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 DAUPHIN COUNTY
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 Patty Kim,
 Kelly Summerford and
 Eugenia Smith, City Council Members

THE COUNTY OF DAUPHIN, et al., <div style="text-align: right;">Plaintiffs,</div>	:	IN THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY, PENNSYLVANIA
vs.	:	NO. 2009-CV-9271-EQ
THE HARRISBURG AUTHORITY, et al. <div style="text-align: right;">Defendants</div>	:	CIVIL ACTION – EQUITY

**BRIEF OF CITY OF HARRISBURG AND ITS TREASURER
 PAUL P. WAMBACH IN SUPPORT OF THEIR MOTION FOR STAY**

I. Introduction

The City of Harrisburg (“City”) and its Treasurer, Paul P. Wambach (“Treasurer”) have moved to stay proceedings on the only remaining claim in this litigation. Plaintiffs Joseph

and Jacalyn Lahr (“Lahrs”) seek a writ of mandamus pursuant to § 8261 of the Local Government Unit Debt Act, (“Debt Act”), 53 Pa. C.S. § 8261 (failure to budget debt service), requiring the Treasurer to pay from “the first tax moneys or other available revenues or moneys thereafter received” the amounts due upon the guarantees of the City associated with the “retrofit bonds” that are at the heart of this litigation. Since the Lahrs first asserted their claim, the financial condition of the City has continued to deteriorate. On October 1, 2010, the City formally requested a determination by the Secretary of Community and Economic Development (“Secretary”) that it is a “distressed municipality” under the Municipalities Financial Recovery Act (“Act 47”). If the writ of mandamus sought by the Lahrs is issued, a preference will be given to certain creditors of the City and – because of its present fiscal circumstances – general operating expenses will therefore not be paid. These operating expenses include the costs of police and fire protection and other services critical to public health, safety and welfare. A writ would subvert the Act 47 process to determine whether the City’s fiscal circumstances warrant the Commonwealth’s intervention and would thwart the development and implementation of the recovery plan mandated by Act 47. This conflict between the preferential remedy of § 8261 and the broader remedial program of Act 47 must be resolved by staying these proceedings.

II. Procedural History

This litigation was initiated by a complaint filed by the County of Dauphin (“County”) on July 22, 2009, against The Harrisburg Authority (“Authority”), the City, and all of the City’s elected officials, including the Treasurer. The City Defendants filed an answer to the complaint on September 10, 2009. On October 9, 2009, with the Court’s permission, the City Defendants moved for dismissal of all counts of the County’s complaint arguing, *inter alia*, that the County lacked standing to seek a writ of mandamus pursuant to § 8261 of the Debt Act. On

March 17, 2010, the County and the Lahrs (“Lahrs”)¹ filed an amended complaint. The Lahrs allege taxpayer status to assert a claim for a writ of mandamus pursuant to § 8261. The City Defendants filed preliminary objections to the amended complaint and, by order entered August 6, 2010, the Court dismissed without prejudice the amended complaint in its entirety, with the exception of Count VI, in which the Lahrs seek the “first moneys” relief under § 8261 in the form of a writ of mandamus directing the Treasurer to take certain actions respecting the City’s guarantees of payments to holders of “retrofit” bonds issued by The Harrisburg Authority.² Currently, a hearing on the Lahrs’ mandamus claim is set to begin on December 16, 2010.

III. Argument

This mandamus action must be stayed because it directly conflicts with the requirements of Act 47.

The Debt Act was adopted to implement Section 10 of Article IX of the Pennsylvania Constitution, as amended in 1968, which prescribes debt limits for municipal governments. Most of the Debt Act’s provisions involve matters so technical that municipalities must retain specialized bond counsel. The Debt Act includes a section of remedies that, according to the Local Government Commission that prepared the legislation, “are included to enable local government units to reduce interest costs as it is anticipated that resort to remedies will rarely occur.” One of those remedies is § 8261, which enacted a common law remedy that had been in use for at least 100 years before the adoption of the Debt Act. See, e.g., Commonwealth ex rel. Hamilton v. The Select and Common Councils of the City of Pittsburgh, 34 Pa. 496 (1859). Generally, the 19th century cases in which writs of mandamus were sought

¹ The Lahrs were joined as plaintiffs because the County does not have standing to assert claims under the Debt Act. Whether the Lahrs have any actual personal interest in this litigation remains to be seen.

² On September 14, 2010, the County filed a motion seeking partial reconsideration of the Court’s order dismissing Counts I and III of the amended complaint. The County’s motion for reconsideration was denied by an order dated October 4, 2010.

against municipal officers deal with orders compelling them to assess and levy taxes to pay interest on bonds and retire them. Id.

The Select and Common Councils of the City of Williamsport v. Commonwealth ex rel. Bair and Shenk, 90 Pa. 498 (1879), involved a claim notably like that presented in this case. In a prior action, which had also reached the Supreme Court, bonds issued by the City of Williamsport were held to be valid. The parties returned to the court of common pleas, which, for nearly two years, was “constantly engaged in an attempt to enforce” the Supreme Court’s decree. Id. at 502. Eventually the treasurer of Williamsport was ordered to show cause why “he should not apply the amount in his hands, . . . in payment of overdue interest on the said bonds.” Id. at 503. The common pleas court, “after ascertaining that the withdrawal of the sum of \$8,000 from the treasury would not embarrass, much less stop the wheels of the municipality for the fiscal year, ending April 1, 1879,” ordered the treasurer to pay the overdue interest. Id. In sustaining the common pleas court, the Supreme Court endorsed the principle that mandamus “ought not to be enforced to the extent of withdrawing from the city treasury, the funds absolutely needed for the ordinary expenses of the city.” Id.

To state this privilege more generally, while a writ of mandamus compels the performance of a clear legal duty, courts nonetheless have the discretion not to issue the writ. The Third Circuit has elucidated this general principle in City of Asbury Park, N.J. v. Christmas, 78 F.2d 1003 (3d Cir. 1935):

Assuming for present purposes the power of the court below in ordinary cases to issue a writ of mandamus upon a municipality to aid a judgment creditor in enforcing such judgment, it still remains the law, as stated by the Supreme Court of the United States in Duncan Townsite Co. v. Lane, 245 U.S. 308, 211, 38 S. Ct. 99, 101, 62 L. Ed. 309, that: “Mandamus is an extraordinary remedial process which is awarded, not as a matter of right, but in the exercise of a sound judicial discretion. It issues to remedy a

wrong, not to promote one; to compel the performance of a duty which ought to be performed, not to direct an act which will work a public or private mischief or will be within the strict letter of the law but in disregard of its spirit.”

After due consideration, we are of opinion that sound judicial discretion does not warrant the exercise of such power at this time. In view of the efforts that are being made – we assume in good faith – by this municipality to provide to the limit of its power for the equity of treatment to all bondholders, we vacate the mandamus order granted, but direct the court to retain jurisdiction of the petition for the present.

Id.

The same general principle is the law of Pennsylvania. “The consideration of an order in a mandamus proceeding is discretionary, and if the object sought to be attained is oppressive, the courts will refuse to entertain the proceeding.” Sinking Fund Commissioners of Philadelphia v. Philadelphia, 324 Pa. 129, 135 (1936) (citations omitted). More recently, the Supreme Court has expressed the same general rule by noting that “although an action in mandamus lies on the law side of the court, equitable principles guide the issuance of the writ and any grant of incidental relief.” City of Pittsburgh v. Department of Transportation, 490 Pa. 264, 269, 416 A.2d 461, 464 (1980); see also Francis v. Corleto, 418 Pa. 417, 429, 211 A.2d 503, 509 (1965) (same).

Equitable principles require this Court to consider the circumstances of this particular case, where issuance of the writ of mandamus sought by the Lahrs conflicts with the requirements of Act 47. This statute declares:

It . . . to be a public policy of the Commonwealth to foster fiscal integrity of municipalities so that they provide for the health, safety and welfare of their citizens; pay due principal and interest on their debt obligations when due; meet financial obligations to their employees, vendors and suppliers; and provide for proper financial accounting procedures, budgeting and taxing practices. **The failure of a municipality to do so is hereby determined to affect adversely the health, safety and welfare not only of the**

citizens of the municipality but also of other citizens in this Commonwealth.

53 P.S. § 11701.102 (emphasis added).

Act 47 requires the Secretary to conduct a hearing promptly after receiving a request for a determination of municipal financial distress. 53 P.S. § 11701.203(b). A hearing on the City's Act 47 request was held on October 20, 2010, but not concluded. To resolve certain procedural disputes, a new hearing examiner has been appointed by the Secretary and a second hearing will be conducted on November 17, 2010. Pursuant to Act 47, the Secretary must issue a determination whether the City is financially distressed on or before December 17, 2010. 53 P.S. § 11701.203(f).

Once a determination that the City is financially distressed is made, Act 47 requires the Secretary to appoint a coordinator who must prepare a plan addressing the City's financial problems. 53 P.S. § 11701.221 (a). Act 47 requires the coordinator to prepare and administer a plan designed to relieve the financial distress of the City. 53 P.S. § 11701.221(d). Act 47 provides alternatively for adoption of the coordinator's plan by the City or the City's adoption of an alternate plan; in either alternative, the Secretary has the power to approve or disapprove the plan, and an approved plan must be adopted as a municipal ordinance. 53 P.S. §§ 11701.245 and 11701.246. Once a plan is approved, then the coordinator or a statutorily-designated substitute must implement the Plan. 53 P.S. § 11701.247. Indeed, the Commonwealth Court has held in a series of cases involving the interplay between Act 47 and collective bargaining agreements that an Act 47 Plan has the force of law. See International Association of Fire Fighters Local 1400 v. The City of Chester, 991 A.2d 1001, 1009 (Pa. Commw. Ct. 2010) ("To the extent the Arbitrator directed the City to violate the 2006 Recovery

Plan and thereby also violate Act 47, he required the City to perform an illegal act.”) (citation omitted).

Unlike a writ issued pursuant to § 8261 of the Debt Act, which would benefit a small class of creditors, an Act 47 plan will coordinate all of the City’s expenditures and its revenues. This conflict between a writ issued pursuant to § 8261 and Act 47 is not merely abstract – the writ sought by the Lahrs would divert funds essential to the operating budget of the City, would immediately threaten public health, safety and welfare, and would make nugatory an Act 47 plan for the City.

IV. Conclusion

The writ of mandamus sought by the Lahrs, which would direct the Treasurer to pay the “first dollar” of City revenues to satisfy the City’s “debt service” obligations, before any payment is made of the City’s operating expenses, would be contrary to the public policy enunciated in Act 47, would unduly interfere with the Secretary’s authority and obligation under Act 47 to evaluate and remediate the City’s financial distress, and would thwart the implementation of any plan adopted pursuant to Act 47. For these reasons, this Court must exercise its discretion to stay further proceedings on the Lahrs’ mandamus claim.

Date: November 17, 2010

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I served this 17th day of November, 2010, a copy of the foregoing document was served via e-mail and U.S. mail, first class postage prepaid, upon the following:

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