

THE CHARTER BOARD OF THE CITY OF READING

IN RE: Investigation of : Complaint Filed: December 20, 2005
Reading City Council :
: Investigation Nos. 2 through 5

FINAL OPINION AND ORDER

I. PROCEDURAL HISTORY

The City of Reading Charter Board (“Charter Board”) notes the following pertinent procedural history in this matter:

a. By letter of June 2, 2006 directed to the Investigative Officer, Jason B. Hopp, Esquire, Vaughn D. Spencer, President of Reading City Council, requested an evidentiary hearing be conducted pertaining to the above captioned investigations.

b. By letter of June 15, 2006 the Charter Board scheduled an evidentiary hearing for July 11, 2006 and noted that unless a written objection was received the four complaints would be consolidated.

c. Neither the Investigative Officer nor Reading City Council (“Council”) objected.

d. Council thereafter requested a continuance of the hearing.

e. By email of June 29, 2006, the Investigative Officer waived the requirement that the evidentiary hearing occur within forty-five (45) days of the request for same and consented to the continuance. *See* Charter Board Ordinance Section V(A)(7)(a).

f. By letter of July 6, 2006 the Charter Board continued the July 11, 2006 hearing to July 25, 2006.

g. By letter of July 12, 2006 Andrew J. Giorgione, Esquire, counsel for Council, requested a stay of all proceedings pending before the Charter Board as a result of certain litigation captioned *M.B. Investments, et al. v. McMahon, et al.*, Berks County CCP No. 05-16304, *appealed and affirmed* 903 A.2d 642 (Pa. Commw. Ct. 2006), *and alloc. denied* 918 A.2d 748 (Pa. 2007), which, as represented by Mr. Giorgione involved the same current and former members of Council and the same legal issues as those involved in the Charter Board investigation.

h. Mr. Giorgione’s letter of July 12, 2006 also waived the time limits set forth in the Charter Board Ordinance. *See* Charter Board Ordinance Section V(A)(7)(a).

i. In as much as the Charter Board had no facts before it to consider the factual representations made by Mr. Giorgione’s letter of July 12, 2006, by letter of July 19,

2006, the Charter Board requested clarification from the Investigative Officer and Mr. Giorgione so that the Charter Board could properly consider the request for a stay.

j. The Charter Board's letter of July 19, 2006 also requested that Mr. Spencer execute a waiver of the time limits found in Charter Amendment I, § 2(c) and Charter Board Ordinance Section V(A)(7)(a) and all other applicable time limits.

k. On July 20, 2006 Mr. Spencer executed the aforementioned waiver.

l. Mr. Giorgione issued a letter dated July 24, 2006 jointly on behalf of himself and the Investigative Officer wherein the facts underlying the request for a stay were clarified.

m. By email of July 24, 2006 the Charter Board granted the July 12, 2006 request for a stay and continued the evidentiary hearing until not later than 60 days following a final decision issued by the Commonwealth Court in the *M.B. Investments* matter, or, if appealed to the Supreme Court of Pennsylvania, not later than 60 days following the issuance of a final decision by the Supreme Court, or 60 days following the Supreme Court's denial of allocatur.

n. On July 28, 2006 the Commonwealth Court affirmed the decision of the Berks County Court of Common Pleas in the *M.B. Investments* matter. *See* 903 A.2d 642 (Pa. Commw. Ct. 2006).

o. On March 1, 2007 the Supreme Court of Pennsylvania entered a *per curiam* Order denying the petition for allowance of appeal filed in the *M.B. Investments* matter. *See* 918 A.2d 748 (Pa. 2007).

p. By letter of April 17, 2007 the Charter Board scheduled the evidentiary hearing in this matter for April 24, 2007.

q. By letter of April 19, 2007 Mr. Giorgione advised that he and the Investigative Officer jointly requested an additional continuance so that a possible stipulation could be reached.

r. By letter of April 23, 2007 the Charter Board granted the request for continuance and rescheduled the evidentiary hearing to May 22, 2007.

s. By letter of May 17, 2007 the Investigative Officer submitted to the Charter Board a document entitled Stipulations of Fact, Applicable Law and Penalty ("Stipulation") executed by both counsel.

t. By letter of May 18, 2007 the Charter Board acknowledged receipt of the Stipulation and cancelled the May 22, 2007 evidentiary hearing.

II. FINDINGS OF FACT

1. The substantive facts of this matter have been previously litigated, and appealed, and ultimately and finally decided, as set forth above, by the Berks County Court of Common Pleas and the Commonwealth Court.

2. Upon review by the Charter Board, the stipulations of fact submitted as part of the Stipulation are in accordance with the facts found and decisions made in the *M.B. Investments, et al. v. McMahon, et al.*, Berks County CCP No. 05-16304, *appealed and affirmed* 903 A.2d 642 (Pa. Commw. Ct. 2006), *and alloc. denied* 918 A.2d 748 (Pa. 2007).

3. As a result of the finding in paragraph 2, above, and for the reasons set forth in our Conclusions of Law, below, the Charter Board accepts the stipulations of fact contained in the Stipulation, except as qualified herein, and incorporates them herein as though set forth fully at length. A true and correct copy of the Stipulation is attached hereto as Exhibit "A."

III. CONCLUSIONS OF LAW

As set forth in the Findings of Fact, above, on July 28, 2006 the Commonwealth Court affirmed the decision of the Berks County Court of Common Pleas in the *M.B. Investments* matter. *See* 903 A.2d 642 (Pa. Commw. Ct. 2006). The Charter Board, necessarily, must yield to, and abide and be bound by, the determinations and decisions of Pennsylvania's appellate courts when those courts address issues or claims which thereafter are before the Charter Board. It is not for the Charter Board to make conclusions of law contrary to the determinations of the appellate courts, or the final, unappealed, orders of the courts of common pleas. Because the stipulations of fact and conclusions of law as set forth in the Stipulation are in accordance with the decision of the Commonwealth Court in the *M.B. Investments* matter, the Charter Board incorporates them herein as though set forth fully at length. *See* Exhibit "A."

IV. DETERMINATION OF THE BOARD

In this particular instance, upon the stipulated facts and conclusions of law, the Charter Board specifically rejects reliance upon the legal advice of counsel as a mitigating factor or as a justifiable excuse permitting violation of the Charter or Administrative Code. *See* Exhibit “A” at p. 5. When the advice of counsel is used for the purpose of circumventing the Charter or Administrative Code, and when, thereafter, a violation is found, reliance on such advice cannot be considered a mitigating factor when considering the penalty to be imposed for such a violation.

Also, the Charter Board takes notice that significant counsel fees and costs have been incurred by the City from Council’s initial retention of an attorney for this matter, through the legal and political wrangling with the Mayor of the City, through litigation between Council and the Mayor before the Berks County Court of Common Pleas, an appeal to the Commonwealth Court of Pennsylvania, and the filing of, and opposition to, a petition for allocatur before the Supreme Court of Pennsylvania. All of these fees and costs have been incurred by the City and, indirectly by the taxpayers of the City.

The Charter Board accepts the Stipulation for all other purposes.

V. PENALTIES IMPOSED

A. Stipulation

The Charter Board accepts the recommendation of the Investigative Officer pertaining to the penalty to be assessed against City Council as set forth in the Stipulation, but accepts it solely for the reasons set forth below in the section entitled “Considerations of the Board.” *See* Exhibit “A” at p. 5. Therefore, the Charter Board shall impose the penalty of admonition as defined and permitted by Charter Board Ordinance Section V(B)(2)(a)(ii)(a).

B. Considerations of the Board

The Charter Board considered each of the factors set forth in Section V(B)(2)(a)(i) of the Charter Board Ordinance. The violation of the Charter and Administrative Code is serious, as it concerns the very balance of power between the executive and legislative branches of City government as required by the Charter. Here, importantly, the Investigative Officer and City Council stipulated to the penalty. Further, the Courts of the Commonwealth of Pennsylvania have fully addressed the claims asserted against Council. Although the violation of the Charter and Administrative Code is serious, the harm has been reversed and prevented by the various courts referenced herein. Also, the Charter Board determined that a penalty of admonition is appropriate because any penalty involving a fine would only cause further expenditure of City resources, as Council is the legislative arm of the City and the payment of any fine would come from Council's own budget. The Charter Board also incorporates herein the reasoning set forth in Section IV, above.

VI. ORDER

The Charter Board enters the Order attached hereto as Exhibit "B."

CITY OF READING CHARTER BOARD

By: Susan J. Gibson
Susan Gibson, Chair

Date: June 15, 2007

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IN RE: Investigation of Reading City : City of Reading Charter Board
Council :
: Investigation Nos.: 2-5
:
:
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STIPULATIONS OF FACT, APPLICABLE LAW AND PENALTY

STIPULATIONS OF FACT

1. On or about December 20, 2005, Mary Jo Weishampel, a City of Reading resident, residing at 1701 Olive Street, Reading, Pennsylvania, 19604, filed separate Complaints with the Charter Board against the City Council ("City Council") for the City of Reading ("City").

2. The only issue determined by the Charter Board Investigative Officer to present to the Charter Board from these Complaints addresses whether the Option

Agreement approved by City Council through Resolution No. 109-2005, which involved an option right to land, was required to be passed by City ordinance subject to the Mayor's veto.

3. The City has owned approximately 560 acres of largely undeveloped land in Lower Alsace Township, Berks County (the "Antietam Lake Property") for more than a century.

4. The Antietam Lake Property has served as an open space recreational area, but is in need of substantial and costly repairs and improvements.

5. On June 13, 2005, Reading City Council approved Resolution No. 54-2005 by a vote of four-to-three authorizing City Council, through a negotiating team, to conclude final negotiations and prepare for execution an Option Agreement to implement a public-private partnership between M.B. Investments (MB) and the City related to the Antietam Lake Property.

6. On November 28, 2005, City Council passed Resolution No. 109-2005 in a vote of four-to-three to approve a final Option Agreement between MB and the City.

7. The Option Agreement allowed MB to obtain an irrevocable option for the Antietam Lake Property for \$2,500,000, and require MB to invest approximately \$3,000,000 in dam repairs; \$500,00 in infrastructure improvements; and \$2,000,000 in property operation and maintenance payments.

8. The Option Agreement contained a restrictive conservation easement which prohibited development on the Antietam Lake Property unrelated to operation

or maintenance for a period of 20 years in order to preserve its use as an open space recreational area.

9. Pursuant to the Option Agreement, MB had the right to exercise its option at any time prior to the end of a 20 year period by giving written notice and paying consideration of \$1.00, at which point the City was required to adopt an ordinance authorizing the conveyance of the Antietam Lake Property to MB and the City as tenants in common.

10. If the City failed to adopt an ordinance transferring ownership in the Antietam Lake Property to MB and the City as tenants in common, the City was required to repay to MB the monies it advanced under the Option Agreement over a term of years.

11. Because it was a resolution, it was not sent to Mayor McMahon for his consideration.

12. On November 29, 2005, MB executed the Option Agreement and it was presented to Mayor McMahon for his signature. Mayor McMahon refused to sign.

13. As a result, the Option Agreement was not consummated, and pursuant to Resolution No. 109-2005, MB and the four City Council members who approved the Option Agreement sought a mandamus order to compel Mayor McMahon to execute the Option Agreement on behalf of the City.

STIPULATION OF APPLICABLE LAW

1. City Council is permitted to take action by ordinance, resolution or motion. Section 224 of the City of Reading Charter.

2. Section 1-122 of the Reading Administrative Code prescribes certain actions that must be taken by ordinance. It provides in pertinent part:

1. **Action Requiring an Ordinance.** In addition to requirements provided by law or the Charter, §§215 through 224, acts of the Council *shall be by ordinance* which:

G. Adopt procedures for purchasing of products, goods, or services, for the making of contracts and for the sale or lease of personal or real property of the City.

J. Purchase, convey or lease lands or buildings.

3. Under Section 308(A) of the Charter, the Mayor shall "[e]xecute, enforce, and obey the ordinances of the City and laws of the Commonwealth of Pennsylvania and the United States of America" and under Section 308(K) to "[e]xecute all bonds, notes, contracts and written obligations of the City."

4. In *Guido v. Township of Sandy*, 584 Pa. 93, 880 A.2d 1220, 1225 (2005), the Pennsylvania Supreme Court noted that an option agreement for the sale of land is an equitable conveyance of land.

5. While the Supreme Court in *Sandy* held that a "normal" option agreement for the sale of a substantial interest in the land would alone require an ordinance to authorize its execution, in this case, the Commonwealth Court found the Option Agreement went much further in effectuating the sale of land than what would be

considered a normal option agreement. *M.B. Investments v. McMahon*, 903 A.2d 642, 646 (Pa. Cmwlth Ct. 2006).

6. The Court further found that the Option Agreement was a de facto sale of the Antietam Lake Property and was not approved by a City ordinance as required, and the trial court properly determined that MB had not shown that there was a clear legal right to have the Option Agreement executed by Mayor McMahon. *Id.* at 647.

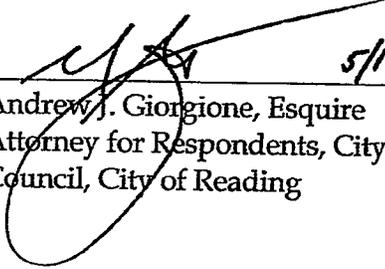
STIPULATION OF PENALTY

1. The Investigative Officer has found that the City Council did not intentionally violate the City Charter and Administrative Code and passed Resolution No. 109-2005 by relying upon the advice of legal counsel.

2. Accordingly, the Investigative Officer recommends and City Counsel agrees to accept the penalty of "Admonition" under paragraph V(A)(1) of the Charter Board Ordinance.



Jason B. Hopp, Esquire
City of Reading Charter Board
Investigative Officer



Andrew J. Giorgione, Esquire
Attorney for Respondents, City
Council, City of Reading

5/16/07

THE CHARTER BOARD OF THE CITY OF READING

IN RE: Investigation of : Complaint Filed: December 20, 2005
Reading City Council :
: Investigation Nos. 2 through 5

ORDER

AND NOW, this day of , 2007, there appearing a Stipulation before the Charter Board submitted by the Investigative Officer Jason B. Hopp, Esquire, and Reading City Council ("City Council"), the Charter Board accepts the Stipulation, attached to the Final Opinion and Order as Exhibit "A" and finds that, for the reasons set forth in the Stipulation, City Council violated the Charter of the City of Reading ("Charter") by entering into a certain option agreement with M.B. Investments, through Resolution 109-2005, involving City owned property in Lower Alsace Township, Berks County, known as the Antietam Lake Property. In accordance with the Final Opinion and Order, it is ORDERED that City Council shall be admonished as that penalty is defined by the Charter Board Ordinance, Section V(B)(2)(a)(ii)(a).

Copies of this Final Order shall be transmitted to the following:

- 1. Vaughn D. Spencer, President, City Council;
2. Andrew J. Giorgione, Esquire;
3. Jason B. Hopp, Esquire, Investigative Officer;
4. Complainant, Mary Jo Weishampel;
5. Charles Younger, City Solicitor

Further, copies of this Final Order shall be transmitted together with a letter of admonition, in accordance with the Charter Board Ordinance, Section V(B)(2)(a)(ii)(a), to the following:

- 1. Thomas McMahon, Mayor
2. R. Leon Churchill, Managing Director

CITY OF READING CHARTER BOARD

By: Susan T. Gibson
Susan Gibson, Chair

EXHIBIT "B"