

THE CHARTER BOARD OF THE CITY OF READING

IN RE: Investigation of : Complaint Filed: August 16, 2010
Charles D. Younger, Esquire :
Solicitor of the :
City of Reading :
Investigation No. 30

FINAL OPINION AND ORDER

I. PROCEDURAL HISTORY AND FINDINGS OF FACT

A. Procedural History

1. On or about August 16, 2010 Ernest H. Schlegel, Jr., a resident of 934 Pear Street, Reading, Berks County, Pennsylvania, filed a Charter Board complaint ("Complaint").

2. The Complaint alleges that Charles D. Younger, Esquire, in his capacity as City Solicitor of the City of Reading, ("Mr. Younger") violated the City of Reading's Charter ("Charter") by advising City Council President Vaughn Spencer ("Mr. Spencer") on July 12, 2010 that an executive session could or should be held to discuss "pending litigation" in violation of Charter § 212(d) and City of Reading Administrative Code Section 1-114(5).

3. On or about September 16, 2010 the Investigative Office advised both Mr. Schlegel and Mr. Younger that based upon the Investigative Officer's preliminary investigation, he had determined that facts existed to support the authorization of a full investigation. Charter Bd. Ord. § V(A)(4).

4. During the course of the investigation, the Investigative Officer interviewed Mr. Younger, Mr. Spencer, Council members Marcia Goodman-Hinnershitz, Dennis Sterner, Stratton Marmarou, Francis Acosta, and Donna Reed, and Linda Kelleher, the City Clerk.

5. On December 10, 2010 David K. Brennan, Esquire, Investigative Officer for the City of Reading Charter Board ("Board"), issued a Findings Report. Charter Bd. Ord. § V(A)(6).

6. The Investigative Officer served a copy of the Findings Report upon Mr. Younger.
7. By letter dated December 29, 2010, Mr. Younger initially requested an evidentiary hearing in accordance with Charter Board Ordinance § V(A)(6)(b).
8. The Board scheduled an evidentiary hearing for February 2, 2011.
9. However, on or about January 25, 2011 Mr. Younger sought to waive the evidentiary hearing he had requested.
10. On January 26, 2011, in summary, Mr. Younger agreed to waive the requested evidentiary hearing and that this matter would be decided on the basis that the Findings of Facts and Conclusions of Law set out in the Investigative Officer's Findings Report would be treated as undisputed.
11. The Board now issues this Final Opinion and Order. Ch. Bd. Ord. § V(A)(8)(c)(i).

B. Findings of Fact

1. On July 12, 2010 City Council held a meeting ("Council Meeting").
2. On that same date, prior to the Council Meeting, Council held a meeting of the Committee of the Whole ("Committee Meeting").¹
3. Council members present at the Committee Meeting included:
 - a. Stratton Marmarou;
 - b. Dennis Sterner;
 - c. Mr. Spencer;
 - d. Marcia Goodman-Hinnershitz;

¹ There is nothing in the record to suggest that the Council Meeting and the Committee Meeting were anything other than ordinary, regularly scheduled and noticed meetings.

- e. Francis Acosta;
 - f. Jeffrey Waltman; and
 - g. Donna Reed.
4. Also present were Linda Kelleher, the City Clerk, and Mr. Younger.
5. As reflected in the minutes² of the Committee Meeting, City Council entered an executive session to discuss "pending litigation" at 6:38 p.m. and exited from the executive session at 6:53 p.m., after which, the meeting was immediately adjourned.
6. At all times material hereto, Mr. Younger served as the City's Solicitor and served in that capacity at the Committee Meeting.
7. Mr. Spencer advised the Investigative Officer that he and Councilman Francis Acosta attended a Zoning Hearing Board meeting prior to the Committee Meeting where certain requests for zoning variances were made in connection with the Berkshire Bottling Works Project.
8. According to Mr. Spencer, the Zoning Hearing Board had asked City Council for approval of a variance and plan for the Berkshire Bottling Works Project.
9. Mr. Spencer stated that the purpose of the executive session called during the Committee Meeting was to understand what City Council's position would be with respect to the Berkshire Bottling Works' zoning matter and to discuss whether City Council needed to have a position on that issue.
10. Mr. Spencer admitted that there existed no pending complaint or threatened litigation as a result of the aforementioned zoning issue.
11. Mr. Spencer further admitted that the purpose of the executive session was not to discuss strategy with respect to any litigation.

² The minutes of the Committee Meeting are attached to the Complaint as Exhibit "2."

12. Mr. Spencer stated that City Council took no official action during the executive session; instead, the executive session permitted discussion as to whether City Council would have a position on the aforementioned zoning issue and what that position may be.

13. On September 17, 2010 the Investigative Officer interviewed Mr. Younger, Esquire.

14. Mr. Younger advised that he called an executive session regarding what he considered "pending litigation."

15. However, Mr. Younger admitted that at that time there existed no imminent litigation.

16. Instead, Mr. Younger stated that he believed that the discussion was somehow related to litigation.

17. Mr. Younger stated his view to be that, generally, a Zoning Hearing Board matter and a potential appeal thereof is "litigation."

18. Additionally, Mr. Younger stated that he recommended the executive session because he believed it would involve privileged communications between himself as the City Solicitor and City Council.

19. It is undisputed that the purpose of the executive session as announced at the public Committee Meeting, and as noted in the minutes of that meeting was "pending litigation."

20. Mr. Younger's belief is that he asked Mr. Spencer to call the executive session, which belief the Board accepts as true.

21. Notably, Mr. Younger denies that the executive session dealt with the Berkshire Bottling Works issue, as discussed by Mr. Spencer.

22. Instead, Mr. Younger advised that he believed that the executive session dealt with a zoning issue concerning student housing involving Albright College and a potential settlement of litigation related thereto.

23. On December 8, 2010 the Investigative Officer interviewed Marcia Goodman-Hinnershitz ("Ms. Goodman-Hinnershitz") via telephone.

24. Ms. Goodman-Hinnershitz recalled the July 12, 2010 executive session being called.

25. However, while she remembers the issue concerning the Berkshire Bottling Works Project, she also recalls asking for clarification as to why the meeting needed to be called as an executive session.

26. Dissatisfied with the explanation, Ms. Goodman-Hinnershitz walked out of the executive session as she felt the issue being discussed should not have been the subject of an executive session.

27. On December 8, 2010 the Investigative Officer interviewed Dennis Sterner ("Mr. Sterner") via telephone.

28. Mr. Sterner was not entirely sure what was discussed at the executive session at issue and confirmed that it may have involved a discussion of a zoning problem and perhaps some litigation involved with the sewage treatment plant.

29. However, he admitted that he was "guessing" and that any time an executive session occurs he relies entirely on the advice of the City Solicitor, in this case, Charles Younger, Esquire.

30. On December 8, 2010 the Investigative Officer interviewed Stratton Marmarou ("Mr. Marmarou") via telephone.

31. Mr. Marmarou could recall nothing about the subject executive session other than the fact that he was present.

32. On December 8, 2010 the Investigative Officer met with Francis Acosta (“Mr. Acosta”) to discuss the executive session at issue.

33. Mr. Acosta recalled the executive session being called after he and Mr. Spencer were present at a Zoning Hearing Board meeting where the Berkshire Bottling Works Project presented a zoning issue.

34. Mr. Acosta also recalls that the zoning issue had something to do with the new owners of the business needing financing.

35. Mr. Acosta does not recall the zoning issue or the issues discussed within the executive session involving any legal issues or any litigation.

36. Mr. Acosta believed that it dealt with land use plans, financing, and a zoning issue, which he believes should have been open to the public.

37. On December 8, 2010 the Investigative Officer interviewed Donna Reed (“Ms. Reed”) via telephone.

38. At the Committee Meeting, Ms. Reed, like Ms. Goodman-Hinnershitz, asked specifically whether the issue to be discussed in the executive session related to litigation.

39. She was not provided with adequate information to satisfy her that the issues to be discussed were sufficient to be held in executive session, so she left the session before it even started.

40. She directed all questions relative to whether the executive session should be called to Mr. Younger, as City Solicitor.

41. Ms. Reed believes that both she and Mr. Acosta left the executive session at the same time.

42. At all times during the Council Meeting and the Committee Meeting, Mr. Younger represented City Council and served as City Solicitor.

43. The minutes from the Committee Meeting reflect that City Council “entered executive session to discuss pending litigation at 6:38 pm and exited at 6:53 pm.”

44. There is no reflection in those minutes of:

- (a) who called the executive session;
- (b) the names of the parties to the pending litigation;
- (c) the docket number of the pending litigation; or
- (d) the court in which the pending litigation is filed.

45. Mr. Spencer as President of City Council is the presiding officer of that body and in fact presided over the Committee Meeting.³

46. The Board specifically finds that there is no evidence that the executive session concerned pending litigation.⁴

47. The Berks County Court of Common Pleas, in the matter captioned *Reading Eagle Co. v. Council of the City of Reading*, 15 Pa.D.&C.4th 505 (Berks Co. 1992), granted an injunction against City Council restricting its ability to call executive sessions.

48. The injunction order, dated June 5, 1992, provides the following:

³ The Board notes that the minutes from the Committee Meeting provide that “Mr. Spencer called the Committee of the Whole meeting to order at 5:06 pm.”

⁴ The Board stands in the same position as the citizens of the City of Reading. When an executive session is called, the citizens must be supplied sufficient information to determine if the purpose of the executive session is permitted. The Board, viewing the information supplied at the Committee Meeting, is not convinced that the purpose of the executive session is one permitted by the Sunshine Act, 65 Pa.C.S. §§ 701, *et seq.*

ORDER

And now, June 5, 1992, the plaintiff's motion for a declaratory judgment and an injunction is granted, and the defendants, and each of them, are hereby enjoined from holding an executive session of the City Council of the City of Reading, (1) unless when in public session the council announces immediately prior to, or subsequent to, the executive session the purpose of the executive session, or if the executive session is to be held at a specific future time and place, after the public session, the date, time, location and purpose thereof, (2) unless when not in public session the members of council are notified 24 hours in advance of the executive session of the date, time, location and purpose of the executive session; and it is further ordered that when giving the purpose of an executive session, the council spell out for which of the reasons set forth in section 8 of the Act of July 3, 1986, P.L. 388, No. 84, subsections 1 to 5 inclusive, 65 P.S. § 278, subsection 1 to 5 inclusive, the executive session is being held, and when in connection with existing litigation, the names of the parties, the docket number of the case, and the court in which it is filed, when in connection with an identifiable complaint, the nature of the complaint (although not the name of the complainant), and with regard to threatened litigation, the nature thereof (although not the possible parties thereto).

Id. at 507-08.

49. The Commonwealth Court of Pennsylvania affirmed the Berks County Court of Common Pleas at 156 Pa. Commw. 412, 627 A.2d 305 (1993).

II. CONCLUSIONS OF LAW

A. Questions Presented

1. During the Committee Meeting did Mr. Younger advise to be called and/or actively participate in an executive session that did not comply with the public notice provisions of the Sunshine Act, and therefore violated the Charter and the Administrative Code?

The Board answers in the affirmative.

2. During the Committee Meeting did Mr. Younger advise to be called and/or actively participate in an executive session called for a purpose other than the purpose announced

to the public in violation of the Sunshine Act and therefore violated the Charter and the Administrative Code?

The Board answers in the affirmative.

3. Did Mr. Younger's advice, participation or inaction substantially contribute to the aforementioned violations of the Charter and Administrative Code?

The Board answers in the affirmative.

B. Legal Discussion

1. Applicable Charter, Administrative Code and Statutory Provisions

Section 1 of Charter Amendment I provides:

a. Governing law of the City. This Charter is the governing law of the City of Reading. No action or inaction by City Council, the Administration, or any other body created by this Charter shall be taken contrary to it, whether individually or collectively, by ordinance, resolution, practice, executive order or decision, or any other means.

Amendment I teaches that no method of action or inaction, or any practice, by the City may be taken contrary to the Charter. Thus, it is not necessary that an affirmative action occur in order to violate the Charter: rather, inaction is sufficient. Further, a "practice" which culminates in, causes, or otherwise results in, a violation of the Charter is prohibited.

Section 212(d) of the Charter provides:

d. Meetings Open to the Public. All meetings shall be open to the public, except executive sessions as authorized by law. The chambers shall be arranged in such a way as to have all Members of Council facing the public.

Thus, in short, with regard to executive sessions, the Charter requires that City Council conduct executive sessions only "as authorized by law," i.e. in accordance with the Sunshine Act.

Section 1-114(5) of the Administrative Code provides:

5. Executive Sessions. The Council may hold executive sessions as permitted by law. No official action shall be taken by the Council on any matter in executive session as provided for by the Sunshine Act of 1986, P.L. 388, No. 84, as amended.

Again, the Administrative Code requires that City Council comply with the Sunshine Act when conducting executive sessions.

The Sunshine Act, 65 Pa.C.S. § 701, *et seq.*, is intended to implement the General Assembly's finding that "the right of the public to be present at all meetings of agencies and to witness the deliberation, policy formulation and decision making of agencies is 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 and the public's effectiveness in fulfilling its role in a democratic society." 65 Pa.C.S. § 702(a). The Act requires:

Official action and deliberations by a quorum of the members of an agency shall take place at a meeting open to the public unless closed under section 707 (relating to exceptions to open meetings), 708 (relating to executive sessions) or 712 (relating to General Assembly meetings covered).

65 Pa.C.S. § 704. The Sunshine Act should be read broadly in order to accomplish its important objective of allowing the public to witness deliberations and actions of public agencies. *Lee Publications v. The Dickinson School of Law*, 848 A.2d 178, 188-89 (Pa. Commw. Ct. 2004).

Enumerating the executive session exceptions to the open meeting requirement, Section 708 of the Sunshine Act provides:

(a) Purpose. An agency may hold an executive session for one or more of the following reasons:

* * *

(4) To consult with its attorney or other professional advisor regarding information or strategy in connection with litigation or with issues on which identifiable complaints are expected to be filed.

* * *

(b) Procedure. The executive session may be held during an open meeting, at the conclusion of an open meeting, or may be announced for a future time. The reason for holding the executive session must be announced at the open meeting occurring immediately prior or subsequent to the executive session.

* * *

(emphasis added).⁵

There are thus two requirements for the executive session exception to the open meeting mandate of the Sunshine Act. First, the substance of the executive session must be one of the enumerated exceptions under Section 708 (litigation discussion, personnel matters, etc.). Second, the reason for the executive session must be announced at the open meeting immediately prior to or subsequent to the executive session.

The Board will address these two requirements, and how those requirements were not met by Mr. Younger, in reverse order.

2. Improper Notice Given for the Reason for the Executive Session.

It is undisputed that during the Committee Meeting City Council entered an executive session for the stated purpose of discussing "pending litigation." *See* Finding of Fact no. 5. It is also undisputed that Mr. Younger advised Mr. Spencer that he should call the executive session on the basis of "pending litigation." *See* Finding of Fact nos. 14, 18, 20. Finally, the record discloses that Mr. Spencer provided no further notice about the executive session to the public other than that the session was "for the purpose of discussing pending litigation." The bald

⁵ Other reasons for an executive session listed in Section 708 of the Sunshine Act are: employment or personnel matters, preparation for or negotiation of collective bargaining agreements, consideration of the purchase or lease of real property, and business to which a lawful privilege or confidentiality applies.

statement of “pending litigation” is insufficient notice and does not comply with the Sunshine Act.

City Council has a history of non-compliance with the executive session provisions of the Sunshine Act. *See Reading Eagle Co. v. Council of the City of Reading*, 15 Pa.D.&C.4th 505 (Berks Co. 1992) (recounting non-compliance with Sunshine Act); Charter § 212(d);⁶ Administrative Code § 1-114(5); *Zoning Hearing is Not Litigation*.⁷ Mr. Younger, City Council’s chief legal advisor, should have been aware of this history of non-compliance.

The law of *Reading Eagle Co. v. Council of the City of Reading*, 156 Pa. Commw. 412, 627 A.2d 305 (1993), *aff’g* 15 Pa.D.&C.4th 505 (Berks Co. 1992), is directly applicable here. In *Reading Eagle Co.* the Commonwealth Court addressed the sole issue of the amount of specificity which must be disclosed to the public by a public body when giving the reason for holding an executive session. *Id.* at 414-15. In affirming the Berks County Court of Common Pleas, the Commonwealth Court held that:

By requiring that the executive session can only be held when reasons are given, the General Assembly intended that the public be able to determine from the reason given whether they are being properly excluded from the session. We agree with the rationale stated in *Hinds County* that in order to effectuate the purpose of requiring that reasons be given, the reasons stated by the public agency must be specific, indicating a real, discrete matter that is best addressed in private.

⁶ The Board notes the historical importance of this provision as evident from its insertion into the City’s Charter. Compliance with the Sunshine Act is a core requirement of City governance.

⁷ This article places before the citizens of Reading a discussion on the City’s non-compliance with the Sunshine Act. The Board finds it relevant that the plaintiff in *Reading Eagle Co. v. Council of the City of Reading*, 15 Pa.D.&C.4th 505 (Berks Co. 1992), continues to criticize City Council on its failure to comply with the Sunshine Act nearly 20 years after institution of suit. Don Spatz, (pub. Reading Eagle), <http://readingeagle.com/article.aspx?id=234407> (accessed July 15, 2010). The cited article is attached as Exhibit “3” to the Complaint.

Id. at 417, 627 A.2d at 307 (citing *Hinds County Board of Supervisors v. Common Cause of Mississippi*, 551 So.2d 107 (Miss. 1989) (emphasis added) (footnote omitted)).⁸

The Berks County Court of Common Pleas order affirmed by the Commonwealth Court in *Reading Eagle Co.* directs that City Council must disclose very specific information to the public in order to conduct a legally permissible executive session compliant with the Sunshine Act. More precisely, in announcing its reasons for calling an executive session, City Council must:

1. In connection with existing litigation, disclose the names of the parties, the docket number of the case, and the court in which it is filed,
2. In connection with an identifiable complaint, disclose the nature of the complaint (although not the name of the complainant), and
3. In connection with threatened litigation, disclose the nature of the litigation (although not the possible parties thereto).

See Reading Eagle Co. v. Council of the City of Reading, 15 Pa.D.&C.4th at 507-508. The minutes of the July 12, 2010 Committee Meeting reveal that Mr. Spencer did not provide any of this mandatory information to the public prior to calling the executive session. The notice of the executive session, called on Mr. Younger's advice, in Mr. Younger's presence, could have been cured by Mr. Younger with further advice to correct the announcement prior to City Council entering the executive session or immediately thereafter. 65 Pa.C.S. § 708(b) ("The reason for

⁸ The Commonwealth Court elaborated on its opinion by referring to *Hinds County*, a Mississippi Supreme Court decision, stating "[p]erhaps the best rationale for requiring specificity was given by the Supreme Court of Mississippi in *Hinds County* In its opinion, the court stated that specificity was necessary because: 'The reason given, of course, must be meaningful. It must be more than some generalized term which in reality tells the public nothing. To simply say "personnel matters" or "litigation" tells nothing. . . . When a board chairman tells a citizen he may not hear the board discuss certain business, he is taking liberties with the rights of that citizen, and the reason given for this interference must be genuine and meaningful, and one the citizen can understand. To permit generalized fluff would frustrate the very purpose of the Act.'" *Reading Eagle Co.* at 416-17, 627 A.2d at 307 (quoting *Hinds County*, 551 So.2d at 111 (footnote omitted)).

holding the executive session must be announced at the open meeting occurring immediately prior or subsequent to the executive session.”)

Action and inaction may violate the Charter. Charter Amd. I, § 1(a). Here both action and inaction by Mr. Younger caused the violation of Charter § 212(d): Mr. Younger’s advice to announce only “pending litigation,” and his failure to correct the defective notice immediately subsequent to the executive session. The notice of the executive session at issue did not comply with the Sunshine Act, 65 Pa.C.S. § 708, the Berks County Court of Common Pleas order entered in the *Reading Eagle Co.* matter, Charter Section 212(d) or Administrative Code Section 1-114(5).

3. The Facts do not Support the Substance of the Reason Given to Call for the Executive Session.

At the time of the Committee Meeting, the record discloses no facts demonstrating the existence of pending litigation⁹ within the meaning of the Sunshine Act. The Investigative Officer’s Findings Report, substantially adopted herein by the Board, reveals a tortured litany of reasons for calling the executive session at the Committee Meeting. For instance, the Findings Report recounts, from the perspective of the two primary actors, Mr. Younger and Mr. Spencer, that:

- (a) The minutes of the Committee Meeting presided over by Mr. Spencer reflect that the stated purpose of the executive session was “pending litigation.”
- (b) Mr. Spencer stated that the purpose of the executive session called during the Committee Meeting was to understand what City Council's position would be with respect to the Berkshire Bottling Works’ zoning matter and to discuss whether City Council needed to have a position on that issue.

⁹ The Board considers “pending litigation” as announced in the minutes of the Committee Meeting to be the same as “existing litigation” provided for in *Reading Eagle Co. v. Council of the City of Reading*, 15 Pa.D.&C.4th at 507-508. See also 65 Pa.C.S. § 708(a)(4) (referencing “litigation”).

- (c) Mr. Spencer admitted that there existed no pending complaint or threatened litigation as a result of the aforementioned zoning issue.
- (d) Mr. Spencer further admitted that the purpose of the executive session was not to discuss strategy with respect to any litigation.
- (e) Mr. Spencer stated that the executive session permitted discussion as to whether City Council would have a position on the aforementioned zoning issue and what that position may be.
- (f) Mr. Younger advised that he called an executive session regarding what he considered "pending litigation."
- (g) Mr. Younger admitted that at that time there existed no imminent litigation.
- (h) Mr. Younger stated that he believed that the discussion was somehow related to litigation.
- (i) Mr. Younger stated his view to be that, generally, a zoning hearing board matter and a potential appeal thereof is "litigation."
- (j) Mr. Younger stated that he recommended the executive session because he believed it would involve privileged communications between himself as the City Solicitor and City Council.
- (k) Mr. Younger's belief is that he asked Mr. Spencer to call the executive session.
- (l) Notably, Mr. Younger denies that the executive session dealt with the Berkshire Bottling Works issue, as discussed by Mr. Spencer.
- (m) Mr. Younger believed that the executive session dealt with a zoning issue concerning student housing involving Albright College and a potential settlement of litigation related thereto.

See Findings of Fact nos. 5, 9 to 12, 14 to 22, *supra.*, *substantially adopting* Findings Report, Inv. No. 30, issued Dec. 10, 2010, Findings of Fact nos. 15, 19 to 22, 24 to 31.

These findings also reveal that in Mr. Younger's view, the purpose of the executive session may not have been "pending litigation" as reported in the minutes, but rather for reasons

of privilege.¹⁰ Findings of Fact no. 18, *supra*. Mr. Younger admits that, at best, the discussion in the executive session may have been “somehow related to litigation.” Findings of Fact no. 16, *supra*. Mr. Spencer also confirmed that pending litigation likely was not the purpose of the executive session. Findings of Fact nos. 9-12, *supra*.

Despite these differing beliefs as between the City Solicitor and City Council President regarding the substantive reason for the executive session Mr. Younger did provide the advice for calling the session for the purpose of “pending litigation.” The record discloses that the differing beliefs as to the substantive reason for the executive session was not confined to only Mr. Younger and Mr. Spencer. At least two, possibly three, Council members walked out of the executive session because they believed the session may have been improper.¹¹ Yet, again, Mr. Younger did not re-announce or otherwise correct the purpose for which the executive session was called as permitted by 65 Pa.C.S. § 708(b).¹²

The record does not demonstrate that the executive session dealt with pending litigation; the Board holds that the contrary is true, that is, that the record demonstrates that the executive session did not involve pending litigation. The improperly noticed executive session, called for an inapplicable substantive reason, violates the Sunshine Act and consequently the Charter and Administrative Code.

¹⁰ See 65 Pa.C.S. § 708(a)(5), permitting an executive session “[t]o review and discuss agency business which, if conducted in public, would violate a lawful privilege or lead to the disclosure of information or confidentiality protected by law, including matters related to the initiation and conduct of investigations of possible or certain violations of the law and quasi-judicial deliberations.”

¹¹ See Findings of Fact nos. 25, 26, 38, 39, 41, *supra*.

¹² “The reason for holding the executive session must be announced at the open meeting occurring immediately prior or subsequent to the executive session.” (emphasis added)

4. The Responsibility of the City Solicitor

The Board has already stated that:

“the ability to call for or announce an executive session is an inherent power of the presiding officer, here Mr. Spencer. However, whether a violation of the Charter is caused by an elected member of City Council, or by the advice of the City Solicitor, is really immaterial.”

In re: Investigation of Vaughn Spencer, City Council President, Inv. No. 29, Final Opinion and Order at p. 12 (Feb. 8, 2011). It is also clear that the Board specifically rejects reliance upon the legal advice of counsel as a justifiable excuse permitting violation of the Charter or Administrative Code. *Id.* at p. 13; *In re: Investigation of Reading City Council*, Inv. Nos. 2 through 5 (June 15, 2007).

The question now, broadly, is whether or not the City Solicitor has culpability where his advice, or failure to advise, results in a violation of the Charter or Administrative Code?¹³ Rendering substantial assistance towards, encouraging, advising to commit, or actively contributing to, a Charter violation, passively participating in the commission of a Charter violation, and failing to take action to prevent a Charter violation when in a position of superior knowledge or responsible to have superior knowledge, is clearly the same as committing a Charter violation. “No action or inaction . . . shall be taken contrary to [the Charter], whether individually or collectively, by ordinance, resolution, practice, executive order or decision, or any other means.” Charter Amd. I, § 1(a).

The Board cannot overstate the importance of the City Solicitor and the advice the Solicitor provides. Although not the presiding officer of City Council, the City Solicitor functions in part to keep the actions of Council within its Charter authorized powers. Here, on

¹³ The Board’s specific charge in this matter is to make a determination relative to the calling of an executive session. Unquestionably the rule enunciated here has broader application than only to the City Solicitor’s duty to provide advice compliant with the Charter in the context of calling executive sessions.

the basis of the Findings Report, it appears that to some degree Mr. Younger acted as a catalyst for City Council President Vaughn Spencer to violate the Charter and Administrative Code. *See* Findings Report, Inv. No. 30, at Findings of Fact nos. 28, 29. On the facts, it does not appear to the Board, and the Board does not believe, that Mr. Spencer called the executive session on the basis of “pending litigation” other than on the advice of Mr. Younger, the City Solicitor. The City Council President and the rest of City Council correctly rely on the advice of the City Solicitor. Charter § 801(a). *See for example* Findings of Fact nos. 20, 25, 29, 40, *supra*.¹⁴ That very important advice must be in compliance with the Charter and Administrative Code, and in this instance, it was not.

The Board considers it self evident, and therefore holds, that the City Solicitor’s advice to the Mayor, the Council and all City departments and agencies, shall be compliant with the Charter and Administrative Code. Here, Mr. Younger’s advice did not comply with Charter § 212(d) or Administrative Code § 1-114(5) because it violated the Sunshine Act. Further, Mr. Younger’s inaction in failing to give needed compliant advice resulted in further violations of Charter § 212(d). Charter Amd. I, § 1(a). The failure to provide Charter compliant legal advice is precisely the type of “practice” or “action or inaction” that is prohibited by Charter Amendment I.

¹⁴ During the executive session several City Council members expressed significant skepticism about the appropriateness of the executive session. *See* Findings of Fact nos. 25, 26, 38, 39, 41, *supra*. In fact, at least two, possibly three, Council members walked out of the executive session because they felt the session may have been improper. *Id.* There is no evidence that Mr. Younger took steps to prevent discussion beyond the purpose of ‘pending litigation’ or to advise to end or reconsider the purpose of the executive session, or to provide a corrective announcement immediately after the completion of the executive session.

C. Conclusions of Law

1. City Council's executive session held during the Committee Meeting violated the specificity requirements of the Sunshine Act as stated in *Reading Eagle Co. v. Council of the City of Reading*, 156 Pa. Commw. 412, 627 A.2d 305 (1993).¹⁵

2. The Charter and the Administrative Code require that executive sessions be held in accordance with the Sunshine Act.

3. The executive session called during the Committee Meeting violated the Charter of the City of Reading, Section 212(d).

4. The executive session called during the Committee Meeting violated the Administrative Code of the City of Reading, Section 1-114(5).

5. The authority and responsibility to call an executive session rests with the President of City Council, and if necessary, on the advice of the City Solicitor.

6. The City Solicitor is as equally bound by the Charter and Administrative Code as his clients, i.e. the Mayor, the Council and all City departments and agencies.

7. The City Solicitor, here Mr. Younger, has the affirmative responsibility to provide legal advice that is compliant with the Charter and Administrative Code in accordance with Charter Amendment I, § 1(a).

8. To the extent that Mr. Younger's silence or inaction caused the violation of Charter § 212(d), silence or inaction by one in a position of superior knowledge or in a position of responsibility to provide advice is sufficient to violate the Charter where that silence or inaction contributes to a Charter violation.

¹⁵ To the extent the injunction entered by the Berks County Court of Common Pleas in *Reading Eagle Co.* is still effective, that injunction appears violated by the non-compliant executive session called during the Committee Meeting.

III. DETERMINATION OF THE BOARD

The Board holds the following:

- A. Mr. Younger violated Charter § 212(d);
- B. Mr. Younger violated Administrative Code § 1-114(5);
- C. Mr. Younger's failure to provide legal advice as City Solicitor in compliance with the Charter is a "practice" or indirect violation of the Charter as contemplated by Charter Amendment I, § 1(a); and
- D. Although the presiding officer of City Council, here the President of City Council, Mr. Spencer, has the ultimate responsibility to call for or announce an executive session, the City Solicitor violates the Charter and Administrative Code by advising to be called, or failing to counsel against the calling of, an executive session that does not comply with the Sunshine Act.

IV. PENALTIES IMPOSED

Having considered the applicable factors stated in the Charter Board Ordinance at Section V(B)(2)(a)(i), and as a consequence of Mr. Younger's violation of Sections 212(d) of the Charter and Administrative Code § 1-114(5), the Board imposes the following penalties:

A. Public Censure

The Board will, not earlier than thirty-one days from the date of this Final Opinion and Order, notify the news media of this decision and provide the news media with a copy of the original of this Final Opinion and Order, and provide notice and other information as required by Section V of the Charter Board Ordinance.

B. Cease and Desist

Mr. Younger, as City Solicitor, shall cease and desist from calling, permitting, causing or advising to be called, and participating in, any executive session meeting of City Council, or any committee thereof, which is not compliant with the Sunshine Act and which does not comply with IV(C), below.

C. Specific Action

The Board directs that all executive sessions which Mr. Younger calls, permits, causes or advises to be called, or in which he participates as City Solicitor on behalf of City Council, or any committee thereof, shall be compliant with the Sunshine Act. To be compliant with the Sunshine Act, the Board considers the following to be the minimum level of compliance required by law:

1. the purpose of the executive session must be announced in the public session immediately prior to, or subsequent to, the executive session, and
2. when giving the purpose of the executive session it shall be spelled out for which of the reasons set forth in 65 Pa.C.S. § 708(a)(1) through (6) the executive session is being held with sufficient detail so as to not compromise the purpose of the executive session, and
3. when the executive session is held in connection with existing litigation, the names of the parties, the docket number of the case, and the court in which the existing litigation is filed shall be announced, and
4. when the executive session is held in connection with an identifiable complaint, the nature of the complaint (although not the name of the complainant), and with regard to threatened litigation, the nature thereof (although not the possible parties thereto) shall be announced.

D. Considerations of the Board

In determining the penalties assessed against Mr. Younger, the Board considered each of the factors set forth in Section V(B)(2)(a)(i) of the Charter Board Ordinance. The offense is serious, as its violation undermines citizen participation, the dissemination and disclosure of information that should be public, and shrouds in secrecy what otherwise should be subject to an open meeting. Further, the Charter and Administrative Code specifically require compliance with the Sunshine Act. Citizen participation as contemplated and required by the Charter is

undermined when public meetings are not open and compliant with the Sunshine Act. As set forth in this Final Opinion and Order, Sunshine Act violations are not a new development for City Council and, although prior Board decisions have not been entered on this subject, a prior Court of Common Pleas order has been entered against City Council on this very subject. Mr. Younger should have been aware of the law relative to executive sessions as it pertains to his client, the City of Reading, and specifically in this instance, City Council.

The Board is of the opinion that the conduct of violating the Charter's and Administrative Code's Sunshine Act provisions exceeded mere negligence, oversight or mistake, and in fact is at least an expression of reckless disregard for the Charter, Administrative Code, citizen participation, and the law. Of course, as set forth herein, Mr. Younger's conduct violates not only the Charter and Administrative Code, but also the Sunshine Act and contributes to the violation of an order of the Berks County Court of Common Pleas. As a highly experienced attorney Mr. Younger possessed specialized knowledge and skill and serves for the very purpose of providing legal advice to a municipality, which, in light of the facts in this matter, militates towards the Board's conclusion that his conduct exceeded mere negligence. The record discloses that Mr. Younger exhibited both a cavalier disregard for the Sunshine Act (and by consequence, the Charter and Administrative Code) and a *laissez faire* approach after some members of City Council questioned the appropriateness of the executive session.

The Board is mindful of the public service provided by Mr. Younger as City Solicitor, Mr. Spencer as City Council President, and of the entire City Council. However, the virtue of public service must yield to the rights of the citizens of Reading, and be tempered by the Charter and Administrative Code.

V. **ORDER**

The Board enters the Order attached hereto.

CITY OF READING CHARTER BOARD

By: *Susan T. Gibson*
Susan Gibson, Chair

Date: March 4, 2011

THE CHARTER BOARD OF THE CITY OF READING

IN RE: Investigation of : Complaint Filed: August 16, 2010
Charles D. Younger, Esquire :
Solicitor of the :
City of Reading :
Investigation No. 30

ORDER

AND NOW, this 4th day of March, 2011, upon consideration of the Findings Report issued by the Investigative Officer on December 10, 2010, and waiver of the hearing requested by Charles D. Younger, Esquire, the Charter Board of the City of Reading (“Board”) finds, for the reasons more fully set forth in the Board’s Final Opinion and Order entered in this matter, that:

- (a) Mr. Younger violated Charter § 212(d);
- (b) Mr. Younger violated Administrative Code § 1-114(5);
- (c) Mr. Younger’s failure to provide legal advice as City Solicitor in compliance with the Charter is a “practice” or indirect violation of the Charter as contemplated by Charter Amendment I, § 1(a); and
- (d) Although the presiding officer of City Council, here the President of City Council, Mr. Spencer, has the ultimate responsibility to call for or announce an executive session, the City Solicitor violates the Charter and Administrative Code by advising to be called, or failing to counsel against the calling of, an executive session that does not comply with the Sunshine Act.

In accordance with the Final Opinion and Order the following is **ORDERED**:

A. Censure. Mr. Younger shall be publicly censored as provided by Section V of the Charter Board Ordinance and in accordance with that section, and not earlier than thirty-one days from the date set forth above, a copy of this Final Opinion and Order shall be transmitted to the following:

- 1. Carl E. Geffken, Managing Director;

2. Thomas McMahon, Mayor of the City of Reading;
3. Reading Eagle Company.

B. Cease and Desist. Mr. Younger, as City Solicitor, shall cease and desist from calling, permitting, causing or advising to be called, and participating in, any executive session meeting of City Council, or any committee thereof, which is not compliant with the Sunshine Act and which does not comply with (C), below.

C. Specific Action.

The Board directs that all executive sessions which Mr. Younger calls, permits, causes or advises to be called, or in which he participates as City Solicitor on behalf of City Council, or any committee thereof, shall be compliant with the Sunshine Act. To be compliant with the Sunshine Act, the following minimum level of compliance shall be required:

1. the purpose of the executive session must be announced in the public session immediately prior to, or subsequent to, the executive session, and
2. when giving the purpose of the executive session it shall be spelled out for which of the reasons set forth in 65 Pa.C.S. § 708(a)(1) through (6) the executive session is being held with sufficient detail so as to not compromise the purpose of the executive session, and
3. when the executive session is held in connection with existing litigation, the names of the parties, the docket number of the case, and the court in which the existing litigation is filed shall be announced, and
4. when the executive session is held in connection with an identifiable complaint, the nature of the complaint (although not the name of the complainant), and with regard to threatened litigation, the nature thereof (although not the possible parties thereto) shall be announced.

C. Distribution. Copies of this Final Opinion and Order shall be distributed to the following:

1. Charles D. Younger, Esquire (via certified, return receipt US Mail);
2. David K. Brennan, Esquire, Investigative Officer;
3. Complainant, Ernest H. Schlegel, Jr., (via certified, return receipt US Mail);
4. Eric B. Smith, Solicitor, Charter Board.

CITY OF READING CHARTER BOARD

By: *Susan T. Gibson*
Susan Gibson, Chair

Date: March 4, 2011