

IN RE	Applicability of City's	:	Request Received September 23, 2019
	Purchasing Policy to the	:	
	Reading Public Library	:	
		:	Advisory Opinion No. 48

THE “OPINION OF THE BOARD” SECTION OF AN
ADVISORY OPINION MAY BE USED AS A DEFENSE ONLY
BY THE REQUESTOR OF THE ADVISORY OPINION IN ANY
SUBSEQUENT INVESTIGATION OR PROSECUTION ONLY
TO THE EXTENT THAT THE QUESTIONS PRESENTED TO
THE BOARD ARE IDENTICAL TO THE FACTUAL ISSUES
FACED IN THE UNDERLYING MATTER IN WHICH THE
DEFENSE IS RAISED. FURTHER, NO OTHER PORTION OF
AN ADVISORY OPINION MAY BE USED IN ANY WAY AS
A DEFENSE AND SHALL NOT BE A DEFENSE. *See Bill No.*
46-2005, as amended, Charter Board Ordinance and Charter Board
Resolution 2-2015.

THE CHARTER BOARD OF THE CITY OF READING

IN RE Applicability of City's : Request Received September 23, 2019
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 Reading Public Library :
 : Advisory Opinion No. 48

ADVISORY OPINION

I. PROCEDURAL HISTORY AND QUESTIONS PRESENTED

By email dated September 23, 2019, Mr. Ernest Schlegel ("Schlegel") requested an advisory opinion from the City of Reading Charter Board ("Board"). Schlegel asks, verbatim, *"Is the Reading Public Library subject to the same purchasing requirements as the City of Reading . . . as it relates to purchasing of goods and services, particularly RFP/RFQ's?"* Schlegel makes this request ("Request") as a member of the Board of Trustees ("Trustees") of the Reading Public Library ("Library").¹

In clarifying his Request, Schlegel states:

I am requesting as a Library Board member some clarification on Advisory Opinion No. 4 issue[d] by the Charter Board November 4, 2006. In that Opinion the question was asked "Are Boards , Authorities and Commissions subject to the same purchasing requirements of the City of Reading. I ask , "Is the Reading Public Library subject to the same purchasing requirements as the City of Reading?" There is some confusion on my part because of the uniqueness of the relationship between the library and the City of Reading. We have a mixture of employees of City and Library under the Library Boards direction. Work on the library buildings go through the city. Our Solicitor is under the Boards hiring and direction. Banking is under the Boards direction. I ask this as it relates to purchasing of goods and services, particularly RFP/RFQ's.

See Schlegel email dated September 23, 2019.

¹ As a Trustee of the Reading Public Library, Schlegel meets the definition of a "public official" with standing to make an advisory opinion request. Charter Board Ordinance, § VI.

Pursuant to the Charter Board Ordinance, if the Board issues an advisory opinion, it must do so no later than thirty (30) days after receipt of the request, but as expeditiously as possible.

Bill No. 46-2005, Charter Board Ordinance, § VI.

II. THE LIBRARY

The Library's history reaches deep into the heart of colonial America, tracing its origins to the year 1763.² The Reading Library itself is a private, non-profit corporation, with a Board of Directors.³ The City owns, by donation from the Reading Library, the physical real estate, buildings, and the books, manuscripts and other person property therein contained. *See* Ordinance 53-1899 *codified at* City of Reading Code of Ordinances, Sec. 332-101, *et seq.* The Library is managed and controlled by a Board of Trustees numbering 16. *Id.* That Board, formerly, was comprised of the Mayor as an *ex-officio* member, and 10 members selected by City Council and 5 members elected by the Board of Directors of the Reading Library. *Id.*

However, in 2000, the County of Berks and the City of Reading entered into an agreement "concerning the operations of the Reading Public Library" ("County-City Agreement") *See* Berks Co. Resolution No. 619-00 *and* City Council Resolution No. 113-2000. In summary, the County-City Agreement provided for the following: 1) a formal commitment by Berks County to significant annual funding of the Library; 2) a change in the governance of the Board of Trustees to divide the City's appointments in half from 10 to five, and to create a

² For a detailed history of the Reading Public Library, *see* <http://readingpubliclibrary.org/get-to-know-us/about/history/> (accessed October 6, 2019).

³ This non-profit corporation, the Reading Library and its directors, should not be confused with the Library and its Trustees.

category of five appointments for Berks County; 3) placing the allocation of resource library funding subject to the approval and monitoring by the County Libraries Board; 4) maintaining the employment status of the Library's employees as being employed by either the Library or the City; and 5) placing continued responsibility for "all costs of maintenance and insurance of Library buildings and vehicles" with the City and/or the Library.

III. DISCUSSION

Schlegel's Request focuses on *In re: Purchasing Requirements of Boards, Authorities and Commissions*, (Adv. Op. No. 4, Dec. 12, 2006), correctly, as a starting point. However, the development of the Board's analysis of boards and commissions and the applicability of the City's purchasing requirements⁴ has grown as requestors have made more pointed and specific advisory opinion requests. The simplicity of Advisory Opinion No. 4, under the very broad request made by then Deputy City Clerk, Christopher Kanezo, and the general rule developed from that advisory opinion is not controlling in all circumstances. Certainly, as with every rule, here too exceptions existed, or have become evident, yet the rule endures.

A. Analysis

All parts of the City's purchasing policy ("Purchasing Policy") are applicable to only City departments, divisions, offices and agencies. See Admin. Code at Sec. 5-809, *et seq.*, *Purchasing Policy and Procedure*.⁵ The question before the Board now is whether the Library is a Charter, Article X, subordinate, board or commission, or some other City department, division, office or agency, such that the City's Purchasing Policy applies to it.

⁴ See Charter § 915; Admin. Code § 5-809, *et seq.*, *Purchasing Policy and Procedure*.

⁵ The editor's note to the Purchasing Policy states that the current version is new, having passed City Council on August 22, 2016, by Bill No. 34-2016.

1. General Applicability of City's Purchasing Policy

In Advisory Opinion No. 4,⁶ under a prior version of the Purchasing Policy, the Board concluded that the purchasing requirements of the Charter and the Administrative Code, including those concerning the purchase of professional services, apply to all subordinate departments, boards and commissions of the City.⁷ The Board noted the lack of specific information in Deputy Clerk Kanezo's request at that time, but did conclude that the "purchasing requirements of the Charter and the Administrative Code, including those concerning professional services, do apply to all subordinate departments, boards and commissions of the City." Adv. Op. No. 4 at p.4. Operative here is the word "subordinate." Indeed, Advisory Opinion No. 4 specifically excluded municipal authorities as being subordinate of the City. *Id.*

Advisory Opinion No. 4 instructs that only subordinate departments, boards and commissions of the City are bound by the City's purchasing requirements. In connection with boards and commissions, the Charter Board, as discussed below, later developed a four-part test to determine if a particular board and commission existed as a Charter, Article X, board and commission.

2. Article X Boards and Commissions

As addressed by the Board in *In re: Application of Charter Art. X to Reading Local Redevelopment Authority* (Adv. Op. 14, May 12, 2009), the Board's analysis began with the general observation that Article X of the Charter pertains to boards and commissions, and

⁶ *In re: Purchasing Requirements of Boards, Authorities and Commissions*, (Adv. Op. No. 4, Dec. 12, 2006).

⁷ Although not addressed in Advisory Opinion No. 4, as to professional services, specifically, the services of independent legal counsel and staff, the Charter and related legislation of City Council provides for certain exclusions, or exceptions, as discussed in this Advisory Opinion.

authorities,⁸ established by ordinance of City Council for the purpose of administering City business, and comprised of non-elected citizens who are not employees of the City.

In Advisory Opinion No. 14, the Board developed a four-part test to determine if a board or commission existed as one organized under Charter, Article X. Article X boards and commissions have the following defining characteristics:

- i) They are *citizen* entities, that is, they are composed of non-elected individuals who are not City employees. Charter, §§ 1001(a)(i) and 1002(a).
- ii) They are established by *ordinance*, with a clear statement of the scope of their powers. Charter, § 1001(a)(i).
- iii) They are established to *carry out* a specific aspect of City government, that is they are delegated authority by City Council to execute or administer City business within clearly delineated channels of accountability. Charter, § 1001(a)(i).
- iv) They are *established* entities that have an ongoing existence until such time as they are abolished or dissolved by ordinance. They are not entities, in the nature of a task force, which expire of their own accord once their mission is accomplished. Charter, § 1001(a)(i), (ii).

Entities which have these four defining characteristics are Article X boards and commissions.

Likewise, these boards and commissions, arising under the Charter, Article X, are most commonly, but not always, the “boards and commissions” referenced in the Board’s Advisory Opinion No. 4.

⁸ “For these purposes, the Board rejects the notion that the mere title of an organization or entity is dispositive of whether or not Article X of the Charter applies to it. Article X of the Charter employs the terms boards and commissions throughout and mentions an “authority” only a single time. The Board considers those terms interchangeable” and will instead look to the substance of the organization at issue, in this case, the Library Board. *Quoting in part* Adv. Op. 14 at p.5, footnote 9.

3. **Boards**

As the Board determined that Article X boards and commissions are subordinate to the City and, as a general rule, bound by the City's Purchasing Policy, boards and commissions that are not subordinate are not bound by the City's purchasing requirements. The Board has already determined that the boards of redevelopment and municipal authorities, which exist as agencies of the Commonwealth, and not of the local municipality, are not Article X boards, i.e., not subordinate. *See* Advisory Opinion No. 4 (Dec. 4, 2006) *and* Advisory Opinion No. 9 (April 3, 2008). Nor are boards created as the result of intergovernmental cooperation, through the Intergovernmental Cooperation Act. *See* Advisory Opinion No. 25 (June 20, 2011). Likewise, a local redevelopment authority created as the result of a military base realignment and closure, in conjunction with the Department of Defense, is not an Article X board, and is likewise not subordinate. *See* Advisory Opinion No. 14 (March 3, 2009).

Other boards, such as the Ethics Board and the Charter Board, are created by the Charter itself, and not by City Council within the framework of Article X or the four-part test of Advisory Opinion No. 14. As an example, these two boards are mandated to be independent, enjoy independent counsel, and are also mandated to be funded. *See generally, as to the Ethics Board*, Charter § 1201(c) *and, as to the Charter Board*, Charter, Amendment I, § 2(a), (b).

These two Boards demonstrate an exclusion or exception to the City's Purchasing Policy,⁹ particularly as it concerns retention of independent counsel, staff and an investigative officer. In compliance with Charter mandated independence, the Charter Board Ordinance, Bill No. 46-2005, specifically provides that the Board shall appoint its solicitor, and necessary staff, and its Investigative Officer. *See* Charter Board Ordinance, Bill No. 46-2005, *as amended*, at

⁹ And an exclusion or exception to the general rule set out by the Board in Advisory Opinion No. 4.

Sec. II(A)(6) and (8). The Charter excepts, or excludes, these two Charter created boards from the Purchasing Policy to the extent that the policy, or its enforcement, purports to supersede state law, the Charter or supporting City legislation.¹⁰

Other exceptions also may exist where a City board, by statute, or by law, must be independent and possess counsel independent of the City. A zoning hearing board is empowered to select its own solicitor, and the municipality it serves is prohibited from foisting its own counsel upon the board. *Zoning Hearing Bd. v. City Council of Uniontown*, 720 A.2d 166 (Pa. Commw. Ct. 1998). Likewise, where other City hearing boards must separate the adjudicatory and prosecutorial processes, or must otherwise prevent even an appearance of bias, to conform with the requirements of constitutional due process, those boards may also be exempt or excluded from the City's Purchasing Policy as it relates to the selection of independent counsel and staff. *See generally, Lyness v. Commonwealth*, 605 A.2d 1204, 529 Pa. 535 (Pa. 1992) (discussing separation of prosecutorial and adjudicatory function and the preservation of due process). *See also In re: City Auditor's Right to Independent Counsel* (Adv. Op. 46, Aug. 22, 2019).

¹⁰ Charter, Amendment I, Section I(a) guarantees the supremacy of the Charter, under all circumstances, regardless of the method of circumvention, whether active or passive, express or implied, the Charter is the supreme document of City government. *See In re: Position of Community Development Director* (Adv. Op. 1, April 12, 2006) at 5. A policy created that is not Charter compliant is unenforceable. *In re: Communications Director and Media and Communications Policy* (Adv. Op. 3, Nov. 22, 2006) at 5. The Administrative Code may not waive, supersede or modify provision of the Charter. *In re: Purchasing Policy* (Adv. Op. 30, Nov. 14, 2012) at 2. A mere ordinance may not modify, enlarge or reduce a provision of the Charter. *See In re: Jurisdiction of the Board of Ethics* (Adv. Op. 41, August 28, 2018) at pp.4-5 (regarding Admin. Code § 5-1006(G)). The Charter has the same force and effect as a statute passed by the General Assembly, *see In re: Addison*, 385 Pa. 48, 57, 122 A.2d 272, 275-76 (1956) and *Gans v. City of Philadelphia*, 403 A.2d 168, 170 (Pa. Cmwlth. 1979), while the Administrative Code is a mere ordinance.

With respect to the application of the City's Purchasing Policy to a particular board or commission of the City, the relevant test is:

First, is the board or commission subordinate to the City, that is, actually a unit arising from within the City itself, and if so, then,

Second, is the board or commission at issue an Article X board or commission, as defined by the four-part test of Advisory Opinion No. 14, and if so, then,

Third, does the law, including the Charter, create any exclusion or exception to the application of the Purchasing Policy to the particular board or commission, and, if not, finally,

Fourth, does the language of any specific legislation of City Council create any exclusion or exception to the application of the Purchasing Policy to the particular board or commission.

Therefore, as to boards and commissions,¹¹ the Purchasing Policy applies only to subordinate, Article X boards and commissions, for which no exclusions or exceptions are made to its application by law, including the Charter, or specific legislation of City Council.

4. Other Applicable Law of Statewide Application

In analyzing the applicability of Charter, Article X, to the creation of the Recreation Commission, a joint City of Reading and Reading School District commission, the Board considered the Intergovernmental Cooperation Act, 53 Pa. C.S. § 2301, *et seq.* See *In re: Recreation Commission*, (Adv. Op. 25, June 20, 2011). There the Board concluded that the Recreation Commission arose from an act of intergovernmental cooperation and not an Article X board or commission and that Charter § 1002(a) did not apply, thereby permitting then City Council President Vaughn D. Spencer to appoint sitting City Council members to the Recreation Commission. Here, the Intergovernmental Cooperation Act also appears applicable in

¹¹ The Board's Advisory Opinion addresses only the application of the Purchasing Policy to boards and commissions of the City and does not address the application of the policy to any other aspect of City government or administration.

connection with the adoption of the County-City Agreement and the modification of the governance and funding of the Library.¹²

Further, in connection with the Library, the Public Library Code, 24 Pa. C.S. § 9301, *et seq.*, determines the nature of the County-City Agreement. Certainly, section 9320 gives multiple municipalities the authority to enter into an agreement to establish and maintain a local library. The County-City Agreement maintains the Library, which is a local library as defined by 24 Pa. C.S. § 9302. Regarding local library governance, pursuant to 24 Pa. C.S. § 9318 (f),¹³ the Public Library Code specifically provides that:

“[a]ny money appropriated for the establishment or maintenance of a local library and all moneys, if any, received from other sources for the use of the library shall be under the exclusive control of and disbursed under the direction of the board.”

The Public Library Code specifically places control and disbursement of all monies under the exclusive control of the Trustees of the Library, not the City, not the County, and without any of the restrictions of the City’s Purchasing Policy.

Both the Intergovernmental Cooperation Act and the Public Library Code are laws of statewide application, therefore the Charter, and any ordinance of the City, including the Purchasing Policy, shall not be contrary to, or in limitation or enlargement of, such a law.¹⁴

¹² The Board does not pass upon whether or not the County-City Agreement, or any acts of intergovernmental cooperation, have been undertaken or implemented in accordance with the law. Such an inquiry would exceed the scope of this Advisory Opinion and the Board is without sufficient information to undertake such an examination.

¹³ 24 Pa. C.S. § 9318(f) – Control of all funds.

¹⁴ Although Home Rule municipalities are given a relatively wide grant of powers under the Home Rule and Optional Plans Law, Section 2961, there are numerous limitations imposed by Section 2962. One of these is that:

“A [Home Rule] municipality shall not . . .

(2) Exercise powers contrary to, or in limitation or enlargement of, powers granted by statutes which are applicable in every part of this Commonwealth.”

53 Pa. C.S. § 2962(c)(2).

IV. CONCLUSION

Under the application of the four-part test announced herein and on the basis of the application of state-wide law, the Library is not bound by the City's Purchasing Policy.

V. OPINION OF THE BOARD

It is the Opinion of the Board that:

A. With respect to City boards and commissions, the City's Purchasing Policy and Procedure, Admin. Code, § 5-809, is applicable only to those boards and commissions as determined by the four-part test announced herein, specifically:

First, is the board or commission subordinate to the City, that is, actually a unit arising from within the City itself, and if so, then,

Second, is the board or commission at issue an Article X board or commission, as defined by the four-part test of Advisory Opinion No. 14, and if so, then,

Third, does the law, including the Charter, create any exclusion or exception to the application of the Purchasing Policy to the particular board or commission, and, if not, finally,

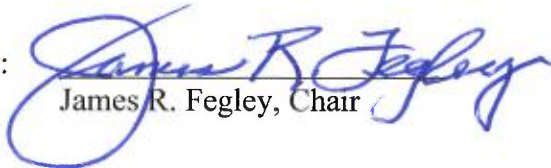
Fourth, does the language of any specific legislation of City Council create any exclusion or exception to the application of the Purchasing Policy to the particular board or commission.

B. The Board of Trustees of the Reading Public Library is not a subordinate board of the City, nor an Article X board, and therefore, the City's Purchasing Policy is inapplicable to it.

C. Governance of the Library is provided for by the laws of the Commonwealth of Pennsylvania and are of state-wide application, particularly, the Public Library Code and the Intergovernmental Cooperation Act, and the agreements reached in conjunction with those acts,

and therefore, the Charter and the Code of Ordinances cannot restrict, alter or modify those state law provisions, making the City's Purchasing Policy inapplicable to the Library or its Board of Trustees.

CITY OF READING CHARTER BOARD

By: 
James R. Fegley, Chair

Date: October 22, 2019

NOTICE

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