

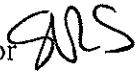


City of Philadelphia

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MEMORANDUM *Privileged and Confidential Advice of Counsel*

TO: Honorable Anna C. Verna, Council President

FROM: Shelley R. Smith, City Solicitor 

DATE: December 1, 2010

SUBJECT: Proposed Draft Amendments to Council Rules for Public Comment at Council Sessions

You asked for a Solicitor's Opinion regarding whether Proposed Draft Amendments to the Council Rules (draft version dated December 1, 2010) ("Draft Rules") — which provide for a single "public comment" period after bills and resolutions are introduced, but before a vote on any bills and resolutions, subject to a 3 minute time and certain other limitations — comply with the Sunshine Act's public participation provision, 65 Pa. C.S. § 710.1(a). In sum, the answer is yes; the Sunshine Act permits the proposed limitations.¹

I. Background

In an opinion dated November 17, 2010, Alekseev v. City Council, -- Pa. --, -- A.2d --, 2010 Pa. LEXIS 2590 (Nov. 17, 2010), the Supreme Court held that Council's longstanding policy of delegating the responsibility to accept public comment to Council Committees violates the Sunshine Act's public participation provision, 65 Pa. C.S. § 710.1(a). More specifically, the Court rejected Council's argument that its practice falls into the express exception set out at Subsection 710.1(d), which exempts a council from the general requirement of public comment so long as it has a pre-1993 policy of holding "special meetings solely for the purpose of public comment," finding that "Section 710.1(d) plainly contemplates a pre-1993 practice by a board or council of entertaining public comment at its own special meetings, and not those of lesser committees." Id. at *7-8; 65 Pa. C.S. § 710.1(d).

While the Court's opinion does state that Council's current practice is violative of the Sunshine Act, it does not provide any guidance regarding what specific changes Council must make to conform with the Sunshine Act's public participation provision, which states:

[T]he . . . council of a political subdivision . . . shall provide a **reasonable opportunity** at each advertised regular meeting and advertised special

¹ Although I have no reason to believe the Draft Rules raise issues under any other applicable law, I note that this Opinion addresses only conformance with the Sunshine Act.

meeting for residents . . . or for taxpayers . . . or for both **to comment on matters of concern, official action or deliberation which are or may be before the . . . council prior to taking official action.** The . . . council has the option to accept all public comment at the beginning of the meeting. If the . . . council determines that there is not sufficient time at a meeting for . . . comment, the . . . council may defer the comment period to the next regular meeting or to a special meeting occurring in advance of the next regular meeting.

65 Pa. C.S. § 710.1(a) (emphasis added). Hence, you have asked whether the Draft Rules — which were drafted by your staff in consultation with Law Department attorneys — comply with the Sunshine Act.

II. Draft Rules

The Draft Rules provide for a single “public comment” period after bills and resolutions are introduced, and directly before a vote on any bills and resolutions. Draft Rules § V(1)(j). The following limits are placed on public comment: (1) only residents and taxpayers may speak, (2) public comment is generally limited to three (3) minutes (or such other time period as the President may announce), (3) the subject matter is limited to “comment on bills and resolutions that are listed either on the final passage calendar or the second reading/final passage calendar for that meeting of Council,” and (4) “[t]he President may place additional reasonable limitations on public comment to permit Council to conduct its meetings and to maintain order, including limiting repetitious comments.” Draft Rules § XVI(1)-(3).

Further, with respect to resolutions specifically, the Draft Rules also amend current practice by requiring, unless the Rules are waived, that all resolutions “lay over” a week and be placed on the final passage calendar for the next session of Council. Additionally, although the default is that resolutions are placed on the final passage calendar, upon motion, resolutions may be placed on a “resolution consent agenda,” which permits Council to consider and vote upon a group of resolutions with a single voice vote. Draft Rules §§ V(1)(k); VI(5); VIII(6).

III. Timing of Public Comment and Changes to Resolution Consideration

The Draft Rules provide for a single “public comment” period as the tenth order of business, after bills and resolutions are introduced (the fifth order of business), and immediately after bills and resolutions have been “called up” for action, directly before a vote on any bills and resolutions. Draft Rules § V(1)(j).

The Draft Rules also amend current practice with respect to consideration of resolutions by requiring that all resolutions (including “privileged” or “honorary” resolutions) “lay over” a week and be placed on the final passage calendar for the next session of Council, or be referred to an appropriate committee (this requirement can be waived to allow consideration of a resolution on the day of its introduction). Further, although the default is that resolutions are placed on the final passage calendar, upon motion, resolutions may be placed on a “resolution consent agenda” (added as the eleventh order of business), which permits Council to consider and vote upon a group of resolutions with a single voice vote (although any member can force a resolution off the consent agenda and back onto the regular final passage calendar). Draft Rules §§ V(1)(k); VI(5); VIII(6).

These changes were proposed to deal with potential Sunshine Act issues related to the current practice of introducing and considering certain resolutions on the same day, without any opportunity for public comment after introduction, but before taking official action on those resolutions.

To this end, I believe the Draft Rules' placement of a single, consolidated comment period *after* all bills and resolutions are introduced, but *before* a vote on any bills and resolutions, conforms with the Act's requirement to "provide a reasonable opportunity . . . to comment . . . prior to taking official action." 65 Pa. C.S. § 710.1(a). The specific mechanisms proposed, including having all resolutions "lay over" a week and allowing for (upon motion) a "resolution consent agenda," are merely two of many ways by which the Rules could be restructured to accommodate public comment. However, to the extent that these changes will permit a more meaningful opportunity for comment, they support the purpose of the Sunshine Act, and thus, the intent of the General Assembly.

IV. Limitations

Each of the proposed limitations in the Draft Rules, which I will discuss in turn, complies with the Sunshine Act.

a. Restricting Comment to Residents and Taxpayers

In the Draft Rules, Council proposes to limit comment to "residents and taxpayers," and directs that "[b]efore providing comment, a resident or taxpayer shall state his or her name, address, and, if not a resident of the City, state that he or she is a Philadelphia taxpayer." Draft Rules §§ XVI(1), (3).

The public participation provision requires an opportunity for public comment by "residents" or "taxpayers" or "both." 65 Pa. C.S. § 710.1(a). Plainly, this means that Council may choose to give the opportunity to only one of those groups, or to both groups, and in so doing, may ask a person wishing to speak to identify him or herself as being a member of one of those groups.

b. Three (3) Minute Time Limitation

The Draft Rules generally limit public comment to three (3) minutes ("or such other time period as the President may announce"). Draft Rules § XVI(2).

The Sunshine Act does not specify a minimum length for the public comment period, nor does it provide that the comment period be unlimited; the public participation provision only requires that council provide a "reasonable opportunity" for comment. 65 Pa. C.S. § 710.1(a). Further, 65 Pa. C.S. § 710 (a provision that applies to the entire Sunshine Act) states that an agency may adopt "rules and regulations necessary for the conduct of its meetings and the maintenance of order" (but also provides that such rules and regulations "not be made to violate the intent of this chapter").

Given the vast amount of legislation and other business before Council — approximately 350 bills introduced annually, approximately 250 of which are passed, and almost 500 resolutions introduced each year, almost all of which are passed — a three minute comment period is an eminently "reasonable" opportunity for comment, which is "necessary for the conduct of its meetings and the maintenance of order." 65 Pa. C.S. §§ 710.1(a), 710. That is, it would be impossible for the Council of the largest City in the Commonwealth to allow unfettered comment. The time limitation is also "reasonable" in light of other opportunities for residents and taxpayers to present their opinions on pending legislation, including at public committee hearings, where they may comment without time limitation. Finally, it is in line with other larger jurisdictions in Pennsylvania: *e.g.*, Pittsburgh (3 min., Rules of Council, Rule VI), Erie (5 min., Rules of Council, Rule 112.10(d)), Bethlehem (5 min., Rules of Council, Rule 3).

Further, the “or such other time period as the President may announce” caveat is facially in compliance the Sunshine Act, as long as it is not applied in violation thereof. For example, it is likely permissible for the President to shorten the time period for each speaker if hundreds of residents and taxpayers wish to speak on a specific item. However, the Sunshine Act likely does not authorize the President to impose a cumulative time limit, *i.e.*, cutting off certain speakers if a designated total time for public comment runs out, if doing so would have the effect of cutting off non-repetitious comments.²

c. Subject Matter Limitation

The Draft Rules propose limiting the subject matter of public comment to “bills and resolutions that are listed either on the final passage calendar or the second reading/final passage calendar for that meeting of Council.” Draft Rules § XVI(1). While Council’s authority to restrict comment only to matters potentially up for a vote at that meeting is not entirely free from doubt, I believe the Sunshine Act permits doing so.

First, the agenda for each advertised regular meeting, which appears on Council’s public website, lists the bills on final passage and second reading/final passage. See, e.g., [http://legislation.phila.gov/meetings/2010/12/3145_A_CITY_COUNCIL_10-12-02_Meeting_Agenda_\(Short\).pdf](http://legislation.phila.gov/meetings/2010/12/3145_A_CITY_COUNCIL_10-12-02_Meeting_Agenda_(Short).pdf). Thus, the public will be afforded an opportunity to comment on any item that appears on that list – *i.e.*, the items Council advertises it may vote upon at that meeting – even if the item is not actually called up for a vote and voted upon.

Second, the public participation provision only requires Council to permit “comment on matters of concern, official action or deliberation which are or may be before the . . . council **prior to taking official action**.” 65 Pa. C.S. § 710.1(a) (emphasis added). Thus, although the words “are or may be before the . . . council” can be read expansively to allow a broad range of commentary, by its plain terms, the Act limits required comment to topics upon which Council is actually taking “official action,” *i.e.*, voting upon, at that session. See id. at § 703 (defining “official action”).³

Further, faced with precisely this question, the Commonwealth Court in Baravordeh v. Borough Council, 706 A.2d 362 (Pa. Commw. 1998), held that a council did not violate the Sunshine Act’s public participation provision by limiting public comment to “current business.” The Court noted that while the language “‘matters of concern’ that ‘may’ come before an agency is very broad, it is clearly intended to prescribe some limitation,” and thus the Court found “patently untenable” appellant’s argument that “limit[ing] . . . comments to ‘current business’ or any other subject matter limitation whatsoever” violates the Sunshine Act, noting that the “logical extension

² In fact, the Sunshine Act specifically indicates what Council should do in such a situation, stating that “[i]f the . . . council determines that there is not sufficient time at a meeting for . . . comment, the . . . council may defer the comment period to the next regular meeting or to a special meeting occurring in advance of the next regular meeting.” 65 Pa. C.S. § 710.1(a). The Draft Rules similarly provide for this scenario, stating that “[i]f in the President’s judgment there is not sufficient time at a meeting for residents and taxpayers to comment, the President may announce that the public comment period will be deferred to the next session of Council, provided that no action shall be taken on a bill or resolution unless there was an opportunity for public comment on that bill or resolution.” Draft Rules § XVI(5).

³ “Official action” is defined as “(1) Recommendations made by an agency pursuant to statute, ordinance or executive order; (2) The establishment of policy by an agency; (3) The decisions on agency business made by an agency; (4) The vote taken by any agency on any motion, proposal, resolution, rule, regulation, ordinance, report or order.” 65 Pa. C.S. § 703.

of [appellant's] position is that . . . a resident has a right at a municipal meeting to relate personal gossip or to read from a telephone book.” Id. at 366-67.⁴ While Barvordeh is a somewhat old case, it is still controlling here.

Finally, as above, limiting the subject matter of public comment to matters potentially up for a vote at that meeting, *i.e.*, reasonably likely to actually be voted upon, is a necessary means by which the Council of the largest city in Pennsylvania can “maint[ain] [the] order” of its meetings, which is expressly permitted by the Sunshine Act. 65 Pa. C.S. § 710.

Thus, reading 65 Pa. C.S. § 710.1, § 710 and Baravordeh together, the proposed subject matter limitation to matters potentially up for a vote at that meeting is permissible under the Sunshine Act.

d. Other Reasonable Limitations/Limitations on Repetitious Comments

Finally, the Draft Rules propose that “[t]he President may place additional reasonable limitations on public comment to permit Council to conduct its meetings and to maintain order, including limiting repetitious comments.” Draft Rules § XVI(2).

As stated above, the public participation provision’s qualification of only necessitating a “reasonable” opportunity for comment, 65 Pa. C.S. § 710.1(a), and 65 Pa. C.S. § 710’s express allowance of “rules and regulations necessary for the conduct of its meetings and the maintenance of order,” strongly suggest that Council maintains authority to do just as you have proposed: to place additional reasonable limitations on public comment to permit Council to conduct its meetings and to maintain order, including prohibiting repetitious comments.

Thus, the Draft Rules, providing for a single “public comment” period after bills and resolutions are introduced, but before a vote on any bills and resolutions, subject to a residency and/or taxpayer status requirement, a three minute time limitation per person, and restricted to items potentially up for a vote at that meeting, comply with the Sunshine Act’s public participation provision, 65 Pa. C.S. § 710.1(a).

If you have further questions, I would be happy to discuss our analysis with you further.

cc: Eric Auerbach, Senior Legislative Counsel to Council
Richie Feder, Chief Deputy City Solicitor, Appeals and Legislation
Kelly Diffily, Assistant City Solicitor, Appeals and Legislation

⁴ Where, under the Rules, it is simply impossible for Council to vote or take other official action on a matter at a given meeting, no resident or taxpayer can legitimately complain that he or she has been denied an opportunity to comment simply because such matter “may” come before the Council at some future meeting. Moreover, the alternative -- wherein all members of the public are free to discuss whatever matters come to mind that they believe are worthy of public business -- is unwieldy and potentially chaotic, and I do not believe that the General Assembly intended to open the Council chambers to every citizen grievance that might arise. Rather, Council is directed by the legislature to receive public comment on matters before Council takes official action, so that it has the public’s opinion before it in making meaningful decisions. See Baravordeh, 706 A.2d at 366-67.