for voter referendum concerning ordinances, the use of the referendum to effect a zoning change was rejected because the General Assembly had directed in the Home Rule Charter Act that zoning legislation would be implemented only in accordance with the Municipalities Planning Code.

86. While other municipalities in the Commonwealth may be governed by the Municipalities Planning Code, Philadelphia, as a city of the first class, is authorized through the Zoning Enabling Act to enact zoning regulations “for the purpose of promoting the health, safety, morals, and general welfare of the community.” 53 P.S. § 14752.

87. Philadelphia derives its authority to zone through power granted by the General Assembly. The Zoning Enabling Act grants the City the power through the enactment of ordinances to regulate and restrict buildings and other structures:

For the purpose of promoting the health, safety, morals, and general welfare of the community, cities of the first class are hereby authorized and empowered to regulate and restrict, by ordinance, the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location, use and occupancy of buildings, structures and land, for trade, industry, residence or other purposes, so that such uses may be permitted in or excluded from certain portions or sections of such cities, or subject to special regulations.

53 P.S. § 14752.

88. In the Zoning Enabling Act, the General Assembly recognized that the growth and development of cities, including cities of the first class, requires careful planning and the development of a “comprehensive plan” that “encourage[es] the most appropriate use of land throughout such city.” 53 P.S. § 14754.

89. The Zoning Enabling Act requires Philadelphia to appoint a zoning commission which recommends and proposes appropriate zoning restrictions and regulations. 53 P.S. §

14757. Such restrictions or regulations proposed by the zoning commission must be passed by City Council and are subject to executive action, just as required for other ordinances. 53 P.S. § 14758.

90. Pursuant to the authority to create a zoning commission conferred by the Zoning Enabling Act, Philadelphia's Charter establishes the City Planning Commission as an independent commission for the orderly physical development of the city and the creation and maintenance of a master development plan. 351 Pa. Code §§ 3.3-100, 4.4-600 note 1.

91. Philadelphia's City Planning Commission has been vested with the obligation to maintain and develop the comprehensive plan required by 53 P.S. § 14754. 351 Pa. Code § 4.4-600.

92. The City Planning Commission proposes zoning ordinances which are submitted to the Mayor for transmission to City Council. 351 Pa. Code § 4.4-601.

93. The City Planning Commission also makes recommendations, to be transmitted to City Council through the Mayor, on all bills originating in City Council that in any manner affects any zoning ordinance or the comprehensive plan. 351 Pa. Code § 4.4-604.

94. The City's zoning laws, as recommended by the City Planning Commission and adopted by City Council, are contained in the Philadelphia Zoning Code, which is Title 14 of the Philadelphia Code. The purpose and scope of the Zoning Code is described as follows:

Chapters 14-100 through 14-1800, inclusive, of this Title are enacted to promote the public health, safety, order and general welfare by regulating and restricting the location, size, bulk and use of buildings; the height and size of buildings and other structures, percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location, use and occupancy of buildings, structures and land for residential and non-residential purposes. The provisions of these Chapters are designed to lessen congestion in the streets, to secure safety from fire, panic and other dangers, to provide

adequate light and air, to avoid undue concentration of population and to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements; reduce dirt, odor, noise, soot and noxious fumes; to conserve property value and to encourage the most appropriate use of land; provide for the administration and enforcement of such provisions, regulations and restrictions, and to provide penalties for violations thereof.

Phila. Code § 14-101(1).

95. The Zoning Code requires that zoning ordinances “conform in every respect to the procedure for the enactment of all other ordinances of the City as prescribed in the Home Rule Charter, except that not less than 15 days notice shall be given of public hearings on all zoning ordinances ...” Phila. Code § 14-1708.

96. The Zoning Code explicitly states that except as otherwise provided in the Charter, the provisions of Title 14 constitute the exclusive law with regard to zoning in Philadelphia. Phila. Code 14-1701(3).

97. Presently, the Charter contains no zoning restrictions, rather it merely establishes the city’s commissions and boards, such as the City Planning Commission (351 Pa. Code §§ 4.4-600 - 4.4-604), the Zoning Board of Adjustment (351 Pa. Code § 3.3-911) and the Department of License and Inspection Review (351 Pa. Code § 3.3-913) and their duties and authority.

98. When City Council has chosen to enact zoning regulations, it has done so through amendments to the Philadelphia Code. In fact, that is exactly what it did in February 2006 when it enacted regulations in Title 14 (Chapter 14-400) to create a “Commercial Entertainment District.” Exhibits 7-8, Bill Nos. 051028-AA, 060631. These regulations specifically targeted the gaming industry so that development of slots facilities would proceed in an orderly fashion and with a plan in mind. *See* Phila. Code § 14-401; Phila. Code § 14-405(2) & (3); Exhibit 8, Bill No. 060631, at page 4.

99. Neither the Zoning Enabling Act nor the Charter and the Zoning Code that together effectuate the Zoning Enabling Act in Philadelphia allow for enactment of zoning regulations by any other method than by enactment of City Council. Accordingly, a referendum, whereby the public is given the authority to amend zoning, is contrary to law. *See Minshall*, 50 Pa. Cmwlth. at 545-46, 413 A.2d 1167, and *Horsham Twp. Council*, 39 Pa. Cmwlth. 408, 395 A.2d 677.

100. In light of the impropriety of utilizing a Charter change amendment to effectuate amendment of the City's zoning regulations, the Ordinance should be vacated and the Board of Elections should be enjoined from preparing the ballot question for a vote by the electorate in the upcoming May 15, 2007 primary. *Mt. Lebanon*, 470 Pa. at 322, 368 A.2d at 650.

C. Because The Zoning Amendment Unreasonably Excludes Licensed Gaming From Philadelphia, It Is Invalid

101. When the Board evaluated the sites for proposed Category 2 licenses, there were no zoning restrictions in place in Philadelphia that would have precluded the establishment of slot machine gaming. To the contrary, City Council had adopted regulations in Title 14 (Chapter 14-400) to create a "Commercial Entertainment District" so that the development of slots facilities as licensed by the Board could proceed in an orderly fashion. *See Phila. Code* § 14-401.

102. All zoning ordinances are "subject to the requirement that [they] not be arbitrary or discriminatory and must bear a reasonable relationship to the safety, morals and welfare of the community." *Twp. of Exeter v. Zoning Hearing Bd. of Exeter*, 911 A.2d 201, 204 (Pa. Commw. Ct. 2006); *see also Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (a zoning restriction can be challenged if it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.").

103. A zoning ordinance is “unreasonable and not substantially related to the police power purpose if it is *unduly restrictive or exclusionary*.” *Hanson Aggregates Pennsylvania, Inc. v. College Twp. Council*, 911 A.2d 592, 595 (Pa. Cmwlth. 2006) (emphasis added) (citing *C&M Developers, Inc. v. Bedminster Twp. Zoning Hearing Bd.*, 573 Pa. 2, 820 A.2d 143 (2002)).

104. The validity of a zoning ordinance which *totally excludes* a legitimate use is regarded with circumspection and, therefore, such ordinance must bear *a more substantial relationship* to a state purpose than a regulation which merely confines that use to a certain area within the municipality. *Fernley v. Bd. of Supervisors of Schuylkill Twp.*, 509 Pa. 413, 418, 502 A.2d 585, 587 (1985) (holding invalid a zoning ordinance which totally banned multifamily dwellings) (citing *Beaver Gasoline Co. v. Zoning Hearing Bd. of the Borough of Osborne*, 445 Pa. 571, 574, 285 A.2d 501, 503 (1971) (remanding the case to allow the borough to produce evidence that an ordinance which constituted a total ban on gasoline service stations was a valid total prohibition in terms of the relationship to public health, safety, morals and general welfare); *Exton Quarries, Inc. v. Zoning Bd. of Adjustment of Whiteland Twp.*, 425 Pa. 43, 59, 228 A.2d 169, 179 (1967) (upholding the decision that an ordinance which created a total ban on quarries was unconstitutional and invalid).

105. The effect of the Ordinance will virtually prohibit gaming within the city of Philadelphia, and is thus exclusionary. March 2 Tr. at 6-10, Testimony of Janice Woodcock, the Executive Director of the Philadelphia City Planning Commission (Exhibit 4) and illustrative Map attached as Exhibit 5.

106. Accordingly, an ordinance is required to “bear[] a substantial relationship to the public health, safety, and welfare.” *Hanson Aggregates*, 911 A.2d at 595.

107. In passing the Ordinance, City Council never reviewed the relationship between the Ordinance and public welfare. *See generally*, March 2 Tr.

108. In fact, because members of City Council viewed the Ordinance as allowing the petition presented by Casino-Free Philadelphia to move forward, at least one member of the Council expressly declined to use any discretion in determining the validity of the Ordinance.

March 2 Tr. at 55, Testimony of City Council Member Wilson Goode (“I’m voting for the petition to move forward and what I’m saying is that we don’t have to use our discretion, we don’t have to say why voting for it or not voting for it. A vote can just take place.”).

109. Moreover, the General Assembly has explicitly found that limited regulated gaming as permitted by the Gaming Act will benefit, rather than harm, the public welfare. 4 Pa. C.S. § 1102(2)-(6)

110. Because the effect of the Ordinance is unduly restrictive in that it effectively excludes limited regulated gaming as authorized by the Gaming Act from Philadelphia, it is unreasonable and invalid. *Exton Quarries*, 425 Pa. at 58, 228 A.2d at 178.

111. In light of the exclusionary and hence invalid nature of the zoning amendments to the Charter that are the subject of the zoning referendum, the Ordinance should be vacated and the Board of Elections should be enjoined from placing the question on the May 15, 2007 ballot for a vote by the electorate.

D. The Zoning Amendment Usurps The Authority Granted To The Board By The General Assembly

112. When City Council approved the zoning referendum it was placing in the hands of voters the decision of where to ban gaming facilities, a power that flies in the face of the General Assembly’s grant, under the Gaming Act, to the Board of the sole and exclusive power to determine where such facilities should be allowed.

113. Although zoning is a local matter, a municipality is prohibited from exercising powers contrary to, or in limitation of, other acts of the General Assembly to the extent that such acts apply to substantive matters of statewide concern. *School Dist. of Philadelphia v. Zoning Board of Adjustment, City of Philadelphia*, 417 Pa. 277, 283, 207 A.2d 864, 868 (1965) (citing 53 P.S. § 13133); *see also Pemberton Appeal*, 434 Pa. 249, 256, 252 A.2d 597, 600 (1969) (holding that to allow a township, by zoning regulations, to prevent a school from being located in a particular spot would render nugatory the directives of the Public School Code, which granted the school board the power to determine the locations of schools).

114. These principles are grounded in Article IX, Section 2, of the Pennsylvania Constitution, which provides in relevant part:

A municipality which has a home rule charter may exercise any power or perform any function not denied by this Constitution, by its home rule charter or by the General Assembly at any time.

115. If an ordinance enacted by a home rule municipality addresses matters of statewide significance and concern that have already been addressed by the General Assembly, the ordinance will be invalid. *Devlin v. City of Philadelphia*, 580 Pa. 564, 573, 862 A.2d 1234, 1239 (2004); *Ortiz v. Commonwealth of Pennsylvania*, 545 Pa. 279, 681 A. 2d 152 (1996); and Section 18 of the Home Rule Charter Act, 53 P.S. 13133.

116. The Gaming Act is intended to provide a significant source of new revenue to the Commonwealth to support property tax relief, wage tax reduction, economic development opportunities and other similar initiatives. 4 Pa. C.S. §§ 1102(3) and (5).

117. The location of licensed slots facilities is clearly a matter of statewide concern because it affects the level of revenue generated for the Commonwealth. The Board selected the successful license applicants, among other things, in order to maximize the revenues and taxes for the Commonwealth on the whole. Indeed, one of the express purposes of the Gaming Act is to “provide a significant source of new revenue to the Commonwealth to support property tax relief, wage tax reduction, economic development opportunities and other similar initiatives.” 4 Pa. C.S. § 1102.

118. In particular, the granting of Category 2 licenses in Philadelphia is a matter of statewide concern. Philadelphia is the only city of the first class in the Commonwealth and its two licensed slots facilities are expected to contribute a substantial percentage of the estimated \$1 billion of gaming revenue to be dedicated toward property and wage tax relief for citizens of the Commonwealth. Thus, any zoning provisions that have the effect of precluding gaming in Philadelphia, such as the proposed zoning amendments to the Charter, are not a local matter, but rather a matter that concerns the entire state.

119. City Council's purpose in passing the Ordinance, as set forth in its preamble, rejects the very premises of the Gaming Act. Thus, while the Gaming Act identifies the benefits of limited gaming in the Commonwealth, City Council found without any hearings that gaming was detrimental to the public welfare:

[L]icensed gaming facilities cause a deleterious effect on the aesthetics and economics of the areas in which they are located and cause the areas in which they are located to become a focus of crime and anti-social behavior....

Resolution No. 070113.

120. City Council's decision to put the zoning referendum on the ballot is aimed at precluding "any action permitting the use of Licensed Gaming as defined and authorized by Act 71 of 2004 and any other Amendments to Title 4 of the Pennsylvania Consolidated Statutes in any area of district of the City of Philadelphia" as defined more fully in the zoning amendment.
Id.

121. City Council's decision to put the zoning referendum on the ballot is aimed at nullifying the comprehensive process put in place by the General Assembly to institute gaming in the Commonwealth. This action by City Council denies the Board the right to exercise its powers under the Gaming Act to license two Category 2 slots facilities in Philadelphia and illegally "zones out" gaming operations in Philadelphia.

122. Inasmuch as the 1500 foot separation mandated by the proposed Charter change would have the effect of putting every lawful, viable, available gaming location in the City off-limits to gaming, the zoning referendum usurps the Board's power and prevents gaming as expressly mandated by the General Assembly.

123. As a practical matter, the effect of the proposed Charter change would be to effectively prohibit gaming in the City altogether. The zoning amendments proposed by the Ordinance place the City squarely in conflict with the State's legislative mandate and, accordingly, they are preempted by the Gaming Act.

124. Furthermore, when the General Assembly amended the Gaming Act on November 1, 2006, the General Assembly amended Sections 1103 and 1202 of the Gaming Act to clarify that only the Board has the power to determine where licensed slots facilities will be located. Specifically, the General Assembly amended Section 1202 of the Gaming Act, which describes the Board's general powers, to vest the Board with "sole regulatory authority over the conduct of gaming or related activities as described in this part." 4 PA. C.S. § 1202(a)(1). At the same time, the General Assembly amended the definitional section of the Gaming Act to provide a definition of the "conduct of gaming":

"Conduct of gaming." The licensed placement and operation of games of chance under this part and approved by the Pennsylvania Gaming Control Board at a licensed facility.

4 Pa. C.S. § 1103. In turn, a "licensed facility" is defined as follows:

"Licensed facility." The physical land-based location at which a licensed gaming entity is authorized to place and operate slot machines.

Id. Reading the three provisions together, it is clear that the Board has the "sole regulatory authority over the licensed placement and operation of games of chance approved by the Board at the physical land-based location at which a licensed gaming entity is authorized to place and operate slot machines." In other words, the Board has the sole authority to approve the location of licensed slots facilities.

125. In vesting the Board with the sole and final authority to determine the locations of licensed slots facilities, the General Assembly recognized that these locations are clearly a matter of statewide concern because they affect the level of revenue generated for the Commonwealth. Indeed, the Board selected the successful license applicants, among other things, in order to maximize the revenues and taxes for the Commonwealth on the whole.

126. Because the effect of the proposed Charter change would be to nullify the Board's right to exercise its powers under the Gaming Act to license two Category 2 facilities in Philadelphia and give the voters of Philadelphia a veto over the Board's licensing decisions, the

zoning amendments proposed by the Ordinance place the City squarely in conflict with the State's legislative mandate and, accordingly, they are preempted by the Gaming Act.

127. In light of the Gaming Act's preemption of the zoning amendments to the Charter that are the subject of the zoning referendum, the Ordinance should be vacated and the Board of Elections and acting City Commissioners should be enjoined from placing the illegal question on the ballot for the upcoming May 15, 2007, primary. *Deer Creek Drainage Basin Authority v. County Board of Elections of Cty. Of Allegheny*, 475 Pa. 491, 381 A.2d 103 (1977).

RELIEF SOUGHT

WHEREFORE, Petitioner respectfully requests the Court to reverse the decision of the City Council of Philadelphia to submit the referendum question to the voters on the May primary election. Petitioner also respectfully requests the Court to enjoin the Board of Elections and the

acting City Commissioners from placing the illegal question on the ballot for a vote by the electorate in the upcoming May 15, 2007 primary.

Respectfully submitted,

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