

COMMONWEALTH OF PENNSYLVANIA



SUPREME COURT

EASTERN DISTRICT

468 CITY HALL

PHILADELPHIA, PENNSYLVANIA 19107

JOHN W. PERSON, ESO.
DEPUTY PROTHONOTARY

PHONE: (215) 560-6370

Fax Coversheet

TO: Sherman, R., Donaghue, F., Waksman, J.,
Fickler, A., Lbyd, L., Hoyle, L., Mitts, M.,
Diaz, R., Limberg, R., Fikry, E., Rotwitt, J.,
Schrer, S., Shapiro, S., McHugh, J., Lamb, W.,
Withers, S., Cozen, S., Sprague, R., Jacoby, F.,
Sprague, T., Fitzgerald, S. + Corbett, T.

FROM: Reg, WA

RE: No. _____ E.D. Allocatur Docket _____

No. 55+56 E.D. Miscellaneous Docket 2007

No. _____ E.D. Appeal Docket _____

No. _____ Capital Appeal Docket

Notes/Comments:

- order entered today (4/13/07)
- briefs due on 4/27/07 @ 2pm

TOTAL NUMBER OF PAGES (Excluding Cover Sheet): 10

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Supreme Court of Pennsylvania

Eastern District

John W. Person
Deputy Prothonotary
Patricia A. Johnson
Chief Clerk

468 City Hall
Philadelphia, PA 19107
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April 13, 2007

Lawrence T. Hoyle, Jr., Esq.
Hoyle, Fickler Herschel & Mathes, L.L.P.
One S Broad St Suite 1500
Philadelphia, PA 19107-3418

RE: PA Gaming Control Bd, Pet v. City Council of Phila
No. 55 EM 2007

Dear Attorney Hoyle:

Enclosed please find a certified copy of an order dated April 13, 2007 entered in the above-captioned matter.

Note: Both briefs are due concurrently in the filing office on or before April 27, 2007 by 2:00 p.m.

Very truly yours,

Office of the Prothonotary

RMR

cc: Stephen A. Cozen, Esq.
Eric G. Fikry, Esq.
Stephen Edward Fitzgerald, Esq.
Charles J. Hardy, Esq.
F. Warren Jacoby, Esq.
William H. Lamb, Esq.
Richard P. Limburg, Esq.
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Romulo Liborio Diaz, Jr., Esq.
Maurice Robert Mitts, Esq.

**Supreme Court of Pennsylvania**

Eastern District

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April 13, 2007

Lawrence T. Hoyle, Jr., Esq.
Hoyle, Fickler Herschel & Mathes, L.L.P.
One S Broad St Suite 1500
Philadelphia, PA 19107-3418

**RE: PA Gaming Control Bd, Pet v. City Council of Phila
No. 56 EM 2007**

Dear Attorney Hoyle:

Enclosed please find a certified copy of an order dated April 13, 2007 entered in the above-captioned matter.

Note: Both briefs are due concurrently in the filing office on or before April 27, 2007 by 2:00 p.m.

Very truly yours,

Office of the Prothonotary

RMR

cc: Howard L. Meyers, Esq.
Marc J. Sonnenfeld, Esq.
Brian L. Watson, Esq.
Stephen Edward Fitzgerald, Esq.
Michael Kenneth Coran, Esq.
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IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

THE PENNSYLVANIA GAMING CONTROL BOARD, : Nos. 55 and 56 EM 2007

Petitioner : Pennsylvania Gaming Control Board's Emergency Petition for Review

v. : Concerning the Ordinance Passed by City Council for the City of Philadelphia on March 29, 2007

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, : Pennsylvania Gaming Control Board's Emergency Application for Emergency Special Relief Pursuant to Pa.R.A.P. 1532(a)

Respondents : Pennsylvania Gaming Control Board's Emergency Application for Leave to File Original Process

Respondents : Pennsylvania Gaming Control Board's Emergency Application for a Preliminary Injunction Pursuant to Pa.R.Civ.P. 1531(a)

ORDER

PER CURIAM

AND NOW, this 13th day of April, 2007, upon consideration of the Pennsylvania Gaming Control Board's Emergency Petition for Review Concerning the Ordinance Passed by City Council for the City of Philadelphia on March 29, 2007, the Emergency Application for Emergency Special Relief Pursuant to Pa.R.A.P. 1532(a), the Emergency Application

for Leave to File Original Process, and the Emergency Application for a Preliminary Injunction Pursuant to Pa.R.Civ.P. 1531(a) it is hereby ordered that

- (1) the Gaming Control Board's Application for Leave to File Original Process is granted;
- (2) the parties are directed to submit the matter on briefs;
- (3) the Prothonotary's Office is directed to establish an expedited briefing schedule; and
- (4) the Gaming Control Board's request for a preliminary injunction enjoining Respondents from placing the proposed question on the ballot in the May 15, 2007 primary is granted.

Mr. Justice Saylor files a Dissenting Statement which Mr. Justice Castille joins.

TRUE COPY FROM RECORDS

Attest: APR 13 2007

Patricia Johnson, Chief Clerk
Supreme Court of Pennsylvania
Eastern District

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

CAPPY, C.J., CASTILLE, SAYLOR, EAKIN, BAER, BALDWIN, FITZGERALD, JJ.

PENNSLVANIA GAMING CONTROL : No. 55 EM 2007
BOARD

Petitioner

v.

THE 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

PENNSLVANIA GAMING CONTROL : No. 56 EM 2007
BOARD

Petitioner

v.

THE 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

DISSENTING STATEMENT

MR. JUSTICE SAYLOR

FILED: April 13, 2007

The Pennsylvania Gaming Control Board seeks preliminary and permanent relief, effectively to negate an ordinance enacted by the Philadelphia City Council placing a referendum question on the local ballot in the May 15, 2007, primary election.

The Board asks this Court to exercise its exclusive, original jurisdiction over the matter under 4 Pa.C.S. §1904. Section 1904, however, pertains to challenges concerning the constitutionality of the Gaming Control Act. See 4 Pa.C.S. §1904 ("The Pennsylvania Supreme Court shall have exclusive jurisdiction to hear any challenge to or render a declaratory judgment concerning the constitutionality of this part."). The Board is not seeking here to raise a challenge to its own enabling legislation; rather, it is challenging the validity of a Philadelphia ordinance. Therefore, the effort to invoke this Court's exclusive jurisdiction under Section 1904 is not well taken.

As of last year, this Court has also been charged with "exclusive appellate jurisdiction to consider appeals of a final order, determination or decision of a political subdivision or local instrumentality involving zoning . . . of a licensed [gaming] facility." 4 Pa.C.S. §1506. On its plain terms, however, the statute merely shifts jurisdiction over

appeals, i.e., matters that otherwise would have been within the appellate jurisdiction of the intermediate appellate or common pleas courts, to this Court. Its provisions do not purport to fundamentally alter the character of appellate jurisdiction.

In the present case, the challenged government action is a legislative act, namely, the promulgation of a City ordinance, which is simply not a matter that implicates any court's appellate jurisdiction. Rather, challenges to legislative decisions of this sort, where cognizable, proceed in the judicial system by way of original jurisdiction actions, such as a declaratory judgment proceeding. See, e.g., Devlin v. City of Philadelphia, 862 A.2d 1234 (Pa. 2004).¹

I recognize that, given the substantial public importance of the Board's challenge, the present circumstances may implicate an exercise of this Court's King's Bench powers. See generally In re Avellino, 690 A.2d 1138, 1140-41 (Pa. 1997). However, the Board has not framed its request in such terms, and to the extent that this Court will invoke this extraordinary form of jurisdiction sua sponte, I believe that this should be accomplished as a matter of record prior to the award of a preliminary injunction that will likely have the effect of a final one with respect to the challenged ordinance, since the ordinance is couched solely in terms of the May 2007 election.

¹ I recognize that, had the General Assembly foreseen the present circumstances, it might very well have drafted Section 1506 more broadly. Nevertheless, our approach to statutory construction is to apply the plain terms of an enactment where they are clear, see, e.g., Commonwealth v. McClintic, 589 Pa. 465, 472-73, 909 A.2d 1241, 1245 (Pa. 2006), as I believe they are here. Moreover, investing a State Supreme Court, which generally functions in an appellate capacity, with exclusive responsibility for original jurisdiction matters is a reordering of great consequence to both the Court (in terms of resources and procedures) and litigants, which I believe should occur only upon very clear and deliberate specification.

In summary, I do not believe that the Court should enter a preliminary injunction on the existing record in this case.

Mr. Justice Castille joins this dissenting statement.