

**[J-100-2007]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**EASTERN DISTRICT**

PHILADELPHIA ENTERTAINMENT AND : No. 88 EM 2007  
DEVELOPMENT PARTNERS, L.P. D/B/A/ :  
FOXWOODS CASINO PHILADELPHIA, :

Petitioner, :

v. :

CITY OF PHILADELPHIA, CITY :  
COUNCIL FOR THE CITY OF :  
PHILADELPHIA, AND DEPARTMENT OF :  
LICENSES AND INSPECTIONS OF CITY :  
OF PHILADELPHIA, :

Respondents. :

SUBMITTED: July 9, 2007

**CONCURRING OPINION**

**MR. JUSTICE CASTILLE**

**DECIDED: November 20, 2007**

I find myself in the position of agreeing with the Majority’s hands-off approach in this gaming appeal, but at the same time having difficulty squaring the approach here with our recent interventionist decision in Pennsylvania Gaming Control Bd. v. City Council of Philadelphia (“PGCB v. City Council”), 928 A.2d 1255 (Pa. 2007) -- a case in which I was in a dissenting posture. My dissent in PGCB v. City Council concluded with the following prediction: “Failing to convince my colleagues of their fundamental error, I content myself with this dissent which, I trust, a future Court will vindicate.” 928 A.2d at 1286 (Castille, J., dissenting). I did not expect said vindication to come so quickly, albeit so indirectly.

The Majority does not purport to disavow, or even to narrow, the decision in PGCB v. City Council. In my view, however, it is difficult, if not impossible, to square today's decision with the majority view in PGCB v. City Council. This creates a jurisprudential conundrum for this author. Ordinarily, notwithstanding my dissent in PGCB v. City Council, principles of *stare decisis* would oblige me to follow the prevailing law. I could dissent here, and insist upon the logical application and extension of the prior decision. However, I am not particularly inclined to insist upon application of the earlier decision which I believe was erroneous -- especially where the Court majority from the prior case fails to so insist. Moreover, it is becoming apparent that the Gaming Act cases, at least in their early stages, are *sui generis*. Perhaps, then, this case has simply revealed the **judicial** "fits and starts," see Riverwalk Casino, LP v. Pennsylvania Gaming Control Board, 926 A.2d 926, 953 (Pa. 2007) (Castille, J., dissenting) that are inevitable in explicating a new review paradigm. I write separately precisely because I view today's decision as a departure from our recent precedent, and I believe that, in order to avoid confusion for the bench and bar, and to avoid unsettling the expectations of litigants, such departures, particularly from recent decisions, should be acknowledged and explained.

As a matter of statutory construction, I take no issue with the Majority's conclusion that this Court has jurisdiction, pursuant to Section 1506 of the Gaming Act, over PEDP's constitutional challenge to the Philadelphia zoning ordinance at issue. Majority Slip Op. at 10. The circumstances described by the Majority, unlike those in PGCB v. City Council, readily fall within the text of Section 1506. The Majority, however, disposes of PEDP's first claim as unripe for adjudication and its second claim as outside this Court's jurisdiction, an overall far more restrained jurisprudential approach than was applied in PGCB v. City Council. Hence my concurrence.

## I. Count I: Ripeness

The ordinance at issue here rezoned a parcel of land owned by PEDP, which was designated as a future site of a licensed gaming facility by the Pennsylvania Gaming Control Board (“the Board”), from commercial use to residential use. If enforced, this designation would preclude the gaming facility development envisioned by PEDP and approved by the Board. The Majority’s ripeness analysis relies on the City’s claim that the prior commercial entertainment district (“CED”) designation supersedes all underlying zoning classifications, and the assertion by the City that it has “never expressed an intention to apply this new R-10A designation to preclude development of [PEDP’s] casino.” Majority Slip Op. at 8 (citing Briefs for Respondents).

While correct in its conclusion, the Majority makes no effort to square its analysis with PGCB v. City Council. That the Majority deems ripeness determinative in this case, while the Court quickly dismissed a similar argument in PGCB v. City Council, is perplexing. See PGCB v. City Council, 928 A.2d at 1265; Id. at 1283-1284 (Castille, J., dissenting). The jurisprudential disconnect arising from two such divergent and near-contemporaneous decisions presents a quandary to those who seek to make sense of this body of law.

The alleged harm in PGCB v. City Council was two steps removed from actuality, as opposed to a single promissory step in this case. In PGCB v. City Council, Philadelphia City Council passed an ordinance that would have allowed the electorate to participate in the legislative process by weighing in on a question concerning whether City Council should facilitate state-ordained slot machine gambling. The proposal would not have affected any gaming facility, or the statewide slot machine empire, unless (1) the electorate voted a certain way, **and** (2) City Council acted upon the measure thereby obstructing the implementation of the Board’s statutory authority. This Court stretched the scope of “substantial and immediate interest” to find standing in the Gaming Board, an administrative agency, to suppress the electoral process and strike the ballot measure, reasoning that the

mere passage of the ordinance providing for the ballot question was somehow an impermissible infringement upon the agency's rulemaking authority. See PGCB v. City Council, 928 A.2d at 1265-1266. Additionally, the majority held that the challenge to the ballot question in PGCB v. City Council was ripe for adjudication, **before** any vote had been cast. Id. In the present case, we are faced with a challenge levied, not by a bureaucratic entity, but by the actual party awarded the casino license. That party has just seen its approved property reverse spot-zoned (or so it says) to prevent it from building the casino it was licensed by the Board to build. The obstructionist ordinance thus actually exists here, where the alleged obstruction had not yet come into existence in PGCB v. City Council. Yet this case is deemed unripe, Majority Slip Op. at 11, where the prior one was ripe -- and so ripe as to warrant unprecedented interference with the democratic process to boot. The Majority's discussion on facial versus as-applied challenges does not change the fact that, in the real world, it is difficult to see how the challenge here is unripe if the ripeness holding in PGCB v. City Council is still deemed valid.<sup>1</sup> I concur in the result on ripeness only because I view today's decision as an implicit disapproval of PGCB v. City Council. What is unfortunate is that, if this Court was destined to be wrong in one of these cases, the error

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<sup>1</sup> Respecting the Majority's distinction between a facial challenge and an as-applied challenge, see Majority Slip Op. at 11, n.7, such is as much a matter of characterization as it is of substance. One could frame today's challenge as a facial challenge also merely by using the reasoning of PGCB v. City Council: given the city's initial zoning scheme, the Board's approval, and PEDP's development plan, the very presence of the new residential zoning classification, as well as the fact that it "spot-zones" PEDP's property, impermissibly infringes upon the rights of PEDP. One could, at the same time, as readily frame the challenge to the ballot question in PGCB v. City Council as an as-applied challenge: *i.e.*, the Board's authority could only have been impinged if the Philadelphia electorate voted a certain way. Furthermore, not only is it difficult to square the ripeness analysis here with that in PGCB v. City Council, but the Majority never addresses this Court's most recent (and unanimous) analysis of ripeness in Township of Derry v. Pennsylvania Department of Labor & Industry, 932 A.2d 56 (Pa. 2007). Township of Derry, like this case, involved an existing, but not-yet-applied ordinance, yet the challenge was deemed ripe. Id. at 60 (finding actual harm suffered by the parties due to the uncertainty surrounding the enforcement of a challenged regulation).

involved suppression of the people's bedrock right to express their opinion through the ballot.

## **II. Count II: Section 1506 Jurisdiction**

In its analysis of Count II, the Majority again examines jurisdiction under Section 1506 and dismisses PEDP's petition for a writ of mandamus, interpreting Section 1506's jurisdictional grant as "appellate" rather than "original." With this reasoning, the Majority seems to implicitly overrule the jurisdictional approach in PGCB v. City Council, and adopt Mr. Justice Saylor's view in dissent in that case, a view which I joined.<sup>2</sup> Given my joinder in Justice Saylor's dissent, I obviously believe today's decision is the better reading of the statute. In my view, the Majority fails to adequately square today's conclusions with the analysis in PGCB v. City Council. Nevertheless, I believe the Majority decision is correct. Today's sound conclusion indirectly overturns a decision that rested upon a shaky foundation the day it was decided.

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<sup>2</sup> Justice Saylor considered the challenge in PGCB v. City Council to be an original jurisdiction matter, recognized that Section 1506 addresses this Court's "appellate jurisdiction" and noted that if the General Assembly had intended the PGCB v. City Council majority's "radical alteration to conventional practice," it would have made use of the appropriate terminology. PGCB v. City Council, 928 A.2d at 1286 (Saylor, J., joined by Castille, J., dissenting).