

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 OF THE PENNSYLVANIA GAMING CONTROL BOARD
IN THE NATURE OF A COMPLAINT FOR DECLARATORY JUDGMENT**

Lawrence T. Hoyle, Jr. (PA ID No. 02926)
Arlene Fickler (PA ID No. 20327)
Jeffrey S. Waksman (PA ID No. 79873)
Hoyle, Fickler, Herschel & Mathes LLP
One South Broad Street, Suite 1500
Philadelphia, PA 19107
(215) 981-5700

Frank T. Donaghue (PA ID No. 72561)
R. Douglas Sherman (PA ID No. 50092)
Linda S. Lloyd (PA ID No. 66720)
Pennsylvania Gaming Control Board
Office of Chief Counsel
303 Walnut Street, Strawberry Square
Verizon Towers, 5th Floor
Harrisburg, PA 17101-1825
(717) 346-8300

Attorneys for Petitioner The Pennsylvania
Gaming Control Board

DATED: April 5, 2007

Pursuant to Rules 3307 of the Pennsylvania Rules of Appellate Procedure, NOW COMES Petitioner, Pennsylvania Gaming Control Board (the “Board”), by and through its counsel, and alleges as follows:

INTRODUCTION

1. 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).

2. 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.

3. 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 Board Feb. 1, 2007) (referred hereinafter as the “Adj.”).

4. Nonetheless, on March 29, 2007, Respondent, the City Council of the City of Philadelphia (“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.

5. This Complaint invokes the Court’s original jurisdiction pursuant to 4 Pa. C.S. § 1904, seeking a declaratory judgment that the Board has been constitutionally vested by the General Assembly in the Gaming Act, as amended, with the sole and final authority to determine the locations of licensed slots facilities and, therefore, City Council lacked the authority to enact the Ordinance.

STATEMENT OF JURISDICTION

6. This Court has original jurisdiction over this action pursuant to 4 Pa. C.S. § 1904.

7. Section 1904 of the Gaming Act provides:

The Pennsylvania Supreme Court shall have exclusive jurisdiction to hear any challenge to or to render a declaratory judgment concerning the constitutionality of this part. The Supreme Court is authorized to take such action as it deems appropriate, consistent

with the Supreme Court retaining jurisdiction over such a matter, to find facts or to expedite a final judgment in connection with such a challenge or request for declaratory relief.

4 Pa. C.S. § 1904.

8. The constitutional question here is whether the Gaming Act, as amended, constitutionally vests the Board with the sole and final authority to determine the locations of licensed slots facilities and, therefore, precludes a home rule charter municipality from utilizing the vehicle of an amendment to its home rule charter to modify its zoning laws in such a way to void legislation of statewide concern of the General Assembly.

THE PARTIES

9. 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 at a particular land-based location. 4 Pa. C.S. §§ 1202, 1304(b), 1325, and 1329. 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.

10. Respondent, Philadelphia City Council, enacted the Ordinance in question on March 29, 2007, with the purpose and/or intended result of effectively prohibiting gaming in Philadelphia and adopting impermissible change in the zoning laws of Philadelphia through a referendum.

11. 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 P.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 has been a City Commissioner, but who is not serving as a member of the Board of Elections for the primary scheduled for May 15, 2007.

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

13. 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, Phila. Code § 2-112, and therefore must place the illegal ballot question on the ballot and ballot labels.

STATEMENT OF FACTS

THE GAMING ACT AND THE BOARD'S GRANTING OF CATEGORY 2 LICENSES

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

15. 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.

16. 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).

17. 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.

18. In conjunction therewith, the Board also 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).

19. 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.

20. Indeed, the Gaming Act also provides that licenses are valid only for the 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.

21. 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.” *See* Exhibit 1, Adj. at 5.

22. The Board engaged in extensive review and investigation of all five applicants pursuant to the comprehensive provisions of the Gaming Act. Exhibit 1, Adj. at 4.

23. 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.

24. 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.

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

26. On December 19, 2007, the Board heard oral argument from counsel for the various applicants for the Philadelphia slots facilities.

27. 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.

28. As for the two Category 2 slots license facilities in the City of Philadelphia, the Board approved the applications of HSP Gaming, L.P., ("Sugarhouse") and Philadelphia Entertainment and Development Partners, LP ("Foxwoods"), both on the Delaware riverfront. That decision was taken pursuant to the Board's authority pursuant to 4 Pa. C.S. §§ 1304(b)(1), 1325(a), (b), (c)(1), and 1329.

29. 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.” Exhibit 1, Adj. at 7.

30. 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).

31. 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. Exhibit 1, 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.

Adj. at 81.

THE DECISION OF PHILADELPHIA CITY COUNCIL TO APPROVE THE ZONING REFERENDUM

32. 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.

33. Following the Board’s announcement of its licensing decisions, 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.

34. 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.

35. 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). Exhibit 2, Bill No. 070112. The text of the ballot question as set forth in the Bill was taken verbatim from Casino-Free Philadelphia's petition.

36. 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. Exhibit 3, Resolution 070113.

37. 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.).

38. On March 2, 2007, just eight days after 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 of City Council Committee on Law and Government* (hereinafter “March 2 Tr.”).

39. 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.

40. 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.* 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.

41. 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.

42. 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.

43. 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 No. 070112 by unanimous vote.

44. 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. 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.

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. Resolution No. 070113.

45. 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.

46. 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.

47. 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.

48. 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. Exhibit 9, Letter of Patricia Rafferty dated March 30, 2007.

49. 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.

50. 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, Bill No. 070112.

51. 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.

52. 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. 70113.

53. 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.*

54. 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.

55. 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 approved by the General Assembly.

56. As a practical matter, the effect of the proposed Charter change would be to effectively prohibit gaming in the City. The zoning amendments proposed by the Ordinance place the City squarely in conflict with the State's legislative mandate.

HARM TO THE BOARD, THE COMMONWEALTH AND ITS CITIZENS

57. Allowing the proposed Charter 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 Board's decision to issue 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 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). Moreover, gaming is intended to provide broad economic opportunities to the citizens of the Commonwealth. 4 Pa. C.S. § 1102(5).

63. 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.

64. 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.

65. 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. 4 Pa. C.S. §§ 1209 and 1403.

66. 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.

67. Furthermore, in addition to 1000 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 1500 gaming operation jobs, between 2100 and 4500 new jobs in other casino jobs, and between 3900 and 6400 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.

68. 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).

69. 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.

CLAIM FOR DECLARATORY JUDGMENT AND OTHER EQUITABLE RELIEF

70. The averments of paragraphs 1-69 are incorporated by reference as if set forth in full.

71. The Gaming Act provides in Section 1904 that this Court "shall have exclusive jurisdiction ... to render a declaratory judgment concerning the constitutionality of this part." 4 Pa. C.S. § 1904. The Gaming Act further provides that in resolving constitutional issues, this Court is "authorized" to take appropriate action so long as it is "consistent with the Supreme Court retaining jurisdiction over such matter ... to expedite a final judgment in connection with such a ... request for declaratory relief. *Id.*

72. The Board seeks a declaratory judgment that the Board has been constitutionally vested by the General Assembly in the Gaming Act, as amended, with the sole and final authority to determine the locations of licensed slots facilities and, therefore, City Council lacked the authority to enact the Ordinance.

73. Petitions for declaratory judgments are governed by the provisions of the Declaratory Judgments Act, 42 Pa. C.S. §§ 7531 -7541. *Unified Sportsmen of Pennsylvania v. The Pennsylvania Game Commission*, 903 A.2d 117, 125 (Pa. Commw. 2006).

74. The granting of a petition for declaratory judgment is a matter within the sound discretion of a court of original jurisdiction. *Id.*

75. The purpose of declaratory judgments is to afford relief from uncertainty with respect to rights, status, and other legal relations, and is to be liberally construed and administered. *Id.*

76. A petitioner whose rights, status, or other legal relations are affected by a statute or municipal ordinance may have determined any question of construction or validity arising under that statute or ordinance and obtain a declaration of rights, status, or other legal relations thereunder. 42 Pa. C.S. § 7533.

77. To sustain an action under the Declaratory Judgments Act, a plaintiff must demonstrate an ‘actual controversy’ indicating imminent and inevitable litigation, and a direct, substantial and present interest. *Stilp v. Commonwealth*, 910 A.2d 775, 782 (Pa. Commw. 2006).

78. Currently, an actual, immediate, and justiciable controversy exists between Petitioner and Respondent City Council concerning the Board’s powers to issue Category 2 slots licenses for slots facilities within the City of Philadelphia at locations approved solely by the Board.

79. The Board is in need of the Court’s assistance in resolving the parties’ difference with respect to the constitutionality of the Board’s powers to locate unilaterally licensed slots facilities as proposed by license applicants.

80. The Board seeks an affirmative declaration that, pursuant to the Gaming Act, as amended, the Board has been constitutionally vested by the General Assembly with the sole and final authority to determine the locations of licensed slots facilities and, therefore, City Council lacked the authority to enact the Ordinance.

81. In *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, 583 Pa. 275, 335, 877 A.2d 383, 415-19 (2005) (“PAGE”), this Court held that the predecessor to the current Section 1506, which provided for local land-use preemption, was unconstitutional because it impermissibly delegated legislative authority to the Board without adequate standards and guidelines. Section 1506 provided in relevant part:

The conduct of gaming as permitted under this part, including the physical location of any licensed facility, shall not be prohibited or otherwise regulated by any ordinance, home rule charter provision, resolution, rule or regulation of any political subdivision or any local or State instrumentality or authority that relates to zoning or land use to the extent that the licensed facility has been approved by the board. *The board may in its discretion consider such local zoning ordinances when considering an application for a slot machine license.* (emphasis supplied).

This Court concluded that portions of Section 1506 should be stricken:

Although the eligibility requirements and additional criteria guide the Board’s discretion in determining whether to approve a licensee, we find that they do not provide adequate standards upon which the Board may rely in considering the local zoning and land use provisions for the site of the facility itself. We conclude that, as a matter of law, Section 1506 does not comply with the dictates of Article II, Section I insofar as the General Assembly has failed to provide adequate standards and guidelines required to delegate, constitutionally, the power and authority to execute or administer that provision of the Act to the Board.

877 A.2d at 419. However, the Court otherwise affirmed the Gaming Act, which vested the Board with authority to grant slots facilities licenses for particular locations.

82. City Council, in effect, agreed that PAGE leaves in place the authority of the Board to approve gaming locations, when the Council enacted on November 16, 2006, the

amended regulations in Title 14 (Chapter 14-400) creating a “Commercial Entertainment District.” See Exhibit 8, Bill No. 060631, amending Bill No. 051028-AA, which had been adopted on February 23, 2006. Exhibit 7, Bill No. 051028-AA. These amended regulations explicitly recognized the authority of the Board to grant licenses and identify the property where the licensee will locate the casino:

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

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

Phila. Code § 14-405(2) & (3); Exhibit 8, Bill No. 060631, at 4.

83. Since the *PAGE* decision, the Board has worked tirelessly to implement gaming in the Commonwealth, including, on December 20, 2006, approving applications for two Category 2 slots license facilities in the City of Philadelphia to Sugarhouse and Foxwoods, both on the Delaware riverfront. That decision was taken pursuant to the Board’s authority under 4 Pa. C.S. §§ 1202, 1304(b)(1), 1325(a), (b), (c)(1), and 1329.

84. 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.

85. 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.

86. At the same time, Section 1506 of the Gaming Act was amended to vest this Court with exclusive original jurisdiction over appeals from local zoning decisions “[i]n order to facilitate timely implementation of casino gaming” as provided by the Gaming Act. 4 Pa. C.S. § 1506. Thus, the General Assembly vested this Court the authority promptly to resolve any conflict between regulations addressing traditional zoning issues and the Gaming Act as implemented by the Board, thereby implicitly recognizing that local authorities may continue to seek to address some zoning issues such as usage, types of construction, signage, occupancy limitations, and parking and traffic problems.

87. Notwithstanding this distinction drawn by the General Assembly between the Board’s locating of licensed slots facilities and local zoning issues, upon information and belief, the proponents of the Ordinance contend that under *PAGE*, local authorities have unbridled discretion to utilize their zoning powers to exclude licensed slots facilities from their communities, notwithstanding the provisions of the Gaming Act and the decisions of the Board,

made pursuant to the Gaming Act, to grant slots licenses to applicants who have been found to satisfy the standards of the Gaming Act.

88. Thus, the Ordinance is premised on the assumption that, notwithstanding the explicit provisions of the Gaming Act, the Board's issuance of licenses can be voided by a zoning restriction of the city where the licensed facility is to be located.

89. However, these arguments of the proponents of the Ordinance disregard the fact that, since *PAGE*, the General Assembly has vested the Board with the sole authority with respect to the conduct of gaming in the Commonwealth, including the power to locate licensed slots facilities.

90. Nor do the proponents of the Ordinance identify any provision of the Pennsylvania Constitution with which the Gaming Act, as amended, does not comply.

91. Accordingly, the Board seeks a declaratory judgment that it has been constitutionally vested by the General Assembly in the Gaming Act, as amended, with the sole authority to determine the locations of licensed slots facilities and, therefore, City Council lacked the authority to enact the Ordinance.

WHEREFORE, the Board now seeks judgment in its favor that the Board has been constitutionally vested by the General Assembly in the Gaming Act, as amended, with the sole authority to determine the locations of licensed slots facilities; that the effect of the Ordinance unconstitutionally deprives the Board of its authority under the Gaming Act to determine the locations of licensed slots facilities; and that therefore the Honorable Nelson Diaz, the Honorable Paul Jaffe, and the Honorable Gene Cohen, acting City Commissioners, acting in their official

capacity as the Philadelphia County Board of Elections, should be enjoined from placing the referendum question on the ballot for the May 15, 2007 primary election.

Respectfully submitted,

/s/Lawrence T. Hoyle, Jr.

Lawrence T. Hoyle, Jr. (PA ID No. 02926)
Arlene Fickler (PA ID No. 20327)
Jeffrey S. Waksman (PA ID No. 79873)
Hoyle, Fickler, Herschel & Mathes LLP
One South Broad Street, Suite 1500
Philadelphia, PA 19107
(215) 981-5700

Frank T. Donaghue (PA ID No. 72561)
R. Douglas Sherman (PA ID No. 50092)
Linda S. Lloyd (PA ID No. 66720)
Pennsylvania Gaming Control Board
Office of Chief Counsel
303 Walnut Street, Strawberry Square
Verizon Towers, 5th Floor
Harrisburg, PA 17101-1825
(717) 346-8300

Attorneys for Petitioner The Pennsylvania
Gaming Control Board

DATED: April 5, 2007