

**[J-122-2007]  
IN THE SUPREME COURT OF PENNSYLVANIA  
EASTERN DISTRICT**

HSP GAMING, L.P.,	:	No. 179 EM 2007
	:	
Petitioner	:	
	:	
	:	
v.	:	
	:	
	:	
CITY COUNCIL FOR THE CITY OF	:	
PHILADELPHIA, THE CITY OF	:	
PHILADELPHIA AND THE CITY	:	
PLANNING COMMISSION FOR THE	:	
CITY OF PHILADELPHIA,	:	
	:	
Respondents	:	

**DISSENTING STATEMENT**

**MR. JUSTICE SAYLOR**

**FILED: December 7, 2007**

To the degree that the above Order represents a merits disposition of Respondent City Council’s Motion to Dismiss in Opposition to HSP’s Petition for Review and Application for Summary Relief, I dissent, in line with my dissenting statement to the Court’s prior Order in this matter. See HSP Gaming, L.P. v. City Council for the City of Phila., \_\_\_ Pa \_\_\_, \_\_\_, \_\_\_ A.2d \_\_\_, \_\_\_, 2007 WL 4226871, at \*11 (Pa. Dec. 3, 2007) (Saylor, J., dissenting). The per curiam opinion filed with the order was, in my view, infirm in that it purported to assert appellate jurisdiction and dispose of the merits of the petition’s claims on the pleadings alone, without the benefit of a factual record or lower court opinion. Indeed, both the jurisdictional and merits issues were resolved based on asserted facts that had not been determined in any legal proceeding. For

example, the majority found: that City Council acted in bad faith, motivated by a desire to “delay[] and obstruct[] implementation of the Gaming Board’s” grant of a license for the site in question; that one City Council member had “overturn[ed] the Gaming Control Board’s approval of [Petitioner’s] Category 2 slot machine license”; and that City Council’s actions in the present case amounted to “pressur[ing] successful applicants with promises or enticements of expeditious zoning approvals should they relocate their facilities to another site.” Id. at \*10-\*11. These are all questions of fact that should have been answered based on an evidentiary record.

Notably, as well, the majority made these findings via inferences stemming from documents attached to the petition, and premised as well on the City Council’s failure, in its motion to dismiss, to controvert the “accuracy” of various documents or statements. See id. at \*6. However, the motion to dismiss incorporated preliminary objections, and the City Council had not yet been given a chance to file an answer to the allegations. The City Council cannot be faulted for acting in this manner, moreover, as it was given only one week to respond to the initial petition and a reasonable request for an extension of time was denied.<sup>1</sup>

Finally, in its brief -- and contrary to the majority’s implication -- the City Council did contradict the essential factual predicate underlying the majority’s reasoning, namely, that the Council’s actions had been taken in a bad faith effort to thwart

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<sup>1</sup> HSP’s Petition for Review, together with its Application for Summary Relief and Expedited Briefing Schedule, were filed in this Court on October 25, 2007. Thereafter, the deadline for responsive briefs was set at November 2, 2007. Counsel for the City Council entered their appearance on November 1, 2007, and requested an extension of time to file their brief. This request was denied the following day, the same day the responsive brief was due.

Petitioner's alleged right to begin building its casino in the immediate term.<sup>2</sup> See Consolidated Motion to Dismiss by City Council for the City of Philadelphia in Opposition to Petition for Review and in Opposition to Application for Summary Relief, Including Preliminary Objections to Both the Petition and the Application, at 2 ("HSP is wrong that the orderly process established by the Respondents, including the deliberation and adoption of the necessary enabling legislation, is in any way defective or intended solely to thwart the advent of gambling in Philadelphia."); id. at 5 ("Despite HSP's best efforts to put a sinister veneer on City Council's response to its constituents, the facts demonstrate otherwise."); id. (asserting that City Council's actions have been aimed, not at prohibiting casinos in Philadelphia, but at ensuring the orderly development of such facilities in a manner that takes into account the interests of the affected residents); id. at 4 n.2 (denying that the council member in question was using his councilmanic prerogative to "unilaterally thwart[] HSP's efforts"); id. at 4, 8 (asserting that the central reason for the delay in implementing the Plan of Development was its dependence upon the grant of a riverbed lease from the Commonwealth -- something the City Council alleges that only the Legislature can provide -- and maintaining, further, that, "City Council has no authority to permit HSP -- or anyone else -- to build a facility that impinges on the Commonwealth's [riparian] rights").

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<sup>2</sup> The majority stated that City Council did not deny any of the "documents" or "public statements" proffered by HSP. This is certainly understandable, as such documents and statements are a matter of public record. As the majority's analysis makes clear, the central question (for the majority at least) concerns the inferences to be drawn from these items. Ideally, such inferences should be drawn in light of any other evidence that may bear on the question -- evidence that the City Council was never given an opportunity to adduce -- particularly as it is only in light of such inferences that supported factual findings can be made concerning the City Council's intentions and motives that the majority found compelling.

Accordingly, I believe it was premature to grant final, permanent relief to HSP at this stage of the litigation.<sup>3</sup>

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<sup>3</sup> Due to an administrative error, these thoughts were not included in my dissenting statement filed as to the order at HSP Gaming, L.P. v. City Council for the City of Phila., \_\_\_ Pa \_\_\_, \_\_\_, \_\_\_ A.2d \_\_\_, \_\_\_, 2007 WL 4226871, at \*11 (Pa. Dec. 3, 2007) (per curiam). Therefore, I am setting them down at this time.