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Steven Fishman, Esq.
Office of Chief Counsel
Department of Community and Economic Development
400 North Street, 4th Floor
Commonwealth Keystone Building
Harrisburg, PA 17120-0225

Re: Local Government Unit Debt Act/Complaint by County of Lancaster

Dear Chief Counsel Fishman:

I. INTRODUCTION

This is a complaint by the County of Lancaster (the "County" or the "Complainant"), 50 North Duke Street, Lancaster, PA 17602, by counsel and pursuant to the Local Government Unit Debt Act, 53 Pa. C.S.A. § 8211, asserting the invalidity of two guarantees the City of Lancaster (the "City" or the "Respondent"), 120 North Duke Street, Lancaster, PA 17602, seeks to give to help provide financing for construction of a for-profit, privately operated Marriott Hotel.

The two City guarantees are as follows:

1. A $12 million guarantee, authorized by City Ordinance No. 5 of 2005, which will cover a $12 million Act 23 bond sought by the Redevelopment Authority of the City of Lancaster ("RACL"); and

2. A $24 million guarantee, authorized by City Ordinance No. 10 of 2005, which is designed to cover real estate taxes due on the Marriott Hotel over a 20-year period during which RACL holds title to the hotel, while the hotel is operated on a for-profit basis by Penn Square Partners ("PSP"), a private entity that will obtain title to the

hotel after 20 years for a nominal final payment under a lease-purchase agreement with RACL.

The foregoing guarantees are illegal and create substantial financial risk to taxpayers. The County requests that the Department of Community and Economic Development ("DCED") deny approval of the proposed guarantees and certify its disapproval to the City pursuant to the Local Government Unit Debt Act, 53 Pa. C.S.A. § 8205.

II. STANDING

The County has standing in this matter as an interested party based on the following:

1. The financial interest of the County with respect to real estate taxes that will be due on the Marriott Hotel.

2. The financial risk to the County due to the impact of the City's illegal guarantees on the County's guarantee in 2003 of $40 million in financing by the Lancaster County Convention Center Authority (the "LCCCA"), which imposed over $60 million of potential liability on County taxpayers.

III. SUMMARY OF FACTS

A determination of legality requires understanding of the key facts of this complex transaction. However, many of the facts critical to determining the legality of the City's guarantees are not disclosed in documents the City has filed with DCED.

A. Overall Arrangement of the Project

PSP is a private party owned by three business corporations. LCCCA and PSP have for seven years planned to construct and operate a convention center and Marriott Hotel near Penn Square in Lancaster City. PSP owns the former Watt & Shand building, and LCCCA owns adjacent properties.

The ownership and financing structure for this project have changed dramatically over time, particularly during recent months. Attached hereto at Tab 1 is a legal opinion by the County's legal counsel dated April 11, 2005, which includes a summary of the pertinent facts. The legal opinion concludes that the Marriott Hotel will be subject to local real estate taxes.

As explained in the attached legal opinion, under the latest plan RACL will hold record title to real estate on which a Marriott Hotel will be built, with PSP operating the hotel on a for-profit basis. RACL will continue to hold record title to the hotel over the 20-year planned duration of a proposed Act 23 grant, pursuant to a complicated lease-purchase arrangement whereby:

1. PSP will pay rent to cover RACL's debt service on $24 million of Lease Revenue Bonds and certain other RACL expenses, but such rental payments will ***not include any amount for real estate taxes on the hotel;***

2. PSP has promised to make additional "guaranteed payments" to RACL in the amount of $3,695,094 over 20 years ($46,960 the first year, $48,134 the second year, and $200,000 annually over the next eighteen years), but to date no written guarantee has been made public;

3. PSP has further promised that if any time during the 20-year lease-purchase arrangement its aggregate profits to date on the hotel exceed an average of 12%, PSP will make "participation payments" to RACL based on 30% of any further profits above and beyond such 12% profit;

4. PSP will operate the hotel and retain all profits from such operation (except for any "participation payments" to RACL based on 30% of any profits above and beyond PSP's 12% aggregate profits);

5. PSP will have the right to acquire record title to the hotel after 20 years for a final payment to RACL of $2,250,000 – an amount far below both the estimated construction cost of $60,300,000 and the projected market value after 20 years;

6. PSP projects the Marriott Hotel will have a tax assessment after construction of $28.3 million (which according to PSP's projections will not thereafter increase throughout the term of the lease purchase agreement);

7. If the Marriot Hotel is taxable (as predicted in the County's attached legal opinion), PSP projects that real estate taxes to the City, the County and the School District of Lancaster over the 20-year period will total approximately $14 million ***more*** than PSP's "guaranteed payments" to RACL (the actual difference may be more or less than $14 million, depending on the accuracy of PSP's assumptions regarding tax assessments and tax rates and whether PSP makes all $3,695,094 of its guaranteed payments);

8. Of this $14 million difference projected by PSP, $9.5 million reflects real estate taxes to be owed to the County and the School District, and $4.5 million reflects real estate taxes to be owed to the City;

9. Therefore, if the Marriott Hotel is taxable, the real estate taxes due by RACL (as the holder of record title) plus its debt service obligations will exceed substantially PSP's payments to RACL, and RACL's payment of real estate taxes will create a shortfall in RACL's ability to pay debt service plus taxes on the $24 million Lease Revenue Bonds; and

10. This shortfall will become the City's obligation through its $24 million guarantee, which requires the City to cover any shortfall in RACL's debt service payments arising from RACL's payment of real estate taxes on the Marriott Hotel.

It is clear that the arrangement between PSP and RACL is not a true lease between a tenant and owner. Rather it is a lease-purchase, with RACL holding title to the Marriot Hotel while PSP pays off the financing and PSP ultimately taking title through a final payment. Indeed, PSP's President has publicly acknowledged that through making its final payment to RACL, "Penn Square Partners is basically paying off a mortgage." *Lancaster Intelligencer Journal*, March 29, 2005, page A-1 (attached at Tab 2).

Therefore, the bottom line is that: (a) PSP will operate the Marriott Hotel on a for-profit basis; (b) PSP, not RACL, is the equitable owner of the hotel during the 20-year lease purchase term; (c) PSP, not RACL, will own the hotel completely after 20 years, after building equity in the property through the 20-year lease-purchase arrangement; (d) from the outset, the plan is for RACL to serve merely as a conduit to provide public

financing, so that PSP can ultimately acquire record title to the hotel and RACL will acquire no capital asset; and (e) the sole purpose of the City's $24 million limited guarantee is to cover the cost of real estate taxes due on the Marriott Hotel, so that PSP avoids any risk of paying real estate taxes throughout the entire 20-year lease purchase agreement.

B. Project Funding

An overview of the sources of funding for the hotel per the latest announced plans is as follows:

Hotel Construction Funding Source	**Amount**
PSP private equity	$ 10,000,000
Interest earnings	$ 1,300,000
RACL Act 23 Bonds/state grants	$ 12,000,000
RACL Bond debt paid by PSP lease payments	$ 24,000,000
Other unidentified state grants	$ 12,950,000
Total hotel construction cost	**$ 60,300,000**

The foregoing amount does not include the City's subsidy of real estate taxes, which as discussed above is approximately $14 million over the 20-year term of the lease purchase agreement (again, this City subsidy amount is based on PSP's projections regarding the tax assessment on the Marriott Hotel and tax rates of the City, the County and the School District, and also assumes PSP's fulfillment of all "guaranteed payments").

Without considering the $14 million in real estate tax subsidies from City of Lancaster, and assuming proration of interest earnings, the amount of public financing for the hotel is $50,030,000, or 83% of the hotel cost. The components of the public

financing portion include $1,080,000 in pro-rated interest earnings; $12,000,000 from RACL Act 23 Bonds; $24,000,000 from RACL Bond debt planned to be paid by PSP lease purchase payments; and $12,950,000 in unidentified state grants. This means that PSP is privately financing 17% of the hotel project.[1]

RACL argues the $24 million RACL Bond debt should not be considered public financing because the plan is for it to be paid by PSP lease payments. This overlooks, though, that for purposes of the City of Lancaster $24 million guarantee it is clearly public financing – it is $24 million borrowed by RACL, a public entity, and supported in large part by a guarantee from the City of Lancaster to pay taxes owed on the Marriott Hotel.

C. City of Lancaster's $12 million guarantee

The City's $12 million guarantee applies to RACL's request for $12 million in Act 23 Bonds.

The primary purpose and impact of the City $12 million guarantee is the ***private purpose*** of reducing the required investment by PSP in the hotel from which it will derive profits as equitable owner for 20 years, and own completely after 20 years.

RACL is seeking $12 million in Act 23 Bonds to fund part of the hotel construction cost. RACL has applied for a grant from DCED, pursuant to the Infrastructure Facilities Improvement Program created by Act 23 of 2004. 12 Pa. C.S.A.

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[1] In addition to hotel costs, there is an additional $68,700,000 in costs for the convention center and $7,700,000 in costs for a parking garage, all of which will be financed through public funds. Therefore, private investment of costs to construct the entire hotel and convention center project is a relatively nominal 7%.

§ 3401 to § 3406. Under Act 23, DCED can provide annual grants for up to 20 years, which reflect the estimated amount of additional state sales tax, state hotel occupancy tax, and state personal income tax generated as a result of operation of the hotel. RACL would use these annual grant funds to pay the debt service over 20 years on the RACL $12 million Act 23 Bonds used to fund part of the cost of the Marriott Hotel.

If DCED initially approves the Act 23 grant, it must review and renew the grant payments after three years. At that point, DCED can reduce the amount of the annual grants if the amount of incremental taxes resulting from operation of the Marriott Hotel does not equal the debt service on the $12 million bond. Further, full payment by DCED of a 20-year grant under Act 23 depends on continued appropriations by the General Assembly throughout that period at a level adequate to fund all approved Act 23 grants.

One purpose of the City's $12 million guarantee is to avoid the need for PSP to provide such a guarantee. Act 23 requires that some party other than the Commonwealth be responsible to pay debt service on the $12 million Act 23 bond. 12 Pa. C.S.A. § 3405(a)(4). The reason for such requirement is that if PSP's projected tax revenues used to justify the original $12 million Act 23 bond do not materialize, or if DCED for some other reason does not make annual grant payments adequate to cover the entire debt service, the General Assembly mandated that a party be available to make up the difference and ensure complete payment of the debt service. Because RACL does not have the ability to independently generate funds to make such debt service payments (other than through Act 23 grant payments from DCED), a guarantor is needed to step in and make such payments in the event DCED does not provide grant payments after three

years, or does not provide grant payments in an amount sufficient to fund the entire debt service. This guarantor could be PSP, which will be the direct beneficiary of the hotel project. However, by issuing its own guarantee, the City has obviated the need for PSP to provide the guarantee and be responsible for this potential cost.

A second purpose of the City's $12 million guarantee is to obtain a lower interest rate on the Act 23 Bonds by backing the Act 23 Bonds with the City's taxing power. Backing the Act 23 Bonds with the City's taxing power will allow a lower interest rate, and therefore lower overall debt service. Since the annual debt service is a fixed amount based on projected DCED grants, lowering the debt service allows an increase in the size of the Act 23 bond issue and the amount of Act 23 money that can be borrowed and applied to the cost of the hotel. Once again, this lower interest rate and higher borrowing amount is for PSP's benefit. If the interest rate were higher and the amount of Act 23 Bonds lower, PSP would be required to provide additional private equity beyond its $10 million contribution.

Very importantly, both of these purposes are private purposes, not public purposes. PSP could provide a guarantee of RACL's Act 23 bonds. The City guarantee is to ensure that PSP is not under any circumstances responsible for payment of Act 23 Bond debt service. Similarly, by providing a higher amount of Act 23 Bond funds through the City's guarantee, the required PSP private equity funding is reduced. As the party that will derive profits from operating the hotel and will ultimately own the hotel, PSP could provide the guarantee – but the City has instead done so for the benefit of PSP.

D. City of Lancaster's $24 million guarantee

The City's $24 million guarantee applies to RACL's $24 million of Lease Revenue Bonds that will be issued to fund part of the hotel construction cost.

The sole purpose for the City $24 million guarantee is the private purpose of making the City responsible for real estate taxes applicable to the hotel from which PSP will derive profits as equitable owner for 20 years, and own completely after 20 years.

The debt proceedings filed with DCED include Ordinance No. 10 and the planned Limited Guaranty Agreement between the City of Lancaster and RACL. Pursuant to § 3.01 of the Limited Guaranty Agreement, the City agrees to pay for any shortfall in RACL's payment of debt service on the RACL $24 million Bonds – but only if caused by the Marriott Hotel becoming subject to local real estate tax. Although not included in the materials the City filed with DCED, we understand the lease purchase agreement referred to in the Limited Guaranty Agreement disavows any obligation by PSP to pay local real estate taxes on the hotel. This is indicated on page 3 in the "whereas" clauses of Ordinance No. 10, and has also been publicly stated by PSP, RACL, and the City of Lancaster.

Although not all relevant facts are disclosed in the documents the City filed with DCED, we understand the City's agreement to pay real estate taxes on the Marriot Hotel will work in the following manner:

1. The lease purchase agreement (not included the City's filing with DCED) disavows any obligation by PSP to pay local real estate taxes on the hotel, provides that PSP will pay to RACL rentals sufficient to cover debt service and certain other expenses

but not real estate taxes, and addresses PSP's duty to make the "guaranteed payments" and "participation payments" explained above.

2. The RACL $24 million Bonds (also not filed by the City with DCED) will provide that RACL is obligated to pay the Bonds solely from rentals and other payments received from PSP under the lease purchase agreement.

3. Because PSP will not pay real estate taxes, and PSP's guaranteed payments and any participation payments are not intended to cover all real estate taxes projected by PSP, real estate tax bills sent to RACL as the holder of record title will create a "shortfall" in funds available to RACL to pay debt service on the RACL $24 million Lease Revenue Bonds. Pursuant to PSP's projections, if there are no participation payments by PSP (i.e., if PSP's aggregate profits do not exceed its goal of 12%), this shortfall will be approximately $14 million.

4. The Limited Guaranty Agreement in section 3.01 states that the City will pay this "shortfall" – in other words, the City will pay hotel real estate taxes of $9.5 million to the County and the School District, and will forego its own real estate taxes of approximately $4.5 million.

PSP and the City developed this circuitous and complex structure to accomplish the City's payment of PSP hotel taxes because they know it is unlawful for a city to agree to pay real estate taxes of a building owner. Because it is illegal for the City to agree to pay taxes of a private party, they developed this back-door means of attempting to accomplish the same result – namely, structure project financing so that it flows through a public agency (RACL); provide in the documents that the public agency has no

responsibility to pay debt except from private party (PSP) rentals and payments; provide in the documents that the private party rentals will cover debt service but not real estate taxes and the private party will have no responsibility to pay taxes; and have the City guarantee the debt service shortfall caused by real estate taxes.

E. Abandonment of the TIF Led to Illegal Guarantees

PSP and the City got into this tangled mess through a back-door strategy attempting to avoid real estate taxes on the Marriott Hotel. Pennsylvania law prescribes a route that can be followed to lawfully reduce or avoid real estate taxes within a redevelopment area. The procedure is provided by the Tax Increment Financing Act (the "TIF Act"), a law designed to encourage development. Although it provides a lawful means to avoid real estate taxes, the TIF Act includes rules that ensure taxes are avoided only where appropriate, and provides protections for local tax authorities, including advance review and approval of the project by local tax authorities.

Under the TIF Act, increased real estate taxes generated from the increased tax assessment on the property after construction of the hotel would be diverted from the three taxing authorities, and instead used to pay the debt service on bonds used to finance hotel construction. This has the same effect as eliminating the real estate taxes, since the taxes are used to pay for the building owned (in this case) by PSP. Any taxing authorities approving the TIF would receive only the amount of real estate taxes based on the assessed value of the property before construction. All additional real estate taxes resulting from an increased assessment would be used to fund debt service on bonds used to finance construction.

As described in greater detail in the legal opinion attached at Tab 1, PSP pursued tax abatement under the TIF Act. As part of evaluating the TIF proposal, the Lancaster County Commissioners raised numerous questions (referred to in the Lancaster community as the "57 Questions"), and the School District of Lancaster established conditions for approval. Instead of answering the County's questions and addressing issues with the School District of Lancaster, project planners halted action on the TIF. They then asserted the hotel would be immune from real estate taxes even without the TIF, because record title to the hotel would be held by RACL.

PSP, though, refused to accept the risk of having to pay taxes on the Marriot Hotel. It agreed to proceed with the project without the TIF only if the City of Lancaster agreed to guarantee the payment of taxes owed on the hotel.

Thus, claiming tax immunity through RACL holding record title (though highly questionable, to say the least) was adopted as a back-door means of avoiding the legally-prescribed procedures for tax abatement through a TIF. And the $24 million City guarantee – phrased as a guarantee triggered by and in the amount of applicable real estate taxes – was developed as a back-door means to provide the City's illegal guarantee to pay taxes owed on the hotel.

Considering it important that City and County taxpayers and the City understand the financial obligations involved in agreeing to pay real estate taxes, the Lancaster County Commissioners requested Kegel Kelin Almy & Grimm LLP to provide a legal opinion concerning the taxability of the Marriott Hotel. KKAG provided the legal opinion attached at Tab 1 – concluding that the Marriott Hotel will be subject to real

estate tax, and explaining the very large risk to City taxpayers. The legal opinion also pointed out that the project violated the requirement of Act 23, 12 Pa. C.S.A. § 3406(b)(11), that PSP as the project user sign a contract agreeing "to timely pay all Commonwealth and local taxes and fees." The County delivered a copy of the legal opinion to the City, RACL and PSP.

On April 12, 2005, despite notice of serious financial consequences to the City and violation of Act 23, City Council adopted Ordinance No. 5 approving the $12 million guarantee, and Ordinance No. 10 approving the $24 million guarantee.

Further, despite notice as to the Act 23 violation, the City and RACL either have filed or still intend to file with DCED an application for an Act 23 grant relating to the hotel project.

F. City Controller Has Not Signed Submittal to DCED

On April 22, 2005, Lancaster City Controller R.B. Campbell, Jr., refused to sign documents relating to DCED debt proceedings due to the Act 23 violation and other legal concerns. Specifically, he stated: "As Controller for the City of Lancaster, I have a fiduciary responsibility to residents of the City and have sworn, under oath, to uphold the law. Therefore, based on the aforementioned, I strongly believe my signing the application may be a violation of both of these duties of my office."

In response to this action, the Mayor of Lancaster filed a lawsuit seeking to force the Controller to sign DCED documents and other future documents based on the argument that signature of documents by the Controller is a ministerial function and not a "control" function. On April 27, 2005, Lancaster County Court of Common Pleas Judge

Allison entered an order authorizing the Mayor to sign documents as attorney-in-fact for the Controller. In the DCED proceedings filed for the guarantees, the Mayor signed the debt statement and borrowing base certificate as attorney-in-fact for the Controller.

Thereafter, on May 9, 2005, the Commonwealth Court entered an injunction against enforcement of Judge Allison's order pending further proceedings and decision by the Commonwealth Court.

G. Project Cost Estimates

Project planners have referred to hotel cost estimates indicating the construction cost of $60,300,000. However, the County questions whether these estimates are reliable and realistic cost estimates. Project planners traveled several weeks ago to meet with project architects in Atlanta, to determine if the $60,300,000 cost estimate for the hotel is reasonable. At that point, upon information and belief, significant engineering issues and associated costs had not yet been resolved.

Project planners have not reported the results of that Atlanta meeting. In fact, an article in the *Lancaster Intelligencer Journal*, page B-1, dated May 7, 2005, states: "Word of the potential delay comes as project developers scrutinize design drawings to procure a cost estimate for construction."

H. County Withdraws Support From the Project/County's 2003 Guarantee

By action taken May 4, 2005, the Lancaster County Commissioners withdrew their support from the project, and requested project planners to cease spending money on the project – and focus on alternate, more appropriate plans for Lancaster City revitalization. Attached at Tab 3 is a statement by the Chairman of the Board of

Commissioners, dated May 2, 2005, summarizing why he believes such action is necessary, appropriate and in the best interest of Lancaster County.

Among the County's leading concerns is the financial risk this convention center and Marriot Hotel project has placed on County taxpayers. In December 2003, just before a new Board of Commissioners assumed office, the prior Board voted 2-1 for the County to guarantee one-half of $40 million in debt by the Convention Center Authority, which could eventually be converted to $40 million of tax-exempt bonds to finance construction of the convention center. The total potential liability to the County and its taxpayers pursuant to this guarantee is $60,278,400.

The 2003 financing created $40 million of debt on which to adhere the County's guarantee. It was structured with the intent of transferring the County's guarantee from (a) an initial $40 million bank loan, to (b) $40 million of tax exempt bonds intended to be sold to finance construction sometime in the future when the project was ready to begin construction.

The dissenting vote in December 2003 was cast by the only Board member reelected to another term, and the two incoming Commissioners had both campaigned against having the County guarantee the construction cost of the convention center. Thus, this premature 2003 financing was intended to prevent the current Board of Commissioners from exercising its authority at the time construction funds are needed in determining whether to provide the County's guarantee. The prior Board, though the 2003 financing, purported to bind the County's initial 2003 guarantee to the construction bonds when they are eventually sold.

Notably, the intent of the 2003 financing documents is for this $60,278,400 of liability exposure for County taxpayers through the County's guarantee to come into effect ***only*** if the convention center and hotel project is ***constructed at and adjacent to the Watt & Shand building site owned by PSP.***

Therefore, the County's guarantee (and the risk to its taxpayers associated with such guarantee) is inextricably tied to construction of the Marriott Hotel at Penn Square. The County's guarantee cannot not be imposed on its taxpayers if the project is not built at that site. Therefore, the County has a direct and compelling interest – indeed, potentially a $60,278,400 interest – in the two guarantees that the City wishes to utilize to help finance construction of the project at that site.

IV. VIOLATIONS OF THE LOCAL GOVERNMENT UNIT DEBT ACT

The City's two guarantees submitted to DCED for approval violate multiple legal requirements of the Local Government Unit Debt Act, including the following:

A. Both guarantees are illegal because they violate the requirement in Act 23 that the project user pay all local taxes.

B. Both guarantees are illegal because they violate the Pennsylvania Constitution "public purpose requirement."

C. Both guarantees are illegal because they do not evidence the acquisition of a capital asset by a government agency.

D. Both guarantees are illegal because they do not guarantee debt incurred for a project the City is authorized to own.

E. The guarantees are illegal because the City does not have realistic cost estimates for the project.

F. The guarantees are illegal because the debt statement and borrowing base certificate are not signed by the City Controller as required by Ordinances No. 5 and No. 10.

G. The $24 million guarantee is illegal because it is not a guarantee of RACL's bonds; in reality, it is an agreement to pay real estate taxes owed on the Marriott Hotel.

H. The $24 million guarantee is illegal because it is unlawful for a city to agree to pay real estate taxes owed to another taxing authority by another government agency or private party.

I. The $24 million guarantee is illegal because it is unlawful for a city to agree to waive real estate taxes owed to the City of Lancaster.

A. <u>Both guarantees are illegal because they violate Act 23</u>

The lease purchase agreement relieves PSP of responsibility to pay real estate taxes, and the $24 million guarantee places this responsibility on the City. This City agreement to pay real estate taxes on the Marriott Hotel violates Act 23, 12 Pa. C.S.A. § 3406(b)(11), which requires PSP (as the "project user") to sign a contract agreeing "to timely pay all Commonwealth and local taxes and fees."

The County has previously notified the Secretary of DCED of the Act 23 violation – see Kegel Kelin Almy & Grimm LLP letter dated May 4, 2005 to Secretary Yablonsky, attached hereto at Tab 4.

Act 23 makes clear that the project user must pay any applicable local real estate taxes, and cannot be relieved of that obligation by the titleholder, local taxing authorities, or any other third party. In fact, the entire purpose of the $24 million guarantee is to violate the Act 23 requirement by having the City pay all local real estate taxes. The City's $12 million guarantee involves guarantee of obligations incurred under Act 23, but in violation of the Act 23 requirement that the financing plan requires the project user to pay taxes. Therefore, both guarantees are illegal as part of a financing plan that violates Act 23.

B. Both guarantees are illegal because they violate the Pennsylvania Constitution "public purpose requirement"

The Pennsylvania Constitution, Article IX § 9, prohibits a municipality from loaning its credit for a private purpose. This provision, known as the "public purpose requirement," states as follows:

> ***The General Assembly shall not authorize any municipality*** or incorporated district to become a stockholder in any company, association or corporation, 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 welfare of the Commonwealth or any municipality or school district. . . .

(Emphasis added).

This requirement means a municipality may not lend its credit to a purely private enterprise. *Rettig v. Board of County Commissioners of Butler County*, 228 A.2d 747 (Pa. 1967). Moreover, to satisfy the "public purpose requirement," a municipal

agreement pledging its credit must be "predominantly for public purposes." *Sullivan v. County of Bucks*, 499 A.2d 678, 684 (Pa. Cmwlth.1985).

1. **Private vs. Public Purpose**

Although decided under the Parking Authority Law, 53 P.S. § 345, rather than the Constitution, an important Supreme Court decision on the "public purpose requirement" is *Price v. Philadelphia Parking Authority*, 221 A.2d 138 (Pa. 1966). In *Price*, where a parking authority proposed constructing a parking garage and apartment towers subject to a lease-purchase arrangement that was extremely advantageous to a private party (including tax exempt status for the property during the term of the lease), the Court held the agreement was improper – and stopped the project.

The Court in *Price* concluded that a private party, rather than the public, was the "primary and paramount beneficiary" of the lease-purchase agreement. 221 A.2d at 150. The Court found that notwithstanding any incidental benefit to the public that might result from the proposed construction project through city redevelopment, the private developer would be the chief benefactor of the advantageous lease purchase arrangement:

> By what is essentially a ***sale and leaseback arrangement***, National [the private developer] will be able to finance its site costs through the medium of long term public financing, with all the benefits which attend such an arrangement, not generally available to other private commercial developers. . . . And by the use of its ***exclusive option to acquire the garage facility in the future***, National is able to defer such major capital investment to a much later date and to ***accumulate revenues generated by the parking facility, the concourse and ground level commercial rentals for the cost of acquisition.***
>
> To this extent, the Academy House Project involves ***substantial public financing of a private endeavor.*** Irrespective of any benefit that the public may ultimately derive, it cannot be denied that a significant

> ingredient of the transaction is the use of the Parking Authority as a ***conduit by which a private developer is able to lighten substantial burdens***, both economic and regulatory, which would otherwise devolve upon it.
>
> There is therefore presented on this record a ***substantial degree of public involvement and investment in a private profit making venture***. . . . [T]he record fails to disclose any benefit to the public of more than a limited and incidental nature.

Id., 221 A.2d at 148-49 (emphasis added).

After evaluating all factors, the Court in *Price* concluded the "totality of these circumstances leads us to conclude that ***the public is not the primary and paramount beneficiary***" of the proposed project. Thus, the Court prohibited the proposed lease purchase arrangement with the private developer. 221 A.2d at 150.

Very importantly, the Court specifically rejected the argument that the construction project was an acceptable public project because it made a contribution to the redevelopment of Center City Philadelphia. 221 A.2d at 150. The Court reasoned that weighing the public and private benefits, the primary benefits of the project were private. 221 A.2d at 150. The Court stated: "[W]e hold that the parking authority may not cloak a private interest, as is here proposed, with benefits so grossly disproportionate to the benefits accorded the public." 221 A.2d at 150.

In another case that involved a redevelopment authority and a challenge to guarantees by the City of Harrisburg, the Commonwealth Court found adequate public purpose – under the Pennsylvania Constitution – where the City guaranteed part of the financing for a redevelopment project to be constructed and owned by Harrisburg Development Corporation involving an office building for state employees and also some

private tenants. In this case, the Court found that the agreement did serve a public purpose – because of the building's use for state offices and because HDC, the developer and owner, was a nonprofit corporation whose board of directors was appointed by government officials and whose purposes were public purposes. Very importantly, the Harrisburg case did not involve any private party owning, deriving profits from, or buying the building. *Appeal of German*, 366 A.2d 311, 114-15 (Pa. Cmwlth. 1976).

The courts have addressed "public purpose" many times in determining whether real estate owned by a public entity is subject to real estate tax. Under Pennsylvania law, in order to be immune or exempt from real estate tax, property must not only be owned by a public entity, but must also be "used for public purposes." In *South Eastern Pennsylvania Transportation Authority (SEPTA) v. Board of Revision of Taxes*, 777 A.2d 1234, 1238 (Pa. Cmwlth. 2001), the Court ruled that space in an office building owned by SEPTA and leased to commercial tenants is subject to real estate tax – because the building loses its public purpose for tax purposes to the extent rented to a commercial tenant.

In a similar situation where a government agency held mere "naked title" to property but a private party was the true beneficial owner, the Supreme Court held that property owned by the Commonwealth or its instrumentalities is entitled to tax immunity "only where the Commonwealth does in fact have rights of control over the premises consistent with ownership." In *Appeal of Owen J. Roberts School District*, 457 A.2d 1264 (Pa. 1983), the owners of a 162 acre estate called "Welkenweir" deeded the property to West Chester State College, which is owned by the Commonwealth. As part

of the transfer, the former owners retained a life estate to Welkenweir, permitting them full use, possession, and enjoyment of the property. The Supreme Court stated that where the Commonwealth holds only "naked title" to the property, the property is subject to tax because it is not used for a public purpose. 457 A.2d at 1268.

In a case very close to our case, *City of Pittstown Redevelopment Authority Appeal*, 44 Pa. D. & C. 2d 425 (Luzerne County 1967), the Court declared taxable a property acquired by a redevelopment authority and leased back to the prior owner for continued operation of a private business – because the property was not being used for a public purpose.

2. RACL's Statutory Purpose

RACL was created in 1957, pursuant to Pennsylvania's Urban Redevelopment Law. 35 P.S. § 1701 to § 1719.2. The Urban Redevelopment Law provides that each county and municipality in Pennsylvania may create a Redevelopment Authority, and empowers such Authorities to engage in a variety of activities for the public purpose of "the elimination of blighted areas through economically and socially sound redevelopment of such areas." 35 P.S. § 1702. Permitted activities to effectuate that public purpose include the power to purchase, own, hold, clear, improve, manage, lease and sell real estate within a redevelopment area. 35 P.S. § 1709.

It is important to note, though, that the statutory authority of RACL to engage in such activities is not without limits. A Redevelopment Authority only has power to act for a public purpose. An Authority's actions "must carefully be examined under the facts of each case" to discern whether it is acting for a public purpose or instead for a private

purpose. *Redevelopment Authority of City of Erie v. Owners or Parties in Interest*, 1 Pa. Cmwlth. 378, 391, 274 A.2d 244, 251 (1971).

In an early case that challenged the constitutionality of the Urban Redevelopment Law, the Pennsylvania Supreme Court explored the underlying public purpose of Redevelopment Authorities. In *Belovsky v. Redevelopment Authority of City of Philadelphia*, 357 Pa. 329, 54 A.2d 277 (1947), the Court held that the Urban Redevelopment Law is constitutional, and that Redevelopment Authorities may acquire, develop and transfer property for the purpose of restoring blighted areas.

The Supreme Court cautioned, though, that once a Redevelopment Authority has improved a blighted property, the public purpose of redevelopment has been achieved, and the Authority should then transfer the property to private, taxable ownership. In contrasting the ***temporary*** ownership by a Redevelopment Authority to the ***long-term*** ownership by a Housing Authority, the Supreme Court emphasized that a Redevelopment Authority should transfer property to a private, taxable interest promptly after the public interest of redevelopment has been achieved:

> [P]laintiff misconceives the nature and extent of the public purpose which is the object of this [Urban Redevelopment Law] legislation. That purpose . . . is not one requiring a continuing ownership of the property as it is in the case of the Housing Authorities Law . . . but is directed solely to the clearance, reconstruction and rehabilitation of the blighted area, and ***after that is accomplished the public purpose is completely realized.*** When, therefore, the need for public ownership has terminated, ***it is proper that the land be re-transferred to private ownership.***

Belovsky, 357 Pa. at 340, 54 A.2d at 282 (emphasis added).

Later in its opinion, the Supreme Court again stressed that after a Redevelopment Authority has rehabilitated a blighted building, the Authority's public purpose has been accomplished and the property should be promptly transferred to a private party:

> Indeed, so far from it being legally objectionable that property acquired by eminent domain be resold or re-transferred to private individuals after the purpose of the taking is accomplished, the law ***actually requires*** that property be taken by eminent domain ***only to the extent reasonably required*** for the purpose for which the power is exercised and ***upon cessation of the public use the public ownership is properly discontinued.***

Id., 357 Pa. at 341, 54 A.2d at 283 (emphasis added, citation omitted).

The Commonwealth Court has twice relied upon the foregoing language of the Supreme Court in *Belovsky* to uphold the taking of property by a Redevelopment Authority through eminent domain, subject to the retransfer of such property to a private developer who had agreed to rehabilitate the property. *In re City of Scranton*, 132 Pa. Cmwlth. 175, 572 A.2d 250 (1990); *Franklin Town Project of Philadelphia v. Redevelopment Authority of the City of Philadelphia*, 19 Pa. Cmwlth. 272, 339 A.2d 885 (1975).

Therefore, based on the language of the Urban Redevelopment Law, the leading Supreme Court decision in *Belovsky* and its Commonwealth Court progeny, it is clear that the purpose of Redevelopment Authorities is to acquire and rehabilitate blighted buildings, and then promptly return the buildings to the tax rolls.

Nothing suggests the purpose of Redevelopment Authorities is to acquire and restore blighted buildings, and thereafter keep them off the tax rolls for another 20 years.

3. City's Guarantees Do Not Serve a Public Purpose

Unlike other situations involving Redevelopment Authorities addressed above, RACL does not propose to transfer title of its property to a private party promptly upon achieving its statutory public purpose of acquiring, demolishing, or restoring a blighted building. Rather, RACL intends to maintain title to a newly constructed hotel for another 20 years – during which time PSP will make a profit operating the hotel and acquire nearly all the equity in the property through its lease purchase arrangement – and then transfer title back to PSP for a price substantially below the hotel's projected fair market value. As PSP's President has acknowledged, this arrangement is basically equivalent to PSP "paying off a mortgage." Lancaster Intelligencer Journal, March 29, 2005, page A-1 (Tab 2).

Under these circumstances, it is clear that PSP is the "primary and paramount beneficiary" of the 20-year lease purchase agreement, and that any spin-off benefit to the public derived from its arrangement with RACL is merely incidental to PSP's private gain.

Therefore, both of the Lancaster City guarantees fail the "public purpose requirement" of the Pennsylvania Constitution, Article IX, § 9. The primary purpose of the $12 million guarantee is to reduce the investment required by PSP, a private party, in the building to be owned by PSP. The entire purpose of the $24 million guarantee is for the City to pay taxes owed by PSP, a private party. Thus, it is very clear that the City guarantees are not "predominantly for public purposes," and "the public is not the primary and paramount beneficiary." Moreover, unlike Harrisburg Development

Corporation in the *German* case – which was a nonprofit corporation controlled by government officials – PSP is a private business entity and is the primary and paramount beneficiary of the proposed guarantees. Although there is an incidental urban redevelopment benefit to the public, as in the *Philadelphia Parking Authority, SEPTA,* and *City of Pittstown* cases, this incidental benefit is insufficient to satisfy the "public purpose requirement" where the City's credit is being loaned for the primary purpose of enabling a private party to save money in buying a hotel investment property.

The Pennsylvania Constitution, Article IX § 9, allows a municipality to give financial assistance to a commercial enterprise pursuant to specific programs authorized by state statute. However, the assistance provided through the City of Lancaster guarantees is not authorized by any such program. Therefore, the constitutional ban on the City of Lancaster loaning its credit to a private entity applies in this case.

C. Both guarantees are illegal because they do not evidence the acquisition of a capital asset by a government agency.

The Debt Act § 8005(c) provides a local government unit the legal authority to guarantee debt, by making "guaranties, leases, subsidy contracts or other agreements evidencing the acquisition of capital asset." Thus, a requirement for a municipal guarantee is that it evidence the ***acquisition of a capital asset by a government agency.***

Section 8004 of the Debt Act establishes the specific technical rules for when an agreement evidences the acquisition of a capital asset. Specifically, it provides as follows:

(a) *General rule.* – A lease, guaranty, subsidy contract or other agreement entered into by a local government unit shall evidence the acquisition of a capital asset if:

(1) the lessee or obligor is a local government unit and the lessor or oblige is an authority organized under any law of this Commonwealth, another local government unit, a nonprofit corporation, the State Public School Building Authority or other agency or authority of the Commonwealth;

(2) the payments, or any portion thereof, which are payable in a subsequent fiscal year or subsequent fiscal years and which are applicable to debt service requirements or capital costs are payable, whether in all events or only upon the happening of certain events, under the terms of the instrument from the tax or general revenues of the local government unit; and

(3) ***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***."

(Emphasis added.)

The "capital asset requirement" of the Debt Act has two important purposes. First, to ensure that a guarantee is provided only for debt of another government agency incurred to enable the agency to acquire a capital asset, such as a building. Second, to ensure that if the agency whose debt is guaranteed is ultimately dissolved, the building or other capital asset will be turned over to the local government unit providing the guarantee, or to the Commonwealth.

The two City of Lancaster guarantees clearly violate the Debt Act capital asset requirement. As summarized above, the latest plan provides that PSP will construct the hotel; retain the profits from operating the hotel; pay rentals to cover RACL's debt service and expenses (except for real estate taxes) on the RACL $24 million Bonds; be the equitable owner during the 20-year lease purchase term; make a final payment of $2,250,000 after 20 years; and then have complete ownership of the hotel.

Thus, from the outset of the lease-purchase arrangement, the clear intent is for RACL to serve as a mere conduit to provide public financing, with PSP operating the hotel on a for-profit basis for 20 years and through such arrangement acquiring ownership of the hotel. As project planners have readily acknowledged, PSP is "basically paying off a mortgage" to RACL in order to acquire the Marriott Hotel. Because the central concept of this arrangement is to provide a means for PSP to acquire a capital asset, the City's two guarantees fail the Debt Act requirement of a government agency acquiring a capital asset.

D. <u>Both guarantees are illegal because they do not guarantee debt incurred for a project the City is authorized to own.</u>

In defining the authority of a local government unit to make guarantees, the Debt Act § 8005(c) states:

> ***[E]very 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 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 the owning, acquiring, subsidizing, operating or leasing with others.

Under this section, the City may provide a guarantee only towards another government agency's acquisition of a project the City has legal authority to own. ***The City of Lancaster's guarantees violate this requirement because the Marriott Hotel project is not a project the City is authorized to own.***

The City and other local government units have authority only to perform activities and undertake projects authorized by statute. Pennsylvania courts have historically held that the power and authority of municipal governments is to be narrowly construed.

> Neither Authorities nor Municipalities are sovereigns; they have no original or inherent or fundamental powers of sovereignty or of legislation; ***they have only the power and authority granted them by enabling statutory legislation.***

In re *Acquisition of Water System in White Oak Borough*, 93 A.2d 437, 438 (Pa. 1953).

> It is a fundamental principle that the ***authority of a municipal body*** is to be found in the statute which confers it, and ***must be exercised strictly in the manner therein provided.***

Kline v. City of Harrisburg, 68 A.2d 182, 188 (Pa. 1949).

This rule of strict construction of municipal powers has been tempered by "home rule" statutes such as the Optional Third Class City Charter Law applicable to the City of Lancaster, which provides that grants of municipal power to cities governed by an optional home rule plan shall be liberally construed in favor of the city. 53 P.S. § 41304. Generally speaking, the effect of a municipality adopting a home rule plan is that the municipality has power to take action for any public purpose except where specifically limited by state law. However, "home rule" does not give municipalities carte blanche to

take any action not expressly prohibited by state law. *Philadelphia Facility Management Corporation v. Biester*, 431 A.2d 1123, 1133 (Pa. Cmwlth. 1981); *Shumaker v. City of Lock Haven*, 906 F. Supp. 230, 234 (M.D. Pa. 1995); *Schneck v. City of Philadelphia*, 383 A.2d 227, 229 (Pa. Cmwlth. 1978).

As a home rule municipality, the basic law prescribing the powers and limitations on the powers of the City is contained in three places: the Third Class City Code, 53 P.S. § 37403; the Optional Third Class City Charter Law, 53 P.S. § 41301 *et seq.*, enacted in 1957 and under which the City of Lancaster elected home rule; and the Home Rule and Optional Plan Government Law, 53 Pa. C.S.A. § 2961 *et seq.*, enacted in 1972 and applicable to all home rule municipalities.

Although the Third Class City Code, 53 P.S. § 37403, expressly authorizes 68 different types of activities, none come anywhere close to authorizing ownership of a hotel.

The most important provision in the Home Rule Law is 53 Pa. C.S.A. § 2962(c), which states that a municipality shall not "engage in any proprietary or private business except as authorized by statute." The similar provision contained in the City of Philadelphia Home Rule Law has been interpreted in two important cases. In *Biester*, the Commonwealth Court stated: "The legislature did not give the City carte blanche powers of home rule but instead imposed restrictions and limitations." 431 A.2d at 1133. In *Martin v. Philadelphia*, 215 A.2d 894 (Pa. 1966), the Supreme Court held that the City of Philadelphia had legal authority to construct a sports stadium, and this did not violate the "business activity ban." The Court reasoned: "A sports stadium is intended for the

recreation of the public, and hence for a public purpose. [A home rule city] may provide gardens, parks, monuments, fountains, libraries, museums, and generally speaking, anything calculated to promote the education, the recreation or the pleasure of the public." 215 A.2d at 896. In so ruling, the Court found that the lease of the facility to professional sports teams was merely an "incident to providing for the recreation or pleasure of the public." 215 A.2d at 896.

In our case, the Marriott Hotel violates the "business activity ban" because it cannot satisfy the public purpose test set forth in the *Martin* case. There is no public purpose for the lease of the hotel to PSP; the sole purpose is to enable PSP to earn profits from the hotel and complete the purchase of the hotel under the 20-year lease purchase arrangement. The Marriott Hotel is not even close to the examples listed of sports stadiums, gardens, parks, monuments, fountains, libraries, and museums. The purpose of the Marriot Hotel is not to promote the education, recreation or pleasure of the public. It is to provide lodging for travelers and profits for PSP.

Thus, the City of Lancaster would not be authorized under Pennsylvania law to own a hotel for lease and purchase by PSP. Such an activity is nowhere authorized in the Third Class City Code, and is prohibited by the Home Rule Law "business activity ban."

E. <u>The guarantees are illegal because project planners do not have realistic cost estimates.</u>

The Debt Act § 8006 requires that prior to authorization of any guarantee, the governing body of the local government unit "shall obtain realistic cost estimates through

. . . professional estimates from registered architects, professional engineers or other persons qualified by experience."

In denying approval of a local government unit's guarantee of an authority's debt based on failure of the local government unit to ensure that realistic cost estimates have been obtained, and to independently review and accept such cost estimates, the Department has stated:

> While the Department will not substitute its judgment as to the sufficiency of realistic cost estimates for that of the responsible local government unit, section 8006 of the Debt Act requires such estimates to have actually been obtained. . . . The record in this case shows no such independent review or acceptance of realistic cost estimates provided to Council by the issuers or by others.

County of Northampton v. DCED, 825 A.2d 1245, 1247 (Pa. 2003).

Based on the information published in newspaper articles, it appears project planners have concluded that the latest estimate of the hotel construction cost at $60,300,000 was outdated and unreliable. As noted above, project planners recently visited with the architects in Atlanta to address unresolved engineering issues and obtain updated cost estimates. However, the results of that visit have not been disclosed. As noted above, a recent newspaper article states: "Word of the potential delay comes as project developers scrutinize design drawings to procure a cost estimate for construction." *Lancaster Intelligencer Journal*, page B-1, May 7, 2005.

This information indicates that the Lancaster City Council did not have the realistic cost estimates required by the Debt Act at the time it adopted Ordinance No. 5 and No. 10 authorizing the guarantees – indeed, the required realistic cost estimates do

not yet exist. Accordingly, under the *County of Northampton* case, the guarantees are illegal.

F. Both guarantees are illegal because the debt statement and borrowing base certificate are not signed by the City Controller as required by Ordinances No. 5 and No. 10

In both Ordinance No. 5 and Ordinance No. 10, section 7 calls for the City Controller to sign the borrowing base certificate and debt statement. As indicated above, these documents were instead signed by the Mayor as attorney-in-fact for the City Controller. There is no legal authority for a mayor to sign a document on behalf of a controller, and therefore the borrowing base certificate and debt statement are defective and cannot be used to support the guarantees.

G. The $24 million guarantee is illegal because it is not a guarantee of RACL's Bonds; in reality, it is an agreement to pay real estate taxes owed on the Marriot Hotel

Under the Debt Act § 8002, "guaranty" is defined as: "***A guaranty*** . . . for the benefit of holders of bonds . . . of an authority . . ., ***of the payment of the principal of and interest on the bonds . . .*** "

Although characterized as a guarantee of debt service on the RACL $24 million Lease Revenue Bonds, the reality is that the City agreement is not a guarantee of debt service. In fact, the City's agreement to pay applies when – and only when – real estate taxes are due and paid by RACL on the Marriott Hotel, thereby creating a shortfall in RACL's payment of debt service on the $24 million Lease Revenue Bonds. Although the City agreement has been denominated as a guarantee of debt service, in reality it is simply the City's agreement to pay real estate taxes for a private business.

Wearing a shoe on top of your head does not make it a hat!

Likewise, characterizing the payment of real estate taxes as payment of a shortfall in debt service is merely a subterfuge attempt to circumvent the legal prohibition of the City agreeing to pay real estate taxes. Under these circumstances, the $24 million guarantee is an illegal agreement to pay real estate taxes, and is not a "guaranty" within the meaning of the Debt Act. Since it does not constitute a "guarantee," the Debt Act § 8005(c) provides no authority for the City to provide the proposed $24 million guarantee.

H. <u>The $24 million guarantee is illegal because it is unlawful for a city to agree to pay real estate taxes owed by another agency or private party to another taxing authority.</u>

As discussed above, powers of home rule municipalities are strictly limited on certain subjects. In addition to the "business activity ban," the Home Rule Law precludes municipalities from taking actions that are not expressly authorized with respect to determining real estate that is subject to taxation. 53 Pa. C.S.A. § 2962(a)(6), and (8); 53 P.S. § 41305(1)(viii), and (ix).

The sole impact of the City agreement to pay PSP real estate taxes is to make the Marriott Hotel effectively exempt from real estate tax – despite being subject to taxation under the Pennsylvania Constitution and General Assessment Law. This action is contrary to the Pennsylvania Constitution, assessment statutes, and applicable case law. See legal opinion attached at Tab 1.

This action is also directly prohibited by the Home Rule Law prohibitions against exempting property from taxation other than as authorized by Pennsylvania law.

I. The $24 million guarantee is illegal because it is unlawful for a city to agree to waive real estate taxes payable to the City

Not only is it illegal for the City to agree to pay taxes owed by a private party to other taxing authorities, it is also illegal for the City to waive its own taxes. As to taxes that PSP will owe to the City in the future based on taxation of the Marriott Hotel, the arrangement is unlawful due to violation of the Pennsylvania Constitution "uniformity clause."

The Pennsylvania Constitution Article VIII § 1 "uniformity clause," states 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."

The Pennsylvania Constitution states certain well-known exceptions to the requirement of uniformity, such as Article VIII § 2(a) that authorizes real estate tax exemption for government-owned property used for public purposes, and charity-owned property used for charitable purposes. The Constitution Article VIII § 2(a) also enumerates a number of other exceptions, including authorization to the State Legislature to adopt laws allowing tax abatement to encourage urban redevelopment – the constitutional authority for the TIF Act. Very importantly, in addition to the "uniformity clause," the Constitution Article VIII § 5 states: ***"All laws exempting property from taxation, other than the property above enumerated, shall be void."***

In our case, none of the constitutional exceptions applies. As discussed in the attached legal opinion (Tab 1), the property will not meet the public purpose requirement

because PSP is the equitable owner deriving a profit from the property, and through the lease purchase arrangement is acquiring the property. Moreover, as to the exception for state laws allowing tax abatement for redevelopment purposes, project planners abandoned pursuit of the statutorily prescribed procedure for such tax abatement under the TIF Act.

The Pennsylvania Supreme Court has on several occasions ruled that to establish a lower real estate assessment (or no real estate assessment) for one property or group of properties, as compared to others, violates the "uniformity clause." See *Brooks Building v. Jenkins*, 137 A.2d 273 (Pa. 1958); *Deitch Company v. Allegheny County*, 209 A.2d 397 (Pa. 1965). In *Jenkins*, the Court stated: "A tax to be uniform must operate alike on the classes of things or property subject to it. . . . [N]or can there be an intentional or systematic undervaluation of like or similar properties." 137 A.2d at 275. Similarly, in *Deitch*, the Court stated that: "[T]he uniformity requirement of the Constitution of Pennsylvania has been construed to require that all real estate is a class which is entitled to uniform treatment." 209 A.2d at 402.

In *Kelly v. Kalodner*, 181 A. 598 (Pa. Court 1935), the Court invalidated a Pennsylvania income tax with progressive rates and an exemption from tax for individuals with net income below $1,000. In determining the $1,000 exemption unconstitutional, the Court acknowledged the exemption was reasonable, but explained the Court had no choice but to rule the exemption unconstitutional because it resulted in a tax that is not uniform. 320 Pa. at 188-89. See also *Saulsbury v. Bethlehem Steel Co.*,

296 A.2d 664 (Pa. Court 1964) (declaring unconstitutional a municipal occupation privilege tax because it contained a $600 exemption).

In *Mill Creek Township School District v. Star Theatre*, 94 A.2d 53 (Pa. Super. 1953), a taxpayer challenged an admissions tax ordinance that included an exemption for certain types of entertainment. In that case, the Court ruled that the exemption must be stricken from the statute because it violated the "uniformity clause."

In our situation, none of the "uniformity clause" exceptions applies to the City's $24 million guarantee. As explained in the attached legal opinion, the property will not be used for a public purpose. Moreover, the project planners elected not to pursue the permitted urban redevelopment tax exception under the TIF Act. Therefore, by attempting to waive its real estate tax for a particular property owner, the City of Lancaster is violating the constitutional mandate that all taxes be uniform upon the same class of subjects. Under Article VIII, § 5, the City's action is "void."

V. REQUESTED RELIEF

The County of Lancaster requests that DCED deny approval of the City of Lancaster's two proposed guarantees, and certify DCED's disapproval to the City of Lancaster pursuant to the Debt Act § 8205. Pursuant to 1 Pa. Code § 33.11, this complaint is subscribed on behalf of the County by its duly authorized Special Counsel.

Sincerely,

Howard L. Kelin

Howard L. Kelin