IN THE SUPREME COURT OF PENNSYLVANIA

No. 88 EM 2007

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

Petitioner,

v.

CITY OF PHILADELPHIA, CITY COUNCIL FOR THE CITY OF PHILADELPHIA, AND DEPARTMENT OF LICENSES AND INSPECTIONS OF CITY OF PHILADELPHIA,

Respondents.

RESPONSE OF RESPONDENT CITY COUNCIL OF THE CITY OF PHILADELPHIA IN OPPOSITION TO APPLICATION FOR REARGUMENT OF PETITIONER PHILADELPHIA ENTERTAINMENT AND DEVELOPMENT PARTNERS, L.P., d/b/a FOXWOODS CASINO PHILADELPHIA

On Foxwoods Casino's Petition for Review and Application for Summary Relief

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A Professional Corporation
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Dated: December 12, 2007

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PRELIMINARY STATEMENT

Philadelphia Entertainment and Development Partners, L.P. ("PEDP") has filed this Application for Reargument, not because it disagrees with any actual holdings of this Court, but solely because it did not get relief that it did not seek against City Council for claims that it did not assert.[1] The City Council of the City of Philadelphia ("City Council") hereby opposes PEDP's Application, which is nothing more than an attempt to re-boot its petition with entirely new arguments now directed against a different party, City Council, that were not before the Court in PEDP's Emergency Petition to this Court, but litigated in *HSP Gaming, L.P. v. City Council, et al.*, No. 179 EM 2007 (Pa. Dec. 3, 2007), a separate case with a separate record and, as already noted by this Court, a separate set of issues.[2] PEDP seeks to introduce an argument and facts that were never alleged in its original petition. Specifically, PEDP never alleged that City Council intentionally interfered with PEDP's efforts to secure the necessary permits or zoning variances necessary for the construction of its gaming facility. If PEDP in fact ever made such allegations, City Council would, if given the opportunity, successfully refute such allegations. Finally, PEDP seeks relief that it is not entitled to under the express provisions of the Gaming Act. This Application raises no reason, let alone a compelling one, that justifies reargument pursuant to Rule 2543 of the Pennsylvania Rules of Appellate Procedure.

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1 PEDP would have this Court believe that it is not seeking Reargument of the Court's decision to transfer Count II to the Court Common Pleas, even while admitting that PEDP's Application, if successful, would lead to that result. (*See* Reargument Application of PEDP at 1, *PEDP v. City of Philadelphia, et al.*, No. 88 EM 2007 (Pa. Dec. 4, 2007)).

2 PEDP distorts the Court's holding and claims that the Court found that "it did not have jurisdiction to determine Foxwoods' claim that it is entitled to Commercial Entertainment District ("CED")" in an effort to seek common ground with the *HSP Gaming* decision. In reality, this Court did not reach the holding that PEDP claims is the basis for its Application. (*See* Reargument Application of PEDP at 1).

STATEMENT OF REASONS PEDP'S APPLICATION
<u>FOR REARGUMENT SHOULD BE DENIED</u>

Reargument before an appellate court is not a matter of right, but of sound judicial discretion, and reargument will be allowed only where there are compelling reasons therefore. Pa. R.A.P. Rule 2543.[3] In its Application for reargument, PEDP makes three arguments which do not have any basis in fact or law: First, PEDP contends that the Court overlooked or misapprehended a fact of record and misapprehended the law, overlooking this Court's commentary on the differences in the arguments raised in *PEDP* and *HSP Gaming*. Second, PEDP asks the Court to take judicial notice of a record developed in a separate proceeding on separate issues as the basis for granting its Application. Finally, PEDP suggests that reargument is appropriate because the Court's decision in this case cannot be reconciled with *HSP Gaming* despite this Court's statements explaining the reasons why it reached a different result in *HSP Gaming*.

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3 The Official Notes to Pa. R.A.P. Rule 2543 illustrate the type of reasons which will be considered in determining whether a motion for Reargument should be granted, none of which are applicable in this case:

> (1) Where the decision is by a panel of the court and it appears that the decision may be inconsistent with a decision of a different panel of the same court on the same subject.
>
> (2) Where the court has overlooked or misapprehended a fact of record material to the outcome of the case.
>
> (3) Where the court has overlooked or misapprehended (as by misquotation of text or misstatement of result) a controlling or directly relevant authority.
>
> (4) Where a controlling or directly relevant authority relied upon by the court has been expressly reversed, modified, overruled or otherwise materially affected during the pendency of the matter sub judice, and no notice thereof was given to the court pursuant to Rule 2501 (b) (change in status of authorities).

A. **This Court Has Not Overlooked Any Facts of Record or <u>Relevant Authority Material to Its Determination in *PEDP*</u>.**

One of the rare instances in which the Court will grant reargument is when the Court has overlooked or misapprehended a fact of record. Pa. R.A.P. 2543. In an attempt to revamp an argument modeled after one made by another entity in an unrelated action that PEDP presumably believes will have more traction than the ones that PEDP presented to the Court in its own Petition, PEDP now claims that the Court "overlooked facts of record that are material to its determination regarding its appellate jurisdiction pursuant to §1506 of the Gaming Act regarding City Council's refusal to act on CED zoning designation, plan of development approval and ancillary ordinances for the Foxwoods development." (Reargument Application of PEDP at 3).

The simple fact is that the Court did not "overlook" any pertinent facts or even a proposition of law. For the Court to "overlook" something would require a showing that the Court failed to consider some finding of fact or proposition of law relevant to the disposition of an issue actually raised by the parties. *See, e.g. Commonwealth v. Cheeks*, 239 A.2d 793, 796 (Pa. 1968) (emphasis in original) (interpretation of Supreme Court Rule 71). Reargument should not be granted simply because one of the parties "overlooked" a relevant issue. *Id.* This Court fully reviewed and considered all facts of record as they applied to the jurisdiction argument *actually* raised by PEDP in its Petition[4]. As such, it is clear that the facts, which PEDP, in retrospect, now deems important to its brand new, post-*HSP Gaming* arguments, were neither

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4 In deciding Count II of the Petition, the Court recited the following facts: "In Count II, PEDP alleges that its application for a C-3 Permit and its other submissions comply fully with all of the Code's requirements, that issuance of the C-3 permit is a ministerial act on the part of the Department, and that PEDP has a clear right to CED designation of the Property by virtue of the Board's decision to locate a licensed facility upon it. PEDP further alleges that the City has no valid reason for not having issued it the permits PEDP needs, that the refusal to issue the permits has prevented it from moving forward with development of the Property as a gaming facility, and that it has no adequate remedy at law." *PEDP v. City of Philadelphia, et al.*, No. 88 EM 2007, slip op. at 11-12 (Pa. Nov. 20, 2007).

overlooked in the consideration of the Petition, nor in the opinion reached thereto. Instead, the decision regarding the Petition was correct on the facts present for consideration *in the context of the issues argued. See, e.g., Osterheldt v. Philadelphia*, 46 A. 114 (Pa. 1900) (emphasis added).

PEDP is in the unenviable position of being in the losing posture on a Petition that it filed, and is dissatisfied with that result. Rule 2543, however, does not provide a basis for reargument "where a party simply disagrees with the outcome, and it most certainly does not do so where the applicant wishes to make arguments not developed in the appeal process ...." *Sackett v. Nationwide Mutual Insurance Company*, 2007 Pa. LEXIS 2171, *5 (Pa. 2007) (Baldwin, M., dissenting).

PEDP seeks to circumvent the basic tenet that reargument must be had on the same record on which the motion was decided and, thus, uses the Application as an additional step in the appeal process, rather than an exceptional tool by which to bring to the Court's attention law or facts that were overlooked. *See Sackett*, *supra*, at 9. The Application is a blatant attempt to put before the Court a matter that was not originally before it in the guise of a request for reargument.

In the December 3, 2007 *HSP Gaming* opinion, this Court highlighted in footnote 7 the fact that PEDP did not raise the same appellate jurisdiction argument that HSP Gaming raised in its Petition. Specifically, the Court stated:

> On November 20, 2007, an opinion was filed by this Court in *Philadelphia Entertainment and Development Partners L.P. v. City of Philadelphia*, 88 EM 2007, (J-100-2007). The decision is not applicable to HSP's Petition for Review as the issues presented to the Court in *Philadelphia Entertainment* did not involve the refusal to act by City Council of an approved Plan of Development under Chapter 14-400 of the Philadelphia Code.
>
> * * *
>
> In Count I of the Petition, PEDP challenged the constitutionality of an ordinance changing the zoning designation of its property from commercial to residential.

In Count II, PEDP sought a writ of mandamus to compel the City to issue a C-3 zoning and use registration permit or, alternatively, a CED zoning an registration use permit. We concluded that...***the allegations contained in the second count of PEDP's petition did not place a final order or determination within the meaning of §1506 before this Court.***

* * *

Unlike the instant case filed by HSP, PEDP did not allege that City Council had refused to act after the Planning Commission had approved a Plan of Development under Chapter 14-400 of the Philadelphia Code.[5] ***As there was no allegation in PEDP's petition of deliberate inaction by City Council following the submission of a plan of development that was approved by the Planning Commission under Chapter 14-400, the issues now presented by HSP were not addressed in Philadelphia Entertainment.***

HSP Gaming, L.P. v. City Council for the City of Philadelphia, et al., No. 179 EM 2007, slip. op. at 7-8, n.7 (Pa. Dec. 3, 2007) (emphasis added).

PEDP even admits in its own Application that it did not make the argument in its Petition that it now wishes to assert:

While the Court was correct that Foxwoods did not assert a refusal to act by City Council after Planning Commission approval of a plan of development in the petition for review, which was filed prior to Planning Commission hearings and approval, Foxwoods did assert in its petition that, based on City Council's action, public statements and refusal to act, to that point (that is of June 1, 2007), further efforts to obtain appropriate City Council action would be futile.

Reargument Application of PEDP at 7, *PEDP v. City of Philadelphia, et al.*, No. 88 EM 2007 (Pa. Dec. 4, 2007) (emphasis added).

5 PEDP claims that the Court "overlooked" that PEDP is similarly situated as is HSP because its CED application was approved, just as HSP's CED application was approved when, in fact, the Court acknowledged that it was aware of this specific development in its opinion: "(o)n August 21, 2007, the Planning Commission approved the [PEDP] CED Plan. These particular developments have no effect on our disposition of the present Petition." Reargument Application of PEDP at 5, n. 2, *PEDP v. City of Philadelphia, et al.*, No. 88 EM 2007 (Pa. Dec. 4, 2007).

PEDP has not presented a basis for granting reargument within the scope of Rule 2543 of the Pennsylvania Rules of Appellate Procedure. PEDP has shown only that it is dissatisfied with the outcome reached by this Court because of its own tactical decisions in its original Petition. Further, PEDP has misused the application for reargument process by attempting to assert a new argument not previously raised in its Petition. For these reasons, this Court should not grant reargument.

B. PEDP's Request for Extrajudicial Notice of Matters Outside the Record is Improper.

Not only does PEDP want the Court to allow PEDP to argue a wholly new argument that it missed in its Petition, it also suggests that the Court could take judicial notice of matters outside of the record to support that new argument. (*See* Reargument Application of PEDP at 6, *PEDP v. City of Philadelphia, et al.*, No. 88 EM 2007 (Pa. Dec. 4, 2007)).

By asking the Court to read facts into the record and allow PEDP to make a new argument, PEDP disregards the paramount consideration of fairness in our system of jurisprudence. The danger in the practice of deciding cases on issues that a party chose not to present to the Court (particularly with "facts" not part of the record) is that counsel and the Court have not been alerted to the issue and so cannot establish an adequate record upon which to decide the unanticipated issue. *See Phillips Home Furnishings, Inc. v. Continental Bank*, 354 A.2d 542, 544 (Pa. 1976). It is unfair both to the party with the burden and to the responding side to allow the outcome of a lawsuit to depend upon the resolution of an issue that was beyond their purview of the area of controversy. *Id.*

PEDP originally failed to make the argument that it now believes, in light of the *HSP Gaming* decision, would have been successful in persuading this Court to grant summary relief. Particularly, the sole basis asserted by PEDP for invoking the Court's jurisdiction pursuant to

§1506 of the Gaming Act was L & I's alleged failure to issue a zoning permit. That was the argument that the parties had the opportunity to analyze and brief. PEDP now asks the Court for permission to reconstruct its facts and claims so they are identical to those made by HSP, when they are not, and then allow PEDP to make arguments it chose not to make. In short, PEDP wants to deprive City Council of the opportunity to respond to this new argument, based upon facts that are not part of the record.

C. There is No Compelling Reason for this Court to Grant <u>Reargument for the Sake of Reconciling Dissimilar Arguments</u>.

PEDP argues that, for the sake of "consistency," the Court should grant reargument and then grant PEDP relief similar to that granted to HSP Gaming. (*See* Reargument Application of PEDP at 4, *PEDP v. City of Philadelphia, et al.*, No. 88 EM 2007 (Pa. Dec. 4, 2007)). The reality is that PEDP did not seek this Court's intervention on the basis of City Council's alleged refusal to act on an approved Plan of Development under Chapter 14-400 of the Philadelphia Code. In reaching its decision on the issue, the Court specifically stated that PEDP was mistaken regarding the scope of the Court's jurisdictional powers as to L&I's alleged failure to issue a zoning permit. The Court went on to further state:

> The Jurisdiction §1506 vests in this Court is appellate, not original. Moreover, §1506 creates an appeal that may be taken from certain local actions that constitute "a final order, or determination or decision of a political subdivision" regarding certain aspects of licenses facilities.
>
> The allegations in Count II do not place "a final order, or determination or decision of a political subdivision" involving a licensed facility within the meaning of §1506 before us. Rather Count II is a traditional mandamus action.

HSP Gaming, L.P. v. City Council for the City of Philadelphia, et al., No. 179 EM 2007, slip. op. at 12 (Pa. Dec. 3, 2007).

In *HSP Gaming*, when the argument was made that City Council effectively reached a final determination by not acting, the Court applied the same analysis it articulated in its opinion on the Petition regarding §1506 and found that jurisdiction existed.[6] Accordingly, it is not that the Court's decisions are inconsistent, but rather that the arguments made by PEDP and HSP Gaming in their separate cases are not the same.

D. PEDP is not Entitled to the Relief it Demands.

In its Application for reargument, PEDP is seeking relief to which it is not entitled as a matter of right.

PEDP seeks a ruling from the Court that "all revisions, relocations, strikes and vacations of easements and public rights of way identified in the plan of development as approved by the Planning Commission are authorized" and a declaration that its plan of development is deemed approved. PEDP further seeks an order compelling the City to take all actions necessary to implement the requested relief.

Part of the relief requested would require the conveyance by City Council to PEDP of certain property interests owned and controlled by the City. For example, PEDP demands that the City "revise the lines and grades on a portion of City Plan No. 12-S by striking from the City Plan and abandoning a certain right of way for water main purposes within the lines of former Dickinson Street from Christopher Columbus Boulevard to the Pierhead Line of the Delaware River and by widening a certain right of way for drainage purposes, water main purposes, and gas main purposes within the lines of former Reed Street from Christopher Columbus Boulevard

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6 Although we acknowledge that there is a consistency in the Court's reasoning regarding its analysis of the Court's appellate jurisdiction pursuant to §1506 of the Gaming Act, specifically that it is invoked upon a "final determination", City Council does not concede that the decision reached in *HSP Gaming* was the proper disposition of the matter.

to the Pierhead Line of the Delaware River, under certain terms and conditions." *See* May 30, 2007 letter from Clarena I.W. Tolson, Streets Commissioner, to the Honorable John F. Street (attached at Exhibit "A" hereto).

Although PEDP has successfully argued that siting casinos is a power exclusively reserved to the Gaming Board, and although PEDP relies on certain provisions of the Gaming Act as the basis for its entitlement to relief, PEDP is strangely silent on one unambiguous section of the Gaming Act which expressly states that it is not entitled to the relief it demands.

Section 1505 of the Gaming Act states:

> No eminent domain authority
>
> Neither the Commonwealth nor any political subdivision thereof shall have the right to acquire, with or without compensation, through the power of eminent domain any property, easement or land use right for the siting or construction of a facility for the operation of slot machines by a slot machine licensee.

4 Pa. Cons. Stat. §1505 (2004)

PEDP's plan of development – and the ordinance required to facilitate PEDP's implementation of that plan of development – requires the City to abandon its right of way for water main purposes, which is a conveyance of real property that the City can authorize only by an Ordinance of City Council. §8-205 of the Home Rule Charter, 351 Pa. Code §8-205. PEDP's demanded relief is expressly ***not*** authorized under the Gaming Act.[7] PEDP cannot succeed in its attempt to have this Court grant it what the Gaming Board is prohibited from granting PEDP.

In passing the Gaming Act, the General Assembly may have granted the Gaming Board the authority to select the locations of casinos, but the General Assembly flatly ***rejected*** granting

the Gaming Board ***any*** power of eminent domain for the ***siting or construction*** of a gaming facility. *See* 4 Pa. Cons. Stat. §1505 (2004).

In discussing the General Assembly's intent to vest in the Gaming Board the authority to locate casinos in *Pennsylvania Gaming Control Bd. v. City Council of Philadelphia*, 928 A.2d 1255, 1267 (Pa. 2007), this Court analyzed Sections 1304 and 1307 of the Gaming Act and concluded "that the words of these statutory provisions are clear and explicit" and revealed the General Assembly's intent. *Id.* at 267.

The words of Section 1505 are no less clear and explicit: the General Assembly determined that the Commonwealth and Gaming Board had ***no*** power to take "***any*** property" – including any "easement or land use right" in connection with "the siting or construction of a [gaming] facility." 4 Pa. Cons. Stat. §1505 (2004) (emphasis added).

PEDP cannot be permitted to get through this Court what the Gaming Act expressly prohibits. What PEDP can get from the Gaming Board is the right to construct a casino on land that PEDP owns – not a right to design or construct its facility in such a manner as to require the conveyance of City property interests without City Council's express approval as expressed through a formal ordinance. This Court does not have the authority to exercise what would effectively be the equivalent of the power of eminent domain. That power is vested solely in the legislature. Accordingly, PEDP's Application should be denied.

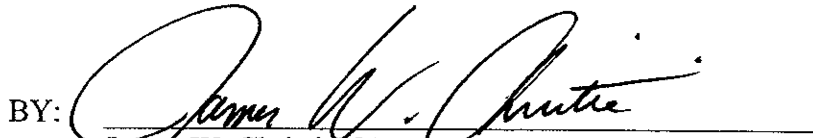
RELIEF REQUESTED

As this Application is nothing more than PEDP's attempt, in the guise of a request for reargument, to introduce and litigate new arguments against a different party based on "facts" that are not part of the record in this case, and presents no basis under Rule 2543 of the Rules of

Appellate Procedure for allowing reargument, the Application is without merit and reargument should be denied.

Respectfully submitted,

CHRISTIE, PABARUE, MORTENSEN AND YOUNG,
A Professional Corporation

BY: 

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215-587-1600

Attorneys for Respondent
City Council for the City of Philadelphia

Dated: December 12, 2007

CERTIFICATE OF SERVICE

I, BRIAN C. VANCE, hereby certify that I am this 12th day of December, 2007, serving the foregoing Response of Respondent City Council for the City of Philadelphia in Opposition to Application for Re-Argument of Petitioner Philadelphia Entertainment and Development Partners, L.P., d/b/a Foxwoods Casino Philadelphia upon the persons and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121:

Service By Hand Delivery and First Class Mail addressed as follows:

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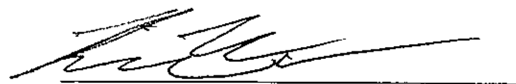

Brian C. Vance
Attorney I.D. No. 67849

Date: December 12, 2007

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Exhibit A

CITY OF PHILADELPHIA

STREETS DEPARTMENT
7th Floor - Municipal Services Building
1401 JFK Boulevard
Philadelphia, Pennsylvania 19102-1676

CLARENA I. W. TOLSON
Commissioner

May 30, 2007

The Honorable John F. Street
Mayor of Philadelphia
Room 215, City Hall
Philadelphia, PA 19107

Dear Mayor Street:

I am submitting for your consideration a proposed ordinance entitled, "AN ORDINANCE Authorizing and directing the revision of lines and grades on a portion of City Plan No. 12-S by striking from the City Plan and abandoning a certain right of way for water main purposes within the lines of former Dickinson Street from Christopher Columbus Boulevard to the Pierhead Line of the Delaware River and by widening a certain right of way for drainage purposes, water main purposes, and gas main purposes within the lines of former Reed Street from Christopher Columbus Boulevard to the Pierhead Line of the Delaware River, under certain terms and conditions."

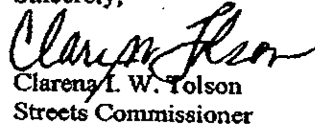
This is not an Administrative Ordinance, but an ordinance requested by Obermayer Rebmann Maxwell & Hippel LLP, 1617 John F. Kennedy Boulevard - 19th floor, Philadelphia, PA 19103-1895.

The purpose of this ordinance is to strike from the City Plan and abandon a certain right of way for water main purposes within the lines of former Dickinson Street and to widen a certain right of way for drainage purposes, water main purposes, and gas main purposes within the lines of former Reed Street to facilitate development of the Foxwood Casino site.

The ordinance format is approved as indicated in the attached letter from Assistant City Solicitor Evan Meyer.

I, therefore, respectfully request your favorable consideration of the ordinance and its transmittal to City Council for introduction at its next meeting.

Sincerely,



Clarena I. W. Tolson
Streets Commissioner

CIWT/les

SIGNED DATE: 5/30/07

Pedro A. Ramos
Managing Director