

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DENNIS M. DAVIN, in his capacity as  
Secretary for the Department of  
Community and Economic Development,

Petitioner<sup>1</sup>,

v.

CITY OF HARRISBURG,

Respondent

:  
:  
: No. 569 MD 2011  
:  
: **RE: DETERMINATION OF**  
: **STATUS OF IMPACT**  
: **HARRISBURG UNDER**  
: **SUNSHINE ACT**

25 FEB 2015 10 29

RECEIVED & FILED  
COMMONWEALTH COURT  
OF PENNSYLVANIA

**APPLICATION FOR RELIEF**

Impact Harrisburg ("Impact"), by and through its counsel, McNeese Wallace & Nurick LLC, hereby petitions for a declaratory judgment determining whether Impact, a nonprofit corporation formed pursuant to the Harrisburg Strong Plan as approved by an Order of this Court, is a public "agency" for purposes of the open meeting requirement of the Sunshine Act, and in support thereof avers as follows:

**Jurisdiction and Venue**

1. Jurisdiction is proper in this Honorable Court under 42 Pa.C.S. § 7532 and pursuant to the Court's Order retaining jurisdiction over the above-captioned matter. *See* Order, February 25, 2014, at ¶ 3.

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

2. By that Order, the Court expressly permitted parties to address the obligations due them under the Harrisburg Strong Plan by application to this Court for appropriate relief. *Id.*

3. This Court therefore is the proper forum to make this Application.

### **Factual Background**

4. The City of Harrisburg (the "City") - a designated distressed municipality under the Municipalities Financial Recovery Act, 53 P.S. § 11701.101, *et seq.* ("Act 47") since 2010 – was placed under state-imposed receivership in accordance with the Act in December 2011.

5. The City presently remains subject to a series of Orders issued by this Honorable Court in the above-captioned matter, which collectively approved the adoption and implementation of a financial recovery plan and its revisions (the "Harrisburg Strong Plan"). *See* Order, September 23, 2013.

6. The Court thereafter granted the City's application to exit the receivership and appointed a coordinator (the "Coordinator") to implement the Harrisburg Strong Plan. *See* Order, February 25, 2014.

7. Pursuant to the Harrisburg Strong Plan, the Court authorized the Coordinator to cause a nonprofit corporation to be formed for the charitable purposes of assisting and engaging in economic development and infrastructure

improvement in the City by making grants and low interest loans to advance those two goals. *See* Order, November 25, 2014.

8. Pursuant to the Court's November 25, 2014 Order, the Board of Directors of Impact Harrisburg unanimously resolved to organize the corporation on March 17, 2015. *See* Exhibit A.

9. On March 17, 2015, Articles of Incorporation were filed with the Pennsylvania Department of State establishing Impact Harrisburg pursuant to the Nonprofit Corporation Law, 15 Pa.C.S. 5101, *et seq.* *See* Exhibit B.

10. Since March 17, 2015, Impact's Board of Directors has conducted closed meetings under the good faith belief that as a private, nonprofit corporation, Impact is not an "agency" as defined by the Sunshine Act, 65 Pa.C.S. § 701, *et seq.*

11. Impact, however, has promptly released the minutes of its meetings to the public in the interests of transparency and advancement of public dialogue regarding Impact's purposes.

12. In January 2016, local media articles appeared questioning whether Impact should be conducting open meetings in accordance with the Sunshine Act. *See* Exhibit C.

13. Subsequently, on January 22, 2016, the Chair of the Governing Board of Impact received correspondence from counsel for PA Media Group, which

contended that Impact was an "agency" pursuant to the Sunshine Act, and thus was required to conduct Impact business in open meetings. *See* Exhibit D.

14. The Sunshine Act requires that meetings of an "agency" be open to the public, subject to certain exceptions. 65 Pa.C.S. § 704.

15. The Sunshine Act defines "agency," in relevant part, as an: "organization created by or pursuant to a statute which declares in substance that the organization performs or has for its purpose the performance of an essential governmental function and through joint action of its members exercises governmental authority and takes official action." *Id.* at § 703.

16. The January 22, 2016 correspondence from PA Media Group asserts that Impact is an agency subject to the Sunshine Act because of the following:

- a. Impact was created pursuant to the Harrisburg Strong Plan;
- b. The Harrisburg Strong Plan was created pursuant to Act 47;
- c. Impact's two principal functions are to fund infrastructure improvements and promote economic development in the City of Harrisburg, which are alleged to be essential governmental functions;
- d. Impact has been tasked by the Court with issuing grants to fund such programs with funds derived from parking revenues generated through implementation of the Harrisburg Strong Plan.

17. At the request of Impact's board, counsel for Impact has determined that there is substantial uncertainty as to Impact's legal status as an "agency" under the Sunshine Act for the following reasons:

- a. Impact was organized as a private, nonprofit corporation pursuant to the Nonprofit Corporations Law, and not as a public entity pursuant to Act 47 or any other statute;
  - i. This Court has found that private, nonprofit corporations are not "agencies" under the Sunshine Act merely because they are created pursuant to the Nonprofit Corporation Law, *see Harristown Development Corp. v. Commonwealth*, 580 A.2d 1174, 1179 (Pa. Cmwlth. 1990), *rev'd on other grounds*, 614 A.2d 1128 (Pa. 1990); *see also Mooney v. Temple Univ. Bd. of Trustees*, 292 A.2d 395, 398 (Pa. 1972);
- b. Act 47 does not provide specifically for or require the creation of a nonprofit corporation such as Impact in distressed municipalities, but instead provides a state-appointed receiver with discretion to tailor a municipal recovery plan toward the recovery of the distressed municipality, subject to the approval of this Court, *see* 53 P.S. § 11701.703;

c. Accordingly, Impact was not created by state law and is not a public entity; instead, uniquely, Impact is a private, nonprofit corporation whose functions are set forth in a municipal recovery plan, which plan was created pursuant to state law and approved by an Order of this Court.

i. This Court, “[w]hile admitting that the [Sunshine] Act’s definition of “agency” is not a model of clarity,” has found that an entity “not created by or pursuant to a statute,” for which “no statute exists which declares in substance that the [entity] performs, or has for its purpose the performance of, an essential governmental function,” is not an “agency” under the Act. *See Ristau v. Casey*, 647 A.2d 642, 647 (Pa. Cmwlth. 1994). *Cf. Community College of Philadelphia v. Brown*, 674 A.2d 670, 671 (Pa. 1996) (an entity performs an essential governmental function only where it is “statutorily identified as providing essential services, or ... provide[s] a service which is constitutionally mandated, or ... provide[s] a service indisputably necessary to the continued existence of the Commonwealth.”) (interpreting prior language of Right-To-Know Law, which definition of agency mirrored the present language of the Sunshine Act).

d. Although Impact's tasks of issuing grants and low interest loans to fund infrastructure improvements and promote economic development in the City of Harrisburg indisputably are of great importance to the citizenry of the City, such tasks have not been found by Pennsylvania courts to be "essential government functions" or "exercises [of] governmental authority" under the Sunshine Act;

i. To the contrary, this Court has found that a nonprofit corporation established to combat urban blight through redevelopment of the City of Harrisburg is not an "agency" under the Sunshine Act even though a substantial portion of its funds were derived from public monies. *Harristown Development Corp.*, 580 A.2d at 1179. *See also Mooney*, 292 A.2d at 400 (non-profit corporation did not become an "agency" as defined by the Right-To-Know Law solely because it received public funds).

**Request for Declaratory Relief Regarding Applicability of the Sunshine Act.**

18. The purpose of the Declaratory Judgments Act is 'to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations,' and, to that end, the act 'is to be liberally construed and administered.'" *Fidelity Bank v. Pennsylvania Turnpike Commission*, 444 A.2d 1154, 1159 (Pa. 1982) (citing 42 Pa.C.S. § 7541)

19. The general scope of declaratory remedies is broad, and such remedies are permitted in any proceeding where a judgment or decree will terminate a controversy or remove uncertainty. 42 Pa.C.S. § 7536.

20. As such, this Court may issue a declaratory judgment to remove the uncertainty as to whether Impact, a private, nonprofit corporation created pursuant to this Court's Order approving the Harrisburg Strong Plan, is an "agency" subject to the Sunshine Act.

21. An actual controversy exists with regard to whether Impact is an "agency" required to hold open board meetings; Impact has received correspondence from counsel for local media organizations asserting that such is the case and threatening litigation, while Impact's counsel has determined that the applicability of the Sunshine Act to Impact is substantially uncertain due to the unique nature of Impact's formation.

22. The directors of Impact understood that it was created deliberately pursuant to the Harrisburg Strong Plan as a private, nonprofit corporation.

23. Like Impact, many private, nonprofit corporations receive public grant money for distribution in furtherance of the corporation's purposes, yet those entities are not deemed "agencies" pursuant to the Sunshine Act.



24. Further, Impact's Board of Directors has not been empowered to hire a staff to run Impact's daily operations; the Board of Directors is engaged in the day-to-day decisionmaking for the organization.

25. If Impact was found subject to the Sunshine Act, that law would require open meetings anytime Impact's board met to discuss any issue, no matter how mundane.

26. Further, Impact then would be required to issue public notice in a newspaper of general circulation in advance of any meeting of its Board, even if the meeting was not to address any topic of any potential public interest but only the corporation's own "housekeeping" matters. *See* 65 Pa.C.S.A. § 709.

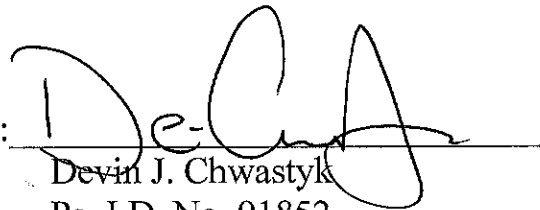
27. The operations of Impact would be impaired if it was required to notify the public in advance of any and all Board of Directors' deliberations and decisionmaking, which would ultimately impede the swift implementation of the Harrisburg Strong Plan.

28. Accordingly, Impact seeks a declaratory judgment from this Court that Impact is not an "agency," as defined in the Sunshine Act, 65 Pa.C.S. § 704, and therefore is not required to hold all of its board meetings open to the public by the Act, *id.* at § 704.

WHEREFORE, Petitioner Impact Harrisburg respectfully requests that the Court issue a declaratory judgment that Impact Harrisburg is not an "agency" subject to the open meeting requirements of the Sunshine Act.

McNEES WALLACE & NURICK LLC

By:



Devin J. Chwastyk

Pa. I.D. No. 91852

Rachel R. Hadrick

Pa. I.D. No. 316383

100 Pine Street, P.O. Box 1166

Harrisburg, PA 17108

(717) 232-8000

*Counsel for Impact Harrisburg*

Dated: February 25, 2016

# EXHIBIT A

**UNANIMOUS CONSENT RESOLUTION OF THE BOARD OF DIRECTORS  
OF  
IMPACT HARRISBURG**

We, the undersigned, being all of the directors of IMPACT HARRISBURG, a Pennsylvania non-profit corporation (the "Corporation"), hereby undertake the following actions as authorized by the provisions of Section 5727(b) of the Pennsylvania Nonprofit Corporation Law of 1988, as amended:

RESOLVED, that the Articles of Incorporation were duly filed in the Department of State of the Commonwealth of Pennsylvania on March 17, 2015 and we hereby direct that notice of such filing be published in accordance with the Nonprofit Corporation Law of 1988, as amended;

RESOLVED FURTHER, that the actions of the incorporator of this Corporation in establishing this Corporation are ratified, and the Treasurer of the Corporation is authorized to pay with the funds of the Corporation all fees and expenses incident to and necessary for the incorporation and organization of the Corporation;

RESOLVED FURTHER, that the Bylaws attached hereto as Exhibit A and incorporated by reference are hereby adopted as the Bylaws of the Corporation until otherwise amended;

RESOLVED FURTHER, that the following individuals are elected as officers of the Board are:

Chair:	Neil Grover
Vice-Chair:	Doug E. Hill
Secretary:	Les Ford
Treasurer:	Brittany T. Brock

RESOLVED FURTHER, that any customary form of corporate resolutions necessary to designate a depository for the funds of the Corporation are approved and adopted as if fully set forth herein, and such persons designated as authorized signatories thereon are authorized as signatories of the Corporation on said accounts provided that any such accounts require the signature of two officers as designated by the Board at least one whom is the Treasurer;

RESOLVED FURTHER, the fiscal year of the Corporation shall end on June 30<sup>th</sup>;

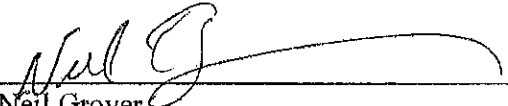
RESOLVED FURTHER, the Conflict of Interest Policy attached hereto as Exhibit B and incorporated by reference is hereby adopted;

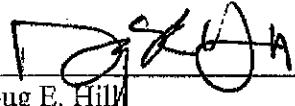
RESOLVED FURTHER, that any of the officers of the Corporation are authorized to seek tax-exempt status with the United States Internal Revenue Service, the Pennsylvania Department of Revenue, and other applicable taxing authority and to sign Form 1023, Application for Recognition of Exemption under Section 501(c)(3) of the Internal Revenue Code, and any other forms necessary to seek tax exempt status; and

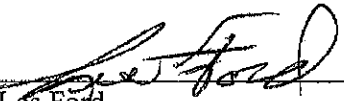
RESOLVED FURTHER, that any of the officers of the Corporation are authorized and directed to take and do, or cause to be taken or done, such further acts and deeds to execute and deliver in behalf of the Corporation such other documents, papers, and instruments and to pay all fees and expenses as are necessary, appropriate, advisable or required to effect the purpose and intent of the foregoing resolutions.


**[Signature Page to Follow]**

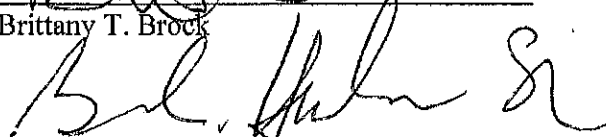
IN WITNESS WHEREOF, we have executed this Unanimous Consent Resolution effective as of the 17<sup>th</sup> day of March, 2015.

  
Neil Grover

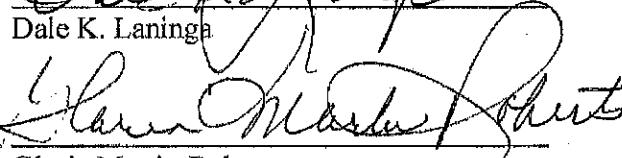
  
Doug E. Hill

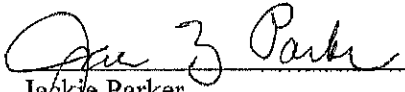
  
Les Ford

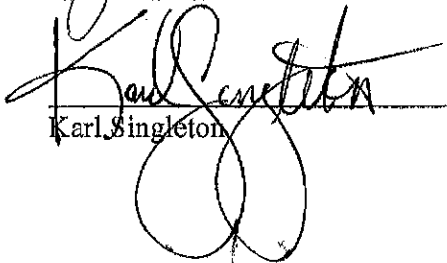
  
Brittany T. Brock

  
Brian A. Hudson, Sr.

  
Dale K. Laninga

  
Gloria Martin-Roberts

  
Jackie Parker

  
Karl Singleton

# **EXHIBIT B**

COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF STATE  
BUREAU OF CORPORATIONS AND CHARITABLE ORGANIZATIONS  
401 NORTH STREET, ROOM 206  
P.O. BOX 8722  
HARRISBURG, PA 17105-8722  
WWW.CORPORATIONS.STATE.PA.US/CORP

IMPACT HARRISBURG

THE BUREAU OF CORPORATIONS AND CHARITABLE ORGANIZATIONS IS HAPPY TO SEND YOU YOUR FILED DOCUMENT. THE BUREAU IS HERE TO SERVE YOU AND WANTS TO THANK YOU FOR DOING BUSINESS IN PENNSYLVANIA.

IF YOU HAVE ANY QUESTIONS PERTAINING TO THE BUREAU, PLEASE VISIT OUR WEB SITE LOCATED AT WWW.CORPORATIONS.STATE.PA.US/CORP OR PLEASE CALL OUR MAIN INFORMATION TELEPHONE NUMBER (717)787-1057. FOR ADDITIONAL INFORMATION REGARDING BUSINESS AND / OR UCC FILINGS, PLEASE VISIT OUR ONLINE "SEARCHABLE DATABASE" LOCATED ON OUR WEB SITE.

ENTITY NUMBER: 4339559

McNees Wallace & Nurick LLC  
\*\*\*counter Pick-Up\*\*\*, 100 Pine St, PO Box 1166  
Harrisburg, PA 17108



Microfilm Number \_\_\_\_\_

Entity Number \_\_\_\_\_



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**ARTICLES OF INCORPORATION - DOMESTIC NONPROFIT CORPORATION**

In compliance with the requirements of the Pennsylvania Nonprofit Corporation Law of 1988, as amended, 15 Pa. C.S.A. § 5105 et seq. (the "NCL"), the undersigned, desiring to incorporate a nonprofit corporation, hereby states that:

1. **Name.** The name of the corporation is **IMPACT HARRISBURG** (the "Corporation").

2. **Address.** The address of the Corporation's initial registered office in this Commonwealth is 10 North Second Street, Suite 402, Harrisburg, Pennsylvania 17101-1681.

3. **Purpose.** The Corporation is incorporated under the NCL for the following charitable purposes (the "Charitable Purposes") within the meaning of section 501(c)(3) of the Internal Revenue Code of 1986, as amended (the "Code") to benefit the City of Harrisburg, Pennsylvania (the "City"):

(a) to assist in and engage in the improvement of the infrastructure of the City as allowed by section 501(c)(3) of the Code, including but not limited to:

(i) making grants and low interest loans to, or to subsidize grants or guaranty loans, made for the purpose of clearing, rebuilding, and rehabilitating blighted and deteriorated structures located in the City;

(ii) making grants and low interest loans to, or to subsidize grants or guaranty loans, made for the purpose of clearing, rebuilding, and rehabilitating blighted and deteriorated streets, sidewalks, light posts, and other aesthetic improvements located in the City; and

(iii) making grants and low interest loans to, or to subsidize grants or guaranty loans, made for the purpose of eliminating and preventing blight and deterioration of the City's infrastructure and to promote the general well-being and livelihood of the residents of the City.

(b) to assist in and engage in economic development within the City as allowed by section 501(c)(3) of the Code, including but not limited to:

(i) making grants and low interest loans to, or to subsidize grants or guaranty loans made to, entrepreneurs and businesses that are located or operating in the

City or intend to locate or operate in the City to assist in the creation of jobs for the City and the realization of tax revenues for the City;

(ii) making grants and low interest loans to, or to subsidize grants or guaranty loans made to, entrepreneurs and businesses that are located or operating in the City or intend to locate or operate in the City and have experienced difficulty in obtaining traditional financing because of the deteriorated nature of the City;

(iii) making grants and low interest loans to, or to subsidize grants or guaranty loans made to, entrepreneurs and businesses that are located or operating in the City or intend to locate or operate in the City which are owned or operated by a disadvantaged group, the unemployed, or the underemployed; and

(iv) making grants and low interest loans to, or to subsidize grants or guaranty loans made to, entrepreneurs and businesses that are located or operating in the City or intend to locate or operate in the City to provide job training.

(c) to encourage participation in the improvement of infrastructure in the City by residents of the City;

(d) to encourage participation in the economic development of the City by residents of the City;

(e) to lessen the burdens of government for the City through the development of business in the City and the improvement of the City's infrastructure;

(f) to receive (by gift, bequest, grant, or otherwise) and administer funds for such Charitable Purposes, including but not limited to distributing such funds to other organizations that qualify as exempt organizations under section 501(c)(3) of the Code in further of the Charitable Purposes of such other exempt organization;

(g) to solicit and receive contributions, whether unrestricted or for designated purposes, consistent with the Charitable Purposes, and if designated or restricted, hold the same for such designated Charitable Purposes or subject to such conditions as may be specified in the terms of the gift or grant; and

(h) to otherwise operate exclusively for the Charitable Purposes set forth herein and, without otherwise limiting its powers, exercise all rights and powers conferred by the laws of the Commonwealth of Pennsylvania upon nonprofit corporations.

Notwithstanding the foregoing or any Article set forth herein, under no circumstances shall funds be distributed to support the operations of any entity, or be transferred or loaned for any purpose to the City's General Fund or other account of the City or to any of the City's authorities or instrumentalities.

4. Operation.

(a) The Corporation does not contemplate pecuniary gain or profit, incidental or otherwise, and no part of the net earnings of the Corporation shall inure to the benefit of, or be distributable to, its directors, officers, or other private persons, except that the Corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the Charitable Purposes set forth herein.

(b) No substantial part of the activities of the Corporation shall be the carrying on of propaganda, or otherwise attempting to influence legislation, and the Corporation shall not participate in, or intervene in (including the publishing or distribution of statements) any political campaign on behalf of any candidate for public office.

(c) Notwithstanding any other provision of these Articles, the Corporation shall not carry on any activities not permitted to be carried on (i) by a corporation exempt from federal income tax under Section 501(c)(3) of the Code, or (ii) by a corporation, contributions to which are deductible under Section 170(c)(2) of the Code.

(d) The Corporation shall, if applicable, distribute income (and principal to the extent necessary) for each taxable year at such time and in such manner as not to become subject to the tax on undistributed income imposed by section 4942 of the Code, or corresponding provisions of any subsequent federal tax laws. In addition, the Corporation shall not engage in any act of self-dealing as defined in section 4941(d) of the Code, or corresponding provisions of any subsequent federal tax laws; nor retain any excess business holdings as defined in section 4943(c) of the Code, or corresponding provisions of any subsequent federal tax laws; nor make any investments in such manner as to incur tax liability under section 4944 of the Code, or corresponding provisions of any subsequent federal tax laws; nor make any taxable expenditures as defined in section 4945(d) of the Code, or corresponding provisions of any subsequent federal tax laws.

5. Term. The term for which the Corporation is to exist is perpetual.

6. Non-Stock Basis. The Corporation is organized on a non-stock basis.

7. Members. The Corporation shall not have any members.

8. Initial Directors. The names and addresses of the persons who are the initial directors of the Corporation are as follows:

Neil Grover	Dale K. Laninga
Douglas E. Hill	Gloria Martin-Roberts
Les Ford	Jackie Parker
Brittany T. Brook	Karl Singleton
Brian A. Hudson, Sr.	

9. **Dissolution or Liquidation.** In the event the Corporation is dissolved or liquidated, the Board of Directors, after paying or making provision for payment of all of the known and legally enforceable liabilities of the Corporation, shall distribute the Corporation's property and assets to the City or an existing non-profit corporation with a similar mission on the condition that such property and assets be used for one or more of the purposes set forth in Section 3, above. In no event shall the net property or assets inure to the benefit of any private person and in no event shall a distribution be made to an organization that is not exempt from federal income tax under Section 501(c)(3) of the Code.

10. **Code References.** References in these Articles to a section of the Code shall be construed to refer both to such section and to such regulations promulgated thereunder, as they now exist or may hereafter be adopted or amended, and to any corresponding provisions and regulations on any subsequent federal income tax code.

11. **Personal Liability of Directors.**

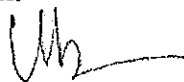
(a) **Elimination of Liability.** To the fullest extent that the laws of the Commonwealth of Pennsylvania, as now in effect or as hereafter amended, permit elimination or limitation of the liability of directors, no director of the Corporation shall be personally liable for monetary damages for any action taken, or any failure to take any action, as a director.

(b) **Applicability.** The provisions of this Article shall be deemed to be a contract with each director of the Corporation who serves as such at any time while this Article is in effect and each such director shall be deemed to be so serving in reliance on the provisions of this Article. Any amendment or repeal of this Article or adoption of any bylaw or provision of the Articles of the Corporation which has the effect of increasing director liability shall operate prospectively only and shall not affect any action taken, or any failure to act, prior to the adoption of such amendment, repeal, bylaw, or provision.

12. **Incorporator.** The name and address of the incorporator is Vance E. Antonacci, Esquire, 570 Lausch Lane, Suite 200, Lancaster, Pennsylvania 17601.

IN WITNESS WHEREOF, the incorporator has signed these Articles of Incorporation this 17<sup>th</sup> day of March, 2015.

Incorporator:

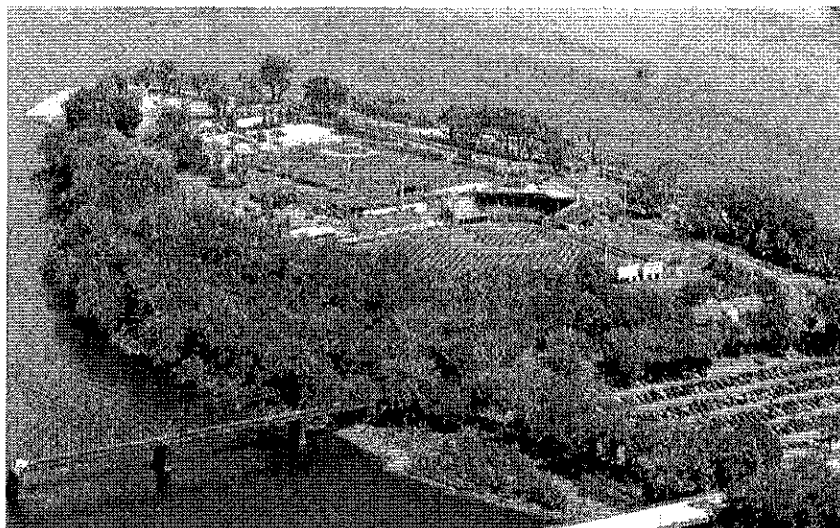


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Vance E. Antonacci, Esquire  
McNees Wallace & Nurick LLC  
570 Lausch Lane, Suite 200  
Lancaster, Pennsylvania 17601  
717-581-3701

# EXHIBIT C

## Harrisburg nonprofit that controls \$13 million in public money meets behind closed doors



A nonprofit set up to jumpstart Harrisburg's recovery by funding \$13 million in infrastructure and economic development projects has been meeting behind closed doors. Board members for the nonprofit said it is exempt from required public meetings. (Photo shows Harrisburg City Island, North End, with stadiums. ) (PETER R. REKUS)



By Christine Vendel | [cvendel@pennlive.com](mailto:cvendel@pennlive.com)

[Email the author](#) | [Follow on Twitter](#)

on January 12, 2016 at 1:22 PM, updated January 12, 2016 at 4:14 PM

HARRISBURG-A Harrisburg nonprofit that controls \$13 million in public money may be violating Pennsylvania's Sunshine Act by meeting behind closed doors, according to two attorneys who specialize in media law.

The nonprofit, known as Impact Harrisburg, was designed by state receivers to guide Harrisburg's infrastructure and economic development.

Board members for Impact Harrisburg have been meeting twice a month for the last year in private sessions, mostly to determine how the group would establish itself. But the group in recent months has **hired an investment firm, an executive director and is currently reviewing accountants.**

Eventually, the group will decide how to distribute \$13 million in public money— money that was set aside from the sale of the city's incinerator and long-term lease of the city's parking assets. The money is supposed to jumpstart the city's economic recovery and address long-ignored infrastructure needs.

That brings up the question: should the group's meetings be open to the public?

Neil Grover, chairman of the volunteer board, thinks not. He said Impact Harrisburg, as a nonprofit, is not subject to the requirements of the state's Sunshine Act requiring public notice and open meetings. Other nonprofits don't have public board meetings, he said.

Melissa Melewsky, an attorney with Pennsylvania Newsmedia Association, disagreed.

"Non-profits formed pursuant to statute that administer public funds and perform government functions, like economic recovery

using public funds, cannot avoid public access and accountability via non-profit status," she said.

Attorney Craig Staudenmaier, with Nauman, Smith, Shissler & Hall, said the relevant phrases of the Sunshine Act define a public agency: "created by or pursuant to statute" to perform an "essential governmental function."

Staudenmaier conceded the first part of the definition represents a gray area, especially considering the unique background of this particular nonprofit. But he said a strong argument exists that Act 47 provided the authority for the city's recovery plan, and thus the formation of the nonprofit.

"It was created by statute, although once removed," said Staudenmaier, who represents PennLive in various matters.

And spending \$13 million for infrastructure and economic development projects?

"It doesn't get any more essential than that," he said.

Grover contends the group does not make governmental decisions.

"We do not perform any 'essential governmental function' or exercise governmental authority," he said.

Mike Feeley, director of content for PennLive.com and the Patriot-News, said it is in the public's best interest for the board to operate in the open.

"There's no more essential government function than the spending of public money," Feeley said. "The group will decide how \$13 million in public money will be distributed for projects to benefit residents of Harrisburg. We believe the public has a right to participate in that process."

Grover said the process to accept applications and award money will be a public process, but stopped short of pledging open board meetings. The group has consistently **posted minutes after each meeting on a state website.**

Although Grover said the nonprofit is like other nonprofits that receive most of their money through governmental sources, Melewsky said Impact Harrisburg had to be approved by the Commonwealth Court as part of Harrisburg's Act 47 plan.

"Its purpose and funding were also set out by the court and are subject to review by the government," she said. "As opposed to most nonprofits, it would not exist but for a deficient government agency."

Being considered a public agency would open the nonprofit to additional costs, including requirements to advertise meetings in advance, and adherence to the state's Right to Know law concerning public documents.

Although Staudenmaier conceded that including the public in meetings may slow down processes, or stymie discussion, he emphasized the purpose of the Sunshine Act, is "so the public can see how agencies function and how they spend their money."

People averse to the concept can always work in the private sector, Staudenmaier said.

"With public bodies and public functions, you should always err on the side of transparency."

Harrisburg resident and attorney Bill Cluck has opposed the group's closed meetings from the start.

"There has to be transparency of this organization," Cluck said. "It is not a run of the mill non-profit. It was created as a result of the corruption of the city government that resulted in hundreds of millions of dollars in debt that had to be paid by leasing parking assets."

Cluck also has concerns because **three current city employees are on the nine-member volunteer board** that will decide how the millions are spent.

"Yet another reason the board meetings must be open to the public," he said.

Doug Hill, vice chair of Impact Harrisburg, reiterated that the process to distribute money would involve the public, although not because of the Sunshine Act requirements.

"We do agree the public needs access to our process," he said. "But we do not believe our 501C3 falls under the open meetings act."

Hill said the group is an "independent body," whose board members are not subject to control or replacement by city, county or state officials. He said the nonprofit plans to voluntarily meet the spirit of the Sunshine Act by creating a "clear and consistent policy" for public participation.

"We are going to develop a framework for public access, knowledge and input," he said. "It's not going to be ad hoc or changeable once we get it in place."

In addition to the closed meetings, the slow pace of the nonprofit in getting started over 24 months has drawn criticism. A task force spent a year determining the proper structure for the nonprofit before the board members began meeting last year.

Fred Reddig, who is overseeing the city's financial recovery from the state, said the process has taken longer than anyone anticipated. But he was not critical of the group, because he said they were simply following the steps outlined in the city's recovery plan.

Grover said each step in establishing the nonprofit was necessary. And he noted the group gets one crack at distributing the money, so it must be done impeccably.

But the complexity of the nonprofit's status is one reason Harrisburg Mayor Eric Papenfuse said he opposed the creation of the nonprofit.

The city wanted to access some of the money set aside for infrastructure last year to help replace the city's streetlights with energy-efficient LED lights. Because the Impact Harrisburg money was not available, the city had to **take out a \$3.2 million bank loan, which carries interest and a 3-percent early payback penalty.**

"I am of the belief that the money should have gone into an account accessed directly by the city with the approval of the coordinator- no need for a nonprofit or paid staff or cumbersome structure," he said. "It should all have been spent by now to help jump start the city's recovery. I think the structure may have been well-intentioned, but clearly has not worked."

The nonprofit was designed to last about five years, with the money roughly evenly split between infrastructure and economic development projects.

The city of Harrisburg and Capital Region Water are the only entities allowed to apply for infrastructure grants, but the rest of the money carries no restrictions as far as who can apply for grants, Grover said.

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# EXHIBIT D



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January 22, 2016

Neil Grover, Esquire  
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**RE: Impact Harrisburg and Sunshine Act Issues**

Dear Mr. Grover:

I represent PA Media Group and its print and online properties, The Patriot News and PennLive. It is my understanding that you are currently the Chair of the Governing Board of Impact Harrisburg. It is my further understanding that the meetings of the Board have not been and are not scheduled to be open to the public pursuant to the provisions of 65 Pa.C.S.A. § 701 *et seq.*, commonly referred to as The Sunshine Act. Through discussions with my client and its reporters that have addressed this issue with you and other members of the Board, I am advised that the Board does not believe that it is subject to the open meeting provisions of the Act as Impact Harrisburg is a 501(c)(3) organization and the belief that it does not fit the definition of "agency" under the Act.

I have reviewed various documents, including the Harrisburg Strong Plan, minutes of your past meetings, the Municipal Financial Recovery Act and various Orders of the Commonwealth Court throughout the receivership proceedings which began back in late 2011. Based upon that review, I am writing to you as Board Chair to request that the Board reconsider its position, and that it immediately begin to hold its meetings in public, and that it comply with the notice and other applicable provisions of the Sunshine Act. I have summarized below my analysis which leads to this conclusion and hope that it will convince the Board of the correctness of this position before further proceedings occur outside of public view.

As you are probably aware, the origins of the Sunshine Act arise from the post-Watergate era. The Act in Pennsylvania and similar ones throughout the country were meant to cast light on the "deliberations, official action and votes of public bodies to ensure that the public had notice of meetings where such action would occur and a chance to personally view government in action." This overriding principle is set forth in the Act's statement of purpose which provides:

The General Assembly hereby declares that it be the public policy of this Commonwealth to ensure the right of its citizens to have notice

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Solicitor, City of Harrisburg  
January 22, 2016  
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of and the right to attend all meetings of agencies at which any agency business is discussed or acted upon as provided in this Chapter. 65 Pa.C.S.A. § 702(b).

The General Assembly further announced that allowing the public to attend meetings was “vital to the enhancement and proper functioning of the democratic process and that secrecy in public affairs undermines the faith of the public in government.” *Id.*, at § 702(a). Generally speaking, the Act applies to “agencies.”

The definition of agency is broad. Within the definition, the following language appears:

The body, and all committees thereof, authorized by the body to take official action or render advice on matters of agency business, of all the following: the General Assembly, the Executive Branch . . . , any board, council, authority or commission of the Commonwealth or any political subdivision of the Commonwealth or any State, municipal, township or school authority . . . **or similar organizations created by or pursuant to a statute which declares in substance that the organization performs or has for its purpose a performance of an essential government function and through the joint action of its members exercises governmental authority and takes official action.** (emphasis supplied) 65 Pa.C.S.A. § 703.

A careful analysis of how Impact Harrisburg came into existence reveals that it appears to fit the definition of a “similar organization created by or pursuant to a statute . . .” Even entities which do not appear to be “typical” government bodies have been found to be an agency under the Act and subject to its provisions.

For example, the Commonwealth Court has held that “empowerment teams” of distressed school districts created pursuant to the provisions of the Education Empowerment Act were found to be *de facto* school boards or, at a minimum, committees of the school district subject to having their meetings held in public session pursuant to the Sunshine Act. Patriot News Co. v. Empowerment Team of Harrisburg School District, 763 A.2d 539 (Pa.Cmwlt. 2000).

The Court found that the team’s statutory ability to make recommendations, create policy, establish curriculum and related functions rendered it an agency under the Act subject to its provisions. In accord, see Hacker v. Colonial League, 2001 WL 34013625 (Lehigh 2001). One of the key factors in the Court’s decision in the Empowerment Team cases was that the teams were

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created by statute and weilded the ability to make policy decisions and recommendations and take other official action.

An analogous situation exists with regard to the Board here. The existence of Impact Harrisburg traces itself back to the City's petition to the Commonwealth Court for the appointment of a receiver pursuant to Act 47, commonly known as the Municipal Financial Recovery Act ("MFRA"), 53 P.S. § 11701.101, *et seq.*, on November 18, 2011. The filing of that Petition resulted in the entry of an initial Order on December 2, 2011, appointing a receiver under the MFRA. A detailed history of the further proceedings is not required, however, of particular significance is Judge Leadbetter's Order entered in the proceeding on September 23, 2013. In the Judge's Order, and in particular paragraph 11, a reference is made to the "second critical component" of the City's recovery plan (Harrisburg Strong Plan) being the closing and funding of the 'Parking Transaction' which was held to provide essential funding to the City for, among other things, 'infrastructure improvements, [ and] economic development.'"

The Court confirmed the Harrisburg Strong Plan pursuant to 53 P.S. § 11701.703(e). As part of that approval, the Court approved the Parking Transaction and "the distribution of proceeds resulting from such parking transaction pursuant to the terms of the Plan."

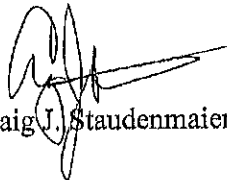
Referring to the Harrisburg Strong Plan as modified through November 25, 2015 (which can be found on both the City and DCED's web sites) as part of the Parking Transaction, a task force was created to create a structure to oversee and administer the \$12.3 million of taxpayer money that was set aside as part of the Parking Transaction. The two uses of these funds were to be improvement of infrastructure in the City and to "incentivize economic development opportunities." The task force eventually recommended the creation of a single non-profit to administer this money. The Coordinator submitted this proposal to the Commonwealth Court for approval and on November 25, 2014, the Court granted the Coordinator's request to approve this proposal and action plan for this entity to oversee the aforesaid funds. That entity, known as "Impact Harrisburg," is "to promote economic development and infrastructure improvements." Harrisburg Strong Plan, page 71, as modified 11/25/15, Order of November 25, 2014. Referring to the MFRA again, in § 704, the effective confirmation of a recovery plan or any modification thereto imposes upon the elected and appointed officials of the City a mandatory duty to undertake the acts set forth in the recovery plan. It further prohibits any interference by elected or appointed officials. In short, the creation and Court approval of the Harrisburg Strong Plan and, as part of that Plan, Impact Harrisburg, are all directly tied to the authority for same provided in statutory provisions found within the MFRA. Furthermore, under the express provisions of the MFRA, the Court has approved the plan and has specifically approved the creation of Impact Harrisburg as set forth above. Thus, Impact Harrisburg, exists as a "similar organization created pursuant to a statute."

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By the very terms of the Plan, Impact Harrisburg's two principal functions are to help fund infrastructure improvements in the City and promote economic development. These are clearly essential government functions. Thus, Impact Harrisburg is an agency as defined under the Sunshine Act as it is created by or pursuant to statute and its stated function is to make determinations of the expenditure of public funds for two essential government functions. Thus, it is required to comply with the notice, public access and related provisions of the Sunshine Act.

I believe the above analysis will convince you and the Board the correctness of the position asserted. We would, therefore, anticipate that the Board would open its next meeting and any subsequent meetings to the public and further comply with the advance notice and other related provisions of the Act. As City Solicitor, I am certain that you are aware of the penalty provisions under the Act contained in §§ 714 and 714.1. Please advise within seven business days whether the Board will be opening its future meetings. Thank you for your prompt consideration of the above.

Sincerely yours,



Craig J. Staudenmaier

CJS/jc

cc: C. Barron  
M. Feeley

**PROOF OF SERVICE**

I, Devin J. Chwastyk, hereby certify that I am this day serving the foregoing document upon the persons below via first class mail, which service satisfies the requirements of Pa.R.A.P.

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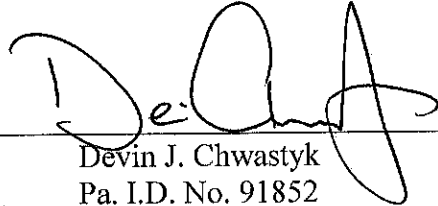
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Dated: February 25, 2016