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IN THE SUPREME COURT OF PENNSYLVANIA

JAN 22 2009

SUPREME COURT
EASTERN DISTRICT

No. 179 E.M. 2007

HSP GAMING, L.P.,
Petitioner,

v.

THE CITY OF PHILADELPHIA AND
CITY COUNCIL FOR THE CITY OF PHILADELPHIA,
Respondents.

CITY OF PHILADELPHIA AND CITY COUNCIL FOR THE CITY OF
PHILADELPHIA'S RESPONSE TO HSP GAMING'S
APPLICATION FOR RELIEF SEEKING ENFORCEMENT
OF THIS COURT'S 12/3/07 ORDER
AND APPOINTMENT OF A SPECIAL MASTER

CITY OF PHILADELPHIA
LAW DEPARTMENT
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January 22, 2009

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
I. INTRODUCTION.....	1
II. COUNTER-STATEMENT OF THE FACTS	5
III. DISCUSSION	10
A. There is No Dispute Over the Foundation Permit	10
B. There Is No Need For Appointment of a Special Master	12
1. There is no need to appoint a Special Master because there is no live dispute for a Master to resolve.	12
2. If this Court appoints a Special Master, the Master’s authority should not be nearly as broad as Petitioner request.	16
IV. CONCLUSION.....	20

TABLE OF AUTHORITIES

CASES

<i>Foxwoods v. City</i> , 1 EM 2008 (Pa.)	16
<i>HSP Gaming, L.P. v. City Council for the City of Philadelphia, et al.</i> , 595 Pa. 508, 939 A.2d 273 (2007)	6, 13
<i>James J. Gory Mech. Contr. v. Phila. Hous. Auth.</i> , 579 Pa. 26, 855 A.2d 669 (2004)	18
<i>Kulp v. Hrivnak</i> , 2000 Pa. Super. 407, 765 A.2d 796 (2000)	19

STATUTES AND REGULATIONS

4 Pa.C.S. §§ 1101, <i>et seq.</i> (“Gaming Act”)	6
4 Pa.C.S. § 1210(a)	2, 6
4 Pa. C.S. § 1506	13, 16, 17, 18
42 Pa. C.S. § 931	18
42 Pa.C.S. § 2503(7)	19

ORDINANCES

Phila. Code §A-302.2	9
Phila. Code §A-302.6.2	9
Phila. Code §A-302.9(1)	8, 9
Phila. Code §14-403	4

COURT RULES

Pa. R. App. P. 2591(b)	13
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I. INTRODUCTION

This Application for Relief, much like the television show “Seinfeld,” is about nothing.

Nothing because, amidst the sound and fury and claims of bad intent, HSP’s Application raises no currently disputed issue between the parties.

Nothing because, when all is said and done, what stands between HSP and casino construction is not the City of Philadelphia but the United States of America, specifically, the U.S. Army Corps of Engineers.

Nothing because the HSP Application, replete with phony, exaggerated allegations against the City, totally ignores its completely stalled review process with the Army Corps.

The HSP Application presents only one actual, specific matter for which relief is claimed: the issuance of a pending foundation permit. And the City agrees that the requirements for that permit have been met and it could have been issued months ago – if only HSP had wanted it.

Instead, HSP chose to continue working under its previously issued rough grading permit, HSP chose to seek an extension of that rough grading permit (which the City granted on July 14, 2008), HSP chose not to seek the foundation permit immediately, HSP chose not to obtain the required sign-off from the Water Department after completing its prerequisite approvals and, most directly, HSP chose to tell the City specifically just one month ago that it did not yet want the foundation permit.

That statement was made by Terrence J. McKenna, HSP's project manager, to John Elfrey,¹ the City's point person, in a telephone call on December 16, 2008. See Elfrey Affidavit (attached hereto as Exhibit A), ¶ 25, and Elfrey email, Exhibit 2 thereto. It was the last communication from HSP to the City regarding the foundation permit until this Application was filed.

HSP clearly is frustrated that its project is not further along – frustration no doubt awakened by the need for its recent application to the state gaming board for an extension of its license. It is true that unless the pending application for an extension ultimately is granted by the gaming board (opposed by other parties, but not by the City), HSP no longer has any right to proceed with its project. See Gaming Act, 4 Pa.C.S. §1210(a).

That frustration, while perhaps understandable, is misdirected in this Application. Even with every permit it could ever need from the City, what is preventing HSP from actually beginning construction of its project in accordance with its approved plan is the U.S. Army Corps of Engineers.²

The project is stalled with the Army Corps on two fronts: HSP needs approval to fill in certain portions of navigable waters in accordance with its plan, and it needs approval under federal historic preservation law because of possible

¹ The Application describes McKenna as Project Executive at Keating Consulting, LLC, the development management consultant for HSP.

² HSP likewise is stalled by its inability to obtain another required approval from a third level of government, namely, a Highway Occupancy Permit that must be issued by the Commonwealth, Department of Transportation ("PennDOT").

disturbance of significant artifacts and archeological remnants at the site. Until those two issues are resolved and approvals obtained, HSP simply cannot construct its casino in accordance with its approved plan.

Perhaps HSP feels better in lashing out at the City over a foundation permit that it could pick up today, but until it satisfies the Army Corps on these two issues its plan cannot move forward no matter what the City does. Those approvals appear to be months away at best.

Throughout this process, the City and its administrative branch, under both former Mayor John Street and Mayor Michael Nutter, have recognized the right of the Commonwealth of Pennsylvania to award gaming licenses and site casinos in Philadelphia, and the authority of this Court to enforce that decision. The City takes seriously its obligation to receive, review and act upon applications from HSP in the ordinary course – and it has done so consistently. This is not mutually exclusive with the Mayor's role as chief executive of the City, and his continuing obligation to seek the best public policy outcomes for its citizens.

Much public outcry and concern greeted the awarding of the two Philadelphia casinos and the locations selected, which HSP has recounted in its Application in hyperbolic detail. That Mayor Nutter has reservations about the waterfront sites of both casinos is an obvious matter of public record. Since the only actual matter raised by HSP is its pending foundation permit, the only purpose of parsing the Mayor's many statements in this Application is to impugn his motives. The Mayor is not on trial here, however; this is a land use application proceeding, not an inquisition into the Mayor's policy perspectives or attitude.

One specific averment of HSP's Application requires particular mention, however, for the very reason that it is otherwise irrelevant to HSP's claim for relief, therefore calling into question the intent and veracity of the entire Application. In its effort to characterize the City as obstructionist, HSP alleges that the Nutter Administration "also improperly created obstacles" to the other Philadelphia casino to be operated by Philadelphia Entertainment and Development Partners, L.P. ("Foxwoods"). Application, ¶ 32.

In fact, last year Foxwoods and the City agreed to explore a potential relocation to East Market Street, and just announced a timetable for the production, submission and review of a Plan of Development for a Foxwoods casino at that site, pursuant to the Philadelphia Code ("Code"), §14-403. See Philadelphia City Planning Commission press release, January 19, 2009, attached hereto as Exhibit B.

Contrary to the HSP allegation, the City and Foxwoods currently are engaged in a process based on their mutual interests in developing a successful casino while meeting the needs of the City in the best possible way. Try as HSP might to point fingers at the City, the major hurdle facing Foxwoods at its waterfront site (as with HSP) is approval from a higher governmental authority; Foxwoods as well as HSP have been unable to procure the required Highway Occupancy Permit from PennDOT.

Despite many hurdles confronting HSP from other sources, much more difficult and daunting than City reviews and permits, it has resisted all appeals to common-sense consideration of alternate sites.

Mayor Nutter's publicly expressed views and efforts to relocate both gaming facilities from the Philadelphia waterfront have in no way changed or denied the two licensees the review and action ordinarily afforded all major developers. If anything has changed from the waning days of the Street Administration, it was simply a return to a normal review process and action in the ordinary course, rather than expedited review and rushed action. See, e.g., Application, ¶ 42 (permit applications filed January 2 and 3, 2008, and permits issued January 4).

Indeed, Mayor Nutter remains in personal contact with HSP and spoke with Neil Bluhm, an HSP principal, on January 8, 2009 (the very day this Application was filed). A meeting with the Mayor and HSP principals scheduled for January 16 was cancelled by HSP, but is now being rescheduled.

II. COUNTER-STATEMENT OF THE FACTS

Petitioner/Applicant HSP Gaming, L.P. ("HSP") is the developer and operator of the SugarHouse slots casino, which was awarded a Category 2 gaming license by the Pennsylvania Gaming Control Board ("GCB") on December 20, 2006. The license was confirmed in a GCB Adjudication and Order on February 1, 2007.

On January 8, 2009, HSP filed this petition styled as an "Application for Relief ... Seeking Enforcement of This Court's December 3, 2007, Order and the Appointment of a Special Master" ("Application"). Within a great deal of extraneous material and irrelevant arguments, HSP's only live grievance is that

Respondent City of Philadelphia (“City”)³ has failed to review and act upon a single application for a foundation permit in the ordinary course.⁴

Under the Pennsylvania Race Horse Development and Gaming Act, 4 Pa.C.S. §§1101, et seq., (“Gaming Act”), Category 2 licensees must open a facility with at least 1,500 slot machines within a year of receiving its license. See Gaming Act, §1210(a).

Unable to meet that deadline, HSP on December 10, 2008, applied to the GCB for an extension of time, as permitted under the Act. See Gaming Act, 4 Pa.C.S. § 1210(a). Several parties opposing HSP’s requested extension have intervened in the matter.⁵ The City has not sought to intervene. To date, the GCB has taken no action and scheduled no hearings on this request.

³ In addition to the City, HSP also names the City Council of Philadelphia as a Respondent to this Application. In revisiting at length the outdated history of statements and actions by Council members, the Application attempts to blur the distinction between the City Administration and City Council, and impute to Mayor Michael Nutter previous decisions of City Council no longer relevant to any pending matter. Furthermore, the portion of the 2007 Order of this Court that the Application invokes is limited to review and approval of permits, and therefore is directed to the City alone. As a result, City Council has no role with respect to the relief sought herein, and no relief should be entered against City Council.

⁴ In its Order of December 3, 2007, this Court directed the City to take necessary steps including “receiving, reviewing and acting upon all applications from HSP Gaming in the ordinary course” See HSP Gaming, L.P. v. City Council for the City of Philadelphia, et al., 595 Pa. 508, 533, 939 A.2d 273, 288 (2007) (“HSP I”).

⁵ The intervening parties include state Reps. Michael O’Brien and William Keller, state Sen. Michael Stack, and Society Hill Civic Association.

In response to the Pennsylvania General Assembly's passage of the Gaming Act, Mayor John Street appointed a task force on gaming to make recommendations. After the two Philadelphia licenses were awarded, Mayor Street created an unusual process for casino development with teams of leaders from numerous City departments dedicated to expediting reviews and approvals for both casinos. HSP reaped the advantages of this special treatment, but recognized it was jeopardized by the election of Michael Nutter as Mayor in November 2007. During the campaign and at the outset of his term on January 7, 2008, Mayor Nutter expressed his reservations over the location of the two casinos and promised to consider all lawful options, including persuading the developers to relocate (with the assistance of the Governor of Pennsylvania).

Not coincidentally, HSP suddenly had benefited from a flurry of activity during December 2007 and into January 2008, including receiving zoning and "rough grading" permits issued Friday, January 4, the last business day of the Street Administration.

In its first weeks in office, therefore, the incoming Nutter Administration undertook a wholly appropriate and lawful status review of both casino projects. That review took several weeks and ended the prior approach of "fast-tracking" all casino applications. While HSP's Application characterizes this transition review as a willful obstruction of justice, this type of analysis and status report is standard at every level of government when a new administration begins, particularly where, as here, a flurry of hasty, 11th-hour actions were taken under the previous chief executive.

Even at that, this review did not result in drastic action to thwart casino development, such as revocation of the last-minute permits issued to HSP, which the City has the authority to do under its Administrative Code for permits issued in error or based on incomplete information, see Phila. Code, §A-302.9(1) and (2). The Administration did return the casino developers to the normal review process but did not impose extra-legal impediments.

Going forward, HSP's dealings with various City departments, including the foundation permit, occurred through the normal channels and process, and John Elfrey remained a significant, if not sole, point of contact.

As HSP concedes, its foundation permit application required multiple Water approvals. In HSP's own best-case averments, the earliest it could have secured those approvals was September 11, 2008, when DEP approved its Act 537 planning module. In fact, HSP also has yet to obtain approval for the necessary relocation of the sewer line running under its site.

Under the Code and standard City procedures, the applicant at that point returns to the Water Department to confirm completion of prerequisite, "checklist" items and obtain a signature attesting to that completion. If the applicant is ready to begin work, it takes that signature to L&I to pick up the permit. Elfrey Aff., ¶ 7.

In the four months since Act 537 approval, HSP has not requested or obtained Water Department signature on its foundation permit application, and has not presented a completed application to L&I and requested the permit.

To the contrary, HSP has maintained its rough grading permit, even

requesting and receiving a 180-day extension of that permit from L&I on July 14, 2008.

HSP also sought permission from L&I to drive test piles at the site in November 2008. After assuring L&I that the piles would not be part of the building construction, L&I agreed no building permit was required and allowed the work to proceed. This assurance subsequently was confirmed in a letter from McKenna on December 16, 2008. See Exhibit C.

On that date, Elfrey called McKenna to make sure he was not also seeking the foundation permit at that time. McKenna confirmed to Elfrey he was not. Elfrey Aff., Exhibit A.

L&I (or any other relevant City agency) does not issue permits on its own volition, without an explicit request from the applicant. Once a permit is picked up the developer must begin work under that permit within six months or the permit expires and an entirely new application process must be undertaken. Phila. Code §A-302.2.

Further, regarding foundation permits in particular, as they are preliminary to a full building permit, any foundation work begun proceeds at the developer's risk, in the event the requirements for a subsequent permit are not met or delayed. Phila. Code §A-302.6.2.⁶ That is why permits do not suddenly materialize in the

⁶ "Owner's risk: The owner of a structure for which a foundation and related permits have been issued shall proceed at the owner's risk without assurance that a permit for the entire structure will be granted. Issuance of a foundation permit shall not be construed to establish vested rights to the building or related permits on the part of any party to the construction project." Phila. Code, §A-302.6.2.

in-box whenever an applicant believes the prerequisites have been satisfied.

III. DISCUSSION

A. There is No Dispute Over the Foundation Permit

The scope of HSP's misleading assertions is clear from self-contradictory statements within two key paragraphs of its Application. In paragraphs 64 and 65, HSP claims it had "provided the necessary information and forms required" for a foundation permit, and had submitted a "*complete* foundation permit application" for approval (emphasis added). Application, ¶¶ 64 and 65. Read those paragraphs carefully, however, and you discover the truth – that HSP had provided all the information "with the exception of prerequisite approval for L&I zoning unit and the Philadelphia Water Department."⁷ Application, ¶64.

Water Department approval is conditioned on fulfilling several requirements, and by its own account of the chronology, HSP did not obtain the last of those items until September 11, 2008, nine months after its "complete" application was submitted. Application, ¶78.

It is truly ironic that these assertions involve a foundation permit, because HSP has constructed a house of cards regarding the City's alleged failure to issue this permit. It is important for the Court to realize the true scope of the word games being played here.

⁷ "Other than that, Mrs. Lincoln, how did you enjoy the play?"

Only a careful reading of its Application, therefore, reveals the misleading story line of this Application and HSP's obscured admission that its foundation permit application was not complete and ready for action until September 2008. But the false averments continue beyond that.

The last stack balanced on this card tower is important both to the legal justification asserted by HSP as its basis for relief, and extraordinarily revealing as to the duplicitous nature of the Application to this Court.

When HSP finally completed the Water Department approvals it needed four months ago, it never bothered to finalize the permit application in the "ordinary course" as every other developer or applicant must do: by obtaining the signature of an authorized Water Department employee on the permit application and submitting the application to L&I for the permit.

How does HSP explain this failure to complete the simple and "ordinary" process? Because, HSP states, zoning and Water Department approvals "would come directly from those departments." Application, ¶65.

"Would come ... ?" Self-propelled approvals do not "come" to L&I so that a permit may "issue" somehow. It is the responsibility of the developer, any developer, every developer, in the ordinary course, to take to L&I whatever prerequisite approvals are needed, whenever they are obtained and the permit is sought. HSP never completed that ordinary process, did not have the permit application signed by the Water Department, never walked in to L&I, never asked for its foundation permit in any manner. See Elfrey Aff., ¶¶ 7 and 24.

It is important to understand that L&I does not require developers to finalize

their permit applications by bringing the prerequisite approvals to L&I merely for the bureaucratic sake of it. Instead, unless and until a developer does so, L&I simply has no way to know that the permit is ripe for issuance. Moreover, because a permit expires after six months if the work is not commenced, unilaterally issuing permits puts the developer at risk if work is not ready to commence. See Elfrey Aff., ¶ 22.

And that brings us to the last card, the one that topples the others like a brick. Not only did HSP never actually request the foundation permit, it told the City directly that it was not yet seeking the permit as of December 16, 2008, in the direct statement by McKenna to Elfrey. See Elfrey Aff., ¶ 27.

As a result, there is no dispute that HSP has completed the underlying requirements to *qualify* for a foundation permit. HSP has not received the permit because it did not pick it up – needing only to bring L&I the necessary Water Department signature. As recently as one month ago, its development manager told the City that HSP did not yet want the permit.

B. There Is No Need For Appointment of a Special Master

1. There is no need to appoint a Special Master because there is no live dispute for a Master to resolve.

Following HSP's insulting and offensive 119-paragraph attack on the Mayor for doing his sworn duty, HSP attempts to use this Court to obtain relief in the form of a Special Master with far broader authority than the Gaming Act or any other law allows.

HSP's prayer for relief requests that this Court appoint a Special Master with

extraordinarily broad power to: (1) resolve any current or future disputes regarding the issuance of permits or other approvals necessary to build HSP's gaming facility, (2) to enforce the December 17, 2007 Tax Settlement and Development Agreement ("Development Agreement"), a private contract that arose after this Court's December 3, 2007 order, and (3) to award attorneys' fees and costs and assess sanctions against the City. However, there is no need to appoint a Special Master because there is no live dispute for a Master to resolve, and even assuming this Court opts to appoint a Special Master, the Master's powers are not nearly as broad as HSP requests.

This Court plainly has jurisdiction to enforce its orders, Pa. R. App. P. 2591(b), and section 1506 of the Gaming Act contemplates appointment of a Special Master consistent with this Court's jurisdiction to hear "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." 4 Pa. C.S. § 1506. In HSP I, this Court determined it had jurisdiction over this matter. Thus, we readily acknowledge that this Court has authority to appoint a Special Master with authority to resolve disputes regarding the Court's ordered relief in its December 3, 2007 Order, including disputes regarding "actions [by the City] necessary to implement the relief granted, including . . . receiving, reviewing and acting upon all applications from HSP in the ordinary course." See HSP Gaming, L.P. v. City Council for the City of Philadelphia, et al, 595 Pa. 508 508, 533, 939 A.2d 273, 288 (2007) ("HSP I").

However, a Special Master is inappropriate at this time because despite HSP's hysterical 119-paragraph Application, no actual live dispute exists. As explained in detail above, the only current "dispute" for which HSP seeks relief is issuance of a foundation permit, which the City is fully prepared to issue now that HSP reversed course and indicated an actual desire for issuance.

Moreover, not one of the other frantic allegations in HSP's Application for Relief amounts to more than either a complaint about already-resolved issues or a discussion of inchoate issues for which HSP does not seek resolution. Much of HSP's Application complains not about what the City has done, but what the City has said. In fact, HSP attempts to link the two, promoting a conclusion that because of things the Nutter Administration has said, its actions are at least suspect, if not willfully obstructionist.

There is no more repugnant statement in HSP's Application than the allegation that the Mayor is intentionally violating an order of this Court because of his policy views:

The Nutter Administration also has continued to publicly reject the approved location of the HSP casino, demonstrating the Nutter Administration's intention to violate this Court's December 3, 2007, Order and the development agreement.

Application, ¶101.

This is little more than an attempt to muzzle the Mayor to prevent his Administration from discussing a major issue of public concern and considering possible alternatives, as he has every right to do.

As a part of his campaign and since his election, Mayor Nutter clearly and

consistently has articulated his views and preferences regarding both licensed casinos in Philadelphia, including problems with location and related issues. Just as clearly, the Mayor has said he would follow the law and the Court's orders with respect to both casino projects, despite his misgivings about the two sites.

What HSP wants is not a methodical, considered, and fully legal process of step-by-step reviews and approvals, but an extra ordinary, specialized process dedicated solely to HSP, willing to abbreviate normal steps and proceed without complete review – a process HSP describes as achieving with former Mayor Street and extols in glowing terms throughout this Application.

The Nutter Administration has followed – not violated - this Court's directive to review all applications in the ordinary course. What HSP seeks is not compliance with "ordinary course" review but an expedited process providing HSP everything it requests. There is no obligation, including the Court's orders, to create a "team" of high-ranking public officials dedicated to any one project, devoting scarce public resources in the manner HSP demands.

The futility of HSP's position is even more pronounced given that the true impediment to casino construction is not the City but the federal government. Whenever HSP qualifies for City permits, it cannot proceed in accordance with its approved Plan of Development without two major approvals by the Army Corps of Engineers ("ACOE"): a Section 10 and 404 permit to build into the waterway, and historic preservation approval to disturb the ground on its site.⁸

⁸ In its Application, SugarHouse acknowledges, barely and indirectly, the need for the ACOE waterways permit. See McKenna Affidavit, ¶ 65, and Exhibit (footnote continues on next page . . .)

In sum, if and when HSP presents an *actual* dispute necessary of resolution, the City would readily agree that it makes sense for this Court to appoint a Special Master to resolve that and future disagreements that inevitably will occur in preparing for a development of this magnitude and complexity.⁹ In fact, the City would likely *join* in such a request, as a Special Master would appropriately relieve this Court of the burdens of determining compliance with City Codes, a technical, fact-based function for which this Court, respectfully, is ill suited. However, absent a live dispute for the Special Master to resolve, there is simply no need to appoint a Special Master at this time.

2. **If this Court appoints a Special Master, the Master's authority should not be nearly as broad as Petitioner requests.**

Even assuming this Court opts to appoint a Special Master under 4 Pa. C.S. § 1506, the Master's authority should not be nearly as broad as that which is requested by Petitioner. A Special Master certainly has no jurisdiction to enforce the December 17, 2007 Development Agreement – a *private* contract that arose *after* this Court's December 3, 2007 order – as this wholly exceeds this Court's

D thereto. SugarHouse does not acknowledge or reference its need for federal Act 106 historic preservation approval from the ACOE.

⁹ In fact, in *Foxwoods v. City*, 1 EM 2008, the City readily *agreed* to Foxwoods' request for appointment of a Special Master in our July 28, 2008 response to Foxwoods' Application for Enforcement. This is because, in contrast to the matter at hand, Foxwoods presented an actual live dispute ripe for resolution by a Special Master.

jurisdiction. And, where HSP has failed to produce evidence of even a scintilla of dilatory, obdurate and vexatious conduct on the part of the City, a Special Master has no authority to award attorney's fees and costs or to assess sanctions against the City.

a) **A Special Master has no jurisdiction to enforce the Development Agreement.**

A Special Master has no authority to decide disputes regarding the Development Agreement for two independent reasons: (1) the Development Agreement is not, and never was, a subject of this case, and therefore cannot be brought within this Court's jurisdiction via an enforcement action, and (2) in any event, neither section 1506 of the Gaming Act, nor any other provision, gives this Court or a Special Master original jurisdiction over a private contract dispute. See Application, at 41-42. This Court should see through and squarely deny HSP's attempt to slip into its Prayer for Relief a request to enforce this private contract, which HSP surely knows this Court lacks jurisdiction to do.

This Court's continuing jurisdiction (and, by extension, a Special Master's authority) to resolve disputes regarding the Court's December 3, 2007 Order plainly does not extend to the Development Agreement, a *private* contract that arose *after* this Court's December 3, 2007 order. First, the Development Agreement is not, and never was, a subject of this case. HSP's Petition for Review sought, and this Court's December 3, 2007 Order granted, relief primarily related to *City Council's* (not the City's) alleged inaction on a bill to zone HSP's site as a "Commercial Entertainment District," a necessary prerequisite to develop the

casino. In fact, neither the October 25, 2007 Petition for Review nor this Court's December 3, 2007 Order makes any mention of the Development Agreement. This makes sense, as the City and HSP did not enter into the Development Agreement until December 17, 2007, two weeks *after* the Order that HSP now seeks to enforce. See Application, ¶45, citing McKenna Aff. at ¶15. Simply stated, HSP cannot bring the Development Agreement within this Court's jurisdiction via an action to enforce an Order that *predates* the contract's existence.

Moreover, neither section 1506 of the Gaming Act, nor any other provision, gives this Court *original* jurisdiction over a private contract dispute. Notwithstanding HSP's repeated rushes to the Supreme Court, this Court's jurisdiction, though broad, remains limited to *appellate* review from final decisions of the City "involving zoning, usage, layout, construction or occupancy, including location, size, bulk and use of a licensed facility." 4 Pa. C.S. §1506. Nowhere does HSP even allege that there is an appealable "final order, determination or decision" with respect to the Development Agreement for this Court or a Special Master to review, because it cannot. To the extent that HSP makes vague allegations about the City's breach of certain Development Agreement obligations, see Application, ¶¶99-100, 111, a *private contract* with the City, and such actions are the basis for litigation, such an action could only properly be brought in the Court of Common Pleas. 42 Pa. C.S. § 931; James J. Gory Mech. Contr. v. Phila. Hous. Auth., 579 Pa. 26, 28, 855 A.2d 669, 671 (2004) (breach of contract action against a local agency is properly brought in court of common pleas).

Because a Special Master's authority can only apply to casino matters that

are or could already be properly before this Court pursuant to the Gaming Act, this Court should deny HSP's request for a Special Master to enforce the City's obligations under the Development Agreement.

- b) **A Special Master would have no authority to award attorney's fees and costs or to assess sanctions against the City.**

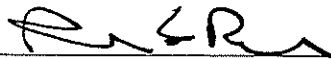
Finally, where HSP has failed to produce evidence of even a scintilla of dilatory, obdurate and vexatious conduct on the part of the City, a Special Master would have no authority to award attorney's fees and costs or to assess sanctions against the City. See Kulp v. Hrivnak, 2000 Pa. Super 407, 765 A.2d 796, 799 (Pa. Super. 2000) (award of attorneys' fees based on an appellant's "dilatory, obdurate and vexatious" conduct pursuant to 42 Pa. C. S. § 2503(7) must be supported by a trial court's specific finding of such conduct).

IV. CONCLUSION

For the foregoing reasons, HSP's Application for Relief presents no active dispute upon which relief may be granted, and accordingly, this Court should deny all relief requested by HSP.

Respectfully submitted,

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Dated: January 22, 2009

JANUARY 22, 2009 AFFIDAVIT OF JOHN ELFREY

I, John Elfrey, a competent adult duly sworn according to law, hereby depose and say on this 22nd day of January, 2009:

1. I have been an employee of the City of Philadelphia ("City") for 24 years.
2. Since August 20, 2008, I have been Director of Operations for the Mayor's Office of Transportation and Utilities for the City.
3. From January 28, 2008, until July 28, 2008, I was Acting Commissioner of Licenses and Inspections for the City.
4. From 2003 until 2008, I was employed in the Managing Director's Office for the City.
5. I have experience and knowledge of the normal interaction between the City and developers of major projects, including the process for review and approval of permits. I am familiar with the facts set forth herein and my statements are based on my personal knowledge.
6. Zoning and building permits, which can take several forms, are issued by the Department of Licenses and Inspections ("L&I"). Many of these permits, particularly various forms of building permits, require certain prerequisite approvals from other City departments before L&I may issue the permit, including the Water Department ("Water"), the Streets Department, and the Department of Public Health. In such cases, an L&I "Building Permit Checklist" form indicates the other approvals needed for the permit, and all the items on the checklist must be completed by the developer before L&I may issue the permit. A copy of such form is attached hereto as Exhibit 1.
7. While working with these various agencies, the applicant (developer) is responsible for shepherding the permit through the required reviews and approvals. When all prerequisite approvals are obtained, the developer is responsible for: (1) presenting the completed package including the "checklist" items to L&I, and (2) requesting that L&I issue the permit.
8. From early 2007 until the present, one of my administrative responsibilities was serving as a liaison to both casinos designated for Philadelphia, and acting as a major point of contact for the City among the various operating departments of the City and the representatives of the developers. Terrence McKenna, a project manager for the Keating Group, was a key representative for HSP Gaming, L.P. ("HSP").
9. At the end of 2007, late in the Administration of former Mayor John Street ("Street Administration"), HSP sought and obtained permit approvals in a highly expedited fashion. These included a Zoning and Use Registration permit and a "rough grading" permit, both issued January 4, 2008, as set forth in more detail below.
10. HSP did not file an application for a foundation permit until December 2007, one month before former Mayor Street was to leave office. Despite that time constraint, McKenna expressed a desire for the City to issue the foundation before Mayor Nutter took office.

11. The City advised HSP that it could not issue a foundation permit without numerous prerequisite approvals, including Water Department and zoning approvals. At least three separate water/sewer issues had to be addressed and approved before HSP could obtain the required Water approval, including a lengthy and complex approval from the Commonwealth of Pennsylvania, Department of Environmental Protection ("DEP"), known as an Act 537 planning module.

12. Recognizing that it could not qualify for a foundation permit before the end of the Street Administration, HSP pressed the City for a more limited building permit that could be granted immediately. Following a special meeting of City and HSP representatives, it was determined that HSP's foundation permit application could qualify for a rough grading permit, which allows for limited surface and site preparation work.

13. The City promptly issued the rough grading permit on Friday, January 4, 2008, based on the existing documents already on file with L&I as part of the foundation permit application.

14. At the same time, on January 4, 2008, L&I also approved and issued a zoning permit for HSP.

15. HSP had also submitted a new application for a rough grading permit on January 2, 2008, and its zoning permit application on January 3. Because of the rushed nature of the process in the last week of an outgoing administration, L&I had those applications before them for only one or two days before issuing the permits on January 4.

16. Shortly after taking office in early January 2008, Mayor Nutter ordered a review and status update regarding the review and permitting of both casino projects to determine compliance with the law and applicable City ordinances and procedures.

17. This process took several weeks, during which time there were no significant developments requiring direct communication with HSP.

18. As a result of that review, the City neither revoked nor took any other action regarding any permit previously issued by L&I. The City did determine that a riparian lands license approved separately by the City's Commerce Department was beyond the authority of the City and revoked it.

19. During the time the riparian license was revoked, prior to its reinstatement, the City undertook a review of HSP's Water Department requirements in the event it could not obtain a riparian license.

20. The City also determined there was no basis for dedicating personnel and devoting public resources to providing HSP a specialized and expedited review of its applications. The City therefore directed HSP to follow the normal course and required steps of review.

21. At all times since the inception of the Nutter administration to the present, the City has followed its regular policies and procedures for review and approval of HSP applications.

22. Under section A-302.2 of the City's administrative code, a building permit expires after six months if the work is not commenced, or if the work is commenced but ceases for six months. Under this section a new permit must be applied for and issued if a permit expires. As a result, developers sometimes choose not to "pick up" a permit, even after obtaining the underlying approvals, because they are not ready to begin work and do not want the clock to start running on their permit.

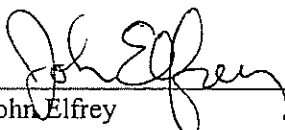
23. L&I ordinarily is not aware of approvals granted by other departments until the developer notifies L&I by providing L&I with the appropriate stamp or signature. In any case, L&I would not issue a permit on its own initiative, without the explicit request of the applicant, so as not to begin the six-month time clock.

24. HSP obtained Act 537 planning module approval in September 2008, although I was unaware of it at that time. To the best of my knowledge HSP has not returned to obtain the Water Department's signature since that time, and at no time has it presented a completed application to L&I and requested a foundation permit.

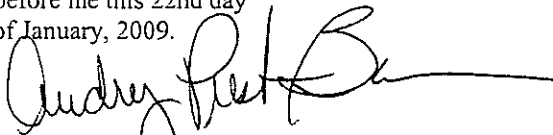
25. I was not aware – and to the best of my knowledge, no one at L&I was aware – that HSP had become eligible for the foundation permit, particularly since HSP still lacks Army Corps of Engineers approvals, until attorneys at the Law Department contacted me in January, 2009, and informed me that HSP had filed an Application for Enforcement with the Supreme Court.

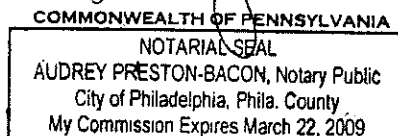
26. In November 2008, HSP sought to drive indicator (test) piles at the site to determine the distance to bedrock for eventual construction of the buildings. L&I initially believed the piles would be used in the construction, which would require a building permit. After further review and consultation with HSP, it was determined that the piles were for testing only and not part of construction. On that basis, L&I determined that no permit was required, and the work proceeded. On December 16, 2008, McKenna clarified HSP's description of the test pile work in a follow-up letter to L&I.

27. On that same date, December 16, 2008, I called McKenna to make sure HSP was not requesting the foundation permit at that time. McKenna advised me HSP was not. That conversation was memorialized in a follow-up email on that date to Terry Gillen, Senior Advisor for Economic Development with the City. A copy of said email is attached hereto as Exhibit 2.


John Elfrey
Director of Operations
Mayor's Office of Transportation and Utilities
City of Philadelphia

Sworn to and Subscribed
before me this 22nd day
of January, 2009.







CITY OF PHILADELPHIA
DEPARTMENT OF LICENSES & INSPECTIONS
 Construction Services Division - Permit Services Unit
 Municipal Services Building - Concourse Level
 1401 John F. Kennedy Boulevard
 Philadelphia, Pennsylvania 19102

**Only complete and legible
 Building Permit Applications will be accepted**

Building Permit Checklist

All relevant information is required to be submitted at the time you file your application and building plans. Failure to do so will delay the issuance of your permit.
 Visit our website at www.phila.gov/li

Ex
A-1

Plans must include the minimum requirements specified in the Department's publication, *"Requirements for Construction Documents"* (available at www.phila.gov/li).

NEW CONSTRUCTION / ADDITIONS

1. Pre-requisite approvals: (See reverse side for additional info.)
 - ☐ L & I - Zoning Unit - Approved Site plans and Zoning/Use Registration Permit.
 - ☐ Water Department (PWD) - Water availability; storm water management; sewage facilities planning (all new construction and most additions over 5,000 sq. ft.).
 - ☐ Streets Department - Curb cuts, driveways, and any encroachments on the public way.
 - ☐ Fairmount Park - street trees for residential subdivisions (3 or more)
 - ☐ Historical Commission - if applicable.
 - ☐ Art Commission - if applicable.
 - ☐ City Planning Commission - if applicable.
2. Soils Investigation Report (See L & I Code Bulletin)
3. L & I - "Structural Design Criteria" Form
4. L & I - "Special Inspections" Form
5. L & I - Energy Conservation Forms:
 - ☐ "Certificate of Design"
 - ☐ Supporting documentation verifying compliance.
6. Three sets of building plans (See reverse side for minimum requirements.)
 - ☐ Signed/sealed by a registered design professional from PA

ALTERATIONS

1. Pre-requisite approvals: (See reverse side for additional info.)
 - ☐ L & I - Zoning Unit - if applicable. Approved Site plans and Use Registration Permit.
 - ☐ Streets Department - Curb cuts, driveways, encroachments on the public way.
 - ☐ Historical Commission - if applicable.
 - ☐ Art Commission - if applicable.
 - ☐ City Planning Commission - if applicable.
 - ☐ Water Department (PWD) - changes in use of existing buildings where the area is 5,000 sq. ft. or more in Residential, Business, Assembly, Mercantile, and Education uses for sewage facilities planning.
2. "Asbestos Inspection Report" on City's Health Dept. Form;
 - Except: a.) Alterations less than \$50,000; or
 - b.) Residential properties 3 dwelling units and less; or
 - c.) Buildings built after 1980.
3. L & I - "Structural Design Criteria" Form - if applicable.
4. L & I - "Special Inspections" Form - if applicable.
5. Three sets of building plans (See reverse side for min. reqs.)
 - ☐ Signed/sealed by a registered design professional from PA, when alterations are structural, or over \$25,000 in cost.

FOUNDATION ONLY

1. Pre-requisite approvals: (See reverse side for additional info.)
 - ☐ L & I - Zoning Unit - Approved Site plans and Zoning Permit
 - ☐ Water Department (PWD) - Water availability; storm water management, sewage facilities planning
2. Soils Investigation Report (See L & I Code Bulletin)
3. Three sets of building foundation plans
 - ☐ Signed/sealed by a registered design professional from PA.
4. "Letter of Owner's Responsibility"
5. "Pile inspection" letter - if applicable.

CERTIFICATES OF OCCUPANCY ONLY (No Construction)

1. Pre-requisite approvals: (See reverse side for additional info.)
 - ☐ L & I - Zoning Unit
 - Use Registration Permit
2. Three sets of building plans (See reverse side for min. reqs.)

FIRE SUPPRESSION

1. Pre-requisite approvals: (See reverse side for additional info.)
 - ☐ Water Department - Plans stamped with flow and pressure availability.
2. Four sets of building plans - (additional set goes to PWD)
 - ☐ Signed/sealed by a registered design professional from PA.
3. Four sets of hydraulic calculations
 - ☐ Signed/sealed by a registered design professional from PA.
4. No. of new sprinkler heads listed on building permit app.
5. PWD Permit Application for Backflow Prevention Assembly Installation (CP 100/CU 100) - if applicable.
 - ☐ Backflow Prevention device is on approved PWD list
 - ☐ Signed by a certified technician.

MECHANICAL (ductwork, fuel gas, HVAC, etc.)

1. Three sets of building plans (See reverse side for min. reqs.)
 - ☐ Signed/sealed by a registered design professional from PA when alterations are structural in nature or over \$25,000 in cost.
2. Number of new registers/diffusers listed on building permit application
3. "Asbestos Inspection Report" on City's Health Dept. Form;
 - Except: a.) Alterations less than \$50,000; or
 - b.) Residential properties 3 dwelling units and less;
 - c.) Buildings built after 1980.
4. All penetrations of rated construction clearly identified.
5. Fire dampers and smoke detectors clearly identified.
6. Kitchen hoods:
 - ☐ Equipment plan provided
 - ☐ Hood and duct sizes and gages provided
 - ☐ Location of duct and fans and termination points
 - ☐ Exhaust and supply air quantities and velocities

COOKING EXTINGUISHING SYSTEMS

1. L&I - Dry and Wet Chemical Extinguishing Systems Data Sheet
 - ☐ Type and manufacturer of system listed
 - ☐ Flow points for each hazard calculated
 - ☐ Cylinder adequately sized for total flow points
 - ☐ Installation by a licensed fire suppression contractor

Please note: These are general requirements for building permits. Additional information may be required as needed.

Ex A-2

John Elfrey/MDO/Phila
12/17/2008 10:13 AM

To Andrew Ross/Law/Phila@Phila
cc Terry Gillen/Commcert/Phila@Phila
bcc
Subject Fw: Sugarhouse

----- Forwarded by John Elfrey/MDO/Phila on 12/17/2008 10:13 AM -----

John Elfrey/MDO/Phila
12/16/2008 02:39 PM

To Terry Gillen/Commcert/Phila
cc Fran Burns/L&I/Phila
Subject Fw: Sugarhouse

Terry,

See below from Fran regarding foundation work. I also called Terry McKenna to make sure they are not requesting their foundation permit, they are not. John

----- Forwarded by John Elfrey/MDO/Phila on 12/16/2008 02:37 PM -----

**CITY OF PHILADELPHIA ANNOUNCES COMMENCEMENT OF THE PLAN OF DEVELOPMENT
PROCESS FOR THE PROPOSED FOXWOODS CASINO IN THE GALLERY AT MARKET EAST**

The developers of the proposed Foxwoods Casino have initiated with the City of Philadelphia the Plan of Development process for the proposed casino in the Gallery at Market East. The Plan of Development is the documentation of the project required by the Philadelphia Code for City Planning Commission approval. An inter-agency group that includes the Planning Commission, Commerce Department, Law Department, Mayor's Office of Transportation and Utilities, and the Redevelopment Authority will participate in the review process.

The process is anticipated to take several months to complete. During that time, the City will convene public meetings so that interested community members and stakeholders can see the evolution of the plans and comment on them at various stages of development. Public meetings will include:

- Community meetings in both Chinatown and WashWest to review plans, traffic analysis and mitigation measures.
- Two Planning Commission meetings – one for information only (no action sought from Commission) and a second for consideration for approval, based on the Plan of Development requirements outlined below.
- Council hearings on any proposed legislation subsequent to Planning Commission action on the Plan of Development

Specific dates and venues for each public event are being developed and will be advertised sufficiently in advance to facilitate public participation.

The casino development team has agreed with the City to a set of rigorous requirements that will be included in the Plan of Development. These include:

- Drawings that show the proposed development in the context of the city and of Market Street, including proposed modifications both inside and outside of the existing building that is being proposed for casino use.
- Renderings that show the anticipated character of the proposed development from the major streets.
- Phasing plans that show anticipated and/or possible future developments.
- A detailed transportation management plan that includes pedestrian, vehicular and transit traffic flows.
- A parking management plan describing resources for patrons as well as employees.

- Anticipated landscape improvements, streetscape improvements, building signage and graphics, incorporation of public art and green building strategies.
- Project schedule that shows anticipated construction durations and commencement of operations.

As part of the development process and regulatory review, issues of security, public safety and gambling addiction will be evaluated. The Police Department and the Department of Behavioral Health will be available at public meetings to listen to community concerns and discuss proposed mitigation measures.

For more information on the Plan of Development process, please contact Alan Greenberger, Executive Director of the Philadelphia City Planning Commission, at 215 683 4600 or at alan.greenberger@phila.gov.

Ex. C

KEATING

16 December 2008

Via Email: michael.fink@phila.gov

Mr. Michael E. Fink
Director – Construction Services
Department of Licenses & Inspections
City of Philadelphia
Municipal Services Building
1401 J.F.K. Boulevard, 11th Floor
Philadelphia, PA 19102-1687

**Re: Indicator Pile Program
SugarHouse Casino
941 through 1025 N. Delaware Avenue**

Dear Mr. Fink:

Pursuant to our telephone conversation earlier this day, the purpose of this letter is to clarify the purpose of the indicator piles installed at the subject site during the period of 12 through 18 November 2008.

As described in the attached report prepared by McClymont & Rak Geotechnical Engineers, LLC ("McClymont & Rak"), a total of 15 indicator piles were successfully installed at the site as part of an extension of the geotechnical investigation completed in January 2007 (not January 2008 as stated in the letter, that date is a typo). The piles consisted of closed-end, 14-inch diameter steel pipe piles with a 0.5-inch wall thickness. The purpose of the indicator pile program was to:

- 1) Confirm the depth of bedrock throughout the property, as initially indicated by the January 2007 geotechnical investigation.
- 2) Confirm the designed pile capacity (compressive load) of 400 tons.
- 3) Confirm the size of the pile hammer for the eventual installation of production piles.

KEATING CONSULTING, LLC
The Phoenix – Suite 300
1600 Arch Street
Philadelphia, Pennsylvania 19103-2028
610-668-4100 Fax: 610-660-4950

KEATING

Mr. Michael E. Fink
Director - Construction Services
Department of Licenses & Inspections
City of Philadelphia
16 December 2008
Page 2 of 2

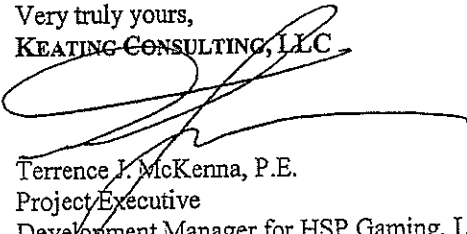
The indicator pile program was an extension of the geotechnical investigation, for which the City of Philadelphia Department of Licenses & Inspections ("L&I") does not require a building permit. Each pile was filled with concrete to prevent the accumulation of water in the pile due to the closed end at the bottom.

It is noted that while nine of the 15 indicator piles were subjected to pile dynamic analysis ("PDA") testing to confirm the compressive load (commonly referred to as dynamic load test piles), static load test piles will also be installed at the site prior to the start of the production piles.

Looking forward to the ultimate installation of production piles to support the future buildings, in the event that one or more of the 15 indicator piles fall within the location of a planned pile cap, then that pile will most likely be used as a production pile. Otherwise, any indicator piles which are not located within a planned pile cap will most likely be cut and abandoned at the lowest level of any future excavation. As L&I can clearly assess by comparing the attached McClymont & Rak report to the pending foundation permit for the project and the January 2007 geotechnical investigation report, the indicator piles were installed pursuant to the geotechnical protocol established by McClymont & Rak for the project.

I trust that this letter will satisfy L&I that no building permit was required for the installation of the indicator piles; however, if L&I has any further questions or concerns, please do not hesitate to contact me.

Very truly yours,
KEATING CONSULTING, LLC



Terrence J. McKenna, P.E.
Project Executive
Development Manager for HSP Gaming, L.P.

Attachment: McClymont & Rak Report, dated 20 November 2008

Cc: John Elfrey, City Managing Director's Office (via email)
HSP Gaming, L.P.
Project File

CERTIFICATE OF SERVICE

I, Andrew Ross, hereby certify that I caused to be served, in the manner indicated below, a true and correct copy of the foregoing **Response to Application for Enforcement** to the following persons in the manner indicated below:

By hand:

Stephen A. Cozen, Esquire
F. Warren Jacoby, Esquire
Jennifer M. McHugh, Esquire
Cozen O'Connor
1900 Market Street
Philadelphia, PA 19103
Counsel for HSP Gaming, L.P.

By hand:

Richard A. Sprague, Esquire
Thomas A. Sprague, Esquire
Charles J. Hardy, Esquire
Sprague & Sprague
135 S. 19th Street, Suite 400
The Wellington Building
Philadelphia, PA 19103
Counsel for HSP Gaming, L.P.

By first class mail:

William H. Lamb, Esquire
Scot R. Withers, Esquire
Lamb McErlane, P.C.
24 East Market Street
P.O. Box 565
West Chester, PA 19381-0565
Counsel for HSP Gaming, L.P.

By hand:

James W. Christie, Esquire
Brian C. Vance, Esquire
Matthew H. Shusterman, Esquire
Christie, Pabarue, Mortensen and Young, P.C.
1880 John F. Kennedy Boulevard, 10th Floor
Philadelphia, PA 19103
Counsel for City Council of the City of Philadelphia

Date: January 22, 2009



Andrew S. Ross
City of Philadelphia Law Department
1515 Arch Street
Philadelphia, PA 19102-1595