Senate of Pennsylvania

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DEMOCRATIC COMMITTEE ON APPROPRIATIONS

November 14, 2007

MEMORANDUM

TO: Senator Vincent J. Fumo

FROM: Christopher B. Craig, Counsel
Senate Democratic Appropriations Committee

SUBJECT: Legal Authority of the City of Philadelphia to permit casino development upon the submerged lands of the Commonwealth.

The purpose of this memorandum is to assess the legal authority of the City of Philadelphia, through its Commerce Department, to license the construction of casino development upon the submerged lands of the Commonwealth. In so doing, the Philadelphia Solicitor's Opinion (November 13, 2007) was reviewed. The Solicitor's Opinion is unpersuasive and does not survive close scrutiny. It is concluded that the City does not possess the legal authority to license, authorize or otherwise permit the construction of a gaming facility and its associated areas upon submerged lands within the Delaware River without specific authorization from the General Assembly.

The proposed Commerce Department action creates the untenable precedent that all future development along the Delaware River upon the submerged lands of the Commonwealth requires only the consent of the City, and that the long established practice of seeking specific legislative authorization is unnecessary. The City's intention to issue a Submerged Land Permit would provide HSP Gaming, LP a financial windfall, at the expense of the Commonwealth.

Any action by the City permitting the development of Commonwealth's property, without clear legal authority, not only clouds the underlying property interest in the gaming facility property, but may also have the unintended consequence of subjecting the proposed development to unnecessary litigation and further delay.

I. Context

HSP Gaming, LP (hereinafter "HSP") has filed an Application for a Submerged Lands License with the City's Commerce Department in an effort to seek a property interest beyond the

low-water-mark and into the Delaware River. It is beyond dispute that HSP's proposed development of a gaming facility contemplates construction upon property it neither owns nor controls. *See, In re Application of HSP Gaming, LP, et al, for Category 2 Slot Machine Licenses in Philadelphia, Pa.*, PGCB Dkt. No. 1356 at 24 (Opinion, December 2006) (The Board noted that "HSP does not own the riparian rights along this portion of the river front.") The development plans of HSP, as approved by the Pennsylvania Gaming Control Board, propose the extension of the gaming facility, and its associated area, out onto the river bed of the Delaware River, beyond the low-water-mark. However, the Commonwealth of Pennsylvania owns the lands within the bed of the Delaware River.

It is well established that the property rights of a land owner, whose property abuts a navigable stream or river, extends only to the ordinary low-water-mark line. *Tinicum Fishing Co. v. Carter,* 61 Pa. 21, 2 Leg. Gaz. 15 (1869); *City of Philadelphia v. Collins,* 68 Pa. 106 (1871); *United States v. Pennsylvania Salt Mfg., Co.,* 16 F.2d 476 (E.D. Pa. 1926); *City of Philadelphia v. Commonwealth*, 284 Pa. 225, 130 A. 491 (1925). A landowner has no property rights beyond the low-water-mark. Title to the land below the low-water-mark is in the Commonwealth, the title to the land between the high-water-mark and the low-water-mark is subject to the control of the Commonwealth, and control of the land below low-water-mark is subject to the Commonwealth. *United States v. Pennsylvania Salt Mfg. Co.,* 16 F.2d at 481.

It is a matter of state law that real property belonging to the Commonwealth shall not be sold or exchanged, nor shall any grant of easement, right of way or other interest be conveyed, without "specific authority from the General Assembly so to do, . ..". (Emphasis added) 71 P.S. §194. This notion has been specifically applied to the Commonwealth's interest to land below the low-water-mark by the legislature's enactment of the Pennsylvania Dam Safety and Encroachments Act which states, in part:

> "No title, easement, right-of-way or other interest in submerged lands or other real estate of the Commonwealth may be granted except as expressly provided by this section or other specific authority from the General Assembly." (Emphasis Added) 32 P.S. § 693.15; Act of November 26, 1978 (P.L. 1375, No. 325), *as amended.*

Accordingly, if HSP were to successfully complete its development on property it has identified along the Delaware River, it will have to obtain legal interest in the submerged lands of the Delaware River that are contiguous with its property pursuant to a specific grant from the General Assembly. To date, not only has HSP failed in acquiring such authorization from the General Assembly, but the legislature has specifically rejected any effort to convey such riparian rights.[1]

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[1] Rather, the House rejected the timely conveyance of riparian rights to HSP and voted to strip language from Senate Bill 862, printers' number 2218 that would have otherwise authorized

HSP has a problem – inexplicably, it has selected property that it does not completely control. Though it has represented to the Gaming Board it is "confident that it will secure those rights . . .", it has not done so. *In re Application of HSP Gaming, LP, et al, for Category 2 Slot Machine Licenses in Philadelphia, Pa., Id.* Compounding this problem is the fact that HSP does not have a reasonable right to expect City zoning and land development approval until such time as it is able to establish clear ownership interest in the property to be developed. *Peach Bottom Township v. Peach Bottom Zoning Hearing Board,* 106 Pa.Cmwlth. 340, 526 A.2d 837 (1987). Responding to this problem, HSP has filed this Application for a Submerged Lands License in an effort to avoid satisfying the legal requirement that the General Assembly specifically authorize the conveyance of a legal interest in the submerged portion of the property.

II. As a matter of state law, the Pennsylvania Dam Safety and Encroachments Act prohibits construction upon submerged lands without the specific consent of the General Assembly.

The only authority, advanced by the City in support of the proposition that the Commerce Director of the City of Philadelphia may permit the construction of a gaming facility upon Commonwealth property, is section 14198 of the Municipal Corporations Code (4 P.S. § 14198)[2] and an Attorney General Opinion of 1978 (Op. Pa.Atty.Gen. No. 78-19). However, upon careful reading, neither of these two authorities support the notion that the City may permit casino construction into the riverbed of the Delaware without the specific authorization of the state legislature.

In 1978, the Pennsylvania Attorney General was requested by the state Secretary of Environmental Resources to clarify whether the General Assembly provided for the conveyance of an interest in submerged lands to anyone intending to construct certain facilities extending below the low-water-mark on the Delaware River. Op. Pa.Atty.Gen., No. 78-19, at 3 (August 21, 1978). The statutory provision upon which the Attorney General's opinion rests is the Act of June 8, 1907 § 7 (P.L. 496, No. 322)[3] (55 P.S. § 7) which reads as follows:

> "Whenever any person . . . shall desire to construct, extend or alter

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the Pennsylvania Department of General Services to negotiate with HSP for conveyance of the Commonwealth's interest. 190 *Legislative Journal of the House of Representatives* at 2335- 2336 (October 24, 2006).

[2]Act of June 8, 1907 (P.L. 488), *as amended.*

[3] Actually, the Attorney General's Opinion references that Act of June 21, 1937 (P.L. 1960, No. 385). However, that was an amendatory act. The underlying Act upon which the cited language of the Attorney General's Opinion is premised originally appeared in the Act of June 8, 1907 (P.L. 496, No. 322), *as amended by,* Act of April 4, 1925 (P.L. 138, No. 99), June 21, 1937 (P.L. 1960, No. 385) *and* Act of November 26, 1978 (P.L. 1375, No. 325).

> any wharf or pier, . . . into or on the aforesaid river and its navigable tributaries, such person . . . shall make application to the president of the Commissioners . . . and file in the office of the president of the Commissioners plans and specifications showing fully the proposed erection, construction, extension, alteration, or improvement, and produce their deed or deeds, or other evidence of title, to the property to be so occupied, altered, or improved . . the Commissioners shall . . . give their assent, and issue a license for the erection . . ." (Emphasis added).

In construing the language, the Attorney General opined that the referenced deed or title required to be produced did not suggest a deed or title to the bed of the river, but rather the title to the riparian land down to the low-water-mark. Op. Pa.Atty.Gen., No. 78-19, at 4. Accordingly, pursuant to this language, it was the Attorney General's opinion that the Director of Commerce for the City of Philadelphia was authorized to grant an interest in the submerged land on which the construction is proposed to be done. However, the particular language that the Attorney General's opinion rested upon, was repealed by the General Assembly.

In what appears to be a reaction to the Attorney General's Opinion, on November 26, 1978, two months after the issuance of the Attorney General opinion, the legislature enacted the Pennsylvania Dam Safety and Encroachments Act, providing for a comprehensive system of regulation of water obstructions and encroachments, throughout the Commonwealth, in order to prevent interference with waterflow and protect navigation. 32 P.S. § 693.1 *et seq.*[4] Among the various provisions of the Dam Safety Act, the legislature included language repealing inconsistent laws, including sections 7 and 8 of the Act of June 8, 1907 (P.L. 496, No. 322) (53 P.S. §§ 7, 8). *See,* 32 P.S. § 693.27. In addition to repealing that specific authority, the Dam Safety Act also included a catch-all clause that provides;

> "All other acts or parts of acts inconsistent herewith are hereby repealed to the extent of such inconsistency." (Emphasis added) 32 P.S. § 693.27(c).

Ordinarily, the legislative repeal of the 1907 act would conclude any further consideration of the City's authority, but there is another 1907 act. Described as a "Supplement", Act of June 8, 1907 (P.L. 433, No. 321)[5], created the City Department of Wharves, Docks and Ferries. Act 321 contains language similar to the provision in repealed Act 322. Section 10 of this law provides, in part;

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[4] Act of November 26, 1978 (P.L. 1375, No. 325) *as amended by,* Act of October 23, 1979 (P.L. 204, No. 70).

[5] *As amended by*, Act of May 29, 1913 (P.L. 380, No. 261) *and,* Act of April 27, 1925 (P.L. 331, No.191).

> "Whenever any person . . . shall desire to construct, extend or alter any wharf, or other building in the nature of a wharf, . . . such person . . . shall make application to the said Director. . . and file in the office of the present of the Director the plans and specifications showing fully the proposed erection, construction, extension, alteration, or improvement, and produce their deed or deeds, or other evidence of title, to the property to be so occupied, altered, or improved . ." 53 P.S. 14199.

At first blush, this language seems to convey similar authority to the City as the repealed act. However, there is an important distinction – the repealed language, upon which the Attorney General's opinion concluded that the City may convey an interest in submerged lands, contained an important clause that is missing in Act 321. Section 7 of Act 322 explicitly states that the construction of harbor structures may "extend into or on the aforesaid river and its navigable tributaries". (Emphasis added). Significantly, there is no mention of the Delaware river, tributary, tide way, submerged land, or river bed to describe the permissible extension or construction in Act 321. This distinction is critical.

Though enacted by the General Assembly on the same day, June 8, 1907, and seemingly dealing with the same subject matter, Act 321, does not specifically authorize the extension or construction of harbor facilities "into the river" as does repealed Act 322. In other words, without the explicit statutory authorization to build "into the river" as contained in Act 321, the provisions of Act 322 cannot be read to provide similar authority. Not only does Act 321 omit statutory language that authorizes construction into the river bed of the Delaware, but such authority cannot be read into the Act without contradicting explicit language in the Dam Safety Act.

The legislature enacted the Dam Safety Act to provide for a uniform system by which encroachments into all waterways of the Commonwealth are to be overseen and regulated.[6] Not only did the Dam Safety Act explicitly repeal the language in Act 322 that included the permissive clause "into or on the aforesaid river and its navigable tributaries", but it also explicitly reserved to the Commonwealth, not the City, the sole authority for the occupation of submerged lands of the Commonwealth. In particular, section 15 of the Act (32 P.S. § 693.15) states:

> "No title, easement, right-of-way or other interest in submerged lands or other real estate of the Commonwealth my be granted except as expressly provided by this section or other specific authority from the General Assembly." (Emphasis added).

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[6] The scope of the Dam Safety Act includes all bodies of water, including natural or artificial lakes, ponds, streams, watercourse, rivers, reservoirs, swamps, marshes or wetlands. 32 P.S. § 693.3.

This reservation of authority to the Commonwealth is entirely consistent with the legislative objectives of the Dam Safety Act as well as Administrative Code of 1929.[7] No "specific" or other clear particular authority permitting the conveyance of a property interest in the submerged lands of the Commonwealth can be identified. It is this very reason the General Assembly routinely considers, deliberates and enacts legislation specifically authorizing the Commonwealth Department of General Services to convey state interests in particularly identified property owned by the Commonwealth. Such legislation identifies, in specific detail, the particular parcel of property to be conveyed, as well as the identity of the recipients of the property.[8] In contrast, the language in both Acts 321 and 322 are general delegations of limited authority to the City – not specific conveyances. Equally important, the legislature also imposes a cost for consideration of its specific land conveyance authorization. If the City's position were accepted, the Commonwealth would be deprived of this substantial source on revenue.

The Dam Safety Act's repealer clause, applicable to any inconsistent acts, ensures that the provisions of Act 321 of 1907 may be read consistently and in *pari materia* with the provisions of the Dam Safety Act, demonstrating a clear intention of the legislature to provide for a statewide system of regulating and overseeing encroachments upon submerged lands within the Commonwealth. *See, Fedor v. Borough of Dormot,* 487 Pa. 249, 409 A.2d 334 (1979) (if a statute sets up a general scheme of regulation covering the subject matter of a prior Act, it is therefore interpreted as a substitute, therefore it can be read that the prior statute is repealed).[9] In this case, the City has received no right to the waters beyond the low-water-mark, therefore it has no interest to convey. *City of Philadelphia v. Pennsylvania Sugar Company,* 349 Pa. 599, 36

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[7] *See,* similar language contained in section 514 in the Administrative Code provides that real property belonging to the Commonwealth shall not be sold or exchanged, nor shall any grant of easement, right of way or other interest be conveyed, without "specific authority from the General Assembly so to do, . ..". (Emphasis added) 71 P.S. §194.

[8] *See, e.g.,* Act of February 5, 2004 (P.L. 45, No.4) (conveyance of land to the city of Philadelphia); Act of December 30, 2003 (P.L. 428, No. 60) (conveyance of land to the city of Philadelphia); Senate Bill 1375 (introduced October 25, 2006) (leasing of land within the Delaware River bed); House Bill 1394 (introduced May 29, 2007) (conveyance of land within the Delaware River bed); House Bill 1332 (introduced May 24, 2007) (conveyance of land within the Delaware River bed).

[9] The Solicitor's Opinion meekly attempts to cite *In re Hoover*, 147 Pa.Cmwlth. 475, 608 A.2d 607 (1992) in support of the proposition that the Dam Safety Act does not preempt municipal authority over waterway encroachments. The Solicitor is wrong. Not only was the primary focus of the *Hoover* decision upon the state Flood Act (32 P.S. § 679.101, *et seq.*), not the Dam Safety Act, but the decision had nothing to do with waterway encroachments. The case related to municipal flood plain management. The *Hoover* decision is simply inapplicable to this matter.

A.2d 653 (1944) (Court determined that City had no property right below the law-water line on the SugarHouse property and therefore could not charge a fee for its use).

III. As a matter of state law, a gaming facility is not a "wharf, pier, or other harbor structure" within the meaning of Act 321 of 1907.

Assuming *arguendo,* that Act 321 of 1907 could be read to permit the City of Philadelphia Commerce Department to convey a property interest in the submerged lands of the Commonwealth, such authority is strictly limited to the authorization for the construction or extension of wharves, piers, ferries, docks or similar harbor structures. Simply stated, a venue for the operation of slot machines and its associated areas, as defined by the Pennsylvania Race Horse Development and Gaming Act, is not a harbor structure.

As explicitly stated in its preamble, Act 321 of 1907 was enacted by the General Assembly in recognition of the growing commerce and substantial improvements made upon the channel-ways of the rivers. Accordingly, the legislature empowered the City Department of Wharves, Docks, and Ferries, (the predecessor of the City Commerce Department), to oversee the development and regulation of the "wharves, piers, bulkheads, docks, slips and basins". *See*, Act 321 of 1907, § 6. This specifically defined scope of authority is carried over to section 10 of the Act, which is limited to permitting the extension, construction or alteration of "any wharf, or other building in the nature of a wharf, or to erect, extend, alter or improve any other harbor structure,". It would be a far reach to suggest that a casino is a "harbor structure" within the meaning of this Act.

A casino can be placed anywhere – near a river, a field, a ravine, mountain, an old steel mill, even within a landlocked state. It is not a harbor structure. In other words, a casino may be a structure placed <u>on</u> a harbor, but it is not a "harbor structure." There is nothing inherent about a slots venue that is particular to harbor or river commerce. A casino is not a wharf, a building in the nature of a wharf, or any other type of harbor structure that would otherwise fall within the regulatory authority of the former City Department of Wharves, Docks and Ferries.

The Pennsylvania Rules of Statutory Construction provide that words and phrases are to be accorded their common and plain meaning. 1 Pa.C.S.A. § 1903(a). Furthermore, general words are to be construed to take their meaning and restricted by proceeding particular words. *Id,* at § 1903(b). The established doctrine of *noscitur a sociis* highlights this point and provides that a doubtful word in a statute may be ascertained by reference to meaning of words associated with it. *Ford Motor Co. v. Unemployment Compensation Board of Review,* 168 Pa.Super 446, 74 A.2d 121 (1951). Accordingly, "harbor structure" must be construed within the context of the associated words in the same passage – such as "wharves, or other buildings in the nature of a wharf." Act 321, § 10. One can look beyond section 10 in the same Act, and consider the terms used throughout the entire statute – "wharves, piers, bulkheads, docks, slips, basins, storage facilities". §§ 8, 9, 12, 14, 15. "Harbor structures" cannot reasonably be interpreted to include

anything other than a structure similar in nature or function as a wharf, pier, dock, slip, or storage facility. As used in Act 321 "harbor structure" cannot reasonably be interpreted to include anything other than those structures commonly used for river or waterway commerce. A casino and its associated areas do not come close to this common sense meaning.

IV. The General Assembly has opposed the conveyance of property rights to submerged lands for the benefit of HSP.

HSP's Submerged Lands License Application has been filed because the General Assembly has rebuffed efforts to expedite the conveyance of property rights to the submerged lands to HSP. The aforesaid application is an acknowledgment of its failure to obtain even the introduction of proposed legislation that would authorize the state Department of General Services to negotiate for the conveyance of such property rights. HSP is attempting to gain from the City what it has been unable to gain from the Commonwealth.

The property ownership problems associated with HSP's gaming development plans for the waterfront have been known to the General Assembly for several years. As part of the legislature's consideration of revisions to the Race Horse Development and Gaming Act, language was drafted and amended into Senate Bill 862 of 2006 that would have facilitated the timely conveyance of riparian rights to HSP. The language, if enacted, would authorize the state Department of General Services to begin the process for the conveyance of such rights upon HSP's licensing from the Gaming Board. *See,* SB 862, pn 2048. The House of Representatives voted to reject this language on two separate occasions, and the Senate subsequently voted in agreement with the House's action. 190 *Legislative Journal of the House of Representatives* (October 17 & 24, 2007); *Legislative Journal of the Senate of Pennsylvania* (October 27, 2006). In each case, the votes were almost unanimous.

It is important to note that this is not a case of the General Assembly failing to recognize a problem or refusing to act. Rather, the legislature was well aware of HSP's need and repeatedly rejected any attempt to expedite or shortcut the traditional land conveyance process in the General Assembly. Unfortunately, the City's proposed action also has the effect of creating a substantial financial windfall for HSP, at the expense taxpayers of the Commonwealth. It is the practice of the General Assembly, when deliberating land conveyance measures, to impose a per foot or per year cost upon in consideration for the development rights on submerged lands. If the City's position were accepted, developers such as HSP would be able to avoid paying costs set by the legislature. In the case of HSP, the City's actions could result in the loss of over $2.5 million to the Commonwealth. *See,* Brennan, "Key SugarHouse hearing tomorrow", *Philadelphia Daily News* (November 14, 2007) (quoting James Creedon, Secretary of the Pennsylvania Department of General Services that it is the policy of the Department to set a flat rate of $5 per square foot for riparian leases). The fact that the City may impose a nominal charge for HSP's construction does not compensate for the revenue shortfall to the Commonwealth.

V. Conclusion

For the foregoing reasons, it is clear the City is without legal authority to convey an interest in the submerged lands of the Delaware to HSP. Not only do the terms the Dam Safety and Encroachments Act repeal the provisions of Act 321 of 1907 of which the City Commerce Department's authority is based, a casino simply does not fit the meaning of the statutory term "harbor structure." It is telling that since the enactment of the Dam Safety Act in 1978, the City has never exercised its authority to approve non-wharf related development or construction upon the Delaware River. Particularly, nothing even remotely like a casino. The use of the 1907 law to permit such construction would stretch othe intent and clear language of a 100 year old law far beyond its intended purpose and meaning. Any acceptance of the argument that the City would be permitted to license construction upon the submerged lands of the Commonwealth would have the effect of ending the long standing practice of the General Assembly enacting legislature specifically conveying such property rights.

Because of the extremely tenuous legal foundation upon which HSP's Application rests, it is likely any action by the Commerce Department to authorize the proposed construction project will have the unintended effect of subjecting the City to unnecessary litigation.[10] The City would be well served by reassessing its legal authority and forgo any action that intrudes upon the sovereign authority of the Commonwealth.

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[10] It is worthwhile noting that Pennsylvania courts have recognized taxpayer standing in public land conveyance matters – thus placing this matter at higher risk of litigation and subsequent delay. *See, Deitrick v. Northumberland County,* 846 A.2d 180 (Pa.Cmwlth. 2004).