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UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF PENNSYLVANIA

IN RE	:	
	:	**CASE NO. 1:11-bk-06938 (MDF)**
CITY OF HARRISBURG, PA	:	**CHAPTER 9**
	:	
Debtor	:	**AUTOMATIC STAY**

BRIEF OF DEBT WATCH HARRISBURG AND NEIL A. GROVER, AS INTERESTED PARTIES, IN OPPOSITION TO THE COMBINED PENDING OBJECTIONS OF THE MAYOR OF HARRISBURG, OTHER INTERESTED PARTIES AND CREDITORS FOR DISMISSAL OF THE CITY OF HARRISBURG'S VOLUNTARY PETITION FOR CHAPTER 9 BANKRUPTCY

Debt Watch Harrisburg and Neil A. Grover, as Interested Parties herein, by and through their legal counsel, Neil A. Grover, Esquire, oppose the pending *Objections* filed against the City of Harrisburg's Voluntary Petition for Bankruptcy Relief in accordance with the provisions of Chapter 9 of the United States Bankruptcy Code, 11 U.S.C. §§ 101, *et seq*. and so, accordingly, in response thereto, hereby file the combined *Brief in Opposition*.

PROCEDURAL HISTORY AND BACKGROUND

On the night of October 11, 2011, the City of Harrisburg filed a Voluntary Petition for Municipal Bankruptcy, seeking protection from their many creditors.

Rhetoric to the contrary notwithstanding, Harrisburg's Petition was filed by the seven-member City Council, who authorized the emergency filing by a 4-3 vote that same evening.[1] The papers were filed by Mark D. Schwartz, Esquire, who was retained by City Council for the matter and, executed by the Honorable Susan Brown Wilson, Chair of the Budget and Finance Committee, in accordance with an authorizing Resolution. The filing perfected the issuance of Automatic Stay, in accordance with Section 922 of the Bankruptcy Code.[2]

The filing for Municipal Bankruptcy occurred after the City of Harrisburg had been slogging along for years with serious structural deficits and also defaulting on Guarantees of Debt Obligations in the tens of millions of dollars. As the time went on, more than a half dozen creditor lawsuits were commenced, most seeking Orders of mandamus to compel payments on overdue obligations. These matters have been winding their way through the local Trial Court, on a

[1] Due to the expedited briefing schedule on initial Objections, the official Minutes of the Harrisburg City Council are not yet available. Minutes have not yet been presented and approved in a Legislative Session. Accordingly, for the purpose of adding context to the events, video clips capturing portions of the relevant proceedings were secured by a local news outlet, Roxbury News, and are available for review on their website and ours.

[2] After the filing, seemingly undeterred by the Automatic Stay, the Commonwealth of Pennsylvania enacted a new statute that seeks to compel Harrisburg to abide by the State's financial recommendations on handling of its debts and assets. Thereafter, the Governor made a formal Declaration of Fiscal Emergency and the Secretary of the Department of Community and Economic Development (DCED) issued an Emergency Plan directing City Officials how to handle immediate financial issues.

increasingly accelerated pace.

If you are a City in financial trouble in Pennsylvania, the only provision in state law that promises technical and financial assistance is the *Financially Distressed Municipalities Act*, Act of July 10, 1987, P.L. 246, 53 P.S. §§ 11701.101 -- 11701.501. (Act 47) In October 2010, Mayor Thompson applied for whatever help that program could bring. The result was the City of Harrisburg being granted the dubious handle of "financially distressed municipality" by the Secretary of DCED in December 2010. Since that time, Harrisburg has been toiling through the vagaries of the Act 47 process, an underfunded program serving roughly 21 distressed local governments. The conditions and so-called benefits of the program have radically changed in the year since the Application was made.

The Act 47 process lead to the drafting of a proposed "Recovery Plan" that was issued in final form on or about July 8, 2011 by a team of state-appointed Coordinators (the Novak Plan). On July 19, 2011, after public hearings and detailed reviews of the phone-book sized proposal, the City Council exercised their lawful option under Section 245 of Act 47 and rejected the Plan, 4-3.

The rejection apparently was the first time a municipality exercised this statutory option. It triggered the next phase of Act 47, which was to be the

drafting of a Plan by the Mayor under Section 246 of the statute. For the most part, the Mayor's Plan turned out to be was for the most part the Novak Plan, but with a host of incomprehensible, scatter-shot changes that seemingly made the Plan even worse. That proposal lead to further public meetings and reviews, until ultimately on August 31, 2011, the Council rejected the Mayor's Plan too, 4-3.

Despite the tumultuous history, or perhaps because of it, the Honorable Linda D. Thompson, Mayor of Harrisburg, has opposed the Petition and so, quickly moved for an Emergency Status Conference. The Court promptly granted her motion and conducted a Conference in open court on October 17, 2011. The Mayor opposed the filing and asserted, through private counsel and the Acting City Solicitor, Jason Hess, Esquire, that the actions of City Council in hiring Attorney Schwartz and authorizing the filing of the Petition were invalid.

Before the Conference commenced, the Commonwealth of Pennsylvania quickly stepped in with separate Objections, moving to have the Petition dismissed forthwith on other grounds, including an assertion that the filing was barred by Act 26 of 2011 and other provisions of law.

On October 19, 2011, as a result of the Conference, a Scheduling Order was issued requiring any and all Objections with regard to the Debtor's authority to file a Petition under Section 109(c)(2) be filed with accompanying briefs on or before

October 28. A stack of Objections followed. In addition to the Commonwealth, there are formal pending Objections filed on behalf of Mayor Thompson; the County of Dauphin; Covanta Harrisburg, Inc.; a combined Objection of TD Bank, National Association, Manufacturers and Traders Trust Company and Assured Guaranty Municipal Corp.; the Fraternal Order of Police, Capital City Lodge No. 12; AFSCME Council 90; Ambac Assurance Corporation; National Public Finance Guarantee Corporation; and Syncora Guarantee, Inc (both in Joinder to Commonwealth's Objections). The Objectors essentially offer the same reasons for dismissal, with the exception of the Commonwealth, who argued an additional basis that this Court has indicated it will not entertain at this time.[3] Responses in Opposition and supporting briefs are now due.[4]

ARGUMENT

In two (2) sessions in early October, the Harrisburg City Council, faced with the prospect of our City being forcibly stripped of its revenue producing assets to

[3] On November 1, 2011, parties appeared for a Hearing on the Mayor's Emergency Motion seeking a "comfort" Order. The Court advised all parties at that time that arguments regarding Act 2011-79 (S.B. 1151)(amending Act 47) would not be considered and that such matters need not be briefed and argued at this time. Accordingly, DWH has not briefed the issue, but would anticipate the matter raising significant issues that would not be resolved without a judicial determination.

[4] A revised Order was issued on November 1, setting the deadline November 14 as the new deadline for responses and briefs. Counsel for DWH is filing a contemporaneous Motion for Leave to File Brief Out of Time regarding the one-day delay on this the filing.

pay out questionable financial obligations from questionable dealings with public monies, moved to seek protection for the residents, taxpayers, landowners and businesses in the municipality in the only venue that could offer protection: a United States Bankruptcy Court.

I. HARRISBURG'S PETITION IS EXPRESSLY AUTHORIZED UNDER LAW

The Objection:

Act 26: Pennsylvania's Anti-Bankruptcy Law Deprives Harrisburg The Keys to the Courthouse

At the end of June, on the cusp of trying to pass a new on-time budget under a new Governor on the very last day of the fiscal year, the Pennsylvania General Assembly amended the Fiscal Code to assert that no Third Class City could:

> "file for relief under 11 U.S.C. Ch. 9 (relating to adjustment of debts of a municipality) or any other Federal bankruptcy law and no government agency may authorize the distressed city to become a debtor under 11 U.S.C. Ch. 9 or any other Federal bankruptcy law."

72 P.S. § 1601-D.1 (Act 26). The singular penalty for going forth with a Chapter 9 filing is plainly set forth in the Part (c) of the enactment, which provides a failure to comply withe Part (b) (the prohibition) will result in the "suspension" of Commonwealth funding. Part (d) made the enactment only temporary, setting a July 1, 2012 expiration date.

The Commonwealth argues the terms of this enactment are clear and

deprive Harrisburg of the right to file a Petition in this Court. All other Objectors, except Mayor Thompson, make the same confident assertion. They are wrong.

First Things First: Statutory Authority for Bankruptcy

Municipalities in Pennsylvania, including Harrisburg, are specifically authorized to file for bankruptcy under the Municipalities Financial Recovery Act, Act 47 of 1987, 53 P.S. §§ 11701.101, 11701.261 (Act 47). Section 261gives us a definitive list of five (5) conditions for filing, but requires only that one be met. There can be no credible challenge that Harrisburg satisfied at least one of these conditions on October 11, 2011.

> Section 261. Filing municipal debt adjustment under Federal law.
>
> (a) Authorization. – In the event one of the following conditions is present, a municipality is hereby authorized to file a municipal debt adjustment action pursuant to the Bankruptcy Code (11 U.S.C. § 101 et seq.):
> . . . .
>
> (5) A majority of the current or immediately preceding governing body of the municipality determined to be financially distressed has failed to adopt a plan or to carry out the recommendations of the coordinator pursuant to this act.
>
> (b) Majority vote. – This authority may be exercised only upon the vote by a majority of the municipality's governing body.

The fact that the current City Council has not adopted a plan is a matter subject to Judicial Notice, as it's made headlines around the nation and the globe. The fact

that the City was "determined to be financially distressed" to qualify for Act 47 likewise is not in dispute. With that, to qualify under Act 47 to file for bankruptcy relief, Harrisburg has to show that City Council is the "governing body" *under Act 47*, who are by direct statutory definition the ones vested with the exclusive authority to "exercise" the right to proceed to Chapter 9 with direct authority from the State. The answer is beyond contest, as there is a plain, binding statutory definition See Section 103. Definitions.

> The following words and phrases when used in this act shall have the meaning given to them in this section unless the context clearly indicates otherwise:
> . . . .
> "Governing body." The council in cities . . .

See Section 11701.103 of Act 47. Of course, "[w]here a statute or ordinance defines a word or phrase, court is bound thereby." *Hughes v. School District of Pittsburgh,* 108 A.2d 698, 379 Pa. 145 (Pa. 1954)

As City Council for the City of Harrisburg as the governing body failed to adopt a plan, Harrisburg was "authorized" to file for municipal bankruptcy. Objectors are correct when the assert that Section 109 (c) of the Bankruptcy Code requires a chapter 9 debtor meet certain requirements to be eligible to file. These do include (1) be a municipality and (2) be specifically authorized, in its capacity as a municipality or by name, to be a debtor under such chapter by State law, or by

a governmental officer or organization empowered by State law to authorize such entity to be a debtor." 11 U.S.C. 109 (c) This authorization under Pennsylvania law is "exact, plain and direct with well-defined limits so that nothing is left to inference or implication." *In re Slocum*, 336 B.R. 387, 390 (Bankr. N.D. Ill. 2006) For this clear authority to be inapplicable, the law would have had to been properly and timely amended in some way. It was not.

THE DEFECTS IN THE ANTI-BANKRUPTCY LAW ARE LEGION

Objectors point in near unison to the act passed June 30, 2011, which purports to eliminate Harrisburg's right to file the bankruptcy petition. Act 26 of 2011, 72 P.S. § 1601-D.1, amending the Act of April 9, 1929 (P.L. 343, NO. 176) (Act 26). One would expect to find this Act as an amendment to Act 47, since it attempts to limit Act 47, but Act 26 appears in the Fiscal Code.

Act 26 is in the Fiscal Code because all its language, other than 1601-D.1, applies to and amends the Fiscal Code, not the group of statutes dealing with municipalities (53 P.S. §§101 *et seq.*, which includes Act 47). All 62 pages of Act 26, except 1601-D.1, address *fiscal matters*. Thus the Act 26 provision at issue here, which essentially attempts an amendment to Act 47, is hidden in an Act amending Title 72 (72 P.S. §§101 *et seq*.), "Taxation and Fiscal Affairs." The statute itself is in a volume of statutes where there are no sections with similar

subject matter. This section does not belong in Act 26; the only reason it was put there was to allow legislators to pass it as a "24 hour" statute.

The legislators who cobbled this together did so in blatant violation of the Pennsylvania Constitution, which in Article III, Section 3, prohibits combining clearly different subjects:

> No bill shall be passed containing more than one subject, which shall be clearly expressed in its title, except a general appropriation bill or a bill codifying or compiling the law or a part thereof.

All subjects in a bill must have a unifying thesis, as the cases below state, and the title must clearly show the subjects of the sections. The part of the bill's title addressing 1601-D.1, however, is intentionally misleading. Under the language relating the "Purpose of the Act," the legislators inserted a reference to this section "*providing for financially distressed municipalities,*" which under the Fiscal Code implies it covers financial aid, rather than voiding application of a statute in another volume of statutes. Were there any doubt of the intention to mislead, titling the section "administrative oversight" and placing it under an article called "Inquisitorial Powers of Fiscal Officers" certainly should dissuade anyone seeking information on municipal bankruptcy from looking there.

A seminal case on the application of this constitutional provision is *City of Philadelphia v. Commonwealth*, 838 A.2d 566 (Pa. 2003) (*Philadelphia*). As

explained there, at 574, the provision was to prevent "omnibus bills," packaging different subjects together to avoid scrutiny and obtain support otherwise lacking for the separate provisions' passage. The test of whether there is constitutional compliance is whether the added language aids the bill's main objective or is germane to the principal subject matter. *Philadelphia*, at 575. The Court recognized that it should hypothesize a broad range of legislative topics for such legislation, but concluded there must be some "single unifying subject to which all of the provisions of the act are germane..." *Philadelphia*, at 579. It concluded there was no such subject in that case, even though the statute at issue proposed to amend only the Municipal Code, thus the statute failed and was unconstitutional.

The statute in *Philadelphia* was far less questionable than the one at issue here - this section is not only unrelated to the other Act 26 provisions, it is unrelated to the entire Fiscal Code where it resides. Under the holding of *Philadelphia*, the provision of Act 26 purporting to prevent bankruptcy filings is constitutionally invalid and cannot be applied here. Another seminal case discussing Article III Section 3 of the Pennsylvania Constitution is *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, 877 A.2d 383 (Pa. 2005)(*PAGE*). There is a lengthy discussion in *PAGE* at 393-404 which cannot be adequately summarized here, but suffice it to say that although

the Pennsylvania Supreme Court found all but a few sections of the statute there to pass review, the Court carefully explained how *Philadelphia* and *PAGE* could lead to the determination of when "bundled" statutes were allowable and when they were constitutionally infirm.

The *PAGE* Court explained the difference between the Court's *Philadelphia* decision and the result in *PAGE*:

> ...the vast subject of "municipalities" stretched the concept of a single topic beyond the breaking point. Indeed, it was not apparent how the diverse subject-matter had a logical or legislative nexus to each other. [*Philadelphia*]. at 589. Finding that, as virtually all of local government is a municipality, the proposed subject was simply too broad to qualify for single subject status for purposes of Article III, Section 3....
>
> In contrast to City of Philadelphia, in the matter sub judice, there is a single unifying subject--the regulation of gaming. The single topic of gaming does not encompass the limitless number of subjects which could be encompassed under the heading of "municipalities."

PAGE, at 396.

We commend to this Court the excellent analysis by both the majority and dissents in that case. Another case voiding a statute under Article III, Section 3, is *DeWeese v. Weaver*, 880 A.2d 54 (Pa.Cmwlth. 2005) and its holding similarly compels a finding that § 1601-D.1 is invalid. Under the holding of any of these cases, the promulgation of section 1601-D.1 violates the Pennsylvania Constitution.

There are other Constitutional infirmities in this bill as well. *Marcavage v. Rendell*, 936 A.2d 188 (Pa.Cmwlth. 2007) discusses the strictures against amendments to a bill changing its original purpose, which we submit occurred here. In *West Mifflin Area School Dist. v. Zahorchak*, 4 A.3d 1042 (Pa. 2010), the Court stated that if legislation creates a class that is "substantially closed" to more than one entity, that constitutes special legislation violative of Article III Section 32 of the Pennsylvania Constitution. The bill here at issue might as well have said it prohibited Harrisburg from filing for bankruptcy, since it would apply to no other entity currently, and its "expiration date" virtually insures it will not apply again.

Further, the amendment runs afoul of basic principals of equal protection at both the Federal and State levels. There is no attempt to justify why taxpayers and residents in a Third Class City in Pennsylvania are not entitled to the same protections to their neighbors across the City line. Every other city, but for Third Class Cities, as well as every county, . .., borough, incorporated town, townships and home rule municipality (see definition of "Municipality" in Section 103) still enjoy eligibility for relief under Chapter 9 if they fall into the same straights as Harrisburg. See U.S. Constitution, Fourteenth Amendment and Pa Constitution, Art. 3, Sec 32. The legislature is free to engage in some classification of

individuals to treat differently people with different needs, but such classifications must have a "fair and substantial relationship to the object of the legislation." *See Curtis v Kline*, 666 A.2d 265 (Pa. 1995). *See also*, *Laudenberger v Port Authority of Allegheny County,* 436 A.2d 147 (Pa. 1988) (purpose, interpretation and analysis of Art. 3, Sec 32 are guided by same principals that apply in interpretation of federal equal protection). The Legislature did not and could not articulate any fair and substantial relationship to the object of the legislation, as there was no constitutionally permissible object to be considered. They simply wanted to stop Harrisburg from going into Bankruptcy.[5]

Act 26 runs afoul of the Statutory Construction Act of 1972, 1 Pa. C..S. § 1926 too, which provides that "[n]o statute shall be construed to be retroactive unless clearly and manifestly so intended by the General Assembly." While a change in a statute may be retroactively applied where it is merely procedural and does not alter any substantive rights, *Montgomeryville Airport, Inc. v. Workmen's Compensation Appeal Board (Weingrad*), 116 Cmwlth. 433, 541 A.2d 1187 (Pa.

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[5] In a Senate Committee hearing of June 2011, a Committee Chair attempts to say that the State's intent is not just to narrow in on Harrisburg. The packed room breaks out in laughter at his claim. He was gingerly responding to another Senate Committee member who just acknowledged aloud "the intention is to narrow it in just to Harrisburg". This is direct evidence of intent of both the Fiscal Code amendment and S.B. 1151, demonstrating the General Assembly was working around the Constitution to thrust Special Legislation on Harrisburg, in disregard for the plain prohibition. *See* www.roxburynews.com/player.asp?videoname=AppropsSB1151A.m4v .

Cmwlth. 1988), a substantive right is implicated when the retroactive application of a statute imposes new legal burdens on past transactions. *See McCormick v. Workers' Compensation Appeal Board (City of Phila.*), 734 A.2d 473 (Pa. Cmwlth. 1999). Harrisburg was in the midst of the Act 47 process when the Fiscal Code shenanigans – a likely political compromise at that moment in time – tried to create a year long moratorium on Third Class City bankruptcy. As Act 47 does not allow a municipality to unilaterally withdraw from the program, the rights, benefits and options available to Harrisburg at the time of filing its Act 47 application were stripped away through Act 26.

On Act 26, it also should be noted that infirm sections of an act are severable under the above cases, so stripping this section would leave intact the rest of Act 26. While we understand that this Honorable Court may be reluctant to find §1601-D.1 unconstitutional, Objectors contend it is a bar to the petition here and must cause dismissal. The problems created by this legislation are not the fault of City Council, nor indeed Mayor Thompson or any other person in City Government. Rather, it is the wanton disregard of Pennsylvania Constitutional requirements by the Legislature that has brought us to this point. In contempt of Harrisburg and its residents, the Legislature rushed through legislation it had to know was infirm, assuming no one would object. Thus it sought to deny to the

City the protection afforded every other Third Class City in Pennsylvania, and made its intention abundantly clear. We submit this Court should find the statute unconstitutional and thus no bar in this proceeding. Alternatively, although the statute fails on its face, we submit the statute can be read as not being an absolute bar to the petition. Rather, it should be read as providing only the elimination of State funds, should a municipality proceed with a bankruptcy filing.

Accordingly, Act 26 is impaired legislation with no legal reach in Act 47 matters, and stands as no moment, no impairment to the Petition. Objectors claims to the contrary should therefore be denied.

II. CITY COUNCIL ACTED PROPERLY AND WITHIN THEIR AUTHORITY

The Objection:

Council Acted Improperly In Hiring Attorney Schwartz, Authorizing the Filing of the Petition Via a Resolution and Executing the Petition on Behalf of the Municipality

In City Where Nothing Works, Resolutions of Council Work Just Fine

As Objectors note, the City of Harrisburg operates under the "Mayor-Council Plan A" form of government, with executive power generally exercised by the mayor (53 P.S. § 41411) and legislative power generally exercised by the city council (53 P.S. § 41407). Apparently it's a much stronger executive branch than we thought, since we now learn that the Acting City Solicitor (whose term

has expired)[6] could invalidate City Counsel resolutions, or veto them, could veto their letter of engagement with an attorney, and if they did these things without his approval they would violate the City Code and the actions would have no effect. Mayor's Brief, 4-5. While it is true that City Council did not follow the letter of a legislative ordinance at § 1-201.1 D, in that it did not submit the resolutions for the Solicitor's review, one wonders how a resolution can be "approved as to form and legality," since a resolution could take any form and cover virtually any topic. Coupled with the Mayor and Solicitor's well-known opposition to bankruptcy, attempting to get legal approval of the resolutions would have been a nugatory act. A the end of the day, however, § 1-201.1 D can not serve as a barrier under Pennsylvania law, a point we will return to in the remaining argument.

The Rules of Council, as modified in January 2010, have been a baffling

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[6] Indeed, the last approved City Solicitor, Phil Harper, Esquire, resigned February 8, 2011, (See Exh.1) leaving Assistant Solicitor Hess as a one attorney office. The Mayor made him the Acting Solicitor shortly thereafter, a position he was only permitted to hold 120 days if one is construing the City Ordinances as strictly as Mr. Hess asserts, which of course would mean he had no authority to assert his arbitrary and improper strict compliance or invalidation ruling.. **See**

2-301.5 DEPARTMENT HEADS; APPOINTMENT AND DUTIES; ACTING HEADS

. . . .

(c) The Mayor may appoint an acting department head for a time period not to exceed one-hundred twenty (120) days unless the appointment of such acting department head has been subject to the advice and consent of Council. ***No individual may serve as an acting department head for more than one-hundred twenty (120) days during a Mayor's term of office.*** (Ord. 29-1982.) (Emphasis added)

sticking point that appear to be wielded to interfere with the will of the legislative body instead of aiding it. See Rules of Council, (Exh, 2) The Objectors tacitly assert that the manner in which in Attorney Schwartz was approved was improper and then directly claim that the manner in which the authorization to file for Bankruptcy was approved demonstrates that the Petition must be dismissed, as if it were somehow improperly before the Bankruptcy Court.

One can conclude that in a shrinking City government where almost the entire senior staff has walked out the door or been fired, perhaps one reason that there appears to be confusion and gridlock in Council Chambers about what rules apply and matters should proceed is the obvious one: in the chaos that is Harrisburg's City government, the Administration has provided a lone, inexperienced, overworked lawyer to oversee all things legal, including advising Council on whatever legislative process and procedure would be controlling, even when the study thereof gets obscure.

To understand the scope of procedural, administrative and legislative powers, options and limits facing Council, one is required to consider the relation and interplay of the City Charter, the Rules of Counsel, The Standard Code of Parliamentary Procedure, the City Ordinances, the Third Class City Optional Plan Charter Law and the Third Class City Code. Each plays a mandatory role in the

law governing the City of Harrisburg.

WHAT RULES APPLY TO THE HARRISBURG CITY COUNCIL?

For a legislative body, the Rules of Council that are suppose to assist Harrisburg officials smoothly proceed with public meetings are fairly limited in their scope. There is good and obvious reason for this limitation. The Council did not need to write its own detailed rules of procedure. Under the heading "Procedure" Council adopted Rule No. 5, which provides:

> The Standard Code of Parliamentary Procedure by Alice Sturgis (most current edition) shall govern the proceedings of the Council on all matters not specifically provided for herein. The Solicitor shall serve as Parliamentarian.[7]

The provisions of Sturgis are significant in determining what City Council should and could do in routine business and, that framework became even more so when a perceived emergency compelled officials to file for the protection of the City's legal and property rights before these were forever lost or forfeited.

Sturgis "shall govern" proceedings in City Council, so a review of this roadmap of definitions and procedures is mandatory reading to know or determine how City Council was permitted or required to act. The principles in the manual are the governing principles when Harrisburg City Council gets down to business.

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[7] There is a brand new 5th Edition of text published in October 2011, but the Solicitor did not use or make available the new version in the Legislative or Special Sessions at issue.

These principles include:

- The purpose of parliamentary procedure is to facilitate the transaction of business and to promote cooperation and harmony. The philosophy of parliamentary law is constructive –to make it easier for people to work together effectively and to help organizational members accomplish their purposes. Chap 2, page 7.

- **The majority vote decides**. (emphasis in original) The ultimate authority of an organization is vested in a majority of its members. This is a fundamental concept of democracy. Chap 2, page 8.

- The primary purpose of parliamentary procedure is to determine the will of the majority and see that it is carried out. Chap 2, page 8.

- After the vote is announced, the decision of the majority becomes the decision of every member of the organization. It is the duty of every member to accept and abide by the decision. Chap 2, page 8.

- The parliamentarian . . . is retained to help members do what they wish to do and to find a valid way to accomplishing, if possible, the legitimate purposes of the organization. Chap 19, page 229.

- The parliamentarian is not an advocate of a cause or a representative of any group within the organization. . . Chap 19, page 229.

- After the meeting the parliamentarian can advise on problems that arise in carrying out the decisions of the membership. Chap 19, page 229.

- The parliamentarian cannot make rulings, but advises the presiding officer, who does make rulings. Chap 19, page 229.

- If a serious mistake is being made, the parliamentarian unobtrusively calls it to the attention of the presiding officer, who then decides what action to take. Chap 19, page 229.

- Many parliamentarian problems involve several rules and principles. A parliamentarian must be able to reconcile the conflicting principles and rules of parliamentary law that may be involved in the particular situation. Chap 19, page 229-230.

- [T]he parliamentarian should neither argue nor seek to prove the correctness of an opinion by quoting books. Chap 19, page 230.

- Suspension of the Rules. A vote to disregard temporarily a rule that prevents the assembly from taking a particular action. Definitions, page 266.

- Parliamentary strategy is the art of using legitimately the parliamentary principles, rules, and motions to support or defeat a proposal. Chap 2, page 9

- An organization has the inherent power to take any action that is not in conflict with law, its charter, bylaws, or adopted rules. This includes the power to adopt motions regulating the conduct of its current business. Since many situations arise that are not covered by rules, it is essential that the details of transacting business be determined by motions. During the course of proceedings, motions are frequently necessary to facilitate the method, manner, or order of transacting business. Chap 23, page 210.

In the role of Parliamentarian, Mr. Hess was to carry out – in accordance with these governing principles that were adopted by Council, with ways to assist the majority in carrying out the will of the majority. How? Most of the material in Sturgis addresses the many forms of motions that can be made in an organization, including motions to amend, rescind, ratify, reconsider, appeal and more. See Exhs, 3-1 to 3-5., excerpts from Sturgis, 4th Ed (extensive).

In the Council Sessions wherein the disputed motions were made, according to Sturgis, Mr. Hess as Parliamentarian had to bring the matters with which he was concerned to the Presiding Officer, who could then make a ruling. If the presiding officer did make a ruling, that would be subject to immediate appeal by any member. As the Parliamentarian cannot oppose or challenge a matter, if the Presiding Officer does not opt to rule on the Parliamentarian's concerns, or more precisely, does not rule a motion or other action out of order, the opportunity to do so has been waived by the legislative body. If a ruling is made, however, but then promptly appealed and overturned by a majority vote, that would be the end to the question for the Parliamentarian.

Mr. Hess was vested with no right to thwart the Council's governing principles, or to after the fact challenge that with which he disagrees. Likewise, he has no right to refuse to carry out the majority's mandate when he views it as procedurally flawed. Being the Parliamentarian, he was not robed with any judicial authority to invalidate acts of City Council. And it would seem a truly obvious thing that he has even less right to render such judgments when he was and remains as their legal counsel.[8]

[8] Counsel's provision of a Affidavit in Support of Objections to a proceeding brought by his current clients should not be allowed or considered by this Honorable Court, as attorneys generally should be, as a matter of law, held to be a legal incompetent when it comes to voluntarily offering evidence against a current client in a judicial proceeding.

ORGANIC LAW: THE CHARTER OF THE CITY OF HARRISBURG WHEN READ TOGETHER WITH THE OPTIONAL CHARTER LAW CONTROLS

The City adopted the Optional Plan Mayor-Council Plan A form of government through a referendum, that ultimately led to the Optional Charter, which became effective January 1, 1970. *See City of Harrisburg-Optional Charter*, Exh. 4. Section 301 provides in relevant part that "[t]he plan adopted and the provisions of this act common to optional plans shall become the organic law of the city at the time fixed by this act."

The Charter's language sets forth a classical grant of legislative power and authority to a municipal government, succinctly stating the "legislative power of the city shall be exercised by the city council. . ." Sec 407. But consistent with the nature of the individual development of Charters in each participating municipality that so opts for the Optional Plan form of government, our City settled upon a few variations worth noting, including:

- "[**t]he council may provide for the manner of appointment of a city solicitor**." Sec. 410(b).
- "Ordinances adopted by the council shall be submitted to the mayor..." Sec 413(a).
- "Council shall determine its own rules of procedure, not inconsistent with ordinance or statute," Sec. 607(a).

- "each ordinance or resolution shall be introduced in written or type-written form, and shall be read and considered as provided by general law" Sec. 607(b).

As Council's power to determine their own rules of procedure is captured in the Charter, it is inextricably part of the organic law of the City, as is their say over appointments of solicitors. In the failure of their "Acting Solicitor" to perform the role as their attorney, advisor, advocate and counselor, the Charter rights bestowed on them should be recognized as an express right to appoint other counsel to serve such functions in a manner the Council requires.

OBJECTORS CAN'T HAVE IT BOTH WAYS, BUT THEY'LL TRY

Paradoxically, after contending resolutions are of enough import to mandate the Solicitor's scrutiny, Objectors then contend such actions do not mean anything. They make the patently absurd argument that Harrisburg City Council should have undertaken a bankruptcy filing by making it the subject of an ordinance, rather than a resolution. The Mayor's brief, pp. 7-11, cites *Department of Environmental Resources v. Rushton Min. Co.*, 591 A.2d 1168 (Pa.Cmwlth. 1991), for the proposition that a policy statement is the same as a resolution. That case, at page 1172, refers to the definition of policy statement found in the Commonwealth Documents Law:

> Section 102(13) of the Law, 45 P.S. § 1102(13), defines statement of policy as follows:
>
> "Statement of policy" means any document, except an adjudication or a regulation, promulgated by an agency which sets forth substantive or procedural personal or property rights, privileges, immunities, duties, liabilities or obligations of the public or any part thereof, and includes, without limiting the generality of the foregoing, any document interpreting or implementing any act of Assembly enforced or administered by such agency.

Although that statute refers to state agencies, the definition there would include resolutions to hire an attorney and file a bankruptcy petition, so applying that definition here leads to approval of City Council's resolutions. Applying the quote from *In re Application for Liquor License of Thomas*, 829 A.2d 410, 413 (Pa.Cmwlth. 2003) (Mayor brief 7) also would include the resolutions here:

> A resolution is an informal enactment of a temporary nature, providing for the disposition of a particular piece of administrative business; it is not a law and there is no difference between a resolution and a motion.

Finally, in considering whether council should use a resolution or ordinance, the Court in *Marshall v. Bentzel*, 397 A.2d 444 (Pa.Cmwlth. 1979), a dispute between mayor and city council over the power to fix salaries for city bureau directors, said:

> ...the Directors argue that the action of the Council in fixing their salaries by resolution was ineffective because it was not done in the form of an ordinance subject to the Mayor's approval or veto. We find, however, that Section 607(b) of the Charter Law which relates to the salaries of department heads merely requires that they be "fixed by council" and it is only Section 607(c) of that law, which relates to salaries of elected officials,

> that requires such salaries to be fixed by ordinance. If the legislature intended the Council to set the salaries here in question by ordinance, it would have so provided.

The Court thus found use of a resolution appropriate, which is consistent with the resolutions here. The City Ordinances define an ordinance as setting out "general, uniform and permanent rules," which clearly does not apply to a one-time legal filing or a contract.

ACTING CITY SOLICITOR TOUTS ORDINANCE REQUIRING HIS INITIALED CONCURRENCE TO MOST ANYTHING

The Objectors rely on the fact that the emergency Resolutions authorizing the Chapter 9 Petition and the retention of Attorney Schwartz did not bear the signatures or initials of Mr. Hess. The absence of his John Hancock and most literally, the fate of the citizens of our beleaguered City somehow are left to dangle on that fine point.

Their essential assertion is that there is a law – Ordinance 1-201.1 D – that mandates that legislation be reviewed and signed off on by the Solicitor, or that legislation – resolution, ordinance, regulation or other – must be deemed fatally flawed. Under that argument, extending its draconian reach down the road that it has been set upon, it would seem no legislative act in Harrisburg has been of any force or effect for many months. If Harrisburg must have a Solicitor to review

enactments, and Harrisburg's Ordinances must be strictly construed, then the passage of the 120 day statutory limit available under another Ordinance means there is no Solicitor to perform the required task. No budget reallocation ordinances would be valid, nor actions proposed for Tax Abatement, flood relief, FEMA reimbursements, parking tax and meter rate increases or any other act of the legislative branch since June 2011. That is the absurd but logical path of all-defects-are-fatal reasoning the Court is asked to accept.

Even more compelling, however, is the careful reasoning of Judge Blatt. In *Marshall v. Bentzel,* 397 A.2d 444 (Cmwlth 1979), the Court recognized that a local ordinance must give way when in conflict with the Charter Law and York City Charter. Judge Blatt cited in her discussion one of the same provision of the Charter Law at issue here, noting:

> "Section 303 of the Charter Law, *53 P.S. § 41303*, specifically provides in pertinent part:
>
> Each city governed by an optional form of government pursuant to this act shall, *subject to the provisions of and limitations prescribed by this act*, have full power to:
>
> (1) Organize and regulate its internal affairs, and to establish, alter, and abolish offices, positions and employments and to define the functions, powers and duties thereof and fix their term, tenure and *compensation*; (Emphasis in opinion)

Marshall v. Bentzel, at 277. Because an earlier case dealt with Home Rule Charter

issues, Judge Blatt rejected arguments that a Supreme Court decision in *Greenburg v. Bradford City*, 432 Pa. 611, 248 A.2d 51 (1968) controlled, but embraced a crisp observation of the dissent:

> It seems to strain the bounds of logical reasoning to contend that the city regulations enacted *under* the enabling act can ignore a provision of the *same* act. (Emphasis in original)

*Marshal*l at 279 (*citing Greenburg,* 248 A,2d at 54).

In the case at bar, Section 303 of the Charter Law warrants a more exhaustive examination, as it further empowers the municipality to:

> (3) Sue and be sued, to have corporate seal, to contract and be contracted with, to buy, sell, lease, hold and dispose of real and personal property, to appropriate,and expend moneys, and to adopt, amend, and repeal such ordinances and resolutions as may be required for the good government thereof;

The litany is a mix of legislative and executive powers. For instance, it covers the power to negotiate contracts, an authority reserved to City Council. *See Moore v. Reed*, 559 A.2d 602 (Pa.Cmwlth.1989) (*Moore*), *petition for allowance of appeal denied*, 527 Pa. 657, 593 A.2d 428 (1991) *See also, Capital City Lodge No. 12 v. Pa. Labor Rels. Bd.*, 2011 Pa. Commw. LEXIS 544 (Nov 1, 2011) (Court found only tentative Extension Agreement of pension plan between Mayor Reed and FOP, by which the City Council was not bound). EXPRESSLY included in those

powers is the power to adopt resolutions as may be required for the good government of the City. That is exactly the power City Council exercised when they authorized Chapter 9 protections.

The City of Harrisburg - Optional Charter includes Section 607 (b), which provides that:

> (b) Each ordinance or resolution shall be introduced in written or type-written form, and shall be read and considered as provided by general law.

The administrative act of a Solicitor's review of a Resolution prior to a Legislative or Special Session of City Council under Harrisburg Ordinance No. 1-201.1 D only could be derived from the grant of legislative power to City Council by the Legislature's enactment of the Charter Law and other governing statutes. It is Council alone who is clothed in nondelegable legislative authority, not the Solicitor. He cannot lawfully impede that authority or encroach thereon in any way without running afoul of the Charter Law and the Optional Plan.

Council can make the rules that control their meeting times and date. What they must do with ordinances and resolutions is write them down (by hand would plainly satisfy the Charter Law) and have them read and considered as provided by general law, which is read aloud at a public meeting when it is being introduced or considered. They have the power to appoint a solicitor, but they cannot delegate

to that individual any legislative, executive or judicial authority. While acting as legal counsel, Attorneys travel through and amongst those who hold such powers, but they cannot accept or usurp such grants of authority.

Reading Sections 303 (a) and (c), together with 607 (a) and (b), shows that the legislature did not intend to put an impediment on the exercise of the grant of the "greatest power of local self-governance" set forth in Section 304 of the Charter Law. The Council must be able to adopt or repeal or amend resolutions as may be REQUIRED for the good government thereof. They must do so "subject to the provisions" of the Charter Law, so as to exercise the "full power" thereof. An ability to stop, invalidate, ignore, or wrest control of a legislative body is simply extraordinary powers intended be or actually found in the local signature ordinance. To find otherwise would to invalidate the grant of legislative power conveyed to this local governmental body.

ERIE V DEPT OF ENVIRONMENTAL PROTECTION LIMITED BY ITS FACTS

Objectors next contend that only the Mayor could file for bankruptcy and that only the Solicitor could pursue legal actions. Contrary to Objectors' assertions, Harrisburg City Council's filing of the instant Petition neither usurped the Mayor's role nor was it inconsistent with the authority residing in Council under applicable ordinances and statutes.

Objectors mistakenly rely on *City of Erie v. Dept. of Environmental Protection*, 844 A.2d 586 (Pa.Cmwlth. 2004) (hereinafter *Erie*), as standing for the proposition that a city council has no authority to retain counsel or undertake legal actions. However, careful analysis of the factual background and the Court's holding in *Erie* demonstrate that holding is fact-specific. To conclude otherwise would place that decision at odds with cases in which the authority of a city council to retain outside attorneys for particular proceedings has been necessary.

Turning to the facts in *Erie*, the Erie City Council took its actions in furtherance of a majority view that the water authority (Erie City Water Authority, "ECWA") should not fluoridate the water supply. *See* Exh. 5. This crusade had nothing to do with any City function, the City had no legal authority over actions of the ECWA, no statutes authorized this type of City action and water quality regulation is preempted by state and federal law, so even the Mayor would have had no basis for City legal action.

Erie City Council first said ECWA fluoridation would violate its lease. Then it passed an ordinance prohibiting fluoride, which was vetoed. Some council members agreed the Tinko Law Group should represent "the City" if it sued the ECWA, but such a suit did not occur[9]. However, after the Department of

[9]The law firm was paid by an outside party.

Environmental Protection issued permits to EWCA allowing fluoridation, the Tinko firm appealed to the Environmental Hearing Board, claiming to represent the City of Erie. When the City Solicitor found out, he filed motions to withdraw the appeals, which were granted on the basis that Tinko and City Council did not represent Erie. Tinko appealed, resulting in the Commonwealth Court decision lambasting Tinko and the Council members who supported the litigation. *Erie*, *seriatim*.

The Court could have stopped at finding that under the facts of that case, considering the Optional Third Class City Charter Law (Charter Law), Act of July 15, 1957, P.L. 901, as amended, 53 P.S. §§ 41101-41625, the members of the Erie City Council were not authorized to bring such actions on behalf of the City, nor was Tinko authorized to represent the City. The Court, however, went farther afield, discussing the Erie City Ordinance covering the appointment, powers and duties of the city solicitor, which provides:

> CROSS REFERENCES
> ****
> City Solicitor - see 3rd Class Charter Law §410(b) (53 P.S. §41410(b);
> 3rd Class §1601 et seq. (53 P.S. §36601 et seq.)
>
> ****
>
> 115.02 CITY SOLICITOR.
>
> The Mayor shall appoint a City Solicitor with the advice and consent of Council. The duties and responsibilities of the City Solicitor shall be those

> set forth in Article XVI of the Third Class City Code, and such other duties and functions consistent with the same that Council may by ordinance provide. (Ord. 2-1962 §107.A.1. Passed l-12-62.).

Thus the Erie ordinance incorporated specific statutory provisions from the Third Class City Code. The ten sections of Article XVI, 53 P.S. §§36601-36610, were all under the same Act of 1951, June 28, P.L. 662, so the rules of statutory construction (1 Pa.C.S. §§1501 *et seq*; §1932) require the sections be read *in pari materia.* The *Erie* Court however quoted from two of those sections, saying they showed that only the solicitor could handle city legal matters, while ignoring provisions explicitly outlining council authority over the role of legal advice to the City. The Court quoted the first part of § 36602, but ignored the second sentence: "No department of the city shall employ or retain any additional counsel in any matter or cause, *except with the previous assent of council*." *Erie*, at 590, emphasis added. So council has authority to approve hiring outside counsel. Since there are many cases involving litigation between city officers, the mayor and/or council, this provision is important. Section 36610 specifically states that a council can, by resolution, hire special counsel for particular city matters, which also is extremely important considering the frequency with which intra-city litigation occurs.

The Court did not find the Erie ordinance on the solicitor invalid, nor say its incorporation of state statutes was invalid - it just ignored certain provisions. The

Court remarked that the executive power is "solely" the province of the mayor and the power to handle litigation is "solely" that of the City Solicitor, but the statutes (53 P.S. §§ 41411 and 36603) do not use the word "solely" or anything like it. In fact, one of the most important statutes in the Charter Law provides that specific enumerations do not serve to limit broader authority:

> 41304. Interpretation of powers; liberal construction
>
> ....Any specific enumeration of municipal powers contained in this act or in any other law shall not be construed in any way to limit the general description of power contained in this article, and any such specifically enumerated municipal powers shall be construed as in addition and supplementary to the powers conferred in general terms by this article....

The Court was overly concerned about council trying to "execute" the laws of the city, but that wasn't at issue in *Erie* - it was the actions unrelated to City business which *Erie* prohibited.

Objectors here claim that Harrisburg City Council has no authority to hire counsel or undertake litigation, but two statutes, § 36602 and § 36610 explicitly provide such authority. If the power were not in those sections of the Third Class Cities Code, it would have to be implicit, because *only* a city council could arrange and pay for outside counsel when litigation occurs between city entities. Objectors assume city council would only need to retain an attorney if council wished to do something that should be in the mayor's powers, but there are broad reasons

council has the power to retain an attorney.

In the cases reviewed, the mayor was usually represented by the city solicitor, creating a conflict that required city council obtaining outside counsel. In *Bentzel*, *supra*, the mayor was represented by the City Solicitor, so Council had to obtain representation elsewhere. *Stork v. Sommers*, 630 A.2d 984 (Pa.Cmwlth. 1993) (*Stork*), a dispute between the Mayor (Stork) and City Treasurer (Sommers) over Sommers not signing checks, had the mayor represented by the solicitor. Sommers sought to have the solicitor disqualified, since the solicitor was required both to bring suit on behalf of the mayor and defend it on Sommers' part under 53 P.S. § 36603. The Court denied disqualification, but found the solicitor bound by City Code and 53 P.S. § 36603 to follow the Mayor's direction in the case. It discussed the necessity of supplying counsel to Sommers:

> After [solicitor] had agreed to prosecute the mandamus action on behalf of Stork, it was impossible for [solicitor] to also represent Sommers. Nonetheless, because Sommers was acting in his official capacity as Treasurer ... he was entitled to legal representation by the City Solicitor's office pursuant to Section 1603 of the Code. Silver v. Downs, 493 Pa. 50, 425 A.2d 359 (1981).
>
> The Lancaster City Council properly addressed this situation. First, it authorized the Assistant City Solicitor to represent Sommers in the litigation, but the assistant solicitor declined because of an apparent conflict of interest. [5] City Council then authorized [outside counsel] to represent Sommers.

Stork, at 988-989.

In *Moore v. Reed*, 559 A.2d 602 (Pa.Cmwlth.1989) (*Moore*), *petition for allowance of appeal denied*, 527 Pa. 657, 593 A.2d 428 (1991), Harrisburg City Council initiated a declaratory judgment action, successfully alleging the Mayor had no authority to issue a permit that was actually a contract, without approval of the City Council. City Council obtained outside counsel and Mayor Reed was represented by the solicitor. *Goldsmith v. City Council of City of Easton*, 817 A.2d 565 (Pa.Cmwlth. 2003), was an action by the mayor against city council. The Court considered whether council could pass an ordinance providing council would, by resolution, appoint the solicitor, or whether that intruded on mayoral authority. The Court said the provision that " council may provide for the manner of appointment of a city solicitor.... " 53 P.S. § 41410(b), meant it could pass such an ordinance. *Smithgall v. Campbell*, 885 A.2d 669 (Cmwlth. 2005), was another action by a mayor against a controller, which decision noted the controller had a right to have services of counsel provided to him.

The salient point of all these cases, involving cities with the Mayor - Council Plan A form of government, is that city council had the power to obtain counsel for itself or parties other than the mayor, and the power to undertake litigation. Since the solicitor normally represents the mayor, that office would have a conflict preventing it from representing another entity in the city. How

could Council have filed its action in *Moore v. Reed* without authority to hire an attorney and bring legal actions? That action was taken under the same ordinances germane here, by the same body (with different members), and contrary to the facts of *Erie* or in the instant case, "executing and enforcing" the Harrisburg ordinances was precisely what City Council was doing in *Moore*. Had the holding of *Erie* been applied, it would have adversely affected these cases and many more. City councils would be unable to obtain judicial relief if a mayor abused power and violated ordinances, or refused to carry out the duties of that position. This is not and can not be the law of Pennsylvania; the *Erie* holding must be limited to the facts of that case.

Of note, perhaps the most striking factual difference between governmental structure in Harrisburg and the organic laws in the *Erie* dispute is the contrast of the organic law of Harrisburg, as our Charter squarely provides that it is City Council who may provide for the manner of appointment on any City Solicitor. *See City of Harrisburg - Charter* Exh 4.

Council has indisputable authority under the City's organic law to hire a solicitor if they so choose and yet, still somehow, the Objectors insist Council must be deemed barred from doing the equivalent, i.e., hiring Special Counsel for litigation. That authority to provide for the manner of appointment may not be an

exclusive grant of authority, but it remains an express grant of direct authority by the General Assembly.

When Council deemed the time was at hand to soberly exercise their exclusive authority under Act 47 and thus protect the rights of 49,000 people, the only other City official who could have assisted Council in fulfilling their duty had made it obstinately plain that she would not do so. In addition to the Mayor's misguided Objections to this Petition and her disregard or lack comprehension of full implications of the City's fiscal quagmire, Mayor Thompson has repeatedly stated that she would not pursue Chapter 9. See Exh 6, Sample News Clippings of 2010 and 2011 quoting the Mayor on her refusal.

FAIRNESS IS WHAT JUSTICE REALLY IS (POTTER STEWART)

There are ever louder demands to strip away the assets of Harrisburg. Payment with public funds are now due to really satisfy an old tab, one run up by the few, the powerful and the reckless. Faced with demands and impending, irreparable harm to the long term fiscal health of our City, a hard vote was cast: the protection of this Court would be sought. It had become obvious that to go on working and hoping for cooperation from an Administration that's openly hostile to all detractors, real or imagined, was pointless. That being so, the Council could take the actions that were needed on their own, for the law does not require one to undertake a futile act. So the Resolutions to hire Council and proceed with a

Chapter 9 Petition were done in manner consistent with the law.

Accordingly, as the Objections of the various parties under Section 109( )() are not supported by the law governing this matter, this Honorable Court should deny the requested relief and uphold the will of the people of this City made manifest by their Council.. Our City, left with no where to turn, must be afforded this one sure shelter. That is the just thing in this natter because that is what's fair.

CONCLUSION

For all the foregoing reasons, the Objections to the filing of the City of Harrisburg's Voluntary Petition for Municipal Bankruptcy Relief under Chapter 9 of the United States Bankruptcy Code should overruled, denied or otherwise dismissed, with prejudice.

Respectfully Submitted

LAW OFFICE OF NEIL A. GROVER

Date: November 16, 2011

By /s/ Neil A. Grover

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