

COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT

APRIL M. KOPPENHAVER AND	:	
COUNTY OF LANCASTER,	:	LGUDA 107 & 108
	:	
Complainants,	:	
v.	:	
	:	
CITY OF LANCASTER,	:	
	:	
Respondent.	:	

OPINION AND ORDER

Statutory Background

The Local Government Unit Debt Act, Part VII of Act 177 of 1996, P.L. 1158, as amended, 53 Pa.C.S.A. §8001-8271 (the "Debt Act" or "LGUDA"), governs the issuance of debt by local government units. The Debt Act establishes procedures for the issuance of various types of debt, including guaranties by local government units. 53 Pa. C.S.A. §8002(c), 8005(d), 8006, 8022 (1997 & Supp 2000). The Debt Act is administered by the Department of Community and Economic Development (the "Department"). The Department has:

exclusive jurisdiction to hear and determine all procedural and substantive matters arising from the proceedings of a local government unit ...including the regularity of the proceedings, the validity of the ...obligations of the local government unit and the legality of the purpose for which the obligations are to be issued.

53 Pa. C.S.A. §8211(d); see also Bundy v. Belin, 501 Pa. 254, 461 A.2d 197 (1983). The Department reviews the local

government unit's debt proceedings to ensure that they do not violate the Pennsylvania Constitution or the Debt Act. 53 Pa. C.S.A. §8211, 8204. Taxpayers of a local government unit that has submitted debt proceedings to the Department for review may contest the validity of the proceedings by filing a complaint with the Department within fifteen days after the proceedings have been filed, or five days following the last submission of any corrected document or certification to the Department, whichever occurs later. 53 Pa. C.S.A. §8211(b).

Title 12 of the Pennsylvania Code sets forth the rules and procedure that govern all adjudicatory proceedings related to complaints and petitions filed with the Department. 12 Pa. Code, Part I, §11.1.-11.15. Complaints to the Department shall contain among other things, a statement of the facts and legal grounds which form the basis for the conclusion that there has been a violation of the Debt Act, and include an identification of the relief sought and the legal basis for the relief. 12 Pa. Code §11.7(1)(iii). Answers by the local government unit to complaints and petitions shall admit or deny specifically and in detail each material allegation of the pleading answered, and state clearly and concisely the facts and provisions relied upon. 12 Pa. Code §11.9(a)(3). The parties may within seven calendar days of the date of service file a responsive amendment, modification or supplement to a complaint, petition or answer or other pleadings. Id. at §11.9(4).

### **The Presiding Officer**

When a complaint or petition is filed under the Debt Act, it is assigned to a presiding officer who has been

appointed by the Secretary of the Department to fulfill that role. 12 Pa. Code §11.14. The presiding officer administers the case and makes a report containing proposed findings of fact and conclusions of law to the Department's Secretary for the ultimate disposition of the matter. Id. Under the Department's regulations, a hearing or oral argument may be convened with respect to motions and complaints if and as necessary. See 12 Pa. Code §11.11(c), 11.12(a).

### **Procedural Background**

The matters before the Department consist of a complaint (the "Taxpayer Complaint") by April M. Koppenhaver, a resident of the City of Lancaster (the "Taxpayer Complainant") and a complaint (the "County Complaint") filed by the County of Lancaster (the "County Complainant") challenging the two sets of debt proceedings filed by the City of Lancaster (the "City"). The Taxpayer Complainant and the County Complainant shall sometimes be referred to collectively as "the Complainants". The Taxpayer Complaint and the County Complaint shall sometimes be referred to collectively as the "Complaints". The City's debt proceedings, dated April 28, 2005, and received by the Department on May 2, 2005, seek Department approval of the City's proposed lease rental (limited guaranty) indebtedness in the amount of \$24,000,000 (the "\$24,000,000 Limited Guaranty Debt Proceedings") and the City's proposed lease rental indebtedness in the amount of \$12,000,000 (the "\$12,000,000 Guaranty Debt Proceedings") (the \$12,000,000 Guaranty Debt Proceedings and the \$24,000,000 Limited Guaranty Debt Proceedings shall be sometimes referred to collectively as the "Debt Proceedings").

The Taxpayer Complaint was filed on April 29, 2005, and docketed at LGUDA-107. The City filed a timely Answer, Motion to Dismiss the Complaint, and Memorandum in Support of the Motion to Dismiss on May 12, 2005 (the "Motion to Dismiss Taxpayer Complaint"). The County Complaint was filed with the Department on May 17, 2005. The City filed an Answer, Motion to Dismiss, and Memorandum in Support of Motion to Dismiss the County Complaint on May 27, 2005 (the Motion to Dismiss County Complaint") The Motion to Dismiss Taxpayer Complaint and the Motion to Dismiss the County Complaint shall be referred to collectively as the "Motion to Dismiss".

The Department held a conference call with the parties on June 20, 2005, to address procedural matters, including the consolidation of the two complaints for purposes of disposition, the County Complainant's Motion for Discovery, the Taxpayer Complainant's Motion for Hearing, and the City's challenge that the County lacked legal standing to file a complaint. The parties agreed to a consolidation of the Complaints, based upon the similarity of the challenges. Argument was presented by counsel for the Taxpayer Complainant, counsel for the County Complainant, and counsel for the City, respectively, on various issues raised in the Complaints.

Upon review of the pleadings and considering the arguments by Counsel during the conference call, the Department issued Orders on June 21, 2005, consolidating the two Complaints, denying the City's Motion to Dismiss to the extent of the legal standing challenge, denying the County Complainant's Motion for Discovery and the Taxpayer Complainant's Motion for Hearing, as it was determined that

there were no outstanding questions of material fact. Legal argument was then submitted by all three parties.

Based upon the legal argument submitted by the Taxpayer Complainant and County Complainant, wherein the Complainants raised a substantially new argument in support of their allegations that the City did not obtain preliminary cost estimates as required by §8006 of the Debt Act, the Department held a conference call on September 19, 2005, to determine if there was additional evidence to address this question. The City made an offer of proof during the conference call that documentation was provided to all members of City Counsel prior to City Council's adoption of the Ordinances to incur the \$24,000,000 and \$12,000,000 of lease rental debt. By letter received September 26, 2005, the City submitted a reply brief including three affidavits and exhibits addressing this issue. The Taxpayer Complainant and County Complainant submitted response briefs on October 11, 2005.

### **Factual Background**

The City is a Pennsylvania municipal corporation which operates under the Third Class City Code, 53 P.S. 37403, Optional Charter Law, 53 Pa C.S.A. 2961, Mayor-Council Plan-A, is a "state public body" within the meaning of the Redevelopment Cooperation Law, 35 P.S. §1742, and is located in the jurisdiction of the Authority within the meaning of the Redevelopment Cooperation Law. The Redevelopment Authority of the City of Lancaster, a redevelopment authority operating under the Urban Redevelopment Authority Act of May 24, 1945, P.L. 1991, as amended and supplemented, 35 P.S. §1701, et. seq., (the

"Authority") initiated a redevelopment project including among other things, the construction of a hotel and related facilities (the "Hotel") in connection with the construction of a convention center on or near Penn Square (the "Project")<sup>1</sup>, as part of a redevelopment plan in the City of Lancaster (the "Redevelopment Plan")<sup>2</sup>. Under the Redevelopment Plan, the Authority will be the fee simple owner of the Hotel portion of the Project unless and until the Hotel is sold by the Authority. Penn Square Partners<sup>3</sup>, the co-developer ("PSP") will lease the Hotel from the Authority for a term of Twenty (20) years. Affidavit of Charles Simms, at #8., Id. After expiration of the lease PSP will have an option to purchase the Hotel. Id. To assist with the financing of the Project, the Authority plans a \$24,000,000 bond issue (the "Authority \$24,000,000 Bonds") and a \$12,000,000 bond issue (the "Authority \$12,000,000 Bonds)". The Authority \$24,000,000 Bonds and the Authority \$12,000,000 shall sometimes be referred to collectively the "2005 Authority Bonds". The Authority requested and the City agreed that the City would guarantee the Authority's payment of principal and interest on the 2005 Authority Bonds to make the bonds more marketable, and to meet the requirements of the Infrastructure and Facilities Improvement Program, 12 Pa. C.S.A. §3406(b) known as Act 23 ("Act 23").

On March 8, 2005, the Lancaster City Council (the "City Council"), the governing body of the City for purposes of the Debt Act, held a public meeting to address

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<sup>1</sup> \$12,000,000 Guaranty Debt Proceedings, \$24,000,000 Limited Guaranty Debt Proceedings. The scope of the Project is in dispute and addressed in the Discussion Section relating to the §8006 challenge.

<sup>2</sup> Affidavit of Charles H. Simms, Jr., #4

<sup>3</sup> A Pennsylvania Limited Partnership, of which Penn Square General, L.P. is the General Partner.

among other things, the Redevelopment Plan involving the construction of a full service hotel and convention center (the Project). All members of City Council were provided with copies of a "Project Plan for Tax Increment Financing" prepared by High Associates, Ltd. (the "Project Plan"), which include as an exhibit the preliminary cost estimates for Project (the "Cost Estimate Exhibit") during the March 8, 2005 meeting<sup>4</sup>. A presentation to the City Council was made jointly by Charles Simms, Chairman of the Authority, and Nevin Cooley, President of the General Partner of PSP. The Project cost estimates, the sources of Project financing, and other issues related to the construction of the Project were discussed at the March 8, 2005 meeting and an April 12, 2005 City Council meeting.<sup>5</sup>

On April 12, 2005, City Administration Bill No. 6, passed as Administrative Ordinance No. 5 ("Ordinance No. 5") in connection with the City's \$12,000,000 Guaranty Proceedings, and City Administrative Bill No. 12, passed as Ordinance No. 10 ("Ordinance No. 10") in connection with the \$24,000,000 Limited Guaranty Proceedings. Following the City Council votes approving the Ordinances Charles W.

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<sup>4</sup> Affidavit of Stephen Diamantoni & Exhibit A of City Memorandum in Support of Motion to Dismiss. As reflected in the transcripts of the March 8, 2005, public meeting and in the Project Plan, the "Project" is described as a condominium consisting of an approximately 300 room full service hotel, a 220,000 square foot convention center and certain common elements. The "common elements" as defined in the Project Plan were said to include maintenance storage, lobby, a lobby restroom, public telephones, engineering shop, director of engineering, security, fire control room, mechanical room, janitor closet, personnel, employee toilets, employee lockers, employee entry, and employee lounge. The "Project" as defined in the Affidavit of Mr. Diamantoni as "a redevelopment project in the City of Lancaster that includes the construction of a hotel and related facilities in connection with the construction of a convention center".

<sup>5</sup> Exhibit B to City Memorandum in Support of Motion to Dismiss, Affidavit of Carol Roland, Exhibit E to City Memorandum and Motion to Dismiss, and City Reply Brief, Exhibit D to Affidavit of Janet Spleen.

Smithgall, Mayor of the City of Lancaster, signed Ordinance No. 5 and Ordinance No. 10 on April 13, 2005 (collectively, the "Ordinances"). The 2005 Authority Bonds are to be used to fund a portion of the Project.

On April 20, 2005, the City forwarded the Ordinances as well as other documents to Robert B. Campbell, Jr., Controller for the City, to sign in his capacity as that officer. On April 22, 2005, Mr. Campbell sent a letter to Mayor Smithgall indicating that he would not sign the documents. On or about April 25, 2005, Mayor Smithgall filed a complaint with the Court of Common Pleas of Lancaster County seeking an Order in Mandamus to direct Mr. Campbell to execute any and all documents presented to him as necessary to effectuate the Ordinances lawfully adopted by City Council and signed by Mayor Smithgall. By Order dated April 27, 2005, Common Pleas Court Judge Paul K. Allison ordered Mr. Campbell to execute any and all documents submitted to him necessary to effectuate the Ordinances and bills identified in the Common Pleas complaint. By order of court, Mayor Smithgall was authorized to execute such documents as attorney in fact for Mr. Campbell, and Mayor Smithgall signed the Debt Statement portion of the Debt Proceedings as attorney in fact for Mr. Campbell and submitted them to the Department (the "Replacement Proceedings"). By Order dated June 29, 2005, the Court of Common Pleas reaffirmed its April 27, 2005 ruling.

#### **Scope and Standard of Review**

The General Assembly has conferred on the Department exclusive jurisdiction over the procedural and substantive matters arising from the proceedings of a local government

unit under the Debt Act. 53 Pa.C.S.A. §8211(d). The Department's scope of review is limited to those issues within the stated grant of jurisdiction of the Act, i.e., to those issues "involving (1) the regularity of the proceedings; (2) the validity of the bonds; and (3) the legality of the purpose for which such obligations are issued."<sup>6</sup>

When considering a motion to dismiss a complaint, the complaint shall be dismissed:

if the pleadings, together with the affidavits or documents, if any, and the proceedings of the local government unit which are the subject matter of the complaint . . . show that there is no genuine issue as to a material fact and that the moving party is entitled to dismissal of the complaint . . . as a matter of law.

12 Pa. Code §11.1(b)(3). "A motion to dismiss resolves all well-plead facts and inferences in favor of the non-moving party and tests the legal sufficiency of the complaint."

Property Owners, Residents, and/or Taxpayers of the Pleasant Valley Sch. Dist. v. Dep't of Cmty. Affairs, 515 A.2d 85, (Pa. Cmwlth. 1986). The motion "places the burden of proof on the moving party to show that no issue exists upon which relief could be granted to the non-moving party." Id.

### **Discussion**

As the Complainants' are undoubtedly aware, the Department lacks the authority to determine whether a local government's project is necessary or wise. Property Owners,

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<sup>6</sup> McMaster v. Dep't of Cmty. Affairs, 610 A.2d 525, 528, (Pa. Cmwlth. 1992); see also Bundy v. Belin, 461 A.2d 197 (Pa. 1983); Allegheny Inst. Taxpayers Coalition v. Allegheny Reg'l Asset Dist., 556 Pa. 102, 112, 727 A.2d 113, 118 (1999).

515 A.2d at 89. It is also well established that the decisions made by a redevelopment authority are outside the scope of the Debt Act and, therefore, outside the scope of Department review<sup>7</sup>. One of the central purposes of the Debt Act is to require disclosure of a project in order to ensure lawfulness and public notice, while respecting the discretion and latitude necessary for a governmental body to pursue a major construction project in a reasonable and business-like way. Borough of Brentwood v. Department of Community Affairs, 657 A.2d 1025 (Pa. Cmwlth. 1995) Pennsylvania courts have also explained that the Department's review is intended primarily to insure that the project is, in a broad sense, a proper governmental undertaking. Mellinger v. Dep't of Cmty Affairs, 533 A.2d 1119, at 1123 (Pa. Cmwlth. 1987).

The Complainants have cited numerous legal challenges to the Debt Proceedings predicated on alleged violations by the City of §8004, §8005 and §8006 of the Debt Act, Articles VIII, §1 and Article 9, §9 of the Pennsylvania Constitution, and the Third Class City Charter Law, and allegations that the Debt Proceedings violate the requirements and provisions of Infrastructure and Facilities Improvement Program, 12 Pa. C.S.A. §3406(b) known as Act 23 ("Act 23"). To the extent the Complainant's challenges address the decisions and actions taken by the Authority with respect to the Project they are outside the scope of review of the Department, as redevelopment authorities are not local government units governed by the provisions of the Debt Act. §8002 (a)

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<sup>7</sup> As indicated in §8002 Municipal Authorities are not subject to the Debt Act.

One of the underlying challenges in both Complaints relates to the question of whether the Project property is subject to local real estate taxes during the period of the Authority's ownership and whether the City's Guaranty of the 2005 Authority Bonds is an illegal mechanism whereby the City will pay the real estate taxes on the Project for the benefit of PSP. These issues are clearly outside the scope of the Department's review, as they have nothing to do with the steps taken by the City to comply with the Debt Act. The Department has never required proof that all components of a Project are complete or resolved before the Department can approve the debt proceedings, so long as the statutory requirements of the Debt Act are satisfied. See Bethel Park Citizens v. DCA, 563 A.2d 969 (Pa. Cmwlth. 1989)

The Complainants argue that the City's support of the Project through the Guaranty Agreement between the City and the Authority with respect to the Authority \$12,000,000 Bonds and the Limited Guaranty Agreement between the City and the Authority with respect to the Authority \$24,000,000 Bonds, (collectively, the "Guaranty Agreements") should open for Department review all issues raised in the Guaranties or implicated by such Guaranty Agreements. This argument is without basis. This Department's review is limited to the steps taken by the local government unit to gain approval of the bond issue. Simonetti v. Commonwealth, Dep't of Cmty. Affairs, 651 A.2d 1025 (Pa. Cmwlth. 1994) In an unpublished opinion regarding an appeal to LGUDA-53 and in Bethel Park Citizens, 563 A.2d 969, the Commonwealth Court held that it is not necessary for a local government unit to acquire all the necessary permits

and final approval for a building project before it can issue bonds to finance a project.

In the instant matter Complainants challenge the regularity of the proceedings and the legality of purpose for which the obligations are to be issued in connection with the Guaranty Agreements. The Department, then, must review the legality and constitutionality of the Ordinances (that provided for the City's guaranty of the Authority debt) and other documents making up its Debt Proceedings, the procedures taken by the City to decide to issue the Guaranty Agreements and for the proper officials to execute the necessary documents, and to confirm that the underlying project is of a type authorized under the Debt Act.

### **Act 23 Challenge**

The first challenge, made by both Complainants, is that the Debt Proceedings violate the Act 23. The City agrees to guarantee the \$12,000,000 Authority Bonds, in part, to induce to the Department to issue a series of Act 23 Grants to the Authority. Notwithstanding the fact that Act 23 is a Department program, the Department lacks subject matter jurisdiction under the Debt Act to review or make a determination concerning the Authority's compliance or non-compliance with the terms and conditions of Act 23. The Department's LGUDA review cannot extend beyond determining if the City has satisfied the steps necessary to gain approval of its Debt Proceedings. These steps for approval do not include proof of compliance with all other non-Debt Act regulations, statutes, building permits, and other contingencies involved in a project. See Property Owners, 515 A.2d at 89. While the City submitted a copy of the Guaranty Agreements with its \$12,000,000 Guaranty Debt

Proceedings, it was not required to do so under the Debt Act. §8111 The City has also met the threshold requirement of establishing that the Project is, in a broad sense, a legitimate governmental undertaking. See §8002(c) "Project" (1). Accordingly, the Complainants' request that the Department address the legality of all the underlying assumptions, transactions and plans in connection with the City's application for Act 23 grant(s) must be denied for lack of jurisdiction.

### **Uniformity Clause Challenge**

The Complainants next challenge that the limited guaranty agreement in connection with the \$24,000,000 Limited Guaranty Debt Proceedings violates the Uniformity Clause of the Pennsylvania Constitution, Article VIII, Section 1 (Article VIII, §1). The County Complainant avers that it is illegal for a city to waive real estate taxes payable to itself. The Taxpayer Complainant, in a similar argument, charges that the City's proposed \$24,000,000 Limited Guaranty Debt proceedings are for an improper purpose under the Debt Act, and that with respect to the City taxes, violates Article VIII, §1. Article VIII, Section 1, provides as follows:

"All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

This section of the Pennsylvania Constitution is inapplicable to the Debt Proceedings at issue. Neither of the Guaranty Agreements purport to impose a tax or exempt any property from taxation. The stated purpose of the

Guaranty Agreements is the guaranty of the Authority's payment of "debt service" which is defined in the Guaranty Agreements as, "the full and prompt payment of principal of each and every Bond when and as such shall be due and payable, whether at the stated maturity thereof or upon acceleration or call for redemption or otherwise; and the full and prompt payment of the interest on each and every Bond when and as such shall be due and payable". Guaranty Agreements at §3.01. This form of guaranty is expressly permitted under §8005 of the Debt Act, the Redevelopment Law, Redevelopment Cooperation Law and the Third Class City Charter Law, 53 P.S. §41303(2.3). Again, the Department lacks subject matter jurisdiction to address the central theme of Complainants' Uniformity Clause argument, namely, that real estate taxes shall be due and payable on the Project property, as this is not one of the substantive or procedural issues involved in determining whether the Debt Proceedings comply with the Debt Act.

#### **§8004 Challenge**

The Complainants next challenge that the Debt Proceedings should be denied because the City's Guaranty Agreements allegedly violate §8004 of the Debt Act. The Taxpayer Complainant alleges that the 2005 Authority Bonds are not for the purpose of acquiring a "capital asset" as required in §8004 of the Debt Act, because PSP, the intended lessor of the Hotel from the Authority-lessee, will own the hotel after twenty years. The County Complainant challenges that because the central goal of the Redevelopment Plan is to provide a means for PSP to acquire a capital asset, it fails the requirements of §8004.

It must first be noted that the Complainants do not challenge a violation of either §§8004(a)(1) or (a)(2), only §8004(a)(3)<sup>8</sup>. Section §8004(a)(3), provides as follows:

upon termination of the lease, guaranty, subsidy contract or other agreement or upon dissolution of the lessor or obligee, whether before or after the termination of the lease, title to the subject project or premises or a given part thereof or undivided interest therein shall or, at the option of the local government unit, may vest by agreement or operation of law in the local government unit or in the Commonwealth.

The Complainant's have misinterpreted Section §8004. §8004(a)(3) applies only to a lease, guaranty, subsidy contract or other agreement (in this case a guaranty agreement) between a local government unit and a municipal authority. See §8004(a)(1) Accordingly, §8004 is not applicable to the lease or other agreement between the Authority and PSP. In the instant matter the Debt Proceedings and the Guaranty Agreements between the City (the obligor for purposes of §8004) and the Authority (the obligee for purposes of §8004) do not violate the requirements §8004 of the Debt Act.

### **§8005 Challenges**

Complainants next challenge that the Guaranty Agreements violate §8005(c) of the Debt Act. Complainants argue that, pursuant to §8005, the City may offer its guaranties only if the purpose of the 2005 Authority Bonds are for the purpose of acquiring a capital asset and if the

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<sup>8</sup>As the City correctly notes in its Memorandum in Support of its Motion to Dismiss, §8004 does not require that a guaranty by a local government unit must have as its purpose the acquisition or construction of a capital asset. This provision simply identifies when a guaranty evidences the acquisition of a capital asset.

City's guaranty involves a project it is authorized to own, acquire, subsidize, operate or lease. The Complainants aver that the City is not authorized to own, acquire, subsidize, operate or lease the hotel, and that accordingly, the Guaranty Agreements violate the Debt Act. The Complainants point to the fact that should the Authority be dissolved during the twenty year lease the City would acquire title to the hotel. The Complainants' position in this regard is untenable.

§§8005(c) provides as follows:

Every local government unit shall have full power and authority to . . . make guaranties . . . or other agreements evidencing the acquisition of capital assets payable out of taxes and other general revenues, to provide funds for and towards the cost of or the cost of completing any project or combination of projects which the local government unit is authorized to own, acquire, subsidize, operate or lease or to participate in owning, acquiring, subsidizing, operating or leasing with others . . .

The Urban Redevelopment Law allows a redevelopment authority to engage in projects involving "planning, replanning, acquisition, rehabilitation, conservation, renewal, improvement, clearance, sale, lease or other disposition of real property, buildings or other improvements in blighted areas or portions thereof..." See 35 P.S. 1703 & 1709(j) & (k). Pursuant to 35 P.S. §1713, a city may directly or indirectly fund a project within the scope of the redevelopment authority. Moreover, Redevelopment Cooperation Law allows a city, with the approval of its city council, to make such appropriations to an authority out of any moneys in such city not otherwise appropriated to assist the authority in carrying

out its public purpose. The County Complainant concedes that the Third Class Cities Charter Law applies to the Redevelopment Plan at issue, but argues that cities do not have unlimited powers under a home rule charter and that the right to own a hotel is not one of the sixty eight specifically authorized activities in the Third Class City Code, 53 P.S. 37403.

The Complainants' scope of authority arguments are not supported by the plain reading of §8005(c), which provides that the local government unit needs only the legal authority to *participate in owning, acquiring, subsidizing, operating or leasing* with others (emphasis added). In the instant matter the Authority is intended to be the fee simple owner of the Project and the City is to provide financial assistance by means of the Guaranty Agreements, a permitted action under §8005(c). When reviewing debt proceedings for compliance with the Debt Act, the Department will not consider hypothetical events that may or may not ever occur, such as the possible dissolution of the Authority. See Bethel Park Citizens, 563 A.2d 969 & LGUDA 53. The Authority clearly has the statutory authority to own and lease the hotel under the Urban Redevelopment Law, 53 P.S. §1709 & 53 P.S. §1702(g), and the City the statutory authority to guarantee the 2005 Authority Bonds for a type of project authorized under §8002(c) of the Debt Act, the Urban Redevelopment Law, 53 P.S. §1713, and the Redevelopment Cooperation Law, 53 P.S. §1741, §1744 & §1746<sup>9</sup>. Accordingly, the Complainants' challenges that the Guaranty Agreements are illegal under §8005(c) of the Debt Act are without merit.

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<sup>9</sup> There is no allegation that by either Complainant that the Project or the Guaranty Agreements violate the Redevelopment Cooperation Law.

## **Lease Rental Debt Requirements**

The Taxpayer Complaint's allegation that the Debt Proceedings fail to meet the Debt Act's requirements for lease rental debt is overly broad and, upon review of the Debt Proceedings and pleadings, not supported by the evidence of record.

### **§8006 challenges**

The Complainants' next challenge that the City (Council) failed to obtain realistic cost estimates "through actual bids, option agreements or professional estimates" prior to executing the Ordinances (to incur lease rental debt) as required by §8006 of the Debt Act.

A conference call was held on June 21, 2005, to discuss the necessity of an evidentiary hearing and to address motions of the parties. In the Department's determination neither counsel for the Taxpayer or counsel for the County identified any specific and compelling reason for an evidentiary hearing to be held on the §8006 challenge or any other issue raised in the Complaints. The Department denied the Taxpayer Complainant's Motion for Hearing and the County Complainant's Motion for Discovery, by Order dated June 21, 2005. The Complainants concede in their legal argument that the City obtained preliminary cost estimates, but allege that the cost estimates are not realistic, are not in adequate detail, and are legally insufficient because they do not identify the costs directly attributable to the Hotel, but only the combined cost of acquisition and construction of the convention center and hotel condominium (hereafter the "Greater

Project")<sup>10</sup>. The Complainants, citing local news articles, allege further that the preliminary cost estimates in the Project Plan do not account for heating, plumbing and air conditioning systems and other costs.

Our review first requires a determination of the scope of the "Project" for purposes of the Debt Proceedings at issue. The Complainants challenge that the "Project" is only the Hotel portion of the Greater Project, while the City maintains that the "Project" for purposes of the Debt Act is the combined convention center and hotel construction. The somewhat vague definition in the Ordinances identifies the Project as: "a redevelopment project in this City that includes the construction of a hotel and related facilities in connection with the construction of a convention center on or near Penn Square".<sup>11</sup> In its Reply Brief the City argues that the "Project" for purposes of the Debt Act is the overall redevelopment project that includes the convention center and hotel construction<sup>12</sup>. Notwithstanding the fact that the two portions of the Project are to be separately owned and that the Complainant's challenges are directed only toward the Hotel portion of the Project, the record supports a finding that the One Hundred Twenty Nine Million Dollar Greater Project and the "Project" are one in the same for purposes of the Debt Act. This determination is based in part on the description of the Project in the Ordinances together with the Project Plan documentation indicating that the Hotel is merely a component part of a single construction project to be funded from various sources.

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<sup>10</sup> County of Lancaster Brief, pages 15-17. Taxpayer Brief, pages 5-6 .

<sup>11</sup> \$12,000,000 Debt Proceeding & \$24,000,000 Debt Proceedings.

<sup>12</sup> Reply Brief at page 2.

When a local government offers its guarantee of an authority project, Section §8006 relates to the underlying acquisition and/or construction project to be undertaken by the authority rather than the form or subject matter of the local government unit's guaranty. In this instance, the Redevelopment Plan calls for the acquisition and construction of a single building that will house the hotel and convention center and several common areas.

The City submitted Affidavits of Stephen G. Diamantoni, the President of City Council, and Carol Roland, Business Administrator for the City of Lancaster.<sup>13</sup> In its Reply Brief, the City submitted a second Affidavit of Mr. Diamantoni, an Affidavit of Janet Spleen, and an Affidavit of Mark Fitzgerald, the President and Chief Operating Officer of High Associates, Ltd., a real estate development, acquisition and management company, and the master developer for the Project. Mr. Diamantoni testified that in his official capacity he received and reviewed cost estimates in connection with the Project including the construction of a condominium development project consisting of a 300 room hotel and 220,000 square foot convention center and common elements (in the City of Lancaster). Id at #4 He further testified that he attended a City Council meeting held on March 7, 2005, at which time there was a presentation to the City Council's finance committee regarding the proposed costs of the Project, including the preliminary cost estimates. On March 8, 2005, a joint presentation by Charles Sims, the Chairman of the Authority and by Nevin Cooley, the President of PSP was made to the full City Council and copies of the Project

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<sup>13</sup> Exhibit B & Exhibit C of City's Answers.

Plan were distributed to all members. Mr. Diamantoni testified that there was substantial discussion and questions about the cost estimates at the March 8, 2005, public meeting. The Affidavit of Ms. Roland is consistent with the testimony of Mr. Diamantoni in all material respects.

Mr. Fitzgerald testified by Affidavit that both the preliminary estimates of the Project, and the costs specifically attributable to the Hotel portion of the Project were provided to members of City Council and were discussed at several public meetings. Reply Brief, Exhibit 3.

The Department addressed a preliminary cost estimate challenge in Borough of Brentwood, 657 A.2d at 1027, wherein the Commonwealth Court affirmed the Department's ruling dismissing a petitioner's complaint. The petitioner in Brentwood alleged that the preliminary cost estimates obtained by the local government unit were not realistic, that specific line items of the estimates were inaccurate, and that certain expenses were not accounted for. In dismissing the petitioner's argument the court reasoned as follows:

The law is clear that the local government unit need only provide a brief description of the project, adequate to inform the public of its general plan and to enable the DCA (the Department) to ascertain legality. Petitioner's allegations demonstrate only present uncertainty about specific details of the construction project. ... This uncertainty cannot be considered proof that the cost estimates are unrealistic or that the cost estimates constitute fraud. Administrative and judicial authorities will neither invade nor supplant the legislative competence of the local government unity, absent a showing of fraud or abuse. Brentwood, 657 A.2d at 1028.

While the Pennsylvania Supreme Court has since eliminated the requirement that fraud must be alleged before an evidentiary hearing may be held<sup>14</sup>, the court's analysis of the requirements of §8006 of the Debt Act remains a controlling authority where a complainant challenges the sufficiency or accuracy of cost estimates<sup>15</sup>.

In Bernard V. O'Hare, et al. v. County of Northampton, LGUDA #85, we provided further guidance on the preliminary cost estimate requirement. In LGUDA 85 we held that Northampton County fell short of the requirements of §8006, in significant part, because the record did not establish that all members of the Northampton County Council reviewed and accepted the cost estimates. We reasoned that "the language and spirit of the Debt Act unquestionably require the guarantor's independent review and acceptance of realistic cost estimates obtained by the issuer from appropriate sources". LGUDA 85, at 27. We held that for a local government unit to satisfy §8006 of the Debt Act it must establish that (i) all such cost estimates were "realistic estimates" as required by the Debt Act, (ii) that realistic preliminary cost estimates were presented to the governing body of the local government unit for each project to be funded by the bond issue, and (iii) that the governing body of the local government unit, as reflected in the public record, reviewed, analyzed and accepted such cost estimates prior to the enactment of the Ordinances.

The Complainants' challenge that the City has failed (i) and (ii) of the above test, alleging that the City's estimates are inadequate and/or unrealistic and that the

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<sup>14</sup> See County of Northampton v. DCED, 825 A.2d 1245 (Pa. 2003)

<sup>15</sup> Id., at 1249.

City failed to establish that City Council obtained and reviewed realistic cost estimates for each project to be funded by the bond issue.

Based on our review of the credible testimony of the City witnesses and exhibits of record, the Department finds that City Council obtained the preliminary cost estimates in the form of the Cost Estimate Exhibit and that City Council reviewed and approved the preliminary cost estimates prior to adopting the Ordinances as required by the Debt Act. The Cost Estimate Exhibit provides a breakdown of the cost of construction for the Project and satisfies the preliminary cost estimate requirement of the Debt Act<sup>16</sup>. The evidence further establishes that all members of City Council heard a presentation on the Project Plan and that that there was public debate and discussion about the wisdom of the Project during at least two public meetings prior to passage of the Ordinances. Moreover, there is evidence that City Council was also provided with an estimate of the Hotel portion of the Project<sup>17</sup>.

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<sup>16</sup> The Project Plan Cost Estimate Exhibit includes preliminary cost estimates for the Project (the combined Hotel-convention center condominium) itemized as follows:

Site Acquisition	\$5,290,000
Hard Cost (construction costs)	\$77,946,045
Furniture, Fixtures & Equipment	\$14,421,187
Soft Costs (professional/finance fees)	\$14,980,419
Contingency funds	\$4,545,506
Financing Costs	\$11,768,844
Total Uses	\$128,952,000

Reserve for Future Eligible Project Cost \$5,200,000

<sup>17</sup> "Allocation of \$129 Million of Costs for Hotel/Convention Center Project, March 2, 2005" (the "Allocation of Costs Document"),

While the Department may in its discretion conduct evidentiary hearings to resolve material factual controversies arising from matters within the purview of the Act, it is to avoid such measures wherever possible. County of Northampton 825 A.2d at 1250. The Department does not believe an evidentiary hearing is warranted in this instance based upon the credible testimony of City witnesses, evidence of public debate on the Project before City Council on at least two occasions, and where there is no specific allegation or basis for belief that any specific member of City Council failed in their responsibilities to review the Cost Estimates.

Finally, the Complainant's charge that the cost estimates were insufficient and/or not realistic is also without basis. The Cost Estimate Exhibit, prepared by qualified professionals, itemized the \$129,000,000 total estimate for the Project into six categories. The fact that the preliminary cost estimates were not provided in greater detail does not establish they are insufficient and/or unrealistic. The Complainant's argue that the estimates do not include a breakdown of the Hotel portion of the Project and they point to anecdotal evidence in the form of newspaper articles suggesting that the costs of the Project remained unknown into July 2005. This information, even if accurate, suggests only that the preliminary cost estimates may have changed over time or do not account for every sub-component of the overall Project. We do not believe these allegations sufficient to warrant an evidentiary hearing to explore whether the preliminary cost estimates are realistic. Where the local government has established that

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indicating that the estimate for the hotel project was \$60.3 Million Dollars. Affidavit of Janet Spleen, Exhibit "A".

it has obtained, reviewed, and accepted realistic preliminary cost estimates of the project we shall not substitute our judgment concerning the quality or sufficiency of cost estimates for that of the local government unit<sup>18</sup>.

**ARTICLE IX, § 9 and Public Purpose Challenges**

The Complainants next challenge that the City's Guaranties violate Article IX, Section 9 of the Pennsylvania Constitution, alleging that the Project has a private and not a public purpose. Article IX, Section 9 provides:

The General Assembly shall not authorize any municipality or incorporated district to become a stockholder in any company, association or corporation, or to obtain or appropriate money for, or to loan its credit to, any corporation association, institution or individual. The General Assembly may provide standards by which municipalities or school districts may give financial assistance or lease property to public service, industrial or commercial enterprises if it shall find that such assistance or leasing is necessary to the health, safety or general welfare of the Commonwealth or any municipality or school district.

The Department has in previous decisions found challenges under Article IX Section 9 to be within the scope of the Department's review when such challenges are centered on the constitutionality of the underlying project. See Ward v. DCA, 685 A.2d 1061 (Pa. Cmwlth. 1996) and LGUDA 85.

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<sup>18</sup> See LGUDA 85, Borough of Brentwood citing Bethel Park Citizens for Better Edu. Less Taxes, 563 A.2d 969 (Pa. Cmwlth 1989).

The County Complainant's reliance on Price v. Philadelphia Parking Authority, 221 A.2d 138 (Pa. 1966) in this matter is misplaced. That decision was made based on the Parking Authority Law, 53 P.S. §345, and not Article 9 §9.

The Complainants raise a similar challenge here, alleging that the Debt Proceedings should fail for having primarily a private and not a public purpose. The County argues that PSP is the primary and paramount beneficiary of the twenty (20) year lease agreement and that any spin-off benefit to the public derived from its arrangement with the Authority is merely incidental. The County concedes that the Urban Redevelopment Law applies to the Project in question, but argues that Authority's powers are not without limits. The County cites the case of Belovsky v. Redevelopment Authority of City of Philadelphia, 357 Pa. 329 (1947) for the proposition that the Redevelopment Law does not allow for continued authority ownership of formerly blighted property after the purpose of the redevelopment project has been accomplished.

The City's guaranties are made pursuant to the Urban Redevelopment Law and Redevelopment Cooperation Law for permitted purposes outlined in those statutes. The Redevelopment Cooperation Law clearly provides that projects made pursuant to the Urban Redevelopment Law "constitute public use and purpose". 35 P.S. 1742 (2004) A hotel and convention center are by their nature open to public. The fact that a private company may gain by its involvement in a redevelopment project alone will not serve to change the character of a project as having a basic public purpose. Ward v. DCA, 685 A.2d 1061, see also Campbell v. Bethlehem Parking Authority, 20 CmwltH Ct. 445,

342 A.2d 114 (1975). Finally, the Department has no basis to second guess the Authority's decision to remain the owner of the Project for a period of twenty years where the Authority has determined that such structure is best suited to accomplish the goals of the Redevelopment Project<sup>19</sup>.

### **Proper Execution of the Ordinances**

The County Complainant has alleged that the Ordinances were not properly executed because Mr. Campbell, acting in his capacity as Controller for the City of Lancaster, refused to sign them. §8110 of the Debt Act requires that before delivering any Debt Proceedings for lease rental (or other forms) debt to the Department that the "officer or officers of the local government unit shall prepare and verify under oath a debt statement of not more than 60 days before the filing with the Department showing . . ." 53 P.S. 8110. While the word "officer" is not a defined term in the Debt Act, the Ordinances indicate that the Mayor, the Controller and the City Clerk are directed to prepared and certify the Debt Statement<sup>20</sup>. Pursuant to the Court of Common Pleas ruling of April 27, 2005, and June 29, 2005, the Mayor was authorized to sign as attorney-in-fact for Mr. Smithgall at the time he executed the Replacement Debt Proceedings submitted to the Department. The Department, therefore, finds that the Replacement Debt Proceedings were executed in compliance with §8110 of the Debt Act.

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<sup>19</sup> In the Case of Kelo v. City of New London, 2005 Lexis 5011, the United States Supreme Court reiterated its general rule that it will not second guess a city's judgments about the efficacy of its development plan.

<sup>20</sup> Section 7, of the \$12,000,000 Guaranty Debt Proceedings, and \$24,000,000 Limited Guaranty Debt Proceedings.

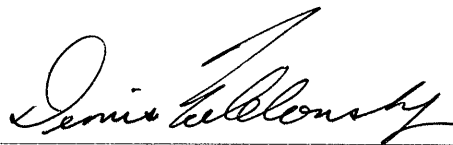
### **Untimely Challenge**

In its legal argument submitted after the June 20, 2005, conference call, the Taxpayer Complainant raised a new challenge that the City did not properly introduce Ordinance No. 10 prior to its approval. Because this issue was not timely raised in accordance with §8211 of the Debt Act and 12 Pa. Code §11.1-11.11, it will not be considered.

## CONCLUSION

The Complainants have raised no genuine issue of material fact regarding the \$12,000,000 Guaranty Debt Proceedings or the \$24,000,000 Limited Guaranty Debt Proceedings filed by the City. Because the City's Debt Proceedings satisfy the requirements of the Debt Act, the City is entitled to a dismissal of the Complaints as a matter of Law.

Dated this 27<sup>th</sup> October, 2005

A handwritten signature in cursive script, reading "Dennis Yablonsky", written over a horizontal line.

Dennis Yablonsky  
Secretary of Community and  
Economic Development

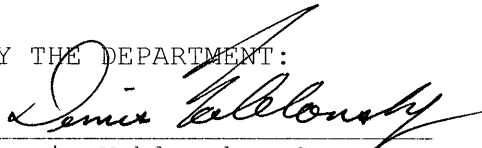
COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT

APRIL M. KOPPENHAVER AND :  
COUNTY OF LANCASTER, : LGUDA 107 & 108  
:   
Complainants, :   
v. :   
:   
CITY OF LANCASTER, :   
:   
Respondent. :

ORDER

AND NOW, this 27<sup>th</sup> day of October, 2005, on review of the respective pleadings, papers, and exhibits in the matters before the Department docketed at LGUDA-107 and LGUDA-108, and on review of applicable law, **IT IS ORDERED** that the Commonwealth of Pennsylvania, Department of Community and Economic Development, pursuant to the Local Government Unit Debt Act, 53 Pa.C.S. §8001-8271, dismisses all counts of the Complaints filed by Complainants, April Koppenhaver and County of Lancaster. The Motions of the Respondent, City of Lancaster, to Dismiss the Complaints in the above-captioned matter are **GRANTED**.

BY THE DEPARTMENT:

  
Dennis Yablonsky, Secretary of  
Community and Economic Development

Order Issued: October 27 2005