

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

\_\_\_\_\_  
THE CITY OF HARRISBURG, PA )  
 )  
DEBTOR )  
\_\_\_\_\_ )

CASE No.1- 11-bk-06938-MDF

Chapter 9

**BRIEF OF HARRISBURG CITY COUNCIL, GOVERNING BODY OF THE CITY OF  
HARRISBURG, IN OPPOSITION TO OBJECTIONS FILED BY THE MAYOR OF  
HARRISBURG, THE COUNTY OF DAUPHIN AND THE COMMONWEALTH OF  
PENNSYLVANIA**

The Governing Body of the City of Harrisburg, its City Council through its attorneys Mark D. Schwartz, Esquire and David A. Gradwohl, Esquire submit this brief in opposition and response to Objections filed by The Mayor of Harrisburg, the County of Dauphin, and the Commonwealth of Pennsylvania (referred to hereinafter as the “Governmental Entities”)

**QUESTIONS TO BE ADDRESSED**

QUESTION #1      Did the Council for the City of Harrisburg meet applicable requirements of Section 109 (c) of Title 11 of the United States Code (the “Bankruptcy Code”) with respect to the filing of the Voluntary Petition for Relief docketed with this Court on October 11, 2011 ?

ANSWER            Yes.

QUESTION #2      Was Council for the City of Harrisburg authorized as a matter of state law to file these proceedings on behalf of the City ?

ANSWER            Yes.

Question #3                      Was Council for the City of Harrisburg authorized as a matter of local law and practice to file these proceedings on behalf of the City ?

ANSWER                      Yes.

### **FACTUAL BACKGROUND**

The City of Harrisburg submitted an application to the Commonwealth of Pennsylvania to be designated as “distressed” for purposes of Pennsylvania’s “Financially Distressed Municipalities Act”, Act of 1987, P.L. 246, No. 47, (commonly referred to as “Act 47”) and on December 15, 2010 the Commonwealth issued a determination that Harrisburg was “financially distressed” for purposes of Act 47. At all times pertinent, Act 47 provided a remedy that included application for municipal debt reorganization and Chapter 9 bankruptcy protection.

On October 11, 2011, the City of Harrisburg, through its Governing Body, directed its counsel to file a municipal debt reorganization petition pursuant to the United States Bankruptcy Code (11 U.S.C. 101 et seq.) which was effectuated through a filing by fax later that evening of October 11, 2011 and confirmation with the Clerk’s Office the next morning. A true and correct copy of said filing is attached hereto and made a part hereof as “Exhibit 1”.

### **THE PARTIES**

While objections have been filed by parties other than the Governmental Entities, this Court has directed the undersigned counsel on behalf of the Council for the City of Harrisburg to address the Objections of the Governmental Entities.

### **ARGUMENT**

#### **The Requirement of Liberal Construction**

Collier On Bankruptcy at P900 “Overview of Chapter 9” sets forth the purpose of Chapter 9 as follows:

Chapter 9 of the Bankruptcy Code is directed toward a reorganization of a municipality's financial affairs or, as the statutory title states "adjustment of its debts." The purpose of chapter 9 legislation is to permit a financially distressed public entity to seek protection from its creditors while it formulates and negotiates a plan for adjustment of its debts, either extending maturities, reducing interest or principal, or refinancing its debt by obtaining a new loan elsewhere to pay off existing debt, in whole or in part, and to provide the mechanism by which the plan that is acceptable to the majority of creditors can be made binding on a recalcitrant and dissenting minority.

The Court in *In Re: City of Bridgeport*, 128 B.R. 688; 1991 Bankr. LEXIS 993; Bankr.L. Rep. (CCH) P74,123; 25 Collier Bankr. Cas. 2d (MB) 140; 21 Bankr. Ct. Dec. 1504 emphasized that "As the Supreme Court stated in *United States v. Bekins*, 304 U.S. 27, 54, 82 L. Ed. 1137, 58 S. Ct. 811 (1938), bankruptcy law is designed so that a state may allow "the intervention of the bankruptcy power to save its agency [the city] which the State itself is powerless to rescue.."

And while it is conceded that the burden of proof is placed upon the petitioner, it is important that one look to the design of Chapter 9 as a whole, its object and policy as well as particular statutory language. See *Crandon v. United States*, 494 U.S. 152, 110 S. Ct. 997, 1001, 108 L. Ed. 2d 132 (1990) Moreover, the Court in *Bridgeport* goes on to state that "It is noted that generations of decisions have established the place of bankruptcy in federal public policy and have held that in general bankruptcy laws are to be liberally construed and ambiguities are to be resolved in favor of the debtor, so that the debtor receives the full measure of relief afforded by Congress." (*Bridgeport*, citing *Wright v. Union Central Life Ins. Co.*, 311 U.S. 273, 278-79, 85 L. Ed. 184, 61 S. Ct. 196 (1940); *In re Mahaffey*, 129 F.2d 292, 295 (2d Cir. 1942); *New Neighborhoods, Inc. v. West Virginia Workers' Compensation Fund*, 886 F.2d 714, 719 (4th Cir. 1989); *In re Lange*, 39 Bankr. 483, 485 (Bankr. D Kan. 1984)).

In addition the Court in *In Re:Hamilton Creek* 143 F.3d 1381; 1998 U.S. App. LEXIS 9856; Bankr. L. Rep. (CCH) P77,701; 32 Bankr. Ct. Dec. 767; 15 Colo Bankr Ct Rep 249; 1998 Colo. J. C.A.R. 2509 stated that “To be eligible for chapter 9 relief, a petitioner must meet several criteria, which are to be construed broadly to provide access to relief in furtherance of the Code’s underlying policies.” See *In re Sullivan County Reg’l Refuse Disposal Dist.*, 165 B.R. 60, 73 (Bankr. D.N.H. 1994).

Since only federal law can provide the type of relief afforded by Chapter 9, other alternatives are inferior, and have been referenced as such. Again, as stated in *Bridgeport*, the Supreme Court stated in *Bekins*, supra at 304 U.S. 27, 53-54, 58 S.Ct. 811, 816, 82 L.Ed. 1137 stated as follows:

In the instant case we have cooperation to provide a remedy for a serious condition in which the States alone were unable to afford relief. Improvement districts, such as the petitioner, were in distress. Economic disaster had made it impossible for them to meet their obligations. As the owners of property within the boundaries of the district could not pay adequate assessments, the power of taxation was useless.... The nature and reasonable remedy through composition of the debts of the district was not available under state law by reason of the restriction imposed by the Federal Constitution upon the impairment of contracts by state legislation.

Bankruptcy courts such as the Court in *In re Pleasant View Utility District of Cheatham County, Tennessee, Bankruptcy No. 382-01139, 24 B.R. 632 (Bkrcty. M.D. Tenn. 1982)* have concluded that Chapter 9 “affords the municipal district in this case the only practical remedy for debt adjustment” (Footnote 4 ) . Harrisburg deserves and should have the benefit of this conclusion.

## **The Bankruptcy Code's Power Over States as Provided by The Supremacy Clause & Fourteenth Amendment to the U.S. Constitution**

Under Article IV, Clause 2 of the U.S. Constitution, the laws of the United States are the supreme law of the land. Specifically the language reads as follows: “This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.”

In tandem therewith is the Fourteenth Amendment to the U.S. Constitution which states “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” Commencing with the Supreme Court decision in *Ware v. Hylton*, 3 U.S. (3Dall.) 199 (1796), the Supreme Court utilized the Supremacy Clause to strike down a state statute. Following this *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) established judicial review of statute. In the seminal case of *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819) where the Supreme Court held that if a state had the power to tax a federally incorporated institution, then the state effectively had the power to destroy the federal institution, thereby thwarting the intent and purpose of Congress, making the states superior to the federal government.

These cases and others support the proposition that state laws which interfere with federally provided bankruptcy powers must be stricken as unconstitutional. For example, the Bankruptcy Court has ruled that a Pennsylvania statute creating a “reserved interest” in a liquor license was in direct conflict with bankruptcy law when the holder of the license filed for protection under the Bankruptcy Code. *In re Pompeo*, 195 B.R. 43 (Bankr.W.D.Pa. 1996). Further, in *In re City of Vallejo, Ca, Debtor, International Brotherhood of Electrical Workers*

*Local 2376 Appellant, v. City of Vallejo, Ca.*, the Bankruptcy Court declined to “legislate from the bench and create a new exception to federal preemption with respect to the issue of the rejection of employee labor contracts.

**Question 1. The Council’s Petition is in Compliance with Section 109 (c) of Title 11 of the U S Code.**

The City Council’s Petition as filed meets the plainly worded requirements of Chapter 9. An analysis begins with the plain words of Section 109 (c) which is tracked in Petitioner’s Statement of Qualifications submitted as a part of its filing. (See Exhibit 1)

Harrisburg is a Municipality

Section 109 (c) provides that an entity may be a debtor under Chapter 9 of this title... if and only if such entity is a municipality. Clearly Harrisburg is a municipality. It may also be considered as a political subdivision or an instrumentality of the State. However Harrisburg existed as an entity long before the enactment of The Third Class City Code, Act of June 23, 1931, P.L. 932, as amended, 53 P.S. Section 35101 et seq. and the Optional Third Class City Charter Law, Act of July 15, 1957, P.L. 901, as amended, 53 P.S. Section 41101 et seq. In fact, Harrisburg may well have derived its status well in advance of the existence of the Commonwealth of Pennsylvania, its Constitution, and the laws cited by the Objectors. (See. Historical Collections of the State of Pennsylvania” Containing a Copious Selection of the Most Interesting Facts, Traditions, Biographical Sketches, Anecdotes, Etc Relating to its History and Anqiquities Both General and Local with Topographical descriptions of every County and all the Larger Towns in the State by Sherman Day, published by George W. Gorton and entered according to the Act of Congress in the year 1843 in the Clerk’s Office of the District Court of Pennsylvania.)

This work states that “Harrisburg, the capital of the state and seat of justice of Dauphin Co., occupies a commanding site on the left bank of the Susquehanna, a short distance above the mouth of Paxton Creek..... Situated in the midst of the fertile Kittatinny valley .... With a highly intelligent resident population, and the annual presence of a transient population, comprising the highest talent in the state, - Harrisburg has great and varied attractions to tempt the resident, the politician, the trader, and the stranger who comes only to observe and admire.” (Historical Code at page 282.) The first John Harris was a native of Yorkshire England who settled eventually in Harrisburg. In 1726 his son John Harris, the founder of Harrisburg, was born. “Under the will of his father, and by purchase, he became the owner of 700 acres of land, on a part of which Harrisburg is laid out.” With the town laid out in 1785 he conveyed to the requisite “Property Commissioners” property which included and was incorporated as a borough on the 1<sup>st</sup> February, 1808.

Fast forward to the electronic and perhaps less reliable treatise, Wikipedia which at “History of Pennsylvania” states it was not until well after the signing of the Declaration of Independence in 1776, that Pennsylvania was governed on an ad hoc basis until a new state constitution was formed in 1790.

Without a doubt, even prior to statute and certainly prior to our present Constitution, Harrisburg was and remains a “municipality”.

**Harrisburg is “specifically authorized” to file as a Debtor in Bankruptcy Pursuant to Federal Law**

Section 109 (c ) of the Bankruptcy Code also requires that the municipality be “specifically authorized” to be a Debtor. As is set forth in the Statement of Qualifications, state law recognized Harrisburg’s general authority to incur debts. See 53. P.S. Section 35101 and

Section 41101. law. As to specific authority to file a Chapter 9 bankruptcy petition, as set forth in the Statement of Qualifications, at the time that Harrisburg applied for and was granted distressed status by Act 47 , that very Act then and now has contained language permitting municipalities including Harrisburg to file it Chapter 9 Petition.

In 1987, Pennsylvania enacted the Financially Distressed Municipalities Act, commonly known as “Act 47”, 53 P.S. §§11701.101, et seq. Section 261 of Act 47 authorizes a municipality “to file a municipal debt adjustment action pursuant to the Bankruptcy Code,” if any of several specified conditions is met, including:

(2) Imminent jeopardy of an action by a creditor, claimant or supplier of goods or services which is likely to substantially interrupt or restrict the continued ability of the municipality to provide health or safety services to its citizens.

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(4) A condition substantially affecting the municipality’s financial distress is potentially solvable only by utilizing a remedy exclusively available to the municipality through the Federal Municipal Debt Readjustment Act (48 Stat. 798). [which was the predecessor to Chapter 9 of the Code].

(5) A majority of the current...governing body of a municipality determined to be financially distressed has failed to adopt a plan or to carry out the recommendation of the Coordinator pursuant to Act 47.53 P.S. §11701.261.

The evidence clearly indicates that the above three conditions set forth above have been met:

Regarding alternate condition 2 set forth above, imminent jeopardy exists as to Harrisburg's ability to provide health and safety services to its citizens. As a matter of public record, in no less than six law suits, creditors seek a preference pertaining to the Harrisburg Materials, Energy, Recycling and Recovery Facilities (the "Harrisburg Incinerator") and outstanding debt thereof, all guaranteed by the City. These actions are detailed in Petitioner's Statement of Qualifications. The recovery requested in those actions includes a mandamus which would direct the City to pay its tax revenues to the bond creditors instead of providing municipal health and safety services.

Regarding alternate condition 4 set forth above, it seems clear that documented circumstances prior to the filing with this Court demonstrate that the City's dire financial situation generally, and specifically its inability to pay the applicable bond guaranty obligations. These constitute conditions "substantially affecting the municipality's financial distress" that are potentially solvable only by utilizing the Chapter 9 remedy. As set forth in the Statement of Qualifications, the creditors' actions "seek money judgments vastly beyond the ability of the City to pay" with the total principal amount of bonds guaranteed by the City approximating \$242 million and with the total past due at the time of filing approximating \$65 million.

Regarding alternate condition 5, prior to its filing with this Court, it is undeniable that a majority of the current governing body of Harrisburg, (again already declared by the Commonwealth to be "distressed" under Act 47 ) has failed to adopt a plan or carry out the recommendation of the Coordinator pursuant to Act 47. Pursuant to Section 103 of Act 47 a municipality's governing body is defined as its Council. Finally, media reports substantiate the fact that Council, the governing body of Harrisburg pursuant to Act 47, has voted down as

inadequate and unsubstantiated the plan recommendations of the Act 47 Coordinators. Council voted down the plan three times, most recently on Sept. 13, 2011.

### The City is Insolvent

Additionally, pursuant to 11 U.S.C. Section 109 (c) (i) the municipality must be “insolvent”; i.e., “generally not paying its debts as they become due.” As set forth in the Statement of Qualifications, while the term “generally not paying” is not defined by the Bankruptcy Code, courts have adopted a “totality of the circumstances” test for determining whether a debtor is generally not paying its debts, as that term is used in the requirements for a creditor to file an involuntary petition against a non-municipal debtor. See 11 U.S.C. §303(h)(1). As noted by Collier on Bankruptcy, the question is how many debts are being paid in proportion to the total number of debts. Not paying one significant creditor can satisfy the standard. 6 Collier on Bankruptcy § 303.31[1] and [2] (Resnick & Sommer eds. 2010). See also *In re Amanat*, 321 B.R. 30, 39-40 (Bankr. S.D.N.Y. 2005) (where a debtor fails to pay even one debt that makes up a substantial portion of its overall liability, a court may find that the debtor is not paying its debts).

The City meets the “generally not paying” definition of insolvency, because it has repeatedly failed to pay the guaranteed incinerator bond debt as it has become due. The failure to pay that debt has generated the previously identified litigation which seeks money judgments and a mandamus remedy that would prevent the City from providing essential services to its citizens. The magnitude of that debt is sufficiently large that it dwarfs the City’s other liabilities. Under the associated guaranty documents, the City would need to cover a combined \$83 million of past due payments and the 2011 debt service.

As the City's audited financials were for the year 2008, Council relied on a report prepared on the City's behalf by the law firm of Cravath , Swaine & Moore LLP. in preparation of the Statement of Qualifications and included exhibits thereto which came directly from the Cravath report, referencing debt of \$242 million. Since Petitioner's filing, a Reuters Article published November 8, 2011 questions the Mayor's understanding of the debt and pegs the actual outstanding debt at \$463 million. A copy of that article is attached here to and made a part hereof as Exhibit 2.

Ultimately, it is clear that the City has been unable to and in fact has not been paying its debts as they come due pursuant to Section 109 (c)(i) and (ii).

#### The Plan to Adjust the City's Debts

Section 109 (d) requires that the municipality must be willing to effect a plan to adjust its debts. As is more fully set forth in the Statement of Qualifications, it is the Petitioner's desire to effect a substantive and viable plan to adjust its debts as opposed to the infirm Coordinator's plan that has been repeatedly rejected. Further, it is Petitioner's expressed desire to disallow the unfair preference that litigants against the City would receive as well as to pursue a clawback against those parties which participated in the questionable financings that brought the City to its current situation.

Finally, pursuant to Section 109 (e), the City must satisfy one of four statutory alternatives. In this case Petitioner has met three of the four following statutory alternatives.

Section 109(e)(i) provides that the municipality has obtained the agreement of creditors. Clearly, this has not been the case given discussions and pending litigation.

Section 109(e) (ii) provides that the municipality has negotiated in good faith, but failed to obtain the consent of creditors. In fact, the creditors maintained their litigation throughout the

Act 47 process and would have continued to do so were it not for the automatic stay imposed by these proceedings. Good faith negotiations by the City were attempted but have been rebuffed by the creditors.

Section 109 (e) (iii) provides that negotiations are impracticable. As set forth in the Statement of Qualifications, negotiations with the creditors who have sued the City are impracticable. The size of the outstanding bond debt is overwhelming. Negotiations are impracticable with one group of creditors, where negotiations with another key group have hit an impasse. See *In re Pierce County Housing Authority*, 414 B.R. 702,714 (Bankr. W.D. Wash. 2009). They may be equally impracticable where another part of the financial equation – a viable long-term financial plan based on revenues or expenses – cannot be determined. For example, where labor costs constitute the largest portion of the municipality’s budget and no agreement could be reached through negotiations, it would be futile to negotiate with other creditors. *In re City of Vallejo*, 408 B.R. 280, 298 (9<sup>th</sup> Cir. B.A.P. 2009). In Harrisburg’s case, negotiations with the principal creditors who have sued the City would be impracticable to resolve the financial problems. These creditors are clearly unwilling to negotiate in good faith with the City. This problem is compounded in light of the Mayor’s refusal to release her budget numbers and to know the amount of debt outstanding. (See Exhibit 2)

Section 109(e)(iv) provides for a situation where negotiations are impracticable. As stated in the Statement of Qualifications, the Council reasonably believes that the principal creditors who have brought legal actions are attempting to obtain a preference through the demand for a mandamus. Some creditors who are prosecuting those legal actions against the City are likely to go on with their cases even if the City negotiates successfully with other creditors. Other purported creditors such as a bond insurer, have withdrawn from negotiations altogether.

Negotiations have failed. The creditors have refused to defer their litigation while a plan under Act 47 was being negotiated. If they succeed in their litigation, these principal creditors will get a preference. However, the City does not have to wait for the entry of a judgment in mandamus to satisfy this Bankruptcy Code requirement. It is satisfied based on the remedies sought in the pending litigation without any judgment in existence.

#### The Filing is in Good Faith

Finally, as noted in the Statement of Qualifications, in addition to the Section 109(c) eligibility requirements, Section 921(c) requires that a petition must be filed in “good faith”. The Code does not define “good faith”, but courts have determined that the primary function of the good faith requirement is “to ensure the integrity of the reorganization process by limiting access to its protection to those situations for which it was intended.” *In re Sullivan County Reg’l Refuse Disposal Dist.*, 165 B.R. 60, 80 (Bankr. D.N.H. 1994). The Council is filing the City’s Petition in good faith. The City’s financial problems fall within the situations contemplated by Chapter 9 of the Code; it has filed the Petition for reasons consistent with the purposes of Chapter 9; it has considered alternatives to Chapter 9 but found them unsatisfactory and not in the best interests of the citizens of the City; and the nature and scope of the City’s financial problems can best be handled by a Chapter 9 proceeding.

The Petition that has been filed is legally sufficient and factually substantiated as a matter of public record. In the event that this Court thinks there is a factual deficiency, then a factual hearing is requested.

**Question 2. Petitioner has Met the Requirements of State Law in Filing these Proceedings**

State Law Provisions as to Invoking Bankruptcy

Petitioner was authorized to file for federal bankruptcy protection under Pennsylvania Law. As set forth in Petitioner's Resolution, the City of Harrisburg submitted an Application for "distressed" status under Pennsylvania's "Financially Distressed Municipalities Act", Act of 1987, P.L. 246, No 47. Harrisburg was in turn so designated by the Commonwealth on December 15, 2010.

At the time of designation, through to the present time, Act 47 at Subchapter D, Application of Federal Law, provides at Section 261 for authorization for "Filing municipal debt adjustment under Federal Law." Again, Section 103 thereof defines "MUNICIPALITY" as "Every county, city, borough, incorporated town, township and home rule municipality." Section 261(a) states that "a municipality is hereby authorized to file a municipal debt adjustment action pursuant to the Bankruptcy Code (11 U.S.C. 101 et seq.) "in the event one of the following conditions is necessary." The only condition not met of the five enumerated Act 47 conditions was Section 261(a)(1) where the plan coordinator has recommended filing under the Federal Bankruptcy Code. Petitioner specifically invoked the remaining conditions in its Resolution as follows:

WHEREAS, the Council has determined that at least four of the five conditions of Act 47 have been met; namely that:

-There is imminent jeopardy of action by a creditor, claimant or supplier of goods or services which is likely to substantially interrupt or restrict the continued ability of Harrisburg to provide health or safety services to its citizens.

-One or more creditors of the municipality have rejected the proposed or adopted plan, and efforts to negotiate a resolution of their claims have been unsuccessful for a ten-day period.

-A condition substantially affecting the municipality's financial distress is potentially solvable only by utilizing a remedy exclusively available to the municipality through the Federal Municipal Debt Readjustment Act (48 Stat.798)

-A majority of the current or immediately preceding governing body of a municipality determined to be financially distressed has failed to adopt a plan or to carry out the recommendations of the Act 47 coordinator;

Further, Act 47's Section 261 (b) provides that a majority vote is required: "Majority vote.- The authority may be exercised only upon the vote by a majority of the municipality's governing body". Again, pursuant to Act 47, Harrisburg City Council, as "governing body" passed by a majority vote on October 11, 2011 the resolution made a part of the Petition, authorizing and directing the filing of these proceedings.

#### The Amendment to the Pennsylvania Fiscal Code

Pennsylvania's The Fiscal Code is found at Title 72 of Purdon's Consolidated Statutes entitled "Taxation and Fiscal Affairs". As per 72 P.S. Section 2, "This act is intended to define the powers and duties of the Department of Revenue, the Treasury Department, the Department of the Auditor General, the Secretary of the Commonwealth, the Board of Finance and Revenue, the Board of Fish Commissioners, the Board of Finance and Revenue, the Board of Fish Commissioners, the Board of Game Commissioners, county treasurers, register of wills, mercantile appraisers, and other statutory agents, with respect to the collection of taxes and other moneys due the Commonwealth, the custody and disbursement or other disposition of all funds and securities belonging to or in the possession of the Commonwealth, and the settlement of claims against the Commonwealth." It deals primarily with collection of funds, cigarette sales and licensing, treasury department, auditor general, liens on property, lien of accounts, budget implementation, various state funds, appropriations and taxes levied by the Commonwealth.

Objectors assert that a last minute amendment, **not to Act 47**, but to the Fiscal Code, all enacted without debate or ascertainable knowledge of those who voted on it, would somehow bar Harrisburg from accessing the relief to be provided by this Court. It will be recalled that the Historical Collections of the State of Pennsylvania refers to “the annual presence of a transient population, compromising the highest talent of the state”; i.e, those who come to Harrisburg to govern. Fast forward to early summer 2011 and we have Pennsylvania’s “highest talent” in their mad rush to summer recess, passing a budget and passing in tandem therewith a gargantuan amendment to the Fiscal Code containing a provision, not clearly provided for in the title, let alone debated, or conceivably read.

What follows is the amendment in **bold** to Article XVI-D of the Fiscal Code pertaining to the Local Government Capital Project Loan Fund, a far cry from Act 47.

**ARTICLE XVI-D. LOCAL GOVERNMENT CAPITAL PROJECT LOAN FUND**

**§ 1601-D. Short title**

This article shall be known and may be cited as the Local Government Capital Project Loan Fund Act

**§ 1603-D. Assistance to municipalities**

(a) The department is hereby authorized, upon application of a municipality, to make loans to the municipality for the following purposes and in the following amounts:

(c) Every application for a loan under this article shall be accompanied by a financial statement of the municipality and a financial plan to show how the loan will be repaid. Every application shall be accompanied by evidence sufficient to show that all costs, except the amount of the loan, will be met by assets or revenues of the municipality, grants or loans from other sources or in-kind contributions or services.

**ARTICLE XVI-D.1. FINANCIALLY DISTRESSED MUNICIPALITIES**

**§ 1601-D.1. Administrative oversight**

**(a) SCOPE OF ARTICLE.-- This section applies to a city of the third class which is determined to be financially distressed under section 203 of the act of July 10, 1987 (P.L. 246, No. 47), known as the Municipalities Financial Recovery Act.**

**(b) LIMITATION ON BANKRUPTCY.-- Notwithstanding any other provision of law, including section 261 of the Municipalities Financial Recovery Act, no distressed city may file a petition 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.**

**(c) PENALTY.-- If a city subject to this section fails to comply with subsection (b), all Commonwealth funding to the city shall be suspended.**

**(d) EXPIRATION.-- This section shall expire July 1, 2012.**

The Applicable Standard(s) for this Court's Analysis

It is this Court's task to reconcile two statutes. As stated by the Court in *Bridgeport*, at 694 "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary contemporary, common meaning. *Perrin v. United States*, 444 U.S. 37,42 , 100 S.Ct. 311, 314, 62 L.Ed. 2d 199 (1979) Further, it is well settled that courts are generally not authorized to rewrite statutes. See *Badaracco v. Commissioner*,464 U.S. 386, 398, 104 S.Ct. 756, 764, 78 L.Ed. 2d 549 (1984) ' *TVA v. Hill*, 4376 U.S. 153, 194-95, 98 S.Ct. 2279, 2301-02, 57 L.Ed 2d 117 (1978) After delving into legislative history, constitutional and legal standards applicable to the legislative process in Pennsylvania, the Court must decide which statute stands, Act 47 or Act 26, or must try to reconcile the two if at all possible.

Act 26. Its legislative History

The bizarre and clearly incomprehensible path that Act 26 took, amending the Fiscal Code of 1929 (Act of April 9, 1929, P.L. 343, No. 176), is set forth as follows according to the official legislative history.

**Regular Session 2011-2012  
Senate Bill 907**

**History****Sponsors:** BROWNE**Printer's No.:** 1452\*, 1451, 1243, 943

**Short Title:** An Act amending the act of April 9, 1929 (P.L.343, No.176), known as The Fiscal Code, providing for time for filing returns for certain sales and use taxpayers; establishing a restricted account within the Agricultural College Land Scrip Fund; in borrowing for capital facilities, further providing for definitions, for Neighborhood Improvement Zone Fund, for Keystone Opportunity Zone and for duration and providing for Commonwealth pledges and for confidentiality, providing for financially distressed municipalities and for Keystone Special Development Zones; in education tax credits, making an editorial change and providing for Department of Revenue and for Department of Community and Economic Development; in special funds, further providing for funding and reviving and further providing for investments; providing for 2011-2012 budget implementation and restrictions; in general budget implementation, further providing for executive offices and for the Auditor General, providing for Pennsylvania Infrastructure Investment Authority Accounts, further providing for the Pennsylvania Higher Education Assistance Agency, repealing provisions related to the Legislative Department, providing for the Catastrophic Loss Benefits Continuation Fund and further providing for the State Gaming Fund; in 2010-2011 budget implementation, further providing for the Department of Education; providing for audits; and making related repeals.

**Actions:**

Referred to <b>FINANCE</b> , March 30, 2011
Reported as committed, April 5, 2011
First consideration, April 5, 2011
Second consideration, April 13, 2011
Re-referred to <b>APPROPRIATIONS</b> , April 13, 2011
Re-reported as committed, April 26, 2011
Amended on third consideration, May 23, 2011
Third consideration and final passage, May 24, 2011 (49-0)
In the House
Referred to <b>FINANCE</b> , May 25, 2011
Reported as committed, June 20, 2011
First consideration, June 20, 2011
Laid on the table, June 20, 2011
Removed from table, June 20, 2011
Re-referred to <b>APPROPRIATIONS</b> , June 20, 2011

[http://www.legis.state.pa.us/cfdocs/billInfo/bill\\_history.cfm?syear=2011&sind=0&body=S...](http://www.legis.state.pa.us/cfdocs/billInfo/bill_history.cfm?syear=2011&sind=0&body=S...) 11/3/2011

Re-reported as committed, June 28, 2011  
Second consideration, with amendments, June 28, 2011  
Re-committed to APPROPRIATIONS, June 28, 2011  
Re-reported as amended, June 28, 2011  
(Remarks see House Journal Page ), June 28, 2011  
Third consideration and final passage, June 30, 2011 (109-89)  
(Remarks see House Journal Page ....), June 30, 2011  
In the Senate  
Referred to RULES AND EXECUTIVE NOMINATIONS, June 30, 2011  
Re-reported on concurrence, as committed, June 30, 2011  
Senate concurred in House amendments, June 30, 2011 (33-17)  
(Remarks see Senate Journal Page ....), June 30, 2011  
Signed in Senate, June 30, 2011  
Signed in House, June 30, 2011  
Presented to the Governor, June 30, 2011  
Approved by the Governor, June 30, 2011  
Act No. 26

\* denotes Current Printer's Number

Originally introduced in the Senate in March 30, 2011, the pertinent language was inserted on second consideration in the House on June 28, 2011, as part of amendments taking up thirty-six pages of fine print. The language that concerns us can be found sandwiched amongst everything else on the eighth page of all the fine print. See Exhibit 3. As per the bill's title, it dealt with State Workers' Insurance Board authority to invest money, Sales and Use Tax filings, agricultural land scrip, a neighborhood improvement zone fund, Financially Distressed Municipalities, Keystone Special Development Zone, Research and Development Tax Credit, Film Production Tax Credit, Tax Credit for New Jobs, Rainy Day Fund, Keystone Communities Program, Partnerships for Regional Economic Performance Program, Budget Implementation: Department of Education, Consumer Energy Program, Budget Implementation: Department of Health, Budget Implementation: Vocational Rehabilitation Fund, Budget Implementation: Department of Public Welfare, Budget Implementation: Tobacco Settlement, State Police , State Government Support Agencies, Debt Service on Water and Sewer Projects, Flood Control Projects and Dam Projects, The Pennsylvania Higher Education Assistance Agency, Catastrophic Loss Benefits Continuation Fund, State Gaming Fund, and the Race Horse Development Fund .

A review of the record of House proceedings with respect to the amendment's adoption is devoid of any discussion of, or even reference to distressed municipalities or Act 47. (Exhibit 4) When the bill was considered by the House on third consideration (Exhibit 5), Representative Markosek referred to SB 907 as "one of those bills most of our constituents and I would venture to say, some of the members do not really fully understand, but the Fiscal Code is used to implement the general appropriations budget.....I recommend a "no" vote. This bill is a mishmash of many miscellaneous provisions' some are good, but mostly bad. It has become a GOP dumping ground for any legislation that you could not get passed during the fiscal year."

He then goes on to urge a “no” vote on SB 907 because “it was done behind closed doors and without the input of the members in this House of Representatives.... It is a poor way to run a government. It is a closed-door way to run a government. It is not open. It is not transparent. There is no light being shined on the backrooms, in the smoke-filled rooms where this was put together.” Another member, Mr. Smith contended that SB 907 was unconstitutional pursuant to Article VIII, section 14 which states “All surplus of operating funds at the end of the fiscal year shall be appropriated during the ensuing fiscal year by the General Assembly.” Then when the Senate concurred with the House amendments, the record is devoid of any mention of the provision. (Exhibit 6)

#### Constitutional Infirmities Regarding Act 26

A relative latecomer to the scene was the Pennsylvania Constitution. Pennsylvania’s courts have long held that an act which conflicts with any section of the Constitution is entitled to no further consideration. *Com ex rel Smilie v. McElwee*, 193 A. 628, 327 Pa. 148 (1937) Measured against the provisions of the Pennsylvania Constitution and parallel sections of the U.S. Constitution, Act 26’s provisions at issue here cannot stand.

Article 1 Section 2 of the Pennsylvania Constitution pertains to political powers and provides that all power is inherent in the people and no person nor branch of government has any more power than is provided by that absolute framework of Government. *Shapp v. Butera*, 348 A.2d 910, 22 Pa. Cmwlt. 229 (1975)

Article 1 Section 17 provides that no *ex post facto* law, nor any law impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities, shall be passed. Two critical elements are necessary to establish an *ex post facto* claim; first the law must be retrospective, that is, it must apply to events occurring before its enactment, and second,

it must disadvantage the offender affected by it. *Myers v. Ridge*, 712 A.2d 791, Cmwlt. 1998, appeal denied 742 A.2d 173, 560 Pa. 677. In both the civil and criminal context, the Ex Post Facto Clause of the US Constitution places limits on the sovereign's ability to use its lawmaking power to modify bargains it has made with its subjects. *Evans v. Pa Bd of Probation and Parole*, 820 A.2d 904, Cmwlt, 2003. When it comes to impairment of contracts, one must see if the substantive law implicitly was incorporated into contract between the parties and was subsequently suspended to a party's detriment. *Nicolette v. Caruso*, WD Pa 2003, 315 F. Supp. 2d 710, *Assoc of Settlement Companies v. Dept of Banking*, 977 A.2d 1257, Cmwlt, 2009 The bar on impairment of contracts applies in the municipal context. *Erie v. Griswold*, 39 A.231, 184 Pa 435 1898, affd Pa Super. 132; *Erie v. Paskett*, 14 Pa Super. 400, 1900.

Moreover, there is something to be said for reliance upon vested rights. For example, when a church acquired a building permit which had been regularly issued under existing law, the church became vested with an interest which could not be lightly set aside, and an attempt to legalize the permit by subsequent passage of zoning legislation directed to that end, constituted unconstitutional special legislation. *Yocum v. Power*, 157 A.2d 368, 398 Pa. 223. 1960 So too is it the case with Harrisburg. In reliance upon the provisions of Act 47, which included the availability of bankruptcy protection, Harrisburg applied for and received distressed status. This action was clearly in the nature of detrimental reliance with all the aspects of contract attendant thereto. Harrisburg had the right to rely on the provisions of Act 47 at the time that it applied for that status. Accordingly, any legislation subsequently revoking those provisions must fail.

Article 2 Section 1 provides that "the legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives."

The Legislature may not act arbitrarily in using its definitional powers. *In re Norvell's Estate*, 203 A.2d 538, 415 Pa. 427, 1964, cert. denied 85 S.Ct. 900, 380 U.S. 913, 13 L.Ed.2d 799

While it is not within the power of the courts to usurp legislative powers, it is clearly the province of courts to say what the law is. Additionally, the General Assembly's exclusive power over its internal affairs and proceedings does not give the General Assembly the right to usurp the Judiciary's function as ultimate interpreter of the State Constitution. *Common Cause v Com.*, 710 A.2d 108, Cmwlt. 1998, affirmed 757 A.2d 367, 562 Pa. 632

Article III of the Pennsylvania Constitution pertains to legislation. Section 1 states as follows: "Passage of laws. No law shall be passed except by bill, and no bill shall be so altered or amended on its passage through either House, as to change its original purpose." The purpose is to put the members of the assembly and others interested on notice by the title of the measure submitted, so that they may vote on it with circumspection. *Scudder v. Smith*, 200 A.601, 331 Pa. 165, 1938, *DeWeese v. Weaver*, 824 A.2d 364, Cmwlt., 2003 *Fumo v. Pa. PUC*, 719 A.2d 10, Cmwlt. 1998. When determining whether a bill violates the original purpose rule in the Pennsylvania Constitution, a two prong inquiry is applied: first, a reviewing court must compare the final purpose of legislation to its original purpose and determined whether there has been an alteration or amendment of the original purpose, and second, a court must consider whether, in its final form the title and contents of the bill are deceptive. *City of Philadelphia v. Rendell*, 888 A.2d 922, Cmwlt. 2005.

Section 3 then deals with the Form of Bills and reads: "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 compelling the law or a part thereof." The question is whether the title gives notice of the real subject of act. *Blood v. Merceklliott*, 53 Pa. 391 1866. This section was

intended to curb practices of incorporating in one bill a variety of distinct and independent subjects of legislation, the real purpose of which was often intentionally disguised by a misleading title or covered by the all-comprehensive phrase “ and for other purposes” with which the title of many “omnibus” bills concluded. *In re Hadley*, 6A.2d 874, 336 Pa. 100, 1939. The title need inform the legislator of its contents. So long as the title indicates a general subject to which the provision involved is germane or incidental, the provision itself is sufficiently contained therein. *Atlantic Pipe Line Co., v Dredge Philadelphia*, 247 F.Supp. 857, D.C. 1965, affirmed 366 F. 2d 780. Further, it is well established that two subjects of legislation can’t be set up in one statute. *Retirement Board of Allegheny County v McGovern*, 174 A.400, 316 Pa. 161, 1934. The subjects must be reasonably germane. *Lehigh Nev. Coal Co v. Pa. Public Utility Comm.*, 1 A.2d 540, 133 Pa Super. 67, 1938. Where the provisions added to a statute during the legislative process assist in carrying out the bill’s main objective or are otherwise germane to the bill’s subject, as reflected in its title, the constitutional single-subject requirements are met. *Spahn v. Zoning Board of Adjustment*, 922 A. 2d 24, Cmwlth. 2007. It is all about reasonable notice. Clearly none of these requirements were met with respect to the pertinent provisions of Act 26.

More stringent analysis applies when it comes to public entities. The title of an act imposing new burdens on political subdivisions must clearly give notice of such fact. *Brunke v. Ridley tp.* 35 A.2d 751, 154 Pa Super. 182 1944. For instance, even if the Supreme Court [PA] was to accept “municipalities” as the overarching subject of legislation, which was essentially an omnibus bill dealing with a variety of topics, such legislation still violated the single subject rule of the State Constitution given that one of the topics the bill dealt with was the composition of the Pennsylvania Convention Center Authority’s governing board and the Authority was an

instrument of the Commonwealth, rather than that of any municipality. *City of Phila v. Com.* 838 A.2d 566, 575 Pa 542. Sup 2003. The Court in this case criticizes omnibus bills such those that eventuated in Act 26. Under no set of circumstances can Act 26's provision with respect to Harrisburg withstand the standards set by case law. Courts are well within their powers in severing out portions of legislation because they are infirm.

Act 26's provision also fails since it is clearly directed at one specific municipality. The requirement to pass a general law can be found in Article 3 Section 20 of the Pennsylvania Constitution : "Classification of Municipalities", which provides that "The Legislature shall have power to classify counties, cities, boroughs, school districts and townships according to population, and all laws passed relating to each class, and all laws passed relating to and regulating procedure and proceedings in court with reference to any class, shall be deemed general legislation within the meaning of this Constitution." Legislating with respect to municipalities must be done by general laws. *Schneider v. City of Scranton*, 199 A. 684, 330 Pa . 507, 1938. Moreover, the legislation cannot be aimed at one particular municipality. It cannot be a subterfuge. There must be a substantial and valid basis for classifications adopted. *Com ex rel. Kelley v. Cantrell*, 193 A.655, 327 Pa 369, 1937. The Legislature may increase or diminish the power of municipalities as to local government under general law. *Schneider v. City of Scranton*, 199 A. 684, 330 Pa. 507, 1938. Statutes applicable to all cities of the third class are general legislation and not violative of Section 32 of Art 3, *Lancaster City Ordinance No. 16-1952*, 98 A.2d 25, 374 Pa. 529, 1953.

There are other constitutional provisions with respect to municipalities. Article 3 Section 32 pertains to "certain local and special laws" stating that:

The General Assembly shall pass no local or special law in any case which has been or can be provided for by general law and specifically the GA shall not pass any local or special law.

1. Regulating the affairs of counties, cities, townships wards, boroughs or school districts.

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Nor shall the General Assembly indirectly enact any special or local law by the partial repeal of a general law; but laws repealing local or special acts may be passed.

Similarly, Article 9 of the State Constitution provides for Local Government stating that pursuant to Section 1 thereof, “The General Assembly shall provide by general law for local government within the Commonwealth. Such general law shall be uniform as to all classes of local government regarding procedural matters.”

Here too, the case law is clear. Acts which apply to all members of a class are general, not special. *Howe v. Smith*, 199 A.2d 521, 203 Pa Super. 212 1964. If an act is intended to apply to but one particular city, county, borough, or township and is not intended to, and under existing conditions never could, apply to any other, it is local and therefore unconstitutional. *Perkins v. Philadelphia* 27 A. 356, 156 Pa 539, 554, 1893. Classifications in a statute are permissible only when founded on reason and logic. *Rudy v. McCloskey & Co.*, 35 A.2d 250, 348 Pa 401 1944. Different classes must be created on basis of criteria that bear a reasonable relation to the legitimate objective of the statute. *Lehigh Foundations, Inc. v Workmen’s Comp Appeal Board.*, 395 A.2d 576, 39 Pa Cmwlt. 416 , 1978. This section was adopted to put an end to the flood of privileged legislation for particular localities and for private purposes, and it was aimed at laws that were local and special. *Haverford Tp. v. Siegle*, 28 A.2d 786, 346 Pa. 1 1943

Moreover, there can be no proper classification of cities or counties except by population: geographical distinctions cannot be resorted to without violating the constitution. *Com. v. Patton*, 88 Pa 258, 1878. “Cities can be classified, only in respect of matters relating to municipal government, and an act which relates to subjects of a general, as distinguished from a municipal

character, is local, and therefore invalid, though it relates to all the members of a class. *Safe Deposit & Trust Co., v. Fricke*, 25 A. 530, 152 Pa 242, 1893. Pennsylvania law specifically provides for municipalities at General Municipal Law Chapter 1 – Title 53. Title 53 P.S. Section 101 specifically provides that cities are to be classified and divided into four classes, according to population. Case law is in accord with this exclusive method of classification. There can be no proper classification of cities or counties except by population; classification by geographical distinctions is special legislation. *Com v. Patton*, 88 Pa. 258, 1878.

The purpose of the constitutional provision which states that the General Assembly shall pass no special law regulating the affairs of counties or townships, was to prevent the General Assembly from creating classifications in order to grant privileges to one person, one company, or one county. A law dealing with but one county of a class consisting of ten would be local or “special law” *Wings Field Preservation Associates, L.P. v. Com. Dept of Transp.* 776 A.2d 311, Cmwlth. 2001. The constitutional proscription against special laws was adopted for a very simple and understandable purpose; to put an end to flood of privileged legislation for particular localities and for private purposes which was common in 1873.

Fast forward to the year 2000 and we find that relying on Article III Section 32 Commonwealth Court held that “The Reed Amendment,” i.e., that portion of the Education Empowerment Act which exempts Harrisburg from treatment mandates for other school districts, is unconstitutional because it is special legislation.” The Court went on to state that “ ‘a school district of the second class with a history of low test performance which is coterminous with the city of the third class which contains the permanent seat of government’ merely refers to Harrisburg. differently from other school districts with failed educational systems. Additionally, this court has held that a classification is per se unconstitutional when the class consists of one

member and it is impossible or highly unlikely that another can join the class.” *Harrisburg School Dist. v. Hickok*, 761 A.2d 1132, 563 Pa. 391, 398 Sup. 2000. (citing *Harristown Development Corp. v. Dep’t of General Services*, 532 Pa. 45, 615A.2d 1128, 1134 n. 9 (Pa 1992))

After the decision in what was referred to “*Hickok I*”, the General Assembly changed the legislation which was later found to pass muster.

#### Act 26 Violates Both Federal and State Equal Protection

Moreover, there are Federal and State equal protection violations here. Classification by the legislature would violate the equal protection clause only if it did not rest upon a difference between classes that bore a reasonable relationship to purpose of legislation. *In re Williams*, 234 A. 2d 37, 210 Pa. Super. 388, 1967, affirmed 246 A.2d 356, 432 Pa. 44. It has been held that the meaning and purpose of the equal protection clause of the Federal Constitution and prohibition against special laws in the State Constitution were sufficiently similar to warrant like treatment, and contentions concerning the two constitutional provisions could be reviewed simultaneously. *Laudenberger v. Port Authority of Allegheny County*, 436 A.2d 147, 496 Pa. 52, 1981, appeal dismissed 102 S.Ct. 2002, 456 US 940, 72 L.Ed.2d 462. The Fourteenth Amendment does not deny to states power to treat different classes of persons in different ways, but does deny to states the power to legislate that different treatment be accorded to persons placed by statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. *Cavill’s Estate*, 329 A.2d 503, 459 Pa 411, 1974. A court must see if it is patently arbitrary or utterly lacking in rational justification. *In re Williams*, 234 A.2d 37, 210 Pa Super. 388, 1967. The equal protection clause of the Federal Constitution and special protection clause of the State Constitution mandate that statutory classifications which do not implicate fundamental interests or suspect classes bear a rational relationship to legitimate state interest. *Com. v. Minnich*, 662

A.2d 21, 443 Pa. Super. 472, Super. 1995. Like persons in like circumstances are to be treated similarly. *West Mifflin Area School dist. V. Zahorchak*, 956 A.2d 1040, Cmwlt. 2008 , reversed 4 A.3d 1042, *Pa Turnpike Com'n v. Com.* 899 A.2d 1085, 587 Pa 347, Sup. 2006.

Classification is a legislative question subject to judicial revision only if it is founded on real distinctions in the subjects classified and not on artificial or irrelevant ones used for the purpose of avoiding the constitutional prohibition against local or special laws. *Dufour v. Maize*, 56 A.2d 675, 358 Pa 309, 1948

The problem in this case is that Act 26 was not general legislation amending the appropriate municipal code as to third class A cities. Nor did it amend Act 47. It was amending the Fiscal Code. Then there is the matter of the plain words of the amendment:

- (a) Scope- This section applies to **a city of the third class which is determined to be financially distressed** under section 203 of the act of July 10, 1987...
- (b) Limitation on bankruptcy- ....no **distressed city** may file a petition...
- (c) Penalty- If **a city** subject to this section fails to comply with subsection (b), all Commonwealth funding to **the city** shall be suspended.

**(Emphasis supplied.)**

Leaving aside for the moment whether the emboldened “is” is prospective or retrospective in meaning, it seems clear that there is nothing general about legislation that refers to “**a city**”. Moreover, the General Assembly has gone beyond classification of municipalities according to class and now attempted to come up with a sub-category, an impermissible subcategory. There is nothing general about this legislation. It is a single bullet aimed at a single target: Harrisburg. For all of the constitutional arguments made herein, it must be disregarded.

Construing Act 26 as per Pennsylvania's Statutory Construction Act

The infirmity of Act 26 in contrast to the validity of Act 47 also is supported by analyzing Act 26 pursuant to the terms of Pennsylvania's Statutory Construction Act of 1972, 1 Pa C.S.A. Section 1501 et seq. Section 1903 pertains to Words and phrases:

- (a) Words and phrases shall be construed according to rules of grammar and according to their common and approved usage,
- (b) General words shall be construed to take their meanings and be restricted by preceding particular words.

The plain meaning controls. "To determine the meaning of a statute, a court must first determine whether the issue may be resolved by reference to the express language of the statute, which is to be read according to the plain meaning of the words." *Com v. Fedorek*, 946 A.2d 93, 596 Pa 475 Sup. 2008. "[The] context in which words are used in a statute must be considered in their interpretation. *Knecht v. Medical Service Ass'n of Pa.*, 143 A. 2d 820, 186 Pa. Super. 456, Super. 1958.

The doctrine of "ejusdem generis" may apply. It means "of the same kind" Where a law sets forth specific classes and then refers to them in general, the general statements only apply to the specific class set forth. Similarly, the mention of one thing implies the exclusion of the others. However where legislative intent is clear, the doctrine is inapplicable. *Com. Randall*, 133 A.2d 276, 183 Pa. Super. 603, Super. 1957, certiorari denied 78 S.Ct. 539, 355 US 954, 2 Led.2d 530.

Additionally, an inquiry must be made as to whether the statute is mandatory or directory. Where a particular statute is mandatory or directory does not depend on its form, but upon the intention of the Legislature, to be ascertained from a consideration of the entire act, its nature, its

object and the consequences which would result from construing it one way or the other. *Com. v. Kowell*, 228 A.2d 50,209 Pa Super. 386 (1967).

According to Section 1921 of the Statutory Construction Act, legislative intent controls. When words are not explicit, the intention of General Assembly may be ascertained by considering among other matters:

- occasion and necessity for the statute
- circumstances under which it enacted
- mischief to be remedied
- object to be attained,
- former law... including other statutes upon the same or similar subjects
- consequences of a particular interpretation
- contemporaneous legislative history
- legislative and administrative interpretation of such statute

In actuality, the record is devoid of legislative intent.

Case law indicates that no word of a statute is to be left meaningless unless no other construction is possible *Charch v. Pa Public Utility Commission*, 132 A.2d 894 (Pa Super. Ct. 1957) 183. One has to give effect to all provisions *Kerns v. Kane*, 69 A.2d 388, 363 Pa 276, 1950 .

According to Section 1926 there is a presumption against retroactive effect. Thus, no statute shall be construed to be retroactive unless clearly and manifestly so intended by the General Assembly. Case law holds that while there is a presumption against retroactive application of statutes affecting substantive rights, a law is only retroactive in its application when it relates back and gives a previous transaction a legal effect different from that which it had under the law in effect when it transpired. *In re R.T.* 778 A.2d 670, Super.2001, appeal denied. For instance, the Pennsylvania Motor Vehicle Financial Responsibility Law could not be applied retroactively. *Henry v. State Farm Ins.*, E.D. Pa 1992, 788 F. Supp 241. Moreover, a

provision of 77 PS Section 481, precluding third-party suits against an employer for indemnity, would be applied only prospectively. *Brescia v. Ireland Coffee-Tea, Inc. E.D. Pa.* 1976, 412 F. Supp. 488.

Next, there is Section 1932, which requires statutes to be read in pari materia:

(a) Statutes or parts of statutes are in pari materia when they relate to the same persons or things or to the same class of persons or things, (b) Statutes in pari materia shall be construed together, if possible as one statute. The Courts have held that statutes are to be construed in harmony as part of a general and uniform system *In re Peplinski's Estate*, 39 A.2d 271, 155 Pa. Super. 564, (1944).

Section 1933 requires that particular provisions control general provisions. Whenever a general provision in a statute shall be in conflict with a special provision in the same or another statute, the two shall be construed, if possible, so that effect may be given to both. If the conflict between the two provisions is irreconcilable, the special provisions shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted later and it shall be the manifest intention of the General Assembly that such general provision shall prevail.

It is undeniable that Courts can't question the wisdom of legislation, but they have an obligation to examine that legislation and question the wisdom of its draftsmanship, despite what was said so long ago about the accumulated talent of those governing Pennsylvania. (Again, See Historical Collections of the State of Pennsylvania). The Statutory Construction Act requires reasonable construction and practical results. If the Court does not wish to reach to the obvious constitutional infirmity of Act 26, then what is left is reasonable construction and practical results. A plain words reading clearly indicates that the provision does not relate to Harrisburg.

The provision applied to “a city of the Third Class which is determined to be financially distressed.” Harrisburg had already long been declared “financially distressed.” The drafters of Act 26 spoke clearly in prospective terms. And, as has been argued earlier, legislation cannot be retroactive, unless clearly intended. Given the plain words, such an intention is not present.

Moreover, the statute can only be read as being “directory” as opposed to “mandatory”. It provides a penalty for filing for bankruptcy, clearly anticipating circumstances in which a bankruptcy would be filed. It does not state that a filing is void. Rather it provides “(c) Penalty. - If a city subject to this section fails to comply with subsection (b), all Commonwealth funding to the city shall be suspended.”

A plain reading making for reasonable construction and practical results is referenced in an October 31, 2011 piece by noted Philadelphia financial columnist Joseph N. DiStefano for his blog entitled “Philly Deals”. “But the state’s punishment for defiant towns like Harrisburg won’t likely block the city from pursuing its case, Alan Schankel, managing director at Janney Capital Markets in Philadelphia, told me. ‘The penalty is a loss of state aid. That’s not much of a penalty’ for a city in bankruptcy, he added.”: Notwithstanding Mr. Schankel’s prominence as a municipal securities analyst, his is a plain reading of a statute that is clearly directory. After all, the drafters could have said that any filing is void.

**Question 3. Council was Authorized as a Matter of Local Law and Practice to File These Proceedings on behalf of the City**

Minutes of Council’s October 11, 2011 Meeting

While Petitioners’ lawyer was not supplied with a verbatim transcript or tape of the minutes of the Council’s meeting of October 11, 2011, wherein it authorized and directed the filing with this Court, the City Clerk did supply Petitioners council with Minutes that are attached and made a part hereof as Exhibit 7.

State Law Concerns- Act 47 Provides no Role for the Mayor in a filing for Bankruptcy

It has already been demonstrated herein that Council and Council alone was the “governing body” of the City pursuant to Act 47 for purposes of petitioning for Chapter 9 protection. Act 47 provides a definition for “Chief Executive Officer” which is the mayor in this case. However, the Chief Executive Officer is not specified as having any role when it comes to filing for bankruptcy. Council acted in accordance with the Act’s requirement for a Majority Vote at 53 P.S. Section 11701.261(a) which states that “the authority to file a municipal debt adjustment action may be exercised only upon the vote by a majority of the municipality’s governing body.” Despite this clear language, Objectors claim that the Mayor has a role in the process. This ignores the plain language of Act 47. If there were to have been any role for or required action of the Mayor with respect to proceeding to bankruptcy then Act 47 would have so provided.

Objectors ignore Act 47’s provisions entirely and choose to rely on cases that are inapposite to the facts and negate the arguments that Objectors seek to make. One such case is *City of Erie v. Dept. of Env. Prot.*, 844 A.2d 586, 591 (Pa. Commw. Ct. 2004). Objector Dauphin County states that “In all relevant aspects, Harrisburg’s governing laws are identical to the City of Erie.” This is blatantly incorrect. Just one difference is Title I of Harrisburg’s Codified Ordinances which state under Section 1-301.3- Statutory Construction that “In the construction of the Codified Ordinances and any amendment thereto, the following rules shall control, except those inconsistent with the manifest intent of Council as disclosed in a particular title, chapter or section.” The City of Erie’s ordinance does not require the intent of Council to control. More importantly, the facts regarding Erie’s ordinance are totally different than those involving Harrisburg. Here the resolution authorizes the filing of a

bankruptcy. In Erie an ordinance was passed authorizing a lease of its water assets and an agreement in connection therewith. Thereafter Erie's Council adopted various resolutions, first directing the City Solicitor to issue a legal opinion, a resolution that was not signed by the Mayor and then two resolutions hiring legal counsel to represent Council in any court proceedings with respect to the agreement. Again, it should be noticed that Erie's Council as a body had standing by resolution to bring or participate in court matters.

It is characteristic of Ms. Linda Thompson to be less than consistent, having a convenient memory. As Mayor, she asserts that the powers of Council are limited, forgetting that when she was on council she and her colleagues brought a case asserting broad powers of council, powers virtually identical to those being asserted in this matter. Not so long ago Councilperson Thompson and Council sought to control the Harrisburg Authority by appropriating the sole power of appointing members to that Authority. The argument then was that Council alone was the governing body. This involved the case of *Reed v. Harrisburg City Council*, 995 A.2d 1137 (Pa. 2009). Clearly as is the case here, Council had standing to bring a case. The Court in *Reed* made its decision upon the basis that where the General Assembly wishes to vest specific authority in either a City Council or the Mayor, it does so expressly by statute stating that where a statute is unambiguous, the plain meaning of the statute shall control. Here it is crystal clear that Act 47 does not provide a role for the Mayor when it comes to filing with this Court.

On November 1, 2011 the Commonwealth Court weighed in , reaffirming the powers of City Council regarding financial matter obligations, in the matter of *Capital City Lodge No. 12, FOP v. Pa Labor Relations Board*, No. 279 C.D. 2011. In this unfair labor practice matter, it was argued that City Council has exclusive control over pension funding

and is not bound by the provisions of the collective bargaining agreement requiring legislative action. “In a proposed decision and order, the hearing examiner determined that the City’s pension fund is under the direction and control of the City Council and that the Mayor lacks power to bind the City to financial obligations. In an opinion by President Judge Leadbetter, the Commonwealth Court states that “ In *Moore v. Reed*, 559 A.2d 602 (Pa. Cmwlth, 1989) this Court agreed with City Council that the Mayor had no authority to negotiate contracts imposing financial burdens and obligations on the City without approval of City Council.” *Capital City*, page 6. The Court goes on to say at page 7 that “As the Pennsylvania Supreme Court observed in *Commonwealth v. Mockaitis*, 575 Pa. 5, 24, 834 A.2d 488, 499 (2003), “[o]ne of the distinct and enduring qualities of our system of government is its foundation upon separated powers.” The principle of separation of powers prohibits any branch of the government from exercising the functions exclusively committed to another branch. *Jubelirer v. Rendell*, 598 Pa. 16, 953 A.2d 514 (2008).

#### Resolution vs. Ordinance

The Objectors gloss over terms such as legislative action, bills, ordinance, and resolution in an attempt to invalidate proper actions of City Council. Yet rules and commonly accepted practice are quite specific regarding procedural requirements. Rather Rule 12 says that “every legislative act of City Council shall be by Ordinance and every act of policy shall be by Resolution” Petitioner asserts that as the designated governing body pursuant to Act 47, it could only act as per a resolution and that it did so in conformity with any applicable statutes and procedures.

The Objectors virtually nullify the powers of Council, maintaining that for any validity, virtually every act of Council’s must involve the Mayor as part of the legislative process. Yet

there are clear distinctions between what is and what is not part of the legislative process. To "legislate" is "to make or enact laws . . . to bring (something) into or out of existence by making laws; to attempt to control (something) by legislation." Black's Law Dictionary 910 (7th ed. 1999).

For instance the case of *The Council of the City of Philadelphia v. Honorable John F. Street*, 856 A.2d 893; (Pa. Cmwlth, 2004) involved Council's litigation over a trash ordinance, clearly legislation controlling the behavior of its citizens and something that the Mayor had to approve and administer. It involved an ordinance, not a resolution. Mayors under the applicable Third Class City Code enforce charters, ordinances of the City and all general laws applicable thereto. 53 P.S. Section 41412. Harrisburg's case involves a resolution, not an ordinance, and Act 47's provisions. The only appropriate manner in which Council could have acted was by resolution. Accordingly, there is no role for the Mayor when it comes to petitioning this court. Mayors enforce charters and ordinances pertaining to the general citizenry. Simply put, there is nothing for the Mayor to enforce, administer or execute

#### Council Rules and Waiving Rules, Designation of Member

In conformity with the fact that Council is the master of its own rules, Council chose to promulgate, and in these circumstances, waive or suspend the rules. Specifically Rule No, 7 provides that "These rules may be suspended by the affirmative vote of the majority of all members of Council present." This suspension included rules pertaining to the duties of the Council President and Solicitor. Moreover, given the fact that the rules were suspended, Council was clearly within its rights to delegate to one of its own, Councilperson Wilson, ministerial powers with respect to the filing of the Chapter 9 petition.

### The Role of the City Solicitor- What Solicitor ?

Much is made by the Objectors about the role of the Solicitor in terms of his role in the passage of the resolution that led to the filing with this court, a role that can only be characterized as a conflict of interest vis a vis loyalty to the Mayor as opposed to City Council.

Let us look to purported authority of the City Solicitor. One controlling document is Harrisburg's City Charter, which was approved November 4, 1969 and became effective January 1, 1970. The only portion of the City Charter pertaining to the city solicitor may be found at Section 410(b) that states "The council may provide for the manner of appointment of a city solicitor."

The next document that controls is the Harrisburg Code. Chapter 2-303 states that the City Solicitor "shall have such duties and responsibilities as are set forth in general law." (Ord. 10-1971) Harrisburg Code chapter 2-303.1 states that the City Solicitor is appointed by Mayor with advice and consent of Council. The same requirement applies to assistants; 2-303.3 Code Chapter 2-703.2 requires a bond of the City Solicitor in the amount of \$10,000.

Some make reference to Mr. Jason Hess as "Acting Solicitor". He does likewise. While he may use this title in perpetuity to attempt some apparent authority, at all times pertinent hereto there has been no City Solicitor, as there was never advice or consent of Council with respect to Mr. Jason Hess or anyone else for that matter. Moreover, how could the bond required be posted for a person who has not properly been the City Solicitor?

The Third Class City Code, 53 PS 36602, titled "Direction of Law Matters" says "The city solicitor shall have the superintendence, direction, and control of the law matters of the city. No department of the city shall employ or retain any additional counsel in any matter or cause, except with the previous assent of council." Meanwhile, 53 PS 36603, regarding "Duties" of a

solicitor, states, in part: "He shall do all and every professional act incident to the office which he may be lawfully authorized and required to do by the mayor, or by any ordinance or resolution of the council." Other than the rules of Council there is no provision for a solicitor's prior involvement. Again, those rules were suspended.

Notwithstanding the fact that Mr. Hess is not the City Solicitor, Objectors make the argument that as Solicitor he is to approve all bills originated in Council. They refer to Section 1-201.1 of the Harrisburg City Code that states at D." All proposed bills or resolutions shall be presented to the City Solicitor for approval as to form and legality prior to introduction." Objectors reading of this and Council's rules would grant an unelected official loyal to the executive branch a virtual veto power over an elected Council, making for a separation of powers violation. Rule 10 provides that "No resolution or bill shall be considered by Council unless the same is delivered to the City Clerk by noon of the Friday preceding the Council meeting. The City Clerk shall furnish all members of Council and the Mayor with copies of the proposed agenda after it is approved by the City Council President. All legislation must be reviewed by the City Solicitor, or his designee, and such review will be indicated by the signature or initials of same. Aside from the fact that there was no City Solicitor to submit legislation to and aside from the fact that it was a resolution approving and directing the filing with this Court, the Council properly voted to waive the applicable rules.

Evidencing clear partiality for the Mayor as opposed to Council, Mr. Hess has submitted an Affidavit to this Court (Document 88) including therewith a number of attachments including his Memorandum of September 28, 2011. What he purposefully neglected to include was Petitioner's' Counsel's response which is attached hereto and made a part hereof as Exhibit 8.

Title 53 PS 36610 governs appointment of special counsel, and states (in its entirety): "Council may, at its discretion, retain special counsel for particular proceedings or matters of the city and fix his compensation by resolution." Mark D. Schwartz, Esquire was appointed to represent Council on September 27, 2011 by resolution. Minutes of said meeting are attached and made a part hereof as Exhibit 9. His retainer agreement was approved by Council on October 11, 2011 during the same meeting where he was directed to file these proceedings. (Exhibit 7)

#### The Role of the Council President

Objectors assert that the majority of Council bypassed the Council President. The City Charter at Section 408 provides for City Council to elect a president who performs the duties prescribed by Council. Council's rules provide for their suspension and as has been made clear, Council's rules were appropriately suspended in the necessary pertinent instances.

#### Political Question- Public Bodies Determine Their Own Rules

Our founding fathers were smart to emphasize the importance of separation of powers out of a concern for principle and the more practical concern of avoiding wading into a morass. Accordingly the doctrine of avoiding a political question was developed.

A public body is clearly the sole authority to determine its rules *Zemprelli v. Daniels*, 496 Pa. at 257, 436 A.2d at 1170 (Senate has exclusive power over its internal affairs and proceedings as long as the exercise of that power is not violative of Pennsylvania Constitution); *Sweeney v. Tucker*, 473 Pa. 493, 518, 375 A.2d 698, 710 (1977) (legislative body has power to determine its own rules of proceeding but such power does not include power to ignore constitutional restraints or violate fundamental rights) (citing *U.S. v. Ballin*, 144 U.S. 1, 5, 36 L. Ed. 321, 12 S. Ct. 507 (1892)).

So too is this the case with a City Council. In *Blackwell v. City of Phila.* 546 Pa. 358; 684 A.2d 1068, 1996, the sole issue was whether a Philadelphia City Councilwoman's complaint concerning the firing of her assistant violated the rules of the Philadelphia City Council ("City Council"). The Court found that such a complaint presents a non-justiciable political controversy citing *Dintzis v. Hayden*, 146 Pa. Commw. 618, 606 A.2d 660 (1992). In *Dintzis*, the Commonwealth Court held that a court could not adjudicate the issue of whether a member of the Pennsylvania House of Representatives violated the House's internal rules governing roll call voting because a violation of the House's internal rules did not present a justiciable controversy. *Dintzis'* reasoning also applied to the internal rules governing the organization and internal workings of a City Council. Thus, the Court in *Blackwell* concluded that if an internal rule of City Council was violated, Blackwell's remedy rested solely within City Council and not the courts.

The political question doctrine is derived from the separation of powers mandated by our tripartite federal constitutional government, *Powell v. McCormack*, 395 U.S. 486, 517, 23 L. Ed. 2d 491, 89 S. Ct. 1944 (1969), and has been applied in our Commonwealth as well. *Sweeney v. Tucker*, 473 Pa. 493, 507-08, 375 A.2d 698, 705 (1977). The question of whether a non-justiciable political question is presented is one for this Court to decide as the ultimate interpreter of the Pennsylvania constitution. *Zemprelli v. Daniels*, 496 Pa. 247, 255, 436 A.2d 1165, 1169 (1981) As the Court stated in *Blackwell*, at 364:

A non-justiciable political question is presented where there is a challenge to legislative power which the Constitution commits exclusively to the legislature. *Sweeney*, supra at 508, 375 A.2d at 705. Courts will not review actions of another branch of government where political questions are involved because the determination of whether the action taken is within the power granted by the constitution has been entrusted exclusively and finally to political branches of government for self-monitoring. *Id.* at 509, 375 A.2d at 706. In deciding whether a dispute concerns a non-justiciable political question, this Court in *Sweeney*, supra adopted the standards enunciated in *Baker v. Carr*,

369 U.S. 186, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962). In *Baker*, the United States Supreme Court set forth the following contours of the political question doctrine: it is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

This Court may decide that concerns over political questions trump arguments objecting to the manner in which Council acted to invoke these proceedings.

### **Conclusion**

This matter has been filed after due deliberation and good faith. The burden of proof should be liberally applied in favor of granting relief when it comes to eligibility (6-900 Collier on Bankruptcy P 900.02. Footnote 4 thereof reads as follows: "S. Report. No, 458, 94 Cong. 2d Sess. 13(1976) ("The provisions of the chapter [9] should provide ready access to the bankruptcy courts. It is during the first steps of reorganization that delay could cause the most permanent harm."); see also *In re City of Bridgeport*, 25 C.B.C. 2d 140, 145-46, 128 B.R. 688, 694 (Bankr..D Conn. 1991. "It is noted that generations of decisions have established the place of bankruptcy in federal public policy and have held that in general bankruptcy laws are to be liberally construed and ambiguities are to be resolved in favor of the full measure of relief afforded by Congress." As demonstrated earlier, Harrisburg's finances and ability to provide for its citizens are in serious jeopardy. As petitioned by its governing body Harrisburg clearly qualifies for and deserves the protection of Chapter 9 and this Court.

Respectfully submitted,

/s/ Mark D. Schwartz\_\_\_\_\_

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