

**IN THE SUPREME COURT OF PENNSYLVANIA**

**Nos. 12 MAP 2023 and 15 MAP 2023**

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Rick Siger, in his capacity as Acting Secretary of the Department of  
Community and Economic Development

v.

City of Chester

Appeal of: City of Chester, Mayor Thaddeus Kirkland and City Council of the City of  
Chester

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**REPLY BRIEF OF APPELLANTS,  
THE CITY OF CHESTER, MAYOR  
THADDEUS KIRKLAND AND CITY  
COUNCIL OF THE CITY OF CHESTER**

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Appeal from the Memorandum and Order entered on January 31, 2023 and the  
Order entered on February 14, 2023 of the Honorable Ellen Ceisler of the  
Commonwealth Court at Docket No. 336 MD 2020

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**TABLE OF CONTENTS**

	<b><u>Page</u></b>
<b>I. INTRODUCTION.....</b>	<b>1</b>
<b>II. ARGUMENT.....</b>	<b>2</b>
<b>A. Act 47 cannot be construed to authorize a wholesale suspension of the administrative duties of the elected officials though a recovery plan modification.....</b>	<b>2</b>
<b>B. The proposed modifications to the recovery plan change the form of government.....</b>	<b>10</b>
<b>C. The suspension of duties is not permitted under the Constitution.....</b>	<b>17</b>
<b>D. The clear and convincing standard does not require confirmation of the modifications to the plan.....</b>	<b>22</b>
<b>E. The Receiver does not have broad power to provide for vital and necessary services.....</b>	<b>26</b>
<b>III. CONCLUSION .....</b>	<b>29</b>

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>City of Chester v. Chester Water Auth.</i> , 263 A.3d 689, 712 (Pa. Commw. Ct. 2021).....	4
<i>Devlin v. City of Philadelphia</i> , 580 Pa. 564, 862 A.2d 1234 (2004).....	9
<i>Fagan v. Smith</i> , 615 Pa. 87, 41 A.3d 816 (2012).....	10
<i>Harrisburg Sch. Dist. v. Zogby</i> , 574 Pa. 121, 828 A.2d 1079 (2003).....	12, 13, 16
<i>In re Petition to Recall Reese</i> , 542 Pa. 114, 665 A.2d 1162 (1995).....	2, 7, 17, 28
<i>Massameno v. Statewide Grievance Comm.</i> , 234 Conn. 539, 663 A.2d 317 (1995).....	19
<i>Newport Twp. Sch. Dist. v. State Tax Equalization Bd.</i> , 366 Pa. 603, 79 A.2d 641 (1951).....	23
<i>Nutter v. Dougherty</i> , 595 Pa. 340, 938 A.2d 401(2007).....	2, 7, 28
<i>Ortiz v. Commonwealth</i> , 545 Pa. 279, 681 A.2d 152 (1996).....	9
<i>Pa. Rest. &amp; Lodging Ass’n v. City of Pittsburgh</i> , 653 Pa. 596, 211 A.3d 810 (2019).....	2, 7, 28
<i>Small v. Horn</i> , 554 Pa. 600, 722 A.2d 664 (1998).....	25
<i>Warner v. Conn</i> , 347 Pa. 617, 32 A.2d 740 (1943).....	23

**Pennsylvania Statutes**

**Page**

53 Pa. C.S. § 2902.....12

53 Pa. C.S. § 2911.....12

53 Pa. C.S. § 2918.....12

53 Pa. C.S. § 2925.....12

53 Pa. C.S. § 2926.....12

53 Pa. C.S. § 2961.....1, 2, 4, 7, 8, 24, 28

53 P.S. § 11701.101.....23

53 P.S. § 11701.102.....1, 3, 6, 8, 24

53 P.S. § 11701.431.....19

53 P.S. § 11701.431.1.....20

53 P.S. § 11701.602.....3

53 P.S. § 11701.605.....1, 2, 3, 6, 8, 23, 25, 26, 27

53 P.S. § 11701.608.....3, 5, 27

53 P.S. § 11701.703.....22, 23, 26

53 P.S. § 11701.704.....3, 10, 18

53 P.S. § 11701.706.....1, 4, 5, 20, 23, 25, 26

53 P.S. § 11701.708.....5, 6, 10

53 P.S. § 11701.709.....6

53 P.S. § 11701.712.....9

**Pennsylvania Statutes (continued)**

**Page**

65 Pa. C.S. § 1101.....25

**Pennsylvania Constitution**

Pa. Const., Art. VI, Section 7.....17, 18, 22

Pa. Const., Art. IX, Section 2.....1, 7, 13

Pa. Const., Art. IX, Section 3.....13

## I. INTRODUCTION

For the first time in the history of this Commonwealth, a court appointed receiver seeks to suspend the duties of municipal officials, on a wholesale basis, and indirectly gain governance control over the municipality. This creates serious conflicts between the self-governance protections afforded to the City under the Pennsylvania Constitution<sup>1</sup> and the Home Rule Charter Act.<sup>2</sup> It also creates issues, which have never been addressed, concerning the ability of a judicial officer, like a receiver, to exercise governance control over a home rule municipality.

The Receiver is not using a specific or express provision in Act 47 to accomplish this result. Act 47 does not give a receiver this power. See, 53 P.S. §11701.706. To the contrary, Act 47 protects local governance. 53 P.S. § 11701.605 (“During a fiscal emergency, the ... appointed and elected officials of the distressed municipality shall continue to carry out the duties of their respective offices, except that no decision or action shall conflict with an emergency action plan, order or exercise of power by the Governor under section 604”); *see also* 53 P.S. § 11701.102(b)(1)(ii) (legislative intent to leave principal responsibility for conducting the governmental affairs to the charge of its elected officials).

Because there is no specific provision in Act 47 authorizing the Receiver to effectuate a wholesale suspension of the officials’ duties, Act 47 cannot be

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<sup>1</sup> Pa. Const., Art. IX, Section 2

<sup>2</sup> 53 Pa. C.S. § 2961

construed to invalidate the home rule protections afforded by the Constitution and the Home Rule Charter Act. See, 53 Pa. C.S. § 2961 (home rule powers are to be liberally construed in favor of the municipality); *Pa. Rest. & Lodging Ass’n v. City of Pittsburgh*, 653 Pa. 596, 607 and 617, 211 A.3d 810 (2019) citing *Nutter v. Dougherty*, 595 Pa. 340, 938 A.2d 401, 411 (2007); *In re Petition to Recall Reese*, 542 Pa. 114, 119, 665 A.2d 1162 (1995)(“pursuant to the constitutional and statutory provisions authorizing home rule, a home rule municipality's exercise of power is presumed to be valid absent a specific constitutional or statutory limitation, and ambiguities are to be resolved in favor of the municipality”).

## **II. ARGUMENT**

### **A. Act 47 cannot be construed to authorize a wholesale suspension of the administrative duties of the elected officials though a recovery plan modification.**

The Receiver asserts he has the right to modify a recovery plan to effectuate a wholesale suspension of the administrative duties of the elected officials. However, no specific provision in Act 47 provides this right and Act 47 may not be construed to allow the result.

### **Act 47 preserves local governance during a fiscal emergency**

A wholesale suspension of the duties of the officials is not permitted. Section 605 of Act 47 preserves local governance during a fiscal emergency by providing the “appointed and elected officials of the distressed municipality shall

continue to carry out the duties of their respective offices, except that no decision or action shall conflict with an emergency action plan, order or exercise of power by the Governor under section 604.” 53 P.S. §11701.605. Section 605 is consistent with the stated legislative intent to leave local governance to the charge of the elected officials. 53 P.S. §11701.102(b)(1)(ii).

The Receiver asserts section 605 is not applicable without providing analysis. However, section 605 expressly applies “during a fiscal emergency” which continues in this case. See, 53 P.S. §11701.602 (declaration of fiscal emergency by governor); 53 P.S. §11701.608 (fiscal emergency ends upon certification by the secretary that the municipality is solvent and able to continue providing vital and necessary services). The fiscal emergency does not end upon the appointment of a receiver.

**Section 704 is narrow and does not  
authorize a wholesale suspension of duties**

The Receiver asserts section 704 of Act 47<sup>3</sup> authorizes a receiver to suspend the administrative duties of the elected officials through a plan modification. This is incorrect. Section 704(a) provides the legal effect of a confirmed modification to a recovery plan.<sup>4</sup> It contemplates a *narrow, limited* and, apparently, self-executing suspension of duties but only “to the extent” of interference with a receiver’s

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<sup>3</sup> 53 P.S. §11701.704

<sup>4</sup> Section 704 suspends the authority of the elected and appointed officials to exercise power “to the extent that the power would interfere with the powers granted to the receiver or the goals of the recovery plan.” 53 P.S. §11701.704(a)(1).



powers or the goals of a recovery plan. In part because it is self-executing, it does not provide a receiver with a right to modify a recovery plan to effectuate a *wholesale* suspension of the powers and duties of elected and appointed officials.

**A receiver has limited powers.**

A receiver does not have express power under act 47 to modify a recovery plan to effectuate a wholesale suspension of the powers and duties of elected and appointed officials. A receiver’s powers are limited and enumerated in Section 706 of Act 47. 53 P.S. §11701.706. Section 706 only authorizes a receiver to modify a recovery plan “as necessary to achieve financial stability” of the municipality. 53 P.S. §11701.706(a)(2). Financial stability, which must be construed narrowly in this context to preserve the City’s self-governance,<sup>5</sup> will be achieved through the bankruptcy process and the monetization of the water authority assets,<sup>6</sup> not through a wholesale suspension of the City’s self-governance.

None of the other enumerated powers in Section 706 give a receiver the right to effectuate a wholesale suspension of duties or give a receiver the right to directly, or indirectly, assume control over the governance and administration of a municipality or to shift authority from one official to another.

Chapter 6 of Act 47 (dealing with the Governor’s powers during a fiscal emergency) is instructive concerning the lack of a receiver’s governance authority

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<sup>5</sup> 53 Pa. C.S. § 2961

<sup>6</sup> See, *City of Chester v. Chester Water Auth.*, 263 A.3d 689, 712 (Pa. Commw. Ct. 2021)

under the act. Under Chapter 6, the Governor, or the Governor's designee, has broad emergency powers to "exercise the authority of the elected or appointed officials of the distressed municipality or authority as necessary to ensure the provision of vital and necessary services." 53 P.S. §11701.604(a)(5). The broad power of the Governor terminates upon the appointment of a receiver. 53 P.S. §11701.608(b).

In contrast, Act 47 does not give a receiver the power to exercise the authority of elected or appointed officials or to strip them of their authority. Other than a receiver's narrow power to file a bankruptcy proceeding, nothing in section 706 of Act 47 gives a receiver the right to act on behalf of the City or to exercise authority, or suspend the authority, of elected and appointed officials. 53 P.S. §11701.706. Had the legislature intended a receiver to possess broad powers over governance, the legislature would have made them express as it did with regard to the Governor's emergency powers.

### **A Receiver's Remedy**

A receiver's statutory remedy to deal with uncooperative officials is to issue orders to the officials to implement any provision of the recovery plan and refrain from interfering with the powers granted to the receiver or the goals of the recovery plan. 53 P.S. §11701.708(a).

If the officials do not comply with the receiver's order, the statutory

procedure is for the receiver to seek enforcement through a *mandamus* proceeding. 53 P.S. §§11701.708(b) and 11701.709. The Receiver’s modifications to the recovery plan are expressly intended to bypass this statutory *mandamus* procedure<sup>7</sup> in favor of the “sledgehammer” approach<sup>8</sup> requested by the Receiver.

### **The Sledgehammer Approach Violates Act 47**

The Receiver’s “sledgehammer” approach<sup>9</sup> of suspending duties, on an across the board basis, is not contemplated by Act 47. There is no specific provision in Act 47 which authorizes a wholesale suspension of duties. Instead, Act 47 preserves self-governance and allows appointed and elected officials to “continue to carry out the duties of their respective offices” during a fiscal emergency like the one which continues in the City. 53 P.S. § 11701.605; *see also* 53 P.S. § 11701.102(b)(1)(ii) (legislative intent to leave principal responsibility for conducting the governmental affairs to the charge of its elected officials).

### **The Sledgehammer Approach Creates Constitutional Problems**

Implementation of the non-statutory sledgehammer approach adopted by the Receiver creates constitutional problems because it denies the City the right to “exercise any power or perform any function” not denied by the state constitution,

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<sup>7</sup> R. 1520a (“By including many of these initiatives, the Receiver hopes to avoid multiple returns to the Court seeking *mandamus*.”); *see also* R. 1546a (Receiver seeking to limit representation of the City in a *mandamus* proceeding to the solicitor)

<sup>8</sup> R. 3288a (transcript page 143, line 14)

<sup>9</sup> R. 3288a (transcript page 143, line 14)

the home rule charter or the General Assembly. Pa. Constitution, Art. IX, Section 2. That right, in this case, is local governance pursuant to the Home Rule Charter and Administrative Code. In other words, it deprives the City of the right to self-governance.

Because Act 47 does not clearly, specifically and expressly provide for the powers claimed by the Receiver, the Home Rule Charter Act requires that Act 47 not be construed to limit the City's right to home rule. 53 Pa. C.S. § 2961; *Pa. Rest. & Lodging Ass'n v. City of Pittsburgh*, 653 Pa. 596, 211 A.3d 810 (2019) citing *Nutter v. Dougherty*, 595 Pa. 340, 938 A.2d 401, 411 (2007); *In re Petition to Recall Reese*, 542 Pa. 114, 119, 665 A.2d 1162 (1995)(“pursuant to the constitutional and statutory provisions authorizing home rule, a home rule municipality's exercise of power is presumed to be valid absent a specific constitutional or statutory limitation, and ambiguities are to be resolved in favor of the municipality”).

**The “Denied by the General Assembly”  
Exception does not Apply to an Act 47 Receivership**

To avoid this problem constitutional problem, the Receiver asserts “Act 47 is an unequivocal mandate from the General Assembly that falls within the ‘denied by the General Assembly’ exception” to Section 2 of Article IX of the

Constitution.<sup>10</sup> This position is incorrect, in part, because there is no “unequivocal mandate” in Act 47 requiring duties be suspended. To the contrary, Act 47 mandates preservation of self-governance except in narrow situations.<sup>11</sup> 53 P.S. §§ 11701.102(b)(1)(ii), 11701.605, 11701.102(b)(1)(ii). Act 47 cannot be construed to authorize a broad suspension of self-governance. 53 Pa. C.S. § 2961 (requiring liberal construction in favor of home rule).

This case does not involve the legislature denying the right of self-governance to the City pursuant to an express provision in the statute. It involves the Receiver attempting to deny that right through a plan modification which is not expressly authorized by the text of Act 47. There is no express mandate in the text of Act 47 requiring, or authorizing, a receiver to effectuate a wholesale suspension of duties.<sup>12</sup>

The “denied by the General Assembly” exception also does not apply to an Act 47 receivership. In order for a statute to deny a municipality the authority to exercise powers and perform functions provided in the home rule charter, the statute must be “applicable in every part of the Commonwealth” and involve

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<sup>10</sup> Appellee Brief, page 5

<sup>11</sup> The Court does not need to address whether suspension of duties in the narrow situation contemplated by Act 47 passes constitutional muster in the home rule charter context. The sledgehammer approach adopted by the Receiver falls outside of the narrow suspension provided in the statute.

<sup>12</sup> Even section 704(a)(2) does not authorize action by a receiver. That section is apparently self-executing upon confirmation of a plan and does not require any action by a receiver or the court.

substantive matters of statewide concern. *Devlin v. City of Philadelphia*, 580 Pa. 564, 578-579, 862 A.2d 1234 (2004) citing *Ortiz v. Commonwealth*, 545 Pa. 279, 286, 681 A.2d 152 (1996).

Matters "of statewide concern" include matters involving "the health, safety, security and general welfare of all the inhabitants of the State," but do not include "matters affecting merely the personnel and administration of the offices local to [the municipality] and which are of no concern to citizens elsewhere." *Devlin v. City of Philadelphia*, 580 Pa. 564, 579, 862 A.2d 1234 (2004).

The receivership provisions of Act 47 do not satisfy this test. They are not matters of statewide concern applicable in all parts of the Commonwealth. They only apply in distressed communities. 53 P.S. § 11701.712(a) ("This chapter shall apply only to distressed municipalities"). They also do not involve "the health, safety, security and general welfare of all the inhabitants of the State," and are only "matters affecting merely the personnel and administration of the offices local to [the municipality] and which are of no concern to citizens elsewhere." Only the residents of the City have an interest in the administrative affairs of the City. Residents of other municipalities are not concerned with the administrative function of the City.

**Act 47 Must be Construed  
to Avoid Constitutional Problems**

Act 47 is drafted to avoid unconstitutionally usurping a home rule charter municipality's authority by expressly prohibiting a recovery plan from being construed as authorizing a change in the form of government or affecting powers and duties of elected and appointed officials except that it may: a) impose a duty on officials to undertake the acts set forth in the Plan; and b) suspend the authority of officials to exercise power which interferes with the powers granted to the Receiver or the goals of the Plan. 53 P.S. § 11701.708.

Courts have the duty to avoid constitutional difficulties, if possible, by construing statutes in a constitutional manner. *Fagan v. Smith*, 615 Pa. 87, 94, 41 A.3d 816 (2012). In this regard, Act 47 must be construed to avoid the constitutional infirmities of permitting a judicial officer, like a receiver, from effectuating a wholesale suspension of appointed officials through a “sledgehammer” approach which is designed to bypass the statutory remedy of *mandamus*.

**B. The proposed modifications to the recovery plan  
change the form of government.**

The Receiver asserts the modifications to the recovery plan do not change the form of the City's government which is protected by section 704(b)<sup>13</sup> of Act

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<sup>13</sup> 53 P.S. § 11701.704(b)(confirmation shall not be construed to change the form of government of the distressed municipality).

47:

The initiatives in the Receiver's proposed modified Plan do nothing to change the City's form of government. The City's Charter is still in effect. The City is still operating under the same Charter with a mayor and five-member council who have the same executive and legislative powers provided in the City's Charter.<sup>14</sup>

The Receiver appears to be saying as long as the Home Rule Charter still exists and the Mayor and council members retain their titles and executive and legislative powers (as opposed to their appointed administrative duties as department heads) there is no change in the form of government. The Receiver's current description of the form of the City's government is a change in position from how the Receiver previously described the City's form of government to the Commonwealth Court as follows:

Under the City's current form of government, each Council member serves as a department head. There is no single individual, such as a city manager, in charge of City operations. This arrangement does not meet Chester's needs. The Receiver will be creating a Chief Operating Officer position who will be responsible for overseeing and coordinating City operations.<sup>15</sup>

The Receiver now asserts the "City's "form of government" is a "home rule charter" form of government as defined in the City's Home Rule Charter and that

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<sup>14</sup> Appellee Brief, page 13

<sup>15</sup> R.40a. (Receiver expressing desire to change the form of government prior to any of the alleged misconduct in this case)



has not changed in any way.”<sup>16</sup> The Receiver’s contends the Home Rule Charter law defines “form of government” to be only the text of the home rule charter adopted by the municipality citing 53 Pa. C.S. §§ 2902, 2911, 2918, 2925 and 2926 for the proposition.<sup>17</sup> Although these sections refer to “form of government”, they do not define the meaning of the term.

The Receiver’s current narrow view of the City’s form of government is derived, at least in part, from an incorrect interpretation of this Court’s opinion in *Harrisburg Sch. Dist. v. Zogby*, 574 Pa. 121, 828 A.2d 1079 (2003). In *Zogby*, the Education Empowerment Act granted **additional** powers to the mayor in a limited area (i.e., responsibility for schools). Under *Zogby*, a statute impermissibly alters a home rule municipality’s form of government if it is inconsistent with the “basic existence, structure, and **powers of the office of mayor or the other branches of city government.**” *Zogby* at 143.

In this case, the Receiver, as opposed to any express provision of Act 47, is seeking to effectuate a wholesale stripping of authority which is not confined to a single issue like the schools in *Zogby*. The Receiver is not seeking a narrow change in powers pursuant to an express and specific provision in a statute. The Receiver is seeking sweeping and wholesale changes to the duties of the officials and the

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<sup>16</sup> Appellee Brief, page 14

<sup>17</sup> Appellee Brief, page 14

City's governance which impact the Mayor's powers and every department in the government:

- a. The administrative duties of City councilmembers with respect to day-to-day operations shall be suspended. City councilmembers may not direct a City employee relating to any matter in the line of the employee's employment.<sup>18</sup>
- b. City elected officials shall not interfere with the directives of the Chief of Staff or the Receiver.<sup>19</sup>
- c. The Receiver shall have the authority to direct the City [] to remove items from their Council [] agenda.<sup>20</sup>

Unlike the narrow grant of additional power to the mayor in *Zogby*, the Receiver's proposed modifications are not expressly provided for in the statute. They were conceived by the Receiver's staff as a "sledgehammer" approach to avoid returning to Court to seek *mandamus* relief.<sup>21</sup>

The modifications effectuate the "wholesale change of municipal government" which is prohibited under *Zogby*. *Zogby* 574 Pa. 143 (the protections of Article IX, Section 3<sup>22</sup> of the Constitution do not "per se preclude a legislative grant of particularized powers and duties to the mayor of a city that has opted for a mayor-council form of government, but refers instead to a wholesale change of

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<sup>18</sup> R. 1546a

<sup>19</sup> R. 1547a

<sup>20</sup> R. 1549a

<sup>21</sup> R. 1520a; R. 1546a; R. 3288a (transcript page 143, line 14)

<sup>22</sup> Article IX, Section 3 is the analogue to Article IX, Section 2 for municipalities which choose optional forms of government.

municipal government”). The Receiver’s modifications are wholesale changes to the government and strip the Mayor and council of their duties as the heads of the City’s departments.

The duties affected by the modifications, including the administrative functions, are solely within the province of the officials pursuant to the City’s Home Rule Charter. The charter provides the Mayor is the City’s chief executive<sup>23</sup> with authority to supervise the conduct of all City officers.<sup>24</sup> Pursuant to the charter, the Mayor may assign to each Council member a responsibility as department head of one or more departments or agencies of the City government.<sup>25</sup> All current department heads are members of City Council and have been appointed by the Mayor in this manner. Finally, the Home Rule Charter provides the Mayor with “any and all additional powers and duties which may be conferred upon him by the Administrative Code.”<sup>26</sup>

The Home Rule Charter authorizes City Council to adopt an Administrative Code to provide for the administrative organization of the City government, the assignment of duties and responsibilities to officers and employees.<sup>27</sup> All changes in organization and procedures in the Administrative Code must be effectuated by

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<sup>23</sup> Appellant Brief, Appendix A, page 7; Appellant Brief, Appendix C § 301

<sup>24</sup> Appellant Brief, Appendix A, pages 7- 8; Appellant Brief, Appendix C § 302

<sup>25</sup> Appellant Brief, Appendix C § 603

<sup>26</sup> Appellant Brief, Appendix A, pages 7-8; Appellant Brief, Appendix C § 302

<sup>27</sup> Appellant Brief, Appendix C § 602

amendment to the Administrative Code in the same manner as other ordinances are enacted and amended.<sup>28</sup>

The Administrative Code provides the directors of the City's various departments have the powers and duties assigned by City Council and serve as agents of City Council and are subject to review, approval and revocation by City Council.<sup>29</sup> The Administrative Code provides the department directors report to City Council.<sup>30</sup>

The Receiver's proposed modifications change this form of government. As the Commonwealth Court noted, the "most contested [modifications] seek to remove the City's elected officials from their appointed positions as department heads; suspend the administrative duties of the City's elected officials as they relate to day-to-day operations; and give Receiver the sole authority to take certain actions on the City's behalf, including entering into contracts<sup>31</sup> and controlling and directing the expenditure of federal and state funds."<sup>32</sup> The Commonwealth Court noted the Receiver sought "to convert the City's current Chief Operating Officer []

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<sup>28</sup> Appellant Brief, Appendix C § 602

<sup>29</sup> Administrative Code § 111.03

<sup>30</sup> Administrative Code § 111.03

<sup>31</sup> The Commonwealth Court did not confirm the modification which would have allowed the Receiver to enter into contracts on behalf of the City.

<sup>32</sup> Appellant Brief, Appendix A, page 10

into the City's Chief of Staff, who would report exclusively to Receiver and oversee each of the City's departments."<sup>33</sup>

Before implementation of the modifications, the Mayor functions as the chief executive with the power to supervise all city offices and appoint the heads of the departments.<sup>34</sup> After the implementation of the modifications, the Mayor will no longer serve as supervisor or chief executive. The chief of staff will report to the receiver and not the Mayor. The Mayor will no longer have the power to appoint the heads of the departments. Those powers will now belong solely to the chief of staff and, indirectly, the Receiver. In other words, the Receiver and the chief of staff will be in control of the administrative governance of the City even though neither were elected by the citizens of Chester and neither are accountable at the ballot box.

In short, the proposed modifications to the recovery plan impermissibly modify the powers and duties of the officials which changes the form of government. The suspension of duties is wide ranging and not circumscribed like the limited enlargement of power in *Zogby*. They are a "sledgehammer" approach to strip all administrative duties from the officials. They are not being implemented pursuant to the reasoned judgment of the legislature. They are being implemented

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<sup>33</sup> Appellant Brief, Appendix A, page 10

<sup>34</sup> Appellant Brief, Appendix A, pages 7- 8; Appellant Brief, Appendix C § 302

by a judicial officer who was not elected by the people and is not accountable to the citizens. This is not the intent of Act 47 and it should not be permitted.

**C. The suspension of duties is not permitted under the Constitution.**

Article VI, Section 7 of the Pennsylvania Constitution provides:

All civil officers shall hold their offices on the condition that they behave themselves well while in office, and shall be removed on conviction of misbehavior in office or of any infamous crime. *Appointed civil officers*, other than judges of the courts of record, *may be removed at the pleasure of the power by which they shall have been appointed*. All civil officers elected by the people, except the Governor, the Lieutenant Governor, members of the General Assembly and judges of the courts of record, shall be removed by the Governor for reasonable cause, after due notice and full hearing, on the address of two-thirds of the Senate.

Pa. Const., Art. VI, Section 7

Section 7 is the exclusive method, absent impeachment, conviction of crime or misbehavior in office, of removing such [appointed civil] officers." *In re Petition to Recall Reese*, 542 Pa. 114, 124, 665 A.2d 1162 (1995)(applying section 7, which facially applies to both elected and appointed officers, in a case involving an elected official).

The Receiver asserts the suspension of the administrative duties of council members and the Mayor, in their appointive capacities, does not violate the removal provisions of the Constitution because the officials “are all still in office and have all powers of such office, except to the point those powers conflict with a

plan initiative.”<sup>35</sup> The Receiver also draws a distinction between administrative duties derived from the Home Rule Charter and those derived from the Administrative Code.<sup>36</sup> The Receiver’s positions are incorrect.

First, the removal provision of the Constitution does not differentiate between officials exercising duties pursuant to a home rule charter versus an administrative code. It applies to “appointed civil officers” without regard to whether they are appointed to positions provided in a home rule charter or an administrative code. Officials acting under both may only be “removed at the pleasure of the power by which they shall have been appointed.” Pa. Const., Art. VI, Section 7. In this case, the power which appointed the officials to their positions as department heads is the Mayor.<sup>37</sup> It is not the Receiver.

Second, the duties of the officials are not being suspended because of a conflict with a current recovery plan. To the contrary, the Receiver is trying to “put the cart before the horse” by proposing a new plan which will suspend the duties rather than wait for a conflict to arise and seek relief from the Court. Section 704 of Act 47 is narrowly tailored to only suspend duties if there is a conflict.<sup>38</sup> The

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<sup>35</sup> Appellee Brief, page 20

<sup>36</sup> Appellee Brief, page 20

<sup>37</sup> Appellant Brief, Appendix C § 603

<sup>38</sup> Section 704 may violate Section 7 of Article 6 of the Constitution. However, the Court does not need to reach that issue because it is not presented by this case. The Receiver’s proposed wholesale suspension of duties is not narrowly tailored like section 704. The Court does not need to determine section 704 is unconstitutional to reject the Receiver’s proposed broad suspension of duties.

Receiver's sledgehammer approach has no restraint and is not an exception to the removal procedure required by the Constitution.

Third, it does not matter that the officials retain the titles of their respective offices because those titles are meaningless if they are not permitted to perform the functions of the office. As the Connecticut Supreme Court once noted, "removal of the power of the office [is] tantamount to impeachment." *Massameno v. Statewide Grievance Comm.*, 234 Conn. 539, 565 663 A.2d 317 (1995). The state constitution is not designed to protect titles. It is designed to protect governance and to prohibit officials from being stripped of their ability to function in the office.

The Receiver also defends the proposed suspension of duties as consistent with the Commonwealth's power to abolish local governments in the legislative intent shows the General Assembly placed saving cities, and keeping them viable, over local governance.<sup>39</sup> Act 47 includes a provision authorizing the disincorporation of a municipality as a measure of last resort when the municipality is non-viable and efforts to merge with a neighboring municipality are unachievable or will not result in viability. See, 53 P.S. § 11701.431 *et seq.* The Receiver has been quoted in the press threatening disincorporation, in part, because

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<sup>39</sup> Appellee Brief, page 21



of this appeal.<sup>40</sup>

Despite the possibility of disincorporation as a measure of last resort, Act 47 is designed to rehabilitate municipalities while leaving local governance in place. Both are important under the statutory regime. Act 47 does not give the Receiver the right to choose between financial recovery and self-local governance. It does not permit a receiver to effectuate a *coup d'état* (for lack of better description) to achieve a financial stability. If the Receiver cannot achieve a financial recovery and stability while retaining self-governance, then the Receiver may recommend disincorporation to the Secretary of the Department of Economic and Community Development but the final decision is up to the Secretary. 53 P.S. § 11701.431.1.

However, the Receiver does not need to remove the officials from their appointed positions to achieve a financial recovery. The Receiver has already unilaterally filed a bankruptcy proceeding on behalf of the City without obtaining consent of the elected officials. See, 53 P.S. § 11701.706(a)(9)(authorizing a receiver to file a bankruptcy case and act on behalf of the municipality in the bankruptcy proceeding).

The Receiver can reorganize the City's finances in the bankruptcy case without removing the Major from his administrative role as head of public works

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<sup>40</sup> <https://www.delcotimes.com/2023/04/11/chester-might-have-to-disincorporate-by-years-end-receiver-warns/> (quoting the Receiver as saying “This is the very real warning or, dare I say, even threat of ‘If we don’t get our act together and get this taken care of, this plan developed by the end of this year, disincorporation is a very real possibility.’”; Receiver’s chief of staff blaming this appeal for delays)

with supervisory capacity of the police and fire departments. The financial recovery depends on monetizing the water authority assets and addressing the large pension and employment related liabilities. The bankruptcy is not dependent upon removing the department head in charge of the parks department or the department head responsible for fielding complaints from residents about potholes and trash pickup. It does not require removal of the Mayor as the supervisor of the police department at the risk that the 60% reduction in violent crime achieved by the Mayor<sup>41</sup> will be undone.

Finally, the Receiver seeks to sidestep the removal provisions of the Constitution by asserting suspension of the duties is “critical to the City’s recovery because there is no debate that the City needs to employ skilled, qualified professionals to oversee, and work in its departments and the City officials have not done so competently, thus threatening the provision of vital and necessary services to residents.”<sup>42</sup>

Without a doubt, the City could use more specialized and professional help and it has relied upon the elected officials because there are insufficient resources to hire staff. In particular, the City needs more help in the finance department but removing the head of the department will not reduce the workload for the other

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<sup>41</sup> R. 3705a (transcript pages 61-62); R. 3739a (transcript pages 198-199); *see also* <https://www.fox29.com/news/chester-sees-dramatic-reduction-in-gun-violence-and-deadly-shootings>.

<sup>42</sup> Appellee Brief, page 23

people in the department. It will only exacerbate the problem. Nothing is stopping the Receiver from hiring professional staff to supplement the finance department or any other department.

The situation is not optimal and there may be blame on the City's side because all cities have operational problems, particularly distressed cities.<sup>43</sup> But this does not give the Receiver the right to unilaterally suspend the officials in violation of Section 7 of Article VI of the Pennsylvania Constitution.

**D. The clear and convincing standard does not require confirmation of the modifications to the plan.**

The Receiver cites 53 P.S. § 11701.703(e) for the proposition that the Commonwealth Court was required to confirm the plan modifications unless it finds by clear and convincing evidence that the recovery plan as modified is arbitrary, capricious or wholly inadequate to alleviate the fiscal emergency in the distressed municipality.<sup>44</sup> There are several factors which make this a non-typical arbitrary and capricious case.

First, this case involves a request by a court appointed receiver, a judicial officer, to take extraordinary measures not specifically authorized by the statute. All courts have an inherent power to supervise a receivership. See example, *Newport Twp. Sch. Dist. v. State Tax Equalization Bd.*, 366 Pa. 603, 608, 79 A.2d

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<sup>43</sup> It is important to remember that the elected officials inherited financial problems which have been building for decades.

<sup>44</sup> Appellee Brief, pages 1-2 (inadvertently citing 53 P.S. § 11701.401); Appellee Brief, page 4 (inadvertently citing 53 P.S. § 11701.401); Appellee Brief, page 29

641 (1951)(the Court has “plenary power to review and supervise proceedings of inferior courts or judicial officers”). Act 47 should not be construed to impinge upon this inherent power by setting a low bar for mandatory confirmation of a receiver’s proposed modifications. A court must be free to determine the necessity of actions proposed by the court appointed receiver. After all, a receiver is only an arm of the court. *Warner v. Conn*, 347 Pa. 617, 32 A.2d 740, n. 3 (1943)(a receiver “is the arm of the Court, doing the Court’s work”).

Second, section 703(e) presupposes the modification of the recovery plan by the Receiver is authorized, and not prohibited, by Act 47. In this case, they are prohibited by Act 47’s requirement that elected and appointed officials remain in place during a fiscal emergency. 53 P.S. § 11701.605.

The modifications are also not authorized. Section 706(a)(2) (dealing with modifications by a receiver) only authorizes a receiver to “modify the recovery plan as necessary to achieve financial stability of the distressed municipality...in accordance with section 703.” 53 P.S. § 11701.706(a)(2).

Financial stability is achieved by taking financial measures affecting items such as revenue, expenses and repayment of debt. Act 47 is titled as the “Municipalities Financial Recovery Act.” 53 P.S. § 11701.101. The purpose of Act 47 is:

to foster fiscal integrity of municipalities so that they provide for the health, safety and welfare of their

citizens; pay 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(a).

The wholesale suspension of administrative duties of the elected officials only deprives the citizens of Citizens of Chester of their right to have a local government responsive to their needs and accountable in the next election. It does nothing to advance financial stability. Financial stability does not require taking supervisory authority of the Mayor over the police and fire department and giving it to non-elected officials with no accountability. Financial stability does not require suspension of the head of the parks department or the person in charge of making sure potholes are fixed.

The Receiver is seeking to sweep all governance issues under the rubric of “financial stability.” However, in this context, “financial stability” must be construed narrowly to avoid usurping local governance. 53 Pa. C.S. § 2961.

Act 47 is not a good governance statute. It does not regulate ethics, nepotism, or competence of officials. The officials are already covered by a

statewide ethics act.<sup>45</sup> Their competency to do the job is determined by the appointing power and the electorate who have the right to vote them out of office if they perform unsatisfactorily.

Conversely, the electorate has the right to re-elect officials, even if they have shortcomings. The residents of Chester may not care that the public officials are not perfect so long as they produce results like reducing violent crime by 60% as the Mayor has done.<sup>46</sup> Act 47, as drafted as opposed to how the Receiver is trying to use it, respects the existing governance and leaves it in place. 53 P.S. § 11701.605.

Because Act 47 limits the type of modifications which the Receiver may propose to those dealing with financial stability, the Receiver lacks authority to propose good governance modifications. As a result, these modifications, which are beyond the scope of the Receiver's authority under section 706(a)(2), should be denied as being *ultra vires* and a nullity without the need to apply the arbitrary and capricious standard. *Small v. Horn*, 554 Pa. 600, 609, 722 A.2d 664 (1998)(*ultra vires* acts are void).

Conversely, if the arbitrary and capricious standard is applied, the modifications must be considered arbitrary and capricious because they are beyond

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<sup>45</sup> 65 Pa. C.S. § 1101, *et seq.*

<sup>46</sup> R. 3705a (transcript pages 61-62); R. 3739a (transcript pages 198-199); *see also* <https://www.fox29.com/news/chester-sees-dramatic-reduction-in-gun-violence-and-deadly-shootings>.

the scope of the Receiver's authority under section 706(a)(2) and violate Act 47's mandate that "appointed and elected officials of the distressed municipality shall continue to carry out the duties of their respective offices" during a fiscal emergency. 53 P.S. § 11701.605. Any other result would vitiate the protections afforded to local governance by Act 47 and the Constitution.

As a result, whether or not the arbitrary and capricious standard is applied, the Receiver's proposals may not be confirmed because they go beyond the scope of the Receiver's power to modify the plan to achieve "financial stability" and violate section 605 of Act 47. It is both *ultra vires* and arbitrary and capricious for the Receiver to seek a wholesale suspension of local governance when Act 47 preserves local governance.

**E. The Receiver does not have broad power to provide for vital and necessary services.**

Act 47 does not give a receiver broad power to provide for vital and necessary services for the municipality. The "vital and necessary services" provision of the Act 47 receivership chapter deals with the required contents of a recovery plan. Specifically, Act 47 requires the plan proposed by a receiver to provide for the continuation of vital and necessary services. 53 P.S. § 11701.703(b)(1)(i).

In other words, section 703(b)(1)(i) prohibits a receiver from eliminating vital and necessary services in a recovery plan. It does not grant additional powers

which are not enumerated in section 706. There is no provision in Act 47 giving a receiver broad authority to provide vital and necessary services to the community. That role remains with the public officials. 53 P.S. § 11701.605.

Only one of a receiver's powers enumerated in section 706 involves the continuation of municipal services. 53 P.S. § 11701.706(a)(3). That provision authorizes a receiver to require the municipality to negotiate intergovernmental cooperation agreements to avoid interruption of municipal services. *Id.* It does not give a receiver broad authority to take any action to insure the continuation of vital and necessary services. It does not authorize a receiver to suspend the duties of the officials.

It would have been easy for the legislature to give broad powers to a receiver in the areas of governance and the provision of vital and necessary services. Indeed, the legislature gave the Governor broad powers to "exercise the authority of the elected or appointed officials of the distressed municipality or authority as necessary to ensure the provision of vital and necessary services." 53 P.S. § 11701.604(a). There is no similar power granted to the receiver.

The Governor's broad powers do not continue during the receivership and are not inherited by a receiver. The Governor's powers are expressly suspended upon the appointment of a receiver. 53 P.S. § 11701.608(b). There is nothing in the receivership chapter of Act 47 which revives the Governor's powers and transfers



them to a receiver. The legislature chose to entrust the Governor, who is elected and accountable to the citizens, with these broad powers, It did not entrust them to receivers who are appointed and not accountable to the electorate.

As a result, it is apparent the legislature intended the “vital and necessary services” requirement for a recovery plan to be a restriction on the power of a receiver to cut vital and necessary services as opposed to providing a broad right of a receiver to exercise plenary authority to take any action the receiver deems necessary. The legislature would have expressly provided a receiver with these powers if intended.

In the absence specific and unambiguous language in Act 47 granting a receiver these rights, Act 47 must be construed in favor of the municipality and the continuation of self-governance. 53 Pa. C.S. § 2961; *Pa. Rest. & Lodging Ass’n v. City of Pittsburgh*, 653 Pa. 596, 607 and 617, 211 A.3d 810 (2019) citing *Nutter v. Dougherty*, 595 Pa. 340, 938 A.2d 401, 411 (2007); *In re Petition to Recall Reese*, 542 Pa. 114, 119, 665 A.2d 1162 (1995)(“pursuant to the constitutional and statutory provisions authorizing home rule, a home rule municipality's exercise of power is presumed to be valid absent a specific constitutional or statutory limitation, and ambiguities are to be resolved in favor of the municipality”).

### III. CONCLUSION

For the foregoing reasons, the Appellants respectfully request the Court vacate the orders of the Commonwealth Court to the extent the orders confirm the appealed modifications.

Dated: May 4, 2023

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I, Mark Pfeiffer, hereby certify that the foregoing Reply Brief contains 6,598 words according to the word count feature of the word processing software used to prepare it. The Reply Brief complies with the 7,000 word limit set forth in Pa. R.A.P. 2135(a)(1) and 2135(d).

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I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

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