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July 8, 2020

VIA EMAIL: linda.kelleher@readingpa.org
AND FIRST CLASS MAIL

Linda A. Kelleher, CMC, City Clerk
City of Reading
815 Washington Street
Reading, PA 19601

**RE: In Re: The 'Governing Body' of the City of Reading
Advisory Opinion No. 53**

Dear Ms. Kelleher:

The Charter Board voted to approve Advisory Opinion No. 53 on Tuesday, July 7, 2020. A copy of Advisory Opinion No. 53 is enclosed.

I am requesting on behalf of the Board that the Advisory Opinion be circulated among City Council members and posted on the City's website as is customary. Thank you for your assistance.

Very truly yours,

Eric B. Smith
Solicitor, City of Reading Charter Board

EBS/plp
Enclosure

cc w/enclosure (via email):
City of Reading Charter Board

Thomas J. Timoney
(1927-2010)

John P. Knox
(1927-2015)

Mark E. Weand, Jr.
(1936-2018)

John V. Hasson
(1936-2019)

Δ Member DC Bar
* Member NJ Bar
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Φ Member MD Bar
Ω Member Ohio Bar
† LLM Taxation

[illegible]

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.*

[illegible]

I. PROCEDURAL HISTORY AND QUESTIONS PRESENTED

¹ Schlegel directed the Request to the Investigative Officer by email. On March 6, 2020, the Investigative Officer forwarded the Request to the Charter Board Solicitor, Eric B. Smith, Esquire, by email. The Board uses March 6, 2020 as the date it received this Request for Advisory Opinion.

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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.

On March 6, 2020, the Governor of Pennsylvania, Tom Wolf, issued a state-wide emergency declaration in response to the COVID-19 virus. Effective at 12:01 a.m. on March 17, 2020, Governor Wolf ordered statewide mitigation efforts, including the closure of non-essential municipal services. On March 19, Governor Wolf ordered a statewide shutdown of all "non-life sustaining businesses," with enforcement of this order going into effect at 12:01 a.m. on Saturday, March 21.” The Governor issued a statewide stay-at-home order effective at 8 p.m., Wednesday, April 1, 2020, through April 30, 2020 with all Pennsylvania schools remaining closed until further notice and non-life-sustaining business closures remaining in effect. During this time, the Pennsylvania Supreme Court ordered all courts in the Commonwealth closed through May 31, 2020 (all of the foregoing, “State of Emergency).

Ultimately, after implementing a three phase county recovery plan, using the colors red, yellow and green, Berks County entered the “green” phase on Friday, June 26, 2020. This is the least restrictive COVID-19 recovery phase. Likewise, in mid-June, the various courts of the Commonwealth began to reopen on a limited, and usually a virtual, basis.

As the result of the above, the Board’s regular meeting scheduled for March 17, 2020 and April 7, 2020 did not occur. The Board did meet for a teleconference executive session on April 7, 2020, and again on June 16, 2020. After a public meeting held on July 7, 2020, via authorized video conference, the Board voted unanimously in favor of issuing this Advisory Opinion.

II. DISCUSSION

A. Pertinent Charter and Statutory Provisions

Charter Section 309, relating to appointments by the Mayor, provides that the Mayor shall appoint one City Solicitor, *see* Sec. 309(a), and “[a]ll members of Boards, Authorities and Commissions, over which he has the power to appoint. Four affirmative votes of Council shall be necessary for confirmation.” *See* Sec. 309(b).

The chief issue in this matter is whether or not the Reading Area Water Authority (“RAWA”) is a board, authority or commission over which the Mayor has “the power to appoint” as provided by the Charter. To answer this question, the Board must first address whether or not the Mayor or City Council is the “governing body” as defined by Pennsylvania statutory law.

Relevant to the appointment of the board of directors of RAWA, the Board reviews 53 Pa.C.S. § 5610. It is beyond question that RAWA is a municipal authority governed by the Municipality Authorities Act, 53 Pa.C.S. §§ 5601, *et seq.* RAWA’s website³ states:

The Water Authority was established on May 20, 1994, and is a body corporate and politic, organized under the Municipal Authorities act. The Authority has been incorporated pursuant to appropriate action of the governing body of the City of Reading, Berks County, Pennsylvania (the “City”) and exists under and is governed by the Act. The Authority has the power to, among other things, acquire, hold, construct, improve, maintain and operate water filtration plants, trunk lines and water distribution systems.

The City established RAWA, making 53 Pa.C.S. § 5610(a)(1) applicable as to the selection of RAWA’s governing body. Section 5610 provides in pertinent part:

a) Board. — Except as set forth in subsection (a.1),⁴ the powers of each authority shall be exercised by a board composed as follows:

³ Reading Area Water Authority, <https://www.readingareawater.com/about-us/> (accessed April 16, 2020).

⁴ Section 5610(a.1) is inapplicable and will not be further addressed.

(1) If the authority is incorporated by one municipality, the board shall consist of a number of members, not less than five, as enumerated in the articles of incorporation. *The governing body of the municipality shall appoint the members of the board*, whose terms of office shall commence on the effective date of their appointment.

* * * *

(emphasis added). The governing body of the incorporating municipality, here, the City, makes the appointments of the members of the Board. To determine whether it is the Mayor that makes the appointments, or City Council, first the Board must determine which is “the governing body of the municipality” under Section 5610(a)(1).

B. Authorities and the Charter

RAWA is not governed by the Charter of the City. Rather, RAWA, created pursuant to the Municipality Authorities Act, 53 Pa.C.S. §§ 5601, *et seq.*, is a Commonwealth agency. See *In re: Purchasing Requirements of Boards, Authorities and Commissions* (Adv. Op. No. 4, December 4, 2006) and discussion therein. See also *In re: Application of Charter Section 706 to the Heads of City Authorities* (Adv. Op. No. 9, April 3, 2008), regarding redevelopment authorities, and *In re: Administrative Code § 1-199.01* (Adv. Op. 13, April 27, 2009), regarding convention center authority, and *cases cited therein*.

Therefore, any determination of appointment power arises strictly under the laws of the Commonwealth of Pennsylvania, and not by City ordinance or individual Charter provisions. Indeed, the Charter itself limits the scope of the Mayor’s appointment powers to only those offices over which the Mayor has the “power to appoint.” Charter § 309.

C. Governing Body

1. Pennsylvania Statutory Law

What is abundantly clear is that the phrase “governing body,” as used throughout Pennsylvania’s statutory law, means the legislative body of a political subdivision, and does not mean a single executive level official, such as a mayor.

Each of the following statutes specifically define “governing body” as legislative in nature and not as a single executive: 24 P.S. § 19-1901-A(6), relating to community colleges; 35 P.S. § 1543, relating to Housing Authorities Law; 35 P.S. § 1590.3, relating to Veterans’ Housing Authority Act; 35 P.S. § 1703, relating to Urban Redevelopment Law; 35 P.S. § 1743, relating to Redevelopment Cooperation Law; 35 Pa.C.S. § 7501(b), relating to of disaster emergencies;⁵ 53 P.S. § 11701.103, relating to Municipalities Financial Recovery Act; 53 P.S. § 6924.402, relating to Local Tax Enabling Act, occupation tax elimination; 53 P.S. § 895.702, relating to foreign fire insurance tax distribution; 53 P.S. § 42104, relating to Intergovernmental Cooperation Authorities Act for Cities of Third Class; 53 P.S. § 6930.3, relating to Tax Increment Financing Act; 53 Pa.C.S. § 1391, relating to municipal acceptance of gifts or donations; 53 P.S. § 12720.203(b)(5), relating to Pennsylvania Intergovernmental Cooperation Authority and differentiating between a governing body and a mayor; 53 Pa.C.S. § 2305(a), relating to intergovernmental cooperation and noting that a governing body is legislative in

⁵ Importantly, this section specifically provides that the governing body and the mayor “or other chief executive” are distinct and separate. 35 Pa.C.S. § 7501(b) provides in part:

(b) Declaration of disaster emergency. —A local disaster emergency may be declared by the governing body of a political subdivision upon finding a disaster has occurred or is imminent. The governing body of a political subdivision may authorize the mayor or other chief executive officer to declare a local disaster emergency subject to ratification by the governing body. The declaration shall not be continued or renewed for a period in excess of seven days except by or with the consent of the governing body of the political subdivision.

function; 53 Pa.C.S. § 2342, relating to regional planning (“Governing body.” - The body or board authorized by law to enact ordinances or adopt resolutions for the municipality.); 53 Pa.C.S. § 2902, relating to Home Rule Charter and Optional Plans Law; 53 Pa.C.S. § 5601, relating to Municipality Authorities Act; 53 Pa.C.S. § 8101, relating to incurring debt and issuing bonds and notes; 53 Pa.C.S. § 8422, relating to Local Taxpayers Bill of Rights; 53 Pa.C.S. § 8582, relating to homestead property exclusion; 53 Pa.C.S. § 902, relating to municipal reapportionment; 53 Pa.C.S. § 2307, relating to content of ordinance or resolution in connection with intergovernmental cooperation and noting legislative function of governing body; 53 Pa.C.S. § 732, relating to consolidation and merger of municipal territory; 73 P.S. § 373, relating to Economic Development Financing Law; 73 P.S. § 410.2, relating to Tourism Promotion Act.

In comparison, specific statutes routinely call for a mayor to make an appointment, without the use of the phrase “governing body.” For example, 35 P.S. § 1705, regarding the appointment and qualifications of members of a urban redevelopment authority, places the appointment power in the hands of the mayor.⁶ Highlighting that there must be a difference between a mayor and a city’s governing body, 35 P.S. § 1709(k) requires certain approval from a city’s governing body “[t]o sell, lease or otherwise transfer any real property located . . . in a redevelopment area.” Often the statutory framework regarding authorities incorporated within a city forms a check and balance between the legislative governing body and that city’s mayor. The Public Auditorium Authorities Law, 53 P.S. §§ 23841, *et seq.*, likewise places appointment power, in connection with cities, in the exclusive power of a city’s mayor. *Id.* at § 23848.

The General Assembly effectively and clearly demonstrated that there is a difference between a mayor and a governing body and that those terms are, in fact, mutually exclusive of

⁶ In connection with a county’s urban redevelopment authority, that power rests with the county commissioners.

one another. See 1 Pa.C.S. § 1921, regarding legislative intent. Further, as to legislative intent, a mayor is a single person holding an office for a defined term, which is incompatible with the term “governing *body*,” which clearly denotes a group of individuals and not a single person.⁷ A statute will not be interpreted to create an absurd result. 1 Pa.C.S. § 1922(1). Municipal laws, relating to governing bodies and mayors or other executives, should be interpreted *in pari materia* to similarly and clearly distinctly define a “governing body” from a “mayor” or other executive. 1 Pa.C.S. § 1931.

2. Relevant Case Law

There are two leading cases discussing the governing body of a city, *Reed v. Harrisburg City Council*, 995 A.2d 1137 (Pa. 2010) and *City Council of Hazleton v. the City of Hazleton*, 578 A.2d 580 (Pa. Commw. Ct. 1990). Neither case is directly on point with the issue at hand in this matter.

In *Reed*, the City of Harrisburg operated under Plan A of the Optional Third Class City Charter Law. Here, the City of Reading operates under the Home Rule Charter and Optional Plans Law, 53 Pa.C.S. § 2901, *et seq.* This is a *significant* difference. In *Reed*, the Supreme Court relied heavily on the various definitions of the Optional Third Class City Charter Law, including the definition of “governing personnel,” which included both the mayor and Harrisburg’s city council. *Reed*, 995 A.2d at 1142 (“Plan A thus established the mayor as a governing municipal officer . . .”). In the opinion of the Board, the phrase “governing personnel” is legally different from the phrase “governing body.”

⁷ The Cambridge English Dictionary defines “governing body” as “a group that manages or controls the activities of country, region, or organization.” See <https://dictionary.cambridge.org/us/dictionary/english/governing-body> (accessed April 17, 2020).

In the case of Reading and the Home Rule Charter and Optional Plans Law, the applicable authority in this instance, there is not a definition of “governing personnel.” Instead, the General Assembly carefully defined “governing body” within 53 Pa.C.S. § 2902 as follows:

“*Governing body.*” —Board of county commissioners, city council, borough or incorporated town council, commissioners of a township of the first class and supervisors of a township of the second class or their successor forms of government.

The Supreme Court in *Reed*, at footnote 4, examines this important difference in explaining *Hazleton* and the Court’s affirmance of the Commonwealth’s Court’s decision in that matter. *Reed*, 995 A.2d at 1143.

Hazleton arose under a prior version of the Home Rule Charter and Optional Plans Law and contained a now repealed definition of “governing body” formerly found at 53 P.S. § 1-102. Like the current definition of “governing body” found at 53 Pa.C.S. § 2902, city council is expressly within the former definition. The *Hazleton* court determined that this definition placed the appointment power under the Municipality Authorities Act found at 53 Pa.C.S. § 5610(a)(1) within the power of city council.

The holding of *Reed* is inapplicable in light of the express statutory definition of governing body found at 53 Pa.C.S. § 2902, which includes “city council” and does not include a mayor.

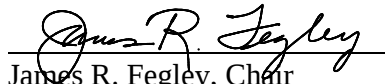
III. OPINION OF THE BOARD

It is the Opinion of the Board that:

- A. The governing body of the City is City Council; and
- B. City Council has the sole authority to appoint members to the board of the Reading Area Water Authority.

The Board declines to issue or complete a chart showing the appointive authority for approximately thirty-six (36) of the City's boards, commissions and authorities, and other appointed bodies. To the extent a specific advisory opinion is sought as to a particular City board, commission or authority, Schlegel, or any other person with standing under the Charter Board Ordinance, may make such an advisory opinion request in writing to the Board.

CITY OF READING CHARTER BOARD

By: 
James R. Fegley, Chair

Date: July 7, 2020

NOTICE

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