

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

THE PENNSYLVANIA GAMING : No. 55 EM 2007
CONTROL BOARD, :
 :
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 : SUBMITTED: April 27, 2007
JAFFE, AND THE HONORABLE GENE :
COHEN, ACTING CITY :
COMMISSIONERS, IN THEIR OFFICIAL :
CAPACITY AS THE PHILADELPHIA :
COUNTY BOARD OF ELECTIONS, :

Respondents

PHILADELPHIA ENTERTAINMENT AND :
DEVELOPMENT PARTNERS, LP, D/B/A/ :
FOXWOOD CASINO PHILADELPHIA, :
HSP GAMING, L.P., :

Intervenors

THE PENNSYLVANIA GAMING CONTROL BOARD,	:	No. 56 EM 2007
	:	
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	:	

DISSENTING OPINION

MR. JUSTICE SAYLOR

DECIDED: August 3, 2007

On the threshold jurisdictional issue addressed in Part II of the majority opinion, I maintain the position that Section 1506 of the Gaming Act, 4 Pa.C.S. §1506, does not extend to original jurisdiction matters.¹ A challenge in the courts to a legislative act, such as the Philadelphia ordinance presently at issue, is conventionally understood to

¹ This position was previously developed in my dissenting statement, joined by Mr. Justice Castille, to the Court’s April 13, 2007, Order granting the Gaming Control Board’s request for a preliminary injunction.

represent an original jurisdiction matter, see, e.g., Devlin v. City of Philadelphia, 862 A.2d 1234 (Pa. 2004); whereas Section 1506 is explicitly addressed to this Court’s “appellate jurisdiction,” 4 Pa.C.S. §1506.² In so addressing Section 1506, I simply do not believe that the Legislature contemplated the radical alteration to conventional practice that is reflected in the majority opinion. Had the Legislature designed the statute to extend its reach to classic original jurisdiction matters, it readily could have utilized the applicable terminology.

My response to the majority’s policy assessment, see Majority Opinion, slip op. at 13-14, as set forth in my previous dissenting statement, remains as follows:

I recognize that, had the General Assembly foreseen the present circumstances, it might very well have drafted Section 1506 more broadly. Nevertheless, our approach to statutory construction is to apply the plain terms of an enactment when they are clear, see, e.g., Commonwealth v. McClintic, 589 Pa. 465, 472-73, 909 A.2d 1241, 1245 (Pa. 2006), as I believe they are here. Moreover, investing a State Supreme Court, which generally functions in an appellate capacity, with exclusive responsibility for original jurisdiction matters is a reordering of great consequence to both the Court (in terms of resources and procedures) and the litigants, which I believe should occur only upon very clear and deliberate terms.

² Highlighting the difference between appellate and original jurisdiction matters, our Rules of Appellate Procedure pertaining to review of governmental determinations are framed around this distinction. See Pa.R.A.P. 1511 - 1561 (distinguishing between appellate and original jurisdiction petitions for review in terms of filing deadlines, content, other pleadings allowed, intervention, scope of review, and disposition); Pa.R.A.P. 1501, Note (“[T]he rules have been amended to more clearly separate procedures for appellate proceedings from those applicable to original jurisdiction proceedings”). See generally G. RONALD DARLINGTON, KEVIN J. MCKEON, DANIEL R. SCHUCKERS, AND KRISTEN W. BROWN, PENNSYLVANIA APPELLATE PRACTICE §1501:1 (elaborating on fundamental differences between appellate and original jurisdiction matters).

Pennsylvania Gaming Control Bd. v. City Council of Philadelphia, Nos. 55-56 EM 2007 (Pa. April 13, 2007) (Saylor, J., dissenting, joined by Castille, J.).

The reasoning supporting each subsequent part of the majority opinion appears to me to depend integrally upon the majority's repeated assertion that "the General Assembly has given the Board the sole authority to locate licensed facilities in Philadelphia and did not give the City's electorate the right to consider or override that decision or to prevent the implementation of that decision under the City's laws." Majority Opinion, slip op. at 15; see also id. at 16, 18-20, 21-23. Clearly, this was the Legislature's design. However, in Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth, 583 Pa. 275, 877 A.2d 383 (2005) ("PAGE"), this Court found that the General Assembly's attempt to effectuate this intent via the Gaming Act violated the non-delegation clause of the Pennsylvania Constitution, in the absence of more specific legislative standards by which the Board is to make such determinations. See id. at 334-35, 877 A.2d at 418-19. Although the Legislature subsequently amended the Gaming Act, it did nothing to supply the necessary "definitive standards, policies and limitations to guide [the Board's] decision-making with regard to zoning issues." Id. I do not follow the logic underlying the majority's position that amended Section 1506 serves this function or otherwise fills the void, See Majority Opinion, slip op. at 21, since the amendment supplies no standards, policies, or limitations to be applied by the Board in the location of gaming facilities, but rather, relates solely to judicial review.

My position concerning this matter remains that this Court should not have intervened to restrain the presentation to the Philadelphia electorate of the ballot

question regarding the location of gaming facilities within the City, on either the jurisdictional or substantive grounds that have been developed by the majority thus far.

Finally, I recognize that there are additional grounds for relief asserted in the Gaming Control Board's petition for review, see Majority Opinion, slip op. at 23 n.11, including the claim that the ordinance represented an attempt to engage in constitutionally impermissible exclusionary zoning. To the extent that additional review is warranted,³ I believe that those matters should be addressed by a court of appropriate jurisdiction, where necessary, in a fact-finding capacity. At this juncture, I would have no objection to the majority's indicated prerogative to invoke the Court's King's Bench powers, see Majority Opinion, slip op. at 14 n.6, to initiate this process.

³ As noted in my prior dissenting statement, I believe that this matter is technically moot since the ordinance was keyed to the May 15, 2007 primary. Although courts generally will not review controversies that have become moot, an exception exists where the circumstances are capable of repetition yet evading review. See, e.g., Burger v. Board of School Directors of McGuffey Sch. Dist., 576 Pa. 574, 583, 839 A.2d 1055, 1060 (2003).