TIMONEY KNOX, LLP
Attorneys at Law

400 Maryland Drive
P.O. Box 7544
Fort Washington, PA 19034-7544
www.timoneyknox.com
E-mail: esmith@timoneyknox.com
Telephone: 215.646.6000
Facsimile: 215.646.0379

Direct Dial No.: 215.540.2653
Direct Facsimile No.: 215.591.8256

James M. Jacquette
John J. McAneney*†
George M. Riter†
Scott H. Wolpert*
Catherine M. Harper
Thomas A. Boulden
Robert T. Horst*ϕ
William O. Krekstein϶
Eric B. Smith
Daniel L. Petrilli
Kevin D. Birkhead*†
Karen Schecter Dayno*†
Christine M. Gordon
Matthew B. Malamud* Φ
Andrea R. Procton*
Andrew W. Knox*
Patrick R. McHugh
James N. Hendershot*
Daniel J. Grossman*
Deborah B. Miller*
Devin L. Ralph
Tyler J. Dunphy*
Adrienna N. Hunsberger
Max A. Greer

Of Counsel
Michael O'Hara Peale, Jr. †
Daniel A. Czaplicki†
Charles J. Weiss
Bernard F. Siergiej

Thomas J. Timoney
(1927-2010)

John P. Knox
(1927-2015)

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

John V. Hasson
(1936-2019)

* Member NJ Bar
ϕ Member NY Bar
Φ Member MD Bar
† LLM Taxation

August 22, 2019

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

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

RE: Advisory Opinion 46

Dear Ms. Kelleher:

Enclosed is a copy of Advisory Opinion No. 46 rendered by the City of Reading Charter Board Tuesday night, August 20, 2018.

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.

Very truly yours,

Eric B. Smith

Eric B. Smith

EBS/plp
Enclosure

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

1346350-1

THE CHARTER BOARD OF THE CITY OF READING

IN RE	City Auditor's Right to Independent Legal Counsel	: : : :	Request Received August 7, 2019 Advisory Opinion No. 46

ADVISORY OPINION
NOTICE

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 EXENT 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.

1346022-1

THE CHARTER BOARD OF THE CITY OF READING

IN RE	City Auditor's Right to Independent Legal Counsel	: : : :	Request Received August 7, 2019 Advisory Opinion No. 46

ADVISORY OPINION

I. PROCEDURAL HISTORY AND QUESTIONS PRESENTED

By letter dated August 6, 2019, received by email on August 7, 2019, the City of Reading's interim City Auditor,[1] Maria M. Rodriguez, ("Interim Auditor") requested an advisory opinion ("Request") from the City of Reading Charter Board ("Board"). The Request asks the Board to "render an advisory opinion regarding the City's requirement or obligation to provide at the City['s] expense legal counsel independent of the City Solicitor to the City Auditor when there is area of conflict with the City Solicitor." The Interim Auditor supplied no further information to the Board in connection with the Request.

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

II. DISCUSSION

A. Applicable Charter Provisions

Charter Section 503 provides for, in relevant part, for the following:

> Sec. 503. The City Auditor shall:
>
> (a) Have financial oversight of City finances, independent of the Executive and Legislative branches and shall review all expenditures of the Mayor, City Council, and City boards, commissions and agencies;

[1] *See* Charter § 505(a).

* * *

(l) Issue any subpoenas in order to fulfill the duties and responsibilities of the office of City Auditor.

As the Request concerns independent counsel, the Board confirms that the Charter does not provide a blanket provision of independent counsel to the City Auditor. However, the Board's analysis does not end there.

B. <u>An Auditor's Independence</u>

For purposes of guidance, the Board considers the existing standards for government auditing. The standard publication is prepared by the United States Government Accountability Office (GAO), known as the Yellow Book.[2] Other publications and guidance documents exist, however, on the point of independence, all of them are perfectly clear: an auditor's independence is sacrosanct. *See for example*, Yellow Book 2018 at 3.18 through 3.22, 3.25, 3.27, *through end of section*. It is noteworthy that the Yellow Book specifically discusses threats and impairments to the independence of an auditor, and the necessity of safeguards to protect independence. The Board adopts the definition and importance of an auditor's independence as found in the Yellow Book, and further, interprets inclusion of auditor independence within the Charter as a recognition by the drafters of the Charter of its importance.

While the Yellow Book and professional bodies provide auditing standards, and independence is certainly a professional and ethical obligation of an auditor, the Charter goes further and <u>codifies</u> the independence of the City Auditor through Section 503(a) and also <u>codifies</u> non-interference with that independence. *See* Charter, Amd. I, § 1(a) (providing that "[n]o 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,

[2] *See* Government Auditing Standards, *Yellow Book* (2018 Rev.), July 2018 (GAO-18-868G).

resolution, practice, executive order or decision, or any other means."). The Commonwealth Court has recognized the importance of protecting internal municipal auditors from threats to their independence by other governmental officials of the bodies the auditors audited. *DeGeorge v. Young*, 892 A.2d 48 (Pa. Commw. 2006).

C. Analysis

As is typical in the Board's advisory opinions, it conducts an analysis of the request on the basis of the information provided. Regarding this particular Request, there is little context and no additional information provided other than the language of the Request quoted herein. In answering the Request, the Board necessarily must examine the issue in its entirety, including the issues of potential legal conflicts and Charter violations. The Board does not pass upon the actual existence of a conflict in connection with this Request as the Interim Auditor provided no information on that issue. Likewise, for the same reasons, the Board does not pass upon any issue of actual interference by any City official, including the City Solicitor, with the independence of the City Auditor. Finally, the Board makes no inquiry or determination regarding any violation, or non-violation, of the Pennsylvania Rules of Professional Conduct by the City Solicitor, as those references herein are *strictly* to aid in defining the limited circumstances when the City Auditor is entitled to independent counsel.

1. City Governance, the Charter and Conflicts

One Charter-created official is powerless to exercise control over another Charter-created official, unless such power or control be found within the Charter. Charter, Amd. I, § 1(a). It is also a misconception, and is legally incorrect, that the Administrative Code supersedes, or could

1346022-1

amend, the Charter.[3] It is likewise a misconception that the Pennsylvania Rules of Professional Conduct ("Rules of Conduct") governing attorneys do not apply to in-house municipal attorneys that represent, in this case, "the City."[4] The limiting language of Charter § 801(a) demonstrates a recognition that the City's "one-lawyer" preference is limited by other considerations, "as may be otherwise required by law." Addressing these misconceptions likewise addresses whether or not the Office of City Auditor[5] may obtain independent legal counsel, at the expense of the City, when, in the exercise of the City Auditor's independent oversight of the City's finances, as provided under Section 503, there is an area of conflict with the City Solicitor, or adversity with a specific office or official of the City represented, or formerly represented, by the City Solicitor.

2. The City Solicitor and Conflicts

Section 503 of the Charter mandates that the Office of the City Auditor have independent oversight of the City's finances. Where the exercise of this Charter mandated independence of the City Auditor generates a legal conflict with the City, or a specific office or official of the City represented, or formerly represented, by the City Solicitor, the City Solicitor must cease interfering with the independence of the City Auditor[6] and no longer may "represent" the City

---

[3] The Administrative Code may not waive, supersede, or modify Charter Provisions. *In re Purchasing Policy* (Adv. Op. 30, Nov. 14, 2012) at 2. *See also*, *Spencer*, *infra*.

[4] Although the intent of the Charter is that only one person shall be the legal advisor of the City, Charter § 801(a), that intent is limited with the phrase "except as may be otherwise required by law." The Rules of Conduct provide for an attorney's responsibilities in connection with, among other things, the representation of clients and conflicts that may arise in such representations, including governmental lawyers and lawyers that represent organizational clients. *See for example*, Pa.R.P.C. 1.7 and 1.13.

[5] Whether filled by an elected official or by an appointed Interim City Auditor.

[6] Should it occur, interference with Charter § 503, regarding the independence of the City Auditor, *at any time*, may be a violation of the Charter. *See* Charter, Amd. I, § 1(a).

Auditor.[7] The City Solicitor's advice to the Mayor, Council, and all City departments and agencies must be compliant with the Charter and Administration Code. *In re Investigation of Charles D. Younger, Esquire, Solicitor of the City of Reading* (Inv. No. 30, Mar. 4, 2011) at 18.

In *Horn*, the Supreme Court held that the procedure in which the same solicitor represented the zoning hearing board and the township opposed the application for a variance was susceptible to prejudice and must be prohibited. *Horn Township of Hilltown*, 461 Pa. 745, 337 A.2d 858 (1975). *See also Sultanik v. Board of Supervisors of Worcester Township*, 88 Pa. Commw. 214, 488 A.2d 1197 (Pa. Commw. Ct. 1985) (finding *conflict of interest* where township hired attorney as special counsel to represent township's adversary position against landowners' claim and board of supervisors hired another attorney from the same law firm as board advisor). In *K. Hovnanian Pa. Acquisitions, LLC*, the township appointed a special solicitor in the conditional use proceeding. The township's regular solicitor stated that the appointment was required to comply with due process and to enable him to question witnesses and to make evidentiary rulings as advisor to the board. The Commonwealth Court determined that the Board's appointment of a special solicitor for certain proceedings was allowed by necessary implication to avoid a *conflict of interest*. *K. Hovnanian Pa. Acquisitions, LLC v. Newtown Twp. Bd. of Supervisors*, 954 A.2d 718 (Pa. Commw. Ct. 2008).

The City Auditor's Charter mandated independence does not cease to exist because the City Solicitor is adverse or conflicted, and can no longer represent the City Auditor. Nor is the

[7] Should it occur, continued representation of the City Auditor, in defiance of the Rules of Conduct, or in violation of the law, may also violate the Charter.

City Solicitor the gate-keeper or final arbiter of what is, or is not, sufficient independence of the City Auditor under the Charter. *See* Charter, Art. VIII (providing for the qualifications and responsibilities of the City Solicitor). That is the province of the Charter Board. Charter, Amd. I, § 1(b) *and* Charter Board Ordinance. The City Solicitor is not empowered by the Charter to conclusively determine whether or not the City Auditor's independence is being fulfilled, nor to limit or control the exercise of the Charter mandated independence of financial oversight as the City Auditor deems appropriate.

3. Independence of the City Auditor

The independence of the City Auditor extends beyond the ethics or standards of that profession. Here, the City Auditor's independence is also Charter mandated. A home rule charter provision has the force and status of an enactment of the legislature. *Spencer v. City of Reading Charter Bd.*, 97 A.3d 834, 840 (Pa. Commw. Ct. 2014). Because the Charter requires the Auditor's independence with the force of statute, the Auditor's independence is not just one of ethics, best practices and public confidence, rather, independence here is legally enforceable. The Auditor's independence under the Charter is both an obligation and duty of the Auditor and a corresponding obligation and duty of other City officials to honor and allow the free and full exercise of the Auditor's independent oversight of the City's finances as required by the Charter. Independent counsel, in limited circumstances, fulfills the Charter's mandated independence requirement for the City Auditor.

To be sure, unlike the Board[8] and the City's Ethics Board,[9] the Charter does not specifically require independent counsel for the City Auditor. Nevertheless, in support of the Charter's required independence of the Office of City Auditor, independent counsel at the expense of the City may be retained by the City Auditor in limited circumstances in connection with the exercise of the Auditor's independent oversight of the City's finances as required by the Charter. Further, the subpoena power of the City Auditor demonstrates the Charter's grant of the power of legal process and the compulsion of testimony, access to persons and things and the production of information, all of which would require legal counsel, and if the City Solicitor faces a conflict, then independent legal counsel for the City Auditor would be required. *See* Charter § 503(l). This cannot be ignored.

II. <u>CONCLUSION</u>

It is an inescapable conclusion to the Board that the fulfillment of the Charter mandated independence of the City Auditor may mean that, from time to time, and in limited circumstances, the City Auditor is entitled to retain independent legal counsel at the expense of the City when, in the exercise of the City Auditor's independent oversight of the City's finances, as provided under Section 503, there exists a) a conflict with the City Solicitor, or b) a conflict or conduct adverse with a specific official or office of the City represented, or formerly represented, by the City Solicitor, or c) conduct adverse to the City Auditor by the City Solicitor impeding the independence of the Auditor's Office.

---

[8] Charter, Amd. I, Sec. 2(b).

[9] Charter § 1201(c).

The Board further concludes that, in the context of the City Auditor and the limited circumstances concluded herein, "independent counsel" means counsel selected directly and solely by the City Auditor free from any threat to its independence and outside of the City's request for proposal ("RFP") for professional or legal services. Both the Board and the Ethic's Board are empowered by the Charter to select independent counsel outside of the RFP process, and in these limited circumstances, in the exercise of the City Auditor's independent oversight of the City's finances, as provided under Section 503, the City Auditor likewise may select independent counsel outside of the RFP process.

III. <u>OPINION OF THE BOARD</u>

It is the Opinion of the Board that:

A. the Charter, with the force of statute, mandates that the City Auditor have independent oversight of the City's finances as prescribed by Charter Section 503(a);

B. the City Auditor is entitled to retain independent legal counsel at the expense of the City when, in the exercise of the City Auditor's independent oversight of the City's finances, as provided under Section 503, there exists:

1. a conflict with the City Solicitor, or

2. a conflict or conduct adverse with a specific official or office of the City represented, or formerly represented, by the City Solicitor, or

3. conduct adverse to the City Auditor by the City Solicitor threatening the independence of the Auditor's Office.

C. in the context of the City Auditor and the limited circumstances concluded herein, "independent counsel" means counsel selected directly by the Office of the City Auditor, free from any threat to its independence by the City Solicitor, or any specific office or official of the City represented, or formerly represented, by the City Solicitor, and outside of the City's RFP process.

CITY OF READING CHARTER BOARD

By: ______________________________
James R. Fegley, Chair

Date: August 22, 2019

NOTICE

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.