

EXHIBIT C

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Dennis M. Davin, in his capacity as	:	
Secretary of the Department of	:	
Community and Economic	:	
Development,	:	
	:	
Petitioner	:	
	:	
	:	
v.	:	No. 336 M.D. 2020
	:	Heard: September 8, 2020
	:	
City of Chester,	:	
	:	
Respondent	:	

MEMORANDUM & ORDER

Before the Court is the recovery plan submitted by Michael Doweary, the Receiver (Receiver) for the City of Chester (City), appointed by this Court pursuant to the Municipalities Financial Recovery Act (Act 47)¹ to address its fiscal emergency.

Based upon the petition filed by Dennis M. Davin, in his capacity as Secretary of the Department of Community and Economic Development (DCED), and the hearing on same, the Court appointed the designated Receiver on June 22, 2020. *See Davin v. City of Chester* (Pa. Cmwlth., No. 336 M.D. 2020, filed June 22, 2020). After receiving a 30-day extension, Receiver filed the Receiver’s Recovery Plan on August 20, 2020 (Plan). Significantly, there were no objections to the Plan.

On September 8, 2020, this Court held a hearing on the Plan where Receiver and members of the Receivership Team (Gordon Mann and Vijay Kapoor) testified. Receiver testified about his role and responsibility for the Plan generally. Mann, of Public Financial Management, (Receiver’s financial advisor), testified

¹ Act of July 10, 1987, P.L. 246, *as amended*, [53 P.S. §§11701.101-11701.712](#).

regarding the pension funds and post-employment benefits received by retired employees whereas Kapoor, Receiver's Chief of Staff, focused on active employees and legacy costs. The Court finds the testimony of all three witnesses credible.

When Receiver was appointed, the Emergency Action Plan (EAP) was in place. Receiver testified that while the EAP contains useful financial controls, which the Plan adopts,² the Plan goes further in that it proposes long-term initiatives and structural solutions designed to improve financial stability in the City. He identified two cash crises: repeated budgetary shortfalls in the General Fund, resulting in a 31% reduction in the 2020 workforce; and impending insolvency of the Police Pension Fund, which suffers a consistent deficit and has high monthly payments for current retirees.

During his testimony, Receiver emphasized the impact of legacy costs and reviewed structural inefficiencies based on the City's form of government, which is comprised of five departments each headed by a different Council member, without a more traditional single executive overseeing and addressing the interests of the whole. Receiver recommends reviewing these departments to maximize efficiencies. He also testified that the impact of past deficits and repeated failure to operate within budgeted constraints has led to legacy costs carried forward, the most impactful being two borrowings undertaken in 2017 to meet general operating costs.

Receiver repeatedly described the Plan as a "first step" based on available information. *See also* Plan at 1, 4. Receiver advised the Court he intends to seek modification under Section 703(e) and file an amended plan based on further investigation and more current financial reports. At present, the 2017 audit is the

² "The controls established in the [EAP] are incorporated in [the P]lan, and responsibility for approving different City actions are transferred from [DCED] to [Receiver]." Plan, filed 8/20/20, at 6.

most current audit of the City, and it does not provide an accurate financial picture because the City undertook two debt borrowings and received an interest-free loan from DCED for \$2 million in 2017. *See also* Plan at 82 (organizational assessment “will identify ways to operate City functions more efficiently to enhance services or reduce costs . . . recommend actions to improve timely and accurate internal financial reporting, completion of independent financial audits, and general financial management and processing activities. As these assessments are completed, the Receiver will have more direction for the City.”).

Mann, who has experience with Act 47 coordination for other cities, testified regarding the pension fund liability for the City’s three pensions (Police, Firefighters and Teamsters) and the potential insolvency of the Police Pension Fund in particular. Like Receiver, Mann characterized the Plan as a “starting point.”

Mann testified that the City’s failure to pay its mandatory minimum obligations (MMOs) to the three funds since 2013, among other factors, led to the current pension crisis whereby the Police Pension Fund is in danger of having insufficient funds for retirees as soon as the second quarter of 2021.

Mann explained the condition of the Police Pension Fund is more dire than the Firefighter Pension Fund because it is less funded and police retirees generally have higher salaries, resulting in a higher draw on pensions. Also, there has been increased participation of public safety employees in Deferred Retirement Option Plan (DROP) retirements, which allow lump-sum payments. Complicating the matter, the City lacks control over the timing of DROP retirements, which can adversely impact the funds.

Kapoor underscored the impact of legacy costs, including past due MMOs and prior budgetary shortfalls, which affect the City's current ability to cover operational costs. The delinquent MMOs, which accrue penalties and interest, are anticipated to reach \$40 million as of January 1, 2021. *See* Plan at 20. Kapoor emphasized the largest annual expenditures relate to salaries and benefits for the City's current workforce, and the City has not fully assessed its workforce needs since hiring back some of the employees furloughed under the EAP.

Based on review of the Plan and the testimony, the Court credits the testimony that the pension crisis in the City is systemic. The Police Pension Fund presents the most immediate challenge in that it is in danger of becoming insolvent by the second quarter of 2021 without additional cash infusions. To abate its threatened insolvency, the City plans in 2020 to exclusively devote the \$1.9 million in annual state aid to the Police Pension Fund. Moreover, beginning in 2021, the City plans to utilize the additional revenues the City receives from taxation under the Municipal Pension Plan Funding Standard and Recovery Act, known as Act 205,³ for pension payments rather than the General Fund as in the past.⁴ The Court recognizes the deficit of the Police Pension Fund, and historical underfunding of all three pension funds necessitates a Plan that includes payment of the MMOs in full.

As noted, workforce costs are a substantial expenditure of the City, and a workforce is essential to providing vital services to City residents. In an effort to

³ Act of December 18, 1984, P.L. 1005, *as amended*, [53 P.S. §§895.101-.1131](#). Chapter 11 of Act 205 (relating to DROP) was added by the Act of September 18, 2009, P.L. 396.

⁴ During the hearing, the Court was made aware that the City has been allocating the 1% additional EIT levied pursuant to Act 205 toward the General Fund, not to pension liability.

contain costs of employee benefits, the City is considering a number of options, including restructure of plan design in upcoming labor negotiations.

Lack of timely and accurate financial reporting prevented a more concrete plan. Based in part on Covid-19, the approved 2020 budget “no longer provides a realistic depiction of the City’s revenues and expenditures for the rest of this year.” Plan at 32. Receiver forecast an annual deficit between \$4.2 and 4.5 million through 2024, but cautions that this baseline projection is subject to revision since it does not fully account for the likelihood that the City’s expenditures/costs will be greater than the assumed 3% annual increase. *See* Plan at 37.

Further, anticipating the amount of received revenues from traditional taxpayers is difficult because the Covid-related shutdown resulted in reduced earned income tax (EIT) revenue and taxes and fees from Harrah’s Casino, both of which provided previously reliable revenue streams. The City received reports regarding the decrease in EIT for only a single month prior to Plan preparation, and so has not yet been able to determine the true impact on revenue. The Court is also cognizant that the cause of the habitual budgetary shortfalls has not been determined.

In terms of asset monetization, the Plan identifies two significant potential assets of the City, the water system and the parking system. However, both assets are the subject of current litigation. Neither proposal, as of now, constitutes a viable source of predictable revenue.

Mindful that the Plan is by its terms “an initial first step” (Plan at 10), outlining preliminary proposals with some unverified information, the Court considers the Plan under Section 703 of Act 47.

Section 703(d) of Act 47 provides: “the [C]ourt shall confirm the [P]lan . . . unless it finds clear and convincing^{5]} evidence that the [P]lan is arbitrary, capricious or wholly inadequate to alleviate the fiscal emergency in the distressed municipality.” [53 P.S. §11701.703\(d\)](#) (emphasis added). As such, in the absence of evidence against the Plan, for which none was presented, confirmation is mandatory if it comports with Section 703.

First, the Court determines the Plan is compliant with Section 703(c) (relating to restrictions) of Act 47 in that it does *not* do any of the following:

- (1) Unilaterally levy taxes.
- (2) Unilaterally abrogate, alter or otherwise interfere with a lien, charge, covenant or relative priority that is:
 - (i) held by a holder of a debt obligation of a distressed municipality; and
 - (ii) granted by the contract, law, rule or regulation governing the debt obligation.
- (3) Unilaterally impair or modify existing bonds, notes, municipal securities or other lawful contractual or legal obligations of the [City].
- (4) Authorize the use of the proceeds of the sale, lease, conveyance, assignment or other use or disposition of the assets of the distressed municipality or authority in a manner contrary to section 707.

[53 P.S. §11701.703\(c\)](#). Also, the Plan does not alter the form of City government.

As to Plan content, Section 703(b) of Act 47 states, with emphasis added:

- (1) The recovery plan shall provide for all of the following:
 - (i) Continued provision of vital and necessary services.

⁵ Clear and convincing evidence, the highest burden in civil law, “requires that the fact-finder be able to come to clear conviction, without hesitancy, of the truth of the precise fact in issue.” *Suber v. Pa. Comm’n on Crime & Delinquency*, [885 A.2d 678, 682](#) (Pa. Cmwlth. 2005).

(ii) Payment of the lawful financial obligations^[6] of the distressed municipality and authorities. ...

(iii) Timely deposit of required payments to the pension fund in which the distressed municipality and each authority participates.

53 P.S. §11701.703(b)(1). The statute is clear that the Plan must “provide for” vital and necessary services⁷ and “timely deposit” of pension payments. *Id.*

The Plan outlines proposals for these three elements. However, the Plan notes the current tension between continuing vital services *and* paying obligations to the City’s three pension funds. *See* Plan at 32 (“The City expects that it will not make the full [MMO] payment to the three pension plans this year so that there is enough cash to sustain critical and vital services.”); 24 (noting the competing goals, stating: “The City could only make the 2020 MMO payment if it either shut down vital and necessary services this year or incurred more debt that would endanger those same services in 2021 and beyond when debt repayment begins.”).

The City faces multiple crises, including three under-funded pensions, one of which is facing insolvency. In its present form, the Plan contains a number of initiatives that target the pension crisis and the workforce-related costs as well as long-term strategies to address structural issues. Accordingly, the Court concludes:

1. The Plan submitted August 20, 2020, is by its terms, preliminary, without the benefit of complete and up-to-date financial reports. Further

⁶ These include “debt obligations, municipal securities, lease rental obligations, legal obligations and consensual modifications of existing obligations.” 53 P.S. §11701.703(b)(1)(ii).

⁷ By definition, such services include: “Payroll and pension obligations” and “[f]ulfillment of payment of [financial] obligations,” encompassing the plan criteria in Section 703(b)(ii) and (iii). Section 701(7), (8) of Act 47, 53 P.S. §11701.701(7), (8) (definitions).

investigation and assessment is necessary to develop and implement a more comprehensive plan capable of alleviating the City's fiscal emergency.

2. Receiver needs additional time to meet with stakeholders, pursue and assess potential sources of additional revenue through economic development and strategic partnerships, and investigate the root causes of the budgetary shortfalls, and determine the essential workforce size to continue vital services to City residents.

Because the City has systemic, repeated failure to operate within budgetary confines, accurate and timely reporting of actual costs is necessary to break the cycle of carrying forward significant debts from prior years. As such, any modification under Section 703(e) of Act 47, [53 P.S. §11701.703\(e\)](#), shall reconcile the actual and budgeted revenues and expenditures to enable any subsequent plan modification in more detail.

3. While undertaking these assessments and negotiations, Receiver proposes certain initiatives, in cooperation with City officials and other stakeholders, to increase revenue and reduce expenses.

4. Receiver advised the Court of his intent to submit a modified plan pursuant to Section 703(e) of Act 47, [53 P.S. §11701.703\(e\)](#), based on more precise information. Based on the Receiver's testimony, and that of his team, the Court is assured that the City will comply with Act 205 during Receiver's appointment, and make expeditious attempts to obtain current financial information to modify the Plan in conformity with Sections 703(b) and (e) of Act 47.

5. Albeit as the initial first step, the Plan submitted August 20, 2020, is neither arbitrary nor capricious, and the Court does not find it to be wholly inadequate to alleviate the fiscal emergency of the City of Chester.

Based on the foregoing findings and conclusions, the Court enters the following order:

O R D E R

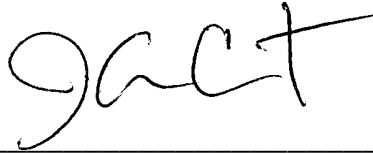
AND NOW, this **19th** day of October 2020, upon consideration of Receiver's Recovery Plan (Plan) and the evidence presented during the hearing, including the credited testimony, as to the Plan submitted on August 20, 2020, pursuant to Section 703 of Act 47, [53 P.S. §11701.703](#), it is hereby ORDERED and DIRECTED as follows:

1. The Plan, as a preliminary step, is hereby CONFIRMED.⁸
2. Receiver shall submit a modified plan pursuant to Section 703(e) of Act 47, [53 P.S. §11701.703\(e\)](#), **no later than Monday, February 8, 2021**, with additional information regarding the provision of necessary and vital services, including timely payment of pension obligations.
3. Unless a modification plan is received prior thereto, Receiver shall file a status report regarding the application of Act 205 funds, payment of MMOs, workforce needs and compliance with Section 703(b) of Act 47, [53 P.S. §11701.703\(b\)](#), within **forty-five (45) days** of the date of this Order. The status report shall include information regarding the 2021 budget and account for payments of pension and other financial obligations, and detail the provision of vital and necessary services as required by Section 703(b) of Act 47.

⁸ It is not unprecedented to approve an appointed Receiver's plan despite its acknowledged preliminary status, particularly where the appointed Receiver advised the Court of his intention to submit a modified plan that is based on more information and time for assessment. *See Order, Walker v. City of Harrisburg* (Pa. Cmwlth., No. 549 M.D. 2011, filed March 9, 2012).

4. As the Court advised during the hearing, the parties may request status conferences as needed to maintain progress with the Plan and its modification.

Jurisdiction retained.

A handwritten signature in black ink, appearing to read "JAC", written over a horizontal line.

J. ANDREW CROMPTON, Judge