

[J-62-2007]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

THE PENNSYLVANIA GAMING CONTROL BOARD,	:	No. 55 EM 2007
	:	
	:	
Petitioner,	:	Emergency Petition for Review of the
	:	Pennsylvania Gaming Control Board
	:	Concerning the Ordinance Passed by City
v.	:	Council for the City of Philadelphia on
	:	March 29, 2007

CITY COUNCIL OF PHILADELPHIA; PATRICIA RAFFERTY, IN HER CAPACITY AS CHIEF CLERK OF CITY COUNCIL OF PHILADELPHIA; PHILADELPHIA COUNTY BOARD OF ELECTIONS; AND THE HONORABLE NELSON DIAZ, THE HONORABLE PAUL JAFFE, AND THE HONORABLE GENE COHEN, ACTING CITY COMMISSIONERS, IN THEIR OFFICIAL CAPACITY AS THE PHILADELPHIA COUNTY BOARD OF ELECTIONS,	:	SUBMITTED: April 27, 2007
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Respondents,

PHILADELPHIA ENTERTAINMENT AND
DEVELOPMENT PARTNERS, L.P. d/b/a/
FOXWOOD CASINO PHILADELPHIA,
HSP GAMING, L.P.

Intervenors

THE PENNSYLVANIA GAMING	:	No. 56 EM 2007
CONTROL BOARD,	:	
	:	
	:	
Petitioner,	:	Emergency Petition of the Pennsylvania
	:	Gaming Control Board in the Nature of a
	:	Complaint for Declaratory Judgment
	:	
v.	:	
	:	
	:	
CITY COUNCIL OF PHILADELPHIA;	:	
PATRICIA RAFFERTY, IN HER	:	
CAPACITY AS CHIEF CLERK OF CITY	:	
COUNCIL OF PHILADELPHIA;	:	
PHILADELPHIA COUNTY BOARD OF	:	
ELECTIONS; AND THE HONORABLE	:	
NELSON DIAZ, THE HONORABLE PAUL	:	
JAFFE, AND THE HONORABLE GENE	:	
COHEN, ACTING CITY	:	SUBMITTED: April 27, 2007
COMMISSIONERS, IN THEIR OFFICIAL	:	
CAPACITY AS THE PHILADELPHIA	:	
COUNTY BOARD OF ELECTIONS,	:	
	:	
	:	
Respondents	:	

CONCURRING OPINION

BAER, J.

DECIDED: August 3, 2007

I disagree with the majority’s conclusion that the Pennsylvania Race Horse Development and Gaming Act (Gaming Act or Act), 4 Pa.C.S. § 1101 *et seq.*, provides this Court with jurisdiction to decide the action brought by the Pennsylvania Gaming Control Board (Board). Nevertheless, because I believe this Court has jurisdiction to decide this matter on an alternative basis and, as I agree with the majority’s ultimate

merits determination that a permanent injunction is warranted, I concur in the result reached by the majority.¹

Like Mr. Justice Saylor, I believe that the Gaming Act's grant of appellate jurisdiction to this Court pursuant to Section 1506 of the Act, 4 Pa.C.S. § 1506, does not warrant our review of the Board's request for injunctive relief, which is a matter directed to the original jurisdiction of a court. See Saylor, J. Dissent at 2 ("A challenge in the courts to a legislative act, such as the Philadelphia ordinance presently at issue, is conventionally understood to represent an original jurisdiction matter.").

Accordingly, I do not believe the Board properly invoked this Court's jurisdiction through its erroneous assertion that we possess jurisdiction pursuant to Section 1506 of

¹ In addition to having a basis to invoke this Court's jurisdiction, as a general proposition, the Board must also be able to demonstrate that this matter presents a "case or controversy," appropriate for judicial resolution, see, Public Defender's Office of Venango County v. Venango County Court of Common Pleas, 893 A.2d 1275, 1279 (Pa. 2006), and that the Board has been aggrieved by the actions giving rise to such case or controversy, so that the Board has standing to seek relief, see Pittsburgh Palisades Park, LLC v. Commonwealth, 888 A.2d 655, 660 (Pa. 2005). Regarding these prerequisites to a merits determination, I agree with the majority that the board is aggrieved by Council's passage of the ordinance and its implementation, as such presumes to provide the electorate with the opportunity to override the Board's decision regarding where licensed facilities are to be located. I agree also with the majority's conclusion that the Board possesses standing to seek to enjoin implementation of the ordinance, based upon the Board's statutory duty to locate licensed facilities within cities of the first class. See 4 Pa.C.S. § 1304(b)(1). Moreover, given my agreement with the majority's ultimate decision on the merits, that a permanent injunction is warranted because the Board has sole authority to locate the licensed facilities at issue, the resulting of the referendum would be a nullity. In my view, it is crucially important that we prevent an election that is void from the outset. See Deer Creek Drainage Basin Authority v. County Board of Elections of Allegheny County, 381 A.2d 103, 107 (Pa. 1977)(indicating, in a case where a referendum could result in a measure that would be void from the outset that, "[i]n order to avoid unnecessary voter confusion and the unjustified expenditure of public resources on an inoperative election, and to protect the interests of all parties, injunctive relief is appropriate.").

the Gaming Act. Nevertheless, because I believe the matter could have been commenced properly in a court having original jurisdiction, rather than dismiss the action, the proper procedure would be to transfer the case to such tribunal. See Pa.R.C.P 1032(b)(specifying that, “whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter. . . the court shall order that the action be transferred to a court of the Commonwealth which has jurisdiction”); see also 42 Pa.C.S. § 5103(“If an appeal or other matter is taken to or brought in a court or magisterial district of this Commonwealth which does not have jurisdiction of the appeal or other matter, the court or district justice shall not quash such appeal or dismiss the matter, but shall transfer the record thereof to the proper tribunal of this Commonwealth”).

Having determined that the instant action for injunctive relief could have been brought in an appropriate court possessing original jurisdiction, I also note that this Court could have then invoked its “extraordinary jurisdiction,” see 42 Pa.C.S. §726, and assumed plenary jurisdiction over the case, resulting in it being transferred back to this Court for final adjudication. I believe that rather than insisting on such procedural maneuvering, under the facts of this case and at this juncture, we should simply keep and decide it given the importance of the issue, the time frame involved and our interest in judicial economy and expediency. See id. (Notwithstanding any other provision of law, the Supreme Court may, on its own motion or upon petition of any party, in any matter pending before any court or district justice of this Commonwealth involving an issue of immediate public importance, assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise cause right and justice to be done); see also Deer Creek Drainage Basin Authority v. County Board of Elections of Allegheny County, 381 A.2d 103, n.3 (Pa. 1977) (where we, likewise, exercised our

plenary jurisdiction in view of the important public election issue involving whether a potentially void referendum matter should be enjoined).

Based on the foregoing, I believe our Court may properly address the merits of the Board's request for injunctive relief. In this regard, I concur in the result reached by the majority that such relief is warranted.