

IN THE SUPREME COURT OF PENNSYLVANIA

No. 179 EM 2007

HSP GAMING, L.P.,

Petitioner,

v.

CITY COUNCIL FOR THE CITY OF PHILADELPHIA, CITY OF PHILADELPHIA,
AND THE CITY PLANNING COMMISSION FOR THE CITY OF PHILADELPHIA,

Respondents.

APPLICATION FOR REARGUMENT OF RESPONDENT CITY COUNCIL FOR THE
CITY OF PHILADELPHIA ON PETITIONER HSP GAMING, L.P.'S PETITION FOR
REVIEW AND APPLICATION FOR SUMMARY RELIEF

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Dated: December 17, 2007

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ORDER IN QUESTION

The order in question was entered by this Court on December 3, 2007. A copy of the opinion embodying the Order, together with the dissenting statement of Justice Saylor, are attached to this application at Exhibit 1. The portion of the Order as to which Respondent City Council for the City of Philadelphia ("City Council") seeks reargument is the Court's decision that (1) Petitioner HSP Gaming, L.P.'s ("HSP") Plan of Development is approved; and (2) all revisions, relocations, strikes and vacations of easements and public rights of way identified in the Plan of Development are authorized. City Council further seeks to reargue that portion of the Order which held that the relief requested by HSP should be granted without the need to appoint a Special Master or develop a full factual record.

POINTS OF LAW AND FACT OVERLOOKED OR MISAPPREHENDED

On December 3, 2007, the Court issued its decision, granting HSP's emergency petition for review and holding that City Council's alleged failure to timely act on HSP's Plan of Development (the "Plan") and the ordinances necessary to effectuate it constituted a final decision appealable to this Court pursuant to §1506 of the Pennsylvania Race Horse Development and Gaming Act, 4 Pa. C.S. §1101, *et seq.* (the "Gaming Act"). The Court granted all relief requested by HSP solely based on City Council's alleged inaction in giving legislative consideration to the Plan, an ordinance rezoning the HSP site, and an ordinance which, among other things, strikes and cedes a part of a City street, easements and rights of way.

The Court overlooked and/or misapprehended the fact that the relief sought by (and granted to) HSP includes the conveyance of City-owned property. For that reason, the Court misapprehended the law; HSP is not entitled to the breadth of the relief it requested because the Gaming Act does not confer on HSP a right to City-owned property. The decision to grant HSP

such sweeping relief required this Court to exercise a power of judicial condemnation – a power the Court does not possess.

In addition, Section 1505 of the Gaming Act expressly prohibits the Gaming Board from exercising the power of eminent domain.¹ HSP's Plan of Development and the proposed implementing ordinance requires the taking of property interests held by the City of Philadelphia. HSP's grant of a license from the Gaming Board is a grant to construct and operate a casino on property owned solely by HSP – not on property owned by the City or anyone else. Thus, the Court has granted HSP property rights in contravention of the express provisions of the Gaming Act. Further, the Court has ordered approved a Plan of Development that both City Council and the City are prohibited from approving as that Plan necessarily impinges on Commonwealth-owned riparian rights.

Accordingly, the Court has misapprehended both fact and law in its conclusion that City Council has improperly tried to use its “power to override the statutory provisions of the Gaming Act regarding the situs of a licensed gaming facility or to use its authority to zone to impede implementation of the Gaming Board’s decision in that regard.”

Finally, the Court has misapprehended the sparse factual record in its conclusion that there are no disputed issues of material fact and no need for a Special Master to be appointed for

¹ 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. C.S. §1505 (2004) (emphasis added).

the purpose of developing a full factual record. Overlooked by the Court are the key factual issues of property ownership and rights.

STATEMENT OF REASONS RELIED UPON FOR ALLOWANCE OF REARGUMENT

The Court should grant reargument in this matter because it overlooked facts of record and principles of law that are material in determining whether HSP can be granted the relief it seeks. Pa. R.A.P. 2543.

The Court has granted HSP's request that "all revisions, relocations, strikes, vacations of easements and public rights of way identified in [HSP's] Plan of Development as approved by the City Planning Commission are authorized" and, further, the Court has declared HSP's Plan of Development "approved." See *HSP Gaming, L.P., v. City Council for the City of Philadelphia*, No. 179 EM 2007, slip. op. at 23 (Pa. Dec. 3, 2007).

However, as the Ordinance HSP sought to have approved by City Council to enable it to proceed with its casino project makes clear, the "revisions, relocations, strikes, vacations of easements and public rights of way" include City-owned property.

Specifically, Bill No. 070457, which HSP has successfully persuaded the Court to "authorize," directs the City's Department of Streets to revise the lines and grades on a portion of City Plan Nos. 146 and 271 by, among other things:

- (a) Striking from the City Plan and vacating Shackamaxon Street from Delaware Avenue approximately 158 feet southeastwardly to a dead end at former Penn Street.

* * *

- (d) Striking from the City Plan and abandoning a 60 feet wide right of way for drainage purposes, water main purposes, and gas main purposes within the lines of former Penn Street and extending from an existing right of way within the lines of former Laurel Street to Shackamaxon Street.

- (e) Striking from the City Plan and abandoning a 50 feet wide right of way for drainage purposes within the lines of former Laurel Street and extending from an existing right of way within the lines of former Penn Street to the Pierhead Line of the Delaware River.

See Bill No. 070457 (the “Omnibus Bill”) (attached at Exhibit 2).²

Thus, among other things, the Court has, through an act of judicial condemnation, ordered City Council to strike and vacate portions of Philadelphia streets and forfeit rights of way for water and gas mains and drainage purposes. These conveyances of Philadelphia’s property rights, as HSP’s Plan of Development makes clear, are necessary for the construction of its facility. *See* HSP Plan of Development, Zoning Narrative Excerpt, attached at Exhibit 3.³

As the narrative makes clear,

It is noted that HSP Gaming, L.P. will be requesting that the remaining portion of Shackamaxon Street, on the east side of N. Delaware Avenue, be vacated by the City of Philadelphia as part of the overall site development.

The vacation of Shackamaxon Street is expressly included in the Omnibus Bill ordered approved by the Court. *See* Exhibit 2.

The Gaming Act, which City Council acknowledges vests in the Gaming Board the power to site gaming facilities, does not empower anyone – including the Commonwealth, the Gaming Board or this Court – to acquire any property through the power of eminent domain for the siting or construction of a gaming facility.

Section 1505 of the Gaming Act states:

² Exhibit 2 is already part of the record, having been submitted at Exhibit E to HSP’s Application for Summary Relief.

³ City Council recognizes that HSP elected not to make its voluminous Plan of Development a part of the record below. However, in its Petition and accompanying brief, HSP freely referenced the multi-volume Plan on numerous occasions. City Council respectfully suggests that it would be disingenuous for HSP to object to relevant portions of the Plan to now be considered – particularly since it is the very Plan that HSP asks the Court to order approved. In any event should leave of this Court be required, City Council respectfully requests this Court for leave to supplement the record with the relevant portions of HSP’s Plan of Development cited herein.

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. C.S. §1505 (2004) (emphasis added).

HSP's Plan of Development – and the Omnibus Bill required to facilitate HSP's implementation of the Plan – requires the City to cede its property – Shackamaxon Street and rights of way – to HSP in direct contravention of §1505 of the Gaming Act and the City of Philadelphia's Home Rule Charter.

Pursuant to §8-205 of the Philadelphia Home Rule Charter:

A department, board or commission shall not sell or exchange any real estate belonging to the City or grant any license, easement, right of way, or other interest over or in such real estate without specific authority from the Council so to do. In deeds of land made by the City, appropriate restrictions may be imposed, including a restriction requiring that the design and location of structures to be altered or erected thereon be first approved by the Art Commission.

351 Pa. Code §8-205 (attached at Exhibit 4).

As the annotation to §8-205 of the Home Rule Charter makes clear: “[t]he consent of Council is required before any interest in land may be transferred because of the value of such interests.” That City Council has **not** consented to the sale or exchange of portions of Shackamaxon Street and the rights of way included in HSP's Plan of Development and the Omnibus Bill is beyond dispute.

The thrust of HSP's Petition – and of the Court's December 3, 2007 Opinion granting HSP all of its requested relief – is that City Council has deliberately failed to act for the purpose of thwarting the purpose of the Gaming Act which, according to HSP, is to facilitate the timely

implementation of the Gaming Act. Ironically, however, it is HSP, not City Council, that is contemptuously thwarting the purpose of the Gaming Act by demanding that the Court do what §1505 of the Gaming Act expressly forbids.

On numerous occasions, this Court has reviewed and analyzed relevant sections of the Gaming Act and found that the language used by the General Assembly was explicit and unambiguous and clearly revealed the General Assembly's intent. *See, e.g., Pennsylvania Gaming Control Bd. v. City Council of Philadelphia*, 928 A.2d 1255 (Pa. 2007), in which the Court analyzed §§1304 and 1307 of the Gaming Act and concluded, with respect to the power to situate casinos, "that the words of these statutory provisions are clear and explicit" *Id.* at 1267. As this Court also made clear in that decision -- and as it again made clear in this Opinion:

[U]nder the Gaming Act, the General Assembly obligates the Board to locate licensed facilities in the first class cities and intends for the Board to make that decision alone. 4 Pa.C.S. §§1304(b)(1), 1307. After the Board's decision on location is made, **the General Assembly intends for it to be implemented under and according to the zoning and land use provisions a City has enacted.**

PA Gaming Control Board, 928 A.2d at 1269, *HSP Gaming*, No. 179 EM 2007, slip. op. at 21-22 (emphasis added).

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

Throughout these proceedings, City Council has consistently argued that HSP's Petition was premature – that it was attempting to short circuit City Council's orderly and deliberative process. In particular, City Council opposed HSP's argument that the Court should "deem" the

Omnibus Bill enacted, and argued that to do so “would directly contradict §1505 of the Gaming Act....” See Consolidated Motion to Dismiss of City Council at 15, *HSP Gaming, L.P. v. City Council, et al.*, No. 179 EM 2007 (Pa Nov. 2, 2007). City Council further argued:

Since the Omnibus Bill would provide for, among other things, easements, the grant of rights of way and striking a street, ordering the Bill ‘enacted’ would be a taking of the property of Philadelphia. This is both prohibited under §1505 of the Gaming Act and otherwise not contemplated by the ‘deemer’ clause in the CED Ordinance.

Id. at 15.

Throughout City Council’s Motion to Dismiss and supporting brief, City Council raised the material issue of fact that HSP did not own the entire parcel of land on which it sought to build and that its Plan of Development and accompanying enabling Ordinance required the conveyance of City property rights by City Council to HSP. See, e.g., Consolidated Motion to Dismiss of City Council at 1, 4-5, 7-8, 15, 19, 21-22, *HSP Gaming, L.P. v. City Council, et al.*, No. 179 EM 2007 (Pa Nov. 2, 2007).

The question of property ownership and rights was one of the essential reasons argued by City Council for, at a minimum, denying HSP’s request for expedited summary relief and providing for a period of discovery to enable the development of a full factual record. See Consolidated Motion to Dismiss of City Council at 21-22, *HSP Gaming, L.P. v. City Council, et al.*, No. 179 EM 2007 (Pa Nov. 2, 2007). The need for a factual record on all issues was recognized by Justice Saylor in his Dissenting Statement in this matter:

[T]he pleadings have been filed directly in this Court, and there has been no lower court decision or, indeed, any fact-finding at all. There is therefore no record on which to determine the merits of Petitioner’s claims. Accordingly, even if this Court has jurisdiction in such circumstances, I believe it would be more appropriate to appoint a special master as Petitioner requests ... to hold any necessary hearings and report back to this Court in an expeditious manner.

HSP Gaming, L.P. v. City Council for the City of Philadelphia, et al., slip. op., No. 179 EM 2007 (PA Dec. 3, 2007) (Saylor, T., Dissenting).

Nowhere in the majority opinion granting HSP complete relief – including the right to have City property conveyed to it in contravention of §1505 of the Gaming Act – does the Court address the issue of the City’s property rights. Instead, in finding no disputed question of material fact, the Court focused solely on City Council’s alleged dilatory tactics and HSP’s claim that it complied with the requirements of the CED Ordinance and that the Planning Commission approved the Plan of Development. Although City Council respectfully disagrees with these findings, the fact remains that the material factual issue of the conveyance of the City’s property rights is a live, material and unresolved issue in this dispute.⁴

This crucial issue counsels against the summary disposition granted by the Court and in favor of, at the very least, the development of a full factual record advocated by both Justice Saylor and City Council.

Additionally, HSP’s foundational factual assertion – presumably accepted by the Court – that the Gaming Board approved the site that is the subject of HSP’s Plan of Development cannot, as a matter of fact and law, be accurate. The Gaming Board, pursuant to §1505, could only approve a site that HSP actually owned. Because the Gaming Board had no power of eminent domain, it was statutorily prohibited from approving the site as that site is set forth in HSP’s Plan of Development. Indeed, HSP’s Plan of Development did not even exist at the time HSP was awarded its license for the site.

⁴ In its opinion, the Court acknowledges that the issue of riparian rights remains unresolved. City Council concurs with this observation by the Court. Accordingly, City Council will not address the issue of riparian rights in its Application for reargument, but wishes to advise the Court that the issue of riparian rights, an integral component of HSP’s Plan of Development, will be addressed presently in the context of a statutory appeal of the Commerce Director’s decision on HSP’s Submerged Lands Application.

What HSP has done is to take the license grant from the Gaming Board and expanded the physical boundaries of the site approved by the Gaming Board to include property owned by the City. HSP is claiming that City Council is guilty of a delay in granting HSP property it does not own and to which it has no legal entitlement. To the extent HSP feels frustrated and aggrieved, it has no one to blame but itself. HSP knows what it was granted by the Gaming Board. Before it even began its process with the City and City Council, it knew the extent and boundaries of the site selected by the Gaming Board. Yet HSP consciously and deliberately designed a Plan of Development that exceeded its entitlement. When City Council failed to give HSP what HSP did not – and could not – obtain from the Gaming Board, it asked this Court to effectuate a judicial condemnation by taking City property for HSP’s benefit.

Because the Court expressly declined to find that the Plan and Omnibus Bill were “deemed” to have been approved by City Council (*see HSP Gaming, L.P.*, No, 179 EM 2007, slip. op. at 21-22, n. 14) and because the Court found that City Council’s inaction constituted an appealable final decision under §1506 of the Gaming Act, it can only be deduced that the Court believes that the appealable “final decision” of City Council was a decision to reject HSP’s Plan of Development and the Omnibus Bill.

If so, it can only follow that City Council made a “final decision” **not** to convey the City-owned property set forth in the Omnibus Bill to HSP, as is its sole right to do under §8-205 of the Philadelphia Home Rule Charter. The Court, in ordering the Plan of Development and Omnibus Bill approved has, consequently, ordered City Council to convey City-owned property to HSP – a private entity – for HSP’s own private, non-public use.

The Court’s opinion, however, cites no authority for the proposition that the Court is empowered to order City Council to convey City-owned property to a private entity for any

purpose whatsoever, particularly for a purely or predominantly private purpose. Although the Court never characterizes the nature of the power under which it is acting in ordering that City-owned property be conveyed to HSP, it can only be surmised that the Court either did not consider the import of its decision to grant HSP the sweeping relief it requested or purported to act under the color of some sort of judicial condemnation or eminent domain power it believes it possesses.

City Council is aware of no such judicial condemnation power in the Court. City Council respectfully asserts that, in the absence of enforcing a valid and existing contract right between City Council and a private entity for the conveyance of property rights – something that is not here pleaded nor pleadable by HSP -- the Court lacks the power -- be it through judicial condemnation or otherwise – to order what it has here ordered, i.e., the taking of the City's property.

Even if the Court did have a judicial condemnation power, that power could not be exercised in the manner and to the effect it is here being exercised. It has long been the law of Pennsylvania that property taken under the power of eminent domain can only be taken for a public purpose. *Balent v. City of Wilkes-Barre*, 669 A.2d 309, 314 (Pa. 1995); *In re Forrester*, 836 A.2d 102, 104 (Pa. 2003). Although a taking does not lose its public character merely because the taking also confers some measure of private gain, a taking will only have a public purpose where “the public is to be the primary and paramount beneficiary of its exercise. *In re the Condemnation of Bruce Avenue*, 438 Pa. 498, 266 A. 2d 96, 99 (1970).

CONCLUSION

The Philadelphia Home Rule Charter vests solely in City Council the power and authority to convey any City-owned property. Section 1505 of the Gaming Act expressly prohibits the Commonwealth from taking any property for the purpose of siting or constructing a gaming facility. In ordering the Plan of Development approved and all of the provisions of the Omnibus Bill authorized, the Court is ordering City Council to convey City-owned property to HSP, a private entity. The Court has no such power or authority.⁵

City Council does not dispute the Gaming Board's exclusive right to situate casinos in Philadelphia or that the Gaming Board has granted HSP a license to construct a casino on the property **actually owned** by HSP. HSP's Plan of Development, however, exceeds the scope of the license grant from the Gaming Board. HSP has no right to the relief it seeks and the Court has no basis to grant such relief.

Accordingly, City Council respectfully requests that its Application for Reargument be granted and that HSP's Petition be denied and dismissed.

Respectfully submitted,

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⁵ As discussed above, even if the Court possessed such power, it cannot exercise the power as it has since the ordered conveyance is solely (or at least predominantly) for the benefit of a private entity.

CERTIFICATE OF SERVICE

I, BRIAN C. VANCE, hereby certify that I am this 17th day of December, 2007, serving the foregoing Application for Reargument on behalf of Respondent City Council for the City of Philadelphia upon the persons and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121:

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