

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

C. Alan Walker, in his capacity as :
 Secretary for the Department of :
 Community and Economic :
 Development, :
 Petitioner :
 v. : No. 569 M.D. 2011
 City of Harrisburg, :
 Respondent :

RE: Receiver's Petition for a Writ in Mandamus

Findings, Conclusions and Order

AND NOW, this 27th day of August, 2012, upon consideration of the Receiver's Petition for a Writ of Mandamus, the Respondent City Council Members' Preliminary Objections, Answer and New Matter and following a hearing and oral argument, the Court finds and concludes as follows:

1. The Petition seeking a writ of mandamus pursuant to Chapter 7 of the Municipalities Financial Recovery Act, Act of July 10, 1987, P.L. 246 (Act 47), as amended by the addition of Chapters 6 and 7 by the Act of October 20, 2011, P.L.318, arises within the broader scope of this Court's oversight of the Receivership previously established for the City of Harrisburg. It is a statutory form of action, which is procedurally *sui generis* and not readily susceptible to strict application of the Rules of Civil Procedure. The Court will issue a separate Case Management Order establishing an appropriate procedural framework for future filings.

2. Each of the City Council members against whom mandamus is sought received prompt service of the Petition and engaged counsel who filed preliminary objections, as well as an answer and new matter. No Council member suffered prejudice as a result of any deviation from strict compliance with the Rules of Civil Procedure regarding service of original process or as a result of the Court's consideration of the Petition within the context of the Receivership action rather than as a new action initiated by a complaint.

3. The Receiver seeks a writ of mandamus directing Council members to enact a 1% increase in the City's earned income tax (EIT) and to amend the budget to provide a \$75,500 salary for the hiring of a Director of Communications.

4. A 1% increase in the EIT and provision for the hiring of a Director of Communications are elements of the Recovery Plan approved by this Court by Order dated March 9, 2012.

5. City Council did not enact the tax increase or the budget amendment prerequisite to hiring a Director of Communications.

6. Pursuant to Section 708 of Act 47, the Receiver issued a letter dated June 11, 2012, ordering Council to implement the Recovery Plan initiatives.

7. Upon Council's failure to comply with the letter of June 11, 2012, the Receiver petitioned the Court, pursuant to Section 709 of Act

47, for a writ of mandamus to secure compliance with the two elements of the Recovery Plan named above.¹

8. The Court held a hearing on August 23, 2012.² Gerald Cross, Executive Director of Pennsylvania Economy League, and General William B. Lynch, the Receiver, testified. Based on their testimony, it is apparent that the City's dire fiscal emergency and particularly the large deficit in the actual and projected operational funds have given rise to a grave threat to the continued provision of vital and necessary services critical for the health and welfare of the citizenry.³

9. The enactment of the earned income tax increase is a crucial component of the Recovery Plan and failure to implement this element of the Plan seriously threatens the probability that related Plan elements dependent on consensus, such as compromise of contracts with

¹ Under Section 709 of Act 47, the Receiver may "petition Commonwealth Court to issue a writ of mandamus upon any elected or appointed official . . . to secure compliance with an order issued under section 708."

² The receiver filed his Petition for a Writ of Mandamus on July 10, 2012 and the Court scheduled a hearing for July 25, 2012. On July 20, 2012, the date for hearing was continued to provide additional time for City Council to obtain counsel. On August 1, 2012, the Court granted respondents' request for a continuance to consider their demand that the Receiver authorize City funding to pay their attorney's fees to defend the mandamus petition. On August 7, 2012, following argument via teleconference, the Court ordered that City funds up to \$7500 be made available for payment, subject to Court approval, of Council's attorney fees. The Court further ordered that the mandamus hearing would convene on August 23.

³ Section 701 of Act 47 defines "vital and necessary services" to include "fulfillment of payment of debt obligations or any other financial obligations." The finding stated in paragraph 8 does not include this element of the definition. Even without the payment of debt service obligations, there would be a threat to those services that are crucial to the health and welfare of the citizens of the City of Harrisburg, such as water supply and distribution, wastewater services, refuse collection and disposal, and police, fire and ambulance services.

bargaining units and creditors, will be achievable. Moreover, the Plan can realistically achieve ongoing operational fiscal stability for the City only if such concessions *as well as* the earned income tax increase are achieved.

10. The Receiver stipulated that no part of the revenue generated by the tax increase shall be used to pay debt associated with the Resource Recovery Facility.

11. Under Section 703(c) of Act 47, the Recovery Plan may not unilaterally levy taxes and under Section 706(b) the Receiver is also prohibited from doing so. Insofar as Section 709 requires judicial action on the mandamus petition, no unilateral tax levy is implicated here. Further, in accordance with *Harrisburg School District v. Hickok*, 781 A.2d 221 (Pa. Cmwlth. 2001), such an order does not violate Art. III, § 31 of the Pennsylvania Constitution. However, also pursuant to *Hickok* and Section 703(c) of Act 47, the Court may not directly order an increase in tax but must require action by Council.

12. The overall scheme of Act 47 impliedly authorizes the requested increase in the EIT.

13. The Court's power to direct the enactment of the tax increase or mandate a budget increase by way of a writ of mandamus against Council constitutes a degree of intrusion upon the fiscal power relegated to the legislative branch under basic separation of powers principles and implicates the political question doctrine. However, such intrusion is appropriate under compelling circumstances or where the action or failure to act imperils another branch's ability to function. *See Larson v. Pa. Turnpike Comm'n*, 507 Pa. 471, 490 A.2d 827 (1985); *County Comm'rs Ass'n of Pa.*

v. Dinges, 935 A.2d 926 (Pa. Cmwlth. 2007). Here the Council has failed to act to alleviate an emergent fiscal threat to the health, safety and welfare of the citizens and threatened the ability of the City government to function.

14. Although authorized in the Recovery Plan and potentially helpful to the recovery effort, there is no immediate compelling necessity to mandate a budget amendment for the expenditure of \$75,500 for a Director of Communications, although Council is urged to cooperate with the Receiver in such matters as they arise.

15. An order of this Court issuing a writ of mandamus satisfies the requirement for court approval of an increase in the BIT beyond the limits set in Section 311 of the Local Tax Enabling Act, Act of December 31, 1965, P.L. 1257, *as amended*, 53 P.S. § 6924.311. Accordingly, the increase will become effective upon passage by City Council.

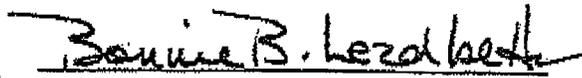
Based on the forgoing, it is hereby ORDERED that:

1. The Preliminary Objections filed by City Council are OVERRULED.

2. The Petition for a Writ of Mandamus is GRANTED IN PART and DENIED IN PART;

3. The Petition is GRANTED as to the tax increase and City Council shall, within 15 days, enact a 1% temporary increase, effective for one year, in the earned income tax rate on residents of the City of Harrisburg, to be effective immediately upon enactment;

4. Subsequent temporary increase in the earned income tax rate may be sought by petition, if necessary;
5. The revenues generated as a result of the increase in the earned income tax rate shall be used only to pay for the services essential to the public health, safety or welfare;
6. The revenues shall not be subject to sharing with a school district;
7. No payments shall be made on debt associated with the Resource Recovery Facility until further order of this Court; and,
8. The Petition for a Writ to mandate the City Council to amend the budget to provide for the hiring of a Director of Communications at an annual salary of \$75,500 is DENIED at this time, without prejudice to further application if circumstances arise creating a compelling necessity.


BONNIE BRIGANCE LEADBETTER,
Judge

Certified from the Record

AUG 27 2012

And Order Exit