

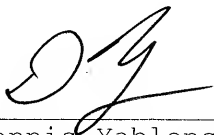
COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT

DR. ROBERT ROMANCHECK et al., :
 :
 Complainant, :
 :
 v. :
 :
CITY OF ALLENTOWN :
 :
 :
 Respondent. :

Number: LGUDA-115

ORDER

AND NOW, this 16th day of November, 2007, on review of the Complaint and Answer, the City's Motion to Dismiss, the Complainant's Response to the Answer, and the Complainant's Motion for a Hearing, as well as 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 Counts 1, 2, 3, 4, 5, and 7 of the Complaint, and **IT IS FURTHER ORDERED** that the parties shall, as directed by the Presiding Officer, provide additional evidence to the Department regarding the useful lives of the underlying capital projects and addressing whether the borrowing of up to \$35,000,000 for the refunding is reasonable under the circumstances.



Dennis Yablonsky
Secretary of Community and
Economic Development

Order issued November 16, 2007

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).

Pursuant to §8008 of the Debt Act, however, the Department does not have jurisdiction over procedural matters arising from the proceedings of a local government unit that has adopted a home rule charter after July 12, 1972, and has not explicitly adopted the procedural provisions of the Debt Act.

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 procedures 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 must 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). A local government unit's answer to a complaint and other 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 Department must grant a respondent's motion to dismiss the complaint if the pleadings, together with affidavits or documents, if any, and the proceedings of the local government unit which are the subject matter of the complaint or petition demonstrate that there is no genuine issue as to a material fact and that the moving party is entitled to a dismissal of the complaint or petition as a matter of law. 12 Pa. Code, §11.11 (3).

PROCEDURAL HISTORY

On September 10, 2007, Dr. Robert Romancheck, Joseph Hilliard, Allentown City Councilman Tony Phillips, and Allentown City Councilman Louis Hershman (collectively, the "Complainant") filed a timely complaint containing seven counts of alleged violations of the Debt Act and requesting that the Department deny the Debt Proceedings (the "Complaint"). On September 19, 2007, the City filed an Answer and Motion to Dismiss the Complaint denying all material allegations (the "Answer"). The Answer included the Affidavits of City Mayor Edwin Pawlowski, dated September 18, 2007, and Michael P. Hanlon, Clerk of the City, dated September 18, 2007. On September 25, 2007, Complainant filed an Answer to the Answer challenging various portions of the City's Answer and requesting a hearing to address facts in dispute. On October 2, 2007, Complainant filed an Amended Answer to Answer and Motion to Dismiss. Following an informal conference call held on October 18, 2007, the parties submitted written arguments on October 24, 2007 addressing the Complainant's request for a hearing.

FACTUAL HISTORY

The City of Allentown (the "City"), an incorporated city of the third class subject to the provisions of a Home Rule Charter

pursuant to the Home Rule Charter and Optional Plans Law, 53 Pa. C.S.A. 2901-3171, adopted by the voters of the City on April 23, 1996.

On August 15, 2007, the City adopted an ordinance to incur General Obligation Note debt in the aggregate amount of up to \$35,000,000 (the "Ordinance"). The borrowing was to consist of Series A Notes in the amount of up to \$26,000,000 (the "Series A Notes") and Series B Notes in an amount of up to \$9,000,000 (the "Series B Notes") and will be referred to herein collectively as the "2007 Notes". On August 27, 2007, the City filed its application for approval of the 2007 Notes with the Department (the "Debt Application"). The Department commenced its preliminary review of the application and Bernadette Barattini, Esquire, of the Department corresponded with the City's bond counsel in a series of emails dated between August 30, 2007 and September 4, 2007. Ms. Barattini requested clarification and additional documentation from bond counsel, which documentation was received on August 31, 2007 (the "Supplemental Information"). The term "Debt Proceedings" are herein referred to collectively as the Debt Application and the Supplemental Information.

DISCUSSION

In the instant matter the Complainant raises seven objections to the 2007 Notes, alleging that the City violated certain procedural and substantive provisions of the Debt Act. The majority of the allegations stem from the Complainant's belief that the City violated the public notice provisions of the Debt Act and their suspicion that the proceeds of the 2007 Notes would be directed to the City's general fund. The Ordinance indicates that the proceeds of the Notes are to be applied toward current and advance refunding of portions of three outstanding debt issues, General Obligation Bond #15024 approved April 21, 2003 for the purpose of refunding and capital projects (the "2003 Bonds"), General Obligation Bond #15495 approved April 12, 2004

for the purpose of retiring accrued pension fund liability (the "2004 Pension Bonds"), and General Obligation Bond #15496 approved April 12, 2004 for the purpose of refunding portions of six general obligation bonds approved between 1995 and 2003 (the "2004 Refunding Bonds"). (Ordinance, page 1)

The scope of the Department's review under the Debt Act is limited to:

"the 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 word "proceedings" as used in this context has been defined to mean solely the steps necessary to gain approval by Department of the bond or note issue. Property Owners, Residents, and/or Taxpayers of the Pleasant Valley Sch. Dist. v. Department of Community Affairs, 515 A.2d 85, at 89 (Pa. Cmwlth 1986). Pursuant to the Debt Act a local government unit that adopts a home rule charter after July 12, 1972 is subject to the substantive provisions of the Debt Act and may adopt by reference the procedural provisions of the Debt Act. 53 Pa. C.S.A. §8008. The City has not adopted the procedural provisions of the Debt Act in its Home Rule Charter, and accordingly, any procedural challenge to the enactment of the Ordinance would have to be made under the City's Home Rule Charter.

COUNT I:

The Complainant first challenges that the proposed 2007 Notes violate Pa. C.S.A §8129 of the Debt Act, because its issuance will result in "unfunded debt" (as defined in that Section). The Complainant points to the Mayor's public comments regarding the borrowing as evidence that the City will fund "unfunded debt" in violation of the Debt Act. This is not a

compelling argument. The Complainant misinterprets §8129 and relies on evidence outside the scope of the Department's jurisdiction. The Complainant's reliance on the comments of the Mayor is misplaced, because the Department may only consider the Debt Proceedings in its review. Property Owners, 515 A.2d 85, at 89. Moreover, §8129 of the Debt Act is inapplicable because the refunding project at issue is debt to be incurred in connection with a permitted Project under §8002 of the Debt Act, a specific exemption from §8129 requirements¹. The Complainant attaches undue significance to the last part of the last sentence in §8129 "as incurred in respect of the costs of a project", and argues that a significant portion of the City's costs in connection with the proposed refunding are unfunded debt². The Complainant has misread this portion of the Debt Act. The 2007 Notes, if approved, would be considered debt incurred in respect of a refunding project, a class of project recognized in the Debt Act pursuant to §8002(c)(9). As such, the funds necessary for the refunding project, including all associated costs, would be considered allowable Project debt under the Debt Act³. See LGUDA-62 & §8007. For the foregoing reasons, Count I is hereby dismissed because no violation of §8129 has been established.

COUNT II:

In Count II of the Complaint, Complainant alleges that the City violated the notice provisions §8003 and §8103 of the Debt Act. Specifically the Complainant argues that the pre-enactment

¹ 53 P.S. §8129 states in relevant part "unfunded debt does not, however, include debt incurred under this subpart or obligations in respect of a project or part of a project as incurred in respect of the costs of a project".

² Complainant's Answer to Answer and Motion to Dismiss

³ The last phrase of the last sentence in §8129 "Unfunded debt does not, however, include debt incurred under this subpart or obligations in respect of a project or part of a project **as** incurred in respect of the cost of a project" is most likely a typographical error in the use of the conjunctive term "as". The intended phrase is certainly the final phrase in §8130, which reads in relevant part "This section shall not apply to the funding of obligations in respect of a project or part of a project **or** incurred in respect of the cost of a project." (emphasis added). The latter phrase is more consistent with the distinction in the Debt Act between funding a Project and funding its associated costs as set forth in §8007.

advertisement (which summarized the proposed text of the ordinance) failed to provide any substantive financial details of the refunding plan for the public to review. Complainant further argues that there were significant changes to the Ordinance just before its adoption on August 15, 2007, including an increase in the amount of the borrowing from \$28,000,000 to \$35,000,000 and that city taxpayers were denied an opportunity to review the details of the refunding plan before the Ordinance was adopted. (Complaint, p.7) Finally, the Complainant argues that the Ordinance was missing Exhibits A, B, C, D, and E at the time of enactment.

This challenge fails to cite a proper legal basis for relief under either the Debt Act or the City's Home Rule Charter. Pursuant to §8008 of the Debt Act, the procedural provisions of the Debt Act apply only if the City adopted the procedural provisions of the Debt Act in its Home Rule Charter. In this case the City of Allentown's charter does not contain such provisions. Therefore, any challenge to the procedure used to enact the Ordinance must be made under the City's Home Rule Charter. The Complainant has not alleged any such violation of the City's Home Rule Charter. The City's Home Rule Charter does not contain any specific procedural requirements relating to the objections raised by the Complainant.

Moreover, even if Pa. C.S.A §8003 were applicable to the procedure used in the enactment of the City's Ordinance in this matter the Department and Commonwealth Court have consistently held that §8003 does not require that the proposed text of an ordinance contain the financial figures such as interest rates or the amount of the proposed borrowing because those figures change frequently and will not likely be known with any certainty until the time of passage of the ordinance⁴. Michael P. Hanlon, the City clerk, testified by Affidavit that that the City did not have all the necessary information to complete the financial

⁴ See LGUDA-51.

information in the proposed text of ordinance. (Answer, Exhibit B at ¶5) 53 Pa. C.S.A §8003 also contemplates that there will be amendments to the text of an ordinance between the public notice thereof and adoption. McMaster v. DCED, 610 A.2d 525, at 528 (Pa. Cmwlth. 1992).

Complainant's argument that certain sections of the Ordinance were not available at the time of enactment is also without merit. The Complainant has failed to cite any violation of the City's Home Rule Charter, the controlling legal authority with respect to procedural requirements for passage of the Ordinance. The Debt Proceedings submitted to the Department contained the completed Ordinance and the related exhibits required by §8103 and §8111 of the Debt Act.⁵ For the foregoing reasons Count II is dismissed⁶.

COUNT III:

The Complainant next alleges that the City failed to submit preliminary cost estimates with the Ordinance and failed to make them available to the taxpayers of the City, as it is argued, is required by §8006 of the Debt Act. These objections are misplaced. First, this section is not applicable to refunding projects such as the 2007 Notes. 53 Pa. C.S.A §8006 states as follows:

Prior to the initial authorization of bonds or notes or the issuance of any guaranty to finance **any project involving construction or acquisition**, the governing body shall obtain realistic cost estimates through actual bids, option agreements or professional estimates from registered architects, professional engineers, or other persons qualified by experience. (emphasis added)

⁵ The Debt Proceedings include a fully completed text of the Ordinance authorizing the Notes with attached Schedules A, B,C,D, and E and the proofs of publication, the proposal for the purchase of the Notes, and the Debt Statement. The Ordinance is certified as duly enacted on August 15th, 2007, with signatures by the President of City Council and City Clerk with the City seal.

⁶ The Complainant cites the case of LGUDA-100 in Count II for the proposition that there must be a reasonable connection between the outstanding debt to be refunded and the maximum amount approved under a local government's ordinance. This allegation will be addressed in Count VI.

The City's Debt Proceedings do not involve "construction or acquisition", a specific type of Project defined in the Debt Act⁷. 53 P.S. §8111 Moreover, the Complainant has not plead facts for which relief may be granted under the Debt Act even if §8006 were applicable to this Project⁸, as the Debt Act contains no requirement that the local government unit provide preliminary cost estimates for public inspection or submit the same to the Department in connection with its Debt Proceedings⁹. Accordingly, Count III is hereby dismissed for failing to state a claim for which relief may be granted.

COUNT IV

Count IV alleges that the City violated §8106 of the Debt Act because the Ordinance provides for the creation of a sinking fund in connection with the 2007 Notes refunding project. Complainant argues that this action is not permitted when refunding debt and that the sinking fund agent is not named in the Ordinance or made available for public review. The Complainant further alleges that the proceeds of the 2007 Notes will not be put into escrow (account(s)) for bond refunding, but rather added to the City's general budget¹⁰.

The Complainant has misconstrued the meaning of §8106 of the Debt Act and the allegations inconsistent with the plain language of the Ordinance. The Debt Act requires that every local government unit issuing bonds or notes (other than small borrowings for capital purposes) must appoint a sinking fund depository which may also serve as the paying agent for the bonds or notes. 53 Pa. C.S.A §8106 The City is simply adhering to the requirements of this Section and §8221 of the Debt Act when it

⁷ See Definition of Project, Pa. C.S.A §8002(c)(1) Items of construction, acquisition, extraordinary maintenance or repair.. See also §8002(c)(9) Funding or refunding of debt incurred for any or all of the foregoing purposes.

⁸ Count III reads "No preliminary costs estimates have been submitted with the ordinance nor was any available for public inspection".

⁹ See LUGDA 84 at p. 6-7; see also LGUDA 65, affirmed by Agromony, Inc. v Dept. of Community Affairs, (Pa. Cmwlth. 1994).

¹⁰ Complainant's Answer to the City's Answer and Motion to Dismiss, 25)

provides for the creation of sinking funds for Series A Notes and Series B of the 2007 Notes. (Ordinance, p. 5) Contrary to the Complainant's allegations, the City named Manufacturers and Traders Trust Company of Pennsylvania as the paying agent, bond register and sinking fund depository. (Ordinance, p. 5) The Ordinance also authorized the proper officers of the City to contract with the paying agent as the agent for the City to effect the redemption and payment, including payment of interest, for the current refundings in the refunding project. (Ordinance, p. 9) The Ordinance also authorizes the proper officers of the City to contract with the paying agent for each of the advance refundings to effect the redemption and payment, including interest of the advance refunded bonds pursuant to the terms and provisions of escrow agreements (to be dated as of the date of issuance of the Series A and Series B Notes) and provides for the Mayor and Director of Finance to execute and deliver the escrow agreements for the advance refunding bonds, Series A and Series B. (Ordinance, Sections 18-20). Finally, the Department cannot deny an application to incur debt based on a taxpayer's speculation of what a local government may or may not do in the future. Accordingly, Count IV is dismissed.

COUNT V

The Complaint next argues that the City violated Pa. 53 C.S.A §8241(b)(1) of the Debt Act, because it is not exercising a proper power to refund bonds and does not reduce the total debt service of the City over the life of the series. This objection fails to state a legal basis for relief under the Debt Act. The City may choose one or more purposes to refund bonds. 53 Pa. C.S.A 8241(b) The City has indicated in its Debt Proceedings and other submissions, that the 2007 Notes are for the lawful purpose set forth in §8241(b)(5) of "substituting bonds for notes or note anticipation notes or substituting notes for bonds". The Department agrees that the City has identified a lawful power to refund under the Debt Act. The Complainant's challenge that the

refunding will not result in a reduction of debt service of the life of the issue, even if true, fails to plead a violation of the Debt Act. 53 Pa. C.S.A §8241 indicates otherwise:

“Authorized purposes. - The refunding may be **for any one** or more of the following purposes:...”. (emphasis added) 53 P.S. 8241(b) Similarly, 53 Pa. C.S.A §8243(b) provides a general rule against a refunding that would increase the amount of principal payable “except in the case of the refundings for the purposes specified in §8241(b)(1) and (5)...”. As such, the Complainant’s challenge in Count V is without merit and is dismissed.

COUNT VI

In Count VI, Complainant challenges that the City has violated 53 Pa. C.S.A §8243(a) of the Debt Act, because the maturity date of the 2007 Notes will exceed the useful lives of the underlying projects to be refunded, and that the City violated §8243(b), which prohibits the increase in the amount of principal payable in a refunding unless specific conditions apply. Other objections in Count IV are that the City failed to determine its actuarial liability of pension fund obligations (in connection with the 2004 Pension Bonds to be refunded) and failed to provide a reasonable basis for the proposed borrowing of up to \$35,000,000.

The Complainant is correct that §8243(a) is applicable to the Debt Proceedings at issue. §8243 (a), entitled “Limitation on extending term of debt by refunding” provides that:

(a) General rule. Subject to the terms of §8247 (relating to special limitation on refunding of funding debt) and to the terms of subsection (b), a local government unit shall not extend the term of outstanding debt through refunding to a maturity date that could not have been included in the original issue, except in the case of an emergency refunding ...

The City argues that Section 2 of the Ordinance dictates that the useful lives of the Projects funded with the proceeds of

the 2004 Refunding Bonds and the 2003 Bonds is not less than previously determined and that the Notes will fully amortize on a level or earlier basis than each component of such projects before the expiration of their useful lives. The City also relies on §8142(a)(2)(i) for the proposition that the statement in the ordinance of the useful life of a project shall be conclusive for all purposes.

The Project in this instance is the refunding of portions of the 2003 Bonds, the 2004 Pension Bonds, and the 2004 Refunding Bonds. The Debt Service Schedule submitted as part of the Debt Proceedings indicates that the 2004 Pension Bonds mature on November 15, 2035. The proceeds of the 2007 Notes, Series A, will fully amortize, on a level or earlier basis, the refunding of the 2004 Pension Bonds prior to November 15, 2035. (Ordinance, p.3) The Ordinance also indicates that the useful life of the 2004 Pension Bonds is 40 years pursuant to 53 Pa. C.S.A. §8142(a)(1) of the Debt Act. The City is authorized under the Debt Act to amend the useful life of a particular project as in this case, but in no circumstance may the useful life exceed 40 years¹¹. The maturity date on the Series A of the 2007 Notes is October 1, 2035, which is within 40 years from 1996, when GOB-17603 was approved. Accordingly, the 2007 Notes do not extend the maturity date on the 2004 Pension Bonds, and the City has established that this portion of the refunding will not extend the City's Debt Service beyond the useful life of the pension fund project.

With respect to the 2004 Refunding Bonds and the 2003 Bonds, however, has the City not provided sufficient information for the Department to identify the underlying capital projects to be refunded to determine the projected useful lives of those capital projects. The maturity date of the 2003 Bonds, Series A, is October 1, 2013, whereas the maturity date of the 2007 Notes, Series B, (which proceeds are intended to retire a portion of

¹¹ 53 Pa. C.S.A. §8142

such 2003 Bonds, Series A,) is October 1, 2021.

The Ordinance indicates that:

the realistic useful lives of the capital projects financed by proceeds of the Refunded 2003 Bonds and the capital projects financed by those bonds refunded by the Refunded 2003 Bonds (collectively, the "2003 Projects") was previously determined to be from 5 to 30 years with respect to the capital projects financed by the proceeds of the 2003 Refunded Bonds, and at least 20 years with respect to the capital projects financed by proceeds of the bonds refunded by the Refunded 2003 Bonds, and the amortization of the Refunded 2003 Bonds was structured to fully amortize on a level or earlier basis each component of the 2003 Projects before the expiration of their useful lives.

Similarly, the Ordinance indicates that the useful lives of capital projects financed by the 2004 Refunding Bonds (the "2004 Refunding Projects") were previously determined to be from 5 to 30 years. The 2004 Refunding Bonds have a maturity date of October 1, 2014 whereas the 2007 Bonds, Series A, (which proceeds are to retire a portion of the 2004 Refunding Bonds), has a maturity date of October 1, 2035. Accordingly, the maturity dates for the 2007 Notes, Series A and Series B, have maturity dates that have been extended beyond the maturity dates of the 2004 Refunding Bonds and the 2003 Bonds.

The City's argument citing §8142 of the Act that the statements of useful life in the Ordinance are conclusive for all purposes is misplaced where, as in this instance the maturity dates for the bond issues to be partially refunded have been extended and the useful lives of the underlying capital projects have not been identified. Accordingly, additional affidavit or other testimony will be necessary to determine if the requirements of §8243 (a) have been satisfied.

The Complainant's allegation that the City violated §8143(b), however, is without merit. As the City indicates in its Answer the 2007 Notes are being issued pursuant to §8241 (b) (5) of the Debt Act, which is a specific exemption to the

requirements of §8243(b)¹². The Complainant next alleges in Count VI that that the City erred in failing to determine the actuarial pension fund liability. The 2007 Notes are for the purpose of refunding existing debt and not for the "Funding of an unfunded actuarial accrued liability" as defined in §8002, and accordingly, the City is not required to provide any documentation of the outstanding pension liability.

The Complainant, citing the Department's Opinion in the matter of LGUDA-100, next challenges that the City failed to identify sufficient justification for the issuance of the 2007 Notes. It appears that this is a challenge to the form of the borrowing which is known as a "parameters filing", and that the City has not provided a reasonable basis for borrowing of up to \$35,000,000 for the refunding. Complainant also asserts that the City erred in failing to identify what amounts of the 2004 Pension Bonds and 2004 Refunding Bonds will be retired, and argues that the fees to be incurred in connection with the issuance are unreasonable. (Complainant's Answer to the Answer, p.7-8, 16)

It is not within the scope of review for the Department to consider a challenge to the amount of fees a local government may incur in connection with a debt issue. In LGUDA-65, we noted that there is no provision in the Debt Act authorizing such a review. Moreover, this challenge did not appear in the Complaint, and therefore, was not raised in a timely manner pursuant to 53 Pa. C.S.A. 8211.

The Complainant's challenge that the overall structure of the 2007 Notes is unreasonable, however, is something the Department has found to be within its purview¹³. In this case the City has filed an application to incur General Obligation Note debt in an amount not to exceed \$35,000,000. Such a filing is known as a "parameters filing". In addition to the setting a

¹² Answer, p. 14

¹³ LGUDA-100; the department has read into §8007 and §8141 of the Debt Act an authority to review the overall structure of a debt financing in the cases of "not to exceed" filings.

maximum amount of the borrowing, a parameters filing must also set a maximum "not to exceed" amount for each principal maturity and each stated interest rate. Typically, a local government will utilize a parameters filing to add flexibility for the issuers to move quickly in order to take advantage of favorable market conditions by obtaining the Department's approval before the issuer is locked into a specific financing arrangement. In the case of a parameters filing the local government may always issue less debt than the maximum amount approved; or at lower interest rates than approved, but it cannot issue amounts greater than approved without necessitating a new debt filing. In such instances, when the actual maturity schedule is finalized, none of the stated maximum parameters, for the total principal amount of debt authorized or for each principal maturity and each stated interest rate, can be exceeded. The Complainant is mistaken in his assertion that parameter filings are not permitted, in that such filings have been determined to be in accordance with the Debt Act for at least the last seven years¹⁴. The Department has interpreted parameters filings to be consistent with the language and spirit of §8103(a)(3) and §8241 of the Act as long as they meet the restrictions as noted above in this paragraph¹⁵.

In LGUDA-100, cited by Complainant, the Department did uphold a complaint filed against a borrowing by Lackawanna County. In that case the County filed a debt application for a parameters filing for the issuance of five series of bonds for refunding purposes. The amount of the proposed borrowing for three of the series of bonds was, in aggregate, in excess of \$100,000,000. It was determined that the aggregate outstanding principal balance for the bonds to be retired was only \$51,565,000. LGUDA 100, p. 7, 10-11. The Department held in that case that there must be a reasonable connection between the funds necessary to effect the refunding of the bonds to be retired and the maximum amount of debt approved in the Ordinance,

¹⁴ Electronic mail from the Department to PABL Members dated November 30, 2000.

¹⁵ Id.

and that the County failed to provide that reasonable connection. While there is no requirement that the City include an explanation of its debt structure as part of its Debt Proceedings, when there is a challenge to a parameter filing, the Department has an obligation to determine if such maximum borrowing amount is reasonable in light of the principal amount of debt to be retired in the refunding, the costs of issuance and other costs of refunding, and the amount of "cushion" that is believed necessary and the explanation of why such cushion is deemed necessary.

At this time, the well-plead facts of Count VI of the Complaint have not been disproved or adequately addressed by the City, leaving open two genuine issues of material fact. For this reason, the District's Motion to Dismiss is denied as regards Count VI of the Complaint and the Presiding Officer is hereby directed to conduct additional fact finding sufficient to determine whether the maturity dates of the 2007 Notes exceed the useful lives of any of the underlying capital projects of the bonds to be refunded, and to determine whether the City's Borrowing of up to \$35,000,000 bears a reasonable connection to the outstanding principal amount of debt to be retired.

COUNT VII

In Count VII, the final count of the Complaint, it is alleged that the City violated (or will violate) 53 Pa. C.S.A. §8250 of the Debt Act because it intends to use the bond refunding as a means to generate short term operating cash with debt. The Complainant arrives at this conclusion by pointing to text in the Ordinance which states that "sums sufficient to meet the requirements of the semi-annual interest payments (on the 2007 Notes) and scheduled maturities shall be deposited in the Series A Sinking Fund not later than the date when interest and/or principal is to become due on the Series A Notes". (Ordinance, ¶ 7(a) & (b)) This argument relies on a selective reading of the Ordinance and is not compelling. The Ordinance


indicates in Sections 18, 19, and 20, how the proceeds of the 2007 Notes will either retire outstanding bonds at the time of closing (current refunding) or be placed in irrevocable accounts as set forth in escrow agreements between the City and Manufacturers and Traders Trust Company for the advance refunding with respect to both the Series A Note and Series B Note proceeds. (Ordinance, ¶ 18, 19, 20) As indicated in Count IV, supra, the City is required to create a sinking fund pursuant to §8106, and the creation of the fund cannot be taken as evidence that the City is planning to violate §8250. The Ordinance provides that sufficient sums shall be deposited irrevocably into escrow accounts, together with interest earned thereon with any other available monies, to effect the refunding of the applicable portion of the bonds to be refunded. Ordinance, Section 19. Count VII, therefore, is dismissed for failing to state a claim for which relief may be granted.

Finally, the Complainants a raised a number of issues in their Amended Answer to the Answer which were not raised in the Complaint. Because these issues were not timely raised in accordance with the Debt Act, they may not be considered. 53 Pa. C.S.A. 8211(b).

CONCLUSION

The Complainant raises a genuine issue of material fact only as regards that portion of Count VI that questions whether it is reasonable for the City to borrow up to \$35,000,000 under the circumstances and whether the maturity date on the 2007 Notes will exceed the useful lives of any of the underlying capital projects to be advance refunded. All other allegations may be determined as a matter of law. The Department, therefore, grants the City's Motion to Dismiss Counts 1,2,3,4,5 and 7 of the Complaint. The Presiding Officer will conduct additional fact-finding as regards Count 6.

Dated this 16th day of November, 2007.



Dennis Yablonsky
Secretary of Community and
Economic Development