

THE CHARTER BOARD OF THE CITY OF READING

IN RE:           Local Regulations for           :           Request Filed: October 12, 2006  
                  Initiative and Referendum       :             
                  Process                               :           Advisory Opinion No. 3

**ADVISORY OPINION**

**I.       PROCEDURAL HISTORY AND QUESTION PRESENTED**

By letter dated October 12, 2006<sup>1</sup> Linda A. Kelleher, Clerk of the City of Reading, (“Clerk”) requested that the City of Reading Charter Board (“Board”) issue an advisory opinion (“Request for Advisory Opinion”) with respect to the following issue: “May the City, by ordinance, add local regulations to the Administrative Code for initiative and referendum petitions?”<sup>2</sup>

**II.     DISCUSSION**

This Request for Advisory Opinion necessarily requires the Board to review the Charter of the City of Reading (“Charter”) and the Pennsylvania Election Code, 25 P.S. §§ 2600, *et seq.* (“Election Code”).

A.     Pertinent Provisions of the Charter and Election Code

Article XI of the Charter governs citizen’s rights and participation, and specifically provides thorough procedural and substantive regulations governing the initiative and referendum process.

The Election Code defines special election as “any election other than a regular general, municipal or primary election.” 25 P.S. § 2602(v). *See Munce v. O’Hara*, 16 A.2d 532, 340 Pa.

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<sup>1</sup> The Charter Board Ordinance, Section VI, requires that advisory opinions be issued within thirty days of the Board receiving the request. Because of the timing of the Charter Board’s receipt of the request for advisory opinion, by letter of November 6, 2006 the Charter Board Solicitor requested that the Clerk extend the thirty day period specified in the Charter Board Ordinance so that it would end on November 24, 2006. By return fax of November 9, 2006, the Clerk agreed to that request.

<sup>2</sup> Although not part of the question presented for this Advisory Opinion, a similar analysis would be employed and an identical result would be reached with respect to the recall provisions of the Charter.

209, 16 A.2d 532 (1940) (considering as a “special election” a proposition to discontinue use of voting machines to be decided at a general election); *Kram v. Kane*, 336 Pa. 113, 8 A.2d 398 (1939) (“[A] ‘primary election’ does not include within its definition a referendum of the question of granting liquor licenses; such referendum being a ‘special election’ within that section.”). Further, the Election Code supplements the Charter where the Charter is silent. *See Petition of Werner*, 662 A.2d 35 (Pa. Commw. Ct. 1995) (holding Election Code requires affidavit for initiative regardless of language of Borough Code provision).

There is no inconsistency between the Charter and the Election Code with respect to the conduct of the initiative and referendum process. The Charter compliments the Election Code where the Election Code is silent, and vice versa.

B. Interaction of Charter and Election Code

*City of Philadelphia v. Schweiker*, 858 A.2d 75, 84, 579 Pa. 591, 605 (2004) explains the power of home rule municipalities to enact ordinances:

Municipalities are creatures of the state and have no inherent powers of their own, *see Naylor v. Township of Hellam*, 565 Pa. 397, 403, 773 A.2d 770, 773 (2001); rather, they "possess only such powers of government as are expressly granted to [them] and as are necessary to carry the same into effect." *Appeal of Gagliardi*, 401 Pa. 141, 143, 163 A.2d 418, 419 (1960); *see also Philadelphia v. Fox*, 64 Pa. (14 Smith) 169, 180-81 (1870). Therefore, a municipality ordinarily lacks the power to enact ordinances except as authorized by statute, and any ordinance not in conformity with its enabling statute is void. *See Taylor v. Abernathy*, 422 Pa. 629, 633, 222 A.2d 863, 865 (1966). Under the concept of home rule, however, the locality in question may legislate concerning municipal governance without express statutory warrant for each new ordinance; rather, its ability to exercise municipal functions is limited only by its home rule charter, the Pennsylvania Constitution, and the General Assembly. *See In re Petition to Recall Reese*, 542 Pa. 114, 119, 665 A.2d 1162, 1164 (1995). *See generally* PA. JUR.2D Municipal and Local Law § 3:42 (2002); McQuillin, THE LAW OF MUNICIPAL CORPORATIONS § 10:13 (3d ed.2004); Gary E. French, Home Rule in Pennsylvania, 81 DICK. L.REV. 265 (1977).

The Pennsylvania Constitution guarantees the right of home rule. *See* PA. CONST. art. IX, § 2. Because the grant of such right makes home rule subject to the procedures and substantive limitations imposed by the General Assembly, home rule must ordinarily occur, in the first instance, according to enabling legislation at the state level.

*Id.*, at 605, 858 A.2d at 84 (footnotes omitted).

The enabling law relevant to this matter is the Home Rule Charter and Optional Plans Law, 53 Pa.C.S. §§ 2901, *et seq.* Section 2962(c)(2) provides that a home ruled municipality shall not “[e]xercise powers contrary to, or in limitation or enlargement of, powers granted by statutes which are applicable in every part of this Commonwealth.” The Election Code is applicable in all parts of the Commonwealth and its provisions concerning special elections govern initiative and referendum elections, to the extent to which the special election provisions are applicable. *See also* 53 Pa.C.S. § 2951 (providing that all elections provided for by Home Rule and Optional Plan governments shall be conducted by the election officials for such municipality in accordance with the Election Code).

The Charter provides the detail that is not provided by the Election Code. As the *Referendum Handbook*, Commw. of Penna., Dept. of Community and Economic Dev., 8<sup>th</sup> ed. (1999), points out, the Election Code has no provisions governing the circulating, signing or filing of referendum petitions. *Id.* at 5. “The charter will define the issue to be presented and outline the requirements for placing it on the ballot, but the mechanics of the election [itself] will be governed by the Election Code.” *Id.* The sections of the Charter which outline the petition process with respect to initiative and referendum are Sections 1102 through 1105.<sup>3</sup>

Section 1102 grants the right to initiative and referendum to qualified voters of the City. Section 1103 specifies the process to commence such proceedings, including the number of

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<sup>3</sup> Section 1110 concerns the Charter’s recall provisions.

qualified voters needed, the requirement of an affidavit and its content and the timing of filing the affidavit and the Clerk's issuance of petition blanks. Section 1104 provides for the number of signatures, the form and content of the circulating petitions, the requirements for the affidavit of circulator, the time for filing referendum petitions and the time in which initiative petitions must be circulated and signed. Section 1105 provides for the process after the filing of the petitions, including the issuance of a certificate from the Clerk as to the sufficiency of the petition, or, if insufficient, the petition's particular deficiencies.

Likewise, the Election Code provides statewide guidance for initiative and referendum ordinances, Charter provisions, and statutes which are silent on, or omit, important substantive or procedural safeguards or requirements of the Election Code.

The case of *Petition of Werner, supra*, is instructive. There, a borough council passed an ordinance to allow the sale of the borough's water system. The Borough Code permitted a protest by the borough's electors and a referendum to challenge such a sale. 53 P.S. § 4709. The Borough Code contained no provision requiring an affidavit to accompany the protest petition, and made no reference to the Election Code. The trial court held that the protest petitions were fatally defective because they lacked affidavits. The Court held that the Election Code's affidavit requirement applied despite the silence found in the Borough Code. *Petition of Werner*, 662 A.2d at 36-38. *See also In re: Referendum for Sunday Motion Picture Exhibitions in Borough of Waynesboro*, 383 Pa. 162, 117 A.2d 699 (1955) (applying provisions of Election Code concerning nominating petitions where Sunday Motion Picture Act silent on form, time and manner of circulation for referendum petitions provided for thereunder); *In re: Sunday Movie Petition*, 352 Pa. 635, 44 A.2d 46 (1945) (holding that Election Code mandated affidavits

be attached to petitions regarding the showing of motion pictures on Sundays, despite absence of such provision in statute authorizing such referendum petitions).

C. The Role of the Clerk

The Charter, Section 225 provides, in part, that:

The City Clerk shall give notice of Council meetings to its members and the public, take the minutes of all City Council meetings, keep the journal of its proceedings, shall have the power of a notary public, shall serve as secretary to the Council and perform such other duties as are assigned by the administrative code, the Council, or state law.

Sections 1103 and 1105 of the Charter also specify specific acts which the Clerk is responsible to discharge relative to initiative and referendum. These acts include accepting for filing initiative or referendum affidavits, issuing petition blanks, examining petitions and affidavits, issuing a certificate of sufficiency, and identifying insufficiencies, with respect to petitions.<sup>4</sup>

D. Propriety of Local Regulations by Ordinance

The Charter sets forth in detail the process by which initiative and referendum petitions are to be issued, prepared, circulated and filed with the Clerk. Certainly, City Council may not pass an ordinance that conflicts with the Charter, or which impinges on the right of citizens of Reading from “exercising the right of initiative, referendum and recall of elected officials as provided in [the] Charter. Charter, Section 1101. Further, Council is charged with protecting and promoting “the right of the citizens of the City of Reading to participate in a positive and constructive manner in the government of the City.” *Id.* That charge may not be amended through mere ordinance.

Certain regulations may be appropriate. As an example, an ordinance which clarifies the definition of “qualified voter,” as provided by Pennsylvania law, would not violate the Charter.

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<sup>4</sup> The Administrative Code, Section 1-161, also sets forth a list of duties for the Clerk, none of which are pertinent to this analysis.

Nor would the Charter be violated by an ordinance providing that all petitions circulated shall be on pre-printed forms available from the Clerk's office, or providing for pre-printed affidavits. However, an ordinance would violate the Charter if it alters in any way the clear language of the Charter with respect to the substance or process of the City's citizens' right to initiative and referendum.

Furthermore, as explained above, the Election Code cannot be ignored. Conduct of initiative and referendum proceedings must be in accordance with the Election Code, regardless of silence or deviation by the Charter. It is not the function of the Clerk, or City Council, to interject substantive or procedural ordinances affecting the initiative or referendum process where, due to the completeness of the Charter and the Election Code, there are no "blanks" to be filled.

The Clerk does not provide any specific regulation or ordinance to be tested by the Charter at this time. The Board encourages the Clerk and City Council to utilize the advisory opinion process for review of specific proposed regulations or ordinances concerning the initiative or referendum process.

#### **IV. OPINION OF THE BOARD**

The Opinion of the Board is as follows:

- A. The Charter governs the initiative and referendum process as set forth therein.
- B. The Election Code governs the conduct of elections respecting initiative and referendum and supplements the Charter where the Charter is silent or deviates from the Election Code.

C. No ordinance or regulation may be adopted by City Council which impacts or alters the Charter in any way with respect to the substance or process of the City's citizens' right to initiative and referendum.

D. Ordinances or regulations involving initiative and referendum may be adopted by City Council which do not impact or alter the substance or process of the Charter's initiative and referendum provisions, which are subservient to those provisions of the Charter, and which merely codify the existing state of Pennsylvania election law or which are ministerial in nature.

E. State election law governs the implementation of the Charter's provisions regarding initiative and referendum.

F. Because the City is a home rule municipality, it is constrained by laws of uniform and statewide application, therefore, a City ordinance which violates the Election Code would also violate the Charter, in so far as it relates to initiative and referendum.

CITY OF READING CHARTER BOARD

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

Date: 11/22/2004