



# FOXWOODS<sup>®</sup>

## CASINO PHILADELPHIA



**Philadelphia Entertainment and Development Partners, L.P.  
Docket Number: 1367**

**Philadelphia Entertainment and Development Partners, L.P. d/b/a  
Foxwoods Casino Philadelphia's Supplemental Memorandum of Law  
In Support of Petition for an Extension of Time for Payment of License  
Fee Pursuant to 1 PA. Code § 31.15**

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**BEFORE THE  
PENNSYLVANIA GAMING CONTROL BOARD**

In re: Application of Philadelphia Entertainment and Development Partners, L.P., d/b/a Foxwoods Casino Philadelphia	:	Docket Number: 1367
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Filed By: Foxwoods Casino Philadelphia Category 2 Slot Machine Licensee	:	<u>Counsel of Record:</u>
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**PHILADELPHIA ENTERTAINMENT AND DEVELOPMENT PARTNERS, L.P., D/B/A  
FOXWOODS CASINO PHILADELPHIA’S SUPPLEMENTAL MEMORANDUM OF  
LAW IN SUPPORT OF PETITION FOR AN EXTENSION OF TIME FOR PAYMENT  
OF LICENSE FEE PURSUANT TO 1 PA. CODE § 31.15**

**I. INTRODUCTION**

On July 20, 2007, Philadelphia Entertainment and Development Partners, L.P. d/b/a Foxwoods Casino Philadelphia (“Foxwoods”) filed a petition with the Pennsylvania Gaming Control Board (“the Board”) seeking an extension of time for good cause to pay the one-time slot machine license fee of \$50 million due to an extraordinary level of governmental interference with the local zoning process that has prevented Foxwoods from obtaining the permits necessary to begin construction of its facility. Since then, the Supreme Court issued its decision in *The Pennsylvania Gaming Control Board v. City Council of Philadelphia, et al.*, \_\_\_ A.2d \_\_\_, 2007 WL 2216100, \*9 (Pa.) (“*PGCB v. City Council*”), in which it confirmed that the Pennsylvania Race Horse Development and Gaming Act, 4 Pa. C.S. § 1101 *et seq.* (the “Gaming Act”) vests

the Board with “the sole authority” to locate slot machine facilities in the City of Philadelphia.<sup>1</sup> In so holding, the Supreme Court noted that, “ordinances enacted by home rule municipalities are negated when they conflict with a statute the General Assembly has enacted concerning ‘substantive matters of statewide concern.’” *Id.* at 11 (quoting, *Ortiz v. Commonwealth*, 545 Pa. 279, 681 A.2d 152, 156 (Pa. 1996)).

Despite the Supreme Court’s recent holding that the misuse of local zoning ordinances to subvert or delay implementation of the Board’s licensing decision is illegal, the conditions described in Foxwoods’ original petition, which are also the subject of still other litigation pending before the Supreme Court,<sup>2</sup> persist. Consistent with the Board’s July 26, 2007 Order, Foxwoods submits this supplemental memorandum of law in support of its request for an extension of time to pay the license fee required pursuant to 4 Pa. C.S. § 1209 until such time as Foxwoods is able to certify that it has obtained final and nonappealable zoning and building permits required for construction of its facility in Philadelphia.

## **II. FACTUAL BACKGROUND**

### **A. The Gaming Act**

In July 2004, the General Assembly of the Commonwealth of Pennsylvania enacted the Gaming Act, a statute of statewide concern that provides for limited, legalized slot machine gaming in the Commonwealth. 4 Pa.C.S. § 1101 *et seq.* See also, *PGCB v. City Council*, \_\_\_ A.2d \_\_\_, 2007 WL 2216100, \*1.<sup>3</sup> The General Assembly articulated several public policy

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<sup>1</sup> For the Board’s convenience, a copy of the Supreme Court’s decision in *PGCB v. City Council* is attached hereto as, Exhibit “A.”

<sup>2</sup> *Philadelphia Entertainment and Development Partners, L.P. d/b/a Foxwoods Casino Philadelphia v. City of Philadelphia, et al.*, No. 88 EM 2007.

<sup>3</sup> Factual averments herein followed by citations to *PGCB v. City Council* are undisputed. See *PGCB v. City Council*, \_\_\_ A.2d \_\_\_, 2007 WL 2216100, \*1 (“The following material facts as

objectives in enacting the Gaming Act. 4 Pa.C.S. §1102. Among those objectives are: “to provide a significant source of new revenue to the Commonwealth to support property tax relief, wage tax reduction, economic development opportunities and other similar initiatives;” “to provide broad economic opportunities to the citizens of this Commonwealth;” and, “to enhance the development of the tourism market throughout this Commonwealth, including, but not limited to, year-round recreational and tourism locations in this Commonwealth[.]” 4 Pa.C.S. §1102(3), §1102(5) and §1102(6).

The Gaming Act established the Board, giving it the “general and sole regulatory authority over the conduct of gaming or related activities as described in this part.” *Id.* See also, 4 Pa. C.S. §§ 1201(a), 1202(a)(1). The Gaming Act also authorized the placement and operation of two stand-alone (Category 2) slot machine facilities at venues within the City of Philadelphia, and provides that the Board has the sole authority to determine whether to issue a license to an applicant, and to approve the location of licensed slots facilities. *PGCB v. City Council*, \_\_\_ A.2d \_\_\_, 2007 WL 2216100, \*2, \*9. See also, 4 Pa. C.S. §§ 1304(b)(1), 1325, 1329. Licenses issued by the Board permit gaming only at the specific physical location selected by the Board. 4 Pa. C.S. § 1329.

#### **B. Preparations for the Introduction of Gaming in Philadelphia**

In December 2005, the Board received five applications for Category 2 licenses in Philadelphia. *PGCB v. City Council*, \_\_\_ A.2d \_\_\_, 2007 WL 2216100, \*2. See also, *Adjudication of the Pennsylvania Gaming Control Board in the Matters of the Applications for Category 2 Slot Machine Licenses in the City of the First Class, Philadelphia*, (“Adjudication”) a copy of which is attached hereto as, Exhibit “B,” at 4-5.

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set forth in the Board’s Petitions for Review and Briefs and the Briefs of HSP and Philadelphia Entertainment are not disputed.”)

On March 9, 2006, in anticipation of the gaming facilities to be established in Philadelphia, the City of Philadelphia (“the City” or “Philadelphia”) and the City Council for the City of Philadelphia (“City Council”) enacted an ordinance adding Chapter 14-400 to the Philadelphia Code, providing a regulatory framework for the establishment of a new local zoning classification—the Commercial Entertainment District (“CED”). *See* Bill #051028AA (“the CED Ordinance”) with legislative history, collectively attached hereto as, Exhibit “C.” *See also*, *PGCB v. City Council*, \_\_\_ A.2d \_\_\_, 2007 WL 2216100, \*2. Chapter 14-400 recognizes the operation of a licensed gaming facility as a permitted use, but requires City Council to designate an area a CED by ordinance. *Id.* *See also*, § 14-403(1). Upon CED designation, all underlying zoning classifications are superseded. *Id.*

At the time that the CED Ordinance was enacted, the City and City Council intended to apply the CED designation to the two locations selected by the Board for licensed gaming facilities, consistent with the Gaming Act. After the Board issued its decision selecting Foxwoods as one of the two applicants who would receive a Category 2 license, the City represented to Foxwoods that the CED designation would be applied to Foxwoods’ property in March, 2007 and Foxwoods, relying on this representation by the City, planned to commence construction of its slots facility in March, 2007.<sup>4</sup>

**C. Foxwoods is Awarded a Category 2 Slot Machine Facility License**

After an extensive application review process, which included public input and public suitability hearings, on December 20, 2006, the PGCB selected Foxwoods as one of the two applicants who would receive Category 2 slot machine licenses for facilities to be located within

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<sup>4</sup> The City’s expectation that CED zoning would be applied to Foxwoods’ property no later than March 15, 2007 was memorialized in a timeline produced by personnel from the City Solicitor’s Office during a meeting with Foxwoods representatives on January 11, 2007. *See* Timeline, attached hereto as, Exhibit “D.”

the City of Philadelphia.<sup>5</sup> The Board’s determination was memorialized in an Order dated February 1, 2007 (“Licensure Order”). *See* Order dated February 1, 2007, attached hereto as Exhibit “E.”

The Licensure Order also provides that the payment of the one-time \$50 million slot machine license fee required pursuant to 4 Pa. C. S. § 1209 be made by the later of four months from the date of the Order or ten (10) calendar days following the conclusion of any appeal of the Licensure Order. *See* Exhibit “E.” The fact that the Licensure Order identifies the conclusion of appeals to the Supreme Court as the event that would trigger payment of the license fee reflects the fact that at the time both the Board and the Licensees anticipated that such appeals would be the primary remaining obstacle to the commencement of construction and operation of the gaming facilities.

Events have proved otherwise. In the eight months since the issuance of its Licensure Order, the Board, Foxwoods and Sugarhouse have had to contend with a vast array of legal challenges to the Board’s licensing decision. Despite having been successful in each court challenge, development of Foxwoods’ slot machine facility continues to be delayed by unusual local governmental interference, *i.e.*, City Council’s protracted and highly-politicized refusal to issue the local zoning and building permits necessary to enable Foxwoods to begin construction.<sup>6</sup>

**D. The Board’s Licensing Decision is Affirmed by the Supreme Court**

The legal challenges to the Board’s licensing decision were extensive. First, Riverwalk Casino, LP, (“Riverwalk”) an unsuccessful applicant for a Category 2 license, filed an appeal

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<sup>5</sup> The second Philadelphia license was awarded to HSP Gaming, L.P. (“Sugarhouse”).

<sup>6</sup> Foxwoods originally planned to begin construction in March, 2007, but was forced to revise its schedule in light of the various legal challenges and the actions of the City and City Council with respect to its zoning and use registration permit application.

challenging the Board's decision. On July 17, 2007, the Supreme Court affirmed the Board's Adjudication and Licensure Order, approving the applications of Foxwoods and Sugarhouse for Category 2 slot machine licenses. *See Riverwalk Casino, L.P. v. Pennsylvania Gaming Control Board*, No. 27 MM 2007, attached hereto as Exhibit "F."

Second, local advocacy groups, anti-gaming activists and City Council filed numerous appeals with the Supreme Court challenging the Board's decision, with the aim of delaying, if not preventing, the introduction of gaming in Philadelphia. *See generally, Neighbors Allied v. PGCB*, No. 38 EM 2007; *City Council for the City of Philadelphia v. PGCB*, No. 39 EM 2007; *Society Hill Civic Association v. PGCB*, No. 40 EM 2007; *Heiko v. PGCB*, No. 41 EM 2007. Consistent with its earlier decision in *Citizens Against Gambling v. Pennsylvania Gaming Control Board*, 916 A.2d 624 (Pa. February 23, 2007), the Supreme Court recently dismissed this series of appeals on grounds that the petitioners therein lacked standing to challenge the Board's licensing decisions. *See Orders* dated, June 4, 2007 and June 22, 2007, collectively attached hereto as Exhibit "G."

#### **E. The Board and Licensees Overcome Political and Legislative Obstacles**

In addition to the litigation in court, City Council has succumbed in other ways to the pressure exerted by opponents of gaming in Philadelphia by creating additional political and legislative obstacles for the Board, Foxwoods and Sugarhouse. Such efforts included the circulation of a petition proposing the addition of a referendum during the May 15, 2007 primary election calling for the modification of the City of Philadelphia's Home Rule Charter to preclude a licensed gaming facility from being located within 1,500 feet of any residentially-zoned district, Institutional Development District or such residentially-related uses as churches, schools, and public playgrounds. This petition was a transparent attempt to eliminate gaming from the City of Philadelphia as a practical matter, as was confirmed by the Philadelphia City

Planning Commission. See Excerpts of Testimony of Janice Woodcock, Executive Director of the Philadelphia City Planning Commission, pages 6-10, and Zoning study of the City of Philadelphia collectively attached hereto as Exhibit “H.” In an Order dated March 6, 2007 the Court in *Petition of Sheldon L. Albert, et al. v. Patricia Rafferty*, Feb. Term 2007, No. 3291 (C.C.P. Phila.), held that the petition was null and void. See Order of the Honorable Ward F. Clark, dated March 6, 2007, attached hereto as Exhibit “I.”

City Council next relented to the pressures of anti-gaming groups by passing an ordinance, over the Mayor’s veto, placing the same question raised in the petition, and already found invalid by the Court of Common Pleas, on the ballot during the May 15, 2007 primary election. See *PGCB v. City Council*, \_\_\_ A.2d \_\_\_, 2007 WL 2216100, \*3-\*4. See also, Bill Nos. 070112 and 070113, attached hereto as Exhibits “J” and “K.”

On April 13, 2007, the Board was successful in obtaining a preliminary injunction from the Pennsylvania Supreme Court enjoining the proposed question from being placed on the ballot. See Order dated, April 13, 2007, attached hereto as Exhibit “L.” The Supreme Court permanently enjoined City Council from placing the measure on the ballot on August 3, 2007. *PGCB v. City Council*, \_\_\_ A.2d \_\_\_, 2007 WL 2216100, \*1.

Despite having survived each of the challenges described above, Foxwoods remains unable to use its site in a manner consistent with the Board’s Licensure Order because of the City and City Council’s attempts to obstruct gaming through the enactment of blatantly illegal and unconstitutional ordinances adverse to gaming generally, and which are designed to hamper Foxwoods’ ability to secure the zoning and building permits necessary to begin construction of its facility. This substantial degree of governmental interference is unique to Philadelphia, and constitutes good cause for the Board to grant Foxwoods’ extension request.



## **F. City Council Adopts an Anti-Gaming Legislative Program**

In furtherance of the provisional award of the gaming license, Foxwoods filed a zoning and use registration permit application (“Permit Application”) with the required site plans with the City on January 23, 2007. As of that date, Foxwoods’ Property was zoned C-3 Commercial, a classification that dates back to the 1990’s. *See* Foxwoods’ C-3 Permit Application #51827 and accompanying zoning plan as filed, attached hereto as Exhibit “M.”

That same day, Councilman Frank DiCicco, District Councilman for the First Councilmanic District, in which both the Foxwoods and Sugarhouse properties are located, introduced eight ordinances intended to delay, limit or exclude gaming in Philadelphia. *See* Ordinances, attached hereto as Exhibits “N” through “S.” *See also*, Exhibits “J” and “K.” There is no question that the ordinances introduced by Councilman DiCicco were intended to obstruct the Gaming Act, and thereby frustrate the General Assembly’s objectives of timely providing new revenue for tax relief, and promoting economic development opportunities in the Commonwealth.<sup>7</sup> In a letter to Foxwoods’ counsel dated January 25, 2007, Councilman DiCicco admitted that his proposed legislation was designed to “challenge[ ] the State’s authority to dictate the City’s economic development[.]” *See* Correspondence dated, January 25, 2007, attached hereto as, Exhibit “T.”<sup>8</sup> It is equally clear that Councilman DiCicco was well-aware of the illegal nature of his legislation, as he previously acknowledged in testimony before the Board that the City had no authority to locate casinos through the exercise of its zoning power. *See* Excerpts from Transcript of April 10, 2006 Public Input Hearing, at Page 182:22-25, attached

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<sup>7</sup> *See* 4 Pa. C.S. § 1102.

<sup>8</sup> In that same letter, Councilman DiCicco further refused to submit appropriate legislation to rezone Foxwoods’ property CED, stating that he could not “be of assistance nor [would he] give the proposal [to submit CED zoning legislation for Foxwoods’ property] consideration.” *See* Exhibit “T.”

hereto as, Exhibit “U.” *See also*, Excerpts from Philadelphia Daily News and Philadelphia Inquirer Articles dated April 20, 2007, collectively attached hereto as, Exhibit “V.”

### 1. City Council Re-Zones Foxwoods’ Property Residential

Perhaps the clearest illustration of the unusual governmental interference faced by Foxwoods is City Council’s passage of Bill No. 070009 (“the R-10A Ordinance”) on April 19, 2007. This bill purported to change the zoning classification of Foxwoods’ property from commercial (C-3) to residential (R-10A). *See* Exhibit “Q.” Rather than applying the CED zoning classification to Foxwoods’ property as originally intended, City Council attempted to move the process backward by unconstitutionally further restricting Foxwoods’ ability to use its property for any commercial purpose, let alone in the manner expressly authorized by the Gaming Act and the Board’s Licensure Order. *Id.*

On May 2, 2007, the Mayor of Philadelphia, The Honorable John F. Street, vetoed and returned the R-10A Ordinance to City Council. The Mayor’s Veto provided, in relevant part:

***The City Solicitor has opined that this Bill [the R-10A Ordinance] is illegal with respect to its intended purpose of preventing development of a casino at the location and is likely to be found to constitute illegal spot zoning were it to become law.***

First, this legislation is clearly calculated to defeat the Gaming Control Board’s approval of gaming at this location. Although neither zoning classification permits casinos, the courts will require the City to permit a casino at this location regardless of the underlying zoning, given the preemptive effect of the Gaming Control board’s license award. The law on preemption is clear on this matter.

Second, the Solicitor has made it clear; case law suggests this legislation is little more than spot zoning. Neither the City’s comprehensive plan nor any other plan of which I am aware calls for row house development on this parcel or on any other nearby parcel between Columbus Boulevard and the Delaware River. East of the Expressway, in the general vicinity of the subject lot, there is no residential zoning, let alone residential zoning as restrictive as R-10A. ***The proposed R-10A zoning for this property would***

*render it a residential island in a sea of industrial and commercial development without any non-arbitrary justification.* Indeed, every adjacent lot to the subject lot is zoned for either commercial or industrial uses. There do not appear to be any distinguishing physical characteristics of this property to explain such substantially different zoning from neighboring properties, other than the fact that this property has been approved as a casino site by the Commonwealth.

*I am once again forced to veto an attempt to regulate land use in a way that clearly is both illegal spot zoning and preempted by state law.*

See Veto of R-10A Ordinance, attached hereto as Exhibit “W” (emphasis added).

City Council subsequently ignored the advice of the City Solicitor as to the illegality of the R-10A Ordinance and overrode the Mayor’s veto on May 10, 2007. See Excerpts from Testimony of City Solicitor, Romulo L. Diaz, Jr. dated March 2, 2007 at 12:16-13:18, 17:4-10, attached hereto as Exhibit “X.” See also, Legislative History, Exhibit “Q.”

**2. The City Fails to Issue a Zoning and Use Registration Permit, and City Council Refuses to Apply CED Zoning to Foxwoods’ Property**

In addition to City Council’s political challenges, Foxwoods faces ongoing delays in its dealings with the City’s zoning administrative apparatus. The City has refused to take action in connection with Foxwoods’ zoning applications, which were submitted months ago, despite Foxwoods’ filing of applications that comply with either C-3 or CED zoning standards. See March 14, 2007 Correspondence from City Solicitor, Romulo L. Diaz, Jr. to City Council President Anna Verna, attached hereto as Exhibit “Y.”

On May 30, 2007, a representative of the City Solicitor’s Office advised Foxwoods’ counsel that the City Solicitor’s Office had prepared and approved three proposed zoning ordinances relating to Foxwoods’ Property which were intended to be introduced during the City Council meeting the following day. One Bill would have changed the zoning designation of

Foxwoods' property from R-10A to CED. The second Bill would have approved Foxwoods' latest plan for development. The third Bill vacated a right of way for water main purposes along the former Dickinson Street, and widened the existing right of way in the former Reed Street by twenty (20) feet. *See* Correspondence dated May 30, 2007 with enclosures, collectively attached hereto as Exhibit "Z."

Since a representative of the City Planning Department previously confirmed that the City had received all necessary plans and information required for the introduction of these ordinances, there was no impediment to the introduction of the above-described bills at the time of the May 31, 2007 City Council meeting. *See* Exhibit "Z." *See also*, Correspondence from The Honorable John F. Street, Esquire, dated May 30, 2007 and other correspondence transmitting proposed Ordinances, collectively attached hereto as, Exhibit "AA." Nevertheless, on May 31, 2007, City Council continued its efforts to block Foxwoods' project by refusing to introduce bills previously approved by the City Solicitor's Office which would have applied the CED zoning classification to Foxwoods' property.

Most recently, on August 17, 2007, L&I denied Foxwoods' application for a C-3 zoning permit. *See* L&I Notice of Refusal, attached hereto as, Exhibit "BB."

**G. Recent Developments Necessitating Foxwoods' Request for an Extension of Time to Pay the \$50 Million License Fee**

**1. Anti-Gaming Proposed State Legislation**

Recently, three bills, H.B. 1477, S.B. 1031 and S.B. 1032, were introduced before the General Assembly with the purpose of amending §1304 of the Gaming Act to prohibit the location of Category 2 facilities within 1,500 feet of a school, house of worship, private residence or park. *See* H.B. 1477, S.B. 1031 and S.B. 1032, collectively attached hereto as, Exhibit "CC." These bills mirror, on the State level, the failed attempts of anti-casino advocates

and City Council to prevent the construction and operation of slot machine facilities in Philadelphia as described above. They remain pending at this time.

**2. City Planning Commission's Delay in Recommendation of Application of CED Zoning Classification to Foxwoods' Property Was Only Recently Resolved**

On July 17, 2007, the same day the Supreme Court affirmed the Board's licensing decision in the *Riverwalk* appeal, the Philadelphia City Planning Commission ("Planning Commission"), at the behest of a City Councilman and various anti-casino activists, postponed, for at least 30 days, its decision on whether to recommend to City Council that the CED zoning designation be applied to Foxwoods' property. This delay occurred despite the fact that the Planning Commission's staff recommended that approval be given and despite the fact that the Planning Commission previously recommended to City Council that the CED zoning designation be applied to Sugarhouse's property. It was not until August 21, 2007 that the Planning Commission finally and unanimously voted to recommend to City Council that the CED zoning designation be applied to Foxwoods' property. *See Philadelphia Inquirer Article*, dated August 22, 2007, attached hereto as, Exhibit "DD." This matter will come before City Council in September 2007.

**3. City Council Recently Requested the Relocation of Casinos**

As the Supreme Court recently held, the Gaming Act unequivocally provides that the Board has the exclusive authority to locate casinos. *See PGCB v. City Council*, Exhibit "A" at 11. *See also*, 4 Pa. C.S. §§ 1304 and 1307. Despite the General Assembly's clear delegation of this power to the Board, and the fact that the Supreme Court has dismissed City Council's appeal of the Licensure Order, City Council continues in its misguided attempt to undermine the Board's decision through the passage of ordinances purporting to impact the selection of casino sites in Philadelphia, needlessly adding to the delays plaguing both Foxwoods and Sugarhouse.

In a letter dated July 30, 2007, City Council President Anna Verna wrote to counsel for Foxwoods inquiring whether Foxwoods would consider an alternate site for its facility. *See* Correspondence dated, July 30, 2007, attached hereto as, Exhibit “EE.”<sup>9</sup> In her letter, Council President Verna refers to Resolution No. 070322, passed by City Council on April 19, 2007, which authorized the creation of a Special Committee on Gaming Alternate Site Selection[.]” *See* Bill No. 070322 and Legislative History, collectively attached hereto as Exhibit “FF.” Foxwoods’ counsel responded to City Council President Verna’s letter, advising that Foxwoods would not consider any alternative site, explaining that the location is optimal for gaming, and that City Council’s alternative site selection proposal would result in the loss of millions of dollars and years of further delays. *See* Correspondence to City Council President Verna dated, August 9, 2007, attached hereto as, Exhibit “GG.”

Also on August 9, 2007, Councilman Frank DiCicco wrote to Governor Rendell similarly suggesting that alternate sites be considered for gaming facilities in Philadelphia. *See* Correspondence to Governor Rendell dated, August 9, 2007, attached hereto as, Exhibit “HH.” Councilman DiCicco further stated that he would delay any effort to apply CED zoning to the Foxwoods and Sugarhouse properties until the Governor fully considered the issue of relocation. *Id.* These recent missives reflect the recalcitrance of City Council with respect to the introduction of gaming, and confirm that there exists good cause for Foxwoods’ extension request.

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<sup>9</sup> Counsel for Sugarhouse received a similar letter from City Council President Verna.

**4. Even Under Optimal Circumstances, an Extension of Time to Pay the License Fee is Warranted Given the Procedural Requirements Necessary for City Council to Apply CED Zoning to Foxwoods' Property**

City Council will return to session on September 14, 2007. Now that Foxwoods' development plan has been approved by the Planning Commission, the first opportunity for City Council to introduce legislation applying the CED designation to Foxwoods' Property is September 14, 2007. Philadelphia's Home Rule Charter requires that any zoning ordinance must be referred to the Committee on Rules before being considered by City Council. *See* Charter §2-201 and §14-1708 of the Philadelphia Code. Zoning ordinances must be advertised at least fifteen (15) days prior to the hearing.

City Council requires that every bill after introduction is delivered to the Council President for reference to the appropriate Committee. The referral to Committee is also subject to the Concurrence of the Majority Leader. *See* Rules of City Council (Resolution No. 040001) §IV.

In the current situation, for the Foxwoods' site three bills are involved. One is for CED site designation. A second is for a CED plan of development. The third is applies to extinguishment of the former Dickinson Street, future water main right of way. The two CED bills will go before the Rules Committee of Council, and the Dickinson Street extinguishment bill will be sent to the Streets Services Committee chaired by Councilman DiCicco. Even if the bills are introduced on September 14, the best case scenario would be for the Council President to immediately refer the bills to a hearing and have them advertised on Monday September 17<sup>th</sup> for a hearing during the first week of October 2007.

The Chairman of the Rules Committee, Council President Verna, must then ask for a motion regarding the bills. The bills can be reported out favorably or disapproved by a vote of

the members of the Committee. The fact that a bill is disapproved will not preclude it from being placed on City Council's calendar, if the bill is approved by a majority vote of all the members of Council.

Once the bill is reported out of committee, it is placed on City Council's calendar and is read on two separate days in open City Council meetings. *See* Rules of City Council §VII, and Charter §2-201(4). The bill can then be placed on the Final Passage Calendar. By a majority vote, City Council can suspend its rules and vote the bill for final passage on the same day as the second reading. Upon passage by a majority of Council, the Bill is then sent to the Mayor for his signature and approval or veto.

Given these procedural requirements, the best case scenario for Foxwoods would be for the CED designation and plan of development to be introduced on September 14, 2007 at the first meeting of City Council. If it were immediately referred to committee and advertised there could be a hearing as early as October 3, 2007. If the Rules Committee voted the bills out on that same day, they could be placed on the calendar for first reading on October 4, 2007 and the second reading could take place on October 11, 2007. If City Council were to suspend its rules, it could vote the bill for final passage on October 11, 2007 as well. This timetable, of course, describes optimal conditions which, given recent history, cannot be expected to occur. Foxwoods cannot control the decisions that City Council will make or the speed with which City Council will act. The purpose of presenting this timeline is to demonstrate that, even if City Council acts favorably and moves as fast as its rules and procedures permit, Foxwoods could not



receive CED zoning and an approved plan of development before, at the earliest, October 11, 2007.<sup>10</sup>

In practical terms, the projected time frame that would allow Foxwoods to use its land for the purpose intended by this Board, and the Gaming Act, is uncertain. Through no fault of the license applicant, the extraordinary governmental burdens imposed have prevented the establishment of the development of the gaming facility for which the license fee is paid as consideration. Clearly, a minimum of ten or more weeks is required before Foxwoods or this Board will know whether the local process is moving forward, stagnating further, or regressing.

**5. Foxwoods Has Made Extensive Efforts to Address Community Concerns, and is Working With State and Local Officials to Address Traffic Mitigation Concerns**

In February 2006, Foxwoods began an extensive grassroots community outreach campaign with residents, civic organizations, churches, non-profit agencies, and businesses in the Philadelphia area. *See* Correspondence to Martin Gregorski, Philadelphia City Planning Commission, dated August 14, 2007, with enclosures, collectively attached hereto as Exhibit “II.” Foxwoods employees and representatives have hosted or attended more than 60 meetings during that time, answering questions, and providing information on topics including, but not limited to, Foxwoods’ traffic mitigation plan, charitable donations, security, employment opportunities, and the special services district. In addition, Foxwoods has established a community telephone number and e-mail address for residents to direct questions, make comments or request a meeting. *Id.*

Foxwoods enjoys substantial support throughout South Philadelphia. By way of example, Foxwoods hosted a job fair in the fall of 2006 attended by more than 400 individuals,

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<sup>10</sup> By way of example, Sugarhouse had its first Rules Committee hearing in June, at which time it was continued pending a further public hearing.

and a construction vendor fair in the spring of 2007 attended by more than 200 local vendors. *Id.* in addition, nearly 20 neighbors, community and business leaders and union members attended a City Planning Commission meeting on July 17, 2007 in support of Foxwoods. *Id.* Foxwoods continues its efforts to sustain a meaningful dialogue with the community, and is committed to being a good neighbor in South Philadelphia for many years to come.

Since Foxwoods' Suitability Hearing in November, 2006, Orth-Rodgers & Associates, Inc. ("Orth-Rodgers"), the independent traffic engineering firm which Foxwoods commissioned to develop a plan for making traffic on South Columbus Boulevard flow better than it does today, has been meeting with representatives of PennDOT, the City Department of Streets, and staff of the Philadelphia City Planning Commission ("City Planning Commission"), and significant progress has been made towards addressing their concerns. *Id.*

Over the course of Orth-Rodgers' meetings with representatives and State and City reviewing agencies, Foxwoods has refined its traffic mitigation plan. The current traffic mitigation plan, identified as "Alternate Plan 7," is on file with PennDOT, as well as the City Department of Streets and City Planning Commission. Over 95% of Orth-Rodgers' plan has either been expressly approved or is not objected to by the various City and State traffic engineering experts who have reviewed it. *Id.* After Alternate Plan 7 is implemented, expected levels of service are, for the most part, expected to be better than those existing at this time, clearly constituting a significant improvement. *Id.*

### **III. SUMMARY OF ARGUMENT**

As described above in detail, Foxwoods has suffered an extraordinary degree of governmental interference with its project to date. The actions and refusals to act on the part of the City and City Council have unduly delayed lawful casino development and have frustrated

the General Assembly's express objectives of implementing gaming in a timely fashion so as to provide a new source of revenue and economic development for the Commonwealth.

Faced with this never-ending series of obstacles, Foxwoods was forced to take extraordinary legal action to protect its right to develop its property for gaming as authorized by this Board. On June 1, 2007, Foxwoods filed with the Supreme Court an Emergency Petition for Review, and an Application for Summary Relief. Foxwoods requested an order: (1) declaring the R-10A Ordinance unconstitutional, null and void; (2) compelling the City, City Council and L&I to issue a zoning and use registration permit to Foxwoods authorizing the construction and use of a hotel and slot machine facility; and, (3) directing that the City, City Council and L&I refrain from further actions inconsistent with the Gaming Act and Licensure Order. *See* Foxwoods' Emergency Petition for Review (without exhibits), attached hereto as Exhibit "JJ;" Foxwoods' Application for Summary Relief (without exhibits), attached hereto as Exhibit "KK;" and Supporting Brief, attached hereto as Exhibit "LL."<sup>11</sup> Foxwoods' Emergency Petition for Review and Application for Summary Relief are currently pending before the Supreme Court. In its moving papers and briefs, Foxwoods has demonstrated that the R-10A ordinance is blatantly illegal and, further, that it is entitled to a zoning and use registration permit as a matter of right. Nonetheless, the City, City Council and L&I continue vigorously to contest Foxwoods' right to relief.

The events described above, culminating in Foxwoods' application for relief to the Supreme Court, have prevented Foxwoods from commencing construction of its slot machine facility. In light of the continuing delays in development caused by the unusual governmental

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<sup>11</sup> Foxwoods' Emergency Petition for Review and Application for Summary Relief describe additional actions of the City and City Council that have the effect of delaying the implementation of gaming in Philadelphia. Those additional facts are incorporated herein by reference.

interference fueled by actions of anti-gaming activists, Foxwoods would be unfairly prejudiced were it to be compelled to pay the \$50 million license fee now, prior to the issuance of final and nonappealable zoning and building permits. As is set forth below, the Board has the authority to grant extensions under Pennsylvania law for good cause. Good cause exists for the Board to grant Foxwoods' extension request for the following reasons:

- (a) Payment of the license fee prior to the issuance of final, nonappealable zoning and building permits would cause an undue financial hardship by necessitating the expenditure of approximately \$400,000 per month in debt service for an indeterminate period of time, which will exceed the time frame contemplated in the budgets prepared and submitted to the Board in support of Foxwoods' license application;
- (b) Foxwoods has acted expeditiously and in good faith in pursuing the requisite local approvals, a governmental and highly politicized process over which Foxwoods has no control, while the local government has created obstacles and substantial delays and has so far refused to issue the approvals necessary to begin construction;
- (c) The grant of an extension poses no financial risk to the Commonwealth, since Foxwoods previously provided an irrevocable letter of credit for the \$50 million license fee to the Board;
- (d) The Gaming Act does not require payment of the license fee until the license has been issued;
- (e) Foxwoods is being deprived of the opportunity to use the Category 2 license awarded by the Board until final, nonappealable zoning and building permits are issued;
- (f) Until final, nonappealable zoning and building permits are issued, there is no guaranty that Foxwoods will ever be able to use the Category 2 license; and as such, Foxwoods is being asked to pay for a license it conceivably may never be able to use; and,
- (g) There is currently no provision in the Gaming Act authorizing the refund of the license fee; thus, if Foxwoods were unable to use the license, there is no assurance that the license fee would be refunded.

Accordingly, good cause exists for the Board to grant Foxwoods' request for an extension of time to pay the license fee, and Foxwoods' petition should be granted.

#### IV. LEGAL ARGUMENT

##### A. **The Board has Authority to Grant Extensions According to the Conditions and Circumstances of a Particular Case.**

##### 1. **Pennsylvania Law Generally Vests Administrative Agencies With Authority to Grant Requests for Extensions of Time.**

Pennsylvania law vests state agencies with the authority to grant extensions according to the facts and circumstances of a particular case. Title 1, Section 31.15 of the Pennsylvania Code provides in relevant part:

(a) Extensions of time shall be governed by the following:

(1) Except as otherwise provided by law, whenever by these rules or by a regulation or order of an agency, or a notice given thereunder, an act is required or allowed to be done at or within a specified time, *the time fixed or the period of time prescribed may, by the agency head or the presiding officer, for good cause be extended upon motion made before expiration of the period originally prescribed or as previously extended; and upon motion made after the expiration of the specified period, the act may be permitted to be done where reasonable grounds are shown for the failure to act.*

1 PA. CODE § 31.15(a)(1) (emphasis added).<sup>12</sup> *See also, Commonwealth v. Overlook Medical Clinic, Inc.*, 518 Pa. 507, 512-513 (1998) (holding that the failure of the Department of Public Welfare (“DPW”) to apply 1 PA. CODE § 31.15 where the DPW did not adopt an express regulation either permitting or prohibiting extensions of time was erroneous); *In re Dwyer*, 486

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<sup>12</sup> Foxwoods’ Petition was timely filed. The Board’s Licensure Order provides, in part, that payment of the one-time license fee be “made by the later of four months from the date of this Order or *ten (10) calendar days following the conclusions of any appeals to the grant of this license pursuant to 4 Pa.C.S. §1204 (if any).*” *See* Exhibit “E” (emphasis added). Foxwoods’ petition was filed on July 21, 2007, within 10 days of the Supreme Court’s decision in *Riverwalk* on July 17, 2007.

Pa. 585, 594-95, 406 A.2d 1355, 1359-60 (1979) (citing, 34 PA. CODE § 31.15)<sup>13</sup> (“The statutes and the [Pennsylvania] Code contemplate exercise of agency discretion in the granting of extensions and variances....”); 36 Standard Pennsylvania Practice 2d § 166:94. In applying 1 PA. CODE § 31.15, the Supreme Court held in *Overlook* that it was an abuse of discretion for a state agency *not* to grant an extension of time, where good cause had been shown, and where no cogent reason for not granting the extension had been advanced.<sup>14</sup> *Overlook, supra*, at 513.<sup>15</sup>

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<sup>13</sup> The importance of an administrative agency’s discretionary power to grant extensions was addressed by the Supreme Court in *Dwyer, supra*, in which the Court held that officials of a state agency were immune from liability for exercising their quasi-judicial authority when granting safety code compliance extensions. *Id.* “The regulations of the Pennsylvania Code [1 Pa. Code § 31.15] specifically provide for the discretionary granting of extension, and of variances . . . These decisions are exercised by the application of standards, rules and regulations to the conditions and circumstances of the particular case.” *Id.* at 594-595. The *Dwyer* Court further noted that such discretionary authority may be properly exercised without the need of formal adjudicatory procedures. *Id.* at 597. In a concurring opinion, Justice Roberts noted, “[t]he exercise of discretion is a prime function of an administrative agencies’ adjudicative role . . . Rules without discretion cannot satisfy the need for tailoring results to unique facts and circumstances of particular cases.” *Id.* (quoting Kenneth C. Davis, *Administrative Law Treatise* § 8.3 (1979)) (emphasis added).

<sup>14</sup> In *Overlook*, the defendant nursing home sought an extension of time to file a final cost report with the DPW. *Id.* In support of its request for an extension, the defendant nursing home submitted a letter setting forth the reason why an extension was needed: the nursing home’s failure to pay vendor invoices, which in turn caused a delay in the closing of the nursing home’s books and delayed filings with Medicare. *Id.* at n. 5. The Supreme Court stated that “good cause was certainly shown” based upon the reasons. *Id.* at 513. Foxwoods’ reasons for its requested extension as set forth herein provide equal, if not greater, justification for an extension than did the facts in *Overlook*.

<sup>15</sup> The authority of administrative agencies to grant extensions of time is consistent with the ability of agencies to waive their rules and regulations, or to waive limitations imposed by their own rules and regulations. *Keys v. Unemployment Compensation Board of Rev.*, 183 Pa.Super. 164 (1957); *Gillis v. Public Service Commission of Pennsylvania*, 105 Pa. Super. 389 (1932). See also, *Popowsky v. Pennsylvania Public Utility Commission*, 589 Pa. 605 (2006) (Pennsylvania Public Utility Commission recognized that it had authority to waive a requirement in its regulations).

2. **Expiration of the Board's Temporary Regulation Governing Extensions of Time is of no Consequence, as the Proposed Permanent Regulation is Identical to the Prior Version and Consistent With the Administrative Code.**

Pursuant to 4 Pa. C.S. §1203, the Board promulgated temporary regulations to facilitate the implementation of gaming in Pennsylvania. The Board's temporary regulations expressly authorized the Board to extend the time fixed or prescribed for the completion of any act required by the Gaming Act or on Order of the Board upon motion for good cause. *See* 58 PA. CODE § 497.5(a) ("Extensions of time shall be governed by the following: (1) Except as otherwise provided by statute, whenever under this part or by order of the Board, or notice given thereunder, an act is required or allowed to be done at or within a specified time, the time fixed or the period of time prescribed may, by the Board, for good cause be extended upon motion made before expiration of the period originally prescribed or as previously extended. ...") The Board's temporary regulations, including 58 PA. CODE § 497.5(a), expired on July 5, 2007. *See* 4 Pa. C.S. §1203(a). The Board has published a proposed permanent regulation, 58 PA. CODE § 497a.5, which adopts verbatim the language of the temporary regulation. *See* Excerpts from *Pennsylvania Bulletin* (May 19, 2007), attached hereto as Exhibit "MM." Both the temporary regulation and the proposed permanent regulation are consistent with Pennsylvania law generally as applicable to administrative agencies under the Pennsylvania Code. Therefore, even absent a current regulation, the Board possesses the authority to grant an extension pursuant to § 31.15 of the Pennsylvania Code.

**B. Good Cause Exists for the Board to Grant Foxwoods' Request for an Extension of Time to Pay the \$50 Million License Fee.**

**1. Payment of the License Fee in the Absence of Zoning Permits Would Cause Foxwoods Undue Financial Hardship, by Exposing it to the Possibility of Servicing a Substantial Debt for an Indeterminate Period of Time.**

Pennsylvania law recognizes financial hardship to be good cause for an administrative agency to grant an extension of time. In *Overlook*, 518 Pa. 507, 544 A.2d 935, the Pennsylvania Supreme Court considered whether the DPW was required to grant an extension to an applicant for reimbursement of costs incurred pursuant to its participation in the Pennsylvania Medical Assistance Program. *Overlook Medical Clinic*, a nursing home facility, participated as a provider in the state program and was required, under the terms of a DPW regulation, to submit its final cost report within 30 days after its participation in the program had been terminated or its ownership transferred. *Overlook* was sold on April 11, 1983, which meant that it was required to submit its final cost report on May 11, 1983. Prior to the deadline, *Overlook* requested an extension in light of the fact that it was still paying vendor invoices and was unable to accomplish a meaningful closure of its books within the required timeframe. DPW denied *Overlook's* request for an extension.

On appeal, the Supreme Court affirmed the judgment of the Commonwealth Court, which held that DPW abused its discretion in failing to grant *Overlook* an extension under the circumstances. *Overlook*, 518 Pa. at 513, 544 A.2d at 937. The Supreme Court applied 1 PA. CODE § 31.15, which (as stated above herein) allows for extensions upon a showing of good cause, and found that “the failure to grant an extension on these facts was arbitrary and capricious as a matter of law.” 518 Pa. at 513, 544 A.2d at 937. Because *Overlook* was still in the process of paying vendor invoices, requiring strict compliance with the deadline would have resulted in a determination by DPW that *Overlook* “had been *overpaid* some \$10,146.60, which



it [would have been] obligated to reimburse DPW.” 518 Pa. at 510, 544 A.2d at 936 (emphasis added). If Overlook instead had been allowed to include payment of all outstanding vendor invoices in its final report, however, “it would have been entitled to a substantial final *reimbursement*, although no firm figure [was] set forth.” 518 Pa. at 510, 544 A.2d at 936 (emphasis added). Therefore, undue financial hardship justified an extension in Overlook’s favor.

As in *Overlook*, the facts before the Board establish that good cause exists for Foxwoods to be granted an extension of time to pay the license fee. As discussed above, the legal obstacles to the implementation of the Board’s Licensure Order have not been limited to challenges in the courts. City Council and agencies of the City of Philadelphia continue actively to oppose Foxwoods’ efforts to obtain the zoning and building permits, approvals and consents required to commence construction of the licensed facility.

As set forth above, and as discussed in greater detail in Foxwoods’ Emergency Petition for Review and Application for Summary Relief filed with the Supreme Court, Foxwoods is faced with significant political obstacles in its efforts to obtain the requisite local approvals for its project. *See* Exhibits “JJ” and “KK.” Foxwoods has gone above and beyond its obligation to provide city officials with all of the information required for the approval of its project, and to use commercially reasonable efforts to secure local approvals. In a further attempt to bring about an expedited resolution to its dispute with local officials, Foxwoods has gone to the extent of filing an Emergency Petition for Review with the Pennsylvania Supreme Court, which is currently pending. Unfortunately, the willingness of certain local officials to advance frivolous and blatantly illegal legislation, and the recalcitrant behavior of anti-gaming advocates has temporarily forestalled the inevitable introduction of gaming in Philadelphia. Despite its best

efforts, Foxwoods cannot predict when its property will be conferred CED status, or when it will be issued the permits necessary for construction. Given these conditions, this Board should not compel Foxwoods to remit the \$50 million license fee until these challenges are resolved. To service a debt of this size would cost Foxwoods in excess of \$400,000 per month for what is likely to be an extended period of time.<sup>16</sup>

**2. Good Cause Exists for Deferring Payment of the License Fee, Since Doing so Poses No Risk to the Commonwealth, While Requiring Payment from Foxwoods in Advance of the Issuance of Local Zoning Approvals is Unduly Burdensome.**

A decision to permit Foxwoods to defer payment of the license fee poses no financial risk for the Commonwealth. Foxwoods has already provided the Board with an irrevocable letter of credit in the amount of \$50 million pursuant to 4 Pa.C.S. §1313(c). *See* Letter of Credit, attached hereto as Exhibit “NN.” The Commonwealth bears no risk of default, as it could simply draw down the letter of credit if the license fee has not been paid within five days of issuance of the license.

Conversely, were Foxwoods to be compelled to tender payment of the license fee prior to the running of all potential appeals periods and the issuance of requisite zoning permits, Foxwoods will be faced with substantial debt service payments before Foxwoods, or even the Board, can determine when construction of its licensed gaming facility could begin and before Foxwoods’ will be in a position to generate income. Moreover, the Commitment Letter from Merrill Lynch, Pierce, Fenner & Smith Incorporated (“Merrill Lynch”) dated November 4, 2006

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<sup>16</sup> The financial hardship which would be visited upon Foxwoods were it compelled to pay the license fee under current circumstances is in addition to the economic burden which has already been imposed by City Council’s ordinance rezoning Foxwoods’ property from commercial (C-3) to residential (R-10A). City Council’s action has had the effect of reducing the appraised value of Foxwoods’ property, hampering Foxwoods’ ability to secure financing.

which Foxwoods submitted to the Board as evidence in support of its ability to finance the proposed gaming facility identified local zoning approvals among the conditions upon which the commitment was based. Foxwoods is currently working with its lenders to modify its financing arrangements in light of the present obstacles it faces.

In *Del-AWARE Unlimited, Inc. v. Commonwealth, Dep't of Env'tl. Resources*, 121 Pa. Commw. 582, 551 A.2d 1117 (1988), the Commonwealth Court considered, *inter alia*, whether the Department of Environmental Resources (“DER”) had good cause to grant an extension of the water allocation permit issued to the North Penn Water Authority and the North Wales Water Authority. Because of what the *Del-AWARE* court referred to as the “protracted history and complexity” of the case, the opinion rendered delineated “only those facts necessary for the present disposition.” 121 Pa. Commw. at 585, 551 A.2d at 1120. However, the following pertinent facts can be gathered by reference to the Commonwealth Court’s opinion in a related case:

The purpose of the Point Pleasant water diversion project is to construct a system by which Delaware River water could be withdrawn by the Point Pleasant Pumping Station and pumped through a combined transmission main to the Bradshaw Reservoir and Pump House (Bradshaw) where (1) water for public use by Bucks and Montgomery Counties would flow through the north branch transmission main and along the Neshaminy Creek to the north branch water treatment plant where it would be pumped, in part, to NP [North Penn] and NW [North Wales] and (2) supplemental cooling water for PECO’s Limerick nuclear generating station would be pumped through the east branch transmission main and flow along the Perkiomen Creek to the Perkiomen Pump House where it would be withdrawn and pumped to Limerick. Supplemental cooling water is necessary because PECO is prohibited from using Schuylkill River water for several months each year.

PECO and NWRA [Neshaminy Water Resources Authority] entered into a Construction and Operation Agreement by which NWRA agreed to construct and maintain the Point Pleasant Pumping Station and combined transmission main, PECO assumed

responsibility for constructing Bradshaw (where it agreed to store and release water to flow through the north branch transmission main, at no cost to NWRA) and NWRA assumed sole responsibility for the north branch transmission main. ... To the extent necessary to insure operation and maintenance of the Point Pleasant Pumping Station and combined transmission main, this agreement provides for assignment by NWRA to Bucks County. The agreement was executed by the required majority of the Bucks County Commissioners.

NWRA, Bucks County and Montgomery County entered into a Water Sales Agreement by which Bucks County agreed to construct (or cause to be constructed by NWRA) the Point Pleasant Pumping Station and combined transmission main and NWRA agreed to construct the north branch transmission main. ... The trial court found that the water reserved for Montgomery County was intended primarily for the benefit of NP and NW, both of which entered into contracts for the water with Montgomery County simultaneously with the execution of the Water Sales Agreement. Montgomery County itself operates no water treatment or delivery facilities.

Later, Bucks County purported to terminate its Construction and Operation Agreement with PECO, demanded that NWRA stop construction of the Point Pleasant Pumping Station and combined transmission main and purported to terminate its obligation to supply water to Montgomery County. Construction recommenced after a thirty-day moratorium. However, the Bucks County Commissioners next passed Ordinance No. 59 which purported to require NWRA to convey the Point Pleasant project to Bucks County (apparently so that they could stop the project). Thereafter, the NWRA ordered a second suspension of construction and passed a resolution questioning the validity of the Construction and Operation and Water Sales Agreements. Finally, Bucks County passed a resolution directing NWRA to delete the project from its water supply system.

*Sullivan v. County of Bucks*, 92 Pa. Commw. 213, 217-19, 499 A.2d 678, 682-83 (1985).

After the withdrawal of Bucks County from the project, it evidently became clear that construction of the appropriate facilities would not be completed within the time period originally provided. Accordingly, the holders of the water allocation permit, the North Penn and North Wales Water Authorities, applied to DER for an extension. DER granted the extension,

but a “concerned citizens” group, Del-AWARE Unlimited, Inc., challenged that decision in a proceeding before the Environmental Hearing Board. The Hearing Board found that DER had good cause to grant the permit extension.

On appeal, the Commonwealth Court affirmed the Hearing Board’s determination. The court held that “because the project had been postponed by events beyond the permittees’ [sic] control and the permittees have otherwise commenced construction in good faith,” DER had good cause to grant the extension. 121 Pa. Commw. at 593 n.7, 551 A.2d at 1123 n.7. Stated differently, the political events surrounding Bucks County’s decision to withdraw were not conditions over which the movants for the extensions had any control. Therefore, “so long as project construction continues under the direction of the appropriate permit-holders, to whom these permits were duly assigned, and under the proper regulatory authorities,” a finding of good cause was proper. 121 Pa. Commw. at 593, 551 A.2d at 1123.

The events that have occurred in Philadelphia since the Board issued its Licensure Order constitute unique circumstances that were not contemplated. Foxwoods has been forced to invest extraordinary amounts of time, effort and expense to overcome legal challenges to the Board’s decision, to pursue its zoning approvals and to do so in a timely manner. Foxwoods has been forced to do all of this in an unusually hostile local environment, in an effort to fulfill its obligations to construct a gaming facility on the site chosen by this Board as expeditiously as possible.

Foxwoods has not been the cause of any delays or disruptions, and has fulfilled its obligations to the best of its abilities. Equity and fairness justify an extension of time for the payment of the license fee by Foxwoods until all remaining legal challenges are exhausted, all governmental obstacles are removed and local zoning and permitting is obtained. Until that

time, Foxwoods is effectively being deprived of the right conferred by the license—the ability to construct and operate a slot machine facility in Philadelphia. Accordingly, Foxwoods respectfully submits that the substantial burdens which would be imposed on it were the Board to compel it to tender the licensing fee in advance of obtaining local zoning approvals constitutes good cause for granting the instant Petition.

**3. Good Cause Exists for the Board to Provide Foxwoods with an Extension of Time to Tender the Licensing Fee Given the Possibility of a Legal Challenge by way of a Further Appeal of the Board’s Licensure Decision to the U.S. Supreme Court.**

Section 1301 of the Gaming Act provides, in relevant part:

Following approval of an application for a slot machine license, the applicant *shall provide formal notification to the board* as soon as:

- (1) *it fulfills all required conditions* for issuance of the license; and
- (2) *the board’s decision approving the application is a final, binding, nonappealable determination which is not subject to a pending legal challenge.*

Upon receipt of such formal notification and upon conducting any necessary verification, the board shall issue a slot machine license to the applicant.

(emphasis added). The Supreme Court rendered its decision affirming the Board’s licensing decision awarding Category 2 slot machine facility licenses to Foxwoods and Sugarhouse in *Riverwalk v. PGCB*, 27 MM 2007, on July 17, 2007. See Exhibit “F.” As such, there remains the possibility that Riverwalk may seek a grant of certiorari from the United States Supreme Court. While the Pennsylvania Supreme Court held, and Foxwoods agrees, that Riverwalk’s contentions are entirely without merit, Riverwalk would nevertheless have a period of 90 days from the July 17, 2007 decision, or until *October 15, 2007*, to petition the United States Supreme Court for certiorari. See U.S. Supreme Court Rule 13.

**4. The Terms of the Gaming Act Do Not Require Payment of the License Fee Until the License is Issued.**

Foxwoods' petition for an extension of time to pay the license fee is entirely consistent with the terms of the Gaming Act. Section 1301 of the Gaming Act requires the licensee to provide formal notification to the Board as to when "(1) it fulfills all required conditions for issuance of the license; and (2) the board's decision approving the application is a final, binding, nonappealable determination which is not subject to a pending legal challenge." Section 1301 goes on to provide that upon receipt of such notification, the Board shall issue the slot machine license. Section 1209(a) of the Gaming Act requires that successful applicants for a Category 2 license pay the \$50 million license fee "*at the time of license issuance[.]*" 4 Pa.C.S. §1209(a) (emphasis added). The provisions of the Gaming Act reflect that the Legislature intended for a licensee's obligation to pay the license fee to be triggered when the Board's licensing determination was rendered final and not subject to pending legal challenges or appeals.<sup>17</sup>

As discussed above, Foxwoods cannot certify that there will be no further legal challenges until the expiration of the 90-day period following the Pennsylvania Supreme Court's July 17, 2007 decision in *Riverwalk v. PGCB*, or the adjudication of any petitions for certiorari filed during that time. Section 1301 therefore prevents the Board from issuing a license until Foxwoods can provide notification that the application is final, binding and nonappealable.

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<sup>17</sup> The Board's February 1, 2007 Order provided that the licensees must satisfy several conditions "prior to the issuance" of Category 2 licenses, including, *inter alia*, "The payment of the one time \$50,000,000 slot machine license fee required pursuant to 4 Pa.C.S. §1209, made by the later of four months from the date of this Order or *ten (10) calendar days following the conclusions of any appeals to the grant of this license pursuant to 4 Pa.C.S. §1204 (if any)*, and no less than ten (10) business days prior to the beginning of the test period necessary to commence slot machine operations under 58 Pa. Code §467.2(a)(9)." See Exhibit "E" (emphasis added). To the extent that the Board's Licensure Order seeks payment of the license fee "prior to the issuance" of Foxwoods' Category 2 license, it is inconsistent with the Gaming Act.

Payment of the license fee therefore should be deferred until Foxwoods can provide notification to the Board that complies with both prongs of § 1209(a) of the Gaming Act.

**5. Other Equitable Considerations Justify Granting Foxwoods' Request for an Extension of Time to Pay the License Fee.**

Until final, nonappealable zoning and building permits are issued, Foxwoods is effectively being deprived of the opportunity to use the Category 2 license awarded by the Board. Similarly, until final, nonappealable zoning and building permits are issued, there is no guaranty that Foxwoods will ever be able to use the Category 2 license, and as such, Foxwoods is being asked to pay for a license it conceivably may never be able to use. Since there is currently no provision in the Gaming Act authorizing the refund of the license fee, if Foxwoods were unable to use the license, there is no assurance that the license fee could be refunded.

**CONCLUSION**

For the foregoing reasons, Philadelphia Entertainment and Development Partners, L.P., d/b/a Foxwoods Casino Philadelphia respectfully requests that:

(A) the Board issue an Order granting this petition pursuant to 1 PA. CODE § 31.15, and extending the time for Foxwoods Casino Philadelphia to make payment of the one-time slot machine license fee of \$50 million as required by 4 Pa. C.S. §1209, until ten (10) days after the later of (i) receipt by Foxwoods Casino Philadelphia of final, nonappealable zoning and building permits required for the construction of the licensed gaming facility; (ii) the time for the filing a petition to the United States Supreme Court for certiorari has expired; and, (iii) in the event a petition for certiorari is filed, the denial of said petition; or,

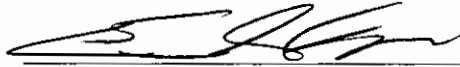
(B) in the event that the Board is unable to rule on this Petition prior to the timeframe established for payment of the license fee, the Board issue a preliminary extension of time for payment of the license fee pending a hearing and determination of this Petition; and,



(C) such other relief as the Board may deem just and proper.

Respectfully submitted,

By:



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Pennsylvania Attorney ID: 78249

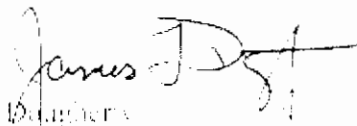
**OBERMAYER REBMANN MAXWELL  
& HIPPEL LLP**

Attorneys for Philadelphia Entertainment and Development  
Partners, L.P., d/b/a Foxwoods Casino Philadelphia

Dated: August 27, 2007

**VERIFICATION**

I, James J. Dougherty, General Manager of Foxwoods Casino Philadelphia, hereby state that the statements made in the foregoing Supplemental Memorandum of Law in Support of Petition for an Extension of Time for Payment of License Fee are true and correct to the best of my knowledge, information and belief. I further understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 6104 relating to a sworn falsification to authorities.



James J. Dougherty  
General Manager  
Foxwoods Casino Philadelphia