

IN THE SUPREME COURT OF PENNSYLVANIA

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No. 1 EM 2008

FEB 08 2008  
SUPREME COURT  
EASTERN DISTRICT

**PHILADELPHIA ENTERTAINMENT AND DEVELOPMENT PARTNERS,  
L.P., d/b/a FOXWOODS CASINO PHILADELPHIA,  
Petitioner,**

v.

**CITY COUNCIL FOR THE CITY OF PHILADELPHIA AND THE CITY  
OF PHILADELPHIA,  
Respondents.**

**CITY OF PHILADELPHIA'S REPLY MEMORANDUM IN SUPPORT OF  
ITS APPLICATION FOR LEAVE TO WITHDRAW ITS 1/24/08  
RESPONSE BRIEF**

**CITY OF PHILADELPHIA LAW DEPT.  
Shelley R. Smith, Acting City Solicitor**

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Appeals (ID 55343)  
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February 8, 2008

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The City respectfully submits this brief reply in support of our application to withdraw the City's prior, premature filing. We reply only to entirely new matter raised by Foxwoods, much of which inappropriately argues the merits.<sup>1</sup>

1. Foxwoods makes the incredible argument that the City is bound by its prior filing because of the "express terms of a binding agreement." Foxwoods Memo. in Opp. to Leave to Withdraw (Feb. 5, 2008) at 11. Given Foxwoods' indignation that the City dare rely upon ordinances recently introduced into City Council that address the very matter about which Foxwoods complains because, according to Foxwoods, these ordinances are outside the "record" on this extraordinary "appeal" (Foxwoods Memo. at 6-7, 16-18), we find surprising Foxwoods' heavy reliance on its extra-record agreement with the City. Notably, however, Foxwoods fails to direct the Court's attention to the "express terms" (or, indeed, to *any* terms) that purportedly preclude the City from revising its position. That is because there are no such terms; the agreement does not even purport to preclude the City from revising its position. Nor could it.

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<sup>1</sup> Foxwoods' argument essentially is that a party should be precluded ever from revising its position, *or even acknowledging its error in a prior filing*, in the course of a litigation -- no matter how long the prior position was outstanding (here, 21 days), no matter what the reason (here, a change in Administration, leading to a decision to defend City powers as opposed to acquiescence in a trampling of City powers), no matter how little prejudice is suffered (here, none), and no matter that the prior brief was withdrawn before it even was "due." The argument is an affront to this Court, suggesting as it does that the Court should deprive itself of the opportunity even to *consider* the position and argument of the defendant, regardless the merits and regardless Foxwoods' failure to justify any, let alone each, of its requested forms of relief.

Foxwoods' remarkable argument essentially is that the City has ceded, and has the power to cede by contract, the City's lawful zoning authority. Foxwoods argues that the City has contracted with Foxwoods to allow Foxwoods to build its casino without zoning authority from City Council, and that the City will work with Foxwoods to persuade this Court that it should ignore and override Council's lawful authority. No such promise was made. No such promise could be made. This Court (and not a contract) will decide whether to accept Foxwoods' request to trample on Council's zoning authority, and it is absurd to suggest that the City is precluded from defending its own, lawful zoning prerogatives.<sup>2</sup>

So, without "express language" upon which to rely, Foxwoods also argues (at 1-2, 26) that it entered into the agreement itself and made a payment pursuant to the agreement, all in reliance on the filing of the City's brief. The argument is vacuous, if only because the language of the agreement reflects no such thing, and because Foxwoods acknowledges (at 5, 9) that it agreed to the essential terms of the agreement by November 23, 2007, when the "term sheet" was executed by the

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<sup>2</sup> The only language we could locate in the Agreement that even touches on the matter at hand is as follows: "The City and PEDP hereby agree to work together in good faith pursuant to applicable law to promptly obtain the following: (i) approval by the City Council of the Ordinances as contemplated by the then approved Plan of Development . . . ." Developer's Agreement at 3, ¶ 2(a) (Exh. A to Foxwoods' Memo. of Law (Feb. 5, 2008)). We are hard pressed to understand how pursuing a lawsuit *against* the City, even while the ink is not yet dry on the Agreement, contemplates "work[ing] together in good faith." Nor do we see how defending Council's right to provide the necessary approval in the normal manner by which Council provides such approvals can constitute a *lack* of good faith.

parties, long before the City filed its January 4, 2008 brief. Regardless, however, if Foxwoods wishes to prove its alleged “reliance,” it is entitled to continue its repetitive litigation quest by filing a breach of contract action, and requesting a trial in which it can present evidence; this “appeal,” however, is not the proper forum.

2. In the guise of opposing our request to withdraw, Foxwoods makes substantive arguments on the merits as to why this Court should grant Foxwoods’ extraordinary request to bypass City Council. Essentially, Foxwoods’ arguments are (i) City Council approval is ministerial, so there simply is no excuse for delay; and (ii) SugarHouse got it, and, thus, so should we.

With respect to Council, Foxwoods takes issue (at 18-25) with the fact that Council does not simply rubber stamp the CED zoning ordinance, instead deigning to consider factors such as traffic exacerbation, public safety, and storm water management. Those factors, Foxwoods argues, have been conclusively considered by the Gaming Control Board, and no local authority exists for further consideration by City Council. Such an emasculated view of the local zoning authority finds no support in any recognized principles of zoning authority. *See generally* Anderson, *Law of Zoning in Pennsylvania* (1982 & 2001 supp.) § 5.32 at 137 (“zoning regulations which promote [the “smooth and safe movement of traffic”] serve a legitimate purpose”); § 5.44 at 160 (“Zoning regulations which are reasonably related to the adequacy of governmental services fall clearly within the established purposes of the police power [including “sewerage” and “police and fire safety”].”).