

THE CHARTER BOARD OF THE CITY OF READING

IN RE:           Public Comment at Meetings :           Request Received January 8, 2014  
                  of City Council                         :  
                                                             :  
                                                             :           Advisory Opinion No. 36

**ADVISORY OPINION**

**I.       PROCEDURAL HISTORY AND QUESTIONS PRESENTED**

By email dated January 8, 2013, Mr. Ernie Schlegel (“Schlegel”), a member of the City of Reading’s Library Board, requested an advisory opinion from the Charter Board of the City of Reading (“Board”). The substantive issue to be addressed in answering Schlegel’s request concerns public comment at City Council meetings. Schlegel specifically asks, in his own words, the following:

1.       Can City Council set different time limits for speakers speaking on Agenda and Non-Agenda matters?<sup>1</sup>
2.       Can City Council make citizens speaking on Non-Agenda items [sic] speak after the end of business at their meeting?<sup>2</sup>

Schlegel’s request for an advisory opinion references the Board’s Investigation No. 39, for which a Final Opinion and Order is now pending, following a hearing and entry into a Stipulated Administrative Settlement.

The Board answers Schlegel’s request for an advisory opinion as follows.

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<sup>1</sup> Schlegel advises in his request that “[c]urrently [City Council] enforce[s] 5 minutes for Agenda Matters and 3 minutes for Non-Agenda matters.”

<sup>2</sup> Schlegel advises in his request that “[c]urrently [City Council] do[es] and occasionally they [sic] poll the body to allow them to speak at the beginning of the meeting.”

## **II. DISCUSSION**

### **A. Prospective v. Retrospective**

As the Board regularly cautions, it is constrained to not answer retrospective questions under the guise of an advisory opinion. The Board will answer as an advisory opinion only those questions that are prospective in application. Also, actual or perceived violations of the Charter or Administrative Code, grounded in actual events that have occurred, are not the proper subject of an advisory opinion. *See* Adv. Ops. No. 11 (September 24, 2008), No. 12 (January 12, 2009), No. 14 (May 12, 2009), No. 30 (November 14, 2012), No. 31 (April 8, 2013) (comparing retrospective and prospective application) *and* No. 32 (April 19, 2013).

Here the context of this advisory opinion request is very specific and addresses the *current* and ongoing conduct of City Council. Schlegel references matters that have already come to pass and are the current policy and procedure of City Council. For instance, Schlegel references that City Council currently permits only 5 minutes of public comment for agenda item speakers and 3 minutes for non-agenda item speakers. He also references the current practice of City Council which requires non-agenda item speakers to speak at the end of business.

All of this has come to pass; it has occurred; it is retrospective.

Finding that this advisory opinion request addresses specific retrospective matters, which have already occurred, the Board declines to issue an advisory opinion. The remedy for an actual or perceived violation of the Charter or Administrative Code is the filing of a Charter Board complaint, not a request for an advisory opinion.

## B. Lis Pendens

It also appears to the Board that Schlegel's advisory opinion request is barred, or should practically be barred, by the doctrine of *lis pendens*.<sup>3</sup> As explained in *Barren v. Commonwealth*, 2013 PA Super 224, 74 A.3d 250 (2013),

[w]hen two lawsuits are pending, the common law doctrine of *lis pendens* permits the dismissal of the newer suit if both suits involve the same parties, the same relief requested, the same causes of action, and the same rights asserted. *PNC Bank, Nat. Ass'n v. Bluestream Tech., Inc.*, 14 A.3d 831, 836 (Pa.Super.2010). . . . *Lis pendens* also serves the purpose of saving judicial resources. *Norristown Auto. Co., Inc. v. Hand*, 386 Pa.Super. 269, 273–74, 562 A.2d 902, 904 (1989). Likewise, *lis pendens* prevents the appearance of the inequitable administration of law that would occur if two cases litigating the same issues in different counties reached different results. *Id.*

“[A]pplication of *lis pendens* is purely a question of law. Therefore, as to application of the doctrine, our scope of review is plenary. *Siekierda v. Dep't of Transp., Bureau of Driver Licensing*, 580 Pa. 259, 860 A.2d 76 (2004).” *Hillgartner v. Port Auth. of Allegheny County*, 936 A.2d 131, 139 (Pa.Comm.w.2007); *see also Procacina v. Susen*, 301 Pa.Super. 392, 395, 447 A.2d 1023, 1025 (1982). Although *lis pendens* is typically asserted as a defense, the Superior Court may affirm the dismissal of a case where “the complete records from two actions are available for review....” *Lowenschuss v. Selnick*, 324 Pa.Super. 193, 199, 471 A.2d 529, 532 (1984). This Court may affirm the trial court's decision on any basis supported by the record. *Dietz v. Chase Home Fin., LLC*, 41 A.3d 882, 890 n. 7 (Pa.Super.2012).

*Barren*, 74 A.3d at 253-54. In *Barren* the Court dismissed the suit on its own motion, *sua sponte*.

Here, the Board determines that Schlegel's request for advisory opinion is only a second bite at the apple and an attempt to recast the issues found in Investigation No. 39. Schlegel references Investigation No. 39 in his advisory opinion request and is familiar with that matter.<sup>4</sup>

To the extent the doctrine of *lis pendens* applies to bar the issuance of an advisory opinion

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<sup>3</sup> *Lis pendens* literally means “prior pending action.”

<sup>4</sup> The confidentiality provision of the Board's enabling ordinance prevents a statement here of Schlegel's role in Investigation No. 39. *See* Charter Board Ordinance Sec. V(C)(1), Ord. 46-2005, *as amended by* Ord. 16-2013.

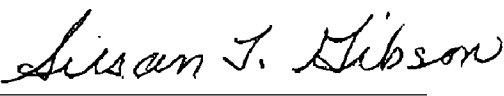
request concerning substantially similar issues among substantially similar parties addressed in a prior pending Charter Board investigation, the Board determines that Schlegel's advisory opinion request is barred.

As a matter of policy, the Board intends to address the matters raised in this advisory opinion request in its Final Opinion and Order respecting Investigation No. 39 as the issues here are completely subsumed by the issues raised, and to be addressed and determined, in Investigation No. 39.<sup>5</sup>

### **III. OPINION OF THE BOARD**

The Board declines to render an advisory opinion in this matter for the reasons stated in Section II, above.

CITY OF READING CHARTER BOARD

By:   
Susan Gibson, Chair

Date: February 7, 2014

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<sup>5</sup> The Board's Final Opinion and Order shall be issued within thirty (30) days of the conclusion of an evidentiary hearing. See Charter Board Ordinance Sec. V(A)(8), Ord. 46-2005. The evidentiary hearing for Investigation No. 39 concluded upon the Board's February 4, 2014 execution of a Stipulated Administrative Settlement, fully executed by the Board's Investigative Officer and the subject of the complaint.