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February 17, 2016

Via Email: charles.younger@readingpa.org

Charles D. Younger, Esquire
City Solicitor
815 Washington Street
Reading, PA 19601

Re: Advisory Opinion No. 38

Dear Attorney Younger:

Enclosed please find Advisory Opinion No. 38, relating to the appointment of a Temporary Managing Director. This is in response to your request dated February 1, 2016. The Board announced its opinion at a regularly scheduled meeting convened last night, February 16, 2016.

Very truly yours,

Eric B. Smith

EBS/mrb
Enclosure

cc: Jim Fegley, Chair, City of Reading Charter Board (via email w/ enc.)
Elizabeth Magovern, Esquire, Investigative Officer (via email w/ enc.)
Linda Kelleher, CMC, City Clerk (via email w/ enc.)

THE CHARTER BOARD OF THE CITY OF READING

IN RE Charter Art. IV, Relating to : Request Received February 1, 2016
the Timing of the Appointment of :
a Temporary Managing Director :
: :
: Advisory Opinion No. 38

NOTICE

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ADVISORY OPINION

I. PROCEDURAL HISTORY AND QUESTION PRESENTED

By letter dated February 1, 2016 the Solicitor for the City of Reading, Charles D. Younger, Esquire, (“Solicitor”) requested that the City of Reading Charter Board (“Board”) issue an advisory opinion regarding Charter, Art. IV, section 401(d), relating to the appointment of a Temporary Managing Director.¹ The Solicitor is making this request for Advisory Opinion on behalf of the City’s newly elected Mayor, Wally Scott.

The Solicitor asks:

“May the Mayor appoint a Temporary Managing Director without City Council confirmation during the first ninety days of a vacancy in the Managing Director position?”

The Board answers this question as stated in Section III, Conclusion, *infra*.

II. DISCUSSION AND ANALYSIS

A. Pertinent Charter Provisions

Section 401 of the Charter states the following:

Section 401. Appointment; Qualification; Compensation.

(a) Within ninety (90) days of taking office, the Mayor, with the approval of City Council, shall appoint a Managing Director for an indefinite term, subject to at least a biennial review, and fix the Managing Director's compensation. The Managing Director need not be a resident of the City at the time of appointment, but

¹ The Board previously issued an Advisory Opinion at the request of the Solicitor as it relates to the length of the appointment of a Temporary Managing Director. See Advisory Opinion No. 22 (Nov. 18, 2010). Advisory Opinion No. 22 did not answer the question posed by the Solicitor in this Advisory Opinion request. See also Advisory Opinion No. 21 (Nov. 9, 2010) (explaining the timing of the appointment of the Managing Director).

after appointment shall reside in the City. The Managing Director shall establish such City residency within twelve (12) months of being appointed.

(b) Any candidate for Managing Director shall:

1. have a Master's degree in public administration, business administration, or its equivalent and have at least three (3) years experience at an executive or administrative level; or

2. have a Bachelors [*sic*] degree in public administration, or its equivalent, and have at least five (5) years of experience at an executive or administrative level.

(c) City Council may, by ordinance, establish additional qualifications for the position of Managing Director, prior to advertisement for the hiring of the Managing Director.

(d) In the event that the position of Managing Director cannot be filled by the Mayor, the Mayor may appoint a Temporary Managing Director for a period of time not to exceed ninety (90) days. During this period of time, the Mayor shall continue to use all available means to fill the position.

(e) In the event that Mayor has not filled the position of Managing Director within one hundred eighty (180) days of taking office, City Council shall, within ninety (90) days thereafter, hire a Managing Director. Any person hired by City Council shall hold the qualifications for said position prescribed by this Charter. The Mayor shall not have the power of veto over any candidate hired by City Council in accordance with the provisions of this Charter.

Only paragraphs (a) and (d) are pertinent to the Board's examination.

B. Analysis

1. *Advisory Opinion No. 22*

In *dicta*, while answering the question of the length of the appointment of a Temporary Managing Director, Advisory Opinion No. 22, at p. 4, stated: "After that first 90 day period, if the Mayor is unsuccessful in making that appointment, the Mayor may then appoint a Temporary Managing Director 'for a period of time not to exceed ninety (90) days.' Charter § 401(d)." In

this statement the Board appeared to embrace the notion that a 90 day period² must pass before a Mayor may appoint a Temporary Managing Director.³ By this Advisory Opinion, the Board now clarifies its interpretation of section 401 of the Charter, and renders this opinion only with respect to the timing of the appointment of a Temporary Managing Director. The holdings of Advisory Opinions No. 21 and No. 22 are unaffected by the advisory opinion now rendered, however, the Board now puts to rest any confusion caused by the *dicta* appearing on page 4 of Advisory Opinion No. 22 as quoted above.

2. *The language of Charter § 401 is clear.*

The Charter Board Ordinance requires that certain standards of interpretation be employed in construing Charter provisions. Ordinance No. 46-2005, *as amended*, at § IV(A). The Board is bound by the plain language of the Charter, and may not interject or interpret a provision unless an ambiguity exists. The object of all interpretation and construction of Charter provisions is to ascertain and effectuate the intent of the authors of the Charter. When the words of a Charter provision are clear and free from ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit. *Id.* Further, it is not for the Board, or the courts, to add, by interpretation, to a statute, a requirement which the legislature did not see fit to include. *Summit School, Inc. v. Commw., Dept. of Educ.*, 108 A.3d 192, 199 (Pa. Commw. Ct. 2015).

² Either a 90 day period at the commencement of a Mayor's term with no Managing Director, or a 90 day period following a vacancy in the office of Managing Director.

³ The City's former Mayor, Vaughn Spencer, made much of this *dicta obiter*, going so far as claiming a defense to an alleged Charter complaint. *See Spencer v. City of Reading Charter Board*, 97 A.3d 844 (Pa. Commw. Ct. 2014) (affirming reversal of Charter Board Investigation No. 34). In Investigation No. 34 (Jan. 18, 2013), ultimately on appeal to the Commonwealth Court, the court agreed as to the existence of a defense for Mayor Spencer based upon his "reasonable" interpretation of this *dicta* in Advisory Opinion No. 22. *Spencer*, 97 A.2d at 853. The court did not address whether or not the appointment of a Temporary Managing Director may occur within the 90 day periods referenced in footnote 2, *supra.*, or may only occur after the expiration of those 90 day periods.

The words of the Charter are here explicit. The Mayor may appoint a Temporary Managing Director, without the need for approval by City Council,⁴ with only one limitation: that said appointment occur only in “the event that the position of Managing Director cannot be filled by the Mayor.” The Board finds no ambiguity in the language of section 401 pertaining to the timing of the appointment of a Temporary Managing Director. There is no language at all in the Charter prohibiting the appointment of a Temporary Managing Director during the first 90 days of a vacancy, nor could the Board, in the face of this language, infer an ambiguity or supply additional language, on its own accord. Charter § 401(a) and (d).

The introductory phrase to Charter Section 401(d) provides “In the event that the position of Managing Director cannot be filled by the Mayor, . . .” Therefore, once this situation has arisen, the Mayor’s right to appoint a Temporary Managing Director follows. The Board has not been asked to render an advisory opinion as to the meaning of this introductory phrase, and declines to do so in this Opinion.

III. OPINION OF THE BOARD

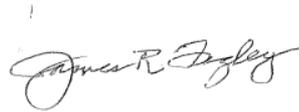
It is the Opinion of the Board that:

- 1) A Temporary Managing Director may be appointed by the Mayor, without approval by City Council, during the first ninety (90) days of a vacancy in the Office of the Managing Director; however,
- 2) The Mayor may not make such an appointment during the first ninety (90) days of a vacancy in the Office of the Managing Director, or otherwise, until “the position of Managing Director cannot be filled by the Mayor.”

⁴ Charter § 401(a) requires that approval of City Council is needed only for the appointment of a Managing Director. The Charter is silent regarding City Council approval for the appointment of a Temporary Managing Director. Charter § 401(d). The Board will not interject new terms into the Charter and Section 401 does not require a Temporary Managing Director to be approved by City Council.

The Board is specifically not rendering an opinion at this time as to what constitutes a circumstance or situation where “the position of Managing Director cannot be filled by the Mayor.”

CITY OF READING CHARTER BOARD



By: _____
James R. Fegley, Chair

Date: February 17, 2016

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