

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DENNIS M. DAVIN, in his capacity as	:
Secretary for the Department of	:
Community and Economic Development,	: No. 569 MD 2011
	:
Petitioner ¹ ,	: RE: DETERMINATION OF
	: STATUS OF IMPACT
	: HARRISBURG UNDER
	: SUNSHINE ACT
	:
v.	:
	:
CITY OF HARRISBURG,	:
	:
Respondent	:

**IMPACT HARRISBURG'S ANSWER TO THE CROSS-APPLICATION OF
PA MEDIA GROUP, WITF, INC., AND HEARST PROPERTIES INC.
D/B/A WGAL-TV IN THE NATURE OF A PETITION FOR
DECLARATORY RELIEF**

Impact Harrisburg ("Impact"), by and through its counsel, McNeese Wallace & Nurick LLC, hereby submits this Answer to the Cross-Application of PA Media Group, WITF, Inc., and Hearst Properties Inc. d/b/a WGAL-TV in the Nature of a Petition for Declaratory Relief (the "Cross-Application"), and in support thereof

avers as follows:

1. Admitted.
2. Admitted.
3. Admitted.

¹ As the present appointee to the position of DCED Secretary, Mr. Davin has been substituted for the original Petitioner, C. Allen Walker.

4. Admitted.

Factual Background

5. The averments set forth in paragraphs 1 through 4 above are incorporated by reference as if set forth in full.

6. Admitted.

7. Admitted.

8. Admitted.

9. Admitted.

10. Admitted.

11. Admitted in part and denied in part. It is denied that the “Parking Transaction” approved through the Harrisburg Strong Plan resulted in a sale of the parking garages to a private enterprise. The remainder of the Paragraph 11 is admitted.

12. Admitted.

13. Admitted.

14. Denied as stated. The Court’s Orders confirming the Receiver’s recovery plan and the amendments thereto, include the Harrisburg Strong Plan, set forth the requirements of the Plan accepted by the Court, including consensual terms reached between the City and various creditors. A Task Force that was appointed to operate consistent with the Court’s mandates made recommendations

to the Coordinator for the City of Harrisburg on the creation of a non-profit corporation to receive and distribute certain funds. The Task Force recommended creation of this non-profit corporation without restriction or limitation on its operations, functioning, or funding determinations. The Court ultimately approved that recommendation, as submitted by the Coordinator. Impact Harrisburg was created pursuant to the Court's subsequent order. The Cross-Petitioners cite to a proposed modification to the recovery plan that had not been adopted or approved by this Court or any other body, which has been revised several times since its initial drafting.

15. Denied as stated. It is admitted the Task Force recommended a single non-profit entity be formed to receive certain funds set aside from the Parking Transaction and this recommendation was approved by the Court. The purpose(s) of the Task Force are set forth in the confirmed recovery plan, as amended.

16. Admitted.

17. Admitted.

18. Denied. The cited provision of law, related to receivership pursuant to the Municipalities Financial Recovery Act ("MFRA"), speaks for itself, and any characterizations thereof are denied. By way of further answer, Impact Harrisburg was created pursuant to the Nonprofit Corporation Law, 15 Pa.C.S. 5101, *et seq.*,

after the Court had allowed the City's exit from receivership. Impact Harrisburg incorporates by reference paragraphs 4-9 of its Application for Relief.

19. Denied as stated. A meeting of the Board was conducted on March 10, 2016.

20. Denied as stated. The Board has been operating as a 501(c)(3) nonprofit corporation consistent with the laws and regulations governing such entities. The Board has caused all minutes of Board meetings to be electronically posted. The Board publicly advertised to fill its position of Executive Director. The Board undertook a competitive process to secure its current accountants, auditors, and its financial institutions. The Board does not prevent any person from attending its meetings, except for executive sessions.

21. Denied as stated. The Board has entered into agreements for the services of an independent contractor to be its Executive Director and agreements with financial institutions, all after publishing its minutes that showed those actions were being considered, undertaken and then carried out. Impact Harrisburg incorporates by reference its response to paragraph 20, above.

22. Admitted with qualification. It is admitted that counsel for PA Media Group wrote a letter to Neil Grover outlining PA Media Group's position. To the extent that it is implied that the correspondence has any bearing on whether or not

Impact Harrisburg is an agency subject to the Sunshine Act open meeting requirements, it is denied.

23. Admitted.

24. Admitted.

25. Admitted. By way of further answer, undersigned counsel for Impact Harrisburg served counsel for PA Media Group with a courtesy copy of Impact's Application for Declaratory relief and the related filings on the same day those documents were filed with the Court.

Declaratory Relief

26. The averments set forth in paragraphs 1 through 25 above are incorporated by reference as if set forth in full.

27. Denied. Section 703 of the Sunshine Act provides as follows:

The body, and all committees thereof authorized by the body to take official action or render advice on matters of agency business, of all the following: the General Assembly, the executive branch of the government of this Commonwealth, including the Governor's Cabinet when meeting on official policymaking business, any board, council, authority or commission of the Commonwealth or of any political subdivision of the Commonwealth or any State, municipal, township or school authority, school board, school governing body, commission, the boards of trustees of all State-aided colleges and universities, the councils of trustees of all State-owned colleges and universities, the boards of trustees of all State-related universities and all community colleges or similar organizations created by or pursuant to a statute which declares in substance that the organization performs or has for its purpose the performance of an essential *governmental* function and through the joint action of its members exercises governmental authority and takes official action

65 Pa. C.S. § 703 (emphasis added).

28. Denied. Impact Harrisburg was created pursuant to the Order of this Court dated November 25, 2014, granting the Application of the Coordinator, based on the recommendation contained in the Harrisburg Strong Plan. Impact Harrisburg is not a "similar organization" as set forth in Section 703 of the Sunshine Act, as it was not "created by or pursuant to a statute which declares in substance that the organization performs or has for its purpose the performance of an essential governmental function." 65 Pa. C.S. § 703. By way of further response, Act 47 does not expressly provide for the creation of Impact Harrisburg or any similar entity and does not declare that Impact Harrisburg "performs or has for its purpose" any function, much less a governmental function. Additionally, Impact Harrisburg is not restricted from receiving or securing other funding for its operations or in the uses of any such additional funds, except as provided by the laws generally applicable to nonprofit corporations. While Impact Harrisburg is the recipient of restricted funds through the Harrisburg Strong Plan, it remains no different from other private, nonprofit corporations that receive portions of their funding through federal or state funds subject to restrictions on the use of those public monies.

29. Admitted in part and denied in part. It is admitted that Impact Harrisburg has, *inter alia*, the purposes of using the funding available to provide for infrastructure improvements and provide for economic development projects within the City of Harrisburg. It is denied that such tasks have been found by Pennsylvania courts to be “essential government functions” or “exercises [of] governmental authority” under the Sunshine Act. To the contrary, this Court has found that a nonprofit corporation established to combat urban blight through redevelopment of the City of Harrisburg is not an “agency” under the Sunshine Act even though a substantial portion of its funds were derived from public monies. *Harristown Development Corp.*, 580 A.2d 1174, 1179 (Pa. Cmwlth. 1990), *rev'd on other grounds*, 614 A.2d 1128 (Pa. 1990). *See also Mooney v. Temple Univ. Bd. of Trustees*, 292 A.2d 395, 398 (Pa. 1972) (non-profit corporation did not become an “agency” as defined by the Right-To-Know Law solely because it received public funds). To the extent that it is implied that Impact Harrisburg's purposes are strictly limited to the two aforementioned items, such averment is denied. By way of further response, the purposes of Impact Harrisburg are outlined in its Articles of Incorporation, which is a writing which speaks for itself, and Impact Harrisburg is imbued with all powers and duties provided for by the Nonprofit Corporation Law, 15 Pa.C.S. 5101, *et seq.* Additionally, Impact Harrisburg is not restricted from receiving or securing other funding for its operations or the uses of any such

additional funds, except as provided by the laws generally applicable to nonprofit corporations. While Impact Harrisburg is the recipient of restricted funds through the Harrisburg Strong Plan, it remains no different from other private, nonprofit corporations that receive portions of their funding through federal or state funds subject to restrictions on the use of those public monies.

30. Admitted.

31. Admitted.

32. Admitted with qualification. It is admitted that the Board of Impact Harrisburg has not advertised notice of its meetings for the public to attend. To the extent that it is implied that Impact Harrisburg is an "agency" as defined by the Sunshine Act and obligated to provide advanced notice of its meeting dates or permit the public to appear at its meetings, the averment is a conclusion of law which is denied. By way of further response, the Board of Impact Harrisburg does not have a policy that denies access to its meetings, and does not prevent any person from attending its meetings, except for executive sessions. Additionally,

Impact Harrisburg's meeting minutes are released for public review on the Pennsylvania Department of Community and Economic Development website. .

33. Admitted in part, denied in part. It is admitted that Impact Harrisburg is not an advisory entity and makes binding decisions on its own behalf as provided for by the Nonprofit Corporation Law, 15 Pa.C.S. 5101, *et seq.* It is

denied that any binding decisions are made by Impact Harrisburg on behalf of the City of Harrisburg. By way of further response, Impact Harrisburg is a private, nonprofit corporation that is neither controlled by, nor controls, the City of Harrisburg or its officials.

34. Admitted in part and denied in part. Impact Harrisburg is an independent, private, nonprofit corporation. To the extent it is implied that Impact Harrisburg has any control over the City of Harrisburg or its officials, such implication is denied. Impact incorporates by reference its response to the averments of paragraph 33, above.

35. Denied. The averment is a conclusion of law to which no response is required. To the extent a response is required, it is denied. Impact incorporates by reference its response to the averments of paragraph 29, above.

36. Denied. The averment is a conclusion of law to which no response is required. To the extent a response is required, it is denied. By way of further response, the Sunshine Act does not define an agency as a "de facto" body of any government entity. *See* 65 Pa. C.S. § 703. Additionally, Impact Harrisburg is not a committee of the City, as it is an independent, private nonprofit entity not subject to the control or review of the City of Harrisburg. *See Lee Publs., Inc. v. Dickinson Sch. Of Law of the Pa. State Univ. Ass'n*, 848 A.2d 178 (Pa. Cmwlth. 2004).

37. Denied. The averment is a conclusion of law to which no response is required. To the extent a response is required, it is denied. Impact Harrisburg is not an "agency" as defined by the Sunshine Act, and as such is not required to comply with the requirements of the Sunshine Act.

38. Admitted.

39. Admitted.

40. Admitted with qualification. It is admitted that the Court approved the release of approximately \$12.3 million in restricted funds to Impact Harrisburg, limiting the potential uses of those funds to activities consistent with the Harrisburg Strong Plan, as amended. To the extent that the averment implies that this makes Impact Harrisburg an agency subject to the open meeting requirements of the Sunshine Act, it is denied. By way of further answer, Impact Harrisburg incorporates by reference its response to paragraph 28, above.

41. Admitted.

42. Denied. The use of public funds is not, in and of itself, sufficient to categorize a private nonprofit entity as an "agency" subject to the Sunshine Act. *See Mooney v. Temple University Board of Trustees*, 292 A.2d 395, 398 (Pa. 1972); *Harristown Development Corp. v. Commonwealth*, 580 A.2d 1174, 1179 (Pa. Cmwlth. 1990), *rev'd on other grounds*, 614 A.2d 1128 (Pa. 1990) (determining an agency charged with promoting economic development in the City

using public funds was not an "agency"). Notably, the Harrisburg Strong Plan specifically recommended, and this Court approved, the use of a private, nonprofit corporation to facilitate the distribution of the funds.

43. Denied. If Impact was found subject to the Sunshine Act, that law would require open meetings anytime Impact's board met to discuss any issue, no matter how mundane. Further, Impact then would be required to issue public notice in a newspaper of general circulation in advance of any meeting of its Board, even if the meeting was not to address any topic of any potential public interest but only the corporation's own "housekeeping" matters. *See* 65 Pa.C.S.A. § 709. The operations of Impact would be impaired if it was required to publish notifications in advance of any and all of its Board of Directors' deliberations and decisionmaking, which ultimately would impede the swift implementation of the Harrisburg Strong Plan. By way of further response, Impact Harrisburg has and will continue welcome public dialogue and comment with regard to its substantive deliberations. Impact Harrisburg incorporates by reference its response to the averments of paragraph 32, above.

WHEREFORE, Petitioner Impact Harrisburg respectfully requests that the Court deny the Cross-Application of PA Media Group, WITF, Inc., and Hearst Properties Inc. d/b/a WGAL-TV in the Nature of a Petition for Declaratory Relief

and issue a declaratory judgment that Impact Harrisburg is not an "agency" subject to the open meeting requirements of the Sunshine Act.

McNEES WALLACE & NURICK LLC

By: /s/Devin Chwastyk

Devin J. Chwastyk
Pa. I.D. No. 91852
Rachel R. Hadrick
Pa. I.D. No. 316383
100 Pine Street, P.O. Box 1166
Harrisburg, PA 17108
(717) 232-8000


Counsel for Impact Harrisburg

Dated: March 30, 2016

VERIFICATION

I, Sheila Dow-Ford, Executive Director of Impact Harrisburg, hereby verify that: I am an adult individual; that I am authorized to make this verification on behalf of Impact Harrisburg; and, that the facts set forth in the foregoing document are true and correct to the best of my knowledge or information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa.C.S. §4904, relating to unsworn falsifications to authorities.

Dated: March 30, 2016


Sheila Dow-Ford, Executive Director
Impact Harrisburg

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

C. Alan Walker, in his capacity as	:	569 MD 2011
Secretary for the Department of Community	:	
and Economic Development,	:	
Petitioner	:	
v.		
City of Harrisburg,		
Respondent		

PROOF OF SERVICE

I hereby certify that this 30th day of March, 2016, I have served the attached document(s) to the persons on the date(s) and in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

Service

Served:	Brian Allen Kint
Service Method:	eService
Email:	bkint@cozen.com
Service Date:	3/30/2016
Address:	Cozen O'Connor 1650 Market Street Philadelphia, PA 19103
Phone:	215-66-5-2771
Representing:	Petitioner C. Alan Walker

Served:	Craig James Staudenmaier
Service Method:	eService
Email:	cjstaud@nssh.com
Service Date:	3/30/2016
Address:	200 North Third St., 18th Floor Harrisburg, PA 17101
Phone:	717-23-6-3010
Representing:	Intervenor Hearst Properties Inc. Intervenor Pa. Media Group Intervenor WGAL-TV Intervenor WITF, Inc.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served: Eric Louis Scherling
Service Method: First Class Mail
Service Date: 3/31/2016
Address: 1900 Market St
Philadelphia, PA 19103
Phone: 215-665-2042
Representing: Petitioner C. Alan Walker

Served: John Michael Quain Jr.
Service Method: eService
Email: jquain@pa.gov
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Address: 400 North Street
Plaza Level
Harrisburg, PA 17120
Phone: 717--21-4-5300
Representing: Petitioner C. Alan Walker
Respondent City of Harrisburg

Served: Joshua D. Bonn
Service Method: eService
Email: jbonn@nssh.com
Service Date: 3/30/2016
Address: 200 North Third St., 18th Floor
P O Box 840
Harrisburg, PA 17108-0840
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Representing: Intervenor Hearst Properties Inc.
Intervenor Pa. Media Group
Intervenor WGAL-TV
Intervenor WITF, Inc.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served: Neil Anthony Grover
Service Method: eService
Email: groverlaw@ix.netcom.com
Service Date: 3/30/2016
Address: 2201 North Second Street
Harrisburg, PA 17110
Phone: 717-.43-9.4251
Representing: Respondent City of Harrisburg
Amicus Curiae Debt Watch Harrisburg
Other Harrisburg City Council
Other Linda D. Thompson

Served: Stephen Aaron Miller
Service Method: eService
Email: samiller@cozen.com
Service Date: 3/30/2016
Address: Cozen O'Connor
1900 Market Street
Philadelphia, PA 19106
Phone: 215--66-5-4736
Representing: Petitioner C. Alan Walker

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Courtesy Copy

Served: Brad Koplinski
Service Method: First Class Mail
Service Date: 3/31/2016
Address: Rev. Dr. Martin Luther King Jr.
City Government Center
10 N. Second Street
Harrisburg, PA 17101
Phone: 717-255-3060
Representing: Other Brad Koplinski

Served: Dan Miller
Service Method: First Class Mail
Service Date: 3/31/2016
Address: 10 N. Second Street
Suite 403
Harrisburg, PA 17101
Phone: 717-255-3060
Pro Se: Other Dan Miller

Served: Edward Lee Stinnett II
Service Method: eService
Email: lstinnett@salzmannhughes.com
Service Date: 3/30/2016
Address: 105 N. Front Street
Suite 205
Harrisburg, PA 17101
Phone: 717--23-4-6700
Representing: Amicus Curiae Suburban Municipalities

Served: Eugenia Smith
Service Method: First Class Mail
Service Date: 3/31/2016
Address: Rev. Dr. Martin Luther King Jr.
City Government Center
10 N. Second Street
Harrisburg, PA 17101
Phone: 717-255-3060
Representing: Other Eugenia Smith

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served: Geoffrey Richard Johnson
Service Method: First Class Mail
Service Date: 3/31/2016
Address: 1110 Wellington Rd
Jenkintown, PA 19046
Phone: 215-490-7436
Representing: Possible Intervenor Mark D. Schwartz

Served: John R. Campbell
Service Method: Facsimile
Fax: 717-255-3065
Service Date: 3/31/2016
Address:
Representing: Other John R. Campbell

Served: Kelly Summerford
Service Method: First Class Mail
Service Date: 3/31/2016
Address: Rev. Dr. Martin Luther King Jr.
City Government Center
10 N. Second Street
Harrisburg, PA 17101
Phone: 717-255-3060
Representing: Other Kelly Summerford

Served: ~~Lee E. Morrison~~
Service Method: First Class Mail
Service Date: 3/31/2016
Address: 420 Lamp Post Ln
Camp Hill, PA 17011
Phone: 717-761-9090
Representing: Other Harrisburg City Council

Served: Mark Kaufman
Service Method: First Class Mail
Service Date: 3/31/2016
Address: 303 Peachtree St.
Suite 5300
Atlanta, GA 30308
Phone: 404-527-4120
Representing: Other Office of Receiver

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served: Markian Roman Slobodian
Service Method: First Class Mail
Service Date: 3/31/2016
Address: 801 N 2nd St
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Representing: Other Ambac Assurance Corporation

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Phone: 717-257-7508
Representing: Possible Intervenor Assured Gauranty Municipal Corp.

Served: Nevin J. Mindlin
Service Method: First Class Mail
Service Date: 3/31/2016
Address: 2550 N. 3rd Street
Harrisburg, PA 17110
Phone: 717-238-8705
Pro Se: Amicus Curiae Nevin J. Mindlin

Served: Patty Kim
Service Method: First Class Mail
Service Date: 3/31/2016
Address: Rev. Dr. Martin Luther King Jr.
City Government Center
10 N. Second Street
Harrisburg, PA 17101
Phone: 717-255-3060
Representing: Other Patty Kim

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served: Ronald L. Finck
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Email: rlfleck@mette.com
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3401 North Front Street
Harrisburg, PA 17110
Phone: 717--23-2-5000
Representing: Possible Intervenor County of Dauphin

Served: Sandra Reid
Service Method: First Class Mail
Service Date: 3/31/2016
Address: Rev. Dr. Martin Luther King Jr.
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10 N. Second Street
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Phone: --
Representing: Other Sandra Reid

Served: Scott T. Wyland
Service Method: eService
Email: swyland@salzmannhughes.com
Service Date: 3/30/2016
Address: 105 N. Front Street
Suite 205
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Phone: 717--23-4-6700
Representing: Amicus Curiae Suburban Municipalities

Served: Susan Brown-Wilson
Service Method: First Class Mail
Service Date: 3/31/2016
Address: Rev. Dr. Martin Luther King Jr.
City Government Center
10 N. Second Street
Harrisburg, PA 17101
Phone: 717-255-3060
Representing: Other Susan Brown-Wilson

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served: Wanda Williams
Service Method: First Class Mail
Service Date: 3/31/2016
Address: Rev. Dr. Martin Luther King Jr.
City Government Center
10 N. Second Street
Harrisburg, PA 17101
Phone: 717-255-3060
Representing: Other Wanda Williams

/s/ Rachel Renee Hadrick

(Signature of Person Serving)

Person Serving: Hadrick, Rachel Renee
Attorney Registration No: 316383
Law Firm: McNeese Wallace & Nurick LLC
Address: Mcneese Wallace & Nurick
100 Pine St PO Box 1166
Harrisburg, PA 171081166
Representing: Intervenor Impact Harrisburg