
THE SUPREME COURT OF PENNSYLVANIA

NOs. 12 MAP 2023 and 15 MAP 2023

**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**

**BRIEF OF APPELLEE, MICHAEL DOWEARY, IN HIS CAPACITY AS
THE RECEIVER FOR THE CITY OF CHESTER**

Appeal from the Orders of the Commonwealth Court Order dated January 31, 2023 & February 14, 2023 at No. 336 MD 2020.

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. Counter Statement of Questions 3

III. Counter Statement of the Case..... 4

IV. Summary of the Argument..... 7

V. Argument..... 10

A. The Receiver’s Court Approved Modified Recovery Plan Did Not Amend the City’s Home Rule Charter. 10

B. The Receiver’s Act 47 Recovery Plan Did Not Change the Form of Local Government and is Permitted Under the City’s Charter and Administrative Code..... 13

C. The Administrative Duties of the Elected Officials May be Suspended by a Modification to an Act 47 Recovery Plan. 19

D. Act 47 Permits the Receiver to Seek Removal of Items from the Legislative Agenda that Interfere with the Recovery Plan and the Goals of Fiscal Recovery..... 24

E. The Modified Plan Does Not Require the City Solicitor to Disclose Privileged Information to an Act 47 Receiver 26

F. Whether the Confirmed Modifications to the Act 47 Recovery Plan are Arbitrary and Capricious or Wholly Inadequate to Alleviate the Fiscal Emergency in the City. 29

G. The General Assembly Did not Violate the Separation of Powers Doctrine by Delegating the Authority Over a Local Government to a Receiver Upon Confirmation by the Commonwealth Court..... 35

H. The Record Developed Over Nearly Three Years, and Established During the Plan Confirmation Hearing, Warrants the Suspension of the Elected Officials’ Permissive Administrative Duties..... 41

I. The Commonwealth Court Applied the Appropriate Remedy by Suspending the Administrative Duties of the Elected Officials..... 47

VI. CONCLUSION 49

TABLE OF AUTHORITIES

Cases

Appeal of Torbik v. Luzerne County, 696 A.2d 1141, 1145-46 (Pa. 1997)..... 43

Beckert v. Warren, 497 Pa. 137, 145 (1981)..... 38

Cary v. Bureau of Professional and Occupational Affairs, 153 A3d 1205, 1210
(Pa. Cmwlth. 2017)..... 32

City of Philadelphia v. Schweiker, 579 Pa. 591, 605, 858 A.2d 75, 84 (2004).. 1, 4

Commonwealth v. Coleman, 285 A.3d 599, 605 (Pa. 2022) 48

Commonwealth v. Harmar Coal Co., 452 Pa. 77, 306 A.2d 308, 316 (1973) 6

Commonwealth v. Howard, 257 A.3d 1217, 1222 (2021)..... 48

County of Fulton v. Secretary of the Commonwealth, J-46-2022 (April 19, 2023)
..... 28

DePaul v. Kauffman, 441 Pa. 386, 272 A.2d 500, 504 (1971)..... 6

Frazier v. Workers’ Comp. Appeal Bd. (Bayada Nurses, Inc.), 616 Pa. 592, 52 A.3d
241, 245 (2012)..... 48

Harrisburg School District v. Zogby, 828 A.2d 1079 (Pa. 2003)..... 13, 14

In Re City of Chester, Case No. 22-13032-amc..... 1

In re Petition to Recall Reese, 542 Pa. 114, 119, 665 A.2d 1162, 1164 (1995)..... 1

Lennox v. Clark, 372 Pa. 355 (1953) 36

<i>Local 22, Philadelphia Fire Fighter’s Union, Intl. Ass’n of Fire Fighters, et al. v. Comm., et al.</i> , 531 Pa. 334, 340 (1992)	35
<i>Ortiz v. Commonwealth</i> , 545 Pa. 279, 285, 681 A.2d 152, 156 (1996).....	4
<i>Pa. State Lodge of Frat. Ord. of Police v. Bailey</i> , 562 A.2d 985, 987 (Pa. Cmwlth. 1989), <i>aff’d sub nom. Pa. State Lodge of Frat. Ord. of Police v. Hafer</i> , 579. A.2d 1295 (Pa. 1990).....	18
<i>Robinson Twp., Washington County v. Comm.</i> , 623 Pa. 564, 722-23 (2013)	38
<i>Romutis v. Borough of Ellwood City</i> , 246 A.3d 361, 369 (Pa. Commw. Ct.), appeal denied, 262 A.3d 1248 (Pa. 2021)	18
<i>Pennsylvania Rest. & Lodging Ass’n v. City of Pittsburgh</i> , 653 Pa. 596, 619–20, 211 A.3d 810, 825 (2019).....	2, 6, 7
<i>Sweeney v. Tucker</i> , 473 Pa. 493, 507-08 (1977).....	37, 38
<i>Wilksburg Police Officers Ass’n v. Comm.</i> , 535 Pa. 425, 433 (1993).....	41

Statutes

1 Pa. C.S. § 1903.....	18
1 Pa. C.S. § 1921(a)	20
1 Pa. C.S. § 1921(b)	51
53 P.S. § 11701.102(b)(1)(i)	38
53 P.S. § 11701.102(b)(1)(iv).....	39
53 P.S. § 11701.102(b)(4).....	26

53 P.S. § 11701.102(b)(5).....	7, 13
53 P.S. § 11701.401	2
53 P.S. § 11701.702(a).....	39
53 P.S. § 11701.703	40
53 P.S. § 11701.703(b).....	37, 44
53 P.S. § 11701.704(a)(1).....	6, 11, 27, 28
53 P.S. § 11701.704(a)(1)(2)	27
53 P.S. § 11701.706(a).....	14
53 P.S. § 11701.706(a)(1).....	6
53 P.S. § 11701.706(b).....	20
53 P.S. § 11701.708	29, 42
53 P.S. § 11701.709	40, 42
53 P.S. § 41305	38
53 P.S. §11701.703 (b)(1)(i).....	32
53 P.S. §11701.703(e).....	31, 36, 50
53 P.S. §11701.704(a)(1)	21
53 P.S. §11701.706(a)(2).....	36
53 P.S. §1701.706(a)(8)	31
53 P.S. §11701.704(b)(1).....	18
53 P.S. § 11701.704(a).....	13, 33

53 Pa. C.S.A. § 11701.605.....	24
53 Pa. C.S.A. § 2902.....	16
53 Pa. C.S.A. § 2961.....	1, 5, 6

Other Authorities

Robert E. Woodside, Pennsylvania Constitutional Law 507 (1985).....	1
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Constitutional Provisions

PA. CONST. art. IX, § 2.....	1, 23
------------------------------	-------

I. INTRODUCTION

Pursuant to this Court’s March 29, 2023, Order exercising its King’s Bench jurisdiction in this case, Michael Doweary, in his capacity as Receiver for the City of Chester¹ (“City” or “Appellee” or “Receiver”), by and through undersigned counsel, hereby submits this brief addressing the issues raised by the Court. The decision of the Commonwealth Court should be affirmed.

The Appellants entire case is based on two fatal flaws:

1. Ignoring “one of the most basic precepts of governmental structure in this Commonwealth”; that is, that “local governments are creatures of the legislature from which they get their existence,” and that even though home rule municipalities have broad power, they cannot exercise power denied by the General Assembly, such as that found in Act 47. See Robert E. Woodside, *Pennsylvania Constitutional Law* 507 (1985); PA. CONST. art. IX, § 2; 53 Pa. C.S.A. §2961; *City of Philadelphia v. Schweiker*, 579 Pa. 591, 605, 858 A.2d 75, 84 (2004); *In re Petition to Recall Reese*, 542 Pa. 114, 119, 665 A.2d 1162, 1164 (1995).
2. Ignoring the controlling standard for any court reviewing the Receiver’s Plan, which is that the Court must approve the Receiver’s Plan unless the Appellants prove the Plan is arbitrary and capricious:

The court *shall confirm the [plan] modification unless it finds 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.***”

¹ The Receiver, on the City’s behalf, filed for chapter 9 bankruptcy in November 2022 pursuant to §706(9) of Act 47. The City has operated for 25 years as a “distressed” city under an Act 47 coordinator and the last 3 years under a “fiscal emergency” and Act 47 Receivership. The United States Bankruptcy Court for the Eastern District of Pennsylvania, after a hearing and briefing, approved the bankruptcy application on March 14, 2022. *In Re City of Chester*, Case No. 22-13032-amc, Eligibility Decision by Judge Chan, March 14, 2023, at 28 n.20.

53 P.S. § 11701.401.

Appellants' arguments require this Court to ignore clear decades-old constitutional law; eviscerate the legislative purpose and effectiveness of Act 47; and ignore basic rules of statutory interpretation and legal analysis posited by this Court for decades. *See Pennsylvania Rest. & Lodging Ass'n v. City of Pittsburgh*, 653 Pa. 596, 619–20, 211 A.3d 810, 825 (2019).

Receivership, as set forth in Chapter 7 of Act 47, is the last chance for the City of Chester (or any city in a declared fiscal emergency) to become viable again. If this Court does not affirm the Commonwealth Court's order and opinion, the Receiver will be left with no other meaningful options to fulfill his statutory responsibility of ensuring the provision of vital and necessary services to the 34,000 residents of the City of Chester. Chester's severe financial condition is beyond debate and the City is simply running out of time.

The Receiver has repeatedly attempted to work with the City elected officials to improve operations and implement basic city functions, even seeking a writ of mandamus from the Commonwealth Court last year to require City officials to comply with the June 2021 Plan.² Certain City officials simply ignored the Commonwealth Court's Order from that proceeding and continue to undermine the

² R. 119a - R.166a.

goals of Act 47 and the Receiver.³ The Receiver can mandate, and the Commonwealth Court can confirm, any initiative, policy, or procedure that it wants, but if the individuals responsible for implementing it are incapable of doing so or refuse to do so and face no repercussions, then nothing will ever change, and the Receiver will not be able to ensure the provision of vital and necessary services. Through the initiatives in the Plan Modification at issue in this action, the Receiver seeks to eliminate the impermissible interference by the City elected officials, and to create a baseline level of professional management required for the basic functioning of the City and the provision of vital and necessary services.

II. Counter Statement of Questions

The Receiver will address the issues required by the Court, but the Receiver maintains that all of the issues raised by Appellants are subsumed in the following two issues that control the outcome of this case:

1. Whether this Court will honor the well-established constitutional powers of the General Assembly found in Article IX, Sections 1 and 2, that control this case and were adopted in the Home Rule Charter Law, the City's own Charter, and Act 47 which constitutionally temporarily suspend certain powers of City elected officials inconsistent with Act 47 and the express remedial power provided the Receiver through Act 47 to ensure that the 34,000 residents of the City of Chester, which is in bankruptcy due to its operational and fiscal deficiencies, receive vital and necessary services.

³ R. 3616a.

Suggested Answer is in the affirmative.

2. Whether the Appellants have provided sufficient evidence to prove that the Commonwealth Court erred by not finding “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*” as required under 53 P.S. § 11701.401.

Suggested Answer is in the negative.

The Receiver will address these issues throughout this brief while addressing each of the issues raised by the Court.

III. Counter Statement of the Case

The fundamental principle that controls this case is that no Pennsylvania city is a sovereign, and such entities may only exercise the powers granted and defined by the General Assembly. PA. CONST. art. IX, § 2; *Ortiz v. Commonwealth*, 545 Pa. 279, 285, 681 A.2d 152, 156 (1996). Home rule municipalities have broader powers, but even home rule municipalities do not possess power “*denied by...the General Assembly*”. PA. CONST. art. IX, § 2; Home Rule Charter Law (“HRCL”) 53 Pa. C.S.A. §2961; *City of Philadelphia v. Schweiker*, 579 Pa. 591, 605, 858 A.2d 75, 84 (2004).

The “denied by the General Assembly” exception to the otherwise broad powers of home rule municipalities is found not only in the Pennsylvania

Constitution and the HRCL, cited above, but also *in the City's own Charter*, which was approved by its voters in 1980 and states, "Chester shall have and may exercise any powers and perform and function not denied by the Constitution of Pennsylvania, the General Assembly of the Commonwealth of Pennsylvania, or this Charter."⁴

Act 47 is an unequivocal mandate from the General Assembly that falls within the "denied by the General Assembly" exception. Through Chapter 7 of Act 47, the General Assembly utilized the foregoing constitutional principles and denied any home rule municipality, including the City, the power to act contrary to the Court approved Recovery Plan. 53 P.S. § 11701.704(a) (1) and (2). Act 47 could not be clearer in that it unequivocally "*suspend[s] the authority of elected and appointed [municipal] officials... to exercise power ... pursuant to law, **charter**, ordinance, rule or regulation,*" and "*imposes the 'mandatory duty' [on such officials] to undertake the acts set forth in the [judicially approved] recovery plan*". 53 P.S. § 11701.704(a) (1) and (2) (emphasis added). *See also* 53 P.S. § 11701.706(a)(1) and (7). Moreover, "a municipality which has adopted a home rule charter may exercise any powers and perform any function **not denied** by the Constitution of Pennsylvania, by statute or by its home rule charter . . ." 53 Pa. C.S.A. § 2961 (emphasis added). Simply put, due to the "denied by the General

⁴ R. 2453a at art. 1 § 102.

Assembly” exception and the language of Act 47, Appellants do not have the power that they seek in this appeal.

In Act 47, the General Assembly expressly stated that it was acting upon its police power to “maintain law and order and protect the health, safety and welfare of its citizens and to ensure compliance with this Act under Article IX of the Constitution of Pennsylvania” and it authorized the Governor to appoint a Receiver,⁵ to be approved by the Commonwealth Court, to act in the case of a fiscal emergency.⁶ 53 P.S. § 11701.102(b)(5); *see also* 53 P.S. § 11701.602 et. seq.; 53 P.S. § 11701.702 et. seq.

The crucial questions before this Court are not the red-herring arguments raised by Appellants. The only issue is whether this Court will ignore the foregoing well-established law and rule for Appellants or whether it will honor the Constitutional mandate in Article IX, Section 2 and the express remedial power provided to the Receiver through Act 47 to ensure that the 34,000 residents of the

⁵ The General Assembly passed act 47 pursuant to its “paramount right and duty to maintain law and order and protect and preserve the health, safety and welfare of its citizens and ensure compliance with [Act 47] under Article IX of the Pennsylvania Constitution”. 53 P.S. § 11701.102(b)(5). As this Court explained in *Pennsylvania Rest. & Lodging Ass'n v. City of Pittsburgh*, 653 Pa. 596, 607–08, 211 A.3d 810, 817 (2019), the Commonwealth’s “police power” is one of the “most essential powers of government” and has been defined by this Court as the power “to promote the public health, morals or safety and the general well-being of the Community,” *Commonwealth v. Harmar Coal Co.*, 452 Pa. 77, 306 A.2d 308, 316 (1973); *see DePaul v. Kauffman*, 441 Pa. 386, 272 A.2d 500, 504 (1971).

⁶ Receiver Doweary’s appointment was approved by the Commonwealth Court on June 22, 2020. His reappointment was approved by the Commonwealth Court on December 28, 2021.

City of Chester, which is in bankruptcy due to its operational and fiscal deficiencies, receive vital and necessary services by creating a baseline level of professional management.

IV. Summary of the Argument

The duplicitous nature of Appellants’ argument is clear. On one hand, they cite protecting “the will of the voters” and the purported right to “local governance”, but their arguments ignore the City’s own Charter and do the exact opposite. That Charter, as approved by the voters in 1980, contains the same “denied by the General Assembly” exception found in the Constitution and the HRCL and it limits the City’s power accordingly. *See* Chester Home Rule Charter, Article 1, § 102.⁷ The Appellants ignore that express limitation.

Act 47 applies to every municipality in the Commonwealth and limits the powers of any city or municipality when it falls under the mandate of that law. Since the Receivership provisions of Act 47 apply to the City, City elected officials do not have any power denied to them by the General Assembly through those provisions.

Appellants argue that the foregoing decades-old constitutional principles were “turned on their head” in *Pennsylvania Rest. & Lodging Ass’n v. City of Pittsburgh*, 653 Pa. 596, 619–20, 211 A.3d 810, 825 (2019). That case, however,

⁷ R. 2453a.

stands for the exact opposite and endorses the Receiver’s argument in this case. The Court stated that home rule municipalities have broad power to legislate without express legislative authority; however, that Court emphasized that even home rule municipalities cannot exercise any powers *DENIED* by the General Assembly. It thus confirmed the “denied by the General Assembly” exception and the Receiver’s theory in this case.

The fundamental issue in this case is whether the foregoing decades old legal constitutional principles will be honored or kicked aside to the detriment of City residents. A decision in favor of the Appellants would do just that, which is something that this Court has repeatedly said it is not willing to do. *Com., Off. of Atty. Gen. ex rel. Corbett*, 956 A.2d at 1107. When read together, it is clear that Act 47 falls within the “denied by the General Assembly” exception to the broad powers of home rule and combined deny Appellants the relief they seek in this case.⁸

The need for Act 47 and the initiatives in the Receiver’s approved plan are made perfectly clear by this case where City elected officials are serving as day-

⁸ This long-standing precedent leads to only one conclusion, which was recently reaffirmed by the United States Bankruptcy Court for the Eastern District of Pennsylvania in the bankruptcy matter: Act 47 falls within the “denied by the General Assembly” exception to Article IX, Section 2 and 53 Pa. C.S.A. § 2961 and the City’s Charter. *In Re City of Chester*, Case No. 22-13032-amc, Eligibility Decision by Judge Chan, March 14, 2023, at 28 n.20. Judge Chan wrote, “[t]he Elected Officials’ power to govern and make decisions for the City, therefore, is not an absolute power and is specifically limited by Act 47”. *Id.*

to-day managers of the City but have been judicially determined to be incapable of doing so and to have intentionally obstructed the Receiver's efforts.⁹ Appellants have been judicially found to have engaged in a pattern of "widespread nepotism," "intentionally turning their back on wrongdoing", engaging in obstructive and uncooperative conduct not in the best interests of the City, and the assignment of positions to people "based on loyalty to City Council and the Mayor's own inclination in a particular year, rather than on the person's actual qualifications."¹⁰

If there was ever a need for the provisions of Chapter 7 of Act 47, discussed below, it is this case. Certain elected officials have incurred nearly \$750,000 in penalties to the IRS,¹¹ neglected to pay more than \$37,000,000 to the police and fire and non-uniformed employee pension plans,¹² the benefit plans for the uniformed employees who risk life and limb to protect the City; and sent \$400,000 to the digital abyss hiding that fact for close to four months in flagrant violation of a Court order.¹³ The foregoing are not just "mistakes"; they reflect a pattern of total neglect and recklessness.

⁹ R. 1328a - R. 1329a; January 31, 2023, Order, No. 336 M.D. 2020, at 22-23 and n. 18 (Judge Ceisler).

¹⁰ R. 1328a - R. 1329a; January 31, 2023, Order, No. 336 M.D. 2020, at 22-23 and n. 18 (Judge Ceisler).

¹¹ R. 3816a.

¹² R. 3541a.

¹³ R. 3271a - 3273a.

The General Assembly was prophetic in anticipating the conflicts between an Act 47 Receiver and elected officials present in this case and clearly drafting Act 47 to deal with that situation. Relying upon its constitutional authority in Article IX §§ 1 and 2, the General Assembly chose the only viable option to empower the Receiver by “suspend[ing] the authority of elected and appointed [municipal] officials,” and “impos[ing] a ‘mandatory duty’ [on such officials] to undertake the acts set forth in the [judicially approved] recovery plan.” 53 P.S. § 11701.704(a) (1) and (2).

Granting Appellants’ argument would ignore the General Assembly’s mandate and subvert the legislative purpose of Act 47 to the detriment of Chester residents. Those residents democratically approved the City’s Home Rule Charter which contains the very same “except as denied by the General Assembly” exception.

V. Argument

A. The Receiver’s Court Approved Modified Recovery Plan Did Not Amend the City’s Home Rule Charter.

Appellants contend that the Commonwealth Court effectively modified the City’s Home Rule Charter by approving a Recovery Plan initiative that allows the Receiver, instead of Council, to approve the hiring of non-residents when the City is unable to employ a qualified resident. [Section 11.9-903(c) of the Charter]. This is the sole Plan initiative challenged by the City as amending its Home Rule

Charter. As envisioned by operation of Act 47 and Article IX, section 2 of the Pennsylvania Constitution, neither the Receiver's Plan nor the challenged initiative amend the City's Home Rule Charter.

The Receiver's ability to ensure that Chester provides vital and necessary services to its residents is directly related to his ability to ensure that the City has qualified personnel to provide those services. The need to employ skilled professionals to oversee and work within the City's departments is clearly detailed in the Commonwealth Court's opinion. The three-day confirmation hearings clearly established the City's long and embarrassing history of nepotism, ignoring wrongdoing of its employees, and overlooking significant issues such as pension spiking and the City's multi-year default on its payments to the pension plan which contributed to its financial distress.¹⁴ The City has been unable to "reliably provide basic vital and necessary services to its residents." *Id.* As the Commonwealth Court found, the City departments are led by unqualified and inexperienced individuals who undertake actions counter to the goals of financial recovery and act to impede the Receiver's ability to fulfill his duties.¹⁵

The framework of Act 47 vis-à-vis the "denied by the General Assembly" exception and the language of § 11701.704(a)(1) and (2) and §11701.706(a)(1) and

¹⁴ R. 1345a; January 31, 2023, Order, No. 336 M.D. 2020, at 39(Judge Ceisler).

¹⁵ R. 1345a; January 31, 2023, Order, No. 336 M.D. 2020, at 39(Judge Ceisler).

(7) was not a legislative coincidence. The General Assembly anticipated that obstructive conduct, such as that which occurred here, was possible and drafted Act 47 with Article IX of the Pennsylvania Constitution in mind.¹⁶ 53 P.S. § 11701.102(b)(5). The symmetry of Act 47, Article IX, Section 2, the HRCL and the City’s Charter reveals adept legislative prowess. Act 47 falls seamlessly within the “denied by the General Assembly” exception and provides the Receiver with necessary powers to act in the best interest of the City. The Receiver’s Act 47 powers, as confirmed in the Court-approved recovery plan, temporarily replace the authority of the elected officials under the laws cited above for as long as the Recovery Plan initiatives remain in effect. All provisions of the City’s Home Rule Charter not impacted by a Recovery Plan remain in effect. Once the City exits Receivership or a Plan initiative expires, all of the provisions of the City’s Home Rule Charter that were suspended under the Recovery Plan will become effective again. Until then, the Appellants’ powers are “suspended” to the extent the elected officials seek to act in a manner inconsistent with the Plan, and the Appellants have a “mandatory duty” “to implement the recovery plan.” 53 P.S. 11701.704(a)(1) and (2) (emphasis added); 53 P.S. § 11701.706(a)(1) and (7).

¹⁶ Appellants’ argument suggests the existence of natural inalienable right for any municipality, which is simply incorrect. *Commonwealth, Office of Atty. Gen (Corbett) v. East Brunswick Twp.*, 956 1100, 1109 (Pa. Commw. 2008) (a township is not a citizen, and the constitution does not recognize or protect the rights of local governments from encroachment by state government.)

Due to the “denied by the General Assembly” exception, and the General Assembly’s mandates in Act 47, the approved Recovery Plan supersedes the powers of the elected and appointed officials while the Plan is in place as envisioned by Article IX, Section 2 and no voter referendum is necessary. Indeed, Act 47 is clear that powers provided to elected officials “pursuant to ... charter...” are suspended when the Commonwealth Court approves a recovery plan or modification thereto. 53 P.S. § 11701.704(a)(2).

B. The Receiver’s Act 47 Recovery Plan Did Not Change the Form of Local Government and is Permitted Under the City’s Charter and Administrative Code.

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.

In this regard, the Pennsylvania Supreme Court’s decision in *Harrisburg School District v. Zogby*, 828 A.2d 1079 (Pa. 2003) is instructive. In *Zogby*, this Court addressed whether the Educational Empowerment Act (EEA), which allowed mayors of certain medium-sized cities to assume additional power and

control of failing school districts, changed Harrisburg's form of government¹⁷ in violation of the Commonwealth of Pennsylvania's Constitution and the HRCL.

The Court adopted Webster Collegiate Dictionary's 'definition of "form" as "the organization, or essential character of something, as opposed to its matter"' and determined that the EEA's addition of such duties was not inconsistent with the basic structure and powers of the office of the mayor or the other branches of city government, and thus, did not alter its "form" even though the EEA authorized an additional grant of power to the mayor. *Zogby* at 1092.

None of the factors that make up the "form of government" as defined by the *Zogby* Court have been impacted by the Commonwealth Court's Orders or the Receiver's Plan. 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 has not changed in any way. The HRCL, under which the City adopted its charter, expressly defines the term "form of government" as to the governmental structure – e.g., Home Rule or one of the Optional Plans – that city or municipality selects under the HRCL. 53 Pa. C.S.A. §§ 2902, 2911, 2918, 2925, 2926. That selection is the City's "***form of government***". *Id.*

¹⁷ In *Zogby*, Harrisburg was an Optional form of government under the HRCL, and not a charter form of government as the City of Chester in this case. That distinction should not impact the application of the Court's reasoning in this case.

Chester adopted the Home Rule “form of government” in 1980 when its citizens approved the Charter, and the City has been operating under that “form of government” since that time. The City’s government is organized with an elected Mayor and a five-member City Council, one of whom is the Mayor.¹⁸ The Mayor is a member of Council with full voting rights.¹⁹ Council members are elected from the city at large to serve for four-year staggered terms. The Council forms the legislative branch of the City government, and the Mayor does not have a right to veto the Council’s legislation. Council’s legislative powers are defined in the City Charter.²⁰ None of the foregoing components that make up the Receiver’s approved Recovery Plan have changed the City’s form of government.

In fact, the “organization, placement or relationship of the basic elements” and “the structure, organization or essential character of” the City’s government—that is, the aspects of the City’s Charter that make up its “form of government” as defined in *Zogby* – have not been impacted at all. They all still exist as they were prior to the Commonwealth Court’s January 31, 2023, approval of the Recovery Plan.

This “form of government” issue raised by the Appellants is a red herring, a distraction to divert attention from the constitutional powers of the General

¹⁸ R. 2454a, City Charter, at §201.

¹⁹ R. 2454a, City Charter, at §201.

²⁰ R. 2457a, City Charter, at §215.

Assembly over non-sovereign municipalities. It is based on Appellants' continued disregard of the "denied by the General Assembly" exception and how Act 47 works seamlessly with that exception to render any such argument meritless.²¹ The seamless quilt of legislative foresight to deal with this precise situation by using the "denied by the General Assembly" exception in Article IX was discussed above and is incorporated herein by reference. In a nutshell, the language of § 11701.704(a)(1) and (2) and §11701.706(a)(1) and (7) was not a legislative coincidence, but an intentional legislative mandate to deny the power of city elected officials in a declared fiscal emergency to act contrary to an approved Recovery Plan all within the framework of the Pennsylvania Constitution.

The City's argument to the contrary is also based on a misreading of Section 704(b)(1) of Act 47. That provision, which provides clear direction to courts reviewing any confirmed recovery plan or modification thereto, actually confirms the Receiver's argument and his powers under Act 47 and the Pennsylvania Constitution. By operation of Act 47 and the "denied by the General Assembly" exception, since the Receiver and his recovery plan have been approved by the Commonwealth Court, the General Assembly has denied the City elected officials the power to act inconsistently with the provisions of that court approved plan. The

²¹ To find otherwise would eviscerate Chapter 7 of Act 47 as any suspension of elected official powers would be challenged as a change in the form of government.

language used by the General Assembly in §704(b) of Act 47 is another example of thoughtful legislative drafting and does not change the City’s “form of government”. Instead, §704(b)(1) actually preempts any such argument by stating that the provisions and implementation of a confirmed recovery plan “shall not be construed” as a change in the form of government.²² 53 P.S. §704(b)(1).

The use of the word “construed” as opposed to the words “shall not” or “prohibited from”, particularly when juxtaposed with § 11701.704 (a) (1) and (2), confirms the legislature’s awareness and intent that an approved recovery plan will impact the powers and duties of elected officials during the pendency of the Plan. Any other interpretation of this clear language would lead to an absurd result by rendering the clear legislative mandate of 11701.704 (a)(1) and (2) to be illusory and meaningless surplusage.

When construing statutory language, “this Court must assume that the legislature intended that every word of a given statute would have effect and that the legislature uses words in their standard and accepted sense”. See *Pa. State Lodge of Frat. Ord. of Police v. Bailey*, 562 A.2d 985, 987 (Pa. Cmwlth. 1989),

²² Under the Pennsylvania Statutory Construction Act, “[w]ords and phrases shall be construed according to rules of grammar and according to their common and approved usage....” 1 Pa. C.S. § 1903. The common definition of “construe” is to analyze the arrangement and connection of words (in a sentence or sentence part) or to understand or explain the sense or intention of usually in a particular way or with respect to a given set of circumstances. <https://www.merriam-webster.com/dictionary/construe>.

aff'd sub nom. Pa. State Lodge of Frat. Ord. of Police v. Hafer, 579 A.2d 1295 (Pa. 1990). In interpreting a statute, particularly one as clear and unambiguous as Act 47, “we must be mindful of what the statute says *and* what it does not say”. *Romutis v. Borough of Ellwood City*, 246 A.3d 361, 369 (Pa. Commw. Ct.), appeal denied, 262 A.3d 1248 (Pa. 2021) (citing *Hanaway v. Parkesburg Grp., LP*, 641 Pa. 367, 168 A.3d 146, 154 (2017)). *See also* 1 Pa. C.S. § 1921(a).

In this case, all powers of the City emanate from and can be denied by the General Assembly, and in §11701.704(a) the legislature clearly suspended the power of elected officials with respect to the powers provided the Receiver in the Plan. Section 11701.704(b)(2) confirms that a court-confirmed recovery plan “shall not be construed” to be a change in the form of government, regardless of what powers are suspended.²³ There is no other way to interpret the clear language of Act 47. There certainly is no way to do so while still honoring the legislative intent and to give effect to all of its provisions. *See* 1 Pa. C.S. § 1921(a) (“Every statute shall be construed, if possible, to give effect to all its provisions.”). Read together, §704 (a) and (b) preclude any argument that the mere suspension of an elected official’s administrative duties somehow amounts to the change in a form

²³ In such cases, the Commonwealth Court has already determined that the plan provision in question meets the standard of review in 53 P.S. § 11701.704.

of government. The impact of §704(b) of Act 47 is thus directly contrary to what the Appellants suggest.

Further, the General Assembly knew how to limit an Act 47 Receiver's powers if it intended to do so. In § 706(b) of Act 47, the General Assembly expressly listed the "prohibitions" that apply to the Receiver and listed the actions that the Receiver cannot take. 53 P.S. § 11701.706(b). The General Assembly also listed specific "restrictions" of the Receiver's recovery plan in § 703(c) of Act 47. It is telling that such language is absent from §704(b)(1) or (2).

C. The Administrative Duties of the Elected Officials May be Suspended by a Modification to an Act 47 Recovery Plan.

The Appellants also challenge the approved modified plan initiative that allows the Receiver to appoint qualified professionals as department heads. Characterizing this initiative as "suspending the administrative duties of Council members", the Appellants assert that this initiative amounts to "impeachment" under Article VI, Section 7 of the Constitution. This argument is nothing but hyperbole and misplaced rhetoric. Article VI, section 7 of the Constitution restricts how elected officials are "impeached" or "removed" from office. The Receiver's modified plan does neither.²⁴

²⁴ Receiver is not looking to take over day-to-day operations and run the City himself. Rather, he is looking to suspend duties so that he can ensure professional management is in place to oversee day-to-day operations and ensure the provision of vital and necessary services. As will be discussed later, he cannot do so without the plan modifications approved by the Commonwealth Court.

As noted above, the Appellants are all still in office and have all powers of such office, except to the point those powers conflict with a plan initiative. That is the result of and envisioned by the Pennsylvania Constitution, Act 47 and the legislative intent as discussed above. The Plan, through Act 47, only temporarily suspends some administrative duties, which *do not* emanate from the Charter, but rather from the City's Administrative Code. Such duties, as stated in Act 47, regardless of the source, such as "pursuant to any law, *charter*, rule or regulation," are "suspended" to the extent they "interfere with the powers granted the receiver or the goals of the plan." 53 P.S. §11701.704(a)(1) and (2). (emphasis added).

The Appellants also argue that §704(a)(1) and (2) must be construed narrowly to avoid conflict with Article VI, section 7 of the Constitution. However, there is no reason to construe §704(a)(1) and (2) any more narrowly than it is written. The language is clear and does not conflict with any other statutory or constitutional provision, and the Appellants fail to highlight such a conflict. Act 47 was passed consistent with the Commonwealth's police power, and it falls neatly within the "unless denied by the General" exception to Article IX, § 2, Pennsylvania Constitution, the HRCL, and §102 of the City's Charter. Those arguments were also addressed previously and are incorporated herein by reference. The suspension of duties also only applies while the Plan is in effect.

It is also illuminating that the Appellants rely upon a portion of one brief provision in the lengthy intent provision of Act 47 to argue that this Court should ignore or rewrite the clear language of §704(a)(1) and (2). In doing so, the Appellants boldly ignore that the different sections of the intent provision apply to the different chapters of Act 47, e.g., early intervention, a distressed municipality operating under a coordinator, the EAP developed by the Governor and DCED, receivership and disincorporation. The provisions of §102 that apply to Receivership state that the General Assembly enacted Act 47 to provide “for the exercise of the Commonwealth’s sovereign and plenary police power in emergency fiscal conditions health, safety and welfare” of residents of a municipality’s citizens when local officials are unwilling or unable to accept a solvency plan developed for the benefit of the municipality” or to provide “for the exercise of the Commonwealth's sovereign and plenary power to establish and *abolish local government units* and provide essential services in areas of this Commonwealth in which the fiscal integrity of existing local government units” cannot be sustained. 53 P.S. §11701.702(b)(1)(iv) and (v) (emphasis added). Such language clearly establishes that, when a city is in a fiscal emergency, the General Assembly placed saving cities and keeping them viable over “local governance”.

Appellants’ reference to the City’s right to “self-governance” is equally meritless. Such a right exists only to the extent provided by the General Assembly

as discussed above, and the constitution does not provide the City with any such rights. PA. CONST. art. IX, § 2; *Commonwealth, Office of Atty. Gen (Corbett) v. East Brunswick Twp.*, 956 1100, 1109 (Pa. Commw. 2008) (a township is not a citizen, and the constitution does not recognize or protect the rights of local governments from encroachment by state government.) That argument also suggests that the Receiver’s Plan initiatives remove any “self-governance rights of the municipality”. None of the Appellants have been removed from office or impeached as discussed above.²⁵ [*See, supra*, at 9-12, 16-21, and 23.]

Appellants reliance on §11701.605 of Act 47 is equally meritless. That section has had no application to this case since the Receiver was approved under Chapter 7 of Act 47. That section allows elected officials to 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 Pa. C.S.A. § 11701.605 (emphasis added). Since the Receiver was appointed and his first Plan was approved in 2020, the emergency action plan (EAP) has been replaced by the Receiver’s Recovery Plan, as stated in §704(a)(3) of Act 47. In any event, §605 along with §704(a) only further confirm that whether it be the Secretary of DCED’s EAP formulated under Chapter 6 of

²⁵ To the extent the Appellants are suggesting they are raising the issues of a city resident, they lack standing to do so. See generally *Office of Governor v. Donohue*, 92 A.3d 1223, 1229 (Pa. 2014) (citations omitted).

Act 47 or the Receiver's Recovery Plan under Chapter 7 of the Act, the powers of city officials are suspended to the extent they are not consistent with either document.

In their entire brief, Appellants fail to recognize that suspending Appellants from certain administrative 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.²⁶ The Appellants also ignore that the City's elected officials are not elected or required to serve as department heads, and when electing a council member, the voter has no idea whether the person for whom they are voting will even be assigned as a department head or have any administrative duties, let alone know what administrative duties might be assigned. The assignment of such duties is discretionary and is arbitrarily made each year regardless of qualifications or skill.²⁷ There are no job or qualification prerequisites for any such assignment. The assignment of such duties is optional and need not be done at all.²⁸

The City's existing Administrative Code already envisions a similar arrangement to the one contained in the Plan. Article 112 of the City's

²⁶ R. 1345a, January 31, 2023, Order, No. 336 M.D. 2020, at 39(Judge Ceisler).

²⁷ R. 4031a - R. 4035a.

²⁸ R. 2461a, City Charter, §601 and §603.

Administrative Code identifies a Chief of Staff position.²⁹ The powers and duties of the Chief of Staff position listed in the Administrative Code are broad and deal with respect to the general management of the City, with oversight over the City's operations.³⁰

D. Act 47 Permits the Receiver to Seek Removal of Items from the Legislative Agenda that Interfere with the Recovery Plan and the Goals of Fiscal Recovery.

Through Act 47, the General Assembly intended to address the “sustained failure of a municipality to enact or implement a fiscal plan to adequately address or prevent insolvency after repeated opportunities to do so...a breakdown in the function of municipal government...a dereliction of its elected officials' paramount public duty to safeguard the health, safety and welfare of its citizens; and ...a threat to the fiscal stability of neighboring communities.” 53 P.S. § 11701.102(b)(4). The General Assembly recognized that it cannot allow a failing municipality in a fiscal emergency to continue to make the same mistakes repeatedly to worsen the situation by governing in an irresponsible manner at the risk of the health, safety, and welfare of its citizens. 53 P.S. § 11701.102(b)(4). As discussed *supra*, any power denied by the legislature through Act 47 is power that the City does not have

²⁹ R. 2493a - 2495a, City Administrative Code, Section 112.

³⁰ R. 2494a - 2495a, City Administrative Code, §112.06

under Article IX of the Constitution and the HRCL. The citizens of Chester did the same in passing the City's Charter.

Thus, as long as the Plan is approved by the Court under section 703(e) of Act 47, which occurred in this case, the General Assembly granted an Act 47 Receiver broad powers to assist the City in its financial recovery and suspended the authority of the City's elected officials. 53 P.S. § 11701.704(a)(1)(2).

The Receiver's ability under the approved Recovery Plan to direct the City to remove items from the Council or Board agenda thus does not operate as an advance veto and does not give the Receiver an "unfettered right to block legislative action" as alleged by the City. Brief of Appellants at p. 33. There is no record testimony that the Receiver has requested removal of mundane ordinances that have no impact on the City's fiscal recovery. Moreover, if that were to happen, the Receiver's authority to do so is express under Act 47 and the city officials have no power to act to the contrary, which is consistent with and envisioned by the "denied by the General Assembly" exception to Article IX, section 2 of the Constitution, the HRCL and the City's Charter.

The record before the Commonwealth Court established that the City has an history of adding agenda items for consideration by Council that can potentially impact the fiscal recovery and harm the operations of the government—and doing

so at the last minute.³¹ The City retains its right to pass ordinances, as it has regularly done since the Receiver's appointment in June 2020, but the Plan gives the Receiver to remove items from the legislative agenda to the extent any proposed legislation would interfere with the Plan. 53 P.S. § 11701.704(a)(1),(2).

The Receiver prefers to work collaboratively with the elected officials and his request for the removal of legislative agenda items is limited to any resolution or ordinance that will impact the provision of vital and necessary services and is meant to avoid the need to seek a mandamus order from the Commonwealth Court. If Appellants feel that the Receiver's direction to do so is contrary to the Plan or Act 47, they can seek relief under section 709(b) of Act 47 which they have never done.

E. The Modified Plan Does Not Require the City Solicitor to Disclose Privileged Information to an Act 47 Receiver

The confirmed initiative at issue in this appeal states:

Should the City Solicitor become aware of a situation where a City official or employee is not complying with an order of this Court or with a confirmed recovery plan or plan modification, he shall immediately instruct the City official or employ[ee] to comply and he shall immediately inform the Receiver.

R. 1564a.

³¹ R. 3487a - R. 3496a.

This Receiver is clearly not seeking disclosure of “all communications between an attorney and client to an opposing party” as alleged by Appellants. The Receiver is not an “opposing party” under Act 47 or the Recovery Plan, and he only seeks notice from the Solicitor whenever an elected official or City employee fails to comply with the confirmed plan initiatives or a court order. The scope of disclosure is limited to informing the Receiver of willing noncompliance with Act 47, or a court order, which is permitted by Rule 1.6(c)(8) of the Pennsylvania Rules of Professional Conduct.

Rule 1.6(c)(8), states “[a] lawyer may reveal such information to the extent that the lawyer reasonably believes necessary to comply with other law or court order”. Act 47 empowers the Receiver to order the elected officials to comply with the Plan and he is permitted to know when the City officials or employees refuse to do so. 53 P.S. 11701.708.

The elected officials have a history of willingly failing to comply with an order of the Receiver under section 708, and an order of the Commonwealth Court. Both acts of misconduct must be addressed, and the Receiver’s only recourse is through the Plan. The Commonwealth Court’s approval of the initiative does not guarantee compliance by the elected officials, but it will serve as a basis for any future mandamus action by the Receiver to enforce the Plan.

The record shows that the elected officials have willingly failed to follow the Plan and at least one order of the Commonwealth Court,³² which interferes with the Receiver's recovery efforts. As this Court recently explained,

[a]s an independent and coequal branch of the Commonwealth's government, the judiciary is as entitled to strict adherence to its mandates as the General Assembly or the executive branch. When an individual or private or public entity deliberately violates a court order, such violation constitutes a clear and present danger to the effective function of the judiciary, the orderly administration of justice, and the rule of law. When such violation passes without consequences equal to its gravity, we can anticipate violations of increasing frequency".

County of Fulton v. Secretary of the Commonwealth, J-46-2022 (April 19, 2023).

The Receiver agrees with this Court that "[t]here can be no orderly and effective administration of justice if parties to litigation do not comply with court orders". *County of Fulton v. Secretary of the Commonwealth*, J-46-2022 (April 19, 2023). The City's failure to comply with the law and court order permits the Solicitor's limited disclosure under Rule 1.6(c)(8).

Moreover, the City Solicitor is a seasoned attorney who knows the parameters of attorney-client privilege and has yet to cross the line in this regard in nearly three years since the Receiver was appointed. The City desperately wants to paint itself as adverse to the Receiver but that was not the intent of Act 47 and

³² R. 4149a-4150a.

the City's elected officials are unnecessarily placing themselves in this adversarial position.³³ But for certain elected officials' ongoing obstruction, there would be no need for the Receiver's request.

F. Whether the Confirmed Modifications to the Act 47 Recovery Plan are Arbitrary and Capricious or Wholly Inadequate to Alleviate the Fiscal Emergency in the City.

Appellants assert the misleading argument that the Receiver's plan can only be approved if it is "necessary" and relates to achieving financial stability, and that any initiative not connected to finances is not within the Receiver's powers. This argument and issue, as stated by Appellants, is a gross misreading of Act 47 and completely meritless.

The standard for the Commonwealth Court's approval of a recovery plan is found in section 703(e) of Act 47 and is "highly deferential."³⁴ 53 P.S. §1701.703(e). Section 703(e) clearly defines the Court's very limited power and scope of review when reviewing the Receiver's proposed Modified Plan:

The Court **shall** confirm the modification *unless it finds 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.*

53 P.S. §11701.703(e) (emphasis added).

³³ Act 47 also gives the Receiver the right to sit in executive sessions. 53 P.S. §1701.706(a)(8).

³⁴ R. 84a. - R. 91a.

In its mandate to the Receiver to ensure the provision of vital and necessary services, the General Assembly clearly tasked the Receiver with addressing City operations, not just finances. Under Act 47, one of the Receiver’s key duties through the Recovery Plan is to ensure “continued provision of vital and necessary services”. 53 P.S. §11701.703 (b)(1)(i). Act 47 defines “vital and necessary services” as:

“[b]asic and fundamental municipal services, including any of the following:

- (1) Police and fire services.
- (2) Ambulance and rescue services.
- (3) Water supply and distribution.
- (4) Wastewater services.
- (5) Refuse collection and disposal.
- (6) Snow removal.
- (7) Payroll and pension obligations.
- (8) Fulfillment of payment of debt obligations or any other financial obligations”.

53 P.S. §11701.701.

The General Assembly’s decision not to limit the Receiver’s powers to a purely financial role was necessary to allow the receivership provisions of Act 47 to be effective and recognizes that municipal finances and operations are inextricably intertwined. A municipality which is in financial distress, particularly one that has filed for bankruptcy, needs to manage its operations in a way that does more with less. Furthermore, providing vital and necessary services is not just a

function of money. It requires ensuring that policies, personnel, and technology are competent to address the tasks.

It would make little sense for the General Assembly to task the Receiver with ensuring that a municipality provides vital and necessary services but prohibit the Receiver from actually effectuating that result. In fact, the General Assembly went so far as to impose duties and obligations on elected officials to implement the provisions of an approved plan and to suspend the authority of elected officials if their powers interfered with the receiver's powers or the goals of the recovery plan. Section 704(a) of Act 47 states in relevant part:

(a) Effect of confirmation - - The confirmation of the recovery plan and any modification to the receiver's plan under section 703 shall have the effect of:

(1) Imposing on the elected and appointed officials of the distressed municipality or an authority a mandatory duty to undertake the acts set forth in the recovery plan;

(2) Suspending the authority of the elected and appointed officials of the distressed municipality or an authority to exercise power on behalf of the distressed municipality or authority pursuant to law, charter, ordinance, rule or regulation 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). The language affecting the powers of elected and appointed officials in Section 704(a) is very broad and not limited solely to financial as opposed to operational areas.

Many initiatives that the Receiver includes in this Plan Modification seek to establish the basic building blocks of a functional city government. To provide “external” vital and necessary services to its residents, a City must have a baseline foundation of core “internal” vital and necessary services such as human resources, finance, procurement, and legal. Chester does not have this baseline foundation which is materially impacting the Receiver’s ability to ensure the provision of “external” vital and necessary services. Operationally, the City cannot reliably provide basic vital and necessary services to its residents, and it does not have the basic internal financial and personnel capabilities and policies to reliably provide basic governmental functions to its employees.

Pennsylvania courts have defined an action as “arbitrary and capricious where it is *unsupportable* on any rational basis because there is *no evidence* upon which the action may be logically based”. *Cary v. Bureau of Professional and Occupational Affairs*, 153 A3d 1205, 1210 (Pa. Cmwlth. 2017) (quoting *Lynch v. Urban Redevelopment Authority of Pittsburgh*, 496 A.2d 1331, 1335 (1985)). It is beyond dispute that the record in this case reveals that the Receiver’s Plan is in no way arbitrary and capricious. In fact, even if the correct standard was the “necessary” standard as disingenuously asserted by Appellants, it would be satisfied.

The burden of producing *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*” is on the party opposing the Receiver’s modified plan, here the Appellants, and they have completely failed in meeting that burden and do not even appear to have tried. There is absolutely no evidence at all produced by Appellants on that point, let alone any evidence that meets that “highly deferential” standard.

Instead, Appellants simply argue based on the wrong standard and interpretation of Act 47, baselessly arguing that the Plan can only be approved if is “necessary”. This argument barely survives its statement and is just one of many examples of their selecting random words in Act 47, the Constitution and other legislation out of context and ignoring the other applicable provisions of the law. The scope of review is stated in section 703(e) is clear. The Commonwealth Court correctly applied that scope of review in its Order confirming and approving the Modified Plan. There is no “necessary” requirement.

The words “as necessary” to which Appellants desperately cling appear in 706(a)(2) of the Act which defines the broad powers of the Receiver. 53 P.S. §11701.706(a)(2). That section provides that the Receiver’s power to “modify the recovery plan *as necessary* to achieve the financial stability of the distressed municipality and authorities *in accordance with section 703*”. *Id.* As highlighted

above, §706(e) provides the standard for approving a plan modification by the Receiver, and utilizes the “arbitrary, capricious or wholly inadequate...” standard which the Appellants ignore because they know they cannot produce any evidence to satisfy that standard.

In contrast, the reference to “as necessary” in §706(a)(2) relates to the power and decision of the Receiver to modify a plan, with court approval under the standard in §706(e), as he deems or determines to be necessary. It is in no way related to the Court’s scope of review as stated in Section 703(e). The General Assembly was very clear with respect to the “highly deferential” scope of review that actually mandates approval of a plan **unless** the party opposing the plan produces “clear and convincing evidence” that the proposed modified recovery plan “*is arbitrary, capricious or wholly inadequate to alleviate the fiscal emergency in the distressed municipality.*” 53 P.S. §11701.703(e).

It is up to the Receiver to determine that the modification is necessary to achieve financial stability “in accordance with section 703”. Section 703(b) provides that any plan must provide for the continued provision of vital and necessary services and the payment of financial obligations, and the timely deposit of payments to pensions”. 53 P.S. §11701.703(b). The fact that §706(a)(2) references “vital and necessary services,” which includes “basic municipal services including...police and fire...Ambulance and rescue...water supply and

distribution...wastewater services...refuse collection and disposal...snow removal...payroll and pension obligations...fulfillment of payment of debt obligations and any other financial obligation.” 53 P.S. §11701.701. That definition clearly shows the Receiver’s plan must provide for more than just financial issues. The Appellants argument to the contrary can only be categorized as nonserious.

G. The General Assembly Did not Violate the Separation of Powers Doctrine by Delegating the Authority Over a Local Government to a Receiver Upon Confirmation by the Commonwealth Court.

To question whether the separation of powers doctrine permits the General Assembly to empower a receiver to exercise control over a local government, is to question the constitutionality of Act 47. This Court has repeatedly stated that its review of such issues is “based upon the strong presumption of constitutionality which accompanies any duly enacted legislation”. *Local 22, Philadelphia Fire Fighter’s Union, Intl. Ass’n of Fire Fighters, et al. v. Comm., et al.*, 531 Pa. 334, 340 (1992). No legislation will be deemed unconstitutional “unless it clearly, plainly and palpably violates some specific mandate or prohibition of the constitution”. *Id.* (citing *Comm. v. Parker White Metal Co.*, 512 Pa. 74, 82 (1986)).

The General Assembly is authorized to exercise its police power over local governments in the Commonwealth through the enactment of statutes, such as Act 47, and municipalities, such as the City of Chester, are prohibited from exercising

powers contrary to acts of the General Assembly. 53 P.S. § 41305; see also *Lennox v. Clark*, 372 Pa. 355, 378 (1953) (the limitations of power concerning laws in relation to substantive matters of State-wide concern, such as the health, safety, security, and general welfare of all the inhabitants of the state). Act 47 is of state-wide importance as it was enacted to address the needs of municipalities in financial distress. 53 P.S. § 11701.102(b)(1)(i), (iv). Act 47 sets forth “procedures to provide municipalities showing early indicators of financial distress with training and technical and financial assistance” and “provide[s] for the exercise of the Commonwealth's sovereign and plenary police power in emergency fiscal conditions to protect the health, safety and welfare of a municipality's citizens when local officials are unwilling or unable to accept a solvency plan developed for the benefit of the municipality.” 53 P.S. § 11701.102(b)(1)(i), (iv).

Municipalities in financial distress enter and exit Act 47 at different stages, with each stage requiring a concentrated level of oversight and assistance from the Commonwealth. The General Assembly, through Chapter 7 of Act 47, delegates to a receiver the power and authority to see municipalities through its direst stage of financial distress.

The flaw in the Appellants’ argument is claiming that an Act 47 receiver is a judicial officer, like receivers appointed at the discretion of a court in estate matters. Rather, an Act 47 receiver is appointed by the executive branch, through

the Secretary of DCED. The Commonwealth Court is bound by Act 47 to confirm that nominee if the individual meets the objective criteria in Act 47. 53 P.S. § 11701.702(a) (“the court shall have no authority to appoint anyone other than the individual named in the petition as the receiver”). The Court’s mandated act of confirming the receiver’s appointment does not make the receiver a judicial officer, and the judicial branch does not exercise control over the local government.

Instead, under Act 47, the General Assembly *mandated* that the Commonwealth Court consider the appointed Receiver’s proposed plan under the “highly deferential” standard discussed above. There is little to no ability for the Court to replace its opinion for that of the Receiver under that standard. The General Assembly then authorized that Court to hear any mandamus petitions filed by either the receiver or local government officials but solely related to compliance with the approved Plan or Chapter 7 of Act 47. 53 P.S. § 11701.703, 53 P.S. § 11701.709.

The separation of powers doctrine recognizes that each independent but co-equal branch of our system of government exclusively exercises its own functions. *Sweeney v. Tucker*, 473 Pa. 493, 507-08 (1977). The executive, legislative, and judicial branches of government may not intrude on the exclusive duties vested in any one branch; however, there is some degree of interdependence as “the dividing line among the three branches ‘are sometimes indistinct and are probably incapable

of any precise definition.” *Id.* (quoting *Stander v. Kelley*, 433 Pa. 406, 421-22 (1969) (plurality opinion)). This Court has stated that “[t]he crucial function of the separation of powers principle ... is not separation *per se*, but the ‘checking’ power each branch has over the others”. *Beckert v. Warren*, 497 Pa. 137, 145 (1981).

Here, there is no tension between the three branches of government that implicate the separation of powers doctrine. Appellee has always maintained that the City’s elected officials retain their decision-making authority, and its right to act as elected officials, so long as those decisions do not interfere with the Plan, or any other limitation, as set forth by the General Assembly under Act 47. See *Robinson Twp., Washington County v. Comm.*, 623 Pa. 564, 722-23 (2013).

If there is any purported tension, it is between the power of the General Assembly and the local government, but that is not a constitutional separation of powers issue because the powers of the legislature in this regard are based on and envisioned by the Constitution, as discussed above. As discussed above, the Appellants again ignore that the City does not have the right to exercise any power that has been denied by the legislature based on the “denied by the General Assembly” exception to home rule powers in Article IX, Section 2 of the Constitution, the HRCL and the City’s own Charter. Act 47 is one law in which the General Assembly has denied the City power to act contrary to a court-

approved Recovery Plan. The City even recognized, accepted, and adopted this limitation in its own Charter.

Thus, while the City maintains its self-governance, the extent of its governance is limited by Chapter 7 of Act 47. The Court approved the Receiver's Plan because the Appellants failed to demonstrate Receiver's plan was "arbitrary or capricious or wholly inadequate to alleviate the fiscal emergency..."

Appellants, without explanation, also argue that the Receiver's Plan is an attempt to bypass section 709 of Act 47 (relating to mandamus), and the Court's confirmation of the plan permitted the receiver to cross the "delicate" line separating the branches of government. The City's argument is not only confusing but also fails to explain how the Court's approval of the Plan, as required by Act 47, violates the separation of powers doctrine.

The mandamus remedy under Act 47 applies to both City officials and the Receiver but it does not eliminate the Receiver's ability to set forth plan initiatives that are necessary to achieve the goals of Act 47. In fact, the approved Recovery Plan is a prerequisite for such relief because the Receiver may only seek a mandamus from the Commonwealth Court when City officials fail to comply with his order to implement an initiative of the recovery plan or to refrain from acting in a manner which interferes with his powers or the goals of the recovery plan. 53

P.S. § 11701.708, 53 P.S. § 11701.709. Notably, the City elected officials have never once sought mandamus against the Receiver's actions.

Appellants' argument is demonstrably insincere in that it ignores that they failed to comply with the order issued by the Commonwealth Court pursuant to the mandamus action filed by the Receiver under section 709.³⁵ The "sledgehammer" approach taken by the Receiver was done after nearly three years of acts by the elected officials to undermine his attempts to implement the recovery plan and ensure the continued provision of vital and necessary services for the residents of the City of Chester. As clearly found by the Commonwealth Court, the elected officials have demonstrated at every turn that they have no interest in cooperating with the receiver, a situation which the General Assembly recognized as untenable.³⁶

Section 709 acts as an appropriate check of the Receiver's authority, as required by the separation of powers doctrine. Section 709 allows the elected officials to file an action with the Commonwealth Court to enjoin any action of the receiver that is contrary to Chapter 7 of Act 47. Considering the purpose of section 709, the Receiver could not possibly be an arm of the judiciary as the court serves as the "check and balance" necessary to ensure a receiver is not unlawfully

³⁵ R. 3613a - 3617a; R. 4149a - 4150a.

³⁶ R. 1333a.

usurping the powers of a local government. This Court has already found that Act 47 does not violate the separation of powers doctrine, and, neither does the approval of the recovery plan by the Commonwealth Court which complies with the requirements of Act 47. See *Wilkesburg Police Officers Ass'n v. Comm.*, 535 Pa. 425, 433 (1993) (affirming the Commonwealth Court's finding that "Act 47 does not unconstitutionally delegate fiscal authority because the municipality's governing body retains decision-making authority.").

H. The Record Developed Over Nearly Three Years, and Established During the Plan Confirmation Hearing, Warrants the Suspension of the Elected Officials' Permissive Administrative Duties.

While there is ample evidence to support the suspension of the elected officials' administrative duties under any standard, it is important to remember the standard and burden applicable to this proceeding. As noted above, Act 47 mandates that the court "shall confirm" Receiver's proposed plan "unless it finds clear and convincing evidence that the recovery plan as modified is arbitrary, capricious or wholly inadequate to alleviate the fiscal emergency...." 53 P.S. § 11701.703(b) and (e). This standard also puts the burden on the Appellants to produce such evidence. As discussed below, no such evidence was produced to meet any standard, but certainly not the "arbitrary and capricious" standard.

The record of City elected official obstruction is undisputed. After three days of testimony, the Commonwealth Court found based on unequivocal evidence:

“The testimony presented at the hearing revealed to the Court a culture of denial, blame-shifting, arrogance, and nepotism within the City’s government. The testimony also demonstrated the existence of significant operational issues within the City’s departments, as well as City officials’ lack of transparency, lack of cooperation, and blatant disrespect of Receiver and his team”. R. 1345a. at p. 2.

....

“The Court concludes that all of this evidence, viewed together, demonstrates the City officials’ continued lack of transparency and lack of cooperation with Receiver and his team... This type of adverse behavior obstructs Receiver’s ability to work amicably and productively with City officials to achieve the City’s fiscal recovery goals...The Court agrees with Receiver that if the City officials responsible for carrying out the goals of the recovery plan ‘are incapable of doing so or refuse to do so and face no repercussions, then nothing will ever change and . . . Receiver will not be able to ensure the provision of vital and necessary services’ to the City’s residents.” R. 1345a. at p. 27.

....

“The credible evidence presented at the hearing demonstrates that the City’s elected officials are not empowering Receiver in the eyes of the City’s employees. Rather, the evidence shows that City officials frequently ignore Receiver’s advice and directives, and even direct other employees in their departments to ignore his directives. City officials also have historically overlooked issues such as the

unauthorized payroll payments to an incarcerated employee, the former police chief allowing his friends to boost their pensions by working extra overtime before retirement, and the City's seven-year default on its MMO payments. These incidents, together with the evidence of widespread nepotism within the City's government, demonstrate a pattern of City officials taking care of their own and intentionally turning their backs on wrongdoing within their departments. Further exacerbating these problems is the Mayor's assignment of Council members as department heads based on their loyalty to City Council and the Mayor's own inclination in a particular year, rather than on the person's actual qualifications to oversee a particular area. These practices cannot continue". R. 1345a. at p. 39.

Regardless of the standard applied, however, the evidence at the hearing clearly showed that the egregious actions by the elected officials warranted the suspension of their administrative duties. It is well-settled in Pennsylvania law that:

"it is within the province of the trial judge, sitting without a jury, to judge the credibility of the witnesses and to weigh their testimony. On appeal, it is not the duty of the appellate court to find the facts, but to determine whether there is evidence in the records to justify the trial court's findings of fact. This Court is bound by the trial judge's findings unless those findings are not based on competent evidence".

Appeal of Torbik v. Luzerne County, 696 A.2d 1141, 1145-46 (Pa. 1997)(citations omitted).

The Receiver and his Chief of Staff, Vijay Kapoor, testified extensively under oath subject to cross examination that the damaging decisions made by the

City elected officials, such as their lack of communication with the Receiver,³⁷ their refusal to initiate or cooperate with investigations into these actions,³⁸ and their interference with City operations and the Receiver's duties, have severely hindered the Receiver's ability to carry out his duties under Act 47. The elected officials continued course of conduct has left the Receiver with no other choice but to suspend their administrative duties in favor of implementing professional management.

Recent incidents range from unauthorized payments to an incarcerated employee later convicted of child rape who should have been terminated and to maintaining that incarcerated employee on the payroll for several months before being forced to act by the Receiver³⁹ to the wire transfer of more than \$400,000 to a fraudulent City vendor which was compounded by the City's failure to inform the Receiver of the error for approximately three (3) months.⁴⁰ Time and time again during the past 3 years, City officials and department heads have proven their unwillingness to allow the Receiver to make the tough and necessary decisions required to achieve fiscal recovery and good governance by:

- Failing to adhere to the Receiver's orders directing full participation in two investigations, and intentionally waiting

³⁷ R. 3803a - 3807a.

³⁸ R. 3613a - 3617a

³⁹ R. 3277a - 3279a.

⁴⁰ R. 3271a - 3273a.

more than three months to inform the Receiver that the City was the subject of a phishing scam.⁴¹

- Intentionally disregarding the Commonwealth Court’s March 2022 order to keep the Receiver informed and to cooperate with the Receiver with respect to investigations, day to day operations and fiscal matters.⁴²
- Failing to complete monthly bank reconciliations;⁴³
- Making late and/or inaccurate federal tax payments, which caused the City to incur tax penalties of approximately \$750,000;⁴⁴
- Approving reimbursements for the purchase of \$1,500 in gift cards without sufficient documentation;⁴⁵
- Making improper “hazard” payments to certain employees totaling \$137,540;⁴⁶
- Allowing the Mayor, the City Solicitor Schuster, Councilman Morgan, former Chief Financial Officer (CFO) Nafis Nichols, and three employees in the Human Resources Department to remain on an expensive health care plan that had been discontinued;⁴⁷ and
- Preventing the Interim CFO, who was appointed by Receiver, from fulfilling her duties and obligations under the Amended Recovery Plan.⁴⁸

These incidents, coupled with the elected officials disrespectful conduct towards the Receiver, which included Mayor Kirkland calling the Receiver the “N-

⁴¹ R. 3275a - R. 3276a.

⁴² *Id.*

⁴³ R. 791a

⁴⁴ R. 3816a.

⁴⁵ R. 3275a - R. 3276a; R. 4179a - R. 4183a.

⁴⁶ R. 3279a.

⁴⁷ R. 3275a.

⁴⁸ R. 177a

word,” threatening him by telling him to “watch his back” and “your days are numbered,” as well as Councilwoman Elizabeth Williams referring to the Receiver as a “slave master” on multiple occasions makes clear that the elected officials have engaged in a pattern of conduct that reveals their unwillingness to work with the Receiver and their refusal to follow his directives will not change absent judicial intervention.⁴⁹ Such comments, in addition to being shocking, serve to undermine the Receiver in the eyes of other City officials and employees.⁵⁰

Notably, one of many troubling financial challenges facing the City is its extremely underfunded police pension fund.⁵¹ However, Mayor Kirkland testified that despite receiving correspondences from the Auditor General and serving as the chair of the pension board, he was unaware that the City needed to make the full MMO payments between 2013 and 2020.⁵² Further, in responding to allegations that the City had miscalculated the pension payment of retired police officers to allow them to “spike” their pension prior to their retirement, the Solicitor testified that they were aware of the issue but did not take any action.⁵³

⁴⁹ R. 3806a.

⁵⁰ Judge Ceisler specifically found that the Mayor made these threats and that they obstructed the Receiver in his work. She wrote “[M]ayor Kirkland has verbally – and publicly – threatened and disrespected Receiver on more than one occasion. The Court discredits Mayor Kirkland’s testimony to the contrary. This type of adverse behavior obstructs Receiver’s ability to work amicably and productively with City officials to achieve the City’s fiscal recovery goals”. R. 1333a.

⁵¹ R. 3541a.

⁵² R. 4004a and R. 4209a -4212a.

⁵³ R. 3972a - 3975a.

In summary, this course of conduct illustrates the necessity of allowing the Receiver to hire qualified professionals to run the City Departments. The City was forced to file bankruptcy, is in severe financial distress, and is on the brink of running out of money. Notwithstanding the fiscal shape of the City, certain elected officials have consistently ignored and opposed the Receiver's attempts to take necessary steps to fix these issues. Their intentional actions clearly provide sufficient grounds to suspend their administrative duties and illustrate why such suspension is necessary if the Receiver has any chance of fulfilling duties goals under Act 47.

I. The Commonwealth Court Applied the Appropriate Remedy by Suspending the Administrative Duties of the Elected Officials

As explained *supra*, the actions by the elected officials to oppose the Receiver's attempts to ensure the continued provision of vital and necessary services, as well as the Receiver's attempts to fix the financially distressed City, warrant the suspension of their administrative duties.

However, even if this Court disagrees with that determination by the Receiver and the Commonwealth Court, applying statutory interpretation principles to Act 47 results in a finding that the legislature did not provide courts with the power to unilaterally alter initiatives in the Plan. With respect to modified recovery plans, as the one at issue in this appeal, Section 703(e) of Act 47 provides that "[t]he court *shall* confirm the modification ... unless it finds 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.” 53 P.S. 11701.703(e) (emphasis added). The legislature provided the Court with no leeway to modify the proposed plan as long as it is not “arbitrary or capricious”.

The Statutory Construction Act provides that the object of all statutory interpretation “is to ascertain and effectuate the intention of the General Assembly”. 1 Pa. C.S. § 1921(a). Generally, the best expression of the General Assembly's intent “is found in the statute's plain language”. *Commonwealth v. Howard*, 257 A.3d 1217, 1222 (2021). “When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.” 1 Pa. C.S. § 1921(b). Further, the Court should not insert words into [a statute] that are plainly not there”. *Frazier v. Workers’ Comp. Appeal Bd. (Bayada Nurses, Inc.)*, 616 Pa. 592, 52 A.3d 241, 245 (2012). Only in instances of ambiguous statutory language “may courts consider statutory factors to discern legislative intent”. *Howard*, 257 A.3d at 1222. Additionally, “[w]ords and phrases shall be construed according to rules of grammar and according to their common and approved usage. . . .” *Commonwealth v. Coleman*, 285 A.3d 599, 605 (Pa. 2022).

Applying the statutory interpretation principles to Act 47, it is clear that the Court does not have the power to edit the initiatives in the Modified Recovery Plan.

Rather, Act 47 explicitly requires the Court to confirm the plan “unless it finds 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”. Act 47 does not allow the Court to change the contents of any individual initiative, and there is no basis in Act 47 for a Court to change a remedy under a confirmed plan. Under Act 47, the role of the Court is to determine whether the plan, as a whole, is arbitrary or capricious, and if it is not, the Court is required to confirm the plan as written.

VI. CONCLUSION

The Receiver filed this plan modification because, after almost three years of obstruction, he saw no other path. The Commonwealth Court, after three days of testimony under oath – including from the Receiver and the Mayor – confirmed the Receiver’s initiatives unequivocally. The Commonwealth Court (as well as the Bankruptcy Court) understands that the City of Chester and its residents are running out of time. The General Assembly recognized that the Receiver’s job is an exceedingly difficult one and that he must be able to utilize the powers provided to him by Act 47 to make the hard changes that will return Chester to viability. For the foregoing reasons, Appellee respectfully requests that the Court affirm the Order of the Commonwealth Court.

(signature page follows).

Respectfully submitted,

Dated: April 27, 2023

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CERTIFICATE OF COMPLIANCE

I, Tiffany R. Allen, hereby certify that the foregoing Brief contains 11,873 words according to the word count feature of the word processing software used to prepare the brief. The Brief complies with the 14,000-word limit set forth in PA R.A.P. 2135(a)(1), 2135(b), and 2135(d).

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

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CERTIFICATE OF SERVICE

I, Tiffany R. Allen, hereby certify that I am this day serving the foregoing **Brief of Appellee, Michael Doweary, In His Capacity As The Receiver For The City Of Chester** upon all counsel of record as provided on the Record of Service accompanying this electronic filing.

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