[J-34A-2023 and J-34B-2023] [MO: Wecht, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

RICK SIGER, IN HIS CAPACITY AS ACTING SECRETARY OF THE DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT	:	No. 12 MAP 2023
	:	Appeal from the Order of the Commonwealth Court Order dated January 31, 2023 at No. 336 MD 2020.
v.	:	
	:	ARGUED: May 24, 2023
CITY OF CHESTER	:	
APPEAL OF: CITY OF CHESTER, MAYOR THADDEUS KIRKLAND AND CITY COUNCIL OF THE CITY OF CHESTER	:	

RICK SIGER, IN HIS CAPACITY AS ACTING SECRETARY OF THE DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT	:	No. 15 MAP 2023
	:	Appeal from the Order of the Commonwealth Court Order dated February 14, 2023 at No. 336 MD 2020.
v.	:	
	:	ARGUED: May 24, 2023
CITY OF CHESTER	:	
APPEAL OF: CITY OF CHESTER, MAYOR THADDEUS KIRKLAND AND CITY COUNCIL OF THE CITY OF CHESTER	:	

DISSENTING OPINION AND OPINION IN SUPPORT OF VACATION AND REMAND

JUSTICE DOUGHERTY **DECIDED: January 29, 2024**

"[D]rastic times" may "call for drastic measures[,]" Opinion and Opinion in Support of Affirmance (OOISA) at 59, but they can't justify illegal ones. Each of the five modifications challenged by the City of Chester (City), the City's Mayor, and City Council, is contrary to the Municipalities Financial Recovery Act (Act 47), or otherwise unlawful. Accordingly, these modifications are arbitrary and should have been rejected as such by the Commonwealth Court. I respectfully dissent.

Under Act 47, the Commonwealth Court "shall confirm" modifications to a recovery 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." 53 P.S. §11701.703(e). A modification is arbitrary if it is contrary to law or rule. *See Commonwealth v. Boczkowski*, 846 A.2d 75, 102 (Pa. 2004) ("An action or factor is arbitrary if it is not cabined by law or principle."); *accord Commonwealth v. Knight*, 156 A.3d 239, 247 (Pa. 2016); *Commonwealth v. Lesko*, 15 A.3d 345, 411 (Pa. 2011); *Commonwealth v. Chambers*, 980 A.2d 35, 56 (Pa. 2009); *see also Arbitrary*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "arbitrary" as "[d]epending on individual discretion; of, relating to, or involving a determination made without consideration of or regard for facts, circumstances, fixed rules, or procedures"). Legal questions are subject to *de novo* review by this Court. *See, e.g.*, *Erie Ins. Exch. v. Moore*, 228 A.3d 258, 262 (Pa. 2020).[1]

[1] According to the OOISA, I've made "no effort to engage with the **facts** found by the Commonwealth Court." OOISA at 35 n.128 (emphasis in original); *see also id.* at 36 n.128 ("[N]owhere in its analysis does the Dissent identify any 'clear and convincing evidence' upon which the Commonwealth Court, or we, could conclude that the challenged modifications were 'arbitrary' under the **facts** of this case.") (emphasis in original). But this mischaracterization is beside the point; to be sure, disregarding facts is one way a (continued…)

Here, the five challenged modifications provide:

> [(1)] The administrative duties of City elected officials with respect to day-to-day operations shall be suspended. . . . City elected officials may not direct a City employee relating to any matter in the line of the employee's employment. . . .
>
> [(2)] City elected officials shall not interfere with the directives of the Chief of Staff or the Receiver. . . .
>
> [(3) T]he Receiver shall have the authority to direct the City to remove items from their Council agenda. . . .
>
> [(4)] Section 11.9-903(c) of the City's Charter provides that, "Where special skills are required, Council may at its discretion, employ qualified non-residents of the City in such cases where there are no qualified City residents available for the particular position involved." This initiative substitutes "the Receiver" for "Council." . . .
>
> [(5) S]hould 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 to comply and he shall immediately inform the Receiver.

Modification of Amended Recovery Plan (Plan Modification), at 30-31, 33, 42, 49.

Regarding the first modification, by way of background, the legislative body for the City is a City Council consisting of five members elected from the City at large to staggered four-year terms. *See* Home Rule Charter of the City of Chester §§201, 205.

---

determination may be arbitrary, but it is not the only one. As this Court's precedents and the Black's Law Dictionary definition endorsed by the OOISA make clear, a determination is arbitrary if it disregards the facts **or the law**. Moreover, the OOISA contends "[t]he Commonwealth Court took evidence over the course of a three-day hearing, found that the credible evidence offered by the Receiver justified many of the significant interventions proposed, and, indeed, rejected many of the initiatives that it concluded were impermissible." *Id.* at 36 n.128. However, the focus of the arbitrariness inquiry is not the Commonwealth Court's decision-making but whether "the **recovery plan** as modified is arbitrary[.]" 53 P.S. §11701.703(e) (emphasis added). Whether the plan modifications challenged by the City are contrary to law and therefore arbitrary are legal questions to be reviewed *de novo*.

The Mayor is one of the five members of City Council, has full voting rights thereon, and serves as the body's presiding officer. *See id.* §201. City Council may, by ordinance, designate members of City Council to serve as the heads of the City's administrative departments. *See id.* §601. Alternately, the Mayor, at the annual organizational meeting of City Council, may assign members of City Council to head one or more of the City's administrative departments. *See id.* §603. Currently, and since at least 2016 when Mayor Thaddeus Kirkland took office, the latter procedure is followed. That is, the Mayor annually appoints members of City Council as department heads. *See* N.T. 1/10/23 at 243-44. Thus, the duties of City Council members are not limited to their legislative responsibilities. They also have administrative duties as department heads. *See* OOISA at 13 ("Mayor Kirkland appoints exclusively City Council members as department heads, thus giving them administrative responsibilities in addition to their legislative roles."); *id.* at 40 ("City Councilpersons . . . have a legislative role as officials elected to serve on City Council, but . . . also, by virtue of the Mayor's appointment, have administrative duties as the heads of the City's various departments.") (emphasis omitted).

The challenged modification totally suspends these duties; it effectuates a wholesale suspension of the councilmembers' leadership of the various City departments, regardless of the particular department or specific governance issue. *See id.* ("The challenged initiatives seek . . . to suspend these officials' duties in their administrative capacities[.]"). Indeed, the modification bars members of City Council from giving even *ad hoc* directions to City employees concerning their work. *See* Plan Modification at 30 ("City elected officials may not direct a City employee relating to any matter in the line of the employee's employment."). In the place of departments run by democratically-elected

members of City Council, the modification contemplates departments headed by unelected "employees and contractors." *Id.*

This drastic change in the way the City is governed contravenes several provisions of Act 47. Section 706 of Act 47 delineates the powers of the Receiver. Concerning modifications to the recovery plan, Section 706 grants to the Receiver the power "[t]o modify the recovery plan as necessary to achieve financial stability of the distressed municipality and authorities in accordance with section 703." 53 P.S. §11701.706(a)(2).[2] Accordingly, the Receiver's power to modify the recovery plan is not unlimited. Under the plain language of Section 706(a)(2), modifications are permitted only to the extent they are "necessary to achieve financial stability." 53 P.S. §11701.706(a)(2).

The City's departments include Public Affairs (which includes the Police Department), Accounts and Finance (which includes the Department of Human Resources), Public Safety (which includes the Fire Department), Streets and Public Improvements, and Parks and Public Property. *See* Codified Ordinances of Chester, arts. 111.04, 111.05, 111.06, 111.07, 111.09. Heading the day-to-day operations of these various departments necessarily involves numerous issues and decisions unrelated to the financial stability of the City. For instance, if the head of Public Affairs directs the police to focus on a specific block experiencing a sharp uptick in crime, if the head of Public Safety directs inspection of a fire plug to ensure it is in working order, if the head of Streets and Public Improvements directs a pothole to be filled, or if the head of Parks and Public Property directs a playground to be cleaned, the overall economic health of the City is not implicated. Completely barring the City's elected officials from involvement

[2] Section 703(e) establishes the procedure for modification. *See* 53 P.S. §11701.703(e).

in any administrative determination whatsoever, regardless of importance or subject, goes well beyond what is necessary to achieve financial stability for the City as a whole.

The OOISA argues:

> Neither this Court nor the Commonwealth Court are experts in municipal finance, and Act 47 does not ask us to be. The question for a reviewing court is not whether the Receiver is, in fact, correct in determining that a particular modification is "necessary to achieve financial stability." Rather, Act 47 directs the court to apply a specific, and highly deferential, standard of review to the Receiver's determination.

OOISA at 35. The standard of review under Section 703(e) is not a rubber stamp. A modification that is "arbitrary" must be disallowed, 53 P.S. §11701.703(e), and a modification is arbitrary "if it is not cabined by law," *Lesko*, 15 A.3d at 411; *Chambers*, 980 A.2d at 56; *Boczkowski*, 846 A.2d at 102. The pertinent law, Section 706(a)(2), does not grant the Receiver unfettered discretion to initiate any modification he pleases. Act 47 does not appoint the fox to guard the henhouse, and leave it to the Receiver alone to define the limits of his own authority to modify the recovery plan. Rather, any putative modification must be "necessary to achieve financial stability." 53 P.S. §11701.706(a)(2). Any modification which is not necessary to achieve financial stability is *ultra vires* and arbitrary. One need not be an "expert[ ] in municipal finance," OOISA at 35, to recognize that totally stripping the members of City Council of absolutely any say in the day-to-day minutiae of municipal operations clearly exceeds what is required to achieve financial stability.[3]

[3] As detailed below, one also does not need any special financial expertise to see that the authority to remove any item at all from City Council's agenda, including items unrelated to the City's finances, goes well beyond what is necessary to secure financial stability.

In addition to violating Section 706(a)(2), the first challenged modification also violates Section 605 of Act 47. Section 605 provides: "During a fiscal emergency, the authorities and appointed and elected officials of the distressed municipality shall continue to carry out the duties of their respective offices, except that no decision or action shall conflict with an emergency action plan, order or exercise of power by the Governor under section 604." 53 P.S. §11701.605. As the OOISA acknowledges, *see* OOISA at 13, 40, the duties of the councilmembers' offices include heading the City's various departments. Suspending these duties directly violates Section 605's command that elected officials shall continue to carry out their duties during a fiscal emergency.

The OOISA insists Section 605 offers "little aid" to the City because "receivership operates under **Chapter 7** of Act 47, which contains provisions that are more directly relevant to the challenged initiative." OOISA at 45 (emphasis in original). However, although a Receiver has been appointed for the City, the fiscal emergency continues. The "fiscal emergency shall end" only "upon certification by the [Secretary of Community and Economic Development] that the municipality: (1) is solvent and is not projected to be insolvent within 180 days or less; and (2) is able to ensure the continued provision of vital and necessary services after the termination of the fiscal emergency." 53 P.S. §11701.608(a).

Moreover, there is nothing in Chapter 7 authorizing the modification. The OOISA points to Section 708(a), *see* OOISA at 45-46 & n.159, but that provision authorizes the Receiver to issue a specific order to a specific elected official to either implement a particular provision of the recovery plan, or to refrain from taking a particular action that would interfere with the Receiver's powers or the goals of the recovery plan. *See* 53 P.S.

§11701.708(a) ("The receiver may issue an order to an elected or appointed official of the distressed municipality or an authority to: (1) implement any provision of the recovery plan; and (2) refrain from taking any action that would interfere with the powers granted to the receiver or the goals of the recovery plan."). In other words, Section 708(a) permits *ad hoc* orders to elected officials on an as-needed basis, not the "extraordinary measure" of the "complete suspension" of the elected officials' administrative duties. OOISA at 47.

The OOISA's reliance on Section 704(a)(2) is also misplaced. *See id.* at 46-47. This section provides: "The confirmation of the recovery plan and any modification to the receiver's plan under section 703 . . . shall have the effect of: . . . 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)(2). Section 704(a)(2) concerns the "effect" of a confirmed modification, not whether a modification is authorized in the first place. It presupposes a valid modification confirmed under the procedure set forth in Section 703(e), and addresses the impact of confirmation. Section 704(a)(2) does not address the Receiver's substantive power to modify the recovery plan; that is addressed by Section 706(a)(2). What's more, this section contemplates only the limited suspension of powers "to the extent" they would interfere with the powers of the Receiver or the goals of the recovery plan, not the blanket, unconditional suspension of duties proposed here. *Id.*[4]

[4] The OOISA asserts that under my "view of these statutory provisions . . . [i]t is difficult to imagine what sort of suspensions of local officials' duties . . . would be permissible (continued…)

The total takeover of the elected officials' responsibilities to conduct the day-to-day affairs of the City also conflicts with Section 102, which sets forth the purpose and legislative intent of Act 47. Specifically, Section 102(b)(1)(ii) provides: "It is the intent of the General Assembly to . . . [e]nact procedures and provide powers and guidelines to ensure fiscal integrity of municipalities **while leaving principal responsibility for conducting the governmental affairs of a municipality**, including choosing the priorities for and manner of expenditures based on available revenues, **to the charge of its elected officials**, consistent with the public policy set forth in this section." 53 P.S. §11701.102(b)(1)(ii) (emphasis added). Presently, not only are the councilmembers stripped of their principal responsibility for conducting the day-to-day affairs of the City, but they are in fact deprived of **any** role at all in daily governance. Wholly banishing the democratically elected officials from managing the City is clearly not what the legislature had in mind in promulgating Act 47. Section 102(b)(1)(ii) calls for the preservation, not abrogation, of self-governance.

The OOISA contends:

> Section 102 contains numerous statements of the General Assembly's intent. . . . [T]he provision of Section 102 that most closely aligns with receivership under Chapter 7 is the statement of the General Assembly's

---

under Section 704(a)(2) . . . yet would not be vulnerable to attack" under Section 605. OOISA at 46 n.161. However, Section 605 does not totally ban the suspension of local officials' duties. Although it sets forth a general rule that "[d]uring a fiscal emergency, the authorities and appointed and elected officials of the distressed municipality shall continue to carry out the duties of their respective offices," expressly exempted from that rule is any "decision or action . . . conflict[ing] with an emergency action plan, order or exercise of power by the Governor under section 604." 53 P.S. §11701.605. Section 605 thus appears to authorize the limited suspension of duties to the extent necessary for fiscal recovery. But the wholesale suspension of the elected officials' administrative duties at issue in this case is incompatible with both Section 704(a)(2) and Section 605, even if a hypothetical, more circumscribed suspension could potentially pass statutory muster.

> intent to "[p]rovide 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." . . . This provision demonstrates the legislature's intent to prioritize the financial recovery of such municipalities over the prerogatives of local officials.

OOISA at 43-44 (footnotes omitted), *quoting* 53 P.S. §11701.102(b)(1)(iv). But the various statements of intent in Section 102 are not mutually exclusive. They are not separated by the word "or" or otherwise phrased in the disjunctive. Section 102 does not present a menu of intents from which a court can pick and choose. Instead, the entirety of Section 102 must be given effect to the extent possible. *See* 1 Pa.C.S. §1921(a) ("Every statute shall be construed, if possible, to give effect to all its provisions."). The language of Section 102(b)(1)(ii) applies just as well to receivership under Chapter 7 as the language of Section 102(b)(1)(iv). Construed as a whole as it must be, Section 102 evinces the legislative intent of balancing the interests of preserving local, democratically elected self-governance and promoting financial recovery. Completely gutting City Council's administrative duties does not balance these concerns but rather disproportionately favors the latter side of the equation to the significant detriment of the former.[5]

---

[5] The OOISA argues Sections 102(b)(1)(ii) and 102(b)(1)(iv) are "plainly incompatible[,]" asking rhetorically "how, if the authority of local officials is unassailable, the Commonwealth might exercise its 'sovereign and plenary police power' to protect the welfare of a municipality's citizens when such 'local officials are unwilling or unable to accept a solvency plan' developed for the municipality's benefit?" OOISA at 44-45 n.155, *quoting* 53 P.S. §11701.102(b)(1)(iv). But Section 102(b)(1)(ii) does not endorse "unassailable" local authority — it does not categorically provide that powers of local elected officials should never be questioned, challenged, or abridged. Instead, it calls for "leaving **principal** responsibility for conducting the governmental affairs of a municipality . . . to the charge of its elected officials[.]" 53 P.S. §11701.102(b)(1)(ii) (emphasis added). (continued…)

The second modification appealed by the City, which dictates noninterference with the Receiver's directives, is also *ultra vires* of Act 47. "Under the doctrine of *expressio unius est exclusio alterius*, the inclusion of a specific matter in a statute implies the exclusion of other matters." *Thompson v. Thompson*, 223 A.3d 1272, 1277 (Pa. 2020) (quotation marks and citation omitted). Act 47 addresses the power of the Receiver to address interference by elected officials in Sections 708(a)(2) and 709(a). Again, Section 708(a)(2) provides: "The receiver may issue an order to an elected or appointed official of the distressed municipality or an authority to . . . refrain from taking any action that would interfere with the powers granted to the receiver or the goals of the recovery plan." 53 P.S. §11701.708(a)(2). Section 709(a), in turn, states: "The receiver may petition Commonwealth Court to issue a writ of mandamus upon any elected or appointed official of the distressed municipality or authority to secure compliance with an order issued under section 708." 53 P.S. §11701.709(a). Accordingly, Act 47 specifies two particular actions the Receiver may take to bar interference by elected officials: the Receiver can issue an order and, if the order is not obeyed, he can petition for mandamus. Pursuant to the doctrine of *expressio unius est exclusio alterius*, the statute's explicit authorization of these two specific actions by the Receiver to protect against interference by elected officials implies the prohibition of other acts to accomplish this objective. That is, under Sections 708(a)(2) and 709(a), interference with the Receiver's directives must be

---

This qualified and flexible legislative intent can be effectuated without barring the exercise of the Commonwealth's police power in emergency fiscal conditions pursuant to Section 102(b)(1)(iv). It is entirely possible to give effect to both Sections 102(b)(1)(ii) and 102(b)(1)(iv), and therefore, pursuant to our rules of statutory construction, we are obliged to do so. *See* 1 Pa.C.S. §1921(a).

addressed through orders and, if necessary, mandamus proceedings, not a provision in the recovery plan itself.

In addition, this modification violates Section 709(b), which provides: "Any elected or appointed official of a distressed municipality or authority may petition Commonwealth Court to enjoin any action of the receiver that is contrary to this chapter." 53 P.S. §11701.709(b). Contrary to the OOISA's implication that the City's elected officials have a "mandatory duty" to comply with the Receiver's directives, OOISA at 39 (quotation marks, citation, and emphasis omitted), Section 709(b) recognizes the Receiver may issue directives in violation of Chapter 7, and authorizes the officials to take legal action to prevent illegal directives from being effectuated. The disputed modification, however, imposes on the City's elected officials a blanket obligation to not interfere with any directive from the Receiver, regardless of its legality. This unequivocal mandate is incompatible with the elected officials' statutory right to pursue mandamus to block illegal directives under Section 709(b).

The third modification, authorizing the Receiver to remove items from City Council's agenda, likewise violates Act 47, as it is unnecessary to achieve financial stability in contravention of Section 706(a)(2). While it is no doubt true that "City Council's legislative activities can involve the expenditure of the City's limited funds[,]" OOISA at 49, the modification is not limited to agenda items related to the City's finances. Rather, it authorizes the Receiver to direct the City to remove any item at all from City Council's agenda irrespective of the subject matter. Under this modification, the Receiver would be able to block resolutions having no bearing whatsoever on the City's financial condition, such as resolutions recognizing the accomplishments of a City resident,

proclaiming support for an oppressed population overseas, naming a new City park, or renaming a City holiday.[6] Granting the Receiver total control over City Council's legislative agenda, even when economic concerns are not implicated, is far in excess of what is required to secure financial stability for the City.

Furthermore, this modification conflicts with Section 706(a)(8). That provision grants to the Receiver the power "[t]o **attend** executive sessions of the governing body of the distressed municipality or authority and make reports to the public on implementation of the recovery plan." 53 P.S. §11701.706(a)(8) (emphasis added). Under the *expressio unius est exclusio alterius* doctrine, the implication of Section 706(a)(8) is that the Receiver's powers regarding City Council's meetings are limited to attending them. The Receiver is not empowered to actually participate in the meetings, much less direct that particular items be removed from Council's agenda.

The OOISA argues this modification "implicates Section 704(a)(2)[.]" OOISA at 49. As discussed, Section 704(a)(2), by its plain terms, addresses the "effect" of confirmation of a modification to the recovery plan; it does not grant any particular substantive power to the Receiver. *See* 53 P.S. §11701.704(a)(2). The OOISA also asserts "[s]uch authority [to control City Council's agenda] is arguably already encompassed within other provisions of Act 47[,]" specifically Sections 706(a)(1),

[6] The OOISA contends "[e]ven seemingly minor activities involve the direction of municipal employees, who the municipality must pay." OOISA at 50 n.172. None of the above-noted examples, which represent but the tip of the iceberg of potential non-financial matters that could be addressed by a city council, directs municipal employees to do anything. In any case, existing municipal employees would get paid regardless of any such enactments. Blocking the measures would not save the municipality from paying the salaries of employees already on the payroll.

706(a)(7), and 708(a). OOISA at 49.[7] However, these general provisions do not specifically address the Receiver's powers regarding City Council proceedings. Section 706(a)(8), on the other hand, squarely addresses the Receiver's authority in this regard. It is a well-settled rule of statutory construction that "the specific controls the general." *LaFarge Corp. v. Commonwealth, Ins. Dept.*, 735 A.2d 74, 76 (Pa. 1999).[8]

Fourth, the modification purporting to amend the City's Home Rule Charter to permit the Receiver to hire non-residents is unconstitutional. The Pennsylvania Constitution mandates that "[a]doption, amendment or repeal of a home rule charter shall be by referendum." PA. CONST. Art. 9, §2. "'Referendum' means approval of a question placed on the ballot, by initiative or otherwise, by a majority vote of the electors voting thereon." PA. CONST. Art. 9, §14. The challenged modification purports to bypass the constitutional requirement of a voter referendum and amend the City's Home Rule Charter via the recovery plan. This is clearly prohibited by Article 9, §2, rendering the modification arbitrary as contrary to law.

According to the OOISA, "[a]lthough the initiative perhaps could be more clear in its phrasing, it seeks to amend the City's Act 47 **recovery plan**, not the City's Home Rule

---

[7] Section 706(a)(1) authorizes the Receiver "[t]o require the distressed municipality or authority to take actions necessary to implement the recovery plan under section 703." 53 P.S. §11701.706(a)(1). Section 706(a)(7) empowers the Receiver "[t]o direct the distressed municipality or authority to take any other action to implement the recovery plan." 53 P.S. §11701.706(a)(7).

[8] The OOISA maintains "[t]here is no reason to conclude that the City Council's listing of items on its legislative agenda is outside the reach of the[] broad statutory delegations of power to the Receiver" in Sections 706(a)(1) and 708(a). OOISA at 51 n.172. On the contrary, there is a very good reason to conclude these general provisions do not supersede the specific language of Section 706(a)(8) granting to the Receiver the limited power to attend City Council meetings: the bedrock principle of statutory construction that the specific controls over the general. *See LaFarge*, 735 A.2d at 76.

Charter." OOISA at 54 (emphasis in original); *see also id.* at 54 n.185 ("[T]he fact remains that the City has failed to demonstrate why this modification to the **recovery plan** was impermissible") (emphasis in original). In fact, the modification seeks to do both things. It is an amendment to the recovery plan that would amend the City's Home Rule Charter. The modification purports to amend the language of Section 903(C) of the Charter by "substitut[ing] 'the Receiver' for 'Council.'" Plan Modification at 42. The OOISA implies a modification to the recovery plan is not "capable of causing a change in the actual wording of the City's Home Rule Charter." OOISA at 54. But that is exactly the point. It is indeed legally impossible for a modification to a recovery plan to amend a Home Rule Charter subject to revision by voter referendum only, which is why this modification purporting to do precisely that is *ultra vires* and arbitrary.

The fifth and final contested modification, which requires the City Solicitor to immediately notify the Receiver if an official or employee with the City has violated a court order or the recovery plan, contravenes Pennsylvania's Rules of Professional Conduct. In particular, Rule of Professional Conduct 1.6(a) provides: "[a] lawyer shall not reveal information relating to representation of a client unless the client gives informed consent[.]" Pa.R.P.C. 1.6(a). The explanatory comment to the rule expounds that "[a] fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation[,]" "the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients," and "[w]ith limited exceptions, information relating to the representation must be kept confidential by a lawyer." Pa.R.P.C. 1.6, expl. cmt. [2], [7]. The City Solicitor is an attorney admitted to

practice in Pennsylvania, *see* Home Rule Charter of the City of Chester §607, and the modification requires him to reveal information relating to representation of his client irrespective of whether there has been consent to disclosure. This presents a clear conflict with Rule 1.6(a).

The OOISA argues the modification is permissible under Rule 1.6(c)(8). *See* OOISA at 55. However, that paragraph simply provides that "[a] lawyer **may** reveal such information [relating to representation of a client] to the extent that the lawyer reasonably believes necessary . . . to comply with other law or court order." Pa.R.P.C. 1.6(c)(8) (emphasis added). Paragraph (c)(8) "permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified" in paragraph (c)(8). Pa.R.P.C. 1.6, expl. cmt. [23]. It confers "discretion" on the lawyer whether or not to disclose client information based on "such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question." *Id.* "A lawyer's decision not to disclose as permitted by paragraph (c)[8] does not violate th[e] Rule." *Id.* The modification, on the other hand, mandates that the City Solicitor "**shall** immediately inform the Receiver" of any violation of an order or the recovery plan. Plan Modification at 49 (emphasis added). The permissive language of Rule 1.6(c)(8) does not authorize the mandatory disclosure of confidential client information pursuant to the challenged modification.[9] Because each of the five appealed

[9] The OOISA claims "portions" of paragraphs [18] and [21] of the explanatory comment to Rule 1.6 "make abundantly clear that, notwithstanding the fact that paragraph (c) is framed in discretionary terms as a general matter, a lawyer may indeed be compelled to (continued…)

modifications to the City's recovery plan is violative of law or rule and thus arbitrary, I dissent.[10]

---

disclose" client information pursuant to a plan modification. OOISA at 56 n.192. Paragraph [18] provides:

Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (c)(8) **permits** the lawyer to make such disclosures as are necessary to comply with the law.

Pa.R.P.C. 1.6, expl. cmt. [18] (emphasis added). Similarly, paragraph [21] states:

A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, paragraph (c)(8) **permits** the lawyer to comply with the court's order.

Pa.R.P.C. 1.6, expl. cmt. [21] (emphasis added). Thus, like Rule 1.6(c)(8) itself, these comments are "framed in discretionary terms." OOISA at 56 n.192. By their plain language, they "permit[]" but do not oblige the lawyer to reveal client information. These permissively-worded comments do not mandate disclosure any more than the permissively-worded Rule they address.

[10] It is unnecessary to my analysis to consider whether, in addition to the legal and ethical violations described above, the challenged modifications also violate Section 704(b)(1), which provides that "[c]onfirmation of the recovery plan and any modification to the plan under section 703 shall not be construed to . . . change the form of government of the distressed municipality or an authority[.]" 53 P.S. §11701.704(b)(1). However, I note my disagreement with the OOISA's interpretation "[t]his [provision] is an unambiguous instruction to those who might 'construe' a recovery plan—reviewing courts, for instance—that they should **not** view a recovery plan as effecting a change to a distressed municipality's 'form of government.'" OOISA at 38 (emphasis in original). This construction of Section 704(b)(1) as dictating the outcome of judicial review raises constitutional separation of powers concerns. *See Bailey v. Waters*, 162 A. 819, 821 (Pa. 1932) ("A legislative direction to perform a judicial function in a particular way, would be (continued…)

Justice Mundy joins this dissenting opinion and opinion in support of vacation and remand.

a direct violation of the constitution, which assigns to each organ of the government its exclusive function and a limited sphere of action.") (quotation marks and citation omitted). As such, the doctrine of constitutional avoidance calls for rejecting this interpretation in favor of the Commonwealth Court's reasonable construction of this provision as a limitation upon the recovery plan, *i.e.*, as a mandate against the recovery plan changing a municipality's form of government. *See Commonwealth v. Herman*, 161 A.3d 194, 212 (Pa. 2017) ("Under the canon of constitutional avoidance, if a statute is susceptible of two reasonable constructions, one of which would raise constitutional difficulties and the other of which would not, we adopt the latter construction.").