[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
v.	:	Concerning the Ordinance Passed by City Council for the City of Philadelphia on
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,	:	March 29, 2007
Respondents	:	SUBMITTED: April 27, 2007
PHILADELPHIA ENTERTAINMENT AND DEVELOPMENT PARTNERS,L.P. d/b/a/ FOXWOOD CASINO PHILADELPHIA, HSP GAMING, L.P.	:	
Intervenors	:	

THE PENNSYLVANIA GAMING CONTROL BOARD, Petitioner, 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 COMMISSIONERS, IN THEIR OFFICIAL CAPACITY AS THE PHILADELPHIA COUNTY BOARD OF ELECTIONS, Respondents	:	No. 56 EM 2007 Emergency Petition of the Pennsylvania Gaming Control Board in the Nature of a Complaint for Declaratory Judgment SUBMITTED: April 27, 2007

DISSENTING OPINION

MR. JUSTICE CASTILLE **DECIDED: August 3, 2007**

Over the dissent of Mr. Justice Saylor, which I joined, this Court entered a *per curiam* order on April 13, 2007, which granted extraordinary, preliminary injunctive relief to the Pennsylvania Gaming Control Board ("Board"), relief which prohibited Philadelphia primary voters from passing on a ballot referendum concerning a zoning amendment to the Philadelphia City Charter. The *per curiam* order contained no citation explaining the jurisdictional basis for the Court's order in prohibition, nor any merits citation or discussion to justify the extraordinary relief granted. The Court goes a step further today and grants a permanent injunction, ordering that the citizens of Philadelphia shall never be permitted to

vote upon the Charter change referendum their local representatives would have them consider. In its opinion, the Court confines itself to the permanent injunction, and does not attempt to explain why it granted preliminary injunctive relief.

The error in the Court's April 13 order is perhaps understandable, given the time constraints when the Board's so-called "emergency" petitions were filed. But, this Court has since had ample time for more careful deliberation concerning the propriety of injunctive relief. That deliberation, of course, creates an uncomfortable situation for the Court, should it recognize that its original suspension of the franchise was erroneous, since correction requires admitting the mistake; perhaps that is why the Majority does not attempt to explain how its initial order was justified under the stringent standard applicable to preliminary injunctions. But admitting a mistake is our duty, in an appropriate case. I am convinced now, more so than in April, that this Court lacked, and continues to lack, jurisdiction to grant the Board's request to deny the fundamental right of the People to vote on the ballot initiative; that, even if we had such jurisdiction, it is a grave mistake to grant relief in the form of suspension of the franchise; and that it is particularly inappropriate to do so upon the request of an administrative agency which has no cognizable legal interest which is compromised in any manner by allowing voters to weigh in on a referendum. Therefore, I would vacate, as improvidently granted, the injunctive order of April 13 and I would dismiss the instant petitions for want of jurisdiction and let the People vote.

On the question of jurisdiction under the Gaming Act to enjoin an election at the behest of an administrative agency, Justice Saylor again dissents, articulating what I believe to be an unanswerable rebuttal to the Majority's claim that this Court has original appellate jurisdiction to abort any ballot initiative that poses a question that the Board feels could inconvenience it if answered a certain way. I therefore join in that part of Justice Saylor's dissent explaining why we lack jurisdiction under the Act.

In addition to joining Justice Saylor's dissent concerning jurisdiction under the Act, I write separately to address the Majority Opinion's suggestion, in *dicta*, that this Court has independent authority to cancel the vote and interfere in the legislative process in Philadelphia through a *sua sponte* assertion of King's Bench power, 42 Pa.C.S. § 502. See Maj. slip op. at 13-14 n.6. I also write to address certain substantive points in the Majority Opinion with which I respectfully disagree. Specifically, I would hold that: (1) even if this Court has jurisdiction over the Board's request to disenfranchise the citizens of Philadelphia, there is no justification for the Court's unnecessary, paternalistic and remarkable prior restraint of the franchise; and (2) the Board, a bureaucratic entity, lacks standing to seek to enjoin the right of the People to vote on a proposed change to their City Charter. Today's decision represents a dramatic departure from this Court's respect for the democratic values underlying our system of government. Therefore, I am compelled to dissent.

I. This Court Lacks Jurisdiction.

As an alternative to its claim that this Court has appellate jurisdiction under the Gaming Act to prohibit City officials from letting the citizens vote on the proposed referendum framed by City Council, the Majority declares, in a footnote, that "this matter also clearly merits invocation of our King's Bench powers" under Section 502 of the Judicial Code, 42 Pa. C.S., and In re Avellino, 690 A.2d 1138, 1140-41 (Pa. 1997). The suggestion of this alternative basis for jurisdiction is gratuitous, since the Board never asked for relief under King's Bench.

In Avellino, this Court exercised its King's Bench power to resolve a dispute arising from the First Judicial District, where a judge of the Court of Common Pleas of Philadelphia County had refused to honor an assignment made by the Administrative Judge of the Trial

Division.[1] The Avellino Court explained the difference in this Court's power of extraordinary jurisdiction, 42 Pa.C.S. § 726, and its King's Bench powers:

> Although in many respects an exercise of the Court's King's Bench powers is to the same effect as an exercise of extraordinary jurisdiction under 42 Pa.C.S. § 726, the two are not identical. Extraordinary jurisdiction under section 726 enables the Court to assume plenary jurisdiction of a matter pending before a court or district justice at any stage. The King's Bench powers are not so limited. **The "power of general superintendency over inferior tribunals,**" may be exercised where no matter is pending in a lower court. Cf. President Judge Determination Cases, 420 Pa. 243, 216 A.2d 326 (1966) (King's Bench powers invoked to determine priority of commission of common pleas court judges). We therefore reject Judge Avellino's argument that this Court cannot take cognizance of the dispute because the subject matter does not fall within our statutory original jurisdiction, there is no final order as to which we can exercise appellate jurisdiction, and there is no "case" pending as to which we can assume extraordinary jurisdiction.

690 A.2d at 1140-41 (emphasis supplied). This Court further addressed the nature of its King's Bench powers in In re Franciscus, 369 A.2d 1190 (Pa. 1977), which involved a challenge to this Court's authority to issue Writs of Prohibition, writs which may only be issued to lower tribunals:

> The Supreme Court's inherent power over the inferior courts and judicial officers can be traced historically. In Carpentertown Coal & Coke Co. v. Laird, 360 Pa. 94, 99-100, 61 A.2d 426, 428-29 (1948), the Court sketched the history of this Court's superintendency powers:
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> > "It is suggested by the Turnpike Commission that although this Court has assumed the power to issue writs of prohibition the question as to its constitutional right so to do has not heretofore been challenged or discussed. Be that as it may, the justification for the Court's exercise of such power is to be

[1] Avellino came to the Court upon a Petition from the Administrative Judge and the President Judge of the First Judicial District, apprising the Court of the judicial dispute below; in response to the Petition, we issued a Rule to Show Cause.

> found in the Act of May 22, 1722, 1 Sm.L. 131, 140, section XIII, which vested in the Supreme Court all the jurisdictions and powers of the three superior courts at Westminster, namely, the King's Bench, the Common Pleas and the Exchequer. **Inherent in the Court of King's Bench was the power of general superintendency over inferior tribunals**, a power which was of ancient inception and recognized by the common law from its very beginnings. Blackstone says, Book III, *42: "The jurisdiction of this court (of King's Bench) is very high and transcendent. **It keeps all inferior jurisdictions within the bounds of their authority, and may either remove their proceedings to be determined here, or prohibit their progress below.**" By the Act of 1722 the Supreme Court of Pennsylvania was placed in the same relation to all inferior jurisdictions that the King's Bench in England occupied, and thus **the power of superintendency over inferior tribunals became vested in this Court from the time of its creation:** Commonwealth v. Ickhoff, 33 Pa. 80, 81; Chase v. Miller, 41 Pa. 403, 411. In the exercise of its **supervisory powers over subordinate tribunals** the Court of King's Bench employed the writ of prohibition and such right and practice accordingly passed to the Supreme Court; First Congressional District Election, 295 Pa. 1, 13, 144 A. 735, 739; McNair's Petition, 324 Pa. 48, 64, 187 A. 498, 505. The provision of the Constitution limiting the original jurisdiction of the Court did not affect the existence of this right; the Constitution did not remove from the Court **its supervisory functions over lower courts** . ... **The power of controlling the action of inferior courts** is so general and comprehensive that it has never been limited by prescribed forms of procedure or by the particular nature of the writs employed for its exercise."

369 A.2d at 1192-93 (Pa. 1977) (emphases supplied) (further citations and footnote omitted).

The exercise of King's Bench in Avellino obviously was appropriate; it involved a supervisory issue concerning judicial officers of an inferior tribunal. But, this Court does not have such a supervisory role *vis a vis* the actions of the Philadelphia City Council, or any other legislative body. City Council is not a tribunal, much less is it an inferior tribunal

subject to the superintendency of this Court. Nor is the Philadelphia County Board of Elections a tribunal answerable to this Court. The Court's explanation for claiming that King's Bench jurisdiction is appropriate in the case *sub judice* rests upon solipsism: "we have authority to act because we say we have the authority to act."

The Majority's *dictum* represents a troubling arrogation of power. The fact that the Gaming Board's displeasure with Council's preliminary legislative action is, in the Court's view, a matter of "widespread importance, and one that has generated … substantial public concern" does not, on its own, explain why King's Bench authority is any more appropriate here than it would be to call in team officials of the Philadelphia Eagles and the Pittsburgh Steelers to explain their draft selections. There is no judicial supervisory issue here, as the Board elected to seek injunctive relief directly in this Court. The "dispute" the "aggrieved" Board created here is properly reviewable or appealable in no court at this time; properly reviewable or appealable to this Court by statute; or properly reviewable or appealable by statute in some other court inferior to this one, a court the Board chose to bypass. If the Majority believes the circumstance presented involves the latter scenario, or if it prefers that route as a way to back away from the patent jurisdictional error it made on April 13, it should identify that court and the basis for its jurisdiction, and then explain why it would ignore the parties' jurisdictional arguments, perceive an issue of judicial supervision or administration, and *sua sponte* assume jurisdiction rather than transferring the matter to the court which should hear the "important" case in the first instance.

Beyond the question of whether this Court properly **has** the power to invoke King's Bench jurisdiction in this instance is the equally important question of **whether** it should do so. The Board does not seek King's Bench review. As the case presents itself -- given the Board's litigation strategy of filing directly here -- there is no issue of judicial superintendency. The extraordinary anti-democratic relief sought -- enjoining the vote of the citizens -- likewise should weigh heavily against the Court becoming the Board's

supplemental advocate and creating a jurisdictional end-around to advance the Board's objectives. Finally, the "harm" alleged by the Board has nothing to do with its cognizable bureaucratic "interests," but at best is political, and that alleged harm is a mere piffle compared to the fundamental, extraordinary harm the agency seeks to visit upon the voters of Philadelphia by depriving them of the franchise. I would not torture King's Bench jurisdiction just because the case involves a statute, an agency decision, and a ballot question, which are important or controversial, or even both.

The final point to be made respecting jurisdiction is that this is a peculiar case in which to reach out and find review authority. The Majority purports to engage in a plain meaning construction of Section 1506 of the Act. But, that construction is implausible, and not only for the reasons articulated by Justice Saylor in dissent. The Act speaks of appealing "final" decisions. The ordinance and referendum here are but a stage in the Philadelphia legislative process. The ordinance merely places a charter change question on the ballot; the City Charter would actually be amended if, and only if, the electorate responded in the affirmative. Until the People have spoken, there is no relevant final "order, determination or decision" at issue, under any plausible plain meaning approach. No doubt, the obvious absence of a final decision is what leads to the Majority's repeated mischaracterization of the ballot question as giving Philadelphia voters an opportunity to override the Board's licensing decisions. The actual ballot question, as phrased by Council, says no such thing. The ballot question does not even address the Board, its powers, or its licensing decisions; if adopted, it would apply only to Council which, unlike the Board, is answerable to the people of Philadelphia.

The Majority's torturing of the statute does not stop there. Despite its insistence that the plain meaning of the statute commands its conclusion that the Board may air any political or trivial grievance directly in this Court, the Majority adverts to extraneous interpretative points, such as the statute's overall purpose to facilitate the hasty

implementation of gaming. In a particularly revealing passage, the Majority invokes another principle of construction and claims that it would be "absurd" to conclude that the General Assembly would allocate direct review jurisdiction over licensing appeals and constitutional challenges to this Court, but not also require direct review of injunctive challenges to ordinances approving ballot questions which, if answered a certain way, **might** (and only might) then "impact on" the decision of the Board's licensing decisions concerning Philadelphia casinos. Maj. slip op. at 12-13. To the contrary, it is not at all absurd to conclude that the General Assembly simply did not contemplate burdening this Court with appeals from local ordinances that would merely place ballot questions involving casino zoning before the electorate. Questions of constitutionality and ultimate licensing are the most important of questions under the Act. Questions involving the Board's attempt to interfere in local legislative processes, and to deny the people a right to vote upon proposed changes to local charters, no doubt, simply were not contemplated. The Gaming Act creates enough of a burden upon this Court, requiring direct review of constitutional challenges and licensing decisions. I would not torture the statute, the plain meaning of words such as "appeal" and "final determination," and the actual content of the ballot question at issue, to pretend that the statute places these sorts of injunctive "appeals," which seek to suspend the franchise, in this Court as well.

The Majority should vacate the April 13 preliminary injunction as having been improvidently entered, dismiss the petitions for want of jurisdiction, and let the People vote.

II. Injunctive Relief, in the Form of Negating the Franchise, is Inappropriate.

The Court's *per curiam* grant of preliminary injunctive relief on April 13 was unaccompanied by explanation or supporting citation. Today's Majority Opinion likewise does not discuss the **propriety** of relief in the form of aborting the vote on the ballot

question, rather than consigning the Board (or the licensees, the truly "interested" parties) to legal relief, in the ordinary course, following a vote on the initiative. Neither preliminary nor permanent injunctive relief is justifiable particularly where, as here, the relief involves suppression of the Peoples' right to vote.

A preliminary injunction properly may issue only when six essential prerequisites are established. As this Court noted in Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc., 828 A.2d 995 (Pa. 2003):

> In ruling on a preliminary injunction request, a trial court has "apparently reasonable grounds" for its denial of relief where it properly finds that any one of the following "essential prerequisites" for a preliminary injunction is not satisfied. See Maritrans GP, [Inc. v. Pepper, Hamilton & Scheetz,] 602 A.2d [1277,] 1282-83 [(Pa. 1992)] (requirements for preliminary injunction are "essential prerequisites"); County of Allegheny v. Commonwealth, 518 Pa. 556, 544 A.2d 1305, 1307 (1988) ("For a preliminary injunction to issue, every one of the [ ] prerequisites must be established; if the petitioner fails to establish any one of them, there is no need to address the others."). First, a party seeking a preliminary injunction must show that an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages. … Second, the party must show that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings. ... Third, the party must show that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct. … Fourth, the party seeking an injunction must show that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits. … Fifth, the party must show that the injunction it seeks is reasonably suited to abate the offending activity. … Sixth and finally, the party seeking an injunction must show that a preliminary injunction will not adversely affect the public interest.

828 A.2d at 1001 (supporting citations omitted). The test for a permanent injunction is simpler, but still requires a showing of harm that cannot adequately be addressed in the ordinary course by an action at law:

> [I]n order to establish a claim for a permanent injunction, the party must establish his or her clear right to relief. … However, unlike a claim for a preliminary injunction, the party need not establish either irreparable harm or immediate relief and a court "may issue a final injunction if such relief is necessary to prevent a legal wrong for which there is no adequate redress at law." …

Buffalo Township v. Jones, 813 A.2d 659, 663-64 (Pa. 2002), cert. denied, 540 U.S. 821 (2003) (citations omitted). Notably, in its discussion of the procedural history of this matter, the Majority cites to Chief Justice Cappy's opinion in the Buffalo Township case, notes that a permanent injunction is available if the Board establishes a clear right to relief, but then omits the requirement that the moving party show that injunctive relief is necessary because there is no adequate remedy at law. In my view, the Board has not come close to carrying its burden of showing that the ballot question at issue posed (and poses) such an immediate and otherwise irremediable harm to the Board that it is entitled to deprive Philadelphia voters of the right to pass upon the measure.

There is no possible justification for the Court's initial order under preliminary injunction standards, which may explain the Court's silence on that point, and its permanent order likewise ignores the governing standard. It cannot seriously be maintained that there was an "immediate" and "irreparable" harm to the Board's "interests" posed by the primary ballot question. Respecting immediacy, I cannot discern what harm the Board would suffer (assuming a bureaucracy can be said to suffer cognizable harm in this area, but more on that later). Any harm was entirely contingent. Harm allegedly would arise **if** the electorate's right to vote had not been suspended by the Court, **if** a majority of Philadelphia voters then voted in favor of the Charter change, and **if** the City Council then acted on that change. The harm consisted in the alleged fact that implementation of the Board's licensing decisions might then be affected in some vague way. I say vague because, according to the Board and the Majority, all the power is with the Board, so any action of

Council would be a nullity. Null acts tend to cause little harm. This is hardly an immediate harm warranting suspension of the vote on a legislative referendum.

Nor is the conjectured harm irreparable, if the word irreparable is to be accorded its ordinary meaning. If all of the contingencies the Board fears came to pass, the Board, or some party with a true "interest" in the matter (the successful license applicants) could seek relief after the vote, and after the alleged harm materialized. Since both the Board and the Majority feel that the Board has "sole authority" in this area, relief in the ordinary course is more than sufficient to vindicate the Board's alleged interest -- all without taking the extraordinary step of sacrificing the People's sacred franchise. It would require sophistry of the highest and most disingenuous order to suggest that the **public** interest is **more** harmed by denial of the injunction than by granting it, or to suggest that it is a greater injury for the Board to have to await actual harm to seek relief than it is to suspend the right to vote in Philadelphia.

Notably, the Office of the City Solicitor, which has filed a very helpful brief on behalf of the City and the Board of Elections, agrees with the Board and with the Majority (in its merits analysis) that the proposed City Charter amendment, if adopted by the voters, would prove to be a nullity, given the breadth of the Gaming Act legislation. As the Solicitor correctly notes, however, that contingent possibility is no reason to deny the right to vote upon the legislative ballot measure, and the Board's remedy should await the contingency and attenuated harm (if any) it posits. In more pointed terms, the City Council respondents characterize this Court's April 13, 2007 injunction as "a fundamentally anti-democratic act directly inconsistent with the traditions of the Commonwealth, of our Nation, and indeed of any civilized democratic polity. E.g., Mt. Lebanon v. County Bd. of Elections of the County of Allegheny, 368 A.2d 648, 649 (Pa. 1977). The role of our courts is to evaluate the statutes produced by the electoral and legislative process. It is not the place of our courts

to intervene before that process is complete." City Council Brief, 3. It pains me to say that this characterization of our order is accurate.

The Board simply cannot be said to suffer any kind of cognizable legal harm by the Philadelphia electorate merely voting on the referendum. First of all, the voters could reject the referendum. The Mayor, many unions, and other groups openly favor gaming in Philadelphia. Even if a majority of the voters were to approve the Charter change, the referendum merely says that Council cannot affirmatively act to permit licensed gaming in certain zones. But, the Board's merits argument, which the Majority is quick to embrace, says it does not need Council's approval or cooperation at all. If the Board is correct, as the Majority says it is, then I cannot perceive how an irrelevant non-action, or even an affirmative non-approval by an entity with no say in approvals, affects the Board's licensing decisions, much less its "authority." How can it harm the Board, a mere agency, to an extent that suspension of the right to vote on a proposed Charter change is justified?

There is little doubt that the referendum was a political ploy on Council's part, nor do I doubt that it raised false hopes in some voters. But, that is no reason to deny the vote. No doubt, the daily business of the Board would be easier if Philadelphia voters were denied the opportunity to voice their dissent, or their concurrence, with the contours of gaming in Philadelphia. No doubt, the Board would prefer not to be the subject of public criticism. However, as Council notes, "[t]he desire of [the Board] to avoid the embarrassment of a public rebuke by Philadelphia voters is understandable enough, but it hardly affords a basis for the extraordinary relief sought." City Council Brief, 8. Welcome to the brave new world of government in a democracy. Memo to Board: criticism is part of the job. If the Board is correct on the merits of its power, by definition, neither it nor the casinos it licensed can be said to suffer any harm which would warrant extinguishing the right of citizens "to express their views about governmental actions that affect them profoundly." Id.

The Majority repeatedly declares, as if it were a self-evident truth, that the General Assembly did not confer upon the citizens of Philadelphia a right to vote upon a Charter change referendum involving the role their local government should play in accommodating state-ordained casinos in Philadelphia. By what authority do the voting rights of the Philadelphia citizenry, concerning their local representatives and the contours of their local Charter, depend upon such assumed silent whims as perceived by the Majority? The Majority seems to believe that if the General Assembly legislates in an area, it thereby implicitly, and lawfully, denies citizens of an affected political subdivision from voting on any measure involving the subject matter. This is an extraordinary, and extraordinarily dangerous, assumption in a democracy. Statewide legislation may occupy a field, it may displace a local expression, it may disapprove a local expression, but how can it operate to deprive the citizenry of the right to even pass upon a subject? If a local law, once actually enacted, proves to be unconstitutional, or to be inconsistent with some greater authority, there is time enough to remedy the matter in the ordinary course, after the law has been voted on and approved, and after considered deliberation.

Moreover, the curious view of democracy which powers the Majority's analysis of the right to vote seriously mischaracterizes the content of the referendum at issue. Again, the ballot question does not purport to tell the General Assembly or the Board what to do. The measure is purely local, aimed at the citizens' local representatives. If adopted, the referendum would approve a Charter change which would restrain Council, not the Board or the General Assembly. It is one thing for a locality to acquiesce in, or to knuckle under to, state-imposed decisions with which the subdivision might disagree. It is quite another to warmly embrace and go the extra mile to advance the state-imposed directive. The Majority's notion that expressions of restraint and dissent have no role in democracy in Pennsylvania is a strange one, indeed.

No candid consideration of the issues presented in this case can be accomplished without acknowledging that the introduction of gaming into Pennsylvania has been controversial. The manner in which the legislation was adopted afforded the average voter, including the people most likely to be affected by the siting of the casinos, scant opportunity to engage in a meaningful public debate. It is no surprise, then, that implementation of the Act has led to outspoken and organized community opposition in Philadelphia, opposition which powered Council's adoption of the ballot referendum at issue.

Philadelphia is not Las Vegas. It is the birthplace of our Nation, a vibrant, historic City where the past and present coexist. The provision in the Act requiring a certain distance from existing slots facilities (as relevant here, the "racinos" in Chester, Delaware County, and in Bensalem, Bucks County) obviously was designed to maximize the chances that the two casinos allocated to Philadelphia would be sited on the historic Delaware River waterfront, the same waterfront that William Penn first saw over three hundred years ago, the same waterfront Benjamin Franklin first saw as a seventeen year-old some forty years later, the same waterfront that borders a number of historic Philadelphia neighborhoods.[2] The sites ultimately approved by the Board are within easy walking or driving distance of Independence Hall and Square, the Liberty Bell, Carpenters' Hall, Christ Church, Elfreth's Alley, Gloria Dei Church, and other historic sites.

The approved remaking of the Philadelphia waterfront is extraordinary. Imagine gaming halls being placed this close to the U.S. Capitol or the White House, or as near to Faneuil Hall in Boston. Aside from the fact that the people of Philadelphia had no opportunity to participate in a public debate on the specifics of the legislation ultimately adopted by the General Assembly, the people in the historic neighborhoods most affected

[2] The only Philadelphia casino applicant whose site was not on the Delaware River, Trumpstreet, found its application rejected, in large part, because of its location.

by the approved casinos had a very limited say before the Board, which was charged only to abide by the Assembly's guidelines, and which went about its licensing duty with alacrity. To add insult to this injury, this Court, over the dissent of Justice Saylor and this author, denied various neighborhood groups "standing" to be heard in connection with the licensing decisions. See, e.g., Society Hill Civic Assn et al. v. Pennsylvania Gaming Control Bd., ___ A.2d ___ (Pa. 2007), 2007 WL 1610165 (decided 6/4/07).

And so, the neighbors directly affected by the licensing decisions were successfully muzzled before the General Assembly, muted before the Board, and totally muzzled before this Court. It is not surprising that the affected citizens pursued a parallel track through City Council, which did respond to their complaints, even if the response is legally meaningless. The referendum, whether adopted or not, allows for an expression of view by Philadelphia voters concerning where casinos should be sited in their historic City. The referendum, if adopted, would keep Council from acting to facilitate gaming under some circumstances and in certain neighborhoods. By what authority, consistent with the founding principles of our Nation, does the Court enjoin a vote by the citizens of Philadelphia concerning the role its **Council** should play in facilitating zoning for casinos? There simply is none. The Court's unnecessary restraint on democracy makes this a sad day, indeed.

I am reminded of the words of the loquacious Pennsylvania Supreme Court Justice Michael Musmanno, in a case involving a very similar issue arising out of a proposed Charter change in Philadelphia half a century ago:

> If the decision handed down today in this case had been promulgated behind the Iron Curtain it might well have been characterized as an illustration of the absolutism which can deprive the people of a voice in their government. The majority of this Court says that the people of Philadelphia are not qualified to pass upon two simple questions submitted to them by their own duly elected representatives, but the majority fails to state why the people are to be disfranchised on a matter involving their own government. …

> The plaintiffs who have sought and obtained an injunction against the submission of these questions to the people quite clearly desire that both questions [that would have been posed] be answered in the negative. If the changes contemplated in the question are bad for the people they would certainly vote them down, and the resulting vote would therefore achieve the result intended by the plaintiffs. If they are good for the people, the people would vote in the affirmative. The plaintiffs have blocked the proposed referendum out of fear that the people might approve the amendments because, obviously, if they believed the people would reject the amendments, they (the plaintiffs) would have [saved] themselves the expense, time, energy and work involved in initiating this litigation. In that aspect of the case, it is pertinent to inquire on what pedestal do the plaintiffs stand that they can presume to determine what is good and what is bad for the people.
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> The right of the people to decide any question which affects their welfare is a right enshrined in the [C]onstitution of the United States, the Constitution of the State of Pennsylvania, and, so far as Philadelphia is concerned, in the Home Rule Charter itself.
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> The lower Court declined to allow the people to pass upon the submitted questions not because of any parliamentary defect in the passage of the ordinance, but because it believed that it knew better than Council what was best for the City. But the Charter did not make of Court of Common Pleas … an upper chamber to the Philadelphia City Council. Court of Common Pleas … has no legislative powers whatsoever.

Schultz v. City of Philadelphia, 122 A.2d 279, 287-88 (Pa. 1956) (Musmanno, J., dissenting). Nor is this Court an upper chamber of Philadelphia City Council, and we do not possess legislative power. We should decline to advance the Board's attempt to stifle the possibility of Philadelphia voters expressing their views -- views which the Majority recognizes would be a nullity anyway -- on the siting of casinos in their historic city.

Although Justice Musmanno was in dissent in Schultz, his views are significant not only because of the inerrant logic of his position but also because, in the Mt. Lebanon case, this Court expressly rejected the plurality approach in Schultz to which that dissent

responded, and instead adopted the separate Schultz dissent of Justice Charles Alvin Jones. Because Mt. Lebanon obviously controls the case *sub judice*, and because the majority mischaracterizes the case, I quote its analysis at length:

> Legislative power has been defined as the power to make, alter, and repeal laws. … Furthermore, the courts may not encroach on the legislature's powers. … **As an amendment to a home rule charter has the force and status of a legislative enactment, … the courts should not interfere**. As Justice (later Chief Justice) Charles Alvin Jones stated, in his dissenting opinion in Schultz v. Philadelphia, 385 Pa. 79, 89-90, 122 A.2d 279, 284 (1956):
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> > "The jurisdiction of a court of equity may not be invoked to enjoin the enactment of a bill during the course of its passage through a legislative body. Such is the preponderant weight of authority throughout this Country and I say that without fear of successful contradiction. . . . Would anyone have the temerity to suggest that the Court of Common Pleas of Dauphin County, sitting in equity, would extend its jurisdiction to a complainant who sought to enjoin the enactment of a bill during its passage through the legislature even though it was conceded on all sides that the bill, if passed, would be a gross and palpable violation of the Constitution?"
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> As this court stated in Cali v. Philadelphia, 406 Pa. 290, 312, 177 A.2d 824, 835 (1962):
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> > ". . . it is too often forgotten that under our basic form and system of Constitutional Government the power and duty of a Supreme Court is interpretative, not legislative. We are not a Supreme, or even a Superior Legislature, and we have no power to redraw the Constitution or to rewrite Legislative Acts or Charters, desirable as that sometimes would be."
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> Furthermore, this court should not offer advisory opinions during the deliberative stages of the legislative process.
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> In Knup v. Philadelphia, 386 Pa. 350, 353, 126 A.2d 399, 400 (1956), this court stated:

> ". . . **it is equally well established that a court will take jurisdiction only in a case in which a challenged statute, ordinance, or rule of court has been actually applied to a litigant; it does not undertake to decide academically the unconstitutionality or other alleged invalidity of legislation until it is brought into operation so as to impinge upon the rights of some person or persons."**
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> … **In the instant case, there was only proposed legislation which, until enacted, affected no one**. The instant action was an attempt to obtain an advisory opinion.

Mt. Lebanon, 368 A.2d at 649-50 (emphases supplied) (citations omitted).

The Mt. Lebanon Court went on specifically to disapprove of the plurality opinion in Schultz, to the extent that plurality deemed it proper to opine upon the constitutionality of proposed amendments to the Philadelphia Home Rule Charter prior to their adoption. The Court disapproved of that proposition because: (1) it was "pure dictum," since the ballot measure independently failed for procedural reasons; (2) it was a non-binding plurality expression; and (3) "it "attempts to allow unwarranted judicial interference with the legislative process … [which] conflicts with sound constitutional principles and two centuries of case law of this court." 368 A.2d at 650-51.

Respondents specifically invoke Mt. Lebanon. The Majority responds only briefly, attempting to distinguish the case on grounds that its decision here, supposedly, is neither "theoretical nor abstract" because the vote is "as much a concern to the Board … as is the outcome of the vote." Even laying aside the strange notion that a party's "concern" makes an advisory opinion appropriate, this "distinction" is distressingly non-responsive to the holding and reasoning in Mt. Lebanon, which I have been careful to present in its fullness above. Mt. Lebanon spoke not only to avoiding advisory opinions, but also, and more fundamentally, to the limits of judicial power when asked to interfere in the legislative process. The Majority enjoins a vote by the citizens on a proposed change to their City

Charter. Mt. Lebanon expressly stated that such amendments have "the force and status of a legislative enactment, [and thus] the courts should not interfere." The ordinance that would result from a positive vote on the referendum has not come into being, much less has it "been actually applied to a litigant." At this point, there is only "proposed legislation which, until enacted, affected no one." The Majority's grant of relief here indisputably is "an unwarranted judicial interference with the legislative process," which ignores centuries of precedent, the doctrine of the separation of powers, and represents a *sub silentio* overruling of the Mt. Lebanon case.

In place of the plainly-controlling decision in Mt. Lebanon, the Majority cites and incompletely characterizes the decision in Deer Creek Drainage Basin Auth. v. County Bd. of Elections of Allegheny Co., 381 A.2d 103 (Pa. 1977). One need only read the third sentence of that case to see that it has no applicability here: "Under the [home rule] charter [at issue], upon the filing with the Board of Elections of Allegheny County of a proper referendum petition, **any ordinance which is the subject of such an election is suspended**." Id. at 104 (emphasis supplied). Moreover, the ordinance automatically suspended by the referendum petition in Deer Creek had initiated the existence of a multi-township, joint water authority; thus, the referendum by its existence effected an unlawful withdrawal from the joint authority. The Deer Creek majority detailed at some length the very real harm to actual parties that resulted from the very existence of the referendum:

> This referendum election has raised doubts about the continuing vitality of the Deer Creek Drainage Basin Authority. Not only the possible repeal but also the mere suspension of this ordinance, by operation of the West Deer home rule charter, has hindered the ability of the joint Authority and the Townships to stabilize the cost of this sewage project. The joint Authority has been frustrated in its effort to begin the operation of the project, and both West Deer and Indiana Townships have been unable to meet their sewage disposal needs.

381 A.2d 103 at 107 (Pa. 1977).

In contrast, the ballot referendum in the case *sub judice* does not, by its very existence, operate to suspend any statute or ordinance, much less does it affect any action of the Board. Again, the referendum only addresses Council's authority, an authority the Board and the Majority insist is a legal nullity. The fact that the Majority ignores this fundamental distinction does not make it go away. Moreover, it is notable that Deer Creek was decided later in the same year as Mt. Lebanon, yet the Court but did not even cite, much less did it purport to overrule, that case. Deer Creek does not remotely support the Majority's suppression of the vote here.[3] The Majority should respect the limitations upon this Court's power to interfere with the legislative process.

III. The Board Lacks Standing to Demand Suppression of the Vote.

The Majority remarkably finds that the Board, an administrative entity, has a "substantial, direct, and immediate interest" in the referendum, such that it has standing to seek to prevent the People from voting on the measure. I respectfully disagree with the Court's embrace of what amounts to bureaucratic standing.

The Board's role, as relevant here, was to investigate, deliberate, and award the two Philadelphia casino licenses authorized by the Gaming Act. In so doing, the Board passed upon the applications of real parties in interest: the license applicants. The Board awarded the two Philadelphia licenses, resulting in two winning parties and three losing parties. One

[3] In any event, I would be very careful before expanding whatever general rule can be said to emerge from Deer Creek, since there is a serious question whether the Court had jurisdiction to grant the relief it ordered, and it seems obvious that avoidance of the immediate harm played a substantial role in the Court bypassing the jurisdictional issue. The difficulties are outlined in the Dissenting Opinion of Mr. Justice Pomeroy, difficulties the Deer Creek majority made no attempt to resolve. See id. at 108-114.

of the unsuccessful Philadelphia license applicants appealed. On that appeal, the Board justified its decision to conduct its deliberations in private, in the face of a Sunshine Act claim, see 65 Pa.C.S. § 704, by arguing that its licensing decisions were quasi-judicial. Riverwalk Casino, LP v. Pennsylvania Gaming Control Bd., ___ A.2d ___ (Pa. 2007), 2007 WL 2034138, *6. The Board thus conceives itself, for purposes of its licensing decisions at least, as a quintessential **disinterested** entity.

In finding that the Board has standing to come into this Court and demand that the People of Philadelphia be denied their right to vote upon a referendum that would effect a zoning change to their City Charter, the Majority credits the Board's argument that a mere vote on the referendum acts to "thwart[] the exercise of its statutory duty and authority under the Gaming Act." Maj. slip op. at 15. Respectfully, this is nonsense. The Board completed the exercise of its relevant "duty and authority" when it awarded the licenses. The vote on the referendum has no effect on those decisions. More importantly, if the well-heeled, successful applicants encounter difficulties thereafter, they are more than positioned to litigate their **actual** interests in seeing to it that the facilities so licensed come into being. Indeed, the successful applicants already are doing so with additional lawsuits filed here. But, the **Board** has no cognizable legal interest -- much less a substantial, direct, and immediate interest -- in what occurs after it has discharged its licensing duty. Furthermore, even if I were to indulge the Majority's paternalistic fiction that the Board has a cognizable interest in vindicating its licensing decisions, a vote on the referendum simply does not operate to "thwart" those decisions. The ballot question is directed at Council and, as I have noted, the Board claims, and the Majority finds, that Council's view on the siting of the casinos is a nullity.

The Majority also declares that the Board has a cognizable "substantial, direct, and immediate" interest in seeing to it that its licensing decisions are not overturned. Maj. slip op. at 16. This is a very curious assertion. Are we to believe that all entities rendering

judicial, or quasi-judicial, decisions have a cognizable "interest" in having their decisions vindicated, such that they may initiate collateral lawsuits designed to defend their rulings? Does such "bureaucratic standing" really extend so far as to embrace petitions designed to abort local ballot questions because, if the vote goes a certain way, it may somehow "affect" the "quasi-judicial" decision? Under the Majority's curious theory, I suppose, trial judges now have "standing" to seek to enjoin elections that might threaten the viability of their rulings in a particular case or controversy.

Respectfully, the Majority needs to step back from its accommodationist approach to the gaming appeals. At least with respect to licensing decisions, the Board can only rationally be viewed as a neutral entity, not a "party" with a proper and cognizable "interest" in the licensing decisions it renders. Strictly speaking, the Board has no interest beyond that of the citizens of Pennsylvania who empowered it. It has no more "interest" in the litigation than this Court does. It is particularly bizarre to conclude otherwise when there are actual interested parties, *i.e.*, the license applicants. I would not recognize bureaucracy standing just because the Board invokes different roles (now agency, now quasi-judicial, now aggrieved litigant), at different times. The fact that the Board has a **position** on the ballot measure (it inconveniences the Board) does not mean it has a cognizable **legal** interest in it. The Board's interest is similar to that of an amicus curiae; but it hardly has the substantial, direct and immediate interest required to establish **party** standing, such that it can properly pursue an action to kill a ballot measure.

What the Board seeks to do in this case is to eliminate the prospect that the citizens of Philadelphia will express opposition to casino gambling near to their residences and "residentially related" properties. Suppression of the vote may well be a political concern for the Board, but it is not a cognizable legal "interest" sufficient to establish standing. Why should the Board, unlike all other governmental entities, be deemed immune from the opinion of the citizenry and the ordinary processes of government and litigation? As an

arm of government, the Board should not be encouraged to seek to suppress the views of the public as expressed in the legislative process.

Finally, it is beyond ironic that the Court finds that a bureaucratic entity has standing to seek to suppress the vote of the citizens of Philadelphia on a matter concerning gaming, while finding, in other cases, that citizens themselves living in the very neighborhoods affected by the awarding of casino licenses have no stake in the licensing appeals. Thus, the citizens of Philadelphia cannot be permitted to so much as voice their opinion on the location of gaming facilities in Philadelphia, but the fictional "person" which is the Board, we are to believe, possesses a "substantial, direct and immediate interest" in the licensing decisions, an interest so strong that it defeats the franchise and the ordinary legislative process. This is perverse: Bureaucracy has a "right" to be heard; the People do not. I would reverse the Majority's skewed priorities and let the People vote!

IV. Conclusion.

I urge my colleagues in the Majority to reconsider the improvident order entered on April 13, to respect the limits upon this Court's power, to respect the primacy of the franchise, and to rethink their acceptance of the extreme positions forwarded by the Board, which has no legitimate stake in this matter. I urge the Court to void its historic error and to let the People vote. Failing to convince my colleagues of their fundamental error, I content myself with this dissent which, I trust, a future Court will vindicate.