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**COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT**

)	Agency No. _____
)	
IN RE:)	Request for Determination
)	of Distress Under Act 47
THE CITY OF HARRISBURG)	
)	

**MOVANT’S COMBINED REPLY TO
RESPONSES IN OPPOSITION OF
THE CITY OF HARRISBURG
TO EACH PENDING MOTION**

1. On October 22, 2010, four (4) *Responses in Opposition* to the *Motions* at issue were filed and served by the City of Harrisburg, seeking denial of all *Motions*.
2. The *Responses* were presented in a traditional pleading format, addressing each Paragraph *seriatim*.
3. A significant portion of the *Responses* requires no reply, as these simply set forth an opposing view which the Secretary must weigh when deciding each Motion.
4. In the course of the Secretary rendering a decision on this dispositive *Motion*, which he has authority to do upon review of the full record, including the transcript of the October 20, 2010 proceedings or at least the videotape thereof, there are several points raised by the City that warrant a *Reply*.
5. It should be noted that the issues in this *Motion to Dismiss* are entwined with the other pending *Motions* and we intend this *Reply* to be the primary substantive reply to the collective *Responses-in-Opposition* filed to each pending *Motion*.

6. The City attributes some significance to the differing language within the Financially Distressed Municipalities Act, Act of July 10, 1987, P.L. 246, 53 P.S. §§ 11701.101 -- 11701.501 (hereinafter "Act 47"), with particular attention to Sections 201 and 203. *See Response ¶4*. While these Sections plainly and obviously contain different language, the City's assertions overlook that these Sections – and indeed the entirety of this or any Statute – must be reviewed together to effectuate the law's full meaning and application.

7. Specifically, within *Response ¶4*, the City asserts in relevant part that "[t]here is no requirement in Section 201 that the criteria used to determine Distressed Status are 'immanent and inevitable.'" While the City is correct that those words do not appear within the text of Section 201, that does not render the "immanent and inevitable" standard inapplicable to the determination to be made by this Agency.

8. The City squarely asserted – within the sworn Application it submitted upon the requisite form the Agency was statutorily mandated to create and provide – that the Applicant believed that the manifestation of distress as set forth in Section 201 was "immanent and inevitable" *in the future*. The assertion on its face means that such a level of distress had not yet been manifested at the time of submission of the Application. The provision of that option within an application simply provided an avenue for a municipality to assert forthcoming distress when the Applicant concluded they are on an irreversible course toward distress.

9. The submission of a response by the City within that portion of the Application placed that factual conclusion – that future distress status was both close at hand and unstoppable – as one which was subject to adequate proof. It is simply a question of fact at a hearing.

10. As the Applicant raised this factual issue and the Agency is mandated to investigate the factual assertions within and even outside the Application, the Agency is required to gather and accept whatever available evidence exists that may prove or disprove the accuracy of the facts asserted within the Application.

11. The contrary facts that have been asserted by the Movant – essentially that several other significant public financial developments occurred during the pendency of the investigation of the Application – stand directly relevant to a determination of whether the City's future distress must be deemed both close at hand and unstoppable

12. Under Act 47, the ongoing duty of DCED to investigate and assess a municipality's economic health does not arise only in the course of an Act 47 Application. It is an ongoing public duty.

13. As a hearing officer is empowered in this Commonwealth to take Official Notice of public facts – such as the vote of a local public body – and the Agency has an ongoing duty to investigate, a correct determination of an alleged immanent and inevitable event is one that can

be determined by other evidence beyond the Agency's report and the assertions of the Applicant. The other financial developments at issue – most significantly the reported unanimous vote for refinancing of the Harrisburg Parking Authority – becomes a factor that needs to be examined by the Agency to determine the accuracy of the claim that future distress is immanent and inevitable.

14. Accordingly, the actions of another local public body that impacts the financial health of the whole community and reportedly provides significant funds to the Applicant must be held to be relevant or not speculative.

15. The Movant never contested the right of HPA officials to voluntarily appear to testify in this administrative proceeding. All interested persons had that statutory right.

16. The issue is the right of other interested parties to have the presiding officer compel the attendance of others for testimony – particularly other local officials and knowledgeable designees of local public bodies – to gather a complete record of the relevant information required to rule on a pending Application.

17. The HPA vote occurred only 24 hours before the October 20 proceeding.

18. An interested party had no right to unilaterally issue a subpoena on their own to HPA, as subpoenas must be issued through the designated presiding officer or the Secretary.

19. There was no time before commencement of the present hearing to invoke and complete the process to compel the attendance of HPA.

20. The Movant organization and the public as a whole had no way of knowing or predicting that local public bodies and officials would fail to appear to offer evidence of the very public information they are required to maintain so the public could hear how it relates to the City's financial health or lack thereof.

21. The Movant organization and the public as a whole had no way of knowing or predicting that the City would have no information to proffer the presiding officer at a public hearing on the terms of the reported HPA refinancing. It was stunning that in the midst of learning of a reported \$75 million influx of near-term cash to a City stuck in a financial crisis, the City's one and only financial director inexplicably did not walk down the hall of the Government Center to ask an HPA official about the report or even telephone them. It is extraordinary that the Applicant did not and still does not consider such a development relevant to these economic distress proceedings.

22. It is extraordinary that not a single official from offices directly involved with the current day-to-day and long term economic condition and prospects of Harrisburg – the HPA, The Harrisburg Authority, the City Treasurer, the City Controller or Dauphin County officials – appeared to corroborate, clarify or dispute the assertions of

fact presented by the Applicant. It was a monumental failure of public duty owed to this citizenry and the entire community.

23. It is our public and civic obligation for DEBT WATCH HARRISBURG to acknowledge that should the Agency determine that the Applicant's own assertion of our City's future status – their claim within their Application that manifestation of distress *is a future event* that is inevitable and immanent – is irrelevant to the determination the Agency must make, then most of the issues raised herein will be of no moment. We do not believe that is the case, but it can occur if the Presiding Officer or Secretary concludes that sufficient record evidence exists to find that the City's *current status* already manifests “distressed status” within the Act.

24. In good faith, all interested persons appear to acknowledge the fluidity of the current financial events within the City of Harrisburg, as evidenced by the assertions such as the Applicant being at risk of missing that October payroll and the latter location of funds to timely meet those obligations.

25. The Movant does not contest that the City will require economic help, but our firm conclusion must be that a pre-bankruptcy Act 47 Coordinator and related “Recovery Plan” cannot offer real help to Harrisburg.

26. As the Agency staff acknowledged at the proceeding, the Policy of Act 47 is that all principle and interest must be paid on time. As the law in general requires the Act to be read as a whole, the Agency must, when faced with a municipality that facially cannot be restored to economic soundness through Act 47 protocols, determine that such an Applicant was not a candidate under the Act intended for a pre-bankruptcy Act 47 determination and resultant Recovery Plan.

27. Harrisburg cannot, through the relatively small grants and loans available through Act 47; an increase in tax rates available under Act 47; and even the sale of public assets, pay its full obligations, yet alone do so on time. Harrisburg has disproportionate debt obligations that mean that it will be unable to pay all of its bills. That is a simple and inescapable fact. It is as if our City borrowed money to construct a new, uninsured toll bridge that collapsed after the builder went bankrupt. With no tolls, we cannot pay for the bridge. With the unpaid construction loans, we cannot borrow the money again and so cannot rebuild the bridge. We cannot use the road, so we stand still, destined to be stuck right looking into the pit where our project collapsed. A pre-bankruptcy Act 47 program can do nothing to actually put Harrisburg back on the road or enable us to build anew.

28. DEBT WATCH HARRISBURG understands that there are limited direct resources available to the City of Harrisburg through DCED and the Act 47 programs. That understanding was confirmed by the following information recently provide by DCED to our City Controller: This question was put to DCED by Dan Miller, acting as Controller:

“I also saw that funding for Act 47 was \$5,000,000 with \$4,500,000 available for grants and loans. Is that the current funding amount? Is that an annual amount? How much is currently available for loans and how much for grants?”

An appropriate actual Agency response was issued by Mr. Krot, as follows:

“The amounts you reference were the initial state appropriation to establish the program and a revolving fund. There have been annual appropriations over the life of the program with the more recent annual appropriations being in the approximate amount of \$1 million. The net funds available as of our most recent financial statement 8/31/10 is \$2,2 million. The FY 10-11 appropriation of \$990,000 has yet to be transferred into the fund. The fund is available for grants, loans and coordinators for all currently designated municipalities and those municipalities that may be so designated in the coming months. There is a limitation on the funds available to a given municipality under the Act as the Department can not approve an application to any one municipality for an amount that would substantially impair the Department’s ability to distribute the remaining sum fairly and equitably to other distressed municipalities. “

A true and copy of that exchange is attached hereto and marked DWH Motion Exh. 3.

29. As DCED reports approximately 16 other municipalities presently in a designated distress status, the report refutes the Applicant’s inaccurate or misinformed assertions and implications that the immediate grant of the Application somehow will foster the flow of new funds from DCED or elsewhere. These Motions are not detrimental to the Applicant’s financial condition.

30. On the related issue of the Presiding Officer issuing subpoenas to compel testimony, whether it be officials of HPA or THA, or others such as those vested with the fiduciary obligations to the City, such as the Treasurer and/or the Controller, such evidence goes not only to the accuracy of the Application on the future status of the Applicant, but also to the statutory duty of DCED to conduct a full investigation of the circumstances in accordance with Section 203 (c).

31. It is a disservice to the citizens of Harrisburg and the public for the City to oppose a complete record being compelled when they did not ensure for the public that a complete record consisting of sworn testimony of representatives of these related local agencies and offices were presented at the hearing.

32. On the issue of the Continuance requested by Council persons, it is the Movants understanding that three (3) council members – Williams, Smith and Brown-Williams -- expressed their intention to DCED to join in that motion, though the undersigned has not been provided that portion of the record.

33. The right to Counsel is fundamental and the AAL has codified that right to all persons who become parties to an administrative proceeding.

34. There is no requirement that City Council or its members must be recognized only as one (1) entity when participating in an Act 47 hearing, as the Act both mandates that each member be served with direct Notice and also provides all interested persons the right to be heard. This implicates the constitutional right to due process and the related statutory right to legal counsel.

35. City Council, by public action subject to Official Notice, is this very day interviewing candidates for special counsel who would be able and available to advise them at an Act 47 hearing, as that level of expertise is within the advertised request for proposals.

36. The Presiding Officer – any presiding officer at a Pennsylvania administrative hearing – had an affirmative duty to expressly advise on the record each party of their right to legal counsel. That did not occur.

37. As the Act makes all interested persons eligible to participate in the proceeding, a Notice of the right to counsel should have been contained within the published and posted Notice of the hearing. It was not and so deemed denied to the participants, including the City Council as a whole and its individual members.

38. As the City has responded that due process was afforded in this hearing, additional facts are relevant.

39. Likewise, the use of an Agency panel to sit before the public, present for the Agency and appear to preside over the hearing as a panel was inconsistent with due process, as it diminished the role of the designated Presiding Officer. In essence, those selected to act as Judge do not get helpers while on the bench and do not get legal counsel to advise and assist them during the actual hearing.

40. Further, the sharing of a single legal advisor and counsel – Mr. Fishman – prior to, during and subsequent to the hearing, who simultaneously represented and advised both the Agency witness and the Presiding Officer was a denial of due process. The very person

requested the Judge to rule on disputes over the evidence being elicited was also advising the Judge on how to proceed.

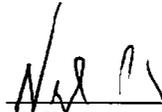
41. The preparation, production and pre hearing submission of what the Agency identified as a Staff recommendation was mishandled. in that it was reportedly conducted by the subordinates of the Presiding Officer, admittedly provided to him before the commencement of the hearing and on its very face bears but one name: Mr. Reddig. It reads as the report *of Mr. Reddig* and his Department, but not as a recommendation *to Mr. Reddig* from his Department.

42. These events each evidence a separate disregard of due process, contrary to the City's assertions. Any one of these defects mandates either the reopening and reconvening of the hearing to bring the proceeding into compliance with constitutional mandates or a new hearing all together. A conference of counsel and the Presiding Officer to address these issues is again requested.

43 For all the foregoing reasons, the requested relief in each pending Motion should be granted

Respectfully submitted.

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Pro se and as Counsel for DEBT WATCH
HARRISBURG and its members

DWH MOTION EXHIBIT 3

Neil Grover

From: "Tara Leo Auchey" <tlauchey@yahoo.com>
To: <groverlaw@ix.netcom.com>
Sent: Tuesday, October 26, 2010 12:23 PM
Attach: Act 47 Coordinators - Potential List.doc
Subject: Fw: Act 47 Info

----- Forwarded Message -----

From: Dan Miller <DMiller@MillerDixonDrake.com>
To: Tara Auchey <tlauchey@yahoo.com>
Sent: Thu, October 21, 2010 5:32:46 PM
Subject: FW: Act 47 Info

-----Original Message-----

From: Dan Miller [mailto:DMiller@MillerDixonDrake.com]
Sent: Thursday, October 21, 2010 5:07 PM
To: Tara Auchey (toauchey@yahoo.com)
Subject: FW: Act 47 Info

-----Original Message-----

From: Krot, Harry [mailto:hkrot@state.pa.us]
Sent: Wednesday, October 20, 2010 1:34 PM
To: Dan Miller
Cc: Kelley, Marita
Subject: RE: Act 47 Info

Dan:

Good afternoon. I believe my responses below address your questions, albeit after your deadline. Also find attached a list of firms that we are aware of that are experienced in municipal finance, administration and municipal service delivery areas.

I also saw that funding for Act 47 was \$5,000,000 with \$4,500,000 available for grants and loans. Is that the current funding amount? Is that an annual amount? How much is currently available for loans and how much for grants?

The amounts you reference were the initial state appropriation to establish the program and a revolving fund. There have been annual appropriations over the life of the program with the more recent annual appropriations being in the approximate amount of \$1 million. The net funds available as of our most recent financial statement 8/31/10 is \$2,2 million. The FY 10-11 appropriation of \$990,000 has yet to be transferred into the fund. The fund is available for grants, loans and coordinators for all currently designated municipalities and those municipalities that may be so designated in the coming months. There is a limitation on the funds available to a given municipality under the Act as the Department can not approve an application to any one municipality for an amount that would substantially impair the Department's ability to distribute the remaining sum fairly and equitably to other distressed municipalities.

Possible changes in collective bargaining agreements and permanent and temporary staffing level changes or changes in organization.

This language relates to Section 252 of the Act which states "A collective bargaining agreement or arbitration settlement executed after the adoption of a plan shall not in any manner violate, expand or diminish its provisions." The coordinator is to

address collective bargaining issues along with the rest of the issues identified in Section 241 as part of the development of a comprehensive recovery plan. Those provisions then serve as the parameters for subsequent collective bargaining. The underlying procedures of Acts 111 and 195 are to continue, however, the end result is limited by the provisions of the recovery plan.

Harry



Harry Krot
Local Government Policy Manager
 Department of Community & Economic Development
 (717)720-7390
 Commonwealth Keystone Building
 400 North Street, 4th Floor
 Harrisburg, PA 17120-0225
www.newPA.com | www.visitPA.com

Confidentiality Notice: This electronic communication is privileged and confidential and is intended only for the party to whom it is addressed. If received in error, please return to sender.

From: Dan Miller [mailto:DMiller@MillerDixonDrake.com]
Sent: Tuesday, October 19, 2010 11:17 AM
To: Hoffman, Mitchell; Kelley, Marita; Krot, Harry
Cc: William Leinberger
Subject: FW: Act 47 Info

One more question. I notice in Section 241 " that the coordinators plan could include the following actions:

(3) Possible changes in collective bargaining agreements and permanent and temporary staffing level changes or changes in organization.

What does this mean? I do not understand the word Possible. Can these changes only occur if the unions agree " changes can not be forced on to the unions?

Thank you, Dan

-----Original Message-----

From: Dan Miller [mailto:DMiller@MillerDixonDrake.com]
Sent: Tuesday, October 19, 2010 10:40 AM
To: 'Mitch Hoffman (mhoffman@state.pa.us)'; Marita Kelley (markelley@state.pa.us); 'hkrot@state.pa.us'
Cc: William Leinberger (wleinberger@cityofhbg.com)
Subject: Act 47 Info

I was hoping to get some information for a meeting tonight (10/19)

On page 26 of the Recovery Act 36.4(c) (3) The Department will maintain a list of eligible, qualified coordinators. Could I please have a copy of that list?

I also saw that funding for Act 47 was \$5,000,000 with \$4,500,000 available for grants and loans. Is that the current funding amount? Is that an annual amount? How much is currently available for loans and how much for grants?

If there is additional info you think I should know to understand these issues please provide that also.

Thank you, Dan Miller, Harrisburg City Controller

Daniel C. Miller, CPA

10/26/2010

Miller Dixon Drake, PC

717-234-2250, x101

**COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT**

)	Agency No. _____
)	
IN RE:)	Request for Determination
)	of Distress Under Act 47
THE CITY OF HARRISBURG)	
)	

CERTIFICATE OF SERVICE

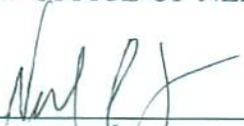
I hereby certify that I have this 26th day of October 2010, served a true and correct copy of the foregoing Combined Reply via facsimile transmission and United States Postal Service, first class postage prepaid and properly addressed to the following:

Steven J. Fishman, Esquire
Charles Brown, Esquire
Department of Community &
Economic Development
Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120-0225
Fax No. 717-772-3103

Philip Harper, Esquire
Solicitor for the City of Harrisburg
Rev. Dr. Martin Luther King, Jr. City Gvn't
Center
10 North Second Street, Suite 402
Harrisburg, PA 17101
Fax No: 717-255-3056

Respectfully submitted,

LAW OFFICE OF NEIL A. GROVER

By 
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